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Preface from the Head of The University of Manchester Law School

It is a great honour to provide the preface for the Manchester Review of Law, Crime and Ethics, a journal that has been central to student learning and research in the University of Manchester. The Journal has been of special significance and as the new Head of Law I look forward to supporting the work of the Editorial Board for the purpose of consolidating even further the contribution the Journal makes to student legal scholarship. The current Volume provides strong confirmation of the attractiveness of the Journal for analyses that are characterised by originality, rigour and significance. The articles included in this Volume focus on a number of areas of topical importance and engage with such matters in the most interesting, comprehensive and thoughtful way. As my predecessor, Professor Yenkong Ngangjoh-Hodu, noted in the past, the contributions in the Journal are accurate reflections of the study in Manchester, a top Russell Group Law School that promotes interdisciplinary research. I am glad this Volume covers issues ranging from commercial law and procurement to medical law and ethics and human rights. This range is a testament to the pluralism of our research and teaching environment. The articles in this Volume exemplify the analysis and exploration of complex legal questions of our time. They provide invaluable insights into some of the key legal issues that will underpin academic debates in decades to come. I will highly recommend this Volume to anybody interested in contemporary intellectual debates.

Professor Aristea Koukiadaki
Head of the University of Manchester Law School

November 2022

Preface from the Editor-in-Chief

This Journal, now in its eleventh Volume, comes at a rather convenient time, being just a handful of months after lawyer and former Chief Crown Prosecutor for North West England, Nazir Afzal OBE, is appointed Chancellor of the University of Manchester. In anticipation of this preface, I took it upon myself to ponder the pages of Nazir's recent publication, *The Prosecutor*, and found words therein which, to no surprise, epitomised the principle to which this Journal and all of its stakeholders must attest: "[e]ducation is the most powerful weapon which you can use to change the world."[1] If anything, my time as Editor-in-Chief of this Review has revealed the importance of this message, and I trust that the papers below will evidence to our ever-growing readership the full extent of its truth.

With education will inevitably come a diversity of thought and opinion, and I am delighted to be able to bring this diversity to the attention of our readership this year. After all, whether we agree, disagree or hold complete indifference with another's thoughts and feelings, it is true that they proffer something from which we can learn. Surely it is only with this alien opinion in mind that we can truly sit well or unwell with our own opinion; that we can rest assured or unassured that we were or were not right! And it only tends to be when we no longer do sit well or assured with a prior opinion that the power of diverse thought reveals itself, in that moment of sudden realisation or enlightenment when our now outdated belief is superseded by another's more refined. But all too often, I think, we fear this phenomenon, many of us too comfortable and

[1] For a fascinating insight into Nazir, see Nazir Afzal, *The Prosecutor* (Ebury Press 2020). Nazir is, of course, referencing Nelson Mandela, who spoke these words during a speech given in South Africa on 16 July 2003.

cocooned within the confines of what we already know, perhaps even oblivious to an alternative argument or perspective. In my view, it is exposure to these new arguments and perspectives which underpins the very aims of education. So, quite simply, when flicking through the pages below, I invite all readers to remind themselves of what lies beyond the confines of their own mind, and what beauty there is in knowing what they do not already know.

Indeed, diversity of thought has been the focal point of this year's Volume. So much so that, since I was privileged enough to have been appointed to this position, my Deputy and I set out to take the reach of the Review one step further. In an attempt to expand the variety of literature exhibited in this Journal, we liaised with universities from across the United Kingdom ('UK'), building far-reaching relationships and introducing new students to this platform. Students from all corners of the country submitted works of differing specialism—a small handful of which feature below alongside the works of Manchester's own scholars—and we are nothing short of fortunate to have had the opportunity to digest them all. In his preface, my predecessor, Timothy Ke rightly touched on the prospects of greatness which follow those who have contributed to this Journal. I am certain that the same can be said of this year's contributors, wherever they are from.

But it is not only the thoughts of the *next* generation of lawyers, ethicists, scholars and the rest that fill this Journal. This year, we are indebted to both Dr. Eleanor Aspey and Mark George KC, who kindly took time to impress on these pages their experience of law at the coalface. Eleanor, a researcher and (I testify, particularly brilliant) lecturer at the University of Manchester, draws on her specialist knowledge of EU public procurement law to illuminate lessons to be learned from the UK's approach to procurement during the COVID-19

pandemic. Mark—a leading criminal barrister, head of chambers, sociolegal commentator and person from whom we can all learn—on the other hand, shares his experiences of the criminal justice system and its unfortunate decline over the past 25 years or more. These contributions to Volume XI make it a well-rounded and particularly important read, but more than that they make it a doubtlessly timely one too.

As Stephen Fry so perfectly put it during his acknowledgements for *Moab is my Washpot*, "[a] problem that bedevils the [author] is that he cannot guess with any confidence whom he will offend by inclusion in his book and whom by exclusion."[2] I find myself with a similar problem, the list of those to whom I owe a great debt for their unstinting professional and emotional support being longer than I could have imagined. But at the forefront of my mind must be this year's Editorial Board: Che, Eve, Jacob, Lisa, Rosie, Stefan and Yee, each and every one of them bringing to this Volume a personality of such diligence and each and every one fuelled by nothing more than their own conscientiousness. And of course, this Journal could not exist without the authors of the works which this Board will be so proud (and relieved!) to finally find printed to the paper below. But I need not speak much more of the skill of our Editors and authors, for that skill I know will leap out at all who expose themselves to this year's contributions.

To my predecessor, Timothy Ke, and his then Deputy, Zhen Qi (Quintus) Wong: my thanks to you are unconditional, since but for your decision to pass the torch my way, I could not have experienced the pleasure and pride that I do now. It is with this in mind that I too find myself vacating my seat to make room for another, this time for Jacob Wharton, an Editor

[2] Stephen Fry, *Moab is my Washpot* (Arrow Books 1998) 435.

who I have had the comfort of working alongside during the formation of this Volume and whose meticulous craftsmanship and passion for academia combine to present an ideal successor.

And finally, a note on my Deputy Editor-in-Chief, ardent supporter and good friend, Adam Spencer. All those months ago, in no more flattering a manner than via text message on the CrossCountry service from Euston to Piccadilly, I invited Adam to embark on this journey with me. "I will gladly accept mate, thank you" he responded in his typically polite and eager way. It would be disingenuous to suggest that either of us knew much of what lay ahead, but perhaps even more disingenuous to suggest that without the kind-hearted support of my trusty Deputy this Journal would resemble anything of the sort presented below. His tenacious work-ethic, managerial mastery and all-round good spirit—inevitably mustered from a life filled with experience—leaves its mark both on the contents of this Journal itself and on all of those who have invested valuable time into its eventual creation.

Thomas Carter
Editor-in-Chief

November 2022

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Absent or Present? A Re-examination of the Existence of a Good Faith Doctrine in English and International Commercial Law

Kurnia Rozliham[†]

Often in commercial agreements, parties focus on the more objective and routine aspects: which items to purchase, how many and for what price. Subjective elements, though commonly overlooked, also play an important role in concluding these transactions, particularly the practice of good faith. However, there is a looming shroud of doubt regarding whether such a doctrine exists in specific jurisdictions of law. The most ethical of individuals in the mercantile world would certainly adhere to good faith principles, though this stems solely from personal ideals of being a well-mannered merchant rather than the existence of a legal incentive. So, is a good faith doctrine an extant and legally mandatory practice in English commercial law? How does this differ from international commercial transactions governed by their respective legal instruments? This paper aims to examine these questions vis-à-vis commercial agreements and negotiations. To that end, this paper references a myriad of English case law and international legal instruments, which include the UNIDROIT Principles of International Commercial Contracts and the United Nations Convention on Contracts for the International Sale of Goods. Contrary to popular belief, a more in-depth study of English case law precedent surprisingly reveals that some legal authority supports the need to practice good faith, provided certain conditions are fulfilled. On the other hand, international commercial law completely welcomes the doctrine of good faith with unqualified embrace, mandating its practice as a legal requirement in commercial transactions.

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I. Introduction

The doctrine of good faith has penetrated English commerce[3] and has "influenced judicial institutions throughout their evolution,"[4] causing it to manifest as a practicable standard in commercial law. Interestingly, despite being a widely known concept in mercantile dealings, good faith does not possess a globally universal definition. Some jurisdictions have codified its meaning, while in others legal scholars have interpreted it at common law in lieu of express legislation. English law relies on a common law definition outlined by Lord Bingham, who characterises good faith as "a principle of fair and open dealings,"[5] with its effects presented through "metaphorical colloquialisms such as 'playing fair' […] and 'putting one's cards face upwards on the table'."[6] While some academics have denied good faith as a practicable element of commercial practice, several others have acknowledged its existence as a legitimate commercial component.

This article aims to illuminate the extent to which good faith exists in distinct scopes of commercial law. Section II will first elucidate that good faith does not generally apply in English commercial law, but that it only conditionally exists in several major transactions such as commercial agreements and negotiations. Following that, Section III widens the scope to examine good faith in commercial contracts under international commercial law, focusing on the provisions laid out in the UNIDROIT Principles of International Commercial Contracts and the United Nations Convention on Contracts for the International Sale of Goods in order to compare the existing

[3] *Yam Seng PTE v International Trade Corp Ltd* [2013] EWHC 111.
[4] Laureano Gutierrez, 'Good Faith in Commercial Law and the UNIDROIT Principles of International Commercial Contracts' (2005) 23(3) Penn State International Law 507, 507.
[5] *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433.
[6] ibid.

imposition of good faith in international commercial law with that found in English law.

II. Good faith in English law

(i) Commercial agreements

Generally, the concept of good faith is not used in English law, especially in commercial agreements. Unless certain requisites are satisfied, good faith is not a default contractual component and is unenforceable, implying a mere conditional existence. As previously mentioned, English law does not posit a legislative authority of binding good faith into commercial dealings and, as such, it was not historically utilised. To illustrate, in *Ingham v Emes*,[7] the courts relied solely on the contract's implied terms and not Ingham's breach to behave in good faith to disclose relevant information of her allergic condition. This suggests that the good faith doctrine at the time lacked legal influence to be an adequate obligation to enforce and was not commonly employed. This judicial reluctance to employ the good faith doctrine is explained by the popular preference to uphold other principles of commercial dealings, particularly primacy of contractual intention and legal certainty.[8] As Bridge notes, the adoption of a good faith doctrine might consequently lead to an abandonment of "legally reasoned decisions" for "personal values."[9] This suggests that the traditional view towards good faith points to a more subjective approach in resolving disputes by potentially considering moral elements.[10]

[7] *Ingham v Emes* [1955] 2 QB 366.
[8] Roger Brownsword, 'Good Faith in Contracts Revisited' (1996) 49(1) Current Legal Problems 111, 114.
[9] Michael Bridge, 'Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?' (1984) 9 Canadian Journal of Business Law 385, 412–13.
[10] Brownsword (n 8) 117.

Recently, the English judicial culture has become progressively—though restrictively—welcoming towards the good faith concept and has begun to employ it in certain agreements, particularly those involving relational parties. This breakthrough can be seen in *Yam Seng*,[11] where the courts enlightened the significance of good faith in the relevant transaction. The defendant, International Trade Corp. ('ITC'), stated that they had "recently signed" a licence agreement to distribute certain products when negotiating with Yam Seng for a 30-month distribution contract which later had been agreed into. However, ITC only truly acquired the licence around the same time the distribution agreement was signed. Yam Seng sought damages for misrepresentation as ITC's false assurance of their licence had induced Yam Seng into contracting with ITC. The court's principal issue was whether an obligation of good faith should be implied into their distribution contract. Primarily, the nature of any contract is typically founded on trust, which necessitates elements of honesty and fairness to be included. As stated in *Yam Seng*, "a general norm […] is an expectation of honesty [which] is essential to commerce, which depends critically on trust."[12] Consequently, a cooperative link is formed between contracting parties, especially relational parties such as parties of long-term distributorship agreements illustrated in *Yam Seng,* or personal friends which demands good faith as a collaborative measure to ensure integrity between them. This implies that elements of good faith are enforced, proving, initially, that it does exist in English practice. The aforementioned collaborative relationship is also illustrated in *Al Nehayan* involving a contract based heavily on "personal friendship," affirming that contracts between relational parties essentially require good faith to ensure that the contract is held upon reasonable expectations, and hence

[11] *Yam Seng PTE* (n 3).
[12] ibid [135].

will be commonly implied.[13] Similarly, in *Bristol Groundschool Ltd*,[14] Spearman QC enforced an implied term of good faith in a relational contract, demonstrating a growing recognition for the reliance of good faith in these contracts.

However, the existence of good faith does not extend to all English commercial agreements by default; instead, it exists *conditionally* in English commercial law. While the obligation can be implied in relational contracts, most others do not possess that standard implication, precluding the general doctrinal status of good faith. This is because the duty to act in good faith is context-sensitive to each agreement. As Lord Scott suggests, the obligation of good faith can only be enforced if the circumstances require it.[15] Therefore, certain requisites need to be fulfilled before the duty of good faith can be enforced: most notably, the common intention of contracting parties. In essence, the good faith performance is only obligated in circumstances agreed to by contracting parties and cannot be implied generally in agreements as a standard practice. In *Mid Essex NHS Trust*,[16] an agreement arose which contained a clause for both parties to 'act in good faith,' yet it was ruled not to apply to every interaction between the parties since this would contradict one party's intentions. This suggests that the concept of good faith is dependent on the agreed purposes of both parties in their commercial interaction, thereby preventing it from becoming a general doctrinal principle. This aligns with the principle of contractual intention supremacy, as it would appear that the enforceability of good faith only exists if the parties intend for it to do so. Brownsword agrees, postulating that this concept can only exist if it

[13] *Al Nehayan v Kent* [2018] 1 CLC 216.
[14] *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145.
[15] *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2001] UKHL 1.
[16] *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200.

"endeavours to keep faith with the contractors' agreed purposes."[17] Several cases acknowledged this requirement, including *TAQA Bratani*,[18] which ruled that the parties were not obliged to act under good faith in all circumstances as a general inclusion of that duty would not reflect the common intention of the parties. From these cases, it is clear that the enforcement of good faith is largely conditional on the presence of an agreed intention, the non-compliance of which precludes its existence. The need to satisfy conditions to bind a party to act in good faith may not completely disprove the existence of the concept because it has still been employed in the aforementioned cases, yet it does restrict the extant nature of good faith in contractual duties. Thus, since the concept of good faith is not inserted into some contractual agreements by default, it seems fair to claim that its existence is conditional in English commercial law.

(ii) Negotiations

The conditional existence of good faith extends beyond contractual performance and applies to negotiations. Generally, parties are not obliged to negotiate in good faith under English law. This was demonstrated in *Walford v Miles*,[19] which involved a lockout agreement where Miles allegedly agreed to not deal with any third party during the contractual negotiations period. The court held that the arrangement was not binding as the parties were still in the pre-contractual stage and there was no reason to imply a good faith obligation as no consideration was provided. The case initially suggests that good faith cannot be enforceable in negotiations and therefore not binding on contracting parties. This is because the enforcement of an obligation to negotiate in good

[17] Brownsword (n 8) 120.
[18] *TAQA Bratani Ltd v Rockrose UKCS8 LLC* [2020] EWHC 58.
[19] *Walford v Miles* [1992] 2 AC 128.

faith represents an impractical standard when bargaining between the parties. Lord Ackner supports this, claiming that to enforce a general good faith requirement in negotiations is "unworkable in practice as it is inherently inconsistent with the negotiating party."[20]

However, a potential point of contention was contemplated in *Petromec*,[21] where the courts enforced an express agreement to negotiate in good faith made between the parties. Longmore LJ argues against the present objections and claimed, in the instant case, that the difficulty of determining what amounted to bad faith withdrawal does not provide a sufficient rationale to deny good faith in negotiations.[22] Also, to maintain that an agreed term ventured by both parties is unenforceable would contradict the nature of any contract, even if it solely focuses on negotiating behaviour.[23] Longmore LJ goes on to reason that "to decide that it has no legal content […] would defeat the reasonable expectations of honest men."[24] This represents a circumvention from *Walford* as it enforces the obligation to negotiate in good faith, implying its existence. However, the enforceability of good faith in negotiations is solely made on the basis that a pre-existing agreement was formed, without which it is unenforceable. As it stands, this implies that the common intentions that are reflected through an agreement represent a requirement for the existence for good faith, signifying that good faith only provisionally exists. Accordingly, this corresponds with the contractual intention supremacy principle mentioned above, since the express agreement condition reflects the common intention of the parties to negotiate fairly. To further advance

[20] ibid.
[21] *Petromec Inc v Petroleo Brasileiro SA Petrobras (No. 3)* [2005] EWCA Civ 891.
[22] ibid.
[23] ibid [57]–[121].
[24] ibid [121].

this argument, it was similarly illustrated in several other authorities including *Foley*[25] and *Emirates Trading Agency*,[26] both upholding that negotiations held in good faith are justifiable with present express arrangement between contracting parties. Consequently, a pattern is produced, maintaining that while parties are not generally implied to negotiate in good faith, an express agreement to negotiate according to good faith is enforceable, signifying the existence of the concept nonetheless. Therefore, with present precedent, a conditional existence of good faith exists within negotiations.

III. Good faith in international commercial law

(i) UNIDROIT Principles of International Commercial Contracts

When contrasted with English law, international commercial law provides a more extensive approach to good faith. This is evident in the UNIDROIT Principles of International Commercial Contracts ('the Principles'),[27] where good faith is codified as a general doctrine. While the Principles do not expressly define good faith, the nature of good faith to enforce honesty and fair dealings are embedded within it. Gutierrez affirms, observing that the overarching aspect of pursuing one's rights honestly and fairly is incorporated as a general basis of good faith in the Principles.[28] Despite the absent definition of good faith, the concept does, nonetheless, exist by virtue of the constant references to it in the Principles. Article 1.7(1) states that "each party must act in accordance with good

[25] *Foley v Classique Coaches Ltd* [1934] 2 KB 1.
[26] *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104.
[27] UNIDROIT Principles of International Commercial Contracts 2016 (UNIDROIT Principles).
[28] Gutierrez (n 4) 508.

faith," suggesting that the good faith doctrine is generally applied in any commercial transaction.[29] Even without an express provision of good faith, an implication of good faith is imposed on contractual relations.[30] The resolute imposition of this doctrine by the Principles in commercial agreements regardless of the agreed terms signifies that the Principles acknowledge the practice of good faith with utmost regard, viewing the concept as crucial in creating more seamless transactions. Such recognition is emphasised in Article 1.7(2), which provides that the duty to act in good faith is one that cannot be removed or limited.[31] *Enerchem Transport Inc.* affirms this, with the court holding that the duty of good faith could not be expressly excluded.[32] As such, this reveals that, on the international scale, the doctrine of good faith represents a standard that guides commercial conduct; a standard which is suggestive of a general existence of a good faith doctrine. Supportively, Magnus claims that parties involved in international commercial transactions regulate their behaviour in accordance with the good faith maxim.[33]

The extant nature of good faith can be further observed by examining specific provisions within the Principles. Regarding contractual performances, the Principles focus mainly on its implied obligations, which among others "stems from good faith" as provided in Article 5.1.2.[34] Additionally, Article 5.1.3[35] implies duties on the basis that "each party shall co-operate […] when such co-operation may be reasonably

[29] UNIDROIT Principles (n 27) art 1.7(1).
[30] ibid.
[31] UNIDROIT Principles (n 27) art 1.7(2).
[32] *Enerchem Transport Inc. et al v Nicholas R. Gravino et al* [2008] J Q NO 9347.
[33] Ulrich Magnus, 'Remarks on Good Faith: The United Nations Convention on Contracts for the International Sale of Goods and the International Institute for the Unification of Private Law, Principles of International Commercial Contracts' (1998) 10 Pace International Law Review 89, 91.
[34] UNIDROIT Principles (n 27) art 5.1.2(c).
[35] UNIDROIT Principles (n 27) art 5.3.

expected for that […] party's obligations,"[36] indirectly referring to good faith through its literal wording. Magnus observes that these provisions represent expressions of the general obligation of good faith in commercial transactions,[37] consequently suggesting that the duty to act in good faith may also exist without direct reference to the concept and thereby strongly proving its general status in international commerce. Compared to English law, the transactions made under the Principles are more widespread; good faith in this context is enforced both expressly and impliedly. In terms of negotiations, particularly pre-contractual negotiations, Article 2.1.15 summarily provides that in international commerce a duty to negotiate in good faith exists.[38] The provision is frequently referred to in a French arbitration case that confirmed the enforceability of good faith conduct in international negotiations.[39]

This approach strikes a balance between freedom of contract and good faith because the contracting parties are free to bargain but are required to behave fairly and not to the detriment of either party. For that reason, it essentially solidifies the existence of good faith through its unconditional enforcement of the concept to specific elements of commercial law—a stark contrast to English practice. Therefore, unlike English law, parties are, in addition to a general duty of good faith, obligated to act in good faith in specific commercial transactions under the Principles.

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[36] Magnus (n 33) 94.
[37] ibid.
[38] UNIDROIT Principles (n 27) art 2.1.15.
[39] ICC International Court of Arbitration, 'Case No. 8540', (*Unilex Unidroit Principles*, 4 September 1996) <https://www.unilex.info/principles/case/644> accessed 15 April 2021.

(ii) United Nations Conventions of Contracts for the International Sales of Goods

Similarly, good faith in international commerce is further evidenced in the United Nations Conventions of Contracts for the International Sales of Goods ('CISG'),[40] which focuses on the international sale of goods. Notably, some applications of good faith under the CISG are used in a similar fashion to the Principles. Magnus supports this, suggesting that both international instruments are commonly utilised to clarify the application of each other's provisions.[41] This is because the CISG represents a reference point in the construction of the UNIDROIT Principles.[42] As such, the CISG similarly recognises good faith as a general doctrine in commercial dealings, albeit more vaguely. Article 7(1) of the CISG states that the interpretation of the CISG requires the "observance of good faith."[43] Initially, this seems to limit the duty of good faith to contractual interpretation, rather than to the actual performance within these contracts. Bridge agrees, observing that the CISG provision initially implies that good faith is only obligated to courts since the literal expression only encompasses the "interpretation" of the contract and the CISG.[44] However, as Bridge goes on to explain, this is a misconception because the parties enforce their rights through the CISG that are interpreted according to good faith, meaning that they are also obligated to behave in good faith.[45] In *Renard*

[40] United Nations Commission on International Trade Law, *United Nations Convention on Contracts for the International Sales of Goods* (CISG) (United Nations 1980).
[41] Magnus (n 33) 95.
[42] Michael Joachim Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (Brill 2005) 305.
[43] CISG (n 40) art 7(1).
[44] Michael G Bridge, 'Good faith, the common law and the CISG' (2017) 22(1) Uniform Law Review 98, 108.
[45] Michael G Bridge, *The International Sale of Goods* (Oxford University Press 2007) ch 10.

Constructions,[46] the courts confirmed the duty of good faith on contracting parties in international dealings as derived from the CISG, proving a solid recognition of the concept. Consequently, this proves the extant nature of good faith under the CISG as an unconditional doctrine, standing in complete contrast with the conditional articulation of good faith which is found in English law.

Delving further into specific duties provided in the CISG, reference to good faith in contractual performance is also outlined clearly in both Articles 35(2)(b)[47] and 42(2)(b).[48] However, unlike the Principles, the CISG does not contain any provision regarding implied obligations of good faith. Even so, common practice under the CISG allows the implication of good faith in commercial agreements. Magnus affirms, stating that additional duties to cooperate under good faith are generally implied, thereby assuring its existence.[49] Relatedly, the CISG does not provide any duty to negotiate in good faith. Yet, the CISG acknowledges possible instances where the parties may negotiate in contracts,[50] in which case the parties should behave in good faith. Magnus confirms this by stating that transactions governed under the CISG should employ a similar solution as Article 2.1.15 of the Principles, hence ensuring that good faith exists even in negotiations.[51] Thus, in comparison with English law, both general and specific provisions under the CISG, like the Principles, provide a more appreciative approach in the enforcement of good faith. As such, the CISG also represents a distinct contrast to English law; it enforces good faith in transactions as a general doctrine.

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[46] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.
[47] CISG (n 40) art 35(2)(b).
[48] ibid art 42(2)(b).
[49] Magnus (n 33) 94.
[50] ibid 92.
[51] ibid.

IV. Conclusion

It is observed that, currently, good faith is utilised and extant in both the English and international setting, albeit to different extents. English domestic law has not completely embraced good faith as it only provisionally exists as an element in most commercial relations, such as contractual agreements and negotiations. Primarily, this is to protect the conventional contractual elements of contractual primacy and the objectivity of contractual relations. Despite this, the legal development up until now does provide a glimmer of hope that the judicial culture will eventually turn to a more appreciative outlook on the good faith doctrine in English commercial law. In international commercial law, though, the doctrine of good faith is much more appreciated as it is regarded as a mandatory standard in international commerce. This represents an excellent approach to uphold considering the sizeable purchases, complex obligations and geographical boundaries commonly involved in international commercial transactions. Following this, it would be unsurprising if the English jurisdiction soon begins to enforce the good faith doctrine for all English commercial transactions, much akin to international commerce.

Equity and the Duality of the English Legal System: a Bleak House?

Diane Forey[†]

Through *Jarndyce v Jarndyce*—the fictional probate case which forms the central plot device in Dickens' *Bleak House*—an extensive criticism of the nineteenth century courts of equity takes place. However, contrary to the fierce opposition displayed by both Dickens and much of the modern academic community, this article aims to prove that this description is no longer realistic as both systems of equity and common law are actually working hand-in-hand. Thus, unlike civil law countries where, according to Montesquieu, judges are the 'mouth of the law,' today's equity is a successful counterbalance to the harshness of the parallel common law system. Throughout its centuries-old evolution, whether through maxims or precedents, equity has fuelled the development of crucial principles which inform the English legal system. Some such principles, particularly that of conscionability, have been supported and debated by scholars who predate the jurisdiction of equity itself. From Aristotle to St. Thomas Aquinas and his divine command theory, equity will be studied through the prism of collective conscientiousness. This paper shows that, through years of refinement, the equity system today is not so much the regrettable system which some would like to suggest, but is instead an impressive mechanism capable of tackling common law inertia. A system such as equity, based on equity, is of particular importance today given both the lack of trust in the political and legislative elite, and the consequential desire for humanistic justice.

I. Introduction

"*This is the Court of Chancery; which has its decaying houses and its blighted lands in every shire; which has its worn-out lunatic in every madhouse, and its dead in every churchyard;*

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[…] which so exhausts finances, patience, courage, hope; so overthrown the brain and breaks the heart, that there is no honourable man amongst its practitioners who would not give […] the warning, 'Suffer any wrong that can be done to you, rather than come here!'"[52]

Dickens' damning description of the Court of Chancery, noting its supposed ineffectiveness and tardy time consumption, is symbolic of outdated, centuries-old clichés which depict the jurisdiction of equity as subservient and even futile in comparison to its common law counterpart. In fact, the tension existent between the jurisdictions of equity and common law has resulted in a preference for latter to the detriment of the former. On the other hand, however, it is evident that comprehensive reforms—largely induced by the Judicature Acts of 1873 and 1875—have contributed to a contemporary perception of equity as an indispensable part of the English legal system.[53] This paper shows that through its evolution, equity has drastically reduced the divisions with common law. Far from being antagonistic, in fact, these two jurisdictions complement each other. Indeed, having been developed to provide more equitable outcomes in cases that the common law had considered unfairly, equity aims to "counterbalance the harshness of the common law,"[54] and does so with success. Its underpinning notion of conscience, which has often enabled equity to fulfil this task, was notably developed by Aristotle:

> "Equity bids us be merciful to the weakness of human nature; to think less about the laws than

[52] Charles Dickens, *Bleak House* (Wordsworth 2001) 15.
[53] Stephen Waddams, 'Equity in English Contract Law: The Impact of the Judicature Acts (1873–75)' (2012) 33 Journal of Legal History 2, 185.
[54] Elizabeth A. Martin and Johnathan Law, *Oxford Dictionary of Law* (9th edn, Oxford University Press 2018) 177.

> about the man who framed them, and less about what he said than about what he meant; not to consider the actions of the accused so much as his intentions."[55]

As early as the sixteenth century, this complementary character of equity was emphasised by Grotius in cases where "the law does not define exactly, but leaves something to the discretion of a just and wise judge."[56] Directly inspired from Aristotelian equity, it was incorporated into nascent English law upon the study of the ancient Roman law Code and Digest at the end of the eleventh century.[57]

But despite the praiseworthy reform and altruistic roots of the jurisdiction of equity, popular beliefs still tend to exacerbate the vain competition between the two systems, focusing on the diametric opposition between common law—thought as "certain thus good"—and equity—which is "capricious thus bad."[58] It is clear that such a Manichean approach fails to reflect the reality, which is the successful implementation of equity in accordance with the rule of law so as to complement, rather than hinder, the common law system. As such, this paper hopes to challenge the aforementioned views, and will do so by first focusing on the development of equity and its attempts to address the deficiencies of the common law. Subsequently, the paper will turn to the criticism continuously levelled at equity, finding that its pragmatic evolution has established it as a permanent alternative to the common law. Ultimately, whilst acknowledging some of its

[55] Aristotle, *Rhetoric* (Book 1 ch 13, first published 350 B.C.E, Stanley Frost 2013) 49.
[56] William Blackstone and others, *Commentaries on the Laws of England Book I Of the Rights of Persons* (1st edn, Oxford University Press 2016) 68.
[57] Hessel E. Yntema, 'Equity in the Civil Law and Common Law' (1967) 15 American Journal of Comparative Law, 60.
[58] Richard Hedlund, 'The Theological Foundations of Equity's Conscience' (2015) 4 Oxford Journal Law Review 1, 119.

drawbacks, this paper concludes with the important reminder that equity both does and ought to sit at the cornerstone of the English legal system.

II. Beginnings of equity, at last an equitable treatment!

As the common law system—created in response to the Anarchy civil war[59]—was gradually growing more and more rigid, an alternative to this arguably formulaic judicial path became vital. For instance, under the common law, one's action must have fallen within a specified list of criteria set out by writs if they wished to access a court.[60] Furthermore, the isolated common law system provided very few remedies, often consisting of monetary damages which failed to address the needs of a diverse set of claimants.[61] In order to resolve these shortcomings, civilians started to turn to the king, known as the 'fountain of justice,' and his Chancellor, the 'keeper of the king's conscience,' for special, tailor-made remedies.[62] During this period, "there was no binding precedent with respect to petitions [and] [e]ach case was considered on its merits."[63] Consequently, the caseload became so overwhelming that, by the late fourteenth century, the Chancellor's Courts was developed, marking the establishment of the early stages of equity through its role as the "court of conscience."[64] However, this development gave rise to

[59] George Tucker Bispham, *The Principles of Equity: A Treatise on the System of Justice Administered in Courts of Chancery* (9th edn, Banks Law Publishing 1916).
[60] George Burton Adams, 'Origin of English Equity' [1916] 16 Columbia Law Review 87, 92.
[61] ibid 94.
[62] William F. Walsh, 'Equity Prior to the Chancellor's Court' (1929) 17 Georgetown Law Journal 2, 97.
[63] Chris Brien, *Equity and Trusts Guidebook* (2nd edn, Oxford University Press 2015) 15.
[64] Mike Macnair, 'Equity and Conscience' (2007) 27 Oxford Journal of Legal Studies 659, 46.

criticism of, and even confrontations between, the now parallel systems of equity and common law: through 'common injunctions,' the Chancellor was able to set aside a common law decision, even if it was well-founded, if they believed either party had acted in such a manner that the judgement had been obtained by "oppression, wrong and [in] bad conscience."[65] This conflict finally came to a head in 1615 in the *Earl of Oxford's Case*,[66] where Lord Ellesmere set out the two purposes of equity and asserted its prevalence over the common law, thus definitively imposing its authority in the English legal system. Through the common injunctions, he first made clear the importance of conscience in equity courts. According to Lord Ellesmere, their purpose was "to correct men's consciences for frauds, breaches of trust, wrongs and oppressions of what nature soever they be."[67] The second purpose of equity, as posited by Lord Ellesmere, was its function as a tool "to soften and to mollify the extremity of the [common] law."[68] Indeed, as Hobbes claimed, there ought to be a mechanism in place which can ensure that the important aspiration of equitable treatment in law is fulfilled, so it makes sense for a parallel system based in equity—or, what Hobbes termed principles of natural law—to inform the otherwise independent common law system.[69]

In civil law jurisdictions, case law lacks the authority seen in common law jurisdictions, therefore no such dual system has been implemented.[70] It can appear somehow defective as universalism prevails over special circumstances.

[65] Brien (n 63) 16.
[66] *Earl of Oxford's Case* (1615) 1 Ch Rep 1.
[67] ibid.
[68] *Earl of Oxford's Case* (n 66).
[69] Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985) 326.
[70] The notion of Equity, originating from Roman law, is only scarcely referred to in civil law jurisdictions. See Renato Beneduzi, *Equity in the Civil Law Tradition* (Springer 2021) 129.

Indeed, the path for a civil law claimant to try and overturn an unfair decision by reaching to their superior court is a lengthy and rigid process leaving little discretion to judges. This was what Montesquieu dreaded: that "the judges become no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour,"[71] leaving the legal rules entirely for legislators to decide on. The absence of judicial flexibility will often result in gaps in the law, so it is crucial to adopt procedures which can fill or compensate for these legal gaps.[72] It is for this reason that the strength of the English legal system lies in the development of a fully-fledged parallel system of equity. And being premised on this need for flexibility and fairness, equity is the product of centuries of evolution and reforms which can only be fully understood in light of the conditions of its creation.

