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EDITORIAL

It is with great pleasure to present the 48th Volume of the Exeter Law Review 2023. The Review aims to showcase exemplar work produced both by academics and students from Exeter Law School and beyond. I have had the honour to lead both a prestigious Journal - which has received many excellent submissions from both academics and students - and an exceptional team, all of whom I am thankful for their hard work.

Exeter Law Review has been an integral part of my undergraduate career, as it has been for anyone that has been involved. I have learnt so much from leading the Journal, to which I am grateful. I am thankful to Fizaa and Rida, my predecessors, for trusting me to continue the Journal at such a high standard to which they left it.

This year has been an exciting year for Exeter Law Review as it has been the first year that the Journal has had a more legitimate affiliation with Exeter Law School. It has been a learning curve to achieve the most seamless and efficient framework to end up with such an exceptional publication. The support that has been provided by Dr Lisa Cherkassky has been both pivotal and invaluable to the creation of this edition and shall be for future publications. I look forward to reading the many volumes to come!

To Amelia Randall, thank you for all that you have done to support me, both on professional and personal level. Your unwavering dedication and hard work have been invaluable to this Volume of Exeter Law Review. To Ania and Callie, your work ethic and commitment to academia has inspired me this year, as well as both of your support, so thank you. Additionally, the Editorial Board has been excellent this year. It is not easy to balance full-time studies with editing such high-quality submissions to the standard to which they have been. I am thankful to everyone, and especially to those who constantly checked in and offered to do more than what was asked of them, and to them I am even more grateful for their support.

I would like to extend a thank you to all the authors who have contributed to this year's edition. The essays featured offer both an interesting but also thought-provoking insight into various legal areas, ranging from human rights and dignity to AI in shipping law. I hope that you enjoy reading them as much as we, the Board, have enjoyed curating them.

Finally, I am incredibly proud of what has been achieved in this year. Therefore, I am excited to present the 48th Volume of the Exeter Law Review's Annual Journal. It has been both a pleasurable but challenging creation, but I hope that you take interest in reading these pieces.

Amelia Clark
Editor-in-Chief

"This volume is a great testament to the quality of work published by our students here at Exeter Law School" – Dr Lisa Cherkassky, Staff Chief Editor, November 2023.

Reforming Article 94 of UNCLOS 1982 and Rule 5 of COLREGS 1972: Ensuring Compatibility with Maritime Autonomous Surface Ships (MASS)

Harry Spice

ABSTRACT

Maritime Autonomous Surface Ships (MASS) pose significant legal challenges to the orthodox international regulatory framework, particularly the United Nations Convention on the Law of the Sea (UNCLOS) and the Collision Regulations (COLREG). As such, this article argues reforms are needed to integrate MASS into the existing legal framework, especially for ships with higher levels of autonomy.

INTRODUCTION

In recent years, the rise in autonomous technologies in the marine sector has offered the prospect of a wide range of economic and scientific advantages. However, the novelty of the technology raises the question as to how, if at all, autonomous ships fit within the current international regulatory framework. The International Maritime Organisation (IMO) Regulatory Scoping exercise[1] identified these technologies as ships 'which, to a varying degree, can operate independent of human interaction'.[2] These so-called Maritime Autonomous Surface Ships (MASS) have varying degrees of autonomy from 1-4.[3] However, as this essay

[1] International Maritime Organisation, 'Outcome of the Regulatory Scoping Exercise for the use of Maritime Autonomous Surface Ships (MASS)' (International Maritime Organisation, 2021) MSC.1/Circ.1638.
[2] Ibid [3.3].
[3] The IMO defines each degree as (1) A Ship with automated processes and decision support, (2) Remotely controlled ships with seafarers on board, (3) Remotely controlled ships without seafarers on board and (4) Fully autonomous ships.

argues, reforms of United Nations Convention on the Law of the Sea (UNCLOS)[4] and the COLREGS[5] are necessary to implement into the existing legal framework MASS, especially for degree 3 and 4 ships which are unmanned. Section one of this essay analyses Article 94 of UNCLOS and highlights the problems it poses. Section 2 examines MASS in light of current COLREG regulations, particularly Rule 5 which remains the most problematic due to its requirements of 'sight' and 'hearing'.[6] Finally, Section 3 explores how reform can be achieved to the requisite extent for MASS to be effectively implemented into the current legal framework.

1. MASS WITHIN THE CURRENT LEGAL FRAMEWORK OF UNCLOS

UNCLOS poses a significant issue for MASS regarding its compatibility with the current legal framework. Veal argues that 'the challenges for unmanned ships arise from the fact that the existing regimes have been developed for conventional, manned ships',[7] suggesting that ships with new autonomous capabilities may not fit within the current legal framework. This conventional nature is evident and problematic within Article 94 which requires states to not only 'exercise jurisdiction and control… over ships'[8] but also 'take measures for ships… to ensure safety at sea'.[9] Most problematically, these measures are required to ensure that 'each ship is in the charge of a master and officers who possess appropriate qualifications'[10] which clearly indicates the traditional nature of ships given the language used. Prima facie, this does not appear to be a problem for degree 1 (d1) and degree 2 (d2) ships as they are manned, and

[4] Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS).
[5] International Regulations for Preventing Collisions at Sea (adopted 20 October 1972, entered into force 15 July 1977) (COLREGS).
[6] ibid (rule 5).
[7] Robert Veal, 'The integration of unmanned ships into the lex maritima' [2017] LMCLQ 303, 314
[8] UNCLOS (n 4) Art.94(1).
[9] ibid art 94(3).
[10] ibid.

thus can have masters and officers on board. However, problems arise with degree 3 (d3) and degree 4 (d4) ships as they are unmanned.

Notwithstanding, Ringbom accurately argues that 'the wording… has less impact on remotely operated ships' as the term 'master' is not defined by UNCLOS nor any other international maritime convention.[11] Ringbom's argument could be reinforced by adopting a teleological approach to the interpretation of UNCLOS.[12] However, as Hooydonk notes, this would likely cause an unduly excessive interpretation.[13] Thus, Ringbom's argument is better reinforced by definitions defined in national state law which offer some guidance and allowance for MASS. For example, in the UK, 'master' is defined as 'every person… having charge or command of a ship.'[14] This does not focus on whether the 'master' is on board the ship, rather it places hierarchy at the forefront of the definition. Similarly, USA law defines 'master' as 'the individual having command of a vessel'[15] once more putting the hierarchy of command at the forefront of what defines a master. Several academics recognise that such definitions embrace remotely operated, unmanned ships as they encompass the highest-ranking remote controlling individual.[16] Nevertheless, the workability of 'master,' even on these broader definitions, appears to prove more difficult for completely autonomous, d4 ships. Veal and Ringbom note that 'after initial programming, persons responsible for the ship's navigation thereafter remove themselves from the decision making'.[17] Only where the staff involved in the making of the autonomous ship 'have overriding powers and… continuous monitoring'[18] could an argument

[11] Henrik Ringbom, 'Regulating Autonomous Ships—Concepts, Challenges and Precedents' (2019) 50 Ocean Dev & IntL 141, 161.
[12] Van Hooydonk, 'The Law of Unmanned Merchant Shipping- an exploration' (2014) 20 JIML 403, 410.
[13] ibid.
[14] Merchant Shipping Act 1995, s 313.
[15] 46 US Code § 10101 (1).
[16] Veal (n 7) 317.
[17] Robert Veal and Henrik Ringbom, 'Unmanned ships and the international regulatory framework' (2017) 23 JIML 100, 104.
[18] Veal (n 7) 318.

be made for an autonomous ship being a master. Therefore, national definitions would not fit either because, as shown above, they refer to 'persons.' This implies that the autonomous ship or AI must have legal personhood in some states to be defined as a master. Overall, therefore, although remotely operated, unmanned ships may hypothetically fit within some definitions of 'master', completely autonomous ships face greater difficulty, suggesting the need for reform of UNCLOS.

2. MASS WITHIN THE CURRENT LEGAL FRAMEWORK OF COLREG

Following the industrial revolution, the increase in marine traffic meant that navigational rules were needed to facilitate safe movement. Today, COLREG is often regarded as the 'rules of the road' when it comes to maritime law; its importance cannot be understated. The rules prevent collisions by requiring ships to conform to a set of navigation rules which cannot be deviated from without harsh consequences. However, the rules of COLREG pose a significant problem to MASS. The most problematic requirement of COLREG involves watchkeeping for which Rule 5 states that 'every vessel shall at all times maintain a proper look-out by sight and hearing… to make a full appraisal of the situation and of the risk'.[19] From this rule, two principal issues can be identified concerning MASS. First, whether the technology of sensors is capable of replacing that of human attributes. Second, whether these watchkeeping requirements can be performed away from the ship.

Turning to the former issue, Ringbom argues that Rule 5's use of words referring to 'human qualities… clearly suggests it is intended to cover the human lookout functions'.[20] This does not impact d1 and d2 ships which are manned, and thus readily involve human qualities by

[19] COLREGS (n 5) Rule 5.
[20] Ringbom (n 11) 152.

crew situated on board. However, there is a problem with regards to d3 and d4 ships which both rely on sensors, in lieu of human qualities. Swain argues that taking a broad reading of Rule 5 would allow for sensors to be a suitable equivalent to 'sight and hearing',[21] thus suggesting that a functional view should be taken towards Rule 5. Furthermore, Swain's argument is buttressed by Pritchett who points out that, in fact, autonomous systems may excel over human counterparts.[22] For example, d4 ships are not susceptible to 'fatigue, attention deficit, or situational unawareness'.[23] This argument could also likely be extended to d3 ships as advanced technologies would only enhance the sight and hearing capabilities of humans. On the contrary, however, these arguments are flawed as they assume a wide scope of interpretation of the words 'sight' and 'hearing.' As Coito argues, COLREG does not in fact allow for such a broad interpretation. Instead, it provides for no equivalences[24] and is 'thus textually committed to being carried out by a human'.[25] Thus, Coito suggests that d3 and d4 ships cannot comply with Rule 5 of COLREGs. In turn, Coito logically conforms to a more formalistic method for construing the treaties following the Vienna Convention.[26] Similarly, Ringbom also appears to conform to a more formalistic method by suggesting that COLREG 'offers no exemptions'.[27] Consequently, despite technology possibly being able to meet or even exceed the requirement of the function of Rule 5, COLREG specifically calls for human qualities which cannot be met by d3 and d4 ships.

[21] Christopher C. Swain, 'Towards Greater Certainty for Unmanned Navigation, A Recommended United States Military Perspective on Application of the "Rules of the Road" to Unmanned Maritime Systems' (2018) 3 Geo L Tech Rev 119, 141.
[22] Paul W. Pritchett, 'Ghost Ships: Why the Law Should Embrace Unmanned Vessel Technology' (2015) 40 Tul Mar LJ 197, 205.
[23] ibid.
[24] Joel Coito, 'Maritime Autonomous Surface Ships: New Possibilities-and Challenges- in Ocean Law and Policy' (2021) 97 Int'l L. Stud 259, 300.
[25] ibid.
[26] Craig Allen, 'Determining the Legal Status of Unmanned Maritime Vehicles: Formalism v Functionalism' (2018) 49 J MarL & Com 477, 503.
[27] Ringbom (n 11) 153.

However, as previously mentioned, the problem lies not only within human qualities but also with whether these qualities are required to be performed onboard the ship. As Veal argues, 'the question is whether the Rule 5 obligation may only be performed by persons stationed on board'.[28] Once more, this would not be a problem for d1 and d2 ships which are both manned by mariners, but problems remain for unmanned d3 and d4 ships. Veal posits that there are some authorities for Rule 5 being discharged in the case of shore-based controllers.[29] For example, in the UK, in the case of *The Nordic Ferry*,[30] Sheen J found that the ship 'could have sought advice from the fog watch pilot on duty in the Harwich Harbour Operations room',[31] suggesting that (in foggy conditions) the obligations of Rule 5 could have been met by an onshore operator. On the other hand, some authorities suggest that Rule 5 cannot be performed by unmanned ships. A classic example is the case of *Chamberlain v Ward*,[32] litigated in the USA. Here, it was remarked that a lookout 'must be persons of suitable experience, properly stationed on the vessel'.[33] Clearly this challenges the remarks of Sheen J in *The Nordic Ferry.* Secondly, the International Convention on Standards of Training, Certification and Watchkeeping (STCW)[34] states that 'when deciding the composition of the watch on the bridge… at no time shall the bridge be left unattended'[35] thus endorsing a more restricted approach to Rule 5. Overall, it is therefore unlikely that either d3 or d4 ships could satisfy Rule 5 of COLREG owing to the absence of human qualities as well as the lack of a physical presence on the ships. The regulation, therefore, must be reformed to implement MASS into the legal framework.

[28] Veal (n 7) 327.
[29] ibid.
[30] *The Nordic Ferry* [1991] 2 Lloyd's rep (QB) 591.
[31] ibid 596.
[32] *Chamberlain v Ward* (1858) 62 US (21 How) 548.
[33] ibid 570.
[34] International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (adopted 7 July 1978, entered into force 28 April 1984) (STCW).
[35] ibid STCW.6/Circ.1, [17](1).

3. POSSIBILITY FOR REFORM

Thus far, this essay has examined whether MASS can comply with UNCLOS regulation and the IMO regulation COLREG. The following section will contemplate suggestions for possible.

A. COLREG RULE 5

From the discussion above it was concluded that COLREGS must undergo reform in respect of Rule 5 to embrace MASS, particularly d3 and d4 ships. However, unlike UNCLOS, the COLREGS are in the remit of the IMO meaning that reform is much more flexible. In its regulatory scoping exercise, the IMO identified the COLREGS as a 'high priority'[36] in need of change and they have suggested the extent of reform could be as little as using equivalences or as large as making amendments to regulation for each degree of autonomy.[37] For example, d3 may be reformed through both equivalences and amendments whereas d4 can only be reformed through amendments. However, it is argued that COLREGS Rule 5 can only and should only be amended not interpreted. As Allen rightly submits, attempting to interpret COLREGS 'demonstrates a fundamental misunderstanding of the COLREGS Convention'.[38] Allen's argument is reinforced by the fact that unlike SOLAS and STCW the COLREGS make no provisions for equivalences, as mentioned in section 2. Therefore, the COLREGS cannot be interpreted to bend the rules. Furthermore, any interpretation of COLREGS must be done by observing the Vienna Convention on the Law of Treaties[39] which, according to the International Court of Justice, involves words being 'given their natural and ordinary meaning in context'.[40] Thus, under this textual guideline, it is unlikely that Rule 5 could be interpreted to change terms

[36] IMO Scoping Exercise (n 1) [6.7.1].
[37] ibid 86.
[38] Craig H. Allen, 'Why the COLREGS Will Need to be Amended to Accommodate Unmanned Vessels' [2021] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3854220#references-widget accessed 14 June 2023, p17.
[39] ibid 13.
[40] Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultive Organization [1960] I.C.J. Rep 150 (Advisory Opinion of 8 June 1960), 159-160.

of 'sight' or 'hearing' even if interpretation was allowed under the COLREGS. Alternatively, Carey argues that reform could instead be achieved by creating a separate annex to COLREG.[41] This is an attractive solution as it would prevent bending the rules and creating overcomplication. Furthermore, this annex could be done in conjunction with an amendment to COLREG. For example, NAVSAC recommends amending Rule 5 to state 'every *manned* vessel shall… maintain a proper lookout',[42] thus eliminating the confusion and preventing an autonomous ship from being held to exhibit human qualities. Overall, by using these alternatives the unsatisfactory nature of interpreting COLREGS may be avoided, and both 'unmanned and manned vessel communities… can be fairly represented'.[43]

B. UNCLOS ART.94

In section 1 it was argued that Article 94 represents a significant barrier to MASS fitting within the existing legal framework. Thus, reform must take place. However, unlike IMO regulation, UNCLOS is not easily amendable. Article 312[44] requires no less than one-half of states to reply favourably; simplified procedure article 313[45] allows for a proposed amendment to be rejected even where only one state party objects to the proposed amendment thus placing the possibility of reform very low. Alternatively, a different option would be to allow the IMO to regulate. Although academics, such as Allan argue that the 'IMO has no power to amend or interpret'[46] UNCLOS. Ringbom argues that UNCLOS was drafted in such a way as to avoid 'freezing' by referring to other international conventions.[47] Similar views are also shared by Maritime Law

[41] Luci Carey, 'All hands off deck? The legal barriers to autonomous ships' (2017) 23 JIML 202, 210.
[42] Craig H Allen, 'The Seabots are Coming Here: Should they be treated as vessels?' (2012) 65 J Navig 749 citing NAVSAC (2011). NAVSAC Resolution 11-02. US Navigation Safety Advisory Council.
[43] Allen (n 38) 21.
[44] UNCLOS (n 4) art 312
[45] UNCLOS (n 4) art 313.
[46] Allen (n 38) 10.
[47] Ringbom (n 11) 161.

Associations. For example, the British MLA, in answering the CMI questionnaire,[48] stressed that the 'absence of clarity in UNCLOS… means that particularities of this international requirement fall to be determined by specific and detailed IMO regulations'.[49] These arguments are evidenced by Article 94(5)[50] which obliges flag states 'to conform to generally accepted international regulations… and to take any steps which may be necessary to secure their observance'.[51] This suggests that states can and should avoid the outdated nature of UNCLOS by complying with developing IMO regulation. However, Ntovas argues that the IMO should not regulate counter to UNCLOS because this would not only cause tension but also diminish the 'textual integrity and coherence' of the constitution.[52] However, this argument is flawed since UNCLOS's constitutional objectives should not be construed as preventing new technology.[53] Therefore it should be appropriate for the IMO to regulate to advance technology in the maritime sector. Given the fact that the IMO has the power to regulate and address problems caused by Article 94, the IMO could amend existing regulations to provide clarity. Parker argues that this will not be enough on its own given the 'dramatic change in capability afforded by the operation of MASS'.[54] Instead, a 'Mass Code' could be implemented by the IMO to allow for a more comprehensive solution to the issues afforded by MASS and its different degrees of autonomy.[55] The code would remedy the problems of Article 94 by providing definitions of a master which would be binding within IMO regulation and subsequently on states. Still, although this solution provides the best option it is limited to an

[48] British Maritime Law Association, 'CMI IWG Questionnaire Unmanned Ships UK' https://comitemaritime.org/wp-content/uploads/2018/05/CMI-IWG-Questionnaire-Unmanned-Ships-UK.pdf accessed 14 June 2023.
[49] ibid 3.
[50] UNCLOS (n 4) Art.94(5).
[51] ibid.
[52] Dr Alexandros X.M. Ntovas, 'UNC0023 – UNCLOS: fit for purpose in the 21st century?' (October 2021) https://committees.parliament.uk/writtenevidence/40850/pdf/ accessed 14 June 2023, [12].
[53] Ringbom (n 11) 162.
[54] Jennifer Parker, 'The Challenges Posed by the Advent of Maritime Autonomous Surface Ships for International Maritime Law' (2021) 35 A & NZ Mar LJ 31, 41.
[55] ibid.

extent given how long it may take to create and implement such a code. Indeed, it has been noted that the earliest implementation for such a code may not be until 1st January 2028 which provides no solution in the interim.[56]

CONCLUSION

From the above discussion, it can be concluded that both UNCLOS and the COLREGS must undergo reform to ensure that MASS is compatible within the legal framework. UNCLOS's Article 94 requirements of a 'master' provides a significant barrier for d3 and d4 ships which are both unmanned. As such, extensive reform is necessary to embrace those degrees. It has been suggested that a MASS code would be appropriate given the IMO's capability to regulate. Finally, it has been argued that the COLREGS Rule 5 requirement also possesses significant issues due to its requirement of human qualities. Once more, this is a significant issue for d3 and d4 ships which are unmanned and primarily use sensors to compensate for the lack of human qualities. It has been argued that reform will need to extend to amending regulation, not mere interpretation which COLREG does not allow.

[56] Allen (n 38) 9.

Reforming the Law of Arrest in English Shipping Law: Streamlining its Perceived Role with its Modern Functions

Dimitri Papadopoulos

ABSTRACT

There are four parts to this analysis, which collectively evaluate the law of arrest and the role it plays in English shipping law. The first section outlines the substantive law governing arrest in maritime claims, identifying the doctrine of wrongful arrest and the role arrest plays in establishing jurisdiction and perfecting security as aspects of the law that demand further scrutiny. The second section critically evaluates wrongful arrest, arguing that its narrow scope provides a deficient limitation to the ability of claimants to arrest vessels. The third section critically evaluates arrest's role in founding jurisdiction and perfecting security, arguing that it is outdated given modern advancements in shipping practice. The fourth section proposes a new test for arrest that consolidates and remedies the issues identified throughout the analysis.

INTRODUCTION

There are four parts to this analysis. First, this analysis briefly describes the law of arrest, and the role arrest plays in English shipping law, identifying the need to scrutinize the doctrine of wrongful arrest and arrest's role in enforcing maritime claims. Correspondingly, this analysis evaluates wrongful arrest, finding that its narrow scope provides an insufficient limitation to the ability of claimants to arrest vessels. Then, this analysis evaluates arrest's role in founding jurisdiction and perfecting security, finding it outdated considering modern advancements in

shipping practice. Finally, this article proposes a new test for arrest that addresses the issues identified throughout the analysis.

DESCRIBING ARREST AND ITS ROLE

Arrest is governed by international convention,[1] with relevant provisions having been adopted domestically.[2] Where *in rem* maritime claims arise under a head of the admiralty jurisdiction,[3] claimants can arrest vessels as of right.[4] Despite comprising separate processes,[5] claimants tend to establish *in rem* claims and obtain arrest warrants interdependently.[6] To prevent arrest,[7] shipowners can provide sufficient security as an alternative to arrest by filing cautions against arrest.[8] Furthermore, shipowners can file cautions against release,[9] enabling claimants having *in rem* claims against arrested vessels to re-arrest such vessels upon their release.[10] The only limitation to arrest is wrongful arrest, which entitles shipowners to damages where claimants arrest vessels in bad faith or with gross negligence.[11] This analysis evaluates wrongful arrest, finding it too narrow and unduly claimant-friendly, before proposing a new test for arrest that remedies these deficiencies.

[1] International Convention Relating to the Arrest of Sea-Going Ships 1952.
[2] Senior Courts Act 1981 (SCA), s 21, s 22, s 23 and s 24.
[3] ibid s 20(2), s 21(2), s 21(3) and s 21(4).
[4] ibid s 21(4)(b)(i) and s 21(4)(b)(ii); The Civil Procedure Rules 1998, SI 1998/3132 (CPR), PD 61.5.2; *The Varna* [1993] 2 Lloyd's Rep 253, 253–257; *The MV Alkyon* [2018] EWHC 2033 (Admlty), [2018] 2 Lloyd's Rep 601 [16], [42] and [45].
[5] *The Nautik* [1895] P 121, 122–124.
[6] SCA, s 21(2), s 21(3) and s 21(4); CPR, CPR 61.5 and PD 61.5; Nigel Meeson, *The Practice and Procedure of the Admiralty Court* (Lloyd's of London Press 1986) 15.
[7] CPR, CPR 61.7(2) and PD 61.3.6(4).
[8] ibid CPR 61.7 and PD 61.6.3
[9] ibid CPR 61.8(2) and PD 61.7.2
[10] ibid CPR 61.8(4).
[11] *The Evangelismos* (1858) 12 Moo 352 (PC), 14 ER 945, 948; *The Kommunar (No 3)* [1997] 1 Lloyd's Rep 22 (Adm) 33; *The Strathnaver* (1875) 1 App Cas 58 (PC) 67; *The Volant* (1864) 38 BR & L 321, 322–323.

