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Note from the Editors-in-Chief

As co-editors-in-chief, we are extremely pleased to present the 10th issue of the Leicester Student Law Review!

This past school year has been an eventful one, with the Novel Covid-19 pandemic. With all of our classes being pushed to virtual, we had to strategically plan out how to coordinate this year's issue. Our authors and the law review committee have worked hard throughout to make this possible. Majority of the work was handled virtually and nonetheless; we were able to create such a vast and encapsulating piece for the 2020-2021 year.

Our authors have given us some of their best essays and we could not have been any happier with the outcome.

We hope that this year's issue encourages all students (law and non-law) to continue to strive for the best, and regardless of what happens, everyone continues to come out stronger and more motivated than ever before.

Thank you to the entire publishing team, the authors, and the readers for making this happen. Enjoy!

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WHAT IS LAW? ANALYSING VARYING VIEWS ON LAW THROUGH ALTERNATIVE METHODOLOGIES AND THEORIES

Tara K. Abeygunawardana

Abstract

What is law? This question has been theorised and analysed for decades. The question seems straightforward, on the surface the law implies neutrality, however, deep within the roots it is intertwined with unseen complexities. This article details the views of law that presents neutrality and fairness and reveals the unjustness of law by analysing varied perspectives of law through alternative methodologies and theoretical tools that illuminate an understanding of law and legal rules. These tools and theories can be used to propel societal change by understanding to view law through different perspectives that truly enable equality and fairness.

Introduction

Law consists of social and theoretical information that aids in understanding it. An understanding of the social effects of law enables analysis of law through meaningful contexts. By questioning the threads running through law of access to justice, a deeper understanding can arise on who has access to the idea of law, access to the spaces of law and access to perplexity of law. This deeper understanding presents the opportunity to question what the law poses as neutral in the common sense of the law.

The common sense of law prevails to be discrete and clearly defined through institutions, procedures and rules.[1] This common sense of law proceeds from law's ability to present itself as neutral to privileged individuals. It remains to be that without law through coercion and rules there would be no order.[2] The difficulty of steering away from the common sense of law is evident, as it has been acknowledged that it is common sense.[3] However, varying theories illuminate the peculiarities of law in society and the order which law reinforces.

This article aims to portray the complexities of law and its common sense, where the common sense of law is not a reflection of reality but rather creates a reality in itself. [4] By lifting the limitation that the common sense of law lends, a prevalence of a deeper understanding of law through varying theories and methods can be achieved to signify law's dynamic societal context.

[1] Wade Mansell, *A Critical Introduction to Law* (4th edn, Routledge 2015) 4.
[2] Ibid 4.
[3] Ibid 3.
[4] Ibid 7.

The Rule Of Law

The *rule of law* structures law as integrations of institutions, procedures and rules, which aims to solve disputes as authoritative.[5] It embodies the root of a fair and just society of a pledged government to protect peace and order.[6] The rule of law sets order, however, it sets a particular type of order portrayed in books, which grants power to individual governing bodies and authorities. The idea of allocating limiting power is what governs the rule of law. It ensures freedom which is signified by law and the way power and rights are granted, where it puts liberty and equality before the law.[7]

Lady Justice's depiction of law symbolises being blind to socioeconomic status, gender and race. However, by learning to see *through* the law, it becomes clear that certain groups are inclined to be distinctively affected by law and access to justice, the legal process and legal outcomes.[8] Lady Justice's scales are meant to balance fairness for all individuals and societies, however, the scales have proven to tilt in favour of middle-class, white, heteronormative males while excluding women, blacks, Asians, minorities and ethnics (BAME).[9]

The rule of law cannot be digested as the socially acceptable way of organising society without knowing what it is made of. By reflecting on the legal myth of objectivity, it becomes apparent who is making the laws (upper/middle class white men) which created the objective rules that exclude individuals in disadvantaged socioeconomic groups. Similarly, the judiciary decides case law by bringing in personal experience to the law which takes away its objectivity. The law is characterised by policy and it cannot be seen as politically neutral when it begins with political policy.[10] This concept questions the sources of law. Law is for the people that created the law and everyone else has to fight for the law.

The law is viewed to provide justice to all; however, it is apparent that justice is not fairly distributed. Judge Sturgess (1928) said "Justice is open to everybody in the same way as the Ritz Hotel".[11] This analogy explains how the law *says* justice is for everyone, however the *actions* portray that justice is *actually* for individuals of certain race, gender and socioeconomic status, just as anyone can book a room at the Ritz Hotel as long as you can afford it. Meaning it goes against the rule of law system that all are equal before the law. Access to justice and the ideas of law is expensive and if individuals cannot have access to quality lawyers and legal education then all are not equal and all do not have access to justice. This is shown

[5] Yasuo Hasebe, 'The Rule of Law and its predicament' [2004] 17(4) Ratio Juris 489.
[6] Wade (n 1) 8.
[7] Ibid 9.
[8] Ibid 10.
[9] Ibid 152.
[10] Alan Thompson, 'Taking the right seriously: the case of FA Hayek', in Fitzpatrick, P (ed), *Dangerous Supplements*, 1991, London: Pluto.
[11] Sturgess (Judge), 'Sayings of the week' (1928) *The Observer*.

simply through the varying fees for lawyer services. Does an individual who pays less for a lawyer receive the same benefits as a lawyer with higher fees? If the representation of the lawyer were truly equal, there would be no distinction in fees. Yet, it would not be denied that there is a positive correlation between advanced lawyers and higher fees.[12] Justice is expensive and therefore is not accessible to everyone. Despites its promise of equality, the rule of law fails to acknowledge the differences in socioeconomic status in relation to access to justice.

The rule of law now embodies inequality and injustice, which it aimed to address. Understanding the injustices of law is the starting point to creating change.

Formal Equality Vs. Substantive Equality

Law is based on *formal equality*, which highlights the rule of law by stating that for fairness to exist, individuals should always be treated equally with an objective view.[13] However, formal equality only treats equal individuals equally. *Substantive equality* is true equality, which identifies differences among people through understanding.[14] As Wade Mansell states in his book, *A Critical Introduction to Law*, 'treating unequal people equally reinforces inequalities' and for substantive equality to emerge unequal individuals should be treated unequally through positive discrimination in favour of underprivileged individuals or by reducing disadvantages.[15] Patricia Williams similarly states in her book, *The Alchemy of Race and Rights*, high objectivity of the law eliminates difference. By refusing difference and by failing to question the high objectivity of the law, the norms are adhered to which prevents differences in race, gender, and socio-economic class.[16] By recognising this, the law's disproportionate inequalities become evident on these factors. Ultimately, the effects on society can be understood by looking *through* the rules to look beyond the 'neutrality' of law. Patricia Williams's subjective view puts a social aspect to law that transforms society.

LEGAL POSITIVISM

The idea of law as rules is strengthened by the theory of *legal positivism* which conveys the law as valid if it comes from a valid recognised source such as the state, legislation or case law.[17] However, the rules of law are the rules of power, which are regulated by the people in power. By acknowledging the relationship between legal rules and power, legal positivism is not the purest form of legal knowledge, as it relates to power and political arrangement. Hence, political power tends to be invested in the positivist position. This idea conveys law as valid because it comes from a valid source,

[12] Wade (n 1) 9.
[13] Ibid 6.
[14] Ibid 6.
[15] Ibid 97.
[16] Patricia Williams, *The Alchemy of Race and Rights* (1st edn, Harvard University Press 1991) 10.
[17] Minkkinen P, 'Critical Legal "Method" as Attitude' in D Watkins and M Burton (eds), Research Methods in Law (Routledge: Abingdon 2013) 119.

rather than being valid because it is morally right.[18] Understanding this theory renders misconceptions of the common sense of the law and allows it to be challenged to view what the law ought to be rather than what law is. However, it should be understood that legal positivism excludes social context. There are many ways of looking at the law which allows us to view ideas that are undisclosed by legal positivism.[19]

Nonetheless, the 'law is rules' claim should be questioned as law is everywhere. This approach does not allow law to be questioned and rids the law from taking responsibility for gendered, racialised and socioeconomic nature of the law which become normative standards that maintain the status of the 'law is rules' approach.

Feminist Theory

The *feminist theory* seeks to view the law through a 'feminist' judgement, by understanding how and why exclusion from law occurs.[20] Judge Baroness Hale believes the feminist judgment project directs us away from 'what is law' and the common sense of law and shows complexity and uncertainty. The feminist movement states the law as indeterminate, where judges have a choice between competing interpretations of the law. Judges interpret the law by referencing their own experiences. Therefore, the courtroom has one experience to judge from, the experience of what is usually a white, middle-class, heteronormative, male. By recognising the need for diversity in the judiciary the courts can work to implement more than one experience in the courtroom.

Human Rights And Critical Race Theory

In relation to the inequalities of law, human rights run parallel to it. Human rights are aimed to be for everyone and challenges state action. However, by asking "who human rights are for", it questions whether some are more equal than others in human rights terms.[21] The idea of challenging state actions is contradictory as human rights are institutionalised. The universal absolute discourse of rights comes up against the absolute power of the state, where both cannot be absolute, and compromise must exist. This creates a gap between the theory and practice of human rights where not all people enjoy the protection of human rights.

The *critical race theory* claims that human rights are not universal, where white people benefit more than people of colour.[22] This theory expands on the view of legal institutions being inherently biased and examines society in relation to categorisation of race, law and power.[23] The case *R. (SB) v*

[18] David Plunkett, 'Negotiating the meaning of "law": the metalinguistic dimension of the dispute over legal positivism' [2016] 22 Legal Theory 2.
[19] Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (1st edn, Routledge 2017) 2.
[20] Rosemary Hunter, Clare McGlynn, Erika Rackley, *Feminist Judgment: From Theory to Practise* (1st edn, Hart 2012) 3.
[21] Walter Mignolo, 'Who Speaks for the 'Human' in Human Rights?' [2009] 5.1 Hispanic Issues Series 11.
[22] Patricia (n 16) 11.
[23] Ibid.

Governors of Denbigh High School[24] involved a young Muslim girl named Shabina who was refrained from wearing her religious clothing to school. This case shows how the power of the state comes up against the absolute nature of human rights. The judgment concluded to no infringement of Shabina's rights; the common sense stated that Islam is gender oppressive by Muslim women wearing Islamic dress. However, Maleiha Malik's feminist judgment sheds light on Shabina's autonomy. Though her decision was the same as the actual judgement, the reasoning differed in that Shabina being a young woman and a member of a religious minority needed to be considered.[25] Maleiha's view advocated diversity rather than denying religious clothing based on gender oppression and national security.[26]

Human rights and feminism aim to advocate dignity and autonomy of the individuals. These theories shed light on the contradictions of human rights and by bringing in varying perspectives to law, human rights can truly be for everyone.

Intersectionality

Kimberlé Crenshaw established the concept of *intersectionality* which challenges the idea that everyone has the same life.[27] Kimberlé states that race, class and gender come together to shape chances in life in varying ways.[28] Intersectionality shows the issues of double discrimination of race and gender, where the law is blinded by the logic of law and enforces one discriminatory factor, where an individual can be discriminated against race 'or' gender, but not both. It also critiques the feminist view as it is experienced by a white woman. This concept revealed the true relationship between intersectionality and power, where power prefers certain traits of whiteness and ableness. This preference instils structural discrimination where the law cannot comprehend the multiplicity of identity that alters reality and discrimination to a single investigation. Intersectionality shows the law as racialised where it should go beyond the single-axis framework to look at individuals as a whole.[29]

Conclusion

By critically analysing 'what is law' the law uncovers its hidden politics where legal interpretation means rules that are natural, however it truthfully embodies one version of right.[30] By understanding the politicised theory of law it becomes apparent that the social context is inhibited.

The law can be analysed through different perspectives and alternative methodologies and theories, leading the law

[24] *R. (SB) v Governors of Denbigh High School* [2006] UKHL 15.
[25] Maleiha Malik, 'Complexity Equality: Muslim Women and the 'Headscarf'' [2008] 68 Editions jurisdiques associees 133.
[26] Rosemary (n 20) 332.
[27] Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour' [1991] 43(6) Stanford Law Review 1246.
[28] Ibid.
[29] Ibid 1258.
[30] Wade (n 1) 170.

to have more than 'one right answer'. The law is meant to advocate justice however the hidden meaning of justice can be revealed through the interpretation of law through theoretical approaches. These varying perspectives of law should propel a wider understanding of law. Through this understanding of law, one can advocate to change the social effects and context of law to have the opportunity for social transformations and substantive equality.

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INSIDE THE BEDROOM OF THE UNITED STATES: A CLOSER LOOK AT *BOWERS v. HARDWICK*

Kelvin Tayag

Abstract

The purpose of this paper is to consider the legal and societal impact *Bowers v. Hardwick* has had on both the US Supreme Court's interpretation of the Fourteenth Amendment, and how the idea of a right to privacy unfortunately did *not* fall within the scope of the Court's interpretation. The key issues this essay examines are whether Georgia's sodomy laws on criminalizing oral and anal sex in private is constitutional, whether homosexual persons are constitutionally protected under the Fourteenth Amendment, and the case's impact on future cases such as *Lawrence v. Texas.* This paper therefore argues that *Bowers*, despite its unfortunate ruling at the time, is a clear example of the negative impact the Court's misinterpretation of the Fourteenth Amendment was to the LGBTQ+ community at the time, as the Constitution should protect against state laws which intrude and impose laws based around the prohibition of private and intimate actions of consenting, of-age individuals regardless of gender.

Introduction

Bowers v. Hardwick is the landmark case which set the precedent for a number of various legal battles regarding gay rights in the United States. Historically in the U.S, the difficult conversations surrounding gay rights has been at the center point of constitutional debate. The genesis of the case culminated in a tumultuous era for the gay rights movement at the time of its inception which came to fruition in 1986 when the petitioner, Michael Hardwick was arrested for engaging in an act of homosexual sodomy in the bedroom of his home, therein violating the Georgia statute that criminalized such behavior. Hardwick proceeded to challenge the constitutionality of the Georgia statute because it inherently placed him in "danger of arrest and the statute violated his constitutional rights".[1] The Federal District Court essentially granted a motion to dismiss Hardwick's case for failure to "state a claim" (which in other words, means there is insufficient evidence to establish an action in court). The case then progressed until ultimately reaching the U.S Supreme Court. The necessary implications in which illustrate the fundamental and constitutional issues that cultivated in this case, were based around the Supreme Court's divided interpretation of the "due process clause" of

[1] [1985] 478 186

the Fourteenth Amendment and the meaning of "right to privacy."

The Supreme Court ruled that the "right of privacy" under the substantive due process under the Fourteenth Amendment did *not* shelter the private, consensual sexual activity of gay adults from prosecution under the Georgia criminal statute.[2] This is where the Court's discussions on privacy took diverging paths. The Supreme Court ultimately ruled that there was no constitutional protection for acts of sodomy, and that the states had the power to outlaw such practices.[3]

The objective of this essay is to analyze and bring to light the broader implications the *Bowers* case brought to the constitutional conversations regarding laws prohibiting such actions. The first section of the essay will outline how the issue came to court, then proceed to analyze the Supreme Court ruling and the Justices' decisions. Finally, this paper will seek to address the issue of societal implications the case ignited. Furthermore, this paper will argue that state laws should not have any power to intrude and impose laws based around the prohibition of private and intimate actions of consenting, of-age individuals regardless of gender.

The Unlucky Situation of Michael Hardwick: How the Case Came to Be

Following a string of events leading to his initial arrest, Hardwick was tending a bar in Georgia when he subsequently threw a beer bottle into an outdoor trash can and got cited by Keith Torick – the arresting police officer - for public drinking. Torick supposedly wrote down the incorrect court date, causing Hardwick to ultimately miss the appearance and thus lead to his arrest warrant.[4] In 1982, a police officer arrived at Hardwick's place of residence to arrest him on the grounds that Hardwick missed his court appearance. The officer peered into one of the bedrooms to find Hardwick engaging in an act of sexual sodomy with another adult companion.[5] The officer then promptly arrested both men for violating the Georgia Sodomy Statute that criminalized homosexual sodomy. The Georgia statute stated that: "a person [who] commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another" and that if individuals were found to be committing this crime: "It is [was] punishable by incarceration for between one to twenty years."[6] The Georgia Statute served as the basis for Hardwick's Constitutional argument during the trial.

Upon being charged for violating the subsequent statute, Hardwick brought

[2] Leonard A.S. 'Exorcising the Ghosts of Bowers v. Hardwick: Uprooting Invalid Precedents.' *Chicago-Kent Law Review, 84*(2), [2009] 519

[3] *Bowers v. Hardwick*, 478 U.S. 186 . 1985.

[4] Bazelon E. 'Why Advancing Gay Rights is all about Good Timing.' [2012] *Slate*

[5] McBride A. 'Expanding Civil Rights: Bowers v. Hardwick' [2007] *PBS*

[6] McBride A. 'Expanding Civil Rights: Bowers v. Hardwick' [2007] *PBS* 94

suit in the Federal District Court challenging the constitutionality of the imposed statute. Hardwick argued by stating that the statute "placed him in imminent danger of arrest and that it also violated his fundamental/constitutional rights."[7] Furthermore, Hardwick argued that his arrest had an effect on the relationship of a pseudonymous heterosexual married couple named (the law applied to heterosexual as well as homosexual sodomy), John and Mary Doe.[8] Ultimately, Hardwick raised a facial challenge to the Georgia statute, alleging that the statute violated not just his rights as a gay man, but as a person.[9] Hardwick also stated that it violated the couple's right to privacy in their marital relations. Unfortunately, the District Court overturned his motion for failure to "state a claim" relying on *Doe v. Commonwealth's Attorney for the City of Richmond.*[10] The District Court ultimately shut the case down.

Picking up controversy from the first half of the case, the Eleventh Circuit Court of Appeals stated a number of issues that had risen out of the District Court's ruling. The Circuit Court reversed the prior ruling and reasoned that "these activities (whether homosexual sodomy or other private endeavors) could not be regulated by state law under the 5th Amendment as well as the Due Process Clause of the 14th Amendment." Ultimately, the State of Georgia's Attorney General Michael Bowers then appealed to the Supreme Court, was granted certiorari and the case was reviewed on March 1986.

The Battle Between Two Michaels: Case Ruling & Opinions of the Justice's

The case presented the question on whether or not there is a fundamental right under the Constitution of the United States to engage in consensual and private homosexual sodomy.

Furthermore, this case poses the question whether the Georgia statute, by intruding upon extremely intimate and private aspect of human life and personality, infringes fundamental human rights.[11] In a 5 to 4 decision, the Supreme Court found that since this case did not give enough reason to invalidate the Georgia statute ban on consensual sodomy, there was no constitutional protection for those acts and ultimately, states were able to outlaw such practices. The Supreme Court therefore, rejected Hardwick's argument and reversed the Circuit Court of Appeals, holding that the "Due Process Clause" of the Fourteenth

[7] *Bowers v. Hardwick*, 478 U.S. 186. 1985
[8] Urofsky M. Bowers v. Hardwick: Law Case. [2014] *Encyclopedia Brittanica*
[9] Goldberg J 'Queering the Renaissance' Durham: Duke University Press
[10] *Doe v. Commonwealth's Attorney for the City of Richmond,* 403 F.Supp
[11] American Psychological Association & American Public Health Association in Support of Respondents: Michael J. Bowers v. Michael Hardwick and John and Mary Doe. [1985] *American Psychological Association*

Amendment does not protect the fundamental right to consensual, homosexual activity between adults, even when it takes place behind closed and private doors.[12] Furthermore, the fact that homosexual conduct occurs in the privacy of the home does not affect the result as stated in *Stanley v. Georgia*.[13] This rather unfortunate ruling ignited constitutional debate between the Justice's, as well as the general public. The opinions of the Justices identified numerous interpretations of past precedents that ultimately led to the final ruling of the case.

Justice White's opinion was notable for its narrow formulation of the central issue of the case. Writing for the opinion of the court, Justice White (in which Justices Burger, Powell, O'Connor and Rehnquist joined the majority) argued that Hardwick's claims in the case did not bare any resemblance to the constitutional right of homosexuals to engage in acts of sodomy that was asserted in the case. Justice White continued by arguing that if the law is constantly based on notions of morality, and if all cases and laws were to be invalidated under the due process clause, the Supreme Court would indeed have their hands full. Justice White was unpersuaded that the sodomy laws of some 25 states should be invalidated on the basis of majority sentiments about the morality of homosexuality being declared inadequate.[14] Essentially, Justice White ultimately concluded the opinion by stating that he feared guaranteeing the right to sodomy because it would be a product of "judge made constitutional law."[15] Furthermore, Justice White believed that with a decision such as this, it would send the Supreme Court down the road of illegitimacy.

Chief Justice Burger filed his concurring opinion by utilizing a more in-depth, moral reasoning to accommodate the majority opinion. Burger saw that the banning of homosexual sodomy has very "ancient roots" and that the condemning of such practices is firmly rooted in Judeo-Christian moral and ethical standards. Furthermore, C.J. Burger stated that if the states were not to outlaw the act of homosexual sodomy and reason that it is protected as a fundamental right, this would essentially put aside a "millennia" of moral teachings. C.J. Burger used the example of the common law of England and its prohibition of sodomy. C.J. Burger stated: "In 1816, the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time."[16] Chief Justice Burger essentially saw that the Constitution does not deprive any states the power to ultimately enact statutes to

[12] Spindelman, M. S. (2001). Reorienting bowers v. hardwick. *North Carolina Law Review, 79*(2), 359
[13] *Stanley v. Georgia,* 394 U.S. 557
[14] *Bowers v. Hardwick*, 478 U.S. 186. 1985
[15] Ibid.
[16] Ibid.

prohibit homosexual sodomy, because of the history of sodomy being an acceptably immoral action overtime.

Justice Blackmun who filed the dissenting opinion (along with Justices Brennan, Marshall and Stevens) argued that the governing majority in a state which has traditionally viewed a particular practice as immoral (homosexual sodomy) is not sufficient reason for upholding a law prohibiting the practice. Blackmun accused the majority of distorting the central issue of the case by focusing on "homosexual activity" rather than on underlying principles.[17] Justice Blackmun argued that the majority's opinions failed to mention the respondent's constitutional right to privacy because, "recognition that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government."[18] Justice Blackmun quoted Justice Holmes' dissent in the *Lochner v. New York* case,[19] "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV… the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past."[20]

Justice Blackmun saw that like in the previously mentioned case of *Lochner v. New York*, the *Bowers* case is a clear example of the majority's "blindness" to Hardwick's claim that the statute violated his constitutional right to privacy. Blackmun focused his argument on the fact that the statute denies individuals the right to decide what they inherently want for themselves and most importantly, their right to privacy. Blackmun found that the statute's goal of enforcing homosexual individual's rights to privacy, but it did not have any desire to enforce the statute against heterosexuals is entirely unconstitutional and that this is a blatant intrusion into an individual's privacy. Blackmun's vehement dissent finds that privacy embodies the moral fact that a person belongs to himself, and not to society as a whole. Justice Blackmun concluded his dissent by stating that sodomy laws should not be invalidated on the asserted basis that the majority belief on sodomy is immoral and is an inadequate rationale to support these laws.[21]

Essentially the dissent given by Justices Blackmun, Brennan, Marshall and Stevens was primarily concerned with the State of Georgia's prohibition of all forms of sodomy. The Justice's (Blackmun) found that the Court's majority decision betrays the values most deeply rooted in the nation's history and that the deprivation of individuals rights to choose for themselves betrays those values. The Justices who dissented found that the majority's decision was a blatant disregard of individual's

[17] Bowers v. Hardwick. Legal Information Institution, *Cornell University Law School.*
[18] *Bowers v. Hardwick*, 478 U.S. 186. 1985 52
[19] *Lochner v. New York*, 198 U.S. 45, 76
[20] *Bowers v. Hardwick*, 478 U.S. 186. 1985 89
[21] Bowers v. Hardwick. Legal Information Institution, *Cornell University Law School.*

privacy and that the majority failed to acknowledge the mere fact that the statute can ultimately punish an individual's private affairs in their private, intimate places.

Supreme Rule Over Private Affairs? The Broader, Societal Implications of the Case

Part of what makes this case a polarizing and rather baffling ordeal for not only Michael Hardwick, but for the LGBTQ+ community at the time as well, was the majority's interpretation of the Due Process Clause of the Fourteenth Amendment. It is imperative to define the Due Process Clause of the Fourteenth Amendment to give context to the following argument on the majority opinion. The Fourteenth Amendment is defined as:

> 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'[22]

What is key to mention in the Fourteenth Amendment with specific regards to *Bowers v. Hardwick* is that, the Supreme Court forecloses meaningful protection for gay men's intimate relations. Because sodomy at the time was viewed as inherently "un-Christian" and its immoral acceptance by Georgia's Legislators, the Supreme Court failed to understand and strike at the heart of the issue: the question on the Georgia statutes deprivation of an individual's life, liberty and denial of equal protection of the laws.

Borrowing from Justice Blackmun's dissent, the Court seemingly hovered over homosexual activity rather than broadening their reading of the constitutionality of the Georgia statute and the topic of privacy. As such, Justice Blackmun stated that unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens.[23] The Court's ruling was a clear distortion of the issue at hand; Hardwick's argument that the statute violated his constitutional right to privacy. Citing from one of the American Psychological Association's amicus briefs: "despite some people's moral or theological objections to oral or anal sex, this conduct is extremely common among married and unmarried heterosexuals and homosexuals."[24] This

[22] DeCew J. Constitutional Privacy, Judicial Interpretation, and Bowers v. Hardwick. [1989] *Social Theory and Practice*, *15*(3), 285-303.

