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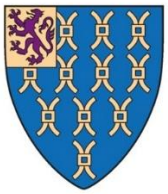

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Foreword

Once again, it is with great pleasure that in my capacity as Editor I am writing this Foreword for the Lincoln's Inn Law Journal. The Journal had a highly successful launch in July 2019, and the second edition is now published. The Panel Members appointed for the purpose of deciding upon which scripts should be selected for inclusion in the publication was constituted on the same basis as last year, apart from one person who was on holiday at the time. However, Howard Page QC also joined the Panel, and we had the benefit of his considerable experience and expertise in making the appropriate assessments.

We also decided that there should be a preliminary sifting process of the scripts submitted by students. Howard Page and I undertook that task. Of the twenty-two scripts submitted by students, eight were sifted out. We then embarked upon a change of process in that, rather than the remainder being divided between the Panel Members, each Member received the entire remaining fourteen scripts for assessment. The reason for this change of approach was in order to achieve consistency.

The Panel then had a difficult task to perform owing to the very high quality of the scripts received. Eleven top-scoring scripts were shortlisted for the prize and one was selected as the winner.

The breadth and diversity of the subject matter ranged from the law relating to Data Protection and Cyborg, Paedophile Hunters and the Law of Entrapment, to Resale Price Maintenance and the UK competition Law. However, the subject matter of the winning entry was the very topical analysis of Miller (2) in the Supreme Court. Again, I must pay tribute to the depth of interest and learning of the students concerned.

As I stated in my Foreword to the first Edition, what has distinguished the Lincoln's Inn Law Journal from other contenders in the field is that it is a student-led initiative which has been embraced and supported by Lincoln's Inn.

Finally, I must pay tribute to all those who assisted in the production of the Journal, particularly the members of staff of Lincoln's Inn, without whose dedication to the task it would not have seen the light of day.

EDWARD COUSINS, 3rd April 2020

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Beyond *Miller (No. 2)*: A New Legal Standard for the Determination of Prerogative Justiciability?

James Taylor

At first glance the decision of the Supreme Court in *R (on the application of Miller) v The Prime Minister* does not appear to have made any real change to our constitutional law, notwithstanding the hyperbolic headlines it has inspired.[1] The attention the judgment has received certainly owes much more to the controversy of the political issues that it dealt with than to a supposed straying of judicial authority into executive territory. However, the Court's decision reflects the acceleration of a long-established trend in UK constitutional law, and preoccupation with the immediate political significance of the case has so far overshadowed a line of reasoning in the judgment that has the potential to expand yet further the concept of 'justiciability' in respect of prerogative powers. The lasting importance of *Miller (No. 2)*, one practitioner has suggested, lies in its articulation at the highest judicial level of a contemporary understanding of core constitutional principles.[2] It will be argued here that what is perhaps more interesting than the mere articulation of these principles is that they are presented in the judgment as a standard against which courts may determine whether the exercise of a prerogative power is justiciable by reference to the degree to which a power's exercise offends these constitutional principles.

Miller (No.2) in context: landmark developments in reviewability

For several centuries the courts have scrutinised the question of which powers exercised by the Crown and subsequently the executive may be subjected to judicial review. Up until the 1980s, this question was decided principally by reference to the source of the power: was it an exercise of the prerogative - of the residual common law powers of the Crown – or did it have a statutory footing? If the power came from the prerogative the court accorded it a special status and was reluctant to intervene. In *Re Petition of Right*, the court had to decide whether the government's use of its prerogative power to requisition property in an invasion scenario was unlawful. The

[1] *R (on the application of Miller) v The Prime Minister* UKSC 41 [2019] 3 W.L.R. 589; Thomas Poole, 'Understanding what makes "Miller & Cherry" the most significant judicial statement on the constitution in over 200 years' *Prospect Magazine* (London, 24 September 2019); Charles Moore, 'The rule of law has become the rule of lawyers' *The Spectator* (London, 28 September 2019).

[2] Kenneth Campbell QC, 'A very British non-coup' (2019) 64(9) Journal of the Law Society of Scotland < shorturl.at/dkAQ8 > accessed 15 November 2019.

court interpreted 'invasion' liberally, and therefore found that the prerogative power had been lawfully used.[3] Further scrutiny of its exercise was not necessary once the court was satisfied that the criteria for the power's application were present.

In *Attorney-General v De Keyser's Royal Hotel Ltd,* the House of Lords scrutinised the prerogative power to requisition property in wartime again, this time determining that the power could not apply because the criterion of necessity was not satisfied. Although the outcome was different, the special status of the prerogative as a power that lay separate from statute was preserved. Reviewability was founded on the fact that prerogative powers had been eclipsed in this case by statutory ones; put 'in abeyance' on some parallel track, but still alive as an independent source of government power.[4]

However, the reviewability of the prerogative in cases over the following decades came to be determined less and less by reference to the source of those powers, with the courts reasserting their common law authority to review the legality of non-statutory government powers. In *ex parte Lain,* it was held that decisions of the Criminal Injuries Compensation Board (of prerogative creation) were reviewable because they were still 'lawful', regardless of whether they were prerogative or statutory. Lord Parker could see 'no reason either in principle or in authority why [the Board] should not be a body of persons amenable to the jurisdiction of this court', for the fact that 'the board are not set up by statute but…under the prerogative, does not render their acts any the less lawful.'[5] Again, the relevance of the source of a government power to its reviewability was minimal in the *Laker Airways* case, where the majority judgment held that policy guidance issued under prerogative that sought to frustrate the intention of the s.3 of the Civil Aviation Act 1971 was unlawful.[6]

A little under a decade later, the landmark case of *CCSU v Minister for the Service* extended the scope of reviewability by formally defining three grounds of review under which the exercise of executive power could be scrutinised.[7] The judgment of Lord Roskill listed the remaining

[3] *Petition of Right Re* [1915] 3 K.B. 649 [1915] 7 WLUK 65.
[4] *Re De Keyser's Royal Hotel Ltd* [1920] A.C. 508 [1920] 5 WLUK 46 p.540 (Lord Atkinson).
[5] *R v Criminal Injuries Compensation Board Ex p Lain* [1967] 2 Q.B. 864 [1967] 3 W.L.R. 348 p.881 (Lord Parker CJ).
[6] *Laker Airways Ltd v Department of Trade* [1976] EWCA Civ 10, [1977] 2 All ER 182.
[7] *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374 [1984] 3 W.L.R. 1174.

prerogative powers that were recognised by the courts, but also stated that there was no 'logical reason why the fact that the source of power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory.'[8] It was in this case that Lord Diplock introduced the concept of 'justiciable' and 'non-justiciable' questions. Government action was always reviewable or 'justiciable' if it concerned legality; whether the exercise of a power was within its lawful limits necessarily fell to be determined by the courts.[9] However, government action might not be reviewable, being 'non-justiciable', if by its nature it was not suitable for review under the other grounds of judicial review, such as the defence of the realm prerogative that featured in Lord Roskill's list.[10] This division put reviewability on a different footing whereby the nature of the power in question rather than its prerogative or statutory source would determine whether the courts could review its exercise.

Justiciability in *Miller (No.2)*

It makes sense to turn to *Miller (No.2)* at this point, as it is with discussion of the *Council of Civil Service Unions* case that the Supreme Court's analysis of justiciability begins.[11] Before the Court addresses the justiciability of the question of whether the prorogation of Parliament was lawful, however, it gives a strong indication of the answer it will reach. The judgment softens the ground for its ultimate conclusion by dealing with four points that it says must be considered at the outset.[12] Firstly, that the power to order prorogation is a prerogative power, and that its exercise 'place[s] on the Prime Minister a constitutional responsibility…to have regard to all relevant interests, including the interests of Parliament'[13]. Secondly, the political hue of a question does not make it non-justiciable per se. Thirdly, accountability of the executive to Parliament does not mean it is 'immune from legal accountability to the courts', and fourthly, that *if* it decided the question was justiciable then that would not offend the constitutional principle of the separation of powers.[14] From the outset, then, and as Caird has recognised, the Court frames the justiciability

[8] Ibid, p.417 (Lord Roskill).
[9] Ibid, p.410-12 (Lord Diplock).
[10] Ibid, p.418 (Lord Roskill).
[11] *R (Miller)* [35].
[12] Ibid, [30].
[13] Ibid, [30].
[14] Ibid, [31]-[34].

question in terms of core constitutional principles.[15] Over the course of its judgment, it is implied, the Court's overarching consideration will be whether a finding that the question was non-justiciable could violate parliamentary sovereignty, the supervisory jurisdiction of the courts or the separation of powers.

It is notable that far more discussion is devoted to the preliminary question of justiciability than to the substantive review of the exercise of the prerogative power to prorogue. Of course, this is in large part due to the fact that the Divisional Court dismissed the claim on the justiciability issue, making an extensive review of the underlying principles of justiciability appropriate in reversing its decision[16]. In the process of this, however, a somewhat novel approach to justiciability emerges; one that involves the collapsing of a distinction established in the *CCSU* case and that relies fundamentally on a return to core constitutional principles. Indeed, it reflects the trend that Greene has observed of the common law and the constitution 'hav[ing] met in the courts' in recent times to 'add delineation' to the United Kingdom's core constitutional conventions.[17]

At paragraph 35 of the Supreme Court judgment in *Miller (No.2)*, a distinction is drawn between two issues. The first is whether a prerogative power exists, and if it does exist, its extent. The second is whether, granted that a power exists, and that it has been exercised within its limits, the nature or mode of that power's exercise is open to legal challenge on one of the established grounds of judicial review.[18] This is essentially a reiteration of the position on justiciability set out by Lord Diplock in the *CCSU* case: a 'lawful limits' issue is by definition justiciable, while a 'mode of exercise' issue may not be.

The Court then addresses an argument that ran central to the respondent party's submissions: that prorogation rightly belongs in Lord Roskill's list of 'excluded categories'.[19] Having set out the respondent's position, the Court explains that this argument only arises in the first place if the

[15] Jack Caird, 'Miller 2, the Supreme Court and the politics of constitutional interpretation' *Counsel* (November 2019).
[16] *R (Miller) v Prime Minister* [2019] EWHC 2381 (QB) [2019] 9 WLUK 81.
[17] David Greene, 'Our unwritten constitution: under pressure & under scrutiny' (2019) 7858 New Law Journal < shorturl.at/nyT03> accessed 27 November 2019.
[18] *R (Miller)* UKSC 41 [2019] 3 W.L.R. 589 [35].
[19] Ibid, [35].

issue at hand concerns the 'mode of exercise' and not the 'lawful limits' of prerogative power.[20] It goes on to restate that justiciability depends on which of these two issues arises on the facts of the present case. Then, between paragraphs 38 and 52, the Supreme Court justifies its departure from the conclusion reached by the Divisional Court by reference to another question: 'by what standard is the lawfulness of the advice to be judged?'[21]

It is the lateral shift to this question that makes the judgment so interesting. Any diligent reader who has followed the Court's reasoned application of the justiciability distinction derived from the *CCSU* case could be forgiven for feeling lost at this point. Was the Court not building up to consider head on whether the facts presented a 'mode of exercise' issue? This was after all what had occupied the Divisional Court, which found that the political nature of the power to prorogue presented an obstacle it could not reason its way around.[22] Ultimately, however, the Supreme Court's distinction between two justiciability issues at paragraph 35 emerges as the most powerful step in the judgment, creating two routes of analysis that lead to quite different ends when applied to the same fact pattern.

The Divisional Court took 'Route A' – nature and 'mode of exercise' within lawful limits - and discovered it to be a dead end, while the Supreme Court takes 'Route B': illegality and 'lawful limits', and by applying the 'standard by reference to which the lawfulness…is to be judged', obviates the need to deal with political nature of the prerogative.[23] At the end of paragraph 38, just before the question of the standard is posed, the judgment makes the following assertion: 'Before reaching a conclusion as to justiciability, the court … has to determine whether the present case requires it to determine where a legal limit lies in relation to the power to prorogue Parliament, *and whether the Prime Minister's advice trespassed beyond that limit*' (emphasis added).[24]

Here, the Court steps beyond justiciability into substantive judicial review 'before reaching a conclusion as to justiciability'[25] in a way that is logically problematic. The first half of this assertion could be confined to the justiciability question, since deciding whether the case requires

[20] Ibid, [35].
[21] Ibid, [38]-[52].
[22] *R (Miller)* [2019] EWHC 2381 (QB) [2019] 9 WLUK 81.
[23] Ibid, [39].
[24] Ibid, [38].
[25] Ibid, [38].

the Court to determine the legal limits of the power to prorogue could conceivably be a preliminary inquiry. The second half of this assertion (in emphasis), however, is clearly blurring this boundary. The proposed line of inquiry involves deciding the question of the lawfulness of this particular use of the power to prorogue – 'whether the Prime Minister's advice trespassed beyond that limit'. For the Court to decide whether it is 'required' to examine whether the limits have been passed, it must go further and determine the answer to the question of lawfulness. Accordingly, after this point there is a breakdown in the division between the stages of determining justiciability and engaging in substantive judicial review.

As a result of this, the Supreme Court judgment collapses the distinction between 'lawful limits' and 'mode of exercise' as a means of determining justiciability. This is because determining where the lawful limits of the power to prorogue lie involves the Court giving itself complete freedom to determine the lawfulness or unlawfulness of the 'mode of exercise' of the power in question, despite 'mode of exercise' supposedly being a discrete issue. Its analysis of the 'lawful limits' sees the Court engage in a freehand line-drawing exercise that enables it to take stock of the 'mode of exercise' and nature of the power, which had been presented earlier as an altogether different line of inquiry.[26] The distinct issues at paragraph 35 merge into one and reduce the whole justiciability question to the *ultra vires* doctrine. The Court is not identifying clear limits at all; rather, it is reviewing a single use of a prerogative power and deciding whether that use was lawful or unlawful. Moreover, unlike in a case where the court must determine the lawful limits of statutory power by reference to the wording of an Act of Parliament, defining the limits of prerogative powers requires no such reference.

It is helped in its task of expanding justiciability by introducing the 'legal standard', which proves to be a vague but powerful tool by which it can import into its analysis those core constitutional principles that it views as the appropriate point of reference for a review of the power to prorogue.[27] It ultimately decides that the 'relevant limit' on the power to prorogue can be determined by application of the legal standard, and 'that standard is one that can be applied in practice' by considering 'the extent to which prorogation frustrates or prevents Parliament's

[26] Ibid, [35].
[27] Ibid, [38]-[39].

ability to perform its legislative functions and its supervision of the executive.'[28] The Court's development of the 'legal standard' is at some points reminiscent of Lord Atkin's reliance on the authority of Humpty Dumpty in *Liversidge v Anderson.*[29] The 'legal standard' must be applied, and it will mean what the Supreme Court in *Miller (No.2)* says it means.

Implications of *Miller (No. 2)*: prerogative justiciability and the *Padfield* principle

One commentator has described *Miller (No. 2)* as being 'openly and unapologetically a "constitutional" judgment', and it is hard to disagree with that assessment.[30] With an unwritten constitution as a point of reference, aided by case law that is largely silent on the scope of the specific prerogative power under review, the Supreme Court has returned to first principles and has interpreted them with an uncommon degree of confidence and freedom.

Interestingly, the Court's reliance on the intention of Parliament and the supervisory jurisdiction of the courts in developing a 'legal standard' against which the lawful limits of a prerogative power can be defined seems to echo the reasoning in *Padfield v Minister of Agriculture.*[31] Although this case is absent from the Supreme Court's reasoning, it featured heavily in counsel for the appellant's arguments, with the intention having been to transplant the *Padfield* principle so that it might be applied to aid the definition of discretion in relation to the use of prerogative powers as well as statutory ones.[32] In *Padfield*, Lord Reid famously described the court's duty to construe the 'policy and objects' of Acts of Parliament, by reference to which the limits of statutory powers of government could be determined.[33] Analogously, the Supreme Court in *Miller (No.2)* divines the limits of prerogative power by reference to the policy and objects of those powers as construed from their common law origins. Another notable similarity of these cases is that they both extend arguments on the basis of constitutional 'principle' in the absence of clear precedent.

[28] Ibid, [50]-[51].
[29] *Liversidge v Anderson* [1941] UKHL 1, [1942] AC 206, p244 (Lord Atkin).
[30] David Allen Green, 'Brexit, Padfield and the Benn Act' (*The Law and Policy Blog,* 27 September 2019) https://davidallengreen.com/2019/09/brexit-padfield-and-the-benn-act/ accessed 16 November 2019.
[31] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 [1968] 2 W.L.R. 924.
[32] Anthony Fairclough (*Supreme Court Live Blog,* 18th September 2019) < shorturl.at/hpVW6> accessed 31 November 2019.
[33] *Padfield,* p.1030 (Lord Reid).

Given its basis on broad principles, it is arguable that the reasoning in *Miller (No. 2)*, although related specifically to the prerogative power to prorogue Parliament, could be followed by the courts when called on to review other prerogative powers. It is true that the Court describes its judgment as a 'one-off', thus lowering the likelihood that it will be followed often in the future, but as Dobson has emphasised, this is nonetheless a judgment of the Supreme Court, and not one that is likely to be forgotten about for the time being.[34] In *Miller (No.2),* the reasoning on 'lawful limits' eclipsed the 'mode of exercise' issue that has previously enabled the courts to find the exercise of certain powers categorically non-justiciable by reason of their nature. Depending on the willingness of courts to apply the same 'legal standard' set out in *Miller (No.2)* when addressing justiciability of other prerogative powers whose lawful limits are uncertain, justiciability could become a question of degree and not kind; a negative basis for review by assessment of the extent to which a power's exercise might violate core constitutional principles if that power were *not* found to be justiciable.

[34] Nicholas Dobson, 'The prorogation judgment – step too far?' (2019) 7860 New Law Journal < shorturl.at/nyT03> accessed 28 November 2019.

Paedophile Hunters and the Law of Entrapment

Thomas Beardsworth

Introduction

In November 2019 Mark Sutherland, one of hundreds of defendants caught in recent years by a vigilante army of self-styled 'paedophile hunters,' became the first to win permission to appeal to the U.K. Supreme Court.[1]

Sutherland was convicted based on evidence of his online communications with a member of 'Groom Resisters Scotland' posing as a 13 year-old boy. The Court of Appeal of England and Wales considered paedophile hunting for the first time in 2018 in *TL*.[2] It affirmed that defendants seeking to stay proceedings on grounds of non-state entrapment might fail when they would succeed if the entrapment were state-orchestrated.

Sutherland is one of hundreds of men who claim they were unlawfully entrapped into committing sexual offences by vigilantes. More than half of the 403 prosecutions against defendants charged with attempting to meet a child following sexual grooming[3] in 2018 included evidence gathered by paedophile hunters, up from approximately one quarter in 2016, according to Freedom of Information requests submitted by the BBC.[4] It's a global phenomenon.[5] In the U.K. commentators have attributed its growth to factors including high-profile abuse scandals and even a plotline in the popular TV soap EastEnders.[6]

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[1] Stuart MacDonald, 'Appeal set to settle role of paedophile hunters,' The Times, 29 November 2019, <https://www.thetimes.co.uk/article/appeal-set-to-settle-role-of-paedophile-hunters-gw30s2c78> accessed 1 December 2019

[2] *R v TL* (2018) EWCA Crim 1821.

[3] An offence under Section 14 and 15 of the Sexual Offences Act 2003.

[4] BBC News, 'Police concerns over rise of 'paedophile hunters'" 6 November 2019, <https://www.bbc.co.uk/news/uk-england-50302912> accessed 4 December 4, 2019; BBC News, 'Police 'may work with paedophile hunters",18 September 2017 <https://www.bbc.co.uk/news/uk-england-41203273> accessed 4 December 2019.
The BBC says it requested data from police forces in England, Wales, Northern Ireland and Jersey.

[5] Hanna Kozlawska, 'There's a global movement of Facebook vigilantes who hunt pedophiles,' Quartz, 24 July 2019 <https://qz.com/1671916/the-global-movement-of-facebook-vigilantes-who-hunt-pedophiles/> accessed 4 December 2019

[6] Jenny Wiltshire, 'Crime fighting is no job for amateurs', The Times, 24 July 2018, <https://www.thetimes.co.uk/edition/news/crime-fighting-is-no-job-for-amateurs-2xpgr9czh> accessed 4 December 2019

The issue demands attention from lawmakers as well as lawyers. Prosecuting authorities are currently managing an unmanageable tension. On the one hand, the state's use of evidence gathered by vigilante investigators is helping catch offenders who might otherwise be missed. On the other hand, the police cannot encourage vigilantes who celebrate their stings online with "macho triumphalism"[7], who may undermine official investigations[8] and even commit offences themselves by using violence or distributing illegal images.

This essay will review and ultimately agree with academic criticism of the entrapment double-standard in common law. It will then be submitted that the way to safeguard the criminal justice system against excessive vigilantism is to license paedophile hunters under a statutory regime. A template for doing so, though not with this purpose in mind, is close at hand: the government's unimplemented 2013 proposal to fully license the private-investigation industry.

Understanding State Entrapment

Lord Hoffman stated in *Loosely*[9] that "Entrapment occurs when an agent of the state - usually a law enforcement officer or controlled informer - causes someone to commit an offence in order that he should be prosecuted." He stated that the police should not "create crime artificially."[10]

Entrapment is not strictly a defence in English law because it does not affect the *actus reus* and *mens rea* of the crime.[11] However the charges will be dropped if the court considers that to continue the

[7] Paul Mason, 'The Vigilante, The Chat Room and Entrapment,' 6 August 2018, Doughty Street Chambers blog: "Their stated motive to assist the police in child sex cases is undermined by the macho triumphalism." <https://insights.doughtystreet.co.uk/post/102f04u/the-vigilante-the-chat-room-and-entrapment> accessed 1 December 2019.

[8] Frances Perraudin, 'Paedophile hunters jeopardizing police work, says senior officer', The Guardian, 24 April 2017, <https://www.theguardian.com/society/2017/apr/24/paedophile-hunters-jeopardising-police-work-child-protection> accessed 4 December 2019

[9] The conjoined appeals of *Loosely* [2001] UKHL 53 and *Attorney General's Reference (No.3 of 2000)*, [2001] UKHL 53; Lord Hoffman in *Loosely* at [36]

[10] ibid at [23]

[11] [1980] AC 402

trial would be "an affront to the public conscience."[12] From a moral perspective the state lacks standing to condemn an act if it "does not come to court with clean hands."[13]

The state may actively involve itself in the commission of a crime[14] providing it does not stray beyond providing the "ordinary temptations and stratagems" that the defendant might normally encounter in the course of the given criminal act.[15]

In *Moon*[16], the Court of Appeal allowed the defendant's appeal because there was no evidence she had been willing to supply heroin before she reluctantly did so in response to a persistent undercover police officer. But the act of cajoling a suspect will not suffice to defeat a prosecution. In *Jones*[17] a differently-constituted Court of Appeal took no objection to officers, posing as a child, who successfully apprehended a suspected paedophile by sending him sexually explicit text messages - after he had not shown up to a previously-arranged meeting. Counting against the appellant was that he had initially posted a graffiti advertisement seeking an illegal sexual encounter.

Understanding Non-State Entrapment

When the jury delivered their guilty verdict in the 1999 trial of the Earl of Hardwicke, they passed an unusual note to the judge expressing their misgivings: "Had we been allowed to take the extreme provocation into account we would undoubtedly have reached a different verdict."[18]

Hardwicke had supplied cocaine to Mazher Mahmood, an undercover journalist for *The News of The World* who later became known as the 'Fake Sheikh'. Hardwicke's sentence was generously suspended but he appealed the verdict nonetheless[19]. The Court of Appeal confirmed that investigatory

[12] Lord Steyn in *R v Latif* [1996] 2 Cr. App. R. 101
[13] Hock Lai Ho, 'State Entrapment' [2010] 31(1) Legal Studies 71.
[14] *Loosely* at [109].
[15] McHugh J in *Ridgeway v The Queen* (1995) 184 CLR 19 , 92, cited with approval in *Loosely* at [100]
[16] [2004] EWCA Crim 2872.
[17] [2007] EWCA Crim 1118.
[18] *R v Hardwicke* [2001] Crim LR 220 at [10].
[19] The trial judge interpreted the jury's note as a "plea ...to exercise particular mercy." Linus Gregoriadis, 'Judge frees peer caught in tabloid drug sting,' The Guardian, 23 September 1999, <https://www.theguardian.com/uk/1999/sep/23/linusgregoriadis> accessed 4 December 2019.

malpractice is "not a consideration which applies with anything like the same force when the investigator allegedly guilty of malpractice is outside the criminal justice system altogether."[20]

In *Saluja*,[21] another appeal stemming from journalistic undercover reporting, Goldring J referred to the court's preoccupation with "the executive's misuse of state power by its agents" rather than "misconduct of non-state agents."[22] The European Court of Human Rights appeared to agree when considering a defendant's Article 6 right to a fair trial. It distinguished *Shannon*[23] from the unlawful entrapment it found in *Teixeira*[24] because "the State's role [in Shannon] was limited to prosecuting the applicant on the basis of information handed to it by a third party".[25]

In *TL*, the trial judge had dismissed the prosecution as an abuse of process. The Crown Prosecution Service ("CPS") appealed. On the facts of *TL*, the issue of the differing standard for state/non-state misconduct was something of a sideshow because the Court of Appeal disagreed with the trial judge that the entrapper had not met the standard of investigatory fairness that a state agent would have been held to.[26] Nonetheless the CPS won agreement for its submission that the trial judge had erred in holding the entrappers to the same standard.[27] This puts in doubt the CPS's official guidance concerning paedophile hunters, which is that the "the vigilante must comply with *Loosely* in order for a successful prosecution to result."[28]

Critically Considering the Entrapment Double-Standard

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[20] *Hardwicke* at [22].
[21] *Council for the Regulation of Healthcare Professionals v General Medical Council and Saluja* [2006] EWHC 2784 (Admin).
[22] ibid at [80]-[81].
[23] Admissibility Decision, ECHR 6th of April 2004, *Shannon v. The United Kingdom*, Appl. nr 67537/01.
[24] *Teixeira de Castro v Portugal* [1999] 28 EHRR 101.
[25] cited by Goldring J in *Saluja* at [71].
[26] *TL* at [37].
[27] *TL* at [31].
[28] CPS Code for Crown Prosecutors, 'Vigilantes on the internet - cases involving child sexual abuse', September 2017, updated March 2019. https://www.cps.gov.uk/legal-guidance/vigilantes-internet-cases-involving-child-sexual-abuse While the guide has been updated since the Court of Appeal decision in *TL*, it does not make any reference to the case. It is therefore unclear if the CPS considers *Loosely* to apply to vigilantes in much the same way as before *TL*, perhaps because Lord Burnett CJ did not elaborate on what justifies a departure from the 'starting point', or if the CPS guidance is simply out of date.

