THE OXFORD UNIVERSITY UNDERGRADUATE LAW JOURNAL

~

ISSUE THIRTEEN

TRINITY TERM

2024

The Editorial Board wishes to thank our platinum sponsors— ***Maitland Chambers, South Square, 3 Verulam Buildings, A&O Shearman*** *and* ***One Essex Court****—for their generous sponsorship of the Journal.*

A&O SHEARMAN

ONE ESSEX COURT

maitland
CHAMBERS

The views expressed by the contributors are not necessarily those of the Editorial or Honorary Board of the Oxford University Undergraduate Law Journal. Whilst every effort has been made to ensure that the information contained in this journal is correct, the Editors and the authors cannot accept any responsibility for any errors or omissions, or for any consequences resulting therefrom.

© 2024 Individual authors

THE THIRTEENTH EDITORIAL BOARD

EDITOR-IN-CHIEF

Ethan Jeremiah Teo
The Queen's College

EDITOR

Saloni Sanwalka
Harris Manchester College

VICE-EDITORS-IN-CHIEF

Syed Taha Anzar
Lady Margaret Hall

Nicole Tay
The Queen's College

Shivanii Arun
Merton College

VICE-EDITORS

Katherine Li
Christ Church

Kenneth Hoh
New College

Wong Yi Xuan
Worcester College

ADMINISTRATIVE DIRECTOR

Rita Cherchian
St Peter's College

PUBLICITY OFFICER

Josephine Kairupan
Exeter College

ASSOCIATE EDITORS

Ingrid Charbonneau
Lincoln College

Ruby Rowlands
Exeter College

Brittany Wong
Lincoln College

Ella So
St John's College

Evangelia Tsintza
The Queen's College

Anders Pang
New College

Isabella Preschern
St John's College

Maha Waqar
St Edmund Hall

BLOG EDITORS

Cauã Calderaro
Worcester College

Oh Ming Song
Somerville College

Maha Waqar
St Edmund Hall

Nara-May Rishani
Pembroke College

Josephine Kairupan
Exeter College

PODCAST EDITORS

Rach Tan
The Queen's College

Juliet van Gyseghem
Christ Church

THE HONORARY BOARD

Sir Nicolas Bratza

Professor Michael Bridge

Professor Mindy Chen-Wishart

Professor Andrew Dickinson

Donald Findlay KC

Professor Christopher Forsyth

Ian Gatt KC

Professor John Armour

Michael Mansfield KC

The Rt Hon. the Lord Neuberger of Abbotsbury

The Lord Pannick KC

His Honour Judge Gordon Risius CB

Dinah Rose KC

Sir Konrad Schiemann

Professor Surya Subedi KC

Professor Philippa Webb

The Rt Hon. the Lord Wilson of Culworth

CONTENTS

I	**Introduction to the Edition** Ethan J. Teo: Editor-in-Chief of the OUULJ	10
II	**Foreword (Public Law)** The Rt. Hon. Lord Sales: Justice of the Supreme Court of the United Kingdom	18
III	**Foreword (Private Law)** The Rt. Hon. Lord Briggs of Westbourne: Justice of the Supreme Court of the United Kingdom	24
IV	**Prizes**	27

PUBLIC LAW ARTICLES

V **With (State) Power Comes (State) Responsibility: Plugging the Accountability Gap Through a Reappraisal of Jurisdiction in International Human Rights Law** 30
Luca Geary

VI **Exploring the Utility of the Tort of False Imprisonment in Addressing Arbitrary Immigrant Detention** 68
Lucy Ryder

VII **A Drop in the *Oceana*, or a Tsunami of Change?** 96
Marlon Austin

VIII **Better Call Brockovich: The Use of Injunctions in English Law as a Remedy Of Enforcement Of the Preventative Principle in Environmental Law** 136
Tevž Sitar

PRIVATE LAW ARTICLES

IX	**Starting Afresh: Reformulating and Reconceptualising the Law of Estoppel** Joel Horsman	166
X	**Unlawful Means Unchained: Causing Loss by Unlawful Means and the Problematic Dealing Requirement** Alexander Pitlarge	196
XI	**Past as Prologue: Roman Law and the Interpretation of International Space Law Governing the Use of the Moon and Other Celestial Bodies** Nathan Oliver	226
XII	**Reopening Old Wounds: What the McCulloch Decision Means for Patient Autonomy** August Chen Zirui	258

INTRODUCTION TO THE EDITION

Ethan J Teo
Editor-in-Chief

It is my great pleasure and privilege to introduce the 13th Edition of the Oxford University Undergraduate Law Journal (OUULJ).

The University of Oxford holds a much-vaunted place in history as the oldest seat of learning in the English-speaking world (c. 1096), with evidence of Law (Roman and Canon, naturally) having been taught as early as the 1100s[1]. Centuries later, in 1753, Sir William Blackstone began what later came to be recognised as the first set of lectures on the Common Law anywhere in the world, giving us two entities which continue to hold great weight in English law today; the Vinerian Professorship of English Law, and the eponymous *'Blackstone's Commentaries on the Laws of England'* [2]. Moving another hundred years ahead, it was in the 1870s that the University formalised its provision of legal education, creating the BA in Jurisprudence[3]. My fellow students will undoubtedly be amused to know that the degree was hardly different back then from what we currently know it to be, save perhaps this account[4] from a student in the early 20th century,

---

[1] University of Oxford, Faculty of Law, 'Roman Law' <https://www.law.ox.ac.uk/roman-law> accessed 25 May 2024.
[2] All Souls College, University of Oxford, 'Law' <https://www.asc.ox.ac.uk/law-1> accessed 25 May 2024.
[3] University of Oxford, Faculty of Law (n 1).
[4] Robert Hale, 'The Teaching of Law at Oxford University' (1926) 12(10) American Bar Association Journal.

which describes 'nine papers in the final honours examination, [being] administered to the candidate, two a day, one before and one after lunch, until the dose is complete'. I must say, as I write this Foreword in the midst of my own Final Honour School examinations, that I am very grateful for the fact that one no longer has to sit two papers a day. Let us, in any case, set aside our historical adventure for just a moment.

I am very pleased to record that the OUULJ has had another outstanding year. One of the great things about the Journal is its continuity of leadership, by which the previous Editor and Vice-Editors remain with the Journal as Editor-in-Chief and Vice Editors-in-Chief respectively. The mantle of Editor is passed on to a new individual, with a fresh board of twenty-odd of the brightest second-year undergraduates under their purview. The primary goal of the Editorial Board is what you currently hold in your hand - the publication of the annual edition of the Journal, traditionally scheduled to herald the end of Trinity Term at Oxford.

The 13th Edition of the Journal received over 80 manuscripts from undergraduates across the world, from common law jurisdictions such as India, the United States, and Singapore. For the first time in its history, and in a perhaps unprecedented distinction for an undergraduate journal, the Journal is fortunate to have the wisdom and insight of two sitting justices of the United Kingdom Supreme Court, Lord Sales and Lord Briggs, who adjudged our Public and Private Law submissions respectively.

Within these pages, the reader will enjoy a fine selection of eight Public and Private Law articles for their perusal. The Public Law articles span an array of legal issues, including a) advocating for the novel use of *Hardial Singh*[5] principles in addressing cases of arbitrary immigrant detention; b) a case note on how the recent decision in *Oceana*[6] deviates from the constitutional principles of judicial review in *Privacy International*[7]; c) a redefinition of 'jurisdiction' within international law to enable holding states legally accountable for their participation in inter-state arms trade; and d) advocating for lowering the threshold for granting injunctive remedies as preventative measures in environmental pollution claims. The Private Law articles possess similar breath, including: a) a critique of the recent decision in *McCulloch*[8] and its implications for patient autonomy; b) an analysis of the Roman Law concepts of res nullius and res communes to formulate a legal regime for the extraction of natural resources in outer space; c) a thesis that the dealing requirement in the tort of causing loss by unlawful means is unnecessary and should be eliminated; and d) a proposed reformulation of the doctrine of estoppel to address normative concerns and gaps created by the current doctrinal framework.

Their Lordships have determined what is, in their view, the best Public Law and Private Law submission. However, let that not be determinative for yourself. I hope you will take the time to peruse each piece in great detail, to determine where you

---

[5] R *(Hardial Singh) v Governor of Durham Prison* [1984] 1 All ER 983.
[6] R *(Oceana) v Upper Tribunal* [2023] EWHC 791.
[7] R *(Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.
[8] *McCulloch v Forth Valley Health Board* [2023] UKSC 26.

agree (but just as importantly, disagree) with each author. The best legal arguments are often the most hotly contested.

The annual edition of the Journal is but the OUULJ's flagship enterprise. Elsewhere, the Journal has been busy with its other projects, as well as organising events within the undergraduate community at Oxford. For example, in Michaelmas Term, the Journal organised its annual academic writing workshop for first-years and aspiring authors. This year, the Journal invited the current Editor of the Law Quarterly Review, Professor Peter Mirfield, to speak to attendees about his insights into the professional editing process, key skills for success, and the value of academic writing.

Our resident podcast, the Oxford Undergraduate Law Podcast (OULP), has been helmed over the past year by our effervescent and sharp podcast editors, Rach Tan and Juliet Van Gyseghem. Amongst the many notable and insightful episodes, the listener will find a discussion on Whistleblower Law between Juliet and Dr. Vigjilenca Abazi (Assistant Professor at Maastricht University); and an interview between Rach and Benoit Durand (Partner at RBB Economics) about Sustainability Agreements and Competition Law. Further episodes consider systemic racism in complicity law; financial influencers and consumer protection; and how employment and discrimination law may rise to the challenge posed by algorithmic management. I heartily encourage each of you to visit our Podcast, which is hosted on Spotify.

The OUULJ's Annual Essay Competition, sponsored by South Square, is currently in progress at the time of writing. In keeping with the Journal's tradition of spotlighting and engaging

with the academic issues of current importance, this year's prompt asked students to consider the significance of generative artificial intelligence (AI) on questions of liability in tort and/or criminal law. Some time ago, whilst at a Mini-Pupillage at Fountain Court Chambers, I had the pleasure of sitting with the counsel involved in the *Thaler*[9] case, heard before the United Kingdom Supreme Court (UKSC), which concerned the question of whether it was possible to register a patent where the invention in question had been created by AI. It was perhaps an indication to the speed at which developments were arising in the field that the UKSC only delivered judgment at the very end of 2023, some nine months after the appeal had been heard. Our hope is that students will approach our set question with a creative mind and seek to apply fundamental legal concepts to a nascent technology that promises to change the world as we know it.

The Journal's partnerships expanded both inwards and outwards. Within the legal community at Oxford, the OUULJ furthered our ties with the Oxford University Commonwealth Law Journal (the Faculty's flagship postgraduate journal), and created a resource-sharing program to enable synergy between our two student-run publications. Our Senior Editorial Board also had a development meeting with the Dean of the Law Faculty, Professor John Armour, where we discussed the Journal's position as a unique space for student discourse and development within the Law Faculty. Meetings were held with the Law Faculty Development Office to discuss support initiatives, including the possibility of an annual funding package for the OUULJ, as we continue to integrate ourselves deeper into the

[9] *Thaler v Comptroller-General of Patents, Designs and Trademarks* [2023] UKSC 49.

Oxford Law undergraduate experience. Externally, the OUULJ forged new connections with the Columbia University Undergraduate Law Review (CULR). Our teams are currently working on a collaborative writing project, which will provide an exclusive opportunity for OUULJ and CULR Board Members to potentially collaborate on comparative analysis of legal issues.

I would be remiss not to express my gratitude to a number of individuals and groups. First, to the Oxford Law Faculty, and its new Dean, Professor John Armour, for supporting the Journal in its work; and to its immediate former Dean, Professor Chen-Wishart, with whom I had the pleasure of receiving Lords Hoffmann and Neuberger at the Faculty to commemorate our previous edition. Second, to Lord Briggs and Lord Sales, our judges for the best submissions to this year's edition, and whom I hope you (the reader) have had the opportunity to watch in the panel discussion commemorating the publication of this present edition.

Third, to our sponsors of this edition of the Journal. Our Platinum Sponsors, A&O Shearman, One Essex Court, Three Verulam Buildings, South Square and Maitland Chambers. In addition, the sponsor for our Public Law Prize is Francis Taylor Building; and the sponsor of our Private Law Prize is Eversheds Sutherland; whilst South Square sponsors our Annual Essay Competition. The publication of this journal and our culture of excellence would not have been possible without their generous support.

Lastly, to the 13th Editorial Board generally, led by the interminable Saloni Sanwalka, who has exceeded every

expectation placed upon her, and whose dedication to the Journal makes her predecessors proud. Special thanks must also go to her team of Vice-Editors (Kenneth; Yi Xuan; and Katherine), Rita (our Administrative Director), Josephine (our Publicity Officer) as well as our numerous Associate Editors, Blog Editors, and Podcast Editors. Many thanks also to my own Vice-Editors, Nicole, Shivanii, and Taha, who have remained with me in the 13th Editorial Board to assist and advise Saloni and her team.

Returning to our historical frolick, in the 1900s, Oxford was once again at the front and centre of legal education, with such eminent professors as Pollock, Anson, Trietel and Dicey; and slightly later, from the world of jurisprudence, HLA Hart, Dworkin, and Raz. Needless to say, there are many in the present day; though I shall withhold from mentioning Oxford's current academic stars by name, lest I be guilty of a severe omission. There was, and is, little doubt that reading Law at Oxford is a magnificent opportunity to situate oneself amongst the best and brightest; the most hardworking and diligent; and in the trail of legal giants (if I may be forgiven the hyperbole). The idea of reading Law at Oxford brings with it a certain international pedigree; one which found me travelling halfway across the globe from Singapore as a young man, where I was born and raised. My next adventure is across the Pond, but I shall dearly miss my time at Oxford. I rest easy in the knowledge that I have been part of something truly meaningful with the Journal.

The Journal aspires to embody its Oxonian principles. Though a young publication by Oxford's standards, we were the first purely undergraduate law review in the country, and in that respect, remain the oldest, much like many other aspects of the

study of Law at Oxford. We aspire to the same principles as the Faculty– a commitment to excellence in the study of the law; uncompromising academic rigour; and leadership in legal scholarship and thought. We shall not lay a claim to being the best or most prestigious undergraduate journal in the country. We shall, however, make no pretence as to the fact that that is what we aspire to. That is the ethos of Oxford, and that is the ethos of the Journal.

As I recall, it was the writer James Joyce who stated that '[t]o learn one must be humble; but life is the great teacher'. My fellow students, I have no doubt that each of you will go on to achieve great things– perhaps in the Law, perhaps outside it, and perhaps in the simple things, for so often those are the most worthy endeavours of them all. But no matter what that may turn out to be, your time reading Law at Oxford will always remain with you.

A hundred, a thousand years from now, there will still be, in some shape or form, an Oxford Law Faculty. It is my hope and belief that there too, existing and thriving alongside the Faculty and the BA Jurisprudence, will always be the Oxford University Undergraduate Law Journal.

FOREWORD (PUBLIC LAW)

The Rt. Hon. Lord Sales
Justice of the Supreme Court of the United Kingdom

A Law Journal dedicated to presentation of academic articles written by undergraduates seems to me to be an excellent project.

In modern legal practice judges and practitioners have to be willing to read and absorb academic writing touching on the topics which they have to examine and the disputes they have to resolve. Lord Goff of Chieveley explained the interaction between what judges do and academic examination of the law in his leading speech in the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460. He explained how useful he had found the work of academics in deciding that case and concluded with these words:

> "For jurists are pilgrims with us on the endless road to unattainable perfection; and we have it on the excellent authority of Geoffrey Chaucer that conversations among pilgrims can be most rewarding."

In addition to deciding cases, a vital part of the work product of judges is legal doctrine, meaning considered formulations of legal rules and principles which are intended to provide guidance in future cases. A great virtue of the common law is the tough, resilient legal doctrine which judges have produced which is the heart of it. But production of good doctrine is hard. It is not

always appreciated how difficult it is to do well. In my experience, it takes much thought, time and effort.

In part, common law legal doctrine is tough and durable because of the conditions under which it is produced – an endless stream of individual cases over decades and centuries, each argued out with formidable skill by talented advocates, to furnish the judges with an in-depth understanding of the facts in each case and how the applicable legal rules might bear upon those facts and on other similar cases. But to produce really durable and helpful doctrine, one also needs to have something of a strategic vision, a sense of where the law has come from and where it ought to be going. Judges, particularly those operating at an appellate level, have to cultivate this sort of vision. And academic writing can help supply it. It makes its own valuable contribution to the production of legal doctrine.

One can look at the contribution of the academic approach to law from three angles: the time factor; perspective; and sources.

Judges work under pressure of time to discharge their public duty to decide cases. Justice delayed is justice denied, so they know they have to get on with writing their judgments. Also, there are always new cases coming into their court, so to delay writing a judgment for a long time means that many others tend to pile up behind it, demanding attention for themselves. By contrast, an academic lawyer can immerse himself or herself in a subject area with the time to think really deeply about it. Judges working with a comparatively tight timetable benefit from being able to draw on that reservoir of knowledge and reflection.

The academic approach to law provides a different and wider perspective to the understanding of legal issues. Lord Goff had been an academic lawyer as well as a practitioner before becoming a judge of the commercial court and then rising to the House of Lords. He was one of our most distinguished judges, and he knew what he was talking about. In his 1983 Maccabean Lecture in Jurisprudence, entitled *The Search for Principle*, he set out the different but complementary roles that judge and jurist play:

> "Judge and jurist adopt a very different attitude to their work. For the [judge], the overwhelming influence is the facts of the particular case; for the [jurist], it is the idea… [But] different though judge and jurist may be, their work is complementary; and…today it is the fusion of their work which begets the tough, adaptable system which is called the common law."

Reading academic writing gives judges the opportunity to stand back and see the wood for the trees. It can provide an overview of a whole area of law and a sense of how the particular rules falling to be applied in the specific case fit within the whole.

Linked to this is the wider range of sources that academic writing may draw upon. It can look at law in its historical, or philosophical, or sociological context more readily than any individual judge working on a case can be expected to do. It can make detailed comparisons with the solutions adopted in other legal systems, from which we might be able to learn something. The academic perspective on law enables one to examine its development over time, and can assist in trying to penetrate to the underlying forces and factors which drive that development.

The common law does not stand still, but adapts to changing circumstances. This is always regarded as one of its great strengths. Appellate judges develop the law and provide guidance for the whole system, but they need to know in which direction they should be pointing and how far they should be taking that development. Drawing on academic work helps them to make good choices.

Since judges are interested in the academic perspective on law, practising lawyers have to be as well. In order to win cases for their clients they have to present the arguments which judges will find persuasive. So thinking deeply about a legal topic from an academic point of view is a wonderful way for students to develop and hone important skills of legal analysis and explication. It makes them better lawyers.

I have very much enjoyed reading the public law essays in this collection, which I was asked to review. Each of them displays legal thinking and analysis of a high order.

I found Luca Geary's essay, *With (State) Power Comes (State) Responsibility*, a really imaginative examination of the complex notion of jurisdiction in international law. It uses legal analysis to face up to real world problems of the greatest importance. In international law, it often takes time and debate for ideas to gain currency and traction. This essay makes a serious contribution to the discussion.

Tevž Sitar's essay, *Better Call Brockovich*, sets out a careful analysis of the principles governing the grant of injunctive relief and deploys an instructive comparative law approach in order to

interrogate and suggest positive development of those principles in our law. I very much liked the practical dimension of the essay. If law does not provide practical solutions to real problems, it fails in its task. The essay points out what a powerful form of remedy an injunction is, particularly to prevent harms arising, and uses that perspective to show how this form of remedy could make a real difference in cases of environmental pollution.

Marlon Austin's essay, *A Drop in the Oceana, or a Tsunami of Change?* engages with the deep structure of the UK's constitution through the prism of the *Privacy International* decision in the Supreme Court on the interpretation and effect of ouster clauses (statutory provisions which exclude the ordinary jurisdiction of the High Court in some way). This is an area of law which I find very interesting. I thought Marlon's essay was a fine piece of analysis both of the divergent approaches in the different judgments in *Privacy International* and of the way in which later authorities have followed (or limited) those approaches.

Last, but by no means least, we have Lucy Ryder's essay, *Exploring the Utility of the Tort of False Imprisonment in Addressing Arbitrary Immigrant Detention*. This takes one back to the basics of the law of tort in relation to false imprisonment, but succeeded in integrating that with an insightful discussion of how the domestic law of tort resonates with the dimension of human rights in both a philosophical and a practical way. Again, I particularly liked the way in which careful legal analysis was used to suggest ways in which the law could address the serious practical questions which arise in relation to detention of immigrants.

All the authors are to be congratulated on what they have achieved in these essays. And the Law Faculty is to be congratulated for encouraging undergraduates to engage with legal topics in such a profound and thoughtful way, by participating in the production of this Law Journal.

FOREWORD (PRIVATE LAW)

The Rt. Hon. Lord Briggs of Westbourne
Justice of the Supreme Court of the United Kingdom

When I became a High Court Judge nearly 20 years ago, my new boss, Sir Andrew Morritt VC, sought to encourage me on day one by saying: "You will never get too upset by being overruled by the Court of Appeal if you take care not to get too excited when you are upheld". That wise advice sustained me all my time in the Chancery Division and then in the Court of Appeal. It is tempting, although wrong, to think that it has no application when you reach the highest court, from which there is no appeal. It is wrong because, however free you may then be from judicial excoriation from on high, you never escape from that final, unanswerable judgment in the court of academic writing and opinion. It is final because there is no continuing process of appeal by which you might get rehabilitated. It is unanswerable, because serving judges have to exercise restraint if they venture into academic debate.

But that is how it should be. Our precious common law is often described as judge-made, no doubt to set it apart from the statutory law made in Parliament and from code-based systems in other countries. But the phrase judge-made arrogates far too much of the process, and the credit, to judges. The truth is that the common law is developed and kept relevant to modern society's needs, by a collegiate partnership between judges, advocates and academic commentators. Sometimes the academics go first, until a suitable case comes along which enables

the advocates and judges to catch up. Sometimes the academics look on while the judges and advocates do their hurried best, and then emerge from their cloisters to lambast them for getting it all hopelessly wrong. Either way their input is hugely welcome, increasingly so to judges. And every now and again a distinguished academic becomes a judge in the highest court.

This edition contains, in its private law section, four splendid articles which fully and fearlessly uphold that tradition. We have three which, with varying degrees of disapproval, mercilessly review recent attempts by the Supreme Court to sort out or bring up to date troublesome areas in the common law (including equity for that purpose).

In *Starting Afresh: Reformulating and Reconceptualising the Law of Estoppel*, Joel Horsman looks for the elusive unifying principle behind all kinds of equitable estoppel and, in particular, suggests a mediated outcome to the contest between expectation and detriment in proprietary estoppel recently fought over in the Supreme Court in *Guest v Guest.*

Unlawful Means Unchained: Causing Loss by Unlawful Means and the Problematic Dealing Requirement is a trenchant expression by Alexander Pitlarge of principled regret that the Supreme Court recently affirmed the dealing requirement as a condition for a claim in the tort of causing loss by unlawful means, in *Health Secretary v Servier Laboratories Ltd*.

In *Reopening Old Wounds: What the McCulloch Decision Means for Patient Autonomy,* August Chen Zirui expresses in forthright terms how much of an unprincipled inroad into patient autonomy

in choosing treatment was made by the Supreme Court in *McCulloch v Forth Valley Health Board*, by its pragmatic application of the *Bolam* test to the extent of a doctor's duty to explain alternative treatment options to a sick patient.

In sharp contrast Nathan Oliver literally blasts off into outer space to deal with rights of property and sovereignty on the moon, in *Past as Prologue: Roman Law and the Interpretation of International Space Law Governing the Use of the Moon and Other Celestial Bodies*. Goodness knows when and where a court will have the opportunity to catch up with the far-sighted thinking expressed, based incidentally upon concepts drawn from Roman rather than common law, in the interpretation and development of the international jurisprudence originating in the Outer Space Treaty.

Readers really will have to suspend their disbelief that these beautifully written, deeply researched and confidently presented articles emanate from undergraduates. Even if one may not always agree with all their conclusions, each of them displays an impressive mastery of their subject, a clarity of thought and a vigour of expression which is a delight to read. I warmly recommend all of them, in each case for a seriously thought-provoking and enjoyable read, from authors who I confidently expect to travel far and fly high in the law.

PRIZES

Best Public Law Submission to the Thirteenth Edition of the Oxford University Undergraduate Law Journal (2024):

Exploring the Utility of the Tort of False Imprisonment in Addressing Arbitrary Immigrant Detention

Lucy Ryder
University of Oxford

The Public Law Prize winner was selected by The Rt. Hon. Lord Sales, Justice of the Supreme Court of the United Kingdom.

Best Private Law Submission to the Thirteenth Edition of the Oxford University Undergraduate Law Journal (2024):

Past as Prologue: Roman Law and the Interpretation of International Space Law Governing the Use of the Moon and Other Celestial Bodies

Nathan Oliver
University of Oxford

The Private Law Prize winner was selected by The Rt. Hon. Lord Briggs of Westbourne, Justice of the Supreme Court of the United Kingdom.

The Editorial Board wishes to thank our prize sponsors:

Francis Taylor Building—*for their funding of the Public Law Prize*

Eversheds Sutherland—*for their funding of the Private Law Prize*

EVERSHEDS
SUTHERLAND

PUBLIC LAW ARTICLES

With (State) Power Comes (State) Responsibility: Plugging the Accountability Gap Through a Reappraisal of Jurisdiction in International Human Rights Law

Luca Geary*

Abstract—This article argues that states can be held legally accountable for inter-state arms trading. This is especially important in light of the conflict in Israel and Palestine, which has seen numerous human rights violations facilitated by arms trading. Currently, the accountability regime is inadequate. Many states have not ratified the Arms Trade Treaty 2014, and Article 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts provides no individual forum for complaint. Instead, we must look to international human rights law. This article advances a new definition of jurisdiction under

---

* Magdalen College, Oxford. I am grateful to Dr Miles Jackson, Megan Bradley, and Lucy Ryder. I would also like to thank the OUULJ editors for their detailed and helpful comments. All errors remain my own.

Article 1 of the European Convention on Human Rights and Article 2(1) of the International Covenant on Civil and Political Rights. Jurisdiction should mean an exercise of state power backed by a normative relationship between the state and the individual. This normative relationship is triggered by (1) the reasonably foreseeable causal relationship between the state and the individual and (2) the existence of parallel international law obligations. When selling arms, states may exercise jurisdiction and violate the right to life by exposing individuals to the 'substantial and foreseeable' risks associated with the use of arms by the receiving state.

Introduction

Arms trading is aptly described by a UN Special Rapporteur on human rights as the 'Billion Dollar Death Trade.'[1] For proof of this, look no further than the conflict in Israel and Palestine. The death toll in Gaza has surpassed 25,000 since the Hamas attack on October 7th, yet the United States has just announced the sale of another 14,000 rounds of tank ammunition to Israel, costing $106 million.[2] The sums involved are astronomical. The consequences for individuals are indescribable. Despite this, there is an accountability gap. The Arms Trade Treaty 2013 has failed to prevent states from facilitating human rights violations, given that many major players, including the United States, are not

---

[1] UN Special Rapporteur on the situation of human rights in Myanmar, *The Billion Dollar Death Trade: The International Arms Networks That Enable Human Rights Violations in Myanmar*. <https://www.ohchr.org/sites/default/files/documents/countries/myanmar/crp-sr-myanmar-2023-05-17.pdf> accessed 8 May 2024.

[2] See, for example: BBC News, 'US Arms Exports to the Middle East 2019-23 (14 March 2024) <www.bbc.co.uk/news/world-middle east68737412#:~:text=The%20US%20is%20by%20far,arms%20between%202019%20and%202023> accessed 19 April 2024. For updates, see Forum on the Arms Trade, 'Biden and Arms Sales to Israel'; David Gritten, 'Gaza war: Where does Israel get its weapons?' (*BBC News,* 15 April 2024) <https://www.bbc.co.uk/news/world-middle-east-68737412#:~:text=The%20US%20is%20by%20far,arms%20between%202019%20and%202023> accessed 8 May 2024. For updates, see <https://www.forumarmstrade.org/bidenarmsisrael.html>. Note also the recent decision of the International Court of Justice ordering Israel to take provisional measures to prevent the Commission of genocide in Gaza (without prejudice to the question of whether Israel is committing genocide): *Application of the Convention on the Prevention and Punishment of Genocide in the Gaza Strip (South Africa v Israel)* [2024] ICJ General List No 192.

parties to the Treaty, while states parties continue to trade with impunity.[3] Further, Article 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts,[4] which provides that states may be held responsible for assisting other states in breaching their obligations, provides no individual forum for complaints.[5]

---

[3] The United States is not a party to the ATT, and many states parties have failed to comply with its obligations. For example, the United Kingdom on 7 July 2020 decided to resume granting export licenses to Saudi Arabia, employing a 'revised methodology' and determining that 'Saudi Arabia has a genuine intent and capacity to comply with IHL.' (Hansard, HC Deb 07 July 2020, col 32WS) <https://hansard.parliament.uk/commons/2020-07-07/debates/20070747000017/ExportLicencesSaudiArabia> accessed 8 May 2024. On 7 June 2023, the Divisional Court in R *(Campaign Against Arms Trade) v Secretary of State for International Trade* [2023] EWHC 1343 (Admin) dismissed a legal challenge against the Secretary of State for his decision to re-issue export licenses in 2020. This decision followed submissions from the Yemeni Human Rights Organisation, Mwatana for Human Rights. They detailed 149 airstrikes carried out by the Saudi-led Coalition which allegedly caused harm to civilians in Yemen, with 32 incidents *prima facie* breaching IHL [91]. That said, the ATT is of course a positive step in regulating inter-state arms transfers. It is notable that the ATT now has 114 state parties, including the United Kingdom, China, Germany and France.

[4] I refer to them as 'articles,' rather than 'draft articles' because of their subsequent treatment by the General Assembly. In para 3 of GA res 56/83 (12 December 2001), the GA 'took note' of the 'articles on the responsibility of states for internationally wrongful acts.' This is also how the ILC Secretariat refers to them. Hereinafter referred to as ARSIWA.

[5] cf the European Convention on Human Rights, where any 'victim' of human rights violation can bring a case before the court (Article 34). For authors to bring claims under the ICCPR, the respondent state must have ratified the second Optional Protocol.

To hold states accountable for inter-state arms trading, we must rely on international human rights law. This article advances a new definition of jurisdiction which applies to the European Convention of Human Rights[6] and the International Covenant on Civil and Political Rights.[7] Specifically, jurisdiction should mean an exercise of state power, backed by a normative relationship between the state and the individual.[8] This normative relationship is triggered by (1) the reasonably foreseeable causal relationship between the state and the individual and (2) the existence of parallel international law obligations. Additionally, there should be an expansive understanding of the right to life. These arguments apply to both treaties under the principle of systemic integration in Article 31(3)(c) of the Vienna Convention of the Law of Treaties 1969.[9]

---

[6] Hereinafter referred to as the 'ECHR'.
[7] Hereinafter referred to as the 'ICCPR'.
[8] cf *Banković v Belgium* [2001] ECtHR App no. 52207/99 [75]; UN Human Rights Committee, *General Comment No 36: Article 6 (Right to Life)* UN Doc CCPR/C/GC/36 (2019) [63].
[9] *Vienna Convention on the Law of Treaties* [1969] 1155 UNTS 331 Art 31(3)(c). Hereinafter referred to as the VCLT.
The article provides that interpretation must take account of 'any relevant rules of international law applicable in the relations between the parties.' The provision was not clearly explained by the International Law Commission in the drafting process, due to concerns about the difficulty in clarifying the relationship between treaty and custom. However, McLachlan explains that the provision essentially reflects the desire for 'systemic integration.' This involves harmonising different rules of international law, often stemming from different sources. Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 International & Comparative Law Quarterly 280; *Yearbook of the International Law Commission*, vol 2 (1964) [74].

Aside from making two positive arguments, this article responds to Ludvig Öhrling's thesis, entitled 'Arms Trade, Human Rights and the Jurisdictional Threshold.'[10] Öhrling and I reach the same conclusion that states should be held accountable for inter-state arms trading, but there are differences in (1) our methodologies and (2) the content of our jurisdictional models.

In terms of methodology, Öhrling focuses narrowly on the meaning of 'jurisdiction' in Article 1 ECHR. This is regrettable. The ECHR only has 46 state parties, while the ICCPR has 174, including the United States and Russia.[11] To truly address the problem of inter-state arms trading, we need a new meaning of jurisdiction, applicable to both to the ECHR and the ICCPR. It is hoped that this will provide a springboard for wider jurisdictional models under Article 1 of the American Convention of Human Rights and African Charter on Human and Peoples' Rights.[12]

The biggest difference lies in the respective contents of our notions of jurisdiction. Öhrling endorses Ben-Naftali and Shany's model of jurisdiction based on direct, significant, and

---

[10] Ludvig Öhrling, 'Arms Trade, Human Rights and the Jurisdictional Threshold: On the Responsibility of Arms Transferring States Under the European Convention on Human Rights' (Lund University 2021).
[11] ECHR: <www.coe.int/en/web/cpt/states>; (accessed 08/05/24); ICCPR: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en > (accessed 8 May 2024).
[12] *African Charter on Human and Peoples' Rights* (Adopted 27 June 1981, Entered into Force 21 October 1986) 1520 UNTS 217. The Charter has no specific jurisdictional clause ; *American Convention on Human Rights* (Adopted 22 November 1969) 1144 UNTS 123 Art 1.

foreseeable extraterritorial consequences.[13] This is problematic, as Öhrling's descriptive argument, which relies solely on ECtHR case law, cannot support this model. By contrast, my model receives support from the (1) ECtHR, (2) Human Rights Committee, (3) Inter-American Court of Human Rights, (4) African Commission on Human and Peoples' Rights, and (5) it is derived from an application of the customary principles of interpretation in the VCLT.[14]

This article will first examine the current extraterritorial models of jurisdiction and their inapplicability to inter-state arms transfers. Second, it will defend a new meaning of jurisdiction. Third, it will outline the expansive reading of the right to life required in addition to this model of jurisdiction. Finally, the model of jurisdiction will be tested against the rules of interpretation under the VCLT,[15] concluding that the model is descriptively possible.

The Current Models of Jurisdiction

Before arguing for a new definition of jurisdiction, it is instructive to set out the current position. Jurisdiction has several meanings

---

[13] Öhrling (n 10) 64; Ben-Naftali and Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003) 37 Israel Law Review 64.

[14] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43 [160]; *Golder v UK* [1975] ECtHR App no 4451/70 [29].

[15] *VCLT* Arts 31 and 32.

in international law.[16] In international human rights law, jurisdiction refers to the trigger for the imposition of human rights treaty obligations.[17] This is supported by the text of Article 1 ECHR, which provides that states owe obligations to those 'within their jurisdiction.'[18] Although Article 2(1) ICCPR provides that states owe obligations to those within their territory and subject to their jurisdiction, this clause is widely recognised as operating disjunctively, and thus jurisdiction is sufficient to engage human rights obligations.[19] International courts and bodies have recognised that jurisdiction is 'primarily territorial'[20], meaning states most commonly owe human rights obligations

---

[16] Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 Human Rights Law Review 434. Jurisdiction can refer to (1) the competence of a court (domestic or international) to hear a dispute, (2) the authority of a state to prescribe, enforce or adjudicate upon legal rules, (3) factual power exercised by a state which triggers human rights obligations, or (4) the domainé reserve, or the domain in which states are entitled to be free from outside interference (particularly in the context of the principle of non-intervention).

[17] ibid 416.

[18] *European Convention for the Protection of Human Rights and Fundamental Freedoms* [1950] ETS 5 Art 1.

[19] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 [109]; UN Human Rights Committee, General Comment No 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant [2004] UN Doc CCPR/C/21/Rev.1/Add.13, para 10; cf the US position: Matthew Waxman, 'Opening Statement by Matthew Waxman on the Report Concerning the International Covenant on Civil and Political Rights (ICCPR)' (US Department of State, 2007) <https://2001-2009.state.gov/g/drl/rls/70392.htm>.

[20] *Banković v Belgium* (n 8) [61], [67]; *Al-Skeini and Others v UK* [2011] ECtHR App no 55721/07 [131]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (n 21) [109].

within their own borders. However, there are two well-recognised exceptions. First, states owe obligations when they exercise effective overall control over territory abroad (the spatial model),[21] and second, when agents of the forum state exercise authority over persons (the personal model).[22] These exceptions do not cover inter-state arms trading.

The Spatial Model – Effective Control over Territory

Under this model, applied by both the Human Rights Committee and the European Court of Human Rights, states exercise jurisdiction where they have effective control over territory outside the forum state.[23] Effective control is a question of fact.[24] Relevant factors include the 'strength of the state's military presence in the area' and 'the extent to which its military, economic and political support for the local subordinate

---

[21] *Loizidou v Turkey (merits)* [1996] ECtHR App no 15318/89 [56]. *Al-Skeini and Others v UK* [2011] ECtHR App no 55721/07 [138]. UN Human Rights Committee (n 8) [10].

[22] *Al-Skeini and Others v UK* (n 21) [133]-[137]. *Delia Saldias de Lopez v Uruguay* [1981] HRC CCPR/C/13/D/52/1979 [12.1]-[12.3].

[23] UN Human Rights Committee, *General Comment No 36: Article 6 (Right to Life)* UN Doc CCPR/C/GC/36 (2019) [63]; *Loizidou v. Turkey (merits)* (n 21) [53].

[24] *Al-Skeini and Others v UK* (n 20) [139]. It is very important to distinguish effective control for the purposes of IHRL obligations and effective control as a test for attribution under article 8 of the Articles on the Responsibility of States for Internationally Wrongful Acts, since both may be relevant in the same context. *Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc A/56/83 (2001) ('*ARSIWA*') Art 8; *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14 [115].

administration provides it with influence and control over the region.'[25] Effective control does not, however, extend to inter-state arms trading, or even direct bombing campaigns. In *Banković,* the ECtHR held that NATO's bombing of Belgrade was not an exercise of jurisdiction, specifically rejecting the application of the effective control state in this context.[26] *A fortiori*, arms sales will not be sufficient to ground jurisdiction.

The Personal Model – Authority over Persons

The ECtHR and HRC have recognised extraterritorial jurisdiction based on an exercise of power by agents of the state over people in another state.[27] According to the ECtHR, human rights obligations can be 'divided and tailored' under this model of jurisdiction.[28]

The ECtHR in *Al-Skeini v UK* recognised three categories of personal jurisdiction, which map onto those recognised by the HRC. These are: (1) acts of diplomatic or consular agents who exert authority and control over others[29], (2) states exercising public powers on another state's territory which

---

[25] *Al-Skeini and Others v UK* (n 20) [139]. This suggests that military presence is not always required, which perhaps explains the ECtHR's intermittent references to 'effective overall control'.
[26] *Banković v Belgium* (n 8) [75].
[27] *Delia Saldias de Lopez v Uruguay* (n 22) [12.1]-[12.3].
[28] *Al-Skeini and Others v UK* (n 2120) [137]; This decision overruled Banković on the point and has now been explicitly confirmed by the ECtHR in *Ukraine and The Netherlands v Russia* [2022] ECtHR App no 8019/16, 43800/14 and 28525/30 [571].
[29] *Banković v. Belgium* (n 8) [73].

would normally be exercised by that state's government, either through consent, invitation, or acquiescence by that government,[30] or (3) use of force by state agents operating outside their territory over persons.[31]

Öhrling explains that since the *Banković* decision, the ECtHR has recognised an increasingly liberal personal model of jurisdiction.[32] In *Ukraine and the Netherlands v Russia,* the Court explained that 'Article 1 of the Convention cannot be interpreted so as to allow a state party to perpetrate violations of the Convention on the territory of another state which it could not perpetrate on its own territory.'[33] This echoes the HRC's position in *Lopez Burgos v Uruguay*.[34]

These statements are inaccurate. In *Soering v United Kingdom,* which concerned state extradition, the ECtHR held that a state can breach Article 3 of the ECHR by exposing an individual to the 'foreseeable consequences of extradition', namely torture, inhuman and degrading treatment.[35] Applying the liberal approach above, the reasoning in *Soering* should apply absent a jurisdictional link. However, in *MN v Belgium*, which concerned Syrian nationals applying for visas to enter Belgium,

---

[30] ibid [71]; *Delia Saldias de Lopez v. Uruguay* (n 22) [12.3]: the HRC refers to agents committing human rights violations regardless of the 'acquiescence of the Government of that State,' so the language is slightly different.
[31] *Issa and Others v Turkey* [2004] ECtHR App no 31821/96 [71]; *Delia Saldias de Lopez v Uruguay* (n 22) [12.1]-[12.3].
[32] Öhrling (n 10) 51–52.
[33] *Ukraine and The Netherlands v. Russia* (n 28) [570].
[34] *Delia Saldias de Lopez v. Uruguay* (n 22) [12.3].
[35] *Soering v UK* [1989] ECtHR App no 14038/88 [86].

the Court rejected this argument, specifically relying on the absence of the territorial connection.[36] This inconsistency means that cases of facilitation, such as inter-state arms trading, do not constitute an exercise of jurisdiction under the personal model.

A Reappraisal of Jurisdiction

Öhrling argues in favour of a 'functional' model of jurisdiction. He explains that 'functional' is 'in essence a claim for universalism,'[37] with states owing human rights obligations to individuals who they 'have a functional capacity to protect.' [38] This is a good starting point, but the obvious problem is its breadth. In a globalised world, many states, particularly those with power and wealth, have some capacity to help any individual. To adopt a notion of jurisdiction based on universalism essentially renders it otiose.

Instead, there should be a new definition of jurisdiction which is broader than the territorial and personal models, but narrower than the universal functional model. States should owe human rights obligations when they exercise state power and have a normative relationship with individuals affected by that power.[39]

---

[36] *MN and Others v Belgium* [2020] ECtHR App no 3599/18 [120].
[37] Öhrling (n 10) 57.
[38] ibid 1.
[39] This definition is inspired by the following articles: Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) Human Rights Law Review 8; Samantha Besson, 'The Extraterritoriality of the European

The ECtHR's and HRC's Position

The ECtHR has repeatedly held that the ordinary meaning of jurisdiction in Article 1 of the ECHR reflects the term's meaning in public international law.[40] Jurisdiction in PIL is 'the authority of the state, based in and limited by international law, to regulate the conduct of persons, both natural and legal, by means of its own domestic law.'[41] This authority consists of jurisdiction to: (1) prescribe – the authority to make legal rules, (2) enforce – the authority to enforce those rules, and (3) adjudicate – the authority of states' domestic courts to settle legal disputes.[42] The law of jurisdiction exists to ensure that states exercise their competences within the limits set by other states. Jurisdiction is thus 'primarily territorial.'[43] The ECtHR states that this understanding must apply with equal force to jurisdiction in IHRL. This should be rejected.[44] Jurisdiction in IHRL does not refer to a state's competence to make, enforce, or adjudicate upon legal rules. This is obvious from the first instance of extraterritorial jurisdiction recognised by the ECtHR itself. In *Loizidou v Turkey*, the Court

Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' 25 Leiden Journal of International Law 857. I have sought to combine these originally competing and mutually exclusive models.

[40] *Banković v Belgium* (n 8) [59]; *HF and Others v France* [2022] ECtHR App nos 24384/19, 44234/20 [184]. 'Public international law' hereinafter referred to as 'PIL'.

[41] Milanovic (n 39) 420.