[23] *Bowers v. Hardwick*, 478 U.S. 186. 1985 52

[24] American Psychological Association & American

was a clear deprivation of Hardwick's liberty and there is no health, individual suffering or damage that could hinder society as a whole. Therefore, the statute not only violated Hardwick and every homosexual's fundamental right, but it also violated their inherent right to privacy.

Furthermore, the Due Process Clause of the Fourteenth amendment can indeed offer the fundamental right on acts of consensual sodomy, especially in the privacy of their own homes. Therefore, the fact that the majority decision of the Supreme Court focused too heavily on homosexual activity, they failed to realize the implications and sole purpose(s) of the Due Process Clause and the violation of the fundamental constitutional right of personal privacy. The main point is that the fundamental rights Hardwick argued for, should have been mentioned and fully protected because of the importance in the individual's rights (Due Process Clause of the Fourteenth amendment). Furthermore, the Court did not consider Hardwick's privacy claim and ultimately did not mention it as fully as possible.

The *Bowers* case is a flagship example of the times where homosexuals were not accepted in society and as such, this was an underlying extension of the majority opinion's ruling. The imperative critique of this case is that it heavily relied on the inadequacy of the majority opinion's judicial interpretation on the case. Because homosexual sodomy was not formally written in the U.S Constitution, it is difficult to determine whether or not the majority utilized an originalist analysis, which could have been used to determine the case ruling.

Ultimately, the majority gives no explanation for narrowing the constitutional question posed in the *Bowers* case, and they even appear to go out of their way to restrict the issue.[25]

Ultimately, it was extremely prevalent at the time that the majority narrowly and hastily interpreted the *Bowers* case in general. DeCew stated the dangers of narrow question drawing: "Narrow question-drawing is potentially even more threatening to individual rights if it is combined with an originalist view of constitutional decision-making, because new technology brings issues the framers of the Constitution did not and could not have foreseen."[26] To further this, the majority's opinion showcased a serious and otherwise disappointing account of Constitutional interpretation. It seemed that the majority was more than attached to the conservative side of interpreting the

Public Health Association in Support of Respondents: Michael J. Bowers v. Michael Hardwick and John and Mary Doe. [1985] *American Psychological Association*

[25] DeCew J. Constitutional Privacy, Judicial Interpretation, and Bowers v. Hardwick. [1989] *Social Theory and Practice, 15*(3), 285-303.
[26] DeCew J. Constitutional Privacy, Judicial Interpretation, and Bowers v. Hardwick. [1989] *Social Theory and Practice, 15*(3), 300

Constitution especially on citing the various different precedents in the case. Therefore, the majority's opinion on the decision of the *Bowers* case was clearly a reflection of the conservative and traditional nature of the discrimination against homosexuals. This reflection seemed to carry over into the majority's decision and unfortunately resulted in a logically flawed and inadequately justified decision by the Court.

Since it has been mentioned that this case took place during a tumultuous time in the U.S, it would seem that the "living constitution" interpretation of the dissent by Blackmun could have been the appropriate and rational answer for the dissenters. It is clear that since Justice Blackmun was concerned with the prohibition of all forms of sodomy as stated in the Georgia statute, it seemed that Blackmun and the other Justices who had dissented followed the way in which society was headed at the time. Gay rights and equality under the law was at the focal point of Constitutional debate and it seemed that Justice Blackmun's dissent was reflective of the fact that society was changing. Therefore, the majority's decision was a clear sign that the Court and by extension, society did not accept homosexuals.[27] Justice Blackmun and the other dissenters were on the other side of the spectrum, where they vehemently disagreed with the majority's opinion and adopted a more living constitutional interpretation of the Constitution and the precedents given.

Moving Forward: Conclusion

Understanding the various and polarizing views of each Justice's ruling post-*Bowers*, one gets a rather clear lens into the societal changes that were underway in the U.S at the time. This case arose when the U.S was experiencing a cultural divide between the acceptance of homosexuals and their specific fundamental rights, and the upkeep of whole traditional values that have been accepted overtime. This societal tension of gay rights has been prevalent over time in the U.S and this case just poured gas on the flame.

With the changing tides in the U.S, the LGBTQ+ community continued forward in their quest for equality in society. As unfortunate and frustrating the Supreme Court ruling was at the time, there was a silver lining that arose more than 17 years later in the *Lawrence v. Texas* case, where the Supreme Court ruled a 6-3 majority that overturned *Bowers* as an unworthy precedent. This case was an enormous step forward for the LGBTQ+ and others in general towards that goal for equality and more importantly, the intimate privacy that is a fundamental right for everyone. As much as the Supreme Court has a colossal responsibility in interpreting the

[27] Bazelon E. 'Why Advancing Gay Rights is all about Good Timing.' [2012] *Slate*

Constitution, the ruling in *Bowers v. Hardwick* was a reflection of the tense and transformative culture of the U.S in the 80's. It is clear that the decision by the Supreme Court in the *Bowers* case was indeed wrong, but the ruling basically served as a hypothetical step in the right direction towards equality. In conclusion, this paper sought to address the fact that the intimate private affairs of individuals should not be in the hands of the courts. As much as this case stirred controversy regarding the Supreme Court's ruling, it is safe to say that society played a substantial role in the *Bowers* decision and in turn, influenced its overturn in the *Lawrence v. Texas* case.

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WHAT IS THE ROLE OF SUPRA-NATIONAL REGULATORS AND THE BENEFITS OF A ONE-STOP SHOP APPROACH WITH RESPECT TO COMETITION LAW IN AFRICA?

Mateusz Slowik

Abstract

Africa has seen rapid development of Competition law frameworks in recent years, with over 25 jurisdictions having operational merger control regulations. The continent is one of the fastest growing markets in the world, with a projection of 1.7 billion consumers by 2030. It is, therefore, clear that there is an ever-growing need for Competition law in Africa to be clear and certain to establish credibility amongst investors. However, the fragmented nature of Competition law on the continent can often lead to administrative duplication, excessive costs and uncertainty. In this regard, the importance of the emerging supranational regulators like the Common Market for Eastern and Southern Africa (COMESA) cannot be understated. The essay explores COMESA's role as a supranational regulator in Africa, and in particular focuses on its one-stop-shop approach to merger transactions within member states.

Introduction

With the projection of 1.7 billion consumers by 2030, Africa is one of the fastest growing markets in the world.[1] Since 2000, [2] Africa's merger control regulations have been growing at an unprecedented rate. The continent counts over 25 jurisdictions with operational merger control and five regional competition regimes. Amongst the five regional competition regimes,[3] the Common Market for Eastern and Southern Africa (COMESA) came into force in 2013 and was the first of its kind on the continent. It is also the largest regional economic organisation in Africa, counting 21 member states.

Against this background, there is an ever-growing need for Competition law in Africa to be clear and certain to establish credibility amongst investors. First, the essay will set out the role of a supranational regulator in the context of markets with underdeveloped regulatory frameworks. Second, it will consider the benefits of a one-stop shop approach with respect to merger and acquisitions transactions (M&A) on the continent.

The supranational regulator

The COMESA Competition Commission (the Commission) is a supranational regulator that deals with all aspects of merger control,

[1] Landry Signe and Chelsea Johnson, 'Africa's consumer market potential Trends, drivers, opportunities, and strategies' (December 2018) Africa Growth Initiative at Brookings, 1

[2] James Whitaker, 'Competition law merger guide: Africa' (PWC) <https://www.pwc.co.za/en/publications/competition-law-merger-guide-africa.html> accessed 7 December 2020

[3] West African Economic Monetary Union (WAEMU), the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of West African States (ECOWAS) and the Economic and Monetary Community of Central Africa (CEMAC)

providing a one-stop shop for businesses interested in cross-border transactions affecting COMESA. It is important to note that COMESA counts six[4] members with no relevant domestic competition law merger control regimes. Therefore, laws concerning M&A transactions are more efficiently regulated by a supranational authority that has expertise in anti-competitive behaviour and more resources to effectively investigate cross-border transactions.[5] In this regard, the Commission plays an important role in incorporating a consistent approach to enforcement and compliance, which contributes to investor-confidence in markets with an underdeveloped regulatory framework.

A challenge to the Commission's role as a supranational regulator is that there are a couple of member states which do not recognise the jurisdiction to the Commission. Notably, in 2017, Egypt's Competition Authority (EGA) referred an antitrust investigation to the Commission but continued to investigate in parallel. This cautious approach by the EGA may be justified on the ground that it was the Commission's first antitrust investigation.

However, it is clear that there is an increasing willingness by member states to accept the Commission's role as a credible supra-national regulator and one-stop shop for M&A transactions. For instance, earlier in 2020 Kenya recognised the supremacy of the Commission's merger control regime and no longer requires the duplication of proceedings with the Competition Authority of Kenya. As one of Africa's most sought-after country for M&A transactions, Kenya's decision legitimises the Commission as a credible competition authority. This is also a great boost to the one-stop shop approach offered by the Commission.

One-stop shop

The Commission provides a one-stop shop for M&A transactions that affect COMESA. Under the COMESA Regulations (the Regulations) a merger is notifiable to the Commission when a regional dimension test and financial thresholds are met. In other words, a merger notification will be required when a party to the merger has an annual turnover exceeding USD$5 million and two-thirds of the turnover are not held in the same member state. The benefit of this approach is that mergers which are considered to be de minimis (i.e., they fall outside of the financial thresholds) are not caught up by the expensive proceedings that are associated with M&A transactions. In turn, those transactions that trigger a mandatory filing benefit from a one-stop shop with the Commission which simplifies administrative procedures and avoids regulatory duplication. This is attractive to businesses as it reduces costs, as opposed to if the merging entities had to notify individual national competition authorities (NCAs).[6]

In practice, however, many member states have jurisdictional thresholds that largely

[4] Comoros, Djibouti, Eritrea, Libya, Somalia and Uganda.

[5] Rachel Alemu, *The Liberalisation of the Telecommunications Sector in Sub-Saharan Africa and Fostering Competition in Telecommunications Services Markets* (Springer, 2018), 207

[6] The filing fee to the Commission is capped at USD$200,000.

differ from COMESA's USD$5 million turnover threshold. The effect of this is that businesses may have to notify individual NCAs because some member states have substantially lower jurisdictional thresholds from COMESA or none at all. For example, Ethiopia's threshold is substantially below USD$1 million,[7] whilst Botswana and Comoros require a mandatory notification for all mergers. This erodes COMESA's role as a one-stop shop, as businesses are unable to reallocate jurisdiction to COMESA when a proposed merger has a community dimension. This creates complexity to M&A proceedings which could undermine the commercial value of a transaction. In contrast, the European Union allows the merging parties to reallocate jurisdiction to the European Commission when a merger concerns multiple European jurisdictions.

In addition, with five regional regulators in Africa, it is inevitable that there will be overlapping memberships across regional economic communities. This may give rise to regulatory complexities for conducting business on the continent. For example, the East African Community (EAC) intends to launch an independent competition regulator, the EAC Competition Authority (ECA). There are currently four COMESA member states party to the EAC. This poses a challenge to the Commission's one-stop structure because ECA claims exclusive jurisdiction over cross-border transactions within EAC which may lead to duplicity and uncertainty. Dialogue and cooperation between the two regulators will be key to minimising regulatory inconsistencies in these areas.

Another challenge to the Commission's one-stop shop is the referral system under the Regulations. This permits member states to request M&A transactions to be referred back to their NCAs if they pose a risk of disproportionally affecting competition in their jurisdiction. The consequence of the referral system is that it may create legal complexities and divergence in approach. By way of example, in 2019 EGA ordered Uber not to complete the acquisition of a regional competitor before its approval despite the Commission's non-suspensory regime.

Conclusion

Competition law in Africa can be complex because of the varying legal regimes and developing nature of the continent. However, it must be acknowledged that there are solid foundations for a certain, predictable, and cost-efficient Competition law framework. For instance, the Commission has greatly contributed to creating a business-friendly environment by acting as a one-stop shop for M&A transactions affecting COMESA. In addition, it is evident that member states are willing to embrace the Commission as their supranational regulator, as shown by Kenya's recognition of the supremacy of its merger regime.

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MERGER CONTROL IN THE EU AND CHINA: A COMPARATIVE ANALYSIS ON SELECTED ISSUES

Ryan Fong Yat Nam

Abstract

With an investment deal between the EU and China nearing completion (as of the date of writing), the proliferation of China as a nexus for foreign investment no longer becomes a question of "if", but "when". The EU's preference for regulated globalization will be able to pan out nicely as the Comprehensive Agreement on Investment has been finalized, giving European businesses a boost in doing business and competing with one of their biggest trade partners. Competition law, regardless of jurisdiction, remains paramount in upholding principles of consumer welfare and an effective competition structure. This essay seeks to explore some of the similarities and differences between both the EU and China's system of merger control/regulation, so as to understand the laws underpinning future business, as well as to gain practical commercial awareness in this area of law.

Introduction

Assuming that an economy works better if markets are open and competitive, competition law aims to bring about the most advantageous outcomes for a range of stakeholders in an economy. In a competitive economy, consumers benefit from lower prices and better products as firms are incentivized to do so under competition. Merger control can be described as a subset of competition law, and generally refers to the procedure of reviewing mergers to prevent detrimental effects to competition. An entity may wish to merge with another for a number of reasons; whether or not a particular merger presents anti-competitive effects warrants a detailed analysis based on the jurisdiction of the proposed merger. The EU Merger Regulation (EUMR) was introduced in 2004[1] to regulate mergers and prevent the anti-competitive consequences of such concentrations. Across the globe, the Anti-Monopoly Law of China was enacted in 2008 to prevent anti-competitive behaviour,[2] similar to Articles 101-106 of the Treaty of the Functioning of the European Union,[3] and operates in tandem with additional regulatory measures to regulate mergers in China. Merger and acquisition ("M&A") activity remains as one of the most profitable for law firms due to their importance as strategic decisions in a company's business cycle, as well as the number of jurisdictional regulations to adhere to.

This essay seeks to briefly describe why entities merge, and provide an outline of the procedures and substantive assessment of both systems of merger control. The EUMR will be used as a point of reference from which to compare and contrast the Chinese

[1] Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1.

[2] Anti-Monopoly Law of the People's Republic of China.

[3] Consolidated version of the Treaty on the Functioning of the European Union OJ C 326.

system of merger control. After which a detailed analysis of specific provisions will guide discussion so as to arrive at a conclusion as to the merits and flaws of each system.

"Merger" defined

A merger can be defined generally as "an agreement that unites two existing companies into one new company."[4] Firms may merge for a variety of reasons. They may seek to expand their economies of scale to produce goods at a lower marginal cost, increase efficiencies within their distribution network or supply chain, or to increase synergies between their management. They may also seek to eliminate competition (although firms will rarely explicitly state this as a reason for merging).[5] As such, competition authorities endeavour to regulate merger activity between undertakings, as the mere risk of a new dominant undertaking is enough to warrant prohibition. If there is a lack of competition, firms will be able to exercise an abuse of their market position by pricing goods/services higher to the detriment of consumers, thus creating a monopoly. There are three types of mergers: horizontal, vertical and conglomerate. A horizontal merger takes place between actual/potential competitors in the same product and geographical markets, and at the same production and distribution cycle. A vertical merger involves firms that operate at different but complementary levels of the market, often to improve distribution networks and supply chains.

The EUMR

Merger control in the EU is contained in the EU Merger Regulation, Regulation 139/2004, and is administered by the European Commission Directorate General for Competition. It has powers to prohibit mergers in its entirety and to impose legally binding commitments upon undertakings so as to render the proposed merger compatible with the EU. Such commitments might involve divestiture or agreements to share infrastructure or resources. A concentration under the EUMR refers to two separate undertakings merging entirely into a new entity. Article 3 stipulates that a merger must contain a degree of "change of control on a lasting basis" and looks at whether or not the control of an entity confers the "possibility of exercising decisive influence on an undertaking."[6]

The Triggers and Thresholds

There is no stipulation within the EUMR of how many shares or what percentage stake an undertaking must acquire in order to amount to a concentration. Instead, it is concerned with whether A will acquire the possibility of exercising decisive influence over the strategic commercial behaviour of B.[7] As such, an acquisition of assets or the establishment of a joint venture amounts to a merger for the purposes of the EUMR. Whether or not a merger falls within the definition of a concentration "*with a union dimension*" is determined by reference to the

[4] Investopedia, 'Merger' (*Investopedia*, August 2020) <https://www.investopedia.com/terms/m/merger.asp> accessed 11 January 2021

[5] R. Whish and D. Bailey, Competition Law (7th Edn, OUP 2012) 830.

[6] (n.1), Art 3.

[7] Enterprise Act 2002.

turnover of the undertakings concerned.[8] Articles 1 and 5 stipulate the turnover thresholds for a concentration having a "Union dimension". It states that such a concentration exists where: the combined aggregate worldwide turnover of all undertakings exceeds €5 billion, the aggregate community wide turnover of each of at least 2 undertakings exceeds €250 million, or unless each of the undertakings achieves more than ⅔ of the turnover in 1 Member State ("MS").[9]

The procedure

Once the thresholds have been met, the procedure for clearance starts with a mandatory notification to the European Commission on the part of the undertakings involved (Article 4(1)).[10] The undertaking must complete a Form CO; a lengthy procedure that requires information on horizontally and vertically affected markets, detailed sales data of the parties, market share estimates for principal market participants, list of parties' main customers...etc. Failure to notify the Commission of a proposed merger (*Marine Harvest*),[11] or carrying out a merger before a notification decision has been made (*Altice*)[12] will result in a fine of up to 10% of the undertakings aggregate turnover. Such conduct on the part of an undertaking is called "gun-jumping", and usually results in a fine regardless of jurisdiction or merger control regulation.

Phase 1 & 2

Once the Commission has been notified, phase 1 of the investigation involves the "examination of the notification and initiation of proceedings" per Article 6.[13] After deliberation from the Commission, the proposed merger could either: fall outside the scope of the Regulation, warrant modification or conditions from the parties relating to minor issues, or raise serious doubts about compatibility of concentration with the common market in the most serious outcome. If the Commission decides that the proposed merger raises such doubts, it proceeds to a phase 2 Article 8 decision. After a further investigation of 90-105 working days, the Commission may either: decide that the concentration is compatible, impose further conditions, or deem the concentration incompatible and prohibit the merger altogether.[14] Although full/outright prohibitions are rare.

The Substantive Test

In the Commission's assessment, the substantive assessment of a concentration (per Article 2) looks at whether it "would significantly impede effective competition".[15] The burden of proof is on the Commission to determine whether a concentration is compatible with the internal market.[16] The Court of Justice in *Commission v Tetra Laval* held that there is no presumption that a merger is either compatible or incompatible,[17] and as such, they must adopt a decision "in

[8] A "Concentration" in this sense means the legal combination of two or more firms by merger or acquisition.
[9] (n.1), Art 5.
[10] (n.1), Art 4(1).
[11] *Marine Harvest/Morpol* Case No COMP/M.7184.
[12] Case T-425/18 *Altice Europe v Commission* [2018] OJ C 341.
[13] (n.1), Art 6.
[14] (n.1), Art 8.
[15] (n.1), Art 2.
[16] (n.5) 822.
[17] Case C-12/03 P *Commission v Tetra Laval* [2005] ECLI:EU:C:2005:87.

accordance with its assessment of the economic outcome attributable to the merger which is most likely to ensue".[18] The significant impediment to effective competition (SIEC) test was adopted in 2004 to address a gap in the EUMR's coverage of a non-collusive oligopoly gap in *Airtours*,[19] while retaining the existing test for dominance. Here, a causal link between the concentration and the deterioration of effective competition must be established,[20] and a counterfactual (what would happen if the merger had not taken place) will be assessed.[21]

The Defence

The undertaking may raise either the efficiency defence or the failing firm defence, in retaliation against the Commission's decision that the concentration is incompatible with the internal market. The efficiency defence argues that the benefits of the merger (efficiency) outweigh the costs of the merger (reduced competition). The failing firm defence purports that the target firm is going out of business and the merger has no significant impact on effective competition.[22]

Chinese Merger Control

The People's Republic of China's equivalent of the EUMR is known as the review of concentration of undertakings in the PRC and is currently administered by the State Administration of Market Regulation (SAMR). The authority underpinning the regime in China can be found in the Anti-Monopoly Law of the PRC (AML),[23] which provides further guidelines such as the "Regulations on Notification Threshold for Concentration of Undertakings" and "Regulations for the Notification of Concentration of Undertakings".[24] The rationale for Chinese merger control is to prevent mergers from restricting competition. Article 28 of the AML states that the Chinese Ministry of Commerce shall prohibit a concentration if it "has or may have the effect of eliminating or restricting competition", but also stipulates that the concentration can be justified if the undertakings can prove either that benefits of the concentration outweigh the detriment to competition, or that the proposed merger is of national interest.[25]

AML Triggers and Thresholds

Similar to the EU, a merger notification is triggered in China when a change of control occurs that gives the acquiring undertaking "the ability to exercise decisive influence over other undertakings",[26] and when the turnover thresholds are met. This may obviously manifest in the form of a merger but may also present itself from an acquisition of a minority stake, so long as the acquirer would be able to exercise decisive influence (perhaps by contract or other de facto means). Under the AML, the turnover threshold is met when, in the previous financial year: a) the combined worldwide turnover of the parties to the transaction

[18] Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* [2008] ECR I-04951.
[19] Case T-342/99 *Airtours plc v Commission* [2002] ECR 2002 II-02585.
[20] Case C-68/94 *France v Commission* [1998] ECR I-01375.
[21] Guidelines on the assessment of horizontal mergers OJ [2004] C 31/5, para 9.
[22] *Aegean/Olympic II* - Case No COMP/M.6796.
[23] (n.2).
[24] Ibid.
[25] Weinreich-Zhao, Tingting, *Chinese Merger Control Law* (2nd edn, Springer 2015).
[26] (n.2) Art 20.

exceeded CNY10 billion (approximately €1.25bn), and the Chinese turnover of each of at least two of the parties to the transaction exceeded CNY400 million (approximately €50 million), or b) the combined turnover of the parties in the PRC exceeded CNY2 billion and the Chinese turnover of each of at least two of the parties to the transaction exceeded CNY400 million; similar in principle to the EU thresholds. Whether or not a minority investment or joint venture meets the turnover threshold (with some of the parties having a substantial Chinese presence) will hinge upon corporate governance factors.[27] In the event that a notifiable concentration is not notified to the SAMR, the regulating body has the authority to impose a fine of up to CNY500,000, and may order a prohibition, divestiture of shares or assets, a transfer of business or a restoration of pre-merger conditions.

The Procedure

Like the EUMR, pre-notification discussions are generally practiced, although they are not a legal requirement. Phase 1 involves a 30-day preliminary review of the notification and deciding whether or not the transaction warrants a phase 2 investigation of 90 days. Further review past phase 2 may be necessary in phase 3, where the SAMR conducts further investigations. In its investigation, "control" is determined by considering factors such as the purpose of the transaction, shareholding structure and the relationship between shareholders and directors, among others.

The Substantive Assessment

The undertakings involved must provide the SAMR with an assessment of the merger's effects on competition. The SAMR then examines various theories of harm by taking a holistic economic approach. Here, a range of factors are considered, such as: market shares and market control power, concentration levels, impact on market entry, technological development, consumers and other stakeholders, as well as the impact on national economic development. This prima facie demonstrates a greater attention to economic analysis than the EU and will be discussed later.[28]

As we can see, the EUMR and Chinese merger control rules are similar in formulation. This is unsurprising considering China's AML came into effect in 2008, and the regulatory authorities sought to align its merger regulations with that of other nations. One notable point about Chinese merger control is the relatively recent 2018 formation of the SAMR combining three previous agencies that enforced merger control (Ministry of Commerce (MOFCOM), National Development and Reform Commission and the State Administration for Industry and Commerce); similar to the European Commission in EUMR enforcement. Another notable commonality shared between both regimes is the lack of certainty regarding "control" over a target entity, as there exists no quantitative threshold (i.e percentage of shares). This makes sense, seeing as the number of shares acquired may not always prove to have

[27] Scott Yu, Frank Jiang, Emily Xu, 'Navigating China Merger Control in Global and Offshore Deals' (*Asia Law*, June 2 2020) <https://www.asialaw.com/articles/navigating-china-merger-control-in-global-and-offshore-deals/arhncerz> accessed 11 January 2021

[28] Ibid.

material effect on the control of a target company, thus warranting the use of "exercising decisive influence" as a metric for control.[29] Naturally, this allows for situations where an acquisition of a minority stake grants a great degree of de facto control, or conversely, a majority share acquisition yields marginal or insignificant control over a target company. However, the SAMR recently proposed to incorporate some of its guidance from the *Guiding opinion on the Notification of concentration of undertakings*[30] into the statutory text, which would allow for greater legal certainty.

With the Chinese merger control regime roughly outlined, we can now proceed to discuss a few of the substantive differences between both the EUMR and AML provisions in greater detail.

