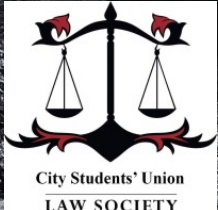


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The City Law Review

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About The CLR

The City Law Review (“The CLR”) is the student-led publication affiliated with The City Law School, a constituent of City, University of London. The Review’s predecessor, The City Law Society Journal, was founded in 2015, and underwent rebranding in 2019. The Review is managed by an Editorial Board consisting of current City Law School students, with the objective of fostering students’ participation and discourse in legal academic scholarship. The Review has undergone several changes over its near decade of legacy under the leadership of Zain Ismail, Cécile Nicod, Shabbir Bokhari, Shabana Elshazly, Sophia Evans, Jonathan Lynch, Teya Fiorante, Monica Kiosseva, and Nicholas Blaikie-Puk.

This year, The Review is proud to be sponsored by 4 New Square Chambers, The City Law School, The City Student’s Union Law Society, and The City Law School Bar and Mooting Society. A special thanks to 4 New Square Chambers for their second consecutive year of sponsorship, and the introduction of their namesake Writing Prize. The CLR showcases the work of aspiring lawyers because of the ongoing support from The City Law School, including hosting launch events, funding sponsorships, and the generosity of voluntary faculty Academic Reviewers.

This year’s Editorial Board, consisting of current LLB, GE LLB, GDL, and BVS City Law students, have expanded the reach of the CLR through such initiatives as indexing with HeinOnline, registering a digital ISSN, rebranding the website, and launching The CLR Blog for rolling supplemental contributions from newer authors, smaller pieces, and on timely topics. This year’s three Writing Prize categories, as voted by the respective namesakes, are awarded for: *The 4 New Square Chambers Award*, *The Editorial Board’s Choice Award*, and *The Most Improved Award*. Printed copies of The Review and its predecessor are available in The City Law Library, Gray’s Inn Library Catalogue, and The British Library. The Review is indexed in their respective digital catalogues, in addition to HeinOnline.

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Editor's Note

*By Nicholas Blaikie-Puk, GE LLB2,
Editor-in-Chief of The City Law Review Volume VI.
Managing Editor of The City Law Review Volume V.*

Writing matters. Through writing, we clarify our thinking. We witness our own perspectives from a new vantage. Unexpressed ideas manifest, and old ones develop. In a time of technological revolutions and cultural shifts, the written word remains timeless. Increasingly, we are called upon to ask better questions, to access knowledge more readily, and to communicate more effectively. All of which is improved by, and is sustained on account of, the craft of good writers.

I have been honoured to steward this year's edition of The City Law Review. The legacy of The Review has carried forward because of the tireless efforts of our Editorial Board, the voluntary wisdom of our Academic Reviewers, the humble courage of our authors, and the oft-unseen support of our vast network.

This year, special thanks are owed to several community members for championing our efforts and often quietly overcoming challenges on our behaves. Our successes this year are with great appreciation for:

At The City Law School

Jane Bradley-Smith - Associate Dean Student Experience, Senior Lecturer.

Dr. David Seymour - Head Academic Advisor of The City Law Review, Senior Lecturer.

Stephen Hitchcox - Deanery Support Team Leader, Executive Assistant to Executive Dean.

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Louise Cochrane – Marketing Executive, 4 New Square Chambers.

Harry Stam – Account Manager, London, Rapidity Printing.

Foreword

*By Professor Richard Ashcroft,
Executive Dean, The City Law School, University of London.*

I am delighted to be able to write this foreword to the latest edition of The City Law Review.

The City Law Review is a journal of legal scholarship edited and managed by students at the City Law School, presenting work done by students from our range of programmes here, from our undergraduate LLB degree to our postgraduate research PhD, and from both our academic programmes and our professional programmes (the Bar Vocational Studies and Solicitors' Practice Programme). It thus represents the best work done in our vibrant student community to advance legal knowledge and professional practice.

I am very grateful to the editorial team for seeing this issue through to publication, to all the students who submitted work for consideration and publication, to the staff who supported students in preparing submissions and who assisted with peer review of submissions, and to Dr David Seymour, who has academic lead for The City Law Review trains and supports the editorial team.

I am also grateful to our professional partners and sponsors who have contributed to the costs of publication and to helping us celebrate students' success.

Everyone who has contributed to this issue, through writing, editing, teaching, publicising or sponsorship, should be very proud of the results. I commend this issue to you, I look forward to reading and discussing its contents with our colleagues and students, and I look forward in anticipation to many more issues to come!

Professor Richard Ashcroft,
Executive Dean, The City Law School.

The Doctrine of Change of Circumstances under Chinese Contract Law and the Common Law Doctrine of Frustration: A Critical Comparison

By Dylan Thakker, BVS LLM.

This piece won *The 4 New Square Chambers Award 2024*.

The law must uphold and enforce obligations made between contracting parties (*pacta sunt servanda*) while also accounting for instances where circumstances change (*clausula rebus sic stantibus*). Determining how the law should do so is the *central problem* to which common law and civil law jurisdictions have proposed considerably different solutions. In English contract law, frustration developed in a conservative and restrictive manner.¹ Hong Kong shares this doctrine as well as the moderate mindset of English courts.² The response of these jurisdictions, as successors of the common law traditions, will be compared to the response of Chinese contract law. Chinese contract law has developed distinct doctrines to address unforeseeable changes in circumstances: the doctrine of change of circumstances ('DCC') and the doctrine of force majeure ('DFM').

In Part One of this article, the legal values underpinning the doctrines and their historical development will be compared. Parts Two and Three will proceed to compare the doctrines' respective legal tests, applicability, remedies, and practical outcomes. Ultimately, though the doctrines share identifiable similarities, they represent very different legal responses to the aforementioned central problem. In particular, the opposing legal values favoured by the jurisdictions underpin the various doctrinal

¹ Basil S Markesinis, Hannes Unberath, and Angus C Johnston, *The German Law of Contract - A Comparative Treatise* (2nd edn, Hart Publishing 2006) 334.

² Cap. 23 Law Amendment and Reform (Consolidation) Ordinance s13-18; *Yung Kee Co. v Cheung So Yin Kee* [1983] 1 HKC 386; *Li Ching Wing v Xuan Yi Xiong* [2004] 1 HKC 353.

differences. The comparative analysis herein highlights the potential for positive and meaningful doctrinal development.

1. Values Underpinning the Doctrines and Their Historical Development

A) Good Faith

Many associate the recognition and significance of the general principle of good faith³ in Chinese law with cultural factors that flourished under Confucianism. Good faith is also considered to have been reinforced by China's Socialist values; it is derived from an understanding of parties sharing equal status.⁴ Good faith translates into 'honesty and trust' but interestingly, has no clear definition. It is merely perceived as 'a legalised standard of morality with indeterminate meaning'.⁵ On the one hand, some scholars wholeheartedly accept the considerable discretion granted to the judiciary under the principle.⁶ On the other hand, others contend that the scope or 'outer limits' of the legal principle must be better defined.⁷ Irrespective of its confines, the principle itself has been influential to the development of Chinese contract law. Courts often use good faith to produce new doctrines to fill inevitable legislative gaps over time. Alternatively, courts have used good faith to provide a legal and authoritative basis for their decisions.⁸ Contracting parties are obligated to comply with a duty of good faith.⁹ The principle applies across various stages of parties' contractual relations.¹⁰ Meanwhile, fairness is

³ Civil Code of the People's Republic of China 2020 (CCC 2020), art 7.

⁴ Tong Rou and Jonathan K Ocko, 'The General Principles of Civil Law of the PRC: Its Birth, Characteristics and Role' (1989) 52 *Law and Contemporary Problems* 151, 160-162

⁵ Ewan McKendrick and Qiao Liu, 'Good Faith in Contract Performance in the Chinese and Common Laws' in Larry A DiMatteo and Chen Lei, *Chinese Contract Law* (CUP 2018) 77

⁶ L. Huixing, 'Good Faith Principle and Gap-Filling' (1994) 2 *Chinese Journal of Law* 22, 25

⁷ McKendrick and Qiao (n 5) 78

⁸ *ibid* 76.

⁹ CCC 2020, art 509.

¹⁰ *ibid* arts 42-43, 60, 92 & 125.

another general principle.¹¹ Considered by some to be a subsidiary of good faith,¹² it has nonetheless played a similar role in developing doctrines. Fairness relates to the allocation and sharing of rights.¹³

These general principles served as the basis for the judiciary's creation of the DCC. The DCC was not featured in any of the earlier contract law-related legislation,¹⁴ contrary to the DFM's various inclusions.¹⁵ Moreover, early proposals for the codification of the DCC were rejected during parliamentary deliberations. Concerns included distinguishing commercial risks from the DCC, the potential to unduly facilitate parties' avoidance of contractual duties and the belief that relevant circumstances could already be sufficiently addressed by the DFM.¹⁶ Meanwhile, the judiciary was certainly more liberal. The SPC referred to the DCC for the first time in *Wuban Gas Co. v Chongqing Detection Instrument Plant Fa Han* (1992) No.27.¹⁷ This case generated much discussion over the need for a DCC, despite ultimately resulting in a settlement between the respective parties. Courts adopted the practice of referring to force majeure provisions¹⁸ and applying the general

¹¹ *ibid* art 6.

¹² Bing Ling, *Contract Law in China* (Sweet & Maxwell Asia, 2002) 50.

¹³ Mo Zhang, Martinus Njihoff Publishers, 2006) 74.

¹⁴ The Economic Contract Law of the People's Republic of China 1981; Law of the People's Republic of China on Foreign-Related Economic Contracts 1985; Technology Contract Law of the People's Republic of China 1987.

¹⁵ The Economic Contract Law of the People's Republic of China 1981, arts 27, 34 & 41; Law of the People's Republic of China on Foreign-Related Economic Contracts 1985, arts 24-25 & 29; General Principles of the Civil Law of the People's Republic of China 1986, arts 107, 139 & 153; Technology Contract Law of the People's Republic of China, arts 20 & 24.

¹⁶ Lei Chen and Qiyu Wang, 'Demystifying the Doctrine of Change of Circumstances under Chinese Law—A Comparative Perspective from Singapore and English Common Law' (2021) 6 *Journal of Business Law* 475, 477.

¹⁷ SPC Gazette, Issue 2, 1996, 63.

¹⁸ The Economic Contract Law of the People's Republic of China 1981, art 27(4).

principles to grant relief and fill the legislative or doctrinal gap.¹⁹ The SPC also formulated the DCC in 1993.²⁰

Another case where good faith was applied directly to grant relief is *Xinbaiman Catering Co. Ltd. of Zhangjaikou v Xuanhua Hotel Ltd.* Here, a hotel leased workspace for the catering company to run its restaurant. However, as the utility fees exceeded the profits made by the restaurant, the hotel refused to continue covering utilities in breach of contract. The court found that insisting the hotel cover the utility fees would run counter to the duty of good faith. Thus, the court modified the contract: the rent was reduced with utilities no longer covered. Such cases where good faith was applied directly to grant relief²¹ as well as the 2008 financial crisis²² and the 2009 Wenchuan earthquake,²³ eventually led to the DCC's codification.²⁴ Having charted the development of the DCC, it is evident that the principles of good faith and fairness were instrumental. They provided courts with discretion and legal authority as no statutory authority for a DCC had existed. Upon further inspection, this differs extensively from the doctrinal development of frustration in English common law.

¹⁹ *Wuhan Gas Co. v Chongqing Detection Instrument Plant Fa Han* (1992) No.27.

²⁰ Ling (n 12) 293.

²¹ *Wuhan Gas Co.* (n 19); *Xinbaiman Catering Co. Ltd. of Zhangjaikou v Xuanhua Hotel Ltd.*

²² Kristie Thomas, 'China's Legal Response to the Global Financial Crisis: Increasing Certainty in Contractual Disputes to Boost Market Confidence' (2010) 10 *Journal of Corporate Law Studies* 485, 492-496.

²³ Shuqi Li and others, 'Force Majeure and Changed Circumstances During the COVID-19 Pandemic: The Case of Sports Service Contracts and Judicial Responses in China' (2022) 22 *The International Sports Law Journal* 259, 263.

²⁴ Judicial Interpretation II of Supreme People's Court of Several Issues Concerning the Application of the Contract Law of the People's Republic of China (13 May 2009), art 26.

B) Sanctity of Contract and Comparisons

English law perceives contracts as fundamentally *ex ante* efficient ‘instrument[s] of private autonomy’.²⁵ The traditional focus has been on enforcing procedural standards rather than trifling with the substance of parties’ agreements.²⁶ With the central ideology of English contract law being market individualism, the aims have been to promote secure transactions, ensure parties know where they stand with minimal restrictions and accommodate commercial practice.²⁷ From this *laissez faire* approach derives the concepts of freedom and the sanctity of contract. First, the freedom of contract means that parties are secured ‘the right... to enter into contracts with whomever, for whatever and... [the contract] is regarded as paramount’.²⁸ Hence, the law follows a non-interventionalist approach to secure party autonomy and consent. Comparisons can be made with the Chinese general principle of voluntariness.²⁹ Second, the sanctity of contract is the idea that ‘contracts must be adhered to’.³⁰ Thus the court’s role will be to enforce terms as expressions of parties’ intentions.³¹

The English law’s response to the *central problem* was initially informed solely by the sanctity of contract - exemplified by *Paradine v Jane*.³² In that case, during the English Civil War, a tenant was deprived of the enjoyment of his residence by Prince Rupert and remained obligated to pay the rent in accordance with the covenant. The position expressed was absolute liability: ‘When the party by his contract creates a duty or charge

²⁵ Roscoe Pound, ‘Liberty of Contract’ (1909) 18 *The Yale Law Journal* 451, 454.

²⁶ Ewan McKendrick, ‘English Contract Law: A Rich Past, An Uncertain Future’ (1997) 50 *Current Legal Problems* 25, 27.

²⁷ John N Adams and Roger Brownsword, ‘The Ideologies of Contract’ (1987) 7 *Legal Studies* 205, 206-211.

²⁸ Christian Twigg-Flesner, ‘The General Principles of the Chinese Contract Law from the Perspective of an (English) Common Lawyer’ in Larry A Dimatteo and Chen Lei, *Chinese Contract Law* (CUP 2018) 33.

²⁹ CCC 2020, art 5.

³⁰ Hans Wehberg, ‘Pacta Sunt Servanda’ (1959) 53 *American Journal of International Law* 775, 786

³¹ *Prime Sight Ltd. v Lavarello (Gibraltar) (Rev.1)* [2013] UKPC 22 [47].

³² (1646) [1558-1774] All ER Rep 172.

upon himself, he is bound to make it good'.³³ Indeed, this was an uncompromising legal position,³⁴ later critiqued for the 'peculiar strictness with which it construes and enforces contracts'.³⁵ Neither this conception of frustration nor the current formulation would have provided relief in the above cases of *Wuhan Gas Co.* or *Xinbaiman Catering Co. Ltd.*

The principles of freedom and sanctity of contract remain dominant as the common law aims to meet the needs of legal certainty. It is 'a theme' that 'the reasonable expectations of honest [contracting parties] must be protected'.³⁶ Furthermore, Beale observed that 'English contract law is not for everyone ... it is in effect designed for big business'.³⁷ Law is therefore traditionally viewed as the facilitator of commercial agreements and private profit-making.³⁸ If courts uphold the reasonable expectations of parties then theoretically, there will be fewer cases where the law conflicts with commercial practices. Hence, the judicial conservatism of English courts.

Having said this, the sanctity of the contract is no longer absolute. English contract law is no longer so predisposed as to prioritise business contracts where a substantial extent of inequality of bargaining power is evident. One perceives a gradual shift in focus towards consumer protection.³⁹ Other limits on the sanctity of contract have developed: vitiating factors aim to protect the disadvantaged party's consent. These include duress, mistake, misrepresentation, fraud, and undue influence. Thus, proponents of good faith could argue that the value has influenced English contract law.⁴⁰ Dishonesty is condemned, such as misrepresentation or applying undue pressure onto others.

³³ *ibid* 173.

³⁴ Guenter H Treitel, *The Law of Contract* (10th edn, Sweet & Maxwell 1999), 866-868.

³⁵ 'Art III. Execution of a Contract Impossible' (1833) 10(20) *American Jurist and Law Magazine* 250, 251.

³⁶ *First Energy (UK) Ltd. v Hungarian International Bank Ltd.* [1993] BCLC 1409, 1410.

³⁷ Hugh Beale, 'The Impact of the Decisions of the European Courts on English Contract Law: The Limits of Voluntary Harmonization' (2010) 18 *European Review of Private Law* 501, 526.

³⁸ *General Accident Fire and Life Assurance Corp'n Ltd. v Tanter: The 'Zephyr'* [1984] 1 Lloyd's Rep 58, 72; *Associated Japanese Bank (International) Ltd. v Credit Du Nord S.A* [1989] 1 WLR 255, 268.

³⁹ Unfair Contract Terms Act 1977; Consumer Rights Act 2015.

⁴⁰ McKendrick (n 26) 43.

Meanwhile, Bingham LJ voiced a compromise. ‘English law has, characteristically, committed itself to no such overriding principle but has developed *piecemeal solutions* in response to demonstrated problems of unfairness’.⁴¹ The law is dynamic. Perhaps the duty of good faith is ‘an incrementally developing area of law’⁴² which goes beyond merely insurance contracts.⁴³ Nonetheless, the emphasis remains on parties foreseeing risks, guarding against them, and taking responsibility for their contractual obligations – irrespective of whether this is to their detriment (*caveat emptor*).

Reflecting on the legal values of English and Chinese contract law, there is some extent of similarity. Like the DCC, frustration developed ‘to give effect to the demands of justice, to achieve a just and reasonable result’.⁴⁴ By extension, the value of fairness in both the common law and Chinese law is qualified through the proper allocation of contractual risk. However, even though the jurisdictions share the same objective, one must appreciate the difference in the two doctrines’ historical developments and evolutions. With greater judicial discretion than the sanctity of contract would otherwise permit, Chinese courts had exclusive recourse to the principle of good faith. On the contrary, the allocation of contractual risk in English law was determined solely by parties in the express terms of their respective contracts.⁴⁵ The common law justification is the protection of parties’ consent to undertake contractual duties and risks – this is sacrosanct.

With the mutual objective of fairness and the just sharing of contractual risk being sought by the jurisdictions, yet in different ways, how can this be reconciled? Demonstrating English courts’ dedication to the sanctity of contract, where a contract

⁴¹ *Interfoto Picture Library Ltd. v Stiletto Visual Programmes Ltd.* [1989] QB 433, 439.

⁴² *TAQA Bratani Ltd. and other companies v RockRose* [2020] EWHC 58 [46].

⁴³ *Carter v Boehm* (1766) 3 Burr 1905.

⁴⁴ *J. Lauritzen A.S. v Wijsmuller B.V., (The Super Servant Two)* [1990] 1 Lloyd's Rep 1, 8.

⁴⁵ Treitel (n 34) 260.

stipulates a duty of good faith, it is well-established that the courts will enforce this duty.⁴⁶ In a sense, parties need only consent to a duty of good faith, signified by its presence in the contract. Henceforth, modern English contract law is not led by hostility to good faith but rather by its allegiance to the sanctity of contract. Both jurisdictions recognise the importance of parties' contracts, but English courts remain unwilling to depart from them on account of good faith. Therefore, between the jurisdictions lies only a limited extent of shared understanding.

2. Legal Tests and Scope

A) DCC

The DCC has recently been reformed⁴⁷ since its initial codification.⁴⁸ First, for the DCC to apply, 'after the conclusion of the contract ... the basic conditions of the contract [must] have undergone substantial changes'.⁴⁹ The need for the supervening event to occur *after* the contract is consistent with English law. The 'substantial changes' could include national disasters, conflicts or acts of government – though arguably not all instances of industrial action.⁵⁰ Second, those substantial changes cannot have been 'foreseeable when the parties enter[ed] into the contract'.⁵¹ This is a distinctively strict requirement for the DCC. Per the duty of good faith, the disadvantaged party cannot

⁴⁶ *Petromec Inc. v Petroleo Brasileiro SA Petrobas (No. 3)* [2006] 1 Lloyd's Rep 121 [115]-[121]; *Compass Group UK and Ireland Ltd. (t/a Medirest) v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200 [146]; *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd.* [2014] 2 Lloyd's Rep 457.

⁴⁷ CCC 2020, art 533.

⁴⁸ Judicial Interpretation II of the SPC of Several Issues Concerning the Application of the Contract Law of the People's Republic of China (13 May 2009), art 26.

⁴⁹ *ibid.*

⁵⁰ Christoph Brunner, *Force Majeure and Hardship under General Contract Principles – Exemption for Non-Performance in International Arbitration* (Wolters Kluwer 2009) 169; Ewan McKendrick, 'Chapter 6: Performance, Section 2: Hardship' in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (OUP 2015) 721.

⁵¹ CCC 2020, art 533.

seek redress for a loss that resulted from their own recklessness or fault.⁵² Third, ‘the continuing performance of the contract [must] cause obvious unfairness to one party’.⁵³ This is different from frustration first because of the application of the underlying principle of fairness and second because the manifestation of ‘obvious unfairness’ can be a means by which economic hardship can qualify as a change of circumstances. This is the distinguishing effect of applying the principle of good faith. Fourth, parties must renegotiate the contract and ‘if the negotiation fails within a reasonable period’ of time then an application may be made to the People’s Court or Arbitration Tribunal for judicial intervention.

Finally, the alleged supervening event must not be a ‘commercial risk’. A commercial risk is distinct from the DCC and DFM. First, though no statutory definition exists, it is regarded as a common risk one takes when engaging in business-orientated activities.⁵⁴ Second, a commercial risk is foreseeable and measured objectively. To demonstrate, in *Friendly Travel Co. Ltd. v Han Xinquan*,⁵⁵ a bus driver was sued for breach of contract as he delivered tourists to an airport late due to a large traffic jam. The issue was whether the traffic jam amounted to a force majeure or was merely an ordinary commercial risk for a transportation business. The court found that the timing, location, and unusual extent of traffic was beyond that which a reasonable bus driver could foresee and so it could not be a mere commercial risk. Foreseeability is decisive.

It can be harder to distinguish between the DCC and DFM. DCC fundamentally redresses unfairness that has arisen because of the change in circumstances. It grants disadvantaged parties relief when a contractual obligation has become excessively onerous.⁵⁶ Force majeure is a doctrine that absolves a party from civil liability for non-

⁵² Ling (n 12) 298.

⁵³ CCC 2020, art 533.

⁵⁴ The Guiding Opinion on Several Issues Concerning the Trial of Civil and Commercial Contract Disputes Under Current Circumstances (7 July 2009), No. 40 [2009] of the Supreme People’s Court, s1(2)-(3).

⁵⁵ Reports of Judicial Decisions in China, Commercial Cases (2007), 107-111.

⁵⁶ Brunner (n 50) 394.

performance where the ‘objective conditions ... are unforeseeable, *unavoidable and insurmountable*’.⁵⁷ In such a case, the contract may be rescinded.⁵⁸ Through literature, scholars have commented on the conceivable difficulties in distinguishing factual situations where the doctrines would apply. Ling contended that the DCC applies when the change of circumstances relates to government policy or severe economic conditions. He believes that the DFM applies to circumstances where performance is rendered impossible by natural events or acts of God.⁵⁹ On the other hand, it may not be purely the nature of the supervening event that is decisive on the applicability of the doctrines but rather the impact of the event on the performance of the relevant obligations. Thus, though DCC and DFM share a requirement that the supervening event was not foreseeable, DFM clearly has a higher bar⁶⁰ given the need for the supervening event to also be *unavoidable and insurmountable*. DFM therefore relates to instances where performance of the obligations is impossible – physically or legally. But, whether DFM applies where the performance is impossible for economic reasons is unclear. For instance, in *Beijing Technological Vocational School v Psychiatric Health Care Centre of Changping District in Beijing City*,⁶¹ a court determined that the DFM applied where the plaintiff had refused to continue his contracted educational operations at a site which had, two years prior, been expropriated by the government to treat SARS patients. And yet, this was arguably not an instance of impossibility. It could have been feasible to renovate the site and advertise to alter negative public opinions. As Ling rightly contended, this case exposes the fact that ‘the line between hardship [DCC] and impossibility [DFM] is thin’⁶² as the DCC could have been an equally appropriate remedy. Despite the difficult distinction between these two contract law doctrines (which simply does not exist in the common law), it will become clear that frustration

⁵⁷ CCC 2020, art 180.

⁵⁸ *ibid* art 563.

⁵⁹ Ling (n 12) 229, 408.

⁶⁰ *Danyang Branch of the Bank of China v Jing Guoxing*, Reports of Judicial Decisions in China, Commercial Cases (2004), 128-131.

⁶¹ Reports of Judicial Decisions in China, Commercial Cases (2007), 187-193.

⁶² Ling (n 12) 229.

relates mainly to those situations addressed by DFM in Chinese contract law.

B) Frustration and Comparisons

Since *Paradine v Jane*, the doctrine of frustration has developed significantly. Centuries later, frustration was successfully invoked in a case of supervening impossibility.⁶³ The plaintiffs had claimed there was a breach of contract. The subject matter of the contract, the music hall, had perished by fire prior to performance. Finding for the defendants, Blackburn J stated that ‘in contracts in which the performance depends on the continued existence of a giving person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance’.⁶⁴ This case not only signified a departure from absolute liability but also demonstrated English courts’ willingness to imply terms and grant relief in recognition of a genuine change of circumstances and an otherwise unjust result. In this sense, the case ‘helped to bridge the gulf then existing between civilian doctrine and the common law’.⁶⁵

First, for frustration to be invoked, ‘the circumstances in which performance is called for [must] render it a thing *radically different* from that which was undertaken by the contract’.⁶⁶ Lord Radcliffe devised this test in *Davis Contractors v Fareham UDC*. Here, the respective claimants contended that the construction contract was frustrated by extensive costs incurred and labour shortages suffered. Frustration did not apply because their obligation remained the same and ‘it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play’.⁶⁷ Thus, frustration already differs from DCC given that mere economic hardship is insufficient to render

⁶³ *Taylor v Caldwell* (1863) 112 ER 309.

⁶⁴ *ibid* 29.

⁶⁵ Werner Lorenz, ‘Contract Modification as a Result of Change of Circumstances’ in Jack Beatson and Daniel Friedman, *Good Faith and Fault in Contract Law* (OUP 1997) 358.

⁶⁶ *Davis Contractors LD. v Fareham Urban District Council* [1956] AC 696, 729.

⁶⁷ *ibid*.

obligations *radically different* though such onerousness may satisfy the DCC's requirement for *substantial changes* in the contract conditions.

The *radically different* test, having developed incrementally, now involves 'a multi-factorial approach'.⁶⁸ Courts will consider factors including 'the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract ... and then the nature of the supervening event...'⁶⁹ This approach conflicts with the DCC's strict requirement that the event be unforeseeable. Though foreseeability is also tested objectively in English law, it is merely one factor that the court can weigh at its discretion. A finding of foreseeability is not always conclusive.⁷⁰

There are three recognised instances of obligations becoming *radically different* in English law. The first category is supervening impossibility, where the event has resulted in the performance of the contract becoming impossible. This could include the destruction of subject matter⁷¹ or death or incapacity.⁷² The second category is supervening illegality, where the event has rendered the performance of contractual obligations illegal.⁷³ The third and rarest category is frustration of purpose, where the alleged supervening event renders the contract's purpose unattainable or falsifies parties' 'shared foundation'.⁷⁴

⁶⁸ *Edwinton Commercial Corp and another v Tsavliris Russ (Worldwide Salvage and Towage) Ltd.; The Sea Angel* [2007] EWCA Civ 547 [111]; *Canary Wharf BP4 v European Medicines Agency* [2019] EWHC 921 (Ch).

⁶⁹ *ibid.*

⁷⁰ *Ocean Tramp Tankers Corp v V/O Soufracht* [1964] 2 QB 226, 239; Duncan Fairgrieve and Nicole Langlois, 'Frustration and Hardship in Commercial Contracts: A Comparative Law Perspective' (2020) 24 Jersey and Guernsey Law Review 142, 155-156.

⁷¹ *Taylor* (n 63); *Appleby v Myers* (1867) LR 2 CP 651; *Bunge SA v Kyla Shipping Co. Ltd.* [2012] EWCA Civ 734.

⁷² *Marshall v Harland and Wolff Ltd.* [1972] IRLR 90; *Atwal v Rochester* [2010] EWHC 2338 (TCC); *Blankley v Central Manchester and Manchester Children's University Hospitals NHS Trust* [2015] EWCA Civ 18.

⁷³ *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd.* [1943] AC 32; *Denny, Mott & Dickson Ltd. v James B Fraser & Co. Ltd.* [1944] AC 265; *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd.* [2010] EWHC 2661 (Comm).

⁷⁴ *Krell v Henry* [1903] 2 KB 740; *Herne Bay Steamboat Co. v Hutton* [1903] 2 KB 683.

Interestingly, concerning frustration of purpose, just as the Article 533 formulation of the DCC excludes the old requirement that the contract no longer fulfills its purpose in light of the change of circumstances,⁷⁵ there have also been few cases where frustration of purpose has been successfully invoked in English law.⁷⁶

The second requirement for frustration is that the contract must not distribute the risk of the event occurring. Again, English courts' do not require that the event was unforeseeable. Rather, they prioritise a finding on whether either of the parties assumed the risk of the relevant supervening event occurring 'as a matter of construction of the contract'.⁷⁷ The third requirement for frustration is that neither party is responsible for the occurrence of the supervening event.⁷⁸ This is identical to the requirement for the DCC, even though the justification derives from good faith in Chinese law.⁷⁹

Upon further inspection, the bar for frustration is higher and the scope narrower. Though commercial risks do not frustrate contracts in either jurisdiction, the DCC can apply in cases of economic hardship or onerousness, so long as this is not merely a materialisation of 'commercial risk' and so long as the continuation of the contract would result in 'obvious unfairness'.⁸⁰ With the multifactorial test involved in frustration, application of the doctrine is 'difficult', the doctrine is not 'to be lightly invoked ... and ought not to be extended'.⁸¹ In one sense, the strictness of frustration's legal test is advantageous. The certainty brought by minimal restrictions on contractual performance⁸² discourages parties from placing undue reliance on the courts. Parties

⁷⁵ Judicial Interpretation II of the SPC of Several Issues Concerning the Application of the Contract Law of the People's Republic of China (13 May 2009), art 26.

⁷⁶ Guenter H Treitel, *Frustration and Force Majeure* (2nd Edn, Sweet & Maxwell 2004) 346.

⁷⁷ Fairgrieve and Langlois (n 70) 156.

⁷⁸ *Imperial Smelting Corporation Ltd. v Joseph Constantine Steamship Line Ltd.* (1941) 70 LIL Rep 1; *The Super Servant Two* (n 44) 8.

⁷⁹ Ling (n 12) 298.

⁸⁰ CCC 2020, art 533.

⁸¹ *The Super Servant Two* (n 44) 8.

⁸² Adams and Brownsword (n 27).

thereby avoid litigation and further costs. This instead encourages parties to find solutions themselves, such as through negotiation.⁸³ It also encourages a more cautious attitude when parties initially draft contracts.

This relates to how the concept of force majeure differs from Chinese law. In common law jurisdictions, despite an early common law definition,⁸⁴ there is no statutory DFM or statutory right. Force majeure refers mainly to clauses inserted into contracts that allocate risks of the manifestation of extenuating circumstances and eventualities.⁸⁵ Realistically, parties include express terms to retain control in such circumstances⁸⁶ and allocate risks themselves⁸⁷ or even retain discretion to renegotiate terms.⁸⁸ The increasingly common inclusion of these clauses effectively ‘ousts the rules of frustration’.⁸⁹ This practice is very much the same in Hong Kong.⁹⁰ This reinforces the common law’s hands-off approach and reflects the value afforded to the sanctity of contract. Rather than provide solely for obvious unfairness, frustration is an all-encompassing doctrine that applies in instances where contracted obligations have radically changed. These are more likely to be covered by DFM in Chinese civil law. Thus, the differences between the legal tests and the scope of the doctrines are clear.

The common law approach has been subject to criticisms. It may be an impossible challenge or impractical expectation ‘to make sure that every eventuality is provided

⁸³ Luke Nottage, 'Changing Contract Lenses: Unexpected Supervening Events in English, New Zealand, US., Japanese, and International Sales Law and Practice' (2007) 14 *Indiana Journal of Global Legal Studies* 385, 412.

⁸⁴ *Lebeaupin v Richard Crispin* [1920] 2 KB 714, 719.

⁸⁵ McKendrick (n 26).

⁸⁶ Ling (n 12) 294-297.

⁸⁷ Brunner (n 50) 440.

⁸⁸ *Associated British Ports v Tata Steel UK Limited* [2017] EWHC 694 (Ch).

⁸⁹ Janet O'Sullivan, *O'Sullivan & Hilliard's The Law of Contract* (8th edn, OUP 2018) 349.

⁹⁰ Gordon Chung, 'A Comparative Analysis of the Frustration Rule: Possibility of Reconciliation Between Hong Kong-English “Hands off Approach” and German “Interventionist Mechanism”' (2017) 25 *European Review of Private Law* 109, 138-139.

against in a contract'.⁹¹ Lawyers in common law jurisdictions 'sweat bullets and don't sleep at night worrying that they missed the one eventuality that will happen and be blamed'.⁹² The criticism is valid, though it is submitted in response that it isn't necessary, as a matter of construction, that parties name *every* potential eventuality in order to allocate risks. The suggestion is somewhat hyperbolic. This aside, it can be contended that China also takes a strict approach when applying the DCC, irrespective of its wider scope.⁹³ Considering that the application of the DCC is rare, it is (at least from an empirical perspective) applied just as strictly as in other jurisdictions, despite the unique criteria of impending unfairness.⁹⁴ So despite differences in legal tests and scope, both doctrines are rarely successfully invoked and are applied with great stringency to ensure consistency. DCC and frustration are applied as the exception rather than the rule.