[42] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 440.

[43] *Banković v Belgium* (n 8) [75].

[44] Milanovic (n 39) 419.

held that Turkey exercised jurisdiction in Cyprus on the basis of its 'military action.'[45] Critically, Turkey's invasion was not internationally recognised as falling within its competence to enforce domestic law. Jurisdiction in the sense of PIL competence must be distinguished from jurisdiction in the sense of factual power.[46]

Having established that the jurisdictional analysis in *Loizidou* was essentially factual, it is vital to examine the specific descriptive aspect of the jurisdictional test. It is suggested that 'state power' should fulfil this descriptive limb. State power should be defined as any power which is attributable to the state under ARSIWA.[47]

The argument that 'state power' constitutes jurisdiction was first advanced by Professor Milanovic.[48] The HRC referred to 'state power' as an aspect of jurisdiction in General Comment No 36 on the right to life.[49] By contrast, The ECtHR continues to refer to 'public power,' which is endorsed by Öhrling.[50] This confusing terminology calls for clarification.

The reference to 'public power' should be rejected in favour of 'state power.' The use of the phrase 'public power' is dangerous because it appears to distinguish the public-facing acts

---

[45] *Loizidou v Turkey (merits)* (n 21) [52].
[46] Milanovic (n 39) 423–424.
[47] *ARSIWA* (n 24) CH.II.
[48] Milanovic (n 39) 417.
[49] UN Human Rights Committee (n 8) 36 [63].
[50] Öhrling (n 10) 57; *Banković v Belgium* (n 8) [71]; *Al-Skeini and Others v UK* (n 20) [149].

of the state from the private-facing acts. To hold that only public-facing acts can constitute an exercise of jurisdiction would provide a loophole for states to avoid accountability.

Imagine State A exercises 'effective control' (for the purposes of attribution, rather than IHRL jurisdiction)[51] over an arms company operating in that state. Under the test set out by the International Court of Justice in *Nicaragua v United States*,[52] this satisfies the test for attribution under Article 8 of ARSIWA.[53] However, this is essentially a private-facing act, in that the state-backed private company is delivering arms pursuant to a commercial agreement with the receiving state. We can say (1) that the arms company is a state organ, but (2) the state is exercising its private-power, which means it would not satisfy the jurisdictional test of 'public power' in IHRL. This test would thus allow states to evade liability by acting through arms companies, rather than selling arms themselves.

The test of state power should mean any power which is attributable to the state under ARSIWA.[54] While the public and private law distinction may be relevant in terms of domestic

---

[51] These two tests of 'effective control' are distinct and operate in different areas of international law. The test set out in *Nicaragua* determines whether conduct is *attributable* to the state (under the secondary rules of international law contained in ARSIWA). The test of 'effective control' in IHRL determines whether the state has exercised jurisdiction in the territory of another state. The latter test necessarily assumes that the relevant conduct is attributable to the state.

[52] *Nicaragua* (n 24) [115].

[53] *ARSIWA* (n 24) Art 8.

[54] ibid CH II.

administrative law,[55] ultimately, in PIL, all state organs, engaging in *any* capacity, are required to comply with international law. Adopting a 'public power' test would unduly narrow the circumstances in which a state exercises jurisdiction. This is because the impact of the state's conduct will not necessarily vary according to whether that conduct is public or private.

Besson's Position – The Need for a Normative Relationship

Besson agrees with Milanovic that jurisdiction in IHRL is different to that in PIL. However, she differs in arguing that an additional normative relationship is required between the state and the individual to trigger jurisdiction. Besson defines jurisdiction as '*de facto* political and legal authority… [that] claims to be, or at least is held to be legitimate by its subjects.'[56] For Besson, this normative claim is a 'corresponding appeal for compliance' by the state, or a 'claim to legitimacy, even if that claim ends up not being justified.'[57]

[55] The UK House of Lords and Supreme Court have frequently struggled to draw the line between public and private entities, most recently in the context of s6 of the Human Rights Act 1998, which provides that public authorities act unlawfully when they violate Convention rights. See, for example *YL v Birmingham City Council* [2007] UKHL 27, which was immediately reversed by s145 of the Health and Social Care Act 2008.

[56] Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' 25 Leiden Journal of International Law 857, 865.

[57] ibid.

Besson's model is attractive. Firstly, if the imposition of human rights obligations is a normative consequence of an exercise of 'jurisdiction,' then a normative reason should justify that consequence. Second, the normative element avoids circular reasoning by not assuming the existence of human rights prior to determining whether there is an exercise of jurisdiction.

However, Besson's requirement of normativity should not be restricted to a claim by the state to exercise authority. The restriction is undermined by the case law of the ECtHR and is not justifiable.[58]

In *Carter v Russia*, the ECtHR held that Russia had exercised jurisdiction over Alexander Litvinenko by poisoning him in London.[59] Russia did not claim to exercise legitimate authority over Mr Litvinenko; it simply exercised power. While Russia may privately believe it had a right to poison Mr Litvinenko, Russia did not make a public claim to have legitimate authority. Indeed, such a claim would lead to international condemnation. Nevertheless, the ECtHR rightly recognised an exercise of jurisdiction, which suggests Besson's model is too narrow. There is no reason to confine Besson's requirement of a normative relationship to this claim to authority. Rather, the focus should be on any feature which generates a normative relationship.

---

[58] Though her article was written before these cases.
[59] *Carter v Russia* [2021] ECtHR App no 20914/07 [170].

The Normative Features of Inter-state Arms Trading

Having established that the ordinary meaning of jurisdiction requires (1) state power and (2) a normative relationship, it is instructive to examine the properties of proposed models of jurisdiction to see if they meet these criteria and can provide guidance on relevant normative features.

Reasonable Foreseeability

Öhrling relies on Ben-Naftali and Shany's intensity of power relations model,[60] which entails that states exercise jurisdiction where their actions have 'direct, significant and foreseeable' consequences in foreign territory.[61] Shany distinguishes this from the special legal relations model, or 'relations of power that put the state in a unique legal position to afford IHRL protection.'[62] Shany puts 'foreseeability' in the power category, but this is too narrow. Rather, foreseeability of extraterritorial harm is a normative feature which can justify the imposition of human rights obligations. Öhrling seems to implicitly recognise this, as he refers to the need for a 'concrete and precise' normative relationship, before paradoxically arguing in favour of Shany's power relations model.[63]

---

[60] Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7 Law and Ethics of Human Rights 47, 69.
[61] Ben-Naftali and Shany (n 13) 64.
[62] Shany (n 60) 71.
[63] Öhrling (n 10) 64.

To resolve this analytical confusion, it is necessary to separate the descriptive aspect of jurisdiction (the exercise of state power), from the normative aspects. As established, one such normative aspect is the notion of 'foreseeability.'

Immediately, we must replace 'foreseeability' with 'reasonable foreseeability.' The former term was rejected by states in the HRC's Draft General Comment No 36 and is not supported by international practice.[64]

The importance of reasonable foreseeability has been emphasised by the African Commission on Human and Peoples' Rights,[65] the Committee on Economic Social and Cultural Rights,[66] and the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and

---

[64] State responses to draft GC 36 [2017]: The United States of America [13], France [37], Russia [6]. See also Australia [3], Austria (p2), Canada [7], Germany [21], Norway (pp4-5), and The Netherlands [29]. Available at Office of the High Commissioner for Human Rights, 'General Comment No 36: Article 6 (Right to Life) <www.ohchr.org/en/calls-for-input/general-comment-no-36-article-6-right-life> accessed 8 May 2024.

[65] African Commission on Human and Peoples' Rights, *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)* (2015) [14]. Available at <https://achpr.au.int/en/node/851#:~:text=cannot%20be%20implemented.-,General%20Comment%20No.,to%20present%20General%20Comment%20No> accessed 8 May 2024.

[66] Committee on Economic, Social and Cultural Rights, *General Comment No 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities* (2017) [27].

Cultural Rights.[67] More widely, the Inter-American Court of Human Rights has stated that a mere causal link is enough for jurisdiction in the context of transboundary harm,[68] which runs contrary to *Banković*.[69] These statements of international courts and expert treaty bodies constitute subsidiary means of determining law under Article 38(1)(d) ICJ Statute, and should inform the interpretation of the ICCPR and ECHR, given the principle of systemic integration in Article 31(3)(c) VCLT.[70] The notion of reasonable foreseeability should thus constitute one normative feature.

Parallel International Law Obligations

So far, we have established the feature of reasonable foreseeability. The second normative feature is the existence of parallel international law obligations, particularly those generated by the ATT. The ECtHR and HRC have recognised that parallel international law obligations can generate IHRL obligations in the absence of a territorial basis of jurisdiction.[71] In *Hanan v Germany*

---

[67] ETO Consortium, *Maastricht Principles on Extraterritorial Obligations on States in the Area of Economic, Social and Cultural Rights* (2011) Principle 9(b). Note, the principles are 'soft law,' but do purport to codify current international law rules on extraterritorial obligations. .

[68] *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and personal integrity: interpretation and scope of articles 4(1) and 5(1) in relation to articles 1(1) and 2 of the American Convention of Human Rights* [2017] IACtHR Advisory Opinion OC-23/17 [102].

[69] *Banković v Belgium* (n 8) [75].

[70] *VCLT* (n 9) Art 31(3)(c).

[71] *Hanan v Germany* [2021] ECtHR App no 44871/16 [135-136]; *AS and others v Malta* [2021] HRC CCPR/C/128/D/3042/2017 [6.7].

the ECtHR found that Germany's obligation to investigate extra-territorial violations of the right to life was triggered because of, *inter alia,* parallel customary humanitarian law, namely the obligation to investigate potential war crimes.[72] This parallel obligation constitutes one 'special feature' which broadens the notion of jurisdiction. While *Hanan* appears confined to the procedural aspect of Article 2 ECHR, the same cannot be said for *AS v Malta*, where the HRC relied on three international treaties to show that Malta owed positive, substantive obligations outside its territory (namely to rescue asylum seekers at sea).[73]

This argument is not without controversy. In *Hanan*, the dissenting Judges Grozev, Ranzoni, and Eicke described the approach as creating 'a chilling effect' by 'unnecessarily duplicating obligations' and broadening the scope of the Convention.[74] In response, the majority in *Hanan* emphasised that 'the gravity of the alleged offence' justified an expansive approach to jurisdiction. A similar argument could be made about inter-state arms trading, especially when considering the pending

---

[72] *Hanan v Germany* (n 71) [137]-[142]. The other 'special features' were the inability of Afghanistan to conduct its own investigation and the domestic law obligation on Germany to investigate. Neither of these are relevant here.

[73] *AS and others v Malta* (n 71) [6.6]-[6.7]. The treaties are: (1) United Nations Convention on the Law of the Sea 1982, (2) International Convention on Maritime Search and Rescue 1979, and (3) International Convention for the Safety of Life at Sea 1974.

[74] *Hanan v Germany* (n 72) Joint partly dissenting opinion of Judges Grozev, Ranzoni and Eicke [7]; Andreas Zimmermann (dissenting) similarly rejected relying on parallel international law obligations to expand jurisdiction in *AS and others v Malta* (n 73).

case of genocide against Israel before the ICJ (facilitated by such arms trading).

There are two further arguments to support reliance on parallel international law obligations to generate a normative jurisdictional link. First, Öhrling argues that that the ATT generates 'legitimate expectations' of IHRL compliance.[75] Second, states impliedly consent to broader IHRL obligations given their acceptance of comparable obligations without a jurisdictional bar.

Öhrling's argument currently lacks a basis in IHRL, with legitimate expectations confined to the doctrine of estoppel.[76] However, considering the desire for systemic integration in international law, now may be an appropriate time to apply the principle of estoppel - a general principle of international law - to the IHRL context. Essentially, estoppel would operate to prevent the state from denying its IHRL obligation when it has already consented to a similar international law obligation. This would provide a doctrinal peg on which Öhrling's legitimate expectations argument could be hung.

Implied consent may provide an additional normative link. The ECtHR could adopt a rebuttable presumption that where a state consents to an obligation in international law, it also consents to a comparable IHRL obligation. For example, article 7(1)(b)(ii) ATT imposes due diligence obligations on states to regulate the transfer of arms where such transfers would be used

[75] Öhrling (n 10) 65.

[76] *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand) (Merits)*, Dissenting Opinion of Sir Percy Spender [1962] ICJ Rep 6 143–144.

to 'commit or facilitate' a 'serious violation of international human rights law.'[77] The ECtHR and HRC could adopt a presumption that the state accepts this obligation in the IHRL context, at least as regards 'serious' violations, which includes the right to life.[78] To rebut the presumption, the state could be required to act as a 'persistent objector' to reject the obligation.[79] This could be effective given the political pressure on states to respect human rights, especially in the context of the Israeli-Palestinian conflict.

Applying These Features

To summarise, we have three features which constitute an exercise of jurisdiction in IHRL: (1) the descriptive feature of state power, (2) the normative feature of reasonable foreseeability, and (3) the normative feature of parallel international law obligations. Admittedly, there lies a difficult question as to whether these features are cumulative. Clearly, some form of state power is necessary. As for the normative features, whether they are independently sufficient will be a question of state practice. Gradually, state practice is beginning to coalesce around the notion of reasonable foreseeability, but it is too early to conclude that this is independently sufficient to create

---

[77] *Arms Trade Treaty* [2013] 3013 UNTS 269 Art 7(1)(b)(ii).
[78] *Coronel v Colombia* [2002] UN Doc CCPR/C/76/D/778/1997 [5.2]; *Velikova v Bulgaria* [2000] ECtHR App no 41488/98 [82]; *Concluding Observations on Togo's Report,* UN Doc CCPR/C/TGO/CO/4 [2001] [9].
[79] Crawford (n 42) 26; *Fisheries (UK v Norway) (Judgment)* [1951] ICJ Rep 116 131.

a normative link. Therefore, these features are currently sufficient only if taken together.[80]

Inter-state arms trading *triggers* these features. First, it involves an exercise of state power, namely a decision to grant export licenses to foreign states.[81] Second, there will often be a reasonably foreseeable connection between the sending state and the individual affected by the receiving's state's use of arms. Third, inter-state arms trading is already governed by the ATT, which imposes parallel obligations, such as that contained in Article 7(1)(b)(ii).[82]

To see how inter-state arms trading may constitute an exercise of jurisdiction, imagine the following two scenarios. First, State A sells arms to State B, who is currently in an armed conflict and has reportedly engaged in human rights violations. Second, State X sells arms to State Y, who uses and stores the arms for domestic training purposes. Both State A and State X have exercised state power in granting an export license to the foreign state. However, only State A has the requisite normative feature of reasonable foreseeability: it is reasonably foreseeable that State B will use arms to commit further violations as it is in an armed conflict and has reportedly engaged in human rights violations. Therefore, only State A has exercised jurisdiction. This example demonstrates that the model of jurisdiction is not overly expansive, which is vital to ensure state support.

---

[80] See the section on state practice for more detail.
[81] Öhrling (n 10) 64.
[82] *ATT* (n 77) Art 7(1)(b)(ii).

Expanding the Content of the Right to Life

Now that it has been established that states can exercise jurisdiction through inter-state arms trading, it must be shown that states can *violate* their obligations under the right to life. Öhrling effectively assumes this. He relies on *Albekov and Others v Russia*,[83] in which Russia breached Article 2 by its 'failure to confine a mined area and properly notify the residents.'[84] However, this is distinguishable from inter-state arms trading, in which states are *facilitating* violations of the right to life.[85] *Albekov,* by contrast, concerned Russia's *direct* breach of a positive obligation.

To expand the right to life, we must have recourse to the ECHR and ICCPR's extradition line of case law. In *Soering*, the UK breached Article 3 ECHR for exposing Soering to the 'foreseeable consequences of extradition' suffered outside UK jurisdiction, namely torture.[86] The ECtHR justified this obligation on the basis of the importance of Article 3 as a non-derogable right which must be protected in accordance with the 'spirit' of the Convention.[87] This positive obligation was also

[83] *Albekov and Others v Russia* [2008] ECtHR App no 68216/01.
[84] Öhrling (n 10) 39.
[85] Here, by 'right to life,' I mean the obligation under Article 6 ICCPR, as in most cases, the state *using* the arms will not be a party to the ECHR. That said, even if the state is not party to any international human rights treaties, this should not prevent the sending state from breaching its obligation.
[86] *Soering v UK* (n 35) [86].
[87] ibid [88].

applied in the context of the right to life in *Al Nashiri*, which established that states are under obligations not to extradite the victim where there is a 'substantial and foreseeable risk' that they could be subjected to the death penalty.[88] Similarly, in *Munaf v Romania,* the HRC held that 'a state party may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction.'[89] Applying this to the inter-state arms trading context, states could be held accountable when transferring arms which pose a 'substantial and foreseeable' risk of violating the right to life.[90]

The key weakness of this argument is that these cases have a purely territorial basis of jurisdiction (the rights-holder was present in the forum state before extradition). In contrast, in inter-state arms trading cases, the rights-holders are in foreign territory.

Öhrling argues that *Soering* can be applied without such a territorial link. He relies on Jackson's argument that the true *ratio* of *Soering* is preventing states from exposing individuals to the 'foreseeable consequences of extradition',[91] relegating the jurisdictional issue to the background. Jackson's argument

---

[88] *Al Nashiri v Romania* [2018] ECtHR App no 33234/12 [728].
[89] *Munaf v Romania* [2009] HRC CCPR/C/96/D/1539/2006 [14.2].
[90] *Al Nashiri v Romania* (n 88) [728]. The same reasoning would apply to the right to be free from torture, inhuman or degrading treatment, but this article focuses on the right to life.
[91] *Soering v UK* (n 35) [86]; Miles Jackson, 'Freeing Soering: The ECHR, State Complicity in Torture, and Jurisdiction' (2016) 27 European Journal of International Law 824; Öhrling (n 10) 66.

accords with: (1) the living instrument doctrine, (2) the importance the ECHR places on the seriousness of the right, and (3) the existence of a parallel international law obligation (Convention Against Torture).[92]

Generally, Jackson's argument appears to have been rejected by the ECtHR in *MN v Belgium*. There the Court criticised any reliance on *Soering,* given the lack of a territorial basis of jurisdiction.[93] In the arms-trading context, Öhrling argues that *Soering* has been rejected extraterritorially by the ECtHR in *Tugar v Italy*. Therefore, it follows *ex hypothesi* that the case should be overruled. This analysis is incorrect. *Tugar,* in fact, can be read consistently with Jackson's argument.

In *Tugar v Italy*, the applicants attempted to use *Soering* to show that Italy violated Article 2 ECHR through failing to establish regulations monitoring and controlling the sale of arms to third states by private companies. These arms were sold by a company within Italy's jurisdiction to the Iraqi government, where the arms were later used to severely injure the applicant.[94] The Commission distinguished *Soering* on the basis that the transfer of arms was 'too remote' from the applicant's injury, and therefore Italy had not breached its positive obligation under Article 2.[95] While this appears problematic, the case is distinguishable because it did not concern direct inter-state arms transfers, but instead conduct by a third party. Naturally then, the

---

[92] Jackson (n 91) 825–827.
[93] *MN and Others v Belgium* (n 36) [120].
[94] *Tugar v Italy (Admissibility)* [1995] ECHR (First Chamber) App no 22869/93, Ser 83-A 26.
[95] ibid.

connection between the state's conduct (its lack of due diligence) and the eventual impact on the applicant is weaker.

Further, the Court in *Tugar* could have simply distinguished *Soering* because of the jurisdictional differences in the two cases. In Italy, the victim was not present in the territory at the time of the arms transfer and thus there was no territorial jurisdiction (in contrast to *Soering*). Despite this, the Court engaged with the remoteness test posited in *Soering*.[96] Placing the emphasis on this test, rather than distinguishing the case based on jurisdictional differences, opens the door to Jackson's argument on 'freeing Soering'. Read in this way, the positive obligations that arise based on a 'substantial and foreseeable risk' can apply in the absence of a territorial basis of jurisdiction.

Testing the Model

The new definition of jurisdiction has significant normative attraction: it ensures accountability for conduct which facilitates numerous human rights violations. That said, the descriptive question of whether the model is permissible when applying the rules of interpretation in PIL is more complex.

The rules of treaty interpretation in PIL are contained in Articles 31 and 32 of the VCLT, which reflect customary international law.[97] The International Law Commission, who

---

[96] ibid.
[97] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 14) [160]; *Golder v. UK* (n 14) [29].

drafted the articles, has made clear that the rules of interpretation form a 'crucible,' with no hierarchy.[98]

To interpret the meaning of 'jurisdiction' in Article 1 ECHR and Article 2(1) ICCPR, the following rules are relevant: (1) the ordinary meaning of the term, (2) the context of the treaties, (3) the object and purpose of the treaties, and (4) state practice.[99] The pronouncements of UN treaty bodies such as the HRC should be ascribed 'great weight.'[100] Decisions of the ECtHR are binding on the respondent state, per articles 32 and 46(1) ECHR. This of course only applies in respect of the Convention.

The Ordinary Meaning of Jurisdiction

It has been argued that the ordinary meaning of jurisdiction under the ECHR and ICCPR should be an exercise of state power backed by a normative relationship. This definition is coherent because it explains why states owe human rights obligations under the various ECHR models.

---

[98] International Law Commission, *Draft Articles on the Law of Treaties with Commentaries* (1966) 219–220. In human rights treaties, the object and purpose of the treaty may be especially helpful due to the frequency of vague and obscure language.

[99] *VCLT* (n 9). State practice in the application of the treaty must be considered under article 31 VCLT, while state practice which do not reach that threshold may be considered as a supplementary means of interpretation under article 32 VCLT.

[100] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* International Court of Justice [2010] ICJ Rep 639 [66].

The Context

This article has advanced a new definition of jurisdiction in the context of the right to life, but in principle, the model should extend to all rights. The context of the treaty supports this interpretation.[101] The meaning of 'context' is carefully circumscribed by the VCLT. Article 31(2) states that 'context' includes the 'text' of the treaties, including its 'preamble and annexes.[102]

The text of the ECHR and ICCPR includes both the jurisdictional clauses (Article 1 ECHR and Article 2(1) ICCPR) and the human rights obligations. These are kept structurally separate, suggesting that the jurisdictional threshold applies in respect of all obligations. This may be contrasted to the International Covenant on Economic, Social and Cultural Rights,

---

[101] The notion of jurisdiction relied on has also been applied outside the context of the right to life: Committee on Economic, Social and Cultural Rights (n 66); *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and personal integrity: interpretation and scope of articles 4(1) and 5(1) in relation to articles 1(1) and 2 of the American Convention of Human Rights* (n 68). The latter does not adopt the same model, but does emphasises causation as the determining factor, suggesting a functional model in the context of transboundary harm.

[102] *VCLT* (n 9) Art 31(2). This articles also defines context as including 'any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty' (31(2)(a)) and 'any instrument which was made by one or more parties in connection with the conclusions of the treaty and accepted by the other parties as an instrument related to the treaty' (31(2)(b)). These are irrelevant for this enquiry.

which has no general jurisdictional clause and instead a specific rights-based jurisdictional clause in Article 14.[103]

The Object and Purpose of the ECHR and ICCPR

The object and purpose of the ECHR and ICCPR may be derived from the preamble of both treaties, which also fall under the 'context' in Article 31(2) VCLT.[104] Both treaties aim to 'promote universal respect for, and observance of, human rights and freedoms.'[105] Judge Bonello interprets the preamble of the ECHR in his concurring opinion in *Al-Skeini v UK* as justifying a broader model of jurisdiction. Specifically, he states, 'universal hardly suggests an observance parcelled off by territory or on the checkboard of geography.'[106] This suggests a model of jurisdiction untethered by territorial considerations. The model advanced here likewise relegates the importance of territory, and positively emphasises the role of state power and normativity.

Letsas argues that the meta-intention of the drafters of the ECHR is the abstract protection of rights, rather than concrete protection (i.e. protecting rights in a specific range of circumstances).[107] This means that the drafters intended to

---

[103] *International Covenant on Economic, Social and Cultural Rights* ('ICESCR') [1966] 993 UNTS 3, Art 14.
[104] *VCLT* (n 9) Art 31(2); *Golder v. UK* (n 14) [34].
[105] *International Covenant of Civil and Political Rights* [1966] 999 UNTS 171, preamble; *European Convention for the Protection of Human Rights and Fundamental Freedoms* [1950] ETS 5, preamble.
[106] *Al-Skeini and Others v UK* (n 20) concurring opinion of Judge Bonello [9]. Öhrling (n 10) 56–57.
[107] George Letsas, 'Intentionalism and the Interpretation of the ECHR', Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris,

protect rights in a range of situations, which, critically, could be *expanded* in future. This intention is supported by the vague nature of the treaty text. For example, Article 3 ECHR states that 'no one shall be subjected to torture or to inhuman or degrading treatment.'[108] This language has evolved, such that making an individual homeless can now constitute degrading treatment, violating Article 3. Similarly, the focus on 'abstract intention' of rights protection should allow for a broader notion of jurisdiction. Indeed, the ECtHR has already taken steps forward, for example by recognising the exceptions of effective control and personal jurisdiction.

An evolutive approach requires examining modern practices. Traditionally, state practice was considered most relevant, as states decide whether to undertake international obligations. However, Higgins argues that international law contains several *participants*, including states, international organisations, and individuals.[109] For Higgins, individuals have rights owed to them under international law. The ECHR is one example, given that individuals can directly enforce their claims at international level.[110] However, it is still states who owe the obligation, and state consent is required in order for the state to

---

Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 years on, vol 1 (Martinus Nijhoff Publishers 2010) 268.

[108] *ECHR* Art 3.

[109] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Repr, Clarendon Press 2010) ch 3.

[110] The ICCPR provides for direct individual complaints, but the respondent state must have signed and ratified the First Optional Protocol of the Covenant.

be bound.[111] Therefore, while international courts may be able to interpret obligations, and international organisations and individuals may comment on desirable changes to obligations, states have ultimate control. This creates problems for the reappraisal of jurisdiction.

Subsequent State Practice

Subsequent state practice is relevant both legally and politically. Legally, subsequent state practice may be relevant (1) as a mandatory rule of interpretation (where there is a consensus) or (2) as a supplementary, residual rule.[112] The weight of subsequent practice depends on 'its clarity and specificity' and 'whether and how it is repeated.'[113] The state practice in respect of a broader jurisdictional model falls into the second category, but this does

---

[111] One exception is given by Higgins (n 109), namely that individuals and states can agree to submit their dispute to a specific arbitral body (as seen with investor-state arbitration).

[112] Compare Article 31(3)(b) with Article 31(2) *VCLT* (n 9). It will be assumed that subsequent practice includes the recent practice of states up until the present day. This was the view taken by the majority in respect of the 1890 Anglo-German Treaty in the *Case concerning Kasikii/Sedudu Island (Botswana v Namibia)* [1999] International Court of Justice ICJ Rep 1045. However, four dissenting judges: Weeramantry, Para-Rangurem, Fleischauer, and Rezek, were of the view that subsequent practice as to the interpretation the treaty should be confined to the immediate decades after its conclusion Hazel Fox, 'Article 31(3)(a) and (b) of the Vienna Convention and the Kasikili/Sedudu Island Case', *Treaty Interpretation and the Vienna Convention on the law of Treaties: 30 Years On* (Martinus Nijhoff Publishers 2010) 69.

[113] *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties,* UN Doc A/73/10 (n 82) draft conclusion 9.

not undermine its *political* importance. State practice in respect of a broader model of jurisdiction provides important evidence as to what states are willing to accept. The evidence shows that states are generally reluctant to accept a broader model of jurisdiction, but that attitudes have begun to shift (a) in respect of the notion of reasonable foreseeability and (b) specifically in the arms-trading context.

In 2017, states were invited by the HRC to submit comments on its draft General Comment No 36 on the right to life. Paragraph [66] of the draft stated that jurisdiction extends over persons who are 'impacted by its [the state's] military or other activities in a [direct], significant and foreseeable manner.'[114] The top three arms exporters, the United States, France, and Russia, all explicitly rejected the model.[115] This is unsurprising. For example, the US does not even acknowledge the disjunctive nature of the ICCPR, making it unlikely to accept a broader jurisdictional model.[116] The state practice is undeniably weighty, given its clarity and specificity.

---

114 UN HRC, *General Comment No. 36: Article 6 (Right to Life)* UN Doc CCPR/C/GC/36 (Advance Unedited Version) <www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf> [66] accessed 8 May 2024. This reflects Shany and Ben-Naftali's model of jurisdiction.

115 State responses to draft GC 36 [2017]: The United States of America, [13], France [37], Russia [6]. See also Australia [3], Austria (p.2), Canada [7], Germany [21], Norway (p.4-5), and The Netherlands [29]. Available at <www.ohchr.org/en/calls-for-input/general-comment-no-36-article-6-right-life>. (Accessed 22 May 2024)

116 Waxman (n 19).

However, there is hope. While Finland and Malta endorsed the comment in its entirety,[117] the United Kingdom and Australia proposed a number of amendments which emphasised support for the notion of reasonable foreseeability. For example, the UK proposed that the obligation to respect and ensure the right to life 'extends to reasonably foreseeable threats.'[118] Australia stated that the reference to 'foreseeable threats', and not 'reasonably foreseeable threats,' does not 'reflect the current state of international law.' This suggests that the notion of 'reasonable foreseeability' will be received better than pure foreseeability. This would explain why the HRC's final version added in this element of reasonableness.[119]

Additionally, in the arms trading context, states have been increasingly receptive to a broader model of jurisdiction.[120] In 2021, the Human Rights Council, consisting of 47 states, along with Albania, Chile, Costa Rica, Ecuador, Greece, Mexico, Paraguay, Peru, Switzerland, and Uruguay, passed Resolution

---

[117] Finland and Malta's response to draft GC 36. Available at <www.ohchr.org/en/calls-for-input/general-comment-no-36-article-6-right-life> accessed 14 May 2024.
[118] UK Response to draft GC 36 [7]. Available at <www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/GCArticle6/UnitedKingdom.pdf> accessed 8 May 2024.
[119] UN Human Rights Committee (n 8) [63].
[120] Human Rights Council, *Impact of Arms Transfers on the Enjoyment of Human Rights* (2017) UN Doc A/HRC/35/8; Human Rights Council, 'Impact of Arms Transfers on Human Rights' (2021) UN Doc A/HRC/47/L.27; Human Rights Council, 'Report of the Working Group on the Universal Periodic Review, United Kingdom' (2017) A/HRC/36/9; Human Rights Council, 'Report of the Working Group on the Universal Periodic Review, France', (2018) A/HRC/38/4.

47/L.27. [121] Paragraph [3] 'urges states to refrain from transferring arms when they assess… that there is a clear risk that such arms might be used to commit or facilitate serious violations or abuses of international human rights law or serious violations of international humanitarian law.'[122] The Resolution's emphasis on refraining from arms trading when there is a 'real risk' echoes the *Soering/Al-Nashiri* understanding of extraterritorial obligation, where states are under duties even though they are acting purely territorially because of the extraterritorial consequences of state action. The language is similar to that in the ATT. Article 7(1)(i) and (ii) require states to consider, in their export assessments, the risk of serious violations of IHL or IHRL facilitated by arms exports. 'Serious violations' would certainly include the right to life.[123] This suggests that, *in principle*, states are willing to modify their inter-state arms trading practices.

Here, it is useful to disaggregate the types of state practice. While states may *say* they are in favour of broader jurisdictional models, their arms-trading *practice* suggests otherwise. This may have been what prompted Josep Borrell, the EU High Representative for Foreign Affairs and Security Policy, to encourage states to 'provide less arms, in order to prevent so many people being killed.'[124] Undeniably, the politics are infused

---

[121] Human Rights Council, 'Impact of Arms Transfers on Human Rights' (2021) UN Doc A/HRC/47/L.27.
[122] *Human Rights Council Resolution 47/17, 'Impact of Arms Transfers on Human Rights'* (2021) [3].
[123] *Coronel v. Colombia* (n 78) [5.2]; *Velikova v. Bulgaria* (n 78) [82]; *Concluding Observations on Togo's Report* (n 78) [9].
[124] Interview with Josep Borrell, 'Informal Foreign Affairs Council' (12 February 2024). Quoted from AFP and Toi Staff, 'EU's top diplomat to Israel's allies: Send less arms if you think too many Gazans dying'

with the law, and the politics may be changing. On 25th March 2024, the United Nations Security Council passed a resolution calling for a ceasefire in Gaza, with the US notably abstaining.[125] Whether this will lead to a shift in arms policy remains to be seen, but it emphasises the ever-changing nature of the issue, and the fact that *previous* state rejection of a broader jurisdictional model is not dispositive of state attitudes *now*.

Conclusion

This article has argued for a reappraisal of the ordinary meaning of jurisdiction and an expansive understanding of the right to life, both in the ECHR and the ICCPR. The new meaning of jurisdiction, based on state power and normativity, provides an explanation for the current models of jurisdiction and demonstrates how states can be held accountable for inter-state arms trading. Specifically, states have jurisdiction where they: (1) exercise state power when granting an export license to a foreign state, (2) have a reasonably foreseeable causal relationship with individuals in that foreign state, and (3) are parties to parallel obligations in international law, such as the ATT.

It is an open question whether the normative features are cumulative. I suggested above that the current international

(*The Times of Israel*, 12th February 2024) <https://www.timesofisrael.com/eus-top-diplomat-urges-israels-allies-to-limit-arms-exports-over-gaza-deaths/> (accessed 08/05/24).

[125] See: 'Israel-Raffi Berg, 'UN Security Council passes resolution calling for Gaza ceasefire' *BBC News* (25 March 2024) <www.bbc.co.uk/news/world-middle-east-68658415> accessed 8 May 2024.

practice has not yet coalesced around the notion of reasonable foreseeability such that it can constitute an independent and sufficient criterion for a normative link, though the practice seems to be heading that way. Ultimately, state practice will decide what happens, though I would not be surprised if judicial creativity had a role to play.

In making these arguments, I have sought to criticise and develop Öhrling's thesis, which similarly argues in favour of state accountability in IHRL. I have attempted to provide a general definition of jurisdiction, rather than a specific model (e.g. a 'functional' model) which is doctrinally coherent and explains the current models already in existence. I have tried to ground specific features of my model in the practice of international bodies and states, relying on the *lex lata* where possible. That said, it is undeniable that this model of jurisdiction requires international participants to adjust their thinking.

In the current political climate, considering the humanitarian crisis in Gaza, it is especially important to confront states with radical interpretations of international law. Indeed, the nature of the solution is often proportionate to the gravity of the problem. While the argument may appear radical, it is proportionate and largely grounded in current practice. In this sense, I hope that this article not only shows what the law *should be*, but rather what the law *can be*.

Exploring the Utility of the Tort of False Imprisonment in Addressing Arbitrary Immigrant Detention

Lucy Ryder*

Abstract—This article considers the ability of the tort of false imprisonment to address immigrant detention that becomes arbitrary due to its unreasonable duration or unacceptable conditions. It argues that, in light of the lack of temporal limit on detention and the risk of poor conditions, the *Hardial Singh* principles play a key role in protecting detainees. In particular, they simultaneously provide recourse to those detained beyond a reasonable period and indirectly incentivise the compliance of public authorities with their human rights obligations. Although the operation of the *Hardial Singh* principles in this context is threatened by the Illegal Migration Act 2023, this article argues that this threat can and must be overcome in order to guard against arbitrariness.

* Exeter College, Oxford. I am so grateful to the OUULJ Editorial Board for their comments. All errors remain my own.

1. Introduction

The tort of false imprisonment is often considered to have faded into obscurity, whereas the issue of immigrant detention has perhaps never been more relevant. The objective of this article is to examine the relationship between these 'strange bedfellows'.[1] In particular, whether in the contemporary legal environment false imprisonment has a place in addressing immigrant detention that becomes arbitrary due to its unacceptable duration or conditions. False imprisonment is the direct and intentional confinement of an individual without lawful justification.[2] The *Hardial Singh*[3] principles are used to assess the lawfulness of imprisonment by examining whether its duration is reasonable. This article proposes that utilising conditions of detention as a factor in this assessment of reasonableness can both provide recourse for those detained beyond a reasonable period and incentivise compliance with human rights obligations. False imprisonment thus has significant potential to address arbitrary immigrant detention. Its ability to do so, however, is threatened by the recent introduction of the Illegal Migration Act 2023, which purports to curtail the power of courts in assessing the reasonableness of detention. If the *Hardial Singh* principles can overcome this attempted curtailment, false imprisonment can

---

[1] 'Strange bedfellows' is a phrase from Act 2, Scene 2 of Shakespeare's *The Tempest* which refers to when a desperate situation brings together individuals who otherwise would not have met. This article argues that the heightened risk of arbitrariness in the context of immigrant detention will necessarily strengthen the relationship between this form of detention and the tort of false imprisonment.

[2] *Walumba Lumba (Congo) 1 and 2 v Secretary of State for the Home Department* [2011] UKSC 12 [65].

[3] R *(Hardial Singh) v Governor of Durham Prison* [1984] 1 All ER 983.

operate alongside public law mechanisms in regulating detention, and even make relevant those conditions which human rights law ignores. The interaction of false imprisonment and human rights is justified by the fact that an inherent objective of tort law is the regulation of public authorities and that tort law and human rights are fundamentally compatible. It will ultimately be concluded that the tort of false imprisonment has incrementally developed into an effective accountability mechanism in the context of immigrant detention and must not be suppressed by the pro-deference agenda contained in the Illegal Migration Act.

2. Immigrant Detention in the United Kingdom

The UN Human Rights Committee defines the term 'arbitrary' as 'inappropriate, unjust, unpredictable, and inconsistent with legality'.[4] The use of immigrant detention in the UK is widespread and large-scale, generating the opportunity for arbitrariness. The Illegal Migration Bill became an Act of Parliament on 20th of July 2023, as part of Rishi Sunak's pledge to 'stop the boats'. Section 2(c) of the Act provides for immigrant detention as an administrative procedure through which an individual is deprived of their liberty in order to facilitate their removal from the UK. The Act promotes such detention as a method of deterring irregular and unlawful migration.[5] There are two types of detention centres in the UK: (1) Immigration Removal Centres, such as Harmondsworth and Brook House, and (2) Short-Term Holding Facilities, such as Tinsley House. In 2019, 24,443 non-

[4] *Mukong v Cameroon* CCPR/C/51/D/458/1991 [9.8].
[5] Illegal Migration Act 2023, s 1(1).

citizens were detained in the UK.[6] The number of detainees decreased dramatically during the COVID-19 pandemic, but has since spiked, with an intake of 24,500 in 2021.[7]

These figures are especially concerning in light of the fact that immigrant detention, an administrative procedure, is subject to different standards and arguably fewer safeguards than criminal procedure. The thresholds for immigrant detention and criminal arrest are similar – requiring 'suspicion' of the immigration officer that the individual has entered the UK illegally and 'reasonable suspicion' of the constable that the individual has committed an offence, respectively.[8] However, the fundamental difference between these two powers is the existence of temporal limits on detention. In the context of criminal arrest, an individual cannot be detained for over 24 hours without being charged.[9] The only possible extensions on this period are related to the seriousness of the intended charge, in which case 36-hour detention is permissible.[10] By contrast, there is no definitive time limit for immigrant detention. Whilst the majority of individuals are held for less than two months, the longest reported detention in recent years was 732 days.[11]

---

[6] Stephanie J Silverman, Melanie Griffiths, Peter William Walsh, 'Immigration Detention in the UK' (Oxford Migration Observatory, 2022) <https://migrationobservatory.ox.ac.uk/resources/briefings/immigration-detention-in-the-uk/> accessed 10 November 2023.

[7] ibid.

[8] Illegal Migration Act 2023, s 11(2); Police and Criminal Evidence Act 1984, s 24(2).

[9] Police and Criminal Evidence Act 1984, s 41(1).

[10] ibid s 42(2).

[11] British Red Cross, 'Scared, confused, alone: the stark truth behind immigration detention' (British Red Cross, 20 September 2023)

The impact of the lack of temporal limit is even more evident when comparing immigrant detention to imprisonment of an individual after they have been convicted of an offence. As highlighted by former detainees, in prison 'you know you have committed an offence, but you know you will get out' whereas in detention 'you don't have certainty, you don't know what's going to happen'.[12] Individuals in immigrant detention thus have less certainty than convicted criminals. Further, approximately 70% of those detained are ultimately released back into the community, with their detention having failed to serve the purpose of facilitating deportation.[13]

The most obvious risk of arbitrariness therefore emanates from the scale of detention coupled with the lack of procedural safeguards for its duration and conditions. This has been identified by the British Red Cross in its campaign for the introduction of a twenty-eight-day limit on detention and the improvement of conditions of detention. The core objective of the campaign is to ensure that in the event that immigrant detention has to be used, it should be as short, certain, and humane as possible.[14] It is thus not necessarily to eradicate

---

<https://www.redcross.org.uk/stories/migration-and-displacement/refugees-and-asylum-seekers/scared-confused-alone-the-dark-truths-of-immigration-detention> accessed 10 November 2023.

[12] A statement from Emmanuel in Catherine Blanchard, 'Never Truly Free: The humanitarian impact of the UK immigrant detention system' (British Red Cross, 2018) [28].

[13] Avid Detention 'Immigration Detention' (Avid Detention, Copyright 2023) <https://aviddetention.org.uk/> accessed 11 November 2023.

[14] Catherine Blanchard, 'Never Truly Free: The humanitarian impact of the UK immigrant detention system' (British Red Cross, 2018) 40.

immigrant detention, but to reduce the possibility of arbitrariness in the form of unreasonable length and unacceptable conditions. Recent developments in Australia also reflect such an objective. For instance, the High Court held in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* that indefinite immigrant detention was unlawful, overturning a 20-year-old precedent.[15] At the same time, the government operates a large-scale detention programme with the objective of halving migrant intake.[16] The simultaneity of such developments reflects the recognition that immigrant detention is, prima facie, a lawful practice, but must be carried out in a manner that respects individual rights in order to avoid arbitrariness.

There are, nevertheless, alternatives to immigrant detention. For instance, during the COVID-19 pandemic, the Spanish Ministry of Inclusion, Social Security, and Migration funded programmes provided by institutions such as Fundación Cepaim that assisted with housing, sustenance and legal advice for those who would have otherwise been detained.[17] In Canada, a voice reporting system is employed whereby individuals are required to call in on a designated day and repeat a pre-recorded phrase three

---

[15] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37.

[16] Tiffanie Turnball, 'Australia to halve immigration intake, tougher English test for students' (BBC News Sydney, Copyright 2023) <https://www.bbc.com/news/world-australia-67609963> accessed 20 February 2024.

[17] Human Rights Watch (2021), 'Dismantling Detention: International Alternatives to Detaining Immigrants' 64 <https://www.hrw.org/report/2021/11/03/dismantling-detention/international-alternatives-detaining-immigrants> accessed 11 January 2024.

times.[18] In 2018, the UK Home Office, with the support of the UNHCR, designed a Community Engagement Pilot. This involves collaboration with non-governmental entities such as Action Foundation in order to provide case-worker support, access to legal aid, and referral to other services for individuals who would have otherwise been detained[19]. Despite the existence of such alternatives, the UK continues to be one of the most prolific users of immigrant detention in the international community.[20] As a result, the question of how to avoid and penalise arbitrariness in the form of unreasonable duration and unacceptable conditions arises.