III. Assertive evolution under heavy criticism

Far from the lethargic system depicted in Dickens' *Bleak House*,[73] equity has greatly evolved, particularly through the development of maxims which embody and transcribe the notion of conscience. Since the prominence it gained in the *Earl of Oxford's Case*,[74] many have taken the opportunity to harshly criticise the system of equity on the basis of subjectivity and arbitrariness. The definition of conscience in English law is nowadays debated, with MacNair, for instance, opposing the historical definition developed by Saint German in favour of a more modern one. Indeed, as modern courts have

[71] Montesquieu C de S, *The Spirit of Laws* (first published 1748, Prometheus Books 2002) 86.
[72] Aristotle (n 55).
[73] Dickens (n 52).
[74] *Earl of Oxford's Case* (n 66).

departed from the divine and natural law approach, conscience has been understood in a more pragmatic sense as opposed to a mere "examination of conscience" or intentions of the defendant.[75] Focusing on practicality, judges approach conscientiousness in a procedural way: is it beneficial for this case to derive from the "normal adversarial common law judicial procedure."[76]

Indeed, equity's characteristic lays in its array of maxims governing the judgements. Although never codified, they were handed down over decades—sometimes even centuries—allowing judges to exercise a relative degree of discretionary power.[77] Even though many complained about the potential arbitrariness which is bound to accompany such discretion, Hart defended equity on the grounds of its ability to "fill in the gaps of the law"[78] and to "transform a relatively impersonal system of law based primarily on reason, into a humanitarian system in which considerations of decent and compassionate conduct play an important role."[79] This "process of the humanisation of the law"[80] is neatly reflected in the maxim, "he who comes to equity must come with clean hands,"[81] and its alter ego, "he who seeks equity must do equity."[82] These maxims clearly convey the expectation that those who seek to bring a case to equity must do so with a strong sense of morality. This is clear in the *Overton v Bannister*[83] case, where trustees were deceived by the relevant beneficiary. The beneficiary, still a minor, had purposely

[75] Macnair (n 64) 659.
[76] ibid.
[77] Roscoe Pound, 'The Maxims of Equity' [1951] 34 Harvard Law Review 8, 57.
[78] HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 67.
[79] Ralph A. Newman, 'The Place and Function of Pure Equity in the Structure of Law' (1965) 16 Hastings Law Journal 3, 17.
[80] ibid 19.
[81] *D & C Builders v Rees* [1966] 2 QB 617.
[82] *Chappell v Times Newspaper* [1975] 2 All ER 233.
[83] *Overton v Bannister* [1844] 3 Hare 503.

misrepresented her age to gain quicker access to her funds. Here, according to common law judges, the trustees had not been wronged; yet, in equity, their case was considered positively because "the infancy of the defrauding party […] gives no authority to cheat others."[84] Her misconduct was against the global civil and political conscience, rather than in breach of any common law rules.[85]

Maxims were developed to mitigate the numerous criticisms levelled at equity. For example, equity was accused of allowing malicious behaviour by subverting the legal rules of common law. Thus, several maxims were designed as safeguards to limit fraudulent behaviours, most notably through the principle that "equity will not permit statute or common law to be used as an engine of fraud." This maxim was established in *Rochefoucauld v Boustead*,[86] where it was ruled that it is impossible to rely on a statutory provision to perform fraudulent acts. *Rochefoucauld* is, yet again, further proof of the good morality inherent to equity and its support for the evolution of society through "humanisation of the law."[87]

Nevertheless, equity has sometimes been rightly criticised. John Selden justly captured the hesitations surrounding the rather nebulous nature of equity, claiming that "[e]quity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity."[88] Selden illustrates the twofold failure attached to equity law: firstly, the lack of clear laws may lead to legal

[84] John Adams, *The Doctrine of Equity: A Commentary on the Law as Administered by the Court of Chancery* (T & J Johnson & Company, 1859) 105.
[85] Dennis Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England Conscience* (1st edn, Routledge 2010) 23.
[86] *Rochefoucauld v Boustead* [1897] 1 Ch 196.
[87] Newman (n 79).
[88] John Selden, *The Table Talk* (2nd edn, London J R Smith 1856) 43.

uncertainty; and secondly, the omnipotence of chancellors, solely bound by their personal sense of conscience, raises concerns regarding its supposed discretionary nature.

The latter concern warrants particular attention here. After all, since the Lord Chancellor usually belonged to the Church and followed its religious and moral principles, Selden's fear seems somewhat justified. It is important to make clear that, whilst criticisable, the religious morality attached to the system of equity, and thus its impact on the decisions of equity judges, was almost exclusively confined to equity's earlier years. Indeed, Lord Shaftesbury's nomination as Lord Chancellor in 1672 was the last time an ecclesiastic occupied this position,[89] with his successors—including Lord Nottingham, nicknamed the "father of modern equity"[90]—mostly coming from secular backgrounds. In addition, as the principles governing equity grew more permanent, the discretionary powers afforded to judges were inexorably decreasing, relying instead on established precedents. In fact, by the nineteenth century equity's framework was so solid that it led Lord Eldon to declare that "[n]othing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot."[91]

Aware of the continuous criticism, equity's protagonists relentlessly attempted to fix its alleged arbitrariness. Yet, Lord Buckley's assertion in 1903 that the "Court is not a Court of conscience,"[92] coupled with Lord Denning's later claim that "the Courts of Chancery are no

[89] Norman Doe, *Fundamental Authority in Late Medieval English Law* (Cambridge University Press 1991).
[90] Klinck (n 85) 26.
[91] *Gee v Pritchard* (1818) 2 Swans 402.
[92] *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174.

longer courts of equity [but] are as fixed and immutable as the courts of law ever were,"[93] signalled that this attempt had left equity almost unrecognisably rigid, leading many to believe that its flexibility—its defining characteristic—had been lost.

These criticisms do not, however, reflect the reality. A firm determination of equity's rules actually reinforced its anchorage in the English system, alongside common law. Already in the sixteenth century the opposition between the two systems were minimised as "[l]aw was not deaf to reason, and equity had to be orderly."[94]

IV. Equity and common law today: co-dependent systems?

In light of the above, it is legitimate to wonder to what extent equity is still relevant today. Some consider that the Judicature Acts of 1873 and 1875 initiated a complete convergence of equity and common law; a conversion which has been uninterrupted since.[95] For them, equity has ceased to be an independent entity. In fact, many think this statute has gone beyond its purpose, from a mere administrative merger to a substantial fusion of common law and equity rules. Indeed, following the Judicature Acts, judges were able to rule cases on the basis of both common law and equity principles.[96] Remedies also began to merge: remedies once only used in one court—such as that of compound interest in the case of equity,[97] or compensatory damages in the case of common law[98]—now arose in courts of the parallel system too. For

[93] Alfred Denning, 'The Need for a New Equity' (1952) 5 Current Legal Problems 1.
[94] Christopher St. Germain, *The Doctor and Student* (William Muchall 1874) 105.
[95] Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 University of Western Australian Law Review 1, 5.
[96] Judicature Acts 1873-1875, s 24.
[97] *Sempra Metals Ltd v IRC* [2007] UKHL 34.
[98] *Target Holdings Ltd v Redferns* [1996] AC 421.

some, this fusion was applauded, since it was believed that two independent jurisdictions in a single nation was unreasonable.[99] However, those such as Ashburner, who qualified both systems as running "side by side" without "mingl[ing] their waters,"[100] preferred to consider these measures as purely administrative by virtue of their mutually distinct natures.

Moreover, Lord Millet reaffirmed recently in 2008 the crucial complementarity between these two systems:

> "The common law is a complete system of law which could stand alone, but which if not tempered by equity would often be productive of injustice; while equity is not a complete and independent system of law and would not stand alone."[101]

After all, equity is surely not "past the age of childbearing" as many believe.[102] Virgo provides quite the opposite in fact, claiming that "[e]quity can still be used to create new doctrines and to develop existing ones to provide solutions to contemporary problems that are ignored by the common law."[103]

Thanks to equity, many remedies were incorporated into English law. The maxims, in addition to asserting a certain morality, also provided fairer solutions: whilst common law solutions revolve around the attribution of damages, equity introduces alternative remedies to fit certain scenarios. In *Hart*

[99] Gary Watt, *Equity Stirring: The Story of Justice Beyond Law* (Hart Publishing 2009) 243.
[100] Walter Ashburner, *Principles of Equity* (2nd edn, London Butterworths 1954) 6.
[101] Simone Degeling and James Edelman, *Equity in Commercial Law* (1st edn, Lawbook Co 2005) 14.
[102] *Eves v Eves* [1975] 1WLR 1338.
[103] Graham Virgo, *The Principles of Equity and Trusts* (3rd edn, Oxford University Press 2018) 283.

v O'Connors,[104] for instance, this originality was demonstrated through the invention of the equitable remedy of rescission. Equity thus allows for a contract to be cancelled if a vitiating factor occurs. After characterising "unconscionable bargaining,"[105] the judge sought to restore the parties to the state that they were in before the transaction occurred. This case illustrates particularly well the crucial importance of equity: that it provides a rapid and adequate responses in an attempt to strive for constant legal improvements.

More modern examples can be cited such as the Mareva injunction, which freezes the defendant's assets until judgment if there is a risk that they may disappear.[106] The Anton Piller order, for its part, seeks to preserve evidence when the defendant could destroy or conceal it.[107]

Nonetheless, in the face of so many legal innovations, the House of Lords rapidly stopped them for fear of equity overstepping common law and even legislators.[108] It thus acted as a strong safeguard to limit equity's extension.

V. Conclusion

In conclusion, it is fair to say that the gloomy description sustained by Dickens—"a Chancery Suit: it is a slow, expensive, British, constitutional kind of thing"[109]—can no longer be applied to modern equity. Indeed, it would be

[104] *Hart v O'Connors* [1985] AC 1000.
[105] Virgo (n 103) 284.
[106] *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213.
[107] *Anton Piller KG v Manufacturing Processes Limited* [1976] Ch 55.
[108] *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 694.
[109] Dickens (n 52) 25.

dangerous to neglect equity as it successfully reduces the inertia of the common law system. Designed to strike the appropriate balance between societal progress and legal certainty, it allows "exceptions to general rules without amplifying divisive claims of sovereign arbitrariness."[110] Additionally, Professor Langdell affirmed that "equity is a great legal system, which has grown up by the side of the common law, and which, while consistent with the latter, is in a great measure independent of it."[111]

The interrogations regarding its relevance are, for many, pointless, as its much-debated uncertainty becomes its most important asset. Indeed, the "Chancery language still has the capacity to inform the art of bending rules without breaking them and the capacity to reform the law without deforming it."[112]

To the strictness of common law, a certain degree of adaptability introduced by equity is preferable. Its existence is therefore essential as long as one wishes to have a fair and efficient legal system.

[110] Yishaiya Abosch, 'An Exceptional Power: Equity in Thomas Hobbes's Dialogue on the Common Law' (2013) 66 Political Research Quarterly 18, 20.
[111] Christopher Columbus Langdell, *A Summary of Equity Pleading* (Charles V Sewer and Co 1883) 41.
[112] Watt (n 99) 243.

Are Tribunals User-Friendly? An Analysis of the Tribunals System

Grete Labunski[†]

For most victims of executive mismanagement, tribunals proffer the only effective route to justice. However, a close inspection reveals that the supposed effectiveness of tribunals could be a mere illusion. Accordingly, this article analyses the balance of accountability between the executive and the tribunal system: a doubtlessly imperative endeavour given that tribunals handle a wide variety of cases, many of which concern significant personal matters. It is argued that, despite their power to substitute wrong first-instance governmental decisions illustrious of an accessible procedural process, tribunals have hidden costs, deflected executive responsibility and passed inaccurate judgements pertaining to their apparent 'accessibility.' Although much-needed reform was enacted by the Tribunals, Courts and Enforcement Act 2007, problems stemming from an unaccountable government apparatus remain. If the quality of first-instance decisions was improved, tribunals could take a more effective approach. Overall, while tribunals are an independent, coherent, and specialised judicial body promoting effective access to justice, their (im)balance of accountability with respect to the executive branch of government is in need of further reform.

I. Introduction

In the United Kingdom ('UK'), tribunals handle around a million cases per year,[113] collectively making them the largest judicial body in the contemporary legal system.[114] Most enable

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[113] Courts and Tribunals Judiciary, 'Tribunal Judges' (*Courts and Tribunals Judiciary*, 2021) <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/tribunals/fee-paid-judiciary-page-1/> accessed 4 April 2022.

[114] Mark Elliott and Robert Thomas, 'Tribunal Justice and Proportionate Dispute Resolution' (2012) 71 Cambridge Law Journal 297.

private individuals to appeal against administrative decisions and, consequently, hold public authorities responsible in various areas of law, from social security to mental health. Tribunals are characterised as cheap, accessible, expeditious and free of technicality,[115] although like all branches of the judiciary their primary objective is to provide effective access to justice. It follows how and to what extent these aims have been reflected after the 2007 tribunal reforms.

The tribunal framework proffers a final resolution for people seeking to secure their important individual rights and interests affecting significant matters in their lives that are subject to administrative decisions. Tribunal judges offer a new perspective on the case; they can consider the situation *de novo* and substitute a new outcome on the grounds of merit.[116] Unlike the courts—which are only permitted to evaluate the lawfulness of these cases based on judicial review principles, and where successful appellants are returned to the executive body which made the problematic decision in the first place—tribunal proceedings allow people to benefit from procedural fairness and the possibility of receiving an overturned decision. Where one applies their case for reconsideration in the same government agency without recourse to independent judicial means, there is a real danger that the decision-maker may be oblivious to the error in their initial judgment.[117] Taking into account that the percentage of wrong first-instance decisions has been deemed "unacceptably high,"[118] and how incorrect administrative decisions can cause considerable distress over

[115] Franks Committee, *Report of the Franks Committee on Administrative Tribunals and Enquiries* (Cmnd 218, 1957).
[116] Robert Carnwath, 'Tribunal Justice—A New Start' [2009] Public Law 48.
[117] Robert Thomas, 'Administrative Justice, Better Decisions, and Organisational Learning' [2015] Public Law 111.
[118] Michael Adler, 'Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice' (2016) 69 Modern Law Review 958.

significant issues in people's lives,[119] tribunals offer effective supervision with binding outcomes to all parties. *R (S) v Secretary of State for the Home Department* demonstrated how the courts are prepared to demand adherence to tribunals regardless of whether the executive has any political considerations that disagree with its result.[120] Thus, tribunals seemingly offer an efficient remedy against wrong administrative decisions. However, the following paragraphs aim to evaluate this supposed effectiveness in practice: one could argue that the accountability proffered by tribunals is merely superficial.

II. Relationship between tribunals and the executive

Somewhat contrary to the suggestion that tribunals are an efficient and effective administrative accountability mechanism, it could be that tribunals simply *deflect* executive accountability. Tribunals are statutory bodies, which means that the executive may—through Parliament—modify, restrict or remove their accessibility when tribunal outcomes contradict the government agenda. For example, the Home Office, under Theresa May, introduced a 'hostile immigration environment' which led to cutbacks on appeal rights to the Immigration and Asylum Chamber.[121] Under this initiative, the executive could certify appellant immigrants 'unfounded' so those tribunal hearings would take place only after an appellant had left the UK.[122] Moreover, Prosser has observed how the introduction of tribunals does not represent "an incorporation of the idea of legality," but merely a "counter-measure for political protests and […] a means of making oppressive

[119] Thomas (n 117).
[120] *R (S) v Secretary of State for the Home Department* [2007] EWHC 51.
[121] Immigration Act 2014, s 15.
[122] Immigration Act 2016, s 63.

changes […] more palatable by giving a symbolic appearance of legality."[123] Prosser's claims are supported by the government's failure to create a system that can take account of successfully appealed cases and effectively improve the quality of initial decisions.[124] Further, Abel has gone so far as to question whether the creation of tribunals has enabled the executive to address the issues of poor and disadvantaged people in "inferior" courts,[125] where appellants' voices are more likely to be silenced. These concerns are problematic, even though tribunals are now more of a "species of court," rather than "substitutes of court."[126] Nevertheless, the executive should take more accountability for administrative decisions made in tribunals, not least since only 4.5% of applicants choose to appeal these at all.[127] Potential appellants possibly assume that the initial decision was correct or suppose it would be too difficult to overturn.[128] To what extent these concerns reflect tribunals in practice will be addressed in the following section.

III. User-friendly nature of tribunals

Tribunals have often been characterised as user-friendly: cheap, accessible, informal and expeditious.[129] Not only do most tribunals not require entry fees, but their low cost is

[123] Tony Prosser, 'Poverty, Ideology and Legality: Supplementary Benefit Appeal Tribunals and Their Predecessors' (1977) 4 British Journal of Law and Society 39.
[124] Thomas (n 117).
[125] Richard L Abel, 'The Contradictions of Informal Justice' in Richard L Abel (eds), *The Politics of Informal Justice*, vol 1 (New York Academic Press 1982).
[126] Peter Cane, *An Introduction to Administrative Law* (5th edn, Oxford University Press 2011).
[127] Thomas (n 117).
[128] Hazel Genn, 'Tribunal Review of Administrative Decision-Making' in Genevra Richardson and Hazel Genn (eds), *Administrative Law and Government Action: The Courts and Alternative Mechanisms of Review* (Oxford University Press 1994).
[129] Franks Report (n 115).

further bolstered by the absence of a need for (costly) representation. The latter point is facilitated by the fact that tribunal judges play a more active role in proceedings than can be seen in the courts;[130] tribunals tend to adopt an inquisitorial, as opposed to an adversarial, approach.[131] This reflects a cooperative investigation process with both the appellant and governmental respondent seeking applicable evidence in tandem.[132] Furthermore, judges in tribunals are believed to have more specific knowledge in their particular subject, because tribunals focus on specific areas of law.[133] To add, some tribunals have lay members with experiences in the applicable field, such as doctors or accountants to support case hearings in their relevant fields.[134] Their easy-to-approach nature might also stem from the lack of formalities that accompany the tribunal process, such as the lack of strict rules of evidence or even the lack of traditional court robes.[135] Different tribunals differ in their complexity and/or financial significance, meaning that a tax dispute involving significant sums is arguably subject to a higher degree of a procedural formality than one concerning social security deploying lay members, for instance.[136] The process is, nonetheless, designed to be as user-friendly as possible.[137] All these attributes enable judges to reach judgements more expeditiously and efficiently. Consequently, tribunals can have both "social and technical advantages over courts."[138]

[130] Carnwath (n 116).
[131] ibid.
[132] *Kerr (AP) v Department for Social Development (Northern Ireland)* [2014] UKHL 23.
[133] *Gillies (AP) v Secretary of State for Work and Pensions (Scotland)* [2006] UKHL 2
[134] Courts and Tribunals Judiciary, 'Tribunal Panel Members' (*Courts and Tribunals Judiciary* 2021) <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/tribunals/fee-paid-judiciary-page-1-2/> accessed 20 September 2022.
[135] Hazel Genn, 'Tribunals and Informal Justice' (1993) 56 Modern Law Review 393.
[136] Carnwath (n 116).
[137] ibid.
[138] Cane (n 126).

IV. Drawbacks of tribunals

Whilst many of the attributes above reflect some of the key advantages of tribunals, they can also be misleading and, as such, resultingly disadvantageous. For instance, certain hearings—such as employment, immigration, and asylum cases—now require appellants to pay entry fees. In addition, given the comparatively higher success rates that follow appellants with legal representation, it could be that those without such representation find themselves needing to heighten their costs in an attempt to improve their chances.[139] Coupled with the fact that many people have trouble translating their concerns into legal arguments, the absence of a need for representation is perhaps as much pleasure as it is a pitfall.[140] Moreover, as mentioned above, tribunals vary in their complexity, so areas like taxation or land follow an adversarial approach where specialist judges are unlikely to substitute legal representation.[141] Tribunals are faced with extremely complicated topics—this is evident when the Court of Appeal recognised that there is "complex legislation" in the law on social security.[142] All of this might leave appellants to feel confused, hesitant or overwhelmed,[143] which is especially problematic considering that people without legal assistance are often among the most vulnerable.[144] Further, the flexibility of proceedings leads some to falsely believe that the decision-making process is likewise subjective. Based on the research of Genn, a considerable number of people were under the impression that tribunals take 'humanity and sympathy' into account. In reality, however, the idea is misleading.

[139] Adler (n 118).
[140] ibid.
[141] Carnwath (n 116).
[142] *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734, 16.
[143] Genn (n 128).
[144] Elliott and Thomas (n 117).

Overall, as Cane has noted, "[t]he price of informality is a certain amount of legal inaccuracy." The expectation of quick decision-making potentially leads to fast but poor final decisions, which individuals might need to further appeal.[145] These factors arguably outweigh the supposed effectiveness of tribunal decisions: the cost of accessibility cannot be the prepetition of injustice. Accordingly, individuals might be hesitant to participate in tribunal proceedings in the first place. Fortunately, there is now a better, more coherent system for appeals in the place, which will be addressed in the following section.

V. Reforms

Following the enactment of the Tribunals, Courts and Enforcement Act 2007 ('TCEA'), the tribunal system plays a more effective role in the justice system. Before the TCEA, tribunals were established in an *ad hoc* manner and, generally, were overseen by the agencies responsible for the decisions which gave rise to tribunal claims in the first place.[146] Today, however, most tribunals fit into a coherent two-tier system and their independence is ensured by Her Majesty's Courts and Tribunals Service. This has abated a large extent of biases and, consequently, increased citizens' trust in tribunals.[147]

Establishing a coherent system also improved efficiency by providing means for Upper-Tribunals to develop precedent for First-Tier Tribunals, thereby ensuring

[145] Cane (n 126).
[146] Sir Andrew Leggatt, *Tribunals for Users: One Service, One System* (London 2001).
[147] ibid.

consistency and quicker results.[148] For example, in the context of asylum cases, the political and social conditions of a country are generally a starting point for assessing the validity of any claim;[149] Upper-Tribunals have created 'country guidance' so that First-Tier Tribunals can follow the same set of evidence concerning conditions in particular countries.[150] Additionally, the TCEA clarified the route for tribunal appeals: appellants can bring First-Tier Tribunal decisions to Upper-Tribunals,[151] and subsequently to the Court of Appeal on questions of law.[152] Considering what Lord Hoffmann observed in *Moyna*—namely, how the distinction between questions of law and fact can be decided 'as a matter of policy'—the decision-making process is concluded with deftness so that only appropriate cases concerning questions of law can be appealed. In addition, Upper-Tribunals enjoy judicial review jurisdiction,[153] meaning they possess the ability to lighten the workload of the Administrative Court. The latter is now more capable of "concentrat[ing] on its central role as guardian of constitutional rights."[154]

An overall objective of the TCEA reforms aimed to develop policies and services that avoid administrative mismanagement to applicants in the first place and to provide tailored solutions to resolve the possible dispute quickly and cost-effectively without necessarily seeking redress from tribunals at all.[155] However, tribunals continue to address an alarming number of problematic initial decisions.[156] For

[148] Carnwath (n 116).
[149] ibid.
[150] *R (on the application of S) v Secretary of State for the Home Department* [2007] EWHC 51.
[151] Tribunals, Courts and Enforcement Act 2007, s 11.
[152] ibid s 13.
[153] ibid s 15.
[154] Carnwath (n 116).
[155] Adler (n 118).
[156] Administrative Justice and Tribunals Council, *Right First Time* (London, 2011).

instance, in 2021/2022, 61% of claimants in tribunal proceedings for social security and child support successfully overturned their initial government decisions which had denied their benefits.[157] While a successful appeal rate indicates the importance of an effective tribunals system, it evidences significant shortcomings in the governmental decision-making process.[158] Executive bodies that prioritise quantity over quality by, for example, instituting ill-conceived key performance indicators for overworked staff are detrimental to the administrative court system.[159] If the government had, as part of the TCEA reforms, implemented a clear mechanism whereby executive bodies must take account of successfully appealed cases and effectively improve the quality of their initial decisions, the administrative decision-making process would have sped up and incurred fewer costs for victims of executive mismanagement.[160] In addition, tribunals could focus on cases of material dispute as opposed to highlighting rudimentary issues with governmental operations moving forward. Proposals of these mechanisms include having decision-makers analyse tribunal feedback, attend tribunal proceedings and/or pay for issuing wrong decisions in the first place.[161] Therefore, while the TCEA has enhanced the general aim of tribunals, which is to improve access to justice, the system is in need of further reform.

VI. Conclusion

In conclusion, this article has explored the significance of tribunals in the administrative court system, and the debate is

[157] Ministry of Justice, *Tribunals Statistics Quarterly: January to March 2022* (June 2022).
[158] Thomas (n 117).
[159] Administrative Justice and Tribunals Council (n 156).
[160] Thomas (n 117).
[161] ibid.

on whether this significance should be attributed to tribunals or whether it should be placed on the initial executive decision-makers. On a surface level, tribunals proffer an effective route to justice, since tribunal proceedings are usually characterised as cheap and accessible. Tribunals have advantages over appealing governmental action in court, as successful appellants can have executive decisions overturned without recourse to the executive body which made the problematic decision in the first place. However, there are longstanding concerns over whether, in practice, tribunals constitute mere mechanisms for executive bodies to deflect governmental responsibility; while proffering a remedy for executive mismanagement, the existence and reach of tribunals as statutory bodies is inherently tied to the government. Although tribunals appear as user-friendly with low costs, adopting an inquisitorial approach and an overall lack of procedural formalities; for some, tribunals can be a confusing appeal process layered with hidden pitfalls such as unexpected costs, the need for legal representation or a general misunderstanding of the tribunal administrative process. Moreover, informality can lead to fast but poor final decisions. The TCEA has clarified the process of appealing tribunal decisions and, thus, embedded the crucial role of the tribunal framework in the general justice system. Nonetheless, concerns remain over the (im)balance of accountability between tribunals and the executive branch of government. The high rate of successful appeals in tribunal proceedings is a worrying indicator of continued low-quality initial executive decision-making processes. Therefore, the supposed effectiveness of tribunals is a mere illusion. Achieving effective access to administrative justice would mean improving the quality of first-instance executive decisions. An accountable government effectuating improved first-instance decisions would speed up the decision-making process and incur fewer costs for victims of executive mismanagement. Achieving effective access to administrative

justice requires further reform of the administrative court system.

Lawful Assisted Dying and Its Eligibility Criteria: A Pernicious Message to Vulnerable People?

Helen Ryan[†]

This paper challenges the argument that legalising assisted dying will negatively impact vulnerable people and undermine their value of life by deeming it unworthy of protection. To effectively address this argument, the paper will assess the meaning of 'vulnerability,' identify who is vulnerable and analyse the extant value that society places on life. The paper also examines whether an eligibility criterion could act as a sufficient procedural safeguard against legalising an assisted death to vulnerable individuals. In order to identify a vulnerable person, there must be an understanding of the characteristics of vulnerability. The distinction between 'a vulnerable person' and 'vulnerability' highlights the difficulty in defining vulnerability and identifying groups of vulnerable people, since providing the answer to either term may result in limiting or over-generalising their respective meanings. The paper's findings highlight that, although an outright ban of assisted dying *may* promote the sanctity of life, it fails to consider the wishes of those with a diminishing quality of life who actively and reasonably seek their own death. The paper emphasises that there is a need for the law to recognise an individualistic approach to assessing one's quality of life and how it is to be valued. Ultimately, a compromise must be made within the safeguarding measures to ensure a balance between promoting both the sanctity and the quality of life.

I. Introduction

This paper will consider whether the legalisation of assisted dying and its eligibility criteria would send a pernicious message to vulnerable people. The polysemous nature of the

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term 'assisted dying' invites exploration into how 'lawful assisted dying' and its eligibility criteria is to be understood in the context of United Kingdom ('UK') legislation. Crucially, however, the definition of 'vulnerable people' is unclear. As such, this paper addresses two important questions: (1) what is vulnerability; and (2) who is vulnerable? For many, lawful assisted dying symbolises an end to suffering and pain, whilst for others it is believed to send a deleterious message to vulnerable people. Arguably, the eligibility criteria for an assisted death could act as an adequate procedural safeguard to ensure that, where there is concern about a vulnerable person's wellbeing, certain choices are made unavailable as a form of protection. A compromise in the safeguarding measure(s) for lawful assisted dying ensures a balance between promoting both the sanctity and quality of life for everyone. Therefore, this article arrives at the conclusion that lawful assisted dying does not send a pernicious or deleterious message to vulnerable people, particularly given that, arguably, what makes somebody vulnerable is not so much any familial, social, or economic pressure, but rather the agonising, chronic and unbearable pain that many of those seeking assisted deaths experience each day.

II. Defining lawful assisted dying

The precise definition of 'assisted dying' is notably elusive. Assisted dying is an umbrella term that covers voluntary euthanasia and physician-assisted suicide ('PAS').[162] Voluntary euthanasia concerns situations where a competent person makes a voluntary and enduring request for another

[162] RPS, 'Assisted Dying' (*Royal Pharmaceutical Society,* January 2013) <http://www.rpharms.com/recognition/all-our-campaigns/policy-a-z/assisted-dying#> accessed 18 April 2021.

individual to end their life.[163] In contrast, PAS involves a physician or healthcare professional providing someone *with the means* to end his or her own life.[164] Although voluntary euthanasia and PAS operate differently, both methods enable a person who is wishing to die to control the time and manner of their death. Whilst assisted dying is illegal in the UK, some form of the above practices can be observed in several jurisdictions, namely the Netherlands and the United States state of Oregon.

Some opponents of assisted dying claim that legalisation in the UK will undermine the relationship between the doctor and the patient, resulting in the doctor's healing role being compromised.[165] Capron vividly expresses this concern, stating that he would never want to wonder "whether the physician coming into [his] hospital room is wearing the white coat […] of a healer concerned only to relieve [his] pain […] or the black hood of the executioner."[166] If legalisation were to allow a doctor to kill his patient, there are fears that a breakdown of trust in the doctor-patient relationship could fester. Despite such concerns, the opposite is observed in the Netherlands, where Dutch physicians view assisted dying as a duty and as a means of alleviating hopeless and unbearable suffering for their patients.[167] One vital question, however, is whether voluntary euthanasia and PAS are capable of

[163] Robert Young, 'Voluntary Euthanasia', *The Stanford Encyclopedia of Philosophy* (18 April 1996) <https://plato.stanford.edu/archives/spr2020/entries/euthanasia-voluntary/> accessed 21 April 2021.
[164] RPS (n 162).
[165] D Harris, B Richard and P Khanna, 'Assisted Dying: The Ongoing Debate' (2006) 82 Postgraduate Medical Journal 479.
[166] Veronica English and others, 'Ethics Briefings' (2002) 28 Journal of Medical Ethics 275.
[167] Commission on Assisted Dying, '"The Current Legal Status of Assisted Dying Is Inadequate and Incoherent..."' (2012) <https://www.demos.co.uk/files/476_CoAD_FinalReport_158x240_I_web_single-NEW.pdf?1328113363> accessed 27 April 2021.

promoting a positive outcome, or whether they simply act as a 'Hobson's choice'[168] for vulnerable people. Studies conducted in Oregon and the Netherlands showed no evidence of higher rates of assisted dying in 'vulnerable groups' compared with background populations, nor was there any indication that PAS or euthanasia has a disproportionate impact on patients in such groups.[169] One major drawback of the findings is that the studies cover different time periods and were obtained using different methods.[170] On the other hand, in spite of the discrepancies in research methods, where the studies do overlap the results are largely consistent with one another and succeed in exposing the weak correlation between assisted dying and harm to vulnerable groups.[171]

III. Vulnerability and the consideration of 'vulnerable groups'

Having defined what is meant by assisted dying, this paper now turns to consider the meaning of vulnerability and who might be considered vulnerable in the context of assisted dying. Despite its common usage, vulnerability is used in different disciplines to mean different things. The Commission Report[172] predicated that vulnerability is not a characteristic of particular societal groups, but that, instead, it is a state that anyone can experience on a temporary or permanent basis and to a greater or lesser extent.[173] Moreover, as Fineman affirms,

[168] 'Hobson's Choice' refers to a situation in which it appears that there are choices between different actions or scenarios, however there is really only one option available.
[169] Margaret P. Battin and others, 'Legal Physician-Assisted Dying in Oregon and the Netherlands: Evidence Concerning the Impact on Patients in "Vulnerable" Groups' (2007) 33 Journal of Medical Ethics 591.
[170] ibid.
[171] ibid.
[172] Commission on Assisted Dying (n 167).
[173] ibid.

"vulnerability is […] universal—it is the human condition […] [W]e are all, always vulnerable."[174] Additionally, Farsides suggests that an "individual's vulnerability is heightened by disability or illness, and further aggravated by personal, societal and/or social factors."[175] The broad definition of vulnerability indicates that it cannot be narrowed down to a particular group of people, as anyone has the potential to fall within its class. Therefore, to class a group of individuals as vulnerable contradicts the *prima facie* observation of vulnerability and limits the expansive definition of the term. Nonetheless, "The Elderly" and "The Disabled" have been cited as vulnerable groups by the House of Lords.[176]

Moreover, in the 'Review Article on Hastened Death,' Mroz *et al* highlight how assisted dying has affected particular societal groups such as the elderly, terminally ill, disabled people, minors and those with learning difficulties[177]—namely through "social, emotional, and financial burdens that are placed on family and/or friends."[178] Additionally, in terms of the legalisation of assisted dying, review evidence derived from other jurisdictions such as The Netherlands and Oregon illustrated that elderly people ("people over 80 years-of-age") were less likely to opt for assisted suicide or voluntary euthanasia.[179] For instance, in Oregon it was found that "people aged 18–65 were over three times more likely to have an

[174] Martha Fineman, 'Reasoning from the Body: Universal Vulnerability and Social Justice' (2022) Emory Legal Studies <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4100709> accessed 19 May 2022.
[175] Commission on Assisted Dying (n 167).
[176] Select Committee on the Assisted Dying for the Terminally Ill Bill, *Assisted Dying for the Terminally Ill Bill* (HL 2004-05, 86-I).
[177] Sarah Mroz and others, 'Assisted Dying around the World: A Status Quaestionis' (2020) 9 Annals of Palliative Medicine 57.
[178] Thomas Frost, Devan Sinha and Barnabas J Gilbert, 'Should Assisted Dying Be Legalised?' (2014) 9 Philosophy, Ethics and Humanities in Medicine 3.
[179] Select Committee on the Assisted Dying for the Terminally Ill Bill (n 176).

assisted death than those aged [over] 85," and in the Netherlands the rates of assisted dying were "lowest among people aged over 80."[180] These findings are insightful. They show that "the older the age of death, the less need in general there is […] for [an] assisted death" in comparison to younger people, because "younger people die harder than very old people."[181] In this way, although elderly people are often classed as vulnerable, they may not strictly be so in an assisted dying situation. This distinction is significant, since it challenges the preconceived notion of what it means to be vulnerable.

Whilst the observations by Mroz *et al* identify key groups in relation to assisted dying—i.e., the elderly, terminally ill, disabled people, minors, and those with learning difficulties—this scope of classification is unnecessarily restrictive. The aforesaid findings do not consider the lack of correlation between the aforementioned groups and their vulnerability, as the severity and degree of 'vulnerability' are assessed on an individual level. Consequently, more subtle forms of vulnerability emerge. In the Oregon report, one of the most frequent end of life concerns cited by those requesting assisted suicide related to 'disability' and 'increased dependence.'[182] The combination of the loss of independence and the fear of becoming a burden on the state and relatives may lead many to mistakenly equate their 'right to die' with having a 'duty to die.'[183] Arguably, the pressure to fulfil this duty may place a disabled person in a more vulnerable position. The latter point has been fervently critiqued by Smith, who

[180] Commission on Assisted Dying (n 167).
[181] Select Committee on the Assisted Dying for the Terminally Ill Bill (n 176).
[182] Tim Stainton, 'Disability, Vulnerability and Assisted Death: Commentary on Tuffrey-Wijne, Curfs, Finlay and Hollins' (2019) 20 BMC Medical Ethics 1.
[183] Care Not Killing, 'Experts Outline Assisted Suicide Risks to MPs' (*Care Not Killing,* 17 September 2020) <https://www.carenotkilling.org.uk/events-reports/experts-outline-assisted-suicide-risks-to-mps/> accessed 7 May 2021.

states that he cannot imagine anything crueller than "letting [people] […] feel that their deaths have a greater value than their lives."[184] In addition, Saunders argued that the most vulnerable must be protected, "even sometimes at the expense of not granting liberties to the desperate."[185]

However, the generalisability of much published literature on the issue of vulnerability appears problematic. As previously noted, vulnerability is not inextricably linked to one source or afforded to one group of people. Although some disabilities possess certain characteristics of vulnerability, a multitude of different factors contribute to the vulnerability of different people in different ways. Hence, it would seem inconducive to consider only one form or meaning of the term in relation to assisted dying, as this would drastically limit the scope of vulnerable people and disregard the otherwise broad definition of vulnerability. If there is concern about a patient's vulnerability and wellbeing, a system should be introduced to ensure that certain choices are made unavailable through an eligibility criterion and safeguarding measures.[186] Thus, the point is that vulnerability is not a characteristic exclusively reserved for some individuals or groups,[187] but rather a broad-ranging term which can include an array of individuals for short or prolonged periods of time. It is now necessary to explore how safeguards can be used to safely introduce assisted dying legislation by preventing exploitation of the most vulnerable in society.