In English shipping law, arrest plays a role in the enforcement of *in rem* claims.[12] There are two aspects to this role. First, arrest helps claimants establish the jurisdiction of their claim in the Admiralty Court.[13] Second, arrest aids claimants in perfecting security,[14] as arrest ensures that vessels are available as security to meet judgment proceeds.[15] The ability of arrest to help claimants enforce maritime claims applies to, *inter alia*,[16] maritime liens,[17] bills of lading,[18] charter parties,[19] salvage and general average.[20] This analysis evaluates arrest's role, finding it outmoded and misrepresentative of when modern claimants rely on arrest, before proposing a new test for arrest that accurately depicts its contemporary application.

EVALUATING WRONGFUL ARREST

It is uncontested that wrongful arrest imposes a narrow limitation upon claimants' abilities to arrest vessels.[21] A judgment, *inter alia*,[22] demonstrating the narrowness of wrongful arrest is *The Kommunar*.[23] In this judgment, the Court established two categories of cases that would

[12] *The MV Alkyon* (n 4) [14]; *The Stolt Kestrel and The Niyazi S* [2015] EWCA Civ 1035, [2016] 1 Lloyd's Rep 125 [12]; *The Styliani Z* [2015] EWHC 3060 (Admlty), [2016] 1 Lloyd's Rep 395 [20]; David Jackson, *Enforcement of Maritime Claims* (4th edn, Informa 2005) paras 10.6 and 15.40.
[13] *The Anna H* [1995] 1 Lloyd's Rep 11 (CA) 16–17; *The Deichland* [1990] QB 361, [1989] 2 Lloyd's Rep 113, 118; *The Ohm Mariana, ex parte Peony* [1992] 2 SLR 623, 637; *The Volant* (n 11) 323.
[14] *The Moschanthy* [1971] 1 Lloyd's Rep 37, 46; *The Bumbesti* [1999] 2 Lloyd's Rep 481, 482–483; *The APJ Shalin* [1991] 2 Lloyd's Rep 62, 67; *The Staffordshire* (1872) Asp MLC 365, (1872) LR 4 PC 194, 196; *The Cella* (1888) 13 PD 82 (CA) 87; *In Re Aro Co Ltd* [1980] Ch 196 (CA) 201.
[15] SCA, s 20(4); *The Styliani Z* (n 12) [20]; *The Vanessa Ann* [1985] 1 Lloyd's Rep 549, 550.
[16] SCA, s 20(2)(a) -(g), s 20(2)(k)-(o), s 20(2)(p) and s 20(2)(r)-(s).
[17] ibid s 21(3).
[18] ibid s 21(4) and s 20(2)(h).
[19] ibid.
[20] ibid s 21(4), s 20(2)(j) and s 20(2)(q).
[21] Francesco Berlingieri, *Berlingieri on Arrest of Ships: Volume 1* (6th edn, Informa 2016) 384; Michael Tsimplis, 'Procedures For Enforcement' in Yvonne Baatz (ed), *Maritime Law* (4th edn, Informa 2017) 512; David Jackson (n 12) para 15.1; Bernard Eder, 'Wrongful Arrest of Ships - A Time for Change' (2013) 38 TMLJ 115, 118; Bernard Eder, 'Enforcing Security by the Arrest of a Ship: The Urgent Need for Change' (2019) 5 JIBFL 323, 323–325; Martin Davies, 'Wrongful Arrest Of Ships: A Time for Change - A Reply to Sir Bernard Eder' (2013) 38 TMLJ 137, 137-139; Aleka Mandaraka-Sheppard, 'Wrongful Arrest of Ships: A Case for Reform' (2013) 19 JIML 41, 44; Shane Nossal, 'Damages for the Wrongful Arrest of a Vessel' [1996] LMCLQ 368, 377–378.
[22] *The Saetta* [1993] 2 Lloyd's Rep 268; *The Peppy* [1997] 2 Lloyd's Rep 722; *The Orion* (1852) 14 ER 946; *The Glasgow* (1855) 166 ER 1065; *The Nautilus* (1856) 14 ER 1044; *The Victor* (1860) Lush 72; *The Cheshire Witch* (1864) Br & L 362; *The Cathcart* (1867) LR 1 A & E 333; *The Strathnaver* (n 11); *The Walter D Wallet* [1893] P 202; *The Active* (1862) 5 LT(NS) 773; *The Kate* (1864) Br & L 218; *The Keroula* (1886) 11 PD 92; *The Village Belle* (1985) 12 TLR 630; *The Eleonore* (1863) 167 ER 328.
[23] *The Kommunar* (n 11).

satisfy wrongful arrest. The first is bad faith arrest, which arises when claimants arrest vessels without an honest belief in their entitlement to arrest.[24] The second is gross negligence arrest, which occurs where the baselessness of an arrest enables the courts to infer that claimants did not believe in their entitlement to arrest ships or arrested vessels without serious regard to the grounds for arrest.[25] Crucially, the narrowness of wrongful arrest derives from this subjective interpretation. By grounding wrongful arrest in claimants' subjective beliefs, *The Kommunar* places the threshold for wrongful arrest beyond objective unreasonableness,[26] circumscribing its applicability to merely exceptional cases.[27] This narrow construction is trite law.[28] The relevant debate concerns whether wrongful arrest's narrow scope offers a justifiable limitation to the ability of claimants to arrest vessels. Some commentators argue that wrongful arrest's narrow scope is justified because a wider construction increasing potential liability in damages would prevent claimants from arresting vessels.[29] Other commentators argue that wrongful arrest's narrow scope is unjustified because it does not sufficiently limit arrest.[30] This analysis prefers the latter position, which will be defended and enhanced.

The argument favouring a narrow construction of wrongful arrest is fundamentally flawed as it misinterprets the function of wrongful arrest. Crucially, wrongful arrest operates *after* arrest to determine whether an arrest was lawful, meaning it operates *retrospectively* rather than *pre-emptively*. Correspondingly, it is incorrect to suggest that broadening wrongful arrest would prevent claimants from arresting ships as wrongful arrest, by its inherently retroactive nature,

[24] ibid [30].
[25] ibid.
[26] ibid.
[27] Mandaraka-Sheppard (n 21) 54; Rhidian Thomas, 'Ship Arrest – Issues of Availability, Fairness and Proportionality' in Paul Myburgh (ed), *The Arrest Conventions: International Enforcement of Maritime Claims* (Hart Publishing 2019) 26–33; Nossal (n 21) 368, 372–373 and 377–378; Eder, 'Wrongful Arrest of Ships - A Time for Change' (n 21) 119.
[28] Thomas, 'Ship Arrest – Issues of Availability, Fairness and Proportionality' (n 27) 25.
[29] Tsimplis (n 27) 512; Davies (n 21) 137–142.
[30] Thomas, 'Ship Arrest – Issues of Availability, Fairness and Proportionality' (n 27) 26–33; Mandaraka-Sheppard (n 21) 54; Nossal (n 21) 368, 372–373 and 377–378; Eder, 'Wrongful Arrest of Ships - A Time for Change' (n 21) 119.

cannot be preventative. Currently, the only pre-emptive impediments to arrest are procedural requirements,[31] which operate independent of wrongful arrest.

Therefore, given its retrospective operation, broadening wrongful arrest could only provide a greater deterrent to arrest, which is entirely justified considering the innocuous nature of its current construction.

The narrow construction of wrongful arrest fails to offer any practical limitation to the ability of claimants to arrest vessels. The reliance on claimants' subjective beliefs unduly privileges claimants against defendant shipowners as it creates a 'practically insurmountable' threshold to establishing wrongful arrest.[32] In requiring more than unreasonableness,[33] wrongful arrest merely applies to exceptional cases, ousting most shipowners from remedy.[34] For example, wrongful arrest is satisfied where an arrest is unconscionably prolonged or made in support of exaggerated financial claims.[35] As a result of its narrow construction, wrongful arrest does not sufficiently compensate defendant shipowners for losses deriving from arrests nor does it effectively deter unreasonable arrests.[36] The high threshold required to invoke wrongful arrest is undesirable because it discourages shipowners from relying on its protections in practice,[37] which indirectly provides claimants quasi-immunity when arresting vessels. Therefore, quite paradoxically, wrongful arrest deters the party it seeks to protect from relying on its operation whilst liberating claimants to commission the very act it purports to constrain. Nevertheless,

[31] CPR, CPR 61.5 and PD 61.5.
[32] Nossal (n 21) 375; Eder, 'Wrongful Arrest of Ships - A Time for Change' (n 21) 120.
[33] *The Kommunar* (n 11) 30.
[34] Eder, 'Wrongful Arrest of Ships - A Time for Change' (n 21) 119; Nossal (n 21) 368, 372–373 and 377–378; Mandaraka-Sheppard (n 21) 54; Rhidian Thomas, 'Ship Arrest – Issues of Availability, Fairness and Proportionality' (n 27) 26–33.
[35] *Gulf Azov Shipping Co Ltd v Idisi* [2001] EWCA Civ 491, [2001] 1 Lloyd's Rep 727; *The Cheshire Witch* (n 22); *The Kallang (No 2)* [2009] 1 Lloyd's Rep 124; *The Duden* [2009] 1 Lloyd's Rep 145.
[36] *The MV Alkyon* (n 4) [83]; Mandaraka-Sheppard (n 21) 54; Nossal (n 21) 368 and 372.
[37]Mandaraka-Sheppard (n 21) 54; Christopher Hill, 'England and Wales' in Christopher Hill, Kay Soehring, Tameyuki Hosoi and Christie Helmer (eds), *Arrest of Ships - 1* (Lloyd's of London Press 1985) 48; Nossal (n 21) 368 and 371.

curing these deficiencies is not as simple as infusing objective considerations into wrongful arrest to broaden its application because the retrospective nature of wrongful arrest inherently conditions its ability to limit arrest in practice (above). Therefore, this analysis proposes a new test for arrest that remedies the deficiencies of wrongful arrest by advocating for an objective test that claimants must satisfy before being entitled to arrest vessels in support of their claims.

EVALUATING ARREST'S ROLE

The role that arrest plays in assisting claimants to establish jurisdiction and perfect security is uncontested.[38] The relevant debate concerns whether arrest's role is prominent or residual. Some commentators argue that arrest plays an integral role in enforcing maritime claims given the elusiveness of vessels and their owners.[39] The irreplaceable nature of arrest in the pursuit of maritime claims is overstated considering that legislation allows claimants to pursue claims *in personam* or *in rem* without arrest.[40] Furthermore, the practical hardships that used to pose difficulties to claimants in founding jurisdiction and perfecting security are no longer unique to maritime litigation. Therefore, the preferred argument stipulates that English shipping law's failure to adapt to practical developments in modern shipping practice has diminished the role of arrest. By allowing claimants to unilaterally deny shipowners the commercial utility of their property, irrespective of the merits or value of claims and with the ability to survive *bona fide* transactions when attached to maritime liens,[41] it is evident that the power to arrest vessels is exceptional.[42] Unfortunately, such an exceptional power in theory is invoked in unexceptional

[38] *The Stolt Kestrel and The Niyazi S* (n 12) [12] and [21]; *The MV Alkyon* (n 4) [14]; *The Styliani Z* (n 12) [20].
[39] *The MV Alkyon* (n 4) [55]; Tsimplis (n 21) 498–499; Anton Trichardt, 'Arrest as Security and Security Arrest' in Paul Myburgh (ed), *The Arrest Conventions: International Enforcement of Maritime Claims* (Hart Publishing 2019) 59–60; William Tetley, *International Maritime and Admiralty Law* (Éditions Yvon Blais 2002) 473; William Tetley, 'Security Rights for Maritime Claims' in Ulrich Dobnig and Konrad Zweigert (eds), *International Encyclopaedia of Comparative Law: Volume 3* (Martinus Nijhoff Publishers 1981) 108.
[40] SCA, s 21(1)-(2).
[41] *The Bold Buccleugh* [1851] 7 Moo PC 267, 13 ER 884, 888.
[42] Tsimplis (n 21) 512.

circumstances in practice.[43] This analysis will illustrate how commercially efficient practices have reduced arrest's role from a prominent power to a residual tool in the arsenal of maritime claimants in the enforcement of their claims. This analysis will analyse arrest's current role in founding jurisdiction and perfecting security independently, finding that reform is needed to streamline arrest's perceived role with its modern application to clarify arrest's contemporary use in maritime litigation.

Arrest plays a residual role in founding jurisdiction. The ability of arrest to found jurisdiction is a relic emblematic of the Admiralty Court's historic quarrels for business against other jurisdictions, which disregards the commercial efficiencies of modern shipping.[44] In practice, jurisdiction clauses embedded in standard contracts and forms are relied on to resolve conflicts of law.[45] Furthermore, English courts have embraced less paternalistic positions in *forum non conveniens* hearings,[46] opting for broader approaches premised on the intentions of parties, commercial practicalities, and the circumstances of each case,[47] resulting in a predisposition to surrender jurisdiction. Therefore, it is evident that claimants no longer primarily rely upon arrest to establish the jurisdiction of their claim in English courts.

Arrest plays a residual role in perfecting security. In practice, arrest is avoided mainly by the custom of filing cautions against arrest.[48] Where cautions against arrest are not filed, parties

[43] Nossal (n 21) 372–377; Jackson (n 12) para 15.1; Thomas, 'Ship Arrest – Issues of Availability, Fairness and Proportionality' (n 27) 6; Rhidian Thomas, *Maritime Liens* (Stevens & Sons 1980) 14; Anton Trichardt, *Maritime Liens and the Conflict of Laws* (University of the Free State 2011) 47.
[44] Nigel Meeson, *Admiralty Jurisdiction and Practice* (Lloyd's of London Press 1993) 117–118; Thomas, 'Ship Arrest – Issues of Availability, Fairness and Proportionality' (n 27) 13–21.
[45] CONGENBILL 94, cl 1; GENCON 1994, cl 19; Lloyd's Standard Form of Salvage Agreement, cl J; New York Produce Exchange Form 2015, cl 54; Thomas, 'Ship Arrest – Issues of Availability, Fairness and Proportionality' (n 27) 17; Nossal (n 21) 376–377.
[46] *The Dictator* (1892) 7 Asp MLC 251, [1892] P 304, 306–315; *The Heinrich Bjorn* (1885) 10 PD 44, 51–60.
[47] *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80, [2018] 1 WLR 192 [31]; *SA Cooley (By His Father and Litigation Friend PA Cooley) v TR Ramsey* [2008] EWHC 129 (QB) [42]; *Wink v Croatio Osiguranje DD* [2013] EWHC 1118 (QB) [47].
[48] *The MV Alkyon* (n 4) [15].

usually mutually negotiate alternative security.[49] The increasing prevalence of P&I Clubs and the provision of alternative security coincides with a diminished role for arrest in perfecting security.[50] Nevertheless, arrest retains some residual significance as a final resort ensuring the availability of funds to meet judgment proceeds where defendant shipowners are unresponsive or become insolvent.[51] This is reflected in practice, where arrest is regarded as a procedural step invoked to implead absentee shipowners rather than exercised as a pre-eminent right.

As this part of the analysis has shown, the ability of arrest to establish jurisdiction and perfect security is prominent in theory but residual in practice. If English shipping law continues to accommodate outdated vestiges of historic practice, the discrepancies between arrest's legal depiction and practical application are certain to expand considering the inevitability of future advancements in shipping practice. Therefore, it is in English shipping law's best interest to mirror the depiction of arrest's role with its modern application for two reasons. First, it would clarify the retained significance of arrest to enforce maritime claims as a final resort, ensuring the common law remains transparent and predictable for parties relying on its application. Second, reform would reinvigorate the international prominence of English shipping law by exhibiting its ability to consolidate legal doctrines with contemporary commercial practices. Therefore, to prevent arrest's outmoded depiction in the law from bringing English shipping law into disrepute, this analysis will redefine the availability of arrest to establish jurisdiction and perfect security as a final resort within a novel test for arrest that reflects its contemporary role in English shipping law.

REFORMING ARREST

[49] *The Majfrid* (1943) 77 Ll LR 127, 129; *The Kalamazoo* (1851) 15 Jur 885, 887.
[50] Paul Myburgh, 'P&I Club Letters of Undertaking and Admiralty Arrests' (2018) 24 JIML 201, 201–203 and 212; Davies (n 21) 139; Nossal (n 21) 377.
[51] Davies (n 21) 139.

This article proposes a new test for determining when claimants can arrest vessels in support of their claims. The catalysts for reform are the deficiencies identified in the above evaluations of wrongful arrest and the role arrest plays in contemporary shipping practice. To summarise, this article argued that wrongful arrest's subjective and retrospective construction prevents it from sufficiently policing the availability of arrest to maritime claimants and that arrest's legal depiction misrepresents when it is relied upon in practice. Correspondingly, this reform has two ambitions. First, it seeks to establish a more effective limitation to arrest than wrongful arrest by reforming arrest from an absolute right to a discretionary privilege, premised upon objectivity rather than subjectivity. Second, this reform seeks to accurately represent arrest's modern role. Crucially, this reform does not amend the *in rem* claims that must arise to invoke the right to arrest. Instead, this reform provides a structure through which the lawfulness of an arrest is pre-emptively assessed. Furthermore, whilst the proposed test takes influence from principles discussed in case law concerning freezing injunctions,[52] the reform advocated does not unconditionally adopt the laws that govern the provision of freezing injunctions because they are not entirely germane to the nature of the proposed reform.

The reform advocated confers upon claimants the right to arrest vessels *after* claimants satisfy all the requirements of a proposed three-pronged test.[53] The proposed test operates as follows. After establishing an *in rem* maritime claim,[54] claimants must satisfy the following three prongs before the ability to arrest vessels is conferred by the courts. First, there must be a reasonably arguable claim against the alleged vessel.[55] In addition to strengthening the calibre of evidence required to authorize arrest, satisfying the first prong simultaneously operates to establish the

[52] Thomas, 'Ship Arrest – Issues of Availability, Fairness and Proportionality' (n 27) 29; *Kazakhstan Kagazy Plc v Arip* [2014] EWCA Civ 381, [2014] 1 CLC 451; *Finurba Corporate Finance Ltd v Sipp SA* [2011] EWCA Civ 465.
[53] Thomas, 'Ship Arrest – Issues of Availability, Fairness and Proportionality' (n 27) 29.
[54] SCA, s 21(2), s 21(2) and s 21(4).
[55] *Holyoake v Candy* [2016] EWHC 970 (Ch), [2016] 6 Costs LR 1157, 1166.

jurisdiction of claims because it inherently requires that claimants demonstrate that their claims are arguable according to English shipping law. Second, there must be a significant risk of insufficient security to support judgment proceeds or a significant risk of the vessel dissipating and the shipowner being untraceable.[56] The second prong accurately reflects when claimants rely on arrest to obtain security in modern shipping practice as a final resort where alternatives to obtaining security are exhausted. Finally, claimants must disclose, in good faith, all material matters relating to their application for arrest.[57] The last prong acts as a safety net ensuring that claimants procure arrest for legitimate reasons, allowing courts to ascertain as comprehensive of a petition as possible before exercising their discretion to either award or deny claimants the ability to arrest vessels. The first two prongs must be analysed objectively while the third prong may be analysed subjectively.[58]

The proposed three-pronged test specifically remedies the deficiencies identified throughout this analysis. Unlike wrongful arrest, the proposed test determines the lawfulness of an arrest *before* it is made, premised on *objective merits* rather than *subjective beliefs*. This test establishes a stronger limitation to arrest than bad faith or gross negligence because, unlike the current construction of wrongful arrest, the three-pronged assessment expressly prevents unreasonable arrests. Furthermore, in examining the merits of arrest before granting claimants the right to arrest vessels, the proposed test is more exacting than current procedure, which merely requires claimants to disclose 'brief details of claim[s]' within the *in rem* admiralty claim form.[59] Moreover, in making the right to arrest discretionary rather than absolute, the proposed test does not advocate for a radical amendment of the law but a reformed reversion

[56] *VTB Capital Plc v Nutritek International Corp* [2012] EWCA Civ 808, [2012] 2 CLC 431, 433; *Thane Investments Ltd v Tomlinson* [2003] EWCA Civ 1272 [21].
[57] *Brink's-Mat Ltd v Elcombe* [1988] 1 WLR 1350, 1359; *Castelli v Cook* (1849) 68 ER 36, 36–40; *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428, 437.
[58] Thomas, 'Ship Arrest – Issues of Availability, Fairness and Proportionality' (n 27) 29–31.
[59] CPR, PD 61.3(3.1).

of previous civil procedure.[60] Crucially, the first prong should not be interpreted as requiring claimants to meet the civil burden of proof as its application necessarily occurs pre-trial and it suffices that claimants merely establish a 'serious argument'.[61] This test also accurately captures the residual role of arrest in the enforcement of modern maritime claims by depicting its capacity to found jurisdiction and perfect security as a final resort.

The proposed test establishes a discretionary right to arrest.[62] Correspondingly, parallels can be drawn between this test and freezing injunctions.[63] Nevertheless, any such parallels should not be overemphasised, and the differences between the proposed test and freezing injunctions must be made clear to preserve this test's autonomy. The most prominent discrepancy between the proposed test and freezing injunctions concerns the requirement for cross-undertakings in damages. Whilst courts often condition discretionary rights such as freezing injunctions with cross-undertakings in damages,[64] which many academics argue should condition arrest,[65] this analysis argues that maritime claimants should not be required to provide cross-undertakings in damages for arrest for two reasons. First, a blanket mandate requiring cross-undertakings in damages would discriminate against financially weaker claimants, such as non-professional salvors, from arresting vessels in pursuit of their claims.[66] Second, a requirement for cross-undertakings in damages is not germane to the nature of the proposed test. Crucially, the proposed test operates pre-emptively to afford successful claimants the right to arrest vessels. The proposed test considers whether the circumstances petitioned by claimants give rise to

[60] Rules of the Supreme Court (Revision) 1965, SI 1965/1776, r 5; *The Vasso* [1984] 1 Lloyd's Rep 235 (CA) 241; *The Kherson* [1992] 2 Lloyd's Rep 261, 268–269; *The Nordglimt* [1987] 2 Lloyd's Rep 470, 473–474.
[61] *The Niedersachsen* [1984] 1 All ER 398, [1983] 2 Lloyd's Rep 600, 605.
[62] Thomas, 'Ship Arrest – Issues of Availability, Fairness and Proportionality' (n 27) 29–31.
[63] ibid 29–32.
[64] *Third Chandris Shipping Corporation v Unimarine SA* [1979] 1 QB 645, 669; *SCF Tankers Ltd (Formerly Known as Fiona Trust & Holding Corp) v Privalov* [2017] EWCA Civ 1877, [2018] 1 WLR 5623 [16].
[65] Bernard Eder, 'Wrongful Arrest of Ships - A Time for Change' (n 21) 131–135.
[66] *Crawford Adjusters v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17 [72]; *The DH Peri* (1862) 167 Eng Rep 245, 246.

the right to arrest vessels in pursuit of their claims and does not concern the ramifications of arrest. Therefore, the jurisdiction of this test *only goes as far as giving successful claimants the right to arrest*, meaning the conduct of arrest or financial losses flowing from arrest are beyond the purview of the proposed test. Unlike wrongful arrest, the proposed test attempts to mitigate any hardships of arrest *before* arrest occurs. Therefore, the proposed test cannot guarantee that shipowners whose vessels have been arrested in pursuit of unsuccessful claims are indemnified. However, the proposed test can guarantee that no financial losses will flow from unreasonable arrests. The inability of the proposed test to guarantee indemnity is entirely justifiable as the courts have recognised policy suggesting that the law cannot indemnify every successful shipowner as some financial losses are simply incidental to proceedings.[67]

The best way to prove the merits of the proposed reform is by applying the three-pronged test to *The Evangelismos*.[68] On the facts, the shipowner was unable to receive damages for three months of commercial inactivity due to the arrest of The Evangelismos, despite the ship being entirely uninvolved in the claim.[69] Here, the shipowner was unable to rely on the doctrine of wrongful arrest to recover losses as the claimant did not arrest The Evangelismos in bad faith or with gross negligence but arrested the vessel in good faith,[70] on the basis that it appeared similar to the ship that actually caused the wrongdoing.[71] Crucially, the manner in which The Evangelismos was arrested would not escape the scope of the proposed test as it had eluded the doctrine of wrongful arrest. The claimant would have failed the three-pronged test because similarities in appearance between The Evangelismos and the wrongdoing vessel falls short of proving a reasonably arguable claim under the first prong. Therefore, the shipowner would

[67] *The Kos* [2010] EWCA (Civ) 772 [51]-[56]; *Crawford Adjusters* (n 66) [82].
[68] *The Evangelismos* (n 11).
[69] ibid 945-948.
[70] ibid.
[71] ibid 946.

not have suffered any commercial losses under the proposed three-pronged test, not because a cross-undertaking in damages indemnified the losses suffered from commercial inactivity, but because the claimant would not have had the right to arrest The Evangelismos in the first place.