Gun Jumping and non-compliance punishments

Gun jumping refers to the practice of not notifying the regulatory authorities of a notifiable transaction. It is not clearly defined in the EU, but the Commission may fine an undertaking up to 10% of its aggregate turnover. China's SAMR on the other hand, is considering revising its fines for noncompliance from CNY500,000 to 10% of the undertaking's global turnover, thus hinting a tightening of the SAMR's rules on merger control.[31] Here, the Chinese fines for non-compliance are actually lower than that of the EU, to which the SAMR aims to revise in line with the EU. The trend of increasing intervention from the SAMR can be seen in their recent caseload. As of mid 2020, 52 decisions have been published; comparatively higher than the EUMR's activity. This suggests that a number of transactions managed to escape the merger rules. Most notably, the Chinese authorities took greater measures to publicise gun jumping decisions, bringing about reputational damage to undertakings.[32]

Economic analysis

While the EU and China share similar assessment metrics such as coordinated/non coordinated/foreclosure effects, there seems to be a lack of economic analysis from the EU in its substantive assessment. Critics of the EUMR have cited the "absence of common sense economic analysis".[33] The merger cases of *Staples/Office Depot*[34] and *Mondi/Walki Assets*[35] demonstrated that the Commission did not provide its own economic analysis, even in a phase 2 investigation. The EU also relies more on theoretical merger simulation models and conventional theories of harm,[36] while specific economic analysis regarding market shares, concentration levels...etc are codified in the AML and its supplementing rules.

[29] Danyi Xu, 'Gun-jumping under China's Antimonopoly Law' (*Norton Rose Fulbright,* June 2020) <https://www.nortonrosefulbright.com/en-hk/knowledge/publications/da26e198/gun-jumping-under-china-s-antimonopoly-law> accessed 12 January 2021

[30] See MOFCOM's Measures on the notification of proposed concentrations of November 21, 2009 and the SAMR's Guiding opinion on the Notification of concentrations of undertakings of September 29, 2018.

[31] Ibid.

[32] Ibid.

[33] Frances Dethmers 'EU merger control: out of control? Frances Dethmers European Competition Law Review' [2016] E.C.L.R. 2016, 37(11), 435-452.

[34] *Staples/Office Depot* Case No COMP/M.7555.

[35] *Mondi/Walki Assets* Case No COMP/M.7566.

[36] (n.32), 7,

Additionally, the Chinese regime is unapologetic in keeping industrial policy and public interest factors relevant in its substantive assessment, albeit unrelated to competition. The reluctance of the EU in engaging with what they purport to be a "more economic approach" under the TFEU[37] may be attributed to limited resources or time. However, taking a narrow interpretation proves counterintuitive to the objectives of EU competition law. The lack of economic analysis also manifested itself in the apparent conclusion that any reduction in competition amounted to a significant lessening of competition (*Pfizer/Hospira*).[38] The SAMR on the other hand, decided in *Novelis/Aleris* that the concentration would likely eliminate or restrict competition on their findings of market dominance, elimination of key competitors and higher technical barriers to entry.[39] While the Courts of the EU may have arrived at a similar conclusion given the same facts, the EU's case law has shown a dichotomy between the Court of Justice of the European Union (CJEU) and the Commission in several different cases. *Pfizer/Hospira*, as an example, was found to restrict competition on the basis that a reduction (from 5 to 4) of drug suppliers was sufficient to find serious doubts in phase 1. However, the courts in *France v Commission* held that a causal link between the concentration and the subsequent impediment to competition must be established.[40]

With that being said, the Chinese regime's relative emphasis on economic analysis is not absolute; there still exists uncertainties when looking at the case law. The two mergers of *InBev/Anheuser-Busch*[41] and *Coca-Cola/Huiyuan*[42] demonstrate inconsistencies with regard to the market definition exercise (determining the scope of competition and the relevant rules in a given market). In the former case, MOFCOM did not elaborate on how economic analysis had been applied on market definition and the competitive effects behind the remedies, whereas in the latter case, market definition "was obviously one of the central concerns, and competition theories were presumed to be more sophisticated."[43]

The "simple case" system

The EU system of merger control suffers from being time consuming, expensive and cumbersome at best.[44] China, on the other hand, introduced a "simple case" system which allowed for a quicker and more streamlined review period, subject to qualification for this process. Mergers fast tracked under the "simple case" system allow for clearance as quick as 16 days as of 2019 and requires fewer documentation requirements. This provides a practical respite to businesses wishing to fast track a merger clearance in China, thus negating additional burdensome costs. The Commission has also considered a simplification of its procedures by streamlining several documentation requirements. Additionally, it explored a

[37] (n.2), Art 102.
[38] (n.32), 3.
[39] Qing Ren *et al*, 'Merger Control, China: Trends & Developments' (2020) *Chambers Global Practice Guide* <http://www.glo.com.cn/UpLoadFile/Files/2020/8/13/102515210617dc673-1.pdf> accessed 13 January 2021
[40] (n.19).
[41] Xinzhu Zhang, Vanessa Yanhua Zhang, 'CHINESE MERGER CONTROL: PATTERNS AND IMPLICATIONS' [2009] Journal of Competition Law & Economics, 6(2), 482.
[42] Ibid, 480.
[43] Ibid, 494.
[44] (n.32) 1.

"block exemption" mechanism that would provide a quantitative safe harbour for concentrations. However, this has not been implemented thus far.[45]While the effectiveness of some form of fast tracking clearance procedure warrants a separate discussion, this is undoubtedly beneficial from a business perspective.

Policy influences on Chinese merger control

When discussing Chinese merger control, one cannot discount the concerns of merger review being influenced by industrial or economic policy considerations. While this is not a completely alien concept to EU merger cases (i.e strengthening digital sectors in light of US dominance), the issue at hand is exacerbated by the position of the SAMR (then MOFCOM).[46] Zhang argued in 2009 that MOFCOM, as a member of the cabinet, has its own monopoly on administrative power evidenced through a lack of transparency and unsatisfactory information disclosure among others. Some critics even cite political considerations as an antithesis to "sound and professional competition analysis".[47] While it has been 12 years since Zhang's preliminary concerns regarding policy influences, the SAMR (as a successor to MOFCOM) is still a governmental agency that arguably holds a greater degree of power via its merging of 3 previously separate governmental agencies. The author opines that the mingling of extra-legal considerations with the substantive analysis of merger control and competition law would be counterintuitive to the very objectives of such rules; to discuss this would extend far beyond the scope of this essay.

Conclusion

Taking the above into consideration, we can observe that the Chinese system of merger control is largely similar to the EUMR, but with a few notable exceptions. Substantively, the EU has seemed to contradict itself between the Commission's guidance, as well as the CJEU's judgment. A more economic approach has been adopted but not adapted for merger regulation, leaving legal uncertainty as to the clearance for companies wishing to merge. On the other hand, the Chinese legislation seems to uphold economic analysis as a key factor in its assessment but is not immune to uncertainty and selective use of economic analysis. Furthermore, the Chinese regime seems to take into account industrial policy considerations as an influence on decision making. Pragmatically, the Chinese regime seems to embrace a quicker review process by introducing the "simple case" system, while the EUMR suffers from its lengthy review process. While there exist much more nuanced contrasts that would exceed the aim of this comprehensive essay, these are some observable differences between both regimes. In light of potential mergers in the future, legal practitioners and companies should be aware of the general regulations in both jurisdictions.

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CALLOW AND THE DUTY OF HONEST CONTRACTUAL PERFORMANCE
Supreme Court Case of *C.M. Callow Inc. v. Zollinger, 2020 SCC 45*

Deepana Devadas

Abstract

The significant judgment in *Callow Inc. v Zollinger* issued by the Supreme Court of Canada, proves to expand the definition of the duty of honest contractual performance. The Court reaffirmed that although there is no obligation to disclose facts such as termination, it may be a breach of the duty of honest contractual performance to fail to correct a party's misapprehension. The dishonest action must be in relation to a contract – can apply to all types of contractual obligations and rights – in order for it to be eligible for a claim of this nature. Introduced to Canadian jurisprudence, the general organizing principle of good faith in contract stems from the landmark decision in *Bhasin v Hrynew*, 2014 SCC 71. This is not a "free-standing rule", but rather "a standard that underpins and is manifested in more specific legal doctrines", exemplifying the idea that a contracting party should have appropriate regard to its counterparty's legitimate interests.[1] *Bhasin* is a landmark case, greatly cited in case law and in academic references, and with this joint appeal of *C.M. Callow Inc. v. Zollinger* and *Wastech Services Ltd. V Greater Vancouver Sewerage and Drainage District*, it is expected that the Supreme Court of Canada will address earlier issues that arose from the Bhasin decision and provide for a larger scope on the good faith in contract performance principle, and the specific scope of the duty of honest contractual performance. In *Callow*, the SCC confirmed the expansion of this principle; in at least some circumstances, half-truths, silence, or conduct may be "knowingly misleading" even when it falls short of an outright lie.[2]

[1] https://canliiconnects.org/en/commentaries/67903
[2] https://www.blakes.com/insights/bulletins/2021/callow-and-the-duty-of-honest-contractual-performa

In *Callow v Zollinger*, the Supreme Court of Canada held a group of condominium corporations liable for breaching their duty of honest contractual performance when they knowingly misled a maintenance contractor into believing a two-year agreement would not be terminated early.[3] "A five-member majority of the Supreme Court—joined by three judges in concurrence, with Justice Côté dissenting—ruled that the duty of honest performance prevents active deception, and that Baycrest breached this duty by knowingly misleading Callow into believing that the winter contract would not be terminated. This was a matter "directly linked to the performance of the contract" because Baycrest had exercised the termination clause dishonestly, even if the 10- day notice period was satisfied[4]. The Court clarified three main issues regarding the duty of honest performance: (i) when dishonesty will be considered a matter "directly linked to the performance of the contract"; (ii) what "dishonesty" means in this context; and (iii) the measure of damages for the breach of the duty of honest performance.[5]

Following this judgment, some concerns arose in regard to the practical implications and obligations businesses would have in the extent of disclosure of a termination in their contract. So will businesses have to immediately inform their counterparty when they have decided to terminate a contract? With reference to the SCC's decision, it has been clarified that the duty of honest contractual performance is not a duty of disclosure. Therefore, a business does not need to inform their counterparty of a termination in their contracts, but should not allude to a false future relationship, and mislead the counterparty with misrepresented intentions. For instance, the business should not confirm that the contract will be extended or not terminated, when in actuality they will be terminating the contract. Any misleading and falsely attesting conduct may violate the duty of honest performance. Businesses should also be conscious about how their counterparties may interpret their contract. For example, discussing terms of a potential renewal of the contract, may incorrectly lead the other party to assume the contract would be upheld. In that case, businesses might need to consider whether they have a duty to correct that mistaken assumption.

Through the implementation of some strategies, businesses, organizations, and individuals can uphold the sanctity of contracts. Lawyers from Blakes, Cassels & Graydon, represented the intervener, Canadian Federation of Independent Business, in this matter and have some tips to avoid breaching the duty of honest performance. First of all, everyone in the organization should be on the same page about matters relevant to the contract[6]. Communications must be executed

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[3] https://www.blakes.com/insights/bulletins/2021/callow-and-the-duty-of-honest-contractual-performa

[4] C.M. Callow Inc. *v.* Zollinger, 2020 SCC 45

[5] https://www.torys.com/insights/publications/2020/12/o-come-all-ye-good-faithful-in-contract supreme-court-expands-duty-of-honest-performance-in-contract

[6] https://www.blakes.com/insights/bulletins/2021/callow-and-the-duty-of-honest-contractual-performa

efficiently and be consistent. In *Callow*, Baycrest was deemed to have violated its duty of honest contractual performance because, after deciding to terminate a contract, one of its directors had told Callow that there may be an extension to their contract. "Baycrest knowingly misled Callow in the manner in which it exercised clause 9 of the winter maintenance agreement and this wrongful exercise of the termination clause amounts to a breach of contract. Even though Baycrest had what was, on its face, an unfettered right to terminate the winter maintenance agreement on 10 days' notice, the right had to be exercised in keeping with the duty to act honestly. Baycrest's deception was directly linked to this contract, because its exercise of the termination clause was dishonest. It may not have had a free-standing obligation to disclose its intention to terminate, but it nonetheless had an obligation to refrain from misleading Callow in the exercise of that clause"[7]. Secondly, it is important to ensure verification and accuracy of any communications about the future of a contractual relationship if termination is a possible foresight. It is not an obligation to disclose a consideration of termination, however, do not miscommunicate or allow for an environment of misinterpretation. Finally, if your organizations' words or conduct have misled your counterparty about the contractual relationship, correct the mistake as soon as possible[8], so as to reduce the risk of a breach of the duty of honest performance.

Damages in this case arise "for the consequential loss of opportunity. While damages are to be measured against a defendant's least onerous means of performance, the least onerous means of performance in this case would have been to correct the misrepresentation once Baycrest knew Callow had drawn a false inference. Had it done so, Callow would have had the opportunity to secure another contract for the upcoming winter." [9]

The case of *Callow v Zollinger* is a key case in the practice of contracts, because it has expanded the common law duty of good faith performance. The fundamental principle of good faith in contractual performance was established in the landmark case of *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, where the Court held that the duty of honest performance meant that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract[10], and Callow now expands the type of conduct that will fall under dishonesty of contract performance, as well as potential damages.

Callow further imposes a positive obligation on a party to actively correct a misunderstanding of a counterparty, even if that is detrimental to itself[11]. However, in a

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[7] C.M. Callow Inc. *v.* Zollinger, 2020 SCC 45

[8] https://www.blakes.com/insights/bulletins/2021/callow-and-the-duty-of-honest-contractual-performa

[9] C.M. Callow Inc. *v.* Zollinger, 2020 SCC 45

[10] *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494

[11] https://www.dlapiper.com/en/canada/insight

dissenting judgement, Justice Côté points out the uncertainty of an inaction to correct a misunderstanding. "Absent a duty to disclose, it is far from obvious when exactly one's silence will 'knowingly mislead' the other contracting party. Are we to draw sophisticated distinctions between 'mere silence' and other types of silence…? If that be so, I wonder how a contracting party – on whom, I note, the law imposes *neither* 'a duty of loyalty or disclosure' *nor* a requirement to 'forego advantages flowing from the contract' … –is supposed to know at what point a permissible silence turns into a non-permissible silence that may constitute a breach of contract."[12]

From this Supreme Court case, it is evident how significant *Callow* is for day-to-day practice. "Parties need to turn their mind to whether their counterparty is under a mistaken belief with respect to contractual performance and consider correcting such a misapprehension—whether about termination, contract renewal, pricing, or otherwise. This is especially true when a party has made an internal decision and the counterparty asks about it. While the Court again emphasized there is no positive duty to disclose a decision to terminate, it may be a breach of the duty of honest performance not only to lie, but also to give an answer that knowingly gives rise to a misapprehension."[13]

The doctrine of good faith is further being explored and will give way to further clarification. The Callow appeal was heard jointly with the case of *Wastech Services Ltd. V Greater Vancouver Sewerage and Drainage District*, and is still ongoing. With an additional judgment on the topic of good faith performance of contracts, the SCC will have another opportunity to clarify what entails the law on duty of honest performance in terms of contracts.

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SHOULD INTERNATIONAL ARBITRATION BE MONITORED BY THE JUDICIAL SYSTEM

Aarti Panchal

Abstract

From a theoretical and practical standpoint, the objective of this essay is to scrutinize the controversy of domestic courts monitoring arbitration. Firstly, this essay will examine the core components of arbitration as it co-exists with domestic and national courts. Next, the key types of domestic court involvement in the arbitration process will be analyzed. It is important to consider various approaches adopted by differing countries in order to gain a deeper understanding of the criticisms surrounding judicial intervention. Lastly, a comprehensive conclusion will be drawn as to whether domestic courts monitoring arbitration is beneficial and necessary. This essay will ultimately establish the grounds upon which the monitoring of arbitration by the domestic courts should take place.

Introduction: Insight into the World of Arbitration –

Historically, when individuals were conflicted and were not able to come to an agreement, they would advance to court for an outcome. Despite this, new patterns show that there is a positive change of attention towards one form of private dispute resolution – 'arbitration'.[1] Arbitration is a procedure in which a dispute is submitted, by agreement by all parties, to a tribunal who then makes a binding decision on the dispute. In many countries, businesses chose to place arbitration clauses in their agreements, letting future disagreements to be resolved through an arbitral tribunal, as opposed to court proceedings. The choice to arbitrate often stems from the autonomous and advantageous nature of arbitration; enabling parties to be the 'dictators of their own war'.[2] Domestic courts become involved in arbitration for a vast array of reasons, principally due to national laws being permissive and from parties inviting or encouraging the courts to engage. Over time, this has evoked a magnitude of controversies on whether this monitoring complements or deters the arbitration process.

Arbitration Agreement Validity –

[1] Nigel Blackaby and others, *Redfern and Hunter on international arbitration* (6th edn, OUP 2015).

[2] Julian D M Lew & Loukas, *Achieving the Dream: Autonomous Arbitration in Arbitration Insights* (2007)

The prime duty of the court is to advocate the agreement to arbitrate and assign matters to arbitration if a valid arbitration agreement is in place.[3] *Channel Tunnel Group Ltd. v. Balfour Beatty Constr. Ltd.* is a prominent example where a court 'refused to order parties to arbitration', but stayed the proceedings to uphold an arbitration agreement.[4] This is indirect, but an adequate way of safeguarding respect for an arbitration agreement while keeping court involvement marginal. Similarly, in *PGF v OMFS*, LJ McFarlane sends a crucial message in 'needing parties to engage in a dispute resolution even if they have valid reasons for refusal.'[5] This identifies just how influential the role of party autonomy plays in arbitration, depicting that courts refuse monitoring themselves when given the choice.

Furthermore, the French[6], Swiss[7], and German[8] national laws require a court to 'decline jurisdiction' in the face of an arbitration clause and for authorities to 'reject court proceedings' delivered in breach of an agreement as being unacceptable.[9] The principle derived indicates minimal monitoring in the arbitration process through their national laws; ultimately, upholding the 'private nature of arbitration'.[10]

Core Pillars of Arbitration –

I. Autonomous Nature

In order to dissect whether arbitration should be monitored by domestic courts, it is important to first understand the roots of arbitration. There are four integral characteristics of arbitration. First, arbitration is of self-governing nature and 'stands in a realm, autonomous of jurisdictions.'[11] Arbitration does not act 'only on the grounds of contract' or the relinquishment of judicial authority by states.[12] Article 5 of The UNCITRAL Model Law suggests 'in matters guided by this law, no court will intervene except where so provided in the law.'[13] Fundamentally, this implies that the extensive intervention monitoring of domestic courts in matters deemed unfit would undermine arbitration as an entity.

[3] S. I. Strong, *Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?* (1998)

[4] [1993] A.C.

[5] EWCA Civ 234

[6] NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] art. 1458 (Fr.)

[7] Loi fédérale sur le droit international privé 1987.

[8] German Criminal Code & Code of Civil Procedure 2001.

[9] Ibid.

[10] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

[11] Lew, Julian D M. "Does National Court Involvement Undermine the International Arbitration Processes?" American University International Law Review 24, no. 3 (2009): 489-537.

[12] Ibid

[13] Ibid (n 5)

I. Party Autonomy

Second, in the decision to choose arbitration, parties have conveyed a 'positive selection' of an alternative private dispute resolution system.[14] More precisely, the parties have willfully rejected the supervision of courts and have freely chosen the private resolution through the act of party autonomy. In the case of *Polimaster Ltd. v RAE Systems, Inc.*, the courts found under the New York Convention, 'arbitration was not in accordance with the arrangement of the parties.'[15] Judge Wallace found that the grounds conveyed in the Article 5 (1)(d) of the New York Convention 'should be measured against the agreement of the parties.'[16] Evidently, monitoring the arbitration process would go against everything that arbitration stands for – evoking pressures of being 'supervised' and ultimately, party autonomy being diminished; thus, limited intervention would be ideal to uphold the core principles of arbitration.

II. Doctrine of Separability & Competence

The Doctrine of Separability in the UNCITRAL Model Law states that an 'arbitration survives if the main agreement fails'.[17] This is seen in the case C v D, where the court of appeal held English law was the governing law of the agreement even though it was in an agreement beneath New York law.[18] Similarly, in the case of *Noble Assurance Co. v. Gerling-Konzern Gen. Ins. Co*, Mr Justice Cooke found that by domestic courts taking a step that would 'disprove the entire groundwork in which the arbitration took place' and disrespect of process.[19] These principles suggest that if parties had exercised their right to go to arbitration, then that principle should be dignified.

II. Co-existence

Despite the private essence of arbitration, it should be perceived that arbitration consistently engages with domestic jurisdictions for its 'survival to be legitimate through help and support.'[20] From enforcing an agreement to arbitrate, appointing an arbitrator, issuing an injunction, or recognizing and enforcing arbitral awards – arbitration regularly seeks continuous support from the domestic courts. These standards are sanctioned internationally and seen in public policy and due process. In Sweden, courts do not hinder in the arbitration process due to their philosophy

[14] Richard Allan Horning, *Interim Measures of Protection; Security for Claims and Costs; and Commentary on the WIPO Emergency Relief Rules* (in Toto): Article 46, 9 AM. Rev. Int'l Arb. 155, 156 (1998).
[15] 623 F.3D 832.
[16] New York Convention 1958.
[17] Horning (n 16)
[18] [2007] EWCA Civ 1282.
[19] *Noble Assurance Co. v. Gerling-Konzern Gen. Ins. Co* [2006] EWHC (Comm) 253 (Eng.).
[20] William W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 Int'l Comp. L.Q. 21, 30 (1983).

that the 'core of arbitration is the freedom of contract', confidence in the arbitrators, and appreciation of the advantages of a private dispute resolution structure.[21] Through these permissible circumstances, the monitoring of arbitration would be deemed beneficial when required by law or parties.

Remarks on Arbitration –

In summary, arbitration can be depicted as a fish that needs nutrients from the ocean, where the realm of arbitration and jurisdiction connect. The arbitration process can be seen as reaching down from the realm of arbitration to the national/ domestic legal systems to seek for validity, support, and recognition.

Court Involvement –

There are five methods in which courts are most likely to become involved and monitor the arbitration process – from the appointment of a tribunal, jurisdictional issues, recognizing and enforcing awards, challenging awards, issuing injunctions, and interim relief.

I. Appointment of Tribunal

Court mediation at the start of arbitration involves assisting with the appointment of arbitrators. In Articles 11(3), 11(4), 13 and 14 of the UNCITRAL Model Law, the court uses its jurisdiction to appointment a tribunal when the appointing structure fails or if there is an issue to the 'impartiality of an arbitrator.'[22] This can be depicted in the case of *Marc Rich Co AG v Societa Italiana Impianti PA*, where the ECJ held that English courts could interfere in appointing an arbitrator.[23] This depicts that the intervening by courts in arbitration should be seen as a mechanism devised by the parties depending on their needs; thus, in this case the monitoring of courts would be deemed beneficial.

I. Jurisdictional Issues: *Lex Arbitri*

Court intervention is highly prevalent in instances where the appropriate jurisdiction for arbitrators need to be established. Article 16(3) of the UNCITRAL Model Law gives the court jurisdiction to 'revisit disputes involving the tribunal's territory in light of the terms of the arbitration agreement.[24] Similar principles can be applied from the case of *Dubai Islamic v Paymentech Inc*, the courts held that the *lex arbitri* (seat of arbitration) was not in England, thus the courts had no right to hear the appeal.[25] Ultimately, the only courts that should

[21] New Arbitration Regime in Sweden, 10 World Arb. & Mediation Rep. 154, 154-55 (1999).
[22] Ibid (n 6)
[23] [1991] (C-190/89).
[24] Ibid (n 6)
[25] QBD 24 Nov 2000.

intervene in arbitration are those at the seat of arbitration or the place of enforcement. The monitoring of the courts would otherwise conflict with these accepted international rules.

II. Recognize & Enforce Arbitral Award

After an award given, the courts can intervene in two places. First, at the place of arbitration, such as when a party challenges to put aside the award; and second, at the place of enforcement, where the party seeks the recognition or enforcement of the award. Articles 35 and 36 of the Model Law depict similar goals in accordance with the recognition and enforcement of awards. In contrast, the courts may also become involved to uphold the integrity of the arbitration process. This can be depicted in the case of *Soleimany v Soleimany*, where an English Court refused to enforce an award giving effect to a contract. The court held that the parties cannot abrogate that regard by private agreement (arbitration). Seeing to enforce an illegitimate contract is against public policy.'[26] Thus, the principles derived from this case depict the courts an integral component of the arbitration process to uphold issues of public policy.

I. Challenging of an Award

Additionally, Article 34 of the Model Law equips for unique situations where the 'court can overturn an award' if the challenges are not within the jurisdiction of the agreement or if there has been 'procedural irregularity' in the policy of the arbitration.[27] This can be depicted in the case of *Dallah Real Estate v Ministry of Religious Affairs*, where the question of 'whether an arbitration agreement' made by the tribunal in Paris could be enforced.'[28] It was held that the enforcement of an ICC award in Paris against the Government of Pakistan was denied on the grounds that the government was not a party to the agreement. Despite an award not being enforced, the principles derived shows the importance of the coexisting nature of the courts and arbitration proceedings. It is important to note that there is no provision allowing the courts to review the tribunal's decision on the merits, as this would constitute as vigorous monitoring of the arbitration process and undermine the autonomous nature of the tribunal.