3. Comparison of Remedies and Practical Outcomes

Under the new formulation of the DCC, where a court finds that the necessary requirements have been met and that the disadvantaged party (now as a precondition) has attempted renegotiation with the other party, then the court will consider either modifying the contract according to the principle of fairness or, at last resort, terminating the contract entirely.⁹⁵ The aim is to primarily encourage negotiation or mediation⁹⁶ in good faith⁹⁷ or else redistribute parties' losses according to the new circumstances and thereby incentivise parties to see their duties through. This strongly

⁹¹ Frederick R Fucci, 'Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts: Practical Considerations in International Infrastructure, Investment and Finance' (2006) American Bar Association Section of International Law, 17.

⁹² *ibid.*

⁹³ Chen and Wang (n 16) 496-497.

⁹⁴ *ibid* 486.

⁹⁵ CCC 2020, art 533.

⁹⁶ The Guiding Opinion on Several Issues Concerning the Trial of Civil and Commercial Contract Disputes Under Current Circumstances (7 July 2009), No 40 [2009] of the Supreme People's Court, s1(4).

⁹⁷ Brunner (n 50) 480.

conflicts with the all-or-nothing common law approach. With frustration, the only remedy available is the termination of the contract. Losses would lie where they fall and parties are relieved of any contractual obligations arising after the frustrating event.⁹⁸ Again, the difference is fundamentally due to the common law's loyalty to the sanctity of contract. Further business between the parties would require the drafting of a new contract.

On one hand, the remedy of modification is a uniquely advantageous feature of Chinese law because it preserves long-standing business relationships.⁹⁹ Goode argued that the expectations of businesses are not being met across vast areas of English contract law. In particular, he notes the absence of relief for commercial impracticability.¹⁰⁰ Perhaps if English law is meant to be profit-facilitating,¹⁰¹ greater flexibility provided by modification would be a sufficient solution. Modification can mediate the unfairness to the supplier and equally save the buyer the additional costs that would inevitably be incurred from seeking a replacement supplier.¹⁰² Modification thereby serves parties' commercial agendas. On the other hand, defenders of the common law's approach would likely raise concerns over the considerable inroad that modification would represent for the sanctity of contract. There is also the concern that judges do not have sufficient specialist knowledge to modify contracts in particular fields.¹⁰³ Finally, doubts have been raised as to the implementation of a re-examined doctrine of frustration with a modification remedy. It could conceivably lead to increased litigation and costs.¹⁰⁴ From a theoretical perspective, these alternative views seem irreconcilable.

⁹⁸ Law Reform (Frustrated Contracts) Act 1943, s1(1).

⁹⁹ Li and others (n 23) 264.

¹⁰⁰ Roy Goode, *Commercial Law in the Next Millennium* (Sweet & Maxwell 1998) 36-37.

¹⁰¹ Beale (n 37).

¹⁰² Chen and Wang (n 16) 496-497.

¹⁰³ Catherine Kessedian, 'Competing Approaches to Force Majeure and Hardship' (2005) 25 *International Review of Law and Economics* 415, 422.

¹⁰⁴ Ewan McKendrick, 'Force Majeure and Frustration – Their Relationship and a Comparative Assessment' in Ewan McKendrick, *Force Majeure and Frustration of Contract* (2nd Edn, Routledge 2013) 52.

In English law, deposits paid in advance were not originally recoverable, but after the finding that such performance lacked consideration,¹⁰⁵ the Law Reform (Frustrated Contracts) Act 1943 was introduced. The Act codified the *Fibrosa* rule.¹⁰⁶ While the baseline position is to return sums paid prior to the frustrating event,¹⁰⁷ the court retains discretion as to the fair sum to be recovered, considering whether the party has received any ‘valuable benefit’¹⁰⁸ for which consideration ought to be due. This statutory remedy is intrusive because it does not merely involve the reversal of contractual obligations (or the returning of whole deposits) for lack of consideration but instead requires the judges’ active allocation of losses. As Chen rightly contends, irrespective of the *modification* label, the ‘practical effect’ here is essentially the same.¹⁰⁹ It therefore appears that the common law may implicitly recognise the commercial benefits of modification.

However, there is an extent of disagreement found with Chen’s subsequent argument that there is ‘practical convergence amidst the two differing legal frameworks’.¹¹⁰ It has been acknowledged that English law has other ‘piecemeal solutions in response to demonstrated problems of unfairness’.¹¹¹ But Chen argues that the English court’s ability to imply terms or apply the doctrine of common mistake means that ‘theoretical differences appear to be more illusory than real’.¹¹² Here, disagreement is expressed given the significantly limited ability of courts to imply terms or terminate entire contracts on the basis of common mistake. Considering common mistake, this doctrine enables courts to set contracts aside where a shared mistake relating to a matter of current fact or law is made between the parties.¹¹³ Established mistakes include the

¹⁰⁵ *Fibrosa Spolka Akcyjna* (n 73).

¹⁰⁶ *ibid* 55.

¹⁰⁷ Law Reform (Frustrated Contracts) Act 1943, s1(2).

¹⁰⁸ *ibid* s1(3).

¹⁰⁹ Chen and Wang (n 16) 485.

¹¹⁰ *ibid* 495.

¹¹¹ *Interfoto Picture Library Ltd.* (n 41).

¹¹² Chen and Wang (n 16) 497.

¹¹³ *Kleinwort Benson Ltd. v Lincoln CC* [1999] 2 AC 349.

subject matter of the contract no longer existing,¹¹⁴ the respective goods already belonging to another client¹¹⁵ or the parties wrongly assuming the quality of a product. Mistake is similar to frustration because a party may call upon either doctrine where they find it impossible to perform their contractual duties, and the remedy upon application of either doctrine is the termination of the respective contract.¹¹⁶ The two doctrines can be difficult to tell apart in some cases.¹¹⁷ However, the main difference between the two doctrines concerns the *timing* of the supervening event. For common mistake, the supervening event (shared assumption or mistake) must have taken place *before* the conclusion of the contract. The distinction between these doctrines parallels that between relief on the basis of significant misconception in Chinese law¹¹⁸ and the DCC. In this light, some extent of *practical convergence* is acknowledged.

And yet, with a higher bar and no relief provided for economic hardship,¹¹⁹ most cases would not have the same practical outcome in English courts and Chinese courts. The doctrine of common mistake is very rarely applied in English courts, akin to, and yet less frequently so than, frustration.¹²⁰ Courts also imply novel contractual terms rarely and with great caution.¹²¹ Moreover, while Chen refers to statistics to liken ‘the operations of the two doctrines in practice’¹²² and demonstrate the equally rare application of the DCC in Chinese courts, it can be argued that in reality, fewer claims of frustration are likely made in English courts - given the comparably higher bar, lack of relief available for all cases of economic impracticability or hardship, lesser extent of judicial discretion

¹¹⁴ *Couturier v Hastie* [1856] UKHL J3; *Scott v Coulson* [1903] 2 Ch 439; *Galloway v Galloway* (1914) 30 TLR 531.

¹¹⁵ *Cooper v Phibbs* [1867] UKHL 1; *Abraham v Chief Amodu Oluwa* (1921) 17 NLR 123.

¹¹⁶ *Great Peace Shipping Ltd. v Tsavliris Salvage (International) Ltd*; *The Great Peace* [2002] EWCA Civ 1407.

¹¹⁷ *Amalgamated Investment and Property Co. Limited v John Walker & Sons Limited* [1976] 3 All ER 509.

¹¹⁸ The Contract Law of the People’s Republic of China 1999, art 54.

¹¹⁹ Larry A DiMatteo, ‘Contractual Excuse Under the CISG: Impediment, Hardship, and the Excuse Doctrines’ (2015) 27 *Pace International Law Review* 258, 266.

¹²⁰ *Bell v Lever Brothers Ltd.* [1932] AC 161, 217; *Great Peace Shipping Ltd.* (n 116) [61], [75] & [85].

¹²¹ *Luxor (Eastbourne) Ltd. v Cooper* [1941] AC 108; *Liverpool County Council v Irwin* [1977] AC 239; *Marks and Spencer plc v BNP Paribas Securities Services Trust Co. (Jersey) Ltd. and another* [2015] UKSC 72, [24].

¹²² Chen and Wang (n 16) 486.

and the single (potentially undesirable) available remedy of terminating the contract. On this basis, the outcome of some cases between jurisdictions may overlap but the differences are not purely ‘illusory’.¹²³ The practical convergence is limited even with alternative common law doctrines in place, given the exceptional application of these doctrines in practice.

Conclusion

Several similarities and differences have been highlighted. Both frustration and DCC exist to produce fair outcomes, though what is *fair* is determined differently based on the different values underpinning the jurisdictions’ contract laws. Moving to the legal tests, the supervening event must occur after the conclusion of the contract for both doctrines. Foreseeability is also objectively tested and relevant to both doctrines. However, a finding of foreseeability is not decisive in the case of frustration. In place of any consideration for obvious unfairness, frustration involves a far more restrictive test for radically different obligations as a result of the change in circumstances. Both doctrines are applied strictly with clear and principled approaches to secure legal certainty, though frustration has a narrower scope and will not provide relief for economic hardship, which likely accounts for a mass of potential cases. Frustration is also a catch-all solution, while the DCC has a causal relationship with the distinct doctrine of force majeure. Parties’ intentions are prioritised in both jurisdictions, though modification is not an available remedy in the common law. Finally, though the statutory remedy in English law may have a similar practical effect to modification, there is limited practical convergence overall because of the narrower scope for applicability and comparably limited relief offered by frustration. Hence, there are more differences than similarities between the jurisdictions, their responses to the *central problem* remain different in most cases and this is all due to the *diverging* underlying values that the jurisdictions remain allied with.

¹²³ *ibid* 497.

Given the educational purpose of comparative contract law¹²⁴ and the criticisms of the common law highlighted in this essay, it is submitted that common law jurisdictions should continue to look towards the responses of civil law jurisdictions and vice versa. As stated in *Taylor v Caldwell*, although ‘the Civil Law is not of itself authority in an English court, it affords great assistance in investigating principles on which the law is grounded’.¹²⁵

¹²⁴ Ralf Michaels, ‘The Functional Method of Comparative Law’ in Mathias Reimann and Reinhard Zimmermann *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019), 345-348.

¹²⁵ *Taylor* (n 63) 313.

When a Contract Falls Short: A Special Case for Restitution under Duress in Unjust Enrichment

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This piece was voted *The Editorial Board's Choice Award 2024*.

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*.¹ 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*.² 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

¹ [1994] 4 All ER 714.

² (1841) 11 Ad & El 983.

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.

I. 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.³ 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.⁴

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.⁵ 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*.⁶ 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.

³ Robert Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574.

⁴ Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 260.

⁵ See Section III for the different approaches adopted towards establishing mistake in contract and unjust enrichment.

⁶ *CTN* (n 1).

II. 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.⁷ 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.⁸

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*.⁹

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

⁷ *Universe Tankships Inc of Monrovia v International Transport Workers Federation (The Universe Sentinel)* [1983] 1 AC 366, 372.

⁸ *CTN* (n 1) 717.

⁹ *Skeate* (n 2).

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’.¹⁰

In *Skeate*, a ‘curious distinction’ was made between money payments and contracts, though there was no clear judicial discussion of such a distinction.¹¹ 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’.¹² 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’.¹³ This distinction is made apparent when comparing *Skeate* with its predecessor, *Astley v Reynolds*.¹⁴ 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.¹⁵ There was no direct judicial discussion of whether the ambit of duress alters if there is a contract.¹⁶ In *Tamvaco v Simpson*,¹⁷ 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

¹⁰ *ibid* 990.

¹¹ Charles Mitchell, Paul Mitchell, and Stephen Watterson (eds), *Goff and Jones: The Law of Restitution* (10th edn, Sweet & Maxwell 2022), paras 10-38.

¹² *Skeate* (n 2) 987.

¹³ *ibid* 991.

¹⁴ (1731) 2 Str 915.

¹⁵ *Scott, Falsely Called Sebright v Sebright* (1886) 12 PD 21, 24: the distinction between contractual and non-contractual payments was first abandoned in this case by Butt J.

¹⁶ *CTN Cash and Carry Ltd* can be considered as an exception.

¹⁷ (1866) LR 1 CP 363.

instrument.¹⁸ In *Maskell v Horner*,¹⁹ 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’.²⁰ There was no consideration of a higher threshold for duress where there was a contract. Similarly, in *The Siboen and The Sibotre*,²¹ 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*²², the judge found that it was ‘interesting’²³ that Beatson suggested that there was no distinction between actual payments and agreements to pay.²⁴ 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,²⁵ it remains important to consider why such a distinction was drawn in the past.

III. 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 risks²⁶ and the reasonable expectations of contracting parties.²⁷ 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

¹⁸ *ibid* 370.

¹⁹ [1915] 3 KB 106.

²⁰ *ibid* 117.

²¹ [1976] 1 Lloyd’s Rep 293.

²² [1979] QB 705.

²³ *ibid* 719.

²⁴ Jack Beatson, ‘Duress as a Vitiating Factor in Contract’ (1974) 33 CLJ 97, 107.

²⁵ *Dimskal Shipping Co SA v International Transport Workers Federation (The Evia Luck)* (No 2) [1991] 4 All ER 871, 165.

²⁶ Mitchell, Mitchell, and Watterson (n 11) paras 3-17; Jack Beatson, ‘Restitution and Contract: Non-Cumul?’ (2000) 1(1) *Theoretical Inquiries in Law* 83, 98.

²⁷ Charles Mitchell, ‘Unjust Factors in Three-Party Cases’ (2017) 25 RLR 223, 236.

does not mean ‘judicial discretion’.²⁸ It allows recovery of payments when one of the unjust factors exists.²⁹ Fundamentally, its purpose is remedial rather than punitive, which is to remedy a problem until the injustice is cured.³⁰

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.³¹ Although a unilateral mistake can serve as the basis of contractual rescission,³² the mistake must be so fundamental that contractual performance is rendered impossible.³³ This high bar reflects contract law’s proper concerns of transactional security and protection of parties’ reasonable expectations.³⁴ Consequently, contract law prioritises the objective principle (protection of security of contract) over the claimant’s impaired intention (protection of personal autonomy).³⁵ In contrast, in unjust enrichment, a simple causative mistake suffices.³⁶ The approach to restitution of mistaken payments is further relaxed in *Kleinwort Benson v Lincoln City Council*,³⁷ which extends recovery for payments made under mistake of law.

²⁸ *Dargamo Holdings Ltd and another v Avonwick Holdings Ltd and others* [2021] EWCA Civ 1149 [59].

²⁹ Burrows (n 4) 159.

³⁰ Stephen Smith, ‘Unjust Enrichment: Nearer to Tort than Contract’ in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 181, 189.

³¹ *Smith v Hughes* (1871) LR 6 QB 597.

³² *Cundy v Lindsay* (1877) App Cas 459.

³³ *Great Peace Shipping v Tsanliris* [2002] EWCA Civ 1407.

³⁴ Mindy Chen-Wishart, ‘In Defence of Unjust Factors: A Study of Rescission for Duress, Fraud, and Exploitation’ (2020) Oxford U Comparative L Forum 2 at ouclf.law.ox.ac.uk.

³⁵ Mindy Chen-Wishart and Rory Gregson, ‘Impaired Intention Unjust Factors?’ in Elise Bant, Kit Barker, and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar Publishing 2020) 323.

³⁶ *Barclays Bank Ltd* [1979] 3 All ER 522; *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108.

³⁷ [1999] 2 AC 349.

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.³⁸ 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.³⁹

The restitution of a mistaken payment is a paradigm example of restitution in unjust enrichment.⁴⁰ 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

³⁸ Martin Fischer, 'Mistakes in Unjust Enrichment' in Fabiana Bettini and others (eds), *New Directions in Private Law Theory* (UCL Press 2023) 334.

³⁹ Kate Bracegirdle, 'Mistake in Contract Law and in Unjust Enrichment', in Paula Giliker (ed), *Re-examining Contract and Unjust Enrichment: Anglo-Canadian Perspectives* (Brill 2007) 59.

⁴⁰ This is because the central issues in mistake are less clear-cut, and the case law is ubiquitous (see Andrew Burrows, 'Restitution of Mistaken Enrichments' (2012) 92 BULR 767). The same strategy is adopted by Peter Birks in *Unjust Enrichment* (2nd edn, OUP 2005), where he remarks on page 3 that 'the law of unjust enrichment is the law of all events materially identical to the mistaken payment of a non-existent debt'.

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.⁴¹ The reason for granting restitution is that the defendant's illegitimate imposition of pressure has rendered the claimant's intention impaired.⁴² 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'.⁴³ 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.⁴⁴ 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'.⁴⁵ To achieve greater clarity of the unjust factors, there must be a proper understanding of the reasons

⁴¹ Neuberger J in *Nurdin & Peacock Plc v DB Ramsden & Co Ltd* [1999] 1 WLR 1249, 1259 found that Lord Goff's use of the words 'duress' and 'compulsion' in *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, 164 indicates 'something more than mere concern in the payer's mind'.

⁴² Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1958) 140, 173-4.

⁴³ Stevens (n 3) 581-2.

⁴⁴ The two-staged test in *The Evia Luck* (n 25) is as follows: 1) whether the pressure was illegitimate; 2) whether the pressure was a 'significant cause' that caused the claimant to enter into a contract. The first limb was a normative question, which objectively reflects the extent to which society can legitimately expect people to stand up to threat. The second limb was a factual question, which looked into the claimant's subjective state of mind.

⁴⁵ Chen-Wishart (n 35).

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.

IV. 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.⁴⁶ 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*,⁴⁷ 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

⁴⁶ Mitchell, Mitchell, and Watterson (n 11) paras 3-17; *Kwei Tek Chao v British Traders* (1954) 2 QB 459; *Dargamo Holdings Ltd and another v Avonwick Holdings Ltd and others* [2021] EWCA Civ 1149.

⁴⁷ (2001) 208 CLR 516.

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’.⁴⁸ On this understanding, allowing restitution in unjust enrichment does not necessarily subvert contract law despite the existence of a valid contract.

*CTN*⁴⁹ 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.⁵⁰ 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.⁵¹ 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

⁴⁸ James Edelman and Elise Bant, *Unjust Enrichment*, (2nd edn, Hart Publishing, 2016) 252.

⁴⁹ *CTN* (n 1).

⁵⁰ Mitchell, Mitchell, and Watterson (n 11) paras 3-12.

⁵¹ *ibid* paras 12-22.

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.'⁵² 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.

V. 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

⁵² *CTN* (n 1) 715.

mistake – is enough to be treated as sufficient pressure.⁵³ 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.⁵⁴ In these cases, necessity is not the ground for restitution in its own right, but also encompasses an aspect of legal compulsion.⁵⁵

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*,⁵⁶ 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'.⁵⁷ 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'.⁵⁸ However, the claimant can be said to be in a

⁵³ *Mason v New South Wales* [1959] HCA 5; *Steele v Williams* (1853) 8 Exch 625.

⁵⁴ *Owen v Tate* [1976] QB 402.

⁵⁵ *Burrows* (n 4) 477.

⁵⁶ (1874) LR 9 Exch 132 (Kelly CB).

⁵⁷ *ibid* 135.

⁵⁸ Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 293.

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.⁵⁹

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,⁶⁰ or where the claimant is not legally obliged to intervene in the circumstances.⁶¹ 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*,⁶² 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.⁶³ In *Williams*

⁵⁹ *ibid.*

⁶⁰ *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234.

⁶¹ *Nicholson v Chapman* (1793) 2 Hy Bl 254, 259; 126 ER 536, 539.

⁶² *CTN* (n 1).

⁶³ *Chen-Wishart and Gregson* (n 35) 329.

v Roffey Bros & Nicholls Ltd,⁶⁴ 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.⁶⁵ 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.⁶⁶ 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*

⁶⁴ [1991] 1 QB 1.

⁶⁵ *ibid* 10.

⁶⁶ *Burrows* (n 4) 257.

*Sutton*⁶⁷ analysed duress *colore officii* in terms of voluntariness and the existence of unjust factors. In *Steele v Williams*,⁶⁸ 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*?"⁶⁹ 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.⁷⁰ 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*.⁷¹ Lord Goff considered the ultra vires demand of payment by a public authority as an isolated category of compulsion, distinct from *colore officii* cases.⁷² 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

⁶⁷ (1869) LR 4 HL 226, 241.

⁶⁸ [1853] 155 ER 1502.

⁶⁹ *ibid* 1504.

⁷⁰ This view is shared by the Law Commission, who anticipates that 'a broader view may be taken in future of "compulsion" or "duress" as a basis for recovering payments made to public authorities'; also see Glidewell LJ's judgment in *Woolwich* (n 41) 97, where he commented that the *colore officii* category 'may not strictly amount to duress in the sense in which that word is understood in private law, nevertheless bears a relationship to duress'.

⁷¹ *Woolwich* (n 41).

⁷² *ibid* 163, 168.

involuntary and provide the basis for restitution.⁷³ 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.⁷⁴ 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'.⁷⁵

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.⁷⁶ 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.

VI. **Reforming Duress in Unjust Enrichment**

A. 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

⁷³ This proposition is suggested by Ronald Collins, 'Restitution from Government Officials' (1984) 29 McGill LJ 407, 431.

⁷⁴ *Mason* (n 53) 142 (Windeyer J).

⁷⁵ *Woolwich* (n 41) 175.

⁷⁶ *Mason* (n 53) 125.

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.⁷⁷

Beatson argued that such a distinction is logically flawed:⁷⁸ in *Astley v Reynolds*,⁷⁹ 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).⁸⁰ Yet, it is submitted that 'agreements to pay and payments'⁸¹ are not the same as 'money payments and contract'.⁸² Contracts are supported by consideration, whereas mere agreements are not. It seems that Beatson has conflated 'agreements to pay'⁸³ with contracts.

B. Assimilating the categories of duress in unjust enrichment

Lord Goff in *Woolwich Equitable Building Society v IRC*⁸⁴ 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.⁸⁵

⁷⁷ *Skeate* (n 2).

⁷⁸ Beatson (n 24) 107.

⁷⁹ (1731) 2 Str. 915.

⁸⁰ Beatson (n 24) 107.

⁸¹ *ibid* 106.

⁸² Mitchell, Mitchell, and Watterson (n 11) paras 10-39.

⁸³ Beatson (n 24) 107.

⁸⁴ *Woolwich* (n 41) 164.

⁸⁵ See *Pakistan International Airlines Corporation v Times Travel UK* [2021] UKSC 40.

However, this article agrees with Beatson that there is no principled reason for making a distinction between the effect of different categories of duress,⁸⁶ 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 property⁸⁷ can be as imminent as blackmailing a person⁸⁸. Lord Simon in *Lynch v DPP*⁸⁹ 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’.⁹⁰ 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.⁹¹

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*,⁹² 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.

⁸⁶ Beatson (n 24) 106.

⁸⁷ *Skeate* (n 2) 721.

⁸⁸ *Bennett v Bank of Scotland* [2004] EWCA Civ 988.

⁸⁹ [1975] AC 653.

⁹⁰ *ibid* 687.

⁹¹ *ibid*.

⁹² [1991] 2 AC 548.

However, as noted, duress and mistake are normatively distinct and must be formulated to be kept distinct.⁹³ 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.

C. 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'.⁹⁴ 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.⁹⁵ This is to accommodate the need for stability and finality in commercial transactions.⁹⁶ 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*,⁹⁷ 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',⁹⁸ but the fact that

⁹³ See Section III.

⁹⁴ *Skeate* (n 2) 990.

⁹⁵ *Pao on v Lau Yiu Long* [1979] 3 WLR 435, 635.

⁹⁶ *Beatson* (n 24) 111.

⁹⁷ (1964) AC 1129.

⁹⁸ *ibid* 1209.

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.⁹⁹ 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.¹⁰⁰ 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.¹⁰¹

While the two-stage test in *The Evia Luck*¹⁰² 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.¹⁰³ It has been

⁹⁹ *Barton v Armstrong* [1976] AC 104, 118, 121.

¹⁰⁰ *The Evia Luck* (n 25).

¹⁰¹ *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 WLR 1249, 1270.

¹⁰² *ibid.*

¹⁰³ See *Pao On v Lau Yiu Long* (n 95) and Dyson J in *DSND Subsea Ltd v Petroleum Geo-services ASA* [2000] 7 WLUK 875.

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'.¹⁰⁴ 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'.¹⁰⁵ The defence even extends protection to non-pecuniary changes that caused the defendant to be in a worse off position.¹⁰⁶ Given English law's flexible and broad approach towards change of position defence,¹⁰⁷ 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

¹⁰⁴ *Lipkin Gorman* (n 92) 580.

¹⁰⁵ Mitchell, Mitchell, and Watterson (n 11) paras 27-03.

¹⁰⁶ *Phillip Collins Ltd v Davis* [2000] 3 All E.R. 808, 827–830; reaffirmed in *Scottish Equitable Plc v Derby* [2001] 3 All E.R. 818, [33].

¹⁰⁷ The English law's more flexible and expansive approach can be contrasted to the more restrictive approach in Australia and Canada, which require the expenditure which the defendant made in receipt of the benefit to be a 'special financial commitment'. See for example *Rural Municipality of Stortboaks v Mobil Oil Canada Ltd* [1976] 2 SCR 147 at 160; *Barafield Realty Ltd v Just Energy (BC) Ltd Partnership* [2017] BCCA 307.

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.

VII. 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.

Harmful Protests: Advocating an Objective Legal Approach.

By Mohammad 'Arman' Armanur Rahman, LLB1.

This piece was voted *The 'Most Improved' Award 2024.*

Introduction

Protests have become increasingly contentious, with calls for the limitation, restriction, and outright prohibition of certain protests that are deemed 'disruptive' and/or 'harmful'. However, this discourse appears to clash with fundamental principles of freedom of speech, expression, and assembly protected by the European Convention on Human Rights (ECHR).¹ This debate revolves around whether protests that contain even an element of harm should be allowed in the context of freedom of expression. Additionally, determining the criteria to distinguish between 'harmful' protests and those deemed acceptable poses a significant challenge. This article will explore the current approach in objectively determining harmful protests in statute law and case law. It will then explore the shift from an objective to a subjective approach of determining what protests are acceptable and whether this poses a significant risk of disproportionately curtailing the right to protest. Finally, this article will endeavour to provide a solution that will prevent curtailment of the right to freedom of expression and the right to protest.

Protests in Statute law and Case law

Section 12 (1) of the Public Order Act² grants the police powers to impose restrictions on processions if 'it may result in serious public disorder, serious damage to property or serious disruption to the life of the community'.³ A serious disruption includes the prevention of, or a hindrance that is 'more than minor to', carrying out daily activities

¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10-11.

² Public Order Act 1986.

³ *ibid* s 12(1)(a).

which includes making journeys.⁴ Although these provisions concern processions, they have been applied to protests. In particular, section 12 powers have been used in the recent protests concerning Palestine to impose restrictions. Examples include the prevention of deviating from a set route.⁵ Such protests can even be prevented, with the consent of the Secretary of State,⁶ if it is thought that the powers laid out in section 12 would be insufficient.

Alternatively, courts have used common law injunctions to prohibit protests, such as those by ‘Just Stop Oil’,⁷ to prevent disruption and obstructions caused to public services.⁸ Furthermore, obstructive climate groups have also been prohibited from causing public and private nuisances in oil refineries⁹. Similarly, the courts have determined protests that may glorify terrorism are harmful; in *Pwr*,¹⁰ the courts held that carrying or displaying symbols associated with a proscribed group is a strict liability offence.¹¹ This, according to Lady Arden, is implemented ‘to deny a proscribed organisation the oxygen of publicity or a projected air of legitimacy’.¹²

Alternatively, the courts have protected protests from the infringement of freedom of expression by public bodies. In *Leigh*,¹³ the court held that the Metropolitan Police Service acted unlawfully by preventing the organisation of a vigil in the wake of the

⁴ *ibid* s 12(2)(a)(i).

⁵ Liberty, ‘Explainer: Palestine Protests’ [libertyhumanrights.org.uk](https://www.libertyhumanrights.org.uk) <https://www.libertyhumanrights.org.uk/advice_information/explainer-palestine-protests/#page-section-7> accessed 9 February 2024.

⁶ Public Order Act (n 2) s 13.

⁷ *Transport for London v Persons Unknown* [2023] EWHC 1201 (KB).

⁸ See Jacob Evans, ‘TfL Seeking to Ban more Climate Activists from Blocking Road’ *BBC.com* (4 May 2023) <<https://www.bbc.co.uk/news/articles/cev40d5n41vo>> accessed 10 February 2024.

⁹ *Valero Energy v Persons Unknown* [2024] EWHC 134 (KB).

¹⁰ *Pwr v DPP* [2022] UKSC 2.

¹¹ Terrorism Act 2003, s 13.

¹² *Pwr* (n 10) [55].

¹³ *R (on the application of Leigh) v Commissioner of Police of the Metropolis* [2022] EWHC 527 (Admin).

disappearance of Sarah Everard, failing to properly consider their rights to freedom of assembly and freedom of expression under Articles 10 and 11 of the ECHR.¹⁴

On the other hand, the legal consensus around harmful disruptive protests have become complicated following *Ziegler*.¹⁵ The appellants, charged with wilful obstruction of a highway,¹⁶ obstructed an approach road and locked themselves to boxes. However, the Court dismissed these charges, ruling that the purposefully obstructive conduct of the appellants was proportionate and therefore a ‘lawful excuse’ under section 137¹⁷ due to the context of the protest.

In other words, this disruptive protest was deemed to have a lawful excuse under Articles 10 and 11 of the ECHR and examines the nature of the protest by looking at the context and the cause it is centred around. It evaluates its proportionality to determine the extent of disruption. The courts, overall, maintain a broadly objective approach when it comes to distinguishing harmful and acceptable protests.

Shift from Objectivity to a Subjective Approach:

Recent developments suggest a decline in objectivity concerning harmful protests, as governmental discretion increasingly shapes their definition. The Public Order Act 2023¹⁸ grants the Home Secretary discretionary powers to initiate proceedings if a protest is deemed by them to (i) cause serious disruption,¹⁹ (ii) pose an ‘adverse effect on public safety’,²⁰ or (iii) be ‘expedient in the public interest’.²¹ The potential subjectivity of this process is highlighted by the actions of former Home Secretary Suella Braverman, who advised police to interpret certain chants and the waving of the Palestinian flag in

¹⁴ ECHR (n 1).

¹⁵ *DPP v Ziegler* [2021] UKSC 23.

¹⁶ Highway Act 1980, s 137(1).

¹⁷ *ibid*.

¹⁸ Public Order Act 2023.

¹⁹ *ibid* s 18(2).

²⁰ *ibid* s 18(3).

²¹ *ibid* s 18(4).

protests as glorification of terrorism²² under the Terrorism Act 2003.²³ Although Braverman was made to resign for saying police had dealt with these protests leniently, the 2023 Act²⁴ allows for future Home Secretaries to manipulate the meaning of harm based on subjective inclinations.

Braverman's statements would find support in case law, as seen from *Pwr*²⁵, if a legitimate determination establishes the symbol in question to be associated with a proscribed group; however, such claims regarding, for example, the Palestinian flag would likely lack authenticity. Although the judgment allows for charges where the individual promotes a proscribed group, Braverman's comments risk conflating the Palestinian flag and symbols promoting Hamas, politically motivating the implementation of the case law and the legislation it concerns. The judgment and the statute, on their own, is concerned around symbols pertaining to proscribed groups. The scope, however, seems to be narrowing and creating further ambiguity. This implies that if symbols, with little-to-no association with a proscribed group, are considered emblematic with terrorism, it may result in protestors carrying it to be charged.

The Government is also currently seeking to pass the Criminal Justice Bill, which would criminalise protestors climbing war memorials and refusing to remove face coverings if police officers 'believe criminality is likely to occur'.²⁶ These, as well as 'acts of violent intimidation', are considered 'disruptive acts' and as such the Bill has been drafted to crackdown on protests that 'endanger lives' and destroy 'democratic values'.²⁷ Even though the available wording is not yet enacted, it still presents a risk of implementing

²² See Rajeev Syal and Aubrey Allegretti, 'Waving Palestinian Flag May Be a Criminal Offence, Braverman Tells Police' *theguardian.com* (10 October 2023)

<<https://www.theguardian.com/politics/2023/oct/10/people-supporting-hamas-in-uk-will-be-held-to-account-says-rishi-sunak?CMP>> accessed 9 February 2024.

²³ Terrorism Act (n 11).

²⁴ Public Order Act (n 18).

²⁵ *Pwr* (n 10).

²⁶ <<https://www.gov.uk/government/news/new-protest-laws-on-face-coverings-and-pyrotechnics>> accessed 9 February 2024.

²⁷ See Rhys Jones, 'Sunak announces further Police Powers to Crack Down on Protests' *yahoo.com* (8 February 2024) <https://uk.news.yahoo.com/sunak-announces-further-police-powers-204530569.html?soc_src=social-sh&soc_trk=ma> accessed 11 February 2024.

subjective processes, especially concerning the beliefs of police officers. It also appears to politicise the determination of acceptable protests by the use of terms like ‘democratic values’, where it is susceptible to conflicting interpretations by different political factions.

Ramifications:

The subjectivity is evident: a protest could be restricted based on the subjective beliefs of the police or the Government regarding the likelihood of criminality and possible harm. Comments from the Government would suggest that certain protests are deemed inherently harmful, which could lead to police action based on the subjective beliefs of the executive.

