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INTRODUCTION TO THE EDITION

Lester Ho
Editor-in-Chief

It is my great pleasure and privilege to introduce the 12th Edition of the Oxford University Undergraduate Law Journal (OUULJ).

One of the more unique elements of the student-published OUULJ is its official affiliation with the Faculty of Law here at Oxford. Indeed, engaging with the Law academically is not something extraneous to a legal education but instead a core component of it. Learning the Law entails more than a mere familiarisation with the positive law. It demands thinking, discussing, and arguing about the law; not merely about what *it is*, but also about what it *should be*. That is, at its core, what the OUULJ is built upon. The Journal now prepares to enter its 13th year. Over the course of more than a decade, the Journal's functions and operations have expanded, but the Journal's mission remains the same - to provide a platform for legal academia written by the brightest undergraduate students at Oxford, and to foster an undergraduate community replete with vibrant and rigorous legal debate.

At the heart of the OUULJ remains the publication of long-form legal articles by undergraduates - the Journal proper. This year, we are fortunate to have the Rt. Hon. Lord Hoffmann—former Lord of Appeal in Ordinary— and the Rt. Hon. Lord Neuberger of Abbotsbury—former President of the Supreme Court of the United Kingdom— as judges for the best

Public and Private Law submissions to the Journal. I should not think it an exaggeration for me to say that the Journal is honoured to have the support of two of the foremost judges of recent memory, and indeed the long history of the English legal system. I thank Lord Hoffmann and Lord Neuberger for their adjudication as well as their sincere Forewords. In their Forewords, both Judges remarked on the quality of the articles published in this Edition. The issues discussed in the articles that follow are current and important, and the arguments advanced are considered and powerful. My thanks and congratulations must go to the authors for their contributions to this Edition.

Complementing the Journal is the Oxford University Undergraduate Law Blog (OUULB) and the Oxford Undergraduate Law Podcast (OULP). The Blog is on course for a new high of 10 publications this year. Thanks must be given to the efforts of our Senior Editorial Board, our team of dedicated Blog Editors, and the writers contributing to the Blog. Meanwhile, the OULP, now entering its third year, has cemented its reputation for hosting fascinating discussions from varied perspectives on a broad range of legal issues. My gratitude goes to our outgoing Podcast Editors - Chen Ji and Dorothea Oyetunde. It is their passion and intellectual curiosity for exploring the vast expanse of the law that has allowed the OULP to have a diverse catalogue that ranges from contemporary legal issues - such as the episode with Dr Nicola Palmer on the UK-Rwanda Asylum Partnership; to long-standing jurisprudential problems - as with the episode with Professor Scott Hershovitz on his theory of Law as a Moral Practice. These and more episodes of the OULP are available on Spotify.

In addition to the OUULJ's publishing output, a number of events and initiatives have been held throughout the year to stimulate legal academic writing among undergraduates. In October, we reprised the academic writing workshop, which saw great success in the previous year, with an additional segment inviting potential contributors to the Journal to raise and discuss their submission ideas. This addition proved popular with second and third years who considered it a useful opportunity to propose some early ideas before beginning work on their drafts. In May, the OUULJ Annual Essay Writing Competition was inaugurated - inviting participants to draft a mock address to the Justices of the Supreme Court in relation to a fictional constitutional challenge to the UK Government's blocking of the Gender Recognition Reform (Scotland) Bill. It is my hope that the Annual Essay Competition becomes a mainstay of the OUULJ calendar, in the rich tradition of some of our American counterparts across the Pond. Thanks must be given to the Dean of the Law Faculty, Professor Mindy Chen-Wishart and the Associate Dean for Undergraduates, Professor Rachel Taylor for their invaluable support.

None of the above would be possible without the generous support of our sponsors. Thanks must be extended to our Platinum Sponsors, 3 Verulam Buildings, Maitland Chambers, and South Square Chambers, who have enabled the 12th Edition to hold workshops, host competitions, and publish legal writing. The prizes for the best Public and Private Law submissions have been funded by 3 Verulam Buildings and Serle Court respectively. The Editorial Board is also deeply grateful to the OUULJ's Honorary Board, who has provided invaluable support and guidance throughout the years. Special thanks must

go to Professor Andrew Dickinson who has agreed to join the Board this year.

Finally, I would be remiss not to dedicate my deepest gratitude to the 12th Editorial Board. First, the Associate Editors who have worked tirelessly to fortify and polish the articles contained in this Journal. The quality of this publication is a testament to their ability and dedication. Second, the Vice-Editors in Chief, Weronika Galka, Amy Hemsworth, and Sahil Thapa who have stayed on the Journal to provide guidance and advice. Thirdly, and perhaps most importantly, thanks must be given to the members of the Senior Editorial Board, which include the Editor, Ethan Teo, our Vice-Editors Taha Anzar, Shivanii Arun, and Nicole Tay, as well as our Administrative Director Kristen Palmer and Publicity Officer Caitlin Gillett.

Ethan has taken up the difficult role of Editor in his stride - particularly in strengthening the OUULJ's faculty ties. His management of every aspect of the OUULJ, with the support of Taha, Shivanii, and Nicole has been remarkably ambitious yet impeccably efficient. Going forward, I am absolutely certain that the OUULJ will reach even greater heights under their stewardship.

In his Foreword, Lord Neuberger explains how academic writing nurtures an analytical rigour which can form the foundations for professional success. I would like to conclude by proposing, in addition, that legal academia is also valuable as an exercise in introspection. The first step in legal academia should be answering the question - 'What do I think?'. That necessitates identifying what our individual beliefs and values are, even when

engaging with the most technical areas of law. In this way, I believe academic law requires and increases not only our knowledge of the law but our understanding of ourselves.

As such, dear reader, I hope that the effect of the articles that follow is not only to illuminate and impress, but to prompt you to ask yourself the question: what *do I* think?

FOREWORD (PUBLIC LAW)

The Rt. Hon. the Lord Hoffmann
Former Lord of Appeal in Ordinary

The three undergraduate essays on public law in this issue are on very different subjects: the rationale of the law of torts, the propriety of using secret information in judicial proceedings and the justification for the use of force against a foreign government on humanitarian grounds. They demonstrate, on the part of their respective authors, a familiarity with legal reasoning and an ability to deploy it on a wide range of issues.

Is there anything which distinguishes legal reasoning from other forms of discourse? And is it something for which it is necessary to have a degree in law? It is only since 1870 that it has been possible to obtain an honours degree at Oxford by reading law. But there were great lawyers before then and Oxford has also produced great lawyers since then who did not read law. What advantage, then, does reading law at Oxford confer? The dons, of course, are a different matter. They not only teach undergraduates but play their own important part in the development of the law itself. Indeed, the current system of public funding for universities seems based on the premise that publication is their only useful function.

Some might say that you should read law if you want to be a lawyer. That might be true on the Continent but it is barely a half truth in England. It is a fallacy, often propagated by school teachers, that law at university is a technical training which equips one for a legal career. The profession is undemanding of

knowledge by entrants of the details of the law. Even in very recent times, careers at the Bar have been founded on qualifications such as a degree at an art school and a year's conversion course. Contrariwise, most lawyers in actual practice would say that they have never had any use for most of the substantive legal knowledge - the law of offer and acceptance, of mutual mistake, of the Settled Land Act - which they acquired for their performance in the Examination Schools. So it would be a mistake to deprive students with a passion for history or English literature from the pleasure of reading those subjects at university only because they also contemplate a career in the law.

But the training which a law degree does offer, and which is exemplified by these three essays, is in clarity of thought. There are subjects in which seminal observations of great significance can be concealed in a fair amount of obscurity. Anyone who has read Kant or Schopenhauer or Wittgenstein will understand what I mean. Not so the law. The first requirement of an advocate making a submission or a solicitor drafting a contract is to be clear. Hart and Dworkin may be philosophers but they write with shining clarity. Again, I do not suggest that reading law is the only way one can acquire the mental discipline to make oneself clear. But if one is trying to identify what reading law at Oxford has to offer, I think this is it. The evidence in support of this proposition will be found in this undergraduate publication.

Leonard Hoffmann
June 2023

FOREWORD (PRIVATE LAW)

The Rt. Hon. the Lord Neuberger of Abbotsbury
Former President of the Supreme Court of the United Kingdom

It is a great pleasure to be writing the Foreword to the twelfth edition of the OUULJ. As I mentioned in my Foreword to the 10th edition, the relationship between legal academics, law and judges has undergone a radical and beneficial shift over the past hundred years. Because they have different experiences and are writing in different contexts with subtly different aims, academics and judges have different perspectives, which means that they can and should benefit from each other's thoughts on difficult and important legal topics.

Judges and legal practitioners are influences by the facts of a particular case before them, and are generally concerned about the practicalities of their decisions, whereas academics tend to take a more principled, if sometimes less realistic, approach. Judges have the benefit of oral argument from each side, whereas academics are more limited to what has been referred to as an intracranial dialogue. Judges tend to be under more time pressure to get their judgments out, whereas academics generally have more time before their views have to be published.

Conscientious judges will want to listen to the arguments developed in writing and orally by the advocates, and will want to read what is said by judges in other relevant cases. But if they are sensible, they will also be interested to read what academic lawyers have written on the topic in issue. And the law benefits from this.

Just as the development of the law in the courts benefits from articles written by academics, so do practising lawyers and legal academics benefit from having written articles about law at an early stage of their careers. It is obviously very valuable, indeed essential, to study law; it is obviously very important, indeed essential, to pass one's law exams. But writing articles on legal issues is not something which law students regularly do. And yet, providing an in depth analysis of a difficult or important legal topic is not only of great value to the development of the law; it is also of great value to the development of the writer.

I find it hard to think of a better training for a successful legal career in a university or outside in the professional legal world than to write such an article. It helps you understand not only the specific topic, but also how to think and how to write like a lawyer. And one only really understands a topic if one can explain it clearly to someone else.

In the light of these considerations, the writers of the four articles published in this edition can anticipate very distinguished legal careers – if that is they want. The four articles are all of high quality, and address important topics which raise issues that still need to be resolved and on which accepted judicial and other views are open to question.

All four topics are of interest to me, although *Can You Hear Me?* is concerned with territory which is less familiar to me than the other three articles. The article raises some interesting practical, social and developmental issues, as well as some legal issues, and it deals with all those issues interestingly and clearly. Family law is an area of law whose social and human importance

has never been in doubt, but its intellectual aspect has been overlooked until relatively recently.

The Latent Uncertainties and Difficulties Surrounding Knowing Receipt addresses an area of law which is more familiar to me. The article exposes inconsistencies and raises questions in relation to a difficult and technical legal topic in a challenging way. Given that the decision in *Byers v The Saudi National Bank* on its way to the Supreme Court, it will be interesting to see how things develop there.

Home (Not So) Alone: Remodelling the CICT discusses an area of law which is pretty familiar territory for me: *Stack v Dowden* was virtually the first case I heard as a Law Lord, and I dissented. The article deals with developments since *Stack* in a full and convincing way, identifying a number of significant issues. Like *Can You Hear Me?* it raises social and ethical questions just as much as legal questions.

Interpreting Smart Contracts covers two areas of interest to me, contractual interpretation and blockchain, and it does so in depth and with perceptiveness. The interrelationship between the law and Artificial Intelligence, and indeed the relationship between lawyers and AI, raises profound, concerning and very difficult questions, and will continue to do so for a long time.

I enjoyed reading all four articles and I hope that many other people do.

David Neuberger
May 2023

PRIZES

Best Public Law Submission to the Twelfth Edition of the Oxford University Undergraduate Law Journal (2023):

The United Kingdom's Doctrine of Humanitarian Intervention: An Emerging Norm of International Law?
Shastikk Kumaran & Mateus Norton de Matos
University of Oxford

The Private Law Prize winner was selected by The Rt. Hon. the Lord Hoffmann, Former Lord of Appeal in Ordinary.

Best Private Law Submission to the Twelfth Edition of the Oxford University Undergraduate Law Journal (2023):

Interpreting Smart Contracts: the Reasonable Coder and the need for a Stronger Contextual Approach
Nick Hsu & Jagjit S. Sahota
University College London and the University of Cologne, respectively

The Private Law Prize winner was selected by The Rt. Hon. the Lord Neuberger of Abbotsbury, Former President of the Supreme Court of the United Kingdom.

The Editorial Board wishes to thank our prize sponsors:

3 Verulam Buildings*—for their funding of the Public Law Prize*

Serle Court Chambers*—for their funding of the Private Law Prize*

PUBLIC LAW ARTICLES

On Tort Abolition

Omid Eliott Yeganeh*

Abstract—This article hopes to make a novel case for the abolition of tort law. The first part is dedicated to a sequential critique of tort, beginning with a conceptual account of its essential features, followed by a moral evaluation of those features. Emphasis is placed on the tension between relief for injury and detriment for wrongdoing in tort. The second part seeks to explore and articulate potential alternatives to tort law, with a view to fill the vacuum left upon its hypothetical abolition. Particular attention is paid once more to the notions of relief and detriment in a post-tort world.

* Lady Margaret Hall, Oxford. A special thanks to the team at the OUULJ for their anonymous comments, to Dr. David Edward Campbell for his continued academic support, and to the Pavlin family for their logistical assistance. I am especially grateful to Moayad Karar for his invaluable advice and relentless loyalty. For that, and much more, I am grateful. All errors are my own.

Introduction

Tort is dead, and we have killed it.

What we call tort law occupies a central position in many legal systems[1] as the principal mechanism of civil remedy for wrongful injury. At its simplest, tort provides a way for injured individuals to seek relief for the wrongful[2] actions of others,[3] without the need for any contractual relationship between them.[4] This article argues for a move away from the orthodox framework of civil wrongs. It makes the case for tort abolition.[5]

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[1] See e.g. *Code civil* [C.civ.] [Civil Code] arts. 1382-1386 (France); ***中华人民共和国侵权责任法*** [Tort Liability Law of the People's Republic of China] (China); *Bürgerliches Gesetzbuch* [BGB] [Civil Code] § 241–853 (Germany); *Código Civil* [CC] [Civil Code] arts. 927, 186, 187 (Brazil).

[2] The concept of 'wrong' is inherent in the very etymology of the term 'tort,' tracing its roots to the Latin *tortum* meaning 'wrong, injustice'. In modern French '*un tort'* translates to 'a wrong'.

[3] *Dunnage (Terry) v Randall (Kathleen Bernadette) & Anr* [2015] EWCA Civ 673 at [129] (Vos LJ).

[4] The exact definition of tort has provoked enthusiastic discussion. See Percy Henry Winfield, *The Province of the Law of Tort* (CUP, 1931) 32; Tony Weir, *An Introduction to Tort Law* (OUP, 2006) ix; Glanville Williams & Bob Hepple, *Foundations of the Law of Tort* (Butterworths, 1984); Peter Cane, *The Anatomy of Tort Law* (Hart, 1997) 11-13; Peter Birks, 'The Concept of a Civil Wrong' in David G Owen (ed), *The Philosophical Foundations of Tort Law* (OUP, 1997).

[5] For earlier arguments on the abolition of tort law, specifically relating to personal injury, see: Patrick S Atiyah, *The Damages Lottery* (Hart, 1997); Peter Cane & James Goudkamp, *Atiyah's Accidents, Compensation and the Law* (CUP, 2018); Lord Sumption, *Abolishing Personal injuries Law - A Project* (Personal Injuries Bar Association Annual Lecture, 2017).

A successful case for abolition follows from two key propositions:

(1) The object of abolition is fundamentally unjust.[6]
(2) There are adequate alternatives to the object of abolition.

Proposition (1) will be dealt with in the first part. There, it will be established that (i) in any given case, relief for tortious injury and detriment for tortious wrongdoing are by nature commensurate; and (ii) this relationship between relief and detriment leads to injustice.

Proposition (2) will be the subject of the second part. There, alternatives to tort will be explored, with a particular emphasis on (i) relief for injury after tort; and (ii) detriment for wrongdoing after tort.

The conclusions reached in this paper are not morally neutral. Nevertheless, if the normative assumptions presented hereafter are accepted, then the conclusions, I hope, must follow by logical consequence.

[6] It is assumed that injustice is morally and legally problematic. This is a settled point in English law: *Jennings v Rice* [2002] EWCA Civ 159 at [36] (Aldous LJ); *Air Canada v Secretary of State for Trade (No 2)* [1983] 2 AC 394 (HL) at 438 (Lord Wilberforce); *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487 (HL) at 509-510 (Lord Scarman); *Pickett v British Rail Engineering Ltd* [1980] AC 136 (HL) at 150 (Lord Wilberforce); *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) at 1054 (Lord Pearson).

1. Abolition

I am concerned, in this first part, with answering the question: *what's wrong with tort?* I will proceed in two stages: (i) describing the essence of tort; and (ii) critiquing that essence.

A. The Essence of Tort

I. Relief for Tortious Injury

Relief for wrongful injury is an essential feature of tort law.[7] Where a court rules in favor of a claimant, that claimant will be entitled to some form of remedy as solace for their injury.[8] This is what is meant by relief.

But tort is not content with providing *any* remedy: it seeks to identify and administer the *right* remedy in any given

[7] *Johnston v NEI International Combustion Ltd* [2007] UKHL 39 at [44] (Lord Hope); *Letang v Cooper* [1965] 1 QB 232 (CA) at 242-243 (Diplock LJ); *Phillips v The London and South Western Railway Company* (1879) 5 CPD 280 (CA) at 287-288 (Bramwell LJ); *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL) at 749 (Sir Thomas Bingham MR); *Athey v Leonati* [1996] 3 SCR 458 at [23] (Major J) (Canada); *Clements v Clements* [2012] 2 SCR 181 at [19] (McLachlin CJ) (Canada). See also Glanville Williams, 'The Aims of the Law of Tort' (1951) Current Legal Problems 137; Mark A. Geistfeld, 'Compensation as a Tort Norm' in John Oberdiek (ed.), *Philosophical Foundations of the Law of Torts* (OUP, 2014) 85; George Edward White, *Tort Law in America: An Intellectual History*, (OUP, 1980) 149.

[8] *Johnston* (n 7) at [44] (Lord Hope).

case.[9] Thus, tort asks: *what relief ought we provide?*[10] That inquiry embodies two relevant concepts. The first is the deserved relief of a wrongfully injured person; this I will term $\kappa(value)$.[11] The second is the *process* through which the injured party's deserved relief is identified; this I will call $Formula\ \kappa$.[12]

II. Detriment for Tortious Wrongdoing

Detriment for wrongdoing is another essential feature of tort law.[13] Where a court rules against a defendant, that defendant will be liable to endure some adverse consequence in response to their wrongdoing. This is what is meant by detriment.

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[9] *John v MGN Ltd* [1997] QB 586 (CA) at 611 (Sir Thomas Bingham MR).

[10] *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25 (HL) at 39 (Lord Blackburn); *Corr (Adminstratrix of the Estate of Thomas Corr (deceased) v IBC Vehicles Limited* [2008] UKHL 13 at [30] (Lord Scott); Law Reform (Contributory Negligence) Act 1945, s 1.

[11] This is the answer to tort's question.

[12] This is tort's question itself. Possible factors relevant to *Formula κ* may include the nature of the injury suffered (e.g. physical injury: *Donoghue v Stevenson* [1932] AC 562 (HL); property damage: *Cambridge Water v Eastern Counties Leather plc* [1994] 2 AC 264; economic loss: *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL); interference with property rights: *Entick v Carrington* [1765] EWHC KB J98; damage to reputation: *McDonald's Corporation v Steel & Morris* [1997] EWHC 366 (QB)), the extent of the injury suffered (*Johnston* (n 7) at [8]) and any contribution by the claimant to their own injury (Law Reform (Contributory Negligence) Act 1945, s 1). For the purposes of this paper, however, the precise contents of *Formula κ* are immaterial.

[13] *Donoghue* (n 12) at 580 (Lord Atkin); *Fairchild v Glenhaven Funeral Services Ltd and others etc.* [2002] UKHL 22 at [9] (Lord Bingham); Williams (n 7) 137.

But once more, tort aspires to be normative. Since the imposition of a detriment will typically involve interference with the defendant's interests, sometimes even with their rights,[14] the courts must justify themselves in doing so.[15] Tort does not seek to impose undue, arbitrary, or disproportionate consequences upon a wrongdoer – it claims to impose no more than an appropriate burden.[16] Thus, tort asks: *how much detriment ought we impose?*[17] That question involves two additional concepts. The first is the detriment which a wrongdoer deserves; this I will coin ***Δ(value)***. The second is the *process* through which the wrongdoer's deserved detriment is identified; this I will call ***Formula Δ***.[18]

[14] e.g. financial damages may *prima facie* interfere with the right to property under the Human Rights Act 1998, s 1(1)(b), incorporating the First Protocol to the European Convention on Human Rights, art 1.
[15] *Heil v Rankin and another and other appeals* [2001] QB 272 (CA) at [27] (Lord Woolf MR).
[16] *Heil* (n 15) at [36] (Lord Woolf MR).
[17] *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL) at 212 (Lord Hoffmann); *Rookes v Barnard* [1964] AC 1129 (HL) at 1228 (Lord Devlin); *Lamb v Camden London Borough Council* [1981] 2 WLR 1038 (CA) at 1045 (Lord Denning MR); *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) at 618 (Lord Bridge).
[18] Possible factors relevant to *Formula ⊿* may include the wrongdoer's motives (*Rookes* (n 17)), the wrongdoer's age (*Mullin v Richards* [1998] 1 All ER 920), and their particular relationship to the injured party (e.g. Children Act 1989 s. 2, 3). For the purposes of this paper, the precise contents of *Formula ⊿* are immaterial. Nevertheless, for one proposition, see Robert Nozick, *Philosophical Explanations* (Harvard University Press, 1981) 363.

III. The Ontology of Tort

With regards to relief and detriment, tort rests on two essential assumptions: (i) that $\mathit{Formula}\ \kappa = \mathit{Formula}\ \Delta$; and (ii) that $\kappa(\mathit{value}) = \Delta(\mathit{value})$.

In other words, tort assumes that the inquiry by which we should identify the claimant's relief and the defendant's detriment is one and the same, and that the output of that inquiry is also one and the same.[19] To be clear, neither of these assumptions is endorsed as correct. They are simply two theoretical suppositions upon which tort rests—no more, and no less.

We know that tort assumes that $\mathit{Formula}\ \kappa = \mathit{Formula}\ \Delta$ because a given tort proceeding embodies, at once, the process of determining the claimant's due relief, and the process of determining the defendant's due detriment.[20] The questions asked in tort, and the answers given, have an equal bearing on both the claimant and defendant. There is no identifiable moment at which

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[19] Ernest Weinrib has referred to this as the 'correlativity' of tort: *The Idea of Private Law*, (OUP, 2012) 114-141. Wayne Courtney and James Goudkamp have referred to it as the 'bilateral structure' of tort: Elise Bant, James Goudkamp, Jeannie Paterson, & Wayne Courtney, *Punishment and Private Law* (Hart, 2021) 5.

[20] *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 AC 190 (HL) at 209 (Lord Hobhouse); *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146 at [154] (Roth J); quoting from the headnote in *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound* [1961] AC 388.

the court stops considering the one and begins considering the other.[21] Tort *is* κ and Δ.

We know that tort assumes that $\kappa(value) = \Delta(value)$ because, in all but exceptional instances,[22] the output of a tort proceeding will be a single award.[23] What the claimant gains is precisely what the defendant loses.

This remains true regardless of the particular form of relief. In the case of monetary damages, the claimant will gain one sum, and the defendant will lose that very sum.[24] In the case of a mandatory injunction, the defendant's detriment will be the compulsory performance of some obligation, and the claimant's relief will be that very same act.[25] Equally, in the case of a prohibitory injunction, the claimant's relief as well as the

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[21] ibid.

[22] The narrow exception to this rule relates social security benefits received by a claimant pursuant to tortious injury, which are deducted from the claimant's damages, but remain payable by the defendant to the Secretary of State via the Compensation Recovery Unit: Social Security (Recovery of Benefits) Act 1997. In such cases, the defendant's detriment will not align neatly with the claimant's relief.

[23] *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 (HL) at 29 (Lord Atkinson). Even where multiple tortfeasors separately contribute to a single indivisible injury, each will be liable in full: *Dingle v Associated Newspapers Ltd* [1961] 2 QB 162 (CA) at 188 (Devlin LJ); *Rahman v Arearose Ltd* [2001] QB 351 (CA) at [17] (Laws LJ). The same rule applies to joint tortfeasors: *Cassell & Co Ltd v Broome* [1972] AC 1027 at (HL) 1063 (Lord Hailsham LC).

[24] See e.g. *Lim Poh Choo v Camden and Islington AHA* [1980] AC 174 (HL); *H West & Son Ltd v Shepherd* [1963] UKHL 3; *Alexander v Home Office* [1988] 1 WLR 968 (CA); *Reynolds v Times Newspapers* [1998] 3 WLR 862 (CA).

[25] See e.g. *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] UKPC 16.

defendant's detriment, will be a prohibition placed upon the defendant.[26] Finally, in the case of specific restitution, the claimant will receive a given item as relief, and the defendant will lose that very item as detriment.[27] In the ordinary course of things, relief and detriment will be equivalent.

The logical structure of tort therefore runs as follows—

The Tort Theorem[28]

$$\begin{array}{ccc} \textit{Formula } \kappa = \textit{Formula } \Delta \\ \downarrow \qquad\qquad \downarrow \\ \kappa(\textit{value}) \;=\; \Delta(\textit{value}) \end{array}$$

The Tort Theorem pervades the law of tort[29] as a whole. The account given in the preceding paragraphs is not particular to any specific tort, or class of torts: it embraces them all. Equally, however, the Tort Theorem is neither comprehensive nor exhaustive – it does not tell us everything about tort, it merely elucidates those features which will be relevant for the purpose of the ensuing critique.

B. The Wrongs of Tort

The deficiencies of tort are felt at both stages of our theorem: (i) in the assumption that $\textit{Formula } \kappa = \textit{Formula } \Delta$; and (ii) in the

[26] See e.g. *Wollerton and Wilson Ltd v Costain Ltd* [1970] 1 WLR 411 (Ch); *Redland Bricks Ltd v Morris* [1970] AC 652 (HL); *Patel v WH Smith (Eziot) Ltd* [1987] 2 All ER 569 (CA).
[27] Torts (Interference with Goods) Act 1977, s 3.
[28] The Tort Theorem admits as its variables the facts of a given case.
[29] Or, if one prefers, the law of *torts*.

consequent upshot that $\kappa(value) = \Delta(value)$. Tort is wrong both in its method and in its results.

The claims made hereafter are not empirical. The reader is called to engage, in the following sections, their moral conscience: that inner sense of right and wrong.[30] It is upon that instinct that my case rests.

I. Wrong Process

The first wrong of tort lays in its assumption that the process by which we determine the claimant's rightful relief is, and ought to be, the same as that by which we determine the defendant's due detriment.

Contrary to tort's claim, $Formula\ \kappa$ and $Formula\ \Delta$ require distinct moral analyses.[31] Some common variables may

[30] Conscience is accepted to be, at minimum, an important factor in legal reasoning: see generally Sinéad Agnew, 'The Meaning and Significance of Conscience in Private Law' (2018) Cambridge Law Journal 479; Lord Kerr of Tonaghmore, 'Dissenting judgments - self-indulgence or self-sacrifice?' (Birkenhead Lecture, 2012) 22; *Dorset Yacht* (n 6) at 1054 (Lord Pearson); *Tinsley v Milligan* [1992] Ch 310 at 319 (Nicholls LJ); *R v Powell, R v English* [1999] 1 AC 1 at 28 (Lord Hutton); *R (Countryside Alliance) v Attorney General* [2008] 1 AC 719 (HL) at [45] (Lord Bingham); *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55 at [92] (Lord Walker).

[31] Delivering his seminal judgement on punitive damages, Lord Devlin almost seems to tacitly endorse this claim, stating that 'a sum awarded as punishment [cannot] be arrived at in just the same way as a sum awarded as compensation. Clearly, they are different and… must be arrived at in different ways.' (*Rookes* (n 17) at 1230). In fairness, Lord Devlin's analysis is strictly restricted to punitive damages, as distinct from compensatory damages, but he certainly seems to gesture towards a normative and conceptual boundary between *Formula* κ and *Formula* $\lrcorner$.

inform our understanding of both formulae, but that is not quite the same as saying that they are identical.

For example, the claimant's revenue might have a bearing on the appropriate relief, but tells us nothing about the due detriment. Consider that Ammanuel and Shivanii are two claimants. Ammanuel earns £1000 monthly, while Shivanii earns £5000 monthly. Imagine then that due to negligent injury, Ammanuel and Shivanii lose the ability to work for a month. It may well be fair for Shivanii to recover a greater sum than Ammanuel given her greater loss of earnings.[32] However, it seems rather strange to expect a defendant to pay more simply because the person they injured is wealthier.[33]

Conversely, the financial means of the defendant might tell us about the appropriate detriment, but not the adequate relief.[34] It may be fair, for instance, to impose a greater detriment upon Grace, a wealthy corporate banker, than Saf a struggling single mother, for the same tortious act, simply because Saf would otherwise suffer disproportionately for the same conduct. But this tells us nothing about the adequate relief – where two claimants have suffered the exact same wrongful injury in the

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[32] See e.g. *British Transport Commission v Gourley* [1956] AC 185 (HL); *Dews v National Coal Board* [1988] AC 1 (HL).

[33] See generally discussions on the thin skull rule: Andrew Ashworth, 'Defining Criminal Offences without Harm' in Peter Smith (ed.) *Criminal Law: Essays in Honour of J.C. Smith* (Butterworths, 1987); Andrew Ashworth, 'Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law' (1988) Rutgers Law Journal 725; Sanford H. Kadish, 'Criminal Law and the Luck of the Draw' (1994) Journal of Criminal Law and Criminology 679; Thomas Nagel, *Mortal Questions* (CUP, 1979) 24-38.

[34] *Cassell* (n 23) at 1090 (Lord Reid).

exact same circumstances, it is not clear why one should recover more simply because their respective wrongdoer is wealthier.[35]

It is not my intention to provide an exhaustive account of the differences between ***Formula κ*** and ***Formula Δ***. Doing so would require me to delve into the precise contents of our formulae, and I have neither the ambition nor the authority to do so. But such an account is not necessary. If the reader accepts that any given factor (i) relates *exclusively* to relief but not detriment; or (ii) relates *exclusively* to detriment but not relief; or (iii) relates *differently* to relief than to detriment, then the case succeeds. If there is any difference, whatsoever, in the adequate measure of the claimant's relief compared to the defendant's detriment, then tort is wrong.[36]

II. Wrong Outcomes

The distinct moral *analyses* embodied in ***Formula κ*** and ***Formula Δ*** lead to distinct moral *outcomes*. If the ways in which we identify rightful relief and due detriment are different, then the output of those analyses will also differ.[37] This is tort's second wrong.

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[35] *Heil* (n 15) at [33] (Lord Woolf MR); *Wells v Wells* [1999] 1 AC 345 at 373 (Lord Lloyd); quoting from *Lim Poh Choo* (n 24) at 187 (Lord Scarman).

[36] Studies have shown that people often take different factors into account when considering, on the one hand, penalties for wrongdoing, and on the other, compensation for injury: Jonathan Baron & Ilana Ritov, *Intuitions about Penalties and Compensation in the Context of Tort Law* (1993) Journal of Risk and Uncertainty 17.

[37] Baron & Ritov (n 36).

The tensions between the $\kappa(value)$ and $\Delta(value)$ are best understood with reference to tangible fact patterns. I will consider two core cases: (i) due detriment in excess of due relief; and (ii) due relief in excess of due detriment.

(1) Detriment in Excess of Relief

First, there is the case where the wrongdoer's due detriment exceeds the claimant's appropriate relief—where $\Delta(value) > \kappa(value)$.[38]

Imagine that Lucas is the owner and dedicated caretaker of a sacred religious field, and that Taha is a member of a vicious hate group which views Lucas' religion as sickening. Taha, wishing to insult Lucas, attempts to drive his truck over the sacred land, but mistakenly drives over land belonging to Tiago: Lucas' friendly neighbour whose lands have no religious significance. No actual property damage occurs in the process, but Taha is nonetheless liable to Tiago for trespass.[39]

In this case, Taha has done wrong, and Tiago has suffered injury, but Tiago's recoverable loss is only nominal,[40] while Taha's rightful detriment might greatly exceed that figure

[38] For real cases, see *Jacque v Steenberg Homes, Inc.* 209 Wis.2d 605, 563 N.W.2d 154 (1997) (WI, United States); *Owen and Smith (trading as Nuagin Car Service) v Reo Motors (Ltd Britain).* (1934) 151 LT 274 (HC); *Loudon v Ryder* [1953] 2 QB 202 (CA).
[39] See *Jacque* (n 38); *Entick* (n 12); *Blundell v Catterall* (1821) 5 B & Ald 268.
[40] ibid.

given his morally reprehensible motives.[41] In formal terms: $\Delta(value) > \kappa(value)$.

(2) Relief in Excess of Detriment

Second, and more morally problematic, is the case where the injury caused by a wrongful act calls for greater relief than the detriment which is justified in the circumstances—where $\kappa(value) > \Delta(value)$.[42]

Imagine the case where Dan, a young student seeking to finance his studies in law, works as a self-employed paperboy, delivering newspapers to his neighbours on early mornings. One day, after a particularly late night of studying, Dan inadvertently throws a newspaper onto a passerby, Juliette, lightly injuring her wrist. By some tragic twist of ill-fate, it so happens that Juliette is an acclaimed violinist, set to perform the next day at a major concert for which she would have been paid £80 000. Unfortunately, due to the minor injury, Juliette is unable to perform, and loses the totality of her pay for the event.

Here, tort leaves us at an impasse. We feel, on one hand, that Juliette merits relief for her injury, as well as the loss resulting therefrom. But equally, we understand that a minor act of

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[41] Tort will ordinarily deal with such asymmetries through punitive damages: *Rookes* (n 17); *AB v South West Water Services Ltd* [1993] QB 507 (CA).

[42] For real cases, see *Brockhill Prison, Ex p Evans* [1997] QB 443 (DC); *Rylands v Fletcher* [1868] UKHL 1; *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11; *Smith v Leech Brain & Co* [1962] 2 QB 405 (QB); *Robinson v The Post Office* [1974] 1 WLR 1176 (CA). See also *Stansbie v Troman* [1948] 2 KB 48 (CA); *Nettleship v Weston* [1971] 2 QB 691 (CA); and *The Arpad* [1934] All ER Rep 326 at 331 (Scrutton LJ).

negligence from Dan, a young student struggling to make ends meet, simply does not justify what is, in effect, an £80 000 penalty.

We have thus reached the point of critical failure of tort. Where tort chooses to prioritize relief of the injured party, it does so at the expense of the innocent.[43] Where tort responds fairly to wrongdoing, it does so at the expense of the injured. In any event, tort must choose what to prioritize, and what to overlook – it is left with a choice between one injustice or another.[44]

III. Vindicating Abolition

Where the law interferes with the lives of ordinary people, it must do so for the right reasons, and in the right way. Tort fails on both accounts.

The first wrong of tort (*Formula κ = Formula Δ*) is conceptual. Tort is 'wrong' in the sense of 'untrue' or 'incorrect.' The second wrong of tort (*κ(value) = Δ(value)*) is normative. Tort is 'wrong' in the sense of 'unethical' or 'immoral.'

In the closing stages of this part, it is important to emphasize that these wrongs of tort relate, not to some secondary characteristic, but to its very essence. So long as tort as we know it continues to exist, it will lead to injustice. The only fix is to rethink the

[43] The term 'innocent' is not to be understood as 'wholly innocent' but 'relatively innocent,' as in *Cassell* (n 23) at 1069 (Lord Hailsham LC), and 1105 (Lord Reid).

[44] Studies have shown that, when asked to consider hypothetical injuries, most people will intuitively assign different amounts in penalty and compensation: Baron & Ritov (n 36). This bolsters our case by providing it with a democratic basis of collective morality.

relationship between *Formula κ* and *Formula Δ* – to deform tort beyond recognition. The only solution is abolition.

2. Substitution

I am concerned, in this second part, with answering the question: *what comes after tort?*

The primary claim of this part is that because *Formula κ* and *Formula Δ* entail distinct legal and moral analyses, the law must deploy distinct legal mechanisms to deal with each *on its own terms*.

The broad contours of those legal mechanisms will form the substance of the sections to follow. I am concerned here with identifying a *framework* for relief and detriment after tort. The contents of that framework, that is to say, the specific rules contained therein, are beyond the scope of this paper.

A. Relief for Injury after Tort

The remedial function of tort serves a critical moral and social function. Without tort, or some adequate alternative, countless victims of wrongful injury would be left without redress. Understanding compensation after tort thus hinges on one key question: *how ought we provide relief?* In other words, how do we best implement *Formula κ*?

This paper proposes to replace tort with an administrative body responsible for reviewing claims of injury and granting compensatory awards based on the merit of each

application.[45] Under that scheme, any injured person would be able to submit a claim, along with any supporting evidence of loss, to the relevant agency. The administrative body would then proceed to award damages based on legally recognized guidelines: *Formula κ*.

The concept of a compensatory scheme is not foreign to English law.[46] Since 1964, the Criminal Injuries Compensation Board and its successor, the Criminal Injuries Compensation Authority (CICA), have been responsible for compensating victims of violent crime in England, Scotland, and Wales.[47] In that time, the CICA has received upwards of 2.2 million applications and paid out almost £6.25 billion in compensation.[48] This makes it one of the most generous criminal compensation funds globally.[49]

A more expansive approach is in effect in New Zealand, where all personal injury claims, regardless of fault, have been dealt with under the Accident Compensation Corporation (ACC)

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[45] For earlier propositions see Cane & Goudkamp (n 5); Arthur Owen Woodhouse, *Compensation for Personal Injury in New Zealand* (New Zealand Royal Commission of Inquiry, 1967).

[46] See e.g. the Vaccine Damage Payment Act 1979 and the Land Compensation Act 1973.

[47] Criminal Injuries Compensation Act 1995, s 1.

[48] Criminal Injuries Compensation Authority Annual Report and Accounts 2016-2017, HC256SG/2017/67, 7.

[49] Compare the Criminal Injuries Compensation Board (Maryland Code of Criminal Procedure [MD Crim. Pro. Code] § 11-819) (Maryland, United States); *Fonds d'aide aux victimes d'actes criminels* (*Recueil des lois et des règlements du Québec* [RLRQ] [Compilation of Québec Laws and Regulations] ch. A-13.2) (Québec, Canada); *Fonds de Garantie des Victimes des actes de Terrorisme et d'autres Infractions* (Code des Assurances [C. assur.] [Insurance Code] art. R. 422-1) (France).

since 1972.[50] In 2022, the ACC spent $2.1 billion (NZ) in compensatory awards,[51] and recorded a 65% public trust & confidence score.[52]

Of course, existing compensatory schemes have not avoided controversy, but the criticism they face relates, almost without fail, to the rules of eligibility,[53] as opposed to their detachment from fault.[54] Naturally, the proposed compensatory agency would be subject to judicial review.[55] Applicants who feel that their case was not assessed fairly would be entitled to appeal to the judiciary.

The proposed change creates a branch of law dedicated exclusively to developing and executing ***Formula κ*** and administering a finely calibrated ***κ(value).*** The agency would have

[50] Accident Compensation Act 1972 (New Zealand); Accident Compensation Act 2001 (New Zealand).
[51] Accident Compensation Corporation Annual Report 2022 (New Zealand) 11.
[52] ibid 10.
[53] See e.g. Richard S. Miller, 'An Analysis and Critique of the 1992 Changes to New Zealand's Accident Compensation Scheme' (1993) Maryland Law Review 1070; Marie Bismark & Ron Paterson, 'No-Fault Compensation In New Zealand: Harmonizing Injury Compensation, Provider Accountability, And Patient Safety' (2006) Health Affairs 280. See finally the issues arising out of the facts in *R v Ministry of Defence ex p Walker* [2000] 1 WLR 806.
[54] Compensatory funds tend to register high levels of public satisfaction: ACC Report (n 50) 10; Criminal Injuries Compensation Authority *Annual Report & Accounts 2021-22* (HC 527 SG/2022/133) 5.
[55] See e.g. Criminal Injuries Compensation Act 1995, s 4; Accident Compensation Act 2001, Part 5 (New Zealand).

one task and one task only: delivering due relief to injured persons.

B. Detriment for Wrongdoing after Tort

The detriment imposed in tort serves an equally remarkable moral and social function. Without tort, or some adequate alternative, countless wrongdoers would be left unaccountable. Understanding detriment after tort thus hinges on one key question: *how ought we impose detriment?* In other words, how do we best implement *Formula Δ*?

This paper proposes to replace tort with a parallel system of public liability: a regulatory framework designed to hold wrongdoers liable looking solely to their desert. English law already knows such a concept – the criminal law.

The language of crime evokes strong feelings, and for good reason: the label of 'criminal' should not be handed out lightly.[56] But public liability for minor acts of misconduct is well recorded in the law of England and Wales. For example, a plethora of road traffic regulations govern the operation of motor

[56] James Chalmers & Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) Modern Law Review 217; Barry Mitchell, 'Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling' (2001) Modern Law Review 394.

vehicles on British roads,[57] and similar provisions are made in environmental law to limit pollution.[58]

In the interest of fair labelling, the language of 'public tort' or 'misdemeanour' may be better suited for our purposes than the term 'crime.' In substance, however, what is proposed is essentially a parallel branch of 'criminal' liability for acts which would otherwise amount to torts.

