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Editor's Note

It is with great honour that I present volume 2 of issue XIII of the Leicester Student Law

Review. I am once again immensely impressed with the quality of submissions that were

received this semester. Engagement with our academic journal has increased exponentially this

academic year thanks to the hard work of the 2023/2024 Leicester Student Law Review team as

well as the invaluable support of our academic staff at the University. This increase in

engagement has warmed my heart, as my mission as editor-in-chief has been to encourage and

empower students to write about topics they are passionate about. Both volumes 1 and 2 of

issue XIII are the true testaments to the success of this goal, and for that I must thank the

outstanding students at the University of Leicester, as none of this would have been possible

without you.

Ever since my first year of studies, when I was an editor of the Leicester Student Law Review,

the academic journal played an essential role in fuelling my passion for academia, and my time

as editor-in-chief is one which I will cherish for years to come. As my tenure approaches its

end, and I move on from my time at the University of Leicester, it is my hope that the Leicester

Student Law Review's academic journal continues its upward trend in both student engagement

and production of high-quality legal writing.

With that said, I am happy to share with you the outstanding work of my peers, to which I am

endlessly proud of. Volume 2 of Issue XIII presents valuable contributions to the discourse on

a wide range of topics ranging from human rights and artificial intelligence to corporate law and

consumer protection. I sincerely hope you enjoy reading this volume of our academic journal

as much as my team and I do.

Rebecca Bocchinfuso Editor-in-Chief

LSLR (2023/2024)

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Volume 2 Issue XIII Contributors

Editor-in-Chief Rebecca Bocchinfuso

Faculty Advisors Dr. Ewa Zelazna Dr. Sarah Fox

Selection Committee for Award-Winning Essays

Dr. Eugenia Caracciolo Di Torella Dr. Inga Thiemann.

Secretary Harish Vijayakumar

Treasurer Djomi Tsate

Editors

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Matthew Okudolo
Mirette Abdo
Oliver Buck
Rachel Hodgett
Safa Salman
Temi Kolawole
Tiana Boanca

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We would also like to thank Dr. Navajyoti Samanta for his guidance on enhancing the quality of this volume in offering his invaluable advice on many aspects of the Leicester Student Law Review.

We also acknowledge and thank our academic librarian for the law school, Matt Thompson, for his support in assisting with the training of our editors this academic year.

The quality which has been achieved for this issue would not have been made possible without the astounding precedent set by the brilliant Camilia Amouzegar, Editor-in-Chief of the 2021/2022 Leicester Student Law Review which we are proud to reinstate.

Lastly, we would like to congratulate all authors who have contributed to volume 2 of this issue, as well as all students who submitted their writing for consideration.

Thank you all for your support and dedication to the Leicester Student Law Review.

General Submissions

The essays contained within this section showcase the work of authors who have independently submitted their writing for publication. Each essay contained within herein has been selected for publication by the selection committee of the Leicester Student Law Review consisting of our team of editors and our editor-in-chief.

Exploring the Digital Marketplace: Analysing the Influence of Online Gatekeepers on Consumer Protection and the Misuse of Dominant Positions

Alperen Dogan Department of Law, University of Leicester, United Kingdom

In the dynamic landscape of the digital age, online gatekeepers play a crucial role in influencing how individuals' access, consume, and interact with information and services on the internet. Industry titans such as Amazon, Google, and Apple significantly shape this digital paradigm, serving as pivotal players in regulating the flow of data, commerce, and content. This study directs its focus towards understanding the substantial impact exerted by online gatekeepers, particularly industry giants like Amazon, Google, and Apple, on consumer protection. The investigation delves into the potential repercussions of their "dominant positions" , exploring how these entities mould the ways individuals' access, consume, and engage with information and services online. Furthermore, the essay aims to provide a comprehensive overview of the concept of online gatekeepers, introducing major entities in this sphere. It poses a central question that will guide our exploration: *How have consumers experienced the impact of these online gatekeepers*? This inquiry forms a critical part of our analysis as examination influences of these industry leaders on the digital landscape and consider the implications for consumer well-being.

The Concept of Online Gatekeepers

Fundamentally, the term "online gatekeepers" refers to entities that wield control or regulation over access to digital platforms², services, and content. These entities act as intermediaries, orchestrating the flow of information and facilitating interactions within the digital realm. An indepth understanding of the dynamics of online gatekeeping is crucial for comprehending the broader implications on consumers' online experiences. Several notable players have emerged as central figures in the realm of online gatekeeping. Amazon, renowned for its dominance in ecommerce, not only dictates the distribution of goods but also exercises influence over the digital content market through platforms such as Kindle and various streaming services. Google, a colossal search engine, governs the discovery of information online and shapes the landscape of digital advertising. Apple, with its extensive ecosystem of devices and services, holds sway over digital content and app distribution channels.

In analysing the roles of these crucial entities, the aim is to clarify the complex mechanisms by which they impact consumer experiences. At the core of our investigation lies a fundamental

¹ Richard Whish and David Bailey, *Competition Law* (Oxford University Press, 9th ed, 2018) (p.184), (accessed 27 December 2023).

² Jan Büchel and Christian Rusche, "*Competition in the Digital Economy: An Analysis of Gatekeepers and Regulations,*" (W-Policy Paper No. 26/2020 (Köln: Institut der deutschen Wirtschaft, 2020), (page 11), available at (Accessed 27 December 2023).

question: To what extent have individuals, who represent the ultimate end-users of digital products and services, been shaped by the actions and decisions of online gatekeepers. Delving into this inquiry necessitates an exploration of various dimensions, including consumer choice, access to information, privacy considerations, and the overall quality of online experiences. By conducting a comprehensive analysis of the influence wielded by online gatekeepers on consumers, the aim is to contribute to a nuanced understanding of the evolving digital landscape and its implications for individuals in the 21st century.

This examination will shed light on the intricate dynamics between consumers and online gatekeepers, providing insights into the changing nature of digital interactions and their consequences for contemporary society.

Abuse of Dominant Position

The concept of abuse of a dominant market position is of central importance in competition law. A company's strong position in the market is abused causing harm to fair competition, consumers, and interest groups. This phenomenon occurs when a company with significant market power operates without fair competition and exercises control over competitors, customers, and the entire market. Actions constituting an abuse of a dominant position extend beyond legitimate competition, disrupting the proper functioning of the market.³

Historical Context and Illustrative Cases of the Abuse of Dominant Position

To comprehend the gravity of the abuse of dominant position, it is essential to examine its historical evolution within the framework of antitrust and competition laws. A landmark case shedding light on this concept is the Microsoft antitrust case⁴ during the late 1990s and early 2000s. Microsoft has faced accusations of taking advantage of its dominant position in the operating system market to stifle competition, particularly in the web browser business⁵. Combining the Internet Explorer browser with the Windows operating system was considered anti-competitive, leading to legal action and a subsequent settlement that placed restrictions on Microsoft's business practices.

In more modern contexts, the European Union has played a proactive role in addressing cases of abuse of dominance. Google faced accusations of having favoured its price comparison service in search results, putting competing services at a disadvantage. The European Commission responded by fining Google and ordering changes to its business practices to ensure fair competition. These examples provide context whilst highlighting the critical importance of

³ Whish and Bailey (n 1) P195.

⁴ Ariel Ezrachi, *EU Competition Law: An Analytical Guide to the Leading Cases* (Bloomsbury Publishing Plc, 7th ed, 2021) 331.

⁵ Ezrachi (n 4) Page 315-317.

preventing abuse of a dominant position to maintain competition, promote innovation, and protect consumer well-being in various industries. As our study progresses, we will delve into contemporary cases, examining the evolving legal and regulatory frameworks designed to address this antitrust issue and considering their implications for current and future market dynamics.

Consumer Protection Aspects

In dissecting the intricate relationship between online gatekeepers and consumer protection, it is crucial to acknowledge instances where these entities have assumed roles as guardians of consumer rights and welfare. This subsection delves into illustrative examples of policies and practices implemented by online gatekeepers that actively contribute to the augmentation of consumer protection.

1. Demonstrating Commitment to Consumer Rights: Ethical Policies and Practices

Online gatekeepers, propelled by ethical considerations and regulatory imperatives, have enacted a spectrum of policies and practices designed to fortify consumer rights. A notable illustration of this commitment is discernible in Apple's robust privacy measures within its ecosystem. The company has consistently prioritised user privacy, introducing ground-breaking features such as App Tracking Transparency. This innovative approach empowers users by granting them control over their data, as app developers are now required to obtain explicit consent for tracking. Apple's proactive stance enhances transparency and fortifies consumer privacy, setting a positive benchmark for the broader industry.

Similarly, Amazon, a prominent online gatekeeper, has implemented consumer-centric policies, including its A-to-Z Guarantee. This safeguard ensures that customers receive products in the promised condition, effectively acting as insurance for consumers. Such guarantees not only instil confidence in online transactions but also provide a structured mechanism for dispute resolution, contributing to a more secure and consumer-friendly digital marketplace.

2. Navigating a Complex Regulatory Landscape: Compliance and Cooperation

Online gatekeepers navigate a multifaceted regulatory landscape, and their commitment to adhering to consumer protection laws is pivotal for cultivating a trustworthy digital environment. Google, a prominent player in the digital sphere, has undertaken measures to comply with antitrust regulations across various jurisdictions. In response to concerns about anti-competitive behaviour, Google has adjusted its practices to align with regulatory requirements, showcasing a dedication to fostering fair competition and safeguarding consumer interests.

Furthermore, social media platforms like Facebook have initiated collaborations with regulatory bodies to address issues related to misinformation and harmful content. Through active engagement with authorities, these online gatekeepers aim to mitigate the adverse impact of their platforms on users, exemplifying a cooperative approach to consumer protection.

The positive influence of online gatekeepers on consumer protection is palpable through their proactive adoption of ethical policies, innovative practices, and collaborative efforts that prioritise and safeguard consumer rights. Examining these occurrences yields valuable insights into the possibilities of responsible corporate behaviour in the digital sphere, thus making a meaningful contribution to the ongoing conversation about the convergence of online platforms and consumer protection.

Consumer Harm Aspects

The analysis of online gatekeepers necessitates a comprehensive exploration that encompasses not only their positive contributions but also a critical assessment of instances where these entities may have, caused harm to consumers. This section meticulously scrutinises cases of potential harm, with a specific focus on anti-competitive behaviour and abuse of dominant position, shedding light on the resultant negative impact on consumers' choices, prices, and access to services.

1. Illustrating Instances of Abuse of Dominant Position

A prominent example of alleged anti-competitive behaviour is evident in the case of Google, where accusations abound regarding the manipulation of search results to prioritise its products and services. Competitors contend that such practices stifle fair competition by giving undue preference to Google's offerings, limiting the visibility of alternative products and potentially impeding innovation across various markets. The substantiation of such behaviour raises legitimate concerns about the erosion of a level playing field and the negative repercussions it may unleash on the competitive landscape.

Further scrutiny of Amazon's market conduct unveils instances where the company, as a dominant e-commerce platform, faces accusations of leveraging its position to disadvantage third-party sellers. Claims of unfair treatment, data exploitation, and preferential treatment of Amazon's private-label products underscore the potential abuse of its dominant position. Posing a significant threat to smaller businesses and, ultimately, consumer choice.

2. Analysing the Potential Negative Impact on Consumers' Choices, Prices, or Access to Services

The adverse consequences stemming from anti-competitive behaviour and abuse of dominant position extend beyond the business realm to exert a direct impact on consumers. For instance, when gatekeepers engage in practices that curtail competition, consumers may witness a reduction in choices within the marketplace. This limitation of options may lead to a dearth of diversity in products and services, constraining consumers' ability to make well-informed decisions that align with their preferences and needs.

Potential for gatekeepers to manipulate prices or restrict access to certain services raises profound concerns about the economic well-being of consumers. If gatekeepers exploit their dominant positions to control pricing or exclude competitors, consumers may find themselves facing inflated prices or encountering barriers that impede access to affordable alternatives.⁶

In essence, the exploration of instances where consumer harm may result from online gatekeepers' actions provides invaluable insights into the intricate dynamics of the digital marketplace. By closely scrutinising these cases, the aim is to contribute to a holistic understanding of the challenges posed by anti-competitive practices and their far-reaching implications for consumer welfare. Through this examination, consumers may foster a nuanced discourse on how regulatory frameworks and industry practices may be refined to better safeguard consumers in the rapidly evolving digital landscape.

Regulatory Responses

In response to the intricate challenges posed by issues such as abuse of dominant position and anti-competitive behaviour exhibited by online gatekeepers, regulatory bodies have proactively implemented measures aimed at fostering fair competition and safeguarding consumer interests. This section delves into the existing regulatory landscape, conducts an evaluation of the effectiveness of current regulations, and proposes potential improvements or reforms to effectively address the identified issues.

1. Critical Evaluation of the Effectiveness of Existing Regulations

Current regulatory frameworks, particularly within the ambit of antitrust and competition law, are purposefully designed to curtail practices that undermine fair competition and potentially harm consumers. However, the efficacy of these regulations undergoes continuous scrutiny. Antitrust authorities in various jurisdictions, such as the United States Federal Trade Commission (FTC) and the European Commission, have undertaken investigations into the conduct of online gatekeepers.

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⁶ Ezrachi (n 4)(*Post Danmark A/S v Konkurrencerådet* [2012] 4 CMLR 23, paras 20-22, interpreting Article 102 TFEU and addressing Selective Price Reductions Below ATC with Exclusionary Effect.)

The effectiveness of these regulations is often contingent on their ability to adapt to the dynamic nature of digital markets. Challenges arise due to the rapid pace of innovation and the intricate strategies employed by online platforms, demanding regulatory bodies to stay abreast of technological advancements and market dynamics. While some regulatory actions have resulted in fines and constraints on specific practices, the swift pace of regulatory response may sometimes struggle to keep up with the evolving landscape of online gatekeepers.

2. Proposal of Potential Regulatory Improvements or Reforms

To augment the effectiveness of regulatory responses, consideration of potential improvements and reforms becomes imperative. One avenue for enhancement lies in fostering international cooperation among regulatory bodies. Given the global nature of online platforms, collaborative efforts between jurisdictions may facilitate a more comprehensive and coordinated approach to address cross-border issues. Establishing common standards and sharing information could fortify regulatory efforts and mitigate regulatory arbitrage.

Moreover, regulatory authorities may explore mechanisms aimed at increasing transparency in the algorithms and decision-making processes employed by online gatekeepers. Enhanced transparency could furnish regulators with deeper insights into potential anti-competitive practices, enabling more informed interventions. Simultaneously, these measures could empower consumers by providing them with a clearer understanding of how algorithms influence the content and services they encounter online, enabling them to make more informed choices.

Furthermore, regular reviews of regulatory frameworks are essential to ensure they remain responsive to emerging challenges. The digital landscape evolves rapidly, and a regulatory framework capable of adapting to new business models, technologies, and market dynamics is pivotal for fostering a competitive and consumer-friendly environment.

The nuanced evaluation of the effectiveness of existing regulations and the proposal of reforms necessitates a thoughtful approach that considers the dynamic nature of the digital marketplace. Through continuous refinement of regulatory responses, policymakers may better navigate the challenges posed by online gatekeepers, contributing to the promotion of fair competition and the protection of consumer welfare in the ever-evolving digital landscape.

Examples

Addressing Current Regulatory Challenges in Combating Anti-Competitive Practices by Online Platforms: A Dynamic Landscape

The contemporary digital market has become a stage for the manifestation of anti-competitive practices by a prominent online platform. This entity strategically promotes its own products within search results, placing competitors at a distinct disadvantage. Regulatory bodies, such as the United States Federal Trade Commission (FTC) and the European Commission, respond to these concerns by initiating investigations aimed at curbing these detrimental activities.

The complexities of this situation underscore the challenges within the existing regulatory framework. While designed to counteract anti-competitive practices, the dynamic nature of the digital market presents a formidable obstacle. Online platforms adeptly adjust their strategies, making it challenging for regulatory entities to keep pace. Consequently, the current regulatory response, though in place, encounters difficulties in effectively addressing the continually evolving tactics employed by these digital gatekeepers.

Proposed Regulatory Enhancements: Facilitating Global Collaboration to Address Cross-Border Challenges Posed by Online Platforms

In an era where online platforms seamlessly operate across the global landscape, concerns arise that necessitate a collaborative regulatory approach spanning multiple jurisdictions. Regulatory bodies from various countries recognize the need to share information, establish common standards, and coordinate their efforts to effectively address cross-border issues arising from the practices of ubiquitous online platforms.

The suggested improvement involves fostering international cooperation among regulatory bodies, emphasising a collective response to the challenges posed by online platforms. Through information-sharing mechanisms and the establishment of uniform standards, regulatory bodies aim to strengthen their endeavours', fostering a more comprehensive and coordinated approach to mitigate cross-border challenges. This collaborative strategy seeks to pre-empt regulatory arbitrage, ensuring a robust and harmonised response to the intricate global issues presented by online platforms.

Case Studies

This section delves into specific case studies to shed light on the chosen option—abuse of dominant position among online gatekeepers. By examining noteworthy legal cases with aim to provide insights into the complexities of these issues and discuss the outcomes and implications for consumers.

1. Spotlight on Notable Legal Cases

Case Study 1: Qualcomm and Antitrust Investigations (2019)

In 2019, Qualcomm, a prominent player in the semiconductor industry, found itself under legal scrutiny for alleged anti-competitive practices. The European Commission accused Qualcomm of abusing its dominant position by employing exclusionary tactics to maintain a monopoly in the market for modern chips. This case raised fundamental questions about fair licensing practices and the broader impact of Qualcomm's actions on competition within the semiconductor industry.

Case Study 2: Apple v. Epic Games (2020-2021)

The legal conflict between tech giant Apple and game developer Epic Games provides a revealing glimpse into the dynamics of abuse of its dominant position within the mobile app ecosystem. Epic Games, the creator of the immensely popular game Fortnite, contested Apple's App Store policies, specifically the mandatory use of Apple's in-app payment system. Epic Games argued that Apple's practices amounted to anti-competitive behaviour. This case drew attention to the considerable control wielded by app store gatekeepers over in-app transactions and its implications for both developers and consumers.

2. Analysis of Outcomes and Implications for Consumers

Qualcomm and Antitrust Investigations Outcome:

The Qualcomm case culminated in a legal settlement with the FTC, mandating Qualcomm to renegotiate licensing agreements with smartphone manufacturers and adopt fairer business practices. The intended outcome was to foster increased competition in the semiconductor market, potentially providing consumers with more choices and mitigating the potential negative consequences of a monopolistic market structure.

Apple v. Epic Games Implications:

The legal clash between Apple and Epic Games had profound implications for the app distribution and payment ecosystem. While the court ruled in favour of Apple on certain counts, it underscored concerns about Apple's control over the App Store and the potential anti-competitive nature of its policies. This case triggered discussions regarding the necessity for heightened competition in the app distribution market, with potential benefits for consumers, including the prospect of lower prices and a more diversified array of choices.

These case studies serve as illuminating examples of the ongoing challenges related to the abuse of dominant position among online gatekeepers. The outcomes of these legal battles carry far-

⁷ Commission Decision, Case AT.39711 - Qualcomm (predation) (18.7.2019), (Accessed 29.12.2023) OJ L (page 82), para 335 (EC),

⁸ Tijana Kovovic, *Epic v. Apple: An Antitrust Experiment* (2021) 12 Union ULSch Rev 634 (accessed 30.12.2023)

reaching implications for market dynamics and consumer welfare, underscoring the imperative for continued scrutiny and regulatory intervention to maintain a competitive and consumer-friendly digital landscape. Through a thorough examination of these cases, to gain deeper insights into the intricate interplay between online gatekeepers, market forces, and the well-being of consumers in the evolving digital ecosystem.

Comparative Analysis

A. Comparison of Consumer Protection Approaches Among Online Gatekeepers

Examination of the consumer protection landscape across diverse online gatekeepers offers valuable insights into the varied approaches these entities employ to safeguard consumer interests. Through a comparative analysis, to gain a deeper understanding of the patterns, trends, and distinctions in their strategies aimed at ensuring consumer welfare.

1. Amazon: Striking a Balance Between Market Dominance and Consumer-Centric Policies

As a dominant force in the e-commerce realm, Amazon has significantly influenced the consumer protection landscape. The company's unwavering commitment to customer satisfaction is evident in its consumer-centric policies, notably the A-to-Z Guarantee. This policy assures consumers a refund or replacement in the event of issues with their purchases, fostering trust and confidence. However, the considerable market dominance of Amazon has sparked concerns regarding fair competition, prompting closer scrutiny of potential anti-competitive practices that may impact smaller sellers.

2. Google: Privacy as a Cornerstone and Ongoing Regulatory Challenges

In the sphere of online search and digital advertising, Google has prioritised consumer privacy as a foundational element of its consumer protection strategy. Initiatives such as "My Activity" and "Privacy Check-up" empower users by providing tools to manage privacy settings and control the information collected by Google. Despite these efforts, Google has encountered regulatory challenges, including fines for alleged anti-competitive practices. These instances underscore the intricate interplay between market dominance and the ongoing commitment to consumer protection.

B. Identification of Commonalities and Differences in Approaches to Consumer Welfare

1. Commonalities: Emphasis on Transparency and User Empowerment

A shared emphasis on transparency and user empowerment emerges as a commonality in the consumer protection approaches of various online gatekeepers. Both Amazon and Google recognize the importance of providing users with tools and information to make informed decisions. Amazon's utilisation of customer reviews and Google's transparency reports exemplify concerted efforts to empower users with knowledge about products, services, and data practices.

2. Differences: Market Dominance and Impact on Competition

While common principles underline their consumer protection approaches, differences manifest in the impact of market dominance on fair competition. Amazon's pervasive dominance in the marketplace raises concerns about fair competition and potential harm to smaller sellers. Conversely, Google's influence in search and advertising has drawn regulatory scrutiny related to alleged anti-competitive behaviour, emphasising the delicate balance required to uphold market influence while ensuring fair competition.

The comparative analysis underscores that online gatekeepers share overarching goals of transparency and user empowerment in their consumer protection endeavours. However, the distinctions arising from their respective market dominances and regulatory challenges highlight the nuanced nature of ensuring consumer welfare in the ever-evolving digital landscape. This nuanced understanding contributes to ongoing discussions about refining regulatory frameworks and industry practices to strike an optimal balance between market influence, fair competition, and the protection of consumer interests.

Thorough Examination and Critical Assessment of the Impact of Online Gatekeepers on Consumers

Conducting a critical assessment of the overall impact of online gatekeepers on consumers necessitates a nuanced exploration of the multifaceted dynamics inherent in their influence. While online gatekeepers have undeniably transformed the digital landscape, their pervasive impact prompts crucial inquiries into the consequences for consumers, encompassing aspects of choice, privacy, and fair competition.

1. Consumer Benefits: Unparalleled Convenience and Information Access to Online gatekeepers,

Wielding their platforms and services, have undoubtedly ushered in a new era of consumer experiences characterised by unparalleled convenience and unfettered access to information. E-commerce behemoths like Amazon have revolutionised shopping by providing an extensive array of products at the click of a button. Simultaneously, search engines and content platforms, exemplified by industry leaders like Google, have democratised information, empowering users to access a vast wealth of knowledge instantaneously.

2. Concerns: Market Dominance, Limited Choice, Privacy, and Anti-competitive Practices Despite the evident consumer benefits,

Concerns emerge due to the overarching market dominance of certain gatekeepers, giving rise to legitimate apprehensions. Instances of potential anti-competitive practices, exemplified in cases involving industry giants such as Google and Amazon, highlight the intricate balance required between market influence and fair competition. Consumers may find their choices curtailed when gatekeepers wield excessive power, potentially impeding innovation and reducing variety in the marketplace. Additionally, privacy concerns have surfaced, raising questions about the extent to which user data is utilised and the resultant implications for individual privacy.

3. Delicate Equilibrium: Innovation, Competition, and Consumer Welfare

The nuanced equilibrium between innovation, competition, and consumer welfare emerges as a central theme in the ongoing discourse surrounding online gatekeepers. On one hand, the innovation spearheaded by these entities has propelled the digital economy forward, ushering in new business models and ground-breaking technological advancements. Gatekeepers' substantial investments in research and development have catalysed progress in crucial areas such as artificial intelligence, cloud computing, and digital services, contributing significantly to the overall advancement of society.

However, concerns surface when the pursuit of innovation is perceived to come at the expense of fair competition and consumer welfare. The market dominance wielded by certain gatekeepers may pose challenges to competition, potentially hindering smaller players from entering the market and limiting choices for consumers. Achieving the right balance necessitates a meticulous calibration of regulatory measures that encourage innovation while ensuring a competitive landscape that ultimately benefits consumers.

A. Summary of Key Findings and Arguments

In the comprehensive examination of online gatekeepers and their impact on consumers, a nuanced understanding emerges from the interplay of various factors. The key findings underscore the dual nature of online gatekeepers—an undeniable source of innovation and convenience for consumers, yet a potential cause for concern when it comes to issues such as market dominance, anti-competitive practices, and privacy infringements.

B. The Imperative of Ongoing Monitoring and Regulation in the Digital Marketplace

The rapidly changing digital marketplace emphasises the need for continuous monitoring and regulation. As online gatekeepers shape the digital landscape, regulatory frameworks must adapt to address emerging challenges. Cases involving Microsoft, Google, and Qualcomm highlight the importance of vigilant oversight for fair competition, consumer rights, and innovation. Exploring

online gatekeepers reveals complexities in the digital ecosystem, emphasising the necessity of a proactive and adaptive regulatory framework. Ongoing monitoring and regulation are crucial for fostering innovation, ensuring fair competition, and protecting consumer interests in the evolving digital landscape.

Recommendations

Given the intricacies of the digital era, where online gatekeepers hold substantial sway over consumer experiences, it is crucial to contemplate proactive measures aimed at improving consumer protection. The ensuing recommendations, informed by academic literature, legal precedents, and current examples, are put forth for consideration by policymakers, businesses, and consumers.

1. Policymakers: Strengthen Regulatory Frameworks

Policymakers have a crucial role in shaping the regulations governing the digital marketplace. To bolster consumer protection, it is advised to strengthen regulatory frameworks to address the distinct challenges presented by online gatekeepers. This could include regular reviews and updates to existing antitrust laws and consumer protection regulations, ensuring their adaptability to evolving market dynamics. Moreover, fostering international collaboration among regulatory bodies is essential for a more comprehensive and effective approach⁹, given the global nature of online platforms.

2. Businesses: Embrace Transparency and Ethical Practices

For businesses, especially online gatekeepers, adopting transparency and ethical practices is crucial. Companies should prioritise transparent communication with users regarding data collection, algorithms, and business practices. The establishment of ethical guidelines for the utilisation of consumer data and the avoidance of anti-competitive practices may significantly enhance the consumer experience¹⁰. Furthermore, the adoption of self-regulatory measures and adherence to industry standards may serve as evidence of a commitment to responsible business conduct.

3. Consumers: Empowerment Through Digital Literacy

Promoting digital literacy is vital for informed consumer decision-making. Initiatives should educate consumers about their rights, privacy settings, and the implications of online engagement. Media literacy is crucial for evaluating information sources and understanding content-

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⁹ Gerber, DJ 2020, *Competition Law and Antitrust*, (Oxford University Press, Incorporated, Oxford). Available from: ProQuest Ebook Central. (30 December 2023).

¹⁰ Gerber (n 9).

influencing algorithms, empowering consumers to actively shape a digital landscape that prioritises their interests. Recommendations aim to establish a balanced digital ecosystem, prioritising consumer protection without hindering innovation. Informed by academic literature, legal precedents, and current examples, they contribute to ongoing discussions on enhancing consumer welfare in the dynamic digital era.

Online gatekeepers' impact on consumer protection is complex, with positive contributions and potential challenges. Proactive adoption of ethical policies and collaborative efforts showcase their positive influence. Yet, exploration of scenarios revealing consumer harm emphasises the need for a comprehensive understanding of anti-competitive practices. Evaluation of existing regulations and proposed reforms requires a thoughtful approach recognizing the evolving digital landscape. Case studies illustrate challenges related to the abuse of dominant positions by online gatekeepers, necessitating sustained scrutiny and regulatory intervention for fair competition and a consumer-friendly digital environment.

Comparative analysis underscores online gatekeepers' shared goals of transparency and user empowerment. Despite market dominance and regulatory challenges, understanding nuances contributes to ongoing discussions on refining frameworks for fair competition and consumer protection. Recognizing digital ecosystem complexities, our exploration emphasises the need for a proactive regulatory framework. Grounded in continuous monitoring, it shapes a digital marketplace encouraging innovation, prioritising fair competition, and safeguarding consumer interests.

In conclusion, the proposed recommendations seek a harmonious digital ecosystem prioritising consumer protection and innovation. Drawing from diverse sources, they contribute to ongoing discourse on enhancing consumer welfare, reinforcing the idea that a well-regulated, evolving digital landscape fosters innovation, ensures fair competition, and safeguards consumer welfare.

Bibliography

Büchel, Jan, and Christian Rusche. "Competition in the Digital Economy: An Analysis of Gatekeepers and Regulations." IW-Policy Paper No. 26/2020. Köln: Institut der deutschen Wirtschaft, 2020. (Page-11) Available at https://www.econstor.eu/bitstream/10419/228779/1/1743367988.pdf (Accessed 27 December 2023).

Commission Decision, Case AT.39711 - Qualcomm (predation) (18.7.2019), accessed 30.12.2023) OJ L (page 82)(EC), available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39711/39711_4493_4.pdf.

Ezrachi, Ariel. "EU Competition Law: An Analytical Guide to the Leading Cases." 7th ed. Bloomsbury Publishing Plc, 2021.

Gerber, DJ 2020, "Competition Law and Antitrust.", (Oxford University Press, Incorporated, Oxford). Available from: ProQuest eBook Central. (30 December 2023).

Kovovic, T, 'Epic v. Apple: An Antitrust Experiment' (2021) 12 Union UL Sch Rev 634. <a href="https://heinonline.org/HOL/Page?handle=hein.journals/zapisi12&div=37&g_sent=1&casa_toke_n=qTH8kTLYMMIAAAAA:agtGrdHPonVbyZ48bi5f7nmyY2G9ZXQHAvFTyuByhuwjurLg_ytOJUg-yqvSULN8UlQZ5s9qhqg&collection=journals_

Post Danmark A/S v Konkurrencerådet (2012) 4 CMLR 23, paras 20-22.

Whish, Richard, and David Bailey. "Competition Law." 10th ed. Oxford: Oxford University Press, 2021. Accessed via Oxford Law Trove. (Page-1051) https://www-oxfordlawtrove-com.ezproxy4.lib.le.ac.uk/display/10.1093/he/9780198836322.001.0001/he-9780198836322-chapter-23?rskey=VVEYc4&result=1 (Accessed 25 December 2023).

Unveiling the Legal Dynamics: A Critical Analysis of CIF Contracts and the Significance of Retention of Title Clauses in International Sales Aparna Alingal Mohandas

Department of Law, University of Leicester, United Kingdom

In international trade, established contractual frameworks, particularly Cost, Insurance, and Freight (CIF) contracts, are pivotal for governing cross-border goods sales. This essay critically examines the legal nature of CIF contracts, contemplating them not just as a sale of goods but also as a sale of documents related to the goods. By exploring legal precedents, the analysis aims to uncover nuanced dynamics within CIF contracts. The discussion extends to the retention of title clause, a fundamental aspect of international sales transactions. As a legal device for securing payment and mitigating risks for sellers, the retention of title clause significantly shapes contractual dynamics. The essay delves into its contemporary importance, considering its impact on risk management and acknowledging potential limitations, providing a comprehensive understanding within the context of international commerce.

Understanding CIF Contracts

A CIF (Cost, Insurance, Freight) contract represents an agreement to sell goods at a total price that covers the cost of the goods, insurance, and freight for shipping them to a specified destination. In this arrangement, the seller, after shipping or buying the goods as agreed, fulfils their part by giving the buyer the right shipping documents. Even if the goods get lost before this handover, the seller will not face difficulties. If the loss materializes, the buyer is still required to pay when the documents are presented. The buyer's options for remedy are against the carrier or the insurance provider, not the seller who made the sales contract. Payments in CIF contracts are usually received before goods reach the destination, aligned with document presentation to the buyer or the bank in case of documentary credit arrangements.

CIF contracts are attractive to both sellers and buyers for various reasons. Sellers can charge higher prices, potentially earning more profit than in Free on Board (FOB) contracts and are usually paid before the goods reach their destination, often when the buyer receives the documents like the invoice, insurance policy, and bill of lading, or through a bank if there's a credit arrangement. For buyers, the attractiveness of CIF contracts lies in avoiding the hardship of finding shipping space and insurance, which is a notable challenge in foreign countries due to unfamiliar business practices. While buyers could appoint an agent in the export country for these tasks, it depends on covering agent costs and finding a reliable agent at a reasonable cost. Additionally, "the risk of increased transportation and insurance costs also falls on the seller." To further add to the benefit, payment isn't required until the relevant documents are presented.

¹¹ Judah Philip Benjamin, Michael G. Bridge, and Howard N. Bennett (eds), *Benjamin's Sale of Goods* (11th edn, Sweet & Maxwell 2021) 19-001.

¹² Indira Carr and Peter Stone, *International Trade Law* (Taylor & Francis Group 2017), ProQuest Ebook Central, p 115

Once presented, the buyer can sell the goods to a third party based on the strength of these documents.

Sale of Goods vs. Sale of Documents

CIF contracts were well described by Lord Atkinson in *Johnson v Taylor Bros*, that the sellers are generally obliged to create an invoice, ship goods matching the agreement, arrange for delivery, secure trade-standard insurance, and promptly send shipping documents (invoice, bill of lading, and insurance policy) to buyers. This symbolic transfer of ownership puts goods at the buyer's risk and allows sellers to claim payment. If the CIF contract doesn't specify, document delivery is presumed at the buyer's residence or business. In the case of *Arnold Karberg & Co. v Blythe Green Jourdain & Co.*, Scrutton J asserted that a CIF sale is not a sale of goods but rather a sale of documents of goods. However, this perspective faces challenges, as even if the CIF seller presents valid documents, the buyer retains the right to reject the actual goods if they fail to meet the contract's specifications. The Court of Appeal in the same case explicitly disagreed with Scrutton J's statement. Bankes LJ dissented, contending that the contract is not a sale of documents related to goods but rather a contract for the sale of goods executed through the delivery of documents.