It seems from this that the definition of harmful protests is narrowing. It would be contrary to the ECHR to limit the right to freedom of expression as a result of possible bias. Section 14 powers of the 1986 Act²⁸, have been used recently with pro-Palestine protesters being prohibited from gathering outside the Israeli embassy. The order in particular prohibited protestors, participating in or associated with certain protest groups, from deviating from a set route under section 12,²⁹ effectively banning expression of support or association with a certain group anywhere other than on the route of the protest.³⁰ This decision appeared to be prefaced on the idea that associated groups are inevitably going to cause disorder– a disproportionate measure that could be predominately motivated by subjective opinion.

The Public Order Acts³¹ and subsequent case law essentially defined harmful protests as those that disproportionately obstruct or disrupt daily activities and those that glorify proscribed groups. However, as seen from new statutes such as the Public Order Act³² and the planned Criminal Justice Bill, as well as comments made by government ministers, it appears the idea of ‘harmful protests’ virtually have no objective legal definition. Rather the definition is ever changing and based on the subjective whims and

²⁸ Public Order Act (n 2) s 14.

²⁹ *ibid* s 12.

³⁰ Liberty (n 5).

³¹ Public Order Act (n 2); Public Order Act (n 18).

³² Public Order Act (n 18).

implementations of the executive in the UK. By current definitions, harmful protests could range from disruption, obstruction, nuisance all the way to including protests that are organised around a cause that the Government has an opposition to.

Solution:

The problems identified in existing definitions are ones of ambiguity, implementation differing from what is in statute, and implementation being exercised by an authority like the police or the Home Secretary who would not be able to exercise objective judgment and may implement provisions based on external motivation. Most importantly, its definitions change according to the wishes of the government, particularly with the addition and omission of factors which deem a protest or procession to be harmful.

To promote fairness and remove bias when it comes to the issue of protests, an objective legal definition that holistically identifies and distinguishes harmful protests from peaceful protests should be implemented.

Such definitions must objectively identify the acceptable, non-violent peaceful protests from its unacceptable counterpart. Secondly, it must keep in mind the ECHR rights to freedom of expression. It must not have any ambiguities that allow for subjective implementation.

Considering these factors, this article proposes the following definition:

A harmful protest is one which constitutes any form of physical harm, serious criminality, endangerment of public safety, disproportionate disruption of essential services and day to day activity, promotion of violence, bigotry, extremism or hate speech.

This definition considers previous definitions that are already available in statute and attempts to use terms that would avoid subjective implementation.

Here, 'harm' will refer to protests that constitute violence; subjective implementation is avoided using 'serious criminality' which would isolate it to gatherings that may result in offences such as assault, affray, and battery. This could even be extended to vandalism.

‘Disproportionate disruption’ reflects the judgment in *Ziegler*³³, where obstructive protests are acceptable if disruption can be minimised, where there are alternative routes available to those affected by the obstruction, if it is time-limited, and if it is aimed at important social or political issues.

When it comes to ambiguities in implementation, mechanisms should be put in place to avoid this. This could involve subjecting authority figures, like the Home Secretary, to judicial review claims under procedural unfairness or bias, and possibly human rights claims under the ECHR if they choose to deviate from this definition.

This approach establishes a circumscribed definition of unacceptable protests, aiming to minimise ambiguity to prevent subjective implementation. It has also developed a mechanism to ensure protests are restricted or prohibited within reasonable bounds. However, this approach may falter and cause additional problems. Firstly, terms like ‘extremism’ may be more subjective than objective as this is more of a political term prone to manipulation; however, this can be resolved by looking at the scope set out by other statutes³⁴. Nonetheless there is a need to isolate this term further. Secondly, the mechanism may work in theory but not in practice. Parliament can simply pass a Bill to place certain actions under ‘serious criminality’, forgoing the definition and subjectively motivating it – something this proposal has been trying to avoid. This is a topic in its own right and warrants exploration in a longer discussion.

Conclusion

This article has explored statute and common law approaches when dealing with the idea of what constitutes a harmful protest and what protests are protected under the ECHR. This article has also explored the transition from an objective approach to a subjective one, and has attempted to provide a solution, recognising the need for a holistic, objective legal definition. This would create clarity through an objective, rather than subjective understanding and remove bias or disproportionate curtailment of the right to protest.

³³ *Ziegler* (n 15).

³⁴ See Terrorism Act (n 11).

The Complex Relationship Between Express and Implied Term in the Contract of Employment.

By Yaade Joba, BVS.

Introduction

It is trite in the law of contract that express terms will always prevail over implied terms when the two are in direct conflict.³⁵ As Evershed MR held in *Lynch v Thorne*, ‘a term *prima facie* to be implied must, according to well-established principle, always yield to the express letter of the bargain’.³⁶ This view was endorsed in the context of an employment contract by Lord Steyn in *Malik*.³⁷ However, there still remains good authority that suggests that terms implied in law can restrict or limit an express term in a contract of employment.³⁸

Whether the relationship between express and implied terms in the employment contract should deviate from the orthodox contract law principles stated in *Lynch* is a question that is yet to receive a definitive answer. It is one that suffers from a lack of clarity in the case law. The confusion surrounding the correct approach raises legal and practical issues for both employer and employee, the substance of which will be discussed below. This piece argues that implied terms should only be able to affect contractual powers in the contract of employment, not contractual obligations. It will be structured as follows: the first section will look at the unique nature of the employment

³⁵ *Lynch v Thorne* [1956] 1 WLR 303, relying on the statement of principle laid out by Romer J in *Perry v Sharon Development Co* [1937] 4 All ER 390, 394-395; see also *Taplin (FA) Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397, 422 and, more recently, *Interactive Investor Trading Ltd vs City Index Ltd* [2011] EWCA Civ 837.

³⁶ [1956] 1 WLR 303.

³⁷ *Malik v BCCI* [1997] UKHL 23 [15] per Lord Steyn who stated obiter that ‘implied terms operate as default rules. The parties are free to exclude or modify them’.

³⁸ *Johnstone v Bloomsbury Health Authority* [1992] QB 333.

contract, the second will discuss the judicial adherence to contractual orthodoxy and its implications, and the final section will assess the potential of implied terms in law to limit express terms.

Section 1: The Unique Nature of the Employment Contract

There is judicial acceptance of the notion that the employment contract cannot be equated with other commercial contracts.³⁹ The contract of employment has unique qualities, which warrant its unique treatment by the law.⁴⁰ For example, the employment contract does not centre around the exchange of goods or services but instead it focuses on the mutual responsibilities of a person and their employer.⁴¹

Secondly, unlike in commercial contracts, the relationship between the parties to an employment contract is hallmarked by an imbalance of bargaining power.⁴² On one hand, the employer offers the opportunity of a job and all of its benefits. On the other, a prospective employee can only offer services which an employer can receive from several other people. The employer unilaterally sets the terms of the contract, and therefore has substantial control over the employment relationship. Drawing from *Autoclenz*, in practice, a court or tribunal is often required to investigate an employee's allegations that the terms in their employment contract are a sham and therefore do not reflect the true reality of one's employment.⁴³ It follows, then, that the inequality of bargaining power inherent in the contract means that employees are prone to exploitation and market opportunism that implied terms in law are designed to prevent.⁴⁴ For example, in the authorities on gig economy cases,⁴⁵ the courts have been

³⁹ *Johnson v Unisys Ltd* [2003] 1 AC 518 [20]; *Autoclenz Ltd v Belcher* [2011] UKSC 41 [33]; *Braganza v BP Shipping Ltd* [2015] UKSC 17 [54].

⁴⁰ [2015] UKSC 17 [54]-[55].

⁴¹ One the fundamental principles of the International Labour Organisation listed in the Declaration of Philadelphia (1944) is that 'labour is not a commodity'.

⁴² *Autoclenz* (n 5) [34].

⁴³ *ibid.*

⁴⁴ *Autoclenz* (n 5).

⁴⁵ *Uber BV v Aslam* [2021] UKSC 5; *IWGB v CAC* [2023] UKSC 43.

required to scrutinise contractual working arrangements that have been drafted by employers with the purpose of excluding gig economy workers from statutory protection of employment legislation.⁴⁶ Their protection is fundamental in preventing the exploitative commodification of labour and achieving a just outcome for employees. For these reasons, the principles applicable to the interpretation of terms in the employment contract must deviate from traditional contract principles. The two can no longer be equated. The employment contract has instead been characterised as a ‘relational’ contract as it preserves a close personal relationship.⁴⁷ The consequence of this categorisation is that it amplifies the role of implied terms in law to regulate the performance of the contract. As Lady Hale held in *Braganza v BP Shipping*:

The personal relationship which employment involves may justify a more intense scrutiny of the employer's decision-making process than would be appropriate in some commercial contracts.⁴⁸

The emergence of the implied term of mutual trust and confidence (which inserts a term into all employment contracts that the parties preserve the trust and confidence in the employment relationship) is a clear illustration of this. The following two sections will explore the different positions endorsed in the limited number of cases that have dealt with this issue.

Section 2: Deference to Contractual Orthodoxy

Despite the special qualities of the employment contract, some courts have been reluctant to depart from the conventional principles of contract initially posited in *Lynch v Thorne*. The most notable is the decision of *Johnson v Unisys* in the House of Lords.⁴⁹

⁴⁶ *ibid.*

⁴⁷ Hugh Collins, ‘Employment as a Relational Contract’ (2021) 137 LQR 426.

⁴⁸ [2015] UKSC 17 [55].

⁴⁹ [2001] UKHL 13.

A Closer Look at the Decision Reached in Johnson

In *Johnson*, it was held that the implied term of mutual trust and confidence could not be extended to permit Johnson to recover damages for the manner in which he was dismissed from his employment.⁵⁰ There was an express term in Johnson's contract that entitled the employer to terminate his employment on four weeks' notice, except in cases of gross misconduct in which case the employer could terminate the contract without any notice.⁵¹ It was accepted that this express term was inconsistent with the notion that the employer has to terminate the contract without being in breach of the duty of mutual trust and confidence.⁵²

Forming part of the majority, Lord Hoffman's reasoning strictly adhered to the orthodox principles of contract law. He held that:

...any terms which the courts imply into a contract must be consistent with the express terms. Implied terms may supplement the express terms of the contract but cannot contradict them.⁵³

Despite Lord Steyn's proclamation earlier in the judgement that the employment contract does not equate with commercial contracts, this was not followed in Lord Hoffman's analysis. The notice provision in Johnson's contract had the effect of defeating his argument that his employer may have breached the implied term of mutual trust and confidence when dismissing him. Bogg and Collins note that this decision marks an unfortunate reminder of the common law traditions of master and servant that had previously dominated how the employment contract was conceptualised.⁵⁴ The

⁵⁰ *ibid.*

⁵¹ *ibid* [38].

⁵² *ibid* [42].

⁵³ *ibid* [37] (emphasis added); see also *Autoclenz v Belcher* [2009] EWCA Civ 1046 per Aikens LJ [88], later reaffirmed by the Supreme Court.

⁵⁴ Alan Bogg and Hugh Collins, 'Lord Hoffmann and the Law of Employment: The Notorious Episode of *Johnson v Unisys Ltd*' in Paul S Davies and Justine Pila, 'The Jurisprudence of Lord Hoffmann: A Festschrift in Honour of Lord Leonard Hoffmann' (Hart Publishing 2015) 189.

master could dismiss a servant without reason at any time by simply giving notice, as stipulated in the contract, or by paying damages instead of this notice.

The alarming implication of the decision in *Johnson* is that it effectively creates an unfettered common law power for employers to terminate their employees at will. This feeds into the commodification of labour and denies employees the right to be treated with dignity and respect.⁵⁵ The sudden and unexpected loss of one's job will have a monumental impact on an employee. Livelihoods could be ruined, economic stability could falter and, as shown on the facts of *Johnson*, physical and mental problems might ensue. The commodification of labour ignores this and reduces employees to the role of a servant, whose sole purpose is to serve its master until they are no longer needed.⁵⁶

As a result of the potentially serious implications outlined above, the express power to terminate the contract at will should be able to be constrained by implied terms in law. Employees are in the most need of protection at the point they are facing termination of their employment contract. After promising signs from cases such as *Aspden*⁵⁷ and *Hill*,⁵⁸ the House of Lords in *Johnson* stopped the development of the common law in using implied terms to provide employees with protection in the context of dismissal.

Unfair Dismissal Legislation

At this stage, it is necessary to discuss the relevance of unfair dismissal legislation brought in by the Employee Rights Act 1996 (ERA) because the ambit of unfair dismissal law includes dismissals which are deemed procedurally unfair.⁵⁹ On the facts of *Johnson*, the appellant had already been awarded the maximum award of £11,691.88 after a successful unfair dismissal claim.⁶⁰ However, while unfair dismissal law offered a level

⁵⁵ *ibid.*

⁵⁶ Douglas Brodie, 'Legal Coherence and the Employment Revolution' (2001) LQR 604.

⁵⁷ *Aspden v Webbs Poultry & Meat Group (Holdings) Ltd* [1996] IRLR 521.

⁵⁸ *Hill v General Accident Fire and Life Assurance Corporation plc* (1999) SLT 1157.

⁵⁹ *Polkey v AE Dayton Services* [1987] IRLR 503.

⁶⁰ *Johnson* (n 5) [6].

of protection to Johnson, the same cannot be said for individuals that fall outside the narrow category of ‘employee’ under section 230(3)(a) ERA.⁶¹ This means that, in the event of a dispute, they only have their contracts to rely on for protection against an unreasonable dismissal.⁶²

This outcome is far from ideal since the inequality of bargaining power in the employment relationship is highlighted by the employer’s (often) unilateral imposition of the terms of the contract. If the employer is unreasonably dismissing their workers, it is highly unlikely that the employer has also included contractual protections to prevent them from doing so. Therefore, it is just as imperative that these individuals gain some form of dismissal protection through implied terms in law. Collins and Golding suggest that the implied term in law should extend to conduct disciplinary proceedings fairly.⁶³ However, even if the common law can develop in this way, the ruling in *Johnson* and its view on the interaction of express and implied terms would severely limit its effect.

Reda v Flag: A Worrying Endorsement of the Principles in Johnson

A further illustration of the adherence to the core principles of contract law is *Reda v Flag*.⁶⁴ Two employees of Flag Ltd were summarily dismissed in accordance with an express contractual term that allowed their employer to dismiss them without cause or notice. The dismissal did not have to be justified. The employees submitted that the employer’s decision to dismiss them in order to avoid granting them stock options was a breach of the implied term of mutual trust and confidence. However, the Privy Council upheld the decision of the Court of Appeal in Bermuda⁶⁵ and held that the employees could not rely on the implied term of mutual trust and confidence because, as it is an implied term, it must yield to the express provisions of the contract.

⁶¹ Examples include ‘workers’ for the purposes of the Employment Rights Act 1996 (ERA 1996), section 230(3)(b) and agency workers.

⁶² Hazel McLean, ‘An Employer’s Right to be Unreasonable’ (2009) 51 CLJ 23.

⁶³ Philippa Collins and Gabrielle Golding, ‘An Implied Term of Procedural Fairness During Disciplinary Processes: Into Contracts of Employment and Beyond?’ (2023) *Industrial Law Journal*.

⁶⁴ [2002] UKPC 38.

⁶⁵ Bermuda is a British Overseas Territory. The decisions of the Privy Council are of persuasive authority to UK courts, but they are not strictly binding.

This decision is particularly troubling as it permitted a termination without cause when ulterior economic motives influenced the employer's decision to dismiss the employees. The decision in *Reda* illustrates the commodification of labour that *Johnson* was feared to have caused.⁶⁶ This prospect is worsened by the fact that unlike *Johnson*, the employees in *Reda* had no alternative remedy that they could claim outside of their contract. They were left completely unprotected after their dismissals. This is the significant cost of deference to contractual orthodoxy in the relationship between express provisions and terms implied in law. While it may provide a degree of certainty, it seems difficult to justify in light of the risk of employee exploitation at the most defining moments in their contractual relationship.

Section 3: Qualifying Express Provisions in the Employment Contract

On the contrary, the proposition that an implied term could provide a fetter on express contractual provisions was favoured by the Court of Appeal in *Johnstone*.⁶⁷

The question before the Court was whether the contractual power of an employer to require a junior doctor to work up to 48 hours of overtime (along with a basic 40 hour working week) was limited by the employer's implied duty to take reasonable care for the employee's health and safety. The majority (consisting of Stuart-Smith LJ and Browne-Wilkinson VC) answered in the affirmative, holding that the express term that permitted the doctor to work up to 88 hours a week was limited by the implied term. Leggat LJ dissented, sticking to the orthodox view of contractual terms.⁶⁸ There were notable differences in all three of the judges' reasoning, which will be explored below beginning with Leggat LJ's dissenting judgment.

⁶⁶ Hugh Collins, 'Claim for Unfair Dismissal' (2001) 30 ILJ 305.

⁶⁷ *Johnstone* (n 4).

⁶⁸ *ibid* at [347].

The Reasoning of Leggat LJ

Leggat LJ's position was clear: 'as a matter of law, reliance on an express term cannot involve breach of an implied term'.⁶⁹ Despite recognising that the working hours of junior doctors 'may indeed be scandalous', he held 'those who cannot stand the heat should stay out the kitchen'.⁷⁰ A judicial response of this kind is concerning as it belittles the legitimate concerns of employees and denies them protection based on the argument that they should not have taken the job in the first place. Leggat LJ's position further reinforces the commodification of labour and fails to recognise the special qualities of the employment contract. It implies that some jobs come with a degree of exploitation that employees should succumb to when entering a contract of employment. This would have been an especially dangerous argument for the Court of Appeal in *Jobstone* to follow as it fails to recognise the sometimes-fatal impact on junior hospital doctors forced to work excessive working hours.⁷¹

The Reasoning of Stuart-Smith LJ

Forming part of the majority, Stuart-Smith LJ took the opposite view; he held that a term implied in law cannot be overridden by an express term when the two are in conflict. This is regardless of whether the contract term was an absolute obligation or a discretionary power. This is a clear contradiction from what the House of Lords (and especially Lord Hoffman) controversially held in *Johnson v Unisys*. For that, it can be praised. However, if followed, the reasoning of Stuart-Smith LJ puts the law on an unstable doctrinal foundation.

As pointed out by Phang, 'the whole tenor of Stuart-Smith L.J.'s judgement appears to suggest that extra-legal considerations were a not insignificant, albeit latent, factor in arriving at the conclusion he did'.⁷² Indeed, Stuart-Smith LJ's ruling involves discussion

⁶⁹ *ibid.*

⁷⁰ *ibid* at [348].

⁷¹ Lesley Dolding and Catherine Fawlk, 'Judicial Understanding of the Contract of Employment' (1992) 55 MLR 566.

⁷² Andrew Boon Leong Phang, 'Implied Terms in English Law - Some Recent Developments' [1993] JBL 242, 248.

on the NHS's role as a 'monopoly employer' and the career prospects of aspiring doctors.⁷³ This is a clear example of judicial considerations of wider policy issues that deference to terms implied in law will naturally involve. The difference between a decision based on an imaginative use of implied terms in law and one on public policy is one of degree, not substance. The uncertainty that will be generated by this form of quasi-legislative reasoning is detrimental to the development of the law in a coherent fashion.

The Reasoning of Browne-Wilkinson VC

Browne-Wilkinson VC agreed with Stuart-Smith LJ but came to a narrower view of the relationship between implied terms and the express terms of the contract.⁷⁴ He characterised the employer's contractual right to demand overtime as an express power or a discretion that should be exercised in a manner that is consistent with the implied duty to take care of the health and safety of the employees.⁷⁵ The employer's contractual power had to be 'exercised in the light of other contractual terms and in particular their duty to take care for [the junior doctor's] safety'.⁷⁶ If this power had been an absolute contractual obligation, then the implied duty could not override this express provision.⁷⁷

This view of the interaction of express and implied terms is one that could provide some clarity to the law. It relies on a clear distinction between contractual terms that confer a discretion and terms that impose an obligation. Express terms would only override an implied term in the latter case. Where a discretion is involved, the parties must exercise that discretion in line with any relevant implied terms. This sits comfortably with the purpose of the implied term of mutual trust and confidence, which requires parties to act in a way that does not breach the trust and confidence in each other.

⁷³ *Johnstone* (n 4) [345].

⁷⁴ *ibid* [350], following his reasoning in the earlier case of *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] ICR 525;

⁷⁵ *Johnstone* (n 4) [351].

⁷⁶ *ibid* [344].

⁷⁷ *ibid*.

The rationale for making this distinction is based on choice. Where the parties to a contract have agreed to take on an obligation, the principles of freedom to contract dictate that that should be respected, and the law should not intervene regardless of the type of contract. On the other hand, where the parties have left open a term to a discretion, the exercise of that discretion should be compatible with implied terms because there is a choice pertaining to how that discretion is operated. To take the example of *Johnstone*, the junior doctor's contractual obligation to work 40 hours a week should remain unrestrained by any implied term. However, the discretion retained by the employer to call upon the doctor for up to an additional 48 hours a week should be subject to the implied term of health and safety.

Two further examples of the approach endorsed by Browne-Wilkinson VC are *Gogay v Hertfordshire City Council*⁷⁸ and *United Bank v Akhtar*.⁷⁹ In *Gogay*, the Court of Appeal considered an express contractual provision to suspend an employee pending a disciplinary investigation. The Court treated the implied duty of mutual trust and confidence in a way that was able to limit the employer's power to suspend its employee. The employer was held to be in breach of this implied term of the contract.

Similarly, in *Akhtar*, the Employment Appeal Tribunal held that the employer's discretionary power to exercise a contractual mobility clause was used in a manner that would breach the implied term of mutual trust and confidence.⁸⁰ The employer had given an employee six days' notice for a transfer to another part of the country.⁸¹ The decision in *Akhtar* faced criticism for imposing a restraint on employer's right to manage their workforce.⁸² However, employees deserve protection against an employer's unreasonable use of express powers.⁸³ When entering into their contract of

⁷⁸ [2000] IRLR 703.

⁷⁹ [1989] IRLR 507.

⁸⁰ *ibid.*

⁸¹ *ibid.*

⁸² Barry Hough and Ann Spowart-Taylor, 'The impotence of contract in employment' (1990) SJ 134.

⁸³ *Johnstone* could be distinguished on the basis that the employer's express provision was sufficiently clearer. The junior doctor was required to be available to work for up to 48 hours of overtime.

employment, it is unlikely that the employees in *Gogay* and *Akhtar* could have predicted that the terms in their contracts would be used in this manner. An obligation in line with the implied terms that are an incident to all contracts of employment should form part of an employer's exercise of express powers and discretions. While it will undoubtedly generate uncertainty for employers, it protects employees from the unjust treatment that their employers would otherwise be entitled to impose upon them.

Conclusion

The difference in the reasoning of the 3 judges in the *Jobnstone* case is illustrative of the confusion that surrounds the relationship between terms implied in law and express terms in the contract of employment. Leggat LJ represents the contractual orthodox approach that was later taken on in *Johnson v Unisys*. Browne-Wilkinson VC and Stuart-Smith LJ represent the alternative approach, that express terms can be subject to implied terms in the employment contract. The decision was described by Barmes to have 'perfectly captured the struggles that common lawyers typically encounter in attempting to reconcile the implication of terms by law with the principles of freedom of contract'.⁸⁴

The lack of clarity in the law has attracted some efforts to redefine the appropriate formulation of this relationship. Commentators such as Brodie and Freedland have suggested that the implied term of mutual trust and confidence should form an irreducible standard of protection in the employment contract by precluding the use of express terms to exclude the implied term.⁸⁵ Their suggestion is defensible, the fact that the parties have expressly contracted otherwise does not result in the implied term being any less of a 'necessary incident' of a specific category of contracts. This proposal would ensure a minimum standard of protection to all individuals with an employment contract and result in adequate safeguarding from unconscionable employer conduct

⁸⁴ Lizzie Barmes, 'The Continuing Conceptual Crisis in the Common Law of the Contract of Employment' (2004) 67 MLR 435, 439.

⁸⁵ Douglas Brodie, 'Beyond Exchange: The New Contract of Employment' (1998) 27 ILJ 79; see also Mark Freedland, *The Personal Employment Contract* (Oxford University Press 2003) 119.

during dismissals. However, the proposal is a radical deviation from the long-standing principles of contract that prioritise certainty and freedom of contract. As long as *Johnson*-like decisions continue to emerge from the courts, it is very unlikely that this proposal will receive judicial support in the near future.

The New York Convention - Failed to Harmonise?

By Nazanin Ilbeigi Taher, LPC LL.M.

Introduction

This essay will argue that the Contracting States to the New York Convention ('NYC') 1958¹ do not have a similar approach to what is needed for an effective agreement to arbitrate and, consequently, fail to achieve the convention's purpose to harmonise arbitration proceedings globally. This essay will first consider the background and purpose of the NYC. It will then discuss the Contracting States' approach to formal requirements for an arbitration agreement and, subsequently, what is meant by an agreement being 'null and void, inoperative or incapable of being performed.' After this, it will analyse the convention and the possibility of reform. Ultimately, it will conclude that the convention's purpose is most effectively achieved through the cooperation of national courts.

NYC Background and Purpose

The NYC is "one of the most important instruments governing international commerce and...international arbitration"² Indeed, it is perhaps "the most effective instance of international legislation in the... history of commercial law,"³ with over 170 Contracting States.⁴

¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

² Carolyn B Lamm and Jeremy K Sharpe, 'Inoperative Arbitration Agreements Under the New York Convention' in Emmanuel Gaillard & Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (1st edn, Cameron May 2008) 321.

³ Michael John Mustill, 'Arbitration: History and Background' [1989] 6 J Intl Arb 43, 49.

⁴ New York Arbitration Convention, 'Contracting States' (New York Arbitration Convention) <<https://www.newyorkconvention.org/countries>> accessed 1 March 2024.

The NYC “[supports the use of] arbitration in...settlement of international disputes”⁵ through facilitating “the recognition and enforcement of arbitration agreements and foreign arbitral awards.”⁶ The NYC’s purpose is “to facilitate uniform rules and standards to apply globally.”⁷ Such uniform standards help “generate confidence in the parties who may be unfamiliar with the diverse laws prevailing in different countries with which they are trading.”⁸ As such, the harmonisation of arbitration laws across jurisdictions is the fundamental purpose of the NYC.

Agreement in ‘Writing’

The Contracting States do not have similar formal requirements for effective arbitration agreements. The NYC requires an agreement to be in writing in order to be recognised by the Contracting States.⁹ As a valid agreement to arbitrate excludes the jurisdiction of the national courts, “there is good reason that the existence of such an agreement is evidenced in writing.”¹⁰ Under Article II(2) NYC, the requirement “shall include an arbitral clause...or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams.”¹¹ The US adheres to this condition by requiring either a pre-dispute written provision in a contract or an agreement in writing to submit a dispute to arbitration.¹²

⁵ Mertcan Ipek, ‘Interpretation of Article II(3) of the New York Convention’ [2016] MÜHF HAD 684, 687.

⁶ Leonardo D Graffi, ‘Securing Harmonized Effects of Arbitration Agreements Under the New York Convention,’ [2006] Hous J of Intl L 663, 689.

⁷ Stefan Pislevik, ‘I Now Pronounce you ‘Null and Void’: Manner of Determination and The Applicable Law under the New York Convention’ [2021] 37 Arb Int 721, 725.

⁸ *Gas Authority of India Ltd v SPIE CAPAG, SA & Ors* [1993] 27 DRJ.

⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art II(1).

¹⁰ Nigel Blackaby and Constantine Partasides QC and Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (7th edn, OUP 2022) 75.

¹¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art II(2).

¹² Federal Arbitration Act 1925, s 2.

What amounts to a written agreement for the purposes of Article II(2) may be interpreted expansively based on the words ‘shall include,’ which are taken to mean “shall include, but not limited to.”¹³ Indeed, the UN General Assembly recommended that “the circumstances described [in Article II(2)] are not exhaustive.”¹⁴ This is reflected in Option I, Article 7 of the UNCITRAL Model Law, which provides that “an agreement is in writing if its content is recorded ‘in any form.’”¹⁵ Under this interpretation, the English Arbitration Act,¹⁶ the Netherlands Arbitration Act,¹⁷ the Swiss Private International Law Act,¹⁸ and the Indian Arbitration and Conciliation Act¹⁹ all abide by Article II(2) NYC and have a similar approach by requiring arbitration agreements to be evidenced in *some* form of writing or text. However, some jurisdictions reject this expansive interpretation of Article II(2). In the US, enforcement was refused when a purchasing agent did not sign the arbitration provisions contained in purchase orders.²⁰

Conversely, Option II, Article 7 of the Model Law does not refer to a ‘written’ requirement, providing that any “agreement by the parties to submit to arbitration all or certain disputes”²¹ will suffice. Belgium²² and Scotland²³ have adopted this option. Furthermore, the French Code of Civil Procedure states, “an arbitration agreement shall

¹³ Albert Jan Van Den Berg, ‘When is an Arbitration Agreement in Writing Valid under Article II(2) of the New York Convention of 1958?’ in GJ Meijer, PM Storm, L Timmerman (eds), *Piet Sanders: een honderdjarige Vernieuwer* (1st edn, BLP 2012) 328.

¹⁴ UNCITRAL ‘Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (7 July 2006) A/6/17.

¹⁵ UNCITRAL, ‘Model Law on International Commercial Arbitration (amended in 2006), Option I, art 7.

¹⁶ Arbitration Act 1996, s 5.

¹⁷ Netherlands Arbitration Act 1986, s 1021.

¹⁸ Swiss Private International Law Statute 1990, s178(1).

¹⁹ Indian Arbitration and Conciliation Act 1996, s 7.

²⁰ *Khan Lucas Lancaster Inc v Lark International Ltd* [1999] 186 F3d 210 (2d Cir 1999).

²¹ UNCITRAL, ‘Model Law on International Commercial Arbitration (amended in 2006), Option II, art 7.

²² Code Judiciaire, art 1681.

²³ Arbitration (Scotland) Act 2010, art 4.

not be subject to any [formal] requirements.”²⁴ In New Zealand, an “arbitration agreement may be made orally or in writing.”²⁵ Adopting a very different approach to the interpretation of Article II(2) NYC, these Contracting States have relaxed formal requirements and have dismissed the need for any agreement in writing.

In contrast, suspicion of arbitration has resulted in some countries having additional formal requirements. In Paraguay, an arbitration clause is inoperative until a submission agreement is also executed.²⁶ Although states which adopt this approach conform to Article II(2), their additional requirements further differentiate their approach from the other Contracting States.

The differing formal requirements of the Contracting States reaffirm the risk and uncertainty that the NYC aimed to resolve. While agreements lacking evidence in writing may be valid in one Contracting State, “they may not be so regarded by the courts of the country which the award falls to be enforced.”²⁷ Indeed, the Norwegian Court of Appeal “refused to recognise an award rendered in London as the arbitration agreement in the form of an exchange of emails”²⁸ did not satisfy Article II(2) NYC in the court’s view.²⁹ This undermines the harmonisation and uniform standard that the NYC aimed to implement.

‘Null and Void’

The Contracting States also vary significantly in their approach to what is meant by and what renders an arbitration agreement ‘null and void’ and unenforceable under Article II(3) NYC. The convention does not define the legal standard for determining when an agreement is ‘null and void.’³⁰ However, this has been interpreted to mean the

²⁴ Code of Civil Procedure 2011, art 1507.

²⁵ Arbitration Act 1996, s 7(1).

²⁶ Blackaby and Partasides and Redfern and Hunter (n 10) 79.

²⁷ *ibid* 78.

²⁸ Blackaby and Partasides and Redfern and Hunter (n 10) 78.

²⁹ Decision of the Hålogaland Court of Appeal (Norway) [2002] XXVII YBCA 519.

³⁰ United Nations, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* (2016 edn, United Nations 2017) 70.

agreement is "affected by some invalidity from the beginning"³¹ and is "devoid of legal effect."³²

The first distinction between the Contracting States' interpretation of 'null and void' can be seen in the form of law applied. Some Contracting States consider this to be determined under national law, "either the *lex fori*"³³ or the law applicable under Article V(1)(a) NYC."³⁴ However, other Contracting States apply an "international standard of contract law defences,"³⁵ such as mistake, duress, waiver or fraud. Indeed, in *Escobar*, the US court suggested that an unconscionability defence "is unavailable under Article II...because it cannot be applied neutrally before international tribunals."³⁶ Similarly, in *Berezovsky*, the English Court of Appeal has suggested that the NYC language "should be interpreted in a broad, international sense."³⁷ Additionally, in Singapore, "an arbitration agreement is 'null and void' only if it is subject to an internationally-recognised defence."³⁸

Another distinction can be seen in the Contracting States' approach to legal capacity. This is especially prominent when considering the capacity of 'groups of companies' and state entities. In regards to 'group of companies,' France considers that an arbitration agreement entered into by one company may also bind its group affiliates because the

³¹ Lawrence Antony Collins, 'Nullity, Invalidity, the Conflict of Laws and Articles II(3) and V(1)(A) of the New York Convention' in Franco Ferrari and Friedrich Jakob Rosenfeld (eds), *Autonomous Versus Domestic Concepts under the New York Convention*, (Volume 61, KLI 2021) 142.

³² *Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd* [2007] EWHC 665 (Ch).

³³ Piero Bernardini, 'Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause,' in Albert Van Den Berg, *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (KLI 1999) 200.

³⁴ United Nations, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* (2016 edn, United Nations 2017) 70; Federal Supreme Court, Switzerland, 21 March 1995, 5C 215/1994/lit.

³⁵ United Nations, *ibid* 70.

³⁶ *Escobar v Celebration Cruise Operator Inc* [2016] 805 F 3d 1279, 1287.

³⁷ *Joint Stock Company 'Aeroflot-Russian Airlines' v Berezovsky* [2013] EWCA Civ 784, [76].