The proposed change enhances public regulatory powers and establishes a distinct legal regime dedicated to developing and executing ***Formula Δ*** and imposing a just ***Δ(value).*** The framework would have one task and one task only: dispensing due detriment upon wrongdoers.

C. Optimizing Justice[59]

The feasibility of tort abolition remains a hotly debated issue and merits brief consideration at the closing stages of this paper.

Arguments from optimization, although relevant, bear limited moral weight. In the final instance, we care (and *should* care) more about a fair legal system than a cheap one. Nevertheless, this is not enough to propose a moral system – the

[57] See e.g. Road Traffic Act 1988; *Highway Code*, Rules 89-102.
[58] See e.g. the Environmental Permitting (England and Wales) Regulations (EPR 2010), SI 2010/675.
[59] I am grateful to Oban Lopez-Bassols for his specialist help in undertaking the necessary research for this section.

suggestion must be feasible. Accordingly, the efficiency as well as probable costs of alternatives to tort will be considered in turn.[60]

I. Temporal Efficiency

By standardizing remedial measures and streamlining investigative procedures, public compensatory bodies can administer relief with much greater efficiency than tort.

One example is Québec's no-fault automobile accident compensation scheme, which emphatically illustrates the relative efficiency of compensatory bodies. The experience in Québec is summarized in the table below.

[60] For relevant studies, see Don Dewees & Michael J. Trebilcock, 'The Efficacy of the Tort System and Its Alternatives: A Review of Empirical Evidence' (1992) Osgoode Hall Law Journal 57; Cecili Thompson Williams, Virginia P. Reno, & John F. Burton, 'Workers' Compensation: Benefits, Coverage, and Costs' (National Academy of Social Insurance 2003); Bismark & Paterson (n 53); Jeffrey O'Connell, 'Tort versus no-fault: Compensation and injury prevention' (1987) Accident Analysis & Prevention 63; Kirsten Armstrong & Daniel Tess, 'Fault versus No Fault - Reviewing the International Evidence' (Institute of Actuaries of Australia, 16th General Insurance Seminar); Gerhard Wagner, 'Tort, Social Security, and No-Fault Schemes: Lessons from Real-World Experiments' (2012) Duke Journal of Comparative & International Law 1

Fig. 1: Percentage of Victims Compensated by Month (Québec)[61]

Duration	*Tort System*	*No-Fault*
Less Than One Month	5%	32%
Less Than Two Months	12%	70%
Less Than Three Months	18%	84%
Less Than Six Months	35%	96%
More Than Six Months	65%	4%

Experiences with centralized compensation schemes for medical malpractice in New Zealand[62] and worker injury in the United States[63] have revealed comparative efficiency gains. Similar findings have also been recorded in Sweden's no-fault Patient Insurance scheme.[64]

Empirical evidence from a range of jurisdictions, assessing a variety of spheres of tortious liability, points to one

[61] Table sourced from Dewees & Trebilcock (n 60) 73.
[62] Bismark & Paterson (n 53).
[63] Bruce Chapman & Michael J. Trebilcock, 'Making Hard Social Choices: Lessons from the Auto Accident Compensation Debate' (1992) Rutgers Law Review 886.
[64] Armstrong & Tess (n 60).

conclusion: compensatory funds are more temporally efficient than the tort system.

II. Economic Cost

It is important, finally, to consider the probable costs entailed by the proposed alternative to tort law.

From a macro-economic perspective, our model entails both a loss and a gain to the state. The loss stems from the new remedial function of the government: providing relief to injured persons. The gain arises out of the expanded regulatory powers of the state: extracting fines from wrongdoers.[65] The exact proportion of cost to revenue is impossible to pinpoint without defining the contents of κ and Δ, and that is a matter beyond the scope of this paper. The only plausible point of comparison, therefore, is the cost of *administering* relief, for which there is ample data.

A comparative analysis of automobile accident compensation in various American states measured an average net pay-out ratio which was 16.2% higher in no-fault states than tort-based states.[66] Similarly, various North American[67] and

[65] Regulatory bodies generate substantial revenue: *New York City Budget Brief*, March 2016, Office of the New York City Comptroller, Scott M. Stringer; Environment and Climate Change Canada, '*Over $8.3 million from penalties for environmental infractions now available for conservation and restoration projects across Canada*' (March 17 News release – Gatineau, Quebec, Canada)

[66] Chapman & Trebilcock (n 63) 818.

[67] Dewees & Trebilcock (n 60) 131.

German[68] workers' compensation schemes have recorded significantly lower administrative costs (10-20%) compared to the tort system (approx. 50%).[69] Nearly identical figures are recorded on a comparative analysis of medical malpractice compensation schemes in New Zealand,[70] America,[71] and Sweden.[72] Existing studies paint a clear picture: public compensatory funds are not only more temporally efficient, they also carry lower administrative costs than tort.

Conclusion

'Uncontroversial ideas need not less but more critical scrutiny, since they generally get such an easy ride.'[73] The merits of the legal system are often taken for granted, and tort law is no exception.

[68] German Social Accident Insurance (DGUV), *Annual Report* (2009).
[69] Dewees & Trebilcock (n 60) 131.
[70] Bismark & Paterson (n 53).
[71] P.C. Weiler, *Medical Malpractice on Trial* (Harvard University Press, 1991) 139.
[72] Armstrong & Tess (n 60).
[73] John Gardner, *From Personal Life to Private Law,* (OUP, 2018) 189-90.

Although a great deal of critical literature seeks to explain,[74] justify,[75] and improve[76] tort, too few have ventured to attack its most basic assumptions.[77]

Be that as it may, extraordinary claims require extraordinary evidence,[78] and the brief musings of one undergraduate do not (and *cannot*) conclusively substantiate the weighty proposition put forth in this article. This piece has merely sought to provide one argument, one perspective, on tort abolition.

If the criticisms put forth are accepted, then we are left to endorse systemic overhaul. I tentatively conclude that the interests of justice demand abolition – that the time has come to herald the death of tort.

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[74] See e.g. Weinrib (n 19); Robert Stevens, *Torts and Rights* (OUP, 2007); John Gardner, 'Tort Law and Its Theory' in John Tasioulas (ed.) *The Cambridge Companion to the Philosophy of Law* (CUP, 2020).

[75] In addition to the above, see Tony Honoré 'The Morality of Tort Law—Questions and Answers' in Owen (n 4); John Gardner, 'What is Tort Law for? Part I: The Place of Corrective Justice' (2011) Law and Philosophy 1.

[76] See e.g. Anthony Gray, *Vicarious Liability: Critique and Reform* (Hart, 2018); Law Commission, *Liability for Psychiatric Illness* (Law Com No 249, 1998); Ernest J. Weinrib, 'The Case for a Duty to Rescue' (1980) Yale Law Journal 247.

[77] But see Atiyah (n 5); Cane & Goudkamp (n 5); Lord Sumption (n 5).

[78] David Hume & P. J. R. Millican, *An Enquiry concerning Human Understanding* (OUP, 2007) 80; Thomas Jefferson, *Letter to Daniel Salmon* (15 February 1808).

Closed Material Procedures at 25: Evaluating the 'Normalisation' of Closed Hearings in UK Judicial Proceedings

Weronika Galka*

Abstract— Written 25 years after the advent of the Closed Material Procedures in the UK legal system, the present article seeks to ascertain the present *status quo* as concerns the degree of 'normalisation' of closed procedures as a judicial response to resolving fairness-security dilemmas. In its first part, the article charts the development of the judicial approach to CMPs related to national security post-dating the enactment of the JSA 2013 in (i) the context of the JSA 2013 itself and (ii) at common law. In the second part, the discussion moves to examining the question of the employment of common law-based CMPs beyond the national security context. The analysis of the case-law concludes by suggesting that the absence of cautionary language comparable to that found in pre-2013 judgments in lower-instance and

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appellate decisions from the 2013-2023 period shows signs of a degree of 'normalisation' of CMPs within the judicial system. The third part of the discussion offers a possible explanation for this phenomenon, arguing that closed hearings present the courts with means to reduce the scope of areas of governmental activity laying beyond the reach of law – at a cost to the rights of the excluded party. The Annex discusses the 2023 UKPC decision in *Ramoon,* containing a number of important implications for the main body of argument.

Introduction

On 16 August 1990, Mr Karamjit Singh Chahal was served with a notice of intention to deport by the Home Secretary. The events which followed had a profound impact – the 1997 European Court of Human Rights' ('ECtHR') decision in *Chahal v. United Kingdom*[1] resulted in the 'exceptional'[2] introduction of closed material procedures ('CMP') to proceedings before the Special Immigration Appeals Commission ('SIAC'). As is well known, the introduction of CMPs into the UK legal system attracted significant criticism, judicial[3] and academic[4] alike, on grounds of their 'inherent unfairness',[5] with emphasis on the recourse to closed hearings being a last-resort, exceptional solution.[6] Nevertheless, despite this proclaimed exceptionality, '[h]aving gained a foothold in the legal system, the procedure has spread progressively, initially to other specialist tribunals, and then to the

[1] *Chahal v United Kingdom* (1997) 23 EHRR 413.
[2] *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 39 [140] (Lord Reed).
[3] See e.g. *Secretary of State for the Home Department v MB* [2007] UKHL 46; *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; *Al Rawi and Others v Security Service and Others* [2011] UKSC 34; *R (Binyam Mohamed) v Foreign Secretary* [2010] EWCA Civ 65.
[4] Amongst many others, see M Chamberlain, 'Special Advocates and Procedural Fairness in Closed Proceedings' (2009) Civil Justice Quarterly 314; J Ip, '*Al Rawi*, *Tariq* and the Future of Closed Material Procedures and Special Advocates' (2012) 75 MLR 606; R Goss, 'To the Serious Detriment of the Public': Secret Evidence and Closed Material Procedures.' in L Lazarus, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing, 2014).
[5] Special Advocates' Memorandum on the Justice and Security Bill Submitted to the Joint Committee on Human Rights (14 June 2012) <https://ukhumanrightsblog.com/wp-content/uploads/2012/06/js-bill-sa-response-final-final.pdf> accessed 8 May 2023, [3].
[6] *Bank Mellat* (n 2) [145] (Lord Dyson MR).

courts'.[7] The present article aims to provide an updated evaluation of the closed procedures' expansion within the UK judicial system. In doing so, the discussion does not seek to evaluate whether such expansion is a *desirable* development: its primary object is that of *identifying* and *explaining* the extent of this phenomenon.

In a 2015 article on the ECtHR's approach to CMPs,[8] Nanopolous referred to the process of judicial 'normalisation' of the mechanism, in which closed procedures no longer could be 'characterised as an exceptional process' but rather 'as the predominant mechanism for dealing with allegedly sensitive security information'.[9] Borrowing this definition of 'normalisation', the following discussion will argue that there are indeed signs that the UK judicial approach has evolved to consider recourse to CMPs the dominant mechanism for addressing governmental claims to secrecy.[10] By way of introduction, the first part of the argument will present a short overview of closed procedures' pre-2013 development. The second part of the discussion will examine the main-post-2013 developments in the courts' approach to CMPs in the national security context under the Justice and Security Act 2013 ('JSA 2013'), and their inherent procedural jurisdiction. Examining the decision in *Haralambous,*[11] the third part will draw attention to the signs that CMPs are increasingly deployed to address concerns

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[7] *Bank Mellat* (n 2) [140] (Lord Reed).
[8] E Nanopolous, 'European Human Rights Law and the Normalisation of the 'Closed Material Procedure': Limit or Source?' (2015) 78(6) MLR 913.
[9] ibid., 913.
[10] ibid, 913.
[11] *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1.

unrelated to questions of national security, concluding that there are indeed signs of 'normalisation' of closed procedures in the court rhetoric. In its final section, the argument will draw to a close by suggesting a possible explanation for this phenomenon: namely, the availability of closed procedures serving to increase the courts' institutional competence to review cases in traditionally non-justiciable areas, of which national security is the archetypal example.

1. Closed material procedures before 2013

Historically, claims involving questions of national security brought before UK courts faced pronounced difficulty, with questions of disclosure of government-held information resolved chiefly through the Public Interest Immunity ('PII') procedure. Under the PII process, a body holding confidential information petitions the relevant minister to issue a 'PII certificate', certifying that the interest in confidentiality outweighs the interest in public administration of justice. If issued, the certificate is subject to review by the courts.[12] However, if a PII certificate is upheld, the relevant information is wholly excluded from the court's consideration – which can be fatal to the claim's triability.

Chahal concerned a related problem. Mr Chahal could not challenge the Home Secretary's decision that his continued presence in the United Kingdom was 'unconducive … to the

[12] *Conway v Rimmer* [1968] AC 910; the test applied is the '*Wiley* test' from *R. v Chief Constable of the West Midlands Police Ex p. Wiley* [1995] 1 AC 274.

international fight against terrorism',[13] as the relevant (classified) evidence was not made available to the court.[14] Holding that the proceedings failed the requirements of Art. 5 and Art. 13 of the European Convention on Human Rights, the ECtHR nevertheless recognised that 'the use of confidential material may be unavoidable where national security is at stake' and referred to a 'more effective form of judicial control' present in Canada.[15] The British government took notice of the ECtHR's suggestions and incorporated a more restrictive[16] version of the Canadian procedure in s 8(3) of the Special Immigration Appeals Commission Act 1997, introducing closed procedures to the UK system. Function-wise, CMPs were intended to be the 'very antithesis'[17] of PII procedures: whereas following a PII certification, the claim either proceeds without the evidence or is struck out, CMPs facilitate the disclosure of sensitive evidence to a limited number of parties. Most controversially, the non-state party is *not* one of them. When a CMP is adopted, a special advocate – a security-cleared barrister – is appointed to represent the excluded party, taking instructions from them and their 'open'

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[13] *Chahal* (n 1), [25].
[14] ibid, [130].
[15] ibid, [131].
[16] In Canada, SAs have more opportunities for contact with the excluded party: for example, applications for communication involving the substance of the closed material do not necessarily require the consent of the party holding the confidential information (usually the Government). In this way, the present Canadian approach has potentially fewer consequences for the protection of the exluded party's right to a fair trial. Special Advocates' Response to the Justice and Security Green Paper Consultation, (16 December 2011) <https://adam1cor.files. wordpress.com/2012/01/js-green-paper-sas-response-16-12-11-copy.pdf>, accessed 17th April 2023, 12.
[17] *Al Rawi* (n 3) [41] (Lord Dyson).

representative. Upon the disclosure of the closed evidence, the special advocate can no longer contact the party or their representative without the court's permission: the contents of the 'closed' *in camera* hearings and 'closed' judgments are known only to the special advocate, the opposing governmental counsel and the court itself.

The difficulty posed by CMPs is thus obvious. Even in its more formal iterations, the fundamental principle of the rule of law calls for judicial proceedings to be open and fair.[18] Common law systems utilise the adversarial format of proceedings as means of ensuring fairness. Furnishing the parties with notice of the respective arguments raised is a crucial element of maintaining equality of arms between the adversaries – and thereby an 'essential requirement of natural justice' at common law.[19] The ability to effectively confront one's opponents is a 'core of due process in adjudicative proceedings' and 'a pre-condition for the exercise of more particular process rights'.[20] Such awareness of the case against one's arguments is inherently absent in the 'fatally flawed'[21] closed procedures carrying 'inescapable' fairness costs to the excluded party, who is at a 'great disadvantage' in the proceedings.[22] As implemented in the UK,

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[18] See e.g. J Raz, *The Authority of Law: Essays on Law and Morality* (Claredon Press, 1979), 217

[19] *Ridge* v. *Baldwin* [1964] AC 40, 113.

[20] P Craig, 'Perspectives on Process: common law, statutory and political' [2010] PL 275, 286.

[21] D Cole and S I Vladeck, 'Navigating the Shoals of Secrecy: A Comparative Analysis of the Use of Secret Evidence and 'Cleared Counsel' in the United States, the United Kingdom, and Canada' in L Lazarus, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing, 2014), 177.

[22] ibid, 175

the ECtHR's well-meaning suggestion of means intended to make proceedings in which an 'irremediable clash between security interests and human rights'[23] occurred *less* unfair by allowing the claim to proceed[24] thus struck at the very core of the mechanism safeguarding procedural fairness.

It is therefore hardly surprising that despite their quick proliferation across various statutory regimes,[25] closed procedures have initially received a rather frosty[26] judicial reception: in a particularly strong-worded opinion in *Roberts*, Lord Steyn considered that 'taken as a whole, the procedure completely lacks the essential characteristics of a fair hearing' and 'involves a phantom hearing only'.[27] On the level of doctrine, the ECtHR itself found it necessary to clarify its stance, indicating that the use of special advocates will only be compatible with Art.5(4) ECHR when the excluded party is provided with sufficient information to meaningfully instruct the special advocate,[28] leading to the

[23] Nanopolous (n 8) 918.
[24] T Hickman and A Tomkins, 'National Security Law and the Creep of Secrecy: A Transatlantic Tale' in L Lazarus, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement*, (Hart Publishing, 2014), 157.
[25] Following the SIACA 1997, CMPs formed part of the regimes introduced in the Anti-Terrorism, Crime and Security Act 2001, Prevention of Terrorism Act 2005 (replaced by the Terrorism Prevention and Investigation Measures Act 2011) and Counter-Terrorism Act 2008.
[26] (n 4).
[27] *R (Roberts)* v. *Parole Board* [2005] UKHL 45 [35].
[28] *A. and Others v United Kingdom* [2009] ECHR 301,[220].

introduction of the *AF* 'gisting' requirement.[29] *AF* also maintained the *R v Davis*[30] rejection of the possibility of excluding the accused from *any* part of criminal proceedings. Further, Lord Phillips' judgment in *AF* is a masterly discussion of the possible *policy* arguments against the resort to closed proceedings, referring to both the dignitarian importance of not subjecting an individual to sanctions which the individual *de facto* cannot challenge,[31] and the impacts on the public confidence in the justice system resulting from justice not being seen to be done even if it is done.[32] The high-water mark of judicial unwillingness to engage with CMPs occurred in *Al Rawi,* where in 'perhaps the most extensive and authoritative statement of the objection in principle',[33] the Supreme Court expressly rejected the possibility of adopting closed procedures in the exercise of its common law procedural jurisdiction, holding that:

> '[T]he right to be confronted by one's accusers is such a fundamental element of the common law right to a fair

[29] 'Gisting' entails providing the excluded party with the 'gist' of the case against them sufficient to enable them to instruct the SA where, as in *AF,* the entirety of the Government's case is made in closed material.

[30] *R v Davis* [2008] AC 1128.

[31] *AF* (n 3) [63] (Lord Phillips).

[32] ibid. Lord Phillips' worry about the impact of CMPs on public confidence in the justice system has proven justified: see O Bowcott, 'What are secret courts and what do they mean for UK justice?' *The Guardian,* 14 June 2013, <https://www.theguardian.com/law/2013/jun/14/what-are-secret-courts>, accessed 20 March 2023.

[33] *CF v Security Service* [2014] 1 W.L.R. 1699 [20] (Irwin J).

> trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that.'[34]

The *Al Rawi* rejection of non-statutory CMPs was rather short-lived. Two years after *Al Rawi,* a bare majority of the Supreme Court in *Bank Mellat* 'crossed the Rubicon'[35] and adopted a closed material procedure in absence of a Parliamentary authorisation, with Lord Neuberger holding that although the stand taken in *Al Rawi* 'remains unquestioned', it did not mean that 'there could be no circumstances' in which a closed procedure could be 'reasonably' introduced.[36] Further, in response to *Al Rawi*, the Parliament enacted the Justice and Security Act 2013 ('JSA 2013; JSA'), Part II of which struck the final blow to Lord Brown's *Al Rawi* urging that claims involving highly sensitive security issues should be either struck out as untriable or determined by some body 'which does not pretend to be deciding such claims on a remotely conventional basis'.[37]

[34] *AF* (n 3) [35] (Lord Dyson).
[35] *Bank Mellat* (n 2) [88] (Lord Hope).
[36] *Bank Mellat* (n 2) [50] (Lord Neuberger).
[37] *AF* (n 3) [86] (Lord Brown).

2. Assessing the post-2013 expansion of the scope of CMP availability

A. National security

I. The framework and practical impacts of JSA 2013

JSA s 6(1) allows courts[38] to make a declaration permitting applications for a closed material procedure. To make a declaration, the court must consider that (i) but for the declaration, a party to the proceedings would be required to disclose material the disclosure of which would be damaging to the interests of national security (s 6(4), read together with s 6(11)) and (ii) that 'it is in the interests of the fair and effective administration of justice' (s 6(5)). If granted, the declaration is subject to statutory duty of review and the court's discretion to revoke the declaration should its continuation no longer be in the interests of fair and effective administration of justice (s 7(2)). The range of proceedings to which the JSA applies is defined broadly: s 6(1), read together with s 6(11), indicates that a s 6 declaration can be made in 'any proceedings (other than proceedings in a criminal cause or matter)'. Although the stated rationale behind the Act was that of enabling the government to defend itself against allegations touching upon questions of national security

[38] Specifically the High Court, the Court of Appeal, the Court of Session and the Supreme Court.

without resort to 'expensive out of-court settlements',[39] the potential reach of the JSA potentially stretches far beyond that context, introducing CMPs into *any* civil proceedings where national security concerns arise.

As relates to the JSA's practical impacts, assistance can be drawn from the long-overdue[40] review of the Act's operation carried out by Sir Duncan Ouseley, published in December 2022.[41] According to the Government's annual reports, there have been 54 applications for a s 6 declaration in the five-year review period,[42] with the numbers falling back towards the end of the review period. Although not all applications have been

[39] See Ministry of Justice, *Justice and Security Green Paper* (Cm 8194, 2011) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/79293/green-paper_1.pdf> accessed May 8 2023, para 1.18 for the Government's specific concern the lack of a civil proceedings framework for damages claims brought by ex-Guantanamo detainees resulting in 'expensive out of-court settlements'.

[40] The review was due in 2018. However, a reviewer was only appointed in 2021, and the Review itself was published in December 2022, over 4 years after the statutory deadline.

[41] Ministry of Justice, *Independent report on the operation of closed material procedure under the Justice and Security Act 2013 presented to Parliament pursuant to section 13(5) of the Justice and Security Act 2013* (MOJ November 2022) ('Ouseley Report') < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_ data/file/1120738/closed-material-procedure-operation-report-webpdf.pdf>, accessed 15 December 2022.

[42] The review examined the period between 2013 to 2018; Ouseley Report (n 41), 39-40.

granted,[43] refusals are relatively rare.[44] At least some of those cases could not have been tried without a closed procedure;[45] the outcome in at least one would have been different under a PII procedure.[46] As regards the Government's stated aim of reducing the number of settlements, it is interesting to note that out of 36 civil damages cases in which a s 6 declaration was made within the review period, *all but one* were settled on a confidential basis (although some without an admission of liability).[47] This 'much greater than anticipated'[48] number of settlements occurring once the closed proceedings have finished[49] but *before* any disclosure[50]

[43] Requests for a s 6 declaration were denied e.g. in *Margaret Keeley and 31 other Plaintiffs v Chief Constable of NI* [2021] NIQB 81 and *Roddy Logan v PSNI* [2017] NIQB 70.

[44] As reasons for granting CMP applications are not usually given in the open judgments, presumably on the grounds of being substantiated by the closed material, few conclusions can be drawn from these high acceptance rates: they can be ascribed to *either* an overly lax judicial approach to the government's attempts to impose unnecessary secrecy or desirable governmental restraint in requesting s.6 declarations (the Ouseley Report prefers the latter interpretation: Ouseley Report (n 41), 64). The question whether such non-disclosure of the grounds of the courts' decision is justifiable lies beyond the scope of the present discussion insofar it goes directly to the question of the fairness of CMPs as a whole.

[45] The Ouseley Report refers to, amongst others, *CF* (n 28), *Belhaj v Straw* [2017] EWHC 1861 (QB) ("*Straw*") and *K, A, and B* [2019] EWHC 1757 (Admin): Ouseley Report (n 41), 110.

[46] Ouseley Report (n 41), 111.

[47] ibid, 59

[48] ibid, 113.

[49] Or even began, as the 1.3bn claim in *Bank Mellat* (n 2) was settled before trial: J Croft, A England and S Provan, 'UK settles £1.3bn lawsuit with Iran's Bank Mellat after 10 years' Financial Times, 18 June 2018, <https://www.ft.com/ content/ 58c4ae5c-91b0-11e9-b7ea-60e35ef678d2> accessed 23 Dec 2022.

[50] Ouseley Report (n 41), 113.

suggests that despite the availability of CMPs, the government may nevertheless prefer to avoid disclosure altogether by settling the claims – and that the enactment of the JSA 2013 may not have been strictly necessary.

II. The scope of JSA 2013: *CF v Security Service* and *R (Belhaj) v DPP*

Nevertheless, the importance of the JSA 2013 to the present discussion lies not in the assessment of the policy behind its enactment, but in the approach to its provisions adopted by the courts. In this regard, the key object of interest is the width given to the two pre-conditions of the grant of a s 6 declaration and the ambit of 'civil proceedings' under s 6(1).

As concerns the s 6(4) and s 6(5) preconditions, the first point of note is that although the s 6(4)(a) 'sensitive material' condition is clarified by s 6(11), stating that 'sensitive material' is material the 'disclosure of which would be damaging to national security', whether this criterion is fulfilled tends to be examined in closed proceedings.[51] As Graham notes, open judgments thus usually simply confirm or deny that the information falls into the qualifying category,[52] precluding the ascertainment of the strictness with which the criterion is applied. Second, as seen in

[51] E.g.in *CF* (n 33), Irwin J's judgment explicitly states (at [40]) that the reasons for finding the material in question to be 'sensitive' stated in the open judgment are 'amplified' in the closer judgment by fuller references to the material relied on.

[52] L Graham, 'Statutory secret trials: the judicial approach to closed material procedures under the Justice and Security Act 2013' 2019 CJQ 38(2), 195.

CF v Security Service, the s 6(5) condition calling for CMPs to only be used where it is 'fair and effective' to do so seems to add little to the 'sensitivity' condition.

In *CF,* the first case discussing the JSA following the Act's coming into force,[53] Irwin J rejected the claimants' submission that a PII process should be concluded before the JSA can apply as 'running directly counter' to the Act's scheme.[54] Irwin J was also 'not persuaded'[55] that a less unfair alternative was available, considering that 'experience [of CMPs] suggests that … a just result can be achieved',[56] particularly where the claimants 'set the agenda for the case'.[57] As noted by Graham,[58] this more permissive approach to the question of fairness of CMPs stands in contrast to *AF* and *Al Rawi* – decisions somewhat unconvincingly put to the side in *CF* as 'made in consideration of the common law'[59] and not the JSA, despite the criticisms of CMPs' impacts on fairness being applicable to both contexts.[60] Further, by emphasising the parliamentary endorsement of the balance struck by the Act,[61] *CF* seemingly suggests that within the JSA, something *more* than the unfairness inherent in CMPs is required to fail the s 6(5) condition.[62] As argued by Graham, some

[53] The JSA 2013 came into force on 25 June 2013; the hearings in *CF* were held in late July, with the judgment handed down on November 7 2013; *CF* (n 33) [11]-[12] (Irwin J).
[54] ibid [25]; [35].
[55] ibid [51].
[56] ibid [52].
[57] ibid [53].
[58] Graham (n 52), 207.
[59] *CF v Security Service* at [27].
[60] Graham, (n 52) 207.
[61] *CF v Security Service* at [31]-[35].
[62] Ouseley Report (n 41), 20.

passages in *CF* may even be understood as suggesting that within the JSA, resort to CMPs will be s 6(5) 'fair' *whenever* a national security issue arises.[63] In employing language painting CMPs as a fair means of delivering justice, *CF* can thus can be considered an early example of the JSA's contribution to the 'normalisation' of closed procedures.[64]

As regards to the Act's scope, a matter conditioned by the s 6(1) notion of 'relevant civil proceedings', the key decision is the Supreme Court judgment in *R (Belhaj) v DPP*.[65] *Belhaj* concerned a challenge brought by Mr Belhaj to the DPP's refusal to prosecute Mr Allen, allegedly complicit in Mr Belhaj's torture in Libya. The question before the Court was whether a claim for judicial review from which a prosecution could result constituted 'proceedings in a criminal cause or matter' – to which, as made clear by s 6(11), the JSA does not apply. The majority (Lord Sumption, Lord Mance, and Lady Hale) held that judicial review was not an inherently civil proceeding,[66] and in reality, Mr Belhaj was attempting to require the DPP to prosecute Mr Allen. For this reason, his challenge constituted 'criminal proceedings' and the JSA did not apply.[67] Following *Belhaj*, the JSA thus applies to some, but not all judicial review proceedings, depending on whether their subject-matter is a 'criminal' matter. In light of the particular importance of equality of arms and open justice in

[63] Graham, (n 52) 209.
[64] Nanopolous (n 8) 921.
[65] *Belhaj and Boudchar v. Director of Public Prosecutions* [2018] UKSC 33.
[66] Lord Sumption in *Belhaj* (n 65) [17].
[67] ibid [20].

criminal-adjacent contexts,[68] the decision to not expand the JSA into the (notably broadly-defined) criminal realm seems correct. However, taken against the wider context of enhanced judicial protection typically afforded to fundamental rights,[69] the reasoning of the majority in *Belhaj* is surprisingly restrained.

Firstly, similarly to *CF,* both the majority and the minority judgments accept that JSA 2013 is to be taken as representing the democratically-legitimised balance between natural justice and national security, from which the courts should not deviate. Lord Lloyd-Jones' dissenting judgment considered that JSA 'leaves *no scope* for … the principle of legality'[70] (emphasis added) which could call for a restrictive interpretation – seemingly indicating that the JSA's specificity removes the possibility of a *Simms*-type narrow interpretation. In contrast, Lord Sumption expressly approved of Richards LJ's *Sarkandi*[71] remark that there is '*no reason*' to give JSA 2013 a narrow construction,[72] approaching the question on 'ordinary principles of construction'.[73] The language used by the majority can thus be understood to 'normalise' CMPs more than that of the minority judgment - although a fundamental right is potentially engaged, at

[68] Reflected both in the wording of Art.6(2-3) of the European Convention on Human Rights and decisions such as *AF* (n 3) and *R v Davis* (n 30).
[69] See e.g. *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC and *R v Ministry of Defence, ex p. Smith* [1996] QB 517.
[70] *Belhaj* (n 65) [42] (Lord Lloyd-Jones).
[71] *R (Sarkandi) v Secretary of State for Foreign and Commonwealth Affairs* [2016] 3 All ER 837.
[72] *Belhaj* (n 65) [14] (Lord Sumption.
[73] ibid.

least in the context of JSA 2013, there is *no reason* to adopt a narrow construction.

Secondly, the majority invoked the *Barras* principle[74] to hold that the meaning of 'criminal cause or matter' should be interpreted consistently across statutory contexts. As indicated by Lord Lloyd-Jones in his dissent, this approach assumes that the rationale for the exclusion of criminal proceedings from the JSA is 'readily applicable or transposable' to other types of challenges.[75] Lord Lloyd-Jones' disagreement with this assumption and insistence that the meaning of a 'criminal cause or matter' may be interpreted differently depending on its statutory context[76] betrays a deeper interpretative difference. The majority located the rationale behind the JSA's civil/criminal differentiation in the consideration that whereas in criminal proceedings:

> 'the state can as a last resort avoid disclosure by withdrawing the prosecution … in civil claims, where the government is a defendant, there is no possibility of withdrawal'[77]

and therefore the absence of CMPs would either complicate the government's defence or render the case un-triable.[78] In contrast, Lord Lloyd-Jones considered that the exclusion of criminal proceedings was intended as a safeguard *for the excluded party*. In

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[74] *Barras v Aberdeen Sea Trawling & Fishing Co. Ltd* [1933] AC 402.
[75] *Belhaj* (n 65) [56] (Lord Lloyd-Jones).
[76] ibid at [51].
[77] *Belhaj* (n 65) [22] (Lord Sumption).
[78] *Belhaj* (n 65) [28] (Lord Mance).

Belhaj, the court was determining the legality of the conduct of the decision-maker, who was not excluded from the proceedings: therefore, the safeguarding rationale was not cross-applicable,[79] and a CMP was permissible.

Despite the refusal to permit the closed procedure, the majority approach thus *does* 'normalise' CMPs. The emphasis on interpreting the JSA consistently with other statutes – which *do not* concern closed procedures - does not treat the JSA 2013's statutory context as 'exceptional', but seeks to absorb CMPs into the wider interpretative frame.[80] The majority's reasoning carries the implicit suggestion that as a 'defendant', the government is to be treated as an individual would, an equivalency that seems questionable in light of the informational asymmetry between the state and the individual. Notably, the Supreme Court's 2020 decision in *Re McGuiness*[81] seems more cognisant of the need to confine security-related decisions to their own context, with the leading judgment of Lord Mance (who also sat in *Belhaj*) advising caution in relying on *Belhaj* to determine the meaning of 'criminal cause or matter' in other frameworks.[82] In *Belhaj*, a failure to appreciate this distinction led the court to *reduce* the degree of scrutiny of governmental decision-making. As argued by Laird,[83] whether such a result was intended by the Parliament must surely be open to doubt.

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[79] *Belhaj* (n 65) [57] (Lord Lloyd-Jones).
[80] K Laird, 'Judicial review: Belhaj v DPP Supreme Court: Baroness Hale P, Lords Mance, Wilson, Sumption and Lloyd-Jones SCJJ: 4 July 2018; [2018] UKSC 33' Crim. LR. 2018 (12) 1012, 1015.
[81] *Re McGuiness* [2020] UKSC 6.
[82] *Re McGuiness* (n 81) at [24] (Lord Mance).
[83] Laird (n 80), 1015.

III. Family proceedings and national security-based CMPs

A potential weakness of using the JSA 2013 cases as evidence of 'normalisation' of CMPs lies in JSA being a specific legislative response to the *Al Rawi* refusal to extend the availability of public interest-related CMPs at common law – a consideration to which, as seen above, the courts are particularly attentive to. However, that explanation is not cross-applicable to contexts where no similar statutory schemes exist. For this reason, the following section will examine the evolution of judicial approach to the CMPs in a context far removed from the control orders-adjacent regulatory regimes: namely, family law proceedings.

Family proceedings are of particular interest in assessing the 'normalisation' of CMPs, as although the use of closed procedures in the family law context is 'very rare indeed',[84] wardship proceedings are one of the 'obvious'[85] contexts in which the use of closed procedures (including procedures employing special advocates)[86] *is* 'normalised'.[87] However, in stark contrast from the JSA 2013-*Al-Rawi* employment of CMPs to protect the state interest in secrecy, the main rationale for reliance on closed

[84] D Burrows, *Privilege, privacy and confidentiality in family proceedings,* (Bloomsbury Professional, 2019), 289
[85] *Al Rawi* (n 3) [63] (Lord Dyson).
[86] Blackbourn, 'Closed material procedures in the radicalisation cases' 2020 CFLQ 32 (4), 14. Blackbourn refers to *Re T (Wardship): Impact of Police Intelligence* [2009] EWHC 2440 (Fam) and *Chief Constable and another v YK and others* [2010] EWHC 2438 (Fam).
[87] ibid.

procedures in family proceedings is the protection of the interests of *the child*:[88] 'where the interests of the child are served, so are the interests of justice'.[89] For this reason, family law CMPs provide an instructive point of comparison, highlighting the key difference between the 'controversial' and 'obvious' uses of CMPs - namely, that of *whose* interest is protected.

Given the distinct rationales for resort to CMPs in national security-related and family proceedings and the *Al Rawi* rejection of common law-based CMPs protecting *state* interests, one would perhaps expect the courts to keep the categories separate. Nevertheless, as seen in *Re XY and Z,*[90] there are signs of cross-contamination. Although *Re XY and Z* was a wardship case, during the course of the proceedings, a question arose of disclosing one of the mother's statements to the CPS and Security Service for prosecution purposes. While discussing the arrangements for the *future* variation of such a permission to disclose, MacDonald J referred to the possibility of employing 'some species of closed procedure involving … special advocates'[91] to determine the application, recognising that

> '[T]here *may* remain an argument to be had as to whether the use of some species of closed procedure in the Family Court is permissible absent express statutory provision for the same, or in family proceedings in the High Court pursuant to the Justice and Security Act 2013 absent any

[88] Burrows (n 84), 294.
[89] *Al Rawi* (n 3) [63] (Lord Dyson).
[90] *Re XY and Z (Disclosure to the Security Service)* [2016] EWHC 2400 (Fam).
[91] ibid [91].

> rules of procedure governing the same having been promulgated'.[92] (emphasis original).

The main source of difficulty for MacDonald J seems to have rested in identifying the legal basis of the CMP.[93] This concern is well-founded. As noted in the Ouseley Report, as family proceedings are a type of civil proceedings, post-JSA 2013 the precise ground of the Family Court's ability to order a closed material procedure is unclear.[94] Blackbourn suggests that as s 6(11) JSA 2013 does not expressly name the Family Court and there is no provision for closed material procedures in Family Procedure Rules,[95] s 6 applications cannot be filed in family proceedings.[96] On the other hand, High Court (before which certain types of family proceedings can also be brought) *is* included in the JSA,[97] and a s 6 declaration has been sought and approved in family proceedings at least once, in the 2016 proceedings in *Re H*.[98]

The use of JSA 2013 in *Re H* seems anomalous, in that although there is no reason in principle why a scheme similar to the JSA should not operate where security concerns arise in children's proceedings,[99] it is exceedingly unlikely that the

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[92] ibid [95].
[93] ibid [89].
[94] Ouseley Report (n 34), 39.
[95] ibid.
[96] Blackbourn, (n 86), 12.
[97] Special Advocates' Submission to JSA Review pursuant to section 13 (8 June 2021), <https://ukhumanrightsblog.com/wp-content/uploads/2021/06/THE-OUSELEY-REVIEW-SAs-Submission-FINAL.pdf> accessed 8 May 2023, 39.
[98] Special Advocates' submission to Ouseley Report (n 98), 39.
[99] Burrows (n 84), p.295.

Parliament addressed its mind to family proceedings while enacting the JSA itself. The inclusion of the High Court, but not the Family Court, would give rise to an unexplained difference between the procedure available in the same set of proceedings. The conclusion that such a distinction was not intended is strengthened by the absence of any provision for procedural rules - as noted in the Ouseley Report, if the JSA *is* to be applicable to family proceedings,[100] the failure to promulgate adjustments to Family Procedure Rules would constitute a long-standing breach of statutory duty.[101] Further, the impact of *Re H* is difficult to assess: the judgment is wholly confidential, little is known about the procedure adopted by the parties,[102] and the proceedings were eventually settled.[103]

Nevertheless, the question of the application of the JSA to family proceedings goes to the heart of the present discussion, as the object of the JSA is the protection of *national security*. As highlighted by Blackbourn, although undoubtedly relevant insofar as the decision to prosecute the mother is concerned, 'it is difficult to see how the best interests of the child might be a factor in a decision to grant onwards disclosure' of the information.[104] MacDonald J's own reasoning was that although 'it is plainly in the interest of children generally that suspected terrorist activity is investigated',[105] further onwards disclosure may adversely impact the child due to the information entering

[100] A matter on which Ouseley J expressed no view: Ouseley Report (n 41), 48.
[101] Ouseley Report (n 34), 49.
[102] ibid, 46.
[103] Special Advocates' submission to Ouseley Report (n 98), Annex, 4.
[104] Blackbourn, (n 86), 18-19.
[105] *XY* (n 90) [62].

the wider public domain.[106] Nevertheless, it is suggested that this consideration notwithstanding, MacDonald J's judgment implicitly adopts *the general public interest* as part of the rationale for the adoption of a CMP. This is so as the use of a CMP was framed in terms of the need to protect information about *the Secret Service's* activities *from the parties* – if the court's concern about onwards disclosure pertained *solely* to the disclosure into the public domain, there would be no need to exclude the parties.[107] The interchangeable treatment of the JSA and the Family Court's inherent jurisdiction in *Re XY and Z* as bases for the closed procedure also points to national security being the relevant interest. The (prospective) use of a CMP in *Re XY and Z* thus risks circumventing *Al Rawi* by the back-door - although *Re XY and Z* is a wardship case, the rationale for relying on a CMP was not strictly connected to the wardship aspect of the proceedings. Nevertheless, despite the uncertain legal basis, the Court was ready to employ this 'existing, well established procedure'[108] to deal with allegedly sensitive security information: the very essence of 'normalisation' as defined by Nanopolous.

B. Beyond national security?

As visible in *XY and Z,* the category of *what* can amount to 'sensitive information' is relatively open-ended. As described by Lord Neuberger in *Bank Mellat*, a CMP protects 'the production of material which is *so confidential and sensitive* that it requires the court not only to sit in private, but to sit in a closed hearing' (own

[106] ibid [65].
[107] ibid [90] –[91].
[108] ibid [91].

emphasis). Following this line of thought, so long as the sensitivity of the information is the primary concern, there is no reason CMPs should be relevant *only* in the context of national security. As will be discussed in the following section, the courts are increasingly cognisant of the arbitrariness of this restriction – and, as seen in the example of the Supreme Court decision in *Haralambous,* increasingly willing to overcome it.