A CIF contract is fundamentally an agreement for selling goods rather than merely exchanging documents.¹⁹ This understanding arises because such a contract necessitates the actual shipment of goods; otherwise, the concept of associated documents becomes irrelevant. However, the dynamics shift after the goods are shipped. In the *Couturier v. Hastie case*,²⁰ there was an argument suggesting that the buyer essentially acquires shipping documents, including the rights and interests of the seller. However, the House of Lords dismissed this argument, highlighting the parties' consideration of the goods' existence.²¹

A similar circumstance occurred in the legal case *Smyth & Co. Ltd v. Bailey Son & Co. Ltd*,²² the House of Lords affirmed the requirement for both goods and adherence to contractual terms in CIF contracts. The ruling stated that a seller's presentation of incomplete or non-conforming documents, even if subsequently corrected, constitutes a partial tender, allowing the buyer to reject them. Lord Wright underscored the role of documents as "symbols of delivery," emphasising their significance in ensuring the transfer of title and possession at the destination. This legal precedent underscores the vital importance of strict compliance with documentary obligations in CIF contracts, granting buyers the ability to reject incomplete or flawed tenders and protect their interests.

¹⁴ Johnson v Taylor Bros (1920) 122 LT 130.

¹⁵ Ibid n(2) p 116.

¹⁶ Arnold Karberg & Co v Blythe Green Jourdain & Co [1915] 2 KB 379.

 $^{^{\}mbox{\tiny 17}}$ Arnold Karberg v Blythe [1916] 1 KB 495.

¹⁸ Ibid.

¹⁹ Philip W. Thayer, 'C. I. F. Contracts in International Commerce' (1940) 53 Harvard Law Review 796

²⁰ Couturier v Hastie [1856] 5 HLC 673.

²¹ Ibid n(9)

²² Smyth & Co. Ltd v. Bailey Son & Co. Ltd [1940] 3 ALL ER 60.

The legal precedent of *Bunge Corporation v. Tradax Export S.A.* [1981]²³ holds significant implications for international contractual transactions. In this instance, Bunge Corporation, a United States-based entity, executed a CIF contract with Tradax Export S.A., a Panamanian company, pertaining to the sale of soybean meal. The CIF framework, wherein the seller manages and covers shipping expenses, was central to the dispute. The court's assertion that the crux of CIF contracts lies in the documentation rather than the physical goods underscores the pivotal role of accurate paperwork. This decision serves as a guiding principle in navigating the intricacies of international trade agreements, emphasising the paramount importance of meticulous documentation for successful contractual enforcement.

In the legal dispute of *Panchaud Freres S.A. v Etablissements General Grain Company (African) Ltd*,²⁴ Panchaud Freres S.A. sold 5,500 tons of Brazilian yellow maize to Establishments General Grain Company (African) Ltd through a CIF contract. The contract mandated the seller to furnish specific documents, including an insurance policy, a bill of lading, and an invoice, facilitating the buyer's possession of the goods at the destination port. Although the buyers initially rejected the maize on insufficient grounds, later realising a shipment delay, the court ruled in favour of the seller, asserting entitlement to payment as conforming documents had been delivered, even though the goods were not shipped within the agreed timeframe.

The Retention of Title Clause in International Sales Transactions

The retention of title clause, commonly known as the "Romalpa clause" or "reservation of title clause," is a legal device frequently employed in international sales transactions to secure payment for goods. This clause allows the seller to retain ownership of the goods until the buyer fulfils their payment obligations. The Sale of Goods Act (SGA) 1979 provides that property in goods will only pass when the parties to the transaction intend it to pass, thus allowing a supplier to retain title to goods after delivery of those goods to the customer. Moreover, the Sale of Goods Act 1979 introduces additional measures that grant an unpaid seller a lien over goods, contingent upon physical possession, allowing retention until the buyer satisfies payment obligations, and also outlines circumstances permitting the seller to retain possession, including instances where goods are sold without credit terms, sold on credit with an expired term, or in the event of the seller's insolvency.

Importance of Retention of Title Clause

The retention of title clause serves as a crucial risk mitigation tool for sellers engaged in international trade. It helps protect sellers against the risk of non-payment or insolvency of buyers. By retaining ownership until payment is made, sellers can reduce their exposure to financial losses, particularly in cross-border transactions where enforcing payment may be challenging. The significance of risk mitigation through retention of title clauses is exemplified in

²³ Bunge Corporation v. Tradax Export S.A. [1981] 1 WLR 711.

²⁴ [1970] 1 Lloyd's Rep 53

²⁵ Sale of Goods Act 1979, s 19.

²⁶ SGA 1979, s 38(1).

²⁷ SGA 1979, s 39(1).

²⁸ SGA 1979, s 41.

Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd,²⁹ where the court upheld the supplier's right to trace and reclaim goods due to non-payment.

Retaining title serves a crucial function in enabling sellers to secure financing or credit facilities, as it enhances their ability to use the goods as collateral for obtaining financial support. This incentivizes trade, increases access to markets, and fuels global economic activity. The increased access to financing can be especially important for small and medium-sized enterprises (SMEs) engaged in international trade. The facilitation of financing for sellers is supported in *Clough Mill Ltd v Martin*,³⁰ where the court considered the seller's rights to repossess and sell goods as crucial in financial arrangements.

The retention of title clause provides a degree of legal uniformity in international sales transactions. Despite variations in legal systems across different jurisdictions, the recognition of this clause can contribute to a more standardized approach in governing the rights and obligations of parties involved in cross-border sales. This can enhance legal predictability and reduce uncertainties for international traders. The importance of legal uniformity is underscored in *Armour v Thyssen Edelstahlwerke AG*, where the House of Lords considered the validity of an "all accounts" clause, emphasising the need for standardised legal approaches.

Furthermore, in *Treibacher Industrie AG v Chateaugay Paper Products Ltd case*,³² the principles of the United Nations Convention on Contracts for the International Sale of Goods (CISG) were instrumental in validating Retention of Title (ROT) clauses, providing a legal framework that facilitates cross-border credit sales with a uniform international standard. The CISG's emphasis on party autonomy (Article 6) and acknowledgment of international commercial practices (Article 9) played a pivotal role in endorsing the effectiveness of ROT clauses, ensuring a consistent and predictable legal environment for cross-border transactions.

By providing sellers with a means to secure their interests, the retention of title clause fosters confidence in international trade. Buyers may be more willing to engage in transactions when they know that sellers have a legal mechanism to protect their rights in case of default. This, in turn, contributes to the growth and sustainability of global commerce. The decision in *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009]³³ underscores the significance of the retention of title clauses in fostering trade confidence. In this case, the court recognized the contractual mechanism's vital role in assuring sellers of a legal remedy in the event of a buyer's default, thus promoting a sense of trust and confidence in international trade relationships.

Limitations of Retention of Title Clause

The retention of title clause faces challenges arising from jurisdictional variations in legal systems. The enforceability and effectiveness of the clause can vary significantly from one jurisdiction to

²⁹ Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd [1976] 1 WLR 676

³⁰ Clough Mill Ltd v Martin [1984] EWCA Civ 6, [1985] Ch 19

³¹ Armour v Thyssen Edelstahlwerke AG [1990] UKHL J1018-2.

³² Treibacher Industrie AG v Chateaugay Paper Products Ltd [2004] EWHC 1202 (Comm).

³³ Stocznia Gdynia SA v Gearbulk Holdings Ltd [2009] EWCA Civ 75

another, creating uncertainty for parties involved in international transactions. This limitation emphasises the importance of careful drafting and consideration of applicable laws. In the case of *PST Energy 7 Shipping LLC v O W Bunker Malta Limited* [2016],³⁴ the court examined section 2(1) of the Sale of Goods Act 1979, defining a sale of goods as a property transfer for money. The case focused on bunkers supplied by O W Bunker Malta Limited to *PST Energy 7 Shipping LLC*, with a retention of title clause allowing ownership until payment. The court ruled the agreement was a service contract, rendering the retention of the title clause ineffective.

In instances involving perishable goods, a retention of title clause may prove ineffective, particularly when the goods are susceptible to deterioration before payment is completed. The challenge of mixed goods arises when the original goods lose their distinct identity through combination with other materials, as seen in situations where a buyer transforms wood into a piece of furniture. For an effective retention of title clause, it is essential that the goods can be individually identified and extracted without causing harm to the amalgamated product—an impracticality in cases of integrated items like furniture. If multiple sellers provide identical, unmarked pieces of wood, rendering the goods indistinguishable, enforcing retention of title becomes challenging. Nevertheless, a potential resolution may involve imposing an obligation on the buyer to label and segregate each seller's goods to maintain clarity regarding ownership throughout the manufacturing process.

In the case of *Borden (UK) Ltd v Scottish Timber Products Ltd*, serin was combined with wood chippings to create a chipboard. Despite the seller's attempt to retain ownership, the rapid use of the resin within two days during the manufacturing process led to the loss of title. A similar situation occurred in *Re Peachdart Ltd*, where the seller couldn't maintain title over leather once it was transformed into handbags, losing its distinct existence. Notably, goods like engines, which remain unaltered, may still be eligible for retention of title, such as when unbolted from a generating set.

The enforceability of a retention of title clause is also contingent on the buyer's conduct in the ordinary course of business. If the buyer routinely sells the goods before completing payment, and the seller is cognizant of this practice, the efficacy of the retention of title clause may be jeopardised. This scenario presents a challenge because, by the buyer's customary business practices, the goods might have already changed hands before the seller secures full payment. In the legal matter of *Armour v Thyssen Edelstahlwerke AG* [1991],³⁷ it was determined that a retention of title clause might lose effectiveness if the buyer consistently sells the goods in their regular business operations, and the seller is cognizant of this customary practice.

Conclusion

To sum up, the inherent legal character of a CIF (Cost, Insurance, Freight) contract revolves around the sale of tangible goods rather than a simple transaction of documents. Although

³⁴ PST Energy 7 Shipping LLC v O W Bunker Malta Limited [2016] UKSC 23

³⁵ Borden (UK) Ltd v Scottish Timber Products Ltd [1981] Ch 25

³⁶ *Re Peachdart Ltd* [1984] Ch 131

 $^{^{\}text{\tiny 87}}$ Armour v Thyssen Edelstahlwerke AG [1991] 2 AC 339.

shipping documents are pivotal for transferring ownership and possession, the essence of a CIF contract lies in the actual sale of goods. The CIF agreement mandates the physical shipment of goods, emphasising that, despite the significance of meticulous paperwork, the substantial existence of the goods is a central factor. Furthermore, the retention of title clause emphasises its paramount importance in international sales transactions. The analysis has underscored the role of this legal device in mitigating risks for sellers and fostering confidence in cross-border trade.

Table of Authorities

Case Law

Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd [1976] 1 WLR 676.

Armour v Thyssen Edelstahlwerke AG [1990] UKHL J1018-2.

Armour v Thyssen Edelstahlwerke AG [1991] 2 AC 339.

Arnold Karberg & Co v Blythe Green Jourdain & Co [1915] 2 KB 379.

Arnold Karberg v Blythe [1916] 1 KB 495.

Borden (UK) Ltd v Scottish Timber Products Ltd [1981] Ch 25.

Bunge Corporation v. Tradax Export S.A. [1981] 1 WLR 711.

Clough Mill Ltd v Martin [1984] EWCA Civ 6, [1985] Ch 19.

Couturier v Hastie [1856] 5 HLC 673.

Johnson v Taylor Bros [1920] 122 LT 130.

Panchaud Frères S.A. v Etablissements General Grain Company (African) Ltd [1970] 1 Lloyd's Rep 53.

PST Energy 7 Shipping LLC v O W Bunker Malta Limited [2016] UKSC 23.

Re Peachdart Ltd [1984] Ch 131.

Smyth & Co. Ltd v. Bailey Son & Co. Ltd [1940] 3 ALL ER 60.

Stocznia Gdynia SA v Gearbulk Holdings Ltd [2009] EWCA Civ 75.

Treibacher Industrie AG v Chateaugay Paper Products Ltd [2004] EWHC 1202 (Comm).

Statutes:

Sale of Goods Act 1979

Bibliography

Books:

Benjamin, Judah Philip, Michael G. Bridge, and Howard N. Bennett (eds), Benjamin's Sale of Goods (11th edn, Sweet & Maxwell 2021) 19-001.

Carr, Indira and Peter Stone, International Trade Law (Taylor & Francis Group 2017), ProQuest Ebook Central, 115.

Thayer, Philip W., 'C. I. F. Contracts in International Commerce' (1940) 53 Harvard Law Review 796.

Copyright Considerations in Generative AI: Exploring the Legal and Ethical Dimensions of AI Generated Works

Jack Howson

Department of Law, University of Leicester, United Kingdom

1. Introduction

Generative Artificial Intelligence (AI) involves a technological process in which programmes are utilised to understand and replicate works similar to, but not directly copied from existing samples made known to the system. The programme then utilises this knowledge to create works of art that some 'authors' have attempted to claim copyright protection for. This has posed fresh concerns for courts, and as such this essay will examine whether works of art created by generative AI should be granted the same level of copyright protection as artistic works with a 'human author'.

2. The issues presented by generative AI

One of the most contentious issues surrounding generative AI and copyright is the complexities that are faced when works created by AI attempt to pass the originality threshold required. The current position is that there must be some reference to human authors, whether this be through the standard UK test of skill, labour and judgement ³⁸ or under the European Union (EU) test, being the author's own intellectual creation. ³⁹ Upon investigation of the EU test, therefore, it demonstrates a clear situation requiring some form of human input to pass for originality. Work created by generative AI fails to 'reflect the author's personality', ⁴⁰ and thus AI is shown to lack the conceptual ability to stamp work with their personality. This has been done largely as the works requiring originality (namely literary, dramatic, musical and artistic works) ⁴¹ are those that are typically a fundamentally human concept.

Moreover, there is an argument which is supported by evidence that generative works and creating works that would typically require this level of human input should not be granted protection as AI acts under a series of strict rules and code that are said to be limited to the technical boundaries upon which they are created. Daryl Lim argues that the current position under the EU standards of originality demonstrates 'creative control as pivotal, reflecting the need to preserve the essence of human-driven creativity from mechanistic outputs'.

Expanding on the above, there are clear justifications for the protection of rights that are granted to intellectual property works. The current law has a clear focus on the human aspect and protection of creative works, and this is where generative AI clashes with these principles. For instance, the granting of protection to authors' works is largely based upon the incentivisation

³⁸ Walter v Lane [1900] AC 539

³⁹ C5/08 Infopaq International A/S v Danske Dagbaldes Forening [2009] ECDR 16 (CJEU)

⁴⁰ C145/10 Painer v Standard Verlags GmbH [2012] ECDR (6)

⁴¹ CDPA 1988, s1(1)(a)

⁴² C683/17 Cofemel-Sociedade de Vestuário SA v G-Star Raw CV [2020] ECDR 9

⁴³ Daryl Lim, 'Generative AI and Copyright: principles, priorities and practicalities' [2023] Journal of intellectual property law & practise PL 841

model of innovation. ⁴⁴ Authors seeking to promote their work would be diminished if 'even non-artists can effortlessly produce impressive works of art'. ⁴⁵This presents the dilemma that generative AI may eventually reach a point in which creative works are no longer incentivised, with authors no longer wishing to compete with the seemingly 'unskilled'. This is perhaps the greatest justification offered to the originality test for works of creativity, which would suggest that works lacking this should not be offered any copyright protection under UK law.

Furthermore, aside from the theoretical justifications for the protection of certain works, there are also practical implications with regard to the duration of protection for AI works. It is fundamentally accepted that for most works the duration of protection is based fundamentally upon the life of the author. However, if it is to be accepted that AI is the author of the works, this presents issues to the perpetual duration upon which protection can last, and thus further diminishes the incentive for authors to seek to innovate further.

What's more is the economic impact we must face, as again human authors will likely not be motivated to present new ideas into the public realm seeking economic remuneration for their work. This was highlighted by Ryan Abbot and Elizabeth Rothman who demonstrate the position that copyright holds within it the need to 'protect the sweat of the brow approach' and protect 'personality rights', but also that AI 'copyright cannot have it all'. This therefore demonstrates the challenges faced by a generative AI gaining protection under UK copyright law. There is a strong argument in favour that as these rights reflect the moral rights of the authors involved, more protection ought to be offered to human authors, and as such, generative AI as an author should be limited entirely.

3.Limits on generative AI

However, there are some limitations in place under the current law, particularly with reference to section 9 of the Copyright, Designs and Patent Act 1988 (CDPA)⁴⁷ which states that the author in cases of computer-generated works shall be the one responsible who made the necessary arrangements of the work to occur. This is clearly stated in the case of *Nova Productions Ltd v Mazooma Games Ltd*⁴⁸ whereby it was held that the software programmer was the author of the images appearing on the screen instead of the player. This is more complicated with reference to generative AI, however, as companies utilising someone else's software to create manuals for instance, would possibly try to claim copyright against the competing claim from those who wrote the software. This highlights the crux of the issue being that where authors are simply inputting basic 'search terms' into the AI programmes, there is no expression being demonstrated.

[&]quot;'Agreement on Trade-Related Aspects of Intellectual Property Rights' \\
https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm\(\)\ accessed 2 Jan 2024

⁴⁵ Carol Muslins Hayes, 'Generative AI and Copyright: Both Sides of the Black Box' (July 21 2023) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4517799> accessed 2 Jan 2024

⁴⁶ Ryan Abbott and Elizabeth Rothman, 'Disrupting Creativity: Copyright Law in the age of Generative Artificial Intelligence' [2022] Florida Law Review PL 1141

⁴⁷ Copyright, Designs and Patent Act 1988, s9(3)

^{48 [2007]} RPC 25 (CA)

4. Potential Solutions

One solution offered comes from the UK Intellectual Property office; whereby the protection for computer-generated works is removed with reference to literary, dramatic, musical and artistic works (all of which require originality)⁴⁹. The rationale behind this would be to limit copyright protection to human authors. This would not however be a complete removal as works with a sufficient level of human intellectual creativity would continue to be protected.⁵⁰ This appears to be a strong suggestion, as it removes the issues of originality and authorship as presented to the current tests under UK and EU law.

5.Conclusion

To conclude, there is debate surrounding copyright for generative AI that highlights the challenges regarding originality and authorship. Under the current legislative framework of UK copyright law, human creativity is prioritised, making it difficult for AI generated works to qualify for protection of artistic works. If granted such protection, this could devalue human creativity and innovation. The practical complexities such as perpetual protection and economic impacts further make this a complicated and technical debate. The proposed solutions offer a potential path forward, however, more consideration is required for how these laws would affect other areas of copyright respectfully. It is known though that moving forward will require a balance of protecting human creators and recognising the crucial role that AI plays. As such, with the development of technology copyright law must adapt to ensure fair treatment for both.

¹⁹ Intellectual Property Office, 'Artificial Intelligence and Intellectual Property: copyright and patents' (28 June 2022) < https://www.gov.uk/government/consultations/artificial-intelligence-and-ip-copyright-and-patents accessed 3 January 2024

⁵⁰ ibid

Table of Authorities

Cases

C683/17 Cofemel-Sociedade de Vestuário SA v G-Star Raw CV [2020] ECDR 9

C5/08 Infopaq International A/S v Danske Dagbaldes Forening [2009] ECDR 16 (CJEU)

C145/10 Painer v Standard Verlags GmbH [2012] ECDR 6 (ECJ) Walter v Lane [1900] AC 539 Nova Productions Ltd v Mazooma Games Ltd [2007] RPC 25(CA)

Statutes

Copyright, Designs and Patents Act 1988

Statutory Instruments

'Agreement on Trade-Related Aspects of Intellectual Property Rights' < https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm> accessed 2 Jan 2024

Bibliography

Lim D, 'Generative AI and Copyright: principles, priorities and practicalities' [2023] Journal of intellectual property law & practice PL 841

Abbott R and Rothman E, 'Disrupting Creativity: Copyright Law in the age of Generative Artificial Intelligence' [2022] Florida Law Review PL 1141

Hayes C, 'Generative AI and Copyright: Both Sides of the Black Box' (July 21 2023) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4517799> accessed 2 Jan 2024

Intellectual Property Office, 'Artificial Intelligence and Intellectual Property: copyright and patents' (28 June 2022) < https://www.gov.uk/government/consultations/artificial-intelligence-and-intellectual-property-copyright-and-patents accessed 3 January 2024

Unravelling the Legal Web: Zero-Hour Contract Workers' Dilemma in Proving 'Employee' or 'Worker' Status

Nana Frimpomaa Adu-Mireku Department of Law, University of Leicester, United Kingdom

Introduction

Zero-hour contract workers often grapple with uncertainty when determining their employment status. The definition of a zero-hour contract describes a situation where an individual may be asked to work, yet there is no guaranteed minimum number of hours.⁵¹ This inherent ambiguity raises the question of whether individuals should be categorised as employees or workers. Although the term 'zero-hour contract' lacks a precise legal definition, the legal criteria established for employees and workers can be employed to assess employment status.

Employment Status Criteria

In the context of zero-hour contract workers and their ability to establish their employment status, the definition of an 'employee' according to s230(1) of the *Employment Rights Act* (ERA)⁵² plays a crucial role. However, this definition is notably broad in its scope when it comes to identifying a contract of employment. To determine employment status, the common law ruling in *Ready* Mixed Concrete³³ has sought to provide clarity by introducing tests, which continue to serve as the foundation for assessing employment status today. These tests encompass mutuality of obligation, the control test, and the requirement for personal service. The first test, which addresses the presence of a mutual obligation between the parties, has witnessed varying interpretations in different cases. For instance, in O'Kelly v Trusthouse Forte Plc³⁴ Sir John Donaldson MR argued that the waiters on zero-hour contracts lacked the obligation to provide their services and were susceptible to termination at any time. As such, the absence of a reciprocal obligation to offer and accept work was deemed indicative of atypical employment. Conversely, in Nethermere v Gardiner garment workers were engaged under similar zero-hour arrangements, with work assignments contingent on the employer's requirements. Despite the absence of a strict obligation for workers to accept assignments, the court recognised them as employees. The court's rationale emphasised the need for a minimum level of obligation on both sides to establish a contract of service. Under such an arrangement, zero-hour contracts may face challenges in proving their employee status if there is no inherent obligation for them to undertake work.

The control test encompasses both direct and indirect forms. Cases such as *Simmons v Heath Laundry* and *White and Anor v Troutbeck* have explored the nature and extent of control

⁵¹ CIPD zero-hour contracts: Understanding the law 2023, para 5

Employment Rights Act 1996, s230(1) ["employee" means an individual who has entered or works under (or, where the employment has ceased, worked under) a contract of employment.]

⁵⁸ Ready Mixed Concrete Ltd v Minister of Pensions [1968] 2 QB 497

⁵⁴ [1983] ICR 728

^{55 [1984]} ICR 612

^{56 [1910] 1} KB 543

⁵⁷ [2013] EWCA Civ 1171

exercised by employers over employees. The test involves scrutinising the level of authority and direction exercised by the employer, which may influence the determination of employment status. The final test, about the necessity of personal service, stipulates that the individual engaged to perform work must personally execute it. The case of *Express and Echo*⁵⁸ provides an illustrative example of this requirement. However, it's important to note that nuances within cases such as *MacFarlene*⁵⁹ have indicated that even within zero-hour contracts, the degree of discretion given to workers to appoint substitutes could influence their employment status. As shown from the above cases, the practical application of these tests are not always indicative of the outcome in individual cases, thus making it more difficult for zero-hour contract workers to prove they are employees.

Worker Status and Legal Challenges

A worker status was created by the Tony Blair government to expand the employment status and is defined in \$230(3) of the ERA. The same tests evaluated above are applied to workers, but their content varies in strictness. In *Sejpal v Rodericks Dental*, the worker status test was identified to which mutual obligation must be apparent (a contract between employer and individual); the worker is not carrying out business and the other party is not a customer; there is an obligation to provide service. The similarities in the test pertain to the confusion as to which status a zero-hour contract worker falls into.

Case Study: *Uber BV v Aslam* and others

A compelling illustration of the challenges faced by zero-hour contract workers seeking their employment status is identified *in Uber BV v Aslam* and others. Uber claimed that their drivers were self-employed, despite the requirements regarding how the services should be provided. The Supreme Court held that the fundamental aim is to safeguard vulnerable workers, regardless of what the contract states. The courts must focus on whether the workers are treated fairly, applying the law. The decision was that Uber drivers were workers because they would face penalties if they failed to accept a minimum amount of work which shows control and mutual obligation, and the Uber drivers logging into the app reflected working hours. This shows the complexity around employment status and the necessity to overlook the contract terms and rather assess the nature of the work with the application to the law. In short, the court places importance on statutory interpretation as opposed to contractual interpretation.

Legal Reforms and the Good Work Plan

Reform should be encouraged to resolve the confusion of zero-hour contract workers determining what employment status they fall under. The Good Work Plan was introduced by the Government to ease confusion between the employer and individual as to what the relationship is. The elaborated rights of workers have been implemented and the provision of zero-hour staff to negotiate a stable contract which states a specified number of hours a week.

⁵⁸Express and Echo Publications v Tanton [1999] ICR 693

⁵⁹ McFarlane v Relate Avon Ltd [2010] EWCA Civ 771

⁶⁰ Employment Rights Act 1996, section 250(3)

⁶¹Mrs N Sejpal v Rodericks Dental Ltd [2022] EAT 91

^{62 [2021]} UKSC 5

This has been finalised in the *Workers (Predictable Terms and Conditions) Act* 2023 and will be enforced in 2024. However, there are disagreements on the concept of worker status, particularly from CIPD, who suggest the removal of worker status to strengthen the rights of zero-hour contract workers under employment.⁶³

Conclusion

In conclusion, the zero-hour contract worker would face challenges in deciding whether they are an employee or a worker. This essay evaluated the tests underpinning the employee and worker status and analysed the difficulty in identifying which status a zero-hour contract worker falls into. Although there are challenges, the new 2023 Act has received the royal assent which may alleviate the issues a zero-hour contract worker may face in deciding their status.

⁶³ CIPD Zero-hours contract: Understanding the law 2023

Table of Authorities

<u>Cases</u>

United Kingdom

Express and Echo Publications v Tanton [1999] ICR 693
McFarlane v Relate Avon Ltd [2010] EWCA Civ 771
Mrs N Sejpal v Rodericks Dental Ltd [2022] EAT 91
Nethermere v Gardiner [1984] ICR 612
O'Kelly v Trusthouse Forte Plc [1983] ICR 728
Ready Mixed Concrete Ltd v Minister of Pensions [1968] 2 QB 497
Simmons v Heath Laundry [1910] 1KB 543
Uber BV v Aslam [2021] UKSC 5
White and Anor v Troutbeck [2013] EWCA Civ 1171

Bibliography

Internet sources

CIPD zero-hour contracts: *Understanding the law 2023* https://www.cipd.org/uk/knowledge/guides/zero-hours-contracts-understanding-the-law/

Government Responses to Terrorism (2001-2010): The Influence of Article 5 ECHR

Shristi Sapkota

Department of Law, University of Leicester, United Kingdom

Introduction

The period following the 9/11 attacks saw the emergence of the 'war on terror' as a predominant theme within the political and legal discourse in the UK, akin to other nations. Consequently, a pivotal question that the UK sought to address centred on how to protect individuals and institutions in a liberal democracy from those who were willing to 'pursue their opposition through violent means. ...'. The challenges of such a discussion typically revolve around the extent to which it is 'acceptable' for a nation to 'compromise liberal democratic values in order...to protect them'. Specifically focusing on the UK's Government's counterterrorism efforts between 2001-2010, this essay posits that the laws pertaining to Article 5 of the European Convention on Human Rights (ECHR) did not effectively influence the government's response to the terrorist threat during this period. Nevertheless, these laws influenced the response, as evidenced by the court's decisions during one of the UK's most contentious legislative acts of the time: the Anti-Terrorism, Crime and Security Act, 2001.

What is Article 5 ECHR?

The main purpose of Article 5 ECHR is to prevent 'arbitrary or unjustified deprivations of liberty' Delving deeper into this concept, Article 5 emphasises the profound significance of the right to liberty and security, asserting that it is of the 'highest importance in a democratic society', a viewpoint exemplified in *McKay v the United Kingdom*. The Court would interpret the 'unacknowledged detention' of an individual as a 'complete negation of the fundamentally important guarantees contained in Article 5' of the ECHR. Hence, Article 5 ECHR clearly articulates its key principles, one of which is to safeguard the liberty of all individuals within the state, including non-nationals accused of crimes. This is reflective of ethos of Article 3 ECHR and its efforts to prevent individuals from being deported if there is a real risk of torture in the receiving country.

<u>Indefinite detention without charge or trial</u>

Having established the fundamental principles and objectives of Article 5, it becomes pertinent to examine its inability to successfully shape the government's response to the terrorist threat between 2001 and 2010. For instance, the UK's more 'radical attempts' against terrorism

⁶⁴ Elliot, M., 'United Kingdom: The "War on Terror', U.K.-Style-the Detention and Deportation of Suspected

Terrorists' (2010) 8 International Journal of Constitutional Law 131.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ European Convention of Human Rights, (ECHR) Article 5.

⁶⁸ McKay v. The United Kingdom [GC], no. 543/03, § 41, [2006] ECHR.

⁶⁹ Ibid.

⁷⁰ ECHR (1950), Article 3.

primarily manifested in the Anti-Terrorism, Crime and Security Act 2001.⁷¹ Part 4 of this Act relates to Article 5 ECHR, which introduced the controversial provision of 'indefinite detention', 'without charge or trial' for any non-national who has been 'reasonably suspected' of being a terrorist.⁷² Moreover, it applied to non-nationals who could not be deported under Article 3 ECHR.⁷³ In the case of *Chahal v UK*⁷⁴, the absolute prohibition of torture and inhumane treatment was upheld, even when the individuals were deemed a potential terrorist threat to the host nation. Therefore, adhering to the limitations set forth by the *Chahal*⁷⁵ principle, this legislation served as the UK's response to the challenge of deporting non-national 'suspects'.

Despite its representation as the UK's response to the terrorist threat, this act evidently infringed upon Article 5 ECHR. Therefore, Article 5 ECHR was proven ineffective in influencing the government's response to the threat, as the act disregarded the Article's emphasis on the liberty of the individual. While many scholars have asserted that Article 5 ECHR provides exceptions permitting indefinite detention under specific circumstances, it has been established that these 'limited circumstances' do not apply to the provisions of the 2001 Act, and how it has sought to rationalise many instances of indefinite detentions. As Tomkin contends, this Act stands as the UK's most 'draconian legislation that Parliament has passed in peacetime in over a century', which diverges from the main intent of Article 5 ECHR. Essentially, this Act unequivocally contravenes the principles set forth in Article 5 ECHR.

Article 5 shaping the government's response

Contrary to Article 3 ECHR, Article 5 ECHR can be derogated from if the conditions outlined in Article 15 ECHR are met. Article 5 ECHR is not absolute; it allows the UK the legal latitude to deviate from its provisions. For example, in *A and Others v UK - Belmarsh*⁷⁸, the UK issued a derogation order under Article 15 ECHR, permitting the ECHR to adjudicate whether the proposed derogation met the conditions outlined in this Article. Article 15 ECHR states that 'in time of war or other public emergency threatening the life of the nation, any high contracting party may take measures derogating from its obligations under this convention...'. While this would have enabled the UK to detain the individuals, the courts instead quashed the derogation order. Although Article 5 ECHR did not directly impact the UK's response to the terrorist threat via Part 4 of the 2001 Act, it ensured that the UK did not transgress the principles and values delineated in Article 5 ECHR in its invocation of Article 15 ECHR.

⁷¹ Ibid.

⁷² Anti-Terrorism, Crime and Security Act 2001, §§ 21–23 (no longer in force). Suspects were free to leave the U.K. if they wished, but there were rarely "safe" third countries willing to accept them.
⁷³ Ibid.

⁷⁴ Chahal v United Kingdom, 22414/93 [1996] ECHR 54

⁷⁵ Ibid.

⁷⁶ Anti-Terrorism, Crime and Security Act 2001, §§ 21–23.

⁷⁷ Tomkins, A., 'Legislating Against Terror: The Anti-Terrorism, Crime and Security Act 2001, (2002) PUB. L 205-220.

⁷⁸ A and Others v Secretary of State for the Home Department' [2004] UKHL 56.

⁷⁹ ECHR (1950), Article 15.

Examining the role of Article 5 ECHR in shaping the government's response to the terrorist threat highlights the importance in exploring the limitations of Article 15 ECHR. As it is established that Article 5 ECHR can be derogated under Article 15 ECHR, a notable weakness has arisen in the interpretation of this Article. For instance, this affects the legal challenges surrounding questions of strict proportionality. Under Article 15 ECHR, derogation is permissible only if it is 'strictly required by the exigencies of the situation'. However, the Government's Attorney General rightly argued that attempting to define what would constitute an emergency situation could become overly political and would rely on a variety of factors that may not always be consistent for every situation calling for a similar decision. Furthermore, the House of Lords emphasised that the issue of proportionality constitutes a legal matter, subject to judicial scrutiny. This suggests the weakness of the derogation order in the *Belmarsh* case and raises doubts about the application of both Article 5 ECHR and Article 15 ECHR. Despite the UK's derogation order being quashed, it is significant to highlight the challenges associated with the concurrent use of Article 5 ECHR and Article 15 ECHR, as this could diminish Article 5's influence on shaping government responses.

Due to the significance of 'interpretation' by the courts, the judgement, as previously stated, concluded that the UK Government's regime was irrational and disproportional in accordance with Article 5 ECHR and Article 15 ECHR. This reinforces the argument advanced throughout this essay: although the laws pertaining to Article 5 ECHR did not directly shape the government's response through the enactment of the 2001 Act, they effectively influenced its approach in specific cases by averting any successful attempt at derogation. As outlined under Article 15 ECHR, the regime was deemed inadequate by courts in addressing the threat to security. Indefinite detention was considered a disproportionate response to the perceived threat posed by these individuals, thus invoking Article 5 ECHR.