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[184] ibid.
[185] Peter Saunders, 'Assisted Dying Is Simply Another Form of Euthanasia' (*The Economist*, 23 August 2018) <https://www.economist.com/open-future/2018/08/23/assisted-dying-is-simply-another-form-of-euthanasia> accessed 12 May 2021.
[186] Roger Crisp, 'Assisted Dying and Protecting the Vulnerable' (*Practical Ethics*, September 2015) <http://blog.practicalethics.ox.ac.uk/2015/09/assisted-dying-and-protecting-the-vulnerable/> accessed 13 May 2021.
[187] Fineman (n 174).

IV. Eligibility criterion and potential safeguards for an assisted death

Thus far, this paper has focused on the meaning and interpretation of assisted dying and vulnerability. The following section will discuss how an eligibility criterion will act as a mechanism for ensuring procedural safeguards to assisted dying. In *Nicklinson,*[188] Lady Hale questioned whether an outright prohibition of assisted dying was reasonably necessary and proportionate. It was concluded that the only sound reasoning for such a prohibition was to ensure protection of vulnerable people. However, one of the limitations with this justification is that it fails to consider the broad definition of vulnerable people, which includes those experiencing daily agonising, chronic and unbearable pain. As Lady Hale remarked, "it is difficult to accept that it is sufficient to justify a universal ban, a ban which forces people like […] Mr Nicklinson to stay alive not for the sake of protecting themselves, but for the sake of protecting other people."[189] Here, the statement introduces the somewhat paradoxical effect of promoting either the sanctity of life or the quality of life. The assertion also invites academics and legislators to contemplate a more expansive definition of vulnerability and its ever-changing nature. An exception to the universal ban on assisted dying would still be capable of protecting vulnerable people, and would grant those who are experiencing insufferable pain the choice to have an assisted death.

[188] *R (on the application of Nicklinson and another) (AP) (Appellants) v Ministry of Justice (Respondent)* [2014] UKSC 38.
[189] ibid [313].

Nevertheless, supporters of euthanasia are on the horns of a dilemma.[190] As postulated by Yuill, if the state were to allow euthanasia only when an individual's decision is deemed 'sensible'—*id est*, when experiencing unrelenting suffering or terminal illness—then this means that a (policy) choice must be made as to whether a person is better off dead. Whilst Yuill's argument is coherent, his interpretation disregards the importance of Article 8 of the European Convention on Human Rights. This confers a right on an individual to decide by what means and at which point their life will end, provided the individual is capable of freely reaching such a decision. Moreover, the decision should be made by the individual who is suffering and should not fall exclusively on others to make the decision—hence the term 'voluntary euthanasia.' The word 'voluntary' is used to indicate that it is the choice of the patient, and the word 'euthanasia' indicates that the death is 'good' or 'preferred.'[191] Therefore, it is logically coherent to hold that euthanasia is appropriate where the patient competently seeks euthanasia[192] and where such a patient is in agonising pain or is terminally ill.[193] Both requirements can be seen as "individually necessary and jointly sufficient" to qualify for an assisted death.[194]

(i) Lady Hale's 'four essential requirements'

Even though an outright ban of assisted dying is insufficient due to its consequential disregard for those who are suffering, issues may arise when deciding what safeguards will ensure that vulnerable people are protected. Nevertheless, Lady Hale states that it "would not be beyond the wit of a legal system to

[190] Jonathan Herring, *Medical Law and Ethics* (6th edn, Oxford University Press 2016).
[191] ibid 29.
[192] ibid.
[193] ibid.
[194] ibid.

devise a process for identifying those […] who should be allowed help to end their own lives."[195] Furthermore, the 'four essential requirements' posited by Lady Hale in *Nicklinson*[196] offer a sound solution to the preceding problem by creating an eligibility criterion for assisted dying and taking important steps towards the creation of an effective safeguard for vulnerable people. The first three requirements operate in accordance with the Mental Capacity Act 2005[197]—an Act designed to protect people who may lack the mental capacity to make personal decisions about their care and treatment. These first three requirements are that (1) a person must have "the capacity to make the decision for themselves," (2) that they must have "reached the decision freely without undue influence from any quarter" and (3) that they would "have had to reach it with full knowledge of their situation, the options available to them and the consequences of their decision."[198] Evidently, the purpose of the requirements is to respect the autonomous choice of a person who has the capacity to make it.[199] When considered in relation to assisted dying, patients who do not have the capacity to make such a decision will be prevented from doing so. As such, the requirements would appear successful in preventing an assisted death, thus protecting many people who may be classed as 'vulnerable'.

Whilst the three outlined requirements would only enable those with the mental capacity to make decisions about their care and treatment, the fourth requirement may be subject to criticism. This requirement holds that a person has to be "unable, because of physical incapacity or frailty, to put that decision into effect without some help from others." The

[195] *Nicklinson* (n 188) [314].
[196] *Nicklinson* (n 188).
[197] Mental Capacity Act 2005.
[198] *Nicklinson* (n 188).
[199] ibid [315].

requirement makes no attempt to explain the meaning of 'physical incapacity' or 'frailty,' nor how that is to be determined. It is possible that the ambiguity present in the fourth requirement could subject vulnerable persons to abuse within assisted dying legislation. For instance, if an individual is unable to self-administer lethal medication, they would need to rely on another individual to carry out their death, which would amount to voluntary euthanasia rather than PAS. Thus, regulation surrounding this issue would need to be enacted to ensure that the individual remains in control of the manner and time of their death.

In contrast, The Assisted Dying Bill 2021 put forward by Baroness Meacher would offer a greater level of protection, because the Bill indicates that its function is to enable adults who are terminally ill to be provided at their request with "specified assistance" to end their own life.[200] Section 4(5) of the Assisted Dying Bill states that an assisting health professional is not authorised to administer a medicine to another person with the intention of causing that person's death.[201] Furthermore, the Bill requires that, in order to obtain an assisted death, an individual must be terminally ill and have capacity. In this way, the Bill would only permit individuals to request a PAS and would not permit the practice of voluntary euthanasia. As previously indicated, although both practices achieve the same result, one could argue that they do not offer the same scope of protection: in particular, PAS provides the individual with the means to end their own life, but the individual must self-administer the lethal medication, whereas voluntary euthanasia does not require the individual to self-administer. Whilst the Assisted Dying Bill appears to overcome the uncertainty surrounding the meaning of 'frailty' and 'physical incapacity' in Lady Hale's fourth requirement,

[200] Assisted Dying HL Bill (2021-22) 13.
[201] ibid.

the Bill's exclusion of physically incapacitated individuals could result in denying people the ability to alleviate their suffering and thus maintaining their vulnerable state (rather than protecting it). Therefore, in order for the procedural safeguards to operate effectively, it is clear that a balance must be struck between both the sanctity of life and the quality of life.

(ii) Potential dangers of eligibility and safeguards

Despite the benefits of assisted dying safeguards, further queries remain. It appears that the moral question is not whether a person should be allowed to commit assisted suicide in a system where it is permitted, but whether such a system should be set up in the first place.[202] Battin suggests that there are three kinds of abuse that could occur, namely interpersonal, professional, and institutional abuse.[203] Collectively, these abuses incorporate societal pressures to die, time, monetary pressures and the potential for medical and legal structures to encourage the use of euthanasia. One of the limitations with these suggested abuses is that they are purely hypothetical and have not been observed in practice: the Falconer Report, for instance, specified that in three assisted dying jurisdictions there was no abuse or evidence to suggest that vulnerable groups were pressured or coerced into seeking an assisted death.[204] Whilst these findings illustrate the potential for effective safeguarding in the UK, the Report[205] creates a blurry picture of what legalisation of assisted dying would look like for the vulnerable, as the Report functions on a hypothetical basis. In addition, there is the concern that a legalisation of assisted dying would act as a stepping-stone towards further

[202] Crisp (n 186).
[203] Herring (n 190).
[204] Commission on Assisted Dying (n 167).
[205] ibid.

liberalisation,[206] resulting in a loosening of the procedural safeguards designed to protect vulnerable people.

Once again, these concerns are purely speculative, and one can only refer to observations in jurisdictions where assisted dying is permitted. When considered, these jurisdictions show that there is a strong case for providing a person with the choice of an assisted death, whilst simultaneously protecting them and vulnerable people.[207] Thus far, this section has shown that by implementing an eligibility criterion that focuses on a patient's mental capacity, assisted dying legislation *can* offer effective safeguards against abuse towards vulnerable people. The final section of this paper addresses the question of the value of life and whether all lives are worthy of protection.

V. The value of life

The value of life can be understood in many ways and, as such, different conclusions regarding the acceptability of assisted dying can be drawn. Huxtable highlights three distinct conceptions of the value of human life: intrinsic value, instrumental value and self-determined value.[208] The intrinsic view is linked to the principle of sanctity of life, which promotes the idea that life itself is valuable and should not intentionally be ended.[209] Huxtable's concept of instrumental value does not hold that "life itself is valuable, but rather that life of a sufficiently good quality is valuable."[210] Lastly, the self-determined value of life refers to the value that the

[206] Care Not Killing (n 183).
[207] *Nicklinson* (n 188).
[208] Commission on Assisted Dying (n 167).
[209] ibid.
[210] ibid.

individual places on their own life and their ability to decide what makes life worth living.[211] Whilst the intrinsic view encourages the protection and preservation of all lives, its religious undertones create an incompatibility with modern-day culture and thus weaken its credibility. However, Keown has suggested that this religious connotation hurdle can be overcome through a reinterpretation of the 'sanctity of life' principle as the 'inviolability of life' principle.[212] Although Keown's redefined principle affirms that all lives are deemed worthy of protection by society, Keown's proposition would have been far more persuasive if he assessed the importance of the 'quality of life' for the individual when determining 'end of life' decisions, which will be further explored in this paper.

Furthermore, it may be argued that the protection that is afforded to individuals' lives rests on the value that is placed on that life. For many, there is concern that assisted dying "devalues human life,"[213] with the existence of an 'eligibility' criteria further suggesting that some people are "unworthy of life."[214] In this way, life is deemed valuable only if it is of a sufficiently good quality. As the British Geriatrics Society argued, "once quality of life becomes the yardstick by which the value of human life is judged, the protection offered to the most vulnerable members of society is weakened."[215] Thus, if the quality of life principle is objectively interpreted and considered, it could conclude that a severely disabled person's

[211] ibid.
[212] Rob Heywood and Alexandra Mullock, 'The Value of Life in English Law: Revered but Not Sacred?' (2016) 36 Legal Studies 658.
[213] Commission on Assisted Dying (n 167).
[214] The Newsroom, 'Who Decides What a Life Is Worth? Not the Weak and Defenceless – Calum MacKellar' (*The Scotsman*, 26 June 2020) <https://www.scotsman.com/news/opinion/columnists/who-decides-what-life-worth-not-weak-and-defenceless-calum-mackellar-2895087> accessed 20 May 2021.
[215] BGS Group, 'Physician Assisted Suicide' (*British Geriatrics Society*, July 2015) <https://www.bgs.org.uk/policy-and-media/physician-assisted-suicide> accessed 8 May 2021.

life holds no worth, value or quality.[216] Using this calculation, the potential dangers regarding the safeguarding of vulnerable people are exposed as the value of life dramatically decreases depending on an individual's vulnerability. However, this theory only introduces the limitations of Huxtable's 'instrumentalist' conception of the value of human life, and is examined purely from an outsider's perspective. Nevertheless, the main weakness with this theory is that it disregards Huxtable's 'self-determined' conception of the value of life and fails to take the individual's view of their own quality of life and dignity into account.

Whilst the sanctity of life principle promotes the protection of all lives, it does not guarantee everyone a good quality of life; and in 'hopeless' cases,[217]it merely emphasises the vulnerability and helplessness of the patient.[218] As observed in *Nicklinson*[219] and *Pretty*,[220] lack of consideration of a patient's wishes results in suffering and dying without dignity because they have no other choice. As highlighted in *R v Arthur*,[221] *Re C*[222] and the abovementioned cases, the 'protect life at all costs' approach is too blunt, but the other extreme of allowing medical professionals to intentionally kill patients gives doctors too much power to decide on life and death.[223]

Furthermore, assessing one's quality of life through the lens of the individual is imperative to ensure that a decision for

[216] Heywood and Mullock (n 212).
[217] A 'hopeless' case refers to situations where, in a given patient, there has been a firm diagnosis of a relatively chronic condition that may be expected to terminate fatally because curative treatment is either not known or not applicable.
[218] KC Micetich, 'Are Intravenous Fluids Morally Required for a Dying Patient?' (1983) 143 Archives of Internal Medicine 975.
[219] *Nicklinson* (n 188).
[220] *Diane Pretty v Director of Public Prosecutions* [2001] UKHL 61.
[221] *R v Arthur* (1981) 12 BMLR 1.
[222] *Re C (Adult: Refusal of Medical Treatment)* (1994) 1 All ER 819.
[223] Heywood and Mullock (n 212).

or against an assisted death is made in the patient's best interests. It can be claimed that there is no philosophical absurdity involved in arguing that life has been of no benefit to one who has spent that life in pain.[224] Therefore, an assisted death is appropriate not where a person's life is deemed 'valueless' by society, but rather where it has lost value for the individual themselves.[225]

In addition, Singer considers the third conception of the value of life—what Huxtable named 'self-determined value.' In his important analysis of assisted dying, Singer concluded that the individual themselves should decide the value that they place on their life.[226] Whilst it may be widely accepted that most people do not want to die, the 'right to life' should not be enforced on a person who is in insufferable pain and who consequently seeks to bring that pain, and their life, to an end. Additionally, Harris poignantly suggested that there is no wrong in assisting a death if the person concerned no longer values life.[227] By focusing merely on the instrumental value and worthiness of life, the value that an individual places on their life is overlooked. As a consequence, the individual must endure prolonged suffering and a poor quality of life. In contrast, the Suicide Act 1961 amendments do not prevent those who are physically able to end their own lives from doing so. This distinction highlights an extant inequality in English law, which begs the question why some people are mandated to essentially live against their will. Whilst Harris presents a convincing argument, counterarguments may be raised regarding the increased pressure on vulnerable people—namely, the disabled and elderly—to end their lives. Not only this, there is the 'slippery slope' fear that further liberalisation

[224] John Stuart Mill, *On Liberty* (John W Parker and Son, West Strand 1859).
[225] Heywood and Mullock (n 212).
[226] ibid.
[227] ibid.

of assisted dying law would strip those who are vulnerable of vital protection. Thus, it may be argued that, although legal rigidity surrounding assisted dying seems conservative and unsympathetic, for many it is a critical lifeline.

Again however, the aforementioned reservations are purely speculative. The findings[228] made in jurisdictions that permit assisted dying, such as the Netherlands and Oregon, do not support the 'slippery slope' arguments raised in opposition to assisted dying. Although one cannot say for certain that legalisation of assisted dying in the UK will produce the same results, effective safeguards will ensure that all lives are protected and that due consideration is given to the evaluation of quality of life. Arguably, all lives are worthy of protection, both in the biological sense and the biographical sense.[229] Additionally, effective procedural safeguards, as suggested by Lady Hale, will create a system that aims to protect the vast majority of lives and will not dictate or supersede the value that an individual places on their own life. Thus, a compromise between the sanctity and quality of life principles emerges. As Rachels put it, "from the point of view of the living individual, there is nothing important about being alive except that it enables one to have a life."[230] Therefore, one may accept the premise that all lives are worthy of protection, but recognise that, ultimately, the worth of life ought to be self-determined.

VI. Conclusion

In conclusion, whilst identifying groups of vulnerable people may appear straightforward, one of the limitations with categorising individuals as being within a vulnerable group is

[228] Battin and others (n 169).
[229] ibid.
[230] ibid.

that it lends itself to over-generalisation. There must be an appreciation that every individual is vulnerable in some way, but in varying degrees. Although an outright ban of assisted dying recognises that all lives are worthy of protection and succeeds in preserving life, it fails to consider the wishes of those who are experiencing insufferable pain and consequently wish to die. The right to choose the time and manner of one's own death is paramount to one's autonomy over their own body, and so denying a person respect for their views is the ultimate denial of respect for that person.[231] Although effective procedural safeguards can act as a mechanism to ensure the protection of those who are vulnerable, further research is required to establish the effectiveness of the safeguards against individuals that have capacity but who are considered vulnerable for other reasons, for instance disability or illness. Thus, there is a need for the law to recognise the individualistic approach to assessing one's quality of life and how it is to be valued. This way, the law is best able to promote dignity in dying.

[231] Herring (n 190).

Direct Awards and Extreme Urgency: Lessons from UK Procurement During the COVID-19 Pandemic

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To what extent should normal regulatory requirements be maintained in times of crisis? This article will consider the impact of a global crisis—the COVID-19 pandemic—on the operation of the United Kingdom's ('UK') procurement regime. The COVID-19 pandemic led to an urgent need for increased amounts of key products and services. To support the purchase of these goods and services in a timely manner, the normal requirements of the UK procurement regime were relaxed, enabling contracts to be awarded directly to suppliers without the need for a full competitive process. This method has the benefit of speed and simplicity but brings with it an increased risk of corruption within the procurement process. Drawing on case law from the pandemic, this article evaluates the level of control within the UK procurement regime to limit the potential for corruption in a crisis situation, before considering the extent to which that control might be improved under the proposed Procurement Bill. The article will demonstrate that the procurement regime at the time of the COVID-19 pandemic lacked clarity on which key obligations applied to emergency procurement, along with the extent of those obligations. There is limited improvement in the revised regime under the Procurement Bill, leading to the risk that issues could reoccur in the future. In particular, there is a need for increased levels of transparency in relation to emergency procurement, enabling greater monitoring of contracts awarded in times of crisis.

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I. Introduction

Public procurement was crucial in the response to the COVID-19 pandemic in the United Kingdom ('UK'). The crisis brought about an immediate need for key products and services, ranging from medical and cleaning equipment to software for tracking infected persons and their close contacts. As is common in a crisis situation, the increased demand for certain supplies led to both shortages of those goods and price rises. The challenge of procuring the necessary goods and services was also exacerbated by the global nature of the emergency, with the limited resources and increased demand at a global level meaning that the state could not rely on obtaining goods from outside the country, as they might in a local or national crisis situation.[232] Procurement was also slowed by government officials and procurement practitioners suffering from illness, alongside the impact of the working restrictions put in place to limit the spread of COVID-19.[233]

In order to ensure that the procurement of urgent necessary goods and services can be as swift as possible, the UK procurement regime allows for the lifting of many of the normal obligations in an emergency situation. In this way, the regime prioritises speed over other concerns. However, with these reduced legal controls comes the risk of increased levels of corruption within procurement, as those involved take advantage of the emergency regime. This risk was particularly highlighted by a lobby group, the Good Law Project, which

[232] Sue Arrowsmith, Luke Butler and Annamaria La Chimia, 'Public Procurement Regulation in (a) Crisis? General Introduction' in Sue Arrowsmith and others (eds), *Public Procurement Regulation in (a) Crisis? Global Lessons from the COVID-19 Pandemic* (Hart 2021) 5.
[233] ibid.

brought several cases challenging contracts awarded during the COVID-19 pandemic.[234]

This article evaluates the level of control within the UK procurement regime to limit corruption even within a situation of extreme urgency. It will start with an overview of the UK procurement regime and the options available to procurement practitioners under that regime to respond to the need for urgent procurement, focusing particularly on the possibility for awarding a contract directly to a supplier without competition (Section II). Controls on directly awarded contracts will then be evaluated in light of two key cases brought by the Good Law Project (Section III). Finally, the impact of the current Procurement Bill will be evaluated to determine if the level of control over emergency procurement has improved (Section IV). The article will demonstrate the lack of clarity within the current law on the obligations applicable to procurement conducted in extreme urgency and the need for additional reform and guidance on this point. In particular, the article will highlight the need for increased transparency around emergency procurement, enabling greater monitoring and challenge of contracts awarded in crisis situations.

II. UK procurement regulation and COVID-19 guidance

The UK's procurement regime predominantly reflects obligations stemming from EU law and the Government Procurement Agreement ('GPA') of the World Trade Organisation ('WTO'), with minimal domestic regulation added to this. The EU, in particular, sets out a comprehensive regime governing the award of public contracts, with legal

[234] To find more information on the work of the Good Law Project, visit <https://goodlawproject.org/>.

sanctions for failing to comply with those requirements. Legal obligations such as a principle of transparency are drawn directly from primary law (particularly the provisions on free movement of goods and services), but the bulk of the requirements are set out in a series of directives which establish detailed substantive rules on the award of contracts.

The core relevant directive for the purposes of COVID-related procurement within the UK is Directive 2014/24/EU on public sector contracts,[235] which was implemented in England and Wales as the Public Contracts Regulations 2015 ('PCR 2015').[236] The PCR 2015, consistent with the UK's normal approach in the procurement arena, copied out the English language version of the Directive with minimal changes. After the UK left the EU on 31 January 2020, the PCR 2015 were retained in domestic law[237] with some minor changes to reflect the UK's changed position (e.g., the introduction of a national site for publication of procurement information, replacing the EU publication system).[238]

Under the PCR 2015, public sector bodies awarding contracts ('contracting authorities') should normally use a competitive procedure to do so. The range of procedures from which a contracting authority may choose is set out in Reg. 26 PCR 2015. The standard procedures are the open procedure[239] (in which an unrestricted number of potential suppliers may submit a tender for the contract) and the restricted procedure[240]

[235] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC OJ L 95/65.
[236] Public Contracts Regulations 2015, SI 2015/102.
[237] See European Union (Withdrawal) Act 2018, s 2(1) providing for the continuing legal effect of EU-derived domestic legislation.
[238] Gov.uk, 'Find high value contracts in the public sector' (*Gov.uk,* July 2022) <https://www.gov.uk/find-tender> accessed 20 July 2022.
[239] PCR 2015 (n 236) reg 27.
[240] PCR 2015 (n 236) reg 28.

(in which the contracting authority may limit numbers of tenderers). Contracting authorities must follow a set process for each procedure in which they advertise the tender process (a call for competition) and publish the requirements of the contract (the technical specifications), the criteria which will be used to exclude any tenderers (or, for the restricted procedure, to select those permitted to tender) and the criteria used to select the winning tender. In some circumstances, contracting authorities may instead use more flexible procedures permitting some negotiation with potential suppliers, but still requiring a call for competition.[241]

The PCR 2015 set minimum time limits for the operation of each procedure, normally requiring at least 30 days for the receipt of tenders. There is, in addition, a mandatory 10-day 'standstill' period after the winning tender has been chosen before the contract can be signed, enabling unsuccessful tenderers to challenge the process before the contract is concluded.[242] However, these minimum periods do not take into account practicalities such as the time taken by the contracting authorities to prepare the tender documentation or to assess the submitted tenders. As such, a tender process is often substantially longer than the time limits set out in the legislation.[243]

What, then, should contracting authorities do in a situation such as the COVID-19 pandemic, when they need goods and services much faster than the standard procedures permit? The primary options permitted by the PCR 2015 are 'accelerated' versions of the open and restricted procedures.

[241] See the competitive procedure with negotiation under reg 29 PCR 2015 and the competitive dialogue procedure under reg 30 PCR 2015. The requirements for their use are set out in reg 26(4) PCR 2015.
[242] PCR 2015 (n 236) reg 87.
[243] Totis Kotsonis, 'EU procurement legislation in the time of Covid-19: fit for purpose?' (2020) 4 Public Procurement Law Review 199, 200.

Where 'a state of urgency' renders the standard time limits 'impracticable,' the time limit for the receipt of tenders may be reduced down to 15 days.[244] However, the 10-day standstill period remains legally required, and the practical requirements for preparing documentation (etc.) also remain in practice, meaning the accelerated procedures can be of limited utility in truly urgent scenarios.[245] Consistent with this, UK contracting authorities appeared to make very minimal use of accelerated open and restricted procedures for COVID-related procurement.[246]

The main alternative solution for urgent procurement is provided in Reg. 32 PCR 2015. This permits contracting authorities in certain defined exceptional circumstances to use the 'negotiated procedure without prior publication,' which enables contracting authorities to award contracts to a supplier without needing to advertise that contract or comply with the normal requirements for competition. A contract concluded in this manner—i.e., directly with a supplier without a competitive procedure —is termed a 'direct award.'

Of the listed grounds under which the negotiated procedure without prior publication may be used, the key ground for COVID-related procurement is set out in Reg. 32(2)(c) PCR 2015, which permits use of the procedure:

> "[I]nsofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted

[244] PCR 2015 (n 236) reg 27(5) and 28(10).
[245] Kotsonis (n 243).
[246] National Audit Office, *Investigation into government procurement during the Covid-19 pandemic* (HC 959, 2019-2021) 21 (showing awards involving competition); Arrowsmith (n 232) 69.

> procedures or competitive procedures with negotiation cannot be complied with."[247]

In March 2020, the UK Cabinet Office released guidance supporting the use of direct awards under this ground, highlighting the risk posed by COVID-19 to life and stating that Reg. 32(2)(c) PCR 2015 was "designed to deal with this sort of situation."[248] The use of Reg. 32(2)(c) for urgent COVID-related procurement was also later supported by guidance from the European Commission, which noted that the EU public procurement regime "provides all necessary flexibility" to purchase goods and services directly linked to the COVID-19 crisis "as quickly as possible." The Commission also identified the negotiated procedure without prior publication as the procedure with the "shortest possible timeframe."[249]

The flexibility provided by the negotiated procedure without prior publication is clearly articulated by the Commission guidance:

> "Under this procedure […] public buyers may negotiate directly with potential contractor(s) and there are no publication requirements, no time limits, no minimum number of candidates to be consulted, or other procedural requirements. No procedural steps are regulated at EU level. In practice, this means that authorities can act as

[247] For an analysis of the requirements set out here, see Arrowsmith (n232) 77-87.
[248] Cabinet Office, 'Procurement Policy Note: Responding to COVID-19' (Procurement Policy Note 01/20, 18 March 2020) < https://www.gov.uk/government/publications/procurement-policy-note-0120-responding-to-covid-19> accessed 20 July 2022, 3.
[249] European Commission, *Communication from the Commission: Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis*, OJ 2020 C108I/1.

> quickly as is technically/physically feasible—and the procedure may constitute a de facto direct award only subject to physical/technical constraints related to the actual availability and speed of delivery."[250]

The procurement rules are therefore effectively "deactivated" as a reaction to the crisis.[251] This has the benefit of removing administrative burdens in the procurement process to support the operation of the state during the emergency period. But with the removal of those administrative restraints comes the removal of legal protections designed to ensure procurement is operated on the basis of objective principles—such as value for money and non-discrimination—and to prevent conflicts of interest and corruption. The procurement regime during COVID-19 therefore risked becoming what Sanchez-Graells dubbed "a chancers' paradise."[252]

One requirement which explicitly remains in place for direct awards made under Reg. 32 is the requirement to publish a contract award notice within 30 days of the contract being awarded.[253] This contract award notice must contain certain specified information, such as a description of the nature of the procurement and the value of the contract and, for contracts concluded under the negotiated procedure without prior publication, justification for the use of that procedure.[254] Without such a notice, it would be virtually impossible for

[250] ibid.
[251] Albert Sanchez-Graells, 'Procurement in the time of COVID-19' (2020) 71(1) Northern Ireland Legal Quarterly 81, 82.
[252] Albert Sanchez-Graells, 'COVID-19 PPE Extremely Urgent Procurement in England: A Cautionary Tale for an Overheating Public Governance' in Dave Cowan and Ann Mumford (eds), *Pandemic Legalities: Legal Responses to COVID-19 – Justice and Social Responsibility* (Bristol University Press 2021) 100.
[253] PCR 2015 (n 236) Reg 50.
[254] Part D of Annex 5 of Directive 2014/24/EU, as required under PCR 2015, reg 50(2).

other interested parties to become aware of a direct award and, consequently, to challenge the procurement in court. In practice, the demands of the pandemic on the procurement system within the UK meant that many contract award notices for COVID-related contracts were published late. In these cases, the court issued declarations of non-compliance, although this non-compliance was not found to be deliberate.[255]

The requirement for a contract award notice offers some level of transparency and protection in relation to direct awards, but only operates after the fact. Is there any level of protection against conflicts of interest and corruption in direct awards under the UK procurement regime which operates at an earlier stage? The following section will evaluate this in light of two key cases brought by the Good Law Project group: *PestFix*[256] and *Public First.*[257]

Before that, a note on scope. It is arguable that a pandemic situation such as this does not necessarily permit the urgency ground to be used as a general exception as the UK did. Rather, contracts should have been considered on a case-by-case basis to determine if the requirements were met for each individually.[258] However, the High Court accepted the use of the exception generally for COVID-related procurement in *PestFix*,[259] so this article will not evaluate the initial decision to use direct awards in an emergency situation.

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[255] *R (on the application of Good Law Project Ltd) v Secretary of State for Health and Social Care* [2021] EWHC 346.
[256] *R (on the application of Good Law Project Ltd) v Secretary of State for Health and Social Care* [2022] EWHC 46 ('*PestFix*').
[257] *R (on the application of Good Law Project Ltd) v Minister for the Cabinet Office* [2022] EWCA Civ 21 ('*Public First*').
[258] Pedro Telles, 'Extremely urgent procurement under Directive 2014/24/EU and the COVID-19 pandemic' (2022) 29(2) Maastricht Journal of European and Comparative Law 215, 219.
[259] *PestFix* (n 256) [350]-[362].

III. Regulation of urgent procurement: *PestFix* and *Public First*

(i) PestFix: equal treatment and transparency

The *PestFix* case concerned the procurement of Personal Protective Equipment (PPE) during the early stages of the pandemic in March and April 2020. The UK's stockpiles of PPE were insufficient and, with rising global demand and limited supply, contracting authorities in the UK were unable to purchase the PPE at the level required. In response, the government established a new 'open source' approach to procurement of PPE, under which they sought offers of supply from across private sector businesses, including those who did not normally supply medical-grade PPE (the Coronavirus Support from Business Scheme).[260] The scheme was established under Reg. 32(2)(c) PCR 2015 and directly awarded contracts to suppliers.

Information about the scheme, including the technical specifications of the goods required, was published on a portal on the gov.uk website, and interested suppliers could make offers using a questionnaire on that portal. These offers would then be evaluated by a Technical Assurance team to determine if the goods offered met the technical specifications. If appropriate, suppliers would be assessed to ensure their financial standing before a contract was negotiated.[261]

In late March 2020, in response to a large number of referrals coming through from outside the portal, the government established a High Priority Lane ('HPL'). This was reserved for referrals for PPE supply from Members of

[260] ibid [21].
[261] ibid [26]-[57].

Parliament, ministers and senior officials.[262] A separate HPL team would assess offers via this route before forwarding promising offers to the standard Technical Assurance team, after which the offer would follow the same steps as an offer which came in via the portal.

Good Law Project challenged contracts for PPE awarded to three suppliers, alleging, *inter alia*, the direct award of contracts via the scheme—and particularly via the HPL—breached the general principles of transparency and equal treatment. The principles of equal treatment and transparency are set out in Reg. 18(1) PCR 2015, which states:

> "Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner."

The principle of equal treatment within procurement requires "that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified."[263] The principle of transparency is drawn from this, intended to ensure that compliance with the principle of equal treatment is reviewable. It requires contracting authorities to ensure "a degree of advertising sufficient to ensure the […] market [is] opened up to competition and the impartiality of procurement procedures […] reviewed."[264]

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[262] ibid [58].
[263] Joined Cases C-21/03 and C-34/03, *Fabricom v Belgium* [2005] ECR I-1577, [27].
[264] Case C-324/98, *Telaustria v Telekom Austria AG* [2000] ECR I-10745372, [62]. For more on the specific requirements of each principle, see *PestFix* (n 256) [311]-[326].

The principles within Reg. 18 PCR 2015 apply generally to all procurement conducted under those Regulations. The application of those principles to direct awards is not expressly excluded by Reg. 32 PCR 2015. However, the situation is muddied by the fact that Reg. 32 does not expressly exclude the operation of many of the rules within the Regulations even where, in practice, they would seem to be inappropriate for a negotiated procedure without competition (e.g., the rules on award criteria).[265] As such, the lack of explicit exclusion cannot be taken in itself to confirm the application of those principles. Certainly, despite the lack of clarity in the Regulations (which import the lack of clarity in the original Directive), the Commission guidance quoted above clearly implies that the majority of obligations do not apply to a direct award. So, what is the status of the general principles under Reg. 18 PCR 2015? As articulated by the High Court, the question is "whether there is an irreducible minimum standard of objective fairness that applies to such procurements, even in the absence of open competition."[266]

The court concluded that where a contract is awarded directly to a single supplier because they are the only supplier who can provide the relevant goods or services, the principle of equal treatment cannot apply; there is no other supplier against which their treatment can be compared.[267] That, however, was not the situation here, in which there were multiple suppliers of PPE, and direct awards were instead being made due to the urgent timescales and need to ensure security of supply. In a situation in which the contracting authority was considering bids from more than one supplier, the court concluded there was no obvious rationale for not applying the principle of equal treatment. In the circumstances of this case,

[265] Arrowsmith (n 232) 93-94.
[266] *PestFix* (n 256) [334].
[267] ibid [341].

although the pool of potential suppliers and the required goods were constantly changing, there was nonetheless a process determined by the contracting authority under which some suppliers were being offered contracts and some were not. Given this, the principle of equal treatment applied.[268]

On the facts, the operation of the procurement via the portal did not breach the principles of equal treatment or transparency.[269] The technical specifications for the supplies required were published and updated when possible, and there were objective criteria for the selection of suppliers and award of contracts, ensuring a fair negotiated process. Those criteria did not have to be published, but there is a suggestion in the judgment that the principle of transparency would require any changes to the rules to be made clear if those changes would disadvantage particular bidders.[270]

The HPL, in contrast, did breach the principle of equal treatment. Evidence suggested that an offer received via the HPL was sent over to the Technical Assurance team more quickly than one received via the portal, and, particularly in light of the urgency of the procurement, getting to that stage quickly was a material advantage in being offered a contract.[271] The HPL system did not treat like suppliers alike; the fact that an offer was received via the HPL "did not justify preferential treatment" over an offer which was similar in relation to the financial and technical requirements, but which was received via the portal.[272]

[268] ibid [348].
[269] ibid [351]-[368].
[270] ibid [349].
[271] ibid [397].
[272] ibid [398].

The conclusion, therefore, appears to be that there is indeed an "irreducible minimum standard of objective fairness" which applies even to direct awards.[273] In a procurement situation involving more than one bidder, even if not a competitive procedure, the principles of equal treatment and transparency remain applicable. Contracting authorities should ensure they establish criteria for selection and award based only on objective factors such as technical and financial merit. As far as possible, contracting authorities would be advised to make the technical requirements available to bidders, and although not legally required it would seem best practice to also publish selection criteria where possible.

What of direct awards made to a single supplier? There is some *obiter* discussion of this within the judgment, but it is somewhat confused. As noted above, the court is clear that in these circumstances the principle of equal treatment cannot apply. Is a contracting authority therefore required to avoid the situation of single source procurement if at all possible? On this point, the court states:

> "It would be open to the Defendant to justify the selection of one economic operator but only: (i) where he could bring himself within the conditions set out in regulation 32(2)(b), for example where only one economic operator could source the required PPE; or (ii) where he could justify the extent of such derogation from the principles in regulation 18 under regulation 32(2)(c), for example where only one economic operator could source the PPE within the required timescale."[274]

[273] *PestFix* (n 256).
[274] ibid [346].