II. Interim Relief/ Injunctions –

Many national laws let 'courts grant interim relief' before the tribunal has been determined or where the pertinent arbitration rules do not let arbitrators grant interim measures of protection.[29]

[26] [1999] Q.B. 785
[27] Ibid (n 6)
[28] [2010] UKSC 46.
[29] Lew & Loukas (n 2)

Additionally, injunctions let courts' make procedural orders that cannot be fulfilled by arbitrators, or orders for maintaining the status quo. These measures are 'helpful and an integral part' of the relationship between domestic courts and arbitration.[30] Anti-arbitration injunctions are used before arbitration has begun or after proceedings have begun to break an arbitration. In Switzerland, these are incompatible with Swiss law. In *Air (PTY) Ltd. v. International Air Transport Ass'n*, the courts ruled that anti-arbitration injunctions are 'contrary to the Swiss legal system' since they go against the principle of competence-competence, which is a well-established principle in Swiss law.[31]

Anti-suit Injunctions aim is to uphold arbitration by guiding parties to the method chosen by the parties to challenge their differences. The position of U.S. courts is shown in *BHP Petroleum (Americas) Inc. v. Reinhold*, where Justice Cooke stated that 'any court should pay respect to another (foreign) court but… the true role of comity is to ensure that the parties' agreement is respected."[32] This vividly depicts that domestic and national courts are not interested in monitoring arbitration, but in fact respect the autonomy principle of the process.

Concluding Remarks –

In relation to the ultimate question of whether domestic courts of the state where the proceedings take place should monitor arbitration, the answer depends on the circumstance and reason for intervention of the courts. It is important to note that domestic courts operate in different legal and cultural contexts, from common law and civil law influences, developing and developed nations, and jurisdictions with political or religious domination. Although the foundational principles mentioned earlier are integral, one should envision that when a domestic or national court is invited to challenge any issues, it is in its simplest form a negation of the arbitration agreement. Furthermore, it may also be motivated by its parochial, cultural, and political system.[33]
Ultimately, it can be argued that in order to preserve the fundamental autonomous component of arbitration, it is essential that the arbitral process remain the way it is
– private and without the direct pressure and supervision of domestic courts. In simple terms, jurisdiction should be given to parties to monitor their own proceedings in accordance with applicable laws and only allow intervention from domestic courts by invitation or when undoubtably

[30] 414 F. Supp. 1384, 1390-91 (S.D. Tex. 1976).
[31] 900 F.2d 369 (D.C. Cir. 1990).
[32] Civ. No. H-97-879 (S.D. Tex.1997).
[33] Lew & Loukas (n 2).

beneficial.

To reiterate the analogy used above, if courts do not provide the nutrients to the fish at the right time and in the right place, the fish of arbitration might be forced into deep waters, where it will surely find itself in peril.

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The Legality of Court-Ordered Caesareans

Jasmine Blow

Abstract

When an obstetrician advises a woman to undergo a caesarean section, most women will adhere to their obstetrician's advice and consent to surgery. However, some women refuse to undergo surgery, resulting in obstetricians attempting to obtain court orders to enforce surgery upon women. In order to overrule the woman's decision, a judge must find that the woman lacks capacity to refuse medical treatment. Judges have been placed in a difficult position, where an acceptance of a pregnant woman's refusal of surgery would put the foetus at serious risk of suffering harm or injury. Whereas, overriding such a refusal would disregard a pregnant woman's right to refuse medical treatment. In an attempt to save lives, there have been a number of cases in which pregnant women refusing caesarean sections have been ordered to undergo surgery against their wishes. This article proposes to critically analyse the case law regarding court-ordered caesareans. Critical analysis will primarily focus on four common problems which have arisen throughout the case law: (1) the effect emergency hearings have on capacity assessments, (2) the lack of patient representation and due procedure, (3) the increased stereotyping of pregnant women as incapacitous, and (4) the use of the court's inherent jurisdiction to enforce caesarean sections. These issues highlight that the law does not adequately acknowledge a woman's right to refuse a caesarean section, demonstrating the need for reform in this area. This article advocates for a combined reform approach, utilising mutual persuasion as evidence of an advance decision's continuing legitimacy.

Introduction

The development of medical technology has given obstetricians access to a variety of medical procedures which increase the safety of labour.[1] An example of such a lifesaving procedure is a caesarean section.[2] However, the surgery may involve a long recovery time, a greater risk of infection, and an increased risk of uterine rupture in subsequent pregnancies.[3] While most women will accept these risks in favour of having a healthy child,[4] legal conflicts can

[1] Tina Lanning, 'The Caesarean Section and The Pregnant Woman's Right to Refuse Treatment' (2004) 8(2) MJLS 36, 39.
[2] ibid.
[3] Charity Scott, 'Resisting the Temptation to Turn Medical Recommendations into Judicial Orders: A Reconsideration of Court-Ordered Surgery for Pregnant Women' (1994) 10(4) GaStULRev 615, 668; 'Risks: Caesarean section' (*NHS)* <https://www.nhs.uk/conditions/caesarean-section/risks/> accessed 12 June 2020.
[4] George J Annas, 'Law and the Life Sciences: Forced Cesareans: The Most Unkindest Cut of All' (1982) 12(3) HastingsCentRep 16, 45.

occur when a woman goes against medical advice and refuses to have a caesarean section.[5] In most cases of caesarean section refusal the courts have been asked to determine whether the pregnant woman has the capacity to refuse medical treatment.[6] This article will address whether the law in the United Kingdom (UK) adequately acknowledges a woman's right to refuse medical treatment when a court orders a caesarean section. Section 1 will provide context and discuss the legal basis for the refusal of medical treatment. Section 2 will provide a brief overview of UK cases involving the refusal of a caesarean section. Section 3 will critically analyse the UK court's inherent jurisdiction in relation to caesarean refusal. Section 4 will critically discuss possible reforms, including the use of advance decisions and mutual persuasion. Ultimately, this article will argue that the law does not adequately acknowledge a pregnant woman's right to refuse medical treatment. It is contended that through a combination of mutual persuasion and advance decisions, the law will more adequately acknowledge a woman's right to refuse medical treatment.

Section 1: Refusal of Medical Treatment

I: Consent

The right to refuse medical treatment is universally recognised as a fundamental principle which protects autonomy and integrity.[7] In order for a medical practitioner to legally carry out any form of medical treatment or surgery on a competent adult in the UK, a valid consent, either express or implied, must be given by the patient.[8] If medical treatment is given without obtaining a valid consent from the patient, against the patient's will, and without statutory authority, it is possible that the medical practitioner will incur civil liability for trespass against the person, and criminal liability under the Offences Against the Person Act 1861.[9]

The statutory authority is supported throughout the case law. For example, in the case of *Re T* Lord Donaldson emphasised the need for the Court to recognise self-determination.[10] He stated that an adult with capacity has 'an absolute right to choose whether to consent to medical treatment [or]

[5] Terri-Ann Samuels and others, 'Obstetricians, Health Attorneys, and Court-Ordered Cesarean Sections' (2007) 17(2) Women's Health Issues 107, 113; Sonya Charles, 'Obstetricians and Violence Against Women' (2011) 11(12) AJOB 51, 54-55.

[6] Hafez Ismaili M'hamdi and Inez de Beaufort, 'Forced caesareans: applying ordinary standards to an extraordinary case' (2018) JMedEthics1, 3.

[7] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 8; George J Annas and others, 'The Right to Refuse Treatment: A Model Act' (1983) 73(8) AJPH 918.

[8] Lanning (n 1) 48.

[9] Offences Against the Person Act (OAPA) 1861, s 20.

[10] *Re T (Adult: Refusal of Medical Treatment)* [1992] 3 WLR 782; Marie Fox and Kirsty Moreton, '*Re MB (An Adult: Medical Treatment)* [1997] and *St George's Healthcare NHS Trust v S* [1998]: The Dilemma of the 'Court-Ordered' Caesarean' in Jonathan Herring and Jesse Wall (eds), *Landmark Cases in Medical Law* (Hart Publishing 2015) 148.

to refuse it (…) notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent'.[11] However, Lord Donaldson also stated that the only scenario in which refusal may be more heavily scrutinised would be where a refusal 'may lead to the death of a viable foetus'.[12]

It can be argued that Lord Donaldson was merely hypothesising that in the event that a pregnant woman decided to refuse medical treatment, putting herself and her foetus at risk, then a more thorough examination of the refusal may be permitted. This was evidenced when Lord Donaldson stated that *Re T* did not address the refusal of medical treatment during pregnancy, meaning if and when such a case arose, 'the courts [would] be faced with a novel problem of considerable legal and ethical complexity'.[13] Nevertheless, Fox and Moreton believe that this statement has made it possible for the courts to override a capacitous pregnant woman's refusal of treatment.[14] This is a valid argument, because in subsequent cases involving court-ordered caesareans, Lord Donaldson's statement has been utilised as authority upon which to justify overriding a pregnant woman's right to refuse medical treatment.[15]

II: Mental Capacity Act

A similar argument can be made with regards to the Mental Capacity Act 2005 (MCA).[16] Section 1(2) states that a person must be assumed to have capacity unless it is established that he lacks capacity.[17] However, a doctor will not incur civil or criminal liability if the patient is found to lack the capacity to refuse medical treatment.[18] Section 2(1) states that a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.[19] The test for capacity is contained within section 3 of the MCA,[20] and once the patient's lack of capacity has been established, the court must determine the course of treatment that is in the patient's best interests.[21] The MCA also makes it clear that unwise decisions are not an indication of incapacity.[22]

The MCA's Code of Practice (CoP) echoes this, stating that an unwise decision should only be investigated if the individual repeatedly makes unwise decisions, placing themselves at significant risk of harm or

[11] *Re T* (n 10) 102 [D]-[E] (Lord Donaldson). See also *Re MB (Adult: Medical Treatment)* [1997] EWCA Civ 3093, [17] (Butler-Sloss LJ); *St George's Healthcare NHS Trust v S* [1999] Fam 26, 45 [E] (Walker LJ).
[12] *Re T* (n 10).
[13] ibid [E] (Lord Donaldson).
[14] Fox (n 10).
[15] *St George's* (n 11) 45 [C]-[E].
[16] Mental Capacity Act 2005.
[17] ibid s.1(2).
[18] ibid s.4(C).
[19] ibid s.2(1).
[20] ibid s.3(1).
[21] ibid s.4.
[22] ibid s.1(4).

exploitation, or if the individual makes an unwise decision which is obviously irrational or out of character.[23] It can be argued that this does little to aid pregnant women who wish to refuse caesarean sections, because it is questionable whether conducting further inquiries would be feasible in an emergency court hearing, especially considering that in many cases the court has had difficulty in locating basic medical records.[24]

Although the MCA and the CoP may appear in theory to provide adequate protection for individuals wishing to refuse medical treatment, the reality is quite the opposite. In cases involving the refusal of caesarean sections, judges have often 'manipulate[d] the threshold of capacity' in order to prevent loss of life.[25] Consequently, in many cases capacity assessments are flawed and lack satisfactory due process, meaning unwise decisions are often used as an indication for a woman's lack of capacity.[26] As a result, it has become necessary to question whether the law adequately acknowledges a woman's right to refuse medical treatment in relation to caesarean sections.

[23] MCA: COP (2007) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf> accessed 1 June 2020, 25.
[24] *A University Hospital NHS Trust v CA* [2016] EWCOP 51, [11], [20] (Baker J).
[25] Fox (n 10) 169.
[26] *Bolton Hospitals NHS Trust v O* [2002] EWHC 2871 (Fam), [12] (Butler-Sloss P); *The Mental Health and The Acute Trust and The Council v DD* [2014] EWCOP 8, [4] (Pauffley J); *CA* (n 24) [22]-[23].

Section 2: Case Analysis

I: Case Overview

There is now a significant body of case law in relation to court-ordered caesarean sections.[27] While it will not be possible within the constraints of this article to describe in detail the facts of historical cases alongside conducting an adequate analysis of more recent case law, it remains important to identify common themes throughout caesarean section refusal case law in order to assess how the law has developed over time. All of the cases mentioned in this article involve women who went against medical advice by refusing caesarean sections, but who were found in court to lack capacity to make such decisions, and as such were ordered to undergo a court-ordered caesarean section.[28]

Many cases of caesarean section refusal fail to distinguish whether the refusal derives from a true lack of capacity, or whether the patient's incapacity derives from a refusal to consent.[29] However, it can be difficult to ascertain the legitimacy of the patient's

[27] *Re S (Adult: Refusal of Treatment)* [1993] Fam 123; *Norfolk and Norwich Healthcare (NHS) Trust v W* [1996] 2 FLR 613; *Re MB* (n 11); *St George's* (n 11); *O* (n 26); *DD* (n 26); *CA* (n 24); *NHS Trust v JP* [2019] EWCOP 23; *United Lincolnshire Hospitals NHS Trust v CD* [2019] EWCOP 24; *Guys and St Thomas' NHS Foundation Trust (GSTT) and South London Maudsley NHS Foundation (SLAM) v R* [2020] EWCOP 4.
[28] ibid.
[29] Elizabeth Wicks, 'The Right to Refuse Medical Treatment under the European Convention on Human Rights' (2001) 9(1) MedLawRev 17, 27.

capacity when the court does not engage in an adequate capacity assessment. Emergency applications have often been utilised as an excuse for a court's failure to conduct an adequate analysis of the patient's capacity.[30] For example, in both *Re S* and *St George's* the Judge's appear to have granted the declarations allowing for a court-ordered caesarean section without any regard to the patient's capacity.[31]

Cahill contends that emergency applications have led to poor communication and timing, resulting in unsatisfactory documentation and representation.[32] For example, in *O* the patient was only interviewed for 45 minutes before being diagnosed with post-traumatic stress disorder.[33] It should be acknowledged that in the case of *O* the Official Solicitor did not accept *O* as a patient unable to make decisions, but was given extremely short notice of the case, and therefore unable to fully cross examine the evidence presented to the Court.[34] The lack of adequate representation has often resulted in the Court only acknowledging one-side of the legal argument, which is most often the medical opinion.[35]

As a result, the reasons for refusing caesarean sections have been trivialised,[36] and in some cases the courts made disparaging comments towards women, for example in *Re MB* the patient was described as a 'naïve, not very bright, frightened young woman'.[37] Indeed, pregnant women who refuse to submit to legitimate medical advice are seen as 'idiosyncratically deficient, individually culpable, [and] maybe even a tragic case'. [38] It can be argued that these comments border on derogatory, and to an extent infantilize pregnant women, conjuring the image of the patient as a minor that needs the permission of the court to refuse medical treatment. Hewson supports this argument, stating that pregnant women are seen as a 'sub-division of what courts once called infants and lunatics, incapable of making decisions for themselves, for whom doctors and courts should be surrogate decision-makers'.[39]

However, it is interesting to note that although the Court argued these women were in too much pain and fear due to giving birth to refuse surgery, the same argument would not be used if the women were to consent. This suggests that if women are

[30] Sabine Michalowski, 'Court-Authorised Caesarean Sections: The End of a Trend?' (1999) 62(1) ModLawRev 115, 127.
[31] *Re S* (n 27) 124 (Brown P); *St Georges* (n 11) 40 [F].
[32] Heather Cahill, 'An Orwellian Scenario: court ordered caesarean section and women's autonomy' (1999) 6(6) NursEthics 494, 499-500.
[33] *O* (n 26) [8].
[34] ibid [11]-[12].
[35] *Re S* (n 27) 124 [A]-[C].
[36] Jane Bryan, 'Reading Beyond the *Ratio*: Searching for the Subtext in the "Enforced Caesarean" Cases' in Daniela Carpi (ed), *Bioethics and Biolaw Through Literature* (De Gruyter 2011) 123.
[37] *Re MB* (n 11) [9].
[38] Susan Irwin and Brigitte Jordan, 'Knowledge, Practice, and Power: Court-Ordered Cesarean Sections' (1987) 1(3) MedAnthropolQ 319, 328.
[39] Barbara Hewson, 'Women's rights and legal wrongs' (1996) 146 NLJ 1385, 1386.

obedient to the advice of their obstetricians, they will be judged as capacitous, but if a woman chooses to go against the norm, she will be labelled as incompetent. Hewson supports this argument, stating that if women comply their consent is not questioned, suggesting competence is a 'floating charge' which 'crystallises on compliance'.[40] This is a convincing argument, because it highlights that pregnant women are not assumed to have capacity as directed in the MCA, instead their capacity is adjustable depending on their response to medical advice. It can be argued that the law has created a paradoxical situation, where refusal is acceptable as long as the woman has capacity. However, her capacity is doubted based upon her refusal, which highlights the illusory nature of women's rights in childbirth.

II: Inherent Jurisdiction

In recent years, the inability for judges to recognise and accept a pregnant woman's right to refuse medical treatment has led to a worrying reliance on the court's 'inherent jurisdiction' as a legal basis to order a caesarean section.[41] The inherent jurisdiction is a doctrine of English common law, described by Munby J as 'a jurisdiction in relation to incompetent adults which is for all practical purposes indistinguishable from its well-established parens patriae or wardship jurisdiction in relation to children'.[42] The regulations of the MCA have since replaced the inherent jurisdiction of the High Court in the case of mentally incapacitated people.[43] However, the High Court has gradually extended the use of the inherent jurisdiction to caesarean section cases.[44] For example, in the cases of *CD* and *R* both patients had capacity at the time of the hearing, meaning both Judges strained to find a legal basis within the MCA which would allow them to make an anticipatory declaration to enforce a caesarean section.[45] Although the Judge in *R* did state that he had a legal basis under section 15 of the MCA to order an anticipatory declaration on a currently capacitous patient, he utilised the Court's 'inherent jurisdiction' in order to further support his decision.[46]

In the case of *R*, the Judge contended that by applying the 'basic rules of statutory construction', and in particular the literal rule, section 15(1)(c) provided a legal basis for anticipatory declarations.[47] However, Fovargue doubts how this interpretation of section 15 sits alongside other key provisions in the MCA.[48] In particular,

[40] Barbara Hewson, 'How to escape the surgeon's knife' (1997) 147 NLJ 752.
[41] *CD* (n 27) [17] (Francis J).
[42] *E v Channel Four News International Limited and St Helens Borough Council* [2005] EWCH 1144 (Fam) [55] (Munby J).
[43] MCA (n 16).
[44] *R* (n 27) [7] (Hayden J).
[45] *CD* (n 27) [11] (Francis J); ibid [8]-[10].
[46] *R* (n 27) [7] (Hayden J).
[47] ibid [34].
[48] Sara Fovargue, 'Anticipating Issues with Capacitous Pregnant Women: *United Lincolnshire NHS Hospitals Trust v CD* [2019] EWCOP 24 and *Guys and St Thomas' NHS Foundation Trust (GSTT) and South London and Maudsley NHS Foundation*

Fovargue states that if anticipatory declarations only come into force when the patient loses capacity, then presumably the MCA is similarly 'switched on'.[49] Consequently, it can be argued that the use of section 15 as a legal basis for making anticipatory declarations on currently competent patients creates a paradox.

On one hand, by making an anticipatory declaration the Judge avoided the need for an emergency declaration to be made if the patient were to suddenly lose capacity while in labour. However, this created an inconsistency between section 15(1)(c) and section 2(1), because when the Judge made the anticipatory declaration he was not looking at the patient's capacity 'at the material time' or 'in relation to the matter'.[50] Due to the nature of anticipatory declarations, a judge cannot know exactly what the 'matter' will be if the patient loses capacity.[51] This is problematic because judges are making declarations without specific knowledge of what the patient's capacity will be during labour.[52] It may be argued that judges are simply being required to make an educated guess, but considering that the patient in *R* was not represented,[53] it is questionable how well informed the judge truly was regarding *R's* capacity and autonomy.

In addition when the Judge made a anticipatory declaration in *R*, although he stated it was crucial that the patient's autonomy remain in focus, he also contended that the best interests of the patient were inextricably linked to the delivery of a 'viable and healthy foetus'.[54] Essentially it could be argued that in order for a patient's autonomy to be respected, her wishes must sit with, or alongside, the foetus' welfare.[55] Fovargue argues that the judgments in both *CD* and *R* are reminiscent of older case law, in which judges would 'strain to conclude' the patient lacked capacity in order to protect her life and that 'of her unborn child'.[56]

On a preliminary reading these judgments may appear sensible because the judges are only condoning enforced caesarean sections if the patient loses capacity. However, this may give obstetricians an incentive to bring applications to the court earlier in the hope for an anticipatory declaration, so when a patient refuses medical treatment during labour, she can be forced to have a caesarean without the need for an emergency application. This highlights that the law does not adequately acknowledge a woman's right to refuse medical treatment. Brazier agrees with this statement, arguing that there is a need to encourage morally correct and responsible choices through reform, without

Trust (SLAM) v R [2020] EWCOP 4' (2020) Medical Law Review 1, 8.

[49] ibid 9.

[50] MCA (n 16) s.2(1); ibid.

[51] Fovargue (n 48) 9.

[52] ibid.

[53] *R* (n 27) [5] (Hayden J).

[54] ibid [63]; Fovargue (n 48) 11.

[55] Fovargue (n 48) 12.

[56] *R* (n 27) [56] (Hayden J); ibid 11.

completely rejecting private and autonomous choice.[57]

Section 3: Reform
I: Advance Decisions

The use of advance decisions to refuse treatment may be one possible way of reforming the law in this area, alongside respecting the interests of both women and obstetricians.[58] Fovargue believes that one of the positives to arise from *CD*, is the apparent acknowledgment that if the patient had properly constructed an advance decision under the MCA, it would have been binding on the Court.[59] The seriousness of advance decisions has also been highlighted in the case of *Rushton*, in which it was held that 'the medical profession must give (…) advance decisions the utmost care, attention and scrutiny'.[60] Burcher supports the case law, citing the idea of a Ulysses contract, which would involve an individual making a decision when they have capacity, for a future time when they may be found incapacitous.[61] This would not only take into account fluctuating capacity, but also allow obstetricians to respect the autonomy of women.[62]

However, it is also important to remember that advance directives may not be accepted by the court, because an individual's opinion may change due to new experiences and emotions.[63] Burcher agrees, noting that there are philosophical and legal questions concerning how far a person is able to project themselves and their choices into the future.[64] The difficulty is that an advance decision or Ulysses contract would have to be made before a woman is in labour, and it is reasonable to argue that it may be difficult for a woman to envisage how she will feel during labour. Consequently, there is a danger that women will want to change their minds, and it could be contended that judges might be willing to overrule advance decisions on the basis that women cannot imagine the precise circumstances of labour.