The central object of *Haralambous* were the magistrates' powers to (i) issue search warrants and seize property under s 8 of the Police and Criminal Evidence Act 1984 ('PACE') and (ii) order the retention of unlawfully seized evidence under s 59 of the Criminal Justice and Police Act 2001 ('CJPA') in *ex parte* proceedings. Two closed s 8 orders were made in respect of addresses allegedly occupied by Mr Haralambous, who sought disclosure of the evidence upon which the orders were based.[109] Following a refusal to order full disclosure, Mr Haralambous brought judicial review proceedings challenging the decision of the Magistrates' Court, at which point the problem arose: whereas s 8 PACE authorised magistrates' courts to consider evidence not disclosable to the subject of the warrant, the same authorisation was not extended to either the Crown Court (for the purposes of s 59 CJPA) or the High Court (to which an application for judicial review could be made). The JSA 2013 could not apply, as the proceedings were criminal in nature and, crucially for the present purposes, disclosure would not be damaging to the interests of national security.[110] The aspect of the public interest in keeping sensitive information confidential at play was the prevention of crime and disorder. The question was thus whether, given that

[109] *Haralambous* (n 11) [6]-[9] (Lord Mance).
[110] ibid [11].

the statute permitted the *creation* of closed material, courts other than the Magistrates' Court were entitled to adopt a closed procedure permitting Mr Haralamous to challenge it.[111]

In the unanimous judgment delivered by Lord Mance, the Court considered that despite the lack of statutory authorisation, such courts were indeed able to review the lawfulness of the decision to grant a warrant. In doing so, it seemingly overruled[112] the earlier High Court decision in *Competition and Markets Authority v Concordia International RX (UK) Ltd*,[113] in which Marcus Smith J held that *Al Rawi* precluded the adoption of a closed procedure in reviewing search warrants issued under s 28 of the Competition Act 1998, which largely parallels s 8 PACE. Lord Mance held that the statutory schemes of PACE and CJPA must have been intended to be coherent, and hence the Parliament must be taken to have contemplated that the Crown Court would be able to operate a closed procedure when assessing a s 59 application.[114] Importantly, this conclusion was drawn in reliance on *Bank Mellat*, which Lord Mance considered to present an 'analogy' to the PACE-CJPA interaction and to be 'compar[able] with' the question of judicial review in High Court.[115] Indeed, *Bank Mellat* loomed large in *Haralambous*, with Lord Mance considering that

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[111] M Chamberlain, 'National Security, Closed Material Procedures, and Fair Trial' in Andrew Higgins (ed.) *The Civil Procedure Rules at 20* (OUP 2020), 85.
[112] ibid [24].
[113] [2017] EWHC 2911 (Ch).
[114] *Harambulous* (n 11) [41] (Lord Mance).
[115] ibid [42], [54].

> 'many of the considerations which were of weight in *Bank Mellat* on an appeal from lower courts conducting closed material procedures are also of weight in relation to judicial review of lower courts conducting such procedures.'[116]

The similarity was taken to lie in the consideration that 'it would be self-evidently unsatisfactory, and productive potentially of injustice and absurdity'[117] if the High Court considered the matter on a different basis from the lower courts. *Al Rawi* was distinguished on the basis of the Court in that case 'not directing its attention to this very special situation'; *per* Lord Mance, had done so, it would see a 'a similarity between this situation and the two exceptions which it did identify'.[118]

However, as argued by Lock, the reasoning employed to reach that conclusion is 'conspicuously underdeveloped',[119] in that 'the Court gives little consideration to the public interest in settling clear limits to the CMP regime'.[120] Although in a sense *Haralambous* is simply another case resulting from drafting oversights in specifying the courts permitted to adopt CMPs, in a stark contrast to cases from the *Al-Rawi* and *Bank Mellat* era, the factors *against* extension are not addressed in detail,[121] and the desirability of the use of CMPs in circumstances where otherwise the claim would be struck out is taken as a given in light of the

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[116] ibid [57].
[117] ibid.
[118] ibid [59].
[119] D Lock, 'A New Chapter in the Normalisation of Closed Material Procedures' (2020) 83(1) MLR 202, 203.
[120] ibid 203.
[121] ibid 211.

need to 'maintain the coherence' of the statutory scheme. This was so even though the facts of *Haralambous* concerned intrusive police investigation which could ultimately culminate in a criminal charge, and the closed procedure adopted within the courts' inherent jurisdiction does not possess procedural protections equivalent to those present in the JSA.[122] Lock's accusation that *Haralambous* results in the creation of 'a non-statutory CMP regime within a less urgent, non-national security context', signalling a new direction for the Supreme Court by displaying a 'more openly supportive' attitude to CMPs[123] seems fairly well-justified: gone is the language of 'phantom hearings', substituted by references to the alternatives to closed hearings risking 'depriving judicial review of any real teeth'.[124]

Further, *Haralambous* is unlikely to constitute the last word in the expansion of closed procedures *beyond* the national security context. Irwin J's pre-*Haralambous* discussion of the relationship between PII certificates and CMPs in *CF* usefully highlights that national security concerns are usually *tied* to concerns about other aspects of the public interest, with the procedural differences risking prospective clashes:

> 'in restricting the ambit of the JSA 2013 to material affecting national security, excluding material where PII may be sought on other

[122] C Montgomery, 'Case Comment: R (Haralambous) v Crown Court at St Albans [2018] UKSC' UKSC Blog 02 February 2018, <http://ukscblog.com/case-comment-r-haralambous-v-crown-court-at-st-albans-2018-uksc-1/>, accessed 22 Dec 2022.
[123] Lock (n 119), 213.
[124] *Haralambous* (n 11) [52] (Lord Mance).

> grounds, Parliament has created problematic anomalies … if a declaration [for material under a PII to be excluded on non-security grounds, such as damage to international relations] is followed by permission for a CMP, material which would have been excluded under a PII application on the (usually) more serious and pressing ground of potential damage to national security will be seen and assessed by the court; material excluded on the ground of potential damage to international relations cannot be considered either in the open proceedings or within the CMP'.[125]

This concern is well-founded. As noted by Chamberlain, although the JSA applies to a wide range of proceedings, the *information* in respect of which it authorises the adoption of CMPs is rather narrow - most statutory CMP regimes define the criterion of sensitive information more broadly, as including the conduct of international relations and the prevention of crime and disorder.[126] Should a case arise in which the material favouring the individuals pertained to (for example) *both* international relations and national security, the court seemingly would have to choose between excluding it under the PII or admitting it in evidence under a non-statutory CMP.[127] Prior to the March 2023 decision in *Ramoon,*[128] discussed in more detail in the Appendix,

[125] *CF* (n 28), [56].
[126] Chamberlain (n 111), 83
[127] *CF* (n 28) [58].
[128] *Justin Ramoon v Governor of the Cayman Islands* [2023] UKPC 9.

the probability of the courts refusing an invitation to adopt a closed procedure in such a case was not at all certain.

3. Closed Proceedings, but Proceedings Nonetheless?

CMPs unequestionably constitute a departure from the principles of natural justice forming the bedrock of English administrative law. Nevertheless, 25 years after their introduction to UK courtrooms and 10 years after the passing of the JSA 2013, there are clear signs of 'normalisation' of CMPs as a solution to security-fairness dilemmas, with indications of transposition into other areas of public interest concerns. The last section of this article proposes a possible explanation for this phenomenon, arguing that CMPs play into a wider tendency[129] of the courts to assert their jurisdiction in traditionally off-limits areas.

To set the stage for this argument, the discussion must return to the comparison drawn between family law and the public interest uses of CMPs. As outlined by Lord Devlin in *Re K* (*Infants*),[130] a family non-disclosure case, the judge usually sits as an arbiter between two parties, and relies on the parties for information. For this reason, the right to effective challenge is of paramount importance, as it ensures the information will be

[129] On the topic of the changes in the courts' approach to the protection of national security, see the excellent discussion of Woods, McNamara and Townend, 'Executive Accountability and National Security' 2021 MLR 84(3), 553

[130] *Re K* (*Infants*) [1965] AC 201, 240G-241A (Lord Devlin).

tested. However, in some cases, the judge is *not* sitting 'purely, or even primarily, as an arbiter, but is charged with the paramount duty of protecting the interests of *one outside the conflict'* – and a rule 'designed for just *arbitrament* cannot in all circumstances prevail' (emphasis added). In *Re K* itself, the interest of the parties locked in conflict was thus trumped for the need to protect the child. In contrast to children, however, in disclosure challenges, the state plays a dual role. It is both 'the one outside the conflict' – the ultimate guarantor of recognised forms of social co-existence, including the legal system itself - and a party *to* the conflict, as it is state actions that impinge on individual rights. The court thus faces a dilemma. As an arbiter, it should insist on only examining tested evidence; as part of the state's machinery tasked with upholding the social order, it must protect the state's continued existence, including by refusing to order disclosure of potentially damaging information.

Historically, this dilemma was resolved by prioritising the state's role as the facilitator of societal co-existence. Exercising their competency as masters of own procedure,[131] the courts deemed the traditionally most sensitive areas - issues of national security, defence, diplomacy and prevention of crime and disorder – non-justiciable,[132] leaving issues arising therein for political decision.[133] Further, governmental claims to secrecy were readily acceded-to under the doctrine of Crown privilege - writing

[131] *Roberts* (n 27) [44] (Woolf CJ).
[132] See e.g. the judgment of Lord Roskill in *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9.
[133] S Weill, Reducing the Security Gap through National Courts: Targeted Killings as a Case Study, Journal of Conflict and Security Law 21(1) 49, 52

in 1965, Williams lamented the tendency of the English judiciary to 'look favourably upon arguments based on public interest' and adopt a 'self-denying ordinance' even when not forced to do so by express provision.[134] With the advent of a more rights-led approach in the late 20th century, the status quo shifted: the courts began to expand the law's reach over state action.[135] Decisisions such as *CCSU*[136] rendered the scope of non-justiciability doctrines and extra-legal governmental decision-making ever narower.[137] Nevertheless, the dilemma remained: although the individual could now challenge the government in a wide range of circumstances, the wider public interest still had to be accounted for, leaving the applicant to face pronounced evidential hurdles. As seen in *Carnduff v Rock,*[138] the reliance on the PII regime may lead to evidence being so one-sided the case cannot be tried at all,[139] leading to the claim being struck out. Further, even if a partial disclosure was made, the claimant would still face the task of rebutting the *Rossminster*[140] presumption of decisions being made in a lawful manner - an eminently difficult task in light

[134] D Williams, *Not in the Public Interest: The Problem of Security in Democracy* (Hutchinson, 1965), 187, 194.
[135] H P Lee, P Hanks, and V Morabito, *In the Name of National Security: The Legal Dimensions* (LBC, 1995), 11.
[136] *CCSU* (n 132).
[137] D Dyzenhaus and M Hunt, 'Deference, Security, and Human Rights' in B Goold and L Lazarus (eds.) *Security and Human Rights* (Hart 2007), 133.
[138] [2001] WLR 1786
[139] Chamberlain (n 111), 86.
[140] *R v Inland Revenue Commissioners and others, ex parte Rossminster Ltd* (CA) [1980] AC 952.

of the *AHK*[141] refusal to assume that *no* other evidence than that disclosed exists.

It is suggested that against this background, the advent of CMPs may have presented the courts with a perceived opportunity to redress the unfairness of this strike-out dilemma: at the cost of subjecting the excluded party to the 'Kafkaesque situation' of not knowing the case against them,[142] CMPs allow judicial scrutiny of government action *without* creating a threat to the public interest. At a cost to the proceedings' adversarial nature, reliance on CMPs promises to 'save' the justiciability of cases touching upon public interest issues - as Chamberlain notes, *AHK, Haralambous,* and *R. (on the application of Campaign Against Arms Trade) v Secretary of State for International Trade* [143] would automatically fail had the CMP not been available.[144] The weight paid to allowing claims to proceed is visible in Lord Mance's *Haralambous* remarks[145] about the 'unattractive result' of *Rossminster* 'depriving judicial review of any real teeth' in comparison with closed procedures. Similar concerns are also evident in Popplewell J's Divisional Court judgment in *Straw*,[146] holding that the effect of the JSA is 'that the executive … can be held to account by judicial process', and Irwin J's decision in *CF,* who indicated that 'a court which remained in ignorance of [the closed material] would operate in the dark'.[147] Most recently, in

[141] *AHK v Secretary of State for the Home Department* [2013] EWHC 1426 (Admin).
[142] *Roberts* (n 27) [95] (Lord Steyn).
[143] [2017] EWHC 1754 (Admin).
[144] Chamberlain, (n 111) 86-7.
[145] *Haralambous* (n 11) [52] (Lord Mance).
[146] *Straw* (n 45)[60].
[147] *CF* (n 33) [43] (Irwin J).

the Ouseley Report, Ouseley J commented that the availability of CMPs '*at least* permit[s] judicial evaluation of the material',[148] and the JSA

> 'substitutes *something closer … to normal litigation* for the random outcomes of strike out, or inevitable failure or success because the defendants were disabled from evidencing their defence.[149] (emphasis added)

CMPs are thus the polar opposite of the traditional objects of judicial hostility, far-ranging ouster clauses of the type recently seen in *Privacy International,* expanding rather than reducing scope of review.[150] The ultimate question, which the present article does not seek to answer, is thus whether this provision of judicial review with metaphorical 'teeth' does not come at too steep a price in terms of the excluded party's rights – and the corruption of the nature of judicial process itself.

[148] Ouseley Report, (n 41), 9
[149] Ouseley Report, (n 41), 112.
[150] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.

Conclusion

As noted by Woods, McNamara and Townend, the reason why closed procedures require 'extraordinary degrees of trust in the executive and judicial branches' is the secrecy which shrouds their use.[151] The preceding discussion has argued that the concerns about procedures introduced in exceptional circumstances becoming 'routine'[152] have been proved at least partly correct. Although in the grand scheme of things, CMPs have not been extended to a significantly wider range of proceedings than those authorised by statute, the open judgments on the use of closed procedures in the post-JSA era show a rhetorical shift from outright hostility to signs of acceptance, evidenced by the employment of a less cautionary tone and a rather run-of-the-mill interpretative approach. It is not claimed that this conclusion is necessarily ground-breaking: the risk of a progressive 'normalisation' of closed procedures is a 'well-worn tale',[153] which the present discussion only attempted to prove on the facts. Nevertheless, as argued in the last section, a possible explanation for the 'normalisation' lies in the manner in which, by distorting the adversarial balance of the proceedings, closed procedures 'normalise' review of governmental action, promising to reduce the number of areas beyond the reach of law.

[151] Woods, McNamara and Townend (n 129), 569.
[152] *Al Rawi* (n 3) [69] (Lord Dyson).
[153] Lock, (n 119), 210.

Appendix

On March 3rd 2023, after the substance of the preceding discussion had been finalised, the Judicial Committee of the Privy Council handed down an important decision in *Ramoon.*[154] The following note seeks to distil the key implications of the decision for the argument developed in the previous sections.

A. The facts of *Ramoon*

There is no statutory basis for CMPs in the Cayman Islands.[155] Nevertheless, the appellant in *Ramoon,* allegedly a '"senior and influential member" of a criminal gang',[156] applied for the adoption of a common law-based CMP in judicial proceedings concerning the Governor's decision to order his transfer to a higher-security prison in the United Kingdom.[157] The Court of Appeal of the Cayman Islands granted the application, holding that 'alternatives to a CMP were unsatisfactory' and that 'the rights of the appellant … could only be justly and fairly vindicated by an effective judicial review … which *is not possible* without a CMP' (emphasis added), for which reason the Grand Court of the Cayman Islands was found to possess jurisdiction to grant a CMP.[158] This judgment was appealed to the Judicial Committee of the Privy Council.

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[154] *Ramoon* (n 128).
[155] ibid [34].
[156] ibid [13].
[157] ibid [23].
[158] ibid [29].

B. The Decision

The advice of the Board, delivered by Lord Lloyd-Jones, marks a significant change from the more 'normalising' language adopted by UKSC in *Harambulous* and *Belhaj*. The change in focus is immediately evident from the account of the authorities in *Ramoon*, referring to *Al Rawi* arguments against the possibility of adoption of 'common law' CMPs at some length[159] and highlighting the 'real misgivings' and 'grave reservations' expressed by the majority in *Bank Mellat* regarding the adoption of a CMP.[160] At [48], the decision makes clear that *Harambulous* is to be considered as 'closely analogous' to *Bank Mellat,* with both judgments constituting a 'limited encroachment on the principle stated in *Al Rawi* depend[ent] on Parliament having expressly established a statutory scheme whereby lower courts are authorised to follow a CMP', with 'neither case support[ing] any greater inroad' into the *Al Rawi* principle.

Most importantly for the present purposes, the counsel for the appellant expressly attempted to rely on the 'unfairness of strike-outs' argument discussed in the main body of the article, in reliance on (amongst others) Ouseley J's *dicta* in *AHK.*[161] This attempt did not find much favour with the Board. It was firstly indicated that the CMP-strike-out dichotomy did not accurately

[159] ibid [35] – [42].
[160] ibid [44].
[161] ibid [50].

represent the options available to the lower courts[162] - the proceedings would not be struck out in absence of a CMP, and true *Carnduff*-type cases are 'likely to be exceptional and rare'.[163] Secondly and more fundamentally, it was made clear that 'in the Board's view the course followed by the Court of Appeal … *was not open to it'* (own emphasis). Even if, as an UKSC decision, *Al Rawi* was not binding on the UKPC, it nevertheless 'possesses the authority of a decision of a Supreme Court comprising eight justices' and 'the Board finds the reasoning of Lord Dyson *compelling*' (emphasis added). The invention of a CMP for the Cayman Islands would not be incremental development: it would be 'a major change involving an inroad into fundamental common law rights' and therefore a decision for the legislature.

C. Turning the tide of normalisation?

The appeal was allowed on the CMP issue, with the Board's discussion concluding with the succinct observation that

> 'the Court of Appeal here overlooked the essential reasoning of *Al Rawi* that a CMP, unlike the law relating to PII, necessarily involves a departure from the principles of open justice and natural justice, principles which are fundamental to the right to a fair trial.'[164]

There are two points of note. First, the approach to CMPs adopted by the Cayman Islands Court of Appeal constituted a

[162] ibid [51].
[163] ibid [55].
[164] ibid [52].

prime example of 'normalisation' discussed in the main body of the article: CMPs increased the effectiveness of judicial review, and therefore were to be adopted. Second, the UKPC empathically disagreed with this conclusion. The emphasis on the importance of the protection of the claimant's right to a fair trial clearly underpinning the analysis in *Ramoon* is a notable change of rhetoric from the Court's previous decisions. *Al Rawi* and the warnings against CMP expansion contained therein have seemingly regained their previous prominence. Lord Lloyd-Jones, dissenting in *Belhaj*, is now the voice of the Board. In light of the importance of the interests at stake, decisions on the expansion of the availability of CMPs are for the legislature – and, given *Ramoon* entertaining the possibility of the 'strike-out unfairness' risk being relevant in 'exceptional' circumstances, the apex court itself. Closed proceedings are *not* to be treated as a readily-available tool for resolving the security-fairness tension, a strategy seemingly adopted by the Cayman Islands Court of Appeal. The cost to the procedural rights of the excluded party, innate in the procedure itself, precludes such a casual approach: the damage inflicted to the principles of natural justice is *not* to be overlooked.

It remains to be seen whether Lord Lloyd-Jones' lead in reasserting the primacy of careful, rights-focused language in regards to CMPs is followed in future decisions. For now, however, *Ramoon* constitutes an important (if non-binding) appellate warning to lower courts overeager to rely on CMPs: the slow creep of complacency is to be resisted.[165]

[165] *AF* [84] (Lord Hope).

The United Kingdom's Doctrine of Humanitarian Intervention: An Emerging Norm of International Law?

Shastikk Kumaran & Mateus Norton de Matos[1]

Abstract: Humanitarian intervention is a proposed exception to the wide prohibition on the use of force, which would allow for states to use armed force based on humanitarian justifications – i.e., to protect foreign nationals from rights violations. It represents a departure from the typical law on the use of force, which only allows uses of force against armed attacks of a sufficient degree in self-defence. This doctrine has philosophical origins with Hugo Grotius and has enjoyed support from philosophers like Rawls, but has encountered criticism from many, including Kant and Hegel. The United Kingdom is one of few states which claim the existence of a legal right to humanitarian intervention in some extraordinary circumstances.

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The existence of such a doctrine – even in a limited form – has been subject to wide normative and legal criticism by States and international law scholars. Any proposal of further expansion to include pre-emptive intervention (pre-emption) has been heavily resisted. We posit that the doctrine of humanitarian intervention is gaining acceptance as a rule of international law through a change in state practice. We also normatively submit that the right to humanitarian intervention should be expanded to include pre-emption to prevent serious human rights violations, in heavily limited circumstances.

1. Introduction and Historical Background

The modern post-war prohibition of the use of force is perhaps the most fundamental norm of current international law.[2] This prohibition is codified in Article 2(4) of the United Nations Charter, which only has an exception under Article 51 of the Charter for acts in self-defence against 'armed attack'. This exception is narrow - the definition of 'armed attack' has been held to be narrow, and self-defence has other requirements which have to be fulfilled to be recognised as legitimate. The definition of 'armed attack' has been interpreted relatively narrowly, with the *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)* judgment in the ICJ having defined it as the 'most grave forms of the use of force'.[3] This is taken to exclude more minimal uses of force from incurring the right to self-defence, even if those more minimal uses of force might meet the lower threshold of the prohibition of the use of force itself. This lower threshold merely requires that force is conducted without consent and is beyond the most *de minimis* uses of force, or police measures.[4] This reflects a general preference for the use of non-violent means to resolve situations threatening international security, including sanctions or diplomatic measures.

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[2] Kolb, 'The prohibition against the use of force: Article 2 § 4 of the Charter' (2018) International Law on the Maintenance of Peace, 321-348.

[3] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)*, Judgment on the Merits (1986) ICJ Reports 14 (hereinafter *Nicaragua*) [191].

[4] Oliver Corten & Bruno Simma, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2010 ed., Bloomsbury Publishing) 51, 52.

'Armed attacks' within the meaning of Article 51 may also be limited with relation to who they might originate from. The *Nicaragua* judgment imposed an attribution requirement – that armed attacks must be effectively attributable to a state.[5] There has been some disagreement about the existence of such a requirement, particularly after the Court's findings in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion and the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* judgment. However, if we do accept the holding in *Nicaragua*, an attack must originate from a state or a group a state has 'effective control' over to qualify for uses of self-defence. In any event, the scope of self-defence has been held to be narrow in nature as a result of the importance of the prohibition of the use of force. While Article 2(4) reads that the use of force is only illegal if used against the 'territorial integrity or sovereignty of a State' or with justifications 'otherwise inconsistent' with the Purposes of the United Nations, this has also been interpreted widely as precluding nearly all uses of force.[6]

However, the near-universal nature of this prohibition is a modern evolution of international law. Before the Second World War, the approach adopted to the use of force in international law, particularly where there were humanitarian justifications, was more permissive.[7] Humanitarian interventions

[5] *Nicaragua* (n 2) [195].
[6] Becker, 'The Continuing Relevance of Article 2(4): A Consideration of the Status of the UN Charter's Limitations of the Use of Force' (2020) Denver Journal of International Law and Policy, 604.
[7] *supra* note 3.

occurred regularly before the Second World War. In the Greek War of Independence, between 1821 and 1829, the British Empire, the Kingdom of France and the Russian Empire cited humanitarian grounds, specifically the halting of the Ottoman Empire's genocide of Greek Christians, to support the Greeks. In the Syrian Civil War in 1860, France intervened in Lebanon and Syria to stop the Ottoman Empire from massacring Christians. Additionally, in the Russo-Turkish War between 1877 and 1878, a coalition led by the Russian Empire intervened against the Ottoman Empire for atrocities in Bulgaria.[8] Outside Europe, in the Spanish-American War of 1898, the United States intervened in Cuba, citing humanitarian justifications *inter alia*, based on the alleged construction of concentration camps by the Spanish to house Cubans.

Despite the prevalence of humanitarian interventions historically as shown above, a general right of humanitarian intervention still found itself sceptics – both from a philosophical and legal perspective. From a philosophical perspective, classical liberals like JS Mill[9] supported the right to humanitarian intervention against 'barbarians', with reference to colonised peoples like those in India and Algeria. However, the supporters of such a right often based it on imperialistic and discriminatory grounds which reflected, beyond a desire to intervene for humanitarian purposes, beliefs of supremacy. One author who

[8] Alexis Heraclides and Ada Dialla, *Humanitarian Intervention in the Long Nineteenth Century: Setting the Precedent* (Manchester University Press, 2015).

[9] Mill J.S., 'A Few Words on Non-Intervention' (1859) *Fraser's Magazine*, 60(360), 766-776.

did not do that was Rawls,[10] who supported intervention where significant human rights violations or aggression was occurring. However, this general approach has been criticised by some authors, including Kant[11], who only condoned interventions in the most extreme of situations and Hegel,[12] who took a largely sovereignty-oriented view in supporting state sovereignty as a guiding principle over any potential intervention.

From a legal perspective, authors such as Heffter, Funck-Bretano and Sorel did not appear to support a general right to humanitarian intervention. They instead upheld the moral value of such an action in certain circumstances.[13] However, this opposition (on legal grounds) was not absolute. For instance, Heffter found the intervention in Greece by the United Kingdom, France and Russia to be lawful. He went even further and stated that intervention could only be justified on two grounds – 1) to assert an existing right or 2) to compensate for a violation of international law. Funck-Bretano and Sorel did not go that far, only acknowledging that that interventions could be

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[10] Martin R, 'Walzer and Rawls on just wars and humanitarian interventions' in Steven P. Lee (ed), *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory* (2007), 75-88.

[11] Lillich RB, 'Kant and the current debate over humanitarian intervention' (1996) J. Transnat'l L. & Pol'y, 6, 397.

[12] Alexis Heraclides, 'Humanitarian intervention in the 19th century: the heyday of a controversial concept' (2012) Global Society, 26(2), 215-240.

[13] Segesser DM, 'Humanitarian Intervention and the Issue of State Sovereignty in the Discourse of Legal Experts between the 1830s and the First World War' in Fabian Klose (ed), *The Emergence of Humanitarian Intervention: Ideas and Practice from the Nineteenth Century to the Present* (Cambridge University Press 2015).

legitimate and just, simply that they might be outside the realm of the law.[14]

Despite clashing with the foundational doctrine of Westphalian sovereignty, Heffter's reasoning is compatible with the pro-intervention reasoning Hugo Grotius adopted in his fundamental theorisation of humanitarian intervention, which formed the basis for humanitarian intervention as a concept. Grotius adopted the reasoning that every society was limited by a 'universally-recognised principle of humanity', which gave rise to a duty and right to humanitarian intervention upon violation.[15] This compatibility arises from a significant body of rights in humanitarian and human rights law arising under modern international law, through instruments like the Geneva Conventions, the International Covenant on Civil and Political Rights (ICCPR)[16] and the International Covenant of Economic, Social and Cultural Rights (ICESCR).[17] These rights expand the 'universally-recognised principle of humanity' to incorporate these rights as universally recognised rights enjoyed by all humans.

This commitment to human rights also forms a component of the post-WWII approach to the use of force. Although international law prioritised the prohibition on the use

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[14] ibid.

[15] Evan J Criddle, 'Three Grotian theories of humanitarian intervention' (2015) Theoretical Inquiries in Law 16, no. 2, 473-506.

[16] UN General Assembly, International Covenant on Civil and Political Rights, 1966, United Nations, Treaty Series, 999 U.N.T.S. 171 (hereinafter ICCPR).

[17] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 1966, 993 UNTS 3.

of force, with a mind of preventing unnecessary conflict between the largest global powers, it also began to include protective duties for the promotion of human rights. Through the evolution of international law, particularly with the rise of the Responsibility to Protect (R2P) doctrine[18] in 2005 by United Nations member states, states appear to have accepted the existence of some element of 'collective responsibility' for foreign nationals (and vice versa, by extension). However, they have only accepted a limited scope of intervention and redress.[19] The R2P doctrine, for instance, did not allow for any use of force unauthorised by the Security Council. It merely imposed a duty for states to hold each other to account through peaceful and diplomatic means for violations of human rights.[20] In this manner, while maintaining its compatibility with the fundamental prohibition on the use of force in Article 2(4) of the UN Charter, states have accepted ever-increasing degrees of responsibility for human rights and wellbeing in other states. States have also accepted such growing extraterritorial responsibilities through the findings that core international instruments – including the ICCPR[21] and the ICESCR[22] – are extraterritorial in application, with States owing

[18] Bellamy AJ, 'The responsibility to protect — five years on' (2010) Ethics & International Affairs, 24(2), 143-169.
[19] Macfarlane SN, Thielking CJ, and Weiss TG, 'The Responsibility to Protect: is anyone interested in humanitarian intervention?' (2004) Third World Quarterly, 25(5), 977-992.
[20] Bellamy AJ, 'The responsibility to protect and the problem of military intervention' (2008) International Affairs, 84(4), 615-639.
[21] Human Rights Council, General Comment No. 31 on the International Covenant on Civil and Political Rights.
[22] Coomans F, 'The extraterritorial scope of the international covenant on economic, social and cultural rights in the work of the United Nations Committee on economic, social and cultural rights' (2011) Human Rights Law Review, 11(1), 1-35.

a wide duty to apply those human rights in their engagements with foreign nationals. This reflects the growing communitarianism of international law (albeit slowly, as authors like De Visscher[23] have illustrated).

Despite such evolutions of international law, there have been instances where States have failed to use the mechanisms of the United Nations to protect humanitarian interests or human life in the manner envisioned by the R2P framework. Examples of this exist and are frequent – particularly when a permanent member of the Security Council is not in favour of authorising force. This was most notably and recently seen in the Syrian Civil War, where UN-authorised force was disapproved by Russia, leading to direct interventions by countries like the United States and France. While several of these countries indicated that they were exercising their right to self-defence under Article 51 of the UN Charter,[24] several of those states, in political dialogues and other statements, indicated a humanitarian intervention justification behind their intervention in Syria.[25] This suggests that states are perhaps looking to the expansion of collective responsibility and defence beyond UNSC-approved force for humanitarian purposes in limited circumstances. This would

[23] Charles De Visscher, 'Theory and reality in public international law' In *Theory and Reality in Public International Law* (Princeton University Press 2015).

[24] Corten O, 'The 'Unwilling or Unable' Test: Has it Been, and Could it be, Accepted?' (2016) Leiden Journal of International Law, 29(3), 777-799.

[25] See, as recently as 2023 – 'Syria – 12th Anniversary of the Syrian Uprising' – Joint statement by the foreign ministries of France, Germany, the United States and the United Kingdom.

apply perhaps when other action through international bodies has been blocked, as was the case in the Syrian Civil War.

The United Kingdom's position on humanitarian intervention is unique and valuable in this regard as a potential guiding principle for other countries which may seek to adapt their positions in this regard, given recent developments in international law. The United Kingdom has historically asserted a right to humanitarian intervention, having invoked it as early as the 19th century.[26] It asserts that it has the right to intervene in a country militarily on humanitarian grounds if three criteria are fulfilled. These are (a) the existence of 'generally accepted' and 'convincing' evidence of 'extreme humanitarian distress on a large scale, requiring immediate and urgent relief'; (b) the lack of any reasonable alternative to the use of force, and (c) the necessity and proportionality of the proposed use of force with relation to the 'aim of relief of humanitarian need'.[27]

In this paper, we argue that the United Kingdom's doctrine of humanitarian intervention[28] may reflect changing customary international law, and the United Kingdom is likely in the position Iceland found itself in asserting larger exclusive economic rights over its seas – as a violator of international law

[26] Edward Newman, 'Exploring the UK's Doctrine of Humanitarian Intervention' (2021) International Peacekeeping 28, no 4, 632-660; Agata Kleczkowska. 'The Illegality of Humanitarian Intervention: The Case of the UK's Legal Position Concerning the 2018 Strikes in Syria' (2020) Utrecht J. Int'l & Eur. L. 35, 35.
[27] UK Government, *Global Britain: The Responsibility to Protect and Humanitarian Intervention: Government response to the Foreign Affairs Committee's Twelfth Report*, 2018.
[28] ibid.

but as a contributor to changing customary international law. State practice may be beginning to reflect the potential existence of such a right to humanitarian intervention, albeit in a highly nascent manner. We proceed to further support the United Kingdom's doctrine of humanitarian intervention on normative grounds, before conceptualising potential expansions of the United Kingdom's grounds of intervention to better provide for greater efficacy in the protection of human rights internationally. This is through the relaxation of the interpretation of criteria involved before intervention, and through the allowance of humanitarian pre-emption – where intervention is undertaken before the actual violation of human rights occurs. It is, however, important to continue respecting the general prohibition on the use of force, and we will discuss the importance of balancing that prohibition with humanitarian imperatives, as well as potential solutions to prevent state abuse.

2. The Emerging Right to Humanitarian Intervention

The United Kingdom is one of only a few states which have supported a right to humanitarian intervention historically, even in limited circumstances. Most states, as Akande writes, maintain support for the strict prohibition on the use of force – particularly non-Western states, perhaps due to inherent power differentials that may arise if the use of force becomes more accepted. Even

in the *Legality of Use of Force (Yugoslavia)* cases,[29] the United Kingdom was only joined by Belgium in claiming a legal justification of humanitarian intervention as forming the legal basis for that military intervention.[30] Even countries that engage in humanitarian interventions often cite other justifications, perhaps to gain credibility under international law – former President Barack Obama, for instance, cited anticipatory self-defence as justification for the US intervention in Syria.[31] Furthermore, in the 2000 Declaration of the South Summit, the Group of 77 explicitly rejected a right to humanitarian interventions, and stated that any provision of humanitarian assistance must be done while respecting the sovereignty and territorial integrity of host states.[32] Thus, it appears clear that under present international law, there lacks legal justification for unitary humanitarian interventions.

Beyond state practice, the approach the United Kingdom has taken has yet to receive any explicit authorisation by international courts. The International Court of Justice is yet to consider a case regarding humanitarian intervention specifically – in all other cases self-defence has been cited as an overriding or contributing factor – and has yet to adopt a position on the

[29] See *Legality of Use of Force (Serbia and Montenegro v United Kingdom)*, Preliminary Objections of the United Kingdom of Great Britain and Northern Ireland (2000) and *Legality of Use of Force (Serbia and Montenegro v Belgium)*, Preliminary Objections of the Kingdom of Belgium (2000).
[30] *supra* note 25, 11.
[31] CNN, 'Transcript of President Obama's Interview on "New Day" CNN Politics' (*Cable News Network*, August 23, 2013) <https://www.cnn.com/2013/08/23/politics/barack-obama-new-day-interview-transcript/index.html> accessed 13 January 2023.
[32] Group of 77, 2000 Declaration of the South Summit, para. 54.

matter. Meanwhile, publicists such as Milanovic and Akande have heavily criticised the United Kingdom's doctrine, meanwhile, rejecting the existence of such a doctrine of humanitarian intervention under international law. [33] This is despite Akande citing, from a normative perspective, the possible value of an 'ignorable breach' doctrine for humanitarian interventions – where they could be breaches of international law, but these breaches are ignored by the international community in favour of the overriding humanitarian imperative. The overwhelming consensus amongst international law scholars appears to be against the legality of the United Kingdom's position. However, a minority of scholars such as Sellers have accepted that such a right may indeed exist (subject to qualifications). [34] Such a right could potentially exist through a number of mechanisms: as a standalone, limited right to humanitarian intervention, or through a more limited interpretation of the prohibition of the use of force. In any event, it appears clear that the United Kingdom's position is not presently supported by international law.

It has been contended by some that the United Kingdom, in adopting its position justifying humanitarian intervention, is attempting to change the law surrounding

[33] Milanovic, 'The Syria Strikes: Still Clearly Illegal' (15 April 2018) *EJIL: Talk!* <https://www.ejiltalk.org/the-syria-strikes-still-clearly-illegal/> accessed 14 January 2023; Akande, 'The Legality of Military Action in Syria: Humanitarian Intervention and Responsibility to Protect' (28 August 2018) *EJIL: Talk!* <https://www.ejiltalk.org/humanitarian-intervention-responsibility-to-protect-and-the-legality-of-military-action-in-syria/> accessed 14 January 2023.

[34] Mortimer Sellers, 'The Legitimacy of Humanitarian Intervention Under International Law' (2001) 81.

humanitarian intervention.[35] While the United Kingdom has not explicitly and in detail outlined a basis for such a change in international law beyond its own justification of its own position, its statements evince a general declaratory belief in the general legality of humanitarian interventions within the conditions it has set out. Thus, if this is the case, while the United Kingdom might be violating present international law, it is doing so within the confines of attempting to change that international rule. This is perhaps logically akin, as noted above, to the example of Iceland,[36] which began asserting twelve-mile exclusive economic zones contrary to the international law at the time. This led to significant conflict between the United Kingdom and Iceland. While this was not akin to a conventional war, it did involve some use of military force, Eventually, through diplomatic means, the conflict ended with the United Kingdom recognising Iceland's right to such an exclusive economic zone in 1976. This was two years after the *Fisheries Jurisdiction* judgment was issued in 1974, obligating the two states to engage in negotiations.[37] Perhaps, the United Kingdom is taking a similarly aggressive step – which might reasonably provoke reactions amongst other states (as the U.K.'s intervention in Syria did) – to promote a larger change in international law.

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[35] One example is Newman E, 'Exploring the UK's Doctrine of Humanitarian Intervention' (2021) International Peacekeeping, 28(4), 632-660.

[36] Churchil RR, 'The Fisheries Jurisdiction Cases: The Contribution of the International Court of Justice to the Debate on Coastal States' Fisheries Rights' (1975) International & Comparative Law Quarterly, 24(1), 82-105.

[37] *Fisheries Jurisdiction (United Kingdom v Iceland)*, Judgment on the Merits, 1974 ICJ 3.

If the United Kingdom is indeed looking to found such a change in international law, there are two potential legal bases it can ground such a rule in. The first such justification is the re-interpretation of the prohibition of the use of force under Article 2(4) of the UN Charter to be more limited to those uses of force which violate territorial integrity, political independence and are otherwise inconsistent with the purposes of the United Nations.[38] The approach to reading a Treaty provision under customary law (which applies to the UN Charter),[39] which was later reflected in Article 31 of the Vienna Convention of the Law of Treaties (VCLT), was to use a good-faith plain reading of the provision.[40] Currently, that provision of the United Nations is read widely, as including nearly all uses of force but those in self-defence. However, it could be argued that a plain reading of this text in context of the object of the Charter (to prevent war and to protect human rights, as per the preamble), which is relevant as provided for by Article 31 of the VCLT,[41] might provide for a highly-limited right to humanitarian intervention. Such a right would be limited insofar as it was to uphold the principles and aims of the United Nations, and as long as the violation of sovereignty or territorial integrity was only that which was strictly necessary. This could more effectively uphold some of the purposes of the UN stated in Article 1 of the Charter, which includes the protection of human rights at Article 1(3), by ensuring that better enforcement against human rights violations is available to

[38] Jordan J Paust, 'Permissible Self-Defense Targeting and the Death of Bin Laden' (2010) Denv. J. Int'l L. & Pol'y 39, 569.
[39] Panos Merkouris, 'Interpreting the customary rules on interpretation' (2017) International Community Law Review 19, no. 1, 126-155.
[40] See Article 31, Vienna Convention on the Law of Treaties.
[41] ibid.

states.[42] A wider reading of Article 2(4) should therefore mean that uses of force that are consistent with the purposes of the UN (such as the promotion of human rights) are not prohibited. Such a right to humanitarian intervention would need to be assessed carefully, and other mechanisms might be imposed to ensure fair use, including assessment by international courts or international organisations like the General Assembly. Measures do exist to hold states abusing such an ambit of humanitarian intervention to account – non-forcible and diplomatic penalties such as the recalling of diplomatic personnel and sanctions, as well as forcible penalties such as collective force if required by the United Nations. However, non-forcible means must of course be attempted first, as per international jurisprudence and the UN Charter. The United Kingdom's position is compatible with this reading of the UN Charter. This is because it would have intervened in the specific contexts under humanitarian guises to protect human rights and perhaps to prevent further conflict in the given state. Such justification is especially compelling due to the limited circumstances the United Kingdom allows itself to intervene in.

The second potential justification for humanitarian intervention under international law (as expressed by the United Kingdom) is the invocation of necessity. Under Article 25 of the ILC's Articles on State Responsibility and corresponding customary law,[43] States can invoke necessity to justify

[42] See Article 1, UN Charter.

[43] International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report on the work of its fifty-third session in Yearbook of the International Law Commission*, 2001, vol II (Part Two)

wrongdoing. It could be argued that Article 2(4) and the prohibition within is not a peremptory norm, and thus a breach can be justified by necessity. Under these guises, necessity would have to be interpreted widely – in that the common duty of humanity Grotius alluded for would have to provide for a necessary duty of humanitarian intervention – even against the prohibition of the use of force provided by Article 2(4) of the United Nations Charter. A further source for justification could be the competing duties that States undertake, both to protect human rights, including extraterritorially, and to respect the prohibition on the use of force. Thus, it could be argued that the obligation to protect human rights is more fundamental than the universal nature of the prohibition of the use of force, and thus in highly-limited scenarios involving a significant breach of human rights that can be addressed, that limited uses of force could be justified. This is certainly a less realistic route for the justification of the humanitarian intervention position under international law than a re-reading of the UN Charter, as it relies on a re-interpretation of necessity which has previously been interpreted very narrowly by the International Court of Justice in the *Gabčíkovo-Nagymaros* case.[44] The most limited (and perhaps feasible) re-interpretation required would be one stating that in situations of extreme humanitarian distress, a situation of necessity is indeed created due to the existence of a situation of

noted by UNGA (A/RES/56/83), Art. 25; Customary as per *Gabčíkovo-Nagymaros Project (Hungary/Slovakia),* Judgment on the Merits, 1997 ICJ Report 88 [51].