CONCLUSION

This article comprised of four parts. After describing the law of arrest and its role in English shipping law, this analysis evaluated wrongful arrest and arrest's role in enforcing maritime claims. From these evaluations, this analysis found, contrary to conflicting perspectives, that wrongful arrest's narrow scope is unjustified as a weak limitation to arrest, and that the role arrest plays in English shipping law is outmoded. Correspondingly, this analysis proposed a new test for determining the availability of arrest that addresses these deficiencies. The three-pronged test provides a more stringent limitation to arrest than wrongful arrest and accurately represents arrest's contemporary role in English shipping law.

Is there a significance of the market access approach developed by the Court of Justice of the European Union in the sphere of free movement of goods and workers?

Callie Swash

ABSTRACT

The market access approach is a central principle, used as a tool to allow the Court of Justice of the European Union to give suitable effect to the Community's main economic aims of establishing a single internal market without any internal frontiers.[1] *To achieve the financial aims of the Union and produce an 'internal market',*[2] *integration of the provisions and harmonisation methods, such as the adoption of the market access approach, has been essential. However, the lack of definition for the market access approach has been subject to contentious debate from academics and judges alike, resulting in it being a broad concept that is still clouded in vagueness, not suitably clarifying the law.*

INTRODUCTION

Part one of this essay will evaluate the development of the market access approach, adopted by the Court of Justice of the European Union, and how the lack of an appropriate definition of the principle, in cases where judicial preference was skewed towards the market access approach, i.e. *Commission v Italy (Trailers)* and *Mickelsson v Roos,*[3] has not suitably filled the

[1] Consolidated version of the Treaty on the European Union (TEU) [2008], art.3(3); Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/59, art 26.
[2] TEU (n 1).
[3] Case C-110/05 *Commission v. Italy (Trailers)* [2009] ECR I-519; Case C-142/05 *Mickelsson and Roos* [2009] ECR I-4273.

lacuna left after the judgment in *Keck.*[4] Both varying academic commentary and relevant opinions from the Advocate Generals will be considered to evaluate the inadequacies, as well as analysis of the relevant judgments to determine the clarity of the reasoning behind the market access approach. Part two will explore, in more depth, the impact that the adoption of this market access approach has had on succeeding case law and, in turn, the significance this has had on the free movement of goods and free movement of workers within the EU.

PART I: EVALUATION OF THE MARKET ACCESS APPROACH DEVELOPMENT

The market access approach has been described as a 'principal technique' to attain the single market goal, 'central to the EU and its economic rationale'.[5] Any non-fiscal barriers to trade are prohibited as national measures that place quantitative limits on foreign goods or 'limit their access to the national market'.[6] The beginning of the assumption of the market access approach can be traced back to the definition of measures having equivalent effect to quantitative restrictions ("MEQRs"), provided in *Dassonville,*[7] as 'all trading rules enacted by member states ("MS") which are capable of hindering, directly or indirectly, actually or potentially, intra-Union trade'.[8] Analysing this decision with the Court's reasoning in *Cassis* marks the initial transition from the established discrimination approach to one whose focal point is aimed towards market access.[9]

[4] Case C-267/91 and C-268/91 *Criminal Proceedings Against Barnard Keck and Daniel Mithouard* [1993] ECR I-6097.
[5] Paul Craig and Gráinne de Burca, 'The Single Market' in *EU Law: Text Cases and Materials UK Version* (7th edn OUP, 2020), 663.
[6] Armin Cuyvers, 'Free Movement of Goods in the EU' *East African Community Law* (BRILL, 2017), 326.
[7] Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837.
[8] ibid, [5].
[9] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein ('Cassis de Dijon')* [1979] ECR 649.

Problems began to manifest when this was exploited by traders who sought to use the broad *Dassonville* formula to promote their own interests such as in the *Sunday Trading* case.[10] After the criticism of *Dassonville,*[11] the Court sought to 'clarify the law' through the judgment in *Keck,*[12] by stating certain 'selling arrangements' that applied 'equally to domestic and imported goods' did not fall into article 34,[13] said by Weatherill to be where the Court 'simply changed their mind'.[14] This was criticised, with the 'majority suggesting market access should be the panacea'.[15] After there was an increase in 'the number of questions about the precise scope of its principle',[16] the Court sought to justify once again using their reasoning for *Keck.*[17] This was stated as when such rules are excluded as 'neither prevent access to the market nor impede access to foreign goods rather than imported goods'.[18] This highlighted the first moment when the Court of Justice of the European Union increasingly began substituting the non-discriminatory approach to one of market access. Moreover, the reasoning provided by the judgment gave no solid definition of what 'market access' entails and the ambiguity was left unsolved. Furthermore, Advocate General Jacob's criticism of the existing non-discriminatory approach in *Leclerc* was prominent in succeeding cases,[19] where the Court then decided to move their focus on highlighting the effect that measures had on access to the markets rather than if they were discriminatory (*Agostini* and *Gourmet*).[20]

[10] *Dassonville* (n 7); Case C-145/88 *Torfaen Borough Council v B & Q plc* (Sunday Trading) [1989] ECR 3581.
[11] *Dassonville* (n 7).
[12] Agne Limante 'Rethinking Keck and Market Access Test Once Again. A Vicious Circle?' [2012] KSLR EU Law Blog; Case C-267/91 and C-268/91 *Criminal Proceedings Against Barnard Keck and Daniel Mithouard* [1993] ECR I-6097.
[13] Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/59, art 34.
[14] Stephen Weatherill, '*Cases and Materials on EU Law'* (10th edn, OUP, 2012) 328.
[15] Limante (n 12) https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=256 accessed 23 February 2023.
[16] Case C-158/04 and C-159/04 *Alfa Vita Vassilopoulos AE, formerly Trofo Super-Markets AE v Elliniko Dimosio, Nomarkhiaki Aftodiikisi Ioanninon* [2006] Opinion of AG [Maduro] ECR I-8135, [34].
[17] *Keck* (n 4).
[18] Jukka Snell, 'The notion of Market Access: a concept or a slogan?' (2010) 47 C.M.L. Rev 437, 447.
[19] Case C-412/93 *Leclerc-Siplec v TF1 Publicite SA* [1995] Opinion of AG [Jacobs], ECR 1-179, [38] – [49].
[20] Case C-34-36/95 *Konsumentombudsmannen v De Agostini et al* [1997] ECR I-3843; Case C-405/98 *Konsumentombudsmannen v Gourmet International (GIP)* [2001] ECR I-1795.

Arguably, using this approach interchangeably with the non-discriminatory test has led to a lack of clarity, and with the increase of market access being used, many question whether *Keck* is still relevant.[21] The confliction shows, where even with the criticism of the non-discriminatory methods given in *Leclerc,*[22] and the supporting views of the market access approach by Advocate General Lenz in *Commission v Greece,*[23] both cases still applied the approach encapsulated in *Keck.*[24] The push towards a change of approach to enable a more structured system was made by Advocate General Kokott in *Mickelsson v Roos,*[25] who proffered a new outlook to widen the *Keck* criterion to encompass national rules which regulate the use of goods.[26]

The biggest change came about with the case of *Commission v Italy (Trailers),*[27] where the Court of Justice of the European Union confirmed that it had preference for transitioning to a market access approach, despite the 'ambiguity that comes with it',[28] and 're-defined the notion of barriers to intra-EU trade underlining market access' through Advocate General Bot's opinion of adopting a 'general approach based on market access'.[29] Market access was introduced as an independent category for establishing whether Article 34 had been violated[30] by broadening the scope of the article to national measures that limit consumer use.[31] Barnard has described the approach and its outcomes as a "sophisticated framework" agreeing with

[21] Eleanor Spaventa, 'Leaving Keck Behind? The Free Movement of Goods After The Rulings in Commission v Italy and Mickelsson and Roos' [2009] 34(6) ELRev 929.
[22] *Leclerc-Siplec* (n 19).
[23] Case 240/86 *Commission of the European Communities v Greece* [1989] Opinion of AG [Lenz], 3 C.M.L.R 578, 586.
[24] *Keck* (n 4).
[25] *Mickelsson* (n 3).
[26] ibid [24].
[27] *Commission v Italy (Trailers)* (n 3).
[28] Catherine Barnard, 'The Substantive Law of the EU' (3rd edn, OUP, 2010), 106.
[29] Limante (n 12); Snell (n 18) 455.
[30] Moritz Jesse, 'What about Sunday Trading? The Rise of Market Access as an Independent Criterion, Under Art.34 TFEU' *European Journal of Risk Regulation* [Cambridge University Press, 2012] Vol. 3(3), 437.
[31] Case C-110/05, *Commission of the European Communities v Italian Republic* [2009] ECR I-519.

fellow academic,[32] Weatherill, that it is indeed more appropriate to 'focus on whether there is a direct or substantial hindrance' to access the markets.[33] The support from academics is counteracted with the disapproval of some Advocate Generals about 'the legal reasoning employed, lack of clarity of the judgment, and fears that it was both too broad…and too narrow'.[34] This opinion is directly identified where the market access based approach was described as 'so broad' that it has caused the system to become 'open to abuse by economic operators'.[35] Nevertheless, it is still unclear whether the market access test has truly overridden the non-discriminatory approach, or if it has simply been undermined by the Court without official replacement. It has been concluded by Spaventa as the *Keck* exception is now 'no longer relevant',[36] and the impact on market access is what is now important.[37] Therefore, Spaventa ultimately agrees with Advocate General Jacobs in *Leclerc* that all measures hindering market access should henceforth be prohibited.[38]

However, this has not been uniformly interpreted by Wenneras and Boe Moen who have established that the judgment in *Keck* 'did not only introduce a market access approach but should be seen as an affirmation of the non-discriminatory principle'.[39] This uncertainty over the reigning approach to establish whether a measure or rule will trigger article 34 TFEU stems from its lack of suitable definition and disproportionate judicial reasoning.[40] It could be argued that this interpretation of what can and cannot fall within the scope of article 34 has gone too

[32] Catherine Barnard, 'Fitting the Remaining Pieces into the Goods and Persons Jigsaw?' [2001] 26 E.L. Rev 34, 52.
[33] Stephen Weatherill, 'After Keck: some thoughts on how to clarify the clarification' [1996] 33 CMLRev, 900.
[34] Catherine Barnard, 'Competence Review: The Internal Market' [2013], Page 10-11 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226863/bis-13-1064-competence-review-internal-market.pdf accessed 23 February 2023.
[35] Case C-442/02 *CaixaBank France v Ministère de l'Économie, des Finances et de l'Industrie* [2005], Opinion of AG [Tizzano], ECR I-6515, [62] – [63].
[36] Spaventa (n 21).
[37] ibid.
[38] *Leclerc-Siplec* (n 19) opinion of AG Jacobs.
[39] Pal Wenneras and Ketil Boe Moen, 'Selling Arrangements, Keeping *Keck'* [2010] 35 ELRev, 399.
[40] TFEU (n 13) art 34.

far and has been applied too widely, without answering the previous questions involving 'selling arrangements' and 'product requirements' first. The result is that the links between discriminatory measures and rules which hinder access to the market for products produced in other MS has become increasingly unclear. As recommended by Advocate General Tizzano in *Caixa Bank,* perhaps a more suitable establishment would be to return to the non-discriminatory approach and to only use market access as a secondary, subsidiary test.[41] The elevation of market access to its own independent category capable of determining a breach alone means it is likely to be the quicker of the criterion to be established in cases brought to the Court, without the necessity of determining whether the same measure would be non-discriminatory, or deemed as a 'selling arrangement' or a 'product requirement'.[42]

PART II: ANALYSIS OF THE IMPACT

By having an independent criterion of whether a national measure or rule hinders access to the market, measures brought before the Court have been swifty determined to be a breach of article 34 TFEU.[43] This approach means that these measures are not being examined in the same depth by comparing the impact on foreign goods compared to those of domestic character, as they do in case law preceding *Commission v Italy (Trailers)*.[44] As Advocate General Maduro argues in *Alfa-Vita,* the Treaty provisions are not to be interpreted as needing an extensive and unlimited amount of negative integration by the Courts.[45] Another problem is the lack of a single definition or step-by-step criteria to be applied universally. Consequently, there is now

[41] *CaixaBank* (n 35) opinion of AG Tizzano, [65].
[42] *Keck* (n 4); *Cassis de Dijon* (n 9).
[43] TFEU (n 13) art 34.
[44] *Commission v Italy (Trailers)* (n 3).
[45] Case C-158/04 and C-159/04 *Alfa Vita Vassilopoulos AE, formerly Trofo Super-Markets AE v Elliniko Dimosio, Nomarkhiaki Aftodiikisi Ioanninon* [2006] Opinion of AG [Maduro] ECR I-8135, [36] –[41].

an open door to complete subjective judicial interpretation, or 'judicial sleight of hand'.[46] After 'the degradation of *Keck,* it will be easier to establish a restriction on trade' and ultimately to show that a measure is in breach of article 34 TFEU.[47] The case of *ANETT* is a direct example of this.[48] In the judgement 'the Court of Justice of the European Union was quick to establish that the case at hand was not about certain 'selling arrangements' in the line of *Keck'*'[49] which, if applied, would have held the measure to fall outside of being in violation of article 34 TFEU.[50] This move can arguably bring into question the reputability of the Court of Justice of the European Union if the concept of justice is being based on undefined terms. Barnard states 'the problem with the market access test is that it is too broad and [in] certain cases a line must be drawn between the rules that can be caught by EU law, and those which fall outside'.[51] In *ANETT*[52] there was no indication that the Spanish rule had the 'objective or effect of treating foreign products less favourably',[53] but the Court clearly 'spelled out that it was the restriction of market access alone that triggered article 34 TFEU'.[54] Arguably, this emphasis on the market access approach being the most decisive criterion 'confirms the development starting in *Trailers* and *Micklesson'*.[55] Despite this continuous promotion of market access approach, suggesting it is now the sole question for the courts, the *Dassonville*[56] formula and *Keck*[57] are *still* being mentioned (such as in the case of *Ker-Optika*).[58] Here, the inconsistency in judicial reasoning is present 'as soon as applicants can show that [national] rules could be defined as

[46] Daniel Wilsher, 'Does Keck Discrimination Make Any Sense? An Assessment of the Non-Discrimination Principle Within the European Single Market' [2008] 33(1) ELRev 3, 20.
[47] Jesse (n 30); TFEU (n 13) art 34.
[48] Case C-456/10 *Asociacion Nacional de Expendedores de Tabaco y Timbre (ANETT) v Administracion del Estado* [2012] ECR I-4233.
[49] Jesse (n 30) 437.
[50] *Keck* (n 4); TFEU (n 13) art 34.
[51] Barnard (n 28).
[52] *ANETT* (n 48).
[53] *ANETT* (n 48) [36].
[54] Jesse (n 30) 439.
[55] ibid.
[56] *Dassonville,* (n 7).
[57] *Keck* (n 4).
[58] Case C-108/09 *Ker-Optika bt v ANTSZ Del-dunantuli Regionalis Intezete* [2010] ECR I-12213.

"any other measure which hinders access of products originating in other Member States"'[59] then this 'drastically limits the practical use of the concept of 'certain selling arrangements''[60] and shows that a violation of article 34 TFEU[61] has taken place 'regardless of its [potential] nature as a non-discriminatory selling arrangement under *Keck'*.[62] Nevertheless, this is not to say the Court has not shown more leniency regarding justifications under article 36 TFEU.[63] In *Mickelsson*[64] after the market access test was used exclusively to determine that a violation of article 34 TFEU[65] was present, the Court of Justice of the European Union then analysed the Swedish law 'during the discussion of potential justifications and their proportionality as to assist the national authorities',[66] showing the Court's determination to leave some 'breathing room' for MS 'to justify indistinctively applicable measures amounting to restrictions on trade on the internal market'.[67] This discussion is perhaps only a requisite due to the widened scope of article 34 TFEU and the market access test,[68] a circular issue that the Court of Justice of the European Union has created for itself. Thus, in turn, 'it will find it necessary to give more and more detailed answers to handle the "open-system" it has created'.[69] Barnard has stated that 'market access as a criterion would be far more intrusive to national regulatory autonomy in the absence of harmonisation than a model establishing restrictions only in terms of discrimination'.[70] Ultimately, this drift towards the market access approach is synonymous to

[59] Catherine Barnard, 'Competence Review: The Internal Market' (2013), 10-11 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226863/bis-13-1064-competence-review-internal-market.pdf accessed 23 February 2023.
[60] Jesse (n 30) 441.
[61] TFEU (n 13) art 34.
[62] Spaventa (n 21) *supra note 2,* 929.
[63] Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/59, art 36.
[64] *Mickelsson* (n 3).
[65] TFEU (n 13) art 34.
[66] Jesse (n 30) 442.
[67] ibid, 441.
[68] TFEU (n 13) art 34.
[69] Stefan Enchelmaier, '*Moped Trailers, Mickelsson & Roos, Gysbrechts*: The ECJ's Case Law on Goods Keeps on Moving'' [2010] Yearbook of European Law Vol. 29(1), 190-223.
[70] Barnard (n 28) 168.

a 'subtle movement of regulatory competence away from the Member States and to the Court of Justice of the European Union in particular'.[71]

In the sphere of free movement of workers, the Treaty provision concerning those who can be considered 'economically active'[72] is contained in article 45 TFEU.[73] As the definition of worker is 'dependent on the person being engaged in an economic activity' and the Treaty provisions are only 'engaged when there is movement between States'.[74] This demonstrates the alignment with access to the market being relevant within the field of workers, as it is with goods. It is evident that the market access approach is also used as reasoning for relevant cases. In the case of *Bosman,*[75] the defendants looked to apply the *Keck* formula but were not accepted by the Courts due to the horizontal application being denied to other fundamental freedoms. Instead, market access reasoning was applied, where the Court stated that despite the contentious rules being non-discriminatory 'they still directly affect players' access to the employment market in other MS and are thus capable of impeding freedom of movement for workers'.[76] However, in the case of *Graf,*[77] regardless of the argument that there was an obstacle to the free movement of workers, by preventing potential access to foreign employment markets as a dissuasive mechanism, the Court took a non-discriminatory approach and said it was 'too uncertain and indirect…to be capable [of] being regarded as liable to hinder free movement for workers'.[78] Under Advocate General Fennelly's opinion it was noted that in *Bosman* the Court was applying a test of whether the measure deterred a worker from leaving

[71] Jesse (n 30) 442.
[72] Case 139/85 *Kempf v Staatssecretaris van Justitie* [1986] ECR 1741.
[73] Barnard (n 59) 5; Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/59, art 45.
[74] Case C-60/00 *Carpenter* [2002] ECR I-6279.
[75] Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman,* [1995], ECR I-4921, [109].
[76] ibid.
[77] Case C-190/98 *Graf v Filzmozer Maschinenbau GmbH* [2000] ECR I-000.
[78] ibid [24]-[25].

their own MS, and argued that those tests related 'solely to the sorts of formal conditions of access to the employment market'.[79] Whereas in *Graf*,[80] by taking a different approach of whether the measure was non-discriminatory in nature, the Court did not subjectively look at whether this substantially hindered access to the employment market, an inconsistency manifested in the case law once again. It appears that the crucial determinant is whether discrimination between host State workers and those belonging to other MS is present for the Court to step in,[81] showing unsurprisingly that there is a lack of consistency in the Court of Justice of the European Union's approach to applying the unclarified market access test. Another case of relevance is that of *Commission v Italian Republic* where the judgment stated that the Court found that the mandatory tariff in contention was hindering the Italian market for legal professionals.[82] They went further to say how despite the restriction being non-discriminatory, it still affected 'access to the market for economic operators from other Member States'.[83] This inconsistency and lack of clarity is mirrored from 'goods' in another fundamental freedom of movement, as to whether the *Keck* analogy,[84] the *Dassonville* formula,[85] or the market access test is the decisive factor when determining a breach of article 45 TFEU.[86]

CONCLUSION

To conclude, albeit the market access approach was introduced as a step towards clarification, it has instead added a further layer of opacity to the law surrounding free movement. By establishing a new market access test, the Court of Justice of the European Union has given

[79] *Graf* (n 77) opinion of AG Fennelly, [32].
[80] ibid.
[81] Catherine Barnard and Simon Deakin, 'Competitive Federalism and Market Access in the EU' *Market Access and Regulatory Competition* [2001].
[82]Case C-565/08 *Commission v Italian Republic (Maximum Fee for Lawyers)* [2011] ECR I-000, [31].
[83] Ibid [46].
[84] *Keck* (n 4).
[85] *Dassonville* (n 7).
[86] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/59, art 45.

itself a larger caseload where it must make judgments on undefined criteria. This has led to a vague area of the law, where judgments are inconsistent and on a constant path to clarifying one another. The scope of the Treaties and articles themselves has been broadened too much by the market access test and has resulted in reasoning and decisions being made by the Court of Justice of the European Union exclusively in a subjective manner, meaning the reliability or consistency of the Court can be brought into question. It is clear the Court of Justice of the European Union still has some work to do on clarifying and defining the market access approach to a significant standard. Ironically the intention of the introduction, to give effect to the aims of the Union, has been undermined by the introduction itself, by hindering the free movement of goods and workers in an overbroad manner. A single established market access test with defined criteria to meet should be created, to ensure clarity and certainty of the law on free movement between MS.

What is the importance of the Rule of Law within the UK constitution?

Arta Ebrahimpour

ABSTRACT

While the rule of law plays an integral part to the United Kingdom's constitution, it has recently been undermined by unprecedented times, such as Covid-19. This article argues that during times of uncertainty, rather than the rule of law being undermined, it serves to be one of the most cardinal doctrines that exist within the United Kingdom. It assesses the role that the doctrine has played during Covid-19, environmental rights, and judicial review. It argues that despite recent struggles, the rule of law is a doctrine which has significant importance within the United Kingdom constitution and supports other doctrines within the United Kingdom constitution.

