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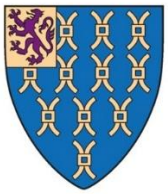

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Foreword

It is with great pleasure that in my capacity as Editor I am writing the Foreword for what is now the third edition of the Lincoln's Inn Students' Law Journal. This year the Editorial Panel has comprised six members who have had the difficult task of selecting the prize winner, together with 10 runners-up. Howard Page QC, Julie Whitby, and Linda Turnbull have served previously on the Panel. However, this year we were joined by two new members – Christopher Stoner QC and Andrew Francis.

Last year we decided that there should be a preliminary sifting process of the scripts submitted by students. Andrew Francis and I undertook that task this year. However, of the 29 scripts submitted by candidates, only three were sifted out, the reason being that the standard of scripts was of high quality. We then embarked upon a change of process from last year in that three sub-Panels were constituted, each comprising two members, and the 26 scripts were divided amongst them. An assessment of the scores achieved by each sub-Panel was then made. This resulted in eleven top-scoring scripts being shortlisted for the prize and one selected as the winner Michael Brooks Reid.

The breadth and diversity of the subject matter ranged from the purpose of the International Criminal Court; the law relating to Mass Surveillance under the guise of Public Security; and Proportionality as a substantive ground of Judicial Review at common law. However, the subject matter of the winning entry was the very topical analysis of the Corporate Manslaughter and Corporate Homicide Act 1997. Again, I must pay tribute to the depth of interest and learning of the students concerned.

As stated in previous Forewords what has distinguished the Lincoln's Inn Students' Law Journal from other contenders in the field is this 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, 21st March 2021

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The Corporate Manslaughter and Corporate Homicide Act 2007: A Critical Analysis

Michael Brooks Reid

Introduction

More than 12 years have passed since the Corporate Manslaughter and Corporate Homicide Act 2007 ('the Act') came into force, yet a definitive performance appraisal remains elusive. Despite wide-ranging academic criticism of the Act since its inception, few of the perceived problems have been substantially tested in court, making it difficult to accurately assess to what extent the criticisms are justified.

Critics of the law may point to the numbers: low conviction rates and no significant change in workplace deaths statistics suggest a disappointing performance.[1] Supporters of the Act may focus instead on its symbolic significance – an appropriately grave offence for the worst of corporate conduct leading to death is now an important feature of UK criminal law. The number of test cases has been limited and with most going unreported[2], it may still be some time until the picture becomes clearer.

This essay will outline the legal and social context leading up to the implementation of the Act, before going on to examine the new legal regime and its aims. Some of the most common targets of academic criticism will be discussed along with an examination of the extent to which these perceived problems have become an issue in the test cases to date.

The Historical Position

It has long since been established in English law that corporations are distinct legal 'persons' in their own right.[3] In the criminal law context, however, a corporation could only be convicted where an individual senior enough to be regarded as its 'directing mind' was himself guilty of the

[1] Health and Safety Executive, *Workplace fatal injuries in Great Britain 2019* <http://www.hse.gov.uk/statistics/pdf/fatalinjuries.pdf> accessed December 12, 2020 (HSE report) 4

[2] V Roper, 'The Corporate Manslaughter and Corporate Homicide Act 2007 – A 10-Year Review' (2018) 82(1) J Crim 48, 49

[3] *Salomon v Salomon* [1897] AC 22

offence (confirmed in the context of manslaughter: *Attorney-General's Reference No.2 of 1999*[4]). This is known as the 'identification doctrine' and was first seen in criminal law in 1944.[5]

In the government's draft Bill for reform[6] it was recognised that between the years 1992 and 2005, of the 34 prosecutions brought for work-related manslaughter against companies, only six convictions resulted, all involving small companies.[7] This was widely believed to be a direct result of the identification doctrine, which made the prosecution of large companies 'almost impossible' due to their complex organisational structures.[8] Decision-making was buried at various levels and it was virtually impossible to identify one controlling mind of the company.[9]

Public concern that the law was not delivering justice grew with events such as the Herald of Free Enterprise Ferry disaster in 1987,[10] where 193 people were killed but a manslaughter prosecution against P&O Ferries was unsuccessful,[11] despite a jury at the inquest returning verdicts of unlawful killing in 187 cases[12] and an inquiry concluding that the company was infected with a 'disease of sloppiness at every level of the company's hierarchy'.[13] There were other disasters with similar results. It was clear that manslaughter under the common law was ill equipped to deal with modern corporations, and, in 1996, the Law Commission released proposals for a new offence of 'Corporate Killing'.[14]

The 'New' Law

The Corporate Manslaughter and Corporate Homicide Act 2007 received royal assent more than 10 years later, on July 26, 2007. Its primary objective was to secure, in a wider range of cases, a conviction for an appropriately serious and grave offence for the conduct involved.[15] The deterrent effect of a possible corporate manslaughter conviction, it was thought, would lead to an

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[4] [2000] EWCA Crim 91
[5] *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146
[6] *Corporate Manslaughter: The Government's Draft Bill for Reform* (2005) Cm 6497 (Government's Draft Bill)
[7] ibid para 9
[8] The House of Commons Home Affairs and Work and Pensions Committees, *Draft Corporate Manslaughter Bill, First Joint Report of Session 2005-2006, Volume 1: Report* (Joint Committees Report) HC 540-I, 3
[9] CMV Clarkson, 'Corporate Manslaughter: yet more Government proposals' [2005] Sep Crim LR 677, 678
[10] Government's Draft Bill (n 6) para 10
[11] *R v P&O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72
[12] Home Office, *Reforming the Law on Involuntary Manslaughter: The Government's Proposals* (2000) (Consultation Paper) 13-14
[13] Dept of Transport, The Merchant Shipping Act. Mv *Herald of Free Enterprise* (Report of Court No 8074, 1987) ('The Sheen Report')
[14] Law Commission, *Legalising the Criminal Code: Involuntary Manslaughter* (Law Cm 237, 1996) (Law Commission Report)
[15] Government's Draft Bill (n 6) para 6

improvement of safety culture,[16] and a reduction in the number of work-related deaths. (At the commencement of the Act, the Health and Safety Executive considered 70 per cent of UK workplace deaths to have been preventable[17]). The Regulatory Impact Assessment for the Act estimated an additional 10 to 13 corporate manslaughter prosecutions per year.[18]

At the forefront, legally speaking, was the need remove the 'identification principle'[19] which was proving so problematic in securing corporate manslaughter convictions, particularly against large companies[20].

To establish liability under the Act, the prosecution must prove that:

1) A qualifying organisation
2) which owed a duty of care to the victim
3) caused the death of the victim; and
4) that this death was attributable to a 'gross breach' of a relevant duty ('gross breach' being defined as conduct falling 'far below what could reasonably have been expected of the organisation in the circumstances'); and
5) that the way in which the organisation's activities were managed or organised by its senior management constituted a substantial element in the gross breach.[21]

The 'Senior Management' Test

One of the most widespread criticisms of the Act involve element (5) above, and the connected test to determine what constitutes 'senior management'.[22] In including this element, the government was keen to ensure that the wrongdoing could properly be attributed to the company, rather than to 'local' failings.[23] However, as Gobert has noted, this 'preoccupation' with individual as opposed to systemic fault makes the new law a less radical overhaul of the historical position than may have been desirable,[24] and represents a departure from the Law Commission proposals

[16] ibid
[17] Home Office, *Corporate Manslaughter and Corporate Homicide: A Regulatory Impact Assessment on the Government's Bill* (2006) (Regulatory Impact Assessment) para 25
[18] ibid
[19] ibid para 3
[20] Government's Draft Bill (n 6) para 9
[21] Corporate Manslaughter and Corporate Homicide Act 2007, s.1, as summarised by J Gobert, 'The Corporate Manslaughter and Corporate Homicide Act 2007 – Thirteen years in the making but was it worth the wait?' (2008) 71(3) MLR 413, 428415
[22] Corporate Manslaughter and Corporate Homicide Act 2007, s1(4)(c)
[23] Government's Draft Bill (n 6) para 14
[24] Gobert (n 21) 428

which focused solely on 'management failure' and did not feature the senior management requirement.[25] On the other hand, it moves away from the identification doctrine in allowing the contribution of non-senior management to be considered, provided their contribution does not render the role of senior managers insubstantial.[26] It is thus much broader in scope than the old law.

But the senior management requirement potentially carries over the evidential problems that plagued the 'identification doctrine,' particularly when focused on a large corporation with a diffuse organisational structure.[27] The overwhelming majority of convictions under the Act to date have concerned small or micro companies that would very likely have been convicted under the old law.[28] Given that the main driver for reform was the difficulties identified in prosecuting large companies in particular,[29] one might view this as evidence of the senior management requirement stifling one of the primary objectives of the Act.

It is submitted that this may be a premature conclusion to draw, given that, as Roper identifies, small and medium enterprises comprise 99 per cent of business in the UK, and account for 90 per cent of occupational fatalities Europe-wide.[30] A fairer analysis might conclude that the extent to which the senior management test is an improvement on the identification doctrine is, due to the type of organisations prosecuted to date, yet to be extensively tested.[31]

There were further criticisms. In scrutinising the draft Corporate Manslaughter Bill,[32] the House of Commons Home Affairs and Work and Pensions Committees expressed concern that the senior management test may have the 'perverse' effect of encouraging organisations to *reduce* the priority given to health and safety,[33] by encouraging delegation of health and safety responsibilities to non-

[25] Law Commission Report (n 14) para 8.35(4)
[26] S Parsons, 'The Corporate Manslaughter and Corporate Homicide Act 2007 ten years on: fit for purpose?' [2018] 82(4) J Crim L 305, 307
[27] S Field, 'Ten years on: the Corporate Manslaughter and Corporate Homicide Act 2007; plus ca change?' (2018) 29(8) ICCLR 511, 520
[28] ibid at 516
[29] Government's Draft Bill (n 6) para 36
[30] Roper (n 2) 58-59
[31] S Tombs, 'The UK's corporate killing law: Un/fit for purpose?' (2018) 18(4) Criminology and Criminal Justice 488, 496
[32] The Government's Draft Bill (n 6)
[33] Joint Committees Report (n 8) para 136

senior manager levels in order to avoid corporate liability.[34] However, such a delegation, Parsons argues, may in itself be evidence of a gross breach of duty[35]. This is yet to be tested.
Whether the widespread criticisms of the senior management test are justified remains to be seen, as it has not been a central issue in the prosecuted cases.[36] Most companies prosecuted to date, being smaller in size, have lacked complex management structures which may have given rise to these arguments.[37]

One successful prosecution under the Act that would not have succeeded under the old law[38] was the *CAV Aerospace* case,[39] where a jury considered the role of collective failures by senior management of a large parent company in a death which occurred within a subsidiary company. Whilst it may be tempting to view the conviction in this case as a vindication of the senior management test, the overwhelming evidence against CAV Aerospace's senior management linking them directly to the fatal negligence likely meant that the jury did not have to grapple much with the issue.[40]

Perhaps more helpful to the analysis are comments from the *Maidstone and Tunbridge* case[41], where Coulson J held that the prosecution need not necessarily *name* senior managers involved in the breach, rather it should be able to identify the 'tier' of management that it considers to be the lowest level of senior management culpable in the offence[42]. Notwithstanding that these comments arose in the unusual context of a case involving a non-corporation, this may work to assuage concerns that the senior management test is simply a watered down reincarnation of the identification doctrine.

Individual Liability

Under the Act, no individual can be prosecuted for aiding, abetting, counselling or procuring the commission of corporate manslaughter or corporate homicide.[43] This exclusion of accessorial

[34] ibid para 133
[35] Parsons (n 26) 307
[36] Roper (n 2) 57
[37] ibid
[38] Tombs (n 31) 495
[39] *R v CAV Aerospace Ltd* (Central Crim Ct, 31 July 2015)
[40] Tombs (n 31) 504
[41] *R v Dr Errol Cornish and Maidstone and Tunbridge Wells NHS Trust* [2015] EWHC 2967 (QB)
[42] ibid [37]
[43] Corporate Manslaughter and Corporate Homicide Act 2007, s18

liability has attracted some of the most cogent academic criticisms of the Act, but it was not always to be.

In its 2000 consultation paper, the Home Office expressed concern at the lack of individual culpability in the Law Commission's proposals[44], and put forward the possibility of sanctions, including disqualification or in the worst cases imprisonment, against culpable individual directors within the context of a Corporate Manslaughter case.[45] It was thought that this would act as a stronger deterrent as well as preventing culpable individuals from simply continuing similar practices in new companies.[46] The Joint Committee report recommended secondary liability be included, due to the difficulties in prosecuting the individual for gross negligence manslaughter,[47] and this point may have been a good one: the test cases to date show just two instances (out of 26 convictions to date[48]) where an individual was convicted of gross negligence manslaughter alongside their organisation's corporate conviction (in the *Bilston Skips* and *Sherwood Rise* cases[49]). Prosecutors were sternly reminded in the *Lion Steel* case[50] of the 'height of the bar' in securing an individual conviction for gross negligence manslaughter[51]; comments which may have subsequently deterred prosecutors, or, perhaps, fueled the widespread use of plea bargaining that emerged in the cases. Further discussion on this below.

In excluding secondary liability, the Government appears to have succumb to the lobbying efforts of the business community, which had concerns about executives being made into scapegoats as well as the potential to usher in a general reluctance to accept posts entailing responsibility for safety.[52] However, as Gobert notes, the exclusion appears to run contrary to principle: given that the Act requires that fault of senior management constitute a *substantial* element of the

[44] Consultation Paper (n 12) 3.4.8
[45] ibid 3.4.9; 3.4.13
[46] ibid 3.4.8
[47] Joint Committees Report (n 8) para 309
[48] Lexis PSL, *Corporate Manslaughter – Prosecutions Tracker* (accessed December 12, 2020) (Lexis tracker)
[49] *R v Bilston Skips Ltd* (Crown Ct (Wolverhampton), 16 August 2016);
Health and Safety Executive v Sherwood Rise Ltd (February 2016)
[50] *R v Lion Steel Equipment Ltd* (Manchester Crown Court, 20 July 2012)
[51] ibid, sentencing remarks of HHJ Gilbard (QC) para 12 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/hhj-gilbart-qc-sentence-remarksr-v-lion-steel.pdf>accessed November 22, 2019
[52] Gobert (n 21) 422

organisation's offence, it is hard to argue that these managers were not accessories to the offence,[53] yet the Act precludes this possibility.

Upon revisiting the broader social aims of the new legislation, namely improving safety and reducing deaths[54], the exclusion of individual liability would seem hard to justify; as Clarkson views it, 'People are more amenable to deterrence than corporations.'[55] Further, only targeting a 'corporation' rather than also a physical person may encourage a perception, says Menis, that this is not 'real' crime,[56] thus potentially undermining the Act's symbolic significance.

Plea Bargains

When a plethora of charges arise from the same fatality (often charges for corporate and individual manslaughter as well as health and safety offences), plea bargaining becomes possible.[57] In 2014, Wells noted a trend emerging in the cases of guilty pleas for corporate manslaughter in combination with individual charges against directors being left to lie.[58] She refers specifically to the *Lion Steel* case, where, following negotiations, it was agreed that Lion Steel would enter a plea to corporate manslaughter with all remaining charges against the individual directors being withdrawn.

It seems plausible, it is submitted, that given the 'high bar' to convict an individual of gross negligence manslaughter, prosecutors may either decline to lay the individual charge, or perhaps resort to using it as leverage to secure a guilty plea for the corporate charge. Indeed an examination of the test cases shows at least eight instances of individual gross negligence manslaughter charges being left to lie combined with a guilty plea for corporate manslaughter[59]. The Act can surely not be said to be satisfactorily fulfilling its aims, it is submitted, when a significant number of convictions are obtained by directors acquiescing to the corporate charges in order to save their own skins.

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[53] ibid 423
[54] Government's Draft Bill (n 6)
[55] Clarkson (n 9) 687
[56] S Menis, 'The Fictionalisation of the Criminalisation of Corporate Killing' (2017) 81 J Crim L 467, 473
[57] C Wells, 'Corporate Criminal Liability: A Ten Year Review' [2014] 12 Crim LR 12 849, 861
[58] ibid
[59] Northumbria University, *Summary of Corporate Manslaughter Cases April 2017* <https://northumbria.rl.talis.com/page/summary-of-corporate-manslaughter-cases-april-2017.html>accessed December 12, 2020 (Northumbria Summary)

Menis questions the logic of even entertaining plea bargaining between a director on an individual charge and an organisation on a corporate charge, when in the latter case no secondary (directorial) liability is allowed (in other words they are separate charges against separate 'persons').[60] He goes further – how can it be acceptable (or even possible) for an organisation to 'voice' out a plea, now that the identification doctrine is disposed of and the organisation is seen as its own 'moral' entity?[61] Menis concludes that the Crown Prosecution Service resort to such strategy simply due to a lack of confidence in their ability to convict.[62] If this is true, it is damning evidence for the Act.

It is worth noting, however, that since February 2016, all but one of the cases has involved simultaneous conviction of a director(s) for an offence.[63] This may well indicate a tougher approach towards individuals has been adopted.[64]

Causation

The Law Commission proposals precluded a company from arguing that an act or omission of an individual broke the chain of causation, thus absolving it of criminal responsibility.[65] In criticising the omission of this proposal, Gobert submits that by opting for the traditional approach to causation, the law will further work to the disadvantage of smaller organisations, where a causal link between a death and a responsible official will be easier to establish.[66] Given that the law was brought in primarily to aid in the prosecution of large organisations with diffuse structures and that the prosecution of such organisations remains elusive;[67] the Law Commission's version may well have been preferable.

Duty of care

Several commentators have questioned why the duty of care requirement was brought into the Act. It was absent from the Law Commission's 1996 recommendations,[68] and the Joint Committee

[60] Menis (n 56) 475
[61] ibid
[62] ibid
[63] Lexis Tracker (n 48)
[64] Roper (n 2) 72
[65] Law Commission Report (n 14) para 8.39
[66] ibid
[67] Field (n 27) 520
[68] Law Commission Report (n 14)

was critical of its inclusion in the Draft Bill.[69] Indeed, as Gobert notes, organisations (as well as individuals) are already under a duty of care not to kill innocent persons except in carefully delineated circumstances (self defence etc.).[70] Bringing this complex civil law concept into criminal law adds 'a layer of technicality' which, it was thought, '…may provide opportunity for a well-resourced organisation to render prosecution very difficult indeed'.[71]

Gobert submits that where an organisation has fallen 'far below' what could reasonably have been expected of it and causes a death, this should suffice to establish liability.[72] Whether the victim was owed a duty of care has, however, not been a particular issue in any of the cases to date.[73] This is likely to continue as long as prosecutions focus on employer/employee relationships, where a duty is well established in the law of negligence,[74] and confirmed by statute.[75]

Exemptions

Whist the removal of Crown immunity (which was absent from the Law Commission proposals) was widely welcomed, it has been argued that the breadth of exceptions in sections 3 to 7 of the Act render this gesture largely symbolic.[76] One prosecution has already been brought against a public authority,[77] however, and although it was dismissed, this was a result of a failure by the prosecution to demonstrate a case for gross negligence, rather than a public policy or public function exemption provided by the Act.

The Act's Performance

On one hand, the conviction of CAV Aerospace shows that the Act is capable of delivering results that would have been impossible under the old law.[78] Further, the symbolic significance of a crime as serious as manslaughter being attributable to an organisation is not to be underestimated.[79] As

[69] Joint Committees Report (n 8) para 105
[70] Gobert (n 21) 416
[71] D Ormerod and R Taylor, 'The Corporate Manslaughter and Corporate Homicide Act 2007' [2008] 8 Crim LR 589, 611
[72] Gobert (n 21) 416-417
[73] Roper (n 2) 60
[74] *Wilsons & Clyde Coal Company Ltd v English* [1937] UKHL 2
[75] Corporate Manslaughter and Corporate Homicide Act, s2(1)(a)
[76] Ormerod and Taylor (n 71) 597
[77] *R v Dr Errol Cornish and Maidstone and Tunbridge Wells NHS Trust* [2015] EWHC 2967 (QB)
[78] Tombs (n 31) 495
[79] Field (n 27) 520

Gobert eloquently states: 'The Act's symbolic value may ultimately transcend its methodological deficiencies.'[80]

On the other hand, examining the statistics, it is difficult to escape the conclusion that the Act has not been a resounding success. The 26 convictions to date[81] represent a yearly average of just two. Even adding to this the six acquittals[82], its performance falls substantially short of the rather modest[83] 10 to 13 prosecutions per year predicted by the government's Regulatory Impact Assessment.[84]

Neither do workplace statistics evidence a noticeable impact on work safety culture: although worker deaths decreased between 2007 and 2013, this was the continuation of a 15 year downward trend which subsequently flattened out, whilst the drop in 2020 is likely due to COVID-19.[85]
How much these results reflect the academic criticisms is an elusive question. The limited volume of reported test cases does not provide a definitive answer.

Slapper gives an alternative theory: that the main barrier to better performance is not the law itself, but rather a lack of resources, co-ordination and training amongst those responsible for investigating and prosecuting.[86] The initial responsibility for investigation, for example, lies with the police, whom Slapper submits have little experience and knowledge of the civil law of negligence '…which lies at the heart of the [corporate manslaughter] offence…'.[87]

The expected prosecution of the Royal Borough of Kensington and Chelsea in relation to the Grenfell Tower fire, being a highly complex case in which 72 people lost their lives, will surely provide some clarity as to the Act's competence.[88] As landlord of Grenfell Tower, the council will likely be pursued on corporate manslaughter charges, but the Act will be tested to its limits. The management of Grenfell was devolved to a separate legal entity, Kensington and Chelsea Tenant

[80] Gobert (n 21) 414
[81] Lexis *Tracker* (n 48)
[82] ibid
[83] Roper (n 2) 64
[84] Regulatory Impact Assessment (n 17) para 25
[85] HSE Report (n 1) 4
[86] G Slapper, 'Justice is mocked if an important law is unenforced' (2013) 77(2) J Crim L 91 93
[87] ibid 94
[88] Roper (n 2) 75

Organisation.[89] They too will likely be prosecuted.[90] Some 460 contractors were involved in work at Grenfell Tower over the years,[91] likely opening potential avenues of argument over the legal chain of causation. Whilst duty of care is unlikely to be a contentious issue, the senior management test and the section 3 public exemptions may be, providing further opportunity for scrutiny of the Act.[92]

This large-scale disaster was precisely the kind of event that the lawmakers had in mind when drafting the Act,[93] and it will surely represent a turning point, however it concludes.[94] Certainly the significant public attention and political will should ensure that the CPS have all the resources they require to succeed with the prosecutions. If they fail nonetheless, we may see new proposals from the Law Commission before too long.