[44] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia),* Judgment, Merits, 1997 ICJ Report 88 [57].

peril towards individuals States continue to hold obligations towards.

In this regard, it is worth noting that there has been some evolution of state practice on the existence of the right to humanitarian intervention. In the widely-supported intervention in Yugoslavia by NATO member states,[45] while only Belgium and the United Kingdom claimed the right to humanitarian intervention in front of the ICJ, the intervention was broadly cited by NATO member states as being for humanitarian reasons.[46] It is worth noting here that the circumstances where that intervention arose without Security Council approval specifically involved the blocking of authorised intervention by permanent members of the Security Council, specifically China and Russia.[47] NATO has not been put in a similar position since – it received Security Council approval for its intervention in Libya and did not seek to intervene in Syria as a collective. Thus, the evolution of the state practice of NATO member states (which include 30 member states of the United Nations) is particularly fascinating. Humanitarian justifications were offered for the NATO intervention in the Iraq-Kuwait War. Politicians in the U.S., including then-President George H.W. Bush, partially cited

[45] Stephen Biddle, 'The New Way of War? Debating the Kosovo Model' (2002) Foreign Affairs vol. 81, 138-144.
[46] Neil A Lewis, 'A Word Bolsters Case for Allied Intervention' (*The New York Times*, 4 April 1999) <https://archive.nytimes.com/www.nytimes.com/library/world/europe/040499kosovo-legal.html> accessed 14 January 2023.
[47] Metzgar E and Zagorski A, 'Russia, the UN, and NATO: Prospects for Cooperation' in Michael Pugh and Waheguru Pal Singh Sidhu (eds), *The United Nations & Regional Security: Europe and Beyond* (Lynne Rienner Publishers 2003).

humanitarian reasons in justifying their intervention, particularly citing the (later demonstrated as false) testimony of Nayirah al-Sabah, the daughter of the then-Ambassador of Kuwait.[48]

Other state practice exists, including Sierra Leone and Nigeria's support for the UK's intervention in the Sierra Leone Civil War, India's intervention in the Bangladeshi Liberation war and various interventions in the Syrian Civil War. In many of these cases, humanitarian intervention was cited as a basis for intervention, even if at times not the only legal basis. Some states have accepted the potential existence of a right to humanitarian intervention in severe circumstances (specifically, against potential genocide) in their interventions in the *Russia v Ukraine* case before the ICJ. This was due to the *erga omnes partes* (obligations which are owed to all Treaty parties) nature of those obligations. Most notable is New Zealand, which stated:

> However, on its own the Article I obligation to prevent genocide does not provide a legal basis for the use of force in violation of Article 2(4) of the UN Charter. As this court recognised in the *Bosnian Genocide* case, the obligation to prevent genocide must be exercised within the limits permitted by international law. In exceptional circumstances, where peaceful means and actions have been exhausted, it may be that an emerging customary norm of unilateral humanitarian intervention provides a

[48] Howard Adelman, 'Humanitarian intervention: the case of the Kurds', (1992) Int'l J. Refugee L. 4, 4; Joseph Darda, 'Kicking the Vietnam Syndrome Narrative: Human Rights, the Nayirah Testimony, and the Gulf War' (2017) American Quarterly 69, no. 1, 71-92.

> justification for the use of force to protect a population from genocide. [49]

New Zealand is not alone. Other states, including Denmark,[50] Estonia[51] and Luxembourg[52] recognised that such a violation of the prohibition of international law might be permitted or justified if to prevent genocide. It is not clear if their stance is limited to genocide, but it might be a reasonable hypothesis to present that this stance extends to all severe human rights violations for which obligations are owed *erga omnes partes*. However, it is worthy of noting that some states have had relatively inconsistent practice on this matter. Norway, a member of NATO, for instance, defined the prohibition on the use of force expansively in its recent intervention on the *Russia v Ukraine* case before the ICJ. Nonetheless, state practice appears to be evolving on the matter.

The practice of international organisations/bodies might also imply the existence of a doctrine of humanitarian intervention. However, there is limited practice that may evince such a conclusion. For example, the United Nations Security Council in 1966, in Security Council Resolution 221, called for the United Kingdom, by 'the use of force, if necessary' to act against

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[49] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Declaration of Intervention Pursuant to Article 63 of the Statute of the Court by the Government of New Zealand [31].

[50] ibid – see Declaration of Intervention under Article 63 of Denmark.

[51] ibid – see Declaration of Intervention under Article 63 of Estonia.

[52] ibid – see Intervention En Vertu De L'Article 63 Du Statut De La Cour Internationale De Justice (Luxembourg).

the import of oil to Southern Rhodesia.[53] This may evince that some uses of force may be legitimate if they are not inconsistent with the Purposes of the United Nations – supporting a more limited reading of the prohibition contained within Article 2(4) of the United Nations Charter. This is supported by the United Nations' further refraining from describing Belgium's invasion of the Congo, which was claimed to be done for humanitarian reasons, as an illegal use of force, merely supporting the territorial integrity of the Democratic Republic of the Congo in Resolution 145 (1960).[54] It is however true, and acknowledged, that the international jurisprudence appears to hold that humanitarian interventions are illegal – as the International Court of Justice, in *Nicaragua*,[55] held that the use of force by the United States was an inappropriate method to ensure compliance with human rights.

All in all, it appears that state practice appears to be evolving to a juncture which may allow for humanitarian intervention in severe situations, where there are violations of human rights obligations owed *erga omnes partes* or *erga omnes*. The existence of such forms of obligations was acknowledged in the Preliminary Objections stage of the *Gambia v Myanmar* case[56] and in the *Barcelona Traction* case[57] respectively – albeit only for serious

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[53] United Nations Security Council, Security Council Resolution 221 (1966). As cited in United Nations, Art. 2(4), Repertory, Suppl. 3, vol. I (1959-1966), 171.

[54] United Nations Security Council, Security Council Resolution 145 (1960). As cited in United Nations, Art. 2(4), Repertory, Suppl. 3, vol. I (1959-1966), 143.

[55] *Nicaragua*, [268].

[56] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v Myanmar),* Provisional measures, ICJ GL No 178.

[57] *Barcelona Traction, Light and Power Company, Limited*, Judgment, 1970 ICJ 3.

human rights violations thus far, and in the abstract for *erga omnes* obligations. There would also likely be a requirement that peaceful means have been exhausted, including perhaps consulting the Security Council. This was seen in the cases of NATO military intervention and as expressed in New Zealand's abovementioned intervention in the ICJ case of *Russia v Ukraine*.

3. A normative perspective on the UK's doctrine of humanitarian intervention

In assessing the doctrine of humanitarian intervention as it stands today normatively, we rely on the United Kingdom's doctrine of humanitarian intervention as our basis, reviewing the application of the doctrine in real-world scenarios before proceeding to suggest potential expansions of the doctrine of humanitarian intervention. As stated above, the United Kingdom's doctrine of humanitarian intervention[58] has three requirements for invocation, namely:

(a) The existence of convincing evidence of extreme humanitarian distress on a large scale, necessitating immediate relief;
(b) The lack of any reasonable alternative to the use of force, and;
(c) The necessity and proportionality of the measure in question.[59]

[58] n 25.
[59] n 25.

As recently as 2013 and 2018, the United Kingdom has cited its doctrine of humanitarian intervention in justifying its use of force in intervening in Syria. In 2013, the Attorney-General of the United Kingdom, setting out the rules for humanitarian intervention stated above, used these rules to justify the United Kingdom's use of force against Syria through missile strikes. This was met with widespread disagreement by academics on not just on a principled basis, but also at a practical, fact-specific level that is valuable to analyse. Sands, for instance, contended that the first and third elements of humanitarian intervention appeared to be insufficiently satisfied.[60] He argued that the United Kingdom government's arguments were 'premised on factual assumptions'. These included assumptions such as that the attacks could be attributed to the Syrian government and that the UK using force would 'deter or disrupt the further use of chemical weapons'. He proceeded to suggest that this evidence needs to be established based on publicly-available information. This would presumably mandate that any intelligence obtained be made accessible to the public before a decision was made on humanitarian intervention, such as to justify those acts.

There is validity in the arguments made by Sands, as it relates to the United Kingdom's existing doctrine. The United Kingdom has itself cited that the evidence of extreme humanitarian intervention was required to be 'generally accepted' internationally. It was important that the questions of attribution have been largely settled – that the attacks were attributable to the

[60] Robert Booth, 'Syria: Legal doubt cast on British government's case for intervention' (*The Guardian*, 29 August 2013) <https://www.theguardian.com/world/2013/aug/29/syria-legal-doubt-british-intervention> accessed January 14 2023.

Syrian government or an entity that the Syrian government had 'effective control' over, within the meaning of the *Nicaragua* case. Whether the specific evidential burden was met in this case is not a question for this article, but it is certainly valid that if the evidence was to be 'generally accepted' internationally before allowing for humanitarian intervention, that then the case should have been sufficiently made by the United Kingdom. Such a burden of proof for the justification of humanitarian intervention would reduce the potential for the abuse of a doctrine of humanitarian intervention and would allow for the balancing of interests between state sovereignty/voluntarism and the protection of human rights. This would further incentivise more states to participate in such a communitarian world order.

Sands also contends that the United Kingdom must demonstrate that its use of force would sufficiently 'deter or disrupt the further use of chemical weapons'. This, in essence, is a contention that the third element of the United Kingdom's test for humanitarian intervention is not met – that the use of force would not achieve the aim of reducing humanitarian distress and would thus be neither necessary nor proportionate. We contend that imputing such a requirement – to demonstrate that a use of force would sufficiently deter or disrupt further humanitarian violations – might be unrealistic and impute too high a burden on any use of force. Due to the unpredictable nature of conflict, particularly in less-stable regions of the world, the impacts of any intervention, humanitarian or otherwise, through the use of force are largely unpredictable and depend on many factors. These include the response of the targeted State, the response of the local population, the support of the international community and more. It would be too high a burden to require that the United

Kingdom must 'demonstrate' that its use of force would eliminate the future use of such chemical weaponry – it should be sufficient that the United Kingdom can demonstrate a significant likelihood that such would happen. While it is difficult to quantify what 'significant' might mean within this context, it should not require the high threshold of universal certainty. This is especially because the definition of such impact can often be a highly politicised question, a factor that should be secondary to humanitarian interests. The justification for this is that the need for such certainty must be balanced with the overriding interest of protecting civilians. In a case of genuine humanitarian distress, particularly that of an extreme nature, it would be harmful to halt humanitarian intervention purely because the response of the target State and the long-term, even ancillary impacts cannot be so clearly ascertained. Such an approach would cost lives – although it is of course vital that some exercise be done to account for the impacts of any intervention – lest military powers rush into a conflict where they contribute to further destabilisation, where such an outcome was foreseeable.

Akande makes another argument with reference to the 2018 use of force by the United Kingdom against Syria.[61] He argues that the United Kingdom had failed to fulfil the second requirement, as it failed to take all possible actions. These include using the General Assembly to pass a resolution using the 'Uniting for Peace' mechanism, which allows the General Assembly to bypass the Security Council in the event of the latter's inaction; or referring the matter to the International Criminal Court for further action. While we agree that purely

[61] n 32.

unilateral humanitarian intervention without any attempt to obtain international approval can often be an invitation for abuse, we contend that the requirement to consult the international community, and to reasonably exhaust means for collective defence, must again be weighed and balanced with pragmatic considerations.

With situations of extreme humanitarian distress, and particularly in scenarios that are militarily active, there are exigencies that can require near-immediate action – which may be compromised if states have to spend crucial time having to consider every alternative before taking action under the doctrine of humanitarian intervention. After all, requirement 2 of the United Kingdom's doctrine (a lack of reasonable alternatives) posits a pragmatic solution to the issue. It is by no means 'reasonable' in the context of an urgent humanitarian crisis to need to go through rounds of debate to pass a resolution in the General Assembly. Further, Akande's suggestion of referral to the International Criminal Court may also not be realistic. Many of those perpetrators of such grave humanitarian violations would never feasibly submit themselves to the Court's jurisdiction. Even if they do, prosecution might proceed for years, during which greater humanitarian distress may ensue.

States such as South Africa, the Gambia and Burundi have withdrawn from the jurisdiction of the Court, and several other states have never been party to the Rome Statute, including large states like the United States, China, India, and Russia. Thus, given the voluntarism-oriented nature of international law, as

espoused in the *S.S. Lotus* case,[62] the limited powers of the ICC may reduce its efficacy.[63] Furthermore, such an approach may highlight international inequities – as a large portion of parties to the Rome Statute of the International Criminal Court are less-developed countries, often in developing regions like Africa and South America – whereas several large and powerful nations are not signatories. This may allow those large states to abuse their powers to a greater extent. Given the above factors, a balanced rule might state that member states should indeed make the best attempt possible at obtaining international consensus. However, where there is sufficient evidence that collective action is being blocked by self-interested states – for example, by Russia in this scenario – states should feel confident in undertaking humanitarian intervention. While there is the concern that small groups of nations may be empowered to unilaterally act despite potential opposition, the requirements for 'indicative' consensus should be sufficient to mean that any such opposition only reflects a minority of the global community. The boundary for the exercising of humanitarian intervention in these circumstances could be one of obtaining 'indicative' international consensus – that there is largely international agreement, even if not universal or rigorously uniform. The precise barrier for this is difficult to define and will likely be a case-specific question, as are many similar questions in international law, but should perhaps reflect the general opinions of states, in mirroring the boundaries for the establishment of rules of customary law. Alternatively, if there are exigencies involved such as urgency due to ongoing

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[62] *The Case of the S.S. 'Lotus' (France v. Turkey)* (1927) Permanent Court of International Justice (series A) No. 10.

[63] Hertogen A, 'Letting lotus bloom' (2015) European Journal of International Law, 26(4), 901-926.

severe humanitarian crimes such as genocide that require immediate responses, states could adopt the approach of seeking post-hoc consent or consent during the intervention, to fulfil their international obligations.

We contend that from a normative perspective, the United Kingdom's policy of humanitarian intervention, while not legal at present under international law, is acceptable and has been utilised in a fair and limited manner. It must not be exploited under false pretences for aggressive war. Such abuses have happened before, including by Russia, in making false pretences of genocide in Ukraine to justify their acts of aggression. However, in a limited manner, the scope of humanitarian intervention can be normatively acceptable and can be exercised in a manner that balances the prohibition of the use of force and state sovereignty with the impetus of protecting vital human rights. Further, to do otherwise would effectively, as Tomuschat writes, 'deprive international law of its essential value content',[64] by rendering the promises of international law empty. To address the concerns raised by Sands and Akande, it is important to further clarify and define the rules surrounding doctrines of humanitarian intervention to better account for the practicalities of modern warfare while preventing any scope for abuses.

There may also be avenues through which the doctrine of humanitarian intervention might be expanded to better serve the purposes of protecting humanitarian interests, although these would represent far more extreme changes to the international

[64] Tomuschat, C., 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) Collected Courses of the Hague Academy of International Law, [27].

law and would require far more international consensus. This would allow states to best meet their duties towards the maintenance of human rights in foreign states. The following two suggestions are made for the expansion of the doctrine of humanitarian intervention – primarily, and most vitally, the suggestion that humanitarian pre-emption be recognised as a valid ground for humanitarian intervention.

A. A more relaxed interpretation of the requirement for 'extreme humanitarian distress on a large scale, requiring immediate and urgent relief'

The requirement for 'extreme humanitarian distress on a large scale, requiring immediate and urgent relief' could potentially be relaxed. The right to life is absolute and does not only apply in situations of extreme distress. A restrictive interpretation of that requirement limits countries from acting against humanitarian distress even when it may well warrant such intervention and result in the protection of life. The justification for the requirement is the severity of the use of force. Some will claim, as Reisman describes in abstract,[65] that even where a system is 'failing to respond to a violation whose remedy has been exclusively to a formal decision-maker', some 'prospective unilateral action' may cause greater systemic injury. This would constitute an injury to the established principle of sovereignty, as

[65] Reisman, W. Michael, 'Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention' (2000) European Journal of International Law, 11(1), 4.

stipulated by Reisman and best understood as 'injury' to the established principle of sovereignty. In other words, the availability of humanitarian intervention, which may be used against smaller, weaker states, might violate the primacy of Westphalian sovereignty even if justified on humanitarian and human rights grounds. This might also violate one of the fundamental tenets of international law – voluntarism, as espoused in the *Lotus* case before the Permanent Court of International Justice. If intervention could be justified despite the protests of smaller states, it might diminish the right of states to exclude themselves from international rules through persistent objection. While this might be valid in a world where there are few or no violations of the prohibition of the use of force, the prohibition in today's world has already been abrogated to the extent that the systemic injury caused by a justifiable use of force will likely be less severe in nature. This is especially true if the international community reaches general consensus on the humanitarian imperative involved. What is important is to prevent injuries to the notion of sovereignty against unjustified attack and aggression – which is not the case in situations of genuine humanitarian intervention.

Furthermore, states are likely to self-regulate their actions given the costs of any use of force to the state itself. Uses of force and conflicts are highly costly endeavours for intervening states – lives are often lost and the financial burden is significant, even for situations of asymmetric warfare and especially so for situations where the State violating human rights has military strength and an ability to resist such intervention. There are also political considerations that come into play for many such interventions, with most democratic polities having significant pacifist groups.

Even with the rise of cheaper forms of warfare, including drone warfare, the costs of such warfare will still be significant for countries from a non-financial perspective – including in the United States, for example, where uses of force face significant domestic political resistance. Reducing the requirement for humanitarian distress will likely not open the floodgates to the abuse of the doctrine of humanitarian intervention but adopt a more permissive approach that can help in situations that may be grave from a humanitarian perspective but insufficiently immediate, extreme or widespread to justify intervention under existing doctrine. One highly suitable approach would likely allow for humanitarian intervention for serious violations of international humanitarian law or international human rights law on a more than *de minimis* level (i.e., not on an individual level), and where those violations are causing significant amounts pain or suffering. The requirement that the violations have not ended is because where countries are able to, they should pursue peaceful forms of redress including criminal prosecutions or cases at the International Court of Justice. Interventions should not be punitive in nature. A proportionality and necessity requirement, as applies to self-defence,[66] should also apply here, to prevent abuses of the system by large states or against more disputed human rights violations.

[66] See *Nicaragua* (n 2); Also applied and affirmed in the *Legality of the Threat or Use Nuclear* Weapons, Advisory Opinion, [1996] ICJ 3, ICJ Reports 1996 and *Oil Platforms (Islamic Republic of Iran v United States of America),* [2003] ICJ 4, ICJ Reports 161.

B. The recognition of humanitarian pre-emption as a valid justification for humanitarian intervention

The second expansion we propose would be the most significant and extreme potential change to the scope of humanitarian intervention. Humanitarian pre-emption refers to the use of humanitarian intervention as a form of deterrence, to prevent foreseeable future abuses of human rights and humanitarian law. It is widely accepted to not be part of the present doctrine of humanitarian intervention, including by Verdirame, who accepts a broader doctrine of humanitarian intervention as proposed by the United Kingdom, subject to some qualifications such as a requirement of providing substantial humanitarian relief, and as a last resort.[67]

Humanitarian pre-emption is a valuable form of intervention. It can prevent violations of human rights in the first place, protecting human life and wellbeing better than post-hoc humanitarian interventions. Furthermore, perhaps more contentiously, it can act as a strong form of deterrence against humanitarian violations which may cause more severe conflict in the future. Belligerent states may feel an impunity to act in contravention of international law if the scope of humanitarian intervention is limited. By allowing for humanitarian pre-emption as part of the doctrine of humanitarian intervention, the

[67] Guglielmo Verdirame, 'The Law and Strategy of Humanitarian Intervention' (Blog of the European Journal of International Law, 30 August 2013) <www.ejiltalk.org/the-law-and-strategy-of-humanitarian-intervention/> accessed 1 February 2023.

allowance for such interventions may be widened sufficiently to disincentivise noncompliance to international law by potentially belligerent states, as they may be rendered more concerned about potential retribution by states intervening on humanitarian grounds before they can engage belligerently.

Present mechanisms, such as redress through the international courts, may be insufficient. Parties must individually consent to the ICJ jurisdiction for the ICJ to be able to make a binding ruling on a case.[68] Furthermore, several states are non-party to the International Criminal Court due to their failure to sign and/or ratify the Rome Statute. Widening the scope of humanitarian intervention in such a manner could also prevent belligerent behaviour towards citizens as states would be concerned about liability arising even from threats to human rights and life, for instance.

From a practical perspective, humanitarian pre-emption would largely be likely to work by allowing early interventions in states perceived as likely to require humanitarian intervention in the near future due to the rising of foreseeable serious human rights violations. This would allow for states to engage in lower-stakes humanitarian interventions without the need for a larger-scale conflict, as belligerent states may have less developed their capacity to resist humanitarian intervention, as they often do, with reference to the examples of Nazi Germany, modern-day Syria and others. Such an approach may likely have, for instance, likely significantly reduced casualties in the Second World War – both civilian (including through the Holocaust) and military. Legally,

[68] Article 36, ICJ Statute.

humanitarian pre-emption is hard to justify, given the prohibition on the use of force. One suggestion is that such pre-emption may be justifiable in a highly limited manner if interpreted to be in accordance with the aims of the United Nations, and if conducted in a limited way that does not threaten the territorial integrity of the State, perhaps by the immediate withdrawal of armed force upon restoring humanitarian protection. However, pre-emptive actions have typically been found illegal under international law, including by the Security Council in Resolution 487 (1981)[69] and the *Armed Activities*[70] case before the ICJ. It is conceded that state practice and *opinio juris* (the belief that an action is conducted due to necessitating legal obligation) is non-existent for a doctrine of humanitarian intervention that is inclusive of humanitarian pre-emption.

From a perspective of preventing abuse, there is the potential concern that expanding the scope of humanitarian intervention might lend itself to abuse. For example, Nazi Germany relied on the doctrine of humanitarian intervention in such a partially pre-emptive manner to launch the *Anschluss* of Austria, although this justification was met with international repudiation.[71] We submit that the requirements of 'indicative international consensus', along with the evidentiary requirements to demonstrate the need for intervention, should sufficiently

[69] United Nations Security Council, Security Council Resolution 487 (1981).
[70] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgment on the Merits (2005) ICJ Reports 168.
[71] Dülffer J, 'Humanitarian intervention as legitimation of violence – the German case 1937–1939' in F. Klose (ed), *The Emergence of Humanitarian Intervention: Ideas and Practice from the Nineteenth Century to the Present* (2015) 208-228.

reduce the potential for abuse by rogue states, as they would insufficiently obtain the support of the international community and evidence, if for an unwarranted case of intervention.

To prevent any potential abuse, given the preliminary nature of pre-emption and as allowed by the typically less-urgent nature of such situations, perhaps, indicative approval would have to be obtained before any such intervention is undertaken. This is more restrictive in comparison to the allowance of post-hoc approval for more restricted humanitarian interventions which are not pre-emptive in nature. The exact mechanism for such approval is uncertain, but could involve a large body of statements or other reflections of approval in state practice.

Conclusion

In this article, we have made a number of novel contributions. We have first suggested that the UK's position on humanitarian intervention reflects an emerging norm of international law. We have then proceeded to normatively assess the UK's doctrine of humanitarian intervention, before proposing potential extensions to the doctrine on a number of grounds to allow for greater humanitarian relief for oppressed populations around the world, while also being cautious of the potential of abuse.

PRIVATE LAW ARTICLES

The Latent Uncertainties and Difficulties Surrounding Knowing Receipt

Nicolò Gaggero[1]

Abstract— This article examines the Court of Appeal's judgment in *Byers v Saudi National Bank*. It argues that there are two different understandings of the relationship between a beneficiary's equitable interest and the relevant trust, and that both are compatible with the Court of Appeal's account of liability for knowing receipt of trust assets; it is submitted that the Court of Appeal's treatment of authorities is anomalous, regardless of one's theoretical stance on the nature of beneficial interest. The article also analyses the two principal requirements set out by the Court of Appeal for a successful claim in knowing receipt – a continuing proprietary interest and unconscionability of retention – and notes some troublesome practical implications of the law laid down. Finally, it reflects on why the Court of Appeal would affirm such inconvenient rules, especially when its handling of case law is so irregular. The article concludes that *Byers* is the result of a broader trend of acritical reliance, on part of courts, on the concept of the trust.

[1] Trinity College, Oxford. I am grateful to the OUULJ editorial team for their helpful comments. The usual disclaimers apply.

Introduction

'Nobody with any experience of legal teaching can doubt the power which legal concepts exercise over the minds of law students,' says Atiyah.[2] But what happens when law students graduate and, say, are appointed Lord Justices of Appeal?

In *Byers v Saudi National Bank*, the Court of Appeal found itself dealing with a claim in knowing receipt brought by Saad Investments Company Ltd (SICL) and its liquidators against the respondents, to whom shares held on trust for SICL had been unlawfully transferred.[3] The Court of Appeal's judgment discussed only one conceptual question of general significance – that is, whether the claimant must prove a continuing proprietary interest in the asset knowingly retained by the defendant – and unanimously upheld Fancourt J's affirmative answer.[4] In isolation, this judicial concurrence appears to be a reassuring sign of the coherence and normative merits of the judgment. However, the concerns already expressed by commentators suggest that the law might not be as tidy as the courts make it out to be.

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[2] P Atiyah, *The Rise and Fall of Freedom of Contract* (1st edn, OUP 1979) 685.

[3] [2022] EWCA Civ 43, [2022] 4 WLR 22.

[4] The 'Saudi Arabian Law Issue' and the 'Valuation Issue' were highly fact-specific and, in the latter case, also an obiter dictum: see *Byers* (n 2) [6], [114]. cf *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424, in which the Supreme Court expressly assessed not only the meaning of 'disposition' in s 127 Insolvency Act 1986, but also the nature of equitable beneficial interest; the Supreme Court reversed the decision of the Court of Appeal, which had in turn reversed the Chancellor's order to stay proceedings.

The first part of this article attempts to defend the internal coherence of the Court of Appeal's reasoning. As a matter of theory, there are two possible interpretations of the judgment – each reflecting a different understanding of the relationship between equitable interest and trust. Although each has difficulties, both remain plausible. As a matter of authority, the Court of Appeal's treatment of precedent and commentary is objectionable, but can be understood as an understandable, albeit misguided, effort to avoid acknowledging that there is uncertainty in the law and avoid engaging with what the law should be. The second part of this article will address two troublesome implications of the judgment. One pertains to the awkward scope of the continuing proprietary interest requirement, oblivious to purpose trusts while unduly generous towards those who hold remote proprietary interests. The other concerns the requirement of unconscionability and, in particular, its practical shortcomings. The reason for the Court of Appeal's affirmation of such inconvenient requirements seems to lie not in Newey LJ's whim, but in a more general judicial trend of acritical reliance on the concept of trust. *Byers*, the latest manifestation of this mischievous trend, demonstrates that courts should reconsider their approach.

1. Internal coherence

The judgment's internal logic is defensible, twice over. The Court of Appeal's ratio decidendi is that, first, the knowing recipient is a constructive trustee and that, second, the claimant must prove a continuing proprietary interest in the subject-matter knowingly

received.[5] There are two alternative interpretations which explain the connection between one point of law and the other.

One interpretation of *Byers* posits that the trust structure runs with its subject-matter: every successor in title to a trustee is himself a trustee unless transfer of the subject-matter extinguishes the beneficiary's equitable interest; proving a continuing equitable interest is therefore essential to proving the knowing recipient's status as trustee.[6] The principal difficulty with this interpretation is that case law tends to suggest that the trust structure is not itself persistent. In *Re Montagu's Settlement Trusts*, Megarry V-C emphatically distinguished between a successor in title being bound by 'some equity' – that is, liable to the beneficiary's specific (or 'proprietary') claim – and him also bearing 'the personal burdens and obligations of trusteeship'. The implication is that, defences aside, what persists against successors in title is the equitable interest alone, divorced from the trust, and that only some successors in title are, additionally, and on a personal basis, trustees.[7] This arrangement has since been confirmed by the

[5] *Byers* (n 2) [13], [47], [56], [75]-[76]; *ED&F Man Capital Markets Ltd v Wong* [2022] EWHC 229 (Comm) [635]-[642].

[6] A Georgiou, 'Knowing Receipt: Continuing Trusts and Unconscionability in *Byers v Saudi National Bank*' (2023) 86(1) MLR 276, 281-82. See also B Au-Yeung and S Y C Leung, 'In Search of a Laundry Receipt' (2022) 5 Trusts & Trustees 360, 363.

[7] [1987] Ch 264, 272-73, 285, 271, 276. In support of this interpretation of *Montagu*, P Birks, 'Knowing Receipt: *Re Montagu's Settlement Trusts* Revisited' (2001) 2 Global Jurist Advances 1: Birks envisions the equitable 'proprietary' claim as an equitable form of *vindicatio rei*, and, therefore, necessarily distinct from a claim in knowing receipt, which protects the equitable interest through the law of obligations, based either on wrongdoing or unjust enrichment.

House of Lords in *Westdeutsche Landesbank Girozentrale v Islington LBC*.[8] An obiter dictum of Lloyd LJ in *Independent Trustee Services Ltd v GP Noble Trustees*, suggesting the contrary, casts some doubt on *Montagu*, but falls short of authoritatively departing from it. Indeed, other commentators, including the very practitioners' textbook cited by Lloyd LJ, maintain a distinction between liability under the specific claim and under a constructive trust,[9] and Lloyd LJ himself admitted that 'one [should not be] misled into thinking that to call the relationship one of trustee and beneficiary tells you, of itself, what the duties and liabilities of the trustee are'.[10]

Nonetheless, to envision the trust itself as persistent is not mere 'semantics',[11] but a meaningful choice with significant practical implications. First, in the context of the beneficiary's specific claim, the defendant's state of mind is relevant only for the purposes of the equity's darling defence. Equating liability for knowing receipt to liability to the specific claim would therefore

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Whether the 'proprietary' claim is actually analogous to *vindicatio* is another question.

[8] [1996] AC 669 (HL) 706-7.

[9] C Mitchell et al, *Underhill and Hayton Law of Trusts and Trustees* (20th edn, LexisNexis 2022) para 103.12; C Mitchell and S Watterson, 'Remedies for Knowing Receipt', in C Mitchell (ed) *Constructive and Resulting Trusts* (Hart Publishing 2010) 129; W Swadling, 'The Nature of "Knowing Receipt"' in P Davies and J Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing 2017) 309-10.

[10] [2012] EWCA Civ 95; [2013] Ch 91 [80], cited in S Agnew and B McFarlane, 'The Paradox of the Equitable Proprietary Claim' in S Agnew and B McFarlane (eds), *Modern Studies in Property Law* (Hart Publishing 2019) 304; Georgiou (n 5) 283-84.

[11] Suggested, tentatively, in *Westdeutsche* (n 7) 707. The view ultimately taken by the House of Lords in that judgment was that the trust structure is not persistent.

reduce the 'knowledge' element to the actual, constructive, or imputed notice necessary to rebut the equity's darling defence.[12] Second, if the recipient's liability is derived from the original trust, the content of the duties which he owes must necessarily be found in the terms of that trust. The knowing recipient could not plausibly be subjected to the same duties as the original trustee, so his duties can only be ascertained through a difficult exercise of implication. One could argue, for example, that the restrictions imposed on trustees' power to delegate reflect a broader principle that every trust imposes duties on the original trustee personally, and that the duties affecting knowing recipients are hence to restore the misappropriated assets to the original trustee and, in the meantime, to keep them in safe custody.[13] However, the restrictions on delegation might simply be prophylactic measures intended to prevent dereliction of the duties of trusteeship, calling into question the proposed implication.

An alternative interpretation of Newey LJ's judgment starts not from the continuing proprietary interest requirement, but from unconscionability. Accepting that a trustee's successors in title need not be trustees themselves, it posits that knowing recipients are trustees under a new constructive trust arising, like all constructive trusts, from the unconscionability of the recipient's conduct.[14] The reason for requiring a continuing interest lies in the particular unconscionable conduct required:

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[12] Georgiou (n 5) 284: 'in order to be liable for breach of trust, a trustee must know (or be reasonably expected to know) of the facts which make them a trustee'.

[13] ibid 282-83.

[14] On the general requirement of unconscionability, *Westdeutsche* (n 7) 705; see the emphasis placed on unconscionability in *Byers* (n 2) [18], [61].

unconscionability is of retention and, as a matter of moral reasoning, requires that the assets retained actually be affected by a proprietary interest. Otherwise, retention is not unconscionable, and liability is not morally justified.[15] The merit of this interpretation is that it allows the doctrine of knowing receipt to develop its own identity, distinct from the specific claim. The degree of knowledge required for unconscionability could – and should – exceed the level of notice required to rebut the equity's darling defence. Thus, liability for knowing receipt would have a unique scope.[16] At the same time, recognising an entirely new trust would afford courts greater freedom in shaping its substance, unaffected by the constraints of implication and instead guided by the general principles of equity and the particular function performed by liability for knowing receipt.[17] In this light, knowing recipients could – and should – be subject

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[15] *Byers* (n 2) [18]-[19], [76]; in support of this interpretation, see Mitchell and Watterson (n 8) 129-30 and, since the Court of Appeal's judgment, Oliver Humphrey et al, 'Knowing Receipt in the Court of Appeal: a Decision on the Necessity of a Continuing Proprietary Interest in the Trust Property' (2022) 3 BJIB&FL 208.

[16] *Montagu* (n 6) 285, conclusions (1) and (3); Swadling (n 8) 311, 314, who distinguishes between knowledge and notice, and dismisses as confused and unauthoritative the occasional use of the language of notice in the context of knowing receipt (eg, *Papadimitriou v Crédit Agricole Corp & Investment Bank* [2015] UKPC 13 [33]); R Chambers, 'The End of Knowing Receipt' (2016) 2 Canadian Journal of Comparative and Contemporary Law 1, 11-14. On constructive and imputed notice, *Pilcher v Rawlins* (1871-72) LR 7 Ch App 259, 273-74 and *Hunt v Luck* [1902] 1 Ch 428 (CA); cf Georgiou (n 5) 282, 286.

[17] As done, for example, by Collins J in *Englewood Properties Ltd v Patel* [2005] 1 WLR 1961 (Ch D), allowing vendor-trustees under *Lysaght v Edwards* (1876) 2 Ch D 499 to use the subject-matter for their own benefit, provided they also preserve the subject-matter in the state in which it was when the agreement took effect.

to obligations 'over and above [their] core restorative duty', possibly including duties 'to take reasonable steps to preserve [the assets'] value', to 'get in the trust property', and fiduciary duties such as that to account for improper gains.[18] Thus, liability for knowing receipt would have a unique content, informed by its unique scope: the ulterior burdens of trusteeship would be justified by the greater blameworthiness of those affected,[19] explaining why a claimant would go to the trouble of bringing an action in knowing receipt as opposed to the specific claim.[20]

The 'new trust' interpretation encounters some specific difficulties too. Firstly, emphasis on unconscionability of retention entails that 'liability for knowing receipt' is a misnomer. Untidiness is exacerbated by Newey LJ occasionally characterising knowing-receipt liability as a form of equitable wrongdoing[21] and equating liability for knowing receipt to liability for dishonest assistance as instances of constructive trusts, given

[18] Mitchell and Watterson (n 8) 139-42.
[19] cf Swadling (n 8), 324, 326-27.
[20] cf S Agnew and B McFarlane, 'The Nature of Trusts and the Conflict of Laws' (2021) 137 LQR 405, 422-24, who treat the claim in knowing receipt as the alter ego of the specific proprietary claim. To the same effect, M Dixon, 'Knowing Receipt, Constructive Trusts and Registered Title' [2012] 76 Conv 439, cited in *Byers* (n 2) [65]; N Hopkins, 'Recipient liability in the Privy Council: *Arthur v Attorney General of the Turks & Caicos Islands*' [2013] 77 Conv 61, cited in *Byers* (n 2) [65], and Au-Yeung and Leung (n 5), 365.
[21] *Byers* (n 2) [69] and, it seems, [76]. Swadling (n 8), 327-30. cf the more prevalent use of the language of trusts: *Byers* (n 2) [13], [39], [47]-[48], [54], [76].

that the status of dishonest assistants is still controversial.[22] Secondly, whereas one of the benefits of the 'new trust' interpretation is that it affords courts greater freedom to shape its requirements and consequences, the Court of Appeal has foregone the opportunity to clearly address those issues, deferring to *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* on the necessary knowledge[23] and remaining virtually silent on the nature and content of the knowing recipient's duties.[24] The failure to provide much-needed clarity on important ancillary questions may be taken to denote a lack of confidence in the law laid down. Thirdly, trust law insists that constructive trusts can only be institutional, arising as the relevant facts occur.[25] Because ascertaining unconscionability involves judgement on part of courts, an institutional account of the *Byers* trust looks contrived.[26] Nevertheless, other constructive trusts have been recognised as valid despite involving similar value judgments – the best example is Arden LJ's trust in *Pennington v Waine*.[27] By the same token, the

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[22] *Byers* (n 2) [13]; *Royal Brunei Airlines v Tan* [1995] 2 AC 378 (HL); *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189; *Group Seven Limited v Notable Services LLP* [2019] EWCA Civ 614, [2020] Ch 129; Elliott & Mitchell, 'Remedies for Dishonest Assistance' (2004) 67 MLR 16; Mitchell and Watterson (n 8) 134, 146-48.

[23] [2001] Ch 437 (CA).

[24] On the debate on whether the liability for knowing receipt is the primary restorative duty or a secondary, remedial duty arising from breach of the reparative obligation, see Mitchell and Watterson (n 8) 131, 135, 137-38; cf S Gardner, 'The Moment of Truth for Knowing Receipt?' (2009) 1 LQR 20, 22; Chambers (n 15) 5-8.

[25] *Westdeutsche* (n 7) 714, 716.

[26] Swadling (n 8) 325.

[27] [2002] 1 WLR 2075 (CA). See also Clarke LJ's trust, which requires that the donor did all which she thought was necessary to perfect the gift. Likewise, see the trust arising from cooperative acquisitions:

trust in *Byers* should be recognised as institutional, notwithstanding the role of courts determining when it arises. Instead, criticism should be addressed at courts' broader reliance on fictional analyses.[28] The more serious obstacle to an institutional account of *Byers* is *Williams v Central Bank of Nigeria*, in which Lord Sumption expressly described the liability in question as 'purely remedial'.[29]

The inconsistency between *Byers* and *Williams* regarding the remedial character of liability provides insight into a broader flaw in the Court of Appeal's judgment – its highly questionable treatment of authority. As has already been noted, the judgment 'overlooks other significant statements in *Williams*' and 'showed perhaps too much deference to academic commentary', while 'the cases on which the Court of Appeal relied to show the existence of the "continuing trust" [or "continuing interest"] requirement do not quite establish the point'.[30] Criticism might be even bolder. More puzzling than simply ignoring several crucial passages in *Williams*,[31] the very passages of *Williams* cited in the judgment

Banner Homes Group plc v Luff Developments Ltd [2000] Ch 372 (CA), but cf *Generator Developments v Lidl UK GmbH* [2018] EWCA Civ 396, [2018] 2 P&CR 7. Finally, see the trust arising from the fraudulent taking outright of land: *Nasrullah v Rashid* [2018] EWCA Civ 2685, [2019] 2 WLR 1310.

[28] The issue transcends constructive trusts. On express trustees' duty to account, Swadling (n 8) 325-26. On proprietary estoppel, S Bright and B McFarlane, 'Proprietary Estoppel and Property Rights' (2005) 2 CJL 449. In contract, S Smith, 'Remedies for Breach of Contract' in G Klass, G Letsas, and P Saprai (eds), *Philosophical Foundations of Contract Law* (OUP 2014) 341, 347, 355-56.

[29] *Williams* (n 21) [9].

[30] Georgiou (n 5), 279-81.

[31] For example, *Williams* (n 21) [6], [9], [13], [90], [161], [165].

appear to contradict the view that knowing receipt generates a trust. For instance:

> The essence of a liability to account on the footing of knowing receipt is that the defendant has accepted trust assets knowing that they were transferred to him in breach of trust and that he had no right to receive them. His possession is therefore at all times wrongful and adverse to the rights of both the true trustees and the beneficiaries. No trust has been reposed in him. He does not have the powers or duties of a trustee, for example with regard to investment or management. His sole obligation of any practical significance is to restore the assets immediately.[32]

While the quote could be reconciled with the law laid down in *Byers* – the 'trust' reposed might be understood in the colloquial, non-legal sense – the Court of Appeal made no effort to do so. Other cases were cited with similar clumsiness.[33] Turning to the Court of Appeal's treatment of commentary, one could argue that 'it is undoubtedly good to see this level of dialogue between courts and commentators'.[34] However, the Court of Appeal's

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[32] *Williams* (n 21) [31], cited in *Byers* (n 2) [51]. Emphasis moved.
[33] *Akindele* (22) [69]-[70], cited in *Haque v Raja* [2016] EWHC 1950 (Ch D) [46], cited in *Byers* (n 2) [67]. In addition, the emphasis placed on *Akindele* is not accompanied by a proper discussion – or even a mention – of *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28, [2004] 1 WLR 1846 [4], which severely undermined the authority of *Akindele*: see Georgiou (n 5), 285 and Swadling (n 8) 306-7. See also n 22.
[34] Georgiou (n 5), 279.

discussion of Mitchell and Watterson's work was exceptionally reverential, and came at the cost of disregarding similarly credible and comparably influential views.[35] It is thus difficult to find any meaningful dialogue. It is especially anomalous for the Court of Appeal to map the evolution of the co-Authors' opinions in relation to case law, treating them as if authorities.[36] Pragmatically, there is the issue of determining on which matters the Court of Appeal gave legal effect to the co-Authors' views: is it only on the nature of the cause in action, or also on the content of the duties imposed on knowing recipients, or perhaps even affirming *Montagu*? Although the ambiguities and discrepancies within the available case law placed the Court of Appeal in a thorny situation, the clumsy treatment of authority undermines the persuasiveness of the Court of Appeal's judgment in its entirety, regardless of one's preferred theoretical rationalisation, and exposes the law laid down to being overturned.[37] Ultimately, both the decision itself and the rule of law would have benefitted from the regulatory gap being more openly noted and the Court engaging in transparent normative reasoning.