³⁸ *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2016] SGHC 238, [2017] 1 Lloyd's Rep 59 [175] (Coomaraswamy J).

group is “one and the same economic entity.”³⁹ However, Swiss and English courts reject this and refuse to accept that an arbitration agreement may bind a third party because of its legal or commercial connection to one of the parties.⁴⁰ In regards to state entities, France,⁴¹ Belgium,⁴² Brazil⁴³ and Switzerland⁴⁴ agree that international arbitration agreements may bind state bodies. However, Venezuela,⁴⁵ Iran⁴⁶ and Saudi Arabia⁴⁷ impose additional restrictions, requiring such agreements to be approved by the relevant government minister.

Distinctions are also present in the Contracting States’ approach to vague, inconsistent or uncertain terms, which render the agreement ‘null and avoid.’ German courts, adopting a pro-arbitration stance, have interpreted such terms to uphold the agreement. Indeed, an arbitral clause stating “without resource [sic] to the ordinary court of Stockholm, Sweden”⁴⁸ was deemed to refer to arbitration under the Stockholm Chamber of Commerce. Singapore takes a similar approach.⁴⁹ Contrastingly, the Indian High Court has refused to enforce an arbitral clause providing for “Durban Arbitration and English Law to apply.”⁵⁰ Similarly, in Switzerland, enforcement of an unclear arbitral clause stating that arbitration should be conducted “through the American Arbitration Association or any other American court”⁵¹ was refused. Overall, significant differences in approach are prevalent, undermining the NYC’s purpose.

³⁹ *Dow Chemical France v ISOVER Saint Gobain* (France) [1984] IX Ybk Comm Arb 131.

⁴⁰ *City of London v Sancheti* [2008] EWCA Civ 1283; ICC case No 4504/1985-86 (1986) 113 J du Droit Intl 1118.

⁴¹ Cass 1st Civ, May 2 1966; *Galakis* Paris Court of Appeals (1996).

⁴² Code Judiciaire 1998, art 1676(3).

⁴³ *Companhia Paranaense de Gas (‘Cinoagás’) v Carioca Passarelli Consortium (‘Consortium’)* [2004] (Paraná CA).

⁴⁴ Swiss Private International Law Statute 1990, s177(2).

⁴⁵ Commercial Arbitration Act 1998, s 4.

⁴⁶ Iranian Constitution 1979, art 139.

⁴⁷ Saudi Arabian Law of Arbitration (Royal Decree No M/34 of 16th April 2012), s 10.

⁴⁸ *OLG Stuttgart* [2006] OLG Report Stuttgart 685.

⁴⁹ *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHC 5.

⁵⁰ *Swiss Singapore Overseas Enterprises Pvt Ltd v M/V African Trader* [2005] High Court of Gujarat, India, Civil Application No. 23.

⁵¹ Federal Tribunal, Switzerland, 25 October 2010, 4A279/2010.

'Inoperative'

The Contracting States also vary significantly in their approach to what is meant by and what renders an arbitration agreement 'inoperative' and unenforceable under Article II(3) NYC. The convention does not define when an agreement is 'inoperative.'⁵² Courts have interpreted 'inoperative' to mean the agreement is no longer "[applicable] to the parties or their dispute."⁵³ The Indian High Court has held an arbitration agreement to be inoperative where, by initiating judicial proceedings, the parties had waived their right to arbitrate.⁵⁴ Similarly, a French court has held that the expiration of the timeframe specified in the constitution of the arbitral tribunal rendered the arbitration agreement void.⁵⁵ Generally, courts will not hold an agreement 'inoperative' due to external factors that do not pertain to the agreement itself, as in Australia.⁵⁶ However, in India, a stay of court proceedings was refused as "exchange control regulations would prevent payments in foreign currency to the arbitrators and other overseas expenses of those participating in [the]...arbitration."⁵⁷ Therefore, it is clear that the contracting states have differing interpretations of 'inoperative' and do not follow a uniform standard, contrary to the NYC's purpose.

'Incapable of Being Performed'

The Contracting States also have varying approaches to when an arbitration agreement is 'incapable of being performed,' and thus unenforceable under Article II(3) NYC. Generally, an arbitration agreement will be 'incapable of being performed' where "the parties have agreed upon a procedure that is physically or legally impossible to follow,"⁵⁸

⁵² United Nations (n 34) 71.

⁵³ *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi TBK Ltd* [2013] EWHC 1240, [2013] 2 Lloyd's Rep 421.

⁵⁴ *Ramasamy Athappan and Nandakumar Athappan v Secretariat of Court, International Chamber of Commerce* [2008] High Court of Madras, India.

⁵⁵ *Soci t  Gefu Kuchenboss GmbH & CO.KG et Soci t  Gefu Geschafis-Und Vervaltungs GmbH v Soci t  Cor ma* [2008] Court of Appeal of Toulouse, France.

⁵⁶ *Dodwell & Co Pty v Moss Securities* [1990] Fed Ct Australia.

⁵⁷ *Blackaby and Partasides and Redfern and Hunter* (n 10) 138.

⁵⁸ Gary Born, *International Commercial Arbitration* (3rd edn, Wolters Kluwer 2020) 844.

such as when the arbitration agreement “designates an inexistent arbitral institution.”⁵⁹ In such cases, the US court will nevertheless compel the parties to use arbitration. In *Travelport*,⁶⁰ the arbitration agreement provided for the appointing authority to be the ‘United States Council for Arbitration’, a non-existent body. However, the court held that the agreement referred to the UNCITRAL Arbitration Rules, which provided a method for constituting an arbitral tribunal.⁶¹ Similarly, the Supreme Court of Canada has determined that the expression ‘incapable of being performed’ should be interpreted narrowly as to avoid providing a “‘back door’ for a party wishing to ‘escape’ the arbitration agreement,”⁶² as in *Seidel*.⁶³ Contrastingly, the Russian Court of Appeal has held an arbitration agreement to be ‘incapable of being performed’ because the appointing authority referred to in the agreement did not exist.⁶⁴ This wide interpretation by the Russian Court of Appeal in contrast to the narrow interpretation by US and Canadian courts highlights the clear differing approaches among Contracting States and the lack of harmonisation in interpreting the NYC, contrary to the convention’s purpose.

Analysis and Reform

Arguably, the NYC “does not seek to establish internationally uniform defences for resisting arbitration.”⁶⁵ Indeed, the lack of guidance as to the legal standard to be applied when determining whether an agreement is ‘null and void, inoperative and incapable of being performed’ and the “use of broad language [particularly of null and void]... has

⁵⁹ United Nations (n 34) 72.

⁶⁰ *Travelport Global Distribution Systems BV v Bellview Airlines Limited* [2012] 12 Civ 3483 (DLC).

⁶¹ United Nations (n 34) 72.

⁶² *Blackaby and Partasides and Redfern and Hunter* (n 10) 224.

⁶³ *Seidel v Telus Communications Inc* [2011] 1 SCR 531

⁶⁴ *ZAO UralEnergoGaz (Russian Federation) v OOO ABB Electroengineering (Russian Federation)* [2009] Ninth Arbitrazh Court of Appeal, Russian Federation, No A40-27854/09-61-247.

⁶⁵ Pislevik (n 7) 730; Ulrich Haas, ‘Part 3: Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958’ in Frank Weigand (ed), *Practitioner’s Handbook on International Arbitration* (CH Beck 2002) 467.

the purpose of reflecting many different grounds for invalidity”⁶⁶ under the Contracting States’ national laws.

However, the same reasoning cannot be applied to the convention’s formal requirements for an ‘agreement in writing.’ Additionally, this does not mean that a uniform and autonomous manner of applying the defences “is not desirable or intended by the NYC itself.”⁶⁷ Indeed, the NYC’s ‘pro-enforcement bias’⁶⁸ requires narrow interpretation of Article II(3),⁶⁹ which, if adhered to uniformly throughout the Contracting States, will fulfil the general purpose of the NYC by harmonising international arbitration laws.

A possible solution to bring uniformity and harmonisation across the Contracting States is reform of the NYC. This was proposed by Van Den Berg’s hypothetical draft of the NYC.⁷⁰ However, such reform will almost certainly be ineffective, primarily due to “the [political and practical] challenges that come with proposing a new international instrument to [170] State members of the Convention.”⁷¹ Even if the convention is reformed, there is no guarantee that all the states will adopt the reformed convention as they “may prefer to stick with the original convention.”⁷² Such reform may even undermine the convention’s credibility and may “not be understood by many

⁶⁶ Pislevik (n 7) 730.

⁶⁷ Pislevik (n 7) 730; Linda Silberman, ‘The New York Convention after 50 Years: Some Reflections on the Role of National Law’ (2009) 38 GJICL 25, 26.

⁶⁸ Pieter Sanders (ed), *ICCA’s Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commercial Arbitration 2011) 13.

⁶⁹ Pislevik (n 7) 730.

⁷⁰ Albert Jan van den Berg, ‘Annex I: Text of the Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards’, in *50 Years of the New York Convention* (Kluwer Law International 2009) 667.

⁷¹ Joseph Manuel Tirado and Alberto Acevedo and Gabriela Cosio, ‘Chapter 18: Time for a New NY Convention? Was Albert van den Berg Right?’ in Katia FachGomez and Ana M Lopez-Rodriguez (eds), *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International 2019) 303.

⁷² *ibid* 304.

Contracting States... [who] believe that the Convention [in its original form] is very helpful and simple.”⁷³

Instead, ultimately, the successful implementation of the convention’s aims largely rests on the “national courts’ spirit of collaboration, cooperation, and internationalism.”⁷⁴ Indeed, the lack of uniformity and harmonisation of arbitration laws across jurisdictions can be resolved through “appropriate judicial interpretation”⁷⁵ of the NYC in each national court. Instances of successful collaboration and cooperation by national courts have previously been seen in response to other international conventions, such as the European Patent Convention 1973 in *Actavis*⁷⁶ and *Grimme*.⁷⁷ Accordingly, uniform approaches to arbitration laws and interpretation of the NYC is possible through the avenue of judicial cooperation. To aid judges and practitioners, information on the convention’s aims and “functioning [can] be provided... in a practical and digestible manner”⁷⁸ to ensure that national courts are moving towards a harmonised approach to interpretation of the NYC.

Conclusion

This essay has argued that the Contracting States do not have a similar approach to what is needed for an effective agreement to arbitrate. While some states adhere to the NYC’s formal requirements of an ‘agreement in writing,’ other states reject such formality or require additional formalities. The Contracting States also differ in their interpretations of agreements being ‘null and void, inoperative or incapable of being performed.’ Consequently, the NYC’s purpose of creating a coherent and efficient system of uniform laws to bring greater certainty, predictability and fairness globally is not fulfilled. Without uniformity in the interpretation and application of the NYC, arbitration proceedings are not harmonised and consequently fail to provide the

⁷³ Albert Jan Van Den Berg, ‘Striving for Uniform Interpretation’ (1999) UNP 41, 42.

⁷⁴ Lamm and Sharpe (n 1) 321.

⁷⁵ Van Den Berg (n 73).

⁷⁶ *Actavis v Eli Lilly* [2017] UKSC 48 (UKSC).

⁷⁷ *Grimme Maschinenfabrik v Derek Scott (Scotts Potato Machinery)* [2010] EWCA Civ 1110 (CA).

⁷⁸ Van Den Berg (n 73) 41.

intended security and confidence to parties who may be unfamiliar with foreign jurisdictions. Reform of the NYC to achieve this aim would be ineffective. Instead, a more uniform application of convention terms can be effectively implemented through cooperation from national courts. This solution relies on national courts considering the approach of other Contracting States' courts to the interpretation of the NYC and its fundamental aims to collectively ensure alignment and fulfil the purpose of the convention.

The Burqa Ban Should Be Abandoned.

By Xenia Kalatha, BVS LL.M.

Abstract

This Article addresses the tension between the burqa bans adopted in various European States and the freedom of religion enshrined in Article 9 of the European Convention of Human Rights. Firstly, it is argued that the living together doctrine promotes the majoritarian conception of socialisation. Nevertheless, even if the showing of one's face is accepted as an important aspect of social interaction, it is no longer necessary in light of the pandemic. Secondly, it will be argued that the bans promote conformity and homogeneity in a manner that suppresses pluralism by adversely affecting Muslim women. Furthermore, it is contended that a militant approach to religion has been adopted which, in turn, increases anti-democratic sentiment. In the final section, the approach of the European Court of Human Rights to the bans will be criticised.

Introduction

Delineating the boundaries between freedom of religion and the constitutional commitment to secularism has sparked widespread academic debate in certain European States.¹ More precisely, the extent to which individuals can exercise the external aspect of the freedom, namely the right to manifest one's religion, has been contested and has led to a series of decisions by the European Court of Human Rights (ECtHR).² This is

¹ Roberta Medda-Windischer, 'Militant or Pluralist Secularism? The European Court of Human Rights Facing Religious Diversity' (2017) 45 Religion, State and Society 216, 217.

² *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014); *Dakir v Belgium* App no 4619/12 (ECtHR, 11 July 2017); *Belcacemi and Oussar v Belgium* App no 37798/13 (ECtHR, 11 July 2017).

particularly the case in relation to the Islamic full-face veil, after the passing of legislation in various European States that prohibits the concealment of the face for religious purposes in the public sphere.³

The burqa bans reveal ‘a gradual hardening of attitudes toward veil dressing practices’⁴ as they have been adopted against a background of growing Islamophobia in the West.⁵ There is fear among European societies of the emergence of communities that do not share a long-standing history of state and church separation.⁶ Terrorist attacks by radical Islamists have also fuelled the anti-Islamic narrative, a phenomenon that has been exacerbated by the contribution of the media.⁷ Therefore, the prohibition of the burqa and the restriction of the right to manifest one’s religion is painted against a backdrop of insecurity and tension. Given that the freedom in question ranks as one of the most important freedoms⁸ and is one of the first rights to be recognised,⁹ it is vital to investigate the extent to which state regulation ought to be permissible.

³ *Loi* n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l’espace public; *Loi* du 1er juin 2011 visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage.

⁴ Marianne Franklin, 'Veil Dressing and the Gender Geopolitics of ‘What not to Wear’ (2013) 14 *International Studies Perspective* 394, 365.

⁵ Muhammad Tariq and Zafar Iqbal, 'Neo-Islamophobia: A New Western Social Order' (2023) 13 *Journal of Islamic Thought and Civilization* 133.

⁶ Ronan McCrea, 'The Ban on the Veil and European Law' (2013) 13 *Human Rights Law Review* 57, 58.

⁷ Raphael Cohen-Almagor, 'Indivisibilité, Sécurité, Laïcité: The French Ban on the Burqa and the Niqab' (2021) 20 *French Politics* 3, 16.

⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 9.

⁹ Tom Lewis, 'What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56 *International and Comparative Law Quarterly* 395, 401.

In the first section, the living together doctrine will be criticised as a perpetuation of a majoritarian conception of socialisation. It will subsequently be argued that, even if there is consensus as to the importance of open-face communication, this is not a prerequisite for interaction in European societies. This is a thesis that is further exemplified by the COVID-19 pandemic and the mandatory mask requirements. Nevertheless, even if it is accepted that there is a long-standing cultural taboo in certain societies against the concealment of one's face, it is not legitimate to enforce the cultural taboo because there is no convincing public interest ground to justify it.

In the second section, it will be argued that the living together doctrine enforces conformity and homogeneity in a manner that is contrary to the promotion of pluralism and multiculturalism. The wider implications of the reduction of pluralism will be investigated by examining the impact on Muslim women given the prohibition of a non-harmful practice.

In the third section, the departure from secularism, in light of the burqa ban, will be analysed. By intervening and regulating the public sphere where non-state actors are involved, the state adopts a militant stance against religion. Moreover, the conception that the burqa is contrary to liberal democracy will be rejected because of the different meanings that underpin the garment. However, even if it is accepted that the burqa may potentially oppose liberal values, the ban, rather than defending democracy, risks undermining it by strengthening the anti-democratic sentiment. The various factors forming the backdrop against which the French ban was enacted will also be examined to indicate the weakness of the argument that the ban was adopted to protect liberal values.

In the final section, a critical analysis of the ECtHR's approach in relation to the burqa ban will be performed by primarily focusing on the court's judgement in *S.A.S. v France*.¹⁰ It will be contended that the rejection of gender equality as a legitimate aim is appropriate, whereas the acceptance of living together as a legitimate aim will be criticised. The court's proportionality analysis in *S.A.S.* will be criticised by noting the distorted approach taken in relation to European consensus, and by focusing on the court's inadequate balancing of the competing interests at stake. Finally, the limited use of the living together doctrine in subsequent Article 9 cases will be considered.

The analysis will be confined to competent, adult women who freely and voluntarily choose to wear the burqa for religious reasons like the applicant in *S.A.S. v France*.¹¹ It ought to be recognised that women may be coerced by societal and familial pressures to conceal their face; nevertheless, this will not be the focus of the analysis. Finally, there are different religious garments associated with the Muslim faith that conceal the face. The burqa covers the face entirely, whereas the niqab leaves open the section of the eyes. For ease of argument, reference will only be made to the burqa.

Section I-Living together: Non-concealment of the face as necessary for social interaction?

The burqa ban has been justified by the ECtHR on the basis that it contravenes the notion of living together given that the burqa, unlike other religious symbols, conceals the face.¹²

¹⁰ *S.A.S.* (n 2).

¹¹ *ibid* [11].

¹² *ibid*.

The doctrine, however, is premised on the majoritarian interpretation of socialisation¹³ which results in the ‘bulldozing’ of personal identity ‘unless that identity is acceptable and permissible in the eyes of the majority’.¹⁴ The perception of the face as a prerequisite for successful socialisation requires individuals to limit the exercise of a fundamental human right because of a perceived ‘societal consensus’ which, as recognised by the concurring opinion in *Dakir v Belgium*, ‘is in fact based on a transient majority’s opinion of what is suitable and right’.¹⁵ The Constitutional Court of Belgium noted that the legislature is entitled to conclude that the face is vital for socialisation¹⁶ and deference is granted to national decision-making by the ECtHR where matters engaging social conditions are involved.¹⁷ Nevertheless, if human rights are truly counter-majoritarian, ‘it makes no sense conditioning their scope and meaning on what the majority itself believes’.¹⁸ If human rights law is to protect marginalised groups and religious minorities, the doctrine of living together should not be interpreted according to majoritarian preferences. All institutions ought to be sensitive to the fact that they embody norms that reflect the dominant culture and run the risk of being biased against minorities.¹⁹ Hence, the development of the living

¹³ Shu-Perng Hwang, 'Margin of Appreciation in Pursuit of Pluralism? Critical Remarks on the Judgements of the European Court of Human Rights on the “Burqa Bans”' (2020) 20 Human Rights Law Review 361, 362.

¹⁴ Jill Marshall, '*S.A.S. v France*: Burqa Bans and the Control or Empowerment of Identities' (2015) 15 Human Rights Law Review 377, 385.

¹⁵ *Dakir* (n 2) [7].

¹⁶ *Constitutional Court of Belgium*, n° 145/2012, December 6, 2012, B.21.

¹⁷ *S.A.S.* (n 2) [141], [154]; *Dakir* (n 2) [54].

¹⁸ George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' in Andreas Follesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 123.

¹⁹ Sarah Down, 'Debating the Burqa: How the Burqa Debate Can Reveal More Than It Hides' (2011) 17 Canterbury Law Review 375, 379.

together doctrine should not succumb to what Sandel calls the ‘liberal illusion’.²⁰ Interpretations of the law ‘according to the stereotypes that inform the cultural values and norms of dominant majorities’²¹ should be avoided to achieve the accommodation and inclusion of different minority cultures.²² History has shown the problems that may arise where there is reliance on majoritarian sentiments;²³ therefore, the interpretation of the living together doctrine should not risk jeopardising minority rights.

Regardless of whether the living together doctrine is based on a majoritarian understanding of socialisation, as put by Lemmens, the ban can be legitimate because wearing of the burqa can cause a ‘rupture of reciprocity’²⁴ and destabilise interaction. Even if the ban perpetuates a majoritarian practice, it should be maintained because this practice prevents the erection of a ‘barrier’²⁵ between citizens in a manner that hinders socialisation. Being a member of a community mandates adherence to the ‘minimum requirements of life in society’,²⁶ and this includes showing one’s face to facilitate the individualisation of people which is vital for interaction. The importance of non-concealment has been recognised in the Resolution of the Parliamentary Assembly of the Council of Europe which outlined the need of promoting values that underpin living

²⁰ Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press 1982) 11.

²¹ Down (n 19) 379.

²² Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (2nd edn, Oxford University Press 2002) 327.

²³ *Dakir* (n 2) [9].

²⁴ Koen Lemmens, ‘Larvatus Prodeo? Why Concealing the Face Can Be Incompatible with a European Conception of Human Rights’ (2014) 39 *European Law Review* 47, 59.

²⁵ *S.A.S.* (n 2) [122].

²⁶ *ibid* [121].

together.²⁷ This is also reflected in the decision of the Constitutional Court of Belgium where emphasis was placed on the impossibility of engaging in human relations with the burqa.²⁸ Hence, social communication and the development of interpersonal relationships have been recognised as vital elements of the collective.

Nevertheless, even if there is consensus as to the importance of showing one's face for the development of human relations, open-face communication is not an indispensable requirement of living together in European societies. Social interactions can occur where individuals wear skiing equipment, carnival costumes and helmets.²⁹ Likewise, interactions can take place via the internet where recognisability is not essential for communication.³⁰ The use of nicknames and avatars do not hinder communication but are rather an expected mode of interaction. Thus, the wearing of a religious garment such as the burqa is not so distinctively problematic that it justifies the restriction of a fundamental human right. This argument is further reinforced by the fact that only a small portion of the population wear the burqa so that there is no real impact on social communication in the public sphere. When the decision of the ECtHR in *S.A.S. v France* was given, only approximately one thousand nine hundred women in France out of the sixty-five million population wore the burqa.³¹ Consequently, it is an exaggeration to claim that one

²⁷ Parliamentary Assembly Council of Europe, Resolution 2076: *Freedom of Religion and Living Together in a Democratic Society*, 30 September 2015 (33rd Sitting) 3.

²⁸ *Constitutional Court of Belgium*, n° 145/2012, December 6, 2012, B.21.

²⁹ Armin Steinbach, 'Burqas and Bans: The Wearing of Religious Symbols under the European Convention of Human Rights' (2015) 4 Cambridge International Law Journal 29, 47

³⁰ *ibid* 47.

³¹ *S.A.S.* (n 2) [145].

thousand nine hundred women can undermine interaction to the extent that there is a disruption of socialisation.

The argument that the face is a prerequisite to interactions is further weakened by the COVID-19 pandemic. The wearing of a face-mask was a legally imposed requirement to which people were routinely exposed to.³² For a period of approximately two years, it was the cultural norm to communicate and socialise with individuals with a face-covering. It can be said that there was a shift of social practices in relation to the concealment of the face after the pandemic and a wider acceptance of communication behind a 'barrier'. Consequently, the pandemic has stirred the notion of socialisation away from non-concealment, rendering face-covering more widely accepted in European communities.³³ Would a judge, who sat in *S.A.S. v France*, reach the conclusion that, in light of the pandemic, the face is no longer an indispensable part of socialisation? It can be said that, unlike the face-masks, the burqa is not associated with public health reasons.³⁴ In other words, it is legitimate to require the covering of one's face for public health reasons to safeguard society from contagious diseases, but it is not justifiable in relation to the burqa, because there are no health considerations underpinning the concealment of the face. This approach, however, entails the discrimination between the reasons one conceals the face.³⁵ If, in light of the pandemic, there has been a shift away from the face being a

³² Meagan Pearson, 'What Happened to "Vivre Ensemble": Developments After *SAS v France*' (2021) 10 Oxford Journal of Law and Religion 185, 193.

³³ Robert Kahn, 'Masks, Face Veil Bans and 'Living Together': What's Privacy Got to Do with It?' (2022) 6(2) Public Governance, Administration and Finances Law Review 7, 8.

³⁴ Mario Ricca, 'Don't Uncover that Face! Covid-19 Masks and the Niqab: Ironic Transfigurations of the ECtHR's Intercultural Blindness' (2020) 35 International Journal for the Semiotics of Law 1119, 1121.

³⁵ *ibid* 1123.

prerequisite for social interaction, it would be inappropriate to distinguish between the reasons of face-concealment given that this will result in the ban being perceived as a ‘a fig leaf for anti-Muslim sentiment’.³⁶ Thus, the pandemic has had wider implications in relation to the understanding of living together and socialisation in European communities.

COVID-19, however, may not have entirely displaced the cultural taboo in Western societies against face-coverings. In European countries such as France and Belgium, there is a long-standing taboo against individuals being unrecognisable in the public sphere.³⁷ As bluntly put by Badinter, ‘le visage n’est pas le corps et il n’y a pas, dans la civilisation occidentale, de vêtement du visage’³⁸ (the face is not the body and there is no clothing for the face in the West). This is primarily premised on the fact that, as mentioned above, importance is attached to facial communication such as smiles and gestures that will not be visible if the face is covered.³⁹ Consequently, it can be contended that the justification of the burqa ban based on the notion of living together is justified, because it enforces a pre-existing taboo in European societies. An analogy can be drawn with the regulation of public nudity.⁴⁰ In Western societies there is a taboo against public nudity except in areas where it is expressly allowed.⁴¹ As a result, prohibitions can be imposed upon the display

³⁶ Kahn (n 33) 7.

³⁷ Lemmens (n 24) 65.

³⁸ Assemblée Nationale, *Rapport d’Information Fait au Nom de la Mission d’Information sur la Pratique du Port du Voile Intégral sur le Territoire National* (no.2262, January 26, 2010) 334.

³⁹ McCrea (n 6) 80.

⁴⁰ *ibid.*

⁴¹ *ibid* 79.

of nudity.⁴² In the same manner, prohibitions upon the concealment can be placed to enforce the taboo. This analogy, however, is not appropriate. There are legitimate public interest grounds as to why public nudity ought to be regulated such as health reasons and the presence of young children in public. Contrary to nudity, the only policy ground against the burqa is the living together doctrine⁴³ which, as explained above, is not an adequate justification. The doctrine perpetuates a majoritarian understanding of socialisation and denies the fact that communication is possible with face concealment, something that is exemplified after the mandatory face-coverings during the pandemic. Hence, unlike the taboo against public nudity, there is no legitimate basis to enforce the taboo of showing one's face.

Section II-Conformity and homogeneity

The justification of the burqa ban through the living together doctrine can have problematic consequences as it operates in a manner that suppresses pluralism and promotes conformity and homogeneity. By compelling citizens to 'embrace only the forms of interaction that the majority believes best capture the ideals of fraternity and civility',⁴⁴ multiculturalism is discouraged as the state is empowered to dictate social conduct. As noted by the concurring opinion in *Dakir v Belgium*, this is problematic because it 'is anathema to the fundamental values of the autonomy of self...tolerance and broadmindedness which are the foundations of the Convention system'.⁴⁵ This is further

⁴² *ibid* 80.

⁴³ *S.A.S.* (n 2) [118], [120], [139].

⁴⁴ Ilias Trispiotis, 'Two Interpretations of "Living Together" in European Human Rights Law' (2016) 75 *Cambridge Law Journal* 580, 582-583.

⁴⁵ *Dakir* (n 2) concurring opinion [6].

exacerbated by the imposition of criminal penalties upon the failure to comply with the ban which operates as a form of coercive homogeneity.⁴⁶ Even if the fines are small, the cumulative effect of receiving small fines can suppress religious difference. Accordingly, there is a departure from the ‘hallmarks of a democratic society’,⁴⁷ namely pluralism and broadmindedness, as an assimilationist agenda is pursued denying the presence of religious difference in the public sphere.

Lemmens maintains that the ban should not be regarded as an inherently anti-Islamic legislation that targets the burqa.⁴⁸ As a result, the ban may not be interpreted as a form of suppression of pluralism because it does not directly exclude a religious practice. The French legislation, for example, is couched in neutral terms as it generally prohibits face concealment regardless of whether it is motivated by religious beliefs.⁴⁹

Section 1: No one may, in public places, wear clothing that is designed to conceal the face.⁵⁰

Section 2: The prohibition provided for in section 1 hereof shall not apply if the clothing is prescribed or authorised by primary or secondary legislation, if

⁴⁶ *Article 3 de la Loi n° 2010-1192 du 11 Octobre 2010 Interdisant la Dissimulation du Visage dans l'Espace Public (Loi n° 2010-1192 du 11 octobre 2010)*

⁴⁷ *S.A.S. (n 2) [128].*

⁴⁸ Lemmens (n 24) 51.

⁴⁹ *Loi n° 2010-1192 du 11 Octobre 2010.*

⁵⁰ *Article 1 de la Loi n° 2010-1192 du 11 Octobre 2010.*

it is justified for health or occupational reasons, or if it is worn in the context of sports, festivities or artistic or traditional events.⁵¹

The French Gerin report also includes testimony from Muslim women favouring the ban.⁵² Therefore, there is no reduction in religious pluralism but rather a legislative intent for the avoidance of covering one's face. This neutrality is also reflected in the Belgian law:⁵³

Article 563bis: 'Persons who, unless otherwise provided by law, appear in a place that is accessible to the public with their faces completely or partially covered or hidden, such as not to be identifiable, shall be liable to a fine of between fifteen and twenty-five euros and imprisonment of between one and seven days, or only one of those sanctions.

However, paragraph 1 hereof shall not concern persons who are present in a place that is accessible to the public with their faces completely or partially covered or hidden where this is provided for by employment regulations or by an administrative ordinance in connection with festive events.'

⁵¹ *ibid.*

⁵² Assemblée Nationale, *Rapport d'Information au Nom de la Mission d'Information sur la Pratique du Port du Voile Intégral sur le Territoire National*, N° 2262, 26 January 2010, p 324.

⁵³ Article 563bis *de la Loi* du 1er Juin 2011 Visant à Interdire le Port de Tout Vêtement Cachant Totalemment ou de Manière Principale le Visage.

Firstly, to deny the anti-Islamic intention of the ban by using what Down calls a ‘native informant’ or an ‘insider’⁵⁴ is problematic. The ‘native informant’ is an individual who shares the culture of the group in question, in this case the Muslim faith, and claims that, according to their perspective, the burqa is not a symbol that corresponds to their religious requirements. The voice of an ‘insider’ is used to reflect the voice of the entire community in order to legitimise the ban. This reductionism results in the suppression of pluralism and the promotion of conformity since the views of minorities are undermined by the majority within the same religion. As put by Down:

‘To claim that the subjective experiences of one may speak objectively for all women who wear the burqa serves to appropriate and silence the voices of those whose experiences may tell a different story.’⁵⁵

Secondly, even though the ban is phrased in neutral terms about non-concealment of the face, it is in fact targeting the burqa⁵⁶ and has the implication of resulting in selective pluralism.⁵⁷ The Parliamentary debate preceding the passing of the legislation in France included anti-Islamic comments.⁵⁸ Politicians also aimed to politicise the integration of

⁵⁴ Down (n 19) 387.

⁵⁵ *ibid* 388.

⁵⁶ Hwang (n 13) 364; Ulrike Spohn, 'Sisters in Disagreement: The Dispute Among French Feminists About the "Burqa Ban" and the Causes of Their Disunity' (2013) 12 *Journal of Human Rights* 145, 145.

⁵⁷ *S.A.S. v France* (n 2) joint partly dissenting opinion [14].

⁵⁸ *ibid* [149].

Muslim communities in European societies⁵⁹ and there is an underlying intolerance to different forms of religious expression.⁶⁰ Hence, against this backdrop, the ban targets the burqa and engages in selective pluralism.⁶¹ A specific religious practice is singled-out and excluded from the sphere of what is considered to be an acceptable way of appearing in public. This marks a departure from the commitment to pluralism as there is a selective side-lining of a specific religious garment.

The burqa ban has wider implications on pluralism and the right to manifest one's religion. There are significant repercussions for women who believe that wearing the burqa is a religious requirement, because they either have to comply with the conformist agenda pursued by the state and therefore not adhere to their religious tenets, or wear the burqa and face criminal penalties.⁶² Women are confronted with a dilemma about the exercise of a right that forms an integral part of their identity and sense of self.⁶³ Thus, rather than guaranteeing a society where pluralism, difference and freedom of religion are celebrated, there is an outright exclusion of religious expression, that has a significant confining effect on women.

⁵⁹ Patrick Weil, 'Headscarf versus Burqa: Two French Bans with Different Meanings' in Susanna Mancini and Michel Rosenfeld (eds), *Constitutional Secularism in an Age of Religious Revival* (Oxford University Press 2014) 208.

⁶⁰ Jean-Paul Willaime, 'The Cultural Turn in the Sociology of Religion in France' (2004) 65 *Sociology of Religion* 373, 379.

⁶¹ *S.A.S.* (n 2) joint partly dissenting opinion [14].

⁶² *S.A.S.* (n 2) [110].

⁶³ Christopher McCrudden, *Litigating Religions: An Essay on Human Rights, Courts, and Beliefs* (Oxford University Press 2018) 139.

The ban also has a significant impact on pluralism and diversity because it legitimises the rejection of a religious practice that does not cause harm. According to John Stuart Mill, the only basis on which a liberal state can interfere with an individual's will is to prevent harm to others.⁶⁴ The state can intervene only where a practice has the potential to cause harm. However, there is no evidence to indicate that women who wear the burqa aim to express hatred, cause harm or proselytise other individuals.⁶⁵ As a result, the ban, by regulating one's ability to pursue a religious practice, strikes at the heart of multiculturalism by prohibiting a non-harmful religious practice.