[89] V Roper, 'Grenfell charge delays understandable, but where have all the corporate manslaughter prosecutions gone?' (2019) 40(8) Comp Law 265, 266
[90] Field (n 27) 517
[91] Roper, 'Grenfell charge delays understandable' (n 89) 267
[92] Parsons (n 26) 310
[93] see paragraph above '*Historical Position*'
[94] Roper, 'Grenfell charge delays understandable' (n 89) 267

The Implications Of Social Media On The Regulatory Framework For Identification Evidence Admitted In U.K Jury Trials

Tariq Aldeek

Background

The last decade has seen an exponential increase in the use of social media platforms such as, Facebook, Instagram and Twitter with the most popular social media websites reporting to have over 2.4 billion users.[1] Social media is a communication tool which commonly refers to the use of electronic devices to create, share or exchange information, images and video recordings with others through virtual networks.[2] The plethora of ways to share information using social media has created a digital goldmine of potential evidence[3] which presents new challenges for the regulation of identification ("ID") evidence admitted in U.K jury trials.

The Legal Framework

An emerging issue is the use of social media by eyewitnesses to research those suspected of offences, which is becoming commonplace in criminal cases.[4] For this discussion, social media ID ("SMID") refers to the circumstance in which a suspect is identified by an eyewitness on social media before attending a formal ID procedure. SMID affects the admissibility of ID evidence and the directions needed where such evidence has been admitted in U.K jury trials.[5] Issues associated with SMID have presented themselves to the Court of Appeal ("CA") in three ways:

1. *R v. McCullough* [2011]: an appeal brought by the defence on the basis that ID evidence should have been excluded pursuant to s. 78 of the Police and Criminal Evidence Act 1984 ("PACE");

[1] Our World in Date, "The rise of social media" available at https://ourworldindata.org/rise-of-social-media (last visited 14 October 2020).
[2] CPS, "Social Media – Guidelines on prosecuting cases involving communications sent via social media" available at https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media (last visited 18 September 2020).
[3] Justin P. Murphy and Adrian Fontecilla, "Social Media Evidence in Government Investigations and Criminal Proceedings: A Frontier of New Legal Issues" (2013) 19 (3) Rich.J.L & Tech 1, 3.
[4] Micheal O'Floinn and David Ormerod, "Social Networking Material as Criminal Evidence" (2012) 7 (1) Crim.L.R 486, 494.
[5] *R v. Phillips and Phillips* [2020] EWCA Crim 126 [1] (Lord Justice Dingemans).

2. *R v. Alexander and McGill* [2013]: an appeal brought against a refusal by the trial judge to stay the prosecution as an abuse of the Court's process; and

3. *R v. LT* [2019]: an appeal brought by the prosecution against a decision to exclude ID evidence (treated as a terminatory ruling).

In 2020, each of these judgements were referred to by their lordships in *R v. Phillips and Phillips* [2020] which addressed the impact of an informal social media recognition of a suspect, before the completion of a formal ID procedure. Collectively these rulings established a set of legal principles which provide clear guidance on how the court should approach SMID. First, ID evidence will be admissible even where ID procedures, in PACE Code D, have been inherently undermined by SMID. Second, deficiencies in the ID evidence resulting from SMID are matters that go to the reliability of an ID rather than its admissibility. Third, the jury can take proper account of a disadvantage suffered by a defendant, resulting from the absence of images used on social media by a witness to identify them. Finally, where there is a sufficient evidential basis for concluding that a SMID may have been influenced by comments made by a third party, a separate direction is required to address the heightened risk of misidentification.

Policy Considerations

Often an eyewitness's ID, whether taken at a formal ID procedure or on social media, will be admissible as it is relevant to the facts in issue. The test for excluding evidence under s. 78 PACE is premised on fairness, however, fairness as a concept is subjective which has led to uncertainty over the precise scope to be given to the limited discretion to exclude evidence. The CA appears to address this lack of uncertainty by consistently supporting the admission of SMID.

The CA acknowledge that the reliability of ID evidence is undermined when formal ID procedures are compromised by SMID. However, these concerns are often insufficient to warrant the exclusion of SMID evidence under s. 78 PACE. This may be because the court recognises the widespread use of social media in society and appreciate it is not possible to completely remove

the risk to ID evidence posed by social media. Doing this would raise several practical issues: it would be difficult to prove whether social media tainted ID evidence and impracticable to filter out potential witnesses who potentially have seen a suspect's image on social media. Should a defendant dispute ID evidence on the ground that it has been tainted by social media, an expensive investigation may be required to verify the allegation. Defendants in criminal trials are often funded by legal aid which is limited, due to cuts since 2012, and unlikely to cover such investigation. If evidence was not admitted on the basis that it was tainted by social media, it is likely that defendants would become increasingly aware of this and may seek to rely on social media to gain a tactical advantage, potentially leading to reliable evidence being excluded. Alternatively, witnesses may choose to be untruthful to the police when questioned about whether they have seen a suspect on social media, before the trial day, to prevent inadmissibility. Henceforth, admitting SMID may be the only practical solution to address the issues raised.

The Investigation Stage – PACE Code D

The law recognises ID evidence is "notoriously uncertain …[and] unreliable"[6] and has developed mitigative safeguards to offer defendants protection from erroneous ID, whilst permitting the admission of potentially valuable ID evidence. During investigations, Code D is the principal safeguard governing all ID procedures conducted by the police service in England and Wales. Code D aims to, in so far as possible, ensure the "quality and reliability of the evidence"[7] collected by police officers to protect innocent suspects from an incorrect ID and to make a successful ID difficult to challenge.

The procedures set out in Part A of s. 3 of Code D test an eyewitness's ability to identify, under controlled conditions, any suspect he claims to have seen or recognised on a previous occasion, offering considerable protection to suspects.[8] In disputed ID cases, suspects normally have a right to have the correctness of the visual ID tested under formal conditions. However, Code D procedures apply only to ID arrangements made by the police and cannot, practicably, extend to

[6] Paul McGorrery, "The Limited Impact of Facebook and the Displacement Effect on the Admissibility of Identification Evidence" (2015) 39(4) Crim LJ 207, 210.
[7] *R v. Popat* [1998] 2 Cr App R 208 at p212.
[8] *Ibid*, 4.

invitations by the public[9] to identify a suspect using social media. SMID often takes place in informal settings and witnesses are not subject to the controlled conditions of formal ID procedures. In an ID parade a witness can see a suspect in three-dimensions situated in a real setting, whereas SMID only offers a limited two-dimensional view. The quality and reliability of ID evidence collected through formal ID procedures is greater than SMIDs due to the gap in regulations between the two and inadequate safeguards provided for the latter.

In each SMID case which reached the CA, the formal ID procedures, contained in Code D, were inherently undermined. In *McCullough,* there was a risk that the eyewitness's memories had been contaminated[10] by communicating with a third party, before making their ID. Paragraph 3F of Code D[11] was breached as the witness's attention was specifically drawn to the suspect, compromising the value and admissibility of the ID evidence obtained.[12] Responding to criticisms over reliability of the ID, comparison was made between a street ID and a SMID. Yet, there are significant differences between these. Often in the latter, a witness will be directed to search for a particular individual which creates a danger of a lack of impartiality and risk of pre-determination.[13] In *LT* and *Phillips and Phillips,* IDs were made by eyewitnesses after they were shown only a single image by a third party which starkly contrasts with Annex B of Code D which insists on "at least eight people" [14] alongside a suspect who resemble them in general appearance, height, age and position in life as a precautionary safety measure to reduce risk of misidentification.

[9] *Lariba & Ors v.* R [2015] EWCA Crim 478 [42] (Lord Justice Pitchford).
[10] *R v. McCullogh* [2011] EWCA Crim 1413 [9] (Lord Justice Richards).
[11] Home Office, *Police and Criminal Evidence Act 1984 (PACE) Code D Revises Code of Practice for the Identification of Persons by Police Officers* (TSO, London, 2017) 38.
[12] *Ibid,* 19.
[13] Micheal O'Floinn and David Ormerod, "Social Networking Material as Criminal Evidence" (2012) 7 (1) Crim.L.R 486, 500.
[14] Home Office, *Police and Criminal Evidence Act 1984 (PACE) Code D Revises Code of Practice for the Identification of Persons by Police Officers* (TSO, London, 2017) 40.

In *Alexander and McGill*[15] and *LT,* it was held that there was an insufficient evidential basis[16] for the trial judge concluding that the eyewitness's ID of the defendant had been influenced by a third party. In *LT,* this conclusion was reached based on crucial evidence that the ID was made before the third party spoke to the witness and only after the ID had been made did the third party mention searching on Facebook. The threshold for the evidential basis remains unclear. The CA has taken a narrow view of the ID rendered by the witness which focuses on the immediate response to being shown an image, rather than looking at the ID in its broader sense to include the conduct and circumstances in which it was made. It is accepted that the third party may not have directly influenced the witness before their initial ID, however, arguably the witness was indirectly influenced by the third party in making the ID. Before the SMID, the third party's conduct introduced biases into the ID as the witness suspected they were invited to the third party's home for reasons relating to the incident. Upon arrival, the witness was shown only one image without being told, as prescribed by Code D, that the individual may or may not be in the photograph.[17] The witness was given no opportunity, absent of suggestion, to confirm their ID before being asked an immediate probing question, which sought to illicit a binary response as to whether the person in the image was the offender. Empirical data from California State University shows that the effect of such suggestion and bias in an ID can lead to a positive ID, formed based on improper social influence rather than the eyewitness's original perception of the incident.[18] Accordingly the forum in which a SMID takes place should be considered when deciding whether the threshold for an evidential basis is met.

In *McCullough* and *Alexander and McGill,* images used to make the SMIDs were not available and could not be presented to the jury. Lack of such documentation diminishes procedural fairness as a defendant's ability to challenge the ID becomes limited. A lack of information surrounding the circumstances in which the SMID occurred limits a jury's ability to make a more detailed assessment of the reliability of an ID. An identifying eyewitness may have spent days viewing an

[15] *R v. Alexander and McGill* [2013] 1 Cr.App.R. 26.
[16] 3 Temple Gardens, "The impact of social media on identification procedures" available at https://www.3tg.co.uk/library/theimpactofsocialmediaonidentificationprocedures.pdf (last visited 22 November 2020).
[17] Home Office, *Police and Criminal Evidence Act 1984 (PACE) Code D Revises Code of Practice for the Identification of Persons by Police Officers* (TSO, London, 2017) 38.
[18] Robert Buckhout, Daryl Figueroa and Ethan Hoff, "Eyewitness identification: effects of suggestion and bias in identification from photographs" (1975) 6(1) Bulletin of the Psychonomic Society 71, 71.

image of a suspect on social media which could seriously impair the reliability of any subsequent formal ID[19] and significantly prejudice a suspect. Code D ID procedures were last revised in 2017 and need updating to provide safeguards capable of addressing these SMID issues which undermine the reliability of ID evidence.

The Trial Stage – Judicial Directions

Once criminal proceedings are initiated there are two principal methods available to regulate unreliable evidence and control a jury's tendency to rely too heavily on a given form of evidence.[20] First, exclude potentially unreliable ID evidence, which suppresses the jury's use of the evidence by restricting its freedom to evaluate it. The second method involves giving judicial directions designed to caution and educate jurors on any potential reliability issues with contested visual ID evidence. The CA has opted to rely on judicial directions to address reliability concerns of ID evidence, in circumstances where a SMID has taken place, rather than to exclude the evidence entirely.

The effectiveness of judicial directions depends on how well they sensitise a jury to the frailties of the evidence,[21] yet it remains unclear how well they protect the innocent[22] from misidentification. The Criminal Law Revision Committee stated that cases of mistaken ID constituted "by far the greatest cause of actual or possible wrongful convictions".[23] The high risk of wrongful convictions in witness ID cases stems from the fact that human memory is a malleable and fragile instrument[24] which can cause honest and compelling witnesses to be mistaken in their ID, resulting in convincing, yet unreliable, evidence being elicited. The displacement effect, one of the causes of this fallibility, is a psychological phenomenon whereby an individual's memory of

[19] Micheal O'Floinn and David Ormerod, "Social Networking Material as Criminal Evidence" (2012) 7 (1) Crim.L.R 486, 494.
[20] Lisa Dufraimont, "Regulating unreliable evidence: Can evidence rules guide juries and prevent wrongful convictions" (2008) 33(2) Queen's Law Journal 261, 280.
[21] *Ibid.*
[22] *Ibid,* 292.
[23] Her Majesty's Stationary Office, *The Criminal Law Revision Committee: Evidence (General) 11th Report* (Stationery Office Books, London, 1972) 44.
[24] David C. Ormerod, David Perry and Paramjit Ahluwalia, *Blackstone's Criminal Practice 2020* (30th edn, Oxford University Press, 2020) 2980.

a person can be unconsciously, and falsely, displaced by a later conception of what that individual may have looked like.[25]

The case law on SMID illustrates that there is a lack of understanding about how the displacement effect impacts an eyewitness's ID; evidenced by the witness's comment in *LT* who stated that he had not been influenced "either consciously or subconsciously".[26] In *Phillips and Phillips,* the trial judge asked each witness whether they had identified the man whose image they had seen on social media or the man they had seen on the night of the stabbing. The issue with this question is that the displacement effect results in the unconscious altering of memory, meaning that a witness's confidence in their ID is unaffected, possibly leading them to have a genuine belief in a potentially false ID. The trial judge rejected the application to exclude the evidence on the grounds that counsel could cross-examine the witnesses on their ID evidence. In circumstances where the displacement effect has occurred, the credibility of a witness is undermined and cross-examining them on their ID evidence is likely to elicit unreliable, yet convincing, evidence which reinforces a false belief. Eliciting such evidence distorts a jury's ability to make an accurate and reliable assessment of what weight to attach to the ID.

The directions in *Phillips and Phillips* were held to be sufficient as they identified the relevant matters for the jury to consider and highlighted weaknesses in the SMID. However, these directions are a "palpably deficient mechanism"[27] for sensitising jurors to the frailties of SMID. While they inform the jury that a witness may be identifying the person they were shown on social media, rather than the person at the crime scene, they fail to explain how this process occurs. Effective judicial directions require more than merely conveying the possibility of displacement occurring. Directions ought to provide jurors with sufficient information to gain an understanding of the displacement effect otherwise a jury's ability to assess the quality and reliability of SMID evidence is impaired by their limited understanding.

[25] Paul McGorrery, "The Limited Impact of Facebook and the Displacement Effect on the Admissibility of Identification Evidence" (2015) 39(4) Crim LJ 207, 207.
[26] *R v. LT* [2019] 4 WLR 51 [15] (Lord Justice Simon).
[27] Lisa Dufraimont, "Regulating unreliable evidence: Can evidence rules guide juries and prevent wrongful convictions" (2008) 33(2) Queen's Law Journal 261, 293.

Conclusion

To conclude, the meteoric rise of social media has created a gap between the digital world and the regulatory framework for ID evidence. The issues associated with SMID have impacted the effectiveness of the mitigative safeguards in place at the investigation and trial stage. These safeguards need revisiting in the interests of protecting suspects' rights and promoting procedural fairness. To increase the reliability of ID evidence admitted in U.K jury trials and reduce the risk of mistaken ID, the criminal justice system is likely to benefit from implementing the following proposals:

1. To foster pre-trial procedural fairness and reduce the need for directions at trial, revising Code D to incorporate safeguards which require eyewitnesses, before attending formal ID procedures, to be routinely asked if they have used social media to identify a suspect. If so, as a necessary condition to proceed to a formal ID procedure, a witness must disclose the image(s) used to make the ID on social media and details of the circumstances in which the SMID occurred;

2. When deciding whether an ID has been influenced by a third party, a precautionary measure designed to protect defendants' rights, a lower threshold should be implemented to establish a sufficient evidential basis in SMID cases; and

3. Where SMID is alleged, careful judicial directions, where appropriate, should be given to the jury to warn them of the heightened risk of mistaken ID in SMID cases because of the real risk that a witness's memory of the perpetrator can be unconsciously, and falsely, displaced by a subsequent social media image. Jurors should be made aware that a witness can have a genuine belief in a false ID.

A Dolphin Is Not a Fish Even If It Looks Like One: The Case Against 'Objectifying' By Effect Restrictions of Competition

Pawel Guzik

Introduction

AG Bobek in his *Budapest Bank* (2019) opinion aptly described the concept of restriction[1] of competition 'by object' by comparing it to a fish. "*If it looks like a fish and it smells like a fish…* [and] *unless, at first sight, there is something odd about this particular fish, … no detailed dissection of that fish is necessary in order to qualify it as such.*"[2] This clearly helpful metaphor is in line with the European Court of Justice's ('the Court's') view in *Cartes* (2014) that the analysed concept must be interpreted "*restrictively*," i.e. applied "*only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects*"[3] (emphasis added).

And yet, in recent years, the Court, while invariably repeating its 'restrictive interpretation' mantra, continuously failed to live up to it. Some solace may be found in the treatment of this mantra by the UK courts, which tend to follow more closely what the Court preaches (or seems to be preaching). In this essay, I am going to trace, and evaluate, the recent evolution of the concept of restriction of competition "by object" and conclude that the concept of 'by object' restrictions should be interpreted very restrictively, adopting the approach more akin to *European Night Services* ('*ENS*') (1998)[4] rather than *Toshiba* (2016)[5] and *FSL* (2017).[6] Accordingly, I am going to suggest that the law should be reformed by making the lists of 'by object' restrictions in Article 101(1) of the Treaty on the Functioning of the European Union ('TFEU') and section 2 of the Competition Act 1998 exhaustive, following the example set by section 188 of the Enterprise Act 2002 which identifies the exhaustive list of 'by object' restrictions leading to the finding of a cartel offence. The application of the effects-based analysis and its effective, even if theoretically

[1] The term 'restriction' of competition is taken to include the prevention and distortion of competition.
[2] Case C-288/18 *Budapest Bank* [2019] ECLI:EU:C:2019:678, Opinion of AG Bobek [51].
[3] Case C-67/13 P *Cartes Bancaires* [2014] ECLI:EU:C:2014:2204 [58].
[4] Case T-374/94 *European Night Services* [1998] ECLI:EU:T:1998:198.
[5] Case C-373/14 P *Toshiba* [2016] ECLI:EU:C:2016:26.
[6] Case C-469/15 P *FSL* [2017] ECLI:EU:C:2017:308.

different, counterparts should be, as much as it is practicable, restricted to the analysis of 'by effect' restrictions of competition.

Preliminary Matters

Article 101(1) TFEU prohibits agreements[7] that have as their object or effect the restriction of competition. Illustrative, though not exhaustive, examples of such agreements identified in Article 101(1), which may be horizontal or vertical,[8] include, among others, price fixing and market sharing. The words 'object or effect' are to be read disjunctively, i.e. where an agreement has as its object the restriction of competition it is unnecessary to prove that it will produce anti-competitive effects.[9] Only if it is not clear that the object of an agreement is to restrict competition, then, to go back to AG Bobek's 'fish metaphor' in *Budapest Bank* (2019), "*a detailed examination of the creature in question*" is required to determine whether the effect of an agreement is to restrict competition.

At surface level, the above appears perfectly reasonable. The inclusion of such 'object or effect' distinction seems to aim to facilitate a quick and efficient handling of most issues that arise by allocating the more 'boilerplate' cases to the 'object' box and assessing the ones remaining in the 'effect' box more extensively. And yet, contrary to the Court's assertion that "*the fact that the types of agreements covered by* [Article 101(1) TFEU] *do not constitute an exhaustive list of prohibited collusion is … irrelevant*"[10] (emphasis added), the practice shows that the courts took the 'not exhaustive' phrasing as a justification for adopting a very liberal, and not really restrictive, approach when it comes to determining what constitutes a 'by object' restriction. So much so that in the recent *Budapest Bank* (2020) decision[11] the Court held that the same conduct can be simultaneously restricting competition 'by object' and 'by effect,' effectively conflating the two concepts even if outwardly attempting to claim that it is still treating the two as separate grounds in law. The forthcoming analysis of the evolution of the concept of 'by object' restrictions will reveal the

[7] The term 'agreements' is taken to include all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States.
[8] Case C-56/64 *Consten and Grundig* [1966] ECLI:EU:C:1966:41; Case C-32/11 *Allianz Hungária* [2013] ECLI:EU:C:2013:160.
[9] Case C-56-65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECLI:EU:C:1966:38.
[10] *Cartes* (n 3) [58].
[11] Case C-288/18 *Budapest Bank* [2020] ECLI:EU:C:2020:265.

inconsistencies in the Court's approach over the years and prove that Damien Gerard's wish expressed in his 2012 article to review the object/effect distinction in light of the general trend away from the formalistic application of competition law to a more '*effects-based*' system[12] may have 'accidentally' come true, to my overwhelming discontent, thereby justifying my reform proposal advocated in this essay.

Evolution of the Concept of Restriction of Competition "by Object"

'By object' restrictions are to be applied "*only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects*."[13] The term 'object' stands for the objective meaning and purpose of the agreement considered in the economic context in which it is to be applied.[14] Subjective intention of restricting competition may be a relevant factor[15] but is not necessary.[16] An alternative, lawful, purpose of an agreement does not absolve an agreement from having an anti-competitive object.[17] A 'by object' restriction may have an objective justification, thereby falling outside Article 101(1).[18]

Initially, 'by object' restrictions were to encompass "*obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets*" (*ENS* (1998)).[19] This formulation admittedly appears to be in line with the 'restrictive interpretation' approach currently advocated by the Court. Nonetheless, over the years the Court's agenda must have shifted drastically seeing that, as recently as 2009, it laid down a very wide test for identifying 'by object' restrictions by stating that "*it is sufficient that* [an agreement] *has the potential to have a negative impact on competition*" without necessarily having a direct impact on prices to end users because Article 101 is designed to protect the structure of the market and competition as such (*T-Mobile* (2009), reaffirmed in *Allianz* (2013)).[20] And so the expansiveness, in direct contravention of the currently advocated

[12] Damien Gerard, 'The Effects-Based Approach Under Article 101 TFEU and its Paradoxes' in Jacques Bourgeois and Denis Waelbroeck (eds), *Ten Years of Effects-Based Approach in EU Competition Law Enforcement* (Bruylant 2012) 8.
[13] *Cartes* (n 3) [58].
[14] Joined Cases C-29/83 and C-30/83 *Compagnie Royale Asturienne* [1984] ECLI:EU:C:1984:130 [25]-[26].
[15] *Allianz* (n 8) [37]; *Cartes* (n 3) [54].
[16] *Compagnie* (n 14) [25]-[26]; Case C-277/87 *Sandoz Prodotti* [1989] ECLI:EU:C:1989:363.
[17] Case C-551/03 P *General Motors BV* [2006] ECLI:EU:C:2006:229 [64].
[18] Case C-439/09 *Pierre Fabre* [2011] ECLI:EU:C:2011:649 [39]; Guidelines on Vertical Restraints [2010] *OJ C* 130 [60].
[19] *ENS* (n 4).
[20] Case C-8/08 *T-Mobile* [2009] ECLI:EU:C:2009:343 [31], [36]-[39], reaffirmed in *Allianz* (n 8)).