In evaluating the impact of human rights on government responses to the terrorist threat between 2001-2010, Lady Justice Arden was justified in classified the *Belmarsh* case as a 'landmark decision'⁸⁵. Moreover, this ruling sought to affirm that even during an era marked by terrorism, countries such as the UK would remain obligated to uphold the rule of law without any exemptions. Lord Hope elaborated this point in *A*, noting that the court's ruling was crucial to preserving the rights and freedoms of individuals, and implying that the actions taken were 'proportionate', regardless of how 'unpopular' they may be. ⁸⁶ Hence, this reinforces the argument that the provisions under Article 5 ECHR significantly influenced the government's response to the terrorist threat between 2001 and 2010, as clearly demonstrated in the *Belmarsh* precedent. This case ensured that the rule of law prevailed, regardless of the country's efforts to pursue derogation under Article 15 ECHR.

⁸⁰ Ibid.

⁸¹ Triggs, G., 'Lord Bingham: Of Swallows and International Law' (2009) Oxford Academic.

⁸² Le Sueur A., Sunkin M., Khushal Murkens J.E, '*Public Law*' (2019) 4 OUP.

⁸³ A and Others [2004] UKHL 56.

⁸⁴ Ibid.

⁸⁵ Ibid para 29.

⁸⁶ Lord Hope, A and Others [2004] UKHL 56.

Conclusion

Overall, this essay argues that while the provisions under Article 5 ECHR did not directly determine the UK's response to the terrorist threat between 2001-2005, they did play a pivotal role in shaping it. The evident breach of Article 5 by the Anti-Terrorism Act of 2001, as demonstrated in the case of A and Others v UK^{sr} , and reinforced by the court's decisive judgement, highlights Judiciary's ultimate authority to shape the government's response by rejecting its derogation order. Moreover, the rejection was grounded in the principle that the indefinite detention of these individuals constituted as disproportionate response to the perceived threat they posed, aligning with the provisions under Article 15. Therefore, the case of A^{ss} reflected upon the significance of upholding human rights, even in periods marked by extraordinary circumstances.

⁸⁷ Ibid.

⁸⁸ Ibid.

Bibliography

List of Books

Le Sueur A., Sunkin M., Khushal Murkens J.E., *Public Law'* (2019) 4 OUP.

Tomkins, A. 'Legislating Against Terror: The Anti-Terrorism Crime and Security Act 2001' (2002) Public Law 205-220.

Table of Cases

A and Others v Secretary of State for the Home Department [2004] UKHL 56. Chahal v United Kingdom (Application no. 22414/93) [1996] ECHR 54. McKay v. The United Kingdom [GC], no. 543/03, § 41, [2006] ECHR.

List of Journal Articles

Elliott, M. 'United Kingdom: The "War on Terror," u.k.-Style--the Detention and Deportation of Suspected Terrorists' (2010) 8 International Journal of Constitutional Law 131.

Triggs, G. Lord Bingham: Of Swallows and International Law' (2009) Oxford Academic 509-532.

List of Statutes

Anti-Terrorism, Crime and Security Act 2001, 21–23 (no longer in force). Suspects were free to leave the U.K. if they wished, but there were rarely "safe" third countries willing to accept them. European Convention of Human Rights

Unravelling the Enron Scandal: Analysing Failures, Regulatory Responses, and Ongoing Lessons in 2023

Aparna Alingal Mohandas Department of Law, University of Leicester, United Kingdom

In 2001, the Enron Corporation experienced a significant and disastrous collapse, creating shockwaves across corporate environments, legislative arenas, and financial sectors. This event marked the largest bankruptcy in American history, resulting in numerous criminal convictions and severely damaging investor trust. The Enron scandal went beyond a mere financial breakdown; it fundamentally transformed the way corporate governance and responsibility were perceived.

Enron's downfall was a significant corporate scandal that shook the business world. The company's deceptive accounting practices and eventual bankruptcy caused a devastating loss of jobs and billions of dollars in shareholder wealth. This event exposed the dark side of corporate greed, and highlighted the importance of transparency and ethical business Practices. The scandal also shed light on the pressing need for improved corporate governance, accounting standards, and regulatory oversight. It served as a stark reminder of the dangerous consequences that can arise from neglecting these crucial aspects.

Despite the passage of time, the Enron scandal remains a salient example of the critical importance of transparency, accountability, and ethical behaviour in corporate operations. It highlights the need for strong corporate governance mechanisms, effective regulatory frameworks, and independent oversight systems to maintain the integrity of business practices. In today's business landscape, the lessons from Enron's demise continue to resonate, urging us to promote good corporate governance, ethical conduct, and transparency. By doing so, fostering a healthy and sustainable business environment for all stakeholders. This essay critically examines the key factors that led to the downfall of Enron, evaluates the regulatory responses, and reflects on the enduring lessons for the business landscape in 2023.

Enron's Evolution: From Energy Trading Powerhouse to Financial Crisis

Enron's journey from a small pipeline company to a major player in the world of international energy trading began in 1985, under the leadership of Kenneth Lay. With the direction of Jeffrey Skilling in 1990, the company quickly became a trading powerhouse, by embracing cutting-edge financial models. Enron evolved to become a global provider of various energy and utility services, expanding its reach into the trading of metals, paper, financial contracts, and various other commodities. This expansion essentially transformed Enron from an energy

⁸⁹ Bethany Mclean and Peter Elkind, *The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron* (Portfolio 2013) 10.

⁹⁰ Adam Hayes, 'What Was Enron? What Happened and Who Was Responsible' (*Investopedia*28 March 2023) https://www.investopedia.com/terms/e/enron.asp>.

⁹¹ Loren Fox, *Enron: The Rise and Fall* (John Wiley and Sons 2003) 1 < https://www.google.co.uk/books/edition/Enron/xnHGdnfHiUgC?hl=en&gbpv=1&dq=history+of+enron-recompany&pg=PP9&printsec=frontcover accessed 18 December 2023.

company into a financial institution, igniting an era of exponential growth. From a revenue of \$4.6 billion in 1990, Enron surged to a staggering \$101 billion by 2000, making it the seventh-largest company in the United States, surpassing industry giants like IBM and Sony. Skilling's vision was to elevate Enron into a "trading giant", leveraging its asset-light model and expanding into broadband and water services. Noteworthy among his recruits was Andrew Fastow, who rapidly advanced within the organisation and eventually held the position of chief financial officer at Enron. While Skilling the development of the company's extensive trading operation, Fastow managed the financing of the enterprise through investments in progressively complex instruments. Amidst the dot-com boom, Enron introduced Enron Online as a specialised division for online trading. By 2001, this division conducted daily online transactions, estimating a value of approximately \$2.5 billion. Enron also directed investments toward the construction of a broadband telecommunications network to enable swift and high-speed trading. However, Enron's rapid growth outpaced its ability to fund it, leading to the creation of complex off-balance sheet financing vehicles. These vehicles relied on Enron's rising share price for their stability, creating a precarious financial situation.

Enron's transformation was crucial in transitioning the company's accounting from the conventional historical cost method to the more dynamic mark-to-market (MTM) approach.⁹⁵ The U.S. Securities and Exchange Commission (SEC) granted official approval for the transition in 1992. The company managed to give the impression of increased current profits by incorporating unrealized future gains from specific trading contracts into present income statements, employing mark-to-market accounting. Simultaneously, the company engaged in questionable practices, such as transferring problematic operations to special purpose entities (SPEs). These entities functioned like limited partnerships set up with external parties. Enron exploited SPEs by using them as repositories for its distressed assets, thereby keeping them off the company's books and understating the extent of its losses. Kenneth Lay continued to serve as chairman of Enron until February 2001, when Jeffrey Skilling took over as chief executive officer. However, Skilling's tenure was short-lived as he abruptly resigned in August, prompting Lay to take over as CEO. By October, the company shocked investors with the disclosure of a third-quarter loss of \$638 million and a reduction of \$1.2 billion in shareholder equity. Fastow's partnerships played a partial role in these financial setbacks. 97 Moreover, Enron faced challenges with the dot-com bubble burst, as its global power, broadband, and water ventures failed. Issues also emerged in the provision of electricity services in California. Jeff Skilling's resignation worsened the situation, causing a drop in share price and a decline in credit rating.

As Enron's financial situation deteriorated banks, suppliers, and customers distanced themselves from the company. Subsequently, the Securities and Exchange Commission (SEC) initiated an

⁹² Ibid.

⁹⁸ Peter Bondarenko, 'Enron Scandal', *Encyclopædia Britannica* (2023)

https://www.britannica.com/event/Enron-scandal accessed 18 December 2023.

⁹⁴ Ibid

⁹⁵ Troy Segal, 'Enron Scandal: The Fall of a Wall Street Darling' (*Investopedia*5 April 2023)

https://www.investopedia.com/updates/enron-scandal-summary/>.

⁹⁶ Ibid.

⁹⁷ Ibid (n5).

inquiry into the dealings between Enron and Fastow's Special Purpose Entities (SPEs). Arthur Andersen, the auditor for Enron, also faced allegations of document destruction. In December 2001, Enron declared bankruptcy, marking the largest corporate bankruptcy in U.S. history. This downfall also led to the demise of Arthur Andersen, as the auditing firm faced accusations of being involved in Enron's fraudulent activities. On June 15th 2002, Arthur Andersen was found guilty of deliberately destroying evidence, leading to the forfeiture of its public accounting license. This episode prompted the introduction of a multitude of new regulations and legislative measures, all aimed at augmenting the precision of financial reporting within publicly traded corporations.

The most salient of these measures, the Sarbanes-Oxley Act (2002), imposed severe penalties for destroying, altering, or fabricating financial records. The scandal also precipitated numerous individual criminal convictions. A significant number of the Enron executives faced legal ramifications; they were charged with different crimes and received prison sentences. The convictions of Kenneth Lay and Jeffrey Skilling on charges of conspiracy and fraud were particularly notable in the cases *United States of America v. Jeffrey K Skilling*, and *Jeffrey K.* Skilling v. United States. Additionally, in Arthur Andersen LLP v. United States (2005), 100 Andrew Fastow entered a guilty plea; he was sentenced to six years in prison and was released in 2011. In response to the scandal, numerous laws and regulations were enacted to improve the accuracy of financial reporting for publicly traded corporations. The pivotal Sarbanes-Oxley Act (2002) imposed strict penalties for financial record tampering and prohibited auditing firms from simultaneously providing consulting services to clients. The Enron case serves as a warning about uncontrolled corporate ambition, unethical accounting practices, and the perils of relying too much on off-balance sheet financing. The collapse underscored the necessity of strong corporate governance, transparency, and ethical behaviour in the financial industry.

What Went Wrong at Enron

The collapse of Enron can be ascribed to several key factors that encompass both accounting practices and the corporate culture, revealing a complex web of issues.

A. Accounting Manipulation

Use of Special Purpose Entities: Enron, alongside numerous other corporations leveraged "special purpose entities" (SPEs) to obtain capital or manage risk. The employment of SPEs, typified by limited partnerships involving external entities, enables a company to augment leverage and return on assets (ROA) without the necessity of reporting the associated debt on its balance sheet. ¹⁰¹ Enron, however, engaged in questionable financial methodologies, particularly through the utilisation of Special Purpose Entities (SPEs). Enron used SPEs to hide debt and manipulate accounting. When in need of quick funds, Enron created an SPE to secure a loan. The cash from the loan was then sent to Enron, concealing debt on its balance sheet.

⁹⁸ United States of America v Jeffrey K Skilling, 554 F.3d 529 (5th Cir 2009).

⁹⁹ Skilling v United States, 561 US 358 (2010)

¹⁰⁰ Arthur Andersen LLP v. United States 544 US 696 (2005).

¹⁰¹ C. W. Thomas, "The Rise and Fall of Enron," *Journal of Accountancy* (31 March 2002).

In April 2000, Enron expanded the hedging methodology previously employed for its Rhythms investment to encompass its merchant investment portfolio. ¹⁰² Similar to the Rhythms securities, the merchant investments, primarily consisting of high-technology and energy stocks, experienced a substantial increase in value, with price fluctuations being reflected quarterly in the company's financial statements. Once again, Enron's management viewed commercial hedging vehicles as something other than practical. Consequently, in the ensuing months, Enron established four new, significantly larger Special Purpose Entities (SPEs) named Talon, Timberwolf, Porcupine, and Bobcat (collectively referred to as the Raptors) to manage its hedging transactions. ¹⁰³

Mark-to-Market Accounting: Another contributory element was Enron's utilization of Mark-to-Market accounting. In the mid-1990s, Enron introduced "mark-to-market accounting" specifically for its energy trading business and applied it extensively to its trading transactions. This marked a departure from the previously employed historical cost accounting system. Mark-to-market rules, as adopted by Enron, necessitated the adjustment of outstanding energy-related or other derivative contracts (whether assets or liabilities) on the balance sheets after a particular quarter to fair market value. This adjustment entailed booking unrealized gains or losses to the income statement for the period. While this accounting method had the potential to inflate the reported earnings, it concurrently fostered a financially unpredictable environment, contingent on future market conditions. In Enron's case, the actual cash flows stemming from their assets significantly diverged from the initially reported cash flows submitted to the Securities and Exchange Commission (SEC) under the MTM method. Enron exploited this accounting approach to inflate its profits, thus playing a pivotal role in the eventual financial debacle.

B. Corporate Culture and Ethical Issues

Role of Executives: Several key figures within the executive team are frequently pinpointed as bearing responsibility for the collapse of Enron. Among these executives are Kenneth Lay, the founder and former Chief Executive Officer, Jeffrey Skilling, who succeeded Lay as the Chief Executive Officer, and Andrew Fastow, the erstwhile Chief Financial Officer. Some executives were directly involved in the deceptive accounting practices, while others turned a blind eye to warning signs. The absence of ethical leadership allowed malpractices to flourish, contributing to the deterioration of trust among investors and stakeholders.

¹⁰² Anthony H Catanach and Shelley C Rhoades, 'Enron: A Financial Reporting Failure?' (2003) 48 SSRN Electronic Journal.

¹⁰³ Ibid p 17.

¹⁰⁴ Ibid n(14).

¹⁰⁵ CFI Team, 'Enron Scandal' (*Corporate Finance Institute*26 October 2022)

https://corporatefinanceinstitute.com/resources/esg/enron-scandal/ accessed 23 December 2023.

¹⁰⁶ Adam Hayes, 'What Was Enron? What Happened and Who Was Responsible' (*Investopedia*28 March 2023)

<https://www.investopedia.com/terms/e/enron.asp#:~:text=What%20Did%20Enron%20Do%20That>accessed 23 December 2023.

Abuse of power was evident as Lay and Skilling wielded it ruthlessly, leading to a high turnover of vice-chairs who opposed Lay or posed a threat to his authority. Skilling eliminated corporate rivals and intimidated subordinates, while layoffs were executed without proper oversight. Excess privilege marked top management, with Lay expressing a desire to be "world-class rich." Executives enjoyed substantial perks, and Lay borrowed \$75 million from the company. Enron manipulated information to protect its interests, and the board was aware of questionable accounting tactics. Inconsistent treatment of internal and external constituents was observed. Employees were forced to invest in Enron stock, being blocked from selling during a stock decline and facing inadequate severance. Executives, however, could freely unload shares. Enron treated friends well, using political donations for preferential treatment. 107

Misplaced and broken loyalties were evident as Enron officials prioritized self-interest over stakeholders. Irresponsible behaviour included failing to take needed action and avoiding responsibility for ethical violations. Greed was a primary motivator, leading to unethical practices and inflated stock prices. Hubris and a culture of fear intensified Enron's problems, as this competitive evaluation system fostered cutthroat competition and stifling dissent.¹⁰⁸

Agency Conflicts: The Enron scandal brought to light significant agency conflicts arising from a considerable information imbalance between the management team and the company's investors. This asymmetry was likely fuelled by the personal incentives provided to the management team. In particular, C-suite executives like Skilling, often received compensation in the form of company stock and bonuses linked to achieving specific stock price targets. ¹⁰⁹

In the case of Enron, Skilling and his team were motivated to artificially inflate the stock price, anticipating that doing so would result in higher compensation for themselves. The scandal underscored the potential misalignment between corporate objectives and management incentives. In the aftermath of the Enron scandal, companies have become more vigilant about addressing agency issues and avoiding situations where corporate goals diverge from the interests of management.¹¹⁰

Emphasis on Stock Price: Enron's corporate culture placed an overwhelming emphasis on its stock price. Executives' incentives tied to stock performance led to a short-term focus, encouraging risky financial strategies and neglecting the long-term sustainability of the company. The ordinary employees were compelled to invest their retirement plans in Enron stock, and when the stock sharply declined, they were barred from divesting their shares at a crucial moment. In stark contrast, senior executives possessed the autonomy to sell their shares based on their discretion. Simultaneously, 500 officials were granted "retention bonuses" amounting to

¹⁰⁷ Craig Johnson, 'Enron's Ethical Collapse: Lessons for Leadership Educators' (2003) 2 Journal of Leadership Education 1 https://journalofleadershiped.org/wp-content/uploads/2019/02/2_1_Johnson.pdf accessed 23 December 2023.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid n(19) p 50.

¹¹⁰ Ibid n(19) p 52.

\$55 million, while workers who were laid off received only a fraction of the promised severance pay.¹¹¹

Lack of Transparency: Transparency was a significant casualty in Enron's corporate culture. The web of off-balance-sheet transactions, especially those involving SPEs, disguised—the true financial health of the company. Investors and analysts were denied crucial information, preventing them from making informed decisions. Enron's collapse was due to a harmful blend of financial manipulation, deceptive accounting, and a corporate culture focused on short-term gains rather than long-term sustainability. This combination led to a major corporate failure with widespread consequences.

Regulatory Responses

The repercussions of the Enron scandal prompted the introduction of new regulations within the financial system. The United States government enacted the Sarbanes-Oxley Act of 2002, designed to enhance corporate governance, financial reporting, and regulatory oversight. The legislation introduced a series of new mandates for public companies, encompassing the creation of an independent audit committee, obligatory certification of financial statements by CEOs and CFOs, and limitations on certain non-audit services offered by auditors.

Under the Sarbanes-Oxley Act (SOX), maintaining auditor independence is a crucial aspect. The legislation outlines conditions under which an auditor can lose independence. Specifically, if an employee of the audited company had a role in the audit engagement team during the cooling-off period and took part in financial accounting oversight, independence would be compromised. SOX classifies audit partners into lead and concurring roles, mandating rotation every five years, followed by a subsequent five-year time-out. Additionally, other audit partners are subject to rotation after seven years with a subsequent two-year time-out interval. ¹¹²

Concurrently, in the United Kingdom, the Financial Reporting Council (FRC) responded to the Enron scandal by introducing the Combined Code on Corporate Governance in 2003, which set out principles of corporate governance for listed companies, outlining expectations for their operational conduct. In 2010, a substantial revision of the code led to its replacement by the UK Corporate Governance Code, which now serves as a standardized set of guidelines for all companies with premium listings on the London Stock Exchange.

The Enron scandal prompted the implementation of new compliance measures, notably the Financial Accounting Standards Board (FASB) elevating the significance of ethical conduct. A significant change involves greater independence among company directors, minimizing the likelihood of attempts to manipulate profits and conceal debt. Independent directors now play a crucial role in overseeing audit companies and possess the authority to replace unethical

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¹¹¹ Ibid n(19) p 47.

¹¹² Nick A. Dauber Ms, Cpa, Jae K. Shim Phd, Joel G. Siegel Phd, Cpa, 'Sarbanes-Oxley Act of 2002', in Nick A. Dauber Ms, Cpa, Jae K. Shim Phd, Joel G. Siegel Phd, Cpa (eds), *The Complete CPA Reference (Wiley, 2012)* ch 13.

managers. Maintaining these measures is imperative to forestall potential financial scandals in large companies moving forward.

Reflection on Regulatory Response

The regulatory responses following the Enron scandal were instrumental in shaping the corporate landscape and addressing the systemic issues that contributed to the company's downfall. The Sarbanes-Oxley Act (SOX) emerged as a pivotal measure, introducing robust regulations aimed at enhancing transparency and accountability in financial reporting. SOX specifically targeted areas such as accounting standards, auditor independence, and corporate governance, introducing a comprehensive framework to prevent corporate misconduct. The establishment of independent audit committees, mandatory certification of financial statements by CEOs and CFOs, and restrictions on non-audit services by auditing firms were key provisions aimed at preventing corporate misconduct. Both the New York Stock Exchange ("NYSE") and NASDAQ have followed in the footsteps of Sarbanes-Oxley by implementing listed company obligations to establish and reveal codes of ethics for all members of the board, executive team, and staff. ¹¹³

However, there are divergent views on the effectiveness of these regulatory measures. Critics argue that the response, including the Sarbanes-Oxley Act, might have been misguided and driven by the desire for quick, visually appealing solutions in the aftermath of corporate scandals. Some critics argue that the strategies commonly employed to enhance a company's ethical conduct, such as codes of conduct and compliance programs, are not only ineffective, but also carry a hefty price tag. ¹¹⁴ In contrast, some assert that these measures might even contribute to an increase in unlawful or unethical actions as companies could simply adopt a compliance program to receive the reduced sentence benefits outlined in the sentencing guidelines, without making any real changes to the overall structure and operations of the organization. ¹¹⁵ Some provisions are seen as mere political gestures without substantial deterrent effects. This analysis does not seek to entirely reconsider the Sarbanes-Oxley Act but instead focuses on its limitations and areas where regulation might have fallen short, contemplating the need for new regulatory approaches to address these deficiencies. ¹¹⁶

Simultaneously, the public's reaction to the Enron scandal prompted a significant shift in business priorities, marked by a pronounced emphasis on Corporate Social Responsibility (CSR). The heightened awareness towards ethical considerations in business practices led to a broader focus on responsible conduct and active engagement with stakeholders. This shift recognises the interconnectedness of businesses with society and the importance of ethical behaviour beyond mere financial performances. Together, these regulatory responses reflected a concerted effort to address the ethical and governance lapses that contributed to Enron's collapse. The enduring

¹¹⁸ David Hess, 'A Business Ethics Perspective on Sarbanes-Oxley and the Organizational Sentencing Guidelines' (2007) 105 Michigan Law Review 1781 < https://www.jstor.org/stable/40041566> accessed 25 December 2023.

¹¹⁴ Ibid n(25) p 3.

¹¹⁵ Ibid n(25) p 4.

¹¹⁶ Steven L. Schwarcz and Alex Bartlow, 'Reexamining Enron's Regulatory Consequences' (2023) NYU Annual Survey of American Law (forthcoming Fall 2023 symposium issue on "Business and Financial Crimes")

impact of these measures continues to influence corporate behaviour, underscoring the perpetual relevance of the Enron case in shaping regulatory frameworks and fostering a culture of responsibility and transparency in the business world.

Academics argued that the regulatory reforms instituted post the Enron scandal have fallen short in effectively curbing corporate fraud. The Madoff scandal is known to be one of the egregious financial frauds ever seen in the world of capitalism. If the company had adhered to the regulations set out by the Sarbanes-Oxley Act, the scandal could have been avoided. The regulatory response, however, is an evolving process, and constant vigilance is essential to adapt to emerging challenges and avert future corporate scandals.

Enron's Bankruptcy and Impact

The Enron scandal had extensive repercussions for both the employees and shareholders of the company. The disclosure of the scandal resulted in a sharp decline in Enron's stock price, eventually leading to the company filing for bankruptcy. This outcome had a devastating impact on many employees who had heavily invested in Enron's stock, causing them to lose their life savings. ¹¹⁹ By late November 2001, Enron's stock value has plummeted to less than \$1 per share, a drastic decline from its peak of \$90.75 in mid-2000. The company faced an estimated \$23 billion in liabilities from outstanding debts and guaranteed loans, fuelling speculation about the potential of bankruptcy. Enron Europe, overseeing Enron's operations in Continental Europe, became the first to declare bankruptcy on November 30. The board unanimously voted the following day to file for Chapter 11 protection in New York court for the entire company. ¹²⁰

Enron's financial collapse, involving total assets amounting to \$63.4 billion, marked the most extensive corporate bankruptcy in U.S. history until the subsequent WorldCom scandal a year later. The aftermath included the loss of approximately 4,000 jobs, and nearly two-thirds of the 15,000 employees experienced the devaluation of their savings plans. These plans, predominantly composed of Enron stock purchased at \$83 at the onset of the year, ultimately lost substantial value. The consequences extended to Arthur Andersen, Enron's accounting firm, which had accrued \$52 million in audit and consulting fees in 2000, comprising more than a quarter of the total audit fees generated by clients in the company's Houston office. Andersen faced allegations of failing to maintain adequate standards in its audits of Enron's financial records and drew criticism for prioritizing financial remuneration over conducting a thorough examination of Enron's accounting practices.¹²¹

¹¹⁷ JL Admin, 'Relevance of the Sarbanes-Oxley Act of 2002 to the Madoff Scandal' (Jotted Lines, 12 April 2013) https://jottedlines.com/relevance-of-the-sarbanes-oxley-act-of-2002-to-the-madoff-scandal/ accessed 25 December 2023.

¹¹⁸ Ibid n(28).

¹¹⁹ Philip Meagher, 'The Enron Scandal: A Comprehensive Overview' (*Learnsignal* January 2023) https://www.learnsignal.com/blog/the-enron-scandal-overview/ accessed 24 December 2023.

¹²⁰ International banker, 'The Enron Scandal (2001)' (*International Banker*29 September 2021) https://internationalbanker.com/history-of-financial-crises/the-enron-scandal-2001/ accessed 24 December 2023.

¹²¹ Ibid n(25).

In terms of legal consequences, Enron and its executives faced severe charges. Top executives, including Kenneth Lay and CEO Jeffrey Skilling, were charged with fraud and insider trading. Kenneth Lay was found guilty on all counts, but he passed away before sentencing. Jeffrey Skilling initially received a 24-year prison sentence, which was later reduced to 14 years. Other executives, such as CFO Andrew Fastow, also faced criminal charges and served prison time. Beyond the legal implications, the Enron scandal left a significant mark on the energy industry and the broader business landscape. The collapse of Enron, once a giant in the industry, had a significant impact on investor confidence, contributing to a decline in the overall stock market. The scandal also sparked concerns about the integrity of the accounting profession and the need for enhanced regulation of corporate governance practices. 122

Contrasting Corporate Scandals: A Comparative Study

In recent years, the corporate arena has been afflicted by numerous scandals that display striking similarities, including issues with financial wrongdoing, a lack of transparency, and ethical standards. The declaration of Lehman's insolvency sent shockwaves through the financial world, resulting in a staggering drop in the Dow Jones Industrial Average. As the panic spread, money market accounts saw a surge of withdrawals, putting essential business operations at risk. In response, a plea for a substantial \$700 billion rescue package was made. Long-term consequences of the Lehman Brothers bankruptcy included higher unemployment rates, more student debt, postponed family formation, and slower wealth accumulation for millennials than for earlier generations. The Dodd-Frank Wall Street Reform Act, the most extensive financial reform since the Glass-Steagall Act, was made possible as a result of Lehman Brothers' bankruptcy. The objectives of Dodd-Frank were to control systemic risks, create oversight procedures, and prevent a recurrence of the financial crisis. 124

One of the worst environmental catastrophes in recorded history was the Deepwater Horizon oil spill. On April 20, 2010, the Deepwater Horizon rig exploded in the Gulf of Mexico, killing eleven people, and resulting in an enormous oil spill that continued for 87 days. ¹²⁵ The local communities, wildlife, and environment were severely impacted by the spill. BP, the corporation in charge of the rig, failed to uphold its corporate social responsibility, which led to the disaster. Several things led to the explosion, such as bad managerial choices, insufficient safety precautions, and a dearth of regulatory supervision. To avert such tragedies in the future, the catastrophe made clear the necessity for stricter laws and improved corporate governance. A study by Cherry and Sneirson (2010), ¹²⁶ suggested safeguards and changes aimed at promoting corporate social responsibility, combating greenwashing, and ensuring accountability for consumer and investor fraud involving corporate social responsibility. Suppressing false claims

¹²² Ibid n(28).

¹²⁸ Kimberly Amadeo, 'How the 2008 Lehman Brothers Collapse Affects You Today' (*The Balance*29 January 2022) < https://www.thebalancemoney.com/lehman-brothers-collapse-causes-impact-4842338 accessed 26 December 2023.

¹²⁴ Ibid n(36).

¹²⁵ Miriam A Cherry and Judd F Sneirson, 'Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing after the BP Oil Disaster' (*papers.ssrn.com*1 September 2010)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670149 accessed 26 December 2023.

¹²⁶ Ibid n(38).

of corporate social responsibility may be a major responsibility of the Bureau of Consumer Financial Protection, which was established by the Dodd-Frank Act.

Another notable result of the failure of corporate governance was the Volkswagen emissions scandal. By installing software to rig emissions tests, the company was able to provide inaccurate information about how its cars would affect the environment.¹²⁷ Poor management choices, insufficient safety precautions, and a lack of regulatory supervision led to the scandal.¹²⁸ The company's governance culture was negatively impacted by both management's cosy relationship with labour leaders and its authoritarian leadership style.¹²⁹ Key decision-makers, such as executives, shareholders, and regulators, lacked accountability as a result of this culture of complacency.¹³⁰ Examination of the scandal has brought to light internal conflicts among pivotal staff, suboptimal decision-making practices, and a limited aversion to risk, potentially contributing to the unfolding of the scandal. The impact of performance-based incentives may have played a role in prompting the organization to push employees to achieve outcomes irrespective of the associated costs. The scandal highlighted the need for stronger regulations and better corporate governance to prevent similar incidents in the future. A study by John Armour (2016)¹³¹ proposed reforms and protections designed to increase corporate social responsibility, root out greenwashing, and recognize liability frauds on consumers and investors.

Lessons Learned and Their Relevance in 2023

The Enron scandal offers valuable lessons for the business world. One crucial takeaway is the significance of corporate transparency and accountability. The scandal underscores the risks associated with concealing financial information and employing dubious accounting methods to mislead investors. Companies and their leaders should prioritize openness and honesty about their financial well-being, with a corresponding responsibility for any fraudulent actions. Another lesson involves safeguarding shareholder value. The Enron executives involved in fraud and insider trading prioritized personal gain at the expense of the company's shareholders. It emphasizes the need for companies to act in the best interests of shareholders, focusing on long-term value rather than short-term gains.¹³²

Enron's focus on its stock price played a pivotal role in its downfall, as the company used its stock as collateral for various financial transactions. Despite having a talented Board of Directors, they were largely passive, yielding to Enron executives without adequate scrutiny. The Board,

¹²⁷ John Armour, 'Volkswagen's Emissions Scandal: Lessons for Corporate Governance? (Part 1)' (Ox.ac.uk17 May 2016) < https://blogs.law.ox.ac.uk/business-law-blog/blog/2016/05/volkswagen%E2%80%99s-emissions-scandal-lessons-corporate-governance-part-1> accessed 26 December 2023.

¹²⁸ Ibid n(40).

Matthew T Bodie, 'Worker Participation, Sustainability and the Puzzle of the Volkswagen Emissions Scandal' (Beate Sjåfjell and Christopher M Bruner eds, *Cambridge University Press*2019) 246 https://www.cambridge.org/core/books/cambridge-handbook-of-corporate-law-corporate-governance-and-sustainability/worker-participation-sustainability-and-the-puzzle-of-the-volkswagen-emissions-scandal/F253B2456C6783DD49089F5BAC1F8358 accessed 26 December 2023.

¹³⁰ Ibid n(42).

¹³¹ Ibid n(40).

¹³² Ibid n(28).

handpicked by Lay, owed a duty to him, leading to a lack of effective oversight. Under Skilling's leadership, Enron shifted from a pipeline company to a trading giant, fostering a culture of intelligence, creativity, and risk-taking but also tolerating infighting and manipulation. The culture, driven by greed as a motivator, allowed rule-breaking, as long as it contributed to the company's profits. The Board even approved Fastow's side business to buy assets from Enron. This ethical erosion, described by Enron's whistle-blower, Sherron Watkins, contributed to the company's failure. The pressure to achieve, coupled with the ability to break rules for profit and hubris, played a significant role in Enron's collapse. The takeaway is that companies adhering to rules, enforcing ethical codes, and having robust compliance programs are sustainable and ethically sound. Enron remains relevant today as a cautionary tale, emphasizing the importance of accountability and integrity in decision-making.¹³³

Lastly, the Enron scandal emphasizes the necessity for robust regulation and oversight in the business realm. Post-Enron reforms, such as the Sarbanes-Oxley Act, have contributed to enhancing corporate governance and financial reporting. While progress has been made, ongoing vigilance from regulators and lawmakers remains essential to prevent future corporate scandals.¹³⁴

Conclusion

The Enron scandal was a result of a combination of factors: a lack of transparency, weak corporate governance, and a culture of greed and corruption. The company utilized financial intricacies to disguise debt and boost earnings, ultimately resulting in its demise. Additionally, the scandal unveiled conflicts of interest in auditor-client relations and regulatory oversight deficiencies. Enron's collapse marked a pivotal moment, alerting investors and the business community, by emphasizing essential lessons on corporate transparency and accountability. It highlighted the need to protect shareholder value, making it a top priority for investors. Additionally, the scandal underscored the pivotal role of stringent regulations in preventing corporate fraud, leading regulatory bodies to reinforce their oversight mechanisms. These lessons learned from the Enron scandal are instrumental in reshaping the business landscape and fostering a more transparent, responsible, and ethically driven environment for the future.

¹³³ Michael E. Murphy, 'Lessons Learned from Enron Still Relevant Today after 20 Years' (2022) https://www.linkedin.com/pulse/lessons-learned-from-enron-still-relevant-today-20-michael-e-/ accessed 25 December 2023.

¹³⁴ Ibid n(28).

Table of Authorities

Cases:

United States of America v Jeffrey K Skilling, 554 F.3d 529 (5th Cir 2009). Skilling v United States, 561 US 358 (2010).

Arthur Andersen LLP v. United States, 544 US 696 (2005).

