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The board wish to give their sincere thanks to the anonymous peer reviewers who have contributed greatly to the production of this issue but who cannot, for obvious reasons, be named.
Foreword to the First Volume by Lord Hope of Craighead

I offer my warmest congratulations to those whose idea it was to institute the Edinburgh Student Law Review and to everyone who has been responsible for bringing this issue forward to publication. It is the first student-produced law review in Scotland and only the third in the United Kingdom. It is fitting that the Law School at Edinburgh – a city that was in the forefront of publishing political reviews in the age of enlightenment – should lead the way here north of the border.

Ground-breaking though its publication may be in this jurisdiction, the Review follows a tradition that has long been established among the leading law schools in the United States. The editorship of student law reviews in that country is much sought after, as is the privilege of having a paper accepted by them for publication. The stronger the competition for these positions, the higher the standard that is exhibited by those who occupy them. It is well known that their editors are singled out by the Justices of the US Supreme Court and the Federal Appeals Courts when they are recruiting their law clerks. The reflected glory that this produces enhances in its turn the reputation of the reviews. A reference to editorship of this Review will not escape notice if it appears on the CV of someone who is applying to be a judicial assistant to the UK Supreme Court. But participation in its publication will be of benefit in so many other ways too.

This is pre-eminently a publication by and for students. Its aim is to enhance standards of thinking and writing about law and to promote discussion among all those who are studying law, at whatever level this may be. Law is pre-eminent among the professional disciplines in its use of words to convey ideas. Thinking and writing about law is an essential part of legal training. So too is the communication of ideas about law, as each generation has its part to play in the way our law should develop for the future. I wish all success to those who will contribute to this project, whether as writers or as editors, and I look forward to the benefits that will flow from making their contributions available through this publication to the wider legal community.

David Hope
March 2009
Editorial

It is with great pleasure that we present the first issue of the fourth volume of the Edinburgh Student Law Review (ESLR). When the ESLR began, more than a decade ago, it was the first student law review in Scotland. Since then, it has not only become a well-established institution within the Edinburgh Law School, but also set the model for similar publications around Scotland. We continue to owe much to both the academic faculty and professional services staff of the Law School, who have been unfailing in the support they have provided since the foundation of the ESLR. Special thanks must go to our Honorary Secretary, Dr Andrew Steven, as well as to Professor David Cabrelli, who has written the guest article for this year’s issue on the legal and institutional underpinnings of capitalism. We are as ever grateful to our Honorary President, Lord Hope of Craighead. We are also grateful to our sponsors, DLA Piper and Turcan Connell, without whom the ESLR could not have been a success.

We must recognise the efforts of the students who over the last decade have helped shape the ESLR into what it is today. It is a point of particular pride for us that the Review remains completely run by students, ranging from undergraduates to doctoral candidates. Over the years, countless students have dedicated their time and effort to its success. The ESLR provides an opportunity for students to develop a full range of skills in writing and editing for academic publication and we hope this has helped to prepare them for a future career.

We aim to provide students with a forum where they can express their ideas on a diverse range of topics, welcoming submissions from across the spectrum of legal scholarship. This year we received our highest number of submissions so far, including a range of submissions from the annual Postgraduate Research Conference. This has enabled us to produce an issue which includes articles on private law, family law, European Union law, data protection, law and technology and a great deal more. We are as always especially pleased to have received submissions from institutions around the UK and the world. We would like to thank all those who submitted to the ESLR this year and we hope that those who were not successful will consider submitting in future.

The ESLR has always been a collaborative effort, with everyone bringing a vital part to the finished product. This year has brought its own set of unique challenges following the Covid-19 pandemic and the closure of the University estate. We have been deeply impressed with the way our staff have adapted to these challenges to produce this issue to the same high standards that our readers have always come to expect. In particular we would like to recognise our copy editing team, who continued working from home in late Spring, as well as our content editors, who dealt with a large number of submissions and were sometimes asked to step slightly outside their own field of expertise. We are also grateful to the publications team, who have excelled in maintaining our digital presence, as well as our finance officers, who have managed some challenging transitions in the corporate structure of the ESLR.

We are extremely proud to have been part of the ESLR and we hope you enjoy this edition as much as we have enjoyed preparing it.

Jonathan Ainslie & Sebastian Jedrzejewski
Co-Editors-in-Chief
2019-2020
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SOME THOUGHTS ON THE LEGAL FOUNDATIONS OF CAPITALISM

David Cabrelli*

A. INTRODUCTION

Commenting on Thomas Piketty’s best-selling book on ‘Capital in the Twenty-First Century’,¹ the legal commentator David Grewal lamented the paucity of study into the ‘actual laws of capitalism… that is… the various legal and institutional arrangements governing capitalist economic systems.’² In this short article, I intend to sketch out the boundaries of a future research project which will provide a modest corrective to Grewal’s account by focusing on the legal underpinnings of the current incarnation of capitalist market exchange in Western economies. In doing so, the primary claim I will make is twofold. First, that the legal foundations of capitalism as discussed in legal scholarship have been tangled up with those elements of the legal institutional design that are in fact the hallmarks of a liberal legal order, i.e. liberalism in political thought. Secondly, that having been conflated, the legal arrangements that underpin capitalism and a liberal order may, and ought to be, decoupled to reveal the former shorn of the latter. By engaging in such research, the legal underpinnings of the democratic and liberal meritocratic form of capitalism extant in Western societies that are truly reflective of capitalist markets and exchange can be examined and studied in isolation from their liberal counterparts, with which they have been intermingled for so long.

The fact that I am intending to separate out the liberal and capitalist elements of the legal system from each other in this research project might seem surprising in light of a famous prediction made by the author Francis Fukuyama in 1989. Fukuyama predicted that the then recent fall of Communism heralded the ‘end of history’ with liberal capitalism brooking no competition and destined to reign supreme from that point henceforward.³ Seen from this angle, if liberal capitalism indeed has no opposing challengers to its hegemony, then what is the point of the exercise that I am pursuing, as it would appear of little relevance or practical value? Of course, the fundamental point is that, far from having cemented itself into place as the only ‘system in town’, liberal meritocratic capitalism’s position as the leading capitalist form of political economy is far from assured. A competing system of capitalist market exchange has emerged from an unlikely source, namely the Chinese state or political capitalist regime.⁴ The existence of the Chinese model would suggest that there are other historical paths that can be taken on the long march towards a capitalist society. And these historical routes do not include any

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³ F. Fukuyama, The End of History and the Last Man (New York, Free Press, 1992). In the context of corporate law, the claim was also made that the Anglo-American ‘shareholder primacy’ model of corporate governance would be exported across the world as the dominant paradigm: H. Hansmann and R. Kraakman, ‘The End of History for Corporate Law’ (2001) 89 The Georgetown Law Journal 439.
liberal elements in the design of the legal infrastructure, since on no stretch of the imagination can the Chinese political, social and economic system be called ‘liberal’ in any shape or form. As such, the Chinese experience is at once a puzzle and poses a challenge: it presents as an illiberal society with an undemocratic communist party state at the helm, which nevertheless functioned and functions as both the handmaiden and the engine of a highly developed capitalist system.

In this brief article, I intend to turn this puzzle around somewhat. Instead of addressing what constitutes the central legal factors in the emergence of a liberal capitalist model, I will ask what the existence and continuation of the Chinese regime tells us about each of the factors that together make up the legal institutional design of capitalism: more explanation of these structural legal arrangements will be provided in the following section. Here, the fundamental point is that what have been cast as essential legal-institutional prerequisites for a capitalist regime in the Western tradition are nothing of the sort. Instead, they have been confused for legal arrangements and structures that are rooted in liberalism and operate to harness a liberal legal order. And the most interesting thing about China’s state/political model of capitalism model lies in the extent to which it can be deployed as a useful proxy to enable the legal hallmarks of liberalism to be abstracted and then screened out from those that are truly characteristic of a capitalist system.

The various factors and concepts that establish the ‘legal institutional design’ of a legal system are discussed in the second section. The third section turns to reflect upon the traditional conflation of liberal and capitalist concepts in such structural legal arrangements, while section four underscores the crucial significance of engaging in a decoupling exercise. As will become apparent, I not only intend to carry out such an exercise to convey the happy gift of greater clarity of meaning to conceptual legal problems, but also for more profound and consequential motives, inasmuch as severance enables more insightful responses to be given to legal, social and economic questions of great weight. In section five, the discussion moves on to consider whether the proxy legal system that enables such a decoupling exercise to proceed – namely the Chinese regime – is capitalist at all, since doubts have been expressed as to whether that is the case. Section six then provides an illustration of decoupling in action, within the rubric of the substantive area of property law. Finally, section seven concludes the discussion and draws certain preliminary observations about the intended project.

B. THE LEGAL INSTITUTIONAL DESIGN

The concept of ‘legal institutional design’ is of critical importance to the coherence of the principal claim in this article. At this juncture, it is useful to draw on the jurisprudential work of William Lucy, who distinguishes between (i) the rules, doctrines and principles found in substantive areas of the legal system such as contract, property, tort, company, intellectual property, etcetera law, (ii) procedural rules in the legal system, and (iii) ‘general structural features’ inherent within the design of a legal system. Turning to the first element (i), namely the development of discrete doctrines that are shaped into substantive areas of law and indispensable to the smooth functioning of a capitalist legal system, we can call to mind insurance law, sale of goods law, the law regulating bills of exchange, company law, the law governing collateral, etcetera. The scholar Morton Horwitz has charted the evolution in economic and political forces that vested power in merchant groups in the late eighteenth and early nineteenth centuries in the US. He demonstrates how these groups lobbied effectively to advance their own interests by transforming the American legal system in a manner that reformulated the then existing commercial laws to sweep away anti-commercial doctrines. This process was mirrored in the UK, albeit slightly earlier, leading to the emergence of pro-commerce substantive areas of law and a

5 W. Lucy, Law’s Judgment (Oxford, Hart, 2017) 26-30. Lucy’s purpose in evoking the ‘legal institutional design’ of a legal system lies in the fact that the focus of his study – the concept of ‘law’s abstract judgment’ – is one of its general structural features.

capitalist legal system attuned to the requirements of the first and second waves of the industrial revolution.\(^7\)

Factor (i) can be distinguished from (ii) which regulates access to justice through the courts and the various procedural safeguards and rules that operate to regulate legal actions, such as how legal claims are to be presented and defended, the rules governing the conduct of court hearings and judicial resolution of disputes, etcetera. As for (iii), this is the aspect of the legal institutional design that is the most interesting for the argument presented in this article. It is a reference to latent abstract concepts, features and institutions (“Latent Concepts & Institutions”) that lie just under the surface, or are situated within the DNA coding, of a legal system, that are nonetheless of a structural nature and/or of key practical relevance in the courtroom and in the process of legal reasoning. These Latent Concepts & Institutions are less concrete and precise in nature than, and would present as entrenched generalisations when juxtaposed alongside, the specific legal rules or principles found in (i) a substantive area of law, such as public law, commercial law, etc, or (ii) procedural rules. To that extent they are higher order normative concepts that inform and stand behind the shape and form of those substantive or procedural principles or rules.\(^8\) And very importantly, they are conceptually distinct from public policy considerations and reasoning, that are reflective of broader societal values or animated by a concern for distributive justice.\(^9\) These Latent Concepts & Institutions have traditionally been cast as structural and essential to the operation of a legal system committed to liberal meritocratic capitalist exchange on free markets. They include (the following list is not intended to be exhaustive) the doctrine of precedent\(^10\) in a common law regime,\(^11\) the concept of the rule of law/formal equality or standing before the law,\(^12\) the protection of due legal process/natural justice,\(^13\) the principle of party autonomy,\(^14\) the separate legal personality of non-natural persons such as companies, partnerships and limited liability partnerships,\(^15\) the limited liability of capital investors in companies,\(^16\) the wage-labour/employment contract,\(^17\) the sanctity of contracts (\textit{pacta sunt servanda}),\(^18\) the negotiability of commercial paper and bonds,\(^19\) the structure of the courts and impartiality and patterns of adjudication,\(^20\) the freedoms of contract, \textit{to} contract, and \textit{not to} contract (i.e. \textit{quit a contract})\(^21\) and the protection of private property.\(^22\) Here, we can

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\(^7\) For an illustration of how merchant interests in the UK used their economic power to introduce laws that were one step removed from, and downright incompatible with, existing legal doctrines and rules, see A. Rodger, “The Codification of Commercial Law in Victorian Britain” (1992) 108 Law Quarterly Review 570.

\(^8\) The main point here is that these Latent Concepts & Institutions permeate the entire legal system, rather than belonging to a particular area of law or aspect of procedural rules.


\(^11\) The Common Law is ‘… a system of judge-made customary law…. [consisting of] a body of instincts and principles which, barring some radical changes in the values of our society, is developed organically, building on what was there before’. \textit{Patel v Mirza} [2016] UKSC 42, [2017] AC 467, 531D-F per Lord Sumption.


\(^15\) \textit{Salomon v A. Salomon & Co. Ltd} [1897] AC 22.


\(^18\) H. Wehberg, “\textit{Pacta Sunt Servanda}” (1959) 53 \textit{American Journal of International Law} 775.


\(^22\) See Z. Adams, \textit{Labour and the Wage: A Critical Appraisal} (Oxford, OUP, 2020) 5-10, on the role of freedom of contract and private property as axiomatic legal foundations in the constitution of capitalist social relations, the market and capitalism as a socio-economic system in general.
also evoke an additional Latent Concept & Institution, which is slightly more ephemeral than the others, but no less fundamental to a capitalist order. This is what Lucy has called ‘law’s abstract judgment’. In terms of ‘law’s abstract judgment’, all persons are judged by the courts equally as abstract beings by reference to uniform and objectively ascertained standards without reference to their own personal or human qualities, capabilities, sensitivities, foibles or needs, and irrespective of their particular or peculiar experiences or characteristics.  

In making the claim that the legal foundations of capitalism can be decoupled from those legal elements that anchor a liberal legal order, it is principally to the centrality of these Latent Concepts & Institutions that this article will refer. The focus on such Latent Concepts & Institutions takes us on to consider a point of clarification that should be made at this juncture. The gap in the study of the legal foundations of capitalism adverted to in Grewal’s quote in the introduction above can be distinguished from existing scholarship which charts the contribution that law and the legal system makes to the development of capitalism and to the role of law in propping up and supporting its primary economic institutions. This scholarship is somewhat voluminous and is devoted to underscoring the importance of law’s role in constituting those institutions and also the maturation of economic development more generally. In that sense, that thread of research establishes how ‘law matters’ to economic progress in the forging of capitalism, which is distinguishable from my own intended project insofar as it charts the boundary between the general features of a legal system’s legal institutional design that are reflective of its capitalist nature and those that are liberal.

C. CONFLATION OF THE LEGAL FEATURES OF CAPITALISM AND LIBERALISM

The fact that there has been conflation between the Latent Concepts & Institutions that underpin a capitalist order and a liberal regime is perhaps unsurprising, since conclusions drawn from observations of the economic path of development in Western history (“Western path of development”) have assumed that it is impossible for modern economic markets and systems of exchange to function outside of a society and legal order committed to the securing of liberty. For example, in common law regimes, one need look no further than legal concepts and safeguards that are closely connected to ideas of liberty. Here, we can evoke the rule of law which ensures formal equality and standing before the law. This Latent Concept & Institution is an expression of liberty insofar as it treats each person equally with the formal freedom to exercise his/her will and take action. It guarantees a legal person equal status in access to legal rights, obligations, liabilities and remedies when in competition with another legal person. Most importantly, it ensures that the law, once promulgated, applies equally to all, whether the government or the butcher, or prince or pauper. Of course, in a legal dispute, a resolution will have


27. Of course, Robert Lee Hale argued that the virtue of equal access to legal rights is simply a figment of the lawyer’s imagination to the extent that the enforcement of property rights is fundamentally unequal: R. L. Hale, “Prima Facie Torts, Combination, and Non-Feasance” (1946) 46 *Columbia Law Review* 196. For a discussion of the idea that law is never neutral in terms of its distributive impact, irrespective of equal access to property rights, see D. Kennedy, “The Stakes of Law, or Hale and Foucault!” (1991) 15 *Legal Studies Forum* 327.
to be reached whereby the rights of one legal person take precedence over another, or an obligation gives rise to a liability that translates into a remedy made available to the other successful party. But the crucial point is that there is no ‘pecking order’ or hierarchy of legal persons recognised by the law when conferring rights, awarding remedies or imposing obligations or liabilities. Each party is formally equal and equally affected by the same law, as far as the law and the process of adjudication is concerned and has equal rights to present their case unhindered before the bar of reason.28 In this way, it is not open to the legal system or court to prefer the arguments of one legal person simply because he/she has more political, economic or social power, in complete disregard of the strength of the other party’s legal arguments and rights.29 Ideas such as the rule of law and formal equality and standing before the law are said to be crucial to the construction and maintenance of mature capitalist legal systems, since they replace brute power with the power of law.30 A businessperson knows that he/she will have recourse to law to protect his/her financial position where he/she has legal right on his/her side to obtain a remedy, regardless of the economic, political or social muscle wielded by the other legal party that they have decided to sue before the courts.

However, whilst seemingly crucial to the operation of a legal system in the capitalist economy, the question is how critical Latent Concepts & Institutions such as the rule of law in fact are? For example, would it be possible for a capitalist regime to subsist in the absence of such values? The same question can be asked about the other Latent Concepts & Institutions, each of which are equally seemingly crucial to the development of more detailed doctrines, rules and principles in private law and commercial law that regulate horizontal relations between the citizens and commercial organisations of any polity. In responding to this question, the relative capitalist and liberal orientations of these Latent Concepts & Institutions can be laid bare, e.g. in terms of whether they are predominantly essential to prop up capitalist exchange as opposed to a liberal order, or vice versa.

**D. WHY BISECT?**

The overriding importance of this exercise is that once the general features of the legal institutional design that secure a liberal order are set apart from those involved in the construction of a capitalist society, the happy outcome is that the risks associated with the conflation of legal concepts are avoided. In a famous panoptic study focusing on clarity of legal concepts, Hohfeld drew attention to the perils of “ambiguity”, “slippage” and “blending”.31 Ambiguity arises where a legal concept can be ascribed two or more meanings. As a result of that ambiguity, there is the potential for “slippage”, where various utterances of a legal concept switch seamlessly from one of those meanings to the other, despite the error in expression in doing so. If that process is repeated long enough, the result is “blending” where the two senses in which the legal concept are deployed become intertwined and their disparate meanings are lost. The products of blending are the twin evils of conceptual confusion and inaccuracy of legal analysis and reasoning. It would be fair to say that Legal Concepts & Institutions have experienced this slippage when analysed in terms of their contribution to the liberal legal order and capitalist economic.

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28 Some parties will enjoy more rights than others based on existing assets, such as a secured creditor vis-à-vis his/her borrower, but this does not detract from the basic point that each party will have equal access to a legal right in the sense that there are no circumstances where the legal right will be removed without operation of law, because of his/her status, class, identity or other particular characteristics.

29 Formal equality and standing before the law is similar, but conceptually distinct from the ‘rule of law’. However, one might argue that laws do, in a systematic fashion, favour certain categories (i.e. those with capital), and as such, the courts have no need to prefer the interests of the owners of assets, since the laws that they enforce already do so.

30 See J. Hong, ”The rule of law and its acceptance in Asia: A view from Korea” in *Rule of Law: Perspectives in the Pacific Rim* (2000) 145, 147 (Missoula, MT: The Mansfield Center for Pacific Affairs, 2000); and Z. Chen, “Capital markets and legal development: The China case” (2003) 14 *China Economic Review* 451, 452-453. However, it could be argued that legal power does not replace brute power, but simply conceals it by juridifying that brute power to provide a veneer of legal respectability.

exchange. For example, as a Legal Concept & Institution, the rule of law is often cited as essential to capitalism. Likewise, in the case of the motif of due process of law. However, this obscures their undoubted liberal credentials.

Cleaving both elements also enables light to be shed on a number of distinct, but equally significant set of issues. First, we can better appreciate some of the reasons for rising economic inequality and why the rate of return on capital paid out as unearned income is higher than the economic growth rate of GDP, with the capital-rich accumulating wealth faster than the rest of the economy.\textsuperscript{32} This is the enigmatic question as to why ‘r’ continues to be greater than ‘g’. If it is accepted that the growth in inequality is not the product of benign economic forces or technological improvements, then it must be a matter of both political ideology as implemented through policy choices, and legal ideology.\textsuperscript{33} In a legal system that clings to contractual-liberalism as a political philosophy, the individual is empowered to exercise his/her freedom and part of that process involves the freedom to be unequal. In other words, if A’s socio-economic position is equal to everyone else in society and inequality is zero, then if everyone (including A) is provided the privilege of liberty, this has a potential adverse impact on equality which may rise above zero. For example, A could deploy his/her new-found liberties to engage in trades with others in society, or engage in other formal or informal practices that ultimately result in A’s socio-economic advancement relative to all others. Hence, we can note how there is a trade-off between liberty and equality.\textsuperscript{34} The relevance of this insight to the overall scheme of my research is that if we screen out these general features of democratic and meritocratic liberalism located in the substructure of the legal system, we can identify the underpinnings of the prevailing legal ideology that are purely essential for the operation of capitalist social relations and markets and thus enhance our appreciation of the legal forces that drive inequality.\textsuperscript{35}

A second virtue of the exercise is that it enables us to understand the extent to which the legal system in an illiberal capitalist order is likely to collapse under the weight of its own contradictions or thrive without major incident. On its face, the proposition that the liberal and capitalist components of the legal order can be decoupled would indicate that it would be no contradiction in terms for a sustainable legal system to exist with Latent Concepts & Institutions reflective of one bereft of the other. However, while that may theoretically be the case, closer analysis may indicate that in practice a legal system that recognises the Latent Concepts & Institutions needed for a capitalist regime shorn of the liberal elements is wholly impracticable. As such, if the findings indicate that the legal system in such an illiberal regime is likely to fold for the want of features in the legal institutional design that are attuned to liberal-contractualist theory, this is a phenomenon to which attention ought to be drawn, since it has profound implications for the global economy and future political and social developments. The third reason it is a topic worth of study relates to the mounting geopolitical, scientific, social, economic, etcetera concerns about the impact of anthropogenic climate change. It is not fanciful to suggest that a new philosophical paradigm at one step removed from either, or both, liberal theory or capitalist enterprise might take hold to supplant it. This would be a theory that is aligned more with conservationism and prioritises the preservation, over the rampant exploitation, of natural resources. It would entail a theoretical approach designed to limit the capacity of capital to take advantage of assets and resources notwithstanding that the harms arising from investment are intangible and merely

\textsuperscript{35} Here, I am assuming that the legal, social, political and cultural institutions that are capitalist are responsible for the recent surge in inequality. However, I accept that in theoretical terms, it could just as equally be those institutions associated with liberalism that drive that phenomenon. After all, as noted above, the application of theory would suggest that the exercise of liberty has the capacity to increase inequality. However, insofar as China is capitalist but illiberal, the evidence would tend to demonstrate the opposite to the extent that while liberalism is not value-neutral, it is more value-neutral than capitalism, which must also be true of its legal underpinnings and auxiliary props.
hypothetical at the stage funds are deployed, thus infringing the negative liberty of the individual and corporations on the altar of precautionary measures.\(^{36}\)

Finally, and perhaps most importantly for the purposes of legal research, the exercise enables us to test whether certain axiomatic legal doctrines and principles are coding capital in the capitalist legal system, or instead coding and reflecting the liberal meritocratic order. This is a distinction of fundamental significance, since some of the claims that have been made about the historical formulation and incremental modifications of the rules and principles of property law, private international law, corporate law, etc. in the legal system and the key role of those adaptations in forging the existing system of capitalism, and driving greater concentrations of wealth, have perhaps been overstated: once again, rather than identifying the centrality of those rules in the development of a capitalist legal system, instead, they are best thought of as rules essential to the construction of a liberal legal order.\(^{37}\)

E. IS CHINA REALLY “CAPITALIST”?\(^{38}\)

A question which is frequently posed is whether the Chinese political, economic and legal system can be accurately cast as capitalist. After all, technically, it is an undemocratic regime that is run by a Communist State. However, labels can be deceptive. If we adopt the tripartite classification adopted by Max Weber, an economic system is capitalist if free wage labour is hired by capital, production of goods, services and assets is undertaken principally through private market-oriented economic activity and means, and the coordination of such productions processes is characterised by decentralisation.\(^{38}\) In the final analysis, if we apply this description, then, by all accounts, China makes the grade, despite the fact that much production is coordinated through the State.\(^{39}\)

F. PROPERTY LAW WITHOUT THE RULE OF LAW OR DUE PROCESS\(^{40}\)

Having established that we are seeking to examine whether Latent Concepts & Institutions are capitalist or liberal in their configuration, at this point in the discussion, we move along the path from conception to the delivery of a concrete scheme or methodology for the project. As noted above, this entails the marshalling of the Chinese legal systems as a proxy for a capitalist illiberal order. The methodology closely analyses whether the following Latent Concepts & Institutions are guaranteed by the state/political form of capitalism in China, namely the concepts of the rule of law/formal equality and standing before the law, the protection of due legal process/natural justice, ‘law’s abstract judgment’, the freedoms of contract, to contract, not to contract (i.e. quit a contract), the impartiality of adjudication, the doctrine of precedent, the principle of party autonomy, the separate legal personality of non-natural persons such as companies, partnerships and limited liability partnerships, the limited liability of capital

\(^{36}\) Liberalism has recently been attacked as a philosophy that is nearing the end of its shelf-life, and that it is bordering on obsolescence: see P. J. Deneen, *Why Liberalism Failed* (New Haven, Connecticut and London, Yale University Press, 2019). As such, it is essential to tease out the design features of a legal order and institutions that cement capitalism into place from those that are only necessary for a liberal society. I should clarify that I do not intend to probe how this new paradigm might supplant both capitalism and liberalism, or either of them. Instead, the argument is that ultimately, not just the legal content and foundations of liberal and capitalism (i.e liberal/illiberal and capitalist/command economy) but also the dichotomies that they draw could also be supplanted by others.

\(^{37}\) For example, K. Pistor’s, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton, NJ, Princeton University Press, 2019) represents the most ambitious and prominent attempt to explain comprehensively the role and importance of the law in generating capital and the observable spikes in wealth and income inequality.


investors in companies, the wage-labour/employment contract, the sanctity of contracts (*pacta sunt servanda*), the negotiability of certain commercial bonds, and the protection of private property. If the response is in the negative, then the Latent Concept or Institution is more likely to be more liberal than capitalist in its orientation, in the sense that it is less of a necessity for the effective functioning of the latter than the former in a legal system. But if the answer is in the affirmative, then that would tend to suggest the opposite, inasmuch as it is not a general feature of a legal system that is necessary in a liberal legal order, but instead one that is central to the construction of a legal regime dedicated to capitalist economic exchange.

Of course, one should not overlook the point that some or each of these Latent Concepts & Institutions have been presented as steeped in both capitalism and liberalism and as such, mutually complementary to, and supportive of, the success of the liberal meritocratic form of capitalism in Western societies. That may well be correct, in which case, bisection would be counter-productive, or even futile. However, we cannot discount the possibility that certain Latent Concepts are essential to the operation of capitalist exchange, but less so for a liberal society, and vice versa. In such a case, various Latent Concepts reflective of and necessary for capitalist markets will feature alongside other Latent Concepts that are only of utility in securing a liberal order. And the fact that such two legal concepts or legal-institutional arrangements co-exist simultaneously in a legal system should not mean that there is any causal link between them, since all that we can claim with any confidence is that a liberal element of the legal institutional design is simply correlated to one that is reflective of a capitalist order. In other words, there would not necessarily be any interdependence between these two legal concepts or features, and their co-existence would be nothing more than inadvertent or coincidental.

As a means of characterising Latent Concepts & Institutions as more reflective of liberal values as opposed to capitalism, I will take property law as the prism through which this decoupling exercise is carried out. I have adopted property law, since it is a substantive area of the law that carries more significance than others in this context. Indeed, when it comes to inequality, it mounts a reasonable claim to being the most relevant and dominant legal discipline, since it determines who owns what and underwrites such ownership. The significance of the exercise lies in the fact that it enables us to gauge what a legal system’s rules of property law would look like in the absence of certain Latent Concepts & Institutions. In civilian and mixed legal systems such as Scots law, the primary proprietorial interest recognised by property law is the real right of ownership (dominium). This has been analysed as a bundle of rights, namely the right to use and abuse property, the right to the fruits of that property and the right to exclude (others) from such use or fruits. Now let us imagine that a Latent Concept and Institution such as due process of law which is inextricably linked to liberal political regimes plays no part at all in such a legal system. In such circumstances, what kind of property law system would that be and what effect would it have on the system of exchange in that country? The short answer is that it would be a property law regime that defies recognition in Western legal systems. Yes, it would still be property law, but not as we know it, since Western legal thought is dismissive of rules that enable legal persons recognised by the order to take property away from others without due process of law. Furthermore, where property is confiscated by the state on the basis that the rule of law does not necessarily apply to certain powerful entities such as the government, once again, this has critical relevance for the functioning of property law principles and rules to the extent that restrictions on confiscation or defences available to property owners would not be given legal effect. Furthermore, the guarantee of private property as a Latent Concept & Institution that stands behind those more intricate and meticulously crafted rules, principles and doctrines of the substantive area of law that we lawyers call ‘property law’ would be hollowed out to the extent that the legal system would be marred by various pockets of lawlessness, which would seem to be hardly conducive to capitalist markets. This would suggest that the rule of law and due process of law are two Latent Concepts & Institutions that are not only reflective of liberal values, but at once vital prerequisites for the realization and perpetuation of capitalist exchange.

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However, notwithstanding the fact that one could never be confident that the Latent Concepts & Institutions of the rule of law, due process of law and the protection of private property, and the ordinary rules of property law, would ever be respected, the economic and legal system would still remain capitalist on certain conditions. For example, if the zones of lawlessness are limited by a policy of selective implementation and enforcement of property confiscation. Of course, this point demands further explanation. As such, I will attempt to unpack the point. For example, where the political regime does not recognise the rule of law or due process of law as Legal Concepts & Institutions, or they are honoured inconsistently, then the state or some other powerful entity A will have the power to decide that the property interests of a commercial company B should be renounced, and A may take enforcement action to confiscate B’s property safe in the knowledge that any legal defences available to B, or any legal restrictions on A’s ability to appropriate the property of B, will be inapplicable. Of course, the extent to which the capitalist economic and legal system continues to function depends on whether commercial companies C, D and E continue to have confidence in it and any assurances from the state and other powerful organisations that their property interests are safe and will not be confiscated. It is at this stage that the role for infrequent and selective enforcement arises, as well as various informal institutions and practices that function as replacements for, or equivalents to, the rule of law and due process. For example, studies on the Chinese context have demonstrated that various informal institutions can function as replacements or equivalents for the rule of law and due process that also sustain economic exchange, albeit at a less sophisticated level. As such, if the degree of lawlessness is kept within carefully limited bounds, alternative mechanisms such as interpersonal trust, informal social networks and a healthy dose of corruption, can shore up the viability of the system. In essence, if outside parties such as C, D and E observing the inapplicability of the due process of law, the rule of law and the guarantee of property rights in the case of B nonetheless continue to have an expectation that these Latent Concepts & Institutions and the rules of property law will in general terms be respected by A, then the system will continue to thrive, and also be capitalist. And most importantly, this is borne out by the Chinese experience, which teaches us is that so long as enforcement of property confiscation measures by the state, albeit unpredictable and random, are relatively infrequent and measured, the entire system will not only be capitalist but illiberal, whilst continuing to subsist without any risk of collapse under the weight of what would appear to be its own contradictions. As such, this is consistent with the finding that the rule of law and due process are inessential for the support of capitalist markets and social relations, which underscores the point that they are predominantly liberal values and institutions.

Having completed such an analysis and exposition of the liberal configuration and nature of the rule of law and due process, the same process of evaluation can be repeated for other Latent Concepts & Institutions. Again, this can be undertaken and stress-tested within the context of the Chinese legal system, as a useful proxy. It is to this recurring analytical exercise that the future research project will turn.

G. CONCLUSION

The objective of this brief article was to set out the bare bones of a future research project which I intend to pursue. The main hypothesis that the research will test is the claim that legal concepts which have been presented as essential for the proper functioning of a capitalist regime in the Western tradition are in fact inherently liberal in their configuration and are sufficient, but not necessary, for the evolution of such a market-oriented system of exchange. What in reality are elements of the legal institutional design that are capitalist in Western economic systems have been mixed up, or conflated, with legal concepts that are essential for a liberal polity. I made the point that the subsistence of the Chinese capitalist regime has been in spite of, rather than because of, its recognition of liberal values and concepts, which

to Western eyes is a paradox. Seen from this angle, once we identify various legal concepts that are latent within the capitalist economic system, we can screen out those that are inherently liberal from those that are required for the operation of capitalist markets by taking China’s state/political model of capitalism as a proxy system.

In this short paper, I have attempted to show how this process might work, and also to demonstrate the methodology by reference to the Latent Concepts & Institutions of the rule of law and due process of law. The conclusion reached was that, contrary to popular belief, the rule of law and due process are far from indispensable to the putting into effect and preservation of capitalist markets and capitalism in general. This conclusion was stress-tested and verified against the Chinese experience where the recognition of the rule of law and due process is sporadic at best, in which case they are often replaced by other informal practices and institutions. Yet, the legal system has sufficient strength and resources in play to support a sophisticated system of capitalist exchange, which simply accentuates the fundamental point.

It is hoped that this sketch provides something of a flavour of the kinds of ways in which an economic system of exchange that is capitalist can operate without certain Western-oriented Latent Concepts & Institutions cemented into position in its legal infrastructure that are entirely liberal in nature. Of course, whether the political order associated with such an illiberal legal system is desirable in terms of its human, democratic and distributional impact is an altogether separate question which can be left to political scientists and economists. However, as lawyers, it is incumbent on us to understand the role of these legal concepts and institutions that are constitutive of capitalist market economies. Intellectual curiosity should also lead us to question how they might be responsible for rising inequality, the coding by lawyers of law in favour of capital, and the degree to which the excising of laws reflective of liberal values introduces incompatibilities into the system, which if serious enough, point towards the erosion of its future viability.
THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE AND REGULATION OF ONLINE COMMERCIAL PLATFORMS: ONLINE PENNY AUCTIONS EXAMINED

Deirdre Leahy*

A. INTRODUCTION: THE ONLINE PENNY AUCTION IN CONTEXT

B. THE ONLINE PENNY AUCTION BUSINESS MODEL

(1) Criticism of OPAs
(2) The ASA Rulings

C. THE UCPD AND THE ASA RULINGS

(a) Annex 1: Blacklisted Practices
(b) Misleading Practices
(c) Article 6(1) UCPD – Misleading Actions
(d) Article 6(1)(a) to (g)
(e) Article 7 UCPD – Misleading Omissions

D. CONCLUSION

A. INTRODUCTION: THE ONLINE PENNY AUCTION IN CONTEXT

As part of its Strategy for the Digital Single Market (“SDSM”), the European Commission seeks to regulate online platforms in a way which ensures transparency of platform content, fair trading and fair marketing practices.44 To achieve these objectives, the Commission will rely on existing consumer protection frameworks, and will enact specific legislation only for “clearly identified problems relating to a specific type or activity of online platforms”.45

This strategy, informed by principles of better regulation, proposes to apply existing rules but does not preclude new regulatory measures, where necessary.46 In this context, the Commission identified the Unfair Commercial Practices Directive (“UCPD”) as a key legislative instrument for ensuring effective enforcement of consumer rights in the online commercial platform environment.47 It

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45 Online Platforms Report at 5.


has now published an updated Guidance on the UCPD,\textsuperscript{48} conducted a “Fitness Check” of the consumer \textit{acquis},\textsuperscript{49} and proposed a scheme of amendment to existing legislation.\textsuperscript{50}

In the UK, the Advertising Standards Authority (“ASA”) recently conducted an investigation of common and recurring marketing practices among several online penny auctions (“OPAs”), an online business model which challenges the traditional trader/consumer relationship and is difficult to classify.\textsuperscript{51} The ASA is a self-regulatory body for the advertising industry which acts as an industry watchdog by applying an advertising code of practice (“the CAP Code”) and investigates advertising practices when required by the enforcing authority for the UCPD in the UK.\textsuperscript{52} The CAP Code contains more extensive obligations for advertisers than the UCPD and its enabling legislation in the UK, but the ASA has regard to both the Directive and the legislation when reviewing advertising practices.\textsuperscript{53} The ASA’s investigation of OPA marketing practices, conducted in 2017, identified five separate categories of infringement of the CAP Code.\textsuperscript{54}

This paper examines the infringing practices, testing the regulatory solution for online platforms proposed by the SDSM by investigating how the UCPD regulates the market practices of the OPA. This examination demonstrates that the static blacklist of infringing practices in Annex 1 UCPD is not sufficiently responsive in the face of an innovative online commercial format. It will show how the infringing practices are more effectively evaluated when examined against Articles 6 and 7 UCPD. It will also confirm that the UCPD interacts with the consumer \textit{acquis} in a way which is more satisfactory than securing compliance through voluntary codes of conduct.\textsuperscript{55} Finally, it will consider whether the UCPD is capable, in a dynamic online marketplace, of effectively and comprehensively regulating commercial practices in the business model of a potentially disruptive online platform such as the OPA.


\textsuperscript{52} \textit{The CAP Code: The UK Code of Non-Broadcast Advertising and Direct & Promotional Marketing (12th edn)}, available at https://www.asa.org.uk/asset/47EB51E7-028D-4509-AB3C0F4822C9A3C4/. See also European Commission: Unfair Commercial Practices: Countries Review: Enforcement Fiche for the United Kingdom, available at https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.country.viewEnforcement&countryID=UK. In the UK the Competition and Markets Authority (CMA) is the enforcing authority for issues arising under the UCPD, but may refer potential infringements to self-regulatory bodies such as the ASA for investigation and review.

\textsuperscript{53} \textit{The CAP Code} (n 9) at Appendix 1. The UCPD was implemented in the UK through The Consumer Protection from Unfair Trading Regulations 2008, SI 2008/27.

\textsuperscript{54} ASA advice online: Pay-per-bid auction websites (hereinafter “the ASA Rulings”), available at https://www.asa.org.uk/advice-online/pay-per-bid-auction-websites.html.

B. THE ONLINE PENNY AUCTION BUSINESS MODEL

Online platforms are either intermediary or proprietary. An intermediary platform acts as third party in a transaction between the trader and the consumer, while the proprietary platform sells products and services on its own behalf. Some academic commentators believe the tripartite nature of the intermediary platform may demand a *lex specialis.* Proprietary platforms, which mirror the well-established transactional relationship between trader and consumer, are generally regarded as capable of regulation within the framework of existing EU consumer law rules and should not require tailored regulatory measures.

However, the OPA is a proprietary platform which combines elements of gaming with the online purchase of consumer goods, thereby challenging many aspects of the traditional bilateral relationship of trader/supplier and consumer. The OPA is an online platform where consumer products (usually high-equity brands) are auctioned through a pre-paid bidding process at heavy discounts from marketplace prices. Also known as the “pay-per-bid” auction, the revenue (and profit) generated by an OPA comes principally from the placing of bids, not the sale of discounted consumer products. Unlike the typical online auction, the OPA is open-ended: each pre-paid bid raises the purchase price by one penny and extends the auction by a period of time, so that auctions may remain in their final seconds for a prolonged period. This allows late entrants to commence bidding in the final stages of the auction, and the person who has placed the most bids may not necessarily be the successful bidder. The auction ends only when the additional time expires without a further bid being placed.

The following examples illustrate how the auction process works:

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57 Ibid.
59 C Riefa, Consumer Protection and Online Auction Platforms – Towards a Safer Legal Framework (2015) at 4 and 5. Riefa notes that the pay-per-bid auction model is the “industry standard for sites acting as principals.” OPAs may operate on an ascending or descending bid model, but it has been shown that the ascending bid model is ultimately more profitable for the platform owner, and therefore is the model most commonly used by OPAs. See J Y Kim et al., “A comparison of different pay-per-bid auction formats” (2014) 31 International Journal of Research in Marketing 368 at 369. For a description of the online bidding process, see Opinion of Advocate General Tanchev in Case C-544/16 Marcandi Limited v Commissioners for Her Majesty’s Revenue and Customs delivered 7 March 2018 at paras 15-21, also Robinson et al (n 15) at 1613.
61 The typical cost of a single bid is €0.10 to €0.50. Bids are sold in packages of 50 units, 100 units, 250 units etc., usually with a discounted purchase price on higher volumes. Auctions of high-equity products may require the participant to use multiples of bid units in order to place a single bid. See also Robinson et al (n 15) at 1613, and R H Thaler, “Paying a price for the thrill of the hunt” New York Times 15 November 2009, available at https://www.nytimes.com/2009/11/15/business/economy/15view.html.
62 Wang & Xu (n 17) at 54.
Example 1: Savings for the buyer

An iPad 9.7 with a recommended retail price of €409 is advertised for auction. Auction participants must purchase pre-paid bid credit before they participate in the auction. Each bid will cost a bidder €0.50, extend the final closing time of the auction, and raise the auction price by €0.01. The final bid raises the closing price to €4.71. The successful bidder has placed 25 bids. The cost to him of purchasing the iPad is:

Cost of bids: (25 x €0.50) €12.50 plus auction price: €4.71 and delivery costs: €12.00
Total purchase price: €29.21
This represents a saving of €379.79 on the recommended retail price of €409.

Example 2: How the OPA platform makes its profit

An iMac with a recommended retail price of €1,701.99 is advertised for auction with a starting price of €0.00. Auction participants must purchase bid credit before they bid. The number of bid credits required to place each bid in this auction is 12 bid credits. The average cost of bid credits on the site is €0.13 per bid credit. Each bid will cost the bidder €1.56 (12 x €0.13) and raise the auction price by €0.01. The final bid raises the closing price to €228.67. The OPA has potentially earned revenue of €35,672.52 (€1.56 x 22,867).

(1) Criticism of OPAs

The OPA industry promotes itself as “entertainment shopping” and has been widely criticised for gamification of the sales process.64 Successful bidding outcomes may depend on skilled bidding strategies.65 inexperienced bidders will incur losses, and some bidders, who consistently lose money, may be characterised as gamblers.66 Unsuccessful bidders will not be entitled to recover the cost of used bids unless the OPA site offers a “Buy-It-Now” (“BIN”) option, which permits losing bidders to either

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66 Wang & Xu (n 17) at 59 and 65; M Caldara, “Should penny auctions be regulated under gambling law?” (2014) 37 Regulation 20 at 23 and 24.
convert used bids into a discount against purchase of the product for a fixed retail price, or as a credit against future purchases in the platform’s online shop.  

Some OPA sites claim that successful auction bidders have achieved discounts of up to 90% against recommended retail prices. On the other hand, the advertised final auction price will not always disclose how much was spent on bid credit in the course of the auction. Two US studies which examined bidder behaviour concluded that profits and traffic to OPAs depend on a high turnover of new and inexperienced bidders. Attracted by advertisements of significant discounts and failing to understand the difficulty of winning an auction, bidders tended to “chase losses”. There was evidence of a high “churn” rate of new bidders: 66% of all bidders participated in no more than five auctions, and the proportion of regular auctions won by these bidders was merely 2.5%. The most recent examination of bidder behaviour on OPA sites concludes that bidders are risk-seeking in gains, loss averse, and overweight small probabilities in the auction process, the latter being the main driver of OPA profit, which exceeds traditional retail prices by an average of 25.46%.  

While no comparable analysis has been conducted in the EU, data sourced from EU-based ascending OPA platforms also showed that revenue was influenced by irrational consumer behaviour such as “non-equilibrium play, the over-valuation of products, risk-loving preferences, or other forms of behaviour”. It suggests that in the EU, as in the US, the OPA format is susceptible to similar consumer biases and behaviour patterns, potentially exposing OPA bidders to manipulation through unfair trading practices.

(2) The ASA Rulings  
In February 2017, the ASA investigated the marketing practices of six pay-per-bid online auctions and found five categories of infringement which breached the CAP Code. The impugned marketing practices were:

1. Exaggerated claims concerning recommended retail prices, savings and sale prices (“exaggerated claims”);

2. Lack of clarity concerning terms and conditions, the operation of the OPA auction process and associated costs (“lack of clarity”);


68 Robinson et al (n 15) at 1613.


71 Wang & Xu (n 17) at 59 and Augenblick, “Sunk-cost fallacy” (n 29) at 58.

72 Wang & Xu (n 17) at 59.

73 T Brunner et al, “Prospect theory in a dynamic game: theory and evidence from online pay-per-bid auctions”, (2019) 164 Journal of Economic Behavior and Organisation 215 at 227 and 229. The study showed that auction participants tended to overweight small probabilities (in this case, successful auction outcomes) and underweighted large probabilities (i.e. auction losses), at 227 and Appendix. While loss aversion reduced expected revenue by 35.38%, probability weighting almost doubled the expected revenue (91.30%), at 215.

74 J Y Kim et al (n 16) at 378.
3. Inadequate disclosure of significant information concerning compulsory purchase of non-refundable bid credit and associated costs (e.g. delivery charges), which was obscured in terms and conditions or available only post registration with the site (“opaque pricing and costs”);

4. Inappropriate use of testimonials (“misleading testimonials”);

5. Inadequate labelling of advertising to distinguish it from editorials (“misuse of advertorials”).

In November 2017, the ASA cautioned the OPA industry against use of these misleading practices and recommended that they be avoided.

C. THE UCPD AND THE ASA RULINGS

The UCPD prohibits unfair business-to-consumer (“B2C”) commercial practices before, during or after a commercial transaction. These transactions include both sale and supply of goods and services, and no distinction is drawn between digital and non-digital products. Commercial practices are unfair if they are misleading, aggressive, or one of 31 blacklisted practices in Annex 1 to the Directive, which are considered unfair in all circumstances. Article 5 prohibits unfair commercial practices generally, and Article 5(3) protects consumers who are vulnerable to a commercial practice or an underlying product.

The UCPD Guidance provides that a commercial practice should be assessed first against the blacklist in Annex 1. If this does not apply, the prohibitions in Articles 6 and 7 (misleading practices) or Articles 8 and 9 (aggressive practices) should be considered. If a practice is neither misleading nor aggressive, then it may be assessed under the general prohibition in Article 5.

Misleading information and omission of material information, prohibited in Annex 1 and Articles 6(1) and 7 UCPD, were core compliance issues in the ASA Rulings. However, aggressive practices or harassment, prohibited by Articles 8 and 9 UCPD, were not significant. Consequently, this paper will confine assessment of the ASA Rulings to the Annex 1 blacklist, Article 6(1) and Article 7.

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75 ASA (n 8).
76 ASA Rulings (n 11).
77 Article 3(1) UCPD.
78 Article 2(c) UCPD. See also N Reich et al, European Consumer Law (2014) at 81.
79 Articles 6 and 7 UCPD.
80 Articles 8 and 9 UCPD.
81 Of the 31 practices listed, 23 come under the heading of misleading commercial practices and eight are aggressive commercial practices.
82 Recitals 18 and 19 and Article 5(3) UCPD.
83 UCPD Guidance (n 5) at 54.
84 Ibid at 54 and Flowchart.
85 The CJEU has clarified that if a practice breaches one of the specific rules in Articles 6 to 9, this is conclusive of unfairness, in which case breach of the general prohibition in Article 5 need not be considered: Case C-435/11 CHS Tour Services GmbH v Team4 Travel GmbH [2013] ECR I-00057 (hereinafter “CHS Tour Services”), and confirmed in Case C-388/13 Nemzeti Fogyasztóvédelmi Hatóság v UPC Magyarország kft [2015] ECR I-00225 paras 61-63 (hereinafter “Nemzeti Fogyasztóvédelmi Hatóság”).
86 UCPD Guidance (n 5) at 54. If the commercial practices examined come within the specific prohibitions of Articles 6 and 7, it is not necessary to consider whether the general prohibition of Article 5 also applies.
(1) Annex 1: Blacklisted Practices

Practices in Annex 1 are automatically assumed to distort consumer economic behaviour. The blacklist is intended to provide legal clarity by specifying practices which do not require subjective, case-by-case assessment.

Three commercial practices examined by the ASA potentially come within the blacklist:

A. Some OPA websites made false claims that discounted offers were available for a limited time. Article 7-Annex 1 prohibits false claims that a product is available on terms for a limited time, when it is not.

B. Some OPAs listed logos from prominent newspapers, giving an impression that the OPAs were independently endorsed in editorial content. Article 4-Annex 1 prohibits claims that a trader has been endorsed by a private body (e.g., a national newspaper), when it has not.

C. Two OPAs published articles presented as an endorsement by an independent third party. In fact, the articles were previously published by the OPAs as sponsored advertorials.

The foregoing also highlights some practical limitations to the blacklist. First, none of the blacklisted practices addressed the most commercially misleading issues, such as exaggerated claims concerning recommended retail prices, opaque sale prices, and lack of clarity. For example, although Article 14-Annex 1 prohibits pyramid selling, this is a precise and well-defined business model and the OPA does not meet its essential criteria. Consequently, a static blacklist may have limited regulatory effectiveness against evolving commercial practices.