3. The Tort of False Imprisonment

A. Contemporary development

The tort of false imprisonment has two elements, the first being the fact of imprisonment and the second being the absence of lawful authority to justify it.[21] In the context of immigrant detention, the fact of imprisonment is usually uncontroversial. Once established, the burden shifts to the detaining authority to demonstrate legal justification for the imprisonment.[22] Such lawful authority stems from the Immigration Act 1971 and the recently passed Illegal Migration Act. An important decision as to

---

[18] ibid 4.
[19] ibid 76.
[20] Detention Action, 'Harmondsworth' (Detention Action, Copyright 2024) <https://detentionaction.org.uk/about-detention/harmondsworth/> accessed 12 February 2024.
[21] *Walumba Lumba* (n 2) [239].
[22] ibid [65].

the justiciability of immigrant detention in the context of false imprisonment is *D and others v Home Office (Bail for Immigration Detainees and another intervening)*.[23] This case concerned the detention of a family with two children in three different centres, pending assessment of the mother's claim and her subsequent deportation. The claimants contended that their detention was an unlawful exercise of power under the Immigration Act 1971 and that the state had failed to safeguard the interests of their children.

The Court of Appeal held that although immigration officers have the ability to lawfully detain individuals, there is nothing in the Immigration Act evidencing Parliamentary intention to confer immunity on those officers who have 'asked themselves the wrong questions' and detained a non-citizen unlawfully.[24] The Home Office also applied for a striking out order or summary judgment in the case, arguing that the claimant's initiation of false imprisonment proceedings in a county court was an abuse of process. The Court rejected the application, reasoning that claimants are entitled to simultaneously bring claims under the Human Rights Act and the tort of false imprisonment. Given that Administrative Courts cannot hear actions for damages alone, claimants can permissibly bring the false imprisonment claims in a county court. *D v Home Office* primes false imprisonment to apply in the context of immigrant detention, even when the claimant simultaneously brings human rights claims. The likelihood of such simultaneity was presaged by *R (Jalloh) v Secretary of State for the Home Department*, in which the Supreme Court unanimously refused to align the concept of false

[23] [2005] EWCA Civ 38.
[24] ibid [121].

imprisonment with that of deprivation of liberty contained under Article 5 ECHR.[25]

B. The *Hardial Singh* principles as a check on lawfulness

The lawful authority to justify detention has long been subject to two key limitations. The first is the common law *Hardial Singh* principles (applicable to both false imprisonment and judicial review) and the second is principles of public law, as identified in *Walumba Lumba v Secretary of State for the Home Department*.[26] The latter refers to the fact that 'a purported lawful authority may be impugned either because the defendant acted in excess of jurisdiction or because such jurisdiction was wrongfully exercised'.[27] It relies on an error of law in order to demonstrate the lack of lawful authority for detention. The *Hardial Singh* principles are much narrower, assessing the lawfulness of detention based on the reasonableness of its duration. They were first enumerated by Lord Justice Woolf in *R (Hardial Singh) v Governor of Durham Prison*[28] and authoritatively restated in *Lumba* as follows.[29] First, the Secretary of State must intend to deport the person. Secondly, the deportee may only be detained for a period that is reasonable in all circumstances. Thirdly, if before the expiry of the reasonable period, it becomes apparent that deportation will not be effected in the reasonable period, the power of detention should not be exercised. Fourthly, the

---

[25] [2020] UKSC 4.
[26] [2011] UKSC 12.
[27] ibid [66].
[28] [1984] 1 All ER 983.
[29] [2011] UKSC 12 [22].

Secretary of State will act with reasonable diligence and expedition to effect removal. Unlike in the typical operation of public law, the Court itself examines reasonableness, rather than reviewing the decision-making of the Secretary of State. The Court has also been reluctant to allow appeals challenging the way in which it has applied the principles.[30] The *Hardial Singh* principles consequently form a robust check on the lawfulness of detention.

The most recent application of the *Hardial Singh* principles was in *Oluponle v Home Office*, in which the claimant brought an action for false imprisonment after he was detained under a deportation order for the possession and use of a counterfeit passport.[31] The relevant lawful authority here was paragraph 2(3) of Schedule 3 Immigration Act, which stipulates that where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the UK. The detention lasted from the 4th of May 2016 until the 2nd of November 2016. The Court structured its analysis chronologically, with reference to every point at which the detention was reviewed. At each of these review points, in order to determine whether detention was still reasonable, the Court balanced 'risk factors' (in support of the Home Office) against 'claimant factors'.[32]

The Court found that the initial decision to detain, as well as the period of detention up until the review on the 27th of July, were

[30] *Muqtaar v Secretary of State for the Home Department* [2012] EWCA Civ 1270 [46].
[31] [2023] EWHA 3188.
[32] ibid [125].

justified. During this period, it seemed unlikely that the deportation process would exceed three months. This was subject to extension when the claimant made a 'last-minute' asylum claim requiring examination. Such extension was deemed reasonable in light of the claimant's history of absconding, which constituted a 'paramount consideration'.[33] However, for the Court, the review on the 27th of July was the first sign of 'alarm bells' that the asylum claim would not be dealt with within six months. The next review was found to be 'window dressing', having failed to consider any recent development.[34] It 'simply kicked the can of the decision further down the road, holding a Nelsonian telescope to that which was revealed by the recent facts'.[35] Essentially, the uncertainty injected into the proceedings by the 'last-minute' asylum claim generated the potential for a detention period that could not be justified in light of the 'claimant factors', which included the change in his family circumstances and the 'upsetting conditions' in Brook House.[36]

This application of the *Hardial Singh* principles underscores the utility of the tort of false imprisonment in addressing detention that extends beyond a reasonable period. Given the absence of a time limit on detention, these principles act as a safety net for individuals who are over-exposed to the 'mental torture' of detention.[37] In addition to this, *Oluponle* demonstrates that conditions of detention and the family circumstances of the claimant are significant factors in

[33] ibid [99].
[34] ibid [141].
[35] ibid [142].
[36] ibid [125].
[37] Blanchard (n 14) 27.

determining whether confinement for a certain period is lawful. As Penovic highlights, such factors have in the past been completely excluded from the tort of false imprisonment, for instance in R *v Deputy Governor of Parkhurst Prison; Ex parte Hague, Weldon v Home Office*.[38] This case concerned the transfer of a prisoner to a facility in which he lost many of the privileges that he had previously held, such as association with other prisoners. The Court rejected the dictum of Justice Ackner in *Middleweek v Chief Constable of Merseyside* that 'it must be possible to conceive of hypothetical cases in which the conditions of detention are so intolerable as to render the detention unlawful' for two reasons. First, that the question of conditions relates to the nature of the confinement rather than the fact of confinement itself.[39] The nature of confinement is not the subject of a false imprisonment claim and, if it were to be, authorities would be obligated to release detainees once the conditions deteriorated to a point of intolerability.[40] The House of Lords found that negligence would be a better fit for addressing claims based on the nature of confinement.

The key issue with this approach is that the tort of negligence requires proof of actionable damage. A claimant subject to arbitrary immigrant detention would therefore be required to have obtained either physical injury or a recognised psychiatric illness caused by the conditions of detention. False imprisonment,

---

[38] [1990] EWCA Civ JO525-3; Tania Penovic, 'Testing the boundaries of administrative detention through the tort of false imprisonment' [2008] 16 TLJ 156, 165.
[39] *R v Deputy Governor of Parkhurst Prison; Ex parte Hague, Weldon v Home Office* [1990] EWCA Civ JO525-3 [166].
[40] ibid [177].

on the other hand, is a trespassory tort and so a claimant would be entitled to damages merely by virtue of their confinement without lawful justification. In *Murray v Ministry of Defence,* Lord Griffiths found that 'the law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable, even without proof of special damage'.[41] By rejecting the use of the tort of false imprisonment, the House of Lords thus undermined the value of liberty and attempted to force negligence into an area in which it is not fully effective. The second reason adduced by the Court was that prisoners do not retain residual liberty once they are within the prison environment. Effectively, there is no sub-liberty within the prison system that a prisoner can be deprived of; the original confinement is the only relevant incursion upon liberty and once complete, a person cannot be deprived of their liberty for the purposes of establishing false imprisonment. The only exceptions to this are if (a) another prisoner unlawfully restrains the claimant, or (b) a prison officer restrains the claimant without lawful authority to do so.[42]

C. False imprisonment and human rights obligations

Despite the limitations on the role of false imprisonment in addressing many aspects of detention, *Oluponle* reflects the essential recognition that conditions of detention are relevant to the assessment of the reasonableness, and thus the lawfulness of immigrant detention. Indeed, the Court has clearly reaffirmed its view that risks of absconding or reoffending are not 'trump cards' in support of detention, and that weight must be given to more

[41] [1998] 1 WLR 692 [703].
[42] ibid [167].

personal factors.[43] The relevant detention conditions in *Oluponle* included the endemic nature of drugs, violence, low-quality food and constant noise. The claimant also witnessed suicide attempts and was manhandled, subjected to physical and verbal abuse, and 'treated like an animal'.[44] These conditions, experienced by the claimant in 2016, were exposed as systemic by the Brook House Inquiry, announced in November 2019. This investigation was centred on poor detention conditions and mistreatment of detainees in Brook House between the 1st of April and the 31st of August 2017. It concluded that several incidents in 2017 could certainly amount to inhuman and degrading treatment contrary to Article 3 ECHR upon judicial examination.[45]

The notion of degrading treatment is that which debases or humiliates an individual and is capable of breaking their physical or psychological will.[46] This treatment becomes inhuman when it is of a higher severity such that it causes actual bodily harm.[47] The European Court found in *M.S.S. v Belgium and Greece* that asylum seekers are in a particularly vulnerable position due to their legal status and so deserve special protection.[48] The practical effect of such protection is that it often lowers the threshold for establishing violations of the prohibition on inhuman and degrading treatment. Regarding detention conditions, the European Court has developed its jurisprudence in finding that

---

[43] [2023] EWCA 3188 [46].
[44] ibid [44]-[45].
[45] Brook House Inquiry, 'The Brook House Inquiry Report' (Crown Copyright, September 2023).
[46] *Bouyid v Belgium*, App no 23380/09 (ECtHR, 28 September 2015) [90].
[47] *Labita v Italy*, App no 26772/95 (ECtHR, 6 April 2000) [120].
[48] App no 30696/09 (ECtHR, 21 January 2011) [251].

confinement in a space less than three-metre-squared will create a strong presumption in favour of a violation.[49] Additionally, exposure to passive smoking in detention constitutes a violation for a detainee with underlying health issues.[50] For treatment of lesser severity, detainees may bring a claim under Article 8 relating to private and family life.

The Human Rights Act provides effective recourse for direct and identifiable victims of violations of Articles 3 and 8 in the context of immigrant detention. Joseph and Kyriakakis highlight that this regime is unique in the international community because it provides directly incorporated human rights protection.[51] It may therefore be questioned whether the operation of the tort of false imprisonment is necessary to incentivise the compliance of authorities with human rights law and standards. However, as Malkin argues, tort law has the inherent ability to 'set higher standards of behaviour' – and this ability should not be disregarded simply because another remedy exists.[52] Malkin focuses on the utility of the tort of negligence in addressing the lack of available clean needles and condoms in Australian prisons, which facilitates the spread of HIV. He identifies a core issue in the application of negligence to these circumstances as the need to prove physical damage. Nevertheless, he argues that even if prisoners were to fail in their litigation, the expenses involved for prison authorities in

---

[49] *Muršić v Croatia*, App no 7334/13 (ECtHR, 20 October 2016) [75].
[50] *Florea v Romania*, App no 37186/03 (ECtHR 14 September 2010).
[51] Sarah Joseph and Joanna Kyriakakis, 'Australia: Tort Law Filling a Human Rights Void' in Ekaterina Aristova, *Civil Remedies and Human Rights in Flux* (Bloomsbury Publishing, 2022).
[52] Ian Malkin, 'Tort Law's Role in Preventing Prisoners' Exposure to HIV Infection while in Her Majesty's Custody' [1995] 20 MULR 423.

responding to a claim would incentivise the implementation of policies that would prevent such harms. Similarly, even if a false imprisonment claim cannot be entirely based on poor conditions of detention due to the limitations set out in *Deputy Governor of Parkhurst Prison*[53], the possibility of claims with poor conditions of detention as a key factor in assessing lawfulness can incentivise change. Specifically, it can reduce the arbitrariness of immigrant detention by promoting the improvement of conditions of detention. This speaks to the nature of public authorities and their responsiveness to claims that involve an obligation to pay damages. Accordingly, false imprisonment can act in tandem with the HRA in addressing poor conditions of detention.

In fact, false imprisonment has a wider scope than the HRA in this context, and can even make relevant those conditions that do not obtain the minimum level of severity for a degrading treatment claim yet are still unacceptable given the context. For instance, the Court in *Oluponle* affirmed the relevance of conditions that the claimant found "upsetting".[54] This constitutes a lower threshold than degrading treatment which must at least have a directly debasing or humiliating effect, even when the flexibility from *M.S.S. v Belgium and Greece*[55] is applied. Contextually, it is important to recall that the individuals exposed to "upsetting" conditions are not detained as part of a criminal sentence – they are the subjects of an administrative procedure, and have often arrived in the UK with the original objective of seeking asylum. For many of these detainees, the mere fact of

[53] [1990] EWCA Civ JO525-3.
[54] *Oluponle v Home Office* [2023] EWCA 3188 [125].
[55] App no 30696/09 (ECtHR, 21 January 2011) [251].

detention can lead to "re-traumatisation".[56] Indeed, according to the Royal College of Psychiatrists, immigrant detention is 'likely to precipitate a significant deterioration of mental health' – a phenomenon evidenced by incidents such as the attempted mass suicide at Harmondsworth.[57] Moreover, the Illegal Migration Act purports to amend the Immigration Act 2014 to allow for the extended detention of especially vulnerable individuals, including minors and persons with mental health conditions. This is predicted to result in the detention of as many as 45,000 children whose asylum claims are deemed inadmissible.[58] For such individuals, their over-exposure to conditions that are 'upsetting', even if not debasing, should not be ignored – and false imprisonment makes them relevant.

Indeed, the need for the tort of false imprisonment in the context of immigrant detention is bolstered by the curtailment of

---

[56] Zachary Steel, Derrek M Silove, 'The mental health implications of detaining asylum seekers' [2001] 127 Medical Journal of Australia 596, 596.

[57]Royal College of Psychiatrists, 'Position statement on detention of people with mental disorders in immigration removal centres' (Royal College of Psychiatrists, 2015) <https://www.rcpsych.ac.uk/pdf/Satisfactory%20Treatment%20in%20Detention%20document%20December%202015%20edit.pdf> accessed 11 February 2024 in Blanchard (n 14) 25; Aaron Walawalkar, 'The full horrors of what security officers termed an "attempted mass suicide" are laid bare in internal documents' (Liberty Investigates, 14 September 2023) <https://libertyinvestigates.org.uk/articles/revealed-mass-suicide-attempt-at-immigration-centre-after-detainee-death/> accessed 12 November 2023.

[58] Refugee Council, 'What is the Illegal Migration Act?' (Refugee Council, Copyright 2023) <https://www.refugeecouncil.org.uk/information/what-is-the-illegal-migration-act/> accessed 12 November 2023.

judicial review in the Illegal Migration Act. Section 13(4) contains a significant ouster clause, which states 'in relation to detention during the relevant period, the decision is final and is not liable to be questioned or set aside in any court or tribunal'. This is a wide ranging exclusion of judicial review of an executive decision. With detainees unable to question the reason for their detention and the absence of an explicit time limit on detention, false imprisonment provides an alternative mechanism for holding the detaining authority accountable. Further, the ability of false imprisonment to address such issues is enhanced by the fact that it is a trespassory tort in that it is actionable regardless of whether the claimant suffered any harm.[59] Ultimately, false imprisonment can both promote compliance with human rights standards and make relevant those conditions of detention that do not meet the threshold of a violation. Twenty-six years ago, Trindade hypothesised that the tort of false imprisonment could be capable of ensuring Australia's compliance with international human rights obligations, including Article 9 ICCPR (freedom of movement).[60] Fifteen years ago, Penovic commented on how this compliance-inspiring relationship still had not materialised across common law systems.[61] In 2024, the tort of false imprisonment shows great potential to finally perform this function in the context of immigrant detention, specifically in relation to conditions of detention.

---

[59] *Walumba Lumba* (n 2) [64].
[60] Francis A Trindade, 'The Modern Tort of False Imprisonment' in Nicholas Mullany, *Torts in the Nineties* (Sydney: LBC Information Series, 1997).
[61] Penovic (n 38) 158.

4. The Illegal Migration Act

Regrettably, s 12 of the Illegal Migration Act attempts to reduce the *Hardial Singh* principles to insignificance. It amends the Immigration Act 1971 to stipulate that 'a person liable to be detained … may be detained for such period as, in the opinion of the Secretary of State, is reasonably necessary to enable the deportation order to be made, or the removal to be carried out'. The use of the phrase 'in the opinion of the Secretary of State' purports to shift the power of interpretation of reasonableness from the courts to the executive. Effectively, s 12 confines the role of the courts to simply reviewing the decision-making of the Secretary of State. This sits alongside significant ouster clauses contained in the Act, such as s 13(4). The Act as a whole thus purports to increase the insularity of administrative detention. Individuals are placed in detention under the delegated powers of the Secretary of State and it is the Secretary of State who then decides the lawfulness of this detention. Montesquieu once warned that 'if joined to executive power, the judge could have the force of an oppressor'.[62] In the same sense, allowing the Secretary of State to become the arbiter of reasonableness in the context of immigrant detention would facilitate arbitrariness, rather than guard against it.

The role of the courts is one of accountability, which is guaranteed by the independence and impartiality of the

[62] Charles-Louis de Secondat (Baron of Montesquieu), *The Spirit of the Laws* (London: T Evans, 1777) Book 11, ch 6.

judiciary.[63] Conversely, the Secretary of State, rather than being isolated from the politics of immigrant detention, is at the centre. This centre is currently defined by the planned relocation of non-citizens to Rwanda. The most recent development in such policies has been the passage of the Safety of Rwanda (Asylum and Immigration) Bill through Parliament.[64] The proposed scheme would rely heavily on pre-deportation immigrant detention.[65] For the Secretary of State, the key role played by detention in the context of the new policies would incentivise the finding that it is reasonable, for instance by viewing the risks of absconding and reoffending as 'trump cards' whilst conditions of detention and family circumstances are sidelined. The utility of the tort of false imprisonment in improving the current state of immigrant detention is consequently threatened.

The full impact of the Illegal Migration Act has, however, yet to be seen. Schymyck has proposed several reasons as to how courts may interpret s 12 to preserve their status as primary decision-makers on the reasonableness of detention, and thus the

[63] Shivaraj S Huchhavanar, 'Conceptualising judicial independence and accountability from a regulatory perspective' [2023] Oslo Law Review 9(2) 110, 121.
[64] Approved on 22 April 2024; Home Office and The Rt Hon James Cleverly MP, 'Rwanda bill to become law in major illegal migration milestone' (Home Office, 23 April 2024) <https://www.gov.uk/government/news/rwanda-bill-to-become-law-in-major-illegal-migration-milestone> accessed 25 April 2024.
[65] Home Office, Immigration Enforcement and The Rt Hon James Cleverly MP, 'First phase of detentions underway for Rwanda Relocations' (Home Office, 1 May 2024) <https://www.gov.uk/government/news/first-phase-of-detentions-underway-for-rwanda-relocations> accessed 3 May 2024.

operation of the *Hardial Singh* principles.[66] The first reason concerns the fact that, in accepting the lack of a time limit on detention in the UK as lawful, the European Court relied on the application of the *Hardial Singh* principles as a safeguard against arbitrary detention.[67] If the determination of reasonableness is placed in the hands of the Secretary of State, and the ability of the courts to regulate detention is thus undermined, the probability of claims for arbitrary detention under Article 5 ECHR will increase. This connects to the possibility for simultaneous tortious and human rights claims as set out in *D v Home Office* and *Jalloh*. Effectively, if the scope of false imprisonment is diminished, the number of human rights claims based on lack of safeguards against arbitrary detention will rise. In this sense, all that s.12 would do is shift the use of false imprisonment claims (and also judicial review under common law principles) to human rights claims.

Another reason Schymyck proposes as to how the courts may preserve their jurisdiction is that the *Hardial Singh* principles are implied into the Illegal Migration Act by the principle of legality. This enables the courts to recognise the *Hardial* Singh principles as implicit limits on the power of detention. If this is the case, it is the courts that must objectively assess the application of the principles, therefore bypassing the need to defer to the decision-

---

[66] Alex Schymyck, 'The expansion of immigration detention in the Illegal Migration Act 2023' (Garden Court Immigration Blog, 1 November 2023) <https://www.gardencourtchambers.co.uk/news/immigration-blog-the-expansion-of-immigration-detention-in-the-illegal-migration-act-2023> accessed 12 November 2023.

[67] *J.N. v United Kingdom*, App no. 37289/12 (ECtHR, 19 August 2016) [97].

making of the Secretary of State. Although an 'unduly court-centred view of the universe' is, as Daly argues, to be guarded against, maintaining the presence of a non-executive body in the process of immigrant detention is valuable in order to promote a fair balance between risk factors and claimant factors.[68] This is arguably the most effective method of preserving accountability given that the judiciary is unaffected by the success or failure of new immigration policies that require detention as a central element. Essentially, there are ways in which the *Hardial Singh* principles will continue to thrive as a limit on the lawful authority of detention for the purpose of establishing false imprisonment. If they do persist, despite governmental attempts to suppress them, the tort of false imprisonment will retain its potential to address arbitrary immigrant detention.

5. Tort Law and Human Rights – A Philosophical Discussion

The tort of false imprisonment is justified in both promoting the accountability of public authorities and indirectly incentivising compliance with human rights standards. This is not simply an additional function of tort law, but is a fundamental facet of its nature. Du Bois, criticising the interaction of tort law with public bodies, argues that human rights give rise to a 'special normative relationship between states and their citizens'.[69] That is, a relationship in which the human rights of citizens impose on

[68] Paul Daly, 'Deference on Questions of Law' [2011] The Modern Law Review 74(5) 720.
[69] Francois du Bois, 'Human Rights and the Tort Liability of Public Authorities' [2011] Law Quarterly Review 127, 595.

public authorities obligations which are more onerous than could be imposed on a private agent. The implication of such a relationship is that claims concerning immigrant detention should only be dealt with by public law mechanisms such as judicial review and the HRA, even if their efficacy is limited. However, as Cane observes, du Bois' objection to the interaction of tort law and human rights is premised on the fact that tort law is constructed around juridically equal relationships – that is, relationships between private agents.[70] In order to account for the fact that tort law can apply to juridically unequal relationships (those between private individuals and agents performing public functions), Cane suggests a recalibration in the way tort law is structured. For instrumentalists, this would require altering the orthodox understanding of the core aim of tort law – rather than ensuring that private agents respect one another in the pursuit of their own interests, it generates accountability for both public and private agents.[71] This aligns with the way in which false imprisonment can promote the compliance of state authorities with their human rights obligations. Namely, how the use of conditions of detention in assessing lawfulness can promote compliance with Articles 3, 5, and 8 ECHR.

Conceptualising tort law as capable of addressing juridically unequal relationships should not be considered a 'recalibration' as such – it is in fact a rediscovery of the true nature and purpose of tort law. This is because tort law does not have a general liability policy per se; it instead consists of several islands

---

[70] Peter Cane, 'Tort Law and Public Functions' in John Oberdiek, *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) 157.
[71] ibid 168.

of liability that each have their own standards. In relation to the structure of these standards, Hohfeld observes that a right (or a 'claim' as he refers to it) is the correlative of a duty.[72] There are torts in which the content of this duty, and thus the correlative right, must refer to public law standards. For instance, the essential requirement for the tort of misfeasance in public office is that the loss to the claimant is caused by the improper exercise of *public* power by a *public* agent. Although the tort of false imprisonment does not require that the deprivation of liberty be committed by a public authority, the context around the tort suggests that public standards must be taken into account. The primary focus of false imprisonment is no longer coal miners and ferry swindlers entrapped by private entities.[73] In the modern day, large-scale deprivation of liberty is most likely to be carried out by public authorities. This is evidenced by the mere existence of the *Hardial Singh* principles which are built around the examination of the decision-making of public authorities. The tort of false imprisonment will therefore necessarily imply a relationship with public law obligations – be it as part of a criminal or administrative process. 'Rights-based fundamentalism' defines the substantive content of private law rights as aligned with the protection of individual autonomy rather than social interests.[74] In reality, the correlative right to the duty to refrain from unlawfully depriving individuals of their liberty must be based on both individual autonomy and social interests rooted in human

---

[72] WN Hohfeld, *Fundamental Legal Conceptions as Applied in Legal Reasoning* (D Campbell and P Thomas eds, Aldershot, Ashgate, Dartmouth, 2001).

[73] See *Herd v Weardale Steel, Coal, and Coke Co Ltd* [1915] AC 67; *Robinson v Balmain New Ferry Co. Ltd* [1910] AC 295

[74] Peter Cane, "Rights in Private Law" in Andrew Robertson and Donal Nolan, *Rights and Private Law* (Bloomsbury Publishing, 2011) 62.

rights. Indeed, the correctness of the interaction between tort law and human rights is affirmed by Penovic's observation that the two sectors share fundamental characteristics.[75]

One shared characteristic of tort law and human rights law is universality. Both tort law and human rights law apply to everyone within the state's jurisdiction, regardless of their legal status.[76] For human rights law, this stems from the jurisdictional clauses in international and regional instruments, for instance Article 1 ECHR, which imposes an obligation on contracting states to respect the human rights of all those within their jurisdiction. For tort law, as a species of private law, direct victims of a wrong are entitled to bring a claim against the tortfeasor regardless of their legal status. This lack of discrimination is particularly important in the context of immigrant detention, which inherently targets non-citizens. Another shared characteristic is the need for the wrong to directly affect an individual. Article 34 ECHR imposes a requirement for direct victimhood in order to bring a claim before the Court – *actio popularis* claims are not permitted. Although a claim may be made on behalf of an individual in certain circumstances, for instance if the direct victim is incapacitated, Article 34 speaks to the individualistic nature of human rights claims.[77] Similarly, the claimant in a tortious action must be the physical or legal person that has suffered the wrong caused by the defendant. Therefore, whilst any individual within the jurisdiction of the state can claim in the context of tort and human rights, this individual must be

[75] Penovic (n 38) 167.
[76] ibid 167.
[77] *Centre for Legal Resources on Behalf of Valentin Câmpeanu v Romania* [2014] ECtHR App no 47848/08 [112].

the victim of the relevant wrong. In this sense, the common objective of both sectors becomes the specific accountability of public authorities for the wrongs affecting individuals. By encouraging universality in the form of equality of access to judicial remedy as well as individual recourse, tort law and human rights law promote both corrective and distributive justice. Penovic explains the origin of such shared characteristics as the influence of common law on the development of international norms, for instance the way in which the UK's draft of an International Bill of Rights influenced the substantive elements of the ECHR.[78]

Tort law and human rights therefore share characteristics at the most basic, mechanical level. The tort of false imprisonment is a key juncture at which these two sectors interact. This interaction is particularly important in light of both the risk of arbitrariness in immigrant detention and the general precarity of human rights in the UK. Brexit saw both the elimination of the EU Charter of Fundamental Rights, which promotes a minimum standard of human rights protection, and the vindication of an anti-immigrant sentiment deeply ingrained into the socio-political fabric of the UK.[79] As Galimberti notes, the elimination of the Charter has significantly reduced the ability of victims to make complaints against Acts of Parliament that violate their human rights.[80] Whilst EU law contains a mechanism to disapply

---

[78] ibid [167].

[79] Matthew J Creighton and Amaney A Jamal, 'An overstated welcome: Brexit and intentionally masked anti-immigrant sentiment in the UK' [2022] Journal of Ethnic and Migration Studies 48 1051.

[80] Marco Galimberti, 'Farewell to the EU Charter: Brexit and Fundamental Rights Protection' [2021] Nordic Journal of European Law 4(1) 51.

legislation in contravention with the Charter, the HRA only offers a declaration of incompatibility, a comparatively weaker remedy.[81] This reduction in protection contributes to a notion of British isolationism in the context of human rights, characterised by a reduction in international accountability and an insular conception of state obligations. This in turn bolsters the importance of the tort of false imprisonment, both in its capabilities as an alternative form of recourse to public law mechanisms and in its ability to incentivise compliance with human rights obligations. Despite academic reluctance to accept that tort law can have such an impact, its inextricable connection to human rights, and thus the comportment of public authorities, demonstrate that the interaction of tort law and human rights law is completely justified.

6. Conclusion

Lord Brown once said that 'freedom from executive detention is arguably the most fundamental right of all'.[82] At a time when the UK Government is actively expanding powers of detention, it is necessary to use every possible mechanism to address the risk of arbitrariness. The tort of false imprisonment, utilising the *Hardial Singh* principles as a check on the lawfulness of confinement, does not simply provide direct relief to victims of arbitrary detention. It also has the potential to incentivise the compliance of public authorities with their human rights obligations, and to address conditions of detention that human rights law ignores. The Illegal Migration Act simultaneously reinforces the need for false

[81] ibid 51.
[82] *Walumba Lumba* (n 2) [341].

imprisonment to address arbitrary detention and attempts to curtail its operation in this context. Yet, it is both feasible and essential that the courts preserve their status as primary decision-makers on the reasonableness of detention. There are two reasons why this preservation is so necessary. The first is the increasingly damaging state of immigrant detention. The number of detainees is increasing, there is no explicit time limit on detention, and incredibly vulnerable individuals such as minors and victims of sex trafficking may be detained. The second is the diminution of remedies for arbitrariness in the context of immigrant detention. Judicial review has been significantly ousted and human rights law is restricted by its high thresholds. Now, more than ever, the utility of the tort of false imprisonment in addressing arbitrary immigrant detention is to ensure that public authorities comply with the simple request of a former detainee – 'to look at people [in detention] as human beings'.[83]

[83] Blanchard (n 14) 36.

A Drop in the Oceana, or a Tsunami of Change?

Marlon Austin*

Abstract—The passage of five ouster clauses within the last two years has reignited familiar debates about the judiciary's proper constitutional role. This article defends the *Privacy International* plurality judgment, justifying the strong interpretative presumption against the ouster of the High Court's supervisory jurisdiction on the grounds of (a) a free-standing principle of hostile interpretation and (b) a fuller understanding of parliamentary sovereignty. It argues that the recent decisions in *Oceana* and *LA (Albania)* are flawed insofar as they deviate from the ratio of *Privacy International.* In addition, it argues that the cases are indicative of a wider reticence to challenge an executive which is increasingly hostile to judicial review. Finally, it comments on the recent jurisprudence of the Supreme Court and suggests that the constitutional landmarks of *Cart* and *Privacy International* are awaiting their demolition.

* Worcester College, Oxford. Many thanks to the OUULJ editorial team, Danyal Raza, Moayad Karar, Valentina Syla, Shivanii Arun, and, as ever, the inimitable Dr Leah Trueblood. Errors remain my own.

I view with apprehension the attitude of judges who … show themselves more executive minded than the executive … I know of only one authority which might justify the suggested method of construction: 'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.[1]

Introduction

What do section 3 of the Dissolution and Calling of Parliament Act 2022, section 2 of the Judicial Review and Courts Act 2022, and sections 13, 51 and 53 of the Illegal Migration Act 2023 have in common? They are ouster clauses, a purportedly 'exceptional'[2] form of legislation used to curtail judicial review. Cumulatively, they represent significant pushback by the government against what they perceive to be overly interventionist judges. The clauses reverse the seminal Supreme Court decisions of *Cherry/Miller*[3] and *Cart*,[4] and almost completely insulate Upper Tribunal immigration decisions from judicial review. The recently passed Safety of Rwanda (Asylum and Immigration) Act goes even further.[5] It declares Rwanda safe despite a unanimous Supreme

[1] *Liversidge v Anderson* [1942] AC 206 (HL) (Lord Atkin), quoting Lewis Carroll, *Through the Looking-Glass*.
[2] Independent Review of Administrative Law, para. 2.89.
[3] R *(Miller) v The Prime Minister*; *Cherry v Advocate General for Scotland* [2019] UKSC 41, [2020] 1 AC 373.
[4] *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663.
[5] It was touted by the Prime Minister as 'the toughest legislation ever introduced to Parliament'. The Home Office, 'Bill to make clear Rwanda is a safe country and stop the boats' (Gov.UK, 6 December 2023) <https://www.gov.uk/government/news/bill-to-make-clear-rwanda-is-a-safe-country-and-stop-the-boats>.

Court ruling to the contrary, immediately ousting this from any form of judicial scrutiny.[6]

Four years after *Privacy International*,[7] both *Oceana*[8] and *LA (Albania)*[9] provide a markedly different and profoundly unwelcome perspective on the judicial interpretation of ouster clauses; one which promotes undue deference to Parliament at the expense of access to justice. The first part of this article will set out the judgment and reasoning of the majority in *Privacy International*, arguing that the approach taken in the case is welcome, not just as a high-water mark of common law judicial review but also as an affirmation of the uniquely important right to access the courts. The second and third parts will analyse the recent *Oceana* and *LA* decisions, arguing that both are deeply flawed. It will be argued that (a) they fail to interpret the ouster clause in question in line with the principles laid down by *Privacy International*, (b) they fail to recognise the particular constitutional threats which ouster clauses pose, and (c) they fail to understand the proper role of the judiciary. Given the recent proliferation of

---

[6] While Parliament can of course legislate to overturn judicial decisions (s3 Compensation Act 2006, overturning *Barker v Corus (UK) plc* [2006] UKHL 20; War Damages Act 1965, overturning *Burmah Oil Company Ltd v Lord Advocate* [1965] AC 75), this power has been used to resolve questions of *law*. Legislating that *facts* are not as they are runs the risk of severely compromising the independence of the judiciary. In the House of Lords debate, Lord Hoffmann could find only one precedent of this kind: the Poisoning Act 1530, through which Henry VIII deemed a cook guilty of poisoning and had him boiled to death without a trial. HL Deb 14 February 2024, vol 836, col 305.

[7] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 49.

[8] *R (Oceana) v Upper Tribunal* [2023] EWHC 791.

[9] *R (LA (Albania)) v Upper Tribunal* [2023] EWCA Civ 1337.

purportedly valid ouster clauses, the Supreme Court should take urgent steps to rectify this misstep; the clause should never have been given effect and its progeny should equally be rejected.

Privacy International: a constitutional watershed

Any judge tasked with the interpretation of an ouster clause should immediately turn to Lord Carnwath's judgment in *Privacy International*. It sets out an authoritative set of principles through which they must be interpreted, affirms the importance of access to justice, and reminds the reader of public law's unique ability to hold seemingly unchecked power to account.

The facts of the case read like a spy thriller: – a legal challenge against GCHQ's mass surveillance campaigns.[10] The Regulation of Investigatory Powers Act 2000 (RIPA) established the Investigatory Powers Tribunal (IPT) to consider such complaints against public bodies. In 2016, the IPT dismissed a

[10] Codenamed 'Tempora', this hacking involved secretly tapping into fibre-optic cables to monitor, access and process all forms of telephone and online activity. As the NSA's principal partner in mass surveillance, GCHQ also ran a program called OPTICNERVE which 'saved a snapshot every five minutes from the cameras of people video-chatting' online. In 2013, they forced the *Guardian* to destroy hard drives containing Snowden's leaked documents in a failed attempt to prevent their publication. For more information, see Glenn Greenwald, *No Place to Hide* (Macmillan US 2014) and Edward Snowden, *Permanent Record* (Metropolitan Books 2019). GCHQ's existence was not publicised until 1976, and the journalist who revealed this was deported for doing so: *R v Secretary of State for the Home Department, ex parte Hosenball* [1977] 1 WLR 766.

complaint brought by Privacy International against GCHQ, holding that its surveillance was legal under 'thematic warrants'. These were broad authorisations which covered 'an entire class of property, persons or conduct', such as 'all mobile phones in London'.[11] In short, GCHQ could (and did) spy on everyone.

Privacy International sought to challenge this in the High Court. However, they were prima facie barred from doing so by section 67(8) of RIPA, which provided that:

> 'determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court'.

The High Court and a unanimous Court of Appeal held that this prevented any supervisory oversight – a finding which a majority of the Supreme Court overturned. Lord Carnwath (with whom Lady Hale and Lord Kerr agreed) gave the leading judgment, alongside a separate concurrence by Lord Lloyd-Jones. Lord Carnwath began by noting the parallels with the seminal case of *Anisminic*,[12] in which section 4(4) of the Foreign Compensation Act 1950 was found not to oust the jurisdiction of the High Court, despite providing that 'the determination by the [Foreign Compensation] Commission … shall not be called in question in

[11] Privacy International, 'The Queen on the application of Privacy International v. Investigatory Powers Tribunal (UK General Hacking Warrants)' <https://privacyinternational.org/legal-action/queen-application-privacy-international-v-investigatory-powers-tribunal-uk-general> accessed 25 May 2024.

[12] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

any court of law'. He summarised its ratio, as understood by later cases,[13] into three principles:

i) 'That there is (at the least) a strong presumption against statutory exclusion of review by the High Court of any decision of an inferior court or tribunal treated as made without jurisdiction and so a "nullity";
ii) That for this purpose there is no material distinction between an excess of jurisdiction at the outset, and one occurring in the course of proceedings;
iii) That a decision which is vitiated by error of law… is, or is to be treated as, made without jurisdiction and so a nullity.'[14]

This final point is the most important. It summarises Lord Reid's now-seminal speech in *Anisminic*, which held that the term 'determination' did not include a 'purported determination', and the ouster clause could thus not apply to one. The logic relies on two senses of the word 'decision' being employed simultaneously. In one, it refers to 'a decision made without error'; in the other, it bears its ordinary meaning of 'conclusion' or 'resolution.'[15]

Given that RIPA's draftsmen were clearly aware of the decision in *Anisminic*,[16] Lord Carnwath held that s67(8) was not

---

[13] Most importantly, *O'Reilly v Mackman* [1983] 2 AC 237 (HL); *R v Hull University Visitor, Ex p Page* [1993] AC 682 (HL).
[14] *Privacy International* (n 7) [43].
[15] Summarised in *Privacy International* (n 7) [45]-[48] (Lord Carnwath).
[16] The predecessor of s67(8), section 7(8) of the Interception of Communications Act 1985, was drafted before the decision in *Page* confirmed a much broader interpretation of *Anisminic*. However, the

'materially different'.[17] The words in parentheses, '(including decisions as to whether they have jurisdiction)', excluded judicial review for errors of fact, but had no impact on the review of errors of law.[18] Noting Laws LJ's conclusion in *Cart*[19] that 'the jurisdiction of the King's Bench Division extended to all inferior jurisdictions without distinction', Lord Carnwath held that there was 'no principled distinction' between the Foreign Compensation Commission and the IPT (despite the quasi-judicial character of the latter).[20] Finally, he held that a limited statutory right to appeal was irrelevant, as 'a power entirely in the gift of the executive does nothing to weaken the case for ultimate control by the courts'.[21] In short, '[i]n the language of *Anisminic*', the clause did not exclude review.[22]

The outcome in *Privacy International* is justified by the long-established 'strong interpretative presumption against the exclusion of judicial review.'[23] This dates back to at least 1669, before the Glorious Revolution established our modern

---

Regulation of Investigatory Powers Bill was introduced in February 2000, seven years after *Page*.

[17] *Privacy International* (n 7) [22] (Lord Carnwath).

[18] Compare 'except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court' (s 67(8) RIPA) with 'the determination by the commission of any application made to them under this Act shall not be called in question in any court of law' (s 4(4) FCA).

[19] R *(Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin).

[20] *Privacy International* (n 7) [66].

[21] ibid [104]. See also R *(Evans) v Attorney General* [2015] UKSC 21.

[22] *Privacy International* (n 7) [109].

[23] ibid [37].

constitutional settlement, and long before A.V. Dicey defined sovereignty.[24] The court's jurisdiction can thus only be ousted through 'the most clear and explicit language'.[25] This is a manifestation of the principle of legality, which holds that 'Parliament must squarely confront what it is doing and accept the political cost' of its actions.[26] The fate of clause 11 of the 2003 Asylum and Immigration (Treatment of Claimants etc) Bill 2003, 'the most extreme form of ouster clause promoted by government in modern times', demonstrates this.[27] The clause:

> 'prevent[ed] a court…from entertaining proceedings to determine whether a purported determination, decision or action of the Tribunal was a nullity by reason of –
>
> (i) lack of jurisdiction,
> (ii) irregularity,
> (iii) error of law,
> (iv) breach of natural justice, or
> (v) any other matter.'

It thus expressly circumvented the logic of *Anisminic* by including 'purported determinations' amongst the ousted grounds of review. Doing so is an extremely odd legislative choice; as Lord Wilson has commented extrajudicially, 'purported' in this context

---

[24] *Smith, Lluellyn v Comrs of Sewers* (1669) 1 Mod 44, 86 ER 719; *R v Plowright* (1685) 3 Mod 94, 87 ER 60; *R v Moreley* (1760) 2 Bur 1041; *Ex p Bradlaugh* (1878) 3 QBD 509. See the even stronger formulation of the principle in *R v Cheltenham Commissioners* (1841) 1 QB 467, where Lord Denman CJ held that 'the statute *cannot* affect our right and duty to see justice executed'.

[25] R *(Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663 [30].

[26] R *v Home Secretary, ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115.

[27] *Privacy International* (n 7) [101] (Lord Carnwath).

can only mean wrongly made.[28] Nonetheless, it demonstrates a commitment to wholly block judicial review.

The fierce backlash which the clause provoked demonstrated both its extremity and how constitutional law adapted in response. Lord Steyn described the Home Office as 'attacking [our] democratic institutions', and the Bill as an attempt 'to immunise manifest illegality.'[29] Lord Woolf, the Lord Chief Justice at the time, described it as a 'blot on the reputation of ministers' which was 'fundamentally in conflict with the rule of law,' and "could be the catalyst for a written constitution."'[30] Mullen suggests that the dicta in *Jackson*[31] asserting a common law power to strike down primary legislation was a reaction to the clause,[32] and eventually, under duress, the clause was withdrawn. Parliament's decision to draft RIPA in similar language to that considered in *Anisminic* demonstrates that they did not have a

---

[28]Alex Dean, 'Is parliament really sovereign?' (*Prospect Magazine*, 17 December 2020).) <https://www.prospectmagazine.co.uk/politics/40872/is-parliament-really-sovereign> accessed 25 May 2024.

[29] Lord Steyn, 'A Challenge to the Rule of Law' (Speech, Inner Temple Hall, Immigration Law Practitioners' Association, 15 March 2004) 'Law' (Speech to Inner Temple Hall, in Immigration Practitioners' Association) <https://ilpa.org.uk/wp-content/uploads/resources/12992/04.03.334.pdf> accessed 25 May 2024.

[30] Lord Woolf, Squire Centenary Lecture, 'The Rule of Law and a Change in Constitution' (3 March 2004)., (Squire Centenary Lecture, 3 March 2004).

[31] *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

[32] Tom Mullen, 'Reflections on Jackson v. Attorney General: Questioning Sovereignty' (2007) 27 Legal Stud 1. Mullen discusses the following paragraphs of *Jackson* (n 31): [102] (Lord Steyn), [104] and [107] (Lord Hope), [159] (Baroness Hale).

clear enough intention to confront this backlash and thus to oust the courts.