It can be maintained that state intervention in relation to the burqa and as a consequence the reduction of religious pluralism, is legitimate because harm is caused by the offensive nature of the symbol. More precisely, the burqa can be classified as offensive because it hinders incidental communication conveying the message that there is a rejection of interaction.⁶⁶ Wearers can see other individuals, whereas others cannot see them. This one-sided interaction has the potential of causing unease. It can also be perceived as 'an affront to the French way of life' which is typically more open to communication.⁶⁷ Despite enforcing homogeneity, the ban can be regarded as legitimate since harm may be caused to the public by the presence of an offensive symbol.

⁶⁴ HLA Hart, *Law, liberty and Morality* (Oxford University Press 1963) 4.

⁶⁵ *S.A.S.* (n 2) [120]; Gabrielle Elliot-Williams, 'Protection of the Right to Manifest Religion or Belief Under the European Convention on Human Rights in *S.A.S v France*' (2016) 5 *Oxford Journal of Law and Religion* 344, 349.

⁶⁶ McCrea (n 6) 85.

⁶⁷ Cohen-Almagor (n 7) 16.

However, this restriction of pluralism based on the perceived harm caused by the offensiveness of the burqa is not convincing. Pluralist, liberal societies ought to tolerate a wide range of practices that may be offensive. An analogy can be drawn with freedom of expression. Speech, that may be classified as offensive by some, is tolerated in democratic societies so long as it is not gratuitously offensive⁶⁸ or inciting harm and violence.⁶⁹ As established in *Handyside v UK*:

‘Freedom of expression ... is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.’⁷⁰

The same tolerance and acceptance of pluralism ought to be permitted in relation to the freedom to manifest one’s religion. In the same manner that opinions and views not shared by others are not banned,⁷¹ the wearing of the burqa ought to be tolerated and accepted as part of a multicultural society. Regardless of whether some find the burqa offensive, this does not necessitate the justification for the ban. In the words of Cohen-Almagor:

‘If we were to ban all that some people may find offensive, then many kinds of dress, food, art and entertainment would have been banned’.⁷²

⁶⁸ *Otto-Preminger Institut v Austria* App no 13470/87 (ECtHR, 23 August 1994) [49].

⁶⁹ *Erbakan v Turkey* App no 59405/00 (ECtHR, 6 July 2006) [56].

⁷⁰ *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) [49].

⁷¹ *Leyla Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) dissenting opinion [9].

⁷² Cohen-Almagor (n 7) 17.

Section III-The burqa ban and secularism

The principle of secularism, ‘defined as a system in which there is a separation between religion and the State’,⁷³ is a fundamental element of liberal democracies and it has received constitutional recognition in certain countries like France. The French Constitution specifically recognises that:

‘France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs’.⁷⁴

Nevertheless, legislation targeting the wearing of the burqa by non-state actors in public spaces has moved beyond this notion of secularism.⁷⁵ The burqa ban, rather than seeking to promote secular goals such as the ‘conciliation of different beliefs and values’,⁷⁶ aims at protecting the ‘areligious identity’ of the state.⁷⁷ The ban marks a shift in the traditional understanding of secularism as there is state regulation of the public sphere in a manner that has not been present before. Unlike cases such as *Dablab v Switzerland*,⁷⁸ *Leyla Şahin v Turkey*⁷⁹ and *Dogru v France*,⁸⁰ where state regulation of the veil was legitimate because public institutions were involved and secularism could be engaged, the burqa ban

⁷³ Myriam Hunter-Henin, 'Why the French Don't Like the Burqa: Laicite, National Identity, and Religious Freedom' (2012) 61 *The International and Comparative Law Quarterly* 613, 617.

⁷⁴ The French Constitution, Adopted by the Referendum of September 28, 1958 and Promulgated on October 4, 1958, Article 1.

⁷⁵ Hunter-Henin (n 73) 617.

⁷⁶ *ibid* 613.

⁷⁷ *ibid* 619.

⁷⁸ *Dablab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001).

⁷⁹ *Leyla Şahin v Turkey* (n 71).

⁸⁰ *Dogru v France* App no 27058/05 (ECtHR, 4 March 2009).

interferes with the right to manifest one's religion where the individual is distinct from the state. There is a state interest in the removal of religious symbols from public institutions such as schools where young children are involved and may be influenced by different religious beliefs. Nevertheless, such an interest is not present where competent, adult women who are not an emanation of the state, choose to freely and voluntarily wear a religious symbol such as the burqa. There is no threat to the secular nature of democracy given that these individuals are not associated with the state. Consequently, state functions are not affected by the public wearing this religious garment.⁸¹ This was recognised by the ECtHR in *Ahmet Arslan v Turkey*,⁸² where a violation of Article 9 was established, given that the individuals who manifested their religious beliefs by publicly wearing their religious garments were not associated with the state. Thus, the burqa ban has moved beyond secularism and has entered into the realm of regulation of the public sphere in a manner that arguably seeks to eliminate the open portrayal of religion.

The departure from the traditional conception of secularism can potentially be justified in relation to the burqa. The full-face covering may be perceived as depicting values that are contrary to liberal democracy such as gender apartheid⁸³ and the submission of women.⁸⁴ Former President Sarkozy commented that 'the burqa is not welcome on the Republic's territory. It does not fit the idea the Republic maintains about the dignity of

⁸¹ McCrea (n 6) 75.

⁸² *Ahmet Arslan v Turkey* App no 41135/98 (ECtHR, 23 February 2010) [48].

⁸³ McCrea (n 6) 64.

⁸⁴ Lemmens (n 24) 55.

the woman'.⁸⁵ Hence, a more 'muscular'⁸⁶ or 'militant'⁸⁷ interpretation of secularism may be adopted to ensure that values underpinning liberal societies are not undermined by religious symbols. A proactive stance in relation to religion can be pursued to ensure that the freedom is not used in a manner that contravenes values such as gender equality and, therefore, 'prevent the so-called 'Trojan horse' from entering the public square'.⁸⁸ Regardless of whether the garment is voluntarily worn, it is still a 'visible sign of a particularly oppressive, inegalitarian, and patriarchal ideology'.⁸⁹ To ensure the preservation of equal citizenship, it is vital to pre-emptively ban it. In the same way that other religions have reformed so as to comply with liberal values, the practice of a religious minority ought to also be reformed to ensure compliance with liberal values, an aim that is secured with the move towards militant secularism. For example, individuals of the Jewish faith revised certain religious dogmas in the early 19th-century, such as family law and dietary restrictions, to assist their accession to citizenship.⁹⁰ Likewise, burqa-wearers ought to adjust and respect the fundamental values of liberal societies so as to show that their commitment is primarily to the state and not to their religion.⁹¹ The ban can be

⁸⁵ Spohn (n 56) 146.

⁸⁶ Christian Joppke, 'The Retreat is Real—but what is the Alternative? Multiculturalism, Muscular liberalism, and Islam' (2014) 21 *Constellations* 286, 286.

⁸⁷ Patrick Macklem, 'Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe' (2012) 19 *Constellations* 575, 579.

⁸⁸ Kathleen Cavanaugh and Edel Hughes, 'Rethinking What is Necessary in a Democratic Society: Militant Democracy and the 'Turkish State' (2016) 38 *Human Rights Quarterly* 623, 625.

⁸⁹ Cecile Laborde, 'State Paternalism and Religious Dress' (2012) 10 *International Journal of Constitutional Law* 398, 406.

⁹⁰ Cecile Laborde, 'Secular Philosophy and Muslim Headscarves in France' (2005) 13 *Journal of Political Philosophy* 305, 320.

⁹¹ *ibid.*

justified under this more muscular and proactive form of secularism so as to ensure the safeguarding of liberal democratic values.

This militant conception of secularism is premised on the assumption that the burqa is a representation of a radical ideology that portrays a salafist understanding.⁹² The burqa is automatically conceptualised as ‘a flag of salafi radicalism’⁹³ that rejects liberal values and is equated with fundamentalism. Such an assumption is blind to the various meanings that the burqa can have.⁹⁴ The burqa can be an indication of culture, a sign of ‘more profound, deeper religiosity’⁹⁵ or even ‘a stance of defiant rebelliousness against the perceived hostility, racism and Islamophobia of the mainstream society’.⁹⁶ As noted by Laborde⁹⁷, many Muslim women chose to wear the burqa after their expulsion from French schools for wearing the veil. Thus, the presumption that a more muscular conception of secularism is required is weakened by the multiple meanings that the burqa can have and do not threaten the values of liberal democracies. Nonetheless, even if it is accepted that a small section of those who wear the burqa reject democratic values, the pursuance of militant secularism through an outright ban is not the most preferable way to deal with a potential threat to democracy. The ban gives publicity to that which is perceived to be a threat to democracy and ‘bad publicity is better...than no publicity’.⁹⁸ This proactive approach to ensure the protection of liberal values has the potential of rendering the

⁹² Hunter-Henin (n 73) 618.

⁹³ Laborde (n 89) 406.

⁹⁴ McCrea (n 6) 64.

⁹⁵ Laborde (n 89) 405.

⁹⁶ *ibid.*

⁹⁷ *ibid.*

⁹⁸ *ibid* 408.

burqas ‘flags of resistance against anti-Muslim hostility’.⁹⁹ This is further aggravated by the imposition of criminal penalties because those affected by the ban will perceive themselves as victims as a fundamental element of their way of life is targeted by the state. Hence, rather than protecting democracy, militant secularism can harden anti-democratic attitudes and strengthen radicalism.

The various factors underpinning the legislative enactment of the ban also weaken the argument in favour of militant secularism. Looking at France as a case study, there are many nuances underlying the ban which are not necessarily premised on the promotion of secularism and democratic values. Historically, colonisers aimed at ‘civilising’ their subjects and sought ‘to lift the colonies up to French standards by bringing Christianity and French culture’.¹⁰⁰ The issue of integration of the Muslim population is still prevalent today in French society as several generations do not feel like they fit in the Western way of life.¹⁰¹ In addition to this, after immigration waves such as the refugee crisis in Europe, attempts were made to integrate migrants in accordance with the French way of life.¹⁰² Immigration is another parameter which paints the rationale underlying the burqa ban since there were concerns about the flow of radical Islamists. As stated by Franklin, ‘non-western veiled women come across as foreign, even ‘monstrous’ to female/male western eyes’.¹⁰³ Finally, growing Islamophobia and insecurity after terrorist attacks led to French institutions hardening their stance against radicalism and the adoption of legislation such

⁹⁹ *ibid.*

¹⁰⁰ Cohen-Almagor (n 7) 9.

¹⁰¹ *ibid.* 11.

¹⁰² *ibid.* 11.

¹⁰³ Franklin (n 4) 403.

as the 2004 state school veil ban.¹⁰⁴ Against this backdrop, one can see that the debate regarding the burqa ban is more nuanced and complex. A variety of considerations have formed the background against which the ban was adopted and they do not automatically pertain to the protection of liberalism. By acknowledging the wider anti-Islamic atmosphere in French society that underpins the ban, the aim of proactively defending democratic values is weakened. The ban is not merely the response against radical Islam, but also the product of a general anti-Islamic agenda that has long-standing roots in France.¹⁰⁵ By recognising this, the pursuit of militant democracy is undermined.

Section IV-Criticism of the ECtHR's case law

Gender equality as a legitimate aim

The ECtHR's rejection of gender equality as a legitimate aim for the burqa ban in *S.A.S. v France* is appropriate.¹⁰⁶ By not legitimising the ban under the equality argument, the court appropriately considered that the state cannot appeal to a practice defended by women to restrict a fundamental right.¹⁰⁷ The court gave adequate weight to the agency of women who choose to wear the burqa and recognised the importance of respecting an individual's right to decide for their own interests.¹⁰⁸ Despite the fact that gender equality is 'a major goal'¹⁰⁹ in modern liberal democracies, the restriction of a religious practice pursued by women would undermine equality. This marks a welcomed departure from

¹⁰⁴ Cohen-Almagor (n 7) 12.

¹⁰⁵ *ibid* 9-10.

¹⁰⁶ *S.A.S.* (n 2) [118].

¹⁰⁷ *ibid* 119.

¹⁰⁸ Down (n 19) 377.

¹⁰⁹ *S.A.S.* (n 2) [119].

the previous comments made by the ECtHR in *Dablab v Switzerland*¹¹⁰ and reiterated in *Leyla Sabih v Turkey*,¹¹¹ where, in the context of the Islamic headscarf, the veil was deemed to be incompatible with gender equality.

The rejection of gender equality as a legitimate aim may be deemed inappropriate by some. As mentioned above, there are various meanings that can be potentially attached to the burqa, some of which may be contrary to equality and be regarded as a means of submission and obedience of women.¹¹² Gender equality may reasonably be employed as a legitimate aim for the ban because of the potential perpetuation of sexist messages. This is a concern that was voiced in the debates leading up to the adoption of the ban in France.¹¹³ Nevertheless, this form of paternalism is problematic.¹¹⁴ The recognition of gender equality as a legitimate aim for the burqa ban goes ‘against the feminist tradition of claiming equal rights with men’.¹¹⁵ Using the aim of equality to ban a practice defended by women perpetuates ‘a paternalistic and outdated view of women’¹¹⁶ that denies women who freely choose to wear a garment the ability to do so. Women have fought to gain the power to decide and express themselves.¹¹⁷ If a minority of women are unable to do so under the guise of gender equality, that would undermine the long-term struggle to gain the ability to choose for themselves.

¹¹⁰ *Dablab v Switzerland* (n 78) 13.

¹¹¹ *Leyla Şahin v Turkey* (n 71) [111].

¹¹² Christian Joppke, 'Islam and the Legal Enforcement of Morality' (2014) 43 *Theory and Society* 589, 604.

¹¹³ Hunter-Henin (n 73) 624.

¹¹⁴ Joppke (n 112) 605.

¹¹⁵ *ibid* 627.

¹¹⁶ *ibid* 624.

¹¹⁷ Cohen-Almagor (n 7) 14.

Living together as a legitimate aim

The acceptance of living together as a legitimate aim for the burqa ban by the ECtHR is problematic.¹¹⁸ The recognition of living together as an aim that falls within the protection of the ‘rights and freedoms of others’, runs counter to the restrictive interpretation of the possible limitations of the freedom.¹¹⁹ The court in *S.A.S.* noted that the grounds that can be employed to justify a restriction under Article 9 paragraph 2 are exhaustive and ought to be interpreted narrowly.¹²⁰ The expansion of the rights of others to cover ‘vague notions of behavioural norms of society or considerations related to the general public interest’,¹²¹ departs from the wording of Article 9 paragraph 2.¹²² This approach enables the state to restrict the right by providing weak justifications that are not ‘directly conducive to alleviating certain harms that flow from the exercise of the human right’.¹²³ This broad interpretation of the ‘rights of others’ is problematic because it may provide the basis for states to employ expansive restrictions of human rights.

Trispiotis argues that the adoption of living together as a legitimate aim is not a ‘a novel addition to the jurisprudence of the ECtHR’,¹²⁴ as the court previously relied on aims such as solidarity and mutual respect to restrict various rights. These aims, like the doctrine of living together, are not expressly referred to in the Convention but ‘the ECtHR

¹¹⁸ *S.A.S.* (n 2) [116].

¹¹⁹ Elliot-Williams (n 65) 345.

¹²⁰ *S.A.S.* (n 2) [113]; Steinbach (n 29) 33.

¹²¹ Steinbach (n 29) 32.

¹²² Sune Lægaard, ‘Burqa Ban, Freedom of Religion and ‘Living Together’ (2015) 16 Human Rights Review 203, 211.

¹²³ *Dakir* (n 2) [6].

¹²⁴ Trispiotis (n 44) 582.

recurrently appeals to them in order to highlight and reinforce the connections between rigorous human rights protection and core principles underlying liberal democracy'.¹²⁵ However, unlike other democratic values previously relied upon by the ECtHR that form the underlying basis of modern liberal democracies, living together is not a legitimate aim that ought to be pursued. As previously mentioned, showing one's face is not a prerequisite for communication. Individuals can interact with covered faces, something that is more widely accepted in European societies in a post-COVID era. Hence, living together should not be regarded as a legitimate aim.

Disproportionate interference with the right to manifest one's religion

The ECtHR's approach to European consensus in *S.A.S. v France*, based on which the court granted a wide Margin of Appreciation,¹²⁶ amounts to a distortion of the principle. The court acknowledged that the outright ban of the burqa is the position in the minority of the Member States.¹²⁷ Forty-five out of the forty-seven Member States 'and thus an overwhelming majority, have not deemed it necessary to legislate in this area [which] is a very strong indicator for a European consensus'.¹²⁸ The ECtHR disregarded the consensus against the ban and chose to rely on ongoing debates and on the fact that the burqa was not an issue in certain states to justify its conclusion.¹²⁹ According to Elliot-Williams, this may be because the ECtHR focused on the wrong question.¹³⁰ Instead of

¹²⁵ *ibid.*

¹²⁶ *S.A.S.* (n 2) [129].

¹²⁷ *ibid* [156].

¹²⁸ *ibid* joint partly dissenting opinion [19].

¹²⁹ Elliot-Williams (n 65) 348.

¹³⁰ *ibid.*

looking for a consensus in favour of the burqa ban, the court considered the consensus against the ban. By not asking the right question, the ECtHR applied the doctrine wrongly.

The court's conclusion can potentially be justified given the lack of consensus between states as to the importance of religion in European societies.¹³¹ Consequently, more deference and a wide Margin of Appreciation ought to be given to national authorities where opinions may reasonably differ. This is particularly the case in relation to manifestation of religion.¹³² However, it is well established in the ECtHR's case law that, where there is consensus against a state policy, a narrow Margin of Appreciation will be granted.¹³³ Where there is no European consensus, a wide Margin of Appreciation is given and the national measure is subjected to less strict scrutiny.¹³⁴ The court by not relying on the clear consensus against the ban and concluding that there is a wide Margin of Appreciation departed from this long-established rule granting greater deference to the state legislature.

Moreover, the ECtHR adopted a hands-off approach to the necessity limb of the proportionality test in *S.A.S. v France*. The court's examination 'lacked the requisite rigour'¹³⁵ as there was insufficient engagement with the competing interests at stake. Various factors pointing away from the ban were listed such as the broad scope of the

¹³¹ *Leyla Şahin* (n 71) [109].

¹³² *S.A.S.* (n 2) [154].

¹³³ *Letsas* (n 18) 114.

¹³⁴ *ibid.*

¹³⁵ *Elliot-Williams* (n 65) 347.

ban,¹³⁶ the Islamophobic remarks during the debate for the adoption of the ban¹³⁷ and the small number of women that wear the burqa.¹³⁸ The court also acknowledged the numerous bodies that find the ban disproportionate.¹³⁹ All these factors, however, were not given sufficient gravitas in the court's assessment as they were brushed away without engaging in a thorough balancing exercise against the interest of living together. Is the doctrine of living together sufficient to justify a restriction of the right to manifest one's religion in light of the factors pointing away from the ban? The effect that the ban has on Muslim women, pluralism and multiculturalism tilt the balance in favour of the right to manifest one's religion.¹⁴⁰ This is also recognised by the Parliamentary Assembly of the Council of Europe which noted that a general ban would be particularly impactful on women.¹⁴¹ The intolerance shown by the absolute ban, that singles out and rejects a minority practice, outweighs the limited impact that face concealment can have on public interaction. Therefore, in light of the implications that the ban has, there is a disproportionate interference with the right to manifest one's religion because the protected interests are outbalanced by the wide-ranging effects of the ban.

Living together in subsequent Article 9 cases

The application of the living together doctrine in cases involving the freedom of religion after *S.A.S. v France* shows that the court considers the doctrine important only in burqa

¹³⁶ *S.A.S.* (n 2) para [151].

¹³⁷ *ibid* [149].

¹³⁸ *ibid* [146].

¹³⁹ *ibid* [147].

¹⁴⁰ *ibid* joint partly dissenting opinion [13].

¹⁴¹ Parliamentary Assembly of the Council of Europe, Resolution 1743: *Islam, Islamism and Islamophobia in Europe*, 23 June 2010 (23rd Sitting), para 17.

cases. The significance of the doctrine is reiterated in the factually similar cases of *Dakir v Belgium*¹⁴² and *Belcacemi and Oussar v Belgium*.¹⁴³ The court bases its reasoning on the importance of the right to live in a society where social interaction and communication are important, something that is hindered by the wearing of the burqa. However, in other cases involving Article 9, the ECtHR does not even mention the doctrine. For example, in *Ebrahimian v France*¹⁴⁴ which involved the non-renewal of the contract of employment of a social worker because she refused to remove the headscarf after complaints were made by patients, the court did not make any direct reference to the doctrine.¹⁴⁵ Likewise, in *Osmanoglu and Kocabaş v Switzerland*¹⁴⁶ there is no express reference to the living together doctrine. In that case, students were obliged to participate in mixed swimming lessons as part of the curriculum. Exceptions were only made for students that had reached puberty under the relevant legislation. The applicants refused to allow their daughters to attend the lessons on the basis of their religious beliefs. The court emphasised the importance of the child developing to be a member of the community. Integration necessitated the adherence to the school curriculum which involved swimming lessons. Although as Trotter argues,¹⁴⁷ living together formed the underlying basis of the decision; the court, again, did not make a direct reference to the doctrine indicating that living together is not at the forefront of the court's concern in non-burqa cases. The court's lack of direct

¹⁴² *Dakir* (n 2).

¹⁴³ *Belcacemi* (n 2).

¹⁴⁴ *Ebrahimian v France* App no 64846/11 (ECtHR, 26 February 2016).

¹⁴⁵ Pearson (n 32) 196.

¹⁴⁶ *Osmanoglu and Kocabaş v Switzerland* App no 29086/12 (ECtHR, 10 April 2017).

¹⁴⁷ Sarah Trotter, "Living Together", "Learning Together", and "Swimming Together": *Osmanoglu and Kocabaş v Switzerland* (2017) and the Construction of Collective Life' (2018) 18 Human Rights Law Review 157, 158.

engagement with the doctrine, in the interpretation of Article 9, connotes that it is not a prevalent consideration undermining its importance.

It can be maintained that the living together doctrine is correctly only applied in burqa-related cases, because, unlike other Article 9 cases, they are the only cases where there is a stark religious practice which contravenes social norms. Nevertheless, if no reference is made to the doctrine in other cases where important social norms are implicated, then this can be interpreted as the doctrine being selectively applied to a Muslim religious practice. Take for example *Gough v UK*¹⁴⁸ which is also a case involving a practice that contravenes social norms. Although the case did not involve Article 9, the applicant chose to be naked in public engaging the social norm against public nudity. The ECtHR again did not refer to the living together doctrine.¹⁴⁹ More reliance was placed on morality and the rights of others rather than the violation of a behavioural norm and the doctrine of living together.¹⁵⁰ The lack of reference to the doctrine indicates that living together is selectively employed only where the specific social norm of face concealment is violated. This restrictive application of the doctrine to burqa cases undermines its centrality and importance.

Conclusion

The justification of the burqa ban under the principle of living together is problematic because the doctrine is premised on a majoritarian conception of socialisation. To

¹⁴⁸ *Gough v United Kingdom* App no 49327/11 (ECtHR, 28 October 2014).

¹⁴⁹ Pearson (n 32) 198.

¹⁵⁰ *ibid.*

promote the interests of minorities, the doctrine should not be used to propagate the majority's opinion of how society ought to be. Some may regard it as justifiable because burqas destabilise social interaction by erecting a barrier. However, open-face communication is not necessary to ensure socialisation as exemplified by the pandemic. Nonetheless, even if the pandemic has not entirely displaced the taboo against face concealment, given that the living together doctrine lacks justification the taboo ought not to be legally enforced.

The burqa ban suppresses pluralism by dictating to Muslim women the appropriate manner of exercising their religious beliefs. Even if the legislation is phrased in neutral terms and is favoured by women, it is problematic. Firstly, the argument that there is a portion of Muslim women supporting the ban is not convincing as the voice of one cannot reflect the views of a religious group. Secondly, although the ban appears neutral, its primary aim is to selectively target the burqa. This has wide implications on multiculturalism as affected women are forced to either be confined at home or face criminal penalties. Non-homogeneity is also reduced, as the ban prohibits a non-harmful practice.

The burqa ban departs from the notion of secularism as non-state actors are prohibited from wearing the garment. The departure from this notion and the move towards militant secularism can be justified if the burqa is conceptualised as propagating values that are contrary to liberal democracy. This approach, however, is premised on the inaccurate assumption that the burqa is only a symbol for salafi radicalism. Nevertheless, even if some wear the burqa to portray extremist values, an outright ban runs the risk of exacerbating the threat to democracy by strengthening extremist views.

The rejection of gender equality as a legitimate aim in *S.A.S. v France* by the ECtHR was appropriate. The court considered correctly that the aim cannot be employed to justify a practice defended by women. Contrary to this, the adoption of living together as a legitimate aim in *S.A.S.* is dubious. The grounds that can form the legitimate basis for the restriction to manifest one's religion must be restrictively interpreted. By linking the doctrine to the protection of the rights of others, the court adopted an expansive interpretation that empowers states to water down fundamental rights. The ECtHR's proportionality assessment in *S.A.S. v France* is also problematic. By not focusing on the clear European consensus pointing away from the ban, the court misapplied the principle.¹⁵¹ Moreover, by not properly engaging with the various factors pointing away from the ban in the necessity assessment, the court merely listed the factors without adequately weighing them. Finally, the reference to living together only in subsequent burqa cases indicates that the doctrine is not prevalent in other Article 9 cases. The principle is not at the forefront of the court's considerations as it is only selectively applied in burqa cases.

¹⁵¹ *S.A.S.* (n 2) joint partly dissenting opinion [19].

Strengthened or Weakened: How Has Part 26A Restructuring Affected The Crown's 'Secondary Preferential Status'?

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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's¹ 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'.² 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.³ Unfortunately for HMRC and the taxpayer, these options were often ineffective and frequently led to concessions on HMRC debts due to the

¹ Corporate Insolvency and Governance Act 2020.

² Elliot Green, 'Road to Insolvency' (2021) 4793 Taxation 18.

³ Ben Jones, 'The Decline and Fall of Pompey: HMRC and Football Clubs' Tax Debts' (2010) 3 CRI 51.

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.⁴ 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.⁵ 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 2020.⁶

As a result of these changes, asset realisations in insolvency are now paid out to creditors in the following order [the ‘Hierarchy’]:⁷

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’);

⁴ HM Revenue & Customs, *Protecting Your Taxes in Insolvency – Summary of Responses* (2019).

⁵ Caroline Sumner, ‘A Welcome New Approach From HMRC: A ‘Win’ for Business Rescue’ (2022) 15 CRI 141.

⁶ *ibid.*

⁷ See Lisa Rickelton, Alex Lewis, and Abby Martin, ‘HMRC v Part 26A: Can You Cram the Crown’ (2023) 1629 Tax Journal 15.

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.⁸ 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.⁹ 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.¹⁰

Second, asset-based lenders expressed unease that the 'secondary preferential status' would discourage lenders from extending credit to SMEs,¹¹ 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.¹² Nevertheless, HMRC has countered that financial institutions with fixed charges over assets still take precedence

⁸ *ibid.*

⁹ HMRC (n 4).

¹⁰ *ibid.*

¹¹ *ibid.*

¹² Caroline Sumner, 'Rescue, Recovery & Renewal' (2020) 13 CRI 109.

over HMRC in the Hierarchy, and the debts these institutions might fail to recover represent a minuscule portion of overall lending in the UK.¹³

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’,¹⁴ 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,¹⁵ 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*;¹⁶ and

¹³ HMRC (n 4).

¹⁴ Stephen Allinson, ‘The Corporate Insolvency and Governance Act 2020 and Other Developments: A Brave New Insolvency and Restructuring World?’ (2020) 13 CRI 155.

¹⁵ Department for Business, Energy & Industrial Strategy, *Insolvency and Corporate Governance - Government response* (2018).

¹⁶ Companies Act 2006, s 901G(3) *emphasis added*.

- 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*.¹⁷

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’.¹⁸

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.

¹⁷ *ibid* s 901G(5) *emphasis added*.

¹⁸ Explanatory Notes to the Corporate Insolvency and Governance Act 2020.

Re Houst Ltd [2022] EWHC 1941 (Ch)

In the world of corporate restructuring, *Re Houst*¹⁹ 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'.²⁰ Evidently, HMRC took a hard-line approach against any plan necessitating the relinquishment of their returns.

¹⁹ *Re Houst Ltd [2022] EWHC 1941 (Ch)*.

²⁰ *ibid* [16].

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',²¹ 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*,²² 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'.²³

Nasmyth Group Ltd [2023] EWHC 988 (Ch)

In *Nasmyth Group Ltd*,²⁴ 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.

²¹ *ibid* [42].

²² *Smile Telecoms Holdings Ltd* [2022] EWHC 387 (Ch).

²³ *ibid*.

²⁴ *Nasmyth Group Ltd* [2023] EWHC 988 (Ch).

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'.²⁵ 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'.²⁶ 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*²⁷ 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'.²⁸

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

²⁵ *ibid* [116].

²⁶ *ibid* [114].

²⁷ *ibid*.

²⁸ *ibid* [119].

situations alongside those of ‘in the money’ creditors.²⁹ 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.³⁰

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

*Great Annual Savings Ltd*³¹ 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'.³²

This principle remained at the forefront in *Great Annual Savings Ltd*.³³ 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

²⁹ Yasseen Gailani and Daniel Freund, ‘High Court Refuses to Sanction Restructuring Plan Seeking to Compromise HMRC Debt (in re Nasmyth Group Ltd)’ *LexisPSL News Analysis* (England & Wales, 21 June 2023).

³⁰ *ibid.*

³¹ *Great Annual Savings Company Ltd* [2023] EWHC 1141 (Ch).

³² Aaron Harlow, Lemi McAuley, and Lizzy Wood, ‘Points to Learn from the High Court’s Decision in the Great Annual Savings Company Restructuring Plan’ *LexisPSL News Analysis* (England & Wales, 24 May 2023).

³³ *Great Annual Savings Company Ltd* (n 31).

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'.³⁴

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*³⁵ and *Great Annual Savings Ltd*,³⁶ 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 *Prezzo Investco Ltd*³⁷ case, the court decided to override HMRC's objections and exercised its discretion to cram down the Crown.

³⁴ *ibid* at [135].

³⁵ *Nasmyth Group Ltd* (n 24).

³⁶ *Great Annual Savings Company Ltd* (n 31).

³⁷ *Prezzo Investco Ltd [2023] EWHC 1679 (Ch)*.

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*,³⁸ 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*,³⁹ 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*⁴⁰ 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

³⁸ *Nasmyth Group Ltd* (n 24).

³⁹ *Great Annual Savings Company Ltd* (n 31).

⁴⁰ *Prezzo Investco Ltd* (n 37).

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*.⁴¹

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*⁴² 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.

⁴¹ *Great Annual Savings Company Ltd* (n 31).

⁴² *Prezzo Investco Ltd* (n 37).

Trade Union Recognition in the UK: A Case for Sectoral Model of Collective Bargaining

By Yaade Joba, BVS.

Introduction

On their own, a worker does not have the power to fight for an improvement in the management of their working arrangements. Therefore, the right for a group of workers to come together and engage in collective bargaining with their employer is fundamental in ensuring labour standards are kept to a fair level. The right to collectively bargain has been recognised as a fundamental aspect of the right to form a trade union under Article 11 of the European Convention of Human Rights (ECHR). The statutory trade union recognition procedure in Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992 ('Schedule A1') provides independent trade unions with an avenue to negotiate with employers about improving standards in the workplace. In light of the Supreme Court's recent decision that Schedule A1 amounts to compulsory collective bargaining, it is important that its machinery is scrutinised.

In the *Fairness at Work* White Paper, the purpose of the introduction of Schedule A1 was stated to 'offer greater protection and security at work for the vulnerable'. In this piece, it will be argued that Schedule A1 fails to facilitate effective collective bargaining due to its cumbersome and unduly restrictive nature, which in turn undermines the human rights of workers. The piece will pose reforms that promote 'enterprise-level' collective bargaining and supplement a wider 'sectoral model' of bargaining. The first section will give an overview of the process under Schedule A1. The second will discuss the scope of the statutory recognition system. The third section will assess the inadequate response of the system to employer hostility. The fourth will evaluate the output of the system and propose reforms.

Section 1: The Process Under Schedule A1

The process under Schedule A1 commences with a trade union making a written request for recognition to the employer. There are various pre-conditions of admissibility that must be satisfied for the request to be valid. Firstly, the trade union must be an independent one. The request must be made in writing, state that it is made pursuant to

Schedule A1 and identify the proposed bargaining unit (the group of workers who wish to be recognised). The request must also be made to an employer that employs more than 21 workers and does not have any recognition arrangements with other trade unions. The employer has 10 working days to agree the request. If the request is accepted, the union is recognised and negotiations can commence over the collective rights of the bargaining unit. If the request is ignored or rejected, the union can make a recognition application to the Central Arbitration Committee (CAC) in an attempt to compel the employer to engage in collective bargaining.

The CAC must then decide whether the application can be accepted. This involves two steps. First, it must satisfy itself that the pre-conditions listed above have been complied with. Then it must also satisfy itself that at least 10% of the workers in the bargaining unit are members of the trade union, and that most workers would be likely to be in support of recognition. If the CAC is not satisfied in these respects, the application will fail. If the application is accepted, the next stage is for the CAC to determine whether the bargaining unit is in support of recognition. Normally, a ballot is held. If the majority of voters and at least 40% of the bargaining unit are in favour of recognition, the CAC will make a declaration of recognition.

The consequence of a declaration in favour of recognition is that the employer is compelled to recognise the trade union for collective bargaining purposes. It facilitates a negotiation between the two parties on 'pay, hours and holidays'. The employer is not obliged to engage in broader discussion outside of these issues. If the employer refuses to engage in collective bargaining even after the CAC's intervention, the sole sanction for a failure to comply is specific performance under paragraph 31(6).