This argument is supported by Ladd, who challenges the applicability of advance directives, arguing only during labour do the previously abstract images of childbirth become real.[65] Therefore, it is reasonable to suggest that women may actually be able to make more informed decisions about their maternal care during labour.[66] In addition, it

[57] Margaret Brazier, 'Liberty, Responsibility, Maternity' (1999) 52(1) Current Legal Problem 359, 391.
[58] MCA (n 16) s.24; Emma Walmsley, 'Mama Mia! Serious Shortcomings With Another '(En)Forced' Caesarean Section Case *Re AA* [2012] EWHC 4378 (COP)' (2014) 23(1) MedLawRev 135, 143.
[59] *R* (n 27) [65] (Hayden J); Fovargue (n 48) 13.
[60] *NHS Cumbria CCG v Rushton* [2018] EWCOP 41 [26] (Hayden J).
[61] Paul Burcher, 'The Ulysses Contract in Obstetrics: A Woman's Choices Before and During Labour' (2013) 39(1) JMedEthics 27, 27-28.
[62] *O* (n 26) [12]; *CD* (n 27) [3] (Francis J); *R* (n 27) [2] (Hayden J).
[63] MCA (n 16) s.25; Burcher (n 61) 28.
[64] ibid.
[65] Rosalind Ekman Ladd, 'Women in Labour: Some Issues about Informed Consent' (1989) 4(3) Hypatia 37, 42.
[66] ibid.

is difficult to know how to prove the continuing validity of an advance decision. Maclean supports this, arguing that an advance directive should only apply to an individual if she is the same moral entity that created the directive.[67] Gligorov and Vitrano concur, stating where there is 'sufficient psychological dissimilarity between the patient before and after her illness, an advance directive ought to be questioned and perhaps revoked'.[68]

II: Mutual Persuasion

Drawing upon the work of Maclean, Wade believes a form of mutual persuasion would encourage a sensitive discussion of the motivations behind the refusal of a caesarean section.[69] If a woman were to continually refuse, her refusal should be respected.[70] Unlike advance directives, there is an exploration of the motives behind refusal, something which the courts often struggle with due to a lack of time and information.[71] There would need to be some attempt on behalf of obstetricians to understand and empathise with their patients, alongside suggesting ways of overcoming such a refusal. For example, if the refusal is motivated by fear,[72] the patient could be recommended for therapy sessions. Furthermore, if the refusal is based upon religious beliefs,[73] through better communication the obstetrician would be in a better position to accept a refusal, instead of making the assumption that a refusal signals a lack of capacity.[74] Minkoff and Paltrow add to this argument, and believe that a refusal to consent to medical treatment stems from poor communication earlier in pregnancy.[75] Therefore, spending more time communicating with patients would give obstetricians the much-needed time to 'overcome the woman's fear, prejudice and ignorance'.[76]

In addition, Chervenak and McCullough argue that 'the informed consent process should also invite the pregnant woman to assess this information in terms of her values and beliefs'.[77] Hollander believes that the aim of the discussions is to reach a compromise where both the patient and

[67] Alasdair R Maclean, 'Advance Directives, Future Selves and Decision-Making' (2006) 14(3) MedLawRev 291, 298.
[68] Nada Gligorov and Christine Vitrano, 'The Impact of Personal Identity on Advance Directives' (2011) 45(2) JValueInq 147, 151.
[69] Katherine Wade, 'Refusal of Emergency Caesarean Section in Ireland: A Relational Approach' (2014) 22(1) MedLawRev 1, 23.
[70] ibid 25.
[71] *Re S* (n 27) 123 [H] (Brown P); *CA* (n 24) [12].
[72] *Re MB* (n 11) [9]-[10].
[73] *Re S* (n 27) 123 [H], 124 [A] (Brown P).
[74] CF Weiniger and others, 'Holy Consent- A Dilemma for Medical Staff When Maternal Consent Is Withheld for Emergency Caesarean Section' (2006) 15(2) IntJObstetAnesth 145, 146-147.
[75] Howard Minkoff and Lynn M Paltrow, 'Obstetricians and the Rights of Pregnant Women' (2007) 3(3) Women's Health 315.
[76] Kristin Lyng, Aslak Syse and Per E BØrdahl, 'Can Caesarean Section Be Performed Without the Woman's Consent?' (2005) 84(1) Acta Obstetricia Et Gynecologica Scandinavica 39, 41.
[77] Frank A Chervenak and Laurence B McCullough, 'Justified Limits on Refusing Intervention' (1991) 21(2) HastingsCentRep 12, 14.

obstetrician feel comfortable.[78] If a compromise cannot be reached, the interests of the woman must come first.[79] This argument has merit, because it highlights that if a woman is judged to be competent, and her refusal has been monitored throughout her pregnancy and her motivations are understood, there is arguably no reason not to follow her refusals. This argument is supported by Pinkerton and Finnerty, who contend if a compromise cannot be reached, the obstetrician must accept the woman's refusal and respect her autonomous decision.[80]

These arguments are convincing, because mutual persuasion would allow obstetricians to monitor and understand the opinions of women in relation to caesarean sections throughout pregnancy. Perhaps if the women in previous case law had been monitored throughout their pregnancies, and their thoughts recorded more accurately, the courts could have obtained a better sense of their true feelings towards caesarean sections. As a result of continuous discussion and communication, issues and points of contention would be identified long before the women arrived at the hospital during labour. Thus avoiding 'last minute chaos',[81] as occurred in *O* where the patient refused a caesarean moments before the operation.[82]

However, for mutual persuasion to be successful, there would be a need for the patient to possess a certain level of knowledge and confidence in order to communicate their views adequately.[83] Thus, there is a danger that someone lacking the ability to articulate their views will succumb to the inherent power imbalance between a patient and doctor, and be coerced into consenting for surgery.[84] Nicholls and others agree, stating that understanding is a fundamental part of the obstetrician-patient relationship.[85] In order to overcome this problem, Scott suggest that if a woman's reason for refusal is 'serious', no further persuasion is appropriate.[86] Whereas, trivial reasons would justify light persuasion to ensure the woman is fully aware of the consequences of her decision.[87] However, these arguments fail to definitively state whether the test for 'seriousness' would be objectively decided from future guidelines,

[78] Martine Hollander and others, 'Women Refusing Standard Obstetric Care: Maternal Fetal Conflict or Doctor- patient Conflict?' (2016) 3(2) Journal of Pregnancy and Child Health 1, 3.
[79] ibid.
[80] JoAnn V Pinkerton and James J Finnerty, 'Resolving the Clinical and Ethical Dilemma Involved in Fetal-Maternal Conflicts' (1996) 175(2) AmJObstetGynecol 289, 294.
[81] Erin P Davenport, 'Court Ordered Cesarean Sections: Why Courts Should Not Be Allowed to Use a Balancing Test' (2010) 18(1) DukeJGenderL&Pol'y 79, 103.
[82] *O* (n 26) [5].
[83] Fox (n 10) 169.
[84] ibid.
[85] Jacqueline Nicholls and others, 'Consent in Pregnancy: A Qualitative Study of The Views and Experiences of Women and Their Healthcare Professionals' (2019) 238 EurJObstetGynecolReprodBiol 132, 137.
[86] Rosamund Scott, *Rights, Duties and the Body: Law and Ethics of the Maternal-Fetal Conflict* (Hart Publishing 2002) 238-240.
[87] ibid 238-240, 244.

or subjectively from either the patients or doctors point of view. While religion may not be serious to a doctor, it may encompass the life of a patient.

Scott supports this argument, stating that obstetricians would need to learn more about religious beliefs in order to properly understand refusals.[88] However, Leavine and Finer challenge the increase in communication, contending that it would be a heavy burden on obstetricians.[89] The practicality of an obstetrician communicating in detail with a patient, alongside their other duties would be difficult to achieve. Furthermore, mutual persuasion would only work if the patient was willing to engage in discussions prior to going into labour.

Consequently, similar to advance decisions, while mutual persuasion is a good idea in theory, in practice it may be difficult to implement without the continual engagement of obstetricians and women throughout pregnancy. It is accepted that both advance decisions and mutual persuasion are not flawless methods of ensuring the acknowledgment of a woman's right to refuse medical treatment. Nevertheless, it is contended that using mutual persuasion to prove the legitimacy of an advance decision will increase the likelihood that a woman's refusal to undergo a caesarean will be more understood by obstetricians and lawyers.[90]

Conclusion

Every individual with capacity has the right to refuse medical treatment, even when the decision to refuse treatment may be considered unwise.[91] However, UK courts have found it notoriously difficult to uphold this principle when pregnant women refuse to undergo caesarean sections in order to save their foetus'. Consequently, courts have begun to manipulate the threshold of capacity in order to prevent loss of life.[92] The continuous failure to accept that some capacitous pregnant women may simply not wish to follow their obstetrician's advice, has led to the Courts utilising their inherent jurisdiction alongside the MCA in order to make anticipatory declarations in cases where the patient has capacity.[93] In light of the clear need for reform in this area, it is argued that the use of advance decisions, allowing for an advance refusal of medical treatment while the patient is capacitous may be useful.[94] However, it is acknowledged that advance decisions can easily be overruled by a court on account of not representing the woman's current

[88] Charity Scott, 'Resolving Perceived Maternal–Fetal Conflicts Through Active Patient–Physician Collaboration' (2017) 17(1) AJOB 100, 101.
[89] Barbara Ann Leavine, 'Court-Ordered Cesareans: Can a Pregnant Woman Refuse?' (1992) 29(1) HousLRev 185, 216; Joel Jay Finer, 'Toward Guidelines for Compelling Cesarean Surgery: Of Rights, Responsibility, and Decisional Authenticity' (1991) 76(2) MinnLRev 239, 291.
[90] Wade (n 69).
[91] *Re T* (n 10) 102 [D]-[E] (Lord Donaldson); MCA (n 16) s.1(4).
[92] Fox (n 10) 169.
[93] *CD* (n 27) [17] (Francis J).
[94] Walmsley (n 58).

wishes.[95] Therefore, mutual persuasion could be considered a more sustainable method of reform, exploring the motives behind refusal before the beginning of labour.[96] Nevertheless, for mutual persuasion to be effective it would rely upon adequate dialogue between the patient and obstetrician throughout the patient's pregnancy.[97] Ultimately, this article has demonstrated that the law does not adequately acknowledge a pregnant woman's right to refuse medical treatment. It is hoped that by combining a recognition of the patient's values through mutual persuasion and advance directives,[98] the law will more adequately acknowledge a woman's right to refuse medical treatment.

[95] MCA (n 16) s.25; Burcher (n 61) 28.
[96] Wade (n 69).
[97] Fox (n 10) 169.
[98] Wade (n 69) 22.

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COMPETITION LAW: IS THE DOCTRINE OF ANCILLARY RESTRAINTS OF ANY PRACTICAL USE TO LEGAL ADVISORS?

Sahil Madan

Abstract

The primary objective of EU competition law is to prevent the distortion of competition to allow for a "free and dynamic" internal market and promote general economic and consumer welfare. This paper evaluates the role of the ancillary restraints doctrine in EU competition law and investigates whether it is of practical use to advisors by examining three problem areas. It concludes that the doctrine of ancillary restraints is of limited use to advisors; it lacks certainty, logic, and reliable precedent. The largest problem area is the suggestion of a partial rule of reason, particularly notable in *La Technique Minière* and *Maize Seeds*, which highlights a lack of certainty in the law. However, perhaps the most fundamental issues are those associated with the requirement for 'objective necessity' and 'proportionality.'

Introduction

The primary objective of EU competition law is to prevent the distortion of competition to allow for a "free and dynamic"[1] internal market and promote general economic and consumer welfare. Article 101[2] is an instrument that implements a thorough ban on anti-competitive agreements. Article 101(1) prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.' Article 101(3) details the exceptions to Article 101(1): 'any agreements or categories of agreement between undertakings; …which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

1. impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
2. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.'

In this paper, I will explain the role of the ancillary restraints doctrine in EU competition law, and investigate whether it is of practical use to advisors by examining three problem areas. Please note that for the purposes of this essay, Article 85 (outdated legislation) is interchangeable with Article 101 (current legislation).

What is the doctrine of ancillary restraints?

Faull and Nikpay summarise the ancillary restraints doctrine as follows: "clauses which restrict rivalry between the parties and/or third parties fall outside Article 101(1) if they are

[1] Stephanie Honnefelder, 'Facts on the European Union' (European Parliament Website, April 2019) <https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy> accessed 24 December 2020

[2] Article 101 Treaty for the Functioning of the European Union

directly related and necessary to the implementation of a legitimate interest."5 We can dissect the wording using case law.

"Directly related"

In Metropole3, the courts held that a clause is directly related if it is "subordinate to the implementation of that operation."4 Faull and Nikpay wrote "the activity covered by the clause must be part of, or at least closely linked to, the main agreement."5 However, the clause must not be the primary purpose for which the parties come together. In Metropole, establishment of a joint venture in the pay-TV market was considered the main operation, whilst a clause which granted certain exclusive rights to the venture was found to be subordinate. There is an obvious connection between a pay-TV platform and the need for content but supplying the channels to the joint venture was not the primary reason for the agreement.

"Necessary"

In Metropole and MasterCard6, the General Court relied on the Court of Justice's judgment in Remia37, which established two conditions to establish 'necessity.'

Firstly, the restriction must be "objectively necessary"7 for the implementation of the main operation. Without the clause in question, the main operation must be "difficult or… impossible to implement"8. There is some debate over how the Court should interpret this. In Metropole and Van den Bergh Foods9, the General Court held that the interpretation should not involve a weighing-up of the pro-and anti-competitive effects of the clause, rather a "relatively abstract"5 examination that does not involve a full market analysis. So, "the key question is not whether the restriction is indispensable to the commercial success of the main operation but rather its importance for the implementation of the main agreement."3 From an economic perspective, undertakings enter into commercial agreements to make money, so commercial considerations are at the centre of these agreements. Therefore, there is little distinction between clauses which are necessary from a business perspective and those which are necessary for the implementation of agreements.

The need for this distinction is clearer through a policy or legal lens. In P&I Clubs10, the General Court elaborated on this principle, explaining that a clause is necessary if there is "no workable method available otherwise."7 In MasterCard, "absence of the MIF may have adverse consequences for the functioning of the MasterCard system,"11 such as being "simply more difficult to implement or even less profitable".12 However, it does not mean that it should be regarded as "objectively necessary, if it is apparent from an examination of the MasterCard system in its economic and legal context that it is still capable of functioning without it."6 We will assess this as a problem area of the doctrine.

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[3] Case T-112/99 Métropole Télévision (M6) v Commission EU:T:2001:215

[4] Métropole télévision (n3), para 105

[5] Faull, Jonathan and Nikpay, Ali, The EC Law of Competition (2nd ed, Oxford University Press 2007)

[6] Case T-111/08 Mastercard v Commission EU:T:2012:260

[7] Métropole télévision (n3), para 106-108

[8] Métropole télévision (n3), para 109

[9] Case T-65/98 Van den Bergh Foods v Commission EU:T:2003:281

[10] OJ [1999] L125/12

[11] MasterCard (n6), para 90

[12] MasterCard (n6), para 91

The 'objective necessity' test also applies in public interest cases. In Wouters13, the Court of Justice ruled that a regulation prohibited multi-disciplinary partnerships imposed by the Dutch Bar fell outside Article 101(1) because it was objectively necessary to "ensure the proper practice of the legal profession".14

The second condition for a provision to be deemed 'necessary' requires that it is 'proportional.' In Ruhrgas15, this meant that "the clause's duration, material and geographical scope must not exceed what is necessary to implement the main operation."16 For example, in Metropole, the General Court found that a clause granting exclusive rights to the joint venture for 10 years was a disproportionate time period. We will also assess this problem area later.

Again, we should note that the 'proportionality' aspect also applies in public interest cases. In Wouters, the Court of Justice found that the clause was restrictive, but it did not "go beyond what is necessary in order to ensure the proper practice of the legal profession"17.

To what extent is the doctrine useful to advisors?

Thus far, these cases have illustrated the requirements set out by the doctrine. There are many cases that fall in between these gaps, causing legal uncertainty, making it difficult for advisors. To answer the question of whether the doctrine is useful to advisors, we should analyse three identifiable problem areas.

Partial 'Rule of Reason' (this is perhaps the largest hindrance to advisors, so we will dedicate to it the most time)

This term 'rule of reason', adopted from US antitrust case law, was defined by the US Supreme Court as the need for "a case-by-case evaluation,"16 where "the fact-finder weighs all the circumstances of a case in deciding whether a restrictive practice should be prohibited"18. This involves weighing-up the agreement's pro- and anti-competitive effects and, where the latter are greater, the agreement will be held as unlawful.

In Metropole, the General Court held that "it is necessary to weigh the pro-and anti-competitive effects of an agreement in order to determine whether it is caught by [Article 101(1)]"19 but "the Court of Justice and the [General] Court have been at pains to indicate that the existence of a rule of reason in [EU] competition law is doubtful."5 In Ruhrgas, the Commission went further, stating that the rejection of a 'rule of reason' type analysis is "justified not merely so as to preserve the effectiveness of Article 81(3), but also on grounds of consistency."12

EU courts are adamant that there is no rule of reason in EU law, but some case law indicates that it has a role to play. In La Technique Miniere20, the Court of Justice held that it must "consider the economic context… nature of the products, the position of the parties on the market, the clauses in the contract…" and hinted that the context of anti-competitive behaviour may be examined if it "seems really

[13] Case C-309/99 Wouters v Algemene Raad van de Nederlandse Orde van Advocaten EU:C:2002:98
[14] Wouters (n13), para 107
[15] Case T-360/09 E.ON Ruhrgas v Commission EU:T:2012:332
[16] Ruhrgas (n15), paras 65-68
[17] Wouters (n13), para 109
[18] Continental Television v. GTE Sylvania, [1977] 433 U.S. 36
[19] Métropole télévision (n3), para 72
[20] Case 56/65 Société La Technique Minière v Maschinenbau Ulm EU:C:1966:38

necessary for the penetration of a new area by an undertaking."17

In Consten and Grundig21, a German manufacturer gave exclusive territorial rights to a French distributor – an activity which the EU courts view as inherently anti-competitive. Thus, the Commission ruled that the clause fell under Article 85(1) and could not be exempted under Article 85(3). However, it could be argued that the agreement would have stimulated intra-brand competition and inter-State trade of Grundig products. So, the Commission's decision involved weighing-up the relative importance of stimulating competition and sanctioning anticompetitive behaviour. Clearly the latter prevails, so if there is a rule of reason, it is evidently of limited scope.

In Maize Seeds22, the Court of Justice held that an open exclusive licence of plant breeders' rights, which involved a degree of territorial exclusivity did not necessarily fall within Article 85(1). This occurs where, in licensing and patenting cases, the territorial exclusivity was necessary to allow the licensee to enter a difficult market or where new technology was being disseminated.

Here, we can assess the usefulness of the doctrine to advisors. After Consten and Grundig, advisors can predict with some certainty that provisions regarding territorial exclusivity will fall under Article 101(1). However, following Maize Seeds, some issues arise when defining the 'dissemination of new technology.' Firstly, it is difficult to decide when the newness of the tech or the problems of penetrating a new market are so pronounced as to render 85(1) inapplicable. Secondly, there is no guarantee that the parties' appreciation of these matters aligns with that of the Commission or Court of Justice (Velcro/Aplix23). Finally, if an exemption is granted, over time the technology becomes older and risk falls, so Article 101(1) could kick in later – it is the actual success of the agreement that causes its downfall. A similar issue is raised in Pronuptia24, where the Court of Justice hinted that in the case of franchises, under certain circumstances, territorial exclusivity may not fall under Article 101(1) where "it concerns a mark that is already widely known".25

Subjective decisions need to be made, so lawyers may have to advise their clients to notify the licence or take the easier route and comply with the terms of the block exemption.

Whilst it is evident that the scope of the rule of reason is fairly limited in relation to commercial cases, the debate remains at the heart of the issue of regulatory ancillarity. Whish and Bailey questioned whether Wouters introduced a rule of reason by establishing that reasonable regulatory rules fall outside Article 101(1). In this case, Wouters challenged a rule adopted by the Dutch Bar Council which prohibited lawyers from entering into partnership with professionals from a different line of work. The Court of Justice held that this prohibition "is liable to limit production and technical development within the meaning of Article

[21] Cases 56/64 & 58/64 Etablissements Consten S.A. and Grundigverkaufs-GmbH. v E.E.C. Commission EU:C:2009:610

[22] Case 258/78 LC Nungesser KG v Commission of the European Communities EU:C:1982:211

[23] Case L233/22 Re Velcro/Aplix OJ [1985]

[24] Case C-161/84 Pronuptia EU:C:1986:41

[25] Pronuptia (n24), para 24

101(1)(b) of the Treaty."26 As previously mentioned, the Court of Justice explained that Article 101(1) would not be infringed where the clause could "reasonably be considered to be necessary in order to ensure the proper practice of the legal profession."0 According to Whish and Bailey, this means that in some cases, it is "possible to balance non-competition objectives against a restriction of competition"27 (i.e. compare non-competition issues to competition issues.

However, they suggest that this is not indicative of a rule of reason, but instead a branch of the doctrine of ancillary restraints that was necessary to allow regulatory bodies to execute their functions effectively.25 It is important to recognise how this 'branch' compares with Article 101(3) itself. It is argued that the Wouters doctrine is more lenient than Article 101(3) and that it should only apply where "a delegation of regulatory or supervisory powers by the government is present as only then part of the necessary 'balancing act' has already been performed by [Article 101(3)]."28 It follows that, while both tests are different in nature, the subject of both investigations is the same. However, as the Wouters doctrine explores areas beyond Article 101(3), it is clear that the doctrine would not fit well under the Article.

The Wouters judgment did not limit the scope of this regulatory ancillary doctrine to the legal or liberal professions; the doctrine was affirmed in Meca-Medina29 and OTOC30. In these cases, the European Courts had the option to "reject, qualify, or distance itself" from Wouters, but chose to affirm it; however, Cleaver argued that "its juridical basis is no clearer, but it is at least more firmly established."31 This does little to clarify the doctrine for advisors, but it at least provides case law from which they can draw.

This partial rule of reason does not bring with it much certainty, arguably an advisor's greatest strength, particularly to cases involving franchises and new technology. As Joliet said, businessmen "complain about the lack of certainty in Antitrust law… they are inclined to demand more flexibility. Such demands are irreconcilable. A rule of reason under Article 85(1) would bring about more uncertainty for business men."32

'Objective necessity'

The decisions in Metropole and MasterCard are founded on the case of Pronuptia, which distinguished between:

Clauses that were necessary for the system to work (e.g. without these, there could be no franchise system in Pronuptia).

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[26] Wouters (n13), para 90

[27] Whish and Bailey & Sufrin `Art 85 [101 TFEU] and the rule of reason` (1987) Yearbook of European Law 1

[28] Charlotte Jannsenn and Erik Kloosterhuis, 'The Wouters case law, special for a different reason?' (2016) 37 E.C.L.R., Issue 8

[29] Case C-519/04 P Meca Medina EU:C:2006:492

[30] Case C-1/12 Ordem dos Técnicos Oficiais de Contas v Autoridade da concorrência, EU:C:2013:127

[31] Tom Cleaver, 'Wouters Naturalised' (Competition Bulletin, 18 March 2013) <http://competitionbulletin.com/2013/03/18/anticompetitive-behaviour-by-professional-regulators-wouters-naturalised/ > accessed 2 January 2020

[32] Rene Joliet, The Rule of Reason in Antitrust Law: American, German and Common Market Laws in Comparative Perspective (2014)

Clauses which dampened price competition between franchisees (e.g. prospective franchisees may not take the risk of becoming part of the chain unless they benefit from a degree of protection against select competition).

This begs the question: what is the need for the distinction? The Commission argued in its White Paper on Modernisation of the Rules Implementing Article 85 and 86 that if analysis of pro- and anti-competitive effects occurred under Article 85(1), Article 85(3) would be cast aside, and this could only come about through revision of the Treaty. The fact that only an "abstract"5 analysis should be carried out and that ancillary restraints are cleared, irrespective of their effect, means that clauses which could be harmful may be taken outside Article 101(1). "Prudence would seem to dictate that the scope of application of the doctrine should not be too wide."26 This is supported by the fact that the Commission is under-resourced and unwilling to delegate these kind of policy considerations to domestic courts.

Distinguishing clauses that were necessary for the system to work from clauses that made the agreement more commercially viable make sense from a policy standpoint, but it is difficult to practically apply. To undertake a competitive effects analysis, the EU courts consider what the position would have been had the agreement not taken place. This clarifies the impact of the agreement on the internal market - the need to establish this 'counterfactual' was stressed by the General Court in O2 (Germany) GmbH33, where "the Commission had failed to show what the position would have been in the absence of the agreement."34 Without the ability to practically apply the distinction to real-life cases, it is difficult for the Courts to establish the counterfactual. In the same way, it is difficult for advisors to do the same and predict how the Courts will approach a case.

Case law shows that little is required to render a provision 'disproportionate'

In Metropole, the General Court found that the clause granting exclusive rights to a joint venture for certain general-interest channels for ten years was disproportionate. Why? The answer is mere assertion. The General Court found, without much evidence, that it was "quite probable"35 that the competitive disadvantage from which the joint venture suffered at its creation would diminish over time. It argued that the clause deprived the joint venture's actual and potential competitors of access to the programmes that were considered "attractive by a large number"36 of French television viewers - however, no real attempt was made by the Commission, nor the GC, to assess the nature or extent of the foreclosure or establish the importance of this content to competition. With baseless decisions such as that in Metropole, it becomes difficult for advisors to predict how the Court will approach the 'proportionality' concept.

[33] Case T-328/03, *O2 (Germany) GmbH & Co. OHG v Commission* EU:T:2006:116
[34] O2 (n33), para 108
[35] Métropole télévision (n3), para 124
[36] Métropole télévision (n3), para 125
[37] Case C-42/84 Remia EU:C:1985:327

Conclusion

To conclude, the doctrine of ancillary restraints is of limited use to advisors; it lacks certainty, logic, and reliable precedent. The largest problem area is the suggestion of a partial rule of reason, particularly notable in La Technique Minière and Maize Seeds, which highlights a lack of certainty in the law. However, perhaps the most fundamental issues are those associated with the requirement for 'objective necessity' and 'proportionality.' In these instances, the European Courts themselves do not seem to have the ability to consistently interpret these functions; this unpredictability clearly hinders an advisor's game plan.

This is not to say that the doctrine is entirely useless; it does offer some certainty, at least in terms of regulatory ancillarity and territorial exclusivity clauses. However, we should conclude that the doctrine's use to advisors is relatively limited, and it is perhaps advisable that they pursue any potential claims through Article 101(3), which the European Courts seem to implement far more comfortably.

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THE PRINCIPLE OF SUPREMACY AND THE PROCESS OF EUROPEAN UNION INTEGRATION

Mariam Ashraf

Abstract

The principle of supremacy, as carried out by the Court of Justice of the European Union, has resulted in European Union Integration. Supremacy of the European Union not only guarantees that Union law will be supreme over the national law of member states, but also that European Union legislation is enforced and protected across all members states, while withholding those states from passing any legislation that would hinder Union objectives. Through an analysis of past Court of Justice of the European Union case law, this paper aims to understand the Court of Justice's position as they balance the supremacy of Union law, against the constitutional rights of member states. There is much criticism of European Union integration as a result of supremacy to consider. An overreach of Union powers, the undermining of national parliamentary sovereignty, the inability of citizens to challenge Union legislation, and the Court of Justice acting as judicial activists are all concerns member states share. However, despite legal challenges and political disintegration, the Court of Justice of the European Union rightly stands firm in holding that the principle of supremacy of European Union law is absolute: when European Union and national legislation conflict, national law must be amended in order to give full effect to European Union provisions. The court correctly uses teleological interpretation to give full effect to the purpose of the European Union treaties, which all member states signed and agreed upon. Union treaties call for increased individual rights and protections, and oblige member states to provide their sincere cooperation to ensure the fulfillment of treaty provisions, which the Court of Justice upholds. Following Union treaty objectives, the principle of supremacy of European Union law carried out by the Court of Justice of the European Union, has successfully resulted in European Union integration.