In *TL*, Lord Burnett CJ echoed Goldring J in stating that a stay of proceedings on grounds of non-state entrapment is possible, though rare.[29] It is unclear how rare exactly. In at least one recent Crown Court trial, the judge stayed the prosecution and the CPS declined to appeal.[30]

The starting point for considering a breach "is to ask whether the same, or similar, conduct by a police officer would do so," the Lord Chief Justice said.[31] He did not elaborate on the conditions in which the standard for non-state entrappers may fall from the starting point. Stark's appraisal is that *TL* amounts to the court making a "grossness" distinction between state and non-state entrapment, "otherwise the 'starting point'...would, presumably, have been an end point."[32]

The argument for ceding ground from Lord Burnett CJ's 'starting point' in cases of paedophile-hunter entrapment is weak. If a distinction between state and non-state entrapment is to be supported the purpose of the investigation must be fundamentally different. Journalistic entrapment is arguably distinguished because the primary motivation - to win an audience with a sensational scoop - is essentially commercial. The desire to criminally sanction the target is, at most, secondary. By contrast the purpose of paedophile hunters, as the trial judge in *TL* put it, is to "behave like an internet police force...in order to obtain evidence on which to mount a prosecution."[33]

Where the court decides that the state's operational distance from vigilantes defeats the defendant's application for a termination on grounds of abuse of process, Hofmeyr suggests the "remedy" lies in an application to exclude evidence through Section 78 of the Police and Criminal Evidence Act 1984.[34] The statutory provision allows judges to exclude any evidence if "the circumstances in which [it] was obtained" are unfair and it is something "on which the prosecution proposes to rely." There is no caveat which requires the misconduct to have been at the hands of state investigators. The CPS in

[29] In *Saluja* at [81]; *TL* at [32]
[30] Geoffrey Bennett, 'Judge throws out court case involving man detained by paedophile hunter', Bristol Post, 29 August 2018, <https://www.bristolpost.co.uk/news/bristol-news/judge-throws-out-court-case-1949588> accessed 4 December 2019.
[31] *TL* at [35].
[32] Findlay Stark, 'Non-state Entrapment,' (2018) Arch. Rev. 2018, 10, 6-9.
[33] Cited by the Court of Appeal at [14] in *TL*.
[34] Kate Hofmeyr, 'The problem of private entrapment' [2006] Crim. L.R., Apr, 319 at 335.

the aforementioned guidelines refers to "a number of cases" where key evidence has been excluded, usually resulting in an acquittal.[35]

The broad principle to be advanced is that a defendant's rights before the court are not overreached by the state leasing its criminal justice system to private agents. The need for uniform standards of investigatory propriety is a principle recognised by professionals in the burgeoning arena of private criminal prosecutions.[36] The judicial system is particularly vulnerable to abuse by vigilantes where there is an established pattern of the police acting on their work. A tacit relationship may form through iterations of (private) entrapment, arrest and charging even where the police's public statements are hostile.

Paedophile Hunting Re-Considered: No Fishing

If it is accepted that the same standard should prevail for state and non-state entrapment, where does that leave the activities of paedophile hunters?

While Lord Hoffman in *Loosely* was largely concerned to condemn overly proactive investigatory techniques, he also stated that passive techniques which amount to virtue testing the general population would be "unacceptable".[37] Fishing for crime by leaving a wallet on a park bench amounts to "preying on the weakness of human nature to create crime."[38]

A pre-existing reasonable suspicion, broadly construed, is essential for legitimate investigation. Considering *Williams v Director of Public Prosecutions*,[39] Lord Hoffman held it was appropriate for Essex police to leave an unattended van as bait to catch those who attempted to steal its cargo because they had a reasonable suspicion of vehicle theft in that particular area. No particular individuals need be

[35] CPS (n 31)
[36] Private Prosecutors' Association, 'Code For Private Prosecutors', July 2019, (3) (1) <https://private-prosecutions.com/investigation/#codecont>
[37] *Loosely* at [58]
[38] *ibid.*
[39] [1994] 98 Cr App R 209

under suspicion. But if the same tactics had been used "in an area where such crime was not suspected to be prevalent, it would have been an abuse of state power."[40]

In *TL*, the Court of Appeal accepted that the vigilante's choice of the chatroom where he encountered the defendant "was not random" because it was based on a tip-off from a contact.[41] For the trial judge, who disagreed that this "vague" intelligence could succeed in grounding a reasonable suspicion, this was the crucial question determining abuse of process.[42]

The pertinent question is whether to impose a weak or strong suspicion rule on investigators. The sheer size of some online networks and apps puts the legitimacy of a weak-suspicion rule in doubt. 'Intelligence' that paedophiles might be encountered on popular platforms is so plausible as to be banal. It would authorize vigilantes to leave the proverbial wallet on a park bench. The starting point for a suspicion rule should therefore be strong. However if the intelligence regarding illegal activity concerns a particular chatroom or sub-group on a platform, the reasonable suspicion need not be as highly informed.

Licensing Paedophile Hunters

Stark's view is that if the state is serious about controlling paedophile hunting, then prosecuting "both the defendant and inducer in such situations could more meaningfully achieve [those] ends."[43]

While it is plainly in the public interest to prosecute criminal conduct committed by vigilantes in the course of apprehending a target, in practice there are challenges. There is anecdotal evidence that sympathetic juries will acquit even when the evidence is strong.[44] State officials may also be wary of a public backlash if their scarce resources are seen to be directed at those who superficially appear to be more effective guardians of vulnerable children than they are.

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[40] *Loosely* at [65]
[41] *TL* at [38]
[42] *TL* at [13]-[14]
[43] Stark (n 35)
[44] Press Association, 'Leeds 'paedophile hunters' cleared of assault charges', 30 October 2019. <https://www.theguardian.com/uk-news/2019/oct/30/leeds-paedophile-hunters-cleared-of-assault-charges> accessed 1 December 2019

From a policy standpoint it is worth considering the merits of a cooperative strategy that brings good-faith vigilantes into the fold. The scale of the threat posed by sexual grooming of children is vast[45] and for all their faults paedophile hunters do identify abusers who might otherwise be missed. To a large extent this is simply a matter of resources. "The police can't sit there for eight, nine hours a day speaking to these predators - we can," one vigilante told the BBC.[46]

The case for regulating rather than prohibiting paedophile hunters is strong but existing regulatory tools are inadequate. Paedophile hunters in theory may be regulatable as quasi-state agents in the Regulation of Investigatory Powers Act ("RIPA") 2000.[47] Sutherland's appeal is reported to advance this claim.[48] In practice such an identification will rarely succeed because vigilantes prefer to act on their own initiative, shunning police contact until they confront the target. RIPA, a statute concerned with state power, is ill-suited to manage the behaviour of volunteers.

Effective regulation would involve issuing investigation licenses, which would allow the state to exercise earlier supervision over the cases it is bringing to trial while excluding vigilantes who refuse training and security checks.

A template for a statutory code of practice may be found in the ashes of abandoned government policy. In July 2013 then-Home Secretary Theresa May announced plans to introduce "a new system of regulation for private investigators to protect the public from unscrupulous activity."[49] It proposed vesting the Security Industry Authority ("SIA"), a non-departmental public body, with the exclusive power to grant and revoke licenses to qualified applicants. Undertaking the activities of a private investigator without a license would become a criminal offence, the government proposed.

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[45] The National Crime Agency estimates that 80,000 people in the U.K. "present some kind of sexual threat to children online." National Crime Agency, Annual Plan 2019-2020.
[46] BBC News, 6 November 2019 (n 5).
[47] Covert Human Intelligence Sources in RIPA s 26 (8).
[48] MacDonald, The Times, 29 November 2019 (n 1).
[49] U.K. Government, 'New Regulation of Private Investigators to be introduced', 31 July 2013, <https://www.gov.uk/government/news/new-regulation-of-private-investigators-to-be-introduced> accessed 1 December 2019

There is no reason to limit such a regime to salaried private investigators serving commercial clients. The Private Security Industry Act 2001, whose drafting predates the emergence of modern paedophile-hunter groups, expansively defines the activities within its scope.[50] Paedophile hunters can be conceptualised as unpaid private investigators whose 'clients' are potential child victims.

The effect of statutory regulation in practice would force vigilante groups to institutionalise their operations. Members would be expected to register with the SIA and undertake training[51] in order to receive licenses. The groups would make accountable to the SIA and other relevant regulatory bodies named individuals for such roles as a data controller, regulatory liaison officer and chief executive. The CPS would vigorously prosecute paedophile hunters operating without a license, an indictment that will be easily understood by juries.

Conclusion

It will be interesting to see how far beyond the facts of Sutherland's case the Supreme Court goes in considering paedophile hunting; and to what extent the Court agrees with Lord Burnett CJ's use in *TL* of the journalistic-entrapment authorities. The regulatory suggestions in this essay are beyond the remit of the Court but may become more urgent in the circumstances that the Court does away with the state/non-state entrapment double-standard.

[50] In Schedule 2, Paragraph 4 of the Act

[51] For examples see The Government Response to the Fourth Report from the Home Affairs Committee Session 2012-13, page 10. <https://www.parliament.uk/documents/commons-committees/home-affairs/32420-Cm-8691-v1.pdf>

Data Protection Essay 2019: "As the Law Stands, Cyborgisation Promises to Make us Both More Vulnerable and More Powerful." What are the Data Protection Concerns of a Cyborg?

Chelsea Penafort

"*A world of cyborgs is a world awash in data.*"

~ Jane Chong, Our Cyborg Future

Introduction

We are undergoing a "technological revolution" in the design and use of internet-connected synthetics as well as how these devices are integrated into the individual. The constellation of networks and devices that have mapped our world through the internet[1], has moved onto and inside our physical bodies.[2] Humans are the next generation of the 'Internet of Things' (IoT) known as "Internet of Living things" or the "internet of Bodies" (IoB).[3]

In this Second Machine Age[4], a new data subject emerges: the cyborg, who, unlike iPhone users, cannot choose to stop using their connected devices. Cyborgs live under constant and automatic data monitoring that threatens their fundamental rights to privacy and leaves their personal and sensitive data unprotected.[5] The addition of non-biological devices to the human body raises novel

[1] Eleonore Pauwels & Sarah Denton, "Searching for Privacy in the Internet of Bodies" (WilsonQuarterly, Spring 2018) <https://wilsonquarterly.com/quarterly/living-with-artificial-intelligence/searching-for-privacy-in-the-internet-of-bodies/> accessed 7th March 2019

[2] Quoting Matwyshyn in the article by David Horrigan "The internet of Boies: A Convenient- and, Yes, Creepy-New Platform for Data Dicovery" (LegalTechnews, 7 January 2019) <https://www.law.com/legaltechnews/2019/01/07/the-internet-of-bodies-a-convenient-and-yes-creepy-new-platform-for-data-discovery/?slreturn=20190207081006> accessed 7 March 2019
Matwyshyn 2019

[3] Pauwels and Denton; Horrigan David Horrigan "The internet of Bodies: A Convenient- and, Yes, Creepy- New Platform for Data Discovery" (LegalTechnews, 7 January 2019) <https://www.law.com/legaltechnews/2019/01/07/the-internet-of-bodies-a-convenient-and-yes-creepy-new-platform-for-data-discovery/?slreturn=20190207081006> accessed 7 March 2019.

[4] Erik Brynjolfsson and Andrew McAfee, *The Second Machine Age: Work, Progress, and Prosperity in a Time of Brilliant Technologies* (W.W Norton & Company, New York London 2014)

[5] Neta Alexander, My Pacemaker is Tracking Me from Inside my Body" (The Atlantic, 27 January 2018) <https://www.theatlantic.com/technology/archive/2018/01/my-pacemaker-is-tracking-me-from-inside-my-body/551681/ > accessed 28th February 2019

questions over traditional legal, ethical, and conceptual norms.[6] Who controls these "IoB" devices in our bodies? Who can access the body-derived data? What means do cyborgs have to protect their bodily integrity from third parties?[7] What is certain is that conversation of the cyborg's position in law will reignite new dimensions to current systems of privacy, ownership, and ethics.[8]

The Data Subject: The Cyborg

The conception of the cyborg in case law was in Riley v California.[9] The Supreme Court ruled cell phones as such intimate parts of our being that police officers cannot search one that was seized during an arrest under the Fourth Amendment. A search of digital information on a cell phone implicated substantially greater individual privacy interests than a brief physical search. Chief Justice John Roberts wrote, "modern cell phones…are now such a pervasive and insistent part of daily life that [aliens] might conclude they were an important feature of human anatomy."

The term 'Cyborg' was first created in 1960 to denote a "cybernetic organism" that has organic and bio-metronic body parts (Clynes & Klein, 1960). Today, millions of people are equipped with "cyborg technology" ranging from prosthetic limb replacements to smart pills[10] and most rely on such medical devices to monitor their physiological functions, deliver medication or supplement the functioning of a body part.[11] In short, cyborgs are integrated persons: humans whose bodies are extended through technology (Borer, 2002) and whose identities are entangled with technology (Introna, 2007; Nyberg, 2009).[12] Based on a wide interpretation of the definition, scholars[13] assert that internet users are cyborgs too, as they extend their bodily senses across space and time by maintaining an online personality in addition to their offline identities.[14] However,

[6] Introduction of the "The Everyday Cyborg: Mapping Legal, Ethical & Conceptual Challenges Workshop 2", Law, Innovation & Society Newcastle Law School (8 December 2017)
[7] Andrea M. Matwyshyn, "The internet of Bodies is Here. Are Courts and Regulators Ready?" (WSJ, 12 November 2018) <https://outline.com/R2bdXU> accessed 7th March 2019
[8] Eleonore Pauwels & Sarah Denton, "Searching for Privacy in the Internet of Bodies" (WilsonQuarterly, Spring 2018) <https://wilsonquarterly.com/quarterly/living-with-artificial-intelligence/searching-for-privacy-in-the-internet-of-bodies/> accessed 7th March 2019
[9] 573 U.S. (2014)
[10] Barfield, W. *Cyber Humans: Our Future with Machines*; Springer: New York, NY, USA, 2016); Matwyshyn lists of other examples like an "artificial pancreas", a Bluetooth-enabled cochlear implant, smart pills, a self-tuning brain implant, prosthetic limbs that "hard-wired" to bones; Nicole Lindsey mentions smart contact lenses and digital tattoos
[11] https://www. fda.gov/MedicalDevices/ProductsandMedicalProcedures/ImplantsandProsthetics/
[12] Ulrike Schultze and Richard Mason, "Studying Cyborgs: re-examining internet studies as human subjects research" (2012) Journal of Information Technology 27, 301-312
[13] Schultze and Mason follow the McLuhanesque definition of 'cyborg' that casts a much wider net.
[14] Robert M Davidson, "The Privacy Rights of Cyborgs" (2012) Journal of Information Technology 27, 324-325

this essay will focus on the "Everyday Cyborg" which Quigley and Ayihongbe have defined as ordinary persons with implantable 'smart'[15] medical devices.[16]

In Our Cyborg Future, Jane Chong said cyborgisation may enable us to put up new barriers when it comes to the government's ability to access information that it could previously have obtained by way of, say, a search warrant based on probable cause"[17] – which is seen in the Riley case above. Nonetheless, it is not very relevant to the "Everyday Cyborg" who is so deeply integrated with their devices that they have no control over what data is generated, how much data is collected, for what reason, who has access to it or even viable means to access it themselves.[18]

While data and privacy concerns for other types of healthcare data, like electronic records, have received a reasonable amount of attention, the everyday cyborg has not.[19] The current hurdles that leave cyborgs vulnerable, affect the privacy and rights of human subjects. We all stand to be exposed "to new forms of compromise and exploitation, whether it's privacy that's at stake or the right to make autonomous decisions regarding our health and health data."[20] Increasing protections for the cyborg will supplement current data protection laws for human citizens by giving us greater means of control and access to our own personal and sensitive data, especially data generated by our own medical devices.

The Perils of Integrated Devices

Many of the issues surrounding the cyborg are a result of integration with highly sophisticated devices, that are also integrated themselves. While these devices have transformed medicine and our daily lives, they introduce new levels of peril and uncertainty to the cyborg. Issues arise over the accessibility of data, the hackability of the device and the harmful potential of AI interacting

[15] The term follows from Haddow's 'persons with implantable 'smart' technologies' that involve a high degree of automation, for example, pacemakers which monitor and regulate a person's cardiac rhythm, but can also deliver treatment without intervention from the person or third parties is needed. (Quigley and Ayihongbe)
[16] Muireann Quigley and Semande Ayihongbe, "Everyday Cyborgs: On Integrated persons and Integrated goods." (2018) Medical Law Review 26 2 p276-308
they use an extended meaning of Haddow's to include persons with a broader range of implantable or carried technologies with diverse functions to ensure a wider conceptualisation of the term cyborgs and prevent a reductive analysis
[17] Jane Chong in Our Cyborg Future
[18] Alexander
[19] Wittes and Chong
[20] Wittes and Chong

with their data. These concerns affect their relationships with third parties, the state, the medical establishment and the tech industry.

These integrated goods have a high level of integration of hardware and the software, of which the latter enables functionality of the good and enables devices to collect, store, and transmit data about patients' health, as well as data about the status and function of devices themselves (Thomas).[21] Pacemakers, for example, are now internet connected and send the data it generates back to a cloud, enabling it and its user to be monitored and accessed from afar.[22] It constantly generates and collects transactional data, which is automatically sent via a wireless connection to a secure portal. The data collected by such devices includes identifying information about the patient (their name and date of birth), information about the their health status (vital signs, diagnosed conditions, and therapies), and data relating to the device's function (like the battery status, lead impedance, disabling of therapy, and inadequate safety margins for sensing or capture).[23] Subsequently, this data can then be accessed by the patient's healthcare team or anyone with access to the "secure" portal.

This silent and invisible process is meant to be effortless for its user and assist medical services by reducing face-to-face sessions and emergency visits.[24] Nevertheless, it raises questions about privacy, security and oversight[25] for it is unknown who might have access to their personal and sensitive data like location and health. The multiple stages of processing increase risk of data leaks, that may even occur unintentionally. The devices may leak information locally, the presence of nearby medical devices may trigger data revelation, or information may leak centrally at the database itself.[26] It will be impossible for the users to know because they are not given access to such portals or notified of such data movements.

[21] Quigley and Ayihongbe
[22] Lior Jankelson, a physician at New York University's cardiac-electrophysiology, in Alexander's article
[23] Wittes and Chong; K Fu, 'Inside Risks - Reducing Risks of Implantable Medical Devices: A Prescription to Improve Security and Privacy of Pervasive Health Care' (2009) 52(6) Communications of the ACM 25, 261
[24] National Institute for Health and Care Excellence, 'CareLink Network Service for Remote; Monitoring of People with Cardiac Devices' Medtech Innovation Briefing (24 May 2016) 1–5, <https://www.nice.org.uk/advice/mib64> accessed 7 March 2019.
[25] Alexander
[26] R. Anderson. "System Security for Cyborgs. In International Workshop on Wearable and Implantable Body Sensor Networks" (2005), Cambridge Computer Laboratory <https://www.cl.cam.ac.uk/~rja14/Papers/cyborg.pdf> accessed 10th March 2019

In the USA, individuals find it difficult to access data collected by their IoB devices. The process that takes weeks, requiring a release form, approval of the manufacturer, only to have no way of knowing whether the delivered data would be partial or complete.[27] Medtronic, the world's largest medical device company that generates the majority of its sales and profits from the U.S. healthcare system, claims that regulations under the Food and Drugs Administration (FDA), they are permitted to send reports to doctors through their web portal, but not to patients. Even if data is sent to patients, there are other regulations that might restrict them from delivering complete sets of data. They claim that creating a website specifically for patients will be expensive because "there are not an overwhelming number of patients who want direct access to their ICD data".

Medtronic also admits concern that patients might misunderstand and misinterpret the data.[28] However, data from such devices should belong to their users because it is their bodies, hearts, and information. Regular feedback will also stand to empower the individual by enabling them to become better informed about their health and manage their health more effectively. Moreover, any misunderstanding can easily be overcome with clear and open communication about the devices between doctor-patients. Yet, most cyborgs admit that doctor-patient conversations do not consist of the long-term risks of connected monitoring systems. Instead, more time is spent on marketing the manufacturer's "brand-new package" or "once-in-a-lifetime deals".

Furthermore, since it operates wirelessly without any encryption,[29] such devices can be hacked.[30] In 2008, a group of researchers at the University of Michigan proved that it is possible to extract sensitive personal information from a pacemaker—or even to threaten the patient's life by changing the pacing behaviour or turning it off. In 2013, Dick Cheney, the former Vice President of the USA told CBS's 60 Minutes that his doctors disabled his wireless pacemaker to thwart hacking and to protect him from possible "remote assassination" attempts. This unleashes horrifying potential for data thefts to steal personal information and set up false identities of a

[27] Alexander; Dyllan Furness, "Who controls the tech inside us? Budding biohackers are shaping 'cyborg law' (Digital Trends, 4th July 2018) <https://www.digitaltrends.com/cool-tech/cyborg-law-and-rights-of-augmented-humans/> accessed 26th February 2019
[28] Wittes and Chong
[29] Furness
[30] Alexander

genomic level.[31] If third parties like the state for example, were able to hack the technology of say brain implants that regulate cognitive action like thought processes and memories, the possibility of a dystopian future for humanity cannot be underestimated.[32]

In the 1970s Foucault coined the term "biopower" to describe how nation-states rely on an "explosion of numerous and diverse techniques for achieving the subjugation of bodies and the control of populations." The ongoing digital revolution magnifies his concerns as it weakens the barriers between what is private and public.[33] Similarly, the personal spheres of mind and body must be protected from third-party invasion and influence. This "cognitive liberty" (or the right to mental self-determination) is a vital element of international human rights and especially relevant in the age of technologically enhanced minds.[34] The privacy of person's thoughts and memories must protected. We cannot forget the man from the machine[35], the former of which is guaranteed fundamental human rights.

The introduction of artificial intelligence (AI) into these devices also adds a "substantial creepiness factor" that borders an Orwellian Nightmare - where everyone's movements are tracked and recorded.[36] AI optimizes data and allows us to make sense of massive amounts of information instantaneously using algorithms that can predict various aspects of our daily lives and reveal hidden insight in the process.[37] Although AI allows such devices to save lives of patients[38] and widen our understanding of human health, the data used and conclusions made by the AI may be abused by third parties.[39] For example, if there are databases of faces and genomes,

[31] Nicole Lindsey "Internet of Bodies: The Privacy and Security Implications" (CPOMagazine, 14th December 2018) <https://www.cpomagazine.com/data-privacy/internet-of-bodies-the-privacy-and-security-implications/> accessed 7th March 2019
[32] Woodrow Barfield and Alexander Williams, "Law, Cyborgs and Technologically Enhanced Brains" (2017), 2(1), 6; *Philosophies* <https://doi.org/10.3390/philosophies2010006> accessed 10 March 2019
[33] Pauwels and Denton; Evelyn Ruppert, Engin Isin, Didier Bigo, "Data Politics" (2017) Sage Journals 4 2

[34] Barfield and Williams
[35] H. Tirosh-Samuelson, "In praise of human dignity: The humanities in the age of Big Data. *(2018) 1* (2) *On Education. Journal for Research and Debate* < https://doi.org/10.17899/on_ed.2018.2.4> accessed 8th March 2019
[36] Nicole Lindsey; Horrigan
[37] Eleonore Pauwels & Sarah Denton
[38] For example, by providing vital information to medical services when patients are unconscious or cannot communicate.
[39] Horrigan

people could be 'red flagged' for their genetic anomalies leading to gene editing, discrimination or behavioural modification training.[40]

In China, the facial recognition software company Cloud Walk is developing AI technology that tracks individuals' movements and behaviour to assess their chances of committing a crime.[41] The problem with mining "big data" to determine whether someone is likely to commit a crime is that it creates a narrative and justifies further action. For instance, disarming that person of any defence against a criminal charge by claiming that is was 'in their nature' to commit the crime. It just undermines the suspect's autonomy by preventing them from providing a defence[42].

