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NORTHERN IRELAND
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Spring Vol. 73 No. 1 (2022)

Contents

Articles

Commentaries and Notes

Northern Ireland
Legal Quarterly
Spring Vol. 73 No. 1 (2022) 1–25
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What happened in there? Confessions, credibility and automatic exclusion: the case of *Artt* and confession admissibility

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ABSTRACT

Confessions ought to be excluded if it is shown that credibility of the police's version of events at interview is disputed, and it is found procedural requirements relating to recording of interviews under Police and Criminal Evidence Act 1984 Codes were not observed.

This article posits that, where the assessment of what occurred in an interview room depends on the trial judge's assessment of the accused's credibility versus the police's credibility, a breach of the relevant Codes should mean a trial judge should doubt the police's version of events and prefer the accused's version of events. This leads to the exclusion of the confession.

While giving particular attention to the recent Northern Ireland Court of Appeal decision of *R v Kevin Artt*, this article suggests a policy that can apply to jurisdictions beyond the Northern Irish jurisdiction, especially where recording of interviews is not routine. Analogies will be made with similar provisions in the United States where appropriate.

Keywords: Northern Ireland; confessions; admissibility; recordings; Code C breaches; Code E breaches; Code F breaches; credibility.

INTRODUCTION

The power of a confession can be such that it is damning to the defence's case in a criminal trial; but it ought to be potentially damning, too, for the prosecution's case if it is shown that the confession was obtained and procedural requirements under Police and Criminal Evidence Act 1984 (PACE) Codes C, E or F were not observed adequately, but only if and when credibility of the police witnesses is brought into question.

While some may see some procedural requirements under the PACE Codes as unrelated to the reliability of a confession and therefore ought to have nothing to do with the confession's admissibility, this article makes the proposition that the procedural requirements of Code C, E and F related to the recording of interviews should be stringently followed;

if they are not, and credibility of the police is brought into question in the *voir dire*, the confession should be excluded *automatically*.

Under the present law, the confession may only be excluded due to a breach of the Codes if the trial judge sees fit under the discretionary power of article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989, and sometimes under article 74(2)(b) of that statute. This article argues that this present standing of the law does not go far enough in protecting an accused who alleges the police are being untruthful in their evidence in some form or another, and who faces the danger of a wrongful conviction if the trial judge decides to believe the police version of events at trial over the accused's own. This article posits that, where the assessment of what really occurred in an interview room depends on the trial judge's assessment of the accused's credibility versus the police's credibility, a breach of Codes C, E or F in relation to recording of interviews should mean a trial judge should doubt the police's version of events and prefer the accused's version of events. If the latter's version of events of what went on in the interview room would lead to the resultant confession being made inadmissible, this should be so done automatically.

Though this article mainly applies, as far as the Northern Ireland and the English and Welsh jurisdictions are concerned, to cases on appeal that were tried pre-PACE, the article's suggestions can apply to present-day jurisdictions where those jurisdictions still do not have routine recordings of police interviews.

The first part of this article – 'Recording of interviews and the admissibility of the confession' – highlights the importance of the Codes in relation to the recording of interviews, before discussing the current admissibility law of confessions in relation to the breach of those provisions in the Northern Irish and in the English and Welsh jurisdictions. The second part – 'Good confessions rendered bad: an injustice?' – explores the argument that any expansion of the law in this discrete area may lead to perfectly valid confessions being excluded for want of bureaucratic, red-tape 'box-checks' found within the relevant Codes, leading to an acquittal on a technicality and arguably causing an injustice. The third part – 'Balancing injustice with justice: a compromise?' – will counter this and suggest that the potential for injustice over an acquittal of the guilty counters the graver possibility of an even greater injustice: the wrongful conviction of an innocent person. A potential 'third-way' approach will be examined as a compromise between the current PACE law and automatic exclusion – that of a rebuttable presumption in favour of the defendant – which is seen in some United States (US) jurisdictions. The suitability of such a third way will be discussed and ultimately rejected.

The fourth part will discuss the role of the Northern Ireland Court of Appeal decision of *R v Kevin Barry Artt* in illustrating the need for automatic exclusion. It is argued that the time has come for an expansion of the law in relation to the unreliability of a confession. It is posited that a breach of Codes C, E and F in relation to the recording of interviews *must* exclude the confession if credibility is a live issue and cannot be left to the current law's reliance on a trial judge's discretion under article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989.

RECORDING OF INTERVIEWS AND THE ADMISSIBILITY OF THE CONFESSION

A confession statement under Northern Ireland law can be excluded, broadly, for three reasons: due to oppression (of the confessor);[1] due to unreliability (of the confession);[2] or due to the fact that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.[3] While the first two categories provide that the confession *must* be excluded if the prosecution fails to discharge its burden of proof, the third category, often referred to as 'fairness', is a discretionary power of the trial judge that is frequently used as a safety net for a defendant's arguments if the confession statement was not obtained via oppression, nor by means that affect its reliability.

As shall later be seen, it is recognised in the jurisprudence that a breach of the Codes can impact the decision whether or not to exclude an obtained confession statement within the framework of the above statutory provisions. This article is not, however, concerned with a breach of the Codes in all their forms; rather, it is concerned with Codes C, E and F, which relate to the recording of interviews of a suspect conducted by police. Although Code C concerns the entirety of the governance of a suspect's detention, questioning and treatment in police custody, this article is specifically concerned with those aspects of Code C relating to the recording of interviews conducted by police in pursuing the investigation of a suspected offence; Code C paragraphs 11.7–11.14 are aimed towards ensuring accurate and, where possible, contemporaneous

1 Police and Criminal Evidence (NI) Order 1989, art 74(2)(a).
2 Ibid art 74(2)(b).
3 Ibid art 76.

note-recordings of these interviews.[4] Code E concerns the audio-recording of interviews relating, generally, to any indictable offence,[5] unless there is an equipment failure or unavailability of an interview room with equipment, and the authorising officer considers the interview should not be delayed until those issues are rectified.[6] In such a case, the requirements of Code C in relation to the recording of interview notes must be observed. Code F contains similar provisions for the video-recording of interviews. Though video-recording is not compulsory, it might be considered appropriate to video-record under similar criteria as found in Code E, which requires mandatory tape-recordings.[7]

The *raison d'être* of Code E can be found in the Police and Criminal Evidence (NI) Order itself concerning the tape-recording of interviews;[8] a 2007 amendment provided for the video-recording, with sound, of all police interviews, thus requiring the creation of Code F.[9]

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4 Paras 11.7 to 11.14 of Code C provide that: an accurate record must be made of each interview, whether or not the interview takes place at a police station; the record must state the place of interview, the time it begins and ends, any interview breaks and, subject to para 2.6A, the names of all those present; these must be made on the forms provided for this purpose or in the officer's note book or in accordance with the Codes of Practice E or F; any written record must be made and completed during the interview, unless this would not be practicable or would interfere with the conduct of the interview, and must constitute either a verbatim record of what has been said or, failing this, an account of the interview which adequately and accurately summarises it; that if a written record is not made during the interview it must be made as soon as practicable after its completion; written interview records must be timed and signed by the maker; if a written record is not completed during the interview the reason must be recorded in the interview record; unless it is impracticable, the person interviewed shall be given the opportunity to read the interview record and to sign it as correct or to indicate how they consider it inaccurate. If the person interviewed cannot read or refuses to read the record or sign it, the senior interviewer present shall read it to them and ask whether they would like to sign it as correct or make their mark or to indicate how they consider it inaccurate. The interviewer shall certify on the interview record itself what has occurred; if the appropriate adult or the person's solicitor is present during the interview, they should also be given an opportunity to read and sign the interview record or any written statement taken down during the interview; a written record shall be made of any comments made by a suspect, including unsolicited comments, which are outside the context of an interview but which might be relevant to the offence. Any such record must be timed and signed by the maker. When practicable the suspect shall be given the opportunity to read that record and to sign it as correct or to indicate how they consider it inaccurate; any refusal by a person to sign an interview record when asked in accordance with this Code must itself be recorded.

5 Ibid paras [3.1]–[3.2].

6 Ibid para [3.3A].

7 Ibid paras [3.1]–[3.6].

8 Police and Criminal Evidence (Northern Ireland) Order 1989, art 60.

9 Ibid art 60A, inserted by Police and Criminal Evidence (Amendment) (Northern Ireland) Order 2007.

The importance of the recording of interviews in the context of confession admissibility

What, then, is the importance of these Codes? Combined, it has been said that the Codes' overriding purpose is the protection of those who are vulnerable because they are in the custody of the police,[10] and it is in this context that the purpose of relevant parts of Code C, along with Codes E and F, should be seen. Together, these parts of the Codes are collectively aimed towards the contemporaneous, accurate and objective recording of interview content, be it as a live-recorded tape-recording or video-recording, or as a note taken of the interview. Assuming contemporaneous, accurate and objective recordings of interview content are made, then this evidence has its weight increased, for it cannot be doubted nor disputed; it is a matter-of-fact statement of both the occurrences and utterances in the interview room.[11] This can be crucial to proving a confession's reliability and admissibility.

The fact that the recordings provide irrefutable evidence of what occurred in the interview room provides protection to both the police and to the suspect,[12] for one party cannot accuse the other of doing something that did not in fact occur, and so evidence cannot be fabricated by either side, which would often lead to a 'swearing contest' between the suspect and police.[13] Such fabrication and 'swearing contests' would cause practical problems, leading to lengthy *voir dire* hearings that require a tribunal of law to determine what precisely occurred in an interview room via hearing of evidence from the suspect and the interviewing police before the actual evidence of the trial proper, and, as shall be seen, frequently requires the tribunal of law to make an assessment of each side's credibility, which can often be a very dangerous task. After this hurdle has been overcome, the tribunal of law must then determine how that assessment of facts impacts the law on the admissibility of the confession, taking into account submissions relating to admissibility from counsel for each party, who are relying on their own respective accounts of what occurred in the interview room. This creates inherent and lingering doubt in the trial process as to what

10 *R v Jelen and Katz* (1990) 90 Cr App R 456, 465 (Auld J).

11 Thomas P Sullivan, 'The time has come for law enforcement recordings of custodial interviews, start to finish' (2006) 37(1) Golden Gate University Law Review 175.

12 Although it has been argued that the contrary occurs with the suspect not being able to effectively challenge the interviews. See M K Kaiser, 'Wrongful convictions: if mandatory recording is the antidote, are the side effects worth it?' (2014) 67(1) Arkansas Law Review 167; M Ibusuki, 'The dark side of visual recording in the suspect interview: an empirical and experiential study of the unexpected impact of video images' (2019) 32 International Journal for the Semiotics of Law 831.

13 *R A Leo, Police Interrogation and American Justice* (Harvard University Press 2008).

actually went on in the interview room, regardless of what decision the trial judge takes. Such doubt can form the basis of an appeal of a subsequent conviction on the basis of fresh evidence applications, or, if an appeal is not pursued, can leave unjust and erroneous convictions left never to be discovered.[14] Instead, if accurate recordings of interviews are made, this means that the court's attention and time is concentrated on other key issues in the case, saving court time and costs, and also releasing the defendant from much anxiety and anticipation.

As allowed by Codes E and F, however, sometimes only a written record is made of the interview process. But problems can arise from dismissing the need for video or tape-recordings and instead solely relying upon interview notes drawn up – even shortly – after the interview itself. A study by Kassin et al found that, when police made reports from memory about what occurred during unrecorded interrogations, they frequently made errors, omitted information and understated their use of several controversial and/or problematic interrogation techniques, such as false evidence ploys and implied promises of leniency;[15] the most sinister of these will be seen in the case of *Artt* discussed later in this article. There is less likelihood of these sinister tactics occurring if the interview is video or tape-recorded,[16] and this is especially required in combatting interviewers' presumptions of guilt, which typically see a more aggressive form of interviewing taking place,[17] and which could in turn result in false confessions being obtained. It is worth noting that while video or tape-recording of interviews positively affects the interviewers' approach, it does not negatively inhibit suspects from confessing, nor does it influence their behaviour during interviews in general,[18] whereas these undesirable approaches that the interviewers sometimes take (by

14 University of California Irvine Newkirk Center for Science and Society, University of Michigan Law School and Michigan State University College of Law, National Registry of Exonerations Project (2020).

15 S Kassin, J Kukucka, V Z Lawson, and J DeCarlo, 'Police reports of mock suspect interrogations: a test of accuracy and perception' (2017) 41(3) Law and Human Behavior 230.

16 S Kassin, J Kukucka, V Z Lawson and J DeCarlo, 'Does video recording alter the behavior of police during interrogation? A mock crime-and-investigation study' (2014) 38(1) Law and Human Behavior 73; S M Kassin, S A Drizin, T Grisso, G H Gudjonsson, R A Leo and A D Redlich, 'Police-induced confessions: risk factors and recommendations' (2010) 34(1) Law and Human Behavior 3.

17 S Kassin, C Goldstein and K Sav, 'Behavioral confirmation in the interrogation room: on the dangers of presuming guilt' (2003) 27(2) Law and Human Behavior 187.

18 S Kassin, M Russano, A Amron, J Hellgren and J Kukucka, 'Does video recording inhibit crime suspects? Evidence from a fully randomized field experiment' (2019) Law and Human Behavior 43, 45–55.

adopting more aggressive and coercive methods of interviewing) have long been accepted in the literature to contribute towards possibly producing the psychological phenomenon of false confessions.[19]

It is true that such approaches to interviews can be changed not just by the recording of the interview, but by the adoption of more reliable, open-minded and ethical interviewing methods, such as the cognitive interview technique-led adaptability model used in the Irish Republic,[20] or the well-regarded PEACE method as preferred in the United Kingdom (UK),[21] which seek to minimise the occurrences of false confessions and are preferable in achieving this over methods such as the US-advocated Reid technique.[22] But just because more reliable techniques – such as the PEACE method in the UK – are endorsed, this does not mean they are always employed,[23] and subsequently there is still a risk of false confessions occurring where more coercive techniques appear in the PEACE model's stead.

Regardless too of the interview method undergone, where recording of interviews is not done and instead the record is found in interview notes, problems exist. Memory recollection in writing up interview notes in the absence of a recording is an obvious inhibitor. The order of items of questioning can be innocently forgotten by interviewers, or omitted altogether, again innocently, due to a lapse in memory entirely. One study found that more than half (57 per cent) of the interviewers' utterances along with 25 per cent of the incident-relevant

19 S M Kassin and K L Kiechel, 'The social psychology of false confessions: compliance, internalization, and confabulation' (1996) 7(3) Psychological Science 125; R Ofshe and R Leo, 'The social psychology of police interrogation: the theory and classification of true and false confessions' (1997) 16 Studies in Law, Politics and Society, 189; R Ofshe and R Leo, 'The decision to confess falsely: rational choice and irrational action' (1997) 74 Denver University Law Review 981; R Leo, 'False confessions: causes, consequences and implications' (2009) 37 Journal of the American Academy of Psychiatry and the Law 332.

20 R P Fisher and V Perez, 'Memory-enhancing techniques for interviewing crime suspects' in S A Christianson (ed), *Offenders' Memories of Violent Crimes* (Wiley 2007) 329–254.

21 B Snook, J Eastwood and W Todd Barron, 'The next stage in the evolution of interrogations: the PEACE model' (2014) Canadian Law Journal 220, 230; D Walsh and R Bull, 'What really is effective in interviews with suspects? A study comparing interviewing skill against interviewing outcomes' (2010) 15 Legal and Criminological Psychology 305.

22 G Gudjonsson and J Pearse, 'Suspect interviews and false confessions' (2011) 20(1) Current Directions in Psychological Science 33–37; see more generally B Snook et al, 'Urgent issues and prospects in reforming interrogation practices in the United States and Canada' (2020) Legal and Criminal Psychology 7–8.

23 J Pearse and G H Gudjonsson, 'Measuring influential police interviewing tactics: a factor analytic approach' (1999) 4 Legal and Criminological Psychology 221.

details provided by the interviewee were omitted from the would-be verbatim interview notes.[24] Details of an interview omitted or included in a record will, it has been found, shape juries' findings,[25] and so the repercussions of non-contemporaneous and non-accurate interview notes can be critical.

Taking the best case scenario in the alternative by assuming that memory recollection is not an issue and the interview notes are verbatim, there is still a problem from a linguistics study perspective, due to contamination between oral language and written language.[26] Written language is devoid of voice modulation – aspects such as intonation, volume and tone are all omitted from even the most faithfully recorded interview notes, especially if such information is written as a summary of the interview process. These factors may, on a case-by-case basis, be used by defence counsel to argue that a confession is unreliable, and thus potentially lead to its exclusion from the evidence. Routine video and tape-recording, however, nullifies this concern and makes confessions more reliable, although the ground of unreliability would still be open to defence counsel, as shall later be seen. Certainly at least, the routine video and tape-recording of the interviews means there is an indisputable basis upon which the prosecution and defence can concur are agreed facts, thus narrowing the basis of contested matters and potentially then enhancing the examination into the confession statement's admissibility.

Lastly, it is likely that the aforementioned reasons contribute to greater public confidence in the transparency and infallibility of tape-recorded or video-recorded interview processes as opposed to non-electronic recording.[27] This can especially be important in societies where in the past the police had gained notoriety in their interviewing and interrogation practices, such as in the Northern Irish jurisdiction during the Troubles.[28]

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24 M Lamb, Y Orbach, K Sternberg, I Hershkowitz and D Horowitz, 'Accuracy of investigators' verbatim notes of their forensic interviews with alleged child abuse victims' (2000) 24 Law and Human Behavior 699.

25 J Keijser et al, 'Written records of police interrogation: differential registration as determinant of statement credibility and interrogation quality' (2011) 18(7) Psychology, Crime and Law 613.

26 K Haworth, 'Police interviews as evidence' in M Coulthard and A Johnson (eds), *Routledge Handbook of Forensic Linguistics* (Routledge 2010).

27 T P Sullivan, 'Electronic recording of custodial interrogations: everybody wins' (2005) 95(3) Journal of Criminal Law and Criminology 1127.

28 See eg I Cobain, *Cruel Britannia: A Secret History of Torture* (Portobello Books 2012) ch 6.

Thus, while this commentator and others[29] advocate, for the above reasons, the compulsory recording of police interviews either via tape or via video-recording and argue that recording requirements are, for those reasons, important, it has been less explored as to how a breach of those important requirements impacts, or should impact, on the admissibility of an associated confession.

How, then, does the current law in Northern Ireland and the English and Welsh jurisdiction treat a breach of the Codes, insofar as they relate to the recording of interviews, in the context of a confession's admissibility? It is to this question that this section now turns.

On grounds of oppression

It is submitted that a procedural breach of the Code cannot be 'oppression' under the general meaning of that term per article 74(8) of the Police and Criminal Evidence (Northern Ireland) Order 1989, which speaks to matters including torture, inhuman or degrading treatment; a procedural breach of the Codes cannot come close to this standard and so only the grounds of unreliability and the discretionary power remain as avenues for exploration when a breach of Codes C, E and F in relation to recording of interviews occurs.

On grounds of unreliability

The unreliability route under article 74(2)(b) of the Police and Criminal Evidence (Northern Ireland) Order 1989 is less straightforward than that of oppression where a breach of recording requirements under the Codes is concerned. An argument that a confession is rendered unreliable due to something not done (specifically that the strict observation of Code C, E or F was not done by the police) is hindered for several reasons.

Firstly, the wording of article 74(2)(b) implies the more usual commission of something said or done, rather than the omission of something that ought to have been said or done (although the omission of keeping a proper record of the interview was entertained for the purposes of article 74(2)(b) in the case of *Doolan*[30] and the case of *Delaney*),[31] and this may necessitate the need to word the argument of an omission in positive terms.[32] This can complicate the submissions being made linguistically, but more importantly it impedes the

29 See eg Sullivan (n 11); G D Lassiter and M Lindberg, 'Video recording custodial interrogations: implications of psychological science for policy and practice' (2010) 38(1) Journal of Psychiatry and Law 177.

30 [1988] Crim LR 747, CA; see also *R v Barry* (1991) 95 Cr App R 384, CA.

31 (1988) 88 Cr App R 338.

32 See D Ormerod and D Perry (eds), *Blackstone, Criminal Practice* (Oxford University Press 2015) F17.24.

argument that an omission positively affected the reliability of a confession. It is far easier to argue that something that the suspect witnessed being positively said or done (in other words, a commission) affects the confession's reliability, than it is to argue that something he or she did not witness said or done (an omission) affected the reliability of that confession.

Secondly, it is difficult for counsel to argue that the interviewing police officers omitting to follow the Codes contributes to the reliability of a confession to the extent it 'cannot be relied upon as being the truth'.[33] This is because the Codes would normally be observed by police without the suspect ever being aware of it, and the question therefore begs how a confession's reliability can be questioned if it does not affect a suspect's actual decision to confess. Indeed, the conduct alleged to undermine the reliability of the confession must have some causal link to the making of that confession, as seen in the cases of *Beales*[34] and *Goldenberg*,[35] as well as being made implicit in the statutory wording itself.[36] This also was the general position of the old common law.[37] Such a causation link between Code breaches and unreliability of the confession is difficult.

Thirdly, and in any event, the courts have demonstrated a preference in practice of dealing with breaches of PACE Codes under article 76's discretionary exclusion as opposed to the ground of unreliability.[38] This can mean that any arguments concerning a breach of the Codes in relation to recording of interviews made in an application by the defence to exclude the confession under article 74(2)(b) is blunted from the onset and denies the defendant a chance to exclude the confession automatically due to a breach of the Codes.

On discretionary grounds

The courts' preference for article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 when it comes to dealing with breaches of the Codes means that cases where submissions mainly depend

33 *R v Crampton* (1990) 92 Cr App R 369, 372.

34 (1992) 95 Cr App R 384.

35 (1989) 88 Cr App R 285.

36 Police and Criminal Evidence (Northern Ireland) Order 1989, art 74(2), which reads '[it] was or may have been obtained … in consequence of anything said or done'.

37 *DPP v Ping Lin* [1976] AC 574, at 601

38 See *R v Sparks* [1991] Crim LR 128; see also W Twinning, *Rethinking Evidence: Exploratory Essays* 2nd edn (Cambridge 2006) 223; M Redmayne, 'The structure of evidence law' (2006) 26 Oxford Journal of Legal Studies 805, 807, where it is argued there has been a 'drift away from exclusionary rules … especially after the Criminal Justice Act 2003'.

on a breach of the Codes fall to be decided within the realm of the discretionary grounds here.

The question of whether or not these breaches ought to render the confession inadmissible depends on their degree of 'adverse effect' on the 'fairness' of the proceedings.[39] This seems to imply a two-pronged approach for judges to consider in the *voir dire*: firstly, whether or not the omission of adherence to Codes C, E or F created an adverse effect *prima facie*, and, secondly then, the degree to which this adverse effect affected the fairness of the proceedings.[40] This appears to be a balancing act between fairness to the accused and fairness to the prosecution, although *prima facie* it seems fairness to the accused will have been prejudiced where major Code breaches are concerned.[41] Nevertheless, like article 74(2)(b), it appears that a causation link needs to be established between the breach of the relevant Codes and the resulting confession.[42] As discussed above, this can be the main sticking point in arguing that a breach of the Codes led to the making of a confession, and it certainly is clear that the mere fact that there has been a breach of the Codes does not of itself mean that evidence has to be rejected;[43] any argument pertaining to a breach of the Codes therefore needs to be developed and proved evidentially by the defence and done so persuasively for the trial judge to exercise his or her discretion.

Of course, the further issue with admissibility arguments focused towards article 76 – being a discretionary power – is that subsequent appeal is difficult. Discretionary powers mean that the fettering of the trial judge's decision on appeal is slight, the standard being one of *Wednesbury* unreasonableness in effect.[44] Indeed, the case law in this area accepts that judges may take different views in how to properly exercise their discretion, even when counsel make parallels between their case and cases gone before,[45] and the Court of Appeal in England and Wales has been reluctant to provide any general guidance to how a trial judge should approach that jurisdiction's equivalent to article 76.[46] All these factors make it less likely that an appeal court would interfere with a trial judge's discretion over article 76, especially

39 See *R v Alladice* (1988) 87 Cr App R 380; *R v Walsh* (1989) 91 Cr App R 161, 163.

40 See *R v Kerawalla* [1991] Crim LR 252.

41 *R v Walsh* (n 39 above).

42 See *Roberts* [1997] 1 Cr App R 217, in which the Court of Appeal held that the breach of a code provision, which was designed to protect another suspect, had no causal link with the accused's own confession.

43 *R v Delaney* (1988) 88 Cr App R 338.

44 *R v Quinn* [1995] 1 Cr App R 480, 487.

45 *Jelen and Katz* (n 10 above).

46 *R v Samuel* [1988] QB 615.

when the appeal panel has not had the benefit of observing the witnesses in a *voir dire*, and it is subsequently incredibly difficult to successfully argue the trial judge ought to have exercised his or her discretion. The net effect of this, where a conviction is secured solely or mainly on the basis of a confession, is that the defendant's safeguard of an appeal is diminished in power and significance where breaches of the Codes concerning recordings formed the backbone of the admissibility arguments.

In sum, successful arguments advocating for the inadmissibility of a confession due to the relevant Codes' breaches is next to impossible under the oppression category, and difficult under the unreliability category. It appears that courts have a preference for the discretionary route where it comes to Code breaches, but this route comes with its own problems: still a causation link is required, and the appeal safeguard is diminished.

It is suggested that this current standing of the law is unsatisfactory; the courts have not yet appreciated the link between the failure to record interviews adequately or at all, on one side, and the increased possibility of a false or coerced confession on the other. It is for these reasons that it is submitted that the current framework of the law is inadequate for protecting an accused from a confession being admitted into evidence against him or her in circumstances where the police evidence's reliability is challenged by the accused.[47] However, it is appropriate first to consider in the following part the arguments against any expansion to the law in this area.

GOOD CONFESSIONS RENDERED BAD: AN INJUSTICE?

Having explored the current standing of the law in relation to breaches of the Codes and admissibility of the confession, this article now turns to considering the arguments against any expansion of the law.

These arguments fall broadly into three categories: the causation requirement; the suitability of the current law's scope for dealing with Code breaches; and the courts' desire to avoid disciplining or otherwise punishing the police for a failure to observe the Codes.

First is the argument that a breach of the relevant Codes may be minor and, in any event, does not bear consequence on the confession's validity. This argument is the strongest and most meritorious argument against any expansion of the current law because it reflects the present

47 Although Roberts argues that failure to record an interview in the context of disputes over the police's credibility will trigger art 76's discretionary powers. See P Roberts, 'Law and criminal investigation' in T Newburn, T Williamson and A Wright (eds), *Handbook of Criminal Investigation* (Willan Publishing 2007) 129.

law's need for causation in both article 74 and article 76 submissions; in order for a confession to possibly be excluded, it must have been in some way contaminated by the actions or inactions of the police or someone else in authority. It is difficult to suggest that a minor breach of the Codes has so contaminated a confession; despite having a right to consult the Codes, suspects typically do not because they often fail to understand the Notice to Detained Persons, particularly regarding their right to consult the Codes[48] and so are unlikely to be able to understand their rights fully,[49] subsequently meaning they are usually oblivious to such breaches occurring. Though this is a criticism of the Notice's formation, it also follows then that the breach would have no bearing on a suspect's decision to confess or not, and therefore, it can be argued, a breach of the Codes should not come into the decision-making realm within a *voir dire*.

Secondly, the argument can be made that the current law is wide enough in its scope. As has been seen, there have been cases where a breach of the Codes has indeed led to exclusion of the confession. The fact that both the routes of article 74(2)(b) and article 76 are open to submissions on the breach of the Codes shows the current law's flexibility and accommodation for these types of cases. It is still open for counsel to argue that a breach of the Codes impacts on the reliability of the confession if appropriate, so long as the causation link is established. Failing this ground, tailored submissions to the case can be made appealing to the judge's article 76 discretionary powers. The discretionary powers can be a 'safety net' for cases that do not meet the unreliability standard and encompass a perhaps wider benchmark of 'fairness' that a judge can assess on a case-by-case basis. This ought to give counsel adequate scope to make arguments for a confession's exclusion, if it is appropriate to the case at hand.

Thirdly, is the argument that any failure to follow the Codes generally is a matter for discipline of the police, and the courts are not concerned with punishing or otherwise disciplining the police for Code breaches.[50] Automatic exclusion of a confession due to a failure to observe the Codes would arguably amount to a 'punishment' setting that is not constructive for justice. Rather, the focus is, and should be,

48 The right to consult the Codes section of the Notice to Detained Persons was found to have been made more difficult to understand in the April 1991 revision of that Notice, from a Flesch score of 53 out of 100 pre-April 1991 to 37 out of 100 post-April 1991. See G Gudjonsson, I C H Clare and P Cross, 'The revised PACE "Notice to Detained Persons": how easy is it to understand?' (1992) 32(4) Journal of the Forensic Science Society 289, 293–295.

49 Ibid 290.

50 *See R v Mason* [1988] 3 All ER 481.

on a criminal court striving to find the truth as to the accused's guilt or innocence to the best of its ability.

These three arguments together reflect the key concern for the court, which is its ability to determine whether the confession's contents are reliable or not. Notwithstanding breaches of the Codes, the confession could still be reliable and so ought to be admitted. Observers could see it as an affront to justice if a breach of the Codes' recording requirements occurred and, as a result, the defendant 'got off the hook', despite having made an otherwise valid confession, the perfectly good confession being rendered bad because of a box-ticking exercise, in the form of the Codes, not done by the police.

Yet the injustices potentially to be found in an expansion of the law, it is submitted, dwarf the even greater injustices that can potentially occur within the current framework. So far, this article has discussed the importance of recording of interviews and the adherence to Codes C, E and F in relation to such recording. It has also suggested that there is an increased risk of false confessions being made and being overlooked where such recording is absent. These arguments are brought together in the third part of this article, where the main thrust of its proposition is made, before, in the fourth part, the arguments take illustration in the 2020 Court of Appeal in Northern Ireland decision of *Kevin Artt*.

BALANCING INJUSTICE WITH JUSTICE: A COMPROMISE?

As has been seen in the first part of this article, the exclusion of a confession due to a breach of the Codes is far from a home-run for the defence because, regarding article 74(2)(b), it will usually be in dispute with the prosecution how and to what extent the reliability of the confession is so undermined by a breach of the Codes due to the requirement for demonstrating a causation link. With regards to the discretionary power to exclude a confession under article 76, it was plainly stated by the Court of Appeal in England and Wales:

> This does not mean, of course, that in every case of a significant or substantial breach of ... the codes of practice [that] the evidence concerned will automatically be excluded.[51]

Indeed, the very nature of article 76 and the standard the appellate courts will use to review use of same means that it is very hard to challenge the case-by-case discretion of the trial judge, who is making a judgment call in the *voir dire* as to how the breach of the Code affected the accused based on the case-specific circumstances.[52]

51 *R v Walsh* (n 39 above) at 163.

52 See eg *R v Dunn* (1990) 91 Cr App R 150.

Herein lies the issue with the current law's standing: where the police claim one version of events in the interview room (but it is found that they breached Codes C, E or F in relation to the recording of interviews) and the accused claims another version of events, the credibility of each side is brought to the forefront in the absence of an independent and reliable interview record, and so the trial judge must make a judgment call. But does the trial judge believe the multiple police interviewers, or does he or she believe the accused?

The answer obviously is that it depends on the case at hand, but this in turn will almost always depend on the trial judge's assessment of the credibility of the police witnesses versus the credibility of the accused in order to determine what occurred in the interview room, and this can sway in the police's favour where a defendant's bad character application is made[53] and may, in fact, always have the presumption that the police are telling the truth.[54] The problem, generally, is that one judge may decide to believe the police and admit the confession, and, were another judge sitting, the confession would have been excluded because that second judge would have believed the accused's versions of events. Judges may make the correct judgment call, but the very existence of a sophisticated appeal infrastructure in the common law world is tacit acknowledgment that trial judges do not always get it right.

Herein lies the problem and the chief contention of this article. Where a breach of the Codes in relation to recording of interviews is made and that provision is designed to protect an accused from fabrication by the police, the importance of those provisions should become paramount as a highlighted safeguard for the accused against the machinery of the state and its agents – in these circumstances, the police – if and when the version of events of the interview room is disputed between the accused and the prosecution. What is proposed is that, if credibility of the police's account of the interview and the circumstances leading to the confession is disputed, and a breach of the Codes in relation to recordings has resulted in the records not having been signed, made contemporaneously, or made at all, in the absence of an independent and reliable record of interview, the trial judge should err on the side of caution and believe the accused's version of events, thereby excluding the confession *automatically* on the grounds of its questioned unreliability or authenticity. While a breach of the Codes may be innocently done, the breach should heighten the suspicions

53 See R Moran, 'Contesting police credibility' (2018) 93 Washington Law Review 1339.

54 See D Dorfman, 'Proving the lie: litigating police credibility' (1999) 26 American Journal of Criminal Law 455, 471–472.

of the court regarding the good faith, and therefore reliability, of the police witnesses.

While the proposition of this article could in effect lead to guilty defendants waltzing free (and this is certainly an injustice), it avoids the greater injustice of an innocent defendant being convicted on the basis of – what turns out to be – an unreliable confession. This was the case for the appellant in the 2020 decision of *R v Kevin Barry Artt*,[55] which will be examined in the next part. Firstly, however, it is appropriate to examine a possible compromise between the current law as found in PACE and its jurisprudence and the proposition of automatic exclusion this article advocates. A third-way compromise between these two can be seen in the US's treatment of confession statements in the context of interview recording, and such an examination provides an insight into similar provisions already in place there to those proposed in this article – but not to its fullest extent.

The US as a whole demonstrates a patchwork approach that varies across states as to the requirements over recording of interviews, although there seems to be a consensus in advocating for greater uniformity federal-wide.[56] In many ways this development was, and is, behind the PACE provisions brought into effect in England and Wales and in Northern Ireland, in 1984 and 1989 respectively; prior to 2003, only two states – Alaska and Minnesota – required police officers to record custodial interrogations (now just over 50 per cent of states require recording of interviews in principle).[57] Alaska and Minnesota are both, however, states with a similar absolute exclusion rule as that proposed in this article; both states' respective supreme courts have ruled that testimonial evidence of what occurred during a custodial interview will be excluded from evidence if the prosecution is unable to establish a valid excuse for not making an electronic recording.[58] This may, or may not, include a verbal confession. While this article has proposed the automatic exclusion of the confession (verbal or written) *resulting from* the unrecorded interviews, the approach taken by these two states focuses on the interview record itself. However, this is still a provision which is close to the reasoning of this article's own proposal.

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55 [2020] NICA 28.

56 Lassiter and Lindberg (n 29); B Bang et al, 'Police recording of custodial interrogations: a state-by-state legal inquiry international' (2018) 20(1) Journal of Police Science and Management 3; A M Gershel, 'A review of the law in jurisdictions requiring electronic recording of custodial interrogations' (2010) 16(3) Richmond Journal of Law and Technology 1.

57 Bang et al (n 56 above)10.

58 T Sullivan and A Vail, 'The consequences of law enforcement officials' failure to record custodial interviews as required by law' (2008) 99(1) Criminal Law and Criminology 215, 217.

Across the other states, there is a sliding scale present, with some states, including New Jersey and Nebraska, having the mere safeguard to admissibility of the evidence in the form of a caution warning to a jury who are considering the weight to give that evidence (although, in New Jersey, as well as Arkansas, Michigan, Montana, New York, North Carolina and Utah,[59] the absence of a record can be a factor in admissibility arguments, thus mirroring the present law's standing in Northern Ireland and England and Wales).[60]

Other states, however, target the admissibility of the confession but do not advocate for automatic exclusion. The District of Columbia Code provides that a statement of an accused taken without the required electronic recording is subject to a rebuttable presumption that the statement was involuntary, and this presumption is overcome if the prosecution proves by clear and convincing evidence that it was voluntary. The same law applies in Illinois.[61] These are, again, similar provisions to this article's own proposal, although these states do not allow for the automatic exclusion.

The common trend arising out of Alaska and Minnesota, on one side, and the District of Columbia and Illinois, on the other, is that there is a rebuttable presumption in favour of the defendant (be the presumption targeting the admissibility of the surrounding testimony or the confession itself). The examples of these four American jurisdictions therefore presents a third, 'middle-way', approach between the current PACE law in Northern Ireland and England and Wales and this article's proposal. That third approach is that failure to record interviews in compliance with the relevant Codes would not lead to *automatic* exclusion of the confession, but will instead create a mere *presumption* as to their exclusion.

The issue, however, with this third middle-way approach, which leads this article to reject such a compromise, is that the middle-way approach of a rebuttable presumption contextualises the *voir dire* as a balancing act of competing interests. Thus, the protections of the accused under discussion in this article, enshrined within Codes C, E and F, are no longer paramount prerequisites to ensuring reliability of a professed confession, but are instead one of several interests subject to a balancing act, including the interest in a successful prosecution (and so ruling the confession admissible). Yet, this view mischaracterises the question of admissibility as a rights-based question rather than a

59 Bang et al (n 56 above) 14.
60 Sullivan and Vail (n 58 above) 218–219.
61 Ibid.

question of reliability,[62] and it also mischaracterises the defendant's stake in adherence to Codes C, E and F as an 'interest' rather than as a protection and safeguard to a miscarriage of justice. This difference in characterisation has appropriately been recognised by other commentators. For example, in discussing evidentiary procedure via the lens of a balance of interests, Giannoulopoulos has correctly separated the issue of a defendant's other interests (eg his or her human rights) from confession evidence, which, as has been seen in this article, is inherently unreliable and dangerous. Thus, Giannoulopoulos, in turning his discussion on judicial balance to the question of confessions, relocates the focus from reliable evidence obtained via a breach of the defendant's interests to 'unreliable and intangible evidence', thereby maintaining focus on the fact that confession evidence admissibility is chiefly concerned with reliability as opposed to an 'interest' whose merits can be substantively identified and balanced with other interests.[63]

Yet, beyond the argument that the third-way approach mischaracterises the question of exclusion, it could still hypothetically be argued that a presumption as opposed to automatic exclusion can protect the principle of ensuring a confession's reliability, assuming the evidence presented in rebutting the presumption speaks to the issue of reliability and reliability only. However, such a view, it is submitted, exposes the perhaps primary problem in assessing 'reliability' as argued by barristers for the prosecution, and that is the documented underplaying, in empirical psychological evidence, as to the difficulty with which a truly reliable confession can be detected; it cannot be left merely to a judge's balancing act between submissions advanced by the prosecution in rebuttal because the very subject of reliability of confessions is still being expounded upon and explored within psychological literature as a phenomenon that is explained by subtle cognitions of any given suspect, and which may involve confessions which are false, notwithstanding their apparent reliability from a lack of obvious external coercion.[64] Further still, such a view misses the fact

62 D Ormerod and D Birch, 'The evolution of the discretionary exclusion of evidence' (2004) Criminal Law Review 767, 779; A Ashworth, 'Excluding evidence as protecting rights' (1977) Criminal Law Review 723, 729–733.

63 D Giannoulopoulos, *Improperly Obtained Evidence in Anglo-American and Continental Law* (Hart 2019) 125.

64 See discussion of the various types of false confessions, some of which may nevertheless seem reliable, in S M Kassin and L S Wrightsman, 'Confession evidence' in S M Kassin and L S Wrightsman (eds), *The Psychology of Evidence and Trial Procedure* (Sage 1985); J T McCann, 'A conceptual framework for identifying various types of confessions' (1998) 16 Behavioural Sciences and the Law 441; H Wakefield and R Underwager, 'Coerced or nonvoluntary confessions' (1998) 16 Behavioural Sciences and the Law 423.

that accurate and contemporaneous recording of interviews, enshrined in the Codes, is absolutely crucial to the veracity and reliability of a confession.[65] Without those safeguards found in the Codes, the reliability of the confession is automatically undermined. It should therefore automatically be excluded from evidence. This was the view taken by Leo et al in explaining their shift[66] – in the US context – from the middle approach of a rebuttable presumption to the view endorsed by this article, namely automatic exclusion. It was also the view of Sullivan and Vail before these two authors began to, instead, argue in favour of a care warning to the jury where an unrecorded confession appears in evidence. Sullivan and Vail have now argued[67] that the trial judge should permit the prosecution to introduce evidence of all unrecorded interviews. If the failure to record is not justified under the law, and if the case is heard by a jury, the judge must give instructions explaining the greater reliability of electronic recordings of custodial interviews as compared to witnesses' testimony about what occurred. This is essentially a reliance on a jury direction as to weight. As aforementioned, this was a reversal of these commentators' previous position, where they advocated for a rule whereby unrecorded interviews are presumed inadmissible into evidence when no statutory exception to the recording requirement applies.[68] The reason for the change in opinion was two-fold: first was that provisions that threaten admissibility of testimony about unrecorded interviews are not necessary, in the contributors' determination, in order to achieve compliance with recording laws. This was due to the research undergone that suggested law enforcement agencies were in any event enthusiastic about recordings taking place. Secondly, law enforcement agencies were concerned that criminals would either not be charged or would be acquitted for lack of sufficient evidence of guilt.[69] While the latter of these arguments has been addressed in this article, it is suggested that, in relation to the first reason, the purpose of the recordings is to protect the accused first and foremost. It is not about 'threatening' law enforcement with inadmissibility of evidence. The courts in this jurisdiction have, as has been seen, made this clear in relation to PACE Code breaches. Subsequently the previous position held by Sullivan and Vail is the preferable view.

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65 R Leo, P Neufeld, S Drizin and A Taslitz, 'Promoting accuracy in the use of confession evidence: an argument for pretrial reliability assessments to prevent wrongful convictions' (2013) 85(4) Temple Law Review 759, 799–800.

66 Ibid.

67 Sullivan and Vail (n 58 above).

68 Sullivan (n 27 above) 1141–1144.

69 Sullivan and Vail (n 58 above) 221–223.

For the reasons aforementioned, this commentator is not persuaded by the merits of a middle-way approach: a contemporaneous and accurate record of police interviews is the very foundation upon which a resultant confession is considered reliable, without which reliability cannot be effectively gauged by submissions by counsel given what we know about the subtlety of unreliable confessions. It follows that this article maintains the position of advocating for automatic exclusion where such foundations as to reliability are absent.

The illustrated merits of this article's preference for automatic exclusion can be seen through a consideration of the 2020 Court of Appeal in Northern Ireland decision of *R v Kevin Barry Artt*, which did in fact involve a third-way approach of a presumption in favour of exclusion.

THE TRIAL OF KEVIN BARRY ARTT

The case at trial of *R v Kevin Barry Artt*, considered in the context of the 38-defendant trial of *R v Donnelly and Others*,[70] was decided six years before the introduction of the Police and Criminal Evidence (Northern Ireland) Order 1989 and before the time of routine video and verbatim transcript recording of interviews. Similar provisions, however, as those found in Code C had been live at the time of the interviews of the appellant in the form of a certain Royal Ulster Constabulary (RUC) Force Order.[71] In addition, interviews were to be contemporaneously recorded as per the Judges' Rules,[72] although it has been outlined that these rules did not amount to 'law' under the common law.[73] At the time, Castlereagh detention centre had stationary video-recording of interrogation rooms, but no sound was provided.

At trial in 1983, the appellant had denied all involvement in the murder of Albert Miles that had occurred five years previously. The sole evidence against him was a confession statement that the appellant claimed had been made to RUC officers in Castlereagh detention centre while under duress. The appellant claimed he had repeatedly been called a 'bastard' and was verbally abused; he had been told someone had 'squealed' on him; he had been confronted by a co-accused who had falsely implicated him; he had been told other suspects would be turning 'Queen's Evidence' against him at trial; a Detective Inspector and a Detective Chief Superintendent had, on separate occasions, threatened

70 Whilst a neutral citation for this case cannot be located, judgment was delivered in Belfast Crown Court, by Judge Basil Kelly, in August 1983.

71 RUC Force Order No 43/81.

72 Practice Note (Judge's Rules) [1964] 1 WLR 152 (Parker LJ).

73 A Sanders, R Young and M Burton, *Criminal Justice* 4th edn (University Press 2010) 228.

to see him rot in jail if he did not confess, whereas he would receive a much shorter sentence if he made a 'good, remorseful statement' with the help of the police, who would then speak on his behalf in court; he had been hit by a Detective Constable after the Detective Constable had told the appellant to pray to God for forgiveness; a newspaper article had been shown to the appellant in order to put pressure on him; and the police had outlined the known facts of the murder to the appellant on multiple occasions. In addition, the appellant was refused access to a solicitor. The RUC officers rejected the appellant's version of events.

The appellant, when asked by the judge why he had made the confession statement, replied that he had thought he had 'no other choice' based on what the police had told him, otherwise he would be going to prison for the rest of his life.

Counsel for the appellant at his trial fought a week-long *voir dire* in an attempt to get the confession statement excluded from evidence under the high-threshold section 8 of the Northern Ireland (Emergency Provisions) Act 1978, which created a rebuttable presumption in favour of the accused that the confession was obtained by torture, or inhuman or degrading treatment if there was evidence *prima facie* of same.[74] Cross-examination of each RUC officer who had interviewed the appellant had it put to them that their denial of the defendant's versions of events was untruthful. One of the questions asked to successive officers was whether or not the interview notes had been contemporaneously recorded. This gave mixed answers, but the majority of officers claimed the interview notes had been made contemporaneously.

The trial judge was left in no doubt that the defendant's case was that the police were lying on oath and so was compelled to believe either the defendant's versions of events or the police's version of events. This inevitably caused him to form an assessment as to the demeanour of each witness.

The trial judge formed a favourable assessment of the RUC witnesses, ruled the confession admissible and, in his judgment, commented that the defendant had told lies about what had occurred in Castlereagh that were 'painfully untrue'. The defendant was sentenced to life imprisonment; however, he became part of the infamous Maze Prison escape in September 1983 – a mere month after sentencing had taken place, thereafter fleeing to America.

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74 S 8(2) provided: 'If, in any such proceedings where the prosecution proposes to give in evidence a statement made by the accused, prima facie evidence is adduced that the accused was subjected to torture or to inhuman or degrading treatment in order to induce him to make the statement, the court shall, unless the prosecution satisfies it that the statement was not so obtained—exclude the statement.'

In 2020, Artt's appeal against conviction and sentence was heard in the Court of Appeal in Northern Ireland and the conviction was quashed on the basis that fresh evidence (namely electrostatic detection apparatus (ESDA)) had shown that some of the RUC interview notes, although not detrimental to the appellant, had been rewritten and were not in any event recorded contemporaneously. Although it was accepted that an innocent explanation for this was plausible, the Court of Appeal had a significant sense of unease over the conviction because the ESDA results demonstrated the possibility that the RUC officers had been untruthful during their evidence in the *voir dire*. This was accepted by the prosecution before reading of the judgment when senior counsel said:

> To put it another way, if the court was to ask me whether I agree—that it is a possibility that if the trial judge had had available to him the ESDA evidence, he would have felt a degree of doubt about his ability to accept the police evidence as to what occurred during the interviews — I would have to answer 'Yes'.[75]

The appeal judgment continued at paragraph 76:

> In order to admit the appellant's confessions, the judge had necessarily to rely heavily on his assessment of the police witnesses as being truthful and reliable. In part that was a comparative exercise in which a diminution of the truthfulness and reliability of the police officers might have led to a more favourable impression as to the truthfulness and reliability of the appellant. If the ESDA evidence had been available to the judge, it remains at least possible that he would have felt a degree of doubt about his ability to accept the evidence of the police officers as opposed to the evidence of the appellant.

It was this uncertainty that gave the Court of Appeal unease as to the safety of the conviction.

The case of *Artt* highlights the importance that so-called 'box-checking', regarding recording of interviews in Code C, E and F (or their pre-PACE equivalents), can have once credibility of the police witnesses is brought into dispute. Ensuring interview notes were signed and recorded contemporaneously may not have seemed significant, and though by themselves the ESDA results may have been insignificant in the *Artt* case, for the Court of Appeal it was the mere possibility that this impacted the credibility of the police officers that led the convictions to be quashed.

Albeit ESDA was not available at the time of trial in 1983, a sign of something not being quite right perhaps raised its head when the RUC Force Order had not been complied with. This ought to have brought up the possibility that the police witnesses were giving untruthful

75 *Artt* (note 55 above) [75].

evidence during the *voir dire*. Although this was not the Court of Appeal's conclusion, it is posited that the confession ought to have been excluded at trial as a matter of precaution as soon as this non-compliance was discovered and the credibility of the police became a live issue. It would have been better had the trial judge been able to determine that it was safer to exclude a confession that *might* have been extracted due to duress rather than to have to form an *ad hoc* judgment as to a witness's credibility before deciding whom to believe. However, it was not the trial judge's fault in the *Artt* case that the credibility assessment was wrong, for this assessment was only discovered to be mistaken with the benefit of later scientific technology.

For the law going forward, it is submitted that, post-PACE, and with the benefit of Codes C, E and F, if police credibility is challenged, the fact that the Code has been breached should weigh heavily in the defendant's favour and the confession should automatically be excluded. This would ensure that justice is protected against the possibility that the police have told untruths in their evidence in order to secure a wrongful conviction.

Though serving a mere month in prison before his escape, the appellant in the *Artt* case certainly faced an injustice where the admissibility of a confession, despite warning signs being present in the form of procedural breaches, was decided on the basis of a formulation by the trial judge as to a witness's credibility. For post-PACE cases in which a trial judge must form impressions of the police's credibility versus that of the accused's, the truth of such assessments should not be left to ESDA evidence, which can be expensive to obtain and depends on a number of conditions for the results to be meaningful. Instead, the breaches of the Codes should be what sways the judge's assessment on credibility.

It is of course accepted that trial judges must form impressions of a witness's credibility all the time; the need for this, nor the value of this, cannot, and should not, be eliminated from the trial process. However, what is proposed in this article is a rebalancing of the scales between, on the one hand, a judge's perception of police witnesses' credibility and, on the other hand, factual warning signs as to a police witness's credibility in the form of Code C, E and F breaches. Perception is abundantly less reliable than reality, even for the fairest and most experienced of trial judges.

The adaption of this proposal would not necessarily lead to the accused who is guilty getting off on a technicality; apart from the reasons discussed above as to why the Code provisions in relation to interview recording ought not to be seen as a mere 'technicality', justice and the need to convict the guilty are protected by an important fact: an accused who is indeed guilty usually will have other evidence

against them merely corroborated by the confession, as opposed to the case against the accused being solely made up by the confession. Even with the confession excluded, then the rest of the evidence may still result in a successful conviction.

Yet, for high-risk prosecutions, such as the *Artt* case, where the case against the defendant rests solely or substantially on a confession that is rendered dubious according to the defendant's version of events, the risk of a wrongful conviction would be mitigated were the approach suggested in this article adopted. The approach would sit alongside the current law in relation to Code breaches and the admissibility of the confession. The sole criterion for activating this article's approach would be that the credibility of the police witnesses is brought into dispute in relation to the conduct of the interviews and that the circumstances put forward by the accused's version of events would amount to oppression or unreliability. At this stage, in a situation where the trial judge must inevitably believe either the accused or the police witnesses, and being mindful of factual and indisputable Code breaches absent satisfactory explanation, he or she – erring on the side of caution – ought to believe the accused's version of events and subsequently exclude the confession. This would be the best balancing in the competing scales of justice.

CONCLUSION

This article opened with the proposition that the power of a confession can be such that it is damning to the defence's case in a criminal trial; but that it ought to be potentially damning, too, for the prosecution's case. Yet, in many ways, the need for a confession to be damaging to a prosecution case is greater than its damning power against the defendant, in order to prevent a miscarriage of justice occurring. This article has argued that Codes C, E and F of PACE in relation to ensuring the accurate recording of interviews is fundamental to ensuring a resultant confession's reliability. For compelling reasons, it has been suggested that a confession, whose very fundamentals of reliability are undermined by a breach of Codes C, E or F, as applicable, ought to be excluded automatically from the evidence if credibility of the police witnesses is raised as a live issue by the defence and the accused's version of events of what went on in the interview room would lead to the resultant confession being made inadmissible.

The first part of this article demonstrated the importance of the Codes in ensuring veracity of the psychological phenomenon of the confession, a creature already notorious in its relatively young literature for being the root cause of miscarriages of justice. This part also examined the suitability of the current PACE statutory framework and jurisprudence

in combatting a breach of the Codes and found that the decision of a case in this area will typically fall to the discretion of the trial judge. Subsequent appeal has been seen to be hopeless. The second part of the article examined the main objections against an expansion of the law, and the chief objection – that this article's proposal would lead to injustices in guilty defendants walking free on account of a mere technicality – was discounted for two reasons: firstly, the requirements of Codes C, E and F are far from a mere technicality, but absolutely crucial to a confession's reliability. Secondly, any prosecution which is strong will have evidence beyond the confession statement, which should on its own merits convict the accused if justice so allows. The third part of the article turned the discussion away from criticisms and to the merits of the article's proposal. It demonstrated that the even greater injustice of the innocent being convicted on the basis of a dubious confession would be mitigated against were the article's proposals adopted. An examination of the US jurisdictions demonstrated a test course for the proposals, but in subtly different ways, including the trend of some states in creating a rebuttable presumption for exclusion as opposed to automatic exclusion. This 'third-way' approach was examined as a potential compromise but ultimately rejected on the basis that the Codes' procedural requirements secure the absolute essentials of a reliable confession, whose absence cannot be reconciled by the arguments and assurances by the prosecution. Part four saw a practical application of the third-way approach in the Northern Ireland jurisdiction in the form of the Northern Ireland (Emergency Provisions) Act 1978, under which the admissibility of the confession in the 1983 case of *R v Kevin Barry Artt* was decided. This case demonstrated the need for automatic exclusion, a rejection of the third-way approach, and a reform to the current PACE jurisprudence that deals with breaches of the Codes in relation to the recording of interviews.