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[35] Swadling (n 8); P Birks, 'Misdirected Funds: Restitution from the Recipient' [1989] Lloyd's Maritime and Commercial Law Quarterly 296; A Burrows, *The Law of Restitution* (2nd edn, Sweet & Maxwell 2005) 202-6

[36] *Byers* (n 2) [49], [54]

[37] However, *Byers* would not be the only rule of equity established through a liberal attitude towards authorities: see A Televantos, 'Losing the Fiduciary Requirement for Equitable Tracing Claims' (2017) 133 LQR 492. It is therefore impossible to reliably predict the future of *Byers*.

2. Implications

The more worrying aspect of *Byers* is not why, with reference to doctrine and precedent, it lays down certain points of law, but what those points of law, going forward, entail.

A. Suitable continuing interests

As a preliminary point, debate is still very much alive on whether the beneficiary's equitable interest – the only interest contemplated by the Court of Appeal – is proprietary.[38] The language of the judgment hence rests on a hefty conceptual assumption. Making that assumption, the 'continuing proprietary interest' remains problematic, being at the same time under-inclusive and over-inclusive. The primary problem is that, by presupposing that there is an intelligible equitable interest in every trust arrangement, the Court of Appeal draws too narrow a scope for liability. In purpose trusts, some of which are valid under English law,[39] there is no figure who can be said to hold an equitable interest. There is an argument that an equitable interest, despite not being held by anyone, still exists in the abstract. Such an arrangement seems, however, awkward. Regardless, there is nobody concretely capable of suing the knowing recipient of misappropriated assets. It might be argued that beneficiaries-in-

[38] cf *Akers* (n 3) [14]-[18], [82] and Case C-294/92 *Webb v Webb* [1994] ECR I-1717, as well as the vast commentary, amongst which McFarlane and Stevens, 'What's special about Equity?', in Klimchuk, Smith, and Samet (eds), *Philosophical Foundations of the Law of Equity* (OUP 2020) and S Douglas, *Liability for Wrongful Interference with Chattels* (Hart Publishing 2011) 39-47.

[39] Charities Act 2011, s 2(1); *Re Endacott* [1960] Ch 232 (CA).

fact[40] and enforcers[41] hold, or should hold, a continuing proprietary interest capable of grounding a claim in knowing receipt, but such an arrangement would be unprincipled. Firstly, proprietary interests must be relatively certain,[42] while the identity of beneficiaries-in-fact and enforcers, as well as their ability and willingness to exercise their entitlements, is unpredictable. Secondly, conferring proprietary interests on enforcers erodes the distinction between enforcers and beneficiaries-in-law, undermining the distinct notion of a purpose trust. It must follow that, under *Byers*, knowing recipients are afforded an immunity from liability on the basis of the structure of the trust breached. Yet, such a conclusion is difficult to justify – if a purpose trust is a valid trust, it deserves the same protection as any other valid trust, including the protection offered by liability for knowing receipt.

Perhaps, courts have already realised the under-inclusivity, and have attempted to counteract it by focusing, rather than on the claimant's continuing interest, on the trustee's misappropriation. In *Courtwood Holdings SA v Woodley Properties Ltd*, for example, Nugee J argued that 'the foundation [of liability for knowing receipt] is that the assets do not belong in equity to the recipient; and the foundation of the fact that the assets do not

[40] Who, as opposed to 'beneficiaries-in-law', merely stand to incidentally benefit from the pursuit of the trust's purpose. *Re Astor* [1952] Ch 534 (Ch D); *Re Denley* [1969] 1 Ch 373 (Ch D) 382-84.
[41] *Re Thompson* [1934] Ch 342 (Ch D); Hayton, 'Developing the Obligation Characteristic of the Trust' (2001) 117 LQR 96; Parkinson, 'Reconceptualising the Express Trust' [2002] CLJ 657.
[42] *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1247-48; *Bailey v Angove's PTY* Ltd [2016] UKSC 47, [2016] 1 WLR 3179 [28].

belong to the recipient in equity is that the transfer by which the assets were transferred is a flawed transfer.'[43] Crucially, there is no requirement that the assets 'belong in equity' to the claimant. To the same effect, Fancourt J maintained that 'the reason for liability is that the transferee has knowingly dealt with (or retained) property that belongs to the trust inconsistently with his duty'.[44] The recurrent implication, it seems, is that breach of a purpose trust is sufficient to vitiate the unlawful transaction and allow enforcers – without a continuing interest – to assert a constructive trust for the original purpose. However, this solution assumes that the trust itself can, if breached, produce third-party effects. Instead, *Montagu* and *Westdeutsche* suggest that, in the absence of a continuing equitable interest capable of binding third parties, the unlawful transfer of purpose-trust assets remains valid, but gives rise to personal liability on the transferor-trustee's part. Thus, the solution proposed is conceptually defensible, but at odds with a significant portion of case law.

A secondary problem with the continuing proprietary interest requirement is that it impliedly admits that a person can bring a claim in knowing receipt even if he does not hold an equitable beneficial interest under the trust breached, provided he has some other proprietary interest in the misappropriated assets. The expansive attitude might appear reasonable – even desirable – to rescue a beneficiary who loses his equitable interest but, still holding some other proprietary interest enforceable against the recipient, can nonetheless bring about a constructive trust. Nevertheless, one could also argue that, when compared to the

[43] [2018] EWHC 2163 (Ch D), cited in *Byers* (n 2) [61].
[44] [2021] EWHC 60 (Ch D) [110], cited in *Byers* (n 2) [27]. Emphasis added.

equitable beneficial interest lost, the interest asserted – hypothetically, a modest easement derived from the fee simple misappropriated – would have only a loose connection to the recipient's knowing retention, and the benefits and burdens imposed by the constructive trust would be disproportionate. From a systemic perspective, to allow the former beneficiary to assert a trust would undermine whichever operation of law extinguished his equitable interest: for instance, when a beneficiary's equitable interest over a registered estate is postponed by the registrable disposition of the estate,[45] *Byers* risks undermining the dynamic security which registration promotes. More alarmingly, there is nothing in *Byers* limiting the claim in knowing receipt to disappointed beneficiaries, and strangers to the original trust may well have standing. Even if the constructive trust were adjusted to benefit the original beneficiary rather than the stranger-claimant, the result would remain incoherent: first, the continuing interest requirement would be undermined; second, the protection of beneficiaries would be largely random, depending on whether some third party happens to hold a suitable interest and to be willing to bring an action. It would therefore have been much more convenient for the Court of Appeal to require a continuing equitable beneficial interest, curing the over-inclusivity (but not the under-inclusivity).

B. The difficulty with unconscionability

Unconscionability is a notoriously troublesome requirement. Many commentators who disagree as to the nature of liability for knowing receipt are unified by their aversion towards the use of unconscionability in adjudication, describing it as 'too imprecise

[45] Land Registration Act 2002, s 29.

and open-textured',[46] 'hopeless',[47] and 'obfuscatory language' which 'gives no guidance' and is 'no more than a fifth wheel on the coach'.[48] Earlier, Arden LJ's reasoning in *Pennington*, which appeals to the same concept, was met with the same criticism.[49] Although unconscionability is habitually employed throughout equity[50] – indeed, even portrayed as a something of a unifying concept[51] – it appears to be consistently rejected in practice. In particular, unconscionability plays no role in the application of most constructive trusts: when trusts arise from breach of fiduciary duty,[52] specifically enforceable agreements,[53] want of formality,[54] mistaken payments,[55] fraudulent acquisition of property,[56] the principle in *Re Rose*,[57] or common intention,[58] courts do not mention unconscionability at all. Even the constructive trust under *Ashburn Anstalt v Arnold*, originally aimed at avoiding inequitable results upon the disposition of an estate

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[46] Georgiou (n 5), 285-86.
[47] Swadling (n 8) 313-14.
[48] P Birks, 'Receipt' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 226; Mitchell and Watterson (n 8), hardly mention unconscionability.
[49] H Tjio and T M Yeo, '*Re Rose* Revisited: The Shorn Lamb's Equity' [2002] LMCLQ 296; P Luxton, 'In Search of Perfection: The *Re Rose* Rule Rationale' [2012] Conv 70.
[50] M Halliwell, 'Perfecting Imperfect Gifts and Trusts: Have We Reached the End of the Chancellor's Foot?' [2003] Conv 192.
[51] *Westdeutsche* (n 7) 705; H Delany and D Ryan, 'Unconscionability: A Unifying Theme in Equity' [2008] Conv 401.
[52] *FHR European Ventures LLP v Mankarious* [2014] UKSC 45, [2015] AC 250.
[53] Such as in *Englewood* (n 16).
[54] *Rochefoucauld v Boustead* [1897] 1 Ch 196 (CA); *Bannister v Bannister* [1948] 2 All ER 133 (CA).
[55] *Chase Manhattan Bank v Israel-British Bank* [1981] Ch 105 (Ch D). The trust seems to still exist after *Westdeutsche*, albeit greatly restricted.
[56] For example, *Nasrullah* (n 28).
[57] [1952] Ch 499 (CA).
[58] *Stack v Dowden* [2007] UKHL 432, [2007] 2 AC 432.

by a licensor,[59] has been pragmatically developed to require, in place of an 'affected conscience', an undertaking on the transferee's part.[60] The constructive trust arising from cooperative acquisition, by contrast, is still based on unconscionability and – perhaps not wholly incidentally – is an area of uncertainty.[61] Lastly, the Privy Council has been reluctant to employ unconscionability in *Royal Brunei Airlines*, with Lord Nicholls expressly noting its volatile, context-dependent meaning.[62] The general aversion to unconscionability can be explained most straightforwardly by the threat posed to the rule of law by such a vague concept. An ulterior explanation is that 'unconscionability' seems to have a remedial connotation, and is therefore at tension with the rule that constructive trusts must be institutional: it does not seem a coincidence that, in *Westdeutsche*, Lord Browne-Wilkinson affirmed the role of unconscionability while also tentatively suggesting that English law might recognise remedial constructive trusts; the same correlation is visible in commentary.[63] Thus, the greater flexibility offered by unconscionability appears to be dwarfed by its drawbacks.

There are two reasons why courts should develop *Byers* by replacing the requirement of unconscionability. One reason is the inherent shortcomings of unconscionability: courts may want to supplant unconscionability with a clearer test capable of being applied prospectively, à la *Ashburn Anstalt*. Another reason pertains to the scope of liability for knowing receipt more broadly. On the one hand, there is pressure to loosen the continuing interest requirement in the interest of properly upholding purpose trusts; loosening that requirement would

[59] [1989] Ch 1 (CA).
[60] *Chaudhary v Yavuz* [2011] EWCA Civ 1314, [2013] Ch 249.
[61] See n 28.
[62] *Royal Brunei Airlines* (n 21) 392.
[63] Delany and Ryan (n 50), 417-25.

demand tightening unconscionability to retain the scope of liability within reasonable bounds. On the other hand, there is an inverse pressure to loosen unconscionability so as to prevent the law from lending its agency to schemes of asset laundering, whereby knowing recipients escape liability by exploiting jurisdictions which do not recognise equitable beneficial interests.[64] Ultimately, the only solution is to depart from, or at least radically rethink, unconscionability. One option is to accept that the trust structure itself is proprietary, reducing knowing receipt to the specific claim and replacing unconscionability with the actual, constructive, or imputed notice required to negative the equity's darling defence. Alternatively, one may adopt the personal account of knowing receipt and, to distinguish it from the specific claim, set a higher bar for liability. From this perspective, economic analysis has been proposed as a guide to the courts' application of unconscionability. The benefit of this reform lies in its ability to reconcile flexibility – distinguishing, for example, between transactions concerning shares and land – with reliable, objective criteria.[65] From a fully normative perspective, the proposal might be improved by shedding the label of unconscionability, conferring greater transparency to the requirement and greater legitimacy to the doctrine of knowing receipt. A more moderate alternative, which preserves the focus on the defendant's mental state, is to require dishonesty. Albeit a somewhat slippery notion too, dishonesty has been more carefully developed by case law, and – if balanced by appropriately

[64] See Au-Yeung and Leung (n 5) 366-67.
[65] S Barkehall Thomas, '"Goodbye" Knowing Receipt. "Hello" Unconscientious Receipt' (2001) 2 OJLS 239.

burdensome duties – would therefore be an improvement.[66] One could even require a conspiracy between the defendant and the trustee in default, restricting the scope of liability significantly but also justifying especially burdensome duties. Conversely, both dishonesty and conspiracy give rise to concerns for the integrity of the broader legal landscape: both tests narrow the scope of liability for knowing receipt significantly, disregarding recipients who, while not deserving egregiously burdensome duties, would be treated unduly leniently by the specific claim alone. Therefore, the better attitude towards reform is cautious and incremental. Nevertheless, the flaws of the current arrangement operate very strongly in favour of some reform. Indeed, considering the ambiguities and discrepancies in authority which, effectively, granted the Court of Appeal regulatory carte blanche, the affirmation of such inconvenient requirements begs for an explanation.

C. The concept of trust

Newey LJ's account of knowing receipt was not plucked out of thin air. Quite to the contrary, its central elements – constructive trust, proprietary interest, and unconscionability – have a pre-eminent role in contemporary case law and are connoted by a sense of solemnity and authority. Therein lies the problem.

The awkward implications of *Byers* depend, at least in part, on underlying anomalies in the concept of trust. For instance, while the continuing proprietary interest is under-

[66] *Re McArdle* [1951] Ch. 669 (CA) 677; *Wheatley v Commissioner of Police of the BVI* [2006] UKPC 24, [2006] 1 WLR 1683; *Ivey v Genting* [2017] UKSC 67, [2018] AC 391; *R v Barton* [2020] EWCA Crim 575, [2021] Q.B. 685. See also *Royal Brunei Airlines* (n 23) 392 and Birks (n 47) 226.

inclusive with respect to purpose trusts, the law on such trusts is far from coherent. On the one hand, equity habitually protects those who reasonably rely on others' acts[67] and seeks to avoid disappointing the intentions of settlors,[68] suggesting that trust-like arrangements set up for the benefit of a purpose should be faithfully upheld. On the other hand, recognising purpose trusts would suppress the beneficiary principle; that principle is desirable not because the trust would otherwise be unworkable – it need not be[69] – but because the principle draws neat conceptual boundaries for the notion of trust, and its removal risks collapsing the notion into an unintelligible mass. The normative uncertainty manifests itself as a checkerboard solution, which seems to validate private purpose trusts according to judicial caprice.[70] Considering that the issue of purpose trusts was far removed from the facts of *Byers*, it is hardly surprising that the Court of Appeal did not review that area of law, ignoring the risk of a troublesome interaction between its judgment and the checkerboard rules. Courts' recognition of some purpose trusts speaks to a broader tendency to widen the scope of the concept of trust tout court. One egregious example is the rise of massively

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[67] See the doctrines of estoppel: for example, *Collier v Wright (Holdings) Ltd* [2007] EWCA 1329, [2008] 1 WLR 643 and *Davies v Davies* [2016] EWCA Civ 463, [2016] 2 P & CR 10.

[68] See the mechanisms which except, or circumvent, formality requirements: *Rochefoucauld v Boustead* [1897] 1 Ch 196 (CA); *Bannister v Bannister* [1948] 2 All ER 133 (CA); *Solomon v McCarthy* [2020] 1 WLUK 130 (CC); *Re Gardner (No 2)* [1923] 2 Ch 230 (Ch D). See also McFarlane, 'Constructive Trusts Arising on a Receipt of Property Sub Conditione' (2004) 120 LQR 667; Gardner, 'Reliance-Based Constructive Trusts' in Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010).

[69] See nn 39-41.

[70] *Endacott* (n 38); *Denley* (n 39).

discretionary trusts, 'in which trustees' dispositive discretions do not merely qualify the beneficial interests but effectively displace them, one might even say overwhelm them'; although such a trust 'has a certain logic to it', it is 'a kind of deformation of the trust device'.[71] A more mundane example is the proliferation of constructive trusts, each arising in different circumstances and (quite rightly) producing different legal consequences.[72] Unconscionability and the institutional account of constructive trusts can thus be understood as attempts to restrain the expansion of the constructive trust; like the checkerboard solution in *Endacott*, they are reactions to the gradual dilution of the concept of trust, the boundaries of which are moving further and further from the stereotypical express trust for beneficiaries. Nevertheless, unconscionability and the institutional account failed in their objective long before Newey LJ lifted his pen: courts seem to have impliedly recognised that unconscionability is a threat to the rule of law, but have not yet rejected it openly and generally, and have mangled the institutional account with fictional analyses. The root cause of these uncomfortable developments seems to be the courts' failure to resolve the critical controversies that lie at the core of the concept of trust – that is, the relationship between trusts and equitable interests, as well as

[71] L Smith, 'Massively Discretionary Trusts' (2017) 1 CLP 17, 27-28

[72] *Englewood* (n 16); *FHR* (n 51); *Stack* (n 57); *Nasrullah* (n 28). For a critical account, portraying constructive trusts as a façade for equitable or restitutionary relief, see W Swadling, 'The Fiction of the Constructive Trust' (2011) 64 CLP 1; *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555 (Ch D) 1579-82. cf a more moderate view, which accepts that some constructive trusts are 'true trusts' while guarding against the risk of improperly extending the label, see *Paragon Finance v Thakarer* [1999] 1 All ER 400 (CA) 408-9; *Williams* (n 21) [9].

the proprietary status of each. This deprives the law of trusts of a stable foundation. In this sense, trusts sit in stark contrast to contract – an intuitive concept, openly examined through the lens of legal theory, which has retained a relatively narrow scope despite profound conceptual development.[73]

Byers itself is a manifestation of the acritical attitude generally employed by courts towards the concept of trust, relying on trusts to resolve the dispute at hand but failing to properly engage with the nature of trusts and equitable interests. The Court of Appeal inherited, and then applied, powerful doctrines – constructive trust and unconscionability – tailored to appease both sides of the *Montagu* debate, while turning a blind eye to the latent anomalies revealed. Reinterpreting knowing receipt as wrongdoing or unjust enrichment is likely hence to circumvent the troublesome anomalies. However, one would have to examine and tinker with the concepts of equitable wrongdoing and unjust enrichment so as to ensure conceptual coherence going forward and avoid exporting the sort of conceptual disorder which afflicts trusts. One should also realise that repudiating trusts, out of fear of inconvenient implications, is no solution: the trust remains a valuable conceptual device, and this fearful attitude, taken to a logical conclusion, would gradually empty the concept of meaning. The ideal solution, which transcends the claim in *Byers*, is instead to commit to the concept

[73] Atiyah (n 1), chapters 17-22; P Atiyah, 'Freedom of Contract and the New Right' in *Essays on Contract* (OUP 1990). See also, for example, G Gilmore, *The Death of Contract* (2nd edn, Ohio UP 1995); C Fried, *Contract as Promise* (2nd edn, 2015 OUP); P Atiyah, 'The Practice of Promising' in *Promises, Morals, and Law* (OUP 1982); S Smith, *Contract Theory* (OUP 2004); D Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Bloomsbury 2003).

of trust and harness it by resolving underlying uncertainties, policing conceptual boundaries from the inside to the outside.

Conclusion

Blame for the shortcomings of *Byers* is borne as much by the Court of Appeal as by past courts. The judgment lends itself to interpretations consistent with radically different understandings of the nature of trusts, but has problematic implications for future cases. In refusing to take a take a side in the debates – still unresolved – which underlie the concept of trust, *Byers* amounts to the latest acritical expansion of the concept. The judgment provides insight into two competing concerns affecting senior courts – first, their peculiar task of authoritatively furnishing legal concepts for the benefit of certainty and, second, the default adjudicative obligation – and the difficulty of mediating between the two. The judgment, as with the generality of cases dealing with trusts, seems to be too biased in favour of adjudicative convenience. Nonetheless, the statement that courts should think more carefully about the conceptual issues lurking behind disputes must be qualified, in that courts must not get lost in abstract puzzles to the detriment of litigants.

Interpreting Smart Contracts: the Reasonable Coder and the need for a Stronger Contextual Approach

Nick Hsu & Jagjit S. Sahota*

Abstract— Emerging technologies are increasingly used to create 'smart contracts': computer code that can automatically monitor, execute, and enforce a legal agreement hosted on the blockchain.[1]

Code is a language used to give instructions to computers and is thus fundamentally different from natural (human) language. So, is English contract law able to accommodate smart contracts? It is concluded that it is not without two inevitable modifications:

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[1] Marcelo Corrales Compagnucci, Mark Fenwick and Stefan Wrbka, 'The Technology, Use-Cases and Law of Smart Contracts', in Marcelo Corrales Compagnucci, Mark Fenwick and Stefan Wrbk (eds), *Smart Contracts, Technological, Business and Legal Perspectives* (1st ed, Hart Publishing, 2021) 1.

1. Firstly, the 'reasonable person' test to determine the meaning of an agreement must be adapted to code. This is because a usual reasonable person would not be able to understand the meaning of a coded term. The solution is to ask what a person with knowledge and understanding of code would understand the coded term to mean – that is, a 'reasonable coder'.[2] This requires the assistance of expert coders.

2. However, this modification substantially shifts the role of adjudication away from the judge and towards expert coders. This is because the average judge is unfamiliar with the way instructions in code are interpreted by a computer – as such, the expert coder's task does not only entail the translation of code but also its interpretation.

To counteract this, we argue that there must be a backshift towards a contextual approach to interpretation in the realm of smart contracts. Admissibility of 'surrounding circumstances' (including pre-contractual negotiations) would restore the judges' role to that of determining the contractual parties' agreement which underlies the code in the smart contracts.

[2] Law Commission, *Smart Legal Contracts, Advice to Government* (Law Com No 401, 2021), para 4.32.

Introduction

A 'smart contract'[3] is the next step in the development and evolution of data mapping and data transfer executed based on distributed ledger technologies ('DLT') such as blockchain. By enabling parties to trade directly with each other without an 'intermediary' in between (such as a bank), smart contracts offer several benefits such as the reduction of costs and the increase of outcome certainty. Smart contracts are not a hypothetical matter only of academic interest – rather, they are already deeply embedded in digital commerce. Currently, smart legal contracts are indeed useful only in respect of 'fairly rudimentary agreements', for example for transferring an amount of cryptocurrency to a person's wallet based on distinct conditions.[4] One of the most well-known cryptocurrencies, Ethereum, runs mainly based on smart contracts.[5] Nonetheless, smart contract technology is developing rapidly and becoming increasingly complex such that more types of clauses and obligations may be encoded in smart contracts.[6] Thus, smart contracts are of growing

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[3] The term was coined by Nick Szabo in 1994, Nick Szabo, 'Smart Contracts' (1994) <https://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart.contracts.html> accessed 1 May 2023.

[4] Law Commission (n 1) para 1.3.

[5] For example, in May 2021, around 45 million transactions were conducted by the thousands of smart contracts deployed on the Ethereum network each day, see Law Commission (n 1); Thibault Schrepel, *Smart Contracts and the Digital Single Market Through the Lens of a "Law + Technology" Approach* (1st ed, European Commission, 2021) 19; Ethereum Whitepaper <https://ethereum.org/en/whitepaper/>, accessed 1 May 2023.

[6] Law Commision (n 1) para 1.3.

importance for areas such as supply-chain-management,[7] life sciences, and healthcare.

The most authoritative views on smart contracts within UK contract law so far have been the Law Commission's report[8] and the statement published by the UK Jurisdiction Taskforce.[9] There is a consensus that the existing legal framework in England and Wales can accommodate smart contracts and that the existing rules of interpretation should apply.[10] **This** paper will critically analyse the Law Commission's conclusions and attempt to present a more nuanced view on the interpretation of smart contracts. Ultimately, while we agree that smart contracts can be interpreted, the use of the 'reasonable coder' test as suggested by the Law Commission must be adapted with an increased emphasis on a contextual approach to contractual interpretation. We further posit that precontractual negotiations may be used due to the similarities between the interpretation of smart contracts and the equitable remedy of rectification.

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[7] The organisation of supply chains tends to be costly, inefficient and error-prone because of their reliance on paper-based documentation. DLT-based smart legal contracts can be used to make supply chains more efficient through easy availability of documents and automaticity of transfers, see Parm Sangha, Veena Pureswaran and Smitha Soman, 'Advancing global trade with blockchain' (IBM, 2020) 16.

[8] Law Commission (n 1).

[9] UK Jurisdiction Taskforce, 'Legal Statement on cryptoassets and smart contracts' (The LawTech Delivery Panel, 2019) 135.

[10] The similarly important project on digital assets is still running, see Law Commission, *Digital Assets, Consultation Paper* (Law Com No 256, 2022).

A. Code and Automaticity

Generally, smart contracts can be divided into (1) natural language contracts ('regular contracts') with automated performance, (2) contracts recorded partially in natural language and partially in code with automated performance ('hybrid smart contracts') and (3) contracts recorded solely in code with automated performance ('fully coded contracts'). Since (1) is essentially no different from a regular contract, much of the essay will focus on fully coded contracts, as they more potently highlight the differences between interpreting regular and smart contracts. Hybrid smart contracts will be addressed briefly at the end.

The obvious difference between regular contracts and smart contracts is the expression of agreed terms in code instead of natural language. Another distinction is the handling of performance: smart contracts perform the parties' obligations automatically once the conditions are fulfilled, eliminating the necessity for human intervention, while regular contracts generally rely on the parties to perform the contract's obligations.[11] This is known as automaticity. Consider, for example, a contract between a restaurant owner and an insurance company where the insurer must compensate the restaurant owner if one of their suppliers, carrying goods, is delayed more than three hours.[12] Under a regular contract, the restaurant owner would need to check when exactly the suppliers arrived with the

[11] UK Jurisdiction Taskforce (n 8).

[12] See for a similar example, Stuart Levi, Christina Vasile and MacKenzie Neal, *Legal issues surrounding the use of smart contracts* (2nd edn, Blockchain & Cryptocurrency Regulation, 2020) 155.

goods and make a claim accordingly. Then, the insurer could either choose to accept the claim and manually pay the restaurant owner, or to contest the claim in an even longer process.[13] However, under a smart contract, a computer could receive a feed by a scanner to identify the time of arrival of the suppliers and then transfer the agreed amount from the insurer's account to the restaurant owner's account automatically if a supplier has been late for more than three hours. In contrast to human beings, computers and computer programs cannot fail to act or perform, unless there is an error which prevents the code from running. Once deployed on the blockchain, and the conditions for the performance are met, the program's fulfilment of the contractual obligations is inevitable and automated.[14]

This is possible primarily due to development of DLT such as the blockchain. The key effect of blockchain technology is that manipulating the structure of smart contracts becomes (nearly) impossible.[15] In essence, blockchains substitute trust with security measures. With blockchain, commercial parties can transact

[13] ibid.

[14] For this reason, computer scientists sometimes refer to smart contracts as 'self-executing' contracts. From a legal perspective, the 'execution' of the computer program constitutes the performance of the contractual obligations. See Sarah Green and Adam Sanitt (n 13) 191; Law Commission (n 1) para 2.14.

[15] This is because on the blockchain, the data is distributed: the output of the contract is validated by everyone on the network. For example, a single person is not able to release funds in contradiction to the provisions of the smart contracts purely in fact, because other people in the network will mark it as invalid, see Matthieu Quiniou, 'Blockchain, The Advent of Disintermediation' (1st ed, Wiley-ISTE, 2019), para 1.1.1. Further, the data stored on a block chain is immutable: after its creation, a smart contract can usually not be altered again.

money directly to each other (peer-to-peer), replacing the need for intermediaries or neutral third parties such as banks, which were formerly widely used to facilitate transactions.

B. Legal Enforceability

Nevertheless, it must be taken into consideration that not all smart contracts are legally binding. In English law, there is a contract when two or more parties have reached an agreement, intend to create legally binding relations, and have each provided consideration.[16] Smart contracts that fulfil these criteria have legal effect and may be examined by courts. However, there are also smart contracts that have not fulfilled these basic requirements for contract formation and by virtue of the technology. They could also be legally void. Consider a smart contract concluded between a seller and a buyer who is at the age of 16. Although this smart contract is effectively immutable once stored on the blockchain, the contract could be voided due to illegality because the buyer is below the age of 18. Such smart 'contracts' will continue to operate as computer programs and are naturally outside the scope of this article. Later references to smart contracts refer to 'a legally binding contract in which some or all of the contractual obligations are defined in and/or performed automatically by a computer program'.[17]

C. Significance

[16] Mindy Chen-Wishart, *Contract Law* (9th edn, Oxford University Press) 42.
[17] Law Commission (n 1) para 1.2.

The legal interpretation of smart contracts is crucial because they are all ultimately just programs, and it is often unclear what legal effects the actions of such programs may have. Take the above example of the restaurant owner and insurer. If supplies arrive late, but the insurer cannot pay (e.g., due to insufficient funds in the account), the smart contract may have a provision to notify both parties that payment has failed. There are two possible interpretations of such a scenario. The provision may be interpreted as a 'cure the breach' clause, thus giving the insurer time to cure the breach before he becomes liable for damages. Alternatively, it may be a termination clause, allowing the restauranteur to terminate the contract and sue for damages.

1. Interpreting Smart Contracts

A. Regular contractual interpretation[18]

First, it is necessary to establish the standard principles of contractual interpretation. English law takes an objective approach, disregarding what the parties themselves meant by the language they used. Instead, the court asks what the language used in the contract would have meant to a reasonable person.[19] However, within the broad contours of the objective approach, there continues to be significant academic and judicial disagreement on the proper approach to contractual interpretation.

[18] For the whole section, see Law Commission (n 1) paras 4.4, 4.5; Sarah Green, 'Smart contracts, interpretation and rectification' (2018) 2 LMCLQ 234; Sir Kim Lewison, *The Interpretation Of Contracts* (7th edn., Sweet & Maxwell Ltd, 2020).

[19] Law Commission (n 1) para 4.4.

This disagreement is often analogised to a pendulum between the approaches of 'textualism' and 'contextualism'. 'Textualism' is the orthodox approach where the courts are limited to the four corners of the contractual document and emphasis is thus placed on the 'plain' meaning of the language. This was changed by the decision of *ICS v West Bromwich BS,*[20] further discussed below, which advocated for 'contextualism' and thus the use of an extended factual matrix in contractual interpretation. Cases such as *Chartbrook v Persimmon Homes*[21] and *Rainy Sky SA v Kookmin Bank*[22] followed in the footsteps of *ICS* by choosing between competing constructions of contractual language utilising an assessment of commercial common sense.

The pendulum swung again in the case of *Arnold v Britton.*[23] Overall, the majority sought to restrict the use of commercial common sense in the interpretation of contracts. Lord Neuberger emphasised that, in applying the reasonable person test, primacy should be given to the 'natural' meaning of the language, which commercial common sense and surrounding circumstances should not 'undervalue'.[24] Further restrictions were implemented. The clearer the meaning of the words used, the more difficult it should be to depart from it.[25] Commercial common sense should not be invoked retrospectively, even if the contract has led to unfortunate consequences for one of the

[20] [1997] UKHL 28.
[21] [2009] UKHL 38.
[22] [2011] UKSC 50.
[23] [2015] UKSC 36.
[24] ibid [17].
[25] ibid [18].

parties.[26] Similarly, '[t]he purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed.'[27]

In a clear attempt at reconciliation, Lord Hodge explained in *Wood v Capita Insurance Services Ltd*[28] that the approach in *Arnold* was consistent with *Rainy Sky*, and was the correct one to be applied:

> [T]he court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated... Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation... There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type.'[29]

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[26] ibid [19].
[27] ibid [20].
[28] [2017] UKSC 24.
[29] ibid [10], [12–13]. See also Zhong Xing Tan, *Beyond the real and the paper deal: the quest for contextual coherence in contractual interpretation* (2016) 79 MLR 623, esp 637.

Thus, the court takes a more holistic view of contractual interpretation, with an emphasis on judicial pragmatism which allows the court to adapt to different situations. Both 'textualism' and 'contextualism' are endorsed. Nonetheless, a combined reading of the *Arnold* and *Wood* signals that the Supreme Court still favours the literal approach as the starting point to contractual interpretation. Although courts are accorded flexibility, the language of the contract itself is given primacy – business common sense and context serve to assist only when a textual analysis is insufficient to interpret the contract.

B. Can smart contracts be interpreted?

Before approaching a method of interpreting smart contracts, it must be clarified whether smart contracts are interpretable in the first place.

Some scholars take a hardline stance, believing that code only has an effect, leaving no room for interpretation.[30] 'Code is law'.[31]

[30] Law Commission (n 1) paras 4.8, 4.9, 4.10.

[31] See Michel Cannarsa, 'Interpretation of Contracts and Smart Contracts: Smart Interpretation or Interpretation of Smart Contracts?' (2018) 26 ERPL 773, 780. The phrase can be traced back to Lawrence Lessig, *Code and other Laws of Cyberspace* (1st edn, Basic Books, 1999); Lawrence Lessig, 'Code is Law: On Liberty in Cyberspace' (Harvard Magazine, 1 January 2000) <https://harvardmagazine.com/2000/01/code-is-law-html> accessed 1 May 2023.

The Law Commission disputes this position, in particular that the code in a smart contract simply 'means what the code does when it is executed', or that code has only an effect and no meaning.[32] The Law Commission contends that code's meaning can deviate from the effects of the code, 'meaning' of a smart contract.[33] While we agree with the Law Commission that smart contracts must be interpretable, the Law Commission's reasoning for reaching this conclusion is somewhat flawed. The Law Commission cites the example of an upgrade to an operating system resulting in 'legacy code' that no longer performs in the way that it used to:

> If we say that the code only means what it does when it is executed, the meaning of the code would change in every instance depending on how the code responded to the system upgrade. However, we do not think it makes sense to say that the meaning of the code has changed in each case, because the code itself has not changed; instead, it must be the outcome that has changed. If we accept this, it then follows that there can be a divergence between what the code 'means', and what it does when it is executed, which entails a distinction between meaning and effect.[34]

First, it must be recognised that the Law Commission adopts their definition of 'meaning' for a pragmatic reason. This is because in the alternative, 'adopting a method of interpretation based on what the coded terms "mean" to a functioning computer

[32] Law Commission (n 1) paras 4.10, 4.11, 4.12.
[33] ibid.
[34] ibid para 4.11.

would leave no room for argument regarding whether the performance of the coded terms aligned with their intended meaning; the code would mean whatever the code performed.'[35] Thus, the Law Commission's definition of the 'meaning of a smart contract fits with orthodox contract law principles of the objective interpretation of regular contracts, where courts try to determine the meaning of contractual terms according to the reasonable person test. This is problematic – in trying to apply this conception of meaning to smart contracts, the specific characteristics of smart contracts must be taken into account. At their core, smart contracts are technical tools for automaticity. Thus, unlike regular contracts, the architecture of smart contracts is focused on optimising their effects and not on providing formal evidence for an agreement – the design of coding languages is geared towards utility, not comprehensibility. To a computer, 'meaning', or what the parties intended the code to do, is a pointless distinction – barring programming errors, it will still take the code and run the program, as smart contracts are logical instructions executed in a deterministic manner. Thus, unlike regular contracts, smart contracts only have an effect – they do what they do, and this may diverge from what the parties subjectively intended. Distinguishing what code 'means' from its effects is therefore fictitious.

Second, in addition to 'meaning' in the context of a regular contract, the Law Commission's example uses 'meaning' in a common sense way to indicate what the parties intended the code to do, or their shared underlying agreement. The Law Commission then distinguishes the 'meaning' of the code from

[35] Law Commision (n 1) para 4.61.

the multiple effects the code may have. This is an intuitive understanding of 'meaning' and is thus attractive. From the parties' or their coders' subjective perspective, of course the code has 'meaning' - 'meaning' merely refers to code that does exactly what they intended. Similarly, one could subjectively say that code's unintended outcomes are merely effects, similar to how unintended outcomes of code are often labelled by coders as being bugged or buggy. However, we think this attraction is superficial. In their example, the 'meaning' of the code is easily ascertainable as one can simply reverse the system upgrade. This is similar to situations where code is written with minor syntax errors and will not run, but the mistake may be easily remedied, perhaps by deleting errant punctuation (although admittedly code that does not run will never become a smart contract). In such situations, there are likewise two outcomes of the code – one that does not run due to the syntax error, and one that does run which reflects the 'meaning' of the code. Crucially, this is often not the case, for example in situations with more complex errors or bugs, where the code does run, but to a completely unintended effect. In such cases, it is impossible to distinguish between 'meaning' and the outcome of the code, as the the code which reflects the parties' subjective intentions (i.e. 'meaning') simply never existed.

It follows that the adoption of the Law Commission's understanding of the 'meaning' of smart contract causes practical difficulties. Using 'meaning' to refer to the parties' subjective intentions of how the code should work is problematic in a dispute. Consider a situation where a smart contract unintentionally benefits a party due to bugged code. Naturally, the benefitting party will argue that the code accurately displayed what the parties agreed to, while the other party will dispute that

and argue that the code is flawed and led to an unintended effect. In contrast to regular contracts, it is more difficult to 'read' smart contracts and extract what the parties might have intended the smart contract to do. If there are no indications in natural language as to what a specific chunk of code is intended to do, we can only run the given code. Running the code is most important for understanding what it 'means'. Therefore, we must differentiate between the objective meaning of a smart contract and what the parties' subjective intentions are. Although this may seem like a small semantic quibble, and situations where signifcant errors occur in the operation of smart contracts may be limited in practice,[36] in our view, it is better to acknowledge the unique characteristics of smart contracts. This is because allowing the parties to distinguish between the 'meaning' and effect of code obscures the crux of the problem – that the direct output or effect of the code may diverge from the parties' subjective intentions. This recognition forms the central theme of our paper.

The Law Commission ultimately concludes that standard contractual principles can be applied to interpret smart contracts due to their definition of 'meaning'. We agree that smart contracts can and should be interpreted – not because the code has 'meaning', but because smart contracts may not reflect the parties' subjective intentions. This is a matter of necessity. The more

[36] If we categorise smart contracts by volume, smart contracts responsible for depositing and withdrawing funds, executing a trade and adding liquidity to a crypto wallet represents the majority of everyday smart contracts. These contracts have an Etherscan page that allows you to 'read' the smart contract and there is no potential for mistake or difference in interpretation when referring to these Etherscan pages. They are a faithful repository of the 'effects' a smart contract can have.

complex the parties' intentions, the more potential for divergence between the parties' subjective intentions and the code's effect. The potential for divergence will only grow as the use of fully coded contracts becomes more sophisticated. Thus, denying the possibility of interpretation would bind the parties to a smart contract that does not reflect their intentions with no recourse. This is clearly unsatisfactory. Building on this understanding of the fundamental difficulty with smart contracts, we will first consider how smart contracts can diverge from the parties' subjective before addressing the appropriate test for interpretation.

C. Divergence of the fully coded contract and the 'real' agreement[37]

As stated previously, fully coded contracts are completely expressed in code and are thus run completely independently by machines. The starting point for our analysis is that while what is coded in the fully coded contract should exactly replicate what was agreed on by the parties and written by their coder representatives, there can be a divergence between what the code should mean (the subjective agreement between the parties) and what it does mean in reality. Put differently, the effects of the smart contract may not be what the parties expected. This divergence is precisely why the interpretation of smart contracts is problematic.

[37] The linguistic differentiation bases on a distinction made by Dworkin as to the relationship between the written statute (as the source) and the subsequently constructed 'real' statute, see Ronald Dworkin, *Law's Empire* (1st edn, Harvard University Press, 1988).

Divergence can occur due to a number of reasons. The most obvious one is that coding remains a specialist skill. The vast majority of non-coders will not be able to understand how a machine would interpret coding language, nor will they be able to write code for the machine to execute.[38] Thus, parties cannot note down the contract themselves and will need coders to act as 'translators'. However, as will be shown below, coding is more than translation – it is a creative task carried out by coders (see example on page 13 below), thus generating some potential for divergence.

Moreover, due to the technical nature of code and computer programs, there are further cases where divergence can occur, as summarised by the Law Commission:[39]

a. As alluded to above, disputes about coded terms may arise also where the 'outcome of a feature of the code'[40] becomes apparent only after the code has been deployed or where the code performs 'differently to how one or both of the parties had expected'.[41]

[38] Sarah Green (n 18) 239.
[39] Law Commission (n 1) paras 4.29, 4.30; elaborated in Law Commission, *Smart Legal Contracts, Responses to call for evidence* (Crown Open License, 2021).
[40] Catherine Phillips, in Law Commission (n 1) para 4.29.
[41] Allen & Overy, in Law Commission (n 1) para 4.29.

b. Similarly, predictions of how the code in a smart contract will perform could be misleading, for example due to errors or bugs in the code.[42]

c. Differences between performance of the code and a reading of the code could be due to 'unforeseen unintended changes by third parties such as hackers'. However, most 'hacks' associated with blockchain technology are, in reality, only exploitations of unintended coding errors.

d. Performance of the code can deviate from its reading if the code unintentionally performs differently due to changes in the hardware, or (per the Law Commission's example) if an 'upgrade to an operating system causes the code to perform unexpectedly'.[43]

The list is not exhaustive. Divergence may, for example, further occur in the context of artificial intelligence that is set up in an umbrella contract, which itself enters into new subsidiary contracts independently.