This statement is problematic as it conflates two separate grounds for the use of the negotiated procedure without prior publication.[275] Reg. 32(2)(c) PCR 2015, which this discussion has focused on, is the ground allowing use in circumstances of extreme urgency and makes no mention of number of potential suppliers. Reg. 32(2)(b) PCR 2015 is a ground available even in non-urgent circumstances, allowing a contracting authority to make a direct award to one supplier on the basis that there is no other supplier able to provide the required goods or services. The statement from the court suggests that if a contracting authority wishes to contract with a single supplier in an emergency situation, they are nonetheless required to 'justify' that choice in order to derogate from Reg. 18. But this is not evident on the wording of the Regulations. The position where only one supplier is possible is adequately covered by Reg. 32(2)(b)—implying similar restrictions into Reg. 32(2)(c) is unnecessarily complex and limiting for a contracting authority making difficult decisions in an urgent situation. If accepted, this requirement would, however, provide additional protection to those wishing to bring a legal challenge to the contract later, by requiring documentation of the decision making process leading to the choice of the single supplier (see further later, in the discussion on *Public First*).

Overall, the finding in *PestFix* is positive, establishing that even in an emergency situation contracting authorities cannot award a contract to any firm they wish on the basis of arbitrary or unfair selection criteria. The application of the principles of equal treatment and transparency even to direct awards goes some way to limiting the potential for corruption

[275] Albert Sanchez-Graells, 'Interesting twist on the interpretation of extremely urgent procurement rules—re: [2022] EWHC 56 (TCC)' (*How to Crack a Nut,* 13 January 2022) <https://www.howtocrackanut.com/blog/2022/1/13/interesting-twist-on-the-interpretation-of-extremely-urgent-procurement-rules> accessed 22 July 2022.

in these contracts. However, as is the case with any procurement situation governed only by general principles,[276] the precise requirements of what needs to be done by a contracting authority to meet their obligations are unclear. There is a risk that the administrative burden of attempting to comply with unclear requirements may outweigh the benefits in relation to preventing unfair contracts when in the highly time-sensitive situations where Reg. 32(2)(c) PCR 2015 is used. To support future compliance, the requirements should have been articulated as clearly as possible. The court's comments on single source procurement are also unclear and unhelpful, potentially limiting future use of single source direct awards for legitimate purposes in urgent situations.

(ii) Public First: apparent bias

Public First concerned the award of a contract for the provision of research services and communications support to aid government public messaging at the outset of the pandemic. The contract was a direct award made on the basis of Reg. 32(2)(c) PCR 2015 and concluded with Public First, an agency which was an existing supplier to the government. The Good Law Project challenged this contract on the basis, *inter alia*, of the close personal and professional connections between the directors of Public First and Dominic Cummings, the then Chief Adviser to the Prime Minister; and the directors of Public First and Michael Gove, the then Chancellor of the Duchy of Lancaster.

The connections between the supplier and senior officials raises the issue of conflicts of interest within

[276] Luke Butler, 'Regulating Single-Source Procurement in Emergency Situations in Light of the COVID-19 Pandemic: Issues in Policy and Practice' in Sue Arrowsmith and others (eds), *Public Procurement Regulation in (a) Crisis? Global Lessons from the COVID-19 Pandemic* (Hart 2021) 117.

procurement. The PCR 2015 cover conflicts of interest within Reg. 24. Conflicts of interest are not exhaustively defined, but cover "at least" any situation in which relevant staff at the contracting authority "have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure."[277] The PCR 2015 oblige contracting authorities to "take appropriate measures to effectively prevent, identify and remedy conflicts of interest" arising during a procurement.[278] A record must be kept of any conflicts identified and the measures taken in response.[279] Despite this coverage within the PCR 2015, Reg. 24 was not pleaded within *Public First* and there is therefore no analysis of its application. It is regrettable that the opportunity was not taken to consider its operation.

Instead, Good Law Project opted to argue the issue under the common law, arguing for a breach of the principles of natural justice and, particularly, that the direct award gave rise to apparent bias. This argument was accepted by the High Court[280] but rejected by the Court of Appeal.[281] It was accepted by all parties that there was no evidence of actual bias. The test for apparent bias was established in *Porter v Magill*:

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the [decision maker] was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a

[277] PCR 2015 (n 236) reg 24(2).
[278] ibid reg 24(1).
[279] ibid reg 84(1)(i).
[280] *R (on the application of the Good Law Project Ltd) v Minister for the Cabinet Office* [2021] EWHC 1569.
[281] *Public First* (n 257).

> real danger, the two being the same, that the [decision maker] was biased."[282]

The High Court concluded that a fair-minded and informed observer, being aware of the urgent need for reliable research, would not have concluded there was a real possibility of bias based purely on the personal and professional connections between the supplier and the relevant senior officials, which were unsurprising given the length of time all involved had worked within government departments.[283] However, the government's failure to consider any other supplier or to undertake any objective assessment to determine if Public First were the most appropriate supplier would have led a fair-minded and informed observer to conclude that there was a real possibility of bias. This suggests that, although a full competitive procedure cannot be required under Reg. 32(2)(c) PCR 2015, where a contracting authority chooses to make a direct award to a single supplier, they must choose that supplier on the basis of objective criteria in order to demonstrate the choice is fair and prevent a finding of apparent bias.[284]

The Court of Appeal in *Public First* were unconvinced by this, however. The court noted the "tension" between the High Court's finding firstly that the government were entitled to rely on Reg. 32(2)(c) PCR 2015 to award the contract using the negotiated procedure without prior publication—a procedure which does not require competition; and secondly, the finding that the government was nonetheless required to consider other suppliers and assess them using objective

[282] *Porter v Magill* [2002] 2 AC 357, [102]-[103].
[283] *R (on the application of the Good Law Project Ltd)* (n 280) [146].
[284] See further Sue Arrowsmith and Luke Butler, 'Emergency Procurement and Regulatory Responses to COVID-19: The Case of the United Kingdom' in Sue Arrowsmith and others (eds), *Public Procurement Regulation in (a) Crisis? Global Lessons from the COVID-19 Pandemic*, (Hart 2021) 377.

criteria.[285] The PCR 2015 did not require such assessment for the negotiated procedure without prior publication, and the Court of Appeal were "unable to accept that in these circumstances the impartial and informed observer would, in effect, require the creation of a common law 'procurement regime-light' in the absence of which he would think there was a real possibility of bias." The common law therefore does not require any additional controls on the award of contracts under Reg. 32(2)(c) PCR 2015, and a contracting authority which is legitimately awarding a contract under that ground may do so to a single supplier without having to demonstrate a fair and impartial process for the choice of that supplier.

The Court of Appeal could not consider the findings of the High Court in *PestFix* on the application of the principles of equal treatment and transparency, which had been handed down after the conclusion of the *Public First* hearings. As noted above, there is the *obiter* suggestion there that a choice of a single supplier may in fact need to be justified under the Regulations, in which case a common law duty to do so would be entirely consistent (although would not necessarily add anything to the duty under the PCR 2015). However, if this (somewhat confused) *obiter* suggestion is incorrect, the situation appears to be one in which a procurement run under Reg. 32(2)(c) PCR 2015 involving multiple potential suppliers must document the process to ensure equal treatment and transparency; but a procedure run under the same Regulation with only one supplier need not do so, either under the PCR 2015 or under common law, leading to a discrepancy in the information available to anyone wishing to challenge the contract.

[285] *Public First* (n 257) [72].

The Court of Appeal also commented on the level of evidence which would be available to the hypothetical fair-minded and informed observer. In particular, the informed observer should be taken to be aware of the evidence presented to court by the government's officials who dealt with the contract.[286] Where the fair-minded and informed observer cannot find publicly documented reasons for a decision, "then they would ask for an explanation before reaching any firm conclusions."[287] This seems to impute a level of commitment to becoming informed which goes beyond the average citizen. The high standard set here does not support public trust in the procurement process for the majority of people who will not take the steps set out in relation to finding evidence of the relevant decision-making.

Overall, *Public First* is a disappointing decision which limits control over future conflicts of interest within procurement. The requirement originally set out by the High Court for evidence of a fair and impartial process did not set an onerous obligation, even in urgent situations, given that no time limit was set and there was no publication requirement. The result of the Court of Appeal judgment is that there is limited potential in the future for a successful challenge to a direct award on grounds of apparent bias, particularly in light of the high expectations of the fair-minded and informed observer test.

(iii) Conclusion on current controls

Based on the analysis above, one crucial area of focus for future reform should be single source procurement. There should be greater clarity on the potential for use of such procurement under Reg. 32(2)(c) PCR 2015 and, where single source

[286] ibid [80].
[287] ibid [82].

procurement is used, greater clarity on the obligations which apply over the course of the procurement. In particular, there should be clarity about whether the decision to choose a single supplier needs to be documented and published. This clarity could be provided either through legal regulation or through government guidance. A Procurement Policy Note was published in February 2021 reiterating the need to keep proper records of decisions, but this does not specifically distinguish between single source and other procurement.[288]

Additional government guidance on the level of documentation required to comply with the principles of equal treatment and transparency when procuring under Reg. 32(2)(c) PCR 2015 with multiple suppliers would also be beneficial. Although some guidance is provided within the *PestFix* judgment, this is inevitably focused on the specific facts of the open source procurement process challenged within that case. Additional guidance for alternative situations would help provide confidence and clarity to contracting authorities who need to be able to act swiftly in an urgent procurement.

Finally, the controls on conflicts of interest appear to be insufficient. Reg. 24 PCR 2015 does at least require an investigation of conflicts to take place and a record to be made of any measures taken. But for the purposes of ensuring public trust and supporting challenge to inappropriate contracts, it might be appropriate for such records to be made publicly available (redacted where necessary for commercial sensitivity). Given the high bar set by the court for apparent bias, additional controls would be best set out in legislation.

[288] Cabinet Office, 'Procurement Policy Note: Procurement in an Emergency' (Procurement Policy Note 01/21, 4 February 2021) <https://www.gov.uk/government/publications/procurement-policy-note-0121-procurement-in-an-emergency> accessed 20 July 2022.

IV. Lessons learned? *Transforming Public Procurement* and the Procurement Bill 2022

Post-Brexit, the UK procurement regime does not necessarily have to be in line with that of the EU (though the UK remains a signatory to the WTO GPA, so its procurement regime must remain compliant with those international obligations). As such, in December 2020, the government published a Green Paper, *Transforming Public Procurement*, looking at reform of the procurement regime.[289] The proposals within that Paper go some way to solving some of the issues identified above, although the issue of conflicts of interest is a notable omission within the discussion.

The Green Paper proposed retaining the negotiated procedure without prior publication, but renaming it to the "limited tendering procedure."[290] This would be available not only under the current 'extreme urgency' ground, but also under a new ground specifically relating to crisis situations, intended to give greater certainty to contracting authorities about when the procedure was available in cases of national or local emergency.[291] Contracting authorities would now be required to publish a 'transparency notice,' setting out the grounds under which they are using the procedure and supporting future review of such contracts.[292] In a positive development given the lack of clarity highlighted above, the Green Paper suggested that guidance would be published making it clear that there should be "no general assumption" that the procedure should be single source.[293] Even where the procedure was used due to crisis or extreme urgency, where

[289] Cabinet Office, *Transforming Public Procurement* (Cm 353, 2020).
[290] ibid para 72.
[291] ibid para 78-82.
[292] ibid para 77.
[293] ibid para 72.

there are a number of potential suppliers and the scope to undertake some competitive assessment, a contracting authority would be required to consider this and to keep a record of their reasoning.[294]

Following on from the Green Paper and the results of the consultation on that Paper,[295] the Procurement Bill ('the Bill') was introduced into the House of Lords in May 2022.[296] At the time of writing, the Bill had just begun the Committee stage within the House of Lords and the discussion in this article reflects the Bill in its initial form, without consideration of any suggested amendments. The Bill contains some elements set out within the Green Paper, but others are noticeably absent, making the level of protection in relation to corruption and conflicts of interest lower than expected.

The negotiated procedure without prior publication is now officially termed a 'direct award,' adopting the terminology previously used informally. It continues to be available in situations of extreme urgency.[297] As suggested within the Green Paper, an additional ground for crisis procurement has been added, although the term crisis has been clarified such that the ground is only available when necessary to protect human, animal or plant life or health, or to protect public order or safety.[298] Clause 43 requires publication of a 'transparency notice' when a decision is made to make a direct award. This must include a notice that the contracting authority intends to make a direct award, but there is no indication as yet of any other requirements, which may be added by secondary

[294] ibid para 81.
[295] Cabinet Office, *Transforming Public Procurement: Government response to consultation* (Cm 556, 2021).
[296] Procurement HL Bill (2022-23) 4.
[297] ibid sch 5, paras 13 and 14.
[298] ibid cl 41. The wording reflects the circumstances in which direct award would be allowable under the GPA.

legislation under clause 86. This is a missed opportunity to clarify whether the decision for (and the reasoning behind that decision) the procurement to be single source or to include some competitive elements needs to be formally recorded and/or published.

The Bill also does not clarify which, if any, obligations apply to direct awards with more than one supplier in order to comply with the principles of equal treatment and transparency as set out in *PestFix*. The situation is, in fact, complicated further by the Bill, as the principles themselves are no longer present. Potentially as part of a desire to move away—or to be seen to move away—from the old European regime,[299] the 'General Principles' section of the PCR 2015 has been replaced by clause 11, which sets out 'Procurement objectives.' Although the phrase 'equal treatment' is not used, the requirements of that principle are set out in clauses 11(2) and (3), such that the substance appears to remain, although litigation may be required to determine the precise extent to which the old principle and new objective cover the same ground. There is no discrete transparency objective (although the term transparency is retained for the 'transparency notices' discussed above). Instead, the old principle of transparency would seem to be covered by two objectives in clause 11. The first is clause 11(1)(c), which requires contracting authorities to have regard to the importance of "sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions." The second is clause 11(1)(d), which requires similar regard to be given to the importance of "acting, *and being seen to act*, with integrity."[300]

[299] Albert Sanchez-Graells, 'Initial Comments on the UK's Procurement Bill: A Lukewarm Assessment' (2022) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4114141> accessed 25 July 2022, 3.
[300] Emphasis added.

The benefit of these changes is not obvious and the change in terminology causes unnecessary complexity, particularly for direct awards where the precise requirements were already unclear.

Conflicts of interest are covered by Part 5 of the Bill. Much of this Part simply replicates Reg. 24 PCR 2015, albeit in more detailed language in places, requiring contracting authorities to take all reasonable steps to identify and mitigate conflicts of interest.[301] Clause 76 requires contracting authorities to prepare a conflicts assessment before publishing a transparency notice for a direct award. The assessment should include details of any conflicts and the steps taken to mitigate, and it must be kept under review during the procurement process.[302] Perhaps inspired by *Public First*, the Bill also requires specifically that if a contracting authority "is aware of circumstances that might cause a reasonable person to wrongly believe there to be a conflict or potential conflict of interest," the conflicts assessment must detail the steps taken to demonstrate that no such conflict exists.[303] It is not clear that this adds anything to the existing obligation to keep a record of the steps taken to identify and mitigate conflicts of interest already within Reg. 84 PCR 2015. No requirements are set by the Bill as to the types of steps which should be taken in response to a real or perceived conflict of interest, which is a missed opportunity to clarify the law after *Public First*.

Overall, the Bill is disappointing. It does little to limit potential for abuse of direct awards or to clarify the law in this area. In fact, in the case of the procurement objectives it actively makes the situation less clear by removing well-established terminology. It is to be hoped that amendments to

[301] Procurement Bill (n 296) cl 74 and 75.
[302] ibid cl 76(3) and 76(5).
[303] ibid cl 76(4).

the Bill are made in order to provide more depth and clarity on the requirements for direct awards and, particularly, on the requirements in relation to equal treatment and transparency (however phrased). It would also be useful to have greater clarity on the detail required in a transparency notice for a direct award other than the grounds for use: an issue currently deferred to future secondary regulation. This would be a useful opportunity to ensure the decision on single source procurement is documented and published.

V. Conclusion

The procurement regime within the UK was not designed for widespread use of direct awards as required during the COVID-19 pandemic. The regime has limited protection against corruption and conflicts of interest within such awards, and it is often unclear about which obligations apply in relation to direct awards. There is no evidence of extensive deliberate wrongdoing,[304] but nonetheless it would be advisable to clarify the legal requirements applicable within an emergency procurement situation to protect public funds and speed up the procurement process by ensuring practitioners know explicitly what they can and cannot do within an emergency procurement.

The cases of *PestFix* and *Public First* highlight that one key area in need of additional clarity is the decision to award to a single supplier or to award to multiple suppliers, which entails some elements of competition, albeit not on the level of standard procurement. The Court of Appeal judgment of *Public First* suggests that a contracting authority is not obligated under the common law even to consider the latter

[304] Arrowsmith and Butler (n 284) 358.

option. It is unclear from *PestFix* if there is such an obligation under the PCR 2015; although such an obligation would have benefits in terms of transparency, it is not obviously supported by the wording of the Regulations.

Where a contracting authority does make an assessment between different suppliers, it is clear from *PestFix* that some legal obligations remain applicable even though the contract is made via a direct award. Contracting authorities remain bound in particular by the principles of equal treatment and transparency, requiring them to ensure that all suppliers are competing on a level playing field. Greater clarity on the specific requirements applicable would be beneficial.

The Procurement Bill 2022 offered a valuable opportunity to clarify the law on these points. However, that opportunity has largely been missed, with the Bill primarily replicating the previous law as set out in the PCR 2015. The Bill changes the terminology used for the principles of equal treatment and transparency, creating added confusion.

The combined effect of the case law and the Procurement Bill is that, unfortunately, should the UK face another extended emergency situation akin to the pandemic, the procurement regime is not discernibly better now than it was in the early days of COVID-19—although there is now likely a wealth of practical expertise amongst procurement practitioners which may help to mitigate this. There is still the chance to develop the regime as the Bill passes through Parliament, and so it is hoped that the legislators will take the opportunity to integrate the lessons learned on emergency procurement to ensure the best regime possible for both the public and the state.

The Corporate Manslaughter and Corporate Homicide Act 2007: Satisfactorily Unsatisfactory

Thomas Spencer[†]

Corporate manslaughter is a heavily criticised offence. Acquiring corporate personality generates certain rights and obligations for the company at hand. Proportionate responsibility for breach of these obligations which result in death is enshrined in the Corporate Manslaughter and Corporate Homicide Act 2007. This article aims to examine the series of precedents which have stemmed from the introduction of the Act, and in particular to analyse whether they represent an overall improvement from the pre-existing common law position. It shows that although a mechanism to criminalise corporate manslaughter should enable a higher conviction rate, the offence of corporate manslaughter remains incomplete and needs further legislative clarification. Ultimately, this discussion hopes to help shape ongoing debates surrounding the efficacy of corporate manslaughter in practice, drawing particular attention to the limits created by the corporate veil, textual language and jurisdiction of the Corporate Manslaughter and Corporate Homicide Act 2007.

I. Introduction

According to the Corporate Manslaughter and Corporate Homicide Act 2007 ('CMCHA'), corporate manslaughter occurs when the death of a person is caused by a gross breach of the duty of care owed by an organisation to the deceased, insofar as the breach involves a serious failing in how that organisation's activities are organised by senior

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management.[305] Its significance came to the forefront of public scrutiny after the Grenfell Tower fire, which resulted in 72 deaths.[306] Unfortunately, however, the absence of arrests in connection with the Grenfell Tower incident is testament to the burgeoning view that the CMCHA is more symbolic than instrumental.[307] It is this (increasingly concerning) view which renders the CMCHA ripe for re-examination.

As such, this article aims to examine the complexities of the offence of corporate manslaughter, first examining its common law origins and key characteristics before unpicking the CMCHA's successes and limitations. This analysis is underpinned by the view that corporate manslaughter is a flawed offence but is being strengthened by judicial interpretation. Indeed, although creating such an offence highlights the legislature's will to hold corporations to account, it can be argued that this will only truly take place when further steps are taken.

II. Common law origins

Until the mid-twentieth century, it was believed that a company could not be indicted for manslaughter.[308] In *R v Cory Bros & Co Ltd*,[309] a corporation's personal liability for manslaughter was said not to exist.[310] This precedent was overturned decades

[305] Jonathan Law, *Oxford Dictionary of Law* (9th edn, Oxford University Press 2018) 164-165.
[306] Victoria Roper, 'Grenfell charge delays understandable, but where have all the corporate manslaughter prosecutions gone?' (2019) 40 The Company Lawyer 8.
[307] Celia Wells, 'Corporate criminal liability: a ten-year review' (2014) 12 Criminal Law Review 849, 853.
[308] Law Commission, *Criminal liability of corporations* (Law Com No 44, 1972) 9.
[309] *R v Cory Bros & Co Ltd* [1927] 1 KB 810.
[310] Law Commission (n 308).

later in *R v Northern Strip Co Ltd*,[311] where the courts accepted corporate manslaughter as a criminal offence at common law for the first time.[312] This precedent was further confirmed by the capsize of the 'Herald of Free Enterprise' in 1991,[313] leading to its general acceptance today, compounded by the introduction of the CMCHA in 2008.

At common law, a conviction of gross negligence corporate manslaughter depended on the identification of a 'controlling mind'[314]—a principle commonly termed the doctrine of identification. According to this doctrine, conviction required "proof that a controlling officer who was the directing mind [...] of the corporation was grossly negligent" in causing a victim's death.[315] Yet this doctrine was soon problematised by its underlying subjectivity, leading to concerns over its legal (un)certainty. For example, in *Tesco Supermarkets v Nattrass*,[316] the House of Lords adopted a narrow view regarding the controlling mind doctrine; whereas in *Meridian Global Funds Management Asia Ltd v Securities Commission*,[317] a noticeably broader approach was taken when it was suggested that a court should not take a literal approach to the concept of a directing mind.[318] A further problem with the doctrine of identification lay with its willingness to only consider "the top echelon senior officers of

[311] *R v Northern Strip Construction Co Ltd* (1965) (unreported, *The Times* 2, 4 and 5 February 1965).
[312] Gary Slapper, 'Corporate manslaughter: An examination of the determinants of prosecutorial policy' (1993) 2(4) Social and Legal Studies 423.
[313] See *R v P&O European Ferries (Dover) Ltd* [1991] 93 Cr App R 72.
[314] Amanda Pinto QC and Martin Evans, *Corporate Criminal Liability* (2nd edn, Sweet & Maxwell 2008) 219.
[315] Simon Parsons, 'The Corporate Manslaughter and Corporate Homicide Act 2007 ten years on: fit for purpose?' (2018) 82(4) Journal of Criminal Law 305, 305.
[316] *Tesco Supermarkets Ltd v Nattrass* [1971] UKHL 1.
[317] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] UKPC 5.
[318] ibid.

[a] company"[319] as sufficient 'controlling minds' capable of being identified. This made it difficult to identify a single controlling mind in larger corporations with several chains of command, which made it particularly difficult to convict larger companies altogether. For instance, the Southall Rail Disaster caused seven deaths and 139 injuries, yet the company was not convicted of corporate manslaughter because "the Crown was not in a position to satisfy the doctrine of identification as the train driver was not the directing mind."[320] Alongside the non-liability of senior officials for acts of gross negligence committed by their employees,[321] the difficulty with which controlling minds could be identified in large organisations was an ongoing problem. The courts' inability to satisfy the doctrine of identification for large companies repeatedly led to non-conviction, as seen in 'The Herald of Free Enterprise,'[322] the Piper Alpha oil platform disaster[323] and the sinking of the Marchioness pleasure boat.[324] Courts were bound by precedent to apply an imperfect doctrine leading to few convictions,[325] despite the scale of injury caused by powerful corporations. Reflecting the general public and judicial consensus that the system in place was failing to adequately punish corporations, Justice Sheen made clear the need for "parliament [to] enact appropriate legislation."[326] It was the weight of such opinion which laid the groundwork for the legislative change discussed throughout.

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[319] ibid 305.
[320] *Attorney General's Reference (No 2 1999)* [2000] 2 Cr App R 207.
[321] Law Commission (n 308).
[322] ibid.
[323] Fiona Macleod and Stephen Richardson, 'Piper Alpha: The Disaster in Detail' (*The Chemical Engineer*, 6 July 2018) < https://www.thechemicalengineer.com/features/piper-alpha-the-disaster-in-detail/> accessed 1 December 2020.
[324] Hines and Fisher, 'The Sinking of the Marchioness Pleasure Boat on the Thames' (1993) Prehospital and Disaster Medicine 106.
[325] See Corporate Manslaughter HC Bill (2005-06) [540-1].
[326] *R v P&O* (n 313).

III. Successes and limitations of the Corporate Manslaughter and Corporate Homicide Act 2007

The merits of the CMCHA can now be examined, with success being attained insofar as the Act addressed the shortcomings of the common law offence in the form of the subjective doctrine of identification and the non-convictions which resulted. The CMCHA was developed over a long period of time, having been previously discussed by the Law Commission in the 1990s[327] and the Act itself being primarily based on recommendations from 1996.[328] Any perception of the CMCHA as hastily conceived and rushed without sufficient consideration is inaccurate. In fact, years of preliminary debate preceded its inception.

The CMCHA made theoretically compelling changes to the law of corporate manslaughter,[329] removing the problematic doctrine of identification and placing the offence on a statutory footing. Such changes rendered an organisation liable if "the way in which its activities were managed or organised caused a person's death and amounted to a gross breach of a relevant duty of care owed by the organisation to the deceased."[330] This is because senior management plays a 'substantial' role in the management and organisation of companies.[331] So today, a conviction requires that "senior management made a decision [amounting] to a breach of [a]

[327] Stephen Griffin, 'Corporate Manslaughter: A Radical Reform?' (2007) 71(2) Journal of Criminal Law 151.

[328] Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter* (Law Com No 237, 1996).

[329] Richard Matthews, *Blackstone's Guide to the Corporate Manslaughter and Corporate Homicide Act 2007* (1st edn, Oxford University Press 2008) 8.

[330] Corporate Manslaughter and Corporate Homicide Act 2007, s 1.

[331] ibid.

duty of care, [falling] far below what can reasonably be expected"[332] of them, as determined by the courts.

(i) Textual limitations

However, scrutiny of the CMCHA text soon exposes its shortcomings. Despite the fact that the Act intended to counteract controversy caused by the lack of clarity in the identification doctrine, its wording alone perpetuates the obstacles of the common law offence.[333] For instance, the word 'substantial'[334] is used repeatedly throughout yet was never actually defined in the Act. Wells argues that 'substantial' has many varied meanings in criminal law,[335] despite often possessing a rather restrictive meaning.[336] Therefore, courts are faced with the same interpretation issues as seen in *Tesco Supermarkets*[337] and *Meridian Global Funds Management*,[338] meaning the "same evidentiary stumbling blocks that frustrated prosecutions under the identification doctrine"[339] continue to persist. Not only that, but replacing the identification doctrine with the senior management test reproduces shortcomings of the common law offence in other ways too. Field argues that it gives larger companies a "persistent invulnerability [...] to prosecution"[340] due to their characteristically "diffuse management structure[s]."[341] For instance, in both *Cotswold*

[332] ibid s 4.
[333] James Gobert, 'The Corporate Manslaughter and Corporate Homicide Act 2007 - Thirteen years in the making but was it worth the wait?' (2008) 71(3) Modern Law Review 413, 414.
[334] CMCHA (n 330).
[335] Wells (n 307) 856.
[336] ibid.
[337] *Tesco Supermarkets* (n 316).
[338] *Meridian Global Funds* (n 317).
[339] Gobert (n 333) 414.
[340] Sarah Field, 'Ten years on: the Corporate Manslaughter and Corporate Homicide Act 2007: plus ca change?' (2018) 29(8) International Company and Commercial Law Review 511, 516.
[341] ibid.

Geotechnical Holdings Ltd[342] and *Lion Steel Equipment Ltd*[343]—the largest companies to be convicted under the CMCHA—it was only because "the management had not taken steps to [protect] employees"[344] that these companies were convicted. However, it seems clear that if both convicted companies had a more complex management structure they could have escaped conviction, because senior management—being so far removed from the decision making—could not be found in breach under the Act. Somewhat tellingly, most organisations convicted under the CMCHA do not have a complex organisational structure.[345]

(ii) Pragmatism

The Crown Prosecution Service ('CPS') gives the Health and Safety Executive ('HSE') full responsibility to charge and prosecute larger organisations under the Health and Safety at Work Act 1974 ('HSWA'). Charging organisations with corporate manslaughter requires the CPS to invest time and resources: the CPS spent around £140,000 to convict Lion Steel Equipment Ltd.[346] Also, as outlined in *Meridian*, "corporate manslaughter cases are [...] harder to prove than health and safety offences."[347] Consequently, if the HSE are willing to take responsibility for larger companies that have a lower chance of conviction under the CMCHA due to their diffuse management structure, the CPS has no incentive to take the economic risk of prosecution via corporate manslaughter.[348] Whilst the accessibility and proper functioning of another

[342] *R v Cotswold Geotechnical Holdings Ltd* [2011] EWCA Crim 1337, [2012] 1 Cr App R (S) 26.
[343] *R v Lion Steel Equipment Ltd* [2011] (MCC, 20 July 2012).
[344] ibid [43].
[345] Law Commission (n 308) 266.
[346] *R v Lion Steel* (n 343).
[347] *Meridian Global Funds* (n 317).
[348] ibid.

statute—the HSWA—is not inherently negative, a conviction of corporate manslaughter would effectively punish a corporation for breaching their obligations towards employees and the wider public. The CMCHA thereby arguably enables a greater sense of retributive justice for victims, making corporate manslaughter a more appropriate form of redress in comparison to the HSWA. Thus, the CMCHA should not be inherently inapplicable to larger companies—yet, the current position seems to suggest that it is.

(iii) Lack of personal liability

The Act has also been seen as an opportunity for directors to use corporations as shields to evade personal liability, which is deeply problematic. In 2000, the Home Office declared that "there is no good reason why an individual should not be convicted for aiding, abetting, counselling, or procuring an offence of corporate killing."[349] However, according to Gobert, the (influential) business community—fearing reputational damage and, worse, imprisonment—resisted these proposals.[350] Such strong resistance led to the conclusion that "the offence [would] not apply to individual directors."[351]

Nevertheless, a director may still be held personally liable for manslaughter at common law.[352] For instance, directors from Huntley Mount Engineering,[353] Pyranha

[349] Prashant Popat and Roger Eastman, 'Reforming the Law on Involuntary Manslaughter: The Government's Proposals on Corporate killing' in Felix Redmill and Professor Tom Anderson (ed), *Current Issues in Safety—Critical Systems* (1st edn, Springer 2003) 137.
[350] Gobert (n 333) 422.
[351] Home Office, *Corporate Manslaughter: The Government's Draft Bill for Reform* (Cm 6497, 2005) 35.
[352] *Meridian Global Funds* (n 317).
[353] *Health and Safety Executive v Huntley Mount Engineering Ltd* (unreported, Manchester Crown Court, 14 July 2015).

Mouldings Limited[354] and Mobile Sweepers Ltd[355] have all found themselves personally liable for events connected to corporate manslaughter charges. But even so, there remains a "corporate veil which protects individuals from [these] charges."[356] Dobson states that directors of bigger companies are less likely to be convicted because multi-layered management offers protection. In cases where the corporate veil fails, prosecutors do not delay in raising charges against directors, thereby putting "pressure on the corporate entity" to enter into a plea bargain.[357] However, in this instance directors often shift liability onto their companies, making organisations plead guilty to corporate manslaughter in exchange for dropping charges against themselves. This was the case in *R v Lion Steel Equipment*, where directors were charged with gross negligence manslaughter and health and safety violations. During the trial the organisation pleaded guilty to corporate manslaughter—even though it was not on trial for that offence at the time—and all charges against directors were subsequently dropped. Yet, it is important to remember that a corporation is its own legal—and arguably moral—entity, so encouraging a company to plead guilty may undermine its legal independence, and sacrificing itself for the benefit of a director seems dubious.[358] Interestingly, Wells argues that senior management is so inherently linked to the corporation that individual and corporate liability are not starkly distinct.[359] Though they are legally distinct, directors make decisions on

[354] *R v Pyranha Mouldings Ltd* [2014] EWCA Crim 533, [2014] 2 Cr App R (S) 43.
[355] *R v Mobile Sweepers (Reading) Ltd* (unreported, Winchester Crown Court, 26 February 2014).
[356] *Meridian Global Funds* (n 317).
[357] Chris Morrison, Rod Hunt and Richard Ollier, 'UK Corporate Manslaughter - Are Directors the Bait?' (Clyde & Co, 30th July 2012) <https://www.mondaq.com/uk/professionalnegligence/189206/corporatemanslaughter-are-directors-the-bait> accessed 1 December 2020.
[358] Susanna Menis, 'The fiction of the criminalisation of corporate killing' (2017) 81(6) Journal of Criminal Law 467.
[359] Wells (n 307).

behalf of the legal entity in practice, making the exclusion of director liability from the CMCHA controversial.

Whilst personal liability remains at common law, its inclusion in the CMCHA could make it easier to convict directors. It would also lead to self-regulation, as the threat of imprisonment is likely to incentivise management to make the workplace safer and thus reduce the likelihood of injury to victims. Significantly, not proposing personal liability after conviction under the CMCHA allows directors to start new corporations under a different name despite their breaches.

On the other hand, excluding personal liability from the CMCHA ensures that the focus remains on the corporation, which can (arguably) be seen as an appropriate protective measure for directors. Wells explains that the public would rather blame directors personally than blame corporations,[360] and Gobert confirms this theory whilst highlighting the risk of an unfair trial given that juries are more willing to convict "corporate executives rather than their companies."[361] Removing personal liability arguably represents a step towards an appropriate level of corporate punishment, attaining the core purpose of the CMCHA, which is to render companies liable for wrongful decision making that has caused death. Nevertheless, the Law Commission insists that the absence of personal liability should not enable directors to escape prosecution.[362]

[360] See Law Commission, *Criminal Liability in Regulatory Contexts* (Law Com No 195, 2010).
[361] Gobert (n 333).
[362] Law Commission (n 360) 217.

(iv) Jurisdictional limitations

The CMCHA, like many Acts of Parliament, is limited by its jurisdiction.[363] But in an age of international business operations characterised by cross-border outsourcing, and with British companies possessing an increasingly international workforce, the limited jurisdiction of the CMCHA is particularly problematic. Indeed, the death of a worker due to corporate negligence outside of the United Kingdom is not punishable under the CMCHA.[364] The collapse of The Rana Plaza in Bangladesh killed over 1,100 people,[365] and although British companies sourced products from the factories, none of those companies were convicted.[366] In practice, this encourages British organisations to outsource to different countries with more lax health and safety regulations, allowing them to escape liability through an illegitimate loophole that exists in the corporate manslaughter framework.

(v) Low conviction rate

Even when an organisation is put on trial, conviction is unlikely. Despite the fact that between 2009 and 2012 the CPS opened 141 cases of corporate manslaughter,[367] only three resulted in conviction.[368] In fact, only 26 convictions have taken place during the lifespan of the Act.[369] This low conviction rate could be seen as representing the Act's inefficiency.

[363] CMCHA (n 330) s 28.
[364] ibid.
[365] Department for International Development and Foreign & Commonwealth Office, 'The Rana Plaza Disaster' (Department for International Development and Foreign & Commonwealth Office 2014, Published 10 April 2014) <https-//www gov.uk.government/case-studies/the-rana-plaza-disaster> accessed 1 December 2020.
[366] Law Commission, (n 308).
[367] ibid.
[368] See *Meridian Global Funds* (n 317).
[369] ibid.