One need only consider the Salem Witch Trials in appreciating the power a confession has had throughout history, but also the power of its obvious pitfalls. Given the serious implications of those pitfalls, automatic exclusion of the confession statement where credibility of the police is brought into question is the safest method of ensuring that miscarriages of justice such as the case of *Kevin Barry Artt* cannot be repeated.

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Protecting private information in the digital era: making the most effective use of the availability of the actions under the GDPR/DPA and the tort of misuse of private information

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ABSTRACT

Globally, enhanced data protection schemes are being introduced in the face of threats to privacy in the digital era. In England and Wales, protection from one such threat – from unconsented-to disclosures of private information online – is covered by *both* the established tort of misuse of private information and a recently enhanced data protection scheme, arising under the General Data Protection Regulation 2016 (GDPR), providing, in particular, the right to erasure. The *previous* scheme ran alongside the tort, in an uneasy relationship which, until recently, saw its marginalisation in the privacy context under consideration, with the result that the data protection jurisprudence in this context is impoverished, while the tort jurisprudence and scholarship has flourished. This article argues that merely noting that the two causes of action are available and may arise in the same claim provides a limited response. With the advent of the United Kingdom GDPR and the rise in the dangers to protection of private information posed by the 'tech' companies, it presents a new argument in opposition to the two separate silos into which scholarship in this area has fallen and, more importantly, in favour of the opportunities the two actions provide for addressing the range and variety of privacy claims, especially against online 'intermediaries', including from non-celebrities. To that end it probes the differences between the designs of the key elements of the two actions which might render one more apt or able to provide privacy protection, depending on the situation, than the other, especially in the online context. It also considers as a warning potentialities within both that could detract from their efficacy.

Keywords: misuse of private information; UK GDPR/DPA; free expression; intermediaries; 'tech' companies.

INTRODUCTION

Globally, enhanced data protection schemes are being introduced in the face of threats to privacy in the digital era.[1] In England and Wales protection from one such threat – from unconsented-to disclosures of private information on or offline – is now covered by *both* the established tort of misuse of private information and the recently enhanced data protection scheme under the General Data Protection Regulation 2016 (now referred to as the United Kingdom (UK) GDPR and relied on by the Data Protection Act 2018).[2] That somewhat anomalous situation – in which two causes of action appear to operate largely as fairly close equivalents – has subsisted for some time: the tort and the previous data protection scheme under the Data Protection Act 1998 (DPA)[3] have run alongside each other for around 20 years, in an uneasy relationship which has until recently seen the marginalisation of the latter in the privacy context under consideration.[4] The result has been that the data protection jurisprudence in this context is impoverished, while the tort jurisprudence and scholarship has flourished. The tort remained in general firmly in the ascendant where both causes of action were at stake, on the basis that the data protection claim would add little

1 For example, India is following the model of the EU's GDPR in introducing the Personal Data Protection Bill 2019, allowing global digital companies to conduct business there under certain conditions, as in Sri Lanka in the Framework for the Proposed Personal Data Protection Bill 2019; in both cases that stance is being taken, as opposed to following the isolationist framework of Chinese regulation which prevents global tech companies like Facebook and Google from operating within its borders.

2 Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) [2016] OJ L119/1 (27/4/2016).

3 Reflecting Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and of the free movement of such data [1995] OJ L281, 31, art 2(a) and recital 26.

4 A number of claimants under the previous DPA 1998 regime brought the claim under both the tort and the DPA on the same set of facts as regards the information in question, but the judges focused mainly on the tort claim; see eg *Campbell v MGN Ltd* [2004] 2 AC 457, 459 [32] (under DPA, s 4(4)); *David Murray v Express Newspapers* [2007] EWHC 1908 (Ch) at [22]. See also n 5 below.

or nothing to the tort one.[5] But the threat to protection of personal information is changing – it is now coming from the tech companies as much as from the traditional media bodies. The global rise in the volume of personal information online,[6] including via 'intermediaries',[7] means that a rise in the number of claimants challenging disclosures of such information when unconsented-to/unauthorised, under the tort and data protection, is already currently underway,[8] prompting the following re-evaluation of the opportunities presented by the availability of both these areas of liability in the online context, and of their ability to protect persons from the forms of online privacy invasion that are the main subject of this article.

This article will focus on one particular aspect of the fundamental right to privacy, reflecting the value often viewed as at the core of informational autonomy, the preserving of control over unconsented-to disclosures of personal information. Online harm created by such loss of control includes the misuse of data due to its dissemination via social media platforms, and due to its gathering and then disclosure of data

5 See eg *Sir Cliff Richard OBE v (1) The British Broadcasting Corporation (2) South Yorkshire Police* [2018] EWHC 1837 (HC) at [226]: 'It will be noted that I have not included any issues arising under the DPA ... That is because I do not propose to consider them. [Counsel] submitted that he was entitled to a verdict on the DPA claim, although he accepted that if he won on privacy then he did not need his DPA claim, which would not get him any more than his privacy claim and if he lost on privacy his DPA claim would not save him. In other words, it adds nothing to the privacy claim. In those circumstances I do not think it is necessary (or proportionate) for me to consider it, and I shall not do so.' In *ZXC v Bloomberg LP* [2019] EWHC 970 (QB) it was noted: 'The Claimant accepted that, if he could not succeed with his claim in relation to the misuse of private information, he would not succeed in ... the Data Protection Act claim.' [3] See also n 16 below.

6 Eg in 2020 1.69 billion Facebook users logged on to Facebook and Instagram every day: see 'Number of users worldwide 2015 to 2020' (*Statista* 2020). and 'Instagram by the numbers (2020): stats, demographics and fun facts' (*Omnicore* 4 January 2020). Websites may have huge readerships and followings, attracting many people from a range of demographics: see eg *Monroe v Hopkins* [2017] WLR 68, at [71(3)].

7 The term is used here only to denote entities that enable access to personal information online, gather and disclose it for gain, or host it, as opposed to publishing it, so it covers search engines and social media platforms. But see as to the complexity of the term: G Dinwoodie, *Who are Internet Intermediaries?* (Oxford University Press 2020).

8 See for recent examples of claims, n 16 and n 39 below. Many de-listing requests are being made to Google relating to unconsented-to access to personal information: eg in *NT1 and NT2 v Google LLC (Intervenor: The Information Commissioner)* [2018] EWHC 799 (QB), it was noted that between the *Google Spain* decision (n 26 below) and 4 October 2017, a period of some 3.5 years, Google had been asked to de-list almost 1.9 million URLs or links to private information via named person searches.

for commercial purposes.[9] The view will be taken, in accordance with the general academic stance,[10] that the preservation of such control lies at the heart of European informational privacy protection,[11] reflecting a concern that is especially engaged by the recent dramatic increase in such disclosures online.[12] Hence the focus of this article on the tort and on addressing such disclosures under the GDPR, including via the 'right to be forgotten' (article 17), in order to answer to this aspect of a control-based notion of privacy.[13] While other aspects of privacy

9 In *Google v Judith Vidal-Hall* [2014] EWHC 13 (QB), it was the 'subsequent use of that information' – the browser-generated information – (at 1052) which was found to bring the situation within the area of tortious liability – and it is the disclosure of private information, whether to the public at large, or for commercial gain that is the subject of this article. It is significant that a court action on this basis has recently been launched in the UK: a 12-year-old girl, supported by the Children's Commissioner for England, is seeking to take legal action against the video-sharing app TikTok, claiming that the company collects and discloses children's data unlawfully to generate advertising revenue. Mr Justice Warby in the High Court has already granted the girl anonymity in bringing the claim on the basis that she might suffer significant harm via online bullying by TikTok users if her identity was known: *SMO (A Child) by their litigation Friend Anne Longfield v TikTok Inc and Others* [2020] EWHC 3589 (QB), 30 December 2020.

10 See Westin's seminal work, identifying four functions of privacy, including enabling the exercise of personal autonomy, emotional release, testing moral activities in communion with others, sharing intimacies: A F Westin, *Privacy and Freedom* (Atheneum 1967) 34–35. All these functions relate to choice and control over the audience for private information. See further: R Wacks, *Privacy and Media Freedom* (Oxford University Press 2013) 21; H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press 2006) 662–666.

11 It should be noted that the right of erasure (the 'right to be forgotten') protects personality rights (in the sense of protecting both privacy and reputation) generally and so does not solely constitute a 'privacy law'.

12 See a number of the very recent cases considered here concerning unconsented-to disclosure of private information, including at n 9 above and n 16 below. For discussion, see: P Bernal, *What Do We Know and What Should We Do about Internet Privacy?* (Sage 2020); P Bernal, *Internet Privacy Rights: Rights to Protect Autonomy* (Cambridge University Press 2014); M Mills, 'Sharing privately: the effect publication on social media has on expectations of privacy' (2017) 9(1) Journal of Media Law 45.

13 The harm has been accepted as consisting of the loss of control of personal data, without the need to prove a specific psychological harm or a diminution of welfare or financial loss: see *Gulati v MGN* [2015] EWCA Civ 1291 [45]; see also *SMO (A Child) v TikTok Inc* (n 9 above): 'The damages claimed are for "loss of control of personal data"' [2]. For some accounts of a control-based definition of privacy, see: R Parker, 'A definition of privacy' (1973) 27 Rutgers Law Review 275, 276; C Fried, 'Privacy' (1967) 77 Yale Law Journal 475; A Westin, 'The origins of modern claims to privacy' in F Schoeman (ed), *Philosophical Dimensions of Privacy* (Cambridge University Press 1984); H Nissenbaum, *Privacy in Context* (Stanford University Press 2009) 75; V Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press 2009).

protection under the GDPR – including curbing the unconsented-to collection by state bodies of personal information online[14] and checking the accuracy of such information or the security of its storage[15] – are clearly relevant to the preservation of informational autonomy, they will lie outside its scope.

Where both causes of action could arise in the context of the same claim in respect of online privacy, claimants may be advised that reliance on one is more appropriate in their particular situation, or that it may be advantageous to proceed under both even though, obviously, they cannot 'double-recover'.[16] A key intention underlying the GDPR – to rein in the power of the tech companies to invade online privacy[17] – contrasts with the intention underlying the design of the tort, originally drawn up largely in the context of such invasion by the traditional media; therefore in the digital era the GDPR will clearly not be as underused in the privacy context under discussion as was the DPA 1998. This article envisages an increasing court-based reliance on both areas of liability in that era and foreshadows the nature of the jurisprudence that is beginning to arise, arguing that it is likely to provide privacy claimants with an enhanced ability to rely on the tort against online 'intermediaries'. The tort jurisprudence in this specific privacy context is far more established than was the case under the previous data protection scheme, but its rooting largely, not wholly, in the intention to protect privacy from traditional media intrusion is now involving a change of approach; while clearly it will continue to provide some protection from such intrusion, its current and future role in relation to online privacy invasion now requires reflection, which this article seeks to provide. Judges confronted by both tort and data protection claims in this online privacy context will clearly proceed in a fact-sensitive manner, characteristic of common law reasoning, adapting the key elements of the tort to a context radically

14 GDPR, art 5(1)(b), (c).

15 Ibid: 'Principles relating to the processing of personal data', (d) and (f), by way of example.

16 An example arose in *NT1 and NT2 v Google LLC* (n 8 above) [43]: 'The relationship between the laws of misuse of private information and data protection has been discussed on occasion. They are often considered to lead to the same conclusion, for much the same reasons.' See also to similar effect *Lloyd v Google LLC* [2019] EWCA Civ 1599 [53].

17 See recital 6 GDPR: 'Rapid technological developments and globalisation have brought new challenges for the protection of personal data. The scale of the collection and sharing of personal data has increased significantly. Technology allows ... private companies ... to make use of personal data on an unprecedented scale in order to pursue their activities.'

different from that within which the tort was originally forged.[18] That is already beginning to occur.[19]

Against that backdrop, this article will argue that merely noting that the two causes of action are available and may arise in the same claim provides a limited response. With the advent of the UK GDPR, and the rise in the dangers to protection of private information posed by the 'tech' companies, it presents a new argument in opposition to the two separate silos into which scholarship in this area has fallen, and, more importantly, in favour of the opportunities the two actions provide for addressing the range and variety of privacy claims, especially against online 'intermediaries', including from non-celebrities. To that end it probes the differences between the designs of the key liability-creating elements of the two actions which might render one more apt to provide privacy protection, depending on the situation, than the other, especially in the online context, and considers as a warning potentialities within both that could detract from their efficacy.

THE LEGAL CONTEXT UNDER THE ECHR AND EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS

The Court of Appeal in *Lloyd v Google LLC*[20] found: 'The actions in tort for MPI and breach of the DPA both protect the individual's fundamental right to privacy; although they have different derivations, they are, in effect, two parts of the same European privacy protection regime'.[21] That regime influences these two somewhat coterminous areas of law by way of both the European Convention on Human Rights (ECHR) and the European Union (EU) Charter of Fundamental Rights, given that a number of the relevant rights align.[22] It is well established

18 See J Rowbottom, 'A landmark at a turning point: Campbell and the use of privacy law to constrain media power' (2015) 7(2) Journal of Media Law 170, 187.

19 See in particular the claims referred to in n 16 above (*NT1 and NT2 v Google LLC*) and n 220 below.

20 [2019] EWCA Civ 1599. The claim was heard by the Supreme Court in April 2021, but the judgment has not yet been made available: UKSC 2019/0213. That significant case concerned a challenge to the collection of browser-generated information to disclose to a third party for commercial gain.

21 Ibid at [53].

22 Where they do so, the EU Charter art 52(3) provides that the meaning and scope of both are to be taken to be the same. See further: W Weib, 'Human rights in the EU: rethinking the role of the European Convention on Human Rights after Lisbon' (2011) 7(1) European Constitutional Law Review 64, 64–67; F Brimblecombe, 'The public interest in deleted personal data? The right to be forgotten's freedom of expression exceptions examined through the lens of article 10 ECHR' (2020) 23(10) Journal of Internet Law 1, 15.

that Strasbourg jurisprudence is relevant to the interpretation and application of EU laws[23] due to inter-court comity between the Court of Justice (COJ) of the EU and the European Court of Human Rights (ECtHR).[24] Both courts regularly cite the other's judgments and look to each other for guidance, in some instances the COJ taking the EctHR's more experienced lead when adjudicating upon aligned rights.[25] In *Google Spain*,[26] the Advocate General in his Opinion found that since article 7 of the Charter of Fundamental Rights (respect for private life) is 'in substance identical to article 8 [ECHR]' it must be duly taken into account 'in the interpretation of the relevant provisions of the [previous] Directive, which requires the member states to protect *in particular* the right to privacy'.[27] Further, he found that:

> ... in conformity with article 52(3) of the Charter, the case law of the Court of Human Rights on article 8 [ECHR] is relevant both to the interpretation of article 7 of the Charter and to the application of the Directive in conformity with article 8 [protection of personal data] of the Charter.[28]

Strasbourg's interpretations of 'private or family life'-based information under article 8(1) will therefore influence the interpretation of articles 7 and 8[29] of the Charter of Fundamental Rights, which will now influence the interpretation of the GDPR. The same clearly applies to the influence of article 10 ECHR, highly relevant in this privacy context to the interpretation of both the tort and GDPR/DPA and to the interpretation of its counterpart, article 11 of the Charter (protecting freedom of expression).

Thus, even after 'Brexit', the interpretation of the UK GDPR, as a retained provision following the end of the post-Brexit

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23 See N O'Meara, '"A more secure Europe of rights?" The European Court of Human Rights, the Court of Justice of the European Union and EU accession to the ECHR' (2011) 12(10) German Law Journal 1813, 1814; C Eckes, 'EU accession to the ECHR: between Autonomy and Adaption' (2013) 76(2) Modern Law Review 254, 254.

24 O'Meara (n 23 above) 1815.

25 See T Pavone, 'The Past and future relationship of the European Court of Justice and the European Court of Human Rights: a functional analysis' MA Programme in Social Sciences, University of Chicago (28 May 2012) 1.

26 Case C-131/12 *Google Spain SL and Another v Agencia Española de protección de Datos (AEPD) and Another* [2014] WLR 659, ECLI:EU:C:2014:317; the Opinion of Advocate General Jääskinen of 25 June 2013.

27 Ibid [114].

28 Ibid [115].

29 Art 8(1): 'Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law.' Obviously, the GDPR now provides that basis.

transition period under the EU (Withdrawal) Act 2018, will still be influenced by interpretations based on the relevant article 8 and 10 ECHR jurisprudence. Such jurisprudence had an influence on the interpretation of the previous data protection scheme via both domestic decisions,[30] and pre-Brexit COJ decisions which took account of articles 7 and 8 of the Charter.[31] Clearly, the indirect influence of the Charter post-Brexit in domestic law is yet to become fully apparent,[32] but articles 7, 8 and 11 were based on pre-existing general principles of EU law and should therefore remain unaffected by the removal of the Charter.[33] Since articles 7 and 11 have equivalents in articles 8 and 10 ECHR, which have effect in domestic law via the Human Rights Act 1998 (HRA), that provides a further basis for their continuing domestic impact and influence on the interpretation of the GDPR/DPA. The design of the tort has also been shaped by the Strasbourg article 8 and 10 jurisprudence. But, despite these commonalities in human rights terms, some differences between the two causes of action emerge in relation to the scope of their privacy protection but much less so in relation to the protection they provide for freedom of expression, as will be discussed.

'PRIVATE LIFE' INFORMATION – DIFFERENCES BETWEEN ITS RECOGNITION UNDER THE TORT AND THE GDPR

Disclosing/facilitating online actors; threats of intermediaries to private information

Questions as to *which* online actors are susceptible to attracting liability under the tort are beginning to be addressed, whereas that issue is less problematic under the GDPR. Online blogging, or postings on social media including personal information clearly amount to data-

30 See eg n 16 above.

31 See in particular n 26 above.

32 Under the EU (Withdrawal) Act 2018, s 5(4), the Charter 'is not part of domestic law on or after exit day', but its status for a period will depend on the transitional provisions; the status of decisions of the COJ will depend on the harmonisation provisions, but they will still influence domestic law in relation to retained law. See for discussion C Barnard, 'So long, farewell, auf wiedersehen, adieu: Brexit and the Charter of Fundamental Rights' (2019) 82(2) Modern Law Review 350–366, especially 360 onwards.

33 They would be expected to be unaffected, in line with the EU (Withdrawal) Act 2018, s 5(5) and sch 1(2). The Government has acknowledged in its right-by-right analysis that arts 7, 8 and 11 of the Charter were pre-existing general principles of EU law: see 'Charter of Fundamental Rights of the EU' (2017) 24–25.

processing.[34] The hosting of unconsented-to third-party disclosures of personal information on social media platforms such as Facebook, and the creation of links to such information via search engines, are covered by the GDPR/DPA since such intermediaries are also viewed as data controllers[35] and within scope of liability if their role is not purely passive.[36] A partial parallel could be drawn with the provision regarding operators of websites in section 5(2) Defamation Act 2013 providing a defence if it was not 'the operator who posted the statement on the website'. The position under the tort is more complex and currently developing: it also clearly covers the online *publisher* of the

34 See eg *The Law Society and Others v Kordowski* [2014] EMLR 2 at [82].

35 There has previously been debate over who or what can be found to be a data controller, but it is now apparent that the tech companies owning social media platforms are viewed as data controllers under the GDPR (that was the case under the previous scheme, and it is also the stance taken under the GDPR by the EDPB: see eg Guidelines 8/2020 on the targeting of social media users, adopted 2 September 2020); see Case C-210/16 *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH* [2018] (ECJ) ECLI:EU:C:2018:388 in which Facebook was found to be a (jointly) responsible data controller (alongside those who operated a Facebook page). Also see COJ, 'The administrator of a fan page on Facebook is jointly responsible with Facebook for the processing of data of visitors to the page' (Press Release No 81/18, 2018). See under the previous regime, determining that search engines can be data controllers: Case C-131/12 *Google Spain SL and Another v Agencia Española de protección de Datos (AEPD) and Another* [2014] WLR 659; *Mosley v Google* [2015] EWHC 59 (QB); *GC, AF, BH, and ED v Commission nationale de l'informatique et de Libertes (CNIL), Premier ministre, and Google LLC* 24 September 2019. See also *Lloyd v Google LLC* [2019] EWCA Civ 1599, concerning a claim under the DPA 1998 since the defendant had collected information about the claimant's internet usage to disclose for gain.

36 Intermediaries might potentially be able to take advantage of their 'shield' under the E-Commerce Directive (Directive 2000/31/EC, art 14) where their role is merely passive: the Directive may place limits on intermediary liability for transmission of data under art 17 GDPR if the service provider's activity is '*of a mere technical, automatic and passive nature*' (recital 42 E-Commerce Directive, emphasis added). Hosting providers will lose the benefit of the art 14 exemption if, upon obtaining actual knowledge of illegal activity or information, or awareness of facts or circumstances from which the illegal activity or information is apparent, they fail to act expeditiously to remove or disable access to the information. Art 17 requires that for information to be deleted that must be first requested by a data subject; the intermediary would at that point have notice as to the disputed material and so would appear to lose its shield. See further G de Gregorio, 'The E-Commerce Directive and GDPR: towards convergence of legal regimes in the algorithmic society?' (EUI Working Paper RSCAS 2019/36, 2019).

information,[37] who may often utilise such platforms for publication, and it is now apparent, although not yet firmly established, that the platform *itself* can incur tortious liability if it has notice of the content and therefore could not utilise an intermediary defence under the E-Commerce Directive (it ceased to apply from January 2021).[38] Search engines which have *only* provided links to information are not currently covered by the tort, but once the engine has decided to maintain links despite a request to remove them on privacy grounds, tortious liability could potentially arise (*Townsend v Google*).[39] That

37 See *Rocknroll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch) at [25]; *AMP v Persons Unknown* [2011] EWHC 3454. The notion of social media as a more ephemeral form of internet use, as compared to setting up a blog or posting an article on a newspaper's website, representing a lawless area of the internet where 'anything goes', was put to bed in the defamation case of *Monroe v Hopkins* [2017] EWHC 433 (QB), [2017] WLR 68 [54]–[62]; over a thousand estimated views of a defamatory tweet (as well as other forms of engagement online) were deemed to create 'substantial' disclosure, enough to cause reputational harm. The interest at stake in relation to privacy does not in contrast require 'substantial' disclosure, so unconsented-to disclosure of private information on social media, viewed by a small number of persons – or possibly only one – would appear to be capable of attracting tortious liability.

38 See 'The E-Commerce Directive and the UK' (Department for Digital, Culture, Media and Sport 5 January 2021, updated 18 January 2021). In *CG v Facebook Ireland Ltd and McCloskey (Joseph)* [2015] NIQB 11, CG had been convicted in 2007 of a number of sex offences. Mr McCloskey ran a Facebook page termed 'Keeping our kids safe from predators 2' on which he posted comments and the comments of others about CG and others, identifying CG and to an extent the area he lived in. CG successfully sued Facebook Ireland Ltd and McCloskey in relation to a series of these posts, alleging *inter alia* that they constituted a misuse of private information. There had been an earlier judgment against both defendants in a case brought by a different convicted sex offender, in relation to a page entitled 'Keeping our kids safe from predators' (*XY v Facebook Ireland Ltd* [2012] NIQB 96). Facebook in the 2015 case, it was found, had misused the information by failing to delete it; all the circumstances had to be taken into account in deciding whether an internet service provider had actual knowledge of the unlawfulness of the material; Facebook appeared to have such knowledge due to the earlier action; a defence under the E-Commerce Directive therefore failed. It was found, however, on appeal (*CG v Facebook* [2016] NICA 54), that the shield would apply as far as damages were concerned since the court disagreed that Facebook had had the requisite notice.

39 In *Townsend v Google Inc & Google UK Ltd* [2017] NIQB 81, the plaintiff made a request for Google Inc to de-list seven of the 12 previously notified URLs because they indicated that he was a sex offender. The judge found that the tort could potentially apply, but on the facts no reasonable expectation of privacy was found [31]–[32]; the claim also failed under the DPA 1998 [36]: see text to n 184 below. In contrast, in *Mosley v Google* [2015] EWHC 59 (QB), the High Court ruled that Max Mosley's claim under the tort against Google in respect of links to private information would not succeed, without explaining why that would be the case, but found that he had a viable claim against Google under the DPA 1998, s 10, [55].

has now been found to be the case where the engine has *collected* browser-generated information with a view to its disclosure for private gain – in *Google v Judith Vidal-Hall*.[40]

In the digital era, therefore, protection for private information under the tort is receiving more expansive interpretations of its scope – extending liability from the traditional media (post-2000), to online publishers (around 2010 onwards), and now also to online intermediaries, where the intermediary's role is more than a purely passive one. But, while the tort is now beginning to adapt itself to the online environment in potentially applying to intermediaries, as well as publishers, the discussion below questions whether the nature of the jurisprudence affecting the current determinations as to whether information is 'private' – linked to an extent to determinations regarding the traditional media – could potentially play a part in inhibiting the creation of tort liability in respect of some disclosures of private information online, depending on the precise situation. In so far as that is the case, the GDPR/DPA would provide the more appropriate cause of action for some privacy claimants.

Contrasts between remedial relief and regulatory aspects of the two schemes: influence on design

The lack of injunctive relief under the DPA 1998, also the case – at face value – under the GDPR/DPA, but its availability under the tort meant, on the one hand, post-2000 that the tort offered a more effective response to privacy invasion,[41] but, on the other, that the prospect of prior restraint engendered some caution in judges in determining its parameters. Such caution did not, however, encourage a reliance by courts on data protection, as opposed to the tort.[42] The regulatory aspects of both regimes tended in the same direction, in the

40 [2014] EWHC 13 (QB) was found to concern a misuse of private information under the tort because the defendant had collected such information about the claimants' internet usage via their Apple Safari browser [3]; it therefore concerned an instance of potential disclosure of private information.

41 Clearly, such relief may be fairly hard to utilise in practice in relation to online disclosures of private information, especially relevant in the *traditional media* context. See eg K Yoshida, 'Privacy injunctions in the internet age – PJS' (2016) 4 European Human Rights Law Review 434; G Phillipson, 'Max Mosley goes to Strasbourg: article 8, claimant notification and interim injunctions' (2009) 1(1) Journal of Media Law 73; C Hunt, 'Strasbourg on privacy injunctions' (2011) 70(3) Cambridge Law Journal 489. Awards of injunctions are now rare: three of the proceedings (of five) for a new interim injunction at the High Court in January–June 2020 were granted. In the previous six months (July–December 2019) six new interim privacy injunction proceedings took place, and all of these were granted. See 'Civil Justice Statistics Quarterly: April to June 2020' (*Ministry of Justice* 2020).

42 See n 5 above.

sense of providing a greater incentive to turn to the courts where the tortious claim was against the press: the Information Commissioner had significant powers to fine data controllers,[43] which have now been enhanced,[44] while the regulatory aspect of the tort regime was and is significantly weaker and of more limited application. Previously operated by the toothless Press Complaints Commission, it now relies on the privacy code policed by the Independent Press Standards Organisation (IPSO),[45] with statutory recognition.[46] Judicial awareness of the weakness of press self-regulation as a means of protecting privacy appears to have had an influence on the genesis of the tort, and on its subsequent design, although signs of caution are still apparent. Thus, a determination to rein in the power of the traditional media to invade privacy, and yet a concern to protect media freedom runs through the earlier jurisprudence establishing the test for 'private' information. The specific tests that emerged to establish liability under the tort[47] were, therefore, largely designed to target the behaviour of the traditional media, especially newspapers; as Rowbottom puts it, the tort was 'forged' with traditional mass-media actors in mind,[48] as exemplified in the seminal case of *Campbell v MGN* in 2004, between Naomi Campbell and the *Daily Mirror*, which named the new tort.[49] This variation in remedial relief and in regulation may partly explain the preference, until recently, for relying on the tort rather than the DPA 1998, resulting in a richer tort-related, but also largely press-focused, privacy jurisprudence.

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43 They arose under ss 55A–55E DPA 1998. The powers now arise under the DPA 2018, pts 5 and 6, and schs 12–16. See also GDPR, art 51.

44 See DPA 2018, s 157 and GDPR, art 83(5)(b), providing for 'administrative fines of up to 20,000,000 Euros, or, in the case of an undertaking, up to 4 % of the total worldwide annual turnover …'. But there is some evidence that these powers are currently underused: see M Burgess, 'MPs slam UK data regulator for failing to protect people's rights' (*Wired* 21 August 2020).

45 See IPSO, Editors' Code of Practice. For discussion, see P Wragg, *A Free and Regulated Press: Defending Coercive Independent Press Regulation* (Hart 2020). The privacy aspects of the Code monitored by OFCOM for broadcasting are also relevant as representing a further part of the regulatory regimes for press and broadcasting operating alongside the tort.

46 See text to n 128 below.

47 The Court of Appeal in *Google Inc v Judith Vidal-Hall* [2015] EMLR 15, [2015] EWCA Civ 311 recently confirmed that the action takes the form of a tort. See J Y C Mo, 'Misuse of private information as a tort: the implications of Google v Judith Vidal-Hall' (2017) 33 Computer Law and Security Review 87.

48 Rowbottom (n 18 above) 187.

49 *Campbell v MGN Ltd* [2004] 2 AC 457 at [14] (Lord Nicholls). It was found that in light of courts' obligations under the HRA, s 6, there is an English action against unauthorised disclosure of private information which should be referred to as the tort of 'misuse of private information' – also at [14].

Determining that information is 'private' under the tort: a traditional media-focused design?

In *Campbell*, the House of Lords focused, not on the confidentiality of the personal information in question, but on the invasion of privacy in article 8 terms that its publication represented,[50] leading Rowbottom to find that the Lords had moved from a confidence-based discussion to a human rights assessment, focusing upon autonomy and dignity.[51] Subsequent developments in the design of the tort, however, saw it depart from that focus, diluting the human rights' assessment via degrees of absorption of traditional media interests, taking account of the somewhat symbiotic relationship celebrities often have with the press. Since the tort emerged due to a recontouring of the breach of confidence doctrine based on the courts' duty under section 6 HRA to abide by the ECHR, it might have been expected that article 8, with its accompanying jurisprudence, would form the primary focus.[52] While that jurisprudence has clearly had a bearing,[53] the interpretation of the key domestic test as to a 'reasonable expectation of privacy', which has in effect become a 'reasonable sensitivities' test,[54] has become largely dependent on the development of a number of traditional media-focused sub-tests: the precise relationship between satisfying these convoluted and cumbersome tests and showing the engagement of article 8 was initially left largely unarticulated.[55] They include: consideration of the attributes of the claimant; the activity in question and the place at which it was happening; the nature and purpose of the intrusion; the location of the photographs (if photographs are involved); the absence of consent; the effect of publication on the

50 See further: Rowbottom (n 18 above); G Phillipson, 'Transforming breach of confidence? Towards a common law right of privacy under the Human Rights Act' (2003) 66 Modern Law Review 726; S Deakin, A Johnson and B Markesinis, *Tort Law* 6th edn (Oxford University Press 2012) 844.

51 Rowbottom (n 18 above) 171.

52 Under the HRA 1998, s 2.

53 See, in particular, *McKennitt v Ash* [2006] EWCA Civ 1714 at [37]–[49].

54 See *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 at [134]–[142], per Baroness Hale, as regards the test. It evolved into asking what 'a reasonable person of ordinary sensibilities would feel [in all the circumstances] if he or she was placed in the same position as the claimant and faced the same publicity': *Terry and Persons Unknown* [2010] EWHC 119 (QB) [55].

55 The Strasbourg Court, however, later began to incorporate similar tests into the relevant jurisprudence; see V*on Hannover v Germany (No 2)* App nos 40660/08 and 60641/08 (ECHR, 7 February 2012).

claimant; and the circumstances in which and the purposes for which the information came into the hands of the publisher.[56]

From the tort's very inception, therefore, judges began demonstrating a concern to adopt a cautious stance in relation to (traditional) media freedom, a concern which had previously appeared to preclude – for the most part – the transformation of breach of confidence into a tort of misuse of private information.[57] It appears that some judges had in mind the desirability of creating an inbuilt leeway at this first stage of a privacy analysis which would aid in giving credence to a finding at the second one (discussed below) that the privacy claim was too 'weak' to overcome the media one.[58] That may in part explain why the domestic judges, while paying lip service to recontouring the tort with the Strasbourg jurisprudence in mind,[59] have not absorbed the *Von Hannover*[60] principle of covering *all* information related to an adult's private/daily life into domestic law:[61] had they done so, some privacy claims would almost inevitably have prevailed since virtually no free

56 See *David Murray v Express Newspapers* [2007] EWHC 1908 (Ch) and [2008] EWCA Civ 446 at [24], [36], [52]; *Terry (previously 'LNS') v Persons Unknown* [2010] EWHC 119 (QB) [55]; *Weller v Associated Newspapers Ltd* [2015] EWCA 1176; first instance: [2014] EWHC 1163 (QB), [2014] EMLR 24 [16] onwards; *ETK v NGN* [2011] Civ 439 [10]. This range of considerations was affirmed in 2018 in *Sir Cliff Richard OBE v (1) The British Broadcasting Corporation (2) South Yorkshire Police* [2018] EWHC 1837 (HC) [276], where the court also made reference to the ECtHR case of *Axel Springer AG v Germany* App no 39954/08 (ECHR, 7 February 2012) [89]–[95] which includes analysis of the above factors.

57 See G Phillipson and H Fenwick, 'Breach of confidence as a privacy remedy in the Human Rights Act ERA' (2000) 63 Modern Law Review 660.

58 That occurred in the cases of both *Terry (previously 'LNS' v Persons Unknown* [2010] EWHC 119 (QB)) and *Ferdinand v MGN* [2011] EWHC 2454 (QB): the information in both instances concerned romantic and sexual relationships; therefore it was of an intimate quality and would obviously have been viewed as information relating to private life under art 8(1). In both instances the judges were hesitant in finding that a reasonable expectation of privacy arose, indicating that, although it did, the test was only satisfied in quite a borderline fashion; in both the court went on to find that, due to the findings as to the balancing act between the media and privacy interests at stake, the claims failed.

59 See *McKennitt v Ash* [2006] EWCA CIV 1714 at [8]–[11] on accepting such recontouring.

60 App no 59320/00 (ECHR, 24 September 2004) at [13]. While it was accepted in *McKennitt* (n 59 above) that the tort should absorb the relevant Strasbourg art 8 jurisprudence, the decision stopped short of accepting that all details relating to daily life would attract a 'reasonable expectation of privacy'.

61 See *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 at [154]: Baroness Hale found that an unconsented-to photograph of Naomi Campbell popping out to buy milk would not count as 'private' information.

speech-based justification would have been available at the next stage of the argument, as the Strasbourg Court found in that instance.

A ready fit between these factors, developed to determine that information is 'private', but clearly created mainly with the traditional media and its relationship with celebrities in mind, is not apparent in respect of most disclosures of personal information online by individuals[62] or made possible by intermediaries. Therefore mismatches or misalignments potentially could arise if those factors were applied to such online privacy invasion. For example, the locational factor may be hard to evaluate or may be merely irrelevant, as in *CG v Facebook Ireland Ltd and McCloskey (Joseph)*,[63] as may the matter of consent, where, for example, the claimant herself had originally played a part in uploading personal material to a platform such as Facebook, aimed at a small number of friends, but where she did not consent to its wider dissemination. The factors concerning the 'nature of the intrusion' and use of photographs were clearly devised with the journalistic practice of covert photography in mind, again often a problematic factor to apply in the online domain.

The personal, but apparently innocuous, information at stake in *Von Hannover*[64] is not covered domestically as regards adults under the 'reasonable expectation' test,[65] contrary to the impact of sections 6 and 2 HRA combined, and to the finding in *McKennitt v Ash* to the effect that the courts should absorb the Strasbourg jurisprudence into the common law to shape the tort.[66] In that respect the notion of private information under the tort is not fully in line with the more expansive conception under article 8, and also contrasts strongly with the stance taken under the GDPR – below – which, unsurprisingly, shows a more ready tailoring to online privacy protection.

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62 See eg *AMP v Persons Unknown* [2011] EWHC 3454.

63 [2015] NIQB 11.

64 *Von Hannover v Germany* App no 59320/00 (ECHR, 24 September 2004) at [13]; eg shopping trips were covered at [13] since the judgment found that a number of activities in public places could still be deemed to be private; see also n 75 below.

65 Innocuous daily life activities engaged in by *children* appear to be covered; see: *David Murray v Express Newspapers* [2007] EWHC 1908 (Ch) and [2008] EWCA Civ 446; *Weller v Associated Newspapers Ltd* [2015] EWCA 1176; first instance: [2014] EWHC 1163 (QB); [2014] EMLR 24.

66 [2006] EWCA CIV 1714 [8]–[11].

'Personal data' under the GDPR/DPA: the broadest possible conception of 'personal information'

On its face, the contrast between the idea of private information under the GDPR/DPA and the cumbersome test of establishing a 'reasonable expectation of privacy' could hardly be more stark. The GDPR/DPA relies on a far more transparent, and much lower, threshold requirement; information must amount to 'personal data' relating to the individual person in question. Article 4(1) GDPR categorises personal data as '*any* information relating to an identified or identifiable natural person ("data subject");[67] an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identifier', and an extensive range of identification modes are listed.[68] It is immediately apparent that there is *no* definition of the term 'personal' under the GDPR, echoing the stance under the 1995 Directive;[69] it is only necessary that the information is *capable* of relating to an identifiable natural person and does so relate. Matters therefore that can be classed as personal data are apparently without limit, subject to that *one* requirement: the emphasis is, in contrast to the emphasis of the test under the tort, not on the *nature* of the information but on the means of identifying a 'natural person' that it relates to, thereby excluding, for example, a robot or a company.[70] In contrast to the test under the

67 Emphasis added. Under the DPA 2018, s 4(2), (5), the GDPR's definition applies to processing under the Act.

68 They include under art 4(1): 'a name, an identification number, location data [including GPRS data], an online identifier or one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person'. The new scheme provides a more contemporary, technology-based account by including the notion of an 'online identifier' as evidence which could render data personal, demonstrating the acceptance of the EU Commission that technology had evolved to a stage where it is common to trace an internet user by utilising their IP address. See D Brennan, 'GDPR series: personal data – an expanding concept' (2016) Privacy and Data Protection 12, 13. Also see Case C-582/14 *Breyer v Germany* [2016] (ECJ) ECLI:EU:C:2016:779. Recital 26 of the GDPR provides elaboration as to the requirement of identifying a natural person: 'account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly'.

69 Directive 95/46/EC. See M J Taylor, 'Data protection: too personal to protect?' (2006) 3(1) SCRIPT-ed 72, 75; P De Hert and V Papakonstantinou, 'The proposed Data Protection Regulation replacing Directive 95/46/EC: a sound system for the protection of individuals' (2012) 28(2) Computer Law and Security Review 130, 183.

70 In that respect the ambit of art 8(1) could be broader than the ambit of 'personal data' under the GDPR; in *Société Colas Est v France* (2002) App No 37971/97 at [41], it was found that a company could have a right to respect for its private life under the article, but that instance only concerned a physical search of the premises.

tort, sensitivities of the data subject as regards the information, or their basis for seeking erasure, are irrelevant for article 4(1) purposes, although the GDPR also recognises the category of 'sensitive personal data', requiring further protection.[71]

One caveat to the above, however, arises in the sense that there appears to be a disconnect between this concept of 'personal data' and the necessity that it is being 'processed'; if it is not being 'processed' under the GDPR definition of processing,[72] it does not attain the status of being 'personal data'. Verbal communication, whether via a phone or face to face, does not, according to a recent ruling under the previous data protection regime,[73] count as 'processing', even where, aside from that limitation, the data would clearly count as 'personal'. Since this article is concerned mainly with online disclosures that limitation is not of significance for its purposes, but questions could be raised as to its basis, given that in *this* respect the scheme may not be coterminous with article 8 ECHR, and possibly of narrower scope than the tort. Further, certain instantaneous communications immediately deleted, connected to an identifiable person online, and hosted by, for example, Snapchat,[74] would count as 'personal data' despite being quite closely cognate to offline verbal communication.

Apart from the matter of verbal communication, this account of 'personal data' under the GDPR, relying *only* on the connection of information to an identifiable person, clearly covers, but goes beyond, information relating to 'private or family life', 'the home or correspondence', the terms used in article 8(1) ECHR. It covers matters that under article 8 would not be deemed 'private' because it entirely disregards the distinction introduced in *Von Hannover* by the Strasbourg Court between a person's public and private life, a distinction obviously of most relevance to celebrities and other well-known figures.[75] Thus, the Princess of Monaco's (the claimant in *Von Hannover*) public life duties, such as opening a new civic

71 GDPR, art 9, recitals 51–56; for definitions, see article 4(13), (14), (15).

72 See art 4(2).

73 *Scott v LGBT Foundation* [2020] EWHC 483 (QB) [55].

74 See Snapchat. The communications can be retrieved. It is possible to 'screenshot' images received and therefore save them onto mobile devices, but the sender is notified.

75 In *Niemietz v Germany* (1993) 16 EHRR 97, the Strasbourg Court stated: 'The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life"', at [29]; but the examples of personal information from *Von Hannover* [2004] EMLR 21 – shopping trips, at [13], eating in a restaurant, at [11] – and from *Von Hannover v Germany (No 2)* [2012] EMLR 16 concerning a skiing trip, at [17], were the result of the court's delineation under art 8(1) of the outer limits of the 'private life' of a public figure, as opposed to their 'public life'-linked information.

building, would be covered under article 4(1) of the GDPR, but not under article 8(1) ECHR, while her daily/private life activities would be covered under article 8,[76] but not under the tort.[77] But for the purposes of covering information that would *in reality* be likely to be the subject of erasure requests or compensation claims, it is the area of convergence between article 4(1)'s account of personal data and the area of private life-linked information covered by article 8(1) that is significant, an area that is currently of greater breadth than the area covered by the tort.

Implications of the narrower conception of 'private information' under the tort

The explanation for the difference between the tort and GDPR in respect of information that counts as 'private' clearly lies in the origins and objectives of the two schemes. Given the nature of the general scheme under the GDPR/DPA, intended *inter alia* to enable control of the processing of personal data by the tech companies[78] as well as state bodies, including data that might have significance on various bases in the future, including economic ones, its adoption of an account that relies only on contrasting humans with non-human entities is unsurprising. It obviously had no need to carry the traditional media-related baggage associated until recently with the test devised under the tort, and it therefore relates more closely to the core value of informational autonomy.

As discussed above, the Strasbourg article 8 jurisprudence is relevant to the application of the GDPR in conformity with article 8 of the EU Charter, while the tort has also been interpreted, to an extent, in conformity with article 8 ECHR, under the HRA. The type of information that is significant in terms of protecting privacy online clearly often differs from information mainly relating to celebrities that has frequently been at issue under the tort until recently. In particular, information relating to non-celebrities as to previous spent convictions or more controversial previous appointments accessible

76 *Von Hannover* [2004] EMLR 21.
77 See n 61 above.
78 See n 17 above.

via a search engine,[79] social media platform or website, could have an impact on a person's work and/or family life. Such 'public life' information would clearly fall within article 4(1) and could also receive added protection.[80] It would probably also fall within article 8(1), since the public life/private life distinction from *Von Hannover* would tend not to apply to online privacy intrusion pertaining to the '*public* life' information[81] of *private* or semi-public figures, bringing them more readily within article 8(1) at Strasbourg. But it would now *also* fall within the ambit of the tort, following a number of online decisions involving intermediaries, including *NT1 and NT2 v Google*, depending in some circumstances on the impact that availability of the information could have on the claimant's family, as well as private, life.[82] The requirement under the tort test, following *Von Hannover*, that the information relates to an individual's private/daily life, as opposed to

79 Much of the information in the following instance was of that nature and concerned private or semi-public figures: in *GC, AF, BH, and ED v Commission nationale de l'informatique et de Libertes (CNIL), Premier ministre, and Google LLC* 24 September 2019 AF wanted search results removed identifying him as previously holding a post as a public relations officer for the Church of Scientology. BH requested deindexing of articles linking him to contemporaneous investigations into the funding of political parties. ED requested such deindexing to mentions of a prison sentence of seven years' and 10 years' judicial supervision for sexual assaults on children under 15. All the requests had been denied. GC had requested domestically that a link to a satirical photomontage depicting her in an illicit relationship with a politician should be removed from search returns. The links included special categories of personal data (now covered by art 9 GDPR). In a preliminary ruling the court found that the prohibition imposed on other controllers of processing data caught by art 8(1) and (5) of Directive 95/46 (previously covering special categories of data), subject to the exceptions laid down there, would also apply to the search engine. In the face of this ruling one possibility is that Google seeks to rely on art 85 GDPR; see text to n 155 below.

80 If previous employment revealed political opinions, religious or philosophical beliefs it could count as sensitive personal data under art 9 GDPR; criminal convictions would fall within art 10 (see s 10(5) DPA 2018).

81 In *ML and WW v Germany* (App nos 60798/10 and 65599/10) judgment of 28 June 2018 information as to the applicants' previous convictions was made available on a website run by a radio station; the court accepted that the information counted as 'private' under art 8(1) but did not disturb the conclusions reached domestically: in the balancing of the art 8 and 10 interests at stake the domestic court had found that the art 10 interest prevailed.

82 See *NT1 and NT2 v Google LLC* (n 16 above). It was found as regards NT1 that he had no reasonable expectation of privacy: the information regarding his previous convictions was found to be 'public' information [171]; in contrast, NT2 was found to have such an expectation [224], mainly due to the impact that the availability of the information could have on his family life since he had young children [226]. See further text to n 212 below. See also *CG v Facebook Ireland Ltd and McCloskey (Joseph)* Neutral Citation No NICA 54; [2015] NIQB 11.

their public one, but *also* has some added sensitivity,[83] clearly does *not* render it inapplicable to information relating to previous convictions, available online via search engines or otherwise. That might also be found to apply in future to other past life information of sensitivity to the claimant available on or offline. The courts clearly are *not* currently struggling to apply the 'reasonable expectation of privacy' test in the online context to individuals, but also intermediaries.

But that added requirement of sensitivity *does* currently preclude reliance on the tort in relation to apparently innocuous private life information relating to public, and probably, private figures, whereas such information would be covered under both article 4(1) and article 8. The current conception of private information under the tort therefore renders it inapplicable, as currently interpreted, to a range of information posted or accessible online, related to private/daily life. Apparently innocuous information such as, for example, images posted on social media of a private figure drinking in a bar, might – albeit not as a necessary requirement – have sensitivity for that person due, for example, to their religious background, but it is not clear that it would count as private information under the tort, although it would obviously fall within article 4(1) GDPR, and probably within article 8 ECHR.

A reconfiguring therefore of the 'reasonable expectation of privacy' test, re-evaluating the basis and value of the factors discussed, to create a somewhat better fit with the online context, may eventually find a place within the jurisprudence. Given the volume of personal information online, including browsing data, that may be misused without consent, the likelihood of claims arising under both the tort and GDPR is increasing, and this article considers a number of very recent instances, arising under the previous data protection regime.[84] In future, where the tort potentially applies in the online context, especially where the claim is brought by a private figure against a private actor, pressure might be placed increasingly on courts to re-evaluate the tort test for private information, in terms of rethinking the requirement of added sensitivity,[85] in order to enhance the efficacy of the tort in that context, and ensure compatibility with article 8 ECHR.

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83 See n 61 above.

84 See in particular n 16 above and n 213 below.

85 That requirement can be traced back to Baroness Hale's comment in *Campbell* to the effect that a photograph of the claimant merely shopping would not count as private information (see n 61 above). However, the comment was technically only *obiter* and was made prior to the findings as to daily life private information in *Von Hannover* [2004] EMLR 21 (n 75 above). The example given above of images posted online without consent of an individual drinking in a bar would not necessarily have added sensitivity, unless, for example, he/she had claimed to be a reformed alcoholic.

FINALLY FULLY DISCARDING THE PUBLIC DOMAIN DOCTRINE UNDER THE TORT IN THE DIGITAL ERA?

Design and (current) decline of the tortious 'public domain' doctrine

It has in the past been the case that a further hurdle must be overcome to establish a 'reasonable expectation of privacy' under the tort: the notion of 'public domain' has evolved in the jurisprudence, mainly with the traditional media in mind, as a potential bar to finding that the expectation exists.[86] The doctrine would be particularly problematic in relation to protecting privacy online, *but for* its recent decline in significance, prompted by the increase in online disclosures. The doctrine traditionally stated that if the personal information is already known to the public (to an extent that a court deemed significant) then the information has lost its private quality and so should no longer be protected.[87] Butler finds that the doctrine clearly derives from the 'all or nothing' analysis in breach of confidence actions,[88] while Wragg observes that a heavy reliance on the doctrine in the tortious context would align the tort more closely with such actions.[89] Such concerns, however, are to an extent misplaced: even in judgments prior to, or following closely on, the process of transformation of breach of

86 See *Douglas v Hello! III* [2005] EWCA Civ 595, [2006] QB 125 at [105]: 'In general ... once information is in the public domain, it will no longer be ... entitled to the protection of the law of confidence ... The same may generally be true of private information of a personal nature.'

87 For example, the focus of the court in *Terry and Persons Unknown* [2010] EWHC 119 (QB) and *Ferdinand v MGN* [2011] EWHC 2454 (QB) was on the number of people to whom the claimants had disclosed their affairs/the number who were aware of them. Given the relatively low numbers in question, the information was not found to be in the public domain. See, for the previous position under the doctrine of confidence, *Attorney General v Guardian Newspapers Ltd (No 2)* (1990) 1 AC 109.

88 Simplistically, the information either is or is not found to be confidential: O Butler, 'Confidentiality and intrusion: building storm defences rather than trying to hold back the tide' (2016) Cambridge Law Journal 452, 453.

89 P Wragg, 'Privacy and the emergent intrusion doctrine' (2017) 9(1) Journal of Media Law 14, 17.

confidence into the tort,[90] the doctrine was *not* applied in an absolutist fashion.[91]

Nevertheless, the doctrine has not yet been *entirely* discarded, and reliance on it as traditionally understood could clearly work to negate a tortious claim in respect of personal information disclosed online.[92] The potential for the rapid and widespread dissemination of personal information online clearly sits uneasily with some of the references to public domain in the earlier tort jurisprudence, which has focused mainly on persons who happened to be in a public place at the time. Finding that disclosure to small numbers who happened to be present would not negate the private quality of the information[93] could readily be taken to imply conversely that more widespread dissemination of the information online would do so.

Lack of doctrinal 'fit' especially in the online context

Judgments under the tort before the judgment of the Supreme Court in *PJS* (discussed below),[94] concerned mainly or partly with disclosures online, have to an extent followed the trends apparent from the offline case law in seeking to determine whether an element of privacy still exists despite prior online publication. But some unarticulated awareness of the difficulty and inaptness of applying the public

90 See *Attorney General v Guardian Newspapers Ltd (No 2)* (1990) 1 AC 109 which found that a small amount of disclosure of the information would not destroy its confidential quality. In *Douglas and Zeta Jones and Others v Hello!* [2001] 2 All ER 289, the fact that a large number of guests had observed the appearance of the couple at the wedding did not preclude the finding that the information remained confidential/private. Similarly, in *Browne v Associated Newspapers* [2008] QB 103, information disseminated to a circle of family and friends was distinguished from its publication in a newspaper.

91 There has also been a reluctance to allow the newspaper in question to take advantage of its own disclosure of the information: widespread disclosure of the information in that circumstance was not deemed to create a bar to establishing the reasonable expectation in *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB).

92 That may explain the decision in *Mosley v Google* [2015] EWHC 59 (QB). The High Court ruled that Max Mosley had a viable claim against Google, at [55], under the data protection scheme, but not under the tort, in respect of links created by Google to sexually explicit information concerning Mosley.

93 See, in particular, *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457; *David Murray v Express Newspapers* [2007] EWHC 1908 (Ch) and [2008] EWCA Civ 446. At Strasbourg, see *Peck v United Kingdom* App no 44647/98 (ECHR, 28 January 2003); *Von Hannover v Germany* App no 59320/00 (ECHR, 24 September 2004). Also see Wragg (n 89 above) 16.

94 *PJS (Appellant) v News Group Newspapers Ltd (Respondent)* [2016] UKSC 26.

domain doctrine in that context has been apparent.[95] In *Martin and Others* publication to a private Facebook account (where viewers were controlled) was not found to have placed the information in the public domain,[96] whereas in *Rocknroll v NGN* the focus was on both intrusion and the degree of disclosure:[97] the initial post was to a friend's private Facebook account and, until changes in the privacy settings, it could be viewed by his approximately 1500 friends, but not by the general public; no internet search would have located it. It was determined that there was still something private left to protect despite the reposting of the information to the more public platform, since its publication in a national newspaper – which had acquired the photographs from the Facebook posting – was found to be likely to create a greater intrusion on the claimant's privacy. A somewhat similar stance, but *purely* in the online context, was taken in *CG v Facebook Ireland Ltd and McCloskey (Joseph)*[98] in which a photograph of the claimant and information about his past as a sex offender were posted on Facebook pages, attracting there very hostile comments. Although the previous court case had been reported on, and the pages could be accessed by a large number of persons since privacy settings were not imposed, a reasonable expectation of privacy *was* found to arise, and the judges appeared to accept on appeal – although this was not clearly articulated – that the material need not be viewed as being in the public domain.[99]

The lack of 'fit' between the doctrine and the likelihood of disclosures of personal information online in the digital era has more clearly led to

95 In *AMP v Persons Unknown* [2011] EWHC 3454, the intimate images of the claimant were uploaded to a free online media hosting service for the sharing of images. They were then also uploaded to a Swedish site hosting BitTorrent files; they had clearly been viewed by a large number of persons, but the public domain issue did not feature in the decision that a reasonable expectation of privacy arose.

