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EDITORIAL

The 2021 edition of the Nottingham Law Journal retains the tradition of diversity, originality and academic quality that has long been part of its ethos. The topics covered are extremely wide-ranging: we have a fascinating discussion of *Luxembourg and the Exploitation of Outer Space* from Jonathan Steele. Given the dawning awareness of the scale and seriousness of the environmental crisis brought about by human actions on Earth, it seems a timely moment to consider how we regulate our behaviour beyond the confines of our chronically abused and suffering home.

Thomas Yeon and Edward Lui address another issue which is rightly high in both the public and academic consciousness, in their analysis of *Modern Solutions to Human Trafficking: A Tangled Journey.* Sadly, this is another arena in which they will be no rapid or easy solution, however, constructing rational and coherent legal policy is undoubtedly a key element in improving the current paradigm, making contributions to scholarship in this area extremely valuable.

Another very current theme is addressed by Mark Ryan, who considers *A Codified Constitution? A Tale of Two Reports.* The codification debate is a perennial issue within British Constitutional law, but both the subject matter of the article and the wider context make it of particular relevance now. The Brexit saga and the Covid-19 pandemic have both forced the legal community to confront anew questions about how we recognise, protect and regulate the fundamental freedoms of people living with the United Kingdom.

The contribution from Affifa Farrukh also deals with the essential rights and interests of individuals, although within a very different setting, in asking *Does the lack of equitable delivery of healthcare (in the specific context of inflammatory bowel disease) give rise to legal liability?* Our collective experience of coronavirus has shone an uncomfortable spotlight of health inequality within our society, but it remains to be seen whether there will be a sustained commitment to tackling these problems more widely. The extent to which we collectively address this will determine both the quality and length of life experienced by individuals, making robust academic treatment of this area key to building a better society.

Although the context is radically different, a similar broad observation could be made in relation to the criminal justice system. David Cornwell addresses *Criminal Punishment and Desert-Based Reparation: An Emergent Justice Paradigm for the 2020s?* In light of the impact of offending for victims of crime, individual offenders and the families of both groups, constructing responses which will provide positive and effective ways is a critical challenge.

In addition to these insightful and timely articles, we are delighted to have a case note from Jack Stuart on *Incapacity in the Bishop's Disciplinary Tribunals and the decision of In* ***Re: The Rev'd AB [2021].*** This also picks up on the theme of balancing conflicting rights and needs in the administration of justice, and sheds light on recent developments in this area.

We are extremely grateful to all of the authors for the quality of their writing and the hard work undertaken, during a period which has continued to be extremely difficult for everyone. Similarly, acknowledgement must be made in relation to the dedication and

patience of the anonymous, and therefore necessarily unsung peer-reviewers, without whom we could not operate as we do and provide guaranteed standards of academic rigour.

Furthermore, the contribution of the editorial team, Daniel Gough as Deputy Editor, Linda Mururu as Postgraduate Associate Editor, and Selbi Durdiyeva as Acting Associate Editor, has been invaluable as always. Furthermore, the constant help of our administrative assistant Kerri Gilbert has been a sine qua non for the production of the journal. I am also very appreciative of the advice and support offered by previous editors who remain as colleagues, Janice Denoncourt, Helen O'Nions and Tom Lewis.

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ARTICLES

The address for submission of articles is given at the beginning of this issue.

MODERN SOLUTIONS TO HUMAN TRAFFICKING: A TANGLED JOURNEY

THOMAS YEON[*] *and EDWARD LUI*[**]

INTRODUCTION

"The world community recognises human trafficking and modern slavery as twin evils requiring a world-wide response".[1] In *MS*, the Supreme Court provided a strong response to these vices – by reasserting the legal protections for potential victims in the UK. But, as will be seen, its response left some problems unresolved in the existing human rights jurisprudence. The background underlying *MS* can be shortly stated as follows. In 2009, the UK ratified the Council of Europe Convention on Action Against Trafficking in Human Beings. Article 10 of the Convention required the UK to "provide its competent authorities with persons who are trainer and qualified in preventing and combating trafficking in human beings, in identifying and helping victims".[2] The National Referral Mechanism (NRM) was established as a response towards this international obligation. Under the NRM, those who are likely to be directly in contact with human trafficking victims – such as the police officers or social workers – are categorised as "First Responders". Upon conducting an initial assessment, they should report suspected cases of human trafficking to the Home Office. The Home Office will then decide whether there are reasonable grounds to believe that the person may be a victim (before ultimately making a decision based on the balance of probabilities, after a further evidence gathering stage).[3] In *MS*, the applicant has been engaged in the NRM. Without any official meeting or an interview with the applicant, the Home Office decided that there was no reasonable ground to believe that he was a victim of trafficking.[4] Later, the Secretary of State sought to remove him from the UK. He

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We are grateful to the anonymous reviewer and Ms Michelle Wong for their comments on the earlier drafts. The usual disclaimer applies.

1 *MS (Pakistan) v Secretary of State for the Home Department* [2020] UKSC 9, [2020] 1 WLR 1373 (hereinafter *MS*) [1].

2 Council of Europe Convention on Action Against Trafficking in Human Beings, art 10.

3 *MS* (n 1) [2]; Jessica Elliott, "The National Referral Mechanism: querying the response of "first responders" and the competence of "competent authorities" (2016) 30(1) Journal of Immigration, Asylum and Nationality Law 9, 10–11. See further Home Office, *Modern Slavery Act 2015: Statutory Guidance for England and Wales* (August 2020).

4 *MS* (n 1) [5].

appealed the Secretary of State's decision to the First-tier Tribunal and the Upper Tribunal (together, the Tribunals).[5] That was done under s 82(1) of the Nationality, Immigration and Asylum Act 2002 (NIAA). Section 84(1) of the NIAA stipulates that the appeal must be brought on one or more of the prescribed grounds. Two of them are that the decision is unlawful under s 6 of the Human Rights Act 1998 (HRA) – for being incompatible with the applicant's Convention rights – and that the decision is otherwise not in accordance with the law.[6] Section 85(4) of the NIAA further provides that, on such an appeal, the Tribunals may consider any matter which it thinks relevant to the substance of the decision.

Two principal issues arising from these facts were considered by the Supreme Court in *MS*. The first issue raises a basic yet fundamental question: in deciding a statutory appeal under s 82(1) of NIAA, when can the Tribunals reverse decisions by the NRM that the applicant was not a victim of trafficking, and if so, by what standard?[7] The second issue then turns to a direct question of human rights: did the purported removal of the applicant contravene Article 4 of the European Convention on Human Rights?[8] As we shall see, the court held in favour of the applicant on both issues. This article seeks to contribute to the literature by subjecting the court's reasoning in *MS* to critical analysis and exploring some broader issues that surrounded the decision. Before we proceed any further, two caveats should be noted. First, the Secretary of State has conceded the first principal issue on appeal.[9] This does not render the venture in this article nugatory, as the court has nevertheless proceeded to discuss the first issue at some detail. It also remains important for us to examine if the court has rightly accepted the concession. Second, by the time *MS* has reached the Supreme Court, the applicant has withdrawn from the appeal. Three interveners were allowed to take over the main conduct of the appeal.[10] This did not really affect the substance of the court's reasoning. So in the remainder of this article, we will not draw a distinction between the original applicant and the interveners – they will all be referred to as the "applicant".

CHALLENGING THE NRM DECISION ON APPEAL

On the first issue, the Court of Appeal in *MS*[11] held that the applicant may only challenge an adverse NRM decision if it can be shown that the decision is perverse or irrational. It is only then that an applicant can invite the Tribunal to re-determine the relevant facts (e.g. by taking into account subsequent evidence since the NRM decision has been made). The Supreme Court disagreed. It held that – and the parties agreed on appeal – that the Tribunals are "in no way bound by the decision reached under the NRM, nor does it have to look for public law reasons why that decision was flawed".[12] So, quite simply, every decision by the NRM can be re-determined by the Tribunals. It is not necessary to show it is perverse or irrational before a re-determination may take place. This article will proceed by examining briefly the reasoning by the Court

[5] *Ibid* [6].
[6] *Ibid* [7].
[7] *Ibid* [3].
[8] *Ibid* [16].
[9] *Ibid* [11].
[10] *Ibid* [9]–[10].
[11] *MS (Pakistan) v Secretary of State for the Home Department* [2018] EWCA Civ 594, [2018] 4 WLR 63 (hereinafter *MS (CA)*).
[12] *MS* (n 1) [11].

of Appeal. After that, we will examine – in much greater detail – the reasoning by the Supreme Court in departing from the Court of Appeal's decision.

The Court of Appeal

The doctrine of binding precedent requires the Court of Appeal to follow its own decisions.[13] Given this constraint, Flaux LJ's judgment was largely an inquiry into pre-existing law:[14] to identify the scope and effect of *AS (Afghanistan) v Secretary of State for the Home Department*,[15] a previous decision by the Court of Appeal in 2013. Accordingly, the judgment had a heavily descriptive focus: it focused on determining what Longmore LJ decided in *AS*, rather than on whether Longmore LJ may have been wrong.

In *AS*, the Court of Appeal was concerned with a similar question – i.e. the extent to which the Tribunals can overturn a previous decision by the United Kingdom Border Agency that the applicant is not a victim of trafficking, upon a statutory appeal under s 82(1) of NIAA. Longmore LJ accepted the contention that, on an appeal to the Tribunals, the applicant may raise the argument that he or she has been a victim of trafficking.[16] And "it seems odd that, if a perverse decision has been reached that an [applicant] has not been a victim of trafficking, the Tribunal[s] cannot consider whether the facts of the case do, in fact, show that the [applicant] was a victim of trafficking".[17] From this, Flaux LJ in *MS* concluded that "it is absolutely clear" the Court of Appeal in *AS* was limiting a challenge to the NRM decision to where it could be shown to be "perverse or irrational".[18] The House of Lords decision in *Huang*[19] (which will be discussed in much greater detail below) was distinguished. According to Flaux LJ, the decision was "concerned with what the approach of a tribunal should be to a decision which is being appealed".[20] Here, the decision being appealed was not the NRM decision. It was the Secretary of State's. So what governs the court's approach here is not *Huang*, but *AS*.

Lady Hale's Three Propositions on Statutory Appeals

Now we arrive at the Supreme Court. We should note at the outset that the Supreme Court's role is different from the Court of Appeal's: it is no longer limited to determining the law as it is. It should also consider the normative aspect: for *AS*, whatever it stands for, does not bind the Supreme Court. So logically, there are two ways for the Supreme Court to overrule the Court of Appeal. It may either say that the Court of Appeal has wrongly interpreted *AS*, or it may say that while the Court of Appeal has rightly interpreted *AS*, *AS* ought to be rejected. As we shall see, the latter option was implicitly adopted by the Supreme Court.

Lady Hale, writing the unanimous judgment for the Supreme Court, overruled the Court of Appeal for three reasons. Let us examine them individually. First, the jurisdiction by the Tribunals is to hear appeals. It does not have jurisdiction to judicially review the NRM decision, and "[a]n appeal is intrinsically different from a judicial review".[21]

[13] *Young v Bristol Aeroplane Co Ltd* [1944] 1 KB 718, [1944] 2 All ER 293.

[14] *MS (CA)* (n 11) [69], [71], [73]–[74].

[15] [2013] EWCA Civ 1469, [2014] Imm AR 513.

[16] *Ibid* [12]–[13].

[17] *Ibid* [14].

[18] *MS (CA)* (n 11) [69]; Julian Bild, "*The Secretary for the Home Department v MS (Pakistan)*" (2018) 32(3) Journal of Immigration, Asylum and Nationality Law 301, 302.

[19] *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167.

[20] *MS (CA)* (n 11) [79].

[21] *MS* (n 1) [12].

This reason offers, in our view, limited support for Lady Hale's position. The distinction between appeal and review is a familiar one in administrative law:[22] according to this distinction, the role of a court in judicial review must be distinguished from that of an appellate court.[23] The imposition of an "irrational" standard by Flaux LJ makes reference to the *Wednesbury* test,[24] which famously fixes the starting point of rationality review in a judicial review.[25] It may be tempting to suggest that, per the distinction, we are not here concerned with judicial review — so Flaux LJ's application of the *Wednesbury* test in the context of a statutory appeal may be open to question. But it does not necessarily follow that Flaux LJ is wrong. The imposition of "irrationality" as a criterion for allowing a statutory appeal is not objectionable, if appeals and reviews – despite their formalistic distinction – apply substantially the same standard of judicial scrutiny. There is judicial support to that effect. In *E*, Carnwath LJ (as he then was) held that there is now "a generally safe working rule that the substantive grounds for intervention [for an appeal and review] are identical":[26] and that it would "certainly be surprising if the grounds for judicial review were more generous than those for an appeal".[27] This point is illustrated by *Re B*, where Lord Neuberger held that an appellate court would only interfere with the trial judge's finding of primary fact if, *inter alia*, it was one "which no reasonable judge could have reached".[28] This already resembles – if not applies – the *Wednesbury* test in the context of a statutory appeal. It is unclear whether Lady Hale, by claiming that "[a]n appeal is intrinsically different from a judicial review",[29] is attempting to cast doubt on the line of thought expressed in *E* and *Re B*.

Second, the appeals under s 82(1) of the NIAA "are clearly intended to involve the hearing of evidence and the making of factual findings on relevant matters in dispute". Lady Hale calls to her aid s 85(4) of the NIAA, which has been referred to above. She also calls to her aid multiple regulations which "make detailed provision for the calling of witnesses and the production of documents".[30]

This reason offers strong support for Lady Hale's position. Two points can be made about it. First, Lady Hale's approach is principled. Here, the courts are tasked with ascertaining Parliament's intention underlying the NIAA – as to the extent to which the NRM decision may be judicially scrutinised.[31] In interpreting the NIAA, the court will naturally take into account the provisions cited by Lady Hale as part of the statutory context. This is an unexceptional approach to statutory interpretation: that all the relevant statutory provisions should be read together as a purposive unity.[32] This is also analogous to the approach in judicial review: where, as Bell argued, the courts have long determined on the appropriate level of judicial scrutiny by navigating the details of any background legislation.[33] Second, this reason responds to the conventional rationale for

[22] Mark Elliott, "Scrutiny of Executive Decisions under the Human Rights Act 1998: Exactly How 'Anxious'?" [2001] Judicial Review 166.

[23] Clive Lewis, "The Exhaustion of Alternative Remedies in Administrative Law" [1992] *Cambridge Law Journal* 138, 141.

[24] *MS (CA)* (n 11) [75]–[77].

[25] But this is only a starting point, and should not be taking as a general code: see Timothy Endicott, "Why Proportionality is not a General Ground of Judicial Review" (2020) 1 Keele Law Review 1, 4–6.

[26] *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044 [42].

[27] *Ibid* [40].

[28] *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911 [53].

[29] *MS* (n 1) [12].

[30] *Ibid* [13].

[31] See, by analogy, *R (MM (Lebanon)) v Secretary of State* [2017] UKSC 10, [2017] 1 WLR 771 [64].

[32] *The Medical Council of Hong Kong v Chow Siu Shek* (2000) 3 HKCFAR 144, [2000] 2 HKLRD 674 [29].

[33] Joanna Bell, "Rethinking the Story of *Cart v Upper Tribunal* and Its Implications for Administrative Law" (2019) 39 Oxford Journal of Legal Studies 74, 85–86, 90–93.

why appellate courts should not re-determine findings of fact. In an ordinary civil trial, the initial decision-maker – not the appellate court – has the advantage of seeing the witness concerned. Without this advantage, the appellate court's finding is inherently bound to be incomplete and imprecise. Given this inevitable deficiency, it should defer to the initial decision-maker.[34] But the initial decision-maker must indeed enjoy this advantage: this reasoning falls apart when the appellate court is in as good a position as the initial decision-maker to make findings of fact.[35] The provisions cited by Lady Hale show precisely that this can be the case for an appeal under s 82(1) of the NIAA: since the Tribunals may, if they see fit, see the witnesses concerned.[36] This point is all the stronger if we look at the facts of *MS*. Here, the Home Office has neither interviewed nor seen the applicant. But the Tribunals will be well-placed to do that, through calling the applicant as a witness. It makes little sense to say, per the conventional rationale, the Tribunals should still defer to the Home Office's decision.

Third, that the Tribunals may re-determine the NRM decision was "made crystal clear" by *Huang*.[37] Let us examine closely whether – and if so how – *Huang* supports Lady Hale's position.

In *Huang*, the House of Lords was concerned with the role of the appellate decision-maker,[38] when there is an appeal under s 65 of the Immigration and Asylum Act 1999 (IAA).[39] Under the then regime, the relevant immigration officers and Home Office officials will decide in the first instance whether leave to enter or remain in the country should be granted to the applicant.[40] A disappointed applicant may resort to the statutory appeal mechanism under s 65(1) of the IAA, by alleging "that an authority has . . . acted in breach of his human rights". If the appellate decision-maker "decides that the authority concerned has acted in breach of the appellant's human rights", the appeal may be allowed.[41] The appeal must also be allowed if the appellate decision-maker "considers . . . that the decision or against which the appeal is brought was not in accordance with the law . . .".[42] In making this determination, the appellate decision-maker "may affirm the determination or make any other determination which the adjudicator could have made".[43]

The House of Lords held that the appellate decision-maker under the IAA is not engaging in a judicial review of the initial decision. It is engaging in a statutory appeal, whereby it decides "whether the challenged decision is unlawful as incompatible with a Convention right or compatible and so lawful". The IAA provisions, "read purposively and in context, make it plain" that this is the case.[44] By contrast, "it is not a secondary, reviewing function dependent on establishing that the primary decision-maker misdirected himself or acted irrationally or was guilty of procedural impropriety . . .".[45] The court also gave some details as to how the statutory appeal should be carried out. The

[34] *Re F (A minor) (Wardship: Appeal)* [1976] Fam 238, 266; *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372; *Re B* (n 28) [41]–[42], [89], [205]. This is a long-standing position in the common law: see Kenneth Norrie, "Appellate Deference in Scottish Child Protection Cases" (2016) 20 Edinburgh Law Review 149, 152–155.

[35] Paul Daly, "Appellate Standard of Review in Public Law Cases" [2021] Public Law 334, 346.

[36] *MS* (n 1) [14].

[37] *Ibid*.

[38] Including the adjudicators, the Immigration Appeal Tribunal, and immigration judges: see *Huang* (n 19) [2].

[39] *Ibid*.

[40] *Ibid* [9].

[41] IAA, s 65(5).

[42] IAA, Sch 4, Part III, para 21(1).

[43] IAA, Sch 4, Part III, para 22(2).

[44] *Huang* (n 19) [11], [13].

[45] *Ibid* [11].

"first task" of the appellate decision-maker is to "establish the relevant facts". This can be important for at least two reasons. First, when the appellate decision-maker decides whether or not the removal is unlawful, it should do so "on the basis of up-to-date facts". And upon an appeal, the facts "may well have changed since the original decision was made". Second, "particularly where the applicant has not been interviewed, the authority will be much better placed to investigate the facts, test the evidence, assess the sincerity of the applicant's evidence and the genuineness of his or her concerns . . .".[46]

In our view, *Huang* supports Lady Hale's conclusion on two grounds. First, there are several similarities shared between the IAA and NIAA's statutory appeal regimes. Both concerned a decision to remove the applicant. Both concerned a statutory appeal on the ground that the decision to remove is unlawful for being in breach of the applicant's Convention rights.[47] Both statutory regimes entailed a possibility whereby the initial decision-maker may not have met or interviewed the applicant: and both empowered the appellate decision-maker to make factual assessments in its own capacity, without reliance on the initial decision-maker.[48] These factors led the House of Lords in *Huang* to conclude that the appellate decision-maker under the IAA is a "primary decision-maker". Since these factors are shared between the IAA and NIAA, it is difficult to suggest that the appellate decision-makers in *Huang* and *MS* play radically different roles. If the appellate decision-maker in *Huang* is a "primary decision-maker", we submit that the same is true for the Tribunals in *MS*.

Second, *Huang* further defines how a "primary decision-maker" should act in assessing the relevant facts to a Convention rights challenge. It should, as explained above, ascertain the "up-to-date facts" as its "first task". It should not be bound by the factual findings by the initial decision-maker.[49] As the subsequent cases have explained, the court's role in human rights cases is different from judicial reviews in common law. In the former case, the court is concerned with "whether the human rights of the claimant have in fact been infringed".[50] In the latter case, the court is "usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer".[51] There is, one may argue, a normative aspect to this rule. Wray has observed that in the family migration jurisprudence, one of the key themes is that the courts will act to ensure that the executive acts compatibly with the migrant's Convention rights.[52] Therefore:

> [W]here the court does regard itself as having authority and competence to act, it will intervene decisively on behalf of migrants and their families to ensure that individual rights are given effect even where this involves significant disruption to the implementation of policy.[53]

Huang embodies this theme. Contrast its position with the Court of Appeal's decision in *MS*. According to it, the applicant will only be allowed to contest the NRM decision if he or she meets the high threshold of irrationality. Arguably, this restrictive

[46] *Ibid* [15].

[47] IAA, s 65(1); NIAA, s 84(1).

[48] See, e.g., IAA, Sch 4, Part III, para 22(2) and the provisions referred to in *MS* (n 1) [13].

[49] *Ibid*. Gina Clayton, "Prediction or Precondition? The House of Lords Judgment in *Huang* & *Kashmiri*" (2007) 21 Journal of Immigration, Asylum & Nationality Law 311, 313; cf. 319–320; Christopher Knight, "Proportionality, the Decision-Maker and the House of Lords" [2007] Judicial Review 221 [9].

[50] *Belfast City Council v Miss Behavin' Ltd (Northern Ireland)* [2007] UKHL 19, [2007] 1 WLR 1420 [31].

[51] *R (Begum) v Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 [68].

[52] Helena Wray, "Greater than the Sum of Their Parts: UK Supreme Court Decisions on Family Migration" [2013] Public Law 838, 848, 850–851.

[53] *Ibid*, 838.

ruling resonates with the UK Government's "hostile environment" approach towards immigrants – which included curtailing statutory appeals available for applicants.[54] On the contrary, *Huang* facilitates statutory appeals. Under *Huang*, the applicant can more readily contest factual matters on appeal, and ask the court to re-assess the finding of fact by using its competence (i.e. its statutory powers under the IAA or NIAA). This is to ensure that the factual substratum of any proportionality assessment will at least be accurate: and so the applicant's human rights will be more strenuously protected.

It is important to address what a hypothetical critic may say in response to this analysis. The hypothetical critic may attempt to make normative arguments in favour of the Court of Appeal's approach in *MS*. As explained above, the critic cannot take advantage of the conventional rationale for deferring initial decision-maker on findings of fact. The critic will then likely resort to the "resources" argument: that the applicant will be allowed to re-litigate the matter, and limited judicial resources will perforce be wasted. This concern will certainly be shared by the Home Office. It has, as Thomas and Tomlinson observed, sought to conserve resources by curtailing immigration appeal rights.[55] While the "resources" argument has recently been a prominent feature in the law of judicial review,[56] two points must be emphasised here. Firstly, by granting powers of assessing facts to the Tribunals (e.g. by calling witnesses), the Parliament has recognised that the concern over resources does not override the concern for a more strenuous protection of human rights – through getting the facts right. Indeed, after Lady Hale's judgment, the need for ensuring an efficient use of resources is still readily recognised. It is recognised through *Cart*, by limiting the judicial review of the Tribunals' decision.[57] It is also recognised through the fact that, in applying *Huang*, the appellate decision-maker will rarely disregard the initial finding of fact altogether: it will also be taken into account and be given an appropriate weight.[58] Secondly, the critic's argument suffers doctrinally. To sustain the argument against Lady Hale's position in *MS*, he or she would logically have to sustain it against *Huang* as well – since both cases proceed upon the same principle. But calling for a rejection of *Huang* will be a tall task, to say the least, since the decision has been repeatedly approved in the UK's highest court.[59]

These points aside, Lady Hale's judgment may perhaps be criticised for failing to engage with Flaux LJ's judgment in *MS*. The immediate response is that this point has been conceded on appeal: so the failure is rather unsurprising. Let us however leave this technical response aside, and examine how Lady Hale would have responded to Flaux LJ. It has been mentioned that Flaux LJ has made two points: (a) that *AS*, properly interpreted, supports his decision; and (b) that *Huang* should be distinguished. Lady Hale has not confronted directly with Flaux LJ on either point. Let us first turn to point (a). In Lady Hale's judgment, *AS* has not been discussed altogether. Her Ladyship did not really engage with the Court of Appeal on how to properly interpret Longmore LJ's judgment. One may however speculate what Lady Hale's response would be to Flaux LJ. Without even discussing the passages in *AS*, she could not have been disagreeing

[54] Sheona York, "The 'Hostile Environment' – How Home Office Immigration Policies and Practices Create and Perpetuate Illegality" (2018) 32 Journal of Immigration, Asylum & Nationality Law 363, 380.

[55] Robert Thomas and Joe Tomlinson, "A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals" [2019] Public Law 537, 553.

[56] *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663 [89]; Joanna Bell, "The Relationship Between Judicial Review and the Upper Tribunal: What Have the Courts Made of *Cart*?" [2018] Public Law 394, 396–397.

[57] Bell (n 56) 396–397.

[58] *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60, [2017] 1 WLR 4799 [45].

[59] See, for example, *Ibid* [39]–[45]; *R (AR) v Chief Constable of Great Manchester Police* [2018] UKSC 47, [2019] 1 All ER 391 [53].

with Flaux LJ on the proper interpretation of *AS*. And given her strong re-assertion of *Huang*, her point is likely that any decision which subjects a re-determination of the NRM decision to a standard of irrationality is inconsistent with *Huang* – and consequently wrong. So the implicit argument by Lady Hale is that even if Flaux LJ has rightly interpreted *AS*, the latter should be rejected.

Let us then turn to point (b). Flaux LJ's argument is that, in the present case, the decision being appealed against is the Secretary of State's. But the Secretary of State is not the decision-maker responsible for the NRM decision. This distinguishes *MS* from *Huang*, which is concerned with an appeal against the fact-finder itself. Lady Hale did not explicitly confront this argument. But if one adopts her propositions, it is clear that Flaux LJ's argument cannot be sustained. One of Lady Hale's emphasis is that the Tribunals here play the role of a primary decision-maker. It does not take a secondary, reviewing role. Accordingly, the Tribunals' role is neither centric, nor subordinate, to the initial decision-maker's. Its role is simply to assess all the relevant facts, and to reach its own decision. It makes no difference to this approach whose decision is being looked at – whether it be the respondent to the action (as in *Huang*) or a fact-finder who is not a party to the action (as in *MS*).

THE EXISTING LINE OF STRASBOURG JURISPRUDENCE ON POSITIVE OBLIGATIONS UNDER ARTICLE 4 AND THE SUPREME COURT'S OBSERVATION

This article now proceeds to the second issue in *MS*. In dealing with this issue, the Supreme Court considered in detail and applied existing Strasbourg jurisprudence on the positive obligations borne by a member state under Article 4 of the ECHR. While the jurisprudence on Article 4 ECHR is vast,[60] we will focus on *Rantsev*,[61] *Chowdury*, [62] and *CN*[63] in this article. The focus will then be shifted onto an issue that has received little academic discussion: the consideration of Article 4 jurisprudence by UK courts under s 2(1) of the HRA. This area merits discussion because, as will be argued below, the line of jurisprudence considered by the Supreme Court is suffused with analytical and logical inadequacies. *MS* could have been an opportunity for the Supreme Court to observe these problems and move on from the existing jurisprudence – which, regrettably, it did not do so.

The Origins of the Tale: The Tangled Tango Between Human Rights Law and Criminal Law

Before delving into the cases, the exposition part of the court's analysis should be analysed. Beginning with the seminal case of *Siliadin*,[64] the court noted that a government has positive obligations to adopt criminal law provisions penalising slavery, servitude and forced labour, and to apply them in practice.[65] In *Siliadin*, the court noted that "in accordance with contemporary norms and trends [under Article 4], the member states"

[60] For a detailed account and analysis of the nature of positive obligations under Article 4, see Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017) Chapter 8.

[61] *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1.

[62] *Chowdury v Greece* (unreported, Application No 2184/15, Judgment of 30 March 2017).

[63] *CN v United Kingdom* (2013) 56 EHRR 24.

[64] *Siliadin v France* (2006) 43 EHRR 16.

[65] *Ibid* [89]; *MS* (n 1) [22].

positive obligations . . . must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in such a situation".[66] The increasingly high standards required in the protection of human rights and fundamental liberties call for greater firmness in assessing breaches of the fundamental values of democratic societies,[67] one of which is exemplified in Article 4.[68] As *Siliadin*'s basis for requiring member states to establish criminal law mechanisms is rooted in the meaning and purpose of Article 4, the extent of such positive obligation may also be seen as rooted in an interpretation of a member state's obligations under the ECHR and the need of protecting human rights and fundamental liberties. We will return to this point later and illustrate why such conception is not as workable.