'restrictive interpretation' approach, continued and the Commission seemed set on making full use of it by continuing to identify 'new' 'by object' restrictions, e.g. in the 'pay-for-delay' cases[21] and all 'hard core' restrictions in block exemptions.[22]

This happy period of an ever-growing box of 'by object' restrictions was seemingly cut short by the *Cartes* (2014) judgment advocating restrictive interpretation of the analysed concept. Whish and Bailey (2018) suggest that this could be interpreted as meaning that "*the very wide test suggested in T-Mobile and the outcome in Allianz Hungaria represent the 'high tide' of expansion of the object box, and that Cartes Bancaires marks a return to a more conservative and orthodox approach.*"[23] While I agree with the latter re the nature of the advocated approach, I respectfully disagree with the former. Going forward, I would like to see the Court put this apparently orthodox approach into action and reverse *T-Mobile and Allianz* because not only are they establishing a very low, and thus easily reachable, threshold for agreements to qualify as 'by object' restrictions, but also the "*potential to have negative impact*" phrasing appears to dangerously verge on the "having anti-competitive effects" territory of 'by effect' restrictions, inevitably leading to the conflation of the two legal grounds, as demonstrated by the *Budapest Bank* (2020) judgment. Considering that 'by object' restrictions should "*reveal a sufficient degree of harm to competition*"[24] and thus necessarily be "*easily identifiable*",[25] a restrictive interpretation should be followed, and expansionary tendencies of the past should be discarded. Otherwise, if the courts continue incorporating the washed-up version of the effects-style analysis into the 'by object' analysis, which is essentially what the *T-Mobile* approach amounts to, there is a direct threat to the presumption of innocence of the defendants under Article 6(2) of the European Convention on Human Rights. Following such expansionary approach may lead to the defendants' being found guilty of restricting competition 'by object' when, in practice, a more detailed, effects-style analysis would have revealed that they were not guilty of restricting competition 'by effect.' Even if a given agreement appears suspicious to the Commission or national competition authorities, it is better to give them the "*benefit of the doubt*"[26] and, instead of prematurely announcing a discovery of a 'new' 'by object' restriction, conduct a

[21] Case T-472/13 *Lundbeck* [2016] ECLI:EU:T:2016:449; Case T-691/14 *Servier* [2018] ECLI:EU:T:2018:922.
[22] Notice on Agreements of Minor Importance [2014] *OJ C* 291 [13].
[23] Richard Whish and David Bailey, *Competition Law* (OUP 2018) 126.
[24] *Cartes* (n 3) [58].
[25] Case E-3/16 *Ski Taxi SA* (2016) 3 EFTA 1004 [61].
[26] ibid [62].

proper effects-based analysis to determine whether they are guilty of restricting competition 'by effect.' It is also not satisfactory for the Court to suggest, as it did in *Toshiba* (2016)[27] and *FSL* (2017)[28], that the analysis of the economic and legal context in an object case may be "*limited to what is strictly necessary in order to establish the existence of a restriction of competition by object*." While this advice may seem workable in theory, in practice it is very difficult for competition authorities to delineate the boundaries between evidence they need to analyse in relation to 'by object' restrictions and evidence required to conduct the 'by effect' analysis. Such a statement thus amounts to a 'cop-out,' a formalistic formulation encapsulating the Court's wishful thinking rather than answering the real problems stemming from the object/effect distinction. Noteworthily, there appears to be a real tension between the General Court and the CJEU, not just in the jurisprudence, but also in reality. After all, the General Court has more recently tried to expand the object box in *Cartes* and it is the CJEU that has, at least purportedly, sought a more restrictive approach. It is time for the Court to decisively return to its *ENS* roots, actually restrict 'by object' restrictions to "*obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets*" and leave the extensive, document-heavy investigations to the analyses of 'by effect' restrictions. Lazy allocation of novel instances of restriction to the object box based on a 'half-measures' investigation of an economic and legal context is not the way to go.

UK Case Law – Light at the End of the Tunnel?

In the UK the concept of restricting competition by object leading to a finding of the Chapter I prohibition under section 2 of the Competition Act 1998 is understood in the same way as Article 101(1) TFEU. Where an agreement has the object of restricting competition, it is unnecessary to prove that it has an anti-competitive effect.[29] The CAT's approach is to examine whether the agreement, by its very nature, having regard to the economic and legal context, "*clearly and unambiguously revealed a sufficient degree of harm to competition to make any examination of its effects unnecessary.*"[30] In line with *Cartes*' restrictive interpretation recommendation, the CAT emphasised that restrictions by object should be *"clear-cut and pronounced without an examination*

[27] *Toshiba* (n 5) [29].
[28] *FSL* (n 6) [107].
[29] Case 50233 *Online Sales of Posters* [2016] (CMA) [5.33]; *Institute of Independent Insurance Brokers* [2001] 1002/2/1/01 (CAT) [169]-[170]).
[30] *Agents' Mutual v Gascoigne* [2017] CAT 15 [150], upheld in *Gascoigne* [2019] EWCA Civ 24.

of the effects" and not *"used as a means of avoiding a difficult investigation of anti-competitive effects."*[31] And, unlike the Court's questionable way of putting the restrictive interpretation approach into practice, the UK seems to have taken it to heart. While the UK courts commendably recognise the obvious 'by object' restrictions, such as price fixing[32] and market sharing,[33] and follow existing EU case law, e.g. in relation to online sales bans,[34] they also duly acknowledge that recognising 'new' 'by object' restrictions has "*the attraction of simplicity*" and thus are very reluctant to do so.[35] CAT's cautious approach to 'by object' restrictions is also evidenced by the fact that it is not afraid to make a reference to the Court for guidance, as it did in relation to patent settlement agreements in the pharmaceutical sector.[36] That is not to say that such recognitions of 'by object' restrictions do not occur, as it happened in relation to confidentiality agreements,[37] which is at present permissible, though I would still insist on framing such new recognitions as 'by effect' restrictions to prevent the danger of conflating the object/effect concepts. From a policy perspective, it can be even strongly argued that the object footprint should not be any larger than the UK's cartel offence. Whilst admittedly the UK is currently bound by section 60 of the Competition Act 1998 and Article 3 of Regulation 1/2003, the UK could – if the judges had the courage - diverge more significantly once it no longer is bound to follow EU law. However, overall, the UK case law seems to be largely in line with the restrictive interpretation advocated in this essay, serving as some useful guidelines for the Court and courts in member states to follow, or at least take into account, in order to properly preserve the object/effect distinction and not allow the aforementioned Gerard's '*effects-based system*' wish to fully come to life.

Reform Proposal

Whilst, as I have indicated above, it would be theoretically possible for the judges in the UK not to accept the expansive approach currently perpetuated by the Court after the UK is no longer bound to follow EU law, it would be preferable for the governing statutory law in the EU and the UK to be reformed to preserve the restrictive approach to 'by object' restrictions in writing.

[31] *Sainsbury's Supermarkets v MasterCard* [2016] CAT 11 [101(2)].
[32] Case CE/3861-4 *Stock Check Pads* [2006] CA98/03/2006 (OFT).
[33] Case CP/1163-00 *Arriva/First Group* [2002] CA98/9/2002 (OFT).
[34] *Ping Europe Limited v CMA* [2020] EWCA Civ 13, applying *Pierre* (n 18).
[35] *Cityhook v OFT* [2009] EWHC 57 [131].
[36] Case C-307/18 *Generics (UK)* [2020] ECLI:EU:C:2020:52.
[37] *Jones v Ricoh (UK)* [2010] EWHC 1743 (Ch) [42].

Accordingly, I propose that the law should be reformed by making the lists of 'by object' restrictions in Article 101(1) TFEU and section 2 of the Competition Act 1998 exhaustive, following the example set by section 188 of the Enterprise Act 2002 which identifies the exhaustive list of 'by object' restrictions leading to the finding of a cartel offence. Such a clear delineation of the boundary between 'by object' and 'by effect' restrictions of competition would be desirable for four reasons.

Firstly, it would reverse the alarming process of dilution of the distinction between 'by object' and 'by effect' restrictions identified in this essay. It is hoped that such a change would effectively reverse the Court's finding in *Budapest Bank* (2020) that one action can simultaneously constitute both a 'by object' restriction and a 'by effect' restriction.

Secondly, it would eliminate, or at least significantly diminish, the direct threat to the presumption of innocence of the defendants under Article 6(2) of the European Convention on Human Rights.

Thirdly, it would decrease costs competition authorities and parties subject to competition law investigations incur at a pre-action stage and in the course of litigation. The process would become cheaper and more time-effective because it would be easier to ascertain whether the investigated actions potentially amount to 'by object' restrictions, the list of which would be exhaustive, which would mean that the investigations could proceed at a faster, somewhat expedited pace. Conversely, where the investigated actions would not fall into any of the clearly defined, exhaustive categories of 'by object' restrictions, both competition authorities and parties subject to investigations would know that they should expect lengthier and more costly 'effects-based' analyses and thus could prepare for them accordingly, as well as, especially in case of competition authorities, decide in advance whether a given investigation is worth pursuing from the proportionality perspective.

Finally, it would contribute to the establishment of an effective European and UK-wide competition enforcement. In a post-Brexit world, many new legal challenges when it comes to

competition law enforcement and litigation, especially at a cross-border level, will likely arise in the EU and the UK. The proposed law reform would ensure that the bases of many competition law claims and investigations, i.e. Article 101(1) TFEU and section 2 of the Competition Act 1998, operate more smoothly and effectively, allowing lawmakers and lawyers to focus on tackling the novel legal problems whenever they inevitably arise.

Conclusion

The concept of 'by object' restrictions should be interpreted very restrictively. Such restrictive interpretation should be implemented through making the lists of 'by object' restrictions of competition used in Article 101(1) TFEU and section 2 of the Competition Act 1998 exhaustive. This law reform would ensure that the distinction between 'by object' and 'by effect' restrictions of competition is duly preserved. The application of the effects-based analysis should be, as much as it is practicable, restricted to the analysis of 'by effect' restrictions of competition.

If it looks and smells like a fish, it should be qualified as such. No detailed dissection is necessary, and let's keep it that way.

How Business Rates Exemptions Legislation Could Be Amended To Tackle Business Rates Avoidance

Thomas Hemming

Introduction

The estimated overall annual loss in England due to business rates avoidance is £250 million.[1] Business rates exemptions legislation could be amended to help tackle this issue. The three most-exploited exemptions are:[2] (1) Re-occupation—there is an exemption where the property is re-occupied for six weeks or more;[3] (2) Occupation by charities—there is an exemption where the occupier is a charity and uses the premises 'wholly or mainly' for charitable purposes;[4] (3) Insolvency—there is an exemption for companies in members' voluntary liquidation.[5] This essay explains how the schemes work. It then explores possible solutions—including an assessment of recent suggestions by councils and the approach taken in Scotland.

How the schemes work

Re-occupation

To make use of the re-occupation exemption, properties are occupied artificially. For the purpose of the exemption all that has to be shown is actual and exclusive occupation of sufficient permanency with a benefit or value to the occupier.[6] *Makro Properties Ltd*[7] shows that any tax avoidance motivation

[1] Local Government Association, *Business Rates Avoidance Survey Report* (LGA 2019).
[2] *Ibid.*
[3] Local Government Finance Act 1988, s 45 and Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008/386.
[4] Local Government Finance Act 1988, s 43(6).
[5] Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008/386, reg. 4(k).
[6] *John Laing & Son Ltd v Kingswood Assessment Committee* [1949] 1 KB 344. See also Local Government Finance Act 1988, s 65.
[7] *Makro Properties Ltd v Nuneaton and Bedworth BC* [2012] EWHC 2250 (Admin).

is irrelevant to this—this was confirmed again recently in *Principled Offsite Logistics Ltd*.[8] Furthermore, it is the premises under consideration which is the court's concern—the fact that other premises could have been used is irrelevant and would at any rate present too much of an investigative burden.[9] The threshold is low—in *Makro Properties Ltd*,[10] a company was able to store six pallets of documentation in a warehouse as evidence of occupation. In *Sunderland City Council*[11] the presence of a blue-tooth apparatus in a warehouse was sufficient to demonstrate occupation.

Occupation by charities

To make use of the charitable occupation exemption, landlords make donations to charities which then accept leases and artificially occupy the premises. Due to the requirement of the premises being used 'wholly or mainly' for charitable purposes,[12] the threshold for demonstrating charitable occupation is higher than demonstrating ordinary occupation. *Kenya Aid Programme* shows that the assessment is of the physical use of the premises and that any tax avoidance motivation is irrelevant, as is any question of operational need.[13] *Public Safety Charitable Trust*[14] shows that 'wholly' does not mean 100% of the floor space and *South Kesteven DC*[15] shows that 'mainly' does not mean over 50% of it. Nevertheless, appearance will be accounted for.[16] A digital apparatus may be enough to demonstrate ordinary occupation, but it may be insufficient to satisfy the 'wholly or mainly' requirement for charitable occupation—this was the situation in *Public Safety Charitable Trust*.[17] In that case, wifi transmitters which provided a free internet service only occupied 0.1% of the demised premises.

[8] *R (on the application of Principled Offsite Logistics Ltd) v Trafford Council* [2018] EWHC 1687 (Admin).
[9] *Makro Properties Ltd v Nuneaton and Bedworth BC* [2012] EWHC 2250 (Admin).
[10] *Ibid.*
[11] *Sunderland City Council v Stirling Investment Properties LLP* [2013] EWHC 1413 (Admin).
[12] Local Government Finance Act 1988, s 43(6).
[13] *Kenya Aid Programme v Sheffield City Council* [2013] EWHC 54 (Admin). This approach is also taken concerning purported agricultural use—see *Wootton (t/a EF Wootton & Son) v Gill (Valuation Officer)* [2015] UKUT 548 (LC).
[14] *Public Safety Charitable Trust v Milton Keynes Council* [2013] EWHC 1237 (Admin).
[15] *South Kesteven DC v Digital Pipeline Ltd* [2016] EWHC 101 (Admin).
[16] *My Community Space v Ipswich BC* [2018] EWHC 3313 (Admin).
[17] *Public Safety Charitable Trust v Milton Keynes Council* [2013] EWHC 1237 (Admin).

Insolvency

To take advantage of the exemption on companies in Members Voluntary Liquidation, properties are leased to companies which then go into a protracted liquidation. *Re PAG Asset Preservation Ltd* confirmed that the 'purpose' of insolvency legislation is understood to be the collection and distribution of assets[18] and that the liquidation is deemed genuine where this has occurred—any tax avoidance motivation is irrelevant to this question.[19] The scheme in that case involved leases with determination premiums. The lessees would go into a protracted liquidation but the effect of the premiums was that the liquidator could not know what the value of the assets to be collected was or what distribution was possible until all of the leases had been determined or expired. The liquidations therefore fell within the purpose of insolvency legislation and business rates were successfully avoided. By contrast, the scheme in *Re PAG Management Services Ltd*[20] failed—there were no such premiums in the leases and so the liquidations went beyond the time when assets could have been collected and distributed. The schemes in the recent case of *Rossendale BC*[21] also involved leasing properties to companies which then went into liquidation. The case is significant because it shows that the court will not set aside limited liability and hold directors personally liable in such circumstances. Following *Petrodel Resources Ltd*, this approach, known as 'piercing the corporate veil', can be used where there is an evasion of existing legal obligations.[22] However, the legal obligation to pay business rates is tied to the occupier (or in the case of unoccupied property, the owner).[23] Accordingly, it was held in *Rossendale BC* that upon grant of the lease, there is no existing obligation on the landlord to evade.[24]

Possible Solutions

[18] *Re PAG Asset Preservation Ltd* [2019] EWHC 2890 (Ch). It was held that this was the effect of Insolvency Act 1986, s 91(1) and s 107.
[19] *Ibid.*
[20] *Re PAG Management Services Ltd* [2015] EWHC 2404 (Ch).
[21] *Rossendale BC v Hurstwood Properties (A) Ltd* [2019] EWCA Civ 364.
[22] *Petrodel Resources Ltd v Prest* [2013] UKSC 34. See also Christopher Arvidsson 'The Piercing Doctrine: Re-Examining Evasion' [2019] Comp. Law 40(10), 320.
[23] Local Government and Finance Act 1988, s 45(1)(b).
[24] *Rossendale BC v Hurstwood Properties (A) Ltd* [2019] EWCA Civ 364.

Suggestions by councils

In July 2019 the Local Government Association asked councils to suggest ways of addressing the avoidance schemes.[25] 42% of respondents advocated defining occupation as a percentage of utilised floor space.[26] Arguably, this approach would be an inadequate solution. As already noted, in *Public Safety Charitable Trust*[27] and *South Kesteven DC*[28] which concern charitable occupation, the court was reluctant to link the utilisation of premises to exact percentages of floor space—it could be exploited by covering a floor space with objects and could also force charities and businesses to use premises in impractical or uncommercial ways. 34% of respondents suggested that the occupier should demonstrate a genuine business need or benefit for the occupation.[29] However, as noted, *Makro Properties Ltd*[30] and *Kenya Aid Programme*[31] show that the court regards any investigation of the operational needs of a business or charity to present too much of a burden.

It has also been suggested that the length of time an occupier is required to occupy a property in order to qualify for relief should be extended.[32] However, this would hardly present much of a deterrent. As explained earlier, *Makro Properties Ltd*[33] and *Sunderland City Council*[34] show that it is very easy to demonstrate occupation for the purposes of business rates liability. Placing a cap on the number of times that an exemption for an empty property can be claimed has also been suggested.[35] This may prevent repeated re-occupation, but it would not address the fact of the initial avoidance. In the case of leases to charities, it has been suggested that business rates liability should be shifted

[25] Local Government Association, *Business Rates Avoidance Survey Report* (LGA 2019).
[26] *Ibid.*
[27] *Public Safety Charitable Trust v Milton Keynes Council* [2013] EWHC 1237 (Admin).
[28] *South Kesteven DC v Digital Pipeline Ltd* [2016] EWHC 101 (Admin).
[29] Local Government Association, *Business Rates Avoidance Survey Report*, (LGA 2019).
[30] *Makro Properties Ltd v Nuneaton and Bedworth BC* [2012] EWHC 2250 (Admin).
[31] *Kenya Aid Programme v Sheffield City Council* [2013] EWHC 54 (Admin).
[32] Department for Communities and Local Government, *Business Rates Avoidance: Summary of Responses* (DCLG 2014), 5.
[33] *Makro Properties Ltd v Nuneaton and Bedworth BC* [2012] EWHC 2250 (Admin).
[34] *Sunderland City Council v Stirling Investment Properties LLP* [2013] EWHC 1413 (Admin).
[35] Department for Communities and Local Government, *Business Rates Avoidance: Summary of Responses* (DCLG 2014), 5.

to the landlord,[36] but this could discourage leasing to charities and would go against the policy consideration behind granting relief to charities in the first place.

Recommended Amendments

For the re-occupation exemption, the legislation could be amended so that the exemption is dis-applied when 'the main purpose of the occupation is to avoid business rates liability'. This would enable the court to account for tax avoidance purposes and would at the same time allow for relief to be granted when business rates avoidance is merely incidental to the main purpose of the occupation. The court has no trouble in identifying a tax avoidance purpose and so it does not present an investigative burden. The tax avoidance purpose was easily found in *Makro Properties Ltd*,[37] *Sunderland City Council*,[38] and *Principled Offsite Logistics Ltd*.[39] By using the words 'main purpose', even where there is a discernable benefit to the re-occupation, the court could still find that the 'main purpose' is to avoid business rates liability.

For charitable occupation, the exemption could be dis-applied when 'the lessor/transferor has leased/transferred the property to the lessee/transferee for the main purpose of avoiding business rates liability'. The court does not find it difficult to identify an underlying business rates avoidance purpose in the granting of leases to charities. The purpose was easily found in the cases of *Kenya Aid Programme*,[40] *My Community Space*,[41] *Public Safety Charitable Trust*,[42] and *South Kesteven DC*.[43] The lessor could argue that they leased to the charity out of generosity and substantiate this with evidence of prior donations to the charity—but this would not necessarily be convincing. They could also argue that there was a factual commercial benefit which arose from leasing the property—however, the

[36] Local Government Association, *Business Rates Avoidance Survey Report* (LGA 2019).
[37] *Makro Properties Ltd v Nuneaton and Bedworth BC* [2012] EWHC 2250 (Admin).
[38] *Sunderland City Council v Stirling Investment Properties LLP* [2013] EWHC 1413 (Admin).
[39] *R (on the application of Principled Offsite Logistics Ltd) v Trafford Council* [2018] EWHC 1687 (Admin).
[40] *Kenya Aid Programme v Sheffield City Council* [2013] EWHC 54 (Admin).
[41] *My Community Space v Ipswich BC* [2018] EWHC 3313 (Admin).
[42] *Public Safety Charitable Trust v Milton Keynes Council* [2013] EWHC 1237 (Admin).
[43] *South Kesteven DC v Digital Pipeline Ltd* [2016] EWHC 101 (Admin).

words 'main purpose' would mean that they would probably need to show that it is greater than the benefit afforded by the avoidance of business rates liability.

The same amendment could be made so that the insolvency exemption is dis-applied when 'the lessor/transferor has leased/transferred the property to the lessee/transferee for the main purpose of avoiding business rates liability'. The court finds it easy to identify when a company is incorporated for the purpose of taking on the lease and immediately going into liquidation—this is shown in the cases of *Re PAG Asset Preservation Ltd*,[44] *Re PAG Management Services Ltd*,[45] and *Rossendale BC*.[46]

Non-Domestic Rates (Scotland) Act 2020

Part 4 of the *Non-Domestic Rates (Scotland) Act 2020* which was enacted on 11 March 2020 features wording very similar to that proposed in this essay and is therefore worth assessing. Section 37(1) empowers the Scottish Ministers to 'make such provision as they consider appropriate with a view to preventing or minimising advantages arising from non-domestic rates avoidance arrangements that are artificial'. In Section 38(1) it defines 'advantage' as including 'relief'. In Section 39 it defines an 'arrangement' as 'any agreement, transaction, undertaking, action or event (whether legally enforceable or not)' from which 'having regard to all the circumstances, it would be reasonable to conclude that obtaining an advantage is the main purpose, or one of the main purposes, of the arrangement'. The arrangement must be artificial, and in Section 40 'artificial' is defined as when the arrangement 'is intended to exploit any shortcomings in those provisions'.