96 *Robert Gordon Martin and Heather Elaine Martin and Others v Gabrielle Giambrone P/A Giambrone & Law, Solicitors and European Lawyers* [2013] NIQB 48.

97 *Rocknroll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch) at [20]–[25].

98 [2015] NIQB 11.

99 *CG v Facebook* [2016] NICA 54. Hugh Tomlinson QC submitted on behalf of the claimant, referring only to the *reporting* of the case: 'In any event it is clear that information which is in the public domain can, through the passage of time, recede into the past and become part of a person's private life' [30], and this appeared to be accepted by the court. In *Reachlocal UK Ltd v Bennett and Others and Mason v Huddersfield Giants Ltd* [2013] EWHC 2869 (QB), concerning claims in defamation and confidence from a company, the issue was not clearly dealt with, but the court did not appear to consider that tweets viewed by thousands should be considered to be in the public domain for the purposes of the confidence claim.

its erosion as a result of the Supreme Court's decision in *PJS*.[100] The case, which concerned a celebrity couple's engagement in extra-marital sex, effected a clear departure from reliance on the traditional public domain analysis. The Supreme Court was concerned with reinstating the injunction,[101] but the findings would *also* apply to the 'reasonable expectation' test. The information in question was deemed to retain a 'private' quality:[102] the doctrine was *not* found to preclude finding that the information retained its ability to create intrusion, despite its very widespread disclosure on and offline in a number of jurisdictions. Rather than focusing mainly on the *extent* of its dissemination, the court considered the further *harm*, in terms of intrusiveness, that would arise due to its further publication in the English and Welsh press,[103] bearing in mind the 'greater influence, credibility and reach, as well as greater potential for intrusion of revelations in the press as compared with the internet …'.[104] That contention was doubted by Lord Toulson who argued that the Law Lords should not be seen as 'out of touch with reality' since the 'world of public information is interactive and indivisible',[105] but it formed part of the *ratio* of the judgment,[106] which undeniably represented a shift in the stance taken by the domestic courts to the public domain doctrine, of particular

100 *PJS (Appellant) v News Group Newspapers Ltd (Respondent)* [2016] UKSC 26.

101 It had already been accepted that, despite the widespread disclosure of the information, it retained its quality of being 'private'. The court reinstated the claimant's interim injunction: ibid at [71] (Lord Neuberger).

102 That was although it had been the subject of several articles outside the jurisdiction and had been widely disseminated online in the United States (US), Scotland and Canada. There was an abundance of US reportage on the rumours and on the subsequent judgments. See, for example, a US article concerning the case on a website, *Pop Goes the News* (19 May 2016), which deployed a disclaimer stating that the blog was not bound by the injunction since it was confined to the English and Welsh jurisdiction.

103 See *PJS (Appellant) v News Group Newspapers Ltd (Respondent)* [2016] UKSC 26 at [68] (Lord Neuberger).

104 Ibid at [69] (Lord Neuberger); see further Butler (n 88 above) 454.

105 *PJS (Appellant) v News Group Newspapers Ltd (Respondent)* [2016] UKSC 26 at [89].

106 Ibid at [88] and [89] respectively.

significance in relation to protection for privacy online.[107] Butler finds that the 'shift from confidentiality or secrecy to intrusion permitted the court to move from a rather abstract notion of the "public domain" to a more concrete notion of the *harms* that disclosure in a particular location and medium would do to the claimant and his family'.[108] That is also the position under the GDPR, but it is only relevant at the stage of considering competing freedom of expression and information claims, *not* at the stage of identifying 'personal data'.[109]

Entirely abandoning the 'public domain' notion: remaining differences between the tort and GDPR?

There is no express reference to the prior dissemination of the personal data under article 4(1) GDPR in relation to disclosures of personal information on or offline. Information already widely disclosed still retains the *status* of 'personal data', whereas under the tort, as discussed, dissemination of the information was found in the earlier case law to be able to overcome the expectation of privacy, rendering the information non-private and so precluding the need to balance its private nature against free expression interests. Even after *PJS*, that notion may possibly linger on, where publication in the traditional

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107 The intimate nature of the information may also have played a part – intimacy may in general have the ability to persuade courts to take a generous view of the public domain notion on the basis, it appears, that the greater its intimate quality, the more likely it is that a court would find that harm has been and would be caused by its disclosure, the situation in *PJS* (ibid). Information already to an extent in the public domain, but of a particularly intimate nature (in one case, consisting of a sex tape: *Contostavlos v Mendahun* [2012] EWHC 850) can still attract liability. See K Hughes, 'Publishing photographs without consent' (2014) 6(2) Journal of Media Law 180. Mead has suggested that the focus on intrusion may also imply that the more intimate the information the greater the harm that might be expected to arise from its disclosure in a particular medium or location, bearing in mind the intimate nature of the information at stake in *PJS*, but the Supreme Court did not expressly advert to that possibility. The information in *PJS*, relating to sexual trysts, was inherently private in nature: see D Mead, 'A socialised conceptualisation of individual privacy: a theoretical and empirical study of the notion of the "public" in MoPI cases' (2017) 9(1) Journal of Media Law 100, 126.

108 Butler (n 88 above) 453 (emphasis added).

109 That stance was adopted in the *Guidelines 5/2019 on the Criteria of the Right to be Forgotten in the Search Engines Cases under the GDPR*, adopted by the EDPB on 7 July 2020 at [48]: 'The rights of the data subjects will prevail, in general [referring to COJ, Case C-131/12, judgment of 13 May 2014, para 99; COJ, Case C-136/17, judgment of 24 September 2019, para 53] [over] the interest of Internet users in accessing information through the search engine provider. However, [the Court] identified several factors that may influence such determination … [including] the nature of the information or its sensitivity, and especially the interest of Internet users in accessing information.'

media, as opposed to online publication, is *not* in question. The ruling in *PJS* related to the greater harm that would be done by *press* disclosure, both online and offline, in England and Wales. The *PJS* principle, however, surely demands a focus on the harm that could still be caused by further disclosure, without necessarily demanding that the harm should arise only via *press* disclosure; that has already been accepted, impliedly, in relation to purely online disclosures.[110] If, for example, the threat to privacy arose due to named person searches,[111] or possibly from more popular websites, and/or ones that had, in terms of a reputation for reliability, attained a standing approaching that attributed to newspapers in *PJS*, it would appear that the harm-based principle from that judgment could be found to apply.

It is contended that attempts to apply this doctrine in the online context should now be clearly and definitively abandoned in seeking to identify a 'reasonable expectation of privacy'. Discussion of degrees of dissemination in that context, involving, for example, seeking to count the number of views of a tweet, approaches the farcical, while the question of the dissemination of the information has now divorced itself so comprehensively from any plausible meaning of the term 'public' as to render that term redundant. Reliance on the harm-based principle from *PJS* to find that information retains a claim for protection even where it has already been extensively disclosed online, departing from the stance taken as to online dissemination in *RocknRoll*, would enhance the tort's ability to protect privacy online effectively. A clearer adoption of such a harm-based test under the tort would still mean that its stance differed from that under the GDPR since the acquisition of the status of 'personal data' does *not* depend on considering the harm that disclosures could cause, but it *would* mean that widespread prior disclosure of the information would in the circumstances discussed have no more impact on its 'private' quality than it would on its 'personal' one under the GDPR.

There is no reference to the prior disclosures of their own personal information by data subjects under the GDPR article 4(1). Article 17 was also clearly designed to avoid distinguishing between personal data initially disclosed to the controller by the individual it relates to and data uploaded initially by a third party or the controller. It states that 'the data subject shall have the right to obtain from the controller the

110 See n 98 above and n 211 below.

111 As in Case C-131/12 *Google Spain SL and Another v Agencia Española de protección de Datos (AEPD) and Another* [2014] WLR 659 at [151]; in *NT1 and NT2 v Google LLC* (n 16 above), the court found: 'The CJEU was surely right to point out in *Google Spain* that information distribution via ISEs [internet search engines] is inherently different from and more harmful than publication via source websites.' Clearly, the search could find links to information from various sources, including from online press or broadcasting coverage.

erasure of personal data concerning him or her without undue delay' where one of a number of grounds applies,[112] including the situation in which the data subject 'withdraws consent on which the processing is based',[113] which would include instances in which subjects changed their minds after initially disclosing the personal information online themselves.[114] As a result, the fact of such initial disclosures by a data subject, or the provision of the specific information at issue by him/her to a third party who discloses it, has no effect on its status as personal data, nor does it mean that the right to erasure ceases to apply.

Conclusions

It is clear from the above that the presence of information in the public domain does not now usually adversely affect the prospects of success under the tort. The notion of taking account of the extent to which the information is already in the public domain is *not* entirely absent from the GDPR/DPA. But that notion *only* arises at the stage of considering competing free speech claims: the data *can* be disclosed if the journalistic 'exemption',[115] which can cover non-media actors, as discussed below, applies to its processing. The public interest value of the data is relevant in determining whether the 'exemption' applies and the IPSO's Editor's Code is relevant to determining whether a public interest in the information in question exists;[116] so doing includes considering whether the information is in the public domain,[117] and/or consideration of the data subject's 'own public disclosures of information'.[118] The Code has no legal status,[119] and its influence on judicial decisions is, as discussed below, variable, but this aspect of the exemption accords some traction to public domain notions under

112 The grounds are set out in art 17(1) (a)–(f).

113 Art 17(1)(b); it continues: 'according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing'.

114 Similarly, DPA 2018, pt 3, ch 3, s 47(4) (applying the right to erasure specifically in the law enforcement context) does not differentiate between the persons who initially uploaded the data, sub-section 4 simply stating that 'a data subject may request the controller to erase personal data or to restrict its processing'.

115 Under DPA 2018, sch 2, pt 5, para 26. See pages 59 onwards.

116 See the reference to the 'Editors' Code of Practice' under Data Protection Act 2018, sch 2, pt 5, para 26(6)(c); this appears to refer to IPSO's Editors' Code of Practice (n 45 above).

117 IPSO's Code (n 45 above), under 'Public interest', cl 3 provides: 'The regulator will consider the extent to which material is already in the public domain or will become so.'

118 IPSO's Code (ibid), cl 2(ii), provides: 'In considering an individual's reasonable expectation of privacy, account will be taken of the complainant's own public disclosures of information …'.

119 It has statutory recognition in the HRA, s12(4)(b), and, as indicated, under the DPA 2018 (n 125 below).

the DPA, and since IPSO's Code is also relevant to public interest arguments under the tort, under section 12(4)(b) HRA, the same point applies. Under the tort the extent to which the information is already publicly known has also become a relevant factor in balancing article 8 concerns against the demands of article 10.[120] The differences between the two causes of action in this respect can be viewed as minimal in the sense that under both the question whether the information was in the public domain, or had previously been disclosed by the claimant, should usually now be relegated to the free expression stage of the argument – see further below.[121]

THE SPEECH/PRIVACY 'BALANCING' ACTS UNDER THE TORT AND UNDER THE GDPR/DPA

Introduction

The so-called speech/privacy 'balancing act' under the tort, undertaken once it has been established that the information in question is private, is conducted as a parallel proportionality analysis under articles 8(2) and 10(2) ECHR:[122] each right is seen as creating a potentially justifiable interference with the other one. That balancing act is expected to be conducted in the same way under the GDPR since that was accepted under the previous data protection regime.[123] The GDPR, as discussed above, must also be interpreted and applied in conformity with the EU Charter of Fundamental Rights,[124] meaning that article 11 must be balanced against both articles 8 and 7 of the Charter. Since the

120 See n 139 below.

121 Their lack of traction at the *privacy* stage is implicit in *NT1 and NT2 v Google LLC* (n 16 above) [220]; it was found in relation to both the tort and the previous data protection scheme: 'The two interviews which NT2 now seeks to delist were given and published with his actual consent. That consent has now been withdrawn.' The information at issue had also been available to a large number of users of Google (unquantified). Nevertheless, NT2 succeeded under both causes of action.

122 As found in *Re S (A Child)* [2005] 1 AC 593; it was termed the 'ultimate balancing act' [17], per Lord Bingham.

123 See *NT1 and NT2* (n 16 above) [115]: 'the exercise the Court must undertake in this context is an assessment of proportionality (see Morland J in *Campbell v MGN Ltd* [116-117]) involving essentially the same Article 8/Article 10 "ultimate balancing test" as prescribed by *In re S (Murray v Express Newspapers* [2007] EWHC 1908 [76]'.

124 See 2000/C 364/01. *Lindqvist v Aklagarkammaren I Jonkoping* (C-101/01) 6 November 2003 [87].

interpretation of the Charter relies on the Strasbourg jurisprudence,[125] the balancing act under the GDPR appears likely to echo the one conducted under the tort, which itself relies on the relevant 'balancing' Strasbourg jurisprudence.[126] It is generally agreed in the academic literature, however, that some of the earlier tort jurisprudence as to conducting the 'balancing act' is unsatisfactory since it was largely (not wholly) developed with traditional media rather than purely free speech concerns in mind.[127] But, given the recently increased likelihood of claims against individuals and intermediaries, aimed at protecting privacy online, the discussion will argue for the desirability of a clearer focus on public interest demands, at times involving some departure from the established tort expression jurisprudence when conducting the balancing act under the GDPR/DPA, and indeed under the tort itself, of particular applicability in the online context.

The design of the balancing act under the tort

All aspects of the 'balancing act' under the tort have been strongly criticised. The notion of 'balancing' has in itself attracted criticism, both for its lack of clarity and for its reliance on a metaphorical reference to weighing scales that does more to obscure than illuminate the exercise apparently being undertaken.[128] The focus of the exercise has also

125 See art 52(3) of the Charter and Case C-400/10 *PPUJMcB v LE* [2010] ECLI:EU:2010:582. See also Case C-131/12 *Google Spain SL and Another v Agencia Española de protección de Datos (AEPD) and Another* [3] and n 132 below.

126 Under the HRA, ss 2 and 6. See n 137 and n 139 below.

127 See the later 'footballer cases', including *Terry and Persons Unknown* [2010] EWHC 119 (QB) at [55]. The judge adverted to Terry's portrayal of himself via the media as in some sense 'reformed'. In *Douglas v Hello!* [2001] 2 All ER 289, the sale of the couple's privacy (pictures of the wedding) to a different magazine, persuaded the court that their privacy interest had been downgraded in relation to the rival magazine's contentions. In *Campbell v MGN Ltd* [2004] 2 AC 457, the House of Lords accepted somewhat uncritically that there was a public interest in correcting the false image Campbell had previously portrayed to the media. See further G Phillipson, 'Press freedom, the public interest and privacy' in A Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press 2016).

128 See R Moosavian, 'A just balance or just imbalance? The role of metaphor in misuse of private information' (2015) 7(2) Journal of Media Law 196, 217: 'Thus perhaps "balance" acts as a convenient fiction which overlays an inherently creative, subjective and, to some extent, inexpressible interpretive activity …'. Wragg has gone further and argued that the balancing exercise is so vague that it fails to give judges any tools with which to effect the balance. He similarly argues that the parallel analysis relies upon 'abstract terms' focusing on the negative effects on freedom of expression: P Wragg, 'Protecting private information of public interest: Campbell's great promise, unfulfilled' (2015) 7(2) Journal of Media Law 225, 234. Clearly, it can also be argued that a negative impact on privacy could also arise.

been found, in some of the earlier cases involving journalism, to have come adrift from the free speech values recognised under article 10,[129] appearing to tend to benefit the traditional media actor,[130] given the range of matters that have been deemed to bear a relationship to the public interest. Contrary pronouncements have emerged from, for example, Lord Hoffmann in *Campbell*, who found that the 'relatively *anodyne* nature of the additional details [as to Campbell's drug addiction and treatment] is in my opinion important and distinguishes this case from cases in which ... there is a public interest ...'.[131] But the range and nature of the matters that the courts have quite frequently somehow found to create a public interest in the private information disclosed[132] are quite staggering to privacy advocates. At their most highly tabloid-friendly mode, such matters have included the need to enable public debate about possible antisocial conduct[133] and to allow newspapers to print private matters that the public feel some curiosity about, in order to ensure that a range of newspapers stay in business.[134] Not only have such factors quite often found purchase within the 'balancing act' in the earlier case law, but, as Mead has pointed out, the term 'public' interest itself has not always been taken

129 See E Barendt, *Freedom of Speech* 2nd edn (Oxford University Press 2007); F Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press 1982); H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press 2006) at 683 onwards. See also, for example: *Plon (Société) v France* App no 58148/00 (ECHR, 18 May 2004): significant political speech, although relating to an individual's private life, was accorded full recognition under art 10; see also *Campbell v MGN Ltd* [2004] UKHL 22 at [117].

130 See G Phillipson, 'Press freedom, the public interest and privacy' in A Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press 2016). See also n 133 below.

131 *Campbell v MGN Ltd* [2004] 2 AC 457 at [60]. Lord Nicholls in that instance similarly found that disseminating information about the claimant's attendance at Narcotics Anonymous meetings was of a 'lower order' than other forms of journalistic speech, such as political speech: ibid at [29].

132 These interpretations created for a period a reneging on the finding that arts 8 and 10 have equal value (as found in *Re S* [2004] UKHL 47 at [17]; *Campbell v MGN Ltd* [2004] 2 AC 457); findings in *Terry and Persons Unknown* [2010] EWHC 119 (QB) and *Ferdinand v MGN* [2011] EWHC 2454 (QB) implied that art 10 may *de facto* take precedence over art 8; that position was more clearly taken by the Court of Appeal in *PJS v News Group Newspapers* [2016] EWCA Civ 393, a position reminiscent of the English courts' pre-HRA jurisprudence. But the notion that art 10 has presumptive priority over art 8 due to the HRA, s 12(4), was eventually put to bed by the Supreme Court in *PJS (Appellant) v News Group Newspapers Ltd (Respondent)* [2016] UKSC 26 at [33].

133 *Ferdinand v MGN* [2011] EWHC 2454 (QB) and *Terry and Persons Unknown* [2010] EWHC 119 (QB).

134 *A v B plc* [2002] 3 WLR 542.

seriously since various *private* interests (such as a lascivious interest in the sex lives of the famous) have been elided with matters deemed to constitute the *public* interest.[135] The nature of the further linked sub-factors that have been identified also quite often show a traditional media-friendly tendency. Such factors have been found at Strasbourg, and then accepted in English cases such as *Weller*,[136] to include the celebrity or well-known status[137] of the claimant[138] and his/her 'prior conduct' as carrying weight on the article 10 side of the balance;[139] if they are present, the privacy interest may in effect be downgraded. The COJ has echoed that tendency in considering the application of article 11 of the Charter of Fundamental Rights, guaranteeing freedom of expression, when it is balanced against articles 7 and 8.[140]

The need for a stricter approach to determinations as to the public interest was, however, signalled by the Supreme Court in *PJS*.[141] The idea that the public interest could encompass allowing the media to disclose private facts in order to enable debate as to possible antisocial

135 Mead (106 above) 130.

136 *Weller v Associated Newspapers Ltd* [2015] EWCA 1176; first instance: [2014] EWHC 1163 (QB), [2014] EMLR 24.

137 See *Von Hannover v Germany (No 2)* App nos 40660/08 and 60641/08 (ECHR, 7 February 2012) at [108]–[113]; *Von Hannover v Germany (No 3)* App no 8772/10 (ECHR, 19 September 2013); *Axel Springer AG v Germany* App no 39954/08 (ECHR, 7 February 2012) at [101].

138 It was accepted in *Rocknroll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch) at [15] that a person with a role in national affairs would have a reduced expectation of privacy.

139 In *Couderc and Hachette Filipacchi Associes v France* App no 40454/07 (GC, 10 November 2015), prior conduct was viewed as a guiding principle for the balancing exercise at [93], and further at [130]; the findings implied that prior conduct *would have* been considered as a balancing factor here (it has its own sub-heading), but the Grand Chamber found that there was no material on the file which was 'itself sufficient to enable it to take cognisance of or examine the Prince's previous conduct with regard to the media', at [130]. It was, however, found that 'the mere fact of having cooperated with the press on previous occasions cannot serve as an argument for depriving a person discussed in an article of *all* protection', at [130] (emphasis added).

140 See Case C-131/12 *Google Spain SL and Another v Agencia Española de protección de Datos (AEPD) and Another* [2014] WLR 659 [81], [97]: 'the interest of the public in having [the information in question] is an interest which may vary, in particular, according to the role played by the data subject in public life …'. That stance was adopted in the *Guidelines 5/2019 on the Criteria of the Right to be Forgotten* (n 109 above): 'the interest of the public in having that information [is] an interest which may vary, in particular, according to the role played by the data subject in public life' [47].

141 *PJS (Appellant) v News Group Newspapers Ltd (Respondent)* [2016] UKSC 26 at [22]. See also Lady Hale's definition of public interest in *Jameel v Wall St Journal* [2006] UKHL 44, where she excludes 'vapid tittle tattle' about footballers from the definition: [147].

behaviour, one of the broadest possible traditional media-friendly factors envisaged, was finally firmly rejected[142] as a matter that could attract any weight on the article 10 side of the balance. But a somewhat less weak 'public interest' had previously been found to inhere in revealing truths about celebrities' private information, where they appeared to have misled the public, usually by presenting a false image.[143] The Supreme Court impliedly accepted the validity of that factor as apparently having a connection with the 'public interest', but concurred with the Court of Appeal's view that it did not apply in the instance in question, since no false image had been presented.[144] That finding is clearly open to criticism on the basis that the court took account, not of a matter of real value in free speech terms, especially in terms of audience-based justifications, but of a factor strongly linked to the somewhat symbiotic relationship between celebrities and the traditional media:[145] acceptance of the false image argument was reaffirmed without providing a defence of its connection with free speech values.[146] The argument from truth could apply but in a low-level form, given that little value attaches to the knowledge that a celebrity takes drugs; it hardly needs pointing out that this is a press-friendly argument since in general the press seeks – for obvious

142 It was previously rejected in *Mosley Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) at [127]: Mr Justice Eady found: 'it is not for the state or for the media to expose sexual conduct which does not involve any significant breach of the criminal law … It is not for journalists to undermine human rights, or for judges to refuse to enforce them, merely on grounds of taste or moral disapproval.' The same argument was also rejected on the facts in *Rocknroll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch): 'nothing in the [lawful] conduct of the claimant which the Photographs portray gives rise to any matter of genuine public debate, however widely drawn is the circle within which such matters may genuinely arise', at [33].

143 See *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457; *Terry and Persons Unknown* [2010] EWHC 119 (QB).

144 *PJS (Appellant) v News Group Newspapers Ltd (Respondent)* [2016] UKSC 26, 1091 [14]: the Supreme Court supported an aspect of the Court of Appeal's decision (*PJS (Appellant) v News Group Newspapers Ltd (Respondent)* [2016] EWCA Civ 100) in finding that 'there was no false image to require correction by disclosure of the claimant's occasional sexual encounters with others'.

145 Nevertheless, the Supreme Court in *PJS (Appellant) v News Group Newspapers Ltd (Respondent)* [2016] EWCA Civ 100 showed a strong awareness of the lack of significance in art 10 terms that would in general attach to celebrity gossip: 'But, accepting that Article 10 is not only engaged but capable in principle of protecting any form of expression, this type … is at the bottom end of the spectrum of importance … it may be that the mere reporting of sexual encounters of someone like the appellant, however well known to the public, with a view to criticising them *does not even fall within the concept of freedom of expression under Article 10 at all* …' at [24] (emphasis added).

146 Ibid at [14].

reasons – to target celebrities for reporting, and celebrities are highly likely to have attracted, and sought, publicity in the past.

A general determination was, however, evident in *PJS* to focus closely on the severity of the privacy intrusion, as compared with the flimsiness of the free speech arguments;[147] its stance was then echoed in the very close focus on the severe impact on the claimant of the intrusion into his private life evident in *Cliff Richard*;[148] the privacy argument prevailed in the face of article 10 arguments that had some plausible connections with the public interest.[149] The objective of refocusing the tort somewhat more clearly on such connections was evident to an extent in *PJS*, and that refocusing would also now be expected to become apparent in relation to speech/privacy balancing under the GDPR. But the possibility that a *stronger* focus on free speech values might arise in relation to privacy claims under the GDPR/DPA and tort is also canvassed below.

The GDPR/DPA protective framework for freedom of expression and information

Under article 7 of the previous Data Protection Directive,[150] echoed under the DPA 1998, schedule 2, paragraph 6, a condition of processing was that a legitimate interest applied; one such interest arose (article 7(f)) if 'the processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and

147 In particular, see Lord Mance's forceful final paras in *PJS* (ibid): 1104–1105, at [44]–[45].

148 *Sir Cliff Richard OBE v (1) The British Broadcasting Corporation (2) South Yorkshire Police* [2018] EWHC 1837 (HC) at [233]: 'Sir Cliff felt trapped in his own home, and he felt despair and hopelessness leading, at times, to physical collapse. At first he did not see how he could face his friends and family, or even his future.' That decision bears some similarity to the one in *Prince Charles*: on a possibly unique set of facts a fairly strong free speech argument, based on the value of political expression, was rejected in the face of a privacy argument weaker than the one in *Cliff Richard (HRH Prince of Wales v Associated Newspapers* [2006] EWCA Civ 1776); the defendant publishers (a large newspaper corporation) sought unsuccessfully to argue that the fact that the Prince was lobbying democratically elected ministers was of public interest since, as heir to the throne, he was expected to be politically neutral; at [123]–[124].

149 *Sir Cliff Richard OBE v (1) The British Broadcasting Corporation (2) South Yorkshire Police* [2018] EWHC 1837 (HC). Mr Justice Mann considered the notion of public interest at length; the disclosure that Cliff Richard was being investigated for historical sexual abuse did have legitimate public interest value, but it was also noted that a point of relevance concerned the motivation of the BBC in making the disclosure [279]–[280].

150 Directive 95/46/EC.

freedoms of the data subject which require protection under Article 1(1)'. That wording is largely, not wholly, reproduced under article 6(f) GDPR; a key change is that special protection is provided for children as data subjects, and in that respect article 6(f) is in alignment with the tort wherein such protection has already been established.[151] The legitimate interests under article 7(f) were found in *Google Spain* to include the interest in serving freedom of expression and information.[152] But since in relation to the right to erasure under article 17, a specific provision, article 17(3)(a), refers to processing serving those freedoms, a processor against whom the right is claimed would tend to rely on that provision rather than on the legitimate interests exception. The free expression jurisprudence discussed below refers to article 7(f) under the previous Directive since article 17 was a clarifying introduction in the GDPR; nevertheless, it is highly probable that that jurisprudence will be relied on under the GDPR since it will also be interpreted in accordance with the Strasbourg speech/privacy balancing jurisprudence. So, that jurisprudence will determine the impact of article 17(3)(a), which provides: '(3) Paragraphs 1 and 2 [the right to erasure/'to be forgotten'] shall not apply to the extent that processing is necessary: (a) for exercising the right of freedom of expression …'.[153] The term 'to the extent that' invites consideration of the speech/privacy balancing act. Under the GDPR, alongside the protection for freedom of expression specifically applying to the right of erasure, there is also a potential or apparent difference between the data protection scheme and the tort: freedom of expression[154] finds a further layer of protection applying to processing generally in the form of the journalistic 'exemption'.

The current iteration of the 'journalistic exemption'

Article 85 GDPR provides that member states shall 'by law reconcile the right to the protection of personal data … with the right to freedom of expression and information, including processing for journalistic purposes'[155] and invites member states to detail derogations.[156] The 'journalistic' aspect of the GDPR/DPA expression-protective

151 See n 65 above.

152 See n 26 above. The COJ spoke of striking 'a fair balance' between 'the legitimate interest of internet users potentially interested in having access' to the information and 'the data subject's fundamental rights under articles 7 and 8 of the Charter': [81].

153 Text in square brackets added.

154 Freedom of expression includes 'free access to information', according to the *Guidelines 5/2019 on the Criteria of the Right to be Forgotten* (n 109 above) at 11.

155 Art 85(1).

156 Art 85(2).

framework arises under schedule 2, part 5, paragraph 26 DPA 2018, which provides that journalism is a 'special purpose',[157] and 'the listed GDPR provisions [including the 'right to be forgotten'] do not apply to the extent that the controller reasonably believes that the application of those provisions would be incompatible with the special purposes' (paragraph 26(3)). The exemption would not therefore apply if, in seeking to follow a journalistic purpose, a belief that a data protection principle could therefore be disapplied was found to be unreasonable,[158] a requirement that could exclude a range of actors from the exemption, including traditional media bodies. Paragraph 26(2) provides, based largely on the journalistic exemption that arose under section 32 DPA 1998, that the exemption applies to the processing of personal data carried out for the special purposes if '(a) the processing is being carried out with a view to the publication by a person of journalistic ... material'. Before considering the further requirements needed to satisfy the exemption, it is important to seek to establish the meaning likely to be attributed to 'journalistic purposes' under the DPA 2018, but it should be noted that content deemed non-journalistic could fall within one of the other special purposes.[159]

The 2018 Act fails to state whether the speech of citizen (non-professional) journalists is covered by the exemption, or to proffer a definition of 'journalistic', although it is notable that the general term 'controller' rather than 'journalist' is used in paragraph 26. The wording of the exemption was also widened somewhat under the current regime, removing the previous requirement that data had to be processed for journalistic purposes *alone*, thus making it

157 Para 26(1)(a).

158 See *True Vision Productions v IC* (EA/2019/0170), hearing: 23 and 24 November 2020. The Information Commissioner had issued a monetary penalty notice to the broadcast production company, imposing a penalty of £120,000, which related to recording, both video and audio, in most of the examination rooms at Addenbrooke's Hospital through CCTV cameras and microphones, with the key purpose that the recording would capture the moment of diagnosis when the mother learned that her baby had died. It was found that the fact of recording was not fully brought to the attention of the mothers in question, and they did not give consent to it. The judge considered that 'a belief that it was impossible to comply with the data protection principles without referring to, or hinting at, the real purpose of the recording' [23] was a reasonable belief (because it related to the key journalistic purpose of the film) so far as obtaining 'explicit consent' under sch 3 DPA 1998 was concerned [25]. But the judge found that 'it was not reasonable to believe that collecting the data required could only be achieved in a way that was incompatible with the principle of fairness' [26] because hand-held cameras could have been used. The exemption did not therefore apply.

159 Para 26(1)(b)–(d) covers academic, artistic or literary special purposes.

more likely that non-journalists could fall within it.[160] The COJ in *Google Spain* held that the search engine Google could *not* rely on the exemption under the 1995 Directive,[161] but nevertheless left open the possibility that website hosts/social media platforms could rely on it in certain circumstances.[162] The pivotal issue, following the COJ findings in *Satamedia*, is likely to be whether content seeks to transmit 'information' or 'ideas' to the public; the COJ also found that the notion of 'journalistic' under the previous Directive should be construed broadly.[163] The court in the English case of *Sugar* found that 'journalism' should *only* encompass the discussion of 'current affairs',[164] but the significant decision in *NT1 and NT2*, relevant to the 'right to be forgotten', provided some guidance on this issue under the previous scheme,[165] which adopted a broader stance. Lord Justice Warby accepted that the journalistic exemption has a 'broad' reach under EU law, and held that 'the concept extends beyond the activities of media undertakings and encompasses other activities, the object of which is the disclosure to the public of information, opinions and ideas'.[166] That was clearly a very generous reading of the extent of the exemption; he sought, however, to place a constraint on its scope, but of a fairly imprecise nature, finding that not 'every' role involving distributing information and ideas could be viewed as journalism,

160 Under the old regime data had to have been processed for journalistic purposes *alone* (with no additional motives); that is no longer the case. See: DPA 1998, s 32; N Cain and R Carter-Coles, 'GDPR and the Data Protection Act 2018 – how do they impact publishers?' (*RPC* 28 May 2018).

161 See n 26 above; the decision referred to Directive 95/46/EC. In *NT1 and NT2* (n 16 above) at [98]–[102], the judge reiterated that search engines do not fall within the exemption. See further F Brimblecombe and G Phillipson, 'Regaining digital privacy? The new 'right to be forgotten' and online expression' (2018) 4(1) Canadian Journal of Comparative and Contemporary Law 1, 34–35.

162 Case C-131/12 *Google Spain SL and Another v Agencia Española de protección de Datos (AEPD) and Another* [2014] WLR 659, ECLI:EU:C:2014:317 at [85].

163 See Case C-73/07 *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy* [2008] ECR I-09831, ECLI:EU:C:2008:727 at [61]. See [56]: 'In order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary, first, to interpret notions relating to that freedom, such as journalism, broadly …'. See further: Brimblecombe and Phillipson (n 161 above); A Flannagan 'Defining "journalism" in the age of evolving social media: a questionable EU legal test' (2012) 21(1) International Journal of Law and Information Technology 1–30.

164 *Sugar v BBC (and Another)* [2012] 1 WLR 439. See also H Tomlinson, 'The "journalism exemption" in the Data Protection Act: part I, the law' (*Inforrm* 28 March 2017).

165 *NT1 and NT2 v Google LLC* (n 16 above). Although the case was decided under the DPA 1998, there is a high degree of overlap between the journalistic exemption under both Acts, as mentioned above.

166 Ibid at [98].

since so doing would 'elide the concept of journalism with that of communication'.[167] That caveat placed on his earlier comments was clearly intended to indicate that the exemption does not necessarily extend to *any* processing conveying ideas or information (bearing in mind that links created by search engines have been found to be outside the exemption). But it fails to create any clear distinction between journalistic and other communicative expression. His generous reading had previously been echoed by the Information Commissioner,[168] and also in findings in *The Law Society and Others v Kordowski*[169] under the previous regime; the court was clear that a private individual can engage in internet journalism: 'Journalism that is protected by s32 involves communication of information or ideas to the public at large in the public interest', an interpretation clearly potentially consistent with the importance of free expression in general.[170]

The main emphasis under the 2018 Act, from the findings above, is likely to be placed, not on the term 'journalistic', but on the public interest value of the expression or information.[171] Given those findings as to 'journalistic', that term, under the current iteration of the exemption, appears to be unlikely to operate frequently in an exclusionary fashion, and to add little to the other requirements of paragraph 26, which include the requirement that 'the controller reasonably believes[172] that the publication of the material would be in the public interest'. Under paragraph 26(4), in making that determination, 'the controller must take into account the special importance of the 'public interest in the freedom of expression and information'. The term 'reasonably' obviously indicates that a purported belief that publication is in the

167 Ibid.

168 'We accept that individuals may be able to invoke the journalism exemption if they are posting information or ideas for public consumption online, even if they are not professional journalists and are not paid to do so.' 'ICO guidance Data Protection and Journalism: A Guide for the Media' (Information Commissioner 2014).

169 [2014] EMLR 2. The High Court found that the exemption was inapplicable in relation to a website set up by an individual to name and shame 'solicitors from hell' because the communications to the public at large lacked 'the necessary public interest' [99].

170 Ibid at [99].

171 So finding might clearly tend to undermine the notion of 'journalistic' speech as distinctive: see Brimblecombe and Phillipson (n 161 above) 35–37.

172 Para 26(2)(b). For discussion of 'reasonably believes' under the DPA 1998, s 32, see the Court of Appeal in *Campbell v MGN* [2003] QB 658. A clear parallel could be drawn with s 4(1) Defamation Act 2013, providing: 'It is a defence to an action for defamation for the defendant to show that (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.'

public interest without substance would not satisfy this requirement. While the exemption therefore apparently relies on establishing objective and partially subjective elements, if the requirements under paragraphs 26(4) and (3) are satisfied, it appears to be likely, with the probable exception of search engines, that the 'journalistic purposes' element would also be. The need for a reasonable belief of the controller in the public interest value of the information would exclude online intermediaries in some circumstances; if there was no evidence that an intermediary had taken cognisance of such value, the exemption could not apply.[173] The requirement as to taking such cognisance, however, could be satisfied in some circumstances by search engines, and their exclusion from the exemption has been questioned.[174]

The wording of the requirement under paragraph 26(4), taken at face value, could mean that there is a public interest in the mere fact of expression in itself, regardless of establishing a separate specific interest. The tort jurisprudence has had to confront a similar provision under section 12(4) of the HRA which requires that: 'The court must have particular regard to the importance of the Convention right to freedom of expression.' That provision receives some reinforcement since the court is also required to 'take account of a relevant privacy code' in relation to 'journalistic material',[175] and IPSO's Code finds that there is a public interest in freedom of expression itself.[176] But the tort jurisprudence, influenced by Strasbourg, has *not* taken the stance that the mere fact of expression, without more, creates a public interest. Had it failed to reject that stance, the speech/privacy balancing act would have been tipped towards favouring article 10 over article 8.[177] So, if paragraph 26(4) DPA is interpreted consistently with that aspect of

173 See *CG v Facebook Ireland Ltd and McCloskey (Joseph)* Neutral Citation No NICA 54; [2015] NIQB 11. In *NT1 and NT2* (n 16 above) Google refused to de-list links to previous convictions of one of the claimants, on the basis that they 'relate to matters of substantial public interest to the public regarding [that claimant's] professional life' [8]. But at [102] it was found: 'There is no evidence that anyone at Google ever gave consideration to the public interest in continued publication of the URLs complained of …'. Thus, it was found that the exemption did not apply to Google.

174 In *Townsend v Google Inc & Google UK Ltd* [2017] NIQB 81, it was claimed on behalf of Google Inc at [60] that 'to ask the question as to whether a search engine is journalism is to ask the wrong question. Rather the enquiry should be whether the material is journalistic material.'

175 S 12(4)(b).

176 See IPSO's Code (n 45 above) at para 2.

177 It was established in *Re S (A Child)* [2005] 1 AC 593 and *Campbell v MGN Ltd* [2004] UKHL 22, despite the provision of s 12(4) HRA, that the articles must be treated as of equal weight. That was reaffirmed by the Supreme Court in *PJS (Appellant) v News Group Newspapers Ltd (Respondent)* [2016] UKSC 26 at [33]. See in contrast text to n 127 above.

the tort jurisprudence that would prevent the exemption from applying to *any* expression processed for 'journalistic purposes' – a specific further public interest would have to be identified. In considering that interest, the fact that the disclosure of private information was carried, for example, on a non-journalistic website of similar standing to that of a serious, well-regarded newspaper[178] could be taken into account, on the basis that an objective of the entity in question was to play a significant informative role in a democracy, aiding democratic self-governance.[179] As Coe puts it, 'media freedom [need not] be a purely institutional privilege; it can apply to any actor[s]'.[180] In this context that would arguably be the case if, for example, such online actors conformed to certain requirements associated with, but not confined to, professional journalism, such as checking sources. Online material fulfilling such requirements could be found to be more likely to satisfy the public interest demands of the exemption. Placing the emphasis on the public interest requirement of the exemption may tend to elide it with other aspects of the speech protective framework of the GDPR/DPA. But it would avoid the possibility that the mere invocation of the term 'journalistic' in paragraph 26 would place media-created, privacy-invading material in a privileged position, given that such material does not usually make the contribution to the marketplace of ideas,[181] to furthering democracy or the search for truth that originally underpinned the idea of media privilege, recognised in article 11(2) of the EU Charter of Fundamental Rights and at Strasbourg.[182] But, given the range of online actors that may now fall within the exemption, the idea of such privilege may now require a re-evaluation in order to cover expression of media *and* non-media actors of genuine public interest.

Expression outside the exemption under the GDPR/DPA

Some online privacy-invading expression might be found to fall outside the exemption due *inter alia* to failing the public interest

178 Communications associated with the traditional media, as is well established, have occupied a privileged position in the speech jurisprudence of a number of jurisdictions; see J Oster, 'Theory and doctrine of "media freedom" as a legal concept' (2013) 5 Journal of Media Law 57–78.

179 See Barendt (n 129 above) 18; *Bergens Tidande v Norway* (2001) 31 EHRR 16 at [48].

180 P Coe 'Re-defining "media" using a media-as-a-constitutional-component concept: an evaluation of the need for the ECtHR to alter its understanding of "media" within a new media landscape' (2017) 37(1) Legal Studies 25–53, at 51.

181 For discussion, see eg J Gordon, 'John Stuart Mill and the "Marketplace of Ideas"' (1997) 23(2) Social Theory and Practice 235–249.

182 It states: 'freedom and pluralism of the media shall be respected'. The Strasbourg Court has also recognised a privileged position of the media; see eg *Lingens v Austria* (1986) A 103 at [42]; *Goodwin v UK* (1996) 22 EHRR 123 at [39]; *Perna v Italy* (2004) 39 EHRR 28; *Armonienė v Lithuania* [2009] EMLR 7 at [39].

test, so it could be covered by article 85, article 6(f) or under article 17(3)(a) (where the right of erasure is sought). At first glance it is hard to conceive of an online processing of private information that would *not* convey information or ideas – potentially attracting the exemption – but would still have some value in free expression or information terms. Thus, the role of the more general provisions could potentially be minimised. But the exemption would not apply if there was no evidence that an online intermediary had adverted to the public interest value of the expression, since paragraph 26(2)(b) would not be satisfied, and, if the exclusion of search engines from the exemption is maintained, it would not apply even where they had so adverted.[183] In such instances expression of some value could be covered under article 17(3)(a) (in the case of an erasure request) or under the general provisions and would have weight in the balancing act. An example in which the exemption was not found to apply is provided by *Townsend v Google Inc & Google UK Ltd*:[184] the plaintiff had requested that Google Inc should de-list seven of 12 previously notified URLs because they indicated that he was a sex offender.[185] The claim failed, partly due to the speech value of the expression[186] as put forward on behalf of Google, given the principle of open justice, and the value of enabling the public to gain access to information of significance, facilitating, for example, public debate as to rehabilitation of sex offenders.[187]

183 See the findings in *NT1 and NT2* (n 16 above) which could be taken to imply that the exemption could apply if there was evidence that a search engine had adverted to the public interest.

184 [2017] NIQB 81.

185 The argument was put forward under condition 6, sch 2 of the DPA 1998.

186 It was found that there was a clear public interest in open justice and a clear right to freedom of expression (*Townsend v Google Inc & Google UK Ltd* [2017] NIQB 81 at [61]). The processing was found to be warranted, which meant that there was no triable issue as to the plaintiff's entitlement to rely on his s 10 DPA notice and therefore no breach of the sixth principle (at [64]–[65]). (The claim failed under the tort on the basis that when a conviction became spent under the Rehabilitation of Offenders Act 1974 that was 'usually' the point at which it might recede into the past and become part of a person's private life. But the court found that the term 'usually' permitted 'facts and circumstances which may take the case out of the usual either one way or the other' (at [32]) and did not find that there was a basis for finding that it had become part of his private life). See also n 39 above.

187 A similar conclusion was reached in *CG v Facebook* [2016] NICA 54 at [43]: 'We agree that with the passage of time the protection of an offender by prohibiting the disclosure of previous convictions may be such as to outweigh the interests of open justice. In principle, however, the public has a right to know about such convictions.'

Similarities between the 'balancing act' under the tort and that under the GDPR/DPA expression-protective framework

The requirements of free expression and information under the GDPR, article 85, article 17(3)(a), article 6(f) and paragraph 26(4) DPA are likely to be interpreted consistently with article 10 ECHR,[188] as discussed above, which also influences the interpretation of article 11 of the EU Charter of Fundamental Rights.[189] Strasbourg has reiterated, albeit in a somewhat tokenistic fashion, due to the impact of the margin of appreciation doctrine,[190] that to justify disclosures of private information identification of a genuine public interest is needed, which must be distinguished from matters that the public feel an interest in.[191] Only the former is deemed capable of adding weight to the article 10 argument. It would appear then that merely establishing that the public would display curiosity as to the information in question would be insufficient to satisfy the GDPR/DPA free expression requirements.[192]

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188 That was the stance taken under the DPA 1998, s 32: see *Campbell v MGN Ltd* (CA) [2003] QB 658 at [133]–[138].

189 See text to n 125 above.

190 See *Von Hannover v Germany (No 2)* App nos 40660/08 and 60641/08 (ECHR, 7 February 2012); *Von Hannover v Germany (No 3)* App no 8772/10 (ECHR, 19 September 2013); *Axel Springer AG v Germany* App no 39954/08 (ECHR, 7 February 2012).

191 See *Couderc and Hachette Filipacchi Associes v France* App no 40454/07 (ECHR, 12 June 2014) at [100]. Although there was a public interest in knowing of the existence of the illegitimate child when Prince Albert was unmarried, the court found: 'The Court has also emphasised on numerous occasions that, although the public has a right to be informed, and this is an essential right in a democratic society which, in certain special circumstances, can even extend to aspects of the private life of public figures, articles aimed solely at satisfying the curiosity of a particular readership regarding the details of a person's private life, however well-known that person might be, cannot be deemed to contribute to any debate of general interest to society.' However, although the Strasbourg Court noted in that instance that sex lives, even of public figures, are an inherently private matter (at [99]) and are often deserving of art 8 protection, the claimant's art 8 rights did not ultimately prevail. See also *Von Hannover v Germany (No 2)* (n 190 above) at [114]. As to the 'public interest' requirement under the DPA 2018 journalism exemption, Tomlinson (n 164 above) finds: 'the provision contemplates a "public interest" justification for processing of a similar type to that required to justify the publication of private or confidential information: a belief that the public will be interested in the story or that publication of stories of that type is necessary for the economic viability of the publisher *will not be enough*' (emphasis added).

192 Such a claim would not appear to provide a 'compelling' basis under art 21(1) for continued processing, under art 6(1): there must be 'compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject …'.

Where relevant, the GDPR/DPA balancing act is likely to be conducted as it would be under the tort,[193] in the sense that the relevant arguments under articles 8 and 10 ECHR are weighed with close intensity against each other on an equal footing. The stance that the English courts will take when balancing article 8 and 10 rights under the GDPR/DPA framework protecting expression and information is fairly predictable; while they may take account of guidance from national Data Protection Authorities across Europe,[194] and the European Data Protection Board (EDPB), it is highly probable that they will be drawn towards relying on the 'balancing' jurisprudence relating to the previous DPA regime and developed to a greater extent under the tort.[195] The guidance provided so far by the EDPB on this matter is of a general nature, leaving open a great deal of leeway for interpretation.[196] The term 'public interest' is also obviously open to interpretation: it might appear that the traditional media-friendly stance at times taken under the tort, as discussed above, could permeate the future GDPR/DPA expression jurisprudence.[197] In the *traditional media* context on or offline that is likely to be the case – the courts' conception of the public interest elements under the GDPR/DPA is likely to be informed by the factors relied on under the tort, and possibly could lead to the underuse of the new data protection scheme, as occurred under the DPA 1998.[198] The public interest could be found to include, conceivably, 'information as

193 The use of the balancing act as under the tort in respect of the provision equivalent to art 6(f) under the DPA 1998, sch 2, condition 6(1), was affirmed as appropriate in *NT1 and NT2 v Google LLC* (n 16 above) at [115], [132]. In Case C-131/12 *Google Spain SL and Another v Agencia Española de protección de Datos (AEPD) and Another* [2014] WLR 659 [81], [97], it was found that a similar balancing act would apply to the interpretation and application of the previous Directive. See also n 125 above.

194 Arts 51–67 of the GDPR set out an enhanced role for national Data Protection Authorities, encouraging different authorities to work together and to insist on implementing rules. See P De Hert and V Papakonstantinou, 'The proposed Data Protection Regulation replacing Directive 95/46/EC: a sound system for the protection of individuals' (2012) 28(2) Computer Law and Security Review 130, 138; L Costa and Y Poullet, 'Privacy and the regulation of 2012' (2012) 28 Computer Law and Security Review 254, 255.

195 As argued in Brimblecombe and Phillipson (n 161 above).

196 See n 140 above.

197 Tomlinson (n 164 above) sees it as probable in relation to the exemption under the DPA 2018 that the English courts will look to the tort jurisprudence to interpret it, as they did under the DPA 1998.

198 It has been found in a number of instances offline that nothing would be gained benefitting either claimant, from engaging in the balancing act under the DPA 1998, than would have been obtained under the tort: see n 4 and n 5 above.

giving an account of a particular mode of living',[199] but more probably reliance might be placed on the 'role model' argument, which was not rejected in *PJS*, and the 'correcting false impressions' notion,[200] since it received express acceptance from the Supreme Court. But it is argued below that where private actors, including intermediaries, misuse private information online, the forthcoming speech jurisprudence is likely to show some fairly marked departures from acceptance of public interest factors of doubtful value in speech terms under both data protection and the tort.

A closer focus on free speech and information values under the GDPR/DPA and tort in the online context?

While the 'public interest' factors on the article 10 side of the balance already established under the tort jurisprudence could influence the balancing act under the GDPR/DPA, they would be less relevant where the data controller is a non-journalist and the private information does not relate to a high-profile public figure.[201] That clearly also applies to the interpretation of the 'public interest' element of the journalistic 'exemption' since it covers speech published or hosted by such actors.[202] The 'public interest' factors identified tended to be linked to interests of the traditional media and so would clearly have a less ready application outside that context. If such factors have in reality merely been used at least partly as a proxy for promoting media freedom by enabling the traditional media to satisfy public curiosity as to celebrities' private lives, then they should be discarded in interpreting the speech protective framework under the GDPR/DPA, since it was designed and developed with freedom of expression and information rather than the interests of the traditional media in mind. Early and tentative intimations of such a discarding in the online context are currently becoming apparent under data protection

199 This position was accepted in *Von Hannover (No 3)* App no 8772/10 (ECHR, 19 September 2013). But this notion sits very uneasily with the stance as to weak public interest arguments taken in *PJS (Appellant) v News Group Newspapers Ltd (Respondent)* [2016] UKSC 26; it is to an extent cognate with the disapproved-of notion of using private information to enable a debate about possible anti-social behaviour (text to n 94 above).

200 See further Brimblecombe (n 22 above).

201 Art 29 of the previous Directive established a Working Party on the Protection of Individuals with regard to the Processing of Personal Data which set out various criteria relevant to balancing privacy and expression claims; it included quite an expansive interpretation of 'public figures', which could include persons in business. Art 68 and recital 139 of the GDPR confirmed the establishment of the EDPB to replace the Working Party; the EPDB is likely to accept the stance of the Working Party.

202 See the comments of the Strasbourg Court on this point in *Ahmet Yildirim v Turkey* (3111/10) 18 November 2012 at [56].

and the tort, giving rise to the prospect of interpreting the article 10 aspect of the balancing act in a manner that involves a closer scrutiny of real connections with free speech, as opposed to traditional media, concerns.[203] The possibility of such scrutiny found some expression in the significant case of *NT1 and NT2 v Google*.[204]

The claims were brought under both the tort[205] and the DPA 1998, so the balancing act was conducted in relation to both causes of action; as far as the DPA claim was concerned, free expression and information arguments were adverted to under the sixth condition for lawful processing,[206] now echoed in article 6(f) GDPR.[207] The personal data in question could be accessed via personal name searches to links operated by Google;[208] the links were to the spent fraud-related convictions of two businessmen, who wanted them to be expunged. Relying on the balancing act developed under the tort,[209] the court found that NT1's de-listing ('erasure') request should not be sustained, on the basis that the public needed to know that he had past convictions for dishonesty in relation to business dealings/enterprise, since he was seeking to start up new companies and was apparently attempting to give a false impression as regards his honesty in business dealings via postings 'cleansing' his image. So, it appeared that there was a legitimate public interest in allowing information as to his convictions to remain online, accessible via Google, so that people were aware of whom they were dealing with; the obvious implication was that he could demonstrate dishonesty in future business dealings. That finding tipped the balance in favour of expression and information, but only after an extensive discussion of the competing speech and privacy-based arguments.[210] The same balancing act was conducted in relation to NT2; although there was some evidence that he had also sought to present a somewhat distorted image to the public, and the information in question was available on more than one website,

203 See eg as to the differences between the two: Chief Justice Brennan, 'Address' (1979) 32 Rutgers Law Review 173; P Wragg, *A Free and Regulated Press: Defending Coercive Independent Press Regulation* (Hart 2020).

204 *NT1 and NT2 v Google LLC* (n 16 above) especially at [111], [130], [168].

205 Ibid at [172] and [226].

206 DPA 1998, sch 2, condition 6(1).

207 See text to n 150 above.

208 The case followed the breakthrough decision in *Google Spain* (see n 26 above) which also concerned name-based searches [98].

209 *NT1 and NT2 v Google LLC* (n 16 above) [115], [132].

210 It was stated (at [166(4)]): 'Freedom of expression has an inherent value, but it also has instrumental benefits which may be weak or strong according to the facts of the case'. The close focus on both arts 8 and 10 involved lengthy consideration, extending from [136]–[172].

regardless of named person searches,[211] a close focus on the true value of Google's free expression claim led to the finding that the privacy argument should prevail. It was found:

> ... there is just enough in the realm of private and family life to cross the threshold. The existence of a young, second family is a matter of some weight ... The claimant's current and anticipated future business conduct does not make his past conduct relevant to anybody's assessment of him, or not significantly so.[212]

In both instances, a close focus on both expression and privacy was achieved and, although the case concerned the presentation of a false or distorted image to the public, the tort jurisprudence concerning such images, in the traditional media context, was not referenced. The findings would clearly now also be relevant under aspects of the GDPR/DPA protective framework for expression and information.

NT1 and NT2 indicates that the courts are ready to accept that, since freedom of expression arguments under the GDPR/DPA or tort are applicable in instances of online disclosures of information outside the traditional media context, their interpretation reaches beyond that context and need not be formulated with the traditional media in mind.[213] Since the distraction of considering protection for freedom of the traditional media is removed, the scrutiny accorded to such arguments can focus more clearly on the question whether factors are present that have any genuine connection with free speech values. The expression at issue in *NT1 and NT2* clearly had little or no connection with supporting democracy or contributing to the marketplace of ideas. Essentially, it related mainly to the private business interests of certain persons who might consider entering into dealings with either claimant: it had some informative value as far as such persons were concerned. It is therefore unsurprising that NT2's private and family life interests – although not very compelling – overcame the expression and information claim. In contrast, it was found that the impact on NT1's family life was merely speculative,[214] and the information itself was only doubtfully to be deemed 'private'.[215]

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211 Google's public domain argument did not succeed; see in particular [220].