INTRODUCTION

The importance of the rule of law can be seen in the Constitutional Reform Act, which illustrates that it is an 'existing constitutional principle.'[1] The rule of law is a 'controlling factor' which the constitution is based on.[2] However, there is no single definition of the rule of law, but rather many different interpretations of the principle. This paper will argue, ultimately, that the rule of law has never been as important as it is in today's constitution. This will be

[1] Constitutional Reform Act 2005, pt 1 s. 1(b).
[2] *R (on the application of Jackson) v Attorney General* [2005] UKHL 56 [107] (Lord Hope).

demonstrated by examining the role that the rule of law has played during Covid-19, environmental rights, and judicial review. Finally, it will explore how the rule of law has worked mutually with other constitutional principles that are part of the United Kingdom's (UK) constitution.

FORMATIVE V SUBSTANTIVE RULE OF LAW

First, it has been exhibited that the rule of law is important within the UK constitution (as seen below), but the content of the rule of law has had major academic disagreements. The first conception of the rule of law, is that of a formal approach. This approach focuses on whether the law follows the correct procedure, and if it was enacted by an authorised person.[3] This approach is heavily supported by Joseph Raz who views the rule of law as a 'negative value', which reduces the danger created by arbitrary power.[4] Furthermore, according to Paul Craig, Dicey was also a formal advocate of the rule of law, as Dicey believed that all laws should be passed in a procedural manner (by Parliament).[5] Therefore, people who follow the formal approach heavily focus on the prevention of arbitrary power, as well as the manner in which the law is passed. However, there are also those who argue for a substantive approach to the rule of law. Substantive advocates focus on the content of the rule of law and the substantive rights of people within the constitution.[6] For example, Lord Bingham heavily emphasises 8 sub-rules within the rule of law, one of which includes protection of 'fundamental human rights.'[7] The rule of law is important because it can be said to protect the way in which laws are passed in the correct manner. Furthermore, the focus on the content of the rule of law is

[3] Paul Craig, 'Formal and Substantive Concepts of the Rule of Law: an Analytical Framework' [1997] Public Law 467, 467.
[4] Joseph Raz, *The Authority of law: Essays on law and morality* (Clarendon Press 1979) 1, 224.
[5] Craig (n 3), 470.
[6] ibid, 467.
[7] Lord Bingham, 'The Rule of Law' [2007] 66 CLJ 67, 75.

important to ensure fundamental human rights are protected. In fact, the difference in approach between the different conceptions have been suggested to be mutually reinforcing and apply in the UK's current constitution.[8]

COVID-19 AND THE RULE OF LAW

It is commonly accepted that the rule of law encompasses the principle that no one should be above the law, including the government. This was first seen in the case of *Entick*.[9] Camden J held the state did not act within legal authority when breaking into Entick's house and thus illustrated the state was not above the law.[10] This was further advocated by Dicey, who asserted that 'every man, whatever be his rank or condition' is subject to the law.[11] Moreover, Lord Bingham supports Dicey's principle as he considered that the 'laws of the land should apply equally to all' (Lord Bingham's third sub-rule).[12] Therefore, it is recognised that no one is above the law, and that everyone (regardless of their position in the constitution) is subject to the law. This is significant because it has been exhibited that the rule of law is important within the UK's constitution, highlighting that during times of crisis the principle should still be upheld. For instance, Dr Cormacain argues that regardless of the threat posed by Covid-19, there is still a role for the rule of law in ensuring that the people are 'ruled in accordance with the law, and that we are all subject to the law'.[13] He illustrates this in relation to Covid-19 by emphasising

[8] T.R.S Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press 1994) 1, 39.
[9] *Entick v Carrington* [1765] 95 ER 807.
[10] ibid, 817-818 (Camden J).
[11] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885, 10th edn, Macmillan & Co 1959) 1, 114.
[12] Lord Bingham (n 7), 73.
[13] Ronan Cormacain, 'Does Law Fall Silent in the War Against Covid-19?' (British Institute of International and Comparative Law, 18 March 2020) https://www.biicl.org/newsitems/16406/does-law-fall-silent-in-the-war-against-covid-19 accessed 30 June 2023.

that 'both the burdens and the benefits' of the Coronavirus Act should apply to all.[14] Therefore, the rule of law carries significant importance in times of crisis such as Covid-19.

However, in practice this has not been the result. Dominic Cummings was not held accountable when it was found that he broke government guidelines, when he had driven from London to Durham during the first national lockdown.[15] Mike Gordon argues the 'constitutional duties' and 'influential' position that Dominic Cumming has with Boris Johnson may be a factor which allowed Dominic Cumming not to be held politically responsible.[16] Therefore, the importance of the Rule of Law (all equal before the law) during times of crisis is still significant within the UK constitution.

Applying a substantive approach to the rule of law, it is suggested the rule of law extends to human rights and the country's compliance with international obligations.[17] Lord Bingham's fourth sub-rule 'adequate protection of fundamental human rights', and eighth sub-rule, compliance with 'international law', have been instrumental in the protection of certain rights.[18] This illustrates that human rights is one way the rule of law is recognised. In the context of Covid-19, there is a large debate as to whether the national lockdown complies with the Human Rights Act.[19] Francis Hoar argues that the lockdown did breach human rights.[20] According to Hoar, the lockdown represented an 'unprecedented intrusion' on the freedoms of

[14] ibid; Coronavirus Act 2020.
[15] Mike Gordon, 'Dominic Cummings and the Accountability of Special Advisers' (*UK Constitutional Law Association*, 3 June 2020) https://ukconstitutionallaw.org/2020/06/03/mike-gordon-dominic-cummings-and-the-accountability-of-special-advisers/ accessed 30 June 2023.
[16] ibid.
[17] Lord Bingham (n 7), 67.
[18] ibid, 75 and 81.
[19] Human Rights Act 1998.
[20] Francis Hoar, 'A Disproportionate Interference with Right and Freedoms: The Coronavirus Regulations and the European Convention on Human Rights' (2020) https://fieldcourt.co.uk/wp-content/uploads/Francis-Hoar-Coronavirus-article-on-ECHR-compatibility-20.4.2020-2.pdf general accessed 30 June 2023.

the public.[21] Hoar emphasises a number of human rights that were in 'grave' danger as a result of the government's lockdown rules.[22] Some of these human rights include Article 5 (right to liberty and security), and Article 8 (right to respect for private and family life).[23]

This is further supported by the *Dolan* case, which challenged the regulations made by the Government as a result of the Covid-19 pandemic.[24] The appellants argued the regulations 'imposed sweeping restrictions on civil liberties'.[25] This reveals that as important as the Rule of Law is in the protection of fundamental human rights,[26] there is a failure in upholding it. However, this is contrasted with the lack of success from the *Dolan* case.[27] The Court of Appeal held the Secretary of State had the power 'to make the regulations under the challenge'.[28] This is further supported by Leo Davidson who argues there was no breach of human rights law, as this fell within the 'executive's margin of discretion for the management of the crisis'.[29]

Moreover, Davidson convincingly suggests that under human rights law, the Government has a 'positive obligation' to protect life and health.[30] As a result, this provides the Government with a large 'margin of discretion' when weighing their objective and other rights.[31] Crucially, Dominic Keene supports Davidson, and rejects Hoar's argument, and instead argues there was no breach of any relevant ECHR rights. [32] Thus, despite an argument of whether fundamental

[21] ibid, para 4.
[22] Francis Hoar (n 20).
[23] The Human Rights Act 1998.
[24] *R (on the application of Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605 [1].
[25] ibid.
[26] Lord Bingham (n 7), 75.
[27] *R (on the application of Dolan) v Secretary of State for Health and Social Care* (n 24).
[28] Ibid, [115].
[29] Leo Davidson, 'The Coronavirus Lockdown Does Not Breach Human Rights (Part One)' (*UK Human Rights Blog*, 30 April 2020) https://ukhumanrightsblog.com/2020/04/30/the-coronavirus-lockdown-does-not-breach-human-rights-part-one-leo-davidson/ accessed on 30 June 2023.
[30] Human Rights Act (n 19); Leo Davidson (n 29).
[31] Leo Davidson (n 29).
[32] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] as amended by Protocols Nos. 11 and 14; Dominic Keene, 'Leviathan Challenged – Is the Lockdown

human rights have been protected during Covid-19, this displays the inherent importance of the Rule of Law in the UK constitution, when applying a substantive approach.

ENVIRONMENTAL RIGHTS AND THE RULE OF LAW

There are some agreements between procedural and substantive theorists on the rule of law. One common principle that theorists such as Joseph Raz and Lord Bingham agree on, is that courts should be accessible.[33] Raz argues that it is of 'paramount importance' that the courts are able to review actions of the administration'.[34] Lord Bingham goes further by viewing the principles of judicial review as a 'fundamental' requirement as part of his sixth sub-rule.[35] This sub-rule states that ministers and public officers must exercise their powers reasonably.[36] Lord Bingham correctly recognises that the courts role has expanded in judicially reviewing the executive powers due to the 'increased complexity of government' and the increasing willingness of the public to challenge the actions of the government.[37] The courts examine the legality, the irrationality or the procedural impropriety of public bodies or the executive to ensure the powers exercised are exercised in the manner intended.[38]

The use of judicial review can be seen in the context of environmental rights. In the case of *Plan B Earth*, the claimants presented five grounds for seeking judicial review against the defendants.[39] However, all five grounds of seeking judicial review were rejected by the Administrative Court.[40]

ECHR Compliant?' (2020) para 15 https://ukhumanrightsblog.com/2020/05/11/leviathan-challenged-the-lockdown-is-compliant-with-human-rights-law-part-two/ accessed 30 June 2023.
[33] Joseph Raz (n 4); Lord Bingham (n 7) ,67.
[34] Joseph Raz (n 4), 217.
[35] Lord Bingham (n 7), 78.
[36] ibid.
[37] Ibid.
[38] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410-412.
[39] *Plan B Earth v Secretary of State for Business, Energy, and Industrial Strategy* [2018] EWHC 1892 [35].
[40] Ibid, [52].

The outcome of the case shows that as important as judicial review is within the rule of law, there are some areas (environmental law) that the UK still fails to protect. Furthermore, when comparing the approach of UK courts to courts in other jurisdictions, there is a suggestion that compared to other countries, environmental law is not as well protected in the UK. For example, even though there is no judicial review in the Netherlands, courts have still enforced environmental law.[41] In the case of *Urgenda*, the Netherlands Supreme Court held that the state had to comply with the European Convention on Human Rights (ECHR) obligation in order to 'take measures to counter dangerous climate change'.[42] Therefore, despite the ability for courts being able to judicially review the powers exercised by public bodies or the executive, the courts have not yet had much progress when it comes to the protection of environmental law. Consequently, this shows the importance of the rule of law within the UK but suggests there are still improvements required. These improvements could come about by a 'UK Bill of Rights', rather than judicial review.[43] This would further support the importance of the rule of law by adopting a substantive approach of complying with international law (ECHR).[44]

PRINCIPLES OF THE UK CONSTITUTION

The courts interpreting the rule of law through Acts of Parliament upholds two other key principles of the constitution. The first is that of separation of powers. This notion represents the idea that the three branches (executive, judiciary and legislature) within the constitution,

[41] Jurgen Poorter, 'Constitutional Review in the Netherlands: A Joint Responsibility' (2013) 9 Utrecht Law Review 89, 92.
[42] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (n 32); *Urgenda v The Netherlands* [2019] Supreme Court of the Netherlands, ECLI:NL:HR:2019:2007 para 5.10.
[43] House of Lords and House of Commons Joint Committee on Human Rights, 'A Bill of Rights for the UK?' Twenty-ninth Report of Session 2007-08 (2008) HL Paper 165-I HC 150-I p59.
[44] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (n 32); Lord Bingham (n 7), 81.

work together to achieve a 'constitutionally valuable objective'.[45] The judiciary in this aspect places checks and balances on the other branches to ensure they do not exceed their powers.[46] Therefore, as Lord Bingham points out; the functions of the judiciary, to interpret and apply the law, is 'universally recognised as a cardinal feature' which is a 'cornerstone' of the rule of law.[47]

The other key principle of the constitution is parliamentary sovereignty. According to Dicey, parliamentary sovereignty is the most fundamental principle in the UK constitution.[48] This significance of parliamentary sovereignty and the rule of law is clear by previous cases. In the case of *Unison*, Lord Reed pointed to the idea that Parliament does not legislate contrary to the Rule of Law.[49] This is also supported by the case of *Ex p Pierson*, where Lord Reed suggested that Parliament does not 'legislate contrary to the rule of law' unless there is a clear provision that says otherwise.[50] The significance of this is that Jowell has argued there has been a fundamental shift in importance from parliamentary sovereignty to the rule of law within the UK constitution.[51] Therefore, the importance of the rule of law can be seen in these three constitutional principles enforcing each other. By acting as checks and balances to each other, the three principles are upholding one another.

CONCLUSION

[45] Alison Young, 'The Relationship between Parliament, the Executive and the Judiciary' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019).
[46] Ibid
[47] A v Secretary of state for the Home Department [2004] UKHL 56 [42].
[48] A.V. Dicey (n 11), 24.
[49] *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51 [68] (Lord Reed).
[50] *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, 575-591 (Lord Reed).
[51] Jeffrey Jowell, 'Parliamentary Sovereignty under the Constitutional New Hypothesis' [2006] Public Law 562, 563.

Ultimately, although the rule of law could be said to have been undermined at times due to Covid-19 and the lack of judicial review on environmental law, they are more important than ever in today's UK constitution. Further, even though there are different conceptions on the rule of law, everyone will have different opinions on it (as understood by Paul Craig from Ronald Dworkin's notion on the rule of law).[52] Moreover, the rule of law is better enhanced when reinforced by the other two key principles in the UK constitution, being the separation of powers and parliamentary sovereignty. Therefore, the rule of law in the UK constitution is very important as it plays a larger role in judicially reviewing cases, protecting fundamental human rights and ensuring equality before the law.

[52] Craig (n 3), 479.

Has the elastic interpretation of human rights law led to the 'living instrument' approach to the ECHR interpretation being inherently flawed?

George Baboulene

ABSTRACT

This essay assesses the extent to which the European Court of Human Rights (ECtHR) are utilising the 'living instrument' doctrine to create elastic interpretations which goes way beyond their jurisdiction and into the realm of policymaking. Through use of case law, this essay demonstrates that the doctrine is restricted by reasonable bounds and limitations, and that the courts have taken an 'incremental and evolutionary rather than revolutionary' approach to interpretation. Furthermore, it fails to find any conclusive evidence that an interpretive ethic was not intended by the drafters to the convention. It therefore concludes that it is only logical to utilise a dynamic interpretative approach as it is the only means by which the ECtHR can achieve the object and purpose of the convention. The ECtHR has achieved this whilst striking a fair balance between judicial innovation and respect for the ultimate policy-making role of member states.

INTRODUCTION

The European Convention on Human Rights (ECHR)[1] is described by the courts as a 'living instrument',[2] which enables judges to interpret legislation 'in the light of present-day conditions'.[3] Although there has been a reluctance to expand on the use of the doctrine, its purpose is clear: to provide 'effective and meaningful protection of individual rights'.[4] Objectively, this purpose is desirable. However, there are issues pertaining to how far the ECtHR can sway from the original intentions of the convention's drafters before overreaching into the realm of policymaking. Furthermore, case law highlights inconsistencies in the use and reasoning of the doctrine, as the ECHR struggles to balance when it is suitable to grant a margin of appreciation, and when to enforce a claim. Firstly, this essay will follow the development of the living instrument doctrine to assess how its reasoning has changed over time. Secondly, it will consider whether the court's interpretations are overreaching into the realm of policymaking. Finally, it will assess the doctrine's compatibility with the convention and international law.

DEVELOPMENT

The 'living instrument' doctrine was first coined in the case of *Tyrer v UK*.[5] This case concerned whether judicial corporal punishment, in the form of birching, was compatible with Article 3 of the convention.[6] The defendant argued that birching could not be considered 'degrading' treatment as it 'did not outrage public opinion' in the respondent state.[7] The court held that the convention was a 'living instrument,' and therefore could not 'but be influenced

[1] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).
[2] *Tyrer v UK* [1978] ECHR 5856/72, [31].
[3] ibid.
[4] Theil. S, *'Is the 'living instrument' approach of the European Court of Human Rights compatible with the ECHR and International Law?'* [2017] *European Public Law, 23* (3), 587, 591.
[5] *Tyrer* (n 2).
[6] ECHR (n 1).
[7] *Tyrer* (n 2).

by the developments and commonly accepted standards' demonstrated by Member States of the Council of Europe.[8] The consensus among member states was that birching was no longer an appropriate form of punishment. Therefore, the court held that birching did constitute a violation of Article 3 despite the opposing 'moral climate' of the respondent state.[9] Unfortunately, the court did not explain or provide evidence to support the use of the living instrument doctrine. As a result, inconsistencies arose in subsequent cases and tension arose around the level of common standard necessary to find a violation in the absence of a consensus. On one hand, respondent states were granted a wide margin of appreciation which enabled national authorities to have a degree of freedom in making decisions on controversial matters *(Sheffield and Horsham)*.[10] On the other hand, the court had invoked some unratified international law to meet a common standard and would cite the living instrument as its justification *(Marckx)*.[11] The court has since preferred the latter approach as case law has demonstrated a move from consensus to finding 'common values'.[12] Thus, where there exists some unratified international law, and where there is evidence for 'trends of evolution in societal beliefs',[13] a violation can be found. *Letsas* submits that the common standards found in *Marckx* were 'so loose as to make one wonder whether the Court is paying lip-service to the idea of common ground'.[14] Evidently, the test is more abstract than that initially used in *Tyrer,* and this invites criticism that the doctrine is being used to assist in 'judicial hegemony'.[15]

[8] ibid.
[9] Letsas G, '*"The ECHR as a Living Instrument: Its Meaning and Legitimacy" in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), Constituting Europe: The European Court of Human Rights in a National, European and Global Context*' [2013] CUP 106, 111. (Letsas)
[10] Sheffield and Horsham v. UK (Appl. Nos. 22985/93 and 23390/94), Judgment (Grand Chamber), 30 July 1998, Reports 1998-V.
[11] Marckx v. Belgium (Appl. No. 6833/74), Judgment (Plenary), 13 June 1979, Series A, No. 31.
[12] Letsas (n 9) 122.
[13] ibid 115.
[14] Ibid 116.
[15] Bratza. N, *'Living instrument or dead letter - the future of the European Convention on Human Rights'* (2014) 2 EHRLR 116–28, 117.

Therefore, whether the living instrument doctrine is facilitating elastic interpretations made without oversight merits examination.

OVERREACHING?

The seeds for opposing the living instrument doctrine were planted by Sir Gerald Fitzmaurice in *Tyrer* as he dissented to the view that birching was degrading treatment for the purposes of Article 3. He claimed that any other view 'would mean using the article as a vehicle of indirect penal reform for which it was not intended'.[16] Since then, there has been a 'root and branch' assault on the doctrine on the basis that the court is 'in effect abusing its function and exceeding its jurisdiction' by adopting such interpretations.[17] Firstly, it should be noted that the doctrine is not without limitations. Bratza acknowledges that the 60 years of case-law has 'taken pains to ensure that the application of the "living instrument" doctrine is confined within reasonable bounds'.[18] For example, the court cannot derive a right which was not included in the convention from the outset.[19] This is demonstrated in the case of *Pretty v United Kingdom* where the court held that the living instrument doctrine could not enforce a positive obligation upon states to sanction the assisted suicide of a terminally ill person.[20] Such decisions are considered to be matters of policy-making which Member States are capable of resolving through protocols to the convention. Furthermore, where convention rights are extended by means of additional protocols, the doctrine will not allow for over-creative interpretations into these areas.[21] The leading case, in this respect, is *Soering*[22] which concerned whether the death

[16] *Tyrer* (n 2) cf Sir Gerald Fitzmaurice [14].
[17] Bratza (n 15), 125; Report of the Commission on a Bill of Rights*: "A UK Bill of Rights?—The Choice Before Us",* Vol.1, published on December 18, 2012 at [64] p.24.
[18] Bratza (n 15) 123.
[19] ibid
[20] (2002) 35 EHRR 1.
[21] Mowbray, A, *'The Creativity of the European Court of Human Rights'* (2005) 5 HRLR 57, 69.
[22] *Soering v United Kingdom* A 161 (1989); (1989) 11 EHRR 439.

penalty could violate Article 3.[23] The court turned to Protocol 6 of the convention and held that their interpretive tools could not extend Article 3 to include the death penalty without overreaching their jurisdiction. Therefore, it cannot be said that the doctrine aids judges in exceeding their jurisdiction as there are limitations which control its flexibility.

Secondly, the court has generally adopted an 'incremental and evolutionary rather than revolutionary' approach to the doctrine.[24] This is best illustrated through the court's handling of cases concerning the right to recognise the new sexual identity of post-operative transsexuals. The issue was first addressed 1986 in the case of *Rees v United Kingdom* where the court failed to find an international consensus on the matter, and therefore granted the respondent state with a margin of appreciation.[25] However, the court was aware that this was a quickly developing area and expressed the need of domestic authorities to 'keep under review' the appropriateness of domestic law.[26] The cases of *Cossey v United Kingdom,* and *Sheffield and Horsham v United Kingdom* followed in 1990 and 1998 respectively, issuing a similar warning to review the social developments of Member States despite not recognising the new sexual identity of a post-operative transexual.[27] Finally, in *Christine Goodwin v United Kingdom* in 2002, the court held that the domestic legislation in the UK was not appropriate for safeguarding the convention rights of transsexuals.[28] The rationale underpinning this decision was 'a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals'.[29] These cases reveal that the court is willing to show 'considerable deference' to

[23] ECHR (n 1).
[24] Bratza (n 15), 123.
[25] A 106 (1986); (1987) 9 EHRR 56.
[26] ibid, para. 47.
[27] App no 10843/84 (ECtHR, 27/09/1990); ECHR 1998-V
[28] 2002-VI 1; (2002) 35 EHRR 18.
[29] ibid para 85.

a domestic stance rather than adopting an interventionist attitude.[30] This is an important aspect of the court's jurisprudence which ensures that the judiciary is not capable of exceeding their jurisdiction. Instead, it assures that 'legal developments keep pace with, but do not leap ahead of, societal changes within Europe',[31] whilst maintaining the integrity of human rights claims.