However, 'artificial' is also defined in other ways in Section 40 which seem too broad, unclear, and possibly misleading. In addition to being defined as an arrangement intended to exploit the provisions, 'artificial' is also defined as the arrangement not being consistent with 'any principles on

[44] *Re PAG Asset Preservation Ltd* [2019] EWHC 2890 (Ch).
[45] *Re PAG Management Services Ltd* [2015] EWHC 2404 (Ch).
[46] *Rossendale BC v Hurstwood Properties (A) Ltd* [2019] EWCA Civ 364.

which those [non-domestic rates] provisions are based (whether express or implied)' and 'the policy objectives of those provisions'. It is difficult to see how a court could rule on 'principles' and 'policy objectives'—as the learned judge remarked in *Makro Properties Ltd*, 'the court is not a court of morals, but of law'.[47] The Act also deems an arrangement artificial if it 'lacks economic or commercial substance', however the examples it gives of this are 'not exhaustive' and include references to such concepts as 'reasonable business conduct', and 'an advantage that is not reflected in the business risks undertaken'. This seems very vague and could demand the kind of burdensome investigation that the court is keen to avoid.

Other examples of arrangements lacking in 'economic or commercial substance' provided by the Act also appear to introduce a concept of statutory interpretation which the court has established to be inappropriate in the context of business rates. The Act refers to arrangements where 'the legal characterisation of the steps in the arrangement' are 'inconsistent with the legal substance of the arrangements as a whole'. It also refers to arrangements featuring elements 'which have the effect of offsetting or cancelling each other'. The inclusion of these examples appears to be an attempt at incorporating the reasoning behind what is known as the *Ramsay* principle.[48] By this principle, the court can decide that the 'effect of a transaction as a whole' can be taxed.[49] However, *Rossendale BC* shows that the *Ramsay* principle is inapplicable where the relevant statute does not concern a transaction but a strict legal definition[50]—such as that of occupation (or in the case of unoccupied property, ownership).

Conclusion

In conclusion, the relevant legislation could be amended so that the three exemptions under consideration are dis-applied when either 'the main purpose of the occupation is to avoid business rates liability' or when the 'the lessor/transferor has leased/transferred the property to the

[47] *Makro Properties Ltd v Nuneaton and Bedworth BC* [2012] EWHC 2250 (Admin) [56].
[48] Following *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300.
[49] *Ibid.*
[50] *Rossendale BC v Hurstwood Properties (A) Ltd* [2019] EWCA Civ 364. See Local Government Finance Act 1988, s 45(1)(b).

lessee/transferee for the main purpose of avoiding business rates liability'. As discussed, the recently proposed alternatives are limited as they present an increased investigative burden on the court and are inadequate deterrents. The language of the *Non-Domestic Rates (Scotland) Act 2020* also seems too imprecise. The amendments proposed in this essay are clearer and would enable the court to impose liability where the main purpose is business rates avoidance and would therefore address the limitations brought forward by cases such as *Makro Properties Ltd*,[51] *Kenya Aid Programme*,[52] and *Re PAG Asset Preservation Ltd.*[53]

[51] *Makro Properties Ltd v Nuneaton and Bedworth BC* [2012] EWHC 2250 (Admin).
[52] *Kenya Aid Programme v Sheffield City Council* [2013] EWHC 54 (Admin).
[53] *Re PAG Asset Preservation Ltd* [2019] EWHC 2890 (Ch).

Mass Surveillance Under The banner Of Public Security: Are Human Rights Protected In Europe?

Dominika Leitane

In 2013, Edward Snowden revealed that various intelligence agencies were engaged in secret large-scale interception of personal information belonging to millions of people worldwide. This prompted an international debate over the acceptability of such measures. Proponents of mass surveillance emphasise its overwhelming necessity in the face of the ever-growing threats of terrorism and serious crime, whereas opponents highlight its enormous impact on individual rights. This essay examines the approach of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) to mass collection, retention and sharing of personal data for security purposes. In particular, it seeks to establish whether the Courts have struck the appropriate balance between individual rights and national security.

Mass surveillance refers to the indiscriminate gathering and use of information relating to the entirety, or a substantial part, of the population. Unlike targeted surveillance, which is restricted to specific individuals or groups, mass surveillance encompasses data from a wider range of individuals, most of whom are not related to a particular crime or threat.[1]

ECtHR jurisprudence:

The seminal case of *Big Brother Watch* concerned mass interception of electronic communications by UK intelligence services.[2] The ECtHR held that the regime lacked necessary safeguards, was overly ambiguous, and lacked foreseeability, thereby breaching Articles 8 and 10 of the European Convention on Human Rights (the Convention). This was deemed by some to be a victory for human rights,[3] since the Court highlighted the importance of oversight at all stages of

[1] European Commission for Democracy through Law (Venice Commission), 'Report on the Democratic Oversight of Signals Intelligence Agencies' (2015) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)011-e>

[2] *Big Brother Watch v United Kingdom* (2018) 9 WLUK 157

[3] Owen Bowcott, 'GCHQ Data Collection Regime Violated Human Rights, Court Rules' (*The Guardian*, 13 September 2018) <https://www.theguardian.com/uk-news/2018/sep/13/gchq-data-collection-violated-human-rights-strasbourg-court-rules>

surveillance, and upheld the need for sufficient safeguards, limiting the extent to which states could "spy" on their citizens and seemingly protecting individual rights. However, upon closer inspection, the reasoning behind this decision is highly problematic and fails to sufficiently protect individual rights. Issues pertaining to this judgment are discussed below.

i. The Court's discussion was one-sided and lacked a proper examination of the impact of mass surveillance on individual rights.

In failing to deem mass surveillance incompatible with the Convention, the Court described it as "valuable" for upholding public and national security, without going into any evaluation of its merits.[4] The presumption that limiting privacy is instrumental in the fight against terrorism and serious crime shifts the balance in favour of security considerations, placing the burden of proof on opponents of mass surveillance and sacrificing individual rights for the (seemingly) collective good.[5]

Similarly, the Court's discussion of how technological advancements are benefitting criminals,[6] lacked appreciation of how said advancements can lead to catastrophic exploitation of personal data by states.[7] Indeed, given the wide range of tasks for which the Internet is used today, mass surveillance is capable of revealing deeply intimate details about the social lives, health, relationships and beliefs of its targets, whilst subsequent analysis of such data can reveal even more personal information, such as habits and vulnerabilities. The ECtHR's failure to engage with the ramifications mass surveillance has for the right to privacy is especially disappointing in light of the Court's role in defending human rights in Europe, and represents a clear failure to achieve the right balance.

Furthermore, the Court failed to deliver a comprehensive proportionality analysis in *Big Brother Watch*: it failed to mention the availability of alternative approaches, such as targeted

[4] Kirsty Hughes, 'Mass surveillance and the European Court of Human Rights' (2018) E.H.R.L.R, 6, 589-599
[5] Tiberiu Dragu, 'Is there a trade-off between security and liberty? Executive bias, privacy protections, and terrorism prevention' (2011) American Political Science Review, 105(1), 64-78.
[6] Dorothy E. Denning, 'Terror's web: How the internet is transforming terrorism' (2010) Handbook of internet crime, 194-213.
[7] Vera Rusinova, 'A European Perspective on Privacy and Mass Surveillance at the Crossroads' (2019) Higher School of Economics Research Paper No. WP BRP, 87

surveillance,[8] and did not elaborate sufficiently on the criteria it used to arrive at its conclusion.[9] As a result, it appears that merely referring to national security is enough to justify mass data collection,[10] which makes the threat to privacy even more dramatic.

The Court tried to justify this approach by emphasising the flexibility it provides in allowing states to address unpredictable threats.[11] David Anderson QC has argued that, since suspects are not always known in advance, targeted surveillance is less effective than mass surveillance, highlighting the need for a flexible approach.[12] A further unique advantage of mass surveillance is that it enables security forces to "rewind" events, as it is usually carried out over long periods of time, and can be used to identify suspicious patterns of behaviour.[13] Indeed, the UK Government's Operational Case for Bulk Powers reveals that mass surveillance has played a role in every major counter-terrorism operation in the past decade, seemingly demonstrating its necessity.[14]

Nevertheless, the arguments above are flawed. Firstly, enforcement agencies cannot be relied on for accurate success rates of anti-terrorism operations, as they have an incentive to push for decreased privacy protections, as well as a general interest in exaggerating their success.[15] Furthermore, such operations tend to encompass a variety of measures - not just mass surveillance - making it difficult to evaluate its unique effectiveness,[16] especially since the absence of terrorist attacks does not necessarily mean success of an operation.[17] Therefore, the Court's assumption that such measures are effective is misguided. Secondly, mass surveillance is not just potentially ineffective - it is also potentially detrimental to national security: it is capable of overwhelming

[8] ibid
[9] (n4)
[10] (n8)
[11] ibid
[12] David Anderson, 'A Question of Trust, Report of the Investigatory Powers Review' (2015) Independent Reviewer of Terrorism Legislation <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/06/IPR-Report-Web-Accessible1.pdf >accessed 1 April 2020
[13] Daragh Murray and Pete Fussey, 'Bulk surveillance in the digital age: rethinking the human rights law approach to bulk monitoring of communications data' (2019) Israel Law Review, 52(1), 31-60
[14] Home Office, *Operational Case for Bulk Powers* (Home Office 2016)
[15] Phoebe Hirst, 'Mass surveillance in the age of terror: bulk powers in the Investigatory Powers Act 2016' (2019) E.H.R.L.R. 2019, 4, 403-421
[16] The Privacy and Civil Liberties Oversight Board (US), *Report on the Telephone Records Program Conducted under section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court* (The Privacy and Civil Liberties Oversight Board, 2014)
[17] (n6)

security forces with information, wasting limited resources and costing lives[18]. Overall, it does not seem that mass surveillance is truly necessary in a democratic society.

One might wonder whether the discussion above is something the ECtHR should be expected to consider: some have remarked that the technicalities behind mass surveillance are not something the Judges have expertise in,[19] and this should perhaps be left to the states as part of their margin of appreciation. However, the risk of the states invoking the threat of terrorism for ulterior purposes,[20] and the extreme threat to human rights, makes it within the Court's power to evaluate such measures, since the Judges are experts in the field of law and human rights. The discussion above demonstrates that the current approach of the Court is overly deferent: the Court should have engaged in a comprehensive examination of the impact of mass surveillance on both individual rights and public and national security (for which there is still hope, since *Big Brother Watch* has recently been heard by the Grand Chamber, with the decision still pending).

ii. The safeguards proposed by the Court are insufficient.

In *Weber v Germany*,[21] the Court set out six minimum criteria against which the safeguards in surveillance regimes must be evaluated; in *Big Brother Watch*, the Court found that the regime in question fell short of satisfying them. However, it disagreed with the submission that the *Weber* criteria were no longer sufficient and thus rejected the additional safeguards that were proposed. The Court explained its treatment of two of the three proposed safeguards (the requirement of evidence of reasonable suspicion, and the requirement of subsequent notification of the surveillance subject) by stating that they undermine the core principle behind mass surveillance - its secretive and large-scale nature. Whilst this is problematic since the Court's basis for allowing mass surveillance in itself is prone to criticism, it is nevertheless consistent with the Court's general perspective. In contrast, the Court's treatment of the third proposed safeguard - *ex ante* independent judicial authorisation - is ambiguous and inconsistent.

[18] Joint Parliamentary Committee on the Investigatory Powers Bill, *Written Evidence* (JPCIPB, 2016) <http://www.parliament.uk/documents/joint-committees/draft-investigatory-powers-bill/writtenevidence-draft-investigatory-powers-committee.pdf>

[19] Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (OUP, 2006)

[20] (n4)

[21] *Weber v Germany* (2008) 46 E.H.R.R. SE5

In the past, the Court appeared to be leaning towards making judicial authorisation mandatory; in *Szabo v Hungary*,[22] it declared that "control by an independent body, normally a judge with special expertise, should be the rule", and that a non-judicial body is permissible only if it is "sufficiently independent of the executive", since "the political nature of the authorisation and supervision increases the risk of abusive measures". This shows a sufficient degree of appreciation for individual rights. However, the position was drastically different in *Big Brother Watch*, with the Court stating that judicial authorisation was not necessary, and the only requirement was an adequate system of independent oversight. The Court went on to explain that judicial oversight is not always effective, relying on past occasions where it found judicial authorisation to be ineffective in Bulgaria, Russia and Turkey.[23] This is a valid ground on which to question the necessity of judicial authorisation. However, on its own it is insufficient to justify the Court's refusal to make judicial authorisation mandatory: just because a measure is not sufficient, does not mean that it should not be implemented.[24] Judge Koskelo noted in her dissenting opinion that such control has to be performed *ex ante*, as opposed to *ex post*, due to the secret nature of the surveillance making it unlikely that affected individuals would be able to obtain *ex post* remedies,[25] which is something that the majority decision has failed to emphasise. Furthermore, the Court relied on instances where judicial authorisation was reduced to a mere formality due to the limited scope of judicial scrutiny:[26] such examples are not representative of judicial control as a whole, and could be mitigated by stringent guidelines. Therefore, the Court has failed to provide adequate reasoning for rejecting *ex ante* judicial control - an important measure for upholding individual rights, which could have improved the balance in the Court's judgment.

Judge Koskelo further stated that the changing nature of surveillance measures means that a change in the Court's approach is due:[27] the cases on which the Court's position is based were decided in a different time, under factual scenarios that no longer apply (e.g., *Weber* is now over 10 years old); bearing in mind the above discussion of how dangerous modern surveillance regimes are, the Court should have modernised its approach to mass surveillance by adding novel safeguards. The inconsistency of the Court's approach to safeguards is in itself detrimental to

[22] *Szabo v Hungary* (2016) 63 E.H.R.R. 3
[23] (n2)
[24] ibid, Partly Concurring, Partly Dissenting Opinion of Judge Koskelo, joined by Judge Turkovic [25]
[25] ibid [27]
[26] (n8)
[27] (n27), [13]

human rights protection, as it creates uncertainty at the national level in terms of what constitutes appropriate mass surveillance oversight.[28] Judge Koskelo also warns that the Court's current approach largely maintains oversight in the hands of the executive.[29] Judicial oversight, on the other hand, is an appropriate way of ensuring legality of surveillance regimes, given the expertise that judges possess in making such assessments, which is something the Court failed to sufficiently take into account.

CJEU jurisprudence:

The latest relevant case to have been considered by the CJEU is *Tele2 Sverige AB and Watson.*[30] It concerned the requests made by the UK and Sweden to clarify the scope of its earlier decision (*Digital Rights Ireland*).[31] *Digital Rights Ireland* in its turn concerned the Data Retention Directive,[32] which was invalidated as it did not satisfy the proportionality test, since it allowed member states to introduce indiscriminate data retention regimes. In *Tele2*, the principles of EU law were extended to national legislation as the legislation was implementing a derogation to another Directive. The Court further held that a general and indiscriminate data retention regime does not represent a necessary and proportionate security measure, ruling that mass surveillance per se is incompatible with EU law; only targeted surveillance, accompanied by stringent safeguards, is capable of fulfilling the necessity and proportionality requirements.

This is a more acceptable approach to balancing individual rights and security considerations. In line with its role, the CJEU has relied on the principles of necessity and proportionality inherent in EU law, as well as the Charter of Fundamental Rights of the EU (the Charter), which applies whenever EU law comes into play. The Court specified that mass surveillance was incompatible with the Charter, namely Articles 7 (Respect for private and Family Life), 8 (Protection of personal data), and 11 (Freedom of expression and information). However, in acknowledging the threat that serious crime and terrorism present to public and national security, the Court allowed

[28] Venice Commission, 'Report on the Democratic Oversight of Signals Intelligence Agencies' (2015) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)011-e>

[29] (n29), [26]

[30] *Tele2 Sverige AB v Post-och telestyrelsen* (C-203/15) EU:C:2016:970; [2017] Q.B. 771; [2016] 12 WLUK 618 (ECJ (Grand Chamber))

[31] *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources* (C-293/12) EU:C:2014:238; [2015] Q.B. 127; [2014] 4 WLUK 285 (ECJ (Grand Chamber))

[32] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006

targeted measures, which were demonstrated above to be a valid alternative to mass surveillance. Therefore, the Court considered issues of security inasmuch as it was permitted to do so by EU law, striking the perfect balance between individual rights, as defined in the Charter, and issues of security.

Another positive aspect of the judgment was the Court's acknowledgment of the impact of mass surveillance on both privacy and security,[33] presenting a more accurate assessment of the effects of mass surveillance on individual rights. Furthermore, the Court explicitly acknowledged that giving governments access to communications data (i.e., the content of the communication) is just as detrimental as content data (i.e., information about the communication, such as whom it was sent to),[34] which is a welcome recognition of the status of communications data, in stark contract to the lack of such recognition in the ECtHR.

One might be tempted to criticise the Court for not giving sufficient consideration to issues of public and national security. Some have highlighted the fact that mass surveillance, which is representative of an *ex ante* approach to tackling terrorism, should be preferred to *ex post* approaches, as it attempts to identify the threat before an attack takes place, as opposed to alternative approaches, which cost lives.[35] Nevertheless, the discussion above reveals that the threats to national security in the absence of mass surveillance are purely speculative, and not backed up by reliable data (in addition to the argument above that mass surveillance itself might pose a risk to national security). Furthermore, targeted measures, which the Court made available, can also involve *ex ante* approaches (albeit less extensive than mass surveillance), and are therefore capable of tackling the issue.

It could be argued that the Court has failed to consider individual rights in its endorsement of targeted measures, which implies that profiling specific groups is acceptable,[36] and may lead to discrimination. However, the Court successfully mitigates this possibility by stating that

[33] Paul Bernal, 'Data gathering, surveillance and human rights: recasting the debate' (2016) Journal of Cyber Policy, 1(2), 243-264
[34] (n35) [259]
[35] Richard A. Epstein, 'The ECJ's Fatal Imbalance Its cavalier treatment of national security issues poses serious risk to public safety and sound commercial practices' (2016) European Constitutional Law Review, 12(2), 330-340.
[36] (n35) [108]

surveillance regimes must be evidence-based,[37] removing the possibility of arbitrary bias - another demonstration of how in-depth and balanced the Court's consideration of relevant issues was.

Overall, the CJEU has departed from the reasoning of the ECtHR, although their earlier approaches were aligned.[38] In doing so, the Court explained that protection of personal data is not enshrined in the Convention, and the CJEU must protect it in light of the Charter.[39] This shows a remarkable level of self-awareness, with the Court reflecting on its own function and providing an in-depth explanation of why it reached a particular conclusion, in contract to the ECtHR. Indeed, although the Court is incapable of going beyond the specific questions referred by national courts, which prevents it from quashing national legislation in many instances[40], it goes as far as its jurisdiction allows it to in order to uphold the relevant principles of EU law. Although certain drawbacks to its approach remain, such as its failure to define "national security",[41] this is beyond the scope of this essay as it concerns the Court's treatment of targeted surveillance.

Conclusions:
The ECtHR placed too much weight on public and national security, failing to analyse the impact of mass surveillance on human rights, and endangering individual rights. That is not to say the Court should have banned mass surveillance - in carrying out the appropriate balancing exercise, the Court could still legitimise mass surveillance; however, that would have been a balanced judgment, undoubtedly supplemented with rigid guidelines and sufficient safeguards, and offering an appropriate degree of human rights protection.

The CJEU, on the other hand, has achieved the right balance: in complying with the requirements of relevant legislation, it protected individual rights, whilst also considering the problem of national security in the context of modern threats as far as the relevant legislation permitted this.

[37] ibid [111]
[38] (n44)
[39] (n35) [77]
[40] E.g., *Proceedings Brought by Ministerio Fiscal* (C-207/16) EU:C:2018:788; [2019] 1 W.L.R. 3121; [2018] 10 WLUK 1 (ECJ (Grand Chamber))
[41] (n44)

The Test for Unfitness to Plead of Criminal Defendants – Is it Time for Change?

Ryan Maguire Singh

1. Introduction

Assessment of defendant capacity is a critical aspect of a criminal trial. Specifically, the law on 'Unfitness to Plead' addresses the courts approach to "criminal defendants who lack sufficient ability to participate meaningfully in trial".[1] A defendant who lacks these abilities will be deemed 'unfit' to plead. This legal mechanism is in place to ensure that an individual is not put through the rigours of a criminal trial if they are deemed unfit. It would be wholly unjust to put someone on trial who is unable to comprehend and engage in legal proceedings, as they are unable to mount an appropriately fair defence.

Between 2002-2014, the average number of defendants found to be unfit was 100.6 per annum.[2] This remarkably low number of annual findings of unfit defendants is greatly concerning, particularly with the prevalence of mental disorders among recently incarcerated offenders.[3] These figures suggest that many highly vulnerable defendants are not being provided with adequate protection with the law as it currently stands.

This essay will discuss the test used to determine defendant unfitness and then consider proposals for reform furnished by the Law Commission.

2. The Test for Unfitness

The common law established the legal test adopted by the courts when assessing whether a defendant is unfit. It originates in Baroness Alderson's judgement in *R v Pritchard*[4] from 1836:

[1] Law Commission, *Unfitness to Plead Volume 1: Report* (Law Com No. 364, 2016) para 1.1
[2] Law Commission, *Unfitness to Plead* (Law Com No. 364, 2016) Appendix A, page 4
[3] Seena Fazel and others, 'Mental health of prisoners: prevalence, adverse outcomes, and interventions' (2016) 3(9) The Lancet Psychiatry 871
[4] *R v Pritchard* [1836] 7 Car. & P. 303, 173 E.R. 135.

> "…There are three points to be enquired into: first, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a defence - to know that he might challenge any of you [jurors] to whom he may object - and to comprehend the details of the evidence…"[5]

All of these conditions must be satisfied for a defendant to be fit to plead. In contrast, they need only to fail to satisfy one condition in order to be unfit.[6]

Whilst this is the key legal authority, over time, the test has attracted attention and has been construed in ways that enable it to be more consistent with modern trials.[7] For instance, a requirement that, in order to be fit, the defendant must be able to instruct counsel has been incorporated.[8]

In 2003, the criminal system was prescribed a modern interpretation of the *Pritchard* test in *R v M (John).*[9] In this case, the Court of Appeal held that a defendant must exhibit an incompetence in one of the following ways:

(a) Understanding the charges;
(b) Deciding whether to plead guilty or not;
(c) Exercising his/her right to challenge jurors;
(d) Instructing solicitors and counsel;
(e) Following the course of proceedings;
(f) Giving evidence in his own defence.[10]

[5] *R v Pritchard* [1836] 7 Car. & P. 303, 173 E.R. 135.
[6] *R v Podola* [1960] 1 QB 325, [1959] 3 All ER 418.
[7] Helen Howard, 'Unfitness to plead and the vulnerable defendant: an examination of the Law Commission's proposals for a new capacity test' (2011) 75(3) J Crim L 194
[8] *R v Davies* [1853] Car & Kir 328.
[9] [2003] EWCA Crim 3452, All ER (D) 199.
[10] *R v M (John)* [2003] EWCA Crim 3452, All ER (D) 199.