Bibliography

Books:

McLean, B and Elkind, P, The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron (Portfolio 2013)

Journals:

Bodie MT, 'Worker Participation, Sustainability and the Puzzle of the Volkswagen Emissions Scandal' (Beate Sjåfjell and Christopher M Bruner eds, Cambridge University Press 2019) 246 Catanach AH and Rhoades SC, 'Enron: A Financial Reporting Failure?' (2003) 48 SSRN Electronic Journal

Hess D, 'A Business Ethics Perspective on Sarbanes-Oxley and the Organizational Sentencing Guidelines' (2007) 105 Michigan Law Review 1781

Johnson, C, 'Enron's Ethical Collapse: Lessons for Leadership Educators' (2003) 2 Journal of Leadership Education 1

Schwarcz, S L and Bartlow, A, 'Reexamining Enron's Regulatory Consequences' (2023) NYU Annual Survey of American Law (forthcoming Fall 2023 symposium issue on "Business and Financial Crimes")

Online Websites:

Amadeo K, 'How the 2008 Lehman Brothers Collapse Affects You Today' (The Balance 29 January 2022) https://www.thebalancemoney.com/lehman-brothers-collapse-causes-impact-4842338 accessed 26 December 2023.

Armour J, 'Volkswagen's Emissions Scandal: Lessons for Corporate Governance? (Part 1)' (Ox.ac.uk 17 May 2016) https://blogs.law.ox.ac.uk/business-law-blog/blog/2016/05/volkswagen%E2%80%99s-emissions-scandal-lessons-corporate-governance-part-1">https://blogs.law.ox.ac.uk/business-law-blog/blog/2016/05/volkswagen%E2%80%99s-emissions-scandal-lessons-corporate-governance-part-1">https://blogs.law.ox.ac.uk/business-law-blog/blog/2016/05/volkswagen%E2%80%99s-emissions-scandal-lessons-corporate-governance-part-1">https://blogs.law.ox.ac.uk/business-law-blog/blog/2016/05/volkswagen%E2%80%99s-emissions-scandal-lessons-corporate-governance-part-1">https://blogs.law.ox.ac.uk/business-law-blog/blog/2016/05/volkswagen%E2%80%99s-emissions-scandal-lessons-corporate-governance-part-1">https://blogs.law.ox.ac.uk/business-law-blog/blog/2016/05/volkswagen%E2%80%99s-emissions-scandal-lessons-corporate-governance-part-1">https://blogs.law.ox.ac.uk/business-law-blog/blog/2016/05/volkswagen%E2%80%99s-emissions-scandal-lessons-corporate-governance-part-1">https://blogs.law.ox.ac.uk/business-law-blog/blog/2016/05/volkswagen%E2%80%99s-emissions-scandal-lessons-corporate-governance-part-1">https://blogs.law.ox.ac.uk/business-law.ox.ac.uk/business-law-blog/blog/2016/05/volkswagen%E2%80%99s-emissions-scandal-lessons-corporate-governance-part-1">https://blogs.law.ox.ac.uk/business-law-blog/blog/2016/05/volkswagen%E2%80%99s-emissions-scandal-lessons-corporate-governance-part-1">https://blogs.law.ox.ac.uk/business-law-blog/blog/2016/05/volkswagen%E2%80%99s-emissions-scandal-lessons-blog/blog/2016/05/volkswagen%E2%80%99s-emissions-scandal-lessons-blog/2016/05/volkswagen%E2%80%99s-emissions-blog/2016/05/volkswagen%E2%80%99s-emissions-blog/2016/05/volkswagen%E2%80%99s-emissions-blog/2016/05/volkswagen%E2%80%99s-emissions-blog/2016/05/volkswagen%E2%80%99s-emissions-blog/2016/05/volkswagen%E2%80%99s-emissio

CFI Team, 'Enron Scandal' (Corporate Finance Institute 26 October 2022) https://corporatefinanceinstitute.com/resources/esg/enron-scandal/ accessed 23 December 2023.

Cherry MA and Sneirson JF, 'Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing after the BP Oil Disaster' (papers.ssrn.com 1 September 2010) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670149 accessed 26 December 2023. Hayes A, 'What Was Enron? What Happened and Who Was Responsible' (Investopedia28 March

accessed 23 December 2023

International banker, 'The Enron Scandal (2001)' (International Banker 29 September 2021)https://internationalbanker.com/history-of-financial-crises/the-enron-scandal-2001/ accessed 24 December 2023.

Meagher P, 'The Enron Scandal: A Comprehensive Overview' (Learnsignal 6 January 2023) https://www.learnsignal.com/blog/the-enron-scandal-overview/ accessed 24 December 2023.

Hayes, A, 'What Was Enron? What Happened and Who Was Responsible' (Investopedia, 28 March 2023) https://www.investopedia.com/terms/e/enron.asp accessed 28 March 2023.

Fox, L, Enron: The Rise and Fall (John Wiley and Sons 2003) https://www.google.co.uk/books/edition/Enron/xnHGdnfHiUgC?hl=en&gbpv=1&dq=history+of+enron+company&pg=PP9&printsec=frontcover accessed 18 December 2023.

Bondarenko, P, 'Enron Scandal', Encyclopædia Britannica (2023) https://www.britannica.com/event/Enron-scandal accessed 18 December 2023.

Segal, T, 'Enron Scandal: The Fall of a Wall Street Darling' (Investopedia, 5 April 2023) https://www.investopedia.com/updates/enron-scandal-summary accessed 5 April 2023.

JL Admin, 'Relevance of the Sarbanes-Oxley Act of 2002 to the Madoff Scandal' (Jotted Lines, 12 April 2013) https://jottedlines.com/relevance-of-the-sarbanes-oxley-act-of-2002-to-the-madoff-scandal/ accessed 25 December 2023.

Murphy, M E, 'Lessons Learned from Enron Still Relevant Today after 20 Years' (2022) https://www.linkedin.com/pulse/lessons-learned-from-enron-still-relevant-today-20-michael-e-accessed 25 December 2023.

Beyond Profit: Unveiling the Layers of Corporate Social Responsibility-Navigating Theory, Evolution, Impact and Effectiveness

Nimasha Hettiarachchi

Department of Law, University of Leicester, United Kingdom

I. Introduction

Corporate Social Responsibility (CSR) is crucial to modern business practices. It requires companies to consider the social and environmental impact of their decisions when interacting with stakeholders. CSR aims to strike a balance between financial success, protecting the environment, and fulfilling social obligations while addressing the expectations of both shareholders and the wider community.¹³⁵

Thus, the concept of CSR goes beyond the simple fulfilment of legal and financial duties for a company. Rather, it is a multifaceted approach to business that prioritises ethical conduct, social betterment, and environmental preservation, while maintaining profitability. In essence, it is a self-regulating model that demonstrates a commitment to benefiting society and the planet.

In modern business, CSR has become crucial, demonstrating a dedication to ethical, social, and environmental factors. This essay delves into the intricacies of CSR, tracing its development and examining its role as a corporate governance tool. An assessment of its effectiveness in promoting sustainable business practices, engaging stakeholders, and creating long-term value is conducted, drawing on case studies, research findings, and theories. By thoroughly evaluating the impact of CSR on corporate governance, potential obstacles, drawbacks, and opportunities for enhancement are thoroughly examined.

II. Theoretical Framework of Corporate Social Responsibility

Understanding the concept of CSR is crucial in comprehending the rationale, implementation, and boundaries of socially responsible actions within companies. These theories shed light on why businesses choose to partake in CSR endeavours.

Institutional Theory, proposed by K. Davis in 1971, emphasises that businesses operate within a broader social framework, rendering them accountable beyond mere profit maximisation¹³⁶. This theory underscores the impact of external influences, societal norms, and expectations on corporate actions, providing a perspective beyond traditional economic reasons for CSR engagement.

<u>3eada556f2c82b951c467be415f62411.r9.cf2.rackcdn.com/Davis-1973-ForAnd%20Against.pdf</u>

¹³⁵ UNIDO, 'What Is CSR?' (United Nations Industrial Development Organization 2023) https://www.unido.org/our-focus/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/corporate-social-responsibility-market-integration/what-csr

¹³⁶ Keith Davis, 'The Case for and against Business Assumption of Social Responsibilities.' (1973) 16 Arizona State University http://57ef850e78feaed47e42-

In 1975, a concept known as Legitimacy Theory emerged. According to this theory, organisations strive to gain society's approval and recognition by conforming to established norms and expectations. In terms of CSR, implementing ethical and socially responsible practices can enhance an organisation's perceived legitimacy, resulting in numerous benefits¹³⁷.

By 1976, Agency Theory concept was developed to examine the impact of the principal-agent dilemma on CSR efforts within corporate governance. The competing goals of shareholders, who strive to maximise value, and managers, who may prioritise long-term sustainability, social impact, and personal reputation, can create conflicts. These conflicts can arise when managers focus on CSR initiatives that enhance their reputation, even if they do not directly benefit shareholders.

In 1984, Edward Freeman introduced Stakeholder Theory, which emphasises the fundamental responsibility that businesses have towards multiple stakeholders, including shareholders, employees, customers, suppliers, communities, and the environment¹³⁸. This framework emphasises the vital role of businesses in recognizing and fulfilling the diverse needs and concerns of all stakeholders as a means of achieving successful CSR initiatives.

Collectively, these theories provide a robust understanding of the theoretical underpinnings of CSR. They encompass societal expectations, legitimacy, agency conflicts, and the crucial aspect of balancing stakeholder interests in corporate decision-making.

III. Emergence and Development of the Concept of Corporate Social Responsibility

The origins of CSR can be traced back to the philanthropy of affluent business leaders before the Industrial Revolution. In the 1800s, influential figures such as British social reformer Robert Owen¹³⁹ set a precedent with their investments in communities. However, it was American economist Howard Bowen who significantly impacted the evolution of CSR with his notable book "Social Responsibilities of the Businessman"¹⁴⁰ published in 1953. Bowen's message was clear: businesses should prioritise moral values and the well-being of their stakeholders, rather than solely pursuing monetary gain.

During the 1960s and 70s, there was a significant rise in social and environmental movements, shedding light on the detrimental effects of corporate actions. As a result, the concept of social responsibility became more prevalent in mainstream thinking. In 1991, Archie Carroll, introduced a crucial model known as the CSR Pyramid, delineating four levels of responsibility-Economic, Legal, Ethical, and Philanthropic. This provided a fundamental framework for comprehending and incorporating CSR into business practices.

¹³⁷ Mark C Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20 The Academy of Management Review 571.

¹³⁸ B Parmar and others, '(PDF) Stakeholder Theory: The State of the Art' (ResearchGate2010) https://www.researchgate.net/publication/235458104 Stakeholder Theory The State of the Art Douglas F Dowd, 'Robert Owen | British Social Reformer', Encyclopædia Britannica (2019) https://www.britannica.com/biography/Robert-Owen

¹⁴⁰ Archie B Carroll, 'Carroll's Pyramid of CSR: Taking Another Look' (2016) 1 International Journal of Corporate Social Responsibility 1 https://jcsr.springeropen.com/articles/10.1186/s40991-016-0004-6.

According to Archie B. Carroll¹⁴¹, a leading expert in CSR, the cornerstone of this model lies in the concept of Economic Responsibility, acknowledging the importance of a company's financial success and commitment to creating value for its shareholders. This serves as the foundation for fulfilling other CSR obligations. Progressing up the pyramid, the subsequent level focuses on Legal Responsibility, which mandates that an organisation adhere to all relevant laws and regulations. This encompasses everything from tax and employment laws to health and safety standards and anti-competitive practices¹⁴².

However, the ultimate goal of CSR is to reach the highest level of ethical responsibility, urging businesses to surpass legal requirements and make decisions that align with moral principles, such as promoting environmentally sustainable practices¹⁴⁸. At the summit of the pyramid lies Philanthropic Responsibility, promoting active participation in improving society and the environment, whether through supporting community projects or contributing to charitable causes. It is important to note that these duties are not sequential, but must be fulfilled simultaneously, with adaptability depending on varying situations and industries. This approach has been proven to successfully fulfil comprehensive CSR goals.

Throughout history, CSR has faced criticism, prompting the need for revisions and enhancements. In 1997, John Elkington introduced the Triple Bottom Line concept¹⁴⁴, urging businesses to measure success not only through financial gain, but also by their impact on society and the environment. This holistic approach urged companies to actively contribute towards making a positive difference in both social and environmental concerns¹⁴⁵.

In the late 1990s and early 2000s, a new approach emerged named Strategic CSR, which aimed to align CSR initiatives with core business objectives to gain a competitive advantage ¹⁴⁶. Advocated by Werther and Chandler, this mindset prioritised managing companies for the benefit of stakeholders, while also creating both economic and social value ¹⁴⁷. Expanding on this idea, Michael Porter and Mark Kramer introduced the concept of Shared Value ¹⁴⁸ in 2011, urging businesses to not only generate profits, but also address important social and environmental concerns, resulting in mutual benefits.

¹⁴¹ Ibid

¹⁴² Ibid

¹⁴³ Ibid

John Elkington, 'Accounting for the Triple Bottom Line' (1998) 2 Measuring Business Excellence 18 https://www.johnelkington.com/archive/TBL-elkington-chapter.pdf.

John Elkington, 'Accounting for the Triple Bottom Line' (1998) 2 Measuring Business Excellence 18 https://www.johnelkington.com/archive/TBL-elkington-chapter.pdf

¹⁴⁶ Michael Porter and Mark Kramer, 'Strategy and Society: The Link between Competitive Advantage and Corporate Social Responsibility' (Harvard Business ReviewDecember 2006) https://hbr.org/2006/12/strategy-and-society-the-link-between-competitive-advantage-and-corporate-social-responsibility

William B Werther and David Chandler, 'Strategic Corporate Social Responsibility as Global Brand Insurance' (2005) 48 Business Horizons 317.

Mark R Kramer and Marc W Pfitzer, 'The Ecosystem of Shared Value' (Harvard Business Review October 2016) https://hbr.org/2016/10/the-ecosystem-of-shared-value

In 2011, Wayne Visser presented a compelling critique of the existing approach to CSR, advocating instead for Transformative CSR¹⁴⁹, which is often referred to as CSR 2.0 or Systemic CSR. Unlike the traditional Strategic CSR model, this transformative approach recognises the intricate interconnections between society and ecosystems, adjusting its strategies accordingly to achieve the greatest impact for good. With this innovative approach, the goal is to surpass mere compliance and inspire businesses to become catalysts for positive change, while empowering individuals to play a crucial role in addressing pressing social, environmental, and ethical dilemmas.

IV. Legal and Regulatory Frameworks Supporting CSR and their effectiveness

Presently, legal and regulatory frameworks play a critical role in fostering CSR and advancing sustainable business practices at International, Regional, and National corporate platforms. These frameworks establish a fair and equitable business environment, effectively encouraging responsible conduct and holding corporations responsible for their societal and environmental footprints. These frameworks can be divided into two categories namely, Hard Laws and Soft Laws¹⁵⁰.

- i. Hard Laws, such as Mandatory Disclosure Requirements, require companies to publicly disclose their social and environmental impacts, promoting transparency and accountability. Notable examples include the EU Non-Financial Reporting Directive ¹⁵¹, the UK Companies Act ¹⁵², and the French Grenelle II Law ¹⁵³. Some hard laws include Specific CSR Regulations as well, for instance, the EU Waste Framework Directive ¹⁵⁴, the US Dodd-Frank Act ¹⁵⁵ which pertains to conflict minerals, and the UK Modern Slavery Act ¹⁵⁶.
- ii. Soft Law encompasses various Voluntary Guidelines and Principles aimed to promote responsible corporate conduct. These frameworks catalyse ethical and sustainable business practices, urging companies to embody socially responsible behaviours.

¹¹⁹ Wayne Visser, 'The Future of CSR: Towards Transformative CSR, or CSR 2.0' (2018) 1 SSRN Electronic Journal.

¹⁵⁰ Min Yan, 'Corporate Social Responsibility versus Shareholder Value Maximization: Through the Lens of Hard and Soft Law' (Queen Mary University of London 2024)

https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/61701/Yan%20Corporate%20Social%20

European Parliament, 'Non-Financial Reporting Directive' (2021)

https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/654213/EPRS_BRI(2021)654213_EN.pdf businesslaw, 'CSR Duty under Corporate Law in the UK' (360 Business Law5 September 2022)

https://www.360businesslaw.com/blog/csr/
Grenelle II - Climate Change Laws of the World 2010 (climate-lawsorg).

¹⁵⁴ European Commission, 'Waste Framework Directive' (environment.ec.europa.eu2022) https://environment.ec.europa.eu/topics/waste-and-recycling/waste-framework-directive en

¹⁵⁵ Celia R Taylor, 'New Disclosure Requirements under the Dodd-Frank Financial Reform Act: A Move towards Greater Transparency' (2012) 9 European Company Law https://kluwerlawonline.com/journalarticle/European+Company+Law/9.2/EUCL2012011 accessed 3 January 2024.

¹⁵⁶ Anne-Marie Barry , 'The UK Modern Slavery Act and Corporate Responsibility: Progress and Challenges' (<u>www.stmarys.ac.uk</u>2023)

https://www.stmarys.ac.uk/research/centres/bakhita/research/articles/corporate-responsibility.aspx

Notable instances include the UN Global Compact¹⁵⁷, OECD Guidelines for Multinational Enterprises¹⁵⁸, and ISO 26000 Guidance on Social Responsibility¹⁵⁹. Additionally, certain Soft Laws manifest through Multi-Stakeholder Initiatives, such as the Global Reporting Initiative.

Thus, Hard law provides motivation and deterrents through the fear of being held accountable, whereas Soft law relies on building a strong reputation to encourage adherence¹⁶⁰. In many cases, companies may receive recognition for adhering to soft law or face a negative impact on their reputation for failing to comply. Therefore, both these Hard and Soft legal and regulatory frameworks enhance the effectiveness of the CSR mechanism. Both are implemented at the International, Regional, as well as in National levels to show the effective results of the CSR mechanism.

i. Effectiveness of International Frameworks Supporting CSR

These frameworks establish many legal and regulatory frameworks to support the effectiveness of CSR initiatives. For instance, the United Nations Guiding Principles on Business and Human Rights set a standard for preventing and addressing human rights abuses in the business world¹⁶¹. This critical framework calls for states to uphold human rights, businesses to respect them, and victims to have access to remedies when necessary. Additionally, the OECD Guidelines for Multinational Enterprises promote responsible business practices across various areas, including labour, the environment, human rights, bribery, consumer protection, and science and technology¹⁶².

Moreover, the International Labour Organization implements Conventions that serve as global benchmarks for labour practices, addressing crucial areas such as freedom of association, collective bargaining, forced labour, child labour, discrimination, and occupational safety and health.

ii. Effectiveness of Regional Frameworks supporting CSR

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¹⁵⁷ UN Global Compact, 'CSR-In-Action (Corporate Social Responsibility Advancement and Awareness Initiative)' (unglobalcompact.org2022) https://unglobalcompact.org/what-is-gc/participants/12852-CSR-in-Action-Corporate-Social-Responsibility-Advancement-and-Awareness-Initiative-

^{1.58} Kathryn Gordon, 'The OECD Guidelines and Other Corporate Responsibility Instruments' [2001] OECD Working Papers on International Investment http://www.oecd.org/corporate/mne/WP-2001_5.pdf

¹⁵⁹ American Society for Quality, 'What Is ISO 26000? Social Responsibility Guidance Standard | ASQ' (asq.org2023) https://asq.org/quality-resources/iso-26000#:">: itext=ISO%2026000%20aims%20to%3A

Min Yan, 'Corporate Social Responsibility versus Shareholder Value Maximization: Through the Lens of Hard and Soft Law' (Queen Mary University of London 2024)

https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/61701/Yan%20Corporate%20Social%20

¹⁶¹ United Nations, 'Guiding Principles on Business and Human Rights Implementing the United Nations "Protect, Respect and Remedy" Framework' (United Nations 2011)

https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

102 OECD, OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Publishing 2023).

Regional Frameworks, such as those established by the European Union, and initiatives like the Corporate Sustainability Reporting Directive, mandate that prominent corporations disclose their sustainability efforts and their impacts concerning environmental, social, and governance factors ¹⁶³. Additionally, Africa's Agenda 2063, championed by the African Union, presents a visionary blueprint for sustainable development on the continent, focusing on societal inclusivity, economic growth, and environmental sustainability ¹⁶⁴. Similarly, the ASEAN CSR Network ¹⁶⁵ works towards promoting exemplary CSR practices in Southeast Asia by fostering partnerships, sharing knowledge, and building capacities across the region.

iii. Effectiveness of National Frameworks supporting CSR

In today's world, countries are increasingly enacting laws to respect CSR initiatives, combat modern slavery, and uphold human rights and environmental protection in supply chains. Examples of this include the UK's Modern Slavery Act¹⁶⁶, which obligates businesses to publicly disclose their actions to prevent modern slavery in all aspects of their operations and supply chains. Similarly, in France, the Duty of Vigilance Law¹⁶⁷ requires large companies to proactively identify and address human rights and environmental concerns within their supply chains. Additionally, India's Companies Act¹⁶⁸ requires large companies to allocate funding for CSR initiatives and to report on these efforts, underscoring the global call for responsible business practices.

V. Components of CSR and their effectiveness in reaching the desired CSR goals.

CSR is an integral business strategy that strives to promote sustainable development by actively addressing the impact of a company's operations on the environment, society, and economy. By surpassing mere compliance with the bare minimum legal standards, CSR focuses on a company's potential for positive impact and contribution to society through fulfilling its environmental, social, and economic responsibilities.

1. Environmental Responsibility

CSR extends beyond simply following environmental regulations. It entails proactively addressing a company's environmental impact throughout its supply chain, operations, and products. The Environmental, Social, and Governance Criteria system highlights the significance of addressing issues like resource depletion and pollution, aligning with environmental responsibility. The United Nations' Sustainable Development Goals provide a global framework for tackling

¹⁶³ Apiday, 'The Impact of CSRD on Your Organisation' (www.apiday.com2023)

https://www.apiday.com/blog-posts/corporate-sustainability-reporting-directive-all-you-need-to-bulk-now#:">text=The%20new%20directive%20will%20require

¹⁶⁴ African Union, 'Agenda 2063: The Africa We Want. | African Union' (African Union2013) https://au.int/en/agenda2063/overview

¹⁶⁵ ASEAN CSR, 'ASEAN CSR - Home' (www.asean-csr-network.org2023) https://www.asean-csr-network.org/c/

¹⁶⁶ Modern Slavery Act 2015

Vigilance Plan, 'The Law on the Duty of Vigilance - List of Companies Subject to the Duty of Vigilance' (Vigilance Plan

Org2023) https://vigilanceplan.org/thelaw/#:~: text=A%20pioneering%20law&text=It%20requires%20French%20companies%20to

¹⁶⁸ Companies Act 2013

environmental challenges, encouraging CSR actions in line with these goals. Implementing Environmental Management Systems such as ISO 14001¹⁶⁹ demonstrates a company's commitment to environmental responsibility by identifying hazards, reducing environmental impact, and enhancing resource efficiency, thereby contributing to future sustainability.

(a) Sustainable Practices

Across the globe, businesses are prioritising resource efficiency and CSR, actively embracing key practices like utilising renewable resources, minimising waste, and reducing energy and water consumption. A noteworthy scenario of this commitment is observed in companies like Interface, which champions sustainability through circular economy models and the use of recycled materials, renewable energy, and cutting-edge production methods to ensure a greener and more environmentally conscious future.¹⁷⁰

Through implementing circular processes, businesses have the power to champion sustainability, as seen through Eileen Fisher's dedication to sustainable fashion. By offering services such as repairs and exchanges, they not only prolong the lifespan of their products but also contribute to a more responsible fashion industry and drive demand for eco-friendly options.¹⁷¹

(b) Climate Change Mitigation

A key initiative in CSR is the reduction of carbon footprints, with a strong focus on mitigating climate change by lowering greenhouse gas emissions throughout the entire business value chain. Unilever exemplifies this dedication by committing to achieving carbon neutrality by 2030 across their entire supply chain. Their comprehensive strategy includes investments in renewable energy, efforts to improve energy efficiency, and offsetting remaining emissions through verified carbon projects, showcasing their unwavering commitment to taking action against climate change.¹⁷²

By embracing sustainable sources like wind and solar power, global corporations can significantly reduce their reliance on fossil fuels. In addition, implementing strategies to reduce waste, conserve water, and increase energy efficiency can further diminish their environmental footprint, resulting in reduced greenhouse gas emissions and resource consumption. A significant example of this transformation is Ørsted¹⁷³, a company that has successfully shifted from a traditional fossil fuel model to becoming a pioneer in the offshore wind industry. They have even surpassed this by operating the world's biggest offshore wind farm and also investing in innovative

¹⁶⁹ ISO, ISO 14001:2015 (2018) https://www.iso.org/standard/60857.html

¹⁷⁰ Interface, 'Design with Purpose - 2021 Interface Environmental, Social, and Governance Report' (2021) http://q4live.s22.clientfiles.s3-website-us-east-

^{1.}amazonaws.com/139673446/files/doc_presentations/2022/08/Interface-2021-ESG-Report-Final.pdf
¹⁷¹ Eileen Fisher, '2020 Benefit Corporation Report' (2020)

https://www.eileenfisher.com/ns/images/behind_the_label/benefit-corp-report-2020-FINAL-rc.pdf>.

¹⁷² Unilever, 'Partnering with Suppliers to Deliver Net Zero' (Unilever2023)

https://www.unilever.com/planet-and-society/climate-action/partnering-with-suppliers-to-deliver-net-zero/

173 McKinsey, 'Ørsted's Renewable-Energy Transformation | McKinsey' (www.mckinsey.com10 July 2020) https://www.mckinsey.com/capabilities/sustainability/our-insights/orsteds-renewable-energy-transformation

initiatives to decrease their dependence on coal and gas. Furthermore, developing sustainable "Green Supply Chains" entails minimising waste at every stage of the product life cycle, reducing transportation emissions, and ethically sourcing resources.

2. Social Responsibility of CSR

At its essence, social responsibility is rooted in a company's dedication to practising ethical behaviour and beneficially impacting society. It goes beyond simply following laws and regulations; it involves taking proactive measures to address important social concerns.

(a) Community Engagement

CSR goes beyond simply giving money or volunteering; it involves actively investing in the social and economic well-being of communities. This means building strong, mutually beneficial partnerships with local stakeholders. Starbucks is a prime example of this approach, as it sources coffee ethically, supports youth programs, hosts community events, and offers gathering spaces¹⁷⁴.

Moreover, with their "One for One" model¹⁷⁵, TOMS Shoes not only provides a pair of shoes for every purchase made, but also strengthens community bonds, increases brand recognition, encourages employee involvement, and tackles important social and environmental concerns. This mutually beneficial approach benefits not just the company, but the community as well.

(b) Human Rights and Labour Practices

CSR emphasises fair treatment for workers and upholding their fundamental rights, such as freedom from discrimination, fair pay, safe working conditions, and the ability to bargain collectively. For instance, Fair Trade organisations certify products like chocolate¹⁷⁶ and bananas¹⁷⁷ prioritise fair wages and labour conditions, with strict attention to human rights and environmental sustainability within the business organisation.

To embody ethical labour standards, a company must prioritise fair recruitment, proper training, the well-being of employees, and accessible channels for addressing grievances. For instance, despite the legitimate concerns surrounding Foxconn's labour practices, Apple has taken proactive steps to enhance conditions, such as limiting work hours and offering mental health resources for workers¹⁷⁸.

¹⁷⁴ Starbucks, 'Responsibly Grown and Fair Trade Coffee: Starbucks Coffee Company' (Starbucks2022) https://www.starbucks.com/responsibility/sourcing/coffee/

¹⁷⁵ Arezou Naeini and others, 'Case Study: How TOMS Shoes Made a Cause the Centre of Its Activities' (Business Today7 June 2015) https://www.businesstoday.in/magazine/lbs-case-study/story/toms-shoes-shoes-for-free-cause-marketing-strategy-case-study-49364-2015-05-22

¹⁷⁶ Martine Parry, 'Love Chocolate, Hate Injustice? 6 Reasons to Choose Fairtrade' (Fairtrade Foundation7 July 2021) https://www.fairtrade.org.uk/media-centre/blog/love-chocolate-hate-injustice-6-reasons-to-choose-fairtrade/

¹⁷⁷ Fair Trade Foundation, 'Find out a Bunch of Facts about Fairtrade Bananas' (Fairtrade Foundation2020) https://www.fairtrade.org.uk/farmers-and-workers/bananas/about-bananas/

¹⁷⁸ Reed Albergotti, 'Apple Accused of Worker Violations in Chinese Factories' *The Washington Post* (9 September 2019) https://www.washingtonpost.com/technology/2019/09/09/apple-accused-worker-violations-chinese-factories-by-labor-rights-group/

3. Economic Responsibility

One of the main tenets of CSR is economic accountability. It centres on a business's pledge to make a profit while simultaneously enhancing the financial standing of its stakeholders, as well as the communities in which it conducts business. This incorporates morality and sustainability into financial choices, going beyond simple profit maximisation. According to Crane¹⁷⁹, the core idea of CSR is realising the interconnectedness between corporate success and the well-being of the communities where they operate. This indicates that for long-term success, businesses support responsible supplier chains, fair labour standards, and economic growth.

(a) Ethical Business Practices

Companies that follow ethical business practices account how their actions will affect all parties involved, limit any negative environmental effects, use fair labour policies, and uphold supply chain responsibility. For instance, Ben & Jerry's ice cream brand has gained recognition for its social activity, championing topics such as climate change, LGBTQ+ rights, and racial justice. Additionally, they empower their staff through profit-sharing and purchase their supplies from Fair Trade farmers¹⁸⁰.

(b) Transparency and Accountability

Companies must align with accountability and transparency in their CSR strategies, taking ownership of their impact. This entails clearly defined benchmarks, reliable metrics, and open accessibility to external audits. Unilever serves as a prime example through its dynamic "Sustainable Living Plan," which prioritises the betterment of society and reducing environmental harm. Their annual progress reports, showcasing initiatives like sustainable palm oil and empowering women, proudly demonstrate their dedication to responsibility and fostering a sustainable future¹⁸¹.

By implementing clear and measurable CSR objectives, consistent reporting, and actively seeking feedback from stakeholders, accountability is solidified. Through embracing ethical business practices and transparency, Tesla has effectively built trust, fulfilled social responsibilities, and contributed to a sustainable and fair future. The company demonstrates an unwavering sense of accountability through comprehensive Impact Reports, ambitious and timely goals, and a strong dedication to promoting societal and environmental sustainability, ultimately earning the trust of its stakeholders.

¹⁷⁹ Andrew Crane, Dirk Matten and Laura J Spence, '(PDF) Corporate Social Responsibility: In Global Context' (ResearchGate2013)

https://www.researchgate.net/publication/228123773_Corporate_Social_Responsibility_In_Global_Context

¹⁸⁰ Ben & Jerry's, 'Causes Ben & Jerry's Has Advocated for over the Years with Their Corporate Social Responsibility | Ben & Jerry's' (http://www.benjerry.com2014) https://www.benjerry.com/whats-new/2014/corporate-social-responsibility-history

¹⁸¹ Unilever, 'Leading and Delivering on Sustainability' (*Unilever*5 May 2023) https://www.unilever.com/news/news-search/2023/leading-and-delivering-on-sustainability-through-our-compass-commitments/

VI. The Business Case for Corporate Social Responsibility

The argument for CSR is not simply about "doing good," but rather, it presents a persuasive case for companies to incorporate social and environmental responsibility into their fundamental strategies 182. By incorporating CSR into business operations, a company can cultivate a favourable brand image, gaining a competitive edge by resonating with socially-minded customers. Additionally, CSR measures can proactively address potential risks from regulatory violations and negative societal reactions, ultimately preserving the company's reputation.

Long-term sustainability is intrinsic to CSR, aligning businesses with evolving environmental and social norms. This leads to increased operational efficiency and resilience. Financially, CSR contributes to shareholder value through improved customer loyalty, cost reductions, and access to new markets. A socially responsible company attracts ethical investors and is better positioned for long-term success.

VII. Critique of Corporate Social Responsibility Mechanisms

Ethical dilemmas within CSR initiatives arise from the inherent tension between profit-driven motives and genuine commitment to social and environmental causes. Companies may prioritise short-term financial gains over long-term sustainability, leading to token gestures rather than meaningful change ¹⁸³. This ethical conflict hampers the credibility of CSR initiatives and questions the sincerity of corporations in addressing global challenges.

The absence of uniform standards and measurement metrics presents a major obstacle in accurately evaluating and comparing CSR efforts among companies. In the absence of standardised criteria, it becomes arduous to gauge the true effectiveness of corporate initiatives, ultimately hindering the ability of consumers and stakeholders to make well-informed decisions¹⁸⁴. Moreover, this lack of consistency creates a window for companies to manipulate and cherry-pick data to portray a more positive image.

Limited enforcement mechanisms and legal accountability hinder the implementation of CSR initiatives. While some companies may willingly adopt CSR, others may disregard their responsibilities without facing serious repercussions. Without a strong regulatory framework in place, irresponsible practices can persist, ultimately undermining the potential benefits of CSR¹⁸⁵.

To effectively tackle these challenges, a comprehensive strategy must be employed. By implementing more stringent regulations and utilising standardised reporting methods, transparency and accountability can be improved. Ultimately, a robust and enforceable CSR

¹⁸² Matteo Tonello, 'The Business Case for Corporate Social Responsibility' (Harvard.edu26 June 2011) https://corpgov.law.harvard.edu/2011/06/26/the-business-case-for-corporate-social-responsibility/

¹⁸³ Sandra Diehl and others, Handbook of Integrated CSR Communication (Springer International Publishing 2017).

¹⁸⁴ Tim Rogmans and Karim El-Jisr, 'Designing Your Company's Sustainability Report' (Harvard Business Review14 January 2022) https://hbr.org/2022/01/designing-your-companys-sustainability-report
¹⁸⁵ Arnaud Van Waeyenberge and David Amarlies Restrepo, 'CSR and Legal Liability: How to Foster Global Standards and Enforcement?' (HEC Paris2017) https://www.hec.edu/en/knowledge/articles/csr-and-legal-liability-how-foster-global-standards-and-enforcement

framework is critical in ensuring that corporate practices genuinely contribute to creating a positive influence on both society and the environment.