The Supreme Court holding otherwise in *Privacy International* would have severely compromised access to justice, a uniquely important 'meta-right' needed to secure the enforcement of other rights. RIPA purported to wholly insulate *every* decision of the IPT from judicial review. This would allow them to independently develop 'local law' in a contradictory manner to the High Court, ignoring precedent and derogating from the certainty that the rule of law is supposed to provide.[33] More worryingly, it would allow the IPT to define their own jurisdiction. Were they to grow tired of hearing about investigatory powers, they could decide to hear particularly dramatic criminal appeals instead. Were the IPT to send someone to prison for contempt, no matter how unreasonable or unjustified this was, there could be no appeal.[34] The courts have necessarily recognised that they must enforce the limitations imposed by Parliament upon administrative tribunals, preventing the 'contradiction in terms [of] a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure.'[35]

Lord Sumption dissented alongside Lord Reed, stating that the ouster was sufficiently clear to prevent jurisdiction in

---

[33] Lord Carnwath in *Privacy International* (n 7) [90] and [139]. While views on the rule of law's content vary, even the most formalistic conceptions agree that the law should be certain. For example, see Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 2009).
[34] Dinah Rose KC, oral argument before the Supreme Court: *Privacy International* (n 7).
[35] R *v Shoreditch Assessment Committee, Ex p Morgan* [1910] 2 KB 859, 880 (Farwell LJ).

substantive appeals. To them, the rule of law was 'sufficiently vindicated' by the fact that the IPT was presided over by a senior judge and that 'it exercise[d] a power of judicial review' in its own right.[36] They thought that the structure of the clause was clearly intended to address the *Anisminic* decision,[37] and that the High Court would still be able to intervene if the error were solely one of procedural failings.[38] Lord Wilson, in a spirited minority of one, thought that *Anisminic* was wrongly decided. He argued that ouster clauses should be given their natural meaning to reverse '50 years of linguistic confusion'.[39]

Lord Wilson's dissent, however, accurately pinpoints the main issue with the 'clarity' test adopted by the other six judges. Namely, the threshold required has frequently been redefined upwards, a seemingly deliberate tactic to avoid answering the question of whether the courts can constitutionally ever be ousted.[40] The most egregious example appears in *Privacy International* itself, in which the Supreme Court read down as 'too unclear' a clause which had been previously described as an 'unambiguous ouster'.[41] Shrinking the goalposts as the ball hurtles past the goalkeeper is an unsustainable strategy which provides little help to Parliamentary draftsmen and actively hinders first

---

[36] *Privacy International* (n 7) [172], [197].
[37] ibid [223]-[224].
[38] ibid [205].
[39] ibid [214].
[40] ibid.
[41] R *(A) v Director of Establishments of the Security Service* [2009] UKSC 12, [2010] 2 AC 1 (Lord Brown). The Court of Appeal described this dictum as 'powerful persuasive authority': *Privacy International v Investigatory Powers Tribunal* [2017] EWCA Civ 1868 (Court of Appeal) [48].

instance judges.[42] The courts' predisposition to say one thing and later hold another thus renders comparisons to the 2007 super-ousting Asylum Bill nugatory. Regardless of what their judgments implied, it is unclear whether the majority in *Privacy International* would have actually given effect to such a clause.

This is because Lord Carnwath, Lady Hale, and Lord Kerr did not stop at reading section 67(8) down. No longer supported by Lord Lloyd-Jones, they suggested that the 'discussion needs to move beyond' the 'highly artificial' logic of *Anisminic*.[43] It was 'ultimately for the courts, <u>not the legislature</u>, to determine the limits set by the rule of law to the power to exclude review.'[44] Taking up the court's role as 'constitutional guardian of the rule of law,'[45] they held that there was a:

> 'strong case for holding that, consistently with the rule of law, <u>binding effect **cannot** be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court</u> to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law.'[46]

[42] The High Court and Court of Appeal judgments in *Privacy International* are just one example. Case notes on the CA decision are equally amusing in hindsight: see Robert Craig, 'Ouster clauses, separation of powers and the intention of parliament: from *Anisminic* to *Privacy International*' [2018] Public Law 570.
[43] *Privacy International* (n 7) [128]-[129].
[44] ibid [131] (emphasis added).
[45] ibid [139].
[46] ibid [144] (emphasis added).

Instead of engaging in linguistic trickery, the court should instead use a balancing exercise to decide the extent to which an ouster should be given effect:

> 'regardless of the words used, it should remain ultimately a matter for the court … having regard to its purpose and statutory context, and the nature and importance of the legal issue in question; and to determine the level of scrutiny required by the rule of law.'[47]

This conclusion (albeit in obiter) is ostensibly shocking for a court which has never struck down primary legislation on common law grounds.[48] However, it should not be seen as a radical constitutional uprising or a wide-ranging statement that the Supreme Court can now strike down law at will.[49] Rather, it should be viewed as a nuanced affirmation of the important principle that an independent judiciary is a necessary corollary of untrammelled parliamentary power. For the laws which Parliament passes to be effective, an independent body such as the High Court must be able to enforce the limits it prescribes (a

---

[47] ibid [144].

[48] Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP 2001). cf particular readings of *Rochefoucauld v Boustead* [1897] 1 Ch. 196, which suggest that the Court of Appeal disapplied section 7 of the Statute of Frauds to allow oral evidence of an express trust over land to be admissible despite statutory words to the contrary. See further William Swadling, 'The nature of the trust in Rochefoucauld v Boustead' in Charles Mitchell (ed.), *Constructive and Resulting Trusts* (Hart Publishing 2010).

[49] cf the judgments in *Marbury v Madison* (1803) 5 US 137 (United States); *Harris v Minister of the Interior* (no.2) [1952] 4 SA 769 (South Africa); *Movement for Quality Government in Israel v. Knesset* (2024) HCJ 5658/23 (Israel).

principle with which Lord Reed and Lord Sumption agree!)[50] If the IPT 'went rogue', judicial review is the primary mechanism by which their abuse of jurisdiction would be tackled.[51] A body that often expresses itself through confusing texts <u>needs</u> an independent and consistent arbiter to determine what they mean.[52] In the same way that Parliament are seen as incapable of binding their successors,[53] they are prima facie incapable of binding their interpreter.[54] The judgment also must be situated within its background – the complete restriction of access to justice. Confining it to this context allows courts to give effect to softer limitations on their jurisdiction, such as those imposing time limits on judicial review to ensure certainty in planning

---

[50] *Privacy International* (n 7) [210], where they state that 'Parliament's intention that there should be legal limits to the tribunal's jurisdiction is not therefore consistent with the courts lacking the capacity to enforce the limit … it would be a strange thing for Parliament to intend, and although conceptually possible, it has never been done'.

[51] *Privacy International* (n 7) [122]-[133].

[52] An amusing example of the difficulty of ascertaining specific legislative intent is seen in *BP Oil Development Ltd v CIR* [19901991] 64 TC 498, in which Staughton LJ held that he could 'not attempt any purposive construction of the detailed provisions of the [statute], since [he was] not sure what their purpose is'.

[53] This view is contestable, but the firm weight of authority suggests that so-called 'manner and form' restrictions such as a 'referendum lock' would not be legally binding. *Ellen Street Estates Ltd v Minister for Health* [1934] 1 KB 590; *Jackson v Attorney General* [2005] UKHL 56 [32] (Lord Bingham) and [133]; *Re Allister* [2023] UKSC 5 [66] (Lord Steyn). It appears to only be afforded to the House of Commons: the Parliament Act 1911, the Parliament Act 1949, and the House of Lords Reform Act 1999. cf *Jackson* (n 31) [163] (Lady Hale); Scotland Act 2016, s 1; Wales Act 2017, s 1.

[54] For further discussion of this view, see *Cart* [2009] EWHC 3052 (Admin) at [36]-[41] (Laws LJ), endorsed by Lady Hale in the Supreme Court in the same case at [30].

decisions,[55] while subjecting more fundamental limits to much stricter review.[56]

The belief that the case flagrantly violates parliamentary sovereignty is grounded in a rigid and flawed conception of this doctrine which fails to recognise any constitutional developments since the Glorious Revolution of 1689. It is a view based on Dicey's absolutist rule that 'no person or body [has] a right to override or set aside the legislation of Parliament',[57] a view which simply no longer reflects reality.[58] Hunt notes that this reductive view juxtaposes the '"irreconcilable' and 'radically opposed narratives of democratic positivism (rooted in the sovereignty of Parliament) and liberal constitutionalism (rooted in the sovereignty of the individual and the courts' task in protecting that sphere)' in a manner which is 'embarrassingly at odds with both legal and political reality.'[59]

---

[55] *R v Secretary of State for the Environment, ex parte Ostler* [1977] QB 122. Note that they are still to be read 'as narrowly as possible'; *R (Richards) v Pembrokeshire CC* [2004] EWCA Civ 1000 [46]-[47].

[56] Noted by Hayley J Hooper, 'No Superior Form of Law?', (2024) Public Law 1.

[57] AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, 1915). This view is unfortunately propagated by the *Privacy International* dissents, by s1(4) of the Rwanda Bill, and by Saini J in *Oceana*.

[58] *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 All ER 70; Nick Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9 International Journal of Constitutional Law 144.

[59] Murray Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Bloomsbury 2003).

The relationship between Parliament and the courts may well have been forged in the fires of the Glorious Revolution, but it was changed by the Acts of Union,[60] by our membership of the EU,[61] and by the Human Rights Act 1998.[62] It was changed by the rise (and the apparent demise) of 'constitutional statutes'[63] and by the Constitutional Reform Act 2005.[64] The courts' supervisory role has blossomed alongside our constitution into what we now know as public law.[65] Similarly, the post-Dicey judiciary have not just developed many elaborate interpretative approaches – --[66] they *have* also disapplied primary legislation.[67]

---

[60] See the judgments of Lord President Cooper in *MacCormick v Lord Advocate* [1953] SC 396 and Lord Hope in *Jackson* at [106].

[61] Nick Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9 International Journal of Constitutional Law 144.

[62] R *(on the application of HS2 Action Alliance Limited) (Appellant) v Secretary of State for Transport and another (Respondents)* [2014] UKSC 3 [207] (Lord Neuberger).

[63] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); *HS2* [2014] UKSC 3 [208], before the doctrine's dismissal as 'academic' in *Re Allister* [2023] UKSC 5.

[64] *Privacy International* (n 7) [120], [142] (Lord Carnwath).

[65] Even in 1964, the UK '[did] not have a developed system of administrative law'; *Ridge v Baldwin* [1964] AC 40 (Lord Reid).

[66] R *v Home Secretary, ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115 (the principle of legality); *Ghaidan v Godin-Mendoza* [2004] UKHL 30 (extremely strained interpretative approaches under s 3 of the Human Rights Act 1998); *Barclays Mercantile Business Finance Limited v Mawson* [2004] UKHL 51 (purposive construction of tax statutes); alongside *Anisminic*, *Cart* and *Privacy International.*

[67] R *v Secretary of State for Transport, ex parte Factortame* (no.2) [1991] 1 AC 603 (HL),) HL (disapplication of primary legislation which conflicts with EU law). See also *Dillon & Ors* [2024] NIKB 111, which disapplied ten sections of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023. The case is also interesting for Colton J's view that 'there is little suggestion or authoritative support for the proposition, <u>outside the context of ouster clauses</u>, that the courts can rule that an Act of

Sovereignty can be retained as the fundamental principle of our constitution without reading it as a rule which ensures that Parliament gets what it wants, all the time. Parliament's legitimacy derives not just from historical fact, but from their democratic credentials.[68] They legislate within an 'environment of omni-applicable constitutional principles'[69] which forcefully protect 'meta-rights' such as access to justice and the right to vote.[70]

Parliament is contrary to the rule of law and therefore, unconstitutional' (emphasis added).

[68] This claim is highly contested and outside the scope of this article. It appeals to an intuitive understanding that in the UK, Parliament are empowered to make law insofar as they are democratically elected, not just 'because they can', a view vindicated by the *Miller* decisions' view of sovereignty. It is for this reason that it has been suggested that Parliament are incapable of passing extremely anti-democratic laws such as those abolishing the right to vote: *AXA v HM Advocate* [2011] UKSC 46 [51] (Lord Hope); *Moohan v Lord Advocate* [2014] UKSC 67 [35] (Lord Hodge); *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469 (Lord Dyson MR); TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993). cf Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP 2001) ch 10, which staunchly defends the 'social fact' thesis and argues that while there may be a moral duty to disobey anti-democratic laws, there is no legal power to do so. In any case, it is 'romanticism to believe that a judicial decision could hold back what would, in substance, be a revolution' (Lord Irvine, cited in Goldsworthy) (emphasis added).

[69] Christian Magaard, 'Reconciling the Proactive Principle of Legality with Parliamentary Sovereignty' (UK Constitutional Law Blog, 17 November 2022) <https://ukconstitutionallaw.org/2022/11/17/christian-magaard-reconciling-the-proactive-principle-of-legality-with-parliamentary-sovereignty/> accessed 25 May 2024.

[70] Pavlos Eleftheriadis, 'Parliamentary Sovereignty and the Constitution' 2009) 2009) 22 Canadian Journal of Law and Jurisprudence 267, 345; Conor Crummey, 'The Safety of Rwanda Bill

Parliament get what it wants, most of the time.[71] In public law, however, 'context is everything.'[72]

***R (Oceana) v Upper Tribunal*: shorely not!**

All these issues have been thrown into focus by the decision in *R(Oceana)*, which gives effect to an ouster with little regard for precedent or principle. Section 11A of the Tribunals, Courts and Enforcement Act 2007 (introduced by section 2 of the Judicial Review and Courts Act 2022), provides that decisions of the Upper Tribunal regarding immigration refusals are:

> '(3) final, and not liable to be questioned or set aside in any other court.
>
> In particular—
>
> (a) the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision;
>
> (b) the supervisory jurisdiction does not extend to, and no application or petition for judicial

---

and the Judicial "Disapplication" of Statutes' (UK Constitutional Law Blog, 26 March 2024) <https://ukconstitutionallaw.org/2024/03/26/conor-crummey-the-safety-of-rwanda-asylum-and-immigration-bill-and-the-judicial-disapplication-of-statutes/> accessed 25 May 2024.

[71] *Jackson* (n 31) [102] (Lord Steyn).

[72] R *(Daly) v Secretary of State for the Home Department* [2001] UKHL 26 [28] (Lord Steyn).

> review may be made or brought in relation to, the decision'[73]

unless 'the Upper Tribunal is acting or has acted in bad faith' or 'in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice'.[74] Most importantly, like the Asylum Bill, it defines 'decision' as including 'any purported decision'.[75]

The legislation was recommended by the Independent Review of Administrative Law ('IRAL') and overturns the much-governmentally-maligned judgment in *Cart*.[76] This allowed appeals to the High Court from the Upper Tribunal if they raised 'some important point of principle or practice' or "other compelling reason',[77] in the absence of statutory guidance. The IRAL suggested that only 0.22% of these were successful and argued that 'the continued expenditure of judicial resources on considering [*Cart*] applications … cannot be defended.'[78]

---

[73] Tribunals, Courts and Enforcement Act 2007, ss 11A(2), 11A(3)
[74] Tribunals, Courts and Enforcement Act 2007, s 11A(4)(c).
[75] Tribunals, Courts and Enforcement Act 2007, s 11A(7).
[76] R *(Cart) v Upper Tribunal* [2011] UKSC 28.
[77] Section 13(6) Tribunals, Courts and Enforcement Act 2007; *Cart* (n 4) [52]-[57] (Lady Hale).
[78] The Independent Review of Administrative Law [3.46]. By way of comparison, between 2000 and 2009, the IPT upheld only 10 out of 1500 complaints (0.0067%, five of which came from one family!), and its abolition was not suggested. Ian Cobain and Leila Haddou, '"Independent" court scrutinising MI5 is located inside Home Office' (*The Guardian*, 5 March 2014) <https://www.theguardian.com/politics/2014/mar/05/independence-ipt-court-mi5-mi6-home-office-secrecy-clegg-miliband> accessed 25 May 2024.

The IRAL neglected to mention that they had no data for 5,457 out of the 5,502 reviews considered (99.182%!) and simply 'assumed that all cases which were not reported were failed *Cart* [judicial reviews]', which 'seriously misrepresent[ed] the statistical findings.'[79] In a more thorough analysis, Barczentewicz estimates that 7.6% of 42,000 *Cart* appeals succeeded.[80] Given that 'reported judgments are extremely rare', JUSTICE argue that on the data available, the rate is significantly higher, at 26.7%.[81]

The governmental response to the IRAL is just as, if not more, flawed. The section on ouster clauses begins with a quote from Richard Ekins suggesting that the 'rule of law does not mean the rule of judges.'[82] It attributes a passage to Lady Hale,

---

[79] JUSTICE, 'Judicial Review Reform: The Government Response to the Independent Review of Administrative Law Consultation Call for Evidence – Response' (April 2021) [24]. Even the explanatory notes to the Bill acknowledge this and estimate it at 3%.

[80] Mikołaj Barczentewicz, 'Should Cart Judicial Reviews be Abolished? Empirically Based Response' (*UK Constitutional Law Blog,* 5 May 2021). <https://ukconstitutionallaw.org/2021/05/05/mikolaj-barczentewicz-should-cart-judicial-reviews-be-abolished-empirically-based-response/> accessed 25 May 2024.

[81] JUSTICE (n 79) [24-25].

[82] Judicial Review Reform, 'The Government Response to the Independent Review of Administrative Law' (March 2021, CP 408) [26]. Ekins' Judicial Power Project has been criticised as 'helping to drive the political agenda of the extreme right in the Conservative Party in the UK', targeting 'seemingly … any institutional check on executive power, political as much as legal'. They advocated amending the Judicial Review and Courts Bill to overturn *Cart*, *Privacy International*, *Evans*, *UNISON*, *Cherry/Miller*, and *AXA*, alongside other judgments which affirm the importance of an independent and powerful judiciary. His endorsement should be read in this light. David Dyzenhaus, 'The Snake Charmers' (*Verfassungsblog,* 7 March 2022) <https://verfassungsblog.de/os5-

suggesting that 'the courts should remain … the servant of Parliament.'[83] This is not what she said.[84] The response asserts the government's intention to ensure the clause overturning *Cart* 'will be used as an example to guide the development of effective legislation' to oust the courts. In addition, it promises a 'review' of all ouster clauses on the statute book, including RIPA.[85] As Lord Carnwath commented extrajudicially, its analysis 'fails to identify a problem requiring legislative intervention' and is both 'muddled and inconclusive.'[86] What it does do, however, is show

---

snake-charmers/> accessed 25 May 2024; Thomas Poole, 'The Executive Power Project' (*London Review of Books,* 2 April 2019); <https://www.lrb.co.uk/blog/2019/april/the-executive-power-project> accessed 25 May 2024; Richard Ekins, 'How to Improve the Judicial Review and Courts Bill' (2021) <https://policyexchange.org.uk/wp-content/uploads/2021/10/How-to-Improve-the-Judicial-Review-and-Courts-Bill.pdf> accessed 25 May 2024. See also Paul Craig, 'Judicial Power, the Judicial Power Project and the UK' (2017) 36 University of Queensland Law Journal, 2, 355.

[83] ibid. This language has been repeated by former immigration minister Robert Jenrick, who claimed that 'in our sovereign parliament, the law is our servant': Robert Jenrick, 'Adopt my amendments to Rwanda Bill or face an illegal migration catastrophe' (*Telegraph*, 12 January 2024) <https://www.telegraph.co.uk/news/2024/01/12/jenrick-migration-bill-rwanda-illegal-migration-catastrophe/> accessed 25 May 2024.

[84] She instead stated that 'in the vast majority of cases, judicial review is the servant of Parliament'. The government's modification of the quote into a suggestion that they 'should remain' the servant of Parliament suggests a level of deference which is ordinarily not afforded to Parliament. Lord Carnwath, 'Response to Consultation', (27 April 2021) [14] <http://www.landmarkchambers.co.uk/wp-content/uploads/2021/04/IRALresponse-rcfinal3.pdf> accessed 25 May 2024.

[85] This intention is given effect by the clauses in the Illegal Migration Act and the Rwanda Bill: 'Judicial Review Reform Consultation: The Government Response' (July 2021) CP 477 [55].

[86] Lord Carnwath's Response to the Consulation: [13], [15].

that clause s11A is intended to be a precedential 'template' for future ousters.[87]

Questionable methodology behind the clause aside, the first and only question which needs asking is whether the wording is clear enough to oust the courts in light of the principle of legality.[88] Backlash to the passage of the Judicial Review and Courts Bill was nowhere near as substantial as that faced by its widely reviled ouster siblings, the Illegal Migration Bill and the Safety of Rwanda Bill. The Law Society stated that the abolition of *Cart* reviews was cause for 'some concern.'[89] A joint statement from 290 organisations condemned the passage of the 'senselessly cruel' Illegal Migration Act as 'dismantl[ing] human rights'[90], while 270 claimed that the 'shameful' Rwanda Bill is an 'attack on the constitutional role of the judiciary and the rule of law'.[91] Suella Braverman and James Cleverly declared under s19(1)(b) of the Human Rights Act that the bills were potentially incompatible

[87] See the Illegal Migration Act 2023 and the Safety of Rwanda (Asylum and Immigration) Act 2024.
[88] *Privacy International* (n 7) [99]-[101] (Lord Carnwath).
[89] The Law Society, 'Judicial review reform' (22 April 2022) <https://www.lawsociety.org.uk/topics/human-rights/judicial-review-reform> accessed 25 May 2024.
[90] Liberty, 'Joint Civil Society Statement on the Passage of the Illegal Migration Act' (18 July 2023) <https://www.libertyhumanrights.org.uk/issue/joint-civil-society-statement-on-the-passage-of-the-illegal-migration-act/> accessed 25 May 2024.
[91] Liberty, 'Over 260 Charities and Expert Organisations Call on House of Lords to Reject Shameful Rwanda Bill' (27 January 2024) <https://www.libertyhumanrights.org.uk/issue/over-260-charities-and-expert-organisations-call-on-house-of-lords-to-reject-shameful-rwanda-bill/> accessed 25 May 2024.

with the ECHR.[92] Though neither bill was in the 2019 Conservative Manifesto,[93] the House of Lords capitulated to the enormous majority in the Commons. As a result, all the bills, and all their ouster clauses, were passed anyway.[94] This failure of the parliamentary process demonstrates how legal constitutionalism functions as a 'backstop',[95] needed most when governments disregard the right of access to justice, a cornerstone of the rule of law.[96]

Soon enough, section 11A found itself hauled before a judge because of Mary Oceana, a woman from the Philippines who used a proxy to fraudulently take an English test and was served with notice for her removal from the UK. After the rejection of her appeals to both the First-tier Tribunal and the

---

[92] Illegal Migration Bill, p1; Safety of Rwanda (Asylum and Immigration) Bill 2023, p1.

[93] Arguably, the Bill was contrary to their promise to 'continue to grant asylum and support to refugees fleeing persecution'.

[94] The Rwanda Act has, at the time of writing, has just received Royal Assent. Given the calling of a general election and Labour's pledge to abandon the scheme, it is unclear to what extent it will ever be tested by the courts.

[95] This is shown by both *Miller* cases, borne throughout the case law of 'exceptional circumstances' review, and in its most extreme form, Carl Schmitt's claim that the 'sovereign is he who controls the exception'. Given Schmitt's later participation in the Nazi state, this latter claim functions as something of a warning. Carl Schmitt, *Political Theology: Four Chapters on the Theory of Sovereignty* (George Schwab, MIT Press 1988) 5; Hayley J Hooper, 'Legality, Legitimacy, and Legislation: The Role of Exceptional Circumstances in Common Law Judicial Review' (Spring 2021) 41(1) Oxford Journal of Legal Studies 142.

[96] *Kennedy v The Charity Commission* [2014] UKSC 20 [112]; *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 [127]; R *(UNISON) v Lord Chancellor* [2017] UKSC 51 [66]-[85].

Upper Tribunal, she applied to judicially review the proceedings. The jurisdictional issue was 'overlooked' at the permission stage and later raised by the Home Department, resulting in a trial solely on the clause's validity.[97]

After referring to the IRAL, the statutory background, and section 11A's 'plain and ordinary meaning,'[98] Saini J criticised the 'time, energy and cost expended in pursuing … [judicial review] proceedings,'[99] before outlining his view of the natural justice exception under s11(A)(4). For there to be a 'fundamental breach' of natural justice, he held, it must be 'so grave as to rob the process of any legitimacy'.[100] It is not clear what this entails outside of kangaroo courts, show trials and the so-called telephone justice of the Soviet Union.[101] Yet, in any case, it is indeed a 'substantial hurdle', which is difficult to imagine ever being met within the modern British legal system. It is no wonder that Mary Oceana was unable to jump it.

The second ground of appeal is where Saini J discusses the efficacy of the ouster clause. He held that 'the point of the legislation … was to remove *Cart* [judicial reviews]'[102] and that the

---

[97] *Oceana* (n 8) [2].
[98] ibid [29].
[99] ibid [31].
[100] ibid [33].
[101] *telefonnoye pravo*, or telephone justice, refers to the practice of the judiciary taking phone calls from those with political power and ruled according to what they were told. Attorney General Dick Thornburgh, 'The Rule of Law in the Soviet Union: How Democracy Might Work' (1990) <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/06-27-90b.pdf> accessed 25 May 2024.
[102] *Oceana* (n 8) [45].

decision in *Cart* arose solely 'because Parliament had not … specified how the scope of judicial review should be limited.'[103] Adding that 'the new legislation was preceded by an analysis of the number of *Cart* challenges and their success rate,' he found that 'the change does not conflict with the rule of law in any sense.'[104] He dismissed the possibility that the clause should be read in any way other than its 'plain and ordinary meaning',[105] tellingly citing Lord Brown's comment that 'the rule of law is weakened … if a disproportionate part of the courts' resources is devoted to finding a very occasional grain of wheat on a threshing floor full of chaff.'[106]

With respect to Saini J, this is mistaken. The High Court should not be questioning, let alone answering, what Parliament were attempting to do; the test is solely whether the words are clear enough, or, putting the point more bluntly, if there is any 'tenable construction' of the clause which retains the court's jurisdiction.[107] The judgment thus fails to give due regard to the court's constitutional obligation to restrictively interpret ouster clauses and merely asserts that the language is 'clear' enough to oust the court. The 'point of the legislation' was indeed to remove *Cart* judicial reviews, in the same way that the point of s67(8) of RIPA was to prevent the IPT from having its decisions questioned, and the point of s4(4) of the Foreign Compensation Act was to insulate the Commission from judicial review.

[103] ibid [48].
[104] ibid [49].
[105] *Oceana* (n 8) [29].
[106] *Cart* (n 4) [100] (Lord Brown).
[107] *Privacy International* (n 7) [22] (Lord Carnwath).

The reasoning adopted in *Anisminic* is expressly precluded by section 11A(7), which for the second time in legal history (following the Dissolution and Calling of Parliament Act 2022),), includes 'purported decisions' within the ambit of a statutory 'decision'. As such, a different approach must be taken to reading down the clause. The provision in s11A(3) that 'any error made in reaching the decision is immune from review' could be read as distinct from the outcome that 'any erroneous decision is immune from review'. Adopting the distinction made by the *Privacy International* majority, the reference to jurisdiction could be held to purely refer to errors of fact. Alternatively, 'supervisory jurisdiction' could be read as distinct from the wider 'jurisdiction' of the High Court, be it equitable or declaratory.[108] However, these approaches are extremely strained. Thus, they would rightly be condemned as more 'highly artificial'[109] linguistic manoeuvres, likely inviting yet another ouster clause in response.

Instead, the court should read the exceptions in section 11A(4) expansively; blocking appeals for error of law is a fundamental breach of natural justice. This is the logic which underpins our legal system – occasionally decision-making bodies err, and these errors ought to be corrected. Even the Supreme Court makes no pretence to infallibility.[110] Allowing the Upper Tribunal to develop immigration law in isolation from the High Court would lead to contradictory law on the same topics, which

---

[108] See *Kaldas v Barbour* [2017] NSWCA 275, in which the New South Wales Court of Appeal held that the 'supervisory jurisdiction' did not include declaratory remedies.
[109] *Privacy International* (n 7) [82], [129] (Lord Carnwath).
[110] See the 1966 Practice Statement, and for just one example *R v Shivpuri* [1987] AC 1, overturning *Anderton v Ryan* [1985] AC 560 one year after it was decided.

would never be 'channelled into the legal system'.[111] The clause thus shatters the rule of law where people need it most.

While this reading requires a stretch of the word 'procedural' beyond its ordinary meaning, this can be justified by the principle of hostile interpretation.[112] Fully embracing this as the sole ground for reading down the clause would allow the court to move past their reliance on the fifty-year fiction of *Anisminic* and show Parliament that their prototype has failed. The wording of section 11A is not as harsh as that of the Asylum Bill, and including 'safety valves' within ouster clauses should not be a justification for their validity. More importantly, this allows for the right outcome without needing to assert the extremely controversial power to annul legislation on common law grounds.

The weakest part of the *Oceana* judgment is its examination (or lack thereof) of this secondary question: whether the court can ever be wholly ousted. In 536 words, Saini J asserts that parliamentary sovereignty means that 'legislation … is supreme,' that 'the High Court enjoys no immunity from these principles,' and that section 11A is clear enough to oust the court's supervisory jurisdiction.[113] 'Putting aside obiter observations in certain cases and academic commentaries,' Saini J held, 'the legal position under the law of England and Wales is

[111] R *(Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475 [30].
[112] The Court of Appeal has held that what natural justice entails is a matter of law for the court, who are the 'author and sole judge' of procedural standards; *R. v Panel on Take-overs and Mergers, ex parte Guinness PLC* [1990] 1 QB 146, 183 (Lloyd LJ).
[113] *Oceana* (n 8) [51]-[54].

clear and well-established.'[114] The judgment expressly and somewhat mysteriously proceeds 'without citing from the extensive body of case law and learning on this subject.'[115] This is unfortunately evident from its analysis.

Why Saini J chose not to engage with these observations is both unclear and unexplained, given that their zenith came in the most recent and the most authoritative case on the very subject before him. *Oceana* thus deliberately disregards the Supreme Court's emphatic statement of the importance of access to justice, as well as the obiter comments, which directly contradict its narrow view of the judicial role. Given that *Privacy International* was not raised by the claimant but by Saini J himself, it is perhaps understandable. However, given the recent proliferation of ouster clauses designed to circumvent *Anisminic*, it is a question in need of much greater discussion.

The role of a first instance judge in such a case is extremely difficult. The Supreme Court have an aforementioned penchant for striking down clauses previously understood to be effective. Given the hostile Parliamentary-judicial relations[116] and

[114] ibid [52]. cf *Jackson* (n 31) [102] (Lord Steyn), [107] (Lord Hope), [159] (Baroness Hale); *AXA v HM Advocate* [2011] UKSC 46 [51] (Lord Hope); *Moohan v Lord Advocate* [2014] UKSC 67 [35] (Lord Hodge); *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469 [49] (Lord Dyson MR); *Public Law Project v Lord Chancellor* [2016] UKSC 39 [20] (Lord Neuberger); *Privacy International* (n 7) [144] (Lord Carnwath); *Sooy v Secretary of State for the Home Department* [2023] CSOH 93 [76] (Lord Richardson).

[115] *Oceana* (n 8) [51].

[116] Rowena Mason, '"An activist blob": Tory party attacks on lawyers' (*The Guardian*, 16 August 2023)

the extremist approaches of certain commentators,[117] it is understandable why lower courts do not stray too far from orthodoxy. While the High Court is not expected to assert a novel right to strike down legislation and take a sledgehammer to the 'foundational principle of our constitution',[118] their 'hostile attitude'[119] towards ouster clauses is an indispensable safety net. It is disappointing to see it cast aside so easily.

Alongside the ballot box, judicial review is one of two mechanisms for preventing the abuse of power. It has already been shown that the IRAL analysis of *Cart* reviews was deeply flawed. Restricting access to the courts is a paradigmatic violation of the rule of law.[120] It is also the unique context in which the judiciary feel most able to push back against parliamentary

---

<https://www.theguardian.com/politics/2023/aug/16/tory-party-criticisms-legal-professionals-timeline> accessed 25 May 2024.

[117] Richard Ekins implied that Lord Carnwath, Lady Hale, and Lord Kerr should be 'removed from office' were they to 'defy or overturn fundamental constitutional law' by giving effect to the obiter in *Privacy International*. It should be noted that the same author recommended the Queen withhold Royal Assent from the Benn Act in violation of both parliamentary sovereignty and a centuries-old constitutional convention and the criticism should be read in this light. Richard Ekins, 'Do our Supreme Court judges have too much power?' (*The Spectator*, 15 May 2019) <https://www.spectator.co.uk/article/do-our-supreme-court-judges-have-too-much-power/> accessed 25 May 2024.

[118] *R (Miller) v The Prime Minister; Cherry v Lord Advocate* [2019] UKSC 41 [42].

[119] *Privacy International* (n 7) [34].

[120] *Kennedy v The Charity Commission* [2014] UKSC 20 [112]; *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 [127]; *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [66]-[85].

overreach.[121] As Lord Dyson held in *Cart,* there is 'no principle more basic to our system of law than the … constitutional protection afforded by judicial review.'[122] This sentiment has been repeated time and time again at the highest appellate level,[123] culminating in Lord Reed's judgment in *UNISON*, where it was invoked to strike down secondary legislation imposing higher employment tribunal fees. 'Without such access [to justice]' he held,

> 'laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade.'[124]

Stephen Sedley points out that 'any state can set out rows of shining rights like medals on a leader's chest,' noting that even

---

[121] So-called 'exceptional circumstances review' primarily arises from discussions of this type; *Jackson v Attorney General* (n 31) [102] (Lord Steyn), [107] (Lord Hope), [159] (Baroness Hale); *AXA v HM Advocate* [2011] UKSC 46, [51] (Lord Hope), and *Privacy International* (n 7) [144] (discussed above).

[122] *Cart* (n 4) [122]. This was agreed with by the unanimous Supreme Court, which cannot be said for the solitary dictum of Lord Brown which Saini J cited instead.

[123] *R & W Paul Ltd v The Wheat Commission* [1937] AC 139; *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260, 286; *R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198; *Simms*; *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; *R (Evans) v Attorney General* [2015] UKSC 21.

[124] *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [68], [66]-[85] of the judgment elaborate on the importance of access to justice.

'Stalin did it'.[125] Any form of right is only as meaningful as its ability to be upheld in the courts.

***LA (Albania)*: 'everybody knows … the sequel's never quite as good'[126]**

Unfortunately, the Court of Appeal affirmed the *Oceana* judgment in *R (LA (Albania))*.[127] All three members stood by Saini J's judgment. Dingemans LJ held that the effect of section 11A was not to 'exclude' the jurisdiction of the court, but to 'reduce' it by allocating its powers to the 'judicial' Upper Tribunal.[128] He adopted the reasoning of Saini J and argued that even the 'second appeals test adopted by the Supreme Court in *Cart* expressly contemplated that some errors of law would not be corrected'.[129] In extremely pointed language, he then held that 'it is the duty of

[125] Stephen Sedley, *Ashes and Sparks: Essays on Law and Justice* (Cambridge University Press, 2011) 289. The 1936 Constitution of the Soviet Union, or the 'Stalin Constitution' recognised a myriad of social, economic and democratic rights which were invariably deviated from. In just one example of this, the Constitution's main author, Nikolai Bukharin, was executed after a show trial in which he allegedly tried to kill Lenin, Stalin, and Gorky: Robert Conquest, *The Great Terror: Stalin's Purge of the Thirties* (50th Anniversary edn, Bodley Head 2018).

[126] Kermit the Frog, Bret McKenzie, 'We're Doing a Sequel' in *Muppets Most Wanted* (soundtrack).

[127] Saini J's reasoning has also been affirmed in the Court of Session's Outer House in *Sooy v Secretary of State for the Home Department* [2023] CSOH 93. Lord Richardson's refusal to describe the Privacy International dicta as 'out of date' or inaccurate at [76] is interesting, though his assertion that s 11 does not fall within these 'exceptional circumstances' is questionable for the reasons given above.

[128] *R (LA (Albania)) v Upper Tribunal* (n 9) [31].

[129] ibid [34].

the Courts to give effect to the clear words used by Parliament, because no one, including a Court, is above the law.'[130] Underhill LJ held that 'the language [of section 11A] is explicit, and there is nothing constitutionally improper in such a limitation.'[131] Lewis LJ agreed with both that 'the wording of section 11A of the 2007 Act, read in context, is clear'.[132]

The same criticisms levelled above apply just as forcefully (if not more so) to the Court of Appeal's uncharacteristically brief judgment. Once more, there is no discussion of the necessarily hostile interpretative approach that the ratio of *Privacy International* requires them to take. Once more, the judges assert the purported clarity of the clause. Once more, the court misinterpret *Cart* as a case in which the Supreme Court came up with a stop-gap solution, rather than one in which they affirmed the constitutional importance of access to justice. In holding that the court is 'bound to apply'[133] the clause, Underhill LJ invokes an extremely contestable distinction between the 'reduction" and the 'exclusion' of judicial review. It begs the question of whether he would have found RIPA to have merely 'reduced' the court's role instead of 'excluding' it.[134] The change in approach appears momentous; on the Court of Appeal's analysis, *Privacy International* and its ancestors may have simply been consigned to the dustbin of history.

---

[130] ibid [36].
[131] ibid [51].
[132] ibid [48].
[133] ibid [31].
[134] An argument advanced by Lord Sumption and Lord Reed in dissent: *Privacy International* (n 7) [197], [211].

In a case note on *Oceana*, Hooper notes four axes around which a purported ouster clause should be interpreted:

> '(1) the clarity of statutory language, (2) the extent of restriction on the role of the court, (3) the character of the institution and decision shielded from review, and (4) the impact (if any) on fundamental rights and the wider legal system.'[135]

The Court of Appeal ignore the fourth, glossing over the judiciary's role as a vital counterpart to untrammelled legislative sovereignty in place of acting as the 'servant' which the government want them to be. In short, the decisions are an abdication of judicial responsibility.

While Murray rightly comments that the case shows that the 'issues raised by ouster clauses ought not to be reduced to a game of constitutional-law Top Trumps' in which the rule of law and parliamentary sovereignty compete for first place,[136] the effect of the judgment is just that. A narrow, dubious view of 'parliamentary sovereignty' triumphs over all else, veering into the language of Lord Reed and Lord Sumption's dissent rather than *Privacy International*'s binding ratio.[137]

---

[135] Hayley J Hooper, 'No Superior Form of Law?' [2024] PL 1.
[136] Philip Murray, 'Ouster Clause Redux: The Court of Appeal's Decision in LA *(Albania)*' (*UK Constitutional Law Blog*, 21 November 2023) <https://ukconstitutionallaw.org/2023/11/21/philip-murray-ouster-clause-redux-the-court-of-appeals-decision-in-la-albania/> accessed 25 May 2024.
[137] cf *Privacy International* (n 7) [207] (Lord Sumption).

More broadly, while the court, Murray,[138] and Elliot[139] all view section 11A as a 'partial' ouster, given Saini J's incredibly narrow interpretation of the s11A(4) exceptions, it is nothing of the sort. Even the Big Bad Wolf of ouster clauses, the 2003 Asylum Bill, had a right to appeal where 'a member of the Tribunal ha[d] acted in bad faith.' The availability of a statutory right to appeal if judges take leave of their senses, or if all the UK's other safeguards to justice simultaneously collapse, should not be an indication of an ouster clause's strength. Rather, following Hooper, it is the extent of the limitation which should be analysed.

The constitutionally proper approach to the construction of ouster clauses is outlined by Fordham J in another recent case, *Exolum*.[140] He held that although 'Parliament's statutory overlay can undoubtedly influence the scope and shape of judicial review … the final arbiters of whether and how that operates are the Courts.' Such a clause does not operate in a vacuum but must be squared with the 'constitutional touchstone' of 'the need to secure the level of scrutiny required by the rule of law … [a]nd it is the Courts who determine what the rule of law requires.'[141] This is the language of *Privacy International*, the language of precedent, and the language of principle. It is the very language that *LA (Albania)* fails to speak.

---

[138] ibid.

[139] Mark Elliott, 'Oceana: Ouster clauses and parliamentary sovereignty' (*Public Law for Everyone*, 5 July 2023) <https://publiclawforeveryone.com/2023/07/05/oceana-ouster-clauses-and-parliamentary-sovereignty/> accessed 25 May 2024.

[140] R *(Exolum Pipeline) v Crown Court at Great Grimsby* [2023] EWHC 2811.

[141] ibid [11].

The Changing Court

Though it is submitted that a narrow interpretation of the ouster at issue is plausible and that an appeal should succeed, the Supreme Court is much changed in personnel since *Privacy International*. Lord Carnwath, Lady Hale and Lord Kerr all retired in 2020, continuing the chaotic if not characteristically British tradition of the senior judiciary making heterodox claims about legislative sovereignty in their final decisions.[142] After the harsh executive criticism of Lady Hale's presidency of the Supreme Court,[143] her successor Lord Reed has been much more reticent. In a series of recent cases,[144] Gearty argues that the court has

---

[142] The other notable candidate being Lord Steyn's speech in *Jackson*.

[143] Former Prime Minister Boris Johnson claimed in Parliament that 'the court was wrong to pronounce on what is essentially a political question at a time of great national controversy' and in one of his final speeches in the House of Commons boasted that he 'saw off Brenda Hale'. This is likely a reaction to the two *Miller* decisions. HC Deb 25 September 2019, vol 664, col 775; HC Deb 18 July 2022, vol 718, col 726.

[144] *Begum v Secretary of State for the Home Department* [2021] UKSC 7 on the deprivation of Shamima Begum's citizenship; R *(SC, CB and eight children) v Secretary of State for Work and Pensions* [2021] UKSC 26 on the two-child benefit cap's compliance with the ECHR and the UNCRC; R *(AB) v Secretary of State for Justice* [2021] UKSC 28 on a policy of solitary confinement for young offenders' compliance with the UNCRC. Also indicative of this attitude are the Scottish *UNCRC* reference [2021] UKSC 42 on whether the Scottish Parliament could incorporate the UNCRC into their domestic law; R *(Elan-Cane)* [2021] UKSC 56 on whether the ECHR required provision for non-gendered passports; the *Scottish Independence Referendum* case [2022] UKSC 31 on whether the SNP could hold an independence referendum; *Re Allister* [2023] UKSC 5 which seemingly dismissed the doctrine of constitutional statutes as conflicting with parliamentary sovereignty. See also Charlotte O'Brien, 'Inevitability as the New Discrimination Defence: UK Supreme Court

'master[ed] an approach to judicial review so light-touch as to be almost no touch at all,'[145] and a statistical analysis of its decisions compared to those under previous court presidents found that 'the Reed court is more conservative when it comes to public law.'[146]

A high-profile example is the baffling and unanimous decision that allowing Shamima Begum into the UK for the purposes of her citizenship appeal would be 'unjust' to Sajid Javid

---

Mangles Indirect Discrimination Analysis While Finding the Two-Child Limit Lawful' (*Oxford Human Rights Hub*, 26 July 2021) for the 'reactionary' tenor of the 'dispiriting' and 'trigger-happy' judgment in *SC*, which 'tak[es] pot-shots at children's rights, discrimination judicial reviews, charities, the UN Convention on the Rights of the Child, pretty much any challenge to sexually discriminatory social security policies, and the basic construct of indirect discrimination'. In private law, one could also view *Fearn v Tate Gallery* [2023] UKSC 4 (upholding a nuisance claim against the Tate's viewing gallery for overlooking floor-to-ceiling glass-walled apartments); *Barry Congregation v BXB* [2023] UKSC 15 (denying vicarious liability for the rape of a woman by an elder of the Jehovah's Witnesses); *YXA v Wolverhampton CC* [2023] UKSC 52 (denying negligence liability for the failure of a local authority to take a child into care); *Paul v Wolverhampton NHS Trust* [2024] UKSC 1 (denying liability for psychiatric injury on the 'rough and ready' *Alcock* mechanisms) as small-c conservative decisions.