It was not until four years after the CMCHA's introduction that the first conviction arose. Subsequent convictions were only handed down to small-or medium-sized companies; Wells believes that these convictions would have probably succeeded in the old common law system.[370] Moreover, due to low conviction rates and the difficulty of prosecuting large companies, it can be argued that the senior management requirement has not been fully tested.[371]

However, some view the low conviction rate in a better light. Roper justifies the conviction rate by explaining that the CMCHA is reserved for the gravest cases of corporate negligence.[372] She does not deny that convictions are numerically low, but states that, prior to the CMCHA, many more years would pass without prosecutions. Gobert concurs, arguing that the limited convictions can be explained by the general infrequency of corporate manslaughter in reality. Interestingly, Gobert goes on to claim that including an offence of corporate grievous bodily harm in the Act would have a greater impact than corporate manslaughter since it is "a far more prevalent problem."[373]

Public companies are less likely to be convicted of corporate manslaughter than private companies, despite the fact that, since 2008,[374] any organisation providing health and social care through the National Health Service ('NHS') can be convicted under the CMCHA.[375] For private sector companies, the conviction rate is steadily increasing, from one conviction

[370] Wells (n 307).
[371] ibid.
[372] For explanation, see *Meridian Global Funds* (n 317).
[373] Gobert (n 333).
[374] CMCHA (n 330) s 1-2(b).
[375] See also Elisabeth Martin, *Concise Medical Dictionary* (9th edn, Oxford University Press 2015).

in 2011 to nine in 2015,[376] with public companies being prosecuted infrequently in comparison. An NHS trust was put on trial for corporate manslaughter for the first time in *R v Comish (Errol)*.[377] The judge directed an acquittal, and the NHS trust was not convicted. Despite the acquittal, putting the trust on trial represents significant progress for the CMCHA;[378] indeed, in *R v Sherwood Rise Ltd*,[379] a care home was convicted of corporate manslaughter and consequently fined. In fact, it has been argued that public bodies are now *vulnerable* to prosecution.[380] Allowing prosecutors to charge public bodies under the CMCHA is beneficial as makes it harder for those bodies to use their workforces as scapegoats in cases of gross negligence.

Notably, there remains an exception that enables public bodies to escape charges under the CMCHA.[381] Public bodies can only be liable if the death arose from an operational decision;[382] therefore, all grossly negligent policy decisions escape the scope of the Act. Even so, it can be argued that such an exception does not go so far as to undermine the adequacy of corporate manslaughter: whilst the Act holds public organisations accountable, it balances this accountability against the need to take difficult policy decisions in the public interest through the use of the exceptions. Thus, whilst a low conviction rate may indicate the Act's limitations, it can be argued that the CMCHA provides a better accountability mechanism than that which was provided in the pre-existing common law position.

[376] *Meridian Global Funds* (n 317).
[377] *R. v Comish (Errol)* [2015] EWHC 2967 (QB), [2016] Crim LR 560.
[378] See *Tesco Supermarkets* (n 316).
[379] *R v Sherwood Rise Ltd* (unreported, NCC, 5 February 2016).
[380] *Tesco Supermarkets* (n 316).
[381] CMCHA (n 330) s 3.
[382] ibid.

(vi) Punishment

Where corporate manslaughter is successfully proven, courts can fine corporations, force a publicity order and/or order remediation.[383] Whilst these sanctions are generally perceived as satisfying the need to punish corporations, some argue that courts misuse these penalties in practice.[384]

As corporations are abstract entities and thus cannot be imprisoned, courts instead fine those responsible for corporate manslaughter. In 2010, sentencing guidelines stated that fines could be unlimited, theoretically enabling courts to set fines which would put companies out of business.[385] Of course, most companies aim to maximise profits, so fines have the potential to impact organisations in a particularly fitting and punitive manner. In practice, however, fines are often disproportionately low when compared to a company's overall value. For instance, Lion Steel Equipment Ltd was fined £487,800 despite an annual turnover of £10,000,000,[386] with Judge Gilbert QC ensuring that the company would stay afloat by setting a notably long repayment period.[387] And in 2014, Mobile Sweepers (Reading) Ltd were fined a mere £8,000 after their corporate manslaughter conviction.[388] These low fines clearly lack punitive potential.

In short, if a company believes that committing a breach and paying a fine is a profitable alternative, they may be inclined to let standards slip, thus undermining the

[383] ibid s 9-10.
[384] Law Commission (n 360).
[385] For instance, see *R v Prince's Sporting Club Ltd* (unreported, Southwark Crown Court, 22 November 2013).
[386] Field (n 340) 516.
[387] ibid.
[388] *Mobile Sweepers* (n 355).

effectiveness of the Act and frustrating its very purpose to convict companies for gross negligence. Consequently, revised sentencing guidelines were published in 2015, recommending that courts impose higher fines.[389] This can be labelled a relatively effective measure given that subsequent cases show "an upward trend in fines."[390] Fines were significantly higher in cases such as *R v GAV Aerospace*[391] and *Master Construction Products (Skips) Ltd*,[392] which does signal welcome progress.[393] However, Wells argues that courts remain generally reluctant to fine in excess of the suggested £500,000 starting point, unless a major public disaster occurs as a result of a company's actions.[394] Thus, it is unlikely that courts will substantially fine companies to the extent that they are put out of business, unless there are exceptional circumstances urging them to do so. In light of the undesirable socioeconomic implications of closing businesses, this seems to be a legitimate balance.

Courts can also apply publicity orders,[395] which offer a means of 'naming and shaming' the responsible company, thus holding them publicly accountable and "advertising" [396] their conviction. On the other hand, a "corporate manslaughter investigation [often puts] the case into the headlines"[397] regardless of a resulting publicity order. This yields the potential to undermine the presumption of innocence, as a corporation could face reputational damage even before conviction. However, this factor could counterbalance the

[389] Sentencing Council, *Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline* (Cm 4224, 2016).
[390] *Tesco Supermarkets* (n 316).
[391] *R v GAV Aerospace* (unreported, CCC, 31 July 2015).
[392] *R v Master Construction Products (Skips) Ltd* (unreported, BCC, 2017).
[393] Although there remains doubt surrounding the impact of such increases.
[394] For instance, see *R v Friskies Petcare (UK) Ltd* [2000] 2 Cr App R (S) 401.
[395] CMCHA (n 330) s 10.
[396] *Tesco Supermarkets* (n 316).
[397] ibid.

CMCHA's limitations: the rise in ethical consumerism may dissuade customers from purchasing from the responsible corporation, seeking out competitors upon learning of the conviction and thereby having a sufficiently punitive effect. In addition, if a company uses any of the CMCHA's limitations to escape conviction, there is still likely to be ramifications in the form of media publicity. When combined with a publicity order, this punitive effect is stronger.

Finally, it is worth noting that courts may order organisations to remedy any breach causing death.[398] Wells explains that "the purpose of the remedial order [...] is unclear,"[399] and is an example of the confusion in the aims of the Act which highlights that a corporate manslaughter trial cannot effectively determine the actions necessary to remedy a breach.[400] Overall, though the penalties provided by the CMCHA are theoretically satisfactory, the way in which the courts use them is problematic, but remain an improvement in comparison to the pre-existing common law position.

IV. Conclusion

In conclusion, the CHCMA has proven beneficial insofar as it has increased conviction rates for corporate manslaughter and made public bodies vulnerable to prosecution where appropriate. The Act remains flawed in other areas. In practice, precedent shows that even when companies are convicted punishments are lower than might be reasonably expected. However, courts are increasing the level of fines and progressively strengthening the effectiveness of the Act. Theoretically, the decision to replace the doctrine of

[398] CMCHA (n 330) s 9.
[399] Wells (n 307).
[400] ibid.

identification with the senior management test maintained the difficulty of convicting large companies, unfortunately transposing many issues from the common law into the CMCHA. During COVID-19, a clinical negligence scheme was established by the NHS to provide additional indemnity for clinical negligence that arises from treating patients.[401] This scheme will further test the CMCHA's limitations and again expand its application to more public bodies.

[401] NHS, 'Clinical Negligence Scheme for Coronavirus' (NHS, 8 April 2021) <https://resolution.nhs.uk/services/claims-management/clinical-schemes/clinical-negligence-scheme-for-coronavirus/> accessed 1 December 2021.

Decolonising Human Rights: State Sovereignty, Colonialism and Challenging Conventionality

Dhuha Al-fahad[†]

The beginning words of the Universal Declaration echo in their finality across planes of the legal field: "all human beings are born free and equal in dignity and rights." However, at the seams of an established concept lies a picture which tells a different story. This article will begin by providing a general grounding of how the phenomenon of human rights has been understood. It will then seek to reconstruct this promulgated narrative about human rights from a decolonial perspective—unveiling its inherently biased origins which led to the significant marginalisation of minority rights and highlighting the impermanence of state sovereignty. It will conclude by applying these observations to a real-life example— namely, China's alleged abuse of human rights towards the minority group of the Uyghurs. Through this article, it is hoped that light will be shed on why, despite being internationally celebrated and recognised, the concept of human rights has created more aspirations than it could practically achieve.

I. Introduction

The concept of human rights has been conventionally understood as universal and individualistic. However, decolonial theory has challenged these perspectives. This paper will explain and evaluate how decolonial processes challenge the conventional concept of human rights—particularly by drawing upon its colonial origins, the 'othering' incurred by its dynamics, and the pervasive role of state sovereignty. This paper will conclude by highlighting the role of decolonial

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discourse in China's alleged mistreatment of the Uyghurs in the autonomous region of Xinjiang.

II. The conventional understanding of human rights

Human rights are the basic rights and freedoms belonging to an individual. Traditionally, human rights have been understood as universal, meaning that they are enjoyed by all people.[402] The universality of such rights was confirmed by the Universal Declaration of Human Rights ('UDHR').[403] This instrument was created in the aftermath of the devastating Second World War, with the aim of preventing a recurrence of such atrocities by encouraging states to protect and promote the rights of their citizens.[404] The UDHR embeds universality within the concept of human rights, highlighting in the preamble its "faith in fundamental human rights" and that "dignity and worth" is inherent to every human being.[405] Human rights are therefore conceptualised as accessible indiscriminately to individuals around the globe, manifesting into legal standards in international law.

The UDHR was not "drafted by a homogenous group of experts but was the outcome of the concerted efforts of eminent figures […] who represented different religions, cultural and ideological backgrounds."[406] This demonstrates that the universality of human rights "transcends the cultural

[402] Linda Hajjar Leib, *Human rights and the environment: philosophical, theoretical and legal perspectives* (Brill 2010).
[403] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)).
[404] Ilias Bantekas and Lutz Oette, *International Human Rights: Law and Practice* (3rd edition, Cambridge University Press 2020).
[405] UDHR (n 403) Preamble.
[406] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania 2000) 21.

and ideological peculiarities underlying the inherent worth of human beings."[407] The UDHR's political and cultural neutrality has emphasised that human rights are accessible to and belong to all, with Tully asserting that the aim of universal human rights was to rise above "cultural differences that might jeopardise the minimum standards set by international human rights norms."[408] Therefore, the universality of human rights enables individuals to understand the innate rights granted to them, facilitating a visceral recognition of their fundamental nature. Thus, human rights have been internationalised, seemingly representing a universal benefit endowed upon all.

In tandem with the above, human rights have been understood as individualistic. This means that rights belong inherently to humans and are grounded "ultimately in what they do for that person, independently of how the rights serve or disserve the person's wider group."[409] The individualistic nature of human rights has been used within international institutions to create a series of obligations upon states, providing a "legal and political framework in which the individual could be concretely recognised."[410] Leib highlights that, due to the increasing importance placed on such obligations, a "state is no longer immune from international scrutiny in the case of egregious human rights violations."[411] Consequently, in order for a country to be reputed globally,[412] it is obliged to "verify" its commitment to protect and promote

[407] Leib (n 402) 48.
[408] Michael Freeman, *Human Rights: An Interdisciplinary Approach* (Cambridge Polity Press 2002) 118.
[409] Rowan Cruft, 'Human rights, Individualism and Cultural diversity' (2005) 8 Critical Review of International Social and Political Philosophy 265, 268.
[410] Vincent Depaigne, 'Individualism, Human Rights and Identity' (2005) Semantic Scholar <https://www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2005/individualismandidentity.pdf> accessed 15 April 2021.
[411] Leib (n 402) 45.
[412] Bantekas and Oette (n 404).

the individual human rights of its citizens.[413] This, in turn, encompasses the necessity for human rights to be universal in practicality.

The protection of human rights goes far beyond the responsibility of states, with defenders of human rights spanning individuals, non-state bodies and the international community.[414] An example of such a defender is the Fundamental Charter of Human Rights in the European Union, which ensures that human rights are protected from an intranational perspective. Rights can simultaneously be invoked by and against the state, encouraging a joint effort amidst a range of actors to ensure that human rights are respected ubiquitously.[415] This has circumvented the traditional understanding that it is states which hold sole responsibility for the rights of their citizens, with Sengupta arguing that the fulfilment of rights is the duty of a "flexible range of duty-bearers."[416] The effective protection of human rights requires "joint efforts from social and political institutions."[417] This means that the individualistic understanding of the concept of human rights has promoted their comprehensive and universal acceptance, effectively engaging a range of actors to ensure their protection.

[413] George Kent, *Freedom from Want: The Human Right to Adequate Food* (Georgetown University Press 2005) 28.
[414] ibid.
[415] Leib (n 402).
[416] Arjun Sengupta, 'On the theory and Practice of the Right to Development' in Bård A. Andreassen and Stephen P. Marks (eds), *Development as a Human Right: Legal, Political, and Economic Dimensions* (Harvard School of Public Health 2006).
[417] Leib (n 402) 56.

III. Decolonising conventional perceptions

(i) The colonial origins of international human rights

Despite its proclaimed universality, decolonial discourse reveals that this concept encourages a "systematic lack of attention to background sociological and political conditions that will determine the meaning a right has in particular contexts."[418] In short, this is due to the colonial, Westernised origins of the international human rights movement. After all, the UDHR came at a time when most Third World countries were still under colonial rules, meaning that human rights reflect a "moral chauvinism and ethnocentric bias that makes them irrelevant to non-Western societies."[419] This inherent cultural bias has given rise to the "asymmetrical power relations embedded in international discourse," which is centred on an "over-representation"[420] of Western ideas. For example, 'freedom of expression' is legally recognised under the European Convention of Human Rights – meaning that all members of the Council of Europe have to adopt its protection.[421] This has set an international standard which subsequently urged more conservative countries like those in the Middle East top adopt similar ideas.[422] Thus, it can be argued that countries are encouraged to instil Eurocentric values under the guise that they are universal human rights. Resultingly, human rights have been used to "strengthen,

[418] David Kennedy, 'The International human rights movement: Part of the Problem?' (2002) 15 Harvard Human Rights Journal 101, 110.
[419] Shashi Tharoor, 'The Universality of Human Rights and Their Relevance to Developing Countries' (1990) 59 Nordic Journal of International Law 139, 141.
[420] Anthony Woodiwiss, 'Human Rights and the Challenge of Cosmopolitanism' (2002) 19 Theory, Culture and Society 139, 139.
[421] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 10.
[422] Fred Halliday, 'Relativism and Universalism in Human Rights: The Case of the Islamic Middle East' (1995) 3 Political Studies 152.

legitimize and export"[423] Western political democracy—presenting this model as a symbol of progress when, in reality, it is centred on preserving colonial dynamics to exert dominance on an international scope.

The above gives rise to a nuanced sense of cultural imperialism. Whilst Leib has argued that this is an ill-founded claim due to the "wide ratification of human rights treaties,"[424] the ratification of human rights may not always indicate universal acceptance of these standards. Indeed, it can sometimes stem from the power imbalances inherent within international discourse, with powerful Western states exerting considerable pressure on their global counterparts to comply with these prescribed standards.[425] This is demonstrated by the pressure inflicted by the High Commissioner for Human Rights upon the Arab League to create an Arab Charter on Human Rights;[426] pressure which is reinforced by the fact that a state's international recognition is "conditional upon the protection of at least basic human rights."[427] Therefore, the conceptualisation of human rights as universal has diverted attention away from its inherently biased origins and, instead, has resulted in the imposition of Western ideals on divergent cultures. It may be argued that regional systems protect rights in similar ways, giving rise to the idea that these regions adopt rights in similar ways to the West and thus that they are in fact 'universal.' However, this claim arguably exemplifies how the prominence of the Western perspective prevents the exploration of other

[423] Makau Mutua, 'The Ideology of Human Rights' (1996) 36 Virginia Journal of International Law 589, 604.
[424] Leib (n 402) 48.
[425] Hakimeh Saghaye-Biria, 'Decolonizing the "Universal" Human Rights Regime: Questioning American Exceptionalism and Orientalism' (2018) 4 ReOrient 59.
[426] Mervat Rishmawi 'The Revised Arab Charter on Human Rights: A step Forward?' 5 Human Rights Law Review 361.
[427] Christian Reus-Smit, 'Human Rights and the social construct of sovereignty' (2001) 27 Review of International Studies 519, 520.

standards which may accurately reflect the notion of 'universality.' Thus, whilst different regions may share an understanding of what a 'universal' human right is, the homogenised regime of protection staunchly reflects Westernised ideals.

This cultural bias has prevented human rights from gaining "cross-cultural legitimacy."[428] Indeed, Mutua illustrates that the dynamics of the human rights rhetoric resemble a model of "the savage, victim and the saviour."[429] In this model, the 'savage' is the culture of a foreign state which staunchly clashes with Western culture. The 'victim,' on the other hand, is depicted as intrinsically oppressed by the foreign culture, with the 'saviour' embodying Eurocentric universalism.[430] Such dynamics have dissociated the culture of human rights from that of the 'oppressive' state—presenting them as mutually exclusive. Consequently, the concept of human rights continues a long tradition of universalising Eurocentric norms by actively "intervening in Third World cultures and societies to save them from the traditions and beliefs that it frames as permitting despotism."[431] This then facilitates the displacement of the predominant culture, depicting indigenous beliefs as supplementary to Eurocentric ones. Hence, the universality of human rights has been persistently emphasised to divert attention away from the concept's colonial roots, and its biased roots has meant that there are entrenched dynamics which impede cross-cultural legitimacy.

Furthermore, decolonial understandings have challenged the individualistic conception of human rights by

[428] Mutua (n 423) 206.
[429] ibid.
[430] ibid.
[431] ibid 235.

facilitating the notion of 'othering.' Othering is defined as "the result of a discursive process by which a dominant in-group constructs one or many dominated out-groups by stigmatising a difference […] presented as a negation of identity and thus a motive for potential discrimination."[432] This gives rise to a paradox: human rights are proclaimed to be individualistic but facilitate identification by collective groups and rights,[433] leading to the othering of minority groups. States can then use the premise of protecting and promoting the human rights of the dominant in-group to introduce legislation which significantly marginalises the minority out-group.[434] This has meant that the 'othering' incurred by human rights could be used as a political instrument to disguise flagrant violations of the rights of minorities.[435]

The notion of othering takes a nuanced form which enables it to withstand comprehensive scrutiny, as evidenced in the treatment of Palestinians by the state of Israel. In this case, Israel has historically associated Palestinian Arabs with notions of terrorism and hostility and portrayed them as a threat to the dominant in-group of Israeli Jews.[436] This resulted in Israel building a wall in Occupied Palestinian Territory on the West Bank, under the guise of security concerns. In an advisory opinion, it was held that, by constructing this wall and effectively displacing Palestinian civilians within the encapsulated regions, Israel had violated the Palestinians' right

[432] Jean-Francois Staszak, 'Other/Otherness' in Rob Kitchin and Nigel Thrift (eds), *International Encyclopedia of Human Geography* (Elsevier 2008).
[433] Michael Freeman, 'Are there collective rights?' (1995) 43 Political Studies 25.
[434] ibid.
[435] Anne Karine Jahren, 'Use and Abuse of Human Rights Discourse' (*E-International Relations*, 2013) <https://www.e-ir.info/2013/10/27/use-and-abuse-of-human-rights-discourse/> accessed 17 April 2021.
[436] Bjorn Moller, 'National Societal and Human Security: Discussion—Case Study of the Israel-Palestine Conflict' (2003) 1 Security and Environment in the Mediterranean 277.

to self-determination.[437] Article 1 of the UN International Covenant expressly states that "all people have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic […] development."[438] However, whilst it has been legally recognised by the Court of Human Rights that Israel violated the Palestinians' right to self-determination, the lack of binding effect that the Court of Human Rights possesses—alongside an under-developed understanding of human rights as an inclusive concept—has meant that human rights do not always comprehensively hold states to account for potential violations. Therefore, an argument could be made that the concept of human rights does not possess the substance to be effectively implemented in practice.

(ii) State Sovereignty

State sovereignty is defined as "the supreme, absolute, and uncontrollable power by which any independent state is governed,"[439] possessing control over internal government and external affairs. In a broad sense, the concept of human rights does not have the capacity to challenge state sovereignty. In fact, it may even be argued the concept of human rights strengthens such sovereignty, with Kennedy highlighting that this comprises a relation between an individual right holder and the state, "with human rights being at the centre of the emancipatory promise."[440] This therefore strengthens the perception of the state as the supreme authority which mobilises the treatment of its citizens. Reinforcing this claim is the fact that the "doctrine of equal and universal rights may

[437] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.
[438] ibid [181]-[184].
[439] Michael Fowler and Julie Bunck, 'What constitutes the Sovereign State? (1996) 22 Review of International Studies 381, 387.
[440] Kennedy (n 418) 113.

support the hegemony of the majority culture over various subordinated cultures,"[441] through endorsing state power to protect collective rights. Thus, one can argue that human rights is "not a challenger to but deeply embedded within state sovereignty."[442]

Whilst there are instances where international law has been utilised to intervene in state affairs in support of human rights, this has not been to the extent that human rights could effectively and comprehensively account for the impact of state sovereignty on individuals. In many cases, the conceptualisation of human rights as universal and individualistic has helped to conceal the abuse and denial of human rights, particularly towards minority group as it 'privileges sameness'.[443] The othering caused by human rights has meant that victims' hopes for self-expression are erased under the power "of an internationally sanctified vocabulary for their self-understanding, self-presentation and representation as victims of human rights abuses."[444] This 'sanctified' vocabulary has been utilised by states to suppress or marginalise minorities and their unique rights. This is exacerbated by the fact that there are no mechanisms to ensure accountability in response to allegations of human rights abuses.[445]

It has been contended that popular sovereignty is "essential in the protection of human rights"[446] and that,

[441] Freeman (n 433) 26.
[442] Jack Donnelly, 'Human rights and State Sovereignty' (2014) 28 Ethics and International Affairs 225, 245.
[443] Gaynor Macdonald, 'Who is the "human" in "human rights"?' (2013) 19 Australian Journal of Human Rights 107, 108.
[444] Kennedy (n 418) 112.
[445] Bantekas and Oette (n 404) 22.
[446] Robert Araujo, 'Sovereignty, Human Rights and Self-determination: the meaning of international law' (2000) 24 Fordham International Law Journal 1477, 1480.

"should popular sovereignty be subjected to attack, the integrity of other rights identified in the UDHR will also be subject to attack." However, this argument does not recognise that sovereignty was a key constituent of why the concept of rights has been internationalised to its current extent. The UDHR was a reaction to the excessive amount of state sovereignty held by Germany and Russia, whose regimes had resulted in grand scale genocides such as the Holocaust. Therefore, whilst human rights have been set up to account for the othering of minorities, it can be argued that the concept is deeply linked to state sovereignty, meaning it does not exist as an independent forum to comprehensively account for the impacts caused by excessive sovereignty.

IV. China and the discourse of human rights

This section will use the example of China's alleged mistreatment of the Uyghurs in the autonomous region of Xinjiang to show how decolonial discourse remains relevant to the concept of human rights. This is achieved by analysing the vagueness of the notion of human rights—which has enabled state sovereignty to be pervasive—and by revealing how othering has helped to disguise human rights breaches.

Firstly, the legal vagueness of the concept of human rights has meant that it is difficult to apply in practice. This is primarily seen in China's response to genocides like those of Rwanda and Kosovo, where officials stated that the "human rights over sovereignty" theory infringes upon the jurisdiction of states and promotes hegemony, which counters the purposes and principles of the United Nations Charter.[447] China

[447] Chengqui Wu, 'Sovereignty, Human Rights and Responsibility: Changes in China's Response to International Humanitarian Crisis' (2009) 15 Journal of Chinese Political Science 71.

consequently highlighted the principle of state sovereignty and advocated for non-intervention. This, in turn, traces a faint relationship between the notion of human rights and the Chinese political system—compounded by the "lack of the concept of rights in traditional Chinese thought."[448] Therefore, despite encouraging "dialogues and exchanges between different nations on human rights," China still adheres to the doctrine that "sovereignty is above human rights."[449] This distances the notion of human rights from state sovereignty, prohibiting it from taking a form which scrutinises the scope of state sovereignty and its impact on the protection of rights for individuals.

Moreover, the discourse of state sovereignty has weakened the position of human rights, which has resultingly reinforced China's tendency of "privileging security concerns over protecting human rights."[450] The collapse of the Soviet Union in 1991 has resulted in an Islamic revival in neighbouring Central Asian countries and has posed a threat to the internal dynamics of China's reform era. China has attempted to integrate Xinjiang (predominantly comprised of Uyghur Muslims) with Central Asia.[451] This has sparked Uyghur dissent (particularly amongst those who had links to violent Islamic groups).[452] In turn, this has prompted a strategy of regulation towards religious practices and expression, typified by "campaigns against religious education outside of state-sanctioned institutions" and the "re-education of religious

[448] Zhou Qi, 'Conflict over Human Rights between China and the US' (2005) 27 Human Rights Quarterly 105.
[449] Wu (n 447) 86.
[450] Michael Clarke, 'Widening the net: China's anti-terror laws and human rights in the Xinjiang Uyghur Autonomous Region' (2010) 14 Texas International Law Journal 542, 548.
[451] Zainab Raza, 'China's "Political Re-education" Camps of Xinjiang's Uyghur Muslims' (2019) 50 Asian Affairs 488.
[452] Clarke (n 450).

leaders."[453] Such policies are clear breaches of the rights of expression and to a private life. However, the concept of human rights struggles to permeate the state sovereignty of China, which holds the view that domestic affairs should remain separate from any external interference via human rights mechanisms. Consequently, the concept of human rights is only effectively engaged in China's global interactions—its applicability is rendered ineffective in terms of *internal* power dynamics. Therefore, it is possible to contend that "states that systematically violate internationally recognised human rights do not lose their legitimacy in international law."[454] Indeed, this is a testament to the idealisation of human rights—diverting attention away from the actual practicality of the concept and overlooking its potential to be used as a tool to scrutinise state measures.

In addition, the othering which is incurred by human rights has meant that violations of minorities (in this case, the Uyghurs) could be concealed. The othering incurred by human rights has been used to victimise the Uyghurs by using separatism and terrorism policies—for instance, through the employment of persuasion techniques like re-education camps designed to encourage Uyghurs to become secular citizens.[455] Jackimow has argued that this extends beyond terrorism, stating that the whole concept of Chinese citizenship has been constructed on the mechanism of othering.[456] In this theory, ethnic minorities in autonomous and rural regions have been presented as "backward" and "uncivilised,"[457] representing a

[453] ibid 547.
[454] ibid.
[455] Malgorzata Jakimow and Elena Barabantseva, '"Othering" in the Construction of Chinese Citizenship' in Lion Koenig and Bidisha Chaudhuri (eds), *Politics of the Other in India and China: Western Concepts in Non-Western Contexts* (Routledge 2016).
[456] ibid.
[457] ibid.

feudal part of society in dire need of reform.[458] These minorities are antithetical to the 'proper citizen,' who is a modern urbanite. This notion has its roots in the Western orientalist narrative, which juxtaposes the "urbanite-citizen with the peasant-non-citizen."[459] Hence, the entrenchment of Western conceptions within Chinese citizenship has enabled the "colonisation of consciousness,"[460] creating a demarcation between the majority and the minority.

Davis claims that if regions like Xinjiang were monitored it would lead to development, allowing minorities to "prosper, be less restive, give less support for separatist activities and be more integrated into the fortunes—both economic and political—of China."[461] This resembles Mutua's metaphor of the savage, the victim and the saviour.[462] In this case, the culture of the Uyghurs has been depicted as hostile and antiquated, with China's Han culture representing an escape from this 'savage' way of life. This negative perception of the Uyghurs was reinforced by increasing levels of dissent arising within their communities and increased prevalence of Islamic extremism in the aftermath of the 9/11 terrorism attacks.[463] This has consolidated the status of the Uyghurs as the 'other'—a separate entity whose culture cannot co-exist alongside dominant Chinese values.

The 'othering' incurred by human rights has meant that the representation of ethnic minorities has been "mobilised to

[458] ibid.
[459] ibid 3.
[460] Mayfair Yang, 'Postcoloniality and Religiosity in Modern China: The Disenchantments of Sovereignty' (2005) 28 Theory, Culture and Society 3, 7.
[461] Elizabeth Van Wie Davis, 'Uyghur Muslim Ethnic Separatism in Xinjiang, China' (2010) 35 Asian Affairs: An American Review 15, 19.
[462] Mutua (n 423).
[463] Michael Clarke, 'China and the Uyghurs: The "Palestinization" of Xinjiang?' (2015) 22 Middle East Policy 22.

present China as a multi-ethnic, diverse and colourful society, commoditised as a tourist attraction."[464] As such, ethnic minorities are depicted as a "source of cultural fascination and economic backwardness,"[465] relying on the framing of ethnic minorities as the ultimate others in the construction of the Chinese nation. The influence of human rights has perpetuated law which prioritises and maintains the rights of minorities, but which has seldom been applied in practice.[466] This enables China to adopt "the language […] of internationally recognized human rights, seemingly as an inescapable precondition to its full recognition as a great power,"[467] without actually adhering to these protections when interacting with minority groups within the state.

V. Conclusion

To conclude, the concept of human rights, whilst seemingly universal and individualistic, has inherent flaws which render it ineffective in practice. Its colonial origins have meant that human rights incur othering which can be used as a political tool, and its vagueness means that it is not effective as a comprehensive instrument to scrutinise the impact of state sovereignty on human rights. The example of China and their disregard of the Uyghurs' human rights has demonstrated that the traditional conception of human rights has not furthered the protection of such rights and in some cases has impeded citizens from realising their rights. It may be time to rethink the current model of human rights in a way that focuses less on achieving universal conformity and more on offering practical protections.

[464] Jakimow and Barabantesva (n 455) 6.
[465] ibid 7.
[466] ibid.
[467] ibid.

Causation in Clinical Negligence: Inconsistent Application and Claimant Injustice

Elinor Jackson[†]

Causation is a complex yet crucial prerequisite to any successful clinical negligence claim, requiring the claimant shows that the defendant's negligence *caused* their eventual injury. In developing the principle of causation alongside both the intricacies of modern medicine and the general need for fairness, the courts have embarked on the creation of common law exceptions to the otherwise standard 'but for' causation test. The purpose of this article is to explore how, in applying these common law exceptions to so-called 'hard cases,' inconsistent judicial decisions have emerged. Discussing the current application of causation in clinical negligence law, this article seeks to demonstrate that, while inconsistency with the standard application of the 'but for' test may favour wider justice objectives, it does so at the expense of individual claimant justice. This article goes on to suggest that through case law a clear theme has arisen within the clinical negligence arena: flexibility is afforded where it carries little financial risk to National Health Service funding, but not when that funding would appear to be unduly stretched. Inconsistent treatment arises out of a need to prevent an 'opening of the floodgates,' placing an arguably unfair restraint on access to compensation.

I. Introduction

Coined by Barker as an "insurmountable hurdle"[468] for claimants, the principle of causation has been developed throughout negligence law in the pursuit of justice and fairness. Acknowledging that complex causal issues are restricted by the limited scope of the traditional 'but for' test, judges have

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[468] Ian Barker, 'Is a No Fault Compensation Scheme the Answer to the Problems of Tort in Clinical Negligence?' (2015) 34(1) Medical Law Review 595, 595.

created a number of "exceptional approaches"[469] aimed at relieving the claimant's burden of establishing a complex causal link between negligent act and consequential injury. However, when considering the scope of liability, courts are mindful of the *de facto* reality presented by strained National Health Service ('NHS') resources and the risks of costly pay-outs.[470] For this reason, a pro-claimant approach, which one might expect given the nature of clinical negligence, is by no means automatic: some complex cases are judged with relative flexibility, while others are confined to the strictures of the standard 'but for' test. The purpose of this article is to explore whether disparities in approaches to causation compromise its true utility in achieving justice in the clinical negligence context. To that end, an analysis of the limitations of the standard test and the exceptional approaches of material contribution, failure to warn and loss of chance, is provided. The analysis concludes that while there are indeed wider justice considerations for the courts—who look to constrain flexibility to preserve legal certainty—it is evident that inconsistency in the application of 'fairness reasoning' leads to injustice for individual claimants.

II. The standard test

The law on causation requires a causal link between the defendant's breach of duty and the harm suffered by the claimant, with *Wilsher v Essex*[471] confirming that mere coincidence between negligence and injury cannot be sufficient. The standard and somewhat simple test for causation

[469] Gemma Turton, 'Factual and legal causation—their relation to negligence in nursing' (2009) 18(13) British Journal of Nursing 825, 825.
[470] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22 [69]; *Gregg v Scott* [2002] EWCA Civ 1471 [102].
[471] *Wilsher v Essex Area Health Authority* [1988] AC 1074.

in clinical negligence is known as the 'but for' test, which Bailey contends is "sufficient and just" as the conventional requirement.[472] The test poses the factual question, 'but for the defendant's negligence, would the harm have occurred?' The burden lies with the claimant, who must prove that on the balance of probabilities the defendant's negligence was the cause of the relevant injury. Its classic illustration is seen in *Barnett v Chelsea Friern Hospital,*[473] the outcome of which supports Bailey's claim given that, on the facts, the test arrived at the logical and just conclusion. In *Barnett*, the claimant's husband was negligently discharged from hospital without examination and died five hours later from undetected arsenic poisoning. Yet, applying the 'but for' test, it was clear that the husband's death would have occurred regardless of his removal from the hospital environment, since there would not have been treatment available which could tackle or resolve his condition. In other words, without a causal link the 'but for' test stipulates that there cannot be liability, which works well in the context of a case such as *Barnett* where the harm suffered had occurred naturally, regardless of clinical failings. Thus, in these relatively straightforward cases the test is commendable in its just approach towards defendants: the burden on the claimant prevents any unfair liability for an injury they did not cause. It is in the not-so-straightforward cases where 'but for' produces less commendable results, and where the courts have chosen to develop exceptional approaches to causation.

[472] Stephen Bailey, 'Causation and Fairness in the Law of Tort' (*LawDocsBox*) <https://lawsdocbox.com/Legal_Issues/72465875-1-the-purpose-of-this-paper-is-to-consider-the-role-of-what-may-be-termed-principles.html#show_full_text> accessed 1 May 2021.

[473] *Barnett v Chelsea & Kensington Hospital Management Committee* [1968] 2 WLR 422.

III. Scientific limitations

While worthy of praise in the context of straightforward cases, in complex or "hard cases,"[474] the 'but for' test proves less effective. Here, the test's desirable simplicity fails to adequately account for the causal issues posed by particularly complex medical cases. Claimants in such scenarios often present with pre-existing injuries or illnesses that hold natural risks of further harm. Moreover, the existence of evidentiary gaps and scientific uncertainty are inherent to the limitations of modern medicine. An example of where the standard approach is limited can be seen in *Wilsher*,[475] where a premature baby developed fibroplasia whilst in hospital, suffering eventual blindness. There existed multiple possible causal agents, one of which was the negligent actions of medical staff, who failed to notice that an oxygen catheter had been inserted incorrectly. The limitations of medical science meant it was not possible to isolate one of the potential causes as the most probable.