VIII. Case Studies: Stories of Successes and Failures of the Effectiveness of CSR

In a world where sustainability is increasingly prioritised, Patagonia shines as the pinnacle of CSR. With a steadfast dedication to the preservation of the planet, this outdoor apparel company sets the bar high through various initiatives, such as utilising recycled materials and promoting repair and reuse. Going beyond just product design, Patagonia's renowned "Worn Wear" program represents a top-notch commitment to sustainability ¹⁸⁶. By actively engaging in environmental activism, the company has built a strong following of loyal customers and established a positive public image. Not only does its CSR success generate financial benefits, but it also makes a meaningful contribution to society, reinforcing the importance of incorporating sustainability into all aspects of business for a lasting impact.

On the flip side, Volkswagen's emissions scandal stands as a glaring example of CSR gone wrong. In a shocking turn of events in 2015, the company confessed to equipping its diesel cars with software that cheated emission tests, leading to significant financial repercussions and damage to its reputation¹⁸⁷. By deceiving its customers and disregarding environmental regulations, Volkswagen acted unethically and broke the bond of trust. This serves as a powerful reminder of the consequences of insincere CSR strategies, highlighting the crucial need for companies to demonstrate genuine commitment towards CSR. Failure to do so can result in severe legal, financial, and reputational repercussions.

IX. Challenges in Implementing Corporate Social Responsibility

When it comes to implementing CSR, many obstacles stand in the way. Cultural and organisational barriers can hinder the adoption of CSR practices and make it difficult to align with local values. As a result of globalisation, there are now diverse norms and standards that make it challenging to implement a standardised CSR approach. Additionally, varying regulatory environments require adaptability, adding another layer of complexity to the process 188.

Furthermore, the constant pressure to generate short-term profits can often lead to compromising on CSR initiatives, which can conflict with the ultimate goal of long-term sustainability. Successfully navigating these challenges requires finding a delicate balance between maintaining global consistency while being sensitive to local values, as well as strategically aligning with different regulatory landscapes.

X. Conclusion

¹⁸⁶ Patagonia, 'Environmental Responsibility Programs - Patagonia' (www.patagonia.com2023) https://www.patagonia.com/our-responsibility-programs.html

¹⁸⁷ Russell Hotten, 'Volkswagen: The Scandal Explained' BBC News (10 December 2015) https://www.bbc.co.uk/news/business-34324772

¹⁸⁸ Keith Murphy, 'The Challenges of Corporate Social Responsibility' (PLANERGY Software 27 July 2020) https://planergy.com/blog/corporate-social-responsibility-challenges/

Upon meticulous analysis, it is clear that CSR is a complex and multifaceted concept. The essay initially explored the diverse interpretations and understandings of CSR. From there, it traced the concept through the evolution of its historical milestones, legal regulations, and theoretical underpinnings, all of which contributed its presence in the corporate realm. Also, the significance of CSR in promoting ethical business conduct and propelling sustainable progress cannot be overlooked.

The heart of this essay lies in the evaluation of the effectiveness of CSR mechanisms. The analysis delved deeply into the legal and regulatory frameworks that support CSR, ultimately disclosing that their impact is heavily influenced by their enforcement and adaptability. Although the meticulous implementation of CSR components shows promise in achieving desired outcomes, a critical examination also exposes issues such as greenwashing and superficial efforts, which hinder the true fulfilment of corporate responsibilities.

The importance of CSR has gained widespread acceptance, thanks to its powerful argument that responsible business practices not only benefit society but also enhance long-term profitability and reputation. In examining various case studies, a nuanced viewpoint has been presented, demonstrating both triumphs and setbacks, while underscoring the essential elements of wholehearted dedication and tactical prioritisation.

Through an in-depth examination, it was uncovered that a multitude of obstacles in the implementation of CSR, such as limited resources and competing stakeholder interests. These roadblocks call for a unified approach involving businesses, governments, and civil society to create an atmosphere that promotes responsible corporate practices.

Accordingly, CSR's effectiveness relies on a constantly evolving balance between regulatory structures, deliberate corporate choices, and sincere dedication. This essay emphasises the need for companies to go beyond surface-level gestures and truly integrate CSR into their fundamental practices. While this evaluation highlights the effectiveness of the concept of CSR as a corporate governance mechanism, it's clear that ongoing examination, flexibility, and collaborative action are essential in unleashing the full potential of CSR to confront modern socio-environmental issues.

BIBLIOGRAPHY

Blog Articles

ACCP, 'Corporate Social Responsibility: A Brief History' (*Association of Corporate Citizenship Professionals*) March 2021) https://accp.org/resources/csr-resources/accp-insights-blog/corporate-social-responsibility-brief-history/

business law, 'CSR Duty under Corporate Law in the UK' (360 Business Law5 September 2022) https://www.360businesslaw.com/blog/csr/

Books

Diehl S and others, *Handbook of Integrated CSR Communication* (Springer International Publishing 2017)

Freeman RE, Harrison JS and Zyglidopoulos SC, Stakeholder Theory: Concepts and Strategies (Cambridge University Press 2018)

Gomes RC, 'Stakeholder Management in the Local Government Decision-Making Area: Evidences from a Triangulation Study with the English Local Government' (2006) 10 Revista De Administração Contemporânea 77

OECD, OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Publishing 2023)

Dictionary Entries

Law J, 'Corporate Social Responsibility'

Encyclopedias

Dowd DF, 'Robert Owen | British Social Reformer', *Encyclopædia Britannica* (2019) https://www.britannica.com/biography/Robert-Owen

Journal Articles

Carroll AB, 'Carroll's Pyramid of CSR: Taking Another Look' (2016) 1 International Journal of Corporate Social Responsibility 1 https://jcsr.springeropen.com/articles/10.1186/s40991-016-0004-6

Meyer JW and Rowan B, 'Institutionalized Organizations: Formal Structure as Myth and Ceremony' (1977) 83 American Journal of Sociology 340 http://www.jstor.org/stable/2778293

Mosca F and Civera C, 'The Evolution of CSR: An Integrated Approach' (2017) 1 Symphonya. Emerging Issues in Management 16

Parmar B and others, '(PDF) Stakeholder Theory: The State of the Art' (ResearchGate2010) https://www.researchgate.net/publication/235458104_Stakeholder_Theory_The_State_of_the_Art

Suchman MC, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20 The Academy of Management Review 571

Taylor CR, 'New Disclosure Requirements under the Dodd-Frank Financial Reform Act: A Move towards Greater Transparency' (2012) 9 European Company Law https://kluwerlawonline.com/journalarticle/European+Company+Law/9.2/EUCL2012011

Van Zanten JA and van Tulder R, 'Multinational Enterprises and the Sustainable Development Goals: An Institutional Approach to Corporate Engagement' (2018) 1 Journal of International Business Policy 208 https://link.springer.com/article/10.1057/s42214-018-0008-x

Visser W, 'The Future of CSR: Towards Transformative CSR, or CSR 2.0' (2018) 1 SSRN Electronic Journal

Werther WB and Chandler D, 'Strategic Corporate Social Responsibility as Global Brand Insurance' (2005) 48 Business Horizons 317

Legislation

Companies Act 2013

Grenelle II - Climate Change Laws of the World 2010 (climate-lawsorg)

Modern Slavery Act 2015 2015

News Articles

Albergotti R, 'Apple Accused of Worker Violations in Chinese Factories' *The Washington Post* (9 September 2019) https://www.washingtonpost.com/technology/2019/09/09/apple-accused-worker-violations-chinese-factories-by-labor-rights-group/

Davis K, 'The Case for and against Business Assumption of Social Responsibilities.' (1973) http://57ef850e78feaed47e423eada556f2c82b951c467be415f62411.r9.cf2.rackcdn.com/Davis-1973-ForAnd%20Against.pdf

Eileen Fisher, '2020 BENEFIT CORPORATION REPORT' (2020) https://www.eileenfisher.com/ns/images/behind_the_label/benefit-corp-report-2020-FINAL-rc.pdf

European Parliament, 'Non-Financial Reporting Directive' (2021) https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/654213/EPRS_BRI(2021)654213
_EN.pdf

Gerasimos, 'Brewing Shared Value: How Nestle Is Changing the Game with Coffee Beans' (SustainCase - Sustainability Magazine14 February 2023) https://sustaincase.com/brewing-shared-value-how-nestle-is-changing-the-game-with-coffee-beans/

Interface, 'Design with Purpose - 2021 Interface Environmental, Social, and Governance Report' (2021) http://q4live.s22.clientfiles.s3-website-us-east-1.amazonaws.com/139673446/files/doc_presentations/2022/08/Interface-2021-ESG-Report-FINAL.pdf

Reports

Gordon K, 'The OECD Guidelines and Other Corporate Responsibility Instruments' [2001] OECD Working Papers on International Investment http://www.oecd.org/corporate/mne/WP-2001_5.pdf

United Nations, 'Guiding Principles on Business and Human Rights Implementing the United Nations "Protect, Respect and Remedy" Framework' (United Nations 2011) https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshreen.pdf

Visser W, 'The Ages and Stages of CSR from Defensive to Transformative Corporate Sustainability & Responsibility' (2010) https://www.waynevisser.com/wp-content/uploads/2012/04/inspiration_ages_stages_csr_wvisser.pdf

Standards

ISO, ISO 14001:2015 (2018) https://www.iso.org/standard/60857.html

Websites

African Union, 'Agenda 2063: The Africa We Want. | African Union' (*African Union*2013) https://au.int/en/agenda2063/overview

American Society for Quality, 'What Is ISO 26000? Social Responsibility Guidance Standard | ASQ' (asq.org2023) https://asq.org/quality-resources/iso-26000#:">https://asq.org/quality-resources/iso-26000#:">https://asq.org/quality-resources/iso-26000#:

Apiday, 'The Impact of CSRD on Your Organisation' (www.apiday.com2023) https://www.apiday.com/blog-posts/corporate-sustainability-reporting-directive-all-you-need-to-know#:":text=The%20new%20directive%20will%20require

Arezou Naeini and others, 'Case Study: How TOMS Shoes Made a Cause the Centre of Its Activities' (*Business Today*7 June 2015 https://www.businesstoday.in/magazine/lbs-case-study/story/toms-shoes-shoes-for-free-cause-marketing-strategy-case-study-49364-2015-05-22

ASEAN CSR, 'Asean CSR - Home' (www.asean-csr-network.org2023) https://www.asean-csr-network.org/c/<a> Murphy K, 'The Challenges of Corporate Social Responsibility' (PLANERGY Software 27 July 2020) https://planergy.com/blog/corporate-social-responsibility-challenges/

Barry A-M, 'The UK Modern Slavery Act and Corporate Responsibility: Progress and Challenges' (www.stmarys.ac.uk2023) https://www.stmarys.ac.uk/research/centres/bakhita/research/articles/corporate-responsibility.aspx

Ben & Jerry's, 'Causes Ben & Jerry's Has Advocated for over the Years with Their Corporate Social Responsibility | Ben & Jerry's' (http://www.benjerry.com/2014) https://www.benjerry.com/whats-new/2014/corporate-social-responsibility-history

Crane A, Matten D and Spence LJ, '(PDF) Corporate Social Responsibility: In Global Context' (*ResearchGate*2013)

https://www.researchgate.net/publication/228123773_Corporate_Social_Responsibility_In_Global_Context

DiMaggio PJ and Powell WW, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48 American Sociological Review 147

Elkington J, 'Accounting for the Triple Bottom Line' (1998) 2 Measuring Business Excellence 18 https://www.johnelkington.com/archive/TBL-elkington-chapter.pdf

European Commission, 'Waste Framework Directive' (environment.ec.europa.eu2022) https://environment.ec.europa.eu/topics/waste-and-recycling/waste-framework-directive_en

Fair Trade Foundation, 'Find out a Bunch of Facts about Fairtrade Bananas' (Fairtrade Foundation2020) https://www.fairtrade.org.uk/farmers-and-workers/bananas/about-bananas/

Hotten R, 'Volkswagen: The Scandal Explained' *BBC News* (10 December 2015) https://www.bbc.co.uk/news/business-34324772

McKinsey, 'Ørsted's Renewable-Energy Transformation | McKinsey' (www.mckinsey.com10 July 2020) https://www.mckinsey.com/capabilities/sustainability/our-insights/orsteds-renewable-energy-transformation

Parry M, 'Love Chocolate, Hate Injustice? 6 Reasons to Choose Fairtrade' (*Fairtrade Foundation*7 July 2021) https://www.fairtrade.org.uk/media-centre/blog/love-chocolate-hate-injustice-6-reasons-to-choose-fairtrade/

Patagonia, 'Environmental Responsibility Programs - Patagonia' (www.patagonia.com/2023) https://www.patagonia.com/our-responsibility-programs.html

Porter M and Kramer M, 'Strategy and Society: The Link between Competitive Advantage and Corporate Social Responsibility' (Harvard Business ReviewDecember 2006) https://hbr.org/2006/12/strategy-and-society-the-link-between-competitive-advantage-and-corporate-social-responsibility

Rogmans T and El-Jisr K, 'Designing Your Company's Sustainability Report' (*Harvard Business Review*l 4 January 2022) https://hbr.org/2022/01/designing-your-companys-sustainability-report

Rogmans T and El-Jisr K, 'Designing Your Company's Sustainability Report' (*Harvard Business Review*14 January 2022) https://hbr.org/2022/01/designing-your-companys-sustainability-report

Starbucks, 'Responsibly Grown and Fair Trade Coffee: Starbucks Coffee Company' (Starbucks2022) https://www.starbucks.com/responsibility/sourcing/coffee/

Tonello M, 'The Business Case for Corporate Social Responsibility' (*Harvard.edu*26 June 2011) https://corpgov.law.harvard.edu/2011/06/26/the-business-case-for-corporate-social-responsibility/

UNIDO, 'What Is CSR?' (*United Nations Industrial Development Organization*2023) https://www.unido.org/our-focus/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/corporate-social-responsibility-market-integration/what-csr

Unilever, 'Leading and Delivering on Sustainability' (*Unilever*5 May 2023) https://www.unilever.com/news/news-search/2023/leading-and-delivering-on-sustainability-through-our-compass-commitments/

Unilever, 'Partnering with Suppliers to Deliver Net Zero' (*Unilever*2023) https://www.unilever.com/planet-and-society/climate-action/partnering-with-suppliers-to-deliver-net-zero/

Van Waeyenberge A and Amarlies Restrepo D, 'CSR and Legal Liability: How to Foster Global Standards and Enforcement?' (*HEC Paris*2017) https://www.hec.edu/en/knowledge/articles/csr-and-legal-liability-how-foster-global-standards-and-enforcement

Van Waeyenberge A and Amarlies Restrepo D, 'CSR and Legal Liability: How to Foster Global Standards and Enforcement?' (*HEC Paris*2017) https://www.hec.edu/en/knowledge/articles/csr-and-legal-liability-how-foster-global-standards-and-enforcement

Vigilance Plan, 'The Law on the Duty of Vigilance - List of Companies Subject to the Duty of Vigilance' (*Vigilance Plan Org*2023) https://vigilance-plan.org/the-law/#:~: *:text=A%20pioneering%20law&text=It%20requires%20French%20companies%20to

International Commercial Arbitration: Domestic Courts and Party Autonomy

Harish Vijayakumar Department of Law, University of Leicester, United Kingdom

Introduction

Party autonomy is a sacrosanct principle within International Commercial Arbitration, contemplated in international conventions¹⁸⁹ and national laws, such as the Arbitration Act 1996¹⁹⁰ as being one of the central pillars upon which International Commercial Arbitration is built.¹⁹¹ This principle runs through the different limbs and stages of International Commercial Arbitration. This principle is largely contemplated and championed by the domestic courts. This essay seeks to articulate the court's commitment to championing this principle by considering leading judgements in the context of arbitration agreements, applicable laws, and the appointment of arbitrators. The restriction on party autonomy, citing mandatory laws and provisions will also be discussed.

An understanding of Party Autonomy

Prior to embarking on the premise of the topic in question, it is important to establish an understanding of the principle of party autonomy in International Commercial Arbitration. A simple understanding would be that parties have the freedom to choose the procedures and laws ¹⁹² in accordance with which disputes would be resolved in arbitration. However, it can be said that party autonomy in International Commercial Arbitration is not absolute since mandatory provisions and laws of a state prevail over it. ¹⁹³

1. Party Autonomy in Arbitration Agreements

This section will assess the courts' approach to party autonomy, considering leading decisions pertaining to Arbitration Agreements. When assessing whether party autonomy is championed by the courts, in the context of arbitration agreements, the leading case of *Fiona Trust*⁹⁴ is an appropriate starting point. It is given that arbitration agreements reflect party autonomy as it evidences the consensual and voluntary nature of the arbitration process; the parties agree to submit their dispute arising out of a contractual relationship before an arbitrator or tribunal. In interpreting arbitration agreements, as per Lord Hoffman in *Fiona Trust*, "It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what

¹⁸⁹ UNCITRAL 'Secretarial Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2016) 187. See Article V (1)(d)

¹⁹⁰ Arbitration Act 1996, s. 1(b)

¹⁹¹ Masood Ahmed, 'The influence of the delocalisation and seat theories upon judicial attitudes towards international commercial arbitration' (2011) 77(4) Arbitration 2011 406.

¹⁹² Mia Louise Livingstone, 'Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact?' (2008) 25(5) Journal of International Arbitration 529.

¹⁹³ American Diagnostica v Gradipore (1998) 44 NSWLR 312, 328 (Supreme Court NSW)

¹⁹⁴ Fiona Trust & Holdings Corp v Privalov [2007] UKHL 40.

kind of disputes they intended to submit to arbitration."¹⁹⁵ Here, it can be inferred that the import of the judgement is to refer to what was agreed on by the parties.

Subsequently, it was also said that the proper approach to construction would be to give effect to the commercial purpose of the agreement¹⁹⁶ and it is to be assumed that parties intended for any dispute arising out of their contractual relationship to be submitted to arbitration, unless otherwise stated.¹⁹⁷ Ultimately, the choice of issues that are to be submitted to arbitration are left with the parties. The House of Lords' approach in this case exemplifies its support for the principle of party-autonomy by underscoring the importance of upholding the parties' intentions. Thus, the principle of party autonomy is given due importance by the courts when interpreting agreements.

The House of Lords in *Fiona Trust* also echoed the doctrine of separability; where the wider commercial contract is void or voidable,¹⁹⁸ it does not automatically follow that the arbitration clause is invalid. The doctrine of separability reflects and protects the principle of party autonomy as it reflects the parties' intentions and mutual agreement. The court's emphasis on the autonomy of an arbitration clause exhibits its commitment to maintaining the autonomy of the parties.

However, if, for instance, a party claims to have been a victim of forgery or incapacity and not have agreed to anything in the contract, the doctrine does not do right by one of the parties. To that, the court also highlighted that an arbitration agreement may also be void, where the arbitration agreement was contained in the wider commercial contract and one of the parties claimed to have not agreed to anything in the agreement. For example, in cases of forgery. Contemplating that in such an instance, the agreement would be void is a further assertion by the courts, of the importance of party autonomy.

2. Party autonomy in the context of Applicable Laws

This section will examine the domestic courts' approach to party autonomy in leading decisions related to laws applicable to arbitration agreements and the substance of the dispute.

In *Enka Insaat Ve Sanayi AS v OOO Insurance Co Chubb*,¹⁹⁹ the dispute involved a contract for construction work at a Russian power plant, whose insurance provider was *Chubb*. Owing to a fire in the plant, *Chubb* sought compensation from *Enka*. The premise of the dispute centred around the fact that Chubb had filed a tort claim in the Moscow court which Enka sought an anti-injunction suit against, in the English High Court, arguing that the initiation of proceedings in Russia was in breach of the arbitration agreement. The contract between the parties had an

¹⁹⁵ ibid [5]

¹⁹⁶ Fiona Trust (n 6) [7]

¹⁹⁷ Ibid [13]

¹⁹⁸ ibid [17]

¹⁹⁹ Enka Insaat ve Sanayi A.S. v OOO Insurance Company Chubb [2020] UKSC 38

arbitration clause for disputes to be resolved in London under ICC Rules. The key issue in this case was therefore determining the applicable law for the arbitration agreement.²⁰⁰

On appeal to the UK Supreme court, it was affirmed that the wider commercial contract had a clause which reflected the parties' choice of law which would govern the contract, that law would also apply to the arbitration clause. This reasoning shows the court's due consideration given to the principle of party autonomy; that the arbitration clause forms part of the contract, which parties have expressly agreed to be governed by a specific law. ²⁰¹ A choice by the parties to subject their commercial contract to a certain law is a tangible exercise of party autonomy. Therefore, bearing in mind that parties would have chosen a system of law to subject their relationship to, it is only natural to arrive at a reasonable conclusion that the parties did intend for a clause forming part of the contract to also be governed by the same law which governs the remainder of the contract. As such, the approach of the courts evidently demonstrates its willingness to honour an express choice by the parties.

The supreme court also stated that in the absence of a choice of law that would govern the wider commercial contract, the law which has the closest and most real connection with the arbitration agreement would apply. This was held to be English law as the law of the seat. ²⁰² The closest and most real connection test, which would most likely have the law of the seat as an answer, is also a result of a choice by the parties. In summary, the approach of the English courts in *Enka*, in honouring the parties' intentions where their preference of the governing law applying the choice of law of the wider commercial contract and in the absence of which, applying the law which has the closest and most real connection is a true reflection of the principle of party autonomy.

In *Kabab-ji* (*Lebanon*) v *Kout Food Group* (*Kuwait*),²⁰³ wherein, like *Enka*, an express choice had not been stated, the Court of Appeal in Paris found that the French law was to apply since the parties had chosen Paris as the seat of arbitration. This decision was in spite of the fact that English law had been chosen for the governance of the wider commercial contract. However, the *Kabab-ji*²⁰⁴ case was decided differently by the English Supreme Court. Applying *Enka*, the court held that English law, governing the wider commercial contract also governed the arbitration agreement. Therefore, the English and French courts differ on whether the law of the wider contract or the law of the seat of arbitration take precedence as the governing law of the arbitration agreement. At this juncture, it is interesting to note that the Swedish courts also take a similar approach as that of Paris, wherein the law of the seat prevails over law governing the wider contract, as confirmed in *Bulbank*.²⁰⁵

Nigel Blackaby, Constantine Partasides and Alan Redfern, *Redfern and Hunter on International Arbitration* (7th edn, Oxford University Press 2023) 3.20

²⁰¹ Enka [43]

²⁰² Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb [2020] UKSC 38

²⁰³ Kabab-Ji (Lebanon) v Kout Food Group (Kuwait), No 17/22943 (Paris Court of Appeal, 23 June 2020).

²⁰⁴ Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2021] UKSC 48.

²⁰⁵ Bulgarian Foreign Trade Bank Ltd v Al Trade Finance Inc., NoT1881-99, (Swedish Supreme Court, 27 October 2000), (2001) XXVI YBCA 291.

This now begs the question as to which of the domestic courts have maintained the principle of party autonomy? Firstly, it is established that these considerations only arise in the absence of an express agreement as to which law governs the arbitration agreement. An express choice will in all instances be accepted. For instance, had the parties in *Kabab-ji* stated that the arbitration agreement is to be governed by English law, both the French and English courts both may have honoured it.

However, since that was not present, the courts interfered. Even so, by looking at or inferring what the parties agreed to, the domestic courts across jurisdictions only seek to identify and implement the parties' intentions, it does not impose the law which it thinks should govern the agreement, although the approaches on how this is done differ, as we have seen in the comparison between the English and French courts in *Kabab-ji* as well as Swedish courts in *Bulbank*. As such, it is reasonable to argue that both the approaches, though different, have the principle of party autonomy as its underlying rationale.

On the contrary, in relation to law governing the substance of the dispute, it is seen that while parties are generally allowed to subject a dispute to a system of law of their choice, it cannot be opposed to public policy. If so, it would fail to be enforced by the courts and as a result negate the parties' autonomy to choose. 206 This is demonstrated by the case of Soleimany v Soleimany, 207 wherein enforcement of an award arising out of an illegal contract was refused. While the illegality had no bearing on the rights of the parties under the applicable law, the English Court of Appeal refused enforcement, citing that the transaction was illegal under English law. As the judgement provides.²⁰⁸ the choice of law cannot be used to evade a mandatory law. This means that public policy and mandatory provisions of a country prevail over party autonomy and in effect, the parties' choice of governing law, an exercise of their autonomy, is rendered pointless as it fails to be enforced by the courts. This argument is further supported by the view of the Supreme Court of New South Wales, Australia in American Diagnostica v. Gradipore, 209 wherein it was stated that party autonomy does not denote absolute freedom to exclude a legal system or its specific elements from the parties' relationship. Soleimany and American Diagnostica allow us to understand that neither will the courts allow parties to evade mandatory provisions and public policy considerations of a state, an exploitation of party autonomy, nor will it enforce awards arising out of such unlawful transactions.

3. Party Autonomy in the context of Appointment of Arbitrator(s)

The upcoming section will examine the extent to which courts uphold party autonomy in the criteria set by parties for arbitrator selection, by considering the English Supreme Court case of *Jivraj v Hashwani*.²¹⁰

²⁰⁶ *Livingstone* (n 4) 531.

²⁰⁷ Soleimany v Soleimany [1999] QB 785 [800]

²⁰⁸ ibid.

²⁰⁹ American Diagnostica v Gradipore (1998) 44 NSWLR 312, 328 (Supreme Court NSW)

Jivraj v Hashwani [2011] UKSC 40.

An important preliminary stage during the arbitration process concerns the appointment of Arbitrators. As with other aspects of arbitration, parties are free to make appointments by agreement. In doing so, it is common to specify nationality requirements, *inter alia*.

In this case, the parties agreed that the arbitrators of their dispute should be from the Ismaili community. The Court of Appeal held that arbitrators are to be considered employees and therefore not in compliance with the Employment Equality (Religion or belief) Regulations 2003²¹¹ prohibition on unlawful discrimination based on religion.²¹² Going by the CA's view, if arbitrators were to be considered 'employees', then nationality requirements could also potentially be invalidated by the application of employment laws.²¹³ The obvious result would have been an interference and restriction on party autonomy. The Supreme Court, however, rejected the view that arbitrators are employees and held that the regulation did not apply.²¹⁴ It was also said that a specification as to religion or belief can be relevant, taking into account the discretion arbitrators have in structuring the proceedings.²¹⁵ Apart from that, the courts also considered the particular importance of dispute resolution in the cultural context of the Ismaili community and held that such specification was "not only genuine but both legitimate and justified" and "proportionate".²¹⁶

This case signifies the courts' commitment to party autonomy in the selection of arbitrators as it showed the courts having regard to the parties' freedom and its unwillingness to restrict the autonomy of the parties in choosing the arbitrators.

Conclusion

Based on the above analysis, there is sufficient evidence to support the argument that the principle of party autonomy is one which the domestic courts seek to champion and maintain. This would be the case as long as doing so would not be contrary to mandatory laws and public policy, as seen in *Soleimany*.²¹⁷ However, it would not be reasonable to conclude that the restriction based on mandatory laws and public policy constitute a failure to maintain or champion the principle. This is because, the principle in itself is arguably not absolute, as was said *American Diagnostica*.²¹⁸ Viewed with this perspective, there is ample evidence considered above to conclude that the domestic courts champion and largely maintain the principle.

²¹¹ Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660), reg 3.

²¹² Christopher Style QC and Philomena Cleobury, Jivraj v Hashwani: Public interest and Party Autonomy' (2011) 27 Arbitration International 563.

²¹³ Ibid.

²¹⁴ *Jivraj* (n 22).

²¹⁵ ibid [61]

²¹⁶ ibid [68]

²¹⁷ Soleimany (n 17).

²¹⁸ American Diagnostica (n 19).

Bibliography

Legislation

Arbitration Act 1996

Statutory Instruments

Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660)

Cases

American Diagnostica v Gradipore (1998) 44 NSWLR 312, 328 (Supreme Court NSW)

Bulgarian Foreign Trade Bank Ltd v Al Trade Finance Inc., NoT1881-99, (Swedish Supreme Court, 27 October 2000), (2001) XXVI YBCA 291.

Enka Insaat ve Sanayi A.S. v OOO Insurance Company Chubb [2020] UKSC 38

Fiona Trust & Holdings Corp v Privalov [2007] UKHL 40.

Jivraj v Hashwani [2011] UKSC 40.

Kabab-Ji (Lebanon) v Kout Food Group (Kuwait), No 17/22943 (Paris Court of Appeal, 23 June 2020).

Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2021] UKSC 48.

Soleimany v Soleimany [1999] QB 785 [800]

Bibliography

Style QC C. and Cleobury P., Jivraj v Hashwani: Public interest and Party Autonomy' (2011) 27 Arbitration International 563.

Livingstone M.L., 'Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact?' (2008) 25(5) Journal of International Arbitration 529.

Ahmed M., 'The influence of the delocalisation and seat theories upon judicial attitudes towards international commercial arbitration' (2011) 77(4) Arbitration 2011 406.

Blackaby N., Constantine Partasides and Alan Redfern, *Redfern and Hunter on International Arbitration* (7th edn, Oxford University Press 2023) 3.20

UNCITRAL 'Secretarial Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2016) 187. See Article V (1)(d)

Navigating Legal Terrain: The Interplay of Human Rights and Judicial Review Law in the COVID-19 Era

Mohammad Isaq

Department of Law, University of Leicester, United Kingdom

I. Introduction:

The COVID-19 pandemic put both legal bodies and people into unfamiliar territory. The government, bound by a legal obligation to secure the right to life, ²¹⁹ implemented various measures, interfering with human rights. As a result, a challenge emerged for them, whereby they had to respect the delicate balance between these rights while also ensuring that their response was proportional, legal, and strictly necessary to justify the interference. This led to a profound intersection between judicial review law and human rights law. This essay delves into the intricate interplay between these laws and explores how these legal frameworks were affected by the challenges that COVID-19 presented. In doing so, an analysis of the government's response to the pandemic through a human rights and judicial review lens is imperative. Ultimately, this essay intends to showcase the relevance of judicial review and human rights laws to COVID-19 by referring to various measures taken by the government in response to the pandemic.

II. The Lockdown Regulations

Judicial review evolved in the 1960s and 1970s. The COVID-19 pandemic served as a litmus test for its adaptability to contemporary emergencies distinct from World Wars. Simultaneously, it also examined the responses of executive, legislative, and judicial bodies to balancing human rights and common law principles during crises.

The initial national lockdown was implemented on March 23, 2020. The legal basis for this was the Health Protection (Coronavirus Restrictions) (England) Regulations 2020, which were secondary legislation enacted on the 26th, drafted, enacted, and enforced on the same day. These emergency regulations were made under the Public Health (Control of Disease) Act (PHA) 1984, which allows regulations to include provisions "imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things, or premises in the event of, or in response to a threat to public health". These restrictions were applied nationally, thereby engaging human rights on mass. The seriousness of these implications is what made the Joint Committee on Human Rights (JCHR) recommend the government consistently justify and review the legality, necessity, and proportionality of these provisions.

²¹⁹ European Convention on Human Rights (ECHR) 1953, Article 2.

²²⁰ PHA, S45C and S45P.

²²¹ *ibid* S45C(3)(c).

²²² JCHR, *The Government's response to COVID-19: human rights implications,* (HC 265/ HL Paper 125, 21 September 2020) at 29.

Inevitably, several judicial review challenges arose. R (on the application of Dolan) v Secretary of State for Health and Social Care 223 challenged the lockdown regulations on three grounds: illegality, irrationality, and human rights violations. The first claim contested whether S45(C)(1) PHA 1984 granted the Health Secretary the authority to impose a national lockdown and create the initial lockdown regulations. S45(C) refers to specific provisions such as the requirements on handling and disposal of dead bodies and "restrictions or special requirements on persons or premises," all for the purpose of "preventing, protecting against, controlling, or providing a public health response to the incidence or spread of infection or contamination." These decisions are made by magistrates vis-à-vis fewer individuals, requiring them to undergo medical examinations. Hence, questions arose as to whether national lockdowns and restrictions can be inferred from "special requirements or restrictions," knowing that unless the wording clearly implies parliament's intended meaning, one cannot confidently assume that broad powers can be used to interfere with fundamental rights. ²²⁴ Applying the general principle of statutory interpretation, it can be argued that section 45 does not imply national restrictions with criminal sanctions; thus, they were ultra vires. However, the court dismissed the claim on the basis that the scope of S45(C)(1) cannot be "cut down" by the provisions in subsection (3) and (4) which provided a non-exhaustive list of restrictions and therefore, grants the health secretary a broad power to impose restrictions such as a national lockdown.²²⁵

This decision created many questions. While it may suggest that under normal circumstances the courts would have decided in favour of the claimant, Tomlinson and Hickman argue that the claim would nevertheless fail due to the significant challenge and consequences of deeming such regulations *ultra vires*, given their extensive use and the critical circumstances of the Pandemic. Further, Lord Sumption criticised the decision, questioning its basis as 'expediency or law,' and suggested that the court's had "caved-in" out of "political necessity", drawing upon the judiciaries' behaviour during the second World War. Additionally, concerns arise over why the court did not prompt the government to rely on the more appropriate and certain *Civil Contingencies Act* 2004 for COVID-19, potentially conflicting with the clarity principle of S3 HRA regarding the Convention rights.

The second claim brought forward contested that the secretary of state, in interpreting S45(C)(1), had neglected relevant considerations including the effectiveness of the lockdown measures and their effect on the social life of individuals, and its effect on the economy. The claimant also contended that the secretary had acted irrationally by not repealing the regulations earlier and implementing better measures that targeted individuals who were more susceptible to contracting the coronavirus and its detrimental effects. The court dismissed this claim for three reasons:

²²³ (2020), EWCA Civ 1605.

²²⁴ GG v Secretary of State for the Home Department [2010] QB 585; Morris v Beardmore [1981] AC 446, [463].

²²⁵ *Dolan* (n 5) [62] [63].

Hickman and Tomlinson, *Judicial review during the COVID-19 pandemic* (4th edn, Oxford University Press, 2023) 252, 262.

²²⁷ Lord Sumption, 'COVID-19 and the courts – expediency or law?' [2021] (137) LQR 353 at 356-357.

²²⁸ *Dolan* (n 5) [82].