Second, some of the blacklisted practices appear arbitrary, blurring competences between the blacklist and the provisions of Articles 6 to 9. Many of the practices listed in Annex 1 could be adequately dealt with also on a case-by-case assessment. For example, Issue 4 (misleading testimonials) and Issue 5 (misuse of advertorials), which contravene Articles 4 and 11-Annex 1, could also be assessed against the prohibitions in Article 6(1)(b), (c) and (d). This potential overspill may

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89 ASA Ruling on Marcandi Limited trading as Madbid, 22 February 2017, available at https://www.asa.org.uk/ralings/marcandi-ltd-a16-348837.html. The OPA’s website offered £5 free credit during auctions if bid credit was topped up within a one-minute period. No evidence could be provided that such an offer expired on 30 July 2016, as the OPA claimed. See also ASA Ruling on Sophora Media Limited trading as Swoggi, 22 February 2017, available at https://www.asa.org.uk/ralings/sophora-media-ltd-a16-348838.html. The OPA offered free credit if bid credit packages were purchased before the end of August 2016, but the offer continued for a further four months beyond the expiry date.

90 ASA Ruling on Sophora Media Limited (n 48). The OPA displayed the logos of the Daily Mirror, the Independent and the Times on its website.

91 ASA Rulings on Sophora Media Limited and on Marcandi Limited (n 48).


94 Similarly, the practice of misstating discount time limits, which breaches Article 7-Annex 1, could be as effectively assessed under Article 8 (pressure selling) and Article 6(1)(b), (c) or (f) UCPD. See also Keirsbilck (n 52) at 396, 398.
undermine the legislative purpose of a blacklist. As this paper will show, the more broadly expressed prohibitions of Articles 6(1) and 7 are better equipped for assessment of misleading practices among OPAs.

(2) Misleading Practices

Although Articles 6(1) and 7 UCPD address different types of commercial practice, they apply similar benchmarks. A misleading practice is one which causes or is likely to cause the “average consumer” to take a “transactional decision” he would not otherwise take.

The CJEU does not take an adverse view of gamified shopping merely because it is a novel or unusual commercial practice. However, opaque pricing (which was condemned in the ASA Rulings) may be misleading for the average consumer. In Canal Digital, price was considered a determining factor in the mind of the average consumer about to make a transactional decision, so that advertisements which broke a price into several components, emphasising one aspect and giving less prominence to another, were capable of giving consumers a misleading perception of the overall offer. Among OPAs, similar practices, such as omitting particulars of used bid credit expended in the auction process, may also make it difficult for consumers to establish price.

The Court also takes account of the psychological effect of commercial practices. For example, in Purely Creative, it considered that award of a prize was capable of exploiting the psychological effect in the mind of the consumer, causing him to take an irrational decision which he might not have otherwise taken. The Court might take a similar approach to the OPA format, with its competitive character and emphasis on “winning”.

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96 In Case C-540/08 Mediaprint Zeitzungs- und Zeitschriftenverlag GmbH & Co. KG v ‘Österreich’-Zeitungsverlag GmbH [2010] ECR I-10909 at para 47 the Court ruled that sales with a bonus are not an unfair commercial practice merely because the opportunity to participate in a competition influences the decision to buy.

97 ASA (n 11), Issue 3 – opaque pricing and costs.

98 Case C-611/14 Denmark v Canal Digital Denmark A/S [2017] 2 CMLR 4 at paras 40, 43 and 46 (hereinafter “Canal Digital”). Similarly, in the context of the Directive on Misleading and Comparative Advertising, the Court ruled that comparative advertising of products based on price alone was misleading because it concealed a fact which might have a deterrent effect on the purchasing decision of the average consumer: see Case C-356/04 Lidl Belgium GmbH & Co KG v Etablissements Franz Colruyt NV [2006] ECR I-08501 at para 80.

99 ASA (n 11) Issue 3 – opaque pricing and costs; see, for example, the websites of Marcandi Limited, Sophora Media Limited, Bidbid.co.uk, Fastbidding Limited and Systematic Entertainment Shopping Limited, and Canal Digital (n 57) at para 49. See also W H van Boom, “Price intransparency, consumer decision making and European consumer law” (2011) 34 Journal of Consumer Policy 359 at 369-373.

100 Purely Creative (n 47) at para 49. This decision has been criticised for potentially setting a higher level of consumer protection than the Directive intended: J Stuyck, “The Court of Justice and the Unfair Commercial Practices Directive” (2015) 52 CMLR 721 at 739. However, the approach was subsequently confirmed when the CJEU examined whether the overall impression of a product was capable of misleading a consumer: see Case C-195/14 Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG [2015] ECR I-00361 paras 35-41 (hereinafter “Teekanne”).

101 See, for example, the website of Bidbid.co.uk. Consumers were advised: “Win it, track it and receive it: we send your winning item straight to your door”; “Purchase, place bids to win: 3 Steps towards maximising your discount” and “Pay for the final price and shipping to get the prize delivered to your door”.

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Moreover, the competitive atmosphere of gamified shopping sites could make them more attractive for consumers addicted to gambling. Recital 19 and Article 5(3) UCPD recognise the need to protect “vulnerable consumers”, who are susceptible to certain commercial practices because of their “mental or physical infirmity, age or credulity”.

So far, none of the studies examining the behaviour patterns of OPA bidders allege that persons vulnerable to gambling are specifically targeted by OPA platforms. However, if research shows that OPA bidders addicted to gambling are particularly susceptible to the OPA format, then they may also be considered a vulnerable class of consumer requiring special protection.

This conclusion creates regulatory tension between Article 5(3) UCPD and the other provisions of the UCPD. In CHS Tour Services, the CJEU clarified that if a practice is unfair when tested against Article 6(1) it is not necessary to consider whether it is also an unfair practice under Article 5(2), suggesting that a practice alleged to target consumers vulnerable to gambling addiction should first be assessed by reference to Article 6(1).

Assessment of vulnerability may, however, require an “individualised analysis” covering both the category of affected consumer and the relevant commercial practice. Accordingly, it would seem correct that national law measures such as those taken in Belgium, which secures protection for vulnerable consumers by blocking any OPA site not licensed under local gambling laws, might not be justifiable under Article 5(3) unless empirical studies show that gambling addicts are a group of consumers who are vulnerable to the OPA format, and in a way which the OPA trader can reasonably foresee.

The other common test of Articles 6(1) and 7 is whether a commercial practice has deceived and distorted the behaviour of the consumer, causing him to take a transactional decision. It is not necessary to prove actual damage or loss to the consumer. A “transactional decision” is broadly defined and extends from actual purchase to the decision to enter a shop. In the online environment, this includes the decision to browse or register with an OPA in response to advertorials, paid-for searches and paid advertising suggesting approval by third parties. Exaggerated discount claims and opaque auction prices which attract auction participants to OPAs also operate as transactional inducements.

(3) Article 6(1) UCPD – Misleading Actions

A commercial practice is misleading if it contains false information which is untruthful, or information which deceives, or is likely to deceive, the average consumer (even if the information is factually

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102 Robinson et al (n 15).
103 Article 5(3) UCPD and Recital 19 UCPD.
104 Markou (n 15) at 557.
105 CHS Tour Services (n 44) and confirmed in Nemzeti Fogyasztóvédelmi Hatóság at paras 61-63. In CHS Tour Services the Court had under consideration the relationship between Article 6(1) and Article 5(2)(a) and was not asked to consider the interplay between Article 6(1) and Article 5(3).
107 For details of the Belgian measures see Markou (n 15) at 548. In Belgium, OPAs are considered gambling and unlicensed sites are blocked.
110 Trento Sviluppo (n 67) at para 36.
111 ASA (n 11): Issue 4 – misleading testimonials and Issue 5 – misuse of advertorials; ASA Rulings on Sophora Media Limited and on Marcandi Limited (n 48) and UCPD Guidance (n 5) at 30. Advertising of this type may persuade a consumer to engage with an OPA website and take a transactional decision which he would not otherwise take: UCPD Guidance at 39. See also O Bray and B Nicholson, “European Commission guidance on online platforms and the Unfair Commercial Practices Directive” (2016) 27(8) EntLRev 271 at 273, 274.
112 ASA (n 11) Issue 1 – exaggerated claims and Issue 3 – opaque pricing and costs. See also UCPD Guidance (n 5) at 40.
correct), and if the practice meets one or more of the provisions in Article 6(1) (a) to (g).\textsuperscript{113} Article 6(1) is intended as a specific rule, without de minimis thresholds,\textsuperscript{114} breach of which is ipso facto evidence of unfairness.\textsuperscript{115}

The way in which information is presented, even if factually correct, may render it false.\textsuperscript{116} Conversely, information which is false but has no effect on decision-making does not breach Article 6(1). For example, untruthful puffs will generally be recognised as such by consumers and are not regarded as unfair commercial practices.\textsuperscript{117} However, false information is a concept which covers a wide spectrum, ranging from practices which are subtly deceptive to untruthful statements.\textsuperscript{118} Article 6(1) also applies to half-truths which “create a misleading effect.”\textsuperscript{119} For example, an OPA will comply with compulsory information obligations under the CRD and the ECD if it provides information on final auction prices for closed auctions (including delivery costs). However, if the cost of bidding is not included, the information is a half-truth and potentially misleading.

\textbf{(4) Article 6(1)(a) to (g)}

Misleading actions under Article 6(1)(a) to (g) fall into two groups: first, representations concerning the product, and second, representations concerning the trader and the contract.\textsuperscript{120}

\textit{(a) Representations Concerning Products}

Article 6(1)(a) prohibits deceptions concerning the nature of the product. The UCPD defines a product as “any goods or services”.\textsuperscript{121} For OPAs, this includes all aspects of their online entertainment-shopping services, and information concerning the same should be unambiguous as to the nature of the auction process.\textsuperscript{122}

Article 6(1)(b) captures incorrect information concerning the main characteristics of a product (including the benefits and risks of the product) provided before and after conclusion of a contract, such as would cause an average consumer to take a transactional decision which he would not otherwise take. The informational requirements of Article 6(1)(b) are less concerned with supply of specific information (as is the case with the CRD and the ECD) and seek to ensure that information provided to the consumer is both accessible and comprehensive.\textsuperscript{123} So, for example, where information concerning

\begin{itemize}
  \item \textsuperscript{114} It is sufficient that only one consumer has been misled; there are no de minimis thresholds when assessing the effect of a commercial practice: Nemzeti Fogyasztóvédelmi Hatóság (n 44) at paras 39-46.
  \item \textsuperscript{115} CHS Tour Services (n 44) at paras 42–48. Once a practice is misleading for the purposes of Article 6(1), then it is not necessary to also consider whether it is contrary to the requirement of professional diligence expressed in Article 5(2): para 45.
  \item \textsuperscript{118} Wilhelmsso n (n 68) at 127.
  \item \textsuperscript{119} Ibid at 130.
  \item \textsuperscript{120} The provisions which concern the product are Article 6(1)(a), (b) and (d). The provisions which concern the trader are Article 6(1)(c), (e), (f) and (g).
  \item \textsuperscript{121} “Product” is defined in Article 2(d) UCPD.
  \item \textsuperscript{122} ASA (n 11) Issue 2 – lack of clarity.
  \item \textsuperscript{123} Article 6(1)(a) CRD requires that information concerning the “main characteristics” of a product be provided to the consumer pre-contract.
\end{itemize}
bid credit is made available only after registration, or is contained within terms and conditions, the way in which that information is presented may mislead the consumer as to the main characteristics of bid credit.\textsuperscript{124} An appropriate standard of pre-registration clarity on bid credit might be expected to include critical information such as the number of bids required to bid in different auction product categories, the minimum bid credit purchase, and any restrictions on the right of withdrawal. Failure to meet this level of information disclosure may infringe both Article 6(1)(b), (d) UCPD and the price information requirements of the ECD and CRD.

Article 6(1)(d) prohibits a trader from misleading consumers as to “the price or the manner in which price is calculated.”\textsuperscript{125} Some OPAs examined by the ASA exaggerated discounts for price comparison purposes and provided misleading information concerning RRPs.\textsuperscript{126} RRPs should be independently verifiable, and at least one national court has prohibited price comparisons against the RRP unless the alternative price has been set by an independent third-party.\textsuperscript{127} Riefa is also critical of pricing practices on OPA sites because “comparing the cost of bids is one of the key elements a consumer needs in order to decide which pay-per-bid auction site to use.”\textsuperscript{128} Lack of clarity about pricing led the ASA to advise OPAs that consumers must be made aware of the costs of bidding in an auction and allowed to access the cost of bid credit packages before registration.\textsuperscript{129}

Article 6(1)(d) may also capture other practices affecting the cost of bid credit which were outside the remit of the ASA.\textsuperscript{130} For example, OPAs routinely furnish information concerning refunds via terms and conditions. However, product refunds do not always include refund of bid-credit used in the course of the successful auction.\textsuperscript{131} Because this information is located in terms and conditions, it may not be easily accessible, and its significance might not be clear to a first-time user.\textsuperscript{132} If this information is to be supplied in compliance with Article 6(1)(d), it would seem appropriate that prior to registration as a user clear notice or warning should be given as to how the refund policy works.

\textit{(b) Representations Concerning the Trader and Contract}

The second strand of activities concern the contract with the consumer and the business practices of the trader.

Article 6(1)(c) requires disclosure of “the extent of the trader’s commitments, the motives for the commercial practice and the nature of the sales process.”\textsuperscript{133} Practices which disguise the true commercial intent of the trader’s activity come under this heading.\textsuperscript{134} Activities identified in the ASA

\textsuperscript{124} See ASA (n 11) Issue 3 – opaque pricing and costs.
\textsuperscript{125} Article 6(1)(d) UCPD. The UCPD Guidance cautions against use of “up to” claims by traders, concerning, for example, the level of price discount, and it recommends that discount claims should be capable of being substantiated: UCPD Guidance (n 5) at 62, 119-121. Article 12(a) UCPD entitles Member States to confer rights on courts and administrative bodies “to require a trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice.”
\textsuperscript{126} Recommended Retail Prices (hereinafter “RRPs”). ASA (n 11) Issue 1 – exaggerated claims.
\textsuperscript{127} UCPD Guidance (n 5) at 61. The decision referred to is Consumer Ombudsman v XXL Sports & Outdoor Oy (Market Court of Finland MAO:829/15).
\textsuperscript{128} Riefa (n 16) at 93.
\textsuperscript{129} ASA (n 11) Issue 3 – opaque pricing and costs.
\textsuperscript{130} The remit of the ASA was confined to an examination of OPA advertising for misleading content. This did not extend to examining whether there was compliance with compulsory information disclosures of the CRD and the ECD.
\textsuperscript{131} Riefa (n 16) at 109, 111-112, 119.
\textsuperscript{132} Ibid at 109.
\textsuperscript{133} Article 6(1)(c) UCPD.
\textsuperscript{134} Wilhelmsson (n 68) at 142.
Rulings, such as pressure selling of bid credit,\textsuperscript{135} the use of advertorials as endorsements,\textsuperscript{136} and the misuse of newspaper logos to suggest editorial approval and endorsement of OPA platforms,\textsuperscript{137} would also appear to come within this category of prohibited practice.\textsuperscript{138}

Article 6(1)(f) stipulates that all information concerning the nature, attributes, and rights of the trader must be accurate. This goes further than the requirements of the ECD and the CRD, since it prohibits deceptive representations about the OPA.\textsuperscript{139} Riefa noted the prevalence of non-compliance with compulsory information disclosures concerning the trader in breach of the ECD and the Distance Selling Directive (the forerunner of the CRD).\textsuperscript{140} Some OPA platforms were located outside the EU and did not readily disclose the fact to consumers.\textsuperscript{141} The ASA also discovered that one OPA operated out of Singapore even though it had a “.co.uk” domain registration, quoted prices in pounds sterling and provided a UK contact address, giving an overall impression that it was based in the UK.\textsuperscript{142} Online platforms must act appropriately to ensure that consumers understand with whom they are contracting.\textsuperscript{143} For retail (off-line) transactions, information of this type must be specifically drawn to the consumer’s attention, and the CJEU might be expected to insist that consumers accessing online platforms are informed precisely about the identity and location of the trader.\textsuperscript{144}

Article 6(1)(f) also captures misleading representations concerning the nature of the business conducted by the trader, its marketing and business practices. If, for example, OPAs claim that products are sold at a discount because they are sourced from warehouse sales and overstock surplus, this is potentially misleading for consumers, because it does not reflect the function of the pay-per-bid format, which is the true basis for discounted prices.\textsuperscript{145}

Finally, Article 6(1)(g) obliges traders to provide accurate information concerning rights, remedies, and legal entitlements.\textsuperscript{146} Riefa demonstrates that compliance with compulsory information obligations (which came outside the remit of the ASA investigation) is poor among pay-per-bid sites.\textsuperscript{147} For example, the right of withdrawal is generally problematic, and information on the right to withdraw from bid credit purchases was shown to be particularly inaccessible, at times subject to onerous conditions.\textsuperscript{148}

Riefa suggests that the real issue with OPAs is not necessarily missing information (for which the ECD and CRD set unequivocal requirements), but clarity and presentation.\textsuperscript{149} These criticisms are supported by studies in behavioural economics, which show that information obligations should be

\textsuperscript{135} ASA (n 11) Issue 2 – lack of clarity. See also ASA Rulings on Sophora Media Limited and on Marcandi Limited (n 48).

\textsuperscript{136} ASA (n 11) Issue 5 – misuse of advertorials. See also ASA Rulings on Sophora Media Limited and on Marcandi Limited (n 48).

\textsuperscript{137} ASA (n 11) Issue 4 – misleading testimonials.

\textsuperscript{138} There is some overlap between the prohibitions against misrepresentation concerning sponsorship or approval in Article 6(1)(c) and the absolute prohibition of such practices in Article 4-Annex 1 UCPD.

\textsuperscript{139} Article 5(1) ECD and Article 6(1) CRD stipulate that information concerning the identity, contact details and address of the online platform must be provided. See also Wilhelmsson (n 68) at 144.

\textsuperscript{140} Riefa (n 16) at 75, 77, 84 and 169.

\textsuperscript{141} Ibid.

\textsuperscript{142} See ASA Ruling on Sophora Media Limited (n 48). The websites operated by Sophora were registered as “.co.uk” and gave a UK contact address, giving the impression that they were UK-based.

\textsuperscript{143} UCPD Guidance (n 5) at 127.

\textsuperscript{144} Case C-149/15 Sabrina Wathelet v Garage Bietheres & Fils SPRL [2016] ECR I-00840. See Bray & Nicholson (n 70) at 273.

\textsuperscript{145} ASA (n 11) Issue 1 – exaggerated claims.

\textsuperscript{146} UCPD Guidance (n 5) at 62.

\textsuperscript{147} Riefa (n 16) at 75, 77, 84.

\textsuperscript{148} Ibid at 109, 111-123. Of the proprietary sites reviewed by Riefa, only 20% provided the required information, 60% provided incomplete information and 20% did not provide any information.

\textsuperscript{149} Ibid at 99, 100.
regulated by reference to qualitative as well as quantitative standards. Consequently, the UCPD’s principles-based rules may provide a more effective means of tackling the often complex interplay between prescriptive information disclosures and evaluation of how that information is presented to the consumer.

(5) Article 7 UCPD – Misleading Omissions

Article 7(1) prohibits omissions of “material information” which the consumer needs to take a transactional decision. “Material information” is not defined in the UCPD, and a case-by-case assessment is necessary. Article 7(2) prohibits traders from obscuring information or providing it in unclear or unintelligible language. Article 7(3) permits examination of the information medium to assess alleged omissions, and Article 7(4) introduces specific rules for “invitations to purchase”.

Misleading omissions include practices which are not untruthful but which are likely to deceive consumers, such as provision of insufficient information and omission of relevant information. Article 7 is narrower in scope than Article 6(1): it does not impose a positive duty of disclosure on traders and is focussed on the information needs of the consumer. Both Article 7(1) and (2) apply the benchmarks of the average consumer and relevance of information to decision-making. When OPAs advertise their products and services in the form of an “invitation to purchase”, these advertisements must comply with the detailed information requirements of Article 7(4). In Canal Digital, the CJEU clarified that an invitation to purchase must not only comply with the requirements of Article 7(4), but its overall effect may also be assessed against the other requirements of Articles 6(1) and 7.

(a) ASA Rulings and Misleading Omissions

It was the intention of EU legislators that Articles 7(1) and 7(2) may be read together, and this permits a more nuanced analysis of OPA commercial practices, to cover situations where information is given, but not in a clear and timely manner, or is given in a way which obscures commercial intent. For example, among the sites examined, the ASA noted a marked absence of clarity about the commercial intent of the OPA format: one site failed to adequately explain how the auction process worked prior to registration, and purchase of a bid package meant consumers were automatically signed up to a 3-month subscription.

Markou is critical of such practices, suggesting that success of the OPA business model may be dependent on information asymmetries which give a false and misleading impression of the

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151 UCPD Guidance (n 5) at 69. “Material information” is defined in the Directive only within the context of Article 7(4).
152 Keirsbilck (n 52) 339.
153 Some academic commentators suggest that a rule which “outlaws the omission to give information of course always can be described as an (indirect) disclosure rule.” See G Howells et al, “Towards a better understanding of unfair commercial practices” (2009) 51(2) IntJLM at 69, 71. See also Wilhelmsson (n 68) at 147, 148.
154 Article 2(2) UCPD defines an “invitation to purchase” as “a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase”.
155 Canal Digital (n 57) at paras 66 to 72. In Case C-122/10 Konsumentombudsmannen v Ving Sverige AB ECR [2011] I-03903 the Court suggested that such an expansion of Article 7(4) is possible, but it did not specifically consider the question or elaborate on the point, even though the Court considered the transactional decision test capable of applying to the criteria of Article 7(4): see paras 39-41 and 58-59.
156 H W Micklitz, “Unfair commercial practices and misleading advertising” in Reich et al (n 37) at para 2.34.
157 ASA (n 11) Issue 2 – lack of clarity and Issue 3 – opaque pricing and costs. See, in particular, ASA (n 8) re Systematic Entertainment Shopping Ltd: on purchase of bid credit consumers were not made aware that after signing up for a 14-day trial membership “they would be automatically billed £59.99 per month and that there was a three-month minimum subscription.”
commercial objective.\textsuperscript{158} The ASA also condemned poorly presented price information which prevented consumers from taking informed decisions.\textsuperscript{159} Taken together, Article 7(1) and 7(2) address the potential of this type of misleading information and the effect which it may have on consumer decision-making.\textsuperscript{160} As already noted, the CJEU considers all information concerning price to be relevant to the decision-making process, and failure to display all “cost components” prominently constitutes a misleading omission.\textsuperscript{161} The OPA practice of splitting the true cost of acquiring an auctioned product into separate components (i.e. bid credit and auction price) is a market practice known as “price partitioning”, a recognised influencer of consumer demand.\textsuperscript{162} In the US, for example, it has been shown that price partitioning, or “framing”, influences the bidding behaviour of consumers in auctions and is a particularly effective means of increasing pay-per-bid auction revenues.\textsuperscript{163}

The practice of price partitioning is conducted on OPA platforms in a way which is more subtle than merely splitting price components into the auction price of a product and associated delivery charges. Riefa notes that among pay-per-bid websites it was difficult to establish how the final price is made up, and such sites tried to hide “the cost of each bid in order to remove consumers’ inhibitions about spending”.\textsuperscript{164} Price-partitioning practices among OPAs create a highly structured commercial product, and products of this type, as the CJEU noted in \textit{Canal Digital}, create an information asymmetry which is likely to confuse consumers.\textsuperscript{165}

Markou observes that such practices induce consumers to use OPAs.\textsuperscript{166} She speculates that compelling OPAs to comply with the information requirements of the UCPD may negatively affect revenues from auction profits, thereby indirectly banning the business format.\textsuperscript{167} However, this conclusion might be questioned.

First, the OPA format has proven to be adaptable. Compliance with Article 7(1) and 7(2) demands that the commercial intent of the business model be disclosed more fully and properly. If the consequence is decreased traffic to OPA platforms, then the format must either develop in response to regulatory compliance, or it may become unviable. Yet the format has already proven itself to be resilient: the introduction of the BIN option demonstrated that the OPA is capable of innovation when forced by a changed commercial environment. Second, while OPAs presently attract a high turnover of new bidders, research in the US has shown they also generate revenue from gamblers and repeat auction participants.\textsuperscript{168} Retention of experienced bidders who are familiar with the format may have the effect of creating a more reliable core business for OPAs than at present, albeit at less profit and with the potential regulatory consequence of relying to a greater degree on those consumers attracted to gambling.\textsuperscript{169} Indeed, recent empirical study of bidder behaviour on pay-per-bid auction platforms confirms that the behaviour of sophisticated bidders is capable of contributing to the longevity and profitability of OPAs.\textsuperscript{170}

\textsuperscript{158} Markou (n 15) at 556.
\textsuperscript{159} ASA (n 11) Issue 2 – lack of clarity and Issue 3 – opaque pricing and costs. See also ASA (n 8) re Marcandi Limited, Item 1.
\textsuperscript{160} \textit{Canal Digital} (n 57) at para 53.
\textsuperscript{161} O Bray and V Noto, “Promoting TV subscription packages: Court of Justice provides guidance on the application of the rules on misleading actions and omissions under the Unfair Commercial Practices Directive” (2017) 28(4) EntLR 149 at 151. See also \textit{Canal Digital} and n 57 above.
\textsuperscript{162} “Price partitioning” is defined as “cutting up the price in the sales sequence (basic price, options, surcharges, etc) to focus consumer attention on one specific component”: van Boom (n 58) at 364.
\textsuperscript{164} Riefa (n 16) at 94, 95.
\textsuperscript{165} \textit{Canal Digital} (n 57) at para 40.
\textsuperscript{166} Markou (n 15) at 557.
\textsuperscript{167} \textit{Ibid}.
\textsuperscript{168} Wang & Xu (n 17) at 59 and 65.
\textsuperscript{169} \textit{Ibid} at 61 and 62.
\textsuperscript{170} Brunner et al (n 32) at 230.
(b) ASA Rulings and Disclosure

Obscuring commercial intent by failing to provide relevant information, or by making it available in a limited way, is prohibited by Articles 6(1)(c) and 7(2).\textsuperscript{171} Although some overlap exists between the two Articles,\textsuperscript{172} Article 7(2) addresses the more specific activity of deliberately attempting to conceal the commercial intent of the practice.\textsuperscript{173} Specific omissions, such as deliberately obscuring information on the role of bid credit and not providing information on volumes of bids required to participate in an auction or conditions requiring minimum bid purchases, should be assessed against Article 7(2).\textsuperscript{174}

Riefa expressed concern at the significant lack of compliance with compulsory information disclosures among online auction platforms, and even where complied with, there remained issues around accessibility, clarity and accuracy.\textsuperscript{175} In her opinion, evaluation of disclosures under the CRD and ECD would be more effective in OPAs if they were assessed by reference to Article 7(2) UCPD, which prohibits the trader from making disclosure of information in an “unclear, unintelligible, ambiguous or untimely manner”.\textsuperscript{176} The ASA Rulings confirm that OPAs are susceptible to practices which make compulsory information inaccessible, with much of the detail located within complex terms and conditions or not available prior to registration.\textsuperscript{177} It found that several OPAs failed to provide information in a clear and timely manner and obscured commercial intent.\textsuperscript{178} Riefa criticises the practice among online auction platforms, including OPAs, of disclosing compulsory information concerning payment, delivery, returns and contractual performance in FAQ pages or within the terms and conditions for use of the website.\textsuperscript{179} She suggests that the proper place for provision of compulsory information is with particulars of sale, and such information should be supplied in a clear and unambiguous manner, since to do otherwise “could be deemed a misleading omission.”\textsuperscript{180}

Even where compulsory information is disclosed, OPA sites often attempt to obscure both this and other essential contractual information through the use of densely drafted and unclear terms and conditions.\textsuperscript{181} On examination of contract terms and conditions among OPAs, Riefa concluded that there was “a clear pattern of drafting unfair terms.”\textsuperscript{182} She also concluded that the use of conflicting, vague or poorly drafted terms was common practice.\textsuperscript{183} Orlando suggests that the use of contractual terms which are not drafted in plain, intelligible language must always be considered a breach of both Article 5 UCTD as well as Article 7(2) UCPD.\textsuperscript{184}

\textsuperscript{171} ASA (n 11) Issue 2 – lack of clarity.
\textsuperscript{172} Wilhelmsson says that such omissions are more properly dealt with as misleading actions rather than misleading omissions; Wilhelmsson (n 68) at 152.
\textsuperscript{173} UCPD Guidance (n 5) at 142.
\textsuperscript{174} See, for example, ASA (n 8) re Systematic Entertainment Shopping Limited, Item 1: the way the bid cost and auction process was disclosed was considered ambiguous and not presented clearly to consumers.
\textsuperscript{175} Riefa (n 16) at 100-101.
\textsuperscript{176} Ibid at 101-102.
\textsuperscript{177} The ASA (n 11) recommends, for example, that all OPA sites should make clear to consumers pre-registration how the site works and clearly state all terms and conditions.
\textsuperscript{178} ASA (n 11) Issue 2 – lack of clarity. See, for example, ASA (n 8) re Marcandi Limited, Systematic Entertainment Shopping Ltd, Bidbid.co.uk and Sophora Media limited.
\textsuperscript{179} Riefa (n 16) at 100.
\textsuperscript{180} Ibid at 101.
\textsuperscript{181} Ibid at ch 5.
\textsuperscript{182} Ibid at 135. Unfair contract terms were present in 64% of the proprietary sites surveyed. This issue was outside the remit of the ASA Rulings, which were confined to investigation of allegedly misleading advertising practices.
\textsuperscript{183} Ibid at 139. 29% of sites surveyed used such contract clauses.
\textsuperscript{184} S Orlando, “The use of unfair contractual terms as an unfair commercial practice” (2011) 7(1) ERCL at 25, 33.
D. CONCLUSION

The foregoing analysis demonstrates the flexibility of the UCPD as a legislative instrument to regulate online commercial platforms. Although OPAs may be disruptive of the online marketplace and the traditional trader/consumer contractual relationship, assessment of the OPA business model through the UCPD confirms that OPAs are not disruptive of legal rules and may be effectively regulated within existing consumer legislation.

This paper shows how the blacklisted practices of the UCPD have limited regulatory value when applied in an evolving and dynamic online marketplace, while the more flexible provisions of Articles 6(1) and 7 are sufficiently broad to comprehensively capture the misleading practices identified in the ASA Rulings. The UCPD also enhances the value of the consumer *acquis*, allowing a more nuanced and qualitative assessment of OPA commercial practices around compulsory disclosure of information and standard contract terms. The effectiveness of the UCPD’s enforcement procedures has in the past been cited as a failing of the Directive. Current reforms of the consumer *acquis* should, however, redress this criticism, thereby allowing the full regulatory potential of the UCPD to be realised, especially as a tool for ensuring fairness and transparency in the trader/consumer relationship of innovative online commercial platforms.
GLOBAL HUMAN SECURITY: A CORNERSTONE IN BRIDGING THE DIVIDE BETWEEN SECURITISATION AND THE HUMAN RIGHTS MARITIME SECURITY FRAMEWORKS

Ramat Tobi Abudu*

A. INTRODUCTION

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F. CONCLUSION

A. INTRODUCTION

2018 and 2019 welcomed an all-round decrease in illegal activities at sea, including a growing concern for the protection of human rights. Reports show essential progress under the European Agenda on Migration as there is a decline in irregular border crossing into Europe owing to the EU externalisation of border control. However, the European Commission report criticises the border control measure for violating the rights of civil actors and causing an increase in deaths at sea and criminal activities in and out of Europe. The ICC International Maritime Bureau (IMB) report an overall decline of piracy and armed robbery at sea incidents. However, the European Court of Human Rights (ECHR) has records of several counter-piracy operations which violated the procedural rights and safeguards under the European Convention of Human Rights.

The two frameworks that are clashing concerning maritime security are the securitisation framework (security-based approach) and the human rights framework (the rights-based approach). The problem here is that the security framework creates a situation which promotes countermeasures that

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188 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950 and entered into force 3 September 1953) 213 UNTS 231 [hereinafter referred to as “ECHR”].
violates human rights provisions at sea. In contrast, the rights-based framework is inconsiderate of the intrinsic nature of the maritime environment, which results in constant violation. Most maritime security strategies adopt a securitised framework which ranges from hard security to soft security approach.\(^{189}\) Therefore, creating the perpetual imbalance between the security-based approach and the rights-based approach of dealing with maritime security.

Nonetheless, recent developments have shown that the international community is beginning to respond to the critics call for an inclusive rights-based approach. For instance, the 2005 modifications to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) to include human rights, refugee law, and international humanitarian law.\(^{190}\) However, the application of human rights at sea and law enforcement operations needs a common ground which takes into consideration the nature of the maritime environment and human rights law.\(^{191}\)

This paper argues that the concept of global human security being a response to the common concern for the protection of people and a dimension of maritime security is the best approach to bring about the much-needed balance. The framework has a securitisation aspect but still retains the individual as the referent object, hence, adopts a people-centred or human-centred approach to maritime security which strengthens law enforcement at sea.

In making this argument, this paper is divided into four main sections. The first section sheds light on maritime security as a multivocal concept and highlights the human security dimension of maritime security. The second section evaluates the security-based nature of maritime security framework by evaluating the various maritime security strategies to illustrate securitisation. The third section, on the one hand, evaluates the human rights framework as an integral part of the maritime security framework. On the other hand, it highlights the challenge created by this framework which is affecting the harmonisation of human rights consideration and law enforcement operations at sea. This section argues this point by evaluating the right to liberty and security being a fundamental procedural right and safeguard within the human rights framework. The final section discusses the concept of common concern and the shift from the common concern of maritime security which led to securitisation to the common concern of humanity which, in turn, requires the protection of all people. This section goes further to argue that the human security framework has at its core the protection of all people and as a dimension of maritime security, it is the best approach to bridge the divide between the security framework and the rights framework with maritime security. In conclusion, this work points out that the nature of the human security framework as being a somewhat excellent complementary tool to the human rights framework and the securitisation framework makes its approach the best in creating and maintaining a sustainable maritime security framework.


B. MARITIME SECURITY

The term ‘maritime security’ gained prevalence after the end of the cold war. However, before that, it was seldom used to reference sea power (i.e. in the Naval context). There is no universal definition of the term, albeit generic features are in existing literature describing maritime security. Consequently, Bueger describes maritime security as a “buzzword” with no definite meaning but best understood through an eclectic mix of other relational concepts.

Although an international buzzword, Considering the measures to secure the maritime domain, maritime security becomes a combination of both preventive (port regulation) and responsive measures (countermeasure, e.g. counter-piracy) to ‘protect the maritime domain against threats and intentional unlawful acts’. The inclusion of ‘preventive and responsive measures’ aims to cover both the law enforcement aspect of maritime security (protection of civilian and military involvement) and the defence aspect (military involvement).

As rightly illustrated by Bueger, maritime security is a multivocal concept that incorporates different dimensions/concepts that interact with each other. These concepts are national security (the concept of sea power- the use of naval forces), marine environment (the concept of maritime safety), economic development (the concept of the blue economy) and human security (the protection of people). International actors (e.g. EU, NATO) and States have embedded some of these interrelated dimensions in their description of maritime security as it affects their maritime domain. NATO in addressing maritime security focusses on the “maintenance of a secure and safe maritime environment”.

Similarly, the United States’ National Strategy for Maritime Security (US National Strategy) refers to maritime security in light of, “the safety and economic security of the United States”.

The traditional view of maritime security is the presence of sea power (naval forces) to protect national interests. One of the major actors in maritime security is the naval force, which creates the link between maritime security and the concept of sea power. In securing the maritime domain, the warships or law enforcement vessels secure states own territorial jurisdiction and engage illegal activities in areas outside national jurisdiction.

Due to the commercial value of fishing and shipping, including the economic potential of offshore resources such as seabed mining, as well as coastal tourism, the oceans need security. Therefore, the concept of the blue economy becomes linked to maritime security because a secure maritime environment is a precondition for sustaining the value of and from the ocean.

The concept of maritime security and maritime safety both have the maritime domain as the referent object of protection through preventive and responsive measures, albeit, maritime security deals with “man-made threats and unlawful acts” while maritime safety deals with “unintentional risks

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194 Bueger, at 160.
195 Germond, at 138.
199 Bueger at 161; see also C Bueger and T Edmunds, “Beyond seablindness: A new agenda for maritime security studies” (2017) 93 International Affairs 1293, p 1293–1311.
200 NATO Alliance Maritime Strategy (n 5) para 14.
201 US Strategy (n 5).
202 Bueger (n 9) at 161.
and dangers." Maritime safety addresses issues concerning the safety of persons, ships, maritime installations and environmental concerns (such as the protection, prevention and response to oil spills, ships wrecks, etcetera) The impact of illegal activities at sea on the safety of persons at sea and the marine environment creates the link between maritime safety and maritime security.

The concept of human security was initially proposed in the United Nations Development Programme (UNDP). As noted in the General Assembly resolution 66/290, "human security is an approach to assist Member States in identifying and addressing widespread and cross-cutting challenges to the survival, livelihood and dignity of their people." It adopts a people-centred approach to security by shifting from the traditional focus of security on State interest to people interest. Human security is a broad concept that covers threat that affects food, health, environment, people, economic, community and political security. Due to its broad nature, human security covers different maritime dimensions, from maritime safety to environmental protection and security of all people.

C. SECURITISATION FRAMEWORK OF MARITIME SECURITY

(1) Maritime Security as a Concept of ‘Security.’

The term ‘maritime security’ falls within Buzan, Wæver and Wilde’s concept of security. Accordingly, from the traditional military to political perspective, security requires the existence of an existential threat to a designated referent object with survival as the goal. The referent object is the object that is being threatened and needs to be protected, which is usually ‘the state, incorporating government, territory and society.’ National security is one of the four dimensions of maritime security that always has the state as the referent object. Being a multivocal concept, the existential threat to maritime security is usually the illegal activities that threaten good order at sea. However, the referent object interchanges between the state (the concept of national security and blue economy), individual (the concept of human security), and society (marine environment) depending on which maritime security dimension is adopted. Presently, each state adopts a different mix of emphases, inclusions and exclusions of these maritime security dimensions. The NATO strategy, for example, prioritises deterrence and collective defence, alongside issues such as crisis management and cooperative security, and thus continues to emphasise ‘hard’ naval power together with more diffuse maritime security tasks. Similarly, the US maritime security strategy prioritises deterrence as it states that “defending against enemies is the first and most fundamental commitment of the United States Government.” On the other hand, the EU does not explicitly do so. The EU conceptualises maritime security as “a state of affairs of the global maritime domain, in which international law and national law are enforced, freedom of navigation is guaranteed, and citizens, infrastructure, transport, the environment and marine resources are protected.” Here, the referent object is still the State and EU.

202 Del Pozo et al (n 12), Lutz Feldt (n 12).
206 Buzan et al.
207 Buzan et al., at 21.
209 NATO Alliance Maritime Strategy (n 5) at 1.
210 US Strategy (n 5) at 7.
211 The European Union Maritime Security Strategy (n 5).
society; however, the EU strategy is more of a “soft” security approach compared to NATO. Similariy, the UK National Strategy is also “soft security”, but national interest is of utmost priority which still places the state as the referent object.

Unlike the above maritime strategies, the 2050 African Integrated Maritime Strategy (AIM Strategy) embraces the ideals of “security, in particular, human security.” The AIM strategy encourages the African member States to have the individual as the referent object. Thereby applying a human-centred approach to “foster increased wealth creation from Africa’s oceans and seas by developing a sustainable, thriving blue economy in a secure and environmentally sustainable manner.” Here, the referent object is the “individual” which means that the AIM strategy reifies the human security dimension of maritime security. As previously mentioned, human security is a broad concept that encompasses all the dimensions of maritime security. The resultant effect of the human dimension of the AIM strategy not only allows it to embrace all the dimensions of maritime security but also brings it in line with the 2030 Agenda on Sustainable Development. However, the impact of such a welcome development cannot be accessed following the lack of resources and expertise to implement the AIM strategy.

(2) Securitisation

As a result of the transboundary effect of maritime security challenges, maritime security is often understood as a ‘transnational task’ which requires joint State co-operation within the international communities. The need for an international co-operation was first echoed by the US, after the 9/11 attack when they recognised the complexities involved in maintaining good order at sea. Consequently, it led to the birth of a more widespread perception beyond the concept of sea power in the US. As Admiral Michael Mullen, Chief of Naval Operations for the US Navy, noted in 2006 “It is time to elevate the discussion of sea power. For far too long and in far too many ways, it has been about big-ship battles and high-tech weapons systems. Life is just not that simple anymore... we face entirely new challenges.” Hayes describes this development as a “co-operative global maritime security network that coordinates the activities of volunteer nations navies, coastguards and constabulary units.” This co-operative framework proposed by the US was largely criticised mostly as a result of other states suspicion of the US agenda.

Nevertheless, this political debate grew and arguably moved “the maritime environment” into the securitisation framework. Securitisation is a concept initially proposed by Buzan, Weaver, and de Wilde. They describe securitisation as “if by any means there is an argument about the priority and urgency of an existential threat, the securitising actor has managed to break free of procedures or rules he or she would otherwise be bound by, we are witnessing a case of securitisation.” Meaning, securitisation places a priority on the securitised issue, which legitimises the demand for extreme measures. The acceptance that an issue is an existential threat to a referent object makes that issue

202 The UK National Strategy for Maritime Security (n 5), defines maritime security as “the advancement and protection of the UK’s national interests, at home and abroad, through the active management of risks and opportunities in and from the maritime domain.”
206 Bueger (n 9) at 163.
207 C Bueger and T Edmond (n 14) at 1298.
209 Haynes at 197.
210 C Bueger and T Edmond (n 14) at 1298.
211 Buzan et al (n 20) at 25.
securitised.\textsuperscript{223} Even though security studies make no reference of maritime security as a dimension of security,\textsuperscript{224} answering the question of whether maritime security challenges are accepted as an existential threat will give a conclusive argument on the issue.

In 2019, due to the ongoing maritime security challenges, the UN Secretary-General report on oceans and the law of the sea noted that “… addressing criminal activities, including in the context of the broader category of transnational organised crimes at sea, remained a priority for the international community.”\textsuperscript{225} These criminal activities according to the UN Secretary Generals’ report are (1) piracy and armed robbery, (2) terrorist acts, (3) the illicit trafficking in arms and weapons of mass destruction, (4) the illicit trafficking in narcotics, (5) smuggling and trafficking of persons by sea, (6) illegal, unreported and unregulated fishing and, (7) intentional and unlawful damage to the marine environment.\textsuperscript{226} Also, Article 39 of the UN Charter places the duty to decide existential threat for the international community on the UN Security Council which according to this provision is ‘any threat to the peace, breach of the peace, or act of aggression.’\textsuperscript{227} On 5 February 2019, the UN Security Council held a ministerial debate on the theme “Transnational organised crime at sea as a threat to international peace and security”\textsuperscript{228} in reaction to a request by the Permanent Representative of Equatorial Guinea.\textsuperscript{229} Consequently, the UN Security Council reiterated that it recognises the transnational organised crimes at sea as a threat to international peace and security.\textsuperscript{230}

Furthermore, other international actors and states have also identified these threats. For instance, the EU extended the UN list to include inter alia cybersecurity, territorial maritime disputes, acts of aggression, armed conflict between states, potential impacts of natural disasters, extreme events and climate change on the maritime transport system.\textsuperscript{231} The US maritime strategy broadly categorises these concerning threats into five main maritime threats which are: Nation-State threats, terrorist threats, transnational criminal and piracy threats, environmental destruction and illegal seaborne immigration.

From the discussion above, it is evident that the illegal activities at sea constitute an existential threat that is widely accepted. According to the Vienna Convention on Law Treaties (VCLT) Article 2 “acceptance” is a States establishment on the international plane its consent to be bound by a treaty.\textsuperscript{232} All these existential threats are incorporated in several international treaties some such as United Nations Convention on Law of the Sea(UNCLOS) (with 168 parties) which refers to piracy as a universal threat and promotes the protection and preservation of the maritime environment.\textsuperscript{233} Others include, the United Nations Convention against Transnational Organised Crimes (with 190 parties)

\textsuperscript{223} Buzan et al (n 20) 25.
\textsuperscript{224} C Beuger (n 9) at 161.
\textsuperscript{227} Charter of the United Nations (UN Charter) (opened for signature 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.
\textsuperscript{230} European Union Maritime Security Strategy (n 4) at 3-4.
which deals with people smuggling, human trafficking and illicit manufacturing of and trafficking in firearms.234 Also, the United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances (190 parties) and, the SUA Convention (166 parties) and it’s 2005 protocol which deals with unlawful acts that threaten the safety of maritime navigation.235

Against this backdrop, it appears a vast majority of states have accepted the illegal activities at sea mentioned in the UN Secretary-general reports as existential threats. The acceptance leads to the conclusion that securitisation of the maritime environment has taken place. Securitisation is a “welcome development” in the maritime environment because it places maritime security as a priority in the international community.236 However, one cannot ignore the adverse effects of securitisation as it promotes “extreme measures” and does not always lead to “optimal and sustainable solution.”237 For example, reports show that the extreme measures of strengthening border control and criminalising humanitarian assistance at sea to address illegal migration (people smuggling and trafficking in human persons) have led to an increase in criminal activities and migrant deaths.238 States have also violated human rights provisions during the detention and transfer of piracy suspects.239

D. HUMAN RIGHTS FRAMEWORK IN MARITIME SECURITY

Although the maritime environment is “securitised”, the human right perspective to maritime security cannot be ignored. Article 53 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARISWA) inter alia provides that countermeasures shall not affect the obligations for the protection of fundamental human rights and obligation of a humanitarian character.240 The International Court of Justice (ICJ) in the Gabčíkovo-Nagymaros Project case, observes that “the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question”.241 International human rights are guaranteed to all individuals. The ICJ in the case concerning Ahmadou Sadio Diallo stated that:

Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope ratione materiae of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, inter alia, internationally guaranteed human rights.242

Furthermore, there have been developments which illustrates the existence of the human rights framework in maritime security. The UN debates concerning the relationship between measures to combat terrorism and the respect for fundamental human rights ushered in modifications to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA

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236 C Bueger (n 9) at 161.
237 C Bueger (n 9) at 162.
238 S Carrera et al.
240 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts UN Doc A/56/10 Supplement No, GA 56TH Session (2001) Hereinafter referred to as “ARISWA”. Article 53 ARISWA provides that Countermeasures shall not affect: (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (b) obligations for the protection of fundamental human rights; (c) obligations of a humanitarian character prohibiting reprisals; (d) other obligations under peremptory norms of general international law.
Convention) to include human rights, refugee law, and international humanitarian law. Also, the UN Security Council, in its binding resolutions on piracy off the coasts of Somalia, always requires States countermeasures to be compliant with international human rights law.

The Geneva Declaration on Human rights at sea points out four fundamental principles on the application of human rights at sea:

(a) Human rights apply at sea to exactly the same degree and extent that they do on land
(b) All persons at sea, without any distinction, enjoy human rights at sea
(c) There are no maritime specific rules allowing derogation from human rights standards
(d) All human rights established under treaty and customary international law must be respected at sea

All the above principles seem practicable, but, the non-consideration of the nature of the maritime environment when fulfilling the first fundamental principle may create a gap. Already there is a real difficulty in harmonising the human rights considerations with maritime law enforcement operations. This difficulty is because of the friction between the procedural rights and safeguards under the human rights framework and law enforcement operations at sea. A clear example of this is inferable from the right to liberty and security. This right will be discussed below in relation to the European Convention on Human Rights because the ECHR has the most record of cases addressing the issue.

(1) The Right to Liberty and Security

The right to liberty and security is a fundamental right enshrined in various human rights provisions. Deprivation of liberty consists of “a measure by a public authority by which a person is kept against his or her own will for a certain amount of time within a limited space and hindered by force, or a threat of force, from leaving that space.

This right to liberty and security entails the right to be brought promptly before a judge contained in Article 5(3) ECHR. It provides that:

Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to a release pending trial.

The interpretation of the phrase “brought promptly before a judge” is beset with uncertainties when applied in the maritime context and often violated by States during maritime law enforcement operations. In Ali Samatar and Others v. France, A dozen men armed with assault rifles and rocket

246 The Geneva Declaration on Human Rights at 3.
247 B Wilson (n 7)
248 B Wilson at 246 points out that “The disparate opinions in Medvedyev underline the challenges of judicially harmonizing human rights considerations with maritime law enforcement operations”.
249 A Petrig (n 55) at 139.
250 See, Article 3 of Universal Declaration on Human Rights, Article 5 of the European Convention on Human Rights, Article 9 of the International Covenant on Civil and Political Rights etc.
251 A Petrig (n 55) at 157.
launchers seized a cruise ship flying the French flag and, took its crew of hostage. In reaction to this, the French Government obtained the consent of the Somali Transitional Federal Government (TFG) to enter into Somali territorial waters to take all necessary measures - including appropriate use of force. The applicants were placed under French military control before being put on a military aircraft on 15 April, around 3 p.m. The plane landed in France at around on 16 April 2008, and the suspects were arraigned on 18 April 2008. The French Court held in favour of the French Government. However, the ECHR overturned the judgement and held that there was a violation of Article 5(3) ECHR. The Court ordered the release of the applicants, and the French Government had to pay damages.

A similar situation happened in Hassan and Others v. France. In this case, the ECHR held unanimously, that there was a breach of Article 5(3) considering that the suspects were brought before a judge six days and sixteen hours after their detention in Djibouti military base and subsequent transfer to France. The Court ordered the French Government to pay damages to the applicants. In Rigopoulos v Spain, as well as Medvedyev v France, ships flying the Panamanian and the Cambodian flags, respectively, were intercepted on the high seas. In the Rigopoulos case, the Spanish navy intercepted the Panamanian ship while in the Medvedyev case the Cambodian flagship was intercepted by the French navy for suspicion of drug trafficking. In both cases, vast quantities of drugs were found on board and thrown overboard. The members of the crew were taken into custody on the Navy ship, brought to a port of the arresting state, and later submitted to criminal proceedings. The time spent between boarding and arraignment before a judge was 16 days in the Rigopoulos case and 13 days in the Medvedyev case. In both cases, the crew members claimed that the state detaining them had violated Article 5(1) and Article 5(3) of the ECHR.