In cases possessing this level of complexity, the rules of the 'but for' test are *too* simplistic;[476] if such cases were confined to this test, their outcomes would be as unjust as they would be absurd. In the context of multiple-cause cases such as *Wilsher*, Khoury notes that while it is evident that some factor caused the harm, the "but for [test] prevents selecting any cause,"[477] sometimes leading to the illogical (legal) conclusion that the injury was in fact caused by nothing. While the 'but for' test is commended by Rogers for its ability to act as a "filter

[474] Sandy Steel and David Ibbetson, 'More Grief on Uncertain Causation in Tort' (2011) 70(2) Cambridge Law Journal 451.
[475] *Wilsher* (n 471).
[476] Rachael Mulheron, *Principles of Tort Law* (2nd edn, Cambridge University Press 2020) 738-742.
[477] Lara Khoury, *Uncertain Causation in Medical Liability* (Hart Publishing 2006).

for irrelevance,"[478] it is in these situations that it also filters out the relevant. Its impact leaves claimants with an outcome which, whilst consistently applied, disregards the very possibility of redress that clinical negligence law is often expected to provide.

III. Material contribution

(i) Wilsher, Fairchild & McGhee

Scientific limitations mean that is often impossible to isolate a more probable cause in multiple-cause cases like *Wilsher*. Highlighting a significant problem should the law rely solely on the standard test, it is here that the use of the 'material contribution' exceptional approach seemingly offers a fair alternative. The multiple-cause doctrine allows for causal agents to be held as contributing to the injury, or risk of it, where it is possible to establish that their "causative impact […] was more than negligible."[479]

The test for finding a material contribution was radically established in the industrial-disease cases of *McGhee*[480] and *Fairchild*. In *McGhee*, the medical evidence could not conclusively prove that an employer's negligence caused the employee's injury. Nonetheless, it was held that the employer's negligence made a material contribution to the *risk* of the injury, the courts finding this sufficient to establish causation.[481] In *Fairchild*, employees developed mesothelioma as a result of asbestos exposure under multiple employers. The

[478] Wendy Rogers, 'Evidence-based medicine in practice: limiting or facilitating patient choice?' (2002) 5(2) Health Expectation 95.
[479] Edward Dove, Shawn Harmon, and Graeme Laurie, *Mason & McCall Smith's Law and Medical Ethics* (11th edn, Oxford University Press 2019) 146.
[480] *McGhee v National Coal Board* [1972] UKHL 7, [1972] 1 WLR 1.
[481] *Fairchild* (n 470).

precise point at which they contracted the disease could not be determined, thus neither could the responsible employer. In finding causation, the House of Lords held it sufficient that the negligence of each employer materially contributed to the risk of the injury. Both cases demonstrate findings of causation where the standard test could not make such a finding, it being sufficient that the negligence materially increased the risk of harm.

However, material contribution did not allow for claimant justice (be that an award of redress or other forms of compensation for the harm suffered) in the case of *Wilsher*. *Wilsher* was distinguished by the court from the criteria developed in *McGhee* and *Fairchild*; its causal agents were independent of one another, not single nor cumulative, and did not contribute to the same risk of harm.[482] While it is desirable that a test for causation maintains a clear, consistent criteria, Steele criticises the House of Lords' refusal to further extend *McGhee* and alleges they "gave no reasoning as to support maintaining a distinction."[483] The House of Lords claimed that their refusal to consider an expansion in the *Wilsher* judgment was because *McGhee* laid down no new principle of law. Unfortunately, this justification now holds little weight, as the House later contradicted itself in the case of *Fairchild,* claiming that *McGhee* did in fact create a new principle of law.[484] Phillips suggests that the principle developed in *McGhee* was applied inconsistently between *Wilsher* and *Fairchild* to avoid "open[ing] the floodgates"[485] for medical litigation. This amounts to an arguably unfair limit on the flexibility that could otherwise have been afforded to deal with scientific uncertainty beyond cases of industrial disease.

[482] Dove, Harmon, and Laurie (n 479) 146.
[483] Steel and Ibbetson (n 474).
[484] *Fairchild* (n 470) [91].
[485] *Sienkiewicz v Grief* [2011] UKSC 10 [32].

Nevertheless, it is possible that consistency with 'but for' could be construed as the better option for legal certainty—Morgan is highly critical of the alleged poor quality reasoning[486] that created the exceptional approach that has become synonymous with *Fairchild*. This is further reflected in an argument made by Lord Hoffman, who suggests that the court relied on a notion of common sense to brush off the articulation of reasons.[487] Adopting an approach in clinical negligence that involves a lack of analytical reasoning would always pose a threat of future injustice, allowing judges to arbitrarily interpret judgments differently and thus generating inconsistencies in case law. Further, *Fairchild* is policy specific,[488] allowing for an employer defendant to be held liable for full compensation. While this could be justified as a deterrent that promotes workplace safety in the industrial setting, Stauch argues the floodgates dilemma, contesting that the inclusion of the material contribution theorem in clinical negligence increases NHS liability costs to an unsustainable extent.[489] This poses a difficult question for justice, whereby distributive notions suggest that a lack of resources for other patient treatments creates a wider injustice. Yet this discussion also aligns with Goldberg's: it would appear overwhelmingly unjust to a clinical negligence claimant for the success of their case to be impacted by public sector funding. This dictates that the sole identity of the defendant takes priority over the actual possibility of causation.

[486] Jonathan Morgan, 'Lost Causes in the House of Lords: *Fairchild v Glenhaven Funeral Services*' (2003) 66 Modern Law Review 277.
[487] ibid.
[488] *Gregg* (n 470) [172] (Hale LJ).
[489] Marc Stauch, "'Material Contribution" as a Response to Causal Uncertainty: Time for a Rethink' (2009) 68(1) Cambridge Law Journal 27.

(ii) Bailey v MOD

Prima facie, the case of *Bailey*[490] responded to this criticism, whereby material contribution was used beyond cases of industrial disease and established a causal link in clinical negligence.[491] Further, it did not carry across the controversial *Fairchild* reasoning and policy, instead taking authority from the 'contribution to the damage' case of *Wardlaw.*[492] In *Bailey*, the claimant received defective care after an operation, and later contracted pancreatitis. Their condition continued to deteriorate and they aspirated their own vomit, causing cardiac arrest and permanent brain injury. Tortious and non-tortious causal agents existed, as the worsened state could have been caused by the pancreatitis regardless of any negligent care. Applying the exceptional approach, the judge deemed it sufficient that the tortious agent had materially contributed to the claimant's worsened state. While the precedent did not cover 'risk of harm' cases like *Wilsher*, it at least created a possibility for claimants to succeed when faced with multiple causal agents.

Unfortunately, however, a misleading and ambiguous statement used in *Bailey* by Whaller LJ has made its reliability confusing and convoluted. It is argued by Turton that *Bailey* is not truly an exception to 'but for,' as exemplified through analysis of the case's reasoning.[493] The case was rightfully deemed one of cumulative causal agents, and yet the very

[490] *Bailey v Ministry of Defence* [2008] EWCA Civ 883, [2009] 1 WLR 1052, supported by the later findings in *John v Central Manchester Health Authority* [2016] 4 WLR 54.
[491] In *Davies v Frimley Health NHS Foundation Trust* [2021] EWHC 169, it was confirmed that material contribution does not have to be considered where the claimant can establish 'but for' causation.
[492] *Bonnington* Castings *v Wardlaw* [1956] AC 613.
[493] Gemma Turton, 'A case for clarity in causation? *Bailey v. Ministry of Defence and another*' (2009) 17(1) Medical Law Review 140.

nature of 'cumulative' provides that they are taken together. Interpreting the cumulative agents together, they meet the balance of probabilities threshold.[494] This satisfies the standard approach, yet Whaller LJ states that the "but for [test] was modified."[495] Critics such as Staunch find fault with drawing "arcane distinctions"[496] between cumulative and alternate risk cases, where the underlying problem of establishing causation appears the same. Yet the distinction aligns with a claim made by Green, in that the difference is of the upmost importance[497] if judges are to interpret the *Bailey* judgment consistently. As such, varying degrees of flexibility have been afforded in case law when referring to *Bailey's* "flawed proposition."[498] *Canning-Kishver*[499] departed from the standard 'but for' test on reliance of *Bailey's* exception, which Carr suggested was to ensure that the case could succeed.[500] Yet *Ab & Others*[501] and *Williams*[502] found differently. In *Williams*, *Bailey* was specifically discussed as an application of 'but for,' but these comments are of limited authority insofar as they were made in *obiter*. Thus, *Williams* seemingly missed an "important chance to clarify"[503] for the consistency and justice of future cases. Mr Justice Soole emphasised difficulties with such inconsistency in the recent case of *Thorley*,[504] holding that the application of material contribution in clinical negligence cases was

[494] ibid.
[495] *Bailey* (n 490) [46] (Whaller LJ).
[496] Stauch (n 489) 30.
[497] Sarah Green, 'Coherence of Medical Negligence Cases. A Game of Doctors and Purses*'* (2006) 14(1) Medical Law Review 1.
[498] Jane Stapleton, *'*Unnecessary Causes' (2013) 129 Law Quarterly Review 39, 58.
[499] *Canning-Kishver v Sandwell & West Birmingham Hospitals NHS Trust* [2008] EWHC 2384 (QB).
[500] Claudia Carr, *Beginning Medical Law* (Routledge 2015) 49.
[501] *Ministry of Defence v Ab & Others* [2010] EWCA Civ 1317.
[502] *Williams v The Bermuda Hospitals Board* [2016] UKPC 4.
[503] Clark Hobson, '*Williams v the Bermuda Hospitals Board*: Pro-Patient, but for Ambiguities Which Remain' (2017) 25(1) Medical Law Review 126, 133.
[504] *Thorley v Sandwell & West Birmingham Hospitals NHS Trust* [2021] EWHC 2604.

"evidently a legal issue […] ripe for authoritative review."[505] Confusing precedent undoubtably leaves claimants in an unfair position, with little certainty as to when flexibility and fairness will be afforded.

IV. Chester – autonomy vs consistency

The case of *Chester v Afshar*[506] appeared to drastically alter the fairness narrative in clinical negligence. The House of Lords applied the idea of 'policy reasoning'[507] (as opposed to strictly legal reasoning, 'policy reasoning' is bound to the political and social realities consequent to judgements) in a novel way to establish a causal link in the realm of medical negligence. *Chester* concerned a 'failure to warn' case: the defendant did not warn the patient of a minor but severely adverse risk of cauda equina syndrome (a 1-2% probability), which sadly later materialised. Proving 'but for' was not impossible, but difficult; the claimant admitted that, had she been warned of the risk, she may still have gone ahead with the operation at a later date. On strict application of the standard test, there could be no liability as the operation held equal risk of cauda equina syndrome regardless of the day on which it was performed.[508] Unsatisfied with this result, the majority prioritised the ethical principle of autonomy—namely, injury to a patient's autonomy and dignity[509]—over any desire for uniformity to the standard approach, relaxing the test to find liability.[510] Dove *et al* state that *Chester* took fundamental steps in recognising and

[505] ibid [151].
[506] *Chester v Afshar* [2004] UKHL 41.
[507] *Fairchild* (n 470).
[508] Martin Hogg, 'Duties of Care, Causation, and the Implications of *Chester v Afshar*' (2005) 9 Edinburgh Law Review 162.
[509] *Chester* (n 506).
[510] ibid.

prioritising informed consent,[511] based on the court "respecting the right to self-determination" and autonomy.[512] The wider logic of the verdict may have been an attempt to shift the power imbalance known to medical interactions, whereby a doctor may hold their opinion on the importance of risk factors above a patient's personal judgement.[513] The decision in *Chester* can be seen to mirror a general shift in medicine from paternalism towards autonomy.[514] Green describes it as a "loss of autonomy"[515] case while Hart comments that it shows that the doctor "does not always know best."[516] The *Chester* decision is supportive of a statement made by Lord Reid, who claimed that "inconsistency from old principle can be favourable for developing modern concepts."[517]

Subsequent court decisions in failure to warn cases appear not to place the same value on autonomy. Thus, the application of clinical causation once again appears to fluctuate inconsistently between strictness and flexibility. The case of *Al Hamwi*[518] appears contrary to the outcome of *Chester* and, regrettably for the values of medical ethics, demonstrates that *Chester* has become "narrowly construed and infrequently applied."[519] While it is possible that the facts of *Al Hamwi* warrant the alternate outcomes —the damage suffered was not considered as severe by the courts—Miola comments that the essential difference was that the judges did not feel that *Al*

[511] Dove, Harmon, and Laurie (n 479) 147-151.
[512] *Chester* (n 506) [146] (Steyn LJ).
[513] Sarah Devaney, 'Autonomy Rules Ok' (2005) 13(1) Medical Law Review 102.
[514] *Chester* (n 506) [143] (Steyn LJ).
[515] Green (n 497) 13.
[516] David Hart, 'Supreme Court reverses informed consent ruling: *Sidaway* is dead' (*UK Human Rights Blog*, 13 March 2015) <https://ukhumanrightsblog.com/2015/03/13/supreme-court-reverses-informed-consent-ruling-sidaway-is-dead/> accessed 15 May 2021.
[517] Lord Reid, 'The Judge as Law Maker' (1997) 12 Society of Public Law Teachers 22.
[518] *Al Hamwi v Johnston* and Another [2005] EWHC 206.
[519] Dove, Harmon, and Laurie (n 479) 147.

Hamwi had been "wronged"[520] in the same way as *Chester*. This suggests a clear limitation on the inclusion of value-laden terms in legal ruling, as the case result appears subjective based on the moral compass of preceding judges. A comparison to Morgan's findings on the other policy-driven case of *Fairchild* can be seen, where poor quality reasoning created a contentious precedent for legal certainty.[521] Devaney suggests that future claimants are encouraged to be as "persuasive"[522] as the claimant in *Chester* in presenting their evidence in court. This perpetuates uncertainty in success and flexibility, binding both to whether the courts afford sympathy to a claimant. It further poses an intimidating burden on claimants who are already struggling to overcome the causation obstacle.[523] Miola adds that *Al Hamwi* clearly lost autonomy, "the right to make her decision at a different time and more time to make it,"[524] meaning it could be suggested that the court should not have expanded causation to cover injury to autonomy until it could first define its scope.

Alternatively, it could be argued that inconsistency with *Chester's* inclusion of autonomy in causation is justified; *Chester* is fact-specific and an interpretation of injury to autonomy would be confined to its decision. This is supported by Hamblen LJ in the recent case of *Duce v Worcestershire*,[525] where he held that the paragraphs of the *Chester* judgment that the claimant sought to rely on were inherent to Miss Chester's circumstances and did not constitute a free-standing legal

[520] Jose Miola, 'Autonomy Ruled OK?' (2006) 14(1) Medical Law Review 108, 113.
[521] Morgan (n 486).
[522] Devaney (n 513).
[523] Joanna Manning, 'Factual causation in medical negligence' (2007) 15(3) Journal of Law and Medicine 337.
[524] Miola (n 520) 113.
[525] *Duce v Worcestershire Acute Hospitals NHS Trust* [2018] EWCA Civ 1307.

principle.[526] Thus, following previous rulings in *Meiklejohn*,[527] *Correia*[528] and *Shaw*,[529] the case declined an attempt to extend *Chester* to further factual scenarios. These decisions suggest that perhaps there was never flexibility in failure to warn cases; *Chester* and its value on autonomy was an anomalous case and not a useable exception. This would support Clark and Nolan, who are critical of the misplaced use of autonomy, arguing that it is contrary to the very foundations of negligence.[530] They argue that the negligence doctrine is concerned with the wrongful causation of the patient's physical *injury*, not their autonomy interest.[531] This view is expanded on by Purshouse, who argues that it is "inconsistent for the law to state that someone's autonomy is worth more than another's."[532] If *Chester* were to be a useable exception, the law would seemingly allow this inconsistent approach; rejecting the *Chester* approach aims to restore like-case justice (whereby factually similar cases are treated equally) and promote consistency. It is difficult to protect autonomy legally until the law has a greater understanding of what injury to autonomy looks like,[533] and 'persuasiveness' seems an unfairly subjective starting point. In *Duce*, Leggatt LJ affirms this stance on autonomy, emphasising the difficulty of marrying ethics and tort.[534] Yet it is hardly easy to overlook *Chester* as a one-off case when the claimant was given unjust and

[526] ibid [87]-[89].
[527] *Meiklejohn v St George's Healthcare NHS Trust* and Another [2014] EWCA Civ 120.
[528] *Correia v University Hospital of North Staffordshire NHS Trust [*2017] EWCA Civ 356.
[529] *Shaw v Kovac* [2017] EWCA Civ 1028.
[530] Tamsyn Clark and Nolan Donal, 'A Critique of *Chester v Afshar*' (2014) 34(4) Oxford Journal of Legal Studies 659.
[531] ibid 676.
[532] Craig Purshouse, 'Judicial Reasoning and the Concept of Damage: Rethinking Medical Negligence Cases' (2015) 15(2-3) Medical Law International 155, 168.
[533] Tsachi Keren-Paz, 'Compensating Injury to Autonomy in English Negligence Law: Inconsistent Recognition' (2018) 26(4) Medical Law Review 585.
[534] *Duce* (n 525) [88]-[92] (Leggatt LJ).

overcompensated[535] damages. Valuing a loss of autonomy at such a pay-out to the claimant in one case, yet failing to similarly quantify others', appears incoherent and perpetuates the claim that *Chester* symbolises "bad law making."[536] Purshouse suggests that its outcome was the consequence of bad judicial examination;[537] a link is evident to the poor reasoning in *Bailey*[538] considered earlier, indicating a pattern throughout 'radical' causation cases. Further to this, it is notable that *Chester* was a private medical case; *Duce* and others that followed were cases against the NHS.

V. Loss of chance

Perhaps the hardest case to reconcile with *Chester* is *Gregg v Scott.*[539] As Green has commented, if the legal decision in *Chester* was right, then *Gregg* cannot be,[540] thus evidencing unjustifiable inconsistency. In *Gregg,* the then House of Lords refused to depart from the balance of probabilities rule to allow recovery for a claimant who, due to medical negligence, lost a 45% chance of a better outcome. The doctor failed to diagnose lymphoma, and the delays meant that the patient's chances of survival (for 10 more years) dropped to 25%. Yet 45% was never enough to meet the 'but for' threshold in the first place, and the case could afford no remedy. There are clear circumstantial differences between the cases: *Chester* suffered the injury as a result of negligence, while *Gregg* suffered a decrease in the hypothetical chance that his injury would not eventuate. Yet Thompson argues that in *Gregg* the patient's

[535] Clark and Donal (n 530).
[536] Green (n 497).
[537] Purshouse (n 532).
[538] *Bailey* (n 490).
[539] *Gregg* (n 470).
[540] Green (n 497).

autonomy was unjustifiably compromised by the negligence,[541] with Green further suggesting that, based on the substantive content of the case, *Gregg* lost the same 'right to choose' that pervaded the judicial decision in *Chester*.[542] These suggestions have substance insofar as the doctor's failure to diagnose in *Gregg* prevented the claimant having any choice as to his treatment options until he was in a much worsened state. As such, his right to choose was lost due to a clinical failure to provide medical attention, in an instance arguably just as severe as the circumstances of *Chester*. The same argument appears pertinent: the law should not be seen to hold one patient's autonomy as more important than another's, *Chester* receiving full damages and *Gregg* receiving nothing.

While Green goes on to speak in favour of allowing policy and autonomy[543] to override established principles in medical causation, she bases this on a need to uphold the balance of probabilities test to maintain coherent law-making. There is however merit on the grounds of legal consistency in the *Gregg* verdict. *Hotson v Berkshire,*[544] an earlier case framed under loss of chance, affirmed that the threshold for the balance of probabilities test must be met based on the statistical evidence available to the court. Yet this approach seems unable to account for any unfairness created by the 'but for' test's arbitrary, "crude"[545] percentage distinctions. *Gregg* demonstrates that should a patient, whose chance of survival

[541] Jack Clayton Thompson, 'Ethics and Loss of Chance in Medical Causation' (2011) Globalising European Bioethics Education <https://westminsterresearch.westminster.ac.uk/download/6cffa002e2590262d2c0333a7aa130e044dc18e7ddfd051d3ae1133fb476f333/315021/Ethics%20and%20Loss%20of%20chance%20in%20medical%20causation%20%28update%29.pdf> accessed 28 April 2021.
[542] Green (n 497).
[543] ibid.
[544] *Hotson v East Berkshire Area Health Authority* [1987] 2 All ER 909.
[545] Margaret Fordham, 'Loss of Chance - A Lost Opportunity? *Gregg v Scott*' [2005] Singapore Journal of Legal Studies 204.

exists below the balance of probabilities, lose a 40% chance of a better outcome due to clinical negligence, their legal remedy is denied. Yet should a patient with a 90% chance of survival lose 5%—which is arguably far less significant to the individual's life—they can claim and be compensated. Thompson deems this "backwards law,"[546] while Hogg condemns the approach of the majority in *Gregg* for refusing to look further than unfavourable complexity in weighing up a fairer calculation.[547] While Lord Phillips states that a robust test producing "rough justice"[548] is preferable for certainty, a clearly different, pro-claimant approach has been allowed for the cases of *Fairchild*, *McGhee* and *Chester*. Lady Hale defends this disparity, distinguishing such cases as fact-specific and narrowly applied.[549] Yet the powerful and vehement dissents in *Gregg*—particularly Lord Nicholls' claim that the denial of remedy would be "irrational and indefensible"[550]—arguably undermine any certainty that the majority verdict sought to promote. Miller notes a theme throughout such cases, whereby judges hold differing attitudes as to the use of statistical evidence in causation, this creating conflicting opinions and judicial misgivings.[551] Here, the narrowness of the judgment, combined with such contrasting and striking speeches, leaves the decision against a flexible loss of chance approach in the medical realm weaker and perhaps doubtful.

It is acknowledged in *Gregg* that the decision was one of wider considerations. Lady Hale affirmed that keeping to the

[546] Thompson (n 541) 2.
[547] Martin Hogg, 'Re-establishing Orthodoxy in the Realm of Causation' (2007) 11(1) Edinburgh Law Review 8.
[548] *Gregg* (n 470) [170] (Phillips LJ).
[549] ibid [192] (Hale LJ).
[550] ibid [3] (Nicholls LJ).
[551] Chris Miller, '*Gregg v Scott*: Loss of Chance revisited' (2006) 4(4) Law, Probability and Risk 227.

principled balance of probabilities approach was necessary to prevent a broad scope of liability, reasoning that personal injustice is a worthy sacrifice for legal simplicity.[552] The floodgates argument is the true consistency across the law of causation, with the risk to NHS funding repeatedly preventing the courts from permitting a more flexible approach. Findings like that of joint and several liability (*Fairchild*) are incongruent with distributive justice concerns across the NHS, and the outcome in *Gregg* was submitted to be determined by the impact that any resulting financial remedies would have on public services. While corrective justice arguments to the contrary will not be repeated, a Singapore medical negligence case, *Armstrong v Quest Laboratories,*[553] found in favour of the claimant based on the dissents given in *Gregg* and *Scott*. Being from another common law jurisdiction, its contrary outcome to *Gregg* offers some support to the suggestion that NHS liability heavily effects the decision making in domestic cases. This suggestion is also made by Dove *et al*, who comment that judgments outside of the United Kingdom firmly reiterate that it is the limitations of public sector funding which prevents patients like those in *Gregg* from accessing the compensatory function of clinical negligence.[554] Consistency to a principle that generates unfair results, that even the majority verdict could acknowledge in *Gregg*, has negative implications for individual justice.

VI. Conclusion

The law on causation in the medical context, discussed here across its notably complex, hard and 'exceptional' cases, cannot be considered consistent nor just. Where the law

[552] *Gregg* (n 470) [212], [225] (Hale LJ).
[553] *Armstrong*, *Carol Ann v Quest Laboratories Pte Ltd* [2019] SGCA 75.
[554] Dove, Harmon, and Laurie (n 479) 151.

invokes a stance of justice in individual cases, wider justice and policy concerns (or insufficient reasoning) deem the precedent unfavourable when considered in future cases, as evidenced by the judicial treatment of the *Wilsher* authority. This risks causing like-case inconsistency, which would promote bad law-making. Yet when the law achieves consistency under the strict application of the 'but for' test, the very nature of complex medical cases and the implications of ethical principles deem its ability, or lack thereof, to establish a causal link as unfair. The approach developed by material contribution and the verdict taken in *Chester* show that inconsistency within causation will not always lead to injustice, at least not for the individual claimant suffering from negligence. But the law cannot maintain such an approach and achieve legal certainty. Wider implications of the evident difficulty in balancing these competing requirements of law may be addressed by calls for reform; reform which Thompson suggests should establish a new system for calculating loss in hard cases such as *Gregg* and *Chester*.[555] However, it is unclear whether, and if so when, English Law will actually implicate such reform. For causation reform to reach both consistency in application and justice for both parties, the NHS funding risks must be addressed to create room for judges to provide a more flexible, claimant-friendly stance in NHS causation cases for the future.

[555] Thompson (n 541) 1-3.

Not-So-Human Rights? A Case for Granting Non-Humans Legal Personhood

Rosie Brown[†]

This article aims to challenge the notion that, on account of their 'inherent dignity,' only humans deserve 'universal, indivisible, and interdependent' fundamental rights. It is argued that there is scope for inclusion of non-human animals into definitions of legal personhood and, further, that it is speciesism rather than logic which (mis)informs the current distinction. This article proposes a methodology based on theories of both legal and moral rights, with analysis drawing on the well-documented Hohfeldian perspective and favouring the interest theory, as opposed to the will theory, of rights-based thinking. On this understanding, the article claims that, despite opinion to the contrary, there *is* a place for non-human rights within currently accepted jurisprudential frameworks, which can be justified without reference to anthropomorphic standards, but rather by reference to the human and non-human capacity for sentience.

I. Introduction

Human rights are fundamental rights which exist in respect of the "intrinsic dignity which comes with being human."[556] Human rights came to the forefront of the global conscience following the Second World War, and nearly eighty years on, human rights remains the most "dominant global morality."[557]

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[556] Anne Peters, 'Liberté, Égalité, Animalité: Human–Animal Comparisons in Law' (2016) 5(1) Transnational Environmental Law 25.

[557] Michael Perry, 'The Morality of Human Rights, A Problem For Non-Believers' (*Commonweal*, 10 July 2006) <https://www.commonwealmagazine.org/morality-human-rights> accessed 22 September 2022.

While the exclusivity of these *human* rights is perhaps conceptually attractive, in the context of a wider society—which contains a multitude of human and non-human species—this anthropocentric outlook does not reflect a defensible (moral) reality. If there are fundamental rights that the law should reflect, they do not necessarily relate to being human. As such, current discussions of human rights should be redirected to focus on a broader definition of legal personhood, with the aim of respecting the 'intrinsic dignity' of humans and non-humans alike. With reference to the currently accepted structures of legal and moral rights, this article not only claims that non-human entities *can* be legal rights holders, but that they *should* be legal rights holders.

The "general agreement among philosophers is that human rights are moral rights."[558] Accordingly, Feinberg suggests this means they "exist prior to or independently of any legal or institutional ruler."[559] This article aims to establish that, if there is a moral basis for the human rights posited in law, then this moral basis does not require humans be the sole recipient of these rights. To arrive at this conclusion, the first section of this article is concerned with the structure of legal rights and whether it is this which excludes non-humans from legal personhood, irrespective of any moral considerations. In that pursuit, it will be argued that to the contrary, legal rights can incorporate non-humans as rights holders. If human rights law is indeed morally informed, then the focus must shift to theories of moral rights. As such, the second section will consider whether, in reference to will theory and interest theory, non-human moral rights can exist. Proceeding from the conclusion that such rights may indeed exist (in both the legal and moral form), the final section will argue that human rights should not be exclusively human, and should instead be

[558] Rex Martin, *A System of Rights* (Oxford University Press 1993) 74.
[559] Joel Feinberg, *Social Philosophy* (Prentice-Hall 1973).

generalised to incorporate species with a wide capacity to suffer.

II. The structure of legal rights

The Hohfeldian analysis of the structure of legal rights, or "legal relations,"[560] can be consulted to incorporate non-humans as rights holders in law. Although this analysis is not indisputable, "the formal structure of rights is generally explicated based on the Hohfeldian typology of rights;"[561] as such, it is the appropriate analysis when illustrating how animal rights can be imagined within our legal structure. The Hohfeldian analysis extends our understanding of positive and negative rights to incorporate eight definitions of correlative rights, but most importantly for this discussion are what Hohfeld termed 'claim rights' and corresponding 'duties' or 'legal obligations.' Human rights are typically understood to be claim rights,[562] and since claim rights are "passive rights that concern the conduct of others"[563] and, *ipso facto*, are enjoyed rather than exercised,[564] they also allow for the conceivable inclusion of non-humans as rights holders. The discussion will hence focus on the relationship between claims and duties in law.

[560] Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (David Campbell and Philip A. Thomas ed, Ashgate 2001).
[561] Saskia Stucki, 'Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights' (2020) 40(3) Oxford Journal of Legal Studies 533.
[562] Carl Wellman, *The Moral Dimensions of Human Rights* (Oxford University Press 2011).
[563] Stucki (n 561).
[564] Leif Wenar, 'The Nature of Rights' (2005) 33 Philosophy & Public Affairs 223, 233.

As defined by Hohfeld, where X has a claim, Y has a duty.[565] The example of home ownership is illustrative here: home ownership provides the homeowner with a legal property (claim) right, the value of which is derived from its ability to trigger legal action against those who destroy or otherwise damage the home. Put another way, the property right entitles the homeowner to claim action against those who fail to observe their duty to respect the home. The relationship between claim rights and duties is thus interdependent and correlative, with the former being inextricably tied-up with the latter by virtue of the fact that "[w]hen a right is invaded, a duty is violated."[566]

On these grounds, there are two leading legal objections to the inclusion of non-human rights: firstly, since animals cannot bear duties, they cannot have rights; and secondly, that non-humans cannot "deliberate"[567] so lack the capacity to exercise rights. In response to the former objection, the question is whether rights holding or duty bearing is reducible. To understand this, the nature of Hohfeld's 'correlative relations'[568] must be considered. Frydrych proposes that there are two opposing conceptions of correlativity: symmetrical correlativity and asymmetrical correlativity. The question is thus whether claim and duty are symmetrical "mirror images"[569] and "two sides of the same coin,"[570] or "asymmetrical wherein one or more of the positions bears features that are not reflected in the other(s)?"[571] Should

[565] Hohfeld (n 560).
[566] ibid.
[567] Thomas Magnell, 'The correlativity of Rights and Duties' (2011) 45(1) The Journal of Value Inquiry 5.
[568] Hohfeld (n 560).
[569] David Frydrych, *Rights Correlativity: Wesley Hohfeld A Century Later* (Cambridge University Press 2022) 114.
[570] Joel Feinberg, *Rights, justice, and the bounds of liberty: Essays in social philosophy* (Princeton University Press 1980) 149.
[571] Frydrych (n 569) 114.

claims and duties be the former, non-humans may not hold legal rights for they may not bear legal duties; non-humans would not be party to Hohfeldian 'legal relations', upon which "the formal structure of rights is […] explicated."[572] Alternatively, were claim and duty considered correlatively asymmetrical, non-humans may hold rights since that exercise would not be contingent on the ability to bear duties.

Radin purports the former theory of correlative symmetry and defines the relationship between a claim and duty as "converse,"[573] in that they can be interchanged or reversed to come to the same conclusion. Returning to the example of home ownership: if the correlation is symmetrical and X sells their home to Y for £100, 'X has a claim of £100 against Y' which is the same position 'as 'Y owes X £100.' The consequence of this being that since an animal is not a moral or legal subject, it cannot bear duties and hence cannot be a rights holder. This rationale was adopted in in *Nonhuman Rights Project Inc v Lavery*,[574] where it was assumed that the correlative relationship between a claim and duty was symmetrical and, as such, rights holders in law were required to be active legal duty holders. It was reasoned that, "unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions." As such, a "chimpanzee is not a 'person' entitled to rights."

However, this "narrow contractarian framing"[575] misconstrues Hohfeldian relations and denies the true nature of claims and duties, which are two distinct normative positions within a legal relation. As illustrated by Frydrych, "my

[572] Stucki (n 561).
[573] Max Radin, 'A restatement of Hohfeld' (1938) 51 Harvard Law Review 1156.
[574] *Nonhuman Rights Project Inc v Lavery* 2014 NY Slip Op 08531 [124 AD3d 148].
[575] Stucki (n 561).

requirement to act or forbear vis-á-vis you are not the same thing as your entitlement to my action or forbearance."[576] Put another way, X may owe Y a ride in their car, however Y is under no obligation to accept said ride.[577] On this analysis, the rights holder need not be a duty bearer since neither claim nor duty is equivalent or reducible. Given this, the more persuasive account of the correlative relationship between claim rights and duties is that they are asymmetrical inasmuch as "the capacity to claim is a feature of A CLAIM, while liabilities to being claimed are exogenous to A DUTY."[578] As evidenced by infants or those without the mental competencies to hold duties, a rights holder need not submit to duties to be so, and as such non-humans can equally exist as duty-less entities in the same sense as infants or those without the mental competencies to hold duties.

The aforementioned second objection to non-human rights holders, that non-humans are unable to 'deliberate,' holds that they are thus unable to exercise rights. This is *prima facie* sound: there is no conceivable reality where an animal can execute a claim in law against a breach of their rights. Nonetheless, this reasoning is "doubtful"[579] since there are (human) rights holders without the capacity to understand or make claims upon their rights (for example children or the mentally incompetent), but with complex legal personhood. In instances such as these, it can be raised that rights exist *qua* human irrespective of mental competency. However, this justification for exclusively human legal rights is unsatisfactory: if duty-less entities may hold rights within the legal framework, the foundation of exclusively human rights

[576] Frydrych (n 569) 115.
[577] Magnell (n 567).
[578] Frydrych (n 569) 117.
[579] Magnell (n 567).

must be some moral distinction between humans and non-humans.

III. The structure of moral rights

Having established that animals can hold legal rights, it is now pertinent to consider the structure of moral rights. If legally enforced human rights should reflect a generally accepted ethical code or morality,[580] these would be rooted in our conception of moral rights. The objective is therefore not to explore the contents of these rights, but rather whether they can be applied to non-human entities. There are two principal theories of moral rights: will theory and interest theory.

Will theory does not accommodate non-human rights: according to the theory, "a right exists when the necessary and sufficient condition of imposing or relaxing the constraint on some person's conduct is another person's choice to that effect."[581] The purpose of rights as prescribed by will theory is to "promote personal autonomy,"[582] and it presents individual liberty to be at the core of the structure of moral rights. As such, "rights can be held only by beings capable of waiving their rights."[583] This would require agency and legal competence, which are qualities only found in humans. As a result, will theory reduces the class of potential rights holders by excluding non-human entities.