212 See n 213 below, at [226].

213 A further example of such a tort claim where the respondents were not mass media entities (and where the DPA was viewed as of relevance to the claim) arose in *CG v Facebook Ireland Ltd and McCloskey (Joseph)* [2015] NIQB 11; in part the case concerned the expression value of a Facebook post from two private individuals concerning CG's conviction for sexual offences, in terms of open justice and warning the public, as compared with CG's privacy interest (which prevailed), linked in part to the impact on his family life that he might face as a result of the postings. See further text to n 98 above.

214 *NT1 and NT2 v Google LLC* (n 16 above) at [154].

215 Ibid at [140].

Overall, therefore, given the shaping of the GDPR/DPA with the creation of stronger protection for personal privacy in mind, as compared with aspects of the design and development of the tort, with traditional media concerns often to the fore, expression claims may be subject to a stronger scrutiny to determine their real connection, if any, to protecting free speech rather than (quite often) press interests. The rise of claims concerning online privacy *outside* the traditional media context is *also* prompting a gradual change of direction under the tort, meaning that the body of expression jurisprudence arising in future, albeit sometimes under the established balancing act, is likely also to show such a connection, or, alternatively, to expose its weakness more readily. Speech jurisprudence in general outside the privacy context, arising in a number of jurisdictions, demonstrating connections with the classic free speech values, tends to arise mainly in media or public protest contexts and to concern matters of general interest.[216] The difficulty of finding such connections in relation to disclosures of private information has at times been obscured under the tort so far, since most (not all) of the key cases concern the press and high-profile public figures. But now that the focus of the jurisprudence is becoming more likely to concern online privacy intrusion by private actors or intermediaries, and therefore more often the public or private lives of private or semi-public figures,[217] the notion that connections can be found with the classic free speech values in privacy cases will be more readily exposed for the hollow argument that it usually is.[218] In such instances the balancing act itself would often merely be irrelevant since there would be nothing of value to place on the article 10 side of the balance, as in, for example, instances giving rise to GDPR, and tort, claims in which search engines or social media platforms collect personal data concerning consumer preferences (browser-generated information) to disclose for commercial profit.[219] The information would almost always have value only in terms of *private* gain; no plausible public interest value could be claimed.

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216 See n 129 above.

217 But see *Google Spain SL* (n 26 above) at [81], [97] as to the expansive definition of a 'public' figure adopted under the previous scheme, likely to be adopted under the GDPR; NT1 as a businessman was viewed on that basis as a public figure with a reduced expectation of privacy. That definition is in some tension with *Von Hannover v Germany (No 1)* (2005) 40 EHRR 1 [63] which identified a 'fundamental distinction ... between reporting facts capable of contributing to a debate in a democratic society and reporting details of the private life of an individual who does not exercise such functions'.

218 See n 145 above.

219 See, for current examples, but arising under the previous data protection regime, n 9 above and n 220 below. In both instances the value of the expression would self-evidently be negligible.

CONCLUSIONS

This article has contended that the tort, together with the UK GDPR/DPA, is entering a new era in terms of privacy protection. Rather than frequently concerning confrontations between a celebrity and the press, the conflicts are now typically also between ordinary people, including children, and the tech companies. When such conflicts arise, including those referenced above, leading to judicial consideration of the applicability of one or both causes of action to misuses of private information online, often by intermediaries, they are providing the judges with an opportunity to affirm the applicability of the tort in this new context, one they are currently grasping with alacrity. Given that the GDPR and tort are 'two parts of the same European privacy protection regime',[220] pressure might be placed on any defence of a lower standard of privacy protection provided by one of those parts – hence the argument canvassed here that the traditional media-linked checks built – to an extent – into the notion of a 'reasonable expectation of privacy' are already being discarded by courts in the online context. Possibly the reluctance to attach such an expectation to apparently innocuous personal information about an adult may in future be questioned when such information is posted and widely disseminated online. Discarding the crude notion of public domain – as has already occurred – is also consonant with the protection the tort is providing, and is able to provide, for informational autonomy online.

It might have been anticipated that the ascendancy of the tort and marginalisation of data protection in the privacy context under discussion that occurred until recently in the pre-digital era would be reversed under the GDPR/DPA. In other words, in the face of a scheme clearly tailored to the privacy-invading power of the tech companies, the tort's role in the online context would diminish. This article has sought to demonstrate that that is *not* the case. It has argued that there are differences between the two causes of action – in particular there is a disparity between the idea of private information under the GDPR as compared with that under the tort – but that they both provide effective opportunities for the privacy claimant to vindicate their claim, especially as there are signs that dubious public interest claims would

220 See *Lloyd v Google LLC* [2019] EWCA Civ 1599 at [53]. The claimant proceeded under the DPA 1998 alone, but the question of relying on tort case law in relation to damages was pivotal on the basis that the remedies should not be less effective under data protection than under the tort: Counsel for Lloyd argued at [6] 'that, if damages are available without proof of pecuniary loss or distress for the tort of misuse of private information, they should also be available for a non-trivial infringement of the DPA. Both claims are derived from the same fundamental right to data protection contained in article 8 of the Charter of Fundamental Rights of the European Union.'

be rejected under both. The differences may mean that such a claimant may turn to one cause of action as opposed to the other: for example, in relation to apparently innocuous private information. Also court action is not essential to invoke the right to erasure under article 17, and in any event reliance on the GDPR may in some circumstances lead to a more rapid and less costly resolution of an online privacy claim against an individual or an intermediary. But it is concluded that the tort is already adapting very readily to the online context, and that the availability of both causes of action provides a wider range of opportunities for the vindication of online privacy claims than would be provided if only one of the actions was available. So there is room for optimism as to the ability of both causes of action to meet the challenges of confronting the privacy-invading potentialities of the tech companies in the coming years, satisfying in many instances the objective of guarding informational autonomy online.

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Should judges be neutral?

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INTRODUCTION: SHOULD JUDGES BE NEUTRAL IN THE SENSE OF AN INDIFFERENCE TO THE OUTCOME OF A CASE?

Writing in the aftermath of the tragic space shuttle *Challenger* disaster in 1986, the great American physicist and Nobel laureate, Richard Feynmann, famously observed that for a successful technology 'reality must take precedence over public relations for Nature cannot be fooled'.[1] By this he meant that there were immutable scientific laws which could not be wished away or somehow glossed over. Is there, I wonder, a lesson here for lawyers and judges as well?

Even though law is a purely human construct and not a natural science, for at least 150 years judges have generally sought to emulate the scientific method of rigorous, detached reasoning even if this method of reasoning sometimes leads to results which are surprising, unwelcome and inconvenient. Feynmann's essential point was that in a scientific context such conclusions cannot be ignored or discounted just because they are unwelcome or inconvenient. But do judges as guardians of a human system enjoy a freedom denied by Nature to scientists? Can we elect to avoid conclusions which might be unwelcome or inconvenient, irrespective of whether this is done for reasons of pragmatism or because such a conclusion offends our own sense of justice? Or is it the case that, just as with Nature, she who Cardozo famously described as 'Our Lady of the Common Law'[2] cannot be fooled?

The question I want to pose this evening accordingly is whether judges should be neutral. There is no question at all but that it is possible that they *can* be neutral in the sense of disregarding their own personal preferences or views as to the desirability of the outcome. Two recent appointees to the US Supreme Court have made this point

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1 *Report of the (Rogers) Presidential Commission on the Space Shuttle Challenger Accident*, vol 2, appendix F.

2 Benjamin N Cardozo, 'Our Lady of the Common Law' (1939) 13 St John's Law Review 231.

rather well in the course of their respective confirmation processes. In her speech immediately preceding her taking the declaration of office, Coney Barrett J said that the most important feature of judicial independence was the independence from one's own personal views. And Gorsuch J said at his Senate confirmation hearing that:

> I have decided cases for Native Americans seeking to protect tribal lands … for victims of nuclear waste pollution … for disabled students, prisoners and workers alleging civil rights violations. Sometimes, I have ruled against such persons too. But my decisions have never reflected a judgment about the people before me – only my best judgment about the law and the facts at issue in each particular case. For the truth is, a judge who likes every outcome he reaches is probably a pretty bad judge, stretching for policy results he prefers rather than those that the law compels.[3]

Lord MacDermott would, I am sure, have approved of these sentiments. After all, he found for the punter in *Hill v William Hill (Park Lane) Ltd*[4] in holding that the money which the bookmaker sought to recover was an irrecoverable gaming debt and even though – in Lord Lowry's memorable words – this must have been 'Lord MacDermott's closest ever contact with a bookmaker'.[5]

There is, of course, another sense in which judges are not and cannot be expected to be neutral. Judges are not neutral about legal values or matters which are part of the core constitutional identity of their own State. The UK Supreme Court is not, for example, neutral about the great legal inheritance that is the common law. One may expect that that Court will see that it is under a duty to ensure that these principles remain vibrant for the modern legal world. South of the border, the Irish Supreme Court is not neutral about upholding the values and principles contained in the Irish Constitution. Indeed, if it were not to go about the business of developing and integrating these values and rules into the legal system it would come under criticism. And much the same can be said in turn for courts in Luxembourg, Strasbourg, Karlsruhe, Rome, Washington DC and elsewhere. This question of ultimate legal and constitutional identity – and which court is under a duty to protect it – is currently the subject of extensive debate between the German[6]

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3 John Greenya, *Gorsuch: The Judge who Speaks for Himself* (Threshold Editions 2017) 210.

4 [1949] AC 530.

5 Lord Lowry, 'The Irish Lords of Appeal in Ordinary' in D Greer and N Dawson (eds), *Mysteries and Solutions in Irish Legal History* (Four Courts 2001) 213.

6 See, eg, judgment in the *Bond Buying* case of 5 May 2020 2 BvR 859 15 and see, generally, J-M Perez de Nanclares, 'Verfassungsgerichtliche Kooperation in europäischen Rechtsraum' in von Bogdandy, C Grabenwarter and P Huber (eds), *Handbuch Ius Publicum Europaeum – Verfassungsgerichtsbarkeit in Europa* (Max Plank Institute 2021) 539–619.

and Italian Constitutional Courts,[7] on the one hand, and the Court of Justice on the other. That is a fascinating debate in its own right, but it is not the subject of my discourse this evening.

My query is rather whether judges *should* be neutral in the sense of a blithe indifference to the outcome. Or should judges instead have regard to the outcome in making decisions so that, so to speak, they reason backwards from the desired result instead of the reverse? And is this not what judges do anyway a good deal of the time, even if this is not often admitted? These, of course, are not new or novel ideas. For over 100 years legal realists have argued that the orthodox theory of judging was wrong because in Dworkin's words, it had taken:

> … a doctrinal theory to jurisprudence, attempting to describe what judges do by concentrating on the rules they mention in their decision. This is an error, the realists argued, because judges actually decide cases according to their own political or moral tastes, and choose an approximate legal rule as a rationalisation. The realists asked for a 'scientific' approach that would fix on what judges do, rather than what they say, and the actual impact their decisions have on the larger community.[8]

This point was well expressed by Ryan P – the former President of the Republic's Court of Appeal – in a scintillating post-retirement lecture. He made the point that it was important for the barrister to know the 'form' of the type of judge before whom the case was assigned and the key role of the identity of that judge:

> The Tammany Hall politician who said: 'Don't tell me what the law says, tell me who the judge is' is accurately enough reflecting the role that I played as a barrister. Most practitioners in the common law world of personal injuries – long the dominant category of litigation—and non-jury actions considered themselves experts on the inarticulate major premises of the judges before whom they appeared. Barristers operated like share analysts or, perhaps, more accurately like punters selecting likely winners. Holmes's man in the State penitentiary did not want to know the law; just like my clients, he wanted to know the likely outcome. That I think is pragmatism at work. The business of the bar is not law, but cases and judges.[9]

It is idle to deny that these observations contain at least a lot of truth, even if they are not perhaps the full picture. It is nonetheless

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7 See, eg, Case C-105/14 *Taricco* EU:C: 2015: 555, Case C-42/17 *MAS* EU:C:2017:936, judgment of the Italian Constitutional Court of 10 April 2018 115/2018 and see, generally, G Piccirilli, 'The *Taricco* Saga: the Italian Constitutional Court continues its European Journey' (2018) 14 European Constitutional Law Review 814.

8 R Dworkin, *Taking Rights Seriously* (Duckworth 1977) 3.

9 Mr Justice Sean Ryan, 'Confessions of a pragmatist', Vivian Lavan Lecture (UCD Law Society 2019). I am very grateful to Mr Justice Ryan for supplying me with the text of this lecture.

striking that there are very few judges who openly admit to this in their judgments. How often does one hear a judge – even the 'Completely Adult Jurist' originally posited by the avowed leader of the realist school, Jerome Frank[10] – openly say that he or she decides cases by reference to their own political or social views and then later chooses an approximate legal rule as a rationalisation for that decision? Indeed, the only 'completely adult jurist' then recognised by Frank – Holmes J – appeared to say the exact opposite when he declared in a letter to Harold Laski that 'if my fellow citizens want to go to Hell, I will help them. It's my job.'[11]

One of the rare instances where a judge openly said that the consequences of a decision should be considered was the following account of what the then President of the Irish High Court, Kearns P, said in a speech on his retirement:

> Mr Justice Kearns said judges should never put themselves in the position of realising, too late, that a particular decision has opened a Pandora's Box of unintended consequences which if proper consideration had been applied, might have led to a different approach being taken. He said this was particularly the case where the boundaries of judicial and executive function intersected.[12]

This, however, was in the course of a retirement speech and was not contained in an actual judgment. Post-retirement Lord Sumption expressed similar views, albeit with an important caveat:

> Almost all judges start from an intuitive answer and work backwards. Most of them, however, recoil in the face of intellectual difficulty or constitutional principle.[13]

But, if is this what judges actually *do*, why do they generally seem reluctant to admit to this?

SHOULD JUDGES STRIVE TO AVOID CONSEQUENCES WHICH THEY (SUBJECTIVELY) CONSIDER ARE NOT IN THE PUBLIC INTEREST?

For those of us of a certain age, the decline of Lord Denning – still, on any view, one of the greatest ever English judges – was in some respects painful to watch. By the end of the late 1970s Denning's tussles with

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10 Jerome Frank, *Law and the Modern Mind* (MIT Press 1930) ch 4.

11 Mark De Wolfe Howe (ed), *Holmes-Laski Letters* vol 1 (Harvard University Press 1953) 249.

12 Quoted by Richard Humphreys, 'The Constitution and law as living instruments for a living society' (2017) 40 Dublin University Law Journal 45, 63.

13 Lord Sumption, 'Covid-19 and the courts: expediency or law?' (2021) 137 Law Quarterly Review 353, 357.

the House of Lords had become the stuff of legend. But it is probably sufficient for this purpose to refer to the series of trade union decisions in the late 1970s and the early 1980s which culminated in *Duport Steels v Sirs*.[14] By this stage Lord Denning – spurred on by a wholly understandable reaction to trade union excesses – was taking his fellow judges in the Court of Appeal down a road which led ultimately to a repudiation of the authority of the Law Lords[15] and, worse again, the authority of Parliament, given that the doctrine of parliamentary sovereignty was then (and, perhaps, still is) a key feature of the UK constitutional regime. In *Duport Steels* Lord Scarman spelt this out when allowing the appeal from Lord Denning's decision:

> My basic criticism of all three judgments in the Court of Appeal is that in their desire to do justice the court failed to do justice according to law … Unpalatable statute law may not be disregarded or rejected, merely because it is unpalatable …[16]

While acknowledging that, within certain limits, judges have a genuine creative role 'as the remarkable judicial career of Lord Denning himself shows', Lord Scarman went on:

> Great judges are in their different ways judicial activists. But the constitution's separation of powers must be observed if judicial independence is not to be put at risk. For, if people and Parliament come to think that the judicial power is to be confined by nothing other than the judge's sense of what is right … confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application.[17]

In passing it may be observed that this passage from Lord Scarman is itself a notable exposition of the importance of judicial neutrality.

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14 [1980] 1 WLR 142.

15 In *Express Newspapers v McShane* [1980] AC 672 the House of Lords had held that the test as to whether a particular act had been done in furtherance of a trade dispute (and, hence, to attract a statutory immunity) was purely subjective. In the Court of Appeal in *Duport Steels*, Lord Denning said of the House of Lords judgment in *McShane*: 'We have gone through that case and read the judgments. They are not nearly so clearly on the point as some would believe …'.
On appeal, however, Lord Diplock would have none of this ([1980] 1 WLR 142, 161–162): 'Lord Denning … was unwilling to accept that the majority speeches … in *McShane* had expressed a clear opinion that the test of whether an act was done in furtherance of a trade dispute was purely subjective. This led him to conclude that this House had not rejected a test based on remoteness that he himself had adumbrated and adopted in three earlier cases … Among the three tests rejected [in *McShane*] as wrong in law was the test of remoteness the authorship of which was specifically ascribed in my own speech to Lord Denning. Recognising this, counsel for the respondents has not felt able to support the judgment of the Court of Appeal on this ground either.'

16 [1980] 1 WLR 142, 168.

17 [1980] 1 WLR 142, 169.

Others commented on these general developments. One academic commentator spoke of:

> ... the tragic drama of a great judge whose acute sense of rightness has become a conviction of righteousness, whose consciousness of the need for justice has led him to become a self-appointed arbiter in the politics of society and whose desire to draw attention to defects in our law has more noticeably drawn attention to himself. Aided and abetted by the media, whose motives are not coincident with the interests of justice, of the legal system nor of the noble judge himself, the process has accelerated and the Master of the Rolls now takes his daily place alongside the good and bad in the nation's headlines.[18]

Denning's decline coincided with the publication of the first edition of JAG Griffith's *The Politics of the Judiciary* in 1977. There is no doubt but that this was a powerful and influential book, which obliged all those who believed in judicial independence, orthodox theories of judicial reasoning and the rule of law, to re-examine many of their basic premises. Even if Griffith's targets were simplistic and, in any one sense, easy ones – after all, why should it be a surprise to learn that earlier generations of English judges who had been public school educated, gone to Oxbridge, who had served in the forces and who were often found dining at the Athenaeum[19] should generally be supporters of the police and private enterprise and should be generally hostile to the rights of trade unions? – he nonetheless had a point. That point essentially was that judges were not – and were not perceived to be – neutral in such matters. Perhaps his real point was that in his view such judges could never be neutral given that they were – in Marxist terms – the embodiment of class interests in a society where labour and capital were in enduring conflict.

Let us take another example from south of the border: *Re Tilson*.[20] This concerned the exceptionally sensitive topic of the religious education of the offspring of mixed marriages. Prior to 1922 the position at common law had been that the right of paternal supremacy was recognised. And in custody disputes the Irish courts had for very practical reasons generally followed the rule that boys took the religion of their father and girls that of their mother. There was a supremely practical justification for this rule, for as Gibson J said in *Re Storey*,[21] religion was a matter in respect of which a court must be neutral: 'each of the various lawful creeds having equal rights', the Court, he declared, was 'not at liberty

18 Andrews, 'Book review' (1980) 14 Cambrian Law Review 114.

19 As Cozens-Hardy MR memorably said in a letter to the incoming Lord Chancellor Buckmaster in May 1915, 'all judges, without exception, are members of the Athenaeum': see R V F Heuston, *Lives of the Lord Chancellors 1885–1940* (Clarendon Press 1987) 269.

20 [1951] IR 1.

21 [1916] 2 IR 328.

to consider what religion is best for the infant'.[22] Whatever the general merits and demerits of such a rule, it was at least a rule that could be applied neutrally as between the various religions and was something which bolstered at least the appearance of judicial neutrality.

All of this came to an end with the Irish Supreme Court's decision in *Tilson*. This was a *cause célèbre* where the Church of Ireland father had given a pre-nuptial promise to the Roman Catholic mother that, in line with the papal *Ne Temere* decree, the children would be raised as Roman Catholics. When the ensuing custody dispute ultimately came before the Supreme Court, that Court ultimately held that the common law rule was contrary to Article 42.1 of the Irish Constitution which speaks of the right of 'parents' to the care and custody of their children. The reasoning of the Court – which I think has been much misunderstood[23] – is admittedly controversial and the result certainly caused much dismay and grief to the Protestant communities in the Republic. The question, however, which I wish to pose is this: would it have been permissible for the court to take the potentially harmful consequences of its decision for a (at least on one view, beleaguered) minority community into account? Or should it simply have applied the constitutional text neutrally – as in a sense it purported to do – and be indifferent as to the result? After all, the constitutional text does say 'parents' – plural – so that a pre-1937 common law rule which assigns this task to the father alone is difficult to square with this constitutional provision. And if you say that the court could have had regard to those consequences, then one must reckon with an argument with the shade of Lord Denning. Why was it not permissible for him to have regard to (what he would certainly have said was) the baneful consequences of the trade union legislation?

SOME JUDICIAL DILEMMAS

I propose to return to this wider question presently because I want now to explore another aspect of this judicial neutrality which is, I think, both imperfectly understood and under-explored in the legal literature. As I have already indicated, the classic theory of judging is that, following approximately the scientific method, judges should decide without fear or favour and (implicitly at least) that they should not have regard to the consequences of their decisions. But, in the real world the situation is not quite as straightforward. Judges are not so Olympian or detached from reality that they are immune from psychological pressures, invariably self-generated by personal doubt

22 [1916] 2 IR 328 at 342, 343.

23 See, generally, G Hogan, 'A fresh look at *Tilson*'s case' (1998) 33 Irish Jurist 311.

and personal concerns about the implications of their decisions and – perhaps especially – how they will be perceived by their legal peers. Let us first briefly explore a series of judicial dilemmas to see how they were resolved and which each in their own way illustrate the psychological pressures of which I have spoken.

The *Abrams* case: the dilemma of Oliver Wendell Holmes

Let us first examine a number of historical examples of these judicial dilemmas. The first I have chosen was the dilemma faced by Oliver Wendell Holmes in *Abrams v United States*.[24] In the period immediately after the end of the First World War, the US Supreme Court was faced with the first wave of free speech cases brought by motley groups of communists and anarchists who were convicted of offences under the Espionage Act for urging support for Soviet Russia. It was in this case that Holmes penned his famous dissent championing the First Amendment and free speech:

> ... but when men have realised that time has upset many fighting faiths ... the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can safely be carried out. That, at any rate, is the theory of the Constitution.[25]

The prospect, however, of a dissent on this sensitive issue alarmed many of his colleagues. A few days before the dissent was to be delivered in November 1919 a delegation from his colleagues came to see him:

> Holmes' colleagues McKenna, Pitney and Van Devanter appeared at the doorstep of 1720 Eye Street. With Mrs. Holmes joining them in the study, they urged him politely but in no uncertain terms not to go through with his planned dissent given Holmes' great reputation and military record ... it would do great harm which he perhaps was unaware of ...[26]

Even though his wife said that she completely agreed with them 'Holmes made clear his mind was made up'. Yet:

> In the shadow of the Red Scare and the vehement disapproval of much of the legal profession and indeed much of the country, Holmes staked his reputation – Boston Brahmin, Civil War hero, pre-eminent legal scholar, distinguished judge – to defend freedom of speech for communists, pacifists and foreign-born anarchists.[27]

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24 230 US 616 (1919). See, generally, M I Urofsky, *Dissent in the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue* (Pantheon Books 2017) ch 6.

25 250 US 616 at 630.

26 S Budiansky, *Oliver Wendell Holmes, A Life in War, Law and Ideas* (W W Norton & Company 2019) at 390.

27 Ibid 460–461.

And, as Collins has observed, Holmes' indefatigable adherence to his convictions meant that 'Free speech in America ... was never the same after 1919 ...'.[28]

The *Childers* case: the dilemma of Sir Charles O'Connor MR

Our second example comes from November 1922 at the height of the Irish Civil War. The then Master of the Rolls, Sir Charles O'Connor, presided over a *habeas corpus* application brought on behalf of Erskine Childers.[29] Childers was a noted author who had in fact been secretary to the Irish Treaty delegation to Downing Street in December 1921, but who later had taken the side of the Anti-Treaty rebels. Childers had been sentenced to death by a military court for the unlawful possession of a pistol in breach of a resolution which had been approved by Dáil Éireann that September. Childers' fundamental argument was that such a prohibition could only have been imposed by Act of Parliament – and not by resolution – and it was irrelevant that the Dáil would only enjoy the power to legislate in the true sense once the Irish Free State was itself established.[30]

The Civil War had itself commenced with the shelling of the Four Courts in June 1922, so that at the time the courts were scattered around the City of Dublin. O'Connor delivered his judgment by candlelight in a Kings' Inns guarded by Free State troops following a four-day hearing. His bristling sense of indignation as he rejected the application still rings through the decades almost 100 years later:

> I am sitting here in this temporary makeshift for a Court of Justice. Why? Because one of the noblest buildings in the country, which was erected for the accommodation of the King's Courts and was the home of justice for more than a hundred years, is now a mass of crumbling ruins, the work of revolutionaries, who proclaim themselves soldiers of an Irish Republic. I know also that the Public Records Office (a building which might have been spared even by the most extreme of irreconcilables) has been reduced to ashes, with its treasures, which can never be replaced ... If this is not a state of war, I would like to know what is.[31]

O'Connor, however, refused an application for a stay on the execution order even though the Court of Appeal was just about to hear an appeal in a similar case in a few days' time. Childers was executed at dawn

28 Ronald K Collins, *Fundamental Holmes: A Free Speech Chronicle and Reader* (Cambridge University Press 2010) at 376–377.

29 *R (Childers) v Adjutant General, Provisional Forces* [1923] 1 IR 5. See, generally, Ronan Keane, 'The will of the general: martial law in Ireland, 1535–1924' (1990–1992) 25–27 Irish Jurist 151; G Hogan, 'Hugh Kennedy, the Childers habeas corpus application and the return to the Four Courts' in C Costello (ed), *The Four Courts: 200 Years* (Four Courts 1996) 171.

30 Which occurred one month later on 6 December 1922.

31 [1923] 1 IR 5, 13–14.

within hours of the delivery of O'Connor's judgment while an appeal was pending.

O'Connor was appointed as a judge of the first Supreme Court in June 1924 but he resigned suddenly in the following April 1925 when he and his wife moved to London. It would seem that both he and his wife suffered a sort of mental breakdown as a result of what he had come to believe was his failure of nerve in the *Childers* case.[32] But, if it brings any comfort to his haunted shade, I think that it is easy to be too critical of O'Connor. The entire atmosphere was an intimidating one – a King's Inns building guarded by Pro-Treaty troops and a hurried judgment delivered by candlelight – and the case had engendered raw passions. If the point raised by *Childers* was correct, a key part of the Government's armoury in the course of the Civil War would have been lost, leading potentially to use of extrajudicial methods on the part of the Free State to counter the Anti-Treaty side's lack of compunction in these matters, and leading possibly to the strangling of democratic institutions at their birth. Was O'Connor haunted by his pragmatic response?

Liversidge v Anderson: the dilemma of Lord Atkin

Our third example is also from war-time: the celebrated dissent of Lord Atkin in *Liversidge v Anderson*.[33] In doing so, I recall that the late Lord Kerr, when delivering this lecture eight years ago, referred to Lord Atkin's celebrated aphorism in *Liversidge v Anderson*, 'amidst the clash of arms, the laws are not silent' which Lord Kerr observed acted as:

> ... an inspiration to today's judges in the solemn duty that they must perform in, to quote Lord Atkin again, 'stand[ing] between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.'[34]

In *Liversidge v Anderson* the central question posed was did the Government have to give reasons for its detention of the plaintiff under the regulation 18B internment powers? As you will all know, a majority of the House of Lords said 'no'. Atkin delivered a majestic dissent saying that the arguments of the Attorney General might comfortably have been addressed to the judges of Charles I. He added for good measure:

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32 Or, as his biographer put it, 'for undisclosed urgent domestic considerations': see Robert D Marshall, 'Charles Andrew O'Connor', *Dictionary of Irish Biography* vol 7 (Royal Irish Academy 2009) 235.

33 [1942] AC 206.

34 Lord Kerr at the Lord MacDermott Lecture, 'Human rights law and the "War on Terror"', Queen's University, Belfast, 2 May 2013, 3–4. Or, as Lord Diplock, famously put it, the majority were 'expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right': *Inland Revenue Commissioners v Rossminister Ltd* [1980] AC 952 at 1011.

> I know of only one authority which might justify the suggested method of construction. 'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be the master, that's all.' After all this long discussion the question is whether the words 'If a man has' can mean 'If a man thinks he has'. I have an opinion that they cannot and the case should be decided accordingly.[35]

Thanks to the work of Heuston and others,[36] the story of how Atkin had to resist pressure from the then Lord Chancellor Simon to change the draft judgment by omitting the 'Humpty Dumpty jibe' before the judgment was delivered is generally well known. The fact that the author of the majority judgment, Viscount Maugham, took the unprecedented step of writing to *The Times* in defence of the Attorney General and that the entire issue was later made the subject of an (again, at the time, unprecedented) parliamentary debate in the House of Lords is also a matter of public record.

But what I find intriguing about this entire episode is what happened afterwards. Atkin appears to have been snubbed by his colleagues, many of whom it seems never really spoke to him again prior to his death in June 1944:

> ... the Law Lords refused to eat with Atkin in the House of Lords or, at one point, even to speak to him. Many felt that he never really recovered from his treatment before his death in 1944.[37]

In his biography of Atkin Lewis maintains that Atkin was unperturbed by this entire affair and points to the fact that in correspondence with friends dating from this period he was more interested in describing the details of a fascinating hand of bridge which he had recently played one evening than giving his account of the controversy.[38] Yet it is hard to avoid the conclusion that the event must have been profoundly destructive of the friendship and collegiality which is indispensable in an appellate court. The central question here is whether Atkin would have taken this step had he but foreseen the extent of the counter-reaction from his colleagues. If he did – or if, like Holmes in *Abrams*, he was prepared to take the risk – then this bespeaks judicial bravery of an exceptional kind.

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35 [1942] AC 206 at 245.

36 R V F Heuston, '*Liversidge v Anderson* in Retrospect' (1970) 86 Law Quarterly Review 33; Heuston (n 19 above) 58–60.

37 Robert Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800–1976* (Weidenfeld & Nicolson 1976) 287.

38 Geoffrey Lewis, *Lord Atkin* (Hart 1999) 142.

The dilemma of (the fictional) Redmond J in *The Heather Blazing*

Atkin's courage may be contrasted with (the fictional) Redmond J in Colm Toibín's great novel, *The Heather Blazing*. In this novel we learn that Eamon Redmond has grown up in a staunchly nationalist Fianna Fáil background in County Wexford. In his twenties and thirties he is closely associated with the party and, as his career at the Bar prospers, he eventually appears for the State in many of the major constitutional cases from this period. Toibín describes how Redmond came to be appointed to the High Court following an apparently chance encounter with the then Minister for Finance, Charles Haughey TD, at a Dublin restaurant – presumably sometime in the late 1960s. Following some light-hearted banter:

> Haughey gave him a mock punch in the chest and grinned.
> 'You're for the bench', Haughey said.
> Eamon said nothing but held his stare.
> 'Will you take if you're offered it?,' Haughey asked.
> 'I will,' Eamon said.
> 'I'll see you soon,' Haughey said. 'It's good to meet you again.'[39]

While one might query whether these informal methods of judicial appointment would meet modern requirements in respect of judicial independence as recently articulated by both the European Court of Human Rights[40] and the Court of Justice[41] respectively, the real point of the story for our purposes comes when Redmond J wrestles with the idea of finding for the plaintiff in a major *cause célèbre* involving the dismissal of a schoolteacher from a Catholic school in a small rural town because she was living with a married man.[42] Redmond ultimately thinks the better of it, in part because of concerns about what his colleagues might think:

> The family, according to the Constitution, was the basic unit of society. What was a family? The Constitution did not define a family, and, at the time it was written, in 1937, the term was perfectly understood: a man, his wife and their children. But the Constitution was written in the present tense. It was not his job to decide what certain terms … such as

39 Colm Toibín, *The Heather Blazing* (Picador 1992) 222.

40 *Astradasson v Iceland* CE: ECHR: 2020: 1201.

41 See, eg, Case C-896/19 *Repubblika* EU: C: 2021: 311.

42 This fictional case is loosely based on the facts of *Flynn v Power* [1985] IR 648. Following the death of the retired former President of the Irish High Court, Hon Mr Justice Declan Costello – who was the trial judge – Toibin published a revised edition of *The Heather Blazing* in 2012 with the revised version of the novel even more closely resembling the facts of *Flynn v Power*: see, generally, Barry Sullivan, 'Just listening: the equal hearing principle and the moral life of judges' (2016) 48 Loyola University Chicago Law Journal 351, 397–403.

> 'the family' had meant in the past. It was his job what these terms meant now. This woman was living with a man in a permanent relationship, they were bringing up a family ... In what way were they not a family? They were not married. But there was no mention of marriage in the Constitution.
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> *He thought about it for a while and the consternation it would cause his colleagues, a definition of the concept of the family*. The teacher would have to win the case then, and the nuns would have to lose. The idea suddenly seemed plausible, but it would need a great deal of thought and research. It had not been raised as a possibility by counsel for the teacher. Lawyers, he thought, knew that he was not the kind of judge who would entertain such far-fetched notions in his court. If he were another kind of person he could write [that] judgment ...[43]

I cannot help thinking but that in this passage Toibín shows an acute understanding of judicial psychology. Unlike Atkin in *Liversidge*, Redmond *is* deterred from doing what he is worried may be the right thing by a consideration of how his colleagues would react. Again, let us not be too hard on Redmond. The views of our peers *are* important, and it is those views which often save us from impulsive and foolish choices which we might otherwise have made, and this is as true of law and judging as it is of life. At the same time, undue deference to collegiate views often leads to group-think and slavish adherence to conventional wisdom when independent judgment is called for.

One way or another these various judicial dilemmas illustrate that, in practice at least, judging is an art and not a science in the sense of the automatic application of autonomous principles similar to mathematical equations or chemical formulae. Holmes had famously said as much in those celebrated opening lines of *The Common Law*. But if the life of the law is experience, it must just as easily have been influenced by judicial psychology.[44]

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43 Toibín (n 39 above) 91–92. Emphasis supplied. It is interesting to note that, while the Irish Supreme Court had previously stated that the reference in article 41 of the Irish Constitution to the family was to the family based on marriage (see, eg, *The State (Nicolaou) v An Bord Uchtála* [1966] IR 567), recently there have been strong signals that the argument which the fictional Redmond J was toying with has been gaining sway: see, eg, the judgment of McKechnie J in *Gorry v Minister for Justice* [2020] IESC 55.

44 See also Michael McDowell SC, 'Reflections on the limits to the law's ambitions' in B Ruane, J O'Callaghan and D Barniville (eds), *Law and Government: A Tribute to Rory Brady* (Round Hall 2014) 31–39.

HOW COULD JUDGES PROPERLY TAKE ACCOUNT OF THE CONSEQUENCES OF THEIR DECISIONS?

As I have grown older, I find myself increasingly drawn to the doctrine of textualism. If law is the 'articulate voice of some sovereign or quasi-sovereign that can be identified',[45] then in western democratic societies at least we can generally hear it only through the written words of legislation enacted by Parliament or legislative assemblies in the exercise of their democratic mandates. All of this means that judges should not readily depart from the ordinary meaning of the legislative text because to do so would effectively involve the rewriting of that text, thereby undermining the legislative – and, ultimately, the democratic – process.[46] A further consideration is that the private citizen can only really regulate their affairs – if needs be, with the benefit of legal advice – by reference to the actual legislative text. The key word here is 'readily': because, of course, rules as to context (such as *noscitur a sociis*), purpose and object often serve to leaven the bare words of the legislative text.

One objection to this approach was set out by a judge of the Irish High Court, Humphreys J, in a very interesting paper written in 2017. Drawing on the work of Posner and Weaver, Humphreys posited two general approaches to legal interpretation. The first was what he called the 'doll's house' theory of law:

> That approach sneers at what it calls 'result-oriented jurisprudence' and clasps to its bosom the concept of *fiat justitia*, *ruat caelum*. Justice must swing her sword blindly and leave it to the 'little people' to pick up the pieces. Decisions that unleash particularly egregious consequences are sometimes accompanied by a disclaimer such as that the court is unfortunately coerced by 'the law' into the particular result, as if the law were some objective, monolithic certainty …[47]

Humphreys continues by saying that:

> Legal rules are an implementation of a social contract and those called upon to interpret that social contract (principally the judiciary) must

45 *Southern Pacific Co v Jensen* 244 US 205 (1917), 223, per Holmes J.

46 As an aside, that is why I consider that departing from the text to look at parliamentary debates in the manner originally sanctioned by *Pepper v Hart* [1993] AC 593 is, in the main, undesirable because it dilutes the importance of the actual legislative text. As Lord Hobhouse said in *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NI 390 at 413: 'It is fundamental to our constitution and the proper ascertainment of the law as enacted by Parliament that the law should be found in the text of the statute, not in the unenacted statements or answers of ministers or individual parliamentarians. This requirement is simply an *a fortiori* application of the rules for the proper recognition of what are and are not sources of law and the construction of written instruments.'

47 Humphreys (n 12 above) 62.

> put front and centre that … interpretative and adjudicative decisions have real-world effects on real people. A theory of adjudication … that has negative, even disastrous and anarchic, results in the real world is generally to be regarded as a failure; insidiously so where the anarchic decision bestows glistening rights on individuals who, as a matter of fact, are behaving in anti-social or lawless manner, at the expense of their victims or, in a more diffuse way, of law-abiding members of society.[48]

Irrespective of one's views on the matter, this is a particularly valuable analysis because it is rare that one finds a judge expressly arguing that courts must have regard to the consequences of their decisions in arriving at a decision, even if since the emergence of the realist school there are many who contend that this is what many judges actually do. Certainly, if courts are going to have regard to the wider policy considerations/consequences in their judgments it would be preferable that such were openly articulated, rather than remaining as a silent unarticulated premise which potentially distorts the reasoning process. But if this can properly be done at all, how would this work? Allow me to take five examples – drawn from each side of the border – and for this purpose conduct a sort of very rough and ready thought experiment.[49]

Example 1: *Moynihan v Moynihan*

In about 2013 I heard the late Adrian Hardiman[50] start a lecture by telling the story of how as a young junior he was asked to write an opinion in respect of a plaintiff who had suffered horrible and life-changing injuries as a result of an industrial accident. In the opinion Hardiman expressed considerable sympathy for the plight of the plaintiff but argued that, as he could discern no negligence on the part of the employer, he thought that the plaintiff had no case. His more worldly wise silk gently told him to put the opinion away, because no jury[51] would reach that conclusion. The case was subsequently settled by the employer's insurer and in many ways the road to *O'Keefe v Hickey*[52] started at that point.

This latter case concerned the question of whether the State could be held vicariously liable for the sexual abuse perpetrated by a teacher at a Catholic school, but which was one nonetheless which had been in

48 Ibid 63.

49 It is very rough and ready because, to do this properly, one would need to survey perhaps hundreds of examples. But these five examples may nonetheless highlight the point I wish to make.

50 Judge of the Irish Supreme Court 2000–2016.

51 In the Republic juries in personal injury cases were only finally abolished in 1988 by the Courts Act 1988.

52 [2008] IESC 72, [2009] 2 IR 302.

receipt of public funds. A majority of the Irish Supreme Court rejected the vicarious liability argument, but what is of interest for our purposes is the treatment found in Hardiman J's judgment of an earlier decision of that Court in *Moynihan v Moynihan*.[53] In that case a small child was injured in her grandmother's house, to which her parents had brought her, when she pulled down a pot of tea on herself. The tea had been made by her aunt who had then left the room to answer the telephone.

A majority (O'Higgins CJ and Walsh J) of the Supreme Court held that the aunt who had made the tea was under the *de facto* control of the grandmother, so that the latter could be made vicariously liable for the negligence of her daughter. There was, however, a dissent from Henchy J:

> Much as one might wish that the law would allow this plaintiff to recover damages from some quarter for the consequences of the unfortunate accident that befell her, the inescapable fact is that there is *a* complete absence of authority for the proposition that liability should fall on the defendant (who was innocent of any causative fault) rather than on Marie whose conduct is alleged to have been primarily responsible for the accident. I see no justification for *stretching the law* so as to make it cover the present claim when, by doing so, the effect would be that liability in negligence would attach to persons for casual and gratuitous acts of others, as to the performance of which they would be personally blameless and against the risks of which they could not reasonably have been expected to be insured. To transfer or extend liability in those circumstances from the blameworthy person to a blameless person would involve *the redress of one wrong by the creation of another*. It would be unfair and oppressive to exact compensatory damages from a person for an act done on his behalf, especially in the case of an intrinsically harmless act, if it was done in a negligent manner which he could not reasonably have foreseen and if – unlike an employer, or a person with a primarily personal duty of care, or a motor-car owner, or the like – he could not reasonably have been expected to be insured against the risk of that negligence.[54] (emphasis supplied)

Hardiman J was later to point to this dissent in his own judgment in *O'Keefe v Hickey*:

> It is of course almost inconceivable that an infant plaintiff suing by her father would sue the father's mother, the infant's grandmother, if it were anticipated that that lady, a widow, would have to pay the damages herself. It seems inescapable that the action was taken in the hope of accessing an insurance policy, perhaps the grandmother's household insurance. In any event, the majority judgment proceeded on the basis of an elaborate legalistic analysis of the entirely casual relationship whereby the defendant's daughter had made a pot of tea in her mother's house, where she herself lived. What, it is speculated, if

53 [1975] IR 192.
54 Ibid 202–203.

> the daughter were an employed domestic servant or a contractor? (But she was neither). An elaborate analysis, in my view highly artificial, took place of the relationship leading to an adult daughter making a pot of tea in her family home ...[55]

Warming to this theme on the issue of the distortion of the law, Hardiman J continued:

> It may be noted that the plaintiff in *Moynihan* had not sued her aunt, the person alleged to be directly negligent, but only the grandmother, hoped to be a 'deep pocket'. The case appears to me to be an early example of the dismantling or muddying of the long established boundaries or limits of vicarious liability. This was done for the very humane reason of helping an innocent injured party to recover compensation, but it was done at a very considerable social cost, not often considered or discussed ... In all cases where there is a serious injury to an innocent person, there is a human tendency to wish that that person should be compensated. But the social and economic consequences of providing a law so flexible that it can be used to provide compensation in the absence of liability in the ordinary sense is addressed in the judgment of Henchy J.[56]

This is an unusual – almost unprecedented – example of where one judge had expressly contended that his colleagues had previously distorted the law in order to secure a particular result, in this case, the provision of compensation of the injured little girl. It is, I think, difficult to stand over the vicarious liability aspects of the majority decision in *Moynihan* and, irrespective of its criticism by Hardiman J in O *Keefe v Hickey*, it is a decision which has engendered little subsequent enthusiasm.[57]

Like all of you present, I am all in favour of the provision of compensation to little girls who have been scalded by boiling teapots. The difficulty with *Moynihan*, however, is that in their desire to secure that result, the majority appear to have been tempted to expand the law on vicarious liability with potentially adverse consequences for other and for future cases. In its own way it shows the difficulties associated with result-oriented jurisprudence.

Example 2: *R (Hume) v Londonderry JJ*

The background to this seminal case is well known. In *R (Hume) v Londonderry JJ*[58] the late John Hume and others challenged the legality of their arrest and conviction following a civil rights protest at Derry/Londonderry. They challenged the validity of a statutory

55 [2009] 2 IR 302, 318.

56 Ibid 319.

57 See, for example, the observations of B M E McMahon and W Binchy, *Law of Torts* (4th edn, Bloomsbury Professional 2013) para 43.109.

58 [1972] NI 91. See, generally, B Hadfield, 'A constitutional vignette: from SRO 1970 241 to SI 1989 509' (1991) 41 Northern Ireland Legal Quarterly 54.

instrument made under the Civil Authorities (Special Powers) Act (NI) 1922 which allowed a member of Her Majesty's forces on duty to effect an arrest where it was suspected that an assembly of three or more persons might lead to a breach of the peace. The Queen's Bench Division held that this legislation was *ultra vires* the Northern Ireland Parliament given that section 4(1) of the Government of Ireland Act 1920 had prevented that Parliament from legislating on military matters. Fresh emergency legislation was necessary to restore the *status quo ante* so that the British Army could in fact act in aid of the civil power,[59] and section 1 of the Northern Ireland Act 1972 was thus enacted within a matter of hours.

But let us leave the merits of that legislation to one side for the moment. How does this decision fit into Posner's argument – as narrated by Humphreys – that for judges to say that they are coerced by 'the law' amounts to the 'theory of power without responsibility'?[60] Putting it more prosaically: to what extent should the members of the Court[61] have had regard to the consequences of its decision? And if they did not, would this have been another example of a judgment with 'downstream consequences of chaotic situations unleashed by judgments …' being regarded as an 'unimportant and an essentially janitorial problem with which the Olympian judge is generally unconcerned?'[62]

Looking back, it is clear that the Court in *Hume* did not have regard to the consequences of its decision. The Court would, of course, have been perfectly aware of the consequences which were to flow from its judgment and that fresh legislation would have been immediately required. For my part, I consider that the judgment represented an entirely correct application of the rule of law. Westminster had clearly forbidden the Parliament of Northern Ireland from legislating on such topics and the Queen's Bench Division duly gave effect to that parliamentary command.

So far as the consequences were concerned, it is impossible to deny that – irrespective of one's views on the conflict itself – the support of the British Army of the civil power was necessary and it could not have been simply withdrawn at the stroke of a pen. Should therefore the court have sought to uphold those provisions of the Special Powers Act on the basis that to do otherwise would have brought about these undesirable consequences? For me, the answer is surely not. Any endeavour by the

59 The Attorney General (Sir Peter Rawlinson) told the House of Commons that the decision had left the army 'without essential powers which enable it to discharge the duties for which it was sent to Northern Ireland' HC Deb 23 February 1972, vol 831, col 2364.

60 Richard A Posner, *Overcoming Law* (Harvard University Press 1995) 124.

61 Lowry LCJ, Gibson and O'Donnell JJ.

62 Humphreys (n 12 above) 61.

court to fix the problem itself would have risked the obvious distortion of the law in the manner which was, I suggest, discernible in *Moynihan*. And besides, how could the Court have known what the proper answer should have been, even if one has regard to the social contract theory? Given the realities which prevailed in Northern Ireland in 1971 and 1972 one could, I suppose, have posited a wide variety of possible responses, ranging from assuming that Parliament would have wanted the army to enjoy the full range of police powers on the one hand to very limited functions on the other. As Lord Lowry LCJ remarked – admittedly in respect of the second issue of reasonableness which the Court ultimately did not have to decide – this was an intensely *political* question which no court could possibly answer.[63]

Example 3: *Bohill v Police Service of Northern Ireland*

Our third example is *Bohill v Police Service of Northern Ireland*.[64] Here the applicant was a former police officer who had given distinguished service over a 30-year period. He then applied to a recruitment agency for temporary work as an investigator with the Police Service of Northern Ireland, but despite his name having appeared on a panel on some 13 occasions he was never selected for this work. He contended that he had been discriminated against on grounds of his religious beliefs or political opinions. The essential question, however, was whether the Fair Employment Tribunal had jurisdiction to entertain his claim under the terms of the Fair Employment and Treatment (Northern Ireland) Order 1998.

The Court of Appeal concluded that it had not. As Coghlin LJ observed, given that the tribunal was the creature of statute, it followed that the claimant 'must show that he comes within one of the relevant concepts defined within the provisions of the 1998 Order so as to confer jurisdiction upon the Tribunal to hear and adjudicate upon the substantive merits of his claim'. But the Tribunal's jurisdiction was confined to hearing claims brought by 'employees', which term was itself defined as extending to persons who were either employed or who had a contract for services. Yet, as Coghlin LJ observed, the appellant fell into neither category:

> [11] ...While the respondent might arguably fall within the definition of 'employer' contained in Article 2 of the Order, the difficulty faced by the appellant is bringing himself within the definition of 'employee'. In the event that the appellant had been selected as a temporary worker by the respondent he would have signed a document constituting a contract

63 [1972] NI 91, 117, quoting Lord Pearson in *McEldowney v Forde* [1971] AC 632, 655.

64 [2011] NICA 2. I am very grateful to Professor Brice Dickson for drawing my attention to this case.

> for services between himself and the recruitment agency Grafton Ltd. to the period during which those services were supplied to the respondent. At no time would he have been employed under a contract of service either by the respondent or by Grafton. Unless and until his name had been put forward by Grafton and accepted by the respondent the appellant would not have been in any contractual relationship with either Grafton or the respondent. In such circumstances, the appellant was not a person who was seeking employment with the respondent within the meaning of the order.

It followed that the tribunal lacked jurisdiction to hear the claim:

> [18] For the reasons set out above this appeal must be dismissed but the case does seem to illustrate how an agency arrangement may deprive potential employees of important protections against discrimination. Northern Ireland enjoys a well deserved reputation for the early development and quality of its anti-discrimination laws and this is an area that might well benefit from the attention of the section of the office of OFM/DFM concerned with legislative reform. We emphasise that, as a consequence of the lack of jurisdiction, we are unable to give any consideration to the substance of the appellant's case.

To my mind, the reasoning and analysis found in this judgment is impeccable. Viewed objectively, most people would, I am sure, agree that it was unfair that Mr Bohill had no effective opportunity of having the merits of his claim tested in this fashion. Yet the words of the definition of employee in Article 2 of the 1998 Order were pellucidly clear. And unless words cease to have any meaning at all, I fail to see how the Court of Appeal were not bound to arrive at the result which they did.

Example 4: *O'Neill v Minister for Agriculture and Food*

My next example is *O'Neill v Minister for Agriculture and Food*.[65] In 1947 the Irish Parliament enacted a rather short item of legislation dealing with the grants of licences in respect of the artificial insemination of cattle. In the late 1950s the Department of Agriculture decided upon an extra-statutory scheme whereby for this purpose the State was divided into nine regional geographical areas. The Minister then adopted a policy of granting a regional monopoly to one licensee in each region. In *O'Neill* the applicant successfully challenged the *vires* of this licensing system. If one leaves aside some specific features of Irish constitutional law and EU competition law, any UK public lawyer would immediately recognise the specific features of this judgment. The parent Act did not envisage the creation of regional monopolies and the Minister's power to grant exclusive licences on this geographical basis was clearly influenced by unlawful policy considerations.

65 [1998] 1 IR 539.

The comments made by Keane J are nonetheless of some interest. While he found that the scheme was plainly *ultra vires*, he nevertheless regretted arriving at this conclusion:

> I reach these conclusions with regret. The evidence in the High Court established overwhelmingly that some scheme of this nature was essential if the practice of artificial insemination was to be both controlled and facilitated in the interests of an industry of paramount importance in the Irish economy. This Court is solely concerned, however, with the legality of the scheme and, for the reasons already given, I am forced to the conclusion that it was ultra vires the Act of 1947 and, in any event, could only have been carried out in the form of regulations made under that Act.[66]

In passing it might be said that these comments represent a paradigmatical example of the Sumption theory that, while all judges start from an intuitive answer and work backwards, they generally 'recoil in the face of intellectual difficulty or constitutional principle'. It could be said that in *O'Neill* the Irish Supreme Court might not have wanted to invalidate this scheme, but recoiled from this conclusion when it became clear that to do otherwise would have offended standard constitutional principles.

A bit of background here might nonetheless not be amiss. At least two of the original licensees – Kerry Group and Glanbia – have gone on to become major multinationals in the food and dairy sector. An economic historian might say that this was a successful example of nascent State dirigisme which involved 'picking winners' and giving a major advantage to new emerging companies in this sector which in turn helped them over time on their way to major multinational status. To that extent, those economists might well agree with the comments of Keane J. Other economists might argue that the granting of regional monopolies of this kind simply stifled competition in an important aspect of the food sector and animal genetics and was deeply unfair to both consumers and new entrants alike. Yet judged from the perspective of administrative law,[67] this question does not admit of judicial resolution precisely because, issues of competition law apart, the manner in which a licensing system for the provision of artificial insemination to cattle should operate is ultimately a matter for economic and political judgment.

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66 [1998] 1 IR 539, 547.

67 It is admittedly different from a competition law perspective. But, if this is so, it is again because there was then in force either legislative (now Competition Act 2002, ss 4 and 5) or European Union (EU) Treaty (now article 101, article 102, and article 106(2) Treaty on the Functioning of the EU) guidance ordaining that the legality of the actions of either undertakings or (in the case of EU law) domestic legislation be judged by reference to certain defined (largely free market inspired) principles.

Herein lies my difficulty with the Posner–Humphreys analysis. It would, I suggest, have been wrong for the Supreme Court to have allowed their own views as to what was good or bad for the development of agriculture to colour what essentially was a straightforward legal analysis. Again, at one level, the court's judgment in invalidating a system which had been in operation for almost 40 years could be portrayed as another instance of what Humphreys has described as the 'downstream consequences of chaotic situations unleashed by judgments …' Yet it was perfectly clear that the Irish Parliament had never sanctioned this exclusivity system and it would essentially have been an affront to the rule of law not to have invalidated it. If, on the other hand, the court had said something like 'we think that this system of exclusive geographical licences has worked just fine and, as we do not want to create chaos in the agricultural sector, we will find some adventitious legal principle which will enable us to uphold the vires of the scheme', then this would be open to the objection that legal reasoning was being distorted by the subjective personal preferences of unelected judges in relation to the functioning of the scheme. What, moreover, would happen in the case of a challenge to the next exclusive licensing system where the judges considered that the scheme happened to work, not well, but badly. If that challenge were to succeed on this ground, then the objection would be that judges were deciding cases by reference to their own subjective personal views, the very objection raised by Wechsler[68] in the first place.