Section 2: The restrictive scope

As identified above, Schedule A1 only permits recognition applications that are made with respect to employers with at least 21 workers. This requirement prevents 8.1 million workers, approximately 31% of working people in the UK, from gaining access to the recognition procedure. As many as 37% of private sector workers are excluded, and 90-95% of private employers are left outside of the scope of Schedule A1. If a recognition agreement cannot be made voluntarily, the only recourse that smaller trade unions have left is to go on strike in an attempt to force a compromise. Evidently, Schedule A1's requirement that the employer must employ a certain number of workers poses a significant obstacle for people working for smaller businesses. They are left unable to contest their working conditions through collective bargaining with their

employer. The recent growth of start-up companies and the emergence of 'indie trade unions' highlight that this is a threshold that needs to be removed.

Simpson suggests that 'political pragmatism rather than principle' provides one justification for Schedule A1's exclusion, as the unnecessary costs that the process of statutory recognition would impose on small employers should be avoided. A second justification that is put forward is that small businesses are usually managed on a personal basis, so collective bargaining may be inappropriate. These justifications are illegitimate to warrant the exclusion of these workers. Firstly, Simpson found no evidence that effective collective bargaining could not be undertaken in small businesses. Also, the cost of the statutory recognition procedure is a defect of the complex and lengthy process that recognition using Schedule A1 involves. It should not be a reason for denying workers their qualified fundamental right to collectively bargain.

Section 3: The hostile employer

Schedule A1 is designed to protect the collective bargaining rights of workers through its 'choice architectures' embedded in the legislation. The CAC must be satisfied at two points that the workers in the bargaining unit have chosen to be in support of recognition. After all, the bargaining unit should be bound by contractual terms agreed by a union they do not support. However, Schedule A1 fails to adequately protect against employers intending to undermine the process of attaining legitimate recognition. It is straightforward for an employer to circumvent the provisions in Schedule A1 and maintain a hostile approach to collective bargaining. This undermines the Schedule A1's reliance on worker 'choice' and permits an employer's tactical suppression of unions attempting to use Schedule A1 to legitimately achieve recognition.

In 2004, the Employment Relations Act inserted into Schedule A1 a series of prohibited 'unfair practices' that the employer might engage in.¹ However, these provisions have not rectified Schedule A1's failure to combat employer hostility. The main critique is that the obligation on employers not to engage in unfair practices only extends to the

¹ See for example Employment Relations Act 2004, s 27A.

period of the balloting process.² At any point before the balloting process, the employer can engage in unfair practices uninhibited by the statute. This may be particularly problematic when a trade union is trying to reach the 10% membership density in the bargaining unit and the necessary majority support that is required under paragraph 36. The narrow timeframe in which the 'unfair provisions' operates was criticised by the International Labour Organisation (ILO) Committee of Experts Observation as it was in breach of ILO Convention 98.³ Articles 1, 2, and 3 of Convention 98 require that 'appropriate machinery shall be established in order to guarantee adequate protection against anti-union discrimination and acts of interference in trade union affairs'.⁴ In light of this, the Committee of Experts requested that the UK Government legislate for more extensive protection before recognition.⁵ However, this has been ignored to date. Furthermore, the CAC is reported to take a tentative approach to interpreting the application of the 'unfair practice' provisions. This has contributed to the prevailing view that the 'unfair practice' provisions are largely ineffective and rarely used.⁶ A system that facilitates sectoral bargaining would help reduce the problem of employer hostility because sectoral bargaining 'embeds trade unions and trade union influence within the industry'.⁷ The hostile employer would be bound to trade union agreements imposed across a whole sector. An employer's means of preventing engagement with a trade union would significantly decrease.

Another example of Schedule A1's failure to protect against hostile employers is paragraph 35(4), which precludes a trade union from using Schedule A1 where the employer has already recognised a different union. When Schedule A1 came into force in 1999, it was noted by Ewing that this provision applies regardless of whether the favoured union is independent of the employer.⁸ Therefore, if an employer decides to tactically enter into a recognition arrangement with a non-independent trade union, this will prevent an unwelcome application of recognition from an independent

² Alan L Bogg, 'The Mouse That Never Roared: Unfair Practices and Union Recognition' (2009) 38 *Industrial Law Journal* 390.

³ CEACR: Individual Observation Concerning Right to Organise and Collective Bargaining Convention, 1949 (No. 98) UK, 2007.

⁴ *ibid*

⁵ *ibid*

⁶ Bogg (n 31).

⁷ Ewing, Hendy, and Jones (2018) (n 6).

⁸ KD Ewing, 'Trade Union Recognition and Staff Associations—A Breach of International Labour Standards?' (2000) 29 *ILJ* 267.

representative trade union. The favoured trade union has been labelled in the literature as a 'sweetheart trade union'.⁹

This occurred in *Boots*, where the independent trade union 'PDAU' had their recognition application deemed inadmissible by the CAC because Boots had already entered into a recognition agreement with 'BPA', a non-independent in-house staff association.¹⁰ The PDAU argued that Schedule A1 was incompatible with their rights under Article 11 ECHR to engage in collective bargaining. The Court of Appeal held that, because the PDAU could invoke provisions to get the BPA derecognised, Schedule A1 was compatible with Article 11.¹¹ Firstly, the application for the derecognition of a 'sweetheart trade union' must be made by a worker rather than the aggrieved trade union or the CAC. Workers may be understandably reluctant to do so, given the prospect of detrimental treatment from the employer. If a worker is dismissed or suspended for attempting to derecognise a sweetheart trade union, they will not be protected under Schedule A1. The 'unfair practice' provisions do not apply at this point. Secondly, the mere availability of derecognition provisions to ostracised unions should not lead to a conclusion that paragraph 35(4) is compatible with Article 11 ECHR. The state has a duty to ensure effective collective bargaining is promoted through domestic law.¹² Taking the statutory provision as a whole, it is clear that the UK fails to discharge their duty with Schedule A1. As apparent in *Boots*, paragraph 35(4) can be utilised as a tactic to prevent or delay recognition and collective bargaining taking place on an enterprise level. The Court of Appeal should have interpreted the right to collective bargaining in line with this duty.

Section 4: the output of Schedule A1 and a simplified framework

Even in a situation where a trade union overcomes the obstacles inherent in the structure of the legislation, the reward that Schedule A1 offers is insufficient. The outcome of the statutory recognition procedure merely compels the employer to negotiate with the union.¹³ There is no promise of a collective agreement being reached.

⁹ *ibid*

¹⁰ *Pharmacists' Defence Association Union v Boots Management Services Ltd* [2017] EWCA Civ 66.

¹¹ *ibid* [61]

¹² Alan Bogg and Ruth Dukes, 'Article 11 ECHR and the Right to Collective Bargaining: *Pharmacists' Defence Association Union v Boots Management Services Ltd*' (2017) 46 *ILJ* 543.

¹³ Simpson (n 19) 215.

The type of dialogue that Schedule A1 facilitates only relates to matters of pay, hours and holidays. This is a very narrow construction of issues compared to the extensive list in s.178 TULRCA that sets out the matters that could be the subject of a collective agreement. Some of the matters listed in s.178 include any terms or conditions of employment, allocation of work, disciplinary action and the facilities for trade union officials in the workplace.¹⁴

The dialogic bargaining procedure is enforceable through the means of 'specific performance' under para 31(6), but this has never been granted or even sought, deeming it 'somewhat dubious'.¹⁵ This was not the case with the previous statutory recognition procedure in the Employee Protection Act 1975.¹⁶ Under this procedure, terms and conditions were able to be imposed upon employers through unilaterally triggered arbitration under s.16 of the 1975 Act. Under Schedule A1 TULRCA, there is no guarantee that the bargaining procedure will result in a collective agreement that will be beneficial to workers in the bargaining unit. The current bargaining procedure that merely requires a dialogue is too weak. Whilst it is accepted that it would be undesirable to force the parties to agree and form a collective agreement, a higher level of duty should be available and imposed.¹⁷ The collective bargaining that ensues after the attainment of recognition should be undertaken with a view to reaching a collective agreement.¹⁸ This can be enforced by imposing a statutory obligation on an employer to give adequate reasons for refusing to agree to a collective agreement proposed by the recognised trade union. This would ensure that the statutory recognition procedure is taking steps to facilitate effective collective bargaining that is more likely to result in a collective agreement in favour of the workers. This enterprise-level of collective bargaining can then effectively supplement sectoral bargaining.

¹⁴ TULCRA 1992, s 178.

¹⁵ Tonia Novitz, 'A Revised Role for Trade Unions as Designed by New Labour: The Representation Pyramid and 'Partnership' (2002) 29 *Journal of Law and Society* 487, 509.

¹⁶ Brian Doyle, 'A Substitute for Collective Bargaining? The CAC's Approach to s16 of the Employment Protection Act 1975' (1980) 9 *ILJ* 154.

¹⁷ Simpson (n 19).

¹⁸ *ibid.*

The current recognition framework under Schedule A1 is overly focused on facilitating voluntary agreements rather than securing recognition for trade unions and extending recognition coverage.¹⁹ The preference for voluntarism and the influence of collective *laissez-faire* still lingers over the statutory recognition system. At almost every stage, there are pauses to encourage the employer and the union to voluntarily engage in collective bargaining amongst themselves.²⁰ These intermittent pauses result in a lengthy procedure which fatigues the trade union and bargaining unit attempting to be recognised. If the employer decides to take advantage of the 'sweetheart trade union' provision under paragraph 35(4), the procedure is lengthened further because the union must invoke derecognition proceedings. It is of no surprise that this procedure is in declining use. Gall noted that the CAC initially aimed to receive an average of 150 applications for recognition annually.²¹ Yet, in the year ending 31 March 2021, the CAC reported that they received only 50 applications for trade union recognition.²² Given the parallel declining levels of collective bargaining coverage, a wide-scale change is needed for this to be rectified.

A promising suggestion from Ewing and Hendy requires that the admissibility stage in Schedule A1 should be the only stage of the recognition process.²³ Thereby, it would be sufficient for a trade union to be granted recognition where 10% of the bargaining unit are union members, and evidence is verified by the CAC that there is majority support amongst workers that the union has the mandate to act in favour of. As Gall points out, one of the fundamental problems with Schedule A1 TULRCA is that it is a 'reflexive law', whereby there is no automatic right to recognition using the procedure but instead

¹⁹ Ruth Dukes, 'The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?' (2008) 37 IJL 236.

²⁰ *ibid*

²¹ Gregor Gall, 'The First Ten Years of the Third Statutory Union Recognition Procedure in Britain' (2010) 39 Industrial Law Journal 444.

²² Central Arbitration Committee, Annual Report 2020/2021, accessed at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1000362/CAC_Annual_Report_2020-21.pdf_on_January_3rd_2022. Upon reflecting on the number of applications received since the introduction of Schedule A1, the number of applications has been in steady decline since its peak of 118 in 2002/2003.

²³ Keith Ewing and John Hendy, 'New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining' (2017) 46 IJL 23.

a right to invoke a procedure which may lead to the granting of union recognition.²⁴ This new simplified framework resolves this by creating a one-stage approach to the question of an appropriate recognition procedure. It shortens the duration of the procedure, which is advantageous in the interests of workers and trade union confidence in the efficient operation of the recognition framework.

Ewing and Hendy also recommend that the bargaining unit, for the purposes of this procedure, be kept confidential as sensitive personal data.²⁵ The potential impact of this is that it would restrict a hostile employer from having ample time to frustrate the process of statutory recognition at any stage of the recognition process. The confidentiality of the bargaining unit also prevents any workers from being subject to an 'unfair practice' at any point during the process of the simplified recognition framework. If the employer cannot ascertain the bargaining unit, then they cannot determine who is to be subjected to a detriment or any other form of 'unfair practice'. Combined with the removal of the 21-worker limit and paragraph 35(4), this new framework could be a positive step in promoting effective collective bargaining on an enterprise level, which would build upon minimum standards set by sectoral-level collective agreements. The purpose of collective bargaining is to allow workers to have their voice heard on the working conditions they must live with. It is pivotal that this is facilitated through an accessible and clear regulatory framework.

Conclusion

The statutory trade union recognition procedure in its current form is flawed. It is unduly restrictive and complex, and it fails to secure enterprise collective bargaining rights for workers. However, the recent proposals put forward by Hendy and Ewing in a series of publications by the Institute of Employment Rights signify a hopeful way forward for the statutory recognition scheme in its proposed new role as a supplement to a wider sectoral bargaining system. Under exclusively enterprise-based models of collective bargaining systems across the world, not one country has a higher collective bargaining density than 35%.²⁶ The transformation of the model of statutory recognition framework from the present 'representational' concept of collective bargaining to a

²⁴ Gregor Gall, 'Union Recognition in Britain: The End of Legally Induced Voluntarism?' (2012) *ILJ* 41 407.

²⁵ *ibid*

²⁶ Ewing and Hendy (n 52).

‘regulatory’ concept is essential to revitalise collective bargaining.²⁷ The representational conception views collective bargaining as a ‘private market activity’ where trade unions are agents of small bargaining units whereas the regulatory conception will involve collective bargaining as a ‘mode of public governance’ in achieving extensive collective bargaining rights for all workers on a national or sectoral level.²⁸ This would finally result in the compliance of UK collective labour law with its international human rights obligations, especially ILO Convention 98, which confers a positive obligation to promote collective bargaining. Only then is it likely that the number of CAC applications for recognition and collective bargaining coverage will rise.

²⁷ KD Ewing, ‘Trade Union Recognition: A Framework for Discussion’ (1990) 19 *Industrial Law Journal* 209.

²⁸ Bogg (n 28).

Computer Generated Works and the Authorship Dilemma: Does granting artificial intelligence with legal personality in the fourth industrial age optimize the UK copyright law?

By Hamza Aslam, BVS LL.M.

Introduction

The fourth industrial revolution, marked by disruptive technologies such as AI, Quantum computing, and the Internet of Things, is reshaping society. Initially focused on physical tasks, AI is now advancing into complex areas, challenging the roles of scientists, artists, and innovators. This rapid innovation necessitates a corresponding evolution in understanding and protecting intellectual property, urging legal academics and practitioners to proactively address these emerging challenges.

The law characterises an important part in the utility and growth of AI. Laws ensure that the risks of AI are minimised by setting certain rules and codes of conduct. It can be enticing to expect that current laws can easily accommodate AI into the legal framework, but the rules enacted to synchronise the conduct of humans may result in an unexpected gloomy outcome once AI starts portraying humanlike behaviour. We humans have advanced more in the last 20 years than in the past two thousand. The United Kingdom has been a pioneer in granting protection to authors and creators of copyright works since the enactment of the Statute of Anne in 1710.¹ Over time there have been upgrades to copyright law to keep pace with ever-growing technologies. Yet, legal academics and intellectual property lawyers are captivated by the idea that artificial intelligence (AI) is generating works of intellect.

Undoubtedly, as has been observed in the past, advanced technologies have always been synonymous with new possibilities as well as challenges. Consider the example of AIVA (Artificial Intelligence Visual Artist), an AI music composer. Users can set parameters for the type of music they want to create, and it will generate the audio track for them within seconds.² Another example is the next Rembrandt project. The scanned works of

¹ The Statute of Anne 1710.

² 'AIVA - The AI Composing Emotional Soundtrack Music' (*Aiva.ai*, 2016) <<https://aiva.ai/>> accessed 5 October 2021.

the famous Dutch master artist are fed into the AI system to generate a 3D painting in the style of the original artist.³

Given the exponential growth in the use of disruptive technologies for generating creative works, we need to take a proactive approach to rethink the legal framework of copyright law in the light of the challenges of the fourth industrial revolution. Particularly, to what extent the authorship requirement, including the use of computer-generated works under the section 9(3) of the Copyrights, Designs and Patents Act 1988 (CDPA), allows for the protection of work that is solely created by artificial intelligence (AI), and what, if any, are the rights and liabilities of these artificial personalities?

This article attempts to solve this problem through the method of normative legal philosophy. It argues for the introduction of an AI-copyright provision that would recognize AI as a person before the law and protect its created works. Doing so would not only promote the development of breakthrough technologies such as AI, but also provide incentive to those who invest their time and resources in building these technologies. While AI may diminish what incentive humans have in seeking inspiration for their creations, the people who make these systems may benefit from such incentives. Aligning with the UK government's goal to establish the country as a global hub for AI and data-driven innovation, this step is crucial.⁴

This article is divided into three key parts. The first part of this paper focuses on doctrine and questions like: Does copyright protect AI-generated work? Should it be protected under copyright law? If yes, who will be the author of such work? And who should be the owner of the work? It provides insights into the extent to which the originality requirement in copyright law accommodates AI generated outputs and whether it ascribes authorship to the rightful originator of the work. Once these ambiguities are explained, the second part proposes possible solutions to the ambiguities in the legal framework, such as granting electronic legal personality to AI and introducing a sui generis right provision in the copyright law. The third part sermonises the potential criticisms of the proposed solutions.

³ Chris Baraniuk, 'Computer Paints 'New Rembrandt' After Old Works Analysis' (BBC News, 2016) <<https://www.bbc.com/news/technology-35977315>> accessed 5 October 2021.

1- Artificial Author

This part concentrates on identifying and explaining the issue surrounding computer generated works in the UK copyright law. It considers three questions in doing so, firstly, is UK copyright law effective in protecting computer generated works? Secondly, does the originality requirement in the copyright law accommodate computer generated works? Lastly, if so, does it ascribe authorship to the rightful creator of the work? Given the continuous growth of technologies in the field of AI, it is hard to predict the uses of AI. Therefore, the analysis is based on the current state of art technologies that are giving rise to the phenomenon of artificial authors.

A. Artificial Intelligence

The term computer generated work or work created by AI is the phenomenon where the copyrightable work in question is the direct output of a computer programme rather than a human being. AI, as broadly defined by the World Intellectual Property Organization (WIPO), encompasses computer systems designed to mimic human cognitive functions such as learning, problem-solving, and pattern recognition.⁴ This definition, while not universally adopted, captures the essence of AI's capacity to perform tasks requiring human-like intelligence, including the creation of works that could potentially qualify for copyright protection. The emergence of AI-generated works, stemming directly from these advanced computational capabilities, presents a unique challenge to the traditional frameworks of copyright law, which have historically recognised human authors as the sole creators.

Consider the example of AIVA, an AI that is capable of creating artistic and musical works with no or minimal human intervention. It is a digital music composer that employs machine learning to apply music theory on the parameters that are set by the user/customer. Moreover, it lets the user choose pre-set parameters such as music genre (jazz, pop, rock etc.), instrumentation, duration, and tune. Within seconds AIVA composes the music.⁵ Recently, AIVA has been officially recognised as a music composer by the France and Luxembourg authors' right society (SACEM).⁶ Therefore,

⁴ *ibid.*

⁵ Pierre Barreau, 'About AIVA' (*Aiva.ai*, 2021) <<https://aiva.ai/about>> accessed 6 November 2021.

⁶ *ibid.*

it is the first non-human composer that can formally hold rights in its own name and receive royalties and credits from its own work. As AI technology is advancing, so is the use of programmes like AIVA.

AI is not just creating works of music; it has produced literary and artistic works as well and is getting better at it exponentially. Another example is the NEXT Rembrandt. It is a painting made from the data of the famous Dutch golden age painter Rembrandt Harmenszoon. The project analysed works by the artist and utilised deep learning techniques to learn the style of the artist. The result was a 3-D painting in Harmenszoon's style.⁷ The works by the Next Rembrandt project were displayed in an exhibition and purchased for a significant sum. Thus, well developed AI systems can achieve a level of autonomy that can generate intellectual output that mimics human intelligence behaviour.

Therefore, undoubtedly, AI technologies are skillful enough to produce works of intellect, and, more specifically, that of art. If these creative works were created by humans, there would not be any objections on them being considered as copyrightable works.⁸ Yet, there remains ambiguity as to whether these works are copyright protectable and who should enjoy the rights on the exploitation of works created by AI.

B. Copyright Law

In the English legal system, the term 'copyright' refers to the area of Intellectual Property Law that regulates the generation of creativity.⁹ The intangible subject matter protected by Copyright Law are called 'works'. The CDPA is the main legislative instrument that regulates works of intellect. The types of works that get copyright protection are well defined. The CDPA provides an exhaustive list of subject matter that is copyright-eligible. As per the act the creation must fall in one of the eight categories listed in the act; namely, literary, dramatics, musical, artistic works and films, sound

⁷ Andrez Guadamuz, 'Artificial Intelligence And Copyright' (*Wipo.int*, 2016) <https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html> accessed 5 November 2021.

⁸ Ryan Abbott, 'I Think, Therefore I Invent: Creative Computers And The Future Of Patent Law' (2016) 57 *Boston College Law Review* 1079, 1080.

⁹ Lionel Bently and Brad Sherman, *Intellectual Property Law* (5th edn, OUP 2018) 35.

recordings, broadcasts and published editions.¹⁰

a. Originality

In order for the work to be protected it must satisfy the originality requirements. More specifically, the work must be in a material form and it must be original. Copyright Law protects LDMA works if they qualify the originality requirement.¹¹ Originality refers to the connection of the claimed work and the claimant itself, as opposed to the novelty threshold in patent law which is determined based on the current state of innovation to the claimed invention.¹² Therefore, to be protectable, the author must utilise the required intellectual attributes (UK; labour, skill and judgment¹³ and EU; intellectual creations)¹⁴ for producing the work.

There is ample evidence which suggests that AI has been generating works of art without a human author's intervention. Under the CDPA section 178, computer generated works are generated in circumstances where there is no 'human author'. Furthermore, in *University of London v Press*, the court considered works to be original if they are copied but originate with the author.¹⁵ Pointing out the fact that originality is to do with origination. This, however, does not explain how to analyse if a work originates from the author. The explanation to this is provided in the case of *Ladbroke v William Hill*; works will be considered original if the author has exercised the requisite skill, labour and judgment while creating the work.¹⁶

In addressing the question of AI and labour, it's crucial to differentiate between human creativity and AI's algorithmic processes. The Searle Chinese Room argument clarifies that AI, lacking consciousness and intentionality, cannot exert 'effort' in the human

¹⁰ Copyrights, Designs and Patents Act 1988 (CDPA), s 9(3).

¹¹ *ibid* s1 (1)(a).

¹² Bently (n 9) 93.

¹³ *Ladbroke v William Hill* [1964] 1 All ER 465, 469 (Lord Reid).

¹⁴ Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-06569.

¹⁵ *University of London Press v University Tutorial Press* [1916] 2 Ch. 601, 609 (act requires that the work should originate from the author).

¹⁶ *Ladbroke* (n 13).

sense.¹⁷ Thus, while AI can produce creative outputs, these are not the result of labour as understood in copyright law, which values human effort and intentionality. This distinction suggests a need for copyright law to evolve, recognizing AI-generated works in a way that respects the essence of human creativity while adapting to technological advancements.

In the case of AIVA, the user (the person who is making arrangements for the work to be produced) is only setting the parameters of the music. It does not amount to exercising substantial skill, labour and judgment to create the work. The artistic skill, labour and judgment are utilised by the AI. It is further supported in the case of *Interlego v Tyco* where it was held that only certain kinds of skill, labour and judgment confer originality.¹⁸ It is clear why copying a Microsoft Word file does not fulfil the originality requirement, it is not only about labour but the right type of labour.

In Copyright Law, 'labour' traditionally implies human exertion of skill, judgment, and intellectual effort, essential for the protection of original works. This concept inherently assumes a creator's intentional involvement and conscious creativity. However, the advent of AI challenges this notion, as AI's 'creativity' stems from algorithmic processes and data analysis, devoid of consciousness or intentionality. AI's ability to generate creative outputs, therefore, does not equate to human labour, lacking subjective experience and intention.

b. Authorship and Ownership of AI-generated work

It is crucial to distinguish between authorship and ownership because copyright grants certain separate rights to the author and the owner of the work. The works which qualify for protection raise two primary rights namely, moral rights and economic rights. It is the owner of the work who can protect the work against infringement and licence the work to a third party for exploitation. The author, on the other hand, gets the moral rights of the works. Moral rights ensure that the holder of the rights will be recognised as the author of the work. Authorship and ownership of creative work do not

¹⁷ Stanford Encyclopaedia of Philosophy, 'The Chinese Room Argument', Stanford Encyclopedia of Philosophy (2019) <https://plato.stanford.edu/entries/chinese-room/#RoboRepl> accessed 3 March 2024.

¹⁸ *Interlego AG v Tyco Industries Inc* [1989] AC 217.

correspond. Generally, authors trade the right of ownership to other interested parties such as a publishing firm for financial gains such as royalties. In such a case, the author still receives the attribution (moral rights) to be recognised as the author of the work but won't be able to exercise any control over the exploitation of the work.

The CDPA states that the author is the first owner of the copyright work.¹⁹ According to the law, where a work is produced by AI the author will be taken to be the 'person' by whom the arrangements necessary were taken.²⁰ So far, there is no precedent from common law to explain how to distinguish whether a computer is a mere tool or where it is responsible for the arrangements, nor is there any explanation as to the meaning of 'arrangement necessary for the creation of work'. By recognising a person as the author of a work generated by AI, the law separates the authorship and creativity. In instances where AI generates a work without a human author, the copyright rights appear uncertain, as they seem to be granted to the individual responsible for arranging the creation of the work rather than contributing substantial artistic efforts.

Copyright Law acknowledges the uniqueness of AI and accommodates it in the law. Yet, it seeks to establish a link between a work of art and human input. Thus, it appears to be uncertain in allocating the authorship to the rightful creator. Leading academic Andres Guadamuz commented on the issue, stating that 'creative works qualify for copyright protection if they are original, with most definitions of originality requiring a human author'.²¹ This part concludes that the current UK copyright law does not favour legal certainty. Therefore, the next part proposes a solution which ensures legal certainty and creates the appropriate environment to encourage the development of AI technologies.

2. Rights of Artificial Authors

This part proceeds with recommending a solution to the ambiguities in the current law as identified above. It proposes that AI should be recognised as a person before law so that it can rightfully be recognised as the creator of valuable intellectual property.

¹⁹ CDPA, s 11(1).

²⁰ CDPA, s 9(3)

²¹ Andres Guadamuz, 'Do Androids Dream Of Electric Copyright? Comparative Analysis Of Originality In Artificial Intelligence Generated Works' (2017) 2 Intellectual property Quarterly 169, 180.

Conferring rights to AI and allowing it to hold property would fill the gap concerning authorship and ownership of new intellectual property which is generated by AI. Doing so would protect the integrity of the IP system and it will encourage the development of advanced technologies.

A. Electronic Legal Personality

There are two reasons that make it desirable to recognise AI as a legal entity before the law. First, to blame when things go wrong and to ascertain liability. Second, to reward when things go right and to ascribe rights.²² The latter is the primary focus of this paper. The former is outside the scope of this project.

AI has already entered the territory of acquiring legal status worldwide. For example, Citizenship of a state is granted to people with unique legal status. Yet, Saudi Arabia has granted citizenship to Sophia, a humanoid robot.²³ This initiative sparked widespread discussion on the legal status of AI. While this action was initially viewed as a pioneering step towards recognising AI within legal frameworks, its long-term legal and practical impacts remain uncertain.

In a landmark decision on November 27, 2023, the Beijing Internet Court granted copyright protection to AI-generated artwork, marking a significant development in the ongoing debate over the copyrightability of AI-generated outputs.²⁴ This case, involving AI-generated pictures by using painting software, highlighted the court's recognition of the intellectual effort and originality embedded in the human interaction with AI tools. The court found that the deliberate choices made by users in operating the AI program such as selecting characters, prompt words, arranging their order, and setting parameters

²² Simon Chesterman, 'Artificial Intelligence and The Limits Of Legal Personality' (2020) 69 *International and Comparative Law Quarterly* 819.

²³ Condé Nast, 'The Agony Of Sophia, The World's First Robot Citizen Condemned To A Lifeless Career In Marketing' (*Wired UK*, 2018) <<https://www.wired.co.uk/article/sophia-robot-citizen-womens-rights-detroit-become-human-hanson-robotics>> accessed 1 December 2021.

²⁴ Bruce Wang, Stefaan Meuwissen, and Zhen Feng, 'Beijing Internet Court Grants Copyright Protection for AI Artworks, but Copyrightability Debate of AI-Generated Output Continues' (*Hogan Lovells Engage*, 2023) <<https://www.engage.hoganlovells.com/knowledgeservices/news/beijing-internet-court-grants>> accessed 6 December 2023.

sufficiently reflected the human author's personalised expression and originality, therefore qualifying the AI-generated artwork for copyright protection.

These examples illustrate the fact that there is a global shift towards acknowledging the role of human creativity in guiding AI to produce original works, emphasising the potential for AI technologies to expand the boundaries of creative expression. Yet, there is neither legislation nor policy that recognizes AI as the holder of legal rights and status.

The consideration of legal status for AI is not just a matter of academic debate; the European Parliament in its civil law rules on robotics (2017) suggested creating a legal status for robots:²⁵

creating a specific legal status for robots in the long run, so that at least the most sophisticated autonomous robots could be established as having the status of electronic persons responsible for making good any damage they may cause, and possibly applying electronic personality to cases where robots make autonomous decisions or otherwise interact with third parties independently.²⁶

The consideration of an electronic personality for AI, as suggested by the European Parliament, represents a pivotal moment in the legal discourse surrounding the integration of AI into society. This proposal envisages a future where sophisticated AI systems could be recognized as electronic persons, responsible for their actions and capable of being held liable for any damages they cause. However, the absence of significant progress since the proposal indicates the complexity of implementing an electronic personality for AI, raising critical questions about the nature of personhood, liability, and rights in the context of artificial entities. This brings us to the question: what is a person before law?

²⁵ European Parliament resolution with recommendations to the Commission on Civil Law rules on Robotics (2015/2103(INL)).

²⁶ *ibid* para 59(f).

a. Legal Person

However, this framework doesn't directly translate to AI, since AI lacks the capacity for intention or agency in the human sense. Individuals can operate or program AI, but they do so for the AI, not as the AI, since AI operates based on algorithms and data processing without consciousness or intentionality.

Humans, through the legal system, created a fiction called legal personality. It is a technical term used to describe several rights and responsibilities. A corporation is a distinct example of this fiction. In corporations, liability is attributed based on actions taken by individuals who act as the corporation, embodying the company's decisions and actions.²⁷

This mechanism of liability attribution is fundamentally tied to the agency and intentionality that can only be exercised by human actors within the corporate structure.

Like individual humans, it can do many things in its own name such as holding assets, forming contracts, securing debt, sue on its own behalf and be sued.²⁸ The rights and liabilities of a company are distinct from those who control it. The company provides the stakeholders a type of 'limited liability' which lets them take risk in promising ventures without the fear of losing their personal wealth in case of failure. In the context of AI, individuals operate or program the technology for its function, not as the entity itself. Thus, while the corporate model provides a useful analogy, it falls short in directly informing the establishment of AI legal personality, due to the fundamental differences in agency and intentionality between humans and AI.

A natural person can form a company to become the only owner and shareholder. He will be independent to take decisions as the entity and will enjoy all the economic yields, such as profit. In reality, there is no distinction between the company and its owner. Still, regardless of all this, Company Law allows for the separate treatment of the company from its owner. Even where a company goes bankrupt, the owner can freely

²⁷ Lee Roach, *Company Law* (Oxford University press 2019) 79.

²⁸ *ibid.*

leave the situation with his own personal assets untouched.²⁹ This essence of corporate law enabling risk-taking while protecting personal assets parallels the potential benefits of granting legal personality to AI, potentially fostering greater investment in AI technologies.

Opinions of academics diverge on the suitability of existing legal frameworks to incorporate AI as legal person. Shawn Bayern argued the possibility of implementing autonomous AI as legal persons into the current US corporate law structure, suggesting a potential pathway.³⁰ Conversely, Mathew Scherer expressed scepticism about the practicality of using the limited liability corporation model for AI, pointing to inherent limitations.³¹ Despite diverging views, the consensus leans towards the need for legislative evolution, accommodating AI within the legal framework as a distinct form of entity.

How To Grant Legal Status To AI

In order to ascribe rights to AI, there is a need to resolve some important challenges first. Jacob Turner presented a blueprint that can be used as a starting point for solving the AI legal status issue.³² It grants a legal status to AI so that it can be used as a legal device like a corporation. Central to this proposal is the idea of formally registering AI systems.³³ This process would involve assigning a unique identification number to each AI by a designated governmental or regulatory body to ensure a practical and relevant oversight mechanism. Such registration is critical for granting AI with legal personality, facilitating a central database for all registered entities to confirm their identity and prevent unauthorised modifications. Just as corporations require registration to be

²⁹ The principle of separate legal personality is established in the case of *Salomon v Salomon and Co Ltd* [1897] Ac 22 (House of Lords).

³⁰ Shawn Bayern, 'The Implications of Modern Business–Entity Law For the Regulation Of Autonomous Systems' (2016) 7 *European Journal of Risk Regulation* 279.

³¹ Mathew Scherer, 'Is AI Personhood Already Possible Under U.S. LLC Laws? (Part One)' (*Law and AI*, 2021) <<http://www.lawandai.com/2017/06/18/is-ai-personhood-already-possible-under-u-s-llc-laws-part-three/>> accessed 4 December 2021.

³² Jacob Turner, *Robot Rules Regulating Artificial Intelligence* (Palgrave Macmillan 2018) 644.

³³ *ibid.*

legally recognized and to have rights conferred upon them, a similar framework could be established for AI.

The establishment of a formal registration system for AI, akin to the issuance of identity numbers to natural and legal persons by official authorities, emerges as a foundational step towards integrating AI within the legal and societal frameworks. Such a system, managed by a designated governmental or regulatory body, would assign a unique identification number to each AI, ensuring their distinct recognition and facilitating their engagement in the commercial domain.

