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Jing Ren and Alex Patrick
Southampton Student Law Review, Editors-in-Chief
September 2020

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Foreword

It is with sincere pleasure that I write this foreword to the Tenth Edition of the Southampton Student Law Review. This edition continues a strong tradition of legal scholarship at the University of Southampton, showcasing some of the best work of students and alumni. We are proud to feature articles that span the breadth of the law, from marine insurance and shipping to constitutional law and human rights, and ultimately to legal decision-making itself.

I have been asked to provide this foreword for the simple reason that I was the person who brought the idea of a law review managed and edited by students to Southampton. The student-run law review has a long history in the United States, but in 2010 only three British universities had started producing them. As I embarked on my legal education, I felt that Southampton would be the ideal place for this to expand.

The person who properly spearheaded the first edition of the journal was my tutor for Legal System and Reasoning, Dr. Harry East, now a junior barrister at Oriel Chambers. Harry and I became good friends quite quickly, often exercising at the gym together; my second year, he moved into the house I was renting with some friends. One fateful evening, circa October 2010, I ran into Harry yet again at the library, and after a discussion of ethics in the law, I asked Harry if he wanted to start a law review with me. He was thrilled by the idea, and said he would approach the faculty with the proposition.

The faculty was receptive to the idea of a journal, but felt it would be inappropriate for it to be led by a first-year law student. Harry took the reins and became editor-in-chief, and we began to solicit contributions. We had our first editorial meeting around November 2010, where we all introduced ourselves. During the academic term, Harry personally was responsible for screening submissions and ultimately deciding which articles we should run. He truly carried the weight of the journal during this time, despite his teaching and research responsibilities.

After the exam period in 2011, we got to work doing cite-checking, copy-editing, and formatting. A team of students, principally doctoral students, did much of the first-pass review work. Supporting Harry as associate editors were me; Dr. Thomas Webber, now Lecturer at the University of Wolverhampton; and Dr. Emma Nottingham, now Senior Lecturer at the University of Winchester. I later co-edited the second edition with Emma. To be frank, editing a law review is hard work. Beyond cite-checking, we learned how difficult formatting in

Microsoft Word can be. Indeed, none of us had any idea how to import the University of Southampton logo onto a coloured background for the cover page without a rectangular overlay, so Harry created a fake logo which he simply typed onto that background. No one ever noticed, though the IT department did create a proper cover page after we published the volume.

The law review was a hit throughout the department. Alongside us, Professor Johanna Hjalmarsson had her students produce a special edition dedicated to marine insurance. Several professors expressed their admiration and pride in their students' work. After we first printed out a copy of the journal, I showed it to a group of law doctoral students relaxing at the Stag's Head, a number of whom had contributed or worked as editors, and its publication easily called for several rounds of ale. Joy Caisley, our lovely law librarian, soon proceeded to get the SSLR onto several legal databases, starting with HeinOnline.

It is thus with incredible pride that I present this Tenth Edition of the Southampton Student Law Review. I am only the founding member of a community of students who have contributed their time, efforts, writing, thought, and creativity to this amazing endeavour over the past ten years, to whom I am exceptionally grateful for keeping this journal going. Southampton graduates have gone on to exceptional careers in legal practice and academia, while the Southampton Law School remains one Britain's premier institutions for legal teaching and research. As we face the challenges of the year 2020 and its aftermath, it is important to bear in mind not only the role law plays in society, but also the role that legal scholarship plays in the law. The Southampton Student Law Review is a part of that.

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New York, 17 August 2020

No Place Like Home: The UK Courts' Cautious Approach on Applying the European Convention on Human Rights to English Housing Law

Zahra Dalal[*]

Abstract

Since the introduction of the Human Rights Act 1998 (HRA)[1] the rights conferred to individuals under the European Convention on Human Rights (ECHR)[2] are directly applicable in domestic courts. Incorporation of these rights into UK law has resulted in challenges to local authority decisions and even in relation to the private housing sector.

This essay focuses on how the UK courts have dealt with the broad applicability of human rights challenges to housing law advocated for by the European Court of Human Rights (ECtHR). It will look at the English courts' interpretation of a "home" in contrast to that of the ECtHR before analysing the case law in the public sector concerning Article 8 ECHR and the significance of the proportionality assessment. It will finally, briefly consider the UK's position on human rights in private landlord cases to conclude, that whilst some caution is warranted, the UK courts have been too narrow in their approach.

Article 8 and the "right" to a "home"

Whilst there is no explicit "right to housing" under the ECHR, it is often regarded as a "qualified right", meaning a public authority has the ability to interfere where it is in the public interest or that of the wider community.[3] Such qualified rights are subject to a proportionality test allowing others' rights to be balanced against them to achieve a fair outcome. The most relevant qualified right regarding housing is found in Article 8 which encompasses the right to respect for private and family life.[4]

The rights under the ECHR have been emphasised by the ECtHR in Strasbourg as being of a broad nature.[5] The enactment of the HRA, which incorporated the latter into UK law, was justified under the umbrella of "bringing rights home"[6] and illustrated the deliberateness of Parliament's intent for these rights to be directly enforceable in domestic courts. The HRA

[*] *LLB with International Legal Studies (Soton)*
[1] Human Rights Act 1998.
[2] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).
[3] Council of Europe European Convention on Human Rights Toolkit, 'Some Definitions' <https://www.coe.int/en/web/echr-toolkit/definitions> accessed 25 June 2020.
[4] ECHR, Article 8.
[5] *Bankovic and Others v Belgium* App no 52207/99 (ECtHR, 12 December 2001).
[6] Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997).

clarified the role of the English courts within this framework as interpreting domestic legislation "in a way which is compatible with the Convention".[7] Some have argued that although the wording of the rights listed in Schedule 1 of the HRA are identical to the ECHR, "a Convention Right need not have the same substantive meaning as a textually identical Convention article".[8] Others suggest that the HRA goes further than defining the Convention rights in the same language but "has created new rights" beyond that "which Strasbourg would give them".[9] Hence the role of the UK courts in interpreting rights is more complex than at first glance.

Notably, the UK courts are not bound by the decisions handed down in Strasbourg but there is an expectation that these should be followed in a consistent way, save for special circumstances (including if the ECtHR have misinterpreted or been misinformed on the domestic law or processes).[10] Commentators have even argued that the incorporation of ECHR rights, particularly Article 8, may provide for a new, equitable property right[11] in addition to those property rights that have been engraved in English law for centuries. Despite this assertion, there have been issues regarding the extent to which the UK courts have been willing to apply this right to English housing law.

Article 8(1) of the ECHR describes the right itself, stating that "everyone has the right to respect for his private and family life, his home and correspondence". Article 8(2) qualifies the latter and sets out that this right can only be interfered with if it is 'necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.[12] To fully understand the significance of Article 8 in the housing law context, it is necessary to look at how "home" is defined and the importance of it. The general approach adopted is one of a non-legal nature; no legal right to be in the premises is necessary for it to be regarded as one's home.

[7] Human Rights Act 1998, s 3(1).
[8] Ian Loveland, *Constitutional Law, Administrative Law and Human Rights* (6th edn, OUP 2012) 640.
[9] Brenda Hale, 'Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?' (2012) 12 (1) HRLR 65, 69.
[10] *R v Horncastle* [2009] UKSC 14, [2010] 2 WLR [11].
[11] Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2009) paras 1.6.1, 1.6.3; Jean Howell, 'The Human Rights Act 1998: Land, Private Citizens and the Common Law' (2007) 123 LQR 618.
[12] Human Rights Act 1998, sch 1, art 8(2).

The flexibility of Article 8 has been exemplified by the ECtHR who have taken into account non-physical aspects including community and a sense of security when deciding if a place is someone's "home". The ECtHR have said that the concept of "home" is 'of central importance to an individual's physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community'.[13] Hence in the broad, European sense, a home is much more than a place for physical shelter. Whilst the Supreme Court has accepted the application of Article 8 in possession proceedings,[14] demonstrated by the Strasbourg courts in *Gillow v UK* [15] and *Buckley v UK*,[16] there is still contention about applying the autonomous meaning of "home" as coined by Strasbourg jurisprudence which simply requires the claimant to show "sufficient and continuing links"[17] with a dwelling.

The reliance placed on abstract concepts such as "belonging" to define "home" has caused concern for the UK courts as they struggle to reconcile the respect due to the home under Article 8 and the recognised proprietary rights in domestic law.[18] However, the broad definition is not to be overstated; Article 8 does not stretch so far as to allow claimants to argue that the state *must* provide them with housing.[19] The Convention does not provide a positive right to a home (unlike other conventions such as the UN International Covenant on Economic, Social and Cultural Rights).[20]

Although Article 8(1) is set out in positive terms, these are qualified by the proportionality test under Article 8(2). The test sets the scope for when intervention with the Convention Right is acceptable – the means employed must be proportionate to the legitimate aims pursued. The Supreme Court in *Manchester CC v Pinnock*[21] held that in the context where the court is asked to make a possession order for someone's home 'at the suit of a local authority…[the court] must have the power to assess the proportionality of making the order, and, in making that

[13] *Ivanova and Cherkezov v Bulgaria*, App no 4677/15 (ECtHR, 21 April 2016) [54].
[14] *Harrow LBC v Qazi* [2003] UKHL 40, [2004] 1 AC 983.
[15] *Gillow v UK*, App no 9063/80 (ECtHR, 24 November 1986).
[16] *Buckley v UK,* App no 20348/92 (ECtHR 29 September 1996).
[17] Antoine Busye, 'Strings Attached: The Concept of Home in the Case Law of the ECHR' (2006) 11 EHRLR 294.
[18] Sarah Nield, 'Article 8 Respect for the Home: A Human Property Right?' (2013) 24 KLJ 147.
[19] Shelter Legal England and Wales, 'Human Rights Challenges – Article 8: Failure to provide suitable accommodation' (10 March 2019) <https://england.shelter.org.uk/legal/homelessness_applications/challenging_la_decisions/human_rights_challenges> accessed 25 June 2020.
[20] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).
[21] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 10.

assessment, to resolve any relevant dispute of fact'.[22] Thus, Article 8(2) can be seen as a balancing act of the legitimate needs of society against that of the individual. The argument often raised by local authorities in such cases is the importance of their role in achieving an effective and efficient housing policy.[23] Resultantly, the English courts have been hesitant in accepting the "justification formula" mantra of Strasbourg that requires States to proportionately balance the respect due to an occupier's home and the wider public interest, despite their duty under s 2 of the HRA to "take into account" the ECtHR's decisions.[24] It is this balancing exercise of holding up the wider public interest against the respect due to an occupier's home, that defines the area of conflict.[25]

Margin of appreciation and deference

Proportionality under Article 8(2) is also subject to the concept of the "margin of appreciation" which operates at two levels. Nield has commented on the unspoken rule that the decisions made by the ECtHR represent "a floor below which human rights values will not fall"[26] but even the European Court has recognised that where matters of social welfare and resource allocation are concerned, signatory states are in a better position to judge what is the "right balance".[27] The domestic courts are thought to be more aware of the social and economic context of their own countries and can decide when interference with a right is necessary. However, the graver the interference with the right, the narrower the margin of appreciation.[28]

The second level, referred to as deference, concerns the domestic courts and features heavily in the reasoning within UK decisions on applying human rights to English housing law. Parliament, as the elected body, has the constitutional right to make decisions which are in the interests of society. This is one of the main reasons behind the wary approach taken by UK courts in this area. The judiciary are not the ones with a democratic mandate; they should

[22] ibid [45] (Lord Neuberger).
[23] ibid [52].
[24] Human Rights Act 1998, s 2.
[25] Sarah Nield, 'Clash of Titans: Article 8, occupiers and their home' in Susan Bright (eds), *Modern Studies in Property Law* (vol 6, Hart 2011) 107.
[26] ibid 104.
[27] ibid.
[28] Rhona K M Smith, *Textbook on International Human Rights* (4th edn, OUP 2010) 178.

therefore show deference to decisions made by the legislature and be cautious about being seen as "overturning" statutory schemes.[29]

When can Article 8 be used as a defence?

Article 8 may be used against local authorities to defend repossession proceedings. There are almost no compatibility problems in scenarios where the court exercises a full merits review such as repossession of a secure tenancy under a discretionary ground. *Pinnock*[30] suggests that where there is repossession against a secure tenant, and where the court uses discretionary powers of reasonableness, this is equivalent to a proportionality assessment. The real issues, therefore, arise in cases concerning mandatory repossessions including the ending of introductory,[31] demoted,[32] flexible,[33] family intervention[34] and non-secure[35] tenancies, as well as the mandatory grounds for repossession under the Housing Act 1985.[36] The mandatory nature of the possession process for such tenancies reflects the narrow approach taken by the UK courts and has raised questions of compatibility with the ECHR.

The policy rationale behind mandatory repossession tenancies is the wish to control anti-social behaviour. Consequently, almost all of the tenancies listed above confer less security of tenure than secure tenancies and are intended for temporary use with minimal court oversight necessary to end them. So long as the local authority landlord has followed the correct procedures, the court must order possession.[37] It is evident that the key features and purposes of these tenancies, which Parliament has set up under statutory schemes, is to achieve specific social policy objectives, creating circumstances where it is easier for local authorities to end a tenancy and use their accommodation flexibly.

Although it could be argued that any compatibility issues between mandatory repossession orders and the ECHR can be combatted by the availability of judicial review proceedings, these can only focus on how the decision was made; there is no proportionality assessment or

[29] Sarah Nield, 'Proportionality and Vindication of Property Rights' in Heather Conway and Robin Hickey (eds), *Modern Studies in Property* Law (vol 9, Hart 2017) 45.
[30] *Pinnock* (n 21) [55].
[31] Housing Act 1996, s 124.
[32] Anti-social Behaviour Act 2003, s 82A(3)(b).
[33] Localism Act 2011, s 154.
[34] Housing and Regeneration Act 2008, s 297.
[35] Housing Act 1985, sch 1.
[36] Housing Act 1985, s 84A.
[37] Housing Act 1988, s 7(3); Housing Act 1980, s 89.

procedural safeguards as advocated for by the ECtHR.[38] Domestic courts rely on the argument that mandatory repossession is a social policy decision taken by Parliament and not for the judiciary to interfere with.[39] The latter exemplifies one of the reasons why the UK courts have been so cautious in fully endorsing the much broader Strasbourg approach.

Great significance is placed on deference and making decisions without undermining Parliamentary authority. Another, and perhaps equally important reason behind their resistance, is the floodgate argument; by applying the broad proportionality assessment to English housing law in the Supreme Court, the Article 8 defence is likely to be relied on by those in the lower courts.[40] This precedent is a luxury the domestic courts have decided they cannot afford to give. Hence, as the case law shows, the courts have been cautious although not without reason.

Excessive caution in early cases

Until recently, the UK courts have been seemingly unwilling to engage with the ECtHR's broad approach on respect for the home conferred by Article 8 on individuals. The House of Lords offered its first view on Article 8 in relation to public sector tenancies in *Qazi*.[41] The case concerned a secure tenant who held a property on a joint tenant basis with his wife. After the marriage broke down, the wife served notice to quit on the council. She had been offered alternative accommodation. Mr Qazi put forward the argument that Article 8 gave the trial court "a proportionality jurisdiction".[42] The majority, emphasising that domestic housing law was clearly compliant with Article 8, rejected his argument and laid down the "initial marker" against human rights defences to possession actions.[43]

Lord Scott, with whom Lords Millett and Hope agreed, strongly stated "that an Article 8 defence can never prevail against an owner entitled under the ordinary law to possession".[44] Lords Bingham and Steyn for the minority disagreed, calling for an application of the

[38] Andrew Le Seur, Maurice Sunkin, Khushal Murkens, Jo Eirc, *Public Law: Text, Cases and Materials* (3rd edn, OUP 2016) 693.
[39] Alan Brady, *Proportionality and Deference under the UK Human Rights Act* (Cambridge University Press 2012) 106-08.
[40] Lorna Fox, *Conceptualising Home: Theories and Policies* (Hart 2007) 302.
[41] *Qazi* (n 14).
[42] Ian Loveland, 'Twenty years later – assessing the significance of the Human Rights Act 1998 to residential possession proceedings' [2017] Conv 174.
[43] Rachael Walsh, 'Stability and Predictability in English property law – the impact of Article 8 of the European Convention on Human Rights reassessed' (2015) LQR 585, 591.
[44] *Qazi* (n 14) [152].

justification formula under Article 8(2). Lord Steyn was particularly harsh in his criticism of the majority, accusing their judgment of being "contrary to a purposive interpretation of Article 8 read against the structure of the Convention".[45] He also said that, in his opinion, the majority's decision would not withstand European scrutiny. Despite this, the ECtHR refused an appeal.

It has been suggested that the split in *Qazi* can be explained by the lack of clarity in the pre-*Qazi* Strasbourg jurisprudence.[46] Regardless, the ECtHR has since clarified its stance through a string of case law. In *Connors*[47] and *Blecic*[48] the court referred to the need for adequate procedural safeguards. The Strasbourg Court's decision in *McCann*[49] reinforced that the need for procedural safeguards applies without restriction and is by no means confined to the eviction of gypsies as the decision in *Connors* implied. They, once again, underlined the importance of "home" stating that "the loss of one's home is a most extreme form of interference".[50] Hence, any claimant in such a position deserves to have the proportionality of the measure determined.

The Strasbourg court really exhibited the prominence placed on the need for strict procedural safeguards in *Zehenter v Austria*.[51] The decision has been deemed noteworthy not only for the fact that it concerned private parties but also because of the proportionality assessment as the means adopted to pursue the legitimate aim were strict time limits. It was held that the State had a positive duty to give specific protection to those vulnerable before the law (in this case the applicant was mentally incapable of acting competently within the given time frame). The outcome here, as well as in previous cases, shows that the Strasbourg jurisprudence on the significance of the proportionality test encompassed by Article 8(2) is strong and clear. Nevertheless, the UK courts have continued to take a cautious approach, moving 'marginally'[52] with regards to the application of human rights to English housing law.

The House of Lords in *Kay v Lambeth LBC*[53] once again rejected a human rights challenge to repossession brought by licensees of housing provided to the homeless. The House was split,

[45] ibid [27].
[46] Nield (n 25) 110.
[47] *Connors v UK* (2005) 40 EHRR 9.
[48] *Blecic v Croatia* (2005) 41 EHRR 13.
[49] *McCann v UK* (2008) 47 EHRR 40.
[50] ibid [50].
[51] *Zehenter v Austria* App No 20082/02 (ECtHR, 16 July 2009).
[52] Nield (n 25) 113.
[53] *Kay v Lambeth LBC; Leeds CC v Price* [2006] UKHL 10, [2006] 2 AC 465.