Neta Alexander writes: "In a way, my heart is no longer entirely mine: I share it with both Medtronic and with the U.S. hospital in which it was implanted. As an immigrant in America at a time when foreign status is uncertain, I can't help but wonder if my pulse might one day betray me. Might it show I visited a place I was not supposed to, or dared meet someone from a hostile country?"[43] Take the case of Ross Compton below; it sets the precedent that personal data collected by such devices can now be used as legal evidence to incriminate its user - further consolidating the fear that IoB devices are not so user-friendly.

Case Study: Ross Compton

First of its kind, the case of Ross Compton[44] used data from the suspect's own beating heart as evidence to incriminate him for aggravated arson and insurance fraud. The police obtained a search warrant for all of the electronic data stored in Compton's cardiac pacing device that included his heart rate, pacer demand, and cardiac rhythms before, during and after the fire. A cardiologist who reviewed that data determined Mr.Compton's alibi was "highly improbable".

[40] Nicole Lindsey
[41] Pauwels and Denton
[42] Steve Fuller, 'Personhood Beyond the Human: Reflections on an Important Conference' (2014) Vol. 3, No. 2, 1-11 *Social Epistemology Review and Reply Collective*, < http://wp.me/p1Bfg0-1d9> accessed 7th March 2019
[43] Alexander
[44] Ross Compton, 60, indicted for aggravated arson and insurance fraud for allegedly setting fire to his house in 2016, causing $400,000 in damages. The arrest was after the fire based in part from data taken from his pacemaker; Lauren Pack, "Man whose pacemaker data was used in his arrest ruled competent to stand trial" (Journal-News, 16th October 2018) <https://www.journal-news.com/news/crime--law/man-whose-pacemaker-data-was-used-his-arrest-ruled-competent-stand-trial/YOzkopsbxnWwzNn044lmPM/> accessed 26th February 2019

Judge Pater rejected the argument by Comption's former defense attorney, Glenn Rossi, who argued the pacemaker evidence should be thrown out because the search was an invasion of Compton's constitutional rights and unreasonable seizure of his private information. "It is just fundamentally unfair to say to a person the functioning of your body and the record of it related to illness that you have … is something that the government should then be able to take and use to incriminate a person," Rossi said. The Judge responded with, "There is a lot of other information about things that may characterize the inside of my body that I would much prefer to keep private rather than how my heart is beating. It is just not that big of a deal."[45]

The Current Hurdles

While there have been efforts to empower ordinary data subjects, experts believe that regulations are seriously lagging behind technological advances, especially regarding rights of the cyborg.[46] This is mainly because of the tricky position of the cyborg in relation to the law. There is the added concern that the medical industry is beginning to resemble the software industry, in that it relies on a shift of power of information away from the individual.[47]

McMilan calls everyday cyborgs liminal beings, as they exist "in between spaces".[48] That being said, the law needs to understand 'things' as fixed categories of subjects or objects. One can be either a persons or a property under the law for the law has never had to account for such - until now. As an assemblage of integrated persons with integrated devices[49], cyborgs "transgress normative legal and biological boundaries" and challenge the deeply entrenched ontological dichotomy that make up the conceptual foundations and structure of law.[50] Thus, for the cyborg, the distinction between rights for property and rights of their body are blurred and become doubly important to their lives.[51]

[45] Lauren Pack, "Judge: Pacemaker data can be used in Middletown arson trial" (Journal-News, 11th July 2017) <https://www.journal-news.com/news/judge-pacemaker-data-can-used-middletown-arson-trial/Utxy63jyrwpT2Jmy9ltHQP/> accessed 26th February 2019

[46] Pauwels and Denton

[47] Alexander

[48] Mcmilan in workshop; The Everyday Cyborg: Mapping Legal, Ethical & Conceptual Challenges Workshop 2, Law, Innovation & Society Newcastle Law School (8 December 2017) h

[49] Quigley and Ayihongbe

[50] Quigley and Ayihongbe

[51] Barfield and Williams

In this sense, everyday cyborgs also challenge traditional legal understanding of bodily Integrity and 'personhood'.[52] The conception of the human body within the European Biotechnology Directive 98/44EC[53] uses arbitrary technical distinctions which are no longer sustainable in view of developments in biotechnology and the changing nature of these technologies is too narrow for the concept of the everyday cyborg (McMahon).[54] McMilan has suggested that analysis with a liminal lens might more effectively accommodate the 'transformative, processual nature of everyday cyborgs'.[55] 'A focus on margins is not very helpful' because boundaries can move and change.[56] Fox suggests the law moves away from the narrative which sees bodies as fixed objects to a notion of embodied integrity that mandates a broader focus on our lived experience , like how we inhabit and experience the world through our bodies.' (Fox & Murphy, 2013). This way we'll avoid the risk of real subject-orientated concerns.[57]

Rauhofer suggests minimising data generation will prevent data abuse. However, this is controversial because device manufacturers and industry have become increasingly data-heavy will collect as much data as possible in the hopes that something will be achieved. [58] For instance, individuals in Europe have a greater degree of control over the use of their data, thanks to the GDPR.[59] However, it arguably does not go far enough. Among its updated[60] provisions, it requires

[52] Marie Fox in The Everyday Cyborg: Mapping Legal, Ethical & Conceptual Challenges Workshop 2, Law, Innovation & Society Newcastle Law School (8 December 2017)
[53] For example, Article 5 (1) states: The human body… cannot constitute patentable inventions" Leaving no room to imagine the cyborg who is integrated with such devices

[54] Aisling Mcmahon The Everyday Cyborg: Mapping Legal, Ethical & Conceptual Challenges Workshop 2, Law, Innovation & Society Newcastle Law School (8 December 2017)
[55] Catriona Mcmilan The Everyday Cyborg: Mapping Legal, Ethical & Conceptual Challenges Workshop 2, Law, Innovation & Society Newcastle Law School (8 December 2017)
[56] Quigley and Ayihongbe
[57] Quigley and Ayihonbe
[58] Judith Rauhofer in The Everyday Cyborg: Mapping Legal, Ethical & Conceptual Challenges Workshop 2, Law, Innovation & Society Newcastle Law School (8 December 2017)
[59] The GDPR *is intended to* "Harmonize data privacy laws across Europe, *protect and empower all EU citizens' data privacy and to reshape the way organizations across the region approach data privacy" - https://eugdpr.org/*
[60] there is a established understanding of what is personal and sensitive data (s1(1)(e)); the GDPR has made strides to be more inclusive and provide better overview policies to health data by refer to 'sensitive processing'(section 2), thus shifting the emphasis from the data to what happens to it. The processing of biometric, health, and genetic data is included in this; even expanding personal data to 'online identifiers' such as IP addresses (Recital 30 and 64). The GDPR is clear that consent is needed for the processing of personal data This must be explicit with regard to special categories of data, including health data (Article 9). Additionally, the GDPR creates a new right of portability, meaning that persons have the right to have their data transferred from one data controller to another 'in a structured, commonly used, machine-readable and interoperable format'. (Article 30, Recital 68) Although formulated to enable transfer between different IT environments (e.g. cloud-based storage systems), there is no reason in principle why this right would not apply to device-mediated everyday cyborg data. Hence, in the UK,

valid consent for any data collection and processing.[61] This putative control would certainly resolve all of the cyborg issues as above, and cyborgs in the USA could find solace. However, the GDPR takes a research-friendly approach and allows exemptions and derogations that potentially weaken the putative control of individuals regarding their data.[62]

Moreover, as the medical device industry incorporates more technology into their products, it begins to resemble the software industry, absorbing 'the good (flexibility), the bad (complexity), and the ugly (monopolies)[63]. "Just as Google or Facebook retains more data than it reveals, so even gadgets inside one's body are gradually shifting control of personal information from users to corporations."[64] As a result, cyborgs must adhere to ill- suited legal doctrines that indulge the fiction that a cyborg has meaningful choice whether to engage in such digital machines.[65] Like most of the tech industry, existing IoB companies are using end-user license agreements and privacy policies to retain rights in software and to create rights to monitor, aggregate and share users' body data. Draconian consequences like companies threatening to deactivate, or "brick," a device unless a consumer agrees to changes in privacy or information-sharing provisions.[66] Is there voluntary consent when the choice is between life and death?

It is from these perverse state of affairs that the law is incapable of realising that the relationship between the persons and their device go beyond mere use into integration.[67] As a result, cyborgs are unable to claim sufficient compensation when such devices are interfered with. For example, a disabled Vietnam veteran was left bedridden for 11 months and developed ulcers when his powered mobility assistance device (MAD) was damaged beyond repair by an airline. He was entirely dependant on that machine to move, travel and protect himself from hypotensive

everyday cyborgs could apply to see any health-related data held about them which has been downloaded from their devices (be this by a hospital or manufacturer or some other organisation) (Quigley and Ayihongbe).

[61] Article 89 of the GDPR: Safeguards and derogations relating to processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes permits potentially broad derogations in this respect. (Quigley and Ayihongbe)

[62] Quigley and Ayihongbe

[63] Anderson

[64] L Blake, 'Health Care in the Digital Age: Who Owns the Data?' Wall Street Journal (28 November 2012) <http://live.wsj.com/video/health-care-in-the-digital-agewho-owns-the-data/28B6E0AD-8506-40B2- A659-20A9B696F524.html#!28B6E0AD-8506-40B2-A659-20A9B696F524> accessed 7th March 2019

[65] Wittes and Chong

[66] Matwyshyn

[67] Wittes and Chong

episodes. Nonetheless, instead of a replacement, he was only offered minimal damages on grounds that they had injured the device, but the customer.

Conclusion

The scheme to track and improve the health and wellbeing[68] of all humans, has become a "Better with Bacon" problem (Matwyshyn 2019). "We are attaching everything to the Internet whether we need to or not."[69] And in the process, data protection issues related to the IoT such as transparency, privacy and security have been amplified. So while there is great promise from these devices, there are also abundant of risks, especially when it comes to ownership and control of our most intimate data.[70] What's worse is that in this digital age, we see a precedent emerging: people valuing the machine at the cost of the man. In order to suit the requirements of an information society and the new worlds of cyberspace, the law must re-orientate itself[71] to ensure a balance of power between data subjects, the medical establishment, the industry, and the state.[72]

[68] Claims of the Google Baseline Project in Jo Best, "Project Baseline: Alphabet's five-year plan to map the entire journey of human health" (ZDNet,31st January 2018) <https://www.zdnet.com/article/project-baseline-googles-give-year-plan-to-map-the-entire-journey-of-human-health/> accessed 10th March 2019

[69] Matwyshyn; Horrigan

[70] Pauwels and Denton.

[71]Halsbury's Laws (5th edn, 2012) vol 57, para 502

[72] Judith Rauhofer in The Everyday Cyborg: Mapping Legal, Ethical & Conceptual Challenges Workshop 2, Law, Innovation & Society Newscastle Law School (8 December 2017)

Knife Crime: Are We Doing Enough? An Analysis of the Criminal Justice Response to the Rise in Knife-Related Offences.

Claudia-Lauren Williams

This essay aims to elucidate the current position taken by the criminal justice system in England and Wales and explore the potential for reform in response to knife crime, which has reached record-breaking levels.

1. The Rise of Knife Crime

Knife crime is not a single specified offence and relates to an array of offences covering the possession of a knife, threatening with a knife, as well as inflicting injuries with knives. From the year ending March 2015 to the year ending March 2019, England and Wales has seen a 34% increase in knife and offensive weapon offences formally addressed by our Criminal Justice System.[1]

An accurate depiction of the current situation can additionally be derived from a recent publication by the Office for National Statistics (ONS) showing that we have now reached the highest number of police-recorded crimes involving a knife or sharp instrument since comparable records began in 2011.[2] Police-recorded crime is a good measure of the offences committed during a specified timeframe. To be included in the statistics, a crime must have been reported to the police, and they must have classed it as criminal.

Superficially, this rise may indicate that current legislation in England and Wales is unsatisfactory, failing to appropriately regulate the carrying and use of knives at a time when this behaviour has become somewhat commonplace.

2. The Legislation

In England and Wales two main pieces legislation govern the offence of knife possession.

[1] Ministry of Justice, *Knife and Offensive Weapon Sentencing Statistics, England and Wales – Year ending March 2019* (2019) 1.

[2] Office for National Statistics, *Crime in England and Wales: year ending March 2019* (2019) 2 <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingmarch2019#main-points> accessed 16 July 2019.

2.1. Possession Offences

This essay deals specifically with knife crime; however, it is essential to note that certain types of knives may come under the term 'offensive weapon'.

Offensive weapons can be defined as 'any article made or adapted for use to cause injury to the person, or intended by the person having it with him for such use'.[3] When considering knives, it must be established whether the article has an 'innocent' purpose. If it has such a purpose (e.g. a penknife), it will not be held to be an offensive weapon.

Weapons without such 'innocent' quality have been held to be offensive weapons, e.g. swords, machetes, and flick knives. If the weapon is offensive, this will have an impact on the section under which the offence is charged.

Carrying an article with a blade or point or an offensive weapon in a public place

Section 139 of the Criminal Justice Act 1988 ('CJA 1988')

Under this section, it is an offence to have any 'article with a blade or sharp point in a public place . . . without lawful authority or good reason'.[4] Under the CJA 1988, the offence applies to articles that have a blade, a sharp point, and folding pocket knives over three inches.

The courts have come to several conclusions in respect of CJA 1988, such as:

a) *'A butter knife, with no cutting edge and no point is a bladed article'*[5];
b) *'A "lock knife" does not come into the category of "folding pocket knife" as it may not be immediately foldable at all times'*.[6]

Section 1 of the Prevention of Crime Act 1953

[3] Prevention of Crime Act 1953 s.1(4).
[4] Criminal Justice Act 1988 s.139.
[5] *Booker v DPP* 169J.P. 368, DG.
[6] *R v Deegan* [1998] 2 Cr. App. R. 121 CA.

Under this section, it is an offence to have 'an offensive weapon in a public place without lawful authority or reasonable excuse'.[7] It is a defence to both offences if an individual charged can prove there was 'good reason' for them carrying the knife, or that they had 'lawful authority' to do so.

It should be noted that the 1953 Act is somewhat wider in scope. Even where an article is deemed not to constitute one having a blade or point under s.139 CJA 1988, it might still be categorised as an offensive weapon pursuant to s.1 of the Prevention of Crime Act 1953.

Under both Acts, the offences are triable either way. They are punishable on summary conviction with a custodial sentence (limited to six months maximum), an unlimited fine, or both. On indictment, the maximum sentence may be a custodial sentence of up to four years, an unlimited fine, or both.

2.2. The Offensive Weapons Act 2019

The Offensive Weapons Act 2019[8] received Royal Assent on 16 May 2019. This Act promises to introduce a plethora of new measures to strengthen the current legislation in force in the UK and stem the current issues concerning knife crime.

Noteworthy changes in legislation:

- the introduction of a new offence of breaching a 'knife crime prevention order' or an 'interim knife crime prevention order' without reasonable excuse;[9]

- where a blade is bought online, the taking of reasonable precautions may only be a defence where a seller met particular requirements concerning age verification, packaging and delivery;[10]

[7] Prevention of Crime Act 1953 s.1.
[8] Offensive Weapons Act 2019 s.29 (hereafter OWA 2019).
[9] ibid s.14-23.
[10] ibid s.35.

- the creation of the new offence of 'prohibiting the dispatch of bladed products . . . sold online to a residential address.'[11]

Knife Crime Prevention Orders (KCPOs)

The new KCPOs have been established through the introduction of the Offensive Weapons Act 2019. According to the Parliamentary Under-Secretary of State for the Home Department, Victoria Atkins, 'these orders are aimed at young people who are at risk of engaging in knife crime, at people the police call "habitual knife carriers" of any age, and at those who have been convicted of a violent offence involving knives'.[12]

The orders can be made on individuals as young as 12. They can be made on application to the courts by the police, on conviction, or prior to conviction.

An individual is eligible for and 'can be subject to a Knife Crime Prevention Order (KCPO) if:

a) they are found to be carrying, without good reason, a bladed article in a public place (including a school) twice in two years, and

b) the court believes it is necessary to impose and order to protect the public or prevent the young person from committing a crime with a bladed article.'[13]

Police can detect those eligible via intelligence reports compiled by Police Community Support Officers regarding known offenders or geographic hotspots for knife crime.[14] Regardless, the court need not be sure an individual has previously carried a knife before imposing the order and restrictions. A finding of a knife during a stop and search under s.60 of the Criminal Justice and

[11] ibid s.38.
[12] HC Deb (4 February 2019) vol. 654, col. 28. Available at: <https://hansard.parliament.uk/Commons/2019-02-04/debates/C738AC3A-612E-41E3-AF25-0980BD1C5F11/KnifeCrimePreventionOrders> accessed 18 July 2019.
[13] Local Government Association, *Offensive Weapons Bill House of Lords, Report Stage Knife Crime Prevention Orders: Briefing*. (2019) 3.
[14] Roberts, S. 'The London killings of 2018: the story behind the numbers and some proposed solutions' *Crime Prevention and Community Safety* (2019) 21(2), 102.

Public Order Act (CJPOA) 1994[15] may also constitute evidence that police can base an application on.

If granted, a KCPO can require that an individual:

'be in a particular place on specified days or between particular times, reports to a specified individual on specified days/times, or participates in specific activities."[16]

A KCPO can also prevent an individual from:

'being in particular place, being with particular people, taking part in specified activities, using or having specified articles with them, or using the internet to facilitate or encourage crimes using bladed articles.'[17]

Breach of a KCPO

Breach of a KCPO is a criminal offence, and those who commit the offence may face up to two years in prison.[18] These orders, therefore, provide the potential for arguably unnecessary criminalisation of those who breach trivial restrictions put on them, such as for using social media, being in contact with specific individuals, or even for breaking a curfew.

The orders may be made against individuals who may have never even carried a knife or been convicted of an offence. Accordingly, England and Wales could see a considerable spike in the number of youths addressed by the criminal justice system who would otherwise have been spared.

2.3. What change will come from the Offensive Weapons Act 2019?

[15] Criminal Justice and Public Order Act 1994 s.60.
[16] ibid.
[17] ibid.
[18] GOV.UK, *Home Secretary announces new police powers to deal with knife crime* (2019). Available at: <https://www.gov.uk/government/news/home-secretary-announces-new-police-powers-to-deal-with-knife-crime> accessed 14 August 2019.

At this early stage, it is hard to predict the impact the Offensive Weapons Act 2019 may have on levels of knife crime, if any, with some changes focussing on retailers of knives rather than offenders or potential offenders themselves.

A potential issue presented is the possibility for overuse and liberal application as a preventative measure; this is an issue given the saliency of knife crime, and more importantly, the low threshold required for a KCPO to be imposed. As a consequence of the current societal tendency to villainise youths in respect of knife-related crime, there is a justified fear that young people will be the main subject of overprescribed KCPOs and potential over-criminalisation resulting from a breach of these orders.

Additionally, where individuals carry knives from fear for their safety in their communities, it is highly unlikely that a KCPO will have any impact or prevent them from carrying knives, and any restrictions placed upon them may be redundant.

Most importantly, the orders are arguably superfluous, mimicking legislation already in place. Questions are raised as to whether new legislation has been a knee-jerk reaction in an attempt to try and fill 'gaps' that did not and do not exist.

3. The Effect of Knives on Sentencing

In addition to specific knife offences under legislation, the presence of a knife during a violent attack has a dramatic impact on the approach taken by the courts in relation to sentencing.

3.1. Sentencing Guidelines

On conviction, courts must categorise the offence in order to establish an appropriate sentence using the guidelines. The Sentencing Council is now taking a tough stance on those who commit violent offences using knives, providing for high sentences accordingly.

Specific knife-related offences

The new sentencing guidelines for Bladed Articles and Offensive Weapons that came into force on 1 June 2018 illustrated a clear move towards severe sentencing; introduced to ensure those

convicted of knife-related offences would receive higher sentences, as will those who repeatedly offend.[19]

Member of the Sentencing Council, Rosina Cottage QC, stated during the announcement of the changes:

'*Too many people in our society are carrying knives. If someone has a knife on them, it only takes a moment of anger or drunkenness for it to be taken out and for others to be injured or killed. These new guidelines give courts comprehensive guidance to ensure that sentences reflect the seriousness of offending.*'[20]

Over the last year, following the first year of the enforcement of the guidelines, a publication by the Ministry of Justice has found that:

- 'In the year ending March 2019 37% of knife and offensive weapon offences resulted in an immediate custodial sentence compared with 22% in the year ending March 2009.'[21]

- 'The average length of the custodial sentences received also increased over the same period, from 5.5 months to 8.1 months, the longest since the series began.'[22]

Non-specific knife-related offences

In the commission of other violent offences, the presence of a knife during an offence is an aggravating factor indicating a higher level of culpability; consequently, the minimum sentence will almost certainly be raised.

Sentencing for murder – starting points

[19] Sentencing Council, *New sentencing guideline introduced for the possession of weapons and threats to use them* [Press Release] 1 March 2018. Available at: <https://www.sentencingcouncil.org.uk/news/item/new-sentencing-guideline-introduced-for-the-possession-of-weapons-and-threats-to-use-them/> accessed 29 July 2019.
[20] ibid.
[21] Ministry of Justice, *Knife and Offensive Weapon Sentencing Statistics, England and Wales – Year ending March 2019* (2019) 1.
[22] ibid.

The Sentencing Council has stated that the starting point for the minimum time to be served in custody for murder, fact dependant, for offenders over 18 is a range from 15 to 30 years. For those under 18, the starting point is a 12-year custodial sentence.[23]

When dealing with cases where an offender over age 18 arms himself with a knife at the scene and makes use of it in the commission of murder, the initial starting point is 25 years.[24] This 'sentencing jump' alone illustrates the severity with which knife crime is addressed at the current time.

3.2. Case Law

Several notable judgments of the Court of Appeal demonstrate the stringent line taken by the courts where knives have been used in the execution of violent offences.

Sentencing in Adults

In May 2008, the Court of Appeal, in *R v Povey* [2008],[25] recommended that the magistrates should sentence individuals convicted of knife possession towards the severe end of the sentencing range available. Since this time, both custody rates and average custodial sentence lengths have increased. Harsher sentences for knife crime have continued to apply, and the courts have since taken this further.

In *R v Mampuya and Gomes,* there were two defendants, both of previous good character, aged 21 and 22 respectively. They were both convicted of three counts of wounding with intent to cause grievous bodily harm ('GBH') after stabbing three different men with knives. Both defendants were sentenced to 18 years' imprisonment on count 1; nine years' on count 2 to run concurrently; and nine years' on count 3, also to run concurrently. The defendants appealed against their sentences on the basis they were manifestly excessive. The appeal was dismissed. Lord Justice Simon stated the trial judge "was right in her view that this type of knife crime is a matter of national concern"; "Although we accept that the sentence on count 1 was a stiff sentence and one

[23] Sentencing Council, SENTENCING FOR MURDER. [Leaflet] Available at: https://www.sentencingcouncil.org.uk/wp-content/uploads/FINAL-Murder-sentencing-leaflet-for-web1.pdf accessed 2 September 2019.
[24] Criminal Justice Act 2003 Schedule 21 s.5A.
[25] *R v Povey* [2008] EWCA Crim 1261.

that was towards the top of the range of appropriate sentences, we are not persuaded that the sentence was manifestly excessive".[26]

Sentencing in Youths

The core focus of the Youth Justice System is the prevention of offending in conjunction with age and maturity, acting to be a vital consideration when sentencing youths.[27] There has, however, been a notable shift in the approach taken towards youths convicted of offences involving knives in parallel with the increased sentencing received by adult offenders.

In *R v Gardner*, Sir Brian Leveson stated "One of the challenges facing society is the commonplace carrying and use of knives. There can never be an excuse for carrying a weapon of the type which this offender carried on that day. Purported self-defence all too frequently becomes an offence and results in fatal injuries, particularly to teenage boys, almost on a daily basis. Public concern is obvious and inevitable. It thus falls to the court to demonstrate that such behaviour must result in substantial and effective custodial sentences". Gardner was given an extended sentence of three-and-a-half years in a young offenders' institution, following an appeal against a suspended sentence for undue leniency. The 17-year-old was convicted of attempting to cause GBH with intent using a so-called zombie knife.[28]

In spite of these harsh guidelines and sentences provided, the number of convictions for knife-related offences continues to rise.[29] Sentencing changes may be all too peripheral to make any real difference to current trends where difficulty rests in establishing 'what levels of punishment produce what levels of general deterrence'.[30] The effect that sentences of imprisonment have on the levels of knife crime will undoubtedly require long-term assessment.

4. Public Policy and Change in Approach

[26] *R v Mampuya and Gomes* [2019] EWCA Crim 619.
[27] Ministry of Justice (Youth Justice Board), *Standards for children in the youth justice system 2019* (2019) 2.
[28] *R. v Gardner [*2019] 1 WLUK 323.
[29] Office for National Statistics (2019). *Crime in England and Wales: year ending March 2019* (2019) Available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingmarch2019#main-points> accessed 16 July 2019.
[30] Halliday, J., French, C. and Goodwin, C. *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (Home Office 2001).