This process is crucial for granting AI legal personality, allowing them access to essential services required for operation in commercial markets, like insurance and financial services. The proposed framework not only solidifies the legal standing of AI but also promotes greater accountability and transparency in their interactions within society. By adopting this approach, we pave the way for AI's seamless integration into the fabric of our legal, economic, and social systems, ensuring they contribute positively and responsibly.³⁴

B. Creating a Sui Generis Right (AI Copyright)

As explained above, the copyright framework does not clearly protect works created by AI. Solely recognising AI as a legal person would not solve the authorship and computer-generated works conundrum. We ought to consider amending the copyright provisions by introducing a right for AI in its own name. Given the exponential growth in autonomous technologies, it will eventually become a necessity to protect the creation of AI through some rights. A sui generis form of protection which will encourage the growth and utility of machine driven creativity and simultaneously protect human creativity is proposed. This AI copyright provision will provide the holder of the right only a narrow extent of protection, empowering them to exclude third parties from infringing and taking advantage of the protected work of their AI. On the flip side, the owner will be able to exploit the creative output of AI for his own financial gains for a

³⁴ Dr Lee Roach, *Company Law* (1st edn, Oxford University press 2019) 79.

relatively short duration.

a. Scope of Protection

The extent of protection shall be narrow as compared to the one provided to human authored works. A lower temporal protection can be allowed in the machine created scenario, for example twenty five from the production of the work as proposed by the UK group in its AIPPI report,³⁵ unlike the typical duration which is the life of the author plus 70 years.³⁶

The justification for a narrow protection as opposed to typical copyright protection does seem consistent with human values. Indeed, providing right holders and corporations incentives by providing longer copyright protections could ultimately result in less works produced by natural persons. Machines can produce mass amounts of work much faster than humans.³⁷ This could potentially undermine human creativity and could de-value the works created by natural persons in the long run.

Dan Burk in his exploration of the shift towards valuing authenticity over production and distribution incentives indirectly supports the rationale for reconsidering the extent and nature of copyright protection applied to AI-generated works.³⁸ The emphasis on authenticity and the reduced role of human labour in the creative process of AI-generated works suggests introducing a AI copyright provision limited in both scope and duration may effectively serve as a measure to mitigate this challenge.

b. Ownership of AI- Copyright

As far as the ownership is concerned, there are two propositions to consider when determining the ownership of AI copyright works, namely the proximity approach and the investment approach.³⁹ The proximity approach assigns ownership based on an

³⁵ AIPPI, 'Study Question – Copyright/Data Copyright in Artificially Generated Works' (2019) 6.

³⁶ CDPA, s 12(2)

³⁷ AIPPI (n 35) 7.

³⁸ Dan L Burk, 'Cheap Creativity and What It Will Do' (2023) 57 Ga L Rev 1669.

³⁹ Jacob Turner, *Robot Rules Regulating Artificial Intelligence* (Palgrave Macmillan 2018) Pg 102.

individual's direct association or involvement with the creative process. Given the collaborative nature of AI-driven creativity, involving various experts contributing technical knowledge, this model suggests that ownership could be attributed to the person most intimately connected to the creation of the final work. The investment approach on the other hand, views the owner as either a natural or legal person made conditions for the creation of the final output.

Both approaches offer distinct perspectives on how to navigate the complex terrain of assigning copyright in the context of AI-generated content. The proximity approach emphasises the human element and direct creative contribution, while the investment approach focuses on the facilitation and funding of the creative works, reflecting a broader view of contribution to the creative process.

C. Position of AIVA and the NEXT Rembrandt Under the Proposal

The solution proposed above can be applied to the issues identified in the first section of this paper. In the case of AIVA, as explained above, the user (natural person) is only putting labour into the work to set parameters for the creation of the work. The final output is not foreseeable by the user, thus raising ambiguity to the originality threshold. Further, if the user is not putting substantial skill, labour and judgment for the creation of the work and the AI rather than the human is responsible for generating artistic works by putting the right type of effort, then the work seems to originate from the AI and it should be attributed as such. Recognising AIVA as a legal person (able to hold and dispose of property) would ensure that the work passes the originality threshold.

Introducing the sui generis AI copyright provision in the law would protect musical works generated by AIVA but the protection will be limited in its scope and duration. The work will be protected against infringement for 25 years, after which it will fall into public domain.

But the investment approach is preferred when considering the ownership of AI copyright because it ensures legal certainty. The owner of AIVA, the person (whether natural or legal) who made the arrangements necessary for creation of the work, will be legally entitled to exploit the music for the said duration. Thus, allowing the ownership of AI copyright to the person using the software to create the music based on his parameters.

As far as rewards and liabilities of AI copyright are concerned, the artistic works produced by the NEXT Rembrandt were the result of analysis of works of the artist. The rewards (economic rights) will go to the owner of the project. Having a register of AI and its stakeholders listed means that there will be predetermined natural persons as owners/creators of AI. they will distribute the incentive of the said work such as royalties, subscriptions and credit. Further, since the works (analysed by NEXT Rembrandt) were in the public domain, there would not have any problem with them being used for creating works; however, if an AI is being trained on data of works that are protected by copyright, it would amount to infringement. The owner of NEXT Rembrandt would be held liable for the acts of AI on that basis.

An important thing to consider when recognizing AI as a legal person is the ultimate control of the electronic entity since possessing rights and taking decisions about those rights are related yet disparate roles.⁴⁰ It is possible to recognize AI as the creator of artistic works while keeping it under the control of natural persons, like a corporation. Doing so will also facilitate and, in fact, empower the owners of AI to take appropriate legal action against those who may infringe the work of AI. Like a corporation, if the rights of a company are infringed then its owners take legal action against the infringer on behalf of the company.

D. Advantages of the Proposed Solution

There are some advantages of adopting the proposed solution for the legal system as well as the society itself. Ryan Abbot supports the regulation of AI through legislation.⁴¹ There are doctrinal and utilitarian/economic reasons for recognizing AI as a person before law and acknowledging it as the author of copyrightable creative works. Lastly, doing so would serve justice and promote fairness.

IP law grants protection to creative works to encourage creativity. Absence of such protection by law would result in the under production of creative and innovative works. AI systems have no use of artistic works but those who built, use and own AI do

⁴⁰ Enrico Bonadio and Luke McDonagh, 'Artificial Intelligence as Producer and Consumer of Copyright Works: Evaluating the Consequences of Algorithmic Creativity' (2020) *Intellectual Property Quarterly*, no 2, 112-137, Pg 13.

⁴¹ Ryan Abbott, *The Reasonable Robot* (Cambridge University Press 2020).

. Allowing copyright for works which are outputs of machines would enhance the value of AIs like AIVA and incentivize the development of such systems. Ultimately, this would result in more creativity by rewarding those who put in their expertise in designing, engineering and developing such systems. On the other hand, not allowing protection for works of AI would discourage companies from using such advanced systems for producing new copyrightable works.

Moreover, recognizing AI as a person, and hence an author of creative works, would afford protection to human moral rights by averting natural person from being conferred with undeserved acknowledgement. Acknowledging humans as the author of AI works would not matter to the AI but it would shrink the achievement of people who create creative works without using advanced systems.

3. Addressing Concerns

This part addresses a few concerns the proposed recommendation may raise. Specifically, it addresses the susceptibility of e-personality being used by people as a means of hiding behind a liability wall and the risk of corporate ownership of works of art.

A. AI as a Liability Cloak

Critics warn against granting legal personality to AI because of the likelihood that humans will use it as a shield to avoid liability.⁴² Granting a separate personality to AI will result in a new form of legal device such as a corporation, and people will use it as a means of limiting the liability of their own defrauding act and hide behind a corporate veil.

In response to the concern that people may take advantage of e-personality, well developed tenets in company law exist to counteract wrongdoers from using the legal personality for their ill-interest. The same principle can be applied to AI as well.

⁴² Joanna J Bryson, Mihailis E Diamantis, and Thomas D Grant, 'Of, For, and By the People: The Legal Lacuna of Synthetic Persons' (2017) 25 Artificial Intelligence and Law 285.

Particularly, the rule of lifting the corporate veil could be used to look behind the curtain of separate personality and to unveil people who are responsible for the cynical acts of the company. The principle of separate legal personality established by the House of Lords can be upheld at the courts discretion where special circumstances exist. In *Guildford v Motor Co Ltd v Horne*, the director of a company was bound by a covenant not to advise any customers after leaving his current employment. However, he incorporated a company to evade his pre-existing legal duty by exploiting the separate legal personality of the company to advise customers.⁴³ The court lifted the veil of incorporation and subsequently issued an injunction.⁴⁴ Likewise, e-personality can also have similar principles because the benefits of e-personality outweigh the risks.

Further, since the past century, separate legal personalities have played a significant role in promoting economic progress in virtually every business. It enables people to take risks in ventures without putting all of their personal wealth at stake . Granting similar legal status to AI will encourage humans to invest in technologies that can produce valuable works of arts and literature. Moreover, if the law acknowledges AI creators of copyright, it will also credit those humans who provide their expertise for the creation of such AI.

B. Corporate ownership of copyright works

The proposed AI-copyright provision is structured to entitle ownership to both natural and legal persons. Therefore, critics may argue that it will give rise to corporate ownership of copyright works. However, a court in China ruled in favour of an AI artist, named Dreamwriter owned by Tencent Corporation, in a copyright infringement case.⁴⁵ The article written by AI was infringed by a third party and the court acknowledged that even though the work was the direct output of a non-human entity, it met the requirements for copyright protection and, therefore, ordered the defendant to pay compensation for the economic losses.⁴⁶ The company who owned the AI

⁴³ *Guildford v Motor Co Ltd v Horne* [1993] CH 935 CA.

⁴⁴ *ibid.*

⁴⁵ *Tencent Computer System Co Ltd v Shanghai Yingmou Technology Co Ltd* [2019] (Shenzhen Nanshan district court).

⁴⁶ *ibid.*

enjoyed the full extent of protection for machine generated works which ought to be allowed only for works which are human authored. Therefore, in the absence of an AI copyright provision, companies are getting full copyright protection for works of AI. Introducing a provision which is limited in scope and narrow in duration will keep the right balance between the aims of copyright protection. It will enable corporations to own work of art but the short slot for exploitation of the work will provide the right balance.

Conclusion

If ideas are the currency of the 21st century, then the ability to protect them is what will give them that value and an efficient, well systematised intellectual property ecosystem is the only way to make it possible. Copyright Law should be amended to allow for the protection of works generated by AI in its own name. Due to the exponential technological advancement, the role of human input in the creative process is becoming remote. This shift challenges us to redefine what constitutes creativity and authorship, urging legal systems worldwide to innovate and create protections that reflect the evolving landscape of digital and autonomous. Recognizing AI as the creator of artistic works would serve justice and promote fairness by precluding humans from taking undeserved credit. Moreover, allowing a short and narrow monopoly over the machine-driven creative works will increase the value of AI systems and would reward those who create such systems.

**R (on the application of AAA and others)
(Respondents/Cross Appellants) v Secretary of State for the
Home Department (Appellant/Cross Respondent) [2023]
UKSC 42**

By Natalia Catechis, BVS LLM.

On 15 November 2023 the Supreme Court held unanimously that the Secretary of State’s Rwanda policy was unlawful.¹

Background

Legal Framework

The Rwanda policy was effected under (then) paragraphs 345A to 345D of the Immigration Rules. It exists as an agreement between the UK and Rwanda and is named the Migration and Economic Development Partnership (‘MEDP’). The MEDP comprises a Memorandum of Understanding (‘MoU’), which is not legally binding, and diplomatic ‘Notes Verbales’. It provides that the UK can transfer people seeking asylum in the UK to Rwanda, where Rwanda will process their claims and, if appropriate, grant asylum.

Under paragraphs 345A to 345D, where an asylum seeker could have claimed asylum earlier in a safe third country but proceeded to claim asylum in the UK, their asylum claim can be ruled inadmissible. If their claim is inadmissible, the asylum seeker can be transferred from the UK either to the safe third country in which they could have claimed asylum, or to another safe third country. Under the Rwanda policy, Rwanda is the other safe third country.

¹ R (*on the application of AAA and others*) v Secretary of State for the Home Department [2023] UKSC 42.

The Preamble of the Refugee Convention recognises that ‘the grant of asylum may place unduly heavy burdens on certain countries, and... the international scope and nature cannot therefore be achieved without international co-operation’.² The safe third country concept, therefore, derives its legitimacy from the ‘long standing recognition of international cooperation as a necessary prerequisite for the satisfactory solution to the plight of refugees’.³

Paragraph 345B(ii) provides that a country is a safe third country if, inter alia, ‘the principle of non-refoulement will be respected in that country in accordance with the Refugee Convention’. As the Supreme Court summarised, ‘Rwanda must accordingly be... a country which will not return refugees to another country where their life or freedom would be threatened’.⁴

Legal Proceedings

The legal proceedings were brought by asylum seekers to challenge decisions and related certificates issued by the Secretary of State, which would see their claims for asylum processed under the Rwanda policy (in Rwanda, by the Rwandan authorities). The United Nations High Commissioner for Refugees (UNHCR), also known as the United Nations (UN) Refugee Agency, intervened in the legal proceedings. As the supervisor of the implementation of the Refugee Convention,⁵ it provided advice and evidence pertaining to the asylum procedure in Rwanda.

² Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

³ María-Teresa Gil-Bazo, ‘The Safe Third Country Concept in International Agreements on Refugee Protection: Assessing State Practice’ (2015) 33 *Netherlands Quarterly of Human Rights* 42, 43.

⁴ *AAA* (n 1) [5].

⁵ UNHCR, the UN Refugee Agency, ‘UNHCR Welcomes the UK Supreme Court Judgement on Transfer of Asylum-Seekers’ (*UNHCR, the UN Refugee Agency*, 15 November 2023)

<www.unhcr.org/uk/news/press-releases/unhcr-welcomes-uk-supreme-court-judgement-transfer-asylum-seekers> accessed 24 December 2023.

The advice and evidence of UNHCR in the proceedings at hand are not to be conflated with the measures taken by the ECtHR in June 2022, which preempted the first flight to Rwanda under the policy.⁶ One asylum seeker expected to be on that flight, N.S.K., successfully requested that the ECtHR grant an urgent interim measure pursuant to Rule 39 of the ECtHR Rules of Court. Rule 39 permits the ECtHR to ‘indicate to the parties [to the ECHR] any interim measure which they consider should be adopted’⁷ where there is ‘an imminent risk of irreparable harm’.⁸ The ECtHR considered concerns about the Rwandan asylum procedure and its status as a safe third country. It indicated to the UK that N.S.K.’s transfer ought to be delayed until three weeks after a decision on his judicial review was issued, in which he challenged the inadmissibility of his asylum claim and the decision to transfer him to Rwanda.⁹ By the time that the present case reached the Divisional Court six months later, no flights to Rwanda had taken off.¹⁰

At first instance, the Divisional Court held that the Rwanda policy was lawful.¹¹ However, the Divisional Court concluded that the policy had, in some cases, been implemented in a procedurally unfair manner. Procedural unfairness arose from decision-making flaws including, inter alia, taking account of erroneous facts and failing to consider material information.¹² Therefore, the decisions concerning eight individual Claimants were to be quashed.

⁶ *N.S.K. v the United Kingdom* (Application no. 28774/22, formerly *K.N. v. the United Kingdom*).

⁷ Registry of the European Court of Human Rights (30 October 2023) ‘Rules of the Court’ <www.echr.coe.int/documents/d/echr/Rules_Court_ENG> 20, accessed 29 December 2023.

⁸ European Court of Human Rights Press Unit ‘Factsheet – Interim measures’ (14 June 2023) <www.echr.coe.int/documents/d/echr/FS_Interim_measures_ENG> accessed 29 December 2023.

⁹ European Court of Human Rights Press Unit (June 2023) ‘The European Court grants urgent interim measure in case concerning asylumseeker’s imminent removal from the UK to Rwanda’ <www.hudoc.echr.coe.int/eng-press?i=003-7359967-10054452> accessed 29 December 2023.

¹⁰ *R (on the application of AAA (Syria)) v Secretary of State for the Home Department* [2022] EWHC 3230 (Admin) [7].

¹¹ *ibid.*

¹² *ibid* [180]-[181].

On appeal, the Court of Appeal held by a majority that the Rwanda policy was unlawful.¹³ The evidence before the Divisional Court had provided substantial grounds for believing that asylum seekers transferred to Rwanda would face a real risk of refoulement.¹⁴

The Secretary of State appealed to the Supreme Court on the issue of the risk of refoulement.

Issues

The primary issue was whether asylum seekers transferred to Rwanda for their claims to be decided by Rwandan authorities would be at risk of refoulement. The Supreme Court invoked the definition of ‘refouler’ found in the Refugee Convention:

... expel or return... a refugee in any manner whatsoever to the frontiers of territories where [their] life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.¹⁵

As the Supreme Court highlighted, the UK has ‘repeatedly’¹⁶ committed to the protection of refugees against refoulement under international and domestic law.¹⁷ The judgment notes that, for the purposes of the Refugee Convention, refoulement encompasses both ‘direct’ and ‘indirect’ refoulement;¹⁸ the latter entails transferring an individual to another country, from which they are refouled. Citing the European Court of Human Rights (ECtHR), the Court explained that the ‘main issue’ in determining a risk of refoulement is whether asylum seekers will have access to ‘an adequate asylum

¹³ R. (*on the application of AAA (Syria)*) v Secretary of State for the Home Department [2023] EWCA Civ 745.

¹⁴ *ibid* [109], [293].

¹⁵ *AAA* (n 1) [20]; Refugee Convention, Article 33(1).

¹⁶ *AAA* (n 1) [26].

¹⁷ *ibid* [19]-[33].

¹⁸ R v Secretary of State for the Home Department, *ex parte Bugdaycay* [1987] AC 514.

procedure' in Rwanda.¹⁹ An inadequate asylum procedure creates 'a real risk of genuine refugees being refouled, either because their claims are not considered at all or because they are not determined properly'.²⁰

It is this 'real risk' of refoulement which constitutes the standard of proof in assessing the existence of a future risk of harm.²¹ Undercutting the standard civil threshold of 'on the balance of probabilities' (51% or more), this lower standard requires 'a reasonable degree of likelihood' be demonstrated.²² As low as a 10% likelihood amounts to a reasonable degree.²³

The decision deals with three issues relating to refoulement:

- 1. Whether the Court of Appeal was correct to conclude that the Divisional Court applied the incorrect test [instead of the correct Soering test].*
- 2. Whether the Court of Appeal was entitled to interfere with the conclusion of the Divisional Court.*
- 3. Whether the Court of Appeal was correct to conclude that there were substantial grounds for believing that asylum seekers would face a real risk of ill-treatment in the form of refoulement following transfer by the UK to Rwanda.*²⁴

Decision

The judgment was delivered by Lord Reed and Lord Lloyd-Jones, with whom Lord Hodge, Lord Briggs and Lord Sales agreed.

¹⁹ *AAA* (n 1) [24].

²⁰ *ibid.*

²¹ *R v Secretary of State for the Home Department, ex parte Sivakumaran* [1988] AC 958.

²² *ibid* 959.

²³ *ibid* 994.

²⁴ *AAA* (n 1) [37].

1. Whether the Court of Appeal was Correct to Conclude that the Divisional Court Applied the Incorrect Test Instead of the Correct *Soering* Test

The Supreme Court explained that the correct test was established by the ECtHR in *Soering v United Kingdom* (1989) 11 EHRR 339.²⁵ Under this test, the Divisional Court ought to have asked itself whether there are substantial grounds for believing that asylum seekers would face a real risk of ill-treatment, in the form of refoulement, following transfer by the UK to Rwanda.²⁶

Instead of making its own assessment as to the risk of refoulement, the Divisional Court appears to have reviewed the assessment by the Secretary of State.²⁷ It described its task as ‘decid[ing] whether, on the totality of [the] evidence, the Home Secretary’s opinion is undermined to the extent it can be said to be legally flawed’.²⁸ However, as the Supreme Court emphasised, the *Soering* test is one of fact rather than law:

... the focus of the *Soering* test, which the Divisional Court had to apply, is not on whether there were legal flaws in the Secretary of State’s decision, but on whether there were, as a matter of fact, substantial grounds for believing that the removal of asylum seekers to Rwanda would expose them to a real risk of ill-treatment by reason of refoulement.²⁹

Yet the Divisional Court judgment also acknowledged that it ‘had to carry out the necessary assessment itself’.³⁰ This ambiguity made it ‘possible to read the Divisional Court’s judgment in more than one way’³¹ and the Supreme Court had difficulty ascertaining which test was applied.³²

²⁵ *ibid* [34].

²⁶ *ibid* [38].

²⁷ *ibid* [39].

²⁸ *AAA* (n 10) [71].

²⁹ *AAA* (n 1) [71].

³⁰ *ibid* [40]; *AAA* (n 10) [63].

³¹ *AAA* (n 1) [40].

³² *ibid* [41].

Ultimately, the Supreme Court stated that ‘it [was] not necessary... to reach a concluded view as to which interpretation of the judgment should be preferred’,³³ because the Court of Appeal was, ‘in any event’, entitled to interfere with its conclusion (see below).³⁴

2. Whether The Court Of Appeal Was Entitled To Interfere With The Conclusion Of The Divisional Court.

Echoing the majority of the Court of Appeal, the Supreme Court found that the Divisional Court had improperly examined the evidence relating to the risk of non-refoulement ‘by failing to engage with the evidence of UNHCR concerning problems affecting the processing of asylum claims’.³⁵

The case turned on the Court’s finding of fact. The UNHCR evidence demonstrated ‘serious and systemic defects in Rwanda’s procedures and institutions for processing asylum claims’,³⁶ on which the issue of risk of refoulement hinges.³⁷ Therefore, ‘regardless of whether the Divisional Court applied the correct legal test’, the Court of Appeal was entitled to interfere with its decision.³⁸

³³ *ibid.*

³⁴ *ibid* [40].

³⁵ *ibid* [42].

³⁶ *ibid* [50].

³⁷ *ibid* [42].

³⁸ *ibid.*

3. Whether The Court Of Appeal Was Correct To Conclude That There Were Substantial Grounds For Believing That Asylum Seekers Would Face A Real Risk Of Ill-Treatment In The Form Of Refoulement Following Transfer By The UK To Rwanda.

The Supreme Court held that the Court of Appeal was correct to conclude that there were substantial grounds for believing that asylum seekers would face a real risk of ill-treatment in the form of refoulement following transfer by the UK to Rwanda.³⁹ The Court, in agreement with that finding, considered it ‘sufficient for present purposes... to summarise briefly the principal aspects which led the Court of Appeal to its conclusion’.⁴⁰ It did not dispute that Rwanda entered into the MEDP in good faith; ‘nevertheless’, the Court continued, ‘intentions and aspirations do not necessarily correspond to reality: the question is whether they are achievable in practice’.⁴¹

The Supreme Court outlined the central reasons for the Court of Appeal’s decision:

...the general human rights situation in Rwanda; the adequacy of Rwanda’s asylum system, including its history of refoulement; and Rwanda’s non-compliance with assurances given under [a similar] arrangement which it entered into with Israel.⁴²

First, citing the Lord Chief Justice in the Court of Appeal, the Supreme Court said that ‘there remain “profound human rights concerns”’ despite Rwanda’s ratification of international human rights conventions,⁴³ which it said ‘raises serious questions as to its compliance with international obligations’.⁴⁴ It highlighted that, in 2021, ministers received advice from officials ‘during the process of selecting a partner country for the

³⁹ *ibid* [73].

⁴⁰ *ibid* [74].

⁴¹ *ibid* [102].

⁴² *ibid* [74].

⁴³ *ibid* [76].

⁴⁴ *ibid*.

removal of asylum seekers, [advising] that Rwanda had a poor human rights record'.⁴⁵ The Supreme Court commented:

Refugees had not been generally ill-treated, but there had been exceptions when they had expressed criticism of the government. The most serious incident occurred in 2018, when the Rwandan police fired live ammunition at refugees protesting over cuts to food rations, killing at least 12 people.⁴⁶

Second, the Supreme Court stressed the concerns of UNHCR about 'defects in past and current practice' in Rwanda's asylum process.⁴⁷ The Court noted UNHCR evidence of threatened refoulement and actual refoulement. Further, the Court drew attention to the fact that, although this evidence was not contested, the Rwandan government disputed that it amounted to refoulement.⁴⁸ This was viewed by the Court as demonstrative of 'a misunderstanding of the meaning of the concept of refoulement', which it said '[reveals] an imperfect understanding of the requirements of the Refugee Convention'.⁴⁹ Crucially, the Rwanda policy does not provide for a new asylum process; it adds 'some modifications' to the current one.⁵⁰

Third, the Supreme Court observed that, under a similar agreement between Israel and Rwanda, those transferred to Rwanda 'suffered serious breaches of their rights under the Refugee Convention'.⁵¹ Evidence provided by UNHCR indicated that 'asylum seekers who arrived in Rwanda under the arrangement were routinely moved clandestinely to Uganda', and 'more than 100 nationals of Eritrea and Sudan who had arrived in Rwanda under the agreement... and had then been taken to the Ugandan border or put on flights to Uganda'.⁵² The Secretary of State submitted that the

⁴⁵ *ibid.*

⁴⁶ *ibid.*

⁴⁷ *ibid* [93].

⁴⁸ *ibid* [91].

⁴⁹ *ibid.*

⁵⁰ *ibid* [93].

⁵¹ *ibid* [96].

⁵² *ibid.*

agreement did not represent Rwanda's compliance with commitments under the Rwanda policy because it was a different agreement, entered into some years ago.⁵³ However, the Court was certain that '[Rwanda's] apparent failure to [comply with the principle of non-refoulement] is relevant to an assessment of the risk of refoulement under the arrangements entered into with the government of the United Kingdom'.⁵⁴

Ultimately, the Supreme Court found that:

As matters stand, the evidence establishes substantial grounds for believing that there is a real risk that asylum claims will not be determined properly, and that asylum seekers will in consequence be at risk of being returned directly or indirectly to their country of origin. In that event, genuine refugees will face a real risk of ill-treatment in circumstances where they should not have been returned at all.⁵⁵

Accordingly, the Rwanda policy was held to be unlawful.

Next Steps

This landmark decision demonstrates the strength of the principle of non-refoulement. The judgment illustrates the Supreme Court's approach to friction between a legal commitment by the UK and a political commitment by the Government. It is the UK's own commitment to this principle under international refugee law on which the Supreme Court made its decision. The Government responded with two pledges: a treaty and a bill.

⁵³ *ibid* [99].

⁵⁴ *ibid* [100].

⁵⁵ *ibid* [105].

The Treaty

Setting the provisions of the Rwanda policy in a legally unenforceable MoU weakened its promise to adhere to international refugee law, including the principle against non-refoulement. The Government pledged to strengthen its promises by reframing the policy in a treaty, which is binding under international law. The Treaty was signed and published on 5 December 2023.⁵⁶

The Treaty introduces safeguards against non-refoulement, including a provision that, whatever the outcome of their application for refugee status or asylum, no individual transferred to Rwanda can be transferred elsewhere from Rwanda, except to the UK if the UK requests their return.⁵⁷ It also establishes an independent Monitoring Committee to advise on adherence to the Treaty's provisions and suggest improvements to its processes.⁵⁸

UK courts are not bound to the Treaty unless and until it is ratified. The Government's prerogative power to ratify is subject to Parliament's statutory power of scrutiny. Under the Constitutional Reform and Governance Act 2010, the Treaty is not to be ratified unless neither the House of Commons nor the House of Lords has resolved, within 21 sitting days, that the Treaty should not be ratified.⁵⁹ If the Commons resolves against ratification, the 21-sitting-day period is repeated. This process may recur, delaying ratification - and realisation of the Rwanda policy - indefinitely. The Lords' role is purely advisory, so its resolve against ratification would be peripheral to proceeding with the Treaty.

⁵⁶ Secretary of State for Foreign, Commonwealth and Development Affairs, *Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Agreement to Strengthen Shared International Commitments on the Protection of Refugees and Migrants* (CP 994, 2023).

⁵⁷ *ibid* Article 10(3).

⁵⁸ *ibid* Article 15(2) and (3).

⁵⁹ Constitutional Reform and Governance Act 2010, pt 2.

The Bill

The task of the Supreme Court involved assessing whether Rwanda satisfies the requirements of a ‘safe country’ for the purposes of the UK’s obligations under the Refugee Convention. Its judgment was that, on the facts, it was not. The Government responded with the Safety of Rwanda (Asylum and Immigration) Bill, which describes itself as ‘[giving] effect to the judgement of Parliament that the Republic of Rwanda is a safe country’.⁶⁰ In doing so, the judgment of the Supreme Court is effectively outweighed by the judgement of Parliament.

The Bill requires that ‘every decision-maker must conclusively treat the Republic of Rwanda as a safe country’.⁶¹ Therefore, it continues, ‘a court or tribunal must not consider a review of, or an appeal against, a decision... on the grounds that the Republic of Rwanda is not a safe country’.⁶² The Bill emphasises that a court or tribunal ‘must not consider’ any claim or complaint that an individual will or may be refouled from Rwanda, that an individual’s claim will not be fairly or properly processed in Rwanda, or that Rwanda will not adhere to the Treaty.⁶³

Similarly to the Treaty, the Bill is subject to Parliamentary scrutiny before its enactment, and it must be enacted to bind the courts.

The European Convention on Human Rights (ECHR)

Public authorities in the UK are prohibited from acting contrary to the ECHR under section 6(1) of the Human Rights Act (HRA) 1998. The Bill explicitly dismantles this barrier, disapplying section 6 in relation to decisions based on the mandatory conclusive treatment of Rwanda as a safe country.⁶⁴

⁶⁰ Safety of Rwanda (Asylum and Immigration) HL Bill (2023-2024) 41, s 1(2)(b).

⁶¹ *ibid* s 2(1).

⁶² *ibid* s 2(3).

⁶³ *ibid* s 2(3).

⁶⁴ *ibid* s 3(2)(c).

Section 6(2) HRA 1998 stipulates that subsection (1) does not apply if the authority could not have acted differently due to the provision(s) of primary legislation, or the authority was giving effect to the provision(s) of primary legislation which cannot be read compatibly with the ECHR. The Bill begins with the following statement from Lord Sharpe of Epsom:

I am unable to make a statement that, in my view, the provisions of the Safety of Rwanda (Asylum and Immigration) Bill are compatible with the Convention rights, but the Government nevertheless wishes the House to proceed with the Bill.⁶⁵

Therefore, the enactment of the provisions of the Bill may be read as protecting any acts contrary to the ECHR against challenge in UK courts. However, the ECtHR is not bound by the Treaty or the Bill; legal proceedings could alternatively be brought against the UK before the ECtHR to challenge such acts.

The Bill also aims to protect against findings by the ECtHR that the UK breached individuals' ECHR rights. Any such outcome is legally binding, and the ECtHR may issue a further interim measure indicating against the act. However, the Bill emphasises that 'a court or tribunal must not have regard to the interim measure when considering any application or appeal which relates to a decision to remove the person to the Republic of Rwanda'.⁶⁶

The Supreme Court's Judgment or Parliament's Judgement?

The courts have historically acquiesced to Parliamentary sovereignty,⁶⁷ the constitutional principle under which 'no person or body is recognised by the law of England as having

⁶⁵ *ibid.*

⁶⁶ *ibid* s 5(3).

⁶⁷ See for example *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 AC 603.

a right to override or set aside the legislation of Parliament'.⁶⁸ Unconventionally, in cases relating to the Rwanda policy, the courts will proceed on a basis which supersedes the Supreme Court's finding of fact.

That basis, however, is the judgement of a democratically elected Government. Arguably, the courts will be simply implementing the preference of the party picked by the populace, the realisation of the Rwanda policy.

On the other hand, as Chair of the Bar Council, Nick Vineall KC, has warned:

If parliament were to pass legislation the effect of which was to reverse a finding of fact made by a court of competent jurisdiction, that would raise profound and important questions about the respective role of the courts and parliament in countries that subscribe to the Rule of Law.⁶⁹

Crucial to the Rule of Law in the UK is a balance between the powers of the legislature (Parliament), the executive (the Government) and the judiciary (the courts). Legislating contrary to a finding by the Supreme Court arguably infringes on the role of the judiciary, allowing Parliament to substitute its own opinion. This could set a precedent of disempowering the courts and it may disincentivise future claimants from challenging acts by the Government.

With adequate amendments, there is scope for the lawful realisation of the Secretary of State's Rwanda policy; the Supreme Court concluded that 'the structural changes and capacity-building needed to eliminate [the risk of refoulement] may be delivered in the future'.⁷⁰ However, until the Treaty is ratified and the Bill is enacted, the possibility of transferring asylum seekers to Rwanda has ground to a halt.

⁶⁸ A V Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan 1897), 38.

⁶⁹ Nick Vineall, 'Rwanda emergency law - Bar Council reaction' (*The Bar Council*, 15 November 2023) <www.barcouncil.org.uk/resource/rwanda-emergency-law-bar-council-reaction.html> accessed 22 November 2023.

⁷⁰ *AAA* (n 1) [105].

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The CLR Blog

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The following pieces
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Hong Kong Matrimonial Finance Law: Enamoured by Big Banking?

*By Alexander Cleveewood Ng, BVS LLM,
Deputy Editor-in-Chief of The City Law Review Volume VI.*

The way the law treats parties in a matrimonial finance case reflects the priorities of a society.

For instance, in a post-*Pettkous* reality in Canada,¹ the imposition of a restitution-based resulting trust in dividing proprietary interests after separation indicates a shift to a more contribution-based, and ultimately, individualistic approach. The tenacity upon which English law adheres to the common intention construction trust in parallel scenarios indicates a greater focus on the ‘venture’ between the two parties.