Example 5: *Robinson v Secretary of State for Northern Ireland*

My final example is *Robinson v Secretary of State for Northern Ireland*.[69] Here the question was whether the election of Mr David Trimble and Mr Mark Durkan to the positions of First Minister and Deputy First Minister in November 2001 was valid even though this election had taken place beyond the six weeks period following the restoration of devolved government prescribed by section 16(8) of the Northern Ireland Act 1998. In the end, following the decision of Kerr J, a majority of the Court of Appeal and the House of Lords held that the election was a valid one.

For the majority Lord Bingham concluded that these statutory provisions should be interpreted generously, saying that they had the generality of a constitutional provision:

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68 H Wechsler, 'Towards neutral principles of constitutional law' (1959) 73 Harvard Law Review 1.

69 [2002] UKHL 32, [2002] NI 390. I am grateful to Professor Christopher McCrudden for this reference.

The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody. Mr Larkin submitted that the resolution of political problems by resort to the vote of the people in a free election lies at the heart of any democracy and that this democratic principle is one embodied in this constitution. He is of course correct. Sections 32(1) and (3) expressly contemplate such elections as a means of resolving political impasses. But elections held with undue frequency are not necessarily productive. While elections may produce solutions, they can also deepen divisions. Nor is the democratic ideal the only constitutional ideal which this constitution should be understood to embody. It is in general desirable that the government should be carried on, that there be no governmental vacuum. And this constitution is also seeking to promote the values referred to in the preceding paragraph.

It would no doubt be possible, in theory at least, to devise a constitution in which all political contingencies would be the subject of predetermined mechanistic rules to be applied as and when the particular contingency arose. But such an approach would not be consistent with ordinary constitutional practice in Britain. There are of course certain fixed rules, such as those governing the maximum duration of parliaments or the period for which the House of Lords may delay the passage of legislation. But matters of potentially great importance are left to the judgment either of political leaders (whether and when to seek a dissolution, for instance) or, even if to a diminished extent, of the crown (whether to grant a dissolution). Where constitutional arrangements retain scope for the exercise of political judgment, they permit a flexible response to differing and unpredictable events in a way which the application of strict rules would preclude.

All these general considerations have a bearing, in my opinion, on the statutory provisions at the heart of this case. The parties are agreed that section 16(8) imposes a duty on the Assembly. The parties are also agreed that such duty is mandatory, although further agreeing that the old dichotomy between mandatory and directory provisions is not a helpful analytical tool … Parliament did intend the Assembly to comply with the six-week time limit laid down in section 16(8). That is why it conferred power on the Secretary of State to intervene if, at the end of that period, no First Minister and deputy First Minister had been elected. It is the answer to the second question which fundamentally divides the parties.

Had it been Parliament's intention that on a failure to elect within six weeks as required by section 16(1) and (8) the Secretary of State should forthwith put arrangements in train to dissolve the Assembly and initiate an early poll for a new Assembly, this could very easily and

> simply have been stated. But this is not what section 32(3) says and such a provision:
>
> (1) would have been surprising, particularly in the context of section 16(1), since little more than seven weeks would have elapsed since the last poll (section 31(4)) and there could be no assurance that a further poll would procure a different result;
>
> (2) would have precluded the possibility of negotiation and compromise to find a political solution to an essentially political problem, contrary (as I would suggest) to British political tradition; and
>
> (3) would have deprived the Secretary of State, acting as the non-partisan guardian of this constitutional settlement, of any opportunity to wait, even briefly, for a solution to the problem to emerge.
>
> It is difficult to see why Parliament, given the purposes it was seeking to promote, should have wished to constrain local politicians and the Secretary of State within such a tight straitjacket.[70]

In his concurring judgment Lord Hoffmann was even more explicit on the issue of the consequences of the decision:

> Mr Larkin QC, in the course of his admirable argument for the appellant, politely but firmly reminded your Lordships that your function was to construe and apply the language of Parliament and not merely to choose what might appear on political grounds to be the most convenient solution. It is not for this House, in its judicial capacity, to say that new elections in Northern Ireland would be politically inexpedient. Mr Larkin cited Herbert Wechsler's famous Holmes Lecture, *Towards Neutral Principles of Constitutional Law* ((1959) 73 *Harvard LR* 1). My Lords, I unreservedly accept those principles. A judicial decision must, as Professor Wechsler said (at p. 19) rest on 'reasons that in their generality and their neutrality transcend any immediate result that is involved.' But I think that the construction which I favour satisfies those requirements. The long title of the Act is 'to make new provision for the government of Northern Ireland for the purpose of implementing the agreement reached at multi-party talks on Northern Ireland ...'. According to established principles of interpretation, the Act must be construed against the background of the political situation in Northern Ireland and the principles laid down by the Belfast Agreement for a new start. These facts and documents form part of the admissible background for the construction of the Act just as much as the Revolution, the Convention and the Federalist Papers are the background to construing the Constitution of the United States.[71]

Despite the protests of Lord Hoffmann, some might think that this is a 'consequentialist' approach whereby the Court opted for the most politically convenient solution and worked backwards. For my part,

70 [2002] UKHL [11]–[14], [2002] NI 390 at 398–399.
71 [2002] UKHL [33], [2002] NI 390 at 403–404.

however, I am not so sure because it does not necessarily follow that just because the six-week time limit was not complied with the consequence that what happened thereafter was thereby void. At the same time it is undeniable that there had been a significant non-compliance with a key statutory provision which Parliament – doubtless for its own good reasons – had seen fit to prescribe.

There is indeed a comparison here with what happened in 1960 and 1961 in the Republic following the High Court's decision[72] that legislation enacted in 1959 revising the electoral boundaries was unconstitutional. The Irish Parliament rushed to enact new legislation which respected the High Court's decision. One result of this finding of unconstitutionality was that the constitutional requirement to the effect that the constituencies had to be revised every 12 years[73] had not been complied with because no valid law had been enacted within that constitutionally stipulated period, as the previous constituency revision had taken place with the Electoral (Amendment) Act 1947. The Irish Supreme Court subsequently held, however, that this omission to comply with that requirement did not affect the constitutionality of the *new* electoral legislation because:

> ... if this period has been allowed to elapse without a revision being carried out, the obligation remains to carry it out as soon as possible. There is, of course, a satisfactory explanation in this case.[74]

But what if there had not been a satisfactory explanation? This is where consequentialist reasoning starts to come into play, because it cannot be that the courts would allow the *ruat caelum* principle to be applied blindly where the fundamentals of the legal order are threatened by a judicial decision with immense consequences, such as where a particular law is held invalid or unconstitutional. In a variety of jurisdictions, the courts have developed techniques ranging from prospective overruling to suspended declarations of unconstitutionality to limit the potentially chaotic consequences of a judicial decision of invalidity.[75] For my part,

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72 *O Donovan v Attorney General* [1961] IR 114.

73 Article 16.4.2 of the Irish Constitution provides that the Oireachtas (Parliament) 'shall revise the constituencies at least once every twelve years, with due regard to changes in distribution of population ...'.

74 *Re Article 26 and the Electoral (Amendment) Bill 1961* [1961] IR 169, 180, per Maguire CJ.

75 This, again, has been the experience of the Irish Supreme Court, particularly in dealing with the aftershocks caused by a finding of constitutional invalidity of a law, precisely because, as Geoghegan J astutely observed in *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88 [203], unless courts limited the retroactive and other effects of such a finding, the consequence would be that judges would be less willing to invalidate laws in future: 'there would be a grave danger that judges considering the constitutionality of enactments would be consciously or unconsciously affected by the consequences'.

however, even in these circumstances any potential remedy should not overbear or distort the substantive decision. Accordingly, rather than saying that 'the consequences would be so bad I must find a way of finding against X on the merits', it is, I suggest, much better to say, for example, that the prison conditions which X is currently enduring are legally unacceptable even if this finding does not in itself mean that X must be immediately released.[76]

CONCLUSIONS

Article 1(2) of the Swiss Civil Code famously states that where the court is required to decide a matter not otherwise provided for in the Code or in customary law, it shall decide the matter 'in accordance with the rule that it would make as legislator'.

> (2) In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator.
>
> (3) In doing so, the court shall follow established doctrine and case.[77]

There is, I think, no equivalent provision in any common law system. And so we return to the question posed at the start: should judges have regard to the consequences of their decisions when adjudicating upon the merits of the case or should they be guided by purely legal factors? Judging is an art, not a science. Pragmatism is a practical human virtue which often represents the better part of valour. One cannot therefore say that pragmatism properly has no role in the judicial process and, even if one did, the reality of human psychology is such that many of us would recognise Eamon Redmond in *The Heather Blazing* in ourselves. One might also say that the fact that a judgment might have far-reaching consequences is itself a reason which should give a judge an occasion to pause and reflect. In such circumstances it would generally be prudent to re-examine the premises and reasoning of any proposed judgment before arriving at such a decision.

Yet, on the whole, judges are better guided by the application of principle rather than any endeavour to peek behind the blinds of justice and to seek to anticipate the consequences of their decisions and to work backwards in their reasoning. To repeat the words of Neil Gorsuch, any judge who seeks to ensure that the result assorts with their own personal views is likely to be a pretty poor judge and, in that

76 See, eg, *Kinsella v Governor of Mountjoy Prison* [2011] IEHC 235, [2012] 1 IR 467.

77 G Picht and G Studen, 'Civil Law' in M Thommen (ed), *Introduction to Swiss Law* (Carl Grossman 2018) 283–284.

respect at least, Our Lady of the Common Law cannot be fooled. And here, I think, is the nub of the problem with the Posner–Humphreys analysis.

I say that for two reasons.

First, I cannot agree that judges are not bound by the text of the law and, inasmuch as Posner says otherwise, I profoundly disagree. One may fully acknowledge that there are nearly always interpretative choices which are open to judges, but the statement that judges are never bound by the legal text is, with respect, far too dogmatic and wrong, as the decisions in both *Hume* and *Bohill* illustrate. And this, after all, was the point with which Lord Scarman could gently chide Lord Denning in *Duport Steels*. To repeat, legislation *is* the authentic voice of the legal sovereign and judges can only hear that voice through the application of well-established principles of statutory interpretation. If, for example, legislatures wish to bring about an important legal change the application of the presumption against unclear changes in the law serves to require that this must be done expressly and not in some indirect manner.[78] So, far from saying that the principle that the court is bound by the legal text to reach a result which Parliament might have never contemplated or intended amounts to the exercise of power without responsibility, I would respectfully contend for the contrary: it is rather the exercise of the judicial power in a manner which is most faithful to the rule of law.

Second, our own thought experiment tends to show, even allowing for the necessarily tiny sample, that the courts cannot satisfactorily seek to cure the deficiencies of legislation or the law generally by *ad hoc* solutions or by a form of working backwards reasoning. If, for example, you think that the licence exclusivity scheme at issue in *O'Neill* worked well and that for that reason you seek to uphold its *vires* by an *ad hoc* solution, then how do you deal with the next exclusive licensing system that you consider is not working well? More to the point, how do unelected judges make value judgments that are essentially policy-driven and legislative-based in character? Most – admittedly not all – orthodox economists would, for example, be sceptical of the supposed value of regional monopoly licensing systems as being bad for consumers and as tending to create inefficiencies and as stifling innovation. I dare say that few would disagree with the comments of Coghlin LJ in *Bohill* to the effect that there were no particular reasons why agency workers should be excluded from the scope of fair employment legislation, but, again, this is ultimately a judgment which a legislature and not judges should make. The Court of Appeal should not have distorted the language of the all too clear provisions of the 1998 Order just because

78 See, eg, *R v Home Secretary, ex p Simms* [1999] UKHL 33, [2000] 2 AC 115.

they think that this would be fairer and better and even if in that case almost no one would disagree. Unless, therefore, one was going to transpose with some adaptations a provision such as Article 1(2) of the Swiss Civil Code, one must acknowledge that the capacity of the judiciary to effect a sort of running repairs to the legislative machinery is limited.

And so I close with this tentative conclusion: human psychology runs deep and judges are often affected deeply by the facts and circumstances of hard cases with real life consequences. The desire to please, to be collegiate and to be flexible are features of that psychology and it allows us to leaven a certain strict and unforgiving legal logic with a necessary degree of pragmatism and, indeed, common sense. To that extent judges cannot be entirely neutral in the sense of effecting a complete, Olympian detachment from the real-life consequences of their decisions: sometimes, perhaps, expediency has a role. Yet experience has shown that judges are at their best when they act independently of their own personal, subjective views and when they listen only to the authentic voice of the legal sovereign. If psychology and pragmatism means that judges cannot always be neutral, then they should nonetheless strive to be so.

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Coronavirus legislative responses in the UK: regression to panic and disdain of constitutionalism

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ABSTRACT

The United Kingdom has considerable prowess in handling emergencies, not just in counterterrorism but also in a wide range of other real or imagined disasters, including public health risks. Core legislation has been installed, including the all-encompassing Civil Contingencies Act (CCA) 2004 and the more specialist Public Health (Control of Disease) Act (PHA) 1984. Despite these finely honed models, the UK state regressed to panic mode when faced with the COVID-19 pandemic. Rather than turning to the laws already in place, Parliament fast-tracked the Coronavirus Act 2020, with scant debate of its shabbily drafted contents. In addition, the UK Government has relied heavily, with minimal scrutiny, on regulations under the PHA 1984. The article analyses the competing legal codes and how they have been deployed to deal with COVID-19. It then draws out the strengths and weaknesses of the choices in terms of the key themes of: the choice of sectoral versus general emergency legislation; levels of oversight and accountability; effectiveness; and the protection of individual rights. Following this survey, it will be suggested that the selection of legal instruments and the design of their contents has been ill-judged. In short, the emergency code that is the most suitably engineered for the purpose, the CCA 2004, has been the least used for reasons which should not be tolerated.

Key words: COVID-19; emergency legislation; pandemic; constitutionalism; Civil Contingencies Act 2004; Public Health (Control of Disease) Act 1984; Coronavirus Act 2020.

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INTRODUCTION

The United Kingdom (UK) has garnered considerable prowess in handling emergencies, as prominently illustrated by its encyclopaedic counterterrorism laws. Less widely appreciated are the extensive codes available to the UK Government covering other real or imagined disasters, ranging from floods to meteor strikes, including public health risks. Here, too, core legislation has been installed, such as the all-encompassing Civil Contingencies Act 2004 (CCA 2004) and the sectoral Public Health (Control of Disease) Act 1984 (PHA 1984).[1] Despite these finely honed models, the UK state regressed to panic mode when faced with the COVID-19 pandemic. Rather than utilising the laws already in place to handle crises like the pandemic, Parliament fast-tracked the Coronavirus Act 2020 (CA 2020). This crucial statute was passed within seven days (19–25 March 2020),[2] having been subjected to brief and poorly attended debates, after which Parliament vanished into recess for four weeks. In addition, the UK Government has installed, with minimal scrutiny in any form, extensive regulations under the PHA 1984 which have become the chief instruments of policy.

This article reviews the contents and defects of the CA 2020, followed by an examination of the competing features of pre-existing laws: the PHA 1984 and CCA 2004. Thereafter, it argues that the selection of legal instruments and the design of their contents have been ill-judged. In short, the emergency code which is the most suitably engineered for the purpose, the CCA 2004, has been the least used for reasons which should not be tolerated, resulting in substantial damage to the constitutional fabric of the UK.[3]

CORONAVIRUS ACT 2020

The CA 2020 runs to over 342 pages, so this summary is necessarily selective.[4] The Act's stated purpose is to implement the UK Government's *Coronavirus: Action Plan* of 3 March 2020,[5] which seeks to 'Contain, Delay, Research, and Mitigate'. All aspects of that *Plan* are potentially covered, though little has since been heard of this *Plan*. Rather than refining it or assessing its success, plans moved onto

1 For surveys, see Clive Walker and James Broderick, *The Civil Contingencies Act 2004: Risk, Resilience and the Law in the United Kingdom* (Oxford University Press 2006); Clive Walker (ed), *Contingencies, Resilience and Legal Constitutionalism* (Routledge 2015).

2 See Parliamentary Bills: Coronavirus Act 2020: stages.

3 For other jurisdictions, see Comparative Covid Law; COVID-19 Civic Freedom Tracker; COVID-19 Government Measures Guide 2.0.

4 See also *CA 2020: Explanatory Notes*.

5 Policy Paper: Coronavirus (COVID-19) Action Plan.

the subsequent phases, and included documents such as *Our Plan to Rebuild*,[6] the *Winter Plan*,[7] and now a stepped roadmap.[8] While the most eye-catching and contentious measures concerned containing and delaying the spread of coronavirus via varying degrees of lockdown of the general populations, the bulk of the legislation is technical and specialised in nature.

The initial titles in the CA 2020 contend with health and social care. Provisions seek to boost available personnel through relaxing health registration requirements to temporarily allow for the registration of an extra intake of suitably experienced persons (such as recent graduates or retired personnel) as regulated healthcare professionals even if they lack some formalities of the normal registration requirements. The recruitment of emergency volunteers is also encouraged by establishing a new form of unpaid statutory leave and powers to compensate for some loss of earnings and expenses. The National Health Service (NHS) Volunteer Responders scheme[9] recruited 750,000 people within days of its announcement, three times more than planned. Further encouragement to grow health system capacity is given by the conferment of individual indemnity for clinical negligence in some circumstances.[10] Next, death certification and coronial interventions are short-circuited by enabling a doctor to certify the cause of death without referral to a coroner.[11] Inquests with juries are also curtailed.[12]

Second, physical and social security are reinforced by a power to require information about food supply chains[13] with a view to potential state intervention. Statutory sick pay is also extended and subsidised.[14]

Third, personal liberties are gravely affected. The scale of these changes to fundamental legal processes is extraordinary and expansive. Various surveillance powers are widened in terms of authorising authorities for the taking and retention of personal data.[15] Notably, no extra powers have yet been devised for compulsory population contact-tracing purposes, though the NHS COVID-19 app, which collected data centrally, was devised by the technological wing of the health

6 CP 239, 2020.
7 CP 324, 2020.
8 COVID-19 Response (Cabinet Office, 22 February 2021); Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021, SI 2021/364.
9 'NHS volunteer responders: 250,000 target smashed with three quarters of a million committing to volunteer' (NHS, 29 March 2020); NHS Volunteer Responders, 'Volunteer now to support the COVID-19 vaccination programme'
10 CA 2020, s 11.
11 Ibid s 18.
12 Ibid s 30.
13 Ibid s 25.
14 Ibid s 39.
15 Ibid ss 22–24.

service, NHSX, and, after abandonment of the initial version,[16] was rolled out.[17] Many questions raised by the Joint Committee on Human Rights about privacy safeguards and independent oversight remained unanswered.[18] In March 2021, a scathing report by the Public Accounts Committee found that this NHS Test & Trace system, which cost an 'unimaginable' £37 billion, had failed to deliver discernible benefits to the UK's pandemic response.[19] More direct intrusions into civil liberties have included regulatory powers to direct the suspension of port operations,[20] which are intended to ensure border monitoring but could also be applied internally (such as to cruise ships).[21] Next, public health officers and other officials can enforce quarantining under section 51.[22] Section 52 allows for regulations to ban events, gatherings and the use of communal premises aimed at the apparently healthy general population. Rights of due process are affected under sections 53 to 57, by which various pre-trial hearings may take place by live video links. Democratic rights may have also been affected by powers under sections 59 to 70 and 84 to postpone (as in wartime) pending elections for local authorities, the London mayor, and even the General Synod of the Church of England. Local authority meetings can also be trimmed (section 78). Finally, there are winners and losers in terms of property rights: tenants in the private, social and business rented sectors have been protected from eviction for a specified time (sections 79 to 83).

16 See Ian Levy, 'The security behind the NHS contact tracing app' (*National Cyber Security Centre*, 4 May 2020).

17 NHS COVID-19 App. For standards, see European Commission, Recommendation (EU) 2020/518 of 8 April 2020, *Common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymised mobility data*; eHealth Network, *Mobile applications to support contact tracing in the EU's fight against COVID-19: Common EU Toolbox for Member States; European Data Protection Board, Guidelines 04/2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak* (21 April 2020).

18 Joint Committee on Human Rights, *Human Rights and the Government's Response to Covid-19: Digital Contact Tracing* (2019–21 HC 343/HL 59). See also Andy Phippen and Emma Bond, 'COVID-19 and tech solutions – another politician's fallacy?' (2020) 31 Entertainment Law Review 191; Marion Oswald and Jamie Grace, 'The COVID-19 tracing app in England and "experimental proportionality"' [2021] Public Law 27.

19 House of Commons Public Accounts Committee, *Covid-19: Test, Track and Trace (Part 1)* (2019–2021 HC 932).

20 CA 2020, s 50.

21 See 'Covid Scotland: UK-only cruise ship MSC Virtuosa "barred from docking in Greenock"' (*The Scotsman*, 8 June 2021).

22 The UK Government cites *Kudla v Poland* App no 30210/96, 2000-XI and *Pretty v UK* App no 2346/02, 2002-III in its Memorandum to the Joint Committee on Human Rights: The Coronavirus Bill 2020, para 24.

Scant oversight mechanisms have been applied to this sprawling legislative edifice. First, by section 97, the Secretary of State must prepare and publish a report every two months on the status of the provisions in the Act. In addition, the report must include a statement that the Secretary of State is satisfied that the status of those provisions is 'appropriate'. No further explanation of this term is provided in the Act or wider guidance, indicating that this requirement is undemanding or even cosmetic. Second, by section 98, the House of Commons is enabled to debate and vote on the continuation of the Coronavirus Act 2020 every six months based on a motion 'That the temporary provisions of the Coronavirus Act 2020 should not yet expire.'[23] This review power is extraordinarily confined and has hindered subsequent much-needed meaningful parliamentary scrutiny of the Act.[24] The House of Lords is allowed no part to play, yet no reasons were given for its exclusion. The only obvious precedents for this treatment are the Provisional Collection of Taxes Act 1968, section 1 (relating to the annual Budget proposals), and the European Union (Withdrawal) Act 2018, section 13, by which the negotiated withdrawal agreement and the framework for the future relationship had to be approved by a resolution of the House of Commons (a 'meaningful vote') while the House of Lords was required by motion merely to take note by debate (a rather meaningless vote). These two precedents could arguably provide justification on the basis that the enhanced democratic credentials of the House of Commons might be peculiarly relevant in those specific contexts. But they cannot support the complete exclusion of the Lords from scrutiny and review of CA 2020 measures of such immense magnitude. The third precaution is that, by section 89, the Act is to expire after two years, but, even then, the 'relevant national authority' (basically, a minister of the Crown under section 90) can extend the life by regulation for six months at a stretch. Proposals to shorten this period, such as to one year, or even shorter, were rejected.[25] For the Scottish Parliament's equivalent, the Coronavirus (Scotland) Act 2020,[26] a final sunset of 30 September 2021 is specified by section 12. However, successor legislation can be installed, and so the Coronavirus (Extension and Expiry) (Scotland) Bill 2021 plans to extend the legislation (with some omissions) until 31 March 2022.[27]

23 The initial draft set two years which was a point of criticism: House of Lords Select Committee on the Constitution, *Coronavirus Bill* (2019–21 HL 44) para 8.

24 For renewal on 25 March 2021, see HC Deb 25 March 2021, vol 691, col 1195; Fiona de Londras, 'Six monthly votes on the Coronavirus Act 2020: a meaningful mode of review?' (*UK Constitutional Law Blog*, 25 March 2021).

25 House of Lords Delegated Powers and Regulatory Reform Committee, *9th Report* (2019–21 HL 42) para 4; HL Deb 25 March 2020, vol 802, col 1771, Earl Howe.

26 Asp 7.

27 SP Bill 1. See Coronavirus (Extension and Expiry) (Scotland) Bill, 24 June 2021.

CHOICE OF LEGISLATIVE PLATFORMS

Appearances at the start of the pandemic emergency[28] seemed to suggest that the CA 2020 would offer the main legislative platform for a response to COVID-19, and so this instrument grabbed the attention of Parliament. But appearances turned out to be deceptive. As this part explains, the CA 2020 has been relatively silent compared to some alternative platforms.

CA 2020: firing duds

The CA 2020 was passed in great haste on grounds of national emergency, but its usage has been relatively modest, as demonstrated by two sample areas: the justice system and economic interventions.

For the struggling justice system,[29] a mixed picture has involved some restrictions to its usual functioning alongside some instances of governmental forbearance. Sentencing by the judges has taken account of the more severe lockdown conditions in prison,[30] while the Ministry of Justice introduced the End of Custody Temporary Release scheme for suitable prisoners, within two months of their release date, to be temporarily released from custody, though this action was taken under rule 9A of the Prison Rules 1999 and rule 5A of the Young Offender Institution Rules 2000.[31] It was reckoned that up to 4000 prisoners would be released under this scheme, but, as of 3 July 2020, only 209 prisoners had been released,[32] and the scheme seems to have been in abeyance since then with no plans to restart.[33] Thus, the CA 2020 was not used to ameliorate the conditions of offenders.

Another planned intervention also fizzled out. Criminal trials by jury in England and Wales were suspended for some months after 23 March 2020,[34] leading to huge backlogs of cases, though some

28 The situation was identified as a 'moment of national emergency': Prime Minister's statement on coronavirus (COVID-19), 23 March 2020.

29 See *Impact of the Pandemic on the Criminal Justice System* (Criminal Justice Joint Inspectorate, 19 January 2021).

30 *R v Manning* [2020] EWCA Crim 592; *HM Advocate v Lindsay* 2020 HCJAC 26.

31 'End of Custody Temporary Release' (Ministry of Justice and HM Prison and Probation Service 24 April 2021). See *R (Davis) v Secretary of State for Justice* [2020] EWHC 978.

32 House of Commons Justice Committee, *Coronavirus (Covid-19): The Impact on Prisons* (2019–21 HC 299) paras 52, 57; and see *Government Response* (2019–21 HC 1065). See further House of Commons Justice Committee, *Coronavirus (Covid-19): The Impact on the Probation System* (2019–21 HC 461).

33 *Government Response* (2019–21 HC 1065).

34 'Review of court arrangements due to COVID-19, message from the Lord Chief Justice'. The pause did not breach the right to trial by jury or cause a delay contrary to s 22(3) of the Prosecution of Offences Act 1985: *R (McKenzie) v Crown Court at Leeds* [2020] EWHC 1867 (Admin).

recovery took place after May 2020 through the greater use of live links under section 51 and also the opening of 60 adapted 'Nightingale' courts.[35] The shift from physical to online hearings raised profound concerns about how to assist and assess the participants,[36] and also to ensure open justice.[37] In its review of the impact of the pandemic upon the court system, the House of Commons Constitution Committee has made various criticisms of the 'crisis level' backlogs in the criminal justice system, deeming them 'neither acceptable, nor inevitable'.[38] More severe modifications to the right to jury trial entered into consideration as a potential reform under the CA 2020 in England and Wales[39] but have as yet come to nought. Elsewhere, drastic changes were opportunistically envisaged in Scotland by early drafts of the Scottish Parliament's Coronavirus (Scotland) Act 2020 which contained proposals to suspend trial by jury and to add exceptions to hearsay rules of evidence. This attempt to railroad through fundamental change was rebuffed by the vocal opposition of Scottish legal professions. Fresh proposals, *Covid-19 and Solemn Criminal Trials*,[40] were tabled, but the threat to jury trial again receded with greater attention to virtual hearings and elongated time limits as in England.[41] The threat has not, however, vanished since the Police, Crime, Sentencing and Courts Bill will replace temporary provisions in the Coronavirus Act 2020 relating to live video and audio court hearings in criminal courts, including live link directions relating to a jury.[42] A variety of other criminal justice issues, such as impacts on custody time limits,[43] the extended retention

35 See Sally Lipscombe and Graeme Cowie, *Coronavirus Bill: Implications for the Courts and Tribunals* (House of Commons Library 08865, 2020); Ministry of Justice, 'Speech: Lord Chancellor outlines his plans to recover the justice system from COVID-19', 4 June 2021.

36 *Inclusive Justice: A System Designed for All: Interim Evidence Report: Video Hearings and their Impact on Effective Participation* (Equalities and Human Rights Commission 2020); *Explaining the Case for Virtual Jury Trials during the COVID-19 Crisis* (JUSTICE 2020); Hannah Quirk, 'Covid 19 and juryless trials?' [2020] Criminal Law Review 569.

37 *Sutter v Switzerland* App no 8209/78, (1984) 6 EHRR 272 [26]–[27]; *Pretto v Italy* App no 7984/77, (1984) 6 EHRR 182 [21].

38 House of Lords Select Committee on the Constitution, *Covid-19 and the Courts* (2019–21 HL 257).

39 House of Commons Justice Committee, *Coronavirus (COVID-19): The Impact on Courts* (2019–21 HC 519) para 77.

40 'Criminal trials during COVID-19 outbreak' (Scottish Government, 14 April 2020).

41 See Coronavirus (Scotland) (No 2) Act 2020 (asp 10), sch 2.

42 (2021–22) HL no 40, cl 169 and sch 19.

43 Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020, SI 2020/953, permitted pre-trial detention to increase from 182 to 238 days. See Luke Marsh, 'The wrong vaccine' (2021) Legal Studies 1–17.

of profile data[44] and domestic abuse remain to be fully assessed.[45] As for civil process, including coronial hearings, the facility of online and closed circuit links has again been promoted.[46] Wider impacts on the legal profession are still to be tackled.[47] On these issues, the CA 2020 has been silent.

The CA 2020 has had more impact on economic and social life than civil and political life. Various ambitious and ruinously expensive schemes of aid to businesses[48] and the furloughing of employees[49] have been implemented. In addition, restrictions on the treatment of tenants have also been applied to prevent evictions.[50] Further legislation (the Stamp Duty Land Tax (Temporary Relief) Act 2020) also reduced stamp duty from June 2020 until October 2021.

PHA 1984: the weapon of choice

The CA 2020 received Royal Assent on March 25. Yet, the very next day, additional measures were introduced via the PHA 1984. In short, part 2A of the PHA 1984 was inserted by the Health and Social Care Act 2008 following the UK's experience of SARS in 2003 and to give effect to the International Health Regulations 2005. It provides powers under sections 45C(1), (3)(c), (4)(d), 45F(2) and 45P which authorise the executive authorities to issue regulations to protect against infectious disease. Under these powers, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020[51] were issued.

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44 Coronavirus (Retention of Fingerprints and DNA Profiles in the Interests of National Security) Regulations 2020, SI 2020/391 and 973.

45 See House of Commons Home Affairs Committee, *Home Office Preparedness for Covid-19 (Coronavirus): Domestic Abuse and Risks of Harm within the Home* (2019–21 HC 321) and *Government Reply* (2019–21 HC 661). Note also the Domestic Abuse Act 2021, the background to which pre-dates COVID-19.

46 See *Chief Coroner's Guidance on COVID-19* (No 34, 29 March 2021); Rudi Fortson, 'Adjusting to Covid 19 under the English legal system' (2021) 2 eucrim 116–122.

47 House of Commons Justice Committee, *Coronavirus (COVID-19): The Impact on the Legal Professions in England and Wales* (2019–21 HC 520) (covering practical difficulties arising from remote working and financial difficulties). For the limited uplift in legal aid funding, see 'Lord Chancellor outlines his plans to recover the justice system from COVID-19' (Ministry of Justice, 4 June 2021).

48 Business Support.

49 See 'Coronavirus Job Retention Scheme and Job Retention Bonus' (HM Treasury, 2 October 2020). The schemes rely on the CA 2020, ss 71, 76.

50 See Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2020, SI 2020/914; Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) (No 2) Regulations 2020, SI 2020/994. See further 'Guidance for landlords and tenants' (Ministry of Housing, Communities and Local Government, 21 June 2021).

51 SI 2020/350.

Corresponding instruments were issued for Wales,[52] Scotland[53] and Northern Ireland,[54] albeit with many inexplicable variations. These regulations expanded upon an earlier regulatory order issued in February 2020[55] which had been, as might be expected for public health legislation, confined to the detention for screening or treatment of potentially infected individuals. Many later amendments, variants, and editions have followed ever since.[56]

The PHA 1984 regulations go far beyond dealing with the sick. They impinge upon many activities of the general population and impose extraordinary restrictions on general liberty, often very similar to those allowed by the CA 2020. A major aim throughout has been to minimise social interactions, including by 'lockdowns', which prevailed in various forms and levels at least until 19 July 2021 when, in England, a lifting of most restrictions occurred.[57] The lockdown regulations have appeared mainly in the PHA 1984 and were not granted by the CA 2020, which could have been designed to afford greater clarity and accountability,[58] The PHA 1984 regulations have entailed the enforced closure of some businesses and restrictions on others (regulations 4 and 5), including entertainment and hospitality venues.[59] Most draconian of all, the initial lockdown under regulation 6 stated that 'no

52 Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, SI 2020/353 (W80).

53 Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, SSI 2020/103. See Robert Shiels, 'The instant law of coronavirus' [2020] Scottish Law Times 153, 245; Paul Scott, 'Responding to COVID 19 in Scots law' (2020) 24 Edinburgh Law Review 421.

54 Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020, NISR 2020/55. See *COVID 19 and the Law* (Committee on the Administration of Justice 2020); Daniel Holder, 'From special powers to legislating the lockdown: the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020' (2020) 71 Northern Ireland Legal Quarterly OA1.

55 Health Protection (Coronavirus) Regulations 2020, SI 2020/129.

56 See especially (No 2) SI 2020/684; (No 3) SI 2020/750; (No 4) SI 2020/1200.

57 'Speech: PM statement at coronavirus press conference' (Prime Minister's Office, 14 June 2021); Health Protection (Coronavirus, Restrictions) (Steps etc) (England) (Revocation and Amendment) Regulations 2021, SI 2021/848; Health Protection (Coronavirus, Restrictions) (Self-isolation) (England) (Amendment) Regulations 2021, SI 2021/851. Scotland and Wales planned a more stepped reduction through to August 2021: 'More normality if progress continues' (Scottish Government, 22 June 2021) ; '"Next steps towards a future with fewer covid rules" – First Minister' (Welsh Government, 14 July 2021).

58 House of Lords Select Committee on the Constitution, *Covid-19 and the Use and Scrutiny of Emergency Powers* (2021–22 HL 15) paras 55, 56, 63.

59 Further enforcement powers were added by the Health Protection (Coronavirus, Restrictions) (Local Authority Enforcement Powers and Amendment) (England) Regulations 2020, SI 2020/1375.

person may leave the place where they are living without reasonable excuse' (which might include the need to obtain basic necessities and to travel to work where it was not reasonably possible to work at home). Under regulation 7, public gatherings of more than a specified (and variable over time and jurisdiction) number of people were forbidden. A person who contravened these requirements committed an offence, punishable by a fine, and the police were given powers to disperse individuals or gatherings and to issue fixed-penalty notices (regulations 8 to 10). Large gatherings (of more than 30 people) in breach of the regulations became subject to a fixed-penalty notice of £10,000 just before the August Bank Holiday 2020.[60]

These key regulations, which grew through hundreds of amendments, have been critiqued by several eminent practitioners.[61] They highlight multiple problems: divergences between the CA 2020 and the regulations; obscurities in the meaning of the regulations; confusing government and other guidance, especially police guidance, as compared to the primary regulatory texts;[62] excessive or inconsistent police enforcement; and arguments that some elements are *ultra vires*. Some technical corrections have been made through amending regulations,[63] but many problems remained.

The resort to PHA 1984, immediately following the more compendious scheme of the CA 2020 (which covers many of the same issues and more besides), seems extraordinary. Part of the explanation may be familiarity. The PHA 1984 had already been invoked against COVID-19 in early 2020 and (as explained above) had been considered in previous threatened pandemics, and so the need for decisive action could most comfortably be met by resort to this established pathway. Yet, the same eminent lawyers mentioned above who cast doubt on the *vires* of the regulations were also sceptical as to whether legal validity or clarity could more securely be delivered under the CA 2020. However, familiarity may also breed constitutional contempt; the regulations could be, and were, made without any forewarning or

60 Health Protection (Coronavirus) (Restrictions on Holding of Gatherings and Amendment) (England) Regulations 2020, SI 2020/907, r 2.

61 See Lord Sandhurst and Anthony Speaight, *Pardonable in the Heat of Crisis – But We Need Urgently to Return to the Rule of Law* and Benet Brandreth and Lord Sandhurst, *Pardonable in the Heat of Crisis – Building a Solid Foundation for Action* (Society of Conservative Lawyers 2020); Tom Hickman, *Eight Ways to Reinforce and Revise the Lockdown* (UK Constitutional Law Association 2020).

62 House of Lords Select Committee on the Constitution (n 58 above) paras 153–177; John Sorabji and Steven Vaughan, '"This is not a rule": COVID-19 in England and Wales and Criminal Justice Governance via Guidance' (2021) 12 European Journal of Risk Regulation 143.

63 See especially Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020, SI 2020/447.

public consultation under the emergency procedure set out in section 45R of the PHA 1984 – and without any draft having been laid and approved by parliamentary resolution. As a backstop, the regulations expire after six months (subject to reissuance).

CCA 2004: right weapon, wrong time

The CCA 2004 represents a legal landmark. It consolidated and expanded legal duties and powers to ensure that public authorities prepare for, and respond to, a wide variety of risks as set out in the *National Risk Register* (in which pandemic influenza tops the list).[64] While the CCA 2004 was impelled by domestic and global crises, it was not enacted in haste but benefited from a prolonged consultation period led by a special parliamentary Joint Select Committee.[65] The CCA 2004 systematically furnishes executive bodies with duties to plan and cooperate (part 1)[66] and with measured powers to respond to an 'emergency' (part 2), subject to vital legal and parliamentary oversight to avert improper responses. The widest range of risks is addressed: terrorist attacks, protests, environmental events – and human and animal disease pandemics. Consequently, the CCA 2004 was expressly designed to tackle circumstances such as COVID-19. Indeed, the Speaker's Counsel, Daniel Greenberg, is reported to have confirmed 'unequivocally that the powers under the Civil Contingencies Act … are absolutely appropriate for the current emergency'.[67] Yet, the UK Government resorted to alternative legislation. Why?

As shall be noted later, part 1 of the CCA 2004, dealing with 'civil protection' through planning and resilience reinforcement, has been in play to some extent, but part 2, 'Emergency Powers', has remained unused even though it could cover much of the work of the PHA 1984. Section 19(1)(a) defines an 'emergency' as including 'an event or situation which threatens serious damage to human welfare in the United Kingdom or in a Part or region'. Calamities such as pandemic influenza were expressly considered during debates. That occurrence qualifies as threatening 'human welfare only if it involves, causes, or may cause' one or more of a series of outcomes under section 19(2). At least three of the items set out in that list arise from COVID-19: 'loss of human life'; 'human illness or injury'; and 'disruption of services relating to health'. Several other threats to 'human welfare' are also

64 The latest edition was published in 2017: National Risk Register of Civil Emergencies (Cabinet Office 2017).

65 See Joint Committee on the Draft Civil Contingencies Bill, *Draft Civil Contingencies Bill* (2002–03 HL 184/HC 1074).

66 Part 1 already requires what the National Audit Office has called for in terms of coordination and the development of 'playbooks': *Initial Learning from the Government's Response to COVID 19* (2021–22 HC 66).

67 HC Deb 23 March 2020, vol 674, cols 118–119, David Davis.

relevant. In short, COVID-19 is a qualifying 'emergency'. This finding underscores the point that appropriate legislation was already in place to address the COVID-19 crisis without resort to an entirely new and hastily enacted emergency framework such as the CA 2020.

Under section 20, 'emergency regulations' can be issued when the further conditions of section 21 are 'satisfied' in the mind of the executive officers, subject to a declaration of necessity, appropriateness, proportionality, and compliance with human rights. Section 21 reiterates that the issuance of regulations requires an emergency to be taking place, or to be about to occur, and that it is necessary 'to make provision for the purposes of preventing, controlling or mitigating an aspect or effect of the emergency'. Existing legislation must be unsuitable or considered potentially ineffective. Section 23 repeats the criteria of appropriateness and proportionality, adds the need for geographical limitation, and specifies other specific curtailments: no forced military service, no banning of industrial strikes, no new indictable offences or changes to criminal procedures, and no amendments to the CCA 2004 or to the Human Rights Act 1998. Overall, the UK Government back in 2004 emphasised the notion of a 'triple lock' – that restraints will be imposed on emergency regulations by reference to seriousness, necessity and geographical proportionality.[68] These 'locks' are not adequately explained and have to be drawn together from sections 19 (seriousness) and sections 21 and 23 (necessity and geographic proportionality).[69] Thus, proportionality is explained just in geographical terms. The test is baldly stated when an emergency is declared (section 20(5(b)) and when the regulations are issued (section 23(1)(b)), but not when the regulations are applied.[70] Likewise, the condition of necessity is left unelaborated, save in section 21(5) and (6) where emergency regulations are not needed if the 'same' as existing legislation which can deal with crisis, such as terrorism legislation, unless the choice of existing legislation would result in serious delay or ineffectiveness. The House of Lords Select Committee on the Constitution depicted section 21(5) as a 'significant barrier' to the use of the CCA 2004.[71] However, this view underestimates the value of the 'triple lock' as a barrier to excessive reactions and fails to note that no minister has claimed that section 21(5) blocked the use of the CCA 2004. Arguably, amongst more pressing general problems,[72] is that there is no express requirement of

68 See Draft Civil Contingencies Bill Consultation Document (Cabinet Office 2003) para 19.

69 For discussion, see Walker and Broderick (n 1 above) 5.02.

70 Compare: Anti-terrorism, Crime and Security Act 2001, ss 17 and 19; Regulation of Investigatory Powers Act 2000, ss 5, 22, 23, 28, 29, 32, 49, 51, 55 and 73–75.

71 House of Lords Select Committee on the Constitution (n 58 above) para 214.

72 Joint Committee on the Draft Civil Contingencies Bill (n 65 above) para 38.

objectivity in any of the tests – the minister is allowed to use powers on the basis of satisfaction without the qualification of reasonableness, a standard which is notorious for encouraging unfounded intrusions into liberties as illustrated by wartime detention powers.[73]

Subject to these criteria and limits, section 22 provides that emergency regulations can 'make provision of any kind that could be made by Act of Parliament or by the exercise of the Royal Prerogative'. The list of potential uses – which itself is not exhaustive – is sweeping. As a result, the potential coverage of the CCA 2004 is far broader than competing legislation and less susceptible to challenge than the CA 2020 or the PHA 1984. It could even grant powers to the military such as to override normal traffic management schemes in order to facilitate operations such as disease testing stations or deliveries of vaccinations.[74] The only possible obstacle to its operation in the circumstances of the COVID-19 emergency is that CCA 2004 regulations are not permitted to 'alter procedure in relation to criminal proceedings' (section 23(4)(d)), whereas the CA 2020 (section 53 and schedule 23) allows live video links in court proceedings, including in criminal cases. But this obstacle to the use of the CCA 2004 was never mentioned in the parliamentary debates and surely could have been overcome by simple primary legislation. Aside from this drawback, neither the declaration of emergency under the CCA 2004 nor the potential list of regulations necessarily demands the further, and politically distasteful, issuance of a derogation notice under article 4 of the International Covenant on Civil and Political Rights or article 15 of the European Convention on Human Rights (ECHR). Derogation is not inevitable[75] but depends on the impacts on human rights of invoked regulations. Unlike some other countries,[76] the UK Government has asserted that its COVID-19 legislation to date is compatible with human rights.[77] Bearing in mind the qualified nature of most human rights in this context, an assessment will be considered later in this article. But the CCA 2004 includes superior oversight safeguards (to be described

73 See *Liversidge v Anderson* [1942] AC 206.

74 A COVID Support Force was placed in readiness in March 2020, and by 13 November 2020, there were 2342 military personnel assisting with 42 open Military Aid to Civilian Authority requests: 'COVID Support Force: the MOD's continued contribution to the coronavirus response' (Ministry of Defence, 21 May 2021). See House of Commons Defence Committee, *Manpower or Mindset: Defence's Contribution to the UK's Pandemic Response* (2019–21 HC 357).

75 See Council of Europe, *Respecting Democracy, Rule of Law and Human Rights in the Framework of the COVID-19 Sanitary Crisis: A Toolkit for Member States* (SG/Inf(2020)11, Strasbourg, 2020).

76 See Council of Europe, 'Notifications under Article 15 of the Convention in the context of the COVID-19 pandemic'.

77 See Memorandum to the Joint Committee on Human Rights (n 22 above).

next) and is thus better positioned than other legislative platforms to ensure it is invoked only 'to the extent strictly required by the exigencies of the situation' as required by international law. Some authors have advocated derogation as a way of marking out the legislation as special and temporary so that it does not become 'normalised'.[78] However, the history of derogation in Northern Ireland shows that derogation itself can too easily become normalised and entrenched as a parallel system without evident expiry date; furthermore, even if successfully challenged, the emergency contents will be quickly distilled into the 'normal' legal system.[79] So, better safeguards can be maintained by legislation which avoids the use of permissive derogations, works within boundaries which do not trigger derogation, and so sets careful limits to permissible boundaries of law even in an emergency. The CCA 2004 and, to a lesser extent, the Terrorism Act 2000 are fine exemplars of such an approach.

The CCA 2004 excels compared to its COVID-19 legislative rivals because it better avoids the disdain which they show for constitutionalism. By comparison, precautions in the CCA 2004 against excessive usage or a lingering life are far more extensive and effective. They include (section 26) that each emergency regulation remains in force for a maximum of 30 days (though a new regulation can then be issued). In debates on the CA 2020, the government minister dismissed that timeframe as too short,[80] but it is relatively short precisely to ensure unremitting public accountability which is proportionate to the extent and duration of the emergency powers being invoked.

Regulations under the CCA 2004 must be laid before Parliament 'as soon as is reasonably practicable' (section 27); if each House has not expressly approved a regulation within seven days, it falls, and Parliament can also later by resolution annul or amend a regulation. If Parliament is prorogued or the Commons or Lords adjourned when a regulation is issued and would be unable to consider it, the Monarch or the relevant Speakers, respectively, must reconvene the sitting (section 28). A less powerful, but still notable, prerequisite is that the UK Government must 'consult' with the devolved executives in Scotland, Wales and Northern Ireland, unless obviated by pressing

78 Alan Greene, 'Derogating from the European Convention on Human Rights in response to the coronavirus pandemic: if not now, when?' [2020] European Human Rights Law Review 262; Kanstantsin Dzehtsiarou, 'Article 15 derogations: are they really necessary during the COVID-19 pandemic?' [2020] European Human Rights Law Review 359; Alan Greene, 'On the value of derogations from the European Convention on Human Rights in response to the COVID-19 pandemic: a rejoinder' [2020] European Human Rights Law Review 526; Alan Greene, *Emergency Powers in Time of Pandemic* (Bristol University Press 2021).

79 See Clive Walker, *Terrorism and the Law* (Oxford University Press 2011) ch 1.

80 HC Debs 23 March 2020, vol 674, col 132, Penny Mordaunt.

circumstances (section 29). This consultation is important since social, economic and even legal circumstances can differ from England. Emergency regulations are to be treated as 'subordinate legislation' under the Human Rights Act 1998, even if 'they amend primary legislation' (section 30). Thus, a court can annul a regulation if found incompatible with the ECHR, thereby going beyond a mere declaration of incompatibility.[81] The present UK Government's election manifesto 2019[82] expressed distaste for the Human Rights Act and, beyond that, the powers of judges by way of judicial review.[83] This suggests that another reason for avoiding the CCA 2004 was to preclude more vigorous oversight via these mechanisms.

As well as parliamentary oversight mechanisms, the CCA 2004, section 24,[84] requires the appointment of 'emergency coordinators' for Northern Ireland, Scotland and Wales, and 'regional nominated coordinators' for each region of England. The objective is to facilitate coordination of activities under the emergency regulations. The officials are subject to directions and guidance by ministers but in turn can override local authorities. Their absence increases the risk of a national emergency response that prioritises some regions (such as London and the south-east) over others, political opposition (or opportunism) by devolved or local politicians and a lack of audit over whether emergency responses are being evenly or adequately undertaken across the land. One might argue that the disagreements between Westminster and local mayors over the terms of lockdown (especially in Manchester in October 2020)[85] might have been less contentious and more constructive if the more consistent approach provided for by the CCA 2004 had applied.

Are there any arguments or features in the CCA 2004 which have ruled out its use aside from the fears of political (in)convenience? Several arguments have been voiced by the UK Government.

First, the Leader of the House (Jacob Rees-Mogg) expressed the view that a known risk could not become an 'emergency':

> Unfortunately, the Civil Contingencies Act would not have worked in these circumstances, because the problem was known about early

81 See Human Rights Act 1998, ss 3 and 4.

82 Conservative and Unionist Party Manifesto 2019, 48.

83 See 'Independent review of administrative law' (pending) (Ministry of Justice, 31 July 2020).

84 Note also the CCA 2004, s 25, provided for expert consultation regarding the setting-up of tribunals, but this mechanism was abolished as part of a more general 'bonfire of the quangos' by the Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013, SI 2013/2042.

85 Mike Kane MP argued that 'Not since the Peterloo massacre of 1819 has the state displayed such coercive power over the people of Greater Manchester.' HC Deb 21 October 2020, vol 682, col 1093.

> enough for it not to qualify as an emergency under the terms of that Act. The legal experts say that if we can introduce emergency legislation, we should do so rather than using the Civil Contingencies Act, because if we have time to introduce emergency legislation, we obviously knew about it long enough in advance for the Act not to apply. That is why that Act could not be used.[86]

This assertion appears to be mistaken because it automatically rules out the CCA 2004's application to any pandemic or other emergency where the danger emerges and grows. There is no rule in the CCA 2004 against the foreseeability of a crisis. If the causes of emergency can only be wholly unpredictable, then why would the CCA 2004 encourage so much time and money to be spent on planning and resilience in part 1?

A second reason for the UK Government's marginalisation of the CCA 2004 is its 'triple lock' feature, as acknowledged by Prime Minister Boris Johnson on 2 November 2020:

> As for the legal basis, the Civil Contingencies Act has a strict test known as the triple lock that must be met before emergency regulations under the Act can be made. One of these tests is that there must not be existing powers elsewhere, and the Public Health Act 1984 offers clear powers to impose restrictions on public health grounds. That is why … the Public Health Act is the more appropriate route.[87]

In response, it might be again noted that the CCA 2004 does not have a binary set of tests under the triple lock, and section 21(5) and (6) in particular ask whether other powers would be 'sufficiently effective' within the test of necessity (as discussed previously). So, without wishing to deny the role of the triple lock as a mechanism which encourages restraint and preference for sectoral legislation,[88] it should not be seen as automatically demanding or justifying a shift to any alternative legislation (such as the PHA 1984). That legislation can cover some of the same ground but patently contains shortcomings which could have been avoided or minimised through use of the CCA 2004. The key advantages of the CCA 2004 remain: clear and comprehensive powers; uniformity of application; and enhanced restraints and accountability. No other legal source can match these attributes – certainly not the PHA 1984.

A third argument against the CCA 2004 was offered in response to the Joint Committee on Human Rights' report, *The Government's Response to Covid-19: Human Rights Responses* (discussed further later in this article).[89] Once again, the CCA 2004 is depicted as 'a last resort, where it is not possible to take conventional or accelerated primary legislation through Parliament, and thereby to allow

86 HC Deb 19 March 2020, vol 673, col 1188.
87 HC Deb 2 November 2020, vol 683, col 45.
88 Joint Committee on the Draft Civil Contingencies Bill (n 65 above) app 9, q 1.
89 (2019–21 HC 265/HL 125); *Government Response* (CP 335, 2020).

Parliamentary scrutiny before measures pass into law'. As argued above, the CCA 2004 should not be understood as a binary choice or as a complete 'panacea',[90] but that Act does allow more involvement by Parliament, especially at the start of the emergency when panic often lowers the parliamentary guard. Conversely, the implication that the PHA 1984 regulations are 'conventional' and allow superior scrutiny should be rejected.

The CCA 2004 is designed to cope with disruptions to constitutional order and everyday life beyond the capabilities of its rivals, thereby avoiding further primary legislation and legal challenges. Overall, the CCA 2004 represents a carefully debated and designed legislative code which has stood the test of time. A Civil Contingencies Act Enhancement Programme review was commenced in 2011,[91] but the conclusion of the *Report of the Post Implementation Review of the Civil Contingencies Act (2004) (Contingency Planning) Regulations 2005* in 2017 was that no major change was required.[92] Part 1 of the legislation has prompted considerable and much improved planning and resilience efforts, and the fact that part 2 had never been invoked was a reflection of the success of part 1 as well as of the effective safeguards written into part 2. Perhaps the only doubts about part 2 relate to the absence of express powers to detain without trial[93] or to force relocation.[94] In practice, these uncertainties (and one cannot be sure that section 22 forbids the grant of such powers) can be overcome by the grant of powers of direction backed by arrest and a summary offence.

Now that a truly severe and widespread emergency has undoubtedly arisen, the UK Government has shirked from the appropriate invocation of part 2. This failure may relate to a lack of capacity or prioritisation in the Cabinet Office, the Civil Contingencies Secretariat of which should provide the central hub of emergency management but has

90 House of Lords Select Committee on the Constitution (n 58 above) para 40.

91 See *Policy Paper: Civil Contingencies Act Enhancement Programme – Programme Initiation Document* (Cabinet Office 2011).

92 See *Report of the Post Implementation Review of the Civil Contingencies Act (2004) (Contingency Planning) Regulations 2005*. Note that the defunct Health Protection Agency was replaced as a First Responder by the Secretary of State for Health: Health and Social Care Act 2012, s 306(4), sch 7, para 16.