Rantsev was the first case considered in detail in *MS*. One of the major findings of *Rantsev* is that, although not explicitly worded under Article 4 ECHR, human trafficking falls within it.[69] The court noted that the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective operation of the rights of both actual and potential victims.[70] Enactments in the following three areas are required: criminal law, regulation of business used as a cover for trafficking, and immigration rules.[71] These enactment requirements are reflected in the following trilogy of duties borne by member states: (i) establish a legislative and administrative framework to punish traffickers, protect the victims, and prevent their trafficking; (ii) take operational measures to protect individual victims in certain circumstances; (iii) investigate potential trafficking situations (a procedural obligation).[72] Despite its detailed elaboration of the positive obligations borne by a member state, the persuasiveness of *Rantsev* is undermined by an important issue at the outset: its approach to human trafficking is too broad and fails to explain how exactly it falls within Article 4. In *ZN*,[73] a case concerning Article 4 of the Hong Kong Bill of Rights Ordinance (which is substantially similar to Article 4 ECHR), the Hong Kong Court of Final Appeal observed that *Rantsev*'s approach to human trafficking ignores the separate concepts of slavery, servitude and forced or compulsory labour under Article 4 ECHR.[74] This can be seen expressly in the *Rantsev* judgment itself:

> In view of [the ECtHR's] obligations to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes 'slavery", 'servitude' or 'forced or compulsory labour'. Instead, the Court concludes that trafficking itself . . . falls within the scope of art.4 of the Convention. The Russian Government's objection of incompatibility *ratione materiae* is accordingly dismissed.[75]

This definitional and analytical weakness of *Rantsev* generates two problems. Firstly, it renders the definitional stage of assessing a State's positive obligations under Article 4 ECHR difficult to operate in practice. Skipping the definitional stage renders the judgments under Article 4 less than sound. There is a lack of analytical certainty and

[66] *Siliadin* (n 64) [112].
[67] *Ibid* [148].
[68] *Ibid* [112].
[69] *Rantsev* (n 61) [282].
[70] *MS* (n 1) [25].
[71] *Rantsev* (n 61) [284].
[72] *Ibid* [87]–[89].
[73] *ZN and others v Secretary for Justice* [2019] HKCFA 53, (2020) HKCFAR 15.
[74] *Ibid* [54(3)], [61].
[75] *Rantsev* (n 61) [282].

security as to when Article 4 is engaged.[76] Secondly, and more problematically, the lack of definitional and analytical clarity in *Rantsev* mean that the articulation of the positive obligations (in terms of criminalisation) borne by a member state is also affected. As noted above, a member state's obligation in terms of criminalising the conducts under Article 4 (as expanded by *Rantsev*) is built upon the purposes of Article 4 and the ECHR as a whole. This represents a tango between human rights law and criminal law: considerations under human rights law guide the scope of criminalisation, and criminal law in return reflects the scopes and objectives of human rights law. It is trite law that, as a living instrument, the ECHR must be interpreted in the light of present-day conditions in both the individual member states and the conditions of member states viewed as a whole.[77] Such expansive interpretations of norms are, however, inappropriate in the context of criminal law.[78] Put to the highest, flexible interpretations in the context of human rights law may be seen as an antithesis of the critical need for certainty underpinning the criminal justice system.[79]

Returning to the consideration of *Rantsev* in *MS*, an important aspect of a member state's positive obligations is that the safeguards established in national legislation, including the criminalisation of the conducts under Article 4, must be "practical and effective".[80] This gives rise to the question of whether there is a need for specific labels under national legislation for a member state to satisfy its positive obligations in this respect. Although neither *Silidain* and *Rantsev* require so, Stoyanova argues there is implicitly such a requirement. It is because the specific labels of slavery, servitude and forced labour affect the how the alleged abuses against migrants are examined.[81] This observation highlights the importance of an accurate label in criminalising the conduct prohibited under Article 4 ECHR. Not only does the label adopted affect the scope of the offence, but it also affects other obligations borne by a member state under Article 4. This is because only a coherent set of labels can ensure that state authorities can provide a coordinated response to an allegation of conduct under Article 4 by carrying out investigation, arrest, and protection duties. The lack of a clearly defined criminal label could, in turn, lead to insufficient criminal investigations by failing to alert state authorities when the relevant circumstances arise. A criminal label is appropriate only if it is based accurately on the crime's essence and the relevant background context(s) it is founded on.[82] Such a need to consider the context(s) within which an offence was found was also observed in *CN* regarding servitude: "domestic servitude is a specific offence, distinct from trafficking and exploitation, which involves a complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance."[83] This need to give due regard to the background contexts of criminalisation means, under *Siliadin* and *Rantsev*, that regard must be paid to the purposes of Article 4 and values of the ECHR. However, the ECtHR has so far failed to elaborate on this intricate link between human rights law and criminal law (in terms of the criminalisation of the conduct specified under Article 4).

[76] Stoyanova (2017) (n 60) 354.

[77] *Siliadin* (n 64) [121].

[78] Stoyanova (2017) (n 61) 336.

[79] Darryl Robinson, "The Identity Crisis of International Law" (2008) 21(4) Leiden Journal of International Law 925, 929.

[80] *MS* (n 1) [25].

[81] Vladislava Stoyanova, "Article 4 of the ECHR and the Obligation of Criminalising Slavery, Servitude, Forced Labour and Human Trafficking" (2014) 3(2) *Cambridge Journal of International and Comparative Law* 407, 426.

[82] Thomas Yeon, "An Examination of the Practicability of Anthony Duff and John Gardner's Legal Moralism as a Basis of Criminalisation in Contemporary English Criminal Law" (2020) V LSE Law Review 150, 170.

[83] *CN* (n 63) [80].

Building on Shaky Foundations: the Extent of Criminalisation

Another important aspect of a member state's positive obligation under Article 4 ECHR concerns the operational measures that protect an individual that is the subject of or has the potential of being subjected to human trafficking. Such measures are engaged when the authorities were "aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited" within the meaning of the Palermo Protocol and Article 4(a) of the European Convention on Action Against Trafficking in Human Beings.[84] The key of a member state's positive obligation in this regard turns on the meaning of "credible suspicion", and the subsequent procedural obligation to investigate into the alleged claims of violation of Article 4. The need to qualify a suspicion as "credible" serves as a filter for ensuring that only cases posing a genuine possibility of engagement of Article 4 will be investigated into and actions are taken. It should be remembered, however, that the determination of whether the "credible suspicion" threshold is reached is also dependent on the relevant state authority responsible for carrying out investigations. The use of this phrase concerning the duty to investigate was first invoked and analysed in detail in *CN*.[85] In *CN*, the court observed that the obligation to investigate does not arise from a complaint: "once the matter has come to the attention of the authorities, they must act on their own motion."[86] This means as long as the state authorities do not consider there to be a credible suspicion of violation of Article 4 suffered by a victim, the obligation to investigate is not engaged.

Arguing for the discontinuation of the use of "credible suspicion" in the context of investigative obligations under Article 4, Stoyanova argues that the reference to credibility distorts the obligation upon the state to investigate.[87] She observed that, as credibility language is often invoked to justify a government's rejection against an individual's claim for refugee status,[88] "credible suspicion" should not be used as a standard for triggering the obligation upon the state to investigate potential crimes against migrants.[89] This criticism, however, rests on a questionable conflation of the usage of credibility languages in the two contexts compared. This is because the considerations faced by the responsible authority is different: the scenario envisaged by Stoyanova concerns the grant of refugee status, while the *Rantsev*/*CN* duty concerns the need to investigate potential allegations of violation of Article 4 ECHR. In the former scenario, there are other considerations (e.g. resource allocation, immigration control) which go beyond the grant of the refugee status *per se*. In contrast, the duty to conduct investigations under Article 4 ECHR is merely satisfying the obligations borne by the government in the first place. Even if the allegation is proven to be substantiated and further protective measures are required, the authorities would still be only fulfilling their existing *Rantsev* duties by, inter alia, taking the victim into protective measures. In *Secretary of State for the Home Department v Hoang (Anh Minh)*, the Court of Appeal noted that "credible suspicion" in the context of investigative duties under Article 4 ECHR refers to "a distinction between mere allegations and those with sufficient foundation to call for an investigation."[90] "Credible suspicion" should be seen

[84] *Rantsev* (n 61) [285]; *Chowdury* (n 62) [88].

[85] *CN* (n 63) [69].

[86] *Ibid*.

[87] Stoyanova (2017) (n 60) 357.

[88] United Nations High Commissioner for Refugees, *Beyond Proof: Credibility Assessment in EU Asylum Seekers* (May 2013) 28–29.

[89] Stoyanova (2017) (n 60) 357–358.

[90] [2016] EWCA Civ 565, [2016] Imm AR 1272 [36].

as a necessary safeguard in ensuring that state authorities will not bear investigative and protective duties disproportionately. In a related vein, in *R (TDT) v Secretary of State for the Home Department*,[91] the Court of Appeal observed that the meaning of the phrase is clear: it corresponds with "reasonable grounds for suspicion".[92] Such a duty is likely to arise either when an individual has been trafficked or that he or she faces a real or immediate risk of being trafficked.[93] Moreover, given the jurisprudence on the meaning of a "real and immediate risk" is well-established,[94] we suggest that a UK court does not have to adopt a phrase as a substitute to "credible". In any event, absent further explanations in terms of transplantability or similarity between the two identified contexts, Stoyanova's attempt of transplanting the credibility language used in the context of refugee claims to a member state's positive obligations under Article 4 is analytically incomprehensive.

The last major case analysed by the court is *Chowdury*. In *Chowdury*, the court held that Greece was not in breach of its obligation under Article 4 as it already criminalised human trafficking at national law.[95] However, the provisions in question, Articles 323 (slave trading) and 323A (human trafficking) of the Criminal Code,[96] do not contain any specific criminalisation of forced labour and servitude.[97] The prohibition against compulsory labour in question is only set out at a constitutional level with no accompanying criminal offences enacted.[98] In this regard, *Chowdury* is inconsistent with two previous authorities. First, in *Siliadin*, the Grand Chamber stated that member states are required to establish criminal law mechanisms penalising slavery, servitude and forced labour. Secondly, in *CN*, the court observed that "domestic servitude is a specific offence, distinct from trafficking . . .";[99] the lack of a specific offence of domestic servitude was held to lead to the authorities" inability to give weight to the dynamics contributing to domestic servitude.[100] That said, it must also be acknowledged that *CN* did not confirm whether the lack of specific criminalisation *per se* is sufficient for finding a violation of the State's Article 4 positive obligation. This is because it also observed that the domestic authorities were "unable to give due weight to [factors underpinning thorough investigation into allegations of coercion]".[101] These two judgments show that, to implement the norms enshrined in Article 4 (*Siliadin*) and ensure that the dynamics underpinning the different offences under Article 4 can be accurately reflected (*CN*), specific criminalisation is necessary for the distinct heads of conduct under Article 4. Not only does the lack of specific criminalisation *per se* may render the member state in breach of its Article 4 violations, but it may also contribute to inadequacies in its investigative and protection duties.

At this point, the analytical weakness discussed earlier regarding the definition of "human trafficking" becomes clear: it is not clear where "human trafficking" stands

[91] [2018] EWCA Civ 1395, [2018] 1 WLR 4822.

[92] *Ibid* [38].

[93] *Ibid* at [39]–[40].

[94] *Ibid* at [41].

[95] *Chowdury* (n 62) [107].

[96] As amended s 12 of Law no.3064/2002 (on the repression of human trafficking, crimes against sexual freedom, child pornography, and more generally sexual exploitation). The relevant sections of the articles are set out in full in *Chowdury* (n 62) [33].

[97] Vladislava Stoyanova, "Sweet Taste with Bitter Roots – Forced Labour and *Chowdury v Greece*" [2018] European Human Rights Law Review 67, 73.

[98] The Constitution of Greece, Art 22(4).

[99] *CN* (n 63) [80].

[100] *Ibid*.

[101] *Ibid*.

under the subsections of Article 4 ECHR. In turn, *Chowdury*'s "puzzling"[102] ruling that the criminalisation of human trafficking under Article 4 is held to be sufficient becomes explainable: as human trafficking is already criminalised under Article 323A of the Criminal Code, it becomes unnecessary to discuss whether the specific heads of Article 4 are covered, as "human trafficking" encompasses all of them. *Chowdury*'s positive obligations discussion opened with observing that Greece is required to put in place a framework to "prohibit and punish forced or compulsory labour, servitude and slavery".[103] However, it ended with finding "Greece has essentially complied with the positive obligation to put in place a legislative framework to combat human trafficking. It remains to be examined whether the other positive obligations have been fulfilled in the present case."[104] Instead of examining Greece's positive obligations vis-a-vis criminalising forced or compulsory labour, servitude and slavery, the subsequent discussions focused on Greece's operational measures and investigative duties.[105] In essence, the effect of *Chowdury*'s ruling is that since "human trafficking" is specifically criminalised, Greece's positive obligations on specifically criminalising slavery, servitude and forced labour are also satisfied. As a matter of analytical clarity, this conclusion is problematic since the text of Article 4 does not support such a conclusion. Nor did *Chowdhury* explain how any reading of Article 4 can reach such a conclusion. All these complaints on definitional and analytical clarity give rise to the issue of a potential departure on the part of UK courts from the existing Strasbourg jurisprudence on Article 4, to which this article now turns.

THE CONSIDERATION OF STRASBOURG JURISPRUDENCE UNDER SECTION 2(1) HUMAN RIGHTS ACT 1998

The Consideration of Article 4 Jurisprudence in MS and the Self-imposed Constraints

The Supreme Court's application of Strasbourg jurisprudence is straightforward: it applied *Rantsev*'s ruling that operational measures of protection are required where the authorities were "aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been or was at real and immediate risk of being trafficked or exploited."[106] It then moved on to hold that there is a lack of effective investigation since "the police took no further action after passing [the victim] on to the social services department."[107] The competent authorities under the NRM are under a positive obligation to rectify the lack of effective investigation when the police have failed to conduct an effective investigation.[108] However, the court missed the more fundamental issues regarding the criminalisation of conducts under Article 4 ECHR (which would affect the triggering of a member state's operational obligations). Although the Supreme Court's application of the *Rantsev* jurisprudence on operational measures undertaken by a member state's competent authorities is correct as a matter of law, the issues surrounding the relationship between the criminalised conducts under Article 4 ECHR and the corresponding operational and protective duties remain unaddressed. This approach is similar to what Lord Rodger would describe

[102] Stoyanova (2018) (n 97) 73.
[103] *Chowdury* (n 62) [105].
[104] *Ibid* [109].
[105] *Ibid* [110]–[127].
[106] *Rantsev* (n 61) [286]; *MS* (n 1) [34].
[107] *MS* (n 1) [35].
[108] *Ibid*.

as "Strasbourg has spoken, the case is closed."[109] This accordingly begs the implicit question lying in a UK court's consideration of Strasbourg jurisprudence: what is a court required to do under s 2(1) of the HRA in considering Strasbourg Jurisprudence?

Section 2(1)(a) HRA provides that in determining a question in connection with a Convention right, a court must "take into account" any judgment, decision, declaration or advisory opinion of the ECtHR. It intends to "take into account in the sense of having regard to" but not automatically follow all Strasbourg decisions.[110] In treating the ECtHR judgments as setting standards to be applied under the HRA, Masterman observes that "the individual justice dispensing of the [ECtHR]'s role have been emphasised at the expense of its ability to deliver constitutional justice."[111] Instead of seeing the ECtHR judgments as contributing (collectively) to a minimum standard of Convention rights, the direct applicability of individual judgments to the facts before a court is emphasised. This poses relatively few problems for cases like *Siliadin* and *Rantsev*, as the general principles and standards set therein are cardinal to the Article 4 jurisprudence. However, for cases which do not establish generally applicable principles, it is questionable whether a court should still see them as standards to be applied domestically under s 2(1) HRA. The application of human rights law principles is often dependent upon the unique facts of a case: this includes the reasons behind the occurrence of the facts in question. Although human rights protection across different member states ought to be implemented similarly, it would be premature to assume that this should be at the expense of overseeing the contextual nuances and differences of different cases.[112]

Apart from individual cases themselves, lines of jurisprudence may also be considered under s 2(1) HRA. If Strasbourg jurisprudence is flawed or leaves room for further development, this does not mean that domestic courts should hesitate to depart from it. The 'semi-mirror" approach to Strasbourg jurisprudence suggests that domestic courts' judgments could or should sometimes outpace Strasbourg. However, if Strasbourg has spoken, they should follow suit; although departure should be infrequent, it is possible and can even be legitimate.[113] Two judicial *dicta* support this model. First, in *Manchester City Council v Pinnock*, Lord Neuberger commented that domestic courts should follow Strasbourg jurisprudence where there is "a clear and constant line of decisions [that] are not inconsistent with some fundamental substantive or procedural aspects of English law, and whose reasoning does not appear to overlook or misunderstand some argument or point or principle."[114] In a related vein, Lord Mance in *R (Chester) v Secretary of State for Justice* suggested that possible dialogue between the Supreme Court and Strasbourg should be considered in an appropriate case – to refuse to follow Strasbourg case law "in the confidence that the reasoned expression of a diverging national viewpoint will lead to a serious review of the position in Strasbourg".[115] Courts under s 2(1) should not see themselves as constrained to depart from existing Strasbourg jurisprudence only in the most extreme circumstances, for example where the jurisprudence is simply too inconsistent or uncertain to be applicable. The most recent Supreme Court decision where the approach to Strasbourg jurisprudence is a central issue, *R (Hallam) v*

[109] *Secretary of the Home Department v AF (No.3)* [2009] UKHL 28, [2010] 2 AC 269 [98].

[110] Conor Gearty, *On Fantasy Island: Britain, Europe and Human Rights* (Oxford, Oxford University Press 2016) 104.

[111] Roger Masterman, "Federal Dynamics of the UK/Strasbourg Relationship" in Robert Schüze and Stephen Tierney, *The United Kingdom and the Federal Idea* (Hart 2017) 217.

[112] See, e.g., Thomas Yeon and Trevor Wan, "Comparative constitutional and administrative law in Hong Kong: In search of coherence" [2021] Public Law 261, 268–270.

[113] Helen Fenwick and Roger Masterman, "The Conservative Project to "Break the Link between British Courts and Strasbourg": Rhetoric or Reality?" (2017) 80 Modern Law Review 1111, 1117.

[114] [2010] UKSC 45, [2011] 2 AC 104 [48].

[115] [2013] UKSC 63, [2014] AC 271 [27].

Secretary of State for Justice, provided more reasons based on which the Supreme Court may consider departing from the existing line of Article 4 Strasbourg jurisprudence. In *Hallam*, the Supreme Court departed from existing Strasbourg jurisprudence on compensations for individuals with quashed or unsafe criminal convictions (a question of criminal procedure which engaged Article 6(2) ECHR). Different members of the majority made different observations on the possible basis for departing from Strasbourg jurisprudence. For Lord Wilson, if Strasbourg decisions are wrong and incoherent, there is no point to follow or build on that line of Strasbourg jurisprudence.[116] Similarly, Lord Hughes observed if the existing jurisprudence "create considerable difficulties in application", it should not be followed; the court's ultimate responsibility is to arrive at its own decisions on the rights domestically.[117]

The Missed Opportunity: What Can be Done in the Future?

The trio of cases discussed in the previous paragraph suggest the *MS* court has imposed upon itself excessive restraints in considering possible domestic developments based on or departing from Strasbourg jurisprudence on Article 4 ECHR. This naturally begs the question: what can the Supreme Court do when a case with similar facts and / or issues come before it? At this juncture, it is helpful to recall the issues we have identified with Strasbourg jurisprudence in the previous section: (i) definitional and analytical weakness of *Rantsev*, (ii) uncertainty as to need of specific criminalisation, and (iii) lack of specific criminalisation lead to a failure to carry out an effective investigation. For (ii) and (iii), as human trafficking is already criminalised in the United Kingdom,[118] there is no real need for the Supreme Court to act on it in a future case similar to *MS* before it. That said, we argue that the Supreme Court can at least consider the following two developments beyond existing Strasbourg Jurisprudence under (i).

Firstly, the Supreme Court should develop (or at least clarify) the domestic jurisprudence on the condition(s) for triggering investigative duties under Article 4 ECHR. There exists room for the Supreme Court to clarify when precisely the investigative duties regarding allegations of human trafficking can be said to be engaged. Although *CN* stated the test for determining whether an obligation to investigate arises is a "credible suspicion" on the part of the relevant state authorities, the court also observed that the obligation was engaged because the complaints were not "inherently implausible".[119] Coupled with its observation that the authorities must act on their own motion "once the matter comes to [their attention],"[120] *CN* may be said to have at least three different potential standards on when exactly the duty to investigate is triggered. Such uncertainty provides room for a possible dialogue between the Supreme Court and Strasbourg on what "credible suspicion" in terms of investigative duties under Article 4 would entail. In this regard, the Supreme Court may consider elaborating on what "reasonable grounds for suspicion" that would trigger an investigation should entail. As Underhill LJ observed in *TDT*, it remains to be seen what a member state's obligation in a case where a person has been trafficked in the past but there is no credible suspicion that they are at any real and immediate risk of being re-trafficked would be.[121]

Secondly, the Supreme Court should elaborate upon how the criminal offences under the MSA that reflect the various heads of Article 4 should be interpreted. The relevant

[116] [2019] UKSC 2, [2020] AC 279 [87] and [90].

[117] *Ibid* [125]–[126].

[118] Modern Slavery Act 2015 (MSA), s 2.

[119] *CN* (n 63) [72]. On this point, also see *TDT* (n 91) [38].

[120] *Hoang (Anh Minh)* (n 90) [25].

[121] *TDT* (n 91) [41].

offences under the MSA are 'slavery, servitude and forced labour" (s 1), "human trafficking" (s 2), and "commit offence with intent to commit offence under section 2" (s 4). This would essentially involve explaining the tango between human rights law and criminal law identified in the earlier parts of this article. The Supreme Court's approach in this regard is, however, not free-flowing. As a public authority,[122] it is required to act compatibly with a Convention right.[123] Any approach laid down by the Supreme Court must be compatible with the requirements of Article 4 of the Convention and its jurisprudence. This means that human rights law will be the leading dancer in its tango with criminal law: more weight should be given to the scopes and objectives of Article 4 and its jurisprudence. While this does not mean that the provisions of the MSA criminalising conducts under Article 4 ECHR have to be interpreted expansively, the court should not attempt to rely on the need for certainty in criminal law to justify a restrictive reading of the MSA provisions mentioned above. The court should also consider the role of "living instrument" played in the interpretation of the MSA offences. Given the necessity of a "world-wide response"[124] for the evil of human trafficking, the court should consider how developments at the Strasbourg court may affect its interpretation of the domestic provisions. The jurisprudence on s 2(1) HRA is also relevant here. The interpretation of the scope and nature of the MSA offences concern the interpretation of Article 4 because the prosecution for an offence under the MSA would mean that an individual is subject to a treatment that falls under Article 4. The fallback for the court is that, should it deem Strasbourg interpretations on the scope of Article 4 in any way incompatible with the domestic position, it may consider relying on the *Chester* or *Hallam* approaches to depart from Strasbourg jurisprudence. Not only does this create a dialogue between the Supreme Court and Strasbourg, but it also avoids the former from following a line of jurisprudence which creates difficulties in terms of both application and development.

CONCLUSION

To conclude, the Supreme Court in *MS* was concerned with two crucial issues that relate to human trafficking. By ruling in favour of the applicant on both issues, it has reasserted the legal protections for human trafficking victims within the UK. On the first issue, the Supreme Court held that the Tribunals can reverse an NRM decision that the applicant was not a victim of trafficking, on a statutory appeal under s 82(1) of NIAA. An applicant does not need to show that the NRM decision was perverse or irrational. The assessment of the veracity of the NRM decision is simply part of the Tribunals' duty as a primary decision-maker: to establish all the relevant facts as its first task. This ruling is consistent with well-established principles. It is also normatively justified since it gives effect to the individual rights of human trafficking victims by ensuring that the factual substratum of any proportionality assessment will at least be accurate.

On the second issue, the Supreme Court affirmed existing Strasbourg jurisprudence on Article 4 positive obligations and found that there was not yet effective investigation of the allegations of breach of Article 4. Although the application of Strasbourg jurisprudence in the present case is legally correct, the court has deprived itself of an opportunity to depart from the analytical and application problems undermining it. A

[122] HRA, s 6(3)(1).
[123] *Ibid*, s 6(1).
[124] *MS* (n 1) [1].

future court should consider the United Kingdom's positive obligations under Article 4 more carefully and not hesitate to depart from it if it deems Strasbourg jurisprudence to be difficult to apply to domestic jurisprudence. It is the Supreme Court — not the Strasbourg courts — that plays the largest role when it comes to determining how the United Kingdom's positive obligations under Article 4 should be implemented and interpreted.

A CODIFIED CONSTITUTION? A TALE OF TWO REPORTS

*DR MARK RYAN**

INTRODUCTION

In June 2010 the House of Commons Political and Constitutional Reform Select Committee was established with the remit to examine matters of political and constitutional reform and during the ensuing 2010–15 parliamentary term, it investigated and reported on a host of constitutional matters. The most seminal of these inquiries concerned possible codification of the United Kingdom's constitutional arrangements, it being well known that, along with New Zealand[1] and Israel, we are unique in lacking a formal codified constitution. In the context of this ambitious and far-reaching inquiry, the Select Committee published two reports: the first in 2014 which included three possible blueprints for codification. The responses to these options were set out in a second (follow-up) report issued a year later. The purpose of this article is to examine the issues that these two reports raise and consider the prognosis for codification. The timing of this article is most propitious given the constitutional turmoil following the 2016 Brexit referendum. This has raised questions about the utility of our present uncodified constitutional arrangements[2] and whether, therefore, leaving the European Union represents a constitutional moment towards a codified constitution.

THE JULY 2014 REPORT: *A NEW MAGNA CARTA?*[3]

In September 2010 the Political and Constitutional Reform Select Committee (hereafter the Committee) invited the Centre for Political and Constitutional Studies at Kings College London (directed by Professor Robert Blackburn) to collaborate on an inquiry into mapping a possible route to codifying the British Constitution. Rather surprisingly, this was officially the first public investigation by Parliament into the issue of a written constitution.[4] In July 2014 the Committee published its first report which outlined the various arguments for and against codifying the British Constitution. The bulk of the report detailed three possible blueprints (considered below); with its remainder setting out the preparation, design and implementation of codification (it also provided additional papers online, including a very useful and comprehensive *Literature Review*). The purpose of the report was to engender and inform public debate about possible codification as we then approached the eight-hundredth anniversary of the signing of

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[1] It is of interest to note the recent publication of a draft codified Constitution for New Zealand as proposed by a former Prime Minister of New Zealand, Sir Geoffrey Palmer together with Dr Andrew Butler, see the Constitution Unit: <https://constitution-unit.com/2016/09/27/draft-constitution-for-new-zealand> accessed 14 October 2016.

[2] For example, see Vernon Bogdanor, *Beyond Brexit Towards a British Constitution* (I B Tauris, 2019) Chapter 7; Philip Johnston, 'Would a written constitution have prevented this Brexit quagmire?' *The Daily Telegraph* (20 March 2019) 16; Allister Heath, 'We need a new Brexit constitution to replace the shattered old order' *The Daily Telegraph* (19 September 2019) 18 and John Bercow MP, Sixth Annual Bingham Centre Lecture 'Process of discovery: What Brexit has taught us (so far) about Parliament, Politics and the UK Constitution' (12 September 2019) <https://binghamcentre.biicl.org/> accessed 4 November 2019. See also the then Attorney General who expressed a degree of sympathy to the idea of a reordering of our constitution following Brexit, HC Deb 25 September 2019, vol 664 col 664.

[3] House of Commons Political and Constitutional Reform Committee, *A new Magna Carta?* (HC 2014–15, 463).

[4] Andrew Blick, *Beyond Magna Carta A Constitution for the United Kingdom* (Hart 2015) 219.

the Magna Carta, which was arguably *the* foundational constitutional document in England. In terms of public consultation, the report invited responses to the following three questions posed:

- Does the United Kingdom need a codified constitution?
- If so, which of the three blueprints was the best way forward?
- What should be included/excluded in your favoured option (if any)?

The Committee pointed out that the blueprints were designed to simply visualise and illustrate the debate on codification,[5] with the distinct advantage of these practical models being that it avoided the consultation process being a purely dry and theoretical academic exercise for the public. It is of course not the first time prototypes have been published for a codified British constitution. Most recently in 2010, Professor Gordon QC[6] published one possible draft and in previous years others have been produced, most notably in 1991 by both the Institute for Public Policy Research[7] and the late MP Tony Benn.[8] It should also be remembered that, at least in historic terms, Britain has already experienced an entrenched constitution in the form of the, albeit rather short-lived, 1653 *Instrument of Government,* together with its somewhat more limited successor, the 1657 *Humble Petition and Advice*.[9] The Committee made a great effort to stress that it was not taking a position on whether codification was desirable[10] as its blueprints were merely illustrative. Its Chair, Graham Allen MP, however, rather tellingly conceded that the Committee would hardly have embarked on this inquiry if all its members were satisfied with the constitutional status quo and that, personally, he did favour a "Written Constitution."[11]

THE THREE BLUEPRINTS/OPTIONS

The Magna Carta report detailed three codification options which are outlined below. The first two set out the status quo of the existing constitution, whilst the third model comprises a composite of the present constitution combined with new elements to form a new Written Constitution. It is curious that the Committee used the rather out dated terminology of a *Written Constitution*, rather than that of a codified one as is modern parlance, given that much of the existing constitution is already written down in both statute and common law. The Committee pointed out that whilst the three blueprints could be considered as standalone options, they could also collectively be treated "as three stages or building blocks to go through in the process of working towards a written constitution."[12]

The Constitutional Code (Option 1):

According to the Committee the Constitutional Code sets out "the essential existing elements and principles of the constitution and workings of government"[13] which includes

[5] *A new Magna Carta?* (n 3) 410.

[6] Richard Gordon, *Repairing British Politics, A blueprint for constitutional change* (Hart 2010).

[7] Robert Blackburn (ed), *A Written Constitution for the United Kingdom* (Mansell 1991).

[8] For consideration of Benn's 1991 Commonwealth of Britain Bill see Dawn Oliver, 'Written Constitutions: Principles and Problems' (1992) 45 Parliamentary Affairs 135.

[9] See Blick, *Beyond Magna Carta A Constitution for the United Kingdom* (n 4) 73–82. Also see Herman Finer, *The theory and practice of modern government Volume 1* (2nd edn, Methuen 1946) 186.

[10] *A new Magna Carta?* (n 3) 3, 7, 9 & 29.

[11] Graham Allen, 'A codified constitution' (2014) 111 LS Gaz No 28, 14.

[12] *A new Magna Carta?* (n 3) 29 and Robert Blackburn, 'Enacting a written constitution for the United Kingdom' (2015) 36 Statute Law Review 1, 8.