The courts established this set of criteria in an attempt to offer more clarity over the official legal test for defendant unfitness, to make it easier to apply in modern criminal trials. As a result, it is the *M (John)* interpretation that is widely favoured by the courts,[11] even though its foundations are rooted in *Pritchard.*[12]

Case law has illustrated that, when the issue arises, the courts apply these legal tests strictly.[13] This was evident in *R v Robertson,* where it was held that the defendant was not unfit, but was not necessarily acting in his own "best interests".[14] Here, the defendant's delusional disorder prevented him from "properly" instructing counsel and giving evidence[15], but the court was nevertheless content that the test was satisfied and the trial ensued.

Moreover, it was established by the Court of Appeal that defendant misconceptions as to the court's sentencing powers and objectivity, or even as to "..evil influences which were thought to be present during the proceedings.."[16] do not necessitate a finding of unfitness. In this case, it was held that the defendant's serious mental disorder did not obstruct his abilities to engage in the trial and therefore it could continue as normal.[17] As well as demonstrating the strict approach of the courts, these cases also indicate why annual findings of defendant unfitness remain exceptionally low.[18]

The recent case of *R v Marcantonio (Robert)* [19] has confirmed the strictness of the law on defendant unfitness. Here, the Court of Appeal was satisfied that the defendant was fit even though four medical experts concurred that he was suffering from 'multiple psychiatric morbidities' which caused marked cognitive disabilities.[20] This case further demonstrates the high threshold set by the courts for unfit defendants.

[11] Law Commission, *Unfitness to Plead Volume 1: Report* (Law Com No. 364, 2016) para 1.37
[12] Arlie Loughnan, 'Between fairness and "dangerousness": reforming the law on unfitness to plead' (2016) 7 CLR 451
[13] Arlie Loughnan, 'Between fairness and "dangerousness": reforming the law on unfitness to plead' (2016) 7 CLR 451
[14] *R v Robertson* [1968] 3 All ER 557, [1968] 1 WLR 1767.
[15] *R v Robertson* [1968] 3 All ER 557, [1968] 1 WLR 1767.
[16] *R. v Moyle* [2008] EWCA Crim 3059, [2009] CLR 586.
[17] *R. v Moyle* [2008] EWCA Crim 3059, [2009] CLR 586.
[18] Law Commission, *Unfitness to Plead* (Law Com No. 364, 2016) Appendix A, page 4
[19] [2016] EWCA Crim 14, [2016] 2 CAR 9.
[20] *R v Marcantonio (Robert)* [2016] EWCA Crim 14, [2016] 2 CAR 9.

In *Marcantonio*, the Court of Appeal emphasised the need, when applying the *Pritchard* criteria, to consider specific complexities of the trial[21] in order to determine defendant unfitness. This means that courts should assess defendants in the context of their individual trials.[22] This is because the complexity of proceedings can vary and therefore a defendant's abilities should only be assessed against the challenges that their own trial is likely to present and not against situations that they are unlikely to encounter. Thus, unique aspects of the defendant's trial such as the probable duration or complicated case specific issues should be considered when assessing whether a defendant is unfit. This ensures that trials are not unnecessarily abandoned on the basis that a defendant is unable to engage in or withstand a hypothetical feature of a trial that they were unlikely to be confronted with anyway.

3. The Case for Reform

There is widespread agreement among legal professionals and academics that the law in this area needs reform. There are numerous reasons for this suggestion.

3.1 Inconsistent Application of an Outdated Test

Firstly, the test for defendant unfitness is outdated and not in line with modern trial proceedings.[23] This is because it originates in *Pritchard* which was heard in 1836. Since then, criminal trials and processes have significantly changed. For instance, at the time of *Pritchard*, defendants were unable to give evidence in their own defence. This meant that the original test did not include an assessment of a defendant's ability to give evidence. Plainly, this is unsuitable for modern trials as defendants are invariably called to give evidence and so their abilities to do so should be assessed when determining whether they are unfit.

As mentioned, the aging nature of the test has led to a modern interpretation, in *M* (*John),* which has introduced an assessment of a defendant's ability to give evidence. However, even though this case clarified the test, it is not consistently applied by the courts as some have continued to follow the *Pritchard* authority.[24] As a result, this has led to uncertainty and inconsistent application of the tests by the courts meaning that some defendants are being assessed on their abilities to give

[21] Ronnie Mackay, 'Fitness to plead: R. v Marcantonio (Robert)' (2016) 8 CLR 564
[22] *R v Marcantonio (Robert)* [2016] EWCA Crim 14, [2016] 2 CAR 9.
[23] Helen Howard, 'Lack of capacity: reforming the law on unfitness to plead' (2016) 80(6) J Crim L 428
[24] *R v Wells* [2015] EWCA Crim 2, [2015] 1 WLR 2797.

evidence and others are not. These inconsistencies are causing an unjust inequity of treatment amongst defendants.

3.2 Lack of Understanding and Awareness

Additionally, there is a lack of understanding of defendant unfitness and the surrounding law on behalf of judges and legal practitioners.[25] This means that they are often unaware of and unable to identify mental disorders or communication impediments that render defendants unfit. Judges and legal representatives are rarely trained to recognise the indicators of mental disorders and therefore many unfit defendants exhibit symptoms that go unnoticed and they ultimately go unprotected. The situation is worsened by the paucity of defendants being found unfit as it has meant that the courts have been unable to develop a strong grasp of this area of law.

There is also an issue with how high the courts set the threshold for a finding of an unfit defendant. It does not seem fair or reasonable that a defendant who is suffering from severe mental disorders[26] or a defendant who is not acting in their own best interests due to their mental condition[27], is made to endure a criminal trial. Any defendant experiencing these symptoms is highly unlikely to be able to mount a fair defence which means that any trial that continues under these circumstances loses credibility. It appears to be imprudent of the courts to set such a high bar for finding a defendant unfit as it inevitably leads to inadequate protection for some vulnerable defendants such as in *Moyle* and *Robertson.*

That being said, it is important to remember that the courts also have a duty to protect the public and ensure justice is served. Therefore, from this perspective the courts may feel a need to keep findings of unfit defendants to a minimum to enable the vast majority of trials to be concluded as normal. The courts are able to make use of the s.4A[28] 'trial of the facts' and the House of Lords has confirmed that a key aim of this procedure is to strike a balance between protecting an unfit defendant and protecting the public.[29] However, this course of action can only be utilised once a

[25] Arlie Loughnan, 'Between fairness and "dangerousness": reforming the law on unfitness to plead' (2016) 7 CLR 451
[26] *R. v Moyle* [2008] EWCA Crim 3059 at (38), [2009] CLR 586.
[27] *R v Robertson* [1968] 3 All ER 557, [1968] 1 WLR 1767.
[28] Criminal Procedure (Insanity) Act 1964
[29] *R v Antoine* [2001] 1 AC 340, [2000] 2 WLR 703.

defendant is deemed unfit. As we are seeing very low numbers of unfit defendants,[30] this indicates that the courts are not using this procedure as frequently as they perhaps should be.

3.3 Test too Narrow?

Ronnie Mackay, a leading academic in this area, comments that the test from *Pritchard* is too narrow.[31] He states that it focuses too heavily on assessing a defendant's cognitive abilities and intellect rather than on issues that may affect a defendant's actual participation and decision-making abilities throughout their trials.[32] This suggests that the test is dominated by criteria that assess a defendant's ability to understand the proceedings, rather than testing their abilities to engage and participate in them. This is particularly problematic for defendants who are able to comprehend trial proceedings but otherwise act irrationally when required to participate. Under the current tests these defendants are unlikely to be deemed unfit, due to the emphasis placed on intellect, even though they are unable to effectively participate. This illustrates the narrow nature of the tests, as they fail to test for mental disorders that hinder a defendant's ability to participate in trial. Therefore, defendants with these inabilities are not protected and they are erroneously made to undergo their trials.

4. Proposals for Reform

In their report titled "Unfitness to Plead"[33] the Law Commission have proposed numerous changes for this area of the law, several of which are considered below.

4.1 Mandatory Judicial Training

One recommendation concerns judicial training. At present there is a focus on training judges on how to deal with vulnerable witnesses and this training is mandatory only for circuit judges[34]. There is no compulsory training for judicial members or legal representatives on the specific topic of vulnerable defendants, who are likely to raise different issues to those raised by vulnerable witnesses. Consequently, the Law Commission recommends that all judicial members and legal

[30] Law Commission, *Unfitness to Plead* (Law Com No. 364, 2016) Appendix A, page 4
[31] Ronnie Mackay, 'Unfitness to plead - some observations of the Law Commission's consultation paper' (2011) 6 CLR 433
[32] Helen Howard, 'Lack of capacity: reforming the law on unfitness to plead' (2016) 80(6) J Crim L 428
[33] Law Commission, *Unfitness to Plead Volume 1: Report* (Law Com No. 364, 2016)
[34] Law Commission, *Unfitness to Plead Volume 1: Report* (Law Com No. 364, 2016) para 2.24

representatives involved in the criminal courts should be required to undertake specific training.[35] This training would focus on improving their abilities to identify vulnerable defendants as well as raising their awareness of the possible trial adjustments that can be made.

These training programmes would improve overall understanding of the law on defendant unfitness and this could lead to a reduced number of vulnerable defendants going unnoticed and ultimately unprotected. Even though it may be both expensive and time consuming to provide such training, it is likely to improve protection of highly vulnerable defendants.

4.2 A New, Statutory Test?

The Law Commission also recommend that that the test for defendant unfitness be reformulated into statute. Specifically, they propose that the test changes to one that assesses a defendant's ability to 'participate effectively'. As part of the report, a draft bill was produced called the Criminal Procedure (Lack of Capacity) Bill[36] and their suggested statutory test can be found at clause 3. At subsection 2 of the clause it states the test:

> "A defendant is to be regarded as lacking the capacity to participate effectively in a trial if the defendant's relevant abilities are not … sufficient to enable the defendant to participate effectively in the proceedings…"[37]

The clause then sets out a list of 'relevant abilities', against which a defendant would be assessed to determine whether they can effectively participate in trial. This list covers a more extensive range of defendant abilities and also includes several decision-making abilities, not presently tested for. If such a bill were to be implemented, it would mean that the test would become wider as more of a defendant's capabilities to understand and participate in proceedings would be assessed. As a result, this would lead to an improved protection of vulnerable defendants as more defendant inabilities are likely to be identified under a test that assesses a defendant more comprehensively.

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[35] Law Commission, *Unfitness to Plead Volume 1: Report* (Law Com No. 364, 2016) para 2.30
[36] Law Commission, *Unfitness to Plead: Draft Legislation* (Law Com No.364, 2016)
[37] Law Commission, *Unfitness to Plead: Draft Legislation* (Law Com No.364, 2016), Clause 3 - p.16

It is important to note that the list of relevant abilities proposed by the Law Commission is non-exhaustive.[38] This would mean that although listed capabilities would be important to assess, the court would be able to consider any other relevant defendant abilities in the specific case. This would provide the flexibility that the courts require when considering this issue.

4.3 A Separate Test for Capacity to Plead Guilty

The Law Commission further propose that, alongside the new 'effective participation' test, there should be a separate test which assesses a defendant's capacity to plead guilty.[39] Defence counsel would be able to invite the court to use this test, only after a defendant has failed the proposed new 'effective participation' test. This secondary test of capacity to plead guilty would assess whether a defendant has sufficient abilities to understand the evidence, the charge and the consequences of pleading guilty.[40] It has been proposed because there are often numerous defendants who are unable to follow and participate in proceedings, but who still have the relevant decision-making abilities to plead guilty. For these defendants, the availability of this secondary test would give them more autonomy, as they would still be able to make their own decision to plead guilty, if the test was passed. In addition, it would also enable these cases to go through a completed criminal process and be concluded. This is in the interests of victims, witnesses and the wider public.

5. Conclusion

It is clear that the existing law provides inadequate and unsatisfactory protection for vulnerable defendants. The low numbers of findings of defendant unfitness illustrate the extent of the failings of a protective function put in place to support the mentally ill. Reform is required and the 2016 Law Commission report has been instrumental in drawing attention to this complex area of criminal law. However, we still await any parliamentary reaction, and this is unlikely to come any time soon as we trudge through the unprecedented 'Brexit' and COVID-19 landscapes. For such a vital aspect of defendant protection, it is important that action is taken sooner rather than later.

[38] Law Commission, *Unfitness to Plead Volume 1: Report* (Law Com No. 364, 2016) para 3.70
[39] Law Commission, *Unfitness to Plead Volume 1: Report* (Law Com No. 364, 2016) para 3.154
[40] Law Commission, *Unfitness to Plead Volume 1: Report* (Law Com No. 364, 2016) para 3.156

The International Criminal Court: Ineffective Or Misunderstood?

Adil Navaid

1) Introduction

The purpose of the International Criminal Court (hereafter 'ICC' or 'the Court') is to hold those perpetrators accountable that commit "the most serious crimes of concern to the international community", to provide justice for the "victims of unimaginable atrocities," and to end the "era of impunity."[1] However, justice is an "inherently subjective" concept,[2] and therefore to assess whether it is ineffective is an inherently flawed objective, as there is no one criteria by which to assess it. The ICC should thus not be seen as isolated from wider international law, but rather as one institution in a larger forum. In light of this, the criticism by the Court's harshest critics, such as John Bolton, appears unjustified and hyperbolic.[3] It represents an outdated and weak perception of the ICC.

The Court has been admittedly ineffective in bringing cases to trial against the most powerful perpetrators of international crimes.[4] However, it would be wrong to ignore the successes of the Court elsewhere, such as in developing international criminal law. The ICC is also seen as unaccountable to an extent, largely due to the nature of the Office of the Prosecutor (hereafter 'OTP') and allegations of 'selective justice' against it. However, the Court has attempted to change this perception in recent times, with limited success. Furthermore, fears of a rogue prosecutor have largely been seen to be untrue. Lastly, the activities of the Court in complex and violent disputes has meant a change in the status quo; the path to peace and justice is no longer solely through the political efforts of the United Nations Security Council (hereafter 'UNSC').

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[1] Rome Statute of the International Criminal Court (adopted 17th July 1998, entered into force 1st July 2002) 2187 UNTS 90 (Rome Statute), Preamble.

[2] M de Hoon, 'The Future of the International Criminal Court. On Critique Legalism and Strengthening the ICC's Legitimacy' (2017) 17(4) International Criminal Law Review 591, 596.

[3] John Bolton, 'Address' (Federalist Society, Washington D.C, 10 September 2018); For a full address see, Editorial, 'Full text of John Bolton's speech to the Federalist Society' *Al Jazeera* (Washington D.C, 10 September 2018) <www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html> accessed 11 December 2019.

[4] For the four crimes that the Court has jurisdiction over, see (n1) art.5.

2) Ineffectiveness

The vast majority of the Court's ineffectiveness remains in its inability to enforce arrest warrants, stemming from its lack of support and eroding legitimacy. However, the Court has been effective in distancing itself from the legacy of previous selection international criminal tribunals and nurturing global awareness of modern crimes.

2.1) Ineffective due to lack of support and eroding legitimacy

The greatest examples of the Court's ineffectiveness can be seen through its failures in tackling the situation in Darfur, ever since its referral by the UNSC in 2005.[5] The ICC has five cases stemming from the situation. One was closed due to lack of evidence,[6] and the four others are pending the arrest or voluntary surrender of the defendant to the Court.[7] It would seem that the ICC struggles with prosecuting individuals from war-torn, uncooperative nations. This is a bigger issue when one considers that those countries are the most likely to be within the scope of the Court.

However, this shortcoming is not attributable to the ICC. International law is based, largely, on positivist and voluntarist theory.[8] Therefore, international law places state sovereignty above all else; no state is bound without its consent.[9] It is the failure of the state party to the Rome Statute that allows impunity for alleged war criminals. Despite two arrest warrants, Al Bashir enjoys immunity in states party to the Rome Statute, which specifically stipulates that head-of-state immunity does not apply when enforcing the arrest warrant.[10] The Court has had to clarify the inapplicability of immunity on multiple occasions:[11] however, this is in vain in the face of

[5] UNSC Res 1593 (31st March 2005) UN Doc S/Res/1593.
[6] *The Prosecutor v Bahr Idriss Abu Garda* (Pre-Trial Chamber I) ICC-02/05-02/09 (8 February 2010).
[7] See, ICC 'Darfur', <www.icc-cpi.int/darfur> accessed 27 December 2019 for cases stemming from the situation.
[8] For further discussion on this, see H.J. Morgenthau, "Positivism, Functionalism, and International Law" (1940) 34 AJIL 260-284.
[9] Succinctly, "state consent is the foundation of international law"; L Henkin, *International Law: Politics and Values* (Brill Academic Pub 1995) 27.
[10] n1 article 27(2).
[11] For the most recent, see *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Appeals Chamber) ICC-02/05-01/09-397-Corr (6 May 2019).

outright defiance by the African Union members.[12] Critics have argued the Court has been placed on a "collision course" with the continent,[13] and has made Africa a "laboratory for new international law."[14] Every act of defiance against the Court further undermines the legitimacy of the Court,[15] and thus breeds stagnation during trial and ineffectiveness overall.[16] Furthermore, the UNSC has taken no steps to help enforce the arrest warrant, nor has it taken any steps to ensure compliance from member states.[17] In addition to this, Resolution 1593[18] only requested for cooperation, rather than mandate it, and thus failed in sufficiently supporting the ICC through a matter it referred.[19] It is submitted that the ICC is only as effective as the international community wills it to be, and that whilst the inception of the Court was expedited through post-Cold War thaw,[20] passion for an effective international criminal court seems substantially diminished.

2.2) The Court must not be compared with previous examples of international criminal tribunals

Both the International Criminal Tribunal for Yugoslavia[21] (hereafter 'ICTY') and the International Criminal Tribunal for Rwanda[22] (hereafter 'ICTR') were ad hoc, and thus served a focused purpose, hence the faster convictions and trial processes.[23] Furthermore, the tribunals had the consistent backing of the UNSC due to being created by them. Only after peace was brokered in the region,[24] and a political consensus was acquired, was the ICTY established. This allowed for greater co-operation and enforcement of the tribunal as a binding authority. In

[12] African Union, 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court' (AU Sirte 2009) Doc Assembly/AU/13(XIII).
[13] V. Ayeni, M. Olong, 'Opportunities and Challenges to the UN Security Council Referral under the Rome Statute of the International Criminal Court' (2017) 25(2) African Journal of International and Comparative Law 239, 250.
[14] 'Vow to Pursue Sudan Over Crimes' BBC News (27th September 2008) <http://news.bbc.co.uk/1/hi/world/africa/7639046.stm> accessed 6th November 2019.
[15] See, generally, R. Aloisi, 'A tale of two institutions: The United Nations Security Council and the International Criminal Court' (2013) 13(1) International Criminal Law Review 147-168.
[16] An illegitimate institution cannot be a successful medium to provide justice, see de Hoon (n2) 594.
[17] Office of the Prosecutor, 'Twenty-Sixth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005)' (12 December 2017) para 11.
[18] Resolution 1593 (n5).
[19] For further discussion on this, see Aloisi (n15) 154.
[20] W Schabas, 'The International Criminal Court: Struggling to Find its Way' in Antonio Cassese (ed), *Realising Utopia: The Future of International Law* (OUP 2012) p250.
[21] Established pursuant to UNSC Res 827 (25 May 1993) UN Doc S/Res/827.
[22] Established pursuant to UNSC Res 995 (26 May 1995) UN Doc S/Res/995.
[23] Schabas (n20) 251.
[24] See UNSC Res 721 (27 November 1991) UN Doc S/Res/721 for the peace-keeping missions in the Former Yugoslavia.

comparison, the ICC has consistently lacked the support of the UNSC,[25] and must investigate what it considers to be the most pressing, and most functionally viable, situations across the world.

Critically, the ICC was envisaged as a permanent institution, and despite reservations,[26] must act in such a manner. As will be later discussed, the ICC is already under attack for being overzealous with its approach and there are fears of a rogue prosecutor.[27] The Court's deliberate and steady approach should not be confused with ineffectiveness, as these criticisms would only likely increase if it were to act in a manner akin to the tribunals. In fact, the Court is still in its infancy, and is only developing further. It recently adopted the definition of aggression,[28] and in 2019 secured approval of the crime of deliberate starvation during civil wars.[29] The latter is critical in tackling modern crimes, and would extend the scope of the Court to situations akin to that in Yemen.

2.3) The ICC is effective in developing international criminal law

The ICC has also been effective in developing international law. The OTP published its policy paper on selection of cases,[30] and stressed the importance of focusing on crimes of environmental damage.[31] Furthermore, the successful conviction of *Al Mahdi*[32] demonstrated the Court's recognition of the critical role the crime plays in displacing communities, and the eventual eradication of peoples.[33] In this way, the court has taken on moral authority,[34] which is a unique and refreshingly responsive role played by an international court towards modern issues. Therefore, it is submitted that the ICC has been effective in addressing a long-

[25] See Aloisi (n15) at 155, describing the UNSC as moving at a "leisurely pace" and suggesting alternatives such as specialised committees to deal with the ICC.
[26] Schabas (n20) 260.
[27] JR Bolton, 'The Risks and Weaknesses of the International Criminal Court from America's Perspective' (2001) 64 Law and Contemp. Probs. 167, 173.
[28] Rome Statute (n1) art 8-bis, adopted in 2010, but the exercise of jurisdiction over the crime was triggered in July 2018, as art 15-bis (2) required the ratification of 30 member states.
[29] Editorial, 'Starvation of civilians in civil conflicts made a war crime' *Scottish Legal News* (11 December 2019) <www.scottishlegal.com/article/starvation-of-civilians-in-civil-conflicts-made-a-war-crime> accessed 29 December 2019.
[30] Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation' (15 September 2016) <www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 28 December 2019.
[31] ibid para 41.
[32] *The Prosecutor v. Ahmad Al Faqi Al Mahdi* (Trial Chamber VIII) ICC-01/12-01/15-171 (27 September 2016).
[33] For a discussion on this, see de Hoon (n2) 607-610.
[34] Ibid.

unaddressed lacuna in international law, as well as being a catalyst in the modernisation of international law.