In the above cases, the Court held that there was a violation of Article 5(1) ECHR. In Rigopoulos v Spain, the Court stated that “the applicant was undoubtedly deprived of his liberty, since he was detained on a vessel belonging to the Spanish customs and that detention lasted for sixteen days.” In Medvedyev v France, the Court stated that:

While it is true that the applicants’ movements prior to the boarding of the Winner were already confined to the physical boundaries of the ship, so that there was a de facto restriction on their freedom to come and go, it cannot be said, as the Government submitted, that the measures taken after the ship was boarded merely placed a restriction on their freedom of movement. The crew members were placed under the control of the French special forces and confined to their cabins during the voyage. True, the Government maintained that during the voyage, the restrictions were relaxed. In the Court’s view that does not alter the fact that the applicants were deprived of their liberty throughout the voyage as the ship’s course was imposed by the French forces.

Also, in the above cases, the Court held that there was no violation of Article 5(3) because it recognised in the Rigopoulos and Medvedyev cases that only “exceptional circumstances” could justify such
prolonged detention.\textsuperscript{262} Therefore, the Court noted in the Medvedyev judgement that “it was materially impossible to bring the applicant ‘physically’ before such authority any sooner.”\textsuperscript{263}

These cases demonstrate the relevance of maritime circumstances in interpreting human rights. Nonetheless, the cases also highlight the challenges in harmonising human rights considerations with maritime law enforcement operations.\textsuperscript{264} In Medvedyev, there are two parts of the dissenting opinion of the judges. The first part expresses the view that there is no violation of Article 5(1) ECHR as there was a legal basis for the detention of the suspects.\textsuperscript{265} Article 5(1) (c) ECHR provides the legal basis for the detention of suspects to bring them before the competent legal authority. However, the case is different arising from maritime enforcement operations because the elements of such an operation automatically qualify it as a violation of the right to liberty.\textsuperscript{266} Accordingly, the ECtHR in Medvedyev held that the restriction of the detained suspects on the arresting ship constituted a deprivation of liberty.\textsuperscript{267} The second part expresses the view that there was a violation of Article 5(3) ECHR as “wholly exceptional circumstances” should not justify the unnecessary abridgement of fundamental human rights.\textsuperscript{268} Such opinion does not recognise the nature of the maritime environment as key in the interpretation of human rights at sea.

E. COMMON CONCERN: A PARADIGM SHIFT TOWARDS HUMAN SECURITY

The term “common concern” is also known as “community interest”, “common interest”, “common good.”\textsuperscript{269} The term “common concern” refers to a “consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or inter se but is recognised and sanctioned by international law as a matter of concern to all States”.\textsuperscript{270} Friedmann famously observed that an emerging international law of co-operation had begun to modify the classical law of co-existence of states significantly.\textsuperscript{271} With maritime security, some States have specific needs or interests that coexist with the interests of other States.\textsuperscript{272} However, geographical factors influence States interests as some states are closer than others and require stricter security measure in dealing with same (for example, irregular migration affects Italy and Spain more in Europe because of their

\textsuperscript{262} Ibid.
\textsuperscript{263} Ibid, para 67.
\textsuperscript{264} B Wilson, (n 7) at 246.
\textsuperscript{265} Medvedyev case (n 75) joint partly dissenting opinion of Judges Costa, Casadavell, Birsan, Garlicki, Hajiye, Šikuta and Nicolaou.
\textsuperscript{267} Medvedyev case (n 75) para 74-5.
\textsuperscript{268} Ibid, joint partly dissenting opinion of Judges Tulkens, Bonello, Zupančič, Fura, Spielmann, Tsotsoria, Power and Poalelungi para 5-7- expresses the view that the Medvedyev case is different from the Rigopoulos case as the circumstances of the case are different, as the delay explains the reason for the delay and does not justify it.
\textsuperscript{270} Y Tanaka (2011) at 332.
proximity to the Mediterranean hotspots). Nonetheless, the co-operative framework creates some form of limit to individual State actions.

The common interest in tackling maritime security challenges positions maritime security at the centre of its interrelated dimensions, i.e. national security, marine environment, blue-economy, and human security. The positioning of maritime security at the centre continues a state-centred focus as the state remains the referent object. Although partly due to the state-centredness of international law which creates a “world fit for government”, Nonetheless, it is all changing as the structure of international law is expanding to fit the common concern for humanity. Justice Weeramantry, in his separate opinion in *Gabcikovo/Nagymaros*, opines that:

we have entered an era of international law in which international law subserves not only the interests of individual States but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare.

Even, UNCLOS, which is a very state-oriented legal instrument, recognises that an essential contribution of the Convention is the “maintenance of peace, justice and progress for all peoples of the world.” In addition, UNCLOS references the protection of human life and sustainable human habitation.

The expansion of activities and human presence at sea has led to the concern over the protection of “human element” at sea. The use of the word human element is synonymous to the goal of global human security. In *Medvedev v France*, the ECtHR observed that the unique nature of the maritime environment should not justify an area outside the law where no legal system protects individuals. Consequently, there has to be a legal system that guarantees people are protected even at sea. Some have argued that at the core of law and security is the shared object to protect people which is the same objective of human rights law and human security. Papanicopulu illustrates that the international protection of people is an emerging legal regime which allows for the systematic integration of all legal norms and rules for the protection of people. People are the primary beneficiaries of the law. The Inter-American Court of Human Rights in its advisory opinion’s observes that:

modern human rights treaties… object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality... the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individual within their jurisdiction.

Similarly, as expressed by the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v Tadic*:

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273 B Germond (n 8) at 138.
274 S Kopela, (n 85) at 108-11; see also J Brunnée, ‘Common areas, common heritage, and common concern’ In D Bodansky, J Brunnée, and E Hey (eds) the handbook of International environmental law (Oxford University press, 2007) at 566 points out that common concern “signals that State’s freedom of action may be subject to limits…”.
275 C Bueger (n 9).
277 *Gabcikovo-Nagymaros Project case* (n 52) para 118.
278 UNCLOS, first Recital in the preamble.
279 UNCLOS, Article 121 and Article 146.
281 Medvedev and others v France (n 76) para 81.
282 Papanicopulu at 227-35; see also B V Tigerstrom (n 23) at 72.
283 I Papanicopulu, ‘International Law and the Protection of People at Sea’ (Oxford University Press, 2018) at 227- 35.
A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually, the maximum of the Roman law *hominum causa onne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.285

Also, even from a maritime security perspective, there is an acknowledgement of the human dimension. For instance, part of the guiding principles of the EU Maritime Security strategy is the respect for rules and principles under international, which includes international human rights law.286 Similarly, the AIM strategy refers to human rights, albeit only with respect to the fight against maritime terrorism, human trafficking and human smuggling.287 The AIM strategy, unlike the EU, explicitly embraces the idea of human security which places people at the core of its mission and vision.288 More recently, in reaction to irregular migration, the vast majority of UN member states adopted the Global Compact for Migration (GCM- a non-legally binding document) which is deeply rooted in the 2030 sustainable development agenda.289 The GCM is a document that has a strong human dimension as it places individuals at its core.290 The significance of 152 states adoption of the GCM out of the 193 UN member States shows the paradigm shift from securitised approach to a human-centred approach in dealing with irregular migration as a maritime security challenge.

In light of the friction between the securitised framework and the human rights framework at sea, the paradigm shift from the common interest in maritime security to the common interest in the protection of people at sea is arguably a better means in achieving the proposed balance between the two frameworks.291 In achieving the proposed balance, human security becomes the core of the maritime security framework which immediately causes the individual to be the referent object.

(1) A Common Concern for Humanity: Human Security and Human Rights

Considering that the protection of people is the goal of human security and human rights framework, why then is the human security framework more favourable? First, the human rights framework compared to the concept of human security is not dynamic to accommodate the intrinsic nature of the maritime environment.292 The human rights provisions such as the right to liberty are almost unachievable during law enforcement operation at sea (such as counter-piracy operations). A deprivation of liberty under the ECHR entails the spatial, coercion and time elements which are fulfilled when a suspect is detained on board a law enforcement vessel (spatial element) and when the suspect has no free will to leave the vessel (coercion element).293 Also, when such a suspect is not brought promptly before the judge (time element).294 Most high seas operations are conducted by law enforcement vessels, and suspects are subsequently detained on such vessels and traversing the sea takes away the time to be brought promptly before the judge. Therefore, there is almost no room to escape liability for violating the right to liberty during a law enforcement operation at sea.

A human security approach will consider the rights and duties of all people involved in the law enforcement operation at sea, which includes the suspects, state agents and victims. An example of the outcome of a human security approach is the *Vassis and others v. France* case.295 The issue was whether

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286 European Union Maritime Security Strategy (n 4) 5.
287 AIM strategy (n 29).
288 AIM strategy para 7.
290 GCM para 15.
291 Papanicopoulou (n 91) at 227-32.
293 A Petrig (n 49) at 157-65.
294 Petrig at 160-66. The concept of the time element is not settled but also regarded as relevant under ECHR.
295 (Application no 62736/09) [2013] ECHR 795.
ECHR Article 5(3) ’s requirement was violated based on the 18-day transit to the port, and the subsequent 48 hours upon arrival at the port. The French Government submitted it was “materially impossible to physically bring the applicants before the judicial authority any more promptly” and upon arrival at the port, the delay was due to the “number of persons concerned and the need for interpreters for the different acts and steps in the proceedings.” The ECtHR held that the 18-day transit was not more than necessary, but the 48 hours delay upon arrival was not justifiable. For this judgment, Wilson points out that Vassis case creates a balance between human rights and maritime law enforcement.

Second, since the human rights framework is not dynamic, it does not cover the protection of people facing new existential threats such as climate change. The human security framework is broad and can deal with new existential threats to maritime security and even human rights. Paris criticises the concept of human security for its “expansiveness and ambiguity” but acknowledges that it allows studies that “explores the particular conditions that affect the survival of individuals, groups and societies.” However, this same nature of human security is the reason it complements the human rights framework.

Finally, the human security framework deals with the protection of all people which leads to a broader spread State responsibility, unlike the human rights framework that is limited to people just within the jurisdiction of the state. Unlike the concept of State responsibility or attribution, the notion of jurisdiction operates alongside State obligation. Meaning that states are only obligated to fulfil their international obligation in areas within their jurisdiction which also includes de facto and de jure extraterritorial jurisdiction. In Hirsyi Jamaa and others v. Italy, the Italian Revenue Police and Coastguard ships at 35 nm South of Lampedusa which is the Maltese SAR’s area intercepted a ship carrying immigrants from Somalia and Eritrea who fled Libya. The intercepted persons were brought on board the Italian naval ship and later handed over to the Libyan authorities as a result of their bilateral agreements. The applicants complained about a violation of Article 3 of the ECHR (prohibition of torture and inhuman treatment) and Article 4 of the Fourth Protocol (prohibition of collective expulsion). The Italian Government submitted that its action was an execution of a relevant agreement with Libya and that there was no jurisdictional link. The ECtHR held that there was a jurisdictional link. Therefore, Italy violated Article 3 of the ECHR and Art 4 of Protocol 4 to the Convention. This case iterates that the concept of jurisdiction is the foundation in which state obligation applies. Meaning, for a state to escape fulfilling its obligation, it has to severe the jurisdictional link, such as the argument of the Italian Government in the Hirsyi Jamaa case.

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296 Ibid.
297 B Wilson (n 6) 267- Points out that “necessary high seas operations may constitute wholly exceptional circumstances in the context of transit times yet imposing strict time constraints regarding when a suspect is brought before a judge or magistrate once ashore.”
298 R E Howard-Hassmann (n 109) at 80-90.
300 R E. Howard-Hassmann (n 100) at 106-11.
302 Case of Hirsyi Jamaa and others v Italy (Application no 27765/09) [2012] ECHR.
303 Ibid.
304 Ibid.
305 Ibid para 65- the Italian authorities argued that the "rescue" operation lasted no more than ten hours, within which applicants were provided with the necessary humanitarian and medical assistance, and that since the State’s military personnel “had in no circumstances used violence; (...) had not boarded the boats and had not used weapons” (as they did in Medvedyev), the State did not exercise full and exclusive control over the applicants, therefore, the applicants did not fall under the Italian jurisdiction.


F. CONCLUSION

The idea of human security is the protection of all people, which is similar to the idea of human rights law. However, the non-dynamic nature and the concept of jurisdiction stymies the human rights framework to ensure better protection of all people. Conversely, the human security framework being a maritime security dimension and a complementary concept to human rights law offers protection to all people. For the reason that the human security framework has the securitisation framework checked and balanced with the right based framework. Therefore, it brings in the perfect balance between both frameworks while maintaining the individual as the referent object in maritime security.

The human security framework will cause states to adjust their state-centric maritime security strategies and incorporate a human-centred approach as done in the 2050 AIM Strategy. The benefit of this is that it creates a sustainable and long-lasting strategy because of the dynamic and all-inclusive nature of a human security framework. On this basis, the human security framework leads to a sustainable ‘welcome development’, unlike the securitised framework, which promotes short term reaction. Consequently, it will bring all States maritime security strategy and policies in line with the Sustainable Development Goals.
AN EVALUATION OF JUS QUAESITUM TERTIO’S
REFORMATION IN THEORY AND IN PRACTICE

Helena Elizabeth Wilson*

A. THE CONTROVERSY OF JUS QUAESITUM TERTIO

B. METHODS OF REFORM
(1) Comparing the justifications for each approach
(2) Replanting common law roots into legislative soil

C. THE 2017 ACT: LIVING UP TO ITS PURPOSE
(a) Does the Act make the necessary changes relating to irrevocability in a successful manner?
(b) Going against the grain: an appropriate adoption of the English elements?
(c) Does the 2017 Act sit well when not viewed in isolation to Scotland?

D. CONCLUSION

A. THE CONTROVERSY OF JUS QUAESITUM TERTIO

Jus quaesitum tertio (‘JQT’) is a Scottish common law doctrine which was in force until the Contract (Third Party Rights) (Scotland) Act 2017 (‘the 2017 Act’) replaced it.306 The doctrine allows third parties to enforce an obligation owed to them under a contract between contractual parties.307 JQT therefore refers to the law governing third party rights.

The common law of JQT developed with contradictory case outcomes. The most obvious example relates to whether irrevocability is a required condition to create an enforceable third-party right. Stair and Grotius disagreed on whether it is a requirement or not.308 Stair thought that a third-party right is irrevocable by nature, in the same way that a unilateral promise is binding as a result of being made. Therefore, the idea of contracting parties choosing to rescind the agreement does not fit with an enforceable third-party right.309 Grotius, on the other hand, believed that a revocable agreement can give rise to a third-party right, if the intention itself has not been revoked by the time the third-party right is enforced.310 He also believed that, upon the fulfilment of certain steps, for example, upon third-party acceptance,311 even a revoked agreement will not make the third-party right unenforceable. Although both Grotius’ and Stair’s ideas each class irrevocability as a consequence and not as a condition, the key difference is whether it is a constant factor or a mere possibility.

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306 Contract (Third Party Rights) (Scotland) Act 2017 s 11 (henceforth ‘2017 Act’).
309 Stair, Inst 1.10.5.
310 Grotius, De Jure 2.11.18.
311 Ibid., 2.11.14.
In 1920, the court in *Carmichael v Carmichael’s Executrix* attempted, wrongly, to apply Stair’s line of thinking. Lord Dunedin thereby -party right. Lord Dunedin’s test garnered criticism because *Love v Amalgamated Society of Lithographic Printers* decided previously, held that JQT was constituted despite the existence of a clause in the contract that permitted modification or cancellation. *Kelly v Cornhill Insurance Company* decided after *Carmichael*, upheld this. Both *Love* and *Kelly* followed Grotius’ school of thought, yet *Carmichael* was not overruled, *Kelly* Since *Carmichael*’s reasoning, and thereby the law of JQT, made third party rights confusing and unworkable, it became unattractive to those who wish to use third-party rights law. To avoid using JQT, parties opted instead to use collateral warranty agreements, or to have the law of a different jurisdiction govern their contracts.

As a result of these considerations, the Scottish Law Commission (‘SLC’) decided to review the law relating to third-party rights. They suggested to reform JQT through legislation and provided a draft bill. The bill was taken up and implemented through the 2017 Act. This move sparked debate: the necessity of reform was widely accepted, but the method used to achieve that reform less so. Some would say that judicial reform should have been the chosen option, whilst others believe that legislation was the best solution.

The approach chosen by the SLC was the best method of reform for third-party rights in Scotland. To explain the justifications for this position, this article will answer two questions. Firstly, why should the legislature reform JQT instead of the courts? Secondly, how can JQT be reformed outwith the courts, given its common law roots?

Moreover, the 2017 Act is an effective implementation of the desired legislative reform, albeit with some areas needing improvement. This article will first argue that the Act clarifies the role of irrevocability in third-party rights and does so to a greater extent than the Contracts (Rights of Third Parties) Act 1999 (‘the 1999 Act’), apart from some minor exceptions. Secondly, by looking to the 1999 Act’s policies, its influence on the 2017 Act is assessed. On the one hand, terminology used by the 1999 Act was, correctly, not adopted in the 2017 Act. On the other hand, the 2017 Act was correct to adopt the 1999 Act’s policy on defences of the contracting party. Finally, the 2017 Act is considered in an international context focusing on arbitration, and possible changes which may improve its harmony with international law.

**B. METHODS OF REFORM**

(1) **Comparing the justifications for each approach**

The inclination of some towards judicial reform in Scotland may draw from a pre-devolution distrust of what the alternative – legislation – would mean for Scots law in practice. There was concern that

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312 1920 SC (HL) 195.
314 *Carmichael v Carmichael’s Executrix* 1920 SC (HL) 195 at 201.
315 MacQueen (n 8) at 245-250; *Discussion Paper on Review of Contract Law Discussion Paper on Third Party Rights in contract* (Scot Law Com DP No 157, 2014) para 2.64 (henceforth ‘Discussion Paper’).
317 1964 SC (HL) 46.
319 Discussion Paper (n 10) para 1.28.
320 Report (n 13) para 1.1.
321 Discussion Paper (n 10) Appendix A.
323 Report (n 13) para 1.37.
English legal approaches would be used to replace Scottish ones, should flaws be found, causing an undesired Anglicisation of Scots law. 325 ‘Copy and pasting’ English legal doctrines into Scotland could unintentionally and unforeseeably distort other areas of Scots law which are not perceived as being flawed. Although devolution has calmed these worries somewhat, it is still important to ensure that Scots law does not become absorbed into English law. 326 This is especially so given the nature of the current political climate. 327 Time may have passed significantly since pre-devolution, but there are still many who are protective of maintaining the separate identities of Scotland and England. In order to convince these individuals that legislation was the right choice, the SLC have needed to be cautious in their choices for reform: any influence from the 1999 Act which would contribute to a change in Scots law, and which has been implemented by the 2017 Act, must have its justifications at the ready. What can be said about this, however, is that if policies are adopted from English practice, and are justified and suitable for Scotland, then there is no practical disadvantage incurred in using legislation, or in basing an Act on an English model.

Turning to the practical considerations, the legislature is far more appealing than the judiciary as an option for reform, particularly in comparison to England, so fewer cases arise. Secondly, judicial reform needs a live case in order to be heard at the court, which has the authority to overrule previous case law on a subject. Thirdly, litigation can be expensive and time-consuming, so parties may not pursue an appeal, or they may settle out of court. Even if these difficulties are overcome, there is no guarantee that a court will rule in favour of change. It may think that the law is correct as it stands or that it is an issue for the legislature to reform. Alternatively, a court may rule in favour of change, but the result might not be the change desired or have negative consequences of its own. Legislation provides the solution. There is no need to wait for the right case to come along. There is no need for private parties to dig deep into their personal pockets. There is no need to hold breath for the judiciary to reform a legal principle in a way that is correct, clear and complete.

Some might respond to the championing of legislative reform with the argument that if a legal issue needs reform but lacks characteristics which make it a priority in party politics, the legislature may not pursue it at all. 328 It is worth pointing out that this is where the SLC steps in. Using its expertise, it can push forward legal areas that are in the most need of reform and make them seem appealing to the legislature. 329 Granted, although some recommendations are not taken up, the SLC’s recommendation for third-party rights was. So, although it is a legitimate argument which promotes judicial reform or, at the very least, which identifies weak areas in legislative reform, it is not relevant to third-party rights reform specifically.

The practical disadvantages of leaving third-party rights in the hands of the judiciary have been previously demonstrated. The Dunedin test, created in Carmichael, greatly distorted JQT, making the doctrine confusing and unworkable. 330 This case, decided in front of the House of Lords, heightened the threshold required to be met for its ruling to be overturned. 331 Since one of the consequences of the Dunedin test was that fewer parties were using Scots law to govern contracts conferring third party rights, there were even fewer possible cases which could be litigated on the ruling. In fact, only one


329 Law Commissions Act 1965 s 3(1); Scottish Law Commission "About Us“ available at https://www.scotlawcom.gov.uk/about-us/.

330 Report (n 13) paras 2.36, 2.38.

case came into the hands of the House of Lords: Allan’s Trustees v Inland Revenue.\(^{332}\) Remarkably, the House of Lords let go of this opportunity for reform.\(^{333}\) These factors, combined with the other challenges presented by the court system, meant that the Carmichael decision stood undefeated for 97 years. The 2017 Act cannot, based on this background, be viewed as less worthy an approach than judicial reform. Who knows how long we might have had to wait for another case to come along, were the 2017 Act not implemented?

(2) Replanting common law roots into legislative soil

The origin of JQT means that there are some challenges to navigate with legislative reform. JQT has always been rooted firmly in common law.\(^{334}\) The solutions for JQT are, therefore, contained within common law principles\(^{335}\) which, it is important to note, reach wider than third party rights, such as the law of conditions. The approach taken by the SLC was that the 2017 Act should refer to the relevant common law principles, making only the necessary changes.\(^{336}\) hoice, it was not the only route available.

Professor Andrew Burrows offers an alternative solution to the “principle of legislative economy”\(^{337}\) restatements.\(^{338}\) Burrows discusses his idea in relation to English common law. Nevertheless, because third-party rights have a common law source, his ideas can be considered, in relation to Scotland, within the confines of third-party rights. Burrows describes his idea as an alternative to legislative reform, acting similarly to a non-binding code. The difference between restatements and a code is that the latter has the luxury of straying away from the law as it currently stands, to impose an ideal. Restatements, on the other hand, are heavily bound by that which already exists, making only small changes.\(^{339}\) The changes which are made within the restatements are justified as being a “principled interpretation of the law”,\(^{340}\) although that may require going beyond what existing cases have set out.

Restatements could have met JQT’s reformation requirements. For example, the restatement could have clarified that irrevocability is not a condition of third-party rights, but a consequence. Arguably, this hypothetical change could be said to alter the Carmichael decision completely, instead of merely going further than existing cases. However, Burrows makes the point that a restatement might include legal stages which could then go on to be confirmed by a UK Supreme Court decision.\(^{341}\) As a result, a restatement would have been an alternative non-common law solution. Parties relying on no condition of irrevocability for the creation of a third-party right would have had increased certainty that, should it be litigated on, courts would find in their favour.

The Burrows alternative is interesting but has some disadvantages when compared to legislation. Firstly, although there would be increased certainty on what court decisions might look like after a restatement, that certainty is even greater with legislation. A restatement does not bind the court and acts merely as a persuasive tool.\(^{342}\) Legislation is binding, and the courts may only interpret it or fill in any gaps. Secondly, although a restatement is valuable, and likely to contain sound guidance moulded by academic and expert input, it might only gain credibility amongst non-lawyers after confirmation of its content by the courts. However, that confirmatory case could take a long time to arise. Furthermore, usage of Scots law for third-party rights will not necessarily increase if users are

\(^{332}\) 1971 SC (HL) 45.

\(^{333}\) MacQueen (n 28).

\(^{334}\) Stair (n 4).

\(^{335}\) Macqueen (n 28).

\(^{336}\) Report (n 13) paras 1.38, 1.45, 6.45.

\(^{337}\) Ibid. para 1.38.


\(^{339}\) Ibid. at 39.

\(^{340}\) Ibid. at 39.

\(^{341}\) Ibid. at 38.

\(^{342}\) Ibid. at 37.
wary of it, which does nothing to meet the SLC’s motivation for reform in the first place.\footnote{Discussion Paper (n 10) para 1.28.} Therefore, if it were only possible to have legislation which distorted common law principles, then Burrows’ approach would be valuable. Avoiding distortion to common law principles would be more important than the issues which a restatement does not address, as listed above. However, this is not the case, and therefore the SLC’s approach remains the preferable of the two.

C. THE 2017 ACT: LIVING UP TO ITS PURPOSE

(1) Does the Act make the necessary changes relating to irrevocability in a successful manner?

(a) The new role of irrevocability

One key focus of the 2017 Act is to reverse the Carmichael ruling on irrevocability, and to clarify which situations do indeed make an undertaking to confer a third-party right irrevocable.\footnote{Report (n 13) para 1.6.} Section 2(4) says that a third-party right can arise even if (a) the undertaking may be cancelled or modified, or even if (b) there has been no delivery, intimation or communication of the undertaking to the person. The function of section 2(4)(a) is to change the position on irrevocability which was set by Carmichael. Under the 2017 Act, an express statement of revocability can still create an enforceable third-party right. The function of section 2(4)(b) is to remove any remaining confusion about implied irrevocability. Section 3(1) supports section 2(4) by stating that an undertaking which gives rise to a third-party right can be modified or cancelled. However, should the parties wish their undertaking to be irrevocable, then they are permitted by section 3(2) to state as much in the contract. These sections emphasise the freedom of the contracting parties and indicate that the rules in the Act are default, not obligatory.\footnote{Ibid. para 1.38.}

Looking at sections 4, 5 and 6, the 2017 Act lists various circumstances whereby a revocable undertaking becomes irrevocable. The difference between this possibility in the Act and the Dunedin test in Carmichael is that the Act makes irrevocability a consequence of the parties’ steps, rather than a condition of the right’s creation.

The 2017 Act describes the position on irrevocability in relation to third party rights very clearly. Having no gaps means that there is no confusion about whether common law tests, such as the one in Carmichael, apply. As well as including all the necessary information, the 2017 Act provides in the 1999 Act. However, the sections are much shorter. The structure offered by the 2017 Act is more advantageous than the 1999 Act because it is easier for users to identify the information most relevant to them by looking at the section headings. As a result, they may feel it is easier to understand the Scots law on third-party rights and feel inclined to use it. Overall, the 2017 Act achieves the SLC’s ambition to create rules on third party rights which “are easy to find” and “clear to use”.\footnote{Ibid. para 1.7.} But are the rules “suitable to meet the needs of those who wish to use them”?\footnote{Ibid. para 1.7.}

(b) From revocable to irrevocable: acceptance

The Act may get across the policy decisions of the SLC on irrevocability in an effective way, but it is important to check whether these policy decisions were the best choices in the first place. The 1999 Act contains different conditions to the Scottish 2017 Act, so the choices can be directly compared and evaluated.

Acceptance by the third party of their conferred right to create irrevocability is one example of where the 2017 Act and the 1999 Act differ. The 1999 Act provides that if the third party accepts their
right whilst making the contracting parties aware of their acceptance,\textsuperscript{348} and there is no express provision in the contract which permits the contracting parties to cancel or modify the agreement,\textsuperscript{349} then the third-party right is enforceable regardless of if the contracting parties do decide to modify or cancel the agreement. This is in line with the UNIDROIT position.\textsuperscript{350} On the other hand, the 2017 Act mirrors the DCFR\textsuperscript{351} and acceptance is not listed as a step which creates irrevocability. One reason for this is that acceptance is not required for the constitution of the third-party right,\textsuperscript{352} so, to include it as a catalyst for irrevocability might be confusing.\textsuperscript{353} A second reason, closely related to the first, is that since acceptance is not required for constitution, it may always be implied that the third party accepts their right in principle (unless they expressly reject it). They simply choose when, and if, to enforce it in practice. This perspective makes an express acceptance less significant, and not a great enough justification for making the undertaking irrevocable. The 2017 Act is preferable to the 1999 Act on this point because it is clearer and more logical.

\textit{(c) From revocable to irrevocable: reliance}

Another instance of differing policy choice by the Acts, on situations which result in irrevocability, is to do with third party reliance on their right, and whether or not that reliance must be detrimental to the third party’s position. The 1999 Act has a comparably lower threshold than the 2017 Act. The third party must have relied on their right to enforce an obligation within the contract, with the contracting party under the duty to perform that obligation, either knowing about the reliance\textsuperscript{354} or having been reasonably expected to foresee the reliance.\textsuperscript{355} Contrastingly, the 2017 Act requires a demonstration of third-party reliance, in that the third party performs an act, or refrains from performing an act, which consequently affects their position to a material extent.\textsuperscript{356} To generate irrevocability, the performing of, or refraining from, the act must have been acquiesced by the contracting parties\textsuperscript{357}, or otherwise they must have been reasonably expected to foresee it.\textsuperscript{358} The Scottish threshold for irrevocability is higher than the English equivalent. One wonders if it is to ‘make up for’ the limits that JQT, through \textit{Carmichael}, placed on parties’ freedom to contract.\textsuperscript{359}

Professor Hugh Beale suggested that the 2017 Act’s drafting is sophisticated, and the 1999 Act comparably cruder. However, he also commented that the 2017 Act’s content is complicated and that the 1999 Act’s content is comparably simple.\textsuperscript{360} In response, the Minister of the Delegated Powers and Law Reform Committee on the Bill for the 2017 Act made the point that England has the luxury of introducing a new subject to their legal system whereas Scotland has to correct and simplify law which has existed for centuries.\textsuperscript{361} On balance, although simplicity is important to the 2017 Act, especially as regards understanding reliance and irrevocability, reform must also reflect common law principles as much as possible. These common law principles were should be considered as a disadvantage that cannot be helped.

One thing which could be changed to achieve simplicity in the concept of reliance, is a definition for the word “material”, to describe the extent of the effect on the third party in their reliance on their right being enforceable. It is used in sections 6(1)(c) and 6(2), with no explanation or reference

\textsuperscript{346} Contracts (Rights of Third Parties) Act 1999 s 2(1)(a) (henceforth ‘1999 Act’).
\textsuperscript{349} \textit{Ibid.} s 2(3)(a)
\textsuperscript{350} The UNIDROIT Principles of International Commercial Contracts 2010 Art 5.2.6.
\textsuperscript{351} The Draft Common Frame of Reference (DCFR) 2009 II.-1:103(2)
\textsuperscript{352} Report (n 13) para 2.13.
\textsuperscript{353} Discussion Paper (n 10) para 6.20.
\textsuperscript{354} 1999 Act (n 46) s 2(1)(a).
\textsuperscript{355} \textit{Ibid.} s 2(1)(c).
\textsuperscript{356} 2017 Act (n 1) s 6(1)(a).
\textsuperscript{357} \textit{Ibid.} s 6(1)(d)(i).
\textsuperscript{358} \textit{Ibid.} s 6(1)(d)(ii).
\textsuperscript{359} Report (n 13) paras 2.16, 2.17.
\textsuperscript{360} Delegated Powers and Law Reform Committee, ‘Stage 1 Report on the Contract (Third Party Rights) (Scotland) Bill’ para 87.
\textsuperscript{361} \textit{Ibid.} para 90.
to a guide for what this might look like in a real situation. If the meaning of “material” were therefore litigated upon, then the standard set might be high. This risk produced by the lack of a definition is disadvantageous because it could mean that reliance, as a possible means to generate irrevocability, might be too difficult to achieve in practice, rendering the section effectively pointless.

(2) **Going against the grain: an appropriate adoption of the English elements?**

(a) Choosing whether to adopt English terminology

One element of JQT which added to confusion, although not as a result of its development through case law, is its terminology. *Jus quaesitum tertio* is already a mysterious phrase for non-lawyers. If they do not feel that they understand what it is, they are less inclined to use it. The 2017 Act borrows the phrase “third-party rights” from the 1999 Act as a replacement. This change is advantageous to the 2017 Act, because it emphasises that the reform of the law on third-party rights brings simplicity and workability.

Another instance of JQT terminology which the SLC reviewed was the characterisation of contractual provisions which confer a third-party right. The 1999 Act refers to a “term”, but this has the disadvantage of being potentially confusing for three reasons. Firstly, a third-party right can be created by more than one contractual term (in the sense of it being a clause in the contract). Secondly, one clause in the contract might impose several obligations, some of which are not intended to be for the benefit of the third party. Thirdly, “term” can be read as covering just one phrase relating to an obligation. For example, it could refer only to the phrase “to supply goods of satisfactory quality.” Therefore, the 1999 Act’s choice of terminology in this instance should not have been adopted in the 2017 Act, which was fortunately the case. The phrase chosen for the 2017 Act was “undertaking”. This solves the 1999 Act’s problem by making it clear that a third party can only enforce the parts of the provisions in the contract intended to benefit them.

Another reason that “undertaking” could be considered advantageous is that it helps to avoid a requirement for formal writing to constitute a third-party right. To explain in more detail, unilateral gratuitous obligations require formal writing under the Requirements of Writing (Scotland) Act 1995 section 1(2)(a)(ii). Unilateral obligations which are not gratuitous are, however, free from this requirement. At the moment, in Scots law, there is no agreement on whether a promise, by its nature, is always gratuitous. If a requirement of formal writing is considered to impose too great an inflexibility on third-party rights, then third-party rights should avoid any characterisation as a promise, and therefore as a possible unilateral gratuitous obligation. Use of the phrase “undertaking” achieves that avoidance. However, there is a disadvantage to using this phrase in the 2017 Act. The Faculty of Advocates pointed out that “undertaking” is a word which is neither used in Scottish nor in international legal practice. Since the word is unfamiliar, it has no settled definition. As a result, litigation is likely to follow, which is undesirable if it could have been clarified easily enough within the Act. The reason given for not making a different choice within the 2017 Act is that there are some descriptions of what

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363 *Report* (n 13) para 1.4.
365 *Discussion Paper* (n 10) para 7.33.
366 *Report* (n 13) para 7.18.
368 Note that the writer evaluates if the choice not to have formal writing was correct later on.
369 Requirements of Writing (Scotland) Act 1995 s 1(1).
370 For arguments by who support the idea of a promise as only gratuitous, look to: H L MacQueen, “Constitution and Proof of Gratuitous Obligations” 1986 SLT (News) 1 at 2; M Hogg, *Obligations* (2nd edn, 2006) paras 2.06-2.11. For arguments that promises can also be non-gratuitous or onerous, look to: J Thomson, “Promises and the Requirement of Writing” 1997 SLT (News) 284; W McBryde, “Promises in Scots Law” (1993) 42 International and Comparative Law Quarterly 48.
371 Delegated Powers and Law Reform Committee (n 58) para 80.
it includes in sections 2(5) and 2(6). However, these descriptions may not be enough to minimise the risk of litigation.

Overall, the adoption of the 1999 Act’s phrase “third-party rights” to replace “\textit{jus quaesitum tertio}” and the decision not to adopt its reference to the third party enforcing a “term of the contract” are justified. The decision to use “undertaking” in the 2017 Act is agreeable, as it solves the issue of confusion which the 1999 Act has. It is also advantageous for the reinforcement of the policy that no formal writing is required to confer a third-party right. Unfamiliarity with the word to Scottish and international legal practice could be settled with proper explanation of what it entails. Therefore, a definition of “undertaking” ought to be included within the 2017 Act. Consequently, most cause for litigation on this word due to its unfamiliarity would be met.

\textit{(b) Defences of the contracting party}

An element of the English 1999 Act which has influenced the Scottish 2017 Act is the scope of defences available to a contracting party, against a third-party action. The approach in the 1999 Act was chosen over the one taken by the DCFR, UNIDROIT, PICC and CESL, and was against the views of Scottish writers.\textsuperscript{373} Despite the hesitancy from so many sources, it shall be argued that the adoption of the English idea was correct.

The approach taken by the international instruments, and favoured by Scottish writers, is for a contracting party, obligated to perform under the third-party right, to have available to him all the defences which he would have against the other contracting party.\textsuperscript{374} For example, if the contract is void(able) due to defective formation, then the third-party right is also void(able). Further, if the contract is void due to illegality, then the third-party right is also void. It should be noted that there is a possible exception: if the third-party right is based on provisions in the contract which are not illegal. Bankton agreed with this line of reasoning and emphasised the dependence of the third-party right on the contract.\textsuperscript{375} Since the third-party right has a high degree of dependence, it made sense to him that their fates are intertwined.

The 1999 Act states that the contracting party who is obligated to perform may only use defences against the third party which he would have against the other contracting party, if they are relevant to the third-party right specifically.\textsuperscript{376} There are practical advantages to narrowing the scope of such available defences. For example, if the contract is frustrated by supervening events, then the third-party right may still be enforceable. The \textit{Love} case is an instance where this occurred.\textsuperscript{377} Of course, the possibility depends on the event causing unenforceability and its effect on the rest of the agreement. The likelihood of it being an option may be low unless the provisions are sufficiently separate. But leaving this open as a possibility is important and follows the idea that the third-party right is dependent on, yet distinct from, the contract.\textsuperscript{378}

The 2017 Act is given advantages of flexibility and higher protection of third-party rights in adopting the 1999 Act’s approach. The approach offered by international instruments and Bankton could be viewed as a useful means of avoiding any similarity to South Africa’s two-contract theory.\textsuperscript{379} In the two-contract theory, acceptance is necessary to constitute a third-party right, so there is not really a JQT at all. The approach avoids the similarity by emphasising the strength of the link between the right and the contract. However, since acceptance is not a requirement for constitution in the 2017 Act, there is no need to counter similarity to South Africa’s two-contract theory. The advantages gained in following the English 1999 Act are greater than the one which would be received otherwise.

\textsuperscript{372} Explanatory Notes to the Contract (Third Party Rights) (Scotland) Act 2017, para 19.
\textsuperscript{373} MacQueen (n 28).
\textsuperscript{374} Ibid.
\textsuperscript{375} Bankton, \textit{Inst} 1.11.7.
\textsuperscript{376} 1999 Act (n 46) s 3.
\textsuperscript{377} Discussion Paper (n 10) para 2.82.
\textsuperscript{378} MacQueen (n 28).
(3) Does the 2017 Act sit well when not viewed in isolation to Scotland?

The 2017 Act governs the law on third-party rights within Scotland. This does not mean that its effect is limited to just Scotland, though. Section 9 of the 2017 Act provides the third party with a substantive right to access a procedural right to arbitration. The enforcement of arbitration awards is on an international playing field, subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (‘the Convention’). There are some potential flaws in the 2017 Act, accompanied by the Arbitration (Scotland) Act 2010 (‘the 2010 Act’), which reduce compatibility with international rules. If an aim of the 2017 Act, as a means of reform of JQT, was to make third-party rights in Scotland workable, then the Act must function well externally as well as internally.

(a) Accessing arbitration as a third party

As an international concept, and within the 2010 Act, arbitration is based on privity. Privity is the idea that rights in a contract are only enforceable by the parties to that contract. Allowing a third party to arbitrate goes against this. If a court, deciding on whether to enforce an arbitration award to a third party, were to follow the doctrine of privity strictly, then it may exercise its discretion to set the award aside. This is because privity is a requirement imposed by public policy. As a result, there is a risk that Scottish arbitral awards will not be enforced in countries which are signatory to the Convention, which may in turn put off parties from using Scots law to govern their contract.

The 2017 Act’s solution in section 9(1) mimics section 8(2) of the 1999 Act. It treats a third party who is permitted access to arbitration as a party to the arbitration agreement, for the purposes of arbitration only. It then refers to definitions used in the 2010 Act to make the rules of both Acts work together. For example, section 9(6) adopts the definitions of “arbitration agreement” and “dispute” provided in the 2010 Act. The effect is to stretch the doctrine of privity to fit around third-party rights, rather than stretching third-party rights around privity. The first fault with this is identified by Dundas & Bartos, which states that a third party right “arises through or under the contract, not by virtue of the third party standing in the place or shoes of one or more of the contracting parties like an assignee”. Further, the definitions of “third party” differ when comparing the Acts. Whereas the 2017 Act sets out that a third party who has rights stemming from a contract can also be included as a party to the arbitration agreement, the 2010 Act refers to third parties as any of those not being a party to the arbitration agreement. This presents an obstacle, as the 2010 Act provides no flexibility for the 2017 Act to engage with.

The solution lies in changing the definitions provided in both Acts. Firstly, by adding a reference to sections 1 and 9 of the 2017 Act within section 2 of the 2010 Act and that a ‘party’ means a party to the arbitration agreement, which includes a third party when the 2017 Act applies. Secondly, references to generic third parties throughout the 2010 Act should be amended to ensure that there is no confusion with third parties which have a right under the contract, which contains the arbitration agreement. These changes would achieve international compatibility by getting around rules of privity.

380 Note that this article will not evaluate the justifications for allowing third party arbitration and will instead focus on the effectiveness of its implementation.
381 Arbitration (Scotland) Act 2010 s 18.
384 Convention 1958 (n 80) Art V 2(b).
386 2010 Act (n 79) s 4.
387 H Dundas and D Bartos, Arbitration (Scotland) Act, ch 10.42
388 2017 Act (n 54) s 9(1).
389 See, for example, the 2010 Act (n 79) s 11.
in the Convention and would make the reformed Scots law on third-party rights more workable and attractive to potential users.\footnote{H Yu, ‘Three may not be a crowd: who is in the driver's seat under s.9 of the Contract (Third Party Rights) Act 2017’ (2018) 7 JBL 539.}

(b) Formal writing for constitution of the right

With the implementation of changes to definitions recommended above, the third party can access arbitration. However, their success is hindered by one of the rules in the 2017 Act. Formal writing is not required to constitute a third-party right. It is also not required under the 2010 Act,\footnote{2010 Act (n 79).} which permits oral arbitral agreements as well as written. This reflects Scots contract law, which imposes formal writing in very few instances, for example for the sale of land. However, to enforce a Convention award in Scotland or to enforce a Scottish award in another signatory country, a copy of the arbitration agreement must be submitted as evidence to allow enforcement.\footnote{Convention 1958 (n 80) Art IV.} If a contract, which gives rise to a third-party right and which allows that third party to access arbitration, is made orally, then enforcement may be difficult. The 1999 Act avoids this problem by only allowing access to arbitration if there is an agreement in writing.\footnote{1999 Act (n 46) s 8(1)(b).} It refers to the Arbitration Act 1996, which requires writing,\footnote{Arbitration Act 1996 s 5.} unlike its Scottish counterpart.

To solve the issue, a choice must be made between staying true to Scots contract law principles and making changes to improve compatibility internationally. The SLC weighed up the arguments after asking whether formal writing should be a requirement, in question 8 of their Discussion Paper. Later, in its Report, it provides its decision without further explanation than a mere reference to the wide response not being in favour of formal writing, as has always been the case in Scots contract law.\footnote{Report (n 13) 4.36.} The Report’s focus was more on whether a provision should be added to the 2017 Act directly addressing that there is no requirement.

The SLC’s decision here was incorrect. Staying true to Scots law when reforming one of its branches is important. However, there has already been an accusation that third-party rights, when they were in the form of JQT, were stuck in the 17\textsuperscript{th} Century.\footnote{D Mathie, ‘Third-party rights – Scots Law stuck in the 17 Century’ available at https://brodiestechblog.wordpress.com/2010/08/26/third-party-rights-%E2%80%93-scots-law-stuck-in-the-17thcentury/.} Since contract law is a means to aid commerce, and commerce in Scotland is economically and socially tied to that of the rest of the world, contract law ought to respond to social and economic developments far more promptly and leniently than, perhaps, other areas of law might. Avoiding progression of domestic law by refusing to make it internationally compatible is disadvantageous. It may mean that, in the future, the 2017 Act will face a similar accusation of being stuck in the past. If reform of JQT was started with a view to modernising Scots contract law on third-party rights, then the modernity must apply in the long-term in order to be effective. Modernity in this sense does not mean ‘new’, but ‘appropriate to current commercial practice’. By maximising the likelihood of reform catering to commercial practice for the foreseeable future, contractual parties and related third parties may find relief in predictability of the application of the reformed legal rules. They would then enjoy commercially beneficial established practice and be able to rely on the system without worrying about significant subsequent changes to it. Another disadvantage which would be dealt with is the unnecessary caution surrounding characterisation of third-party rights as a gratuitous unilateral obligation which would potentially require formal writing. With this alternative policy decision, writing would be required anyway. Therefore, it would be easier to describe third-party rights in Scots law, and the fact that they do reflect elements of a promise.

An advantageous change which could be made is to add another condition of the Requirements of Writing (Scotland) Act 1995. This change would be that contracts conferring third-party rights and
access for that third party to arbitration are to require formal writing to constitute those rights and access. A provision echoing this requirement should then be implemented into the 2017 Act and into the 2010 Act. The Report expresses that had the SLC made a different policy decision, then it would have agreed with inserting such a provision in the 2017 Act.397

D. CONCLUSION

In conclusion, the question of whether the Scots law on third-party rights in contract could have been reformed judicially can be responded to directly. Judicial reform of third-party rights in Scotland was especially when looking specifically to third-party rights’ path in court, from the Carmichael case onwards. Consequently, third-party rights could not have been reformed judicially in an effective way.

Legislation ‘did the job’, and more. Legislation was both a possible and an appropriate choice. It was also, upon considering the 2017 Act overall, an effective choice. The necessary changes to JQT were made and third-party rights in Scots law are now clearer and more workable. This is due, in part, to the availability of the English 1999 Act as a helpful and influential template. However, some influence from the 1999 Act has proved to be disadvantageous, for example, where terminology was adopted which is unfamiliar to Scots law. Although the Acts are similar and can draw upon each other, it is important to remember that they are implemented in different legal systems and were drafted with different purposes in mind: England introduced an entirely new concept, whereas Scotland corrected a judicial error and interpreted a concept that was already in existence. One further area of improvement for third-party rights in Scotland is amending the 2010 Act to better support the 2017 Act. Amendments to definitions and alterations to the formal requirements for creating third-party rights may enable the 2017 Act to perform better at the international level and ensure that the arbitration it offers is truly available. The clear win for the 2017 Act is that it tackles several issues at once with a high level of success, something that judicial reform could not, and would not, have managed.

397 Report (n 13) 4.37.
COHABITATION IN ENGLAND & WALES AND SCOTLAND: THE CASE FOR GRANTING EQUAL RIGHTS TO MARITAL AND NON-MARITAL COHABITANTS

Kate Whiting*

A. INTRODUCTION

The extent to which family law should regulate private relationships is a topic that has generated significant debate, and none more so than when it comes to non-marital cohabitation. Central to this is the relationship between autonomy and protection, values that are often juxtaposed in academic and legal commentary. On the one hand are those who argue that to cohabit is to make a deliberate choice not to marry and, as such, to impose a “marriage-like” regime on cohabitants is to deny their autonomy. On the other are those who argue that irrespective of the lack of legal formality in the relationship, legal consequences should attach to cohabitation in order to protect vulnerable parties. In addition are those who fear that regulation of cohabitation will erode the special ‘status’ of marriage in society, thus wishing to keep the two phenomena entirely distinct. Across Europe, where dramatic rises in cohabitation are continuing, different jurisdictions have attempted to strike an appropriate balance between these apparently competing interests. Yet it is apparent from the divergence that exists that the desirability or otherwise of regulating cohabiting relationships remains a highly contentious issue.

This article will focus on financial regulation upon relationship breakdown and the contrasting approaches taken in England and Wales, which currently offers no distinct legal regime for cohabitants, and Scotland, where ‘de facto’ cohabitants enjoy some statutory protection. Through a comparison of these jurisdictions, it will be argued that neither jurisdiction currently offers a satisfactory

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398 References to ‘cohabitation’ throughout to refer to non-marital cohabitation.
402 See more recent statistics cited at page 2 below.
403 References to ‘England’ throughout to includes both England and Wales.
approach to cohabitation; that current law reform proposals fall short; and that more wide-ranging reform to ensure equality of treatment between married and unmarried cohabitants is what is required.

A central tenet of this argument will be that the values of autonomy and protection are not in fact dichotomous and may be simultaneously realised through an ‘opt-out’ system for cohabitants, to include both intimate couples and certain non-conjugal relationships. Whilst, for some, an approach that nonetheless has protection as its starting point may appear overly paternalistic and represent an unacceptable shift away from autonomy as the driving principle of modern family law, it will be argued that this is entirely necessary and better reflects the realities of family life where interdependence and vulnerability is a fact of many relationships.

This article will first explore the ‘autonomy versus protection’ debate, followed by a comparison of marriage and cohabitation. A critique of England and Scotland will then be offered (including current law reform proposals), followed by an examination of the ‘opt-out’ approach taken in New South Wales, Australia. Using this as a starting point, it will be argued that a firm policy decision is needed, as opposed to ad hoc law reform, to place married and unmarried cohabitants on an equal legal footing.

B. AUTONOMY VERSUS PROTECTION: A FALSE DICHOTOMY?

The ‘common-law marriage myth’, which emerged in the 1970s following misreporting around cohabitation rights, led to a significant increase in the number of cohabitants in the United Kingdom and this is a trend that has continued. Latest figures from the Office for National Statistics reveal that married or civil partner couples currently account for two thirds of families but that cohabitants are nonetheless the fastest growing family type, with a 25.8% increase recorded between 2008 and 2018. Research from Barlow et al has demonstrated that there is now widespread acceptance of cohabitation as both a partnering and parenting structure.