[13] *A new Magna Carta?* (n 3) 30.

setting out key constitutional conventions (e.g. ministerial responsibility). It is clearly the most straight-forward of the three blueprints. It comprises a manageable 95 paragraphs (12 pages long) and has been described by the legal commentator Joshua Rozenberg, as "a masterly summary"[14] and depiction of the constitution as it stands. Although the intention was that the Constitutional Code would be recognised and sanctioned by Parliament, it would not have the status of an Act of Parliament. It is true to state that the Constitutional Code is certainly user-friendly and accessible for the public as a synopsis of the present constitutional framework.[15]

The Constitutional Consolidation Act (Option 2):
The second option involved "A consolidation of existing laws of a constitutional nature in statute, the common law and parliamentary practice, together with a codification of essential constitutional conventions."[16] In essence, the significance of the Constitutional Consolidation Act is that it re-enacts existing constitutional statutes and sets out key constitutional conventions (albeit these would remain legally non-justiciable (s221(2)). This second blueprint is by some distance the bulkiest of the three weighing in at a rather dense and somewhat unmanageable 239 pages (around twenty times the size of the Constitutional Code above). This in turn raises the question of the Constitutional Consolidation Act's accessibility to the public given that a key purpose of the Committee's report was to provide clarity and accessibility of our constitutional framework.[17] Some of the language replicated, moreover, is somewhat archaic,[18] two examples of which are the historically opaque text used for the line of succession (s2) and in detailing the arrangements for the Consolidated Fund of Great Britain and Ireland (s37). There also appears to be excessive detail, for instance, is it really necessary to have around four pages on the programming of a Bill in the House of Commons (s 67) or 64 pages detailing devolution (ss113-150)? The Constitutional Consolidation Act clearly needs major editing in order to simplify and render it more intelligible for the wider public. After all, Professor Blackburn has pertinently highlighted the difference between a lawyer's technical constitution and a plainer one which is more accessible to the public.[19] In any event, today the Constitutional Consolidation Act would have to be updated to include more recent statutory enactments, for example, the Recall of MPs Act 2015 and Cities and Local Government Devolution Act 2016. This blueprint would simply be an Act of Parliament passed in the normal legislative fashion, albeit it would be a statute dealing with matters of fundamental constitutional importance. In terms of its legal status, therefore, it would clearly be subject to express repeal by a future Parliament, but there remains the question of whether its sections would be protected from implied repeal. The Committee was no doubt legally correct[20] in its assertion that the provisions of the Act, owing to their content, would not be subject to implied repeal (i.e. being analogous to Lord Justice Laws' hierarchy of *constitutional statutes*).[21]

[14] Joshua Rozenberg, 'UK constitution conundrum' (2014) 111 LS Gaz No 26, 8.

[15] It is interesting that in 2006 students at Oxford University were asked to draft the British constitution as it appeared to them. The resulting document was published in Vernon Bogdanor, Tarunabh Khaitan & Stefan Vogenauer, 'Should Britain have a written constitution?' (2007) 78 Political Quarterly 499.

[16] *A new Magna Carta?* (n 3) 42.

[17] *A new Magna Carta?* (n 3) 361.

[18] Rozenberg, 'UK constitution conundrum' (n 14).

[19] Blackburn, 'Enacting a written constitution for the United Kingdom' (n 12) 10.

[20] *A new Magna Carta?* (n 3) 388.

[21] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin). In this context see also *R (HS2 Action Alliance Limited) v Secretary of State for Transport* [2014] UKSC 3.

The Written Constitution/The constitution of the United Kingdom (Option 3):
According to the Committee the third option is "a document of basic law by which the United Kingdom is governed."[22] It is the most radical of the three models and depicts one version of a possible Written Constitution for the United Kingdom. It provides for a re-wiring of the constitution as although it retains key existing elements (e.g., the parliamentary executive: Articles 8–9; monarchy: Article 4, etc.), it also introduces new aspects (e.g. a new process for constitutional reform prescribing special parliamentary majorities: Article 52).[23] In addition, the Written Constitution replaces key political constitutional conventions (e.g. the appointment of the Prime Minister: Articles 8 & 4(12)) with "written procedures".[24] One major – and new – feature is the role of the judiciary under Article 43, whereby the Supreme Court would be authorised to issue a *declaration of unconstitutionality* in respect of primary legislation deemed inconsistent with the Written Constitution. This is in effect an expansion of the existing judicial power under section 4 of the Human Rights Act 1998, and as with the 1998 Act, the courts under the Written Constitution would be unable to invalidate the offending legislation (Article 43(3) (b)). An exception to this, however, is detailed in Article 43(3) (c), which provides that in relation to specified aspects of the Written Constitution, the senior judiciary would be empowered to declare invalid inconsistent legislation. Rather curiously, these legally protected and entrenched parts of the Written Constitution were *not* identified or listed.

ISSUES RAISED BY THE BLUEPRINTS

Although all three blueprints are supposed to provide an organisational chart for citizens of the United Kingdom,[25] the first issue is whether codification is even necessary. Following the passing of a raft of statutory constitutional reforms in the past two decades, it is arguable that – in one sense – the United Kingdom has already been transformed into a *de facto* statutory constitution. According to Professor Leyland writing in 2012, in many ways the British constitution "has come to look much more like a codified constitution".[26] It is certainly true that those parliamentary enactments which establish and regulate key institutional aspects of the British constitution, such as the Government of Wales Act 1998, the Constitutional Reform and Governance Act 2010, the Recall of MPs Act 2015 and the Cities and Local Government Devolution Act 2016, are analogous to the constitutional rules found elsewhere in codified constitutions. Lord Norton of Louth has, however, consistently made the point that the constitutional reforms introduced in recent decades have been made without any reference to an overall principled and coherent view as to the type of constitution deemed appropriate.[27]

In another sense the process of codification is arguably unnecessary given that the key constitutional conventions relating to the Executive have been placed in writing in (albeit non-legislative) documents such as the Ministerial Code and Cabinet Manual. Furthermore, by codifying the details of the Cabinet Manual it would also transform this internal facing document with an Executive constitutional perspective, into an outward looking/external one. Indeed, in 2011 the House of Lords Select Committee

[22] *A new Magna Carta?* (n 3) 29 see also Blackburn, 'Enacting a written constitution for the United Kingdom' (n 12) 7.

[23] It is noteworthy that super majorities were unknown in the British constitution before the advent of the Fixed-term Parliaments Act 2011 (s 2(1) (b)).

[24] *A new Magna Carta?* (n 3) 282.

[25] *A new Magna Carta?* (n 3) 361.

[26] Peter Leyland, *The Constitution of the United Kingdom* (2nd Hart 2012) 296.

[27] HL Deb 25 June 2015, vol 762, cols 1715–16 and previously at HL Deb 28 January 2010, vol 716, col 1562.

on the Constitution argued that the purpose of the Cabinet Manual should be to record practices and rules and not " be the source of any rule",[28] which it would become particularly under the Constitutional Consolidation Act. It also added that the Manual was "not the first step towards a written constitution".[29] In fact, in 2015 the Magna Carta Committee itself stated that at present there was no compelling case for the independent "statutory recognition of the Cabinet Manual" which could result in the creation of a halfway house towards full codification.[30] It is certainly questionable whether it is appropriate to codify the Cabinet Manual and make it part of the codification process given that it was described by Lord Adonis in his evidence to the House of Lords Select Committee on the Constitution as a document which is 'by the Executive, for the Executive; it does not in any way represent the views of parliamentarians or even views formally expressed by select committees as to how the Executive should behave".[31]

It is also important to draw attention to the Constitution Unit's report on codification in March 2015 which observed that most of the United Kingdom constitution had *already* been written down in statute and that the uncodified elements had been set out in documentary form (e.g. in the Cabinet Manual).[32] As a result, further codification was not therefore essential.[33] In fact, the lead author of this report, Dr Melton, suggested that although the Committee "seems to support further codification of the UK's constitution, it is ironic that their products have reduced the need for codification."[34] In this way, therefore, it could be contended that the Committee's report in one sense is actually self-defeating. It is undeniable, however, that by virtue of the publication of its first blueprint (and to some extent its second as well), the Committee has performed an invaluable public informational service in collating and setting out in writing for the wider public (and students of the constitution) the key elements of the constitution as it stands.

A further set of related issues concern the inherent difficulty of trying to codify and depict the existing constitution. First, there is the conceptual problem that Professor Barber writing in 2008 warned of, which was in attempting to codify the existing position (as the first two blueprints attempt to do), the result would be that "Drafters who were mandated to describe the constitution would, more or less knowingly, be compelled to evaluate it, and shape it in light of those evaluations."[35] In other words, there is a critical difference between what the constitution 'is' as opposed to the normative question as to what the constitution 'ought' to be. It follows therefore that there is clearly an argument to be had that it is not objectively possible to simply describe and set out the British constitution. This is particularly the case in relation to the depiction and parameters of a number of contested political conventions. Second, although there may be common agreement on the main constitutional framework, there is inevitably going to be argument as to its precise boundaries given that its evolutionary nature makes our constitutional arrangements "highly contested".[36] Indeed, the Constitution Unit's

[28] House of Lords Select Committee on the Constitution, *The Cabinet Manual* (HL 2010–11, 107) para 27.

[29] *Ibid,* para 47.

[30] House of Commons Political and Constitutional Reform Committee, *Revisiting the Cabinet Manual* (HC 2014–15, 233) para 22.

[31] *The Cabinet Manual* (n 28) Q 18.

[32] On these and other documents see Andrew Blick, *The Codes of the Constitution* (Hart 2016).

[33] James Melton, Christine Stuart & Daniel Helen, *To codify or not to codify?* (The Constitution Unit, 2015) 3.

[34] James Melton's Blog: 'Codification of the UK Constitution is not essential' <http://constitution-unit.com/2015/03/19/codification-of-the-uk-constitution-is-not-essential/> accessed May 6 2015.

[35] Nick W Barber, 'Against a written constitution' [2008] PL 11, 13.

[36] Robert Brett Taylor, 'The contested constitution: an analysis of the competing models of British constitutionalism' [2018] PL 500, see also Sionaidh Douglas-Scott, 'Brexit, Article 50 and the contested British Constitution' (2016) 79 MLR 1019.

report on codification acknowledged the subjective nature of its exercise in producing its list of constitutional statutes.[37] This was a difficulty shared by the author in his own taxonomy of 193 Bills published during the 2015–16 session of Parliament.[38]

A third problem is that the first two blueprints in effect attempt to codify a 'snapshot' of our ever-changing and shifting constitutional arrangements. As the House of Lords Select Committee on the Constitution stated in July 2001 "The constitution is said to be in flux, and the sense of what it is constantly evolving."[39] More recently, the United Kingdom has been described as in "a state of constitutional unsettlement".[40] Professor Bogdanor pointed out in 2009 the difficulty of selecting and pinpointing the constitution while it was still changing, as it "would be to seek to capture the essence of a tradition that was in the process of being altered while it was being described."[41] As Professors Bogdanor and Vogenauer suggested (rather prophetically) over a decade ago, there was "no reason to believe that the era of constitutional reform which began in 1997 has yet run its course."[42] Indeed, in June 2015, Lord Butler of Brockwell argued that it was "absolutely the wrong time to propose the chimera of a written constitution. There are too many moving parts."[43] It is undeniably true that the constitution of 2021 looks markedly different to that of 1997. Furthermore, the years following the Brexit referendum have seen somewhat of a reordering of the constitutional order in terms of the internal workings and proceedings within Parliament. Another issue of attempting to codify the existing constitution is that it would involve *fossilising* these arrangements, including the current asymmetrical nature of devolution and absence of an English Parliament. Professor Oliver has questioned whether we really wanted to 'freeze', for example, the grounds of judicial review thereby making them more difficult to develop in the future.[44] A recent high profile example of a major development in judicial review is the *Miller* litigation in late 2019[45] in which the Supreme Court held that the lawfulness of the Prime Minister's advice concerning the prorogation of Parliament *was* justiciable by the courts. This development may well not have been possible if the constitution had been fully and legally codified.

One difficulty raised by Professor Bogdanor is that the drafters of any new United Kingdom Constitution will face a problem which the architects of codified constitutions elsewhere did not have to contend with, namely that "of needing to select from a huge inheritance of existing laws, customs and conventions."[46] In any case, there will inevitably be argument over what constitutes a 'first' and 'second' order constitutional issue (the former being worthy of being detailed in the main constitutional text). For example, is the electoral system a first or second order constitutional issue? It appears that in

[37] Melton, Stuart & Helen, *To codify or not to codify?* (n 33) 11.

[38] Mark Ryan, 'A comparative parliamentary and procedural analysis of recent constitutional legislation' delivered at the SLS Conference at Queen Mary University in September 2018. Similarly, see the author's earlier SLS conference paper entitled 'The process of constitutional legislation – an analysis of six case studies' at St Catherine's College, Oxford University in September 2016. Both papers were available in the SLS conference paper bank at <https://www.legalscholars.ac.uk> accessed 12 May 2021.

[39] House of Lords Select Committee on the Constitution, *Reviewing the Constitution: Terms of reference and method of working* (HL 2001–02, 11) para 18.

[40] Neil Walker, 'Our constitutional unsettlement' [2014] PL 529.

[41] Vernon Bogdanor, *The New British Constitution* (Hart 2009) 218.

[42] Vernon Bogdanor & Stefan Vogenauer, 'Enacting a British Constitution: some problems' [2008] PL 38, 42.

[43] HL Deb 25 June 2015, vol 762, col 1713.

[44] *A new Magna Carta?* (n 3) Dawn Oliver Oral Evidence Q83-Q86 <www.parliament.uk/pcrc-constitution> accessed 12 May 2021. Now see the conclusions of the *Independent Review of Administrative Law* (Crown copyright CP 407, 2021) at 1.43 which stated that little advantage would be secured by 'statutory codification' of the judicial review grounds, but it may 'make judicial review more accessible to non-lawyers.'

[45] *R (Miller) v Prime Minster* [2019] UKSC 41.

[46] Bogdanor, *The New British Constitution* (n 41) 217.

most constitutions the detail of the electoral system for the legislature is not detailed in the main constitutional text.[47] In terms of the three blueprints, the Constitutional Code is more in accord with standard international practice as it relegates the details of the electoral system/process and its administration to supplementary legislative instruments. It is noteworthy that both the Constitutional Consolidation Act (section 60) and the Written Constitution (section 27(3)) make direct reference to the first-past-the-post system.

As an aside, it is fascinating to point out that the Written Constitution sets out a wholly elected second chamber comprising 240 members (Article 27(8)) elected by proportional representation.[48] The issue of the reform of the House of Lords has been an intractable constitutional problem which has dogged parliamentarians for decades.[49] In fact, in 2007 even when the House of Commons did seemingly approve reform, this consensus was illusory given that MPs endorsed two contradictory options, viz., that of a fully elected House as well as a hybrid one. These are very different political entities, both of which raise separate constitutional questions.[50] As Professor Barber warned in 2008, any all-embracing package of constitutional reforms contained within a proposed Written Constitution (and presented to the public for approval in a referendum) could have the effect that disparate and unpopular elements of constitutional reform could "be passed on the back of other reforms."[51] There is an analogy here with the fiction of election manifesto commitments whereby a voter in casting a vote cannot register a distinction between a raft of different policies. This is something which Professor Dicey acknowledged over a century ago in his support for selected referendums on specific issues,[52] which is ironic given he is so closely associated by constitutional lawyers with the principle of parliamentary sovereignty.

A broader issue is that of the question of whether a codified constitution should simply codify the existing constitution or reform it, and if so, how radically. One supposed advantage of creating a new constitution is the opportunity to reform, and so improve upon the present constitutional arrangements. Indeed, some who *are* in favour of a new Written Constitution (including the author), would object to simply codifying the existing constitution on the basis that the present constitutional framework is deeply unsatisfactory. Indeed, FF Ridley disputed whether the United Kingdom even has a constitution in any case; as for one thing, it lacks any entrenched fundamental constitutional laws.[53] In his oral evidence to the Committee, the late former MP Tony Benn described the British Constitution as "defective. If it were not defective, you would not be having this Committee now that has been set up on that basis."[54] Similarly, it also worth perusing a 2010 pamphlet which provides a superb lampoon of the current British system of government.[55] There is certainly a case for arguing that the existing constitution in recent decades has typically conferred excessive power onto an incumbent

[47] See Melton, Stuart & Helen, *To codify or not to codify?* (n 33) 11.

[48] *A new Magna Carta* (n 3) 283.

[49] See for example Mark Ryan, 'A summary of the developments in the reform of the House of Lords since 2005' (2012) 21 Nott LJ 65; Mark Ryan, 'The latest attempt at reform of the House of Lords-one step forward and another one back' (2013) 22 Nott LJ 1 & Mark Ryan, 'A referendum on the reform of the House of Lords?' (2015) 66 NILQ 223.

[50] Mark Ryan, 'A consensus on the reform of the House of Lords?' (2009) 60 NILQ 325.

[51] Barber, 'Against a written constitution' (n 35) 12.

[52] Albert Venn Dicey, 'Ought the referendum to be introduced into England?' (1890) 57 *Contemporary Review* 489 and 'The referendum and its critics' (1910) 212 Quarterly Review 538.

[53] FF Ridley, 'There is no British constitution: A dangerous case of the Emperor's clothes' (1988) 41 Parliamentary Affairs 340, 342–3.

[54] *A new Magna Carta?* (n 3) Oral Evidence Q117 <www.parliament.uk/pcrc-constitution> accessed 12 May 2021.

[55] *The Unspoken Constitution* (Democratic Audit, 2009).

Government (albeit not in recent times up until December 2019), and accordingly its democratic credentials can be questioned.[56] In short, for some (including the author) the simple codification of the present system would effectively entrench, whether politically and/or legally, our highly unsatisfactory existing constitutional arrangements.

For some (including the author) the rationale behind establishing a Written Constitution would be to – finally – extinguish the legal doctrine of the supremacy of Parliament and confine it "to the constitutional history books".[57] In fact, if a future Written Constitution did retain the principle of sovereignty, in strict legal terms, this constitutional document could nevertheless be expressly revoked by Parliament at some later date (albeit politically this may be highly unlikely to happen). Drawing upon Ridley above,[58] a Written Constitution in any meaningful sense of the term is clearly inconsistent with the retention of the supremacy of Parliament. There is also the issue of whether retaining sovereignty is even democratic given that its origins are hardly rooted in democracy and the second parliamentary chamber is *still* not even elected. As Professor Gordon QC has observed, this principle has never been approved of by the people other than voting at general elections, which is not the same as express approval of it (however, a referendum on a choice between this principle and a Written Constitution could test support for it).[59]

In contrast, it has to be acknowledged that there is a real fear in some quarters that the replacement of the supremacy of Parliament with 'constitutional supremacy' as encapsulated in an entrenched document, would be undemocratic as it would shift power to unelected judges. In the past few decades Professor Griffith was adamant that the law was not a substitute for politics[60] and Lord Norton has asserted that there was no compelling case to replace the elective dictatorship with a judicial "non-elective dictatorship".[61] More recently, a retired Supreme Court Justice expressed concerns about the calls for a Written Constitution which in effect provides legal solutions to what are essentially political problems.[62] After all, in a separate report the Magna Carta Committee recognised that the role of the judiciary would undoubtedly alter with the creation of a codified constitution.[63] Dr Jones, moreover, notes that the "idolatry"[64] associated with a codified constitution leads to a form of constitutional legalism which raises the so-called 'counter-majoritarian difficulty' involving constitutional/judicial review.[65] This links with a form of constitutionalism known as "negative constitutionalism" which is policed legally by the judiciary.[66] In any event, as noted, the report's third blueprint of a Written Constitution does retain sovereignty, as the *declaration of unconstitutionality* (Article 43(3)(b)) would not disturb any offending legislative provision. This model, however, also simultaneously provides for a weakening of sovereignty

[56] See historically Lord Hailsham, 'Elective dictatorship' *Listener* 21 October 1976, 496.

[57] Written evidence of Mark Ryan, House of Commons Political and Constitutional Reform Committee, *Consultation on A new Magna Carta?* (HC 2014–15, 599) AMC0079, para 5.

[58] Ridley, 'There is no British constitution: A dangerous case of the Emperor's clothes' (n 53).

[59] Gordon, *Repairing British Politics, A blueprint for constitutional change* (n 6) 17 & 26.

[60] JAG Griffith, 'The political constitution' (1979) 42 MLR 1, 16.

[61] Phillip Norton, 'The Glorious Revolution of 1688 its continuing relevance' (1989) 42 Parliamentary Affairs 135, 147.

[62] Jonathan Sumption, *Trials of the State* (Profile Books 2019) 96.

[63] House of Commons Political and Constitutional Reform Committee, *Constitutional role of the judiciary if there were a codified constitution* (HC 2013–14, 802) para 25; similarly, see also the author's view on the role of the judiciary in his written evidence to the Committee (CRJ0001).

[64] Brian Christopher Jones, 'Preliminary warnings on "constitutional" idolatry' [2016] PL 74, 84–5.

[65] On the core argument against judicial review see Jeremy Waldron, *Political Political Theory* (Harvard University Press 2016) chapter 9. On constitutional courts as lawmakers in general see Allan Brewer-Carias, *Constitutional Courts as Positive Legislators – A comparative law study* (CUP 2011).

[66] Nick W Barber, *The principles of constitutionalism* (OUP 2018) 2–6.

because Article 43(3)(c) would enable the Supreme Court to invalidate Acts inconsistent with (albeit unspecified) elements of the Written Constitution. It is of course only speculative, but presumably it was envisaged that these elements would include the fundamental aspects of the constitutional framework such as human rights, etc.

Finally, all three of the Blueprints codify existing constitutional conventions. The issue of codifying constitutional conventions is complex and controversial and it is worth recalling at the outset the findings in 2006 of the Joint Committee on Conventions (albeit its remit was confined to the issue of codification in the context of regulating the relations between the two Houses of Parliament). It concluded that codification was "a contradiction in terms" owing to the unenforceability of conventions and "would raise issues of definition, reduce flexibility, and inhibit the ability to evolve".[67] In fact, Professor Bogdanor has argued that "some conventions are so very general that it is difficult to interpret their meaning with any real degree of precision".[68] Although the courts interpret laws of a constitutional nature, there is no comparable arbiter in respect of the definition and parameters of conventions (though the judiciary on occasions do recognise them).[69] The argument advanced behind codification is to provide some clarity and assistance in a constitutional crisis;[70] but would all or any of these conventions then become justiciable in law? According to the Committee's report, the new constitutional arrangements could clearly state that the codified conventions were non-justiciable.[71]

Some issues nevertheless still remain. For example, is there really a convention that a referendum should be held for example "when a wholly novel constitutional arrangement is proposed" (as suggested in the Committee's report)?[72] Is there a convention that no one political party should have an overall majority in the House of Lords? Should the Foreign Secretary always be an MP?[73] Lastly, should the Salisbury convention continue to apply (assuming the second chamber remained unelected)? In addition, in recent times even well-established political and parliamentary norms of the constitution have been tested in the context of the Brexit process. For example, the historic practice that the Government control the business in the Commons and the convention that the contents of the Attorney General's advice to Government remains confidential, have both been questioned.[74] Further, Professor Barber has argued that "the conventions could evolve whilst the written 'constitution' remained constant. Perversely, the façade erected by the written constitution might make it harder to understand the content of the actual constitution, not easier."[75] One final interesting development is the emergence of what has been described as a 'statutory convention'. This is illustrated by section 2 of the Scotland Act 2016 which codified the Sewel convention relating to the Westminster Parliament that it should not legislate for Scotland without the consent of the Scottish Parliament. The Supreme Court[76] held that despite its statutory recognition, the Sewel

[67] Joint Committee on Conventions, *Conventions of the UK Parliament* (2005–06, HL 265 I, HC 1212-I) para 279.

[68] Bogdanor, *The New British Constitution* (n 41) 225.

[69] For example, the classic example (in relation to the convention of collective ministerial responsibility) is *Attorney General v Jonathan Cape* Ltd [1976] 1 QB 752.

[70] As noted by Bogdanor & Vogenauer, 'Enacting a British Constitution: some problems' (n 42) 51.

[71] *A new Magna Carta?* (n 3) 387.

[72] *A new Magna Carta?* (n 3) 394.

[73] On this see Ridley, 'There is no British constitution: A dangerous case of the Emperor's clothes' (n 53) 357.

[74] On the second issue, see HC Deb 13 November 2018, vol 649 col 189ff for the Motion which specified that the advice of the Attorney General issued to the Government be laid before Parliament for inspection, and also see HC Deb 4 December 2018, vol 650 col 667ff in the context of the Motion for Contempt by government ministers for failing to do so.

[75] Barber, 'Against a written constitution' (n 35) 14.

[76] *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5 para 148–151.

convention was not enforceable in law.[77] One thing remains certain; it seems inevitable that with any codification process new conventions will emerge around any newly created codified constitutional document or Written Constitution.

THE MARCH 2015 REPORT: *CONSULTATION ON A NEW MAGNA CARTA?*[78]

In March 2015 the Committee issued its follow-up report in which it set out the overall response to its earlier July 2014 report and blueprints. It stated that the public response to its inquiry had been unprecedented and confirmed over 3,000 interactions. This was indeed an outstanding demonstration of outreach to, and engagement with, the public. Unfortunately, as a consequence of the number and breadth of responses received, the report stated that it would *not* detail a specific united response which considered all of the issues/points raised.[79] This was most disappointing given the scale of the public response as it would have been most illuminating to examine and drill down into these figures and submissions. It did confirm, however, that the balance in terms of responses favoured some form of codification (in particular, the Written Constitution), but it reiterated that the Committee did not endorse any particular blueprint.[80] It noted that a number of responses found that the July 2014 options were too detailed and dry to fully engage the public[81] (as suggested earlier, the Constitutional Consolidation Act was rather a unwieldy and voluminous 239 pages), and so recognised the need for a more basic document setting out key constitutional principles. In an effort to encourage further debate on Britain's constitution and possible reform options, the Committee issued a 'Pocket Constitution' as an annex to its report. It stated that "In publishing it in a brief and accessible format we hope to engender the broadest possible discussion of constitutional issues".[82]

According to the Committee this draft Pocket Constitution is a summary of the current constitution, but in addition – and in parallel to these elements – it also includes possible options/alternatives to our present arrangements. The Pocket Constitution is certainly aptly titled as it is a terse document to say the least, as its main text (excluding the Preamble and possible alternatives) is approximately 1,400 words. As noted earlier, although it is important to achieve a balance between a constitutional document which is detailed and precise and one which is informative and educative for the public, it is arguable that the Pocket Constitution is simply too brief to be truly meaningful. Instead, it is suggested that a slightly shortened version of the first illustrative blueprint (i.e. the Constitutional Code) might have been preferable. The Pocket Constitution is undoubtedly accessible and easily understandable, but it is just too lacking in detail to be of any real value. Further, in the separate and free-standing version of the Pocket Constitution, the inclusion of drawings (albeit these are not found in the Committee's report) trivialises such an important exercise. It would have been interesting to see how the public responded to this abridged version of the British Constitution (the author

[77] On statutory conventions see Conor Crummey & Eugenio Velasco Ibarra, 'Statutory conventions: conceptual confusion or sound constitutional development? [2018] PL 613, 615–16. On criticism of the codification of the Sewel convention, see the author's written submission to the House of Commons Political and Constitutional Reform Committee, *Constitutional implications of the Government's draft Scotland clauses* (HC 2014–15, 1022) DSB0002 para 5.

[78] House of Commons Political and Constitutional Reform Committee, *Consultation on A new Magna Carta?* (HC 2014–15, 599).

[79] *Ibid,* 9.

[80] *Ibid,* 16.

[81] *Ibid,* 19.

[82] *Ibid*.

provided his own written submission), and whether it really advanced any further the general debate on codification. Unfortunately, the Committee was disbanded and the report on the Pocket Constitution was never published, perhaps rather symbolic of the debate on codification in general.

THE PROSPECTS FOR CODIFICATION

There are four issues to be considered here. First, there is the matter of "a constitutional moment".[83] It is generally agreed that internationally the creation of a new constitution requires a political watershed moment, be it revolution, independence, or other seismic event. As the Institute for Public Policy Research has rightly noted, few constitutions are made by calmly and coolly reflecting on the short-comings of the present constitutional framework.[84] Instead, a watershed moment/political crisis is required. During the last four centuries the United Kingdom has, of course, not suffered the seismic events endured elsewhere (most notably an invasion) and so therefore has lacked this so-called constitutional watershed. According to the Chair of the Committee in December 2014, however, we had perhaps reached a crisis of some description given that 23 million people do not vote, the Union almost broke up and people are disengaged with politics.[85] Further, events have clearly moved on from the Magna Carta report with the result of the Brexit referendum which is arguably *the* (albeit peaceful)[86] constitutional moment. This event was incidentally one which the 2014 report posited as a potential future watershed.[87] In the context of Brexit, Professor Bogdanor references the constitutional and political uncertainty of our departure from the EU in respect of referendums, rights and devolution arrangements.[88] He makes the valid point that it is unlikely that we can simply return to the position in 1972, as the constitutional landscape has fundamentally altered in the ensuing years.[89] In addition, as a result of Brexit it is not impossible that in the immediate future a second referendum could take place on Scottish independence, which would necessitate a reordering of our constitutional arrangements to accommodate the watershed of the break-up of the Union.

Second, even if we have reached a constitutional moment and crisis, the political will for codification is still lacking. Although it is axiomatic that the British Constitution is not owned by one political party, the practical reality is that legislative constitutional reform is driven by, and dependent upon, the incumbent Government of the day. To take by way of example the recently passed Private Member's measure of the House of Lords Reform Act 2014 which allows peers to retire. This only became law because of Government acquiescence and backing.[90] At the 2019 general election support for a Written Constitution from the three main UK-wide political parties was mixed. Whereas the Liberal Democrats advocated a written federal constitution,[91] the Labour Party proposed a UK–wide Constitutional Convention to examine how power is distributed in

[83] See *A new Magna Carta?* (n 3) 365.

[84] Blackburn, *A Written Constitution for the United Kingdom* (n 7) 5, see also James Cornford, 'On writing a constitution' (1991) 44 Parliamentary Affairs 558.

[85] Graham Allen, C*onsultation on A new Magna Carta?* (n 78) 37.

[86] Bogdanor, *Beyond Brexit Towards a British Constitution* (n 2) chapter 7.

[87] *A new Magna Carta?* (n 3) 365.

[88] Bogdanor, *Beyond Brexit Towards a British Constitution* (n 2) 261–273.

[89] Bogdanor, *Beyond Brexit Towards a British Constitution* (n 2) 258.

[90] See Mark Ryan, 'Bills of Steel: The House of Lords Reform Act 2014' [2015] PL 558.

[91] *Stop Brexit Build a Brighter Future Manifesto 2019* (Liberal Democrats, 2019) 79.

the country and how the regions/nations can relate to one another.[92] The Conservative Government was elected on a manifesto platform for some piecemeal constitutional reforms (eg repeal of the Fixed-term Parliaments Act 2011), though it did promise to establish a *Constitution, Democracy and Rights Commission* to consider broader constitutional issues (such as judicial review and relations between the Executive, Parliament and the courts) in the round.[93] As a result, there is simply no current political will from the incumbent Executive for a Written Constitution. Furthermore, world events have overtaken this issue as at the time of going to print at the end of 2021, the British Government (and Parliament) was consumed with facing the health, economic and social consequences caused by the Covid-19 virus.