4:3, but the majority were adamant in their refusal that the personal circumstances of the individual should form part of the Article 8(2) proportionality test. Instead, they concluded that judicial review of the local authority's decision would suffice with the relevant principle of *Wednesbury*[54] reasonableness applying; a decision is considered to be *Wednesbury* unreasonable if it is so unreasonable that no reasonable person or body could have come to it. The minority were more willing to concede that the occupier's personal circumstances could be taken into account but were not prepared to extend this, agreeing with the majority that very rarely will domestic law be incompatible with the Convention. *Kay* gave the House of Lords the opportunity to bring domestic law in line with Strasbourg, but they declined to create a precedent of broad proportionality, instead providing, what they viewed, to be an acceptable alternative. In reality, the alternative of judicial review has done little for victims of repossession who rely on an Article 8 defence, as the procedure is not well-adapted to resolve sensitive, factual questions.[55]

The House was asked to reconsider their position in *Doherty*.[56] However, due to the fact that the Housing and Regeneration Act[57]was about to receive Royal Assent at the time of the decision, their Lordships saw little advantage of making a declaration of incompatibility.[58] It could be argued that the court essentially ignored the minority view in *Kay* even though the ECtHR had expressed a preference for that in *McCann*.[59] The judgment in *Doherty* upheld the local authority's defence under s 6(2)(b).[60] They claimed that their action was not incompatible with the Convention as they were acting in a way that was enforcing the provisions of primary legislation which could not be read or given effect to in a compatible way. The local authority's decision was still subject to judicial review, as suggested in *Kay,* but the court did little to broaden domestic law. If anything, the decision only increased the constrain and hesitation of the lower courts in such cases in being bound by two strong authorities.[61]

[54] *Associated Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).
[55] Ian Loveland, 'The newest latest last word on the relevance of ECHR Article 8 to possession proceedings' [2010] JPL 415, 418.
[56] *Doherty (FC) and others v Birmingham City Council* [2008] UKHL 57.
[57] Housing and Regeneration Act 2008.
[58] Human Rights Act 1998, s 4.
[59] *McCann* (n 49).
[60] Human Rights Act 1998, s 6(2)(b).
[61] *Kay* (n 53); *McCann* (n 49).

***Manchester CC v Pinnock* – A step in the right direction?**

The English courts have been accused of being preoccupied with "the speed and efficiency of county court possession hearings".[62] However, *Pinnock* saw the Supreme Court concede to the expanding of mandatory possession proceedings and the need for a proportionality assessment. Here, the council had granted Mr Pinnock a secure tenancy of a property which he lived at with his partner and, sometimes, their children who had a long history of antisocial behaviour. Consequently, possession proceedings were brought and the tenancy was demoted at first instance, under the Housing Act 1996.[63] Further anti-social behaviour resulted in more possession proceedings being brought for which the council could obtain a mandatory outright possession order due to the nature of the new demoted tenancy.[64]

The appeal in the Supreme Court gave rise to the issue of whether the jurisprudence of the Strasbourg court required the domestic court to consider proportionality of evicting a person from his home under Article 8. It also brought to light the question of whether the demoted tenancy regime could properly be interpreted to comply with the requirements of Article 8. Lord Neuberger, in his leading judgment, made reference to the "consistent and unambiguous" approach provided by the previous decisions, stating that "it would be wrong for this court not to follow that line".[65] The court therefore held that the occupier of a home is entitled to a determination of the proportionality of eviction by the court in every possession claim brought by a public authority. Lord Neuberger underlined the point that the Supreme Court is not bound to follow every decision of the ECtHR and went further to say that to expect this would not only be "impractical" but also "destroy" any constructive dialogue to develop the Convention.[66] His Lordship stated that 'in virtually every case where…[there] is no contractual or statutory protection, and the local authority is entitled to possession…there will be a very strong case for saying that making an order for possession would be proportionate'.[67]

Whilst *Pinnock* conceded the need for proportionality, this was not without the limitation of a very high threshold. Lord Neuberger set out six general points as to when proportionality may be considered.[68] Firstly, Article 8 will only be relevant where a person's "home" is threatened.

[62] Nield (n 25) 118.
[63] *Pinnock* [2009] EWCA Civ 852, [2010] 1 WLR 713.
[64] ibid [65].
[65] *Pinnock* (n 21) [46].
[66] ibid [48].
[67] ibid [54].
[68] ibid [60]-[64].

Article 8 will also only be considered if it is raised by the residential occupier; if raised, the court must first consider the argument summarily and should only proceed if it is satisfied that there is a seriously arguable case. Furthermore, where domestic law justifies an outright possession order, in exceptional circumstances, Article 8 may justify granting an extended period of possession or suspending the possession order or even refusing an order entirely. Additionally, the point was made that the court's ability to assess proportionality under Article 8 may require revisitation of certain statutory and procedural provisions. Finally, Lord Neuberger stated his agreement with the view of the Equality and Human Rights Commission that proportionality is more likely to be relevant where the occupier is "vulnerable".[69]

Pinnock represents a significant deviance from the previously very cautious approach but also underlines that the current state of English law assumes proportionality in favour of the local authority. Arguably, the judgment has "generated many more questions than it has answered".[70] Commentators have noted that more applicants will be raising proportionality challenges and that the decision left open the question of whether proportionality should be considered to have horizontal effect in private landlord and tenant possession claims.[71] Whilst it was made clear that the proportionality defence is more likely to succeed where a person is vulnerable, the judgment failed to expand on what "vulnerable" means or what a seriously arguable case will look like. The lack of guidance has caused discontent[72] and emphasises that whilst the UK courts claim to be widening their approach, they are not willing to go so far as to giving explicit reasoning. The cautionary approach has been justified by the fear that further expansion may result in floodgates opening in the lower courts.

Did *Pinnock* have the desired effect?

The issues raised in *Pinnock* were reconsidered by the Supreme Court in *Hounslow LBC v Powell.*[73] Both of these cases have been said to represent "a *volte face* on the impact of Article 8 in possession proceedings".[74] *Powell* was the long awaited sequel in the saga of case law and concerned both the introductory tenancy scheme and non-secure tenancies granted under the

[69] ibid [64].
[70] Stephanie Smith, 'Case Comment: Manchester City Council *v* Pinncok & Ors [2010] UKSC 45' (December 2010) <http://ukscblog.com/case-comment-manchester-city-council-v-pinnock-ors-2010-uksc-45/> accessed 20 June 2020.
[71] 'Brave New World or Same Old Story' (*Nearly Legal: Housing Law News and Comment*, 4 November 2010) <https://nearlylegal.co.uk/2010/11/brave-new-world-or-same-old-story/> accessed 27 June 2019.
[72] Walsh (n 43); Nield (n 29).
[73] *Hounslow LBC v Powell; Leeds CC v Hall; Birmingham CC v Frisby* [2011] UKSC 8, [2011] 2 AC 186.
[74] Walsh (n 43) 591.

homelessness regime of the Housing Act 1996. The nine-judge panel ultimately approved the approach adopted in *Pinnock*. Lord Hope rejected the argument that local authorities should have to put forward their proportionality justification in each case where there is a mandatory repossession. He argued that to require this "would…collapse the distinction between secure and non-secure tenancies" resulting in "prolonged and expensive litigation" which could be better spent on promoting social housing.[75] In Lord Hope's opinion, the court should assume the proportionality of the local authority's decision unless the claimant can prove they have a "seriously arguable case" – all that is needed to satisfy the ECtHR.[76]

This approach is validated because the decision of any local authority to seek possession in a homelessness case has to be taken with regard to all the background required under Part VIII of the 1996 Act. Lord Hodge reemphasised this in *R (on the application of N) v Lewisham LBC*[77] regarding an *ab initio* trespasser who referred to the procedural safeguards for occupants in the statutory scheme.[78] Thus, the English court retained the position that there is no need for structured proportionality and reaffirmed the position in *Pinnock.* Cowan and Hunter have argued that *Powell* narrowed *Pinnock* and emphasised the limits of the proportionality jurisdiction.[79] However, in light of more recent cases,[80] this view has been amended to label the proportionality jurisdiction as "a white elephant" having little effect in reality due to the unlikelihood that cases will cross the "seriously arguable" threshold.[81] The ultimate question is always whether the making of a possession order is lawful and proportionate, but"'there remains a strong presumption in favour of the enforcement of the right to exclude",[82] rebuttable only when a very high threshold can be met.

Southend on Sea BC v Armour[83] – A breakthrough?

The decision in *Powell* illustrates the lack of development or broadening on applying the proportionality aspect of the ECHR to domestic law, for which *Pinnock* was meant to be the

[75] *Powell* (n 73) [41].
[76] ibid.
[77] [2014] 3 WLR 1548.
[78] ibid [69].
[79] Dave Cowan and Caroline Hunter, '"Yeah but, no but" – Pinnock and Powell in the Supreme Court' (2012) 75(1) MLR 78.
[80] *Corby BC v Scott* and *West Kent Housing Association Ltd v Haycraft* [2012] EWCA Civ 276, [2012] EWHC 169 (QB); *Riverside Housing Group v Thomas; Ford v Alexander* [2012] EWHC 266 (Ch).
[81] Dave Cowan and Caroline Hunter, '"Yeah but, no but", or just "no"? Life after Pinnock and Powell' (2012) 15(3) Journal of Housing Law 58.
[82] Walsh (n 43) 593.
[83] [2014] EWCA Civ 23, [2014] HLR 23.

catalyst, although some commentators opine that the significance of both cases is overstated and "devoid of any practical effect".[84] Loveland has admitted that it is tempting to take such a view due to the lack of reported authority in which an Article 8 defence has succeeded.[85] There appears to be only one case, namely *Armour,* which was a rare success. Here, the occupier lived with his 14-year-old daughter under an introductory tenancy given to him by the local authority. He was accused of anti-social behaviour including verbal abuse of his neighbours and contractors which resulted in a claim for possession. However, at the hearing there was evidence that he had recent good behaviour and that eviction would not only be detrimental to his health but would affect his daughter.

The Court of Appeal looked closely at their function as an appeal court. This was due to the argument put forward by the local authority that 'whether a given set of facts crosses the high threshold of giving rise to an Article 8 defence is a question of law…there is no question of discretion involved'.[86] Lewison LJ agreed that there was no question of discretion and said that the applicable test was not "a bright line test" but more of a "value of judgement".[87] The local authority's submission that compliance with the terms of the tenancy did not amount to the level of exceptional circumstances warranting a successful defence under Article 8 was also considered. On this point, Lewison LJ stated, as highlighted in *Pinnock*, that "exceptionality is an outcome rather than a test".[88] Thus, he distinguished the case of *Leeds CC v Hall*[89] (which had been joined with *Powell)* as in that case the anti-social behaviour had persisted for the rest of the year, concluding that the local authority's decision was disproportionate and a breach of Mr Armour's Article 8 rights.

Notably, the decision underlined the nature of the proportionality test as a "value judgment" which an appeal court would be wary of interfering with.[90] *Armour,* at first glance, appears to be a victory for tenants as although the defence may not be successful, occupiers are more likely to successfully delay a possession order by arguing for a hearing to be adjourned or

[84] Loveland (n 42) 189.
[85] ibid.
[86] *Armour* (n 83) [17].
[87] ibid.
[88] ibid [30].
[89] *Leeds City Council v Hall* [2011] 2 AC 186, [2011] UKSC 8.
[90] Hardwicke Chambers 'Article 8 – A chink in the landlord's armour? A look at Southend on Sea BC v Armour' 13th March 2014 <https://hardwicke.co.uk/article-8-a-chink-in-the-landlords-armour-a-look-at-southend-on-sea-bc-v-armour/> accessed 27 June 2020.

lengthened.[91] In cases where anti-social behaviour is alleged, the delay can be used advantageously by the occupier to demonstrate a change in behaviour. Nevertheless, the reluctance in interfering with the value judgment of a trial judge should not be overlooked as this is likely to be used to support decisions making orders for possession as well as those refusing them.[92]

***McDonald v McDonald*[93] – Reinstating restriction**

As mentioned previously, *Pinnock* (and subsequently *Powell)* did not answer the question as to whether proportionality can be deemed to have horizontal as well as vertical effect. This issue came before the Supreme Court in the case of *McDonald*. The appellant, Fiona McDonald, claimed that the judge erred by not taking into account Article 8(2) in his decision of making a possession order of her assured shorthold tenancy under s 21 of the Housing Act 1988. Her claim was based mainly on the fact that under s 6(3)(a) of the HRA, a court is a public authority and must therefore act in accordance with Convention rights. However, the appeal was dismissed with the Supreme Court rejecting the broader application of proportionality shown in the public housing sector to home repossession by a private landlord.

They came to this conclusion for two main reasons. Firstly, in this case the landlord's right to possession was governed by statute[94] and contract; it was not for the court to interfere with the "appropriate balance" Parliament has struck.[95] The court would be required to balance the landlord's rights under Article 1, Protocol 1[96] in an unpredictable way. Secondly, whilst there is some support in the Strasbourg jurisprudence that Article 8 is engaged, there is no requirement that a proportionality assessment be carried out.[97]

Although the decision has been received with great relief by private landlords, the reasoning has been criticised for simplifying the complex reality of housing provision and showing excessive deference to the legislature.[98] Lees argues that the court's reasoning for not

[91] Marina Sergides and Tessa Buchanan 'Article 8 and disability discrimination: Where are we now?' (2014) 18(6) L&T Review 210.
[92] ibid 211.
[93] [2016] UKSC 28, [2017] AC 273.
[94] Housing Act 1988.
[95] *McDonald* (n 93) [40]
[96] ECHR Article 1, Protocol 1.
[97] *McDonald* (n 93) [59].
[98] Sarah Nield and Emma Laurie, 'The private-public divide and horizontality in the English rental sector' [2019] PL 724.

interfering where the rights and obligations of private parties are governed by statute or contract is unusual because any potentially relevant statutory provisions must include the HRA as this is exactly what the interpretation obligation in s 3 intended.[99] Admittedly, this argument does not guarantee an outcome, however it should not be assumed that Parliament "intended" for the balance between the rights of tenant and landlord to be governed only by the Housing Act 1988. Lord Neuberger made a broader policy point that where proprietary rights are concerned and neither party is a public authority, 'the state should be allowed to lay down rules which are of general application, with a view to ensuring consistency of application and certainty of outcome'.[100] However, in asserting general rules of application, the state is already interfering with private rights and is essentially referring to the protection conferred by its own enactment of the HRA.[101] Disappointingly, even the ECtHR agreed that if the proportionality of a possession order is disputed, procedural horizontality regarding the court's function as a public authority did not need to be demonstrated.[102]

Although *McDonald* affected more than half the UK's renting population,[103] it did not shut the door on proportionality in the private rental sector entirely, finding that there was a requirement for the County Court to consider proportionality before making a possession order under s 21.[104] Lord Neuberger left open the possibility of challenging the law itself, rather than the application of that law to the appellant, but it is difficult to imagine a different result unless the challenge was based on a breach of Article 8 and Article 14, regarding discrimination. The judgment in *Ghaidan v Mendoza*[105] (a successful Article 14 case) shows that the rights enshrined in the ECHR can be applied horizontally in an individual-individual case where the challenge is to the compatibility of the legislation, but the rejection of this in *McDonald* has ratified the cautionary approach of the courts.

Conclusion

Ultimately, the UK courts have been extremely cautious in their application of the ECHR to English housing law. The very early decisions, such as *Qazi,* suggest that the judiciary were excessive in their reasoning. Subsequent decisions have shown some, albeit not huge, steps in

[99] Emma Lees, 'Article 8, proportionality and horizontal effect' (2017) 133 LQR 31.
[100] *McDonald* (n 93) [43].
[101] Lees (n 99) 32.
[102] *FJM v UK* App no 76202/16 (ECtHR, 29 November 2018).
[103] Loveland (n 42) 191.
[104] *McDonald* (n 93) [24].
[105] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 3 WLR 113.

the right direction. It seems that the Strasbourg court's call for procedural safeguards has fallen onto deaf ears with the outcomes of *Kay* and *Doherty* making little progress. The availability of judicial review to local authority decisions as an alternative remedy for applicants is not entirely satisfactory.

Admittedly, their caution is somewhat justified by policy reasoning; a narrow approach results in local housing authorities being able to use accommodation flexibly and efficiently as well as the concept of deference to Parliament. The test of reasonableness gives courts more control rather than setting a precedent that risks opening the floodgates to Article 8 defences, particularly in the lower courts.

The Supreme Court's concession to proportionality in *Pinnock,* followed in *Powell,* was significant in moving the law more in line with decisions of the ECtHR. Nevertheless, the courts have been careful in extending the application of Article 8 without limitations, emphasising the need to meet the high threshold of a seriously arguable case. The rare success in *Armour* should not be overstated and has little binding effect. Whilst the court's negative position on extending proportionality to the private sector in *McDonald* was supported by Strasbourg, it also confirms that the resistance from the UK courts is unlikely to change.

The Mean, Harmonious Decision-Making and the Case of Sally Challen

Dr Ebenezer Laryea[*]

Abstract

The task of legal decision-making sits at the very heart of the legal system as a direct representation of how Law expresses itself as a social system. In order for Law to get its expression right and avoid wrongful convictions or miscarriages of justice, the endeavour of legal-decision making is one which must be pursued with balance and harmony. This article argues that pursuing balance and harmony in legal decision making allows for the legal decision-making process to be anchored at a mean between Law's competing extremes. It is further argued that the anchoring of the legal decision-making process at a mean point between Law's extremes ensures that the subject individual in any given case is not lost to Law. Both these arguments are demonstrated through an analysis of the recent Court of Appeal decision in *R v Challen* [2019] EWCA Crim 916 – an authority which this article highlights as an example of the kind of harmonious decision-making which can be achieved through the pursuit of balance and a mean in legal decision-making.

Introduction – Upholding the rule of balance

In almost all instances of human endeavour, achieving a correct balance between extremes often makes the difference between success and failure. As the proverbial saying goes, too much of one single thing is bad, and can lead to results different to that which are desired. For example, too much sleep is bad just as engaging in overly excessive work is equally bad – too much leisure is bad, as is too much a time spent without leisure – gluttony is bad, so is extreme hunger which leads to malnourishment – extreme inflation is bad and unwanted in any country, but so is deflation which leads to economic weakness. There is thus general agreement, that an endeavour pursued with balance is one which achieves the most optimum results.

Such is the principle underpinning Aristotle's Golden Mean[1] – it is about getting a balance between two opposing extremes so as to achieve optimum results. Notwithstanding, the Golden Mean is about much more than balance; it also about harmony – specifically, the harmony which can be found in-between two extremes; between work and leisure, between courage and mindfulness, between praise and blame, between narrowness and wideness.[2]

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[1] C.D.C. Reeve, *Aristotle: Nicomachean Ethics* (Hackett Publishing 2014).

[2] ibid.

Like many others within our social system, the process of legal decision-making is an endeavour which must be pursued with balance and harmony if Law is to obtain its optimum result i.e. justice. The harmony which can be found in legal decision-making lies at a median point between two extremes; (1) Law's universal nature, and (2) the particularities of a given case.

Given that legal decision-making will always be faced with the tensions created by both these extremes, it is imperative to engage them creatively through acts of balance which beget harmony; the foundation and the basis upon which Law can work to achieve results of virtue through good legal decision-making.

Whenever legal processes are devoid of balance, Law loses – as the result is often a wrongful conviction or a miscarriage of justice. To illustrate; if I were invited to be the judge of a cooking competition and – in so doing – came to realise that all the dishes prepared could be classed into one of two categories, i.e. they were either too salty, or completely without salt and therefore without taste, my verdict would be that none of the dishes merited a win mainly because the dishes which were too salty would not taste at all well, and those which were without salt would have no taste at all.

If, however, there was a dish made during the competition, where the chef was able to maintain a balance in the use of salt and spices, to the extent that they are able to achieve a harmony between the extremes of having too much salt and having no salt at all, then that would be a dish worthy of winning the competition because it is a dish that would taste right and taste the best. And just as the winning dish, Law too wins when judges adopt a balanced approach in their decision making.

The central argument of this article is that if Law and its handlers were to uphold the rule of balance in any given case, they would be able to anchor the legal decision-making process at the *mean* point between Law's two extremes; i.e. at the point where we have enough of the Universal nature of Law while paying enough attention to the particularities of a case to ensure that the subject individual is not lost to Law.