One of the principal difficulties faced by legal systems is many different forms of cohabitation. Sutherland draws a distinction between “well-informed couples” who consciously reject marriage; “misinformed couples” who base their ‘decision’ on incorrect information; “asymmetrical couples” where one partner is informed, the other ignorant; “inertia couples” who give no thought whatsoever to the law until something goes wrong, such as death or relationship breakdown; and “no-choice couples” who are simply unable to marry. In some jurisdictions, this may include

404 References to ‘marriage’ throughout to include both opposite sex and same sex marriage, and by extension civil partnership.
405 Defined for the purposes of this article as those relationships where the parties are engaged in – or at least have the potential to legally engage in - a sexual relationship and not, therefore, persons related through blood.
410 Probert, (n 10).
411 Sutherland (n 2) at 14.
412 Including England and Scotland prior to greater rights for same-sex couples being secured through the Civil Partnership Act 2004; Marriage (Same Sex Partners) Act 2013; and Marriage and Civil Partnership (Scotland) Act 2014.
same-sex couples, with research from Bulloch and Headrick⁴¹³ revealing how certain countries initially introduced greater rights for cohabitants in an attempt to accommodate homosexual relationships. An alternative typology is espoused in Barlow and Smithson’s⁴¹⁴ “ideologues”, “romantics”, “pragmatists” and “uneven couples”.

The critical point here is that living as a cohabitant is not necessarily a conscious or desired choice and that many cohabitants may have either misunderstood the law or be ignorant of its implications. As such, the notion of choice can, as Eekelaar and George have stated, be rendered “somewhat illusory”.⁴¹⁵ With this, any argument that respect for individual autonomy demands in all cases that the law ‘stays out’ of cohabiting relationships quickly falls away. Moreover, irrespective of the parties’ legal knowledge or otherwise, the “optimism bias”⁴¹⁶ experienced by many new couples may call into question the extent to which a decision to cohabit or to marry is really determined by the existence or otherwise of protection upon separation.⁴¹⁷

The argument that is frequently “pitted against” autonomy⁴¹⁸ is the need to protect vulnerable parties, particularly women and children who may face homelessness, destitution, poverty, abuse and exploitation on relationship breakdown.⁴¹⁹ Lack of education or employment opportunities for women, or traditional views about childcare responsibilities, may lead to economic reliance on a partner and deprive women of the ability to make ‘real choices’ about their living situations.⁴²⁰ Failure to recognise women’s property rights upon dissolution of domestic partnership has been identified by the Special Rapporteur on Adequate Housing as a “major contributing factor”⁴²¹ to this situation, and the Committee for the Convention on the Elimination of All Forms of Discrimination Against Women⁴²² expressly recommends that states take necessary measures to protect women in de facto unions.⁴²³ This potential for economic or emotional harm, whether through lack of knowledge or deliberate attempts by a stronger party to deprive the other of legal protection,⁴²⁴ clearly exists in any relationship and all persons may be seen as ignorant, interdependent and vulnerable to a degree.⁴²⁵

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⁴¹⁸ Sutherland (n 2) at 146.
⁴²¹ Ibid at para 47.
An alternative autonomy argument presented by Deech is that cohabitation law “tards the emancipation of women” who “do not need...to be kept by men after their relationship has come to an end”.426 This presupposes, however, equality of bargaining power and overlooks the substantive inequality that exists in society and within domestic relationships. This, according to Barlow,427 is a reality that may be masked or even reinforced by blind appeal to the ‘alluring’ concept of autonomy - a concept she considers inherently individualistic in nature - as the driving principle of family regulation. In divorce law, both jurisdictions seek to redress this imbalance through the principles of ‘equality’428 and ‘fair sharing’,429 making the lack of equivalent protection for cohabitants even starker.

C. HOW DISTINCT REALLY IS NON-MARITAL COHABITATION TO MARITAL COHABITATION?

An alternative argument for differential treatment is that to grant greater protection to cohabitants is to erode the special status of marriage430 in society; and that by limiting the protection available, more people will be encouraged to marry. This argument, according to Barlow,431 has proved an “impossible political hurdle”432 for law reform, particularly in England where “no government wants to be seen to undermine marriage”.433 However, the assumptions here - that people are generally aware of their legal rights (or lack thereof) and thus more likely to marry; that cohabitation and marriage are qualitatively different; and that marriage, by contrast to cohabitation, is a unique social good deserving of privileged legal status – merit further scrutiny.

Duncan,434 citing data suggesting cohabiting relationships have a shorter duration than marriages, are “less healthy” and more unstable,435 concludes that marriage is a “bona fide social good” and that great caution should be exercised before treating all personal decisions as equally deserving of legal recognition.436 Highlighting the apparently unique qualities of marriage, Fitzgibbon437 also argues that the “mutual reinforcement of obligation” created between spouses generates the social goods of steadfastness and stability.438 Other apparent differences are noted by Scott,439 commenting that marriages “produce greater happiness and less conflict”440 additionally, Ermisch and Francesconi,441 noting how children born to married parents are twice as likely to continue living with both parents

428 White v White [2001] 1 AC 596 per Lord Nicholls.
430 The focus of this argument being placed, more commonly, on different-sex as opposed to same-sex marriage (see Sutherland (n 2) at 147: ‘other opponents of regulating cohabitation are less concerned about party autonomy than they are with retaining the privileged position of (often only different-sex) marriage in the legal system...’ [emphasis added].
432 Ibid at 91.
433 Ibid.
435 Ibid at 1005.
436 Ibid at 1031.
438 Ibid at 47.
440 Ibid at 240.
throughout childhood. Moreover, Haskey and Humphrey observe that cohabitants are less likely to hold the family home and other assets in joint names and to make a will. In Re P, Lord Hoffman stated, “the state is entitled to take the view that marriage is a very important institution and that in general it is better for children to be brought up by parents who are married to each other...”

Whilst certain qualitative differences may therefore exist between unmarried and married couples, research by Crawford et al has demonstrated that this may simply reflect the types of people who marry and socio-economic factors, such as education and income. As such, differential treatment of such persons simply on the basis of their civil status may instead be seen as discriminatory. Sutherland argues that cohabitants are “as much in need of assistance from the legal system when the relationship ends” as spouses are, noting how they too may combine their efforts, make sacrifices for the relationship, develop levels of dependence and have children together.

Eekelaar and McLean present similar challenges to the notion that certain unique benefits are created simply by the fact of marriage. They question the claim that marriage is uniquely capable of producing certain ‘goods’ and instead note how spouses and cohabitants often share similar values and feelings of obligation. These may derive from ethical principles; external sources (such as childbirth); or negotiations between the parties, as opposed to the nature of the relationship per se. As such, they conclude that it is increasingly difficult to identify marriage in itself as necessarily, or even characteristically, constituting a significant source of personal obligations.

It is clear that increasing levels of cohabitation have coincided with a reduction in marriage rates. However, research from Barlow et al has indicated that the introduction of greater protection for cohabitants does not necessarily impact upon the propensity of people to marry. As Probert observes, the relationship between law, social change and individual choice is complex; and the common law marriage myth illustrates how perceptions about the law may be more important in shaping individual behaviour than the actual law. Even if a direct correlation could be found, this does not prevent those people who wish to marry – whatever their diverse reasons for this may be – from doing so, nor does it necessarily rid marriage of its religious or symbolic meaning.

Before examining the approaches in England and Scotland, two principal observations should therefore be made. Firstly, that the most significant difference between marriage and cohabitation arguably lies in form rather than function; and secondly, that where qualitative differences do exist (and irrespective of their source), any disparity in legal protection is likely to prejudice economically weak and vulnerable parties the most.

444 Re P and others (AP) (Appellants) (Northern Ireland) [2008] UKHL 38.
445 Ibid at para 13 (see also Lady Hale at para [108] that “…being married does at least indicate an initial intention to stay together for life…it makes a great legal difference to their relationship [and] brings with it legal rights and obligations between the couple which unmarried couples do not have…”).
447 Sutherland (n 2) at 149.
449 Ibid at 536.
451 Probert (n 10) at 279.
D. COHABITATION IN ENGLAND & WALES

According to research by Bulloch and Headrick, approaches to regulating cohabitation across Europe can be broadly categorised as follows:

1. Registration: cohabitants enjoy rights and responsibilities only if they opt into a scheme (The Netherlands and the French ‘pacte civil de solidarite’);
2. Contractual: cohabitants regulate their relationships through private contracts;
3. Presumptive: relationships meeting certain criteria are entitled to certain rights and responsibilities by default (Scotland); and
4. A combination of any of the above.

In England, however, the law generally treats cohabitants as two separate individuals unless a specific statutory provision provides otherwise. This includes, for example, s.144 (4) (b) of the Adoption and Children Act 2002 which entitles two persons living “as partners … in an enduring family relationship” to adopt; and the Family Law Act 1996, where two persons “living together as husband and wife” may apply for an occupation order or non-molestation injunction. The language used in these statues indicates that the emphasis is on intimate cohabiting relationships as opposed to relationships of care and dependency – a theme that will be returned to below.

Whilst the focus of this article is on financial provision on relationship breakdown, it should be noted that, by contrast to spouses, a cohabitant has no automatic entitlement to the estate of a partner who has died intestate; and, as in Scotland, does not enjoy the same special tax exemptions. Furthermore, a cohabitant cannot seek a maintenance order during their relationship (though an unmarried parent living apart from their child still has an obligation to provide maintenance for that child). This privileging of marital relationships is mirrored in parenthood where, in both jurisdictions, different rules apply to married and unmarried fathers, including that unmarried fathers do not automatically acquire parental responsibility.

Unlike marriage and civil partnership, where the courts enjoy a broad statutory jurisdiction to redistribute property interests on divorce and dissolution, there is no distinct regime for cohabitants. In order to secure any rights on separation, they must instead turn to existing legal doctrines in contract law, property law, trusts or estoppel. Dewar argues this has led to the “familialization” of property law. However, property law is concerned with ownership of a particular property and was

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452 Bulloch and Headrick (n 16).
453 French Civil Code, Articles 515-1 to 515-8.
454 J Herring, Family Law, 9th edn (2019) at 120.
457 Family Law Act 1996 s 42.
458 Instead, they must apply under the Inheritance (Provision for Family and Dependants) Act 1975, requiring them to have lived together ‘as man and wife’ or civil partners for at least two years prior to the death.
459 Children Act 1989 sch 1.
462 Civil Partnership Act 2004 sch 5.
never designed to deal with the “full panoply”\textsuperscript{464} of financial arrangements arising upon domestic relationship breakdown. Lady Hale in \textit{Gow v Grant}\textsuperscript{465} posits that property law is arguably an inappropriate forum for dealing with such issues. For example, whilst the Court can make a declaration of beneficial interest in a property,\textsuperscript{466} it cannot make a property transfer order, lump sum or pension-sharing order as exists on divorce.

Where the land is registered, the property has been conveyed into joint names and a valid express trust exists; establishing ownership is generally straightforward: legal ownership lies with the registered parties and equitable ownership is determined in accordance with the trust.\textsuperscript{467} Cohabitanst may also enter into a contractual agreement to govern their respective property interests in the event of separation, which, unlike pre-nuptial agreements,\textsuperscript{468} are generally enforceable. Such options clearly respect party autonomy but nonetheless depend upon prior knowledge and understanding of the law – an assumption that, it has been argued above, cannot be readily made for all cohabiting couples.

The most common alternatives, therefore, are to attempt to make out a constructive trust or seek relief through proprietary estoppel. The former requires evidence of (1) common intent to share ownership through (a) joint registration - where a presumption of equal beneficial ownership exists;\textsuperscript{469} (b) an express and communicated agreement to share;\textsuperscript{470} or (c) an inferred agreement to share;\textsuperscript{471} and (2) detrimental reliance on this by the applicant.\textsuperscript{472} The decision in \textit{Lloyds Bank v Rosset},\textsuperscript{473} that only direct monetary payments towards the purchase price or mortgage instalments would suffice under the ‘inferred agreement’ condition, was criticised by feminist scholars for overlooking the value of non-financial contributions, including Probert who notes the imbalance this would create between men and women.\textsuperscript{474} In subsequent cases including \textit{Stack v Dowden}\textsuperscript{475} and \textit{Abbott v Abbott},\textsuperscript{476} it has been established that where common intention is not evident, the parties’ whole course of conduct in relation to the property may be considered in inferring or ‘imputing’\textsuperscript{477} intention to share ownership. This is not limited to financial contributions\textsuperscript{478} and includes - from a non-exhaustive list – looking at “the nature of the parties’ relationship”.\textsuperscript{479} The imputation approach has subsequently been limited to questions of quantification, rather than initial establishment of the trust.\textsuperscript{480}

The English judiciary has been eager to stress that this is not about creating an intention to share in order to achieve a fair result\textsuperscript{481} and that \textit{actual intention} must be found. However, for some, this

\begin{footnotesize}
\textsuperscript{465} \textit{Gow v Grant} [2012] UKSC 29.
\textsuperscript{466} Trusts of Land and Appointment of Trustees Act 1996 s 14.
\textsuperscript{467} \textit{Goodman v Gallant} [1986] 1 FLR 513; Law of Property Act 1925 s 53(1)(b).
\textsuperscript{468} Following \textit{Radmacher v Granatino} [2010] UKSC 42, a pre-nuptial agreement will not be given effect by the court if it considers it unfair to do so.
\textsuperscript{469} \textit{Stack v Dowden} [2007] UKHL 17. Note the TR1 form from the Land Registry now contains an express declaration of trust, sharing beneficial interest, where a property is brought in joint names.
\textsuperscript{470} \textit{Fowler v Barron} [2008] EWCA Civ 377.
\textsuperscript{471} \textit{Lloyds Bank v Rosset} [1990] 1 All ER 1111.
\textsuperscript{472} \textit{Chan Pui Chun v Leung Kam Ho} [2003] 1 FCR 520 CA.
\textsuperscript{473} Rossett (n 75) at paras 132 - 133 per Lord Bridge.
\textsuperscript{475} \textit{Stack} (n 73) at para 33 per Lord Walker and para 68 per Lady Hale.
\textsuperscript{476} \textit{Abbott v Abbott} [2007] UKPC 5.
\textsuperscript{477} See also \textit{Jones v Kernott} [2011] UKSC 53, at para [31].
\textsuperscript{478} \textit{Stack} (n 73) at para 69 per Lady Hale.
\textsuperscript{479} Ibid.
\textsuperscript{480} \textit{Geary v Rankine} [2012] EWCA Civ 555.
\textsuperscript{481} Herring (n 57) at 185 commenting on \textit{Gallarotti v Sebastianelli} [2012] EWCA Civ 865.
\end{footnotesize}
“inevitably collapses back into something approaching an assessment of fair outcome.” as judges are granted discretion to “pick and choose” which factors to consider. A “fiction” of actual agreement or common intention may therefore be created when none in fact existed.

Fairness considerations also arise in proprietary estoppel, which Herring explains is underpinned by the principle of conscionability, which “in essence means fairness”. Following Thorner v Major, it must be shown that the applicant’s belief that the other was going to give them an interest in their property, and the applicant’s subsequent reliance on this, was reasonable.

As achievement of a fair outcome has, at least historically since White v White, been recognised as the implicit objective of the section 25 criteria applying on divorce; it may be questioned to what extent the courts are, in practice, truly applying distinct considerations in cases involving married and unmarried couples. Crucially however, cohabitants have no equivalent statutory regime to refer to. They are dependent upon complex and uncertain common law doctrines that can cause injustice and hardship and beyond the case law; they have no ability to predict how an individual judge may approach their case. The Law Commission has recognised the disproportionate impact this may have on vulnerable parties.

This unsatisfactory state of affairs leads us to ask, once again, what justification there is for treating married and unmarried couples so differently. If it is protection rather than autonomy that should be the primary concern of family law and if in any event the autonomy argument cannot always be successfully, appealed to, then England would appear to be failing a significant proportion of its population. Before considering a potential solution to this, it is essential to consider the contrasting approach taken in Scotland.

E. COHABITATION IN SCOTLAND

In what Sutherland terms the “compromise position”, Scotland has sought to balance protection with respect for autonomy (thus assuming informed choice) through the Family Law (Scotland) Act 2006 (The Act). Making clear this was to remedy certain specific situations widely perceived as harsh and unfair (particularly for economically vulnerable parties), the drafters were anxious to confirm that this was not an attempt to undermine marriage nor to grant cohabitants a new legal status. The Act

485 Herring (n 57) at 191.
487 A review of recent divorce caselaw, and the evolving principles articulated by the English judiciary in deciding financial provision upon divorce, lies outside the scope of this article.
488 White (n 31)
489 Matrimonial Causes Act 1973 s 25: “Matters to which court is to have regard in deciding how to exercise its powers under ss. 23, 24, 24A, 24B and 24E”.
490 Gow v Grant (no 69) Lady Hale at para 49, citing the Parliamentary Under-Secretary of State for Justice Mr Jonathan Djanogly (Hansard, HC Deb 6 Sep 2011 cc15-16WS).
492 Sutherland (n 2).
introduced ownership presumptions during cohabitation for certain household goods, money and property (but not, it should be noted, akin to the aliment obligations that have at least traditionally applied between spouses); greater rights for cohabitants on intestacy and some redress upon relationship breakdown. Whilst this is preferable to the regime in England, it will be demonstrated below that this approach is not without its difficulties.

Section 25 of The Act defines cohabitant as a man or woman [or same-sex couple] who are (or were) “living together as if … husband and wife”, thus seemingly excluding persons in ‘non-intimate’ relationships. The obvious difficulty with this definition is highlighted by McCarthy who, commenting that couples in formalised adult relationships do not conduct themselves in a uniform manner, notes that the one characteristic they do necessarily share is the fact of formal registration. This is the very characteristic that cohabitants, by definition, lack. As there is no minimum cohabitation period (a requirement it was felt would be arbitrary, unresponsive to particular cases and could distort behaviour), the Court is asked instead to consider the period for which the parties have “lived together”; the nature of their relationship; and any financial arrangements they have made. This is clearly sensitive information, particularly as regards the “nature” of the parties’ relationship. A parallel may be drawn with divorce law where, in order to prove irretrievable breakdown, the intimate details of a parties’ relationship must sometimes be adduced before the court. Such enquiries in divorce law may, according to Black, amount to misuse of private information and violate Article 8 of the European Convention on Human Rights.

Of the cases reported, McCarthy notes that more difficulties have been encountered in determining the end date of cohabitation than its initial establishment. Whilst the courts in cases such as and Garrad v Inglis have seemingly focused on the stability of the relationship and the parties’ expectation it will continue, the uncertainty that nonetheless exists has proved particularly problematic due to the “hard-line” approach they have taken to The Act’s strict one year time limit. Where a party is unaware of their rights or does not seek immediate advice upon cessation of cohabitation, this can produce harsh results, particularly for domestic abuse survivors. Similar unfairness may result from The Act’s interrelation with the law of unjustified enrichment; as a claim

495 Family Law (Scotland) Act 2006 s 27.
496 Family Law (Scotland) Act 2006 s 29.
497 Family Law (Scotland) Act 2006 s 28.
498 Family Law (Scotland) Act 2006 s 25(1)(b).
499 A theme that will be returned to below.
501 Policy Memorandum of 07.02.05 to the Family Law (Scotland) Bill, at para 67.
502 Family Law (Scotland) Act 2006 s 25(2) (a).
503 Family Law (Scotland) Act 2006 s 25(2) (b).
504 Family Law (Scotland) Act 2006 s 25(2) (c).
507 McCarthy (n 104).
510 McCarthy (n 104).
511 Scottish Law Commission (n 97) at 14.
512 Ibid.
513 Ibid at 5, noting “an abused partner may be reluctant to pursue a claim shortly after the breakdown of the relationship for fear of repercussions”.

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for the latter is precluded where the section 28 provisions could have been utilised. Black and Carr\textsuperscript{514} comment that an economically disadvantaged cohabitant who misses the one year time limit may find themselves “in a worse position than pre-2006”.\textsuperscript{513} As such, it is argued here that certainty should prevail over flexibility in this particular context; and a minimum qualifying period should therefore be introduced.

The key provision governing relationship breakdown is section 28, which entitles either cohabitant to apply to court for a capital sum;\textsuperscript{516} an award to address the future economic burden of caring for a child;\textsuperscript{517} or an interim order.\textsuperscript{518} In making such orders, the court is directed simply to “have regard to”\textsuperscript{519} whether, and if so to \textit{what extent}, the defender has derived any economic advantage\textsuperscript{520} (including gains in capital, income or earning capacity at the time of relationship breakdown)\textsuperscript{521} as a result of the applicant’s contributions (including the indirect and non-financial);\textsuperscript{522} and similarly to any economic disadvantage suffered by the applicant in the interests of the defender or any relevant child.\textsuperscript{523} This is notably an “entirely different exercise”\textsuperscript{524} to that applying on divorce. In a divorce, “fair account” is to be had to such factors;\textsuperscript{525} the net value of property acquired \textit{over the course of the relationship} is to be shared fairly\textsuperscript{526} between the parties; and a range of remedies, including pension sharing and property adjustment orders, are available.

Whilst, unlike England, the presence of statutory criteria at least provides the courts and cohabitants with some reference point, the lack of guidance in section 28 has resulted in judicial divergence, piecemeal development of the law\textsuperscript{527} and loss of coherency.\textsuperscript{528} Principles articulated by the courts in trying to understand the underlying redistributive rationale of section 28 have included equality (\textit{CM v STS}),\textsuperscript{529} thus essentially mirroring the scheme on divorce;\textsuperscript{530} restitution (\textit{Selkirk v Chisholm});\textsuperscript{531} and compensation or fairness (Lord Hope, \textit{Gow v Grant}).\textsuperscript{533} This is again to be contrasted with Scots divorce law which permits some judicial discretion but favours certainty over flexibility.\textsuperscript{534}

\textsuperscript{515} Ibid at 300.
\textsuperscript{516} Family Law (Scotland) Act 2006 s 28(2) (a).
\textsuperscript{517} Family Law (Scotland) Act 2006 s 28(2) (b).
\textsuperscript{518} Family Law (Scotland) Act 2006 s 28(2) (c).
\textsuperscript{519} Emphasis added.
\textsuperscript{520} Family Law (Scotland) Act 2006 s 28(3) (a).
\textsuperscript{521} Family Law (Scotland) Act 2006 s 9.
\textsuperscript{522} Ibid.
\textsuperscript{523} Family Law (Scotland) Act 2006 s 28(3) (b).
\textsuperscript{524} \textit{Gow v Grant} (n 69) at para 15 per Lord Hope.
\textsuperscript{525} Family Law (Scotland) Act 1985, section 9(1) (b).
\textsuperscript{526} \textit{Gow v Grant} (n 69).
\textsuperscript{527} Scottish Parliament, \textit{6th Report (Session 4): Post-legislative Scrutiny of the Family Law (Scotland) Act 2006}, at para 39, noting “[the law] has evolved in a piecemeal fashion over the last decade and a half, with limited consideration of what the underlying aims and principles of the law should be” available at: https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/97604.aspx#h
\textsuperscript{528} Sutherland (n 14) at 144.
\textsuperscript{529} \textit{CM v STS} [2008] SLT 871.
\textsuperscript{531} Ibid at 270-274.
\textsuperscript{532} \textit{Selkirk v Chisholm} Duns Sheriff Court, 25 Nov 2010.
\textsuperscript{533} \textit{Gow v Grant} (n 69).
\textsuperscript{534} For example Black (n 109), noting at 20 the debate as to “whether the Scottish system provides much-needed certainty and a clean-break or is too rigid, and whether the English system provides much needed-flexibility, or is a permanent drain on one party, while providing a “meal ticket for life” for the other".
The existence of a specific statutory regime, which offers some protection to cohabitants on relationship breakdown, is, regardless of the above, to be preferred to the current position in England. What remains problematic about the Scots approach, however, is the existence of distinct regimes for married and unmarried cohabitants. Commenting on the public confusion that results, Sutherland notes how this may create “a false sense of security among the ill-informed”\(^{535}\) and some cohabitants, mistakenly trusting they will be protected by the statutory regime, may fail to take other protective measures, such as cohabitation agreements, that they otherwise would have taken.\(^{536}\) This is damaging to the parties and potentially to the state, which may end up bearing some responsibility for an unsupported party. Similar observations can be made of England, where widespread illusions continue to exist about ‘common law marriage’.

As such, it can be questioned whether protection for cohabitants – in a way that nonetheless maintains a distinction between married and unmarried couples – is really the answer. As will be explored below, current law reform proposals in England and Scotland continue to insist upon this distinction, either through the introduction of new legislation in England or through amendment of the existing law in Scotland.

F. LAW REFORM

In England, legislative reform was first recommended by the Law Commission in 2007\(^ {537}\) in the form of a statutory scheme which would have entitled eligible cohabitants\(^ {538}\) to a range of remedies\(^ {539}\) aimed at redressing any benefit retained by the respondent, or continuing economic disadvantage suffered by the applicant, as a result of “qualifying contributions”\(^ {540}\) made to the relationship. Numerous attempts to introduce this, backed heavily by Resolution,\(^ {541}\) have failed. This includes the most recent Cohabitation Rights Bill 2017-19\(^ {542}\), which proposed an opt-out scheme for cohabitants but has not progressed beyond second reading. As with the 2007 proposals, this Bill provided for distinct regimes with cohabitants being offered less extensive protection.

The focus of current consultations by the Scottish Law Commission\(^ {543}\) is similarly on specific aspects of the existing law. This includes proposals to amend section 28 to allow the courts to accept applications submitted after the one-year time limit “on cause shown”; and to permit unjust enrichment claims to proceed in appropriate cases even if a section 28 claim could have been made. A wider review of sections 25-29A has also been requested, with the potential for an “opt-in” scheme for cohabitants.

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\(^{535}\) Sutherland (n 2) at 143.

\(^{536}\) Ibid at 160.


\(^{538}\) In order to qualify for protection, the couple would need to show that they have lived together for a minimum period of three years or had a dependent child.

\(^{539}\) Law Commission of England & Wales (n 141) at para 4.40. Orders to include (1) lump sums; (2) property transfers; (3) property settlements; (4) orders for sale; and (5) pension sharing.

\(^{540}\) Ibid at para 4.34: “A qualifying contribution is any contribution arising from the cohabiting relationship which is made to the parties’ shared lives or to the welfare of members of their families. Contributions are not limited to financial”


Notably, and despite the problems outlined above, there is no proposal to introduce a minimum qualifying period for financial claims on separation or death.

G. AN ALTERNATIVE: AUTONOMY AND PROTECTION

In an example of how family law can simultaneously respect autonomy and protect vulnerable parties, New South Wales provides presumptive legislative protection for cohabiting couples in “domestic relationships”, including “de facto relationships” (two adult persons living together “as a couple” but not married or related), and “close personal relationships” (two persons living together, whether or not related, where one or both provides the other with “domestic support and personal care”). There is no minimum qualifying period for determining the fact of cohabitation but, in order to apply for an order, the parties must have lived together for a period of at least two years. Considering the particular injustices that can be caused by uncertainty in this context, this approach is preferred.

An interesting aspect of the legislation is the specific inclusion of non-intimate, caring relationships – a position that has emerged in France where persons in caring relationships of “solidarity” may enter into *apace civil de solidarité*. This is to be contrasted to England and Scotland where, as noted above, the relevant statutory provisions place emphasis on intimate relationships. This tendency to elevate sexual relationships (a position that Herring is particularly critical of) may be challenged if it is accepted firstly that family law can and should be used to further important state objectives including promoting stable relationships, encouraging the provision of care, and protecting people from abuse and exploitation, and secondly that sexual and non-sexual relationships may all possess, to varying degrees, characteristics fundamental to this. Judge Zupancic, noting the proximity that can exist between elderly sisters as between spouses in *Burden v UK*, alluded to this in questioning why consanguinity would be “any less important” than a spousal relationship, even if the quality of consanguinity is different to a sexual relationship.

Advocating for a “sexless family law”, Herring argues that it is relationships of care and dependency that family law should be concerned with; an approach grounded in the feminist “ethics of care” tradition. The specific considerations that would apply in determining the appropriate level of protection for such relationships falls outside the scope of this article, but it is nonetheless argued that the needs of persons in non-conjugal relationships must be recognised and not overlooked in any law reform.

A crucial aspect of the New South Wales legislation is the ability of parties to opt-out of the property division regime by specific agreement. Some argue that an opt-in scheme would better respect autonomy; however, as not all cohabitants are suitably informed to take such protective steps, this may prove both ineffective and damaging to vulnerable parties. Instead, the autonomy of ‘well-informed’ cohabitants – the minority group who Sutherland notes actually possess the knowledge and capacity to

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544 Property (Relationships) Act 1984 (New South Wales, Australia).
545 Ibid at s 5(1) (a).
546 Ibid at s 5(1) (b).
547 Ibid at s 17(1).
548 See pages 11 and 12 above.
549 Bulloch and Headrick (n 16), citing G Ignasse, *Les Pacsé-e-s - Enquête sur les signataires d'un pacte civil de solidarité*, (2002), in observing that “the legal framework for cohabitants (the *pacte civil de solidarité* or 'civil union PACS') is open to both opposite and same-sex couples, as well as to caring relationships of 'solidarity'”.
552 *Burden v UK* (Application 13378/05) [2008] 2 FLR 787 (Judge Zupancic, Dissenting).
553 Herring (n 155).
554 For example, see C Gilligan, *In a different voice: psychological theory and women's development* (1982).
organise — is still respected through the ability to opt out. With careful regulation to ensure, such
decisions are based on genuine party agreement and not, for example, exploitation or manipulation by
a more powerful party, this approach appears to offer a very appealing compromise.

The question that remains, therefore, is that of the level of protection cohabitants should be entitled
to in any opt-out scheme. Above, it has been argued that there is no convincing justification for the
differential treatment that both England and Scotland afford to married and unmarried couples. Further,
that even in Scotland where protection for cohabitants exists, the insistence on distinct regimes is
problematic and results in public confusion, uncertainty and potential detriment to both the parties and
the state. The logical conclusion is that unmarried cohabitants, who have cohabited for a defined period
of time and have not expressly opted out of a legislative scheme, should receive equal legal protection


to married couples upon relationship breakdown and enjoy the full range of rights and remedies that
exist on divorce. This would need to be backed by a strong public awareness campaign to ensure that
cohabitants are as fully acquainted with their new legal status as possible. Such equality in legal
treatment does not, it is contended, necessarily rid marriage of its symbolic and religious status for
many current or potential spouses who, in any event, represent an increasingly diminishing proportion
of the population.

H. CONCLUDING REMARKS

In this article, the case has been made for granting greater protection to cohabitants, not through the
introduction or amendment of a distinct regime, but through affording cohabitants equivalent legal
rights and protections to married couples on relationship breakdown. This requires a firm and principled
policy decision to be taken by the English and Scottish legislatures to expressly recognise that
cohabiting relationships are important to the state; that vulnerability is a reality of many such
relationships; and that family law in contemporary society has a vital role to play in regulating
cohabitation and protecting the interests of vulnerable parties. With this presumptive approach, where
rights attach automatically to the fact of cohabitation, comes a shift away from autonomy and towards
protection as the starting point. This, it is argued, is a shift that is entirely necessary and, to reference
Barlow’s model of ‘family solidarity’, pays heed to the “joint enterprise, mutual support and
obligations which modern family life (in all its different forms) encompasses.” It is therefore
disappointing that current law reform proposals in England and Scotland continue to insist on distinct
regimes and it can be hoped that recent cases before the Supreme Court, including McLaughlin
and Brewster, where differential treatment of cohabitants in specific contexts has been found
incompatible with Article 8 and Article 14 of the European Convention of Human Rights, may
now reignite the debate here.

555 Sutherland (n 2) at 149.
556 An approach that has been adopted by The Netherlands.
557 Barlow (n 30).
558 Ibid at 226.
561 Right to respect for private and family life.
562 Prohibition of discrimination.
CAN THE ISSUES OF CYBERBULLYING AND SEXTING BE ADDRESSED BY LEGISLATION ALONE? A CRITICAL ANALYSIS OF THE CURRENT LEGISLATIVE MEASURES AND SOCIETAL MEASURES NEEDED TO PROTECT OUR YOUTH IN THE DIGITAL REALM

Gabriella Lipschitz*

A. INTRODUCTION

The internet can be “understood as an (ever-expanding) city comprising places of great wonder as well as dark backstreets where danger lurks, and the rule of law is weak or non-existent and where the vulnerable can be exploited and abused”.

The issue at hand relates to the fundamental challenges that all digital citizens, but specifically the youth, face in today’s digital era. This article will argue that the problems of cyberbullying and ‘sexting’ cannot be addressed by legislation alone, by highlighting the limits of the law and illustrating the necessity for greater social measures. Cyberbullying and “sexting” will be evaluated by analysing the effectiveness of current legislative measures, as well as what more can be done from a legislative perspective. In emphasising that the solution is not through legislation alone, weight will be placed on the need to shift the lens of focus away from a policy space dominated by technological determinism, where sight is lost on the wider stakeholder perspective relating to child development and the everyday experience of young people’s lives. This will be highlighted by analysing the ineffective use of technological interventions to tackle the issue. The broader social concerns will be evaluated by examining the fundamental role of gender within the patriarchy, the problems surrounding blame culture, the generational ‘ideology’ gap and the lack of education provision across all stakeholders. The article will conclude by suggesting a global model for reform, highlighting the need for greater digital literacy education for all, placing children’s rights and needs at the heart of the solution.

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B. THE CONTEXTUAL NATURE OF “SEXTING” AND CYBERBULLYING

In this “virtual cosmopolis”, it has been argued that the internet was designed with adults, not children, in mind, and thus the issues of cyberbullying and sexting are examples of the “doctrine of unintended, unforeseen and definitely unwanted consequences”. Today’s children and young people are the first generation to grow up in a digital globe and thus being online is an inevitable and integral part of their lives; yet they are not “digital natives” despite living in this “digital world”. This is because to accept that today’s younger generation are digital natives, would be to assume that children are born equipped with the sufficient understanding and tools to safely navigate the online sphere, when in fact this is not necessarily the case. As illustrated by the case of Daniel Perry, “online bullying can follow the child wherever they go” without the awareness of the victim’s support-systems. According to UNICEF, one out of three internet users worldwide is a child, highlighting that the distinction between the online and offline worlds continues to blur.

C. THE LEGISLATIVE APPROACH

‘Cyberbullying’ is bullying that takes place online and it can take many forms, including ‘sexting’. It can be carried out by peers or by adult perpetrators. The scope of this article will predominantly examine peer-to-peer abuse. ‘Sexting’ refers to sharing semi-naked or naked images and videos, or sexually explicit messages, with someone electronically. Cases of sexting involving children have “more than doubled in the last two years” and, correspondingly, so have the number of young people “becoming engaged in the criminal justice system” for such offences. There are various pieces of legislation in place that deal with issues of cyberbullying and sexting. The former is covered by legislation applicable throughout the UK and specifically for Scotland. There are also legal regulations and guidelines

569 Longfield (n 4).
573 Longfield (n 4).
577 A Phippen and M Brennan, “Youth-Involved Sexual Imagery” – A Better Term To Challenge Blame Culture In Youth Sexting Cases?" (2018) 29 ENT.L.R. 73 at 73.
for schools on fulfilling their duty to protect children and young people.\textsuperscript{580} Notably, ‘sexting’ in and of itself is not criminalised, unless the act involves people under the age of eighteen or if it is reported as non-consensual. ‘Underage sexting’ can be prosecuted under one of four statutes\textsuperscript{581} that cover a wide range of sexual offences. Law officers treat complaints of sexting the same way as any other potential crime and on an individual basis.\textsuperscript{582} Especially in cases of extreme technology-facilitated abuse, the legal position is that “regard should be paid not only to the best interest of the claimant as a child” but also to “potential victims of future sexting incidents involving the claimant”.\textsuperscript{583} According to recent research on childhood in the digital age,\textsuperscript{584} punitive approaches to sexting may be unnecessary and damaging, as those who sext rarely pose an ongoing threat.\textsuperscript{585} This approach is mirrored by the Crown Prosecution Service raising similar concerns around criminalising children who have engaged in such practices\textsuperscript{586} and end up on the sexual offenders register for “no good reason”. It is here that the issue of young people’s lack of awareness of the law becomes apparent. For instance, under sections 6 and 7 of the Sexual Offences (Scotland) Act 2009,\textsuperscript{587} the mere act of sending an image to someone under the age of 18 is an offence. The fact that ‘sexting incidents’ are regular, widely known and highly visible in school settings\textsuperscript{588} highlights that young people lack awareness of the law relating to sexting, and are unaware of the potential consequences. Ignorance of the law is not a legal defence, which raises the urgent requirement for greater legislation awareness, alongside increased relationship and sex education\textsuperscript{589} in schools\textsuperscript{590} for both students and adults\textsuperscript{591} — an initiative reflected in the recent White Paper.\textsuperscript{592} A clear example of how legislative measures alone fail to alleviate the challenges for young people is the Civic Government (Scotland) 1982 Act. It has extended its protection to cover children up to the age of 18,\textsuperscript{593} as opposed to 16,\textsuperscript{594} emphasising that sexting is part of “the fastest developing and changing child protection challenge of our time”.\textsuperscript{595} The fact that merely “possessing”\textsuperscript{596} an image is an offence is ineffectual, as smartphones have created easy access to a range of illegal content at the


\textsuperscript{581}Civic Government (Scotland) Act 1982, s 52, s 52A, s 52B, s 52C; Sexual Offences (Scotland) Act 2009, s 6, s 7, s 9, s 23, s 24, s 33, s 34; Criminal Justice and Licensing (Scotland) Act 2010, s 38, s 39; Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 1, s 2, s 3.


\textsuperscript{585}Ibid.


\textsuperscript{587}Sexual Offences (Scotland) Act 2009 s 6, s 7.


\textsuperscript{589}Department for Education, “Relationships (And Sex) Education And Health Education” (2018).


\textsuperscript{592}Department of Digital, Culture, Media & Sport, “Online Harms White Paper” (White Paper, CP 57, 2019).

\textsuperscript{593}Civic Government (Scotland) Act 1982, s 52(2).

\textsuperscript{594}Age of Legal Capacity (Scotland) Act 1991, s 1(1)(b).


\textsuperscript{596}Civic Government (Scotland) Act 1982, s 52A.
click of a button.\footnote{Carr (n 5).} This is an act of “unauthorised distribution”,\footnote{Phippen, “Cyberbullying and Peer-Oriented Online Abuse” (n 12).} often unknown to the recipient. Furthermore, there is the practical concern that legislation is passed in the same way as it was decades ago. The 1982 Act\footnote{Civic Government (Scotland) Act 1982.} has been amended multiple times in an attempt to bring it up to date, yet it fails to compete with technology, as the unchallenged ability to reproduce and distribute images remains.\footnote{Phippen, “Cyberbullying and Peer-Oriented Online Abuse” (n 12) at 47.} Although the current provisions covering sexting are encompassing and do cover a wide range of offences, the relevant provisions are scattered across various pieces of legislation and are constantly being amended. This lack of codification represents a lack of accessibility and a resulting lack of public awareness, and thus needs to be consolidated into one to be more effective. However, even with these improvements, success cannot come from legislation alone.\footnote{Phippen and Bond (n 2).}

D. THE POLITICAL CLIMATE: POLICY’S “NAIVE” RESPONSE TO TACKLING THE ISSUE

The current policy direction is explicitly aimed at putting pressure on technology providers to ensure harm does not occur.\footnote{Ibid.} Thus, the responsibility to “do more”\footnote{Her Majesty’s Government, “Government Response To The Internet Safety Strategy Green Paper” (2018) 11, 13, 36, 57.} is being placed on the industry. This approach is similar to the NSPCC’s,\footnote{National Society for the Prevention of Cruelty to Children.} arguing that “it’s time [for the government] to take a stand” and introduce statutory regulation on social media sites “after a decade of inaction”.\footnote{H Bentley et al, How Safe Are Our Children? The Most Comprehensive Overview of Child Protection In The UK 2018 (2017) 9 (henceforth, Bentley et al) at 5.} For technology giants to accept responsibility,\footnote{House of Commons Petitions Committee, “Online Abuse And The Experience Of Disabled People” (2019) available at https://publications.parliament.uk/pa/cm201719/cmselect/cmpetitions/759/759-large-print.pdf} and be held accountable, there needs to be a code of practice, a minimum set of safeguarding standards, transparency measures, and proactive steps to report and remove illegal and harmful content that children and young people are exposed to.\footnote{H Bentley et al (n 43).} These are all measures that the government has proposed in the recent \textit{Online Harms White Paper}.\footnote{Department of Digital, Culture, Media & Sport, “Online Harms White Paper” (White Paper, CP 57, 2019).} Unless “legislation is comprehensive and wide reaching”, the government’s ambition “to make Britain the safest place in the world to be online” is unachievable.\footnote{H Bentley et al (n 43) at 9.} Social networks should no longer be unwilling to prioritise child protection, and the voluntary Code of Practice\footnote{Byron Review, “Safer Children in A Digital World” (2019) available at https://www.iwf.org.uk/sites/default/files/inline-files/Safer%20Children%20in%20a%20Digital%20World%20report.pdf.} proposed ten years ago should become mandatory. This is vital to addressing the data collection of children's personal information,\footnote{M Kosinski, D Stillwell and T Graepel “Private traits and attributes are predictable from digital records of human behaviour” (2013) 110 (15) Proceedings Nat’l Academy Sci Early Ed 5802.} and the issue of digital persuasive design\footnote{5 Rights, “Disrupted Childhood: The Cost of Persuasive Design” (2019) available at https://5rightsfoundation.com/static/5Rights-Disrupted-Childhood.pdf (henceforth 5 Rights).} — a technique used to make children “addicted” to platforms that results in less intentional time spent online.\footnote{Kosinski, Stillwell and Graepel (n 49).}

Similarly, the General Data Protection Regulation (GDPR) seeks to tackle the issue of online child protection by placing pressure and greater regulation on industry to ensure protection and privacy.
of children’s data. Although the GDPR is “laudable”614 and has been implemented into domestic law,615 children remain largely unprotected. The majority of the websites that children access are not designed with consideration of child development and children’s rights and needs.616 Despite Article 38617 insisting on this, the Government’s “illusion of autonomy and control”618 for young people under the GDPR is highlighted by the controversy around parental consent.619 This has the possibility of invading children’s right to privacy.620 More harmfully, parental consent may cause children greater risk, as certain sites blocked may be a “digital lifeline for seeking outside assistance”621 for instance for LGBT+ young people who may have been cyberbullied.622 Children do not have control of their data, nor do they understand how it is collected and used, undermining their agency. For instance, sexting allows extremely sensitive information to be collected, and children struggle to access tools to limit or remove such data.623 Government needs to understand that addressing “the biggest transparency challenge” means to encourage the youth to “want to understand how and why their personal data is used and processed”.624 Although regulation and industry responsibility are needed, Government has failed to understand the fundamental roots of cyberbullying and “sexting” abuse, and ultimately the policy perspective is one of “prohibition”.625 Prevention does not amount to safety and, “in the absence of meaningful discussion”, there have been proposals for content control, monitoring age verification and limitation on screen time as a means of “filling the void”626.

E. TECHNOLOGICAL INTERVENTION DOES NOT WORK: CONTROL IS NOT SAFETY; THE DANGER OF ERODING CHILDREN’S RIGHTS627

The failure of the measures implemented by technology providers to tackle sexting and cyberbullying through technological tools demonstrates that technology does not solve social problems.628 In fact, no measure implemented by technology providers could solve the issues in isolation; in order to be effective they must operate in tandem with greater social measures. The consequence of turning to

615 Data Protection Act 2018.
616 Kidron, “Clickbaity” (n 6).
618 Hof & Lievens (n 52) at 33.
627 Ibid.
628 Ibid.
technological “solutions” as a way of dealing with the “dearth of public education”\textsuperscript{629} on digital literacy is that “we [lose] sight of the child in our protectionist rush to keep them safe”.\textsuperscript{630} This leads to the danger of becoming a society governed by a safeguarding dystopia: control does not mean safety. The understanding of the relationship between children’s use of digital technology, time spent online and impacts on their well-being is “very immature and poor...”\textsuperscript{632} Kidron argues that it is not about the time spent, but what children are doing online and “what being online is doing to them”.\textsuperscript{633} The time spent online and exposure to risk is a “correlation, not a causation”.\textsuperscript{634} Thus, proposals to limit screen time\textsuperscript{635} and employing “watertight”\textsuperscript{636} age verification measures online will be ineffective in preventing access to illegal or harmful content, as these can be accessed via social media and peers.\textsuperscript{637} This can be illustrated by the results of COPPA\textsuperscript{638} in the US regarding the 13 “age limit” requirement which has “failed [in] diminishing the problem it claimed to address”.\textsuperscript{639} Furthermore, child safety apps are not the solution as they cannot replace human communication in the form of “honest conversation”.\textsuperscript{640} Control through apps and filters also results in “eroding children’s rights to keep them safe”\textsuperscript{641} and the further risk that the “next generation of our society develops in a way that makes them think they have no right to privacy”.\textsuperscript{642} Filters can only be an additional safety net\textsuperscript{643} and part of the “toolkit”; filters cannot be relied upon solely.

In 2011 the Scarlet Extended CIEU judgment\textsuperscript{644} clarified that ISPs\textsuperscript{645} are not obligated to filter content as this would be an infringement of fundamental rights. Similarly, the use of apps contravenes multiple rights under the UNCRC.\textsuperscript{646} Thus, the disproportionate responsibility placed on digital platforms deflects responsibility away from more important and direct influences in children’s lives. In “assign[ing] responsibility to a service provider [it] does not seem like appropriate stakeholder roles have been adopted”: parents should be primarily responsible for the management of their children’s internet\textsuperscript{647} through open and honest discussion of the potential risks that come with being online, as opposed to attempting to control and limit their screen time. Further, the proposal to regulate algorithms is unrealistic as it is doubtful that algorithms could be sophisticated enough to “understand the nuances”\textsuperscript{648} of abuse. They cannot be expected “to make moral judgements, as algorithms deal with

\textsuperscript{629} Ibid.
\textsuperscript{630} Ibid.
\textsuperscript{631} Ibid.
\textsuperscript{633} Kidron, “Clickbait” (n 6) at 28.
\textsuperscript{634} Phippen, “Screentime” (n 70).
\textsuperscript{635} Ibid 137-140.
\textsuperscript{636} Phippen & Bond (n 2).
\textsuperscript{637} Ibid.
\textsuperscript{639} Phippen, Screentime (n 70) 137-140.
\textsuperscript{640} Phippen & Earl (n 64).
\textsuperscript{642} Phippen & Gray, Invisibly Blighted (n 22).
\textsuperscript{644} Scarlet Extended SA v Societe Belge des Auteurs, Compositeurs et Editeurs SCRL (SABAM) (C-70/10) [2011] E.C.R. I-11959.
\textsuperscript{645} Internet Service Providers.
\textsuperscript{647} Phippen, Screentime (n 71) 137-140.
\textsuperscript{648} Phippen & Bond (n 2).
absolutes while morality does not”. The problematic persuasive design techniques used by internet ‘giants’ are evident in algorithmic detection and the tragic case of Molly Russell highlights that the young often turn to social media instead of having a “meaningful discussion” with their parents regarding mental health. This case should inform policy regulation and there needs to be greater focus on digital literacy for all digital citizens. There is a clear generational barrier, reflecting a broader social concern that needs to be addressed before attempting to “legislate our way out of a social problem”.

F. BROADER SOCIAL STRUCTURAL ISSUES

The biggest limitation to the effectiveness of the law in dealing with sexting is the fact that legislation alone is unable to address its harmful implications because its underlying issues are deeply rooted in patriarchy. One of the ways in which patriarchal issues take form in the online world is through technology-facilitated gender-based violence. It has been demonstrated that “sexting has a different purpose according to gender” and has disproportionate consequences for young women and girls. Therefore, the roots of peer-to-peer bullying and sexting trace back to patriarchal issues, in which technological platforms are able to “reinforce and reproduce the same structural inequalities and discrimination.”

It is vital “to improve the lives of young women through effective Relationships and Sex Education in schools”. This is emphasised by the research in schools on “upskirting” prohibited under section 9(4B) of the 2009 Act. The lack of transparency of the legislation in this area is highlighted by the fact that schools have yet to intervene or implement an exclusive no-tolerance policy for upskirting. This has resulted in “girls hav[ing] to adapt to this form of harassment” in order to protect themselves. There should be “no world order in which the duty should rest on a child to adapt to the needs of tech, rather than on tech to adapt to the needs of childhood”. The latest findings on sexting...

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649 H Phippen and A Phippen (n 63).
650 5 Rights (n 50).
652 Phippen (n 79).
654 Phippen et al (n 26).
655 Kennedy & Phippen (n 29).
659 Sexual Offences (Scotland) Act 2009.
661 Kidron, “Clickbait” (n 6) at 29.
from eNASCO confirm that sexting is part of a complex range of interconnected issues facing young people; for instance, a sexualised culture, peer pressure and sexual violence towards women. Legislation dealing with sexting and cyberbullying can therefore be regarded as dealing with the symptoms but not the cause, which is in large proportion the sexist and gendered nature of sexting.

As social media is an omnipresent part of the fabric of childhood, there has been a concerning change in the mentality and attitude amongst young people due to "idealized notions of physical appearance in the visual culture of social media". This is evident in how "snapchat turns conversations into streaks, redefining how our children measure friendship" and how "Instagram glorifies the picture-perfect life, eroding our self-worth". Research has demonstrated that the type of images that are glorified and deemed "sexy" on social media amongst teens are those that conform to traditional gender norms of masculinity and femininity such as images showing "six packs" for young boys and "breasts" for girls. This allows for socially structural issues such as gender performativity to be reinforced online and through sexting, as vulnerable young people are sharing images that uphold heteronormative standards by constructing a "digital gendered identity". As the "digital bleeds into the material space of peer culture in complex ways", educational environments struggle to address toxic hyper-masculine behaviour encouraging "boys’ ownership of girls bodies" which only legitimises unacceptable "behaviour that we might once have felt to be offensive offline. This creates further barriers to challenging blame culture in youth sexting cases. Blame culture is a prominent facet of the sexting phenomenon, which is evident in the fact that girls are labelled as consciously choosing to become victims by sharing "self-generated" images. This "exaggerates the sexual agency of children and young people" in this context and fails to consider that sexting is often coercive, reflecting how we “build resilience from an early age rather than dealing with issues in a reactive way”. Thus, sexting is neither a “distinct practice” nor a “secluded phenomenon; it is part of growing up in a connected age and relates to cultural influences wider than the peer group".