The European Union is a form of international cooperation based on political, economic, legal, and social integration, as highlighted by the values and aims stated in articles 2 and 3 of the Treaty of the European Union[1]. European Union treaties support supranational integration, providing for the transfer of legislative sovereignty by member states to the European Union Institutions (The Commission, Council, and Parliament). European Union treaties are enforced by the Court of Justice of the European Union (CJEU) whose primary objective is to ensure the uniform application and interpretation of European Union law in member states. Based on Declaration 17, concerning primacy in the Treaty of Lisbon[2], the CJEU

[1] Treaty of European Union 2008, art 2, art 3

[2] Treaty of Lisbon 2007

constitutionalized the principle of supremacy through case law. The supremacy of the European Union law, as carried out by the Court of Justice of the European Union, led to European Union integration. However, European Union integration through supremacy has drawn criticism and the CJEU faces challenges as it tries to find the balance between the supremacy of European Union law, and the constitutional rights of national law within the 27 member states.

The principle of supremacy of the European Union law is constitutionally important for the following reasons. First, as is the CJEU's role, the principle of supremacy guarantees the application of European Union law. Second, it prevents member states from pursuing self-interest legislation and retains a European-centric focus. Third, the principle of supremacy ensures treaty rights are applied uniformly across the 27 member states, maintaining the democratic legitimacy of the Union. Fourth, the principle ensures European Union legal rights are protected and enforced by member states in national courts. Fifth, supremacy is a legal principle that enables the pursuit of the political objective of European Union integration. Sixth, and most importantly, the principle of supremacy creates a constitutional status for European Union legislation where it is supreme over the national legislation of member states.

Flaminio Costa v ENEL[3] was a seminal case where the CJEU established the principle of supremacy of the European Union. The Court of Justice's decision supported, first, that European Union law is superior to the national law of member states; second, whenever there is conflict between European Union law and national law, national courts should apply European Union law; and third, the obligation to apply European Union law is absolute. This principle of supremacy generated negative reactions from member states who feared competence disputes and an overreach of European Union powers. The principle of supremacy was challenged by Germany in *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*[4]. In this case, the CJEU held that the constitutionality of European Union law cannot be challenged by national courts, and reinforced European Union legal supremacy by stating national court judges must apply European Union law over national law. The supremacy of European Union law has had clear constitutional effects within member states. Further cementing this Union supremacy, in *Amministrazione delle Finanze dello Stato v Simmenthal Spa*[5], the CJEU clarified that if any new legislation by a member state conflicts with Union treaties, that law will be dismissed, as member states cannot legislate contrary to European Union law.

[3] [1964] ECR 585
[4] [1970] 3 WLUK 70
[5] [1978] 6 WLUK 168

Moreover, all new legislation passed within a member state will not take precedence in its national application over existing law by the European Union; and older European Union law will retain its supremacy irrespective of the national status of the law. The principle of supremacy of European Union law was held to be absolute.

Van Gend en Loos v Nederlandse Administratie der Belastingen[6] established a new legal order of European Union legal supremacy whose subjects are both member states and individuals. The CJEU held that European Union legislation can be applied directly in national courts to disapply national laws. The Court of Justice held that European Union legislation has direct effect within member states if first, the legislation is clear and precise; second, the legislation is unconditional and stands on its own; and third, is not dependent on any further action by the European Union or member states. *Van Gend en Loos v Nederlandse Administratie der Belastingen*[7] highlighted direct effect as the foundation of the supremacy of European Union law. However, the *Van Gend en Loos* criteria is not applicable to directives which form 80% of European Union legislation. As a result, in *Van Duyn v Home Office*[8], the CJEU held that a directive will have vertical direct effect against a state if it is first, clear and precise; second, unconditional; and third, the time limit for its implementation by the member state has expired.

The principle of supremacy is clear: when European Union and national legislation conflict, national law must be amended in order to give full effect to European Union provisions. Where direct effect is not available because a legislation does not meet the *Van Gend en Loos* criteria, indirect effect steps in to ensure the supremacy of European Union law. *Von Colson v Land Nordrhein-Westfalen*[9] supports that national courts have an obligation to interpret national law in a manner that is consistent with European Union law to give individuals the full benefit of Union law and uphold European Union supremacy. The Court of Justice of the European Union in *Von Colson v Land Nordrhein-Westfalen*[10] looked towards article 4(3) in the Treaty of the European Union[11], referencing the principle of solidarity and calling for sincere cooperation by member states as the foundation for this national obligation. Indirect effect is not applicable when national law provisions are unambiguous and leave no room for interpretation, the time period for implementation of a directive has not expired, or it would be against principles of legal certainty and non-retroactivity.

Where direct and indirect effects are not available for the enforcement of

[6] [1963] 2 WLUK 17
[7] Ibid.
[8] [1974] 12 WLUK 16
[9] [1984] 4 WLUK 85
[10] Ibid.
[11] Treaty of the European Union 2008, art 4(3)

European Union law, effective enforcement looks at the principal of member state liability. In *Francovich v Italy*[12] the CJEU held, the state shall be liable for loss suffered by the individual as a result of breaches of European Union law by that member state. The Francovich principle ensures member states comply with Union law and make European Union rights available to citizens, or be held liable and suffer having to pay compensation. While this does lead to tension between the European Union and member states, Szyszczak argues this is consistent with the judgement in *Van Gend en Loos v Nederlandse Administratie der Belastingen*[13]. The Francovich principle also promotes the supremacy of European Union law by making citizens agents for European Union integration within their states.

European Union integration based on the principle of supremacy has faced criticism. Attorney General Bobek of the United Kingdom called out the CJEU for being restrictive in who they allow to have standing in court, despite the Treaty of Lisbon[14] supporting a relaxation of standing rules. However, the Court of Justice has successfully empowered individuals since *Van Gen den Loos* to bring challenges. Further, in *Kadi v Council of the European Union*[15], the Court of Justice of the European Union allowed the right to judicial review and supported procedural fairness; adding it is their responsibility to ensure effective judicial protection of fundamental rights in all circumstances.

In *R. v Secretary of State for Transport Ex p. Factortame*[16], the CJEU held, the House of Lords must suspend a United Kingdom act of national parliament for the effective enforcement (supremacy) of European Union law. This absolutist interpretation of the principle of supremacy was unpopular as it undermined parliamentary sovereignty and led to Euro-Skepticism in the United Kingdom. While it is true that without the principle of supremacy of the European Union law, European Union integration would not have been achieved, such supremacy has constitutional effects within member states which they may not have foreseen when initially joining the European Union, and may contribute to political disintegration. On the other hand, the Court of Justice of the European Union is protecting the individual rights of those 95 shipping vessel owners in the Factortame dispute and benefiting them with the additional rights available under the Union treaties. Such protection has always been the aim of the Treaty of the European Union, which is signed and accepted by all member states as the foundation of the European Union.

While the European Union exercises its conferred powers, European Union

[12] [1991] 11 WLUK 237
[13] [1963] 2 WLUK 17
[14] Treaty of Lisbon 2007
[15] [2008] 9 WLUK 32
[16] [1991] 7 WLUK 326

integration is criticized for creeping beyond their competence to push the bounds of treaty provisions in an effort to expand their supremacy through soft law and policy changes. Yet, the CJEU's judgment in *Germany v Council Tobacco*[17] disallows the European Union to act outside the limits of powers conferred to them by European Union treaties. When the European Union Council acted through an internal market measure based on article 114 of the Treaty on the Functioning of the European Union[18], the CJEU upheld the rule of law and stated the Council cannot circumvent limits on European Union power and the directive was a public health measure which did not fall under exclusive Union competences listed in article 3 Treaty of the European Union[19]. Evidently, the European Union can only exercise its powers subject to a clearly defined treaty base and competence.

National parliaments argue they gave up legislative powers to the European Union, but the European Union is exercising powers conferred to them through signed treaties giving them legal competence. Furthermore, the principle of subsidiary under article 5(3) Treaty of the European Union[20] highlights the effectiveness of European Union legislation in areas of shared competence listed in article 4 Treaty of the European Union[21]. In *R Vodafone Ltd v Secretary of State for Business, Enterprise and Regulatory Reform*[22], the CJEU held, certain objectives will only be achieved through a single piece of European Union legislation, as opposed to 27 separate frameworks passed by each member state. The competences exercised at the European Union level demonstrate why European Union integration has been successful.

The judgement in *Mangold v Helm*[23] was criticized for being judicially activist, going beyond the treaty powers of article 18 Treaty of the European Union[24]. However, Leonarts argues that the principle of supremacy is a judicial concept the CJEU developed through teleological reasoning in its application of European Union law. This purposive approach is key to legitimizing European Union integration as it is anchored by the legitimate objectives of the Treaty of the European Union[25]. Leonarts supports that it is appropriate for the CJEU to use their purposive interpretation to give full effect to the purpose of the treaties signed by member states. Additionally, the principle of solidarity in article 4(3) Treaty of the European Union[26] obliges member states to provide their sincere cooperation to ensure the fulfillment of treaty provisions and facilitate the European Union's

[17] [2006] 12 WLUK 238
[18] Treaty of the Functioning of the European Union 2008, art 114
[19] Treaty of the European Union 2008, art 3

[20] Treaty of the European Union, art 5(3)

[21] Treaty of the European Union 2008, art 4
[22] [2010] 6 WLUK 67
[23] [2005] 11 WLUK 617
[24] Treaty of the European Union 2008, art 18
[25] Treaty of the European Union 2008
[26] Treaty of the European Union 2008, art 4(3)

objective. *Mangold v Helm*[27] correctly demonstrated that effective enforcement is the protection of both the purpose and substance of treaty rights.

Despite challenges, the principle of supremacy of European Union law carried out by the CJEU, has successfully resulted in European Union integration. The CJEU established and strengthened the principle of supremacy through case law. Direct effect, indirect effect, and member state liability work together as a system to ensure the effective enforcement and supremacy of European Union law. In carrying out the principle of supremacy, the CJEU sided with the rule of law as determined in European Union treaty provisions, and balanced the supremacy of European Union legislation with the constitutional rights of member states. The process of Union integration is incremental, and legal challenges between the European Union and member states will continue to push European Union integration forward gradually.

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UK COMPETITION LAW AND THE CRIMINAL CARTEL OFFENCE: THE FLAWS AND FUTURE

Fraser Barnstaple

Abstract

The prohibition and punishment of cartels is a staple of global Competition Law. In the UK it is a criminal offence to engage in cartel practices and agreements. The following discussion will begin by providing a contextual background of the criminal cartel offence and why its important role of deterrence renders the offence important. However, this essay explains why the overwhelming consensus is that the offence has been and remains ineffective. From analysing the application of the offence thus far and the legal provisions in which the offence is contained, it is apparent that the core reasons of the ineffectiveness include the severe lack of prosecution, the inexperience of the CMA and the purposeless current legal framework. The inevitable consideration following this discussion is where the future of the offence lies. In doing so, this essay will answer the questions of whether the offence can and will be revived. Through evaluating the feasible options for improvement, and the current position of the government and the CMA, it will become clear that although there are ways in which the offence can be revived, any discernible change in the near future seems regrettably unlikely.

Introduction

The United Kingdom's criminal cartel offence was introduced in the Enterprise Act[1] (EA) in what was described as a dramatic gesture by Gordon Brown's treasury.[2] This established that an individual is guilty of a criminal offence if they agree with an undertaking to engage in certain practices listed within the EA 2002, section 188, including price fixing, limiting or preventing production or supply and bid rigging.[3] Currently, the Competition and Markets Authority (CMA) conducts the investigations and brings the prosecutions. However, the application and workings of the offence have been a clear failure and remains far from effective.

This following discussion will begin by explaining why the offence is important. Following this, the effectiveness of the cartel offence will be discussed, and an explanation of why the offence has not been and is not effective will be given. Issues with the

[1] Enterprise Act 2002 (EA 2002), s188

[2] Stephen Wilks, 'Institutional Reform and the Enforcement of Competition Policy in the UK' (2011) Euro CJ 7(1) 1-23, 19

[3] For the full list, see EA 2002, s188

offence itself and those enforcing it have led to a woeful and abortive lack of enforcement. The resulting consideration from this is the future of the offence. This will be discussed in relation to two questions of significance; *can* and *will* it be revived? Although the offence is not effective, there are ways it could be revived. However, this article discussion will eventually explicate how discernible change in the near future seems unlikely.

Why Should There Be A Criminal Cartel Offence?

In answering this, one may ask themselves; why are cartels undesirable? Why do they require punishment? The starting point for this would be that 'there are no economic arguments in favour of cartelisation'.[4] The practices cartels engage in are severely economically damaging because individuals or entities conspire together to raise prices, limit supply and/or manipulate customer allocation to dominate the market and increase their profits. The consumer is damaged because they are subjected to higher prices and it is estimated that they are overcharged by an average of 25% when cartels operate.[5] Furthermore, competition is lessened because undertakings can unfairly dominate the market, meaning less choice for consumers as competition is driven out of the market, subsequently resulting in even higher prices and lower quality of goods/services. Put simply, there are no redeeming qualities of cartels.

It is, therefore, important that they are discouraged and effectively deterred. There are civil sanctions for cartels, and perpetrators may be fined[6], however, civil penalties are capped at just 10% of the undertaking's turnover.[7] This is a meagre penalty for such damaging conduct and a party may take a calculated risk where the potential profit of cartel engagement far exceeds a fine equating to 10% of their turnover. Therefore, the criminal offence has an important role to play as 'there is clear evidence to support the assertion that cartel formation diminishes in response to enhanced anti-competitive laws and enforcement'.[8] Unlike the civil sanctions, the criminal cartel offence has a prison sentence of up to 5 years.[9] Prison sentences are effective because, in addition to the regular reasons why one would want to avoid them, 'the embarrassment of a prison term is much greater than a fine'[10], and they are more newsworthy than fines. This is particularly relevant as those committing these economic crimes are usually directors of large, high-

[4] Mark Furse, *The Criminal Law of Competition in the UK and in the US: Failure and Success* (1st edn, Edward Elgar Publishing Limited 2012) 29

[5] John M Connor, 'Price Fixing overcharges: Legal and economic evidence' (*Purdue University*, 26 July 2005) < https://core.ac.uk/download/pdf/7034767.pdf> accessed 15 January 2021

[6] Under the Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ 115/88, art 101

[7] By the Competition Act 1998, s36(8)

[8] Furse (n 4) 28

[9] EA, s190

[10] Richard Posner, *Antitrust Law: An Economic Perspective* (OUP 1976), 89

profile companies. In this sense, criminal consequences relating to cartels can be effective.

However, deterrence is only as effective as the offence itself.

Why The Offence Is Failing

Lack of prosecution

There have been just four prosecutions, resulting in five successful results so far. Namely, three executives pled guilty in the Marine Hose Cartel case[11], and one executive pled guilty in both the Galvanised Steel Water Tanks Cartel case[12] and the Concrete drainage pipes cartel case.[13] An important limitation to the extent of these successes is that convictions relied on the defendant's pleading guilty. In other cases, the defendants chose to plead not guilty, and eventually escaped prosecution.[14] The CMA (and previously the Office of Fair Trading (OFT)) have yet to find favour in a contested case among a popular jury. Nonetheless, the cases still serve as some deterrence, and Colino summarises that 'the CMA continues to attempt to use the cartel offence to ensure that it has the desired deterrent effect. The convictions of the executives [in these cases] … are important steps in this regard'.[15] This is true, however, 5 individual convictions are simply not enough.

The effectiveness of any deterrence relies heavily on individuals believing they will likely face prosecution should they engage in cartels. As discussed, since the creation of the cartel offence, there have been just four prosecutions and only five individuals were subsequently convicted. This number is incredibly low given the offence has existed for almost two decades. Lack of prosecution will seriously undermine any effective deterrence because individuals will doubt that cartel involvement will lead to criminal prosecution. It partially speaks to the lack of the UK's commitment to criminalising cartels but there are a few other reasons why this could be.

Past failures

One reason is the lack of success from past prosecutions. The 'Fuel surcharge' case[16] involving British Airways and Virgin Atlantic Airways ended in huge failure for the OFT. The case collapsed before properly opening because of a failure from the OFT to supply the court with 70,000 evidential emails. The OFT subsequently withdrew the case, and the defendant was acquitted. Such a mistake was condemned as 'an

[11] *R v Whittle* [2008] EWCA Crim 2560
[12] CMA Decision, 'Galvanised Steele Water Tanks' (19 December 2016)
[13] CMA Decision, 'Supply of precast concrete products' (15 September 2017)
[14] in *R v George and others* [2010] 1 WLR 2676 (Fuel surcharge)
[15] Sandra Marco Colino, *Competition Law of the EU and UK* (8th edn, OUP 2019), 299
[16] Fuel surcharge (n 14)

embarrassment' for the OFT[17] and remains a stain on the application of the cartel offence. The lack of prosecutorial experience from the OFT was certainly an issue and a reason for the lack of cases being brought. As noted by Colino 'The success of the criminal offence depends on how adequately it is applied'.[18] Therefore, perhaps the problem lies not with the criminal offence as a tool, but with those wielding it.

The new law

Before 2013, the requirement for the defendant to have been 'dishonest' per the definition in *R v Ghosh*[19] made prosecuting difficult. The second limb of the *Ghosh* test provided that the defendant must have subjectively realised their conduct was dishonest by the standard of the reasonable person. The issue here is that, due to the obscure nature of cartels, individuals could claim they didn't realise they were being dishonest and thus avoid conviction. Fortunately, the use of *Ghosh* dishonesty in the cartel offence was removed by the Enterprise and Regulatory Reform Act 2013 (ERRA 2013), which appeared to make prosecution easier.[20] However, exclusions and defences[21] replaced the dishonesty requirement, and thus as prosecution became easier, conviction became harder. One such defence will apply if there was no intention to conceal the cartel and the nature of the agreements was disclosed to legal advisors. However, one does not need to follow the advice. These have been criticised for being 'so easily met that liability can be avoided'.[22] An exclusion, which, if applied, would mean that there was no offence committed, is disclosing the agreement in the London Gazette, Edinburgh Gazette or Belfast Gazette. An entity who would otherwise be guilty of the offence need only pre-warn the public in one of the above Gazettes, which seems a strange and fruitless exercise because, as put by Gilbert, 'who reads the London Gazette?'.[23] Therefore, despite these changes, the cartel offence is still very easy to avoid and the new exclusions and defences have not improved matters.

The Future Of The Offence

With the offence dormant and an apparent lack of motivation to enforce it, there are two questions to be answered.

Can the offence be revived?

[17] Simpson P, 'Criminal Cartel Offence in the UK: Public Attitudes' (*Competition Word*, Quarter 2 2016) < https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/competition-world--q2-2016.pdf?la=en&revision=b9603d3d-536c-458f-b475-8a7cc9c2836b> accessed 8 December 2020, page 14

[18] Colino (n 15) 293

[19] [1982] QB 1053

[20] *Ghosh* was also later overruled in *Ivey v Genting Casinos UK Ltd* [2017] UKSC 67, and confirmed for purposes of criminal cases in *R v Barton and Booth* [2020] EWCA Crim 575

[21] Contained in s188 (A) and (B) EA 2002 and in the ERRA 2013

[22] E M Michaels, 'The real shortcomings of the UK Cartel Offence: A Lack of Public and Political Support' (2014) Global Antitrust Review 53

[23] Paul Gilbert, 'Changes to the UK cartel offence- be careful what you wish for' (2015) JECL & Pract 6(3) 192, 195

Some commentators suggest not[24], and there is evidence to support this. Why have an offence if you are not going to enforce it? For years, the offence has been neglected and it has become clear that the CMA lack the expertise to prosecute cartels successfully. Furthermore, the offence 'is intensely unpopular in the business community, and rightly so'[25], primarily because it creates economic offences with heavy penalties. However, cartels are economically damaging, and therefore deterring them is in the interest of the business community.

The offence can be successfully operated, and many other jurisdictions have one and seem to enforce it with relative success.[26] In the USA, the Anti-Trust Division of the Department of Justice (DoJ) brings both civil and criminal cases, and around 20 criminal cartel cases are conducted on a Federal level each year. Therefore, suggestions that the CMA cannot do both is flawed. The DoJ conducts the criminal prosecutions for the US justice system. Therefore, they have the experience in general criminal prosecution, which the CMA lacks.

The UK must therefore take a number of steps to reach the same level of success. The first would be to make changes to the CMA itself. As discussed, the CMA lacks the necessary experience to effectively use the offence. Therefore, personnel changes must be made. Currently, the CMA primarily conducts civil investigations and makes decisions based on civil standards of proof. Although these decisions must be appeal-proof, it is not the same as having to satisfy the threshold of criminal standards of proof. The CMA must therefore appoint specialists who are experienced in the field of financial crime prosecution, similar to the DoJ.

They must also identify more cases and take the smaller ones more seriously. The CMA has a history of going after large companies to make a statement, however, these companies have the ability to drag out cases, expending much of the CMA's limited resources. Prosecuting smaller cartels could be a way for the CMA to start showcasing they will use the offence, without suffering a heavy drain of resources.

A remaining problem is the offence itself and given the criticisms of the offence before and after the 2013 amendments, it is easy to assume that the legal provisions of the offence could be changed. Despite the problems with the defences and exclusions, legislative change is not the answer. There cannot be legislative change at this point because the CMA has not brought any cases under the new law. Only recently has the law been changed, and there is little desire from policy makers to change the law again despite it not being used a single time. Therefore, it cannot be claimed that the law itself is

[24] Such as Wilks (n 2) 20
[25] Wilks (n 2) 20
[26] Such as in the USA: Sherman Anti-Trust Act, s1

inadequate as there is no conclusive evidence to suggest otherwise. It is not simply enough for the CMA to say they would have brought more cases had the law been different, and the defences and exclusions not been so easy to avoid. Therefore, personnel change is the most feasible solution.

Will the offence be revived?

There is very little political discourse on the matter, and the government has not made its stance clear on how strong they would like competition policy to be. However, the offence has been neglected for almost 20 years. The likelihood of there being a drastic change in the near future seems incredibly unlikely. Eventually, there may be pressure on the CMA to take the offence more seriously, as one cannot have an offence and never use it, especially if a government with a particularly strong stance against competition infringement was to intervene. However, this will probably not materialise for several years, if at all. Additionally, the CMA seems to be content with using director disqualification[27] as a means of punishing cartels, rather than pursuing criminal action. Director disqualification is a mechanism by which the High Court can disqualify company directors from being a director for up to 15 years and is a far easier enforcement mechanism to achieve than criminal conviction. Therefore, structural or personnel changes of the CMA for the purpose of criminalising cartels effectively seems unlikely.

Another important consideration is that the criminal justice system has virtually collapsed. There is an extreme backlog of cases[28], and any prosecution the CMA brings may have to wait years before it reaches trial. 'Competition law cases are very costly; they are often factually complex… and they tend to be lengthy'[29], which means these cases, in particular, may take a significant amount of time. This will be a factor that discourages the CMA to bring any in the near future.

Conclusion

The UK cartel offence is clearly ineffective. Lack of experience from those enforcing it, as well as issues with the offence itself, has led to an extreme lack of enforcement. The changes made in 2013 have not made the offence more effective, and no prosecutions have been brought under this law.

Nonetheless, there is both scope and sense to revive it. It is an important mechanism, particularly for the deterrence of damaging economic practices, such as price fixing. However, the issues discussed must first be addressed. The CMA must undergo some changes to ensure their staff is capable of effectively prosecuting financial crime, and the offence must be altered to allow for

[27] The means for which are contained within EA 2002, s204

[28] see Clive Coleman, 'Courts backlog 'tipping point' for justice system' (*BBC*, 30 October 2020) < https://www.bbc.co.uk/news/uk-54737289> accessed 8 December 2020

[29] Cosmo Graham, *EU and UK Competition Law* (2nd edn, Pearson 2013) 262

effective prosecution. Regrettably, none of this seems likely to materialise. Therefore, the cartel offence will remain ineffective for the foreseeable future.

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The European Court of Human Rights has held that freedom of expression is not only applicable 'to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb': *Handyside v UK* (1976) 1 EHRR 737.

TO WHAT EXTENT SHOULD CURBS BE PLACED ON 'INFORMATION OR IDEAS' THAT 'OFFEND, SHOCK OR DISTURB' AT BRITISH UNIVERSITIES?

Harrison Jowett

Abstract

There is currently no practical guidance on the practicalities of free expression in academic institutions. Whilst the campus has been designed with free and open discussion in mind, there is increasing demand for the censorship of views which are unavoidably offensive. This study intends to find a line between suppression and protection in this area. Free discussion within educational institutions would allow for shocking or disturbing content, an approach advocated in Handyside, intended to progress academic thought and critique. However, more protections for those groups offended, shocked, disturbed, discriminated against or disrespected by those views are required to create an inclusive and supportive educational environment for all students.

To examine an acceptable extent of restriction, this study compares the theoretical approaches of Mill, as expressed through his critical text On Liberty, and of Milton who developed an approach to harm in Areopagitica. Further, it will include the approaches taken by the European Court of Human Rights. Whether restricting expression in the case of M'bala M'bala or empowering it as in Handyside, the court has provided decisive guidance on how far particular types of expression (artistic, comical, or otherwise) should be tolerated by its opposition. An application of these viewpoints to the specific setting of a university campus generates a liberal approach to discussion with a focus on the marketplace of knowledge which recognises the purpose of these institutions as challenging learning environments.