Public policy in contemporary society is driving forward a notion of punishment, longer custodial sentences, and lesser regard to the core principles of the primary aim of the Youth Justice System; the prevention of offending.

4.1. Change in Scotland

Scotland has seen an 81% fall in the number of under 18s convicted of handling offensive weapons in the last ten years.[31] The establishment and success of the Violence Reduction Unit ('VRU') can largely be held responsible for this.

The government-funded VRU was established in 2005. At that time, Glasgow was known as the murder capital of Europe. The VRU took an alternative stance towards the problem of knife crime and targeted the causes, establishing effective methods and solutions before implementing them on a larger scale.[32]

The VRU has been able to do this by launching projects such as Mentors in Violence Prevention, Medics Against Violence, and No Knives Better Lives.[33] NKBL takes a youth-focused approach to prevention, supporting youths' positive decision-making, arguably this government-funded educational knife crime prevention programme catalysed the reduction in knife crime in Scotland.[34] Collectively, these projects brought together those in health, education, and social work not only to combat the issue and change perceptions for those involved in, or at risk of falling into, a life of knife crime and gang lifestyle, but also to provide a way out. The undeniable success of the all-around multi-agency approach taken in Scotland should not be overlooked.

England and Wales in Contrast

[31] 'No knives, better lives' (2018) *Counsel Magazine*. Available at: <https://www.counselmagazine.co.uk/articles/no-knives-better-lives> accessed 5 August 2019.
[32] Evans, L., *Tackling knife crime in Scotland – 10 years on* (2018) [Civil Service Blog] Available at: <https://civilservice.blog.gov.uk/2018/05/24/tackling-knife-crime-in-scotland-10-years-on/> accessed 15 August 2019.
[33] ibid.
[34] Challenging perceptions of knife crime, *Centre for Youth and Criminal Justice* [Blog]. Available at: <https://www.cycj.org.uk/changing-the-perception-of-knife-crime/> accessed 5 August 2019.

In London, there has been a 44% reduction in the budget for youth services from 2011/12 to 2017/18.[35] Due to the gap in funding faced by child services, predicted to be around £3.1 billion, funds have been directed away from the work of YOTs and prevention-focused work.[36] YOTs have been our primary means for youth crime prevention; therefore, it is hardly surprising that England and Wales saw such a dramatic increase in knife crime offending, particularly among youths.

However, a change could be on the horizon. Policing Minister Kit Malthouse announced on 12 August 2019 that £35 million would go to 18 Police Crime Commissioners so they can establish Violence Reduction Units. These Units will mirror those that have long been implemented in Scotland, bringing together a spread of organisations 'including the police, local government, health, community leaders and other key partners to tackle violent crime by understanding its root causes'.[37] The steps taken to align resources in England and Wales in the same manner as in Scotland arguably have the best chance of reducing knife crime, albeit late in the day.

5. Concluding Thoughts

In conclusion, this essay has demonstrated that there has been an active response to the rise in knife crime in terms of new legislation, updates in sentencing guidelines, and approach in the courtroom. To date, it appears the approach of the Criminal Justice System has been predominantly reactive, with a lesser focus on preventative measures in the name of deterrence.

When considering the legislation and case law, arguably enough is being done from this stance, and perhaps we have reached the outer limit in what is achievable. Further 'knee-jerk' changes to legislation or courtroom practice may be entirely futile where the solution lies beyond the remit of the criminal justice system alone. In this time of crisis efforts must be refocussed onto early intervention and rehabilitation of those at risk of offending. Resources should be directed

[35] Berry, S., *London's Lost Youth Services 2018* (2018) 2. Available at: <https://www.london.gov.uk/sites/default/files/2018_03_20_sb_londons_lost_youth_services_2018_final.pdf> accessed 15 August 2019.
[36] Eichler, W., *Cuts to youth services factor in rise of knife crime, MPs say* (2019) Localgov.co.uk. Available at: <https://www.localgov.co.uk/Cuts-to-youth-services-factor-in-rise-of-knife-crime-MPs-say/47353> accessed 19 August 2019.
[37] GOV.UK, *Funding for Violence Reduction Units announced* (2019). Available at: <https://www.gov.uk/government/news/funding-for-violence-reduction-units-announced> accessed 16 August 2019.

towards effective prevention initiatives and those teams who assist them for any real improvement to be accomplished.

Although notable progress has been made, at this premature stage we cannot yet predict the effectiveness of this 'public health approach' we endeavour to implement or how congruent it may be with the position taken by the criminal justice system

Current drugs policy a success or a colossal failure? —the case for legal regulation

Humayoun Ali

Introduction

The Transform Drug Policy Foundation in its *Blueprint for Regulation*[1] presents a case that the current 'war on drugs' has been a costly failure and the prohibition policies are draconian in nature. Similar sentiments have been shared by high-level policy forums,[2] in particular the United Nations Office of Drugs and Crime has itself acknowledged the many 'unintended consequences' of drug enforcement in detail, and shifted its public rhetoric away from former aspirational goals of a 'drug-free world' and towards a 'containment' of the drugs problems at the current levels.[3] However, this paper will argue that Transform's *Blueprint* is one stride ahead of being a 'simple' criticism and has arrived at a new regulatory model which serves as a point of orientation and transplantation for a change in drugs policy towards a legalised but regulated drugs market. It argues that the legal regulation of drugs is a politically sensible task which serves as a pragmatic approach to control all aspects of drug production, supply and use. In the existing debate around these issues, the term 'legal regulation' is often used interchangeably with 'legalisation', yet a subtle distinction in emphasis can be made between the two.[4] On the one hand, legalisation is merely a process of making something which is illegal, legal. Whereas, on the other, the term 'legal regulation' emphasises that the drug policy reform school of thought is not aiming towards an unregulated free-for-all on drugs.[5]

In the same way that Transform has divided the regulation model into three different aspects, in a similar manner this paper will try to split the general criticisms and reasons for the legalisation of drugs into three different categories overall. At the heart of the case presented is the argument

[1] Stephen Rolles, *After the War on Drugs: Blueprint for Regulation*, (Adam Shaw Associates 2009).

[2] Police Foundation, 'Drugs and the Law: Report of the independent inquiry into The Misuse of Drugs Act 1971' (1999); UK Parliamentary Home Affairs Select Committee, The Government's Drug Policy: is it working? [2002]; The King County Bar Association, 'Effective Drug Control- Toward A New Legal Framework' [2005]; British Colombia Health Officers Council, 'A Public Health Approach to Drug Control' [2005]. See also Steven Rolles, 'After the War on Drugs?' (2010) 10 Drugs and Alcohol Today 22.

[3] Antonio Maria Costa, 'Making Drug Control Fit for Purpose: Building on the UNGASS decade' [2008] United Nations Office On Drugs and Crime; Steven Rolles, 'After the War on Drugs?' (2010) 10 Drugs and Alcohol Today 22.

[4] Rolles (n1) 7.

[5] ibid 8.

that these criticisms do not hold up to scrutiny, while also highlighting that at times Transform overestimates the impact of certain regulatory models and fails to address sufficiently some of the legitimate concerns of legalising drugs, such as how a potential 'black market' would be dealt with. Such assessments will be based on two drugs; cannabis and heroin, and relating to the current issues of both. The rationale behind choosing cannabis is that there appears to be some public support for its legalisation and then, secondly, heroin is chosen as this paper believes they require a public health led approach rather than that of criminal justice.

Current drugs policy a success or a colossal failure? —the case for legalisation

The current drug control regime is global in scope, with a series of international conventions adopted by the United Nations member states to control all aspects of the drugs market.[6] Despite this, the illicit drug economy still stands at an estimated $320bn annually,[7] which accounts for between 0.6% and 0.9% of the global gross domestic product[8]—rivalling the worldwide markets in oil, wheat and arms.[9] It is an economy that caters to a sizeable consumer base; according to the 2014/15 Crime Survey for England and Wales, 2.2% of all adults aged 16 to 59 were classed as frequent drug users (which is defined as taking an illicit drug more than once a month in the last year).[10] It is because of figures like these that some have suggested that drug use has become 'normalised', [11] although there exists disagreement about particular age groups.[12] As a result of securitisation, the market has been gifted to organised criminals.[13] Taking the example of Afghanistan, in the year 2007, 93% of the world's non-pharmaceutical-grade opium originated there, and it remains the main source of income for the Taliban.[14] In short, prohibition drugs policies have led to the corruption of law enforcement, governments, funding for terrorism,

[6] Single Convention on Narcotic Drugs (1961); Convention on Psychotropic Substances (1971); Convention Against the illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).
[7] United Nations Office on Drugs and Crime, *World Drug Report* [2005] 2.
[8] Ibid.
[9] Danny Kushlick, 'International Security and the Global War on Drugs: The tragic irony of Drug Securitisation' <http://www.tdpf.org.uk/resources/publications/international-security-and-global-war-drugs-tragic-irony-drug-securitisation> accessed 13 December 2017.
[10] Home Office, 'Drug Misuse: Findings from the 2014/15 Crime Survey for England and Wales' (July 2015) 8.
[11] Shane Blackman, *Chilling out: The Cultural Politics of Substance Consumption, Youth and Drug Policy* (Open University Press, 2004) 137
[12] See Lisa Williams, 'Muddy Waters Reassessing the dimensions of the normalisation thesis in twenty-first century Britain' (2016) 23 Drugs: Education, Prevention and Policy 190,194.
[13] Kushlik (n9).
[14] United Nations Office on Drugs and Crime, *Afghanistan Opium Survey* [2007] iii; UN News Centre, 'Opium trade finances Taliban war machine, says UN drug tsar' (2008)<http://www.un.org/apps/news/story.asp?NewsID=29099#.Wmc4e6hl_Dc >accessed 13 December 2017.

insurgency and criminal networks[15]—something which the paper will argue that legalisation would help fight.

The current policy on drugs remains inflexible and has abandoned findings from scientific research as views which argue against the status quo are not given an opportunity to bear fruit, and policies on drugs are built on 'moral panics'.[16] Any challenge is perceived as a threat to the world order and cannot be 'countenanced'.[17] A prime example of this on the international stage is that at the 48th World Health Assembly, the US representative threatened to withdraw funding for projects 'if WHO activities relating to drugs failed to reinforce proven drug control approaches'. [18] Historically, the criminalisation of drugs and its users has been presented as an emergency response to an imminent threat, rather than an evidence-based health or social policy intervention.[19] One example of this is the classification of cannabis under the Misuse of Drugs Act 1971, from class B to C and then back to class B.[20] The downgrading was initially as a result of a study commissioned by the Joseph Rowntree Foundation which concluded that moving cannabis to class C would yield financial savings, allowing officers to respond more effectively to other calls on their time and that it would stop the 'criminalisation' of young youths who are were just using drugs for recreational purposes.[21] A subsequent study found that it saved the police more than 260,000 officer hours in the first year alone.[22] Despite these many benefits of reclassification, the government, under pressure from 'moral panics' created by British tabloids,[23]

[15] Stephen Rolles, 'An Alternative to the War on Drugs' (2010) 341 British Medical Journal; Vanda Fellab-Brown, 'Shooting up: Counter insurgency and the War on Drugs', <https://www.brookings.edu/events/shooting-up-counterinsurgency-and-the-war-on-drugs/> accessed 13 December 2017.

[16] See Jeremy Collins, *Moral Panics in the Contemporary World* (Bloomsbury 3PL, 2013) 125-223; Erich Goode and Nachman Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (2nd edition, Wiley-Blackwell 2009) 199.

[17] Kushlick (n9).

[18] David Bewley Taylor, *International Drug Control: Consensus Fractures* (Cambridge University Press, 2012) 259; Kushlick (n9).

[19] Kate Fay, 'Prescribed Addiction' in Mick Bloor and Fiona Wood (eds), *Addiction and Problem Drug use: Issues in Behaviour, Policy and Practice* (Jessica Kingsley Publishers, 1998); Damon Barret, 'Security, development and human rights: normative, legal and policy challenges for the international drug control system' (2010) 21 International Journal of Drug Policy 140, 144; Rolles (n1) 5.

[20] Michael Shiner, 'Drug Policy Reform and the Reclassification of Cannabis in England and Wales: a cautionary tale' (2015) 26 International Journal of Drug Policy 696, 697.

[21] ibid 698.

[22] Tiggey May and others, 'Policing Cannabis as a Class C Drug: An Arresting Change? - A review of the impact of reclassification on the policing of cannabis possession.' [2007] Joseph Rowntree Foundation i,x.

[23] Professor David Nutt, 'The Inconvenient Truth About Drugs' (2012) 15:10-20:30 <https://www.youtube.com/watch?v=gkcO_wJ9yKo> accessed 8th December 2017. See also < http://www.dailymail.co.uk/health/article-179264/Cannabis-kills-30-000-year.html > accessed 2 January 2018.

first give the police much more discretionary power before moving cannabis back to class B,[24] making a complete fiasco of the whole situation. However, this is not an isolated case of bad decision making related to drug policies but is instead representative of a wider trend of reluctance to be led by scientific research and reason, as well as to accept that some drugs are less harmful than others. One stark example of this is in the case of cannabis in comparison with alcohol, with 5.9% of all global deaths attributable to alcohol in the year 2012[25] whereas cannabis, despite some side effects has had little to zero deaths and has instead been used for medicinal purposes in countries such as Canada and now been legalised in eight US states for recreational use.[26] The sacking of Professor David Nutt, the government's chief drug adviser, who claimed that certain drugs were less harmful than alcohol, showed precisely this, as his views were supported with vast amounts of scientific research and field experience, yet an attempt was made to forcefully silence them.[27]

This paper argues that drug policy should not treat the drug user as the 'other', but be built on granting people liberty and the realisation that drug use has a history of documented use far beyond the modern era. China, for example, has a continuous history of about 6000 years of cannabis cultivation and opium use.[28] Drug policy should then recognise that this 'war' cannot be won, for 'as long as there is an insistent market they (illicit drugs) will be produced. And so long as they are illegal, their production will be through organised crime'.[29] Instead, it argues we ought to provide a safe environment as we have failed to control the market and instead made it hostile to the end consumer. Like all laws, drug policy should grant people as much liberty as possible—the notion of a democratic society demands it. Transform in its blueprint does not make this an explicit issue of discussion; instead, it is implied through the text and mentioned elsewhere in the

[24] Shiner (n20) 698

[25] World Health Organisation, 'Global status report on Alcohol and Health' (2014) <http://apps.who.int/iris/bitstream/10665/112736/1/9789240692763_eng.pdf?ua=1> accessed 2 January

[26] Daniel T. Abazia and Mary Barna Bridgeman, 'Medicinal Cannabis: History, Pharmacology, And Implications for the Acute Care Setting' <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5312634/> Accessed 1 January 2018; Editorial, 'Recreational Cannabis use becomes Legal in California' *BBC* (US & Canada, 1 January 2018) <http://www.bbc.co.uk/news/world-us-canada-42532776> accessed 1 January 2018; Drug Enforcement Administration, 'Drugs of Abuse' (PUBLISHED BY Drug Enforcement Administration, 2017) 75.

[27] Jeremy Laurence, 'Government Fires top Adviser for Challenging its hard-line policy on Cannabis' (*The Independent* 2009) <http://www.independent.co.uk/life-style/health-and-families/health-news/sacked-ndash-for-telling-the-truth-about-drugs-1812255.html> accessed 1 January 2018.

[28] Blackman (n11) 128.

[29] David Passage, 'The United States and Colombia – Untying the Gordian Knot' [2000] Strategic Studies Institute 1,28. See also Kushlick (n9).

Transform campaign.[30] The biggest criticisms of the current 'paternalistic set of laws' stem largely from ideas put forward by the British philosopher *John Stuart Mill*, who in particular objected greatly to the limitations on freedoms of drug consumers. In his book *On Liberty*, in which he applies his ethical system of utilitarianism to society and the state, he specifically criticises the laws against the importation of opium into China,[31] saying: 'these interferences are objectionable, not as infringements on the liberty of the producer or seller, but on that of the buyer.'[32] Throughout his works Mill has supported an idea of free experimentation; our need to try different lifestyles and this, together with his opinion on the ban of opium, suggests that the freedom to use drugs appears as a necessary consequence of his arguments.

Moreover, 'when there is not a certainty, but only danger of mischief' education should be provided explaining the potential dangers—an idea which is at the heart of the blueprint as education will be provided at all levels of the supply models.[33] The strength of this libertarian argument for change comes from the fact that we already apply this form of utilitarianism in certain areas of everyday life; 'an act is only wrong if it harms others' can be seen in legislation around of freedom of expression, wherein a speech is only allowed to be limited if it is hate speech or in general term causes harm to others.[34] Taking into consideration the impact of Mill on western political thought and on the concept of human rights in general, it is difficult then to see how prohibitionist drug policies are justifiable and why a criminal justice approach has had such a considerable impact on the drugs policy. Moreover, it gives further credence to the argument in favour of the legalisation of drugs.

An alternative to the 'war on drugs'; Legalisation of drugs and the regulatory models

Production

Transform argues that drug production for non-medical use will mostly require the expansion of existing frameworks,[35] rather than the development of new ones. There are already many well-established businesses engaged in the production of plant-based and synthetic psychoactive

[30] See Rolles (n1) 6,52; Transform, 'Concerns about Legal Regulation' <http://www.tdpf.org.uk/resources/concerns-about-legal-regulation> accessed 2 January 2018.
[31] John Stuart Mill, *On Liberty* (first published in 1859, this version printed by Enhanced Media, 2016) 70.
[32] ibid.
[33] see Rolles (n1) 52,55,59.
[34] See European Convention on Human Rights Article 10 (2).

[35] Rolles (n1) 32

drugs,[36] a task which they are performing within existing regional, national, and global legal frameworks.[37] Almost half of the global opium production is legally produced for processing into opiate-based medicines by 18 countries in 2001 under the auspices of the UN Single Convention on Narcotics Drugs of 1961 and under the supervision and guidance of the INCB.[38]

The strongest case for the legal production of drugs is that currently 'cultivation, harvesting and distribution are not subject to the quality control mechanism to ensure the reliability and safety of the product used by consumers'.[39] This has resulted in heroin users unintentionally injecting things like brick dust,[40] and heroin overdoses occurring because of uncertainty about the active substance. This is also true of cannabis as 'super strong' varieties are being sold on the streets of England.[41] Thus, legal production is a pragmatic approach in that it allows consumers to know the exact contents and the strength of the ingredients being taken. Yet, there still exists a potential for the diversion of now legally-produced drugs into illicit markets. Transform tries to downplay this by giving examples of two countries; India estimates that a maximum of 10% of total production [of opium] is diverted into illicit markets,[42] whereas 'no seizures of opium derived from Turkish poppies have been reported either in the country or abroad'.[43] But, in self-admission by Transform, 'very little substantiated data exists (concerning this issue)'.[44] Arguably, Transform is too optimistic about existing little danger of the diversion of drugs into an illicit market. It argues that such issues could be addressed through appropriate licensing, and with effective enforcement where violations of licensing conditions are identified.[45] However, it is very difficult to see how this works in practice. The whole argument in the *Blueprint* rests on the belief that strong prohibition laws don't work, and that the current enforcement mechanisms are weak. So

[36] ibid.
[37] ibid 33.
[38] ibid 35.

[39] World Health Organisation, 'A Comparative Appraisal of the Health and Psychological Consequences of Alcohol, Cannabis, Nicotine and Opiate Use' <http://www.druglibrary.org/schaffer/hemp/general/who-probable.htm> accessed 1 January 2018.

[40] Editorial, 'Brick dust sold as heroin' (*BBC* 2002) < http://news.bbc.co.uk/1/hi/england/1791507.stm> accessed 1 January 2018.
[41] John Bingham and others, 'Super strong cannabis responsible for quarter of new psychosis cases' (The Telegraph, 2015) <http://www.telegraph.co.uk/news/health/news/11414605/Super-strong-cannabis-responsible-for-quarter-of-new-psychosis-cases.html> accessed 1 January 2018.
[42] Rolles (n1) 195.
[43] ibid 196.
[44] ibid 194.
[45] Ibid.

if we have been unable to control a market which is worth over $320bn annually, of which every single aspect is prohibited, then what is going to stop the diversion of licit goods into an illicit market? Transform mentions economic incentives, but incentives by their very nature rely on potential rather than certainty. There is the hope that people will follow them, but no guarantee, as can be seen in the case of cigarettes, with 1 in every 7 cigarettes smoked being from a black market within the UK.[46]

Alternatively, economic reasons for legal production are a much more contentious issue. There are still gaps in the quantitative research because of the number of variables, therefore evaluations are primarily qualitative in nature.[47] Although, some raise moral arguments against prohibition, , saying that it is unethical to legalise drugs simply because of potential revenue from taxes.[48] These are contradiction within themselves and extremely hypocritical, as we allow relatively unrestricted consumption of alcohol,[49] and because of its contribution of 2.5% of the GDP in the UK,[50] we even allow alcohol companies to become sponsors of international sporting events.[51] Such moral convictions help support the words on the first few pages of the *Blueprint*: 'global prohibitionist drug policy continues to focus efforts primarily on the substance alone. This is wrong.'[52]

There is a tendency to bring the idea of 'social costs' into the debate to support the status quo and serve as a simple denial of potential benefits: 'compared to the social costs of drug abuse and addiction—whether in taxpayer dollars or in pain and suffering—government spending on drug control is minimal'.[53] But this could not be further from the truth as $36bn was spent on the drug

[46] KPMG, 'A study of the illicit cigarette market in the European Union, Norway and Switzerland 2016 Results' < https://assets.kpmg.com/content/dam/kpmg/lt/pdf/project-sun-2017-report.pdf> accessed 1 January 2018.
[47] This paper holds the firm belief that qualitative research is also a form of credited research.
[48] See Antonio Maria Costa, World Drug Report [2009] 3.
[49] Henry Yeomans and Chas Critcher, *The Demon Drink: Alcohol and Moral Regulation, Past and Present* (Routledge, 2013) 305, 312.
[50] Institute of Alcohol Studies, 'Splitting the bill: Alcohol's impact on the economy' <http://www.ias.org.uk/uploads/pdf/IAS%20reports/rp23022017.pdf>3 accessed 20 November 2017. See also David H. Jernigan, 'The Global Alcohol Industry: an overview' (2008) 108 Addiction 104, 9.
[51] Jim McCambridge, 'Dealing Responsibiliy with the Alcohol Industry in London' 47 Alcohol and Alcoholism 635,636.

[52] Rolles (n1) xi.
[53] US Drug Enforcement Administration. 'Speaking out against drug legalisation' (2010) <https://www.dea.gov/pr/multimedia-library/publications/speaking_out.pdf> accessed 24 December 2017.

war in 2015 in the US,[54] and with the UK that number stands at around £16bn.[55] Transform accept that the usage of drugs will increase, however, as presented above drugs such as cannabis, despite the health risks are usually less-than or comparable with alcohol, and would eradicate the many downsides with prohibition. The amount of people who have had to visit the NHS for reasons related to illegal drug use is less than half that of those linked to alcohol or tobacco.[56] And majority of it caused by overdoses as illicit drugs are of an unpredictable strength,[57] which the three models would protect against. Therefore, even if the use of drugs grew considerably the impact on the Health Service is likely to be minimal. Perhaps the best response to such concerns comes from the comments of the controersial figure Enoch Powell; 'we could enter endless consideration of the reasons which brought patients to be treated under the NHS— unwise courses of life, unwise behaviour of any kind. Are we to make all these criminal offences because the consequences might be to divert the use of resources inside the NHS'.[58] Despite such a strong case being presented here, due to the current stress on the NHS and the cuts by the Conservative government, it is likely that such defences will fall on deaf ears. Comments such as those made by Powell were said at the peak of the NHS and still the decision by parliament was against his argument.

Another perspective which is missing from this discourse is that the rights of those who are employed on the ground to make drugs should be considered. 'The farmers and labourers who make up most of the illicit workforce are frequently living in poor, underdeveloped and insecure environments'.[59] As the UNODC acknowledged, in Myanmar, 'opium poppy cultivation is a sign of poverty rather than wealth'.[60] In the UK, there has been increasing talk about the links between commercial cultivation and modern slavery, including the exploitation of vulnerable adults and children.[61] Due to this Transform comments that the current prohibition policies are in conflict

[54] Drug Policy Alliance, The Federal Drug Control Budget [2015] < https://www.drugpolicy.org/sites/default/files/DPA_Fact_sheet_Drug_War_Budget_Feb2015.pdf> accessed 24 December 2017.

[55] Tom Whitehead, 'Illegal drugs cost the country £16bn a year, says charity Transform (*The Telegraph*, 2009'http://www.politics.co.uk/news/2009/4/7/the-cost-of-drug-laws-16-billion accessed 24 December 2017.

[56] NHS, *Statistics on drugs misuse England 2017* < https://digital.nhs.uk/catalogue/PUB23442 > 8 December 2018.

[57] NHS, *Statistics on alcohol England 2017* < http://digital.nhs.uk/catalogue/PUB23940 >accessed 8 December 2017.

[58] HC Deb 05 April 1973 vol 854 cc745-75.

[59] Rolles (n1) 85.

[60] .United Nations On Drugs and Crime, 'Life in the Wa Hills: Towards Sustainable Development', [2006] UNODC Myanmar Country Office, 3.