In any case, given that legislation and constitutional reform in particular is Executive-driven, why would *any* incumbent Government initiate fundamental constitutional change which would reduce its power? After all, as Professor Gordon QC has powerfully reminded us, those in power have a vested interest in maintaining the status quo.[94] Indeed, it is noteworthy that the Political and Constitutional Reform Select Committee was not re-appointed for any of the three subsequent Parliaments in 2015, 2017 and 2019, and although this is technically a decision for the House, the reality is that this is in practice determined by the Government of the day. Instead, since 2015 the Committees' successor, the Public Administration and Constitutional Affairs Select Committee, has examined constitutional issues. To continue the debate on codification, this Select Committee could have charged itself with collating and publishing the public reaction and response to the March 2015 Pocket Constitution.

Third, if the political will is then lacking, is it possible that pressure could be exerted from the people for a Written Constitution? Opinion polls in the first decade of the millennium have indicated that the public (in percentage terms between 68 and 80%)[95] are in favour of a Written Constitution, with the most recent poll in 2010 signifying 73% support.[96] Furthermore, international evidence suggests that the population can be energised "at important constitutional moments".[97] Caution, however, should be urged with such polls as truly depicting an accurate gauge of public opinion. For one thing, it very much depends on exactly what question has been asked. For example, by analogy with House of Lords reform, although people historically have been in favour of an elected House, there has also been simultaneous (and somewhat contradictory) support for the inclusion of many independent members and experts.[98]

Whatever the general support for a Written Constitution, an opinion poll conducted by the Hansard Society Audit of Political Engagement in 2008 indicated that a Written Constitution was ranked as the least pressing constitutional issue,[99] and no doubt our departure from the EU will focus minds on economic and international issues for the foreseeable future in tandem with the all-persuasive impact of the Covid-19 pandemic.

[92] *It's time for real change The Labour Party Manifesto* 2019 (Labour Party, 2019) 81.

[93] *Get Brexit Done. Unleash Britain's Potential. The Conservative and Unionist Party Manifesto 2019* (Conservative Party, 2019) 48. Now see the 2020–21 Independent Human Rights Act Review (IHRAR); the *Independent Review of Administrative Law* (Crown copyright CP 407, 2021) Chapter 1 on codification and Government response to the report: *Judicial Review Reform the Government response to the Independent Review of Administrative Law* (Crown copyright CP 408, 2021).

[94] *A new Magna Carta?* (n 3) Oral Evidence Q135 <www.parliament.uk/pcrc-constitution> accessed 12 May 2021.

[95] *A new Magna Carta?* (n 3) King's College London, *Existing Constitution*, CDE 02, 20 <www.parliament.uk/pcrc-constitution> accessed 12 May 2021.

[96] Blick, *Beyond Magna Carta A Constitution for the United Kingdom* (n 4) 226.

[97] Stephen Tierney, *Constitutional Referendums* (OUP 2012) 302.

[98] Ryan, 'A referendum on the reform of the House of Lords?' (n 49) 237. See further Meg Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived* (OUP 2013) 248, Table 9.8.

[99] (n 95) 20–21.

Although people may be supportive of a written constitution in general, it is arguable that there is no groundswell from the public pressing for one.[100] Nevertheless, any future transition to a Written Constitution must involve extensive public involvement (and the Committee has commendably led the way on this), otherwise it would remain a purely Westminster–centric exercise.[101] As Professor Tierney notes "constitutive referendums"[102] act as constitutional authority and provide legitimacy for the instalment of new constitutional arrangements. There remains, however, the problem of an informed public decision. As was recognised by the Committee's report, even though there may well be public support for a written constitution, surveys indicate that knowledge of the constitution and its mechanics is low.[103] In fact, rather worryingly, the Constitution Unit's 2015 report pointed out that "nearly 80% of UK citizens believe that they know little to nothing about the UK constitution as the text of UK constitution, the piece of constitutional order which is most meaningful to them, is buried across numerous states (Ipsos Mori 2008)".[104]

The fourth issue concerns compromise. The debate about a written constitution is, in essence, really an existential debate about the sort of system of government we wish to live under. As Dr Allison quite rightly said in his oral evidence to the Committee "Writing a constitution is a difficult matter, which will bring into contention a number of difficult issues".[105] Professor Barber makes the pertinent point that most states have had little choice as to whether or not to make a constitution (because they were facing a watershed moment) and so it was almost inescapable that a constitution *had* to be agreed and established.[106] In other words, necessity meant that there was a political imperative to compromise on detail and not insist doggedly on preferred favoured aspects. The question in the United Kingdom is whether there is any incentive to compromise over detail in the absence of some external existential threat. To take the House of Lords again as an illustration, although most commentators believe the House should be reformed, there has been no consensus for over a century on how this should be achieved, which historically has led to an impasse with all parties supporting their own preferred settlement. In terms of the wider constitutional framework, how do we agree, for example, where to strike the balance of power between central and local government, which electoral system(s) to adopt for the legislature and which rights should form part of, and more significantly excluded from, an indigenous British Bill of Rights? Indeed, in an event organised by the Committee in December 2014, Professor Oliver rather bluntly questioned the futility of such an exercise as "My sense is that, like it or not, it is just going to be impossible to achieve consensus about such a wide range of issues and it would be undesirable to go ahead with a written constitution in the absence of broad consensus."[107]

One final point is whether we could even agree on a preliminary issue of which authority/body should draft the Written Constitution?[108] A UK-wide Constitutional Convention has been mooted as a suitable vehicle. In terms of Constitutional Conventions

[100] Ryan, *Consultation on A new Magna Carta?* (n 57) para 4.

[101] *Ibid*, para 2.

[102] Tierney, *Constitutional Referendums* (n 97) 14. In this context, see also Martin Loughlin & Neil Walker (eds), *The Paradox of Constitutionalism* (OUP 2008).

[103] *A new Magna Carta?* (n 3) 406.

[104] Melton, Stuart & Helen, *To codify or not to codify?* (n 33) 8.

[105] *A new Magna Carta?* (n 3) Oral Evidence Q154 <www.parliament.uk/pcrc-constitution> accessed 12 May 2021.

[106] Barber, 'Against a written constitution' (n 35) 11.

[107] *Consultation on A new Magna Carta?* (n 78) 48.

[108] On such a body see *A new Magna Carta?* (n 3) 369.

in general, however, perhaps the minister Lord Bridges of Headley had a reasonable point when he suspected "that we would need a convention on a convention"[109] in order to get agreement on its remit and membership. In recent years there has been support for a UK Constitutional Convention from two of the main UK-wide political parties to address the challenges following Brexit.[110] In 2017 and 2019 the Labour Party manifesto pledged a Constitutional Convention to examine the way the UK works and how power is distributed[111] and in 2017 the Liberal Democrats proposed one tasked with the objective of providing "a full, codified constitution for the UK".[112] Finally, it is noteworthy that in December 2018 the House of Lords debated and agreed a Motion to take Note on the case for a UK-wide Convention to address the "issues of democratic accountability and devolution, particularly in England".[113]

CONCLUSION

On the one hand the House of Commons Political and Constitutional Reform Select Committee has undertaken an admirable and far-reaching inquiry into possible codification of the British constitution. This exercise actively involved and engaged the public for which the Committee should be warmly commended. On the other hand, there appears at present to be no political will or imperative to take the issue of codification forward, and so in one sense the work of the Committee – at least in the immediate short term – has been in vain. Indeed, it is rather telling and symbolic that the Committee was not even reappointed. The Committee has, nonetheless, performed a valuable public service in producing useful resources in the form of its two reports and three practical blueprints which showcase the issue of codification. In the final analysis, seismic events have rather overtaken the arguments concerning a Written Constitution, as at the time of going to print at the end of 2021, the most pressing issues facing the British Government, Parliament and public were the overwhelming health, economic and societal problems caused by the Covid-19 virus.

[109] Parliamentary Secretary for the Cabinet Office, HL Deb 25 June 2015, vol 762 col 1734.

[110] In general, see Alan Renwick & Robert Hazell, *Blueprint for a UK Constitutional Convention* (The Constitution Unit, 2017) and Bruce Ackerman, 'Why Britain needs a written constitution – and can't wait for Parliament to write one' (2018) 89 *Political Quarterly* 584 & 'Is Britain ready for a constitutional Convention? A rejoinder' (2018) 89 Political Quarterly 608.

[111] *For the many not the few The Labour Party Manifesto 2017* (Labour Party, 2017) 102 & *It's time for real change the Labour Party Manifesto 2019* (n 92).

[112] *Change Britain's Future Liberal Democrat Manifesto 2017* (Liberal Democrats, 2017) 9.2.

[113] Lord Foulkes of Cumnock, HL Deb 13 December 2018, vol 794 cols 1405, 1452.

LUXEMBOURG AND THE EXPLOITATION OF OUTER SPACE

JONATHAN STEELE[*]

ABSTRACT

Luxembourg has legislated to facilitate the development of asteroid mining, with a view to acting as the base of the mining entities. However, the Outer Space Treaty, to which Luxembourg is party, prohibits the national appropriation of celestial bodies. This could be considered incompatible with national licensing of private asteroid mining. Other states, notably the United States, are engaged in developing similar regimes for the exploitation of space resources. The analogy with deep sea fishing, where the fish are not owned until caught, that is invoked by proponents of asteroid mining is of doubtful relevance. In particular, the exploitation of an asteroid to destruction could not be considered compatible with the non-appropriation principle. The interests of developing states should be taken into account, and a solution that helps promote the cause of solidarity between the developed world and the developing world is not out of reach. Such a solution need not replicate exactly the benefit-sharing arrangements of the 1982 Law of the Sea Convention, but should at least promote intra-generational equity.

Luxembourg has been for many decades a leader in the field of broadcasting but the fact that it has developed wider interests in the use of space is perhaps less well known outside the Grand Duchy.

The government proposed legislation in 2016 to facilitate the utilisation of space resources. The passage of the legislation was followed by the establishment of a Luxembourg Space Agency in September 2018. It is significant that it was the Economy Minister, Etienne Schneider, who announced at the press conference held to launch the agency that the space sector already accounted for 2% of Luxembourg's gross domestic product. He made it clear that the objective of the agency was not to carry out scientific experiments in space, but to exploit the commercial possibilities of space.[1]

Making it clear that one of the ultimate objectives of the legislation was to facilitate asteroid mining, the minister drew an intriguing analogy with deep sea fishing, pointing out that fish in the high seas are no-one's property until caught, when they become the property of the fishers.

In general, proponents of asteroid mining have refrained from invoking the more obviously relevant analogy of deep sea bed mining in this context. The reason is not hard to seek. Deep sea bed mining is subject to an extensive regulatory framework, including oversight by an international regulatory body as well as revenue sharing arrangements designed to benefit developing nations. None of this appears to be on the horizon for the nations taking steps toward the development of a space mining industry.

It is unlikely, and will remain unlikely for some time, that asteroid mining will be undertaken in the asteroid belt between the orbits of Mars and Jupiter, on account of the prohibitive distances involved. It is more likely that efforts would be directed toward near-Earth asteroids, with an orbital distance from Earth of up to 1.3 astronomical units (about 120 million miles). Rather than the return of resources extracted from asteroids to Earth, asteroid mining activities would probably involve *in situ* utilisation

[*]The author is an official of the European Parliament. Any opinions expressed are strictly those of the author personally.

[1] Jean-Philippe Schmit, 'Das All ist cool' *Tageblatt* (Luxembourg, 13 September 2018) 3.

of resources. The use of space-sourced raw materials, including water, would increase the longevity and reduce the cost of space activities.[2]

The potential wealth of resources that could be extracted from asteroids makes the interest demonstrated in recent years entirely understandable. The near-Earth asteroid Psyche, believed to be the remnant of a planetary core rich in metals, has a value which, according to Powell, '. . . has been estimated at a staggering, and seemingly incomprehensible, $ 10,000 quadrillion.'[3] This sum is many times greater than the gross domestic product of the whole world.

From a policy perspective, there is a threefold rationale for the Luxembourg government's commitment to asteroid mining. In the first place, there is the provision of raw materials for space-based production of, for example, satellites. In the second place, there is the impact on the Grand Duchy itself, in terms of job creation and fiscal revenue. Space mining enterprises applying for a Luxembourg licence would have to incorporate in Luxembourg and maintain their administrative centre in Luxembourg. Moreover, it does not appear that the Luxembourg government intends to collect significant licensing fees or taxes from space enterprises. The third justification is to open up a wealth of new resources and opportunity to build economies beyond what exists on Earth today.[4]

The Exploitation of Outer Space in International Law

There is a collection of multilateral agreements covering space activities, such that Haanappel[5] refers to a body of space law: *corpus iuris spatialis*.

The principal instruments in this body of law are the 1967 Outer Space Treaty, the 1968 Rescue Agreement, the 1972 Convention on International Liability for Damage Caused by Space Objects, the 1976 Convention on Registration of Objects Launched into Outer Space and the 1984 Moon Treaty. This last instrument is widely seen as a failure.[6] Its signatories include states with no capacity for space launch, while the principal actors in space have declined to accede to it.

The basic principles of this body of law include non-appropriation of territory in space, the use for peaceful purposes of space, prohibition of nuclear weapons in space and state liability for damage caused by space objects. It can thus clearly be seen that this body of law reflects the state of affairs in the 1960s, 1970s and 1980s, when space exploration was an activity undertaken by state actors exclusively. As will be seen, more recent national legislation, notably in the United States and Luxembourg, reflects a shift to an emphasis on private sector backing of space activities.

By far the most significant international instrument is the first. The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (hereafter the 'Outer Space Treaty') was adopted by the General Assembly of the United Nations on 19 December 1966 and opened for signature on 27 January 1967. It entered into force on 10 October 1967.

Luxembourg is a state party to the Outer Space Treaty having deposited its ratification on 17 January 2006.

[2] Scot W. Anderson, Korey Christensen, Julia LaManna, 'The development of natural resources in outer space' (2019) 37 Journal of Energy & Natural Resources Law 227.

[3] Mitchell Powell, 'Understanding the Promises and Pitfalls of Outer Space Mining and the Need for an International Regulatory Body to Govern the Extraction of Space-Based Resources' (2018–2019) 19 Pitt J Tech L & Pol'y 1.

[4] Isabel Feichtner, 'Mining for humanity in the deep sea and outer space: the role of small states and international law in the extraterritorial expansion of extraction' (2019) Leiden Journal of International Law 32(2) 255.

[5] P.P.C. Haanappel, *The Law and Policy of Air Space and Outer Space* (Kluwer Law International 2003) 25.

[6] Mitchell Powell, 'Understanding the Promises and Pitfalls of Outer Space Mining and the Need for an International Regulatory Body to Govern the Extraction of Space-Based Resources' (2018–2019) 19 Pitt J Tech L & Pol'y 1.

As stated above, one of the central principles set out in the treaty is the renunciation of national appropriation of outer space, including celestial bodies. Article II of the Outer Space Treaty provides:

> 'Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.'

It seems quite clear that the wording of the treaty is intended to exclude claims by prescription as well as to dispel any idea that celestial bodies are *res nullius* waiting to be claimed by the first comer.

If celestial bodies are not *res nullius*, then what is their status? Shaw is confident that outer space belongs to the category of *res communis*, another example of which is the high seas, and so is incapable of being reduced to sovereign control.[7] The assigning of outer space to that category does not however necessarily imply that all celestial bodies are included in it.

The concept of national appropriation may have some ambiguities. Does the concept include state activities only, or can it be extended to other bodies operating under national law? In this context, according to Jinyuan Su, there appears to be an inconsistency between, on the one hand, the Chinese text of the Outer Space Treaty, and, on the other hand, the English, French, Russian and Spanish texts of the same treaty. The Chinese text seems to limit prohibited appropriation to state parties to the treaty.[8] Permitting private appropriation of space resources would however frustrate the purposes of the Outer Space Treaty.

Space law has developed further since the establishment of the Outer Space Treaty. In 1979 the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (hereafter the 'Moon Agreement') provided at Article 11, paragraph 5, for the establishment of an international regime to govern the exploitation of the natural resources of the moon and other celestial bodies in the solar system. The Moon Agreement has been in force since 11 July 1984. Luxembourg, however, is not a state party to the Moon Agreement.

The Luxembourg Law of 2017

The law makes in its Article 1 a simple but bold assertion: 'Space resources are capable of being appropriated.' The concept of 'space resources' is not defined, but Article 2(4) gives some guidance in providing that the law does not apply to satellite communications, orbital positions or the use of frequency bands. As indicated above, policy pronouncements by the Luxembourg government show that the exploitation of physical, indeed mineral, resources is the aim of the legislation.

The law is of course a municipal law of the Grand Duchy of Luxembourg. As such, it can produce its effects within the jurisdiction of the Grand Duchy. Luxembourg occupies an area of 2,586 square kilometres in north-west Europe. As a sovereign state, Luxembourg exercises territorial jurisdiction over its own airspace, as has been recognised in international law since the 1919 Paris Convention for the Regulation of Aerial Navigation. The vertical extent of territorial jurisdiction is not exactly defined, but it is not generally accepted that such territorial jurisdiction can extend beyond the atmosphere. This is indeed suggested by the expression 'airspace.' More significantly, all states have as a matter of state practice acquiesced in overflight by satellites in orbit. Differing opinions have been stated as to the vertical extent of sovereignty, ranging

[7] Malcolm N. Shaw, *International Law* (7th edn, Cambridge University Press 2014) 355.

[8] Jinyuan Su, 'Legality of unilateral exploitation of space resources under international law' (2017) ICLQ 86(4), 991.

from about 80 to 160 kilometres.[9] The best view appears to be that the upper limit of airspace is the upper limit of aerodynamic lift and the lower limit of space the lowest altitude at which an artificial satellite can orbit. Some writers have postulated a zone between the two, called 'mesospace.'[10] In any event, the areas of space where asteroids are found are well beyond any conceivable limits of airspace.

It is therefore clear that in legislating for the appropriation of space resources, Luxembourg is legislating, or purporting to legislate, with extraterritorial effect. The legislation is not necessarily fatally flawed on the grounds of its extraterritorial effect. It has long been accepted that states may exercise jurisdiction extraterritorially in some circumstances. In fact, in the 1927 *Lotus* case, the Permanent International Court of Justice held that international law normally allowed extraterritorial jurisdiction: '. . . [f]ar from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.'[11] It is fair to say that the '*Lotus* presumption' has cast a long shadow, being cited for example in the 2002 *Arrest Warrant* case.

It is well established that territoriality is only one basis of prescriptive jurisdiction: others include nationality and, more controversially, the passive personality principle, the protective principle and the universality principle. Few would deny that Luxembourg can lawfully regulate the conduct of Luxembourg citizens in space, for example. Similarly, Luxembourg law would apply on Luxembourg registered spacecraft, just as on Luxembourg registered ships and aircraft passing on or over the high seas. The protective principle covers vital national interests: a state may pass laws prohibiting the counterfeiting of its currency outside the state territory, for example. It would not be credible to claim that such an embryonic industry as asteroid mining constituted a vital national interest under the protective principle.

In the context of public international law, a distinction can be made between monist states where international agreements have direct municipal effect and dualist states where they have to be transposed into municipal law before taking such effect. Ireland, for example, is a dualist State, in accordance with Article 29.6 of the Constitution, which provides that international agreements have the force of law to the extent determined by the legislature. Luxembourg, on the other hand, is a monist state, where international agreements form part of the legal order of the state without further transposition. This means in principle that a Luxembourg judge will treat the Outer Space Treaty as part of the law of the Grand Duchy.

The United States Law of 2015

Luxembourg was not the first state to provide in its domestic law for private appropriation of space resources.[12] On 25 November 2015 President Barack Obama signed into law the U.S. Commercial Space Launch Competitiveness Act.

This legislation provides for private appropriation of 'resources' from an asteroid or other body in these terms: 'A United States citizen engaged in commercial recovery of an asteroid resource or a space resource under this chapter shall be entitled to any

[9] Malcolm N. Shaw, *International Law* (7th edn, Cambridge University Press 2014) 393.

[10] P.P.C. Haanappel, *The Law and Policy of Air Space and Outer Space* (Kluwer Law International 2003) 25.

[11] *France* v *Turkey*, PCIJ, Series A, No. 10. 18–19.

[12] In 2019 the United Arab Emirates passed a Federal Law on the Regulation of the Space Sector, in accordance with which the UAE Space Agency is charged with the regulation of the space sector in the Emirates.

asteroid resource or space resource obtained, including to possess, own, transport, use, and sell the asteroid resource or space resource obtained in accordance with applicable law, including the international obligations of the United States.'[13]

The legislation also includes a disclaimer of territorial sovereignty, stating that '. . . by the enactment of this Act, the United States does not thereby assert sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any celestial body.'[14]

Powell claims '*This provision was, and still is, truly radical and represents the first time that a space-faring nation has, in writing, provided a private citizen a legal property right to celestial resources and seems to be at odds with the generally agreed upon notion, as referenced by the language in the various COPUOS treaties, that space shall belong to and benefit all of mankind*.'[15] Some more enthusiastic voices hailed the passage of the legislation as an important advance for private property rights in space: '*Sen. Marco Rubio (R–Fla.) lauded the bill as an "important win" for the space exploration community. Eric Anderson, cofounder of Planetary Resources, hailed the law as "the single greatest recognition of property rights in history."*'[16]

It is evident that the legislation is part of a secular shift in the focus of space activity, from state-driven exploration ventures to commercial activities carried out by, and in the interests of, private sector operators. Moreover, the question of whether the Outer Space Treaty prohibition on national appropriation is applicable to private sector activities has been raised.[17]

However, at least one writer has expressed the view that the rights of private entities in space can be no more extensive than those of the sovereign states from which they originate: '. . . *private entities . . . are still bound by the limits that are imposed by the states within which they are registered and by international law*.'[18]

The question is of course where those limits lie. Can one distinguish between the appropriation of space bodies and space resources, or is it a distinction without a difference? There follow of course related questions about the enforcement of such limits.

At any event, the legislation can be seen as an extension of what, as long ago as 2008, Galloway called '. . . a disturbing ambivalence concerning the legitimacy of space law and its further development.'[19] Galloway detected what he saw as a somewhat illogical distinction between future law and present law, in that existing treaty law was to be upheld but not extended in such a way as to prohibit or limit American use of or access to space. (One could of course point out there is a very significant distinction between legislation currently in force and proposed legislation.)

The Crux of the Problem: Plenty of Fish in the Sea?

The analogy of high seas fishing has already been mentioned in the context of remarks made by the Luxembourg Economy Minister, Etienne Schneider.

In fact, high seas fishing is one of the oldest rights recognised in international law, but its scope has been substantially reduced over the course of the last century.

[13] 51 U.S. Code §51303 (2015).

[14] *Ibid.,* at sec. 403.

[15] Mitchell Powell, 'Understanding the Promises and Pitfalls of Outer Space Mining and the Need for an International Regulatory Body to Govern the Extraction of Space-Based Resources' (2018–2019) 19 Pitt J Tech L & Pol'y 1.

[16] R. Gramer, 'Striking Gold in Space,' Washington Lawyer, December 2016, 18 <http://washingtonlawyer.dcbar.org/december2016> accessed 5 January 2021.

[17] Chelsey Davis and Mark J. Sundahl, 'The Hague Working Group on Space Resources: Creating the Legal Building Blocks for a New Industry' (2017) 30 No 3 ASPLAW 7.

[18] G. Oduntan, 'Aspects of the International Legal Regime concerning Privatization and Commercialization of Space Activities' (2016) XVII No I Georgetown Journal of International Affairs 81.

[19] Jonathan F. Galloway, 'Revolution and Evolution in the Law of Outer Space' (2008) 87 Neb L Rev 520.

It is true that the freedom to fish is one of the two traditional freedoms of the high seas of which the classical statement is found in Mare Liberum by the Dutch jurist Hugo Grotius. The reference to deep sea fishing seems to take for granted a legal situation in which the Grotian freedom to fish is still in its full vigour. This is however not the case. The development of the law of the sea over the second half of the 20th century in particular was characterised by a progressive codification of the law of the sea, with the four Geneva conventions of 1958 being succeeded by the United Nations Convention on the Law of the Sea of 1982.

The effect of this progressive codification has been not only to reduce the extent of waters in which the freedom to fish may be exercised, as the introduction in particular of the Exclusive Economic Zone, within which coastal states control the exploitation of natural resources, has substantially reduced the extent of the high seas, but also to alter the modalities of exploitation of natural resources, particularly fish.

As a matter of fact, the richest fishing grounds tend to be found within 200 nautical miles of the coast in any event. It could therefore be said that the freedom to fish on the high seas has effectively been reduced to a freedom to fish where no fish are found.

In fact, one of the most pressing issues in maritime policy is to combat the prevalence of illegal, unreported and unregulated (IUU) fishing. So, in spite of the fact that fishing continues to be recognised as a freedom of the high seas, it is a freedom heavily constrained by the obligations of most states to exercise it only in accordance with regional arrangements. It is bordering on misleading to suggest that the fish of the high seas are a resource freely available to all comers without restraint.

In any event, the practice of deep sea fishing predates the concept of a territorial sea or even the development of theories of sovereignty. It is rather the case that the law of the sea has grown up around existing practices like the exploitation of distant fisheries and been forced to accommodate them *ab initio*. The same is not true of asteroid mining, in the case of which principles, like the non-appropriation principle, have preceded practice.

There is a fundamental difference between mining on Earth and asteroid mining. Although extractive industries operating on Earth can scarcely be described as blameless with regard to their stewardship of the environment, there has never been a risk that mining activities on Earth could lead to the destruction of the planet itself. The same cannot be said of asteroids. Removing all the valuable minerals from an asteroid might well consume that body totally. Admittedly few would greatly miss even a large asteroid, but the unrestrained exploitation of space bodies by private operators licensed by a single state and operating on a first-come, first-served basis appears likely to lead to disputes at the very least.

The fact that the principle of non-appropriation is a powerful one is demonstrated by the fate of the Bogota Declaration of 1976. Eight equatorial states purported to claim territorial sovereignty over the portions of the geostationary orbit above their territories. This claim was based on an argument invoking intra-generational equity, in that the state parties involved claimed that the distribution methodology for geostationary orbital slots practised by the International Telecommunications Union did not allow equitable access by developing states that did not have the technical and financial means available to developed states. It was generally recognised that the logic of the Bogota Declaration was flawed in that it was impossible in the case of a finite resource like geostationary orbital slots to grant exclusive rights to them, while at the same time allowing equitable access.[20]

[20] Kelly M. Zullo, 'The Need to Clarify the Status of Property Rights in International Space Law' 90 GEOLJ 2413.

There is a general duty to avoid harmful contamination of space in accordance with Article 9 of the Outer Space Treaty. As Viikari points out, the motivation for efforts to mitigate such environmental threats as the formation of space debris is not so much concern over the state of the space environment, but rather the risks which degradation of the environment poses to space activities.[21] She gives the example of satellite manufacturers motivated to avoid the intentional generation of space debris because such debris might remain in the vicinity of the satellite and pose a threat to the satellite itself. There seems no reason in principle why such considerations should be applicable only to near-Earth activities.

In fact there is a more fundamental objection to the assumptions underlying both the Luxembourg and American legislation providing for private appropriation of space resources. Reed Elizabeth Loder has questioned whether space resources should be viewed as resources available to humans at all. Her argument is that there is an ethical dimension to environmental law that the November 2015 Space Act fails to address. In this context, she refers to the 'Earth Jurisprudence' movement that '. . . urges that laws be modified to reflect the ecological interdependency and interrelationship of everything in the universe.'[22] She is clearly speaking *de lege ferenda*, but makes the cogent point that the actual mechanisms by which asteroids might be mined, such as 'lassoing' them by means of a tether encircling the entire celestial body, are tantamount to a claim of exclusive ownership rights over that body. Loder also invokes the precautionary principle, drawing attention to such risks as 'backward contamination' from material removed from asteroids.[23]

Anderson, Christensen and LaManna suggest that legal uncertainty could have a chilling effect on space resources development. This could be manifested in such areas as security of tenure (the national laws of the USA and Luxembourg could be challenged as inconsistent with the Outer Space Treaty) and enforceability of contracts.[24]

According to Viikari, there may exist an obligation under customary international law to conduct an environmental impact assessment in cases including a risk of harmful environmental consequences.[25] Given the paucity of state practice in this area, it would be hard to argue that there is a positive duty to conduct an environmental impact assessment in advance of outer space activities. Certainly the space treaties do not contain provisions concerning environmental impact assessment, although Article 9 of the Outer Space Treaty requires prior consultations for potentially harmful activities.

Resolving the Issues

The lawfulness of the Luxembourg legislation hinges on the validity of the distinction between the appropriation of a celestial body and the appropriation of the material of which it is composed. The imperfect analogy between fishing and mining, advanced to justify the latter, overlooks the fact that a sea still exists even if its fish stocks have been exploited to exhaustion. (The whole tenor of the fisheries provisions in the 1982 Law of the Sea Convention is to prevent such outcomes, of course.) A rock, on the other hand, if mined to exhaustion does not necessarily remain essentially the same object. So there is reason to doubt that asteroid mining can be conducted in accordance with

[21] Lotta Viikari, *The Environmental Element in Space Law: Assessing the Present and Charting the Future* (Martinus Nijhoff Publishers 2008) 145.

[22] Reed Elizabeth Loder, 'Asteroid Mining: Ecological Jurisprudence beyond Earth' (2018) 36 Va Envtl LJ 275.

[23] *Ibid*., 293.

[24] Scot W. Anderson, Korey Christensen, Julia LaManna, 'The development of natural resources in outer space' (2019) 37 Journal of Energy & Natural Resources Law 227.

[25] Lotta Viikari, *The Environmental Element in Space Law: Assessing the Present and Charting the Future* (Martinus Nijhoff Publishers 2008) 166.

the principle of non-appropriation, which as we have seen is the central plank of the Outer Space Treaty.

If the non-appropriation principle does indeed render the domestic legislation passed by Luxembourg inconsistent with its obligations under the Outer Space Treaty, such that a Luxembourg judge would be obliged to give effect to the Treaty provisions in preference, the question arises of how to resolve the conflict. One option would be for Luxembourg simply to withdraw from the Outer Space Treaty in accordance with Article XVI by giving one year's notice. This would, in principle, bring about a very clear position where the Outer Space Treaty no longer imposed any obligations on Luxembourg, leaving the Grand Duchy free to exploit the resources of the cosmos in accordance with the 2017 municipal legislation.