This argument will be demonstrated through a discussion of the recent case of Sally Challen.[3] Further, it is the aim of this article to highlight the legal decision-making process seen in the Sally Challen case as an example of the kind of harmonious decision-making which can be achieved through the pursuit of balance and a mean in legal decision-making.

Beauty in Law

In his dialogue of Whitehead's Metaphysics and the Law,[4] Jay Tidmarsh maintains that any progressive and successful society must aspire to certain key qualities of which Beauty is chief.[5] A commitment to beauty will lead us towards a burning and feverish desire to find a reconciling and a synergy of feelings between two opposing extremes which have sharp contrasts.[6] Put differently, our commitment to Beauty will help us attain harmony between opposing extremes; harmony occurs when there is a symmetry and a working together of feelings between two opposing extremes.

As Tidmarsh suggests, the ultimate goal for every system within society, for every actor within the social sphere and for every process worked by that actor, is Beauty. The entire craft of the Universe is directed at the attainment of Beauty. Our pursuit of fairness, justice, morality – our entire support and insistence upon the doing of all that is good and all that is true, is justified by the fact that such pursuit, such support, and such insistence creates Beauty. Otherwise, such pursuit, such support and such insistence would not mean much and would have no special importance.[7]

Wrongful convictions/miscarriages of justice do not make Law beautiful, rather there is an ugliness that is created as result of them – where individual people suffer, and one where Law loses credibility and fails to attain its highest goal.

Law's path to Beauty can only be paved by harmony – and harmony in turn can only be realised through balance. Most appropriately therefore, Tidmarsh expresses and articulates this point quite clearly by asserting that we can do the job of having two contrasting extremes that are forged and resolved into a harmony which is greater than either of the extremes held in contrast.

[3] *R v Challen* [2019] EWCA Crim 916.
[4] Alfred Whitehead, *Process and Reality* (Free Press Publishing 1978) 90.
[5] Jay Tidmarsh, 'Whiteheads Metaphysics and Law: A Dialogue' (1998) 62(1) Albany Law Review 1, 9.
[6] ibid.
[7] ibid.

What is needed therefore is a novel solution which harmonizes law and morality within some new and greater Beauty by harmonising the tensions that exist between Law's universal nature and the unique particularities of the individual to which the legal decision-making process must pay attention.[8] Harmonising these tensions and harnessing them through the introduction of *balance* and a *mean* will make Law beautiful.

Nevertheless however, there is the risk that such a solution might produce far worse results than there would be if we did not attempt to navigate the opposing extremes by attaining *balance*. Rather than making things better, we could well make things worse. Nonetheless, what must be understood is that an error, no matter how grave, is often the price that we pay for progress.[9] We therefore need not fear to err – for to err is human – and an error does not become a mistake unless we fail to correct it.

So then the work of Beautifying Law, through harmonising the tensions of the two extremes, through introducing a balance and mean, must and can go ahead. To this end, it is important that we preserve the contrasts that exist between the two extremes whilst avoiding them. The contrasts give rise to tensions, but neither are the problem – the real problem is the tensions left unattended, un-harmonised and unworked.

This point is supported by Charles Hartshorne who writes that the contrast that must be preserved is that between actual and possible, or concrete and abstract.[10] Mere nominalism, asserts Hartshorne, and the denial of universals, makes language unintelligible – for words express universal aspects of things if they express anything. However, the attempt to explain particulars as mere conjunctions of universal also fails. Thus, affirms Hartshorne, the contrast between Law's universal nature and the particularities of a case must be preserved, and the tensions created, as a result of the contrast, must be worked.[11]

In light of this, the real question before us is one of how we work the contrasts and their resulting tensions constructively, in a manner that is positive for Law and makes Law beautiful? The issue of how we work the contrasts and their resulting tensions constructively,

[8] ibid.
[9] ibid.
[10] Charles Hartshorne, *Wisdom as Moderation* (State University of New York Press 1987) 7.
[11] ibid.

in a manner which makes Law beautiful can be addressed by the introduction of balance and a mean into the legal decision-making process.

The introduction of a mean will produce harmony by reconciling the contrasts between Law's universal nature and the particularities of any given case. And it will, as a result, nullify the negatives of the tensions which result from those contrasts. Law will be helped in attaining its functioning of justice and fairness – and in attaining such function, Law will be beautiful.

Harmonious/beautiful decision making – Positioning the mean

The introduction of balance in legal decision-making through the finding of a mean is crucial to harmonising the tensions generated by the contrasts between Law's Universal nature and the unique particularities of a give case. The question of how we go about positioning and determining the mean is one which is therefore necessary to address.

The mean between the extremes can be achieved on different levels of intensity or complexity of experience, as explained by Hartshorne. There are intense sufferings, intense enjoyments – as well as tepid suffering and enjoyments. Whatever the intensity is of an event or experience, it is possible to achieve a mean between two extremes for that event or experience regardless of how complex the facts are.[12]

Intensity or complexity depends partly on contrast and variety. The richer the contrasts that are embedded into a matter or experience, the more crucial it is to strike a mean, and the greater the aesthetic and virtuous value of that mean. Hartshorne argues that there is a sense in this regard where beauty is, in effect, our mean. He makes reference to our use of the word 'pretty' to illustrate this point.[13]

We use the term 'pretty' for a less intense form of an extreme.[14] So for instance, in commenting on a statutory provision, one might say the legislation is 'pretty lengthy'. The word pretty, which in itself, is used to describe a thing of beauty, is used in this sense to describe a mean between two extremes. By saying that the legislation is 'pretty lengthy', the person from whom the statement originates is using a word which describes beauty to articulate a mean.

[12] ibid 52.
[13] ibid.
[14] ibid.

The mean ought to be positioned in an area between the extremes which is an area of moderation. This means that a judge at the helm of a legal decision-making process must begin that process by deriving guidance, by reason, from the facts of the case as to which area between the two extremes (Law's universal nature and the unique particularities of the given case) serves the cause of Law best as the area of moderation. By example, if the defining facts of a matter are stated as fear and confidence, then the point of moderation (mean) between two extremes could be 'courage'; a mean point between one extreme of excess and the other extreme of deficiency.

With that said, it is essential to point out that the mean need not necessarily be a point equal to the halfway point of each extreme i.e. an exact average point. While it may indeed be so in some cases, the appropriate and relevant mean may not always be the distance equal to the halfway point of each extreme. Rather it could be situated at a point which is beyond the halfway point to either extreme.

For the purposes of illustration, let us for instance say that two extremes are represented by the numbers ten (10) and one (1), where ten (10) is too many and one (1) is too few. The number five (5) is the mean of the two extremes – and by selecting that number we maintain balance and avoid the extremes; a deficiency (1) and an excess (10).

In similar fashion, we could possibly select the number six (6) as a mean, or the number four (4) or even possibly the number seven (7) as a mean. Any number between two (2) and nine (9) could well be the mean.

In practice, the correct positioning and achievement of the mean in legal-decision making requires that we weigh every rule against the facts of the case as presented before us – asking the question of whether the application of the rule is warranted by the facts, or whether we ought to suspend the application of that rule, or even re-interpret it in its application to the facts of the case.

This allows us to find an area of moderation between Law's universal nature and the need for the unique particularities of any given case to be recognized by Law. It is as though we must have the rule/Law's universal nature in our right hand, but also have the unique characteristics

and particularities of the case in our left hand – and we must construct judgment with both hands. Both hands, and their contents (Universal and Particular*),* need to work together.

If the facts warrant that we apply our right hand (Law's universal nature) much more firmly than our left, then we must do so. If the facts warrant that we apply our left hand (Particular) much more firmly than our right (Universal*),* we must do so. And if the facts warrant us to apply both our left (Particular*)*, and right (Universal) hands equally and evenly, we must do that as well if we are to attain beauty within legal decision-making.

But how would we know?

So how do we know whether the facts warrant a much firmer application of this hand or the other – or an even application of both hands? For a legal decision-maker to know what the facts of the matter warrant, he/she must engage with the story of the individual(s) and interact with that story in a creative and productive manner.

Put differently, a legal decision-maker must engage in an 'act of knowing' which will provide the knowledge required to place him/her in the position of determining what the facts warrant; whether we should apply our left hand (Particular) more firmly than our right – whether they warrant that we apply our right hand (Universal) more firmly than our left – or, whether the facts warrant that we apply both right (Universal) and left (Particular) evenly.

The application of rules must be guided by a strong and accurate perception (feeling, hearing and seeing) of the facts of matter. In other words, the positioning of the mean must be influenced by the judge's insight, recognition, cognizance and thoughtfulness of the subject's story within the facts of the case. It is the judge's insight, recognition, cognizance and thoughtfulness of the subject's story, which will provide him/her with sufficient enough knowledge to realize the sort of mean which is practically suitable to be applied and warranted by the facts. This way, a judge is able to resist the impulse to surrender the legal decision-making process to Law's universal nature because he/she has undertaken the act of knowing the individual's unique particularities.

The mean at work – Implications for Law as a system

Law is an institution in itself – and much like any institution, it has its own rules, boundaries, procedures and remedies. Sally Falk Moore writes that the institution of Law represents

society's attempt, through government, to control human behavior, prevent anarchy, violence, oppression and injustice by providing and enforcing orderly, rational and fair and workable alternatives to the indiscriminate use of force by individuals or groups.[15]

The systems theorist, Luhmann, supports Moore's view of Law.[16] Luhmann is thought to offer the most comprehensive and sober theory on societal systems, especially the Legal System. Luhmann argues that the legal system performs in society by differentiating itself from other social systems and creating its own operations – one of which is its filtration system.[17]

Law uses its filtration system to sift out information that is presented to it from other sources with the objective of reducing the volume of information that it needs to process. The filter within Law's filtration system is its binary code (legal/illegal).[18] With its binary code, Law re-evaluates, compresses and refines the information that is presented to it into a form that it recognizes, can accommodate and work with – specifically speaking, it has to transform all inbound communication into legal communication.[19]

Turning all inbound communication into legal communication is central to how Law operates as a system. Without it, Law would not be Law. Filtering inbound communication represents an effort on Law's part to put aside all the information this is not needed so it is able to focus on the information which it needs – a getting rid of any 'noise' so it can hear much clearly. This filtration process also tends to make Law blind so that it cannot see.[20]

While Law's filtration process is an essential part of how Law functions as a system, the unfortunate result of it is that it is often the unique characteristics/particularities of the subject individual (particular events, particular circumstances, particular ailments, particular conditions regarding the individual) which mostly gets filtered and sifted out completely as noise.

Having fewer particularities to take into account when adjudicating is welcomed by Law – the fewer things Law has to consider, the quicker and cleaner a decision can be made. This is what

[15] Sally Falk Moore, *Law as a Process* (Routledge Publishing 1978) 2.
[16] Niklas Luhmann, *Risk* (Gruyter Printing Press 1993).
[17] ibid 566.
[18] Emilios A. Christodoulidis, 'The Inertia of Institutional Imagination' (1996) 59(3) Modern Law Review 377.
[19] ibid.
[20] Roberto Mangabeira Unger, *Law in Modern Society* (Free Press 1976) 206-207.

makes tunnel vision possible – without much to consider, the decision becomes a relatively straightforward one which is heavily influenced by Law's universal nature.

Law's default instinct is to steer clear of complications. The more factors there are to consider for Law, the more complex a case is. Law's fear in this regard is that it will be less predictable and less simple – and that with it having more factors than usual to consider, its workings will be thrown into an undesired state of chaos.

Law relies on its filtration system to steer clear of the particularities of a case which might cause complications. To illustrate, Law is very much like the black and white televisions of the 1950s; it presents a simple picture in a format it can support. The picture it presents is devoid of details of color – and never minding this, it will present the colorless picture to the viewer because that is the only the picture its system can support.

But how do we see the true picture without the richness, detail and particularity of its color? How can we truly assess the quality of the picture if what is presented is incomplete and only half of what the picture really holds? Surely it is only to our advantage that we are able to view the picture in its fullness and entirety, complete with all the different colors. And is it not only fair that we appreciate the 'whole picture' (including the unique particularities of the case), before we pass judgment on its quality?

Such queries rightly raise the very complex question of how we help Law present a picture that is rich with all the particularities, while still maintaining its universal nature and core processes.

One might think the easiest answer lies in the elimination of Law's filtration system. However, this is not a realistic option as doing so would amount to changing Law's systematic processes so fundamentally that Law would cease to be Law.

The only workable solution therefore lies with the mean; by striking a mean and anchoring the legal decision-making process at that mean, we are able to give Law the ability to present a colorful picture – one which is complete with all the unique particularities of the subject individual as opposed to a mere black and white picture. Additionally, the striking of a mean is the most ideal solution because it is one that can be worked without us having to take away

Law's filtration system or alter its characteristically universal nature. In other words, Law can remain Law while recognizing particularity.

Systems theory gives us an understanding of the legal process, its limits and the problem of how the individual human being is often lost within its autopoietic equation.[21] Law has a capacity and ability to think independently and separately from the actors in its process. Though Law by design operates as a closed and independently thinking system, there is a window of opportunity, by the striking of a mean, through which it can be given the capability to be open, inclusive, and thoughtful of subject individuals.

Law can work as a 'two-way street' – where it moves in one direction but accepts and allows traffic from the opposite direction. By striking a mean we are able to make Law a 'two-way street' where there is oncoming traffic of information. Law has to pay attention to this traffic, it has to respect its right of way and it has to, on occasion, give way to this oncoming traffic (information) if necessary.

Demonstrating the mean: The case of Sally Challen

The case of Sally Challen captured the attention of the country when news broke that the Court of Appeal had quashed her conviction.[22] Sally's case bears much relevance to the issues raised in this article because it is a recent case which demonstrates how the striking of a mean between Law's universal nature and the particularities of a given case can lead to results of virtue and beauty in legal decision-making.

Sally had killed her husband, Richard, in 2010 after suffering years of abuse by him.[23] While it may not matter much to the universal nature of Law, Sally's background is extremely important to understand and to take into account if we are to have a full and true picture of Sally – not one which is merely black and white, but one which has the full color of Sally's life.

[21] Richard Nobles and David Schiff, 'Miscarriages of Justice: A Systems Approach' (1995) 58(3) Modern Law Review 299.
[22] 'Sally Challen at home after murder conviction quashed' (BBC News, 7 April 2019) <https://www.bbc.co.uk/news/uk-england-surrey-47845450> accessed 10 May 2019.
[23] *Challen* (n 3).

Sally was only sixteen when she met Richard. Very much like many other romance stories, their romantic relationship began with much excitement. Not long after however, Richard began to abuse Sally.[24] He bullied and belittled her on many occasions and exercised control over her spending and the people she interacted with. Whilst he forced absurd restrictions upon Sally, Richard placed no such yoke upon himself. He spent their money as he wished and pursued other women. Richard would abuse Sally emotionally whenever she challenged him, manipulating her to make her think and believe that she was going mad.[25]

At a time in their marriage, Sally did manage to gather the courage to begin divorce proceedings to leave Richard and start a new life. However, Richard had made her so emotionally dependent on him that she soon after returned to him.[26] Richard made her sign a 'post nuptial' contract which stipulated that she would have no financial claim if the couple were to divorce in the future. Absurdly, the contract also further forbade her from interrupting Richard in conversations or speaking to strangers.[27] The contract put Sally in an even more vulnerable position, and Richard would take full advantage of that to abuse her the more. Being so emotionally dependent upon Richard, Sally wanted to believe that they could be together. Nonetheless, the abuse continued unabated and Sally found herself at a breaking point.[28]

One afternoon Richard sent Sally to get his lunch. He did this so Sally would not be present when he placed a call to arrange a meeting with a woman he had been pursuing romantically.[29] Upon her return, Sally was very suspicious about what Richard had been up to while she had been away. She challenged him, and he in turn commanded her not to question him – following which, she struck him repeatedly with a hammer resulting in his death.[30]

Sally's story provides us with a full picture of all the particularities of her life. She had been abused for many years by a man who was meant to protect her. Richard had, intentionally and systematically, turned Sally into a shell of her former self; she was vulnerable, marginalized, without confidence and lived everyday with the hurt which he had continuously caused her for years. The years of abuse Sally suffered no doubt had a significant impact on her mental health.

[24] 'Sally Challen' (Justice for Women) <https://www.justiceforwomen.org.uk/sally-challen-appeal> accessed 10 May 2019.
[25] *Challen* (n 3).
[26] ibid.
[27] ibid.
[28] ibid.
[29] ibid.
[30] ibid.

One can only imagine the sort of mental health issues she was suffering from at the time when she killed Richard.

At trial, Sally's legal team argued diminished responsibility on the basis that she was suffering from a depressive disorder.[31] The facts of her husband's abusive behavior were presented and treated as relevant to provocation. Had the facts related to the years of abuse been explored appropriately, issues such as Richard's intimidation of Sally, his financial control of her and his attempts to isolate her would have been put before the jury in far greater detail.[32] These issues were either not at all explored, or were presented to the jury as being representative of unhappiness and uncertainty, as opposed to abuse and entrapment.[33] In retrospect, it is reasonable to form the view that a direction to the jury from the trial judge for more weight to be given to the facts regarding the abuse and entrapment would have made a significant difference.

Resultingly, Sally was convicted of murder and received a life prison sentence with a minimum of twenty-two years. In early 2019, the Court of Appeal heard new evidence from a consultant forensic psychiatrist regarding two mental disorders which Sally was potentially suffering from at the time when Richard was killed, and a report from sociologist and forensic social worker Professor Evan Stark, on coercive control.

It requires pointing out that the new evidence highlighted at appeal is evidence which is based on the same facts regarding Richard's behavior and entrapment as was presented as part of Sally's defense at trial.[34] Though these facts were considered relevant to provocation, and while the trial judge left the issues of provocation and diminished responsibility to the jury, the merits and implications of the facts regarding Richard's abuse and entrapment of Sally were not explored to their fullest limits.[35]

The Court of Appeal quashed Sally's conviction, with prosecutors accepting a manslaughter plea which resulted in a sentence of nine years and four months. Due to time served however,

[31] ibid.
[32] Karl Laird, 'Homicide: R v Challen (Georgina) Court of Appeal Criminal Division' (2019) 11 Criminal Law Review 980.
[33] ibid.
[34] *Challen* (n 3).
[35] ibid.

Sally was able to walk free.[36] The quashing of Sally's conviction was welcomed by many in the country including Sally's two sons who expressed their delight in saying that the quashing was an 'an amazing moment' as they felt that the abuse their mother suffered at the hands of their father was 'never recognised properly and her mental conditions were never taken into account' during her first trial.[37]

There is clearly a difference in the handling of the legal decision-making process at the court of first instance, from that which we see from the Court of Appeal. The Court of Appeal clearly took Sally's history of abuse/entrapment and what it might have done to her state of mind into account, whereas the court of first instance did not although the facts were well known and had been presented at trial.

The Court of Appeal clearly struck a mean between observing Law's universal nature while still taking Sally's particularities into account in the legal decision-making process. Law's universality would say that Sally caused Richard's death and as such she should be convicted of murder without any consideration of the particularities surrounding the years of abuse she suffered and the psychiatric harm it caused her.

The Court of Appeal undertook an 'act of knowing'. It considered the entirety of Sally's story – with all of its colors of particularity – and took it all into account. In so doing, the Court of Appeal was able to strike a mean in its legal decision-making process which meant that while it would not absolve Sally of all wrongdoing (allowing Law's universal nature to take its course), it would not ignore the particularities of her case either.

This style of legal decision-making is what accounts for the difference in outcomes of the two courts. The court of first instance struck no mean in its legal decision-making by allowing Law's universal nature to run its fullest course without taking Sally's particularities into account in any meaningful way whereas the Court of Appeal anchored its legal decision-making process at the point of a mean.