[61] National Police Chiefs' Council, 'UK National Problem Profile: Commercial' (2014) <http://www.npcc.police.uk/Publication/FINAL%20PRESS%20CULTIVATION%20OF%20CANNABIS%202.pdf> accessed 1 January 2018. See also Amelia Gentleman, 'Trafficked and enslaved: the teenagers tending UK cannabis

with other aims of the UN, namely, human rights and the protection of the vulnerable.[62] Arguably the individuals being exploited have a human right to protection from harm and exploitation, the duty of which falls upon us as a society. If we don't the criminals and terror groups will continue exploiting them as there exists a vacuum. Building upon the prime example given of Afghanistan where opium is the main form of funding for the Taliban, an attempt was made by the British and Americans to buy opium directly from the poor farmers at the start of the previous decade.[63] Although this was a failure due to the lack of consensus over the policy between the two nations,[64] it could be argued that legal production could still be attractive and pragmatic politically today if there was one single policy adopted. Moreover, nationally, it would grant politicians the potential to remove the main source of funding for criminal networks, giving further credence to their claim to fighting crime as well as saving on the criminal justice associated costs.

Supply

Transform suggests five basic models for regulating drug supply and lists them, starting with the most restrictive and moving to the most open. It argues that variants of these models exist already and function across the world, supporting the entirely legal distribution of a range of medical, quasi-medical and non-medical psychoactive drugs.[65] However, due to limitations of length, this paper will focus on the medical prescription model which is used for highest risk drugs such as heroin, as well as licensed retailing and licensed premises for sale and consumption which are associated with low-risk drugs such as cannabis.[66]

One of the major reasons why the prescription model is necessary comes from a medical point of view as it concerns the highest risk drugs such as heroin. This would be particularly helpful to those who are injecting as they are at the highest risk of contracting blood-borne diseases. We have already used medical prescription models within the UK by providing methadone to people

farms' (*The Telegraph*, 2017) <https://www.theguardian.com/society/2017/mar/25/trafficked-enslaved-teenagers-tending-uk-cannabis-farms-vietnamese> accessed 1 January 2018.

[62] Transform, 'The Benefits of Legal Regulation' < http://www.tdpf.org.uk/resources/benefits-legal-regulation> accessed 2nd January 2018; Rolles (n1) 10.

[63] Francis Elliott, 'Britain and US plan to stop heroin trade by buying Afghan opium crop' (*The Telegraph*, 2001) <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/1362740/Britain-and-US-plan-to-stop-heroin-trade-by-buying-Afghan-opium-crop.htm l> accessed 1 January 2018; Professor David Nutt, 'The Inconvenient Truth About Drugs' (2012) 15:10-20:30 < https://www.youtube.com/watch?v=gkcO_wJ9yKo > accessed 8th December 2017.

[64] ibid.

[65] Rolles (n1) 23.

[66] ibid.

as a replacement and as a form of therapy.[67] But under closer examination, we can see that this is not as pragmatic as initially prescribed by Transform. Transform does not focus on *why* the need for prescribing heroin exists, but instead focuses on *ways* that it can. This is perhaps one of the weaknesses of Transform in general, in that it doesn't make explicit cases for legalisation and instead focuses on ways of doing so instead throughout its campaign, especially in comparison to other similar analyses.[68] Moreover, any chances of the prescription model being a pragmatic approach which is also politically possible are taken away with the admission that it is likely to be very expensive as it will require 'specialist training, a specific qualification/license, or a new specialist prescribing- practitioner professional'. It is unlikely then that this model would be put in place as it is already being used in the form of methadone prescription and due to financial constraints within the current political climate in the UK. Simply put, if one of the reasons for the abandonment of prohibitionist policy is the high rise in criminal justice system costs then are we not just diverting cost to have 'specialist prescribing practitioner in place'? Even though the cost is likely to be considerably less, it still seems self-contradictory.

These models would provide a safe place for individuals to purchase drugs without the threat of violence. The current markets operate without the usual protections offered by the court systems; rather, the state attempts to disrupt them resulting in a 'closed drugs market' over which the authorities have little to no control.[69] Use of violence is common,[70] and much of the incidents go unreported.[71] Also, the first large-scale survey shows that this is one of the primary reasons for the rise of cryptomarkets, as cryptomarket customers report fewer incidents and threats of violence in comparison to their 'street alternative'.[72] In this area, in can be seen that the supply models do adequately respond to the challenges currently faced in the purchase of drugs as they provide a safe purchasing environment. However, it is very unlikely that these supply models could

[67] Ambros Uchtenhagen, 'Heroin Maintenance Treatment: From idea to research to practice' (2011) 30 Drug and Alcohol 130.
[68] See Ethan Nadelmann, 'Thinking Seriously About Alternatives to Drug Prohibition' (1992) 121 Daedalus 85, 94; King County Bar Association (no 2) 54.

[69] Mathew Taylor and Gary R. Porter, 'From "Social Supply" to "Real Dealing": Drift, Friendship, and Trust in Drug-Dealing Careers' (2013) 43 Journal of Drug Issues 394, 401.
[70] Tiggey May and Mike Hough, 'Drug Markets and Distribution Systems' (2009) 12 Addiction Research & Theory 549, 551.
[71] ibid.
[72] Monica Barratt and others, 'Safer scores? Cryptomarkets, social supply and drug market violence' (2016) 35 International Journal of Drug Policy 24.

adequately stop the increase of 'innovative'[73] methods of supply as commentators who have argued that 'there exists no way of taking down cryptomarkets'[74] have not mentioned that legalisation could either. It is important to mention again the fact that the *Blueprint* stands firm on the belief that any activity outside the realm of a regulated market will still be prohibited and liable to civil penalties. Transform is being hypocritical, as it is relying on the somewhat same prohibition strategies that its fighting in order to control black markets. If *Silk Road*, one of the biggest cryptomarkets was back up and running on a new server after being shut by the FBI,[75] it is very unlikely that 'civil penalties' and competition will end this potential black market.

Use

Transform has dedicated a general chapter to purchaser, end user controls and how to deal with potential issues as a result of legalising drugs. However, the focus here will be on the most contentious of issues; the age of the purchaser and the anxiety about drug use being more visible and socially intrusive.

Dealing with the first issue of age of purchaser, Transform argues that preventing access to drugs by non-adults is a key element of any existing or future regulatory models. Any rights of access to psychoactive drugs and freedom of choice over drug taking decisions should only be granted to consenting adults but also 'in practical terms, stringent restrictions on young people's access to drugs—whilst inevitably imperfect—are more feasible and easier to police than population-wide prohibitions.[76] Furthermore, it is also worth pointing out that one ironic and unintended side-effect of prohibition can often be to make illegal drug markets that have no age thresholds easier for young people to access than legally regulated markers for, say, alcohol or tobacco.[77] This is certainly true in the UK where according to NatCen Social Research and the National Foundation for Education Research survey carried out by an annual survey of secondary pupils in England and Wales in years 7 to 11 (219 schools) showed that 17% of pupils had taken drugs (2011).[78] Whereas

[73] Fernando Caudevilla and others, 'Results of an International drug testing service for cryptomarket user' (2016) 35 International Journal of Drug Policy 38,39.
[74] David Décary-Hétu and Luca Giommoni, 'Do police crackdowns disrupt drug cryptomarkets? A longitudinal analysis of the effects of Operation Onymous' [2016] Springer Science+Business Media Dordrecht 55,58.
[75] ibid 55,59; Joe Van Buskirk and others, 'The closure of the Silk Road: What has this meant for online drug trading?' (2014)
[76] Rolles (n1) 52.
[77] Transform (n30).
[78] NatCen Social Research and the National Foundation for Educational Research, *Smoking, drinking and drug use among young people in England in 2011 <https://digital.nhs.uk/catalogue/PUB06921> accessed 8 November 2017.*

the proportion of pupils who drank alcohol in the last week had fallen from 26% in 2001 to 12% in 2011. Moreover, in 2014, less than 18% said that they had smoked at least once, this figure being the lowest level ever recorded since the survey began in 1982.[79]

One of the general criticism against legalisation of drugs is that it drug use would become considerably cheaper and this would lead to a significant increase in the number of people who use drugs.[80] But such concerns are met with the response that falls in price would allow drug users to support their consumption habits without having to resort to crime or falling into poverty, and Transform argues that price control mechanisms would be in place to make sure drugs have a minimum set purchase price.[81] Moreover, as can be seen through the example of the Netherlands which has a 'toleration' to drugs policy, heroin use has not risen in 25 years, and cannabis use is still less than half that of the United States, and much less than in Britain.[82] Transform tries to further address this 'unspoken anxiety' about drug use being far more visible and socially intrusive by arguing that the new regulatory regimes would make it possible for drug use to be far less visible than the present.[83] To do this, public smoking bans could naturally extend to cover the smoking of cannabis and restrictions on public intoxication, and public disorder could be extended to include any form of intoxication, pointing back at the idea which has been at the heart of this paper that an action is only wrong if it causes harms to others.

Concluding remarks

This paper has highlighted that the current prohibitionist drug policies are unethical and a cause of harm and that there is a considerable amount of consensus that a change is necessary. There are certainly some downsides to legal regulation of drugs, but they are overcome by the advantages such as quality control and providing a safe environment for individuals to consume drugs. However, this being said, Transform has not addressed the concern of how a potential black market after legalisation would be dealt with efficiently, it relies on somewhat the same policies

[79] NatCen Social Research and the National Foundation for Educational Research, *Smoking, drinking and drug use among young people in England in 2014* <https://digital.nhs.uk/catalogue/PUB17879 >accessed 8 November 2017.
[80] Christine Saum and James A. Inciardi, 'Legalization Madness' (1996) 123 Public Interest 72,76. See also Chris Wilkins and Frank Scrimgeour, 'Economics and Legalisation of Drugs' (2000) 7 A Journal of Policy Analysis and Reform 333,334
[81] Rolles (n1) 89,
[82] Rolles (n15); King County Bar (n2) 50; Fay (n19). See also Peter Cohen, 'The Case of the two Dutch Policy Commissions: an exercise in harm reduction 1968-1976 [1994] Addiction Research Foundation 22,27.

[83] Rolles (n1) 92.

that it seeks to oppose, only to relabel them. But overall, Transform has presented a regulatory model which is both pragmatic and at times politically attractive and at its best, already being used in different countries and proving successful.

Resale Price Maintenance and UK Competition Law

John Sirica

Introduction

Resale price maintenance (RPM) agreements prevent retailers from selling an identified product below a certain price. Consumers normally pay higher prices as a result. RPM is therefore nearly always found to infringe European competition law. In a significant recent example, the European Commission ("the Commission") fined four consumer electronics manufacturers €111 million for maintaining fixed resale prices.[1] Each company co-operated with the Commission, admitted its infringements, and received a reduced fine.

British competition authorities take a similar approach to RPM. In August 2019, just four months after issuing a statement of objections, the Competition and Markets Authority ("CMA") fined Casio £3.7 million for implementing RPM in the sale of electronic keyboards and pianos.[2] Similar to the EU example, Casio co-operated with the CMA, admitted its infringements, and received a reduced fine.

It is unsurprising that firms accused of engaging in RPM normally co-operate with competition authorities rather than challenge their decisions in court proceedings. The Commission and the Court of Justice of the European Union ("the CJEU") categorise RPM agreements as restrictions of competition by object.[3] This classification makes RPM extremely difficult to justify.

United States antitrust law is more tolerant. In *Leegin Creative Leather Products v PSKS*,[4] the majority of the Supreme Court of the United States ("the Supreme Court") accepted that RPM enhances rather than harms competition in many situations.[5] Prior to *Leegin*, US antitrust law

[1]European Commission, "Antitrust: Commission Fines Four Electronic Consumer Electronic Manufacturers for Fixing Online Resale Prices" (*Commission Press Corner*, 24 July 2018) <https://europa.eu/rapid/press-release_IP-18-4601_en.htm> accessed 7 December 2019

[2]Competition and Markets Authority, "Piano Supplier Fined £3.7m for Illegally Preventing Price Discounts" (*Government News*, 1 August 2019) <https://www.gov.uk/government/news/piano-supplier-fined-3-7m-for-illegally-preventing-price-discounts> accessed 7 December 2019

[3] European Commission, *Guidelines on Vertical Restraints* (Commission Notice, SEC(2010) 413, 2010) para 223; Case C-243/83 *SA Binon v AMP* [1985] ECR 2015.

[4]*Leegin Creative Leather Products, Inc. v PSKS, Inc*. (2007) 551 US 877.

[5] *Leegin* (n 4) page 849.

classified RPM agreements as anti-competitive and illegal in all circumstances. The majority in *Leegin* decided this was inappropriate given the pro-competitive justifications for RPM.

At the time of writing, there is a strong possibility that the UK will leave the EU in the near future. Currently, UK authorities are required by statute to interpret and apply domestic competition law consistently with EU competition law.[6] The purpose of harmonising competition law, however, is to create a level economic playing field across the EU single market.[7] It is therefore possible that the UK would abandon this obligation if it leaves the single market. Under those circumstances, British competition authorities would be free to treat RPM more permissively. This article argues that this would be undesirable.

Economics of RPM

RPM is a vertical restraint. This term refers to an agreement between market operators at different levels of a production or distribution chain which restricts the parties' conduct beyond the identification, quantity, and price at which the goods or services are supplied.[8] Casio's conduct is an example. Its agreements with retailers presumably specified the products to be supplied, their quantity, and the price payable by the retailers. Beyond this, however, Casio sought to restrict the downstream firm's subsequent economic behaviour by setting minimum resale prices for the products supplied. This characteristic brought the agreements within the scope of competition law. Not every vertical restraint, however, will infringe competition law.

Both US and EU authorities are hesitant to prohibit vertical restraints which result in lower prices for consumers. Agreements which stipulate *maximum* resale prices, for example, are usually tolerated,[9] since they provide some protection from firms overcharging consumers. *Minimum* RPM, by contrast, normally increases the prices that consumers pay for the relevant goods or services. In the absence of RPM, retailers would compete for customers by undercutting each

[6] The Competition Act 1998, s 60.
[7] See, for example, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Recital para 8; Article 3(2).
[8] Jeremy Lever and Silke Neubauer, "Vertical Restraints, Their Motivation and Justification" [2000] ECLR 7
[9] In US law see, for example, *Mathias v. Daily News, L.P.*, (2001) F. Supp. 2d 465, 486. In EU law, see *Guidelines on Vertical Restraints* para 226.

other's prices.[10] Different reasons are therefore required to support the proposition that RPM can promote, rather than hinder, competition. Free-rider theory is the most important of these.

The theory describes a situation in which a manufacturer sells a product to several retailers, who provide varying levels of pre-sale customer service.[11] In the RPM debate, the services most frequently discussed concern the provision of information about the product to consumers.[12] The manufacturer requests that its retailers provide these services, which increase consumer demand for its product.[13]

The problem arises when one retailer realises that it can substantially increase its sales by offering a lower price than its competitors. In order to make this profitable, the discounter terminates its pre-sale services. It can do so without significantly affecting demand because its competitors continue to provide the services. Rational consumers will visit the full-service retailer, then make their final purchases from the discounter. This predicament is unsustainable for the discounter's rivals;[14] it results in universal price cuts and discontinuation of pre-sale services. Manufacturers and retailers are thus deprived of an effective technique for increasing demand.[15] Pre-sale services disappear from the market and consumers must make purchases on incomplete information, leading to inefficient allocation of their resources.[16] RPM agreements purport to solve these problems by preventing discounts.[17] With no freedom to cut prices, retailers instead compete to provide the best service.[18]

This section has described justifications for manufacturer-imposed RPM. Retailers, of course, could also insist on RPM. In these situations, the retailer usually either has market power or attempts to use RPM to enforce a horizontal price-fixing agreement.[19] Consequently, neither EU

[10]Lester G Telser, "Why Should Manufacturers Want Fair Trade" [1960] 3 Journal of Law & Economics 86, 86
[11] Warren S Grimes, "The Seven Myths of Vertical Price Fixing: The Politics and Economics of a Century-Long Debate" [1992] 21 Southwestern University Law Review 1285, 1295
[12] Ibid.
[13] Kenneth G Elzinga and David E Mills, "The Economics of Resale Price Maintenance" [2008] *Issues in Competition Law and Policy* 1841, 1842
[14] Ibid.
[15] Elzinga and Mills (n 13) at 1842.
[16] Elzinga and Mills (n 13) at 1843.
[17] Ibid.
[18] Ibid.
[19] Elzinga and Mills (n 13) at 1845.

competition law nor US antitrust law permits RPM in these circumstances.[20] It is manufacturer-imposed RPM that has generated divergent positions in EU competition and US antitrust law. This article therefore concentrates on the legal position regarding manufacturer-imposed RPM.

RPM in the EU and US

This section discusses the treatment of RPM in EU competition and US antitrust law. The conclusion reached is that while RPM is nearly always permitted in the US, the position in the EU approaches outright prohibition. EU law is considered first, followed by US law.

Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the internal market."[21] Article 101(2) renders void all agreements which article 101, as a whole, prohibits. Article 101(3) exempts an agreement that infringes article 101(1) if it meets four pro-competitive conditions.[22]

Article 101(1) contains numerous technical terms which, though important, are unnecessary to explain in detail for the purposes of this article.[23] The key concept for RPM is the distinction between agreements that restrict competition by object and those that do so by effect. An agreement that restricts competition by object reveals, in itself, a sufficient degree of harm to competition.[24] There is therefore no need to prove its actual or potential negative effects on competition for the article 101(1) prohibition to apply.[25] The Commission[26] and CJEU[27] classify RPM as a restriction of competition by object. A party seeking to defend an RPM agreement will therefore bear the burden of justifying it under article 101(3). The Commission's view is that any such attempt is unlikely to succeed in the absence of exceptional circumstances, which could

[20] In EU law, see *Guidelines on Vertical Restraints* para 224. In US law, see *McDonough v Toys "R" US, Inc.* (2009) 638 F. Supp. 2d 461. E.D. Pa.
[21] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47, art 101.
[22] Ibid.
[23] For more information, see Richard Whish and David Bailey, *Competition law* (9th edn, Oxford University Press 2018) chapter 3
[24] Case C-67/13P *Groupement des Cartes Bancaires v Commission* [2014] EU:C:2014:2204, para 57
[25] Ibid. Para 51.
[26] *Guidelines on Vertical Restraints* para 223.
[27] *Binon v AMP* (n 3). Para 44.

include a short term, low-price campaign.[28] This follows from the CJEU's insistence that "price competition is so important that it can never be eliminated…"[29]

In summary, RPM's categorisation as a restriction of competition by object means that the article 101(1) prohibition applies automatically.[30] Any party seeking to justify RPM must do so under article 101(3).[31] This is unlikely to succeed. The legal position therefore approaches outright prohibition.

In US antitrust law, RPM is analysed under section 1 of the Sherman Act 1890, which prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations…"[32] The section is unworkably broad if interpreted literally. Courts therefore quickly developed the rule of reason, which provides a framework to separate legitimate contractual restrictions from those that hinder competition. Its original formulation requires a court to examine an agreement's economic effects and purpose in order to determine whether it suppresses, increases, or has no effect on competition.[33] In other words, only *unreasonable* restraints of trade are prohibited. However, some restraints, as determined by the Supreme Court, are so inherently harmful to competition that they are conclusively presumed to violate section 1. These are *per se* illegal, and no analysis of their effects is necessary or admissible.[34]

Prior to *Leegin*, RPM was considered a *per se* violation of the Sherman Act.[35] The majority in the Supreme Court in *Leegin* held that the rule of reason should apply instead, as the *per se* category is reserved for restraints "that would always or almost always tend to restrict competition and decrease output".[36] Justice Kennedy, writing for the majority, noted the plethora of economic literature supporting the theory that RPM often strengthens competition between goods of

[28] *Guidelines on Vertical Restraints* para 223.
[29] Case 26/16 *Metro SB-GROSSMÄRKTE GMBH & Co. v Commission* (1977) ECR 01875. Para 21.
[30] *Groupement des Cartes Bancaires* (n 24). Paras 47-48.
[31] *Binon v AMP* (n 3). Para 44.
[32] The Sherman Antitrust Act of 1890 (as amended) (USA)
[33] *Chicago Board of Trade v. United States* (1918) 246 U.S. 231. Page 238. Also, *National Society of Professional Engineers v. United States* (1978) 435 U.S. 679. Pages 687- 688.
[34] Adam Neale and Abe Fortas. *The Antitrust Laws of the United States of America* (2nd edn, Cambridge University Press 1970) page 27
[35] *Dr. Miles Medicine Co. v. John D. Park & Sons* (1911) 220 U.S. 373.
[36] *Leegin* (n 4) page 886.

different brands ("interbrand competition") by reducing competition between goods of the same brand ("intrabrand competition").[37] Furthermore, his opinion explicitly endorses free-rider theory:[38] RPM, he stated, is an effective way to ensure that valuable pre-sale services remain on the market.[39] For these reasons, the Supreme Court overturned RPM's *per se* classification.

Under the rule of reason, the court in each RPM case must weigh all the circumstances to determine whether the practice is an unreasonable restraint of trade.[40] This analysis takes place in a three-step, burden-shifting framework.[41] The initial burden of proof is on the plaintiff to show that the agreement has an anti-competitive effect.[42] The Supreme Court in *Ohio v American Express* confirmed that, normally, anti-competitive harm can be established by showing that the agreement increased prices.[43] If the plaintiff discharges its initial burden, the defendant must then show a pro-competitive justification for the restraint.[44] If this is proved, the burden shifts back to the plaintiff to show that the efficiencies could have been achieved by less restrictive means.[45]

In US antitrust law, therefore, unlike in EU competition law, the party challenging an RPM agreement bears the burden of proving it anti-competitive. This task might seem relatively straightforward: RPM agreements normally increase prices, and a consistent line of authority recognises increased prices as an anti-competitive effect.[46] In RPM cases, however, increased prices have not been considered sufficient, in themselves, to demonstrate an anti-competitive effect.[47] It is therefore difficult, particularly in the context of manufacturer-imposed RPM, for a plaintiff to discharge the initial burden of proof.

The effect of removing RPM from the *per se* illegal category of restraints, and the burden-shifting approach which now applies, is that manufacturer-imposed RPM is nearly always permitted in

[37] Ibid. Page 894.
[38] Ibid. Page 890.
[39] Ibid. Page 891.
[40] *Continental T.V., Inc. v. GTE Sylvania, Inc.,* (1977) 433 U.S. 36, 49.
[41] *Ohio v. Am. Express Co.*, (2018) 138 S. Ct. 2274, 2284.
[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] *Craftsmen Limousine, Inv v Ford Motor Co.,* (2007) 491 F.3d 380, 390.
[47] *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, (2010) 615 F.3d 412, 419.

US antitrust law. If one accepts that the rule of reason operates as a sliding scale,[48] with *per se* illegality at one end and complete tolerance at the other, RPM falls close to the latter region. The remainder of this article argues from that understanding.

Why the EU approach is preferable

The primary argument for a more permissive approach to RPM is free-rider theory. This section presents one important criticism: the pre-sale services which RPM protects are increasingly unlikely to benefit modern consumers, who can access a vast amount of quality information about products independently.

RPM's supporters claim it is most useful for consumers when purchasing complex or technical products.[49] They argue that, for these products, pre-sale services are necessary to ensure that consumers allocate their resources properly.[50] Because product and service information is widely available and frequently utilised, however, the price increases which result from RPM are likely to have an aggregate negative effect on consumer welfare.[51] This is because, in economics terminology, the surplus reduction suffered by infra-marginal consumers in these situations is likely to outweigh the surplus increase for marginal consumers.[52]

Marginal consumers are those to whom the provision of pre-sale services increases the value which they place on a given product.[53] This occurs because the information reveals to the consumer the product's ability to meet their needs, or to do so better than they had predicted.[54] Their consumer surplus is the difference between the price paid and their valuation after receiving pre-sale services. The value estimates of infra-marginal consumers, however, are unaffected by pre-sale information services.[55] Their surplus is the difference between the price paid and their original value estimate. Increased prices and steady value estimates cause a surplus reduction for infra-

[48] Willard K Tom and Chul Pak, "Toward a Flexible Rule of Reason." [2001] 68 *Antitrust Law Journal* 391, 401. Also, *California Dental Assn. v. FTC* (1999) 526 U.S 756.
[49] Elzinga and Mills (n 13). Page 1842.
[50] Ibid.
[51] Consumer welfare is the difference between the price of a product and the value which the consumer places on it, i.e., the highest price that consumer would be willing to pay for it.
[52] William S Comanor, "Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy." [1985] 98 *Harvard Law Review* 983, 991.
[53] Ibid.
[54] Ibid.
[55] Ibid.

marginal consumers.[56] Because they had enough knowledge of the product to make a reasonably accurate assessment of its value, the pre-sale services were otiose. If this occurs in the context of an RPM-controlled product, the consumer will have paid more without receiving a corresponding benefit.

Available data suggests that infra-marginal consumers are likely to predominate over marginal consumers in the context of technical or expensive purchases. One study found that the vast majority of consumers conducted online research before making "big" purchases.[57] In separate research, Deloitte found that 81% of consumers read online reviews and ratings before buying.[58] Furthermore, in general, the internet has helped people feel better informed about products and services.[59] These changes in consumer behaviour should impact RPM policy. While further RPM-specific empirical research would be helpful to determine with precision the practice's impact on consumer welfare, it is submitted that British competition law should be reluctant to adopt a legal position which assumes that consumers are poorly informed. This assumption is at odds with empirical data about consumer behaviour.