The position may not however be quite so straightforward. It is possible that the provisions of the Outer Space Treaty have crystallized into customary international law. As is well established, customary international law can be said to exist where there is both a general state practice in a given area and the 'mental element' generally called *opinio juris*. This is the belief on the part of a given state that in following a certain course of action it is respecting a legal obligation. State practice in this sense comprises official acts of state, such as military acts, like conduct of warfare, diplomatic acts, like protests or normative acts, like passing legislation on a national level, that are extensive and representative.[26] One example of state practice on a diplomatic level is shown in the zeal with which the United States government calls on states to respect the provisions of the 1982 United Nations Convention on the Law of the Sea, even though the United States is not a state party to that convention. It has long taken the view that most provisions of the 1982 Convention reflect the state of customary international law, and are thus binding on all states of the globe, not merely states parties to the Convention.

Haanappel takes the view that Article 11, paragraph 3, of the Moon Agreement is considered declaratory, that is, indicative of customary law.[27]

On the other hand, referring to the low number of ratifications of the Moon Agreement, Stephen Hobe has claimed '. . . one can certainly not state that the economic regulation contained in the Moon Agreement has already emerged into customary international law.'[28] By 'economic regulation' he means the 'common heritage of mankind' provision of that agreement. Clearly, ratification of a treaty can be considered as evidence of state practice, as, on one view, can states' refraining from a given course of action.[29]

Another option, and a more constructive one from a policy viewpoint, would be to conduct any mining operations in a fashion compatible with the Outer Space Treaty, for example by reinstating mined bodies at the end of mining operations. Hofmann and Bergamasco have referred, in the context of the prohibition of appropriation, to proposals to exclude from the definition of 'celestial bodies' any asteroids under a minimum diameter.[30] It is clearly smaller asteroids that would be most susceptible to complete destruction in mining operations.

One difficulty in deciding whether the prohibition on space mining is a reflection of customary international law or treaty obligations is of course the fact that the complete

[26] Antonio Cassese, Guido Aquaviva, Mary Fan and Alex Whiting, *International Criminal Law: Cases and Commentary* (Oxford University Press, 2011) 5.

[27] P.P.C. Haanappel, *The Law and Policy of Air Space and Outer Space* (Kluwer Law International 2003) 25.

[28] Stephen Hobe, 'The International Institute of Space Law Adopts Position Paper on Space Resource Mining' (2016) 65 ZLW 204.

[29] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8) (Nuclear Weapons Case).

[30] Mahulena Hoffmann, Federico Bergamasco, 'Space resources from the perspective of sustainability: legal aspects' (2020) 3 Global Sustainability 1.

absence of state practice in this area depends in reality on neither. No-one is mining in space because it is technically difficult or indeed almost impossible, irrespective of legal prohibitions.

In fact, some writers attribute the failure of the Moon Treaty to gain general acceptance at least in part to its Article 11, with its references to 'the common heritage of mankind' and an international regulatory regime.[31]

Another consideration in this context is the position of developing states. The concept of intra-generational equity, defending the interests of disadvantaged states, has a prominent position in the law of the sea: LOSC has many provisions concerning the rights of landlocked states as well as those of less developed states.[32] Participation in space activities has hitherto been the exclusive preserve of the most developed states. Indeed, it is not unknown for a country's participation in a space programme to be advanced as an argument that it should no longer be considered a developing state. So the concept of intra-generational equity could be applied with even more force to space law than to the law of the sea. Indeed, Viikari advances the suggestion that '. . . deliberate degradation of outer space would be a violation of the Outer Space Treaty, as it infringes on equity and the interests of other states by diminishing the possibility to use outer space.'[33]

There is another example of a treaty-based regime for resource management in a challenging environment. It is furnished by the Antarctic Treaty. This regime effectively prohibits exploitation of resources as opposed to regulating it. The Antarctic Treaty dates from 1959 and suspends territorial claims to the region. The treaty has some fifty parties who have agreed to demilitarise Antarctica in addition to suspending claims of sovereignty.[34] A Protocol on Environmental Protection to the Antarctic Treaty was adopted in 1991 and provides the framework for environmental management in Antarctica. The Protocol, while referring to the protection of 'wilderness and aesthetic values' at Article 3(1), also recognises the importance of scientific research in the region.[35] Without setting out to create a permanent regime, the Antarctic Treaty has effectively resulted in a lasting suspension of sovereignty claims as well as resource exploitation. It is perhaps doubtful that a total prohibition on asteroid mining could find support among the states most concerned, but a moratorium could be one possibility.

If one looks beyond the Luxembourg legislation, one can identify potential for a bolder multilateral stroke in this area. Parallels between the law of the sea and the law of outer space are not hard to identify.

As Galloway has pointed out, instruments other than the five major space treaties can be used in their interpretation. He refers specifically to the use of the United Nations Convention on the Law of the Sea '. . . to elaborate on the concepts of freedom of access and use found in the space treaties and on the meaning of the concept "the Common Heritage of Mankind" found in both UNCLOS and the Moon Agreement.'[36]

Similarly, Viikari has pointed out that ". . . challenges encountered in the management of the deep seabed appear in many respects similar to those which the space sector

[31] Kelly M. Zullo, 'The Need to Clarify the Status of Property Rights in International Space Law' 90 GEOLJ 2413.

[32] *cf.* Articles 69, 70, United Nations Convention on the Law of the Sea.

[33] Lotta Viikari, *The Environmental Element in Space Law: Assessing the Present and Charting the Future* (Martinus Nijhoff Publishers 2008) 146.

[34] Malcolm N. Shaw, *International Law* (7th edn, Cambridge University Press, 2014) 387.

[35] Holly Deary & Tina Tin, 'Antarctic Treaty Consultative Parties' engagement in wilderness protection at home and in Antarctica' (2015) 5 The Polar Journal 278.

[36] Jonathan F. Galloway, 'Revolution and Evolution in the Law of Outer Space' (2008) 87 Neb L Rev 518.

is facing."[37] She suggests that an international trust fund could be established for the environmental management of the space sector.

The concept of an international trust fund evokes the obvious parallel with the International Seabed Authority established under the 1982 United Nations Convention on the Law of the Sea. The functions of the authority include the distribution of revenues from mining activities in the "Area" or deep seabed beyond national jurisdiction.

A Modern Pardo?

On 1 November 1967 the Maltese representative at the United Nations made one of the most influential interventions ever made to the General Assembly. The path that had led Arvid Pardo to New York was unusual by any standards: the orphaned child of a Swedish mother and Maltese father, he was brought up by an Italian diplomat. Having been imprisoned by Mussolini for his underground activities, he made his way to London after the war and joined the staff of the fledgling United Nations. He subsequently became Malta's first permanent representative.

His message to the General Assembly was a powerful call for solidarity between the developed states of the world and to developing ones. He set out a vision whereby '. . . *the seabed and the ocean floor are a common heritage of mankind and should be used and exploited for peaceful purposes and for the exclusive benefit of mankind as a whole*.' He specifically called for poor countries to receive preferential consideration from the proceeds of the exploitation of seabed and ocean floor resources.

Pardo's vision was realised in the conclusion in 1982 of the United Nations Convention on the Law of the Sea. This 'constitution for the oceans of the world' contains detailed provisions on the establishment of an international authority to supervise deep seabed mining. In addition to the distribution of certain proceeds from such mining, the International Seabed Authority, based in Jamaica, also has the function of distributing to developing states in particular certain proceeds from the exploitation of non-living natural resources in the continental shelf beyond 200 nautical miles from a coastal state's baselines (i.e. coastline).[38]

In a similar vein, some ideas about benefit-sharing from space mining activities have already been developed. In addition to Viikari's suggestion of an international trust fund mentioned above, there have been proposals for benefit-sharing going beyond the monetary aspect.

In response to developments at national level, a grouping of universities and other bodies set up the Hague Space Resources Governance Working Group, a consortium intended to facilitate the construction of a legal framework governing space mining activities.[39] It is of course possible for the writings of eminent jurists to constitute a subsidiary source of customary international law, and in any case well-considered and reasoned contributions to the development of international law can have considerable influence.

Further to a meeting held in Luxembourg, on 12 November 2019 the Working Group adopted what it called 'Building Blocks for the Development of an International Framework on Space Resource Activities.'[40] These elements set out to ensure not

[37] Lotta Viikari, *The Environmental Element in Space Law: Assessing the Present and Charting the Future* (Martinus Nijhoff Publishers 2008) 205.

[38] *cf.* Articles 82, 140, United Nations Convention on the Law of the Sea.

[39] Chelsey Davis and Mark J. Sundahl, 'The Hague Working Group on Space Resources: Creating the Legal Building Blocks for a New Industry' (2017) 30 No 3 ASPLAW 7.

[40] The Hague International Space Resources Governance Working Group, 'Building Blocks for the Development of an International Framework on Space Resource Activities' 2019 <https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-publiekrecht/lucht--en-ruimterecht/space-resources/bb-thissrwg--cover.pdf>, accessed 6 August 2020.

only legal certainty about the ownership of space resources, but also prevention and abatement of harmful impacts of outer space activities and, significantly, the sharing of benefits arising from the utilisation of space resources.

Correctly, the 'Building Blocks' emphasise that such benefits go beyond monetary benefits, including access to and exchange of information, for example. However, the paper does advocate the establishment of an international fund, while stating at 13.2 'The international framework should not require compulsory monetary benefit-sharing.' It is not clear how the proposed fund is to be capitalised or what activities it is intended to finance, nor is it clear who would be the beneficiaries of the fund, although at 13.1 there is a reference to '. . . the promotion of the participation in space resource activities by all countries, in particular developing countries.'

Even in a climate where national authorities are mobilising themselves to promote the exploitation of space resources, it is perhaps not too late for a modern Pardo to make the case for a multinational approach to the exploitation of such resources that would take account of the interests of developing nations. As the representative of Malta, a recently independent island state, Pardo was well placed to plead for an equitable distribution of the proceeds of the exploitation of the deep seabed beyond national jurisdiction. Perhaps in our days the case for benefit sharing from the resources of space mining would be most appropriately made by a representative of a state with no access to space resources, the equivalent of a landlocked state in the law of the sea.

Admittedly, the case for a solution following the example of the Law of the Sea Convention is not universally accepted. For example, Hofmann and Bergamasco question '. . . whether the model of the deep seabed based on Part XI of the United Nations Convention on the Law of the Sea of 1982 is the best example to follow,' referring to the paucity of contracts concluded to date.[41] It is highly doubtful, however, that the complexity of the administrative structures imposed by Part XI is the principal reason for the lack of activity in this area. Still less, surely, can the lack of activity be attributed to the benefit-sharing provisions of the 1982 Convention, rather than to the technical difficulty of executing such operations.

[41] Mahulena Hoffmann and Federico Bergamasco, 'Space resources from the perspective of sustainability: legal aspects' (2020) 3 Global Sustainability 1.

DOES THE LACK OF EQUITABLE DELIVERY OF HEALTHCARE (IN THE SPECIFIC CONTEXT OF INFLAMMATORY BOWEL DISEASE) GIVE RISE TO LEGAL LIABILITY?

*AFFIFA FARRUKH**

Inflammatory bowel disease includes Crohn's disease and ulcerative colitis. Both are characterised by recurrent abdominal pain and episodic diarrhoea with rectal bleeding. Neither can be cured and both are associated with an increased risk of colorectal cancer.[1] As a result, most patients are under long-term follow-up by specialist gastroenterologists and colorectal surgeons. Their care includes routine blood tests and regular colonoscopic monitoring for evidence of precancerous changes. During the last decade treatment has changed significantly with the introduction of biologics. Treatment is expensive and on-going and can amount to between £12,000 and £15,000 per year for these medications alone. Their benefit has been confirmed through well-respected international trials and as a result their use has been approved by the National Institute for Health and Care Excellence (NICE) for use in patients with these conditions.[2]

As the majority of patients with Crohn's disease and ulcerative colitis are cared for within the National Health Service (NHS) this has significant economic consequences for hospital trusts and local commissioning groups. However, recent community based studies have highlighted evidence that patients with inflammatory bowel disease, who are of South Asian origin, have less access to biologics.[3] Based on census data and local epidemiology these studies hypothesised how many cases would be expected to have received treatment and compared them with the numbers who had actually received treatment. The situation with other minority groups in the UK is unknown. However, there is supportive evidence from outside the UK. In Atlanta[4] and Baltimore[5] it was Black Americans and in Miami Hispanics[6] who experienced substandard care. The direct relevance to the situation in the UK may be questioned on the basis that the health care systems are very different in the two countries, as are the communities themselves. The importance of the comparison lies in the fact that discrimination in the delivery of care has long been recognised in the USA, dating back to Martin Luther King's comment in 1966 that:

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1 CA Lamb, NA Kennedy, T Raine et al. British Society of Gastroenterology consensus guidelines on the management of inflammatory bowel disease in adults Gut Epub doi:10.1136/ gutjnl-2019-318484; JA Eaden, KR Abrams & JF Mayberry The risk of colorectal cancer in ulcerative colitis: a meta-analysis () 48 *Gut* 526; C Canavan, KR Abrams & J Mayberry Meta-analysis: colorectal and small bowel cancer risk in patients with Crohn's disease. (2006) 23 *Alimentary Pharmacology and Therapeutics* 1097.

2 NICE, *Infliximab and adalumimab for the treatment of Crohn's disease. Technology appraisal guidance [TA 187]* (2010) <www.nice.org.uk/guidance/ta187> (Accessed 22/11/2016); NICE, *Infliximab, adalumimab and golumimab for treating moderately to severely active ulcerative colitis after the failure of conventional therapy. Technology appraisal guidance [TA329]* (2015) <www.nice.org.uk/guidance/ta329> (Accessed 22/11/2016).

3 A Farrukh and J Mayberry, 'Ethnic variations in the provision of biologic therapy for Crohn's Disease: A Freedom of Information Study' (2015) 83 *Medico-Legal Journal* 104; A Farrukh and J Mayberry, 'Apparent discrimination in the provision of biologic therapy to patients with Crohn's Disease according to ethnicity' (2015) 129 *Public Health* 460.

4 JF Jackson 3rd, T Dhere, A Repaka, A Shaukat, and S Sitaraman, 'Crohn's disease in an African-American population' (2008) 336 *American Journal of Medical Sciences* 389.

5 MH Flasar , T Johnson, MC Roghmann and RK Cross 'Disparities in the use of immunomodulators and biologics for the treatment of inflammatory bowel disease; a retrospective cohort study' (2008) 14 *Inflammatory Bowel Disease* 13.

6 OM Damas, DA Jahann, R Reznik, JL McCauley, L Tamariz, AR Deshpande, MT Abreu and DA Sussman, 'Phenotypic manifestations of inflammatory bowel disease differ between Hispanics and non-Hispanic whites: results of a large cohort study' (2013) 108 *American Journal of Gastroenterology* 231.

> Of all the forms of inequality, injustice in health is the most shocking and inhuman[7]

At the same time, in the UK, Patterson, ascribed the poor health of Afro-Caribbean children to ignorance and lack of health literacy.[8] The benefit of considering the situation in the USA relates to those common factors between disadvantaged communities, including both social deprivation and discrimination and the readiness in the USA to examine reasons behind differences in delivery of care. In the USA, such disparities are seen across a broad range of diseases and in the 1990s the American Medical Association recognised that, 'subconscious bias' may have been a factor.[9] Managers and health teams in the UK do not consider tackling ethnic healthcare inequities is part-and-parcel of their job.[10] In the USA, there is evidence of discriminatory attitudes present early amongst medical students[11] and similar attitudes have been reported amongst British nurses.[12] In 2019, Kmietowicz et al*,* suggested there was no appetite in the UK, or worldwide, to address these inequalities.[13] Indeed, negative attitudes to the issue of poorer health outcomes for minority communities have again been highlighted during the Covid pandemic.[14] There is, therefore, clear evidence of a lack of insight at senior and government levels to the lived experience of many people from minority communities. Although private health insurance and health maintenance organisations may have played a significant part in the USA, they are not the cause within the NHS. Indeed, there is evidence that patients from the South Asian community with ulcerative colitis were seen less often by senior clinicians, discharged from follow-up more frequently and underwent less intense investigations and more infrequent cancer surveillance. These differences, for which there is no ready explanation, occurred before the widespread introduction of biologics for ulcerative colitis.[15] The disease is recognised to occur with equal severity in patients of South Asian and English origin.[16] Suggestions that cultural or linguistic issues may be responsible do not alter the fact that there is a lack of equitable delivery of care. In the USA, Geiger has attributed such differences in care to either, 'conscious bias or, more often, unconscious negative stereotyping.'[17] The question that remains is whether NHS organisations and individual clinicians in the UK are legally liable for apparent discrimination in the provision of care to patients from minority groups whatever its cause.

[7] D Munro (2016) The 50th anniversary of Dr King's healthcare quote. *Forbes* March 25.

[8] S Patterson.'The Health of the Coloured Child in Great Britain.'(1964) 57 *Proceedings of the Royal Society of Medicine* 325.

[9] Council on Ethical and Judicial Affairs American Medical Association 'Black-White disparities in health care' (1990) 263 *Journal of the American Medical Association* 2344; H Jack Geiger 'Racial and ethnic disparities in diagnosis and treatment: a review of the evidence and consideration of causes' in Brian D Smedley, Adrienne Y Stith, and Alan R Nelson (eds) *Unequal Treatment. Confronting Racial and Ethnic Disparities in Healthcare* (The National Academies Press (2003) 417–454.

[10] S Salway et al. 'Obstacles to "Race Equality" in the English National Health Service. Insights from the Healthcare Commissioning Arena'(2016) 152 *Social Science & Medicine,* 102.

[11] WJ Hall. et al 'Implicit racial/ethnic bias among health care professionals and its influence on health care outcomes: A systematic review.'(2015) 105 *American Journal of Public Health* 60.

[12] JD Cortis(2004), 'Meeting the needs of minority ethnic patients.'(2004) 48 *Journal of Advanced. Nursing* 51.

[13] Z Kmietowicz, et al. (2019) 'Ethnic minority staff and patients: a health service failure', (2019) 365 *British Medical Journal* DOI: 10.1136/bmj.l2226.

[14] Commission on Race and Ethnic Disparities (2021) *The Report* https://assets.publishing.service.gov.uk/government/uploads/system/uploads57./attachment_data/file/974507/20210331_-_CRED_Report_-_FINAL_-_Web_Accessible.pdf (Accessed 14 April 2021); Editorial (2020) '"Structural racism" is not to blame for BAME Covid-19 deaths, says Government advisor.' https://www.gmjournal.co.uk/structural-racism-is-not-to-blame-for-bame-covid-19-deaths-says-government-advisor (Accessed 21/1/2021).

[15] A Farrukh and JF Mayberry, 'Patients with ulcerative colitis from diverse populations: the Leicester experience' (2016) 84 *Medico Legal Journal* 31.

[16] I Carr & JF Mayberry 'The effects of migration on ulcerative colitis: a three year prospective study among Europeans and first- and second-generation South Asians in Leicester (1991–1994)' (1999) 94 *American Journal of Gastroenterology* 2918.

[17] Geiger (6) 431.

REGULATION OF TREATMENT AND ITS DELIVERY WITHIN THE NHS:

NICE:

The management of inflammatory bowel disease has been considered by NICE on a number of occasions. Its advice has fallen into two main categories:

1. Technology Appraisal Guidance
2. Other guidance and quality standards, including Clinical Guidelines

Technology Appraisal Guidance was introduced as one of NICE's tools for assessing medications and ensuring their equitable introduction into clinical practice. It was intended to give greater clarity to both providers and consumers on rights of access to effective but expensive treatments. NICE's recommendations on the use of biologics in inflammatory bowel disease are classified as 'Technology Appraisal Guidance' and their purpose is defined as, 'to ensure that all NHS patients have equitable access to the most clinically- and cost-effective treatments that are available.'[18] Such Guidance has a different status to Clinical Guidelines developed by NICE. The consequences are that these, 'Regulations require clinical commissioning groups, NHS England and local authorities to comply with recommendations in a technology appraisal within 3 months of its date of publication.'[19] Compliance appears not to be optional, rather it is a duty. A specific purpose of NICE's recommendations in its Technology Appraisal Guidance is to, 'to reduce variations in practice across the country.'[20]

These powers are set out in Regulation 7 of Statutory Instrument 2013 No. 259[21] and arise from the Health and Social Care Act 2012. Although the choice of medications to be assessed depends upon new drug registrations, a government minister makes the final decision as to which products should be reviewed by NICE.[22] The Statutory Instrument states, 'A relevant health body must comply with a technology appraisal recommendation.'[23] Clearly NHS organisations, such as Trusts and Foundation Trusts, in England and Wales are required to comply with Technology Appraisal Guidance. How is such compliance checked? Monitor and the Care Quality Commission are charged with supervising the overall functioning of hospitals, but in general their inspections do not drill down into adherence to individual Guidance.

The NHS Constitution was first published in 2009. It sets out patients' rights as well as pledges the NHS is committed to achieving. The first principle of the Constitution is that the NHS should provide, 'a comprehensive service available to all.'[24] At the time, Professor Field wrote to the Secretary of State on behalf of the NHS Future Forum that, 'the Constitution amounts to "fine words but no teeth"'.[25] For example, the Constitution goes on to state, 'You have the right to drugs and treatments that have been recommended by the National Institute for Health and Care Excellence (NICE) for

[18] NICE, *Summary of Technology Appraisal Decisions* (2016) <www.nice.org.uk/about/what-we-do/our-programmes/nice-guidance/nice-technology-appraisal-guidance/summary-of-decisions> (Accessed 22/11/2016).

[19] *Ibid.*

[20] NICE Charter (2013) <www.nice.org.uk/Media/Default/About/Who-we-are/NICE_Charter.pdf> (Accessed 22/11/2016).

[21] Statutory Instrument 2013 No. 259 The National Institute for Health and Care Excellence (Constitution and Functions) and the Health and Social Care Information Centre (Functions) Regulations 2013.

[22] NICE topic selection process for technology appraisals (TA) and highly specialised technologies (HST) <www.nice.org.uk/media/default/About/what-we-do/our-programmes/Topic-selection-and-scoping-flowchart-July-2014.pdf> (Accessed 22/11/2016).

[23] Statutory Instrument 2013 No. 259 (n 12) s7 (6).

[24] Department of Health, *Guidance: The NHS Constitution for England* (2015) <www.gov.uk/government/publications/the-nhs-constitution-for-england/the-nhs-constitution-for-england> (Accessed 29/11/2016).

[25] <www.gov.uk/government/uploads/system/uploads/attachment_data/file/212841/Letter-to-the-SofS-from-Professor-Steve-Field-NHS-Future-Forum-26-June-2012.pdf> (Accessed 29/11/2016).

use in the NHS, if your doctor says they are clinically appropriate for you.'[26] It makes no distinction between Guidance and Guidelines, although the latter are not generally seen as legally enforceable.

Clinical Guidelines are produced under Regulation 5.[27] Their purpose is to give advice, guidance and recommendations, but there may be some support for the view that they could be legally enforceable. For example, prior to the introduction of the NHS Constitution failure to provide expensive drugs, such as β interferon for treatment of multiple sclerosis, has been successfully challenged. In 1997, in *R v North Derbyshire Health Authority,* it was held that decisions by a Health Authority in response to guidance issued by the Department of Health through circulars could be challenged on Wednesbury principles.[28] In this case the original decision was quashed and an order of mandamus required the Health Authority to reformulate its policy so as to be consistent with Departmental guidance. In the delivery of care to patients with inflammatory bowel disease all NICE Guidelines and Technology Appraisal Guidance advocate equality which is also a fundamental principle of the NHS Constitution. Where an NHS Trust is shown not to meet this principle it is conceivable that a judicial review would require that organisation to reformulate its policies.

Indeed, in *R v Thanet* Mr. Justice Jay, in an obiter dicta, said, 'The extent of the public law obligation is to have regard to the relevant NICE guideline and to provide clear reasons for any general policy that does not follow it.'[29] This case concerned a young woman who needed to preserve her oocytes prior to chemotherapy and bone marrow transplantation to treat her severe Crohn's disease. Oocyte preservation was the subject of a NICE Guideline but not a Technology Appraisal. NICE interpreted this case as demonstrating that Clinical Commissioning Groups, and by implication NHS Trusts, cannot choose to not follow Guidelines simply because they disagree with them.[30] This finding has relevance to equitable delivery of care in inflammatory bowel disease as NICE has produced a number of Guidelines related to Crohn's disease[31] and ulcerative colitis,[32] including frequency of screening for cancer[33] and quality standards that should exist within Trusts.[34]

Within its Quality Standard for Inflammatory Bowel Disease NICE recognised:

> People with inflammatory bowel disease and their families or carers (if appropriate) should have access to an interpreter or advocate if needed.
>
> Commissioners and providers should aim to achieve the quality standard in their local context, in light of their duties to have due regard to the need to eliminate unlawful discrimination.[35]

This would suggest that Commissioners should be seeking to eliminate poorer care for minority groups with inflammatory bowel disease and to ensure that suppliers have

[26] Department of Health (n 15).

[27] Statutory Instrument 2013 No. 259 (n 12).

[28] *R v North Derbyshire Health Authority, ex parte Fisher* (1997) 38 BMLR 76.

[29] *Rose, R (on the application of) v Thanet Clinical Commissioning Group*, Court of Appeal – Administrative Court, April 15, 2014, [2014] EWHC 1182 (Admin).

[30] NICE, Court warns CCG over disagreeing with NICE guidance (2014) <www.nice.org.uk/news/article/court-warns-ccg-over-disagreeing-with-nice-guidance> (Accessed 30/11/2016).

[31] NICE *Crohn's Disease; management* (2012) <www.nice.org.uk/guidance/cg152/resources/crohns-disease-management-35109627942085> (Accessed 30/11/2016).

[32] NICE *Ulcerative Colitis: management* (2013) <www.nice.org.uk/guidance/cg166?unlid> (Accessed 30/11/2016).

[33] NICE, *Colorectal cancer prevention: colonoscopic surveillance in adults with ulcerative colitis, Crohn's disease or adenomas* (2011) <www.nice.org.uk/guidance/cg118> (Accessed 30/11/2016).

[34] NICE, *Inflammatory Bowel Disease* (2015) <www.nice.org.uk/guidance/qs81> (Accessed 30/11/2016).

[35] *Ibid.*

appropriate protocols in place to deliver equal care across patient populations. An example would be the provision of appropriate interpreters. In light of *Rose*[36] this could mean that Commissioners and Trusts could be required to explain failures to provide such services.

The potential legal consequences of NICE advice were recognised by the NHS Litigation Authority in 2012 when it issued a document to all organisations which it covered. The advice concerned the need to have a system to ensure implementation of NICE Guidelines and monitor that this occurred. The minimum requirements were that each Trust should identify:

- Who will perform the monitoring?
- (. . . .)
- How are you going to monitor?
- What will happen if any shortfalls are identified?
- (. . . .)
- How will the resulting action plan be progressed and monitored?[37]

The executive lead for this work was to be the medical director, so bringing responsibilities for implementation within his or her fitness to practice as a clinician as defined by the General Medical Council (GMC). Deficient performance could lead to a referral and ultimate loss of his or her licence to practice. Such referrals can be made by employers, colleagues or members of the public. This raises the possibility that a community which became aware that it was not receiving the care that others had could make a direct referral of the medical director of the responsible trust to the GMC for investigation of his or her fitness to practice.

Department of Health and Monitoring Standards of Care:

The Public Sector Equality Duty identified in the Equality Act 2010 is the basis for the statement in the NHS Constitution that, 'Legal duties require NHS England and each clinical commissioning group to have regard to the need to reduce inequalities in access to health services and the outcomes achieved for patients.'[38] The criteria set by the Secretary of State to assess whether the Department and NHS England have met this duty includes obtaining appropriate evidence and monitoring.[39] No details are given as to how this evidence is sought or how the monitoring is conducted. For such data to be sound it needs to be collected through truly independent research and not based on figures generated by internal NHS bodies. In 2014 the Secretary of State in a report entitled *Equality in DH* identified, 'high-level quality objectives' which were to be achieved over the subsequent four years.[40] The Care Quality Commission and Monitor were both charged with ensuring these objectives were being met. Perhaps, not surprisingly, none were disease or group specific, and any formal measurement nebulous, so allowing confidence that they would all be achieved. It seems that there is uncertainty as to what is monitored within the NHS and who is legally liable and for what.

[36] Rose (n 20).

[37] NHS Litigation Authority (2012) *An organisation-wide document for the dissemination, implementation and monitoring of NICE guidance* www.**nhs**la.com/. . ./Document%20for%20the%20Dissemination%20Implementation%. (cached) (Accessed 1/12/2016).

[38] Department of Health (n 15).

[39] Department of Health *Corporate Report: Meeting the Public Sector Equality Duty in 2015* (2016) <www.gov.uk/government/publications/dh-public-sector-equality-duty-compliance-2015/meeting-the-public-sector-equality-duty-in-2015> (Accessed 22/11/2016).

[40] Department of Health *Equality in DH* (2014) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/401180/DH_equalities_2015_acc.pdf> (Accessed 22/11/2016).

Monitor:
Monitor was established by the Health and Social Care (Community Health and Standards) Act 2004. Its purpose was to monitor the services and financial viability of NHS Trusts and Foundation Trusts. In 2013 Monitor was tasked with issuing NHS Provider Licences to Trusts providing clinical care. Amongst the conditions for licenses were:

> 4 (a) improving the quality of health care services provided for the purposes of the NHS (. . . .) or the efficiency of their provision,
> (b) reducing inequalities between persons with respect to their ability to access those services, and
> (c) reducing inequalities between persons with respect to the outcomes achieved for them by the provision of those services.[41]

Between January 2013 and December 2016 Monitor made 301 announcements and published the results of 34 consultations.[42] None were obviously associated with the issue of disparities in the provision of care linked to patients' ethnicities. This is of particular importance when viewed against Monitor's role in reducing inequalities. Section 89 of the Health and Social Care Act 2012 outlines the conditions which allowed Monitor to revoke an NHS Provider Licence. In practice discrimination in the delivery of care has not formed the basis for such action. Indeed, Monitor seemed to use its powers with significant caution and equality in delivery of care was an oft repeated mantra on which little real action was taken. Unfortunately, with Monitor's transfer into NHS Improvement matters have not improved. NHS Improvement's mission is to:

> give patients consistently safe, high quality, compassionate care within local health systems that are financially sustainable. By holding providers to account and, where necessary, intervening, we help the NHS to meet its short-term challenges and secure its future.[43]

However, a search of its website using the terms 'ethnicity,' 'equality,' 'South Asian' and 'discrimination' yielded no relevant documents on 1/12/2016. It is difficult to envisage how this organisation will help, 'more challenged providers (. . .) To help stabilise and improve their performance.'[44] There does not appear to be any clear legal liability associated with defective performance as identified by Monitor and now NHS Improvement. Equally Section 71 of the Health and Social Care Act 2012 provides no remedy to the ordinary citizen if Monitor itself fails in the performance of its functions. Liability should lie with the "controlling minds" of these bodies and sanctions could include bans from holding public office and private directorships. Senior executives should certainly not be "rewarded" with early retirement and accompanying financial packages.