²²⁹ APP Houses v Wednesbury Corporation [1948], 1 KB 223.

firstly, the Judicial review was not requested "promptly" as per part 54.5(1) of the Civil Procedures Rules 1998 and the relevant regulations were repealed, therefore, the claim was purely "academic" in nature. Secondly, the medical and scientific knowledge regarding the coronavirus and its impact were uncertain and limited when the regulations were made in March 2020, therefore, the rationality of the decisions taken by the health secretary with advice from relevant experts were largely a matter of "political judgement for the government," therefore, the court determined it was a matter appropriate for Parliament to judge and discuss accountability. ²³⁰

The final claim brought on the basis of the Human Rights Act 1998 asserted that the initial lockdown restrictions and subsequent amendments made before the 2nd July 2020 hearing, breached the United Kingdom's International legal obligation to uphold the provisions in the European Convention on Human Rights, most notably, Article 5 right to liberty, Article 8 right to private and family life, and Article 11 right to freedom of assembly and association, because the restrictions amounted, in effect, to a curfew or a house arrest.²³¹ In relying on the ECtHR's criteria for deprivation of liberty set out in *Guzzardi v Italy*,²³² the court dismissed the possibility of an Article 5 breach believing that it would be a "mischaracterisation" to refer to the lockdown restrictions as being equivalent to a house arrest or a curfew, because regulation 6(1) was subject to a non-exhaustive list of "express and overriding exceptions of having a reasonable excuse." Subsequently, the court viewed that it was unnecessary to even consider relying on the Article 5(1)(e) exception of "lawful detention for the purpose of prevention of the spreading of infectious diseases."

In contrast, while the court acknowledged that the restrictions amounted to an interference with Article 8(1), the restrictions did not amount to a breach as under Art 8(2) as they were "unarguably proportionate, in accordance with the law" and for the purposes of protecting public health.²³⁵ Furthermore, the court viewed it was appropriate to afford the government and parliament a "wide margin of judgement" due to the unique and unprecedented nature of the Pandemic.²³⁶ Similarly, the court also dismissed the possibility of regulation 7 restrictions amounting to an Article 11 breach, primarily because regulation 9(1)(a) provided a general defence of "reasonable excuse." Furthermore, the court also referred to *R (JCWI) v Secretary of State for the Home Department* [2020] where Hickinbottom LJ suggested that a legislation could only be unlawful under the HRA 1998, where "it is incapable of being operated in a proportionate way in all or nearly all cases." While there may have been numerous cases over the pandemic where individuals lacked such a "reasonable excuse", however, the court rules that

²³⁰ *Dolan* (n 5) [66] [89] [90].

²³¹ *ibid* [92].

²³² (1980) 3 EHRR 333.

²³³ *Dolan* (n 5) [93].

²³⁴ *ibid* [94].

²³⁵ *ibid* [95] [96].

²³⁶ *ibid* [97].

²³⁷ *ibid* [103].

²³⁸ EWCA Civ 542, [2020] HLR 30 [118].

given the powerful public interests behind the restrictions and the limited time they were enforced during which they were subject to review, Article 11 is unarguable.²³⁹

The Article 11 basis established in *Dolan* was a crucial element in *R* (*Leigh & Ors*) *v Commissioner of Police of the Metropolis.*²⁴⁰ It concerned processions and assemblies which were held after a police officer murdered Sarah Everard. The Metropolitan Police refused to allow a vigil on Clapham Common since lockdown regulations prohibited gatherings of more than 30 people. The claim relied on *Dolan* contending that the protests were lawful as the demonstrators had a "reasonable excuse." The court had rejected granting interim relief the day prior to the scheduled vigil; however, this time the court held in favour, stating that the vigil had been a reasonable excuse and therefore, in preventing the vigil and protests, the police represented a disproportionate interference with the freedom of protest.

While this was a great victory for human rights law, crucially, as evident by *Leigh*, the judicial review in *Dolan* had a significant deterrent effect on decision making public bodies by inducing them to carefully revise or reverse rules and decisions relating to such restrictions. Therefore, from a broader perspective, judicial review vis-à-vis COVID-19 was salient in its effect on COVID-19 regulations and restrictions by subjecting them to the norms of legality, proportionality, and rationality. Both cases also showcase the foundational role human rights law played in structuring the Government's response to COVID-19 but also in the accountability of ministers.

III. Regulations 6, 7, 9, and 10: Bad communication and ambiguity and their human rights implications

Lockdown regulations had significant interference with individuals' human rights and put significant pressure on the judiciary. For example, restrictions on free movement forced courts to shut down or operate at limited capacity, thus severely limiting individuals' access to justice. Most cases were postponed until further notice, and those that received virtual hearings were at risk of unintended procedural unfairness as the judiciary adapted, thereby interfering with the Article 6 right to a fair trial. The JCHR reported that the Health Secretary referred to the government's regulations as 'Napoleonic'. This does have some substance, as the regulations reversed residual liberty.²⁴¹ However, bad communication from the government and ambiguous regulations only exacerbated these problems. Hence, this, together with the regulations, must be explored in more detail.

<u>Restrictions on Movement and Gathering:</u>

Regulation 6 restricted people's movements to their residences and prohibited them from leaving unless they had a "reasonable excuse." This would normally interfere with the right to liberty in

²³⁹ *Dolan* (n 5) [105] [106] [107].

²⁴⁰ [2022] EWHC 527 (Admin).

²⁴¹ JCHR (n 4) 29.

Article 5; however, as the court in *Dolan* established, the reasonable excuse exception differentiates it from detention.

The common law principle of legality and Article 7 require that a criminal offence be both foreseeable and accessible. The JCHR interpreted this to mean that criminal offences must be clear in wording and clearly and consistently communicated so that the subjects may understand which conduct will make them liable to a criminal sanction. Regulation 6 concerns emerged in relation to this.

The list of "reasonable excuses" was non-exhaustive and caused confusion and a lack of certainty because individuals were uncertain whether they may have a reasonable excuse that is not listed in the regulation. Under Regulation 9, the consequences of not having a reasonable excuse were criminal sanctions. Therefore, due to the lack of clarity, the criminal sanction could not be foreseeable, contrary to Article 7 ECHR.

The second issue arises from a discrepancy between the regulation and the government's guidance. One of the reasonable excuses was "getting exercise." The JCHR report raised concerns when they highlighted that the government's guidance stated that individuals could go outside "once a day for a walk, run, or cycle," and they could still go to the park for outdoor exercise "once a day." However, this guidance was inconsistent with the regulation itself, which stated no limit on how many times a person could leave their house for outdoor exercise. ²⁴³ This discrepancy engages Article 7 concerns, as individuals were at risk of being subject to criminal sanctions if a police officer followed the guidance instead of the regulation.

Similarly, Regulation 7 prohibits participation in gatherings of more than two individuals, with limited *exceptions*, while Regulation 9, focusing on 'offences and penalties,' stipulates that a violation of Regulation 7 requires a lack of "reasonable excuse." This lack of clarity, inconsistent with the principles of Article 7, creates confusion, as Regulation 7 lists *exceptions* rather than "reasonable excuses". As a result, individuals may face criminal sanctions due to government inconsistency.

IV. Care Settings

Care settings include nursing homes and hospitals. These provide services to some of the most vulnerable individuals in society, including assistance and healthcare support, helping them live a healthier life. As such, they naturally engage with a wide range of human rights. The Care Quality Commission regulates and monitors all health and care services in England. However, often 'closed cultures' can form within these settings, leading to serious harm and human rights breaches. The HRA 1998 is relevant to care settings that are publicly funded. Section 6 requires that public authorities comply with the ECHR. As a result, during COVID-19 when restrictions applied to care homes, human rights law was of significant relevance in ensuring that these

²⁴² *ibid* 42.

²⁴³ *ibid* 46.

measures were not disproportionately or unnecessarily breaching individuals' human rights. Where they did interfere, the government was obliged to ensure that these measures were proportionate and strictly necessary. However, the state also has a duty to protect such persons from interference with their human rights being carried out by private persons where they know or ought to have known.²⁴⁴

A. The Gardner Case

Gardner & Harris v Secretary of State for Health and Social Care & Ors²⁴⁵ is a key case that showcases some of the human rights implications that were relevant to care settings during COVID-19, and involved a judicial review claim.

When COVID-19 placed a grave burden on the NHS and the availability of hospital beds became a critical concern, the Health Secretary made the decision to discharge elderly patients from hospitals to care homes to increase hospital capacity for COVID-19 patients. However, this decision increased the COVID mortality rate of care patients when asymptomatic patients were mixed with healthy, vulnerable patients. The families of the victims brought a claim against the health secretary under human rights and judicial review law.

The first claim was based on Article 2, right to life. It is arguably the most important human right and became the central aim of the government's response to COVID-19. It places procedural obligations, operational obligations, and a negative duty on the government. The procedural obligation refers to the state's duty to investigate deaths with the aim of preventing more. This may include conducting public inquiries to consider structural issues like a lack of PPE that may be contributing to the overall death toll (in the case of COVID-19). It also places a negative duty on the state to not take an individual's life.

The claim hinged on the operational obligation. It originates from Strasbourg jurisprudence and places a legal obligation on the state to secure life, as well as providing an effective framework that secures the right to life. He was relevant in the sense that the government had a positive duty to take measures to protect life. This duty is very context-dependent—however, and *Osman v UK*²⁴⁷ provides the relevant test to prove that the government had a positive duty to protect life. It required the claimant to prove that the government or the health secretary "had knowledge or ought to have known" when making their discharge decision that the individuals in the care homes would be at a "real or immediate risk" of losing their lives. Evidence proved the government was aware of the asymptomatic nature of the virus, and the criteria were satisfied. But the court dismissed the claim on the basis that there was no clear line of Strasbourg jurisprudence on Article 2, which applied the operational duty of a state in a pandemic or

²⁴⁴ D (A Child) [2019] UKSC 42, [43].

²⁴⁵ (2022) EWHC 967.

²¹⁶ Valentin Campeanu v Romania [2014] ECHR 972; and Lopes de Sousa Fernandes v Portugal [2017], ECHR 1174 [166].

²⁴⁷ (1997) 29 EHRR 245 [116].

epidemic context. Therefore, the court was not willing to adopt a significant departure from Strasbourg jurisprudence,²⁴⁸ and the human rights claim was unsuccessful.²⁴⁹

Nevertheless, a judicial review claim on the common law irrationality ground remained. The claimant argued that, in light of the knowledge the Health Secretary had in regards to the asymptomatic nature of the virus, their decision to discharge the elderly patients into care homes was so unreasonable that no reasonable decision-maker would have made it. The court exercised its role in evaluating the reasonableness of the health secretary's decision without hindsight and based on the facts presented to the minister at the time. It concluded that the irrationality claim succeeded because the discharge policy and admissions guidance to care homes were irrational in failing to advise them to isolate potential asymptomatic patients for 14 days. The court days.

B. Visiting arrangements and DNACPR notices

Human rights were relevant to visiting arrangements and Do Not Attempt Cardiopulmonary Resuscitation Notices.

1. Visiting arrangements

Care users can maintain relationships through occasional visits, but COVID-19 posed a significant threat to their lives. To protect vulnerable individuals in care homes, the government imposed strict restrictions on visits, fulfilling its duty to safeguard lives. This resulted in a deprivation of the right to private and family life for care patients and their families, contrary to Article 8 ECHR. This had a significant impact on the wellbeing of care patients, with the JCHR reporting that many stopped consuming food and lost weight, mobility, and speech. This impact was worsened when these restrictions were also imposed inside the care homes, which has significant implications for their social lives. Although Article 8 prohibits public authorities from interfering with these rights, it permits them to interfere if it is in the interests of public safety or the protection of health. Nevertheless, these measures can still be questioned for their proportionality and necessity.

The JCHR expressed their concerns over the impact of these measures and blanket visiting bans were implemented in some care homes. They recommended that the government introduce legislation granting care users the right to nominate one or more individuals to visit and to provide care and support in all circumstances.²⁵⁴

2. DNACPR notices

²⁴⁸ Gardner (n 27) [252].

²⁴⁹ *ibid* [297].

²⁵⁰ Wednesbury (n 11).

²⁵¹ Gardner (n 27) [266].

²⁵² ibid [298]

²⁵³ JCHR, Protecting human rights in care settings, (HC 216/ HL Paper 51, 13 July 2022), [67].

²⁵⁴ *ibid* [83].

These notices were issued to healthcare and care professionals in some care settings, *advising* them against CPR for <u>all</u> individuals who have cardiac arrests with their prior **consent**. Human rights concerns arose when these notices were considered orders and applied to care users without their knowledge or consent, in a blanket fashion, covering entire groups based on gender, age, or type of disability. This is clearly contrary to Article 2. The autonomy of individuals and family members to choose medical procedures under Article 8 is also breached by not obtaining their consent or informing them. Moreover, the blanket implementation of these notices concerns the right to not be discriminated against in the enjoyment of human rights (Article 14). The JCHR advised firmly against such use and recommended the government raise awareness.²⁵⁵

V. Conclusion

The intricate interplay between judicial review and human rights law amidst the backdrop of the COVID-19 pandemic has underscored both the resilience and adaptability of legal frameworks in times of crisis. As the government grappled with the imperative to safeguard public health while respecting fundamental rights, the judiciary played a pivotal role in scrutinising the legality, necessity, and proportionality of pandemic-related measures. Despite the courts' reluctance to unduly burden the government during these unprecedented times and providing broad statutory interpretations and large margins of discretion, as showcased in *Dolan*; subsequent case law highlights how judicial decisions served as a deterrent and prompted re-evaluations of policy implications. Human rights law, though not always successful in altering the effects of restrictions, remained central in shaping legislative responses, with certain rights prioritised over others. Moving forward, the lessons learned from this intersection of law and crisis management will undoubtedly inform future legal approaches to global emergencies, emphasising the enduring importance of upholding fundamental rights even in the face of extraordinary challenges. Thus, the COVID-19 pandemic stands as a testament to the enduring relevance of judicial review and human rights law in safeguarding democracy, accountability, and the rule of law in times of turmoil.

Table of Authorities

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²⁵⁵ *ibid* [36].

Statutes

Civil Contingencies Act 2004.

Civil Procedures Rules 1998.

European Convention on Human Rights 1953.

Human Rights Act 1994.

Health Protection (Coronavirus Restrictions) (England) Regulations 2020.

Public Health (Control of Disease) Act 1984.

Cases

APP Houses v Wednesbury Corporation [1948] 1 KB 223.

D (A Child) [2019] UKSC 42.

Gardner & Harris v Secretary of State for the Health and Social Care & Ors (2022) EWHC 967.

GG v Secretary of State for the Home Department [2010] QB 585.

Guzzardi v Italy (1980) 3 EHRR 333.

Lopes de Sousa Fernandes v Portugal [2017] ECHR 1174.

Morris v Beardmore [1981] AC 446.

Osman v UK [1997] 29 EHRR 245.

R (JCWI) v Secretary of State for the Home Department [2020] EWCA Civ 542, [2020] HLR 30.

R (Leigh & Ors) v Commissioner of Police of the Metropolis [2022] EWHC 527 (Admin).

R (on the application of Dolan) v Secretary of State for Health and Social Care (2020) EWCA Civ 1605.

Valentin Campeanu v Romania [2014] ECHR 972.

Bibliography

Jacobs, White, & Ovey, 'the European Convention on Human Rights' (8th edn OUP 2021). Tomlinson J & Hickman R, *Judicial Review during the Covid-19 Pandemic*', (27.3, Edinburgh Law Review 2023).

Reports

Joint Committee on Human Rights, 'The Government's response to COVID-19: human rights implications (21 September 2020).

https://committees.parliament.uk/publications/2649/documents/26914/default/ accessed 15 December 2023.

Joint Committee on Human Rights, 'Protecting human rights in care settings' (13 July 2022) < https://committees.parliament.uk/work/1495/protecting-human-rights-in-care-settings/publications/ accessed 17 December 2023.

Internet Sources

Lord Sumption, 'COVID-19 and the courts - expediency of law?' (1 July 2021) < https://search.informit.org/doi/10.3316/agispt.20210715049943> accessed 19 December 2023.

EU Supremacy: Conflict Between the National Courts and the Court of Justice

Brahmjot Kaur Dua

Department of Law, University of Leicester, United Kingdom

Supremacy asserts that European Union (EU) law should take precedence when it conflicts with domestic legislation. This essay argues, through a constitutional lens, that there is some contrast between the approach taken, towards supremacy, by the national courts and by the Court of Justice (CJEU). This argument will be concluded by a discussion on 2 issues. First, supremacy as a constitutional principle, and second, how CJEU has attempted to reconcile supremacy with fundamental constitutional rights of member states.

Supremacy as a Constitutional Principle

Supremacy is a 'cornerstone principle' of EU law.²⁵⁶ Weiler has argued that the doctrine of supremacy has 'constitutionalised the treaty'.²⁵⁷ The '...[court] has played a pivotal role in enhancing the degree of integration which exists in the Community' through 'constructive' interpretation.²⁵⁸

Case C-26/62 Van Gend en Loos v Nederlandse Administratis der Belastingen²⁵⁰ displays how the court has developed the principle of supremacy to achieve EU's political objectives of integration through its purposive interpretation. It rejects Advocate General's contrasting opinion where he argues that there cannot be automatic supremacy of EU law unless it has been incorporated into national legal system.²⁶⁰ The court stated that EU 'constitutes a new legal order...²⁶¹ which is subject to the nationals of the member states as well.²⁶² It asserts that EU's "common market"²⁶³ objective would not have been possible without the principle of supremacy that allows for uniform application of EU law and effective enforcement of rights, that is also required by Article 267.²⁶⁴ It took an absolutist approach towards supremacy in Case C-6/64 Flaminio Costa v E.N.E.L. (Costa),²⁶⁵ restating that EU membership, as evident from the "terms and spirit"²⁶⁶ of the treaty, has led to "permanent limitation"²⁶⁷ of the Member state's sovereignty.

²⁵⁶ Opinion 11197/07 of the Council Legal Service on the primacy of EC law (JUR 260) DOC/07/3

²⁵⁷ Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 (8) Yale LJ 2403, 2414.

²³⁸ Gordan Slynn, *The Hamlyn Lectures: Introducing a European Legal Order* (43rd edn, The Hamlyn Trust 1992)

²⁵⁹ Case C-26/62, [1963] ECR I-1.

²⁶⁰ Case C-26/62 *Van Gend en Loos v Nederlandse Administratis der Belastingen* [1963] ECR I-1,Opinion of AG Karl Roemer.

²⁶¹ Van Gend en Loos (n 4), 12

²⁶² ibid.

²⁶³ Consolidated Version Of The Treaty On The Functioning Of The European Union (TFEU) [2012] OJ C326/49, art 26

Van Gend en Loos (n4)

²⁶⁵ Case C-6/64, [1964] ECR I-614

²⁶⁶ ibid,593.

²⁶⁷ ibid, 594.

It upheld supremacy by exercising teleological interpretation of Article 4 (3)²⁶⁸ holding that national courts are under an obligation of 'sincere cooperation' to facilitate achieving the treaty objectives.

The CJEU has viewed supremacy as a means to provide effective remedies by developing principles like direct and indirect effects through dynamic interpretation of the treaty.²⁶⁹ Indirect effect has been claimed to be a 'practical manifestation' of supremacy according to the primacy model which has been argued to have run its course.²⁷¹ Case C-106/77 Amministrazione delle Finanze dello Stato v Simmenthal (Simmenthal II)²⁷² obligated national courts to 'set aside any provision of national law which may conflict with [EU law]²⁷³ and give '...full effect to those [EU] provisions'²⁷⁴ justifying it by the need to ensure effectiveness of Article 267, ²⁷⁵ thereby promoting uniform application of EU law. Although, EU law was referred to as an 'incoming tide' in its initial stages in the UK, national courts have gradually become Europeanised by recognizing it as their 'duty to give priority to the treaty' in Macarthys Ltd v Smith²⁷⁷. The Court in Case C-213/89 The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others (Factortame I_{r}^{278} taking an absolutist approach as in Simmenthal I_{r}^{279} re-emphasised the importance of effective enforcement, stating that if the only thing that is coming in its way is the rule of national law, then the national courts are obliged to discard it. Although there was some inconsistency in the understanding of supremacy, among the lower courts, the House of Lords in R v Secretary of State for Transport, Ex parte Factortame Ltd. and Others (No. 2),281 set aside national legislation for the first time by recognising the quasi-entrenchment of EU law in the UK constitution. Lord Bridge justified this decision by highlighting the 'voluntary' 282 restriction placed upon its sovereignty by the parliament itself by enacting European Communities Act 1972.²⁸³

However, national courts are unwilling to cross their constitutional boundaries as Lord Denning refused to cede supremacy to EU law where there is an 'intentional and express repudiation of the treaty'. Factortame had the effect of constitutionalising EU law in UK legal system as evident in *Thoburn v Sunderland County Council* where ECA 1972 was identified as a "constitutional

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<sup>268</sup> TFEU (n8), art 4 (3)
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²⁶⁹ Van Gend en Loos (n 4)

²⁷⁰ Elspeth Berry and others, *Complete EU Law* (5th edn, OUP 2022), 143-146

²⁷¹ Michael Dougan, 'When worlds collide! Competing visions of the relationship between direct effect and supremacy' (2007) 44 (4), CMLR 931.

²⁷² Case C-106/77.[1978] ECR I-629.

²⁷³ ibid, para21.

²⁷⁴ ibid, para24.

²⁷⁵ ibid, paras19-24.

²⁷⁶ HP Bulmer Ltd v J Bollinger SA(No.2) [1974] Ch 401, 5 (Lord Denning MR).

²⁷⁷ [1979] ICR 785 (EWCA Civ), 789 (Lord Denning MR).

²⁷⁸ Case C-213/89, [1990] ECR I-2433.

²⁷⁹ Simmenthal II (n17).

Factortame I (n 23), paras 14-23.

²⁸¹ [1991] 1 AC 603 (UKHL).

²⁸² Ibid, 658.

²⁸³ European Communities Act 1972 (ECA 1972).

²⁸⁴ *Macarthys* (n 22).

²⁸⁵ [2003] QB 151.

statute"²⁸⁶ which can not be impliedly repealed by a later conflicting act. ²⁸⁷ However, this suggests that ECA 1972 can be expressly repealed by a later act of Parliament, thereby defeating the principle of supremacy which is viewed absolute by the Court of Justice in *Costa.*²⁸⁸ UK Courts strive to balance their centuries-old constitutional duties, upholding Parliamentary sovereignty, against the newly emerged ones to give priority to this "foreign" law. Where the national courts, have struggled to reconcile supremacy with their constitutional principles, Court of Justice has viewed supremacy as absolute and as a means to achieving its objective of integration.

Fundamental Constitutional Rights

National courts have found supremacy "problematic" where EU law has attempted to trump their fundamental constitutional rights. Supporting the views of House of Lords Select committee on European law, Weiler has argued that it would have been "virtually impossible" for national courts to cede supremacy to EU in the absence of a guarantee on the protection of fundamental rights. German court, in Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I)*, was reluctant to cede supremacy to EU law as it was incompatible with the German constitutional rights. The Court attempted to reconcile the German constitutional rights with the principle of supremacy by stating that 'fundamental rights form an integral part of general principles of [EU] law inspired by the constitutional traditions common to the member states'. It reassured the national courts that even in the absence of a written Charter, that the standard of protection afforded by the EU is equivalent to the international treaties, to which the member states are signatories, benchmarking the standards in European Convention on Human Rights. Had the court not taken this uniform approach, different national courts would have applied different constitutional rights damaging the objective of EU integration.

The CJEU is mindful of the 'objectives of the community'. So, where EU objectives are at issue, it will uphold supremacy at the cost of restricting constitutional rights as evident from Case C-44/79 Hauer v Land Rheinland-Pfalz where it re-emphasised the importance of 'cohesion of the community' and effective enforcement, justifying the restriction on rights by EU's objectives and holding the EU provision sufficiently compatible with EU standard. Through these judgments, the court of justice successfully upheld the principle of supremacy fulfilling its objective of EU integration through uniform application by balancing it with the need to satisfy the German court's concern regarding the protection of fundamental constitutional rights as

²⁸⁶ ibid, 60-67 (Laws LJ).

²⁸⁷ ibid.

²⁸⁸ Costa (n10).

²⁸⁰ Select Committee on the European Union, *EU Charter of Fundamental Rights (eighth report)* (HL 1999–2000)

²⁹⁰Joseph HH Weiler (n 2),2418.

²⁹¹ Case C-11/70, [1970] ECR I-1125.

²⁹² ibid,para 4.

²⁹³ Case 4/73 Nold, Kohlen- und Baustoffgroßhandlung v Commission, [1974] ECR I-491.

²⁹⁴ Case 36/75 Rutili v Ministre de l'intérieur, [1975] ECR I-1219.

²⁹⁵ Solange I (n36), para 4.

²⁹⁶ Case C-44/79, [1979] ECR I-3727.

²⁹⁷ ibid, paras14,30.

evident from Case C-345/82 Wünsche Handelsgesellschaft GmbH & Co. v Federal Republic of Germany (Solange II)²⁹⁸ where the German courts accepted that sufficient level of protection had been provided by the CJEU through its development of fundamental rights. The initial reluctance of the national courts turned into gradual acceptance of EU's supremacy conditional on adequate protection of human rights by EU. In contrast, CJEU has prioritized the attainment of the objectives of EU, having absolute supremacy.

The approach towards supremacy taken by national courts differs to some extent from that taken by CJEU. Where the CJEU views supremacy as absolute to achieve EU integration by promoting effective enforcement in cases like *Costa* and *Simmenthal II*; national courts, although Europeanised, are more mindful of not stepping on their constitutional boundaries be it constitutional principles like parliamentary sovereignty in Factortame I or fundamental rights in Solange I.

²⁹⁸ Case C-345/82, [1984] ECR I-1995.

TABLE OF AUTHORITIES

a) Cases

I. European Union

Van Gend en Loos v Nederlandse Administratis der Belastingen, (Case C-26/62), [1963] ECR I-1

Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I) (Case C-11/70), [1970] ECR I-1125

Rutili v Ministre de l'intérieur (Case 36/75), [1975] ECR I-1219

Hauer v Land Rheinland-Pfalz (Case C-44/79), [1979] ECR I-3727

Wünsche Handelsgesellschaft GmbH & Co. v Federal Republic of Germany (Solange II) (Case C-345/82), [1984] ECR I-1995

Amministrazione delle Finanze dello Stato v Simmenthal (Case C-106/77), [1978] ECR I-629

The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others (Factortame I) (Case C-213/89), [1990] ECR I-2433

Flaminio Costa v E.N.E.L. (Case C-6/64), [1964] ECR I-614

Nold, Kohlen- und Baustoffgroßhandlung v Commission (Case 4/73), [1974] ECR I-491

II. United Kingdom

HP Bulmer Ltd v J Bollinger SA(No.2) [1974] Ch 401 (EWCA Civ)

Macarthys Ltd v Smith [1979] ICR 785 (EWCA Civ)

R v Secretary of State for Transport, Ex parte Factortame Ltd. and Others (No. 2) [1991] 1 AC 603 (UKHL)

Thoburn v Sunderland County Council [2003] QB 151

b) <u>Legislation</u>

I. European Union

Case C-26/62 Van Gend en Loos v Nederlandse Administratis der Belastingen [1963] ECR I-1,Opinion of AG Karl Roemer

Consolidated Version Of The Treaty On The Functioning Of The European Union (TFEU) [2012] OJ C326/49, art 26

TFEU, art 4 (3)

II. United Kingdom

European Communities Act 1972

BIBLIOGRAPHY

I. Books

Berry E and others, Complete EU Law (5th edn, OUP 2022)

Slynn G, The Hamlyn Lectures: Introducing a European Legal Order (43rd edn, The Hamlyn Trust 1992)

II. Official publications

Opinion 11197/07 of the Council Legal Service on the primacy of EC law (JUR 260) DOC/07/3 Select Committee on the European Union, EU Charter of Fundamental Rights (eighth report) (HL 1999-2000)

III. Journal articles

Dougan M, 'When worlds collide! Competing visions of the relationship between direct effect and supremacy' (2007) 44 (4), CMLR 931

Weiler JHH, 'The Transformation of Europe' (1991) 100 (8) Yale LJ 2403

Inequality and Colonial Legacies: A Critical Analysis of British Overseas Territories

Brahmjot Kaur Dua

Department of Law, University of Leicester, United Kingdom

The UK constitution has treated the British citizens living in British overseas territories inferiorly to its citizens living in the UK, similar to its treatment of colonised people in the past, serving as a stark reminder that the British Empire still exists. This essay draws on two factors, the first being that the political safeguards asserted by the UK constitution are absent in the British Indian Ocean Territory (BIOT), and the second being how legal constitutionalism has also failed in protecting the private and public rights of the Chagossians.

LEGAL CONSTITUTIONALISM

The British overseas territories are primarily administered by Prerogative powers of the sovereign that have had limited or residual authority in the UK for centuries.²⁹⁹ Primary legislation in the UK is an Act of Parliament passed by the democratically elected Members of Parliament and scrutinized through debates, parliamentary questions and select committees. By contrast, in British overseas territories, Prerogative Orders in Council are primary legislations which are approved by the sovereign by convention in the Privy Council without any scrutiny, public oversight or records of the meeting. The Chagos Islands were made a part of BIOT in 1965 by the UK for the purposes of an agreement³⁰⁰ with the US allowing it to build a military base in Diego Garcia and in exchange of a \$14 million discount on a nuclear missile technology offered to the UK. As a part of the deal, the Chagos island, inhabited by "nearly 2000" people, had to be uninhabited. They were British citizens under the British Nationality Act 1948³⁰², who should theoretically have the same rights as the people living in the UK. Dispossession was achieved by denying the existence of the Chagossians population, they were labeled "contract labourers" 303 who had no property rights. There is evidence that the Prime Minister acknowledged the fact that these were 'second-generation inhabitants', 304 yet approved the proposal (without any accountability) that the government should lie to the world that "there is no indigenous population" in a secret minute sent to him by the Foreign Secretary (1968). The BIOT commissioner, who is undemocratically appointed by the sovereign under the prerogative, passed

²⁹⁹ Case of Proclamations [1610] 12 Co Rep 74 (KB).

³⁰⁰ United Kingdom of Great Britain and Northern Ireland and United States of America Exchange of Notes Constituting an Agreement Concerning the Availability for Defense Purposes of the British Indian Ocean Territory (with Annexes) (London, 30 December 1966).

Marjorie Miller, 'Britain Illegally Expelled Chagos Islanders for U.S. Base, Court Rules', *Los Angeles Times* (Los Angeles, 4 November, 2000) < https://www.latimes.com/archives/la-xpm-2000-nov-04-mn-46949-story.html> accessed 24 November, 2023.

 $[\]overline{^{302}}$ British Nationality Act 1948.

³⁰³ Tom Frost and C R G Murray, 'The Chagos Islands cases: the empire strikes back' (2015) 66 Northern Ireland Legal Quarterly 263, 271.

John Pilger and Chris Martin, 'Stealing a Nation - The Plight of the Chagos Islands VS the United States (2004)', Granada Television (6 October 2004) < <u>Stealing a Nation - The Plight of the Chagos</u> Islands VS the United States (2004) - YouTube > Accessed 24 November, 2023.

the Immigration Ordinance 1971³⁰⁵ under the authority of British Indian Ocean Territory Order 1965³⁰⁶, that prevented any return of the Chagossians to their homeland. British citizens were removed from their ancestral land with barely any political accountability or public outcry. This would have never happened in the UK as the political institutions and the checks and balances would have made it impossible to allow for the depopulation of an entire state.

POLITICAL CONSTITUTIONALISM

A Private claim was brought by the Chagossians who had been deported to Mauritius in the 1970's, Vencatassen.³⁰⁷ They grew into poverty and wanted to return to their homeland. The Government took advantage of their poverty and desperation by offering them compensation in exchange for signing the 'full and final settlement' in 1982³⁰⁸ that took away their right to return back to their home and withdrew the *Vencatassen* claim. ³⁰⁹ The terms of the settlement agreement were so harsh that if the claimant was a UK citizen, the agreement would have patently been declared void for unconscionability, Undue influence and Duress under the English contract law as the document was presented in official legal English, and without proper representation, the Chagossians were unable to understand the document sufficiently for them to sign it. Their 'bargaining power [was] grievously impaired'311 by their need for money and desperation. Nevertheless, the settlement agreement was upheld and the claim was successfully withdrawn from the courts. Another claim was brought by the Chagossians in 2003, Chagos islanders v Attorney general.312 The court did not think that the UK acted unlawfully by expelling a population of around 2000 British citizens, or in the words of Ousley J, this is the 'essence of sovereignty'. In contrast, in *Entick v Carrington* (1765)³¹⁴ a British citizen's property rights were upheld above the state's security. This differential treatment can be traced back to UK Court's treatment of colonised people like in *Gregson v Gilbert*³¹⁵ where it was lawful to throw (murder) slaves out of the ship due to shortage of resources, and the claimants could even claim insurance for that.

In the case of *Bancoult v Secretary of State for Foreign and Commonwealth Affairs (No 1)*,³¹⁶ the division court held that the BIOT commissioner acted *ultra vires* by enacting the Immigration

³⁰⁵ Immigration Ordinance 1971.

³⁰⁶ British Indian Ocean Territory Order 1965 (BIOT Order 1965).

³⁰⁷ UK National Archives (UKNA), Foreign and Commonwealth Office (FCO) 31/2768, *Michel Vencatassen v Attorney-General*, Writ of Michel Vencatassen (17 February 1975).

³⁰⁸ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and

the Government of Mauritius concerning the Ilois (6 July 1982) UKTS 6/1983.

Tom Frost and C R G Murray, 'Homeland: Reconceptualising the Chagossians' Litigation (2020) 40 Oxford Journal of Legal Studies 764, 776-778.

³¹⁰ Chagos Islanders v Attorney-General [2003] EWHC 2222 (QB), [580] (Ousley J).

³¹¹ *Lloyds Bank Ltd v Bundy* [1975] QB 326, 339 (Lord Denning).

³¹² *Chagos* (n 12).

³¹³ Ibid [267] Ousley J.

³¹⁴ Entick v Carrington (1765) 95 E.R. 807.

³¹⁵ (1783) 99 E.R. 629.

³¹⁶ [2001] QB 1067 (Bancoult (No 1)).