3) Unaccountable

The ICC is not unaccountable; in fact, it is too constrained. It is argued that the ICC was not only a creation of neoliberalism in international law, but also a response to the instability and unaccountability of the "great powers" and the UNSC permanent members.[35] Criticism on this by Americans such as John Bolton must be read in context; the USA has historically disliked powerful international institutions.[36] During the Court's conception, the USA and France, due to their various peacekeeping missions and involvement in foreign wars, were afraid of a "politically motivated" prosecutor,[37] and Bolton himself advocated for more oversight and control from governments.[38] In fact, the deferral mechanism by the UNSC was introduced to the Rome Statute as a compromise.[39] However, concerns regarding the abuse of the discretion that the OTP enjoys[40] are misplaced.

3.1) The OTP is not unaccountable

The OTP may initiate an investigation *proprio motu*,[41] but this is subject to considerable constraints, hence why it has only been used four times.[42] The OTP must present its request before the Pre-Trial Chamber,[43] and the Pre-Trial Chamber can reject the request if it is not satisfied. Critically, the OTP can also be urged to reconsider its investigations by the pre-trial chamber, so as to ensure the interests of justice are served.[44] Furthermore, the Assembly of State

[35] J Ralph, 'Anarchy is What Criminal Lawyers and Other Actors Make of it: International Criminal Justice as an Institution of International and World Society' in Steven C Roach (ed), *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court* (OUP 2009).
[36] see, generally, Bolton (n27); Alfred P Rubin, 'The International Criminal Court: Possibilities for Prosecutorial Abuse' (2001) 64 Law and Contemp Probs 153-166.
[37] Bolton (n27) 170.
[38] Bolton (n27) 174.
[39] Aloisi (n15) 150.
[40] Rubin (n36) 154.
[41] Rome Statute (n1) art 13(c).
[42] *Situation in the Republic of Kenya* (Situation) ICC-01/09 (31 March 2010); *Situation in the Republic of Côte d'Ivoire* (Situation) ICC-02/11 (3 October 2011); *Situation in Georgia* (Situation) ICC-01/15 (27 January 2016); *Situation in the Republic of Burundi* (Situation) ICC-01/17 (25 October 2017).
[43] Rome Statute (n1) art 15(3).
[44] *Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation* (Pre-Trial Chamber I) ICC-01/13-34 (16 July 2015) paras 23, 26.

Parties, which itself provides oversight, created the Independent Oversight Mechanism in 2017.[45] Therefore, there are multiple oversight mechanisms in place to ensure the ICC is effective and fair.

3.2) The ICC must be allowed discretion to operate effectively

International criminal tribunals have historically been political and selective.[46] Relative to previous international tribunals the ICC is a far more accountable body.[47] Yet, its independence from the "undemocratic nature of the UNSC"[48] is critical to its effective functioning. Only recently has the ICC begun investigating situations in which permanent members of the UNSC are involved.[49]

Furthermore, it would appear that the ICC is accountable to the criticism and views of its member states, as it has made a clear effort to move away from Africa and has boldly taken on, arguably, politically challenging situations.[50] Whilst academics such as Schabas may be hesitant about the ICC's unaccountability,[51] the Court must be allowed to be so, if it is to develop past the UNSC acting as its "gatekeeper".[52] There is a balance between unaccountability and judicial integrity, and it is submitted that not only can they co-exist,[53] but must supplement each other. If the Court can prove its ability without being seen as an extension of the political body that is the UNSC, then it will become a more approachable forum for states seeking justice.[54]

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[45] ICC-ASP, 'Establishment of an independent oversight mechanism' (26 November 2009) ICC-ASP/8/Res.1.
[46] See R Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press 2005) 200-201 for a discussion on the unaccountability of the Nuremberg trials, and specifically that of Admiral Karl Donitz.
[47] Ayeni and Olong (n13) 241
[48] E O Asaala, 'Rule of law or realpolitik? The role of the United Nations Security Council in the International Criminal Court processes in Africa' (2017) 17 African Human Rights Law Journal, 265, 266.
[49] See, for example, Office of the Prosecutor, 'Report on Preliminary Examination Activities (2018)' p19 for the situation in Ukraine involving Russia, and p49 for the situation in Iraq involving the UK.
[50] Office of the Prosecutor, 'Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court's territorial jurisdiction' (20 December 2019) <www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine> accessed 30 December 2019.
[51] Schabas (n20) 258, "...whiff of politics is inescapable..."
[52] Aloisi (n15) 150.
[53] De Hoon (n2) 607.
[54] See, for example, the impact the Court has already had by adopting a broader scope than simply situations in Africa, Aamir Latif, 'Pakistan mulling going to ICC over India's Kashmir move' (*Anadolu Agency*, 6 August 2019) <www.aa.com.tr/en/asia-pacific/pakistan-mulling-going-to-icc-over-india-s-kashmir-move/1551069> accessed 9th December 2019.

4) The ICC's role in peace processes

The Court may be seen to be a danger to delicate political situations. This has been long hypothesised by academics, and critics argue that the Court's interference often heightens tensions if the principle of complementarity is not duly followed.[55] Admittedly, the ICC has recently passed judgments on tenuous reasoning,[56] which may lead to a growing view that the Court is overstepping its competences, and in turn may inspire defiance of the Court. States may remove themselves from negotiations and the undermined legitimacy of the Court may prevent victims from receiving justice.[57]

However, empirical evidence shows the Court has helped deter human rights abuses. A study by Benjamin Appel[58] found that states that have ratified the Rome Statute commit fewer human rights abuses than those who have not. Whilst there are other markers for a reduction in abuses, the ICC ratification can be seen as a recognition of the role justice mechanisms play in peace processes.[59]

Irrespective of its functions in peace processes, and the veracity of its ability to deter human rights abuses, international criminal justice has more than one function. An undeniable benefit of a permanent Court playing an active role in war torn nations is to "institutionalize an official condemnation of certain actions…so that they are commonly understood to be the exception to the norm."[60] The ICC is not meant to only deter, it is meant to help construct a society in which the crimes can be deterred. Once again, this links back to the idea that the ICC must be seen in conjunction with the wider frame of international law.

5) Conclusion

[55] See, for example, MA Newton, 'The Chameleon Court: The Changing Face of the ICC' (2009) 27 Law in Context 5-32.
[56] *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"* (Pre-Trial Chamber I) ICC-RoC46(3)-01/18-37 (6 September 2018).
[57] C H Wheeler, 'Human Rights Enforcement at the Borders: International Criminal Court Jurisdiction over the Rohingya Situation' (2019) 17(3) JICJ 609, 610.
[58] B J Appel, 'In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?' (2018) 62(1) Journal of Conflict Resolution 3-28.
[59] See, P S Wegner, *The International Criminal Court in Ongoing Intrastate Conflicts: Navigating the Peace–Justice Divide* (CUP 2015) 288-298.
[60] J Ralph (n35) 137.

The ICC is an effective institution hampered by the shortcomings of international law and the impact of state sovereignty. It must be viewed in tandem with the other international players to be critiqued correctly, and must be given time as it is only an 18-year old court with a permanent mandate. The Court is accountable to the mechanisms in place under the Rome Statute, but must be given due independence if it is to operate effectively. The Court has earned a place in the modern world during international peace processes, and it can be showed empirically that it deterred human rights abuses.

Proportionality As A Substantive Ground Of Judicial Review At Common Law: "Novel And Dangerous" Or Desperately Needed?

Vishnu J. Patel

Introduction

Lord Diplock's judgment in *Council of Civil Service Unions v Minister for the Civil Service*[1] (commonly known as and henceforth the "*GCHQ*" case) is notable for two key reasons: he reformulated the grounds of judicial review (illegality was consolidated; *Wednesbury* unreasonableness became *GCHQ* irrationality; natural justice became procedural impropriety); and he hinted that proportionality may one day emerge as a ground of judicial review. Thenceforth the question was revived: should the UK courts recognise proportionality as a substantive ground of judicial review alongside illegality and irrationality?

Proportionality can be defined by its three-stage assessment of: (1) whether the decision maker had a legitimate aim; (2) whether the means were necessary to achieve the aim; and (3) whether there was as little (or proportional) interference as possible. Proportionality is formally recognised under ECHR and EU law, but not as a common law ground for judicial review. The arguments against formally recognising it at common law are few and feeble: centring around conceptual constitutional problems; that it breaches the rule of law in terms of legal certainty; and that the 'distinctly' EU ground is irrelevant upon Brexit. Conversely it would appear many stronger arguments can be made in terms of introducing the ground: predominantly that it has actually been long practised under the guise of irrationality; recognising it would re-legitimise the court's authority; and that it would actually aid legal certainty.

The arguments against recognising the ground are first evaluated, showing their weaknesses in comparison to the arguments for; then the arguments for are outlined before concluding that whilst arguments can be made both ways, only the arguments in favour hold any real weight.

[1] [1985] A.C. 374.

Arguments Against Recognising Proportionality

Professor Ian Loveland notes two conceptual problems with the introduction of proportionality into UK common law. Firstly it is not the job of the appellate courts to question the best way to achieve an outcome (the substantive problem); and secondly the appellate jurisdiction of the courts was created by statute, not the common law (the jurisdictional problem).[2] These are valid problems in theory. The judiciary allege that proportionality would bring the courts too close to the merits of the decision, which is not within their judicial review purview. Lords Roskill and Bridge made clear they struggled with these problems in *R v Secretary of State Ex p. Brind*,[3] stating that it was not for them to interfere in the merits of a decision made under a parliamentary duty conferred upon the Secretary of State.[4] Lord Lowry was particularly certain that there was "very little room" for judges to operate a doctrine of proportionality between traditional substantive grounds of review and their appellate jurisdiction.[5] Two points must be made: firstly their Lordships have taken a very narrow approach to the issue and properly construed proportionality does not amount to an appellate jurisdiction;[6] secondly, these conceptual problems are outweighed by that proportionality has precedence and would be better practised as an independent ground not under the guise of irrationality (further discussed below). Therefore arguments based on the aforementioned conceptual issues are not true issues and do not support the case against recognising proportionality.

The other key objection to proportionality is that its effect in UK law is only felt as a result of ECJ jurisprudence: leaving the EU should also entail the removal of this foreign import. The ECJ made clear the principle of proportionality was applicable to community institutions as well as member states in *Italy v Watson and Belmann.*[7] Since then all government action on EU matters was subject to a proportionality test. However, given that we are leaving the EU, should the ground not disappear with it? J.Simor QC at a White Paper Conference at The Caledonian Club

[2] Ian Loveland, *Constitutional law, administrative law, and human rights: a critical introduction*, Oxford University Press, 8th ed, 201. 377-80.
[3] [1991] 1 A.C. 696.
[4] Ibid. 765.
[5] Ibid. 767.
[6] Loveland. *Op cit.*
[7] (118/75); [1976] 2 C.M.L.R. 552.

in 2018 made clear this ground is not a distinctly foreign import.[8] This is developed further under the arguments for proportionality. Nonetheless the logic that it came with the EU and should go with the EU is clearly flawed. Whilst the test developed under ECJ jurisprudence need not be directly imported into common law, it is not the case that the principle should disappear.

Furthermore, there is the argument that judges would be too politicised, and their personal views imported onto the facts of the case would render the law uncertain. This presupposes that irrationality is a sounder and more certain ground than proportionality – a fundamentally flawed argument. Whilst the high bar in *GCHQ* certainly protects ministers, the test itself has led to differing outcomes (cf. *Roberts v Hopwood*[9] with *Hall & Co. Ltd v Shoreham-by-Sea Urban District Council*[10] and *R v. Hillingdon LBC, Ex p. Royco Homes Ltd*[11]*).* The three-stage proportionality test under EU law or the four-stage test under ECHR law (see Lord Sumption in *Bank Mellat v HM Treasury (No2)*[12]) are more rigorously applied than the loose concept of irrationality. The substance of those tests is largely irrelevant for present purposes (the three-stage test is mentioned in the introduction); but it is worth noting the questions are to be objectively answered. And there is no reason why the common law cannot formally recognise proportionality and adopt these tests for domestic law purposes. The judges will not (if the test is properly applied) get too close to the merits of the case; their personal views are not at issue and the rigorous test renders the law more certain than the irrationality test. Therefore, arguments of over-politicisation and importation of personal merits are unfounded given the solid ECHR and EU law tests upon which a UK common law test could be founded.

Finally, and related to the above, one should not forget that in any case judges are necessarily political: the proper application of their power protects the democracy that we so cherish.[13] One should not dismiss proportionality merely because there is fear of the judges becoming political – they are political! Their fabled apoliticism is as much a constitutional myth as the separation of

[8] Jessica Simor QC, "Is the civil law interpretation of proportionality causing the Court to become political and therefore harder to predict?", 2018, <https://www.matrixlaw.co.uk/wp-content/uploads/2016/03/Does-the-proportionality-test-make-judges-too-political.pdf>. Accessed on 10/12/2020.
[9] [1925] A.C. 578.
[10] [1964] 1 W.L.R. 240.
[11] [1974] Q.B. 720.
[12] [2013] UKSC 39; [2014] A.C. 700 at [20].
[13] Jessica Simor QC. *Op. cit.* 12.

powers: indeed, L'Hereux J in *R v Seaboyer*[14] stated that judges are necessarily informed by their experiences and preconceptions. Judges are humans; humans have opinions informed by their lives. There is no way of escaping that any person who sits on the Bench will be influenced by their personal views to some degree: Baron Burnett of Maldon LCJ's 'five-year action plan' to tackle 'implicit bias' in the judiciary is proof that the problem is already recognised.[15] Therefore the argument that judges will be politicised is baseless. Judges are by their very natures, as humans, somewhat political. And given that they will not be importing their personal views any more than usual onto the merits of a decision, with the aforementioned structured tests, their political nature is not a problem.

Arguments for Recognising Proportionality

The key reasons for recognising the ground of proportionality at common law are that it has precedence and would aid judges escape criticism. Although Millett J (as he then was) in *Allied Dunbar (Frank Weisinger) Ltd v. Frank Weisinger* [16] described proportionality as a "now fashionable…[but] novel and dangerous doctrine", with respect, he was wholly wrong. Lee writes that Lord Diplock's assertion in *GCHQ* that there may be a future for proportionality completely ignores cases such as *R v Barnsley MBC Ex p. Hook*[17] where such language was already used.[18] The ground is certainly not novel; and nor is it (as above) a foreign import. The history of proportionality shall be explored, showing a strong impetus to recognise it; and then the concept of it being a dangerous ground shall be dispelled, showing arguments for proportionality's recognition are far stronger than those against.

Although in modern law the proportionality test might be thought to be a European import, with the French and Germans having long-recognised it, the principle in UK law can be traced not to EU accession but to the Bill of Rights 1690 and perhaps further. Professor Jowell and Anthony Lester QC firmly disagree with Millett.[19] In the Bill of Rights there were to be no "excessive

[14] [1991] 2 S.C.R. 577.
[15] Courts and Tribunal Judiciary, *Judicial Diversity and Inclusion Strategy 2020-2025*, Judicial Office, 2020, <https://www.judiciary.uk/wp-content/uploads/2020/11/Judicial-Diversity-and-Inclsuion-Strategy-2020-2025.pdf>.
[16] [1988] 1 WLUK 672.
[17] [1976] 1 W.L.R. 1052.
[18] Simon Lee, "GCHQ: prerogative and public law principles", *Public Law*, 1985. 186-193.
[19] Anthony Jowell and Anthony Lester, "Proportionality: neither novel nor dangerous", *New Directions in Judicial Review: Current Legal Problems*, 1988. 51-72.

baile…excessive fines" or "cruell and unusuall punishments". These exemplify that in criminal law the punishment must fit the crime and Jowell and Lester claim this shows that the English attitude was rooted in state actions needing to be proportionate.[20] They are correct and in *Ex p. Hook* Lord Denning held that the punishment was *excessive* and *out of proportion* to the occasion.[21] What is this if not proportionality? *R v. Secretary of State for the Home Department, Ex p. Benwell*[22] saw Hodgson J accept that quasi-judicial penalties can be shown to be disproportionate so as to be perverse.[23] Similarly in *R v Brent LBC, Ex p. Assegai*[24] Woolf LJ held that a ban from all local authority property due to bad behaviour in a meeting was "wholly out of proportion to what the applicant had done". Clearly proportionality has common law precedent that is not tied to the EU or ECHR.

Furthermore, this language is not merely a modern common law trend towards proportionality but a representation of the historic acceptance of proportionality within the legal system. Professor Craig examined the usage of words like "proportionably" and "proportionable", showing they are used 763 and 1230 times in statutes from the 17th century respectively.[25] Usually they are used in regulatory statutes with a view not to burden an individual too excessively. Any argument objecting to the lack of the word "proportionality" itself fails to understand the semantic differences do not prevent the substantive principles remaining the same. The concept of proportionality has existed in the legal system for a long time, and recently has been enforced at common law as a ground of review (see *Hook*, *Benwell*, *Assegai*). Indeed cases where the word proportionality is not used, e.g. *Wheeler v. Leicester City Council*[26] or *Congreve v Home Office*[27], are best analysed under it: comments on the misuse of power with no actionable wrong or an unfair means of achieving the desired result may not mention proportionality but clearly amount to judgment on the disproportionality of the council's actions.[28] Proportionality has precedence both at common law and more widely in the domestic legal system. This does not *per se* provide a reason

[20] Ibid. 60.
[21] [1976] 1 W.L.R. 1052. 1057.
[22] [1985] Q.B. 554.
[23] Ibid. 568-569.
[24] [1987] 1 WLUK 368.
[25] Paul P. Craig, "Proportionality and Judicial Review: A UK Historical Perspective" 2016, *General Principles of Law: European and Comparative Perspectives, ed S Vogenauer and S Weatherill*. 2016, Oxford Legal Studies Research Paper No. 42/2016. 7.
[26] [1985] A.C. 1054.
[27] [1976] Q.B. 629.
[28] See the judgments of Lords Templeman and Roskill in *Wheeler* respectively.

for its recognition but does provide a solid basis for its formal adoption and dispels the many myths in the arguments against its recognition.

The strongest reason for the formal adoption of proportionality as an independent ground of review is that it currently approximates and is exercised under the guide of irrationality. Jowell and Lester point out that hiding the concept away as such puts the judiciary in a difficult position: decisions that misapply the irrationality test appear to be politically motivated and the judges utilise ineffective justifications to defend themselves.[29] Therefore, in *Hall & Co. Ltd* that the council were better placed to deal with the condition on their planning permission and in *Ex p. Royco Homes Ltd* comments on that the objective could have been attained with less adverse consequences are both unjustifiable in relation to irrationality. Irrationality was the substantive ground of review in question, but questions of proportionality were raised and appear to be the court assessing the merits of the decision; under a rigorous proportionality test, this would not be called into question. Although Lord Widgery CJ in *Royco Homes* suggests both cases fit better under the concept of illegality, the comments are clearly made in relation to the proportionality test (better placement of burden) and amount to a French-type *le bilan coût-avantages* analysis. In essence proportionality would stop the courts trying to justify what appears to be a rectification of a bad decision by misapplying irrationality. The solidification of proportionality as a ground for judicial review allows the courts to apply a rigorous test, dissolving prior notions of political judicial aims; it would be a most welcome addition to the substantive grounds of judicial review. Millett J was wrong to call the ground novel or dangerous: it is certainly more dangerous to allow the legitimacy of court decisions be called into question than to accept the long-established in all but form substantive ground of proportionality.

Conclusion

It is clear that there are reasons both for and against recognising proportionality as a ground of review at common law. However, it is also clear that the arguments against recognising proportionality hold little weight. In spite of judicial *dicta* to the contrary, the conceptual difficulties are misguided; the test from EU/ ECHR law can easily be imported to form a test more rigorous than that of irrationality; and it is neither a novel nor dangerous nor foreign

[29] Jowell and Lester. *Op. cit.* 67-68.

concept. It is, as suggested, far more dangerous not to allow the courts to adopt the ground at common law: it gives rise to suspicion and calls into question the legitimacy of court decisions. Thus whilst there are arguments for and against recognising the ground, it is obvious that allowing a ground with such precedence to be overlooked is in no way desirable.

An Evaluation Of The Effectiveness Of The Corporate Manslaughter And Corporate Homicide Act 2007

Isaac Rajakaruna

In order to critically evaluate the effectiveness of the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA) this essay will first outline corporate manslaughter under the common law, and then under the Act, before finally evaluating whether or not the Act has made any substantial change to the offence. Corporate manslaughter is defined as causing death through gross breach of a relevant duty of care, where the cause is the poor organisation or management of the company's activities[1]. It must be stated that this definition creates a dual requirement for breach of a duty, and conduct falling grossly below what could reasonably be expected[2].

The common law offence of corporate manslaughter required attribution of the mind of an agent, or at one stage agents, to the mind of the company because, although the company is a separate legal personality[3], it cannot think for itself and so, but for the attribution of the mental state of another, it would not be liable for offences requiring mens rea. Use of the broad principles of agency would be unfair to a company, because even one which took every step available at financial detriment to itself would still be liable for the actions of one rogue employee[4]. Similarly, aggregation of the minds of multiple agents was wholly rejected when reference was made to the need for an "identified individual's conduct" rather than acts of a collective of individuals[5]. As shall be explored below, the rejection of the aggregation theory of attribution was one of the great failings of the common law offence. This leaves the common law with a need for a single agent's mind to be attributed to that of the company's, which was done through the directing mind and will test.

[1] Corporate Manslaughter and Corporate Homicide Act 2007, s1
[2] Dobson, "Shifting Sands: Multiple Counts in Prosecutions for Corporate Manslaughter" (2012) 3 Crim LR 200
[3] *Salomon v A Salomon & Co Ltd* [1896] UKHL 1
[4] David Kershaw, Company Law in Context (2nd edn, OUP, 2012) at 166
[5] *R v HM Coroner for East Kent, ex p Spooner* [1989] 88 Cr App R 10; *AG Reference (No 2 of 1999)* [2000] 2 BCLC 257

It was held by a Court for the first time in 1944 that a company could be liable for a criminal offence which required proof of mens rea[6], though the concept of a directing mind and will was coined nearly three decades earlier[7]. The doctrine was developed in order to "overcome problems of mens rea"[8], whereby the acts and states of minds of the directing mind and will are taken to be those of the company for which the company will be liable[9]. This test was clearly established as the correct test over aggregation or agency in 1957[10], which was later confirmed by no less than the House of Lords[11]. In the House of Lords case *Tesco*[12] were held as not liable for the actions of a store manager for failure to adhere to the Trade Descriptions Act because the manager was not a director, and so failed the directing mind and will test. This position was surely an absurdity, because it allowed Tesco to slip through the net though they had, through their agent, in fact committed the very mischief the Act was aimed at. This effect of the test demonstrates one of the failings of the common law which CMCHA sought to amend whereby it was far easier to prosecute large companies with more diffuse management[13] than smaller companies, particularly the so-called "one-man businesses"[14] owing to the fact that in the latter it was far easier to determine who the directing mind and will were. Even where failings at every level of management lead to nearly 200 deaths there would be no finding of corporate manslaughter if one person's mind could not be attributed to that of the company[15].