COMPATIBILITY

In the court's view, the logical conclusion drawn from the convention's objective is that fundamental rights must 'evolve with technological and social developments'.[32] This interpretive approach has been criticised for being 'anti-textualist' and 'anti-originalist' on the basis that such interpretations are neither compatible with the convention nor international law.[33] The argument was ignited following the case of *Hirst v United Kingdom*[34] where the court held that a blanket ban on the right to vote for prisoners was a violation of Article 3 of Protocol No.1 to the Convention (Right to Vote).[35] Notably, the focus was not on the legal substance of the case, but on the sovereignty of the UK Parliament against the jurisdiction of Strasbourg Court. Some critics argued that the contracting states agreed to uphold rights as stated by the drafters, and thus, the ECtHR had acted in an 'illegal and illegitimate fashion'[36] by extending their obligations to the Convention without the consent of contracting States. Lord Hoffman formed the basis of this view, stating that it was the duty of the Member States to recognise human rights which 'were not culturally determined but reflected our common humanity'.[37] However, there is inconclusive evidence to suggest that the drafters envisioned or

[30] Mowbray (n 21), 69.
[31] Bratza (n 15) 124.
[32] Theil (n 4) 591.
[33] Letsas (n 9) 123.
[34] [2005] ECHR 681.
[35] ECHR (No 1).
[36] Theil (n 4) 592.
[37] 5 Rt Hon Lord Hoffmann, 'Human Rights and the House of Lords' (1999) 62 The Modern Law Review 159, 166.

required such a strict interpretation of the convention. Firstly, the ECHR grants the court interpretative authority, by virtue of Article 32, and binds signatory states to the court's decisions under Article 46(1). Secondly, the *travaux preparatoires*, which evidence the negotiations that occurred whilst drafting the treaty, does not evidence any specific method of interpretation, and fails to set out any boundaries for the convention.[38] Considering that the convention's text is far from clear, it can only be concluded that the advocated 'originalist' approach would be unrealistic in practice. Additionally, the living instrument doctrine is compatible with international law as the Vienna Convention requires interpreting the 'original' meaning of the convention in coherence with the object and purpose of the treaty under article 31.[39] It is only possible to achieve the object and purpose of the convention by interpreting claims in the light of modern-day developments. Therefore, the 'originalist' approach would unduly restrict and render individual rights as 'theoretical and illusory'.[40]

CONCLUSION

In conclusion, indeed, the living instrument doctrine provides for flexible interpretations. However, these are not without domestic and legislative oversight, and are certainly not a 'fig-leaf to cover… judicial activism'.[41] The doctrine - is restricted by reasonable bounds and limitations, as exhibited in *Pretty v United Kingdom*[42] and *Soering v United Kingdom,*[43] and the ECtHR has adopted an 'incremental and evolutionary rather than revolutionary' approach to interpretation.[44] Furthermore, there is no conclusive evidence that demonstrates that the

[38] Theil (n 4) 593.
[39] Vienna Convention on the Law of Treaties (adopted 23 March 1969, entered into force 27 January 1980) 1155 UNTS 331.
[40] *Mamatkulov and Askaraov v Turkey*, 46827/99, 46951/99 at 121.
[41] Bratza (n 15) 123.
[42] Pretty v United Kingdom (n 21).
[43] Soering v United Kingdom (n 23).
[44] Bratza (n 15), 123.

doctrine goes beyond what the drafters intended as there are no bounds to the approach found in the convention or the *travaux preparatoires.* Ultimately it is logical to employ a dynamic interpretative approach, as it is the only means by which the ECtHR can realise the objective and purpose of the convention. Overall, the ECtHR has achieved this whilst striking a fair balance 'between judicial innovation and respect for the ultimate policy-making role of member states'.[45]

[45] Mowbray (n 21) 79.

Unravelling the 'Living Instrument' Approach: Unveiling Flaws in the Elastic Interpretation of Human Rights Law and its Impact on ECHR Interpretation

Ash Jenab

ABSTRACT

The modern socio-political environment in Europe has fostered antagonism towards the EU and its liberal "agenda". The protection of homosexuals, and subsequent acknowledgement of their existence and right to pursue happiness, has attracted a hegelian opposition. One of the ways that the EU imposes its expansive interpretation to human rights is the 'living instrument' (LID) doctrine. The pendulum of social order is suggested to have been pushed too far left, with this instrument as the culprit. Conservative critics emphasise that politics and law must remain separate.

INTRODUCTION

This essay aims to ascertain whether criticisms of the EU's liberal expansion are substantive. The modern world is far more diverse and complex, politically, than 50 years ago. How has the EU justified the progression of law in the manner that it has? It is fair to say that no matter the intention, law that cannot stand up to scrutiny is doomed to fail. Hypocrisy and corruption threaten to shake the foundations of Europe if such laws are borne of posturing and not from sound law. This essay will explore the details of the ECtHR's application of Article 3 to traverse the functions of the LID doctrine. To gain an understanding into how European judges have

woven tolerance into the fabric of European law. Have these laws been undermined, or do they stand on principle?

Homosexuality has existed parallel to heterosexuality since the beginning of human existence. The 'living instrument' doctrine (LID) has allowed for the accumulation of gay rights in the modern era. Yet the European Court of Human Rights' (ECHtR) interpretation is suggested to be flawed by certain illegitimacies. To determine their veracity: a coherent assessment of the legal evolution of gay rights under Article 3 (art.3) will allow effective scrutiny of the 'living instrument' mechanisms, thereby assessing if criticisms of the doctrine's application and interpretation are substantive. This essay will first examine the convention from which the ECtHR interpretation derives its legitimacy; followed by detailed evolutive case-law analysis of art.3 and the expansion of its ambit to homosexuals. A deep engagement of various academic criticisms will be discussed throughout. This essay argues that the ECtHR's interpretation is not flawed.

CONVENTION FROM WHICH IT DERIVES LEGITIMACY

Firstly, the Council of Europe (CoE) is not a contract treaty, it is a law-making treaty.[1] It creates negative and positive obligations internationally. Bound by common heritage and consensus on scientific, judicial and administrative matters, it is of 'objective character'[2] and designed to protect the fundamental rights of all individuals. With regards to the LID interpretation, it is important to bear in mind that the doctrine only derives legitimacy from the convention through the unobstructed functions of the convention, and only when necessarily scrutinised against the sound principles of its own application in law; aided by the strength of informed legal

[1] Paulo Pinto de Albuquerque, 'Plaidoyer for the European Court of Human Rights' (2018) 2 EHLR 119, 121.
[2] *Austria v Italy* App no 788/6 (ECtHR, 11 January 1961) 19.

progression. This is true equity and a theme that will be revisited. At present, is this really what the architects intended? Yes. The architects of the convention intended social progress. The first article of the CoE enshrines 'greater unity between its members', including 'facilitating […] social progress'.[3] Social progress is our focus, the facilitation of gay fundamental rights was unlikely to start in all four corners of Europe at once. The question is whether the ECtHR's interpretation was flawed when accomplishing a legitimate goal of spreading fundamental rights across Europe. The architectural beginning of the LID legitimises expansive aspects of the interpretation and dismisses critics that characterise the interpretation as hollow or merely a 'spirit of the times'.[4] Gay rights undoubtedly fall within the rational scope of progress, alongside the rights of women and ethnic minorities. Indeed, we see an osmosis of case law between these discriminated groups which drives greater change for all.

The tool of evolutive interpretation, combined with a supra-jurisdictional authority,[5] empowered these rights to grow in a homophobic social context during the 1970s. A wide variety of scientific arms of the CoE, including investigative social ones pertaining to the psychological effects of homosexual discrimination, informed judicial interpretation. This intricate weaving of 'hard law' and 'soft law' was grandfathered in by the Universal Declaration of Human Rights (UDHR),[6] which inspired the convention preamble.[7] This legitimises the 'living' aspect of the doctrine's interpretation. An organ connected metaphor within the wider 'body' of the convention. Equitable courts rightly strive to include all organs of rationality and objective science to determine policy; this is what good law necessitates. The respect owed to

[3] SCoE (The Statute of the Council of Europe), Article1(a).
[4] Lord Leonard Hoffmann, 'The Universality of Human Rights' (2009) 125 LQR 416, 428.
[5] *United Communist Party of Turkey v Turkey* [1998] 26 E.H.R.R. 121 [29]; *Anchugov v Russia* App no 11157/04 and 15162/05 (ECtHR, 4 July 2013) [50].
[6] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on European Human Rights, as amended) (ECHR) art 53.
[7] Paulo Pinto de Albuquerque 'Plaidoyer for the European Court of Human Rights' (2018) 2 E.H.L.R. 119, 125.

the courts, by critics, rebukes their arguments against the expansive interpretations concerning the court's authority. It is clear that the ECtHR's expansive interpretation of rights are likely legitimate - as they are pragmatically informed and historically embedded within Europe following the atrocities of the 20th century. This essay will now explore the legitimacy of the ECtHR's interpretation as it relates to the details of evolutive case-law surrounding art.3 and degrading homosexual discrimination.

EVOLUTIVE CASE-LAW OF ART.3 PERTAINING TO HOMOSEXUALS

Art.3 contains an absolute and unqualified right against torture or inhuman and degrading treatment or punishment,[8] which is significant given its inability to be derogated. In the infancy of the ECtHR's jurisprudence, discrimination against homosexuals was held to be an inadmissible factor pending application to the court.[9] Preferring to use the reach of 'private life' under art.8, gay applicants avoided art.3.[10] Thus, homosexuals ultimately had no recourse for harmful discrimination at a fundamental level, which stands as a clear barrier for equitable progress. However, this is despite homosexual discrimination being intelligently within the definition of 'degrading' in 1969.[11] Allen Buchanan describes 'informal internal constraints' that prevent progress being caused by a 'predisposition against a [particular] proliferation of rights', not by sound legal principle.[12] Here the LID, and the practical rights of the people it protects,[13] are undermined by unsound legal principles.

[8] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on European Human Rights, as amended) (ECHR) art 3.
[9] *AS v the Federal Republic of* Germany App no 530/59 (ECtHR, 4 January 1960); *HS v Federal Republic of Germany* App no 704/60 (ECtHR, 4 August 1960); *X v Federal Republic of* Germany App no 986/61 (ECtHR, 7 May 1962); *GW v Federal Republic of Germany* App no 1307/61 (ECtHR, 4 October 1962); *X v Austria* App no 1593/62 (ECtHR, 4 July 1964).
[10] *X v Federal Republic of Germany* App no 5935/72 (ECtHR, 30 September 1975).
[11] *The Greek case* (1969) 12 YECHR 186.
[12] Allen Buchanan, *The Heart of Human Rights* (OUP 2017) 289.
[13] *Artico v Italy* App no. 6694/74 (ECtHR, 13 May 1980) 15-16.

The 'living instrument' interpretation, thereafter, allowed the loosening of the 'minimum level of severity' needed to trigger art.3 over time.[14] The LID worked to break down these informal constraints directly, demonstrating the LID interpretation is not flawed, but an effective and principled jumpstart to the proliferation of gay rights. Concurrently, racial discrimination under art.3 provided an additional accelerant for developing case-law defending homosexuals.[15] The LID displays a powerful amplification effect between marginalised groups that build on one another's case-law. This is further evidence of naturally progressive interpretation and equitable jurisprudence working hand in hand. Regardless, early notions of sexual minority abuse were still considered 'absurd or frivolous'.[16] However, this lasted until the turn of the 1980's.

Following *Dudgeon*, art.3 began to expand its definition to encompass and acknowledge sexual minority discrimination.[17] Nevertheless, the court still showed a reluctance to uphold a claim, giving credence to Buchanan's argument.[18] The watershed moment followed two cases of mentally scarring hate crimes. *Zontul*[19] and *X v Turkey*[20] refined jurisprudence that rooted a strong legal framework for the protection of homosexuals against degrading treatment. The law based on hatred, until then, had applied to other articles including art.11 and art.14, yet now it was woven into the fabric of homosexual discrimination.[21] Judicial calls 'to promote respect for human rights and freedoms and to call for tolerance towards sexual minorities' created a

[14] *Bouyid v Belgium* App no 23380/09 (ECtHR, 28 September 2015) [86]; *Selmouni v France* App no 25803/94 (ECtHR, 28 July 1999) [101].
[15] *Moldovan v Romania (No.2)* App no 41138/98 and 64320/01 (ECtHR, 16 June 2005) [111].
[16] Denys P. Myers, 'The European Commission of Human Rights' (1956) 50 American Journal of International Law 949, 950.
[17] *Dudgeon v United Kingdom* (1982) 4 EHRR 149; *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 [121].
[18] ibid [122]; *Stasi v France* App no 25001/07 (ECtHR, 20 October 2011).
[19] *Zontul v Greece* App no 12294/07 (ECtHR, 17 January 2012).
[20] *X v Turkey* App no 24626/09 (ECtHR, 9 October 2012).
[21] *Alekseyev v Russia* App no 4916/07, 25924/08 and 14599/09 (ECtHR, 21 October 2010.

united affirmation of these principles.[22] Progress thus appeared to be organic and motivated by rationality, aided by the wide variety of CoE organs.[23] This can accurately be described as the strength of liberal democracy.

Positive obligations on national authorities to investigate homosexual discrimination marked a significant shift in Europe.[24] The court lowered the threshold of art.3 to account for the combined effect of 'hate speech and aggressive behaviour'.[25] The LID interpretation catalysed social progress that also extended beyond homosexuals. Stephen Bouwhuis describes this as rights expanding their scope through elaboration.[26] I argue that this is a legitimate interpretative line of jurisprudence informed by rationality. However, there are critics that assert that the LID is creating human rights 'inflation' which weakens all rights, which this essay contends is incorrect.[27] These are real rights, not monetary policies. Precedent is not something that lacks value as the money in your pocket does. The government gives that money value. These cases and the wealth of knowledge that goes in and comes out of them have innate value. The LID interpretation builds rights, it does not spread them evenly as though it was carelessly creating arbitrary rules. Critics also say that the success of rights will lead to their demise.[28] That the addition of these 'frivolous' rights will reduce the value of all rights. The court is also accused of interfering with 'distinct moral values'[29] following the collapse of the Soviet Union. Described as the largest catastrophe in modern geopolitics by Vlamidir Putin, an influx of states

[22] ibid [82].
[23] *Identoba v Georgia* App no 73235/12 (ECtHR, 12 May 2015) [65].
[24] ibid [80].
[25] ibid [70]; also *MC and AC v Romania* App no 12060/12 (ECtHR, 12 April 2016) [117].
[26] Stephen Bouwhuis, 'Revisiting Philip Alston's Human Rights and Quality Control' (2016) European Human Rights Law Review 475, 481; see also Stephen P. Marks, 'Normative Expansion of the Right to Health and the Proliferation of Human Rights' (2016) 49 George Washington International Law Review 101, 105.
[27] Anne Peters, *Jenseits der Menschenrechte. Die Rechtsstellung des Individuums im Völkerrecht* (Mohr Siebeck 2014) 396; also Maurice Cranston, *Talking about Welfare* (Chapter 5, 'Human Rights, Real and Supposed'; first published in 1976, 1st edn).
[28] Hurst Hannum, 'Reinvigorating Human Rights for the Twenty-First Century' (2016) Human Rights Law Review 16, 409, 424.
[29] Jonathan Sumption, *Trials of the State—Law and the Decline of Politics* (Profile Books 2019) 56-60.

wherein homosexuality was considered 'satanic' opted to join the European project.[30] Some argue that the court must exercise caution and avoid flooding domestic courts with 'overzealous' cases and pushing the conservative population away from the court. They emphasise that EU judges need to be impartial and not politically motivated[31] and that local authorities are presumed best equipped to govern at a local level.[32] I question whether these are reasonable concerns against the current interpretation; it has been suggested that only European consensus can give the convention or the LID 'real' legitimacy.[33] Preferring to adopt a disciplined approach, Wildhaber notes that consensus is not binding and that the degree of European consensus merely widens or restricts the States' margin of appreciation.[34] This stance is taken to be preferable as the LID concerns real rights that are not imaginary, but rather extend to all of humanity and should be interpreted as such. With joining the European market, the strength of liberal democracy also comes from its free economy and how this plays hand in hand when leveraging social freedoms. It is also evident that these criticisms are qualified, as there is still equitable accommodation for these conservative states. The CoE provided very generous recommendations for the Central and Eastern European (CEE) states,[35] allowing for the continuance of dated and discriminatory legislation surrounding same-sex partnership recognition.[36] The impact of such laws will inevitably lead to blind discrimination by state authorities, Including very real consequences stemming from the lack of legislative protection

[30] Anonymous, 'Moscow Bans 'Satanic' Gay Parade' (BBC News, 29 January 2007) http://news.bbc.co.uk/1/hi/world/europe/6310883.stm accessed 6th December 2022.
[31] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2012) 139; Lawrence R. Helfer, 'Nonconsensual International Lawmaking' (2008) 1 U Ill L Rev 71, 120.
[32] *Handyside v UK* App no 5493/72 (ECtHR, 7 December 1976) [48].
[33] Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015) 2.
[34] Luzius Wildhaber, Arnaldur Hjartarson, Stephen Donnelly, 'No Consensus on Consensus? The Practice of the European Court of Human Rights' (2013) 33 HRLJ 248, 262; *Kearns v France* App no 35991/04 (ECtHR, 10 January 2008); 50 EHRR 33; [2008] 1 F.L.R. 888 [74]; *Mosley v UK* App no 48009/08 (ECtHR, 12 April 2011); 53 EHRR 30; [2012] E.M.L.R. [110]; *X v Austria* App no 19010/07 (ECtHR, 19 February 2013); 57 EHRR 14; [2013] 1 FCR 387 [148].
[35] Council of Europe, Committee of Ministers, Recommendation CM/Rec(2010) 5.
[36] Paul Johnson, Silvia Falcetta, 'Sexual orientation equality in Central and Eastern Europe: the role of the European Convention on Human Rights' (2019] 5 EHRLR 482, 488.

- regardless of the absence of any outright criminal ban against homosexuality itself.[37] Is this congruent with LID interpretation or the betrayal of it? It is likely inconsequential to the present question of whether the interpretation, in its functioning during the proliferation of gay rights, was legitimate or flawed. Public morals differ widely so perhaps there is no common standard.[38] Yet there is a minimum standard (Lady Hale).[39] This essay argues that the interpretation was rational and worked effectively. Whether the LID is betrayed thereafter is not, at present, relevant. It has succeeded as an excellent catalyst for legitimate and informed interpretation. As such, though the ECtHR's interpretation might have logical hypocrisies, for example, in regard to homosexual asylum seekers,[40] it is not flawed per se.

CONCLUSION

In conclusion, the fit for purpose 'living instrument' doctrine for which the ECtHR develops prudently, is a rationally sound line of interpretation. Built thoroughly well and with a legitimate aim, the ECtHR employs it effectively across Europe. It is an unmistakably powerful amplifier of rights. Though its critics are sceptical of any long-term effects of an inflationary trend, such criticism is hollow when compared to the substantive benefits it provides to millions of people across Europe. Politics often clashes with the objective judiciary. In an evolved body of law, such conflict is inevitable, and care must be taken to minimise and identify such instances. This is not one of those instances. The success of this line of interpretation is

[37] ibid 484; *Orlandi v Italy* App no 26431/12 and three others (ECtHR, 14 December 2017) [113]; ILGA-Europe, 'Rainbow Europe Index 2018' https://www.ilga-europe.org/sites/default/files/Attachments/index_2018_small.pdf accessed 26 June 2023.
[38] *Hertzberg v Finland* App no 61/1979 (ECtHR, 2 April 1982) [10.3].
[39] Lady Hale, 'Common Law and Interpretation: the limits of interpretation' [2011] EHRLR 538.
[40] *IIN v Netherlands* App no 2035/04 (ECtHR, 9 December 2004); *F v United Kingdom* App no 17341/03 (ECtHR, 22 June 2004); *ME v Sweden* App no 71398/12 (ECtHR, 26 June 2014) [73]; *AN v France* App no 12956/15 (ECtHR, 19 April 2016); *United Nations High Commissioner for Refugees, Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees* (December 2015); also, Jabari v Turkey ECHR 2000-VIII [38].

evidenced by the drastic change in social attitudes towards homosexuality. As it stands, the doctrine is woven emphatically within European jurisprudence and to conclude, the ECtHR's interpretation is not flawed.

‘Traversing Public Spaces Fearlessly’: Human Dignity’s Living Nature as the Concept’s Greatest Strength

Evie Johnson

ABSTRACT

The ancient concept of human dignity is one which has been consistently developing throughout the centuries. From Pico della Mirandola’s theory of man as his own self-determining creature in the 15th century, to Immanuel Kant’s opposition to humans being used as a ‘means to an end’ in the 18th century, the concept has always been ever-changing. More recently, for example, Lady Hale decided in Ghaidan that the Rent Act’s covert discrimination against homosexual couples violated their dignity due to being treated as ‘having less value’ than their heterosexual counterparts, representing the way in which dignity’s protection can be upheld by the concept’s movement alongside modern-day morals. Human dignity thus lacks a clear definition which is frozen in time, and while some argue that this lack of a clear definition limits the protection of dignity due to legislators and judiciaries not having a solid foundation for decision-making, this essay instead suggests that dignity’s malleable nature means the concept effectively develops alongside widely held societal morals and ideologies. Its protection is made more effective by its living nature, which means the standard of what constitutes the upholding of human dignity is constantly being raised.

INTRODUCTION

Human dignity is a rich and complex concept, the understanding and application of which has developed across centuries and continues to develop today. Jonathan Cooper has defined

human dignity as a concept that 'prohibits' the 'instrumentalisation or objectification of human beings'.[1] However, Cooper also notes that to clarify human dignity in this way is to 'over formalise' the definition,[2] limiting a concept that is rich and ever-expanding, which are qualities that have strengthened dignity's protection in law.

Firstly, this essay will evidence the legal protection provided by such richness by discussing the application of dignity's philosophical origins in the German Federal Constitutional Court. Secondly, it will be argued that human dignity's malleable nature aids its own protection in the contemporary world. Its meaning and importance have been enhanced by events such as the Second World War, which led to dignity's strengthened protection through the Universal Declaration of Human Rights (UDHR). Furthermore, human dignity has acted as a foundation for newly required rights such as the prohibition of cloning.[3] Thirdly, it will be contested that as there is no definition of human dignity that is frozen in time, the concept has aided the advancement of positive societal ideologies such as the need for equality.

Although issues with the promotion of damaging ideologies using the dignity concept have arisen in Hungary, this essay argues that such issues are not a result of a lack of a clear definition for the dignity concept. Thus, it will be concluded that human dignity's rich and complex quality has in fact strengthened its protection in law and would be undermined by setting one clear definition that is not as abundant and malleable as the concept can evidently be.

PHILOSOPHICAL ORIGINS OF HUMAN DIGNITY AS A RICH FOUNDATION

[1] Jonathan Cooper, 'The Human Rights Act: Delivering Rights and Enhancing Dignity' (Guest lecture at the University of Exeter, 17 March 2021).
[2] ibid.
[3] Charter of Fundamental Rights of the European Union 2000, Article 3.

The concept of human dignity is rooted in ancient texts, through which it first arose as a philosophical idea. While such texts add to dignity's complexity, thus complimenting the idea that dignity lacks a clear definition, this essay argues that such complexity in fact enriches the concept's meaning. In 1486 Pico della Mirandola composed writings that moved from the view of man as *imago dei* to his own self-determining creature, with dignity arising through such self-determination. Pico composed his controversial theories while living in a deeply religious society, meaning the dignity concept originated from powerful revolutionary ideas. Likewise, Kant's idea of dignity based on humans not being 'used merely as a means',[4] arose during the French Revolution when aristocratic society meant many working-class individuals were viewed as objects rather than human beings deserving of fundamental rights. Thus, dignity is a concept rooted in a passionate belief in human autonomy. Despite adding to the complexity of human dignity, these ancient philosophical texts are foundational for the dignity concept, enriching its meaning and strengthening its protection. This strengthened protection will now be discussed.