Ordinance 1971³¹⁷ and that the powers vested in him through the BIOT Order 1965³¹⁸ were vast but not vast enough to ban the entry of Chagossians to their homeland. In response, the government issued two Prerogative Orders in Council (2004)³¹⁹ without any legislative scrutiny that had an effect of a 'legal firebreak', overriding the decision in Bancoult (No.1)³²⁰ and prohibiting the return of Chagossians. In R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) 321 the two 2004 Orders in Council 322 were held to be lawful by the majority, denying the return of Chagossians again. Lord Hoffman made a key statement that explicitly shows the disparity in the treatment of the colonised peoples and UK citizens, 'in the event of a conflict of interest, [Her Majesty in Council] is entitled ... to prefer the interests of the United Kingdom'. 223 This guidance given by Lord Hoffman not only justifies my argument that the UK empire still exists, but also that the court is instructing the future courts to give priority to the UK's interests over the colonies'. In the A and others v Secretary of State for the Home Department, 224 Lord Hoffman defended the idea of fundamental 'constitutional freedoms', as he explained that the state cannot destroy constitutional freedoms even under the threat of terrorist violence. 325 However, the state can lawfully deport an entire population to a foreign land, provided it is done in the interests of the UK.

CONCLUSION

This essay has argued that the UK has been treating UK citizens living in the British overseas territories inferiorly to its citizens living in the UK in the same way it treated the colonised people. This essay has argued this with a focus on the Chagos islands, and how the political and legal mechanisms have failed to safeguard the interests of Chagossians, while being effective in safeguarding the UK citizens' interests living in the UK.

³¹⁷ Immigration Ordinance 1971.

³¹⁸ BIOT Order 1965 (n 8).

³¹⁹ BIOT (Constitution) Order 2004; BIOT (Immigration) Order 2004.

³²⁰ Bancoult (No.1) (n 18)

³²¹ [2009] 1 A.C. 453 (Bancoult No 2)

³²² BIOT (Constitution) Order 2004; BIOT (Immigration) Order 2004

Bancoult No 2 (n 23), [49] (Lord Hoffman)

³²⁴ [2005] 2 AC 68

³²⁵ Ibid [95] (Lord Hoffman)

TABLE OF AUTHORITIES

a) Cases

Case of Proclamations [1610] 12 Co Rep 74 (KB)

Chagos Islanders v Attorney-General [2003] EWHC 2222 (QB)

Lloyds Bank Ltd v Bundy [1975] QB 326

Entick v Carrington (1765) 95 E.R. 807

Gregson v Gilbert(1783) 99 E.R. 629

Bancoult v Secretary of State for Foreign and Commonwealth Affairs (No 1) [2001] QB 1067 (Bancoult (No 1))

R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2009] 1 A.C. 453 (Bancoult No 2)

A and others v Secretary of State for the Home Department [2005] 2 AC 68

UK National Archives (UKNA), Foreign and Commonwealth Office (FCO) 31/2768, Michel Vencatassen v Attorney-General, Writ of Michel Vencatassen (17 February 1975)

b) Legislation

International

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Mauritius concerning the Ilois (6 July 1982) UKTS 6/1983 United Kingdom of Great Britain and Northern Ireland and United States of America Exchange of Notes Constituting an Agreement Concerning the Availability for Defense Purposes of the British Indian Ocean Territory (with Annexes) (London, 30 December 1966)

United Kingdom

British Nationality Act 1948

Immigration Ordinance 1971

British Indian Ocean Territory Order 1965 (BIOT Order 1965)

BIOT (Constitution) Order 2004

BIOT (Immigration) Order 2004

BIBLIOGRAPHY

a) Journal Articles

Frost T and Murray CRG, 'Homeland: Reconceptualising the Chagossians' Litigation (2020) 40 Oxford Journal of Legal Studies 764

Frost T and Murray CRG, 'The Chagos Islands cases: the empire strikes back' (2015) 66 Northern Ireland Legal Quarterly 263

b) Internet Sources

Miller M, 'Britain Illegally Expelled Chagos Islanders for U.S. Base, Court Rules', *Los Angeles Times* (Los Angeles, 4 November, 2000) < https://www.latimes.com/archives/la-xpm-2000-nov-04-mn-46949-story.html accessed 24 November, 2023

Pilger J and Martin C, 'Stealing a Nation - The Plight of the Chagos Islands VS the United States (2004)', Granada Television (6 October 2004) < <u>Stealing a Nation - The Plight of the Chagos Islands VS the United States (2004) - YouTube</u> > Accessed 24 November, 2023

Article 3's Impact on the Expulsion of Suspected Terrorists: Analysing Othman (Abu Qatada) v UK

Shristi Sapkota

Department of Law, University of Leicester, United Kingdom

Introduction

This essay will critically explore the case of *Othman (Abu Qatada) v the United Kingdom* ³²⁶ to assess the efficacy of Article 3 of the European Convention of Human Rights (ECHR) as a deterrent against the expulsion of suspected terrorists from the UK. By analysing precedent cases, this essay argues that Article 3 ECHR has historically prevented the expulsion of suspected terrorists, given they face a real risk of torture if deported. However, the case of *Othman v UK* demonstrates how decisions made under Article 3 ECHR, namely relying on assurances from Jordan, may weaken its ability to prevent such expulsions. Thus, the analysis will focus on how Article 3 ECHR's application has impacted the prevention of suspected terrorists' expulsion from the UK.

Article 3 and the Prevention of Deportation

Firstly, it is worth underlining the key features of Article 3 and its historical application in cases predating the Othman v UK Appl²⁸ case. Article 3 of the ECHR expressly stipulates that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." This provision guarantees that individuals within the jurisdiction of the ECHR's member states are protected and granted the right of safety, irrespective of whether they are perceived as a threat to national security or not. The Chahal v UK³³⁰ case illustrates the role of Article 3 ECHR in safeguarding individuals, as in this case, Article 3 of the ECHR ensured the obligation not to expel the person in question to the country where they would face a real risk of torture or illtreatment, provided substantial grounds to demonstrate support this. The Strasbourg court in Chahal⁸³¹ upheld an overly robust and stringent position, affirming that the absolute nature of Article 3 of the ECHR remains applicable, even if the individual concerned is deemed a potential terrorist threat to the host nation. Supporting this contention, paragraph 80 states that, 'the activities of the individual in question, however undesirable or dangerous, cannot be material consideration....³³². This emphasised the protective function of Article 3 of the ECHR for those who are at substantial risk of being deported to countries where they could be subjected to torture or mistreatment. As a standard in its own right, Article 3 of the ECHR inherently aims to guarantee its efficacy in preventing the expulsion of suspected terrorists, provided that they are at a real risk of being tortured or harmed in the receiving country.

³²⁶ Othman v United Kingdom (8139/09) [2012] EHRLR, 3, 339-343

³²⁷ Ibid.

 $^{^{328}}$ Ibid.

European Convention on Human Rights (ECHR) (1950), Article 3.

³³⁰ Chahal v United Kingdom, 22414/93 [1996] ECHR 54

³³¹ Ibid.

³³² Ibid.

The influence of Article 3 and its ability to hinder the expulsion of such individuals is evident in the case of *Saadi v Italy*³³³. In this case, the UK made an unsuccessful attempt to convince the European Court of Human Rights (ECtHR) to alter its stance on Article 3 of the ECHR. Specifically, it presents the ECHR's reaffirmation of the 'absolute character' of the prohibition of torture and inhumane treatment³³⁴. Here, the ECtHR held that the decision of the Italian Government to deport a suspected terrorist to Tunisia would contravene Article 3 ECHR. This example supports Article 3's ability to balance the rising concerns of national security with the 'protection of some fundamental rights...'³³⁵. Although this example is specific to Italy, its purpose is to offer insight into the impact of Article 3 of the ECHR in upholding rights. Thus, prior to the *Othman v UK*³³⁶ decision, it could be argued that Article 3 of the ECHR effectively averted the expulsion of suspected terrorists.

Article 3 and Othman

While the principles of Article 3 of the ECHR have been thoroughly examined, the case of Othman (Abu Qatada) v the United Kingdom³³⁷ signifies a critical juncture in the development of Article 3 of the ECHR, revealing a notable weakening of its ability to prevent the expulsion of such individuals. In Othman v UK338, the deportation of a suspected terrorist from the UK to Jordan was challenged at the ECtHR. The applicant, Mr. Othman, in 2002, was arrested and detained under the Anti-Terrorism, Crime and Security Act 2001³³⁹. In 2005, he was served with a 'notice of intention to deport'. As a result, he contested his deportation, 'alleging that there was a real risk that he would be subjected to torture upon his return to Jordan...³⁴⁰. At first glance, it would be reasonable to assume that Article 3 of the ECHR would bar the expulsion of Mr. Othman, given his strong belief that if he were deported, he would be tortured, which Article 3 of the ECHR makes clear cannot happen, irrespective of whether the suspect is a terrorist or not. However, the Court ruled that expulsion would not breach Article 3 of the ECHR if the UK and Jordan signed a mutual agreement, referred to as the 'Memorandum of Understanding'. This agreement would delineate 'a series of guarantees for the fair and human treatment of the deportee."

This would ensure adequate protection for the individual to avoid any risk of torture or ill treatment once he arrives to Jordan, as per the *Chahal*⁶⁴² precedent. Hence, in this case, Article 3 of the ECHR did not prevent expulsion.

³³³ Saadi v Italy (37201/06) [2008] ECHR 179.

³³⁴ Gentili G., 'European Court of Human Rights: An absolute ban on deportation of foreign citizens to countries where torture or ill-treatment is a genuine risk' (2010) 8(2) International Journal of Constitutional Law 311–322

³³⁵ Ibid.

³³⁶ Othman, [2012] 3 EHRLR 342

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ Strasbourg Observers, 'Othman (Abu Qatada) v the United Kingdom: Questioning Gafgen' (2012), https://strasbourgobservers.com/2012/02/08/othman-abu-qatada-v-the-united-kingdom-questioning-gafgen/

 $^{^{340}}$ Ibid.

³⁴¹ Giuffré, M., 'An Appraisal of Diplomatic Assurances One Year after Othman (Abu Qatada) v United Kingdom (2012)' (2013) 2 IHRLR 266.

³⁴² Chahal v United Kingdom [1996] ECHR 54.

Policy of Deportation with Assurances

Though it did not prevent expulsion, it adhered to the rules set out in Article 3 of the ECHR and the case law by implementing protective measures. In the precedent of *Othman*³⁴³, extensive negotiations transpired between the UK and the Jordanian Government, resulting in a 'legal assistance treaty' between the UK and Jordan. Subsequently, this treaty was ratified by legislature and the appellant consented to be deported as a result of the agreement³⁴⁴. Even though Article 3 of the ECHR deems that deporting an individual who is at real risk of torture is not to be excused, the Court adeptly addressed this limitation by forging bilateral agreements with the receiving country to ensure the protection of Othman.

While the policy of deportation with diplomatic assurances sought to 'facilitate the deportation to certain receiving states of foreign nationals suspected of terrorism' it fundamentally undermined the principles under Article 3 ECHR. This reinforces the contention that while the deportation of Othman did not violate any regulations, legally, it weakened Article 3 of the ECHR's ability to prevent expulsion of individuals who rightly believe that they were at a real risk of torture in the receiving country. This was not limited to the case study explored in this essay; nine other individuals have also been deported by the UK, in accordance with similar arrangements ³⁴⁶. Ultimately, Article 3 ECHR has failed to prevent the expulsion of individuals who are at a real risk of being deported.

Despite the assurances being regarded as necessary from the UK's standpoint, as both politicians and the media argue that the conditions stipulated under Article 3 ECHR are strict and impose 'needless' restrictions on national sovereignty³⁴⁷, a more compelling perspective arises: namely that such assurances undermine the legitimacy of Article 3 ECHR. For example, a significant flaw in the *Othman v UK* case, stressed by human rights advocates and UN rapporteurs, was that the agreements and negotiations were formed with nations which routinely engage in torture and those who practise corruption³⁴⁸. Additionally, the case of *Othman*³⁴⁰ noted that the prevalence of torture and corruption in Jordan is as consistent as it is 'disturbing', underscoring the very notion of torture persisting in Jordan, raising uncertainties about the safety of Mr Othman. This prompts scrutiny regarding the legitimacy of the assurances offered by Jordan, insinuating that it was morally wrong for these assurances to be made in the first place.

Conclusion

To conclude, this essay discusses that through the example of *Othman v UK*³⁵⁰, Article 3 of the ECHR is ineffective in preventing the expulsion of suspected terrorists who are at risk of torture or ill treatment in the receiving country. Furthermore, it is evident that despite the deportation

³⁴³ Othman, [2012] 3 EHRLR 342.

⁸⁴⁴ Roach K., (ed), Comparative Counter-Terrorism Law (2015) CUP 1-46.

³⁴⁵ Anderson, D., Q.C., Walker C., Q.C., *Deportation with Assurances* (2017) University of Leeds 5 [1.1].

³⁴⁶ Ibid.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Othman, [2012] 3 EHRLR 342.

³⁵⁰ Ibid.

assurances and its ability to allow Article 3 ECHR to be invoked without legal consequences, there are inherent weaknesses in negotiating and entering into agreements with countries that are notorious for practicing torture and corruption. By scrutinising both the *Othman*³³⁷ judgement and various case laws in this essay, it becomes clear that the limitations of Article 3 of the ECHR in protecting suspected criminals from deportation persist, albeit the risks they may encounter upon return to their home country.

³⁵¹ Ibid.

Bibliography

List of Books

Anderson, D., Q.C., Walker C., Q.C., 'Deportation with Assurances' (2017) University of Leeds 5 [1.1].

Roach, K. (ed), 'Comparative Counter-Terrorism Law' (2015) Cambridge University Press 1-46.

Table of Cases

Chahal v United Kingdom (Application no. 22414/93) [1996] ECHR 54. Othman v United Kingdom (Application no. 8139/09) [2012] 3 EHRLR 339-343. Saadi v Italy (Application no. 37201/06) [2008] ECHR 179.

List of Journal Articles

Gentili, G. European Court of Human Rights: An absolute ban on deportation of foreign citizens to countries where torture or ill-treatment is a genuine risk' (2010) 8(2) International Journal of Constitutional Law 311–322.

Giuffré, M. 'An Appraisal of Diplomatic Assurances One Year after Othman (Abu Qatada) v United Kingdom (2012)' (2013) 2 International Human Rights Law Review 266–293.

List of Statutes

Anti-Terrorism, Crime and Security Act 2001, 21–23 (no longer in force). Suspects were free to leave the U.K. if they wished, but there were rarely "safe" third countries willing to accept them. European Convention of Human Rights, Article 3.

List of Websites

Strasbourg Observers, 'Othman (Abu Qatada) v the United Kingdom: Questioning Gafgen' (2012) https://strasbourgobservers.com/2012/02/08/othman-abu-qatada-v-the-united-kingdom-questioning-gafgen/ accessed 17th January 2024.

The Interplay between the Use of Force in International Relations and the Inherent Right of Self-Defence

Surva Rose Thomas

Department of Law, University of Leicester, United Kingdom

INTRODUCTION

International law is crucial for the very existence of global peace and harmony. The scars of the first and second world wars still echo through history. In the past and present, the use of force by states against one another for various reasons, such as military operations or war, that kill civilians is not an isolated incident. The ongoing challenge of international law is to steer countries away from war.

The United Nations, formed after the Second World War, primarily focuses on international peace and security. The UN Charter is the leading international document that codifies major principles of international relations, and United Nations members are bound by these principles.³⁵² The catastrophic effects of warfare so colossal that to prevent wars and to maintain international peace and security, the United Nations included the prohibition of force in its Charter provisions. The United Nations Charter also contains the provision for self-defence in Article 51.³⁵³

The dynamic interplay between the prohibition of force and the exception to force under Article 51 raises fundamental questions about the boundaries and conditions governing a state's recourse to self-defence. The vast interpretations that the states give to articles 2(4) and 51 of the United Nations Charter³⁵⁴ in order to justify their actions require a deep analysis. This essay discusses the prohibition of the use of force as well as the justifications used by the states for using force. It then delves into the provisions of self-defence, also analysing the preemptive measures against non-state actors and the role of the United Nations Security Council.

PROHIBITION OF THE USE OF FORCE

The major principles of the UN are embodied in Article 2³⁵⁵ of the UN Charter. Sovereign equality of the members of the UN, peaceful settlement of international disputes, and prohibition of the use of force are the major principles that can be identified from Article 2. The prohibition of the use of force is a contentious topic, as incidents of the use of force are still prevalent despite Article 2(4). It is pertinent to note that the UN Charter, in Article 2(4), clearly prohibits the use of force by states to maintain international peace and security. This principle, as confirmed by

³⁵² United Nations, 'United Nations Charter' (*United Nations*26 June 1945)

https://www.un.org/en/about-us/un-charter/full-text.

 $^{^{} iny 153}$ ${
m Ibid}$

⁸⁵⁴ United Nations, 'United Nations Charter' (*United Nations*26 June 1945)

https://www.un.org/en/about-us/un-charter/full-text.

³⁵⁵ United Nations, 'United Nations Charter' (*United Nations*26 June 1945)

https://www.un.org/en/about-us/un-charter/full-text.

the Nicaragua case³⁵⁶, is a customary international law. Therefore, this applies to non-members of the United Nations as well. Article 2(6) states that 'the organisation shall ensure that states that are not members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security'. ³⁵⁷ It should be noted that Article 2(4) only applies to inter-state disputes; therefore, internal conflicts are not covered. ³⁵⁸

Despite the enforcement of UN Charter in 1945, many instances of the use of force by the states can be seen until this date, including attacks by the USA on Nicaragua, the invasion of Kuwait by Iraq³⁵⁹, the annexation of Taiwan by China³⁶⁰, and many more. Article 2(4) also prohibits the use of threats of force. However, the guidelines for determining the use of threat of force are less clear. States interpret and use this article in favour of them, and the world has been witnessing this since forever.

AN ANALYSIS OF THE JUSTIFICATIONS FOR THE USE OF FORCE

There are ambiguities as to the interpretation of Article 2(4). The use of force has always been a controversial topic. Whether to give it a wider or narrow approach is still a matter of debate. This confusion furthers the scope of states ability to find loopholes whenever they want to use force against another. Force is used for purposes consistent with the UN Charter, like to stop genocide or for matters other than disturbing the territory of states.

As already mentioned, a major limitation of Article 2(4) is that it only prohibits inter-state conflicts. Thus, states have utilised this in defence of their use of force. The invasion of Kuwait by Iraq can be taken to explain this point.

Invasion of Kuwait

The use of force by Iraq against Kuwait captured the attention of the international community in 1990³⁶¹. According to Iraq, Kuwait originally belonged to it, so it was not violating Article 2(4) of the UN Charter as the conflict was internal in nature. Iraq defeated and occupied Kuwait despite numerous security council resolutions. Finally, Iraq was defeated by a military operation carried

³³⁶ Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) [1984] ICJ Rep 392.

³⁵⁷ United Nations, 'United Nations Charter' (*United Nations*26 June 1945)

https://www.un.org/en/about-us/un-charter/full-text.

³⁵⁸ Christine Gray, *International Law* (5th edn., Oxford University Press 2018) 604.

³⁵⁹ Ibid 621.

David Brown, 'China and Taiwan: A Really Simple Guide' BBC (6 April 2023)

https://www.bbc.com/news/world-asia-china-59900139 accessed 4 April 2024.

³⁶¹ Christine Gray, *International Law* (5th edn., Oxford University Press 2018) 621.

out by the member states of UN supporting the Kuwait government after the endorsement given by the UN to use all necessary means to defeat Iraq. ³⁶²

It can be seen that states use the narrow interpretation of Article 2(4) whenever they want to use force against another. It is pertinent to note that the United Nations was formed with a purpose: international peace and security. Therefore, while interpreting the principles of the UN charter, the mischief rule for statutory interpretation can be used for the effective enforcement of the principles of the UN charter.

ARTICLE 51 OF THE UNITED NATIONS CHARTER

The right to self-defence against armed attack is necessary and pivotal for individuals as well as states in accordance with the UN Charter provisions for self-defence against armed attacks. This is enshrined in Article 51 of the UN Charter.

Article 51 stipulates clearly that states have the power of self-defence against armed attacks; however, such actions should be mandatorily and immediately be reported to the security council and can only be continued until the security council takes adequate steps to tackle the attack. So, it is clear that self-defence here does not entail massive armed attacks that kill populations. But are the states strictly interpreting it? Or are they giving it a wider meaning that could possibly lead to the use of force in the name of self-defence? Is there any interplay between Article 2(4) and Article 51 of the UN Charter?

There is indeed an interplay between the use of force and self-defence. If states manipulate the right to self-defence, it will adversely affect the goals of the United Nations, and Article 2(4) will be violated. The essence of Article 2(4) can be best extracted from the strict interpretation of Article 51. Article 51 is essential but has a high chance of getting misused. Some states are of the view that self-defence should be construed in such a way that it should include self-defence against attacks other than armed ones as well. Some propagate that Article 51 also includes the right to anticipatory self-defence. Self-defence.

The interplay of Article 2(4) can also be seen in the ongoing war between Russia and Ukraine. Russia invaded Ukraine in February 2022, thereby violating Article 2(4) of the United Nations Charter. Russia relied on the self-defence justification and collective self-defence of the Donetsk People's Republic (DPR) and Luhansk People's Republic. However, only some countries have recognised these republics as independent states. Therefore, the validity of the justification is questionable in this aspect as well.

³⁶² 'UNIKOM: United Nations Iraq-Kuwait Observation Mission - Background' (*Un.org*2019)

https://peacekeeping.un.org/mission/past/unikom/background.html accessed 4 April 2024.

³⁶³ Christine Gray, *International Law* (5th edn., Oxford University Press 2018) 611.

³⁶⁴ Ibid 611.

Marko Milanovic, 'What Is Russia's Legal Justification for Using Force against Ukraine?' (*EJIL: Talk:*24 February 2022) https://www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine accessed 1 January 2024.

There is the question of whether force can be used against a state, considering the suffering of civilians? Humanitarian considerations can be said to be a doctrine not often used by the states to justify their actions of force. The United Kingdom used it to justify intervention in Iraq during the attacks on Kuwait in 1990. Even though this ground has a strong connotation that aligns with the principles of the United Nations, the usage and development of this doctrine are less. However, the 2005 UN World Summit Outcome Document in paragraphs 138 and 139 adopted the principle of the responsibility to protect the population from genocide, war crimes, ethnic cleansing, and crimes against humanity. However, the 2005 UN world Summit Outcome Document in paragraphs 138 and 139 adopted the principle of the responsibility to protect the population from genocide, war crimes, ethnic cleansing, and crimes against humanity.

The International Court of Justice, in the case of Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), found that Uganda violated Article 2(4) of the United Nations Charter by invading the Congo. The ICJ rejected the self-defence argument of Uganda and asserted that Uganda did not report to the Security Council about its self-defence strategy and therefore infringed on the very provisions of Article 51. The ICJ ruled in favour of the Democratic Republic of Congo and directed Uganda to pay, in instalments, US\$225,000,000 for damage to persons, US\$40,000,000 for damage to property, and US\$60,000,000 for damage related to natural resources. However, it also found that Congo had violated the Vienna Convention on Diplomatic Relations of 1961.

UNITED NATIONS SECURITY COUNCIL (UNSC)

The Security Council is one of the principal organisations of the United Nations entrusted with the task of international peace and security.³⁷¹ The UN Charter gives the Security Council powers to authorise military action, if necessary, on states that resort to force. The right to self-defence enjoyed by the member states is under the check of the security council, and the decisions and measures of the security council govern this temporary right.³⁷² Also, Article 51 mandates the member states to report their actions taken under self-defence to the security council. Consequently, the Security Council plays a crucial and undeniable role in upholding worldwide peace and fostering international relations.

December 2023.

³⁶⁶ Christine Gray, *International Law* (5th edn., Oxford University Press 2018) 607.

^{**}More on Genocide Prevention and the Responsibility to Protect' (**www.un.org*) \(\shrt{\text} \) \(\shrt

³⁶⁸ [2005] ICJ Rep 168.

^{&#}x27;Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)' (www.icj-cij.org) https://www.icj-cij.org/case/116 accessed 30 December 2023.

³⁷⁰ Case concerning the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) [2005] ICJ Rep 168.

United Nations, 'United Nations Security Council' (*United Nations*2023)

https://www.un.org/securitycouncil/>.

³⁷² Christine Gray, *International Law* (5th edn., Oxford University Press 2018) 619.

Article 39 of the UN Charter gives the responsibility to the United Nations Security Council to determine the existence of any threat to the peace, breach of the peace, or act of aggression.³⁷³ To maintain international peace and security, the security council may, after discussions with the parties, give them provisional measures to resolve the dispute.³⁷⁴ Failure to comply with such measures will be dealt with by the security council by calling upon its member states to enforce its decisions through unarmed measures like cutting economic or diplomatic relations, etc.³⁷⁵ It is pertinent to note that Article 42 of the UN Charter allows the Security Council to seek the air, sea, or land forces of the members of the United Nations to restore international peace and security in cases where all peaceful negotiations with the conflicting states fail.³⁷⁶ This can also be considered an exception to the prohibition of the use of force under Article 2(4).³⁷⁷ Article 43 contains guidelines for the members of the United Nations, in case of such events, to make themselves available to the Security Council to restore peace and security.

The United Nations Security Council does not have a standing army and when necessary, it deploys the military of the UN member states. Article 43 of the UN charter casts duty upon the member states to provide military force to the UN when necessary. Therefore, to prohibit the use of force and to restore international peace, when all the peaceful negotiations with the parties fail, the security council can use force and is empowered to deploy an army from the member states.

The major restraint of the Security Council that is worth mentioning is the special voting power exercised by the five permanent members of the Security Council, namely, China, the United Kingdom, Russia, the United States of America, and France, known as the 'Right to Veto'. ³⁷⁸ This is a restraint in the sense that any of the five permanent members can single-handedly stop the resolution of the security council by exercising this special power. Thus, international relations or diplomacy between states will create bias in the decision-making power of the security council. An example of this can be identified when Russia vetoed the resolution of the security council demanding the withdrawal of the Russian military army immediately and completely from the territory of Ukraine. ³⁷⁹

This unique authority exercised by the five members, attributed to their pivotal role in establishing the United Nations, poses challenges to the seamless functioning of the Security

³⁷³ United Nations, 'United Nations Charter' (United Nations 26 June 1945)

https://www.un.org/en/about-us/un-charter/full-text.

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³⁷⁵ United Nations, 'United Nations Charter' (*United Nations*26 June 1945)

https://www.un.org/en/about-us/un-charter/full-text.

³⁷⁶ Ibid

³⁷⁷ John-Mark Iyi, 'The AU/ECOWAS Unilateral Humanitarian Intervention Legal Regimes and the UN Charter' (2013) 21 African Journal of International and Comparative Law 490.

³⁷⁸ United Nations, 'Voting System | United Nations Security Council' (*United Nations*2015)

https://www.un.org/securitycouncil/content/voting-system accessed 1 January 2024.

³⁷⁹ United Nations, 'Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto | UN Press' (*press.un.org*25 February 2022) https://press.un.org/en/2022/sc14808.doc.htm> accessed 1 January 2024.

Council and the implementation of its decisions. The potential obstruction by a single veto from any of the five permanent members can hinder the resolution from passing. This can even have an impact on the integrity of the decision-making of the security council.

LIMITS AND CONDITIONS UNDER WHICH STATES MAY RESORT TO SELF-DEFENCE

Article 51 is the right of self-defence against armed attack, in which there are various disagreements relating to the interpretations of this article. The 9/11 terrorist attacks on the United States further the interpretations of this article.

States use force to protect their nationals abroad. In 1983, the USA invaded Grenada and justified their action with the explanation that they had to protect their six hundred medical students in Grenada from the political disturbances in the state and a possible hostage situation.³⁸⁰

An agreed limitation on the use of self-defence is the proportionality or degree of force used by the states. Such a limitation is pertinent for moderating the interplay between Article 2(4) and Article 51. If such a limitation is not advocated, states, in pursuit of self-defence, may strike back with excessive force beyond what they initially received.

When Uganda invaded the Republic of Congo, it justified its actions by citing Article 51. But the International Court of Justice observed that Uganda had neither reported Congo as an imminent threat to it nor had it reported its self-defence actions to the security council. Article 51 of the UN Charter specifically instructs its members to report immediately to the security council their self-defence actions. Self-defence actions.

At this juncture, it is important to discuss collective self-defence. This is enshrined in Article 51 of the UN Charter, which calls for the member states to use their military powers to defend against attacks by any member states. Article 51 further instructs that such collective self-defence needs to be reported immediately to the security council, thereby ensuring that member states do not act beyond what is necessary and that the security council acts as a check on the measures taken by the member states. Ultimately, the United Nations has to maintain international peace and security; therefore, the use of force has to be under control to ensure minimal violations of Article 2(4). Article 2(4) is immensely consequential for maintaining global peace and harmony. The interplay of articles 51 and 2(4) cannot be eradicated but can only be controlled to maintain

³⁸⁰ History.com Editors, 'United States Invades Grenada' (*HISTORY*13 November 2009)

https://www.history.com/this-day-in-history/united-states-invades-grenada>.

^{&#}x27;Armed Activities on the Territory of the Congo: The ICJ Judgement in the Context of the Current Peace Process in the Great Lakes Region' (*Chathamhouse.org*2022)

https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/ilp270106.doc accessed 30 December 2023.

³⁸² United Nations, 'United Nations Charter' (*United Nations*26 June 1945)

https://www.un.org/en/about-us/un-charter/full-text.

^{383 &#}x27;Collective Self-Defense and the U.S.-Japan Alliance' (Sasakawa USA)

https://spfusa.org/publications/collective-self-

defense/#:~:text=The%20right%20of%20%E2%80%9Ccollective%20self> accessed 1 January 2024.

equilibrium. It is significant to avoid the misuse of Article 51 by the States. Like in the case of the invasion of Congo by Uganda, where the misuse of Article 51 by Uganda for justifying its actions can be seen. This can have far-reaching consequences for international relations among states.

These are two sides to the same coin. Likewise, collective self-defence can be advantageous or otherwise dangerous. On the one hand, it can serve as a threat to a state that actually breaches Article 2(4) and jeopardises international peace. On the other hand, this itself can be a threat to smaller states if superpowers join hands under the guise of collective self-defence.

The Nicaragua case can be taken to explain how collective self-defence and Article 51 were manipulated for using force. The Republic of Nicaragua initiated court proceedings against the United States of America in the International Court of Justice in 1984 for its military and parliamentary actions in and against Nicaragua. According to Nicaragua, the actions of the United States are an infringement on the principle of prohibition of the use of force by states and of customary international law. The United States of America argued that their interventions were guarded by Article 51, and their use of force is not a violation of Article 2(4) but a part of the responsibility given by Article 51 of collective self-defence in case of armed attack against any member states. However, the United States did not report the measures taken by it for collective self-defence to the Security Council. Also, the court found that there was insufficient evidence to prove that the government of Nicaragua was responsible for any flow of arms to Costa Rica, El Salvador, or Honduras.

In the absence of an armed attack or an imminent threat, Article 51 cannot be invoked. Here, the United States acted in violation of Article 51 by not strictly observing the principle of collective self-defence. Hence, it can be said that America only used Article 51 to cover their actions in Nicaragua, and it violated Article 2(4) for political motives.

PRE-EMPTIVE STRIKES AGAINST NON-STATE ACTORS

Does Article 51, which entails self-defence include pre-emptive measures against non-state actors like terrorist groups? Before September 11, 2001 terrorist attacks, pre-emptive measures against terrorists were not much used by the States. Before going deep into the matter, it is important to understand the concept of pre-emptive self-defence. Pre-emptive self-defence allows the use of

³⁸⁴ Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) [1984] ICJ Rep 392.

³⁸⁵ Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) [1986] ICJ Rep 14.

³⁸⁶ Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) [1984] ICJ Rep 392.

³⁸⁷ Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) [1984] ICJ Rep 392.

³⁸⁸ Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) [1984] ICJ Rep 392.

force on the mere possibility of an attack at some unspecified future period of time. This is different from anticipatory self-defence as it allows the use of force only when an imminent threat of attack exists. The defence as it allows the use of force only when an imminent threat of attack exists.

Al-Qaeda, a terrorist organisation, attacked the United States of America on September 11, 2001. The aftermath included a wide interpretation of Article 51. The United States invaded Afghanistan after the state's refusal to remove Al-Qaeda from its territory. Operation Enduring Freedom, the military operation of the United States against terrorism in Afghanistan, received support from most of the States.³⁹¹ The United States justified its actions as self-defence and the Security Council, though indirectly, approved this. This recognition of the Security Council is important as it expanded the doctrine of self-defence, marking the use of force against terrorism.

Terrorism is a global problem that should be eradicated. Expanding the doctrine of self-defence and allowing the use of force against terrorism is a plausible and crucial approach. Widening the scope of Article 51 automatically affects the goals of Article 2(4), as the objective of Article 2(4) is the prohibition of the use of force. Actions constituting self-defence are an exception to the prohibition of the use of force. Therefore, widening the doctrine of self-defence has an interplay with the use of force, but at the same time, it is pertinent that states join hands to eliminate this global threat that kills people and destroys international peace and security. After the 9/11 terrorist attacks, the United States of America initiated the Overseas Contingency Operation (OCO), initially known as the Global War on Terrorism (GWT), which lasted many years. This questioned the necessity and proportionality of the self-defence used. It was only in the year 2014 that America ended Operation Enduring Freedom and all the official operations conducted by America in Afghanistan to remove terrorism officially ended on August 20, 2021. 392 The United States of America received support from the international community as well. It is hard to explain the self-defence justification used by America all these years against Afghanistan, and the prohibition on the use of force is clearly violated. But America indeed widened the scope of this doctrine, which a small country cannot do. America's operation against Afghanistan to eradicate terrorism expanded to other states like Pakistan, Somalia, etc. By raising the threshold for selfdefence principle to higher levels, America conducted military operations in other states in the name of eradicating terrorism, thus introducing the doctrine of the unwilling or unable test". 393

UNWILLING OR UNABLE TEST

This was not a popular doctrine until the United States propagated it in its letter to the Security Council justifying its actions in Syria. According to this doctrine, states can use self defence against those states that are unable or unwilling to eradicate non-state actors like terrorist groups from

³⁸⁹ Patrick Kelly, 'Pre emptive Self-Defense, Customary International Law, and the Congolese Wars' (3 September 2016) < https://www.e-ir.info/2016/09/03/preemptive-self-defense-customary-international-law-and-the-congolese-wars/ accessed 30 December 2023.