When divergence occurs, a dispute arises between the parties regarding the difference(s) between their subjective agreement

[42] As with many bugs in computer code, these errors are not glaring, but rather become obvious only once they have been exploited. See the example of 'The DAO'.

[43] It is interesting to note that blockchains' function is precisely to obviate issues of difference in hardware/software of the end-user. Code in general might respond differently to different hardware and the BIOS that is coded into the hardware but smart contracts will never experience such issues.

and the actual implications of the smart contract. As such, a test for determining the meaning of coded terms will be key to resolve disputes.[44] The principles of contractual interpretation have developed with the understanding that the contract itself represents the objective intention of the parties.[45] Smart contracts disrupt this paradigm. This calls for a clarification as to how existing contract law can be utilized to interpret coded terms.

2. The Appropriate Test

A. The reasonable coder test

According to standard principles of contractual interpretation, the court's starting point is to determine the objective meaning of the language of the smart contract.[46] In Lord Hodge's words, this represents 'textualism', one tool in the judge's toolbox.[47] The principles of contractual interpretation have been developed with traditional natural language contracts in mind. Accordingly, the reasonable person test creates certainty for contracting parties by asking what a third party would the contract understand to mean – an objective approach. However, code is written with computers in mind, not human beings. The average reasonable person does not understand code, at least to date.

[44] Law Commission (n 1) para 4.76.
[45] see eg *GB Building Solutions Limited v SFS Fire Services Limited* [2017] EWHC 1289 (TCC) [13].
[46] *Wood* (n 23) [13].
[47] *Wood* (n 23) [13].

Thus, we agree with the Law Commission that it is necessary to modify the test to become that of a 'reasonable coder'. Naturally, this is because a reasonable person will not understand a coded term and is not able to deduce its meaning from the written code itself. For context, the Law Commission suggests asking 'what a person with knowledge and understanding of code would understand the coded term to mean – that is, a reasonable coder'.[48] A benefit of this test is that it provides an 'insight into what the parties intended the code to do, regardless of the computer's ultimate performance,' with the obvious caveat that courts will need the assistance of expert coders.[49] This modification is necessary as accommodating a reasonable person 'could significantly inhibit the use of smart contracts by steering the design of coding languages towards comprehensibility, rather than utility'.[50]

B. Issues with the reasonable coder test

However, the necessary modification of the 'reasonable person test' towards the 'reasonable coder test' inveitably leads to a disruption of the judges' role by shifting the role of interpretation from the judge towards the coder. Thus, we argue that the reasonable coder test cannot be applied as straightforwardly as the reasonable person test. To counteract this, the courts must use the remaining tool in the judge's toolbelt: 'contextualism'.[51] In the context of smart contracts, this necessitates a return to ICS

[48] Law Commission (n 1) para 4.32.
[49] ibid para 4.40.
[50] Lloyds of London, in Law Commission (n 1) para 4.36.
[51] *Wood* (n 23) [13].

and possibly going even further to allow the unprecedented use of pre-contractual negotiations.

On a preliminary note, the reasonable coder test builds on the premise that the contractual rights and obligations are drafted in the human-readable source code, and not in the machine code.[52] While this reflects the majority of smart contracts nowadays, it must be taken into consideration that smart contracts concluded by artificial intelligence or 'umbrella contracts' could state the contractual terms in machine code. Machine code, meanwhile, is unintelligible even to expert coders since it requires enormous computing power capacity.[53] Moreover, the 'test overlooks the reasonable coder's most natural first step of running the code' and it is 'not futureproofed for AI-generated code'.[54]

Even for code that coders can understand, the coder's task does not solely entail the translation of code but significant elements of interpretation as well. This is because code cannot always be translated line by line such that laymen are able to understand it. Consider, for example, the following command translated from source code into natural language: 'Go to the

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[52] Martin Fries and Boris P Paal, *Smart Contracts* (1st edn, Mohr Siebeck, 2019) 17; Matevž Pustišek , Nataša Živić und Andrej Kos, *Blockchain* (De Gruyter, 2022) 89; Law Commission (n 1) para 4.50.

[53] ibid.

[54] Harriet Jones-Fenleigh, Adam Sanitt, Jonathan Hawkins, 'Smart legal contracts under English law – Part 2: Formation & Interpretation' (Norton Rose Fulbright, 2 February 2022) <https://www.nortonrosefulbright.com/en/inside-disputes/blog/202202-smart-legal-contracts-under-english-law-formation-and-interpretation> accessed 1 May 2023.

shop and buy a coffee. If there are any eggs, get a dozen.'[55] A conventional reasonable person, including judges, would understand this as the command to buy a coffee at the shop, and if there are any eggs, to get 12 eggs. At the very least, the language is ambiguous to a reasonable person and thus open to interpretation. A computer, meanwhile, necessarily and unequivocally understands that as the command to buy twelve coffees under the condition that there are any eggs.

Hence, merely translating the code into natural language by an expert coder is insufficient to aid the court in interpreting a coded term and providing a 'natural' meaning of the code.[56] They will have to explain how individual components of the code relate and interact with each other. This is a complex exercise. In sophisticated programs, different coders will have different opinions on whether and how the program will operate. Moreover, just as most people are unfamiliar with code, most coders are unfamiliar with the law. There is thus another layer of translation that coders are engaged in – they must attempt to account for and navigate the legal effects that the parties hope for the smart contract to have.

Thus, the Law Commission's analogy to translating terms in a foreign language, while having certain logical force, underestimates the extent to which coders may have to interpret the smart contract.[57] Certainly, translators have a complex role,

[55] A well-known example in the context of smart contracts, see Sarah Green and Adam Sanitt (n 13) 205.
[56] Again, the Law Commission considers this issue but makes an inaccurate inference, see Law Commission (n 1) para 4.42.
[57] Law Commission (n 1) para 3.86.

which may require them to take creative liberties to translate words and phrases that may not have direct translations. Coders, meanwhile, will have to elaborate on the 'effect of certain combinations of words, and give their reasoned opinion as to what the code appeared to instruct the computer to do.'[58] This task, however, cannot be done without interpreting the agreement. On the most fundamental level, explaining how the coded terms will have effect (prediction) and how they relate to each other (relation) is in and of itself an unavoidable act of interpretation. Analysing the wider matrix, the links, the nature of the code and the context constitute an inherent part of this task. This includes, however, to see the program in the context of its system – a certain chunk of a subprogram may start at one point and end hundreds of lines later. Thus, coders will need to read and summarise entire chunks of code, try to understand its effect and express what they take to be the purpose. The aforementioned 'egg' example is a drastic simplification of how entire subprograms (containing plenty of lines of code) might function; code is written in computer-logic, which is not necessarily the same as human-logic. It is not only about translating the content of certain syntax or digits, but is most importantly about translating the logic. In contrast, the significance of rephrasing sentences or circumscribing words when translating a contract from English into Hindi, as human languages following the similar patterns and logics, appears to be small.

[58] See Thibault Schrepel (n 4) 36. He also refers to AI systems that may assist with interpreting smart legal contracts supplementing 'the experts capable of translating the code of smart contracts into natural language'.

In the case of an error in the code, which is typically when interpretation is required, the expert coder will likely have to go further to provide a full picture of the code to the judge. The coder will have to build upon their knowledge of the present effects of the code, their experience with common coding mistakes, and their understanding of the overall objectives of the parties to come to a version of code that better reflects the parties' subjective agreement. However, the line between this exercise (essentially a backwards construction of code) and interpretation of the code is exceedingly thin. The reconstruction of the original agreement is inevitably based on the coder's understanding of what the code 'should' do based on the commercial reality of the specific smart contract and general legal requirements for the creation of contracts. This entails mixing the coder's objective understanding of the code and subjective understanding of the agreement which underpins the smart contract.[59] This form of subjectivised objectivity is frequently exercised by the courts – per *Rainy Sky,* the court may utilise evidence relating to 'background knowledge which could reasonably have been available to the parties in the situation which they were at the time of the contract' when interpreting the contract.[60] To allow coders to do so would be to grant them judge-like powers of interpretation.

What is left to the judge is solely to linguistically reformulate the results of the coder as, for instance, an 'obligation' or a 'right'. In some cases, the judge may also have to reformulate the findings of the coder having regard to the commercial context and the principles of contract law, such as if the contract included a penalty clause (which have long been held to be unenforceable

[59] This is the fundamental difference to appointing other experts.
[60] *Rainy Sky* (n 23) [14].

under English law[61]). Nonetheless, not only are such situations limited, but even in such situations, the role of the judge is dwarfed by that of the coder. Although the Law Commission recognises this shift, they fail to classify its consequences.[62] As many or all of the contractual terms are written in code, courts are in need of translation (and interpretation) for all of them. In contrast to the use of expertise in other areas of law,[63] the reasonable coder test involves the clarification of not only a certain factual question, but, essentially, the meaning of the entire smart contract.

Moreover, the fact that smart contracts do not use a language known to both their authors and their audience[64] breaks the analogy to, for example, industry terms. This is because if parties make use of industry terms, 'the courts' willingness to interpret those words according to a customary lexicon' arises from the point 'that both parties to the agreement would have understood the language in a particular way.'[65] This, however, is not the case with code: whilst the machine will certainly understand it (and experts might), the parties themselves likely will not.[66] This is notwithstanding the different interpretations experts might have of the code in predicting its effect in virtue of its complexity. In addition, while some draw a comparison between this scenario and hiring a lawyer to elucidate the legal

[61] see eg *Viviene Westwood Ltd v Conduit Street Development Ltd* [2017] EWHC 350 (CH).
[62] Law Commission (n 1) para 4.43.
[63] E.g. the *Bolam* test in the tort of negligence, *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.
[64] Sarah Green (n 18) 241.
[65] ibid.
[66] ibid 242.

implications of a traditional contract, such an analogy is also inappropriate.[67] The reason for this is that non-lawyers 'typically can understand simple short-form agreements as well as many provisions of longer agreements, especially those setting forth business terms,'[68] though they may still hire legal counsel. In contrast, a non-programmer is 'at a total loss to understand even the most basic smart contract' and is therefore significantly more, if not completely, dependent on the explanation of an expert.[69]

It follows that the reasonable coder test would not be a test exercised by judges. One could argue that this does not imply that expert coders are offering an opinion on a matter of law and so there is still some room for the judges to decide.[70] Similar to the *Bolam-Bolitho* test for medical negligence, the Law Commission argues that the court is not bound by the outcome of a coder's examination.[71] However, the degree to which judges depend on the experts differ. Medical experts address a specific medical issue which is of importance for the case. Expert coders, however, would be appointed for translating (and interpreting) the entire contract. Medical opinions can usually be checked by judges on the basis of common sense and logic per *Bolitho*, which reflects the court's desire to not be completely bound by the expert evidence. However, judges are neither generally capable of

[67] Stuart Levi, Christina Vasile and MacKenzie Neal (n 11) 148; Martin Fries and Boris P Paal (n 49) 88, 89.
[68] ibid.
[69] ibid.
[70] Law Commission (n 1) para 4.54.
[71] In *Bolitho v City & Hackney Health Authority* [1998] AC 232, 243, Lord Browne-Wilkinson made it clear that the court was not bound to accept the outcome of a *Bolam* inquiry, but retained the right to reject it where it 'could not be logically supported'.

scrutinising a coder's interpretation and are reliant on the coder's 'translation' of the code, nor may they refer to potential aids to contractual interpretation (such as surrounding circumstances). This is because, technically, the 'natural and ordinary meaning' of the code is clear, as the meaning of code is simply its effect. Thus, the court's ability to depart from the expert coder's opinion is fictitious.

In conclusion, the Law Commission underrepresents the extent to which interpretation of code differs from interpretation of natural language. The application of the reasonable coder test shifts power from judges to coders, subverting the orthodox role that judges play in favour of a third party. Sir Lewison stated that 'in principle, where a document has been translated, its proper interpretation is a matter for the court, and not a proper subject of expert evidence'[72] and 'although expert evidence may be necessary to explain technical terms to the court, it is not the function of an expert to interpret the contract. That remains the function of the judge.'[73] This is desirable because 'an independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice'.[74] It goes without saying that expert coders cannot play the role of a judge, thus making the reasonable coder test unsatisfactory.

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[72] Sir K Lewison, *The Interpretation of Contracts* (6th edn, Sweet & Maxwell, 2015) para 5.06; seemingly of the same opinion Slaughter & May, in: Law Commission (n 1) para 4.38.

[73] ibid.

[74] Commonwealth (Latimer House) Principles on the Three Branches of Government 2004 (adopted by the Commonwealth in 2003), Principle IV Independence of the Judiciary.

3. The Return to Contextual Interpretation

The modification towards a 'reasonable coder' test under the current law of interpretation leaves too little of the judges' function intact. Moreover, the present primacy of the language chains judges to the results of the interpretation of coders and limits the courts to accepting the effect of code, as code is unambiguous. This is probably what the Law Commissions feared and hoped to avoid by defining 'meaning' in the way that they do.[75]

To counteract this development, extended admissibility of 'surrounding circumstances' would restore the judges' role to determine the agreement, freed from the complex technicalities and deterministic nature of code. This represents a necessary and pragmatic compromise for the courts. It is also doctrinally sound. Fortunately, Lord Hodge notes that the nature of the contract should determine the extent to which the wider context can be considered when trying to ascertain its objective meaning.[76] Thus, the courts could utilise context despite the clarity of a smart contract's coded terms on the basis that it is necessary for interpretation due to the special nature of smart contracts. This is supported by the pragmatic, balanced approach of contractual interpretation suggested in *Wood,* where the use of contextualism

[75] Law Commission (n 36).
[76] *Wood* (n 23) [10].

is not limited by specific scenarios or tests, but used whenever necessary according to the circumstances of the case.[77]

A. Vindication of ICS and the necessity of a wider factual matrix

The Law Commission references natural language aids to interpreting smart contracts, namely business process document[78] ('design script'), natural language explanation of code,[79] and natural language comments in source code.[80] While these documents are significant in restoring the appropriate role of the judge, the availability of these tools vary significantly on a case-by-case basis, and commonly necessitate intentional incorporation as part of the contract by the parties. Our proposal of a return to a contextual approach that can incorporate the aforementioned natural language aids is analogous to Lord Hoffman's approach in *ICS*.

ICS is commonly viewed as a pivotal point that dramatically shifted English law away from a literal interpretation of contract towards contextual interpretation, constituting a radical change in the legal approach of contractual

[77] *Wood* (n 23) [13].
[78] Law Commission (n 1) paras 4.62-4.66.
[79] ibid paras 4.67-4.74.
[80] ibid paras 4.75-4.80.

interpretation.[81] This view is exaggerated.[82] There has been recognition of the importance of context prior to *ICS* as evidenced by Lord Wilberforce's dicta in *Prenn v Simmonds*[83] and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen*[84], noting that 'the time has long passed when agreements... were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations' and 'no contracts were made in a vacuum', respectively. What *ICS* does do controversially, however, is to endorse the broad-brush use of context in contractual interpretation in three of five principles outlined by Lord Hoffmann.

The fourth principle suggests that language (in the case of smart contracts, the code) is distinct from the agreement, which is what the overall contract would convey to a reasonable person. This can be contrasted with Lord Sumption's approach that 'language, properly used, should speak for itself and it usually does'.[85] The fourth principle allows for the 'reasonable coder test' to be applied with relative flexibility to smart contracts because there is no emphasis on the primacy of language or the code itself – it is the agreement of parties to a reasonable coder that matters. Lord Hoffman's fifth principle follows logically from the fourth, giving the court considerable power to reformulate the code to fit the parties' intentions, 'as there is not... a limit to the amount of

[81] Lord Sumption, 'A Question of Taste: The Supreme Court and the Interpretation of Contracts' (2017) Harris Society Annual Lecture, Oxford.
[82] Lord Bingham, 'A New Thing Under the Sun? The Interpretation of Contract and the ICS Decision' (2008) EdinLR Vol 12 374, 375.
[83] [1971] 1 WLR 1381.
[84] [1976] 1 WLR 989, 995-6.
[85] Lord Sumption (n 76).

red ink or verbal rearrangement or correction which the court is allowed.[86] This principle was held to be problematic, as the ability for courts to do so is 'difficult to reconcile with the law relating to implied terms and rectification'.[87]

Most importantly, Lord Hoffman's second principle held that the range of facts that could serve as relevant evidence in the interpretation exercise include 'absolutely anything' which could have affected the way in which the contract would be understood. On the application of this principle, the aforementioned documents are no longer merely natural language aids to interpreting code per the view of the Law Commission. Instead, they become part of the factual matrix, and are thus instruments for the judge to evaluate the interpretation of the agreement on their own terms. The broad terms of Lord Hoffman's second principle which provided little guidance to circumscribing the scope of the factual matrix understandably led to criticism on its potential practical impact, with the fear that the vague language will encourage counsel to present great volumes of evidence to court.[88]

However, in the context of smart contracts, such a broad formulation can be better justified for two reasons. First, in contrast to regular contracts, the smart contract itself does not provide sufficient evidence of the parties' intentions. The risk of having too much evidence is surely better than having no evidence at all. Second, once incorporated within the factual

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[86] *ICS* (n 19) [912].
[87] Lord Sumption (n 76).
[88] Sir Christopher Staughton, 'How Do the Courts Interpret Commercial Contracts?' [1999] CLJ 303, 306-8.

matrix, the judge may utilise such aids along with considerations of commercial common sense to interpret the contract alongside the use of the reasonable coder test. The court can first establish what the code does and what the parties meant for the computer to do, having recourse to the explanation by the coder. Then, the court can build on that understanding via the court's interpretation of the parties' subjective intentions with recourse to the surrounding circumstances. This restores the role of the judge and ameliorates the aforementioned difficulties with the reasonable coder test. Should the courts still find Lord Hoffman's formulation to be too broad, limitations could be imposed as to the range of facts that can serve as the relevant surrounding circumstances, such as to the aforementioned documents and perhaps the parties' instructions to their coders.

B. Beyond *ICS* and into pre-contractual negotiations

The interpretation of smart contracts may even justify utilising pre-contractual negotiations, rebuking Lord Hoffman's third principle which established that pre-contractual negotiations and information unavailable to the parties would remain inadmissible as a matter of 'practical policy'.[89]

There has been a longstanding exclusion of pre-contractual negotiation in contractual interpretation. Recently, the Court of Appeal has confirmed that pre-contractual materials may be used to demonstrate the background leading up to the contract and its commercial purposes, but may not be used in the

[89] *ICS* (n 19) [913].

interpretation of the contract itself, or to any effect that might reflect the parties' intentions such as communications that may show a consensus as to the meaning of certain words.[90] However, in *Chartbrook,* Lord Hoffmann confirmed that 'it would not be inconsistent with the English objective theory of contractual interpretation to admit [evidence of pre-contractual negotiations]'[91] and that the existence of the exclusionary rule 'may well mean... that parties are sometimes held bound by a contract in terms which, upon a full investigation of the course of negotiations, a reasonable observer would not have taken them to have intended'.[92]

In coming to that conclusion, Lord Hoffman reasoned that there are no 'conceptual limits' to what can properly be regarded as background, echoing his second principle in *ICS* on the range of facts that would be considered relevant surrounding circumstances.[93] However, his Lordship agreed with Lord Wilberforce that 'inadmissibility [of pre-contractual negotiations] is normally based in irrelevance', and that a departure from the rule 'can be justified on pragmatic grounds'. Following a consideration of the benefits and detriments of such a departure, Lord Hoffman ultimately concluded 'that there is no clearly established case' for departing from the rule'.[94] However, this ruling was not definitive. His Lordship emphasised that there was insufficient material before the House to form a view, and that

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[90] *Merthyr (South Wales) Ltd v Merthyr Tydfil County Borough Council* [2019] EWCA Civ 526.
[91] *Chartbrook* (n 20) [33].
[92] ibid [41].
[93] ibid [33]. Note that this has received much of the same criticsm as in (n 87).
[94] ibid [41].

'[i]t is possible that empirical study (for example, by the Law Commission) may show that the alleged disadvantages of admissibility are not in practice very significant or that they are outweighed by the advantages of doing more precise justice in exceptional cases or falling into line with international conventions.'[95]

The interpretation of smart contracts may form a reason for departing from the rule. While Lord Hoffman dismisses the point that the admission of pre-contractual negotiation would lead to a flood of evidence in litigation, he notes that, unlike surrounding circumstances (which may be used), pre-contractual statements may be 'drenched in subjectivity' and in dispute.[96] Moreover, it is difficult to determine the line between negotiation and a provisional agreement.[97] Such concerns apply with the same force to smart contracts as to regular contracts. However, for smart contracts, this practical difficulty becomes a practical necessity. Admitting such evidence to fully coded contracts is essential. This is because the actions and statements of the parties during their negotiations are indicative of the final position they adopted when entering into the fully coded contract.[98] Importantly, this position is unadulterated by any number of potential errors that may exist within the code that may lead the parties' subjective intentions to be lost in translation. In other words, pre-contractual negotiations offer the best evidence of what the Law Commission views the code to 'mean', as it is unadulterated by any number of potential errors that may exist

[95] ibid.
[96] ibid [35]-[38].
[97] ibid [38].
[98] Contrasting opinion Law Commission (n 1) para. 4.98.

within the code that may lead the parties' subjective intentions to be lost in translation. Comparatively, in regular contracts, the use of pre-contractual negotiations simply muddies the water because the contract itself provides objective evidence of the parties' intentions. If, as Lord Hoffman proclaims, that the guiding principle of contract is to 'enforce promises with a high degree of predictability', then in the case of smart contracts, pre-contractual negotiations offer better predictability than the code itself.[99]

Moreover, while important, contextual clues such as comments in the source code are often insufficient. One reason is simply that such clues are not necessary for the smart contract to function and accordingly may not always be provided. As technology develops and smart contracts become increasingly automated, for example in an umbrella contract (see page 11 above), contextual clues will not be generated by AI for each derivative contract as the clues are utilised solely for humans. In addition, even if contextual clues exist, as complexity increases, such accompanying documents may not be adequate for judges to glean an extensive understanding of the parties' legal relationship.

Thus, examining the interactions between the parties before entering into the smart contract supplements the court's existing tools of interpreting contracts by providing additional information when natural language documents that accompany the smart contract are insufficient. In doing so, corresponding with our previous arguments, this returns the competency of interpretation to the judge.

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[99] *Chartbrook* (n 20) [37].

Further, Lord Hoffman notes in obiter that a key consideration for the extension of the admissible background in contractual interpretation is the 'compromise between protecting the interests of the contracting parties and those of third parties.'[100] This is because there is a 'risk that a third party will find that the contract does not mean what he thought.'[101] However, this risk is unlikely to arise in the context of smart contracts. Transparency is the principle for many technologies in the context of smart contracts, such as blockchain. However, in practice, only a limited number of people are likely to view and understand smart contracts. Moreover, in cases of complex code, the predicted outcome of smart contracts will be likely be conducive to multiple interpretations, even for expert coders. Finally, normatively, the interests of third parties who may read the smart contract must be secondary to the interests of the contracting parties when it comes to the accurate interpretation of the smart contract. To think otherwise would be to put the cart before the horse, not to mention that the contract might not have any impact on third parties at all.

C. Parallel to rectification

Allowing pre-contractual negotiations to be considered as an aid in contractual interpretation would undoubtedly involve a change in the law.[102] The Law Commission rejects this change on the basis that it would create 'an unprincipled distinction' between the

[100] *Chartbrook* (n 20) [40].
[101] ibid.
[102] Law Commission (n 1) para 4.102.

approach of interpreting regular contracts and smart contracts.[103] However, this distinction is not unprincipled when considering that, on the application of our above arguments and per a running theme in this article, smart contracts have a greater chance of diverging from the contractual parties' subjective intentions. This makes smart contracts sufficiently different from regular contracts to warrant separate treatment. Indeed, the interpretation of smart contracts parallels the equitable remedy of rectification, which does permit the use of pre-contractual negotiations.

In brief, rectification is where the court can correct the written terms of a contract to remedy the inconsistencies between the parties' agreement and the agreement's outward expression.[104] The rectified contract will have retrospective effect from the moment it was first created. Doctrinally, interpretation and rectification are distinct. As an equitable remedy, rectification does not happen as a matter of course, and is typically the last resort of the courts. The requirements for rectification for common mistake as summarised by Peter Gibson LJ in *Swainland Builders Ltd v Freeland Properties Ltd*[105] and affirmed by Lord Hoffman in *Chartbrook* are:

The party seeking rectification must show that: (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) there was an outward

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[103] ibid.
[104] *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361.
[105] [2002] 2 EGLR 71 [33].

expression of accord; (3) the intention continued at the time of the execution of the instrument sought to be rectified; (4) by mistake, the instrument did not reflect that common intention.

In *FSHC Group Holdings Limited v GLAS Trust Corporation Ltd,*[106] the Court of Appeal settled the long-standing debate over the nature of the continuing common intention arising from Lord Hoffmann's obiter *Chartbrook,* which held that the test for common mistake was objective and involved asking a reasonable observer what the intentions of the parties were. The Court of Appeal distinguished two types of common mistake: common agreement mistake, which is where the contract fails to give effect to a prior concluded contract, and common intention mistake, where the contract fails to accurately record the common intentions of the parties.[107] The former type of mistake utilises an objective test – as rectification is rooted in the principle that prior agreements should be upheld, the courts can objectively determine the contents of the prior agreement. Due to the latter type's underlying justification being the equitable principle of good faith, the Court of Appeal held that the test is subjective – rectification requires the determination of the subjective intentions of the parties as well as the 'outward expression of accord'.[108]

Many smart contracts parallel common intention mistakes, the subject of discussion in *FSHC*. This is because the smart contract, or the 'outward expression of accord', could fail to capture the subjective common intentions of the parties (e.g.

[106] [2019] EWCA Civ 1361.
[107] *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* (n 99) [140]-[148].
[108] ibid [176].

in virtue of a bug), which leads to difficulty interpreting the smart contract. Thus, for smart contracts, interpretation and rectification are often interlinked. The normative force of utilising pre-contractual negotiations for the interpretation of smart contracts is highlighted by the Court of Appeal – if common intention is established, 'there is no sound justification for giving effect to the meaning that a hypothetical reasonable observer would have attributed to the words used in preference to what the parties actually intended the effect of their contract to be. Indeed, to do so will result in injustice.'[109] Moreover, the Court of Appeal notes that the requirement to show that the contract is inconsistent with the parties' common subjective intentions is good policy because it is a stringent test that reflects respect for contractual certainty.[110] Interpreting smart contracts in a way that disregards the intentions of one or more parties undermines the certainty and security of commercial transactions, which are the foremost reasons for utilising smart contracts in the first place. The utilisation of pre-contractual negotiations in conjunction with the reasonable coder test provides the court with additional certainty in determining the appropriate interpretation of smart contracts.

4. Interpretation of Hybrid Smart Contracts

In principle, the interpretation of hybrid smart contracts (e.g. contracts that contain some clauses in code and other clauses in natural language) is significantly less difficult than the

[109] ibid [151].
[110] ibid [173]-[174].

interpretation of fully coded contracts. Due to the use of both code and natural language, the court is no longer chained to the effect of the fully coded terms – it has the material in the natural language clauses to aid in the interpretation of the coded elements of the hybrid contract. Tensions between different provisions in contractual documents are regularly resolved by courts. When faced with two tenable readings of a contract, one provided by the code and one provided by the natural language, the court can evaluate the competing interpretations by considering which view aligns better with business common sense.[111]

With the use of the reasonable coder test in conjunction with the reasonable person test used in the interpretation of regular contracts, the role of the judge is no longer completely sidelined. While the reliance on business common sense may place a heavy burden on courts and lead to uncertainty that has been cautioned against by the recent Supreme Court cases (most prominently in *Arnold)*, it is submitted that hybrid contracts, for the most part, avoid the central difficulty with the interpretation of fully-coded contracts as described above – that the code of the contract itself may fail to represent the parties' intentions.

However, in practice, it must be noted that while hybrid smart contracts contain both coded and natural language clauses, they are more similar to fully coded contracts than not. Hybrid contracts do not necessarily have the same clause expressed in both code and natural language. Whether the natural language clauses can be used to understand the coded clauses is strongly dependent on the specific hybrid contract. For example, the

[111] *Wood* (n 23) [11].

natural language elements may conflict with the code, making the overall function of the smart contract unclear. Thus, the judge's ability to gain an understanding of the overall contract via the natural language elements will vary significantly from case to case. In situations where the natural language elements are not conducive to the judge's ability to understand the overall contract, the above arguments relating to the necessity of a wider contextual approach for fully coded contracts are likewise applicable to hybrid contracts.

Conclusion

The public perception of smart contracts reflects certain aspects of 'Amara's Law,' the concept formulated by computer scientist Roy Amara that 'we tend to overestimate new technology in the short run and underestimate it in the long run.'[112] Some might argue that contracting parties who choose to adopt smart contracts should be forced to bear the risk of the potential failure of those contracts to accurately represent their intentions, as had they contracted in the conventional way, there would be more certainty as to how the courts will adjudicate the contract. Of course, the initial judicial foray into smart contracts will be difficult and prone to uncertainty. This is likely a necessary risk. While smart contracts may not be prevalent now, in the long run, they could revolutionise commerce. To prepare members of the judiciary for this development, it is increasingly necessary to train them on code and smart contract technology. Relatedly, it is suggested that 'specialised courts and tribunals' specifically

[112] Susan Ratcliffe, *Oxford Essential Quotations, Roy Amara 1925–2007 American futurologist* (4 edn, Oxford University Press, 2016).

designated to deal with such disputes are created, perhaps as part of or akin to London's commercial courts.[113]

Realistically, as technology advances, all efforts made to accommodate new technologies like smart contracts may not be adequate.[114] Nonetheless, in the present, this article's proposed solution to address the flaws of the reasonable coder test by utilising a stronger contextual approach is a reliable way of maintaining the role of judges and striking a fair balance between contractual certainty and the parties' intentions. The interpretation of smart contracts highlights the ongoing tension between English law's objective approach to contractual interpretation[115] and the consideration of the explicit intentions of the contracting parties.[116] Rather than simply swinging the pendulum back and forth, the interpretation of smart contracts highlights the necessity of compromise and the importance of the pragmatic approach propagated in *Wood*.

[113] See Thibault Schrepel (n 4) 37 for a similar view. He also argues that judges could get trained on programming languages and 'computational thinking basics'. In addition, the Law Commission also refers to 'specialised technology chambers' for dealing with smart contract disputes, see Law Commission (n 1) 4.103.

[114] Consider, for example, contracts between machines (artificial intelligence).

[115] Johan Steyn, 'Contract Law: fulfilling the reasonable expectations of honest men' (1997) 113 LQR 433, 433–434.

[116] Sarah Green (n 18) 242.

Home (Not So Alone): Remodelling the Common Intention Constructive Trust

Allegra Kunze-Concewitz and Zofia Gajewska[1]

Abstract— This article proposes a modification of the common intention constructive trust expounded by the courts in *Stack v Dowden* (*Stack*) and *Jones v Kernott* (*Jones*). It advances that the courts should adopt a unified legal regime for both 'joint names' and 'single name' cases, as the Supreme Court proposed in *Jones*. This is to be achieved by (i) basing the presumption of a beneficial joint tenancy on the intention of the parties to enter into a joint enterprise, and (ii) foregoing the quantification stage of analysis. This article identifies a number of issues plaguing the current case law, namely that in 'joint names' cases (i) it is unclear when severance occurs and whether the necessary formalities are actually met; and (ii) in practice when quantifying beneficial interest, the case law shows an over-reliance on financial contributions. Moreover, it outlines how in 'single name' cases there is considerable confusion and inconsistency in how the lower courts have applied the clashing decisions in *Lloyds Bank plc*

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v Rosset and *Jones*. It argues that the proposed model is to be preferred because it (i) better reflects the parties' intention of a joint enterprise, (ii) improves legal certainty and (iii) provides clarity for when severance of the joint tenancy occurs.

Introduction

How to address the division of the beneficial interest in the home upon the breakdown of a relationship is a challenging question. The present solution, the common intention constructive trust (CICT) approach, as adopted in *Stack v Dowden*[2] ("***Stack***") and *Jones v Kernott*[3] ("***Jones***"), leaves a lot to be desired. In joint names cases the presumption of joint beneficial ownership fails to afford effective protection to the family home, because it does not give due weight to the parties' intention to enter into a joint enterprise. Further, the quantification stage has led to undesirable results in that (i) it is unclear when severance occurs and whether the necessary formalities are actually met; and (ii) in practice when quantifying beneficial interest, the case law shows an over-reliance on financial contributions. Moreover, in single name cases there is considerable confusion and inconsistency in how lower courts have applied the clashing decisions in *Lloyds Bank plc v Rosset*[4] ("***Rosset***") and *Jones*. In order to remedy these issues, this article proposes a reformed CICT model, which, by foregoing the quantification stage and establishing a consistent approach between single and joint names cases: (i) better reflects the parties' intention of a *joint enterprise,* (ii) improves legal certainty and (iii) provides clarity for when severance of the joint tenancy occurs. Moreover, by focusing on the parties' intention at a *joint enterprise*, it achieves the 'single legal regime' Lord Walker and Baroness Hale alluded to in *Jones*.

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[2] *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432.

[3] *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776.

[4] *Lloyds Bank plc v Rosset* [1991] 1 AC 107 (HL).

1. *Stack v Dowden*

A. *Stack v Dowden* Facts

In *Stack* the House of Lords (HL) was concerned with ascertaining the division of the beneficial interests in a home after the breakdown of Mr Stack (S) and Ms Dowden (D)'s relationship. The parties were joint legal owners of the property on Chatsworth Road.[5] In addition to the profits from the sale of Purves (their first property bought in D's sole name and with D's sole contributions), Chatsworth was bought using D's savings and a loan secured through a mortgage and two endowment policies (one in joint names and one in D's name alone).[6] S paid both the joint endowment and the mortgage interest, whereas D paid for the other endowment. The mortgage repayments were paid through lump payments by both parties, with D contributing more money.[7] The majority of the outgoings were paid by D, and it is unclear who was responsible for the improvements made to Chatsworth.[8] The relationship broke down nine years after the purchase of Chatsworth and S tried to sell the property and divide the proceeds equally.[9]

[5] *Stack v Dowden* (n 2) [80] (Baroness Hale).
[6] *Stack v Dowden* (n 2) [81] (Baroness Hale).
[7] ibid.
[8] ibid.
[9] ibid [83] (Baroness Hale).

B. *Stack v Dowden* Decision

When this case reached the HL, Baroness Hale speaking for the majority held that the starting point in approaching the question of dividing the beneficial interest is that equity follows the law. Thus, beneficial interest should mirror legal ownership. Where the parties are in a joint tenancy, there should be a CICT of equal shares.[10] That is provided there is no strong evidence which would allow the Courts to find a tenancy in common. In such a case there would be a CICT of potentially unequal shares. Notably Baroness Hale distinguished the domestic context from commercial transactions, and thus held that there will be an unequal division of beneficial interest where 'the facts are very unusual'.[11] The presumption of a joint tenancy will be rebutted by evidence which demonstrates that the parties did not intend to divide beneficial interest equally. This can be an express agreement or inferred through conduct[12] (in *Jones* the imputation of intention was deemed inappropriate at this stage).[13] Where the presumption has been rebutted, the Courts can rely on an express agreement to quantify each parties' beneficial interest, or they can infer (and impute as a last resort)[14] the parties' intentions as to quantification by taking into consideration a range of facts, including the nature of the relationship, reasons for which the house was bought, the presence of children and how the

[10] ibid [54] (Baroness Hale).
[11] ibid [68] (Baroness Hale).
[12] ibid [49] and [60] (Baroness Hale).
[13] *Jones v Kernott* (n 3) [51] (Lady Hale and Lord Walker).
[14] *Jones v Kernott* (n 3) [51] (Lady Hale and Lord Walker), [71] (Lord Kerr).

outgoings of the home were met.[15] It is clear that 'how much was paid by each party is also likely to be less important'.[16]

On the facts, S and D were joint tenants at law and therefore, following the maxim 'equity follows the law', they were also joint tenants in equity. Continuing Her Ladyship's analysis, Baroness Hale found the presumption of a joint tenancy in equity had been rebutted by evidence that there was no mutual intention of equal beneficial ownership, giving rise to a CICT of unequal shares. The relevant evidence was that the parties had kept their finances strictly separate.[17] Following this, the majority rejected the appeal and upheld the 65:35 split in beneficial interest in favour of D.[18]

Lord Neuberger dissented, arguing that adopting a CICT in this case was undesirable, as the resulting trust (RT) was the historically favoured approach, even in the family context.[19] His Lordship identified problems in applying the CICT. Firstly, it invokes the presumption of advancement between unmarried cohabitants which is a context that had never seen the presumption's application.[20] Traditionally, when a father or husband gives property to their children or wife it will be considered an outright transfer[21] (the *paterfamilias* is considered to be under a duty to provide for his child or wife, and equity

[15] *Stack v Dowden* (n 2) [69] (Baroness Hale).
[16] ibid.
[17] *Stack v Dowden* (n 2) [92] (Baroness Hale).
[18] ibid [95] (Baroness Hale).
[19] ibid [111] (Lord Neuberger).
[20] ibid [112] (Lord Neuberger).
[21] Jamie Glister, 'The Presumption of Advancement' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 268.

assumes that a relevant gratuitous transfer of property is made in furtherance of that obligation)[22]. Lord Neuberger explained that the introduction of the presumption of advancement into the context of unmarried cohabitants is novel, and in doing so ignores the fact that the 'the court is increasingly unenthusiastic about the presumption'.[23] Thus, *Stack* indirectly expands the scope of the presumption of advancement's application in face of changing social beliefs concerning gender roles within the family.[24] In fact, the presumption of advancement has been deemed 'clearly discriminatory'.[25] His Lordship further identified that the registration into joint names does not necessarily elucidate the parties' intentions (couples do not often discuss beneficial interest)[26] and the RT approach offered greater consistency in single name cases.[27] Thus, Lord Neuberger stressed that in the 'absence of any relevant evidence other than the parties' respective contributions'[28] the RT analysis should be adopted. Despite taking this different route, His Lordship arrived at the same 65:35 split in beneficial interest as the majority.

C. *Stack v Dowden* Objective

In *Stack* Baroness Hale was concerned with how the context of a family home shapes the intention of the parties as to the beneficial interest in their property. Her Ladyship clearly distinguished the

[22] ibid 271.
[23] *Stack v Dowden* (n 2) [112] (Lord Neuberger).
[24] *Pettitt v Pettitt* [1970] AC 777 (HL) 793F (Lord Reid).
[25] HL Deb 9 February 2010, vol 717, col 707.
[26] *Stack v Dowden* (n 2) [113] (Lord Neuberger).
[27] ibid [114] (Lord Neuberger).
[28] ibid [122] (Lord Neuberger).

family home from houses bought in commercial or other contexts, for example, by stating that the case concerned a 'dwelling house which was to become their home'[29] and further that 'the domestic context is very different from the commercial world [...] Many more factors than financial contributions may be relevant to divining the parties' true intentions'.[30] Lord Neuberger, extrajudicially, has said that '[f]amily law certainly won *Stack*'.[31]

As Dewar explained, property law is undergoing a process of familiarisation, 'the process by which both judges and the legislature have modified general principles of land law or trusts to accommodate the specific needs of family members'.[32] Hayward further suggested evidence of familiarisation includes how CICTs can now be inferred on grounds other than substantial financial contributions, which was not the case in *Rosset*.[33] In examining *Stack*, Hayward found two instances of familiarisation. The first is setting a strong presumption that equity will follow the law,[34] in fact, a joint tenancy will only be displaced where 'the facts are very unusual'.[35] Requiring such exceptional evidence affords substantial protection to the family

[29] *Stack v Dowden* (n 2) [40] (Baroness Hale) (emphasis added).
[30] ibid [69] (Baroness Hale).
[31] Lord Neuberger, 'The Plight of the Unmarried' ('At a Glance' Family Law conference, 21 June 2017) [16] <www.supremecourt.uk/docs/speech-170621.pdf> accessed 19 March 2023.
[32] John Dewar, 'Land, Law, and the Family Home', in Susan Bright and John Dewar (eds), *Land Law Themes and Perspectives* (OUP 1998) 327, 328.
[33] Andrew Hayward, 'Family Property and the Process of Familiarisation of Property Law' (2012) 24 Child & Fam L Q 284, 286.
[34] ibid 297.
[35] *Stack v Dowden* (n 2) [68] (Baroness Hale).

home.[36] The second is the emphasis on fact sensitivity in *Stack*.[37] Baroness Hale set out factors which future courts may consider when inferring intention, namely, '[the] purpose for which the home was acquired'[38] (including whether it was intended to be a family home), 'the nature of the parties' relationship'[39] and the personalities of the parties[40] (among other factors).[41] This cast the scope of analysis wider than mere financial contributions.