G. A SHIFT IN THE POLITICAL LENS: IT IS TIME TO LISTEN TO THE YOUTH

To address these challenges, all stakeholders need to take a proactive approach to listen to and understand the viewpoints of children and young people, “the very group that legislation is designed to

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663 Kennedy & Phippen (n 29).
664 Bentley et al (n 44).
667 5 Rights (n 50).
668 Ringrose & Harvey (n 104) at 206.
669 Ibid at 206.
670 Ibid at 210.
671 Ibid at 206.
672 Ibid.
673 A Phippen and M Brennan, “Youth-Involved Sexual Imagery” (n 15).
674 Ibid.
676 Phippen, “Cyberbullying and Peer-Oriented Online Abuse” (n 12) at 39.
677 Ibid at 51.
The fundamental question is: how can the policy space be different to the youth voice? Children are in desperate need of better sex and relationship education to be “delivered by knowledgeable and non-judgmental practitioners”. As parents, carers, educators and professionals lack digital literacy, young people often turn to their peers out of fear of being “told off”, or the “threat of prosecution”. The youth are not dependent on technology providers as the single solution; instead they need learning environments that encourage open discussion where they can ask questions about the “complexities of the digital world”. The policy objectives are in danger of falling into a pattern of liberal paternalism, undermining the autonomy of today’s youth. Placing greater weight on autonomy as part of solution will ensure effective education, which is at the heart of the issue. This includes creating a non-patronising educational environment where children feel respected and can learn to be active agents with meaningful choice, making critical decisions based on proper digital literacy and education.

H. REFORM: PROPOSED ECOSYSTEM MODEL FOR REFORM

The “DNA of Silicon Valley” has not catered to child users, and “rejected hugely precious cultural, social and legal norms of childhood”. It is therefore “time to listen to the youth” and reposition the child at the centre, with their rights and needs as an “overarching wrapper”. Instead of chasing technological solutions to social problems, policy direction needs to adopt a “holistic” approach. An adaption of Bronfenbrenner’s ecosystem approach for online safety allows for shared responsibility across all stakeholders through “interconnections that facilitate the development of the child”. This recognises that there is not “one independent entity that ensures positive development of the child”, but instead “interactions between the child, their immediate environments – parents and family – and wider systems such as schools, health and social educational systems”. This system would enable the issues of sexting and cyberbullying to be addressed in a manner that allows for legislation to be effective, as it creates a structure that promotes the importance of broader social measures having a pivotal role in tackling the challenges. Instead of relying on greater regulation of the industry, this framework will allow for other stakeholders in children’s lives to work on different levels and together in order to bring about the necessary changes and understanding. At the basic level, this includes individuals and institutions that have a direct impact on the development of children such as parents or carers and teachers, acting as agents of education, facilitating open discussion about the online world. This joint responsibility amongst young people, carers and schools will inform policy makers and legislative drafters to work together and craft a legal framework that is effective in tackling online harms, demanding a mandatory code of practice to ensure internet service providers cater for child users. As a result, this ecosystem will allow for children to appropriately navigate and make the most of the opportunities presented in the digital realm, as they will be equipped with the necessary tools, education and support from all the relevant stakeholders. Additionally, tech giants will work with these immediate stakeholders in order to allow young people to remain online and be protected within it simultaneously. In order to protect and respect children’s rights, the UNCRC will have a crucial role to play under this model, acting as the vital component of the macrosystem that should define the

678 Phippen & Bond (n 2).
679 Ibid.
680 Ibid.
681 Ibid.
682 Ibid.
683 Kidron, “Clickbait” (n 6) at 26.
684 Phippen & Bond (n 2).
685 Ibid.
686 Ibid.
688 Phippen & Bond (n 2).
689 Ibid.
I. CONCLUSION

The digital era presents a cosmopolitan dichotomy between protecting the youth from technology facilitated risks and respecting their autonomy and rights to digital literacy through “informed and conscious” decisions with the knowledge, “power and the resilience they need to make the most of the amazing opportunities the online world brings”. It is clear that the challenges of cyberbullying and sexting are part of a bigger global challenge in which regulation only serves to mask the unresolved social roots. Although the current legislative measures are indeed encompassing, they lack effective codification. Legal regulation is needed to safeguard children from the challenges of digital persuasive design and data protection. However, attempting to use technology to keep children safe online is unrealistic and has the consequence of violating fundamental children’s rights. The issue is not merely that the law cannot compete with the rapid pace of technology, rather that legislation will not alleviate the strains of sexting and cyberbullying until the broader social issues underlying these challenges is recognised. Due to insufficient recognition of children’s digital needs in the 21st century, all stakeholders need to adopt a holistic model. As technology seeks to “undermine our democratic values”, it is vital to “turn [the] balance of power in [the youth’s] favour” by ensuring that children's rights, needs, and protection online are equivalent to offline, keeping in mind that a “child is a child until they reach maturity – not until they reach for their smartphone”.

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690 5 Rights (n 52) at 38.
691 Longfield (n 4).
692 Kidron, “Clickbait” (n 6) at 26.
A. INTRODUCTION

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D. REGIME UNDER THE NEW EECC

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A. INTRODUCTION

On 13 June 2019, the Court of Justice of the European Union (“ECJ”) held that Gmail was not an electronic communications service (“ECS”) as defined by Article 2(c) of the Framework Directive (“FD”).

This decision clarified the debate over which if any of the so-called over-the-top services (“OTT services”) are electronic communications services. It is thus highly relevant for the telecommunications sector, as OTT services include such widely used applications as instant messaging, voice over internet protocol (“VoIP”) and web-based email services like Google’s Gmail in the case at hand. Beyond this, the case illustrates the regulatory challenges industry convergence and disruptive services impose on the telecommunications sector. These challenges, illustrated in the decision, have contributed to shaping the framework of the new European Electronic Communications Code (“EECC”) and will be of ongoing relevance in the EECC’s application.

This paper is divided into three main sections: a summary of the ECJ decision providing background to the OTT services debate, a critical analysis of the decision, and an outline of the changes imposed by the EECC.

B. SUMMARY OF THE DECISION

(1) Background on OTT services

The phenomenon of convergence and the advent of disruptive technologies acutely challenge the telecommunications sector and its regulatory framework. The European Union’s 2002

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694 Case C-193/18 Google LLC v Bundesrepublik Deutschland [2019] ECR 498 (hereinafter “Google”)

telecommunications legislation is based on a seemingly self-evident differentiation between conveyance of signals and provision of content.\textsuperscript{696} Various directives – in particular, the FD – draw a clear distinction between the production of content, which involves editorial responsibility, and the transmission of content, which does not. Content and transmission are covered by different measures which pursue their own specific objectives. The legislators of the FD nevertheless anticipated this differentiation growing more difficult due to the “convergence of the telecommunications, media and information technology sector” in Recital 5 of the FD. One specific phenomenon challenging the differentiation of content and transmission is that of the OTT service. Such services developed with the advent of high-speed internet access and are, as Brown puts it, “de-coupled from the provision of connectivity\textsuperscript{697} – carried out “over the top” of the basis provided by the internet.

The term “OTT service” is not clearly defined by binding law. The Body of European Regulators for Electronic Communications (“BEREC”) defines it, rather broadly, as “content, a service or an application that is provided to the end-user over the public internet”.\textsuperscript{698} BEREC distinguishes three types of OTT services: OTT-0 services, which may qualify as ECS; OTT-1 services, which do not qualify as ECS but potentially compete with ECS; and OTT-2 services, which are not ECS and do not potentially compete with them.\textsuperscript{699} This classification does not itself provide legal guidance on whether OTT services are ECS, however. Although OTT services rely on the internet connection provided by traditional telecommunications companies, they are subject to less regulatory burdens and can be used across the whole world. This impacts traditional telecommunication service providers’ (“plain old telephone services” or “POTS”) business models and has led to calls for a more “level playing field”\textsuperscript{700} as POTS fear for their revenues.\textsuperscript{701} One proposed solution for the regulation of OTT services would be to qualify them as ECS and subject them to the same rules. It is heavily disputed, however, whether a level playing field would best be achieved by more regulation for OTTs or less regulation for POTS in general.

All in all, POTS feel threatened and treated unfairly, especially in the light of legal obligations further limiting their operational freedom such as recent EU net neutrality regulation.\textsuperscript{702} Governments, meanwhile, have security concerns regarding OTT services: traditional telecommunications services are subject to regulations allowing government monitoring in certain situations and the creation of interfaces for data access by investigating authorities.\textsuperscript{703} Against this background the case at hand was to be decided.

\textsuperscript{696} 2002 Directive.
\textsuperscript{699} Ibid.
(2) Factual background

Google LLC ("Google") offers, among other things, the web-based email service Gmail. Google operates its own network infrastructure connected to the internet, but Gmail itself is an OTT service. Gmail users create the content of emails, while Google uses email servers to identify the IP addresses of the corresponding terminal devices. When transmitted via Gmail emails are broken down into data packages but their content remains unchanged. The data packets are then uploaded to or received from the open internet via Google’s email servers. Third parties, such as internet access providers ("IAP") then convey the data packets via the open internet. The internet routing of the data packages is dynamic and follows the "best-effort" principle.

The background to the main proceedings was an official decision of the German Federal Network Agency (Bundesnetzagentur or "BNetzA") of 2 July 2012 addressed to Google. The BNetzA determined that Gmail constituted a "telecommunications service" according to Article 6(1) read in conjunction with Article 3(24) of Telekommunikationsgesetz (the Telecommunications Act or "TKG"), the main German telecommunications regulation, Article 3(24) TKG being the national legal implementation of Article 2(c) of the FD. A telecommunication service in TKG is defined by the same criteria as an "electronic communications services" (ECS) in Article 2(c) FD, as a service concerned "wholly or mainly in the conveyance of signals" which are "normally provided for remuneration". Google therefore had to register with the BNetzA or else be subject to a penalty payment.

Following subsequent administrative court proceedings, the Cologne Administrative Court ("AC-Cologne") confirmed the legal opinion of the BNetzA in a judgment of 11 November 2015. It held that, while signals are conveyed by IAP, they can be attributed to Google from a teleological point of view. Google then appealed against the decision of the AC-Cologne to the North Rhine-Westphalia Higher Administrative Court ("HAC-NRW").

Google submitted that its Gmail service may involve the conveyance of signals, but not by Google itself. It argued that the conveyance was conducted by IAPs and could not be attributed to Google as it had no actual or legal control over that process. The company submitted that its own network infrastructure was primarily used for the provision of other data-intensive services.

The BNetzA argued that Gmail was a telecommunications service since its primary purpose was the transmission of emails, not the provision of their content. From a functional viewpoint, the transmission of emails between sender and recipient was facilitated by the transmission of signals.

(3) Main legal issues

The HAC-NRW referred the following questions to the Court for a preliminary ruling under art 267 TFEU. One, whether the characteristics of a "service...which consists wholly or mainly in the conveyance of signals" within the meaning of Article 2(c) FD also covered web-based email services which did not themselves provide access to the internet. Two, whether this would be the case in a situation where the provider of the web-based email service had its own electronic communications networks connected to the internet. Three, whether the criterion of remuneration mandated payment of a fee by users or whether financing by third parties was sufficient.

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705 Verwaltungsgericht Köln.
706 VG Köln 21 K 450/15.
707 Oberverwaltungsgericht für das Land Nordrhein-Westfalen.
708 Treaty on the Functioning of the European Union OJ C326/1.
(4) Applicable law

The decision was based on the interpretation of Article 6(1) TKG, which requires every operator of telecommunications services to register with the BNetzA when read in conjunction with Article 3(24) TKG. The latter regulates the definition of telecommunications services as the German implementation of the definition of ECS in Article 2(c) FD. The preliminary ruling of the ECJ would therefore determine whether OTT services were telecommunications services within the definition of Article 2(c) FD.

(5) Holding and reasoning of the Court

The Fourth Chamber of the Court examined the first and second question together and focused on the central feature of a service consisting “wholly or mainly” of signal transmission. The Court held that the function performed by Gmail would not classify it as an ECS according to the meaning of Article 2(c) FD. Although the Court confirmed that Google was transmitting data by sending and receiving messages via its servers, it did not fulfil the criteria of doing so “wholly or mainly”. The Court substantiated this claim with two main arguments. First, vis-à-vis end-users, the responsibility for the transmission of signals lay with the IAPs and network operators. Second, from a technical point of view, splitting messages into data packets and uploading them to or receiving them from the open internet did not suffice to classify Gmail’s activities as consisting “wholly or mainly” of the conveyance of signals. The Court did not answer the third question on remuneration since it had already rejected one constituent element of the definition of telecommunications services.

C. CRITICAL ANALYSIS OF THE DECISION

This analysis will focus on the following elements of the decision. First, the significance and further implications of the decision itself will be explained. Second, the Court’s reasoning will be critically discussed, tracing its interpretation of Article 2(c) FD with regard to the criteria necessary in order to establish ECS status and assessing its interplay with the noted SkypeOut decision. Third, the strengths and weaknesses of the Court’s decision will be assessed within the broader context of the regulation of OTT services.

(1) Significance and further implications of the decision

The decision at hand is a landmark one as it combines and illustrates two current regulatory challenges for telecommunications and internet regulation.

The decision shows the difficulties the phenomenon of convergence poses to the traditional distinction between regulation governing the transmission of signals and that concerned with the provision of content. Reading the decision in conjunction with the SkypeOut decision, it develops a more precise differentiation regarding the criterion of responsibility for signal transmission. Additionally, the ECJ was confronted with the politically motivated call for a “level playing field” by traditional ECS providers. This was capitalised upon by the German BNetzA, which wanted to increase its administrative power. The ECJ rightly chose a technological approach over a functional-equivalence-based one, something which will be analysed in the following discussion. The decision at hand therefore provides an example of a possible path of regulation of disruptive services and highlights the challenge of avoiding the “imposition” of traditional rules on new emerging services and technologies. As will be illustrated, it did not overstretch the law but left it to legislators to develop a nuanced approach to regulation of disruptive services. This judicial and legislative process may provide future guidelines for other areas of EU law that are strongly influenced by disruptive technologies, such as platform regulation and e-privacy.

709 See Google (n 2).
710 Case C-142/18 Skype Communications Sàrl v Institut belge des services postaux et des télécommunications (IBPT) [2019] ECR 460 (hereinafter “SkypeOut”).
(2) Points of law from the ruling

Systematically, the ECJ focused its interpretation of the definition in Article 2(c) FD on the criterion of Gmail being a service “wholly or mainly consisting in the conveyance of signals”.

(a) Service

The Court did not elaborate on the exact classification of a service. The criterion of “service” can be interpreted as an entire bundle of services marketed to the end-user or, at the other end of the spectrum, may focus on an individual component of the service in isolation. An argument against considering the overall service is that the classification as ECS would depend solely on the service design by the provider, which could easily circumvent the regulations of telecommunications law by combining it with other services. On the other hand, a differentiation that is too fragmentary would render the criterion of signal transmission obsolete. The service should therefore be assessed in terms of its so-called isolated marketability. Gmail offers additional applications such as chat functionalities and Google “Hangouts”, or group video calls. In the SkypeOut decision, which will be discussed in detail below, one specific feature was singled out from a bundle of services. It might have been helpful if the Court had provided further guidance on how to distinguish which feature of a bundle constitutes a service.

(b) Conveyance of signals

The Court held that Gmail does convey signals, with a relatively short but convincing explanation. It regarded the transmission and reception of emails from the open internet as a conveyance of signals, without focusing too narrowly only on transmission by the IAPs and network operators. This reasoning is convincing from a technical point of view, as can be illustrated by comparing the service offered by Google to the OSI layer model. The model is not undisputed, but can provide a helpful guideline. Gmail provides signal transport in the sense of the OSI layer model by dividing its email messages into data packets and assigning the IP addresses of the corresponding end devices to the emails (transport in layer 4, packing of the data packets in layer 3).

The court pointed out that the conveyance of signals can be facilitated by an infrastructure that does not belong to the service provider. The Court had previously established this reasoning in the UPC DTH judgment and referred to it coherently and convincingly in the case at hand. In the UPC DTH judgment, the service provider argued it was not an ECS as it did not have its own satellite infrastructure but relied on using third-party infrastructure for the provision of its service. The Court held that the fact that the transmission of signals used infrastructure belonging to a third party was of no relevance

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711 Kühling & Schall, “WhatsApp” (n 9).
712 Ibid.
713 SkypeOut (n 18) at para 30.
714 Google (n 2) at para 34.
715 Ibid at para 32.
720 Grünwald & Nüßing, “Kommunikation”.
721 Alani, “OSI model”.
723 Ibid at para 42.
to the classification of the nature of the service. The Court justified this for a service such as UPC DTH by citing the objective of establishing a genuine internal market for electronic communications governed by competition law only. The same rationale can be applied to the case at hand. Although the ECJ did not specify it, applying these criteria to OTT services illustrates the ECJ’s general consciousness of a potential need to regulate them. Furthermore, avoiding a focus on the ownership of the infrastructure left as irrelevant whether or not Google used its own server infrastructure for the provision of Gmail.

(c) Wholly or mainly: focus on responsibility for signal transmission

The Court subsequently focused its interpretation of Article 2(c) FD on the criterion of Gmail being a service “wholly or mainly” consisting in the conveyance of signals. The argumentation provides some difficulties in interpretation and is rather curt. Nevertheless, the outcome is convincing overall.

The ECJ relied on the criteria of responsibility already established in the UPC DTH decision, pointing out that the deciding criterion was whether a service provider was responsible “vis-à-vis the end-users for transmission of the signal which ensures that they are supplied with the service to which they have subscribed”. The Court determined that this responsibility, in the case of a web-based email service such as Gmail, is mainly borne by the network operators and IAPs of the end-users and did not take a functional approach or follow the so-called “causation doctrine”.

The causation doctrine was developed in German scholarly literature. It strongly influenced the discussion around OTT services in Germany and was reflected in the decision of the AC-Cologne which interpreted the criterion of “wholly or mainly” from a teleological point of view. The causation doctrine only applies to OTT communication services, meaning services that mainly consist of the facilitation of the transmission of signals, in contrast to so-called OTT content services that mainly consist of the provision of content. Its proponents argue that the criterion for attributing conveyance of signals must be seen in a “qualified causation” of it by OTT communication services. In contrast to OTT content services, the conveyance of signals itself is the primary purpose of the OTT communication service. As they are “functionally equivalent” OTT services, causing the conveyance of signals should be treated in the same way as a traditional ECS conveying the signals itself. This classification was in line with the thinking of BNetzA, which had explicitly argued for a “precedence” to allow for regulation of such services under its own authority.

(d) Merits of the technical approach

The ECJ discussed the criterion of responsibility based on the technical-functional contributions of the parties involved in the signal transmission. It concluded that, although a supplier of a web-based email service might participate in the sending of messages, on a technical level a web-based email service cannot be regarded as wholly or mainly consisting of such conveyance. The technological considerations of the Court are convincing for the following reasons. First, the act of transmission of signals is not a technologically neutral process. Even if services provide a functional equivalent to ECS, they do not technically convey (most of) the signals. It can also be challenged whether services

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724 UPC DTH (n 30) at para 43.
725 Ibid at para 44.
726 Google (n 2) at para 39.
727 UPC DTH at para 43.
728 Google at para 32.
729 Ibid at para 38.
730 Kühlung & Schall, “WhatsApp” (n 9).
731 Ibid.
732 Grünwald & Nübing, “Kommunikation” (n 25); WAR (n 8).
such as Gmail mainly consist of conveyance of signals in the end-user’s view; there is at least no scientific evidence for it. It might as well be argued that, in the case of a service as Gmail not functioning, the user will first seek to fix their internet connection (provided by the IAP) and not the email application.

Second, the concept of general assessment based on the causation doctrine seems, as Ludwigs and Huller describe it, to open the examination of the different criteria constituting an ECS to “argumentation from the desired outcome”. Furthermore, arguing for such an outcome appears to be short-sighted. While it may be desirable to achieve a level playing field via more regulation of OTT services, this may have undesirable consequences: the relatively old regime of the FD might not be the right regulatory tool to mitigate the disruptive potential of OTT services, and may even unduly limit the potential benefits OTT services can provide for society. Some of the provisions of telecommunications law are not fit for applying to OTT services. Examples include regulations concerning the access to infrastructure (which is usually not provided by OTT services themselves: Article 9 TKG), interconnection requirements, or requirements to provide itemised bills for OTT services which are not number-based (Article 99 TKG).

Third, the positive aspects of OTT services, such as promoting the achievement of the Digital Single Market, should be balanced against the negative impact they might have on traditional telecommunications services. Regulation which does not consider the specific service and whether it is fit for regulation under telecommunications law instruments may arguably be undesirable: any negative impact for traditional service providers will be mitigated, as OTT services still rely on the infrastructure of a traditional IAP. A market-based solution for the disruption of traditional telecommunication business models may therefore be sought. An adequate solution might require changes to the boundaries of net neutrality and considerations about redistributing spectrum usage.

In this light it can be concluded that the ECJ treating OTT services as ECS purely for the sake of regulating them somehow would have led to what is discussed in academic literature as an “imposition” of telecommunications regulation on OTT services. The ECJ’s decision against considering Gmail an ECS based on an evaluation of responsibility for the technical conveyance is more convincing than a functional approach. It should not be disputed that some areas of OTT services may benefit from being subject to regulation. If, however, such regulation is imposed, it should be imposed de lege ferenda in a differentiated manner by legislators. This differentiated approach to regulating OTT services has been adopted in the EECC, which will be discussed further below.

(e) The SkypeOut decision and the unclear criterion of “any other element”

The Google decision may have benefitted from reference to the SkypeOut decision, delivered about one week before the case at hand and also focusing on the correct interpretation of Article 2(c) FD. SkypeOut is an additional feature of the Skype software which allows users to call a landline or mobile number on the public switched telephone network (“PSTN”) from a device connected to the internet using VoIP technology. SkypeOut thereby enables end-users to communicate with conventional telephone lines and guarantees the signal transmission to the end customer. The operators of SkypeOut had concluded agreements with telecommunications service providers in order to reach the telephone network.

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735 Ludwigs & Huller, “OTT” (n 24).
736 Brown, “An assessment” (n 5).
737 Ibid.
740 Ibid.
741 SkypeOut (n 18).
In *SkypeOut*, the Belgian National Regulatory Agency classified the SkypeOut service as an ECS within the national legislation implementing Article 2(c) FD. The court held that Skype did bear the responsibility vis-à-vis the end-users for the connection from the gateway to the PSTN network. Although Skype does not convey any signals itself, it has a responsibility similar to contractual liability vis-à-vis the end-users, as those end-users do not themselves have any contractual relationship with the PSTN service providers.

Articles discussing the judgments\(^\text{742}\) point out the usage of the PSTN network by SkypeOut as the Court’s main reason for classifying it, but not Gmail, as an ECS. However, examining both judgements following the methodology of the *UPC DTH* decision seems to imply that the fundamental distinction is not SkypeOut’s usage of the PSTN network, but rather its responsibility to end-users.\(^\text{743}\)

Responsibility is also a crucial criterion in the *Google* decision, where the ECJ places it with IAPs. In the case of an email service such as Gmail, end-users have a contractual relationship with their respective IAP without the involvement of the email service provider. Comparing both rationales, the contractual relationship between the PSTN providers and Skype independent of the end-user can be identified as the distinctive feature of the *SkypeOut* judgment; the exclusion of responsibility for connection in the contractual terms and conditions for SkypeOut’s end-users is considered irrelevant by the ECJ. This reasoning is in line with the argument mentioned above that the contractual design of a service cannot be allowed to determine its classification as an ECS.

Still, this line of argument poses the question of which types of contractual relationships exactly suffice to constitute “responsibility” vis-à-vis the end-user. This ambiguity, read in conjunction with paragraph 38 of the decision at hand,\(^\text{744}\) provides for a gateway of legal uncertainty, as the Court refers to “the absence of any other element” to establish Google’s responsibility. The academic literature on the decision rightfully views this criterion as “cryptic”.\(^\text{745}\) Arguably, such an “other element” may include contractual agreements with IAPs. These could be agreements on the preferential transmission of signals within the framework of the net neutrality Regulation.\(^\text{746}\) Such agreements may not be technically necessary, as they were in SkypeOut, but may still increase the value of an OTT service.

(3) **Broader context of regulation of OTT services**

The Court’s decision shall now be discussed within the broader context of legal issues related to the regulation of OTT services.

(a) **Assessment of the need for regulatory intervention**

It can be questioned how pressing the need for regulation of OTT services put forward by telecommunication service providers and some government agencies truly is. This demand is often justified on grounds of user protection and the furthering of competition – including, in the latter context, the demand for the creation of a “level playing field” – as well as public security concerns.\(^\text{747}\)

With regard to competition and user protection, these arguments overlook the fact that end-users have a different situation with OTT services compared to traditional ECS. As services are often provided free of (monetary) payment, users often use multiple services: a phenomenon called

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\(^{742}\) Ludwig & Huller, “OTT” (n 24); Assion, “Reichweite” (n 42); Wüsthof, “OTT-Dienste” (n 46).

\(^{743}\) *UPC DTH* (n 30) at para 43.

\(^{744}\) *Google* (n 2) at para 38.

\(^{745}\) Ludwig & Huller, “OTT” (n 24).

\(^{746}\) Ibid.

\(^{747}\) See VG Köln 21 K 450/15 (n 14) at para 52.
“multihoming”. They can usually change or terminate services quickly and do not experience “lock-in effects”, as can occur in traditional telecommunication services. It can therefore be argued that existing general legislation sufficiently protects users by civil and contract law, such as consumer protection or terms and conditions law.

Another argument brought forward is a concern for sufficient data protection. Data collection and analysis by major OTT services is a societal and legal issue heavily discussed by academics and practitioners. It will be touched upon here only very briefly. OTT services are now subject to the GDPR, which provides the end-user with additional rights such as the right to be forgotten and a specific right to data portability. Furthermore, there is a considerable legislative debate as to whether to include OTT services in the still-to-be-determined e-privacy directive. These efforts show that data protection concerns are already being addressed by legislators and do not necessarily mandate a classification of OTT services as ECS.

OTT services have been a disruptive force in the telecommunications industry. However, OTT services are not obviously jeopardising the safeguarding of fair competition. The aforementioned multihoming effects and stronger market alternatives can even promote competition. While a “level playing field” might be desirable to a certain extent, the regulator should not try to “preserve the past status” at any cost, as a mere loss of revenue for traditional ECS does not necessarily mandate intervention. As for regulators’ concerns that traditional ECS providers will no longer have enough incentive to invest in future telecommunications infrastructure, it can be argued that the question of providing infrastructure for internet access can be addressed by market-based solutions such as infrastructure sharing or other measures to reduce infrastructure cost.

In addition to emergency call services, the public-safety obligations logically required by national regulatory authorities include, in particular, telephone surveillance measures or requests for information from law enforcement. Although security authorities may be able to access data packets from IAPs, they may not be able to decode them in a timely manner in the event of a specific threat. A certain degree of access to OTT services employing telecommunications monitoring is therefore certainly desirable, although data protection aspects must also be taken into account.

Against this background, the factual circumstances encountered may not be dire enough to mandate a pressing need to reconsider the regulation of OTT services as ECS.

(b) Remuneration

As mentioned above, the Court did not decide whether a service such as Gmail was provided for “remuneration”. As a majority of OTT services accrue a substantial amount of their revenue by

749 Grünewald & Nüßing, “Kommunikation” (n 25).
750 WAR (n 8); Kühling & Schall, “WhatsApp” (n 9).
753 Brown, “An assessment” (n 5); Parcu & Silvestri, “Past and Future” (n 47); BEREC, “Report” (n 6).
754 BEREC, “Report” (n 6).
756 Brown, “An assessment”.
757 Ibid.
758 WAR (n 8).
monetising end-user data, the issue of whether personal data itself can or should be considered as remuneration, or how two-sided business models with paying advertisement clients on the one side and free-of-charge end-users on the other side should be treated, is controversial in different fields of law, with data protection, consumer protection and competition aspects. It can be argued that remuneration is either provided by the user in the form of personal data, or by advertisement companies paying for placement of their products. However, more convincing points argue for interpreting “remuneration” in a relatively narrow sense.

The wording of Article 2(c) FD itself is not entirely conclusive, as its inclinations differ depending on the different language versions of the Directive. It could be argued that if legislators had wanted to include the possibility of remuneration provision via revenues generated by personal data, i.e. by means other than monetary, it would have been explicitly mentioned, since other legislative acts such as the E-Commerce Directive explicitly mention this possibility. The E-Commerce Directive states at Recital 18 that it extends “to services which are not remunerated by those who receive them”. The legislative history of the FD supports this interpretation, as the European Parliament wanted to change the Commission’s initial proposal of the FD to “services provided on a commercial basis”, but had to compromise with the Council on the formulation “normally provided against remuneration”, which the Commission considered as being closer to the regulatory intention of its initial proposal.

(4) Interim summary

The judgment allows a clearer distinction between ECS and other information society services (ISS) not subject to sector-specific regulation. Despite the omissions mentioned above in its reasoning, the Court did not obviously argue from a teleological standpoint, as the AC-Cologne did, but instead chose a neutral answer from a technological viewpoint. Moreover, the ECJ arguably achieved a desirable result by deciding against the system design adopted by legislators.

D. REGIME UNDER THE NEW EECC

The new European Electronic Communications Code has until 21 December 2020 to be implemented into national law by Member States. The EECC still emphasises a differentiation in the regulation of content and regulation of ECS (Recital 7) but nevertheless changes the regulation of OTT services, as it decides on a functional instead of a technological approach in determining ECS status.

Following its functional approach, the EECC considers some ISS to be ECS as clarified in Recital 10. The EECC introduces a new category of “interpersonal communications service” (ICS) in Article 2(4), defined as “a service normally provided for remuneration that enables direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons”. This inclusion means both types of services – SkypeOut (OTT-0) and Gmail (OTT-1), previously not considered as an ECS – will fall within the scope of the EECC.

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764 See VG Köln 21 K 450/15 (n 14) para 49.
765 The German version (Gegen Entgelt erbrachte Dienste) argues for a narrower viewpoint, as “Entgelt” implies the payment of money. The English and French versions appear more open to an expansive interpretation.
However, whether a service is concerned “wholly or mainly” with the conveyance of signals remains, as Recital 15 clarifies, an “important parameter”, and the concept of “responsibility for signal transmission vis-à-vis the end-user” may still be employed by the ECJ to provide guidance in future cases where the categorisation of a service is unclear.

As legislators implement a functional approach to the regulation of OTT services, the problem of “imposition” of regulation seems to be avoided by the EECC’s placing of differentiated rights and obligations on specific services as laid down in Recital 15. Article 12 EECC provides an example of this approach by differentiating between number-based and number-independent interpersonal communication services concerning notification requirements. All in all, the additional regulatory burden placed on OTT services by the EECC is kept relatively low.765

The unresolved issue of how to interpret the criterion of “remuneration” is also addressed in the EECC, specifically in Recital 16. While the same wording prevails, the EECC acknowledges the economic reality that payment for OTT services is often provided by users giving access to their data or by third parties paying for the display of advertisements customised using such data.

E. CONCLUSION

Following the ECJ’s decision it appears highly likely that the HAC-NRW will not classify Gmail as an ECS, although the criterion of “absence of any other elements” might need additional consideration.

Although the ECJ has convincingly followed a technological reasoning under the FD, the new EECC adopts a more nuanced functional approach. Yet the question remains whether a functional approach does not impose outdated regulation on a reality shaped by convergence and disruptive services. As Savin argues, these challenges may be better addressed with new rules derived from a radical reassessment of the ways in which converged services need to be regulated.766 This possibility was recognised by European legislators as early as in 1997.767 While they did not act upon it at the time, the EECC today tries to fit new rules within a framework that is a revised version of the old regulation. Due to the political reality – and the intense involvement of stakeholders in the European Union’s legislative process – such a radical reassessment will likely be difficult to achieve. It therefore remains to be seen how the EECC will be implemented by national authorities, and whether it can sufficiently cope with the digital environment and adequately promote the general policy goal of achieving a Single Digital Market.

767 Ibid.
JOINT CONTROLLERSHIP IN DATA PROTECTION: WHAT THE CJEU HAS STATED SO FAR

Mariana Galindo Sánchez*

A. INTRODUCTION

Organisations and individuals that decide on, and manage, personal data are becoming more relevant. Whether in politics, economics, or markets, personal data is an essential asset. Previously, the processing of information was a task for one. A single company or an individual determined and completed it. Now, the world has evolved into a sophisticated and advanced data-based environment. Within it, the plurality of individuals and organisations deciding on data processing has overcome that of individual processing.768

To address such changes, the European Union (EU) updated the data protection regime by adopting the General Data Protection Regulation (GDPR).769 This regulation intends to keep up with the evolution of the digital world by balancing the rising powers of organisations with the need for protection of data subjects’ rights. The GDPR follows the EU’s principle of enacting secondary law to protect individuals770 and increase the obligations of organisations.771

This article aims to analyse the concept of joint controllership from four angles. Pursuing this purpose, section (1) analyses the GDPR provisions on controllers, joint controllers and their compliance obligations within the GDPR. Section (2) reviews the existing case law from the Court of Justice of the European Union (CJEU) in this regard, and compiles the legal reasoning used by the CJEU. Section (3) identifies the practical effects of the case law for businesses. Such effects will be readressed in section (4) to approach joint controllership in the Internet of Things (IoT) environment. Resultantly, based on the structure presented, the article draws conclusions on the issues of joint controllership.

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B. GDPR PROVISIONS ON CONTROLLERS, JOINT CONTROLLERS AND THEIR COMPLIANCE OBLIGATIONS

(a) Data controllers

One of the most important changes between the previous data protection legislative act, Directive 95/46/EC (Directive), and the GDPR is that the latter bolstered the role of persons in deciding on the purposes and means of processing data.772 Such persons fit into the definition of a controller, as stated in Article 4(7) of the GDPR.773 Regarding this Article 4(7), three elements structure the definition of a controller. First, the term is applied irrespective of the nature of the person; any natural or legal person can be a controller. Second, it is a functional definition. In this context, the sole action applicable to a controller is ‘determining’. Therefore, it is not acceptable for controllers to excuse themselves from collecting, accessing, or storing the data. Third, controllers can refer to two or more individuals or organisations.

These features depict that the definition of a controller is an ample one. The CJEU accepted such an extended scope even before the GDPR adoption, in the Google Spain case.774 In its judgement, the CJEU identified Google, the search engine, as a controller. It was a turning point away from the traditional view of search engines as processors. That is, natural or legal persons who do not determine the purposes and means of processing.775 It was the result of the CJEU’s teleological interpretation of the Directive, for the protection of data subjects.776 By deciding Google’s status as a controller, the CJEU managed to ensure that there is always a controller responsible, before the data subjects are.777

(b) Joint Controllers

Concerning the third element (i.e. more than one controller), the GDPR goes further in recognising this plurality. Indeed, Article 26(1) explicitly addresses joint controllers in terms of the existence of a multiple number of controllers and their collective determination of the means and purposes of the processing. The Article seems to be a regulatory response to the increasing scenarios where several controllers carry out different activities within the data processing.778

Nevertheless, the Article has also created uncertainties. It seems to establish the presumption that the involved persons are already aware of their roles as controllers and that, by getting together, they immediately acknowledge their new position as joint controllers.779 Moreover, the requirement of jointly determining the means and purposes does not differentiate the level of manoeuvre or decision-

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773 Article 4(7) of the GDPR states: “controller’ means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law.”
775 Article 4(8) of the GDPR.
776 Articles 1(1) of the Directive and 1(1) of the GDPR.
making that each controller has.\textsuperscript{780} Therefore, even the smallest amount of cooperation can turn into joint controllership. Furthermore, it is noteworthy that the word ‘processing’ is broad. It may be unclear in the case of joint controllership if it refers to all of stages of the processing or if it could be singled out.

Some government agencies have adopted the broad understanding of the definition of joint controllership. The British Information Commissioner’s Office (ICO) established a five-point checklist to guide controllers in assessing if they fall under the joint controllership category.\textsuperscript{781} It lists ambiguous scenarios of shared objectives, same purpose, same set of data, joint processing design, and standard data management rules. Aside from the abstract wording, it is noteworthy that the ICO may have gone further than merely collective determination of purposes and means. Thus, authorities, like the ICO, would likely consider that controllers are carrying out joint data processing in more situations than the ones explicitly stated in Article 26 of the GDPR, such as sharing the same set of data or design.

(c) Responsibility principles of joint controllers

Recitals 79 and 146 of the GDPR depict the responsibility framework for controllers. The first one sets out the allocation of responsibilities. At all times, there must be a controller responsible for data processing, before data subjects.\textsuperscript{782} It ensures that the protection of data subjects’ rights is effective. The second recital refers to the full damage compensation principle for data infringements.\textsuperscript{783} This principle has two impacts on this analysis. Firstly, despite the existence of joint controllership, data subjects can enforce their rights on any joint controller, so each of them is fully liable.\textsuperscript{784} Secondly, there is a possibility for the controller who paid the full compensation to data subjects to claim back from other joint controllers.

The damage compensation and joint liability\textsuperscript{785} principles bring about law enforcement and prosecution challenges for joint controllers.\textsuperscript{786} For instance, the identification and proportion of each controller’s responsibility can be problematic.\textsuperscript{787} In civil law proceedings, the lines between joint controllership and another kind of relationship, and contractual or extra-contractual matters, cannot be clear enough to assign compensation for each controller accurately.\textsuperscript{788}

Concerning administrative and criminal law, the situation becomes even more laborious. Within the EU, some countries only apply administrative and criminal liability to individuals and not to legal persons.\textsuperscript{789} To this extent, the joint liability allows data subjects to claim entire compensation before any controller can be at stake. Assuming a scenario of joint controllership, where a natural and a legal person are controllers, the prosecution and enforcement in administrative and criminal


\textsuperscript{783} Article 82 of the GDPR.

\textsuperscript{784} This principle is also found in the Article 26(3) of the GDPR.


\textsuperscript{786} A R Puig, “Daños por infracciones del Derecho a la protección de datos personales: El remedio indemnizatorio del artículo 82 RGPD” (2018) Revista de Derecho Civil at 53-87.


\textsuperscript{788} L M Velarde Saffer, “Análisis de los regímenes de responsabilidad civil contractual y extracontractual, sus respectivas funciones y los supuestos limitrofes” (2008) Ius et Veritas at 264-298.

proceedings will vary extensively. Ultimately, that lack of parity will impact on how much of the damage compensation can be entirely achieved.

(d) Obligations of joint controllers

Each of the joint controllers must comply with all the GDPR obligations. Thus, the duties that the GDPR states for a single controller must be abided by all. Aside from these obligations, there is an additional one for joint controllers.

Articles 26(1) and (2) of the GDPR point out that joint controllers must enter into an arrangement. It is a contract that establishes the roles and responsibilities of each joint controller for data processing. This provision recognises flexibility; joint controllers can determine how to govern their relationship. Naturally, such an arrangement must correspond to the factual circumstances of involvement, stage of processing and degree of decision-making about the means and purposes that each controller has. However, in the digital environment, data processing occurs at a large volume and may involve several actors at once. Therefore, to speed up these processes, joint controllers may end up entering into standardised arrangements that may not acknowledge their actual business capacities and involvement in the processing.

Additionally, the arrangement, like all legal agreements, attempts to provide certainty in the activities and, of the responsibilities, of joint controllers. In practice, that certainty may not be immediately evident. Other processing activities, or controllers, may appear de facto or unexpectedly to complete the processing. Such unanticipated situations may create mismatches between the contractual and the actual conditions of processing. With an outdated arrangement, the distribution of activities and responsibilities among joint controllers becomes unclear. Overall, it can be considered to be a breach of Article 26 of the GDPR and, in practice, it will be challenging to apportion the compensation and claim back among controllers.

To illustrate the challenges of contractual bonds and controllership, the Society for Worldwide Interbank Financial Telecommunication (SWIFT) case is a good example. This case involved financial institutions – considered to be controllers – that had the legal obligation to ensure that SWIFT, also a controller, complied with data regulations and protection of its clients. The fact underpinning such conclusion was that some banks were part of SWIFT’s Board of Directors. While it has been 14 years since the scandal occurred (2006), in which business contexts and controllership schemes have evolved, the SWIFT situation could be a precedent for analysing joint controllership and the way that those controllers rule their contractual links.

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791 Chapters II to IV of the GDPR primarily focus on this regard.


C. THE CJEU CASE LAW ON JOINT CONTROLLERS AND ITS LEGAL REASONING

Up until this point, this article has reviewed and analysed the GDPR provisions on joint controllers and their obligations. This section introduces the CJEU’s perspective on these matters.

(a) **Summary of the case law**

The CJEU has generated three judgements on joint controllers. Succinctly, these are the facts of each case:

(i) **The Facebook fan page case**\(^{799}\): Wirtschaftsakademie Schleswig-Holstein GmbH (WSH) is a German education provider. WSH created a Facebook fan page to promote its services. WSH obtained anonymous statistical information from Facebook on the site’s number of visitors. To get that information, every time a visitor accessed the fan page, Facebook processed the visitor’s data through an installed cookie in the visitor’s hardware. The CJEU found WSH and Facebook to be joint controllers. It also found that both had failed to inform the visitors (i.e. data subjects), about the processing, function and set up of the cookie.

(ii) **The Jehovah’s Witnesses’ case**\(^{800}\): In a Finnish Jehovah’s Witnesses’ community, parishioners practised door-to-door preaching. During such activity, the witnesses collected and stored information of the people they visited, without their consent. The information included the name, address, religion and family context of the visited person. While it is common for the Jehovah’s Witnesses that the community organise events, in this case, the community refused to recognise that it gave orders to the preachers about the collection of information, nature of the collected data nor the content of the records. Irrespective of this, the CJEU identified the community and preachers as joint controllers.

(iii) **The FashionID case**\(^{801}\): Fashion ID GmbH & Co KG (FashionID) is an online German clothing retailer that embedded a plug-in in its website, through Facebook’s ‘like’ button. Due to default setups, when a visitor accessed FashionID’s webpage, Facebook collected the IP and browser’s technical data. FashionID could not control the browser transmission, nor the usage Facebook had for the data. Furthermore, the transfer occurred without the visitor consenting to it or having a Facebook account. However, the CJEU concluded that FashionID and Facebook were joint controllers and that they had failed to inform the visitors about data and processing information.

(b) **Legal reasoning depicted by the CJEU**

Based on the legal provisions discussed in the three cases, this subsection highlights the legal interpretations that the CJEU primarily used to conclude that there was a joint controllership situation.

**Definition of controller**

All three cases share the same starting point. At the onset of each case, the CJEU questions the nature of the legal persons acting as defendants. In this regard, the CJEU determines that all the activities carried out by the persons attest to the fact that that they processed data with a degree of decision-making in the way that the processing occurs. Thus, they acted as controllers.\(^{802}\)

The CJEU goes further with this conclusion by reaffirming its precedent, namely the

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\(^{800}\) Case C-25/17 Tietosuojavaltuutettu v. Jehovah todistajat — uskonollinen yhdysskunta ECLI:EU:C:2018:551.


\(^{802}\) C-210/16 para 31 and 39. C-25/17 para 23 and 64. C-40/17 para 39 and 74.
definition in the Google Spain case law.\textsuperscript{803} The meaning of controller must have a broader interpretation than the one assigned previously. For the CJEU, that understanding allows real and comprehensive protection of data subjects’ rights.\textsuperscript{804} Considering the legal persons to be controllers from the beginning brings two advantages. On the one side, the CJEU guarantees that there will be someone responsible before the data subjects, irrespective of the outcomes of the remaining analysis. On the other hand, with the acknowledgement of single controllers, the next question is whether they acted jointly or not.

**Accessing the personal data is not necessary to be a controller**

Another common element is that the lack of access to the data does not exempt controllers from being labelled as such.\textsuperscript{805} Based on the case law, it seems that not all joint controllers had access to the information (e.g., the WSH only reviewed anonymised statistics, while Facebook accessed personal data).\textsuperscript{806}

It can be an intuitive mistake to equate accessing the data with determining why or what to do with it. However, if that were the benchmark, responsibilities could be incorrectly assigned (e.g., with the identification of the controller in charge of ensuring the lawful ground for processing). All cases also show that the most significant controller, or the one who carries out the central part of the processing, did not have direct access to the data source.\textsuperscript{807} Whether it is the religious community or Facebook, if access were a factor in allocating responsibilities, liabilities on dominant controllers could be misplaced.

Also, the lack of access does not imply that controllers did not pursue or achieve their purposes.\textsuperscript{808} For instance, the Jehovah’s community pleaded not knowing the data collected by the preachers.\textsuperscript{809} Ultimately, the collected information backed the church’s mandate of preaching. In the other cases, WSH and FashionID received anonymised information, but they still fulfilled their purposes: to know their audience to have better-promoting strategies. As in the first argument, this also impacts the responsibilities allocation. Allowing an exemption in this context because of the access to the information would create a gap in how data subjects exercise their rights.\textsuperscript{810}

**Joint determination of means purposes for the processing**

The CJEU moves on to identify if there was a joint determination of purposes and means. So far, all cases comprise only two controllers. At a glance, the CJEU reviewed each case as a twofold-purpose situation.\textsuperscript{811} Afterwards, the CJEU rounded up each controllers’ purpose within one general goal. The Jehovah’s witnesses case clearly illustrates it.\textsuperscript{812} One of the commands of the community is spreading


\textsuperscript{805} C-210/16 para 12.


\textsuperscript{808} C-25/17 para 17.

\textsuperscript{809} Article 29 Data Protection Working Party, Opinion 1/2010 on the concepts of “controller” and “processor” (2010) at 22.


\textsuperscript{811} C-210/16 para 43, 44 and 70.
its faith. As part of the community, its members preach in door-to-door visits to diffuse and publicise their faith. The purposes of the community and preachers are indistinctive, if not, the same. Consequently, the joint controllers pursued one goal, to obey a divine command.

In the Facebook fan page and FashionID cases, Facebook had the same purpose of improving its advertising with the processed data.\textsuperscript{813} Regarding the other controllers, WSH wanted to promote and manage its education activities.\textsuperscript{814} FashionID expected to improve its clothing publicity by making it more visible.\textsuperscript{815} Irrespective of these set of goals, for the CJEU, WSH, FashionID and Facebook shared the unit of economic interests.\textsuperscript{816}

As for the means of processing,\textsuperscript{817} the CJEU recognises it as the settlement of parameters, filters or criteria, upon which controllers process data.\textsuperscript{818} In situations such as the Facebook fan page, WSH selected the variables to obtain the statistics. Within the Jehovah’s witnesses, the community supplied guidelines on preaching activities.

The above section highlighted the relevant legal review the CJEU completed to frame the concept of joint controllership in the \textit{sub lite} cases. It started by recognising the existence of single controllers. Then, the CJEU included the extensive interpretation of controllership in the Google Spain case law. Finally, it concluded that the controllers acted jointly by determining the means and purposes of the processing.

**D. PRACTICAL EFFECTS OF THE CASE LAW FOR BUSINESSES**

Aside from the features considered in the previous section, other legal elements were not decisive to conclude the existence of joint controllership, but they also appeared in the judgements. They are relevant to the extent that they may have potential effects on doing business. In particular, since a pluralistic number of entities may complicate the appearance of such results.

\textit{(a) Pre-existing legal relationships between controllers}

A common factor in all cases was a pre-existing and binding relationship between the controllers. When WSH or FashionID agreed to Facebook’s terms of service; and analogously, in the Jehovah’s witness community, parishioners become part of the community through baptism. The original agreements set obligations and rights. In these situations, Facebook and the Jehovah’s community were dominant parties, while FashionID, WSH and the parishioners were subordinates, they unconditionally accepted. WSH accepted some unilaterally drafted terms by Facebook that provided on one way to have an account and to use the platform services. The same applied to FashionID. It could have hardly reinstated Facebook’s plug-in. As per parishioners, they cannot modify or refuse religious orders.

These cases also point out that when a new situation as joint controllership arises, it can affect the original relationships among controllers. Considering WSH, Jehovah’s witnesses and FashionID as controllers, this role grants them a new position. Now, they can act on a dual status. Their acknowledgement as controllers could somehow level the uneven parties when executing the joint controllers’ arrangement.\textsuperscript{819}

One of the business effects of this new status is the potential redistribution of negotiation power. The no-longer subordinated party could renegotiate the first agreement. A hypothetical example

\textsuperscript{813} C-25/17 para 34 and 59. C-40/17 para 80.
\textsuperscript{814} C-25/17 para 36, 39.
\textsuperscript{815} C-40/17 para 80.
\textsuperscript{816} C-40/17 para 80.
\textsuperscript{817} D Tran and L Adde, “Joint controller relationships - more prevalent than previously thought?” (2019) Privacy & Data Protection at 6-8.
\textsuperscript{818} C-210/16 para 36. C-40/17 para 16.
may help explain it. To comply with joint controllers’ obligations, a considerably large group of Facebook-fan page administrators pushes a new draft on consent terms for using Facebook. Facebook, holding the same condition as those administrators, a joint controller, may agree on the draft. It may end up in the amendment of consent terms for all Facebook’s users. Ultimately, those fan page administrators would benefit from that amendment because they are users too.