The 1949 German Basic Law provides evidence of dignity's philosophical origins acting as roots on which contemporary branches grow; the protection of dignity in German law has been aided by these writings. Following the atrocities of Nazi Germany, the nation's Constitution vowed that 'human dignity shall be inviolable'.[5] This inviolability was a powerful post-war promise, which has been protected with the help of reflections of Kantian philosophy in the German Federal Constitutional Court. For example, in the *Life Imprisonment Case* it was found that a life sentence conflicted with respect for human dignity,[6] which is 'legally binding' under German Basic Law.[7] In its reasoning, the Court emphasised the importance of not making

[4] Immanuel Kant, *The Metaphysics of Morals* (1797), edited by Mary Gregor (CUP 2009), 209.
[5] Basic Law for the Federal Republic of Germany 1949, Article 1(1).
[6] *Life Imprisonment Case* (1977) 45 BVerfGE 187.
[7] Basic Law for the Federal Republic of Germany 1949, Article 1.

individuals 'tools of the state'.[8] This falls in line with the 'object formula',[9] which Dupré discusses as a modern take on Kantianism that has been retained by 'constitutional' judges, as is the case here.[10] Thus, Kantian philosophy, despite contributing to the intricacy of the dignity concept, has in fact aided the court's understanding and protection of human dignity in law. Kommers and Miller have elaborated on this, noting that this Kantian influence has 'taken such deep root in Germany' that 'the use of the polygraph' has been 'invalidated' as it risks regarding humans as 'objects' and thus threatens human dignity.[11] Therefore, while human dignity's historic origins may add to its complexity, such origins have in fact strengthened its protection in law and aided the judicial understanding of the concept. In the case of Germany, Kantian theories have intertwined with the post-war dignity promise to enrich the protection of human dignity in the Constitutional Court. Such complexity may explain the lack of a clear definition critique; however, this essay argues that the legal protection of human dignity is strengthened by its philosophical roots, which also aid the court's understanding of the concept.

THE PROTECTION OF HUMAN DIGNITY AGAINST THREATS OF THE MODERN WORLD

As well as its historic origins, the protection of human dignity in law has been furthered by the concept's fluidity, deriving from the fact that it does not have one clear written definition that is frozen in time. Human dignity is instead an ever developing, living concept; its protection has only been strengthened in time as its meaning grows richer and the concept becomes more expansive. For example, Kant's theories on dignity centred around the man, consequently

[8] Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, DUP 2012) 365.
[9] Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (1st edn, Hart Publishing 2015) 36.
[10] ibid.
[11] Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, DUP 2012) 363.

implying that women were without dignity, an interpretation that is in line with perceptions of women in the eighteenth century. However, the UDHR, with its influential power as the first codification of human dignity in an international text, confirmed that dignity was in fact 'inherent' within all human beings.[12] Had Kant's explanation of dignity been set as the sole definition, although this would arguably provide clarity on the subject, it would also have prevented such important developments from occurring. Human dignity's malleable nature has subsequently resulted in greater human dignity protection for women in law. In *SW v UK*, the European Court of Human Rights strongly considered 'women's equality of status with men'[13] in holding that it was not lawful for a husband to rape his wife. Such considerations were in line with 'respect for human dignity'.[14] Thus, this case provides evidence of the contemporary recognition that human dignity applies to all. Had Kant's male-dominated definition been clearly set in stone, the same outcome may not have occurred.

The UDHR is also representative of human dignity's strengthened protection resulting from its malleable nature. The title of Habermas' article 'Learning by Disaster' is representative of how human dignity becomes enriched and subsequently better understood and protected following harrowing events.[15] He explains how historic events, such as the Second World War, lead to a 'change in mentality'[16] which consequently results in a change in 'political and cultural parameters'.[17] The development of the UDHR is a consequence of such changes; the atrocities of the war cultivated the human dignity concept, leading to an understanding that it required greater legal protection. Importantly, Habermas also developed the 'Theory of Communicative

[12] Universal Declaration of Human Rights 1948, Preamble.
[13] *S.W. v The United Kingdom,* App no 20166/92 (ECtHR, 22 Nov 1995), para. 40.
[14] ibid, para. 44.
[15] J. Habermas, 'Learning by Disaster? A Diagnostic Look Back on the Short 20th Century' (1998) 5 Constellations 307.
[16] ibid, 319.
[17] ibid.

Action',[18] which urges 'critical thought and practical action'[19] to overcome social issues. Thus, his assessment of changing social attitudes following 'disaster' supports the idea that fluidity is required for society to advance in protecting its members. This assessment can be applied to human dignity; its flourishing nature means it becomes ever enriched as events occur, leading to a stronger understanding of the concept and the need for its legal protection as was the case in the UDHR following the Second World War. Such enrichment would not be possible should the human dignity be over-simplified to, for example, one clear written definition.

Human dignity's ever-expanding nature thus means the concept can act as a foundation for new rights in unprecedented times, consequently leading to a greater protection of dignity itself. Dupré has noted that dignity can 'make space in judicial reasoning' for 'discussing' a novel problem;[20] as the concept is not fixed in a frozen definition from a time of the past, but instead fixed to the objective of protecting humanity, it can do so by providing a reliable basis on which judicial decisions can occur. For example, Dupré references the Oviedo Convention within her discussion on dignity's response to modern threats.[21] This instrument was created in response to rising threats in the world of biomedicine, resulting from scientific advancements of the twentieth century. It codifies the protection of dignity for 'all human beings' within this field and subsequently guarantees 'respect' for related 'rights and fundamental freedoms'[22] One such right relates to the regulation of 'interventions on the human genome',[23] a modern advancement in biomedicine. Thus, it is evident that the concept of human dignity has provided a foundation for the protection of a newly required human right in the modern world, made possible by its expansive nature. Such protection of rights subsequently protects human dignity itself, which

[18] C. M. Gaspar, 'Habermas' Theory of Communicative Action' (1999) 47(3) PS 407.
[19] ibid, 409.
[20] C. Dupré, 'Dignity, Democracy, Civilisation' (2013) 33 LLR 263, 272.
[21] ibid, 271.
[22] Convention on Human Rights and Biomedicine 1997, Article 1.
[23] ibid, Article 13.

would arguably not be possible should the concept be reduced to one clear written definition that is fixed in the period of which it was written. Similarly the EU Charter, the foundation of which is the protection of human dignity's inviolability,[24] has codified the right to respect for 'physical and mental integrity' in relation to 'the prohibition of the reproductive cloning of human beings'.[25] Thus, a legal text founded on the protection of human dignity has explicitly responded to a technological threat of the modern age, conflicting with the suggestion that the concept's protection has been 'greatly limited' by its lack of a clear definition. In reality, it is evident that human dignity's expansiveness has strengthened its own protection, and its applicability to new threats may aid the judicial understanding of the concept as something that needs protecting in a vast array of circumstances. Over-clarifying dignity would diminish this understanding and underestimate its applicability.

DIGNITY AIDING THE ADVANCEMENT OF SOCIETAL IDEOLOGIES

As well as responding to new threats of a developing world, the concept of human dignity has itself aided the advancement of societal ideologies such as inclusivity and equality. The concept has led to the introduction of new rights for 'unpopular minorities', encouraging equality and consequently becoming more expansively protected as a result. Cameron draws on this perception, noting that the idea of inherent dignity was the driving force behind the South African legal acceptance of homosexual individuals. Much like Dupré's analysis of dignity-based rights developments within the biomedical sphere, he discusses how dignity enables the 'advancement' of society's views on minority groups. Drawing on his own experience of being 'gay in an otherwise heterosexual world',[26] Cameron discusses the importance of dignity's

[24] Charter of Fundamental Rights of the European Union 2000, Article 1.
[25] ibid, Article 3.
[26] E. Cameron, 'Dignity and Disgrace: Moral Citizenship and Constitutional Protection' in C. McCrudden (ed) *Understanding Human Dignity* (1st edn, OUP 2013) 467, 482; ibid 468.

ability to traverse 'public spaces fearlessly',[27] furthering the idea of dignity as a concept that is responsive to the requirements of the time. It is thus through dignity's universality that its own protection is strengthened within the law. Evidence of dignity's ability to aid the advancement of progressive societal ideologies can be found in the case of *Ghaidan*, within which the issue of the Rent Act's prejudice in favour of heterosexual couples was considered.[28] Crucially, in this case Lady Hale addressed the importance of protecting 'unpopular minorities', noting that 'treating someone as automatically having less value' than other individuals 'violates' their 'dignity as a human being'.[29] Thus, the 'essential rights' of 'unpopular' minority groups deserve to be protected.[30] Basing this protection of rights on dignity furthers the idea of dignity as a tool for supporting the advancement of equality. Such advancement in turn expands the protection of human dignity itself, as the dignity of 'unpopular' minorities is also protected. The delivery of *Ghaidan's* judgement by Lady Hale is powerful, as being the President of the Supreme Court in a male-dominated field means she well understands the importance in all 'human beings' being treated with equal dignity. In line with Habermas' 'Communicative Action' theory, such discussions on the importance of dignity's equal application drive positive change, which would not be possible should dignity be simplified to one clear written definition that is trapped in a time of specific ideologies.

However, it cannot be denied that human dignity's openness and ability to advance societal ideologies poses the threat of political and religious agendas impacting its perceived meaning and subsequent protection. In Hungary, the nation's Constitution codifies human dignity as 'inviolable',[31] a seemingly favourable provision. However, the concept of human dignity

[27] ibid, 482.
[28] *Ghaidan v Godin-Mendoza* [2004] UKHL 30.
[29] ibid, para. 132.
[30] ibid.
[31] The Fundamental Law of Hungary 2011, Article II.

within Hungary's Fundamental Law has been skewed by the nation's religious ideologies and traditions. For example, the bill clarifies that marriage is to be 'the union of one man and one woman'.[32] Such strict adherence to such ideals presents a deviation from Kant's 'dare to know' philosophy, in which dignity arises from the human ability to learn and move away from tradition. Furthermore, the nation's leaders have used their political agenda of increasing birth rates to excuse the use of women as a 'means to an end',[33] presenting a threat to human dignity following the Kantian 'object formula'. For example, in one political speech it was said that 'women should not concern themselves with earning as much as men',[34] thus implying that their sole purpose should be to birth children. When considered alongside the Fundamental Law's proclamation of dignity's 'inviolability',[35] it is evident that the Hungarian Constitution's writers' perception of dignity has limited the concept's legal protection. It may thus be suggested that this limited protection is due to the European Union (EU) not providing a dignity definition that is clear enough to ensure a universal legal protection of the concept.

However, this essay argues that the issue does not lie with the definition of human dignity, as is evident through the widespread international criticism of the Hungarian Fundamental Law. Such criticism shows that there is an external understanding of what a violation of human dignity looks like. As an illustration, Dupré, who has carried out extensive research on dignity as a foundation for rights,[36] has contributed to this criticism by noting that the 'constitutional foundations' of Hungary's Fundamental Law 'are not to be found in dignity'.[37] Instead, the Fundamental Law shows a 'different understanding of dignity' which depends on 'the values

[32] ibid, Article L(1).
[33] C. Dupré, 'Human Dignity: Rhetoric, Protection, and Instrumentalisation' in G. A. Tóth (ed.), *Constitution for a Disunited Nation. Hungary's New 2011 Fundamental Law* (1st edn, CEUP 2012) 156.
[34] *The Guardian*, 'Pressure to procreate" inside Hungary's baby drive' (23 February 2021) https://www.youtube.com/watch?v=BeeQSWDwvxk accessed 30 June 2023.
[35] The Fundamental Law of Hungary, Article II.
[36] Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (1st edn, Hart Publishing 2015).
[37] C. Dupré, 'Human Dignity' (n 33), 168.

set by the constitution's drafters'.[38] This analysis evidences an external understanding of dignity and Hungary's threat to it. Such an external recognition of this threat is also evident through the Venice Commission's opinion on the Hungarian Constitution, which arose following a request from the Parliamentary Assembly of the Council of Europe due to international criticism.[39]

Thus, this external recognition of a dignity violation means the issue does not lie with an unclear definition of human dignity within the EU, but with the EU's lack of intervention and inadequate response. One explanation for the EU's apprehension in intervening with Hungary's Constitution, as suggested by Avbelj, is the fact that the EU is a 'pluralist entity' whereby 'human dignity can have a plurality of meanings too';[40] the EU is made up of individual, unique legal entities whose 'self-identity' should be respected.[41] Such self-identity forms the foundation of the Hungarian Fundamental Law, thus the EU may be wary of the risk to Hungary's national autonomy. However, this essay argues that the EU should push Hungary to closely consider outside perceptions of human dignity. For this change to occur, Avbelj suggests a stricter application of 'legal pluralism',[42] under which 'the defence of human national constitutional identity, with human dignity at its core, cannot be used in a self-referential way'.[43] Rather, legal orders must 'develop a dialectic open self'.[44] In other words, the EU should strictly enforce 'legal pluralism' within Hungary, pushing its Constitution's writers to develop an openness in relation to their perception of human dignity by learning from other EU nations. This solution furthers the idea that the openness of the dignity concept is a strength,

[38] ibid, 165.
[39] Venice Commission, Opinion on the Constitutional Amendments Adopted by the Hungarian Parliament in December 2020 (1035/2021) 3.
[40] M. Avbelj, 'Human dignity and EU Pluralism' in G. Davies and M. Avbelj (eds), *Research Handbook on Legal Pluralism in the EU* (1st edn, E Elgar 2018) 101.
[41] ibid, 100.
[42] ibid, 108.
[43] ibid.
[44] ibid.

aiding the development of solutions to dignity violations. In relation to the case of Hungarian Fundamental Law, the issue does not lie with the definition or understanding of dignity within the EU. In fact, the international response to the Hungarian Constitutions is representative of a stable understanding of the concept. Furthermore, this essay has evidenced the restrictive issues with over-simplifying the rich, complex concept of human dignity, meaning one clear written definition would be detrimental to the concept's protection. The issue instead lies with the EU's current prioritisation of Hungary's national self-identity over the protection of human dignity, which may be resolved by a stricter enforcement of 'legal pluralism', possibly with legal sanctions should Hungary's legislature not comply.

CONCLUSION

This essay has argued that the richness and complexity of the human dignity concept ultimately strengthens its protection in law. It has been determined that despite dignity's historic philosophical origins adding the intricacy of the concept, such origins have in fact provided a strong foundation on which dignity's protection can grow, as was the case in the German Federal Constitutional Court. Dignity's expansive and malleable nature, consequent of its expansive and malleable 'definition', allows the concept to become enriched and consequently greater protected following contemporary events, such as the Second World War. This malleability means dignity also has the ability to aid the development of, and thus become greater protected by, rights that have become necessary following modern advancements in the biomedical and technological spheres. As well as contemporary human rights, human dignity has aided the advancement of positive societal ideologies such as the inclusivity of LGBTQ+ individuals, made possible by its lack of a set definition that is frozen in time. Despite the damaging Hungarian perception of dignity threatening this essay's claim that dignity's fluidity is a strength, upon observation the issue does not in fact lie with the concept's definition but a

need for the EU to prioritise human dignity over national self-identity. Thus, this essay disagrees with the idea that dignity's legal protection has been 'greatly limited' by a lack of a clear definition for the concept. Rather, dignity is a rich, respected concept that draws its strength from its expansive nature. Setting dignity in stone, possibly in the form of a single written definition, would under-value the strength that dignity derives from its complexity and limit its protection in law, particularly in the modern world.

‘The protection of human dignity in law is greatly limited by the lack of a clear definition for this concept.’

Jemma Milner

ABSTRACT

A clear definition of human dignity is vital because this allows it to function as a concept in law. The issue is whether a distinct understanding can be established through historical interpretations and contemporary debates surrounding human dignity. This essay argues that there is a clear and consistent definition, through an analysis of the substance, codification, and application of human dignity. These elements maximise the certainty of human dignity, and consequently improve its protection in law.

INTRODUCTION

The definition of human dignity must be clear to achieve the best protection for the concept, as it must be understood what human dignity is, and how it is used for it to function in law. Human dignity seeks to protect human freedoms and identities and can be interpreted as an adjunct to human rights.[1] The issue is whether a distinct concept can be established amongst the historical interpretations of human dignity and contemporary debates over its content.

For the purposes of this essay, the idea of clarity encompasses three interrelated concepts, which will be addressed in turn: substance, codification, and consistent understanding and

[1] Catherine Dupré, ‘What Does human dignity mean in a legal context?’ (*The Guardian,* 24th March 2011) https://www.theguardian.com/commentisfree/libertycentral/2011/mar/24/dignity-uk-europe-human-rights accessed 26 June 2023.

application. These are significant regarding clarity because they seek to maximise the certainty of human dignity, and consequently improve its protection in law. It is argued that the definition of human dignity has a recognisable substance, and an understanding of what human dignity means in law is visible. Protection, dependent on clarity, is most effectively achieved through codification, which ultimately prevails over discrepancies in construction of the concept. Ultimately, the power of codification significantly improves protection. Finally, it is emphasised that the protection of human dignity is limited by the lack of consistency in its construction and application. This is the most tangible limitation, because it involves the current function of the concept of human dignity in law, and therefore is the element of clarity that has the potential to improve its protection most readily. It will be concluded, however, where the consensus of human dignity is followed, there is a clear and consistent definition, which aids protection.

THE SUBSTANCE OF HUMAN DIGNITY

The definition of human dignity has been given substance through the construction of the concept in the German Federal Constitutional Court. The substance of human dignity can be understood as who human dignity relates to and the limits of the concept, and in Germany the concept has a uniquely broad scope.[2] Human dignity was incorporated into the German Basic Law in 1949,[3] demonstrating a commitment to dignity as the highest value[4] in the constitutional order. Article 1 establishes the 'inviolable' human dignity as a fundamental principle,[5] which is prescriptive in nature, and has become 'absolutely outstanding and increasingly dominating'

[2] Sebastian Heselhaus, 'Human Dignity in the EU,' in P. Becchi and K. Mathis (eds), *Handbook of Human Dignity in Europe* (Springer, 2019).
[3] *Germany: Basic Law for the Federal Republic of Germany* [Germany],' Article 1, 23 May 1949, available at: https://www.refworld.org/docid/4e64d9a02.html accessed 10 March 2022.
[4] *Life Imprisonment Case* 1977 (45 BVerfGE 187), in D Kommers and R A Miller, *Constitutional Jurisprudence of the Federal Republic of Germany,* (Duke University Press, 2012) pp365-366.
[5] Basic Law for the Federal Republic of Germany, Article 1(1).

in the German legal order.[6] The construction of human dignity in Germany has been influential on subsequent developments in human dignity, so it is vital to recognise the substance given to human dignity.

Firstly, echoes of Kantian philosophy underpin the prohibition of objectification and instrumentalization, providing a philosophical substance to the legal human dignity. This resulted in a wide scope, as it surpasses limitations that may have been implemented under a different rationale. The prohibition of instrumentalization is prominent in the reasoning in *The Aviation Security Act Case* (2006), which states that 'the obligation to respect and protect human dignity generally precludes making a human being a mere object of the state'.[7] Therefore, it was not acceptable to allow the death of one person to be used as a tool to save others. To do this would question the person's 'quality of a subject' and 'status as a legal entity', and undermine the value due to every human 'by virtue of his or her being a person'.[8] Human beings will not be reduced to objects - reflecting the Kantian idea of viewing people as ends in themselves, not simply means.[9] The reasoning is explicit in its stance, that even where the situation concerns state actions, a breach of human dignity cannot be justified. Ultimately, this exemplifies a powerful commitment to human dignity, because its protection is not limited based on the number of lives potentially saved, as would be the case in a Utilitarian approach. This reasoning shows the integrity of inviolable human dignity. It is truly untouchable in German law. Whilst the use of the Kantian formula in this case as the primary reasoning has been criticised for its weak guidance,[10] or overly simplistic reasoning, when assessing the

[6] Horst Dreier, 'Human Dignity in German Law,' in M Düwell et al (eds), *The Cambridge Handbook of Human Dignity* (CUP, 2014) 375-386.
[7] *The Aviation Security Act Case* (2006) BVerfG, Judgment of the First Senate, 1 BvR 357/05.
[8] ibid.
[9] Thomas E Hill Jr, 'Kantian Perspectives on the rational basis of human dignity,' in M Düwell et al (eds), *The Cambridge Handbook of Human Dignity* (CUP, 2014) 215-221.
[10] Kai Möller, 'On treating persons as ends: the German Aviation Security Act, Human Dignity, and the German Federal Constitutional Court', (2006) *Public Law* 463.

substance of the definition of human dignity, it remains significant. This reasoning creates an expansive scope for human dignity, and this can be viewed as a positive feature of the dominating force of the concept.

Secondly, the concept of human dignity protects every human - which is exemplified in *The Life Imprisonment Case* (1977).[11] Here the scope of human dignity is investigated, and the conclusion made that 'the state must regard every individual within society with equal worth'.[12] In this case it was held that it would be 'intolerable' for the statue to deprive someone of their freedom without at least the chance of regaining it, because the social existence of the person is intrinsic. The punishment is a loss of freedom, but should not be a loss of social worth, leading to a loss of humanity. It was emphasised that a vital element of a person's minimal existence is dependent on being related to and bound by the community, so that the conception of human dignity is not isolated to the individual. It is a positive addition to the substance of the definition, because it incorporates the ideas of self-determination and the social basis of human beings into the construction of dignity. Also, it is correct to conclude that a person would lose a vital part of humanity if they were permanently deprived of the hope of regaining social worth. Therefore, in their judgment, the Court has opened human dignity in its understanding of humanity, and has adopted an inclusive protection, which refuses to ignore the humanity of criminals. Overall, the most prominent contribution given to human dignity's substance from the Court is the insistence on its dominating force, which accurately reflects the intended inviolability of the concept in the basic law.

[11] *Life Imprisonment Case* 1977 (45 BVerfGE 187), in D Kommers and R A Miller, *Constitutional Jurisprudence of the Federal Republic of Germany,* 2012, pp365-366.
[12] ibid.

In comparison, the European Convention on Human Rights (ECHR) has a judge-made substance of human dignity, but judicial practice shows that the concept has great significance in the European Court of Human Rights (ECtHR) despite not being codified.[13] The Convention contains guarantees that cannot be interfered with, and these guarantees can be interpreted as 'an expression of a European consensus on core elements of the protection of human dignity'.[14] It is acknowledged that human dignity is vital for the recognition of human rights, and argued that the ECtHR applies a 'multilayer concept of human dignity'.[15] In contrast to Germany, substance for the concept can be found through the layered approach to protection. The ECHR's foundation of human dignity is seen through the absolute rights, such as Article 3. As Heselhaus identifies, the ECtHR inspects a potential interference with Article 3 using a case-by-case approach.[16] This has allowed for a far-reaching and flexible protection, which forms the base of the recognition of human dignity. For example, in *Tyrer v UK,* corporal punishment was held to be against Article 3, because it compromised his dignity and physical integrity,[17] and made him an object in the power of the authorities. It is also interesting to note the echoes of Kantian anti-objectification here, as the core elements of dignity are protected in the guarantees. This demonstrates that the ECtHR has improved protection by filling in substance, and it is submitted that this does not weaken protection, only separates human dignity into narrower routes of interpretation in the ECtHR.