Whilst *Stack* is a clear example of the familiarisation of property law, nonetheless, as explained by Lady Hale, it is still fundamentally a property law, rather than family law, case.[42] This article proposes that the intention of the parties as to their interests in the property in question cannot be read outside the context of their relationship. This is because, as will be noted below, the way in which financial contributions are divided by couples in intimate relationships is much different than it is in other circumstances. In this essay we will argue it is important to "protect the family home", meaning that it is important to protect the party who has contributed less or not at all to the purchase price ("the weaker party") and the investments they have made into the property.

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[36] Hayward (n 33) 296.
[37] ibid 296-297.
[38] *Stack v Dowden* (n 2) [69] (Baroness Hale).
[39] ibid.
[40] *Stack v Dowden* (n 2) [69] (Baroness Hale).
[41] Hayward (n 33) 297.
[42] Lady Hale, 'Legislation or Judicial Law Reform: Where Should Judges Fear to Tread?' (Society of Legal Scholars Conference, 7 September 2016) <www.supremecourt.uk/docs/speech-160907.pdf> accessed 19 March 2023.

I. The Strength of the Presumption in *Stack v Dowden*

Despite Baroness Hale's concern with giving effect to the joint enterprise between the parties in cases concerning the domestic context, on the facts of *Stack* itself the presumption of a beneficial joint tenancy is significantly weaker than Her Ladyship intended. Her Ladyship's contention that the facts were 'very unusual'[43] and that '[t]here cannot be many unmarried couples who have lived together for as long as this [...] and whose affairs have been kept as rigidly separate'[44] is misleading. For a case which aimed to develop the law to better reflect changing economic and social conditions,[45] it showed a limited understanding of how people in relationships approach finances. Firstly, a study by Vogler et. al. in 2006 identified that 21% of cohabitating partners kept their finances completely separate, as did 15% of cohabiting parents. A further 12% of cohabiting parents kept their finances partially independent (and partially pooled).[46] Thus, the facts of *Stack* were far from 'very unusual',[47] especially when considering that independent money management was more common (occurring in 21% of cases) in relationships where the woman earned more than the man.[48] Furthermore, a 2001 study by Elizabeth (which

[43] *Stack v Dowden* (n 2) [92] (Baroness Hale).
[44] ibid.
[45] ibid [60] (Baroness Hale).
[46] Carolyn Vogler, Michaela Brockmann and Richard D Wiggins 'Intimate Relationships and Changing Patterns of Money Management at the Beginning of the Twenty-First Century' (2006) 57 British Journal of Sociology 455, 465
[47] *Stack v Dowden* (n 2) [92] (Baroness Hale).
[48] Vogler, Brockmann and Wiggins (n 46) 474.

studied 13 cohabitating couples from New Zealand which made the conscious decision not to get married) identified that cohabiting couples treat their finances differently from married couples, and are more likely to keep their finances separate.[49] While the majority of the couples interviewed, which had children, used joint money management, they had been using it even before their decision to have children. In fact, only one couple changed from separate money management to joint money management upon having a child.[50] Thus, independent money management is not as unusual as Lady Hale suggested.

This, however, does not mean that *Stack* set a weak presumption. *Stack* appears to be an exception to its own rule. While the facts in *Stack* may in truth not have been highly unusual, future cases emphasised the degree to which the facts must be out of the ordinary to warrant an unequal division of the beneficial interest. For example, in *Solomon v McCarthy*, despite the defendant's claims of having made substantial improvements to the property, shares were found to be equal.[51] Furthermore, in *Pillmoor v Miah* the Court explicitly stated that the facts must be 'exceptional'.[52] The strength of the presumption is clear in *Rowland v Blades*, where the Court found that despite one party contributing the entire purchase price, the beneficial interest was

[49] Vivienne Elizabeth 'Managing Money, Managing Coupledom: A Critical Examination of Cohabitants' Money Management Practices' (2001) 49 The Sociological Review 389.
[50] ibid 395.
[51] *Solomon v McCarthy* [2020] County Court (Bristol) C01BS923, [2020] 1 P. & C.R. DG22 [35] (HHJ Paul Matthews).
[52] *Pillmoor v Miah* [2019] EWHC 3696 (Ch) [27] (Judge Kramer).

shared equally.[53] These examples highlight how in practice *Stack* achieves the familiarisation of property law by setting a strong presumption that equity will follow the law.

D. *Stack v Dowden* Analysis

Unfortunately, *Stack* falls short of providing effective protection for the family home. This is so for two reasons: (i) it added confusion to the law of severance, and (ii) in cases following *Stack*, where the presumption of equality is rebutted, courts have moved away from considering the holistic factors Baroness Hale set out,[54] and, instead focused on financial contributions.

I. The Issue of Severance

It is still unclear when and how severance occurred in *Stack*. Following the decision in *Stack*, upon the rebuttal of the presumption of a joint tenancy, the right to survivorship will no longer subsist. There are four ways through which a party can sever a joint tenancy: (i) serving a written notice under section 36(2) of the Law of Property Act 1925 (LPA),[55] (ii) acting on one's own share (such as selling or mortgaging the property),[56] (iii) a

[53] *Rowland v Blades* [2021] EWHC 426 (Ch) [145] (Deputy Master Hansen). It must be noted that the decision has since been successfully appealed; however, on a separate point concerning the amount the Respondent should pay for having excluded the Appellant from the use of a jointly-owned weekend home.
[54] *Stack v Dowden* (n 2) [69] (Baroness Hale).
[55] Law of Property Act 1925 (LPA 1925), s 36 (2).
[56] *Williams v Hensman* (1861) 1 J&H 546, 557.

course of dealings (this can be desire or tacit acceptance)[57] and (iv) mutual agreement.[58] Methods (i) and (ii) are unilateral.[59] While the exact actions which could amount to severance are unclear,[60] it is generally accepted that a sale, a gift, a mortgage[61] or an express trust[62] all amount to severance. Severance can also occur at an individual's whim as long as they 'give'[63] written notice (which communicates a desire that severance should take immediate effect)[64] to all of the joint tenants.[65] It is possible for severance to occur through mutual agreement and, *per* Browne LJ, mutual agreement can be inferred from the course of dealing, allowing for the joint tenancy to be severed without express communication.[66] There are two issues which remain unaddressed in *Stack*: (i) when, and (ii) how severance into unequal shares took place. Briggs highlights how the Supreme Court did not even mention the term severance in *Stack*.[67] This has the unfortunate consequence of muddying the current law on severance.

One issue with how the Court in *Stack* deployed the CICT is that it had the effect of severing the joint tenancy into

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[57] ibid.
[58] ibid.
[59] Ben McFarlane, Sarah Nield and Nicholas Hopkins, *Land Law: Text, Cases and Materials* (4th Edition, OUP 2018) 511.
[60] ibid 519-521.
[61] *First National Security v Hegerty* [1985] 1 QB 850 (CA).
[62] McFarlane, Nield and Hopkins, *Land Law: Text, Cases and Materials* (n 59) 521.
[63] LPA 1925, s 36(2)
[64] *Harris v Goddard* [1983] 1 WLR 1203 (CA) 1209B.
[65] LPA 1925, s 36(3).
[66] *Burgess v Rawnsley* [1975] Ch 429 (CA) 444A (Browne LJ).
[67] Adrian Briggs, 'Co-ownership and an Equitable Non Sequitur' (2012) 128 Law Quarterly Review 183, 183.

unequal shares. A further issue is how this severance occurred without signed writing, which is required under section 53(1)(c) LPA.[68] Mee explains how this may have happened through the ambulatory constructive trust,[69] which was described by Lord Hoffman[70] as a mechanism that operates when the intentions of the legal owners change, which causes their beneficial shares to change accordingly.[71] Mee suggests the reason there is no need for the agreement to be in signed writing *per* section 53(1)(c) LPA[72] is that 'each new division of the beneficial ownership occurs under a new, or (to put it a different way) newly refreshed, constructive trust'.[73] No writing is required for the creation of a constructive trust *per* section 53(2) LPA.[74] This explains how severance into unequal shares may occur. However, some uncertainty persists as noted by Pawlowski and Brown. Specifically, in *Stack* the Court was unclear as to whether subsequent common intentions work to merely alter the ambulatory trust already in existence or create a new constructive trust.[75] Dixon makes a further important point, stating that it is not evident whether behaviour giving rise to the common intention directly severs the joint tenancy into unequal shares, or whether it is first severed equally followed by

[68] McFarlane, Nield and Hopkins, *Land Law: Text, Cases and Materials* (n 59) 526.
[69] John Mee, 'Ambulation, Severance, and the Common Intention Constructive Trust' (2012) Law Quarterly Review 500.
[70] *Stack v Dowden* (n 2) [62] (Baroness Hale, quoting Lord Hoffman).
[71] Ben McFarlane, Nicholas Hopkins and Sarah Nield, *Land Law* (2nd Edition, OUP 2020) 203.
[72] LPA 1925, s 53(1)(c).
[73] Mee (n 69) 501.
[74] LPA 1925, s 53(2).
[75] Mark Pawlowski and James Brown, 'Co-ownership and Severance after Stack' (2013) 27 Trusts Law International 59, 63.

a transfer of shares.[76] If severance works in the latter way, signed writing would in fact be required under section 53(1)(c) LPA.[77] All of these issues highlight the general lack of clarity as to how severance occurred under the CICT.

Putting the difficulties surrounding formalities aside, *Stack* set a curious precedent for what constitutes a common intention to sever. Can it truly be said that holding separate finances (which, as explained above, is not 'very unusual' in the context of cohabitation) is enough evidence to infer that the parties had a common intention to exclude survivorship? This would be a reach, as there are many valid reasons for the parties in question to keep their finances separate such as avoiding responsibility for each other's debts, not being impacted by each other's credit history and avoiding arguments about money where the parties have different spending habits.[78]

There is one more problem concerning severance, namely, when exactly does severance take place under the ambulatory constructive trust? If we accept Mee's explanation, the question as to the exact moment when the courts should deem that there has been severance remains. As Brown and Pawlowski explain, 'the acts of detriment relied on to support a new common intention to vary beneficial entitlement may take place over a period of time'.[79] The lack of clarity as to *when* severance occurs

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[76] Martin Dixon, 'The Still Not Ended, Never-ending Story' (2012) The Conveyancer and Property Lawyer 83, 84.
[77] Pawlowski and Brown (n 75) 63.
[78] 'Should you manage money jointly or separately' (Money Helper) <www.moneyhelper.org.uk/en/everyday-money/budgeting/should-we-manage-money-jointly-or-separately> accessed 22 March 2023.
[79] Pawlowski and Brown (n 75) 65.

can cause issues when one party dies during or before proceedings.[80] When this is examined alongside the fact that it is not evident *how* the severance happens and whether all necessary formalities under the LPA are complied with, it becomes clear that the issue of severance post-*Stack* is messy and requires clarification.

II. The Factual Over-Emphasis on Financial Contributions

There are three consequences of the factual overemphasis on financial contributions: (i) financial contributions are often prioritised at the expense of the other relevant factors set out by Baroness Hale,[81] (ii) this emphasis is misguided for it takes too narrow a view as to what may amount to a relevant contribution to the couple's joint enterprise and (iii) has the consequence of cementing the male as the norm.

The majority in *Stack* accepted that a home has significance beyond its financial value. Pallasmaa suggests that the home is an expression of the life and personality of its inhabitants.[82] Fox O'Mahoney identifies values that can be held by a home, including the home as a financial investment, as a territory, as a physical structure, as identity and as a socio-cultural

[80] ibid 59.
[81] *Stack v Dowden* (n 2) [69] (Baroness Hale).
[82] Juhani Pallasmaa, 'Identity, Intimacy and Domicile - Notes on the Phenomenology of Home' in David N. Benjamin, David Stea and Eje Arén (eds), *The Home: Words, Interpretations, Meanings and Environments* (Avebury 1995) 132.

unit.[83] Specifically, it 'provides the locus for family life, a place of safety, a place of privacy, continuity and a sense of permanence'.[84] Pallasmaa explains that the home is a projection of an individual's identity but also of a family.[85] These less tangible attributes of the home were not explored by the courts, both on the factual consideration in *Stack* itself and in subsequent case law.[86] Focusing on financial contributions as opposed to the other factors set out by Baroness Hale is a gross oversimplification of the complicated interplay between financial and non-financial contributions within cohabiting couples. This risks misrepresenting their intentions in a way that unduly benefits the financially dominant party.

Probert explores what may have made the facts of *Stack* so exceptional that it required the majority of the factual analysis made by the Court to be focused on financial contributions. One reason may be that S could have contributed more to family finances. However, as Probert identifies, this would suggest that D's contributions to household expenses were relevant and

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[83] Lorna Fox O'Mahoney, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (2002) 29 Journal of Law and Society, 580.

[84] ibid 592.

[85] Pallasmaa (n 82)135.

[86] For an example see *Abbott v Abbott* [2008] 1 FLR 1451 (HL) [17]-[18] (Baroness Hale): While a 50:50 division of the beneficial interest was found despite one of the parties' negligible financial contributions, the Court focused on (besides the intention of the Respondent's mother in giving financial assistance to the couple) the financial arrangement between the parties, specifically their joint bank account and joint liability for the mortgage.

considered by the Court, which they were not.[87] Another reason suggested by Probert may be that S did not contribute as much as he could have (Baroness Hale states 'it might have been possible to deduce some sort of commitment that each would do what they could')[88]. However, as Probert states, this 'leaves non-financial contributions out of account'.[89] Thus, Probert outlines how, despite Baroness Hale setting out a myriad of non-financial considerations at [69], the Court focused extensively on financial considerations and, in doing so, did not accord sufficient weight to non-financial contributions. This had consequences in subsequent case law. Greer and Pawlowski suggest that any contributions other than the 'Herculean activities of the claimant in *Eves v Eves*' are unlikely to help claimants who focused on contributions such as housework or childcare.[90] This can be seen, for example, in both *Morris v Morris*[91] and *Solomon v McCarthy*[92] where shares were found to be unequal despite significant contributions to the property through farming or property improvements. Thus, in practice, the post-*Stack* case law fails to achieve the second form of familiarisation identified by Hayward in *Stack* itself, namely, putting emphasis on fact specificity in the context of family homes.

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[87] Rebecca Probert, 'Equality in the Family Home: *Stack v. Dowden* [2007] U.K.H.L. 17' (2007) Feminist Legal Studies 341, 348.
[88] *Stack v Dowden* (n 2) [91] (Baroness Hale).
[89] Probert 'Equality in the Family Home: *Stack v. Dowden* [2007] U.K.H.L. 17' (n 87) 349.
[90] Sarah Greer and Mark Pawlowski, 'Imputation, Fairness and the Family Home Graham-York v York [2015] EWCA Civ 72; [2015] H.L.R. 26' (2015) Conveyancer and Property Lawyer 512, 519.
[91] *Morris v Morris* [2008] EWCA Civ 257, [2008] Fam. Law 521 [23] (Sir Peter Gibson).
[92] *Solomon v McCarthy* (n 51) [35] (HHJ Paul Matthews).

Moreover, in focusing on financial contributions, and failing to give weight to indirect financial or non-financial contributions, the courts are taking an overly stringent view of what could constitute a relevant contribution to the couple's joint enterprise. In reality, one half of a cohabiting couple performing domestic duties (i.e. cooking, cleaning etc.) or paying for non-purchase related expenses (i.e. children's clothing, trips, food etc.) will free up the other's finances, enabling them to directly contribute to the purchase of the house. Although such seemingly legally irrelevant conduct does not directly contribute towards the purchase sum, in reality, it does enable the purchase of the house by freeing up capital that would have otherwise been used on domestic duties and expenses. This has been recognised by the Law Commission in its 2002 Report, which stated that 'in the same way as the indirect financial contribution by one sharer would enable another to make the direct payment towards the acquisition of a home (in other words, if B met the utility bills, and thereby enabled A to pay the mortgage), non-financial contributions by one sharer might enable another to pay for the home.'[93] Moreover, this has also been recognised by Lord Reid in *Pettitt v Pettitt*, where His Lordship stated that 'the wife who wants to contribute pays all the household bills thus enabling the husband who holds the title to the house to pay the instalments. [...] The wife may not be able to make any financial contribution but by good management and co-operation she may make it possible for the husband to pay the instalments regularly.'.[94]

Further, focusing the analysis on monetary contributions poses the risk of recognising the significance of the home as the

[93] Law Commission, *Sharing Homes* (Law Com No 278, 2002) para 3.38.
[94] *Pettitt v Pettitt* (n 24) 794F (Lord Reid).

significance more generally afforded by men than by women. This has the effect of centring the male as the norm,[95] meaning that, it sets "the man's" experiences and behaviours (specifically in relation to how men value property) as the standard that women have to conform to in order to get legal protection. Those women who do not meet this standard remain unprotected by the law. This can be seen in Csikszentmihalyi and Halton's study, which found that, for fathers, the home 'becomes a concrete embodiment of all the psychic energy they have invested in the form of money',[96] while mothers find it significant how the home is a site for relationships and interactions.[97] Furthermore, Csikszentmihalyi and Halton identified that the 'most salient tie' between a man and his home is the work he put into the home, such as through renovations.[98] While women also take pride in work they do to the home, this work tends to be less structural, such as decorating.[99] Yet, in *Stack* Lord Neuberger agreed with Lord Walker that beneficial interest may shift where one party carries out serious improvements, but 'any work must be substantial: decoration or repairs (at least unless they were very significant) would not do'.[100] This clearly shows how the significance of the home as recognised by the courts favours male parties and leaves the interests of female parties less protected. This is because, since the contributions considered legally relevant align with the way men value the home, they are more likely to

[95] Sandra L. Bem, *The Lenses of Gender: Transforming the Debate on Sexual Inequality* (Yale University Press 1993) 2.
[96] Mihaly Csikszentmihalyi and Eugene Halton, *The meaning of things: Domestic symbols and the self* (CUP 1981) 130.
[97] ibid.
[98] ibid 131.
[99] ibid 132-133.
[100] *Stack v Dowden* (n 2) [139] (Lord Neuberger).

have made such contributions and thus benefit from judicial protection. Beresford explains that when women perform their gender role - 'performing their femininity as expected'[101] - the courts fail to recognise their contributions. An example of this is Valerie Burns in *Burns v Burns* who undertook caring responsibility for the home and the couple's children. In doing so she was unable to undertake consistent paid employment, and the financial contributions she did make were deemed insufficient to meet the bar of being 'substantial'.[102] Fox LJ gave examples of what would amount to 'substantial contributions', these would be: 'substantial financial contributions' to household expenses or direct contributions to the purchase price or mortgage.[103] This shows a limited appreciation for domestic work, for example, undertaking child rearing responsibilities frees up money in cases where a babysitter would otherwise have to be employed. Thus, courts should extend their understanding of legally relevant conduct.[104] It is conceded that the courts must be careful when examining the holistic significance of the home to avoid confining women to the private sphere and entrenching the stereotype that the home is a woman's only place.[105] However, it is also important that the family home be valued in a manner, which reflects how all residents ascribe significance to their home.

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[101] Sarah Beresford, 'It's Not Me, It's You: Law's Performance Anxiety over Gender Identity and Cohabitation' (2012) 63 N Ir Legal Q 187, 198.
[102] *Burns v Burns* [1984] 2 WLR 582 (CA) 592C (Fox LJ).
[103] ibid 592E (Fox LJ).
[104] Beresford, (n 101) 200.
[105] Lorna Fox O'Mahony, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, 2007) 361.

Thus, a solution will have to mitigate the issues identified. It must address the issue of severance and ensure a clear, consistent approach to quantification. It will be shown how a revised CICT model ameliorates these problems and establishes a clear and coherent framework for the courts to apply and consequently make the law more predictable.

E. Single Name Cases

Single name cases concern situations where A and B, an unmarried couple, have purchased a family home together, and said property was registered in B's sole name. The current state of the law with respect to such cases is in a state of considerable confusion. Since *Rosset* remains the binding authority, the starting point is that equity follows the law, which can only be rebutted by direct contributions to the purchase price or express agreement between the parties.[106] However, *Rosset* has been criticised in *Stack* with Lord Walker suggesting the law has 'moved on'.[107] The implications of the decision in *Jones* for single name cases are even more confusing. On the one hand, Baroness Hale and Lord Walker seemed to confirm that the presumption that equity follows the law continues to apply and avoided explicitly disapplying *Rosset*.[108] On the other hand, Her Ladyship and His Lordship nonetheless held that, at a high level of generality, the CICT should apply to both single and joint names cases.[109]

[106] *Lloyds Bank plc v Rosset* (n 4) 132-133 (Lord Bridge).
[107] *Stack v Dowden* (n 2) [26] (Lord Walker).
[108] *Jones v Kernott* (n 3) [16] (Lord Walker and Baroness Hale)
[109] *Jones v Kernott* (n 3) [17] (Lord Walker and Baroness Hale); Brian Sloan, 'Keeping Up with the Jones Case: Establishing Constructive Trusts in 'Sole Legal Ownership' Scenarios' (2015) 35 LS 226, 232.

Further departing from *Rosset*, Baroness Hale and Lord Walker held that such common intention of the parties had to be deduced objectively from their conduct.[110] Thus, there is a clear clash between the binding authority *Rosset* and the more recent obiter comments of the Court in *Stack* and *Jones*.

Considering the confused state of authorities on how single name cases should be approached, it is no wonder that the application of the law in lower courts has been inconsistent. As Sloan argues, lower court decisions post-*Jones* can be divided into three categories: (i) where the possible impact of *Jones* in moving beyond *Rosset* was ignored; (ii) where the influence of *Jones* was recognised but the outcome (in establishing rather than quantifying the relevant beneficial interest) would have been permissible following *Rosset*; and (iii) where *Jones* produced a novel result in a 'sole name' case.[111] *Jones* has been recognised and correctly applied in cases such as *Geary v Rankine*.[112] However, in cases like *Rezaeipoor v Arabhalvai*, *Jones* was ignored completely, with the judge failing to distinguish between resulting and constructive trusts and applying *Rosset*.[113] Even where it was not ignored, *Jones* has sometimes been fully distinguished or misapplied. In *Re Ali* Dobbs J held that 'the "whole course of dealing" between the parties, in order to ascertain their intentions, or, if necessary, to impute them' was relevant only to

[110] *Jones v Kernott* (n 3) [52] (Lord Walker and Baroness Hale).
[111] Brian Sloan, 'Keeping Up with the Jones Case: Establishing Constructive Trusts in 'Sole Legal Ownership' Scenarios' (2015) 35 LS 226, 232.
[112] *Geary v Rankine* [2012] EWCA Civ 555, [2012] 2 F.L.R. 1409 [21]-[22] (Lewison LJ).
[113] *Rezaeipoor v Arabhalvai Jones* [2012] EWHC 146 (Ch) [15] (Kevin Prosser QC).

quantification, citing *Rosset*.[114] Similarly, in *Ullah v Ullah*, the judge, while considering *Jones* as relevant and failing to cite *Rosset*, held that the claimant could not establish a CICT.[115] The claimant would in principle be able to establish a purchase money resulting trust (PMRT) if he could show he had made direct contributions to the purchase price.[116] In rejecting the claims, the deputy judge focused on discussions and financial contributions.[117] Thus, since there is clear confusion amongst the lower courts as to how *Jones* and *Rosset* should be applied, the law governing single name cases is in dire need of clarification.

2. Proposed Solution

This article proposes a reformed CICT model, which, by focusing on the parties' intention of a *joint enterprise*, achieves the 'single legal regime', which Lord Walker and Baroness Hale alluded to in *Jones*. The Court would be justified in taking this approach since (i) differentiating between the two types of cases puts too much emphasis on the way the estate is registered and (ii) the parties' commitment to a joint enterprise should take precedence. Further, it will be argued that the fact that the CICT would give effect to the joint enterprise entered into by the parties calls for doing away with the quantification stage of analysis of the CICT.

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[114] *Re Ali* [2012] EWHC 2302 (Admin), [2013] 1 F.L.R. 1061 [105] (Dobbs J).
[115] *Ullah v Ullah* [2013] EWHC 2296 (Ch), [2013] B.P.I.R. 928 [6] (John Martin QC).
[116] ibid.
[117] Sloan (n 111) 238.

A. A Single Legal Regime

Lord Walker and Baroness Hale insisted in *Jones* that there was a 'single regime' governing single and joint names cases, in that a CICT is of central importance to both.[118] However, as the above analysis of recent case law on single name cases shows, said single regime has not materialised.

The reason for this may lie in the fact that His Lordship and Her Ladyship chose to maintain a stark division between the two types of cases, having held that 'the starting point for analysis is different'[119] depending on the way the property was registered. Where it is registered in a single name, the claimant has no interest in the property unless he can show a common intention to the contrary.[120] Conversely, where property is registered in joint names, the parties are presumed to be joint beneficial owners unless the contrary is shown.[121] This appears to be in line with the long-standing maxim that 'equity follows the law'. However, the Court then proceeded to state that the presumption in joint names cases is not based on that principle, but rather on the parties' commitment to a joint enterprise and the practical difficulty of accounting for the individual contributions of the parties during their relationship.[122] The Court omitted to explicitly state what the presumption in single name cases is based on.

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[118] *Jones v Kernott* (n 3) [16] (Lord Walker and Baroness Hale).
[119] ibid.
[120] ibid [17] (Lord Walker and Baroness Hale).
[121] ibid.
[122] ibid [19], [22] (Lord Walker and Baroness Hale).

In our view, if the Court wishes to implement a single regime that gives effect to the parties' commitment to a joint enterprise, then the Court should clearly break from the current approach which puts too much emphasis on the way the estate is registered. This is because, where there is a joint enterprise, the choice whether to put property into sole or joint names is often governed by considerations which have nothing to do with how the beneficial interest is to be held. For instance, in *Sandhu v Sandhu*, property was transferred into a party's sole name because the other party was too old to take out a mortgage.[123] More importantly, as the Court recognised in *O'Neill v Holland* and *Thompson v Hurst*, where one of the parties has a poor credit history, the best, or only, way to obtain a mortgage is to register the property in the sole name of the party with the stronger credit score.[124] It must be acknowledged that Etherton LJ in *Thompson* stated that a proposition that a presumption of joint beneficial ownership should apply, where there is evidence that they would have liked to be joint legal owners but registering as such was neither practical nor desirable, as it is 'neither consistent with principle nor sound policy'.[125] While it is indeed inconsistent with principle, since *Jones* failed to establish that the presumption should apply equally to single and joint names cases, we submit that it would be sound policy. Contrary to what Etherton LJ was concerned with in *Thompson,*[126] we do not propose that in every case where mortgage considerations influenced parties to register

[123] *Sandhu v Sandhu* [2016] EWCA Civ 1050 [7] (Floyd LJ).
[124] *O'Neill v Holland* [2020] EWCA Civ 1583, [2021] 2 F.L.R. 1016 [61] (Henderson LJ); *Thompson v Hurst* [2012] EWCA Civ 1752, [2014] 1 F.L.R. 238 [8], [21], [23] (Etherton LJ).
[125] *Thompson v Hurst* (n 124) [20] (Etherton LJ).
[126] ibid [21] (Etherton LJ).

the property in a single name, they would (were it not for mortgage considerations) inevitably have registered it in joint names. Rather we simply aim to show that, if the Court is truly concerned with giving effect to the parties' intention, then there is too much weight attributed to the way in which the property was registered. Mortgages are an increasingly popular way of financing property purchases, especially for younger generations. According to UK mortgage statistics amongst British homeowners 22.5% of those aged 25-34, 29.3% aged 35-44 and 28.7% aged 45-54 were buying property with a mortgage in 2023, as opposed to 1.5%, 3.3% and 9.5% respectively owning property outright.[127] Long gone are the days when property would be purchased with a lump sum payment. Thus, decisions regarding the registration of purchased property are becoming more likely to be influenced by the respective credit scores of the parties. Thus, if the Court is truly concerned with giving effect to the parties' intention, it should recognise this shift. This should be done by recognising their commitment to enter into a joint enterprise, regardless of how the property was registered.

Naturally, if either of the parties can clearly show that the decision to register into a single name was made because the property was intended to be owned by that party alone, this would show that the parties did not intend a joint enterprise, and that line of analysis would no longer apply.

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[127] Claire Flynn, 'UK Mortgage Statistics 2023' (*U Switch*, 1 February 2023) <https://www.uswitch.com/ mortgages/mortgage-statistics/> accessed 17 April 2023.

B. The Importance of a Joint Enterprise

It is submitted that the Court would be justified in basing the single legal regime on the finding of an intention to enter into a joint enterprise. This is because, as Baroness Hale stated, where an inference, that parties intended that each should contribute as much to the household as they reasonably could, can be drawn, their commitment to running their household as a joint enterprise should take precedence over mercenary considerations.[128] (Though it must be noted that Her Ladyship was speaking in the context of joint names cases only). There is no good reason for not extending this approach to single name cases, especially because, as argued above, decisions as to registration are often distinct from the parties' genuinely held intentions. If the parties both act in the same manner with regards to the property and hold a mutual intention of equal beneficial ownership, why should the way they are treated be based completely on how the property is registered?

By responding to the intention of a joint enterprise, the CICT better protects a party contributing through non-financial means. Many of the considerations set out by Baroness Hale at [69] of *Stack* are generally made by a cohabiting partner without any thought as to beneficial interest. Consequently, the courts have sometimes found that these actions cannot be relied upon as evidence as to a common intention of shared beneficial interest. For example, in *James v Thomas* Ms. James' work for the parties' business was found to be 'explicable on other grounds'

[128] *Stack v Dowden* (n 2) [69] (Baroness Hale).

from an agreement that she would have beneficial interest in the property.[129] Sir John Chadwich explained '[i]t is a mistake to think that the motives which lead parties in such a relationship to act as they do are necessarily attributable to pecuniary self-interest'.[130] Similar reasoning is present in other decisions. In *Williams v Lawrence*, the Court found that contributions to household expenses and outgoings were 'simply the ordinary cost of living' and could not be attributed to an intention related to the beneficial interest.[131] In *Morris v Morris*, the claimant's participation in the farming business did not grant her an interest in the land,[132] and Sir Peter Gibson highlighted that 'court[s] should be cautious before finding that the activities of a wife or a cohabitant can only be explained on the footing that she believes that she was acquiring an interest in land'.[133] Finally, in *Pillmoor v Miah*, the Court emphasised that a long marriage provides no evidence as to how a couple intends to hold their assets,[134] and is only relevant to the question of quantification, and not the parties' intentions.[135] In *James*, the Court conceded that the current principles of law and equity are 'inadequate to meet the circumstances in which parties live together in the twenty-first century'.[136] By responding to the intention of a joint enterprise, our model solves this issue, for while domestic duties and child

[129] *James v Thomas* [2007] EWCA Civ 1212, [2008] 1 F.L.R. 1598 [27] (Sir John Chadwick).
[130] ibid [36] (Sir John Chadwick).
[131] *Williams v Lawrence* [2011] EWHC 2001 (Ch), [2011] B.P.I.R. 1761 [61] (HHJ David Cooke).
[132] *Morris v Morris* (n 91) [23] (Sir Peter Gibson).
[133] ibid [25] (Sir Peter Gibson).
[134] *Pillmoor v Miah* (n 52) [32] (Judge Kramer).
[135] ibid [37] (Judge Kramer).
[136] *James v Thomas* (n 129) [38] (Sir John Chadwick).

rearing may not be done in pursuit of beneficiary interest, they *do* provide evidence of an intention to create a joint enterprise.

Moreover, such an approach will better reflect the expectations of lay persons. Probert explains how there is 'empirical evidence that many cohabitants believe that they in fact have the same rights as if they were married'.[137] More specifically, Barlow's study reveals that 66% of participants believe a woman (an unmarried and childless cohabitant of two years, whose partner has bought the house) should have 'the same financial rights she would have done were they married'.[138] It was also found that participants had different opinions on how similar rights should be to marriage based on: individual circumstances, the existence of children, 'investment' in the relationship and the duration of the relationship.[139] Interviewees were more likely to find that legal treatment of the dissolution of a cohabiting relationship should be treated similarly to the end of a marriage in cases, where there was a long period of cohabitation, there were children and earning/caring responsibilities were shared or one partner's career was prioritised.[140] This demonstrates that participants believe that in cases where there is evidence of a *joint enterprise*, with both partners contributing what they can (in terms of money or caring responsibilities), the financial rights should be

[137] Rebecca Probert, 'Trusts and the Modern Woman - Establishing an Interest in the Family Home' (2001) 13 Child and Family Law Quarterly 275, 285.
[138] Anne Barlow, Carole Burgoyne, Elizabeth Clery and Janet Smithson, 'Cohabitation and the law: myths, money and the media' in *The 24th British Social Attitudes Report 2008* (Sage, 2008) 46.
[139] ibid.
[140] ibid.

the same as, or similar, to those available at the dissolution of a marriage.

Furthermore, in view of the multidimensional nature of contributions and the gender-specific views on the value of the home, the law should be careful not to set the male as the norm.

C. Foregoing Quantification

The fact that the CICT would give effect to the joint enterprise entered into by the parties calls for doing away with the quantification stage of analysis. This is so for three reasons.

Firstly, if the CICT, in the context of the family home, is responding to an intention to establish a *joint* enterprise, and the parties reflect this intention by each giving as much as they could reasonably be expected to provide, it makes little sense to allocate shares in the beneficial interest which fail to reflect this commitment. It is inconsistent to base a trust on the intention of a joint enterprise and then vary shares.

Secondly, foregoing quantification in favour of strengthening the presumption of joint beneficial ownership, and where that is rebutted, resorting to a RT analysis, would change little in how many cases play out in practice. As has been analysed above, the presumption of joint beneficial ownership is very strong, meaning that some cases never reach the stage of substantive quantification, beyond the courts declaring that the

interest should be held equally.[141] Moreover, as shown by our analysis of the overemphasis of financial contributions in post-*Stack* case law, even if they do, the courts rarely go beyond simply accounting for the financial arrangement between the parties. This can best be seen from *Stack* itself, where the majority, which utilised a CICT, and the minority, which used a RT, arrived at the same division of the beneficial interest.

Thirdly, it is submitted that quantification, when it does play a role, cannot accurately be done. Once we recognise that the significance of the home *should* be wider than finances, then we cannot possibly quantify individual contributions. How can we afford a percentage of beneficial interest based on elements such as identity or socio-cultural significance? Greer and Pawlowski explain that under the current law, when courts do try and quantify, it often leads to arbitrary results,[142] as was conceded by HHJ Behrens in *Aspden v Elvy*.[143] Hayward suggests that in *Stack* and *Jones* 'context-specific analysis is becoming more of an estimation of party fault'.[144] Furthermore, in Parliament, Lord Marks of Henley-on-Thames explains that 'it remains extremely difficult to predict or ascertain what courts will decide the parties' shares should be, even where joint ownership is established'.[145] An approach yielding so much uncertainty is clearly undesirable,

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[141] *Solomon v McCarthy* (n 51); *Pillmoor v Miah* (n 52); *Rowland v Blades* (n 53).
[142] Greer and Pawlowski (n 90) 517.
[143] *Aspden v Elvy* [2012] EWHC 1387 (Ch), [2012] 2 F.L.R. 807 [128] (HHJ Behren).
[144] Andy Hayward, 'Common Intention Constructive Trusts and the Role of Imputation in Theory and Practice: Barnes v Phillips.' [2016] 80(3) Conveyancer and property lawyer 233, 242.
[145] HL Deb 15 March 2019, vol 796, col 1258.

especially in the law of real property, where certainty and clarity are paramount when dealing with the most important asset most people own.

It must be acknowledged that the lack of quantification may create certain difficulties when dealing with the ambulatory nature of human relationships. This may be particularly obvious where, after a long period of maintaining a joint enterprise, the relationship between the parties suddenly breaks down and one of them entirely ceases to contribute. A blunt approach, which, in all likelihood, grants them 50% of the beneficial interest, may be regarded as unfair in such a scenario. However, this issue would arise only in very few cases, where the period of contributions is long enough and the contributions significant enough to establish a joint enterprise, but ends so abruptly and totally as to warrant this feeling of injustice. It is submitted that, the potential of an undesirable outcome in a narrow range of cases, which may not even materialise, should not jeopardise the increased protection afforded to the weaker party in the great majority of cases. In this highly delicate area of the law there is no perfect approach. The courts can, on the one hand, give minute consideration to the facts of each case, estimating the beneficial interests with regards to each individual relationship. This, as stated above, risks uncertainty and biased assessment of certain contributions. On the other hand, while the proposed approach rests on certain generalisations, it offers a significantly more certain outcome, and is specifically concerned with protecting the weaker party by ensuring that due consideration is given to historically undervalued interests. The Court has a legal policy choice to make, and in our submission, for the reasons stated, the latter approach is preferable.

3. How the Proposed Model Would Work

A. Joint Names Cases

This section deals with cases where A and B, who are an unmarried couple, have purchased a family home together, that property was registered in their joint names, however B contributed more than A to the purchase price of the home. In such a case, the proposed CICT model will operate in the following way:

1) At the outset they are joint beneficial owners.
    a) This is because A and B are joint legal owners.
    b) If neither party litigates, they will remain joint legal owners, unless there is a separate act of severance as explained below.
2) The presumption of the PMRT arises.
    a) The presumption arises in response to the unequal financial contributions to the purchase price between the parties.[146]
        i) Thus, it is presumed that the parties intended to be tenants in common in equity and hold the beneficial interest in proportions equal to their contributions.
    b) The presumption would be raised by B, who had contributed the majority of the purchase price.

[146] *Stack v Dowden* (n 2) [110] (Lord Neuberger)

3) The presumption of the PMRT is rebutted by the presumption of a CICT.
    a) The presumption of a CICT arises where there is either an express or inferred agreement that the parties intended to enter into a joint enterprise and the party relying on that agreement, in this case A, suffered detriment in reliance on that agreement.
    b) The presumption of a CICT displaces the presumption of a PMRT.[147]
    c) The presumption of a CICT can be rebutted by evidence showing that the parties did not intend to enter into a joint enterprise.
    d) If the presumption is rebutted, then the presumption of a PMRT will apply and the parties will hold the beneficial interest in the proportion in which they contributed to the purchase price.
4) The parties are once again joint tenants in equity.
5) The parties sever the joint tenancy, making then tenants in common holding the beneficial interest 50:50.
    a) This is because, as will be explained below, bringing proceedings amounts to severance under section 36(2) of the LPA.

I. The Presumption of Joint Enterprise

In order to raise the presumption of a joint enterprise the parties will need to show a course of conduct from which an inference,

[147] *Jones v Kernott* (n 3) [23] (Lord Walker and Baroness Hale).

that the parties intended that each should contribute as much to the household as they reasonably could, can be drawn.[148]

II. Detriment

Although the issue of detriment was not argued in either *Stack* or *Jones*, the Court of Appeal has confirmed in *Hudson v Hathway* that detrimental reliance remains a required element for a CICT to arise.[149] While the precise degree of detriment required is unclear, it is assumed that the requirement must have been fulfilled in both *Stack* and *Jones*.[150] This is presumably because, where the agreement is inferred from conduct, the parties' conduct is simultaneously both the evidence from which the agreement is inferred and the detriment which gives rise to the constructive trust.[151] Thus, wherever there is sufficient evidence to find that the parties intended to enter into a joint enterprise, there will also be sufficient evidence of detrimental reliance.

Moreover, it should be noted that, while detrimental reliance is required for the CICT to arise in the first place, it is separate from the question of quantification of interest once the trust has arisen.[152] Thus, its persistence in the application of the

[148] *Stack v Dowden* (n 2) [69] (Baroness Hale).
[149] *Hudson v Hathway* [2022] EWCA Civ 1648, [2023] H.L.R. 13 [153] (Lewison LJ).
[150] *Hudson v Hathway* (n 149) [107]-[108] (Lewison LJ); Martin Dixon, 'Non-problems, Future Problems and Fairy Dust' [2022] Conveyancer and Property Lawyer 119, 121.
[151] John McGhee (ed) *Snell's Equity* (34th edn, Sweet & Maxwell 2020) 24-056.
[152] *Hudson v Hathway* (n 149) [90] (Lewison LJ).

CICT does not prevent the Court from foregoing the quantification altogether, as proposed in this article.

B. Single Name Cases

This section applies to cases where A and B, an unmarried couple, have established a family home together and that property was registered in B's sole name. (Notably, it is not required that A and B both contribute to the purchase price, so long as they both contribute to the household in correspondence with their intention of a joint enterprise.) In such a case, the proposed CICT model will operate in the following way:

1) At the outset B is sole owner of the property.
2) The CICT presumption arises.
    a) The presumption of a CICT arises where there is either an express or inferred agreement that the parties intended to enter into a joint enterprise and the party relying on that agreement, in this case A, suffered detriment in reliance on that agreement.
    b) The CICT presumption can be rebutted by evidence showing that the parties did not intend to enter into a joint enterprise.
    c) If the presumption is rebutted, then B will remain the sole owner of the property.
        i) Alternatively, if A has contributed to the purchase price, then A can rely on the PMRT presumption to argue that they did not intend to make a gift of their contribution to B.

ii) If A is successful, then A and B will be tenants in common in equity and will hold the beneficial interest in the proportion in which they contributed to the purchase price.

3) The parties are joint tenants in equity.
4) The parties sever the joint tenancy, making then tenants in common holding the beneficial interest 50:50.
    a) Severance takes place the same way as in joint names cases.