Additionally, due to the multiple number of contractual relationships among controllers, they may have other ways to settle the obligations between themselves (e.g. crossing debts and payments). Taking the ICO’s luxury car event example, the arrangement between the car company and the fashion brand, as joint controllers, may include vis-à-vis payments for the provision of services between them. Also, each company may enter into supply contracts with third parties that help the promotional event. After the car exhibition, when netting obligations stem from the arrangement and third parties’ agreements, joint controllers may use their contractual links to settle all their commitments. For example, the car company owes the fashion brand. At the same time, the latter owes a publishing agency. By settling those contractual obligations, the car company can pay the publishing agency.

(b) Joint controllership and allocation of responsibilities

In this case law, the CJEU concluded that joint controllership does not imply equal responsibility. It means that the roles and responsibilities of controllers can be limited. This concept is the result of the CJEU’s systematic interpretation adopted in the Facebook fan page administrators’ case and has been maintained since then. In that judgement, the CJEU took the Article 29 Working Party (WP29) and the Advocate General’s position.

Plural control requires a substantive and functional approach. For the WP29, it means that joint controllership may take several forms; as a result, it is not possible to foresee all possible scenarios. Hence, the assessment of each situation must aim at identifying when a controller decided on the purposes and means of the processing. Following the Advocate General Bot’s Opinion, the WP29’s position entails that processing comprises diverse stages. Thus, each controller can be involved in the decision-making process in different stages or degrees. That differentiation is the ground for the allocation of responsibilities to controllers. Regarding the facts of each case, it is possible to assess whether two or more controllers co-determined the means and purposes of a specific stage of processing, or whether they acted by themselves.

The CJEU included this logic in the Facebook fan page and the Jehovah’s Witnesses’ cases. Furthermore, the CJEU applied it in the FashionID decision to identify each of the joint controller’s

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821 “A luxury car company teams up with a designer fashion brand to host a co-branded promotional event. The companies decide to run a prize draw at the event. They invite attendees to participate in the prize draw by entering their name and address into their prize draw system at the event. After the event, the companies post out the prizes to the winners. They do not use the personal data for any other purposes.
The companies will be joint controllers of the personal data processed in connection with the prize draw, because they both decided the purposes and means of the processing.” ICO. “What does it mean if you are joint controllers?” Controllers and processors. Available at https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/controllers-and-processors/what-does-it-mean-if-you-are-joint-controllers/
824 C-210/16 para 43.
responsibilities. In the judgement, it was held that the facts showed that FashionID and Facebook jointly collected visitors’ data and transmitted it between them. Indeed, when a person accessed FashionID’s webpage, there was an automatic transmission of their information via the ‘like’ button, even without clicking on it or having a Facebook account. However, FashionID did not know why or how Facebook used the data. There was no joint decision during that particular stage of processing. Therefore, FashionID was not responsible for the usage of data by Facebook.

The CJEU ruled that FashionID and Facebook were jointly responsible for not complying with data protection obligations about the collection and transmission of visitors’ data. Both companies failed to inform visitors about the processing, and to obtain visitors’ consent. Telling data subjects about the processing refers to the legal duty of transparency; data subjects must be aware of the who, why and how regarding the processing of their data. Without informing data subjects, they cannot decide on whether or not to give consent. Ultimately, FashionID and Facebook lacked a lawful ground for the processing, did not notify the website visitors about the processing and, according to the facts, they may not have had a joint controllers’ arrangement.

Readdressing the joint controllers’ arrangement, the context of the co-decision is essential to point out which activities were carried out by which controllers. Arrangements should reflect those facts and allocate responsibilities based on them. In cases where there is no arrangement, or there is one, but its clauses are ambiguous or do not match reality, the risk of having a void contract may arise. In some circumstances, contract law understands the mismatches between facts and terms as null or ineffective because they are inapplicable or inaccurate in practice. Upon these scenarios, the parties will face uncertainty when identifying due obligations and payments. To overcome that situation, parties will have to settle, start arbitration or a judicial procedure. These options are expensive and negatively affect business timing.

(c) Importance of informing stakeholders

Finally, in all three cases, the CJEU stressed an aggravating condition for the joint controllers: lack of information to, or consent from, stakeholders. In the Facebook fan page administrators and Fashion ID cases, non-Facebook users visited the fan site and the processing was still triggered. In the Jehovah’s Witnesses’ case, it was even more paradigmatic. All visited people were stakeholders. They did not belong to the community and preachers still received personal information about them. The lack of familiarity of the stakeholders with who are the controllers or what are they doing eliminates the data subjects’ chances to exercise their rights.

Stakeholders pose a challenge when trying to comply with the full damage compensation

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827 C-40/17.
828 C-40/17 para 27.
829 C-40/17 para 64.
832 C-40/17 para 28.
834 Article 6(1) of the GDPR.
837 C-210/17 para 41 and 75. C-40/17 para 83.
838 C-25/17 para 66.
obligation. The assessment of how many stakeholders were harmed, and to what extent, is problematic. Those are typical situations of extra-contractual responsibility (the visitors did not have Facebook accounts or any membership in the Jehovah’s community). Without a pre-existing contract to set the benchmark for compensation, the usual solution is a judicial proceeding. Within the GDPR framework, this solution poses a counter-harmonisation effect. EU member states judges are meant to rule on such cases to allocate pecuniary and non-pecuniary damages. However, they will do so by abiding by national precedent case law or valid laws. Moreover, since the CJEU has not decided yet on extra-contractual responsibility parameters for damage compensation under GDPR for joint controllership, each national court will settle its own position. Thus, the enforcement and effectiveness of GDPR in this situation could turn out to be unharmonised.

In sum, joint controllers’ obligations reinforce data subjects’ protection. However, the trade-off in sheltering those subjects implies higher contractual and extra-contractual duties and business risks for the controllers. Similarly, uncertainty on the effects of the joint controllers’ arrangement and aggravating infringement conditions, as the existence of stakeholders, are also pressing matters.

D. AN APPROACH OF JOINT CONTROLLERSHIP IN THE IoT ENVIRONMENT

While CJEU has not yet addressed IoT cases linked to joint controllers, in this section, this article will analyse three situations of joint controllership within IoT environment. First, how joint controllers can be used as an advantage to ensure data subjects’ protection by a double-check mechanism of compliance obligations. Second, a rising concern for joint controllers since compliance with their GDPR duties may challenge their freedom to conduct business. Third, given the nature of the IoT, the challenges for joint controllers in informing stakeholders about the processing.

(a) How joint controllers can ensure data protection subjects’ rights

IoT refers to the interconnection between physical objects and the Internet (e.g. house automation, smart wearables and quantified self-things). With this, devices provide individuals with functional and efficient solutions to life and business problems. Overall, the effectiveness and comfort that IoT creates depend on a large and diverse volume of collected data. A vast dataset enables a broader and more in-depth analysis of behaviour, environment and activities of data subjects to provide better and more intelligent solutions.

The critical aspect of IoT is the proximity of the devices to the inner personal and family sphere of an individual. As an illustration, a smartwatch keeps track of heartbeats, which is associated with health data. The channel setup of a smart TV can identify the existence of children at home. Given

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this, in the IoT context, the risks of data creep and mishandling are elevated. The dangers of profiling, discrimination or data hacking are more significant because of the value of the information and its potential impact on someone’s life.\textsuperscript{847}

In this regard, joint controllership can be a way to mitigate those risks. In a solo situation, chances that a single controller acts damagingly are higher. Nevertheless, in a joint-controllers case, controllers face joint liability before data subjects.\textsuperscript{848} This legal consequence can work as an incentive to ensure lawful behaviour. Otherwise, each of them is potentially fully responsible before data subjects for an infringement caused by another controller.\textsuperscript{849} As part of their arrangement, the enforcement of a check-and-balance system (with specific obligations, penalties or even whistleblowing actions) can avoid deviations or breaches of GDPR.

Moreover, these self-binding strategies can extend to information obligations of data subjects.\textsuperscript{850} For the CJEU, not informing data subjects about the processing is a neuralgic failure. Within a check-and-balance system, controllers can review the compliance with that obligation.\textsuperscript{851} Therefore, each controller can back up or bridge communication channels with data subjects to ensure complete information (e.g. a controller with experience in house automation can share or enhance the information practices of its joint peer controller). As illustrated, an overall cooperative and coordinated system can derive from joint controllership in the IoT context.

(b) Compliance obligations can challenge the contractual freedom of controllers

The obligation to inform data subjects about the who, why and how for data processing is mandatory under GDPR. At first, all controllers must abide that duty, even if they are in a joint controllership scenario. However, as stated in section 3(a), joint controllers may have pre-existing contracts before executing the joint controllers’ arrangement. A prior contract and the joint controllership arrangement may have opposing legal obligations, as is the case of undisclosed principal agreements.\textsuperscript{852} The structure of these agreements provides that one party remains hidden to third parties (undisclosed principal), while the other has public disclosure. Usually, these agreements take place in economic activities where one of the parties is well-recognised or trusted but lacks the sources or knowledge to carry out businesses.\textsuperscript{853} Then, the other party holds the means but is unknown in the market. Since the revelation of the unfamiliar party can confuse or miss the audience’s trust, it remains undisclosed.

Within the IoT context, the sensitivity of the data collected by the devices puts a pressure on people to carefully select the companies that provide such products.\textsuperscript{854} For example, the trust and acknowledgement for choosing the provider of a baby monitor are the key variables. With a brand that meets the criteria, parents buy the device. However, if the baby monitors derive from an undisclosed principal agreement, both companies must inform the parents that they are joint controllers. Now, with

\textsuperscript{848} F Gilbert, “Cloud service providers as joint-data controllers” (2011) Journal of Internet Law at 3-15.
\textsuperscript{851} J Mäkinen, “Data quality, sensitive data and joint controllership as examples of grey areas in the existing data protection framework for the Internet of Things” (2015) Information & Communications Technology Law at 262-277.
\textsuperscript{854} J Mäkinen, “Data quality, sensitive data and joint controllership as examples of grey areas in the existing data protection framework for the Internet of Things” (2015) Information & Communications Technology Law at 262-277.
a new name on the line, parents may hesitate on the purchase.

The information obligation directly affects and obviates the lawful interest and business performance of the companies. The balance of the rights at stake is challenging. On one side, data subjects’ rights and privacy must be protected. On the other hand, companies are free to set legal, fair and profitable terms for their business. The cost of complying with the information obligation goes further. The scope of this obligation is broad, and may permanently discourage the chance to draft an undisclosed principal agreement for joint controllers. Indeed, as long as any judiciary body (e.g. the CJEU) does not interpret this type of contract as an exemption of the information obligation, the undisclosed principal agreement is likely to be unlawful for joint controllers.

To this point, the analysis of compliance obligations within the IoT environment presents an extreme scenario. Joint controllers can take advantage of that position by cooperating and coordinating their compliance responsibilities. However, those same duties can deter the freedom to structure business contracts among joint controllers.

(c) Informing stakeholders in an IoT situation

At home, the relationship between a smart baby monitor and the resident may be straightforward. There may be a purchase agreement and then, by starting the device, a set of instructions, terms of service and other clauses between the controller(s) of the data and the person living at the place. However, it will be unrealistic to think that only this subject will interact with the device. The rest of the inhabitants and visitors of the house could be stakeholders. While they did not enter any contractual relationship, they are part of the scope of the processing and their data could be susceptible to the collection. Readdressing the example, the device may use the information from the people in a room to keep monitoring the baby.

The usage of such information could involve the processing of personal data (e.g. intensity of the voices, body temperature, etc.) and, therefore, it entails the application of the GDPR. According to this analysis, there is a problem related to the duty of informing those stakeholders. The purchaser is aware of the scenario, but for the remaining people, it may be unclear or worst, unknown. While this is a significant matter, it may be to a limited extent when there is one controller. However, in a joint controllership situation (e.g. the monitor embeds a software of baby health care, then that information is transferred to baby food company), this issue has a multiplying effect.

If the principle of full damage compensation is paired up with the aggravating condition outlined by the CJEU about informing stakeholders, joint controllers will face a double duty. First, telling all stakeholders about the processing and, second, reporting the existence of a plural number of controllers. Again, in practice, this could be even more problematic. Similarly, as in the FashionID case, there may be only one controller that has direct contact with the persons involved. Given this straightforward channel, that controller may do all communications and reports. However, the duty of informing and communicating entails liability to controllers. Thus, it is noteworthy to question if, in practice, this controller would allow the inclusion of a clause within the joint controllership agreement stating that the informing obligation rely only on his.

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855 Article 14(5) of the GDPR.
857 D Borelli, N Xie and EKT Neo, “The Internet of Things: Is it just about GDPR? Available at https://www.pwc.co.uk/issues/data-protection/insights/the-internet-of-things-is-it-just-about-gdpr.html
859 C-210/17 para 41 and 75. C-40/17 para 83.
As seen in this section, even a brief analysis of joint controllership in an IoT displays that the freedom to conduct business or ensuring transparency to data subjects could be at stake. Particularly, when more than one controller process data, each gap or risk has a broader impact on the controllers’ relationship and their compliance with the GDPR.

E. CONCLUSIONS

This article attempted to structure and characterise the concept of joint controllers from the GDPR and the three judgements the CJEU has rendered in this regard. Then, from the case law, the article identified potential practical issues that joint controllers may face in the course of their business, especially if they take place in the IoT environment.

Joint controllership arises when there is a plural number of controllers collectively deciding the means and purposes of data processing. They bear the same data protection responsibilities as single controllers plus the duty of executing an arrangement among them. The CJEU used this definition to identify who were joint controllers and what were the obligations they failed to comply in the cases of the Facebook fan page, Jehovah’s witnesses and FashionID.

Following the case law analysis, in practice, there are three challenging matters for joint controllers: pre-existing agreements among them, allocation of responsibilities and communication with stakeholders. These topics are problematic since they raise the bar for cooperation and coordination when there is a plural number of controllers. Also, the scope of liabilities gets broader. Joint controllers will have duties not only with data subjects and stakeholders but also within them.

The impact of these issues is more substantial when joint controllers process data within an IoT scenario. Given the close approach of IoT to data subjects’ and stakeholders’ privacy and intimacy, the commitment with data protection is higher. This situation places joint controllers at stake. On one side, compliance with GDPR obligations may threaten pre-existing contractual bonds among them (e.g. undisclosed principal agreement). Ultimately it will be a challenge to the freedom to conduct business. On the other hand, joint controllers may need to build a coordinated front to ensure adequate and precise information and communication. Again, considering their plurality and diverse business bonds among them, it will be a hard task to achieve.
THE TIME FRAME FOR THE APPELLATE REVIEW AND THE LEGITIMACY OF THE WORLD TRADE ORGANISATION

Hsin-Yi Wu*

A. INTRODUCTION

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E. CONCLUSIONS

A. INTRODUCTION

The World Trade Organization (“WTO”), established in 1995, has become one of the most influential institutions in global economic governance. It provides a forum for negotiating agreements aimed at reducing obstacles to international trade and ensuring a level playing field for the 164 WTO members, thus contributing to a prosperous international trading system and global economic growth. In the past decade or so the WTO dispute settlement mechanism has served an impressive number of trade disputes, and has earned a reputation as the “crown jewel” of the global trading system. However, the Appellate Body (“AB”)’s judicial features were not comprehensively thought out by the negotiators. The AB was mainly established for WTO members losing the political right to block adoption of panel reports. Today, because of the failure of WTO members to negotiate reforms to the WTO rulebook, the AB plays an increasingly crucial role in rendering decisions on ambiguous or incomplete WTO rules.

While the AB may have already achieved some success in moving towards a new ground for legitimacy of the trading system as a whole, its intended objective of “promptly” setting disputes has come under pressure. The USA has complained about the overreaching of the AB and raised certain procedural concerns in terms of the appellate review. The USA’s disagreement with the rulings of the AB translated into criticism, diminished the USA’s will to refer disputes to the WTO adjudicating body, and perhaps even attempted to undermine the WTO as an institution itself. The USA complained that the rulings of the AB have “frequently and increasingly” been issued beyond the ninety-day mandatory deadline. The violation of the ninety-day time frame creates political and institutional uncertainty.

In 2017, the AB organised the first special event to mark the release of its Annual Report. Ujal Singh Bhatia, the Chair of the AB in 2017, highlighted the challenges the AB had been facing, and especially pointed out the problem of delays. He addressed this issue by saying that “[t]he consequential delays in handling appeals have implications not only for the dispute settlement process of the WTO,

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but also for the WTO itself”. Bhatia also emphasised that “[w]hen delays in WTO dispute resolution become the norm, they cast doubt on the value of the WTO’s rules-oriented system itself. An erosion of trust in this system can lead to the re-emergence of power orientation in international trade policies.”

We have a puzzling situation where we discuss the time frame of the AB and the legitimacy of its rulings or the WTO as a whole. The problems arising from the ninety-day time frame of the appellate review are of a systemic and structural nature and will not be easily resolved. A multiplicity of factors can make substantial contributions to the legitimacy of the WTO dispute settlement system in terms of the ninety-day deadline for the appellate review. Although the dispute settlement in the WTO has proven to be a more legalised mechanism, the legitimacy of the rulings and the WTO still face the challenge of balancing between efficient adjudication and high-quality legal reasoning. Debra P. Steger, the first Director of the AB Secretariat, expressed the view that the most important ways to establish its reputation are to maintain the high quality of its decisions, and no compromise should ever exist.

B. THE TIME FRAME FOR THE APPELLATE REVIEW

Initially, the reason for creating the AB within the WTO dispute settlement mechanism was to ensure against bad panel reports being adopted by reverse consensus. Therefore, the idea of creating an AB was the quid pro quo for parties losing the political right to block adoption of panel reports. The appeal was expected to be rarely used by Uruguay Round negotiators. There is only one provision under Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”)—Article 17—relating to the AB in comparison with multiple provisions governing the panel process in Articles 6 to 16 and Appendix 3 of the DSUs. DSU Article 17 places on the AB certain general duties and codifies certain working procedures for efficacy or housekeeping purposes.

The AB has gained remarkable international respect as a judicial body in its first few years. The expectations of the negotiators were that the appeals were to be very rare, but the reality is that virtually every panel report was appealed in the early years following the establishment of the AB. The AB bears certain distinctive features, however, the judicial features of the AB were not carefully thought out by the negotiators, because they did not anticipate the frequency with which the WTO dispute settlement system would be used by WTO members.

(1) The Legal Basis and Purpose of the Time Frame for the Appellate Review

Pursuant to DSU Article 17.5, as a general rule, the appellate review shall not exceed sixty days from the formal notice of appeal to the circulation of the AB report. When the AB considers that it cannot circulate the report within sixty-day time frame, it has to inform the DSB in writing of the reasons for the delay with an estimate of the period within which it will submit its report. However, in no case shall the proceedings exceed ninety days. It should be noted that DSU Article 17.5 does not contain an obligation for the AB to inform the DSB or any other body if it fails to comply with the ninety-day statutory deadline. However, this ninety-day time frame for the appellate review is not realistic, as is demonstrated by the fact that the average duration of appellate review is now around 160 days. The longest appellate review to date is in the case of US – Large Civil Aircraft (2nd complaint)(Article 21.5

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863 Ibid.
865 Ibid at 1.
866 WTO Analytical Index, DSU-Article 17 (Jurisprudence), available at https://www.wto.org/english/res_e/publications_e/ial17_e/dsu_art17_jur.pdf. (The average of the length of time taken in the WTO appellate review, from the date of the commencement of an appeal to the date of the circulation of the AB report, updated to December 31 2019.)
– EU), lasting for 637 days.\(^{867}\)

The purpose of designing the time frame for the appellate review can be tracked back to the Uruguay Round negotiations launched in 1986. According to the Ministerial Declaration on the Uruguay Round, “negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process” in order to “ensure prompt and effective resolution of disputes” to the benefit of all WTO members.\(^{868}\) The statutory deadlines of the adjudication were important elements to ensure prompt and effective resolution, and as noted by L Johannesson and P C Mavroidis, the time-bound requirements under the DSU were agreed as *quid pro quo* for the USA to abandon its aggressive unilateralism.\(^{869}\) DSU Article 3.3 recognises the prompt and effective resolution of disputes by stating that “[i]ncluding the requirement of ‘prompt’ resolution of disputes in the WTO dispute settlement mechanism was a major feature that distinguished it from other international adjudicative systems”.\(^{870}\)

In addition, the strict ninety-day deadline for the appellate review might be one of the purposes for the negotiators to have considered the need for retrospective or provisional remedies in the WTO dispute settlement system. DSU Article 22 does not apply to damages suffered before the expiry of the reasonable period of time for implementation. As such, the WTO dispute settlement does not provide for compensation of harm caused by the measure at issue during the time that the dispute settlement proceedings are running. Therefore, it is of great importance that the dispute should be resolved promptly and determined the recommendations and rulings quickly. Otherwise, there is a free ride to violate WTO obligations for several years, given the length of time the dispute process takes from beginning to end.\(^{871}\) The negotiations might also expect that the entire dispute settlement process would in all probability be completed within the timelines prescribed under the DSU.\(^{872}\)

The reasons for exceeding the DSU time frames are mostly due to the complexity of the issues and the workload of the AB which might require more time to resolve and complete a report. The workload of the AB has been put on the table at the DSB meeting of 23 July 2012. Almost all WTO members recognised that the workload faced by the AB and the increasing complexity of the issues raised make it impossible for the AB to meet the ninety-day requirement in some cases. The AB also issued a communication on 30 May 2013 addressing its workload and revealed a growth in the size of disputes appealed, the number of issues raised, the number of participants and third participants, as well as the length of submissions filed.\(^{873}\) This growth led to a significant increase in the average length of AB reports. Delays in the appellate review may also be due to other reasons, such as scheduling difficulties. According to Rule 26(1) of the Working Procedures, the AB division has a responsibility to draw up an appropriate working schedule for an appeal in accordance with the time-periods.


\(^{870}\) U S Bhatia (n 1).


summarised in Annex I of the *Working Procedures*. However, Rule 16(2) does provide some space for the division to modify the time period of the working schedule in exceptional circumstances.

(2) The AB’s Actions When Exceeding the Time Frame of the Appellate Review

There are two issues with regard to the time frame of the appellate review which have not been agreed upon by WTO members and have, therefore, given rise to considerable controversy, namely: (1) whether the ninety-day time frame is compulsory and rigid in all circumstances; and (2) what actions the AB should take when complying with the ninety-day time frame is not possible. The non-respect of the ninety-day time frame has been strongly criticised by some WTO members. Those members are of the view that extension is only possible if the parties to the dispute reach a consent to do so, or that more detailed reasons should be provided by the AB in order to be justified under the specific “exceptional circumstances”.

The delay of appellate review was not significant in the early age of the appeals. From 1995 to 1999, only two appeals out of the twenty-six appeals exceeded the ninety-day time frame, and “the average review period was not a delay, rather ahead of the deadline by around six days”. In the next ten years (2000-2009), there were only ten appeals out of the seventy appeals that missed the deadline, and all appeals in this period on an average were delayed by around five days. However, the increasing pressure on the AB has become evident from 2010. The *US – Large Civil Aircraft* and *EC and certain member States – Large Civil Aircraft* cases had a substantial affect, the corresponding numbers of delay were thirty-seven days (2010-2014) and 125 days (2015-2018). The AB still managed to complete the appeals within the ninety-day deadline in the early years of the dispute settlement because the first Chair of the AB, Ambassador Lacarte Muró, insisted that the AB must comply with the DSU and set an example for panels and other arbitration bodies in the dispute settlement system. Although the AB is not a permanent tribunal and only required to be available at the times stated under DSU Article 17.3, its members devoted a tremendous amount of time and energy into ensuring the operation of the AB and WTO system as a whole.

It is important to note that the DSU does not contain any provisions penalizing the AB for missing the ninety-day deadlines nor does it indicate any legal consequences of the failure to stick to the timelines. It seems that the negotiators of the DSU did not aim to put undue pressure on the AB, while the limited appellate function that the AB was expected to discharge under the DSU. As suggested by Ehlermann, the nature of the ninety-day deadline should simply be an informative time limit and should not have any consequences for the legality or legitimacy of the AB reports issued. In addition, he points out that strict respect of the ninety-day deadline may in reality not make much difference for the disputing parties since the delays are considerably more important at the panel stage. Without the idea of any pre-defined time frame may relieve the pressure of the AB members to reach a consensus and come out with an appropriate solution. The flexibility should be built into any statutory time limit.

However, increasingly explicit and persuasive conflict of values implicated in dispute settlement proceedings do raise questions on legitimacy concerns of the non-compliance of the ninety-day time frame. As indicated by Howse, the legitimacy of the AB’s rulings depends on “the manner in

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876 Ram (n 11) at 329–330.
877 Steger (n 3) at 6.
878 *Ibid* at 8.
879 Ram (n 11) at 314.
880 Ehlermann (n 14) at 720.
881 *Ibid* at 722.
which it handles a conflict of values held by diverse stakeholders.\textsuperscript{882} The strict time frame would cause a conflict of values between the prompt dispute settlement and the high-quality of the appellate review. The legitimacy of the AB’s rulings might also rely on what actions the AB should take when complying with the ninety-day time frame is not possible.

In the following subsections, I will document what actions the AB took when complying with the ninety-day time frame is not possible. The AB had three possible actions that could be taken: (1) seeking a deeming letter from disputing parties, (2) unilaterally informing the DSB for the delays with estimated date of circulation, and (3) unilaterally informing the DSB for the delays, and announcing the estimated date of circulation later.

(a) Seeking a Deeming Letter from Disputing Parties

In the earlier disputes, the AB would simply inform the DSB that due to certain reasons and in light of the agreement of the disputing parties, circulation of the AB report to WTO members would be delayed and would be circulated no later than a specific date.\textsuperscript{883} In some appeals, the certain reasons were well explained and could be referred to extraordinary circumstances. Therefore, the disputing parties agreed to extend the deadline of the appellate review to a certain date. For instance, in the case of US – Lead and Bismuth II, a member of the Division hearing this appeal passed away. The AB, pursuant to Rule 13 of the Working Procedures, selected a new member to establish a new division. Due to these extraordinary circumstances, “the participants in this appeal…agreed to a two-week extension of the ninety-day time limit for the consideration of this appeal, and thus agreed that this Report should be circulated no later than 10 May 2000”.\textsuperscript{884}

In most of the early disputes, the AB would consult with the AB Secretariat and the disputing parties in order to file deeming letters to confirm that the disputing parties would deem the AB Report in that proceeding to be delayed and issued no later than a specific date. For instance, in the case of EC – Export Subsidies on Sugar:

[A]fter consultation with the Appellate Body Secretariat, the European Communities and Australia, Brazil, and Thailand agreed, in letters filed on 19 January 2005, that it would not be possible for the Appellate Body to circulate its Report in this appeal within the ninety-day time limit referred to in Article 17.5 of the DSU. The European Communities and Australia, Brazil, and Thailand accordingly confirmed that they would deem the Appellate Body Report in this proceeding, issued no later than 28 April 2005, to be an Appellate Body Report circulated pursuant to Article 17.5 of the DSU.\textsuperscript{885}

Some appeals would also further address the reasons why it would not be possible for the AB to circulate its Report within the ninety-day time frame. In the case of US – Upland Cotton, the AB stated in its Report that:

Brazil and the United States agreed that additional time was needed for several reasons: the issues arising in this appeal were particularly numerous and complex compared to prior appeals, which increased the burden on the Appellate Body and WTO translation services; WTO translation services were unavailable during the WTO holiday period; and the Appellate Body was likely to


\textsuperscript{883} Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243, para 8. ("On 20 December 2000, the Appellate Body informed the DSB that, due to the exceptional workload of the Appellate Body, and in light of the agreement of the participants, Canada and the European Communities, the Appellate Body Report in this appeal would be circulated to WTO members no later than Monday, 12 March 2001").


be considering two or three other appeals during the same period.\textsuperscript{886}

In some of these appeals, the AB also referred to the requests from the side of the participants which caused the delay. In the case of \textit{Mexico – Anti-Dumping Measures on Rice}, the AB addressed the delay by stating that

[A]t the outset of the appeal, the participants asked to have all written submissions made available to all participants in English and Spanish. Following consultations with the participants, the Appellate Body Division hearing the appeal issued a Working Schedule for the appeal, taking into account time periods for translation of submissions estimated by the WTO Language Services and Documentation Division. Given the time required for the translation of submissions, it was not possible to circulate this Report within ninety days from the date the Notice of Appeal was filed.\textsuperscript{887}

(b) Unilaterally Informing the DSB of the Delays with Estimated Date of Circulation

Starting from around 2010, the AB has not sought a deeming letter from disputing parties to justify its delays for the appellate review anymore. The Chair of the AB directly and unilaterally informs the DSB without further explanation of the reasons that the AB Report in the appeal would be delayed and would be circulated to WTO Member no later than a specific date. Some parties expressed their concerns in this regard. In the case of \textit{US – Tyres (China)}, the AB received a letter from the USA indicating that:

The United States wished to better understand the reasons why the Appellate Body Report in this dispute would not be submitted within the ninety-day period referred to in Article 17.5 of the DSU. In the interest of transparency, the Chair of the Appellate Body will, at the time of transmittal of the Report, inform the DSB of the reasons for the delay.\textsuperscript{888}

Due to the transparency concern, the AB started to include reasons of delay in its Report even though it still preferred to unilaterally inform the DSB for the delays without agreements from the disputing parties. For instance, in the case of \textit{US – COOL}, the Chair of the AB notified the Chair of the DSB that the AB would not be able to circulate its Reports within the sixty-day period and the ninety-day period pursuant to Article 17.5 of the DSU. The Chair of the AB explained that:

This was due in part to the size of this appeal, including the number and complexity of the issues raised by the participants. [The Chair] added that this was also due to the AB’s heavy caseload, scheduling difficulties resulting from the overlap in the composition of the Divisions hearing different appeals at the same time, as well as constraints resulting from the relocation of the AB and its Secretariat in the context of ongoing renovation work at the Centre William Rappard.\textsuperscript{889}


(c) Unilaterally Informing the DSB of the Delays, and Announcing the Estimated Date of Circulation Later

In some of the most recent cases, the Chair of the AB unilaterally informed the DSB that the AB Report in the appeal would be delayed and would be circulated to WTO members later “without specific a certain date”. For instance, in the case of China – HP-SSST (Japan) / China – HP-SSST (EU), the Chair of the AB notified the Chair of the DSB that the AB would not be able to circulate its Reports by the end of the sixty-day period, or within the ninety-day timeframe provided for in Article 17.5 of the DSU. The Chair further indicated that:

Due to a pending request for a change in the working schedule in the parallel appellate proceedings in DS381, the Appellate Body was not, at that time, in a position to inform the DSB of the estimated date of circulation of the Appellate Body Reports in DS454 and DS460. The Chair indicated, however, that the Appellate Body expected that matter to be resolved soon and that the Appellate Body would then inform the DSB of the estimated date of circulation.890

Starting from around 2015, the Chair of the AB separated its notification of the delays to the DSB into two times: (1) the earlier notification: notifying the Chair of the DSB that the AB would not be able to circulate its report within the sixty-day period or the ninety-day period pursuant to Article 17.5 of the DSU with different reasons, and (2) the later notification: informing the Chair of the DSB with a certain date that the AB Report would be circulated to the WTO members.

In the case of EC and certain member States – Large Civil Aircraft, the USA once again emphasised the importance of reaching agreement between the disputing parties and the AB on a date for circulation of the AB report. In the light of DSU Article 17.5:

The United States considered it important to reach ‘agreement’ on a date for circulation of the Appellate Body report in these proceedings ‘without further delay’ and requested the Division to propose to both participants a time period for completion of this appeal ‘as soon as possible’. 891

The European Union (“EU”), however, submitted that the AB did not require "agreement" of the participants as to the date of circulation of its report. The EU noted in this regard that “the Working Procedures clearly state that the relevant time periods are set and modified by the Appellate Body and do not require agreement of the participants”. Furthermore, according to the EU, requiring agreement of the participants "would open the door to potential abuse and would not be consistent with the objectives of the dispute settlement system". 892

The USA reiterated the importance of setting a date for the issuance of the report in this appeal, noting that

It understood that, consistent with Appellate Body practice, the participants would need to provide letters agreeing that additional time is needed for this appeal and that such letters would specify the date of circulation of the report. The United States further recalled that it recognized from the outset that the appeal in this case, which raises an unprecedented number of issues, would require more than ninety days to resolve. The United States also submitted that producing a high-quality report was in the interests of all.893

890 Appellate Body Reports, China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (“HP-SSST”) from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (“HP-SSST”) from the European Union, WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015, DSR 2015:IX, p. 4573, para 1.29. (“Subsequently, after the working schedule in DS381 was decided, the Chair of the Appellate Body informed the Chair of the DSB, by letter dated 28 July 2015, that the Appellate Body Reports in these appeals would be circulated no later than 14 October 2015.”)


892 Ibid.

893 Ibid para 24.
The AB stated in *EC and certain member States – Large Civil Aircraft* that “it intended to provide an estimated date for circulation of the Appellate Body report after the oral hearing, once it was in a better position to assess the amount of time reasonably required to complete its work in this appeal”.\(^{894}\) In the case of *US – Large Civil Aircraft*, the AB also informed the Chair of the DSB that it would provide an estimate for when its Report would be circulated after the oral hearings had been hold.\(^{895}\)

In sum, the ninety-day time frame is not compulsory and rigid in a definite way in all circumstances. The AB in the earlier disputes would seek a deeming letter from disputing parties when complying with the ninety-day time frame was not possible. However, from the year of 2010, the AB does not seek agreements from the disputing parties anymore, and it usually unilaterally informs the Chair of the DSB that the appeal would be delayed and would be circulated to WTO members no later than a specific date. In recent years, in some of the cases, the estimated date of circulation would only be announced by the Chair of the AB a few days before the real circulation. We have a puzzling situation here with regard to what actions the AB should take when complying with the ninety-day time frame is not possible. The USA was of the view that seeking a deeming letter from the disputing parties should be a requirement if the AB was not able to comply with the ninety-day time frame of the appellate review. However, the agreement from the parties might raise a concern of abuse of the rights. This will bring us to the next section which will discuss the legitimacy of the appellate review and the WTO.

C. THE LEGITIMACY OF THE APPELLATE REVIEW AND THE WTO

The sources of the legitimacy of the WTO dispute settlement mechanism vary across WTO members, relating to regional, cultural and other differences in the standards governments apply to evaluate an international court’s exercise of authority.\(^{896}\) General acceptance of the necessity of an institution’s authority is a precondition for the expression of support from members. The general acceptance *per se*, which signals the effectiveness or operation of the system as a whole, does not otherwise impact the institution’s legitimacy.\(^{897}\) In other words, the legitimacy stems from shared normative briefs such as the common good and procedural fairness. The institution is considered legitimate, not simply because members believe in its legitimacy, but because its actions can be justified under these shared normative briefs.\(^{898}\) The institution could be perceived as “illegitimate” with respect to “the way or manner” of exercising its authority.

There have been fluctuations in the views of WTO members on the exercise of authority by WTO dispute settlement mechanism relating to the legitimacy of the WTO. Legitimacy is dynamic because different WTO members may have different perceptions, and the perceptions may change over time. For instance, blocking the appointment process of the AB by the Trump Administration could be seen as “an outcome of the AB’s assertions of independence and authority in a treaty community that likes to see itself as ‘member driven’”.\(^{899}\) The USA was of the view that the service of the AB did not reflect the role originally assigned by WTO members. However, the institution may be considered functionally necessary to achieve certain objectives, even in instances where its members disagree with particular outcomes.

As legitimacy reflects the idea of accepting authority which joins both legal and formal requirements as well as social acceptability of institutional outcomes,\(^{900}\) The legitimation became problematic once

\(^{894}\) Ibid para 25.
\(^{897}\) Ibid at 282.
\(^{899}\) Howse (n 10) at 72.
the adjudicating body was faced with the disputing issues where the need to address competing values was explicit and unavoidable. As suggested by Nichols, as complex as the interface between promoting free trade and other social values may be, the WTO must address it if the organisation is to become a credible institution. It is almost certain that these questions will come before the AB, and coherent answers by the AB will do much to legitimise the WTO. The legitimacy of judicial institutions meant to produce specific results and to enjoy long endurance will depend on both the integrity of the process and on the communication and substantive quality of their reasoning. Efficiency therefore should also mean quality and achieving the purpose of the dispute settlement, namely, to secure a positive solution to a dispute.

Attempting to identify and analyse legitimacy challenges that the WTO face is useful to understand how the institution should function and behave. As defined by Grossman, “legitimate international adjudicative body is one whose authority is perceived as justified”. He further identified three factors which have specific qualities for an international adjudicating body in order to lead its actors to perceive it as legitimate: (1) fair and unbiased procedures and decision making, (2) interpreting and applying norms consistent with what states believe the law is or should be, and (3) transparent and infused with democratic norms. His approach looks to whether the relevant public regards an institution as “justified”, and whether particular claims to authority deserve respect or obedience for reasons not restricted to self-interest. In the absence of the above-mentioned factors, actors are less likely to perceive an international adjudicative body as legitimate. In the following subsections, I will answer the question of what actions the AB should take when complying with the ninety-day time frame is not possible in light of Grossman’s three factors of legitimacy for the international adjudicating body.

(1) Fair and Unbiased Nature

The disputing parties must perceive a tribunal as fair and unbiased before they agree to submit their disputes to it. An actor is unlikely to view a tribunal as legitimate unless the tribunal contains a core set of provisions guaranteeing procedural fairness. The procedural fairness should provide all parties with equal opportunities to present their views on both procedural and substantive matters. Parties seek to ensure that disputes will be decided by fair and unbiased individual adjudicators. If actors consider decision makers to be unfair or biased, they will perceive the institution as lacking justified authority or legitimacy.

In terms of the time frame of the appellate review, the WTO dispute settlement proceedings have explicit statutory deadlines which prize efficiency over flexibility. The AB permits extension of deadlines only in exceptional circumstances and in no cases shall exceed the ninety-day time frame. However, the strict adherence to a time-period would result in a manifest unfairness in view of the increasing workload faced by the AB. When the AB is requested to examine the increasing complexity of the disputes, longer time limits than those provided for the normal situation should be established in order for both the disputing parties and the AB to prepare and present their arguments and rulings with necessary time-frame flexibility. A lack of deadline flexibility may weaken the ability to respond to political circumstances and reach a negotiated solution. How the strict time frame is implemented and interpreted over time may impact willingness to utilise the WTO dispute settlement mechanism in the

901 Howse (n 21) at 38.
903 JHH Weiler, "The rule of lawyers and the ethos of diplomats reflections on the internal and external legitimacy of WTO dispute settlement" (2001) 35 Journal of World Trade 191 at 204.
904 J Pauwelyn, "The WTO 20 years on: 'global governance by judiciary' or, rather, member-driven settlement of (some) trade disputes between (some) WTO members?" (2016) 27 European Journal of International Law 1119 at 1124.
906 Ibid at 117.
907 Ibid at 123.
908 Ibid at 129.
future. If actors perceive that an adjudicating body is implementing a rule arbitrarily or in a biased manner, both the rule and the institution may lose force and their legitimacy.\textsuperscript{909}

(2) \textbf{Buy-in to the Underlying Normative Regime}

Actors are unlikely to perceive a tribunal as authorized to decide on a dispute if they do not support the underlying normative regime that the tribunal is interpreting and applying. Treaty provisions are subject to new interpretations over time, often in light of states’ actions and understandings of what constitutes binding international law, judicial decisions, the writings of publicists, and the actions and views of other actors who influence the source of international laws.\textsuperscript{910} Actors will not perceive an adjudicating body to possess justified authority if the underlying normative regime lacks “currency”. The currency for actors refers to the beliefs that the normative regime is consistent with their views of what the law is or should be. The currency of a normative regime may change over time, growing or shrinking depending on actors’ evaluations of the normative regime’s evolution as compared to their interests and values. When interests and values diverge, actors must decide which is more important to them in assessing a regime’s currency.

In terms of the time frame of the appellate review, the WTO members do express concerns over the absence of agreements from the disputing parties to circulate the report outside of the ninety-day deadline. While many WTO members expressed an understanding attitude given the complexity of the dispute or potential problem of abuses of rights as well as an agreement coming from the parties may not appropriately take into account scheduling difficulties arising from possible backlog of cases and shortages of staff in the Secretariat, the AB should still be encouraged to seek consent from the disputing parties to secure its legitimacy of the rulings.

(3) \textbf{Transparency}

Transparency is an important prerequisite for allowing international actors to assess whether a tribunal is fair and unbiased and to decide whether to continue to buy into a tribunal’s interpretations and applications of a particular normative regime. Without access to information about a tribunal’s function and reasoning, no such assessments can occur. A transparent tribunal is one in which interested parties, both inside and outside the judicial process, can observe its processes and outcomes.\textsuperscript{911} Through transparency, a tribunal can enhance its legitimacy by raising the degree of its accountability. A tribunal might issue written decisions listing explicit reasoning and opinions. The mere knowledge that these reasoning and opinions are being watched may affect the behaviour of the adjudicating body to be more cautious and heighten its sensitivity.\textsuperscript{912}

In terms of the time frame of the appellate review, the AB in \textit{US – Tyres (China)} received a letter from the USA indicating its wishes to better understand the reasons why the AB Report in this dispute would not be submitted within the ninety-day period referred to in Article 17.5 of the DSU. The Chair of the AB also emphasised on the interest of transparency and would inform the DSB of the reasons for the delay.

In sum, the ninety-day time frame should not be compulsory and rigid in all circumstances due to the fair and unbiased nature of the legitimate international adjudicating body. Due to the buy-in to the underlying normative regime, the AB should be encouraged to seek agreements with the disputing parties when complying with the ninety-day time frame is not possible. Finally, the AB also need to provide reasons for its delays under the consideration of transparency. These procedures constrain adjudicators by rules on conflict of interest or the taking of public decisions for purely personal

\textsuperscript{909} Ibid at 127–128.
\textsuperscript{910} Ibid at 143.
\textsuperscript{911} Ibid at 153.
\textsuperscript{912} Ibid at 158.
advantage.\textsuperscript{913} Even though the legitimating impact of these procedures does not preclude the tendency to argue that the substance of the dispute was badly adjudicated by the adjudicating bodies, it does preclude a democratic deficit claim that the deciding institutions themselves deserve to be rejected as having the authority to decide the question which could threaten the global trading system.\textsuperscript{914}

D. THE REFORM OF THE TIME FRAME FOR THE APPELLATE REVIEW

Due to the scepticism about multilateralism and binding dispute settlement, the USA administration has elevated longstanding US concerns of WTO dispute settlement to new heights by refusing to join the consensus to launch the AB appointment process. The future of the WTO as an institution is in question with no consensus now about what it can do or what it should do in the future. However, the WTO’s AB had, for a long time, served as “an engine of global economic governance”. It had actively issued a wide number and range of decisions, and many of those decisions has provided jurisprudential guidance for settling disputes in the future.\textsuperscript{915} Many of WTO members has come forward with their own proposals in respect of streamlining the process of the dispute settlement proceedings.

Amongst those proposals, most of them are related to amendments of the DSU. In the following sections, I summarized their proposals into four categories: (1) extending the timeframe for completing the appellate review, (2) enlarging the number of AB members, (3) extending terms of appointment of AB members, and (4) making the AB permanent and resident in Geneva. The first proposal is directly related to amend the time frame \textit{per se}. In any event WTO members still view ninety-day time frame as a crucial and unchangeable element for achieving prompt settlement of disputes, the other three proposals could also be considered. These three reforms would indirectly affect the efficiency of the time frame for the appellate review by reducing the workload of the AB.

(1) Extending the Timeframe for Completing the Appellate Review

The solutions discussed involve the extension of this statutory time frame for the appellate review, which will extend the general deadline to ninety days and in no case exceed 120 days. They also contain the requirements for the AB to reach agreements on terms respectful of both disputing parties’ interests with greater predictability and the independence of the AB under which the timeframe could be exceeded in specific circumstances in order to produce high-quality reports. Although it has been argued that some of the first appeals which respected the ninety-day time frame are not necessarily less complex than many of today’s case and the ninety-day deadline had been missed in only five out of approximately fifty-five cases,\textsuperscript{916} the expanding body of jurisprudence could still stimulate the most of the time-consuming processes during the appellate review. If the ninety-day time frame cannot be directly amended, and if WTO members still believe that the AB is an important institution that is essential to the dispute settlement system, serious consideration should be given to indirect amendment of the time frame by the following reforms.

(2) Enlarging the Number of AB Members

The mechanism for modification of the total number of AB members, such as by the General Council or DSB, could be made to ensure flexibility. However, China considers that an increase in the number of AB members may affect the principle of collegiality among them. It could be argued that the exchange of views mechanism for the principle of collegiality to ensure consistency and coherence in decision making could only work efficiently by small divisions. This practice with the relatively small group of the AB has been proved to work extremely well and delivered fruitful rulings contributing to the foundation of the WTO dispute settlement system.\textsuperscript{917}

\textsuperscript{913} Howse (n 21) at 42.
\textsuperscript{914} Ib\textit{id} at 43.
\textsuperscript{915} Ib\textit{id} at 75.
\textsuperscript{916} Ehlermann (n 14) at 723.
\textsuperscript{917} Steger (n 3) at 11
The exchange of view is about reaching a consensus among all AB members on each particular dispute. However, with the accumulation of jurisprudence, the need to emphasise collegiality may not be as great as it was in the early days. The enlargement of the AB can create more concurrent divisions and bring more geographical diversity into the WTO dispute settlement system. As indicated by Ehlermann, the decision of the negotiators of the DSU to allow for divisions of three only may also be closely related to the short time limits prescribed for the appeal process.918

A special AB for trade remedy cases can be established with the enlargement of AB members. The decisions that are at the heart of the USA substantive concerns are those in the trade remedy areas. Given that about half of all WTO disputes have also been over trade remedy matters, having two bodies evenly splitting the workload would also assist both bodies to more readily complete their work in the ninety-day time frame prescribed by the DSU.919

(3) Extending Terms of Appointment of AB Members

AB members are appointed for a four-year term and each of them may be reappointed once.920 However, the selection process of AB members has been increasingly politicised in recent years, which may lead to delays in the settlement of disputes. A single, longer term would better achieve a more independent AB and more efficient one.921 The AB members will benefit from learning curve with greater experience, knowledge and institutional memory gained from a term of eight years or longer rather than four years. However, there is a concern that a full-time employment would bring in a sensitive financial issue and therefore is probably not a preferable option for the reform.922

(4) Making the AB Permanent and Resident in Geneva

The caseload and expense figures could be reduced and more manageable if the AB members are permanent and resident in Geneva rather than part-time and living at home. The quality of decision making, collegiality, ability to work closely with the Secretariat, and time management of cases would all be significantly improved.923 Having more people in the Secretariat helps the efficient functioning of the AB. Furthermore, the amended 2010 Working Procedures has revised the internal processes requiring for the appellant’s submission to be filed on the same day as the date of filing of the Notice of Appeal.

However, it is worth noting that some other proposed reforms might have negative effects on the overall timeframe at the AB stage. For instance, interim review mechanism at the AB level bringing the disputing parties opportunities to address the reasoning in the Report in advance would be more time-consuming than without the interim review mechanism. Dissenting opinions allowing each AB member to give an individual opinion on the issues raised would mean additional resources and work for the Secretariat. Amicus curiae briefs would create serious implications for future AB in terms of workload and efficiency.924

In addition, introducing the possibility of remand authority should enhance the efficiency of both panels and the AB, allowing them to focus on their proper mandate in the WTO’s two-tier dispute settlement system. The Panel is the finder of the fact and the AB is the reviewer of questions of law and legal interpretations.925 When the AB cannot complete its analysis and decide the issue itself due to insufficient factual basis, the complainant do not need to initiate a new proceeding once again in order to solve the dispute. However, in any event this procedure is introduced, it would require the extension

918 Ehlermann (n 14) at 725.
920 DSU Article 17.2.
921 Steger (n 3) at 17.
922 Ehlermann (n 14) at 728.
923 Ibid.
924 Creamer and Godzimirsk (n 35) at 298.
925 Ehlermann (n 14) at 729.
of the overall time-frames for dispute settlement. Allowing the Panel to reopen cases, hear new evidence and arguments, and review their original findings in light of the AB’s legal guidance will inevitably increase the overall length of the dispute settlement process.

E. CONCLUSIONS

The current crisis of the WTO stems from the USA’s use of the consensus rule in the DSU to unilaterally block the appointment of the AB, thereby jeopardizing the functioning of the dispute settlement system. The vote for appointing new AB members would probably occur only after WTO members’ efforts to resolve the USA’s concerns and requests. As such, it is important to note that the US has complained that the rulings of the AB have “frequently and increasingly” issued beyond the ninety-day mandatory deadline. The violation of the ninety-day time frame creates political and institutional uncertainty, and therefore the legitimacy of the AB’s rulings could be questionable.

DSU Article 17.5 stipulates the time frames for the appellate review. These time frames, according to the negotiators of the DSU, aim to improve and strengthen the rules and the procedures of the dispute settlement process in order to “ensure prompt and effective resolution of disputes” to the benefit of all WTO members. However, due to the increase in workload and scheduling difficulties of the AB, the time frames have not been easily complied with in practice. Therefore, there are two questions raised: (1) whether the ninety-day time frame is compulsory and rigid in all circumstances; and (2) what actions the AB should take when complying with the ninety-day time frame is not possible.

This article argues that the ninety-day time frame should not be compulsory and rigid in a definite way in all circumstances. With regard to the manner or actions the AB should do when complying with the ninety-day time frame is not possible, the AB in the earlier disputes would seek a deeming letter from disputing parties when complying with the ninety-day time frame was not possible. However, from the year of 2010, the AB no longer sought agreements from the disputing parties anymore, and it usually unilaterally informed the Chair of the DSB that the appeal would be delayed and would be circulated to WTO Member no later than a specific date. In recent years, in some of the cases, the estimated date of circulation would only be announced by the Chair of the AB a few days before the real circulation.