Nevertheless, will theory fails to offer an account of all the rights and rights holders that can be understood as morally

[580] Wellman (n 562) 4.
[581] Hillel Steiner, *An essay on rights* (Blackwell 1994) 57.
[582] Stucki (n 561) 533.
[583] Rowan Cruft, 'Rights: Beyond Interest Theory and Will Theory?' (2004) 23(4) Law and Philosophy 347.

self-evident. Likewise, the theory has been critiqued for offering an over-reductive conception of rights given that firstly, it denies that there is an inalienable, or unwaivable, quality of rights and, secondly, that its conception of *capacitous* rights holders sets too high a threshold which is incompatible with the reality of rights generally, and human rights especially. On the former point, it is arguably mistaken to exclude the possibility of unwaivable/inalienable rights.[584] For demonstration, consider that there is a right to be protected from slavery. Can this right be waived, and can a volunteer enter into slavery?[585] Or would it not be more convincing that one can "accept or submit to an infringement […] but cannot be understood to consent,"[586] as these rights exist even if "not understood" nor "asserted?"[587] Further and as regards the necessity for capacitous rights holders, will theory in the abstract removes "infants, comatose people [and] senile people"[588] from the class of potential rights holders, since they are without the competence to form or express their will. Consequently, certain rights and rights holders that are taken to be morally self-evident "exist outside the explanatory power of will theory,"[589] and for as long as the intent is to take those rights seriously, there exists reason to find a more satisfactory explanation.

By suggesting that rights are grounded in the interests of rights holders, interest theory offers a more convincing account of moral rights that allows for the inclusion of non-human rights holders. In contrast with will theory, where

[584] ibid.
[585] Paul Graham, 'The Will Theory of Rights: A Defence' (1996) 15(3) Law and Philosophy 257.
[586] Stuart Brown, 'Inalienable Rights' (1955) 64 Philosophical Review 192, 196.
[587] ibid.
[588] Mathew Kramer, 'Do Animals and Dead People Have Legal Rights?' (2001) 14(1) Canadian Journal of Law and Jurisprudence 30.
[589] Stucki (n 561) 533.

emphasis is placed on agency, the emphasis for interest theorists lies in wellbeing.[590] Rights under the interest theory can still be exercisable, but this is limited to cases where "important interests are better served by those persons themselves having controlling choices over the constraints on objects' conduct."[591] Given the above, in order to hold rights under interest theory, one must be first capable of possessing interests. Although this may be a problematically broad criterion creating an impossibly large class of rights holders, if these rights are posited in law, it certainly appears to include non-human rights. It is worth noting that, as a matter of principle, even while a non-sapient creature may have interests, not all interests can generate rights: interests are thus a necessary, not sufficient, condition. Raz asserts that the interests which ground rights must be of "intrinsic value"[592] and that one is capable of having rights if "his well-being is of ultimate value."[593] He reasons that there must be a morally "sufficient reason" to place a duty on another.[594] Human interests are accepted as intrinsically valuable as a matter of fact, yet, as Stucki contends, "[m]odern animal welfare legislation cannot be intelligibly explained other than as acknowledging that the animals it protects have […] morally relevant goods and interests."[595] By extension, if it is accepted that there is intrinsic value requiring protection in law as noted above, then interest theory suggests the moral rights of non-humans exist, or at least that such rights are capable of existing.

Thus, under the account of rights within interest theory, it can be demonstrated that there is no structural necessity for the exclusion of non-humans from human rights

[590] ibid.
[591] ibid.
[592] Joseph Raz, *The Morality of Freedom* (Clarendon Press Oxford 1986) 177.
[593] ibid.
[594] ibid 180–1.
[595] Stucki (n 561).

and, further, that there is a compelling moral foundation for said rights protecting the interests of those with intrinsic value. The logical consequence of this foundation is that if the interests of humans and non-humans cannot be reasonably separated, then the human and non-human cause must co-exist.

IV. Should fundamental rights have nothing to do with being human?

Having argued that neither the accepted legal nor moral structures of rights exclude non-humans as potential rights holders, the case for extending the definition of legal personhood turns to whether there is reasonable moral cause. The following section of this article will question what it is to be human and whether these interests can be justifiably separated from those of other species. It will be argued that the aspirational, fundamental rights which aim to prevent harm, such as bodily integrity,[596] life,[597] and freedom from torture,[598] must be afforded to all those with the capacity to feel harm. If fundamental rights in law are posited on a moral foundation,[599] then that moral foundation has little to do with being human and everything to do with the capacity to suffer. To formulate an exact criterion based on the varying sentience of potential rights-holders would require an exhaustive biological study, yet the aim of this section is not to define this criterion, but rather to demonstrate that it cannot reasonably exclude non-humans from its scope.

[596] Charlotte Blattner and Raffael Fasel, 'The Swiss Primate Case: How Courts Have Paved the Way for the First Direct Democratic Vote on Animal Rights' (2022) 11(1) Transnational Environmental Law 201.
[597] ibid.
[598] ibid.
[599] Wellman (n 562) 4.

There is a conclusive biological definition of what it is to be human,[600] however arguably this is a mere "biological fact of no moral import"[601] and provides no conclusive reasoning for why humans' 'inherent dignity' is placed above that of all other species. Perhaps this is merely an exercise in speciesism. Speciesism can be defined as an assumption of human superiority which leads to the exploitation of animals. While it can be conceded that, practically, the human cause is placed above that of non-humans, this is not grounded vis-à-vis fundamental rights. It can be argued that, as Feinburg suggests, this is merely "self-favoring [sic] arbitrariness antithetical to the character of all genuine moral reasoning."[602]

A common moral defence of speciesism and anthropocentric rights is that there are human attributes which non-humans have not been observed to possess. The question is thus which characteristics make humans eligible for "universal, inalienable and indivisible rights?"[603] Kant offers a plausible account of personhood, defined as "a set of functions or abilities"[604] which relate to uniquely human competencies: for example, "self-awareness, higher brain functions, and the ability to relate to others."[605] An immediate criticism of this account is its exclusion of all humans without such abilities, such as children or the mentally incompetent. However, Kant's

[600] A human (being) is "a culture-bearing primate classified in the genus Homo especially the species H. sapiens"—Editors of the Encyclopaedia, 'human being' (*Encyclopaedia Britannica*, 2 February 2018) <https://www.britannica.com/topic/human-being> accessed 18 September 2022.
[601] Tom Regan, *Animal Rights, Human Wrongs: An Introduction to Moral Philosophy* (Rowman and Littlefield Publishers 2003) 99.
[602] Feinberg (n 570).
[603] ibid.
[604] Dennis Sullivan, 'The Conception View of Personhood: A Review' (2003) 19(1) Ethics and Medicine: An International of Bioethics 11.
[605] Jennifer Nelson, 'Human Personhood from a Kantian Perspective' (2009) 8(2) Journal of Critical Thinking in Bioethics 1 <http://digitalcommons.cedarville.edu/cedar_ethics_online/3> accessed 12 April 2022.

Formula of Universal Law[606] resolves this, explaining that where duties arise "you can generalize [those duties] for everyone."[607] Put simply, as the majority of humans possess the necessary attributes for personhood, all humans can be treated as such. Intellectual ability, rationality and personality are arguably attributes which define a set of uniquely human capabilities. However, whilst Kant has identified a distinction which he is satisfied elevates any species with these characteristics, these are perhaps nebulous concepts and the interests that require protection in legal rights may seek to satisfy a lower, more tangible threshold.

While Kant posits a convincing argument for the characteristics that make us human, this does not offer a sufficiently convincing account of why humanity is the sole species entitled to legal personhood. There is scope to extend our definition of legal personhood to non-humans on another basis: sentience. Put another way, rather than applying anthropomorphic standards to non-humans, it is possible to generalise humans and animals in their shared capacity to suffer. Bentham's challenge—"[t]he question is not can they reason? Or can they talk? But can they suffer?"[608]—is a plausible rebuttal to the notion that Kant's criterion of personhood justifies exclusively human rights.

If fundamental rights reflected in law tend to focus on the prevention of harm and individual autonomy, regardless of "self-awareness" or "higher brain function,"[609] the natural assumption might be that, to qualify as a rights holder, you

[606] ibid.
[607] ibid.
[608] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (first published 1789, Hafner Publishing 1948).
[609] Nelson (n 605).

should have the ability to feel and 'consciously experience'[610] said harm. It is contradictory to assert that humans can experience harm and thus have interests worth protecting, but than an animal can experience harm similarly, even equally, yet not have interests worth protecting.[611] Is it not more persuasive to assert that protections in law matter since they protect against the compromise of experiential welfare, making it necessary to protect all those that can be observed to have valuable experiential welfare?[612]

Utilitarian thought can be invoked when discussing harm as a detriment to experiential welfare: in simple terms, "pain is the only evil and pleasure the only good"[613] and, since it can be admitted that almost all animals are sentient and thus have interests worth protecting, they should be included as a "logical extension of a human rights ethic."[614] As noted above, infliction of pain is something that can be regarded as having 'intrinsic badness' and detriment to the wellbeing of humans, as well as non-human animals.[615] The degradation and exploitation of humans in slavery as a means to an end is unconscionable and intuitively condemned. The right to be protected from such suffering is posited in human rights law because the pain and suffering inflicted by such practices is intrinsically bad.

However, during the process of meat production, animals are subject to pain in unnatural and stressful

[610] James Kirkwood, 'The distribution of the capacity for sentience in the animal kingdom' in Joyce D'Silva and Jacky Turner (eds), *Animals, Ethics and Trade: The Challenge of Animal Sentience* (Taylor and Francis Group 2006) 12.
[611] Regan (n 601) 95.
[612] ibid.
[613] Julian Franklin, *Animal Rights and Moral Philosophy* (New York Columbia University Press 2004).
[614] Tom Regan, 'The Case for Animal Rights' (*Tom Regan*) <www.animal-rights-library.com/texts-m/regan03.pdf> accessed 26 April 2022.
[615] Franklin (n 613613).

conditions, and in animal training it is commonplace for pain to be inflicted to routinise behaviours. Can the rights of a sentient subject exposed to unnecessary pain or torment be distinguished based on species? Singer asserts, to the contrary, that "the principle of equality requires that suffering be counted equally with the like suffering of any other being."[616] In respect of this, it seems fair to submit that the fundamental characteristics that are reflected in legal rights can be generalised to incorporate animal and human suffering alike, since those characteristics are not exclusively features of sapience.

Some scholars articulate the view that extending human rights to protect non-human animals will trivialise human suffering: "by treating animals as our moral equals, we would undermine the liberty and dignity of human beings."[617] This view claims that, by elevating the status of non-human animals, the cause for and purpose of human rights is belittled, or at least diminished, with the consequence that "we cheapen the concept of human rights."[618] 'Human rights talk' came to the fore following the publication of atrocities committed during the Holocaust—does opening the door for animal rights equate this suffering? There is a general unease with this concept, evident in the banned PETA slogan 'the Holocaust on your plate.' The ban was upheld as consistent with the European Convention on Human Rights in *PETA v Germany*,[619] where it was said that the slogan violated the human dignity of victims of the Holocaust.[620] As an extension of diminishing human suffering, critics of animal rights argue that, by focusing attention on animal hardship, the human cause

[616] Peter Singer, *Practical Ethic* (3rd edn, Cambridge University Press 2011).
[617] Aeyal Gross, 'Vegans For (and Against) Occupation' (*Haaretz,* 14 November 2013) <http://www.haaretz.com/opinion/.premium-1.557912> accessed 12 April 2022.
[618] Peters (n 556).
[619] *PETA Deutschland v Germany* App No 43481/09 (ECtHR 12 August 2009).
[620] Peters (n 556).

is *practically* neglected. It is thought that time devoted to these non-humans is time which could be, and ought to be, dedicated to humans themselves. For example, does extending the definition of legal personhood detract from resources that would be given to, for example, refugees or victims of genocide? While these may be valid political concerns about the positing of moral rights into law, as an argument against affording non-humans legal rights this is a misconception that simply evokes speciesism as a cause for exclusively human rights in absence of compelling philosophical reasoning.

The implication that the non-human cause only detracts from the human cause is baseless. There is some contradiction in the fact that humans have demoted animals to secondary, less dignified or deserving entities, but then protest that non-human rights and animal empowerment reduces humanity to that artificial animal status. As compellingly argued by Francione, "the argument for animal rights does not decrease respect for human life; it increases respect for all life."[621] The human and animal agenda can coexist. That is not to say that humans and animals are the same, but that they can be entitled to 'equal concern.' Equal concern refers to the notion that "people have the right not to suffer disadvantage […] in the liberties permitted to them"[622] without any regard to their person, character or tastes.[623] Equal concern does not refer to equal distribution of resources nor economic equality; it is "a condition of the social contract rather than a product of it."[624] If it is understood that non-humans' capacity to suffer makes their well-being intrinsically valuable, then the inclusion of

[621] Gary Francione, *Introduction to Animal Rights: Your Child or the Dog?* (Philadelphia Temple University Press 2000) 174.
[622] Ronald Dworkin, 'Is There a Right to Pornography?' (1981) 1(2) Oxford Journal of Legal Studies 194.
[623] Ronald Dworkin, *Taking rights seriously* (Bloomsbury Academic 2013) 179.
[624] Joshua Marshall, 'The Right to Equal Concern and Respect: The Foundation of Affirmative Action' (2005) 19 Brigham Young University Prelaw Review 42.

animals in fundamental legal rights adds weight to their philosophical grounding, to protect those with intrinsic value. Per the concept of equal concern, this is not to the detriment of human value; Dworkin asserts that value is "unitary in as much that values do not conflict."[625]

There is no true 'human right,' simply a universal respect for human life and quality of life which should be protected, and which should be applied to non-human animals. Per the deontological argument posed by Regan, to "treat [animals] unjustly fails to respect their inherent value,"[626] and, further, that "the principle of respect […] demands that we not treat beings with inherent value as mere receptacles."[627]

A final point worth noting is that, with advances in science and technology, it will become more difficult to claim the existence of a significant gap between the sentience of human and non-human animals. Take for example marine mammals, which we now know to possess sophisticated emotional and cognitive capacity. A study from 2017 found that the "apparent coevolution of brains, social structure and behavioural richness of marine mammals provides a unique and striking parallel to the large brains and hyper-sociality of humans and other primates."[628] Cetaceans are not the only creatures with immense cognitive capacity, as revealed by a further study in 2018 which found that apes exhibit intelligence through the means of, for example, "self-control."[629] As Regan neatly argues, this data shows that humans and animals "share a family of mental capacities and a common status as beings

[625] Carl Knight, 'Justice for Foxes' (2015) 34 Law and Philosophy 633.
[626] Regan (n 601).
[627] ibid.
[628] Kieran Fox, Michael Muthukrishna and Suzanne Shultz, 'The social and cultural roots of whale and dolphin brains' (2017) 1 Nature Ecology and Evolution 1699.
[629] Benjamin Eisenreich and Benjamin Hayden, 'Cognitive Science: Persistent Apes Are Intelligent Apes' (2019) 28 Current Biology 160.

who have experiential welfare."[630] Should it be accepted that there is a species-wide experiential welfare that requires elevating and protecting, it is not clear why purely human interests should be separated.

V. Conclusion

The question of "who is inherently valuable? And who is never to be treated as having instrumental value only?"[631] requires a species wide discussion of conscious experience, and answers that rely on *qua* human logic are unsatisfactory. If there is a presupposition that the human rights posited in law are fundamental and moral in nature, then there needs to be compelling moral reasoning as to their species exclusivity. In the absence of such reasoning, it can be agreed that these fundamental rights need not be strictly human; since non-human species exhibit both an evident capacity to suffer and intelligent cognitive ability, human interests and intrinsic value can no longer be justifiably separated from that of non-humans. The question of whether animals can have rights has been profitably broached and it is clear there is no systematic necessity that rights holders be, firstly, capacitous duty bearers and, secondly, have the faculties to exercise a claim right in law. Furthermore, in accordance with interest theory, where there is undeniable intrinsic value, there are interests (morally) worthy of rights. Since these rights are designed to protect the vulnerable and promote autonomy, and since the necessity for this has nothing to do with being human, it seems that so-called human rights are not-so-human after all.

[630] Regan (n 601).
[631] ibid 93.

The State We Are In: The Crisis of Criminal Justice and How We Got Here

Mark George KC[†]

The criminal justice system is in crisis. Recently, the criminal Bar has been engaged in direct action designed to increase fees for those responsible for defending criminal cases.[632] But this is only one concern; a concern reflective of the deeper, more systematic crisis which follows 30 years of legislative and policy changes to the criminal justice system. This article considers how the system found its way into this crisis and how these changes have contributed to its doing so. These changes have undermined the concept of a fair trial and risk creating more wrongful convictions. Even the principle of trial by jury itself—a cornerstone principle for over 800 years—has found itself under threat. Today's criminal justice system has been pushed to its limits, with resource deficiencies and disgruntled users an all-too-common characteristic. Government action is needed before this state of crisis becomes a state of unsustainability.

I. Introduction

As I started writing this article in the first week of March 2022, two significant events took place which are pertinent to the

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[632] As Andrew Keogh tweeted on 8 April 2022, "[c]rime is the only area of practice at the Bar of England and Wales in which there has been a real terms decrease in income in the last 20 years. Adjusted for inflation, male criminal barristers have experienced a 33% decrease in earnings since 2006." The subsequent strike action combined a refusal to cover work for other barristers ('no returns'), a refusal of all new work and a rolling programme of one week of strike action and one week of normal working. From the beginning of September 2022, the strike became a full withdrawal of labour by those participating.

theme I will be developing. The first was that the Criminal Bar Association ('CBA')—the representative body for criminal barristers and the nearest thing we have to a trade union—balloted members for direct action against the government for its (repeated) failure to implement pay rises for criminal barristers. The second was that I received an email from a solicitor for whom I had just finished a case. He kindly thanked me for my assistance, but also informed me of his firm's decision to withdraw from criminal legal aid due to the poor rates of pay on offer in carrying out the critical work of representing clients in the police station at the start of a criminal investigation and in preparing criminal cases for trial.

These two developments, taking place in the same week, offer nothing short of a perfect illustration of the state of today's criminal justice system ('CJS'). What follows is a closer look at how we have arrived in such a state.

II. The rise and fall of legal aid

When I first started to undertake criminal cases in 1977, legal aid seemed readily available in both civil and criminal cases. Even at that time, the system of legal aid had already come a long way since its foundations in the Legal Aid and Advice Act 1949. I have always admired those who established the welfare state, doing so in a period of real austerity and in the aftermath of a gruelling and financially ruinous six-year world war. To me, this seemed a real sign of the degree of civilisation we had reached as a society. I believe legal aid goes alongside a state-funded health service; just as we are fortunate not to have to check our credit card balance before we seek medical assistance, it seems to me correct that if you have a legal problem and do not have the means to enforce your rights, you should receive state aid to enable you to do so. Legal aid

seemed to make that possible and was initially designed to provide assistance to approximately 80% of the population.[633] In the years since then that percentage has fallen and fallen, and fewer and fewer people are eligible today, especially in civil cases. In criminal cases, legal aid is automatically available to those whose income is below a very low threshold. Above that, a defendant is expected to pay considerable sums of money for their defence.

In 1996, the government, anxious to control spending, introduced the concept of graduated fees in crime. At first, this only applied to short trials. The scheme paid a flat fee for a case of a certain type with a further flat fee for each day of the case. It made no difference how much work you did to prepare the case—the fee was the same. Inevitably, such a scheme was very attractive to the government, since it gave them a great deal of control over spending on criminal legal aid. Before long, the scheme was extended to all cases no matter how long they might last.

If barristers and solicitors had been employees of the state, they would have probably seen a number of pay rises over the years. But barristers and solicitors are self-employed, meaning they have no employment rights in dealing with the government. Since 1996, there has been a whole series of attempts to pretend that fees have been increased, but in general this has only been achieved by cuts in some areas—including in the brief fee, which was meant to cover all the work by way of preparation before a trial began—and by moving other fees around so as to maintain what the government liked to call the

[633] Sir Henry Brooke, *The History of Legal Aid 1945-2010* (Appendix 6, Bach Commission on Access to Justice 2017) 6.

"cost neutrality" of spending.[634] But you can only get away with that sort of ruse for so long before the reality of increasingly inadequate fees becomes obvious.

(i) Squeezing the Bar

One thing that governments never seem to fully understand is why people, like myself, enter the field of criminal law in the first place. You certainly do not undertake criminal law to get rich. All young lawyers who have completed the Bar course are essentially blank pieces of paper, with almost any area of law—commercial, pensions, housing, immigration and so on—available to them. Which area they choose is largely a matter of personal choice, but those who choose crime are invariably attracted by the jury trial theatrics, the opportunity for daily advocacy, the unpredictability of criminal trial progression and the sense of great satisfaction at a job well done. Unfortunately, however, these things will only take you so far.

Students from my generation had their university course fees and maintenance allowance paid by the state; it was an investment by the state in our futures. Nowadays, by the time a student has completed the Bar course, many of them are saddled with copious amounts of debt. If a barristers' chambers is offering a commercial pupillage at a salary of, say, £75,000, yet another chambers is offering a criminal pupillage at the London average salary of approximately £19,000, it is easy to see why many would avoid legal aid work and plumb for the more lucrative commercial alternative.

[634] Criminal Bar Association, *Response of the Criminal Bar Association of England and Wales: Consultation on Amending the Advocates' Graduate Fee Scheme* (Criminal Bar Association 2018) paras 5, 7 and 12.

(ii) Why are there so few women at the top?

Even before COVID-19 and the associated lockdown we had been losing members from the criminal Bar. This was especially noticeable amongst women. At entry level, the criminal Bar has been more or less equally comprised of men and women. Thereafter, however, the situation is very different. Many women wish to take a break to start a family, often during their mid-30s, by which time they are starting to undertake a quite senior and more serious case load. Experience suggests they have two or three children over the next several years and then, once their youngest is ready to attend nursery, they consider a return to the Bar. But it is here that reality kicks in, and they immediately discover that the cost of childcare easily outstrips the fees they can earn in court. Barristers must pay their own travel costs to court, usually at peak times, which can easily eat-up half or more of the fee on offer for a particular hearing. As a result, many talented women leave the criminal Bar and never return, meaning that by the time barristers reach their mid-to-late 40s, the number of men far outweighs the number of women. Of those women that remain, many are then attracted to the idea of becoming a judge, where their working hours and workload would be more predictable and the job more compatible with a family lifestyle. And since King's Counsel ('KC')—the most senior of barristers—are selected from amongst those with long experience in the job, this also helps to explain why there are so few women KCs doing criminal work.

(iii) They can't say they haven't been told

The onset of the COVID-19 lockdown seems to have had the effect of accelerating a process which was already in motion. As we finally emerge from lockdown two years after its introduction, it has become apparent that many of our

colleagues have left the criminal Bar to go elsewhere: some into other areas of law, others to different jobs altogether. For years the CBA has been warning government that falling numbers of barristers would destabilise the profession and cause serious problems for the courts.[635] But no one in government has listened, and now we are seeing the consequences. Never in my entire career, now almost 45 years after it began, have I ever heard of trials having to be adjourned because there was no barrister available either to defend or to prosecute the case—this is simply uncharted waters. But this is the experience today, and like a bleached coral reef it is a sign of the CJS in deep distress.

The current crisis has been many years in the making. The criminal Bar has been attacked by governments of all political persuasions: Labour, coalitions and the Conservatives. The Blair/Brown Labour government was obsessed by market reforms and initiated concepts such as 'price competitive tendering' ('PCT') and 'best value tendering' ('BVT')[636] along with a scheme known as 'one case one fee,' where the fee would be split between the solicitor and barrister, endangering the very survival of an independent criminal Bar. At the end of several years of contention, one of the last acts of the outgoing Labour government in 2010 was to unilaterally impose a 13.5% cut in the fees of defence barristers. No consultation, no negotiation: just a piece of political spite that many of us will never forget.

[635] Duncan McCombe and Onyeka Onyekwelu, *Young Barristers' Committee Report* (Annex 5, Bar Council Meeting, 16 September 2017). The Young Barristers' Committee reported a 30% loss of those under 5 years' experience between 2005 and 2015. See also Criminal Bar Association, 'Monday Message 08.11.21' (*Criminal Bar Association*, 8 November 2021) <https://www.criminalbar.com/resources/news/monday-message-08-11-21/> accessed 17 August 2022. The Chair of the Criminal Bar Association reported that "hundreds have already taken a decision to opt out of criminal work."

[636] Sir Henry Brooke (n 633) 28.

(iv) The Bar fights back

Things were no better under the coalition government, whose infamous Legal Aid, Sentencing and Punishment of Offenders Act 2012 removed a number of areas of civil law almost entirely from the scope of legal aid. The coalition even toyed with the idea that a road haulage company, famous for its green lorry cabs all bearing female names, could run a legal aid franchise.[637] Amongst other things, a scheme of this nature would have deprived defendants of their right to choose their own lawyers. It was one of a number of truly disturbing ideas from the then Lord Chancellor, Chris Grayling.

The Bar was involved in a lengthy and bitter dispute with the Ministry of Justice over a number of attempts by the government to cut legal aid fees. By 2013, the Bar had had enough. At a meeting in London, I was privileged to be asked to propose a motion calling for direct action to be taken to stop the government imposing further cuts to our fees. The motion was overwhelmingly carried, and on two occasions in early 2014 the criminal Bar simply stopped work. By any other name we were on strike, yet Grayling lied about our fees, using outdated figures and describing us as 'fat cats.' In reality, of course, criminal barristers earn a small fraction of what commercial barristers earn; we serve the public in cases that really matter to ordinary people, but still the criminal Bar was vilified by the government and their supporters in the press. Indeed, the courage and determination of the criminal Bar put it in a very strong position vis-à-vis the government, but determined and capable though the leadership of the CBA

[637] John Hyde, 'Stobart to bid for new legal aid contracts' (*The Law Society Gazette*, 29 April 2013) <https://www.lawgazette.co.uk/news/stobart-to-bid-for-new-legal-aid-contracts/70612.article> accessed 17 August 2022.

were, this was no match for a government which had far more experience of handling labour disputes. The government bypassed the CBA leadership and persuaded the Chair of the Bar Council—the governing body of barristers—and the Leaders of the Circuits into which the Bar is organised to support a deal to end the dispute. No one thought to consult the membership until after the action had been called off.

For several years after 2014 an uneasy peace prevailed, but matters soon started to come to a head again. Whenever the criminal Bar has been asked, it has voted overwhelmingly in favour of direct action in support of higher fees. Juniors have voted in huge numbers for action that they know will detract from their earnings in the short-term, in the hope and expectation that victory will result in higher long-term fees. In both 2018 and 2019 we voted for action, during the latter of which we were told by our leadership that taking action would be pointless given the government's proposal to review legal aid. Well, that was 2019, and here we are three-and-a-half years later. At the end of 2021, the report of the Criminal Legal Aid Review ('CLAR') made the government aware of the need to spend at least an additional £35 million per year to increase the fees for criminal court advocacy in order to curtail the tide of people leaving the profession and to start injecting a sense of worth into the profession.[638] In a ballot in March 2022, more than 94% of the criminal Bar told the government that the money on offer needed to increase and that the implementation period for such change needed to be sped up.[639]

[638] Sir Christopher Bellamy, 'Independent Review of Criminal Legal Aid' (*Gov.uk,* 29 November 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041116/clar-independent-review-2021-annexes.pdf> accessed 20 August 2022, para 16.13.

[639] Criminal Bar Association, 'Monday Message 21.03.22' (*Criminal Bar Association*, 21 March 2022) <https://www.criminalbar.com/resources/news/monday-message-21-03-22/> accessed 17 August 2022.

(v) Cutting the police and prosecutors

Another reason for the crisis which was building in the CJS stemmed from the fact that, in the decade after 2010, the Conservative party—with the help of their Liberal Democrat allies—carried out a veritable blood bath so far as police numbers and Crown Prosecution Service ('CPS') lawyers were concerned. Whilst politicians currently claim the credit for their efforts to recruit an extra 20,000 police officers, it should not be forgotten that this is simply a reverse of the cuts of precisely the same number of officers during the period after 2010.[640] During the same period, the CPS budget was cut by a third,[641] with 25% of CPS staff lost.[642] How a prosecution service is meant to serve the public after sustaining such vicious cuts was never satisfactorily explained by any minister. The inevitable result was seriously overloaded caseworkers left to cover the work of their lost colleagues. To no one's surprise, a recently published report of the joint inspection of the police and CPS found caseworkers with unsustainable workloads complaining that they could not keep complainants up to date with developments in their cases.[643]

[640] Full Fact, 'Police officer numbers in England and Wales' (*Full Fact*, 8 November 2019) <https://fullfact.org/crime/police-numbers/> accessed 20 August 2022.
[641] Patrick Worrall, 'FactCheck: extra funding for CPS comes after long-term cuts' (*Channel 4,* 23 June 2021) <https://www.channel4.com/news/factcheck/factcheck-extra-funding-for-cps-comes-after-long-term-cuts> accessed 20 August 2022.
[642] Maeve McClenaghan and Jamie Doward, 'Staff cuts at CPS lead to delays, errors and waste, say legal experts' (*The Guardian,* 27 July 2013) <https://www.theguardian.com/law/2013/jul/27/staff-cuts-cps-delays-errors> accessed 20 August 2022.
[643] Justice Inspectorates, *A joint thematic inspection of the police and Crown Prosecution Service's response to rape—Phase 2: post-charge* (Criminal Justice Joint Inspection 2022) 55.

(vi) Closing courts and furloughing judges

From 2017, the Court Service—which had been selling a large number of Magistrates' Courts and some Crown Courts—started to reduce the number of 'court sitting' days. A typical courthouse might have 10 courts all capable of dealing with a list of cases. A glance at the daily lists would often reveal that in half of the courts at any one court centre there was no judge sitting nor available. This cost saving exercise by the government was further developed by a new phenomenon, where judges were assigned 'reading days'[644] in which they would complete necessary case reading outside of court. In addition to reducing the number of courts available, this had an impact on judicial recruitment. Judges come from the ranks of solicitors and barristers, and those who wish to become judges in due course invariably begin by applying to sit as a recorder, which is a part-time trainee judge. In 2017, the minimum number of days a recorder was required to sit was 30 days per year—another government target for cuts. By 2019, many recorders were complaining that they were not being offered enough days to allow them to qualify as full-time judges. Some were sitting as few as 15 days per year.

(vii) A crisis becomes a catastrophe

A lack of courts and judges to fill them leads to a number of problems, not least a growing backlog of cases waiting to be dealt with. In the carefree days before March 2020, the Court Service showed very little concern towards this backlog. They had no concern about complainants in criminal cases, anxious to have their case brought before the court for resolution. The

[644] Helen Pidd, 'Serious crime victims wait longer for justice after court days cut' (*The Guardian,* 13 January 2020) <https://www.theguardian.com/law/2020/jan/13/serious-victims-wait-longer-justice-court-days-cut> accessed 15 August 2021. As the date of this article makes clear, this report took place *before* the onset of COVID-19.

government cared even less for those accused of often serious offences, which effectively placed their lives on hold as delays lengthened. In light of recent government claims that the backlog is all the fault of COVID-19, it is important to note that by March 2020 very nearly 40,000 cases were already outstanding in the Crown Court. And then the entire system was brought to a thunderous halt by a microscopic piece of viral material none of us had ever heard of before.

The Magistrates' Courts had to continue working on a skeleton basis to deal with those who, despite the lockdown, continued to commit criminal offences. But the Crown Courts, on the other hand, stopped all trials completely. A jury trial, even for a single defendant, involves a minimum of 20 people being in a confined space for up to six hours and was never going to be possible in the age of social distancing. Although a few trials recommenced at the Old Bailey in London, outside of the capital nothing moved for months. By the autumn of 2020, a few more courts were slowly starting up again, but many barristers were without work for at least a year, with many having to wait much longer than that. The 40,000 backlog rapidly reached around 60,000 cases,[645] and never had the consequences of a government decision been so cruelly exposed. Every one of those 60,000 cases involve at least one accused person, many of them in custody for well over a year before their trial. Every one of those 60,000 trials involved a complainant who wanted justice and a resolution to their case. It is no wonder that many complainants simply gave up hope of ever seeing their cases brought to trial.

[645] Jon Ungoed-Thomas, 'Thousands of victims of violent and sexual crime stuck in England and Wales court backlog' (*The Guardian,* 18 June 2022) <https://www.theguardian.com/law/2022/jun/18/thousands-victims-violent-sexual-crime-stuck-england-wales-courts-backlog> accessed 1 July 2022.

III. Fighting crime or making life tough for those accused of crime?

(i) Fair trials and the golden thread

So, a decade or more of funding cuts have had a devastating effect on the CJS. But now I propose to consider some other important factors which I believe to have compounded the current crisis. If the CJS is to work properly, then it should fulfil the overriding objective set out in the Criminal Procedure Rules—acquitting the innocent and convicting the guilty. In this part of the article, I seek to argue that there has been a series of changes in law and procedure, beginning in the mid-1990s, that have significantly tilted the balance in favour of the prosecution and made convictions, which inevitably include wrongful ones, more likely.

A criminal trial is a specific legal process. At its most simple, it is a process whereby a person who has been accused of a criminal offence is tried in court, and evidence to support the relevant allegation is produced before the fact finder and a verdict eventually reached. If the accused is acquitted, that is the end of the matter as far as the criminal law is concerned;[646] if they are convicted, the defendant will receive a sentence. In some form or other, this basic process has existed in England for more than a thousand years. For almost the entirety of that period, the only person who was considered of any real importance during the process was the accused. The issue was simply whether the accused was guilty or not of the offence that was charged.

Over the years, the concept of something vaguely akin to a fair trial came under consideration and rules of procedure

[646] In certain circumstances, civil proceedings may be brought in which there is a claim for damages for alleged wrongdoing.

developed as a means of putting that in place. Amongst the most important of these was the right of an accused to remain silent: a right sometimes referred to as the rule against self-incrimination, in recognition that it is for the prosecution to prove guilt rather than for the accused to prove their innocence.[647] Long before anyone had ever heard of Article 6 of the European Convention of Human Rights, English judges considered that the paradigm fair trial was one conducted in an English court of law.[648]

(ii) The politicisation of crime: getting tough with those accused of crime

It may be argued that the arena of justice and crime has always been a political battleground, but that is not how it seemed to me until sometime in the 1990s. That was the time when Michael Howard, as Home Secretary at the Conservative party conference in 1993, announced that 'prison works.' Besides the fact that Howard's conclusion was premised on a very narrow study of around 130 former prisoners,[649] what made his remark particularly noticeable was its dramatic confliction with the opinion of his colleague and former Home Secretary, Douglas Hurd. In 1989, Hurd had confidently claimed that "prison is an expensive way of making bad people worse."[650]

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[647] As Lord Sankey expressed in *Woolmington v DPP* [1935] UKHL 1, [1935] AC 462, 481, "throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt."

[648] Sir Matthew Hale, *The History and Analysis of the Common Law of England* (The Lawbook Exchange 2000). See also John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press 2005) 338, at which the English criminal trial is extolled as "the best method of searching out the truth."

[649] Ros Burnett and Shadd Maruna, 'So "Prison Works", Does It? The Criminal Careers of 130 Men Released from Prison Under Home Secretary, Michael Howard' (2004) 43(4) Howard Journal of Criminal Justice 390.

[650] Home Office, *Crime, Justice and Protecting the Public* (HM Stationary Office 1990), in which it was stated "Nobody now regards imprisonment, in itself, as an effective means of reform for most prisoners […] For most offenders, imprisonment

Not to be outdone in the war of words, and as the prospects of a Labour government developed during the 1990s, Tony Blair came up with his own mantra. He said a New Labour government would be 'tough on crime and tough on the causes of crime.' In my naivety, I thought the second part of that phrase would see Labour look at the reasons why people commit crimes, enabling them to address underlying causes such as poverty, poor education, drug addiction and so on. As it turned out, Labour, whether New or not, was every bit as reactionary as any previous Conservative government had been.[651]

The war on crime was not confined to mere words. In 1994, the Conservative government introduced the Criminal Justice and Public Order Act ('CJPOA'), a key aspect of which introduced a very significant change to the procedure of English criminal trials.