93 The Bill's sponsors refused to rule out detention without trial: Walker and Broderick (n 1 above) para 5.26.

94 The lack of a clear power was noted in connection with the Toddbrook Reservoir (Whaley Bridge) incident in 2019: David Balmforth, *Toddbrook Reservoir Independent Review Report* (DEFRA 2020). The Floods and Water Management Act 2010, s 33 and sch 4, provides for reservoir owners to prepare flood plans.

been missing in action in terms of clear coordination and messaging.[95] Perhaps there has been some hollowing out of its authority both downwards through devolution and sideways by the growth of the powerful Environment Agency which has 10,000 staff compared to just under 100 within the Cabinet Office's Civil Contingencies Secretariat.[96] These administrative and legislative failures in central government were arguably compounded by the political desire to avoid more stringent oversight and accountability by the resort to more malleable powers under the PHA 1984 and the CA 2020.

CONSEQUENCES OF CHOICE OF THE LEGISLATIVE PLATFORM

The choice between the CA 2020, the PHA 1984 and the CCA 2004 is not merely a decision about the formal, legislative basis of COVID-response measures. This part of the article analyses the legislative options according to substantive criteria in order to draw out their respective strengths and weaknesses.

Sectoral versus general emergency legislation

The contention that constitutional safeguards have been neglected might be mitigated if the PHA 1984 or CA 2020 could be depicted as specialist 'sectoral' legislation rather than 'emergency' legislation. This line of argument was made by the New Zealand Law Commission in its *First Report on Emergencies* of 1990 and *Final Report on Emergencies* in 1991.[97] The Commission recommended that emergency powers should, whenever possible, be conferred by 'sectoral legislation' – legislation deliberated upon and designed in advance of the emergency and tailored to the specific needs of each kind of emergency.

If a 'sectoral' approach can be properly adopted, then the full majesty of the CCA 2004 would not be required, and well-tailored public health legislation could instead apply. Indeed, more targeted legislation could meet more precisely the public health needs of society and avoid disproportionality and the tainting of other spheres. However, the

95 See Guidance: Preparation and Planning for Emergencies (Cabinet Office, 20 February 2013). Note also the disbandment of the Threats, Hazards, Resilience and Contingency Committee: 'Boris Johnson scrapped Cabinet Pandemic Committee six months before coronavirus hit UK' (*Telegraph Online*, 13 June 2020). For institutional reforms, see Aidan Shilson-Thomas et al, *A State of Preparedness* (Reform UK, 2021).

96 Hansard (House of Commons) UIN 207215, 17 January 2019.

97 *Report No 12: First Report on Emergencies* (New Zealand Law Commission 1990) 11. See also *Report No 22: Final Report on Emergencies* (New Zealand Law Commission 1991).

PHA 1984 and the CA 2020 cannot truly be categorised as 'sectoral legislation', and certainly not well-tailored sectoral legislation, because they lack at least four essential features.

First, sectoral legislation should be limited to a 'sector'. The advantage is that the relevant sector stakeholders and even the public can be engaged in the shaping and running of the legislation. There is no legal definition of a 'sector', but some idea of the meaning can be derived from the definition of 'critical national infrastructure(s)' which picks out 13 'sectors'.[98] The CA 2020 covers multiple sectors and embodies no mechanisms to engage with affected sectors.

The second beneficial feature of sectoral legislation is time to consider, debate and consult. Following on from the last point, sectoral legislation can be properly considered in advance in debates and subsequently in implementation. It follows the usual public and parliamentary timetable for debate (not a fast-track) and can utilise the usual structures for implementation (consultative and advisory bodies, draft proposals). For their part, the CA 2020 and the PHA 1984 regulations afforded almost no time to consider, debate and consult.

The third feature of sectoral legislation might be termed 'WYSIWYG': 'What you see is what you get.' The details of what is to be achieved in law are set out largely on the face of the sectoral legislation and do not await implementation by regulations which are even less amenable to scrutiny. In this aspect, the CA 2020 sets out ample details in its hundreds of pages but still embodies some very broad regulation-making powers, especially section 50 (power to suspend port operations), section 51 (powers relating to potentially infectious persons), section 52 (powers to issue directions relating to events, gatherings and premises), section 61 (power to postpone certain other elections and referendums) and section 62 (recalls), section 88 (power to suspend and revive provisions of this Act) and section 90 (power to alter expiry date). Much modern legislation contains broad regulation-making powers, but the collection here is not confined to one sector, and many expansive powers affect the general public rather than one sector.

The fourth feature which sectoral legislation should reflect is oversight. Post-legislative oversight in the context of a given sector is likely to be superior to omnibus legislation as it can be specialist and targeted. Yet, the PHA 1984 and CA 2020 both fail since they embody weak mechanisms, even compared to the comprehensive CCA 2004.

98 Chemicals, civil nuclear communications, defence, emergency services, energy, finance, food, government, health, space, transport, and water: 'Critical National Infrastructure' (Centre for the Protection of National Infrastructure, 20 April 2021).

Levels of oversight and accountability

Sectoral legislation should take advantage of its narrower focus by enhancing scrutiny in making, usage and duration. However, the precautions in the CA 2020 and PHA 1984 are much weaker than those specified for the CCA 2004.[99] The results are reflected in poor quality legislation, confusion between guidance and law, lack of consultation and debate, and an absence of criteria for making assessments. The inability of ministers to answer 'basic questions' has been condemned as 'lamentable and unacceptable' by the House of Commons Public Administration and Constitutional Affairs Committee.[100]

These defects were exacerbated by the failure of Parliament to adapt, especially in the early months, to the circumstances of crisis.[101] Though the House of Commons Committee on Procedure has now considered various issues around adapting to the pandemic, especially remote participation by members,[102] it took several months after March 2020 for numbers to return to the Commons Chamber and for the Select Committee to get to grips with the emergency. Certainly, the level of parliamentary attendance during passage of the CA 2020 and the main PHA 1984 regulations and in the early months of the pandemic was abysmal.[103] In May 2020, the House of Lords established the COVID-19 Committee to consider the long-term implications of the COVID-19 pandemic on the economic and social wellbeing of the UK in a way which can cut across the departmental-based structure of the

99 See Ronan Cormacain, *Rule of Law Monitoring of Legislation – Coronavirus Bill* (Bingham Centre 2020); Sandhurst and Speaight (n 61 above); and Brandreth and Sandhurst (n 61 above).

100 See *Government Transparency and Accountability during COVID-19* (2019–21 HC 803) para 143.

101 See *Parliaments and the Pandemic* (Study of Parliament Group 2021).

102 See *Procedure under Coronavirus Restrictions: Proposals for Remote Participation* (2019–21 HC 300); *Procedure under Coronavirus Restrictions: Remote Voting in Divisions* (2019–21 HC 335); *Procedure under Coronavirus Restrictions: The Government's Proposal to Discontinue Remote Participation* (2019–21 HC 392); *Government Responses* (2019–21 HC 565).

103 The House of Commons Commission (Decision of 16 April 2020) paved the way for remote attendance but did not change the rules as to quorum. The rules were implemented at HC Deb 21 April 2020, vol 675, col 2, and remained in place until 30 March 2021: House of Commons Chamber proceedings during the COVID-19 pandemic. For the rules in wartime, see Jennifer Tanfield, *In Parliament 1939-50* (House of Commons Library 20, 1991). For foreign legislatures, see Elizabeth Bloomer (ed), *Continuity of Legislative Activities during Emergency Situations* (Library of Congress 2020).

House of Commons.[104] However, Parliament has still not seen fit to insist upon other augmented oversight, unlike, say, the Independent Reviewer of Terrorism Legislation.[105]

The performance of Parliament on scrutinising the detail of the COVID-19 secondary legislation also leaves much to be desired.[106] It has been estimated that, as at 16 November 2020, 294 pandemic-related regulations had been made: 205 were subject to the 'negative' procedure; 75 were subject to the 'affirmative' procedure (but 67 were made using the urgent power under the PHA 1984, so making them more akin to a negative type); 13 were subject to the 'draft affirmative' procedure; and one was simply 'laid'; 41 came into effect before they were laid before Parliament.[107] Most regulations are made under the PHA 1984, part 2A, under the negative procedure; just 17 fall under the Coronavirus Act 2020. It almost goes without saying that consultation exercises with the general public and expert authorities about regulatory designs have been virtually non-existent. A challenge on these grounds to the Adoption and Children (Coronavirus) Amendment Regulations 2020, which amended protection systems around timescales, contacts and visits in social care, prevailed on appeal in *R (Article 39) v Secretary of State for Education*.[108] The Secretary of State had acted unlawfully by failing to consult the Children's Commissioner and other bodies representing the rights of children in care before introducing the regulations having regard to the vulnerability of children in care and the expertise of the Children's Commissioner (which surpassed the local authorities which were consulted).

Parliament has been slow to address its abnegation of responsibility. Eventually, at the six-month renewal debate, the Speaker, Lindsey Hoyle, made clear his dissatisfaction:

> The way in which the Government have exercised their powers to make secondary legislation during this crisis has been totally unsatisfactory. All too often, important statutory instruments have been published a matter of hours before they come into force, and some explanations why important measures have come into effect before they can be laid before this House have been unconvincing; this shows a total disregard for the House.

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104 House of Lords Select Committee on COVID-19: the Committee published its first report in April 2021, *Beyond Digital: Planning for a Hybrid World* (2019–21 HL 263). See also Scottish Parliament COVID-19 Committee, *Legacy Report* (SP 1010, 2021).

105 See Nina Malik, *Leaving Lockdown: The Impact of COVID-19 on Civil Liberties and National Security in the UK and US* (Henry Jackson Society 2020) 13.

106 See also Keith Ewing, 'Covid-19: government by Decree' (2020) 31 Kings Law Journal 1.

107 See Hansard Society, Coronavirus Statutory Instruments Dashboard.

108 [2020] EWCA Civ 1577.

> The Government must make greater efforts to prepare measures more quickly, so that this House can debate and decide upon the most significant measures at the earliest possible point.[109]

In response, the Secretary of State for Health and Social Care promised in September 2020, with manifest loopholes, that

> ... for significant national measures with effect in the whole of England or UK-wide, we will consult Parliament; wherever possible, we will hold votes before such regulations come into force. But of course, responding to the virus means that the Government must act with speed when required, and we cannot hold up urgent regulations that are needed to control the virus and save lives. I am sure that no Member of this House would want to limit the Government's ability to take emergency action in the national interest, as we did in March.[110]

Next, some institutional formations have emerged during the pandemic, with the potential for imposing independent scrutiny, but their roles and designs have not been the subject of debate or legislation in Parliament. One prominent example comprises experts appointed to advise the UK Government who form the Scientific Advisory Group for Emergencies (SAGE) (plus various sub-groups) which feeds into the Cabinet Office emergency planning structures.[111] SAGE was activated to provide scientific advice on the H1N1 (swine flu) pandemic in 2009 and has been revived on seven occasions before COVID-19. Criticisms have related to the selection of members and also other attendees, transparency (which has improved over time through the disclosure of members and minutes) and the nature of subsequent relationships between collective scientific advice and ministerial decisions.[112] Another important structure has been the Joint Biosecurity Centre which was announced in May 2020 to provide a threat assessment: 'A new UK-wide joint biosecurity centre will measure our progress with a five stage COVID alert system.'[113] The idea derived from the

109 HC Deb 30 September 2020, vol 681, col 331.

110 Ibid cols 388–389, Matthew Hancock.

111 Scientific Advisory Group for Emergencies. See *Enhanced SAGE Guidance: A Strategic Framework for the Scientific Advisory Group for Emergencies (SAGE)* (Cabinet Office 2012); Lawrence Freedman, 'Scientific advice at a time of emergency: SAGE and Covid-19' (2020) 91 Political Quarterly 514.

112 See House of Commons Science and Technology Committee, *Scientific Advice and Evidence in Emergencies* (2010–11 HC 498); Cabinet Office (n 111 above); Nyasha Weinberg and Claudia Pagliari, 'Covid-19 reveals the need to review the transparency and independence of scientific advice' (*UK Constitutional Law Blog*, 15 June 2020).

113 HC Deb 11 May 2020, vol 676, col 24, Boris Johnson. For geographical alert levels applied through regulations, see Health Protection (Coronavirus, Local COVID-19 Alert Level) (England) Regulations 2020, SI 2021/1103 (Medium), 1104 (High), 1105 (Very High).

Joint Terrorism Assessment Centre which sets alert levels in regard to terrorism and draws strength from being multidisciplinary and independent. Whether the new centre can attain similar advantages and can produce unassailable advice free from political influences cannot yet be gauged.[114]

By contrast, some institutions under part 1 of the CCA 2004 have been put into operation and function under clear rules. Thus, Local Resilience Forums have remained in force to handle implementation and coordination, and there are Strategic Coordinating Groups and Tactical Coordination Groups at this level.[115] However, without prime reliance on the CCA 2004, there arise overlapping responsibilities and powers, with other structures (such as local mayors and enterprising Members of Parliament) becoming much more prominent. Furthermore, some of the expected planning and state of readiness within the Cabinet Office, on which the CCA 2004 vitally depends, has been far from evident or satisfactory.[116] Devolved administrations have also complained about the lack of coordination including through Cabinet Office Briefing Rooms (COBR) meetings.[117]

The periodic reviews of the legislation have also been perfunctory. The two-monthly reports have been largely confined to plotting the issuance and usage of powers without evaluation.[118] Renewal of the CA 2020 in September 2020 involved the publication of a slightly fuller 'analysis' document (which was in reality factual rather than evaluative)[119] and a 90-minute debate.[120] Another substantial, mainly factual review was issued in February 2021.[121] The Scottish reviews likewise involve the laying of a report every two months and full renewal after six months under sections 12 and 15 of the Scottish

114 Any system must also overcome the considerable amount of disinformation published about COVID: House of Commons Digital, Culture, Media and Sport Committee, *Misinformation in the COVID-19 Infodemic* (2019–21 HC 234).

115 See *Emergency Response Structures during the COVID-19 Pandemic* (Local Government Association 2020).

116 See House of Commons Public Accounts Committee, *Whole of Government Response to COVID-19* (2019–21 HC 404).

117 See House of Commons Scottish Affairs Committee, *Coronavirus and Scotland: Interim Report on Intergovernmental Working* (2019–21 HC 314).

118 See *Two Monthly Report on the Status on the Non-devolved Provisions of the Coronavirus Act 2020* (CP 243, May 2020; CP 282, July 2020; CP 298, September 2020; CP 334 December 2020).

119 *The Coronavirus Act Analysis* (CP 295 2020).

120 HC Deb 30 September 2020, vol 681, col 388.

121 HM Government, *Covid-19 Response* (CP 398, 2021).

Act, but the relevant reports have conveyed markedly more detail and evaluation.[122]

A comprehensive independent review was announced by the Prime Minister in May 2021.[123] It will take place under the Inquiries Act 2005, but its work will not even commence until spring 2022, by which time one might predict that over 130,000 deaths will have occurred and around £450 billion in public funds will have been expended.

Effectiveness

As suggested by the Hansard Society,[124] problems ensuing from an inadequate legislative superstructure include: rapid amendment, repeat amendment and revocation arising from poor quality of drafting and misconceptions, technical errors and omissions. Unclear powers also increase the risk of arbitrary or inconsistent application and are more susceptible to legal challenge.

One illustration is the powers relating to lockdowns with restraints on physical movement outside one's place of abode. Controversially, the restraints have been applied to the whole population under the PHA 1984 regulations rather than just applying to those who are infected or suspected to be infected or even more at risk ('Clinically Extremely Vulnerable').[125] The extent of these legal powers, and their variance from accompanying guidance,[126] has caused confusion, the vacating of convictions, and the need to revise and reissue regulations.[127] Thus, according to the Crown Prosecution Service in May 2020: 'All 44 cases under the Act were found to have been incorrectly charged because there was no evidence they covered potentially infectious people, which

122 Scottish Government, *The Coronavirus Acts: Two-Monthly Report to Scottish Parliament* (SG/2020/92; SG/2020/130; SG/2020/186; SG/2020/248; SG/2021/13; SG/2021/52; SG/2021/114). For evaluation, see Pablo G Hidalgo, Fiona de Londras and Daniella Lock, 'Parliamentary scrutiny of extending emergency measures in the two Scottish Coronavirus Acts' (*UK Constitutional Law Blog*, 21 June 2021).

123 HC Deb 12 May 2021, vol, 695, col 137.

124 See Hansard Society (n 107 above). See also Ronan Cormacain and Ittai Bar-Siman-Tov, 'Legislatures in the time of Covid-19' (2020) 8(1–2) Theory and Practice of Legislation 3–9.

125 Compare 'Can we be forced to stay at home?' (David Anderson QC, 2020); Jeff King, 'The lockdown is lawful' (*UK Constitutional Law Association*, 1 April 2020); National Audit Office, *Protecting and Supporting the Clinically Extremely Vulnerable during Lockdown* (2019–21 HC 1131).

126 See House of Commons Home Affairs Committee, *Home Office Preparedness for Covid-19 (Coronavirus): Policing* (2019–21 HC 232) para 7.

127 See the case of Marie Dinou: Jennifer Brown, *Coronavirus: The Lockdown Laws* (House of Commons Library Briefing Paper 8875, 2020) 8: 28 editions have been issued between March and June 2021, reflecting frequent changes in regulations.

is what this law is intended for.'[128] Resulting problems for the police have been mitigated by the sensible compliance of the public and the calming down of police approaches.[129] The latter, as represented by the College of Policing, have sensibly engaged in a policy of the relegation of coercion to the last step in line with the mantra, 'Engage, Explain, Encourage, Enforce'.[130] Thus, just 24,933 notices were issued between 27 March and 16 November 2020 compared to 'hundreds of thousands of COVID-19 related incidents',[131] though the £10,000 fixed penalty notice for large gathering has proven controversial because of frequent successful challenges.[132]

Unity and consistency of purpose in dealing with a universal pandemic is better tackled by national legislation which avoids or at least minimises jurisdictional confusion and special local pleading. For instance, the rules as to multiple tiers of restraint and the catalogue of measures within them have varied between different jurisdictions of the UK for reasons which have nothing to do with Scottish, Welsh or Irish mutations in the virus, other factual differences, or even distinct legal systems but are attributable to variant policy choices.[133] These localised versions tended to get worse rather than better after around May 2020.[134] For example, Scottish legislation was passed in autumn 2020 to add restrictions on leaving or entering Scotland, and these were then imposed to restrict travel to areas of north-west England, even though they were largely unenforceable and even though parts of

128 'CPS announces review findings for first 200 cases under coronavirus laws' (Crown Prosecution Service, 15 May 2020). The failure rate has continued to be very high: 'February's coronavirus review findings' (Crown Prosecution Service, 22 March 2021).

129 The Chief Constable of Northamptonshire had threatened to set up roadblocks and search shopping trolleys for 'non-essentials': John Simpson et al, 'Coronavirus: police chief forced to back down after threat to search shopping' *The Times* (London, 10 April 2020).

130 COVID-19 Policing Brief in Response to Health Protection Regulations (College of Policing 2020). The document has been replaced by 'Understanding the law'.

131 *Policing the Pandemic* (National Police Chiefs' Council 2020) and 'Fixed penalty notices issued under COVID-19 emergency health regulations by police forces in England and Wales' (National Police Chiefs' Council, 30 November 2020).

132 See Jennifer Brown, *Coronavirus: Enforcing Restrictions* (House of Commons Library Briefing Paper 9024, 2020) 13.

133 Compare: Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, SI 2020/1374; Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020, SSI 2020/344. Wales and Northern Ireland currently operate unitary restrictions: Health Protection (Coronavirus Restrictions and Functions of Local Authorities) (Amendment) (Wales) Regulations 2020, SI 2020/1409; Health Protection (Coronavirus, Restrictions) (No 2) Regulations (Northern Ireland) 2020 and Amendment Nos 15 and 17, NISR 2020/150, 256 and 287.

134 House of Lords Select Committee on the Constitution (n 58 above) paras 98, 117.

Scotland had worse infection rates.[135] In addition, localised inputs and controls can tempt local politicians into decisions or behaviour which appears to show partiality, such as the attendance by Northern Ireland ministers at the funeral of Bobby Storey on 30 June 2020 in potential breach of regulations about large gatherings,[136] though allegations of favouritism have also arisen at a national level in connection with the award of contracts for the supply of goods and services[137] or the non-prosecution of government adviser Dominic Cummings.[138] The assertion of the primacy of devolved administrations in public health affairs only makes sense if one views the COVID-19 pandemic as a localised emergency and as a public health emergency. In reality, neither boundary is accurate or makes sense. The pandemic is international and, while arising from health causes, has impacts well beyond that sector, with major impacts on individual liberties and social and economic life.

Arising out of the jurisdictional confusion created by a sectoral public health approach, which then draws in devolved administrations, many of the first 200 convictions under the PHA 1984 had to be set aside: 'Errors usually involved Welsh regulations being applied in England or vice versa.'[139] Even the House of Commons Scottish Affairs Committee has expressed concern about jurisdictional divergence when dealing with exactly the same problems and wonders how Scottish interests might fit alongside institutions such as Cabinet Office structures like the COBR and the Joint Biosecurity Centre.[140]

The problems of approaching a global pandemic through devolved administrations can be further illustrated through the performance of federal constitutions. An instructive case-study might be the United

135 See Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020, SSI 2020/344, sch 7A, as amended by SSI 2020/389, SSI 2021/193, 211, 242 and 262; Alex Massie and Claire Elliot, 'Scots' maladies laid bare in Dundee, the Covid capital of Europe' *Sunday Times* (London, 11 July 2021) 19.

136 *An Inspection into the Police Service of Northern Ireland's handling of the Bobby Storey funeral on 30 June 2020* (HM Inspectorate of Constabulary and Fire and Rescue Services, 17 May 2021); 'PPS upholds decisions not to prosecute any individual in connection with Storey funeral' (Public Prosecution Service Northern Ireland, 10 June 2021).

137 See *R (Good Law Project) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin); *Good Law Project v Minister for the Cabinet Office* [2021] EWHC 1569 (TCC).

138 *Redston v DPP* [2020] EWHC 2962 (Admin).

139 Crown Prosecution Service (n 128 above).

140 Scottish Affairs Committee (n 117 above). See Gareth Evans, 'Devolution and COVID-19' [2021] Public Law 19.

States (US),[141] where the policy under President Trump during 2020 was to treat the COVID-19 crisis as a matter mainly for state responsibility, whereas President Biden in 2021 has adopted much stronger centralised federal direction through his National Strategy of January 2021 and a raft of Executive Orders.[142] As in many aspects of this transition, controversy abounds as to which President has been more successful, and the invention of vaccines has been a transformative intervening event. In addition, many US states are powerful polities and able to fend for themselves. However, a national approach seems to have brought advantages, including scaling counter-measures to fit the emergency, which is national and requires comprehensive mobilisation, reducing the possibility of conflicting and competing disparate approaches, better ensuring equality of treatment, and gaining efficiency of operations through scale.

Protecting individual rights

Emergencies have the tendency to interfere with protected rights, but at least the CCA 2004 foresaw that danger and put in place explicit and effective limits. By contrast, the CA 2020 pays little special heed to the protection of rights. Its impacts, such as on the rights to run businesses and to travel abroad,[143] have stirred much opposition. As already described, based mainly on powers in the PHA 1984, part 2A, a variety of intrusions into individual rights have been imposed. Those relating to the justice system have already been considered. Some rights in other contexts will be examined here.

First and foremost, the initial lockdown measures made it an offence to leave one's residence without 'reasonable excuse'.[144] According to the ECHR, article 5(1)(e), no one can be deprived of liberty, though preventing the spread of infectious disease is a specified exception.[145]

141 See John F Witt, *American Contagions* (Yale University Press 2020); Elizabeth Goiten, 'Emergency powers, real and imagined: how President Trump used and failed to use presidential authority in the COVID-19 crisis' (2020) 11 Journal of National Security Law and Policy 27; Emily Berman, 'The roles of the state and federal governments in a pandemic' (2020) 11 Journal of National Security Law and Policy 61; James G Hodge Jr, 'Nationalizing public health emergency legal responses' (2021) 49 Journal of Law, Medicine and Ethics 315.

142 President of the United States, *National Strategy for the COVID 19 Response and Pandemic Preparedness* (2021) followed by Executive Order 13987 and many others.

143 The restrictions on travel abroad emerged in June 2020 when track and trace systems were considered more effective to monitor the restrictions. See Health Protection (Coronavirus, International Travel) (England) Regulations 2020, SI 2020/568, and 2021, SI 2021/582; House of Lords Secondary Legislation Scrutiny Committee, *37th Report* (2019–21 HL 189).

144 Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350, r 2(4)(a), 6.

145 See *Enhorn v Sweden* App no 56529/00, [2005] 19 BHRC 222 [43].

Much initial academic debate concerned whether lockdown measures actually amounted to a potential restriction on liberty or a lesser restriction on freedom of movement (which is not ratified by the UK).[146] Though the courts confirmed the latter stance,[147] it is clear that liberty in a general or colloquial sense is at stake. The article 8 privacy right has also been affected in numerous ways, such as by prohibiting individuals from different households from physically meeting,[148] and infringed 'family life' and wider relationships, both of which are protected by article 8.[149] The lockdown also entailed closing buildings for religious worship,[150] impacting upon the right to freedom of religion covered by article 9. The article 11 right to peaceful assembly and association was also restricted by initial lockdown measures that prohibited gatherings of more than two people[151] and provided police with enforcement powers to break up prohibited gatherings and issue fines.[152] Yet, such restrictions did not prevent the emergence of all protests across the political spectrum from those directly opposing lockdown measures to those advocating 'Black Lives Matter'.[153] Indeed, article 5, 8, 9 and 11 violations have been argued (albeit unsuccessfully) in the English legal challenges to date, along with the protocol 1 rights to property and education, which have been impacted by business restrictions[154] and school closures[155] respectively.

Second, the need to protect human life has been frequently relied upon by the UK Government when justifying its lockdown measures. Yet, the state has a positive obligation to uphold article 2.[156] In the health context,

146 See Dominic Keene, 'Leviathan challenged – the lockdown is compliant with human rights law (part two)' (*UK Human Rights Blog*, 11 May 2020).

147 *R (Dolan) v Secretary of State for Health & Social Care* [2020] EWCA Civ 1605 [92]–[94]. See also *Terkeş v Romania* App no 49933/20, 20 May 2021.

148 Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350, r 7.

149 *Mostaquim v Belgium* App no 12313/86, (1991) 13 EHRR 802 [36], [45]–[46]; *Marckx v Belgium* App no 6833/74, (1979) 2 EHRR 330 [45]; *Bensaid v UK* App no 44599/98, (2001)33 EHRR 205 [47]; *Niemietz v Germany* App no 13710/88, (1992) 16 EHRR 97 [29].

150 Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350, rr 5(5), 6(1), 7.

151 Ibid r 7.

152 Ibid rr 7, 8, 10.

153 'Coronavirus: inside the UK's biggest anti-lockdown protest' (*Independent Online*, 16 May 2020); 'Black Lives Matter protests held across England' (*BBC Online*, 20 June 2020).

154 Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350, rr 4, 5, 9.

155 See House of Commons Public Accounts Committee, *COVID-19: Support for Children's Education* (2021–22 HC 240).

156 *Osman v United Kingdom* App no 23452/94, (1998) 29 EHRR 245 [115]–[116].

the systemic failure to secure the proper organisation and functioning of the public hospital service, or its health protection system, amounted to a violation of article 2 when patients had died in cases involving Turkey[157] and Portugal,[158] and this doctrine has been recognised, albeit narrowly, by the English courts.[159] With COVID-19, attention turned to, for example, the shortages in personal protective equipment (PPE) for key NHS and care home workers[160] and the absence of safeguarding procedures governing the transfer of patients from hospitals to care homes.[161] Academic commentators have suggested that such controversial failures might invite article 2-based challenges.[162] Finally, the article 14 right to protection from discrimination could arise from the same areas of inadequate health practices and systems because of the widely reported differential impact of COVID-19 responses upon certain groups, particularly women, black and minority ethnic and disabled people.[163] In January 2021, the parliamentary Women and Equalities Select Committee concluded that governmental economic support schemes had 'overlooked labour market and caring inequalities faced by women' and that the Government's priorities for recovery are 'heavily gendered in nature'.[164]

As this brief account demonstrates, such is the range of fundamental rights affected by the UK's lockdown that it is perhaps simpler to catalogue *un*affected rights. This breadth of engaged rights is merely a legal reflection of the obvious fact that COVID-19 responses have radically changed our lives and world, for the time-being at least. With such extraordinary and pervasive impacts, the imperative to ensure

157 *Asiye Genç v Turkey* App no 24109/07, 27 January 2015; *Aydoğdu v Turkey* App no 40448/06, 30 August 2016. See also *Mehmet Şentürk and Bekir Şentürk v Turkey* App no 13423/09, 9 April 2013; *Center of Legal Resources on behalf of Valentin Câmpeanu v Romania* App no 47848/08, 17 July 2014.

158 *Fernandes v Portugal*, App no 56080/13, 19 December 2017.

159 *R (Parkinson) v HM Coroner for Kent* [2018] EWHC 1501 (Admin); *R (Maguire) v HM Senior Coroner for Blackpool* [2020] EWCA Civ 738.

160 House of Commons Public Accounts Committee, *NHS Capital Expenditure and Financial Management* (2019–21 HC 344).

161 The National Audit Office confirmed that 25,000 patients were discharged into care homes without testing: *Readying the NHS and Adult Social Care in England for COVID-19* (2019–2021 HC 367) paras 3.19–3.20. See *As If Expendable* (Amnesty International 2020).

162 Ed Bates, 'Article 2 ECHR's positive obligations – how can human rights law inform the protection of health care personnel and vulnerable patients in the Covid-19 pandemic?' (*OpinioJuris*, 1 April 2020); Conall Mallory, 'The right to life and personal protective equipment' (*UK Constitutional Law Association*, 21 April 2020); Shaheen Rahman, 'Article 2 and the provision of healthcare' (*UK Human Rights Blog*, 19 November 2020).

163 'COVID-19: understanding the impact on BAME communities' (Public Health England, 16 June 2020).

164 *Unequal Impact? Coronavirus and the Gendered Economic Impact* (2019–21 HC 385).

high-quality policy and decision-making, even in such challenging circumstances, is vital. Therefore, close attention should be paid to the overall performance of Parliament and the courts.

As for Parliament, a critical assessment has already been offered in this article, and, for most of the time since March 2020, the performance of Parliament has been sorely wanting. There is, however, an important postscript in the field of human rights since the Joint Committee on Human Rights released in November 2020 an important report, *The Government's Response to Covid-19: Human Rights Responses*.[165] Many of the issues covered in this article were rehearsed.[166] Overall, the Committee bemoaned the decision not to invest greater reliance on the CCA 2004 which has better safeguards for rights.[167]

As for the courts, most challenges have failed. Even when an objection is sustained, such as the arguments in the *Good Law Project* cases against the processes adopted for the award of PPE and communications research contracts, no mandatory order was granted and criticism was expressed about the joining of claimants for political purposes.[168] Likewise, a narrow interpretative approach avoided a breach of the absolute right to liberty under article 5 in *R (Francis) v Secretary of State for Health & Social Care*.[169] On the one hand, the High Court found that the legal powers under the PHA 1984, section 45G, could impose self-isolation for a specified period after a positive test (including of close contacts). On the other hand, it was an equally crucial finding that this imposition of confinement did not amount to detention (which would require an order from a justice of the peace under section 45D followed by clinical management), but was restraint on movement not amounting to quarantine. In this way, an Englishman's home is not necessarily his prison hospital, but only because the court defined the boundaries of detention as not including a home curfew if unaccompanied by other restraints.[170]

Most other rights affected by COVID-19 legislation are qualified not absolute, and so account must be taken of the variable intensity of the standard of proportionality[171] and the margin of appreciation which

165 2019–21 HC 265/HL 125; see also Government Response (CP 335, 2020).

166 2019–21 HC 265/HL 125 paras 203–216.

167 Ibid para 222.

168 *R (Good Law Project) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin); *Good Law Project v Minister for the Cabinet Office* [2021] EWHC 1569 (TCC).

169 [2020] EWHC 3287 (Admin). See Health Protection (Coronavirus, Restrictions) (Self Isolation) (England) Regulations 2020, SI 2020/1045.

170 Ibid [64]. Compare: *Secretary of State for the Home Department v JJ* [2007] UKSC 45.

171 See *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39.

the ECHR affords to national authorities.[172] Domestically, two factors determine the intensity of proportionality review. First, democratic legitimacy is commonly cited by reviewing judges as a reason to afford greater latitude to executives, especially where measures entail complex or sensitive political judgments.[173] The polycentricity of the problem can be a further warning signal against judicial intervention,[174] perhaps more so nowadays than the political interest in the topic.[175] A second crucial factor determining the intensity of judicial scrutiny is expertise,[176] whereby judicial deference is justified because the decision-maker enjoys specific expertise and responsibility.[177] Such 'epistemic deference' is adopted by the courts where an issue is beset with empirical uncertainty, and it covers both the underlying scientific or similar evidence used by government and, crucially, how government chooses to use such data to inform policy.[178]

The implications of COVID-19 restrictions have been considered in the context of qualified rights in two key English cases:[179] *R (Dolan) v Secretary of State for Health & Social Care*[180] and *R (Hussein) v Secretary of State for Health & Social Care*.[181] The deferential approach in both of these English cases can be contrasted with that of the later Scottish decision in *Reverend William Philip & Others*.[182]

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172 *Handyside v United Kingdom* App no 5493/72 (1979) 1 EHRR 737, [48]–[49].

173 *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; *R (Gentle) v Prime Minister* [2008] UKHL 20. See Rebecca Moosavian, 'Judges and high prerogative: the enduring influence of expertise and legal purity' [2012] Public Law 724.

174 *R (Mott) v Environment Agency* [2016] EWCA Civ 564.

175 *Miller v Prime Minister* [2019] UKSC 41 [39].

176 *R (Huang) v Home Secretary* [2007] UKHL 11 [16].

177 Alan Brady, *Proportionality and Deference under the Human Rights Act* (Cambridge University Press 2012) 113, 117, 67–69.

178 Ibid.

179 For leading jurisprudence elsewhere, see: (Australia) *Palmer v Western Australia* [2021] HCA 5; (France) *Association Civitas, Conseil d'Etat* 446930, 29 November 2020, *Syndicat Jeunes Médecins*, Conseil d'Etat 439674, 22 March 2020; (Germany) *T* (1 BvR 828/20) (15 April 2020); *M* (1 BvQ 37/20) (17 April 2020), *F* (1BBQ 44/20) (29 April 2020); (Ireland) *O'Doherty & Waters v Minster for Health, Ireland* [2020] IECA 59; (Israel) *Ben Meir v Prime Minister* (2020) HCJ 2109/20, *Loewenthal v Prime Minister* (2020) HCJ 2435/20; (Netherlands) *Stichting Viruswaarheid.nl* ECLI:NL:GHDHA:2021:285; (New Zealand) *Borrowdale v Director-General of Health* [2020] NZHC 2090; (South Africa) *De Beer v Minister of Co-operative Government & Traditional Affairs* (2020) High Court of South Africa 21542/2020; (USA) *South Bay Pentecostal Church v Newsom* 592 US ____ (2021), *Tandon v Newson* 593 US ____ (2021).

180 [2020] EWHC 1786 and [2020] EWCA Civ 1605.

181 [2020] EWHC 1392.

182 *Reverend Dr William Philip for Judicial Review of the Closure of Places of Worship in Scotland* [2021] CSOH 32.

Democratic legitimacy was referred to in *Dolan*, an application for judicial review of the lockdown measures on grounds including their alleged violation of a wide range of human rights. At first instance, Lewis J claimed that the appropriateness of the lockdown measures was a political issue more suitable for public debate than judges:

> The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. The court is not responsible for determining how best to respond to the risks to public health posed by the emergence of a novel coronavirus. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies.[183]

Lewis J also alluded to polycentricity by mentioning the mix of political, social and economic factors that inform public health policy choices. The exceptional circumstances of COVID-19 were viewed as a factor complicating the public health aims of the lockdown regulations, arguably making them more unsuitable for judicial determination:

> Against that background, it is simply unarguable that the decision [to impose restrictions via the Regulations] … was in any way disproportionate to the aim of combatting the threat to public health posed.[184]

Yet, this categorical claim should be treated with circumspection, not least because it problematically suggests that proportionality review is potentially rendered weakest when the human rights stakes are highest, as in the coronavirus situation. Such deference to government amounts to *de facto* immunity for all but the most extreme policies, resulting in identical outcomes to the blanket immunity for high policy areas associated with prerogative powers that courts have long abandoned.[185]

The *Dolan* challenge expressly questioned the scientific evidence used by the UK Government to justify lockdown measures, especially the data from Professor Neil Ferguson, including lack of peer review, modelling assumptions and the author's incorrect predictions in previous pandemics.[186] Yet, Lewis J did not refer to these arguments in his judgment and paid limited attention to the Government's evidential base for lockdown measures because:

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183 *R (Dolan) v Secretary of State for Health & Social Care* [2020] EWHC 1786 [7], [5].

184 Ibid [61].

185 Moosavian (n 173 above) 745–746.

186 'Statement of Facts and Grounds and Written Submissions of the Claimant' [89], [123]. A flavour of these allegations was considered in the later appeal: *R (Dolan) v Secretary of State for Health & Social Care* [2020] EWCA Civ 1605 [82].

> The courts recognise the legitimacy of according a degree of discretion to a minister 'under the urgent pressure of events, to take decisions which call for the evaluation of scientific evidence and advice as to the public health risks'.[187]

This attitude prevailed in the circumstances of gaps or shortcomings in the current science:

> ... the context ... was one of a pandemic where a highly infectious disease capable of causing death was spreading. ... The scientific understanding of this novel coronavirus was limited.[188]

The Court of Appeal in *Dolan* was markedly even less indulgent towards the expansive agenda of the claimants and indeed criticised the practice of 'rolling' and 'evolving' judicial review by which new issues or arguments were added as the case went along.[189] The court engaged in detail only with the first ground of appeal (*ultra vires*) and viewed the remaining two (breach of public law principles and breach of human rights) as being out of time.[190] The Court of Appeal found that the PHA 1984 powers allowed for responses to pandemics to impose restrictions on the whole population.[191] Many of the deferential signals voiced in the High Court were echoed here, encapsulated as follows: 'This was quintessentially a matter of political judgement for the Government, which is accountable to Parliament, and is not suited to determination by the courts.'[192]

The severe risk and time pressures of the COVID-19 situation were also noted in the earlier case of *Hussein*. Here, the claimant sought an interim order prohibiting enforcement of the regulations on the basis they represented a disproportionate interference with the article 9 right to religion by preventing Friday prayer at mosques during Ramadan. Swift J claimed the virus represented 'a genuine and present danger' and noted the 'truly exceptional circumstances, the like of which has not been experienced in the UK for more than half a century'.[193]

Proportionality was raised in *Hussein*, wherein the claimant argued that the Health Secretary could have taken less intrusive lockdown

187 *R (Dolan) v Secretary of State for Health & Social Care* [2020] EWHC 1786 [59].

188 Ibid [95].

189 *R (Dolan) v Secretary of State for Health & Social Care* [2020] EWCA Civ 1605 [118].

190 Ibid [42].

191 Ibid [65], [68], [71], [78].

192 Ibid [90]. *Dolan* was also cited in the more specific circumstances of a plan to hold a vigil for murder victim Sarah Everard: *Leigh v Commissioner of the Metropolis* [2021] EWHC 661 (Admin).

193 *R (Hussein) v Secretary of State for Health & Social Care* [2020] EWHC 1392 [19].

measures so as to enable mosque attendance with appropriate social-distancing measures still in place.[194] Dismissing this argument in brief terms, Swift J claimed that the minister must be allowed a 'suitable margin of appreciation to decide the order in which steps are to be taken to reduce the reach and impact of the restrictions in the 2020 Regulations'. This leeway regarding the means by which public health could be maintained was necessary due to the complex (polycentric) political, social and economic assessments involved. It was thus deemed a matter for political debate rather than judicial 'second-guessing'.[195]

Swift J also noted that 'consideration of scientific advice' was part of the complex mix of political and other elements that informed what steps the minister would take.[196] He found that the regulations were rationally connected to the legitimate aim of protecting public health by reducing opportunities for people to gather and mix; they '[rest] on scientific advice ... that the COVID-19 virus is highly contagious and particularly easily spread in gatherings of people indoors'.[197] However, Swift J did not undertake sustained scrutiny of the Health Secretary's justifications. He noted that the minister's submissions regarding this application were 'generic', but nevertheless deemed them 'likely to be sufficient' and confirmed they amounted to a 'valid response'.[198]

By way of comment, though a degree of deference to central government is defensible in the context of a health crisis,[199] there are two problems with the approach adopted in these cases. First, it creates an uneven playing field, making it almost impossible for claimants to challenge government in certain areas (such as public health emergencies) even where they can point to credible evidence to support their arguments. *De facto* non-justiciability is no more desirable than the *de jure* non-justiciability which has been curtailed in recent times. Second, refusal to undertake a full, intensive human rights proportionality review represented a missed opportunity to require the Government to provide more detailed reasons and evidence to justify its regulations and its scientific claims.

The approach of Lord Braid in the Scottish case of *Reverend William Philip and Others* – a similar article 9-based challenge to that in *Hussein* – represents an illuminating alternative approach.

194 Ibid [20]
195 Ibid [21]
196 Ibid [21]
197 Ibid [19]
198 Ibid [26].
199 There may be less deference to local government, shown in *Hertfordshire County Council v Secretary of State for Housing* [2021] EWHC 1093 (Admin), whereby online council meetings were not permitted after the expiration of regulations. Company meetings may be remote under the Corporate Insolvency and Governance Act 2020, s 37 and sch 14.

Philip demonstrates that courts do have the capacity to take a more robust level of review, even during a pandemic when considerations of expertise and democratic legitimacy are pertinent. Rather than relying on such factors to restrain inquiries, Lord Braid undertook a detailed and carefully reasoned application of the four-stage proportionality test. He closely examined the surface logic of the Scottish Government's justifications and statistics (without questioning the scientific evidence *per se*). Issues such as the severity of the public health threat and the political nature of the Government's decision were incorporated into the proportionality test as weighted factors rather than brick walls. Braid also afforded countervailing weight to the petitioners' arguments, including the particular importance of the article 9 right, the inadequacy of alternative online worship and the availability of low-risk alternatives to a blanket closure of Scottish places of worship.[200] As a result, the court concluded that this closure in the January 2021 lockdown was a disproportionate and unlawful violation of the petitioners' article 9 rights.[201]

Especially in the light of this outlier decision, the leeway afforded by proportionality enables a range of rights-compliant COVID-19 restrictive measures to be devised and applied. Future and ongoing constraints may also be anticipated, especially around the compulsory application of vaccines[202] or proof of COVID immunity as a condition of services or employment.[203] Though the response to the pandemic will inevitably severely limit human rights, it should by no means make them redundant. The English COVID-19 cases demonstrate that the judges are clearly not keen to usurp the functions of Parliament and so place the onus of scrutiny on others. The woeful performance of Parliament to date is therefore a particular disappointment. If reliance is to be placed on the political limbs of the state for fair and effective policy, Parliament must become more active in interrogating policy and upholding individual rights.

200 *Reverend Dr William Philip for Judicial Review of the Closure of Places of Worship in Scotland* [2021] CSOH 32 [101]–[126].

201 For more detailed discussion, see Rebecca Moosavian, Clive Walker and Andrew Blick, 'Proportionality in a pandemic: the limitations of human rights' (forthcoming).

202 Compulsory vaccination of children was upheld in *Vavricka v Czech Republic* App no 47621/13, 4 April 2021.

203 See Department of Health and Social Care, *COVID Status Certification Review* (Cabinet Office, 29 March 2021).

CONCLUSION

A severe and prolonged public health emergency has arisen because of COVID-19, such as to shake the foundations of international[204] and national lives. Legislative responses should be comprehensive and even unpalatable. But whether the PHA 1984 and the CA 2020 offer the best medicine can be disputed. These models of emergency legislation contradict the wishes of Parliament's better self, as represented by the CCA 2004, and contradict the considered warnings of the House of Lords Select Committee on the Constitution in its report, *Fast-Track Legislation: Constitutional Implications and Safeguards*.[205] Like special legislation against terrorism,[206] it has proven an uphill struggle to control the coronavirus state. The advent of effective vaccines from the beginning of 2021 onwards[207] has given governments the opportunity to curtail the COVID restrictions, but the mechanisms to ensure proportionality in the path to recovery remain weak.

The CCA 2004 should have been selected to play a central role in the national crisis, especially at its commencement, in preference to the more rushed, less certain and less accountable alternatives.[208] Thereafter, more permanent sectoral laws should be designed for the lengthier recovery stages.[209] Otherwise, the current legislative models stand testament to official panic and form part of the problem rather than the solution. As the UK Government's COVID-response to date has demonstrated, disregard of constitutionalism increases the risks of pursuing untested and flawed policies, diminishing democracy and weakening fundamental human rights. Such consequences should not be added to COVID-19's already catastrophic legacy.

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204 UNSCR 2532 (1 July 2020) called for the cessation of all hostilities (with exceptions). See Maurizio Acari, 'Some thoughts in the aftermath of Security Council Resolution 2532 (2020) on Covid-19' (2020) 70 Questions of International Law 59. For other international law obligations, see Antonio Coco, '"Prevent, respond, cooperate states" due diligence duties vis-à-vis the Covid-19 pandemic' (2020) 11 Journal of International Humanitarian Legal Studies 218; Independent Panel for Pandemic Preparedness and Response, *COVID-19: Make it the Last Pandemic* (World Health Organization 2021).

205 See House of Lords Select Committee on the Constitution, *Fast-Track Legislation: Constitutional Implications and Safeguards* (2008–09 HL 116).

206 Clive Walker, *The Anti-Terrorism Legislation* (3rd edn, Oxford University Press 2014) ch 1.

207 This programme is national: 'Coronavirus vaccinations' (NHS Digital); 'COVID-19 vaccination programme' (Public Health England, 14 July 2021).

208 House of Lords Select Committee on the Constitution (n 58 above) paras 41, 48.

209 A model has been devised by Liberty, The Coronavirus (Rights and Support) Bill 2021.

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The Union in court: *Allister and others' Application for Judicial Review* [2021] NIQB 64

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INTRODUCTION

An hour before the end of 2020, the Brexit implementation period ended in the United Kingdom (UK). In much of the European Union (EU), 2021 had already begun. From that time, the Protocol on Ireland/Northern Ireland (the Protocol) to the Withdrawal Agreement between the UK and EU[1] has governed much of everyday life in Northern Ireland, but not Great Britain. A mere seven months on, the Protocol has had a tumultuous journey, with London and Brussels exchanging sharp words over its implementation, while nervously watching empty supermarket shelves and rising sectarian tensions in Northern Ireland.

On 30 June 2021, the Northern Ireland High Court handed down judgment in *Allister and others' application for judicial review*,[2] in which the Protocol and its attendant legislation were challenged on multiple grounds. In a dense, comprehensive and keenly awaited judgment, Mr Justice Colton dismissed all five grounds of an extraordinary challenge. The unenviable difficulty of delving into the roots of the famously uncodified UK constitution was compounded by the febrile politics surrounding the Protocol itself. Colton J's efforts are, therefore, considerable and commendable.

In what follows, I examine the facts of the case before turning to the judgment in three main sections: first, its implications for

* I am grateful to Dr Conor McCormick and to the anonymous peer reviewer for their helpful comments on an earlier draft of this piece. All views and any errors, however, are my own.

1 Protocol on Ireland/Northern Ireland Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community [2019] OJ C 384 I/01.

2 [2021] NIQB 64, Colton J. I do not cover the related case of *Peeples's application for judicial review* for reasons of economy on what is an already lengthy piece. The salient point in Colton J's judgment in *Peeples* was that the Protocol does not breach the Northern Ireland Act 1998 or the Good Friday Agreement 1998 and that the latter has not been incorporated generally into domestic law: [318]–[319].

'constitutional' statutes; second, its implications for devolution in Northern Ireland; and, third, miscellaneous matters.

THE PROTOCOL: A GAME OF THREES

A detailed examination of the Protocol is both unnecessary and outside the scope of this piece.[3] Indeed, its provisions are as complex as they are long. Instead, this article suffices to focus on six main points, in two sets of three.

The first set of three points relates to the content and agreement of the Protocol itself: first, that the Protocol was intended to 'address the unique circumstances on the island of Ireland';[4] second, that 'Northern Ireland has in effect remained in the EU single market for goods' as well as in the UK's single market,[5] so that goods originating in Northern Ireland may be traded tariff and barrier-free in both the EU and Great Britain;[6] and, finally, that the Protocol was itself agreed (and ratified) after a series of intensely political failures in the UK Parliament.[7]

The second set of three points concerns the manner in which the Protocol was incorporated into UK domestic law, through three key pieces of legislation:[8] the European Union (Withdrawal) Act 2018 (EUWA) which prescribed the requirements for ratification of a withdrawal agreement; the European Union (Withdrawal Agreement) Act 2020 (the 2020 Act) which incorporated the Withdrawal Agreement and Protocol; and the Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020 (the Consent Regulations) which provided for the Northern Ireland Assembly to express itself as to whether aspects of the Protocol would continue to apply, in periodic votes to be held for this purpose.

As Colton J observed, the effect of the Protocol's operation is for some EU law to continue to apply in Northern Ireland but *not* in Great Britain, necessitating 'new checks and administrative burdens on businesses in G[reat] B[ritain] providing goods to Northern Ireland'[9]

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3 However, for detail see Sylvia de Mars, *EU Law in the UK* (Oxford University Press 2020).

4 Protocol (n 1 above) C 384 I/92.

5 *Allister* (n 2 above) [16].

6 Protocol (n 1 above) art 5, C 384 I/94.

7 *Allister* (n 2 above) [8]–[10].

8 Colton J mentions the Trade and Cooperation Agreement as a 'key further instrument in the Withdrawal architecture' (see *Allister* (n 2 above) [29]) but this was the last mention of that Agreement in the judgment and that Agreement is, in any event, irrelevant in my analysis.

9 *Allister* (n 2 above) [18].

which have 'proven extremely controversial in Northern Ireland and ... are opposed by all the unionist political parties'.[10]

The Protocol and its incorporation were challenged on five grounds: first, that they violated the Acts of Union 1800; second, that they breached constitutional guarantees that Northern Ireland's political status would not change except by referendum; third, that they side-stepped the consociational heart of Northern Ireland's constitutional framework; fourth, that they breached the European Convention on Human Rights; and, finally, that they breached EU law.[11] I deal with each ground in turn.

THE UNION CHALLENGE

The Acts of Union 1800 were simultaneous statutes passed by the Parliament of Great Britain[12] and the Parliament of Ireland[13] in order to unite the two islands into one country. Among the many provisions of this new union was article VI, which is worth setting out in full:

> That it be the Sixth Article of Union, that his Majesty's subjects of Great Britain and Ireland shall, from and after the first day of January, one thousand eight hundred and one, be entitled to the same privileges and be on the same footing, as to encouragements and bounties on the like articles, being the growth, produce or manufacture of either country respectively, and generally in respect of trade and navigation in all ports and places in the United Kingdom and its dependencies; and that in all treaties made by his Majesty, his heirs and successors, with any foreign power, his Majesty's subjects of Ireland shall have the same privileges, and be on the same footing as his Majesty's subjects of Great Britain.

The Protocol, however, provides for customs duties to be charged for goods entering Northern Ireland from another part of the UK or elsewhere outside of the EU, if those goods are at risk of subsequently being moved into the EU.[14] Thus, although goods originating in Northern Ireland may freely be moved elsewhere in the UK,[15] *some* goods which originate outside Northern Ireland, *even if* they originate elsewhere in the UK, will be charged customs duties when entering Northern Ireland. Thus, even without assessing evidence of disruption in trade between Northern Ireland and Great Britain,[16] Colton J was

10 Ibid [19].
11 Ibid [44].
12 Union with Ireland Act 1800.
13 Act of Union (Ireland) 1800.
14 Protocol (n 1 above) art 5.1, C 384 I/94.
15 See in particular Protocol (n 1 above) art 6.1, C 384 I/96.
16 *Allister* (n 2 above) [61].

able to point to the design of the Protocol itself as cutting across the 'same footing' command in article VI.[17]

The challenge under this ground proceeded along two lines: first, that the Acts of Union prevented the UK from making an agreement which breached the 'same footing' command under article VI;[18] and, second, that the provisions of the Acts of Union were supreme over the provisions of the Protocol (thus retaining the 'same footing' command over the provisions in the Protocol).[19]

In aid of the first submission, counsel for the applicants, former Northern Ireland Attorney General John Larkin QC, referred to international law, specifically article 46 of the Vienna Convention,[20] which prohibits a state from invalidating its consent to a treaty on the basis of that consent having been provided in violation of some rule of domestic law (of that state) 'unless that violation was manifest and concerned a rule of [that state's] internal law of fundamental importance'. Essentially, the argument was that the UK Government could not have consented to a treaty in breach of article VI, and thus the consent provided was invalid. Labelling the point 'an excursion',[21] Colton J dispatched with it very briefly, observing that the Withdrawal Agreement (and thus the Protocol) had been signed on authorisation from the Prime Minister, and that treaty-making was in any event a matter of 'high politics' ill-suited to scrutiny by the courts.[22] Moreover, the Withdrawal Agreement had been ratified in accordance with the provisions of the EUWA,[23] meaning that parliamentary will had been followed to the letter. As the UK constitution does not contain a doctrine more fundamental than the sovereignty of the Crown in Parliament, the Protocol remains unimpeachable on this point.