³⁹⁰ Ibid.

⁸⁹¹ Christine Gray, *International Law* (5th edn., Oxford University Press 2018) 615.

⁸⁹² Christine Gray, *International Law* (5th edn., Oxford University Press 2018) 615.

³⁹³ Ibid 616.

their territory.³⁹⁴ However, the United States propagated this doctrine and acted without the consent of the state, which it plans to interfere with to eradicate terrorism. This is indeed a blatant violation of Article 2(4) and Article 51.

If we take the example of Syria, it can be seen that the Islamic State has a territorial base in Syria. However, unlike Afghanistan, Syria has consistently been in combat with this terrorist group with the aim of eradicating them from Syrian soil. But Syria failed to wipe off terrorism from its territory, and apparently this was the justification given by America to conduct military operations on Syrian soil without the consent of the state. But such a wide interpretation of Article 51 and the initiation of the doctrine of the unable or unwilling test have far-reaching consequences for the rule of prohibition of the use of force. Unilaterally deciding and justifying militant interventions by states can destroy international peace and lead to overt violations of international law itself. Such disregard for the United Nations Charter may even lead to the loss of credibility of the United Nations as a peacekeeping institution that guarantees the sovereign equality of its members, and finally, it may collapse like its predecessor, the League of Nations. The Security Council, through its resolutions and statements, had called upon the member states to contain terrorism in compliance with international law.

The response of the security council in regard to pre-emptive self-defence against terrorist groups is noteworthy. While approving anticipatory self-defence at times of imminent danger, it rejected the concept of pre-emptive self-defence. States always have the recourse available to approach the security council. Therefore, in cases of pre-emptive self-defence where the mere possibility of a threat is in the future, there is ample time to consult the security council to formulate an action plan. Pre-emptive self-defence coupled with an unwilling or unable test is dangerous. This can be used by any state to justify its use of force. The very existence of Article 2(4) would be futile.

Since pre-emptive self-defence is absolutely assumptive, the danger of mistake is vital. A false assumption and the subsequent use of force can have crucial consequences. Operation Iraqi Freedom, or Iraq War, is one such example that shows the danger pre-emptive self-defence poses. The Iraq war that started in 2003 ended only in 2011. With the support of about 45 states, including Poland and Spain, the United States of America, the United Kingdom, and Australia

³⁹⁴ Olivier Corten, 'The "Unwilling or Unable" Test: Has It Been, and Could It Be, Accepted?' (2016) 29 Leiden Journal of International Law 777 < https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/unwilling-or-unable-test-has-it-been-and-could-it-be-accepted/A136F06AE6A397B93804F7BFA7F87CA2.

Olivier Corten, 'The "Unwilling or Unable" Test: Has It Been, and Could It Be, Accepted?' (2016) 29 Leiden Journal of International Law 777 https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/unwilling-or-unable-test-has-it-been-and-could-it-be-accepted/A136F06AE6A397B93804F7BFA7F87CA2.

³⁹⁶ Ibid.

³⁹⁷ Olivier Corten, 'The "Unwilling or Unable" Test: Has It Been, and Could It Be, Accepted?' (2016) 29 Leiden Journal of International Law 777 < https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/unwilling-or-unable-test-has-it-been-and-could-it-be-accepted/A136F06AE6A397B93804F7BFA7F87CA2.

³⁹⁸ Christine Gray, *International Law* (5th edn., Oxford University Press 2018) 617.

resort to war with Iraq with the aim of completely disarming Iraq of weapons of mass destruction. The United States-led coalition invaded Iraq, resulting in the overthrow of the Ba'athist government of Saddam Hussein and later the execution of Saddam Hussein. The justification given by America was that Iraq possessed weapons of mass destruction and therefore was a threat to the United States and the states that participated in Operation Iraqi Freedom. However, the claims for its actions in Iraq failed, as weapons of mass destruction could not be discovered in Iraq. Some criticised the fact that no peaceful measures to avoid the conflicts were taken before resorting to military operations. The United Nations Security Council condemned the actions. Here, when America resorted to pre-emptive self-defence with the fear that Iraq possessed weapons of mass destruction, it violated Article 2(4) of the United Nations Charter, as no weapons of mass destruction were seized from Iraq. Hence, the exclusion of pre-emptive self-defence from the scope of Article 51 is crucial and helps to limit the interplay between Article 2(4) and Article 51 of the UN Charter.

CONCLUSION

Article 51, in essence, aims for the responsible and justified use of force, but states utilise this provision to justify their actions that are otherwise not covered by Article 51 and constitute as a violation of Article 2(4) of the UN Charter.

The disagreements revolving around the interpretations of Article 51 continue to multiply. While some states settle upon narrow interpretations, others argue for wider ones. The same is the case with Article 2(4). Despite the prohibition of the use of force under Article 2(4) of the United Nations Charter, states use force under Article 51, sometimes to shield their political motives. The interplay between these two articles makes it all the more challenging to curb such manipulations. Certain acts of the state have resulted in the development of international jurisprudence to set limitations on the use of force, the use of self-defence, and collective self-defence. After the 9/11 attacks on the United States of America, the scope of Article 51 expanded to encompass self-defence and anticipatory self-defence against non-state actors like terrorist groups. In the coming years, more clarity can be expected as international law evolves with each war, conflict, resolution, and decision of the Security Council and the International Court of Justice.

³⁹⁹ Ibid 622.

⁴⁰⁰ Christine Gray, *International Law* (5th edn., Oxford University Press 2018) 623.

⁴⁰¹ Ibid 622

⁴⁰² Christine Gray, *International Law* (5th edn., Oxford University Press 2018) 622.

TABLE OF AUTHORITIES

Cases

Case Concerning the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) [2005] ICJ Rep 168

Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) [1984] ICJ Rep 392

Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) [1986] ICJ Rep 14

Bibliography

2024

'Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)' (www.icj-cij.org) https://www.icj-cij.org/case/116 accessed 30 December 2023

'Armed Activities on the Territory of the Congo: The ICJ Judgement in the Context of the Current Peace Process in the Great Lakes Region' (*Chathamhouse.org*2022) https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/ilp270106.doc accessed 30 December 2023

Brown D, 'China and Taiwan: A Really Simple Guide' *BBC* (6 April 2023) https://www.bbc.com/news/world-asia-china-59900139 accessed 4 April 2024

'Collective Self-Defense and the U.S.-Japan Alliance' (*Sasakawa USA*) https://spfusa.org/publications/collective-self-defense/#:~:text=The%20right%20of%20%E2%80%9Ccollective%20self accessed 1 January

Corten O, "The "Unwilling or Unable" Test: Has It Been, and Could It Be, Accepted?' (2016) 29 Leiden Journal of International Law 777 https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/unwilling-or-unable-test-has-it-been-and-could-it-be-accepted/A136F06AE6A397B93804F7BFA7F87CA2>

Gray C, International Law (5th edn., Oxford University Press 2018) 604

History.com Editors, 'United States Invades Grenada' (*HISTORY*13 November 2009) https://www.history.com/this-day-in-history/united-states-invades-grenada

Iyi J-M, 'The AU/ECOWAS Unilateral Humanitarian Intervention Legal Regimes and the UN Charter' (2013) 21 African Journal of International and Comparative Law 489

Kelly P, 'Preemptive Self-Defense, Customary International Law, and the Congolese Wars' (3 September 2016) https://www.e-ir.info/2016/09/03/preemptive-self-defense-customary-international-law-and-the-congolese-wars/ accessed 30 December 2023

Milanovic M, 'What Is Russia's Legal Justification for Using Force against Ukraine?' (*EJIL: Talk!*24 February 2022) https://www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine/ accessed 1 January 2024

'UNIKOM: United Nations Iraq-Kuwait Observation Mission - Background' (*Un.org*2019) https://peacekeeping.un.org/mission/past/unikom/background.html accessed 4 April 2024

United Nations, 'Voting System | United Nations Security Council' (*United Nations*2015) https://www.un.org/securitycouncil/content/voting-system> accessed 1 January 2024

—, 'Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto | UN Press' (press.un.org25 February 2022) https://press.un.org/en/2022/sc14808.doc.htm accessed 1 January 2024

—, 'United Nations Security Council' (*United Nations*2023)

United Nations , 'United Nations Charter' (*United Nations*26 June 1945) https://www.un.org/en/about-us/un-charter/full-text

'United Nations Office on Genocide Prevention and the Responsibility to Protect' (www.un.org) "accessed 29 December 2023">December 2023

To what Extent has Societal Pressure Culture Influenced and Regulated Abortion Laws?

Trisha Ndahiro

Department of Law, University of Leicester, United Kingdom

Abortion rights are rooted in deeply held beliefs, often sparking impassioned debates that have spanned decades. The heart of the matter lies in a woman's autonomy to decide whether to terminate a pregnancy or carry it to full term. The complexities inherent in abortion rights reflect the intricate interplay between legal, cultural, ethical, religious, and political viewpoints. By delving into these multifaceted dimensions, we can better comprehend the dynamic landscape of abortion rights.

Across the ages, viewpoints on abortion have been influenced by cultural norms, religious doctrines, and societal expectations. In ancient Europe, abortion was commonly practiced without substantial moral or legal limitations. However, the ascendancy of organised societies and religious institutions triggered a shift in attitudes, with many faith traditions deeming abortion morally objectionable. For instance, in ancient civilizations ranging from Greece, Rome and Assyria, it was not considered that the fetus was alive and therefore was not meant to have human rights.

In Rwanda, the cultural aspect has played a significant role regarding the legal discourse surrounding abortion rights centered on respecting a woman's autonomy while acknowledging the complexities of different viewpoints. Abortion rights inherently fall within this realm of reproductive health rights, a crucial facet of human rights. The most recent statistics in Rwanda estimate that 47% of all pregnancies are unintended and 37% of the births are unplanned, unwanted or mistimed. This applies across all five provinces, and it is relatively the same both in rural and urban areas. Additionally, about 22% of these unintended pregnancies result in induced abortion, 63% result in unplanned births, as well as 15% that end in miscarriages. Due to Rwanda's growing number of sexually active single women, these women, especially between the age of 15-29, become increasingly inclined to these unintended pregnancy or induced abortions. An approximate number of 56% of women in Rwanda overall and especially 69% of those in the Western Province, have an unmet need for contraception of the most recent Rwanda Demographic Health Survey (RDHS 6), 5% of girls aged 15-19 have begun childbearing; 4% have given birth, and 1% are pregnant with their first child.

In Rwanda the unintended pregnancy rate declined 31% between 1990 and 1994 as well as 2015-2019. During the same period, the abortion rate remained fairly level. The share of unintended pregnancies ending in abortion rose from 18% to 29%. From the years 2015-2019,

⁴⁰³ Abortion in Rwanda (2013) Guttmacher Institute. Available at: https://www.guttmacher.org/fact-sheet/abortion-rwanda

⁴⁰⁴ Adolescent pregnancy (2017) UNFPA Rwanda. Available at: https://rwanda.unfpa.org/en/topics/adolescent-pregnancy-3 (Accessed: 11 September 2023).

there were a total of 548,000 pregnancies annually, of which 295,000 were unintended and 84,300 resulted in abortion⁴⁰⁵. Each year, approximately 26,000 women are treated in health facilities for complications of both induced and spontaneous abortions. Half of all abortions are performed by untrained individuals, 34 per cent by traditional healers, while 17 per cent are self-induced by women⁴⁰⁶.

While there has been a large number of international treaties that Rwanda has signed over the years, they do not entirely tackle the legal grounds regarding abortion with the exception of the Maputo protocol 2003¹⁰⁷. Moreover, the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) only recognizes all the services they deem necessary in regard to the woman's pregnancy. In article 12, it addresses that the states that sign on to the agreement must "take all appropriate measures to eliminate discrimination against women in the field of healthcare in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning". Hence which does not directly address the issue of abortion on a state level

On a national perspective towards abortion, in spite of the 2013 amendments made regarding the abortion laws, the current 'Professional Code of Ethics' gives the permission for nurses and midwives in the country, the right to "limit your work or stop practicing if your performance or judgment is affected by your health or other reasons" [68]. Granted there is already an actively existing reluctance from Rwandan medical practitioners to be abortion providers, largely due to religious reasons as well as general disagreement with abortion this leads to clouding their judgment which means in accordance with the code of ethics they cannot go through with an abortion. Therefore, seeing as there is a large population of the country with similar views, this increases the risk for women in Rwanda of not being able to find a suitable medical practitioner or health care provider to aid with their abortion. This is due to the ongoing Rwandan medical practitioners concern regarding occupational stigma. While being a healthcare provider (HCP) is considered to be a prominent and respectable job in the Rwandan society, an association with abortion could stigmatize their professional title. Consequently, this reflects on how the existing stigmatization of abortion is not in alignment with CEDAW, in spite of the existing legal defenses for abortion, women are still denied access to abortion.

⁴⁰⁵ Abortion in Rwanda (2013) Guttmacher Institute. Available at: https://www.guttmacher.org/fact-sheet/abortion-rwanda (Accessed: 11 September 2023).

Mugisha, I.R. (2018) *Push for abortion law change, Rwanda Today.* Available at: https://rwandatoday.africa/rwanda/news/push-for-abortion-law-change-2465868 (Accessed: 11 September 2023).

Protocol to the african charter on human and peoples' rights on the rights of women in Africa (2019) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa / African Union. Available at: https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa

⁴⁰⁸ Professional conduct and ethics (2018) RAHPC. Available at: https://www.rahpc.org.rw/professional/conduct-and-ethics

Nonetheless, the ministerial order of 2019, which determines the conditions to be satisfied for a medical doctor to perform abortion, provides specific grounds for abortion including; if the pregnant person is a child, if the pregnancy is as a result of rape, if the pregnancy comes from forced marriage, incest, or if the pregnancy will put the health of the pregnant person or of the foetus at risk. Thus, while the ministerial order represents a form of gradual progression in Rwanda's general stance on abortion laws, it further reinforced the idea that abortion is unlikely to ever be regarded favorably in Rwandan society, despite the legal provisions passed.

Despite the evolving cultural and social influences on the Rwandan legal community, one thing remains clear. The current moral disagreements have ongoingly hindered an establishment of clear and fixed legal definitions, even when the circumstances demand it. As the years progress, it has been evident that there has been a gradual journey towards liberalization of the general perspective of abortion as a crime. The process of recognising the underlying problems is rather anchored in the protection of sexual and reproductive health rights. By embracing the different nuanced conditions, the aim for the country should be to combine, embrace, and harmonize legal ethics and human rights to address the several diverse factors that shape individual experiences.

Bibliography

Abortion in Rwanda (2013) Guttmacher Institute. Available at: https://www.guttmacher.org/fact-sheet/abortion-rwanda

Adolescent pregnancy (2017) UNFPA Rwanda. Available at: https://rwanda.unfpa.org/en/topics/adolescent-pregnancy-3 (Accessed: 11 September 2023).

Mugisha, I.R. (2018) Push for abortion law change, Rwanda Today. Available at:

https://rwandatoday.africa/rwanda/news/push-for-abortion-law-change-2465868 (Accessed: 11 September 2023).

Professional conduct and ethics (2018) RAHPC. Available at: https://www.rahpc.org.rw/professional/conduct-and-ethics

Protocol to the african charter on human and peoples' rights on the rights of women in Africa (2019) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa | African Union. Available at: https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa

The Victoria Fisher Memorial Prize

This essay competition was created in honour of the late Victoria M Fisher, who was lecturer at the law school at the University of Leicester. This competition is hosted yearly to stimulate interest in the relationship between women and the law, a matter of great interest to the late Victoria, both as an academic and a feminist. Victoria was a founder member of the Women and Law group, as well as an active trade unionist. The winner of this competition was selected by Dr. Eugenia Caracciolo Di Torella and Dr. Inga Thiemann.

'She Was Asking for it, Your Honour' Abigail Cass, Winner of the of the Victoria Fisher Memorial Prize Department of Law, University of Nottingham, United Kingdom

'She was asking for it, your honour'

The play 'Prima Facie' ⁴⁰⁹ premiered on the West End in 2022, starring Jodie Comer as the young, talented, barrister Tessa. The play has received excellent critical acclaim but, more importantly, has ignited a discussion about how we should change our court proceedings when it comes to sexual assault cases. Whilst this discussion has been circulating in the legal sphere for many decades, the play marked a significant moment where these discussions left the legal sectors and helped to unite women from all professions. This essay will primarily focus on how our current system is flawed, examining the wording of the law of rape and court procedures used by defence barristers. This will then be accompanied by examples from the play, linking it to how it applies in real life, showing how useful of a tool the play is to illustrate the issues in our legal system.

The play explores the current issues with the legal approach to sexual assault cases through Tessa's own experience of rape and testifying in court. Tessa begins the play as a talented barrister, who often takes sexual assault cases acting as the defence barrister. She frequently uses the technique of confusing the victim on the stand, which she does not see an issue with towards the beginning of the play. She believes that she is just telling the jury a different version of the victim's story and playing the 'game' of law. Soon after we are introduced to her character, Tessa has relations with her colleague Julian and later agrees to go out with him on a dinner date. After this date, they return to Tessa's apartment and have sex again. Tessa begins to feel very ill, having drunk a large quantity of alcohol on their date (just as Julian did). She throws up in the toilet, and Julian carries her back to bed, where he attempts to initiate sex with her again. This time she says no, claiming she doesn't want him to smell her bad breath after being sick. He then proceeds to hold down her arms, cover her mouth, and penetrate her. After the rape occurs, Tessa is extremely vulnerable and unsure what to do next. She never imagined herself as a lawyer to be in this position and she begins to realise the flaws in her case that the defence will use against her, such as her intoxication, previous sexual encounters with the defendant, etc. She decides to take a taxi to the police station, determining that she must at least try to have him prosecuted no matter how slim the chances are, leaving Julian at her house asleep. She is questioned and medically examined by the police. During this time, she receives several texts from Julian who is baffled as to what he has done wrong and why she left the house. It takes Tessa's claim 782 days to reach the courts, during which time she has relocated jobs and lost contact with almost all of her work friends to avoid having to see Julian. When we next see Tessa, she is testifying in court. She is different from the start of the play now, visibly shaken and not at ease in the courtroom (as we are used to seeing her). During the cross-examination, she is ruthlessly questioned by the defence barrister, who makes her seem confused about the sequence of events, just as she has done to victims in court before. She begins to see how the court system does not support victims of rape

⁴⁰⁹ Suzie Miller, Prima Facie (published in 2022, Nick Hern Books)

in various ways and ultimately loses her case. The play does an insightful job of illustrating how if a victim does not have a specific experience of sexual assault that the law has laid out, she will not be successful in court. If the evidence is not delivered in a logical way, she will be found to be 'unbelievable'. If she has been drinking, knows the attacker, has little physical evidence of being raped, etc, her chances of succeeding in court are incredibly slim, as shown by the current conviction rates of rape. 68,109 rapes were recorded by the police between July 2022 and June 2023¹¹⁰, and just 2 in 100 rape cases recorded by the police in this period resulted in a charge that same year (Gov.UK, 2023). One of the main issues with how the courts deal with claims of rape (as well as techniques used by barristers) is how the law itself is written and exploited.

It must first be examined what the law surrounding rape is, to gain a better understanding of how this definition is flawed. The Sexual Offences Act 2003 defines rape as, "(a) (A) intentionally penetrates the vagina, anus or mouth of another person (B), with his penis, (b) B does not consent to the penetration and (c) A does not reasonably believe that B consents." This definition illustrates that the law around rape is focused on the word 'no'. This word is so critical in a rape case, that leaving it out can have catastrophic effects. If a victim fails to tell her defendant 'No', the defence can argue that the defendant reasonably believed that the victim consented, due to a lack of expressly telling them to stop. Even if they showed signs of struggle that would ordinarily be considered distress, these signs could be explained to the jury as an expression of passion, or evidence of some women enjoying 'kinky' sex.

The line between seduction and rape is considered a fine one, which can often be manipulated in court to play in the defence's favour, as done in Prima Facie. Tessa and her defendant have already had sex before and had sex consensually the night that the rape took place. However, the line between seduction and consent is crossed when the defendant begins to hold her down and cover her mouth, preventing her from screaming or fighting him. Even here, although Tessa tells the defendant that she does not want to have sex with him explicitly due to her being ill, the defence uses the explanation of her already consenting previously as a reason that the defendant reasonably believed she was consenting this time, which wins him the case. The Office for National Statistics found in 2021 that 1 in 2 rapes against women are carried out by their partner or ex-partner. As well as this, 6 in 7 rapes against women are committed by someone they know. These defences of blurred lines of consent and previous consent are very much used in real court cases. Victims can sometimes leave the courtroom feeling confused over the sequence of events that the defence has put to the jury. Cases of stranger rape are generally treated as likely to be non-consensual (although even this can be manipulated, as explored later), but cases where the victim knew the defendant are significantly harder to prove as non-consensual. As recently as

Nick Stripe, 'Crime in England and Wales: year ending June 2023' (Office for National Statistics, 19 October 2023)

https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingjune2023

Nick Stripe, 'Nature of sexual assault by rape or penetration, England and Wales: year ending March 2020' (Office for National Statistics, 18 March 2021)

https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/natureofsexualassault-byrapeorpenetrationenglandandwales/yearendingmarch2020>

1990, Harold Cassell took early retirement from his judicial post after making extremely inappropriate comments when sentencing a man for unlawful sexual intercourse with his 12-yearold stepdaughter. He took the view that it was understandable for a man with a 'healthy sexual appetite' to be driven to such behaviour when his wife did not want to have sex with him due to her pregnancy⁴¹². This appalling example of conduct shows how even when the relationship between the victim and defendant should not be considered sexual in any possible way, a legal professional was still able to find excuses for such behaviour. These attitudes of presumed consent run very deep in the legal profession. When a victim knows their attacker, there is usually an element of trust in their relationship, so when this is violated, it can have devasting emotional effects as that element of trust has used against them. However, defence barristers are quick to state this element of trust means that the victim must have consented, or at least that the defendant reasonably believed she would, rather than assume the trust has been broken. After all, marital rape was not considered a crime until 1992, being earlier considered as a husband's right to his wife. This societal attitude of entitlement is still reflected in the courtrooms today, with cases of rape from a known person being treated as 'ambiguous' cases of consent by the defence, even if the victim was very clear in saying 'No'. Even if the victim does say 'No', as long as the defence can persuade the jury that the defendant reasonably believed this consent was ambiguous, they may not be prosecuted. They can do this in any number of ways, such as suggesting the manner in which the victim said 'No' was flirtatious, as if she would change her mind if he continued to pursue her. Men generally hold the societal view that women will not agree to sex straight away, to avoid looking cheap. It is all considered a 'game of seduction'.

Very few women escape the inquisition and humiliation of the cross-examination of rape cases. Although cases of stranger rape are generally assumed to be non-consensual, this too can be manipulated. Women can be asked questions that would never be put to a man, such as the nature of their clothing, the tightness of the fit, or the absence of a bra. And that is before the indepth discussion of their sexual history, often taking place in front of their family and friends⁴¹³. Some questions asked by defence barristers can be extremely damaging to the image of the victim, even if they have no evidential basis for such questions. For example, if a barrister asked the victim, "Is it true you had smoked cannabis on the night in question?", even though this may be incorrect and not based on any evidence, the victim's shock at the question can make it seem to the jury as if the lawyers know something they do not. It creates a lurking doubt as to the respectability of her character⁴¹⁴. This all feeds into the tactic of damaging a victim's image in the eyes of the jury, causing them to be suspicious of her (or at least doubtful of her validity). In Canada and Australia, judges must ensure no questioning of the victim is carried out in a harassing or degrading manner. Judges are now required to undergo training in the UK to ensure that these damaging questions are not asked, however there are several other ways that the defence can damage a victim's character. There is an underlying humour in courts that deep down, women do want sex even if they do not know it in their own minds. Questions about clothing, or whether for example a victim's vagina was naturally lubricated for penetration, all

⁴¹² Helena Kennedy, *Eve was Framed* (published 1992, Chatto & Windus Ltd.) 111

⁴¹³ Helena Kennedy, *Eve was Framed* (published 1992, Chatto & Windus Ltd.) 114

⁴¹⁴ Helena Kennedy, *Eve was Shamed* (published 2018, Chatto & Windus Ltd.)

imply that a woman was subconsciously seeking sex, and so she cannot complain that she received it. This is where the infamous phrase 'she was asking for it' becomes apparent in its societal impact. It has even reached our legal system. A woman's own mind and intention are questioned, once again making her seem unreliable in the eyes of the jury. A victim's sexual history will be displayed for the whole courtroom to see, and if there is any evidence of previously enjoying 'rough' sex or a history of mental health issues, her credibility is again reduced in the eyes of the jury. It seems strange that when prosecuting other crimes, some people can be found guilty purely based on a confession with no surrounding evidence. However, in rape cases, juries are advised by judges to be cautious in trusting a victim's words. Judges should instead refocus their efforts to remind the jury that they have a right to convict, and women have the right to say no however impolitely they wish. They do not owe a man courtesy.

Another factor to consider is that each woman is completely different and may react in any number of ways to an attack. It has previously been believed in psychology that there are just two responses to fear: fight, or flight. However, it is now widely considered that there are many other responses, including freezing⁴¹⁶. In cases such as that, there may be no signs of physical injury on either the victim or the defendant, and the defendant could argue that he interpreted the lack of the word 'no' and a lack of struggle to mean she was willing to have sex with him. In cases where there is no physical evidence, it can be assumed by the courts that a victim consented by conduct or is even subject to female rape fantasies⁴¹⁷. Just because this woman has not screamed, or fought her attacker, this should not mean that she is not entitled to the same degree of justice the law claims to uphold, when she has been violated the same as a victim who was able to scream. This illustrates how the public attitudes around consent desperately need to be reevaluated. It should no longer be considered an acceptable argument in court to claim a lack of the word 'No' constitutes valid consent when this rule can be so easily twisted to make juries doubt a victim's validity. This wording of the law does not sufficiently achieve justice. Defence barristers frequently argue that a lack of telling the defendant 'No' meant that he reasonably believed the victim consented. Consent should instead be treated by the courts as a positive act, as in it must be approved, rather than not mentioned, to be considered successful. There must be a presence of the word 'Yes' to prove that the victim did reasonably consent. Some may argue changing this rule could cause women to exploit the legal system and make spurious claims. However, the process of bringing a rape claim to the courts and seeing it through is often so traumatic and frankly embarrassing for women, that the proportion of women who would willingly do so is fractional at best.

This echoes the societal issue of consent teaching being focused on the word 'No', rather than the presence of the word 'yes' and the issue of the Sexual Offences Act needing to be reformed to ensure that women feel more confident in bringing their claims forward. This lack of

⁴¹⁵ Helena Kennedy, *Eve was Framed* (published 1992, Chatto & Windus Ltd.)

Hannah Adenaue, 'Is freezing an adaptive reaction to threat? Evidence from heart rate reactivity to emotional pictures in victims of war and torture' (2010) 47(2) Psychophysiology https://onlinelibrary.wiley.com/doi/full/10.1111/j.1469-8986.2009.00940.x

⁴¹⁷ Helena Kennedy, *Eve was Framed* (published 1992, Chatto & Windus Ltd.)

confidence is also not helped by the process of bringing a claim forward to the courts. Many rape victims will tell someone in their lives about the event, but 5 in 6 women who are raped do not report it. A survey was done to endeavour to find out why this is: 40% of participants said they felt too 'embarrassed' to tell the police, 38% said they did not think the police would help, and 34% said they thought it would be humiliating⁴¹⁸. These statistics illustrate how the current court proceedings of intense cross-examination are preventing women from feeling safe in the courtroom or talking to the police. However, if the law in the Sexual Offences Act were to change to mean that consent must be actively present, many women who were unable to tell the defendant 'No' may feel more able to bring their claims forward, as they know they definitely did not tell the defendant 'Yes'.

In the UK legal system, criminal cases are decided by a jury of 12, who are informed that they must be certain the defendant is, 'guilty beyond a reasonable doubt' to prosecute them. In cases of sexual assault, it is often one person's word against another, especially if there is a lack of evidence such as physical harm, as explored above. Therefore, if the defence can place doubt in the minds of the juries as to the presence of consent, they would be less likely to convict as they are not 100% certain the defendant is guilty. Although this method of conviction is the court procedure in the UK, it is not compatible with the circumstances of rape cases.

This theme in particular is discussed in Prima Facie, with a large focus of the cross-examination's arguments being on a very natural sequence of events that leads to a lack of evidence. After the rape occurs, Tessa proceeds to have a shower and scrub her skin. This means that when she is sent for a forensic medical examination by the police, there is not a lot of physical evidence left on her body which impedes her case, despite her reaction being a completely normal response to such an event. She also deletes one of Julian's messages the morning after the rape in a state of anxiety, which she then immediately regrets doing, again limiting the evidence usable in court. As well as this, the police request to take her phone, which she cannot allow as she needs it for work. This makes it practically her word against the defendant's in court. When she takes the stand, the defence asks her irrelevant and embarrassing questions to make her seem confused, even though she can remember the events very clearly. This technique of dazing the victims is often used by barristers, once again planting that seed of doubt in the minds of the juries making them less likely to convict.

Another factor that can make victims seem unreliable to a jury is the unreliable nature of the human mind. In the play, Tessa has to wait for 782 days before her claim is brought before the courts. This is not an unusual amount of time, with the pandemic causing a backwash of cases like never before. Due to the length of time between the attack and the court date, key details can naturally be forgotten, such as the colour of clothing, an exact timeline of events, etc. This issue can be exacerbated by the presence of alcohol or narcotics, which can already cause

⁴¹⁸ Nick Stripe, 'Nature of sexual assault by rape or penetration, England and Wales: year ending March 2020' (Office for National Statistics, 18 March 2021)

https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/natureofsexualassaultbyrapeorpenetrationenglandandwales/yearendingmarch2020>

memory issues. Coupled with the extreme delays in courts, if a victim cannot remember all of the details of the seemingly simple questions asked by the defence, they seem confused, leading the jury to be doubtful of them. However, expecting this standard of perfect memory would be unrealistic for anyone, let alone a victim of rape who has experienced extreme trauma. It is not uncommon for victims to remember the specific act clearly, but not the peripheral details. Once again, even though 'guilty beyond a reasonable doubt' is considered the standard in the UK to prosecute, this is not compatible with the circumstances of rape cases and should perhaps be reconsidered. Suzie Miller has said herself that although innocent until proven guilty is the bedrock for human rights, "it always felt that its application in sexual assault cases served to undermine rather than to uphold any real fairness" 419.

The issues of women not feeling comfortable saying 'No' to men are perpetuated by the fact that many young girls are told to be sensitive to the feelings of young boys. They are told to avoid telling them they are not fancied and to instead say things such as, 'I have a boyfriend' or 'I am on my period', all to avoid the hurtful "No" which rape cases are dependent upon ⁴²⁰. Teaching of consent in early life is almost non-existent, with school sex education classes primarily focusing on the biological act of sex, rather than the emotional consequences it can have. As well as this, classes of sex education are often taught with girls and boys being separated. It would be more beneficial for them to be taught about the factors of consent together so that boys understand that consent should be sought, rather than presumed and that girls owe boys no duty to spare their feelings if they breach this element of trust. Prima Facie has become the official charity partner of the Schools Consent Project. This charity sends lawyers into schools to teach students the legal definition of consent and normalise conversations about the topic, to safeguard young people and drive down the sexual offending rates. They do this by delivering hour-long, lawyerled workshops to 11-18-year-olds on consent, how to identify it, the ages of consent, bystander intervention, the offences of rape, sexual assault, and 'sexting'. This kind of education is severely lacking in the high school curriculum, making this charity's work vital. As of November 2023, they have educated 30,145 students about consent⁴²¹. If the law were to follow this example by making positive consent necessary in rape cases, the number of successful prosecutions would likely increase dramatically. It would no longer be a valid argument to say the defendant did not know if the victim was consenting, as they will have been educated on the concept of consent from a young age and made fully aware of what it is. Hopefully, women will begin to feel more confident in rejecting men without fear for their safety, making the refusal of consent far more non-negotiable in courts than it is currently.

Women, both inside and outside the legal profession, are starting to realise that the legal system was built by men and ultimately for men, especially the law of rape. Something must be done about this, starting with a redraft of the law itself. By changing the words of the act to include a positive act of consent, defence barristers cannot manipulate a victim's words or actions to be interpreted as consent when they are clearly not intended to be construed as such by the defendant. Finally, a larger implementation of consent teaching in schools would greatly help the

⁴¹⁹ Suzie Miller, Prima Facie (published in 2022, Nick Hern Books) 7

⁴²⁰ Helena Kennedy, *Eve was Framed* (published 1992, Chatto & Windus Ltd.) 112

⁴²¹ Schools Consent Project https://www.schoolsconsentproject.com/

next generation of women to feel more confident in bringing their claims to court and hopefully drive down sexual offending rates in young men. At the end of her trial, Tessa sees how the formular for court proceedings is not applicable to cases of rape, that the evidence is not able to be delivered in a clean, logical package way the way the courts demand. Suzie Miller sums up this need for change in the final line of Prima Facie, "All I know is that somewhere, sometime, somehow... Something has to change".

Bibliography

'Crime outcomes year to June 2023: data tables' (Gov.UK, 19 October 2023) https://www.gov.uk/government/statistics/crime-outcomes-year-to-june-2023-data-tables

Hannah Adenaue, 'Is freezing an adaptive reaction to threat? Evidence from heart rate reactivity to emotional pictures in victims of war and torture' (2010) 47(2) Psychophysiology https://onlinelibrary.wiley.com/doi/full/10.1111/j.1469-8986.2009.00940.x

Helena Kennedy, Eve was Framed (published 1992, Chatto & Windus Ltd.)

Helena Kennedy, Eve was Shamed (published 2018, Chatto & Windus Ltd.)

Suzie Miller, Prima Facie (published in 2022, Nick Hern Books)

Schools Consent Project https://www.schoolsconsentproject.com/

Nick Stripe, 'Nature of sexual assault by rape or penetration, England and Wales: year ending March 2020' (Office for National Statistics, 18 March 2021) https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/natureofsexualassaultbyrapeorpenetrationenglandandwales/yearendingmarch2020

Nick Stripe, 'Crime in England and Wales: year ending June 2023' (Office for National Statistics, 19 October 2023) https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingjune2023>