[145] Conor Gearty, 'In the Shallow End' (2022) 44*: London Review of Books* no 2.(Vol,),

[146] Lewis Graham, 'The Reed Court by Numbers: How Shallow is the "Shallow End"?' (*UK Constitutional Law Blog*, 4 April 2022) <https://ukconstitutionallaw.org/2022/04/04/lewis-graham-the-reed-court-by-numbers-how-shallow-is-the-shallow-end/>.

and Priti Patel.[147] While the *Rwanda* judgment[148] shows a willingness to push back against the executive, it was primarily founded on the United Nations Higher Commissioner for Refugees' strong evidence. Therefore, it is likely not indicative of a wider shift away from this new attitude.[149] In any case, Parliament has just deemed Rwanda safe through another, even stronger ouster clause.[150]

The consequences of allowing *Cart* to be amputated from the wider body of judicial review, however, are much more severe for the many asylum seekers and immigrants who rely on it. The

---

[147] *Begum v Secretary of State for the Home Department* [2021] UKSC 7, [90]. Former Lord Chancellor Robert Buckland has welcomed this 'appropriate degree of restraint', suggesting that 'it is essential … we remain blessed with sensible judges like Lord Reed'. It is somewhat surprising to see this, given that Lord Reed is no stranger to constitutional innovation nor a typically 'conservative' judge; he wrote the judgment in *UNISON* and concurred with Lord Neuberger's somewhat radical approach in *Evans*. In the aftermath of the *Rwanda* judgment, the executive seems somewhat less happy with his court's output.

[148] R *(AAA) and others v Secretary of State for the Home Department* [2023] UKSC 42.

[149] The other grounds for the decision were the UK's international treaty obligations and customary international law, which is binding on states with or without their consent (ibid [20]-[26]). Given that R *(LA (Albania))* was handed down the day after the *Rwanda* appeal, it may be that two anti-executive decisions in two days were one too many.

[150] The problematic constitutional aspects of the Rwanda Act are numerous and beyond the scope of this article. In short, it disapplies parts of the Human Rights Act and a number of international treaty obligations, prevents compliance with ECtHR interim measures, conflicts with customary international law (which is binding upon all states, regardless of consent), and defines 'decision' as including 'purported decision'; tacitly admitting Rwanda to be unsafe.

Upper Tribunal is not immutable; *A v Secretary of State for the Home Department*[151] is clear evidence. Both the First-tier Tribunal and the Upper Tribunal inexplicably believed the German claimant to be Ghanaian and sanctioned her deportation, ignoring her valid claim under EU law. Without the institutional backstop of *Cart*, A *would* have been unjustly and unlawfully deported.

The often overlooked epilogue to *Privacy International* is that the High Court quashed the IPT's decision and held that the use of 'thematic warrants' to justify mass surveillance was unlawful.[152] Citing the 'great case' of *Entick v Carrington*,[153] Bean LJ and Farbey J held that 'aversion to general warrants is one of the basic principles on which the law of the United Kingdom is founded.'[154] The IPT, despite all its expertise, had ignored 'one of the permanent monuments of the British Constitution',[155] and had significantly erred in law.

Section 13(4) of the Illegal Migration Act prevents review of executive decisions to detain. The desire to oust more and more issues from judicial review makes the government's commitment to re-examining every ouster clause on its statute book all the more worrying. GCHQ's illegal spying ought to be

[151] *A v Secretary of State for the Home Department* [2013] EWHC 1272 (Admin).
[152] *Privacy International v Investigatory Powers Tribunal* [2021] EWHC 27 (Admin).
[153] *Entick v Carrington* (1765) 19 State Tr 1029.
[154] *Privacy International v Investigatory Powers Tribunal* [2021] EWHC 27 (Admin) [48].
[155] The Supreme Court of the United States, *Boyd v. United States* (1886) 116 US 616, 626.

held to account.[156] Whether immigrants are entitled to remain in the country is a question which must be answered correctly. Whether the rate of success is 0.22% or 26.7%, *Cart* reviews save much more than rare 'grain[s] of wheat'. The rule of law demands that our world-leading judicial system must be accessible,[157] and ouster clauses prevent this, be it through 'reduction' or 'exclusion'.

Conclusion

Oceana and *LA (Albania)* are indicative of a wider judicial carelessness at a time when protection of our courts could not be more important. With a former Home Secretary decrying the Human Rights Act as the 'Criminal Rights Act' at the 2023 Conservative Party Conference[158] and Parliament legislating akin to Humpty Dumpty ('when I say "safe country", it means just what I choose it to mean'),[159] access to justice is increasingly under threat. This article has argued that the reasoning in both *Oceana*

---

[156] Lord Carnwath admitted that this particularly important context influenced the Supreme Court's approach to interpreting s 67(8): see the 'Enemy Of The People' Panel Discussion (The Oxford Union) <https://www.youtube.com/watch?v=ADqHie9lEY8/> accessed 25 May 2024.

[157] Tom Bingham, *The Rule of Law* (Penguin 2011).

[158] Rajeev Syal, 'Suella Braverman claims 'hurricane' of mass migration coming to UK' (*The Guardian*, 3 October 2023) <https://www.theguardian.com/politics/2023/oct/03/suella-braverman-claims-hurricane-of-mass-migration-coming-to-uk> accessed 25 May 2024.

[159] The Safety of Rwanda (Asylum and Immigration) Act 2024, deeming Rwanda a 'safe country' for the purpose of non-refoulement despite clear evidence to the contrary.

and *LA (Albania)* is wrong, according to both precedent and principle. In both cases, the court failed to apply the correct test to the clause, wrongly absolved itself of its own jurisdiction, and abdicated their proper constitutional role in favour of unjustifiable executive deference. However, given the Supreme Court's recent shift in attitude, it is unlikely that any appeal can resurrect *Cart*. The best we can hope for is a eulogy.

Better Call Brockovich: The Use of Injunctions in English Law as a Remedy of Enforcement of the Preventative Principle in Environmental Law

Tevž Sitar*

Abstract—This article discusses the issues in the use of injunctive relief to enforce the preventative principle in environmental protection claims. While injunctions could serve as effective preventative measures, the criteria for granting this remedy render their use in the prevention of environmental pollution limited. The article identifies two significant issues in their stringent requirements – (i) an unsound interpretation of the discretionary nature of equitable remedies and (ii) the property rights-linked locus standi. It then engages in a cross-jurisdictional analysis of the use of injunctions in environmental cases in US federal law which reveals some interesting distinctions between injunctions in English and US law. Based on this analysis, the

---

* London School of Economics. A special thanks to the OUULJ editors for their invaluable comments and suggestions. All errors and opinions are my own.

article proposes potential solutions to the identified issues, which would increase the availability and effectiveness of the remedy as a preventative measure in the cases of environmental pollution.

Introduction

In 1988, a tanker driver at Lowermoor Water Treatment Works accidentally discharged an aluminium sulphate solution into the treated water tank. This led to the contamination of drinking water supply for over 20 000 local consumers as well as temporary visitors of North Cornwall,[1] who experienced health issues such as severe skin conditions, digestion problems and even dementia as a result.[2]

In a similar period, in Hinkley, California, a large number of inhabitants started suffering from different types of cancer, mothers were increasingly experiencing miscarriages, and the majority had regular nose bleeds.[3] A young American law clerk Erin Brockovich in 1991 discovered that these conditions were caused by a negligent discharge of water contaminated with hexavalent chromium Cr (VI) from a compressor station operated by Pacific Electric & Gas between 1952 and 1964.[4]

---

[1] Douglas Cross, 'The Politics of Poisoning; The Camelford Aluminium Sulphate Scandal (An examination of the effects of aluminium poisoning after the Lowermoor Incident)' (1990) 20(6) The Ecologist 228, 228.

[2] Geoffrey Lean, 'Poisoned: The Camelford scandal' The Independent (London, 16 April 2006) <https://www.independent.co.uk/climate-change/news/poisoned-the-camelford-scandal-358010.html > accessed 25 March 2024.

[3] Amanda Fortini, 'Erin Brockovich Wants to Know What You're Drinking' The Atlantic (15 September 2020) <https://www.theatlantic.com/magazine/archive/2020/09/the-relentless-erin-brockovich/614185/> accessed 19 February 2023.

[4] John A. Izbicki and others, 'Occurrence of natural and anthropogenic hexavalent chromium (Cr VI) in groundwater near a mapped plume,

In both cases, the affected individuals initiated legal actions against the companies responsible for the respective contaminations of drinking water.[5] However, the damage in the form of cancer, respiratory diseases, skin conditions, digestive issues and dementia was done, and could never be fairly compensated. The two incidents serve as proof of the inadequacy of compensatory remedies in many violations of environmental law and emphasise the importance of preventative remedies which should be integrated into law to avoid the recurrence of such incidents.

The preventative principle was introduced in the EU First Environmental Action Programme 1977. It imposes on a state the duty to take early measures to prevent or minimise environmental harm as opposed to solely remedy the harm that has already been caused.[6] The UK clearly continues to enshrine the preventative principle in its legislation after leaving the EU as the Environment Act 2021 explicitly includes the principle of

---

Hinkley, CA' (United States Geological Survey, June 2023) <https://pubs.usgs.gov/of/2023/1043/ofr20231043.pdf > accessed 19 February 2023.

[5] Paloma Esquivel, '15 years after 'Erin Brockovich,' town still fearful of polluted water' Los Angeles Times (Los Angeles, 12 April 2015) <https://www.latimes.com/local/california/la-me-hinkley-20150413-story.html> accessed 19 February 2023; Camelford poisoning hearings begin BBC (London, 3 April 2002) <http://news.bbc.co.uk/1/hi/england/1908534.stm> accessed 25th March 2024.

[6] Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the Programme of Action of the European Communities on the Environment [1973] OJ C112/1.

preventative action to avert environmental damage as one of the five environmental principles.[7] This principle is essential in environmental protection as, based on the EU Environmental Action Programme, the preventative principle provides the protection and improvement of the environment 'at the lowest cost' by avoiding environmental harm in the first place.[8] This implies both monetary and non-monetary cost as the preventative principle avoids both expensive remediation of an area and, more importantly, permanent harm to the ecosystem and human health.

Although the integration of the principle into legislative framework and environmental policy can be noticed in the Environment Act 2021,[9] the principle plays a less prominent role in the law of remedies. While the Act enshrines the principle of preventative action to avert environmental damage which requires the government to incorporate it as one of the considerations in the policy-making process,[10] the preventative principle is not as well incorporated into the law of remedies through which prevention is ultimately enforced in practice. The current gap between substantive environmental laws and

[7] Environment Act 2021, s 17 (emphasis added).
[8] ibid, Title II: Principles of a Community Environment Policy.
[9] s 17 of the 2021 Act imposes an obligation on the Secretary of State to prepare a policy statement on environmental principles – (a) the principle that environmental protection should be integrated into the making of policies, (b) the principle of preventative action to avert environmental damage, (c) the precautionary principle, (d) the principle that environmental damage should as a priority be rectified, (e) the polluter pays principle. This statement should explain how these environmental principles should be interpreted and applied by the government in policymaking.
[10] ibid (emphasis added).

environmental enforcement tools is one of the most pressing problems of environmental law.[11] Without remedies capable of enforcing the preventative principle, substantive policy rules become 'paper tigers with no teeth'.[12] The substantive provisions encapsulating the preventative principle should thus be accompanied by appropriate remedies to ensure a robust enforcement of the preventative provisions.

English law already devises a remedy capable of enforcing the preventative principle – injunctions. Injunctions are an important remedy for environmental law as environmental litigation often concerns a future or ongoing action that presents an imminent threat to the environment.[13] These court orders can thus enforce prevention by prohibiting the action before the harm of the action materialises. Nevertheless, while injunctions are a well-established relief in the English law of remedies, their stringent legal criteria significantly diminish their practical value in environmental protection. The cases of *Dennis v Ministry of Defence*[14] and *Coventry v Lawrence*[15] are representative cases of courts preferring to use damages to compensate for the noise pollution nuisance claims and refusing to grant an injunction prohibiting this activity due to their restrictive criteria. While such remedy would be extremely important for the enforcement of the preventative principle in environmental law, its stringent

---

[11] George Pring and Catherine Pring, 'Twenty-first century environmental dispute resolution – is there an 'ECT' in your future?' (2015) 33(1) Journal of Energy & Natural Resources Law 10, 30.
[12] ibid.
[13] ibid 31.
[14] *Dennis v Ministry of Defence* [2003] EWHC 793 (QB).
[15] *Coventry (t/a RDC Promotions) v Lawrence* [2014] UKSC 13, [2014] AC 822.

requirements ignore the cardinal feature encapsulated in the principle – taking measures to prevent environmental harm.[16]

Although injunctions are urgently needed as a preventative measure of environmental law, the nature of the remedy and the standing requirements are overly restrictive. The article will examine the discretionary nature of the remedy, its stringent standing criteria and the implications of these rigid rules in the context of enforcement of the preventative principle. In search for a more accessible injunction regime in environmental protection, the article will then engage in a cross-jurisdictional analysis, exploring the use of environmental injunctions in the United States. Ultimately, it will be demonstrated that greater availability of environmental injunctions could be achieved with a more flexible reading of the already established criteria.

Using injunctions to enforce the preventative principle

Injunctions are court orders which demand or prohibit a certain party to take a certain action.[17] They are equitable remedies granted by the High Court.[18] While many types of remedies are important in environmental law, including in the form of non-judicial, administrative orders like remediation notices,[19] this

---

[16] *London Borough of Islington v Elliot and Morris* [2012] EWCA Civ 56 (CA).

[17] Jill E Martin, Hanbury & Martin: Modern Equity (22nd edn, Sweet & Maxwell 2009) para 25-001.

[18] ibid para 25-002.

[19] Environmental Protection Act 1990, s 78E.

article will focus on the use of prohibitory injunctions which restrict or prohibit a certain party from engaging in an action[20] and are thus instrumental in preventative prohibition of potentially polluting actions. The analysis will investigate both interlocutory and perpetual injunctions.[21] Nevertheless, particular attention will be dedicated to perpetual injunctions, thereby exploring injunctions as a final and long-term preventative remedy, prohibiting polluting activities at any time, and not simply as an interim measure.

The remedial capacity of injunctions is effective due to their severe sanctions acting as a deterrent to any environmentally harmful practices. If the party in question fails to comply with an injunction, they will be held in contempt of court, which is punishable by a custodial sentence, removal of property or fine.[22]

Despite their remedial qualities, injunctive relief is unavailable in many instances of the environmental law proceedings due to their stringent requirements. This essay identifies two major challenges in using injunctions to enforce the preventative principle. Firstly, the contemporary interpretation of their discretionary nature does not provide the flexibility needed for the availability of injunctions as preventative remedies in environmental protection. Secondly, the standing requirement is based on property rights and therefore allows only a limited, and

---

[20] Halsbury's Laws of England (5th edn, 2020) vol. 12, para 1086.
[21] Martin (n 17) para 25-005. While perpetual injunctions are granted to settle an issue as a final remedy, interlocutory injunctions are used in the first stages of litigation to stop an action which will cause irreparable damage while the legal proceedings concerning this practice are pending *(Beese v Woodhouse* [1970] 1 All ER 769) (CA).
[22] Martin (n 17) para 25-011.

potentially disinterested, pool of applicants to file a claim for injunctive relief. Both challenges may greatly impede success of a private claimant engaged in proceedings for injunction against a polluting activity.

1) A discretionary nature of injunctions and its impact on the preventative capacity of the injunctive relief

Jurisdiction to grant injunctions is delegated to the High Court in the Senior Courts Act 1981, s 37. The statutory text reveals a discretionary approach to granting an injunction. The court can grant an injunction 'in all cases in which it appears to the court to be just and convenient to do so'.[23] While this, of course, does not entail that the exercise of discretion is exercised 'on the individual preferences of the judge' as emphasised by Martin,[24] the granting of the order nevertheless should depend entirely on the court's opinion whether injunction is really needed. However, although the discretion in deciding what 'appears to the court' seems to provide sufficient flexibility to the court, the later development of case law adopted a rather restricted view of discretion in awarding damages.

Equitable remedies are extraordinary remedies which can only be used when the common law remedies – damages – are unavailable or inadequate.[25] Only if common law damages were defective, would the court consider granting an injunction.[26] In more recent case law, the House of Lords in *American Cyanamid v*

---

[23] Senior Courts Act 1981, s 37(1).
[24] Martin (n 17) para 25-002.
[25] Denis Browne, Asburner's Principles of Equity (2nd edn, Butterworth & Co 1933) 343.
[26] Martin (n 17) para 25-008.

Ethicon established the *balance of convenience* test, which should be exercised by the court granting an injunction. This test clearly provides that the availability of injunction is contingent on the availability of damages – if damages are an available remedy in a case, an injunction should not be granted. [27]

All this means that a claimant would have to discharge the burden of demonstrating that damages for an environmental damage, which has potentially not even materialised, are unavailable or inadequate. This is particularly concerning in environmental protection where pollution often causes irreversible damage which cannot be compensated by damages. In light of the weaknesses of damages, the currently used discretionary approach, which prioritises damages, allowing injunctions only in extraordinary circumstances, restricts the access to injunctive relief where such remedy would be needed most.

The dilemma between injunctions and damages was introduced into law by the Chancery Amendment Act 1858 which provided the Chancery Court with the power to award damages, not merely injunctions.[28] However, this brought some confusion to the law in nuisance cases where both remedies were available. *Shelfer* explained that while an injunction could be awarded to correct a wrong, the court can also award damages if more

[27] *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL).
[28] Since equitable jurisdiction was transferred to the High Court by the Supreme Court of Judicature Act 1873, common law courts have the power to award both damages and injunctions.

appropriate.[29] This was clarified by the Court of Appeal in *Kennaway v Thompson*, which held that in the claims based on actions of nuisance or trespass, injunction should be a default remedy, despite its usual discretionary nature, unless the severity or duration of the complained activity do not warrant its prohibition.[30] The judges prevented defendants from 'buying off' claimant's rights through damages while carrying on the harmful action.[31] While this judgment introduced some prima facie optimism with respect to the use of injunctions in environmental law, its impact on the awarding of injunctions was limited.

Firstly, the *Kennaway* principle was limited to the actions of nuisance and trespass.[32] Though these are important in environmental protection, they are unavailable in certain cases which means that injunctions remain discretionary and rarely available in any other claim.

Secondly, notwithstanding the attempts in *Kennaway* by the Court of Appeal, it seems that later case law reversed the position and re-enshrined the equitable, discretionary nature of injunctions which in this case decreased their availability. This approach came to light in the case of *Dennis v Ministry of Defence*.[33]

---

[29] *Shelfer v City of London Electric Lighting Co (No 1)* [1895] 1 Ch 287 (CA).
[30] *Kennaway v Thompson* [1981] QB 88 (CA). The case of *Colls v Home & Colonial Store Ltd* [1904] AC 179 (HL), contrary to *Kennaway*, emphasised the need for a more flexible approach in determining the remedy. However, the post-*Kennaway* cases adopted the *Kennaway* approach.
[31] Stuart Bell and others, *Environmental Law* (9th edn, OUP 2017) 376.
[32] *Kennaway* (n 30).
[33] *Dennis* (n 14).

Even though the court recognised the noise produced by RAF fighter jets flying over the claimant's property as nuisance, the public interest would be too severely harmed by an injunction prohibiting the use of the air base near the property for military drills. Damages, on the other hand, compensated the claimant for the nuisance suffered while allowing the polluting activity to continue operating. This new paradigm on injunctions was reaffirmed in *Coventry v Lawrence.* The case involved a nuisance claim against planning permission for a stadium to be used as a speedway. While the nuisance claim was successful, the Supreme Court in its discussion of remedies reaffirmed the approach in *Dennis.* Lord Sumption in his concurring judgment resolutely rejected the idea of using injunctions as a matter of principle, preferring damages which are less hostile to a wider public interest.[34] In this way, justice would be provided to the claimant, who would recover financial compensation, while the public could still enjoy a beneficial activity.

Lord Neuberger in the leading judgment similarly stressed the importance of the consideration of public benefit in determining the remedy, which diminished the *Kennaway* default status of injunctions. However, Lord Neuberger did not entirely endorse Lord Sumption's argument as he presented a more flexible approach to granting remedies. He emphasised that the question of whether to award damages or an injunction is a discretionary decision that should be based on the evidence and arguments in a particular case.[35] His proposal highlights the importance of discretion in equity and flexibility in the decision-making on remedies, but falls short of establishing an approach

[34] *Coventry* (n 15).
[35] ibid [120] (Lord Neuberger).

which would clearly provide such discretion to the courts. Firstly, Lord Neuberger refused to engage more thoroughly with Lord Sumption's arguments against the use of injunctions and simply recommended that the law is reviewed before it is further developed.[36] Secondly, despite acknowledging it, he did not endorse the argument made by Lord Mance,[37] in which he criticised Lord Sumption's approach as placing too much significance on the public interest. Lord Mance's argument was not adopted in Lord Neuberger's leading judgment, thereby creating uncertainty regarding the status of the public interest. [38] Thirdly, it should be noted that based on the position of the law before *Coventry*, the Court in this case restricted access to injunctions. The arguments submitted to the Court were based on the *Kennaway* principles where an injunction is a default remedy. *Coventry* rejected this approach and reaffirmed the availability of damages, which were explicitly preferred by Lord Sumption. Lord Neuberger's judgment was thus not an endorsement of injunctions, but rather a rejection of the *Kennaway* approach. The discussion on injunctions seems to serve as a reminder that injunctive relief is still possible and perhaps more suitable in some instances as a way to balance Lord Sumption's more hostile approach towards injunctive relief.

Lord Neuberger's discussion of injunctions is thus strictly obiter dictum. He explained that the Court could not set a precedent on this question as *Coventry* was not specifically concerned with the status of injunctions. Lord Neuberger himself acknowledged that this discussion presented the Court with a risk

[36] ibid [127].
[37] ibid.
[38] ibid [168] (Lord Mance).

of 'introducing a degree of uncertainty into the law'. While the leading judgment seems to have set the right course for the future development of law, it has failed to provide a ratio decidendi which explicitly reaffirms a true flexibility in the discretionary approach. Simultaneously, the paradigmatic understanding of the discretionary approach to granting equitable remedies diminishes the availability of injunctions as it only allows them to be awarded in exceptional circumstances. The failure of the discretionary approach to firmly establish the flexible approach as binding undermines the power of injunctions as a robust preventative remedy.

2) A proprietary nature of injunctions and its effect on a claimant's locus standi

Alongside their discretionary character, the criteria for establishing injunctions are inherently linked to specific proprietary rights, which detrimentally affects an individual's standing in their claim for injunctive relief. This is so because pollution[39] in such a claim and its impact are not confined to specific areas, designated by proprietary titles. This incompatibility between the criteria for establishing an injunction and actual pollution severely limits the availability of injunctions for the enforcement of the preventative principle.

Locus standi in claims for injunctions is conditioned by the existence of a proprietary right. This means, in the context of environmental protection, that a claim for injunction prohibiting

[39] This could be pollution of water, air or soil which would not be confined to a proprietary title but would likely be more widespread across an area.

a certain activity will only be available to an individual who has a legal or equitable title over the estate of land impacted by the polluting activity.[40] This requirement, however, does not provide standing for an injunction claim to an affected individual without a proprietary right in land or to an NGO wishing to prevent harm to environment which has no title over the polluted land. While a claimant without a proprietary right might not be impacted by a polluting activity to the same degree as an individual with a proprietary interest, an injunctive relief should not be available solely to prevent pollution of private property. For effective environmental protection on the basis of the preventative principle, locus standi should be extended so that pollution of the ecosystem as a whole can be stopped even in absence of a claim for injunction by a title-holder. As Lord Hope correctly stated in *Walton v The Scottish Ministers*, an erection of wind turbines will seriously affect the movements of an osprey even though it might not affect any individual's property rights.[41] This should of course not be a sufficient reason for restricting the availability of remedies as it would be 'contrary to the purpose of environmental law'.[42] The focus in standing should shift from an individual to the environment (in practice to someone acting on environment's behalf). However, even though pollution can have a detrimental impact on vast areas of the country, including flora and fauna, an injunction remains only available to the title-holders of the impacted land. In this way, the standing requirement denies access to injunctive relief to a large group of potential claimants, both affected individuals and interested NGOs.

---

[40] *Day v Brownrigg* (1878) 10 Ch. D. 294 (CA); Browne (n 25) 9.

[41] *Walton v The Scottish Ministers (Scotland)* [2012] UKSC 44, [2013] P.T.S.R. 51 [152] (Lord Hope).

[42] ibid.

A serious legal argument should, of course, consider the fact that such non-restrictive and non-property-based standing would open the floodgates to claims for injunctions which could detrimentally affect other people's rights and the wider public benefit. While such concern is valid, support for a standing requirement that is not linked to property rights does not entail support for an unregulated and unrestricted standing requirement. A flexible approach, which increases the availability of injunctions to non-title-holders, is important because property rights are often not the only relevant spatial factor in environmental pollution, which could have an impact on temporary visitors as well. Moreover, the property-based approach excludes the possibility of granting preventive measures for the protection of the non-human part of the ecosystem like flora and fauna. Even though it is true that such flexible and inclusive approach may invite 'floodgates' arguments, the law could use certain safeguards to ensure that only claims filed by the parties with genuine interest in environmental protection will pass the locus standi stage. Although not related specifically to the question of remedies, the point on standing in environmental law already gained some judicial recognition in *Walton*, where Lord Hope argued that to prove standing, the claimant would have to 'demonstrate a genuine interest in the aspects of the environment that they seek to protect, and that they have sufficient knowledge of the subject to qualify them to act in public interest in what is, in essence, a representative capacity.'[43] While normally this position would be taken by environmental NGOs, Lord Hope emphasised that due to the lack of funding, these grounds should not be limited to such organisations but should

[43] ibid [153] (Lord Hope).

be open to sufficiently concerned and well-informed individuals as well.[44] A similar line of argumentation was adopted by Lord Reed when he recognised that the claimant in the case demonstrated sufficient interest and concern on the basis of his engagement with the issue even though this interest was not demonstrated on the proprietary right grounds.[45] This representative capacity, enabling a person or an organisation would demonstrate a sufficient interest and knowledge on the issue, could be transferred to the law of injunctions in environmental law.

Such an approach would enhance the enforcement of the preventative principle by opening up access to injunctions to interested non-proprietary right holding parties. At the same time, the requirements of knowledge and interest would act as protection against the flood of litigation and therefore against the abuse of litigation for non-environmental law purposes. It is important to note that the issue in *Walton* relates only to a specific statutory standing criterion for judicial review, not to an injunction on the remedial stage. However, we could use Lord Hope's approach granting injunctive relief in environmental tort-based claims. Since not every instance of environmental harm is caused by an activity conducted by the state or its contractors, the *Walton* approach should be expanded to actions in tort, between two private entities, in order to provide a similar level of protection as provided in the judicial review criteria.

It is important to note that in light of the standing requirement based on proprietary rights, the courts created an

---

[44] ibid.

[45] ibid [88] (Lord Reed).

exception to the rule by granting injunctions on the *quia timet* principle.[46] This type of injunction is granted to prevent a threatened infringement from occurring,[47] and could, with its anticipatory function, serve as an effective enforcer of the preventative principle. However, although Browne claims that these injunctions do not have a property title-linked standing requirement,[48] in practice, the successful cases of *quia timet* injunctions were argued under the claims anticipating trespass or nuisance and therefore involved a claimant who had a proprietary right over the impacted territory.[49] This leads to a conclusion that even in these precautionary injunctions, a proprietary right was still needed and that the criteria in a *quia timet* injunction do not increase the availability of injunctions to non-title holders.

3) Conclusion on the discretionary nature and property-based locus standi

Both discretionary powers and property rights based standing criteria show the difficulties in using injunctions for enforcing the preventative principle. An attempt to find a solution to these two issues will be made in the following cross-jurisdictional analysis.

---

[46] Browne (n 25) 337. *Quia timet* is a Latin expression meaning 'because he fears' and the very name of the principle implies precautionary and preventative characteristics. However, the preventative principle is only enforceable in rare instances as discussed above.
[47] Martin (n 17) para 25-042.
[48] Browne (n 25) 338.
[49] *Redland Bricks v Morris* [1970] AC 652 (HL); *Earl of Ripon v Hobart* (1834), 3 My. & K. 169, 40 ER 65; *Haines v Taylor* (1847), 2 Ph. 209, 41 ER 922.

A cross-jurisdictional perspective: an environment-friendly approach to granting injunctions in pollution cases in the US environmental law

Notwithstanding the strict standing criteria and discretionary nature of injunctions, the equity-based requirements established by Chancery might not demand as strict an interpretation as is currently used by English courts. The following cross-jurisdictional analysis thus presents a viable approach for the courts' use of equitable injunctions as a remedy of enforcement of the preventative principle. Such approach remains doctrinally consistent with the requirements for equitable remedies and simply uses a more pragmatic reading of the requirements to extend the use of injunctions to environmental protection cases and make them more accessible. Based on the doctrinal consistency and urgency of the immediate ceasing of polluting activities in legal actions, the approach to granting an injunction in an environmental case can be justifiably relaxed to make it a more easily accessible remedy in cases where it is most needed. The US Supreme Court at first established a similarly rigid approach to granting injunctions. However, despite the Supreme Court's restrictive view, the US circuit courts devised an interesting approach to enforcing the preventative principle which provides greater availability of environmental injunctions and could thus be embraced by English courts.

1) The established approach to granting injunctions in environmental law

In the case of *Winter v NRDC*, the majority of the US Supreme Court stated that a preliminary injunction is a 'an extraordinary remedy never awarded as of right' which should only be granted in exceptional cases and should not become a default remedy, or a favoured remedy in cases of environmental harm.[50] The Court emphasised that each of the four criteria for injunctions must be satisfied for injunction to be granted. These are that: i) the claimant is likely to succeed on the merits; ii) he is likely to suffer irreparable harm in the absence of preliminary relief; iii) the balance of equities tips in his favour; and iv) an injunction is in public interest.[51]

The binding ratio in the *Winter* decision sets a rather clear course of non-favourable treatment of environmental harm in injunctions in the US caselaw, resembling the approach in English law. However, in the *Winter* dissent and in some post-*Winter* cases, we can nevertheless observe a substantial divergence from this *Winter* approach in the issue of discretionary nature and in the requirement of proprietary rights in injunctions. The following two sections analyse the divergences in US caselaw and propose solutions to current constraints in using injunctions in English environmental law.

---

[50] *Winter v Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008) [B].
[51] ibid.

2) A solution to the issue of the discretionary nature of injunctions: Ginsburg's dissent and Sierra Club

Despite the clear rejection of the more relaxed criteria for injunctions in environmental law in *Winter*, the doctrinal disagreement with such rigid approach can be seen in the *Winter* judgment itself, particularly in the interpretation of discretionary nature in Justice Ginsburg's dissent. Albeit dissents offer no binding legal authority, Justice Ginsburg in her dissent provided a helpful interpretation of discretionary jurisdiction in equitable remedies.[52] The Court in *Winter* reaffirmed that injunctions are an extraordinary remedy. As equitable remedies, they should only be used when damages do not suffice.[53] Justice Ginsburg, on the other hand, argued that the crucial component of equitable remedies is a discretionary jurisdiction and its flexibility.[54] Stemming from the original purpose of equity to correct an injustice produced by common law, equitable remedies are granted on a discretionary basis, where justice so requires.[55] The corpus of equity rules and remedies deriving from England was accepted in the US common law in the case of *Weinberger v Romero-Barcelo*, where the US Supreme Court emphasised the importance of the '*equity court's traditionally broad discretion*' and preserved this broad discretion in granting injunctive relief.[56]

---

[52] ibid (Ginsburg J, dissenting).
[53] ibid (Roberts CJ) [III].
[54] ibid (Ginsburg J, dissenting).
[55] Frederic W. Maitland, *The Constitutional History of England* (Cambridge University Press 1920) 224.
[56] *Weinberger v Romero-Barcelo*, 456 U.S. 305 (1982), (White, J).

Following the line of precedents, Justice Ginsburg herself cited *Weinberger v Romero-Barcelo* when she argued that equity is distinguished from common law precisely by its '*[f]lexibility rather than rigidity*', as '*[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case*'. [57] According to Ginsburg, judges should thus not insist on meeting rigid *Winter* criteria like the extent of harm or the availability of damages. Each environmental case should be approached on a case-by-case basis, making a discretionary decision after evaluating the need for an injunction.[58] Justice Ginsburg proposes an approach similar to Lord Neuberger's idea in *Coventry,* but she seems to more robustly emphasise the importance of flexibility as an essential part of equitable discretionary power, linking it to the original purpose of equity. The more flexible case-specific assessment should increase the availability of injunction claims and therefore strengthen the enforcement of the preventative principle.

The dissent correctly identifies the mistake in the leading judgment in *Winter*. Justice Roberts in the leading judgment described injunctions as an 'extraordinary remedy never awarded as of right'.[59] However, in this otherwise accurate description of equitable remedies, he only recognised one element of equity – namely that it only operates in exceptional cases to correct an injustice suffered under common law. He notably overlooked the second element – that in order for equity to fulfil its purpose to provide relief in case of injustice, the court has to use its discretionary powers to correct an injustice by granting an

---

[57] *Winter* (n 50) (Ginsburg J, dissenting) [III].
[58] ibid.
[59] ibid (Roberts CJ) [III].

equitable remedy, for which flexibility, as stated in *Weinberger*,[60] is essential. It seems that common law courts not only derived the idea of an 'extraordinary remedy' from the discretionary nature of equitable remedies, but also deprioritised this original discretionary nature, placing emphasis on the 'extraordinary character' of the remedies instead. In this way, the current paradigmatic understanding of discretion in equitable remedies is not correct as it lacks the flexibility required in the decision-making on awarding injunctions and only allows them to be awarded in exceptional cases. Allowing injunctions only exceptionally is only the implication of equity's purpose of correcting injustices caused by common law. The expectation that common law will correct the majority of legal wrongs inevitably leads to the conclusion that equity will only have to be resorted to in the minority of cases, in extraordinary situations. The implication should thus not be mistaken for a rule. As mentioned above, the discretionary nature, deriving from the Chancellor's discretionary power to correct an injustice of common law, is a quintessential part of equitable remedies, and as held in *Weinberger*, flexibility in court's decision-making is its essential feature.

Justice Ginsburg's understanding of the discretionary nature should be preferred as it is based on the original rationale and purpose of equitable remedies under which the court should not be restrained in granting equitable remedies by set rules as is the case in common law, but should, on the contrary, be allowed the flexibility to correct an injustice perpetrated by the common law. Despite jurisdictional differences between US and English law, English courts could easily adopt Ginsburg's interpretation

---

[60] *Weinberger* (n 56).

of the discretionary character of equitable remedies. This would enhance injunctions' ability to enforce the preventative principle as the courts could award the right remedy to correct a potential injustice using their discretionary powers in a flexible way as prescribed by the fundamental equitable principles.

As part of this proposal, it is important to address the question on the idea of injunctions as a default remedy in environmental law. This article argued in favour of adopting a discretionary approach, as proposed by both Justice Ginsburg and Lord Neuberger, where injunctions would not be resorted to only very exceptional circumstances while damages would be used as a primary remedy. However, it did not argue in favour of adopting injunctions as the default remedy. This is because of a practical and doctrinal reason. From a practical perspective, it is more viable to rely on the original idea of flexibility in the discretionary approach used when awarding a remedy. It would be much more difficult to introduce injunctions as a default remedy which would present a radical deviation from the centuries old case law in equity. This leads into the second, doctrinal, reason. The change of the status of injunctions is unnecessary since the correct reading of the old equitable principle of discretionary remedies, as explained by Justice Ginsburg, already provides the flexibility to the court in deciding whether damages or injunction should be more appropriate. This flexible approach can thus enhance the availability of injunctions to enforce the preventative principle in environmental law cases while, at the same time keeping in line with the elementary principles of equity and preventing any potential over-use of injunctions as a default remedy.

Moreover, while it could be proposed that the approach to granting injunctions in environmental law could differ from the approach in general equity, such a proposal should be rejected as it would create unnecessary and undesirable fragmentation of the law of remedies. This would bring another unnecessary frustration into the law of remedies while the issue could be solved more elegantly by adopting the correct original discretionary approach applicable to remedies in all claims.

3) A solution to the issue of the proprietary nature of injunctions

The disagreement with the majority in *Winter* has not ended with a dissent in the same case. Since the handing down of the strict and restrictive ruling in *Winter*, the federal courts invented a solution to the restrictive approach. The Eighth Circuit Court found a way to follow the binding *Winter* judgment in form but derogated from its substance through a unique interpretation of the *Winter* rules.[61] By doing that, the Court embraced substantively laxer approach to formally rigid criteria for granting injunctions in environmental cases. This laxer approach could be of great help to English courts specifically in respect of the treatment of the proprietary nature of injunctions.

After *Winter*, the Eighth Circuit Court of Appeals in the *Sierra Club* case adopted an interesting approach to the criterion

[61] Eric J. Murdock and Andrew J. Turner, 'How Extraordinary Is Injunctive Relief in Environmental Litigation? A Practitioner's Perspective' (2012) 42(5) ELR 10469.

of irreparable harm. [62] Similarly to *Winter*, in English cases, this criterion can only be satisfied by an infringement of a proprietary right through nuisance or trespass. As discussed above, only a recognised title over the land impacted by polluting actions provides an individual with a locus standi for an injunction claim. Unlike in England, the court in *Sierra Club* linked this standing requirement of irreparable harm to an individual's interests, instead of their rights, and made an injunction more accessible as a preventative remedy.[63] While the Court followed *Winter* in form and upheld the requirement of harm to the plaintiff, it broadened it so that it was satisfied by a proof of harm to environment, which in this case inevitably meant harm to the plaintiff.[64] The Court in *Sierra Club* held that such requirement of irreparable harm to the environment can be seen in 'the harm to the plaintiff's specific aesthetic, educational and ecological interests,' even where the claimant may not have any proprietary rights.[65]

However, the Court went further and found the requirement fulfilled without conducting a detailed assessment of the impact of pollution on the claimant's interests.[66] This might seem problematic according to the strict reading of the assessment, but the assessment was in fact based on the sliding scale where 'no single factor is determinative'.[67] The sliding scale is a convenient feature providing the courts with sufficient

---

[62] *Sierra Club v U.S. Army Corps of Engineers (Corps)*, 645 F.3d 978 (8th Cir. 2011).
[63] ibid.
[64] Murdock and Turner (n 61) 10471; *Sierra Club* (n 62) 996.
[65] *Sierra Club* (n 62) 996.
[66] Murdock and Turner (n 61) 10471.
[67] *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) 113.

flexibility which is essential for the discretionary approach. In absence of explicit abrogation of this feature in *Winter*, the Court correctly derived the sliding scale from the equitable principle of discretion and by that enabled the flexibility in the remedial decision-making. This relaxation put the emphasis on the hypothetical harm to the claimant's interests – assessing how the pollution could affect the individual's interests even though there was no actual impact. The substantive deviation from the *Winter* approach enables a more effective enforcement of the preventative principle as it allows an injunction even if pollution does not harm the plaintiff directly. The *Winter* standard is plaintiff-focused – it only allows an injunction if there is an actual harm to the plaintiff. However, it overlooks the possibility that a hypothetical harm could entail an actual harm to the environment even if the harm was only hypothetical for the plaintiff. Moreover, the *Winter* standard is also short term oriented as it fails to recognise that an actual harm to the environment (like polluted air, soil and water) will arguably in most cases inevitably harm individuals in the long term, even if no individual is actually harmed by a polluting activity at a given time. The Eighth Circuit's assessment is thus preferrable as it focuses on the pure harm to environment which could ultimately harm the individuals and thus in its essence enforces the preventative principle.

While one could argue that this relaxed standard could potentially lead to an arbitrary exercise of discretion, the rules of equity clearly establish that discretionary powers can only be exercised 'according to sufficient legal reasons',[68] not on the judge's personal opinion, which requires the court to make the

[68] *Beddow v Beddow* (1878) 9 Ch.D. 89, 93.

determination within the limits of the set criteria. The *Sierra Club* standard provides the appropriate discretionary powers to use injunctions as an effective preventative remedy in addition to the safeguards of the law of equity which prevent an abuse of those powers.

The floodgate criticism also arises against such a proposal. By removing the requirement of property rights, a possibility of filing a claim for an injunction would be open to everyone and would thus be open to abuse. However, such removal of the property rights requirement should be paired with additional requirements like the ones proposed by Lord Hope in *Walton*, where a claimant could act on behalf of the environment if they demonstrated sufficient interest, concern and knowledge of the issue. This would strike the right balance between enhancing the availability of injunctions for the enforcement of the preventative principle while limiting the claim to the genuinely interested claimants.

Inspired by *Sierra Club*, the English courts could embrace a more relaxed interpretation of the criteria while continuing to apply the criteria for granting an injunction. The issue of proprietary rights could be resolved by adopting a more liberal understanding of interest instead of a right as established by the Eighth Circuit Court. This would make injunctions available to the wider public, not only title-holders, which could be affected by pollution. Moreover, the courts should adopt a more flexible approach to assessing the criteria, potentially by using a sliding scale, through which the focus could be shifted from the claimant to the environment as a whole. The relaxed standard would

enhance the power of injunctions in environmental protection and would make injunctions an effective preventative remedy.

Conclusion

Injunctions with their prospectively prohibitory effect are an essential tool for enforcing the preventative principle as they can in most cases prevent or stop pollution in early stage. But while their remedial function is effective and indispensable, the criteria for establishing a claim for injunction are overly restrictive. The current interpretation of discretionary powers limits the use of injunctions, as they are granted restrictively as an extraordinary remedy and not in a flexible manner as proposed by Lord Neuberger. Furthermore, property-based and individual-centred standing requirements greatly reduce the pool of individuals who can file a claim for the injunctive relief.

The article proposed that general injunctions could retain the existing formal criteria but should adopt a more flexible interpretation of those criteria. Cross-jurisdictional analysis presents the *Sierra Club* judgment and Justice Ginsburg's dissent in *Winter* as examples that could be used by English courts to introduce the laxer approach to rigidly defined criteria of injunctions. Whether this proposal is judicially endorsed remains to be seen. The current climate crisis calls for an environment-friendly approach to be adopted.

PRIVATE LAW ARTICLES

Starting Afresh: Reformulating and Reconceptualising the Law of Estoppel

Joel Horsman*

Abstract—This article proposes a new way of formulating and conceptualising estoppel. The various shades of estoppel currently recognised are convoluted, unclear in principle, and conceptually discordant. As such, this article presses the reset button. It will propose a basic formulation for estoppel: 'an estoppel arises where it would be unconscionable for the representor to insist upon his strict legal rights'. This will provide a refined theoretical and practical view of promissory estoppel, proprietary estoppel, and estoppel by convention. This conceptualisation makes two points of contact with existing doctrine. Firstly, it sheds light on the sword/shield dichotomy, arguing that the dichotomy rests upon the nature of the representation in question. The analysis will re-orient estoppel along positive/negative lines; providing a framework for uncovering arbitrary gaps—what I will call lacunae—in existing

---

* Pembroke College, Oxford. I would like to thank the OUULJ editors for their tireless work in improving my article. Thanks to Olivia Hall for all her logistical and moral support. All errors and omissions remain my own.

doctrine. These are gaps that are unveiled when overlaying the model of estoppel advocated for in this article against the existing doctrine. Secondly, I will develop a rationale of the doctrine predicated on the representee's planning interest. When the rationale is married with the mode of relief, it will be seen that it provides a third perspective to the 'lively controversy' surrounding the expectation-detriment debate when determining the relief to which the representee is entitled. It will be argued that the planning rationale provides a more convincing normative account of the relief the courts have granted to claimants than both the expectation-based and detriment-based frameworks.