The second submission is where the judgment reaches its densest point and its richest potential. To begin, article VI is couched in sweeping language when it comes to 'same footing' between Great Britain and Northern Ireland. Equally sweeping is the reach of section 7A of the EUWA (as inserted in that Act by the 2020 Act), which provides for the availability in domestic law of all 'rights, powers, liabilities, obligations and restrictions, from time to time created or arising by or under' the Withdrawal Agreement, *without* such matters needing any

17 Ibid [62].
18 Ibid [63].
19 Ibid [80].
20 1155 UNTS 331 (entry into force: 27 January 1980).
21 *Allister* (n 2 above) [66].
22 Ibid [67].
23 S 13; *Allister* (n 2 above) [69].

further enactment.[24] Section 7A(3) goes even further, requiring every enactment to be read and given effect to subject to the rights, *powers*, liabilities, obligations, restrictions, remedies and procedures arising under the Withdrawal Agreement and having effect in domestic law.

With the court thus caught between Scylla and Charybdis, the parties provided diametrically opposed solutions. The applicants argued that the Acts of Union were constitutional in character and therefore should be supreme over the EUWA or the 2020 Act.[25] The respondents argued that there was no proper hierarchy of statutes, so that the court should simply prefer the newer statute to the older one.[26]

Colton J was unable to agree with the applicants, 'in light of the analysis of the reviewability of the [treaty-making] power and the manner in which Parliament has legislated for the Withdrawal Agreement including the Protocol', stating 'to adopt Mr Larkin's argument would be to in effect to render section 7A inoperative'.[27] The judge also disagreed with the respondents, in that existing case law points to there being a hierarchy of statutes,[28] constitutional statutes having been defined by Lord Justice Laws in *Thoburn*.[29] However, while Laws LJ had defined the term in the context of a conflict between a constitutional statute and an ordinary statute, the task for Colton J was to resolve a conflict between two constitutional statutes.

Ultimately, Colton J preferred the newer statute (with the Protocol) over the older Acts of Union for two main reasons: first, that in the centuries since the Acts of Union had come into force, there had been much profound change enacted to *their* provisions, observing rather understatedly, 'Much constitutional water has passed under the bridge since the enactment of the Act of Union.'[30] Thus, even a constitutional statute could be subject to implied repeal. I deal with these changes in more detail below. Secondly, the judge observed that article VI was 'open textured' in its language, in contrast to the specificity of the provisions under section 7A of the EUWA.[31] In the circumstances, centuries-old general language must yield to very recent specific text.

Although Colton J did not explicitly hold that article VI (or any part thereof) had been repealed, impliedly or otherwise, Colin Murray has described the judge's reasoning as 'a classical assertion of implied

24 EUWA 2018, s 7A(1)(a), in language almost identical to the repealed s 2(1) of the European Communities Act 1972.
25 *Allister* (n 2 above) [80].
26 Ibid [83].
27 Ibid [81].
28 Ibid [83]–[87].
29 *Thoburn v Sunderland City Council* [2003] QB 151 [62].
30 *Allister* (n 2 above) [96]–[108].
31 Ibid [110].

repeal', while finding it 'difficult to square with some of the discussion in the Supreme Court's *HS2* decision'.[32] It is important to explore this tension, not least because *Allister* is perhaps the first time any court in the UK has had to resolve a conflict between two constitutional statutes.

At the outset, it is important to note that although the court's guiding light was the sovereignty of Parliament, what the court was in fact concerned with was the question of how to give effect to the enactments of a sovereign Parliament. The distinction is important both on a conceptual as well as a practical level. Traditionally understood, parliamentary sovereignty encapsulates the unrestricted ability of the Crown in Parliament to enact law,[33] but, once enacted, the work of giving effect to that law rests with the courts. Of course, this general statement yields to specific exceptions, where the manner in which a statute is given effect is contained in the statute itself. A famous example of this is section 3(1) of the Human Rights Act 1998, and a second (and more relevant) example is section 7A(3) of the EUWA (as discussed earlier). So, the key question for the courts when faced with two conflicting statutes is how they are to be given effect. Generally, the more recent statute is favoured over the less recent where the conflict between them cannot be interpretively resolved, for the fundamental reason that a sovereign Parliament cannot bind its equally sovereign successors.[34]

However, the above norms of statutory construction start to unravel when faced with constitutional statutes. Although Laws LJ defined such a statute as 'one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights',[35] it is clear that such statutes may also condition horizontal relationships between governmental or constitutional elements in just as much an overarching manner as vertical relationships between citizen and state. The Acts of Union, for example, while providing for the treatment of citizens in the new Union, also explicitly provide for the manner of the Crown's succession[36] and the maintenance of pre-existing judicial structures and jurisdictional heterogeneities,[37] so that, following union, Ireland did not become subsumed into a single jurisdiction with England in

32 Colin Murray, 'Vichy France and vassalage: hyperbole versus the Northern Ireland Protocol' (*UKCLA*, 1 July 2021).

33 See Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan 1899) 38.

34 Ibid 62–64.

35 *Thoburn* (n 29 above) [62].

36 Act of Union (Ireland) 1800, art II.

37 Ibid art VIII.

the same way as Wales had been nearly a quarter of a millennium earlier.[38] Even article VI conditions both vertical relationships (in terms of the entitlement of citizens in the new union) and horizontal relationships (treaty-making powers, for example). Similarly, the EUWA (as amended by the 2020 Act), in addition to conditioning the new relationship between citizen and state in respect of pre-existing rights and obligations under EU law,[39] distributes new powers between central and devolved authorities in connection with Brexit.[40] Thus, when a court is faced with a conflict between constitutional statutes, the manner in which such a conflict is resolved has the potential for far-reaching consequences beyond the domain of citizen–state relations.

It is in this context that a straightforward application of the doctrine of implied repeal is somewhat problematic. In *R (HS2 and others) v Transport Secretary*, a joint judgment from Lord Neuberger PSC and Lord Mance JSC, which had the Supreme Court's unanimous approval, contained a short statement which, as Murray points out, conflicts with an assertion of implied repeal of a constitutional statute:

> It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.[41]

Although stated in the context of whether EU law was supreme over constitutional principles in UK domestic law,[42] the Supreme Court acknowledged that constitutional statutes may operate in a manner which restrains *subsequent* constitutional statutes from having unrestricted effect. This, of course, conflicts with the idea that a more recent sovereign Parliament may impliedly repeal legislation enacted by a previous sovereign Parliament. Discussing the implications of this judgment, Mark Elliott argued that *HS2* heralded a new approach to interpreting constitutional statutes: that conflicts between such statutes should be resolved 'by reference to their respective fundamentality'; in other words, whichever of the conflicting constitutional statutes is the more (or most) fundamental within the UK constitution is

38 Laws in Wales Acts 1535–1542.
39 EUWA, s 4.
40 EUWA, ss 10–12 and sched 2.
41 [2014] UKSC 3, [2014] WLR 324, [207], and Murray (n 32 above).
42 Ibid 382D, [206].

preferable in effect to those other statutes with which it conflicts.[43] Obviously, the determination of relative fundamentality in light of the lack of a supreme constitutional text necessitates a degree of judicial scrutiny of non-formal criteria: 'functional, institutional or normative' criteria within the statutes to be scrutinised.[44] There is no obvious or straightforward way to determine the *relative* fundamentality of norms, some of which are creatures of the common law.[45] The reason for this is because, in the UK, constitutional norms have never been neatly listed into a hierarchy of fundamentality.[46] When a court has to consider such a hierarchy, it has to do so in a multi layered context: the statutes which are in conflict, the factual matrix relevant to the conflict, any other constitutional norms which may be relevant (or may be impacted by the court's decision) and so on.

What this discussion illustrates is the difficulty Colton J faced when having to determine which of the two constitutional statutes before him should be given effect. In the judge's reasoning, two main points supported the EUWA over article VI: first, the significant constitutional developments which had been the subject of legislation since the Acts of Union, so that, among other things, the Ireland of today is unrecognisable through the lens of 1801 and Brexit is unrecognisable through the lens of 1998 (the making of the Good Friday Agreement and the return of devolution to Northern Ireland). Second, the difference in language between the two statutes: the generality of the Acts of Union in contrast with the specificity of the EUWA. Although such reasoning reinforces the sovereignty of Parliament, it is also problematic: the lack of any reference to *HS2* by Colton J raises a question as to whether the judgment was brought to the court's attention,[47] in circumstances where implied repeal is not a straightforward matter.

Returning to my earlier discussion of the nature of constitutional statutes, it is plain to see that both the Acts of Union and the EUWA condition vertical and horizontal relationships. In such circumstances,

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43 Mark Elliott, 'Constitutional legislation, European Union law and the nature of the United Kingdom's contemporary constitution' (2014) 10(3) European Constitutional Law Review 379, 388.

44 Ibid 386.

45 Cf the 'principle of legality', outlined by Lord Steyn in *R v Home Secretary ex p Pierson* [1998] AC 539 (HL), 587C.

46 Similar difficulties were highlighted by Mark Elliott in an earlier article about constitutional statutes, 'Embracing "constitutional" legislation: towards fundamental law?' (2003) 54(1) Northern Ireland Legal Quarterly 25, 39, fn 56, and also in 'Parliamentary sovereignty and the new constitutional order: legislative freedom, political reality and convention' (2002) 22(3) Legal Studies 340.

47 Not having seen the parties' submissions, I do not know whether *HS2* featured in them.

the implied repeal of one statute by the other, as a matter of legal effect, risks jeopardising the certainty and predictability of pre-existing relationships and their attendant rights and obligations. The context here is crucial because, while legal uncertainty in the private sphere may be a mere unavoidable annoyance, in the constitutional sphere, the consequences can be severe. The UK Government has already been criticised for limiting parliamentary scrutiny of the Withdrawal Agreement (which eventually led to the 2020 Act and the incorporation of the Protocol),[48] with the UK Government's chief Brexit negotiator Lord Frost testifying that the impact to businesses trading under the Protocol had a 'bigger chilling effect' than previously thought[49] and the Prime Minister having provided 'assurances' in Parliament that the EUWA did not impliedly repeal article VI[50] (which had no impact on Colton J's judgment).[51] The result of the Government's apparent 'enact now and don't ask questions later' approach to the most constitutionally significant change in generations negatively impacts on the certainty needed to keep constitutional relationships functional. Of course, the level of scrutiny afforded to a Bill by Parliament before its enactment is (from an orthodox viewpoint)[52] immaterial to the enforcement of that enactment by the judiciary. Constitutionally, however, legislative scrutiny matters when courts are asked to give effect to language that has far-reaching implications for constitutional functioning by dramatically changing a pre-existing constitutional landscape. An internal customs and regulatory border bisecting a single customs territory, with one side of that border having to apply a foreign customs and regulatory code, is at least dramatic enough to warrant *sufficient* scrutiny before enactment. Scrutiny is also crucial here because the risk of implied repeal jeopardising constitutional certainty is prospective: the implied repeal of a past constitutional statute by a relatively rushed present one sets the precedent for another rushed constitutional change by implied repeal in the future.

It is therefore constitutionally (if not strictly *legally*) insufficient to point to the enactment of a statute as a *fait accompli* when it is left to the courts to make sense not only of the language of one statute, but the way that language interacts with previous statutes which occupy the same field. In this way, the distinctions between law and politics

48 Hannah White, 'The government's timetable is designed to frustrate Brexit scrutiny' (*Institute for Government*, 22 October 2019).

49 European Scrutiny Committee, *Oral Evidence: The UK's New Relationship with the EU* (17 May 2021) Q 57.

50 HC Deb 16 June 2021, vol 697, col 276.

51 *Allister* (n 2 above) [117].

52 See *R (SC and others) v Work and Pensions Secretary* [2021] UKSC 26, per Lord Reed PSC [167]–[173].

in the UK constitution collapse as the courts face questions of law with considerable political significance. Elliott had argued that one possible way to resolve a conflict between two constitutional statutes was 'on a normal implied-repeal basis, the constitutional status of the two statutes cancelling out the significance of their being constitutional statutes in the first place'.[53] As the above discussion shows, implied repeal is not a straightforward resolution to such a conflict, in part because the constitutional implications of certain statutes (beyond the strictly legal field) are wider than the judicial arena. This is not to suggest that the courts should be embroiled in political questions, but only to highlight that such matters cannot be entirely ignored.

Colton J's second point (specificity of language) is also somewhat problematic. The judge states:

> … Article VI is open textured. This is to be contrasted with the specificity of section 7A which expressly refers to the terms of the Withdrawal Agreement. The Withdrawal Agreement is a detailed specific and complex agreement making provision for the withdrawal of the United Kingdom from the European Union, the repeal of the 1972 EC Act and the details for the implementation of the Agreement. These specific details are in marked contrast to the general provisions of Article VI and give further weight to the proposition that in recognising the principle of the supremacy of primary legislation and the importance of 'constitutional' statutes that section 7A should be given effect.[54]

While section 7A of the EUWA is concerned with the general implementation of the provisions of the Withdrawal Agreement, there are additional powers conferred by the EUWA which are worth highlighting. Sections 8–8C of the EUWA deal with powers in connection with the UK's withdrawal, empowering ministers to make regulations to deal with deficiencies arising from the withdrawal itself (section 8), the implementation period (section 8A), 'certain other separation issues' (section 8B) and the Protocol (section 8C). Section 8C has no sunset clause (unlike sections 8 and 8A), highlighting the permanent nature of the Protocol. Moreover, the law-making power conferred on ministers by section 8C is extremely broad and the regulations made thereunder are subject to affirmative resolution[55] and unamendable during their scrutiny. In part, the breadth of this power reflects the potential in the Protocol for dynamism in the future relationship between Northern Ireland and the EU.[56] However, a

53 Elliott (n 43 above) 387.

54 *Allister* (n 2 above) [110].

55 EUWA, sched 7, para 8F(1).

56 See eg Katy Hayward, '"Flexible and imaginative": the EU's accommodation of Northern Ireland in the UK–EU Withdrawal Agreement' (2021) 58(2) International Studies 201, 210.

virtually open-ended power to make law on a permanent basis is hardly an example of specificity, when such law-making is authorised in respect of a relationship which is itself (in some respects) non-specific. What I mean by this is the *scope* of what section 8C allows in law-making. Section 8C(7)(b), for instance, states '[any reference in section 8C to the Protocol includes a reference to] any provision of EU law which is applied by, or referred to in, the Protocol (to the extent of the application or reference)'. Provisions of EU law referred to in the Protocol are *not* exhaustively enumerated. Article 13(3), for example, provides for any references in the Protocol to EU Acts as being those Acts 'as amended or replaced', while article 13(4) envisions adoption of acts which fall within the scope of the Protocol without replacing or amending any EU act listed in the Protocol itself.[57] Given the non-specific nature of the Protocol's objectives ('arrangements necessary to address the unique circumstances on the island of Ireland'),[58] what falls within the scope of the Protocol is, at least arguably, a fairly open-ended question. Admittedly, the implementation of the Protocol's dynamism into domestic law may necessitate *some* parliamentary legislation, but section 8C provides a constitutional (and incidentally convenient) pathway to avoid the scrutiny involved with parliamentary legislation. Most problematic of all perhaps (from the perspective of specificity) is that section 8C(2) authorises regulations to modify Acts of the UK Parliament, including the EUWA itself, perhaps foreshadowing some future regulation (still unamendable by Parliament) which avoids *all* parliamentary scrutiny when incorporating newer and newer EU law as part of the implementation of the Protocol.

Seen in this light, if the operation of one constitutional statute were to impliedly repeal a previous one, then such repeal may have to be construed narrowly in the interests of constitutional certainty and predictability, which are themselves norms of constitutional significance.[59] At this point, it is worthwhile to return (briefly) to Laws LJ in *Thoburn*. In answer to the question of how a court would find that a constitutional statute (or provision) had been repealed, Laws LJ stated: 'I think the test could only be met by express words in the later statute, or words so specific that the inference of an actual determination to effect the result contended for was irresistible.'[60] In the context of the Acts of Union, as Colton J observed in *Allister*, the entire constitutional landscape had changed utterly: from the partition of Ireland and the establishment of the Irish Free State in

57 Protocol (n 1 above) C 384 I/99–100.
58 Ibid art 1.3, C 384 I/93.
59 Lord Bingham, 'The rule of law' (2007) 66(1) Cambridge Law Journal 67, 69–70.
60 *Thoburn* (n 29 above) [63].

1922[61] to the Ireland Act 1949.[62] While neither of these legislative developments explicitly repealed any aspect of the Acts of Union, they certainly provided for a specific realignment (and eventual severance) of constitutional relationships and functionality between the UK and Ireland. Thus, insofar as there was any implied repeal of the Acts of Union, such repeal was accompanied by efforts to prevent a constitutional vacuum. The need to prevent such a vacuum may well be a relevant factor when determining whether a constitutional provision has been repealed (and to what extent) by a subsequent constitutional provision. From this perspective, the EUWA (as amended) succeeds in impliedly repealing article VI: not necessarily because of its recentness, but because, by realigning constitutional relationships between Northern Ireland and Great Britain through empowering the implementation of the Protocol (however messy and concerning such empowerment may be), it does not (in itself) create a constitutional vacuum through repeal.

An additional element is the extent to which implied repeal is the only (or only proper) analytical paradigm by which to explain what has happened to article VI. Colton J referred to two reports of the House of Lords' Committee for Privileges (the Committee): *The Earl of Antrim's petition*[63] and *Lord Gray's motion*.[64] Both matters concerned the right of peers to sit in the House of Lords: *Antrim* concerned the right of 28 Irish peers to sit in the Lords under the Acts of Union,[65] while *Gray* concerned the right of 16 Scottish peers to sit in the Lords under the Acts of Union 1706–1707.[66] In both cases, the Committee found that events of constitutional significance had overtaken the UK, so that neither right applied.[67] As with Colton J, the Committee in *Antrim* did not explicitly hold that the provisions of the respective Acts of Union had been impliedly repealed, only that the claimed right of Irish peers no longer existed,[68] with the relevant statutory provisions having become 'spent or obsolete or impliedly repealed'.[69] In *Gray*, by contrast, the Committee doubted whether the right of Scottish peers was 'fundamental law' at all.[70]

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61 Irish Free State (Constitution) Act 1922.
62 *Allister* (n 2 above) [96]. To be clear, this describes constitutional change from the UK perspective, not the Irish perspective.
63 [1967] 1 AC 691 (HL).
64 [2002] 1 AC 124 (HL).
65 *Antrim* (n 63 above) 709G.
66 *Gray* (n 64 above) 128F.
67 Respectively, *Antrim* (n 63 above) 710A, and *Gray* (n 64 above), 130H.
68 *Antrim* (n 63 above) 718B, per Lord Reid.
69 Ibid 719E, per Viscount Dilhorne.
70 *Gray* (n 64 above) 143D, per Lord Hope.

These two reports, and *Antrim* in particular, illustrate the myriad perspectives on what happens to a statute which was foundational in an age which no longer exists, and which cannot sensibly be revived. If the Acts of Union were required to be strictly enforced in perpetuity, the effects of such enforcement would be an anachronistic delirium. It might be jarring on a doctrinal level to see the highest judicial officeholders conclude that a provision, enacted by an always-sovereign Parliament and still very much alive in the statute book, has ceased to have effect, has become obsolete or is now spent (without any indication that it could become obsolete or spent in the legislative text). But at such a sharp intersection between legal doctrine and reality, reality takes precedence. There is an added benefit to leaving open the question whether a constitutional statute has been impliedly repealed or rendered obsolete (or spent) by facts over which the statute itself has no control: the reinforcement of parliamentary sovereignty. As sovereignty encapsulates the *ability* of the Crown in Parliament to enact legislation, external events rendering its constitutional statutes ineffective do nothing to diminish this ability as a matter of law. Moreover, although not relevant to the judicial task, a finding of obsolescence due to external events preserves a modicum of dignity in a legislative body which might otherwise appear to have enacted a statute in its sleep.

What *Antrim* and *Gray* both provide is a basis to conclude that certain constitutional norms no longer apply in a state which would be unrecognisable to those who hoped such norms would be entrenched in perpetuity. Of course, there are problems with this approach, not least the principle that parliamentary sovereignty demands that Acts of the UK Parliament be enforced as such.[71] Difficult questions would therefore arise: what sort of external events would justify finding that an Act of Parliament has ceased to have effect? How could such a justification sit normatively within a constitution whose bedrock remains the sovereignty of the Crown in Parliament?[72] More difficult still would be the question of why such a justification should be limited only to constitutional statutes and not ordinary ones. However, as previously discussed, the Supreme Court's observations in *HS2* also gave rise to difficulties, as does the doctrine of implied repeal.

Related to this discussion is the Scottish doctrine of 'desuetude', which requires 'a very considerable period, not merely of neglect, but of contrary usage of such a character as practically to infer such completely established habit of the community as to set up a counter

71 See *In re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [2019] AC 1022 [43].

72 *R (Jackson and others) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 [9], per Lord Bingham.

law or establish a *quasi*-repeal' of a law.[73] However, two problems arise with the conclusion that the Acts of Union (or any other constitutional statutes) could be subject to desuetude. First, it appears to be a specifically Scottish doctrine which has no equivalent in the constitutional practice in the rest of the UK (including in respect of Northern Ireland),[74] and anyway appears to apply only to pre-Union Scottish statutes.[75] Second, even if the doctrine applied, it is not immediately clear that article VI was rendered ineffective through desuetude. This is because, until Brexit and the Protocol, there was no customs border dividing Northern Ireland from Great Britain. This is despite the whole island of Ireland being one epidemiological unit, necessitating sanitary and phytosanitary checks at points of entry into Northern Ireland even before Brexit.[76] Thus, it is arguable that aspects of the 'same footing' element of article VI applied in the relationship between Northern Ireland and Great Britain, until the incorporation of the Protocol and its commencement in domestic law.

Ultimately, the point of this discussion is not to suggest *the* correct path: just as there is apparently more than one way to skin a cat,[77] there is more than one perspective on how to resolve conflicts between constitutional statutes. This is relatively uncharted territory for the courts and the strictly legal aspects of the UK constitution. We do not have a wealth of case law on how to deal with constitutional statutes, what is precisely encompassed by the 'constitutional' status and how that sits normatively within existing (and long-standing) constitutional doctrine. In such circumstances, a holistic approach is essential because this issue is far from settled.

What matters in the end from a doctrinal perspective is the 'true meaning' of a legislative enactment, whether or not such meaning aligns with the factual intentions of its enactors.[78] And where two constitutional statutes conflict, a sensible resolution ought to be preferred over a nonsensical one. In that, Colton J came to what was possibly the only conclusion: whether or not article VI had in fact been impliedly repealed by the EUWA, its provisions no longer had effect as they did in 1801. The alternative conclusion would have

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73 See *Brown v Magistrates of Edinburgh* (1931) SLT 456, per Lord MacKay (Outer House) 458.

74 Ibid Lord MacKay quoting Lord Eldon in *Johnstone v Stott* (1802) 4 Paton 274 (HL).

75 A W Bradley, K D Ewing and C J S Knight, *Constitutional and Administrative Law* 17th edn (Pearson 2018) 61, fn 90.

76 *Allister* (n 2 above) [60].

77 Having never tried to skin a cat, I do not know how true this is.

78 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613G, per Lord Reid.

irresistibly bled into some other constitutional moments: notably when the UK Parliament gave up legislative supremacy over most of the British empire. The Prime Minister might in that event meet with a spectacularly hostile reception at the next Commonwealth Heads of Government Meeting.

THE DEVOLUTION CHALLENGES

The Protocol was challenged on the basis not only of the UK constitution, but also that of Northern Ireland. I deal with the second and third grounds of challenge in this section, as both were predicated on largely similar themes arising out of Northern Ireland's constitutional arrangements. Central to these arrangements (and the grounds of challenge covered in this section) are the inter-related concepts of consent and consociationalism. Section 1(1) of the Northern Ireland Act 1998 (NIA) provides that Northern Ireland remains in the UK unless a majority of its people vote to secede from the UK and unite with the Republic of Ireland instead. This wording is reproduced in its entirety from the Belfast (Good Friday) Agreement 1998 (GFA).[79]

The second challenge in *Allister* proceeded on the basis that the NIA 'protects the status of Northern Ireland under the Acts of Union 1800 and that any diminution in that status can only occur if it has been approved in advance by a referendum held in accordance with the first Schedule of the [NIA]'.[80] In other words, the applicants submitted that, in addition to membership within the UK or unification with the Republic of Ireland, the NIA's consent requirement also covers other changes to Northern Ireland's constitutional status, including via the Protocol. In dismissing this argument, Colton J pointed to *R (Miller) v Brexit Secretary*, in which a unanimous 11-judge Supreme Court panel had considered the same argument (albeit in the context of the UK's intention to exit the EU) and dispatched it with three sentences.[81] Admittedly, the Supreme Court had to contend with much more than Northern Ireland's constitutional arrangements in *Miller*, but Northern Ireland's peculiarities have a habit of returning to the judicial arena. Colton J, to his credit, explored the issue in greater detail, looking to the GFA as the interpretational backdrop to the NIA.[82] However, no part of the GFA supported the applicants' argument that Northern Ireland's constitutional arrangements required popular consent for

79 The Agreement reached in the Multi-party Negotiations (10 April 1998).
80 *Allister* (n 2 above) [121].
81 [2017] UKSC 5, [2018] AC 61 [135].
82 *Allister* (n 2 above) [129]–[135].

changes beyond secession from the UK.[83] Consequently, this ground of challenge failed.

The third challenge revolved around the Consent Regulations. Per the Protocol,[84] the UK is required to seek the democratic consent of the Northern Ireland Assembly on the question whether articles 5–10 of the Protocol (which relate to the customs and regulatory border) will continue to apply. The consequences of an affirmative vote depend on whether that vote was by a simple majority or a cross-community majority,[85] whereas a negative vote results in the cessation of the application of articles 5–10 and other Protocol provisions on which the foregoing articles depend (only to the extent of such dependence) two years after the negative vote.[86] The relevant point for this challenge was the *manner* of the Assembly's vote.

Currently, any vote in the Assembly may be made subject to the petition of concern mechanism provided for under section 42(1) of the NIA. Maligned by many but defended by others, the petition of concern is a mechanism which allows a minimum of 30 Members of the Legislative Assembly to bring a motion for a cross-community vote on any matter on which the Assembly is due to vote. If the cross-community vote fails, so does the matter underlying it. The petition is an example of the consociationalism built into the GFA and NIA and is a crucial element of ensuring participation in Northern Ireland's politics by its two main communities. However, it has also come under fire for a number of years for being tactically used to defeat *bona fide* Assembly scrutiny of the Northern Ireland Executive and popular legislative measures.[87] However, this is not the place for a detailed discussion of its merits.

The Consent Regulations inserted schedule 6A into the NIA, providing for the Assembly's consent vote in connection with the Protocol. Crucially, it also disapplied section 42 (and thus the petition of concern) in respect of the entire voting process.[88] The challenge in this connection proceeded on the basis of section 42 being a fundamental constitutional provision in Northern Ireland and thus not subject to implied repeal, amendment or disapplication by secondary legislation.[89] The similarities of this challenge to that concerning the

83 Ibid [136].
84 Protocol (n 1 above) art 18(2), C 384 I/102.
85 Ibid art 18.5, C 384 I/102.
86 Ibid art 18.4, C 384 I/102.
87 For detail, see A Deb, 'Judicialising the legislative process: the Petition of Concern' (*UKCLA Blog*, 14 June 2021).
88 NIA, sched 6A, para 18(5).
89 *Allister* (n 2 above) [150].

Acts of Union were obvious.[90] Moreover, the applicants argued that a part of the EUWA itself prevented the Consent Regulations from having been made: section 10(1)(a) which provides: '[a Minister of the Crown or devolved authority must] act in a way that is compatible with the terms of the Northern Ireland Act 1998'.[91]

The court's answer to this challenge was to examine the history of the consent vote, which it did in great detail.[92] Ultimately, the court's reasoning lay in the breadth of section 8C of the EUWA, empowering ministers to make any law appropriate to implement the Protocol. Plainly, the Consent Regulations fall within this power, the more so as they faithfully reproduce what the Protocol itself requires in terms of the Assembly's consent.[93] As an aside, the court did not note in much detail that the applicant's challenge under section 10 of the EUWA was largely upended by the fact that the Consent Regulations also inserted section 56A into the NIA, which provides for schedule 6A to have effect.[94] Thus, it would appear that the Consent Regulations, made under the extremely broad section 8C power, amended the NIA in a way which would not render the making of the Consent Regulations a breach of section 10. There appears to be nothing unconstitutional (let alone unlawful) about this because, lest we should forget, the Consent Regulations were laid in draft form for affirmative resolution by each of Parliament's Houses (in accordance with the EUWA): the draft was laid on 9 December 2020 and came into force the *following day*. At such times, legislative scrutiny has taken on a whole new meaning.

Leaving aside the manner of the Assembly's consent vote, the applicants also attacked its substance as being in violation of the consociational heart of Northern Ireland's constitution. This was argued on the basis that the consent vote was a devolved matter because it related to the implementation of an international obligation (arising under the Withdrawal Agreement) which was transferred to the Assembly's competence.[95] Thus, the argument ran, it should be subject to the petition of concern mechanism like any other matter transferred to the Assembly.[96]

Colton J turned to the 'paramount' role of the Northern Ireland Secretary in the facilitation of the consent vote (by the making

90 Ibid [149].
91 Ibid [151].
92 Ibid [157]–[164].
93 Ibid [165]–[172].
94 Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020, SI 2020/1500, reg 2.
95 Sched 2, para 3 to the NIA.
96 *Allister* (n 2 above) [183].

of the Consent Regulations and in the process contained within Schedule 6A),[97] concluding:

> Plainly, any decision taken by the Assembly to end the application of Articles 5–10 of the Protocol to Northern Ireland would come within the ambit of international relations, including relations with the territories outside the United Kingdom which is not a transferred or devolved matter.[98]

Thus, the court held that the consent vote was not a matter transferred to the competence of the Assembly.[99] However, the court's reasoning on this point deserves a more detailed examination. The consent vote process is plainly a responsibility of the UK Government under the Protocol, which requires the UK Government to 'seek democratic consent in Northern Ireland in a manner consistent with the [GFA]'.[100] However, the design of the Protocol equally plainly envisions two actors within this process: the UK Government facilitating the consent vote, and the Assembly reaching a decision on the vote itself. It is the outcome of the Assembly's vote that determines the consequences for articles 5–10 of the Protocol, not any action strictly on the part of the UK Government. It is thus at least arguable that there are two obligations at play – one on the part of the Northern Ireland Secretary and the second on the part of the Assembly. In such circumstances, the court's conclusion that the consent vote in its entirety is an excepted matter under schedule 2 of the NIA appears to lack appropriate nuance.

An analogy may be drawn here with Scotland. In *The Scottish Continuity Bill Reference*, the Supreme Court considered that:

> There is relatively little scope for Scottish legislation to 'relate to' international relations other than by way of implementation of international obligations, unless such legislation were to purport to deal with the power of Ministers of the Crown to exercise its prerogative in foreign affairs, or to create a state of law in Scotland which affected the effectual exercise of that power'.[101]

Although we are concerned here with a power conferred on the Northern Ireland Assembly and not legislation enacted by the Assembly, the analogy is important. As the Supreme Court held in *The Scottish Continuity Bill Reference*, in the field of international relations, the UK is a single entity.[102] The relations between the EU and the UK in respect of Northern Ireland are governed by the Protocol, the majority

97 Ibid [184]–[186].
98 Ibid [189].
99 Ibid [190].
100 Protocol (n 1 above) art 18(2), C 384 I/102.
101 *The Scottish Continuity Bill Reference* (n 71 above) [32].
102 Ibid [29].

of which remains in force even if the Assembly votes against the continued application of articles 5–10. Even in such circumstances, the Protocol makes provisions for what happens.[103] The Assembly's vote changes neither of these facts; far less does it impact the UK Government's ability to exercise the Crown's prerogative powers in foreign affairs or its obligations under the Protocol or the remainder of the Withdrawal Agreement. Thus, it is certainly questionable whether the Assembly's vote would 'come under the ambit of international relations' as Colton J concluded.[104]

However, Colton J provided alternative reasoning to dismiss this ground of challenge, which is much stronger. The judge's alternative reasoning rests principally on the breadth of section 8C of the EUWA: the Consent Regulations were made pursuant to the power conferred by this section and have to be given effect as authorised by primary legislation.[105] This was despite the restrictive approach that the courts usually employ when construing secondary legislation which attempts to amend primary legislation.[106] At this juncture, Colton J examined generally the relationship between Parliament and the devolved legislatures with reference to Scotland and Northern Ireland,[107] concluding:

> ... the court notes that under section 7 of the Northern Ireland Act the [EUWA] is an 'entrenched enactment' not subject to modification but that regulations made under the Act may be modified by an Act of the Assembly which does not arise in this case.[108]

This appears to suggest that the Assembly may modify the Consent Regulations, but the Court did not go into much detail for its reasons in reaching this conclusion. This is a somewhat problematic conclusion reached by the court, for reasons which are worth detailing. The court's primary reference for this conclusion appears to be section 5(6) of the NIA which states:

> This section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland, but an Act of the Assembly may modify any provision made by or under an Act of Parliament in so far as it is part of the law of Northern Ireland.[109]

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103 Protocol (n 1 above) art 18.4, C 384 I/102.
104 *Allister* (n 2 above) [189].
105 Ibid [205].
106 Ibid [193]–[199].
107 Ibid [207]–[210].
108 Ibid [211].
109 *Allister* (n 2 above) [209].

However, section 5(6) cannot be read in isolation from the rest of the section or indeed sections 6–8, to which section 5 is subject.[110] Section 5 lays down formal requirements for the Assembly to make Acts, culminating in the explicit recognition of parliamentary sovereignty at section 5(6). Section 6 outlines matters outside the Assembly's competence, which includes excepted matters under schedule 2 insofar as the corresponding Assembly Act (or provision of such an Act) is 'not ancillary to other provisions (whether in the Act or previously enacted) dealing with reserved or transferred matters'.[111] 'Ancillary' is defined as a provision 'which provides for the enforcement of those other provisions or is otherwise necessary or expedient for making those other provisions effective; or which is otherwise incidental to, or consequential on, those provisions'.[112] If the court's conclusion that the entire consent vote process is an excepted matter is followed to the letter, the Assembly is, by operation of section 6, prohibited from making any legislative modifications to that process.

There is, however, a related point in terms of the Assembly's competence to modify the Consent Regulations. Schedule 2 of the NIA lists a number of excepted matters upon which the Assembly cannot tread, including parts of the NIA itself. The new section 56A of the NIA (which gives effect to the schedule 6A consent vote process) is not on this list. Thus, as a matter of *strict* statutory construction, there is a considerable grey area. The Northern Ireland Secretary made the Consent Regulations pursuant to section 8C of the EUWA, in order to give domestic effect faithfully to the requirements of article 18 of the Protocol. However, although the EUWA is protected from modification by the Assembly,[113] the part of the NIA giving effect to the consent vote process is not. If this part or schedule 6A is subsequently modified by the Assembly, such modifications may breach the UK Government's obligations under the Protocol if those modifications deviate from the text of the Protocol itself (for example, by requiring cross-community consent under section 42 of the NIA). Of course, the Consent Regulations could have modified schedule 2 of the NIA by entrenching section 56A and schedule 6A, but they did not. Moreover, while Parliament could not have amended the Consent Regulations while considering them, it could have refused to approve them and asked the Northern Ireland Secretary to provide a modified draft which closed this potential loophole. But neither of these steps was taken. Legislative scrutiny, indeed.

110 NIA s 5(1).
111 Ibid s 6(2)(b).
112 Ibid s 6(3).
113 Ibid 7(1)(e).

THE ECHR AND EU LAW CHALLENGES

The fourth and fifth grounds of challenge were premised, respectively, on article 3 of Protocol 1 (A3P1) to the European Convention on Human Rights (ECHR)[114] and articles 50 and 10 of the Treaty on European Union (TEU).[115]

The central argument of the A3P1 challenge was what could be described as a variation on the famous slogan from Revolutionary America: 'no taxation without representation',[116] turning to 'no implementation without representation' in the case of the Protocol. Essentially, the argument ran that, since Northern Ireland could no longer elect representatives to the European Parliament, it had no democratic say in the implementation of EU law which is required by the Protocol.[117] The court examined the provisions of the Protocol in detail, with a particular focus on its dynamism,[118] concluding that the right to free expression 'of the opinion of the people in the choice of the legislature' as guaranteed by A3P1 was engaged, but only in respect of future EU law being made,[119] rather than the EU law already incorporated via the Withdrawal Agreement and Protocol, which was made by Parliament.[120]

For Colton J, the applicants' challenge fell because of two reasons: first, the implementation of future EU law would have to go via the Joint Committee constituted under the Protocol, in which the UK Government plays a full part.[121] Secondly, Northern Ireland residents could elect representatives to the Assembly, which has a role in relation to the consent vote, and Parliament, which 'can amend or repeal [the statutes relating to the Withdrawal Agreement]'.[122] The Court also pointed to article 16 of the Protocol which allows either the UK or the EU to take unilateral 'safeguard measures' to remedy 'serious economic, societal or environmental difficulties that are liable to persist' as a result of the application of the Protocol, as the 'ultimate protection'.[123] No comments were made about the likelihood that Parliament would amend or repeal the Withdrawal Agreement statutes

114 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 3, Protocol 1.
115 Treaty on European Union (Lisbon Treaty) art 50.
116 Sarah Kay, 'Is the Northern Ireland Protocol unlawful? Analysis of the High Court judgment' (*EU Law Analysis*, 3 July 2021).
117 *Allister* (n 2 above) [215]–[216].
118 Ibid [220]–[238].
119 Ibid [241].
120 Ibid [240].
121 Ibid [260].
122 Ibid [259].
123 Ibid [263].

(or the corresponding damage to the rule of law for legislating in breach of an international agreement).[124]

A related (though scantly argued) point with the A3P1 challenge was that the Protocol would be a breach of article 14 of the ECHR, which prohibits discrimination in the enjoyment of the rights under the ECHR, on grounds both explicitly enumerated and unenumerated ('other status'). Colton J considered that Northern Ireland residence could conceivably fall within 'other status', so that article 14 was engaged in the context of the A3P1 right to vote.[125] However, the court was unable to find an analogous comparator by which to determine whether there had been prohibited discrimination: if comparison was to be made with residents of Great Britain, then they are not subject to the Protocol anyway and thus their voting rights would not be in issue.[126]

Ultimately, the court determined that article 14 was not engaged,[127] but that, even if it was, the Protocol was justifiable under either proportionality or the 'manifestly without reasonable foundation' test due to the fundamental reasons for the Protocol's necessity (relating to the unique conditions on the island of Ireland as a result of Brexit).[128] The court thus found the Protocol to be distinctly within the UK's margin of appreciation ('matters of political judgment'),[129] thereby escaping a particularly searching judicial enquiry. Murray makes the important point that, had the court concluded otherwise, 'this would have dramatic consequences for countries like Norway and Switzerland which have long been "rule takers" in their relationship with the EU'.[130]

The EU law challenge was premised on the ability of the EU to agree the Withdrawal Agreement. The applicants contended that article 50 TEU did not envision a formal future-facing document like the Protocol (especially one which subjects a part of the departing state to EU law permanently)[131] and that the EU could not agree such a document

124 For example, when the now UK Internal Market Act 2020 was first introduced and the Northern Ireland Secretary stated in the House of Commons that the then Bill as drafted would breach international law in a 'specific and limited' way (HC Deb 8 September 2020, vol 679, col 509) and the criticism which followed, including from the Lord Chief Justice of Northern Ireland, Sir Declan Morgan: see Freya McClements and Colin Gleeson, 'UK Brexit plan could undermine rule of law domestically, says NI chief justice' *The Irish Times* (Dublin, 9 September 2020).

125 *Allister* (n 2 above) [273], based heavily on the Supreme Court's judgment in *R (Stott) v Justice Secretary* [2018] UKSC 59, [2020] AC 51, see *Allister* [271]–[272].

126 Ibid [274].

127 Ibid [274].

128 Ibid [276].

129 Ibid [277].

130 *Murray* (n 32 above).

131 *Allister* (n 2 above) [290].

in any event because the democratic deficit contained therein was in breach of article 10 TEU (rehashing some of the A3P1 arguments).[132] In answer to the first point, Colton J found nothing in the text of article 50 which precludes agreement of the Protocol (or indeed a document of its kind)[133] and the judge adopted his analysis under the A3P1 challenge in answer to the second point, citing the impropriety of interfering with the sovereign will of Parliament as expressed in primary legislation.[134]

Although the recentness of the invocation of Article 50 meant that the court did not have precedent on which to rely or by which to be informed, Colton J should be commended for resolutely avoiding the kind of adventure embarked upon by the *Bundesverfassungsgericht* in May 2020, in which the German Constitutional Court found that the Court of Justice of the European Union had 'manifestly exceed[ed] [its] judicial mandate' under EU law when determining the proportionality of the Public Sector Purchase Programme of the European Central Bank.[135]

CONCLUSION

Given that the applicants in *Allister* have already indicated their intention to appeal Colton J's judgment,[136] there is not yet a conclusion to these proceedings. However, two important points need to be borne in mind. First, just as Colton J repeatedly indicated that he was bound by previous judgments of the Supreme Court, so too is the Northern Ireland Court of Appeal. If the issues encapsulated by *Allister* require examination from a first-principles perspective (I think some, not all, issues do), the chances of such an examination are highest in the Supreme Court. This is not, however, to suggest that the Court of Appeal should be leapfrogged; there is no doubt that the Supreme Court (if the appeal goes that far) would benefit from the observations and conclusions of Northern Ireland's highest court. Rather, my point is about recognising the reality of *stare decisis*: only the Supreme Court is unbound by decisions made by domestic UK courts and thus has the most freedom to consider the issues in *Allister* from the basis of first principles, including whether to maintain the 'constitutional statutes' designation at all. Second, the issues raised in *Allister* are neither academic nor esoteric. Regardless of whether one approves or

132 Ibid [292].
133 Ibid [291].
134 Ibid [297].
135 Judgment of the Second Senate (5 May 2020) 2 BvR 859/15 [154].
136 'Politicians react to High Court ruling NI Protocol is lawful' (*BBC News*, 30 June 2021).

disapproves of Brexit and the Protocol, the case raises questions with far-reaching consequences for constitutional principle and practice in the UK. Statutory interpretation can be a difficult exercise, but constitutional statutes make it even more so. How such statutes are given effect and which are preferred in the event of a conflict between them have consequences beyond the immediate case in which such questions are answered. Colton J made an admirable effort at answering these questions, but his word may not be the last.

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Freedom of expression

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INTRODUCTION

This article is based on a lecture I gave at Queen's University Belfast on 20 October 2021. I have included some materials which have emerged subsequently. I draw attention to two recent decisions of the European Court of Human Rights (ECtHR) in this area delivered on the same day and the application of the underlying principles in the leading decisions in this jurisdiction. I also want to look briefly at the recent Supreme Court decision in *DPP v Ziegler*[1] dealing with freedom of assembly.

THE EUROPEAN CASES

Freedom of expression and freedom of assembly engage rights under the European Convention of Human Rights under articles 10 and 11. The scheme of both articles is to assert the right in the first part of the article and the grounds for interference in the second part.

ARTICLE 10 FREEDOM OF EXPRESSION

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

1 [2021] UKSC 23.

The first ECtHR decision is *Lilliendahl v Iceland*.[2] The background was that an Icelandic municipal council had approved a proposal to strengthen education and counselling in elementary and secondary schools on matters concerning those who identify themselves as lesbian, gay, bisexual or transgender (LGBT). This was to be done in cooperation with the National LGBT Association. The decision was extensively reported in the news and led to substantial public discussion. That included radio stations where listeners could phone in and express their opinions on the decision of the municipal council. The applicant was one of those who took part in the public discussion. He criticised the radio station for covering what he called 'sexual deviation' and indoctrinating children on how to become sexual deviants. He expressed his disgust at the content of the radio show.

The applicant's comments were investigated by police as a result of numerous complaints and were considered to potentially constitute publicly threatening, mocking, defaming and denigrating a group of persons on the basis of their sexual orientation and gender identity. The District Court before which the case progressed considered that the comments did not reach the threshold required to justify interference with the applicant's freedom of expression rights and that the applicant had not intended to violate the relevant domestic statutory provision.

That decision was overturned by the Supreme Court. The court found that the requirement of intent was satisfied by the intentional use of the words by the applicant and that account should not have been taken of the motives which the applicant claimed were behind his expression. He was convicted and fined.

The Supreme Court first considered the application of article 17 of the Convention. This provides:

> Nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

The Supreme Court explained that the decisive point under article 17 is whether the applicant's statements sought to stir up hatred or violence and whether, by making them, he attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it. article 17 is one of the Convention rights brought home by the 1998 Act.

If applicable, the effect of article 17 is to negate the exercise of the Convention right that the applicant seeks to vindicate in the proceedings before the Court. Article 17 is only applicable on an exceptional

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2 App no 29297/18 (11/06/20).

basis and in extreme cases, and in cases concerning article 10 of the Convention, it should only be resorted to if it is immediately clear that the impugned statement sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention.

The Supreme Court concluded that the circumstances of this case did not reach the high threshold for the applicability of article 17. It accepted that, although the comments were highly prejudicial, it was not immediately clear that they were aimed at inciting violence and hatred or destroying the rights and freedoms protected by the Convention.

Having rejected the applicability of article 17, the Supreme Court then began the conventional article 10 exercise noting that freedom of expression constituted one of the essential foundations of a democratic society and one of the basic conditions for its progress. That included ideas that might offend, shock or disturb. Such were the demands of pluralism, tolerance and broad mindedness without which there was no democratic society. Any interference had to be construed strictly and the need for restrictions had to be established convincingly.

The Supreme Court noted that the relevant penal provision had been introduced after Iceland's ratification of the UN Convention on the Elimination of All Forms of Racial Discrimination and subsequently extended its protection to sexual orientation and gender identity. The interference with freedom of expression was in accordance with law. Curbing that freedom in this case was justified and necessary to counteract the sort of prejudice, hatred and contempt against certain social groups which hate speech could promote.

The applicant lodged proceedings in the ECtHR. The ECtHR explained that states had a margin of appreciation which meant that where the independent and impartial domestic courts have carefully examined the facts applying the relevant human rights standards consistently with the Convention and its case law and adequately balanced the applicant's personal interests against the more general public interest in the case it was not for the court to substitute its own assessment of the merits unless there were strong reasons for doing so. This approach has also been particularly noticeable in deportation cases.

The ECtHR then went on to look at the concept of hate speech. The first category is the gravest form of hate speech which falls under article 17 and is therefore excluded entirely from the protection of article 10. The second category is comprised of less grave forms of hate speech which the court has not considered to fall entirely outside the protection of article 10 but which it is considered permissible for the contracting states to restrict.

Into this category the court has not only put speech which explicitly calls for violence or other criminal acts but has held that attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient to allow the authorities to combat prejudicial speech within the context of permitted restrictions on freedom of expression. In hate speech cases which did not call for violence or other criminal acts the conclusion has been based on an assessment of the content of the expression and the manner of its delivery. This would tend to support the proposition that the test is objective and the motives of the speaker in such cases will not prove exculpatory.

In this case the ECtHR agreed that the comments were serious, severely hurtful and prejudicial. The prejudicial nature of the comments was not necessary for participation in the ongoing public discussion. Discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour (*Smith and Grady v UK*.[3] The Supreme Court had, therefore, acted within its margin of appreciation. The application was inadmissible.

The second European case is *Baldassi v France*.[4] The applicants were members of a local collective supporting the Palestinian cause as part of an international campaign entitled 'Boycott, Disinvestment and Sanctions'. They were prosecuted for calling on customers at a hypermarket not to purchase products from Israel. The relevant law prohibited incitement to discrimination against a group of persons on account of their origin or belonging to a specific nation. The court accepted that the convictions had been intended to protect the right of producers or suppliers of products from Israel to market access. The convictions had, therefore, been a means of protecting the rights of others which was a legitimate aim.

The ECtHR recognised that a call for a boycott constituted a very specific mode of the exercise of freedom of expression and that it combines expression of the protesting opinion with incitement to differential treatment. It may amount to a call to discriminate against others. Incitement to discrimination is a form of incitement to intolerance which, together with incitement to violence and hatred, is one of the limits which should never be overstepped in exercising freedom of expression.

The ECtHR distinguished this case from the earlier decision of *Willem v France*.[5] In that case the applicant as mayor had instructed the municipal catering services to boycott Israeli products. He made the announcement without prior debate or any vote in the municipal council

3 (1999) 29 EHRR 493.
4 App no 15271/16 (11/06/20).
5 App no 10883/05 (10/12/09).

and accordingly had not encouraged free discussion of this subject of public interest. Essentially, he had abused his powers and interference with his decision was justified.

In this case the applicants were ordinary citizens and their influence over consumers was not comparable to that of a mayor over his municipal services. The purpose of the call for the boycott had been to trigger or stimulate debate among supermarket customers. There had been no racist or anti-Semitic remarks or incitement to hatred or violence.

The convictions of the applicants proceeded simply on the basis that they had called for a boycott of products from a particular geographical location. There had been no examination of whether that interference was necessary in a democratic society to attain the legitimate aim pursued. The court had been required to give detailed reasons for its decision. The actions and remarks imputed to the applicants concerned a subject of public interest and contemporary debate. The actions and remarks in question had fallen within the ambit of political or militant expression. It was in the nature of political speech to be controversial and often virulent. That did not diminish its public interest provided that it did not cross the line and turn into a call for violence, hatred or intolerance. That was the limit that should not be overstepped. The applicants' convictions had not been based on relevant grounds sufficient to show that the domestic court had applied the principles set out in article 10.

THE DOMESTIC DECISIONS

There are two significant recent domestic cases in this area. The first is the decision of Maguire LJ in *Jolene Bunting's Application*.[6] The applicant was a Belfast city councillor. The case arose as a result of complaints made to the Local Government Commissioner for Standards. The complaints related to various remarks made by the applicant and her approbation of remarks made by others about Muslims. The Acting Commissioner considered the complaints and concluded that a suspension for a period of four months from council business was appropriate while an investigation was carried out into whether the applicant had breached the Northern Ireland Local Government Code of Conduct for Councillors (the Code).

Maguire LJ addressed the argument that this was protected as political speech. He adopted the principles derived by Hickinbottom J from the European case law in *Heesom v Public Service Ombudsman for Wales*:[7]

6 [2019] NIQB 36.
7 [2014] EWHC 1504 (Admin), [38].

'i) The enhanced protection applies to all levels of politics, including local (*Jerusalem v Austria* (2003) 37 EHRR 25), especially at [36]).

ii) Article 10 protects not only the substance of what is said, but also the form in which it is conveyed. Therefore, in the political context, a degree of the immoderate, offensive, shocking, disturbing, exaggerated, provocative, polemical, colourful, emotive, non-rational and aggressive, that would not be acceptable outside that context, is tolerated (see, e.g., *De Haes and Gijsels v Belgium* (1997) 1 EHRR 1, at [46]–[48], and *Mamère v France* (2009) 49 EHRR 39, at [25]: see also *R (Calver) v Adjudication Panel for Wales* [2012] EWHC 1172 (Admin), at [55] and the academic references referred to therein). Whilst, in a political context, article 10 protects the right to make incorrect but honestly made statements, it does not protect statements which the publisher knows to be false (*R (Woolas) v Parliamentary Election Court* [2012] EWHC 3169, at [105]).

iii) Politicians have enhanced protection as to what they say in the political arena; but Strasbourg also recognises that, because they are public servants engaged in politics, who voluntarily enter that arena and have the right and ability to respond to commentators (any response, too, having the advantage of enhanced protection), politicians are subject to "wider limits of acceptable criticism" (see, e.g., *Janowski v Poland* (1999) 29 EHRR 705, at [33]; but it is a phrase used in many of the cases). They are expected and required to have thicker skins and have more tolerance to comment than ordinary citizens.

iv) Enhanced protection therefore applies, not only to politicians, but also to those who comment upon politics and politicians, notably the press; because the right protects, more broadly, the public interest in a democracy of open discussion of matters of public concern (see, e.g., *Janowski* at [33]). Thus, so far as freedom of speech is concerned, many of the cases concern the protection of, not a politician's right, but the right of those who criticise politicians (e.g. *Janowski*, *Wabl v Austria* (2001) 31 EHRR 51 and *Jerusalem*). *Castells v Spain* (1992) 14 EHRR 445, of course, was both; the senator criticising politicians within the Spanish Government through the press.

v) The protection goes to 'political expression'; but that is a broad concept in this context. It is not limited to expressions of or critiques of political views (*Calver* at [79]), but rather extends to all matters of public administration and public concern including comments about the adequacy or inadequacy of performance of public duties by others (*Thorgeirson v Iceland* (1992) 14 EHRR 843, at [64]: see also *Calver* at [64] and the academic references referred to therein). The cases are careful not unduly to restrict the concept; although gratuitous personal comments do not fall within it.

vi) The cases draw a distinction between fact on the one hand, and comment on matters of public interest involving value judgment on the

> other. As the latter is unsusceptible of proof, comments in the political context amounting to value judgments are tolerated even if untrue, so long as they have some – any – factual basis (e.g. *Lombardo v Malta* (2009) 48 EHRR 23, at [58], *Jerusalem* at [42] and following, and *Morel v France* (2013) Application No 25689/10, at [36]). What amounts to a value judgment as opposed to fact will be generously construed in favour of the former (see, e.g., *Morel* at [41]); and, even where something expressed is not a value judgment but a statement of fact (e.g. that a council has not consulted on a project), that will be tolerated if what is expressed is said in good faith and there is some reasonable (even if incorrect) factual basis for saying it, 'reasonableness' here taking account of the political context in which the thing was said (*Lombardo* at [59]).
>
> vii) As article 10(2) expressly recognises, the right to freedom of speech brings with it duties and responsibilities. In most instances, where the State seeks to impose a restriction on the right under article 10(2), the determinative question is whether the restriction is "necessary in a democratic society". This requires the restriction to respond to a "pressing social need", for relevant and sufficient reasons; and to be proportionate to the legitimate aim pursued by the State.
>
> viii) As with all Convention rights that are not absolute, the State has a margin of appreciation in how it protects the right of freedom of expression and how it restricts that right. However, that margin must be construed narrowly in this context: "There is little scope under article 10(2) of the Convention for restrictions on political speech or on debate on questions of public interest" (see, e.g., *Lombardo* at [55]–[56], *Monnat v Switzerland* (2010) 51 EHRR 34, at [56]).
>
> ix) Similarly, because of the importance of freedom of expression in the political arena, any interference with that right (either of politicians or in criticism of them) calls for the closest scrutiny by the court (*Lombardo* at [53]).'