Conclusion

The proper treatment of RPM has been extremely controversial in the last decade. Despite the traditional scepticism with which any form of price fixing is viewed, the Supreme Court in *Leegin* held that RPM can be pro-competitive in many situations.[60] EU competition authorities have not yet accepted this proposition. In Europe, intrabrand price competition is still considered too important to eliminate, even on the efficiency grounds advanced by RPM's supporters.

It is not certain when or if British competition law will be able to diverge from EU competition law after Brexit. The future relationship between the UK and the EU, particularly regarding

[56] Ibid. Page 992.
[57] "Study: 81% Research Online Before Making Big Purchases." (Chain Store Age, 12 July 2013) <https://chainstoreage.com/news/study-81-research-online-making-big-purchases> accessed 7 December 2019
[58] "The Growing Power of Consumers" (The Deloitte Consumer Review 2014) <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/consumer-business/consumer-review-8-the-growing-power-of-consumers.pdf> page 4. Accessed 7 December 2019
[59] Kristen Purcell and Lee Rainie, "Americans Feel Better Informed Thanks to the Internet." (Pew Research Center Report 8 December 2018) <http://www.pewinternet.org/2014/12/08/better-informed/> accessed 7 December 2019
[60] Leegin (n 4)

competition law, is uncertain.[61] This article has argued, however, that despite the popularity of free-rider theory and other justifications for RPM, the EU approach to the practice is correct. British law should therefore maintain this position notwithstanding any option to do otherwise.

[61] Linklaters, "Brexit: UK Competition Law in a Deal or No Deal Scenario" (*Linklaters Insights* 2018) <https://www.linklaters.com/en/insights/publications/2018/december/brexit-uk-competition-law-in-a-deal-or-no-deal-scenario> accessed 8 December 2019

Parenthood, Self-Identification, and the Need for Linguistic Adaptability in Determining Legal Parentage

Mahnoor Javed

In September of this year, the High Court was for the first time required to offer a definition of the term "mother" in *R v Registrar General*.[1] The case concerned a judicial review challenge brought by a transgender man against the Registrar General's decision to register him as his child's mother rather than father. The child was the result of intrauterine insemination, meaning the provisions of the Human Fertilisation and Embryology Acts 1990 and 2008 ("HFEA 1990" and "HFEA 2008") apply, including ss.33 and 35-41 HFEA 2008, which define he terms "mother" and "father". According to s.33, the person who carries a child and no other woman is to be considered that child's mother, while ss.35-41 define "father" in light of a man's relationship with the child's mother. These definitions are significant in large part because mothers and some categories of fathers are automatically granted parental responsibility, but that is not the concern of this essay.

In this essay, I consider the rationale behind Sir Andrew Mcfarlane's definition for "mother" in order to demonstrate that the law on determining and registering legal parentage cannot be justified on the reasoning implied in *R v Registrar General*, including both the view of gender and the policy implications emphasised in that judgement. I then go on to consider how the current categories of legal parenthood may be adapted in order to allow for both enabling self-identification and addressing relevant policy concerns.

In *R v Registrar General*, Sir Andrew Mcfarlane defined a child's "mother" as being the person who had undertaken the biological process of conception, pregnancy, and birth, essentially affirming Lord Simon's earlier definition of motherhood as being the result of parturition.[2] The Claimant in *R v Registrar General* was registered as the child's mother due to the court's finding that there is a material difference between a person's gender and their role as parent, with the latter being contingent on pregnancy and childbirth. It was also found that registering TT in this way was necessary due to the need to enable children to discover who carried and gave birth to them.

[1] *R (on the application of TT) v Registrar General for England and Wales (AIRE Centre intervening)* [2019] EWHC 2384 (Fam) ("R v Registrar General").
[2] *Ampthill Peerage Case* [1976] 2 All ER 411 [425].

In his judgement, Sir Mcfarlane suggested:

> *"Being a 'mother', whilst hitherto always associated with being female, is the status afforded to a person who undergoes the physical and biological process of carrying a pregnancy and giving birth. It is now medically and legally possible for an individual, whose gender is recognised in law as male, to become pregnant and give birth to their child. Whilst that person's gender is 'male', their parental status, which derives from their biological role in giving birth, is that of 'mother'."*[3]

The material difference between a person's status as "mother" vs their legal status as being male was not rationalised in the judgement, but the excerpt quoted above suggests that legal recognition of a person's gender is determinative of its nature, whereas a person's biological reality should determine their legal status as a mother or father.

In the same judgement, the reality of being a man or woman was considered with reference to *R (C) v Secretary of State for Works and Pensions*,[4] where Baroness Hale stressed the importance of a person's sense of self in determining their gender, and an inference can perhaps be drawn that this is the relevant material difference between parenthood and gender. A question arises as to the underlying logic behind making "mother" an immutable biological category, and another arises as to why this logic does not apply to the broader categories of "male" and "female".

It is difficult to accept that a person's status as a mother or father is separate from their sense of self, that parenthood can or should be defined primarily in terms of biology, or that a person's gender may be disconnected from their biology in a way their status as parent may not. In fact, it is acknowledged in Sir Mcfalane's judgement that TT would be his child's social and psychological father, not mother.[5] So, if there can be such a social and psychological disconnect between the characters of legal/biological and social parenthood, the question arises as to the "material" difference between parenthood and gender that renders the former and not the latter a biological reality.

[3] [2019] EWHC 2384 (Fam) [279].
[4] [2017] UKSC 72.
[5] [2019] EWHC 2384 (Fam) [147].

When considering the relationship between biology and gender, it is relevant that although TT is socially and psychologically male and although his gender was recorded as such at the clinic where he received fertility treatment, the clinic treated him as a "woman". This is because the HFEA 1990 authorises the Human Fertilisation and Embryology Authority ("the HFEA") to assist "women" to carry children, the implication being that "women" are to be understood in relation to the ability to gestate and give birth. For the purposes of the HFEA 1990, then, womanhood has an underlying biological reality, and this is the same biological makeup required to meet Sir Mcfarlane's criteria for being a child's "mother".

Nonetheless, the argument that this biological reality should override considerations of a person's sense of self specifically in relation to parenthood is not convincing. As far as a person's social and psychological gender is concerned, biology is not only relevant to one's role as a gestational or non-gestational biological parent. Indeed, the role of biology in determining one's gendered reality more generally is implicitly recognised in the judgement, which distinguishes "trans men" and "non-trans men", and it is difficult to conceive of an ontology that clearly demarcates parenthood from any other aspect of a person's experience of their gender.

If the rationale behind allowing gender transition is that it affirms a person's sense of self, and if in practice medical professionals are able and willing to adapt their language to meet the changing needs of members of society (for example by recording TT's gender as "male" and only recording TT as a "woman" due to the provisions of the HFEA 1990), there is no convincing argument for the law to fail to do the same. Indeed, the language used in the relevant legal fields should be adaptive, rather than retraining the workings of authorities such as the HFEA – were it not for the relevant legal framework codified by the HFEAs 1990 and 2006, the clinic would not have had to treat TT as a "woman".

As the clinic was willing and able to record TT as a "male", this is a question of language rather than one of recognising an immutable ontology. As far as adaptability goes, an answer may be found in the distinction between "male" and "man", a distinction that is not drawn in Sir Mcfarlane's judgement and has not been drawn thus far in this essay in order to prevent confusion. Where "male" refers to a person's biological sex, "man" can be taken to refer to their gender; a

person's sense of self is relevant to the latter category, not the former. For this reason, defining parenthood in terms of gestation rather than the biological sex that enables gestation belies a logical fallacy in that it arbitrarily exceptionalises gestation as a biological function. It is perhaps the most relevant biological function for the purposes of reproduction, but this was not the logic forwarded by Sir Mcfarlane.

An alternative to being registered as a "father" was offered by TT, in that he should be registered as his child's "parent" if not their "father". Although this would be more affirming than registering a trans man as a "mother", it does not solve the policy issue of needing a cohesive scheme for recording who carried and gave birth to a child. Indeed, it was found in *R (JK) v The Registrar General (The Secretary of State for the Home Department and others intervening)*[6] that the terms "father" and "parent" were mutually exclusive, as the HFEA 2008 limited the applicability of the term "parent" to a second female parent. It was found that the Claimant could not be recorded as their child's "parent" in that case due to a need for administrative cohesion and a need for a child to be able to discover the identity of their biological father, with the infringement of the Claimant's Article 8 ECHR rights being legitimate for these reasons.

The issue, then, is one of categorisation, and it is possible to solve the problem with the introduction of an adapted system of registration. If it were possible to add a biological qualifier to registering a person as a "parent", i.e. if a person could be registered as a "male" or "female" natural parent, their biological link to their child would be clear. Such a reform would enable cohesion and certainty in registering biological parenthood without infringing on trans parents' ability to self-define their relationships with their children, as well as recognising non-biological female parents in same-sex relationships simply as "parents", in line with current practice.

[6] [2015] EWHC 990 (Admin).

Unlimited Tax Jurisdiction: The Myth of Source and Residence in International Law

Ryan Power

In a standard case a state's jurisdiction to tax will depend on the residence of the individual taxpayer or the source of the income itself. However, there is a debate as to whether these nexus requirements exist as norms in customary international law. This debate was summarised neatly by Qureshi: "there is a dichotomy in perception as to the International Law position with regard to the content and extent of a State's legislative fiscal jurisdiction".[1] Qureshi took the view that the principles of jurisdiction do not form part of international law,[2] whereas the opposite view has been taken by both Gadzo[3] and Avi-Yonah[4]. The arguments of these particular academics will be the particular focus here.

This piece will begin by conducting an analysis of the current debate over legislative jurisdiction and some of the key examples of state practice in claiming jurisdiction, with particular focus on so-called offshore indirect transfers ("OITs"). Although, before this the features that would need to be established to show that the source and residence principles are a part of customary international law will be set out.

Having undertaken this analysis, it will be concluded that the better view is that these nexus requirements do not form part of international law. Furthermore, it will be argued that the alternative view represents a narrow minded perception of international tax law focussing on the practice of developed countries and OECD members while ignoring the perspective of developing nations.

Customary International Law

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[1] Qureshi, 'The Freedom of a State to Legislate in Fiscal Matters under General International Law', (1987) Bulletin IBFD 14, 14

[2] ibid 16

[3] Gadzo, *Nexus Requirements for Taxation of Non-Residents' Business Income* (IBFD 2018)

[4] Avi-Yonah, *International Tax as International Law* (Cambridge 2007)

Daniels stated that "international tax law is concerned with defining the tax sovereignty of states". He continues further that the traditional focus is on the application of the residence and source principles.[5] These principles are based on the concept of economic allegiance, which states that those who benefit from government services are obliged to fund that government (giving the state the inverse justification to tax).[6] Firstly, the residence principle focusses on the physical presence of a person in a jurisdiction. For individuals this may focus on a range of different factors (most often on the maintenance of a dwelling or abode).[7] On the other hand, for corporations the test will usually focus on the place of incorporation,[8] a test to determine the place of management (such as the central management and control test[9]) or a combination of both (as is now the case in the UK[10]). Secondly, the source principle focusses on the activity from which the income arises. This can refer to the activity from which the income arises, as well as the geographical location of that activity.[11]

The concepts of residence and source are widely accepted and applied. However, mere acceptance is insufficient to consider the requirements as forming part of customary international law. According to Gadzo, in order for a principle to be considered as such, firstly, it must be manifested uniformly and consistently in the state practice (the objective element) and, secondly, the practice of states is a result of the belief that they are legally obliged to do so (the subjective element).[12] The abundance of the typical nexus requirements means the objective element is largely made out, it is making out the subjective element that is significantly more difficult and manifests at the centre of the debate.[13]

When assessing the subjective element, it is important to bear in mind what is conceptually meant by jurisdiction, of which Gadzo outlines three categories,

[5] Daniels, 'Sovereign Affairs' (2000) 29(1) Intertax 2, 2
[6] Harris and Oliver, *International Commercial Tax* (Cambridge 2010) 43
[7] ibid 57-58
[8] ibid 59
[9] *De Beers Consolidated Mines v Howe* [1906] AC 455, 458
[10] Corporation Tax Act 2009, s.14
[11] Harris and Oliver (n6) 71
[12] Gadzo (n3) ch 2.2.5
[13] ibid ch 2.2.5

> "Firstly, legislative (or prescriptive) jurisdiction pertains to the power of law-making, usually in the form of legislative rules. Secondly, enforcement jurisdiction pertains to the power to enforce the applicable law.... Thirdly, adjudicative jurisdiction pertains to the ability of a state's judiciary to hear and decide a case."[14]

He later continues that tax jurisdiction refers to the law-making and law-enforcing powers of a state[15] (the first two of the jurisdictional categories). Clearly, there are territorial restrictions on the latter, particularly in light of the revenue rule under which states refuse to enforce the revenue laws of other nations[16] and the more general customary international law doctrine that a state may not exercise its enforcement jurisdiction outside its territorial limits without specific permission to do so[17]. Furthermore, it is the question of law-making which is more important in showing that states operate under the belief they are legally obliged to uphold the nexus requirements due to the legislative restrictions that are likely to flow from this belief (although this is not to say the enforcement jurisdiction is unimportant in this discussion).

Having set out what must be shown in order to establish whether or not the nexus requirements form part of customary international law, we may now move to consider the debate on the issue and determine whether states subjectively see a limitation to their legislative jurisdiction.

Theory and Practice in Claiming Tax Jurisdiction

In supporting the theory that the nexus requirements do not form part of international law, Qureshi argues that legislative tax jurisdiction is unlimited on two main grounds. Firstly, he argues that there is no limit on this jurisdiction within the state's territory, even if the presence in the jurisdiction is tenuous. He argues that a reasonable nexus requirement would be violated by a tax on unsuspecting transient visitors, insufficient for the residence requirement to be fulfilled. As an example of transient visitors, he relies

[14] ibid ch 2.1.2
[15] ibid ch 2.2.1
[16] *Government of India v Taylor* [1955] AC 491
[17] *The S.S. Lotus, France v Turkey* (1927) PCIJ Series A no 10

on the popular example from the USA where citizenship extends taxing rights to all property wherever it arises.[18] The case of so-called 'accidental Americans' (persons who were born in the USA by accident but are still thereby citizens, even though they are often unaware of this fact) makes this point even more apparent.[19]

Secondly, Qureshi argues that there is minimal international law constraint on extra-territorial competence to legislate.[20] This means that, in principle, states are free to exercise fiscal legislative jurisdiction where there is no reasonable link, which Qureshi refers to as the "alien category".[21] He admits that this category is rare due to lack of enforceability even when the subject moves within the territory, but remains valid however tenuous the intra-territorial connection subsequently becomes.[22]

Finding examples of Qureshi's latter category can be difficult. However, experience of OITs is illuminating in this respect. Kane defines such a transfer as the realization of a capital gain on the transfer of the equity in a foreign resident corporation which holds equity in a resident corporation.[23] Precisely this form of transaction was seen in *Vodafone India*[24].

In that case, Vodafone were seeking to break into the Indian market through the purchase of an Indian resident telecomm company indirectly owned by Hutchison International. In order to avoid the Indian capital gains tax, it purchased shares in a holding company, resident in the British Virgin Islands, which indirectly held the desired share capital in the Indian company that would become Vodafone India.[25] India claimed that transaction was liable to capital gains tax and that Vodafone ought to have withheld tax on the transaction. The original case, *Vodafone International*,[26] reached the Indian Supreme Court where it was held that there was no jurisdiction to tax the

[18] Qureshi (n1) 15-16
[19] Denicolo, 'Irish 'accidental Americans' may get US tax bills' (2018) 7(3) CRJ 18
[20] Qureshi (n1) 17
[21] ibid 18
[22] ibid 18
[23] Kane, 'Offshore Transfers: Policies and Divergent Views' (2018) BFIT 331, 332
[24] *Vodafone India Service v Union of India* [2014] 227 Taxmann 1 (High Court of Bombay) (*Vodafone India*)
[25] ibid [3]-[9]
[26] *Vodafone International Holdings v Union of India* (2012) 204 Taxmann 408 (*Vodafone International*)

offshore transfer, on the ground that there was not a sufficient nexus to tax the non-resident companies based on the underlying assets.[27] However, before this judgment was passed the Indian government introduced a transfer pricing order which expanded jurisdiction to the transaction,[28] which the Indian court allowed to operate retrospectively.[29]

Kane points out that any tax levied on an indirect transfer would necessarily be derivative, as it cannot be asserted that there is any right to tax foreigners on the sale of foreign companies.[30] It appears this point was appreciated by the Indian Supreme Court in *Vodafone International;*[31] however, the acceptance of the expansion of jurisdiction by the court in *Vodafone India*[32] shows the initial approach was merely reflective of a previous respect for the reasonable nexus requirements under Indian law which were expressly overridden in the transfer pricing order, rather than being international law norms.

This case proves to be a significant example whereby a state, attempting to tackle OITs, exercises extra-territorial competence. The fact that this was in response to a transaction structured to avoid a tax which would have had sufficient nexus does not detract from the point that there was not such nexus in fact.

In addition to India, there are also examples of exercises of extra-territorial legislative competence from various other developing countries. Firstly, in Peru the law was changed in response to the offshore acquisition of the Peruvian oil producer, Petrotech, through the purchase of an American holding company. Peru now taxes all OITs of resident companies where at least 50% of the parent company's value derives from Peruvian assets.[33]

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[27] ibid [187]
[28] *Vodafone India* (n24) [28]-[29]
[29] ibid [41]-[43]
[30] Kane (n23) 332
[31] *Vodafone International* (n26) [187]
[32] *Vodafone India* (n24)
[33] The Platform for Collaboration on Tax, *The Taxation of Offshore Indirect Transfers: A Toolkit* (Discussion Draft, OECD 2017) 27

Secondly, in Uganda it was held that the Uganda Revenue Administration had the jurisdiction to assess and tax an offshore seller of an indirect interest in local assets after the sale of a Dutch company which owned a Ugandan mobile phone operator.[34]

We therefore see in these cases that extra-territorial competence to legislate was not constrained by any principle of international law respected by the judiciary or legislature of these jurisdictions. This in turn provides strong evidence in support of Qureshi's argument for the lack of international law constraint on the fiscal legislative competence of states. However, a number of academics put forward powerful arguments to the contrary which must be countered. Furthermore, an effort must be made to explain why there is such a prevalent commitment to the traditional nexus requirements if they do not form part of customary international law.

Gadzo argues that the theory of unlimited tax jurisdiction is internally contradictory as jurisdiction is a concept that is inherently limited under international law.[35] He then agues further that states have always acknowledged the limits of their sovereignty when exercising tax jurisdiction.[36] In respect of the latter point, we have already seen that the recent developments in OITs make this claim a questionable one. Secondly, the former point fails to properly address the argument made for the unlimited jurisdiction theory. As has been made clear here, the main substance of the argument that the nexus requirements do not form part of customary international law rests on a very specific aspect of jurisdiction. It has been accepted that the enforcement jurisdiction is limited in international law, however disproving the sense of obligation under which Gadzo alleges states operate requires unlimited legislative jurisdiction. This has certainly been seen to an extent in the OIT cases and it is therefore hard to see how jurisdiction is inherently limited, especially in cases such as *Vodafone* where domestic courts have accepted legislation which taxes offshore transfers.

[34] *Commissioner General URA v Zain International BV* [2014] UCA 120 (Court of Appeal of Uganda) 1-3, 26-28 (*Zain International)*
[35] Gadzo (n3) ch 2.2.2
[36] ibid 2.2.6.2

Secondly, Avi-Yonah argues that there is a coherent international tax regime embodied in the tax treaty network and domestic laws.[37] He argues that the network of several thousand tax treaties has definable principles which constitute international law and thereby the freedom to adopt international tax rules is severely constrained, even before entering tax treaties. Further, he says that even in the examples of divergence integration into the world economy has forced change.[38] With regard to the question of tax treaties, it is undeniable that the extensive network of these conventions form part of international law. However, these treaties do not set out general principles relating to nexus requirements but instead assign taxing rights on a case by case basis[39] and it is therefore difficult to rely too heavily on such treaties in proving that the nexus requirements form part of customary international law.

Avi-Yonah's second point is particularly illuminating of a more general attitude amongst the academic writing on this topic. Firstly, the point seems to admit that there is significant divergence in developing countries (as has been seen here). Secondly, it exposes the predominant focus on the practice of developed countries in claiming tax jurisdiction in arguing that the nexus requirements form part of customary international law. Gadzo's focus in attempting to show the limits to legislative jurisdiction is on the UK, Germany and the OECD more generally[40] and Avi-Yonah's is largely on the USA.[41] It seems to be the attitude that the position and approach of developing nations is less relevant, whereas in fact such nations provide the most significant examples of extra-territorial claims to jurisdiction. In particular, Kane appreciates the differences between developed and developing countries and why this might affect their approach, saying that,

> "developing countries may find the regimes [taxing offshore transfers] relatively more appealing. Here the comparison point is not taxation of indirect transfers versus taxation of direct transfers. It is, rather, the effective taxation of residents through robust information collection

[37] Avi-Yonah (n4) 1
[38] ibid 3-4
[39] Harris (n6) 79
[40] Gadzo (n3) 2.2.6.2
[41] Avi-Yonah (n4) 5-8

> (that reveals true identity in the case of round-tripping) versus taxation of all foreign persons (on the theory that some foreign persons are actually domestic ones). For developing countries, indirect share transfer taxation could be more appealing than information collection, which is difficult. There are error costs, however, to the extent that one now imposes greater source tax than was desired."[42]

In addition to this, less comprehensive tax treaty networks make developed countries more susceptible to avoidance via treaty shopping schemes via tax havens, as was the case in *Vodafone India*.[43]

By failing to properly consider the issues faced by developing nations, it is easier to conclude that residence and source requirements form part of customary international law. However, from the analysis of India, Peru and Uganda we have seen that many developing countries do not in fact comply with the nexus requirements out of a sense of legal obligation and that they do not form part of customary international law.

Moving then to the prevalence of these nexus requirements, it is clear that in the developed world the nexus requirements are given far greater respect than in the examples discussed from developing countries, so much so that in the case of *Oroville Reman & Reload Inc. v R*[44] the court found for the taxpayer on the ground that there was no real and substantial link between the taxpayer and Canada.[45] This may be due in part to the lack of the pragmatic restrictions that developing countries face, but this may also relate to the purpose of the numerous tax treaties developed countries are subject to.

In the preamble of the OECD Model, it is made clear that the double tax convention is made between the contracting parties to improve their economic relationship and tax cooperation.[46] The consequence of this broad aim of cooperation would seemingly be

[42] Kane (n23) 338
[43] *Vodafone India* (n24) [103]-[106]
[44] [2016] TCC 75; (2016) 19 ITLR 259 (Tax Court of Canada)
[45] ibid [37]-[41]
[46] OECD, *Model Tax Convention on Income and Capital* (Condensed Version, OECD 2017) 'Preamble to the Convention'

that countries with comprehensive tax treaty networks, and without the issues faced by developing nations in raising revenue, have a greater interest in economic cooperation (rather than attempting to expand its tax jurisdiction) in order to foster the economic growth from increasing globalisation.[47] It is therefore more in the interest of developed nations to allocate tax jurisdiction according to economic efficiency, rather than maximal revenue.[48]

The reasoning here is not as clear-cut as the case of developing nations, but does to an extent further the conclusion reached here. At the very least, the lack of a clear rationale on the binding nature of the nexus requirements in developed countries certainly makes it harder to argue that they form part of customary international law, even if the positions of developing nations completely ignored.

Conclusion

On broad consideration of state practice in claiming jurisdiction, the need for a sufficient nexus as defined here does not form part of customary international law according to the requirements set out above. This is no better illustrated than by assessment of examples of taxes on OITs. Furthermore, it can be seen here that it is often a narrow perception of international tax practice that results in the conclusion that the nexus requirements form part of customary international law. The plight of developing countries is often ignored in the literature and, at present, expanding jurisdiction may be the only effective method for these nations to raise sufficient revenue as compared to the developed world. Over time this position may change and this would likely be for the better, however at present fiscal legislative jurisdiction remains unlimited.

[47] Daniels (n5) 3
[48] ibid 4

Exclusionary Duty – Why Courts Should Stop Devouring Fruit From the Poisoned Tree

Wajahat Sherwani

Introduction

Section 78 PACE[1] and *r. 32.1 CPR*[2] create a discretion allowing judges to exclude any evidence that may have an adverse effect on current proceedings. The Court's interpretation of these provisions have shown that the discretion is rarely exercised when evidence is unfairly obtained. The justification for this approach is based on the premise that unfairly obtained evidence does not automatically prejudice the trial. Thus, courts in England have preferred to satisfy themselves with merely conducting a fair trial, without striving to ensure the defendant is treated fairly. This essay aims to evaluate the current discretion and subsequently present the benefits of imposing a duty. It will be argued that although the current discretion provides flexibility to judges, it is intrinsically coupled with uncertainty. Additionally, while the prevailing regime precludes the successful application of a defence vested in entrapment, which would not be automatically available if a duty is imposed, specific qualifications could be introduced within the duty to prevent the function of this defence. Therefore, a duty, although strict in its implementation, guarantees the fair treatment of defendants by protecting their fundamental Human Rights, whilst establishing stability and certainty within the law.