Care Quality Commission:
The Care Quality Commission (CQC) was created in 2009. In the Health and Social Care Act 2008 its initial purpose was described as to encourage, 'the provision of health and social care services in a way that focuses on the needs and experiences of people who use those services.'[45] Under Section 65 of the Act the CQC can require an explanation from a legal person of matters relevant to their regulatory functions. If that person fails to do so it will be liable to a fine on summary conviction.

[41] Monitor, *The New NHS Provider Licence* (2013) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/285008/ToPublishLicenceDoc14February.pdf> (Accessed 1/12/2016).

[42] <www.gov.uk/government/announcements?departments%5B%5D=monitor> (Accessed 1/12/2016).

[43] <www.gov.uk/government/announcements?departments%5B%5D=monitor (Accessed 1/12/2016).

[44] https://improvement.nhs.uk/ (Accessed 1/12/2016).

[45] Health and Social Care Act 2008 3(2)(b).

The CQC considers itself, 'the independent regulator of health and adult social care in England.'[46] In outlining its work the CQC stated its objectives were to 'help to focus providers and commissioners on the importance of their responsibilities towards equality, diversity and human rights,'[47] and to ensure that, 'an organisation provides services proportionately to different groups and their needs.'[48] Its program was intended to ensure that in 2010–2011 these assessments were locally based and included, 'people who otherwise have no voice.'[49] Between 2015 and 2016 CQC was concerned that ratings of providers should reflect attitudes, 'to equality groups where there are known 'access' issues to counter 'fear of discrimination.'[50]

These are fine words and need to be assessed against CQC's output. It does not provide a detailed analysis of issues related to differences in quality of care to ethnic minorities across a wide range of diseases, such as diabetes, heart disease, colorectal and breast cancer where this has been identified as an issue in the UK.[51] An example can be seen in the in-depth inspection of University Hospitals of Leicester NHS Trust in 2014. The report acknowledged the cultural diversity and social deprivation of the community it served. However, its sole assessment of access to services consisted of the following statement:

> We spoke with staff about how they communicated with people whose first language was not English. They told us they had access to a telephone interpreter service (Language Line) and that many staff were bilingual or multilingual and could be used to interpret. We did not see evidence that communication was an issue at this trust.[52]

Equally in 2016 a report about The Pennine Acute Hospitals NHS Trust failed to identify problems with access to care by ethnic minorities.[53] In a study published in 2015 this was one of the trusts which had been identified as providing less access to biologics for South Asian patients with Crohn's disease.[54] Clearly the CQC seemed unaware of this or related issues in its Quality Report. Both of these reports raise questions as to the rigour of methods used by the CQC to assess NHS Trusts' approach to equality issues regarding patients. In both cases the CQC stated they conducted in-depth analysis. However, in Leicester, this simply consisted of asking staff how they communicated with patients whose first language was other than English.[55] There is no evidence that they spoke with patients from minority groups, reviewed published work about access to care in Leicester or even tried out the Language Line. The question arises as to whether such poor practice represents a breach of statutory duty by CQC and so give a remedy to patients who suffered harm as a result.

[46] <www.cqc.org.uk/content/about-us> (Accessed 1/12/2016).

[47] Care Quality Commission, *Equality and Human Rights Impact Assessment (EHRIA)* (2010) <www.cqc.org.uk/sites/default/files/documents/20100630_31_assessments_of_quality_eia_pub_version.pdf> (Accessed 4/12/2016).

[48] *Ibid.*

[49] *Ibid.*

[50] Care Quality Commission *Care Quality Commission: Equality and human rights duties impact analysis (decision making and policies)* (2015) <www.cqc.org.uk/sites/default/files/20141218_provider_ratings_display_equality_human_rights_duties_impact_analysis_v3.pdf> (Accessed 4/12/2016).

[51] JF Mayberry and A Farrukh, 'Gastroenterology and the provision of care to Panjabi patients in the UK' (2012) 3 *Frontline Gastroenterology* 191.

[52] Care Quality Commission, *University Hospitals of Leicester NHS Trust Quality Report* (2014) <www.cqc.org.uk/sites/default/files/new_reports/AAAA0708.pdf> (Accessed 4/12/2016).

[53] Care Quality Commission, *The Pennine Acute Hospitals NHS Trust Quality Report* (2016)<www.cqc.org.uk/sites/default/files/new_reports/AAAF1278.pdf> (Accessed 4/12/2016).

[54] Farrukh 'Ethnic variations' (n 2).

[55] Care Quality Commission, *University Hospitals of Leicester NHS Trust Quality Report* (2014).

Health and Well-being Boards:
The Health and Social Care Act 2012 introduced duties and powers for Health and Well-being Boards. Decisions about services were to be made locally and involve patients and the wider community. The purpose of such a strategy was to ensure that clinical services were based on local needs. The mechanism for achieving this is through the development of Joint Strategic Needs Assessments.[56] There is a duty for these Boards to involve 'people living or working in the area.'[57] However, of the 22 members of the Board in Leicester all appear to hold a political, administrative or clinical office and this situation appears common.[58] It is, therefore, perhaps not surprising that the current needs assessment fails to take any account of difficulties experienced by people from ethnic minorities in accessing health care.[59] However, it is clear that such Boards also lack formal powers to instruct Clinical Commissioning Groups or NHS Trusts into making changes. Rather, at best through building good relationships, they may hope to influence decisions by these bodies. Their present role appears to be little more than that of a talking shop – but they should at least involve the users of local services. The weakness of these boards is well summarised in section 195 (3) of the Act, 'A Health and Wellbeing Board ***may encourage persons*** who arrange for the provision of any health-related services in its area to work closely with the Health and Wellbeing Board.'[60]

ROLE OF OTHER STATUTES IN EQUITABLE DELIVERY OF CARE

The Equality Act 2010 and the Human Rights Act 1998 both have a significant role within the equitable delivery of care to patients in the UK.

Equality Act 2010:
Under Section 149 all public authorities are under a Public Sector Equality Duty. Section 149 states:

> (1) A public authority must, in the exercise of its functions, have due regard to the need to—
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;.[61]

Section 212 subsections 2 and 3(c) make it clear that references to an act include omissions to provide services, whether deliberate or not. Monitoring and enforcement of these duties are the responsibility of the Equality and Human Rights Commission, which was set up as a statutory body under the Equality Act 2006. The Commission's main powers are defined in Sections 20 to 24 and include investigations and, where appropriate, issuing Unlawful Act Notices.[62] The failure to deliver equitable care to ethnic minority communities should fall within its ambit. The legal person who receives

[56] <www.gov.uk/government/uploads/system/uploads/attachment_data/file/223842/Statutory-Guidance-on-Joint-Strategic-Needs-Assessments-and-Joint-Health-and-Wellbeing-Strategies-March-2013.pdf> (Accessed 22/11/2016).

[57] http://webarchive.nationalarchives.gov.uk/20130805112926/https://s3-eu-west-1.amazonaws.com/media.dh.gov.uk/network/18/files/2013/03/Summary-table-of-the-duties-and-powers-introduced-by-the-Health-and-Social-Care-Act-2012-relevant-to-JSNAs-and-JHWSs-March.pdf (Accessed 5/12/2016).

[58] <www.cabinet.leicester.gov.uk/mgCommitteeDetails.aspx?ID=728> (Accessed 5/12/2016).

[59] <www.leicester.gov.uk/media/180392/leicester-health-and-wellbeing-survey-2015.pdf> (Accessed 5/12/2106).

[60] Health and Social Care Act 2012 s 195 (3) (emphasis added).

[61] Equality Act 2010 s 149.

[62] Equality Act 2006 s 20–24.

such notices is required to provide an Action Plan within 6 weeks and the Commission can apply to the court during the subsequent 5 years if that person fails to comply. When found guilty of such a failure, the offender is liable to a fine.

However, the Commission has had limited involvement with healthcare and unequal treatment related to protected characteristics. One of the few examples that has been reported was the formal agreement it made with NHS Tayside.[63] Its purpose was to ensure that all deaf patients would have their communication needs met. It arose from the fact that a deaf patient spent 6 days in Perth Royal Infirmary without any access to a signer. South Asian patients with inflammatory bowel disease find themselves in a comparable situation in many NHS Trusts. Clearly this discrepancy could also be the basis for an Unlawful Act Notice and a subsequent Action Plan. The advantage of an Action Plan would be its local nature and so able to deal with specific Trusts where unequal treatment has been documented.[64]

Human Rights Act 1998:

Prior to the Human Rights Act 1998 there was a general view that the role of the courts was to ensure that administrative actions were reasonable. In *R v Central Birmingham Health Authority ex parte Collier* Lord Brown said, 'the courts of this country cannot arrange the list in the hospital (. . .) and should not be asked to intervene.'[65]

However, a number of articles within the Human Rights Act 1998 are relevant to healthcare and when considering the delivery of medical care Elizabeth Wicks noted that:

> rights-based arguments are now, for the first time, a legal ground for judicial review of public authorities, rather than merely a moral influence. The perceived rights of patients will not always be compatible with medical paternalism, nor with legal acquiescence in it.[66]

Support for this optimism came with the creation of the Human Rights in Healthcare Program. This was a response to the fact that more than 70% of NHS organisations were poor on human rights issues.[67] However, in 2013 its activities were put on hold due to lack of funding.[68] Despite this, in 2016 the Equality and Human Rights Commission published its statutory five yearly report which acknowledged that, 'Some migrant communities suffer worse access to health than others (. . . . .) This could be impacted by institutional racism within the NHS.'[69]

Since the Act became law there have been very few cases concerning access to NHS treatment by any community.[70] Under Article 2 the state has a duty to protect the right to life.[71] Inflammatory bowel disease is associated with increased mortality within the

[63] *Section 23 Agreement between The Equality and Human Rights Commission and Tayside Health Board This Agreement dated 7 October 2014* <www.nhstaysidecdn.scot.nhs.uk> (Accessed 11/4/2017).

[64] <www.equalityhumanrights.com/en/legal-casework/enforcement-work> (Accessed 10/12/2016).

[65] *R v Central Birmingham Health Authority ex parte Collier* (1988) unreported through Newdick (1993).

[66] Elizabeth Wicks, 'The implications of the Human Rights Act 1998 – prioritising consent' in John Tingle, Charles Foster and Kay Wheat (eds) *Regulating Healthcare Quality. Legal and Professional Issues* (Butterworth Heinemann 2004) 107.

[67] L Dyer, 'A review of the impact of the Human Rights in Healthcare Programme in England and Wales' (2015) 17 *Health and Human Rights* 111.

[68] <www.humanrightsinhealthcare.nhs.uk/About-Us/default.aspx> (Accessed 11/12/2016).

[69] Equality and Human Rights Commission, *Healing a Divided Britain: the need for a comprehensive race equality strategy* (2016) <www.equalityhumanrights.com/en/publication-download/healing-divided-britain-need-comprehensive-race-equality-strategy> (Accessed 9/11/2016).

[70] Elizabeth Haggett, 'The Human Rights Act and Access to NHS Treatments and Services: A practical Guide' The Constitution Unit, School of Public Policy, UCL (2001) <www.ucl.ac.uk/political-science/publications/unit-publications/78.pdf>.

[71] Human Rights Act 1998, sch 1.

NHS, which is an agent of the state.[72] The NHS was confirmed as an agent of the state in *Cassidy v Ministry of Health* when the Ministry of Health was held vicariously liable for its employees.[73] In *Erikson v Italy*, which concerned the death of a woman, the Court found that, 'the deprivation of life was not the result of the use of lethal force by agents of the State, but where agents of the State potentially bear responsibility for loss of life.'[74] However, this particular case was not admissible as the state had held an appropriate investigation and the plaintiff was able to bring a case in negligence against the hospital. In 2008 in *Savage v South Essex Partnership NHS Foundation Trust* the House of Lords confirmed that a Health Authority could be held liable under Article 2.[75] In *Powell v United Kingdom* the European Court of Human Rights confirmed the responsibilities of NHS organisations to protect life.[76] It found 'that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2.'[77] Therefore, an individual with inflammatory bowel disease or, if deceased, his relative, could bring an action against the relevant NHS Trust.

A failure to provide potentially life-saving management and treatment, such as regular colonoscopic surveillance and biologic therapy, would probably fall within the ambit of Article 2, as no official investigations have been conducted into the disparate outcomes for various ethnic communities. Any suggestion that it might be a disproportionate burden may not be applicable in this case.[78] Why would the provision of care and treatment to South Asian patients be out of proportion to that given to White English patients in the same Trust? Indeed in the case of inflammatory bowel disease South Asian patients receive less care and treatment.[79]

Similarly, it could be argued that Article 3[80] could provide grounds for challenging the allocation of medical resources, but it would be necessary to demonstrate that failure to provide appropriate care to South Asian patients with inflammatory bowel disease resulted in inhuman or degraded suffering. Faecal incontinence occurs amongst a quarter of South Asian patients with inflammatory bowel disease resulting in impaired quality of life.[81] A survey of 10,000 members of Crohn's and Colitis UK described the symptom as 'degrading and humiliating for most people.'[82] Though not specifically included in the Act,[83] Article 13 of the European Convention on Human Rights could give patients of South Asian origin the right to an effective remedy from the UK government and its agent, the NHS, if they were able to demonstrate that the suffering was extreme as in *Valentin Câmpeanu v. Romania*.[84]

[72] C Canavan, KR Abrams, B Hawthorne and JF Mayberry, 'Long-term prognosis in Crohn's disease: An epidemiological study of patients diagnosed more than twenty years ago in Cardiff' (2007) 25 *Alimentary Pharmacology & Therapeutics* 69; TP Chu, GW Moran and TR Card, 'The pattern of underlying cause of death in patients with inflammatory bowel disease in England: a record linkage study' (2016) *Journal of Crohn's and Colitis* 2016 Oct 25. Pii:jjw192 [Epub ahead of print].

[73] *Cassidy v Ministry of Health* [1951]2KB 343, [151] 1All ER 574.

[74] *Erikson v Italy* App no. 37900/97 (ECtHR, 26.10.99).

[75] *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74.

[76] *Powell v United Kingdom* (2000) 30 EHHR CD 362.

[77] *Ibid.*

[78] *Osman v United Kingdom* (2000) 29 EHRR 245.

[79] Farrukh (n 2); Farrukh (n 7).

[80] Human Rights Act 1998, sch 1.

[81] D Subsasinghe, NM Navarathna and DN Samarasekera, 'Fecal incontinence and health related quality of life in inflammatory bowel disease patients: Findings from a tertiary care center in South Asia' (2016) 6 *World Journal of Gastrointestinal Pharmacology & Therapeutics* 447.

[82] L Dibley and C Norton 'Experiences of fecal incontinence in people with inflammatory bowel disease: self-reported experiences amongst a community sample' (2013) 19 *Inflammatory Bowel Disease* 1450.

[83] Human Rights Act 1998.

[84] *Centre For Legal Resources On Behalf of Valentin Câmpeanu v. Romania* App no 47848/08 (ECtHR, 17 July 2014).

Under Article 6 everyone is entitled, 'In the determination of his civil rights . . . to a fair and public hearing within a reasonable time by an independent and impartial tribunal.'[85] Based on Articles 2 and 3,[86] which are absolute rights, there would appear to be sound grounds for any South Asian patient to seek either judicial review of his management or a trial. In either case this would bring to the fore the needs of other patients of a similar ethnic background and the potential need for the NHS to provide both a local and national remedy. The only question is whether the court would consider medical treatment a civil right.

Claims linked to Article 8[87] are conditional and relate to the right to a private and family life. In practice this includes moral and physical integrity.[88] In *Otgon v Republic of Moldova*[89] the plaintiff was awarded additional damages because of the dysentery she developed after drinking contaminated water from a state-owned facility. The Court found that Mrs. Otgon's rights under Article 8 had been violated as she, 'had sustained a certain degree of mental and physical suffering as she had been kept in hospital for two weeks.'[90] Inflammatory bowel disease can adversely affect a range of aspects of family life.[91] The discharge of South Asian patients from regular hospital follow-up may worsen these issues and so bring such actions of some NHS Trusts within the scope of Article 8[92] violation.

Article 14[93] ensures the right to enjoy the other rights embodied within the Convention without discrimination. There is clear evidence that in some Trusts there is direct discrimination in the provision of care in inflammatory bowel disease. In some cases, this may be due to the direct actions of individual clinicians. 'There were consultants who did not see patients from the South Asian community who attended their clinics, but rather they were seen by junior members of the teams.'[94] Clearly there would be legal liability on the part of NHS Trusts and their agents, the consultants, where this occurred. In addition, to this specific study a parliamentary report commissioned from ClearView Research found over 60% of Black people in the UK did not believe their health was as equally protected by the NHS compared to white people.[95] In a separate prospective study of ethnic minority communities, almost 21% of patients reported that they experienced racial discrimination[96]. Indeed, there is a history of individual doctors being suspended[97] and struck off[98] because of racial abuse, although cases usually refer to issues concerning their colleagues.

[85] Human Rights Act 1998, sch 1.

[86] *Ibid.*

[87] *Ibid.*

[88] Home Office *Human Rights Claims on Medical Grounds* (2014) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/488179/Human_rights_on_med_grounds_v6.0_EXT_clean.pdf> (Accessed 13/12/2016).

[89] *Otgon v Republic of Moldova* App no 22743/07 (ECtHR 25 October 2016).

[90] *Ibid* 2.

[91] G Li, J Ren, G Wang, G Gu, H Ren, J Chen, Q Wu, X Wu, N Anjum, K Guo, R Li, Y Li, S Liu, Z Hong and J Li, 'Impact of Crohn's disease on marital quality of life: a preliminary cross-sectional study' (2015) 9 *Journal of Crohn's and Colitis* 873.

[92] Human Rights Act 1998, sch 1.

[93] *Ibid.*

[94] Farrukh (n 7) 33.

[95] https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/559/55905.htm (Accessed 22/7/2021).

[96] Hackett, R.A., Ronaldson, A., Bhui, K. *et al.* Racial discrimination and health: a prospective study of ethnic minorities in the United Kingdom. *BMC Public Health* **20,** 1652 (2020). https://doi.org/10.1186/s12889-020–09792-1.

[97] https://www.echo-news.co.uk/news/local_news/4220815.doctor-suspended-for-racist-slur-on-colleagues/ Accessed 22/7/2021.

[98] *BMJ* 2015;351:h6880.

ROLE OF INTERNATIONAL TREATIES

Although international treaties do not generally create rights within domestic law, they set a standard by which a country's performance can be assessed.

In 1976 the UK ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) and so took on the obligations contained within it under international law. Article 12 states, 'The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'[99] As part of this commitment states are required to ensure, 'creation of conditions which would assure to all medical service and medical attention in the event of sickness.'[100] The CESCR clarified that violations of the ICESCR include 'insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to health by individuals or groups, particularly the vulnerable or marginalized; the failure to monitor the realization of the right to health at the national level . . . [and] the failure to take measures to reduce the inequitable distribution of health facilities, goods and services.'[101] This right is also supported by Article 5 e (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination which identifies people's equal rights 'to public health, medical care,'[102] amongst other services. This convention was ratified by the UK in 1969. However, as Chapman reported violations are common throughout the signatory states and there is no effective enforcement policy to address such breaches.[103] Indeed the impact of the Covenant is at best aspirational and the effect on substantive measures of well-being is yet to be assessed and so its value in cases of disparate care for underserved minority communities is extremely limited.[104]

The limited impact of international treaties on UK domestic law has been acknowledged by Parliament.[105] This failure to meet treaty obligations is well summarised in *Healing a Divided Britain; the need for a comprehensive race equality strategy.*[106] Despite recognising a broad range of conditions in which minorities failed to achieve equitable healthcare and accepting institutional racism within the NHS might be responsible, it failed to provide a clear strategy to resolve this problem. EHRC's main hope lay with The National Health Inclusion Board. Its purpose is to play, 'a critical role in leading the Inclusion Health programme by providing expertise, focus and momentum to the agenda, and champions the needs of those most vulnerable to poor health outcomes.'[107] The board identified four groups as its target: the homeless, gypsies travellers and Roma,

[99] International Covenant on Economic, Social and Cultural Rights (ICESCR) <www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>(Accessed 9/11/2016).

[100] *Ibid.*

[101] Office of the United Nations High Commissioner for Human Rights. Committee on Economic, Social, and Cultural Rights. General comments. No. 14. The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social, and Cultural Rights). E/C.12/2000/4 (Accessed 22/7/2021).

[102] International Convention on the Elimination of All Forms of Racial Discrimination <www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> (Accessed 9/11/2016).

[103] AR Chapman 'A "violations approach" for monitoring the International Covenant on Economic, Cultural and Social Rights.'(1996) 18 *Human Rights Quarterly* 23.

[104] WM Cole 'Strong Walk and Cheap Talk: The effect of the International Covenant of Economic, Social, and Cultural Rights on policies and practices.' (2013) *Social and Economic Rights in Law and Practice https://www.researchgate.net/profile/Wade-Cole/publication/265737823_Strong_Walk_and_Cheap_Talk_The_Effect_of_the_International_Covenant_of_Economic_Social_and_Cultural_Rights_on_Policies_and_Practices/links/59b1aa020f7e9b37434abf6a/Strong-Walk-and-Cheap-Talk-The-Effect-of-the-International-Covenant-of-Economic-Social-and-Cultural-Rights-on-Policies-and-Practices.pdf.*

[105] House of Lords House of Commons Joint Committee on Human Rights, *The International Covenant on Economic Social and Cultural Rights*HL Paper 183 HC1188 (The Stationery Office 2004).

[106] Equality and Human Rights Commission (n 59).

[107] National Health Inclusion Board <www.gov.uk/government/groups/national-inclusion-health-board#role-of-the-group> (Accessed 9/11/2016).

sex workers and vulnerable migrants.[108] However, it has not published any minutes since 2013 and it seems that such international commitments give rise to no legal liability.

CONCLUSION

In 1995 in *R v. Cambridgeshire Health Authority* Sir Thomas Bingham MR said, 'Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make.'[109] Therefore, courts have been hesitant in making interventions in medical decisions. As a result, the most practical remedy for aggrieved patients has been to sue under the tort of negligence. This requires patients to know that their treatment has been defective. The fact that ethnic minority communities have not cried aloud about inequitable care suggests that they may not even be aware of it. However, it is clear from the Human Rights Act 1998 that an equitable health service must give access to patients on the basis of need and this should be independent of ethnicity. Its Articles introduced clear legal liability in cases where patients' rights were not upheld. Despite this, the EHRC has had minimal involvement when it comes to upholding these rights on behalf of patients, especially those from ethnic minorities. The issue maybe the difficulty in using statistical calculations which estimate how many people should have been treated compared to the actual number treated. Such hypothetical evidence could be argued to lack causal connection and 'converts raw data into refined statements of probability.'[110] However, many judicial outcomes are based on the balance of such probabilities. Communities need organisations such as CQC and EHRC to be pro-active, together with changes in policy within the Department of Health which clearly define who is responsible for deficiencies in equitable care and so pointing towards where legal liability lies.

[108] Inclusion Health *Commissioning Inclusive Services* <www.gov.uk/government/uploads/system/uploads/attachment_data/file/287787/JSNA_and_JHWS_guide_-_FINAL.pdf> (Accessed 9/11/2016).

[109] *R v. Cambridgeshire Health Authority ex parte B* [1995] 2All ER 129.

[110] R Schmalbeck, 'The trouble with statistical evidence' (1986) 49 *Law and Contemporary Problems* 221.

CRIMINAL PUNISHMENT AND DESERT-BASED REPARATION: AN EMERGENT JUSTICE PARADIGM FOR THE 2020s?

*DAVID J. CORNWELL**

ABSTRACT

The penal process of England and Wales remains in a crisis reaching back over almost thirty years in extent. Many prisons are overcrowded; rates of post-sentence recidivism are high; continued lack of governmental restraint exists over the use of short-term sentences rather than of non-custodial alternatives; these features have combined to make England and Wales the epicentre of incarceration within Western Europe, and its prisons widely unfit for purpose because flawed or outmoded principles and purposes of punishment have been retained to the confusion of the penal process.

This Article places a focus on Desert and Reparation in an entirely different context, and as a substantive justification for criminal punishment in their own right. It offers a 'Consequentialist' or teleological ethical perspective on the nature of true Desert within criminal justice without denial of the 'Deontological' claim as to the duty or right of the state to punish using prescribed reparative sanctions in pursuit of the 'general good'.

INTRODUCTION

Criminal justice legislation in England and Wales since the mid-1990s has been dominated by the promotion of retributive measures by successive governments in pursuit of crime control rather than of crime reduction. The result of these policies, directed predominantly against seriously violent and sexual offenders, has been a considerable increase in the average daily prison population,[1] the overcrowding of prisons, and an alarming extent of violent, drug-related and self-harming behaviour within them.[2] This situation has been compounded by loss of confidence within the judiciary in the punitive effectiveness of non-custodial sanctions, and by an increase and costly corresponding resort to the use of short- and medium-term custodial sentences *in lieu* of such sanctions.[3]

Figure 1 (*Opposite*) indicates the traditionally accepted principles of criminal punishment in England and Wales, and in other jurisdictions that retain the British pattern of criminal justice administration. If dependence upon deterrence, reform and rehabilitation were to be abandoned as 'cardinal' principles of punishment, then only retribution and desert would remain with the former dependent upon the latter for its justification

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[1] From a level of some 46,000 in 1994 to one of more than 83,000 in 2010, but which subsequently reduced to around 79,500 in late 2020 – see: Ministry of Justice, *Story of the Prison Population 1993–2016*, (2016a), London: Ministry of Justice, and Prison Reform Trust, *Bromley Briefings Prisons Factfile (Winter 2021)*, London, PRT, at pp.12–17.

[2] As of 26th February 2021 the prison population stood at 78,015, a decrease of 5,853 on the same month the year previously. This decrease was mainly due to the onset of the Covid-19 pandemic, the use of End of Custody Temporary Release (ECTR), and the considerable backlog of cases being heard in the courts during 2020–21 (around 40,000 cases in the Crown Courts, and 400,000 cases in Magistrates' Courts by September 2020) See: PRT 2021 *op. cit.Ibid.*

[3] This development has, however, to be viewed against the high rates and cost of reconvictions within twelve months of release from short-term custodial sentences which was estimated in 2016 to cost the government up to £15 billion *per annum* (see: Ministry of Justice, *Prison Safety and Reform*, [White Paper], Cm 9350, (2016b) London: Ministry of Justice, at p.5.

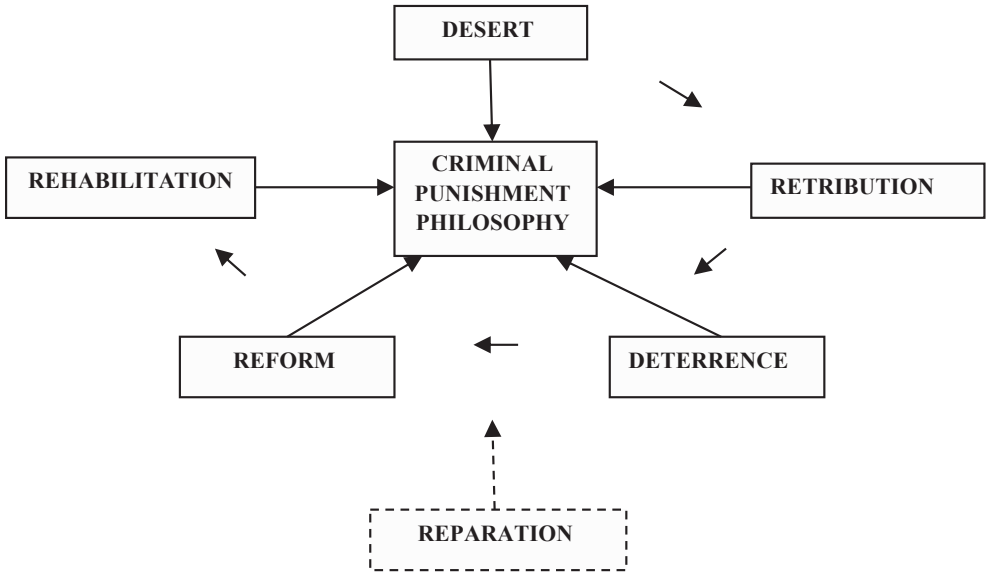

Figure 1 Traditional Principles of Criminal Punishment Philosophy *Circa* 2021 and the Marginalisation of Reparation

if A.C. Ewing's widely accepted (1929) analysis was to be upheld.[4] This is very much the situation pertaining within criminal justice in England and Wales since the mid-1990s.

In this article an attempt is made to distance the discussion away from that as to whether retribution and restorative reparation are reconcilable concepts – a well-trodden if somewhat unyielding issue of debate (cf. Zedner (1974);[5] Duff (2003);[6] Cunneen and Hoyle (2010)[7] and others), towards that concerning the deservedness of reparation as a viable ingredient principle of a criminal punishment philosophy for the 2020s and beyond.

The context of this article is to accept that the doctrine of deterrence is indeed deeply flawed, that reform is an archaic construct, that rehabilitation in a contemporary punitive context is, as Pat Carlen (2012 *passim*) insisted, at the least an equivocal concept,[8] but that this situation is far from being irredeemable if reparative justice were to be accepted as a purpose of criminal punishment. It will further be contended that reparation as a principle of punishment has an unquestionable desert-base within a *consequentially* conceived interpretation of criminal justice, but yet is not entirely inconsistent with *deontological* ethical explanations.[9] In his elegant account of the

[4] Here, it will be recalled that in Ewing's interpretation, ' its (punishment's) primary justification was to be found not in its consequences but simply in the fact that it was deserved as the penalty for a wrong act committed in the past' (*Ibid.*1). As a possible alternative explanation, Ewing suggested that 'it was only by reference to its consequences that it could be justified and its amount fixed' (*Ibid.*). His stated purpose for his book was to attempt to reconcile these two alternatives (1929:1).