Companies were even able to escape liability if they could prove that the deceased was particularly skilled or experienced such that a portion of the duty of care could be offloaded on to them[16]. This ability to discharge some of the duty coupled with the need for the mindset of one sufficiently ranked agent (i.e. a director) explains why although there were 34 prosecutions for corporate manslaughter from 1992 to 2006 there were only six convictions, and only of small companies[17]. The greatest issue clearly presented by the common law was a failure to hold to account larger

[6] *DPP v Kent & Sussex Contractors Ltd* [1944] KB 146
[7] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705
[8] Edwin Mujih, "Reform of the law on corporate killing: a toughening or softening of the law?" (2008) 29(3) Comp. Law 76
[9] Smith and Hogan, Criminal Law (11th edn)
[10] *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159
[11] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, HL
[12] ibid
[13] Pickford and Alderton "Corporate Killing" (2005) 149(26) SJ 784 at 784
[14] *R v Kite* [1996] 2 Cr App R 295
[15] *R v P & O European Ferries (Dover) Ltd* [1990] 93 Cr App R 72
[16] *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743
[17] G Summers "Work Related Deaths" (2006) 150(13) Solicitor's Journal 422

companies though, even where there were prosecutions, the fines ranged from £4k to £90k[18], an abysmal reflection of the sometimes-great loss of life caused by these incidents. However, there was the interesting interaction of the Health and Safety at Work Act[19] (HSWA) which could explain the lack of prosecutions for manslaughter. The HSWA does not require a causal link between the death and the gross breach of the company, and consequently is a much easier charge to prove[20]. Indeed, cases involving death would be brought under HSWA over bringing a charge for corporate manslaughter for this reason[21], allowing companies to escape the label which would cause greater detriment to the business. This in itself is an issue of the common law position, because companies would frequently plead guilty to the lesser health and safety offences, most likely in the knowledge that the Crown could not afford the lengthy litigation required to demonstrate the requisite mens rea and gross breach for corporate manslaughter.

It is interesting to note that Parliament allowed for agents as low as managers to have their minds attributed to the company for the purpose of demonstrating fraudulent accounting[22], though no such changes were introduced for corporate manslaughter until the CMCHA even though death is surely a far greater consequence than the Theft Act offence.

The 2007 Act clearly had areas on which it was expected to make improvements, namely: higher fines, more prosecutions, and longer prison sentences[23]. Ultimately, its intention was to spread the net of "corporate criminal liability" more widely[24] and achieve greater equality of economic impact on offending organisations of different sizes[25]. In aiming for this goal, the Act entirely abolished the common law rules relating to the offence[26] and made some seemingly large changes to the position, such as the requirement to include the actions of senior management not just

[18] N Davies "Sentencing Guidance: Corporate Manslaughter and Health and Safety Offences Causing Death – Maintaining the Status Quo?" [2010] Crim LR 402
[19] Health and Safety at Work Act 1974
[20] P Thompson, "Corporate Killing and Management Accountability" (2006) 156(7211) New Law Journal 232
[21] *R v British Steel Ltd* [1995] 1 WLR 1356
[22] Theft Act 1968, s18
[23] Gerald Forlin, "Corporate Punishment" (2006) 156(7250) New Law Journal 1789
[24] Sarah Fielder & Lucy Jones, "The Corporate Manslaughter and Corporate Homicide Act 2007 and the sentencing guidelines for corporate manslaughter: more bark than bite?" (2015) 36(11) Comp Law 327
[25] Sentencing Advisory Panel, Advice to the Sentencing Guidelines Council: Sentencing for Corporate Manslaughter and Health and Safety Offences Involving Death (2009), recommendation 6
[26] Corporate Manslaughter and Corporate Homicide Act 2007, s20

those of directors[27]. The Act expressly states the words "the persons"[28] as opposed to a person suggesting the actions of multiple individuals can be combined in determining the liability of the company. This alteration moves away from the identification theory of attribution used at common law and towards aggregation theory[29] which should theoretically at least lead to an increase in prosecutions by lowering the bar to be met.

Issues with the Act have been highlighted and, unfortunately, they are precisely those which the Act was brought in to extinguish. Clarkson noted that there could be "endless arguments in court" to determine who are considered to be senior managers[30], and this senior management test will, of course, still be in the favour of big companies where it is more difficult to determine in which category an employee will fall[31]. This issue is marginally alleviated because it is no longer necessary to prove that senior management had knowledge for a gross breach to occur[32], whereas foreseeability was previously a key element[33] which could be a ground that led to the reduction in any fines issued[34].

The affect that the Act has had on corporate manslaughter shall now be considered. It must immediately be stated that, by 2019, there had been 26 companies convicted of corporate manslaughter[35], significantly higher than the 6 convictions between 1992 and 2006. 11 of these convictions under the Act were pre-2015, and 7 of those were guilty pleas, so clearly the corporate perception of the offence is that there is a high likelihood of being convicted at trial. The first successful conviction was, however, a small company with a single director, which would have been caught under the common law offence[36]. Although the company itself is no different than those caught previously, this case did abolish the *Qualcast*[37] ratio allowing for a variable duty, which would increase the ease of finding a conviction, and also increases the equality of impact

[27] Ibid, s1(3)
[28] Ibid, s1(4)(C)
[29] D Ormerod and R Taylor, "The Corporate Manslaughter and Corporate Homicide Act 2007: Legislative Comment" (2008) Criminal Law Review 589
[30] Clarkson, "Corporate Manslaughter: Yet more Government Proposals" [2005] Crim LR 677 at 683
[31] Bebb, "Plus CA Change?" 68 Employment Law Journal 22 at 22
[32] Corporate Manslaughter and Corporate Homicide Act 2007, s8
[33] *R v HTM Ltd* [2006] EWCA Crim 1156
[34] *Transco plc* [2006] EWCA Crim 836
[35] Tolley's Employment Law Service, Health and Safety at work, Health and Safety at Work etc Act 1975, Corporate Manslaughter
[36] *Cotswold Geotechnical Holdings Ltd* [2011] EWCA Crim 1337
[37] *Qualcast* (n 16)

on companies charged. Under the Act there have been acquittals of the manslaughter charge, and continually low-level fines issued, which is "interpreted as judicial sympathy" towards companies which contribute to the economy[38]. This position follows the common law whereby fines were set against pre-tax profits[39], and with consideration to the financial circumstances of the offending company[40].

Changes were brought in more recently to alter the financial impact in order to increase fines, including a move to link fines to turnover by the Sentencing Council[41] which must be considered by the courts when passing sentence[42]. For completeness, it must be noted that CMCHA does allow for the issuing of unlimited fines[43], and with this in mind it will now be explored whether the change in sentencing guidelines has led to the issue of greater fines. It would appear that the courts are still imposing a means tested consideration on the imposition of fines, for example issuing fines only £4,024 below the total assets of a company[44] payable over 5-years to prevent insolvency (£150k fine)[45]. This extended time for payback shows that the courts are reluctant to have the "effect of terminating the business"[46], similarly, they are still linking fines to profit rather than turnover to minimise the risk of insolvency[47]. However, the fines that are being imposed are essentially "every penny" that the company has available[48] and, it is submitted, demonstrate the fact that courts are considering the impact on innocent employees who would be made redundant if larger fines were issued. This is also, perhaps, a contributing factor to the issuing of concurrent fines by the courts, for example £1.2mil per death fined to *Martinisation*[49] with only £1.2mil payable.

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[38] Edwin Mujih, "Reform of the law on corporate killing: a toughening or softening of the law?" (2008) 29(3) Comp. Law 76

[39] *R v ESB Hotels Ltd* [2005] EWCA Crim 132

[40] Criminal Justice Act 1991, s18; *R v F Hower & Sons (Engineers) Ltd* [1999] 2 Cr App R (s) 37

[41] Sentencing Council, Health and Safety Offences, Corporate Manslaughter & Health and Safety Offences Causing Death: Definitive Guideline (2010) (SGC, Guidelines)

[42] Criminal Justice Act 2003, s172

[43] Corporate Manslaughter and Corporate Homicide Act 2007, s1(7)

[44] *Cavendish Masonry Ltd,* Oxford Crown Court, unreported 22 May 2014; L Ponting "Corporate Manslaughter Fine Allows Offender to Keep Going" (2015) 435 Health and Safety Bulletin 7

[45] L Wustemann, "Corporate Killing carries £150k fine for stonemasons" (2015) 9(1) Tolley's Health and Safety at work, p4

[46] *R v Murray & Son Ltd* [2013] NICC 15

[47] *R v Lion Steel Equipment Ltd* 20 July 2012 unreported; *R v JMW Farms Ltd* [2012] NICC 17

[48] *Princes Sporting Club Ltd*; H Fidderman "Fifth Corporate Manslaughter case claims first non-worker" (2014) 426 Health and Safety Bulletin 15; *Mobile Sweepers (Reading) Ltd*; *Peter Mawson Ltd*; N Barrett, "News in Brief" (2015) 26(2) Construction Law 5(1); *R v Sterecycle (Rotherham) Ltd*; J Vvan der Luit-Drummond, "Legal News" (2014) 158 Solicitors Journal 44

[49] *Martinisation (London) Ltd* 2017

Concurrent fines are a common theme in this area of law, however, there has also been an increase in HSWA sentences including higher custodial sentences and even disqualification from directorship[50]. It is suggested that this increase in fines and sentences for HSWA offences is an attempt by the courts to have a greater punitive effect against companies that plead guilty to the lower charge to avoid the corporate manslaughter label. The relationship between HSWA offences and the new offence has been described as "interesting or… incoherent"[51], considering that it is vital to establish a breach of the former to convict for the latter[52].

Having considered the alterations that the Act has made, and what affect they have had, the author submits that the Act has been effective in some respects though not in those which are arguably most important. It has clearly been effective in increasing the punitive effect of convictions on companies and decreasing the likelihood of a company pleading guilty to HSWA offences. Of course, the fines issued are only rarely above the £500k start point in the guidelines, though, as has been mentioned, this is because of the impact that the company going insolvent will have on both the economy and innocent employees of the company. The greatest issue is that the Act, for now at least, only catches the companies that would have been caught by the common law. It is suggested that in order to catch larger companies, entirely separate sections of the Act should be inserted to expressly define whom should be considered as senior management in such organisations, in order to tighten the net and prevent them from escaping liability. In summation, the author considers the Act to be ineffective for its purpose, and would only consider it effective at the point that larger companies begin to be convicted for corporate manslaughter.

[50] Ibid and *CAV Aerospace Ltd* 2015; *R v Southern Water Services Ltd* [2014] EWCA Crim 120; *R Stellafield Ltd*; *R v Network Rail Infrastructure Ltd* [2014] Env LR 19

[51] D Ormerod and R Taylor, "The Corporate Manslaughter & Corporate Homicide Act 2007" [2008] Crim LR 589

[52] Gobert, "The Corporate Manslaughter and Corporate Homicide Act 2007 – thirteen years in the making but was it worth the wait?" (2008) 71 Modern Law Review 413-433

A Critical Analysis Of The Positive Obligations Under Article 2 Of The ECHR – Protection Of Right To Life

Tehreem Sultan

Introduction

Over the past few decades, positive obligations under articles of the European Convention on Human Rights (ECHR) continue to play a pivotal role in evolving and sculpting the system.[1] Article 2 of the ECHR *'protects every individual's right to life, while no one shall be deprived of their life intentionally other than resulting from the use of force which is no more than absolutely necessary'*, in the following circumstances, i) defence of a person from unlawful violence, ii) preventing the escape of a detained person, iii) lawful action taken for quelling a riot or insurrection. [2] The fundamental characteristic of Article 2 of the Convention[3], consists of positive obligations imposed on the State to ensure the system is running effectively and is up-to date. There has been potential disagreement on determining if this is an effective and well-established doctrine. Addressing this multi-faceted issue, this essay shall firstly evaluate what justifies as a positive obligation, while discussing the nature of the Convention. Secondly, the main focus lies on the evolution of the obligations placed on the state, while identifying the three positive duties initiating from the first seminal case of '*Osman v UK*'.[4] Lastly, this essay shall assess the implications these obligations have, considering the social developments and the increasing tensions and burdens placed on the authorities. While reviewing the key concepts and approaches

[1] T Sarikaya, 'Positive Obligations Doctrine of the European Court on Human Rights: Is It Cogent or Obscure?' (2017) 2 (6) EJMS 359.
[2] Article 2, European Convention on Human Rights.

[3] *McCann and Others v the United Kingdom,* (App No 18984/91) (1995) 21 EHRR 97.

[4] *(1998) 29 EHRR 245.*

adopted by various authors; *Dickson*[5]*, Mowbray*[6]*, Juliet Chavelier*[7], the aim of this essay is to afford an overall understanding of the subject, to provide a systematic picture of the positive obligations under Article 2, and the varying consequences they pose.

What justifies as 'positive obligations' jurisprudence?

To begin with, there is a need to understand the purpose behind the creation of 'positive' obligations. From the nature of the Convention, to the varying deficiencies in the system, the Court reiterates the primacy of the Convention to ensure Human Rights remain interdependent and indivisible.[8] With the rising complications in society, and a need for a higher rigidity in determining the breaches of principles, maintaining the human rights system has become a challenge as described by *Harris and Warbrick*.[9] As *Dickson* confirms, the ECtHR adapts to not only strive for the 'prevention of violations' but rather also the 'construction of better rights framework'[10]

The Nature of the Convention and Evolving Characteristics of the Court

[5] Dickson B, 'Positive Obligations and The European Court of Human Rights' (2010) 61(3) NILQ 203.

[6] A Mowbray, The Development of Positive Obligations under the European Convention on Human Rights by the, European Court of Human Rights (Hart Publishing, Oxford 2004).

[7] J Chevalier-Watts, 'Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?' (2010) 21(3) Eur J Int Law 701.

[8] T Sarikaya, 'Positive Obligations Doctrine of the European Court of Human Rights: Is It Cogent or Obscure?' (2017) 2 (6) EJMS 359, 360.

[9] DJ Harris, M Boyle, Warbrick, Law of the European Convention on Human Rights (2nd, Oxford University, Press, New York 2009), 71.

[10] B Dickson, 'Positive Obligations and The European Court of Human Rights' (2010) 61(3) NILQ 203, 204.

The evolving nature of the convention indicates that judicial changes of the ECtHR are unavoidable. Originally, aiming to provide judicial remedies rather that carrying our positive obligations,[11] *Dickson* states that the Court is trying to transform itself from "a factory churning out thousands of judgements each year" to "an institution that can make a real difference to the lives of people."[12] Further confirmed by '*Artico v Italy*'[13] which points out the role of the convention is intended to guarantee practical rights rather than theoretical ones.[14] As a consequence, the dynamics of the Court have changes, since now it aims on keeping up with societal context, a positive stimulus for the Courts. Now, this essay will analyse the three main positive obligations placed on the state.

Positive Obligations Under Article 2

As justified by evolving jurisprudence, the absolute nature of the expression 'protection of right to life,' consists of a negative obligation to refrain from unlawful killing, and a positive obligation to 'protect' the right to life. In *'LCB v United Kingdom'*[15], the Strasbourg Court recognized for the first time the double obligation nature of Article 2, which requires the Contracting Party to not only refrain from the intentional taking of life, but to implement appropriate measures to safeguard life.[16] The court indicated in *McCann v UK*[17], mistakes would not necessarily give rise to a breach of article 2, 'since there was no prescribed procedure to scrutinize justification for the use of lethal forces in a domestic legal system,' [18] the court imposes a range of positive obligations through its judicial interpretation and creativity, as suggested by *Janis et al.*[19] The three recognized duties consist of;

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[11] S Fredman, 'Human rights transformed: Positive Duties and Positive Rights' (2006) Oxford Legal Research, Paper 38/2006, p.1.

[12] B Dickson, 'Positive Obligations and The European Court of Human Rights' (2010) 61(3) NILQ 203, 205.
[13] *[1980] ECHR 4 para 33.*
[14] Ibid.
[15] *(1998) 27 EHRR 212, ECHR 1998-III.*
[16] B Rainey, E Wicks and C Ovey, *The European Convention on Human Rights* (7th edn, OUP 2017) 161.
[17] *(1995) 21 EHRR 97.*
[18] Ibid [16].

[19] M. Janis, R. Kay, and A. Bradley, European Human Rights Law Texts and Materials (3rd edn, 2008), at 130-131.

preventive and protective measures, planning and supervision of operations, and the effective investigation in killings. This paper will observe them in separate turns respectively.

I) Protective and Preventive Measures

Interpreting the Convention, the Court highlights the duty to take preventive operational and protective measures to individuals who are under an immediate risk or threat. The first case dealing with positive obligations, *'Osman v UK'*[20] established that the failure to take reasonable measures to avoid a risk, violates Article 2.[21] This 'Osman Test'[22] confirms the horizontal (state to state) and not only vertical effect (state to individual),[23] since the ECHR also poses a positive obligation on a member state to protect an individual from the criminal act of another.[24] This case is of immense importance since it lays out the basic principles protecting the risk to life.

Currently developing case law, has confirmed the various duties imposed on the state, to place an effective safeguarding mechanism. This is clearly reflected by the tragic case of '*Centre of Legal Resources v Romania,*'[25] and the deaths occurring after the premature release of an individual from detention in '*Branko Tomasic v Croatia*'.[26] Furthermore, as analysed in *Keenan v UK*[27], it is incumbent on states to account for injuries suffered in custody, since prisoners are considered to be in a vulnerable state, taking into account their mental health issues. However, there is a fine line between the interference by the state, since the operational duty to protect an individual from real risk of

[20] *(1998) 29 EHRR 245, [116].*
[21] B Rainey, E Wicks and C Ovey, *The European Convention on Human Rights* (7th edn, OUP 2017) 162.
[22] See *Hertfordshire Police v Van Colle* [2008] UKHL 50 (30 July 2008).
[23] See *Costello-Roberts v United Kingdom*, (1993) 19 EHRR 112.
[24] *Osman v The United Kingdom*, (1998) 29 EHRR 245, [115].
[25] *Centre for Legal Resources on Behalf of Valentin Campeanu v Romania, (App.47848/08), 17 July 2014 [GC].*
[26] *Brank Tomasic and Others v Croatia, (App. 46598/06), 15 January 2009.*
[27] *Keenan v United Kingdom, (App. 27229/95), 3 April 2001, (2001) 33 EHRR 913, ECHR 2001-III.*

suicide, in '*Reynolds v United Kingdom*'[28], also raises the issue of a conflict with rights under Article 8 (respecting the autonomous decision regarding death).[29]

The Strasbourg Court interprets the obligation rather narrowly, as '*Jacobs, White and Ovey*[30]' claim. Acknowledging the difficulties involved in policing modern societies, the unpredictability of operational choices and human conduct, and the limited resources of a state, the Court specifies that obligations had to be interpreted without imposing a disproportionate burden on the authorities, [31] thus assured to not create a too high standard of care required by the state.

Medical and Environmental Rights Failures

Taking into consideration the economic situation of every country, fulfilling every citizens need is a challenge when introducing minimum health care provisions.[32] Errors of judgement made by medical practitioners, and deprivation of access to appropriate emergency care, indicates that the state is held to a standard of duty to protect the physical needs, as rightly justified in *'Mehmet Senturk and Bekir Senturk v Turkey*.[33] Traditionally, the court took the approach that death caused by medical negligence does not constitute to a breach of Article 2, [34] however with an advancement in judgments, the more recent 2017 case of '*Lopes De Sousa*'[35] amends this rule of negligence law. Due to these changing circumstances, it is confirmed that there is increasing ambiguity in these *developing* positive obligations.

[28] *Reynolds v United Kingdom, (App. 2694/08), 13 March 2012.*
[29] B Rainey, E Wicks and C Ovey, *The European Convention on Human Rights* (7th edn, OUP 2017) 164.
[30] Ibid.
[31] Ibid 162.
[32] T Sarikaya, 'Positive Obligations Doctrine of the European Court of Human Rights: Is It Cogent or Obscure?' (2017) 2 (6) EJMS 359, 363.
[33] *(App. 13423/09), 9 April 2013.*
[34] *Powell v United Kingdom, (App. 45305/99), 4 May 200, Decision on Admissibility.*
[35] *Lopes de Souza Fernandes v Portugal, (App. 56080/13), 15 December 2015.*

The Court also assures that providing sufficient information regarding possible threats is a state responsibility.[36] As reflected in '*Oneryildiz v Turkey*'[37], the lack of information provided to the inhabitants regarding the buildup of toxic waste, led to the Turkish authorities being held accountable. Similarly, there is a duty of regulation on the Contracting state, where the risk to life appears from a dangerous but lawful activity, military tests[38], or toxic waste emissions[39]. This positive obligation is also extended further to natural disasters, confirmed by the devastation caused by mudslides in '*Budayeva*'[40]. Therefore, the court has gradually widened its positive obligations doctrine by enforcing new duties on the state.[41]

II) Planning and Supervision of Operations

As a subsidiary organ, the protection of human rights requires that the relevant conventions are interpreted in the light of social developments. Due to a lack of appropriate care and precaution when carrying out operations by civilian or security forces, there are positive obligations imposed on the state for the effective implementation of Article 2 which are discussed below.

To begin with, Article 2 imposes a positive duty on state to provide adequate training, briefing and instructions to its security forces and to supervise any action which might contain lethal force, which was not 'absolutely necessary'.[42] The landmark case of *McCann v UK* [43] set out a certain standard; the ECtHR concluded that the killings in this scenario were not a proportional response since there was

[36]T Sarikaya, 'Positive Obligations Doctrine of the European Court of Human Rights: Is It Cogent or Obscure?' (2017) 2 (6) EJMS 359, 363.
[37] (2004) 41 EHRR 2.

[38] *LCB v United Kingdom, (1998) 27 EHRR 212, ECHR 1998-III.*
[39] *Guerra v Italy, (1998) 26 EHRR 357, ECHR 1998-I.*
[40] *Budayeva and others v Russia, ECHR 2008 (extracts).*
[41] T Sarikaya, 'Positive Obligations Doctrine of the European Court of Human Rights: Is It Cogent or Obscure?' (2017) 2 (6) EJMS 359, 363.
[42] *McCann and Others v the United Kingdom,* (1995) 21 EHRR 97.
[43] Ibid [151].

lack of appropriate care in organising and control. [44] As *Mowbray* states[45] this ruling depicts the courts eagerness to examine the level of care taken by security forces of the member states involved in operations. However, it was found otherwise in the case of *Andronicou and Constantinou v Cyprus.*[46]These contrasting verdicts by the court in a span of three years, indicates that there is an extent of inconsistency in the courts doctrine which is loosely legitimized.[47]

III) The Duty to Investigate Suspicious Deaths

Focusing on the final positive obligation, the Court imposes 'a procedural and investigative duty' on the states, surrounding the death or disappearance of an individual. The seminal case of *McCann v UK*,[48] was the turning point in the Court's authority to scrutinize state actions.[49] The Strasbourg Court observed the "obligation to protect the right to life under Article 2 requires the effective official investigation where individuals have been killed due to force used by 'inter alios', state agents". Reflecting upon the Court's practical interpretation, this judgment was a guarantee of rights,[50] providing the groundwork from which principles developed. *Ergi v Turkey*[51] stands as a milestone along with *McCann v UK*[52], in developing the Court's jurisprudence,[53] and emphasizing the shift in

[44]Ibid [212].