This study presents the argument that blatantly offensive or obstructive attacks on any characteristics should be prohibited as they cause harm and impair the knowledge marketplace that universities seek to develop. However, this is a step that should be taken carefully. Debate should be openly encouraged, and hateful or prejudicial ideas should be open to effective challenge whilst the vulnerable are still protected.

A university is, by virtue of its purpose, both a sanctuary dedicated to the learning of fact and a forum for research and debate of ideas. However, the hyper-progressive nature of the university environment can lead to discussion and research potentially harmful to society. The regularity that offence is caused in educational environments, the regression of social morality and the public dismantling of political ideas are just three examples of harm caused by free expression. In order to protect society, there is scope to consider curbing ideas that may 'offend, shock or disturb'.[1] However, restrictions in the area of education could lead to a majoritarian oversight of ideas or opinions, restricting effective argument and access to the ideas marketplace. A progressive approach to opinion or thesis is uniquely central to the purpose of universities so must be restricted only where necessary in a controlled and measured way.

University is devoted to the progression of research and ideas, but where disagreement crosses into disrespect, discourse may infringe other Convention rights.[2] The respectful debate of contrasting ideas is cardinal to a university's purpose and the respectful aspect of this is central to its success. This is not a free pass to aggravating individuals. For example, the European Court of Human Rights (ECtHR) supports free discussion surrounding acts of particular 'gravity'[3] as it can inform fact-finding and democracy.[4] But in *M'bala*,[5] the act of presenting a Holocaust denier an award using an actor in striped pyjamas was considered to have breached the Article 8 rights[6] of people with a Jewish faith or origin. The domestic fine was upheld by the ECtHR in line with Article 10(2) despite the freedom awarded in Article 10(1).[7] This clearly shows that acts without 'societal value'[8] can be restricted despite the *gravity* of the topic. This reasoning can be seen applied in other religious cases[9] with nation states often given a wide margin of appreciation.[10] We can therefore see how the topic's importance may not be central to the discussion of restriction. Instead, the court appears to look at the value of the contribution, suggesting that where the offence caused outweighs the societal gain it should be impeded.

Mill may argue that it is wrong to restrict expression at all because oppression obstructs society's ability to fact-find. In *On*

[1] *Handyside v UK* (1976) 1 EHRR 737
[2] European Convention of Human Rights (ECHR), arts 8, 9, 14
[3] *Giniewski v France* [2016], application No. 64016/00; (2007) 45 EHRR 23 589, [591]
[4] *Handyside v UK* (n 1)
[5] *M'bala M'bala v France* [2015] ECHR No. 25239/13
[6] ECHR (n 2) art 8
[7] ECHR (n 2) art 10
[8] Anon, 'Freedom of speech: comedian – performance' (2016), EHRLR, 1, 99-101
[9] *Otto-Preminger Institute v Austria* (1995) 19 EHRR 1
[10] *Wingrove v UK* (1997) 24 EHRR 1

Liberty he was adamant that contrasting ideas should be met with counterarguments and progressive debate. He fears the Many allowing themselves to be led by the Few (or One) and apprehends the majoritarianism blinding of civilisation, commending the outlier for 'eccentricity' and for breaking through tyranny.[11] Disagreement is vital.[12] Restricting the views of Mill's non-conforming eccentric would be the epitome of the majoritarian restriction, a blatantly obstructive environment for the pursuit of truth which would be ineffective as a university setting. This echoes the earlier work of Milton, who argued that restricting expression would impact the ability to develop intellectually:

> [I]t will be primely to the discouragement of all learning, and the stop of Truth, not only by disexercising and blunting our abilities in what we know already, but by hindering and cropping the discovery that might be yet further made both in religious and civil Wisdome.[13]

It is from these two arguments that the free market analogy in relation to expression derives.[14] It assumes that, through the process of 'robust debate', a society with access to all opinions will uncover the truth '…or at least the best perspectives or solutions for societal problems'.[15] The theory suggests that extremism or bigoted behaviour can be identified and countered effectively through discussion.[16] This anti-interventionist approach is reflective of a university setting in respect to the free and peaceful challenge of ideas.

However, if left unrestricted, this freedom can be harmful to society. Firstly, it exposes individuals to views or opinions that may grossly offend them. This extends to individuals being exposed to inappropriate content, violently persuasive content or content which may emotionally affect them.[17] Secondly, it relies on every individual having equal bargaining power. As with the free market model of economics, this cannot exist in reality[18] as there will always be individuals who will abstain from an open debate to discover the

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[11] Mill, J.S., *On Liberty* (1859, Batoche Books 2001), 61-63; 4

[12] Wragg, P., 'Mill's dead dogma: the value of truth to free speech jurisprudence' (2013), PL, April, 363-385

[13] Milton, J., Areopagitica (1644) accessible at <https://www.dartmouth.edu/~milton/reading_room/areopagitica/text.html> accessed at 31 March 2020

[14] Gordon, J., 'John Stuart Mill and the "Market Place of Ideas"' (1997) *Social Theory and Practice*, vol 23, 235-249

[15] Ingber, S., 'The Marketplace of Ideas: a legitimising myth' (1984) *Duke Law Journal*, vol 1, 1-91, 3

[16] Hassan, M.H., 'The "Marketplace of Ideas" and Countering Violent Extremism' (2013), *Counter Terrorist Trends and Analysis*, vol 5, 3-5

[17] Anon, 'The Impermeable Life: Unsolicited Communications in the Marketplace of Ideas.' *Harvard Law Review*, vol 118, no. 4, 2005, pp 1314–1338. JSTOR, <www.jstor.org/stable/4093381>. Accessed 4 April 2020.

[18] Ingber, (n 15), 5.

truth.[19] Therefore, it becomes impossible for a whole society to uncover a truth that is vehemently contested and blindly denied. Hence, whilst the theoretical marketplace may be the most effective platform for the discussion of ideas, it does not work *de facto*. The free expression of ideas can thus lead to conflict and offence and this is especially likely in the university setting Mill's dictum, though, is not proposing uninhibited speech. Balance is offered by implementing his harm principle:[20] 'Acts, of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavourable sentiments.' Peaceful free expression is distinctly different to the delivery of aggravating facts to 'an excited mob',[21] a distinction which can be drawn relatively easily.[22] This shows how it can occasionally be beneficial to restrict freedom of expression. But, to follow *Handyside,*[23] not merely where offence may be caused as this could have a detrimental effect.

To restrict freedom of expression would also impact self-fulfillment – a major element of Schiffrin's multiplicity.[24] This is the theory that individual self-fulfillment is a 'desirable objective'[25] and expression should support the pursuit of fulfilment regardless of the means for example through the creation of an explicit book or a painting depicting an offensive scene. However, the ECtHR has defended the Article 8[26] rights of religious groups when artistic portrayals of idols are merely 'offensive'.[27] This suggests that, in the scope of religion, expression intended to humiliate or attack rather than discredit are less likely to amount to a protected expression under Article 10.[28,29] This is not reflective of the dictum in *Handyside*[30] but supports Mill's harm principle and the importance of the value expression adds to the marketplace of ideas. Outside of religion, especially in the realm of political critique, potentially offensive expression is defended because of its democratic value.

Restricting expression by any degree may have a negative impact on democracy and political accountability. There are many

[19] See the unwavering support for their own views expressed by the Phelps family in: Theroux, L., 'The most hated family in America' *BBC* (London, 2006) <https://www.bbc.co.uk/iplayer/episode/b007clvf/louis-theroux- the-most-hated-family-in-america> accessed 20 March 2020

[20] "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others" Mill (n 11), 13

[21] Mill (n 11), 52

[22] Barendt, E., 'Threats to Freedom of Speech in the United Kingdom?' [2005] UNSWLawJl 55;

[23] *Handyside v UK* (n 1)

[24] Schiffrin, 'Liberalism, Radicalism and Legal Scholarship' (1983) 30 *UCLA L Rev* 1103, 1197-98

[25] Constagin, R., and Stone, R., *Civil Liberties and Human Rights* (11th ed, OUP 2017), 301

[26] ECHR (n 2) art 8

[27] *Wingrove v UK* (n 10); *Otto-Preminger Institute v Austria* (n 9)

[28] ECHR (n 2) art 10

[29] Anon (n 8)

[30] *Handyside v UK* (n 1)

methods for expressing frustration with a political idea or politician[31] and there should be space to challenge the legitimacy of each concern to improve the effectiveness of accountability. This view is supported by the ECtHR in *Thorgierson*[32] *Castells*[33] and *Lingens*[34] where, in each case, the author of the allegedly offensive critique was punished for their views but this punishment breached the author's Article 10 rights.[35] The court found that expression was an essential foundation of democratic society[36] and the bounds of permissible criticism 'are wider with regard to the government than in relation to a private citizen'.[37] This suggests that political expression should be unrestricted to enable a balanced merit-based discussion.

But this unrestricted approach to political comment has led to unfounded political jibes progressing unchecked into the public domain to facilitate political point scoring.[38] When used in this way, it seems right that there should be some restriction on the freedom of political expression, but this generates a possibility of expression being politically weaponised. Moreover, limiting expression may cause a departure from effective political accountability and education of political issues.

Curbing free expression in the field of academia also facilitates the growth of majoritarianism and other prejudices as well as undermining one of the central justifications for the freedom: truth.[39] But 63% of students support a no-platforming policy[40] against people or groups on a banned list for holding racist or fascist views.[41] This arguably protects their religious or political views from assassination by 'bigoted speakers'.[42] However, the finding that 54% of people asked thought the policy should be enforced against people who could be found intimidating[43] suggests that student opinion is moving away from mere protection and towards censorship.[44] Whilst it is clear that

[31] See: *Tinker v Des Moines School District* 393 US 503 (1969); *Cohen v California* (1971) 403 US 15
[32] *Thorgierson v Iceland* (1992) 14 EHRR 843
[33] *Castells v Spain* (1992) 14 EHRR 445
[34] *Lingens v Austria* (1986) 8 EHRR 407
[35] ECHR (n 2) article 10
[36] *Lingens v Austria* (n 34) [41]
[37] *Castells v Spain* (n 33) [46]
[38] See: Gold, A,. 'US election: Do 'lock her up' chants mark a new low?' *BBC* (London, July 2016) <https://www.bbc.co.uk/news/election-us-2016-36860740> accessed at 4 April 202
[39] Constagin, R., (n 25) 300
[40] ComRes as reported in: Bell, S., 'NUS "right to have no platform policy"' *BBC News* (London, 25 April 2016) accessible at <https://www.bbc.co.uk/news/education-36101423> accessed at 1 April 2020
[41] Bell, S., (n 40)
[42] Guo Sheng Liu, 'There is no intellectual gain in platforming bigoted speakers' in Salisbury, J., 'Do "no platform" policies threaten free speech at university?' *The Guardian* (London, 26 October 2017) accessible at <https://www.theguardian.com/education/2017/oct/26/do-no-platform-policies-threaten-free-speech-at-uni- students-share-their-views> accessed at 1 April 2020
[43] Bell, S., (n 40)
[44] This doesn't necessarily reflect public opinion See: Lock, H., 'Student protests: are young people too

eliminating a platform for those who cause offence may have a social value in that it protects races, genders and groups who are made to feel uncomfortable,[45] it should not be implemented to the extent that it restricts views which contribute to an academic discussion as this may prevent the proper development of society.[46] Moreover, those with the majority view alone should not have the right to restrict the Article 10 rights of others.[47] The principle of majoritarianism is the cornerstone to prejudices and biases that can only inhibit progression, especially in education.

Fear of majoritarianism and unrestricted freedom for new ideas may undermine some forms of expression or negatively impact the morality of wider society. The importance of the First Amendment[48] in the United States of America (US) results in an 'uninhibited' sphere of discussion where 'vehement, caustic and sometimes unpleasantly sharp attacks' are commonplace.[49] Whilst the UK values expression insofar as it is 'one of the essential foundations of a democratic society',[50] and by extension a 'condition'[51] for its progress, its tolerance is noticeably different to the US approach where freedom of expression is deemed 'indispensable',[52] hence making it a valuable comparison.

In the Skokie Cases,[53] there was considerable debate around what should be accepted as expression within modern society. These were a series of cases surrounding permission for a neo-Nazi group to march and display swastikas in Skokie, a town inhabited largely by Jewish Holocaust survivors. Ostensibly like *Handyside*,[54] it was found that expression 'may not be prohibited merely because the ideas are themselves offensive to some of the hearers'.[55] This reasoning suggests that there may be scope to prevent the march on the grounds that this is an extreme example. But this was to be considered in the context of 'fighting words',[56] the dictum broadly interpreted to prohibit only those expressions which incite violence. As the protest was not *prima facie* violent it was not prohibited.

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sensitive these days?' *The Guardian* (London, 10 Mar 2016) accessible at <https://www.theguardian.com/higher- education-network/2016/mar/10/student-protests-are-young-people-too-sensitive-these-days> accessed at 1 April 2020

[45] Consider especially the topic of holocaust denial; Butler, D., 'Holocaust Denial in England' [1997] 4 *Web JCLI*: <www.webjcli.ncl.ac.uk/1997/issue4/butler4.html> accessed 30 March 2020

[46] Ingber, S., (n 15)

[47] Mill, J.S. (n 11) 53;

[48] U.S. Const., amend. 1,

[49] *New York Times Co. v Sullivan* [1964] 376 U.S. 254 (Brennan J)

[50] *Sunday Times v UK* [1979] 2 EHRR 245, 280

[51] *Handyside v UK* (n 1)

[52] *Whitney v California* 274 (1927) 357, 374

[53] *National Socialist Party of America v Village of Skokie*, 432 U.S. 43 (1977); *Collin v Smith*, 578 F.2d 1197 (7th Cir. 1978);

[54] *Handyside v UK* (n 1)

[55] *Collin v Smith* [1978] (n 53)

[56] *Chaplinski v New Hampshire* 315 US 568 (1942)

This reasoning is also seen in cases of individual conflict and criticism of the government. *Snyder*[57] concerns the Westboro Baptist Church picketing the military funeral of a gay serviceman, openly blaming conflict on God's hatred for homosexuals, using offensive banners and slogans in a vicious verbal assault.[58] But the court upheld the right for the church to express their views in this way as their dictum did not amount to 'fighting words'. In *Cohen*,[59] a man wore a jacket expressing anger at 'the draft' (relating to the drafting of troops for the Vietnam war). His offensive language was excused on the grounds that his political opinion, however expressed, may also reflect the opinion of others and should be welcomed in a democratic society.[60] Finally, in *Johnson* a man was arrested under Texan law for burning an American flag as a way of protesting against then-President Regan's financial aid reform.[61] This, like Cohen's jacket and the armbands worn in *Tinker*,[62] was deemed to be a democratic criticism and permitted.[63] Even outside the realm of democratic critique, there is support for publications without foundation in truth which have the intention of ridiculing an individual or idea.[64] This blatantly contrasts the more protective approach of the ECtHR[65] and shows the free-market approach to the First Amendment.[66]

As well as the European approach, the anti-intervention standpoint reflected here represents a stark contrast in morality, decency, and respect from the theoretical ideal. The offensive and brash expression shown in Skokie and by the Westboro Baptist Church does not amount to an effective contribution to any discussion or debate in search of truth. Moreover, the likelihood of groups with opposing views feeling intimidated by pickets, armbands or offensive slogans may amount to a *de facto* restriction on the opinions of those afraid to speak up. This uncomfortable environment where offensive views are hurled at the public without open discourse is the best argument for restricting expression on campus. Far from contributing, these pressure groups detract from progressive debate and it is prudent to prevent their methods on campus.

It is worth mentioning here that a 'no-platforming policy' or campus ban does not entirely restrict the expressive capacity of a group or individual.[67] The internet, for example, would still amount to an effective medium for distributing and discussing

[57] *Snyder v Phelps*, 533 F.Supp.2d (2011)
[58] ibid, 579
[59] *Cohen v California* (n 31)
[60] ibid (per J Harlan)
[61] *Texas v Johnson* 109 S. Ct 2533 (1989)
[62] *Tinker v Des Moines School District* (n 29)
[63] Bradley, A., 'Free expression and acts of racial hatred' (1992), PL, Aut, 357-359
[64] *Hustler Magazine v Falwell* (1988) 485 US 46
[65] *Wingrove v UK* (n 10); *Otto-Preminger Institute v Austria* (n 9)
[66] U.S. Const., amend. 1,
[67] O'Keefe, T., 'Making feminist sense of no-platforming' (2016) Fem. Rev., no. 113, 85-92, 86-87.

views in any way.[68] This makes campus restriction more attractive as it allows for informed discussions to take place utilising sources distributed online to facilitate an informed and progressive discussion without the fanatical support that obstructs the collective search for truth.

There are distinctive arguments supporting the curbing of offensive behaviour in British universities that is currently supported by Article 10,[69] where expression contradicts Mill's harm principle or is grossly offensive or hateful (specifically in the realm of religion) for example. Moreover, there appears to be a distinct split between the real marketplace of ideas and the theoretical, suggesting that extreme views should be restrained to restore respect and dignity in fear of Skokie-style insensitivity. However, the benefits of an open system are indisputable. An effective marketplace of ideas that aligns with both Mill and Milton and facilitates the pursuit of truth is attractive. This system would also allow fulfilment in every area of Schiffrin's multiplicity as well as acute and direct political accountability, but it does leave specific groups open to disrespect or offence.

Ultimately universities should place restrictions on expression where it is grossly offensive, not simply offensive, shocking or disturbing – as suggested in *Handyside*.[70] Debate should be openly encouraged, and hateful or prejudicial ideas should be open to effective challenge whilst the vulnerable are still protected. The only exception should be the field of politics where special allowances should be made to hold political actors to effective and thorough account to prevent the social hijacking outlined by Mill.

[68] Anon, (n 17)
[69] ECHR (n 2) art 10

[70] *Handyside v UK* (n 1)

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A CRITICAL ANALYSIS OF THE NATIONAL MINIMUM WAGE ACT 1998 AND ITS EFFECTIVENESS IN PROTECTING THE LOW PAID OR VULNERABLE IN THE LABOUR MARKET

Ryan Corr

Abstract

The National Minimum Wage Act 1998 (NMWA) was implemented to create a 'wage floor' within the UK, ensuring that workers are afforded a minimum level of hourly pay which employers are legally obligated to enforce. This article explores the effects of the NMWA 1998 in protecting the low paid or vulnerable in the labour market, critically assessing whether it has been truly 'effective' in its attempt to support groups such as female part-time workers and young male workers who are particularly susceptible within the modern labour market. This paper refers to the extensive work of the Low Pay Commission and varying economists respectively, citing their reports and studies relating to the recent trends and consequences that the NMWA 1998 has had on such groups. The overall findings concluded within this paper suggest that the NMWA 1998 has been effective to an extent in protecting the low paid or vulnerable in the labour market, due to real wages increasing for low paid workers which inherently reduced the number of low paid workers in 'relative poverty' as their standards of living increased. Despite this, job retention rates for part-time female workers have fallen and young male workers have struggled to access jobs due to the 'anticipatory effect' deployed by employers and consequently highlights the deficiencies in the protection afforded to low paid or vulnerable within the labour market under the NMWA 1998.

I. Introduction

The national minimum wage (NMW) is the minimum amount workers must get paid on average for the hours that they work,[1] this applies to workers or those who are 'working under his/her contract'[2] and has been extended to cover casual workers such as agency workers[3] and those on zero-hour contracts. The NMW is set by the government based on recommendations made by the Low Pay Commission (LPC), who are experts consisting of trade unions, business figures and academics. The LPC make recommendations on the appropriate level that the NMW should take, aiming to help low paid workers by raising the NMW

[1] ACAS, 'National Minimum Wage Entitlement' (2018) < https://www.acas.org.uk/national-minimum-wage entitlement > accessed 19th December 2019.

[2] National Minimum Wage Act 1998, s1(2)(b) (NMWA 1998).

[3] Ibid (n2), s34.

without creating negative employment effects.[4] The National Minimum Wage Act 1998 (NMWA) was enacted by a newly elected Labour government, following the reign of a Conservative government who had placed drastic restrictions on labour market regulation, particularly restricting the power of trade unions to strike. Following such restrictions, the NMWA 1998 was introduced to provide a 'statutory level beneath which pay should not fall',[5] aiming to protect workers from the exploitative unequal bargaining power that employers possessed by providing a wage floor. Despite initial scepticism surrounding the proposal of a NMW from academics who argued that a minimum wage would lead to a rise in unemployment,[6] it is widely accepted that the NMWA has had a significantly positive effect on the labour market, especially for the low paid and vulnerable workers. The act's introduction led to higher wages and thus decreasing 'low-paid workers', in addition to a rise in productivity from low paid workers which provided protection for such workers.

Despite the clear benefits the NMWA provides by protecting low paid or vulnerable workers, I believe it has not been **wholly** effective in the protection of low-paid workers; since the NMW causes less job retention for female part time workers and increases unemployment for young male workers. These ideas will be discussed further in detail in the following paragraphs.

II. Increase in real wages for low-paid or vulnerable workers and its subsequent benefits

In regards to the implementation of the NWMA, the overriding consensus from academic commentary concludes that it has overall benefited low paid workers.[7] This was highlighted by the LPC who stated that in 2018, the lowest paid workers (lowest 1%) earned £2.70 per hour more in real terms than if there had been no minimum wage – this equates to £5000 a year for a full-time worker,[8] whilst not affecting their job prospects. This argument supports the notion that the NMWA has been effective in protecting low-paid workers, as real wages have increased without creating higher unemployment which many traditional economists had initially predicted.[9] However, this argument depends on whether employers have not

[4] Elizabeth Howlett, '*Two decades on, has the minimum wage worked?*' (People Management, 28 September 2019) < https://www.peoplemanagement.co.uk/long-reads/articles/two-decades-minimum-wage-worked > accessed 19th December 2019.

[5] Low Pay Commission, '20 years of the National Minimum Wage A history of the UK minimum wage and its effects' (2019) 4.

[6] Ibid.

[7] Mark B. Stewart, 'The Employment Effects of the National Minimum Wage' [2004] 114(494) The Economic Journal.

[8] Low Pay Commission, '20 years of the National Minimum Wage A history of the UK minimum wage and its effects' (2019) 4.

[9] David Card and Alan B. Krueger, 'Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania' (1994) The American Economic Review, 84(4),772-793.

reduced working hours whilst wages increased, which is a practice employers often follow to counteract their rising labour costs. This could lead to workers being financially worse off overall, although their hourly real wage rates may have increased. In practice, their real weekly wage rates may have reduced as workers are offered less hours in the week. Therefore, real hourly pay rates and real weekly pay rates should be differentiated. Real weekly pay rates provide a greater indication on whether the NMWA has been detrimental for the earnings of workers, as it offers a rate which is affected by the reduction in hours, whereas hourly real wage rates do not show such an effect. The LPC has provided insight on this issue stating that weekly real pay for the low paid has grown faster than those who earn a median amount in the pay distribution since the NMW was implemented.[10] Applying this notion, this clearly emphasises the effectiveness the NMWA has had in protecting the low paid workers in the labour market, as low paid workers have seen an increase in their weekly real wage rates without a loss in hours worked, in turn providing an effective form of financial protection through an increased real wage.

An increase in real wage rates provides several benefits to low paid workers. Firstly, it has profound effects on their financial capabilities, which are often restricted due to the limited income they generate as low paid workers typically work in low paid sectors, such as retail.[11] A rise in real wages provides greater disposable income available for these workers which can be used to raise their standards of living, accessing more goods and services as they are financially more stable. This effect is important as almost half of people living in working households in the UK are in relative poverty[12], which is defined as a household income lower than 60% of median income within the UK.[13] Thus, raising real wages will have a direct effect to the lowest paid households who could use their additional income to aid their financial troubles. This effect can be shown as the percentage of workers who are deemed to be 'low pay' fell from 20.7% in 2015 to 17.1% in 2018 due to an increase in real wages.[14] In turn, this shows how the NMWA has been wholly effective in protecting the low-paid workers, as higher real wages has allowed such workers to use their additional income to no longer be deemed in the 'low pay' bracket. It also

[10] Low Pay Commission, '20 years of the National Minimum Wage, A history of the UK minimum wage and its effects (2019) 18.

[11] Andrew Aitken, Peter Dolton, Rebecca Riley, 'The impact of the introduction of the National Minimum living wage on employment, hours and wages' (Feb 2019).

[12] Olesya Dmitracova, '*Fifth of people in working UK households trapped in relative poverty'* (19th June 2019) < https://www.independent.co.uk/news/business/news/poverty-uk-inwork-working-inequality-a8964291.html > 5th January 2020.

[13] Ibid.

[14] N Cominetti, K Henehan, S Clarke, 'Low Pay Britain 2019', (2019) Resolution Foundation, 12.

provides workers with the opportunity to further their standards of living which could directly help reduce relative poverty.

Furthermore, a rise in real wages for low-paid workers has acted as an incentive for workers to increase their productivity. A research study conducted on the NMW's impact on productivity[15] argued that the NMW has improved productivity in low-paying sectors. The productivity measure used in the study (TFP) found that the retail sectors had the highest aggregate labour productivity.[16] Therefore, it can be inferred that low paid workers' productivity have increased as the retail industry has a large proportion of low paid workers. This benefits low paid workers as increasing productivity suggests workers are performing more efficiently which could lead to future career progression. This is a clear benefit that the NMWA has provided which shows that the NMWA has been effective in protecting low paid workers.