[36] 'Sally Challen: No fresh trial over husband murder' (BBC News, 7 June 2019) <https://www.bbc.co.uk/news/uk-england-surrey-48554239> accessed 29 May 2020.
[37] Caroline Davies, 'Sally Challen wins appeal against conviction for murdering husband' (The Guardian, 28 February 2019) <https://www.theguardian.com/law/2019/feb/28/sally-challen-wins-appeal-against-conviction-for-murdering-husband> accessed 21 June 2019.

Conclusion

Sally's case demonstrates the central argument of this article; that striking a *mean* between Law's universal nature and the particularities of a given case is the approach which best guarantees beauty and outcomes of virtue for the legal decision-making process. Additionally, the striking of a mean presents us with the best possible path to avoiding wrongful convictions and miscarriages of justice.

Evidently it essential for judges to undertake an 'act of knowing' which allows them to identify all the particularities associated with a case – and once they have so identified such particularities, to strike a mean in their decision-making process by taking those particularities into account.

Given that Law, by its very nature, is universalistic and does not on its own see particularities, there is a strong onus upon legal decision-makers to pay attention to the particularities of the case as they engage the process of legal decision-making in order to ensure beauty and virtue in Law. For jury trials, it may well be necessary – evidently – for a judge to direct/advise a jury to give weight to certain facts which might otherwise appear less than relevant.

Left to Law's universality alone, Law would always be happy to present a black and white picture which leaves out all the colors of particularity which the legal decision-making process needs to have in order to attain beauty and an outcome of virtue. Striking a mean allows us to update Law's picture of the subject individual so that it is clear in its reflection of the colorful particularities surrounding a given individual.

While this article has argued in favor of striking a *mean* in legal decision-making in order to avoid the extremity of Law's universal nature, such an argument should not misunderstood as one which advocates for the suspension of the application of Law to allow for any given individual to be absolved of any crimes that he/she may have committed (as demonstrated by Sally's case where she has – despite the Court of Appeal's ruling – been convicted of manslaughter for her actions). Quite the contrary, this article has argued that Law's universal nature should be maintained and that its filtration processes should not be tampered with as doing so would make Law unrecognizable.

The article maintains this position, and rightly so, because the choice between Law's universal nature and the particularities of a given case is a false choice. The legal decision-making process needs both to attain beauty and an outcome of virtue. Nobody should be excused from the responsibility of crimes they have committed, but surely, the least Law owes them is to see, recognise and take into account those particularities which helped shape the events of their actions at the given time.

The Current Constitutional Rules Relating to the Prorogation of Parliament are Unsatisfactory: A Call for Reform

Ned Sillett[*]

Abstract

This paper looks at the current constitutional rules relating to the prorogation of Parliament and reveals the problems associated with them. These rules put constitutional principles such as Parliamentary Sovereignty and Parliamentary Accountability at risk. Recent clarification from the Supreme Court provided some relief for these constitutional principles, however, prorogation remains problematic. This paper then questions whether codification would provide suitable safeguards in the procedure of prorogation. However, it concludes that prorogation is no longer necessary under the United Kingdom's modern constitution. Other methods, such as adjournment, provide the same effect but without the problems of prorogation. Furthermore, with populism becoming increasingly prevalent, prorogation could be used as a tool to avoid the checks and balances of a liberal democracy. Therefore, the prorogation of Parliament should be abolished.

Introduction

Prorogation recently gained attention due to the landmark case of *Regina (on the application of Miller) v The Prime Minister* (*Miller (No 2)*), which challenged the government's prorogation of Parliament immediately before the United Kingdom's planned exit from the European Union.[1] This public spotlight has raised questions as to whether the current constitutional rules on the prorogation of Parliament are appropriate or require reform. This paper will endeavour to demonstrate why the current constitutional rules relating to the prorogation of Parliament are unsatisfactory; they are archaic and no longer relevant. Change, if enacted, could occur in a plethora of different methods. Therefore, this paper will also evaluate the most satisfactory options for the much-needed reform of the constitutional rules of prorogation.

The rules of prorogation preceding *Miller (No 2)*

Prorogation originates from a time in British history when Parliament met according to the will of the British monarch. It was a method by which the monarch could end a Parliamentary session, because they no longer wanted one, without incurring the expense of an election, in

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[1] *Regina (on the application of Miller) v The Prime Minister* (*Miller (No 2)*) [2019] UKSC 41, [2019] 3 WLR 589.

contrast to dissolving Parliament.[2] The power to prorogue Parliament is a royal prerogative, which means it is exercised by, or on behalf of, the Crown.[3] Since the Glorious Revolution of 1688, the monarch is expected to remain politically neutral.[4] Therefore the prerogative power is exercised by the Crown on the advice of the Privy Council;[5] it would be wrong for the monarch to depart from, or refuse, this advice. There lies an issue as to the ownership of this prerogative power to prorogue Parliament. The executive has sole control over when it would like to prorogue Parliament, and it may also stipulate the duration of that prorogation. Why is this potentially problematic? It is problematic because, during prorogation, all Parliamentary business is terminated.[6] This includes Parliament's function of scrutinising the executive and ensuring political accountability of the executive's actions.[7] This imbalance in power disturbs the principle of the separation of powers, each providing a check and balance on one another. It also goes against the principle of Parliamentary Sovereignty: Parliament has the right to make, or unmake, any law whatsoever; and, further, no person shall be able to override such law or challenge it in a court of law.[8] A residual power wielded by the executive is capable of denying Parliament of the ability to scrutinise the very entity who is denying them of that ability. As Parliament does not decide when it is prorogued,[9] this sits uncomfortably with Parliamentary Sovereignty and the general principles of democracy.

When referring to Parliamentary Sovereignty, this paper will look to Dicey's leading account of the principle.[10] In this specific context, that means that Parliament should not be prevented from legislating. There has been discussion of Dicey's account being an 'old' view, and a 'new' view has emerged in recent years.[11] However, the difference is predominantly as to whether Parliament should be thought of as continuing (the 'old' view), in that each Parliament is a separate law-making entity, or self-embracing (the 'new' view), in that Parliament is viewed as a whole over time.[12] This debate does not affect the focal subject matter of this paper. None dispute the fact that Parliament is sovereign over the executive, and that, therefore, the

[2] James Fowkes, 'Prorogation of the Legislative Body', *Max Planck Encyclopaedia of Comparative Constitutional Law* (OUP 2017) [5].
[3] *Miller (No 2)* (n 1) [3].
[4] Asif Hameed, 'The Monarchy and Politics' [2016] Public Law 401.
[5] *Miller (No 2)* (n 1) [3].
[6] ibid [2].
[7] Fowkes (n 2) [17].
[8] Albert Venn Dicey, *Introduction to the Study of The Law of the Constitution* (8th edn, Macmillan Press 1915).
[9] *Miller (No 2)* (n 1) [3].
[10] Dicey (n 8).
[11] Alison Young, 'Hunting Sovereignty: Jackson v Her Majesty's Attorney General' (2006) Public Law 187, 187.
[12] ibid 188; H.L.A Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 145-146.

executive should be accountable to Parliament for its actions. Furthermore, Parliament may choose to limit its own sovereignty,[13] by passing any law it likes, however, this is done so by choice. The problem in the case of prorogation is that Parliament has not limited its sovereignty itself. Instead, the affront on its sovereignty comes from a residual prerogative power, potentially an undemocratic historical power, harking from a time when the Crown was sovereign over Parliament. This cannot be acceptable in a modern constitution which asserts the principle of Parliamentary Sovereignty.

Prorogation must be distinguished from dissolution of Parliament. Dissolution terminates a Parliament and calls for an election; prorogation simply places the existing Parliament in stasis.[14] When a Parliament is dissolved, Members of Parliament cease to be Members of Parliament.[15] In this respect, prorogation is, once again, problematic. When Parliament is dissolved there are no longer any Members of Parliament. However, during prorogation, Members of Parliament are simply denied from exercising their function of Parliamentary scrutiny. Prorogation presents a unique problem, not seen in cases of a dissolved Parliament; this is because it involves the suspension of the current Parliament rather than the creation of a new one.

Furthermore, when the executive decides to prorogue Parliament, any bills that are in the Parliamentary process fail; they will have to be started again from scratch (with limited exceptions).[16] Once again, this is problematic due to the executor of the prerogative: the executive. Parliament cannot decide when prorogation occurs and therefore has no, or at least very limited, control over bills in its process. This could be dangerous if, for example, a rogue executive was to prorogue Parliament in order to prevent a bill or motion, on which it looked unfavourably, from completing its process through Parliament. An example of these sorts of tactics has been seen in Canada, where the government used prorogation to avoid a vote of no-confidence.[17] It has been suggested that, since prorogation does not involve a change in Parliamentary membership, the revival of bills after they have fallen does not face the

[13] Mark Elliot, 'United Kingdom: Parliamentary Sovereignty Under Pressure' (2004) 2(3) International Journal of Constitutional Law 545, 546.
[14] Fowkes (n 2) [3].
[15] *Miller (No 2)* (n 1) [4].
[16] ibid [2].
[17] Gerard W. Horgan, 'Partisan-Motivated Prorogation and The Westminster Model: A Comparative Perspective' (2014) 52(4) Commonwealth and Comparative Politics 455, 457-458.

democratic concerns that a bill does after dissolution.[18] However, this does not overcome the affront to Parliamentary Sovereignty and the impact on the ability of Parliament to carry out its functions, in particular as the scrutiniser of the executive.

This shows how the constitutional rules which preceded the case of *Miller (No 2)* were highly problematic and held little justification under the modern constitution of the United Kingdom (UK).

***Miller (No 2)*: A remedy?**

This recent case brought attention to the problems with the prerogative to prorogue. The Prime Minister, along with their government, decided to prorogue Parliament for five weeks in advance of the UK's scheduled exit from the European Union (EU). Action was brought against this decision in the Court of Session of Scotland, where the Inner House held that the advice given to the monarch, to prorogue, was justiciable, that it was motivated by the improper purpose of avoiding Parliamentary scrutiny of the executive, and that the advice and the prorogation were unlawful.[19] The High Court of England also reviewed the decision, but found it not to be justiciable.[20] Both cases were appealed to the Supreme Court. The different decisions from the English and Scottish courts evidence the confusing and uncertain nature of the rules surrounding the prerogative of prorogation.

The Prime Minister's defence was that the prorogation was over the conference season, and so that sitting days lost were actually very few.[21] However, this argument is unconvincing in light of the circumstances; Parliament may have chosen to reduce the duration of the conference season due to the upcoming withdrawal from the EU, however, the executive took that choice away from Parliament.

The Supreme Court was able to provide some clarification as to the constitutional rules on prorogation. It held that every prerogative power has its limits, as a residuary power,[22] and must adhere to the fundamental principles of constitutional law.[23] The court held that two main

[18] Fowkes (n 2) [15].
[19] *Cherry v Advocate General* [2019] CSIH 49.
[20] *Regina (on the application of Miller) v Prime Minister* [2019] EWHC 2381 (QB).
[21] *Miller (No 2)* (n 1) [18].
[22] *British Broadcasting Corporation v Johns* [1965] Ch 32, 79.
[23] *Miller (No 2)* (n 1) [38].

principles applied in this case: Parliamentary Sovereignty[24] and Parliamentary Accountability.[25] Firstly, the principle of Parliamentary Sovereignty would be undermined if the executive was capable of preventing Parliament from exercising its legislative authority for as long as it pleased.[26] This establishes the need for a limit of the power of the executive to prorogue Parliament;[27] a limit which would satisfy the concerns about Parliamentary Sovereignty preceding this case. Secondly, the principle of Parliamentary Accountability, no less of a constitutional fundamental.[28] '…[A] Prime Minister and Cabinet [are] collectively responsible and accountable to Parliament'.[29] This accountability arises through scrutiny of their actions.[30] However, the longer the prorogation, the greater the risk of a 'responsible government' being replaced by 'unaccountable government'; this was described in *Miller (No 2)* as the 'antithesis of the democratic model'.[31] It is of vital importance that a government should be held to account by Parliament in order to ensure democracy is carried out. Taking these two constitutional principles, the Law Lords created a legal limit to the prerogative power to prorogue:

> A decision to prorogue Parliament … will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.[32]

The judges have therefore limited the scope of the prerogative power to prorogue in order to ensure that Parliament is able to carry out its functions, both as a law-making body and the scrutiniser of the executive. This provides a remedy for one issue set out earlier in this paper; there is no longer unlimited power to prorogue Parliament in an undemocratic way. The Supreme Court has added an element of legal accountability to what once was a practically unlimited 'weapon in Parliamentary warfare'.[33] However, the decision of the Supreme Court

[24] ibid [41].
[25] ibid [46].
[26] ibid [42].
[27] ibid [44].
[28] *Regina (on the application of Miller) v Secretary of State for Exiting the European Union* ('*Miller (No 1)*') [2017] UKSC 5, [2018] AC 61 [249] (Lord Carnwath).
[29] *Bobb v Manning* [2006] UKPC 22 [13] (Lord Bingham).
[30] *Miller (No 2)* (n 1) [46].
[31] ibid [48].
[32] ibid [50].
[33] Fowkes (n 2) [30].

fails to address whether prorogation is still relevant or necessary; it is taken at face value and not looked into further. This paper will address this issue later.

It is necessary to analyse the critiques of *Miller (No 2)* in order to assess its effectiveness in remedying the problems associated with the prerogative power to prorogue Parliament. The main criticism which was raised in the wake of the Supreme Court's decision is that the case should not have been justiciable and that the judges were overreaching.[34] It has long been accepted that it is inappropriate for judges to make judgment on 'purely political' matters.[35] This is because of the separation of powers – one of the fundamental principles of the UK constitution. The courts and the executive have different functions and they should not be overstepped.[36] This is why the High Court decided that the advice given to the monarch was purely political and therefore non-justiciable.[37]

However, the Supreme Court addressed this issue of the justiciability of political matters openly. The judges made it clear they were reviewing the scope of a prerogative power, which has long been established as justiciable in the courts.[38] They explained that they did not breach the separation of powers either, as 'by ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions, the court will be giving effect to the separation of powers'.[39] One should not jump to the conclusion that the decision was purely political simply because it involved the conduct of politicians.[40] This shows, clearly, why the court was able to pass judgment on a matter relating to prorogation; it directly affects constitutional legal principles which the courts must uphold.

One might argue that judges should not be involved in political matters as they are not part of the democratic process. However, this was strongly disputed by Lady Hale in an extra-judicial lecture. She held the opinion that judicial processes are a necessary part of the checks and balances in any democratic constitution.[41] This can be demonstrated by looking to the case of

[34] Nicholas Dobson, 'The prorogation judgment — a step too far?' [2019] New Law Journal 9.
[35] *A v Secretary of State for the Home Department* [2005] 1 AC 68 [29] (Lord Bingham).
[36] *Gibson v Lord Advocate* (1975) SC 136 144 (Lord Keith).
[37] *Miller (No 2)* (n 20) [51].
[38] *Miller (No 2)* (n 1) [52].
[39] ibid [34].
[40] *Miller (No 2)* [2019] 3 WLR 589, 590.
[41] Lady B Hale, 'Law and Politics: A Reply to Reith' (Dame Frances Patterson Memorial Lecture, 8 October 2019) 14.

Miller (No 2). Ministerial responsibility, due to their accountability, depends on the will of Parliament.[42] However, Parliamentary will was unable to be exercised due to the executive's prorogation of Parliament. That is why it is necessary for the courts to intervene, as the separation of powers allows, in order to protect the constitutional principles of Parliamentary Sovereignty and Parliamentary Accountability. Therefore, in this way, the decision in *Miller (No 2)* provides some remedy to the issues caused by constitutional rules relating to the prorogation of Parliament.

It would be inappropriate to call the decision in *Miller (No 2)* judicial overreach. The common example of judicial overreach, given by political constitutionalists, is Lord Steyn's obiter comments from *Regina (Jackson) v Attorney General.*[43] He suggested that in exceptional circumstances the courts may have to reconsider the definition of Parliamentary Sovereignty.[44] However, even with such divisive statements, there is merit; 'the legitimacy of parliamentary sovereignty rests upon Parliament's representative and accountable features', and so perhaps this is not a case of judicial overreach after all.[45] The *Miller (No 2)* case is by no means comparable to the obiter comments of Lord Steyn in *Jackson*. While in *Jackson* the judges were more critical of Parliamentary Sovereignty, the Supreme Court, in *Miller (No 2)*, showed their devotion to that principle and their great endeavours to make sure that the prerogative power to prorogue Parliament did not interfere with this constitutional fundamental.[46] This comparison shows that the decision in *Miller (No 2)* was in fact not an example of judicial overreach and therefore should not be criticised as such. The Supreme Court has produced a legal standard which limits the power to prorogue Parliament in order to maintain the sovereignty of Parliament and enable it to carry out its functions. This is arguably most beneficial in reflection of a growing Parliamentary dissatisfaction in how government is held to political account;[47] a legal remedy has been provided.

However, this new legal standard only provides a remedy to some, but most definitely not all, of the issues presented earlier in this paper. Parliament is still unable to decide when it should

[42] Adam Tomkins, 'What is Parliament for?' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003) 61.
[43] [2005] UKHL 56, [2006] 1 AC 262.
[44] ibid [102].
[45] Jeffrey Jowell, 'Parliamentary Sovereignty Under the New Constitutional Hypothesis' (2006) Public Law 562, 572.
[46] *Miller (No 2)* (n 1) [44].
[47] Tomkins (n 42) 72.

be prorogued or for how long, provided that the duration is reasonable and does not prevent Parliament from carrying out its functions. This lack of control leaves it supine to the executive. Furthermore, the threshold set by the Supreme Court seems very high, as it was described as 'exceptional'.[48] This means that the clarification from *Miller (No 2)* may not be as effective as it seems. Therefore, while the case of *Miller (No 2)* has improved the constitutional rules relating to the prorogation of Parliament, they are in desperate need of reform.

Codification: A suitable reform for prorogation?

Thus far, this paper has shown how the current constitutional rules on the prorogation of Parliament are unsatisfactory and the areas in which action must be taken. One potential reform could be to codify the prerogative of prorogation; all of the rules would then be found in a statute. This statute would be of a similar type to the Constitutional Reform Act 2005. The existence of this statute is evidence of how this sort of codification, and reform of constitutional rules, has proved to be successful in the past.

Why would codification provide a remedy to the issues raised by this paper? The first solution that it would provide is the protection of Parliamentary Sovereignty. Parliament would be able to choose the rules of prorogation through a deliberative process, without them being a relic from a historic period. Prerogative powers are residuary and therefore can easily be replaced by legislation. Furthermore, having all of these unwritten rules about prorogation can lead to a lot of confusion, as is clear from the recent litigation of *Miller (No 2)*. A codified rule would enable everyone to know and see what the rules relating to prorogation are and how they work.[49] Blackburn also highlighted that codification is a good method to implement constitutional reform.[50] Prorogation could undergo a similar process to dissolution, which also used to be a prerogative power. Dissolution is now governed by the Fixed-term Parliaments Act 2011. Codifying a prerogative would not be a novel or difficult task to achieve.

However, codification only solves the problem of legitimacy in relation to Parliamentary Sovereignty; prorogation would stem from the will of Parliament demonstrated through legislation, rather than the archaic prerogative. Issues of necessity would remain unanswered.

[48] *Miller (No 2)* (n 1) [50], [57].
[49] Robert Blackburn, 'Enacting a Written Constitution for the United Kingdom' (2015) 36(1) Statute Law Review 1, 3.
[50] ibid 6.