I. Conceptualising estoppel

A. Formulating estoppel

The task this article undertakes is to identify a formulation capable of explaining the various permutations of estoppel. This article's methodology is therefore interpretivist in nature: the formulation will seek to fit the existing scheme through providing an explanation of the circumstances under which an estoppel will arise and then will argue that such a formulation also justifies the doctrine through highlighting the normative significance of the formulation.[1] Where there is asymmetry between fit and justification, this article views the existing law as failing to emulate the justification in its entirety and therefore requires reform in comportment with its rationale.[2]

Estoppel by representation and by silence will not be considered discrete estoppels, but rather means by which estoppels may arise. The same is true of 'representation-', 'acquiescence-', and 'promissory-based' strands of proprietary

[1] Andrew Gold argues that the 'New Private Law' theorists have adopted a similar 'Interpretive Criteria':
Andre S. Gold, 'Internal and External Perspectives: On the New Private Law Methodology', in Andrew S. Gold, and others (eds), *The Oxford Handbook of the New Private Law* (OUP 2020) 10-16.
[2] This methodology reflects that adopted by Joseph Raz, 'Legal Positivism and the Sources of Law' in his *The authority of law: Essays on law and morality* (OUP 1979) 50.

estoppel.[3] This analysis will focus on 'promissory estoppel', 'proprietary estoppel', and 'estoppel by convention'.

The formulation I propose to explain and justify the doctrine is as follows:

> An estoppel arises where it would be unconscionable for the representor to insist upon his strict legal rights.

It is my position that the formulation both explains the existing law,[4] and highlights its normative base.[5] The existing estoppels cover a commendably broad range of factual scenarios from a promise not to collect the full sum of rent during wartime,[6] a mutual understanding as to how a guarantee will be interpreted and discharged,[7] to a promise to leave a farm in the representee's inheritance;[8] thus its breadth ought to be captured in the formulation at the risk of excluding morally significant cases.

Unconscionability serves as the underpinning principle that guides the raising of an estoppel;[9] where resiling on a

---

[3] Ben McFarlane, *The Law of Proprietary Estoppel* (2nd edition, OUP 2020) 1.05-23. Though the author argues these are conceptually distinct strands, I will seek to unify them as subsets of the broader law of estoppel.
[4] The language of the formulation is indeed influenced by Denning LJ's formulation in *Combe v Combe* [1951] 2 KB 215 (CA), 219.
[5] It thus follows a Dworkinian kind of 'fit and justification'.
[6] *Central London Property v High Trees House* [1947] KB 130.
[7] *Amalgamated Investments v Texas Commerce Bank* [1982] QB 84.
[8] *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776; and *Gillett v Holt* [2001] Ch 210.
[9] *Davies v Davies* [2016] EWCA Civ 463, [2016] 2 P & CR 10 [38] (Lewison LJ): 'The essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result'.

representation not unconscionable, no estoppel can arise.[10] As Elizabeth Cooke argues,[11] it is the representee's detrimental reliance that makes resiling unconscionable.[12] A broad conception of unconscionability also provides the flexibility to ensure justice towards the representor:[13] orienting unconscionability as the guiding principle allows for the malleability to achieve justice on the facts.[14]

A 'representor' implies the existence of a 'representation'. It is proposed a 'representation' has a sufficiently wide reach to include a failure to disabuse the representee of a belief generated through conduct and correspondence[15] as the representor in such a case is understood as undertaking responsibility for the promise.[16] The formulation covers a case wherein the representee labours under a mistake, for example, as to the pre-emption rights attached to his shares whereby the

---

[10] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752, [92] (Lord Walker).
[11] Elizabeth Cooke, 'Would It Be Unconscionable …?' in her *The Modern Law of Estoppel* (OUP 2010) 86.
[12] *Gillett* (n 8) 229 (Robert Walker LJ).
[13] This argument is made also by B. McFarlane and P. Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 632 and 633.
[14] This broadness allows for the calibration to countervailing benefits: *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8, [51] (Robert Walker LJ); or calibration to other equitable considerations: *Thorner* (n 8) [19] (Lord Hoffman).
[15] The formulation is hence intended to cover the conduct of BDO to HMRC in *Tinkler v Revenue and Customs Commissioners* [2021] UKSC 39, [2022] AC 886 [51] (Lord Burrows).
[16] This formulation coheres with the 'assumption of responsibility' analysis propounded in *Revenue and Customs Commissioners v Benchdollar Ltd* [2009] EWHC 1310 (Ch), [2010] 1 All E.R. 174 [52] (Briggs J).

representor induces the representee to believe in a state of affairs in relation to his strict legal rights.[17] Where A makes a promise to B, he does so through representing to B that he intends to follow through on the promise. The promissory dimension of estoppel is hence explained by the fact that a promise is seen as a subset of a representation.[18]

With regards to an insistence upon one's rights, I propose two ways in which we can interpret an 'insistence': A can insist upon a contractual right against B that he had vowed not to enforce, yet A may also insist upon a right to dispose of a property right that he has promised to give B.[19] For an estoppel by convention, the right that the representor cannot insist upon is less evident. In *Tinkler v Revenue and Customs Commissioners,*[20] Mr Tinkler was estopped from denying that a valid enquiry under section 9A of the Taxes Management Act 1970 had been opened. The common assumption was not as to the rights of either party, but rather the combination of fact and law that gave rise to a valid enquiry under the Act.[21] Lord Denning M.R.'s solution in *Amalgamated Investments v Texas Commerce Bank*[22] was to pitch the assumption at a degree of generality such that the right the claimant bank could not insist upon was the 'strict interpretation

---

[17] *Blindley Heath Investments Ltd v Bass* [2015] EWCA Civ 1023, [2017] Ch. 389.

[18] 'Promise' and 'representation' will therefore be used as synonyms unless denoted otherwise.

[19] Such an estoppel restricts the 'customary freedom of disposition of the owner of the property': *Sutcliffe v Lloyd* [2008] EWHC 1329 (Ch), [2008] 6 WLUK 351 [4] (Norris J).

[20] *Tinkler* (n 15).

[21] ibid [57] (Lord Burrows) considers the assumption to arise through Mr Tinkler's representative's correspondence with HMRC.

[22] ('*Texas Bank*') (n 7).

of the original terms of the contract'.[23] *Ex hypothesi*, the right that Mr Tinkler could not insist upon was the right accorded to parties to litigation to deny an assertion of fact where the estoppel restrains him from doing so.

B. Justifying estoppel

In his keynote Lecture at Modern Studies in Property Law Conference, Lord Justice Philip Sales sought to frame the rationale of proprietary estoppel in the context of the courts' equitable jurisdiction.[24] His Lordship argues that equity serves to inject a vector of moral sensitivity that supplements the common law's strict, rule-governed approach. His Lordship's conception of equity is thus intractably Aristotelian.[25] *Ex hypothesi*, the role of equity is to <u>correct</u>[26] the law when the law, strictly applied, has gone wrong.[27] Where the law goes wrong, on Aristotle's account, is where its universal nature serves to exact an injustice when applied to the facts of a given case; when such an injustice arises, equity intervenes to ensure that the law operates justly.[28]

---

[23] *Texas Bank* (n 7), [121] (Lord Denning M.R.).
[24] P. Sales, 'Proprietary Estoppel: Great Expectations and Detrimental Reliance' (2022) Keynote Lecture: Modern Studies in Property Law Conference [12].
[25] ibid (n 24).
[26] Aristotle, 'Nicomachean Ethics (335 – 323 BC): Book V: 10.' in W. D. Ross and Lesley Brown (eds), *Oxford World's Classics: Aristotle: The Nicomachean Ethics* (Revised Edition, OUP 2009) 1137b 25.
[27] There has been recent support in the Supreme Court for this 'corrective view'. See: *Guest v Guest* [2022] UKSC 27, [2022] 3 WLR 911 [4]-[5] (Lord Briggs).
[28] Aristotle (n 26) at 1137b 30. The analysis is fortunately not complicated by remnants of Aristotle's natural law conception; his

It is submitted that this analysis is consonant with McFarlane and Stevens' analysis of the two-tiered formal structure of equity.[29] McFarlane and Stevens argue that most equitable rights are both explained and justified by controlling the acquisition and enforcement of common law rights.[30] This view, so the authors argue, is narrower than the Aristotelian view: on their view, equity's concern is not so much with correcting the rules of the common law, but rather controlling the enforcement or acquisition of common law rights.[31] Should the authors view the distinction as between common law rights and common law rules as persuasive, the distinction is unimportant for this article. This is so because the formulation can be viewed in terms of either account. On the Aristotelian view, the common law rule that a contract modification cannot be legally binding absent good consideration is corrected by the equitable rule that a representor cannot insist upon his strict legal rights when he has represented not to. On McFarlane and Stevens' view, the strict common law rights that the representor has under a contractual agreement are controlled by the equitable right the representee acquires in virtue of an estoppel.

Accepting this formal analysis along with the Aristotelian view requires one to consider the principle underlying equity's

---

referring to a 'decree' in the cited passage evinces that he is speaking of positive law.

[29] McFarlane, Ben, and Robert Stevens, 'What's Special about Equity? Rights about Rights', in Dennis Klimchuk, Irit Samet, and Henry E. Smith (eds), *Philosophical Foundations of the Law of Equity* (OUP 2020).

[30] ibid 192.

[31] ibid 194: 'A focus on rights that relate to other rights is narrower than a focus on rules that relate to other rules'.

intervention. It has often been proposed that this principle is unconscionability *simpliciter*.[32] However, this view is too broad to justify the formulation: estoppel ought not to be a catch-all for unconscionable conduct.[33] It is tempting to ground the formulation in the norm that 'representations ought to be adhered to'. However, this solution is unsatisfactory for two reasons. Firstly, an unqualified promissory basis would unduly expand the domain for promise-enforcement, transgressing the law of contract. Secondly, the principle fails to capture the normative significance of the proviso 'insist upon his strict legal rights' as it is too broad to explain why the formulation is so refined.

The normative significance emanating from a representation <u>in relation to one's strict legal rights</u> is that of planning and consistency. A representation in relation to one's legal rights attaches greater normative significance than a representation without such attachment because the subjects of a legal system regard their rights and obligations as reasons for action.[34] It is in this sense that we can distinguish equity's intervention in a promise not to collect on one's rent obligations from a promise not to eat the last biscuit.[35] The basis for this distinction is as follows: A's obligation to φ, in respect of B, is a reason for A to φ.[36] B promising not to enforce the obligation to

---

[32] *Guest* (n 27) [94] (Lord Briggs)

[33] This point is reiterated in *Cobbe* (n 10) [16] (Lord Scott).

[34] Joseph Raz, 'Reasons for Action, Decisions and Norms' (1975) 84(336) *Mind* 481–99 <http://www.jstor.org/stable/2253635> accessed 4 May 2024.

[35] The former being of the kind in *High Trees* (n 6).

[36] This conceives of the obligation to φ as an exclusionary reason: Joseph Raz, 'Normative systems' in his *Practical Reason and Norms* (OUP

φ removes A's reason to φ. A thus plans his affairs absent of his reason to φ; B seeking to enforce the obligation to φ hence fatally disrupts A's plan. A thus cannot reliably plan his affairs in relation to his obligation to φ and equity intervenes to provide him certainty through vindicating his plan. This justifies why the approach taken in estoppel focuses on what the representor has indicated that he will do with his legal rights.

Estoppel has often been divided along common law and equitable lines where common law estoppel functions as a rule of evidence[37] whereas equitable estoppel arose as an extension of the law of waiver which sought to modify a common law right.[38] Some modern commentators have doubted the accuracy and utility of such a distinction.[39] It is submitted that we ought to excise the law of the distinction and categorise all estoppel as equitable: though McFarlane and Stevens' analysis admits of no logical categorisation of equitable/legal rights,[40] it helps to elucidate important general features of equitable rights. Given that this article seeks to reconceptualise the law of estoppel, it carries with it the freedom to make such categorisations and

1999) 143 where Raz regards 'legal obligations' *simpliciter* as an exclusionary reason regardless of whether the obligation is statutory or contractual.

[37] *Avon C.C. v. Howlett* [1983] 1 W.L.R. 605, 622 (Slade LJ) considered 'estoppel by representation' as a rule of evidence.

[38] Robert Stevens 'Improvements' in *The Laws of Restitution* (OUP 2023).

[39] Elise Bant, Michael Bryan, 'Fact, Future and Fiction: Risk and Reasonable Reliance in Estoppel', (2015) 35(3) Oxford Journal of Legal Studies 427–452, 450; Elizabeth Cooke 'A New Framework for Estoppel' in *The Modern Law of Estoppel* (OUP 2010) 58-60.

[40] McFarlane and Stevens (n 29) 193 - this is evident in that the authors note not all equitable rights fall into this structure.

distinctions as is necessary to fine-tune the doctrine. Categorising all estoppel as equitable helps ensure coherence with the two features of equitable rights which this article seeks to identify: (i) equitable rights are generally secondary and (ii) equitable rights intervene to avert an injustice. It is trite that the right conferred by an estoppel is secondary; as argued, even the typically 'common law' estoppel by convention has the feature of controlling the rights of litigants. Moreover, the basis for intervention, that the representee's planning interest is protected, lends itself to the conclusion that an injustice would ensue should equity fail to protect such interests. It would be an affront to justice if individuals could induce others into planning their lives around a representation as to one's legal rights without equity protecting the position of the representee. Classifying all such rights as equitable helps enunciate the key point that estoppel is parasitic on existing strict legal rights and exists to restrain the acquisition or enforcement of such rights where the planning interest of the representee so necessitates.

C. Sword or shield?

Now the principle underlying equity's intervention can be discerned, it is necessary to consider how equity intervenes. The argument I intend to advance is that much of the confusion about the defensive nature of promissory estoppel and the offensive nature of proprietary estoppel is due to the elliptical discussion of the nature of the representation in question.[41] It has frequently

[41] For an example of this, see: M.P. Thompson, 'From Representation to Expectation: Estoppel as a Cause of Action' (1983) 42(2) The Cambridge Law Journal 257-278, 260 where the author conceives of the doctrine as promise-enforcement absent of consideration.

been reiterated that promissory estoppel operates as a shield[42] and that proprietary estoppel's anomalous feature is its capacity to act as a sword.[43] The terms 'sword' and 'shield' are not legal terms; their usage obscures our understanding of the mechanisms at play. To translate the nomenclature into legal terms, it is necessary to analyse their use in judicial reasoning.[44] I will refer to the party raising the estoppel as A and the estopped party as B.

Where A evinces the elements of a proprietary estoppel claim, an equity arises which it is the court's duty to satisfy.[45] In Hohfeldian terms, A's power to apply to the court to satisfy the equity serves as a meta-right that has the capacity to alter the relations between A and B.[46] Where an equity in favour of A arises, B is under a liability to have his relation against A changed. The power, so exercised, can impose a duty upon B to, for example, grant an easement to A.[47] As such, where the equity arises, the exercise of A's power, subject to the court's discretion, will create a new right as against B.

---

[42] *Combe* (n 4) 224 (Birkett LJ)
[43] *Crabb v Arun D.C.* [1976] Ch 179, 187 (Lord Denning M.R.)
[44] A Hohfeldian analysis is pertinent to view the matter in strictly legal terms and to understand the mechanisms at play when one refers to estoppel as either a 'sword' or a 'shield'.
[45] *Jennings* (n 14) [36].
[46] Conceiving of the category of incidents: 'powers, liabilities, disabilities, immunities' as meta-rights is influenced by Duarte d'Almeida, 'Fundamental Legal Concepts: The Hohfeldian Framework' (2016) 11 Philosophy Compass 554–569 particularly at 558 and 559 where he groups these classes into 'families' with the 'meta-rights' being labelled 'higher-order'.
[47] As was the position of the District Council in *Crabb* (n 43). This correlates with the claimant's claim-right to be granted an easement.

Promissory estoppel differs in the meta-right that is accorded to A. To conceive how the Hohfeldian framework applies to promissory estoppel, the way in which Hohfeld's framework applies to contractual claims must be elucidated. Where a party to a contract commits a breach thereof, the innocent party has a power to sue for breach of contract.[48] This power has the capacity to alter the legal relations between the parties to the contract. Should the court decide in the claimant's favour, the defendant will be under a secondary duty to the claimant to make good on the breach.[49] The claimant thus acquires a claim-right as against the defendant for the secondary obligation to be fulfilled.

Where a claimant brings an action in respect of an alleged breach of contract, the defendant raising a promissory estoppel has the effect of negating this power. In Hohfeldian terms, the negation of a power is a disability; that is, B is disabled from applying to the court to impose a secondary duty upon A for a breach of contract in relation to the estopped right. In *Collier v Wright*,[50] the agreement between the parties from which an estoppel arose disabled the claimant from imposing a duty upon the defendant to discharge joint liability incurred by he and his business partners. The effect of the estoppel was hence to confer an immunity upon the defendant that prevented the debt from being enforced against him.

---

[48] This power turns on the nature of the breach in question. For example, in a repudiatory breach, the power is to accept the breach. There is, however, no general requirement to exercise this power: see *White & Carter v McGregor* [1962] AC 413.
[49] The nature of the secondary duty is contingent, again, on the nature of the breach and may range from damages to specific performance.
[50] *Sutcliffe* (n 19).

The way in which I propose to explain the difference in the nature of the rights each kind of representation creates is through an analysis of the nature of the representation in question. If one starts from the premise that estoppel is concerned with remedying the unconscionability that flows from defaulting on a representation,[51] the appropriate remedy is to compel the representor to abide by his representation. There may be reasons for giving effect to the representation in a way that falls short of specific performance.[52] The matter of giving effect to a representation must have regard to the nature of the representation in question; the course of action a court takes, for example, in response to a father promising his son that he would inherit his farm[53] is not and ought not to be the same as the response in regard to a promise not to enforce a repair covenant whilst negotiations for sale were pending.[54]

This is so because the representations are different in their nature. In the latter case, the negative nature of the representation merely requires imposing a disability on the representor such that he cannot create a secondary duty for the representee to perform a bargain on which the representor has

---

[51] This point is independent of whether one takes a reliance-based, expectation-based, or planning-based rationale. This is so because each account is merely a means of explaining the source of unconscionability rather than contesting the presence of unconscionability.

[52] *Guest* (n 27) [94] (Lord Briggs). This matter also arises in the public law doctrine of legitimate expectations: see Sales, Philip, and Karen Steyn. 'Legitimate Expectations in English Public Law: An Analysis' [2004] Public law 564–593, 579.

[53] *Spencer v Spencer* [2023] EWHC 2050 (Ch), [2023] 8 WLUK 38.

[54] *Hughes v Metropolitan Rly* (1877) 2 App Cas 439.

indicated forbearance. However, in the former case, fidelity to the representation requires imposing fresh duties upon the representor. What is required is that the representor must take an affirmative step to make good on his representation. Equity bites upon the fact that a plan has been erected around a positive representation. In classic cases of promises to confer an interest in a family farm, imposing upon the representor a disability fails to capture the normative significance of the representation in question: that the representee has planned his affairs around a promise that an interest in the farm will be conferred upon him.[55] The only way in which this interest can be vindicated is through conferring a right in the farm (or an equivalent measure the court views as equitable).

Framed in this way, it is clear that estoppel operates as a sword when it confers a power upon the representee to assert a claim-right and it operates as a shield when it confers an immunity upon the representee. I will refer to those power-conferring estoppels as 'positive estoppels' and those immunity-conferring estoppels as 'negative estoppels'. This positive/negative framework will now be transposed onto current doctrine to unveil the lacunae of the existing framework.

II. The lacunae of the existing framework

The confinement of positive estoppels to interests in land exacts injustice upon representees who plan around normatively

[55] For example: *Thorner* (n 8).

equivalent representations outside of a land law context. These injustices are a product of lacunae which will now be spelled out through the following examples.

(1)(a): A assures B that B has a 50% beneficial interest in Blackacre

(1)(b): A assures B that B has a right of first refusal regarding A's shares in X Corp

In both cases, A makes a representation to B about his existing rights; the difference consists in the fact (1)(a) relates to an interest in land and (1)(b) relates to an interest in a company. This difference is a tenuous basis upon which to draw a distinction, yet that is the apparent position of the law.

The harshness of the distinction can be uncovered when comparing the application of the doctrine to the facts of the following two cases. In *Sutcliffe v Lloyd*[56], the Chancery Division of the High Court awarded Mr Sutcliffe £25,000 as a 'personal guarantee'[57] in relation to a profit-sharing agreement that the parties had made under a joint venture to renovate two development sites. When Mr Lloyd 'unconscionably resiled'[58] from this agreement, an equity arose in favour of Mr Sutcliffe whose claim was put on the grounds of proprietary estoppel despite the sought remedy's tenuous relationship with his interest in land. Mr Justice Norris, however, regarded this as no hurdle to Mr Sutcliffe's claim. By contrast, in *Brewer Street Investments Ltd v*

---

[56] *Sutcliffe* (n 19).
[57] ibid [18] (Norris J).
[58] ibid [8] (Norris J).

Barclays Woollen Co Ltd[59] the claimant landlord sought remuneration for expenditure incurred under an agreement in principle whereby the defendant had requested renovations for which they had agreed to cover the costs. When negotiations between the parties broke down, the claimant stopped the renovations and sought remuneration for cost expended. McFarlane and Sales argue that this factual paradigm falls within the ambit of the 'promise-detriment principle'[60], yet Denning LJ saw great difficulty in morphing the claimant's submission into the framework of any equitable doctrine.[61] The harshness of the distinction was mitigated on the facts through the application of a risk-based analysis, but it is easy to envision a lacuna that may open on an alteration of the facts. Denning LJ's reasoning placed weight on the fact that the renovations were of no benefit to the claimant,[62] yet it is simple to conceive of a case wherein the benefit and risk is not so easily apportionable, and the claimant is unable to place his claim under any established doctrine due to the illogical narrowness of a power-conferring estoppel.

(2)(a) A assures B that B will be granted an easement; B gives no consideration

(2)(b) A assures B that A will give B a valuable artwork; B gives no consideration

[59] *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 QB 428.
[60] McFarlane and Sales (n 13) at 626; the authors argue that the principle justifies the use of estoppel as a cause of action where the representee has relied on a promise as to the representor's future conduct.
[61] *Brewer Street* (n 59), 435-436 (Denning LJ).
[62] ibid 437 (Denning LJ).

The distinction between (2)(a) and (b) is elusive. (2)(a) clearly accords B a power-conferring estoppel.[63] The authorities point in the opposite direction with regards to (2)(b); disallowing a positive estoppel from glueing together a contract void for want of consideration.[64] The position is more refined in Australia. This derives from the seminal decision in *Waltons Stores (Interstate) Ltd v Maher*[65] where the High Court of Australia imposed a duty upon the defendant to enter into the lease agreement notwithstanding non-compliance with section 54A(1) of the Conveyancing Act 1919. Though this may be explained as an instance of proprietary estoppel,[66] subsequent commentary and application has rendered an Australian doctrine of promissory estoppel capable of conferring a Hohfeldian power.[67] The court provided two discrete reasons why this expansion does not transgress the doctrine of consideration: (i) the rationale of the doctrine sits upon a different basis to contract enforcement and accordingly the doctrine of consideration represents no bar to enforcement upon such a basis;[68] (ii) a broader concept of estoppel helps supplement consideration in 'special circumstances' where the doctrine exacts an injustice through preserving its operation in

---

[63] *Crabb* (n 43) 185-186 noted explicit absence of consideration for the easement.

[64] *Combe* (n 4) 220 (Lord Denning) .

[65] *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

[66] The claim certainly fits into the paradigm of an agreement void for non-compliance with section 2 of the LP(MP)A 1989 as noted by Micheal Barnes, 'Promissory Estoppel' in *The Law of Estoppel* (OUP 2020) Chapter 6.18.

[67] For example, see Eugene Clark, 'The Swordbearer Has Arrived: Promissory Estoppel and Walton Stores (Interstate) Ltd v. Maher', (1987) 9 U Tas L Rev 68.

[68] *Waltons Stores* (n 65), 423-24 (Brennan J).

central cases.[69] Though the decision results in a more expansive class of promises capable of attaching legal obligations,[70] it can be justified in two ways. Firstly, the expansion accords with the conception of equity drawn in this article: estoppel can correct or control the common law doctrine of consideration where a strict adherence to it exacts an injustice. Secondly, the rationale of a positive estoppel ought not to restrict its domain of operation as narrowly as existing doctrine; a representee's planning interest is liable to be injured regardless of whether the representation is as to one's rights in land or over a chattel.

However, consider (2)(a) against:

> (3): A agrees to sell his freehold to Blackacre to B; B gives valuable consideration, but the parties fail to make a valid contract under section 2(1) of the LP(MP)A 1989

The analysis incorporates considerations of whether the law should consider the cause of failure. In the run up to the enactment of the 1989 Act, the Law Commission seemed to think so.[71] The Law Commission advanced what I will call the 'margin for error' argument: that the law ought to accord lay parties a degree of leniency when failing to comport with strict formalities requirements.[72] The margin for error argument would insist upon according (3) greater leniency than (2)(a), yet this is not the approach the law takes.

---

[69] ibid 453 (Deane J).

[70] Argued by Eugene Clark (n 67) especially at 76.

[71] Law Commission, *Formalities for Contracts for Sale of Land* (Law Com No. 164, 1987).

[72] ibid particularly at part 5, para 5. See also Cooke (n 39) at pages 127-128: 'the formalities problem'.

The resolution to (3) turns on matters of fact it is silent on. In *Cobbe v Yeoman's Row Management Ltd*,[73] the House of Lords rejected Mr Cobbe's proprietary estoppel claim because, *inter alia*, proprietary estoppel could not be invoked to 'render enforceable an agreement that statute has declared to be void'.[74] However, *Thandi v Saggu*,[75] a recent High Court decision, seeks to vindicate the representee's loss in a different way. Mrs Thandi agreed to sell one of her properties to Mr Saggu for £270,000, but the parties failed to create a contract that was valid for the purposes of section 2(1) of the LP(MP)A 1989.[76] Hugh Sims KC, sitting as a Deputy Judge of the High Court, acknowledged the constraint that he could not order enforcement of a contract rendered void by statute.[77] However, he was at pains to distinguish the equitable remedy under consideration from enforcement of the void agreement. This permitted the awarding of 'lesser relief in the form of a relief of some detriment', namely the legal costs incurred flowing from Mrs Thandi erroneously representing that she was committed to the agreement.[78] Contrary to the margin for error argument, the law is harsher to B in (2)(a) than in (3).[79]

---

[73] *Cobbe* (n 10).
[74] ibid [29] (Lord Scott).
[75] *Thandi v Saggu* [2023] EWHC 2631 (Ch), [2023] 10 WLUK 231.
[76] ibid [105] (Hugh Sims KC) - In his conclusion on this matter, placed weight on the proviso 'incorporating all the terms which the parties have expressly agreed in one document'.
[77] ibid [138] and [139] (Hugh Sims KC).
[78] ibid [145] (Hugh Sims KC).
[79] Whether this requires a change in approach to either (2)(a) or (3) is beyond the scope of this article, yet I incline to argue that the approach in (2)(a) ought to be adopted for its coherence with the rationale of a power-conferring estoppel.

One may also ask: why can we not apply this line of reasoning to contractual cases? Consider (3) against:

> (4) A and B fail to create a contract giving A's car to B; B suffers detriment by instructing solicitors to assist him on the transaction

Applying the analysis in *Thandi* to both cases, B would be entitled to recover his solicitors' fees.[80] The margin for error argument would postulate that the cause of failure in (4) would be due to absence of consideration, uncertainty, or absence of intention to create legal relations: given the relatively lenient requirements to form a contract,[81] B ought not to be treated with the same sympathy in equity relative to a case such as (3). The margin for error argument therefore supports the analysis taken in cases regarding failure of consideration, intention, and certainty, but impugns the validity of the analysis taken in cases of non-compliance with section 2(1) of the LP(MP)A 1989.

The above analysis reveals that:
(i) an estoppel can confer a Hohfeldian power where the estoppel exists in relation to an interest in land, but not otherwise
(ii) a positive estoppel can supply an exception to the doctrine of consideration in relation to an interest in land, but not otherwise

---

[80] *Guest* (n 27) [4] (Lord Briggs): His Lordship notes that 'proprietary' denotes an interest in land and is doubtful as to whether it can bear a broader meaning. See A. Waghorn, 'Promises in Equity and at Law: Proprietary Estoppel after Guest v Guest' (2023) 86(6) M.L.R 1504, 1514.
[81] The courts have, for example, typically been lenient to cases of uncertainty: *Openwork v Forte* [2018] EWCA Civ 783, [2018] 4 WLUK 245 [25] (Simon LJ).

(iii) the courts treat non-compliance with section 2 of the LP(MP)A 1989 as a greater bar to relief than absence of consideration[82]
(iv) proprietary estoppel claims predicated on void contracts entitle the claimant to some relief reflecting his detriment, but such claims are confined to interests in land.

It is intended that the positive/negative estoppel conceptualisation advanced in this article provides a point of reference for identifying the lacunae and inconsistencies, and accordingly provides a framework for resolving them. This article will now address the issue of how the equity ought to be satisfied once raised.

III. Satisfying the equity

Lord Justice Sales calls for the law of estoppel to 'marry up the relief granted with the grounds for applying the doctrine in the first place'.[83] The planning-rationale identified in this article must thus be configured into the remedy awarded. The first section of this article has discussed the normative strength of such a rationale and hence provides the case for its integration into the

---

[82] Whether this can be justified is beyond the scope of this article. Bevan, 'Liberating Minerva's Owl: the (ir)relevance of the LP(MP)A 1989 s.2 to estoppel claims' [2021] Conv. 381 is one view of the common academic opinion that Section 2 ought not to effect the operation of proprietary estoppel.
[83] Sales LJ (n 24), para 68.

law, but this section will also argue that the relief courts have granted is best explained by the planning rationale.[84]

A. Promissory estoppel

It is a logical consequence of the factual matrix attached to a negative estoppel that it can only be used in defence.[85] The relief that equity grants is the controlling of the right in question. The only questions that can arise are whether the rights are suspended or extinguished and, in the case of the latter, for how long? In *D and C Builders v Rees*, Lord Denning M.R was willing to acknowledge the extinguishing effect of promissory estoppel,[86] but this is far from a universal effect.[87] It is submitted that the courts ought to, and indeed do, have regard to unconscionability and planning to adjudicate the effect of the estoppel. In *Ajayi v Briscoe*,[88] the Privy Council argued that promissory estoppel extinguishes a right where the representee cannot resume his position upon reasonable notice.[89] It is submitted that this approach is best explained as allowing revocation only when it is possible for the representee to re-plan his affairs.

B. Rationalising positive estoppels

---

[84] Once again a 'fit and justification' analysis is employed.
[85] It does not necessarily follow that a claimant cannot raise a negative estoppel; this turns on matters of procedure as noted: *Texas Commerce Bank* (n 7) 121 (Brandon LJ).
[86] *D and C Builders v Rees* [1966] 2 QB 617, 624 (Lord Denning M.R.).
[87] The suspensory character of the estoppel is most evident in *High Trees* (n 6).
[88] *Ajayi v Briscoe* [1964] 1 WLR 1326.
[89] ibid 1330 (Lord Hodson). This analysis also explains the conclusion reached in *Foster v Robinson* [1951] 1 K.B. 149.

Where a positive estoppel arises, the fact that the court can impose a duty upon the representor widens the scope of available relief. The most recent Supreme Court authority on the matter endorsed an amorphous configuration of both reliance and expectation interest.[90] The majority noted that the starting assumption[91] is to enforce the promise *in specie* unless such enforcement is 'out of all proportion to the detriment'.[92] This framework is underpinned by the majority's conception of estoppel as ensuring 'the prevention or undoing of unconscionable conduct'.[93] For the reasons given in section I, this rationale does not work as it only begs the question of what constitutes unconscionable conduct.[94] The majority does, however, signal their approval of an expectation-based framework, inter alia, on the grounds that the 'relevant harm' is the repudiation of expectation, not the reliance placed thereon.[95]

However, the planning-rationale gives credence to both the reliance and expectation paradigms; the planning-rationale does not choose a side in the debate, but rather fashions a middle ground. We can apply the practical reasoning framework outlined in Section I to demonstrate this: Andrew Guest, believing that he would inherit the farm, considered his inheritance a *reason* to incur

[90] *Guest* (n 27).
[91] ibid [75] (Lord Briggs).
[92] ibid [68] (Lord Briggs).
[93] ibid [94] (Lord Briggs).
[94] Waghorn (n 80) 1511 - argues that the majority's answer 'reformulates' the question it seeks to address. Lord Leggatt notes this point in dissent in *Guest* (n 27), [160].
[95] ibid [53]. Lord Briggs provides many reasons supporting this rationale, yet the one highlighted here is the most convincing.

the detriment. Because he acted upon this reason[96] he planned his life and affairs around the promise.[97] When his parents derogated from their promise, they ensured that the reason for which he incurred the detriment ceased to operate. Andrew's plan, predicated on the promise of inheritance, was thus torn apart. As demonstrated in Section I, this gives rise to his equity and thus guides how the equity ought to be satisfied.[98]

C. Planning v Expectation

As a general principle, given that Andrew has planned his life around the representation, the appropriate remedy should be to vindicate his plan. According to the planning-rationale, he should be awarded such remedy as is necessary for him to recalibrate his plans. In some circumstances, however, there may be no possibility of him re-planning his life.[99] In such circumstances, the most appropriate measure is to estop the representor from

---

[96] ibid – Through incurring the relevant detriment: see [1] (Lord Briggs).

[97] *Guest* [2020] EWCA Civ 387, [2020] 1 WLR 3480 [11]-[41] Andrew's plan entailed enrolling in agriculture-related education courses and assuming responsibility for managing the farm on a basic wage in the knowledge that David Guest planned on leaving the farm to pass to the children. This rules out the pursuit of other life goals and choices that Andrew might have reasonably made; see *Winter v Winter* [2023] EWHC 2393 (Ch), [2023] 9 WLUK 287, [133].

[98] Mere months before *Guest* was decided, Lord Justice Sales cautioned against divorcing the reason for which equity intervenes with how equity intervenes: see Sales (n 24), para 68.

[99] These are cases where the detriment suffered is over decades and thus conditions the life choices the representee made. See for example *Gillett* (n 8) 215 where the representee dropped out of school at 16 in order to work on the promised farm.

disrupting the plan; that is, enforcement *in specie* of the representation that constituted the plan.[100] Where a substitute plan can be devised, the representor is to be awarded a remedy that facilitates this goal. On the facts of *Guest*, then, this approach diverges from the majority's only in its journey.[101] However, the planning framework can be of further use when other factual *indicia* of detriment are present. In *Jennings v Rice*[102] the Court of Appeal diverted from a specific enforcement remedy;[103] awarding Mr Jennings £200,000; £235,000 less than expectation.[104] In reaching this conclusion, both Alduous LJ[105] and Robert Walker LJ[106] acknowledged the remedy to be bound by proportionality, yet there seems little justification for the proportionality test that can be fashioned out of the expectation rationale.[107]

On the majority's reasoning in *Guest*, very little can be said to support this proportionality test. If one reasons, as the majority does, that the basis of the doctrine is to protect one's expectations, the imposition of a proportionality test appears

---

[100] *Spencer* (n 53) [33] (Rajah J).
[101] Lord Leggatt's dissent also notes the value of awarding specific performance on a reliance view: *Guest* (n 27), [192]-[193] (Lord Leggatt).
[102] *Jennings* (n 14)
[103] This formulation is to be preferred over the conceptually dubious formulation of 'expectation-based remedy'. The above analysis demonstrates that specific enforcement of the promise is not inherently an expectation-measure.
[104] *Jennings* (n 14), [2]: this is on the assumption that Mr Jennings' expectation was to inherit the house.
[105] ibid [18].
[106] ibid [50].
[107] ibid - It was argued by Alduous LJ at [18] that the rules arise as a consideration of justice, yet this reasoning is far too nebulous to give credence to the expectation rationale.

unprincipled. If we accept the proposition that the unconscionability arising from the default of a relevant representation flows from the fact that the claimant expected the promise to be fulfilled, then non-fulfilment of this expectation requires justification that the majority cannot provide. If non-fulfilment is justified when such an award would be 'out of all proportion to the detriment'.[108] then one must question what the majority means by 'detriment'. They cannot be referring to expectation detriment because the argument would be tautological: it would amount to claiming that 'the expectation is out of all proportion to the expectation'. If they are referring to detrimental reliance, it is unclear why such considerations are important if the doctrine is underpinned by expectation. By contrast, the planning rationale provides a more convincing normative account of this paradigm: in *Guest*-type cases, the only way in which the claimant's plan can be vindicated is through ordering specific performance of the promise, but in *Jennings*-type cases, the award of damages is such that it enables the claimant to devise a substitute plan. The proportionality analysis hence turns on whether a monetary sum is sufficient to vindicate the claimant's plans or whether enforcement *in specie* is necessary.

D. Planning v Reliance

If one assumes the minority position in *Guest*, that the equity should be satisfied in view of the claimant's reliance,[109] the

[108] *Guest* (n 27), [68] (Lord Briggs).

[109] A proponent of this view can be found in Andrew Robertson, 'The reliance basis of proprietary estoppel remedies' (2008) 4 Conv. 295, 296.

planning rationale remains more convincing. Robertson[110] argues that since reliance is a necessary precondition for raising an estoppel, it ought to ground the award of relief[111] However, this argument overstates the role of detrimental reliance in raising an estoppel. Detrimental reliance will almost always be considered a necessary condition,[112] but is ultimately subject to the overarching analysis of unconscionability noted in section I. If we are to equate detrimental reliance with unconscionability in the manner Robertson does, then we presuppose that the source of unconscionability is detrimental reliance which is the very conclusion he is trying to advance.

The planning rationale also provides a more compelling explanation of *Jennings* than the reliance rationale. The Court of Appeal awarded Mr Jennings £200,000, £150,000 of which was adjudged necessary for him to buy a new house.[113] This is best explained by the planning view: the Court of Appeal did not award Jennings a sum representing the extent of his reliance, rather a sum that facilitated the creation of a substitute plan. In *Habberfield v Habberfield,*[114] Lucy Haberfield's detrimental reliance on a farm inheritance promise was found to be £220,000[115] whereas Woodrow farm's value was£2.5 million.[116] Mr Justice Birss noted that the reliance metric was not exhaustive of Lucy's

---

[110] Andrew Robertson, 'Unconscionability and Proprietary Estoppel Remedies' in *Exploring Private Law* (CUP 2010) 402–426
[111] ibid 422.
[112] *Gillett* (n 8) 229 (Robert Walker LJ).
[113] *Jennings* (n 14), [15] (Aldous LJ).
[114] *Habberfield v Habberfield* [2018] EWHC 317 (Ch), [2018] 2 WLUK 566.
[115] ibid [246].
[116] ibid [2].

detriment:[117] her life plan was predicated upon the fact that she 'expected to receive a viable dairy farm'.[118] Mr Justice Birss, seeking to give effect to this plan, awarded Lucy £1,170,000, representing the sum necessary to sustain a farm of an equivalent scale.[119] The best way to explain this reasoning is through the invocation of the planning rationale. The sum was calibrated to ensure Lucy could re-plan her life by awarding her the money necessary to do so. Lawyers and judges are more than capable of thinking in planning-terms, in large part because they already do. It is submitted that a court ought to, and, in some instances do, take the following steps in satisfying the equity:

(1) Once an equity has arisen, consider the extent to which the representee has planned their life around it
(2) Consider what is necessary for this plan to be vindicated[120]
(3) Enforcement *in specie* is the most natural way in which a plan may be vindicated, but it may also go further than what is necessary
(4) If a plan may be vindicated through the awarding of a monetary sum, then the court is to order such a sum
(5) If there is no prospect of a plan being vindicated through the awarding of relief less than *in specie* enforcement, then the court is to grant *in specie* enforcement

[117] ibid [225] (Mr Justice Birss).
[118] ibid [226] (Mr Justice Birss).
[119] ibid [251] (Mr Justice Birss).
[120] It is submitted that this is where the 'minimum equity' analysis is to take place: see *Sutcliffe* (n 19) [4] (Mr Justice Norris).

IV. Conclusion

This article has sought to provide a reconceptualisation of the law of estoppel through identifying a formulation that explains and justifies the estoppels. It has developed a theory of when estoppel can found a cause of action, identifying logical and normative gaps in existing doctrine that appear when contrasting the framework advanced here to the existing law. This article has also propounded a normative account of the purpose of estoppel and thus identified how the remedial approach of the rationale helps explain features of existing doctrine more adequately than the two dominant modes of rationalising relief.

Unlawful Means Unchained: Causing Loss by Unlawful Means and the Problematic Dealing Requirement

Alexander Pitlarge[*]

Abstract—This article considers the decisions in *OBG v Allan* and *Health Secretary v Servier Laboratories Ltd*. It argues the law should not require the defendant to have interfered with third parties' freedom to do business (the 'dealing requirement') with the claimant for the defendant to be held liable for the tort of causing loss by unlawful means. This leads to a more detailed consideration of the gist and the importance of the tort; the two, it is contended, must be kept carefully separate. The gist of the tort is said to be the intentional causation of economic damage to another through a third party functioning as an instrument. The importance lies instead in defending a fair market. The dealing requirement is needed neither to fulfil the tort's principled purpose, of protecting against this intentional damage, nor for it to better achieve its practical goals. It is therefore contended that

---

[*] Keble College, Oxford. Many thanks to the editors at the OUULJ for their insightful comments throughout the editing process and to Professor James Goudkamp for his remarks on an earlier draft of this article. Any errors remain my own.

the requirement should be removed, though the law should still require *Sorrell v Smith* intention to find a defendant liable.

Introduction

The decision in *OBG v Allan* (‘*OBG*’)[1] left the tort of causing loss by unlawful means in a far clearer state than it had been, particularly given the confusion that had previously surrounded the economic torts. Several questions, however, remain following that decision. For example, Lord Nicholls dissented on what should count as unlawful means,[2] and the term has since taken different meanings in the separate torts of unlawful means conspiracy and causing loss by unlawful means.[3] This article will focus on one such point of contention: whether the ‘dealing requirement’ should be a necessary element of the tort. The issue arose after Lord Hoffmann defined the tort as occurring when X intentionally causes Y damage through unlawful means *by interfering with Y's liberty to deal with a third party*, Z. This final part, relating to interference, is the ‘dealing requirement’ and the focus of this article. Whether the dealing requirement was an element of the tort was questioned at the Supreme Court level in *Health Secretary v Servier Laboratories Ltd* (‘*Servier*’),[4] where the court sat as a panel of seven. Lord Hamblen affirmed that the requirement is a part of the tort. All of their Lordships agreed with his judgment bar Lord Sales, who nevertheless offered a very brief concurring

[1] *OBG v Allan* [2007] UKHL 21, [2008] 1 AC 1.
[2] ibid. cf [49] (Lord Hoffmann) to [162] (Lord Nicholls).
[3] See *JSC BTA Bank v Ablyazov (No.14)* [2018] UKSC 19, [2020] AC 727.
[4] *Secretary of State for Health v Servier Laboratories Ltd* [2021] UKSC 24, [2022] AC 959.

judgment. The issue thus appears to be settled, at least for the time being.[5]

Nevertheless, this article argues that the Supreme Court took a misstep in *Servier* in three ways. First, in both *Servier* and *OBG*, the analysis of the relevant authorities was dissatisfactory. Second, both judgments failed to explain convincingly why the dealing requirement should, in principle, be an element of the tort (i.e. why it is part of the wrong). Third, insofar as the requirement was considered a welcome limiting mechanism, the necessity of such a limiting mechanism was underanalysed.