The two other functions of human dignity here can be seen in its 'concretisation' of other rights,[18] and the court's use of human dignity to reach an outcome that protects human rights

[13] Sebastian Heselhaus and Ralph Hemsley, 'Human Dignity and the European Convention on Human Rights', in P. Becchi and K. Mathis (eds), *Handbook of Human Dignity in Europe* (2019) 980.
[14] ibid.
[15] ibid at 981.
[16] Ibid.
[17] *Tyrer v UK* (1978) 2 EHRR 1.
[18] Sebastian Heselhaus and Ralph Hemsley, 'Human Dignity' (n 13), 989.

without a legally binding consequence for states. [19] It is argued that this concretisation demonstrates the substance associated with human dignity, because it creates links which place humans at the centre of judicial reasoning. [20] However, where human dignity is merely used to achieve a 'desirable outcome',[21] the substance of human dignity may become muddied through prioritising the outcome rather than the clarity of the concept. So, despite using human dignity in that instance to provide protection for human rights, the protection of human dignity more generally may be diminished. Although, the flexibility of the Convention can be viewed positively – especially when it is recognised that it is a 'living instrument' and must be viewed in the present. [22]

In conclusion, an integrated view of the substance from both the ECHR and German Constitutional Court sources provides a comprehensive understanding of who human dignity protects and the limits of the concept, so it is reasonable to conclude that the substance of human dignity is well established. This aspect of a clear definition is therefore satisfied.

THE CODIFICATION OF HUMAN DIGNITY

Despite the possibility of finding a comprehensive substance for human dignity through case law, it can be argued that protection is most effectively achieved through codification. This is because the language used is distilled into the vital elements of human dignity, and the codification of the concept allows it to prevail over discrepancies in construction of the concept. The best example of this, which is sufficiently comprehensive to be compared with the previous legal systems, is the EU Charter of Fundamental Rights. Becoming binding with the Lisbon

[19] ibid.
[20] Catherine Dupré, 'Dignity, Democracy, Civilisation,' (2012) *Liverpool Law Review* 33, 263-280.
[21] Sebastian Heselhaus and Ralph Hemsley, 'Human Dignity and the European Convention on Human Rights', in P. Becchi and K. Mathis (eds), *Handbook of Human Dignity in Europe* (2019) 989.
[22] *Tyrer v UK* (1978) 2 EHRR 1.

Treaty (2009), human dignity has been codified in its most comprehensive and explicit form at the heart of the European Union. This means it prevails over the Court of Justice of the European Union (CJEU) construction of the concept, and is an unwavering standard of protection for human dignity. This guarantees the intended understanding of human dignity has legal force. Whereas the German Constitutional Court has developed the concept over time, because the codified Article 1 does not provide a complete understanding. Even though this form of construction has created a positive outcome in Germany, the protection of the concept of human dignity is certainly stronger when it is fully established at the outset of its application. Reinforcing this argument is the Treaty on the European Union (TEU), which contains a commitment to human dignity in Article 2 that is 'common to the Member States'.[23] This is supported by Article 49, which requires the respect for the values referred to in Article 2, including human dignity. It is therefore a requirement that all Member States are 'committed to promoting' human dignity.[24] Notably, the recognition of a separate right to dignity works to harmonise divergent views on human dignity.[25] This is an outstanding and powerful protection for human dignity, because the concept has expanded with prescriptive force to all twenty-seven Member States, which reflects the unique benefit of this codification.

Regarding the meaning of human dignity in the Charter, it is identified that the precise wording is beneficial for the protection of human dignity, because it offers an explicit confirmation and substantiation of the concept. Title 1, the dignity title, establishes the extent of human dignity that it holds as 'inviolable',[26] and adds the imperative that it 'must be respected and protected'.[27] Article 2 reflects the right to life as contained in the ECHR, and Article 4 reflects

[23] Article 2, Consolidated Version of the Treaty on European Union [2012] OJ C326/13.
[24] ibid, Article 49.
[25] Sebastian Heselhaus and Ralph Hemsley, 'Human Dignity' (n 13), 977.
[26] Article 1, Charter of Fundamental Rights of the European Union [2016] OJ C202/389.
[27] ibid.

Article 3 ECHR, which prohibits inhuman or degrading treatment. This is an example of how the Charter incorporates previously understood ideas of human dignity for protection across the Union on which human rights were founded post-1945.[28] However, the superiority of Title 1 comes from the codification of the developments seen in the understanding of human dignity. For example, the prohibition of the death penalty in Article 2, and, most significantly, the protection of 'physical and mental integrity' in Article 3. This is a proactive feature of the Charter, because it seeks to protect human dignity in a range of new situations, and consequently offers the best possible protection for the concept. Further proactivity can be seen in how the wider European systems collaborate to protect human dignity. Article 6 TEU provides that the judgment of the ECtHR will be accepted, so the Charter benefits from the ECHR rights and subsequent ECtHR case law when CJEU applies human dignity. Overall, the codification of human dignity in the Charter works to include previously understood constructions of the concept, and therefore is proven to be the unprecedented combination of comprehensive substance and the force of codification across Member States. This best satisfies all aspects of a clear definition and offers a strong protection for human dignity.

THE NEED FOR CONSISTENCY

Where there is inconsistency with the construction of human dignity, this raises concerns about its protection. The concept of human dignity in European constitutionalism follows similar themes of protecting human identities and freedoms,[29] but this is not without tensions. The legal construction of humanity has never been complete, and an aim of human dignity is to improve this construction of humanity. However, some constructions of human dignity can

[28] Catherine Dupré, 'Article 1: Human dignity,' in S Peers et al (eds) *A commentary on the European Charter of Fundamental Rights* (Hart Publishing, 2021) 3-24.
[29] Catherine Dupré, 'Human Dignity: Rhetoric, Protection, Instrumentalisation,' in Gábor A Tóth (ed.), *Constitution for a Disunited Nation. Hungary's New 2011 Fundamental Law* (Central European University Press 2012) 143-170.

oppose the 'substantial and consistent' European standards.[30] The codification of human dignity does not guarantee the protection of human identities and freedoms unless it is consistent.

In Hungary, the concept of human dignity is codified, and is stated to be the basis of human existence in the National Avowal. Unsurprisingly, following the trend in European constitutionalism since 1949,[31] human dignity is considered 'inviolable' in Article II. While this appears to provide a sufficient codified human dignity, the Fundamental Law incorporates further rules which diminish the protection it affords. Interpreting the dignity provisions in Article II in accordance with the National Avowal, as required by the rule of interpretation,[32] the construction of human dignity becomes reliant on the Christian values expressed. This construction does not conform to European constitutionalism, and this is problematic, because of its potential to refocus the concept of human dignity upon religion, and in turn exclude groups of people from the legal concept. As recognised by Dupré,[33] this rule of interpretation gives the preamble unusual normative strength, which supports the suggestion that the Christian values in the National Avowal are prioritised over dignity. Subsequently, an instrumentalization of dignity is risked – abandoning the protection of identities and freedoms and making the 'inviolable' dignity 'devoid of meaning'.[34] Therefore, Hungary is an example of how a codified human dignity is not always sufficient, because its construction of the concept is not consistent with that applied across Europe.

[30] ibid,145.
[31] ibid, 143-170.
[32] '*Hungary: Fundamental Law of Hungary* [Hungary],' 25 April 2011, Article R(3) available at: https://www.refworld.org/docid/53df98964.html accessed 26 June 2023.
[33] Catherine Dupré, 'Human Dignity' (n 29), 146.
[34] ibid, 150.

In addition, the preamble notes the role of Christianity in preserving nationhood. This is further reflected in Article R(4), which establishes that every organ of the state is obligated to protect the Christian culture of Hungary. Similar reasoning can be found in the insistence in Article L(1) that a family (with a man and woman as parents) is the basis of the survival of the nation. It is evident in these provisions that Christianity is central to Hungary and is protected in the constitution. An initial observation from this is the potential for the exclusion of different religions or people who are not religious, which opposes human dignity. Similarly, the Venice Commission has noted that Article XVI(1) may 'translate into a *de facto* discrimination based on sexual orientation'.[35] It is important to recognise that the Fundamental Law implies that where there is conflict between dignity and these conservative values, dignity will not be respected. This is alarming, because it restricts the concept of human dignity and denies that every person has dignity as an inherent human value. In essence, there is a disparity between the role of human dignity in protecting rights as envisioned by the Venice Commission and those who champion the European Convention on Human Rights, and the construction of human dignity in Hungary.

The negative impact of this on the protection of human dignity and rights has been observed. A growing concern is the impact on the right to make choices about family life, which supports the Venice Commission's concerns about the Fundamental Law's stance on family life. For example, with a government push to grow the Hungarian nation through increasing the birth rate, many women are facing discrimination for choosing to not have children.[36] With five per cent of the Gross Domestic Product spent on the promotion of having children, and the range

[35] European Commission for Democracy Through Law (Venice Commission), 'Opinion: On the Constitutional Amendments Adopted by the Hungarian Parliament in December 2020,' Opinion 1035/2021, CDL-AD(2021)029, at [31].
[36] The Guardian, 'Pressure to Procreate: Inside Hungary's Baby Drive,' (2021) https://www.youtube.com/watch?v=BeeQSWDwvxk accessed 26 June 2023.

of benefits provided for those with three or more children,[37] the government's desired focus is easy to discern. This campaigning has increased the pressure to have children in Hungary, and the emphasis on the family as the basis of the nation (mirroring the Fundamental Law) has resulted in a hostile environment for people who do not conform. For example, women report receiving death threats amid a general culture of judgement and alienation.[38] The reality for these women arguably supports the above: that certain groups have been excluded from protection of the dignity provision in the Fundamental Law. Therefore, the interpretation of the Fundamental Law must be scrutinised, as recommended by the Venice Commission,[39] to avoid these consequences. A link can be seen between the construction of human dignity through a traditional, religious lens and this undermining of human dignity protection in Hungary. Instead of protecting the identities and freedoms of every person, a clear preference is given to those who conform to the values in the National Avowal, and this severely diminishes the concept and protection of human dignity.

CONCLUSION

Overall, a clear definition for human dignity can be found because the concept has sufficient substance, has been codified, and typically applied in a consistent manner. Protection for human dignity is strongest through the EU Charter of Fundamental Rights, which provides the most comprehensive codification of the concept, in contrast to the German Basic Law, and its force across Member States establishes the force of human dignity in law. Whilst the substance of human dignity has been heavily influenced by both philosophical origins from Kant and legal origins in the German Constitutional Court's case law, human dignity is at an

[37] ibid.
[38] ibid.
[39] European Commission for Democracy Through Law (Venice Commission), 'Opinion: On the Constitutional Amendments Adopted by the Hungarian Parliament in December 2020,' Opinion 1035/2021 (2021).

unprecedented stage of clarity. This is because the concept has been built upon at each stage of evolution, to reach the point of a general European understanding of human dignity, and commitment to its protection. Therefore, human dignity has been constructed in a sufficiently clear form to maximise protection. It is the task of applying this understanding of human freedoms and identities in law in a consistent manner that will provide greater protection of human dignity. It can be concluded that it is not the definition that is at fault for a lack of protection, but differing interpretations that misconstrue the purpose of human dignity in law.

Is the approach of proprietary estoppel clear and reliable?

Lauren Malin

ABSTRACT

The law which encompasses proprietary estoppel is one which has been unsteady in its ability to provide the law with certainty and clarity. Over the last two decades the courts have had the opportunity to provide a clear approach and understanding to the principles of proprietary estoppel. The aim of this essay is to illustrate opportunities where the courts have failed in their duty to clarify the law but also how the current approach is unacceptable in providing fair results. The essay begins by critically analysing the facts of the case alongside the differing approaches when considering detrimental reliance to demonstrate the inadequacy of the courts in their approach. The second part of the essay is analysis of the language used by the parties involved and the importance of taking this into account by using clear-cut lexis rather than ambiguous terms. This part coincides with the discretion of the court which is shown to be too wide and plays a part in the failure to construct a clear and reliable approach. Lastly, this article shows why the attempt to categorise non-bargain and bargain cases failed despite the fact that in theory it works well.

INTRODUCTION

Following *Taylors Fashion v Liverpool Victoria Trustees,*[1] a list of requirements has been approved by the Court of Appeal.[2] Some of these requirements have led to unsuccessful

[1] [1982] QB 133.
[2] *Habib bank v Habib Bank AG Zurich* [1981] 1 WLR 1265.

elaboration that uses ambiguous language which prevents a clear and reliable approach from being fashioned. This is demonstrated from the varying interpretations of what detriment consists of in common law. The attempt to categorise cases into bargain and non-bargain[3] has been considered by the courts but has ultimately been denied. It will therefore be discussed whether the courts have fashioned a clear and reliable approach. First, this essay will analyse the court's differing interpretation of detriment through case law, as well as what is considered 'substantial'.[4] Throughout, it will discuss the use of language and wide judicial discretion. Lastly, it will demonstrate how the division of bargain and non-bargain cases has been denied by the courts as, in practice, it is inapplicable.

DETRIMENTAL RELIANCE

This is tested by whether the claimant would suffer as a result of having no claim. This can be difficult to encapsulate in a 'one size fits all' approach but could be better elaborated by the courts. Walker LJ attempted to refine this by stating 'detriment need not consist of expenditure of money or financial detriment so long as it is something "substantial".[5] This is unclear as there is no elaboration as to what is substantial, nor are there examples. It is also subjected to whether it would be unconscionable to repudiate the assurance in 'all the circumstances'.[6] It is recognised that this is part of a 'broad enquiry' and draws on mass judicial discretion.[7] Without a clear set approach, judges are left to quantify the potentially unquantifiable such as any non-financial detriment which naturally creates uncertainty. However, this does allow for an opportunity for claimants to argue that their detriment should be considered substantial and therefore allows the law to decide on particular contexts and take into account crucial evidential

[3] *Jennings v Rice* [2002] EWCA Civ 159; [2003] 1 F.C.R 501; [2002] 2 WLUK 603 (CA(Civ Div)).
[4] *Gillett v Holt* [2001] Ch 210, [232] (per Robert Walker LJ).
[5] ibid.
[6] ibid.
[7] ibid.

factors.[8] For example, where key witnesses may have died like in the case of *Thompson v Thompson.*[9] The problem is that it prevents cohesion in the law because of the ambiguous nature of 'substantial' and 'all the circumstances'. This is reinforced by Gardner's point that there is no requirement that the reliance has to take a particular form and its current position is that it is not a narrow or technical concept.[10] Due to its broad application, it can be argued that it is a relatively clear concept, but due to inconsistent interpretation and little elaboration, it is hard to determine the approach of the courts and their interpretation of 'substantial' detriment.

This is seen in the differing interpretations of detriment and the approach to satisfying the equity in common law, most notably *Suggitt v Suggitt* and *Davies v Davies.*[11] The facts of *Suggitt* are as outlined: the claimant sought relief in relation to assurances his father made that he would succeed the farm business. He was then granted the farmland via the expectation approach. In *Davies,* the claimant was promised partnership but was instead awarded a lump sum as a result of the proportionality approach. The detriment in *Suggitt*, had been considered with modest evidence. This consisted of 'stripping of wallpaper, clearing of rubbish, gutters and work in the garden when he was supposed to be off work sick,'[12] but the work in which he had completed was 'not heavy, or onerous as a farm labourer would have done'.[13] In addition to this, his father had 'paid everything for him: food, board, lodging, college fees, living expense,'[14] which softens the detriment and makes his detriment appear illusory. On the one hand, one may argue in favour of which both judges did: 'John positioned his whole life on the assurances given to him.'[15] But on the other hand, in *Davies v Davies* '[t]he non-financial

[8] Elizabeth Darlington, 'Quantification in Proprietary Estoppel Part 1' [2021] 51 Fam Law 837.
[9] [2018] EWHC 1338 (Ch).
[10] Simon Gardner, 'The Remedial Discretion in Proprietary Estoppel Again' [2006] 122 LQR 492.
[11] *Suggitt v Suggitt* [2012] EWCA Civ 1140; *Davies v Davies* [2016] EWCA Civ 463.
[12] ibid [59].
[13] ibid [38].
[14] ibid [9].
[15] ibid [23].

detrimental reliance[...] the judge identified was[...] Eirian gave up the ability to work shorter hours in a working environment of her choice and freedom from the difficult working relationship she had with her parents'.[16] This was described as nothing that was 'irretrievable'[17] – which can be argued to be relative to what *Suggitt* gave up in relation to the work he completed.

Additionally, in *Davies v Davies*, the detriment can be considered to be greater as the work she completed was considered high quality consisting of 'veterinary work, foot trimming, insemination and general farming work'.[18] This appeared to be done with 'high standards of care,'[19] and 'excellent stockman skills,'[20] and even acclaimed her Young Farmer of the Year.[21] In *Suggitt*, Arden LJ was seen to affirm the dicta from *Jennings* that if the expectation is 'extravagant or all out of proportion to the detriment suffered' that 'equity should be satisfied in a (generally more limited) way'.[22] When comparing the two detriments, it is evident that the detriment in *Suggitt* is far less detrimental than in *Davies*, suggesting that the expectation can be reasoned to be extravagant or out of all proportion despite Arden LJ recognising that it is not.[23] It must be noted that there is a suggestion of lack of certainty as to the granting of the expectation with the latter part of the phrase 'to grant him the farmland, whatever that means'.[24] This further demonstrates how the courts' discretion and the choice of approach can potentially create an outcome that is *purely* shaped by judicial discretion and interpretation. When looking at contextual factors and relationships; it demonstrates how the detrimental reliance approach vis-à-vis the proportionality approach taken in *Davies* can lead to an over generous relief. More

[16] *Davies (*n 11) [65].
[17] ibid.
[18] ibid [6].
[19] ibid [20].
[20] ibid.
[21] ibid.
[22] *Jennings v Rice* [2002] EWCA Civ 159; [2003] 1 F.C.R 501; [2002] 2 WLUK 603 (CA(Civ Div)) [51].
[23] *Suggitt* (n 11) [45].
[24] ibid.

so, how the discretion used by judges can blur which approach is going to be used and has even been the point of question in Darlington's view[25] of which approach will be taken in the recent case of *Guest v Guest.*[26] It upholds Lord Denning's point that this doctrine shows 'equity at its most flexible',[27] but is evidently unreliable for lawyers as Blohm points out (who was QC in *Davies)*, it is also at its most uncertain.[28]

Overall, this discussion and comparison of detrimental factors upholds the argument that the law is unreliable and unclear, even for legal experts. The courts' differing interpretation of what is considered a detriment when looking to contextual factors remains unpredictable and therefore, unreliable.

ASSURANCE, DISCRETION AND LANGUAGE USED

An assurance to the claimant can be made expressly or communicated by the conduct of the landowner and will exist where the claimant is led to believe they will enjoy an entitlement to the landowner's land. Walker LJ's language choice when establishing the nature of an assurance is that it only needs to be 'clear enough' and is dependent on context.[29] While this allows for justice on a case-by-case basis, the application of this is unreliable due to the uncertainty of the approach. To suggest that it only needs to be 'clear enough' is rather ambiguous and unclear; the court was given the opportunity to elaborate and refine what is considered to be 'clear enough' in *Habberfield v Habberfield.*[30] However, they just reinforced the point which led to a missed opportunity to push forward a modern approach to estoppel.

[25] Darlington (n 8).
[26] [2020] EWCA civ 387.
[27] *Crabb v Arun DC* [1976] Ch 179.
[28] Leslie Bohlm, 'Davies v Davies—the Cowshed Cinderella and the clock strikes 12' (2016) St John's Chambers https://www.stjohnschambers.co.uk/wp-content/uploads/2018/07/Davies-v-Davies-the-cowshed-cinderella-and-the-clock-strikes-12.pdf accessed 4 July 2023
[29] *Thorner v Major* [2009] UKHL 18; 1 WLR 776 [794].
[30] [2019] EWCA Civ 890.

Arguably, this has slowed down the advancement of clear and reliable law behind equity by estoppel. This is backed up by Bright and Macfarlane's[31] argument that with greater certainty conferred by elaborating specific principles, it lessens the risk of extensive and costly litigation, debatably making it more reliable for some. This is furthered by the point that the claimant spoke in 'oblique and allusive terms',[32] suggesting the court had room for a wide use of discretion to interpret the assurance; dampening and clouding the understanding of what can be considered to be 'clear enough'. The courts' ability to apply more discretion and require less clarity in domestic cases has been reinforced[33] which in itself is problematic as Bright and Macfarlane argue that because the underlying purpose is to prevent unconscionability: it does not give rise to open ended discretion in each case.[34] It is important to note that, despite its discretionary nature, it allows for cases to take into account key contextual features which may be crucial to determining the outcome. This was demonstrated in *James v James*[35] where the personalities were considered by the judge resulting in a lack of assurance due to the father's reluctance to make commitments and the son's overly keen attitude to inherit the farm.[36] So, despite a lack of examples and clarification of what is 'clear enough', the court is able to weigh up the facts and choose the correct approach. This further suggests that there is inconsistency in what approach to take and a failure to take a considered and consistent approach which may lead to costly litigation and the break-up of family assets, resulting in overly busy courts.[37] Ultimately, leading to unstable and unreliable law.

[31]Susan Bright and Ben Macfarlane 'Proprietary estoppel and property rights' [2005] 64 CLJ 449.
[32] *Thorner v Major* [2009] UKHL 18; 1 WLR 776 [3].
[33] *Ely v Robson* [2016] EWCA Civ 774.
[34] Bright and Macfarlane, 450 (n 31).
[35] [2018] EWHC 43.
[36] ibid [33]
[37] Ashleigh Carr, 'Proprietary estoppel claims—lessons from recent case'(*Forsters,* 12 April 2019) https://www.forsters.co.uk/news/blog/proprietary-estoppel-claims-lessons-recent-case-law accessed 4 July 2023.

As such, in conclusion, the courts' failure to elaborate on the language they have used throughout fashioning an approach to satisfying an equity by estoppel has prevented the law from being clear and reliable. This is emphasised by the high level of judicial discretion that produces variable and unpredictable results.[38]

NON-BARGAIN AND BARGAIN CASES: A FAILED ATTEMPT TO CATEGORISE

Walker LJ distinguished, in *Jennings and Rice,*[39] bargain and non-bargain cases as a means to categorise cases. In theory, this differentiation works as it attempts to categorise and simplify the application of estoppel to certain case types and facts, however, in practice it is harder to apply. Bargain cases are those which fall short of an enforceable contract with relief in an expectation measure.[40] Bargain cases are relatively clear cut and require there to be a clear bargain between the parties with a clear understanding to what action the claimant had to take in reliance in order to earnt the expectation.[41] Whereas, non-bargain cases have been acquired a list of factors for the court to consider, both of which attempt to take a contract-like division of cases. It is arguable that a reasonable degree of support has been given in previous case law,[42] for example, *Crabb v Arun DC.*[43] This analysis has evidently been somewhat denied by other judges with Aldous LJ 'making no use of the idea' and the Court of Appeal presenting it in an 'unfaithful way, denying it any determinative force'.[44] Both favour a 'homogenous' and 'single discretionary approach', that suggests an inability to categorise cases,[45] showing difficulty in applying this in practice. It is also shown to be transparently ineffective and

[38] Mandeep Chima, 'The difficulties of proprietary estoppel claims', (*Shoosmiths,* 1 October 2019) https://www.shoosmiths.co.uk/insights/articles/the-difficulties-of-proprietary-estoppel-claims accessed 3 July 2023.
[39] *Jennings* (n 3).
[40] Simon Gardner, 'The remedial discretion in proprietary estoppel—again' [2006] 122 LQR 492.
[41] *Jennings* (n 3).
[42] Gardner (n 40).
[43] [1976] Ch 179.
[44] ibid.
[45] Gardner (n 40).

unreliable as it is only applicable to a small number of cases, as in reality, as Gardner argues, very few cases fall very distinctly to one side or another.[46] Gardner also points out that it is hard to say whether there is a bargain at all and in order to give a clear answer one must take an 'artificial, stylised, view of the facts,'[47] reinforcing the idea that the theoretical idea does work but is impractical to apply in practice as it fails to be applied to 'typical estoppel scenario(s)'.[48] Furthermore, the unhelpful agreement from Mantell LJ has been highlighted by Bolhm[49] to show the surrounding uncertainty as to how the court go about assessing the remedy that needs to be considered, fortifying the point that the court has produced an unclear approach.