How could the current constitutional rules relating to prorogation be reformed?

Codification would also require reform, addressing the problems associated with an executive having powers which affect the functions of Parliament. One way this problem could be resolved is through procedural reform; a change in the process of prorogation. One example of procedural reform could adapt the current non-legal constitutional rules relating to prorogation, examples of which being that Parliament must meet at least once every year,[51] and that the Monarch must act on the advice of the executive.[52] However, this alone is unsatisfactory as prorogation could still be used to affect Parliament in a detrimental manner, and these non-legal rules are not problematic. Instead, procedural reform could require the House of Commons to approve a prorogation before the Monarch is advised to exercise their Royal Prerogative. This could either be done through a simple or super majority, depending on the decision of Parliament. A super majority would hold it in special regard, as an important matter for the House to agree on, whereas a simple majority would regard it as standard House business. Prorogation should be seen as a very important matter due to the suspension of Parliamentary function, essential in a functioning democracy. However, this reform could fail to address the different consequences associated with a minority government as opposed to that of a majority government. A minority government may not be able to exercise the prerogative at all if the majority opposition refused to grant them permission through a vote; potentially a case of political overreach in stopping government from achieving their agenda.[53] Even so, this might be avoided if a super majority was required; the vote would require Parliamentary consensus rather than governmental will. This would put the power back into the hands of Parliament and avoid legal scrutiny of the executive's decisions in the political sphere. Further protection could be added through greater specification of what sort of majority is required. If a super-majority of the whole of Parliament were required, rather than just of those sitting, then it would be more difficult for the executive, as a majority government, to push a vote through.[54] A super majority of the whole of Parliament would provide the best procedural safeguards.

Another option might be to reform the substantive definition of prorogation. For example, in India, prorogation does not have the effect of bills falling.[55] This would be an improvement

[51] James Randall, 'The Frequency and Duration of Parliaments' (1916) 10(4) The American Political Science Review 654, 654-656.
[52] Vernon Bogdanor, 'The Monarchy and The Constitution' (1996) 49(3) Parliamentary Affairs 407.
[53] Michael Zander, 'Brexit: is MPs taking control a good or a bad thing?' (2019) 169 New Law Journal 13(2), 13-14.
[54] Constitution of the People's Republic of China, Art 64.
[55] *Rules of Procedure and Conduct of Business in Lok Sabha* (15th edn, Lok Sabha Secretariat 2014), s 336.

from the current prorogation in the UK as it would not mean that Parliamentary business is supine to the will of the executive. It should be for Parliament to decide on matters which relate to its own business; government's role is to facilitate the running of the country, not to control Parliament. While it is possible to 'carry-over' a bill if it has not left the House it originated in,[56] this is only a very limited protection of Parliamentary business. Bills do not lapse in Commonwealth countries, such as Australia;[57] this seems to be customary in many other countries also.[58]

However, the problem with both of these options of reform is that they fail to address the question of necessity; they take prorogation as definite without looking into whether our constitution needs such a process.

Should the prerogative to prorogue be abolished?

This paper endeavours to demonstrate that the prerogative power to prorogue Parliament is archaic and no longer necessary or relevant in light of the modern UK constitution. The only suitable reform which will provide a remedy to all of the issues raised in this paper is to abolish the prerogative power of prorogation.

Prorogation, as previously discussed, stems from a historical time when the Monarch governed, and often wished to suspend Parliament without the disruption of dissolution.[59] A strong motive for such a power was to prevent a Parliament from sitting indefinitely.[60] However, as Fowkes highlighted,[61] the concern is much weaker today due to fixed Parliamentary terms and regular election cycles.[62] This implies that prorogation might have become an outdated feature in our constitution, now only used as a 'weapon in Parliamentary warfare'.[63]

One must consider whether prorogation benefits our country. In fact, prorogation could put Parliament at risk due to the rise of populism over recent years. Populism is, for the purposes

[56] Malcolm Jack (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (24th edn, LexisNexis 2011) 640-642.
[57] Owen Clough, 'Lapsed Bills' (1940) 22(4) Journal of Comparative Legislation and International Law 194, 194-196.
[58] Fowkes (n 2) [16].
[59] ibid [5].
[60] William Blackstone, *Commentaries on the Laws of England* (1st edn, Oxford Clarendon 1765-69) Ch 2, 180.
[61] Fowkes (n 2) [5].
[62] Fixed-Term Parliaments Act 2011, s 1.
[63] Fowkes (n 2) [30].

of this paper and its restrictions, the idea that 'the people' are against a corrupt 'elite'.[64] Associated with this ideology is the rejection of pluralism, associated with liberal democracy.[65] If a populist executive was to gain power, Parliament might be vulnerable to attack by a government whose definition of good and of the interests of society is homogenous.[66] This is in contrast to a liberal, democratic and deliberative process, recognising overlapping conceptions of good and overlapping interests in society.[67] Democracy today means, above all, a liberal democracy.[68] However, with the populist idea of 'the people' against 'the elite', prorogation of Parliament could be dangerous in preventing the process of liberal democracy. Therefore, prorogation does not directly benefit the UK constitution, but it may prove dangerous to the constitutional institutions of the UK, such as Parliament.

Why does prorogation still exist in the UK? Is there any good reason for its persistence? Weill argued that the legislative discontinuity, bills falling at the end of a Parliamentary term, provided by prorogation is beneficial as it allows each Parliament to choose their own legislative agendas, without being affected by its predecessors.[69] However, this interpretation is inconsistent with the 'new' view of Parliamentary Sovereignty, alluded to earlier in this paper. The most accurate understanding of Parliamentary Sovereignty under the UK constitution is the self-embracing model, where each Parliament is bound by its predecessors, or Parliament is viewed as a whole over time as sovereign.[70] This is because of the existence of so-called 'constitutional statutes' which cannot be impliedly repealed by Parliament.[71] Furthermore, European law requires courts to treat domestic statutes as 'invalid if and to the extent that they cannot be interpreted consistently with European law'.[72] Devolution also proves a self-embracing Parliamentary Sovereignty;[73] Parliament unilaterally relinquishes its sovereignty over a dominion, and it cannot later legislate to reclaim that power.[74] These

[64] David Marsh, 'Populism and Brexit' in Ivor Crewe and David Sanders (eds), *Authoritarian Populism and Liberal Democracy* (Palgrave Macmillan 2020) 73-74.
[65] ibid.
[66] Alison Young, 'Populism and the UK Constitution' (2018) 71(1) Current Legal Problems 17, 21.
[67] ibid 21.
[68] Cristóbal Rovira Kaltwasser, 'Populism and the Question of How to Respond to It' in Cristóbal Rovira Kaltwasser, Paul Taggart, Paulina Ochoa Espejo and Pierre Ostiguy (eds) *The Oxford Handbook of Populism* (OUP 2017) 491.
[69] Rivka Weill, 'Resurrecting Legislation' (2016) 14(2) International Journal of Constitutional Law 518, 519.
[70] Young (n 11) 188.
[71] *Thoburn v Sunderland City Council* [2003] QB 151 [63] (Laws LJ).
[72] *Regina (HS2 Action Alliance Ltd) v Secretary of State for Transport* ('*HS2*') [2014] UKSC 3, [2014] 1 WLR 324 [206] (Lord Neuberger).
[73] Scotland Act 1998, s 1.
[74] Elliot (n 13) 546.

examples prove that the current conception of Parliamentary Sovereignty is a self-embracing one. Therefore, Weill's argument for legislative discontinuity falls short. Parliament is always affected by the legislative agenda of its predecessors as there are examples of Parliament binding itself and future Parliaments, to an extent.[75] Prorogation does not provide a substantial benefit to the UK constitution.

This paper demands the abolishment of the power to prorogue under the UK constitution. While many have argued that, as discussed before, prorogation is political matter and not one for the law,[76] when prorogation infringes on constitutional principles it is up to the courts to protect the Rule of Law. Simply because the decision is announced in Parliament does not mean that the decision is immune from judicial review, under Article 9 of the Bill of Rights 1688.[77] Furthermore, prorogation deprives Parliament of any ability to fulfil its deliberative and legislative function.[78] This executive control over Parliament might operate against democratic values rather than upholding them.[79] Modern constitutions containing prorogation clauses do not provide a positive reason for including such a clause; for example, the 'effects of prorogation' under the Australian constitution deprive their Parliament of function rather than aid it.[80] Prorogation is left over from a time when Parliament sat at the will of the monarch, which does not fit with the modern principle of Parliamentary Sovereignty.

There are methods of producing the same effect as prorogation, without the copious negatives associated with this prerogative power. A suggestion which provides a satisfactory answer is to expand the use of House adjournment. There is an adjournment each day that Parliament sits.[81] This is a motion which is debated and decided upon by Members of Parliament. Therefore, the democratic process of deliberation before coming to a decision is upheld, maintaining Parliamentary Sovereignty and Parliamentary Accountability. There are also longer adjournments, such as for summer recess.[82] It would not be a stretch to adapt the

[75] Parliament Act 1911; Parliament Act 1949; European Communities Act 1973; Scotland Act 1998.
[76] Dobson (n 34).
[77] Anne Twomey, 'Article 9 of the Bill of Rights 1688 and Its Application to Prorogation' (UK Constitutional Law Association, 4 October 2019) <https://ukconstitutionallaw.org/2019/10/04/anne-twomey-article-9-of-the-bill-of-rights-1688-and-its-application-to-prorogation/> accessed May 2020.
[78] Stefan Theil, 'Unconstitutional Prorogation' (UK Constitutional Law Association, 3 April 2019) <https://ukconstitutionallaw.org/2019/04/03/stefan-theil-unconstitutional-prorogation/> accessed May 2020.
[79] ibid.
[80] Parliament of Australia, 'A Session' <https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML/Chapter7/A_Session> accessed May 2020.
[81] Parliament.uk, 'Adjournment Debates' <https://www.parliament.uk/about/how/business/debates/adjournment/> accessed Dec 2019.
[82] HC Deb 5 August 1942, vol 38,2 cols 1039-60; HC Deb 11 August 1966, vol 733, col 1890.

convention of adjournments to fulfil the function of prorogation. This would place all of the power into Parliament's hands. Of course, the Government would still be able to bring this motion to the House and, in the event of a majority government, could force a motion through Parliament; however, this would depend on the vote threshold, discussed earlier in this paper. Even so, this motion would have to be voted on and debated – standard practice in a liberal democracy. This adaptation of the current constitutional rules would, in fact, add to the democratic process. This is the antithesis of the current constitutional rules that involve prorogation, which are, arguably, undemocratic in procedure; the executive is able to control Parliament without debate or a vote.

The use of the prerogative is dwindling, and rightly so. While it holds historical importance, it remains an anachronism; democratic values now far outweigh arguments in favour of the prerogative. This can be shown through the Fixed-term Parliaments Act 2011 which removed from the monarchy any personal role in dissolutions of Parliament.[83] The curtailing of the prerogative is a natural process in today's liberal and democratic society. Therefore, the prerogative to prorogue Parliament should be abolished. Furthermore, it should not be codified, as prorogation is no longer applicable to the UK's modern constitution.

Conclusion

The constitutional rules relating to the prorogation of Parliament are unclear, thus causing legal uncertainty. The case of *Miller (No 2)* provided some, but limited, clarification. However, the current rules, in the form of a royal prerogative, are highly unsatisfactory. They lack a democratic quality and allow the executive to assert itself over Parliament. Therefore, constitutional principles, such as Parliamentary Sovereignty and Parliamentary Accountability, are threatened. The executive is able to control Parliament without its consent and therefore avoid political scrutiny – an essential part of the separation of powers. Thus, it is clear that change, through reform of this archaic prerogative, is needed. However, codification, although it could provide some legal clarity, would not provide a satisfactory answer to all the issues which prorogation creates. This is because prorogation is no longer an appropriate part of the UK constitution; it was created to avoid Parliament sitting indefinitely, which is no longer a concern. Prorogation must be abolished in order to cure the potential unconscionability that could arise from its use. An alternative method of suspending Parliament, or stopping

[83] Andrew Blick, 'Constitutional Implications of the Fixed-Term Parliaments Act 2011' (2016) 69 Parliamentary Affairs 19, 33.

Parliament from sitting, could be achieved through adjournment. Adjournment is democratically viable through debates and voting, and so proves no threat to any of the aforementioned constitutional fundamentals. Of course, adjournment may continue to allow a majority government to push through adjournment motions in Parliament, but this potential issue could be remedied by a super-majority threshold, requiring two thirds of the vote for the motion to pass. Overall, the archaic prerogative power to prorogue Parliament should be abolished.

Unbundling Modern Day Tax Avoidance: *Homeserve Membership Ltd v Revenue and Customs* [2009] EWHC 1311 (Ch)

Clive Bow[*]

Abstract

This article explores the impact of the *Homeserve* decision on the application of indirect taxes on fees charged for additional services by insurance intermediaries. Following the restrictive measures introduced after this case by HMRC, the current scope of the separate contracts rule will be analysed. The intention of this article will be to conclude whether the legacy of this decision contributes to an unfair tax regime, which is the focal point of a 2019 consultation launched by HMRC.

Background

There is a general rule that services provided by UK insurers will attract indirect tax, which is collected from policyholders by insurers. Raising insurance fees through the collection of tax may deter some customers from entering into new policies, and this is considered by some insurers to be detrimental to the overall market. In response to this, legal advisors have developed cunning ways to avoid these taxes altogether, resulting in HMRC launching a consultation in 2019 to better understand modern-day practices that result in unfair Insurance Premium Tax ("IPT") outcomes.[1]

IPT was introduced by the Finance Act (the "Act") in 1994 and is an indirect tax on general insurance premiums.[2] HMRC have issued a prescribed list of contract types that are deemed worthy of exemption, for example, policies relating to the Channel Tunnel.[3] There is also a statutorily enshrined exemption, which is to be referred to hereon as the separate contracts rule,[4] which forms the focal point of the *Homeserve*[5] decision. It is the intention of this essay to review this landmark case, and its aftermath, to conclude on whether this has contributed to an unfair tax regime.

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[1] 'Call for Evidence: The Operation of Insurance Premium Tax' (3 June 2019) <https://www.gov.uk/government/consultations/call-for-evidence-the-operation-of-insurance-premium-tax> accessed 20 May 2020.

[2] Depending on the class of insurance, the tax rate applicable is either 12% or 20%.

[3] 'Notice IPT1: Insurance Premium Tax' (6 March 2019) <https://www.gov.uk/government/publications/notice-ipt-1-insurance-premium-tax/notice-ipt1-insurance-premium-tax> 2.3 Exempt insurance contracts, accessed 19 May 2020.

[4] Finance Act 1994, s 72.

[5] *Homeserve Membership Ltd v Revenue and Customs* [2009] EWHC 1331 (Ch).

Case Commentary

Homeserve was a home emergency repair business that distributed insurance products, along with other support services, to policyholders. These additional services included inter alia access to the services of an approved plumber or drainage expert within two hours. One fee was charged by Homeserve to its policyholders, comprising two elements: a premium; and an administration fee. Whilst the tax treatment of the premium was not in contention, this case focused on whether the administration fee was subject to IPT.

Clearly not an insurer, Homeserve was an intermediary operating under a delegated authority arrangement. This setup bears relevance to a fundamental insurance concept that supports the main argument that there were two contracts in place:

- A contract of insurance – distinct from the delegated authority arrangement, the parties to this contract were the insurer and the policyholder. The status of the insurer was enshrined by the concept of risk transfer, as the insurer remained responsible to financially indemnify the policyholder in the event of a claim; and
- A contract for additional services – to account for all other services received by the policyholder, over and above transferring risk. As the insurer did not orchestrate the provision of these services, this contract was directly between the intermediary and the policyholder.

In the context of the tax exemption, for the separate contracts rule to apply the distinction between these contracts must be clearly articulated to the policyholder. On this point, this case serves as a precedent that the threshold to satisfy this requirement is very low, as this was achieved despite the subject-matter overlap between the contracts, and the consolidated fee paid by the policyholder. The fee received in respect of the additional services contract was not therefore subject to IPT.

Whilst there is a clear logic to this decision, it is based on an assumed level of insurance awareness the average policyholder does not possess. Regardless of the contractual clarity, most policyholders are solely concerned by whether they have insurance cover or not, as opposed to being able to understand the distinction between an insurance intermediary and an insurer. Considering the online customer journey most policyholders typically embark on, in reality, most policyholders will view there to be only one contractual arrangement in place.

The Aftermath

Not seeking to appeal the decision, HMRC issued new measures to reduce the scope of this loophole in relation to commoditised products,[6] which is where the exploitation of this rule is deemed to be most prevalent. A commoditised insurance product is one that does not involve a comprehensive risk assessment,[7] for example, standard mobile phone insurance – as opposed to insurance to operate an aircraft. Other criteria applied to this tax avoidance crackdown include the additional service contract must be:

- In relation to a personal line of insurance;
- Inextricably linked to the main contract of insurance (i.e. unlikely to be entered into but for the main insurance product); and
- Non-negotiable, in terms of the clauses of the additional contract.

So why is this state of affairs unsatisfactory? For non-commoditised insurance products, which equates to a large section of the market, intermediaries are still able to engage in *value shifting*. This is the practice of allocating income, not by reference to the nature of the transaction, but with the sole aim of lowering the overall tax liability. Such activity is not without other practical implications; for example, the ultimate insurer may not champion the concept of receiving less premium. However, this would not be an issue for intra-group delegated authority arrangements, where the financial benefit is mutual.

In the case of Homeserve, but for the related insurance service, the additional services supplied would have attracted VAT. This indirect tax applies to goods and services provided by VAT registered businesses, unless the service falls under an exempt category.[8] The intrinsic nature of the domestic repairs and an emergency response service meant there was no clear exemption available. However, legal advisors successfully argue in practice that fees received for additional services are exempt because they constitute an insurance-related service.[9]

[6] 'HMRC internal manual: Insurance Premium Tax' (3 September 2018) <https://www.gov.uk/hmrc-internal-manuals/insurance-premium-tax/ipt05180> accessed 19 May 2020.
[7] Finance Act 2010, s 51.
[8] 'VAT rates on different goods and services' (12 May 2017) <https://www.gov.uk/guidance/rates-of-vat-on-different-goods-and-services> accessed 19 May 2020.
[9] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1, art 135(1)(a).

The insurance exemption under VAT rules was designed to avoid double taxation, as it is assumed that IPT would apply in lieu of VAT. In summary, additional services provided under these circumstances avoid any form of indirect tax. This see-saw of tax avoidance does not appear to have been the intention of Parliament and the continuation of this loophole is only defended by those that seek to exploit and benefit from it – without any clear moral or public interest justification.[10]

Conclusion

To conclude, *Homeserve* exposes a gap in tax legislation that always existed under the Finance Act. Exacerbated by competitive market forces, this has incentivised insurance intermediaries to utilise the separate contracts rule to avoid indirect tax on additional services. This requires the policyholder to be aware that there are two contractual arrangements in place; however, in practice, policyholders are likely to be naive to this. Whilst this strategy is currently lawful, it is morally indefensible, and the outcome was unlikely to have been the desired outcome of Parliament. Those who choose to exploit this loophole do so with a heavy weight on their conscience as, if this decision is overturned, it is possible for HMRC to investigate unpaid tax for the past four years.[11] This presents unwelcome uncertainty in what is already a volatile market and is an area that should be investigated as part of the HMRC consultation on unfair tax outcomes.