Continuance of the Exclusionary Discretion

English law generally does not classify and exclude evidence on the basis of how it is obtained. Historically, in criminal proceedings, courts had been firm in the assertion that they were not concerned with how the evidence was obtained. Their indifference can be highlighted in Crompton J's statement, in *R v Leatham*[3], 'it matters not how it get it, if you steal it even, it would be admissible as evidence'. *Kuruma v R*[4] demonstrates the Court's apathy towards fair treatment by merely concerning itself with conducting a fair trial and 'not… how the evidence was obtained'[5].

[1] *s. 78 Police and Criminal Evidence Act 1984 ('PACE')*
[2] *r. 32.1 Civil Procedure Rules 1998*
[3] *R v Leatham* [1861] 8 Cox CC. 498
[4] *Kuruma v R* [1955] AC 197
[5] Ibid, 203

Lord Goddard[6] felt that Horridge J.'s approach in *Elias v Passmore*[7], where he concerned himself with the illegality of obtaining the evidence, was not the current state of the law. He regarded the Court's function in considering the admissibility of evidence to strictly depend on the relevance of the issue being tried and not the method it was obtained. *s. 78 PACE*[8] introduced a technical evolution to this consideration by requiring judges to consider the circumstances in which the evidence was obtained, allowing them to exercise their discretion to exclude such evidence only if it adversely effected the fairness of the proceedings. However, it did not automatically disqualify such evidence. Therefore, imposing a duty would diverge away from the orthodoxy. Additionally, the orthodoxy is not maintained solely because it is the status quo, it also guards against entrapment succeeding as a defence. *Loosley*[9] confirmed that entrapment is not a defence in English law. Imposing a duty to exclude all unfairly obtained evidence, which includes entrapment, would have the effect of acting as a defence. This possibility was explored in *Sang*[10] when the House of Lords deliberated that exclusionary discretion may be used as a procedural device to avoid the substantive law preventing entrapment from acting as a defence. Ashworth[11] argues that the current discretion is more stringent in guarding against the entrapment defence. Evidence will only be excluded if it has an adverse effect on the proceedings. Thus, procedural prejudice may act as a defence, but not entrapment.

The orthodoxy is more profound in civil proceedings to such an extent that the existence of an exclusionary discretion was refuted in *Helliwell v Piggott-Sims*[12]. However, *r. 32.1 CPR*[13] creates a power for judges to control evidence, which encompasses an exclusionary discretion. Glover[14] suggests the rules allow for judges to prevent unfairness to a party arising from unfairly obtained evidence. It is argued that while this may be the result of the exercise of a judge's discretion, it is not germane to his considerations. The overriding objectives of the *CPR* do not include a judge's role to ensure an individual party has no cause of complain. The purpose of *r. 1.1 (2)(a)* & *(d)*[15] can still be achieved if the evidence is obtained unfairly. Furthermore, it may be the situation that to

[6] Ibid
[7] *Elias v Passmore* [1934] 2 KB 164
[8] *s. 78 PACE*
[9] *R v Loosley; Attorney General's Reference (No. 3 of 2000)* [2001] 1 WLR 2060
[10] *R v Sang* [1980] AC 402
[11] Andrew Ashworth 'Defending the entrapped.' (1999) Archbold News 9, pp. 5-8
[12] *Helliwell v Piggott-Sims* [1980] FSR 582
[13] *r. 32.1 Civil Procedure Rules 1998*
[14] Richard Glover, *Murphy on Evidence* (15th edn. OUP 2017) p. 76
[15] *r. 1.1 (2)(a)* & *(d) Civil Procedure Rules 1998*

achieve equal footing between parties, the judge is required to admit evidence that is unfairly obtained. Therefore, imposing a duty to exclude all such evidence would deprive the judge of an opportunity to balance the parties by including evidence. Glover's[16] interpretation of *Jones v University of Warwick*[17] suggests the facts of the case indicate a marked preference for the admission of relevant evidence. Hence, imposing a duty will be the antipode of common law's preference. Nevertheless, a departure from the orthodoxy is advised. As it will be shown below, the current orthodoxy is unpredictable and consequently undesirable. A strict duty will introduce consistency within the law.

An argument for the continuance of a discretion is the flexibility granted to judges to make decisions based on public policy considerations. Pattenden[18] argues that unfairly obtained evidence invokes several public interests that are in conflict. On the one hand, it would be of paramount importance to admit all relevant evidence before the court in the interest of justice. On the other hand, securing individual rights and deterrence of future illegality should be encouraged. Lord Nicholls, in *R v Loosley*[19], summarised that 'fairness of the proceedings' is directed primarily at the fairness in the actual conduct of the trial and the reliability of the evidence presented. Thus, the interest of justice is best served by admitting all relevant evidence, ensuring it is reliable, and the defendant having the opportunity to test the reliability. Pattenden[20] argues that breaches of individual rights could be pursued in separate proceedings and illegal evidence gathering should not be dealt with the crude expedient of exclusion. Additionally, if there is a duty, courts will not have the flexibility to include evidence that has been procured illegally by the State or its agents. This in turn may prejudice the innocent party that seeks to rely on such evidence and not effectively deter future misconduct. Choo[21] places merit on discretion as it allows judges to tailor their rulings to the facts of the case. However, it is argued that rules are clear and consistent in application. The flexibility which is valued by proponents of a discretion simultaneously invites unpredictably and inconsistency. An exercise of discretion, or even lack thereof, is prone to the allegation of arbitrary application, especially when fundamental Human Rights are encroached. Whether infringing the rights of the defendant by including

[16] Richard Glover, n(14) p. 77
[17] *Jones v University of Warwick* [2003] 1 WLR 954
[18] Rosemary Pattenden, 'The discretionary exclusion of relevant evidence in English civil proceedings.' (1997) International Journal of Evidence and Proof 1(5) pp. 361-385
[19] *R v Loosley; Attorney General's Reference (No. 3 of 2000)* [2001] 1 WLR 2060
[20] Rosemary Pattenden, n(18)
[21] Andrew L.-T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (Clarendon Press 1993)

unfairly obtained evidence or impinging rights of the victim by excluding relevant evidence. While a duty will not alleviate encroachments against victims, it will be consistent in its application. Additionally, it is more often the defendant's rights that are encroached compared to the victim's, as the latter could rely on separate evidence. Even if the unfairly obtained evidence is the sole relevant evidence, the Court cannot be indifferent towards illegality (as discussed below) albeit to protect public interest. Such behaviour is contradictory. It is not in the public interest to endorse illegality.

Reform towards an Exclusionary Duty

The difference between a duty and a discretion lies in their mechanisms of appeal[22]. An advantage of imposing a duty would allow defendants to appeal on the grounds that the judge erred in law. However, with the current discretion, the defendant would need to demonstrate that the judge's decision was *Wednesbury*[23] unreasonable through judicial review. It is not sufficient to show that a judge, or multiple judges would reach a different conclusion, the defendant must show the judge's decision was so unreasonable that no reasonable judge would conclude similarly[24]. Administrative Law principles make such an appeal considerably obstinate. Thus, petitioning appellant courts would be increasingly achievable if a duty was imposed, compared to the theoretical possibility of judicially reviewing an exercise of discretion. On the other hand, judicial discretion provides a flexibility[25] that is not available in the application of rigid judicial duty. Yet, flexibility is accompanied by uncertainty. Arguably a rigid duty is preferable to a flexible discretion as it allows defendants a realistic opportunity to appeal coupled with the benefit of providing certainty to practitioners[26].

Torture is a criminal offence in England[27], nevertheless, the general rule of English Law does not automatically exclude evidence as a consequence of criminal activity. However, *A & Others*[28]'s unqualified assertion identified the exclusion of evidence obtained by torture as an overriding principle of common law. It is therefore questioned why one form of criminal activity is so despised that it imposes a duty, but all other classes of criminal activities do not attract similar

[22] Nicola Monaghan, *Law of Evidence* (1st edn. CUP 2015) p.149
[23] *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223
[24] Neil Paperworth, *Constitutional & Administrative Law* (9th edn. OUP 2016) p.301
[25] Law Commission Report *Evidence in Criminal Proceedings: Hearsay and Other Related Topics* (LCN. 245, 1997) p. 130
[26] Andrew L.-T. Choo *Evidence* (4th edn. OUP 2015) p. 15
[27] *s. 134 Criminal Justice Act 1988*
[28] *A & Others v Secretary of State for the Home Department (No. 2)* [2006] 2 AC 221

consternation. This lends to the argument that torture should not be the exception but the rule. Bloom[29] argues judicial integrity embodies the principle that the Government should not profit from illegal acts of its agents. Dissenting in *Olmstead*[30], Justice Brandeis likens the Government to a teacher teaching by example. Accordingly, the contagious nature of crime would breed contempt for law and invite anarchy. If the Government adamantly employs such pernicious behaviour, exclusionary duty would provide courts with the tools to reprimand such conduct. Bloom[31] further advocates an exclusionary duty by requiring courts to uphold the law and refrain from sanctioning the use of unfairly obtained evidence. Watkins LJ, in *R v Mason*[32], stated a that discretionary exclusion should not be exercised in order to discipline the police. It is argued the assertion is deflective. Dyer[33] states that the court's moral authority would be compromised if they were to countenance breaches of Human Rights and/or the Rule of Law. Thus, courts have an obligation to reprimand unfair conduct if they are to command moral authority and rights of judgement over citizens. This can only be exerted through a duty to exclude unfairly obtained evidence.

There is a lack of adequate remedies available for breach of rights through unfair procurement of evidence. The rule in *Lord Ashburton*[34] is only available if the defendant has a proprietary interest in the evidence. Auld LJ[35] directed the court to mark its disapproval in other ways rather than excluding evidence. This lends to the argument that courts should strive for fair treatment of the accused and not be satisfied with merely conducting a fair trial. The presumption of innocence is a fixture of English Law[36]. Consequently, any premature unfair treatment of the accused is a violation of this principle. Furthermore, even if State agents believe they have evidence of guilt and rely on it to unfairly obtain further evidence, this is not justified. A person's rights are not extinguished the moment their guilt is proven. Ormerod[37] argues that confusion is created over the meaning of "fairness" in *s. 78*[38]. Courts have largely interpreted this as being limited to

[29] Robert M. Bloom and Erin Dewey, 'When rights become empty promises: promoting an exclusionary rule that vindicates personal rights.' (2011) Irish Jurist 46, pp. 38-73
[30] *Olmstead v United States* [1928] 277 U.S 438,468
[31] Robert M. Bloom, n(29)
[32] *R v Mason* [1988] 1 WLR 139
[33] Andrew Dyer 'The problem with media entrapment' (2015) Criminal Law Review 5, pp. 311-331
[34] *Lord Ashburton v Pape* [1913] 2 Ch 469
[35] *R v Chalkey and Jeffries* [1998] 2 All ER 155
[36] *R v Lambert* [2002] 2 AC 545
[37] David Ormerod and Diane Birch, 'The evolution of the discretionary exclusion of evidence' (2004) Criminal Law Review October, pp. 767-788
[38] *s. 78 PACE*

conducting a fair trial rather than ensuring fair treatment. Further exacerbation is caused by the ECtHR's indifference towards fair treatment, construing *Art. 6*[39] narrowly to only guarantee fair trial. Therefore, if domestic and European courts are unwilling to promote fair treatment through exercise of an exclusionary discretion, they must be obligated to do so by imposing a duty. Grevling[40] reasons that in the current view of discretion, fairness to the defendant is liable to be overwhelmed by competing considerations of allowing the prosecution to invoke relevant and crucial evidence. Additionally, Taylor[41] contends the prevailing view, that only abuse of process triggers unsafety is too narrow to protect fundamental rights and integrity of the legal system. If courts are content to invoke their discretion only when there has been an abuse of process in the proceedings, basic Human Rights will become vulnerable. *Matto*[42] demonstrates that courts are more willing to exercise their discretion when the police have acted *mala fide*. It is argued that a test based on the intention of State agents is too deflective of the fundamental inspection of improper conduct. Whether the police acted *bone fide* or *mala fide* is irrelevant, improper conduct should be reprimanded regardless of intent. As such, a strict duty would not require specific tests and would be exercised irrespective of intent, with the effect of promoting fair treatment and not merely a fair trial. Another facet of fair treatment is the preservation of the maxim *nemo debet se ipsum prodere*, which signifies that no one is bound to accuse themselves. In *Sang*[43] the House of Lords held that the rule against self-incrimination would be infringed if unfairly obtained evidence, after the commission of the crime, was admitted. *s. 78*[44] does not distinguish between types of evidence or the fact that it was obtained before or after the commission of a crime. Thus, a judge by virtue of not exercising his discretion may infringe the aforementioned maxim. A strict duty, on the other hand, would automatically protect against self-incrimination and promote fair treatment. Furthermore, it is seen in the United States, the 'Exclusionary Rule' is invoked to safeguard against unfairly obtained evidence that violates constitutionally entrenched rights of the defendant. Glover[45] states that the rule transcends the Rules of Evidence, with American

[39] *Article 6 European Convention on Human Rights 1953*
[40] Katherine Grevling, 'Fairness and the exclusion of evidence under section 78(1) of the Police and Criminal Evidence Act' (1997) Law Quarterly Review, October 113, pp. 667-685
[41] Nick Taylor and David Ormerod, 'Mind the gaps; safety, fairness and moral legitimacy' (2004) Criminal Law Review April, pp.266-283
[42] *Matto v Crown Court at Wolverhampton* [1987] RTR 337
[43] *R v Sang* [1980] AC 402
[44] *s. 78 PACE*
[45] Richard Glover, n(14) p. 69

courts regarding it their constitutional duty to act as watchdogs. Ward[46] argues that a strict duty to defend and vindicate Constitutional Rights and the Rule of Law should form the basis of the Law of Evidence. However, a strict approach may encroach upon the rights of victims, as unfairly obtained evidence may form their only reprieve against an acquittal for the defendant. Yet, it is submitted that English courts should also assume the role of watchdogs to promote fair treatment. Indeed, it should be within the capabilities of investigators to obtain evidence without encroaching Human Rights, even more so if they represent the State. It is acquiesced that English Law does not recognise strict rights such as those afforded to its American counterpart, as a consequence of the Constitution of the United States. However, there is ample supremacy in the *Human Rights Act*[47] for English courts to utilise as authority to promote fair treatment and evolve towards an exclusionary duty rather than the narrow discretion. Reading Convention Rights[48] as widely as possible (as all fundamental rights should be applied widely) would provide persuasive reasoning to emanate fair treatment.

Conclusion

Analysing the approach employed by domestic and European courts with respect to unfairly obtained evidence, the exercise of discretion has been wholly inadequate in safeguarding fundamental Human Rights. It is accepted that while English courts do not have the luxury to rely upon entrenched Constitutional Rights, there is sufficient authority in the *Human Rights Act*[49] for courts to incorporate the promotion of fair treatment within their purview. A strict exclusionary duty will assist in attaining this objective. Furthermore, if English courts aspire to continue commanding moral authority and rights of judgement over citizens, they must not employ an indifferent approach toward illegal activity. Courts must act as watchdogs to exclude, with vigour, all unfairly obtained evidence, lest they breed discontent towards the supremacy of the Rule of Law. In conclusion, although the current discretion provides flexibility, its application does not sufficiently promote fair treatment. Courts must zealously protect rights and reprimand illegal activity. Both are only possible if the current discretion is reformed towards a duty.

[46] Tony Ward and Clare Leon, 'Excluding evidence (or staying proceedings) to vindicate rights in Irish and English Law' (2015) Legal Studies 35(4) pp. 571-589
[47] *The Human Rights Act 1998*
[48] European Convention on Human Rights 1953
[49] *The Human Rights Act 1998*

Considering Whether Trade Mark Law Prevents the Defendant From Telling the Truth in Light of Case C-487/07 *L'OrÈal SA v Bellure NV*.

Kendal Watkinson

1. Introduction

The Court of Justice of the European Union (CJEU) being criticised for focusing on the preservation of "brand image" and thus enhancing protection for well-known trade marks in Case C-487/07 *L'OrÈal SA v Bellure NV*[1] (*L'Oréal)*. Although protecting trade marks to the extent that they indicate origin of source, or guarantee quality, is relatively uncontroversial, it has proved difficult to justify the extensive protection awarded to marks as "brands".[2]

Opinion can be broadly divided into two categories: restrictive and expansive. The restrictive view opposes extensive trade mark protection due to potential costs, such as restriction of free speech, monopolies, or increased costs for competitors, resulting in restricted competition.[3] However, since the recent flourishing of brands has been linked to the advancement of capitalism in terms of expanding consumer choice,[4] the expansive view argues that trade mark law encourages further investment in unique brand creation.

Protection is also justified by the perceived injustice of a third party taking unfair advantage of another's brand image without contribution.[5] Nevertheless, "blind faith in the value of trade marks is difficult to sustain",[6] and a critical examination of justifications and costs of trade mark protection is necessary to evaluate *L'Oréal*. This essay will examine European trade mark infringement legislation and analyse the reasoning of the CJEU in *L'Oréal*. It will be concluded that the CJEU reached the "fairest" result, in order to maintain effective competition.

2. Law on Trade Mark Infringement

[1] [2009] ECR I-5185.
[2] L. Bently, B. Sherman, D. Gangjee and P. Johnson, *Intellectual Property Law* (5th edn 2018) 853.
[3] See N. Economides, 'The Economics of Trademarks' (1998) 78 TM Rep 523.
[4] E. Rogers, 'The Social Value of Trade Marks and Brands' (1947) 37 TM Rep 249.
[5] J. N. Sheff, 'Marks, Morals and Markets' (2013) 65 Stanford L Rev 761.
[6] Bently (n 2) 853.

Trade marks are awarded statutory protection under the Trade Marks Act (TMA) 1994 in the UK, the legislation which implemented the original Trade Marks Directive (TMD) (Directive 89/104) into domestic law. Article 5 TMD confers exclusive rights in the trade mark on to the proprietor, which entitles him to prevent all third parties who use the mark in absence of his consent. Article 5 TMD establishes three types of infringement: double identity; likelihood of confusion; and dilution of marks with a reputation. The first and third are relevant to the *L'Oréal* dispute.

Article 5 (1)(a) (section 10(1) TMA) addresses use of an identical sign to the trade mark in relation to identical goods or services. In Case C-206/01 *Arsenal FC v Reed,*[7] "the impairment of a trade mark function", and in particular "the essential function" was held to be the guiding principle in these cases. The essential function is "to guarantee the indication of origin",[8] i.e. to inform consumers about a product's source.

Article 5 (2) (section 10(3) TMA) addresses use of an identical or similar mark, where the registered mark has a reputation, and use of the sign, without due cause, gains an unfair advantage from, or causes detriment to, the distinctive character or the repute of the trade mark. *Case C-65/12 Leidseplein Beheer v Red Bull*[9] maintains that "due cause" means proprietors must tolerate use of a similar sign where "that sign was being used before that mark was filed and that the use of that sign in relation to the identical product is in good faith".

Article 4 of the EU's Directive on Misleading and Comparative Advertising (CAD) maintains that Member States must prohibit comparative advertisements which do not satisfy the eight requirements, two of which are applicable in *L'Oréal*: firstly, that it doesn't take unfair advantage of a trade mark;[10] secondly, that it doesn't present its goods or services as imitations or replicas as those bearing the trade mark.[11]

3. The L'Oréal Dispute

[7] [2002] ECR I-10273.
[8] TMD 89/104/EC, Recital 10; TMD 2008/95/EC, Recital 11.
[9] ECLI:EU:C:2014:49.
[10] Article 3a(1)(g).
[11] Article 3a(1)(h).

Facts

The L'Oréal group sell various luxurious perfumes, including "Trésor", "Miracle", "Anaïs Anaïs" and "Noa", each of which are protected by both word and figurative registered trade marks. The defendants, Malaika and Starion, were selling low-cost imitation perfumes produced by Bellure. Both the shape of the perfume bottles and the packaging used were generally similar to the L'Oréal perfumes which they aimed to imitate. Further, Malaika and Starion provided their retailers with comparison lists, which mentioned the word mark of the particular L'Oréal fragrance that each perfume imitated. Accordingly, L'Oréal sued the defendants under the headings of trade mark infringement, passing off and unfair competition. On appeal, the Court of Appeal referred five questions concerning the interpretation of the TMD and CAD to the CJEU. Passing off was dismissed before the case reached the CJEU.

First and Second Questions

The CJEU found that under Article 5(1)(a), a proprietor is entitled to prevent a third party using a sign identical to their trade mark in relation to identical goods, in a comparative advertisement which fails to satisfy the conditions in Article 3a(1) of Directive 84/450, where use does not jeopardise the essential function of the mark, but nevertheless affects (or is capable of affecting) another of the mark's functions. Thus, for the first time the CJEU recognised that functions such as communication, investment and advertising could also be infringed under Article 5 (1)(a). This consequently widened the scope of protection for trade marks in cases of double identity.

The court distinguished the case from *Case C-2/00 Hölterhoff* [12], on the basis that here the L'Oréal word marks were used for the purpose of advantageously advertising, not used for purely descriptive purposes.[13] As such, the defendants could not rely on the Article 6 TMD descriptive use defence.

Third and Fourth Questions

The CJEU concluded that comparative advertisements which implicitly communicate that goods offered are imitations of products bearing a well-known trade mark do present "goods or services as imitations or replicas" within the meaning of Article 3a(1)(h) of Directive 84/450. In this

[12] [2002] ECR I-4187.
[13] *L'Oréal* CJEU (n 1) paragraph 62.

situation, advantage is "taken unfairly" of the reputation of that trade mark within the meaning of Article 3a(1)(g).[14]

The CJEU highlights that CAD recitals make it clear that comparative advertising cannot be used anti-competitively or unfairly.[15] Accordingly, the purpose of Article 3a(1)(h) is to prevent such use. Drawing on the fact that the purpose of the defendant's comparison list was to highlight which L'Oréal product their perfumes imitated, the CJEU concluded that defendants presented their goods as imitations of those bearing a trade mark.

Fifth Question

The CJEU held that to take unfair advantage of a trade mark under Article 5(2), there was no requirement of a likelihood of confusion or detriment to the distinctive character or the repute of the mark, or its proprietor.[16] Article 5(2) gives marks with a reputation more protection than Article 5(1). It was held to be sufficient that a link was established between the sign and the trade mark in the mind of the public.

Hence, the Court identified image transfer to be a doctrinally distinct form of infringement of property rights with a reputation.[17] Dr Chronopoulos observes that the CJEU consequently created a "qualified property right in brand image", allowing the trade mark owner to internalise this intangible value in the context of its advantageous use in marketing.[18] The CJEU appears to emphasise that there is infringement when a defendant fails to make their own marketing efforts to boost the appeal or their brand image,[19] but instead rides on the coat tails of a well-known trade mark by means of a transfer of its image, as was the case here.

4. Drawbacks of Protecting Brand Image

Freedom of Expression

[14] Ibid, paragraph 80.
[15] Ibid, paragraph 69.
[16] Ibid, paragraph 50.
[17] A. Chronopoulos & S. Maniatis, 'Property Rights in Brand Image: The Contribution of the EUIPO Boards of Appeal to the Free-Riding Theory of Trade Mark Protection' (2017) in EUIPO (ed), 20 years of the Boards of Appeal at EUIPO, Celebrating the Past, Looking Forward to the Future, Liber Amicorum, 147.
[18] Ibid.
[19] Ibid.

Jacob LJ maintains that the CJEU's interpretation of trade mark legislation muzzles the defendants from being truthful about their products and thus infringes the right to free speech, which extends to those who wish to hear.[20] However, the relevance of this argument here can be questioned, since commentators have argued that this is not an issue of free speech.[21] The real issue here is whether the defendants should be allowed to use the trade mark of another for significant promotional benefit, by taking advantage of its reputation, without contributing in terms of time or resources. I agree with Morcom that this question cannot be addressed simply by stating that the trader is "telling the truth".[22]

Even if free speech was at issue here, it is not an unqualified right.[23] There are other rights at issue in the dispute. Supporting the position that the right to free speech may trump trade mark rights, Jacob LJ cited *Laugh It Off Promotions v South African Breweries*,[24] a judgment from the Constitutional Court of South Africa. Jacob LJ emphasised that the South African trade mark legislation was identical to the equivalent EU legislation, and that although the attacked use was likely to cause more damage than in the *L'Oréal* case, the right to free speech still prevailed.[25] However, the problem with this comparison is twofold. Firstly, that case concerned a legitimate political dissent, constitutionally distinct from the advertising of low-cost smell-alike perfumes. Secondly, it is not recognised that South Africa has any laws corresponding to the EU CAD.[26]

In essence, free speech must be balanced against competing rights within a given case. This view is supported by *Patel v Allos*, in which it is recognised that free speech "is not unqualified and must be balanced against the rights of others, such as [...] the rights of a trade mark owner freely to enjoy its own rights and property."[27] Given the low level of ethical concern with prohibiting the smell-alike comparison lists, and the potentially high level of interference with L'Oréal's property rights, it may be argued that the protection of property rights should take precedence here.