In a careful and instructive judgment reviewing the terms of the Code, the approach that should be taken by the court to the decision of the Acting Commissioner and the extent of the assistance that the applicant could derive from article 10 of the Convention, Maguire LJ concluded that the decision to suspend for a period of four months was proportionate.

The judge paid particular attention to the question of whether the matter which was the subject of the complaint constituted political speech. He concluded that a generous interpretation should be given to that concept. He also recognised that not every pronouncement by a politician should attract that protection and the test will usually depend upon whether the matter complained of had a sufficient connection with a matter of public interest.

The other relevant domestic decision is the judgment of Keegan LCJ in *Lee Brown v PPS*.[8] The prosecution was concerned with the distribution of a leaflet on behalf of Britain First complaining about an influx of migrants in Ballymena. The LCJ extensively reviewed the most recent case law in a wide-ranging and informative judgment.

The following propositions can be extracted from these decisions:

1 Freedom of expression is a fundamental right in a democratic society.
2 It follows that any restriction on the exercise of the right under article 10 (2) must be strictly construed.
3 If the exercise of the right is to be restricted it is invariably where the speech promotes violence or hatred or intolerance of the democratic values of the Convention.
4 Political speech qualifies for enhanced protection. Generally, the state has a wider margin of appreciation in matters of morals or religion.[9]
5 In order to qualify as political speech it is not necessary that the speaker holds a political office nor does it follow that because the speaker holds a political office the speech attracts the protection. It is for the court in each case to assess whether or not the speech is on a matter of public interest or debate.
6 Cases such as *Willem v France*[10] and *Feret v Belgium*[11] demonstrate that politicians who abuse their position in order to stifle public debate or to promote their personal prejudices will lose the enhanced protection.
7 The ECtHR acknowledges that each state has a margin of appreciation in respect of the restriction of the right to freedom of expression subject to European supervision.
8 This means that the court will review the intensity of the analysis of the nature of the speech and the corresponding strength of the ground upon which a restriction is proposed. A good demonstration of the type of analysis required is that exercised by Maguire LJ in *Bunting* where he analysed each of the complaints and identified those which he found justified the interference and rejected some of the matters upon which the Acting Commissioner had placed reliance.
9 The analysis is central to the ability of the court to adequately explain the justification for any restriction. Where that analysis has not been carried out or relevant and sufficient reasons in accordance with the ECtHR's cases law have not been

8 [2022] NICA 5.
9 *Murphy v Ireland* 38 EHRR 212.
10 App no 10883/05 (10/12/09).
11 App no 15615/07 (16/07/09).

demonstrated the court is likely to find a violation. *Baldassi* is an example of that.[12]

10 Where the analysis and reasons for the restriction are explained bearing in mind the appropriate European case law the ECtHR will not normally interfere with the proportionality assessment made by the domestic court.

11 Proportionality also plays a role in the extent and nature of any interference with the right.

ZIEGLER

That brings me to the case of *DPP v Ziegler*[13] decided by the Supreme Court in June 2021. The case arose from a protest at the 2017 biennial Defence and Security International arms fair. The action taken consisted of lying down in the middle of one side of the dual carriageway of an approach road leading to the Excel Centre (the side for traffic heading into it). The appellants attached themselves to two lock boxes with pipes sticking out from either side. Each appellant inserted one arm into a pipe and locked themselves to a bar centred in the middle of one of the boxes.

There was a sizeable police presence at the location in anticipation of demonstrations. Police officers approached the appellants almost immediately and went through the 'five-stage process' to try to persuade them to remove themselves voluntarily from the road. When the appellants failed to respond to the process they were arrested. It took approximately 90 minutes to remove them from the road. This was because the boxes were constructed in such a fashion that was intentionally designed to make them hard to disassemble.

The protestors were prosecuted for obstruction of the highway without lawful excuse. The critical issue was whether the obstruction was the lawful exercise of the right of free assembly.

ARTICLE 11 FREEDOM OF ASSEMBLY AND ASSOCIATION

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article

12 App no 15271/16 (11/06/20).

13 [2021] UKSC 23.

shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

The district judge made the following findings:

'a. The actions were entirely peaceful – they were the very epitome of a peaceful protest.

b. The defendants' actions did not give rise either directly or indirectly to any form of disorder.

c. The defendants' behaviour did not involve the commission of any criminal offence beyond the alleged offence of obstruction of the highway which was the very essence of the defendants' protest. There was no disorder, no obstruction of or assault on police officers and no abuse offered.

d. The defendants' actions were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair ... I did hear some evidence that the road in question may have been used, at the time, by vehicles other than those heading to the arms fair, but that evidence was speculative and was not particularly clear or compelling. I did not find it necessary to make any finding of fact as to whether "non-DSEI traffic" was or was not in fact obstructed since the authorities cited above appeared to envisage "reasonable" obstructions causing some inconvenience to the 'general public' rather than only to the particular subject of a demonstration ...

e. The action clearly related to a "matter of general concern" ... namely the legitimacy of the arms fair and whether it involved the marketing and sale of potentially unlawful items (eg those designed for torture or unlawful restraint) or the sale of weaponry to regimes that were then using them against civilian populations.

f. The action was limited in duration. I considered that it was arguable that the obstruction for which the defendants were responsible only occurred between the time of their arrival and the time of their arrests – which in both cases was a matter of minutes. I considered this since, at the point when they were arrested the defendants were no longer "free agents" but were in the custody of their respective arresting officers and I thought that this may well have an impact on the issue of "wilfulness" which is an essential element of this particular offence. The prosecution in both cases urged me to take the time of the obstruction as the time between arrival and the time when the police were able to move the defendants out of the road or from below the bridge. Ultimately, I did not find it necessary to make a clear determination on this point as even on the Crown's interpretation the obstruction in Ziegler lasted about 90–100 minutes ...

> g. I heard no evidence that anyone had actually submitted a complaint about the defendants' action or the blocking of the road. The police's response appears to have been entirely on their own initiative.
>
> h. Lastly, although compared to the other points this is a relatively minor issue, I note the longstanding commitment to opposing the arms trade that all four defendants demonstrated. For most of them this stemmed, at least in part, from their Christian faith. They had also all been involved in other entirely peaceful activities aimed at trying to halt the DSEI arms fair. This was not a group of people who randomly chose to attend this event hoping to cause trouble.'

He held that the interference with the highway was protected by article 11 and the defendants had a lawful excuse for the interference with the highway.

The Divisional Court was not impressed. Its core criticism of the decision was set out as follows:

> 'At para 38(d) the district judge said that the defendants' actions were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair. However, the fact is that the ability of other members of the public to go about their lawful business, in particular by passing along the highway to and from the Excel Centre, was completely obstructed. In our view, that is highly relevant in any assessment of proportionality. This is not a case where, as commonly occurs, some part of the highway (which of course includes the pavement, where pedestrians may walk) is temporarily obstructed by virtue of the fact that protestors are located there. That is a common feature of life in a modern democratic society. For example, courts are well used to such protests taking place on the highway outside their own precincts. However, there is a fundamental difference between that situation, where it may be said (depending on the facts) that a "fair balance" is being struck between the different rights and interests at stake, and the present cases. In these two cases the highway was completely obstructed and some members of the public were completely prevented from doing what they had the lawful right to do, namely use the highway for passage to get to the Excel Centre and this occurred for a significant period of time.'[14]

The issue which was then certified for the Supreme Court was whether deliberate physically obstructive conduct by protesters was capable of constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, where the impact of the deliberate obstruction on other highway users is more than *de minimis*, and prevents them, or is capable of preventing them, from passing along the highway.

The Supreme Court by a majority allowed the appeal and restored the decision of the magistrate. The principal majority judgment was given by Lords Hamblen and Stephens, with Lady Arden delivering

14 *DPP v Ziegler* [2019] EWHC 71 (Admin), [112].

a concurring judgment allowing the appeal. In the following passage they adopted certain observations of Lord Neuberger:

> 'A non-exhaustive list of the factors normally to be taken into account in an evaluation of proportionality was set out at para 39 of the judgment of Lord Neuberger of Abbotsbury MR in *City of London Corpn v Samede* [2012] EWCA Civ 160. The factors included "the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public". At paras 40–41 Lord Neuberger identified two further factors as being: (a) whether the views giving rise to the protest relate to 'very important issues' and whether they are 'views which many would see as being of considerable breadth, depth and relevance'; and, (b) whether the protesters "believed in the views they were expressing". In relation to (b) it is hard to conceive of any situation in which it would be proportionate for protesters to interfere with the rights of others based on views in which the protesters did not believe.'[15]

The point of dispute between the majority and Lords Hodge and Sales concerned the importance of the police conduct. If, it was argued, the police were entitled to arrest and remove the protesters it could only be because it was reasonably suspected that the offence of obstruction was being committed and there was no lawful excuse for the continuation of the protest. That had not been addressed by the judge. The minority did not agree that the district judge had properly reflected the fact that the dual carriageway leading into the Excel Centre was completely blocked and did not analyse the disruption actually caused and likely to continue. They also considered that the judge had not properly reflected the period of disruption before the protesters could be removed.

CONCLUSION

The broad circumstances surrounding the *Ziegler* case are being played out on virtually a daily basis in many parts of the United Kingdom. It is disturbing to find that there is such a degree of dispute as to the relevant factors to be taken into account and the weighting to be given to the disruption caused by the protest. Close scrutiny of many of the cases which have been reviewed earlier shows a pattern of disagreement and conflicting views within the various levels of the appeal process.

As the majority indicated in their review of the principles underlying Article 11:

15 *DPP v Ziegler* [2021] UKSC 23, [72].

> 'Arrest, prosecution, conviction, and sentence are all "restrictions" within both articles. Different considerations may apply to the proportionality of each of those restrictions. The proportionality of arrest, which is typically the police action on the ground, depends on, amongst other matters, the constable's reasonable suspicion. The proportionality assessment at trial before an independent impartial tribunal depends on the relevant factors being proved beyond reasonable doubt and the court being sure that the interference with the rights under articles 10 and 11 was necessary. The police's perception and the police action are but two of the factors to be considered. It may have looked one way at the time to the police (on which basis their actions could be proportionate) but at trial the facts established may be different (and on that basis the interference involved in a conviction could be disproportionate).'[16]

I agree but I also wonder whether the proportionality assessment of police conduct in clearing the highway is different from the assessment that should take place when a decision to prosecute the protester is in issue. Does it necessarily follow that because the police were entitled to clear the highway by arrest and removal that the protester should be the subject of a further interference by way of criminal charges? Does that not require a further proportionality assessment? And may that not give rise to a different outcome? Is there, for instance, a difference between a criminal prosecution and a caution or penalty notice in terms of proportionality?

There is continuing political interest in this area, and it seems inevitable that the Supreme Court will once again be asked to address the issues to see if further guidance can be given. The problem is that, where the issue of interference with the Convention right arises, particularly in a political context, the ECtHR requires a detailed analysis of the relevant and sufficient reasons justifying the decision. The intensity of that exercise, particularly where political speech is involved, in part explains how conflicting views have been taken by different judges in respect of these cases. Difficult though it may be, I consider it preferable that any guidance giving greater clarity to the approach should come from the Supreme Court as any legislative solution is unlikely to be flexible enough to avoid incompatibility issues.

16 *DPP v Ziegler* [2021] UKSC 23, [57].

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Foster v Jessen: a comment on law and online defamation in Northern Ireland

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INTRODUCTION

With a national television celebrity being hauled before a Belfast court for a false and defamatory tweet about Northern Ireland's then First Minister, *Foster v Jessen* was always going to prove good copy for the press.[1] For lawyers and legal academics, however, the case appeared relatively straightforward and of little significance to this notoriously complex area of law. The inherently serious nature of the defamatory tweet, the lack of any proper response or likely defence, and the way in which the application for the defendant's late appearance consumed the court in analysis of facts, meant that the case contained no great contest of legal principle. Nonetheless, the case invites some brief reflection on certain issues in defamation law in Northern Ireland today.

BACKGROUND

The plaintiff, Arlene Foster, was elected leader of the Democratic Unionist Party (DUP) in 2015 and served as First Minister of Northern Ireland from January 2016 until the collapse of the Northern Ireland Executive a year later. At the material time, late December 2019, she was involved in difficult negotiations to restore authority to the Northern Ireland Executive – although, with the Christmas holidays having just begun, one can easily imagine that she was looking forward to spending some time with her family, away from public life.

The defendant, Christian Jessen, is a practising doctor, who worked for a number of years at a clinic at Harley Street, London, but is more widely known as a presenter on popular television shows such as *Embarrassing Bodies* or *Supersize vs Super Skinny*. On the evening of 23 December 2019, the defendant posted a tweet to his 311,000 followers on Twitter about 'rumours' that Mrs Foster was having an extra-marital affair, with further comments about a perceived hypocrisy

1 *Foster v Jessen* [2021] NIQB 56.

of 'preaching the sanctity of marriage' and implying the plaintiff was homophobic.[2]

The defendant was not the original source of the rumour on the internet, but, with the help of his tweet, the rumour percolated further through the social media grapevine, with other users 'liking' or retweeting the post (by 6 January 2020, the defendant's original tweet had been retweeted 517 times and had been liked by approximately 3500 users).[3] The plaintiff was informed of the defendant's tweet on the evening it had been posted, and the next morning contacted her solicitor, Paul Tweed, instructing him to take appropriate action. Mr Tweed, at first, apparently had some difficulty finding an address at which to contact the defendant, and on 24 December 2019 instead posted a response on the defendant's Twitter page, putting the defendant on notice in relation to the false allegation and promising that 'legal action will also be taken against any person' who retweeted the allegation.

Unfortunately (not least for the defendant), this had something of a so-called 'Streisand effect', namely where an attempt to censor information has the adverse effect of publicising it further. When one other Twitter user pointed this out, the defendant appeared to celebrate that Mr Tweed's post was having such a 'Streisand effect'.

Thereafter, correspondence between the parties withdrew to more private channels, although it was largely one-sided, issuing mostly from the plaintiff, with little response from the defendant. On 2 January 2020, Mr Tweed issued a letter of claim to the defendant, requiring removal of the defamatory statement, publication of a retraction and apology, and proposals to compensate the plaintiff. The defendant responded to this on 7 January 2020, confirming that the offending tweet had been removed from his Twitter page, and hoping that this would be enough to 'resolve the matter'. Obviously, it was not, and Mr Tweed posted again the outstanding requests to the defendant on 9 January 2020. There was no response to this, or to any of the other 10 subsequent letters or emails that Mr Tweed sent the defendant.

A writ of summons was issued on 28 January 2020, which appears to have been duly served on the defendant at his London address on 4 February 2020.[4] When no appearance was entered by or on behalf of the defendant, the plaintiff issued an application to mark the judgment in default, which was granted on 29 September 2020. Even with this,

2 Whilst the DUP is broadly perceived to harbour homophobic attitudes, in her evidence, the plaintiff denied having any such negative attitudes, ibid [36].

3 Ibid [7].

4 This was a matter of some dispute, with the defendant asserting that he never received such documents or having notice of the proceedings, see below.

there was still no answer from the defendant. The plaintiff applied for assessment of damages by judge alone and the hearing was carried out before McAlinden J on 14 April 2021. The plaintiff appeared to give evidence and was represented by counsel, but there was still no appearance by or on behalf of the defendant. The judge reserved a decision on damages and undertook to provide a full and reasoned judgment in due course.

All of a sudden, on Friday, 16 April 2021, two days after the hearing on damages, the court office was contacted by Olivia O'Kane of Carson McDowell, informing them she had been instructed by the defendant 'late' on 15 April 2021.[5] The defendant, it was stated, had been unaware of the proceedings and now wished to respond. On 19 April 2021, an application was made by the defendant to enter a late appearance. The defendant submitted affidavits and appeared in court to give evidence in support of the application on 23 April 2021.

THE COURT'S DECISION ON APPLICATION FOR DEFENDANT'S LATE APPEARANCE AND ASSESSMENT OF DAMAGES

Much of McAlinden J's decision of 27 May 2021 is taken up with careful consideration of evidence submitted in support of the defendant's application to enter a late appearance. Leave for such could only be granted if the court could be persuaded that the defendant had in good faith been unaware of the ongoing proceedings in the case.

The court was therefore compelled to trawl through and weigh up the body of evidence presented by the defendant as explaining his ignorance of the proceedings. The exercise revealed the extent to which all our lives are now extensively documented in data and, ironically, proved some compromise to the defendant's own dignitary interests. If the defendant had really moved in to a spare room in his parents' house, how did he acquire the photos he posted on his twitter account of graffiti on a wall near his own apartment?[6] If the defendant had thought court proceedings were suspended due to the COVID pandemic, how could he not have seen the extensive media coverage about Johnny Depp's own libel case in London at the time, when his own Twitter account suggested he was still following the news?[7] If the defendant was suffering from mental health issues, why did he not mention these in the podcasts he appeared on discussing the subject?[8]

5 Ibid [39].
6 Ibid [73].
7 Ibid [47].
8 Ibid [65].

Did he really make up earlier stories about face-timing lonely friends during lockdown and playing virtual ping-pong with his partner for 'entertainment' value?[9]

The court considered the evidence from different angles, but in the end was not convinced by the defendant's claims. The evidence was judged to point towards effective service of the key documents in the case, and that the defendant simply chose to ignore the proceedings in the hope they would go away. His application for late appearance was, therefore, refused.[10]

Turning to the question of assessment of damages, the court found more assurance in legislation, precedent and established legal principles. It relied heavily in that regard on the 'recent' decision of Stephens J in *Elliot v Flanagan*.[11] As there, the starting point was section 3(5) of the Defamation Act 1996 and the three declared functions of damages in defamation of 'consolation to the plaintiff', 'repair' of the damage to reputation and 'vindication'.[12] As in *Elliot*, reference was made to the checklist of *Jones v Pollard*,[13] including the objective features of the libel, the subjective effect on the plaintiff; and matters tending to mitigate.[14] As in *Elliot*, there was a nod to article 10 of the European Convention on Human Rights, and the necessity to avoid any award that disproportionately violates the defendant's right to freedom of expression. Interestingly, though, this was more emphatically ruled out as an issue in *Foster*, as it was considered 'not unreasonable to assume that a media figure with [the defendant's] profile ... would have substantial resources'.[15] This sat in some awkward juxtaposition with the admission a few paragraphs later that there had been 'earlier anonymous tweets which had been circulating in the "twittersphere" for a number of days before the defendant's tweet was published'.[16]

Applying the law to the case, the judge went through the checklist. The objective features of the libel were such to accuse the plaintiff of being 'an adulterer, a hypocrite, and a homophobe'.[17] It 'affected core aspects of the plaintiff's life, namely her relationship with her husband and her Christian faith'.[18] It 'called into question the plaintiff's fitness

9 Ibid [71].
10 Ibid [90].
11 [2016] NIQB 8.
12 *Foster v Jessen* (n 1 above) [91].
13 [1996] EWCA Civ 1186.
14 *Foster v Jessen* (n 1 above) [92].
15 Ibid [97].
16 Ibid [102].
17 Ibid [103]. Though it was not contested, the plaintiff's assertion of the defamatory meaning was accepted already as such at [38].
18 Ibid [103].

and suitability to occupy the office of First Minister' at a pivotal point in the development of the office. It was a 'highly prominent libel', with wide circulation, remaining on the defendant's Twitter page for two weeks, and the subject of substantial media coverage, especially in Northern Ireland.[19]

The court held the defamatory tweet caused the plaintiff 'considerable upset, distress, humiliation, embarrassment and hurt',[20] and noted that the defendant took little action to mitigate the damage caused. While the tweet was eventually taken down two weeks after posting, the court emphasised the lack of apology or retraction, and that the defendant made no attempt to address compensation to the plaintiff.[21] McAlinden J considered the absence of an apology meant 'the need for vindication remains unaddressed'[22] and deemed it therefore 'necessary' to make an award 'sufficient to convince a bystander of the baselessness of the charge'.[23]

Consulting the Green Book, the judge noted the range of compensation for loss of one eye as between £80,000 and £140,000, damages for female infertility up to £150,000: 'Bladder, complete loss of natural function and control: £125,000 – £170,000. Total or effective loss of one hand: £85,000 – £145,000. Amputation of 1 foot: £150,000 – £250,000.'[24] On that basis, the court awarded the plaintiff £125,000 and costs.

DISCUSSION

The award has been reported in the press as setting a new 'UK record for defamation',[25] but it clearly is not the first award of this kind.[26] It is also generally in keeping with the relatively high awards for defamation in Northern Ireland.[27] Reputation holds great importance in Northern

19 Ibid [105].
20 Ibid.
21 Ibid [107].
22 Ibid [108].
23 Ibid.
24 Ibid [110].
25 David Blevins, 'Embarrassing Bodies' Dr Christian Jessen ordered to pay Arlene Foster £125,000 over defamatory tweet' (*Sky News*, 27 May 2021)
26 See eg *Monroe v Hopkins* [2017] EWHC 433 (QB).
27 See on this *Elliot v Flanagan* (n 11 above) [32]. As in *Elliot* ([33]) there was reference in *Foster* to conventional personal injury awards as a 'check' on any excess ([100]–[101]). However, the judgment in *Elliot v Flanagan* was a little more careful not to make any comparison between defamation and personal injury. In *Jones v Pollard* itself (n 13 above), Hirst LJ noted the problems with comparing harm to reputation with personal injury and noted key distinctions (257).

Ireland. This was a senior politician, defamed by a statement which had no basis in fact, and which served no public interest.

One aspect of the decision on the assessment of damages that is worth discussing, however, is the role of vindication in damages in a case of this kind. It is an established principle that damages in defamation law can function to vindicate the reputation of the plaintiff. But it is also well recognised that the greater significance of the principle lies in those cases 'where the defendant asserts the truth of the libel'.[28] Vindication is necessary where the 'truth of the statement' is in issue,[29] that is, where the defendant asserts the defence of truth and where there is a need to therefore contest the truth of the allegation and set the record straight.

In addressing the effect that a dismissal of a defence of truth would have on determining damages in a defamation case, in *Purnell v Business F1 Magazine Ltd*, Laws LJ said:

> Where there has been a fiercely contested trial on the facts, perhaps attended with much publicity, and the defendant's witnesses have been roundly disbelieved and there is an unequivocal finding in the claimant's favour on the merits, those circumstances will be relevant as amounting to some vindication.[30]

It is for this reason that the principle of vindication is said to be a 'fact-specific question'.[31]

The case of *Turley v Unite the Union and Stephen Walker*[32] provides a good example of facts that warrant the application of vindication to damages in relation to a defamatory statement made on social media. The claimant there, Anna Turley, was a Labour Party MP, known to be opposed to Jeremy Corbyn's leadership of the party. She joined Unite to acquire a vote against its leader, Len McCluskey, in an apparent bid to undermine Mr Corbyn's support. The defendant was the author of a blog, *Squawkbox*, which published an allegation that the claimant had dishonestly declared she was 'unemployed' when she joined the union in order to take advantage of a discount the union offered unemployed members. In answer to the claimant's claim for defamation, the defendant asserted the defence of truth. The question that therefore had to be tried in Turley was the knowledge and intention of the claimant in joining Unite at the discounted fee for unemployed members. When

28 As per Sir Thomas Bingham MR in *John v MGN* [1997] QB 586, 607–608.

29 A Mullis, R Parkes and G Busutill, *Gatley on Libel and Slander* 12th edn (Sweet & Maxwell 2013) para 9.1.

30 [2007] EWCA Civ 744 [29].

31 See *Turley v Unite the Union and Stephen Walker* [2019] EWHC 3547 (QB) [32]: 'There will be occasions when the judgment will provide sufficient vindication, but whether it does so is always a fact-specific question.'

32 Ibid.

the evidence was considered in the whole, and it was determined to have been an innocent mistake on the part of the claimant and the defence of truth was therefore found lacking, there was a pressing need for vindication of the claimant.

The facts are quite different in *Foster v Jessen*, however, and one might question the decision that need for vindication remained 'unaddressed' at the end of the trial. In this case, there was no question about the truth of the defamatory statement. Rather, it was the credibility of the *defendant* which was under close scrutiny in the case. Moreover this scrutiny was attended with a great degree of publicity, and in the end the defendant was very roundly disbelieved with an unequivocal finding in the plaintiff's favour.

There was also an important difference in the nature and form of the media in the two cases. In *Turley*, the defamatory statement was published on a blog devoted to discussion of such political issues, and which had enough of a loyal readership that it had a sufficient presumption of credibility amongst its readers. Posts of 'rumours' on social media, however, are quite different. It is now generally recognised that social media like Facebook and Twitter, as much as they may achieve anything else, have provided an unchecked mass medium for 'trolls', malicious falsehoods and 'fake news'. It is even widely recognised that because of these developments we now live in something of a 'post-truth' society. Most reasonable people today have a healthy degree of scepticism about statements made by individuals on social media, regardless of how well known they may be, or how many 'followers' they may have. How far, therefore, does one need to convince the reasonable bystander of the 'baselessness' of rumours posted on social media on a daily basis?

Is there even a possibility of full vindication under the conditions of social media? In the past, before the internet and social media, there were fewer sources of defamatory statements. All the offending parties could be named as defendants and summoned to set the record straight. Now, with social media, narratives circulate in 'echo chambers' and 'filter bubbles', relatively unperturbed by the counter-narratives of central authorities. Typically, there is a constellation of different sources of a single libel. In many cases, as in this (but not in *Turley*), the named defendant will not even be the original source of the false and defamatory statement. The application of the traditional principle of vindication to these conditions raises awkward questions about why certain defendants are singled out and how their sole liability serves as vindication.

None of this is to say the defendant in such cases should be absolved of liability for defamatory statements. The courts must do what they can to promote accountability and responsible use of social media, and

it is accepted that a defendant's lack of credibility is no defence to an action in defamation.[33] Furthermore, none of this is to say that the plaintiff in *Foster v Jessen* did not deserve adequate compensation for the harm suffered. It cannot be doubted that, even if right-thinking members of society treated the defendant's statement in this case with scepticism, it would still have caused the plaintiff considerable distress and required setting the record straight to some degree. No one can doubt that, even if those close to the plaintiff would have given little weight to such statements on social media, the plaintiff would still have been burdened with the unpleasant responsibility of making those close to her aware that such a defamatory statement had been posted on Twitter, and with assuring them that their scepticism of such rumours was well placed.

The point about the role of vindication in damages for a defamation claim is a subtle one, but one, nonetheless, worth noting in relation to changes in the form of defamatory statements on social media. Considering the traditional role of vindication as an answer to the defendant's assertion of truth, the principle should have more nuanced and fact-specific application to those cases where the defendant contests the truth of the statement, or at least enjoys a greater degree of credibility.

Finally, even though a threshold test was not in issue in the case, it is worth making a brief point about the limited effect that a 'serious harm test' (as reflected in section 1 of the Defamation Act 2013 and section 1 of the Defamation and Malicious Publication (Scotland) Act 2021) would have in a case such as this. As the Northern Ireland Assembly is now tasked with considering reform of this area of law,[34] it may be feared by some that a serious harm test would tip the scales too far in favour of the defendant in defamation actions and leave plaintiffs in Northern Ireland without proper remedy against the increasing amount of defamatory statements which, as in this case, find platform now on social media. However, *Foster v Jessen* reveals that, while the serious harm test may have achieved some raising of the threshold, it nonetheless would still provide ample protection for plaintiffs in such cases.

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33 See Warby J in *Doyle v Smith* [2018] EWHC 2935 (QB) [122]: 'This is an inherently odd argument, as it presupposes that people opt to read material which they do not consider credible.' Of course, the matter is somewhat different with Twitter. Users do not necessarily follow other users in the same sense that they would subscribe to readership of a publication, even including blogs that repeatedly address specific issues, and which hold themselves out as be some kind of an authority on the subject.

34 'Defamation laws could be brought in line with England by next year' (*Irish Legal News*, 8 June 2021).

It is now clear that the serious harm test, as it applies in England and Wales, must be determined by reference to actual facts, and calls for investigation of the actual impact of the defamatory statement.[35] That is, damage to reputation can no longer be presumed from words alone. Nonetheless, a claim will not necessarily fail for want of evidence, and inferences of fact as to the seriousness of the harm to reputation may still be drawn from the evidence as a whole.[36] In *Lachaux*, serious harm was proved based on a combination of the meaning of the words, the situation of the claimant, the circumstances of the publication and the inherent probabilities of harm.

The above point about the need for a more nuanced and fact-specific application of the vindication principle in assessment of damages is quite separate from this issue of serious harm. There is nothing to suggest that the plaintiff in *Foster v Jessen* would have failed to pass the serious harm test. Had it been in issue in the case, the plaintiff may not have been required to provide any more evidence than she did at the hearing on the assessment of damages, and it should also be noted that a great deal of evidence of serious harm was considered in answering the defendant's application for late appearance.[37] If the serious harm test was applicable, and the proeceedings had reached that stage, it is nonetheless clear that, as in *Lachaux*, serious harm would have likely been proved based on a combination of the meaning of the words, the situation of the plaintiff in the case, the circumstances of the publication, and the inherent probabilities of harm to reputation resulting from such a statement.

On analysis, it would seem that, while the application of a serious harm test in Northern Ireland would raise the threshold slightly, it would have little effect on cases such as this.[38] As a demonstration

35 *Lachaux v Independent Print Ltd* [2019] UKSC 27, [2020] AC 612 [15].

36 Ibid [21].

37 The judge in *Foster* did briefly address defamatory meaning at [38]. In relation to s 1, it should also be noted that there is scope for application of the serious harm test at a preliminary stage, if it is expedient to do so: see eg *Sakho v World Anti-Doping Agency* [2020] EMLR 14. However, that would of course depend on abolition of the presumption in favour of jury trial, such as has been achieved by s 11 of the 2013 Act.

38 Arguably, one of the only cases to fail the serious harm test that may have been successful under the rules in Northern Ireland is that of *Nwakama, Ihenakaram and O'Nwere v Bartholomew Umeyor* [2020] EWHC 3262 (QB). In *Nwakama*, the meaning of the words may have been judged to have an inherent tendency to cause harm to reputation, but the court's careful analysis of facts under s 1 revealed the statement was published only to a very small number of people, that it appeared no one believed the allegations, there was a retraction of the statement soon after publication, and the claimant's accounts on examination were found to be unconvincing and exaggerated [79]. Cf *Coulter v Sunday Newspapers Ltd* [2016] NIQB 70 and *Coulter v Sunday Newspapers Ltd* [2017] NICA 10.

of the nature of defamation on social media, the decision in *Foster v Jessen*, and the exercise the court was compelled to undertake to resolve the case, should assure plaintiffs in Northern Ireland that a serious harm test would still catch a great majority of defamatory statements that would be actionable under the old law and would only filter out a narrow band of cases on an equitable basis.

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Family provision claims and young children: *Re R (Deceased)*

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INTRODUCTION

In England and Wales, the Inheritance (Provision for Family and Dependants) Act 1975 allows specific individuals to claim against a deceased person's estate, if dissatisfied with an intestacy or will's distribution.[1] Potential claimants[2] are listed in section 1(1) of the Act, with applications by, or on behalf of, 'a child of the deceased' contemplated by section 1(1)(c).[3] The wording means that any child may apply, regardless of their age.[4] As the legislation approaches its half-century, it is true to say that the bulk of claims under section 1(1)(c) have involved adult children, many of whom were in financial need;[5] those involving infants and minors have, to use the old phrase, been 'few and far between'. This is hardly surprising. Parents have a duty to provide for their children financially, with legal obligations in the form

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1 For an overview, see G Douglas, 'Family provision and family practices – the discretionary regime of the Inheritance Act of England and Wales' (2014) 4(2) Oñati Socio-Legal Series. Identical legislation is in force in Northern Ireland, under the Inheritance (Provision for Family and Dependants) (NI) Order 1979; the core provisions will also be referenced below.

2 While 'claimant' is the more usual term today, the word 'applicant' appears in the legislation and both will be used interchangeably here.

3 1979 Order, art 3(1)(c).

4 The reference to 'child' includes an adopted child of the deceased, persons who would have been classed as an illegitimate child in the past, unborn children (a child *en ventre sa mère*) and children born by assisted reproduction techniques who are the legal child of the deceased.

5 And regardless of whether they were financially dependent on their (now deceased) parent. While the Supreme Court ruling in *Ilott v The Blue Cross* [2017] UKSC 17; [2017] 2 WLR 979 concluded one of the best-known examples of a family provision claim involving an adult child who was in necessitous circumstances, there are numerous other examples. For a flavour of the decisions prior to this ruling, see H Conway, 'Do parents always know best? Posthumous provision and adult children' in W Barr (ed), *Modern Studies in Property Law*, vol 8 (Hart Publishing 2015) 117–134. For post-*Ilott* illustrations, see *Noble v Morrison* [2019] NICh 8, *Miles v Shearer* [2021] EWHC 1000 (Ch) and *Rochford v Rochford* [2021] 2 WLUK 699.

of maintenance payments by a non-resident parent on divorce or the dissolution of a registered civil partnership,[6] and the Child Maintenance Service as the public body that deals with child maintenance (replacing the Child Support Agency (CSA) in February 2013).

When making a will, most parents include their infant and minor children since the latter are viewed as natural recipients of parental wealth and have ongoing financial needs that must be met.[7] Disinheritance[8] typically results from outdated or lax estate planning where, for instance, an old will pre-dates parenthood;[9] situations in which a parent *deliberately* leaves their estate to other family members (or elsewhere) to the complete exclusion of young children will be rare. However, the decision in the recent English case of *Re R (Deceased)*[10] is a salutary reminder that testators who are inclined to act in this manner would be strongly advised to reconsider.

FAMILY PROVISION CLAIMS: A BRIEF REMINDER

The basis of all claims under the 1975 Act is a failure to make 'reasonable financial provision'[11] for the individual in question. For surviving spouses and civil partners, the test is what 'would be reasonable in all the circumstances of the case';[12] for all other categories, claims are based on what it would be reasonable for the applicant to receive for his/her 'maintenance'.[13] What constitutes maintenance is not defined

6 See eg the Matrimonial Causes Act 1973, ss 21 and 23 in England and Wales.

7 In a research project funded by the Joseph Rowntree Charitable Trust, children were most frequently cited (by 89 per cent of those surveyed who were expected to make a bequest) as intended beneficiaries under a will – K Rowlington and S McKay, *Attitudes to Inheritance in Britain* (Policy Press 2005). Research published by Legal and General in November 2021 shows that 60 per cent of participants left assets to their children, though the figure does not distinguish between young and adult children – Legal & General, 'Planning for the future'.

8 Though the word is something of a misnomer, since English law (like many other common law jurisdictions) imposes no legal obligation on parents to provide for their children on death.

9 A successful family provision claim is extremely likely where a parent's will was drafted before their child was born and consequently made no provision for them. For a recent illustration, see *Re Ubbi (Deceased)* [2018] EWHC 1396 (Ch) where the court awarded two children (born in 2012 and 2014) a lump sum payment of almost £400,000 from their late father's estate (valued at £4.5 million), where the father's last will had been drafted in 2010 and left everything to his wife. Divorce proceedings were pending between the deceased and his wife when he died in 2015; at this stage, the deceased had been living with the claimant children's mother for over a year.

10 [2021] EWHC 936 (Ch).

11 1975 Act, s 1(1); 1979 Order, art 3(1).

12 1975 Act, ss 1(2)(a)–(aa) and 1979 Order, art 2(2).

13 1975 Act, s 1(2)(b) and 1979 Order, art 2(2).

in the statute, though a number of judicial statements have clarified the matter. For example, Browne-Wilkinson J (as he then was) in *In Re Dennis (Deceased)*[14] described it as 'payments which … enable the applicant … to discharge the cost of his daily living at whatever standard of living is appropriate to him'. More recently, this somewhat restrictive interpretation was affirmed by the Supreme Court in the well-known case of *Ilott v The Blue Cross and Others*.[15] According to Lord Hughes, maintenance means just that: it 'cannot extend to any or every thing which it would be desirable for the claimant to have' and must 'import provision to meet the everyday expenses of living'.[16]

For all applications, courts should adopt the two-stage test set out by the Supreme Court in *Ilott*: '(1) did the will/intestacy make reasonable financial provision for the claimant and (2) if not, what reasonable financial provision ought now to be made …?'[17] In addressing each question, a range of statutory factors must be evaluated. General factors include the financial resources and future needs of the applicant and any beneficiaries of the estate, the size of the estate, and 'any obligations and responsibilities which the deceased had towards any applicant … or towards any beneficiary'.[18] Specific factors differ for each category of applicant;[19] for children, however, the only factor listed is the 'manner in which the applicant was being, or … might expect to be, educated or trained'.[20] If the court then decides that reasonable financial provision has not been made, it can choose from a range of orders listed in section 2 of the 1975 Act.[21]

The test is not whether the deceased acted reasonably, but whether reasonable financial provision has been made on the facts. And while the jurisdiction is a discretionary one, the decision in *Re R* suggests that success is almost guaranteed where the applicant is an infant or a minor who received nothing under their parent's will. Before turning

14 [1981] 2 All ER 140, 146. See also the dictum of Goff LJ in the Court of Appeal decision in *Re Coventry* [1980] Ch 461, 485.

15 [2017] UKSC 17; [2017] 2 WLR 979. The case was formerly listed as *Ilott v Mitson* and was the first family provision claim to reach the highest appellate court. For an analysis of the decision see B Sloan, '*Ilott v The Blue Cross* (2017): testing the limits of testamentary freedom' in B Sloan (ed), *Landmark Cases in Succession Law* (Hart Publishing 2019) 301 and H Conway, 'Testamentary freedom, family obligation and the *Ilott* legacy' [2017] The Conveyancer and Property Lawyer 372.

16 [2017] UKSC 17, [14].

17 Ibid [23] and affirmed more recently in Northern Ireland by McBride J in *Noble v Morrison* [2019] NICh 8.

18 1975 Act, s 3(1); 1979 Order, art 5(1).

19 1975 Act, ss 3(2)–(4); 1979 Order, arts 5(2)–(4).

20 1975 Act, s 3(3); 1979 Order, art 5(3).

21 1979 Order, art 4.

to that case, it is worth revisiting an older decision that dealt with the same issue, albeit in a slightly difficult factual context.

SETTING THE STANDARD: *IN RE PATTON*

Decided in the High Court of Northern Ireland, *In Re Patton*[22] is a rare example of a family provision claim involving a child claimant and one that is (regrettably) often overlooked in both judgments and succession law texts in England and Wales. The children in this case were twins – a boy and a girl – who were aged 11 at the time of their father's death in 1984. The deceased, who owned a small farm near Killylea in County Armagh, had been in an 'on-off' relationship with the children's mother since 1971. However, he had shown little interest in the children and rarely spoke of or saw them, though the mother had secured a court order for weekly maintenance payments a few months after the children were born. The deceased's actions in life were mirrored on death, when he bequeathed his entire estate – with a net value of around £52,000[23] – to other family members. Left with nothing but an annual pension from the Post Office Staff Superannuation Scheme to which the deceased had contributed for the support of the children until they attained 17 years, the children's mother brought a family provision claim on their behalf under the Inheritance (Provision for Family and Dependants) (NI) Order 1979.

In deciding that reasonable financial provision had not been made under the 1979 Order, Carswell J (as he then was) stated that 'a child's financial needs should rank very high in the order of priorities, and … should normally rank well before the needs of other beneficiaries'.[24] The children were awarded a lump sum of £10,000 each from the deceased's estate.

PLUS ÇA CHANGE: RE R (DECEASED)

Fast forward 35 years, and the decision in *Re R* suggests that, while much may have changed in the interim, the financial obligations that parents have towards their children – and the court's willingness to extend these 'beyond the grave'– have not.

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22 [1986] NI 45.

23 The original net value of around £47,000 was increased by £5,000 from a joint bank account which the deceased had held (the original £10,000 was due to pass to the other account holder by survivorship, until the court exercised its powers under art 11(1) of the 1979 Order – the equivalent of s 9 of the 1975 Act).

24 [1986] NI 45, 51.

Facts

The deceased was 41 years old when he died from an incurable lung disease in October 2018, leaving two sons, J and H, who were then aged 15 and 14 respectively. Relations between the three had been strained for some time. After the deceased and the claimants' mother (N) had divorced in 2012, the children had relocated to Scotland with N and her new husband in July 2013 (the deceased only found out about the move a few days before it happened). The children had weekly telephone calls with their father until these ceased sometime in 2014; the deceased stopped sending birthday and Christmas presents in 2016.[25] Following the divorce, the deceased had made child maintenance payments, until N stopped accepting them in early 2013 and contacted the CSA claiming that the deceased was under-estimating his income. However, N decided not to pursue the deceased for child maintenance (the CSA confirmed this in writing to the deceased), meaning that the deceased paid nothing towards his two sons from February 2013 onwards, and the children were looked after financially by their mother and step-father.

An earlier version of the deceased's will, made in 2013, left a portfolio of shares to his parents and the residue of the estate to J and H. When he made his final will in 2018, the deceased left his entire estate (valued somewhere between £519,081 and £720,481)[26] to his parents and to S, his new partner.[27] At the same time, the deceased set out his reasons for excluding his sons. Referring to the move to Scotland, the fact that he had not been able to contact J and H for over three years, and N's ongoing behaviour in not wanting him to be a part of the boys' lives, the deceased stated that he did not want his children 'to be a part of my family's life on my death'[28] and that he believed the boys did not require any financial payments from him given that no CSA or personal arrangements had been made with N for maintenance.

In December 2019, the children's mother commenced proceedings under the 1975 Act, acting on the boys' behalf as their mother and litigation friend.[29]

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25 For the purposes of the family provision claim, the court made no finding on who was to blame for contact ceasing.

26 There was conflicting evidence over the value of the deceased's shares, which were a significant part of the estate assets. The value of the net estate for the purposes of the 1975 Act was consequently lower than the net probate value of £813,836 which had been based on a single valuation of the shares.

27 The deceased also made no provision for C, his daughter from a previous relationship, on the basis that C was an adult and it had been agreed that he would no longer support her financially.

28 [2021] EWHC 936 (Ch), [33].

29 In J's case, this appointment as litigation friend ceased when he reached 18 although he continued to rely on his mother and the solicitors she had instructed to act for her.

Decision and reasoning

Master Teverson began by stressing that the 1975 Act 'cannot be used as a means to overturn or re-write a will'.[30] He then identified the statutory provisions applicable to the present claim and the core themes from *Ilott*, including the definition of maintenance and the fact that the legislation does not allow the court to make an order simply because it believes that the deceased acted unreasonably. Here, the applicants were young persons, one of whom was now at university and the other in sixth form at school; both were of school age at the time of their father's death. The issue for the court, therefore, was 'whether, and if so, how far the Deceased's estate should be required to provide for their maintenance until they [were] in a position to earn a reasonable wage or salary'.[31]

Master Teverson then worked systematically through the generic statutory factors, focusing on a number of key provisions:

Section 3(1)(a) – the financial resources and financial needs that the applicants have or are likely to have in the foreseeable future.

Both children had a very small amount of savings and were dependent for their needs on their mother and step-father. The amounts sought from the deceased's estate were £353,518 and £458,431 for J and H respectively.[32] Calculated by their mother (N), these sums were based on current and future living expenses; school-related expenses (including school fees); car-related expenses; university costs; counselling costs; and future housing costs.

Master Teverson noted that the basis for claiming these expenses seemed to be that 'the full amount of J and H's maintenance needs from the date of the Deceased's death should be met from the Deceased's estate',[33] since N had met those needs post-2012 without any contribution from the deceased. However, a more nuanced approach was needed; the idea that responsibility for maintenance should shift entirely to the deceased on death when child maintenance was not sought from him after the CSA assessment in 2013 did 'not seem right'.[34] Accepting the defendants' argument that the financial positions of N and the boys' step-father (A) were relevant factors when considering the resources available to J and H, the court reviewed the incomes and assets of both N and A. The court noted that A had net

30 [2021] EWHC 936 (Ch), [35].

31 Ibid [45].

32 These sums would have exceeded the valuation of the estate for the purposes of the 1975 Act claim; as noted earlier (see n 26 above), the net probate value had been in excess of £800,000.

33 [2021] EWHC 936 (Ch), [50].

34 Ibid [50].

assets of close to £3 million, although the fact that he had four children of his own had also been recorded earlier in the judgment.

Section 3(1)(c) – the financial resources and needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future

The deceased's partner, S, was in her forties and had no children. She had a property portfolio valued at over £2 million with a gross rental income exceeding £60,000 and over £200,000 in bank accounts and premium bonds. The home that S had jointly owned with the deceased had passed to her by survivorship; she had also received around £40,000 from the deceased's life policy.

The deceased's parents owned shares and had savings in the region of £83,000 (though these had been depleted by the current litigation). The couple owned their own home, two other rental properties and a plot of land; other income sources included their pensions.

Section 3(1)(d) – any obligations and responsibilities which the deceased had towards any applicant or towards any beneficiary of the estate of the deceased

The crux of the present claim was 'whether the Deceased at the date of his death continued to owe any obligations and responsibilities to J and H' and, if so, 'the nature and extent of those obligations and responsibilities'.[35] The defendants argued that these had ceased by the time the deceased made his final will in 2018: the deceased had not been maintaining J and H since 2012, had no contact with his children, and maintenance had been assumed by N and A. On behalf of J and H it was argued that the deceased continued to have obligations and responsibilities towards them as his children, both of whom were of school age when he died and whose education and training would be continuing for a number of years.

As for the beneficiaries of the estate, Master Teverson noted the deceased's relationship with S,[36] the fact that the couple's home had passed to her by survivorship, and that S had played a significant role in supporting the deceased as his health deteriorated. The deceased's parents had, over the years, contributed significantly to the wealth of the deceased.

35 Ibid [67].

36 Who was still married to her previous partner (and may still have been having sexual relations with him while with the deceased).

Section 3(1)(g) – Any other matter, including the conduct of the applicant or any other person, which the court considers relevant

Neither J nor H had been responsible for the fallout from their parent's divorce, and its 'sad outcome'[37] that the boys had ceased to have contact with their father (or grandparents).

Turning to the specific factor for child applicants listed in section 3(3) of the 1975 Act – the manner in which J and H were being or might expect to be educated or trained – Master Teverson noted that the children were at private school at the time of their parents' separation and that, 'subject to affordability, there was an expectation that J and H would be educated privately'.[38]

In addressing the first element of the two-stage test in *Ilott*, Master Teverson concluded that the deceased's will had failed to make reasonable financial provision for J and H. Noting a distinction between applications by a child of the deceased under section 1(1)(c), and those by a person who had been treated as a child of the deceased under section 1(1)(d) who must establish that maintenance has been provided, he continued:

> [I]t will not generally be open to beneficiaries in response to an application [under section 1(1)(c)] to rely on the fact that the deceased failed to provide child support (even if not called upon to do so), or to rely on the fact that the child was treated by a step-father as a child of his family and assumed responsibility for his maintenance. Lack of contact and the assumption of responsibility by another person are factors capable of impacting on the value of the claim. Only in the most exceptional circumstances would I expect the court to accept that the obligation to maintain had been completely severed. The concept of a clean-break is not generally applicable in respect of child maintenance.[39]

Turning to the second element (ie assessing the value of the award), the court stressed that the boys' mother could not expect the entire burden of maintaining them to shift to the deceased's estate after his death – even if N had been the only parent supporting J and H financially for several years. Sounding a cautionary note, Master Teverson stated:

> The court must … guard against unreasonable claims made on a child's behalf by the surviving parent especially in circumstances in which the claim is limited to what is reasonably required for the child's maintenance and where there is a proper ground for concern that the claim is being viewed as an attempt to re-write the 2018 Will.[40]

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37 [2021] EWHC 936 (Ch), [78].
38 Ibid [78].
39 Ibid [79].
40 Ibid [82].

The original total sum claimed on behalf of both boys was over £800,000, though this was revised downwards during the trial to remove both historic (pre-trial) costs and a claim of £30,000 for each claimant towards a future deposit on a house. This left J seeking £117,831.00 and H seeking £230,935.17. Working through the schedules submitted on behalf of the claimants, the court settled on the following figures:

1. Home living costs from January 2020[41] onwards, dividing these between N and the deceased's estate up to January 2025 for J and January 2026 for H to cover periods living at home until each boy had completed his university education. This gave sums of £15,000 and £18,000 respectively.
2. School fees from January 2020 onwards, with the estate paying 100 per cent of the fees of J's last year in school and paying 100 per cent of H's fees for fifth year and 80 per cent of his boarding fees for his last two years at school (the other 20 per cent to be paid by N and A). Master Teverson also emphasised the section 3(3) factor again here.
3. A contribution towards a second-hand car for each child constituted maintenance, for which the estate would pay £5,500 to J and to H.
4. University tuition fees were not a reasonable cost of maintenance (J was attending university in Scotland, and H could take out a student loan if he attended university in England). Sums of £16,000 and £7,500 were awarded to J and H respectively towards one-half of their accommodation costs at university.
5. Housing costs would be met by a payment of £5,000 to each claimant (50 per cent of £10,000 allowed for rent, furnishings etc) as a reasonable maintenance need to cover accommodation for a year after leaving university.
6. Both J and H had been emotionally affected by their parents' divorce. A sum of £2,990 would be awarded to each child, as 50 per cent of a year's private counselling fees.

The result was a final award of £68,022 to J and £117,962 to H from the deceased's estate, as reasonable financial provision for their maintenance under the 1975 Act. There was no obligation on the children to prove need; rather, these sums 'properly represent[ed] and reflect[ed] the extent of the limited continuing obligation on the part of the Deceased for the maintenance of J and H'.[42]

41 Taking January 2020 as the month immediately after the family provision claim had been issued.

42 [2021] EWHC 936 (Ch), [109].

Implications and observations

Re R is a useful contemporary addition to the sparse volume of case law on family provision claims involving infants and minors against a deceased parent's estate. The judgment highlights several interesting points, most notably the fact that the former – who have no current income or earning capacity – have ongoing financial needs, which will have to be met from the estate. Parents are still obliged to maintain their dependent children, regardless of changes in living arrangements, lack of contact, non-payment of child maintenance in the past, or the fact that the children were (and are) being financially supported by someone else.

What constitutes reasonable financial provision, and the value of any consequent award, is limited to maintenance; and while young children may attract larger sums based on their living costs, education-related fees and other specific needs, the judicial limits on maintenance combined with the ability to earn their own living within a certain timeframe act as checks and balances on any award. However, responsibility for maintenance does not automatically end at the age of majority. The category-specific factor – the manner in which an applicant was being or might expect to be educated or trained – extends to university education and (one would assume) to vocational training if a child chose that path instead. It is interesting that Master Teverson in *Re R* confined his analysis to the boys' undergraduate degrees,[43] and refused to include university tuition fees as part of the award. In contrast, school fees were a major factor in this case. Both J and H were being privately educated before their parents' marriage ended, and this was expected to continue as long as the financial resources were available; the fact that H was boarding in his final two years also increased the value of his award significantly, alongside the fact that he was the younger of the deceased's children and therefore needed to be maintained for slightly longer.

Assessing the award in any family provision claim will be fact-sensitive, though it is worth pointing out the final amounts in this case (£68,022 and £117,962 to J and H respectively) were significantly lower than the original sums sought for both claimants albeit still substantial for two teenage boys. The decision also makes it clear that the surviving parent cannot simply use a family provision claim to discharge their own future financial responsibilities towards their children, even if they have been providing the lion's (or lioness's) share of this in the past.

43 There was no mention of postgraduate study or provision being made for that.

CONCLUSION

In both *Re Patton* and *Re R*, the respective fathers made a conscious decision to leave nothing to their young children; in both cases, the respective courts altered the intended outcome.[44] While *Ilott* may have stressed the importance of testamentary freedom in family provision claims, it seems that courts are less inclined to indulge the freedoms of a testator who leaves nothing to an infant and minor child[45] – even if that particular testator believes that he or she has good reason not to, and makes the underlying reasons clear as in *Re R*.[46] In these circumstances, the estate will be extremely vulnerable to a successful claim under the 1975 Act (or 1979 Order in Northern Ireland). The amount awarded will be sizeable though not exorbitant; and the younger the child, the larger the sums that are likely to accrue over time as a reasonable maintenance need.

This contrasts sharply with adult children with earning capacity, and for whom no provision can be deemed reasonable financial provision under the legislation. As noted at the outset, parents have a legal obligation to look after their infants and minor children financially. It seems that this obligation is one that also transcends death and continues until such times as the child finishes either university or vocational education and can earn their own living.

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44 In both cases, it is also worth noting that the deceased left nothing to the respective mothers, which might have (indirectly) benefitted the children financially.

45 Master Teverson made a passing nod to the deceased's testamentary freedom, simply stating that it had been taken into account – [2021] EWHC 936 (Ch), [109].

46 Contrast this with other cases involving eg adult children where an explanatory document has been taken into account – see eg *Miles v Shearer* [2021] EWHC 1000 (Ch).

Articles

Commentaries and Notes