[10] In contrast to areas where tax avoidance is accepted, for example, postage services, and health services.
[11] 'HMRC Internal Manual Compliance Handbook: Assessing Time Limits' (11 March 2016) <https://www.gov.uk/hmrc-internal-manuals/compliance-handbook/ch51300> accessed 19 May 2020.

Comment on the Decision of the Supreme Court in *Volcafe Ltd v Compania Sud Americana de Vapores SA* [2018] UKSL 61

Dr Jia Jia[*]

Abstract

The Hague Rules are silent on the burden of proof issue and now, the Supreme Court provides a clear judgment on the legal burden of proving negligence and exceptions under the Hague Rules in *Volcafe Ltd v Compania Sud Americana de Vapores SA*.[1] Considering the popularity of containers in the carriage of goods by sea, the English court has some interesting findings in relation to container transport. The Supreme Court ruled that the carrier had the burden of proof under Art III rule 2 and Art IV rule 2(m) of the Hague Rules.

Facts and Issues

Bags of coffee beans were carried in 20 unventilated containers from Colombia to north Germany. Coffee beans are hygroscopic cargo; they absorbed, stored and emitted moisture. When they were carried from a warm to a cooler climate in an unventilated container, as in the present case, the beans would inevitably emit moisture which would cause condensation to form on the walls and roof of the container.[2] At destination, all but two containers suffered condensation damage.

The carriers issued nine bills of lading which incorporated the Hague Rules by a Paramount clause (condition 2) and there were LCL/FCL (Less Container Load/Full Container Load) terms.[3]

The cargo interests claimed that the carrier did not fulfilled his obligation of care for cargo under Art III rule 2 of the Hague Rules because he failed to use adequate Kraft paper to protect the coffee beans from condensation damage. The carrier argued that even if he was liable under Art III rule 2, he could rely on inherent vice exception under Art IV rule 2(m) on the ground that the coffee beans were unable to withstand the ordinary levels of moisture forming in unventilated containers from a warm to a cool climate.

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[1] [2015] EWHC 516 (Comm) (hereinafter *Volcafe* (QB)); [2016] EWCA Civ 1103 (hereinafter *Volcafe* (CA)); [2018] UKSC 61 (hereinafter *Volcafe* (SC)).

[2] *Volcafe* (SC) [3].

[3] FCL/LCL terms mean that the containers were provided and stuffed with the bags by the carrier but unloaded by the consignee after arrival at the destination.

The issue in the Supreme Court was who bore the burden of proving the negligence of the carrier under Art III rule 2 and the inherent vice exception under Art IV rule 2(m).[4] The Supreme Court revealed the Court of Appeal's decision. Lord Sumption, who gave a single judgment, approved the decision of David Donaldson QC that the carrier failed to adopt a sound system to care for cargo and thus, he was in breach of Art III rule 2. As for the burden of proof, he believed that the carrier bore the onus under both Art III rule 2 and inherent vice exception under Art IV rule 2(m). This mainly followed the principle of bailment since the Hague Rules do not provide rules for burden of proof. The Supreme Court, differing from the Court of Appeal, ruled in favour of the cargo interests.[5]

Reasoning

1. Bailment

Before considering the application of the Hague Rules, Lord Sumption discussed the position the carrier in bailment because he thought "the delivery of goods for carriage by sea is a bailment for reward on the terms of the bill of lading".[6] And he believed that two fundamental principles in bailment should be followed. The first one is that the duty of a bailee of goods is limited to reasonable care of goods rather than absolute.[7] The second one is that at common law, the bailee has the burden of proving the absence of negligence and he needs to show either that he took reasonable care of the goods or that any lack of reasonable care did not cause the loss of or damage to the goods.[8] The main doubt is that whether the principle of pure domestic law should not be considered when an international convention applied.[9] But Lord Sumption disapproved with this view that the second principle in relation to the burden of proof was not a principle of pure common law. Other civil law jurisdictions such as France and Scotland have the same rule that the custodian of goods also has a legal responsibility to justify their loss or

[4] There were two other issues discussed in depth in the High Court and the Court of Appeal and the Supreme Court did not consider them. But this article will cover these two issues in order to understand the case overall. The two other issues are: temporal application of the Hague Rules and duty of care for cargo under Art III rule 2 of the Hague Rules.
[5] Although David Donaldson QC also supported the cargo interests, the grounds of Lord Sumption are dramatically different.
[6] *Volcafe* (SC) [8].
[7] ibid.
[8] ibid [9].
[9] *Stag Line Ltd v Foscolo Mango Company* Ltd [1932] AC 328 (HL) 350 (Lord Macmillan).

redelivery in damaged condition.[10] The discussion with regard to the burden of proof issue will be considered below.[11]

2. Application of the Hague Rules

The application of the Hague Rules was mentioned in front of the High Court and the Court of Appeal. And this is the only issue both courts had the same conclusion: the Hague Rules should apply.[12]

The carrier claimed that the Hague Rules did not apply because the stuffing occurred before loading.[13] David Donaldson QC rejected this argument because he thought that when the cargo is loaded into a carrier's container which are subsequently loaded on the vessel, it should be treated as a single loading process even if there is inevitably some interval between the two.[14] His judgment on this point follows dicta in *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd*,[15] which was approved by the House of Lords in GH *Renton Co Ltd v Palmyra Trading Co of Panama*.[16] However, the application issue is dicta because unlike the case of *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd*[17] in which the damage occurred during the loading process, the damage occurred after loading in *Volcafe* case.

The interesting point is David Donaldson QC spread the application of the Hague Rules to the stuffing process even if there is interval between the stuffing and loading process. But he did not give any restriction to "interval", either geographical or temporal. Should there be any time limit for such interval, like a few hours or a couple of days? But it is likely that containers are stuffed beyond the port area and stored before loading to the vessel. The question whether the Hague Rules would apply to that interval period is not answered.

[10] *Volcafe* (SC) [10]. The judge gave examples in Conventional jurisdictions, such as Scotland, France and other civil law countries.
[11] See issue 5, pages 59-61.
[12] *Volcafe* (QB) [9]-[10]; *Volcafe* (CA) [107]-[108].
[13] *Volcafe* (QB) [8].
[14] ibid [9].
[15] [1954] 2 QB 402 (QB).
[16] [1957] AC 149 (HL).
[17] (n 15).

3. Art III rule 2 of the Hague Rules

The obligation under Art III rule 2 is to care for cargo "properly and carefully". There is not much confusion about the meaning of "carefully" but doubt with regard to the construction of "properly". In antithesis to "carefully", the natural meaning of "properly" is interpreted as "in accordance with a sound system".[18] The further explanation for what constitutes a sound system was made in *Albacora SRL v Wescott & Laurence Line Ltd*.[19] The fish was contaminated due to bacteria which were dormant below the temperature of 41°F. The bacteria would not be activated if the fish was carried on a refrigerating plant, but the ship did not have such plants. And there is no evidence that the carrier knew or should know of this danger. Lord Reid ruled that the carrier was not in breach of Art III rule 2 because he believed that the obligation to adopt a sound system meant to consider all knowledge of which the carrier has or ought to have about the goods.[20] Lord Pearce explained further that 'a sound system does not mean a system suited to all the weakness and idiosyncrasies of a particular cargo, not a sound system under all circumstances in relation to the general practice of carriage of goods by sea'.[21]

In this case, the issue is whether the carrier employed a sound system to protect coffee beans in unventilated containers from condensation damage. In the opinion of David Donaldson QC, the fact that coffee beans could generate moisture and potentially condensation during carriage in containers to colder climates was well known in the industry and the carrier should recognise this risk when he lined the containers.[22] Therefore, the weight of Kraft paper became a decisive element. To prove certain weight of Kraft paper was sufficient, there should be either (i) theoretical amount of moisture absorption of different papers or cards which could be expected in the same contractual carriage and time or (ii) an empirical study of a particular weight of paper which was sufficient to prevent damage through such carriage.

The cargo interests claimed that the lining of the containers was lined by the stevedores with a single layer of Kraft paper and it should have been done in a double layer.[23] The carrier intended to prove that they used two layers of Kraft paper because emails of the carrier around 1 March 2012 implied that the quotations for shipment of coffee beans LCL/FCL should be based on two layer of Kraft paper with the customer to bear and be invoiced for the increased

[18] *G H Renton Co Ltd v Pamlyra Trading Co of Panama* [1957] AC 149 (HL) 167 (Viscount Kilmuir LC).
[19] [1966] SC (HL) 19.
[20] ibid 23 (Lord Reid).
[21] ibid 28 (Lord Pearce).
[22] *Volcafe* (QB) [47].
[23] ibid [23].

expense.[24] However, David Donaldson QC found there was one layer of Kraft paper because the carrier failed to provide any proof about the invoice of a second layer and the surveyor appointed by the cargo interests underestimated the weight of Kraft paper, even significantly.[25] Besides, he also found that the photographs did not indicate the paper was double layers but an overlap between two single papers.[26] Thus, the factual issue is certain: there was only one layer of Kraft paper.

Furthermore, the carrier argued that it was a general industry practice to use Kraft paper which could prove he was not in breach of Art III rule 2. But the trial judge did not think there was such an industry practice because it would contrast with the carrier's change to double layers and there was no further information for the weight or thickness of Kraft paper.[27] Besides, David Donaldson QC believed that even if there was a general practice, it could not have been regarded as a sound system under Art III rule 2 without any appropriate theoretical or empirical underpinning.[28]

The Court of Appeal reversed the judgment of David Donaldson QC and Flaux J, who gave the leading judgment, found that there were two layers of Kraft paper after examining the photographs of the inside of the containers and emails mentioned above.[29] As for Art III rule 2, Faux J held that David Donaldson QC interpreted the sound system too strictly. In the opinion of David Donaldson QC, a sound system could "prevent damage of a normal cargo from the risks reasonably to be expected during the contracted carriage".[30] In this case, coffee beans carried in unventilated containers are worldwide and the moisture damage is common. Consequently, if the carrier adopted a sound system, the condensation damage should not occur. But Flaux J thought that the trial judge imposed a higher standard of duty than the House of Lords did in *Albacora SRL v Wescott & Laurence Line Ltd*[31] because in the view of David Donaldson QC, the sound system had to guarantee that no damage would occur in the current case. Moreover, Flaux J thought a theoretical calculation or an empirical study of the thickness of Kraft paper was impractical and beyond what a sound system required for the carrier.[32]

[24] ibid.
[25] ibid.
[26] ibid [24].
[27] ibid [49].
[28] ibid.
[29] *Volcafe* (CA) [83]-[88].
[30] *Volcafe* (QB) [45].
[31] [1966] SC (HL) 19.
[32] ibid [69]-[71].

Additionally, he also held that the trial judge errored in aspect of the general industry practice. He supported the carrier's claim that there was a general industry practice to carry coffee beans in unventilated containers lined with Kraft paper.[33] And an essential criterion for assessing a sound system because a sound system should be in accordance with general industry practice.[34]

Given that the use of Kraft paper is a evidential issue, the Supreme Court thought that this matter should be decided by a trial judge and the Court of Appeal should not overturn David Donaldson QC's findings of facts simply because they found them differently.[35] Lord Sumption restated the traditional view in English law that the weight of evidence was a matter for the trial judge because the Court of Appeal tended to arrive a conclusion purely based on documents. Therefore, although Lord Sumption did not rule whether the carrier adopted a sound system by following the general industry practice, he seemed to agree with Flaux J that the general industry practice should be taken into consideration when a sound system was assessed. He only thought that the issue proving an accepted industry practice should be judged by the high court judge who was able to examine all evidence both oral and documentary.[36]

4. Inherent Vice in Art IV Rule 2(m)

It is accepted by all courts that coffee beans carried in unventilated containers are in widespread use although it is preferable to be carried in ventilated containers.[37] The matter is should moisture damage be seen as inevitable damage or inherent vice? The High Court and the Court of Appeal gave different judgments. David Donaldson QC started with a view that exceptions in Art IV rule 2 were just a category of cases in which breach of Art III rule 2 obligations were necessarily negative and therefore, exceptions would be denied when the carrier was in breach of Art IV rule 2. Flaux J reversed his judgment because it would make inherent vice exception meaningless which contrasted to the traditional role of inherent vice exception at common law. Art III rule 2 and Art IV rule 2(m) overlapped to some degree but the main difference would be shown in the aspect of burden of proof which will be discussed in the next issue.[38]

[33] ibid [71].
[34] ibid [72].
[35] *Volcafe* (SC) [41].
[36] ibid [42].
[37] *Volcafe* (QB) [15]; *Volcafe* (CA) [9]; *Volcafe* (SC) [3].
[38] See issue 5, pages 59-61.

Another argument proposed by the carrier is that condensation damage is inevitable. David Donaldson QC held that the moisture damage was not inevitable otherwise it gave rise to "an industry-wide spate of claims and litigation".[39] Flaux J believed that since the carrier provided evidence about the number of damage surveys of coffee in containers had been conducted (80 bags), it could be deducted that there were many other cargo less than 80 bags with moisture damage.[40] Therefore, Flaux J held that the condensation damage to coffee beans carried in unventilated containers was common and minor condensation was inevitable whatever lining was used pursuant to the general practice of container trade.[41]

Lord Sumption disagreed with the Court of Appeal's judgment on this point. Lord Sumption said David Donaldson QC was not wrong on the ground that inherent vice of coffee beans would only be expressed since a sound system could not prevent inevitable damage.[42] And it was probable coffee beans was perfectly capable of withstanding the risks reasonably to be expected during unventilated carriage with reasonable care.[43] But Lord Sumption did not go further on this point because the carrier failed to prove, which will be analysed in next issue.

5. Burden of proof under Art III rule 2 and Art IV rule 2(m) of the Hague Rules

The essential debate in this case is the legal burden of proof under Arts III rule 2 and Art IV rule 4 except (m). The onus of proof under the Hague Rules is not clear because the Hague Rules do not provide a clear provision. The English court considered the evidential burden of proof issue in many cases but does not have a clear answer as to legal burden of proof until *Volcafe* case.[44]

To begin with, the House of Lords considered the burden of proof rule at common law of bailment which has been discussed above.[45] The Hague Rules do not have the force of law in the United Kingdom except the carriage of goods shipped from a port in the United Kingdom.[46] The principles applicable to bailees could generally apply to carrier and they are usually modified by contract (i.e. the Hague Rules).[47] As mentioned above, in bailment, the bailee

[39] *Volcafe* (QB) [43].
[40] *Volcafe* (CA) [100].
[41] ibid [102].
[42] *Volcafe* (SC) [40].
[43] ibid.
[44] *Volcafe* (SC).
[45] See issue 1, pages 54-55.
[46] Carriage of Goods by Sea Act 1924, s 1.
[47] *Volcafe* (SC) [8].

bears the legal burden of proving the absence of negligence; he does not need to show exactly how the loss of or damage to the goods occurred.[48] However, he should prove either he took reasonable care of the goods or any lack of reasonable care did not cause the loss of or damage of goods.[49] Lord Sumption believed that the bailee was in a better position to prove the loss of or damage of the goods as he was in possession of the goods and even though modern techniques reduce the level of difficulty, the position of the bailee is the same.[50]

The problem is the burden of proof issue under the Hague Rules. In the first stage, it is undoubted that if the goods suffer damage at destination when the apparent goods order and condition are recorded, the court can infer the carrier is in breach of Art III rule 2 of the Hague Rules. The debate lies on the next following stages: who has the onus of proving the loss of or damage to the goods were caused by lack of reasonable care under Art III rule 2 or inherent vice of Art IV rule 2(m). Lord Sumption held that, in accordance with principles of bailment, the carrier must show 'either that the damage occurred without fault in the carious respects covered by Art III rule 2 or that it was caused by an excepted peril'.[51] He criticised the statement of Lord Pearson in *Albacora SRL v Wescott & Laurence Line Ltd.*[52] Lord Pearson pointed that in the Hague Rules, the carrier did not need to prove negligence in order to rely on exceptions.[53] But the carrier did need to show the damage was caused by an excepted peril and by doing that, the carrier may provide evidence excluding causation by his negligence.[54] Lord Sumption disagreed on several ground. Firstly, Lord Pearson's decision on legal burden of proof was obiter dicta because the carrier was not negligent and the burden of proof is not an issue.[55] Secondly, Lord Pearson's judgment was contrary to principles of burden of proof in bailment.[56]

Another decision was considered is *The Glendarroch*.[57] The cargo was damaged by water when the vessel ran aground. The issue is a contractual exception, perils of the sea and the trial judge held the carrier should prove the damage occurred without negligence in the navigation of the vessel. The Court of Appeal disapproved the burden of proving the carrier's negligence had

[48] ibid [9].
[49] ibid.
[50] ibid [10].
[51] *Volcafe* (SC) [25].
[52] [1966] SC (HL) 19. He agreed with the House of Lord decision on interpreting Art III rule 2. See issue 3, pages 56-58.
[53] ibid 31.
[54] ibid.
[55] *Volcafe* (SC) [27].
[56] ibid.
[57] [1894] 226 (CA).

caused an excepted peril should be on the cargo interests. Lord Esher MR, who gave the leading judgment, observed that perils of the sea was an exception to an exception which meant the carrier was liable except the loss was by perils of the sea, unless the loss was caused by the negligence of the carrier.[58] The Court of Appeal extended the decision of *The Glendarroch*[59] to the application of the Hague Rules.[60]

Lord Sumption held that the distinction drawn in *The Glendarroach* should not apply in this case because "if an exception is subject to an exception for cases where it was avoidable by the exercise of due care, then the issue must ultimately be one of causation".[61] In this case, the carrier must bring him within the inherent vice exception and prove the effective cause was inherent vice.[62] The fact that coffee beans are hygroscopic and emit moisture when carried from a cool to a warm climate may not constitute inherent vice if the carrier should and can exercise reasonable care.[63]

To conclude, the principle of burden of proof in bailment would still apply to the Hague Rules and the carrier needs to disapprove his negligence.

Conclusion

In summary, the Supreme Court provides a clear answer as to the legal burden of proof issue under the Hague Rules. Despite of further discussion regarding "sound system" of Art III rule 2 from the legal aspect, the judgment clarifies the relationship between Art III rule 2 and Art IV rule 2 of the Hague Rules.

[58] ibid 230.
[59] ibid.
[60] *Volcafe* (CA) [45].
[61] Text to n 59.
[62] *Volcafe* (CA) [33].
[63] ibid [34].

Homophobia, 'Increasing Barbarity' and 'Perverted' Desires:[1] Why *Brown* Has no Place in Governing Consent to Non-fatal Offences Against the Person

Lily McDermaid[*]

Abstract

This article discusses the relevance of *Brown* [1994] 1 AC 212 in today's society, a quarter of a century after the House of Lords decision. It will be argued that the decision was wrongly decided on its facts but had previously uncontemplated consequences that may have benefited different sections of society. Similar cases from the subsequent 26 years are also discussed in order to track the development of the law and any changes in precedent. *Slingsby* in particular highlights a difference in judicial opinion when a case involved a heterosexual couple as opposed to homosexual men, even where the result was death. This article concludes that underlying prejudices and misunderstandings led to a disproportionate punishment for private sexual activity among homosexual men compared to heterosexual couples.