(iii) The right to silence

It may be true that the right to silence was not an especially ancient right, having only really been established from around the end of the 18th century. Nevertheless, by the 1990s it was a well-established and largely accepted principle of English law.[652] Section 34 of the CJPOA 1994 did not abolish the so-called right to silence, but it allowed a court or jury to draw

has to be justified in terms of public protection, denunciation and retribution. Otherwise it can be an expensive way of making bad people worse."

[651] In 2010, I wrote to Henry Porter with my observations on the Labour government under Tony Blair and Gordon Brown, and what I wrote was published in The Observer. Mark George, 'The assault on our civil liberties has been long and laboured' (*The Observer,* 31 January 2010) <https://www.theguardian.com/commentisfree/2010/jan/31/mark-george-henry-porter-civil-liberties> accessed 15 August 2021.

[652] For a thorough explanation of the emergence of the principles underpinning the right of silence, see Langbein (n 648).

what is called an 'adverse inference.' An adverse inference could be drawn against any accused individual who (1) did not answer questions during police interview, and who (2) later relied in court on a fact not mentioned previously which they might reasonably have been expected to mention during that interview. The obvious inference to be drawn from the accused's silence was that their account had been fabricated and was thus false. Section 35 of the Act allowed similar adverse inferences to be drawn from a failure to give evidence at trial.

Judges are still required to direct juries that an accused person has a right to remain silent both in interview and at trial, but it is difficult to view this 'right' as anything of the sort given the detrimental consequence of its exercise. After all, those who do not speak may have a perfectly good reason; they may be young, vulnerable, ill-educated, inarticulate or simply traumatised by their arrest and subsequent detention. And rather ironically, this change in the law produces paradoxical results: the only way that an accused person can convince a jury of their reason for silence is by waiving the very right which they were trying to protect.

Adverse inferences do not sit well with the duty of the accused's legal representative to advise them of their right not to answer questions during police interview. Judges regularly tell juries that just because a solicitor may have advised the accused to remain silent, that does mean that that person had to follow the advice. This approach further undermines the so-called right to silence.

The right to silence—the right not to incriminate yourself—remains, in my view, a key pillar of any society that purports to conduct fair trials in accordance with the rule of law. If a prosecution case is so insubstantial that it cannot be

proved without a confession from the accused, then in my opinion the prosecution must live with the consequences. The Americans thought the right not to incriminate oneself was so important that they enshrined it in the 5th Amendment of the Federal Constitution of 1787, and I do not think that their system of criminal justice functions any less well on that account.

(iv) Defence statements and disclosing unused material

Two years after the enactment of the CJPOA, the government introduced the Criminal Procedure and Investigations Act 1996 ('CPIA'). In part, the Act was designed in response to the fact that, in the early 1990s, the Court of Appeal had had to deal with a number of shocking miscarriage of justice cases. These cases emerged from decisions made in the 1970s—cases concerning Judith Ward, the Birmingham Six, the Guildford Four and the Maguire Seven—all of which resulted from failures to disclose unused material otherwise helpful to the defence.[653] Section 3 of the Act placed a duty on the prosecution to disclose any material in its possession which either undermined the case for the prosecution or could assist the case for the defence.[654] However, this duty was closely bound up with a duty on the defence to serve a defence statement which summarised the defence's case. A failure to serve such a statement or the service of one which lacked sufficient detail could also result in an adverse inference being drawn by the jury.

[653] Every criminal investigation generates material on which the prosecution ultimately decides not to rely. This is called unused material, the disclosure of which is now governed by the Criminal Procedure and Investigations Act 1996.

[654] In fact, the duty under section 3 is titled 'initial duty of prosecutor to disclose' and requires the prosecution to disclose material as part of the initial stages of service of its case and before any defence statement has been served. Section 7A creates a continuing duty of disclosure and in particular requires the prosecution to consider further disclosure in the light of the contents of any defence statement that is served.

I continue to believe, even now, that to require the defence to reveal to the prosecution the contents of its case flies in the face of what remains an adversarial system, where the prosecution is required to prove guilt and the accused required to prove nothing. In addition, in the vast majority of cases the likely defence is predictable anyway, begging the question whether this duty to serve a defence statement is necessary in the first place.

The defence statement and the requirement to serve one was sold to the defence community as a sort of *quid pro quo* for greater disclosure, the idea being that if the accused's representatives set out their defence, the disclosure of relevant unused material would follow. Unfortunately, that has not been the case, and the lack of proper disclosure remains a serious problem. Partly, this is because the current system still leaves the whole matter of disclosure in the hands of the prosecution, who, as one party to a criminal prosecution, have no interest in helping the defence to undermine their own case.

Although the defence may nowadays be served with lengthy schedules of unused material, there remain too many cases where information which the prosecution know should be disclosed is not. Leaving disclosure in the hands of one party to the proceedings is obviously flawed. At the time that the Act was introduced, the police claimed full disclosure was tantamount to "handing the keys to the warehouse" to the defence.[655] But one retort to this claim is that the defence are in a position to know what material the prosecution are likely to

[655] Certain major police inquiries no doubt generate enough undue material to justify being stored in a warehouse, although most cases will not generate nearly so much material. The phrase was coined long ago to describe the idea of allowing the defence to search thorough all unused material in the hope of finding the needle in the haystack. For a number of references to this phrase, see Lord Justice Gross, *Review of Disclosure in Criminal Proceedings* (Judiciary of England and Wales 2011) para 45.

have which might assist the defence's case. Until that concern is addressed, the problems of disclosure will continue.

(v) Restrictions on cross-examination – sections 28 and 41 of the Youth Justice and Criminal Evidence Act 1999

This Act introduced a series of "special measures"[656] intended to assist witnesses to give their evidence by, for example, being screened in court from the defendant. It also allowed a pre-recorded interview with the police to be used as the evidence-in-chief of the witness. Section 28 extended this to allow the cross-examination of the witness to be conducted well in advance of the trial itself. The provision, however, lay unused on the statute books until a pilot scheme to introduce it began in certain courts in 2018. As we shall see, section 41 imposed restrictions on the cross-examination of witnesses in sexual assault cases.

(a) Section 41

Section 41 had the laudable aim of preventing the humiliating questioning of complainants (often women) during sex cases; questioning designed to belittle a complainant's character without being of any probative value. No one could seriously argue, in an English court in the 21st century, that there is any relevance in what clothing a woman wears when she heads out for the night and finds herself the subject of some sexual crime. Questions about the length of her skirt or her underwear could make no difference to whether she was consenting to a sexual act.

But section 41 did not just prevent such questions; section 41 says '*no questions* may be asked in cross-

[656] Youth Justice and Criminal Evidence Act 1999, s 16-30.

examination about any sexual behaviour of the complainant.' The Act interprets 'sexual behaviour' widely, and so such a blanket ban was almost guaranteed to be challenged before long. In the case of *R v A (No 2)*,[657] the relevance of the sexual conduct in question for the purposes of section 41 was interpreted so narrowly that it prevented a man who claimed he had been in a relationship with a woman for some time from referring to the occasions when they had undoubtedly had consensual sex. For context, this information would have otherwise assisted the defendant's attempt to justify his belief that the sex with the woman, for which he was on trial, was consensual and thus legal. On appeal it was argued that such a restriction affected the accused's fundamental right to a fair trial and that, in this case, where the accused claimed reasonable belief in consent, it was essential that the jury be allowed to know that the complainant and the defendant were in a relationship together.

When the case reached the Judicial Committee of the House of Lords—the forerunner of the United Kingdom Supreme Court—the House declared section 41 incompatible with the right to a fair trial, which is guaranteed by Article 6 of the European Convention on Human Rights. It said that the section would have to be 'read down' in accordance with section 3 of the Human Rights Act 1998 in order to avoid gross unfairness. Indeed, the court only avoided issuing a declaration of incompatibility with Article 6 because it felt able to interpret the words in section 41 as being subject to the rider that the evidence would be admissible if this was necessary to ensure the trial was fair.

Of course, witnesses must be treated with respect, and no one would suggest we should return to the days when

[657] *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45.

advocates would seek to humiliate complainants through deeply personal questioning. Equally, however, we cannot allow properly admissible evidence to be excluded on the specious ground that this only adds to the suffering of the complainant and merely compounds their trauma. Allegations of sexual assault are very serious, as are the consequences for those convicted. That is why it remains important that such allegations continue to be tested in court and subject to thorough and appropriate questioning.

(b) Section 28: cross examination in advance.

As we have seen, one of the special measures introduced by the Youth Justice and Criminal Evidence Act allowed using pre-recorded video as a witness's evidence-in-chief and allowing witnesses to give evidence behind a screen or via live link from outside of the courtroom. The justification for these measures rested on the belief that the experience of giving evidence would be less traumatic for witnesses. As a result, many witnesses, especially complainants in sex cases, do not give evidence live in court until they are cross-examined by the defence. Section 28 allows the cross-examination of the complainant also to be recorded in advance of the trial, which means a complainant in a sex case now need not enter the courthouse at any time.

Although passed in 1999, section 28 lay unused on the statute books for many years, and it was only in 2018 that a pilot began in a number of courts where cross-examination in advance took place. Despite the fact that there has not yet been time to assess the benefits and drawbacks of the section 28 procedure, the Government seems to be signalling its intention to ensure this right is extended to almost all witnesses in criminal cases.

Section 28 is a provision that could only have been drafted by someone with no experience of a criminal trial. Not only is a trial adversarial, where there are different views being taken of the evidence; a trial is also a dynamic process. Serious allegations likely to result in lengthy prison sentences should be robustly challenged. Cross-examination should take place as part of that process and not months before the trial begins. The case may change, and the evidence certainly will. What seemed important at the outset of a trial often turns out to be less important than something that arises only later in the proceedings.

Unfortunately, the contemporary consensus has resulted in too great an emphasis being placed on the comfort of witnesses at the expense, I would argue, of the impact of their evidence on a jury, and little attention is afforded to the impact cross-examination in advance might have on the fairness of a trial. Some judges seem to regard a section 28 cross-examination as an opportunity to limit the extent of any cross-examination by the defence. Importantly, this entire process also overlooks the important matter of unused material. In many cases involving sexual offences, examination of devices such as mobile phones will take place. This takes time, and any relevant information arising will not be available until shortly before the trial and long after the section 28 cross-examination has taken place. So if, for instance, the defence wish to ask a complainant further questions about messages on a mobile phone, they will need to recall that complainant. But the presumption in section 28(5) and (6) is against such further questioning, and judges are unlikely to permit further questioning unless persuaded that this is necessary for the purposes of a fair trial. Thus, whilst clearly well-intended, section 28 creates problems with the assembly and presentation of (often important) evidence during trial.

(vi) The Criminal Justice Act 2003

The Criminal Justice Act 2003 ('CJA'), consisting of 329 sections and 38 schedules, introduced a plethora of changes to criminal law and procedure. Amongst these are a number of particularly notable changes: the routine introduction of the bad character of an accused before guilt has been decided; an expansion of the use of hearsay evidence; a loosening of the eligibility for jury service so as to include police officers, prison officers, lawyers and others involved in the CJS; the introduction of a new type of indeterminate sentence, and a new regime for determining the length of life sentences with new and much higher 'starting points.' No single Act of Parliament in many years has introduced so many measures designed to increase convictions in the knowledge that these will inevitably include wrongful ones too. In time, it will surely come to be regarded by all who value the concept of fair trials and due process of law as one of the most regressive pieces of criminal legislation ever passed.

(a) Bad character and hearsay

Prior to 2003, most people involved in the criminal justice system understood why the law provided that, save in exceptional circumstances, a jury should be kept unaware of a defendant's previous convictions. The risk of prejudice to the defendant was obvious: if the jury knew of previous convictions, it would distract them from an objective consideration of the merits of the case at hand. Such evidence was already allowed if an accused person attacked the character of a prosecution witness on the basis that this entitled a jury to hear about his own character, but the CJA considerably extended the potential reach of such evidence.

Much the same could be said about the hearsay provisions in the CJA. It had long been one of the cornerstones of English law that hearsay evidence, with all the risks of unreliability, was not permitted save for very few exceptional circumstances. Allowing such evidence to be admitted via the very wide door in section 114(1)(d) that it is "in the interests of justice" gives a court far too wide a discretion to admit hearsay evidence despite the safeguards in section 114(2). Section 116(2)(e) goes so far as to allow the evidence of a witness who claims to be in fear of giving evidence to have their evidence read to the jury. Thus, an unscrupulous police officer may tip-off reluctant witnesses to the effect that, if they make such a claim in respect of the defendant, they will not need to attend court. Hearsay evidence may be very convenient to the police and prosecution, but its widespread use is not compatible with an adversarial system. I believe this increased use is all part of the drift towards a less adversarial and more inquisitorial system, in which much that is of dubious relevance is allowed in on the basis that the jury should have as full a picture as possible.

Although there were those who did not like the law as it was—believing criminals 'got away with their crimes' too often—there was no great clamour before 2003 which might have justified a change of this nature. The only basis I can see for the relaxation of hearsay rules is that the Labour government at the time seemed to think it would boost the number of convictions, regardless of the fairness of those convictions.

(b) Police officers and legal professionals on juries

In a similar vein, the CJA even allowed police officers to sit on juries, along with many others whose work familiarised them

with how the criminal justice system works.[658] One of the reasons we take care to ensure a jury does not know about the case they are to try or those involved is to ensure fairness and lack of bias in their deliberations. That concept was completely undermined by this change.

A common argument against 'judge-only trials' is the claim that judges become case hardened and that their objectivity resultingly diminishes over time. Yet for some reason the government thought this did not disqualify those such as police officers, whose entire job is to catch and prosecute criminals and who are therefore professionally disposed to support one side only of the trial process, from sitting on a jury. It is hard to avoid the conclusion that these changes were primarily introduced to help increase conviction rates.

(c) Imprisonment for public protection

Changes to the substantive law are, however, nothing compared to the changes in sentencing practices, which have allowed politicians to flaunt their 'tough on crime' credentials. Nowhere was this more clearly seen than during the hopelessly unthinking proposal for what was known as 'imprisonment for public protection' ('IPP') contained in section 225 of the Act. I have previously written on the iniquities of IPP at greater length,[659] outlining why the very idea of such a sentence is

[658] Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (Criminal Courts Review 2001) (Auld Report). Prior to the Auld Report, it had long been considered that those with a familiarity with the justice system—such as lawyers, judges and police officers—should not be allowed to serve on juries for fear they would bring into the jury room prejudices based on their own general experience rather than the evidence in the case they were trying. Nor had there been any campaign to suggest such views were now outdated and required reform.

[659] Mark George, 'Five years after abolition of IPP—why are so many still serving this discredited sentence?' (*mmchgeorge99,* 7 December 2017) <https://mmchgeorge99.wordpress.com/2017/12/> accessed 21 August 2021.

wholly wrong. In short, IPP sentences were similar to life sentences, in that offenders received a minimum term prison sentence but without a specified release date. The thinking behind IPP was that certain offenders, who were regarded as dangerous and likely to commit serious violent offences in the future, would be subject to a short period in custody followed by a potentially life-long licence; a licence which would allow their recall to prison without the need to be convicted of a further offence. Judges were encouraged to impose very short minimum terms, sometimes under a year in prison. But unfortunately, these prisoners were treated by the prison system just like any other prisoner without a release date—as a part of the so-called 'lifer system.' Furthermore, because these offenders had been deemed dangerous, their release would only be allowed if the parole board agreed; and the parole board would only do that if they were satisfied that the offender had made such progress that they no longer represented a danger to the public. This threshold required offenders to undertake course work which took years to complete due to the lack of resources, followed by further assessments of their progress. For obvious reasons, that cannot be accomplished in a matter of months—it takes years. By the end of the decade thousands of people were languishing in prison, having served years beyond the original period for which they had been sentenced and with no end of their sentence in sight. This Kafkaesque nightmare was, in my view, the single worst punitive idea since the decision to transport felons to Australia in the 18th century. So serious was the situation that this sentence had created, it was rightfully abolished in 2012 by the coalition government.[660] However, even then no adequate steps were taken to assist those already subject to IPP sentences, and even

[660] Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 123.

today, a decade on from abolition, there remain prisoners who are serving their never-ending sentences.[661]

(d) The impact of changes to life sentences

Other provisions of the CJA made significant changes to the length of life sentences for murder.[662] Life sentences are mandatory for murder, and the real issue for the sentencing judge is to fix the minimum period which the offender will need to serve before being considered for parole. This is known as the 'minimum term,' and unlike all other types of prison sentence, it is not open to any further reduction. The CJA originally introduced three separate starting points: a whole life order, from which an offender would never be released; a minimum term of 15 years, or a minimum term of 30 years when deemed appropriate in light of aggravating factors. The Act was amended in 2010 to introduce a further category with a starting point of 25 years.[663]

It seems to have been a deliberate act on the part of the government to substantially increase sentences for murder. The CJA was, perhaps remarkably, the first time there had been a statutory scheme for such sentences, replacing the Practice Direction issued in 2002 which set out much shorter minimum terms. The result was an immediate and then sustained rise in

[661] As of September 2021, according to the government's own statistics, there were 1,661 people still serving a sentence of IPP. See Home Office, 'Imprisonment for Public Protection: Police, Crime, Sentencing and Courts Act 2022 factsheet' (*Gov.uk,* last updated 20 August 2022) <https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/police-crime-sentencing-and-courts-act-2022-imprisonment-for-public-protection-factsheet> accessed 2 September 2022.

[662] Originally set out in the Criminal Justice Act 2003, s 269 and sch 21. The current regime for mandatory life sentences is set out in the Sentencing Act 2020, s 322 and sch 21.

[663] Criminal Justice Act 2003 (Mandatory Life Sentence: Determination of Minimum Term) Order 2010, SI 2010/197.

the minimum term for murder, sometimes in the region of a 50% increase.[664]

Whole life orders, where a prisoner will never be released, did not exist before 1983. In the next 20 years, approximately 23 such orders were made. Since 2004, at least 73 such orders have been made. Before 2003, life terms with a minimum to be served of 30 years were extremely rare. In the years after 2003, the length of murder sentences increased significantly. Importantly, these developments had a knock-on effect. Once sentences for murder increase, so too must those for offences such as attempted murder or manslaughter, otherwise too large a gap will emerge between sentences for different violent offences. And then the increase applied to serious assaults, and then to less serious assaults all in the name of consistent sentencing. In other words, a number of sentences began to increase across the board. But none of these changes appear to have resulted from careful and detailed research concerning the impact of the length of sentences on matters such as reoffending. This appears to be a very clear example of a purely political move designed to burnish the then Labour government's reputation. No one thereafter could accuse a Labour government of being soft on criminals, seemingly fulfilling the promise to get 'tough on crime.' But whatever happened to the second half of that mantra?[665]

[664] The House of Commons Justice Select Committee in 2022 heard evidence from the Sentencing Council that sentences for the vast majority of murder cases increased substantially. See Justice Committee, *Prison population 2022: planning for the future* (HC 2017-19, 483) para 72.

[665] Not much seems to have changed in the Labour party's approach to sentencing if remarks by David Lammy in August 2021, who called for minimum terms of seven years for rape offences, are anything to go by. See Rachel Wearmouth, 'Fury at soft sentencing for rapists as almost 3,000 jailed for 6 years or less' (*Mirror,* 10 August 2021) <https://www.mirror.co.uk/news/politics/fury-soft-sentencing-rapists-almost-24731987> accessed 1 August 2022.

(vii) Convicting the innocent: the continuing saga of failures to disclose unused material

We have seen above how the CPIA introduced substantial changes in how unused material was to be dealt with by prosecutors: if material may assist the defence case or undermine the prosecution case, there is a duty on the prosecution under section 7A to disclose it to the defence. A failure to disclose material which plainly should have been disclosed has plagued criminal justice in this country for decades. From the cases of Judith Ward, the Birmingham Six, Maguires Seven and the Guildford Four of the 1970s; through to the case of Stefan Kiscko in 1986; and, most recently, the cases of Sally Clarke and Sam Hallam during the turn of the century, the CJS in England and Wales has shown itself to be remarkably good at convicting the wrong people.[666] In all of these cases the proper disclosure of unused materials would have allowed the defence to mount challenges that would probably have changed their results. Instead, evidence which was dubious at best and dishonest at worst infected the justice

[666] In *McIlkenny v Chief Constable of the West Midlands* [1980] 1 QB 283 [323], when dismissing an attempt by the Birmingham Six to sue the West Midlands Police for assault whilst they had been in custody, Lord Denning plainly found the very idea that men had been beaten up in order to extract false confessions more than he could tolerate. In the course of the judgment, Lord Denning said that the idea the men might have been right was "such an appalling vista that every sensible person in the land would say it cannot be right that these actions should go any further." He ended his judgment by stating that "this case shows what a civilised country we are." See also Evan Whitton, *The Cartel: Lawyers and Their Nine Magic Tricks* (Herwick 1998) 117, in which Lord Denning is quoted stating that "we shouldn't have all these campaigns to get the Birmingham six released if they had been hanged." Nor was Lord Denning alone in making unfortunate remarks about the Birmingham Six. See also Gareth Pierce, 'The Birmingham Six: Have we learned from our disgraceful past?' (*The Guardian,* 12 March 2011) <https://www.theguardian.com/theguardian/2011/mar/12/gareth-peirce-birmingham-six> accessed 25 August 2021. In this article, Gareth Pierce, who represented members of the Birmingham Six, reports the court as stating that "the longer this hearing has gone on, the more convinced this court has become that the verdict of the jury was correct."

system, creating miscarriages of justice which destroyed innocent lives, forgot victims of crime and allowed the real offenders to walk free.

Then, in 2018, a young man named Liam Allan came very close to being convicted of a number of rape offences alleged against him by a former girlfriend. Despite previous defence requests for sight of the social media messages on the complainant's mobile phone, no such evidence was provided until after the trial had begun. Upon receipt of the evidence, Allan's barrister discovered messages from the complainant which completely undermined her account, and once the prosecution were made aware they moved swiftly to end the prosecution by offering no further evidence. Had Allan been convicted, he would have probably received a prison sentence of double figures. He was, in fact, innocent. When asked afterwards how this series of events had been allowed to happen, prosecutor Jerry Hayes blamed sheer incompetence and the fiasco on cuts in police and CPS budgets. I have no doubt that Hayes was essentially correct, but I suspect there was something else to blame in this case…

(viii) Believe the victim

For a number of years before 2016, the police had been working under the College of Policing's requirement to 'believe the victim.' The problems with this approach were highlighted in 2016 when Sir Richard Henriques, a retired High Court judge with a wealth of experience in the criminal courts both as a barrister and judge, produced a report on Operation Yewtree—beginning with allegations against Jimmy Savile—and Operation Midland—the inquiry into allegations against a number of prominent people in public life.[667] Alongside the

[667] Sir Richard Henriques, 'An Independent Review of the Metropolitan Police Service's Handling of Non-recent Sexual Offence Investigations Alleged Against

recommendation that complainants of sexual assault should not be called 'victims' until the commission of a crime had been established in court, Sir Richard vocalised his disapproval of the 'believe the victim' policy. He pointed out that "any policy of believing one party necessarily involves disbelief of the other party."[668] In notably forthright terms, Sir Richard went on to claim that "the imposed 'obligation to believe' removes" the obligation on an investigator to be impartial,[669] reverses the burden of proof[670] and "has the hallmark of bias."[671] In short, 'believe the victim' threatens the concept of a fair trial for the person accused.

In cases such as that against Liam Allan, it is easy to see how this policy could affect the judgment of investigators. If the police are required to believe a complainant, there is an obvious risk that they will not wish to investigate matters that might undermine the credibility of that complainant. And given the sensitivity of some of these cases, that would be a wholly unacceptable situation.

In defence, it might be said that the 'believe the victim' policy was an attempt to reset the way the police approached allegations of rape and sexual assault; having shown little interest in these allegations for a number of years, this may well be true. But if so, it was misguided—replacing one bad policy with another. Surely it is reasonable to expect the police to approach complainants with respect and sensitivity, whilst remaining within a professional and objective capacity. They should investigate the allegation for supporting evidence; they

Persons of Public Prominence' (*Metropolitan Police*, October 2016) <https://www.met.police.uk/police-forces/metropolitan-police/areas/about-us/about-the-met/henriques-report/> accessed 23 August 2021.

[668] ibid para 1.26.

[669] ibid para 1.27.

[670] ibid.

[671] ibid para 1.29.

should test the prospects of an allegation to ensure genuine allegations result in conviction. At the same time, they should not be blinkered to the possibility that the allegation is false; they should investigate all reasonable lines of inquiry even if this would undermine the allegation and reduce the likelihood of conviction. No decent police officer should have any interest in convicting an innocent person. Instead, they should gain as much professional pride from establishing the innocence of an accused person as they would from the conviction of the guilty.

(ix) The Court of Appeal

So far, I have considered a number of factors which in my opinion increase the risk of unfairness in trials to the extent that they increase the likelihood of wrongful convictions. We now turn to look at the aftermath of the trial process where, unfortunately, things do not look much better.

> "Members of the jury, you will take the law that applies in this case from me. If I am wrong, there is another court that will put me right."

This is how judges have routinely directed juries at the beginning of their trial. Naturally, jury members would be led to believe that in the event of the judge getting the law wrong, a different, more senior court would simply rectify the error. If only this were true.

The Court of Appeal has never been keen to be seen as a court of review charged with the task of reviewing evidence and legal directions.[672] These days, appeals are based on the

[672] Despite the eventual overturning of all the major convictions related to the conflict in Northern Ireland, it must be said that the Court of Appeal has had a poor record of spotting the errors in these cases. The Birmingham Six, Guildford Four, Stefan Kiscko, Sally Clarke and Sam Hallam are just some of the major miscarriages of justice that

simple concept that counsel must identify as grounds of appeal serious errors that are said to render a conviction unsafe. Nor is it at all uncommon for the Court of Appeal to agree that, whilst various things may have gone wrong during a trial, the subsequent conviction is nonetheless safe. Before 1995, the Court of Appeal was required to allow an appeal if they thought the conviction was unsafe *or unsatisfactory*, which at least raised the possibility that the court might allow appeals where they felt uneasy about upholding a conviction. That was occasionally expressed as a 'lurking doubt,' meaning that, despite the lack of an obvious procedural error, the court was left with a lurking doubt as to the safety of the conviction.

We need a Court of Appeal that is properly resourced so that it can review serious cases properly. Even if it was restricted to convictions for homicide offences, that would, in my opinion, represent a major step forward.

(x) The Supreme Court

Until 2009, the final appellate court in the United Kingdom was the Judicial Committee of the House of Lords. However, to satisfy any concerns that the doctrine of separation of powers required that the judicial functions of the House of Lords be separated from its legislative role, the Constitutional Reform Act 2005 established the United Kingdom Supreme Court.

One of its most recent significant decisions in criminal law came early in 2016 in *R v Jogee; Ruddock v R.*[673] The case involved the concept of joint enterprise. Joint enterprise allows

failed in their first appeals. Since these were all murder cases this itself raises an interesting point as to what would have happened if England and Wales upheld the death penalty. In the days before abolition in the 1960s, unsuccessful appellants could be expected to be executed within a few weeks of their appeals being rejected.

[673] *R v Jogee (Appellant)* [2016] UKSC 8; *Ruddock (Appellant) v R (Jamaica)* [2016] UKPC 7.

a jury to convict those who, whilst not personally carrying out the criminal act (the stabbing in a murder, as was the case in *Jogee*) should be regarded as assisting, encouraging or aiding and abetting the actual perpetrator.[674] Joint enterprise has become an increasingly controversial doctrine, not least because of its tendency to catch young people on the periphery of serious violence who may not have intended to commit any actual violence. In *Jogee*, the Supreme Court allowed the appeal on grounds that for the previous 30 years courts in England and Wales had been incorrectly directing juries about the requisite intentions of the secondary party. This clarification of the law seemed to imply that each defendant would need to be proved to have acted with the intention that death or serious injury would be caused, thereby taking a progressive step in the right direction. However, what the court appeared to give with one hand, it immediately snatched away with the other. The Supreme Court made it clear that it did not expect its decision to lead to a flurry of appeals by those who had been convicted on the basis of the previously misunderstood law, instead stating that appeals should only be considered if an appellant could show that an inability to appeal would result in substantial injustice. To many observers, this just seemed to impose a further hurdle to appeal. In the six years since this judgment, it has only been utilised successfully once.[675] Some will rightfully question the purpose of an appeal system which explicitly denounces three decades of judicial wrongdoing, but then turns its back on all those who have suffered unjustly as a result.

(xi) The Criminal Cases Review Commission

Set up in 1997 after the disastrous litany of cases outlined above, the Criminal Cases Review Commission ('CCRC') was

[674] ibid [8]-[12], [14]-[16] and [88]-[99].
[675] *R v Crilly* [2018] EWCA Crim 168.

designed to review cases of suspected miscarriage and given the power to refer cases back to the Court of Appeal. The test the CCRC applies questions whether there is 'a real possibility' that the Court of Appeal would overturn the conviction.[676] Once the CCRC has considered a case, they produce a 'Statement of Reasons' setting out the reasons for either referring the case for appeal or declining to do so. Originally, the CCRC had 11 full-time commissioners who would examine the cases they received. Like much of the criminal justice system, the CCRC has suffered a relentless series of cuts to its budget over the past 15 years or so.[677] Commissioners were originally salaried members of staff, but now they are part-time and paid a modest daily rate. As a result, one former Commissioner told the Westminster Commission on Miscarriages of Justice that they had been "effectively reduced to marking the homework of staff preparing Statements of Reasons for approval."[678]

The CCRC's own website cites figures showing that in the 25 years from 1997 to 2022, a total of 755 cases out of 27,729 reviewed by the CCRC were referred back to the Court of Appeal for hearing. This amounts to an average of 30 referrals a year, or just 2.82%. Of the cases referred to the Court of Appeal, 538 convictions were overturned, equal to 71%.[679] Whilst this is clearly a positive result, it raises serious questions surrounding why the CCRC has not referred more cases.

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[676] Criminal Appeal Act 1995, s 13.

[677] See The Westminster Commission on Miscarriages of Justice, 'In the Interests of Justice: An inquiry into the Criminal Cases Review Commission' (All-Party Parliamentary Group on Miscarriages of Justice 5 March 2021) <https://appgmiscarriagesofjustice.files.wordpress.com/2021/03/westminster-commission-on-miscarriages-of-justice-in-the-interests-of-justice.pdf> accessed 10 August 2022, paras 94-96.

[678] ibid 25.

[679] CCRC, 'Facts and Figures' (*Criminal Cases Review Commission,* 1 November 2022) <https://ccrc.gov.uk/facts-figures> accessed 1 November 2022.

The Westminster Commission also recommended a revision of the 'real possibility' test to ensure the CCRC could refer cases "where it determines that the conviction may be unsafe, the sentence may be manifestly excessive or wrong in law or where it concludes that it is in the interests of justice to make a referral."[680]

(xii) The future of trial by jury

In addition to the long list of concerns described above, the very concept of trial by jury is being regularly attacked by various interest groups. Over half a century ago, Lord Devlin described jury trial as "the lamp that shows that freedom lives."[681]

From time-to-time, politicians have suggested that trial by jury should be restricted, even though juries only deal with approximately 1% of all criminal cases.[682] Tony Blair's New Labour government tried to reduce the right to jury trial in both 2000 and 2001, but ultimately—and thankfully—failed.[683] This was, however, an early indication of the very illiberal tendencies in New Labour on criminal justice issues, with the CJA representing the vehicle through which many of these tendencies could manifest. In recent years, a number of radical feminists—who for years had criticised the police for their truly dismal record on rape convictions—decided that it was juries that were the real problem. Supposedly, juries believed

[680] Westminster Commission on Miscarriages of Justice (n 677) 38.
[681] Sir Patrick Devlin, *Trial By Jury* (1st edn, Stevens & Sons Limited 1956) ch 6.
[682] The Secret Barrister, *The Secret Barrister: Stories of the Law and How It's Broken* (Macmillan 2018) 54.
[683] The Economist, 'Straw condemns the juries' (*The Economist*, 11 January 2001) <https://www.economist.com/britain/2001/01/11/straw-condemns-the-juries> accessed 22 August 2021.

in 'rape myths' and were inclined to give men the benefit of the doubt too often.[684]

The impact of the COVID-19 lockdown led to various calls to introduce smaller juries in an attempt to better observe social distancing measures. But in the end the government gave up on this idea too.

Juries do not always get it right. They are, after all, only human; and, importantly, they are only as good as the evidence that is put in front of them. But juries are still drawn from the community in which the offence took place and are a good example of democracy in practice. We have been using them for over 800 years and no one has come up with a better idea of how to determine guilt or innocence since then.

IV. Conclusion

Over the last 30 years or so, the criminal justice system has been assailed by politicians determined to be seen to be tough on crime. As argued above, I believe that a combination of changes in both legislation and criminal justice policy has whittled away the rights of those accused of serious crime and fundamentally shifted the balance of a trial so as to make convictions—of the innocent included—much more likely. We have seen sentences rise to heights never seen before in this

[684] See Alexandra Topping, 'Scrap juries in rape trials, Labour MP suggests' (*The Guardian,* 21 November 2018) <https://www.theguardian.com/society/2018/nov/21/scrap-juries-in-rape-trials-labour-mp-ann-coffey> accessed 22 August 2022; Julie Bindel, 'Juries have no place in rape trials. They simply can't be trusted' (*The Guardian,* 21 November 2018) <https://www.theguardian.com/commentisfree/2018/nov/21/juries-rape-trials-myths-justice> accessed 22 August 2022; Harriet Wistrich, 'Press Release: should juries be abolished in rape trials? My jury is out' (*Centre for Women's Justice,* 8 October 2019) <https://www.centreforwomensjustice.org.uk/news/2019/10/8/press-release-should-juries-be-abolished-in-rape-trials-my-jury-is-out> accessed 22 August 2022.

country; our prison population remains at or near record levels.[685] No one seriously suggests the rising prison population has made people feel safer, and it remains a very expensive way of dealing with a lot of the crime that blights people's lives. Our appellate courts lack the resources and desire to properly review doubtful convictions, and the CCRC safety net has been emasculated. Years of funding cuts have vandalised the court system and demoralised those who work within it. The COVID-19 pandemic has undoubtedly accelerated the crisis, but the truth is that it was already in motion. Now, as we emerge from the worst of the pandemic, it turns out that the many years of warnings by the CBA over criminal barristers' pay rates were correct—but no one in government was listening. Today, reports come almost daily of trials being adjourned due to the lack of barristers available to defend or prosecute cases. These truly are uncharted waters.

And so we find ourselves with the Bar having taken direct action in an attempt to force the government to increase pay before the system collapses entirely.[686] If rates of pay are not significantly improved in the very near future, it is hard to see how the criminal Bar will be able to maintain its presence. Standards of representation will fall as less qualified people are encouraged to fill the gap.

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[685] Francis Pakes, 'Prison numbers set to rise 24% in England and Wales—it will make society less safe, not more' (*The Conversation,* 30 November 2021) <https://theconversation.com/prison-numbers-set-to-rise-24-in-england-and-wales-it-will-make-society-less-safe-not-more-172566> accessed 23 August 2022.

[686] On 10 October 2022, the Criminal Bar Association announced that it was suspending action taken by barristers following acceptance of terms for settling the dispute. In broad terms the government agreed to increase fees by 15% for cases in which the main hearing would be after 31 October 2022 and for all new cases thereafter. Since barristers calculate that they had lost about 28% of the value of their fees over the previous decade, there remains a big gap in lost earnings that still needs to be addressed.

It seems clear that, if the government fails to act very soon, the state of our criminal justice system, already on life support, may become unsustainable.