In light of Grossman’s three legitimate factors of the international adjudicating body, the ninety-day time frame should not be compulsory and rigid in all circumstances due to the fair and unbiased nature of the legitimate international adjudicating body. In addition, due to the buy-in to the underlying normative regime, the AB should be encouraged to seek agreements with the disputing parties when complying with the ninety-day time frame is not possible. Finally, the AB also needs to provide reasons for its delays under the consideration of transparency.

The reforms—extending the time frame of the appellate review, enlarging the number of AB members, extending terms of appointment of AB members, and making the AB permanent and resident in Geneva—could possibly reduce the workload of the AB, and therefore enhance the efficiency of the functioning of the AB with respect to the time frame of the appellate review. However, it is worth noting that some other proposed reforms—interim review, dissenting opinions, amicus curiae briefs, and remand authority—might have negative effects on the overall timeframe at the AB stage.
THE COUNTER-TELEORRISM BORDER SECURITY ACT 2019: A SWORD AT PRIVACY’S SHIELD?

Ellie Colegate*

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A. INTRODUCTION

Domestic terror attacks in the last few years have resulted in increased pressures on authorities to limit the effects, at the detriment of non-targeted individuals. Increased online recruitment by organisations such as the Islamic State have prompted the legislative to react and update their terrorism laws to better fit online environments. Enacted in early 2019, the Counter Terrorism Border Security Act 2019 [‘the 2019 Act’] seeks to address various shortfalls within concurrent terrorist legislation. This paper suggests that the amendments provided by the 2019 Act have allowed for a new legal order to be promoted and supported. One which is concerned with placing individual freedoms and protections lower than an institutional desire to constantly monitor individuals. This paper will explore how the removal of the internal regulatory ‘three clicks’ mechanism within Section 3 of the 2019 Act has allowed for potential human rights infringing practices to occur. Part B will look at the law, firstly exploring and analysing the new Section 3 of the 2019 Act and assessing the changes that have occurred. Then looking at the right to personal privacy legislated for under Article 8 of the European Convention on Human Rights, as transposed into the Human Rights Act 1998, and exploring the connections to the new Section 3. Part C will look at the surveillance implications arguably encouraged by the removal of the “three clicks” regulatory mechanism, juxtaposing such with privacy theory to illustrate the impact these alterations have had. Part D will then assess two potential solutions to the issues presented in Part C to establish any potential resolutions to the presented problems, utilising current literature, reports and legal instruments to assess the likelihood of reform or resolution to the presented issues.
B. THE LAW CONCERNED

(1) ‘Three Clicks’ - Section 3, Counter Terrorism Border Security Act 2019

Seeking to update the powers assigned to law enforcement authorities in Section 58 of the Terrorism Act 2000, Section 3 of the 2019 Act states that if an individual “views, or otherwise accesses, by means of the Internet a document or record containing information of that kind” they could be found liable for terrorist offences. Within Section 58, “that kind” is directly referencing information “likely to be useful to a person committing or preparing an act of terrorism”. As an amendment, the 2019 Act does not add any additional clarifications or examples as to what “that kind” of information could consist of; it only reinforces the vague examples provided in the original section of “a document or record”. This can be suggested to be a non-exhaustive list, as within the context of the Internet a “document or record” can be anything from a blog post briefly mentioning a podcast concerning actions of terrorist organisations to a detailed plan of how to make a bomb. These extreme examples are used as a means of illustrating that online the content that a person could interact with is widely varying in nature, therefore if a person was to be held liable under this section. The various types of content is not specified under this section is damaging for any individual, in theory, precarious academic search of materials could be determined and held to be the same as the detailed planning of a terrorist attack. As both would see an individual interact with materials likely “to be useful to a person committing or preparing an act of terrorism”, yet their motivations would arguably be very different. Similar concerns were raised by a non-governmental campaign group (Liberty) in their report responding to the second reading brief of the 2019 Act. They suggested that in connection to viewing or collecting material online it was possible that an individual could interact with a variety of different content sources, all varying in their degrees of severity for the purposes of Section 3. This suggests again that whilst the 2019 Act seeks to update legislation for the online world, it is perhaps failing to do so well, as there is no apparent appreciation of the varying types of content and content sources that can be accessed via the Internet and its subsequent platforms.

It is apparent that Section 3 that is currently enacted had the potential to be less damaging to individuals. However as previously indicated, the changing of the wording of this section has meant that this section is now internally unregulated. At a bill stage, this section had the “three clicks” threshold. This threshold saw Section 3 stated as the following: “on three or more different occasions the person views by means of the Internet a document or record containing information of that kind.” Consistent with the enacted legislation, “that kind” is a reference to terrorism related material. What is key here is the mentioning of an individual having to view or access the content on “three or more different occasions.” Unlike the enacted section which suggests no minimum requirement on the part

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926 Terrorism Act 2000 s 58.
927 Counter Terrorism Border Security Act 2019 s 3.
928 Counter Terrorism Border Security Act 2019 s 3.
929 Terrorism Act 2000 s 58.
930 Terrorism Act 2000 s 58.
931 Terrorism Act 2000 s 58(1)(c).
932 Terrorism Act 2000 s 58(1)(c).
933 Terrorism Act 2000 s 58(1)(a).

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of the individual, this enunacted Section 3 provides some form of a regulatory mechanism, as in order for an individual to be considered liable under this section at a bill stage they would have to access content on more than three occasions. This threshold is beneficial to individuals who encounter terrorist material without the necessary requirement for the intention of the offence, such as academics or journalists. However, with the threshold removed they are likely to be picked up as a suspect as they have accessed the content period.

Section 3 does provide a defence for those accused, however it was suggested and can be seen that this is inadequate for the offence in question. Subsection 4 states that if an individual had a “reasonable excuse”938 for viewing the content they could see their liability negated. If this defence was to be used, an individual accused must be able to show that at the time of viewing the content or material they either “did not know r have reason to believe”939 that the content in question contained or was “likely to contain”940 information useful in the potential process of committing or preparing an act of terror. It is suggested that this defence is not adequate for a platform such as the Internet, again due to the various differing types of content an individual can encounter. This concern was highlighted by Liberty at the second bill reading. They noted that due to the nature of the Internet it was possible for an individual to encounter terrorist content without prior knowledge of such being present.

This excuse or defence is highlighted to be applicable to both journalists and academics.941 From an interpretation of the wording of Section 3. These are the two groups who stand to be most affected by the legislation amendments as these are the two definitively highlighted. However, by highlighting these two specifically, it can be argued that individuals whom are not terrorists, nor academics or journalists are unprotected as the defence they are provided with can be seen to be inadequate.

Looking at the interpreted motives behind this legislation it can be understood why this threshold was less than desirable for authorities, as it can be suggested that there is no typical instance of terrorist violence. The preparation of any two individuals can be extremely different in nature, from idea conception to any potential attack, thus in the interests of determining any potential threats to the population, it is likely that relevant authorities would want to be aware of any potential perpetrators as soon as possible. A suspect could carry out minimal research, not reaching the stipulated threshold under the 2019 Act, yet could continue to carry out a harmful terrorist act. The reported mass surveillance agendas adopted by governments do suggest that sweeping monitoring is taking place, suggesting that the threshold is unnecessary. However, this will be explored in a latter section. Of course, there is no definitive answer as to how to deal with the heightened levels of terrorist content and resources online. It is noted that the way in which the 2019 Act updates and reforms enacted legislation potentially over legislates for offences, whilst also increasing surveillance for others who are not suspected of terrorism offences. This can be evidenced to be representative of the aforementioned new legal order, as the removal of the ‘three clicks’ threshold has arguably led to the threatening of individual freedoms.

(2) ‘Right to Privacy’ - Article 8, Human Rights Act 1998

Despite the Independent Terrorist Legislation Reviewer and the Joint Committee for Human Rights highlighting issues that Section 3 has in connection to freedom of expression, this paper seeks to assess its compatibility with another right. The right to personal privacy. Legislated for under Article 8 of the European Convention on Human Rights, (hereafter referred to as the ECHR), now domestically incorporated into the Human Rights Act 1998, an individual is entitled to “respect for his private and

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938 Counter Terrorism Border Security Act 2019 s 3(4).
939 Counter Terrorism Border Security Act 2019 s 3(4).
940 Counter Terrorism Border Security Act 2019 s 3(4).
941 Counter Terrorism Border Security Act 2019 s 3(4)(b).
family life, his home and his correspondence."\textsuperscript{942} Article 8 of the ECHR conveys an unequivocal right to personal privacy for individuals living in states which have ratified the convention.

It has been recorded that the 2019 Act in its entirety does not contravene in any way the contents of the Human Rights Act, however this is not to say that it does not contravene the sentiments and teleological basis of the right to privacy. These can be traced to Warren and Brandeis’ archetypal works\textsuperscript{943}, which focused on protecting individuals by proposing they have a right to be left alone. This will be explored in full within Part C of this paper, when such is explored as a theoretical expansion on the legislated right.

Such a conclusion has arguably been reached in favour of the legislation as when compatibility with human rights is considered the legislative branch only concerns themselves with the indicated limiters placed within subsections of the act, not the wider sentiments of the articles themselves. Here they would be assessing the 2019 Act against the contents of Article 8(b) which states that the granted right to privacy can only be limited or derived from in “the interests of national security [or] public safety”\textsuperscript{944} or “for the prevention or disorder of crime.”\textsuperscript{945}. When the contents of Section 3 are considered in line with these requirements it can be evidenced that the section is entirely in the interests of national security, as it seeks to discover and determine those who are likely to carry out acts of terrorism, contributing to “the government’s objective of hardening the UK’s defences against hostile state activity.”\textsuperscript{946} This is akin to national security\textsuperscript{947}, meaning that should the consequences of Section 3 result in privacy infringements these would be justified according to Article 8. Moreover, the 2019 Act was enacted as a means of ensuring terrorism legislation reflects “the severity of the crimes”\textsuperscript{948} suggesting that the entire act was written predicated on the means of preventing crime, thus again satisfying the requirements of compatibility of Article 8.

The European Court of Human Rights has considered the scope of Article 8 in connection to surveillance on a number of occasions\textsuperscript{949}, ultimately concluding that beyond the limits of Article 8(b) an individual’s privacy will only be infringed upon in circumstances that contain the following: covert surveillance\textsuperscript{950}, unregulated application of technology\textsuperscript{951}, a breach of private correspondence\textsuperscript{952}, and unwarranted interception of communication\textsuperscript{953}. Looking at the section as it is, without interpretation or prediction, it can be argued that it meets the requirements of established by the Court. However, this is not adequate for the section to operate in practice, as what is written and what is likely to occur is suggested to have disparity. The most recent instance in which the Court was asked to consider an individual’s right to privacy concerned the monitoring of communications online, and the Court ultimately declared that the bulk interception of communications, intelligence sharing and the obtaining of communications from providers was unlawful and did violate Article 8 principles.\textsuperscript{954} This decision

\textsuperscript{942} European Convention on Human Rights 1953, Article 8.

\textsuperscript{943} S Warren, L Brandeis, 'The Right To Privacy' (1890) 4 Harvard Law Review 193-220

\textsuperscript{944} Human Rights Act 1998 Article 8(b).

\textsuperscript{945} Human Rights Act 1998 Article 8(b).


\textsuperscript{947} There is much debate as to what national security consists of for the purposes of legal analysis, the dictionary considers such to be the safety of a state against threats such as terrorism, war or espionage.


\textsuperscript{950} Case 63737/00 Perry v UK [2003] ECHR 17

\textsuperscript{951} Case 8691/79 Malone v United Kingdom [1984] ECHR 10

\textsuperscript{952} Case 33274/96 Foxley v UK [2001] ECHR 224

\textsuperscript{953} Case 4451/70 Golder v The United Kingdom [1975] ECHR 1

\textsuperscript{954} Case 24960/15 Big Brother Watch and others v United Kingdom [2018] ECHR para 468
is significant when considering Section 3, as it will be suggested in Part C that in order for such a section to be successful in its aims of detaining individuals for accessing content, the relevant authorities could adopt similar tactics to those declared unlawful.

When considering personal privacy and surveillance, a comment on the debate which sees the two in conflict is unavoidable. It is the common consensus that there is no correct answer or resolution to this debate, as neither can arguably be limited or compromised, however placing one above the other as evidenced in practice can result in issues. This has been reaffirmed by the European Union Agency for Fundamental Rights that cases of “national security” which potentially impacts the teleological basis of Article 8 - the right to be left alone by others - are “rarely questioned by the ECHR” suggesting a lack of interest by the Court to debate issues of such nature due to a reluctance to get involved with internal state politics surrounding such contentious issues as terrorism, as there are differing levels of the rule of law presented across their jurisdiction. Moreover, the precedent of the European Court of Human Rights does not supplement the Human Rights Act as the Court decides on a case by case basis, meaning that, whilst a precedent or criterion can be formed, this is just a guide as to what could be seen as contrary to rights and not a definitive answer as to what would or would not contravene rights. Therefore, it can be evidenced that Section 3 may not endanger the right to privacy as it is. However, it is argued that the application and real-world application of the section will undermine the basic principles and theories that Article 8 is based upon.

For the above-mentioned reason, this paper will now assess various theories of privacy in connection to the Section 3 to illustrate that it is encouraging damaging practices from a legislative level. This will be done by placing such theories in parallel to surveillance theories as a means of illustration to show how Section 3 is or could potentially operate in practice.

C. SURVEILLANCE AND PRIVACY THEORY: ISSUES ARISING

(1) Schneier, Data Mining and False Positives

As previously alluded to, Section 3 has not been enacted with any formal guidance or report detailing how the aims of apprehending terrorists or content monitoring will be achieved. However, looking at the current contemporary policing climate present in the UK there can be a degree of speculation as to how such may occur. It is likely that as a way of sorting through all the information and data collected to detect individuals of interest, artificial intelligence (hereafter referred to as AI) will be utilised by authorities. GCHQ (The General Communication Headquarters), the leading intelligence authority at a government level, has plans to implement AI to “save lives and provide the public with a “new kind of security” which - in contemplation of GCHQ’s main aims - suggests that there are plans to use algorithms to cease potential terrorist behaviour online and apprehend those connected. It can be evidenced that such practice is already occurring, with police forces highlighting the benefits of utilising data science and a “DDI prediction algorithm[s]” for identifying potential offenders in regions. This arguably reaffirms the suggestion that AI is to be utilised by any agency monitoring

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955 Case 24960/15 Big Brother Watch and others v United Kingdom [2018] ECHR
956 European Convention on Human Rights 1953, Article 8
958 Caution as to the specifics of how section three operates has been taken by the author, as there has been no published or reported means of operation connected to section three the author has taken it as a point of speculation for the means on analysis. Utilising the most likely conclusion in the contemporary policing climate as the starting point for analysis.
960 ‘Data Driven Insight & Data Science Capability For UK Law Enforcement’ (West Midlands Police, 2016)
961 ‘Data Driven Insight & Data Science Capability For UK Law Enforcement’ (West Midlands Police, 2016)
communications for the purposes of Section 3, whether this is county lines police forces or governmental agencies, as this is the most efficient way of processing large amounts of data at present. The removal of the “three clicks” threshold is significant here as this has undoubtedly increased the amount of data any agency would need to sort through in order to apprehend individuals. At first instance there would arguably be the same amount of information. However, the ‘three clicks’ threshold would mean that only those whom meet the criteria would be closely monitored by authorities. Moreover, for the purposes of Section 3 it was highlighted by Liberty\textsuperscript{962} that it would be possible for an individual to access more than one instance of “material” from one site or host online. Therefore, it is possible that AI could be employed to track and monitor cookies in order to establish how much “material” an individual has encountered at one online source. This, as well as the lack of clarification as to what constitutes “material”, suggests that AI is likely to be implemented to assist authorities with policing Section 3 offences.

It is theorised, based on previously revealed surveillance agendas\textsuperscript{963}, that the surveillance of individuals for the purposes of Section 3 would see a macro-micro focusing model. Firstly - with the threshold present - all traffic, key words, terms or phrases would be monitored on a macro level by authorities on a large scale as a means of establishing a long list of potential individuals of interest, similar to that which is undertaken within surveillance programmes such as Tempora and PRISM\textsuperscript{964}. This would see the general monitoring of communications, browsing history and habits and data transfers by authorities, as a means of establishing a shorter list of individuals. This macro level would see the inclusion of those who have not visited sites or accessed content related to terrorism or terrorist acts via the Internet on multiple occasions, indicating that their privacy could be infringed by such actions. Meaning that there would be no separation between those who have been generally browsing the Internet, and those who have visited such content on two occasions, thus making them more likely to reach the ‘three clicks’ threshold which would have allowed authorities to act. Close, micro-level monitoring would entail such things as monitoring of communications, search history, browsing habits, with a direct focus on terrorist related content. Whereas macro-level monitoring would be generalised surveillance with no specific focus beyond content related to terrorism, such as known websites, discussion boards and search terms. This is presented as a two-level approach as there would be a need for justifications for increased surveillance of individuals.\textsuperscript{965} The satisfaction of or likelihood of satisfaction of the Section 3 criteria would be justification enough for authorities.

The removal of the threshold arguably allows for this close, micro-level, monitoring to occur constantly, as there is no limit that would have to be reached. This is significant for two reasons; firstly, it supports the idea that AI is likely to be implemented as a means of data sorting. As illustrated, it likely that in practice, there will be masses of data to be analysed and sorted through in order for authorities to identify those who are of interest, so as a means of making the process more efficient there is to be implementation of an automated system, to save time as well as costs of man power. Secondly, the removal of the threshold allows for unequivocal close surveillance to occur, as it is theorised this threshold would have caused close monitoring. However, this was illustrated to be in certain contexts and circumstances. Without such being present, it can be argued that there are no limitations on the amount of surveillance that could occur in order to establish who is or is not an individual of interest.

Although not a counter terrorism surveillance expert, Bruce Schneier\textsuperscript{966} has provided commentary and predictions (writing at the time in 2015) as to what a macro and micro data mining at


\textsuperscript{963} Those revealed by former NSA analyst Edward Snowden.

\textsuperscript{964} G Greenwald, No Place To Hide Edward Snowden, The NSA And The Surveillance State (Penguin Books 2014)

\textsuperscript{965} Investigatory Powers Act 2016

\textsuperscript{966} B Schneier, Data And Goliath The Hidden Battles To Collect Your Data And Control Your World (1st edn, W W Norton & Company 2015)
a governmental surveillance level could mean for individuals of the concerned state. Alluding to a needle-haystack metaphor967, Schneier suggests that such methods of surveillance only work effectively if there is a “well-defined profile”968 being searched for. For the purposes of Section 3 before the removal of the threshold, a “well-defined profile”969 would be established upon the increased level of surveillance and it would be those who have viewed content two times or more. Whereas, without the threshold being present it can be suggested that there is no “well-defined profile”970 present for authorities to mine against. The removal of the threshold has resulted in any target demographic being removed as well; there is no profile provided for authorities beyond individuals who concern themselves with online information “likely to be useful to a person committing or preparing an act of terrorism”971. This can be seen to be an extremely wide profile, meaning that individuals who are not accessing the material for sinister means could also be victims of micro-level monitoring. Linking this to their rights to privacy, the micro monitoring of communications in the above illustrated way has been held by the European Court of Human Rights to be unlawful and incompatible with human rights.972 Indicating that the increased levels of surveillance directly caused by the removal of the ‘three clicks’ threshold has caused the right to privacy to be infringed upon.

Moreover, it is likely that due to the wide profile, this technique would not work effectively due to the amount of information being likely to cause false positives. This means that personal privacy would be infringed, and a potential new legal agenda be set in motion; one that allows and arguably encourages the close surveillance of individuals, all based on the goal of apprehending individuals. Yet, as illustrated, there is no guarantee that such will occur in practice. Schneier states that the presence of potential false positives will most certainly result in “millions of people”973 being falsely accused. This arguably undermines the motivations behind Section 3, as instead of identifying individuals who fit the defined profile of individuals accessing terrorist content online, the model would highlight false positives, bringing up matches that do not fit the profile. This means that there would not be a more rapid disruption of terrorist activity, listed as a motivation behind the implementation of the 2019 Act, since determining potential terrorists from the false positives would take both time and money.

(2) Individual Privacy, Warren and Brandeis and Bentham-Foucault

Seen as the conceptual birthplace of the legal right to privacy, Warren and Brandeis974 proposed that individuals should be entitled to “to decide whether that which is his shall be given to the public.”975 Although referring to published and unpublished works, they highlight that the burden is on an individual to conclude what they wish to be in the public domain, by suggesting that the moment an individual places something into the public domain, publishes a previously unpublished work, to use their example, they forfeit the etheric right to privacy. This is commonly evidenced when an individual publishes something online, such as a photo or comment on a post, which would occur if an individual was to post something online, as they were in control of its publication. It can be suggested that the browsing history and patterns used to build profiles or to determine who is an individual of interest under Section 3, are privy to privacy as they are not published in any way and arguably remain closed lists between an individual and their Internet Service Provider.976 For the purposes of Section 3, an individual’s browsing history as well as their habits would need to be obtained and tracked by authorities in order to be established if that individual is indeed a potential offender. It is worth noting

967 Schneier. p 161
968 Schneier. p 160
969 Schneier. p 160
970 Schneier p 160
971 Terrorism Act 2000, s 58
972 Case 24960/15 Big Brother Watch and others v United Kingdom [2018] ECHR
973 B Schneier, Data and Goliath The Hidden Battles To Collect Your Data And Control Your World p 161
974 Warren 193-220
975 Warren 199
that under the Investigatory Powers Act 2016\textsuperscript{977}, any interception of communications, data or information must be lawful and have respect for privacy. However, as this is a section concerned with matters of terrorism, it can be suggested that the authorities concerned will always be determined to have carried out lawful interception due to the wider aims of national security. Regardless of justifications, any potential interception or interpretation of an individual’s habits online can be seen to be a theoretical infringement on their personal privacy. To use the terminology of Warren and Brandeis, by browsing the Internet for any manner of content, including terrorist material, an individual is not publishing their intentions, nor their habits for all to see. Let alone for authorities to act upon. Therefore, whilst there can be justifications and rationales placed behind the interception of communications for the purposes of apprehending terrorists, there is the potential for innocent individuals to have their privacy infringed upon in the process.

Such was the case in the United States in 2013, when a mistake within the New York Police Department framework of choice resulted in a family being subjected to a home search for terrorist paraphernalia because they searched the above and were deemed as more likely to be terrorists.\textsuperscript{978} This conclusion was supposedly reached due to someone\textsuperscript{979} watching and monitoring Internet traffic and identifying connections via an algorithm. Fundamentally, this illustrated that such predictions could be made from analysis of Internet browsing history, such as is suggested to occur under Section 3.

Focusing on wider surveillance practices, the Bentham-Foucault\textsuperscript{980} commentary saw the development and application of Bentham’s architectural ideas\textsuperscript{981} to a metaphor of society\textsuperscript{982}; giving rise to the theory that as long as society is aware they are being watched but not certain as to when this is occurring, the state or comparable power has an element of control, eventually resulting in the self-regulation of the target group. Predicated on the architecture of a panopticon, Bentham theorised a method of surveillance that was based upon idea that individuals are under the illusion that they constantly watched, without confirmation as to whether such is true. The panopticon architecture of the prisons Bentham designed saw a guard or authoritative figure be placed in the centre, affording them the ability to see all that was going on around them. Whereas, the individuals detained within the cells would be able to see that there was an authoritarian figure in the centre, yet they were never afforded the means to tell if they were being observed at any given point.\textsuperscript{983} Creating a power dichotomy and model of surveillance.

When considering online surveillance for the purposes of Section 3, this surveillance theory and subsequent privacy effects can be recognised. As previously suggested, in order to establish Section 3 offences law enforcement authorities would need to monitor the actions of an individual constantly, echoing the nature of the Internet being unconfined by time and physical constraints. As previously suggested, for the purposes of Section 3, any authority would need to monitor the actions of an individual, this can be held to be constant monitoring, as the Internet and any potential content is not limited to physical and time constraints like the offline realm. Thus, if an individual can access the Internet at any time then they are likely to be monitored concurrently. To directly apply Bentham’s metaphor and Foucault’s theory to the presented circumstances, the main actors can be seen to align with the roles of the guards and prisoners. Akin to the model, in which the authorities - whether that is

\begin{itemize}
\item \textsuperscript{977} Investigatory Powers Act 2016
\item \textsuperscript{978} M Catalano, 'My Family's Google Searching Got Us A Visit from Counterterrorism Police' The Guardian (2013) available at https://www.theguardian.com/commentisfree/2013/aug/01/government-tracking-google-searches
\item \textsuperscript{979} No clarity was provided as a whether this was a singular individual acting alone as an individual, or an AI system making connections.
\item \textsuperscript{980} M Galic, T Timan, B Koops, Bentham, Deleuze And Beyond: An Overview of Surveillance Theories from The Panopticon to Participation' (2016) 30 Philosophy & Technology 9-37
\item \textsuperscript{981} J Manokha, 'Surveillance, Panopticism, And Self-Discipline in The Digital Age' (2018) 16 Surveillance & Society 219-237
\item \textsuperscript{982} Galic 30
\item \textsuperscript{983} Galic 30
\end{itemize}

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an organisation such as GCHQ or county lines police forces – adopt the role of those who stand in the middle. The authorities have the capabilities to see all that they need to see and extract any conclusions they need to extract. Whereas all the individuals operating online – who are adopting the place of those incarcerated - regardless of their motives, can be supplemented as those within the cells within this model. Individuals are potentially aware that they are being watched, however, have no confirmation as to when they are actually being monitored. This impacts their personal privacy at its core as they are placed under the illusion that there is no safe space in which they can conduct themselves. Such social surveillance structures can be evidenced in states such as China which is renowned for its inconsistent valuing of personal privacy.984

Moreover, it can be suggested that the Bentham-Foucault model is present due to a secondary reason. It has been recorded by Stoycheff and others985 that this model is widely used as a metaphor in circumstances where a state wishes to deter individuals’ actions to engage in illegal offences. The state uses the model as a means of control, as evidenced this is true of surveillance under Section 3. In theory, those who do not know if they are being watched in at any specific moment are more likely to not engage with illegal activities in fear of them being discovered and detained. It is widely reported since the Snowden revelations that society is constantly monitored, and this is something Stoycheff986 credits to being advantageous to governments seeking to utilise this method. This monitoring and presence of the model arguably sees an infringement of personal privacy and the Bentham-Foucault model has been widely recognised to be a model that impacts significantly on personal privacy.987 Stoycheff observed in a 2018 study that the presence of the panoptical model altered the behaviour of target groups, as they were aware that they were being watched. The act of being watched does not qualify as being an infringement of personal privacy. However, akin to the circumstances and the level of monitoring suggested by Section 3, Stoycheff observed that those who were being watched were being watched to a “chilling”988 degree, suggesting that there was an invasion of personal privacy at points.

By exploring both the concepts of Schneier and Warren and Brandeis, it has been illustrated that whilst the 2019 Act does not pose a direct threat by mere presence. However, it is the operation of such in practice that gives rise to the issues presented. The likelihood of AI being used as a means of monitoring individuals is high, as the “three clicks” removal has seen an increase in the amount of data that would need to be surveyed. Utilising akin methods to surveillance programmes that have resulted in privacy infringements. Moreover, the consultation of Warren and Brandeis’ ideas have reaffirmed that whilst the legislated right to privacy present in Article 8 has not been undermined, when the wider theoretical expansions are consulted such an infringement can be seen. Especially when these ideas are juxtaposed alongside a predominant surveillance theory, as it has been shown that the lack of confirmation as to how Section 3 will work in practice has given rise to the possibility of constant monitoring. This has been determined on previous occasions to undermine the right to personal privacy.

D. POTENTIAL RESOLUTIONS

As is the case of any present issues of any field, there is room for the author to present potential resolutions. These can be directly connected to the legislation and building on the commentaries and criticism highlighted before the legislation’s implementation; or the utilisation of concurrent legislation such as protections provided with the Data Protection Act 2018.

984 K Strittmatter, R Martin, We Have Been Harmonised: Life In China’s Surveillance State (Old Street Publishing 2019)
986 Stoycheff 604
988 Stoycheff 602
(1) Data Protection Regulations – Some protection is better than none?

As the 2019 Act seeks to update and reform legislation to allow for better suited laws in the age of terrorist threat, it can be suggested that there is perhaps a solution in already enacted legislation.

The General Data Protection Regulation989, domestically incorporated in the Data Protection Act 2018 has been seen as a protective instrument by some due to its provisions surrounding consent for data processing, transparency and lawful basis oversights. Article 21990 of the Regulation grants the right to an individual to object to the processing of their personal data in certain circumstances. However, public tasks – those which are carried out within the public interest or see the exercising of an official authority vested in an individual991 – are considered to be circumstances in which the right granted is not “absolute”992 as conveyed by the Information Commissioner’s Office at the first instance. The Commissioner’s Office states that groups/authorities can continue to process individual data if they can illustrate “compelling legitimate grounds for the processing”993 under Article 21(4)994. This arguably negates the protection granted to individuals in connection to policing operations and governmental processing of data, as it can be said that the protection of the state from terrorism and other national security threat will always be “legitimate grounds”995 for collection and processing.

This means that whilst Article 21 should be applicable to all individuals browsing online, the national security caveat provided with this section means that they are perhaps not as fully protected as they should be. This suggests that a solution to the problems presented by Section 3 fall to the individuals themselves as concurrent legislation is perhaps not sufficiently suitable in the given circumstances.

(2) Self-regulation?

Returning to the findings of the European Union Agency for Fundamental Rights996 it can be suggested that in order for any effective oversight to be implemented there must be questioning of the “current legal understandings of privacy”997. This is further supported by the works of Solove998 who suggests that there needs to be expansion and clarity as to what technologies are aiming to do when implemented, so there can be a better balancing of privacy in connection to emerging technologies and practices. When assessing the impact of Section 3, it can be argued that this recognition and expansion of legal discourse or the occurrence of test cases are too far away for it to make any real difference to such an imminent practice, thus the burden arguably falls to the individual to protect themselves against any

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989 Council Regulation 2016/679 of 27 April 2016 concerning the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC
990 General Data Protection Regulation 2018 Article 21
991 General Data Protection Regulation 2018 Article 24
994 General Data Protection Regulation 2018 Article 21(4)
infringement of privacy. To protect oneself from invasive practices presented by Section 3, an individual could in theory utilise such technologies as virtual private networks, to conceal their Internet browsing habits. It was suggested that such a burden would result in “only the well-to-do will know[ing] how to protect their privacy”999 which is a concerning prediction when reviewing personal privacy as an overarching concept. This suggests that a split between the standard individual who does not have the expertise needed to implement such things as a virtual private network to avoid being tracked online, and those who have the ability to do such will become apparent. However, they will both be surveyed in the same ways, meaning that someone who can protect themselves has an advantage over those who cannot.

This presented solution that can be seen as means of limiting the impact of Section 3 has on personal privacy. However, it arguably reinforces the disparity encouraged by the surveillance practices derived from Section 3, as it allows those who are in possession of all the facts or information to be at an advantage. Looking at the motivations of Section 3 it can be suggested that there is the potential for potential targets to already be using such methods as showcased here, meaning that the effectiveness of Section 3 is arguably limited before it is even applied in practice. As these are not methods limited to individuals who are carrying out typical browsing, if anything, they and virtual private networks are used more by those whose habits are likely to attract attention by the authorities.

Regardless of an individual’s knowledge of surveillance evasion, it can be argued that the burden should not fall on the individual to protect themselves from practices that are legally uncertain. Currently it has been suggested that in order for individuals to remain immune from biometric data collection they should partake in either “occlusion or confusion,”1000 reaffirming that there is indeed a burden on individuals to protect themselves. To date, there has been no judicial decisions or commentaries declaring Section 3 incompatible with any current legislation, in fact the contrary has been illustrated within Part B. The entirety of the 2019 Act cannot be repealed or altered in any way, only judicial review cases can be brought forward connected to the contents. None seem likely to occur at this stage, therefore this paper can be seen to be aligning with the sentiments of Van Brakel and De Hert.1001 They recognise that in lieu of a definitive conclusion being reached there should be a shifting of responsibilities when reviewing law enforcement applications of such technologies as AI as a means of data mining. They suggest that future cases and research needs to address the “unintended social consequences”1002 that have become apparent, indicating that such a burden should not lie with the society when they are the ones being subjected to such surveillance practices.

E. CONCLUSIONS

This paper was brought about on the basis that a new legal order is incrementally being created through the reform and implementation of legalisation that encourages widespread surveillance. Choosing to focus on Section 3 of the 2019 Act, this paper has illustrated that the motivations of apprehending likely terrorists or terrorist attack perpetrators have caused a section to be drafted that poses significant threat to personal privacy. Assessing the wider ideas of personal privacy in conjunction with concepts of surveillance this paper has shown how the removal of the “three clicks” regulatory mechanism has altered the way this section operates in practice. Concluding that while there is potential for the damage to personal privacy to be reduced, these are unlikely to occur due to external political factors and a lack of interest in this specific piece of legislation. Overall, this paper has shown that Section 3 of the 2019 Act poses a legitimate threat to the right of personal privacy. However, without further discussion or

1001 Van Brakel, Policing
1002 Van Brakel, Policing
investigation through test cases or direct application to the real world, this threat is confined to nothing more than academic conjecture and theory. With such being representative, regardless of application, of the United Kingdom moving towards a system of state surveillance that records and profiles all individuals without hesitation.
HUMAN RIGHTS LAW AND POLITICS: CAN IT CREATE SOCIAL AND POLITICAL CHANGE?

Eliza Wynne*

A. ABSTRACT

This article offers varying critiques of human rights law and politics as an effective instrument of social and political change. Through analyses of Samuel Moyn, Stephen Hopgood, César Rodríguez-Garavito, Gráinne de Burca, Philip Alston and Kathryn Sikkink, it is evident the human rights system is not perfect. While optimism and hope may exist, the literature conveys a strong sentiment of distrust and uncertainty in human rights law and politics as the means of creating impactful change.

B. INTRODUCTION

Human rights law and politics is a hotly contested instrument of social and political change, with polarised and competing scholarly perspectives of its efficacy. Understanding the causal relationship, or the lack thereof, of human rights law and politics on social and political change is important because it can result in the recognition of major flaws to the current system, the resolution of which will result in progress and development.1003

For the purpose of this article, human rights law and politics is referred to as human rights, and is consistent with Stephen Hopgood’s working definition of the ‘Global Human Rights Regime’.1004 Under the premises of the Global Human Rights Regime, ‘human rights’ is defined as the “amalgamation of law, permanent institutions, courts, [and] global campaigns”.1005 Following Kathryn Sikkink’s succinct terminology, ‘effectiveness’ will be defined as “whether human rights work produces positive change in the world”.1006 ‘Social and political change’ will be defined as the reduction of human rights violations.1007

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1005 Hopgood at 66.
1007 Sikkink, Evidence at 5.
This article aims to assess and validate the varying critiques of human rights efficacy and means of producing viable social and political change. This article analyses eight scholars, whose perspectives range from views of human rights as an ineffective, a semi-effective, or an effective instrument of social and political change.

C. A BRIEF HISTORY OF HUMAN RIGHTS

An understanding of the history of human rights is essential to contextualise the causal relationship between human rights and social and political change. The timeline associated with the birth of human rights is debated amongst scholars. Samuel Moyn, a scholar well-acquainted with political realism, suggests that human rights “crystallised in the moral consciousness of the people only in the 1970s… as the result of widespread disappointment with earlier…forms of idealism that were failing”. Moyn continues by arguing the creation of human rights in the 1940s was motivated by the pursuit of Western goals, and not by the creation of a holistic world order. Moyn’s interpretation is met with harsh criticism from a polarised viewpoint.

Alternatively, Kathryn Sikkink, a self-proclaimed admirer of Walter Hirschman’s ‘possibilism’, argues the human rights movement dates back to the 1940s because it was introduced as a “set of interconnected struggles”. The historical distinction of the origins of human rights is essential because it proves the depth of the institutionalisation of human rights, and in turn, its impact on political and social change. By acknowledging human rights as beginning in the 1970s, major human rights treaties, institutions, and movements are ignored, which in turn hinders the depth of analysis. This article will define human rights as beginning in the 1940s, alongside the aftermath of World War II and the creation of the Universal Declaration on Human Rights. Despite Moyn’s critique of this understanding, allowing a broader time frame within which to analyse the scope of social and political change is necessary.

D. CHAMPIONS OF HUMAN RIGHTS INEFFICACY

Scholars such as Samuel Moyn and Stephen Hopgood, complemented by Eric Posner, adopt and share similar perspectives regarding the efficacy of human rights as impacting social change. Amongst this group of scholars, political realism and a self-interest oriented approach guides their critiques of human rights. This section outlines both Moyn and Hopgood’s main critiques of human rights, and assesses both the strengths and weaknesses in their respective arguments.

(1) Samuel Moyn

For Moyn, human rights emerged out of disappointment with failed ideals like socialism and communism in the 1970s. Unlike some scholars who adopt a more liberal approach, human rights did not emerge out of a universal hope for humanity. Realism is used to underscore Moyn’s critiques of human rights, namely the lack of enforcement mechanisms, the fragility of human rights norms, and stigmatisation of the middle class. Human rights are too weak to engage and enforce international norms because they have conformed to the realities of partisanship, state sovereignty, and formal

1010 Sikkink, Evidence at 26.
1011 Moyn, Future at 460.
1012 Sikkink, Evidence.
entitlements to the point where human rights are “so minimalist in their proposals to change the world that they become neutered”.  

The efficacy of human rights is limited by its lack of enforcement mechanisms, as a result of state sovereignty and the lack of state willingness. The strength of Moyn’s argument rests in his understanding of harsh political realities. Despite advancements in human rights law and legal mechanisms such as the Responsibility to Protect and the International Criminal Court, there has been little challenge to concerns of human rights violations. Moyn’s argument for the superiority of state sovereignty, especially regarding human rights enforcement mechanisms, is compelling because states instinctively act in their best interests in a “zero sum game”. This is strongly evidenced by the fact that the International Criminal Court has only convicted two people from the time of its creation to 2014, with no regard for the crimes against humanity committed by hegemonic powers such as the United States. Moyn also claims human rights norms that rely on judicial decision-making are weak because judges are only able to mobilise in specific institutional contexts where domestic law allows. However, while human rights mechanisms may not be potent, there is opportunity for their effectiveness with the same logic that according to Moyn makes them ineffective. Whilst judges can be catalysts for enabling social and political change, their presence, however strong, is not necessary. Judges can often limit and narrow human rights beyond the extent it can be applied in local contexts, and therefore, human rights norms can have opportunity to develop regardless of enforcement mechanisms.

In Moyn’s view, understanding the history of human rights is essential to understanding its limits with respect to its fragility. The origins of human rights are not found within universalism, but instead arise from national welfarism to ensure ultimate benefit to the state. Moyn has grounded this critique largely in the recent emergence of human rights, and has declared systems such as the United Nations “dead on arrival”. The strength of Moyn’s harsh political realist lens is found within comparable understandings of the origins of human rights. However, in reality, the origin of human rights has been institutionalised since the 1940s. This is evidenced by the Universal Declaration of Human Rights and state memberships to the United Nations. By adopting a broader interpretation of human rights origins, human rights has grounded itself within movements such as decolonisation. These movements were not exclusively the result of quests for sovereignty as Moyn suggests. Instead, these movements are interconnected struggles between sovereignty and rights, and demonstrate the effectiveness of human rights in creating social and political change. By understanding a broader history of human rights, human rights norms are not as frail as Moyn states.

1014 Moyn, Future at 58.
1015 Ibid.
1016 Hopgood, Social Change at 68.
1018 Ibid. at 68.
1019 Sikkink, Evidence at 43.
1020 Moyn, Future at 62.
1022 Moyn, Utopia at 6.
1023 Ibid.
1024 Sikkink, Evidence at 58.
1026 Sikkink, Evidence at 29.
1027 Ibid. at 28.
1028 Ibid. at 195.
1029 Ibid. at 29.
The lack of mobilisation of the middle class stems from Moyn’s belief that human rights are not equipped to challenge global inequalities.\textsuperscript{1030} In order to overcome inequalities, human rights must focus on distributive inequality as opposed to championing the missions of the poor and underprivileged.\textsuperscript{1031} Moyn’s critique is strong: by diminishing the inequalities evident in human rights, it can keep at bay various populist regimes that have emerged, and that have since had a negative effect on human rights.\textsuperscript{1032} It is also strong because if middle classes are responsible for advancing human rights multilaterally, for example by participating in and creating an active civil society, domestic political campaigns have a stronger opportunity to embed human rights.\textsuperscript{1033} Without middle class support, there can be no mobilisation of human rights. This is evidenced by non-governmental organisations, such as Amnesty International, that have supported research into understanding the equality disparities in human rights.\textsuperscript{1034} However, Moyn’s argument begs the question: is the redistribution of resources an appropriate and efficient means of ensuring human rights that has the ability to create effective social and political change? While extremist populist governments may not be elected, human rights violations may repurpose themselves in alternative forms. It is not as necessary, as Moyn believes, to find alternative routes to human rights to combat issues such as populism.\textsuperscript{1035} Instead, an evaluation of strategies similar to the experimentalist governance theory of de Búrca, as discussed herein, may be a more balanced approach.\textsuperscript{1036} If human rights were a “product sold to middle classes in Western countries to ‘feel good’”,\textsuperscript{1037} then an evaluation of strategies may be a more appropriate approach to targeting human rights inequalities as opposed to pure abandonment in order to increase its efficacy.\textsuperscript{1038}

(2) Stephen Hopgood

Within a similar line of realist thought, scholar Stephen Hopgood is an equal champion for the “end times of human rights”.\textsuperscript{1039} Hopgood’s critique of human rights as an ineffective language for social change is the result of the decline of Western influences, politicisation of human rights languages, and disapproval of human rights norms.\textsuperscript{1040}

Hopgood’s view of human rights, or the ‘Global Human Rights Regime’, interprets human rights as a product sold to serve the interests of international elites.\textsuperscript{1041} As a result, it has largely stemmed from the creation of Western or Global North powers such as the United States and the United Kingdom.\textsuperscript{1042} With the geopolitical climate facing increasing uncertainty, there is subsequent decline of the West and an emergence of new powers such as Brazil, Russia, India and China.\textsuperscript{1043} Despite various treaty ratifications, the rising new powers do not have the “capacity or will” to make a similar commitment to that of the US towards human rights.\textsuperscript{1044} This logic is strong because American values, such as democracy, have often coincided with the advancement of human rights norms.\textsuperscript{1045} If human

\begin{footnotesize}
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\item \textsuperscript{1031} Moyn, \textit{Trump}.
\item \textsuperscript{1032} \textit{Ibid}.
\item \textsuperscript{1033} Hopgood, \textit{Social Change} at 73.
\item \textsuperscript{1034} Sikkink, \textit{Evidence} at 36.\textsuperscript{1035} Alston, \textit{Populist Challenge} at 5.
\item \textsuperscript{1036} de Búrca, \textit{Experimentalism}.
\item \textsuperscript{1037} S Hopgood, \textit{The Endtimes Of Human Rights} (Cornell University Press 2013) at 104.
\item \textsuperscript{1038} de Búrca, \textit{Experimentalism}.
\item \textsuperscript{1039} Hopgood, \textit{Endtimes}.
\item \textsuperscript{1040} Hopgood, \textit{Social Change}.
\item \textsuperscript{1042} Hopgood, \textit{Social Change} at 70.
\item \textsuperscript{1043} \textit{Ibid}.
\item \textsuperscript{1044} \textit{Ibid}.
\item \textsuperscript{1045} B Simmons, \textit{Mobilizing For Human Rights} (Cambridge University Press 2009).
\end{itemize}
\end{footnotesize}
rights norms cannot be easily transferred between world powers, human rights are therefore culturally specific and can exclusively succeed where certain, mainly Western, world powers exercise a strong pro-human rights foreign policy. The rise in multipolarity has created a fragile system that relies upon a weakening foundation of Western states. While this creates fragmentation within political and legal structures, a multipolar human rights ecosystem can promote creativity and innovation. However, there is a major factual weakness to Hopgood’s argument. Human rights have largely been the product of the Global South, dating back to the American Convention on Human Rights in 1969. Western states, such as those described by Hopgood as champions of the human rights system, have actually obstructed human rights more often than they have upheld them. When understood with a correct interpretation of historical events, it is evident the West has not been the clear driver of human rights, which therefore presents a weakness in Hopgood’s argument. Despite its origins however, it is clear that without continued support from Western states, the efficacy of human rights will suffer in the future.

Hopgood’s secondary reasoning for the inefficacy of human rights is due to its politicisation. By Hopgood’s logic, human rights language is vague and has been rejected in the name of sovereignty. Human rights language adopts a minimalist form, by claiming it has been “diluted of all significance.” This is a strong argument because when human rights are politicised, they can become scapegoats for self-interested actions. This is evidenced by human rights language used to justify wars and humanitarian interventions. The over-politicisation of human rights has also increased the stigmatisation of human rights actors in countries without a strong civil society. In countries such as India, human rights actors and NGOs are often viewed by civil society as perpetrating Western ideologies around human rights. However, there is debate as to whether it is the over-politicisation or the over-legalisation of human rights that has resulted in its inefficacy. By creating overtly technical legal knowledge as a prerequisite to understanding human rights, particular groups such as grassroots activists are alienated from participating in human rights to ensure social and political change. Regardless of repression stemming from over-politicisation or over-legalisation, the existence of repression towards human rights activists is evidence in itself that human rights is not effective.

Finally, Hopgood’s critique of human rights as an ineffective means for social and political changes stems from the disapproval of human rights norms. For Hopgood, the universalism behind human rights is not Human rights were not discovered, as Posner suggests, but instead created by Western impositions of values. Within human rights, there is a fear of advancing Western values, including questions of tolerance of religious and social standards. While enforcements of homogenised differences have been used, such as Responsibility to Protect, they have been used erratically. This argument is strong because there is significant contrast between human rights

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1047 Rodriguez-Garavito, Symbiosis at 506.
1048 Sikkink, Evidence at 28.
1049 ibid. at 28.
1050 Hopgood, Social Change at 71.
1051 Moyn, Future at 58.
1052 ibid. at 58.
1053 Hopgood, Social Change at 71
1054 ibid.
1055 Rodriguez-Garavito, Symbiosis.
1056 ibid.
1057 Posner, Twilight.
1058 ibid.
1059 Hopgood, Social Change at 72.
1060 Hopgood, Endtimes at 167.
commitments, and human rights enforcement. This indicates that there is a disapproval of human rights norms, evidenced clearly in states such as China and Russia who overtly reject human rights standards. However, weaknesses are apparent in Hopgood’s critique as well. The disapproval of human rights norms is not evidenced at all by states agreeing to ratify the treaties. By making a legal commitment to human rights, human rights norms are subsequently validated. “Regardless of the strength of commitment or belief, the agreement to be bound to the goals of the treaty suffices for the purposes of the first features of an experimentalist system”, This is also known as a shared problem, by recognising the problem as such, human rights are an effective instrument of social and political change. However, as evidenced in Saudi Arabia, ratification of a treaty without belief in the values of the treaty proves to be ineffective at creating social and political change. Despite the weaknesses of Hopgood’s argument, its strengths are most persuasive in deciding the inefficacy of human rights.

In conclusion, both Moyn and Hopgood pose strong arguments for the ineffectiveness of human rights to create social and political change. Through comparison of strengths and weaknesses, it is evident that their arguments are weakly refuted by critics on the other end of the spectrum as there is apparent strain on the effectiveness of human rights.

E. A MIDDLE GROUND

The critiques of Stephen Hopgood and Samuel Moyn are met, albeit to a limited extent, by arguments from scholars including César Rodríguez-Garavito and Gráinne de Búrca. This section will analyse their middle ground interpretations of human rights as a semi-effective instrument of social and political change and will draw on both previous and forthcoming critiques to identify the relative strengths and weaknesses of their arguments.

1. César Rodríguez-Garavito

César Rodríguez-Garavito admits that human rights rest in a vulnerable place. In recent years, there has been a new wave of scrutiny regarding human rights. His scrutiny of human rights rests upon similar criticisms shared by Hopgood. Rodríguez-Garavito distinguishes his critique by his view of human rights as a diverse ecosystem, and not a hierarchy. The creation of this diverse ecosystem is predominantly due to the rise of a wider range of actors, resulting in a multipolar international order. This separation allows for creativity and innovation in the interpretation of human rights. The human rights system must change in light of contemporary human rights issues to ensure its efficacy.