CONCLUSION

In conclusion, it can be seen that the courts have failed to elaborate and define certain language elements to proprietary estoppel, which are key in determining the necessary approach to take as recognised by academics. The courts have also favoured a wide discretionary approach in determining detriment, which has made the law unreliable due to the uncertainty surrounding their interpretation and ultimately, which approach will be taken. The further denial of categorising the cases to bargain/non-bargain by the courts has proven it to be inapplicable and unreliable in practice. In light of these arguments, it can be argued that, so far, the courts have failed to fashion a clear and reliable approach.

[46] ibid.
[47] ibid.
[48] ibid.
[49] Bohlm (n 28).

How international and domestic regulations implemented to combat terrorism have demonstrated the international struggle to find a suitable balance with human rights since 1999.

Amelia Randall

ABSTRACT

Terrorism has continued to provide a rising threat to national security, and governments have utilised a range of methods in an attempt to counter this. The catastrophic event of 9/11 particularly prompted drastic international and domestic responses, resulting in the introduction of harsh regulations and policies, such as the use of torture and extraordinary rendition. This article will explore the impact of governmental response nationally and internationally on human rights. Ultimately, it will be suggested that governments have thus far failed to find a suitable balance between combatting terrorism and protecting the human rights of individuals suspected of connection to terrorist organisations or involvement in terrorism. This tension between the two has been met with heavy-handed regulations and policies which reflect a complete disregard for human rights.

INTRODUCTION

As terrorist threats to worldwide security heightened, governments responded in a manner which resulted in widespread and multifaceted violations of human rights. However, as Kofi Annan explained in the General Statement to the Commission on human rights, 'we cannot achieve security by sacrificing human rights'.[1] With a particular focus on the United States, it

[1] Kofi Annan, UN Secretary General in Statement to Commission on Human Rights on 12 April 2002.

will be argued that international and domestic regulations and policies implemented since 1999 have demonstrated the international struggle to find a suitable balance against terrorism, resulting in an adverse impact on human rights. Whilst a broad range of human rights has arguably been infringed, this essay will consciously assess the impact of such policies and regulations regarding two specific human rights. It will begin by critically analysing interrogation methods used concerning the prohibition of torture, before moving on to examine how the right to liberty has been ultimately stripped from individuals suspected of terrorist activity.

THE 'WAR ON TERROR'

In the shadow of 9/11, threats to national security gave rise to a drastic and heavy-handed response, specifically by the United States in the so-called 'war on terror'.[2] This introduced a 'wave of retrospective measures',[3] which sparked fear of a complete disregard for human rights. The response to security threats was dominated by excuses of 'legal vacuums and uncertainties' to justify governments circumventing the fundamental protection for human rights harboured in international law.[4] In 2009, the International Commission of Jurists published a report which shed light on numerous and profound violations of human rights and made public the culture of secrecy within government action.[5]

PART 1: PROHIBITION OF TORTURE

[2] Helen Duffy, Stephen A Kostas, 'Chapter 21: 'Extraordinary Rendition'' in Ana Maria Salinas de Frias, Katja Samuel, Nigel D White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Publishing 2012), 539.
[3] Martin Scheinin, 'Chapter 29. Terrorism' in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and David Harris (eds), *International Human Rights Law (4th edn)* (Oxford University Press 2022) 620.
[4] Helen Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' in Larissa van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge University Press 2013) 482.
[5] Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, 'Assessing Damage, Urging Action' (International Commission of Jurists 2019).

State torture of terrorists is not a new phenomenon. However, since 1999, the introduction of regulations and policies to broaden governments' power led to the legalisation of interrogation methods that would otherwise constitute torture. The prohibition of torture is one of the clearest examples of *jus cogens* and is absolutely prohibited in international humanitarian law,[6] and international law.[7] It has further been addressed by the Convention Against Torture and Other Cruel Inhuman and Degrading Treatment 1984, which provided that '[n]o exceptional circumstances' would ever justify the use of torture.[8] Thus, the prohibition of torture is an absolute right which is binding on states, subject to no derogation or limitation, even in serious public emergencies.[9] Under these frameworks, the meaning of torture contains 'three key features', which include severe physical or mental pain or suffering, which is inflicted for a prohibited purpose, with some degree of official involvement.[10] However, in response to the threat of terrorism, governments found the 'looming temptation to apply pressure' irresistible, as stated by Pregent.[11] Therefore, torturous interrogation methods were utilised as a central tool to extract intelligence at the expense of the indisputable international absolute prohibition of torture.

ENHANCED INTERROGATION METHODS

[6] Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, Common art.(1)(a) (GV III); ibid Common art.(1)(c).
[7] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art.7; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art.7 (ICCPR); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) United Nations, Treaty Series, vol.1465 (CAT).
[8] CAT, art.2(3); Ben Saul and Mary Flanagan, 'Chapter 24: Torture and Counter-Terrorism' in Ben Saul (ed), *Research Handbook on International Law* (Edward Edgar Publishing 2020) 356.
[9] Terrorism Prevention Branch United Nations Office on Drugs and Crime, *Counter-Terrorism in the International Law Context* (United Nations Office on Drugs and Crime, 2021) 17.
[10] CAT, art.1; Saul and Flanagan (n 8) 355; Scheinin (n 3) 613.
[11] Richard Pregent, 'Chapter 20: Torture, Interrogation, Counter-terrorism, and the Rule of Law' in Ana Maria Salinas de Frias, Katja Samuel, Nigel D White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Publishing 2012) 532.

In 2002, the United States Department of Justice Assistant Attorney General and the Head of the Office of Legal Counsel introduced domestic regulation in the form of "Torture Memos" which authorised the legalisation of interrogation methods, directly violating the absolute prohibition.[12] The "Torture Memos" 'sycophantically informed the President' that he had the power to 'ignore international law'.[13] A 'crucial preliminary finding' to authorising such methods was the United States' denial of the extraterritorial application of the Geneva Conventions to Al Qaeda or Taliban members captured in Afghanistan.[14] This ultimately stripped non-nationals of their human rights. However, it has since been established that a state's obligations arise 'where individuals are within the state's territory or where they are subject to its jurisdiction' under the international law framework.[15]

Despite considerable overlaps in the meaning of torture in international and domestic law, there are notably some discrepancies. In international law, a more general definition of torture is provided by the Convention Against Torture and Other Cruel Inhuman and Degrading Treatment 1984, which Peijc and Droege argue is purposeful to 'cover a wide range' of circumstances.[16] However, the failure of international law to provide a more 'concrete specification' led to 'potential for subjective interpretation' by governments, which enabled the United States to exploit this prohibition.[17] For example, the "Torture Memos" narrowed the

[12] Saul and Flanagan (n 8) 358; Central Intelligence Agency Inspector General, 'Special Review: Counterterrorism, Detention and Interrogation Activities (September 2001-October 2003)' (*New York Times*, 2009) https://www.nytimes.com/interactive/projects/documents/c-i-a-reports-on-interrogation-methods accessed 30 April 2023.
[13] Gabor Rona, 'A Bull in a China Shop: The War on Terror and International Law in the United States' (2008) 39(1) California Western International Law Journal 135, 138.
[14] David Weissbrodt, 'Extraordinary Rendition: A Human Rights Analysis' (2006) 19 University of Minnesota 123, 133; Saul and Flanagan (n 8) 357.
[15] UN Human Rights Committee 'General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant' (1994) U.N. Doc.CCPR/C/21/Rev.1/Add.13; Weissbrodt (n 14) 133; Duffy and Kostas (n 2) 549.
[16] Jelena Pejic and Cordule Droege, 'The Legal Regime Governing Treatment and Procedural Guarantees for Persons Detained in the Fight against Terrorism' in Larissa van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge University Press 2013) 530.
[17] Saul and Flanagan (n 8) 361.

meaning of torture to give it an extreme nature, allowing the United States to argue that 'aggressive or enhanced' interrogation techniques did not constitute torture.[18] The United States Government contended that severe pain amounting to torture must be 'equivalent in intensity to the pain accompanying serious physical injuries such as organ failure, impairment of bodily function, or even death'.[19] The "Torture Memos" thus 'resolved the textual ambiguity' in a way that 'suited the prevailing imperative' to legitimise the use of methods such as waterboarding or sleep deprivation.[20] As Casale explains, there were 'unintended loopholes in the protections' afforded to those deprived of liberty.[21] The United States Congress also passed the Detainee Treatment Act of 2005 which legally solidified military interrogation practices.[22] The extreme nature of this practice was highlighted in a human rights Watch report, which documented over '300 cases in which US military' and Central Intelligence Agency personnel were alleged to have abused or even killed detainees.[23] Therefore, the domestic regulations and policies implemented by the United States, alongside the exploitation of small technicalities in international law, led to an adverse impact on human rights.

PART 2: THE RIGHT TO LIBERTY

The typical reaction of states when confronted by perceived threats of terrorism has been to 'eliminate the threat by removing those who ought to represent it'.[24] Thus, Shah explains the main concern was the 'capricious use of detention powers by oppressive governments'.[25]

[18] ibid 354.
[19] ibid 358.
[20] ibid 362.
[21] Silvia Casale, 'Chapter 19: Treatment in Detention' in Ana Maria Salinas de Frias, Katja Samuel, Nigel D White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Publishing 2012) 496.
[22] Pregent (n 11) 519; Detainee Treatment Act of 2005.
[23] Saul and Flanagan (n 8) 360.
[24] Nigel S Rodley, 'Chapter 18: Detention as a Response to Terrorism' in Ana Maria Salinas de Frias, Katja Samuel, Nigel D White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Publishing, 1 January 2012) 457.
[25] Sangeeta Shah, 'Chapter 13. Detention and Trial' in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and David Harris (eds), *International Human Rights Law (*4th edn) (Oxford University Press 2022) 258.

Administrative detention arguably poses the highest risk to human rights, with the aim being to detain without the 'discipline of a criminal trial process'.[26] A pertinent example is Guantanamo Bay, which highlighted administrative detention prior to 'the introduction of a clear legislative basis'.[27] Detainees were therefore 'beyond the protection of any courts, and at the mercy of the victors'.[28]

It is now accepted that international human rights law applies alongside international humanitarian law.[29] However, specific differences in the legal frameworks regarding detention cannot be overlooked. Whilst administrative detention is not normally authorised in peacetime, it is permitted by international humanitarian law in international armed conflict so long as it complies with detailed requirements to ensure detention is not arbitrary.[30] However, for non-international armed conflict, the 'grounds and procedures' of detention are not stipulated by international humanitarian law, so international human rights law applies *lex specialis* to regulate detention.[31] The ability to derogate in international human rights law is arguably narrow, permitted only where 'strictly required by the exigencies of the situation' in a public emergency and where it is not inconsistent with other international law.[32] However, as de Londras explains, when states derogate international human rights, it never 'loses its relevance'.[33]

[26] Rodley (n 24) 458.
[27] Fiona de Londras, 'Chapter 25: Counter-Terrorist Detention and International Human Rights Law' in Ben Saul (ed), *Research Handbook on International Law* (Edward Edgar Publishing 2020) 371.
[28] Johan Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53(1) ICLQ 1, 8.
[29] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), art.5 (ECHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art.9 (ICCPR).
[30] Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art.2 (GC IV).
[31] ICCPR, art.9; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 [25].
[32] ECHR, art.15; ICCPR, art.4(1); UN Human Rights Committee 'General comment no. 29, States of emergency (article 4) : International Covenant on Civil and Political Rights' (2001) CCPR/C/21/Rev.1/Add.11.
[33] de Londras (n 27) 373.

Whilst the United States is not the only state to utilise administrative detention in combating terrorism, it demonstrates the attempt to legally justify arbitrary detention by exploiting these differences in the legal framework. Following 9/11, the United States argued that the 'war on terror' emanated from an international armed conflict to justify the 'creation' of a 'dumping ground' in Afghanistan for detainees without the scrutiny of international human rights law.[34] However, in 2006 the United States Supreme Court held it constituted a non-international armed conflict and demonstrated the need to 'interpret IHL creatively' to 'overcome to rigidities of the categories created by the Geneva Conventions'.[35] Duffy thus warns against the danger of a 'rigid approach' to *lex specialis,* given it could exclude human rights protections harboured in international human rights law.[36] As Rodley explains 'the idea the writ of international human rights law stops at the frontiers of' an international armed conflict has 'conceptual plausibility'.[37] Therefore, in analysing the impact of regulations and policies, detainees do not 'need to be pigeonholed',[38] given it has been demonstrated that legal protections apply to all detainees.

Even if administrative detention is justified, Shah argues that a 'state's obligations regarding the detainee do not end'.[39] It has become increasingly evident that detention needs to be 'tempered by serious safeguards'.[40] The right to liberty regarding detention comprises the right to be informed of the reasons for detention, and the ability to challenge the lawfulness of

[34] Duffy, 'Harmony' (n 4) 523.
[35] Andrea Bianchi, 'Counterrorism and International Law' in Erica Chenoweth, Richard English, Andreas Gofas, and Stathis N. Kalyvas (eds) *The Oxford Handbook of Terrorism* (OUP March 2019) 665; *Hamdan v Rumsfeld* 548 US 557 (2006) 69.
[36] Duffy, 'Harmony' (n 4) 523.
[37] Rodley (n 24) 459.
[38] Rona (n 13) 145.
[39] Shah (n 25) 263.
[40] Rodley (n 24) 473; de Londras (n 27) 379.

detention.[41] The ability to challenge detention has been argued as the 'key to a true assessment' of the effectiveness of human rights protection.[42] However, as Guantanamo Bay demonstrated, this is not happening in practice as of yet. Prisoners had 'no access to' *habeas corpus* to even establish whether there is reasonable justification for detention, let alone challenge it.[43] Additionally, the implementation of the Military Commission Act 2006 authorised the use of military courts which infringed the right to effectively challenge detention given the debatable fairness provided to civilians in those proceedings.[44] Furthermore, the challenge of detention must also have the 'capacity for effectiveness'.[45] In 2001, the UK introduced the Anti-Terrorism, Crime and Security Act, which authorised the Home Secretary to imprison non-nationals indefinitely, without an official charge or conviction.[46] This was challenged in the *Belmarsh* case,[47] where it was held the provision was incompatible with Article 5 ECHR when read in conjunction with the 'non-discrimination provision of Article 14'.[48] This decision did not result in 'liberty for the detainees' but rather the 'introduction of control orders' as amended by the Prevention of Terrorism Act 2005.[49] Therefore, not only did regulations and policies authorise indefinite detention, but also limited access to safeguards provided under international law.

Secret detentions became a useful practice for authorities to avoid judicial oversight. This practice involves the holding of a person, deprived of their liberty, in secret locations which are outside the reach of the law. The United States Government asserted that their international

[41] GC IV, art.43; ECHR, art.5(4); ICCPR, art.9(2); ibid art.9(4); *Brogan v United Kingdom* (1989) 11 EHRR 117.
[42] de Londras (n 27) 377.
[43] Steyn (n 28) 9.
[44] GC IV, art.43; Military Commission Act 2006; Pregent (n 11) 529.
[45] de Londras (n 27) 377.
[46] Howard Davis, 'Anti-Terrorism Law and Human Rights' in Howard Davis (ed), *Human Rights Law Directions (5th edn)* (OUP 2021) 504; Anti-Terrorism, Crime and Security Act 2001, s.23.
[47] *A v Secretary of State for the Home Department* [2004] UKHL 56.
[48] ECHR, art.5; ibid, art.14; Rodley (n 24) 473.
[49] de Londras (n 27) 378; Prevention of Terrorism Act 2005.

human rights obligations did not arise in Afghanistan or Iraq to justify the use of secret detention.[50] This meant the individual was essentially 'removed from the protection of the law' and could not 'make use of the judicial safeguards' to uphold their human rights.[51] A 'notorious example' was the Central Intelligence Agency's use of 'black sites',[52] including the creation of the 'Dark Prison' in Afghanistan between 2002 and 2004.[53] Given such activity occurred under the veil of secrecy, it is unlikely the Central Intelligence Agency were keen to ensure review mechanisms were carried out in line with the requirements of international law. Therefore, the regulations introduced aimed to evade the safeguards within international law and resulted in drastic violations of an individual suspect's right to liberty.

EXTRAORDINARY RENDITION

The practice of extraordinary rendition emerged following 9/11, which resulted in a 'hybrid' and cumulative violation of human rights.[54] This involved the state-sponsored abduction of a person in one country, with or without the cooperation of the government, who was extra-judicially transferred to another country without legal scrutiny. The sending governments relied on diplomatic assurances from the receiving government that torture would not be used against the detainee. Duffy argues this emanated into a 'judicially endorsed void' where 'detainees…can be deposited to avoid judicial' accountability and immunised the sending state of any wrongfulness.[55] Whilst there are 'no reliable numbers' on the programme, United States

[50] Helen Duffy, 'Chapter 22: International Human Rights Law and Terrorism: An Overview' in Ben Saul (ed), *Research Handbook on International Law* (Edward Edgar Publishing April 2020) 322.
[51] Shah (n 25) 268.
[52] ibid.
[53] Human Rights Watch, 'U.S. Operated Secret 'Dark Prison' in Kabul' *Human Rights Watch* (United States, 19 December 2005) https://www.hrw.org/news/2005/12/19/us-operated-secret-dark-prison-kabul accessed 1 May 2023.
[54] Weissbrodt (n 14) 127.
[55] Duffy, 'Harmony' (n 4) 512.

documents demonstrated that by '2005, the Central Intelligence Agency had taken custody of 94 persons'.[56]

The programme was originally intended to protect the United States, however, the Central Intelligence Agency colluded with 'at least 54' governments to extrajudicially transfer suspects.[57] The multiple-actor system was described as a 'spider's web spun across the globe'.[58] Whilst the degree of 'material involvement' varies,[59] numerous states, such as Egypt, Syria and Jordan, allowed United States 'rendition' flights through their airspace and refuelling stops on their territory. This was highlighted in *Al Nashiri,*[60] where an individual was taken to a secret Central Intelligence Agency prison in Afghanistan before being transferred to Poland. The Court found Poland's knowledge of the Central Intelligence Agency rendition operations to be established, especially with regard to the fact that it would be 'inconceivable for rendition aircraft to cross Polish airspace' without the 'authorities being informed'.[61] Additionally, as Borelli highlights, some states used this programme to justify their 'rendition practices' which also infringe on human rights.[62] Therefore, as Rona argues, 'lawyers serving the American leadership have constructed a house of cards in a Potemkin village of legalisms' to authorise the contravention of human rights.[63]

HAS THERE BEEN EFFECTIVE ACCOUNTABILITY?

[56] Duffy and Kostas (n 2) 541.
[57] Lette Tayler and Elisa Epstein, 'Legacy of the "Dark Side"': The Costs of Unlawful US Detentions and Interrogations Post-9/11' (Human Rights Watch, 9 January 2022) < https://www.hrw.org/news/2022/01/09/legacy-dark-side accessed 2 May 2023.
[58] Rodley (n 24) 543.
[59] Silvia Borelli, 'Chapter 23: Extraordinary Rendition, Counter-Terrorism and International Law' in Ben Saul (ed), *Research Handbook on International Law* (Edward Edgar Publishing 2020) 336.
[60] *Al Nashiri v Poland App* No. 28761/11 (ECtHR, 24 July 2014); *Husayn (Abu Zubaydah) v Poland* App No. 7511/13 (ECtHR, 24 July 2014).
[61] Nina H B Jorgensen, 'Complicity in Torture in a Time of Terror: Interpreting the European Court of Human Rights Extraordinary Rendition Cases' (2017) 16 Chinese Journal of International Law 11, 25.
[62] Borelli (n 59) 352.
[63] Rona (n 13) 155.

The disrespect for human rights has only been enumerated by a lack of proportionate response in failing to hold states accountable. As Duffy and Kostas explain, the prosecutions have been 'scarce, limited, and secretive'.[64] The main barrier to redress was that most allegations were 'frequently met with blanket denials by officials'.[65] In other circumstances, the clandestine nature of such violations made effective investigations problematic. This was evident in *El-Masri*, where the Bush Administration intervened to assert the state secrets privilege, which applies in United States law when there is a 'reasonable danger that compulsion of the evidence will expose military matter'.[66] Therefore, the clandestine nature of such activity drastically impacted the ability to hold states accountable under international law.

The lack of prosecutions has been 'most striking in the US' given its 'well-documented and leading role' in authorising the violation of basic human rights.[67] As Roth describes, it 'took the exposure' of the "Torture Memos" for the government 'to be embarrassed enough to withdraw them'.[68] To date, no indictments have been filed in the United States against Central Intelligence Agency agents or other officials regarding their role in the extraordinary rendition programme.[69] While the ECtHR found some European states were involved in the Central Intelligence Agency's extraordinary rendition programme,[70] this had no jurisdiction over the United States itself.[71] Therefore, 'prospects for international accountability' seem 'remote'.[72] Thus, it appears that on a domestic and international level, appropriate penalisation and

[64] Duffy and Kostas (n 2) 540.
[65] Amnesty International, (2008) 'No Hiding Place for Torture' (*Amnesty International,* 2008) https://www.amnesty.org/en/documents/ACT40/008/2008/en/ accessed 3 May 2023.
[66] *El-Masri v Tenet* 437 F.Supp.2d 530 (Eastern District of Virginia, 2006); Duffy and Kostas (n 2) 571.
[67] ibid 567.
[68] Kenneth Roth, 'The Wrong Way to Combat Terrorism' (2008) 14 Brown Journal of World Affairs 263, 266.
[69] Duffy and Kostas (n 2) 567.
[70] *El-Masri v The Former Yugoslav Republic of Macedonia* App No. 39630/09 (ECtHR, 13 December 2012); *Al Nashiri v Poland* App No. 28761/11 (ECtHR, 24 July 2014); *Husayn (Abu Zubaydah) v Poland* App No. 7511/13 (ECtHR, 24 July 2014); *Nasr and Ghali v Italy* App No. 44883/09 (ECtHR, 23 February 2016); Al Nashiri v Romania App No. 33234/12) (ECtHR, 31 May 2018).
[71] Saul and Flanagan (n 8) 369.
[72] ibid; Duffy and Kostas (n 2) 568.

accountability for human rights violations have not been provided. The lack of effective investigations highlights the importance of ensuring effective accountability and 'greater transparency' of state action to safeguard against future responses to terrorist threats that are not as catastrophic.[73]

CONCLUSION

To conclude, in the face of terrorism, there is arguably always going to be an inextricable element of 'inevitable tension' between protecting national security and ensuring human rights are not violated.[74] However, since 1999, it has been demonstrated that this tension has been met with heavy-handed regulations and policies which reflected a complete disregard for human rights. Governments attempted to justify the authorisation of prohibited methods, such as the use of torture and secret detention. As a result, the regulations and policies introduced have drastically impacted the human rights of individuals suspected of connection to terrorist organisations or involvement in terrorism. If we are to effectively prevent terrorist activity, governments should not respond in the same extreme manner. All government retaliation to protect its state should not infringe on human rights.

[73] ibid 576.
[74] Duffy, 'Chapter 22' (n 50) 324.