[5] See: L. Zedner, 'Reparation and Retribution: Are They Reconcilable?' (1974 in *Modern Law Review*, 57(2), at pp.228–250).

[6] See: R.A. Duff, 'Restoration and Retribution', (2003 in A von Hirsch *et al.*, (Eds.) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms*, Oxford: Hart Publishing Limited, at pp.1–43).

[7] See: C. Cunneen and C. Hoyle, *Debating Restorative Justice*, (2010, Oxford: Hart Publishing Limited).

[8] Particularly within the custodial sector of correctional practices involving imprisonment, see: P. Carlen, *Against Rehabilitation: For Reparative Justice*, [22nd Eve Saville Lecture], (2012), London: Centre for Crime and Justice Studies, (November).

[9] By way of clarification here it should be noted that *deontological* explanations follow the rule-driven insistence that punishment should be devoted primarily to the retrospective requital of past wrong-doing as a moral duty, whereas *consequentialist* explanations are more concerned with the moral 'rightness' of sanctions prospectively devoted to the inculcation law-abiding values, future conduct and the wellbeing of society.

place and purpose of desert in criminal justice theory and practice, Ted Honderich in *Punishment: The Supposed Justifications* (1976) described a range of nine constructions of the justification of desert and dismissed most of them as either inadequate, fallacious or morally objectionable.[10] It is also of interest that Ewing (1929 *op. cit.*) fared little better in his extensive survey of punishment philosophy beyond the intuitive insistence within retributive theory that punishment is deserved and justified as a matter of moral rectitude in requital of an offence committed in the past. It should also be added that a number of other commentators on this aspect of criminal justice have struggled to reconcile the retrospective and the prospective purposes of distributive, corrective and compensatory justice to a convincingly satisfactory extent (see: e.g. Hoekema, (1986)[11]; Ten, (1987)[12]; von Hirsch, (1993)[13]; all cited in Cornwell, (2016)[14].

It may be questioned why such reconciliation is necessary or desirable. After all, what has been done amiss cannot be undone, and if punishment is deserved to requite the harm, then it should be, insofar as is possible, no greater in extent than is in some measure proportionate to the harm occasioned – such is to suggest either 'corrective' (i.e. retributive) or 'compensatory' in nature. Herein, it must be claimed, resides the paradox of the punitive process insofar as two quite separate but competing desert bases (or claims) have to be simultaneously satisfied: the one in relation to the offender in retrospective requital of the harm, and the other prospective in relation to the victim in compensation (or reparation) for the harm. This situation leads to consideration of a further question as to whether (or perhaps even if) the satisfaction of either desert base or claim alone can reasonably be held to provide adequate satisfaction of the other.[15]

Consideration of this situation necessarily brings the need to determine from a utilitarian perspective the issue of moral precedence in terms of distributive justice that it raises in relation to the 'fairness' of the distribution of rewards and burdens (i.e. responsibilities) within societies. Within such a concept it becomes reasonable to suggest that it is morally right that citizens who live law-abiding lives 'deserve' the support and protection of the state from those who commit legally proscribed offences against them. Such a proposition lies at the heart of Social Contract Theory as expounded by John Rawls (1971)[16] and many others before him dating back through John Locke (1632–1704) and Thomas Hobbes (1588–1679) to Socrates and Plato in ancient times.

In another sense, however, and from a deontological perspective, can the moral duty to uphold the law through sanctions be considered to be super-ordinate to that of compensating innocent victims of crime for their suffering from violations? Or is it possible that both can be accommodated? In the section which follows this possibility is examined.

[10] See: T. Honderich, *Punishment: The Supposed Justifications*, (1976), Harmondsworth: Peregrine Books, at pp.26–45.

[11] See: D. Hoekema, *Rights and Wrongs: Coercion, Punishment and the State*, (1986), Selinsgrove: Susquehanna University Press.

[12] See: C.L. Ten, *Crime, Guilt and Punishment*, (1987), Oxford: Clarendon Press.

[13] See: A. von Hirsch, *Censure and Sanctions*, (1993), Oxford: Oxford University Press.

[14] See: D.J. Cornwell, *Desert in a Reparative Frame: Re-Defining Contemporary Criminal Justice*, (2016), Den Haag, Netherlands: Eleven International Publishing, at p.27. One notable exception to this observation lies in the work of John Rawlsin his paper 'Two Concepts of Rules' originally published in (1955), *Philosophical Review, vol. LXIV,* and re-printed in H.B. Acton (ed.), (1969), *The Philosophy of Punishment: A Collection of Papers* at pp.105–114.

[15] Or stated another way, perhaps, whether, for example, a retributive sentence to imprisonment or other punitive sanction in the absence of reparation or compensation by the offender can be held to satisfy the legitimate desert claim of the victim of the offence.

[16] See: J. Rawls, *A Theory of Justice*, (1971), Harvard University Press.

DESERT IN A REPARATIVE CONTEXT AS A FUTURE CORRELATIONAL PARADIGM

The existing situation of the criminal justice process in England and Wales is not the most promising scenario for a futuristic view of what possibilities there might be for its reform. Like a stagnant lake with its outflow blocked by a traditional resistance[17] towards progressive initiatives to release its potential, it has become grid-locked in a perceived governmental need to preserve the *status quo*.

It was unfortunate that the New Labour government abandoned its apparent interest in Restorative Justice (RJ) in the early 2000s, and that the Conservative government opted out (by derogation) of implementation of the European Commission's requirement for member states to incorporate RJ principles into domestic legislation by 2014.[18] This was unfortunate because much of value could have been learned from such a requirement, but instead allowed the United Kingdom to 'cherry-pick' the concept of RJ for its various attractive initiatives with media appeal, but without any commitment to their implementation beyond support for victims through limited funding of private sector and charitable involvement.

RJ had many other objectives besides support for victims, perceiving the potential of Victim: Offender Mediation (VOM) and reparation, Family Group Conferencing (FGC) and Circle Mediation (CM) as means of diverting many low-level offenders from formal court processes and short-term imprisonment, and of increasing community participation in the criminal justice process.[19]

Returning to the concept of desert, in marginalising RJ away from the mainstream justice process the opportunity was also missed to create a revised sanctioning algebra that is not predominantly grounded in the retributive motivation. Following Celello (2015)[20], this should consist in two logical propositions as follows:

O deserves P by reason of GC

Where O is an Offender, P the extent of Punishment, and GC the Gravity of the Crime(s) convicted and the Desert Base.

and,

V deserves R by reason of GH

Where V is the victim, R the extent of Reparation, and GH the Gravity of the Harm occasioned by the Crime(s) convicted and the Desert Base.

Here it will be noted that in the first proposition the requirement for punishment or sanction is not in any sense disputed providing that it is contingent upon, and not disproportionate to, the seriousness of the offence(s) committed once aggravating and/or mitigating circumstances have been considered. However, in the second proposition it becomes implicit that state law has been infracted (*per* conviction), but that the harm

[17] Both politically and institutionally embedded in an ever present fear of adverse criticism from the mass media, electoral constituencies, and from within its own professional structures.

[18] See: European Commission, *Rights of the Victim*, (2013) Brussels: European Commission. And see also: European Union, *Council Framework Decision of 15th March on the Standing of Victims of Crime In Criminal Proceeding,* (2001), Brussels: European Commission.

[19] See: D.J. Cornwell, (2016 *op. cit.*) at Chapter 11, pp.119–128.

[20] Here see an undated entry cited as: P. Celello, 'Desert', in *Internet Encyclopaedia of Philosophy*, and the entry for this analysis is available at: www.iep.utm.Edu/desert [Accessed 06/08/2015].

caused by the offence attaches specifically to the innocent victim(s) of the offence who deserve(s) reparation, rather than to the state which has suffered no material harm.

The justice paradigm indicated here may be seen to have many advantages over the traditionally accepted retributive model presently espoused by judiciaries in England and Wales which has proved so ineffective in reducing both crime and recidivism. Its primary virtue is that it is simply stated, direct, and easily understood in serving the interests of equity and reasonableness or rationality. The model also implies a demand that offenders accept guilt and take responsibility for their offences, and make reparation to those harmed by their offending – a prospective motivation entirely neglected by contemporary retributive justice.

It will also be evident that the form of justice advanced in such a paradigm excludes punitive 'premiums' intuitively supposed to serve the purposes of general or specific (individual) deterrence, but which are empirically incapable of verification (cf. Gibbs, 1975[21]; Beyleveld, 1979a. and b.[22]; Bean, 1981 *op. cit.*[23]; Paternoster, 2010[24]; among others), and therefore unjust. It does, however, have a restorative purpose insofar as offenders who comply with its requirements to accept responsibility and make reparation have a nominal right to return to full citizenship status having done so. This could prove to be a decisive factor in dealing with the offences of many thousands of non-violent and relatively less serious offenders sentenced to short-term custody in present circumstances.[25]

On the obverse side of this equation lies the fact that to deal effectively with such offenders within the community would call for a major infrastructural development programme of multi-purpose Community Correctional Centres (CCCs) throughout the regions of England and Wales at considerable capital investment cost. Such Centres would need to be staffed and equipped to deliver offender supervision and counselling, and programmes to reduce addiction and substance abuse in addition to remedial education and basic skills training for future employment under the auspices of the Probation Service.[26] The capital cost would, however, be considerably less than that of continuing to build and maintain additional large prisons over a lifetime of their use, and possibly unnecessary if the existing prison population could be significantly reduced.[27] It would also avoid the criminalising effect of unnecessarily exposing less serious offenders to the experience of prison custody which has been proved to result in high rates of reconviction within short periods following release from custody, or recalls to prison due to non-compliance with licence conditions.[28]

Insofar as mediated reparation is concerned, two quite separate issues have to be considered here. The first concerns the efficacy of sanctions involving offender: victim

[21] See*:* J.P. Gibbs*, Crime, Punishment and Deterrence,* (1975), New York: Elsevier Publishing Co. Inc..

[22] See: D. Beyleveld, ' Deterrence Research as a Basis for Deterrence Policies', (1979a), in *Howard Journal of Criminal Justice*, vol.18, at pp.135–149; and, 'Identifying, Explaining and Predicting Deterrence', (1979b), in *British Journal of Criminology,* vol.19, at pp.205–224.

[23] See: P. Bean, 1981, *op. cit. passim*.

[24] See: R. Paternoster, 'How much Do We Really Know About Deterrence Research?' (2010), in *Journal of Criminal Law and Criminology*, Volume 100, Issue 3, at pp.765–864.

[25] In the year to June 2020, 47,000 people were sent to prison in England and Wales to serve a sentence. The majority (65 *per cent.*) had committed a non-violent offence, and almost half (47 *per cent.* Were sentenced to serve six months or less (effectively three months or less in custody) (2021), Prison Reform Trust, *op. cit.*(Winter) at p.10.

[26] Possibly with assistance from HM Prison Service in terms of supervision of the security and control aspects of CCCs once in operation.

[27] By stricter controls over the use of short-term (less than two year) custodial sentences, re-calls to imprisonment, and the removal of un-convicted remand prisoners to separate custody under the control of HM Courts and Tribunals Service.

[28] Here, see (2021) Prison Reform Trust and the footnotes thereto indicating the sources of Ministry of Justice statistical records for 2020–21 (*op.cit.*:10–11). On 30 September 2020 there were 9,250 people in prison recalled from licence in the community.

reparation within the community as an alternative to custodial punishment, and the second the potential for reparative activity to be incorporated within prison regimes. These issues are discussed (albeit briefly) in the following text.

Reparation as a Community Sanction

Dictionary definitions of the term 'reparation' differ marginally, though most agree that it subsumes the notions of 'repairing' wrongs or harm, or of 'making amends' which may include forms of compensation whether financial or through activity to make good damage caused by offences committed. Mediation is the means by which agreement between the parties to offences (normally offenders and crime victims) can be resolved to the satisfaction of both, and is conducted by professionally trained persons impartially independent of the parties concerned. Hence, victim: offender mediation (VOM) has become the most widely used medium for the resolution of offences, though in matters of criminal offending it remains for the courts to endorse the resolution, and determine the nature and extent of any reparation deemed to be appropriate.[29]

A considerable volume of research conducted in America during the 1990s (cf. Umbreit *et al.*, 2005: 273–4)[30] indicated that satisfaction rates with the outcomes of VOM resolutions in a number of different States using face-to-face mediation were consistently high (80–90 *per cent*) among both victims and offenders. The satisfaction rates in two experimental studies involving 'shuttle-mediation'[31] in England and Wales were, however, of a slightly lower order (Dignan, 1990; Umbreit & Roberts, 1996; cited in Umbreit *et al.,* (2005 op. cit.: 273–4 and at fn.99 thereto). In Western Europe however, a major study conducted by Dünkel *et al.* (2016)[32] yielded equivocal results and a widespread decline of governmental interest and participation in restorative interventions during the first two decades of this century in many countries surveyed.

The failure of the successive governments in England and Wales since 2003 to endorse and include RJ practices within mainstream criminal justice beyond the limited financing of private sector operated victim support organisations and charities has largely prevented the development of reparation as a viable sanction other than in the youth justice arena. This much stated, the Community Service Order (CSO) first introduced in the Criminal Justice Act 1972, re-named the Community Punishment Order in 2000, and subsequently termed 'Community Pay-Back' in the Criminal Justice Act 2003, bore some resemblance to the notion of 'reparation' within criminal justice,[33] but was not specified as being, in any direct or indirect sense, related to the potential development of RJ practices.

[29] In respect of financial reparation (or compensation) there remains a difficulty in England and Wales insofar as at the present time the criminal courts have limited powers to make Reparation Orders other than in the Youth Court in favour either to victims directly or to indirectly communities (e.g. to undertake remedial work). Compensation for injuries caused by offences has to be pursued either in the Civil Courts or by application to the Criminal Injuries Compensation Authority (CICA) – see: Gibson, B. (2009) *The A to Z of Criminal Justice*, Hook, Hampshire: Waterside Press at pp.42 and 142) for further explanation.

[30] See: M.S. Umbreit, B.Vos, R.B. Coates and E. Lightfoot, 'Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls' (2005) in *Marquette Law Review*, Volume 89, Number 2, Winter, at pp.251–304.

[31] The term 'shuttle-mediation' relates to situations in which victims and offenders do not meet face-to-face, but the Mediator meets with both parties and relates their responses back and forth between them.

[32] See: F. Dünkel, F. Grzywa-Holten J. and Horsfield P.(Eds.), *Restorative Justice and Mediation in Penal Matters – A Stocktaking of Legal Issues, Implementation Strategies and Outcomes in 36 European Countries*, (2016) London: Restorative Justice/Taylor & Francis.

[33] The Community Punishment Order (CPO) could also be made in conjunction with a Suspended Sentence of Imprisonment requiring the offender to complete between 40 and 300 hours of 'Unpaid Work' within the community. It was, however, designed as a form of punishment rather than of reparation in the sense intended within the principles or practices of Restorative Justice to which it never referred.

Reparation in the Custodial Setting

Although RJ practices are perceived by many to be part of, or allied with, a wider disputes resolution process with educational, industrial and other contexts, the particular nature of conflict resolution within the criminal justice process has somewhat different implications in both theoretical and practical terms since it concerns the imposition and extent of punitive sanctions. Here, it becomes necessary to differentiate issues and processes of conflict resolution in prisons from those involving reparative activity *within* communities designed to compensate crime victims either directly or indirectly. It is to the former dimension that this discussion applies.

Many inhabitants of prisons serving medium (over four and up to ten years) and long-term (including life) sentences reach a stage of reflection on the harm caused by their offences and those whom they have caused distress or other serious physical or psychological damage. Given the opportunity and the means of doing so, they would be amenable to undertaking some extent of reparative action to make amends for this harm either to their victims directly if such were acceptable, or to crime victims more generally in other circumstances.[34]

In a more congenial situation of the prisons of England and Wales it is possible to envisage a number of smaller prisons devoted specifically to the provision of reparative regimes designed to generate income from marketable production for the purposes of victim compensation. Prisoners engaged in such employment might also (or alternatively) agree to a deduction from their prison wages to a central fund for victim compensation. Providing that these reparative prisons were of lower security status, inmates approaching the final stage of their sentences might be considered eligible for temporary daytime release to work within local communities on projects of social amenity under the supervision of regional Probation Services, returning each evening to the prison or to approved and supervised hostel-type accommodation – possibly within the perimeter of CCCs (see p.60 *supra*).

Whether or not offenders having accepted responsibility and made apology and reparation should be held to have established a subsidiary desert-claim to some extent of positive consideration (possibly **O deserves C by reason of R**) should remain an open question. However, if the making of reparation is to be encouraged, then it would seem to be appropriate that there should be some incentive to do so simply by virtue of the fact that it would be done voluntarily, and that under present circumstance within the criminal justice process there is neither requirement nor expectation that convicted offenders should do so.

THE REPARATIVE *VERSUS* TRADITIONAL JUSTICE RELATIONSHIP

The history of this equivocal relationship dates back to the early writings of Randy Barnett (1977)[35] and Howard Zehr (1990)[36] in which the concept of Restorative Justice (RJ) was proposed as a transformative alternative to the traditionally espoused and predominantly 'retributive' mode of justice prevalent in many democracies worldwide. This set RJ initially at odds with traditional justice – a situation subsequently revoked by Zehr (2002:13)[37] although that stance had become widely endorsed by many scholars

[34] For instance, if the offer of apology and reparation was declined by the victim(s) in the wish not to be further contacted or re-traumatised, or as part of the mediation process the Mediator concluded that such contact would be inadvisable or unwelcome for other reasons (such as ill-health, resulting physical damage, disability, etc.).

[35] See: R.E. Barnett, 'Restitution: 'A New Paradigm for Criminal Justice', (1977, in 87 *Ethics*), at pp. 279–301.

[36] See: H. Zehr, *Changing Lenses: A New Focus for Crime and Justice*, (1990/1995, Scottdale PA: Herald Press).

[37] See: H. Zehr, *The Little Book of Restorative Justice*, (2002, Intercourse PA: Good Books) at p.13 in which he noted 'Despite my earlier writing, I no longer see restoration as the polar opposite of retribution.'

who became interested in RJ during the interim years, and lingered on into the new millennium. Indeed, as Zehr subsequently noted:

> For example, philosopher of law Conrad Brunk has argued that on the theoretical or philosophical level, retribution and restoration are not the polar opposites that we often assume.[38] In fact, they have much in common. A primary goal of both retributive theory and restorative theory is to vindicate through reciprocity, by evening the score. Where they differ is in what each suggest will effectively right the balance. (Ibid.:58).

Early in the new decade a considerable body of academic writing on RJ emerged in North America, Western Europe, Australia and New Zealand in particular, and enthusiasm for a less formal and more victim inclusive mode of justice than the traditional court-centred justice process became widely evident. Governments also became involved in evaluating the merits of RJ although empirical studies were limited due to lack of investment funding, and hesitancy over committing opportunity and resources to assess its operational effectiveness in reducing crime and recidivism.

Between 2000 and 2005 member states of the European Union, prompted by the publication of the Council Framework Decision of 15th March 2001 on the *Standing of Victims of Crime in Criminal Proceedings,*[39] were required (under Articles 10 and 17) 'to put in place laws, regulations and administrative provisions' to promote the use of restorative justice in appropriate cases within their national law by March 2006. Though the United Kingdom had published a Victim's Charter in 1990,[40] revised in 1996,[41] response to the Council Decision was variable and partial across the EU. In the UK it did, however, result in the generation of a series of government publications relating to RJ and victims of crime and their treatment between 2001 and 2005.[42]

Enactment of the Criminal Justice Act 2003 – the culmination of a raft of increasingly punitive retributive sentencing provisions introduced by the New Labour administration since 1997 – effectively halted any speculation over the inclusion of RJ practices within the mainstream criminal justice process of England and Wales thereafter until the present time.[43] Although it did not altogether stem the flow of academic publications focused on reparative and restorative theory and practices within Western Europe, North America, Australia, New Zealand and other jurisdictions elsewhere, a revival of punitive sentencing policies became evident in many areas of the world as the millennium progressed and interest in RJ promotion and implementation decreased correspondingly.[44]

Here, it is of interest to note that in 2018 a group of Dutch legal scholars submitted a Legislative Proposal to Introduce Provisions Governing Restorative Justice Services into the Dutch Code of Criminal Procedure to the Minister of Legal Protection and the Permanent Commission for Justice and Security of the Lower Chamber of the Dutch

[38] See: C. Brunk, 'Restorative Justice and the Philosophical Theories of Criminal Punishment' in *The Spiritual Roots of Restorative Justice*, M.L. Hadley (ed.), (2001, Albany, NY: State University of New York Press) at pp.31–56.

[39] See: European Union, *Council Framework Decision of 15th March 2001*, [2001/220/JHA], Official Journal L 82,22.3.2001], (2001, Brussels: European Union).

[40] See: Home Office, *The Victim's Charter- A Statement of Rights for Victims of Crime*, (1990, London: Home Office) – now obsolete.

[41] See: Home Office, *Victim's Charter: A Statement of Standards for Victims of Crime*, (1996, London: Home Office).

[42] The most prominent of which were: *Victim Personal Statements*, Circular 35/2001, (2001: London: Home Office); *Restorative Justice: The Government's Strategy*, [Consultation Paper], (2003a, London: Home Office Communications Directorate); *A New Deal for Victims and Witnesses: National Strategy to Deliver Improved Services*, (2003b, London: Home Office); *Victims' Rights*, (2005, London: Office); *The Code of Practice for Victims of Crime*, (2005a, London: HMSO (October)); *Re-building Lives – Supporting Victims of Crime*, CM 6705, (2005b, London: HMSO (December)).

[43] See: D.J. Cornwell, *Prisons, Politics and Practices in England and Wales 1945–2020*, (2021, London: Palgrave Macmillan), at Chapters 4 and 5).

[44] This situation was particularly noticeable in The Netherlands, the USA, South Africa and Australia to date.

Parliament (Claessen *et al.*2018).[45] The submission was acknowledged, but failed to attract parliamentary support in the criminal justice policy climate of The Netherlands prevailing at the time of submission. Such events, and the situation more widely described above, were subsequently noted specifically in the work of Dünkel *et al.* (2015 *passim*) in their study of the implementation of RJ and mediation in 36 European countries.[46]

There were, of course, some notable exceptions to the generalisation outlined above. It is apparent, with hindsight, that the principal barrier to an accommodation between traditional and restorative agendas within criminal justice processes resides in devising the means of a satisfactory measure (or extent) of 'transferability' of cases between the one and the other.[47] Herein lies a problem in England and Wales within which the judiciary have historically proved to be very resistant to legislative measures by the Executive involving limitations on, or interference in, their discretion in trial and sentencing matters.[48] It seems, however, that as the 2000s progressed, initiatives to 'civilise' criminal justice in many jurisdictions worldwide would fail to overcome hardening governmental attitudes towards criminal offending and its punishment.[49] Indeed, in England and Wales from 2010 onwards, a period of severe fiscal retrenchment in the funding of public sector services precluded any major reforming initiatives within the criminal justice sector, and such went 'on hold' as the prison and probation services struggled to survive in considerably straitened circumstances.

This did not resolve the situation of crisis within both services that had engulfed them since the 1990s, but it made more urgent the search for means of alleviating it against a scenario in which the government had, since 2007 and the formation of the Ministry of Justice[50], committed itself to a major expansion of the penal estate and, subsequently, the out-sourcing of low and medium risk offender supervision from the Probation Service to the private sector – a hastily contrived and un-researched initiative that was doomed to failure.[51] Means had to be explored of 'doing justice better' even if to do so would involve yet another U-turn in penal policy formulation. It seemed just possible to the academic world that the dormant prescriptions of RJ, earlier consigned to the margins of criminal justice delivery, might hold the key to relief of the overloaded but damaged justice process. However, implicit in the adoption of restorative and reparative practices within the criminal justice process would be the inclusion of offender: victim mediation and reparation provisions where these were appropriate in both the non-custodial and possibly the custodial sectors of the justice process. It is to consideration of the implications of such a development that attention is turned later.

[45] See: J. Claessen, J. Blad, G. J. Slump, A. van Hoek, A. Wolthuis and T. de Roos, (2018, Oisterwijk NL: Wolf Legal Publishers).

[46] Here, see: F. Dünkel, J. Grzya-Holten and P. Horsefield (eds.), *Restorative Justice and Mediation in Penal Matters: A Stock-Taking of Legal Issues, Implementation Strategies and Outcomes in 36 European Countries*, (2015, Mönchen-Gladbach: Forum Verlag Godesberg. In Schriften zum Strafvollzug, Jugendstrafrecht und zur Kriminologie). A Review of the work is available by C. Rigoni, in *Restorative Justice: An International Journal*, VOL.4, NO.2, (2016, London: Routledge) at: pp.276–279, and also at: https://doi.org/10.1080/20504721.2016.1197539 [Accessed 30/09/2021].

[47] Here see: J. von Holderstein Holtermann, 'Outlining the Shadow of the Axe – On Restorative Justice and the Use of Trial and Punishment', (2009, *Criminal Law and Philosophy*, 3 (2)) at pp.187–207.

[48] See: B. Gibson, *The A to Z of Criminal Justice*, (2009, Hook, Hampshire, UK: Waterside Press), at p.93.

[49] This situation became apparent in many of the international essays included in the volume *Civilising Criminal Justice: An International Agenda for Penal Reform*, (2013: Hook, Hampshire: Waterside Press, *passim*).

[50] And adoption of the main recommendations of the Carter Report in December 2007 – see: Carter of Coles, Lord P., *Securing the Future: Proposals for the Efficient and Sustainable Use of Custody in England and Wales*, (2007, London: House of Lords) December.

[51] Through the creation of 21 regionally dispersed Community Rehabilitation Companies (CRCs) contracted out on five year contracts in the Offender Rehabilitation Act 2014 effective from February 2015. In July 2018, the (then) Justice Secretary David Gauke announced that the CRC contracts were to be terminated early in 2020 and progressively due to the widespread failure of the CRCs to deliver acceptable standards of service, and at a cost of £170 million to the exchequer.

During this same period in which governmental interest in RJ in England and Wales had appeared to have lapsed almost entirely, the same situation was also widely evident within Western Europe. In academic circles, however, there emerged some interesting initiatives in an attempt to resolve the theoretical *impasse* between retributive and restorative modes of justice which had become effectively polarised in governmental thinking – largely for electoral rather than for philosophical or doctrinal reasons.[52] These initiatives were, therefore, primarily devoted towards devising an acceptable measure of synthesis between the two modes without undue disturbance to the existing traditional processes of trial and punishment perceived as sacrosanct by judiciaries and other component elements of the established formal legal system – particularly in England and Wales, but also in many other jurisdictions in Western Europe and further afield.

Such a debate inevitably raises the issue of the relationship discussed at some length by Jakob von Holderstein Holtermann (2009) between formal court trial processes and the less formal deliberative processes of RJ, for example, victim-offender mediation, conferencing, circles, and the like, promoted by the United Nations in 2002.[53] There is no doubt that such a debate focuses upon the potential tensions between the two processes, and has considerably and adversely hindered wider acceptance of RJ within many jurisdictions worldwide. It is maintained later in this article that an effective accommodation between the processes can be devised, thereby enabling the passage of cases back and forth between them to an acceptable extent.

In 2012, in an edited work by Michael Tonry,[54] Anthony Duff at Chapter 4 under the title 'Responsibility, Restoration and Retribution' provided a finely argued analysis of the relationship between retribution and restoration within the criminal justice process.[55] In summary terms, he held to the view that retribution represented the State's response on behalf of the polity to address the *wrongfulness* of criminal acts (or offences) through the court process, whereas restoration – being contingent upon apology and reparation being made or offered – represented the wrongdoer's response to the *harmfulness* of the offence caused to the victim(s) violated by taking responsibility for it and attempting to 'put wrongs right'. Mediation is the means or process by which harms are addressed, and punishment the means by which the wrongfulness of offences is established and an appropriately 'burdenful' response imposed upon the offender on the basis of desert.

There is considerably more to Duff's elegant and nuanced discourse which requires very careful reading than such an abbreviated account can adequately convey. It does, however, serve to indicate an important differentiation between retributive and reparative justice and the purposes of both which may, or may not, be reconcilable in terms of the moral credibility of retributive criminal punishment and its operational applicability and implementation. This leaves the relative culpability or seriousness of offences alleged and charged a matter for deliberation – an issue that has proved to be difficult to resolve in the past.

In the following year (2013), a somewhat different approach to the same issues discussed by Duff became evident in an article by Mike C. Materni bearing the title

[52] The implication here is that many politicians, sensitive to media criticism of being perceived as 'soft on crime', had shied away from giving serious consideration to the implementation of RJ initiatives other than in the youth sector of criminal justice, and to a limited extent.

[53] Here see: *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, (2002, New York: United Nations) *passim*. And see also: J. von Holderstein Holtermann, 'Outlining the Shadow of the Axe – On Restorative Justice and the Use of Trial and Punishment', in *Criminal Law and Philosophy*, (2009), 3: 187–207.

[54] See: M. Tonry (ed.), *Retribution Has A Past: Has It A Future?* (2012: Oxford: Oxford University Press).

[55] See: R.A. Duff, 'Responsibility, Restoration, and Retribution', in M. Tonry (ed), (2012 *op. cit.*) at pp.62–85.

'Criminal Punishment and the Pursuit of Justice.'[56] Here, Materni argues that both the backward-looking (retributive / deontological) approach to punishment and the forward-looking (utilitarian / consequentialist) approach should 'serve as checks and balances upon one another' (p.299), and neither is sufficient alone to provide a moral justification for criminal punishment. Retributivism alone he perceives as 'morally suspect', having no prospective purpose, while an entirely forward-looking approach taken to its logical conclusions would, he claims, 'violate the bedrock principle of *extrema ratio*.'[57] Only moral desert, he concludes, should as HLA Hart insisted, 'serve as the licence to punish the offender.'[58] With a nod to Duff (2012 *supra*), Materni concludes:

> R.A. Duff, acknowledging "the manifest destructiveness and inhumanity of so much of what now passes for punishment in our existing institutions of criminal justice" and "the rather crude brutalism of some retributivist thought, with its emphasis on making offenders suffer – on imposing the kind of pain that is purely backward-looking and that lacks any redemptive or constructive character – "call[ing] a wrongdoer to account for the wrong he has done" – in a perspective that is "not merely retributive, since it also looks to the future to the offender's (self-) reform, and to the restoration of the bonds of citizenship that the crime has damaged. This kind of retributivism, Duff concludes, would not be opposed to ideas of "restoration and reparation" (Duff, 2012 *op. cit*: 89,74,80) (*Ibid.* 303).