The broader spectrum of civil society actors has resulted in an expansion of how human rights are enforced and scrutinised. For Rodríguez-Garavito, this creates uncertainty. Human rights are not as negative as Hopgood or Moyn suggest, and they are not as positive as per the likes of Sikkink. However, Rodríguez-Garavito acknowledges a strong and persuasive viewpoint. The current model of non-collaboration between states and NGOs wastes opportunity. This argument is strong because in the past two decades alone, there has been significant expansion of civil society actors. Civil society

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1061 Posner, Twilight.
1062 Hopgood, Social Change.
1063 de Búrca, Experimentalism at 501.
1064 Posner, Twilight at 71.
1065 Ibid. at 500.
1066 Rodríguez-Garavito, Symbiosis at 499.
1067 Ibid. at 500.
1068 Rodríguez-Garavito, Symbiosis at 500.
1069 Sikkink, Evidence at 128.
1070 Rodríguez-Garavito, Symbiosis at 505.
actors, including transnational coalitions and grassroots organisations, are particularly successful at mobilising civil society, especially domestically.\textsuperscript{1071}

The traditional method of ‘gatekeeping’, whereby hegemonic states set and determine international human rights norms to which actors respond, is no longer in line with the current pace of human rights.\textsuperscript{1072} This is a strong argument due to a range of contemporary issues and mobilisation techniques that have expanded opportunity for both institutional and grassroots activists to effect meaningful social and political change.\textsuperscript{1073} This is evident when grassroots organisations and non-governmental organisations (NGOs) adopt contemporary means of creating change, such as e-activism.\textsuperscript{1074} For Rodríguez-Garavito, the traditional approach to understanding human rights fails as it is no longer a feasible explanation to account for the discrepancies in the human rights system, including the emergence of new actors. However, the ecosystem model preferred by Rodríguez-Garavito is also flawed. Although human rights is becoming an ecosystem, not every actor is treated equally which may hinder the symbiotic nature of an ecosystem. Despite the fact that hegemonic powers such as the United States are decreasing in effectiveness, some voices are simply louder than others.\textsuperscript{1075} Hence, a gap exists in Rodríguez-Garavito’s ecosystem. While an ecosystem is a strong symbol of the contemporary human rights system, there is still a medley of predators who are higher up on the metaphorical food chain.

(2) Gráinne de Burca

Gráinne de Burca addresses three common criticisms of human rights: the ineffectiveness of human rights regimes, ambiguity and lack of specificity of human rights standards, and weakness of international human rights enforcement mechanisms.\textsuperscript{1076} De Burca approaches all three criticisms from an experimentalist governance perspective, or the “recursive process of provision goal setting and revision based on learning”.\textsuperscript{1077} Through this lens, human rights, in particular human rights treaties, have a semi-effective ability to create social and political change by relying upon an active civil society to engage with the treaty bodies.\textsuperscript{1078} Under experimentalist governance theory, human rights law can be understood as open-ended, participatory, and self-reflecting that can adjust to the currents of civil society.\textsuperscript{1079}

The strengths of her arguments regarding human rights efficacy do not outweigh the weaknesses. De Burca claims the open-ended framework of human rights treaties appeal to experimentalist governance theory by encouraging participation, with the ambiguity serving as opportunity for development and engagement by a civil society.\textsuperscript{1080} While this does serve as potential for cultural interpretations to adjust human rights law within local frameworks, there is a noticeable weakness to this argument. Historically, ambiguity in human rights treaties has monstrously failed to effect prevent change, as a direct result of their vagueness. Such treaties have also fallen victim to political manipulation.\textsuperscript{1081} For example, the Genocide Convention 1948 encountered numerous challenges in clarifying its ambiguity during the Rwandan Genocide. In Rwanda, the open-ended framework resulted in mass casualties and human rights violations did not obligate international actors to move swiftly enough, and instead disguised their international obligations under the phrases ‘ethnic

\textsuperscript{1071} Sikkink, Evidence.
\textsuperscript{1072} Rodríguez-Garavito, Symbiosis at 504.
\textsuperscript{1073} Ibid. at 503.
\textsuperscript{1074} Ibid. at 499.
\textsuperscript{1075} Moyn, Future at 61.
\textsuperscript{1076} de Búrca, Experimentalism.
\textsuperscript{1077} Ibid. at 281.
\textsuperscript{1078} Ibid.
\textsuperscript{1079} Ibid.
\textsuperscript{1080} Ibid. at 311.
\textsuperscript{1081} Hopgood, Endtimes.
cleansing’ and ‘civil war’.\textsuperscript{1082} In doing so, major hegemonic actors such as the United States avoiding taking responsibility. This was despite a strong civil society presence advocating and pressuring international actors to engage with the Convention.\textsuperscript{1083}

De Burca instead references the Convention on the Rights of the Child 1989, where civil society pressure has resulted in various appointments of UN officials to ensure appropriate supervision and subsequent expansion of treaty goals.\textsuperscript{1084} This bureaucratic solution merges the works of grassroots activists and hierarchical institutions of human rights into a space of collaborative learning.\textsuperscript{1085} The experimentalist governance theory proves human rights treaties are capable of being reinterpreted and expanded upon. The main flaw to this argument is whether or not these goals have become too broad and have distracted both states and civil society actors from achieving the goals stated in human rights treaties. By expanding human rights to incorporate various local and cultural contexts, it is arguable that the universality behind human rights has been sacrificed as well.

De Burca also heralds the opportunity for civil society actors to engage with human rights by remediying gaps in treaty body mechanisms, specifically within domestic enforcement.\textsuperscript{1086} NGOs are positioned strongly to act as cultural mediators or translators to ensure that human rights treaties are enforced at a local level. It is a strong argument that NGOs have the opportunity to act as safeguards for human rights, and to ensure appropriate reporting and review. This is evident in various international conferences, such as the Fourth World Conference on Women in Beijing in 1995, which exhibit an increased understanding and shared commitment to specific elements of human rights.\textsuperscript{1087} However, this relation back to the local level is only possible when civil society actors are able to attend and contribute to these conferences. It is clear that de Burca’s argument in this respect rests upon the presence, and the corresponding ability, of a highly active civil society. Where local civil society actors are weak, transnational coalitions have the opportunity to support and strengthen these actors in order to effect socio-political compliance.\textsuperscript{1088} However, transnational coalitions are not always effective and able to interact with local civil society actors, let alone act for them due to national restrictions or laws.\textsuperscript{1089} De Burca’s claim of efficacy demands active participation and reflection from civil society, and therefore limits her critique to countries where an active civil society is a prominent feature of political and social life.

The arguments of both Rodriguez-Garavito and de Burca enjoy a middle ground perspective on the effectiveness of human rights to create social and political change. Through emphasising the importance of civil society actors, they pose strong arguments for the uncertainty of human rights effectiveness in creating social and political change. While human rights may not be as ineffective as their realist counterparts Moyn and Hopgood suggest, human rights are still largely ineffective.

**F. AN OPPORTUNITY FOR HOPE?**

Human rights are not entirely met with pessimism. Scholars such as Philip Alston, the United Nations Special Rapporteur on extreme poverty and human rights, and Kathryn Sikkink offer suggestions of human rights ability to effectively create social and political change.

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\textsuperscript{1083} Sikkink, *Hopeful*.

\textsuperscript{1084} de Búrca, *Experimentalism* at 283.

\textsuperscript{1085} Ibid. 314.

\textsuperscript{1086} Ibid. at 292.

\textsuperscript{1087} Ibid. at 290.

\textsuperscript{1088} Ibid. at 286.

\textsuperscript{1089} Moyn, *Trump*. 

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(1) Philip Alston

For Alston, human rights assumptions must be rethought in order to ensure that respect for human rights is strengthened.\(^{1090}\) This involves a change in mindset to address factors affecting human rights efficacy. This includes the role of civil society, the fragility of institutions and international law, and inequality resulting from exclusion from human rights.\(^{1091}\) Alston emphasises throughout his critique that it is important to persuade principles of human rights to the general public. Alston believes it is also important to ensure that human rights are not also assumed to be always correct to allow for different actors to adapt human rights within their own cultural context.\(^{1092}\)

The issue regarding the role of civil society is of high importance for determining the efficacy of human rights in coming years. There must be strong interplay between domestic and international actors. There have been recent attempts to remedy this disparity, evidenced by Amnesty International’s decentralisation and expansion to the Global South.\(^{1093}\) However, Alston recognises that the success of domestic NGOs is contingent on domestic policy, where often the space for civil society “has shrunk to the size of a prison cell”.\(^{1094}\) Alston’s concerns are strong and valid. Civil society actors endure hostile environments that hinder the opportunity for collaboration with enforcers of human rights, such as domestic governments.\(^{1095}\) If there are not domestic enforcements and protections of human rights NGOs, the extent to which human rights can furthered (if at all), especially in areas of key development, is extremely limited.\(^{1096}\) Despite this acknowledgement, Alston remains optimistic about the future of civil society. In reality, attempts to decentralise, such as in the case of Amnesty International, are not as effective as Alston suggests. Due to the discrepancies in values and belief systems, there are inevitable disconnects between the Global North and the Global South that cannot be mended by local expansion.\(^{1097}\) The universality of human rights does not always appeal to a religious audience. Where religion functions as a domestic stronghold, the overriding of divine law with man-made law has questionable implications.\(^{1098}\) Whilst creating local offices of international NGOs positive step,\(^{1099}\) human rights must first and foremost be supported domestically so people can “free themselves” from oppression handed down by their own governments.\(^{1100}\) With strict domestic laws hindering opportunities to create let alone develop human rights NGOs, the opportunity for civil society expansion is limited. Alston acknowledges his argument’s limits but notes that the notion of civil society as an opportunity for human rights to create social and political change is an inoperable suggestion.

The fragility of international institutions is especially concerning for Alston. There is systematic undermining of international law, and institutions such as the International Criminal Court have dwindled in efficacy, noted by the withdrawal of various African states in recent years.\(^{1101}\) However, Alston remains an optimist. For him, there is “immense potential” within these institutions.\(^{1102}\) The aforementioned potential is evidenced by the Human Rights Council operating in balanced and constructive areas, and the Office of the High Commissioner of Human Rights acting as a forceful actor in the realm of human rights.\(^{1103}\) Whether or not that stems from his interlinked association as the United Nations Special Rapporteur on Extreme Poverty and Human Rights is unclear.

\(^{1090}\) Alston, Populist Challenge at 14.
\(^{1091}\) Ibid. at 8.
\(^{1092}\) Ibid. at 11.
\(^{1093}\) Alston, Populist Challenge at 8.
\(^{1094}\) Ibid. at 5.
\(^{1095}\) Rodriguez-Garavito, Symbiosis at 504.
\(^{1096}\) Alston, Populist Challenge at 6.
\(^{1097}\) Hopgood, Social Change.
\(^{1098}\) Ibid.
\(^{1099}\) Ibid. at 8.
\(^{1100}\) Ibid. at 72.
\(^{1101}\) Alston, Populist Challenge at 7.
\(^{1102}\) Ibid.
\(^{1103}\) Ibid.
However, Alston admits, and is supported by scholars such as de Búrca, that there has been recent retreats from said institutions.\textsuperscript{104} Political developments, such as the recent re-emergence of populism through the election of Donald Trump,\textsuperscript{105} leaves these institutions particularly vulnerable to the threat of withdrawal. Institutions such as the International Criminal Court, and civil society actors such as NGOs, have emerged as inflexible and rigid structures that cannot adjust to quickly evolving demands.\textsuperscript{1106} There is little room left for Alston's praise of international institutions to fit within this framework.

Alston’s third concern stems from the current failure of human rights to address inequalities, largely due to the failure to uphold social and economic rights as equal to traditional notions of human rights.\textsuperscript{1107} Including social and economic rights to political and civic rights can be daunting for civil society actors and governments alike.\textsuperscript{1108} However, without appreciating an all-encompassing view of human rights, there is limited opportunity for social and political change.\textsuperscript{1109} This is a strong argument because it is supported across both extremes of scholarly perspective. Human rights both disguises inequalities and exposes radical inequality.\textsuperscript{1110} It is important to encourage social policies that have positive effects on inequalities to further promote human rights.\textsuperscript{1111} Alston does not offer suggestions for positive first steps, aside from a mere suggestion of “taking the wind out of the sails of the principal opponents to some key initiatives”.\textsuperscript{1112} While it is undisputed that human rights efficacy suffers from inequality, Alston does not offer to develop the “strategies” mentioned throughout his critique.

(2) Kathryn Sikkink

Arguably the most optimistic of her colleagues, Kathryn Sikkink maintains that within the human rights system, there is evidence of hope for its ability for create effective social and political change.\textsuperscript{1113} Sikkink relies heavily upon a ‘possibilism’ interpretation of human rights: human rights progress has been the result of struggle, and human rights is contented on continued commitment and effort from activists.\textsuperscript{1114} There is evidence the human rights system works, through accurate measures of progress, the rise of civil society actors, and its promotion of peaceful social movements.

Sikkink’s strongest evidence of the efficacy of human rights is in relation to the unfairness of previous critiques, notably by the likes of Hopgood and Moyn. Noting that critics are quick to compare to an unrealistic ideal or utopian version of human rights; Sikkink argues that Moyn, for example, does not clearly outline what ideal is used as a comparison against the current state of human rights.\textsuperscript{1115} The comparison to a utopia is an unrealistic standard and human rights will always prove to be an ineffective instrument of social and political change when held to such a standard.\textsuperscript{1116} Instead, when human rights data is viewed with an empirical and transparent method, there is evidence of human rights as a valuable and impactful mobiliser of social and political change.\textsuperscript{1117} When evaluating critiques of human rights, the conceptualisation of effectiveness is imperative to understanding the perceptions of the conclusions reached.\textsuperscript{1118} This argument put forward by Sikkink is highly persuasive. By changing the metrics of

\textsuperscript{104} de Búrca, Experimentalism at 278.
\textsuperscript{105} Moyn, Trump.
\textsuperscript{106} Rodriguez-Garavito, Symbiosis at 501.
\textsuperscript{107} Alston, Populist Challenge at 9.
\textsuperscript{108} Hopgood, Nowhere.
\textsuperscript{109} Moyn, Utopia at 211.
\textsuperscript{110} Moyn, Utopia at 211.
\textsuperscript{111} Sikkink, Evidence at 200.
\textsuperscript{112} Alston, Populist Challenge at 13.
\textsuperscript{113} Sikkink, Evidence.
\textsuperscript{114} Ibid. at 19.
\textsuperscript{115} Ibid. at 28.
\textsuperscript{116} Ibid. at 36.
\textsuperscript{117} Ibid. at 142.
\textsuperscript{118} Ibid. at 33.
analysis, it is clear that human rights has effected social and political change over a period of time.\textsuperscript{1119} For Sikkink, it is the change that her critics do not recognise that change takes time.\textsuperscript{1120} Despite this, Sikkink’s argument of empirical comparison is flawed in a major respect. It is not clear if there is to be an empirical indication of how long change can be reasonably expected to occur. By Sikkink’s understanding of human rights as beginning in the 1940s, is change over a period of almost 80 years not long enough? Should there not be more robust examples of human rights efficacy?

Another weakness to Sikkink’s critique is the encouragement of human rights treaty ratification as a means to enact social and political change. From an empirical consideration, it is evident human rights treaties have in fact had a positive effect on human rights.\textsuperscript{1121} This has been marked by a decrease of genocide, wars, and other factors.\textsuperscript{1122} However, this is most prevalent where change is ‘easy’ to be enacted, like countries undergoing democratic transition.\textsuperscript{1123} By this metric, human rights efficacy has improved. Should this not be the marker for success? There is a positive trend. However, the extent of continued improvement is a particular weakness to Sikkink’s argument. If mobilisers such as civil society actors face increasing domestic repression, social movements and the like of civil society cannot mobilise human rights as an effective instrument for social and political change.\textsuperscript{1124} Under Sikkink’s ‘boomerang’ model, effective social and political change can be created by domestic and transnational coalitions externally pressuring governments.\textsuperscript{1125} However, if civil society actors are restricted by domestic law, the extent the boomerang model can be implemented is limited, and hence, there is a pressing need for domestic NGOs to adapt new approaches.\textsuperscript{1126} While there may be evidence for hope, the extent of the role civil society can play in this development is limited.

Finally, Sikkink argues that human rights effectiveness is evident in the increase of nonviolent movements, such as peaceful protests, as a means of producing social and political change.\textsuperscript{1127} Sikkink argues they can push authoritarian governments towards a peaceful transition, and hence be coined as “transition” states that are more susceptible to human rights enforcement.\textsuperscript{1128} Adopting Adolf Hirschman’s possibility approach, Sikkink supports that while non-violent movements may create negative consequences, they can create positive consequences as well.\textsuperscript{1129} However, her argument is weak because it demands the question: at what point do the positives outweigh the negatives? If events such as the Arab Spring have promoted democratic transition, is the result of ongoing civil wars justified in the promotion of the possibility of good? Perhaps Sikkink holds an overly positive interpretation of human rights as a means to effect social and political change. The critiques of Alston and Sikkink are met with varying levels of acceptance. Both scholars acknowledge the limits of human rights in its current form but attempt to make a case for human rights as an effective instrument of social and political change. Despite some merit, these critiques can be devalued by the likes of their realist counterparts.

G. CONCLUSION

In conclusion, the extent to which human rights law and politics can act as an effective instrument for social and political change is unclear. As evidenced by the literature, there is no scholarly consensus on the efficacy and role that laws, institutions, and movements play in developing

\textsuperscript{1119} Simmons, Mobilizing.
\textsuperscript{1120} Sikkink, Evidence at 195.
\textsuperscript{1121} Simmons, Mobilizing.
\textsuperscript{1122} Sikkink, Hopeful.
\textsuperscript{1123} Simmons, Mobilizing.
\textsuperscript{1124} Alston, Populist Challenge at 5.
\textsuperscript{1125} Sikkink, Evidence at 212.
\textsuperscript{1126} Alston, Populist Challenge at 5.
\textsuperscript{1127} Sikkink, Evidence at 190.
\textsuperscript{1128} Ibid.
\textsuperscript{1129} Ibid. at 215.
contemporary human rights. Human rights as an instrument of social and political change will always be in pursuit of its optimum efficacy. Perhaps this ever-evolving goal is not a poor one to have. Due to the sheer amount of scholarly research and critique on the subject, the attempt to achieve an academic consensus on the efficacy of human rights is not without a lack of effort. In fact, there is a dedicated commitment to its success. In order to effectively evaluate human rights as a potential instrument for creating future social and political change, further academic discussion and research reflecting on modern adaptations of human rights is essential.
THE DILEMMA OF CAUSATION WITHIN INTERNATIONAL LEGAL THEORY

Adam Rowe*

A. INTRODUCTION

B. STRUCTURALISM AND CAUSATION

C. Koskenniemi and the Culture of Formalism

D. CONCLUSION

A. INTRODUCTION

Within theoretical narratives of international law, the presence and utilisation of causation is pervasive. Critical explorations of international law are particularly illustrative in this regard, arguing that the form of law that is recognised as such is produced by sub-realities of various social, political and economic factors. Take the work of Boyle as an instructive example. On his analysis, “international law” is nothing more than a sustained project of reification. “Reification” is a somewhat slippery term, but Boyle clarifies his usage by defining it “as an attempt to deny both contingency and choice by incorporating some political decision about a subject into the description of that subject.” Applying this to international law, Boyle argues that state-based positivism (or any qualitative theory, for that matter) is but a mere political description that has been reified to constitute law’s essential nature. The gloss of objectivity merely obfuscates the causal operation of historical, political and professional prejudices.

While certainly at its most paradigmatic in connection with such overtly ontological enquiries, the reliance upon ideas of causation has a far wider application than just the various critical projects. One can, for example, investigate the various historical analyses of international law. Such literature raises causal questions concerning the original production of international law and the manner in which it can temporally exhibit change. On a more doctrinal level, there are, amongst other things, the causal operations of opinio juris and state practice in the production of customary international law; the causal agency of state consent with respect to treaty law; and such things as the causal ability of a particular body of doctrine (such as international human rights law) to exercise transformative changes

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1132 Ibid at 329.

1133 Ibid at 336. Flowing from this central critical position are a multiplicity of theoretical inquiries that attempt to map and analyse these various subterranean, unspoken biases that are generative of the legal forms that we engage with. For a Marxist approach, see R Knox, “Marxist approaches to international law” in A Orford, F Hoffman, M Clark (eds) The Oxford Handbook of The Theory of International Law (2016) 306; or for a feminist analysis, see D Otto, “Feminist approaches to international law” in the same work at 488.


1135 See M Akhurst, “Custom as a source of international law” (1974-5) 47 BYIL 1 at 31; F Kirgis, “Custom on a Sliding Scale” (1987) 81(1) AJIL 146 at 147.

throughout the entire canopy of international law. As one can see, then, causation is almost ecumenical within legal dialogues.

It is not the intention of the present paper to directly attack or affirm any one of these particular theses. Our objective is simply the identification of the central agency of causation within contemporary theorisations of international law, and the assessment of whether this causation is, in fact, coherent. For the purposes of this discussion, an explicit or implied usage of causation will be considered incoherent when the dynamic in question cannot affect the necessary change claimed by an author without producing logical contradiction or confusion. The core argument that will be presented in response to this objective is that the employment of causation always produces incoherence.

In the demonstration of this, the paper will employ the writings of Koskenniemi to provide the necessary backdrop in which to conduct our inquiry. This discussion will proceed in two halves. The first will focus its attention upon direct instances of causation in the production of international law; that is to say, we will examine Koskenniemi’s exploration of how international law operates. This analysis will involve a close examination of Koskenniemi’s From Apology to Utopia (FATU) and the structuralist account of legal argumentation contained therein. Specifically, it shall be argued that the moments of interaction that Koskenniemi describes as occurring between an international legal langue, parole, and a political act of determination are incoherent.

This is owing to the fact that for causation to occur between discrete ontological entities, one must act upon the other. This operation, however, would require the mutual dissolution of the respective existential boundaries of the two entities; for with such boundaries in place, the entity could not even be said to be aware of that without itself. But in the moment of this dissolution, the two entities will be fixed into indistinction. They become, in other words, synthesised into a unity. As such, the attribution of any causal activity between the langue, parole, and the political will collapse into confusion.

Proceeding from this, the paper will widen its scope and consider more subtle and indirect utilisations of causation within theoretical discussions. By “indirect”, I refer to those theories that are not concerned with providing an account of how law ontologically functions, but nevertheless rely implicitly upon causation in the development of their theories. To explore this, the paper will concentrate upon Koskenniemi’s The Gentle Civiliser of Nations (GC) and his formulation of the “Culture of Formalism”. More precisely, our analysis will examine the central roles of “particular” and “universal” within that theory, arguing that the dichotomy constructed between the two is based upon causation, and that it is consequently incoherent. The paper will conclude with some general reflections upon the potential implications of this analysis.

With our direction thus made evident, we can now proceed to the commencement of our inquiry.

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1138 The selection of Koskenniemi is propitious in several respects. For a start, his writings are particularly influential and insightful – a point that will lend weight to the issues raised here. But what is more, Koskenniemi’s theorisations of international law are particularly fecund with instances of causation.
B. STRUCTURALISM AND CAUSATION

Within his seminal work FATU, Koskenniemi presents us with a causally rich account of how international legal argumentation functions.\(^{1141}\) To summarise the position before moving to unpack it, Koskenniemi’s central argument is that international legal disputation is not objective, but is instead dependent upon a political decision in order to reach determination.\(^{1142}\) This presents us with an immediate instantiation of causation, but there is far more to be gleamed than this superficial description would indicate.

To explain why the political decision is necessary, Koskenniemi employs the linguistic structuralism formulated by Saussure.\(^{1143}\) According to that author, the activity of speaking is not a free one, but is, in fact, conditioned by a lingual structure.\(^{1144}\) That is to say, the possibilities of phonological and literary constructions are conditioned and delimited by a fundamental network of rules. This observation is what underlies Saussure’s distinction between *parole* (the activity of speaking) and *langue* (the rules that govern speech).\(^{1145}\) Applying this to argumentation within international law, Koskenniemi contends that there is an international legal *langue* that conditions the form that specific international legal *paroles* take. This presents us with an additional layer of causation; namely, how it is that a *langue* can produce and condition a *parole*.

This dichotomy between *langue* and *parole*, however, does not account for the primary causal role exercised by the political decision. Something more is required. This additional causal factor is located in the fact that the *langue* of international law is indeterminate. To elaborate upon this, Koskenniemi describes the *langue* of international law as being composed of “Descending” and “Ascending” styles of justification.\(^{1146}\) Descending arguments invoke “a given normative code which precedes the state and effectively dictates how a state is allowed to behave.”\(^{1147}\) In other words, one arrives at a higher normative code, which is then argued down from in order to qualitatively categorise state conduct. Ascending arguments attempt “to construct a normative order on the basis of the ‘factual’ state behaviour, will and interest”.\(^{1148}\) Here, one argues up from factual affairs in order to compose the higher normative code.\(^{1149}\)

Importantly, neither branch of disputation can be preferred. As Koskenniemi explains, the contrasting styles of disputation are irreconcilable and cast mutual criticisms of subjectivity and insubstantiality against one another.\(^{1150}\) For instance, proponents of the descending branch accuse ascending arguments as fundamentally indexing international law to the political interactions of states,

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\(^{1141}\) The importance of FATU is difficult to underestimate. Kennedy described it as the most important monograph of the late 20th century. See D Kennedy, “The last treatise: project and person (reflections on Martti Koskenniemi’s *From Apology to Utopia*”) (2006) 7(12) *German Law Journal* 982.


\(^{1143}\) Jouannet, “Critical introduction” (n 13) at 1, 2.


\(^{1145}\) Ibid.

\(^{1146}\) Koskenniemi, *FATU* (n 10) at 60.

\(^{1147}\) Ibid at 59.

\(^{1148}\) Ibid.

\(^{1149}\) David Kennedy’s “Theses about international law discourse” represents an important progenitor of Koskenniemi’s own work in this regard. On Kennedy’s analysis, international law is organised into several doctrinal layers: sources, substance and processes. The form of disputation within and between these platforms of doctrine is controlled and conditioned by a foundational argumentative structure. This structure is the differential between state autonomy and state community. As such, certain doctrinal positions are justified in terms of enhancing and protecting state autonomy, and others as doing so for state community. See D Kennedy, “Theses about international law discourse” (1980) 23 *GYIL* 353 and D Kennedy, *International Legal Structures* (1987).

\(^{1150}\) Ibid at 46.
rendering it more of an apology for law than a real regulatory instrument.\textsuperscript{1151} In response to this allegation, the ascending scholars can counter by denouncing the invocation of normative principles as simply substituting the opinions of states for the subjective moral determinations of individual scholars.\textsuperscript{1152} Because of this indeterminacy, a dispute can proceed indefinitely, with the eventual determination being “dependent upon ultimately arbitrary choice to stop the criticisms at one point instead of another.”\textsuperscript{1153} Resolution must be imputed from an externality. As such, each pronouncement upon law is simply an “ad hoc” political decision.\textsuperscript{1154}

The final element within this structuralist account is the identification of the causal factor that conditions the political decision; for while the decision is arbitrary, “the system still de facto preferences some outcomes or distributive choices to other outcomes or choices.”\textsuperscript{1155} This phenomenon is produced by what Koskenniemi refers to as “structural bias”.\textsuperscript{1156} By this term, he seeks to indicate those “background conditions about the epistemic, economic, ideological, psychological and other such ‘truths’ and self-evidences that institutions have come to accept in more or less unthinking terms.”\textsuperscript{1157} To demonstrate this structural bias in operation, Koskenniemi points to the way in which “human rights treaties have been read by human rights organs differently from ‘regular’ treaties so as to enable human rights bodies to assume a wider jurisdiction than regular treaty organs and to prioritise human rights over formal state consent.”\textsuperscript{1158} The human rights organs have a particular set of ideological preferences that prioritise humanitarian concerns, thus occasioning the systemic patterns of treaty interpretation that Koskenniemi describes.

To summarise the aspects of causation that are demonstrated in the above outline, we have, first, the idea that the legal parole is produced from the legal langue. Closely linked to this is Koskenniemi’s argument that the indeterminacy within legal argument occasions the need for a political act in order to affect the production of the parole. While unmentioned by Koskenniemi, there is the further issue of how these paroles interact within one another. Finally, the political decision itself is then conditioned by a structural bias that characterises the institutions in which the decision is made.

In distinguishing which elements to focus our attention upon, it is important to recollect that our concern is with causation that takes place between qualitatively discrete elements. Besides his references to language, Koskenniemi does not clearly expand upon the ontological nature of the various components of his theory. To some extent, then, our selection is impressionistic, but since they are described in discrete terms I will take the aforementioned aspects of structuralism as distinct entities and consequently focus our attention upon them. What I wish to exclude from our reflections is the causal agency of the argumentative indeterminacy that afflicts the legal langue. This indeterminacy, for a start, is limited to the langue and does not itself engage an inter-entity interaction. It may indeed provoke the intervention of the political, but this attaches to why that intervention occurs. It does not explain how it is actually affected.

\textsuperscript{1151} Ibid at 42.

\textsuperscript{1152} These ideas concerning deconstruction are inspired by the writings of Derrida. Most simply, Derrida argued that philosophy took the basic unit of meaning to be pairs: “light/dark”, “truth/falsity” etc. The pairs are thought to be exclusive of each other, contradictory, and asymmetrical (i.e. one aspect of the binary can be preferred over the other). Derrida, however, deconstructs the apparent difference between such binaries, demonstrating that each (logically speaking) carries within it, and is dependent upon, the conception of its opposite. Dark requires a conception of light to be meaningful as such, and vice versa. Accordingly, the terms cannot be coherently separated or said to be contradictory, and are, as a result, symmetrical. See Gutting, French Philosophy (n 15).

\textsuperscript{1153} Ibid, French Philosophy (n 15) at 67.

\textsuperscript{1154} Ibid at 60.

\textsuperscript{1155} M Koskenniemi, “The politics of international law – 20 years later” (2009) 20(1) EJIL 7.

\textsuperscript{1156} Ibid. See also M Koskenniemi, “What is critical research in international law? Celebrating structuralism” (2016) 29 LJIL 727.

\textsuperscript{1157} Ibid.

\textsuperscript{1158} M Koskenniemi, “The fate of public international law: between technique and politics” (2007) 70(1) MLR 1 at 4.
With that aside, let us turn to whether the causal interactions are, in fact, coherent. The first aspect that we shall inspect concerns how it can be said that the political acts upon the legal grammar.

For such causation to occur, there must be some manner of contact between the respective elements; that is, the political must act upon the grammar. This operation, however, is impossible whilst simultaneously maintaining the respective identities of the two causal agents. For if the political is to knowingly condition the grammar of law, it must dissolve its existential boundary with law in order to give effect to the necessary contact. Without this respective dissolution of boundaries, each causal agent would be bound within its own interiority and as such incapable of knowing or acting upon anything but itself.

It might be posited that an indirect form of causation could be in operation here that maintains the respective identities of the causal agents. On this account, the causal entities would not act upon one another directly. Instead, the necessary communication would be conveyed through the offices of an external mediator or mediators, as the case may be. By virtue of this, there would be no need for the causal entities to perform the dissolution described above. This, however, is fallacious. Indeed, we can simply posit the question as to what causal operation allows this ulterior agent to produce the causal bond between politics and the legal grammar. The supposition of further mediating agents produces an infinite regress, while direct causation simply gives rise to the dissolution of identity that indirect causation was employed to circumvent.

Outside of this causal dynamic, there is a further quandary as to how the interaction between the grammar and political can produce a parole that is distinguishable from both of them. If we say that the causal conjunction of politics and grammar determines the parole, then we must posit the understanding of a causal bond between the parole and the fusion appertaining between politics and grammar. As we saw above, however, such a causal bond will produce incoherence. The parole of law will collapse into indistinction from both the langue and the political. What is more, this line of reasoning presupposes the existence of the parole before the causal interaction between grammar and politics. That is incoherent.

We must instead ask how grammar and politics can produce a new discrete entity as a consequence of their interaction. This, however, is even more problematic than that which is described above. As we have seen, for an entity to be capable of activity without its boundaries and to be cognisant of other natures, it must dissolve those same barriers. Therefore, we can say that everything within that boundary is the entity. It is impossible, then, for an opposed entity to be produced from any activity of the original. By way of illustrative anecdote, you may arrange putty into any shape you like, but it will still remain putty. Each new form is but an expansion or contraction of its nature.

Even if we allow the viability of this operation, and that the interaction between langue and political could indeed produce a novel entity, we must inquire after the causal activities of this parole. This is because the parole of law is not limited to a single utterance, but is a continuing act of dialogue undertaken by a vast range of individuals in a variety of forms. Because of this, we must inquire whether there is but a single parole that is continually re-determined by the langue and the political, or whether there is a multiplicity of paroles.

The first of these possibilities can be quickly dismissed. If it is the case that the langue and political maintain a causal connection with the parole after its production and affect a continuing change in its internal determination, then they must act upon it. This would produce the incoherent synthesis that we mapped above. More than that, however, and following on from what we have previously established, to even postulate the mechanics of this interaction is to assume that the parole exists before its determination. This is, again, incoherent – an observation which elicited our conjectures upon whether the langue and political could originally produce the parole.

To attempt to justify the point another way, we could maintain the thesis concerning original production but posit a continuing causal bond between the producers and the thing produced. One would
have to argue that the original interaction of the *langue* and the political is a productive one, but that subsequent acts, instead of being generative of new *paroles*, causally act upon the pre-existing *parole* to re-determine it. Why the process of interaction would change like this is utterly inexplicable on the present facts. To do so, there would have to be some intervention by a new causal factor. Without any identification of this, however, the position (notwithstanding its incoherence resulting from the synthesis) must be dismissed.

Turning to the second of our options, is it any more coherent to contend that each interaction of the *langue* and the political is generative of a new *parole*? Adopting this position would remove the obstacle outlined above of accounting for why the consequence of the interaction between the *langue* and the political can suddenly change. That being so, the question that this position raises is how the various *paroles* interact following their creation. Do all *paroles* exist simultaneously as expressions of international law, or do certain instances of *parole* terminate other, contradictory ones? After all, it is hardly the case that every *parole* is perpetually authoritative of international law. Further, if multiple *paroles* do exist, how do these respective iterations coalesce into a coherent and singular legal system; or by the agency of what factor are certain *paroles* preferred over others as authoritative expressions of international law?

With respect to the tenability of a *parole* existentially terminating another, the activity in question would require the terminating *parole* to act upon the body of its opposition. This, however, would produce a synthesis between the two entities into a single thing. Even if this was coherent, the transmutation into a unity would frustrate termination, for the respective *paroles* would have fused into indistinction – no aspect of which could be isolated for the purposes of eradication.

If the respective *paroles* exist separately and cannot terminate another through their own agency, then how is it that certain *paroles* can be preferred over others? Confined to their interiorities, each is absolute in its own terms and indifferent to its fellows. Therefore, the activity of discrimination would have to be affected by an external agency. In order to avoid an incoherent synthesis, however, the agency in question could not act upon the *paroles* themselves; but such an omission would confine the judgment to the external agent itself. In addition to its failure to disturb the introversion of each particular, this confinement of the judgment to the external agent is in itself incoherent. For the agent is equally circumscribed to its own interiority, which begs the question as to how the agent could even have knowledge of the *paroles* in question.

This dilemma of external agency connects with the aforementioned issue of how individual *paroles* can become constitutive of a single legal system. For, again, if the *paroles* are causally confined to their respective interiorities, no act on their part could perform the necessary unification. This once more raises the possibility that the organisation is imposed by an external observer. However, as with the above point, this would confine the organisation to the agent itself and invite all of the issues that qualification entails.

Finally, and by way of concluding this part of the discussion, there is the issue of the political decision itself. According to Koskenniemi, the decision is conditioned by the structural bias of the institution. While being, prima facie, un-complex, this conjecture raises several difficulties. Most straightforwardly, there is the question of how the bias conditions the political decision. As we explored above, for the bias to determine the human decision, it must act upon it. This, however, produces a synthesis and incoherence.

More than this, however, we can interrogate the mechanics by which the bias is constructed. For how is it that a multiplicity of individual opinions (that one will find in an institution) can be generative of a singular bias? Mirroring our discussion of the *parole*, for the discrete entities to affect such organisation themselves they would have to dissolve their respective boundaries. This, however, would lead to indistinction and incoherence. We can, in reaction to this, posit the hypothesis that the organisation in question is externally imposed, but in order to avoid incoherence this organisation would be confined to the external actor itself. Not only is this, as we have described, incoherent, but with such
a qualification in place, the discrete entities in themselves would suffer no transformation beyond their introverted particularity.

With that, we can conclude the first part of our inquiry. We have seen that the direct employment of causation in theorisations of international law produces incoherence. The question remains, however, whether the dilemma of causation has an application beyond explicit discussions of legal ontology.

C. KOSKENNIEMI AND THE CULTURE OF FORMALISM

While causation is at its most conspicuous in those discussions that address the operation or creation of international law, its utility is essential in the composition of theories that do not address this ontological dimension of law. To demonstrate this wider ambit of our thesis, and the danger attaching to the employment of causation, we will examine another of Koskenniemi’s theorisations. For the remainder of the discussion, our attention will centre upon the formulation of the Culture of Formalism.

Formalism, as presented by Koskenniemi, is a very subtle concept. Before immediately moving to the identification of the uses of causation contained within, I consider it worthwhile taking some time to thoroughly introduce the ideas it presents.

In accordance with this, we can say that the development of the Culture of Formalism was provoked by the identification of what Koskenniemi described as “fragmentation”, “deformalisation”, and “managerialism”. Each of these phenomena flow, according to Koskenniemi, from a mounting sense that traditional international law “is failing to manage the problems of a globalising world due to its excessive formality and rigidity and its failure to ‘adapt’ to new regulatory needs.”

To meet this need for more streamlined regulation, the law has split “into functionally defined ‘regimes’ such as ‘trade law’, ‘human rights law’, ‘criminal law’… each geared to further particular types of interests and managed by narrowly defined expert competences.” This is what Koskenniemi describes as fragmentation.

Closely connected with this fragmentation is the fact that the various regimes, in their functioning, largely eschew formal rule-making. Such rules “will almost automatically appear as either over-inclusive or under-inclusive”. As such the regimes look to the underlying objectives of their activities and engage in a process of analysing costs and benefits, finding an appropriate balance, and limiting the scope of that calculation to a case-by-case basis. The result is the replacement of the language of law by “the most varied kinds of guidelines, directives, de facto standards, and expectations.”

1162 Ibid.
1164 Koskenniemi (n 29) at 9.
1165 Ibid; Koskenniemi employs the example of the United Nations’ draft articles on the Prevention of Transboundary Damage from Hazardous Activities. Another example might be the codes and regulatory activity of the Canadian Transport Commission.
1166 Koskenniemi, “Global governance” (n 31) at 13.
With this deformalisation, Koskenniemi argues that there is no dialogue of legal responsibility, but merely the assessment of compliance. “Disputes” become “management problems”\textsuperscript{1167} that are dealt with by the ostensibly “neutral language of the regime’s expertise.”\textsuperscript{1168} In such an environment, where the legal apppellations of “sovereignty” and “consent” have become “epiphenomenal”, the international lawyer has been replaced by the international relations expert.\textsuperscript{1169} Indeed, the question of whether to abide by international instruments has ceased to be answered normatively, but instead by an examination of the power dynamics and interests of various actors.\textsuperscript{1170} The contemporary lawyer therefore simply advises a power-holder as to the navigation of competing powers, identifying the most efficient strategy for achieving its own goals. With this transformation of the international lawyers into “engineers of international relations, pragmatists and apologists for government power”,\textsuperscript{1171} Koskenniemi argues that international law, as an operative discipline, has perished.

It is for the regeneration of international law that Koskenniemi advances his idea of formalism. From this mere description of intent, it would appear that Koskenniemi is making an existential claim concerning international law – that is to say, indicating an objective standard by which a thing can be considered international law or otherwise. This would immediately raise causal questions concerning the mode of communication between the standard and the given practice.\textsuperscript{1172} In contradiction to this, however, the formalism described here does not refer to the precise, technical form that is said to constitute the specifically legal. As such, it must not be reduced to an additive or a reformulation of the structural mechanisms outlined in FATU. Koskenniemi is so insistent upon this point that he stresses that his formalism is “certainly not a substance or theory [of law]”,\textsuperscript{1173} and that its central value rests “in its resistance towards being reduced to structure.”\textsuperscript{1174}

Indeed, according to Koskenniemi, the Culture of Formalism “seeks to persuade the protagonists (lawyers, decision-makers) to take a momentary distance from their preferences and to enter a terrain where these preferences should be justified, instead of taken for granted, by reference to standards that are independent from their particular positions or interests.”\textsuperscript{1175} Instead of remaining within the vocabulary of managerialism that only consults its specific idiom and unreflectingly assumes its universality, Koskenniemi desires a style of communication that engages directly with the claims of universal application, inducing “every particularity to bring about the universality hidden in it.”\textsuperscript{1176}

This need to focus upon the universal is justified by Koskenniemi through the subtle demonstration of an almost constitutional or existential bond between the universal and the particular, in which the particular is dependent upon, and defined by, the universal. It is in the conceptual operation of this bond that we can see causation at work.

\textsuperscript{1167} Koskenniemi, “Postmodern anxieties” (n 34) at 14.  
\textsuperscript{1168} For a discussion of the almost imperialistic consequences flowing from domination of the expert, see Koskenniemi, “20 years later” (n 26) at 7, 11.  
\textsuperscript{1170} Koskenniemi draws attention to Goldsmith and Posner’s book, The Limits of International Law (2005) as being symptomatic of this trend. See Koskenniemi, “Miserable comforters” (n 40).  
\textsuperscript{1171} Christoph Möllers, “It’s about legal practice, stupid” (2006) 7(12) German Law Journal 1011, 1012.  
\textsuperscript{1172} As we have thus far seen, such a bond would be incoherent. For the objective standard to determine the identity of the activity in question, it would have to act upon it. This operation, however, would require the mutual dissolution of exteriorities – the result of which would be a synthesis into indistinction. Aside from this, if formalism was interpreted as an objective standard, an interesting question would be how Koskenniemi conceives of its ontological relation with the structural analysis presented in FATU.  
\textsuperscript{1173} Koskenniemi, GC (n 11) at 508.  
\textsuperscript{1174} Ibid.  
\textsuperscript{1175} Ibid at 501.  
\textsuperscript{1176} Ibid.
But in order not to get ahead of ourselves, how does Koskenniemi describe this bond as functioning? First, for a particular to make a claim in the world it must “experience itself as unfulfilled, devoid of some aspect without which it cannot fully realise itself.”\(^{1177}\) Without this “lack” the particular would be fully determined and remain silent. Continuing from this, Koskenniemi contends that this experience of deficiency can only be supplied through the agency of the universal. That is to say, it is the want of universal application that renders the particular as particular and imperfect. Only through the seizure of the universal can the particular complete its being. As such, the claims the particular makes will always implicitly rely upon a universalist vocabulary. Importantly, the universal described here is not possessed of any concrete attributes or traits. It is but a “horizon of possibility”.\(^{1178}\) As such, no particular can ever be successful in the making of its claims.

Therefore, through formalism’s demand that each legal position or regime offers up its specific claim to universality, attention is directed “to that absence of what a particular feels it should possess in order to be fully itself.”\(^{1179}\) Through the identification of this lack and the recognition that the various claims are each striving towards an unreachable horizon, “the particular is opened up, and its communal lien, its shared property or value with other particularities is revealed.”\(^{1180}\) Each particular, then, can recognise the legitimacy of the claims by other particulars to the status of universal. But what is more, through centralising argumentation upon the horizon of universality, legal dialogue can transcend the sterile language of managerialism. No longer will legal analysis be one where attention is focused upon the operation of power. The discourse will rather centre upon the attainment of organisational ideas or principles that can apply to everyone equally and complete us.\(^{1181}\)

It is not my intention here to dispute or affirm the beneficial results that may flow from revitalising the role of the universal in legal dialogue. What is important for our purposes is the identification and evaluation of causation within the justification of this revitalisation.

An immediate question in this regard is how it is that a particular requires the universal to be fully itself. Such a point implies that the particular, in isolation, is not entirely itself, or somehow deficient. This idea of existential deficiency raises serious metaphysical dilemmas. For this identification to be affected, there must be an independently existing standard of the “complete” particular that permits the evaluation of the incomplete particular. There is, in other words, a causal link between the complete particular and the incomplete particular. But this relationship is problematic. For the complete to determine the ontological identity of the incomplete, it must internally determine and act upon it. This, as we have seen, would require the mutual dissolution of existential boundaries and

\(^{1177}\) Ibid at 505.
\(^{1178}\) Koskenniemi, GC (n 11) at 506.
\(^{1179}\) Ibid.
\(^{1180}\) Ibid.
\(^{1181}\) Koskenniemi has expanded upon this emancipatory dynamic of formalism through a re-imagining of constitutionalism. On this analysis, that which is identified as “constitutional” is endowed “with sacredness or with symbolic meaning that lifts them beyond their individuality.” (M Koskenniemi, “Constitutionalism as mindset: reflections on Kantian themes about international law and globalisation” (2007) 8 Theoretical Inquiries in Law 9, 35-36) Employing the French Revolution as an illustrative example, Koskenniemi describes how the composition of a constitution by the revolutionaries in order to enshrine their values not only represented an act of societal determination, but invested the aforesaid values with the potential for universal applicability that transcended the temporal and geographic limits of the moment. By employing this vocabulary, the injustices of the ancien régime were not just capable of identification, but condemnation: “individual suffering [is transformed] into an objective wrong that concerns not just the victim, but everyone.” (Ibid at 35) Therefore, through the formal presentation of dialogue in constitutional terms, law is lifted from its eclipse by international relations into a discussion that addresses what it is that the entirety of humankind needs to be complete. Alternatively, Koskenniemi has explored these ideas through the medium of “kitsch”: see M Koskenniemi, “International law in Europe: between tradition and renewal” (2005) 16(1) EJIL 113; and, in connection with the alleged moral imperialism displayed by NATO in response to the Kosovo intervention, M Koskenniemi, “The lady doth protest too much – Kosovo and the turn to ethics in international law” (2002) 65(2) Modern Law Review 159.
the ultimate synthesis of the two causal actors into a single thing. What is more, this postulated causal mechanism assumes that the derivative entity is present before the act of causation. This, however, is incoherent.

It could be denied that this causation of deficiency is affected directly; it may instead be an independent act undertaken by an individual that does not engage the causal entity itself. But this too carries with it certain perplexities. For a start, we must inquire as to how the discrimination undertaken by the mediating agent is to be affected. If we maintain that this act carries with it an internal determination of identity (that through this act, in other words, the derivative body truly is deficient) then we simply encounter the quandaries illustrated above: the mediator must act upon the respective bodies in order to establish communication, but this act will simply produce a synthesis of the three components into a single thing. If we disavow this and contend that the exercise of the discriminator is confined to the person of the mediator, then the ascription of deficiency towards the particular becomes purely external. The particular retains its internal completeness.

All this may indeed problematise the conception of deficiency, but we must recollect that the deficiency Koskenniemi discusses is a “lack”; the universal does not have any positive content. Throughout our reasoning above we have assumed that the “lack” was in relation to something positive and possessed of actual presence. This engages complex question concerning the ontological status of negative being that are really beyond our scope. Notwithstanding that, I will advance the tentative remark that it is difficult to avoid couching the universal within some degree of positivity. For if we assume that the particular is rendered deficient due to a negative with no content, then the particular is in a causal bond with nothing; and if it is nothing that rendered the particular deficient, then we are faced with a logical contradiction. If nothing rendered the particular deficient, then how can it be deficient?

Whatever the correctness of the above supposition, there is scope to deepen our analysis beyond ideas of deficiency in the particular, and to inquire whether it is in fact coherent to draw, as Koskenniemi does, a distinction between “particular” and “universal”. To be sure, much of this may turn on definitions. For instance, we can ask whether the universal is a predicate or an independent thing. The sense one gets from Koskenniemi’s work is that the universal is conceived in spatial terms. It is a “horizon” that constantly recedes. Particulars, in contrast, are spatially confined. If we continue with this dimensional conception, then “particular” and “universal” do not make sense. For to be particular, the particular must be limited, and be cognisant of the fact that there exist other circumscribed particularities; but as we have thus far seen, the particular can only act within its own existential boundaries and cannot be said to be causally acted upon. Such introversion carries with the implication that the boundaries of the particular are itself; and any activity undertaken beyond that boundary would constitute an extension of itself. Without knowledge of delimitation, then, the particular is infinite and universal.

We can, to be sure, counter and argue that an external observer could see and give expression to the delimitations within conceptual space. This too, however, cannot maintain the qualitative separation between the particular and universal. For the external agent is likewise confined to an interiority whose actions are limited to that interiority. To be aware of discrete particulars beyond itself, the viewer would have to project beyond its exterior; but such action would require the dissolution of the boundary and, as a consequence, of the agent itself. The observed particulars would therefore have to be a constitution within the boundary of the agent and would, as such, be the agent; and as we outlined above, the agent is its own boundaries and must as a consequence be considered universal.

Even if we accepted that this could be coherent, we must inquire into the issue of differentiation. That is to say, if we postulate that everything within the interiority of an entity is a unity, then how can we differentiate the discrete elements that are taken for the particulars? Differentiation requires actual difference in order to be affected, but if we admit of difference and a degree of idiosyncrasy attaching to the particular, then the unity that we insisted was logically necessary splinters.
The presentation of a dichotomy appertaining between the particular and universal thus collapses into incoherence or contradiction, no matter the direction which we might take to demonstrate it.

D. CONCLUSION

With that, the inquiry of the present paper is concluded. To be sure, the analysis presented here is but a very incomplete sketch. There are a wealth of conceptual and doctrinal theories that engage issues of causation that could have been the subject of our attention. Notwithstanding such limitations, it is hoped that the present analysis has still succeeded in indicating the importance and difficulties of causation.

As to the implications of these findings, it must be admitted that there is a certain degree of nihilism stemming from them. To extirpate causation from our thinking would appear an impossibility. As such, it may well be the case that the ascertainment of incoherence here will mirror the results of deconstructivist analysis more generally, in which the demonstration of the logical incoherence of our concepts has not destroyed their usage.

This consideration notwithstanding, what promises more hope is the application of the present work to ideas of an inter-subjective foundation of international law. Instead of inquiring after how a multiplicity of individuals could produce a singular entity (and encountering the insuperable issue of causation) we could, instead, explore the potential of a non-metaphysical solution in which our concepts do not have an abstract reality beyond particular invocations, and where this semblance of abstract reality is a consequence of a quality within human ontology. In placing our discussion within a singular ontological essence, the problems of causation might be avoided.