[20] L'OrÈal SA & Ors v Bellure NV & Ors [2010] EWCA Civ 535, 6-7, 12.
[21] C. Morcom, 'L'Oréal v Bellure -The Court of Appeal Reluctantly Applies the ECJ ruling: L'Oréal SA v Bellure NV [2010] EWCA Civ 535' (2010) EIPR 530.
[22] Ibid.
[23] Ibid.
[24] (CCT 42/04) Unreported May 27, 2005.
[25] L'Oréal CA (n 20) paragraph 13.
[26] Morcom (n 21).
[27] Pankajkumar Patel v Allos Therapeutics Inc. [2008] EWHC 1730 (Ch), 22.

Freedom to Trade

Jacob LJ maintains free-riding has effectively been made actionable *per se*, without any proof of damage, creating a restriction on the freedom to trade. He argues that the CJEU interpreted "unfair advantage" as if the word "unfair" simply wasn't there.[28] However, this is a biased interpretation. The CJEU made it clear that the transfer of image or characteristics was the advantage, while the unfairness was found in the defendant's attempt to exploit the marketing and investment efforts of L'Oréal, without making marketing efforts or paying financial compensation.[29] Thus, unfair advantage would be found in cases where parasitic intent is present.

In *Whirlpool v Kenwood,*[30] no unfair advantage was found on the application of the *L'Oréal* principle. The Court reasoned that even if the defendants had obtained a commercial advantage resulting from the perceived similarity between the shape of the two kitchen mixers, there was no evidence that this was unfair.[31] This shows that *L'Oréal* establishes a standard by which to judge whether advantage gained from use of a mark is in fact unfair.

Jacob LJ concludes that the decision "amounts to a pointless monopoly."[32] A monopoly would both hinder competition and eliminate consumer choice, confining them to a single brand. However, I agree with Morcom that there was no question of a monopoly here.[33] L'Oréal did not have a monopoly in smell-alike products, rather they objected to the defendants taking unfair advantage of the significant investment made by them to build up the reputation of their brand. The defendants are free to market their products as substitutes, rather than imitations, of L'Oréal fragrances.[34] The issue here is that by marketing their products as imitations of *L'Oréal* products, the defendants have gained an unfair advantage from unauthorised association with the luxurious brand.

5. Benefits of Protecting Brand Image

Fair Competition

[28] L'Oréal CA (n 20) paragraph 49.
[29] L'Oréal CJEU (n 1) paragraph 49; see Chronopoulos & Maniatis (n 17).
[30] [2009] EWCA Civ 753.
[31] A. Horton, 'The Implications of L'Oréal v Bellure: A Retrospective and Looking Forward' (2011) EIPR 550.
[32] L'Oréal CA (n 20) paragraph 50.
[33] Morcom (n 21).
[34] Chronopoulos & Maniatis (n 17).

Commentators object to comparative advertising on the grounds of fairness,[35] arguing that people should not be allowed to "reap where they have not sown."[36] This justification is associated with broader areas of the protection of proprietors against unfair competition and unjust enrichment.[37]

Others argue that justifying protection of brand image on the basis of fairness is unsustainable, since ethical principles are not consistently objective, and because in a commercial context, something being unethical does not always mean that it merits legal protection.[38] The strength of this statement is diminished on an examination of international law, which reveals that maintaining fair competition is a primary aim. For example, the concept of "honest practices in industrial and commercial matters" originates from the Paris Convention,[39] which compels states to prevent unfair competition. Thus, it is clear that the CJEU made the just decision, based on the principle of fair competition, which is a central purpose of the relevant law.

Investment and Advertising Value

In recognising other functions of trade marks, the CJEU endorsed the investment and advertising value of a brand. Justice Breyer of the US Supreme Court got to the crux of the matter when he explained that trade mark legislation helps "assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product",[40] which stimulates further investment. Rogers recognises that benefit is conferred on consumers by this, since an increase in consumer choice will result from an increase in investment in brand creation.[41] This should lead to increased competitive activity and a wider range of brands for consumers to choose from in the market.

Gangjee and Burrell say that "referencing activity and building on the efforts of others are fundamental to creative and competitive processes",[42] and restricting such practice will actually hinder, not help, investment and creativity in establishing brand image. Yet, there is a line to be

[35] See J. N. Sheff, 'Marks, Morals and Markets' (2013) 65 Stanford L Rev 761.
[36] Bently (n 2) 856-7.
[37] A. Kamperman Sanders, *Unfair Competition Law: The Protection of Intellectual and Industrial Creativity* (1997).
[38] I. Pak 'The Expansion of Trademark Rights in Europe' (2013) 3(2) IP Theory 158; D. Gangjee & R. Burrell, 'Because You're Worth It: L'Oreal and the Prohibition on Free-Riding' (2010) 73 Modern Law Review 282.
[39] Article 10bis(2) Paris Convention for the Protection of Industrial Property 1883.
[40] Qualitex v. Jacobson Products, 115 S. Ct. 1300, 1303 (1995).
[41] Rogers (n 4).
[42] Gangjee and Burrell (n 38), 282.

drawn between building on the efforts of others, and "riding on the coattails" of their efforts. The latter is applicable in *L'Oréal*. The defendants were simply imitating a brand image which already exists, without investing anything unique or creative into the market.

The CJEU's endorsement of the advertising function has proved more controversial. Pak argues that advertising is of no benefit to consumers, and persuasive advertising can even cause detriment to consumers as goods can be presented as "falsely appealing". [43] Accordingly, "recognizing other functions of marks and granting them legal protection creates the danger of shifting protection away from consumers."[44] However, taking a single perspective view and focusing only on the rights of consumers is problematic. As Dr Chronopoulos highlights, "the principle that trader interests are independent and protectable in their own merit has been prevalent at the time of the inception of trademarks as property rights at the courts of equity."[45] Accordingly, the determination of the scope of trade marks must be a balancing exercise to accommodate the diverse interests of proprietors, competitors and consumers.[46]

6. Conclusion

L'Oréal confirms that the European legislator has widened the scope of proprietors' exclusive rights in relation to the advertising value attached to a well-known trade mark, creating a property right within. This right enables a proprietor to monitor and control people utilising such advertising value.[47] However, the decision has been heavily criticised. Jacob LJ argues that the defendants were prevented from "telling the truth" about their lawful perfumes, infringing the right to free speech and distorting competitive trade.

This essay concludes that the CJEU made the "fairest" decision. Freedom of expression is not an unqualified right, as Jacob LJ suggests. Trade marks are property rights, which are accorded protection under the European Convention of Human Rights.[48] As such, these rights must be

[43] Pak (n 38), 161.
[44] Ibid, 158.
[45] A. Chronopoulos, 'Goodwill Appropriation as a Distinct Theory of Trade Mark Liability: A Study on the Misappropriation Rationale in Trade Mark and Unfair Competition Law' (2014) 22 Texas Intellectual Property Law Journal 253.
[46] Ibid.
[47] Chronopoulos & Maniatis (n 17).
[48] See Article 1 of the First Protocol ECHR.

given due protection. In regard to freedom of trade, the purpose of Article 5 TMD is to provide a wider scope of protection where an offender uses a trade mark for identical goods or services, and for trade marks which have a reputation.[49] Such provisions were brought into force based on a long history of protection, including Article 10 of the Paris Convention which requires states to implement effective protection against unfair competition. Hence, the CJEU interpreted the legislation in a way that adheres to the purpose of Directive, which aims to maintain fair and efficient competition.

[49] Morcom (n 21).

'The European Commission should not act as police, prosecution and the judge.'

Ho Yung Wei

1.Introduction

The EU competition enforcement system is peculiar. It combines the powers to investigate, prosecute and decide under the roof of one institution, the European Commission. In theory, centralizing competition law within single administrative authority enhances legal certainty as enforcement is not dispersed across courts, and a broad range of anti-competitive conducts can be covered.[1] Nevertheless, it is argued by judge Ian S Forrester that such unique feature of law enforcement system is flawed when it comes to fairness and protection of due process rights.[2]

The absence of due process rights within EU competition law enforcement has received great attention due to the growing importance of the European Convention on Human Rights (ECHR).[3] This topic is also relevant today given the extensive investigative powers, and of decision-making function such as substantial fines that EU Commission imposes in Article 101 and 102 of The Treaty on the Functioning of the European Union (TFEU) cases.[4]

Margrethe Vestager, Head of Competition Commissioner once stated that 'the job of agencies is not to get too cosy with special interest but to have the courage to defend the public interest'.[5] Nevertheless, 'a long-standing concern is the commission acts as prosecutor, judge and executioner in cases against dominant firms', and the waning in the check and balance by European Courts in recent years is also notable.[6]

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[1] Pablo Ibáñez Colomo, *The Shaping of EU Competition Law* (Cambridge University Press 2018) 48.
[2] Ian S Forrester, 'Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures' (2009) 34 EL Rev 817 (hereafter Forrester, 'Due Process')

[3] ibid 820.
[4] ibid 820.

[5] 'Is Margrethe Vestager Championing Consumers on Her Political Career' *The Economist* (London, 14 September 2017) <www.economist.com/business/2017/09/14/is-margrethe-vestager-championing-consumers-or-her-political-career> accessed 24 November 2018

[6] ibid

The issue remains, as to whether there should be a clearer separation of functions within the institutional structure of EU competition law enforcement system.

2. Commission Acts as Police, Prosecutor and Judge

Regulation 1/2003 sets out the enforcement rules of the prohibition on restrictive agreements or concerted practices (Article 101 TFEU) and of the prohibition on abuse of a dominant position (Article 102 TFEU). The Commission has powers to investigate[7], to make decisions[8] and to impose penalties[9]. As for rules of the control of concentration[10] between undertakings, they can be found in Regulation 139/2003.

2.1 Police

The investigation of possible violations of Article 101 or 102 TFEU, or of serious doubts on the concentrations [11] is conducted by officials of the Commission's Directorate-General for Competition (DG Comp), working under the authority of the Member of the Commission responsible for competition issues (Competition Commissioner).[12]

The officials' investigatory power includes requests for information[13], taking of oral statements[14] and carrying out unannounced inspection[15].

2.2 Prosecution

After consultation of the Commission's Legal Service, if the Competition Commissioner is convinced that the rules have been breached by investigated parties, it will open the infringement proceedings.[16] This is done by issuing the Statement of Objections.

[7] Chapter V of Regulation 1/2003.
[8] Chapter III of Regulation 1/2003.
[9] Chapter VI of Regulation 1/2003.
[10] mergers and acquisitions.
[11] Art 6(1)(c) decision of Merger Regulation.
[12] Forrester, 'Due Process' (n 2).
[13] Art 18 of Regulation 1/2003.
[14] Art 19 of Regulation 1/2003.
[15] Art 20 of Regulation 1/2003.
[16] Art 7 of Regulation 1/2003.

The parties can then respond both in writing and at an oral hearing to allegations found in the Statement of Objections.[17] The oral hearing is presided by a Hearing Officer, and is attended by the officials from DG Comp dealing with the case, sometimes by officials from other Commission services, and by officials of member states in the form of Advisory Committee.[18]

After the Hearing, the Hearing Officer submits an interim report of his findings regarding the effective exercise of procedural rights to the Competition Commissioner.[19]

2.3 Judge

If the Commission considers that its preliminary findings can be maintained, the officials of DG Comp will draft the final decision.

After consultation of the Advisory Committee, the case team will send out the adoption file to the Cabinets of the Competition Commissioner for approval.[20] The adoption file is then provided to the College of Commissioners to adopt a formal decision.

The adoption of the decision is done either by an oral procedure (meeting of the College) or by a written procedure (providing Cabinets 5 days to raise comments before adoption by the expiration of the set deadline).[21] Surprisingly, no vote is carried out in this procedure within the College, rather it is a paper-based procedure.

The formal decision can either require a firm to bring its breach in question to an end, or it can be the Commission imposing structural and/or behavioural remedies on the firms.

Instead of issuing a formal infringement decision, Article 9 of the Regulation 1/2003 allows the Commission to issue a commitment decision, where investigated parties offer commitment to

[17] Forrester, 'Due Process' (n 2).
[18] ibid
[19] ibid.
[20] Forrester, 'Due Process' (n 2).
[21] European Commission, 'Antitrust Manual of Procedures: Internal DG Competition Working Documents on Procedures for the Application of Articles 101 and 102 TFEU' (European Commission, March 2012) <http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf> accessed 24 November 2018

future behaviour. This makes the proceedings more efficient as Commission can close the file without continuing to find whether an infringement exists.[22]

3. The Imperfect Enforcement System

A legitimate enforcement system requires complementary input set of 'fairness' or 'due process standards', and such standard governs the pre-adoption, decision-making and post-adoption litigation stages of EU law application.[23]

In particular, the absence of due process rights can be found in three categories.[24] Firstly, the decision is taken by a college of commissioners, rather than by a tribunal. Secondly, the same 'case team' deals with both the investigation and decision-making task. Thirdly, the oral hearing system is inadequate.

3.1 Unelected Politician's Decision

Since the decision is taken by 28 politicians, political lobbying to commissioner can happen during the decision-making stage.[25] In 2009, the Brussel lobby group for the European steel industry — Eurofer, have asked the European Commission to stop a proposed joint venture between Rio Tinto and BHP Biliton since the combined firm would have too much leverage on pricing.[26] However, there was no real decision as the plan was scrapped[27] and so political lobbying remains a hypothesis.

Having said that, it is unacceptable for the political body in a democracy like the College of Commissioners decides on someone's guilt, or innocence, or have the authority to impose penalties on competition matters, let alone for any Prime Minister of a member state.

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[22] Art 9 of Regulation 1/2003.

[23] Pieter Van Cleynenbreugel 'Effectiveness Through Fairness? Due Process as an Institutional Precondition for Effective Decentralized EU Competition Law Enforcement' in Paul Nihoul and Tadeusz Skoczny (eds), *Procedural Fairness in Competition Proceedings* (Edward Elgar, 2015) 70. (hereafter Pieter 'Effectiveness')

[24] Forrester, 'Due Process' (n 2), 822-823.

[25] ibid 832.

[26] Carl Mortished, 'Steelmakers ask EU to bar BHP and Rio venture' *The Times* (London, 16 November 2009) <www.thetimes.co.uk/article/steelmakers-ask-eu-to-bar-bhp-and-rio-venture-jobp93s88ms> accessed24 November 2018

[27] Terry Macalister, 'BHP walks away from mining mega-merger' *The Guardian* (London, 26 November 2008) <https://www.theguardian.com/business/2008/nov/26/bhp-rio-tinto-deal-collapse> accessed 24 November 2018

Besides, there is no guarantee of the parties' due process rights to be protected, as the Commissioners have not attended the hearing. Even though they might be given copies of key documents and is briefed by expert staffs, the final-decision makers have not heard the case in a comprehensive manner from the accused company. [28]

3.2 The Case Team (Officials of DG Comp)

'There is extensive horizontal co-operation between colleagues within DG Comp, the Legal Services and other Commissions services', [29] and such a fusion of the investigation and decision-making task might lead to potential 'prosecutorial bias', which is a source of unfairness of due process rights in establishing an infringement. [30]

Bias might be induced by the policy priorities of the Commission.[31]For instance, the Commission has adopted regulation proposals towards the creation a 'Digital Single Market' for consumers.[32] This might lead to the Commission placing higher scrutiny on giant online platforms to protect smaller companies from their monopolistic powers.[33]

Recently, EU Commission just imposed £3.8 billion antitrust fine on technology giant Google for using its Android mobile operating system to push competitors out of the market. This amounts to the largest fine ever imposed by a regulator against a single firm.[34]

[28] F Forrester, 'Due Process' (n 2), 832.
[29] Forrester, 'Due Process' (n 2), 823.

[30] Martin Möllmann, 'Due Process in Antitrust Proceedings Before the European Commission: Fundamental Rights are Not Enough' (2014) (1) CPI Antitrust Chronicle <www.competitionpolicyinternational.com/assets/Uploads/MollmannJUN-141.pdf> accessed 24 November 2018

[31] Colomo, *The Shaping of EU Competition Law* (n 1) 51.
[32] The Parliament Magazine, Interview with Mariya Gabriel, European Digital Economy and Society Commissioner (London, 5 June 2018).
[33] Jamie Doward, 'The Big Tech Backlash' *The Guardian* (London, 28 January 2018) <https://www.theguardian.com/technology/2018/jan/28/tech-backlash-facebook-google-fake-news-business-monopoly-regulation> accessed 24 November 2018
[34] Andrew Griffin and John Stone, 'Google Hit with Record-Breaking $5 Billion Fine Over Android Web Browsing and Told to Change How Phone Work' *The Independent* (London, 18 July 2018) <www.independent.co.uk/life-style/gadgets-and-tech/news/google-android-fine-latest-billion-eu-european-commission-browser-chrome-web-a8452481.html> accessed 24 November 2018

However, in 2017, when the Russian gas giant Gazprom was alleged abuse of market power, it has agreed on a draft compromise with the Commission instead of being fined.[35]

We can draw an analogy that Google and Gazprom are both foreign investigated parties triggering Article 102. Nevertheless, Google is heavily fined whereas Gazprom can get away with a commitment decision.

Another type of bias is bias cognitive in nature, namely confirmation bias, hindsight bias and the desire to show a high level of enforcement activity.[36] Some companies might be led to offer unjustified commitments to avoid a decision, since evidence adverse to a case only have little impact in changing officials' mind in working towards an infringement decision.

3.2.1 Compatibility with Article 6

Over the years, many companies have argued that the EU system fails to respect a right of fair trial reflected in the ECHR.[37]

Article 6(1) of the ECHR provides that any person faced with criminal charge, has the civil right to be entitled to fair and public hearing by an independent and impartial tribunal.

Given the level of the fines imposed today in Articles 101 and 102 TFEU cases, they are likely to be classified as 'criminal' under Article 6. The real issue, however, is that criminal sanctions should not be imposed by an administrative body like the Commission.

[35] Rochelle Toplensky and Henry Foy, 'Gazprom reaches draft antitrust deal with EU' *Financial Times* (London, 13 March 2017) <https://www.ft.com/content/575f8d2e-07f2-11e7-ac5a-903b21361b43> accessed 24 November 2018

[36] Wouter P J Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis' (2004) 27 World Competition: Law and Economic Review 201,215.

[37] Case C-386/10 *Chalkor* v *Commission* [2011] ECR I-13085 and Case C-389/10 *KME Germany* v *Commission* [2011] ECR I-13125.

Such an issue has been resolved in *Menarini* judgement [38] and *Saint-Gobain Glass France* v *Commission*[39], by the European Court of Human Right (ECtHR) and the European Court of Justice (CJEU) respectively.

In *Menarini*, the ECtHR noted that an administrative body may impose criminal law sanctions, without violating Article 6 as long as parties can appeal such decisions before a tribunal with full jurisdiction as to facts and law. Since the Commission's decision is subject to annulment, it is compatible with Article 6. This is affirmed in *Saint-Gobain*.

Menarini sounds like a death knell for the legal debates of EU enforcement system. However, its judgement should not close the debates as to the correctness of due process right.[40] This is because when firms apply for commitments or settlements, a significant amount of decision adopted by Commission will not be challenged before Community Court.[41] Hence, errors of law and fact is not subjected to adequate scrutiny.

Limited judicial review can also be seen when Court did no more than verifying whether the Commission acted within its power and follow its own fining guidelines.[42]

3.3 The Oral Hearing

The hearing of accused company takes place without the presence of the final decision-makers. Investigated parties may have an opportunity to restate their case in front of an independent unit. Nonetheless, it is still unfair as the hearing is not a trial. While disputed points of evidence are considered, that evidence will not be balanced and analysed by a neutral judge who has heard both sides.[43]

[38] *Menarini Diagnostics v Italy* App no 43509/08 (ECtHR, 27 September 2011)

[39] Joined Cases T-56/09 and T-73/09 *Saint-Gobain Glass France* v *Commission*

[40] Möllmann, 'Due Process in Antitrust Proceedings Before the European Commission: Fundamental Rights are Not Enough' (n 30).

[41] Colomo, *The Shaping of EU Competition Law* (n 1) 53.

[42] James Killick, Assismakis Komninos and Strati Sakellariou-Witt, 'Due Process in Competition Cases: A Step Forward By the ECJ' (White & Case, 12 December 2011) <https://www.whitecase.com/publications/alert/due-process-competition-cases-step-forward-ecj> accessed 24 November 2018

[43] Forrester, 'Due Process' (n 2), 833.

From an internal organizational point of view, there is a clear segregation between the investigation and prosecution stage in which due process rights are protected by the Hearing Officer.[44]

However, from an external point of view, the Commission remains singularly structured enforcement institution tasked with adopting EU law enforcement decision.[45]

'Even though the Hearing Officer Mandate states that EU Hearing Officer may ask questions and present observations on any matter, the hearing officer has no power to compel any party to respond to his questions.'[46] The interim report is also not made public and it has no formal influence on the final decision.[47]

4. Internal Check and Balance

Despite bias exists, credits shall be given to the EU Commission as they sought to improve procedure's transparency and reduce risks of prosecutorial bias through Best Practices, Chief Economist and Peer Review Panel. [48]

Although there are some check and balance, the problem faced in the pre-adoption, decision-making and post-adoption litigation stages still exists. 'Nobody should be the judge on their own cause'[49]. Since the role of police is to collect information, secure evidence and arrest suspects, it will be undesirable to let them encroach upon the powers of the arbiter of disputes. The same goes to the DG Comp. As such, further reforms should be taken to ameliorate this issue.

4. Further Reforms

[44] Pieter 'Effectiveness' (n 23) 52.
[45] ibid,53.
[46] Forrester, 'Due Process' (n 2), 842.
[47] ibid.
[48] Möllmann, 'Due Process in Antitrust Proceedings Before the European Commission: Fundamental Rights are Not Enough' (n 30).
[49] Colomo, *The Shaping of EU Competition Law* (n 1) 49.

One proposal by judge Ian S Forrester is to reorganize DG Comp, where the case team should act as investigator-prosecutor, and bring the case before the decision maker. [50] This reduces bias as decision makers are not involved in the preparation of prosecution case.

An independent competition agency can also be established to deal with cases up to Statement of Objections, and submit the case to the Hearing Officer.[51] At this juncture, the Hearing Officer's role should be ascribed more importance.[52] The EU Commission can adopt the United States model as employed by the Federal Trade Commission (FTC). Although such a model is 'less ambitious'[53] compared to the adoption of the Department of Justice model (an adversarial model), it is a more pragmatic approach[54] for the Commission to consider.

The function of EU Hearing Officer must be strengthened. The Hearing Officer must be granted the right to hear and assess factual evidence, to take views on any disputed facts, and to allocate more time for questioning parties if necessary. Stronger oral hearing must be conducted too. Instead of parties voicing arguments, the robustness of factual statements made by parties must also be tested, to give them a chance to prove innocence.[55]

Finally, the Hearing Officer submits a text with factual conclusion, which will be presented to the College of Commissioners to adopt or reject. Such a text is binding on the College, and they will not have the right to alter or modify the factual conclusion. [56]

5. Conclusion

[50] Forrester, 'Due Process' (n 2), 841.
[51] ibid.
[52] Terry Calvani and Jenny Leahy, 'A Larger Role for the Hearing Officer: A Modest Proposal' (2018) 6(2) Journal of Antitrust Enforcement 213,223
[53] Möllmann, 'Due Process in Antitrust Proceedings Before the European Commission: Fundamental Rights are Not Enough' (n 30).
[54] Calvani and Leahy, 'A Larger Role for the Hearing Officer: A Modest Proposal' (n 52) 213.
[55] Möllmann, 'Due Process in Antitrust Proceedings Before the European Commission: Fundamental Rights are Not Enough' (n 30).
[56] Forrester, 'Due Process' (n 2), 842.

'Fair competition is recognised as one of the foundations of EU'. [57] In the same vein, fairness is deeply rooted in the Commission procedures and guidelines for implementation of EU competition law, driving enforcers towards rigour and consistency. [58]

For people to obey competition law, law enforcement must be legitimate, and legitimacy is judged by whether the legal authorities are procedurally fair. [59]

Hitherto, the European Commission's procedures for enforcing competition law are inadequate. It is prone to bias and does not comply with the right to fair hearing. After *Menarini*, even though 'the Commission stopped holding its breathe',[60] a number of their crowd-pleasing victories over big tech firms may come back to haunt them. [61]

Therefore, the ideal concept is that the EU Commission should not act as police, prosecutor and the judge. It is submitted that complete abolition of competition law enforcement that vests investigation, prosecution and adjudication in the hands of EU Commission is unrealistic. Nevertheless, reforms still need be taken to address some unfairness perceptions, so as to enhance the credibility of administrative agencies and the legitimacy of EU competition law enforcement system.

Once competitors are willing to follow antitrust rules without fearing their due process rights being undermined, the EU Commission can take another step toward reaching better decisions firmly grounded in fact and law.[62] (2990 words)

[57] European Commission, 'Fairness in EU Competition Law Enforcement', (British Chambers of Commerce EU & Belgium, 20 June 2018) <http://ec.europa.eu/competition/speeches/text/sp2018_10_en.pdf> accessed24 November 2018
[58] ibid.
[59] Pieter 'Effectiveness' (n 23) 7.
[60] Möllmann, 'Due Process in Antitrust Proceedings Before the European Commission: Fundamental Rights are Not Enough' (n 30).
[61] 'Is Margrethe Vestager Championing Consumers on Her Political Career' (n 5).
[62] Calvani and Leahy, 'A Larger Role for the Hearing Officer: A Modest Proposal' (n 52) 223.