Introduction

Brown involved the prosecution of a group of homosexual men with multiple counts of grievous bodily harm and actual bodily harm, under s 20 and s 47 of the Offences Against the Person Act 1861 respectively.[2] The defendants were charged after police discovered video footage of their entirely consensual sadomasochistic activities. These videos had not been recorded for dissemination to the public as they were only for members of the group that were absent. A key issue in court was whether a person's consent to such activities made their conduct lawful or provided a defence to charges. The trial judge ruled that the prosecution did not need to prove the victims lacked consent. They appealed against their convictions on the basis that the prosecution could not fully prove actual bodily harm or grievous bodily harm where the victims consented, although this was dismissed by the Court of Appeal. The appellants ultimately appealed to the House of Lords. The Law Lords dismissed their appeal in a 3-2 decision, with Lord Templeman, Lord Jauncey and Lord Lowry forming the majority. This paper argues that the *Brown* decision should not be used to govern consent in non-fatal offences against the person as it was wrongly charged under the Offences Against the Person Act 1861 and has caused confusion and conflicting decisions since.

[*] *LLB with Psychology (Soton).*
[1] *R v Brown* (1994) 1 AC 212 (HL) 235, 242.
[2] ibid.

The *Brown* case was wrongly decided, so should not be treated as a leading case. The appellants' counsels and Lord Mustill and Lord Slynn had very persuasive arguments as to why they should not have been charged under the 1861 Act, whereas the majority judgments seem to be more concerned with totally different types of activities, like duelling. There was a very solid argument advanced by the appellants' counsel that the only appropriate charge would have been gross indecency, as they were committing these acts in the presence of more than two people. However, this offence was time-barred, and it had become too late to prosecute for this offence. Counsel for two of the appellants said it was these circumstances that made the prosecution 'search around and choose inappropriate legislation'.[3] In this situation, it seems that the public policy side of the litigation took over all other aspects of the case, making an example of these men in the hope that such practices would not become more widespread. *Brown* should not be treated as a leading case because of these fundamental questions as to the accuracy of the charge. As the House of Lords were split 3-2, this also suggests that the principle from *Brown* should not be treated as reliably defining the law, as there was obvious disquiet about it in the House.

Why *Brown* was wrongly decided

The *Brown* case was too clouded by issues of morality to make any conclusive legal doctrine. As the dissenting Lord Slynn and Lord Mustill rightly pointed out, it was for Parliament to decide if the legislation needs to be changed to make such conduct explicitly criminal, and it was not for the House to make a decision about morality. The majority instead seemed to focus on their role as custodians, adopting a somewhat creative interpretation of the 'opaque' 1861 Act so that the existence of consent was irrelevant to the criminality of the conduct.[4] The Lords relied on policy arguments that asserted that fully consensual sadomasochistic acts were not an exception to the general rule that consent is not a defence to an offence against a person.

The moral guidelines by which *Brown* was decided are now outdated. The House of Lords decision was made 26 years ago. Since then, same-sex marriage has been legalised and a greater diversity in romantic and sexual relationships is more widely accepted. It is reasonable to assume, therefore, that if a case with the same facts reached the Supreme Court tomorrow, it would be dealt with differently. This shows that *Brown* should no longer be treated as defining

[3] ibid 215 (Lady Mallalieu QC and Adrian Fulford).
[4] ibid 258 (Lord Mustill).

consent as it is very likely that a different decision could be reached in this ever-developing social environment.

The judges in *Brown* clearly did not understand why these men were acting as they did, which meant that their decisions were based on treating their behaviour as an evil, worthy of being a crime, even though Parliament had not explicitly legislated on it. This can be seen with Lord Templeman's and Lord Lowry's use of a victim/perpetrator rhetoric throughout, showing that they thought of the receiver as a 'degraded and humiliated' victim,[5] regardless of their eager participation in the activities. Lord Jauncey instead used the term 'receiver', which better characterises their view of the situation and recognises their consent. Ashford argued that the criminal law continues to look at sex in the binary tradition of good or bad, where married monogamous sex is seen as good and BDSM is seen as bad.[6] He highlighted the bafflement of the criminal law as to why these men would embrace such high-risk sexual activity and that this confusion reflects the judges' failure to understand the 'queer sexual world'.[7] Ashford said that the 'overt and self-evidently queer behaviour' of the men in *Brown* simply defied the ideas of masculinity in other cases that are accepted, like in the exceptions of horseplay or sports.[8] He said that Lord Templeman, who discussed duelling at length, clearly was not that familiar with BDSM. *Brown* can be seen as inciting fear and that these practices were 'a radical challenge to the heteronormative sexual relationship' which the law is still constructed around.[9] Cherkassky says alternatively that the activities in *Brown* were not prohibited due to the sexuality of the participants but on the basis that they were dangerous.[10] However, this does not explain the outcome in *Slingsby*, as here the acts were inherently dangerous but consent was available as a defence.[11]

In *Slingsby*, the defendant was found not liable for the death of his wife from septicaemia, which occurred after he caused her multiple internal cuts by wearing a ring whilst digitally penetrating her. He was found not liable for her death on the basis that she had consented to the sexual activity and therefore to the risk of death. As the court did not find him guilty of

[5] ibid 236.
[6] Chris Ashford, 'Barebacking and the "Cult of Violence": Queering the Criminal Law' (2010) 74 Journal of Criminal Law 339.
[7] ibid 349.
[8] ibid 351.
[9] ibid.
[10] Lisa Cherkassky, 'Being Informed: The Complexities of Knowledge, Deception and Consent When Transmitting HIV' (2010) 74 Journal of Criminal Law 242.
[11] *R v Slingsby* [1995] Crim LR 570.

grievous bodily harm, there could be no liability for unlawful act manslaughter. This is because unlawful act manslaughter requires an unlawful act which caused the death and in *Slingsby*, the deceased's implied consent meant that there was no such unlawful act committed.

Here, apparently unintended injury arose from what the court referred to as vigorous but consensual sexual activity, and the defendant's conviction was quashed. In *Brown*, an argument was presented that vigorous sexual acts could get out of hand and lead to very serious harm or death, so consent should not be an available defence.[12] The two cases are therefore inconsistent. The activity in *Slingsby* was of a dangerous nature due to a ring that the appellant was wearing, which resulted in his wife's internal wounds and susceptibility to infection. Due to the inherent danger in this practice, it is reasonable to argue that he chose to ignore the risk to her health, leading to her death. This ignorance of risk is arguably worse than in the circumstances in *Brown*, where there was no lasting injury or need to seek medical attention. Given the discrepancy between these two decisions, *Brown* is not fit for the purpose of applying it to cases such as *Slingsby* as there was insufficient discussion in *Brown* over liability for manslaughter charges, had any of the injuries led to death.

In *Wilson*, another case involving a heterosexual, married couple, an appellant had his conviction for assault quashed after the Court of Appeal found that his actions were no more dangerous than tattooing, and it was 'not in the public interest' that the private activities of 'husband and wife' be subject to criminal investigation.[13] Wilson used a hot knife to brand his initials on his wife's buttocks, causing scarring and requiring medical attention. Russell LJ, reading the opinion of the court, emphasised that private, matrimonial activities were considered outside the scope of criminal law. By specifically referring to married heterosexual couples, the Court followed a heteronormative narrative that invalidates less conventional or unmarried couples. Not only is this approach very dated, it could work towards silencing victims of domestic abuse. For instance, in *Wilson*, the victim did not give evidence at trial and neither did the defendant. The only evidence of consent was a recorded interview of the defendant, who stated that the victim consented. The validity of this assertion is unknown but was accepted as true by the courts.

[12] *Brown* (n 1) 274 (Lord Mustill).
[13] *R v Wilson* (1996) 3 WLR 125 (EWCA Crim) 128C.

The *Brown* case was about sexual activities that cause harm so it should not be authoritative in standard assault cases, as there should be a distinction between these sexual acts and those of personal adornment, tattooing and horseplay. To that effect, the Offences Against the Person Act 1861 was not the appropriate Act to charge the appellants under due to its inherently sexual nature. There was a decision by the prosecution to attempt to convict the appellants when charges for gross indecency under the Sexual Offences Act 1956 were time-barred. As the Lords were at great pains to point out, the acts in *Brown* were motivated by desires that the Lords found to be 'perverted and depraved',[14] which surely is different and carries a distinctly different *mens rea* to assaults sustained in the course of a fight for instance. In *AG Ref (No 6 of 1980)*, the men that had agreed to fight in the street can hardly be said to have wanted to have pain inflicted upon them by the other, unlike the men in *Brown*.[15] Cases that deal with consent to sexual acts would be more logically and sensibly dealt with as sexual offences rather than assault.

Since *Brown*, Parliament passed the Sexual Offences Act 2003, which contains detailed definitions of consent under ss 74-6. It is reasonable to argue that a change to legislation to allow for consent to s 47 and potentially s 20 offences could have best been made in this Act. The Sexual Offences Act 2003 failed to deal with a recommendation made in a Home Office Consultation Paper that the criminal law should not treat others differently because of their sexual orientation. Had consent to sexual injuries been tightened up in the Sexual Offences Act 2003, this would have eradicated issues with *Brown* as precedent. There has been a failure by the legislative arm of the state to protect the population from inconsistent judicial interpretation and subjective policy decisions. The Spanner Trust, an advocacy group for BDSM-enthusiasts, submitted a memorandum to Parliament during the debates surrounding the Criminal Justice and Immigration Bill in 2007.[16] This memorandum highlighted that, in *Slingsby* and *Wilson*, consent was a defence for heterosexual couples, and that the women/receivers were not also prosecuted, unlike the receivers in *Brown*, even though the facts in *Wilson* were identical to one of the counts of indictment in *Brown*. The Minister of State at the Home Office had advised The Spanner Trust that such an amendment should not be made in the Sexual Offences Bill passing through in 2002/3 but in a Criminal Justice Bill. This group also stated that *Wilson,*

[14] *Brown* (n 1) 255 (Lord Mustill).
[15] *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715 (HL).
[16] 'Uncorrected Evidence M407' (Public Bill Committee, November 2007) <https://publications.parliament.uk/pa/cm200607/cmpublic/criminal/memos/ucm40702.htm> accessed 3 February 2020; *Wilson* (n 13).

Slingsby and *Brown* were treated differently because of the sexuality of the participants. The Spanner Trust was horrified at the *Slingsby* decision that a woman could consent to such a high risk of her own death.

'[S]ex is no excuse for violence'[17]: The unexpected benefits of *Brown*

Brown was arguably decided incorrectly on its facts, and highlights inaccurate or outdated views of homosexual activity. However, the precedent from *Brown* has occasionally been beneficial in that it has ensured the punishment of some men who have performed dangerous sexual acts on their female partners.

Had Lord Mustill and Lord Slynn been the majority in *Brown*, it may have been easier for sexual abusers of women to get away with their behaviour. This is the opinion of Bradwell, who says that liberating the law of assault would have unjustly meant that issues in proving consent could allow for unsafe acquittals for domestic sexual abusers.[18] She also added that the attitude that it is not proper to investigate the private lives of couples, as seen in *Wilson*, helps to hide sexual abuse. This perhaps suggests that the outcome in *Brown* was the correct one, not for those involved, or those who may subsequently have engaged in similar activity, but for those who could have been failed by the law and victimised.

Emmett held that *Brown* should apply to all dangerous sexual exploits which cause harm.[19] In this case, the just outcome was achieved as Emmett was held responsible for his life-threatening actions toward his girlfriend. He caused her injuries via asphyxiation and burning using lighter fluid in the course of sexual relations, putting her life at risk and requiring medical attention. This case uses *Brown* in a confined sense as it is another scenario with potentially dangerous sexual acts. Here, intervention is objectively necessary as there was a dangerous threat to the receiver, as she had to seek medical attention and the nature of her injuries was much more concerning than in *Brown*, where no one required medical attention. Had *Brown* been decided in favour of the appellants, Emmett would still have likely been found guilty because of the immediate risk to life that his actions posed, compared to the less immediately dangerous acts of those in *Brown*. This shows that *Brown* is not as decisive as previously thought and that *Emmett* should perhaps be the new authority for sadomasochistic acts of

[17] *Brown* (n 1) 237.
[18] Julie Bradwell, 'Consent to Assault and the Dangers to Women' (1996) 146 New Law Journal 1682.
[19] *R v Emmett* [1999] ER D 641 (EWCA Crim).

violence. *Emmett* drew a sensible distinction in deciding that *Brown* is indicative of sadomasochistic cases but that it is not authority in all circumstances. This restrictive following of *Brown* makes sure to put it in its place. The Court of Appeal in *Emmett* also drew on *Wilson*, which they distinguished from the instant case on the basis that Wilson's actions were consensual behaviours between a husband and wife and that the harm in *Wilson* was less significant than in *Emmett*. This argument that consensual behaviour between a husband and wife is beyond the law's reach is flawed, as realistically the marital status of the participants makes no difference to consent. Instead, this argument is evidence of a judicial desire to impose heteronormative ideals by treating the conduct in *Brown*, *Emmett* and *Wilson* differently because of a perceived moral difference in the relationships between those involved. The argument about the harm being of a different level is clearly stronger, as Emmett posed much more of a risk to his girlfriend than Wilson did to his wife.

Dica distinguished *Brown* as the victims were found to not have consented to the risk of HIV transmission when consenting to sexual intercourse with the defendant.[20] The defendant knew that he had HIV and chose to have sexual relations with two complainants on a number of occasions, without informing them of the risk or using any protection. However, in *Brown*, there was an underlying focus on the risk of infection because of the acts carried out by the appellants. It would be better to follow *Dica* in cases of sexual transmission of diseases and the specific case law for the exceptions in *Brown* for standard assaults. According to Cherkassky, there is no good reason given in *Dica* that explains why a person can consent to contracting a potentially fatal virus under s 20 if they are informed but cannot consent to trivial harm under s 47.[21] This disparity seems entirely illogical and undermines moral arguments concerned with the level of harm involved.

R v BM applied *Brown* to find a body modifier guilty of three counts of s 18 grievous bodily harm.[22] A tattooist and piercer began offering body modification services such as removing an ear, removing a nipple and splitting a tongue. He had no medical training and patient protections were lacking. The Court of Appeal found that the consent of the customers was no justification for his actions against them and that there was no special reason to put it into a category of exemption. The court here found that the exceptions in *Brown* gave no easily

[20] *R v Dica* [2004] EWCA Crim 1103.
[21] Cherkassky (n 10).
[22] *R v BM* [2018] EWCA Crim 560; Andrew Beetham, 'Body Modification: A Case of Modern Maiming? R v BM [2018] EWCA Crim 560; [2018] WLR (D) 187' (2018) 82 Journal of Criminal Law 206.

articulated principle as to how to judge a novel situation. They said that Lord Templeman's exceptions fall into two categories of having social worth, like sports, or it being unreasonable to criminalise them, like tattooing. This highlights the subjective nature of *Brown*'s principle and the difficulty in deciding whether a scenario has social worth or whether it would be unreasonable to criminalise it. The usefulness of *Brown* was called into question and it suggests that perhaps *Brown* is no longer fit for purpose, if it ever was.

Conclusion

In conclusion, *Brown* was a difficult case for the courts to decide. The majority were driven by public policy concerns that are not as prevalent now, and the minority were compelled by the application of the law. Had the tapes been found sooner and the men found guilty of gross indecency, the law may be in a different state today. Subsequent cases have pushed *Brown* into a niche area of consent to the point where it would not be reasonable to say that it can still be usefully applied to the vast majority of instances. The Court of Appeal's ruling in *R v BM* appears to be a sensible way forward, largely putting aside *Brown* itself, applying only the exceptions that Lord Templeman gave. *Brown* itself should no longer govern consent in non-fatal offences against the person. To a certain extent, its effect has already been greatly reduced and subsequent cases have more solid foundations in law and reason from which to view consent to minor harm.

Section 11 of the Insurance Act 2015: A Work in Progress on the Doorstep of the Marine Insurance Industry

Panagiotis Adamos[*]

Abstract

British marine insurance law has been codified over a century by the Marine Insurance Act 1906. And although it becomes apparent that it embodies some basic principles of common law, on the other hand, it is also clear that it could no longer reflect the commercial practice of the 21st century. The dawn of 12th August 2016 brought with it the Insurance Act 2015, which led to an ongoing shifting tide. One of the most crucial changes deals with the warranties' regime, with Sections 9, 10 and 11 of the Insurance Act 2015 establishing a more pro-insured approach, where reliance by insurers on breaches of irrelevant warranties will be avoided. Section 11, in particular, seems to clarify ongoing mischiefs of the warranties' regime. Or does it? It also seems that old concerns about uncertainties have given their place to new ones, and this is a comment on this legal development trying to briefly point out some of the basic thoughts troubling today's marine insurance business.

Introduction

The reform came into several stages after a ten-year program, leading finally to the topic under discussion, basically the Law Commission's July 2014 Report *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment,* where some controversial proposals under Chapter 18 were embodied later on into Section 11 of Insurance Act 2015. But in order to understand better the ongoing considerations, which Section 11 brought to life, it is important to refer to the new *status quo* created under Section 10.

The key nature of a warranty has been codified through several cases by the courts[1] until finally, it became part of the Marine Insurance Act 1906 (M.I.A. 1906). Still, under the Insurance Act 2015, the definition of a promissory warranty remained unchanged.[2] It is a promise undertaken by the assured that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby the assured affirms or negatives the existence of a particular state of facts. Warranties are not defined, presumably because Lord Mansfield's well-known dictum in *Bean v Stupart* has been repeatedly cited, where warranty is 'a condition on which the contract

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[1] *HIH Casualty & General Insurance Co Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735; *The Good Luck* [1992] 1 AC 233.
[2] Marine Insurance Act 1906, s 33(1).

is founded'.[3] Moreover, if we try to construe a term into a marine policy generally, we still have to apply the same principles as before. So on this ground, a condition precedent to the inception of the risk or to the policy (e.g. the payment of the premium) or a condition precedent to liability (e.g. "the insurer faces no liability unless the assured has submitted a claim within a fixed or reasonable time of the date of the loss") will remain unaffected as far as their nature is concerned. To clarify that a little bit more, using an example, cases like *Friends Provident Life & Pensions Ltd v Sirius International Insurance*[4] are still going to be good law. Therefore, as per Mance LJ, when the wording intends to introduce a condition precedent, it has to do it expressly, and there is no general characterization of a condition precedent. This example merely illustrates that the general construction and interpretation of terms remains still unchanged (bear condition, condition precedent, promissory warranty). Intact also remained the rule of strict compliance regardless of the materiality of the risk insured.[5] Implied warranties were as well retained since the Law Commission found that these remain important, are well understood, and there were no strong arguments on their removal.[6]

So, what has changed under the new law? As it is well-known Section 9(2) of the Insurance Act 2015 abolished the "basis of contract" clauses completely and insurers will not be able to contract out of this.[7] But most importantly Section 10 of the Insurance Act 2015 tried to deal with the draconian approach of the breach of warranties, leading as a result to the suspension of insurer's liability, rather than the discharge of it, in the event of a breach of warranty, so that the insurer is liable for valid claims which arise after a breach has been remedied.[8] And this is the point where Section 11(2), (3) comes to provide what was in demand for so many years. A causal element between the nature, purpose and scope of the term breached and the loss which actually occurred in the circumstances in which it occurred. In the exact words of the Law Commission:

> We do not think it is fair that an insurer can refuse a claim on the basis of the policyholder's breach of warranty or other condition in circumstances where those terms are clearly irrelevant to the loss – that is, where the type of loss which occurred

[3] *Bean v Stupart* [1778] 1 Doug 11, 14.
[4] [2006] Lloyd's Rep IR 45.
[5] *Union Insurance Society of Canton, Limited v Wills* [1916] 1 AC 281, 286.
[6] Law Commission, *Insurance Contract Law: Business Disclosures; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* (Law Com No 353/Scot Law Com No 238, 2014) paras 17.78-17.81.
[7] Explanatory Notes to the Insurance HL Bill (2014-15).
[8] Insurance Act 2015, s 10(2).