I. Detriment

In *O'Neill v Holland* the Court of Appeal defined detriment in the context of single name cases as 'a description, or characterisation, of an objective state of affairs which leaves the claimant in a substantially worse position than she would have been in but for the transfer into the sole name of the defendant'.[153] It is submitted that detriment can be made out whenever: (i) the parties held an intention to form a joint enterprise, but for some reason registered the home in B's name alone, *and* (ii) where A contributed as much as they reasonably could be expected to to the household. This is because A will clearly be in a worse position than they otherwise would have been.

C. Severance

Under this model there is no 'ambulatory' nature to the CICT, instead, upon severance it will break into a tenancy in common

[153] *O'Neill v Holland* (n 124)[62] (Henderson LJ)

with equal shares. Thus, the issue as to the need for signed writing under section 53(1)(c) LPA identified by Pawlowski and Brown,[154] and Dixon[155] never arises. It also solves the temporal issue, identified by Brown and Pawlowski: 'the acts of detriment relied on to support a new common intention to vary beneficial entitlement may take place over a period of time'.[156]

This statement highlights that under the ambulatory nature of the CICT the differing contributions will accrue over a period of time (such as contributions to household expenditures and bills) thus, making it difficult to point to a moment in which the shares changed from being equal to unequal. Any change in percentage of beneficial interest will inherently mean severance has taken place; however, the exact moment is illusory and often intangible. Under this model, there is no need to grapple with quantification, and thus, the moment of severance will be explicit and clear. There are three possibilities as to when severance occurred.

(1) The CICT presumption is accepted by the courts, rebutting the presumption of the PMRT. The parties will be found to have been joint tenants under a CICT, which will sever *because* of the proceedings as explained below.
(2) The CICT presumption is accepted by the courts, rebutting the presumption of the PMRT and the parties can point to a clear moment of severance (before the proceedings) with sufficient evidence, this will have to be

[154] Pawlowski and Brown (n 75) 63.
[155] Dixon, 'The Still Not Ended, Never-ending Story' (n 76) 84.
[156] Pawlowski and Brown (n 75) 65.

one of the methods of severance established in *Williams v Hensman*.

(a) The most likely form of severance, relevant in these cases, is mutual agreement. As Browne LJ explained mutual agreement can be inferred from the course of dealing, and thus requires no express communication of an agreement to sever.[157] As long as the parties have sufficient evidence, this may be established.

(3) The CICT presumption is not accepted by the court, in this case the court will find that there has always been a PMRT and thus the issue of severance will not arise.

Whether bringing proceedings can actually amount to severance is contested. Brown and Pawlowski explain that 'where the application [to the court] clearly indicates a desire to sever, [it] may constitute a "notice in writing" within the meaning of s 36(2)'.[158] The case law on this matter is slightly unclear: in *Harris v Goddard* the Court found a divorce petition to the Court was found not to indicate an imminent desire to sever[159] rather the requested relief 'lay in the future and was contingent on the Court's exercising its discretion'.[160] In *Re Draper's Conveyance* the Court found that, where an application to the Court evinces an imminent intention to sever, then the application will act as written notice *per* section 36 LPA.[161] Plowman J even suggests that

[157] *Burgess v Rawnsley* (n 66) 444A (Browne LJ).
[158] Pawlowski and Brown (n 75) 65.
[159] *Harris v Goddard* (n 64) 1209C (Lawton LJ).
[160] ibid 1210H (Dillon LJ).
[161] *Re Draper's Conveyance* [1969] 1 Ch 486 (Ch) 487E-488B (Plowman J).

this can act as severance by operating on one's own share,[162] in line with *Williams v Hensman*.[163] As Dillon LJ states, these two cases can be distinguished from each other: while *Draper* involved a specific request for severance and sale, *Harris* involved a 'general and unparticularised' petition.[164] Thus, a petition can constitute severance if it is clearly phrased.

D. Why Not Parliamentary Reform?

This should be left to the courts rather than Parliament, because we are merely calling for a remodelling of the current judicial approach to family homes. Thus, the courts would not be exercising any power, which they do not already possess. Furthermore, as Lady Hale stated extrajudicially 'legislative reform freezes the law in a particular place and prevents its incremental development'.[165] Such a sensitive area requires flexibility with serious thought being given to the facts of each case. As Hayward explains, certainty in the law of the family home does not come from setting a strict statutory standard, it comes from having a sufficiently developed (and we add *consistent*) case law.[166]

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[162] ibid 492B-492E (Plowman J).
[163] *Williams v Hensman* (n 56) 557
[164] *Harris v Goddard* (n 64) 1210H (Dillon LJ)
[165] Lady Hale (n 42).
[166] Andrew Hayward 'Stack v Dowden (2007); Jones v Kernott (2011) Finding a Home for 'Family Property" in N. Gravells (ed), *Landmark Cases in Land Law* (Bloomsbury Publishing, 2013) 250.

4. The Proposed Model's Benefits

A. Certainty

Barlow suggests the current approach to cohabitation in England and Wales is on an 'ad hoc basis leaving the law complex, confusing and often illogical'.[167] Under our model, quantification is not an issue which the court has to grapple with at all. If there is sufficient evidence as to an intention of a joint enterprise, the shares will be equal; if not, a PMRT, which reflects contributions to purchase price, will exist. Thus, under our model, parties can more easily predict, before beginning litigation, what the division of the beneficial interest will be. This is key. In property law (particularly in the realm of real property) certainty and clarity are paramount, for the Court is dealing with the most important asset most people own.

In joint names cases certainty is achieved because there are only two possible outcomes:

(1) the CICT presumption arises, which B is unable to rebut, and A and B, after severance, hold a tenancy in common with the beneficial interest divided equally; or
(2) the CICT presumption arises, but B is able to rebut the presumption, in which case the PMRT presumption applies, and A and B hold as tenants in common in equity in the proportion of their financial contributions.

[167] Anne Barlow, 'Regulation of Cohabitation, Changing Family Policies and Social Attitudes: A Discussion of Britain within Europe' (2004) 26(1) Law and Policy 57, 60.

In joint legal ownership cases, evidence that the parties were a couple intending to form a joint enterprise, such as contributions to the household through payments, childcare, bills and more, would be invoked to rebut the presumption of a PMRT, instead of for quantification. This model better reflects how individuals generally believe the law should operate. As stated above, Barlow identified that a majority of her interviewees believed that an unmarried and childless cohabitant of two years who made *no* contribution to the purchase, '*should*' have the same financial rights as if she had been married.[168] The logical and cohesive approach, which reflects the expectations of homeowners, in which a joint tenancy can be severed into a 50:50 split or never exist (a PMRT having been created instead) allows the law to reflect reality and be more certain.

In single name cases certainty is achieved because there are only three possible outcomes:

(1) the CICT presumption arises, which B is unable to rebut, and A and B, after severance, hold a tenancy in common with the beneficial interest divided equally;
(2) the CICT presumption arises, but B is able to rebut the presumption, in which case B remains sole owner; or
(3) the CICT presumption arises, which B is able to rebut, but A successfully raises the PMRT presumption, in which case the parties hold a tenancy in common with the beneficial interest divided proportionally to their financial contributions to the purchase price.

[168] Barlow, Burgoyne, Clery and Smithson (n 138) 46 (emphasis added).

This is an improvement on the current state of the law because it replaces a sliding scale of possible outcomes (which cannot be predicted from the incidence of the trust), with a finite list of possible outcomes, one of which (a 50:50 split) is by far the most likely to arise.

B. Coherence in Application

This approach not only achieves the 'single legal regime' Lord Walker and Baroness Hale discussed in *Jones*,[169] but it ensures there is a coherent and consistent approach in all cases which concern the intention of establishing a joint enterprise. Furthermore, the proposed model solves the ambiguity and lack of clarity as to the current law in single name cases because it provides a clear line of analysis for the courts to follow: either the presumption of a CICT will be rebutted or it will not. If the presumption stands, the parties will have a tenancy in common with equal shares (severance will occur upon proceedings if it did not happen at an earlier point). If the presumption is rebutted the question will become whether the PMRT presumption stands or is rebutted.

C. Temporal Clarity

Quantification makes it challenging to determine when exactly severance takes place, especially since the 'whole course of the dealings'[170] is considered.[171] Adopting our model of the CICT

[169] *Jones v Kernott* (n 3) [16] (Lord Walker and Baroness Hale).
[170] *Stack v Dowden* (n 2) [60] (Baroness Hale).
[171] Pawlowski and Brown (n 75) 65.

mitigates the uncertainty and allows for greater clarity as to the moment of severance. As explained above there are three ways in which severance can occur. Thus, any issues with temporal certainty will be resolved, either because they would never arise in the first place, or because a clear moment of severance can be easily determined.

Conclusion

It has been shown that the current state of the law suffers from a lack of clarity and certainty and fails to fully give effect to the parties' intentions. This article has proposed an alternative solution by altering the CICT so that it no longer deals with quantification. Rather, it should simply respond to the common intention of establishing a joint enterprise by dividing beneficial ownership equally. This achieves the single legal regime alluded to by Lord Walker and Baroness Hale in *Jones* and thus achieves greater consistency in the law. It also clarifies the issue of severance, making the law more predictable.

Can You Hear Me? – Dismantling the Barriers to Child Participation in Divorce Proceedings

Zi Hao Tan & Solomon Chann[1]

Abstract— This article examines and challenges three key justifications which act as barriers against child participation in divorce proceedings, namely: (1) presumption of incompetence in children, (2) susceptibility of children to parental manipulation, and (3) anti-therapeutic implications for making children feel responsible for the final outcome. With respect to (1), it is argued that a ready rebuttal exists in demonstrating that the child has sufficient understanding, paving the way for a competence-based approach centred on understanding. With respect to (2), it is argued that concerns over parental manipulation are outdated in light of modern psychological and sociological developments, and that a stricter and context-sensitive approach would be more appropriate. With respect to (3), it is argued that having the opportunity to be involved in the decision-making process has

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positive therapeutic implications and does not inevitably lead to children bearing the stress of a conflict of loyalty. Fundamentally, the article calls for the dismantling of said barriers, protecting the rights of children by giving due weight to their views in major decisions that affect them.

Introduction

Article 12 of the UN Convention on the Rights of the Child (UNCRC) guarantees that children 'capable of forming [their] own views [have] the right to express those views freely in all matters affecting [them]'. This means having the choice of whether or not to exercise the right to be heard, as well as being able to do so without pressure. At the domestic level, the Children's Act 1989 (CA 1989) affirms that in making major decisions affecting the child, the courts must have regard to the 'ascertainable wishes and feelings of the child concerned' under the CA 1989, s 1(3)(a). Such general sentiment is also supported by prominent political[2] and judicial figures.[3]

However, as this article will show, existing legal protections have fallen short in practice. There exists a perceived tension between child protection and child participation in discussing the optimal extent of child involvement in proceedings

[2] Former Justice Minister Simon Hughes: "[a]lthough they are often at the centre of proceedings, the views of children and how they feel are often not heard, with other people making vital decisions for them." Former President of the Supreme Court Baroness Hale has similarly emphatically explained that "[i]t is the child more than anyone else who will have to live with what the court decides." (https://www.gov.uk/government/news/voice-of-the-child-children-to-be-more-clearly-heard-in-decisions-about-their-future, 2015) accessed 20 February 2023

[3] Former President of the Supreme Court Baroness Hale has similarly emphatically explained that '[i]t is the child more than anyone else who will have to live with what the court decides.' in *Re D (A Child)* [2006] UKHL 51

which affect them.[4] Justifications against child participation remain easily employable by the courts, and such barriers undermine the ability of children's views to be heard. This is particularly problematic in the backdrop of rising divorce rates.[5]

A. Child Protection

Protection can be understood in two different senses. First, with respect to the protection of the child's right to be heard, it is clear that the opportunity to be involved in divorce proceedings is a logical prerequisite. Second, with respect to the protection of the child's general welfare, factors such as not being caught in the crossfire of hostile litigation are often cited as a barrier to the participation of children. However, the article will suggest that while these concerns are not unfounded, they are overstated, can be mitigated in practice, and tempered by the fact that the child has always retained the autonomy to opt out of participating.

B. Child Participation

There are three primary justifications against child participation: (1) presumption of incompetence in children, (2) susceptibility of children to parental manipulation, and (3) anti-therapeutic implications for making children feel responsible for the final

[4] Parkinson and Cashmore, 'Different Ways of Hearing the Voice of the Child' in *The Voice of a Child in Family Law Disputes* (OUP 2008) 39

[5] In 2021 there were 111,934 opposite-sex divorces, which is an increase of 9.3% from 2020 and 4.0% from 2019 divorces. (https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/datasets/divorcesinenglandandwales, 2022) accessed 20 February 2023

outcome. This article challenges these justifications, arguing that these concerns are overstated and have led to a result where the voice of the child is too easily dismissed.

First, against the paternalistic presumption that children by virtue of age lack the maturity and insight to consider their long-term interests, it will be argued that a ready rebuttal exists in demonstrating that the child has sufficient understanding of the issue. A competence-based approach centred on understanding and less on age would be more robust and appropriate.

Second, against the danger of undue influence and parental alienation, it will be argued that these concerns are outdated in light of modern psychological and sociological developments. Instead, a stricter test should be employed in determining whether parental influence is sufficient to warrant a child's views being relegated to the sidelines.

Third, regarding the concern that making children feel responsible for the final outcome brings them anti-therapeutic implications (such as shame, confusion, or resentment), it will be argued that this fear is misguided. As a matter of principle, being granted the opportunity to be involved in the decision-making process has positive therapeutic implications for children. As a matter of practice, being involved in the decision-making process does not inevitably lead to children bearing the stress of a conflict of loyalty.

1. Competence: What and How the Child Thinks

A. Presumption of incompetence

Before getting into the specifics, it is worth noting that the presumption of incompetence in children is pervasive across multiple areas of law. A child must be at least ten years old to be guilty of a crime.[6] A child is held to a lower standard of care than an adult when assessing liability for the tort of negligence per *Mullin v Richards*.[7] This article does not go so far as to suggest dispensing with the presumption of incompetence in children across the board. Its scope is limited to advocating for a lower threshold to rebut the presumption in family law generally and divorce proceedings specifically, all while recognising the value of the presumption in other areas of law. The basis is that the child has unique knowledge by virtue of their lived experience with their parents. This can assist in assessing parental attitudes towards and treatment of the child, as well as the child's responsiveness to, and compatibility with, such an environment, which are of particular relevance to matters of custody and access.

B. Status quo

In making, discharging, or varying child arrangement orders under the CA 1989, s 8, the court has to have regard to the checklist provided in the CA 1989, s 1(3). What is pertinent here

[6] Children and Young Persons Act 1933, s 50
[7] [1998] 1 WLR 1304, 1309

is the 'ascertainable wishes and feelings of the child concerned (considered in light of his age and understanding)' under the CA 1989, s 1(3)(a). Qualifiers of 'age' and 'understanding' point to a competence-based approach in assessing the adequate weight to be placed on the child's input in relation to matters of custody and access. This aligns with the common law treatment of parental power over the child as 'start[ing] with a right of control and end[ing] with little more than advice', and gradually diminishing as the child approaches the age of legal adulthood at 18, as per *Hewer v Bryant*.[8]

Since then, the landmark decision of *Gillick v West Norfolk and Wisbech Area Health Authority*[9] has reinforced the position of a competent minor child vis-a-vis their parent, although the facts of the case are specific to consent to medical treatment. A child is *Gillick* competent if they demonstrate full understanding of the nature and consequences of the arrangement[10], such as being able to weigh the potential benefits and costs, or being aware that there are alternatives available. Parental power over minor children is not absolute and yields to child autonomy upon the child reaching 'sufficient understanding and intelligence' to fully comprehend what has been proposed.[11] In the family law context, there appears to be a sensible shift from an arbitrary focus on age to a nuanced emphasis on sufficient understanding.[12] This can be seen in *Re M (A Minor) (Family Proceedings: Affidavits)*.[13] The court 'very

[8] [1970] 1 QB 357, 369 (Lord Denning MR)
[9] [1986] 1 AC 112
[10] ibid at 113
[11] ibid at 186 (Lord Scarman)
[12] Lamont (ed) *Family Law* (2nd edn, OUP 2022), 528
[13] [1995] 2 FLR 100

seriously deprecate[d]' the attempt to involve the 12-year-old daughter in support of her father's application for a residence order.[14] However, the decision to attach little weight to her expressed wishes to live with her father was based not on her age but on the Welfare Officer's evaluation that she 'certainly had not put her mind to the consequences'.[15]

The attractiveness of a competence-based approach lies in rebutting a common justification against giving weight to a child's voice. Children are often subject to the paternalistic presumption that by virtue of age, they lack the maturity and insight to predict and give proper consideration to their interests and reactions in the longer term. By demonstrating the child's competence in appreciating the matter in hand, the presumption that adults are generally better placed to determine the best interests of the child by virtue of their greater life experience can be undermined. In fact, the child is less likely to have pre-existing negative biases towards either parent as compared to a couple going through an acrimonious divorce.[16]

However, due to the phrasing of the CA 1989, s 1(3)(a), the courts retain the discretion to give greater weight to age rather than understanding despite the aforementioned normative objections. This has led to instances where the courts imposed their notion of the child's welfare over the child's expressed wishes and feelings, on the basis that 'children of his age have to

[14] ibid at 102
[15] ibid at 104
[16] Lamont (n11) 531

have their lives regulated by adult judgment'.[17] Such age-fixated reasoning is undesirable because it appears to reinforce the adult-centric bias which disempowers children in the first place. It gives credence to commentators' concerns that judges often decide on the basis of their personal convictions of what is right or wrong for the child, rather than an empirical analysis of the child's competence to make informed decisions.[18] There remains a real risk of judges overlooking the child's views by reverting to the flawed logic that 'adults know best', which arguably outweighs the practical convenience of relying on age.

C. Reform

It is submitted that when assessing the weight to be attached to the wishes and feelings of the child, a more rigorous and contextualised assessment of their competence is needed to keep up to date with advances in developmental psychology. This requires a two-pronged approach of drastically reducing the role of age as a proxy for competence, and carefully dissecting what understanding entails.

Age is a poor barometer of a child's competence[19] except in the earliest stages of development, as it is based on a misguided expectation of a predictable and inevitable developmental

[17] *Re S (Contact: Intractable Dispute)* [2010] EWCA Civ 447 [7] (Thorpe LJ)
[18] Hansen, 'Children's Participation and Agency When They Don't "Do The Right Thing"' (2016) 23 Childhood 471
[19] Smith, Taylor and Tapp, 'Rethinking Children's Involvement in Decision-Making after Parental Separation' (2003) 10(2) Childhood 201

trajectory.[20] It is problematic because a child's competence is inextricably intertwined with the unique context within which they live in, such as the availability and stability of support system[21] and even the attachment styles of parents.[22] While having an easily quantifiable factor is convenient, the existence of other significant factors means that age, as the sole, or even the dominant indicator of competence is clearly insufficient, especially in light of it being a barrier to participation.[23]

At the foundational level, for the child to have understanding means having the cognitive capacity to comprehend the situation. Parents are undergoing a relationship breakdown where reconciliation is unlikely, and sorting out custody and access of the child is part of the necessary reordering of family ties so as to allow every family member to move on with their lives. The child must also be able to articulate preferences that reflect some ability to identify and weigh benefits and drawbacks, in the short and long term. Yet, even if such wishes do not reach the level of rational deliberation that can be reasonably expected of an adult of sound mind, the courts should not default to giving the child's view little weight as long as it is not manifestly detrimental to the present and future well-being of

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[20] Hogan, 'Researching the child in developmental psychology' in Greene and Hogan (eds) *Researching children's experiences: Approaches and methods* (SAGE Publishing 2005) 22

[21] Skjorten, 'Children's voices in Norwegian custody cases' (2013) 27(3) IJLPF 289

[22] Belsky, 'Developmental origins of attachment styles' (2002) 4(2) Attach Hum Dev 166

[23] Eriksson and Nasman, 'Participation in family law proceedings for children whose father is violent to their mother' (2008) 15(2) Childhood 259

the child.[24] An example of a manifestly detrimental view would be to stay with an abusive or completely uninvolved parent for a prolonged duration. Erring on the side of the child can be justified on the basis that while the child's view may not perfectly align with what the court regards as being objectively in their best interest, the fact that the child has first-hand experience of living with their parents can help them arrive at an arrangement that is more attuned to their specific needs and preferences. The child is also more likely to be receptive and cooperative in relation to an outcome arrived after meaningfully integrating their input.

To facilitate comprehension, the child must have access to sufficient information from the legal system independent of their parents. Otherwise, the same information might be distorted or withheld, due to the parents' contaminated attitudes towards each other or as a result of their sense of responsibility motivating them to shelter their child from further shock and hurt.[25] The parents' opinion on the flow of information takes a backseat due to their vested interests, while the possibility of exposing the child to the same shock and hurt through giving them more information will be addressed in the section on therapeutic jurisprudence. In any case, the onus should be on the legal system to deduce the child's wishes in a manner that augments their competence. The child should not be penalised for failing to

[24] Government of Canada, 'Voice and support: Programs for children experiencing parental separation and divorce' (https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/2004_2/p4.html, 2004) accessed 1 November 2022

[25] Lamont (n11) 529

personally gather the relevant information needed to make an informed opinion.[26]

While the full practicalities of implementation are not within the ambit of this article, a plausible solution to resource constraints is for the Children and Family Court Advisory and Support Service (CAFCASS) officer who would be preparing the welfare report under the CA 1989, s 7 to take charge of distributing the information, as they would be interacting with the child.

However, for understanding to do the lion's share of the work in assessing the competence of a child, one must go beyond simply 'what the child thinks' to 'how the child thinks'.[27] The child has to have the emotional capacity to ponder over the situation based on their own values, and formulate their personal and authentic views and concerns. An appraisal must take into account any traumatic events in the child's history and the manner in which they are addressed, considering the potential sway on the child's thought process.[28] This highly individualised and holistic appraisal cannot be quantitatively assessed, and requires psychological expertise.[29]

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[26] Thomas and O'Kane, 'Discovering what children think: Connections between research and practice' (2000) 30(6) BJSW 819

[27] Henderson-Dekort, van Bankel and Smits, 'Gathering Perspectives on Expert Approaches to the Capacity and Rights of Children: Working to Inform a Capacity Assessment Tool for Children to Participate in Family Law Proceedings' (2022) 63(1) J Divorce Remarriage 35

[28] ibid

[29] Walton and Hibbard, 'Exploring adult's emotional intelligence and knowledge of young children's social-emotional competence: A pilot study' (2019) 47(2) Early Child Educ J 199

Children can be empowered to articulate their genuine thoughts given the right environment. This requires an interviewer with child development expertise to be sharply attuned to the child's reactions indicating a relaxed or pressured state of mind when spoken to in a particular manner, and a child-friendly space tailored to help the child feel comfortable and in control such as allowing the child to play with their favourite toy while talking.[30]

To reflect the proposed approach but avoid a drastic unilateral change in statutory interpretation by the courts, the reformed CA 1989 s 3(1)(a) should read 'the ascertainable wishes and feelings of the child concerned (considered in light of his competence)'.

This section has explored the possibility and desirability of expanding the judicial attitude towards the child's competence, as adopted in *Gillick*, beyond the medical setting, and into divorce proceedings. A competence-based approach that prioritises understanding over age is advocated for, with understanding bifurcated into the capacity for rationality and authenticity.

[30] Henderson-Dekort, van Bankel and Smits (n26)

2. Undue Influence and Parental Alienation: Ascertaining the "Real Views" of the Child

The CRC has noted in its General Comment No. 12 that in ensuring the child can "freely" express their views under Art 12 UNCRC, the child 'must not be manipulated or subjected to undue influence or pressure'.[31] As a matter of principle, this makes sense - if the 'real views' of children are to be ascertained, the court must give weight to the real risk of influence from either parent. It is submitted that this, however, becomes an issue if the presence of undue influence or manipulation gives courts too much leeway to disregard children's views in divorce proceedings.

The proceeding section will (1) show that the cautious approach to treating children's views manifests itself strongly in judicial treatment as well as in the opinions of practitioners (and academics), before (2) arguing that while concern over the operation of undue influence is not unfounded, the concern is somewhat overstated, and such treatment is outdated in the light of modern psychological and sociological understanding of children's role. Finally, it will (3) suggest reform for a stricter and context-specific approach to ascertaining when influence actually allows the views of a child to be disregarded.

[31] UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, para 22

A. Status Quo

I. Judicial Treatment and Case Law

While courts have yet to provide clear guidelines or principles with respect to the operation of undue influence in divorce proceedings, the courts' recognition of the possibility of influence and alienation is well-documented: In *M v B,*[32] the child's own views in the CAFCASS report stated that '[a]t that time dad told us stuff, that she was evil. He said that she abandoned me and stuff, that she didn't love me.'[33] The report itself specifically pointed to 'a major shift in [the child's] thinking' following the things his father told him, with his school reporting that 'he feared for his life', that 'his mother would kill him', and that 'she tortured him in France and that he looked like a tramp when he was with her'.[34]

Such concerns are echoed in cases like *Puxty v Moore,*[35] where the Court of Appeal gave limited weight to a child's wishes to live with her mother on the basis that the mother allegedly bought her a new pony, noting that there was 'no doubt that one of the reasons the pony was acquired with was a view to enticing [the child] to spend more time with her mother'. Similarly, in *Re M (Intractable Contact Dispute: Court's Positive Duty)*[36] the court would not support children's opposition to contact with their mother when it transpired that they had been heavily influenced by their

[32] [2016] EWHC 1657 (Fam)
[33] ibid at [19]
[34] ibid at [23]
[35] [2005] EWCA Civ 1386 [12]
[36] [2006] 1 FLR 627 [39]

father's ill-feeling towards the mother. Comments by courts in the inverse underscore this: courts have a greater willingness to ascribe weight where a child answered questions 'without any sign of being coached and with no detectable bias in favour of either parent'[37] or where the child is described as being free of undue influence by reference to her 'matur[ity] and confiden[ce]' and the fact that she 'knew her own mind'.[38] Here, the child's ability to articulate their own thoughts clearly is treated as an indicator that the child is free from undue influence.

The above concerns mentioned in case law broadly show that the courts are willing to place less weight on the views of the child in cases where the child appears to have been influenced. This concern does however seem to lack any consistent principle or clear threshold, with courts attributing less weight to the voice of the child in cases involving the evidence of mere monetary gifts, to finding emotional animosity or ill-feeling between parents. In such cases, it is not necessarily clear that these factors of influence will affect the ability of the child to reason or provide clear instructions to the extent that it is justifiable for courts to detract from the weight of their views. Reform in the later section will thus propose that a clearer and stricter threshold is necessary to prevent the fear of undue influence from overly silencing the views of the child.

[37] *G v G* [2015] SCLR 1 [28]
[38] *H v H* [2010] SLT 395 [31]

II. Treatment by Legal Participants

These views are not just present in the courts, but are also shared by legal participants such as practising solicitors and CAFCASS officers. Kay Tisdall observes a trend of legal participants feeling concern and scepticism over the ability to ascertain the 'real views' of children, and that the opinions of such legal participants risk undermining children's participation rights.[39] Among a series of interviews conducted with legal participants, a telling remark by a solicitor was that '[a]ny mechanism that we use to get the child's views is going to be coloured by the environment in which they find themselves … mak[ing] it very difficult to gather truly objective information from a child'. A similar set of interviews by Judy Cashmore similarly concluded that 'there was a widely held opinion that any views that children expressed could well be strongly influenced by the views of a parent'.[40] Both courts and legal participants thus seem to paint the role of the child in divorce proceedings as one which is heavily vulnerable to adult pressure and manipulation.

While this concern of children being influenced is not unfounded, this paints a somewhat oversimplified picture of parent-child dynamics and dismisses the ability and readiness of children to exercise agency. To suggest, as strongly as the case law and some participants seem to, that children's views should not be given significant weight where there is the presence of

[39] Tisdall, Morrison and Warburton, 'Rethinking children's participation in contested child contact' (2021) 43(1) JSWFL 8
[40] Parkinson and Cashmore, 'Professional Views of Children's Participation' in *The Voice of a Child in Family Law Disputes* (OUP 2008) 94

influence, sits uncomfortably with (1) the fact that parents will inevitably seek to influence their children on where they should live and whether they should have contact, and (2) that children have a degree of autonomy and maturity to express their own views.

With respect to the first point, parental influence is clearly unavoidable. As a clear example, Art 2 Protocol 1 of the European Convention on Human Rights gives parents a right to influence their children's thinking to ensure education is in conformity with religious and philosophical convictions. On an intuitive level, it is implausible to suggest children are not shaped by their parents' views at all, as parents naturally seek to influence their children on where they should live and whether they should have contact (whether they do so subconsciously or otherwise). The extreme position of accepting that parental influence in general should negate the ability of children's views to be heard is thus unacceptable since this would open the door to the possibility of children's views being disregarded in virtually all divorce proceedings. It is thus clear that a more moderate position must be adopted in dealing with parental influence (this will be dealt with in the section on reform).

With respect to the second point, Hunter notes a changing paradigm in family law, drawing a difference between the welfare paradigm, under which 'children [are seen] as lacking the capacity and maturity to understand their own needs', and new paradigms, where children are 'seen as subjects with agency' rather than 'dependent, vulnerable, at-risk victims of divorce and

passive objects of law'.[41] As Neale points out, it seems that children are currently only able to exercise their right to speak if they gain the permission of adults to do so, usually by proving they are 'adult' enough to do so.[42]

B. Reform

Given the lack of a clear guiding principle from case law, it is helpful to use Booth J's comments in *Re H: a minor*[43] as a starting point.[44] Where undue parental influence is accepted, the question is expressed in a strict fashion: whether 'the influence [has] been so intense as to destroy the capacity to give coherent and consistent instructions' (this test was also applied by Thorpe J in a separate case[45]).

This test which requires that the influence is so intense as to 'destroy' the capacity to give coherent and consistent instructions is useful at least to the extent that it recognises that the child possesses some level of competence to give instructions, even in cases where they are subject to influence: For the child's capacity to be 'destroyed', it is a logical prerequisite that there exists such a capacity in the first place - one cannot destroy what does not exist. Given the discussion in the previous section on the competence of children, this acknowledgment is desirable.

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[41] Hunter, 'Close Encounters of a Judicial Kind: Hearing Children's Voices in Family Law Proceedings' (2007) 19 CFLQ 283
[42] Neale, '*Dialogues with children: Children, divorce and citizenship*' (2002) 9 Childhood 455
[43] *Re: H (A Minor) (Role of Official Solicitor)* [1993] 2 FLR 552, 556
[44] *Re: H (A Minor) (Role of Official Solicitor)* [1993] 2 FLR 552, 556
[45] *Re: H (A Minor) (Care Proceedings: Child's Wishes)* [1993] 1 FLR 440, 450

The test also sets the bar for undue influence being able to allow a child's views to be disregarded very high. As Thorpe J noted in *Re H (A Minor) (Care Proceedings: Child's Wishes)*, '[t]he level of emotional disturbance was relevant in that it might be such as to *remove* the necessary degree of rationality that led to coherent and consistent instruction'.[46] The use of very strong language like "remove" or "destroy" (in Booth J's words) puts forth an approach strongly in favour of the idea that the views of the child are not as helplessly vulnerable to influence or manipulation as the majority of case law and legal participants' views suggest.

The test is thus at least helpful in these two regards. It is however conceded that having such a high bar may not be satisfactory either. Even if it is acknowledged that children are not as helplessly vulnerable as case law and participants' views suggest, it remains largely uncontroversial that children are still more vulnerable to undue influence as compared to adults. The threshold of "destroy" thus seems too high - it is possible that influence not leading to the total destruction of capacity will heavily affect the decision to be made by the child. This extreme position seems to be alluded to by Thorpe J, as he stressed that "although the child was suffering from emotional disturbance", it was not sufficient to find an operation of undue influence unless there was a finding of, for example, "mental disability or psychiatric disorder".

The word "destroy" thus seems somewhat problematic, as it suggests that the ability of the child to deal with undue

[46] ibid. at 449 (emphasis added)

influence follows a bright-line divide between influenced and not-influenced. It is however submitted that the "destroy" threshold is not an issue, as long as it is understood as running alongside a context-dependent analysis of whether undue influence is operating. Thorpe J highlights within his judgment that "it was necessary to … ensure that … the child's wishes and feelings, however limited the horizon, should be similarly presented." Of specific interest is the phrase "however limited the horizon", where it is understood that the child's views, even if not "destroyed", are still limited or biased at least to some extent. The term "destroy" thus should be understood as a point at which courts are permitted to stop taking the child's views into account entirely. As an example, applying this approach on the facts of *Puxty*[47] where the child had been influenced through being bought a pony, the mere fact that the child's views may have been biased by the gift should not permit courts to stop taking the child's views into account. Prior to reaching that threshold, a context-specific analysis as to the extent to which a child's views are subject to influence should be adopted where the influence can be seen to be substantially or significantly operating - where courts can, accordingly, attribute less weight to the child's views on a sliding scale. The imposition of a higher bar would make abundantly clear that courts are obliged to take the views of children into account in a serious manner (in the absence of meeting the "destroy" threshold). This is contrasted with having the option to rid the child's views entirely through a declaration of undue influence which currently lacks clear or guiding principles.

[47] [2005] EWCA Civ 1386

This section has thus shown that the cautious approach to treating children's views in the case law and legal participants is somewhat outdated. In light of modern psychological and sociological understanding of children's roles, combined with the vast scope of fact patterns in which undue influence can operate, a stricter and context-specific approach to ascertaining when influence actually allows the views of a child to be disregarded is necessary.

3. Responsibility: Autonomy and Therapeutic Jurisprudence

A. Sentiment

The looming fear that children will be unnecessarily made to feel responsible for the final outcome of divorce proceedings has been explicitly affirmed by judges, lawyers, and academics. It is unsettling for children to be placed in a position where it appears to them that they are putting their own interests in direct hostile competition with their parents, or choosing which parent to side with when there is a deeply divided sense of loyalty.

In *Sahin v Germany*, the Grand Chamber of the European Court of Human Rights acknowledged expert advice against public questioning of the child on whether she wished to see her father, on the basis that she might be under the misapprehension that her statement would be decisive in resolving the conflict

between her parents.[48] The concern is echoed by Robert Emery, who has taken the position that matters in divorce proceedings are ultimately adult in nature and should not be thrust upon or even perceived to be thrust upon the child.[49] The view that it is important to shield children from the potential trauma of being in the decision-making process is prevalent among legal practitioners, affirmed by a series of interviews conducted by Mervyn Murch and his colleagues.[50]

B. Rebuttal

Such great compassion for the child's general welfare when they are caught in the crossfire of hostile litigation between their parents is to be welcomed. However, it is submitted that while the concerns have a reasonable foundation, they have been overstated.

An autonomy-based approach that respects a child's wishes to be meaningfully heard in formal divorce proceedings is not fundamentally incompatible with therapeutic jurisprudence, either in principle or in practice. Therapeutic jurisprudence is an approach to the law with particular regard to its intended and

[48] [2003] ECHR 340 [74], [80]
[49] Emery, 'Children's voices: Listening-and deciding-is an adult responsibility' (2003) 45 Ariz Law Rev 621
[50] Murch and others, 'Safeguarding Children's Welfare in Uncontentious Divorce: A Study of S41 of the Matrimonial Causes Act' (Lord Chancellor's Department, Research Series 7/99; Simpson 'Giving children a voice in divorce: The role of family conciliations' (1989) 3(3) Children and Society 261

unintended psychological effects on legal participants.[51] In the family law context, it urges a problem-solving system that strives to achieve a restorative outcome so as to allow the family members to move on emotionally and look forward to 'a new tomorrow'.[52]

As a matter of principle, involving children in the decision-making process has positive therapeutic implications. The opportunity to be meaningfully heard is a validation of the child's thoughts and feelings on the events that have unfolded, and a legitimisation of their first-hand experiences.[53] This is associated with a sense of empowerment and control[54] which can assist in reducing emotional turmoil and facilitating acceptance and closure.[55] Findings from the International Resilience Project support the link between a child's views being acknowledged and considered and the child having a greater coping capacity in the face of adversity.[56] Furthermore, having an open and honest dialogue allows parents and children to rely on each other for

[51] Wexler, 'Putting Mental Health Into Mental Health Law: Therapeutic Jurisprudence' in Wexler and Winick (eds) *Essays in Therapeutic Jurisprudence* (1991) 3, 8
[52] Justice Debbie Ong, Singapore Family Justice Courts Workplan 2021: 'A New Tomorrow' (2021)
[53] Smart, 'From children's shoes to children's voices' (2002) 40(3) Fam Court Rev 307
[54] Van Bijleveld, Dedding, and Bunders-Aelen, 'Children's and young people's participation within child welfare and child protection services: A state-of-the-art review' (2015) 20 Child Fam Soc Work 129
[55] Smith, Taylor and Tapp, 'Rethinking children's involvement in decision-making after parental separation' (2003) 10(2) Childhood 201
[56] Grotberg, 'The international resilience project' in John (ed) *A charge against society: The Child's right to protection* (Jessica Kingsley 1997) 19-32

emotional support with minimal misunderstandings.[57] In contrast, a stubborn refusal to engage the children who would be directly affected by the post-divorce arrangements can aggravate the disorientation and isolation that typically accompanies family breakdown.[58]

To address the objection that the mentioned benefits can already be enjoyed by the child through the status quo (i.e. being heard indirectly through a welfare report prepared by a CAFCASS officer under the CA 1989, s 7), it should be pointed out that there is a crucial distinction in being heard directly by a judge. The CAFCASS officer will be making a recommendation based on what they consider to be in the best interests of the child in the welfare report. In contrast, the judge will be receiving a raw primary account of the child's wishes and feelings, ensuring that the child remains front and centre and their views adequately expressed and deliberated upon.

As a matter of practice, involving children in the decision-making process does not inevitably lead to them bearing the stress of a conflict of loyalty. The voice of a child can be meaningfully heard without being compelled to take a stand on specific proposals made by parents, which could otherwise lead to the adoption of a confrontational stance against either or both parent(s). This can be achieved through child-inclusive mediation or judicial interview.

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[57] Maclean (ed), 'Parenting after Partnering: Containing Conflict after Separation' in *Onati International Series in Law and Society* (Hart Publishing 2007)

[58] Lamont (ed) Family Law (2nd edn, OUP 2022) 529

Child-inclusive mediation engages consultation methodology that steers clear of imposing any burden of decision-making on the child.[59] Instead of expressing a preference for either parent's position, the child consultant can have the child privately share and discuss their experience of existing living arrangements and ongoing conflict.[60] It is for the child consultant to derive the child's concerns and desires, and relay that assessment to the parents. From there, it falls on the parents to reconsider any proposed arrangements perceived to be in the best interests of the child, and to reach a compromise that accounts for the child's voice. The child is meaningfully heard, but their views are not decisive in determining the discharge of parental responsibilities.

Judicial interview involves a confidential meeting between the judge and the child in the absence of the parents. The child is able to share their views without fear of disclosure. The judge can authoritatively dispel any concerns that a decision would be reached without properly taking into account the child's views, or assure the child that it is the courts which have the final say and that any views raised are not indicative of the child taking sides.[61]

As illustrated, hearing and taking into account the child's voice does not necessarily involve giving it decisive weight, which

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[59] McIntosh, 'Child inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors' (2007) 1 AFRC 1

[60] Parkinson and Cashmore (n3)

[61] Marcus, 'The Israel Family Court – Therapeutic jurisprudence and jurisprudential therapy from the start' (2019) 63 Int J Law Psychiatry 68

may cause it to be taken as an expression of disloyalty. Sensible efforts can be made to prevent such a false impression from forming, and hence safeguard the child from its accompanying emotional detriments. Of course, the principled support and procedural safeguards only come into play when the child exercises their right to be heard. It is important to highlight here that prior to being involved, the child has always retained the autonomy to opt out of participating.

On a final note, rather than defaulting to limiting child participation whenever it appears that a child has been 'caught in their parents' divorce battles'[62] and may be subject to anti-therapeutic effects, the first port of call should be assessing the child's competence in expressing an authentic and reasoned view, as explored in the first section of this article. If competence is not established, it is conceded that there is a stronger case for paternalism in relation to children who do not sufficiently comprehend the issues pertinent to the proceedings, or the degree of hostility that such proceedings are likely to lead to. On the other hand, once competence is established, even if the child expresses a view wishing not to indicate any opinion on the divorce at all, that should be equally respected.

Conclusion

The status quo is such that the views of children involved in divorce proceedings are inadequately represented, and this position is highly unsatisfactory. The three primary justifications against child participation, namely presumption of incompetence,

[62] Emery (n45)

susceptibility to parental manipulation and anti-therapeutic implications for making children feel responsible, do not adequately justify the state of the law. Adjustments need to be made to ensure that the rights of the child to be heard are sufficiently protected.

Firstly, there should be a deliberate effort to shift away from age-fixated reasoning in ascertaining the competence of the child. The emphasis should be on understanding, interpreted as the capacity for rationality and authenticity. Secondly, the existence of parental influence is inevitable and too easily used as a reason for the courts to sideline the views of the child. A stricter and more context-sensitive test should be used to determine the extent of parental influence necessary to undermine the independence of the child's views. Thirdly, involving the child in the decision-making process is not about burdening them with what ought to have been settled between parents. Instead, it can be an empowering experience which does not necessarily lead to children being forced to pick sides.

Ultimately, the article calls for a greater emphasis on child participation in divorce proceedings and for the rights of children to be better protected and promoted. This means recognising the mutually reinforcing relationship between child protection and child participation, and giving due weight to children's views in making major decisions that affect them. The final decision directly impacts the child in the immediate future, and should not be conceived as something that adults have complete say over.

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