III. Female part-time workers and the 'anticipatory practice' deployed in relation to young workers

Despite the aforementioned benefits surrounding the NMWA's effect on the low paid or vulnerable workers and the protection it provides, there is a strong argument that the implementation of the NMWA has lowered job retention for female part-time workers – a significantly vulnerable group within the labour market.[17] The argument made by Dickens, Riley and Wilkinson (2012) (DRW) suggests that job retention amongst part-time females fell by 3% since the NMWA's implementation and that these effects deepen during a recession, despite the NMW being moderately raised during this time.[18] This is problematic for part-time female workers as this suggests the propensity to reduce employment of part-time female workers during periods of economic difficulty, which can directly affect their job security and financial income.

Furthermore, when comparing part-time female job retention rates to full-time male and female worker retention rates, part-time female workers saw a 5% fall from the years before and after the NMW's implementation, whereas full-time male and female workers saw a negligible difference between the retention rates respectively.[19] This suggests that the NMWA has had an adverse employment retention impact on part-time female workers, but it has not affected other groups as strongly. This is a strong argument supporting the notion that the NMWA has not been wholly effective in protecting the low paid or vulnerable workers.

[15] Marian Rizov, Richard Croucher and Thomas Lange, 'The UK National Minimum Wage's Impact on Productivity' (2016).
[16] Ibid 9.
[17] Richard Dickens, Rebecca Riley, David Wilkinson, 'A Re-examination of the Impact of the UK National Minimum Wage on Employment' (2012).
[18] Ibid.
[19] Ibid.

However, a contrasting view from Stewart (2004) suggests that the NMWA has not adversely affected the job retention levels for female part-time workers, having estimated the NMWA's effect on the levels of unemployment using the Labour Force Survey data.[20] Analysing this, when critically evaluating the research methods used by DRW in comparison to Stewart, Stewart only focuses his research on full-time workers and merely questions the data on part-time workers, whereas DRW conducted thorough data collections from part-time workers. Therefore, it is arguable that Stewart's work should be approached with caution and instead DRW's rationale should be followed, as data was collected directly from female part-time workers rather than estimations being made. In addition, recent commentary from Aitken, Dolton Riley (2019)[21] (ADR) follows the same rationale from DRW that the NMWA has caused female part-time worker retention rates to fall, especially following the NLW's implementation in 2016. ADR's research agrees with the overall consensus that the NMWA has caused part-time female workers job retention rates to fall. However, ADR's main argument is that the significant reduction in retention rates were felt in the retail sector particularly where there was a 5% fall, whilst there were no reductions found in other sectors such as in hospitality or in food processing.[22] Although there is a strong argument collectively from DRW and ADR that the NMWA has caused a fall in part-time female worker retention rates, it appears to be specific to certain sectors where female part-time workers dominate. This could affect job retention rates further and the financial security of these workers. In turn, this agrees with the statement that the NMWA has not been wholly effective in protecting the low paid or vulnerable workers, instead, it hinders sectors that are heavily reliant on part-time female workers.

Moreover, the NMWA has not been wholly effective in protecting young workers, due to the varying wage rates leading to an anticipatory effect being used by employers.[23] The current NMW rates for young workers are £4.35 aged 16-17, £6.15 aged 18-20 and £7.70 aged 21-24.[24] This sharp increase in pay as age increases creates a dilemma for employers, as they must pay their workers a significantly higher rate whilst gaining similar productivity rates, as it is rare for

[20] Mark B. Stewart, 'The Employment Effects of the National Minimum Wage' [2004] 114(494) The Economic Journal.

[21] Andrew Aitken, Peter Dolton, Rebecca Riley, 'The Impact of the introduction of the national living wage on employment, hours and wages' (21st February 2019).

[22] Ibid 30.

[23] Fidrmuc, Jan; Tena, J. D., 'National Minimum Wage and Employment of Young Workers in the UK' CESifo Working Paper, No. 4286, Center for Economic Studies and Ifo Institute (CESifo), Munich (2013)

[24] BBC News, What is the Minimum Wage? (30th May 2019) <https://www.bbc.co.uk/news/uk-politics-48445674 > accessed 5th January 2020.

productivity levels of a worker just above and below the age barrier to vary drastically. Therefore, this led employers to engage in a practice causing an 'anticipatory effect', where prior to turning 18 or 21 and reaching the respective higher wage band, employers will dismiss or not rehire workers approaching the threshold and instead employ younger staff who are less costly. This is hugely concerning as young workers are an extremely vulnerable group in the labour market, as they lack experience, bargaining power and often work under zero-hour contracts. This is shown through the Office of National Statistics (ONS) stating that 30.6% of zero-hour contract workers in 2018 were aged 16-24.[25] Under zero hour contracts, there is no certainty that any work will be made available to workers.[26] Collectively, the ability to not provide work whilst dismissing or not rehiring workers poses a huge disemployment effect for young workers, effectively reducing their employment rates due to uncontrollable factors.[27] Therefore, due to the NMWA causing such differences between wage brackets, this has led to an anticipatory practice being adopted by employers which has profound effects on young workers, especially those on zero-hour contracts. In turn, I agree with the statement that the NMWA has not been wholly effective in protecting the vulnerable within the labour market.

To conclude, the NMWA's introduction into the labour market has provided effective protection for the low paid or vulnerable workers to an extent, enabling workers to increase their standards of living and in turn reduce poverty due to raises in real wages. Moreover, productivity rates in low paid jobs have increased due to increases in real wages. Nevertheless, the NMWA has created some seismic issues that need redressing. The two major issues that the NMWA has caused are unfairly low retention rates for part-time female workers in addition to an anticipatory practice being adopted by employers when employing young workers. After taking the aforementioned arguments into consideration, I believe that the NMWA is not wholly effective in protecting the low paid or vulnerable workers as rectifying the aforementioned issues would require a huge shift in employer behaviour to rectify and these problems would be extremely hard to regulate, especially preventing businesses from employing cheaper labour which is a

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[25] ONS, Contracts that do not guarantee a minimum number of hours (April 2018)

<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/april2018> accessed 5th January 2020.

[26] Employment Rights Act 1996 s27(1)(b).

[27] Fidrmuc, Jan; Tena, J. D., 'National Minimum Wage and Employment of Young Workers in the UK' CESifo Working Paper, No. 4286, Center for Economic Studies and Ifo Institute (CESifo), Munich (2013) 4.

financially viable option. The NMWA has isolated these groups who are both susceptible to exploitation and this is why I believe the NMWA has not been wholly effective in protecting such workers.

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THE COMMERCIALISATION OF LAND IN 'COLONIAL GHANA' AND THE IMPACT OF ENGLISH LAND LAW ON CUSTOMARY LAND TENURE SYSTEM: A COMPARATIVE APPROACH TO THE EVOLUTION OF GHANAIAN LAND LAW

Monique Nimo

Abstract

Until the late nineteenth century, African societies had very limited parallels in the Western World. In Ghana and common with much of sub-Saharan African, land was mainly owned communally along family lines. The management of land vested in the chiefs of tribal groups who acted as trustees, as opposed to individual ownership. In British colonies, the colonialists revolutionised the regulation of buying and selling land from the simple form of tribal ownership.[1] The egalitarian nature of its land tenure system followed the principle of fair and equal distribution of land and that differed significantly from the concept of private ownership and competition. The colonisation of Africa transformed its traditions and customs through the imposition and implementation of the English law. This evolution of law changed the meaning and concept of property in British colonial countries such as Ghana, formerly known as the Gold Coast. The commercialisation of land tenure systems created a dual system of private ownership including the English law of title and registration in land and the customary law of tribal ownership.[2] This paper intends to examine the evolution of land law in Ghana and the influence of colonial rule in the nineteenth century.

Introduction

The first section of this paper will focus on the operation of customary law in pre-colonial Ghana by illustrating the concept of land ownership and the prominent role of chiefs in customary land tenure systems. Secondly, this paper analyses how colonial rule simultaneously maligned the egalitarian nature of land tenure through the imposition of the common law to help benefit capitalist economic interests in land and the conflicting interest of the existing customary legal regulation of land titles. Furthermore, the principle of an indirect rule aimed to maintain the existence of a dual system of colonial and tribal leadership, in which both sides were still able to preserve their authority will also be analysed. Finally, the post-independence Ghanaian society will be

[1] Gershon Feder and Raymond Noronha, 'Land Rights Systems and Agricultural Development in Sub-Saharan Africa'(1987) <http://documents.worldbank.org/curated/pt/893841468740175281/pdf/multi-page.pdf> Accessed 23 January 2020.

[2] Lennox K Agbosu, Land Law in Ghana: Contradictions between Anglo-American and Customary Conceptions of Tenure and Practices (2000) Working Papers 12796, University of Wisconsin-Madison, Land Tenure Centre <https://ageconsearch.umn.edu/record/12796/files/ltcwp33.pdf>Accessed 23 January 2020.

explored and the colonial legacy that was left behind will be examined to conclude on the extent to which English land law influenced and rearranged the new Ghanaian legal order.

Pre-colonial Land Tenure System

Subsistence economy

The root of customary land tenure derived from the Akan ancestors who were a nation of hunters in the past.[3] The social organisation of hunter gatherers was one of harmony and balance as hunting required a high degree of synchronization and coordination of activity amongst the people. Therefore, the role of the democratic leader of these hunters was to ensure that this sense of balance and equality was maintained for hunting to be efficient.[4]

In the mid-nineteenth century, Ghana was almost completely a subsistence economy based on these principles of harmony and equality. The main goal was to maintain the existence and livelihood of ones' family as opposed to the market. Based on this, predominantly every household was self-sufficient and operated an independent economic organisation. The product of land belonged to the family that cultivated it and trade was voluntary.

The land tenure system in this era also reflected this organisation of this society, preventing the appropriation of land being accumulated in the hands of a few in return for economic benefit.[5] This egalitarian nature of the land tenure system was maintained by the governance of greatly rooted customary laws.

Traditionally, the 'stool' is a sacred symbol in Ghana and has been used for many years to represent the soul of the nation and its ancestors. In Ghana, all land is associated with the souls of departed ancestors hence why under customary law, land is often referred to as 'stool land' which represents the band between Earth and the ancestors.

The scheme of interest in land was anchored on the fundamental premise that absolute ownership of the land was vested in the stool and consequently any interests in land were also derived exclusively from the stool. There was no claim to exclusive private

[3] Ivor Wilks, 'The State of the Akan and the Akan States: A Discursion' (1982) 22 (231) Cahiers d'études africaines <https://www.persee.fr/docAsPDF/cea_0008-0055_1982_num_22_87_3377.pdf> Accessed 21 Jan 2020.

[4] Jones, H.G, The Earth Goddess: A Study of Native Farming on the West Coast, Loggmans, 1936 quoted in Hymer Stephen, Economic forms in Pre-Colonial Ghana (1969) <https://www.econstor.eu/bitstream/10419/160011/1/cdp079.pdf> Accessed 28 January 2020.

[5] Kasim. R. Kasanga, and others, 'Land Markets and Legal Contradictions in the Peri-urban area of Accra Ghana: Informant Interviews and Secondary Date Investigations' (1996) Research Papers 12747, University of Wisconsin-Madison, Land Tenure Centre <https://www.persee.fr/docAsPDF/cea_0008-0055_1982_num_22_87_3377.pdf> Accessed 21 Jan 2020.

rights of possession over land and everyone in the community from birth was a beneficiary under a kind of universal succession.[6]

The occupant of the stool was the chief, regarded as the custodian of the land. The role of the chief almost resembled that of a trustee, who managed all the land for the benefit and in trust for their community. As a custodian, the chief held the right of absolute interest to distribute land equally, further elevating the importance of tribal chiefs in the regulation of land.

Colonial Commercialisation of Land Tenure

Colonialism created a pluralistic system of land ownership where the traditional states of tribal ownership ruled by customary law. The opposing system consisted of the capitalist property owners including the colonialist and the 'native capitalists'[7], where English land law applied.

There were many issues posed by this application of law. The first difficulty related to customary tenure terminology being written to reflect Anglo-American tenure, making it hard to adapt to customary language.[8]

Therefore, two types of dispositions were created at the conveyance of land: one for evidentiary purposes to accommodate the customary tenure and the other drafted by English lawyers that constituted the dispositive acts themselves relying on English conveyancing precedents. [9]

The policy of indirect rules intended to harmonise the two opposing interests. This began with the enactment of the Gold Coast Supreme Court Ordinance 1874, that provided for the application of customary law.[10] The Stool Lands Declaration was passed in 1932 which recognised the function of stool lands in customary land and provided a definition as **'**land attached to stool over which stool exercised some measure or control'**.**[11] Additionally, the Colonial Laws Validity Act 1865 declared that colonial laws were valid only if there were no contradictions to the home country's laws. The Act effectively removed any apparent inconsistency between customary and imperial law.

The courts also gave judicial effect to changing conditions of land tenure in Ghana. The following cases outline how ownership and the rights in customary land were interpreted differently by English courts and

[6] Robert. S. Rattray, Ashanti law and Constitution, (Cambridge University Press 1929) at 340, 349.
[7] David Kimble, A Political History of Ghana 1850-1928 (Oxford University Press 1963).
[8] ibid at 18.

[9] Samuel K.B. Asante, 'Interests in Land in the Customary Law of Ghana. A New Appraisal' 74 Yale Law Journal Company (1965) < https://www.jstor.org/stable/794709> 848.
[10] Gold Coast Supreme Court Ordinance 1874, section 19.
[11] Kathryn. F. Sellers, The Transformation of Property Rights in the Gold Coast (Cambridge University Press,1996) 64.

were given new meaning. However, this meaning was not to the detriment of the established customary land tenure system.[12]

In Lokko v Konklofi,[13] it was recognised that customary stool land was on a different footing. The defendant held, as his father's successor usufructuary rights to stool land as he built a cottage on the land and also undertook commercial farming. The defendant had pledged land as a security for a loan without consent of the stool and upon default of payments, the creditor sought to seize the land. However, it was argued that stool property could not be seized for payment of a private debt because the permanent cultivation qualified an attachable interest in land. The court judgement transformed the subject's usufructuary right in stool land into a species of ownership similar to the English common law of freehold, where an individual can own an estate or interest in land which can be used and dealt with as their own. Konklofi's interest were held to be equivalent to a freehold, fully alienable.

Similarly, the courts ruled in Kotei v Asere Stool, that 'native law or custom in Ghana has progressed so far as to transform the usufructuary rights… into an estate or interest in land.'[14] In doing so, the Privy Council created an individualised right over stool lands that existed as a private right and adapted customary law to align with English land law principles.

[12] Asante, (n 8) at 865.
[13] [1907] Ren. 450 cited in Asante (ibid) at 867.
[14] [1961] G.L.R. 492 cited in Asante (ibid).

The English Concepts of Estates and Tenures

Following the industrial revolution, the purpose of land transformed into a product of commerce and as the main pillar for measuring economic growth. The concepts of modern English land law are important to examine the influence this had on Ghanaian land tenure system. Many of the economic and social changes that occurred after these times developed the fundamental principles of English land law. The estate in land created by feudal tenures rather than ownership of the land itself was retained however, the obligation to work for land was no longer expected.

Interest in land

Modern English land law makes a separate distinction between ownership of land and interests in land. The ownership of land refers to the estates and interests in the nature of property rights in the land or estate.[15]

In reference to property rights, there was a clutch of continuities. First, the British accepted and enforced the continuation of the fundamental principle of indigenous land law and the distinction between ownership of the soil and ownership of what stood on it. However, the English system concerning how land rights were created, defined, and enforced which had clear distinguishable

[15] Martin Dixon, Modern Land Law (12th edn, Routledge 2018) 10.

features to the traditional custom.

Conveyancing of land

In English law, the importance of written evidence in the process of moving, transferring, or executing any form of change to legal ownership of land from one person to another is heavily relied upon.[16] However, under pre-colonial Ghanaian customary law, land was normally acquired through conquest, occupation, or given orally as "gifts". For the transfer of land, ceremonial practices were used as opposed to deeds or other forms of written transfer of land.

Registration of title in land

Major radical changes in English land law occurred in 1925 with the system of land registration introduced by the Land Registration Act 1925 mainly designed to simplify and cheapen conveyancing of land. The purchaser would be able to investigate and locate all relevant information relating to land including ownership and any third-party rights.

As land law was experiencing major change within the English jurisdiction, the reforms were capable of application in Ghana because of the Supreme Court Ordinance of 1874. The problems associated with insecurity of title in the traditional land interests were eradicated by the implementation of land registrar. For the capitalist sectors that existed in the urban areas the concept of title security was beneficial.[17] The registration system seemed advantageous as it ensured, identification of physical boundaries of land to which interests relate. This also, aided in adjudication and settlement of competing claims in respect of positively identified plots of land and finally the guarantee by the state that such recorded interest shall be indefeasible.[18]

The Evolution of Land Ownership: Post-Colonial Ghana

Land ownership is divided into three categories: State and public lands owned and managed by the government. Customary land under the custodian of chiefs, tribes and families in particular communities and finally, private land owned by private institutions and individuals. These different types of land are governed by different legislation.

In the Ghanaian Constitution, customary law has continued existence and is recognised as "the rules of law which by custom are applicable to particular communities".[19] The state courts are constitutionally endowed with the power to apply all the rules of law recognised in

[16] Barbara Bogusz and Roger Sexton, Complete Land Law: Texts, Cases and Materials (6th edn, Oxford University Press 2019) 39.

[17] Lennox K. Agbosu 'Land Registration in Ghana: Past, Present and the Future' (1990) 34 Journal of African Law < https://doi.org/10.1017/S0021855300008251> Accessed 20 January 2020 104.

[18] Ibid at 105.

[19] Constitution of the Republic of Ghana 1992, Article 11(3).

Ghana, including such customary law.

Article 267 of the constitution also recognises the stool customary ownership of land applicable in the rural areas and the tribal authority of chiefs to enforce rights and obligation to the land that has been granted. Additionally, the highest interest in land under Ghanaian law is the allodial interest. This interest is derived from customary law and still held by the chief of the community. The allodial title of stool land lies with the community, the usufructuary interest with individuals or family and the role of custodian is allocated to the chief.

Customary law is separated from the operation of the common law. For example, the Ghana Interpretation Act 1960 defines land in general to include [20] "land covered by water, any house, building or structure whatsoever and any estate, interest or right in, to or over land or water."[21]

Other interests in land are freehold, most commonly used outside of rural areas and recognised under common law. The owner of these rights exercises most rights of ownership over the land for an indefinite period. There is no inclusion of stool land in this definition as this is limited to particular communities. It is evident that the overarching Ghanaian legal system reflects the pluralistic system that operated in the colonial era.

Registration of title

Ghana also operates a Land Title Registration scheme to provide and facilitate proof of title to land and guaranteeing security.

The Land Title Certificate is issued irrevocably unless done so in court and therefore indefeasible. The Land Registration Title provides for the registration of interests held under customary law as well as common law.

Land regulation in Ghana since independence, has been modified to suit modern economic needs. This is evident in the cadastre system that entails the rights, restrictions and responsibilities associated with land. This form of land administration also aids in the facilitation of land conveyancing and minimising land litigation. The objective has been in pursuit of socio-economic development for the public good. Most interests in land are registrable with the Lands Commission either under the Land Title Registration Act 1986 or the Land Registry Act 1962 (Act 122).

Conclusions

The English colonial administration introduced modern concepts such as security of title through the title registration system and contributed to the development of land tenure systems in Ghana for the future. The conflicts that arose out of the introduction of land legislation encouraged colonists to

[20] Law of Property Act 1925, s 205(1).
[21] Interpretation Act 1960 s 32, Acts of Ghana 1960.

harmonise the two differing operations of law to suit both the indigenous customs and imperial needs.

The regulation of land in Ghana today represents the transition from a religio-cultural to commercialisation of land, less focused on communal and equal distribution of land allocation but more to private and individual ownership of land. Land was formerly used as a means of survival and individual families creating their own economic organisations.

It is evident Ghana still embodies this dualistic legal system that arose out of the colonial era however, the received English common law did not completely eradicate the established importance of customary law but can be said to have rearranged its role in the operation of modern day Ghanaian land law.

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HUMPHREY'S SCHOLARSHIP WINNING ESSAY

Amrit K. Notay

Abstract

The meaning of law and whether it is equal is a controversial topic and one that is frequently discussed. To understand the meaning of law and consider whether it is equal, often the role of the law and its aims must be considered. The essay discusses the question 'what is law?' from a personal perspective whilst considering the law's role and aims. Comparisons are drawn between the ideological view of law and viewing law through an intersectional lens, with reference to *R (on the application of Begum) v Headteacher and Governors of Denbigh High School [2006] UKHL 15.* The aim of law to prevent chaos is discussed and how it is controlling with reference to the levels of accessibility to law. This is further explored by looking at how the controlling nature of law hides the divisions present in society. It is found that law is only equal on the surface, but as intersectionality of law and how the law is controlling is considered, there is inequality within the law.

Prior to studying the Analysing Law module, I was aware that the law is not always equal; however, as a whole I viewed law to be fair and equal. I believed the implementation of acts such as the Equality Act 2010[1], aided individuals to be able to enforce their rights. I believed that without such acts, the law would not have evolved to protect everyone's rights. However, after studying the module, my view of law shifted. As Kimberlé Crenshaw states, 'self-interrogation is a good place to start'[2], which is what this module has provided me with the opportunity to do. Therefore, in this essay, I will be answering the question 'what is law?' from a new perspective, which will include the discussion of topics that have played a role in shifting my viewpoint of the law.

'This idea that we all have the same life is false. Race, class and gender come together to shape the life chances of people in very different ways.' [3] The law may provide rights; however, the view that law serves justice, is equal and fair, is a rather ideological view. Law often appears as a single axis framework where overlapping discrimination is ignored as law reinforces structural discrimination. Law often sees particular social problems through the logic of law rather than acknowledging the complexities and the combined nature of discrimination, and other factors such as race, religion or gender. In *R (Begum) v Governor's of Denbigh High School* [4], Shabina is only viewed as an adherent to Islam. Religion is viewed as the only relevant factor to Shabina's experience. However, by viewing the case through an intersectional lens, we will see other factors

[1] Equality Act 2010

[2] Katy Steinmetz, She Coined the Term 'Intersectionality' Over 30 Years Ago. Here's What It Means to Her Today, Time (New York, 20 February 2020) < https://time.com/5786710/kimberle-crenshaw-intersectionality/> accessed 4 January 2021.

[3] Dr Kimberley Brayson, Lecture 13, *Intersectionality: Shabina Begum,* (2 November 2020) 2

[4] R (on the application of Begum) v Headteacher and Governors of Denbigh High School [2006] UKHL 15

forming Shabina's experience, such as age, gender, and family. All of these factors contribute to the story that she is telling, but by the court failing to see Shabina in her complexity, it gave way to her case's politicisation. It gave rise to assumptions such as Islam being oppressive and that women wearing Islamic dress are terrorist threats. This highlights that although law enforces rights, it doesn't hear the individual's full story; therefore, can law really be said to be fair if it doesn't take into account an individual's experiences?

Maleiha Malik's feminist judgement on the case[5] is important in uncovering what an orthodox interpretation and judgement, in this case, was hiding. It highlights that the law should recognise Shabina's choice of religious dress and her choice of preferred school rather than creating a conflict between them. Therefore, at present, the law can be seen streamlining people, hinting that perhaps law is not entirely as fair as we are led to believe, as law detracts from the individual by overlooking, overlapping discrimination. However, by seeing individuals through an intersectional lens and challenging this ideological view of law being fair, can restore an individual, such as Shabina, to the centre of their story. We can recognise their human rights claim as an autonomous individual rather than a human rights claim in wider society.

The order that law aims to create by preventing chaos, is to an extent, controlling. The controlling nature of law hides the divisions present in society such as the varying levels of accessibility to law. The move towards online courts has been useful as it makes it easier for individuals to be able to access the court system from wherever they are. However, the system fails to consider those who may not have access to the relevant resources, which allows them to access the online court system. The court system may have moved towards being in line with modern society, but it has left behind and is widening the gap, between individuals who can easily access and afford such facilities, compared to individuals who cannot. This gap has further widened due to the 2020 Covid-19 Pandemic as 'remote hearings fail most vulnerable clients'[6]. Creating a system that fails the most vulnerable, raises doubts of an equal system. It raises questions about the fairness of the legal system as it appears to only extend the privileges of the privileged but cannot aid those in need. Therefore, if the law is truly equal, then why should people be disadvantaged in gaining legal access under the current system? Thus, law isn't 100% equal and fair.

The view of law being fair and equal is a pre-existing notion within society. Law has its strengths and does protect but there are also flaws. It overlooks an individual's experiences, focuses on the logic of law and accessibility to law is limited. Therefore, the law may have associated itself with equality, but it is far from being equal.

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[5] Holly Cullen and Maleiha Malik, 'Chapter 19: R(Begum) v Governors of Denbigh High School', in Hunter et al, *Feminist judgments: from theory to practice* (Hart, 2010) 332

[6] Jemma Slingo, 'Remote hearings fail most vulnerable clients, say solicitors', (LawGazette, 25 September 2020) < https://www.lawgazette.co.uk/news/remote-hearings-fail-most-vulnerable-clients-say-solicitors/5105755.article > accessed 28 December 2020

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