Here it seems, we have an important issue to resolve. Both Duff and Materni (among others) appear to seek an overarching, 'one size fits all' solution to what is, after all, a debate of historical origin (cf. Ewing,1929:1 *op. cit*.)[59] Both accounts treat *all* offenders convicted of crime as deserving of the same outcomes of the justice process (viz. punishment) regardless of the relative seriousness of their offences, antecedent histories of offending, denial or acceptance of their crime, and willingness to cooperate within the justice process. Such places the callous murderer and the petty thief in the same position before the law as deserving of retributive punishment differentiated only on scales of desert alone.

Now, few would deny that the commission of criminal offences must, to uphold the law, have consequences for the offender. But must these consequences always or necessarily be of an entirely retributive nature? A consequentialist philosophy of justice would argue that requital of the law by 'evening the score' is of secondary importance to the moral and behavioural improvement of the offender (re-socialisation) through a requirement of him/her to accept responsibility for the wrong done and offer voluntarily to make apology and reparation, to those harmed.[60] Mediation is the process by which such an approach can be given operational effect in cases in which, within clearly specified parameters of seriousness and circumstantial criteria, might be considered appropriate for such resolution. It is to this more 'unified' conception of criminal justice that the final section of this article is devoted.

Before doing so, however, this account would be incomplete without mention of an important recent development within this discussion which occurs in the work of Thom Brooks, Professor of Law and Government at Durham University in 2021.[61] In a major revision of an earlier (2012) book with the same title, and in a newly re-written Chapter 7

[56] Mike C. Materni, 'Criminal Punishment and the Pursuit of Justice' (2013: in 2 Br.J.Am. Legal Studies, (2013)) at pp.263–304.

[57] Materni uses this term which I take to be synonymous with the more widely used *Ultima Ratio*.

[58] See: H.L.A. Hart, *Punishment and Responsibility*, (1968: Oxford: Oxford University Press) at pp.236–7.

[59] See p.1 *supra*.

[60] Such a requirement is neither expected nor demanded within the retributive lexicon of criminal punishment.

[61] See: T. Brooks, *Punishment: A Critical Introduction*, (2021, London and New York: Routledge), [Second Edition].

(at pp. 143–179), Brooks advances what he terms a new hybrid theory of criminal punishment – *the unified theory.* As he explains, the theory is 'an attempt to show how multiple penal goals can be brought together coherently in a single framework, or what might be called a "grand unifying theory" of punishment succeeding where others have failed.'(*Ibid.*143–4).

The chapter is, without doubt, a finely argued and innovative text in a legal philosophical sense, seeking to reconcile former perceptions of the 'deontological *versus* consequentialist' divide in penological discourses. It makes compelling reading, although it also raises some profound questions about the operational practices within the criminal justice arena that derive from it. Foremost amongst these is the evident need for political consistency in relation to the fundamental question of whether crime control or crime reduction is to be the dominant purpose of penal policies in the 2020s and onwards.

It is also the case that the jurisdiction of England and Wales, unlike many European and other countries, has, as matters presently stand, no formally established Penal Code to differentiate offences into categories of seriousness (beyond e.g. indictable only, triable either way, or summary). This situation gives the courts and the judiciary a complete monopoly (*via* the Crown Prosecution Service (CPS)) of the trial and sentencing processes which largely precludes consideration of alternative means of offence resolution.[62] In a previous chapter (Chapter 4 at pp.76–101) Brooks discusses the merits (and problems) involved in the inclusion of restorative justice (RJ) within the mainstream of criminal justice offence disposals, but then discounts it on the basis that it rejects the use of imprisonment as an obstacle to restoration (p.99) which need not necessarily be the case as will later be seen.

Another problem is evident in the fact that within the same jurisdiction there is no formally established Mediation Service within the criminal justice process to enable less serious offences to be resolved involving victim: offender mediation (VOM)[63] and reparation where this is possible and desirable. Brooks addresses and acknowledges the potential of a 'stakeholder society' participation in encouraging pro-social behaviour and reducing crime (pp.153–5), and also as a means of reducing the perceptions of isolation and lesser-eligibility which encourage criminality within sectors of the community in which many feel disadvantaged and respond in a criminal manner. Such makes the case for RJ inclusion in mainstream criminal justice disposals the more compelling.

If crime control is to dominate the forseeable political agenda of criminal justice policies in England and Wales, then there is little merit in discussion of alternatives to the deontological retributive concept of the state duty to punish offences using imprisonment to whatever extent is deemed necessary, and regardless of the cost and the dysfunctional outcomes for offenders which are considerable under present circumstances.[64] Alternatively, a crime-reductive model of justice would refute such an agenda as unreasonably punitive and ultimately uncivilised within a modern democratic society.

By way of a conclusion to Brooks' discourse, it is without doubt compelling at the legal philosophical level even though he does not venture to suggest how it might be applied in practice within the context of the contemporary penal process of England

[62] Other than within the Youth Courts system which has other offence disposals (e.g. reparation) available for consideration.

[63] And other RJ interventions such as Conferencing, Circles and community involvement.

[64] Such as, in overcrowded prisons, failure to provide constructive daily regimes to enhance employability, overcome educational deficits, address offending behaviour, combat endemic drug cultures and increased criminality, and reduce post-sentence recidivism.

and Wales which remains retributively punitive in pursuit of crime control. This seems to beg the question of whether his prescriptions actually amount more to an 'inclusive' rather than a 'unified' theory of punishment in the absence of textual explanation of their practicability within the prevailing penological climate. It is to this particular issue that the final part of this article is addressed.

MEDIATION: THE KEY COMPONENT IN REPARATIVE JUSTICE

From the foregoing analysis it will be evident that there are certain stages within the criminal justice process at which decisions have to be made concerning criminal offenders, their offences and their punishment if convicted. If the reparative justice model is to be followed, decisions have to be made at the pre-trial and subsequent stages, as each poses a potential requirement or an opportunity for mediation in one form or another. At this point it has to be remembered that unlike certain countries in Western Europe (notably in Scandinavia), England and Wales have neither a Penal Code nor a designated Criminal Justice Mediation Service (CJMS) or similar organisation at the present time. An outline illustration of how a reparative justice decision-making process might work in practice now follows – see *Figure 2 (Opposite)*.

Once an offence has been alleged or committed it would be subject to police investigation and, if sufficient evidence was available, the offender charged with the alleged offence. The case would then fall to the Crown Prosecution Service (CPS) to determine whether the offence might or might not be amenable to an outcome through mediation, and if the former, refer it to the Mediation Service for assessment. In the latter instance the case would be sent for trial in the criminal courts unless the CPS considered that diversion to a civil court would be more appropriate.[65]

In the event of a possible mediated outcome being considered to be achievable by the mediators assigned to the case, and having interviewed the alleged offender and any persons offended against, a recommendation for disposal of the case would be made to the CPS to decide finally whether the case should proceed to trial, be resolved by mediation, or be diverted to a civil court for judgement. In all cases in which a mediated resolution was permitted, the case would not be closed until the outcome (including any agreed reparation fully made) had been reported by the Mediators to the CPS and finally approved by the court as sufficient and complete.

Evidently, it would be inappropriate for offenders with antecedent profiles of a serious violent, sexual or drug-trafficking nature and now charged with such offences, or those with histories of multiple previous convictions and custodial sentences for petty offending to be considered for inclusion within such arrangements other than in exceptional circumstances. Such offenders would remain, as at present, subject to the established criminal justice procedures for trial and conviction in the courts. Though this might have a net-narrowing effect upon eligibility for reparative justice interventions, it would give some assurance that only offenders with a lower risk of recidivism would be considered suitable for participation and selected.[66]

[65] In cases in which, for instance, the alleged offence might be considered to amount to a civil law tort or constitute a case for damage reparation as compensation.

[66] Here it will be recalled that in his *Review of the Criminal Courts in England and Wales* (2001, London: Home Office), Lord Justice Sir Robin Auld had recommended a revised 'three tier' system for trials in the courts (particularly of sexual offenders) the most serious of which would be tried in the Crown Courts (before a judge and jury); the 'middle range' of offences by a new District Division of courts (before a judge sitting with two lay assessors or magistrates) to deal with 'triable either way' offences; and the less serious offences remaining to be dealt with in the Magistrates' Courts without the option for jury trial. The purpose of these proposals was to speed up the trials process and to reduce the cost to the public of protracted and extended Crown Court trials and deliver justice more speedily. The (then) government chose not to implement the proposals which did not have the wholehearted support of the judiciary.

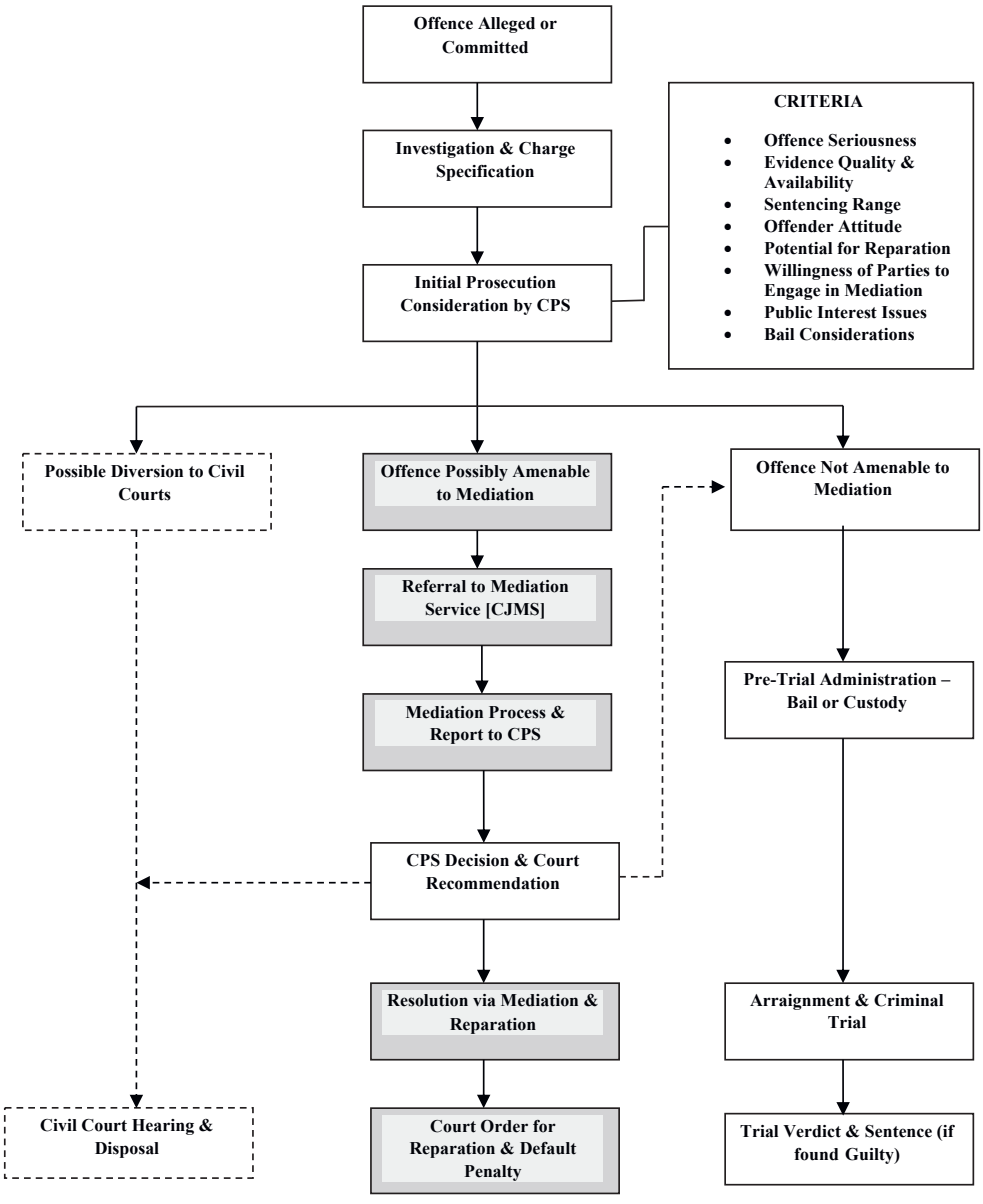

Figure 2 Disposal of Offences in Reparative Justice

Essential to the genesis of such a process would be the establishment of a CJMS with a core membership of mediators fully trained to certified standards of professional competence in a similar manner to that presently in use for the selection and certification of Hostage Incident Negotiators trained and assessed centrally by the Metropolitan Police Service at Hendon in Middlesex. It would also be envisaged that the CJMS would work in partnership with the Crown Prosecution Service (CPS) to ensure its independence within the criminal justice process. Once they were trained and certified, mediators might be deployed in small teams on a regional basis[67], working to a

[67] It is recommended the Mediators work in pairs, ideally one male and one female, to reduce as far as possible any feelings of vulnerability in relation to crime victims being interviewed as part of the mediation process.

national coordinating headquarters located in Central England for ease of accessibility and professional support.[68]

CONCLUSION: THE DESERT BASE OF THE REPARATIVE JUSTICE MODEL

Within the scope of this article an attempt has been made to establish a claim that the principle of Desert in combination with that of Reparation has a rightful place within mainstream criminal justice administration. Further, that the traditionally accepted and supposed justifications of criminal punishment grounded in Retribution, Deterrence and Rehabilitation are, to a significant extent, inimical to the purpose of crime reduction.

The desert base for the necessity of punishment *per se* has remained unchallenged but qualified (see p.59 *supra*), and that of victim reparation has been advanced as being morally superior to the supposed justification of rehabilitation. Moreover, the purpose of deterrence as a justification of criminal punishment has been exposed for its inherent fallibilities in both its specific and general forms.

The concept of retribution remains problematic, rooted as it is in a deontological and retrospective conception of the purpose of punishment focused more on crime control than on crime reduction. Reparation, by way of contrast, has a consequentialist and forward-looking motivation towards the desirable future improvement of both victims of crime and of offenders.

Criminal punishment for the purpose of deliberately causing pain or unpleasantness is morally abhorrent unless it can be shown to have beneficial consequences for the general good and that of those subjected to it in the reduction of crime. Unfortunately in the contemporary instance of England and Wales neither can be held to be demonstrably the case. Imprisonment undoubtedly risks increases in the criminality of those imprisoned, while high rates of re-offending and reconviction strongly indicate that it is also significantly ineffective in reducing crime. Unfortunately, in recent years the confidence of the judiciary in the 'penal bite' of community sanctions has reduced considerably, and resort to the use short-term custodial sentences has now become almost as frequent as the use of Community or Suspended Sentence Orders.[69]

Finally, in whatever form reparation is made (whether financially or by remedial activity either directly to victims, to communities or to a central fund), it must be supervised to ensure its delivery in full. This requirement for supervision might appropriately fall to the HM Probation Service to undertake, though with additional workforce resources derived from the reduction in the size of the short-term prison population which implementation of the model should make available. Ways of 'doing justice better' deserve to be explored, and this article has had the purpose of contributing towards one means of doing so.

Acknowledgement

The author wishes to thank peer reviewers and journal editors who reviewed this article for publication for the helpful suggestions made for its revision and the inclusion of further contemporary reference material.

[68] This pattern of deployment is perceived as being preferable to that of the location of the CJMS within the Ministry of Justice in Central London which, since 2007, has expanded into a monolithic bureaucratic structure which might threaten its independent operation.

[69] Between 2010 and 2020 the number of Community Orders imposed decreased from around 190,000 to a level of 60,000 (a reduction of almost 50 *per cent.* while the use of short prison sentences and Suspended Sentence Orders remained relatively constant at around 50,000 *per annum*. See: Ministry of Justice, *Criminal Justice Statistics Quarterly – June 2020*, (2020), Tables Q5.1b and Q5.4), London: Ministry of Justice; and, Prison Reform Trust, (2021) *Bromley Briefings Prison Factfile (Winter 2021*: London: Prison Reform Trust, (February) at pp.12–17.

NOTTINGHAM LAW JOURNAL

CASE NOTES

The address for submission of case notes is given at the beginning of this issue

INCAPACITY IN THE BISHOP'S DISCIPLINARY TRIBUNALS AND THE DECISION OF In Re: The Rev'd AB [2021]

INTRODUCTION

With an ever-increasing panoply of corrupt behaviour from religious leaders coming to light, we have seen a wave of attempts to bring those responsible to account in recent years. The Independent Inquiry into Child Sexual Abuse has investigated dozens of church institutions across the UK and late last year heard from its final (648th) witness.

At the Vatican, Pope Francis has recently introduced changes to Roman Canon law in pursuit of criminalising sexual abuse in the ecclesiastical jurisdiction[1]. More recently, steps are underway for the trial in a Vatican court of ten former church officials for financial crimes[2], among them Cardinal Angelo Becciu following his unprecedented forced resignation for his alleged financial fraud[3].

Many attempts of Western Christian institutions, specifically within the Anglican and Roman Catholic traditions, to discipline its rogue religious leaders involve historical abuses of position. This brings with it evidentiary and procedural difficulties. Yet one such difficulty has (perhaps surprisingly) not come to the surface, at least in Anglican disciplinary proceedings: the age and potential incapacity of the alleged perpetrator. That is, until now. It is exactly this issue which was key to the staying of proceedings in the recent decision of the Bishop's Disciplinary Tribunal in *Re: The Rev'd AB (by his litigation friend CD)* [2021].

THE FACTS

The allegations against the Rev'd AB ("**AB**") were that he had an inappropriate relationship with two women, one of whom he allegedly sexually touched without her consent. AB's Archdeacon investigated the complaints and later commenced Tribunal proceedings against AB. Before these complaints were raised, AB suffered several strokes in January 2017, and had not exercised his ministry since March 2017. In October 2017 AB took medical retirement from his parish.

Whilst no criminal proceedings were ever brought in relation to the allegations relevant to the Bishop's Disciplinary Tribunal, AB had previously faced criminal proceedings

[1] Cindy Wooden, 'Pope promulgates revised canon law on crimes, punishments' (*Catholic News Service*, 1 June 2021) <https://www.catholicnews.com/pope-promulgates-revised-canon-law-on-crimes-punishments/> accessed 12 August 2021.

[2] BBC News, 'Vatican's Cardinal Becciu on trial in $412m fraud case' (*BBC News*, 27 July 2021) <https://www.bbc.co.uk/news/world-europe-57981508> accessed 12 August 2021.

[3] Christopher Lamb, 'Pope accepts shock resignation of Cardinal Becciu' (*The Tablet*, 24 September 2020) <https://www.thetablet.co.uk/news/13409/pope-accepts-shock-resignation-of-cardinal-becciu> accessed 12 August 2021.

in respect of other, albeit similar, allegations. Those went to trial, though the jury were unable to reach a verdict. Before a re-trial could take place, AB's legal team provided medical reports suggesting AB was now unfit to stand trial. The Crown did not contest this, and the proceedings were formally dismissed. As a result, the Court was never invited to formally rule on whether AB did in fact lack capacity.

These Tribunal proceedings were re-instated following a stay, and after AB had instructed solicitors, the issue of AB's capacity went to the Tribunal for determination as a Preliminary Issue.

THE ISSUES

In addition to considering arguments concerning abuse of process, the following issues were considered by the Tribunal, the first being ruled upon by the Chair alone and the latter two being decided by the full Panel:

(a) whether the Tribunal should, and indeed could, appoint a litigation friend for AB;
(b) whether AB was incapable of conducting the proceedings; and
(c) if there was incapacity, should there be a 'trial of the facts.'

APPOINTING A LITIGATION FRIEND

The first hurdle was actually whether or not the Tribunal had any power to appoint a litigation friend, after this was requested by AB's representatives.

There is no express power in *the Clergy Discipline Measure* ("**CDM**"), *the Tribunal Rules* or *the Clergy Discipline Measure Code of Practice 2003* ("**COP**") for appointing a litigation friend in the same way as *Part 21 of the CPR* provides for this in the civil courts. In concluding that they do indeed have such a power, the Chair read the power under *Rule 33 of the Rules* to make directions *'in respect of all procedural matters'* broadly, and alongside *Jhuti v Royal Mail Group Ltd and others* [2017] UKEAT/0061/17/RN. The Chair adopted the Employment Appeal Tribunal's rationale that in the employment context:

> *'whilst there is no express power . . . the appointment of a litigation friend is within the power to make a case management order under the 2013 Rules as a procedural matter in a case where otherwise a litigant . . . would have no means of accessing justice . . .'*

In deciding whether a particular individual (in this case CD) should be appointed, the Chair extrapolated the three questions from *CPR r. 21.4*, receiving evidence answering these points.

INCAPACITY

Again, incapacity is not currently provided for in the CDM, the Tribunal Rules or the COP.

In treating (at paragraph 13 of their decision) these proceedings as a *'sort of hybrid which sit somewhere between the spheres of criminal and civil litigation,'* the Tribunal applied a number of key principles of law, those being that:

(a) the Respondent has the burden of rebutting a presumption of capacity to the civil standard; and
(b) the Tribunal should judge the question of capacity according to what specific activities are required to conduct the proceedings, considering what special measures

might be able to aid the Respondent, and must rigorously examine all the evidence to reach its own factual conclusions (applying *R v Walls* [2011] EWCA 443).

In looking at what *'decision or activity'* is relevant for the purposes of capacity, the Tribunal looked to *R v Pritchard* (1836) 7 C&P 303 as applied in *R v John M* [2003] EWCA Crim 3452. Following this rationale, the Tribunal adapted the 'five key questions' from *John M* to make them better suited to a disciplinary process, and concluded that if the Respondent is unable to do any of these things then they must find he lacks the necessary capacity:

(a) understand the complaints made against them;
(b) decide whether to make admissions in relation to the complaints;
(c) instruct solicitors and/or Counsel;
(d) follow the course of the evidence; and
(e) give evidence in their own defence.

There was little contention about the legal principles involved, which undoubtedly would have assisted the Tribunal. The parties did, however, disagree on whether AB did in fact lack capacity to conduct the proceedings. After considering a number of medical reports and the potential for special measures, the Tribunal found as fact that the Respondent did lack the necessary capacity.

TRIAL OF THE FACTS

Having found that AB lacks capacity, should there be a 'trial of the facts' to determine the factual complaints which have been brought? This is what ordinarily follows in the criminal context. *Section 4A of the Criminal Procedure (Insanity) Act 1964* ("the **1964 Act**") requires a jury to determine whether a criminal Defendant did the act or made the omission charged against him. The rationale behind this provision is to ensure the case against an incapacitated Defendant is tested, to avoid innocent people being detained in hospital by the courts, merely because they are mentally unfit[4].

Ordinarily, the focus of a criminal trial is on both the alleged criminal action itself (the *actus reus*) and whether the relevant 'mental element' (*mens rea*) was operating on the Defendant's mind at the time, for example whether a Defendant intended to act. However, the wording of *section 4A* makes it clear that the focus of a 'trial of the facts' is what actions the Defendant is accused of committing, not the workings of a Defendant's mind at the time of the alleged offence.[5]

The issue of a Defendant's capacity at the time of trial can arise whether or not he was 'sane' at the time of the alleged offence, a matter which would ordinarily engage the defence of insanity[6]. Irrespective of whether the Defendant lacked mental capacity at the time of the alleged offence, if he is found unfit to plead then there cannot be a full trial to determine his criminal culpability, and a 'trial of the facts' should follow.

The potential results of any positive findings are in *section 5 of the 1964 Act*, namely that the Court must make a hospital order, supervision order or an absolute discharge.

In arguing for a trial of the facts, the Archdeacon (at paragraph 27) relied on the approach in the 1964 Act and submitted that this *'would serve the public interest by*

[4] David Ormerod QC and David Perry QC (ed.), *Blackstone's Criminal Practice 2021* (OUP 2020) D12.10 at p. 1803.

[5] This approach was confirmed by the House of Lords in *R v Antoine* [2001] 1 AC 340. There are exceptional circumstances in which the intentions of a criminal Defendant must be considered in a trial of the facts, such as in *R v B* [2012] 2 Cr App R 15 (164) where the 'act' of voyeurism included the purpose of the voyeur.

[6] David Ormerod QC and David Perry QC (ed.), *Blackstone's Criminal Practice 2021* (OUP 2020) A3.27 at pp. 49–50.

ensuring a determination of serious allegations against a priest who was at the time in public ministry.'

The Tribunal rejected this approach on two bases, firstly by constraining the ambit of the 1964 Act strictly to criminal proceedings. The Tribunal looked at *section 4*, which speaks *of 'any disability such that apart from this Act it would constitute a bar to [the defendant] being tried,'* and took it to mean that the 1964 Act must itself apply to the proceedings before a trial of the facts can take place.

Secondly, the Tribunal looked at the purpose of the 1964 Act, in particular at protecting the public from incapacitated persons who have nonetheless committed dangerous conduct. The Tribunal distinguished this from the Disciplinary Tribunal context, looking to Diocesan Safeguarding when concluding that there are other means of obviating any such risk in the ecclesiastical mechanisms which do not involve the Tribunal. At paragraph 30, the Tribunal concluded that:

> *'The purpose of the 1964 Act is... to ensure the safety of the public even if the defendant's disability means that he cannot fairly be found to be responsible for his actions... In the wider context of the Church of England mechanisms clearly do exist for the management of any risk that a respondent may pose within the Church.'*

SIGNIFICANCE

The Tribunal were clearly unhappy with the decision they felt compelled to make. At paragraph 35 of their decision, they noted in relation to a trial of the facts that:

> *'We have struggled to reach this decision. We acknowledge as deeply unsatisfactory the absence of any method or procedure under the Measure to allow the Complainants in this matter to be heard in circumstances where, through no fault of their own, the Respondent has lost the capacity to conduct the proceedings.'*

In filling the gaps left by the Church's legislature, the Tribunal seemed ready to adopt a patchwork approach to the incapacity issue where the current legal lacuna allowed it. The Tribunal appeared particularly receptive to case law from the criminal jurisdiction in deciding what relevant principles should stand. Given the nature of the Tribunals' disciplinary function, it is perhaps not surprising that the Tribunal were happy to be guided by the criminal courts in this respect, especially given that the criminal jurisdiction has much to offer by way of guidance on incapacity in particular.

That said, the Tribunal turned to the civil jurisdiction when deciding to appoint a litigation friend. One might suspect that a future Tribunal's focus will similarly be on allowing full participation by all parties and ensuring a fair trial for all involved, and that in dealing with similar uncertainties the Tribunal will likely be open to solutions from either jurisdiction where solid guidance is available.

The Tribunal intended their approach to be of general application. At the outset of their judgment, the Tribunal noted at paragraph 1 that: *'We have provided full reasons in this decision in the hope that it will assist future tribunals facing this issue.'* Therefore, whilst a first instance decision, it is likely that this fully-reasoned approach will carry considerable weight in future similar cases.

All in all, this decision should give greater certainty should the question of incapacity arise in future cases. Moreover, practitioners may find it reassuring to know that a Tribunal will likely be receptive to creative solutions in deciding its own jurisdiction, looking to both the criminal and civil contexts to do this, save for situations where a similar power from elsewhere is expressly excluded.

There was some hint that the Tribunal would have welcomed explicit, more comprehensive Rules which accounted for these issues. At paragraph 35, they noted that:

> *'The lack of any explicit procedural rules addressing the issue of how a respondent's incapacity should be dealt with within proceedings is a significant gap in the current Rules . . . We would urge those applying their minds to the current review of the Clergy Discipline Measure to address this issue in any new revision of the Measure and Rules.'*

What such reform might entail remains to be seen. As far as this matter is concerned, the Tribunal expressed clear frustration in having to prevent the complainants from having their allegations properly heard and ruled upon. In their concluding remarks, the Tribunal stressed (at paragraph 57) that *'our inability to determine the complaint is a deeply unsatisfactory state of affairs.'* One might infer that this Tribunal would have much preferred a mechanism for having a 'trial of the facts' in much the same way as is done in the criminal jurisdiction. It remains to be seen whether this view will be taken into account by church legislators.

Those implementing any such reforms would need to be mindful of the Article 6 rights of all participants in particular. Bishop's Disciplinary Tribunal proceedings undoubtedly come within the remit of *Article 6 of the European Convention of Human Rights*, guaranteeing the right to a fair trial, since these proceedings can affect a Respondent's ability to exercise their ministry[7]. Accordingly, any reform to the Tribunal process would need to carefully balance the rights of complainants in having the opportunity to make representations about their case under the 'equality of arms' principle[8], alongside the broader rights of respondents to a fair trial.

CONCLUSION

This decision provides useful guidance for future Tribunals in dealing with questions of incapacity. The manner in which this Tribunal reached their conclusions can also offer some insight into how future Tribunals might approach similar lacunas in the law. Specifically, it seems that, while perhaps not necessarily favouring one jurisdiction over another, a Tribunal can readily look to a jurisdiction offering solid guidance on matters not covered under the current legislative rules, and where their application can fit (in adapted form) with the proceedings of the Bishop's Tribunal.

In encouraging legislative reform, the Tribunal in this case expressed a desire for certainty and comprehensive guidance from revised legislation. The Tribunal also intimated that they would welcome a mechanism that caters for complainants of abuses having their cases properly listened to, as well as for Respondents who are unable to conduct Tribunal proceedings.

Those working in this area should watch this space for reform. What that might entail remains to be seen, though this decision should reassure practitioners that a Tribunal can throw itself into finding solutions where gaps in the law lie, with both alacrity and creativity.

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[7] The UKSC accepted in *R (on the application of G) v X School Governors* [2012] 1 AC 167 that the right to practice one's profession is a 'civil right,' the interfering with which engages a respondent's rights under Article 6 ECHR. Indeed, when considering (at paragraph 34) AB's participation in any potential trial of the facts, the Tribunal in *Re: The Rev'd AB* [2021] considered AB's Article 6 rights as being engaged in the Tribunal proceedings.

[8] cf. *Ocalan v Turkey* [2005] 41 EHRR 45 at [140].