It is therefore submitted that the dealing requirement is an undesirable limit on the scope of the tort. Limiting mechanisms should also, as a whole, be avoided. Priority should be given to granting remedies for the underlying wrong – *intentional* causation of economic loss through unlawful means. Such restriction is not justifiable simply by reference to a need to keep the tort within narrow boundaries – the tort performs an important role in regulating economic behaviour. This also explains why the arguments for the narrowest view of intention in the tort should be rejected.[6] Instead, the tort should be allowed to protect a wider range of claimants than more conservative definitions allow.

---

[5] ibid. See, however, [97] (Lord Hamblen), and [103] (Lord Sales), both noting that this case *was not the right one to consider* an alternative to the requirement – thus leaving the door open for future appellants. See also the conclusion to this article.

[6] E.g. the Sales/Stilitz argument in: Philip Sales and David Stilitz, 'Intentional Infliction of Harm by Unlawful Means' (1999) 115 LQR 411. On their definition, intention is established where the defendant intended to inflict such harm as they did onto the claimant.

1. The basis of *Servier*

In *Servier,* Lord Hamblen's judgment considered two issues. The first issue was whether the dealing requirement was a part of the ratio in *OBG*. His Lordship identified eight reasons as to why it was,[7] and decided the case on this basis. However, this article focuses on the second issue raised in Lord Hamblen's judgement: whether the dealing requirement in *OBG* should be departed from. His Lordship answered this question in the negative, accepting much of the reasoning offered in *OBG*. He thought that, in light of the 1966 Practice Statement on precedent,[8] there was no evidence 'of it causing difficulties, creating uncertainty or impeding the development of the law'.[9] In determining this, his Lordship addressed relevant authorities and considerations of principle, dismissing possible alternatives and remaining faithful to the argument put forward in *OBG*.[10] Thus, the reasoning in both *OBG* and *Servier* should be considered in parallel when analysing the justifications for the dealing requirement.

---

[7] *Servier* (n 4) [64]-[71]. John Murphy argues persuasively that the dealing requirement was not part of the ratio in *OBG*: John Murphy, 'Floodgates fears and the unlawful means tort' (2021) 80 CLJ 436.
[8] *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234. The Supreme Court is entitled to depart from precedent if it 'is the safe and appropriate way of remedying the injustice and developing the law', per Lord Scarman in *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74 (HL), 106.
[9] *Servier* (n 4) [83].
[10] Lord Sales, in his brief judgment in *Servier*, also paid lip-service to these principles. However, his Lordship's judgment was in some ways hesitant, as will be noted.

2. The dealing requirement: justified by the authorities?

In *OBG,* Lord Hoffmann argued that the unlawful means tort did 'not… include acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant.' His Lordship began his justification of the dealing requirement by analysing authorities with potentially relevant facts.[11] However, his Lordship's analysis was not convincing. A good starting point is to divide the cases Lord Hoffmann relied on into two categories: (1) cases that explicitly discuss interference with liberty of dealing; and (2) cases that Lord Hoffmann considered relevant despite there being no explicit discussion of such interference.

Cases that explicitly discuss interference with liberty of dealing

There is only one case that fits into the first category[12] – *Quinn v Leathem*.[13] In that case, to punish Mr. Leathem for refusing to employ union labour, a union persuaded a client of Mr. Leathem's to stop dealing with him. The House of Lords found such interference to be unlawful. In reaching this conclusion, Lord Lindley emphasised the importance of 'a person's liberty or right to deal with others'.[14] In *OBG,* Lord Hoffmann described this as the 'rationale of the tort'.[15] This draws us to the first issue with

[11] See *Servier* (n 4) [52]-[55].
[12] Murphy (n 7) 438.
[13] *Quinn v Leathem* [1901] AC 495 (HL), see 534-535 for discussion on liberty in dealings.
[14] ibid 534.
[15] *OBG* (n 1) [46].

his Lordship's analysis of this case: the tort involved was not that of causing loss by unlawful means.[16] As argued by Murphy, 'what was said there was said *obiter*: *Quinn* was a lawful means conspiracy case'.[17] It is unwise to try to extract a theoretical framework for the unlawful means tort from a conspiracy case. Secondly, however, even if Lord Lindley did identify an important principled consideration for the unlawful means tort, it is unclear why this can *only* be protected by the dealing requirement. Lord Lindley identified that this interference with dealing contributed to the action's wrongfulness; yet, this does not necessarily mean that it is part of the gist of the tort.[18] Their Lordships' consideration of the gist was too brief, and thus doubt remains as to whether the dealing requirement is a fundamental part of the wrong underpinning the unlawful means tort. Importantly, going forward, a proper analysis of the tort's basis and what it *should* prima facie protect is necessary. This is not the same as delineating what the tort *should not* protect for a supervening reason (i.e. emphasising its need to be narrow as a reason to exclude liability in some instances).

Relevant cases without explicit discussion of liberty of dealing

Lord Hoffmann discussed three cases in the second category: *Isaac Oren v Red Box Toy Factory Ltd*[19] ('*Isaac Oren*'), *RCA Corpn v*

---

[16] Murphy (n 7) 438.
[17] ibid.
[18] i.e. the basic object of the action.
[19] *Isaac Oren v Red Box Toy Factory Ltd* [1999] FSR 785 (Pat).

Pollard [20] ('*RCA*'), and *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)*[21] ('*Lonrho*'). These cases will be discussed in more detail.

Isaac Oren

First, in *Isaac Oren* the defendant illegally sold articles, thereby infringing a design right. The exclusive licensee to that design right sued the defendant for this infringement on the grounds of tortious interference with contractual relations.[22] Jacob J found against the claimants, noting that 'the contractual relations and their performance remain completely unaffected'.[23] Lord Hoffmann reframed this observation as there being no interference with the claimants' freedom of dealing. However, in doing so, his Lordship failed to consider the legal context of that decision, one that *OBG* was in fact unravelling. Following *DC Thompson v Deakin*[24] (though it was a gradual process), the torts of inducing a breach of contract and unlawful means were somewhat subsumed into the tort of interference with contractual relations. There was no recognition of a separate unlawful means tort until *Merkur Island Shipping Corp. v Laughton (The Hogeh Apapa)*,[25] and no detailed consideration of what it entailed until *OBG.*[26] Therefore, Lord Hoffmann's analysis respectfully starts from an undesirable starting point. It is commonly accepted that the torts identified in

[20] *RCA Corporation v Pollard* [1983] Ch 135 (CA).
[21] *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 (HL).
[22] *Isaac Oren* (n 19) [29].
[23] ibid [33].
[24] *DC Thomson & Co Ltd v Deakin* [1952] Ch 646 (CA).
[25] *Merkur Island Shipping Corp. v Laughton (The Hogeh Apapa)* [1983] 2 AC 570 (HL).
[26] Hazel Carty, *An Analysis of the Economic Torts* (2nd edn, Oxford University Press 2010) 74-76.

DC Thompson v Deakin caused a 'terrible mess' in the law.[27] There should therefore be no reason to insist that the modern form of the unlawful means tort conform with *Isaac Oren*. This is an important point in the context of the English precedent-based legal system; it provides strong justification for not placing too much weight on the cases that came before *OBG*, and instead seeing it as a chance significantly to clarify the law.

RCA

Second, in *RCA,* the defendant had been selling bootlegged Elvis Presley concert recordings after his death. Although Presley himself would have been able to sue under the Dramatic and Musical Performers' Protection Act 1958, his estate (and the exclusive licensee who owned the licence to his work) was not so entitled.[28] The estate therefore sued the bootlegger, claiming that it was nevertheless entitled to the damage suffered in tort. The claimants' case was dismissed as having no reasonable cause of action. Lawton LJ decided this on the basis that (i) no property right of the claimants had been breached; and (ii) the true construction of the Act did not create the desired cause of action.[29]

However, even if it is held that it is important that prior cases such as *RCA* fit the definition of the tort, the decision in this case can be explained without reference to a dealing requirement. In *OBG*, Lord Hoffmann conceded that there 'was no allegation that the defendant intended to cause loss to the

[27] See e.g. Lord Nicholls in *OBG* (n 1) [139].
[28] *RCA* (n 20) 142-44.
[29] ibid 148.

plaintiff'.[30] If congruence with the authorities is seen as important, despite the argument above, this case does not cause problems even without a dealing requirement. Liability under the unlawful means tort could be avoided by denying the requisite intention. This would even be the case with the '*Sorrell v Smith*' view of intention[31] – that is, intention to cause loss only as a means to an end. The intention in *RCA* was not to cause loss to the licensee as a means to make money, only for the bootleggers to make a profit. Bootleg recordings are generally of performances that were never originally intended to be sold as recordings. The bootleggers, hence, likely did not indirectly intend to eat into RCA's share of the market for sales of individual records and thus did not intend to cause loss. Importantly, Lord Hamblen failed to consider this in his judgment in *Servier*. Instead, his Lordship only briefly quoted and accepted Lord Hoffmann's commentary in *OBG*.[32]

Lonrho

Third, *Lonrho* was a case where the claimants, Lonrho, argued that the defendants, Shell, had unlawfully helped to prolong the Rhodesian independence regime that started in 1965 by supplying it with petroleum products in breach of sanctions.[33] These sanctions meant that a pipeline owned by Lonrho, as well as a refinery, were unused for a period. Prolonging this regime extended the duration of the sanctions which increased Lonrho's loss due to their being unable to use their property. Lord

[30] *OBG* (n 1) [53].
[31] More extensively discussed below.
[32] *Servier* (n 4) [40].
[33] *Lonrho* (n 21) 182.

Diplock's judgment focused on the possibility of a cause of action due to Shell's breach of statutory duty, regardless of intention,[34] or of a conspiracy[35] rather than on the unlawful means tort, however. Applying the proposed version of the unlawful means tort, as will be outlined below, it is a good example of a case that should have been decided the other way if, on all the facts, Shell met the requisite intention. A tort where loss was intentionally caused through the use of unlawful means towards a third party was not, however, before the court.

Broader discussion

The first generalised statement of the tort of unlawful means, by Lord Watson in *Allen v Flood*, noted that a person would be 'held liable if he can be shewn to have procured his object [of "detriment" to another] by the use of illegal means directed against that third party'.[36] The root of the tort does not here appear to include any interference with dealing – it was a later addition. Lord Hoffmann, in *OBG*, never truly answered the following question: why did the lack of interference with a party's freedom to deal with another mean that liability should not be found in tort?

This issue was identified by Lord Hamblen in *Servier*. Whilst outlining Lord Hoffmann's speech, his Lordship noted that: 'neither *Allen v Flood* nor any other pre-*OBG* authority holds that the dealing requirement is an essential element of the

[34] ibid 187.
[35] ibid 188.
[36] *Allen v Flood* [1898] AC 1 (HL) 96.

unlawful means tort'.[37] Hence, Lord Hamblen subtly undermined the role of these authorities in forming the basis of the decision. His Lordship said:

> 'The House of Lords in *OBG* were … deciding what the essential elements of a tort of previously uncertain ambit should be. Their policy decision was that it should include the dealing requirement.'[38]

Lord Hamblen hence implicitly rejected Lord Hoffmann's analysis of the authorities as a *foundation* for the dealing requirement. Under this reading, the cases discussed by Lord Hoffmann should therefore not be treated as being more authoritative than a court's discussion of how a tort would apply to a hypothetical set of facts.[39]

The essential point of this section, is, therefore, that Lord Hoffmann's discussion of authorities in *OBG* is a red herring. They do not offer a useful guide to the question of whether there should be a dealing requirement. Rather, they are mere *examples* of the *application* of the requirement to the facts of previous cases. Furthermore, if one is to argue that precedent should carry more value than a mere hypothetical,[40] most of these cases (i.e. *Lonrho* and *RCA*) are not inconsistent with a tort free of the dealing requirement. However, given the lack of structure, clarity, and detailed discussion of the law on the requirement prior to *OBG*,

---

[37] *Servier* (n 4) [89].
[38] ibid (emphasis added).
[39] ibid, as happened in *Servier* itself. See [84]-[87] for a discussion of hypothetical cases raised in the appellants' written submissions.
[40] For example those referred to in the footnote above.

an analysis based on considerations of policy and principle far outweighs a precedent-based approach.

3. Alternative justifications for the dealing requirement?

Relevant considerations of principle

Since the dealing requirement cannot be justified by authority, it must instead be justified on the basis of policy or principle. So far, the courts have raised several potential justifications. Such justifications have often been vague, underdeveloped, and imprecise. They can roughly be summarised as follows: (1) as a way to limit indeterminate liability;[41] (2) as a broader 'way to keep the tort within reasonable bounds';[42] (3) to aid the tort's role in protecting the bare minimum standards of behaviour in business;[43] and (4) as a restrictive measure in the field of economic torts, an area of tort that has been argued should remain limited given that it is an exception to the normal rule that pure economic

[41] See e.g. *Servier* (n 4) [95].
[42] *OBG* (n 1) [135]. Lord Walker similarly recognised the requirement's role as a 'control mechanism' at [266], though he was more hesitant as to whether the dealing requirement is the appropriate method. Lord Brown was in closer agreement with Lord Hoffmann that the requirement should 'confine … [the tort] to manageable and readily comprehensible limits' at [320]. It is here especially regrettable that their Lordships opted for subtly different descriptions of their reasoning, further limiting the clarity of already vague statements (e.g. 'reasonable bounds' compared to 'manageable and readily comprehensible limits').
[43] ibid [56].

loss is irrecoverable.[44] First, the third justification will be considered in more detail. Whilst a helpful starting point, such an observation does not go far enough. It will be shown that the proper role of the unlawful means tort is to influence the behaviour of market actors so as to protect a fair and competitive marketplace. Such protection is stronger without the dealing requirement. In contrast, it will be maintained that the other justifications for the dealing requirement are of considerably less importance.

Practical concern: limiting the tort

A key concern with the unlawful means tort has been to keep it within 'reasonable bounds'.[45] However, the courts have failed to justify the necessity of a strong control mechanism to this end. Let us consider the facts of *Servier* itself. The case involved respondents (Servier, the defendants) who had allegedly lied to the European Patent Office ('EPO') to obtain a patent for a new drug. The patent was later revoked, and the appellants (the NHS) suffered loss as cheaper, generic versions of the drug entered the market far later than they otherwise would have. Hence, the appellants had needed to pay inflated prices for the defendant's version. The appellants claimed under the unlawful means tort. The case and its appeal were struck out due to a lack of interference with freedom to do business – the dealing

---

[44] *Servier* (n 4) [62] and [94]. See also *JSC BTA Bank* (n 3) [6]. This may appear very similar to reason (2). However, it is kept distinct because the general exclusionary rule on pure economic loss *can* be justified in other ways. For a brief summary, see Robert Stevens, *Torts and Rights* (Oxford University Press 2007) 21 (though he rejects the existence of such a general exclusionary rule).

[45] See *Servier* (n 4) [59]-[62].

requirement. At trial, Roth J noted that if the case were not rejected due to the dealing requirement, floodgates concerns would arise as *Servier* could face claims from a large number of parties, including:

> 'all potential generic competitors who suffered loss through their inability to supply a generic version …; any private medical expenses insurer who paid higher …; and, subject to any issues of jurisdiction, all foreign health authorities and insurers in each of the various other states in Europe [could have brought a claim against the defendants].'[46]

The response to this is to bite the bullet. Indeed, there could be extremely wide-ranging liability for the defendants. However, that would be a result of their conscious wrongful action. In torts with laxer fault requirements, such as the tort of negligence, there *is* an argument to be made for limiting the extent of a defendant's liability. However, this argument does not hold true for the unlawful means tort due to a higher necessary level of wrongdoing. Instead, the defendant should compensate all affected, given that they *intended*, by definition, to cause them some harm.[47] This becomes all the more persuasive when one considers the issue as one of deciding who bears the cost of damage. Given that someone will need to bear the cost of the

---

[46] *Secretary of State for Health v Servier Laboratories Ltd* [2017] EWHC 2006 (Ch); [2017] 5 CMLR 17 [34].

[47] cf liability in negligence, where such a powerful moral intuition does not often exist. See, for example: James Goudkamp, 'The Spurious Relationship Between Moral Blameworthiness and Liability for Negligence' (2004) 28(2) Melbourne University Law Review 343.

loss, it is difficult to accept that that burden should fall to an intentionally harmed claimant. Insofar as causation requirements can be met, it should be the party who sought to make a profit wrongfully. The practical importance of holding a claimant responsible will be addressed in more detail below.

In the context of *Servier*, it was argued that the unlawful means tort should not intrude on areas which have been subject to extensive legislation. Roth J noted that there were other means of redress in this case; there was also a claim in competition law for abuse of a dominant position, as well as claims under patent law.[48] It was further feared that a wider tort 'would circumvent the legislative balance' – that is, it would undermine Parliament's intention.[49]

This initially appears to be an attractive argument. There is a strong constitutional reason not to interfere with what Parliament has enacted. Nevertheless, some replies can be advanced that apply in any context – not just where patents are involved. First, as Deakin and Randall argue, the tort has a '<u>residual</u> market-protecting role which we are suggesting for the economic torts comes into play'.[50] The tort should exist in case a statutory scheme fails, even if other parts of the scheme had a delicate balance. This ties back to a purpose of tort law identified by Murphy: 'to move with the times and do 'justice' in novel

[48] *Servier* (n 46) [44].
[49] ibid.
[50] Simon Deakin and John Randall, 'Rethinking the Economic Torts' (2009) 72 MLR 519, 534 (emphasis added).

scenarios as and when the need arises'.[51] A defendant should not be rewarded for coming up with a particularly creative way of causing damage that evades a statutory scheme. Secondly, as Carty notes, if the claimant is entitled to or has received statutory compensation, that would be relevant when calculating damages, thus ensuring that the tort does not offer a windfall payment.

Alternative methods of limiting the tort?

Other means of restricting the tort, beyond the dealing requirement, do exist. There has been plentiful academic discussion as to how the tort could be kept within reasonable bounds through such mechanisms. The claimants in *Servier* submitted three alternative potential control mechanisms. They were as follows:

1. The law would remain as outlined by Lord Hoffmann in *OBG*, but without a dealing requirement.[52] The intention required is that in *Sorrell v Smith*:[53] the tortfeasor need only intend to cause loss through the intermediate actor's

[51] John Murphy, *The Province and Politics of the Economic Torts* (Hart Publishing 2022) 89. See also: John Murphy, 'Contemporary Tort Theory and Tort Law's Evolution' (2019) 32 CJLJ 413. Carty has argued that the tort should instead be seen as a 'liability stretcher' instead of a 'gap filler' (see Hazel Carty, 'The modern functions of the economic torts' (2015) 74 CLJ 261). It is submitted that these two ideas are not mutually exclusive – gaps can be filled by stretching liability. Here, a reason *why liability should be stretched* is to ensure that there are not gaps in the law allowing for unfair competition. As noted below, recognising the importance of this does not mean this must be the tort's gist.

[52] *Servier* (n 4) [92].

[53] *Sorrell v Smith* [1925] AC 700 (HL).

unlawful actions *as a means to an end*, rather than directly to harm the claimant. Much of the control for the limits of the tort would depend on the instrumentality requirement: that is, the requirement that 'the defendant uses the third party as an instrument to strike at the claimant', 'so that the third party's conduct forms a necessary link in the causal chain between the defendant's conduct and the harm suffered by the claimant'.[54]

2. The tort should be extended in three senses, but the requisite intention restricted.[55] First, unlawful means should include criminal unlawful means (like in unlawful means conspiracy), not only civil unlawful means. Secondly, the tort should protect non-economic interests. Third, there should be no dealing requirement. *However*, the tort should be restricted through a narrow test of intention, where the defendant would specifically need to intend to harm the claimant.
3. The court should adopt the Canadian approach outlined in *A.I. Enterprises Ltd. v Bram Enterprises Ltd.*[56] This would be similar to the first alternative. There would be no dealing requirement, and the intention should be the same *Sorrell v Smith* view of intention. *However*, this option would be without the instrumentality requirement in

[54] *Servier* (n 4) [77].
[55] ibid [96]. The claimants put forward the argument in Paul S Davies and Philip Sales, 'Intentional harm, accessories and conspiracies' (2018) 134 LQR 69. Elements of Lord Nicholls's dissent in *OBG* can also be seen in this argument.
[56] *A.I. Enterprises Ltd. v Bram Enterprises Ltd.* [2014] SCC 12, [2014] 1 SCR 177.

OBG, thus leaving a broader tort than under the first alternative.[57]

The first alternative will be advocated for. Though, given that it overlaps with *A.I. Enterprises Ltd. v Bram Enterprises* on intention and the dealing requirement (the third requirement), *A.I. Enterprises Ltd. v Bram Enterprises* is, at times, used to argue those elements of the first alternative.

Removing the dealing requirement

The main challenge to the dealing requirement as a control mechanism follows the form of the second alternative put forward in *Servier*. This challenge is the suggestion that a narrow definition of intention should be used to limit the scope of the tort instead. The most influential account of this argument is Lord Sales' extra-judicial and pre-judicial writing.[58] His Lordship, with Davies, has argued that there should be no dealing requirement. Instead, the tort should require a "specific intention to use unlawful means to harm a particular person, using those means as the club to hit them".[59]

---

[57] *Servier* (n 4) [99]. It must be questioned whether Lord Hamblen was right to make the distinction between 1 and 3 on instrumentality here. See *A.I. Enterprises Ltd.* (n 56) [78]: 'The gist of the tort is the targeting of the plaintiff by the defendant <u>through the instrumentality</u> of unlawful acts against a third party' (emphasis added).

[58] In *OBG*, Lord Hoffmann referred to Sales and Stilitz (n 6). In *Servier*, Lord Hamblen referred primarily to Lord Sales's more recent writing on the issue – see Davies and Sales (n 55).

[59] Davies and Sales (n 55) 77.

This position stems from Lord Nicholls' understanding of the purpose of the tort in *OBG*. Lord Nicholls' conception, adopted by Davies and Sales,[60] was that the tort covered a set of situations (i.e. where unlawful means are used) where illegitimate action intended to harm another is made unlawful.[61] Under that approach, intending to harm another forms the requisite connection between the act and the damage for it to be made unlawful.[62] Since intention forms this nexus, it is claimed that it must be considered more stringently under this position. Intention as a means to an end is not enough to justify making such acts unlawful.

However, a narrow view of intention is not required to meet that threshold, even before one considers other purposes of the tort. The instrumentality requirement provides the sufficient connection, making an illegitimate action unlawful. The defendant is not causally separate from the harm caused because of their unlawful means, providing the justification for giving the claimant standing. Furthermore, there is still some intention to harm the other. Meanwhile, Davies and Sales themselves recognise that English law does not ground liability in bad

---

[60] ibid 75.

[61] cf Lord Hoffmann's view that the tort serves as an exception to privity in tort. It allows a damaged third party to sue a defendant with whom they have not directly interacted but who still caused them damage. For more on this position, see also Stevens (n 44) 174 and 188-89. For Stevens, this presents a large problem for his bilateral structure of torts. This structure entails that a victim of a breach of their rights can only sue the party who breached their rights, but here they are a third party to the dispute.

[62] Davies and Sales (n 55) 76. This is persuasively compared to the nexus required in negligence.

motive.[63] Thus, intention to cause loss as a means to an end (i.e. regardless of the motive) should be sufficient intention to justify making the conduct tortious.[64] Their proposal otherwise pushes English law towards accepting bad motive as key to the grounds for liability.

The dealing requirement should instead be considered as mere *evidence* of instrumentality, which performs the important function just outlined.[65] Lord Nicholls recognised how critical instrumentality was to the tort, noting in *OBG* that 'the function of the tort is to provide a remedy where the claimant is harmed *through the instrumentality* of a third party'.[66] The dealing requirement provides one way in which the defendant, acting through the intermediary, can cause the claimant harm. In other words, the interference with the claimant's freedom to do business with others and consequent loss incurred fulfils the instrumentality requirement. The third party is an instrument which restricts that freedom.

---

[63] ibid 76.
[64] Cf also Lord Hoffmann's assertion that, 'It is not, I think, sufficient to say that there must be a causal connection between the wrongful nature of the conduct and the loss which has been caused': *OBG* (n 1) [58].
[65] See figure 1.
[66] *OBG* (n 1) [159].

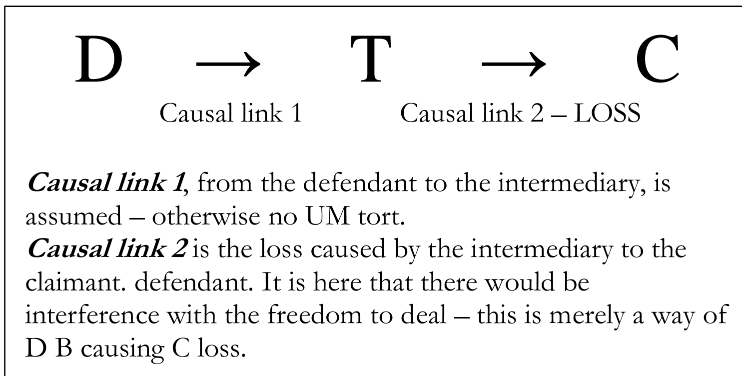

Figure 1 – a visual representation of when dealing and causation overlap

This can be understood more clearly by considering the facts in *Tarleton v M'Gawley*.[67] In that case, the master of the *Othello* (the defendant) fired cannons at Cameroonian natives' vessel (the third party), deterring them from trading with Mr Smith (the claimant's employee). The claimant lost money by missing out on that trade. Hence, Mr Smith's freedom to do business with the natives was interfered with by the unlawful cannon-fire. Framing the issue as an interference with the claimant's liberty to trade does not expose the underlying wrong. It merely describes *how* the intentional economic harm was caused (i.e. is evidence of instrumentality).

Consider, in comparison, a hypothetical situation in which the master of the *Othello* had sailed over to the Cameroonian natives and communicated effectively with them before they were to deliver palm oil to Mr Smith. The master

---

[67] *Tarleton v. M'Gawley* (1793) Peake 270, 170 ER 153.

promised the native Cameroonians five times the value of whatever was offered by Mr Smith at some point in the future if they left the area and thus did not trade with Mr Smith. The master, in this example, never intended to pay this amount, and knew that Mr Smith would miss the Cameroonians and thus not secure the business. In doing all this, the master would have committed the tort of deceit towards the natives.[68] There is a strong argument that the master never impeded any *freedom* of dealings. He simply stopped business dealings from happening. However, he nonetheless unlawfully and maliciously caused Mr Smith's employer damage.

Such a scenario exposes the shortcomings of the dealing requirement as a fundamental element of the tort. First, the requirement itself can suffer from a lack of clarity. The extent to which freedom must be interfered with is up for question. It could equally be argued that, by getting the natives to leave, Mr Smith was no longer free to trade with them. As a criterion, 'freedom' offers little guidance. Secondly, the master's conduct seems equally wrong towards Mr Smith *regardless* of whether there is true interference with the 'freedom' to deal. Yet, Mr Smith's employer's entitlement to compensation for missing out on the trade would depend on proving such interference. Thus, we see that the dealing requirement is: (a) not a necessary theoretical part of the underlying wrong; (b) at best *evidence* of it; and (c) itself vulnerable to ambiguity. Hence, the dealing requirement is at best a *practically useful* limiting mechanism, rather than one which should be, in principle, part of the tort.

[68] Applying the test laid out by Lord Clarke in *Hayward v Zurich Insurance Company plc* [2016] UKSC 48, [2017] AC 142 [18].

4. The way forward: a broad test of intention

A more radical alternative is therefore preferable. This would be to keep a broad test of intention (as it was in *OBG*), to dispense with the dealing requirement, and to keep the instrumentality requirement (i.e. the first alternative above). This would be in line with the Canadian position, barring instrumentality. Importantly, in *Clerk and Lindsell on Torts*, it is said that 'a narrow form of intention'[69] was clarified as the position in Canadian law in *A.I. Enterprises Ltd. v Bram Enterprises Ltd.*[70] Whilst Cromwell J in that case *did* use that term,[71] it is slightly deceptive. As Lord Hamblen noted in *Servier*,[72] Cromwell J's description of 'narrow intention' is broader than that of David and Sales.[73] Narrow intention, for Cromwell J, included 'an intention to cause economic harm to the claimant because it is a necessary <u>means of achieving an end</u> that serves some ulterior motive'[74] – that is, *Sorrell v Smith* intention. Davies and Sales' intention, meanwhile, requires the defendant to intend to cause the other harm. Their view requires a 'specific intention to use unlawful means to harm a particular person

---

[69] Andrew Tettenborn (ed), *Clerk and Lindsell on Torts* (24th edn, Sweet & Maxwell 2023), ch 23, para 95.
[70] *A.I. Enterprises Ltd* (n 56).
[71] E.g. ibid [87], [95].
[72] *Servier* (n 46) [99].
[73] It is what has so far been described as the broad position.
[74] *A.I. Enterprises Ltd.* (n 56) [95] (emphasis added).

should be required, using those means as the club to hit them, in Lord Devlin's language'.[75]

It is worth noting that Cromwell J distinguishes the above intention from what he describes as a broader level of intention – 'knowledge that the course of conduct undertaken will have the inevitable consequence of causing the claimant economic harm'.[76] The distinction verges on non-existent and is regrettable. His definition of a broader level of intention appears simply to be wilful blindness, and should be considered as forming part of *Sorrell v Smith* intention.

Accepting the *Sorrell v Smith* view of intention would lead to a tort that is open to more claims. It is evident that this would be the case by comparing the broad view of intention to Hazel Carty's argument for a narrow view of intention. She has argued that the dealing requirement 'adds nothing to … [the Sales-like] 'targeted' requirement of intention'.[77] Cases excluded by the dealing requirement would also be excluded by a narrow definition of intention. This is likely correct. The outcome in *Servier*, for example, could instead be justified by saying that the defendants did not specifically intend to *harm* the NHS, but rather only to profit. Consider also, the oft-used example of a hypothetical pizza delivery company, X, whose drivers drive dangerously (using unlawful means) to deliver pizza more quickly.[78] Pizza delivery company Y thus suffers a loss as customers move to buy from X. Analysis following the dealing

[75] Davies and Sales (n 55) 77.
[76] *A.I. Enterprises Ltd.* (n 56) [95].
[77] Carty (n 26) 98.
[78] See, for example, *OBG* (n 1) [266].

requirement (no interference here) and a narrow view of intention (no targeting of Y by X) lead to the same conclusion – no liability under the tort.

A broader view of intention would not necessarily exclude all such cases. This should not, however, be considered the terrifying prospect that the courts make it out to be for several reasons. First, the test of intention is still a relatively narrow fault element,[79] in line with Cromwell J's description of it. As noted in his judgment, knowledge of the *possibility* of harm would not be enough.[80] The defendant needs to act in full knowledge of the effect of their actions. Second, in cases where a wide number of actors are harmed and have a legitimate claim, one of two situations will likely materialise. One possibility is that although many are harmed, each party only suffers a small loss. In such a scenario, the defendant will not be liable for much; the expense and hassle of bringing a claim may not be worth it or a settlement could be readily reached. Another possibility is that there has been a large amount of harm to a great deal of actors. In this case, the defendant should live with the consequences of intentionally acting unlawfully, knowing that they would harm such actors yet still deciding to go ahead with their actions. This same principle applies even if many smaller claims are brought. Third, there is the requirement of unlawful means. This ensures that the tort does not intrude into areas that should be left to a market, where

[79] Cf mere recklessness as a requirement. For a scale of potential fault elements here, see *A.I. Enterprises Ltd* (n 56) [95].
[80] *A.I. Enterprises Ltd* (n 56) [95].

businesses are legitimately competing for an advantage, rather than breaking the rules for a competitive advantage.

This final reason brings us to the critical importance of the unlawful means tort, one identified by Deakin and Randall.[81] That is, the tort serves an important function in ensuring *productive* competition in a capitalist society. One of the tensions inherent in this economic structure is that it is in the general interest to ensure that companies do not become *too* successful so that they *become* the market – it is for that reason that antitrust/competition rules exist. As Deakin and Randall argue, the tort should exist to protect the free market from itself.

It should be added that this protection is achieved through the tort's ability to influence the behaviour of actors, ensuring that they do not act unfairly in a market. It is important to protect the market *mechanism* by influencing the actions of its actors. A cartel, for example, is undesirable because it means that the very process of businesses competing on price, service and effectiveness has broken down. Such protections can operate either by forcing a company to act a certain way (e.g. requiring approval on mergers), or by creating disincentives to act unfairly. With the unlawful means tort, the 'penalty' for unfair behaviour is essentially of the profit made, given that the damage suffered by business rivals should be at least in a similar region to the gain of the tortfeasor. The tortfeasor thus has little or nothing to gain from acting unfairly. The unlawful means tort serves to maintain an effective process where companies do not try to 'cheat' by acting unlawfully to harm other actors. If they do, they open

[81] Deakin and Randall (n 50); see especially 534-535.

themselves up to claims from those that they intended to harm thereby. Otherwise, committing the tort is a way in which a business could try to 'win' a market by damaging its competitors (results of higher prices, worse service, a business being made insolvent, etc.) The importance of a broader view of intention within the unlawful means tort is thus clear – it ensures that a larger proportion of those in a market damaged by another's attempt to 'cheat' get redress, and the market is restored closer to its prior, more procedurally functional state.

Nevertheless, it is important not to lose sight of the fundamental issue at hand. Deakin and Randall argue that if one considered the protection of competitive interests to be the gist of economic torts, this would replace the idea that the gist is intentionally causing economic damage.[82] This is not the case, however. The basic justification for a tort's existence must be kept separate from why a tort is thought important. The reasons for importance should perhaps influence how a tort is shaped, but they are not the gist of the action. These two things may be the same, but they need not necessarily be. Reasons for importance are perhaps better described as the good 'policy' reasons for a tort and its structure – utilitarian benefits from making unlawful the conduct that has been deemed wrong. Here, the basic principled justification for the existence of the tort is to remedy where

[82] ibid 532: 'If the economic torts are seen in this way, as regulating the competitive process, it becomes a distraction (at best) to try to fit them into a wider principle of liability for intentionally causing harm.'

someone has intentionally been harmed financially. It is important to protect this to ensure a functional market.

Conclusion

Was *Servier* a confusing decision by Lord Sales? Unlike Lord Hamblen, Lord Sales had written multiple articles arguing for an unlawful means tort shaped very differently to how it was in *Servier*. His Lordship is now sitting in the country's highest court, free to shape this economic tort, and yet nothing changed. To see the decision as a true surprise – one of a dramatic volte-face by Lord Sales, together with a now settled tort – ignores subtleties in the judgments in *Servier*. Lord Hamblen considered that *Servier* was 'not … an appropriate case to consider the possibility of adopting the Sales/Davies reformulation of the tort'.[83] Lord Sales himself thought 'the present appeal … in no way [to be] an appropriate vehicle for undertaking any such exercise'.[84] This perhaps leaves some room for the courts to conduct another set of radical reforms to the economic torts in line with Lord Sales' published views. It is nevertheless disappointing that the proposal to keep the tort as it was in *OBG,* yet without the dealing requirement, was dismissed in *Servier* in far more certain terms than the argument by Davies and Sales.

There is irony in the fact that Lord Hoffmann recognised that the tort is important in protecting standards of behaviour in business – the very reason that this article suggests that his

---

[83] *Servier* (n 4) [97].
[84] ibid [103].

Lordship was wrong to push for a narrow tort[85]. Nevertheless, with fuller consideration of how standards in business are protected, it appears that the tort should have a wider scope than the courts have accepted thus far. Persuasive challenges have been mounted to the tort as one that only protects business interests and not personal ones,[86] to the definition of unlawful means,[87] and to the existence of the dealing requirement.[88] It can only be hoped that the courts will come to realise the true importance of this tort as a general protection of a *fair* free market, and reverse the course taken in *Servier*. This should be done whilst recognising that the gist of the tort is still to protect from intentional economic harm. Abandoning the dealing requirement and maintaining the current test of intention set out in *OBG* would be a positive step in the right direction.

---

[85] *OBG* (n 1) [56].
[86] See Murphy (n 7).
[87] Lord Nicholls in *OBG* (n 1) [149]-[163]. See also Davies and Sales (n 55) 70-71. Note also Lord Sales recognising the potential for change in this, in *Servier* (n 4) [102].
[88] See Roderick Bagshaw, 'Lord Hoffmann and the Economic Torts' in Paul S Davies and Justine Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart 2015) 64-70.

Past as Prologue: Roman Law and the Interpretation of International Space Law Governing the Use of the Moon and Other Celestial Bodies

Nathan Oliver*

Abstract—This article argues that the Roman legal concepts of *res nullius* and *res communes* can be fruitfully applied to the legal regime created by the Outer Space Treaty (OST) in order to articulate a legal, Treaty-compliant basis for the extraction of natural resources from the Moon and other celestial bodies. The first section of the article scrutinises the text of the OST, which mandates that the acquisition by States or their authorised actors of property rights in outer space must not involve any claims of territorial sovereignty. The second section proffers Roman legal ideas as a potential solution to this quandary. Applying Roman

---

* Harris Manchester College, University of Oxford. I am most grateful to the OUULJ Editorial Board for all their hard work, and extend my sincere thanks to the Associate Editors whose many constructive comments on earlier drafts rendered this article fit for publication. I would also like to thank those who have endured rather more discussion of space law than they bargained for at breakfasts, lunches, and dinners. All errors and omissions remain my own.

legal thought to the vexed question of celestial resource extraction, this article advocates for the recognition of lunar resources as appropriable *res nullius*, enabling their use while safeguarding the status of celestial bodies as 'the province of all mankind.'

Introduction

After more than 50 years, humankind is poised to return to the Moon. A transformative new era of lunar activity is imminent, as rapidly advancing technological capabilities will enable the exploration and use of the Moon by public and private actors from across the globe.[1] Whereas the scramble to reach the Moon in the 20th century was driven by great power rivalry and a quest for national prestige, commercial interests in the 21st century, particularly in the mining and extraction of resources, are projected to be the principal drivers of lunar exploration and use.[2]

There is however a serious problem: as Section I of this article will demonstrate, the legality of the exploitation of lunar resources remains an open, unsettled question. The foundational document of space law, the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (hereafter referred to as the 'OST'), establishes the broad contours of the

[1] 'Which Firm Will Win the New Moon Race?' *The Economist* (London, 25 January 2023) 77.

[2] The Moon is rich in resources not easily obtained on Earth, such as Helium-3 and numerous rare earth metals. While a discussion of the specific mining opportunities afforded by the Moon is beyond the scope of this paper, it is worth noting that, at present, water is easily the most important lunar resource. The Moon is estimated to contain 'at least' 600 million metric tons of water ice on or near the surface of its north pole alone, the exploitation of which would be essential for the long-term sustainment of human life on the Moon. See Bill Keeter, 'NASA Radar Finds Ice Deposits at Moon's North Pole' (*NASA*, 2 March 2010).

legal landscape in outer space, but makes no direct mention of space resources and contains no explicit provisions regarding their exploitation.[3] Without legal certainty, it is unlikely that profitable lunar ventures will ever get off the ground. What is needed is a coherent legal framework that permits the extraction of resources from the Moon and other celestial bodies and is consistent with the fundamental principles of the OST.

Enter Roman law. It is the contention of this article that the interrelated Roman legal concepts of *res nullius* and *res communes* can contribute a great deal to the ongoing debate concerning the legal status of celestial bodies and their resources. Specifically, it will be argued that these two mutually reinforcing concepts of Roman law, when applied to the legal regime created by the OST, resolve latent interpretational ambiguities and encourage the designation of lunar resources as *res nullius* susceptible to legal and treaty-compliant exploitation, while preserving the inalienable *res communis* status of the Moon itself.[4] In addition, it is submitted that Roman legal concepts can function as valuable heuristic tools which can fruitfully be used to evaluate fundamental issues pertaining to the legal status of outer space and its natural resources.

---

[3] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Outer Celestial Bodies (entered into force 10 October 1967) 610 U.N.T.S. 205.
[4] The Moon's inalienable *res communis* status is enshrined by Article II of the OST. See Section IB, below. The relationship between *res communis* (modern international law) and *res communes* (Roman law) is discussed in Section IIA.

I. Property Rights on the Moon under the OST

The OST is the indispensable point of departure for any discussion of property rights in outer space. More than half a century after it came into force, the foundational instrument of space law still stands as the single most important international convention governing human activities in outer space, for it establishes the basic contours of the celestial legal order, and enjoys near-universal recognition among space-faring States.[5] Articles I and II of the OST establish, respectively, two 'guiding principles': (1) outer space is free for exploration and use by all States; (2) outer space, including celestial bodies, is not subject to 'national appropriation' by any means.[6] These principles are regarded by authoritative commentators as having become customary international law.[7] However, as Lisk notes, the overarching principles enumerated in Articles I and II are

---

[5] Ram S. Jakhu, 'Evolution of the Outer Space Treaty' in Ajey Lele (ed.), *Fifty Years of the Outer Space Treaty: Tracing the Journey* (New Delhi 2017) 13.

[6] David E. Marko, 'A Kinder, Gentler Moon Treaty: A Critical Review of the Current Moon Treaty and a Proposed Alternative' (1993) 8(2) Journal of Natural Resources and Environmental Law 293, 299.

[7] Francis Lyall and Paul B. Larsen, *Space Law: A Treatise* (2nd edn, Routledge 2018) 64. The designation of a rule as customary international law both reflects and reinforces its normative strength. The UN regards a principle or rule as customary international law if widespread state practice demonstrates consistent adherence to it, and if that adherence comes to be motivated by a belief among States in the obligatory nature of that principle or rule. See Michael C. Wood, 'Second Report on Identification of Customary International Law' (New York, 2014) UN A/CN.4/672, 72-74.

'incredibly general' and their 'exact scope and application remains in question'.[8]

In this section, Articles I and II will be discussed in turn and together, in order to establish the purpose and nature of the legal regime that the OST brought into being, and the extent to which proprietary rights are permitted on celestial bodies. It will be argued that despite its ambiguity, on balance the OST broadly favours the use of outer space, including its exploitation. It will be seen that such rights as the Treaty permits States to exercise in space are over persons and things, not territory. The prohibition against claims of territorial sovereignty in space and on celestial bodies places significant limitations upon the nature and scope of proprietary rights, but does not preclude them altogether. In the next section, the contention will be advanced that Roman legal doctrine is capable of reconciling the tension between the Treaty's purpose, and the restrictions it imposes.

A. Article I – The Object and Purpose of the OST: Freedom of Exploration and Use

Article I, paragraph 1 of the OST is programmatic, and clearly establishes the treaty's fundamental object and purpose. It declares that '[t]he exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries … and shall be the province of all mankind.' The next sentence contains important provisions clarifying the nature of this principle: 'Outer space …

[8] Joel Lisk, 'Review Essay: Space Law: A Treatise By Francis Lyall And Paul B Larsen Routledge, 2018' (2018) 39(2) Adelaide Law Review 453, 460.

shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.'