A recent case in Hong Kong jurisprudence revealed the increasing significance of commerciality in matrimonial cases. It was decided by the Hong Kong District Court (‘HKDC’).² Where a married couple was living in a mortgaged property, one of which having become insolvent, the other might not be able to exercise any right of redemption attached to the property. The bank could therefore exercise foreclosure.

Although this decision was overruled by the Hong Kong Court of Appeal (‘HKCA’), the mere fact that the lower courts prioritised commerciality when adjudicating familial cases sparks concern. Access to justice is not free. There are reasonably similar cases which do not attract the attention of the HKCA. Furthermore, it is questionable whether, in its reasoned judgment, the HKCA did put this notion to bed.

However, this sparks a broader question: Should the HKCA do so, given that the law reflects societal values? Indeed, commerciality may mean more in some societies than others.

¹ *Pettkous v Becker* [1980] 2 SCR 834.

² *Shanghai Commercial Bank v Lee Yau Tak* [2021] HKDC 69.

This article is organised into four parts. Part I provides a summary of the case. In Part II, it criticises the reasoning adopted by the HKDC. Part III summarises the reasoning of the HKCA and evaluates the extent to which it overruled the HKDC's reasoning. Part IV is the conclusion.

As a side note, the HKDC judgment is only available in Traditional Chinese. The HKCA judgment is available in English. This is also **not** a traditional case note.

Part I. Case Summary

A. Factual Background

The two defendants, Mr Lee Yau Tak ('Mr Lee') and Ms Chan Wan Ying ('Ms Chan') had been married until 2015. They decided to purchase a new property as their matrimonial home ('the Property') in 2012. The purchase price was approximately HK\$2,000,000.

Mr Lee took out a mortgage with the Shanghai Commercial Bank ('the Bank') valued at HK\$700,000 at the time. In addition, Mr Lee borrowed a sum of HK\$1,310,935 from the government. These sums were sufficient in purchasing the Property. Although Ms Chan borrowed HK\$200,000 on behalf of her husband from her brother-in-law, intending for said sum to be used towards the purchase, it was ultimately not required.

In 2016, Mr Lee declared bankruptcy. The Bank applied for foreclosure of the Property.

B. Legal Background

Mr Lee was the sole legal owner of the Property. Since equity follows the law, he was presumed to be the sole beneficial owner as well.³

However, during the proceedings, Ms Chan wished to maintain mortgage payments to avoid foreclosure. She argued that she had an interest in the Property. Since her name was not used for the purchase, at most, she could claim a beneficial interest. According to Hong Kong law, this may arise from a common intention constructive trust. A holistic approach is propounded

³ *Stack v Dowden* [2007] 2 AC 432, [54]. This presumption is adopted in Hong Kong law as well.

by *Primecredit Ltd v Yeung Chun Pang Barry*,⁴ which mirrors the approach in England and Wales.⁵ This would displace the presumption stated in the preceding paragraph. This is elaborated in greater detail in Part II.

This interest might encompass the equity of redemption as a result of the mortgage. Alternatively, the trustees in bankruptcy (‘the Trustees’) could transfer or sell the equity of redemption to Ms Chan, having assessed that this concurred with the best interests of other creditors.⁶

A potential issue was whether Ms Chan had an overriding interest which would prevent the Bank from seeking foreclosure. This issue was academic since it was admitted at trial that the Bank’s interest took precedence. It could be briefly dealt with in this context.

In *Abbey National Building Society v Cann*,⁷ it was held that the mortgagee’s interest should always take precedence over any beneficial ownership that arose upon the purchase of matrimonial property, even if the beneficial owner made financial contributions. The same conclusion was reached by the District Court judge after referring to authorities in common law jurisdictions.⁸

However, *Cann* is not authority for any priority issues arising from the contention between the second defendant’s equity of redemption and the interests of creditors in an insolvency situation. Alternatively, since English caselaw is only persuasive in Hong Kong courts, it can either be departed or distinguished.

C. Procedural Background

This case was decided by the HKDC, culminating in a judgment published on 8 October 2020. The HKDC ruled in favour of the Bank.

⁴ [2017] 4 HKLRD 327. Another instructive authority is *Mo Ying v Brilllex Development Ltd* [2015] 2 HKLRD 985.

⁵ n.3.

⁶ This operates on the presumption that the equity of redemption is not extinguished but rests in the hands of the Trustee(s). This presumption is not challenged in the District Court judgment.

⁷ [1991] 1 AC 56.

⁸ n.2, [14]-[18].

The two main issues in contention were:

- (1) Whether Ms Chan had any interest in the Property; and
- (2) Whether Ms Chan could exercise the equity of redemption to redeem the mortgage.

This decision was appealed to the HKCA. The appeal was allowed in Ms Chan's favour on both issues in March 2023.

Part II. Critique of the HKDC Judgment

The judge erred on both legal issues and general fact-finding. The first two subsections contain (1) what the judge decided on the point and (2) why it is submitted to be wrong.

Ground 1: Common Intention Constructive Trust

In [33] of the judgment,⁹ the judge concluded that there was insufficient evidence to declare a common intention constructive trust over the Property.

Two reasons were advanced to support this determination:

- (1) There was insufficient evidence to suggest any express common intention to hold the Property in favour of both Ms Chan and Mr Lee;
- (2) Ms Chan had not made any direct financial contributions to the acquisition of the Property. Her being married to Mr Lee at the time of the purchase did not give rise to the presumption that she was a beneficial owner.

Both reasons are discordant with Hong Kong jurisprudence and should be rejected.

As mentioned in Part I, *Primecredit Ltd v Yeung Chun Pang Barry* incorporated the holistic approach in *Stack v Dowden*¹⁰ in determining whether a common intention constructive trust should be declared over a matrimonial home.

⁹ n.2.

¹⁰ n.3.

Common intentions can either be express or inferred. Inference is made using a holistic approach, which may involve, but not necessarily, financial contributions.¹¹ This analysis is applicable for both the establishment of beneficial ownership and its quantification, the latter of which is not relevant to this case. Inference is particularly important in a Chinese-majority society. Chinese families, particularly those involving older generations, are reluctant in discussing money matters including the division of proprietary interests. This is acknowledged in *Primecredit*¹² by Vice President Lam (as he then was)¹³ and Cheung J.A.¹⁴ The judge therefore erred in (1).

In sole legal owner cases, including the current case, such inference must be supported by proof of detriment. In English jurisprudence, lower courts are bound to find that nothing less than financial contribution to the purchase can be used in establishing the inference.¹⁵ *Stack v Dowden* is technically obiter in these cases. However, this issue does not arise in Hong Kong jurisprudence. The HKCA in *Primecredit* applied *Stack* to sole legal owner cases as well. Although the judge in this case was correct to state that marriage alone could not establish beneficial ownership, they erred in holding that only direct financial contributions mattered.

Further and alternatively, even if the judge followed English jurisprudence (which they were not entitled to do, given that there was binding Hong Kong authority), they still reached the wrong conclusions on (2).

The holistic approach in *Stack v Dowden* originated from the observation that English law moved to keep up with overall socioeconomic changes.¹⁶ This is reinforced by recent appellate decisions.¹⁷ Furthermore, concerning sole legal owner cases, *Oxley v Hiscock* (decided after *Lloyds Bank v Rosset*- a Court of Appeal decision) held that a holistic approach should be used.¹⁸

¹¹ Id, [68]-[69].

¹² n.4, [1.6] and [2.9].

¹³ He is currently sitting as a Permanent Judge in the Hong Kong Court of Final Appeal.

¹⁴ J.A. refers to Justice of Appeal of the HKCA.

¹⁵ *Lloyds Bank v Rosset*, [1991] 1 AC 107, 132-133.

¹⁶ n.3, [60].

¹⁷ *Marr v Collie* [2017] UKPC 17, [54]-[55].

¹⁸ [2004] EWCA 546.

Although it contradicted *Rosset*, it was endorsed in *Stack v Dowden*.¹⁹ *Stare decisis* was therefore observed.

In England and Wales, this development coincides with the abolition of the presumption of advancement concerning resulting trusts.²⁰ This renders the law more relevant to a community founded on gender equality. Societal differences between England and Hong Kong, including opinions on gender equality, are not significant to justify any departure from this reasoning. Hong Kong enacted the Sex Discrimination Ordinance (Cap. 480) in 1996, parallel to relevant provisions in the Equality Act 2010 in England and Wales.

Thirdly, in light of *Lloyds Bank v Rosset*, Lord Bridge's determination that nothing less than financial contributions could be used for inferring a common intention is prefaced by 'as I read the authorities'. It is reasonable that the court felt bound by pre-1991 authorities to come to such a conclusion. However, after *Stack v Dowden*, and reinforcement of the dicta therein by subsequent authorities by Supreme Court justices,²¹ *Rosset* should no longer be relevant.

Ground 2: Transfer/ Sale of Equity of Redemption

The judge concluded, in [41], that even if Ms Chan could establish a beneficial interest in the property, she would not be able to exercise any equity of redemption. As the Trustees owed due diligence to other creditors, when deciding whether the equity should be transferred to Ms Chan, the interests of other creditors should be heeded first. The judge held that, since there was no evidence that Ms Chan had sufficient funds to redeem the mortgage, she should not be transferred the equity.

This argument is fallacious.

Mr Lee had held the Property on trust in favour of himself and Ms Chan. Since the mortgage was a liability attached to the Property,²² and the equity of redemption arose in response to the

¹⁹ n.3, [61].

²⁰ Equality Act 2010, s.199.

²¹ e.g. *Jones v Kernott* [2011] UKSC 53.

²² *Ambrister v Lightbourn* [2012] UKPC 40.

mortgage,²³ the equity could be deemed an integral part of the same trust. This appeals to the fund concept of trusts proposed by Penner and Chambers.²⁴ As Mr Lee was declared insolvent, the Trustees stepped in his shoes (metaphorically). This does not affect the magnitude and scope of Ms Chan's pre-existing interest, nor Mr Lee's obligations owed to Ms Chan under the trust. Per Lord Justice Millett in *Armitage v Nurse*,²⁵ the distinguishing, essential feature of a trust is that the trustee must act on behalf of the best interests of the beneficiary. The Trustees must therefore exercise the equity of redemption to advocate for Ms Chan's best interests. This should entail exercising the equity to protect Ms Chan's right from extinguishment by foreclosure.

Furthermore, this interest is proprietary in nature. It would be independent of Mr Lee's asset pot available for distribution amongst his creditors.²⁶ When exercising the equity of redemption, it is therefore against authority that the Trustees be required to consider the interests of all creditors before deciding whether to exercise the equity.

Submissions from the Trustees in [27] of the judgment that Ms Chan could only intervene should the Trustees improperly exercise the equity did not alter this conclusion. Trusteeship entails a bundle of duties. Trustees cannot simply pick and choose.

Alternatively, the equity of redemption is held on a bare trust which is concurrent to the common intention constructive trust imposed on the Property.

According to *Saunders v Vautier*,²⁷ the beneficiary acquired the legal ownership of the asset(s) from the trustee when they reached the age of maturity, four years in advance of the anticipated date of receipt. This arrangement is particularly attractive when making bequests in olden times. However, this example is merely indicative, not exhaustive. In a bare trust, the beneficiary shall be treated as a quasi-legal owner (if not entirely) until the point of acquisition of full legal

²³ *Kreglinger v New Patagonia Meat and Cold Storage Ltd* [1914] AC 25, 48.

²⁴ Penner and Chambers, 'Ignorance' in Degeling and Edelman (Eds) 'Unjust Enrichment in Commercial Law' (Lawbook Co., 2008), 268-271.

²⁵ [1997] EWCA Civ 1279, [253].

²⁶ *Re Lehman Brothers International (Europe) (in administration)* [2009] EWCA Civ 1161, [33].

²⁷ [1841] EWHC J82. This is recognised in Hong Kong jurisprudence, e.g. see *Hotung v Ho Yuen Ki* (2002) 5 ITELR 556.

interest. The trustee is tantamount to a custodian here, i.e. keeping the property until the beneficiary is ready. Equality underlies this arrangement.

The bare trust concept should be used in situations analogous to this case.²⁸ *Primecredit* is testimony to the courts' view that matrimonial assets form part of a common venture between two partners.²⁹ Although one party ('Party X') is often appointed to implement the procedures of the venture (as in this case), it does not suggest the parties ('Parties X and Y') are unequal. Indeed, it evinces an even stronger intention of collaboration since there is a division of obligations. Equality underlies the common venture.

Party X acts in two capacities: (1) an agent for Party Y; and (2) an agent for themselves. Hence, regarding the equity of redemption, since it is the key to the success of the joint venture, it is intended that both parties have an equal say on how and whether it should be exercised. This accords with the guiding principle of bare trusts.

This proposition is an extension of traditional juridical principles governing the equity of redemption. According to *Pawlett v Attorney General*,³⁰ the equity is a right 'inherent in the land' which is 'assignable and devisable'. It is not subsidiary to other interests in the property, such as the legal estate of the mortgagor.³¹ It could therefore be held on trust. The trust arrangement can also assume a different morphology to that which binds other interests, i.e. the legal estate here. This is supported by academic authority, notably Cousins.³² There is no evidence that this analysis was restricted by the provisions contained within the mortgage contract here.

If the bare trust analysis were accepted, Ms Chan would acquire the legal ownership to the equity upon the occurrence of an event which threatens the husband's role as trustee, whereby the viability of the joint venture is impugned, i.e. equality could no longer be maintained.

²⁸ *Pearce v Morris* (1869) 5 Ch App 227, relied upon by both the judge and counsel for the trustees in bankruptcy, only details the role of the mortgagee in conveying title deeds to a party which (1) has the equity of redemption, and (2) exercises said equity. It is no authority for the proposition that, in any case, the trustee necessarily holds the primary right to exercise the equity.

²⁹ n.4.

³⁰ (1667) Hard 465, 469.

³¹ Clark, 'Fisher and Lightwood's Law of Mortgage' (15th ed), 998.

³² 'Ch28: The Equity of Redemption as an Interest in Property', Cousins, Clarke and Hornett (Eds) 'Cousins on the Law of Mortgages' (4th Ed) (Sweet & Maxwell, 2017), 588.

Insolvency is such an event. Ms Chan could therefore exercise the equity to redeem the mortgage.

In addition, it is unreasonable to encumber the exercise of the equity with an arbitrary threshold: that Ms Chan is capable of paying off the mortgage debt.³³ Deciding otherwise would allow a third party (the Trustees in this case) to take the reins of the equity. Ms Chan's index consent to entering the joint venture would be impugned since her rights attached to the equity are unjustifiably curtailed. This is against what has been decided in *Primecredit* and *Mo Ying*.

Further, the judge's analysis risks unjustly enriching the Bank at Ms Chan's expense. The purpose of the equity of redemption is the careful calibration of interests between the mortgagor and mortgagee. Since the Bank's interest takes precedence over Ms Chan's, without her involvement in the exercise of the equity, her beneficial interest in the Property is potentially extinguished upon foreclosure.

The Trustees, holding the equity, were very unlikely to exercise it. They could only exercise the power with the permission of the creditors' committee.³⁴ The creditors' committee was unlikely to approve this, given their interest in getting as many assets included in the distribution pot as possible. The Bank would benefit from having its legal charge 'upgraded' to legal ownership in practical terms. This is unjust owing to a want of authority.³⁵

³³ The judge's conclusions appear to be influenced by the Family Law Act 1996, s.30(3) enacted in the United Kingdom, and *Hastings and Thanet Building Society v Goddard* [1970] 1 WLR 1544. However, even if there were a parallel Act in Hong Kong with the exact wording, such an assertion would be unreasonable. According to s.30(1) of the same Act, the section only applies if only one of the spouses is not entitled to the matrimonial property. As explained in Ground 1, the second defendant is a beneficial owner of the Property. This therefore takes the matter outside the ambit of the section.

³⁴ Cl.61(h), Bankruptcy Ordinance (Cap. 6). The equity of redemption was not Mr Lee's property since he held it for the benefit of himself and Ms Chan. It should therefore lie outside the power of disposition of the Trustees. However, the wording of Cl.61(h) is wide enough to encompass any arrangement 'incidental to the property of the bankrupt'. The equity of redemption reasonably falls within its ambit. Therefore, approval by the creditors' committee is likely required.

³⁵ See, for instance, *Lipkin Gorman v Karpnale* [1988] UKHL 12, and *Trustee of FC Jones and Son (a firm) v Jones* [1996] EWCA Civ 1324. Although 'want of authority' is not explicitly named the unjust factor in these cases, it sensibly serves as a common thread. This analysis is supported in Goff & Jones *The Law of Unjust Enrichment* (10th ed.).

Ground 3: Errors in Fact-Finding

The judge might have omitted the consideration of some relevant factors when determining whether a common intention constructive trust could arise from the factual matrix.³⁶ These factors were not discussed in the HKDC judgment. However, for the sake of brevity, only the provenance and application of the \$200,000 borrowed by the second defendant will be discussed here.

Ms Chan borrowed HK\$200,000 from her brother-in-law to fund the purchase.³⁷ The judge dismissed this as irrelevant since it had been returned to the husband. Any associated fees regarding the purchase were successfully covered by the mortgage and government loan.³⁸

This should be rejected due to the following reasons:

- a) It is unknown whether the judge considered if the sum was paid towards any instalments;
- b) Mr Lee might have used the sum to satisfy his debt obligations owed to the government. Since Mr Lee took out a government loan, deductions might be made from his monthly income and retirement fund. Such deductions might originally have been set aside for Ms Chan since, given she was a housewife, it was her husband's custom to make monthly maintenance payments to her. This implies the possibility that Ms Chan financially contributed to the acquisition of the Property.
- c) Mr Lee's bank account, where the \$200,000 was deposited, might have been overdrawn at the time any possible dispositions were made to satisfy any debt obligations. Even if it were overdrawn, backward tracing is increasingly accepted in the common law world,³⁹ in light of the increasing complexity of commercial transactions. The judge should have considered this possibility.

³⁶ Following the principles laid out in *BMC v BGC* [2020] HKCA 317. The judge conducted an unreasonable evaluation of primary facts, having: (1) misapprehended the facts; (2) failed to take into account relevant matters, i.e. factors other than financial contributions which lead to the inference of common intention; and as a result (3) came to a conclusion lying 'outside the ambit within which a reasonable disagreement is possible'. These limbs are outlined in *BMC v BGC*, [82]-[86].

³⁷ n.2, [11](2).

³⁸ *Id.*, [31].

³⁹ *Brazil v Durant* [2015] UKPC 35; *Reljo v Varsani* [2014] EWCA Civ 360.

Part III. The HKCA Judgment and its Impact

The HKCA allowed Ms Chan’s appeal on both issues. There is a separate issue regarding whether the Bank unjustifiably obstructed Ms Chan from redeeming the mortgage, thereby leading to cost implications. This lies outside the ambit of this article.

Concerning the common intention constructive trust, it stated that:

...direct financial contribution to the acquisition of the property is not the only relevant consideration, particularly in the domestic context. A proper consideration of whether a common intention constructive trust exists would require a careful, objective, consideration of the whole course of conduct of the parties.⁴⁰

The panel declined to analyse the full merits of Ms Chan’s common intention constructive trust claim since a full trial was considered to be a superior forum for its adjudication.

Concerning the equity of redemption issue, it stated in [32] of the judgment that:

- (1) *... if the 2nd Defendant [Ms Chan] is a beneficial owner of the Property, she is entitled to exercise her right to redeem the Mortgage, and does not require the Trustees to transfer or sell such right to her.*
- (2) *... We see no reason in principle why a beneficial owner may not exercise the right of redemption in the absence of consent from the other co-owner/ mortgagor (or his successor in title) or the trustee of the beneficial owner, at any rate where their interests do not align.*
- (3) *on the footing that the 1st and 2nd Defendants [both Mr Lee and Ms Chan] are both beneficial owners of the Property, it is by no means clear that the Trustees’ wish to sell the Property under the Partition Ordinance would necessarily prevail over the objection of the 2nd Defendant... [the Court refused to lay down a definitive statement on this point]*
- (4) *... there was no reason why the 2nd Defendant should be required to pay off the 1st Defendant’s general body of creditors, or purchase the 1st Defendant’s interest in the Property, before she could exercise the right to redeem the Mortgage...*
- (5) *... the Judge seems to have thought, mistakenly, that the 2nd Defendant was seeking to require the Trustees to transfer the right of redemption to her. In fact, she was seeking to exercise her own right to redeem the Mortgage.*

⁴⁰ *Shanghai Commercial Bank v Lee Yau Tak* [2023] HKCA 450.

Some may suggest that all is right in the end. The HKCA corrected the narrative and eradicated the roots of an emerging error. There is nothing else to fear. However, both realists and nihilists alike concur that there are commercial reasons behind the judge's decision.

Hong Kong is an international financial centre. It has long been deemed an offshore jurisdiction, providing numerous benefits for those who wish to conduct business activities there.⁴¹ This commercial focus helps bolster Hong Kong's reputation in the region. For instance, Hong Kong recorded the highest number of arbitrations in 2022 since 2010, with a 24.2% increase from 2021. Furthermore, the vast majority of disputes submitted to Hong Kong's jurisdiction were international in nature, i.e. 83.1%, in 2022.⁴² Commerciality is therefore an ingrained societal notion that affects the general development of Hong Kong law.

One advantage of the HKDC judgment is maintaining the stability of the mortgage market. If the law over-emphasises spousal interests in cases involving banks, banks may be less willing to enter into mortgage agreements with families. Alternatively, they may increase interest rates, run more stringent financial assessments before approval, or raise the threshold of approval. Hong Kong is one of the most expensive property markets in the world.⁴³ Most residents could only afford a property with a mortgage. Potential changes in mortgage requirements may further decrease property ownership rates and exacerbate pertinent issues such as homelessness. Further, if banks are not given sufficient incentive to operate in Hong Kong, their departure might tarnish Hong Kong's reputation as a business hub in the Asia-Pacific region.

Moreover, it is doubtful whether the HKCA indeed resolved the issue. Legal academia and practice vary in their objectives. The former seeks to unearth the truth and focuses on doctrinal neatness. The latter places a greater emphasis on practical considerations such as social policy. The HKCA judgment made assertions which lacked doctrinal exploration. It was stated that Ms

⁴¹ 'A Challenge to Hong Kong's Long-Established Offshore Tax System' (Deloitte, 25 October 2022) <<https://www2.deloitte.com/cn/en/pages/tax/articles/a-challenge-to-hk-long-established-offshore-tax-system.html>> accessed 12 February 2024.

⁴² Lianjun Li and others, 'HKIAC Records 12-Year-High Number of New Cases' (Reed Smith, 3 February 2023) <<https://www.reedsmith.com/en/perspectives/2023/02/hkiac-records-12-year-high-number-of-new-cases>> accessed 12 February 2024.

⁴³ Kate Everett-Allen, 'How Much Property Will \$US1 Million Buy You across the World?' (Knight Frank, 1 March 2023) <<https://www.knightfrank.com/research/article/2023-03-01-where-are-the-most-expensive-cities-in-the-world>> accessed 12 February 2024.

Chan held a right to redeem the mortgage. This was linked to her potential beneficial interest in the Property. But why? The equity of redemption is arguably a separate interest from the legal estate. What is the linkage therein? Why and how can an interest in one translate into an interest in another? The absence of doctrinal reasoning renders it difficult for the lower courts to follow. In more nuanced cases, the lower courts are less likely to seek guidance from doctrinal principles to ensure coherence with current law. Commercial considerations might be inadvertently prioritised in family cases, making bad law.

This is a significant issue. Returning to the real world from the malaise-inducing academic building, very few people contemplate litigation due to the potential costs of legal representation. Even fewer would pursue an appeal. If the line of reasoning adopted by the HKDC were extended to analogous cases, absent further instruction from the HKCA, it would be doubtful whether the rights of families could be adequately protected.

Whether this is only secondary to commercial interests in Hong Kong society remains an open-ended question. Whether this, if true, is a genuine ‘error’ depends on one’s perspective. After all, society and the law evolve in lockstep.

Nonetheless, certain universal norms unite societies. Examples include respect for human dignity and individual autonomy. These norms are explored in-depth by jurisprudential scholars such as John Rawls and Immanuel Kant. They need no recitation here. Respecting familial interests, especially the right to keep the family home, appeals to fundamental human rights.

Part IV. Conclusion

How a court adjudicates matrimonial cases reflects what a society thinks about their families.

Although Hong Kong is a more commercially focused society, there is still ample room for love, altruism and harmony. Indeed, there is a phrase which is commonly used in Cantonese conversation: ‘人情’ (literally translated as ‘being humane’, although one might argue that there is no true English equivalent).

Commercial considerations are important. A city’s reputation is important. However, do they matter much if the law cannot even protect the right of a woman, who has diligently supported her family for decades, to remain in her home?

The Rwanda Bill: A Dicey Affair with Constitutional Principles

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Introduction

This article aims to provide a concise critique of the government's intentions to maintain the Rwanda policy¹ despite the Supreme Court's ruling in *AAA*.² *AAA* is principally concerned with non-refoulement, i.e. 'requir[ing] that refugees are not returned to a country where their life or freedom would be threatened'.³ The scope is confined to certainty, equality, and judicial deference under the Diceyan Rule of Law ('the RoL'). Overall, the article concludes that any legislation directly countering the Supreme Court's judgment would undermine the RoL on all three concepts, especially if passed through Parliament too quickly.

Certainty

The Safety of Rwanda Bill⁴ undermines the Diceyan avoidance of 'wide, arbitrary, or discretionary powers'⁵ on two interpretations.

Regarding the first, the Government contradicting the courts (or the opposite) on a factual dispute using legislation would indicate that one of those decisions is incorrect and arbitrary, suggesting an unjustified abuse of discretion by a branch of government. The 'emergency'⁶ nature of the Bill undermines arguments that the 'structural changes and capacity-building

¹ BBC, 'What was the UK's plan to send asylum seekers to Rwanda?' (BBC.com, 16 November 2023) <<https://www.bbc.co.uk/news/explainers-61782866>> accessed 17 November 2023.

² R (*on the application of AAA and others*) v Secretary of State for the Home Department [2023] UKSC 42 ('*AAA*').

³ Id [5].

⁴ Safety of Rwanda (Asylum and Immigration) HL Bill (2023-2024) 41.

⁵ AV Dicey, Introduction to the Study of the Law of the Constitution (8th edn, Macmillan 1915) 110.

⁶ William Wallis, Anna Gross and George Parker, 'Sunak Pledges to Change the Law After Supreme Court Rules Against Rwanda Policy' (FT.com, 15 November 2023)

<<https://www.ft.com/content/2ff756e4-9719-44f6-b4db-1955ae90ac64>> accessed 17 November 2023; cf Civil Contingencies Act 2004, s 1.

needed to eliminate [refoulement] risk⁷ will be sufficiently addressed. Although Parliament is sovereign and the successful passage of the Bill would arguably reflect the democratic will of British citizens, Parliament could equally legislate that ‘all blue-eyed babies should be murdered’.⁸ It would be circular to solely use parliamentary sovereignty to determine the constitutionality of the Bill. Regard for the RoL is necessary and the legislative contradiction of judicial determinations indicates arbitrary decision-making by one of the branches. Allowing greater time for the scrutiny to address structural issues or the complete desertion of the Bill would prevent any uncertainty stemming from this contradiction.

Concerning the second interpretation, individuals are prevented from having a ‘security of expectations’⁹ in the law considering the policy’s inconsistency. Where laws cannot ‘be understood by all subjects’¹⁰ and reasonably followed because of this understanding, ‘security in economic, governmental, and social life’¹¹ cannot be sustained. This is significant as the speed with which the Bill is progressing through Parliament indicates the potential for public confusion on which laws apply. Arguably, the principle of Parliament’s ‘right to make or unmake any law’¹² provides sufficient security. However, this does not justify arbitrary discretion and the imposition of an ‘elected dictatorship’.¹³ Failing to provide certain laws with which can be complied will undermine the purpose of law whether made or unmade. Alternatively, it suggests that the judiciary has exercised their discretion in an arbitrary fashion which necessitates the legislature to remedy. Overall, the Bill undermines certainty.

Equality

Subjecting all individuals ‘to the ordinary law of the realm’¹⁴ is undermined by the Government’s proposed legislation. Indeed, *Re M* indicates that, in matters concerning the equal treatment of asylum seekers, the executive does not have the prerogative to act notwithstanding court

⁷ *AAA* (n 2) [105].

⁸ Leslie Stephen, *The Science of Ethics* (1st edn, Cambridge University Press 2012) 143.

⁹ Scott Veitch, Emiliios Christodoulidis and Marco Goldoni (eds) *Jurisprudence: Themes and Concepts* (4th edn, Taylor & Francis Group 2023) 173.

¹⁰ *Id.*, 174.

¹¹ *Ibid.*

¹² Dicey (n 5) 3.

¹³ HL Deb 29 January 2024, vol 835, col 1033.

¹⁴ Dicey (n 5) 114.

orders.¹⁵ *Re M* is especially significant considering that the Bill has provisions to disregard interim injunctive measures in the ECHR which would prevent the removal of asylum seekers to Rwanda.¹⁶ Although *Re M* can be distinguished as the Government did not have legislative backing, asylum seekers would still not be ‘subject to the ordinary law of the realm’¹⁷ as injunctions from the ECHR would apply in all other circumstances. Furthermore, the Bill’s contradiction¹⁸ with the Human Rights Act 1998, while technically a legal expression of the will of the public through a democratically elected Parliament, shows further derogations from British constitutionalism as individuals are treated unequally seemingly arbitrarily. Undoubtedly, as Young describes, there should be scope for democratic dialogue between the legislature and the judiciary.¹⁹ Dialogue requires scrutiny. The speed at which the Bill is passing through Parliament cannot adequately provide said scrutiny.

Judicial Deference

The Rwanda Bill undermines Diceyan protections of constitutional principles through ‘judicial decisions determining the rights of private persons’.²⁰ This is tenable on two grounds.

Regarding the first, the Supreme Court cannot fulfil its protective function if its decisions are expressly reversed. Contrarily, Barnett suggests this view ‘demonstrat[es] a faith in the judiciary which is arguably not sustainable nowadays’²¹ considering the quasi-codification of rights in the Human Rights Act. This argument is insubstantial. As Lord Reed outlines, rights preserved in the Act are ‘too general to provide the guidance which is necessary in a state governed by the rule of law’.²² This is significant in indicating that the Bill potentially frustrates the continued importance of the common law in protecting constitutional principles.

Concerning the second ground, the judiciary’s finding of ‘a lack of independence in the [Rwandan] legal system in politically sensitive cases’²³ indicates complacency in allowing

¹⁵ *M v Home Office* [1994] 1 AC 377.

¹⁶ Safety of Rwanda Bill (n 4) cl 5.

¹⁷ Dicey (n 5) 114.

¹⁸ Safety of Rwanda Bill (n 4) cl 3.

¹⁹ Alison L Young, *Democratic Dialogue and the Constitution* (Oxford University Press 2017).

²⁰ Dicey (n 5) 115.

²¹ Hilaire Barnett, *Constitutional and Administrative Law* (13th edn, Taylor & Francis Group 2019) 66.

²² *Osborn v Parole Board* [2013] UKSC 61 [56].

²³ *AAA* (n 2) [93].

individuals to be tried in a system which does not respect the RoL. Deferring judgment to a system which has been found to not respect the independence of the judiciary suggests an acceptance of the legality of a jurisdiction which is contrary to British constitutionalism. Although the legislation would provide a legal basis to argue the contrary, de jure and de facto should not be conflated. Furthermore, deference to the Rwandan system does not protect the constitutional principles of the UK, as their decisions will not directly impact the British jurisdiction. Consequently, the plan does not have the potential to be constitutional, neither literally nor theoretically. Overall, the Rwanda Bill is contrary to the Diceyan preference of judicial deference.

Concluding Remarks

Thus, the Rwanda Bill undermines the Diceyan RoL. Greater scrutiny or the Bill's abandonment is necessary to uphold constitutional principles. It would create uncertainty through arbitrariness, disregard equality, and undermine judicial deference to advance constitutional principles. This article has favoured conciseness over breadth. There is room for further discussion into, for instance, other conceptions of the RoL, a deeper analysis of the democratic dialogue, and the sustainability of modern judicial deference.

Afterword

*By Alexander Cleveewood Ng, BVS LL.M.,
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We live in an exciting era. Recent cases such as *Thaler v Comptroller-General* and *Lifestyle Equities v Amazon UK* marked the courts' attempts at refining the law so that it is still fit for purpose in a world dominated by artificial intelligence and digital marketing. There are no borders to the human mind. The breadth and volume of academic inquiry can only be limited by human imagination.

The CLR has always been a place for students and academics alike to express their views regarding the law. Should a certain doctrine be abolished due to its contradiction with modern values, such as the doctrine of presumption of advancement? Should a certain step be taken by the courts to ease commercial activity or follow international developments? As a long-time CLR author, I can attest to the myriad of opportunities that words can offer a law student. Words allowed me to explicate the unfairness of a (still-)gendered sexual offences regime in England and Wales. Words allowed me to challenge the legal structure of unjust enrichment. Words allow me to go forward and advocate for my clients' interests.

Earlier in the year, we celebrated the inauguration of The CLR Blog., which is an initiative to encourage more students to contribute to legal academia. This allows for a mode of expression outside the ordinary law review format, promoting thus both engagement and enthusiasm. We are proud to have hosted several significant pieces on that platform, exploring diverse ideas ranging from foreign law to an economic analysis of the law.

As we reach the end of this main issue, I urge you not to think of the law as an ageless beast confined to the waters of the eighteenth century, confined to the ruminations of certain social classes. I urge you to consider it as a mother thread guiding societal culture in lockstep with social developments. No input is too trivial or insubstantial. Any major change starts from a figment of the imagination of whom is/was once a struggling law student nearly submitting their Equity and Trusts exam late.