[45] A Mowbray, The Development of Positive Obligations under the European Convention on Human Rights by the, European Court of Human Rights (Hart Publishing, Oxford 2004) 9.

[46] *(1997) 25 EHRR 491.*
[47] T Sarikaya, 'Positive Obligations Doctrine of the European Court of Human Rights: Is It Cogent or Obscure?' (2017) 2 (6) EJMS 359, 364.

[48] *(1996) 21 EHRR 97.*

[49] J Chevalier-Watts, 'Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?' (2010) 21(3) Eur J Int Law 701, 703.

[50] Mowbray A, 'The Creativity of the European Court of Human Rights', 5 *Human Rights Law Review* (2005) 57, 78.

[51] *32 EHRR 388, ECHR 1998-IV.*
[52](1995) 21 EHRR 97.
[53] Sperotto, 'Law in Times of war, the case of Chechnya', 8 Global Jurist (2008), Topics, Article 5,1.

jurisprudence to stringent accountability of an operation at all stages.[54] Furthermore, the Grand Chamber directed the issue of an effective investigation for disappearances of Cypriot nationals during Turkish military operations, in '*Varnava and others v Turkey*.'[55] As founded, Article 2 interpreted in light of international humanitarian law,[56] imposes an obligation to account for the whereabouts and information on missing individuals. Thus, making states more accountable for killings and disappearances under their jurisdiction.[57]

The crucial elements of a proper investigation were specified while reviewing the lawfulness of lethal force used by the state in '*Ramsahai*'[58]. The judgment in this shooting police case, combined with *Brecknell v UK*[59] sets out a certain criterion for what accounts as an 'effective investigation'. This includes the effectiveness, practical independence of the investigation,[60] and the accessibility to family and public scrutiny.[61] Furthermore, *Mccaughey v UK*[62] also established that an excessive delay in an investigation would categorise it as ineffective. Particularly in cases where the evidence is not sufficient to justify the killing, an effective investigation has formed a vital part of the Strasbourg Courts artillery, while complying with various measures. [63]

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[54] J Chevalier-Watts, 'Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?' (2010) 21(3) Eur J Int Law 701, 704.

[55] *[GC], ECHR 2009.*
[56] B Rainey, E Wicks and C Ovey, *The European Convention on Human Rights* (7th edn, OUP 2017), 169.

[57] *Kelly and Others v the United Kingdom, [2001] ECHR 40.*

[58] *Ramsahai and others v Netherlands, (2008) 46 EHRR 083, ECHR 2007-nyr.*

[59] *[2007] All ER (D) 416.*

[60] The requirement of an independent investigation when the respondent state is in occupying power was considered in Jaloud v Netherlands, and Al Skeini, involving deaths in Iraq, drawing emphasis on the fact that the investigating authority was operationally independent of the military chain of command.
[61] *Brecknell v the United Kingdom, [2007] All ER (D) 416, para 75-82.*
[62] *Mccaughey and others v United Kingdom, (App. 43098/09), 16 July 2013.*
[63] B Rainey, E Wicks and C Ovey, *The European Convention on Human Rights* (7th edn, OUP 2017) 168.

Burdens on the State

Are these developing obligations becoming increasingly onerous for the State*? Rainey and Wicks*[64] rightly criticize these detailed levels of investigations, considering *'Jelic v Croatia'*[65]. These measures might prove to be impracticable or expensive to apply, therefore creating unrealistic standards regarding the application of Article 2.[66] Despite an element of discretion available to the states, it is best to not be 'overly prescriptive'.[67] Suggesting that, where such crimes are implicated, the burden to reopen investigations may be greater due to public interest.[68] With the evolving duties under investigation, the courts striking to provide effective remedies under Article 2, the Court attempts to not to bring an onerous burden to the state.[69]

Conclusion

After a slow start, the judgments concerning the right to life have now secured their place amongst the richest and most dynamic Convention case law.[70] However, despite the advancements, it is asserted by *Dickson (2010),* that these positive obligations still do not demonstrate a "*principled and systematic commitment*" to all of the rights.[71] Thus, this essay preferred to evaluate the main positive obligations derived and concludes that positive obligations doctrine has yet some vague aspects, in need of further clarification. Due to the uncertainty and inconsistency in the implementation of the

[64] Ibid.
[65] *Jelic v Croatia, (App. 57856/11), 12 June 2014.*
[66] B Rainey, E Wicks and C Ovey, *The European Convention on Human Rights* (7th edn, OUP 2017) 171.
[67] J Chevalier-Watts, 'Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?' (2010) 21(3) Eur J Int Law 701, 714.
[68] H*ugh Jordan v The United Kingdom*, (2003) 37 EHRR 52.
[69] J Chevalier-Watts, 'Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?' (2010) 21(3) Eur J Int Law 701.
[70] B Rainey, E Wicks and C Ovey, *The European Convention on Human Rights* (7th edn, OUP 2017) 182.

[71] B Dickson, 'Positive Obligations and The European Court of Human Rights' (2010) 61(3) NILQ 203, 207.

doctrine, there have been varying impacts on the protection of right to life under Article 2, while concerns of an increasing burden on states.

Who Owns The Future?[1]

Jack Ventress

Like modern-day versions of the masses who rushed to the Klondike in the late Nineteenth Century, social media companies are alive to the fact that "there's gold in them thar data".[2] The value of the EU data economy stood at €301 billion in 2018 and is predicted to rise to €829 billion by 2025.[3] Whilst only a small proportion of this figure comprises personal data, companies have developed sophisticated ways of profiting from their share. Meanwhile, the relative impotence of the current legal regime leaves those willing provide providers of personal data, the data subjects, with very little actual control.

This essay considers whether the use of personal data by social media companies could be regulated using the principles of property law. It is divided into four sections: Part I will outline the problem, Part II will define the key terminology used, Part III will deal with the substantive legal issues and Part IV will explain why this is of concern to legislators.

Part I: Data commodification

It is well-known that data platforms such as Apple, Amazon, Facebook and Google commodify personal data to turn a profit.[4] Each platform harnesses user data differently: Google and Facebook are an advertising duopoly in the sense that an estimated 85% of money spent on advertising goes to those two companies alone.[5] Amazon, meanwhile, harnesses personal data by tracking consumer behaviour in infinitesimal detail. The methods used by these companies are developing along with new technologies. For example, AI-powered analytics now enable rich

[1] Jaron Lanier, *Who Owns the Future?* (Simon & Schuster 2013)
[2] The Economist, 'The world's most valuable resource is no longer oil, but data' (*Economist*, 6 May 2017) <https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data> accessed 1 June 2020
[3] *Ibid.*
[4] Scott Galloway, *The Four: The Hidden DNA of Amazon, Apple, Facebook, and Google* (Penguin 2017)
[5] John Herrman, 'Media Websites Battle Faltering Ad Revenue and Traffic' (*The New York Times*, 17 April 2016) <https://www.nytimes.com/2016/04/18/business/media-websites-battle-falteringad-revenue-and-traffic.html> accessed 30 May 2020

individual profiles to be constructed from each user's personal data, which can then be sold on to third parties.[6]

At the heart of the relationship between data platforms and their users is the 'data for services' model, "in which users are neither paid for their data contributions to digital services nor pay directly for the value they receive from these services".[7] According to Lanier, this model undermines market principles, prevents data subjects from receiving their share of the wealth that is created using their personal data and prevents users from becoming "first-class digital citizens".[8]

Crucially, the protections offered by GDPR are woefully inadequate.[9] The 'take it or leave it' approach adopted by most platforms, whereby users are simply offered the opportunity to consent to a fixed regime of privacy settings invites the question of whether this consent is truly meaningful.[10] It is submitted that by framing the relationship between data platform and subject in terms of privacy, GDPR simply creates a mechanism through which users consent to the exertion of quasi-proprietary rights over their personal data by social media companies whilst receiving little in return.

Part II – Definitions

Data

The term 'data' is not defined anywhere in European law and precise definitions can vary between sectors.[11] The definition of data used here is "machine-readable

[6] The Economist, 'Data is giving rise to a new economy' (Economist, 6 May 2017) <https://www.economist.com/briefing/2017/05/06/data-is-giving-rise-to-a-new-economy> accessed 2 June 2020
[7] Arrieta Ibarra, Imanol and Goff, Leonard and Jiménez Hernández, Diego and Lanier, Jaron and Weyl, Eric Glen, 'Should We Treat Data as Labor? Moving Beyond "Free"' (2017) *American Economic Association Papers & Proceedings* 1:1 <https://ssrn.com/abstract=3093683> accessed 31 May 2020
[8] Lanier, *Who Owns the Future?*
[9] Brendan Van Alsenoy, Valerie Verdoodt, Rob Heyman, Jef Ausloos, Ellen Wauters and Güneş Acar, 'From Social Media Service to Advertising Network. A Critical Analysis of Facebook's Revised Policies and Terms' (*SPION*, 31 March 2015) <http://www.law.kuleuven.be/icri/en/news/item/icri-cir-advises-belgian-privacy- commission-in-facebook-investigation> accessed 30 May 2020
[10] See Fred H Cate, 'The Failure of Fair Information Practice Principles' in Jane K. Winn (ed), *Consumer Protection in the Age of the Information Economy* (Ashgate 2006); E Kosta, *Consent in European Data Protection Law* (Martinus Nijhof 2013)
[11] Anna Kocharov, 'Data Ownership and Access Rights in the European Food Safety Authority' (2009) *European Food and Feed Law Review* 5, 336

encoded information".[12] This excludes the broader understanding of 'data' as simply being synonymous with 'information'. 'Data' is used throughout this essay as a plural noun, as per the convention in scientific literature.[13]

Personal/non-personal data

Personal data are "any piece[s] of information that [relate] to an identifiable person" and are subject to GDPR, meaning that individuals are provided with a number of rights in relation to their personal data that do not exist elsewhere.[14] Personal data can include photographs, Facebook status updates, financial records and even certain data recorded by automatic vehicles, as well as all of the associated 'metadata' (i.e. information about that data such as their time or location). In principle, 'non-personal data' refers to everything else (e.g. industrial data collected by sensors in a production line). However, the boundary between personal and non-personal data is not always easy to distinguish.[15]

Data subject

The 'data subject' is the individual to whom personal data relate.[16]

Part III – Property rights over personal data

Broadly speaking, property rights are defined as rights that are enforceable against the world (*in rem*) as opposed to those which are only privately enforceable (*in personam*). There is no right of ownership over data within the European Union.[17] Whilst GDPR offers data subjects rights in relation to their personal data, these do not amount to property rights.[18]

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[12] Herbert Zech, 'Data as a Tradeable Commodity' in Alberto De Franceschi (ed), *European Contract Law and the Digital Single Market: The Implications of the Digital Revolution* (Intersentia 2016), 53
[13] ONS Digital, '"Data is" versus "data are"' (*ONS Digital Blog*, 8 December 2016) <https://digitalblog.ons.gov.uk/2016/12/08/data-is-versus-data-are/> accessed 3 June 2020
[14] General Data Protection Regulation: Regulation (EU) 2016/679 [2016] OJ 2016 L 119/1, Art 4(1)
[15] Michelle Finck and Frank Pallas, 'They who must not be identified—distinguishing personal from non-personal data under the GDPR' (2020) *International Data Privacy Law* 10:1
[16] General Data Protection Regulation: Regulation (EU) 2016/679 [2016] OJ 2016 L 119/1, Art 4(1)
[17] Ivan Stepanov, 'Introducing a property right over data in the EU: the data producer's right – an evaluation' (2020) *International Review of Law, Computers & Technology* 34:1, 74
[18] Nestor Duch-Brown, Bertin Martens, Frank Mueller-Langer, 'The economics of ownership, access and trade in digital data' (2017) European Commission Joint Research Centre Working Paper 2017 No 1 <https://ec.europa.eu/jrc/sites/jrcsh/files/jrc104756.pdf> accessed 31 May 2020

This section will discuss two fundamental aspects of the law of property in relation to personal data: where personal data fit within the *numerus clausus* of legal objects and how proprietary rights over personal data fit with the 'bundle of rights' theory.

Legal objects

'*Numerus clausus*' traditionally refers to the limited number of legal rights which can exist in the law of property,[19] but this issue will be discussed in the subsequent section. The question here is whether personal data could and should be the *object* of legal rights – i.e. does it fit within the *numerus clausus* of legal objects?[20]

Firstly, it is necessary to consider this question from a computer science perspective. Fundamental to any future legal regulation of data is "the scientific consensus that digital information is not intangible, but is physical, tangible matter".[21] It is important that data are regarded as tangible because the rights provided by the law of property relating to intangibles – i.e. intellectual property law – are of little utility when it comes to the protection of personal data: bank transactions and medical records cannot be said to have been the product of any human creativity, nor are they protected by the database *sui generis* right.[22] That said, it is difficult to imagine how one might 'possess' personal data in the everyday sense of the word. The solution, as shall be discussed in the following section, may be to grant limited proprietary rights over data that do not amount to outright ownership.

Secondly, from a legal certainty perspective, the fundamental distinction between personal and non-personal data is not as clear-cut as it may first appear. Through the 'network effect', recent

[19] Thomas W. Merrill and Henry E. Smith, 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle (2000) *Yale Law Journal* 110:1; Sjef van Erp, 'A Numerus Quasi-Clausus of Property Rights as a Constitutive Element of a Future Property Law?' (*EJCL*, 2003) <https://www.ejcl.org/72/art72-2.PDF> accessed 2 June 2020

[20] Sjef van Erp, 'Ownership of Data: The Numerus Clausus of Legal Objects' (2017) 6 *Brigham-Kanner Property Rights Conference Journal* 235

[21] Jeffrey Ritter and Anna Mayer, 'Regulating Data as Property: A New Construct for Moving Forward' (2018) *Duke Law & Technology Review* 16:1; see also Rolf Landauer, 'Information is Physical' (1991) Physics Today 44

[22] Francesco Banterle, 'The Interface between Data Protection and IP Law: The Case of Trade Secrets and the Database sui generis Right in Marketing Operations, and the Ownership of Raw Data in Big Data Analysis' in M Bakhoum, B Conde Gallego, M-O Mackenrodt, G Surblytė-Namavičienė (eds), *Personal Data in Competition, Consumer Protection and Intellectual Property Law Towards a Holistic Approach?* (Springer-Verlag 2018)

AI-powered data analytic techniques enable many more individuals to be identified from one datum than was previously possible.[23] The concept of transparency requires that property rights are clearly defined and are knowable at least by those who have an interest in knowing about them.[24] Therefore this is clearly a potential technical barrier to the introduction of proprietary rights over personal data and is something that legislators should consult on.[25]

Another key characteristic of data, often cited in discussions about whether property rights *should* apply, is their supposed non-rivalrousness.[26] Non-rivalry is where the consumption of goods by one person does not mean that they become unavailable for others. This characteristic may invite the conclusion that there is no justification for including data amongst the *numerus clausus* of legal objects to which property rights may apply, because there is no scarcity of resource.[27] However this interpretation does not hold water when applied to personal data.[28] According to Purtova, personal data are a rivalrous resource because they must be extracted, or 'harvested', from data subjects, of whom there is a limited number. Furthermore, the data economy is dominated by a small number of platforms who have the ability to harvest personal data. Most importantly, these data platforms are able to exclude others from having access to the harvested data. Given that exclusion of the world at large is a fundamental aspect of property rights, it can therefore be said that data platforms exert quasi-proprietary rights over the personal data they collect.

'Incidents of a novel kind'

> "it must not… be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner"[29]

[23] N. Purtova, 'Do property rights in personal data make sense after the big data turn? Individual control and transparency' (2017) *Journal of Law and Economic Regulation* 10:2
[24] van Erp, 'Ownership of Data'
[25] Purtova, 'Do property rights in personal data make sense after the big data turn?'
[26] Oren Bracha, 'Give us back our Tragedy: Nonrivalry In Intellectual Property Law and Policy' (2018) 19 *Theoretical Inquiries in Law* 633; Drexl *et al.*, 'Data Ownership and Access to Data: Position Statement of the Max Planck Institute for Innovation and Competition of 16 August 2016 on the Current European Debate' (2016) *Max Planck Institute for Innovation & Competition Research Paper* No. 16-10 <https://dx.doi.org/10.2139/ssrn.2833165> accessed 31 May 2020
[27] Simon Douglas, 'The Argument for Property Rights in Body Parts: Scarcity of Resources' (2014) *Journal of Medical Ethics* 40:1
[28] Nadezhda Purtova, 'The illusion of personal data as no one's property' (2015) Law, Innovation and Technology 7:1
[29] *Keppell v Bailey* (1834) 2 My & K 517; [1834] 39 ER 1042

Turning to the traditional conception of *numerus clausus*, which refers to the principle that private individuals may not create new forms of property right,[30] this section will consider which of the 'bundle of rights' might apply to personal data. Notwithstanding recent criticism of the 'bundle of rights' theory of property rights,[31] Professor Honoré's eleven 'incidents of ownership' provide a useful guide for our discussion of how existing property rights might apply to personal data.[32]

On one hand, some of these incidents clearly could not apply to data. It does not make sense to think about granting the 'right to possess' – possession being defined as "exclusive physical control" – in relation to data.[33] This can be observed in the common law, in the recent case of *Your Response v Datateam*, in which the Court of Appeal considered whether the defendant could exercise a possessory lien over the claimant's database.[34] It was held that simply exercising control over the database did not amount to a continuing right of possession. This reflects the unwillingness of the common law to bend traditional concepts such as 'possession' to apply to new legal objects, such as data.

On the other hand, it is submitted that the "right to manage" and the "right to the income" could be highly applicable to personal data and could represent the key to restoring the balance of power between data platforms and subjects. The right to manage is "the right to decide how and by whom the thing owned shall be used" and income is "a reward for work done in exploiting the thing".[35] Granting individuals the right to manage their personal data would offer far stronger protection than the existing GDPR provisions, which it has been shown are liable to abuse.[36] Furthermore, the notion of granting individuals the right to manage their data fits closely with the ideals of natural justice: it makes sense that *you* ought to have a degree of control in managing *your* personal data, and that you ought to take a share of its value where it is traded for profit.[37]

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[30] Avihay Dorfman, 'Property and Collective Undertaking: The Principle of *Numerus Clausus*' (2011) 61 *University of Toronto Law Journal* 467

[31] Thomas W. Merrill & Henry E. Smith, 'The Architecture of Property' in Hanoch Dagan & Benjamin Zipursky (eds), *Research Handbook on Private Law* (Edward Elgar Publishing 2019)

[32] A. M. Honoré, 'Ownership' in A. G. Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961)

[33] *Ibid*., 371

[34] *Your Response Limited v Datateam Business Media Limited* [2014] EWCA Civ 281

[35] Honoré, 'Ownership', 372

[36] See Part I: Data commodification

[37] B. Sharon Byrd and Joachim Hruschka, 'The Natural Law Duty to Recognize Private Property Ownership: Kant's Theory of Property in His Doctrine of Right' (2006) *The University of Toronto Law Journal* 56:2

Taking a cursory glance beyond the central issue of disparity between data platforms and subjects reveals other potential areas of benefit. Most notably, succession lawyers have bemoaned the complex web of legal issues that must be disentangled when managing digital assets upon death.[38] In a notable judgement last year, a woman who had been denied access to her late husband's iCloud account containing family photographs despite her being the sole heir and executrix was forced to gain a court order to allow her to retrieve the personal data.[39] Introducing a proprietary right akin to Honoré's "incident of transmissibility" over personal data, which would allow the right to pass upon the death of the original right-holder, could provide data subjects with greater control when managing their personal data footprint on death.

Part IV – Law Reform

As suggested in the introduction to this essay, the scope of this proposed area for reform is enormous: in 2017, an estimated 66% of UK citizens over the age of 16 were active on social media.[40] There are two specific reasons why legislators should be concerned with the idea of property rights over personal data.

Firstly, the Law Commission's Thirteenth Programme Consultation Booklet lists 'Electronic Signatures' and 'Smart Contracts' as topics of interest, showing that legislators are awake to the positive potential of new digital technologies.[41] Whilst these areas certainly merit attention, the Law Commission must be wary of the damaging potential of digital technologies and should not neglect its duty to consumers.

[38] H. Conway & S. Grattan, 'The 'New' New Property: Dealing with Digital Assets on Death' in H. Conway & R. Hickey (eds), *Modern Studies in Property Law, Volume 9* (Hart Publishing 2017)

[39] Mark Bridge and Jonathan Ames, 'Widow wins long battle for iPhone family photos' (*The Times*, 11 May 2019) <https://www.thetimes.co.uk/article/widow-wins-long-battle-for-iphone-family-photos-h7mv9bw7t> accessed 3 June 2020

[40] ONS, 'Social networking by age group, 2011 to 2017' (*ONS*, 2017) <https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/adhocs/007401socialnetworkingbyagegroup2011to2017> accessed 3 June 2020

[41] Law Commission, 'Thirteenth Programme of Law Reform' (Law Com No 377, 2017) <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/12/13th-Programme-of-Law-Reform.pdf> accessed 31 May 2020

Secondly, the European Commission has placed data at the centre of its strategy for the next 5 years.[42] Although the UK has indicated a desire to work alongside the EU specifically on the topic of the regulation of personal data,[43] its decision to leave the European Union means that legislators have an increased burden of keeping abreast of law reform independently from its European counterpart. This area of reform represents an excellent opportunity for the UK to exhibit its leadership credentials in the digital space.

Conclusion

The regulation of social media companies is one of the great public policy challenges of our time. This essay has outlined one specific issue – the unfettered commodification of personal data – and provided a potential solution. Whilst it seems that the window in which property rights may have been useful in regulating personal data may have closed for the time being, the issue remains highly pertinent and ought to be at the forefront of the government's post-Brexit digital strategy. If nothing is done it will be us, the data subjects, who will be left panning for fool's gold.

[42] European Commission, 'A European Strategy for Data' (Com No 66, 2020) <https://ec.europa.eu/info/sites/info/files/communication-european-strategy-data-19feb2020_en.pdf> accessed 31 May 2020

[43] HM Government, 'The exchange and protection of personal data: a future partnership paper' (2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639853/The_exchange_and_protection_of_personal_data.pdf> accessed 2 June 2020