> is not one which compliance with the warranty or condition could have had any chance of preventing. The insurer might seek to rely on this type of "technical" get-out in order, for instance, to avoid having to prove a suspected fraudulent claim. This is not good practice and insurers tell us they do not frequently take such points.[9]

Defining the risk as a whole: the problem stated

On the one hand, the sole effort of retaining warranties but removing some of the most problematic features under the new law mirrors an attempt by the Insurance Act 2015 to treat 'warranties as ordinary conditions: there can be no reliance if there is no breach, and if there is a breach then s. 11 will restrict enforcement where its requirements are satisfied'.[10] On the other hand, this change comes along with a hidden bargain. The rise of some areas of uncertainty on the basis of which policy terms fall within the scope of Section 11. Both the Act's and Law Commission's efforts to answer this question seems to remain in constant need of interpretation, when the lack of judicial precedents under the new law widens the field of uncertainty.

Reading carefully Section 11, we can realize that there is a new classification of insurance contract terms. Specifically, there are those that "define the risk as a whole" and those characterised as "risk mitigation clauses". Section 11(1) does not apply to any terms which are considered to define a risk as a whole. The Law Commission proceeded with a poor effort of identifying which kind of terms would define a risk in its generality, rather than, if complied with, would "tend to reduce" the risk of loss of a particular kind, or loss at a particular location or time. The Law Commission took the example of the New Zealand Law Commission (NZLC)[11] and referred to the non-applicability of Section 11 to terms which set out:[12]

(1) the uses to which insured property can be put (e.g. commercial/personal);

(2) the geographical limits of the policy;[13]

(3) the class of ship being insured; or

[9] Law Commission (n 6) para 18.7.
[10] Robert Merkin and Özlem Gürses, 'Insurance contracts after the Insurance Act 2015' (2016) 132 LQR 445, 457.
[11] Law Commission (n 6) para 18.33.
[12] Special Public Bill Committee, *Insurance Bill [HL]* (HL 2014, 81) 47 [1.8] (Stakeholder Note: Terms Not Relevant to the Actual Loss).
[13] For example, see *Involnert Management Inc v Aprilgrange Ltd* [2015] 2 Lloyd's Rep 28.

(4) the minimum age/qualifications/characteristics of a person insured.

The Law Commission characterized those terms as terms that go to the heart of the risk profile, and therefore any breach of them should lead us outside the scope of Section 11 and allow the insurer to avoid liability. This is an approach which renders these risk-defining terms as of a more general rather than specific importance. But this is not even a proposition by the Law Commission to identify and create a list of terms which do not fall within the Section 11, thus leaving with the courts any effort of determination and interpretation.[14] This practically leaves a blank page to one of the most fundamental modifications of the Insurance Act 2015. The difficulty in reading between the lines and finding an answer will point out how misleading or not this new regime is. Taking as an example *HIH Casualty and General Insurance Co v New Hampshire Insurance Co*,[15] the term creating an obligation to make 16 films in two slates, under the scope of a film finance policy, was a term not expressly worded as warranty. But it was held that this is a warranty on the grounds that it defines the risk which the underwriter agreed to undertake, and as such a risk-defining term it reaches the root of the transaction, as it was mentioned above. In this case, common law gives the answer leaving such cases outside the scope of Section 11. In contradiction, it has to be noticed that a marine seaworthiness warranty[16] seems to define as well the risk as a whole, however according to the Law Commission even if a loss is proved to be unconnected to seaworthiness it should be recoverable, and Section 11 should apply.

The lack of a clear answer becomes more evident if we take into consideration exclusion clauses. Paragraph 94 of Law Commission's Explanatory Notes provides that Section 11(1) catches as well exclusion clauses, 'provided those terms relate to a particular type of loss or loss at a particular location or time'. In that sense, if a vessel is insured for private use, under a marine policy, and is damaged during a business activity the insurer would not have to face liability and the shipowner would been left without cover even if the loss was caused by a massive wave. In the case now that the policy still defines the risk in its generality but contains an exclusion for any loss that has been incurred during any business activities of the vessel, it is possible that Section 11 will apply, leaving to the shipowner to prove the requirements of section 11(2), (3). But it also can be argued that under similar circumstances an exclusion is a

[14] Law Commission (n 6) para 18.35.
[15] [2001] EWCA Civ 735; [2001] 2 Lloyd's Rep 161.
[16] Marine Insurance Act 1906, s 39.

term which defines the risk as a whole in any case, placing limits on the scope of cover provided by the policy, falling therefore outside Section 11.

Risk-mitigation clauses: interpretation in demand

Generally, terms which define the risk assured as a whole, or terms which do not aim to reduce the risk of loss, or terms which manage the risk of loss other than the three types enumerated under Section 11(1), will be outside of the scope of this Section.[17] Any term including warranties, which manages/reduces the risk of loss by time, place and manner falls within Section 11(1). The abovementioned difficulties only mirror an analogy of equal problems of interpretation of such clauses. The applicability of Section 11 is evident when it comes to a warranty which requires a security watchman during the night, because if the loss occurs during the morning hours, even 'non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred'.[18]

Let us now take a closer look to the example given by the Law Commission as an illustration of Sections 10 and 11,[19] and specifically the case where a private individual insures a small yacht with a "lock warranty" requiring the hatches to be secured by a special type of padlock. This warranty intends to reduce the risk of a loss of a particular kind, meaning the loss caused by theft, intruders, burglary. If the warranty is breached but the loss is caused because of perils of the sea, then the insured can easily prove that there was no causal link between the non-compliance with this term and the loss which actually occurred under this specific circumstance. But if the loss is caused by an intrusion through a different part of the yacht, for example breaking a window, it could be argued that two main thoughts are emerging: that the warranty requiring the special type of padlock may relate to 1) all types of intrusion and therefore all types of loss caused by theft, or 2) only an intrusion through the hatches which were expected to have the special padlocks. There is no doubt that there is a certain degree of uncertainty on how the courts will interpret this kind of terms and more importantly how broadly or narrowly are going to receive these notions, turning them into future precedents. And with some interest it will be observed how the manifestation of a requirement of a causal

[17] Merkin and Gürses (n 10).
[18] Insurance Act 2015, s 11(3).
[19] Law Commission (n 6) paras 18.47-18.48.

link between the breach and any casualty leading to a claim, will eventually challenge the reasoning of the House of Lords in *The Good Luck*.[20]

Conclusion

There is no denying that the Insurance Act 2015 via Section 11 tried to give life to a more objective approach, constantly analyzing the "purpose" of every provision inside a marine policy. The new regime created a *status quo* fairer towards the assured, since insurers will not be able to rely on a breach of a warranty or similar "risk mitigation term" to reject a claim, if such non-compliance could not have increased the risk of the loss occurred, in those circumstances the loss has actually occurred. This need of a '*nexus*' and the new suspension regime will lead to a completely different approach to cases like *De Hahn v Hartley*,[21] where the term 'Warranted to leave Liverpool with 50+ hands' under the new law is put under interpretation in order to define it as a term designed to reduce the risk of a particular type of loss and apply Section 11, or if not apply Section 10, where the breach of the warranty leads to a suspensive effect.[22] But, nevertheless, it seems like something has been left incomplete and in constant need of clarification. In the exact words of the Law Commission:

> One of the major concerns raised by consultees about this recommendation was the lack of certainty over how it would be interpreted and applied by the courts. We accept that this is likely to become the subject of litigation particularly in the beginning before the courts have begun to build precedent. There is undoubtedly a degree of uncertainty relating to how the courts will interpret a "type of loss", a "loss at a particular place" and "a loss at a particular time". Often the questions will have common sense answers, but we are aware that sometimes they will not.[23]

And we should always be also aware that uncertainty in the mind of the Law Commission and the courts, practically means at a much greater level uncertainty inside the insurance business, inside the mind of the policyholder and the insurer in order to draft their policy terms properly and avoid litigation in the first place. We have to wait and see what else this dawn of 12th of August 2016 has yet to reveal.

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[20] [1992] 1 AC 233.
[21] [1786] 1 Term Rep. 343.
[22] See also *The Milasan* [2000] 2 Lloyd's Rep. 458; *The Newfoundland Explorer* [2006] 1 Lloyd's Rep IR 704.
[23] Law Commission (n 6) para 18.49.

The Magna Carta: An Invaluable Asset to Legal Development

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Abstract

For centuries scholars have debated the Magna Carta's importance, questioning if its apparent paramountcy and notability is justified. The Charter's chapters initially favoured the interests of the aristocracy and the Church beyond those of the general public. Nevertheless, the Magna Carta seemingly marked a paradigm shift in legal and political theory that remains relevant to modern governing systems. This article explores this legacy and discusses the theoretical and practical developments that were born in its wake. From establishing the rule of law to acting as a symbol of democracy, the Magna Carta lives on in contemporary campaigns to curtail absolute power.

Introduction

In 1215 the barons in England rallied together and pressured King John into sealing the Magna Carta, the Great Charter.[1] This document is known throughout the world as the origin of the rule of law and myriad vital principles that govern the legal system of the United Kingdom.[2] However, scholars have begun questioning whether that document was merely a feudal regulatory manual[3] instead of a paragon of doctrinal virtue. This article explores the purported importance of the Magna Carta by describing the historical context and intentions behind its conception, followed by a critical evaluation of its outcomes, and a discussion of its impact on legal theory and global precedents.

Historical Context and Intentions

The Magna Carta is a charter drafted by the barons in an effort to rein in the prerogative powers and abilities of the monarch.[4] Two main drivers incited the creation of the Magna Carta: increased financial pressure on the barons and a plethora of conflicts that King John exacerbated with the Church.[5] To fund the military campaigns and wars, the Crown imposed heavy taxation and increased their control over the justice system to access fines, payments,

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[1] Nicholas Vincent, 'Kingship and Crisis' in Claire Breay and Julian Harrison (eds), *Magna Carta: Law, Liberty, Legacy* (British Library 2015).

[2] Duncan French, 'Magna Carta and environmental justice: "A paradoxical motif in a modern context"' (2015) 23(2) 39.

[3] Alexander Lock and Jonathan Sims, 'Invoking Magna Carta: Locating Information Objects and Meaning in the 13th to 19th Centuries' (2015) 15(2) Legal Information Management 74.

[4] Glenna Robson, 'Fine Words Butter No Parsnips' (2008) 172 Criminal Law and Justice Weekly 181.

[5] Vincent (n 1).

and bribes.[6] One of King John's approaches to fundraising was to raise the scutage rate imposed on the barons and to change the collection frequency from a one-time payment to annual.[7] The frustration of the barons was furthered due to King John's clashes with the Church. His reign saw several conflicts in addition to the Interdict, a period from 1208-1213 where the English were entirely deprived of Church services.[8] Alongside his failed invasion of France these financial and spiritual vexations led to the barons uniting to pressure King John into signing the Magna Carta under the threat of civil and military conflict.[9] The Magna Carta was not intended to be an innovative force for law-making, society and politics, but instead a re-iterance and restoration of the old law "which a lawless king has set as naught".[10] The barons wanted to restore liberties based on their understanding of an idealized past.[11] It was born within the contemporary scope of "lay thinking" out of necessity driven by the political situation.[12]

The majority of the provisions in the Magna Carta aimed to establish limitations on the rights of the monarch to influence feudal land law.[13] These limitations functioned mainly to support the interests of the barons,[14] due to their role as representatives of the community and familiarity with corporate actions.[15] While modern society views this document as an early form of rights for individuals, realistically the majority of freedoms established were only directly accessible by a small percentage of the population.[16] Over a third of the chapters relate specifically to the concerns of the barons, and the religious freedoms specified would only apply to followers of the English Church.[17] With limited applicability to the general populous and intentions that aimed to benefit the aristocracy, one could assume that its general importance has been overstated.

Outcomes

The Magna Carta initially focused on the interests of the aristocracy and the Church but measures up to its modern valuation due to the numerous unexpected outcomes, precedents

[6] ibid.
[7] Euryn Rhys Roberts, 'The "Madness" of King John' (2015) 9 History Magazine 1.
[8] Vincent (n 1).
[9] Robson (n 4).
[10] Frederic W. Maitland and Francis C. Montague, *A Sketch of English Legal History* (G. P. Putnam's Sons 1915) 79; J.C. Holt, *Magna Carta* (2nd edn, Cambridge University Press 1992).
[11] Anne Pallister, *Magna Carta: The Heritage of Liberty* (Oxford University Press 1971) 2.
[12] Holt (n 10) 295.
[13] Lock and Sims (n 3).
[14] ibid.
[15] Holt (n 10) 295.
[16] Lock and Sims (n 3).
[17] ibid.

and practical applications it inspired. It has been used in high politics, the Church, and elite legal circles ever since its creation.[18] Lord Bingham acknowledged that it was not the intention of the barons to make the world a better place but it still functioned as the embryo for the rule of law.[19] Throughout the 1400s it was a fundamental document for establishing an early form of Parliament based on the common counsel (i.e. the "Twenty Five") established by chapter 61,[20] the importance of which grew exponentially in the centuries that followed.[21]

Three of the chapters from the 1297 iteration of the Magna Carta remain in force today: chapters one, nine and 29.[22] Chapter 29 restricts the power of the monarch to infringe upon the rights of an individual and guarantees their access to justice.[23] This chapter prioritized the fundamental principles of law above the power of executive authority, thereby establishing the rule of law.[24] In essence it was a grand compromise where the king was meant to grant liberties via a method by which he was also bound.[25] This is an integral part of the legal system in England and formed the basis of a plethora of other national governing systems.[26]

While these clauses acted as symbolic guarantees of rights, they also served important practical functions.[27] The most obvious victory of the Magna Carta was in controlling the relationship between the Crown and the tenant with regards to reliefs.[28] It confirmed the practice from the twelfth century whereby minors would not have to pay reliefs upon inheriting the land, counteracting the fixed reliefs that would have sent heirs into bankruptcy.[29] In addition to feudal procedures one can see chapters from the Magna Carta utilized in the trial of Charles I in 1649.[30] The prosecutors stated that the King was attempting to delay justice through his contempt for the court, which was contrary to the provision in the Magna Carta.[31] Additionally, the phrase "judgment of his peers" formed the basis of the jury trial system, which became

[18] ibid.
[19] ibid.
[20] Magna Carta 1215; Holt (n 10) 295.
[21] Lock and Sims (n 3).
[22] ibid.
[23] Magna Carta 1297.
[24] French (n 2) 39.
[25] Maitland and Montague (n 10).
[26] Linda Colley, 'Empires of Writing: Britain, America and Constitutions, 1776–1848' (2014) 32(2) Law and History Review 237.
[27] Sir Geoffrey Bindman, 'Magna Carta Lives: the story of the Magna Carta & lessons the government should learn from it' (2014) 164(7620) New Law Journal 7.
[28] Holt (n 10).
[29] ibid.
[30] Lock and Sims (n 3).
[31] ibid.

more relevant when the Lateran Council prohibited the participation of priests in trial by ordeal in 1215.[32] The legal system changed from having verdicts decided by God, to those decided by one's peers. These chapters are still relevant in the modern legal system as they place limitations on absolute power in order to protect individual rights.[33]

Legal Theory and Global Precedents

In the 1700s Sir Edward Coke, a judge, politician, and Chief Justice of Common Pleas and King's Bench, used the Magna Carta to oppose the royal prerogative.[34] He believed that the Magna Carta was a confirmation of the common law with enduring value to be upheld by each generation of lawyers[35] and was affirmed by every monarch since time immemorial.[36] It was through his published works, his seat in Parliament and from his *dicta* in the courts that he invoked the Magna Carta to entrench the supremacy of the common law.[37] In his seminal work *The Institutes of the Laws of England* he stated, '[every] oppression again't law, by colour of any usurped authority, is a kind of destruction[…] and it is the worst oppression that is done by colour of justice'.[38] By restricting absolute power and guaranteeing individuals' access to justice, the Crown would not be able to usurp authority to the detriment of rights and freedoms.

Many modern judges agree with Coke's interpretation of the Magna Carta. Lord Bingham expressed that it established the rule of law by creating a clear rejection of the unaccountable and unbridled prerogative power of the monarch.[39] This parallels the views of Lord Denning that the Magna Carta was the foundation of individual freedoms that subvert the authority of the despot.[40] Contrary to these beliefs Lord Sumption stated that placing the Magna Carta as the origin of the principles and values of the legal system is a "distortion of history to serve an essentially modern political agenda".[41] He believed that the Magna Carta was feudal land law's compilation of technical regulations.[42] Regardless, even these "distortions" have led to the

[32] S.F.C. Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981); Maitland and Montague (n 10) 59.
[33] Bindman (n 27) 7.
[34] Lock and Sims (n 3); Pallister (n 11).
[35] J.W.F. Allison, 'History to Understand, and History to Reform, English Public Law' (2013) 72(3) Cambridge Law Journal 526.
[36] Lock and Sims (n 3).
[37] ibid.
[38] Sir Edward Coke, *The Second Part of the Institutes of the Laws of England: Containing the exposition of many ancient and other statutes* (E. and R. Brooke 1797) 48.
[39] Lock and Sims (n 3).
[40] French (n 2) 39.
[41] Lock and Sims (n 3) 8.
[42] ibid.

advancement of individual rights in governance systems all over the world.[43] An example of this is the emigration of pioneers to America, where the Magna Carta was used as a symbol for justice and freedom since the civil wars of the 1640s.[44] It was then used in oppositional propaganda throughout the 1700s and 1800s,[45] and again in the Supreme Court as a basis for the ideals of liberty and rights[46] and good governance.[47] Overall, the Charter provided a baseline to measure the effects of official action on the individual that is central to legal and political thought and practice.[48]

Conclusion

While the intentions behind the creation of the Magna Carta were to benefit a small percentage of the citizens, it served practical functions in the court of law in the centuries following its inception. Further, it was the seed of modern legal and political theory that created global precedents for governing systems to date. Present scholarship rightly attributes the inception of the rule of law, the jury trial system and Parliament to this document, thereby justifying its importance. In the Supreme Court it is still referenced in contemporary immigration and human rights cases to prevent the delaying and denial of justice,[49] and more technically in maritime cases referring to the rights of fisheries and estates to exclude the public.[50] The ability of the legal system to rely on a document that is approximately 800 years old is an affirmation of its long-standing impact and value. In the words of Sir Edward Coke, "[u]pon this chapter, as out of a roote, many fruitfull branches of the law of England have sprung".[51]

[43] ibid.
[44] Colley (n 26).
[45] Lock and Sims (n 3).
[46] Robson (n 4).
[47] French (n 2) 39.
[48] Pallister (n 11).
[49] See *R (on the application of O and another) v Secretary of State for the Home Department* [2019] EWHC 148 (Admin); *Regina (UNISON) v Lord Chancellor (Equality and Human Rights Commission and another intervening) (Nos 1 and 2)* [2017] UKSC 51; *R v. Secretary of State for the Home Department, Ex parte Phansopkar, R v. Secretary of State for the Home Department, Ex parte Begum* [1976] Q.B. 606; *SMM v United Kingdom* (App. No. 77450/12) [2017] ECHR 77450/12.
[50] Caroline A. Buffery, 'The Rivers of Law: A Historical Legal Geography of the Fisheries on the Severn Estuary' (2017) 25(6) Journal of Water Law 263; *Loose v Lynn Shellfish Ltd and others (Le Strange Meakin, Part 20 defendant) (Crown Estate Commissioners intervening)* [2016] UKSC 14;
[51] Coke (n 38) 45, referencing Magna Carta 1297, s 29.