As Hertzfeld has aptly observed, 'it is not the physical domain of outer space . . . but the activity itself, the "exploration and use" of outer space, which is addressed.'[9] In this connection, the full title of the Treaty should again be recalled: it is the 'Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies'. The commonplace shortening of the title to 'Outer Space Treaty' is certainly expedient, but the programmatic emphasis on exploring and using outer space must not be overlooked. Establishing that all States have the freedom to explore and use outer space, and laying down certain foundational parameters to govern such exploration and use is, plainly, the principal object and purpose of the Treaty. It is submitted that cognisance of the overarching objectives of the OST – which are clearly articulated by both the title and the opening clause – adjures a purposive, use-friendly approach to the interpretation of the Treaty's other provisions.

B. Article II – The Nature of the Legal Regime Established in Outer Space

Article II of the OST is the most contentious provision of the entire Treaty, for it lays down a fundamental rule in terms which

---

[9] Henry R. Hertzfeld, Brian Weeden, and Christopher D. Johnson, 'How Simple Terms Mislead Us: The Pitfalls of Thinking about Outer Space as a Commons' [2016] IAC-15 - E7.5.2 x 29369, 3-4.

leave the scope of its application indeterminate.[10] It succinctly declares that '[o]uter space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.' The apparent simplicity of this statement belies its ambiguity, and two questions naturally arise in connection with Article II: what is meant by the prohibition of 'national appropriation', and what are the implications of this non-appropriation principle for the legal status of outer space and its resources?

It is evident that, in broad terms, Article II forbids any extension of territorial sovereignty into outer space.[11] In addition to barring 'national appropriation' by means of traditional public international law methods of acquisition ('claim of sovereignty', 'occupation', 'use'), a tellingly categorical catch-all coda is appended to Article II – 'or by any other means.'[12] However, it is precisely the sweeping nature of Article II's language which makes ascertaining the precise scope of application of Article II's prohibition on 'national appropriation' difficult.[13]

---

[10] For a summary of the myriad interpretations advanced in connection with Article II, see Stephan Hobe, 'Adequacy of the Current Legal and Regulatory Framework Relating to the Extraction and Appropriation of Natural Resources' (2006) McGill University IASL & IISL Workshop on Policy and Law Relating to Outer Space Resources) 204-213.

[11] See Ogunsola O. Ogunbanwo, *International Law and Outer Space Activities* (first published 1975, Springer, 2013) 77.

[12] See Ian Brownlie, *Principles of Public International Law* (5th ed., OUP, 1998) 129-130 for an overview of the traditionally acknowledged means of territorial acquisition in public international law.

[13] The fact that the phrase 'national appropriation' is scarcely encountered elsewhere in international law makes interpretation of this article yet more difficult. As Hobe memorably put it, the phrase 'national

What is it, exactly, that cannot be appropriated? Specifically in relation to celestial bodies including the Moon, does Article II only prohibit their appropriation *en bloc*, or does this prohibition also extend to the resources of celestial bodies? We shall return to this crucial question shortly, in subsection C. For the present, however, it is important to emphasise the fact that Article II categorically prohibits any State from extending its sovereign territory into outer space.

This is hugely consequential. To understand the profound effect of Article II on the legal status of outer space, a brief summation of the way in which international law divides the world (or rather, the cosmos) is necessary. In spatial terms, international law recognises four regimes: (1) territory subject to the sovereignty of a State or States; (2) territory not formally subject to the sovereignty of any State which possesses a special status of some sort (such as, historically, UN trust territories); (3) *res nullius*, which in modern international law connotes territory 'legally susceptible to acquisition by States but not as yet placed under territorial sovereignty'; (4) *res communis*, which refers to an area available for <u>use</u> but which cannot be made subject to the sovereignty of any State.[14] The latter two categories are derived from Roman law, and shall be discussed at length in Section II of this article.

---

appropriation' contains the 'mysterious mix of a private law concept, "appropriation", and a public law concept, "national".'
See Stephan Hobe, 'Adequacy of the Current Legal and Regulatory Framework Relating to the Extraction and Appropriation of Natural Resources in Outer Space' (2007) 32 Annals of Air and Space Law 121.

[14] Brownlie (n 12) 105.

Before the OST came into force, the presumptive status of outer space, under general international law, was bifurcated. Outer space, in the sense of deep space, was regarded as *res communis*, because the acquisition and exercise of sovereignty over a domain that is infinite, intangible, and ever-expanding is conceptually impossible; celestial bodies, on the other hand, were regarded as *res nullius*, being theoretically capable of appropriation by States.[15] Article II upended this presumption. Today, on account of the status of this provision as customary international law, all States are obliged to regard the Moon and other celestial bodies as *res communis*.[16]

C. Articles I and II: Ensuring the Rights of Exploration and Use of the *Res Communis*

To understand why the Moon and other celestial bodies were designated as *res communis* by Article II, we must return to Article I, which establishes the object and purpose of the OST. The overriding objective of the OST is to enshrine that the exploration and use of outer space is a right enjoyed equally by *all* States. Any claim of sovereignty over the Moon or other celestial

[15] See Bin Cheng, 'The Legal Status of Outer Space and Relevant Issues: Delimitation of Outer Space and Definition of Peaceful Use' (1983) 11 Journal of Space Law 89, 91, which delves into the presumptively bifurcated status of outer space and celestial bodies before the OST came into force. See also Zachos A. Paliouras, 'The Non-Appropriation Principle: The Grundnorm of International Space Law' (2014) 27(1) Leiden Journal of International Law 37, 42.

[16] That outer space, including the Moon and other celestial bodies, is to be regarded as *res communis* is universally acknowledged by scholars. This was also the understanding of the national representatives who drafted the 1967 OST: see Carl Q. Christol, *The Modern International Law of Outer Space* (first published 1982, Pergamon) 45ff.

bodies by one or more States would contravene this foundational goal, rendering the exploration and use of outer space no longer the 'province of all mankind'. Thus, in light of the central object of the OST, it is clear that the purpose of Article II 'is to prevent any exclusive claim to outer space and celestial bodies in order to allow the use of these areas as *res communis*.'[17]

Having established that under Article II all areas of outer space are regarded as *res communis*, in order to ensure that their exploration and use is open to all States, we can now return to the question of whether the prohibition of 'national appropriation' applies to the natural resources of celestial bodies. Much necessarily hinges upon the meaning of the term 'use', which is left undefined by the Treaty despite its manifestly central importance.[18] Does 'use', as employed in the Treaty, encompass and countenance the exploitation of a celestial body's natural resources? To attempt an answer to these two interrelated questions, it is necessary to turn to the Vienna Convention on the Law of Treaties.[19] Article 32 states that, where the meaning of a term or provision is ambiguous, '[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty'.

To begin with, it is notable that the UN General Assembly resolution which established the Committee on the

---

[17] Hobe (n 13) 123.
[18] The 'use' of outer space is mentioned repeatedly, throughout the OST. This term is to be found in the full title, the preamble, and in Articles I, II, III, IX, X, XI, and XIII.
[19] Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 U.N.T.S. 331.

Peaceful Uses of Outer Space (UNCOPUOS), responsible for drafting what became the OST, referred to the 'exploration and exploitation of outer space'.[20] During debate concerning the final wording of the treaty in July 1966 (by which time the term 'use' had come to replace 'exploitation'), the French representative expressed the view that 'use' is to be construed as equivalent to 'exploitation', a position which was supported by several other representatives; unfortunately, his recommendation that the legal subcommittee should define the terms 'exploration' and 'use' in the final treaty was not taken up.[21] In essence, what exactly was meant by 'use' was left to later determination by state practice. Yet in the absence of any explicit reference to the exploitation of natural resources in the OST, the legal basis for Treaty-compliant exploitation of space resources remains murky, and essentially unarticulated.

We can conclude that Article II prohibits any claims of territorial sovereignty in outer space, thereby designating the Moon and other celestial bodies as *res communis*. We can also conclude that an appropriately purposive interpretation of this provision does not prohibit the appropriation of natural resources found on celestial bodies, so long as territorial sovereignty is not claimed or conferred over the areas where such use takes place. This requirement imposes substantive limits on any property regime which may be implemented in outer space, precluding a

---

[20] 'International Co-Operation in the Peaceful Uses of Outer Space' (12 December 1959) UNGA Resolution 1472 (XIV): 'Recognizing the great importance of international cooperation in the exploration and exploitation of outer space.' Note, in the very name of the committee, the centrality of 'use'.

[21] The views of the French representative are quoted in Christol (n 16) 39-40.

territorial basis for claims of rights of ownership. This prompts three interrelated, fundamental questions – what is sovereignty, what is property, and can the latter exist without the former?

D. Property Rights Without Territorial Sovereignty?

What constitutes sovereignty? Sovereignty may be understood as the comprehensive complement of rights, duties, and powers which a State, *de jure*, holds over persons, things, and territory, to the exclusion of other States.[22] Exclusive ownership of territory is fundamental to the exercise of territorial sovereignty, but is not a *sine qua non* for the exercise of sovereign control over persons and things. As Judge Max Huber wrote in the influential *Island of Palmas Case* (1928) between the Netherlands and the United States:

> 'International law . . . [has established the] principle of the exclusive competence of the State in regard to its own territory, in such a way as to make it the point of departure in settling most questions . . . [T]erritorial sovereignty belongs always to one, or in exceptional circumstances to several States, to the exclusion of all others. The fact that [certain] functions of a State can be performed by any State within a given zone is, on the other hand, precisely the characteristic feature of the legal situation pertaining in those parts of the globe which, like the high seas or lands without a master, cannot [*res*

[22] Brownlie (n 12) 106.

> *communis*] or do not yet [*res nullius*] form the territory of a State.'[23]

Where territorial sovereignty does not or cannot exist, as in outer space, States may still, as Judge Huber indicates, perform certain sovereign functions and exercise certain sovereign rights, and this extra-territorial competence over persons and things is encompassed by the concept of 'jurisdictional sovereignty'.[24] Article VIII of the OST explicitly grants States jurisdiction in the following terms:

> 'A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and any personnel thereof, while in outer space or on a celestial body. Ownership of objects launched into outer space, including objects landed or constructed on a celestial body . . . is not affected by their presence in outer space or on a celestial body, or by their return to the Earth.'

[23] See United Nations Reports of International Arbitral Awards (1947) 2, 838-9.

[24] See Martin Dixon, Robert McCorquodale, and Sarah Williams, *Cases & Materials on International Law* (6th ed., OUP, 2016) 281ff. The authors describe jurisdictional sovereignty as a broad-ranging concept which includes that 'part of the exercise of its sovereignty' which a State exerts over persons (both natural and legal). It is this 'personal' aspect of jurisdictional sovereignty, and specifically its extra-territorial dimension – which Article VIII of the OST explicitly grants to signatory States operating in outer space – that concerns us in this article.

Thus, Article VIII establishes that States are competent to exercise jurisdiction over persons and things in outer space. Furthermore, States Parties are under a positive obligation to ensure that entities subject to their jurisdiction comply with the provisions of the OST, by virtue of Article VI:

> 'States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental or non-governmental entities … The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty.'

While the question of the extent to which the provisions of the OST apply to private actors, writ large, is beyond the scope of this paper, it is submitted that the Treaty's provisions indirectly apply to all private actors whose activities are authorised by States Parties. This is due to the important provisions to be found in Articles VIII and VI, which establish that States Parties retain extra-territorial jurisdiction over persons and objects launched into outer space, in order to ensure that all activities conducted in outer space are carried out in conformity with the provisions of the Treaty.

Property is conventionally understood, in the context of public international law, as consisting of a fourfold 'bundle of

rights'.[25] These are the right to possess, to right to use, the right to exclude, and the right to transfer.[26] Just as sovereignty can be broken down into constituent elements (the most salient being territorial sovereignty and extra-territorial jurisdiction over persons and things subject to state-control), so too can the rights of property be conceptually partitioned. In international law, the exercise of all four proprietary rights over territory confers 'absolute title', a status tantamount to territorial sovereignty, which is precluded by the OST's designation of outer space as *res communis*.[27] However, as Ogunbanwo observes, 'the prohibition of absolute title does not mean that States are prohibited from exercising any rights' in outer space.[28]

By virtue of the prerogatives of jurisdiction and control over persons and space objects granted to States by Articles VIII and VI, it follows that certain property rights – embodied by the explicit retention of '[o]wnership of objects launched into outer space' (Article VIII) – already exist in outer space. Can States' continuing jurisdictional sovereignty over persons and objects launched into outer space form the basis for the exercise of property rights over natural resources which said persons and

---

[25] Ezra J. Reinstein, 'Owning Outer Space' (1999) 59 Northwestern Journal of International Law and Business 72.
[26] ibid.
[27] Brownlie (n 12) 146. At a minimum, the right to exclude is inimical to outer space's *res communis* status. In addition to Article I, see also Article XII of the OST: 'All stations, installations, equipment, and space vehicles on the Moon and other celestial bodies shall be open to representative of other States Parties to the Treaty'.
[28] Ogunbanwo (n 11) 69. The precise nature of those rights which are permitted in outer space shall be dealt with in Section II.

objects might acquire therein, without contravening the OST? That is the critical question.

E. An Affirmative Answer in Search of An Appreciable Justification

Numerous commentators, not to mention States, have answered this question in the affirmative, without providing a persuasive legal basis for this claim.[29] In recent years the United States of America, the world's pre-eminent space-faring power, has made a concerted effort to forge consensus around the position that the extraction of natural resources from celestial bodies is an OST-compliant activity which does not violate Article II's prohibition of 'national appropriation' and claims of extra-terrestrial territorial sovereignty. The chosen instrument of the United States for the process of building consensus around its position regarding the exploitation of natural resources in outer space is the 2020 Artemis Accords, a non-binding plurilateral agreement which seeks to establish a framework for cooperation in the exploration and use of the Moon and other celestial bodies.[30] The provisions of the Artemis Accords are explicitly rooted in the

---

[29] See Carl Q. Christol, 'Article 2 of the 1967 Principles Treaty Revisited' (1984) 9 Annals of Air and Space Law 217ff.

[30] Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of The Moon, Mars, Comets, and Asteroids for Peaceful Purposes (13 October 2020). See Rossana Deplano, 'The Artemis Accords: Evolution or Revolution in International Space Law?' (2021) 70(3) Int'l & Comp LQ 799, 800: 'The intention of the United States is to gather consensus around its interpretation of the Outer Space Treaty with regard to the exploitation of the Moon's resources.' As of writing, 33 States have signed the accords, including the following major space-faring nations: France, Germany, India, Japan, Mexico, South Korea, the United Kingdom, and the United States.

OST, with the clear intent being to build upon, rather than replace, the principles which international space law's founding document established. With this in mind, the contents of Section 10, paragraph 2 of the Artemis Accords must be regarded as a significant step towards the formation of a consensus in support of the position that the exploitation of natural resources on celestial bodies does not contravene the non-appropriation principle laid down by the OST:

> 'The Signatories emphasize that the extraction and utilization of space resources, including any recovery from the surface or subsurface of the Moon, Mars, comets, or asteroids, should be executed in a manner that complies with the Outer Space Treaty and in support of safe and sustainable space activities. The Signatories affirm that the extraction of space resources does not inherently constitute national appropriation under Article II of the Outer Space Treaty.'

As the United States and its international partners, including the United Kingdom, continue their efforts to forge a global consensus around this position and establish new rules of customary international law permitting the extraction of natural resources from the Moon and other celestial bodies, it will be necessary to articulate and defend the legal basis for their interpretation of Article II of the OST.

F. Conclusion: The Need for a Practicable Legal Theory

The OST does not prohibit the acquisition and exercise of property rights over natural resources in outer space, nor does it explicitly recognise them. The development of a legal regime governing the exploitation of natural resources in outer space was essentially left to State practice, with the caveat that such a regime must not lead to the extension of territorial sovereignty into outer space. In order for any legal regime developed by States to attract the *opinio iuris* necessary to establish a definite norm of customary international law permitting the exploitation and ownership of natural resources in outer space, it is necessary for it to be grounded in a coherent legal theory that delineates the relationship between space resources and the domain of outer space itself. This theory must be capable of justifying the position that the recognition of property rights over outer space resources, by a State on behalf of those falling under its jurisdiction, does not *ipso facto* constitute a claim of sovereignty in outer space. It is at this point that Roman law enters the picture, and offers just such a theory.

II. Thinking With and Through Roman Law

Classical Roman law articulated a sophisticated and multifaceted approach to what Rose refers to as 'nonexclusive property', formulating many different categories of such property in response to various social, economic, and above all, practical

considerations.[31] Broadly speaking, the various Roman legal categories of nonexclusive property all connote those things which were available to all, and subject to the exclusive control of none. A diverse range of property concerns that are often 'blithely lumped together as 'the commons' in our own legal and economic thinking' were given sustained, nuanced, and differentiated treatment by the Roman jurists.[32] In this section, it will be submitted that consideration of the ways in which Roman law dealt with the disposition of 'nonexclusive property' and its concomitant resources can yield important insights into the current and future state of the legal regime in outer space, and could provide the theoretical basis for the establishment of a new customary norm of international law. Classical Roman law may be ancient, yet '[t]he ideas it reflects remain evergreen, despite changing times and shifting structures.'[33]

Specifically, at issue in the ensuing discussion are the Roman legal concepts of *res communes* and *res nullius*, and the applicability of these concepts to celestial bodies and their

---

[31] Carol M. Rose, 'Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age' (2003) 66 Law & Contemp Probs 89, 91. Rose identifies the Roman categories of nonexclusive property as *res nullius*, *res communes, res publicae*, *res universitatis*, *res divini iuris*, and *res extra commercium* (92-109). Only the first two will be dealt with in this article, yet the intellectual dexterity of the Roman approach to this topic, exemplified by the sheer number of categories, is important to note.

[32] ibid.

[33] L. F. E. Goldie, 'Title and Use (and Usufruct) – An Ancient Distinction Too Oft Forgot' (1985) 79 American Journal of International Law 689, 691.

resources.[34] It will be argued that the Roman legal concepts of *res communes* and *res nullius* convey three fundamental propositions of salutary value when considering the present and future state of the legal regime governing the use of celestial bodies. The first is that *res communes* and *res nullius* are interrelated: in Roman law they are not opposites, but mutually reinforcing corollaries. The second is that the right to access and appropriate natural resources from *res communes* is not just an aspect of these spaces, it is the principal purpose underlying this legal category. In other words, *res communes* exist in order to guarantee uninhibited, universal use-rights with respect to natural resources. The third proposition concerns the conditions of ownership that Roman law attached to the appropriation of natural resources from *res communes*. For any property rights to become vested, actual control over the resources in question had to be demonstrable and ongoing.

A. The Containers and its Contents: Distinguishing Roman Law from International Law

It is necessary to begin with a matter of semantics. The terms *res nullius* and *res communis* carry distinct connotations in the context of Roman and international law. Despite this, it is submitted that the Roman conceptions of *res communes* and *res nullius* may profitably inform our understanding of their international law descendants. This is because the principal distinction lies in the

---

[34] Note that modern international law invariably refers to *res communis*, whereas scholarly discussions of the relevant Roman legal concept render it as *res communes* or, alternatively, *res communes omnium*. For the sake of clarity and in deference to convention, this article will use the term *res communes* when discussing the Roman legal concept, and *res communis* when discussing its international legal descendant.

conception of the relationship between the concepts of *res communis* and *res nullius* – each concept, *qua*, functionally resembles its Roman antecedent. Whereas in modern international law these two concepts are conceived of as diametrically opposed territorial designations, in Roman law *res nullius* is closely related to *res communes*.[35] It is submitted that the modern, oppositional understanding does not preclude the application of Roman legal ideas regarding *res communes* and *res nullius* to the issue at hand, because such application does not necessitate any change to modern international law definitions either of *res communis* or *res nullius*. What Roman law facilitates is an approach to *res communis* spaces which is informed by an understanding of their original purpose – to enable the extraction of the *res nullius* resources contained therein. Such an understanding provides a conceptual basis for the extraction of resources in a manner which accords with the provisions and purpose of the OST.

With one notable exception, *res nullius* in Roman law refers not to territory but to things, of natural origin, which are susceptible to acquisition. The *Institutes of Justinian*, drawing heavily on the work of the Classical Roman jurists, describes the legal status of *res nullius* by way of example, writing that '[w]ild animals, birds, and fish, that is to say all creatures which the land, the sea, and the sky produce, as soon as they are caught by any one become at once the property of their captor'.[36]

---

[35] For the international law definitions of *res nullius* and *res communis*, and the oppositional rather than complementary understanding of their interrelationship, see Brownlie (n 12).
[36] *The Institutes of Justinian* 2.1.12 (trans. J. B. Moyle, 5th ed., Project Gutenberg, 1913) 37.

Things capable of designation as *res nullius* are derived from spaces that closely map onto those classified as *res communes* in Roman law. Again, the *Institutes*: 'the following things are by natural law common to all [*res communes*] – the air, running water, the sea, and consequently the seashore.'[37] The inextricable connection of *res communes* and *res nullius* in Roman Law is apparent, as is the divergence of the latter concept from its territorial connotation in modern international law.[38] But what of the exception alluded to above? In a seemingly esoteric excursus Gaius, the famous jurist of the 2nd century, wrote that '[a]n island arising in the sea (a rare occurrence) belongs to the first taker.'[39] Yet upon reflection, this seeming exception in fact confirms the general rule that things produced by or contained within *res communes* spaces – be they fish, precious stones, or entire islands – are, *ipso facto*, *res nullius* and therefore capable of appropriation in Roman law.

What are we to make of this connection? In one sense, it is evident that both *res communes* and *res nullius* are conceived of as 'common' to everybody, the former in perpetuity, the latter until the moment of appropriation. As Capurso has eloquently argued,

---

Likewise, '[p]recious stones, and gems, and all other things found on the seashore, become immediately by natural law the property of the finder': *Institutes* 2.1.18.

[37] ibid 2.1.1.

[38] As for *res communes*, its basic meaning in international law has not substantively diverged from its Roman private law origins, although the legal persons to whom it applies (States, rather than individuals) are of course different.

[39] *The Digest of Justinian* 41.1.7.3 (trans. Alan Watson, Vol. 4, Penn Press, 1985).

these two Roman legal concepts can together be regarded as a 'complex category, made up of two things in one':

> 'The first one – the "container" – [is] the physical domain at large: the air, the flowing waters, the seas and the seashores [*res communes*]. The second one – the "content" – [is] the set of all things that [can] be found in that domain, such as birds in the air, fish in the sea or pebbles on the seashore [*res nullius*] … [all of which are] susceptible to appropriation once seized.'[40]

This attractive way of thinking about the interrelation of *res communes* and *res nullius*, with the former as a non-appropriable 'container' full of appropriable 'contents', merits consideration as a model applicable to celestial bodies and their natural resources. Article II of the OST establishes that celestial bodies are *res communis*, and therefore not subject to appropriation; Article I establishes that the fundamental purpose of the legal regime created by the Treaty is to enshrine the freedom of all States to explore and <u>use</u> outer space. A great deal of scholarly literature regards these two provisions as fundamentally in tension with one another, with the non-appropriation principle being seen as potentially prohibitive of the most obvious use of outer space – the exploitation of its natural resources.[41] Yet Roman law encourages us to view the non-appropriability of a *res communis*

---

[40] A. Capurso, 'The Non-Appropriation Principle: A Roman Interpretation' (2018) International Aeronautical Congress, Bremen 4.
[41] See, for example, N.D. Cooper, 'Circumventing Non-Appropriation: Law and Development of United States Space Commerce' (2009) 36(3) Hastings Constitutional Law Quarterly 457.

space and the appropriability of its resources as inherently concomitant concepts.

B. Where the Wild Things Are: The Purpose of *Res Communes*

For a long time, the conventional view taken by scholars has been that the Romans created the legal category of *res communes* simply in order to group together all those spaces that are practically difficult or impossible to appropriate, such as the sea and the sky.[42] This misses the mark, overlooking the instrumental purpose underlying the designation of a space as *res communes*. In a word, the rationale behind *res communes* is fundamentally to guarantee common usage and facilitate economically productive activity. As Frier observes, non-legal lists of 'common property' assembled by various Roman writers are known to include things such as sunlight, the wind, and fire; such an approach is never found in Roman legal texts addressing *res communes*, which are concerned with the practical uses for these spaces such as fishing, fowling, and pearling.[43] Chardeaux has persuasively argued that '[u]sage common to all, being the *goal* of the norm of inappropriability, is at the heart of the *res communes* regime.'[44]

---

[42] This view is still sometimes reflected in contemporary scholarship. See Rose (n 31) 93: '*Res communes* encapsulates what might be called the Impossibility Argument against private property: the character of some resources makes them incapable of … exclusive appropriation.'
[43] B. Frier, 'The Roman Origins of the Public Trust Doctrine' (2019) 32 Journal of Roman Archaeology 644.
[44] M.A. Chardeaux, *Les Choses Communes* (LGDJ, 2006) 6. Translation my own.

Roman law's designation of the seashore as *res communes* brings this point home. The seashore is, of course, perfectly susceptible to appropriation. Wealthy Romans were exceedingly fond of seaside villas (Cicero had at least six) and, like today's tycoons, considerably less keen on public beaches.[45] Yet the Roman jurists consistently maintained and over time developed the idea that the seashore was *res communes*, and therefore freely accessible to all legal persons for a broad range of uses.[46] These uses included the building of structures, with the caveats that, in recognition of the non-appropriability of the seashore, no enduring title to the land beneath the structure was granted, nor could such buildings interfere with the public's use-rights.[47] As the great 3rd century Roman jurist Ulpian wrote: 'the sea and its shores are common to everyone, like the air . . . [therefore] no one can be prohibited from fishing'.[48] Perhaps the most telling indication of the instrumental purpose behind the *res communes* legal concept comes from Celsus who – in a passage remarkably

---

[45] Regarding Cicero's seaside villas, see B. C. Fortner, 'Cicero's Town and Country Houses' (1934) 27 Classical Weekly 177ff. Disagreement between Roman jurists and propertied elites over the legal status of the seashore is implicit in an offhand comment made by Cicero: '. . . when question arises about shores, which you jurists all claim are public property . . .' See Cicero, *Topics* (trans. H. M. Hubbell, CUP, 1949) 407.

[46] For an account of how the *res communes* concept developed over time, see M. Schermaier, '*Res Communes Omnium*: The History of an Idea from Greek Philosophy to Grotian Jurisprudence' (2009) 30 Grotiana 20.

[47] *Digest* (n 39) 41.1.14; 41.1.50: 'one [intending to build on the seashore] should be physically prevented, if he builds to the inconvenience of the public.'

[48] *Digest* (n 39) 47.10.13.7. That Ulpian felt compelled to discuss, in the rest of this passage, the legal remedies available to those who were illegally barred from exercising their right to use the seashore demonstrates that the *res communes* concept did not simply acknowledge reality, it sought to shape practice.

redolent of the OST's programmatic Article I declaration that the exploration and use of outer space is the 'province of all mankind' – wrote that 'the sea is for the common use of all mankind.'[49]

The *res communes* concept is not some sort of default depository for spaces that do not readily lend themselves to appropriation. The designation of an area as *res communes* has an instrumental, purposive function, which is to guarantee that rights of access and use can be freely enjoyed by all. At this point, it should be recalled that Article II of the OST modified the presumptive legal status of celestial bodies from *res nullius* (in the sense imparted to that term by international law) to *res communis*. Confronted with a dilemma analogous to that which the Roman jurists faced with respect to the seashore, the drafters of the OST chose to enshrine the non-appropriability of celestial bodies. The purpose behind designating celestial bodies as *res communis* was manifestly to prevent exclusive territorial claims from being made, in order to ensure that all could explore and use celestial bodies. Yet the question of whether the extraction of natural resources constitutes a licit use is left open by the OST. The Roman jurists were clear-eyed about the sorts of use which *res communes* spaces are meant to facilitate: the extraction and exploitation of natural resources. Presented with the provisions of the Treaty and the nature of celestial resources, a Roman jurist would be in no doubt that such resources are ripe for the taking.

[49] *Digest* (n 39) 43.8.3 – *maris communem usum omnibus hominibus*. The very next sentence from this passage assimilates the status of the seashore to that of the sea, and specifies that 'the use of the shore or the sea' cannot be impaired.

C. The Contingent Conditions of Ownership

Res communes spaces, in the Roman conception, were established to ensure the susceptibility of the *res nullius* natural resources contained therein to claims of ownership. How, then, was ownership actually acquired over those objects classified as *res nullius* in Roman law? The answer is simple, straightforward, and appealing. The full complement of property rights over *res nullius* were available, but they only vested upon the assumption of actual control over the thing in question.[50] The Roman playwright Plautus illustrated the essence of this notion more than 2,000 years ago, in words that still intuitively resonate today:

> 'Look, you wouldn't call any particular fish in the sea mine, would you, as long as it's in the sea? But <u>those that I catch</u>, supposing I do catch any, <u>are mine</u>. They're my property, and no one else can put a legal claim to them or demand a share of them. I sell them all on the market, in public, as my own stock. Right? Of course I do. <u>For the sea is unquestionably common to all persons</u>.'[51]

---

[50] *Digest* (n 39) 41.1.5: 'The question has been asked whether a wild animal, so wounded that it may be captured, is already ours . . . [t]he majority opinion is that the beast is ours only if we have actually captured it.' See also *Digest* (n 39) 41.2.3: 'Once an animal strays, so that it cannot be found, it immediately ceases to be ours.'

[51] Plautus, *The Rope* (trans. E. F. Watling, Penguin, 1964) 131-2. For further information on the extraordinarily close connection between law and comedy on the Roman stage, and Plautus' intimate familiarity with Roman law, see E. Karakasis, 'Legal Language in Plautus with Special Reference to *Trinummus*' (2003) 56 Mnemosyne 194.

In this passage, the essential features of Roman law's approach to the extraction of *res nullius* natural resources from *res communes* spaces are laid bare. On the basis of his common right to access and use the sea, the fisherman is able to acquire full rights of ownership over any fish which he may capture. However, the acquisition of these rights is wholly contingent upon the removal of the fish from the *res communes* and the continued exercise of control.[52] Until that moment, it continues to be *res nullius*, capable of appropriation by anyone. In other words, there cannot be property rights over resources *in situ*. The great value of this rule for the articulation of an OST-compliant legal framework governing the exploitation of natural resources on celestial bodies is that it creates a distinction between the acquisition of property in things, and the *de facto* appropriation of territory. By necessitating that resources must be physically extracted from the *res communis* in order for property rights to vest, it becomes impossible to claim territory under the guise of claiming resources.[53] By virtue of this rule, the non-appropriable legal

[52] The Roman jurists were much interested in the legal status of *res nullius* resources which were brought under control, and then lost in some way. See *Digest* (n 39) 41.1.44, where Ulpian, noting his disagreement with Pomponius, opines that 'a fish, wild boar, or a bird which escapes from our power will become the property of anyone else who seizes it. [Pomponius, however] thinks that such a thing remains ours [ie does not return to its former *res nullius* status] so long as it can be recovered.' For an illuminating discussion of this passage, and its reverberations in subsequent legal history, see T. Finkenauer, 'On Stolen Swine, Fished Fisherman, and Drowned Dogs' (2011) 7 Roman Legal Tradition 30.

[53] An interesting question, which lies beyond the scope of this paper, is whether the exhumation of resources from beneath the surface of celestial bodies is sufficient for said resources to be deemed 'removed' from the *res communis* and subject to property rights.

status of the 'container' is upheld, without conceptually or practically impeding the exploitation of its 'contents'.

III. Conclusion: The Possibilities and Shortcomings of Roman Law in Outer Space

How can Roman law refine and inform our understanding of the issues which must be addressed by any OST-compliant legal regime purporting to establish a new norm of customary international law permitting the exploitation of celestial resources? Three propositions drawn from Roman law have been put forward in this article. The first is to paradigmatically shift assumptions about the relationship between the non-appropriability of *res communis* spaces and the appropriation of natural resources. By regarding the latter as fundamentally <u>enabled</u> by the former, a more expansive view of use-rights is encouraged. The second is to regard the integral relationship between the 'container' and its appropriable 'contents' as the defining feature of the *res communis* concept. Interpreting legal concepts and categories in terms of their instrumental purpose and practical utility, as the Romans did, is imperative, lest the debate concerning the OST and the exploitation of natural resources loses sight of the Treaty's ultimate goal: to facilitate the exploration and use of outer space. Finally, the rule of Roman law that *res nullius* natural resources cannot be owned until they are removed from their environment and brought under actual control is to be commended, as an indispensable means of

maintaining the non-appropriability of the *res communis* itself, a principle that must be upheld for any legal regime to be consistent with the OST.

It is submitted that these concepts all hold much promise, and ought to be considered in connection with future efforts to interpret the OST, and articulate the legal basis for the establishment of rules and norms permitting the exploitation of natural resources on the Moon and other celestial bodies. However, one must also consider the shortcomings of the Roman law approach. In the first place, the Roman legal model of natural resource exploitation is predicated upon the tacit assumption that such resources are essentially unlimited; Roman law has no conception of sustainability and makes no provisions concerning the regulation of *res communes*, other than those which guarantee open access and freedom of use. We cannot share this assumption of Roman law, nor the concomitant *laissez-faire* attitude to regulation; the legal regime governing the exploitation of natural resources on celestial bodies must take environmental considerations into account, and provide for the safe, sustainable development and use of such resources.[54] In addition, the rights of exploration and use enshrined in the OST are not unqualified; the Treaty sensibly mandates the establishment of national licensing regimes and the active supervision of space activities over which States have jurisdiction, in order to ensure safety and Treaty compliance.[55] These considerations make it clear that the wholesale reception of Roman legal doctrines into the space law regime, even if such a thing were plausible, would not be advisable. Rather, in the spirit of Roman law, we should adopt a

---

[54] See Reinstein (n 25) 74ff.

[55] See Articles VI and VIII of the OST.

practical, instrumental attitude toward those Roman legal principles that are useful in the articulation of new norms and new rules governing the extraction and utilisation of natural resources on the Moon and other celestial bodies.

Reopening Old Wounds: What the McCulloch Decision Means for Patient Autonomy

August Chen Zirui*

Abstract—Patient autonomy in the selection of medical treatment was recognised as a fundamental interest worth protecting in the case of *Montgomery v Lanarkshire Health Board*. However, in the recent judgment of *McCulloch v Forth Valley Health Board*, the Supreme Court has shown less willingness to give effect to patient autonomy. This article examines the flaws in the Supreme Court's judgment, especially in their unprincipled application of the test in *Bolam v Friern Hospital Management Committee*. The analysis will show why matters of professional skill and judgment cannot be as easily delineated as the Supreme Court might have hoped, and, consequently, why *Bolam* cannot be the sole test used in determining negligence liability in certain clinical situations. Thereafter, this article will demonstrate why the test in *Montgomery* ought to be preferred whenever issues of patient autonomy arise, and not just when advising patients of treatment risks. Ultimately, patient autonomy is a matter of life and death, and not simply a principle to be thrown around, so it is imperative

* Lincoln College, Oxford. I am grateful to the OUULJ team for their continued support and incisive comments. A special thanks goes to my family for their unwavering support. All remaining errors are my own.

that the restraints placed on the principle by the Supreme Court be examined in detail.

Introduction

In the recent case of *McCulloch v Forth Valley Health Board*,[1] the Supreme Court contended with the issue of how to define the range of reasonable clinical treatment options that doctors are under a duty to inform a patient of. The key question was whether the 'professional practice test' found in *Bolam* is determinative of the issue above.[2] While *Montgomery v Lanarkshire Health Board* made clear that the *Bolam* test is not applicable to disclosures of risks associated with treatments, it is unclear whether the *Bolam* test still applies to a doctor's potential duty to advise on alternative treatments and, if so, how it applies.[3] The judgment in *McCulloch* established that the *Bolam* test is applicable to such cases. More generally, wherever issues of professional skill and judgment arise, *Bolam* applies. However, in so doing, it has taken patient autonomy and the principles animating the law of medical negligence two steps back. In response, this article endeavours to construct a more coherent framework for analysing issues of patient autonomy by exploring the shortcomings in the *McCulloch* judgment.[4]

---

[1] *McCulloch v Forth Valley Health Board* [2023] UKSC 26; [2023] 3 WLR 321.

[2] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, 587: the *Bolam* test is stated to be '… whether [a doctor] has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of, if acting with ordinary care.'; the 'professional practice test' shall be referred to as the *Bolam* test from hereon in.

[3] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] AC 1430.

[4] The focus is on cases alleging negligent *treatment* as opposed to negligent *diagnosis*, but references will be made to cases about diagnosis to illustrate certain issues that go to the coherence of the law more generally.

The article is divided into two parts. Part I first outlines the facts of and judgment in *McCulloch*, before critiquing the judgment for its misinterpretation of the *Bolam test* and its inconsistency with case law. Part II makes an argument for the case to be decided on account of the doctor's failure to take due care in advising the patient of his prognosis. Building on the literature on differentiating the standards of care required at different stages of the patient-doctor encounter, Part II also makes recommendations for reform. Namely, the law needs a finer appreciation of the multitude of ways that patient autonomy could arise at different stages of the patient-doctor encounter, and leave room for *Montgomery* to apply accordingly.

Part I

1. *McCulloch v Forth Valley Health Board*

A. Facts

The claimant in *McCulloch* was a 39-year-old man who was first admitted to Forth Valley Hospital after suffering severe chest pains on 23 March 2012.[5] Medical examination and tests revealed abnormalities consistent with a diagnosis of pericarditis. An additional echocardiogram confirmed that there was pericardial effusion and fluid in the abdomen, with the concern being that a combination of pericarditis and pericardial effusion could lead to death.

---

[5] *McCulloch* (n 1) [9]; Pleuritic chest pain is characterised by sudden and intense sharp or burning pain experienced when one inhales and exhales.

Following treatment with antibiotics and steroids, Mr McCulloch's condition improved rapidly.[6] This led to his discharge on 30 March 2012 with instructions to return for another test in four weeks' time.[7] However, upon returning home, Mr McCulloch experienced the same pain and was re-admitted to Forth Valley Hospital on 1 April 2012.[8] The tests revealed that the symptoms observed on his first admission had worsened. Dr Labinjoh, the consultant cardiologist who was involved in Mr McCulloch's care at his first admission, was asked to review Mr McCulloch's echocardiogram on his second admission and visited him to verify her interpretation of said echocardiogram.

Dr Labinjoh did not prescribe or discuss the option of prescribing Non-Steroidal Inflammatory drugs ('NSAIDs'), such as ibuprofen, because Mr McCulloch was not in pain during her visit to him. Nor did Dr Labinjoh think that a repeated echocardiogram was warranted given Mr McCulloch's apparently stable condition.[9] While under the care of his primary care doctors, no further tests were performed, and the treatment plan was unchanged.

The court accepted evidence from the claimant's wife that his condition had deteriorated over the next few days and that he was so unwell that she did not wish to take him home.[10]

---

[6] *Jennifer McCulloch and others v Forth Valley Health Board* [2021] CSIH 21; [2021] SCLR 361 [45].
[7] ibid [14].
[8] ibid [15].
[9] ibid [21].
[10] ibid [24].

Nonetheless, Mr McCulloch was discharged on 6 April 2012 and passed away on 7 April 2012 as a result of a cardiac tamponade caused by pericardial effusion and pericarditis.[11]

B. Judgment

The applicable legal test

The two questions on appeal before the Supreme Court were[12]:

> '(1) What legal test should be applied to the assessment as to whether an alternative treatment is reasonable and requires to be discussed with the patient?
> (2) In particular, did the Inner House and Lord Ordinary err in law in holding that a doctor's decision on whether an alternative treatment was reasonable and required to be discussed with the patient is determined by the application of the professional practice test found in *Hunter v Hanley* and *Bolam*?'

The Supreme Court found that the correct test to be applied was the *Bolam* test.[13] McNair J, citing Lord President Clyde in *Hunter v Hanley*, states that the test is[14]:

> '… whether [a doctor] has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of, if acting with ordinary care.'

---

[11] ibid [25], [7]; cardiac tamponade occurs where fluid, accumulating in the pericardial sac, compresses the heart, and can lead to death.
[12] ibid [43].
[13] ibid [56].
[14] *Bolam* (n 2) 587.

This test is qualified by *Bolitho v City and Hackney Health Authority*.[15] There, the court accepted that expert evidence from medical professionals can be rejected if 'it is incapable of withstanding logical analysis'.[16]

Applying the *Bolam* test, the Supreme Court found that Dr Labinjoh's decision not to prescribe NSAIDs as an alternative treatment was supported by a responsible body of medical opinion ('RBMO') and was not negligent.[17] Given that Mr McCulloch had no pain that indicated the necessity of NSAIDs, and had 'no clear diagnosis of pericarditis', which would, otherwise, have warranted the prescription of NSAIDs, Dr Labinjoh's decision was supported by a RBMO.[18] The Supreme Court added that the doctor was not obliged to inform the patient of fringe alternative treatments or alternative medicine practices.[19]

---

[15] *Bolitho v City and Hackney Health Authority* [1998] AC 232 (HL).

[16] *McCulloch* (n 1) [1]; Jones, M. 'The *Bolam* Test and the Reasonable Expert' [1999] 7 Tort Law Rev 226 at 244: while there are no clear tests provided for determining whether the expert evidence in question is 'logical', one can draw from the *Bolitho* judgment that it is a matter of balancing medical evidence and complex risk/benefit ratios in order to establish what constitutes reasonable conduct in a particular situation. For example, in *Bolitho*, while the decision not to intubate the patient was supported by expert evidence due to it being an invasive and painful procedure, it cannot withstand 'logical analysis' as the risk of not intubating the patient is death.

[17] The standard of a doctor of ordinary skill is established by a responsible body of medical opinion. In practice, this means that as long as one or more doctor(s) of reasonable esteem supports the doctor under examination's course of conduct, said conduct is regarded as being supported by a RBMO.

[18] *McCulloch* (n 1) [22], [56].

[19] ibid [73].

However, mere preference for one treatment option does not relieve a doctor of his or her duty to inform a patient of other acceptable and known treatment options, in line with *Montgomery*.[20]

Lord Hamblen and Lord Burrows justified their decision with the following hypothetical. Given that there are ten possible treatment options for a certain diagnosis and they are all supported by a RBMO, a doctor is entitled to exercise his or her clinical judgment to decide that only four of them are reasonable.[21] The *Bolam* test applies to such exercises of professional clinical judgment, so as long as the doctor's decision is supported by a RBMO, any selection of one or more of the ten treatment options is legally unproblematic. This ensures that doctors are able to readily understand when their duties arise and what the duties require.[22] Since Dr Labinjoh's decision that none of the treatment options were appropriate was supported by a RBMO, she was not under a duty to advise the patient of said treatment options.[23] It will be demonstrated later in the article that this reasoning is faulty and risks arbitrariness.

Consistency with case law

The Supreme Court made extensive references to two cases, namely *Montgomery* and *Duce v Worcestershire Acute Hospitals NHS*

[20] ibid [58].
[21] ibid [57].
[22] ibid [74].
[23] ibid [31].

Trust.[24] The Supreme Court's analysis of these two cases will be explored and critiqued in turn in the following section.

Firstly, the Supreme Court stated that their decision to apply the *Bolam* test is consistent with their judgment in *Montgomery.* The Supreme Court ruled that the duty to advise patients of alternative treatments is 'a matter of professional skill and judgment' and is hence governed by the *Bolam* test and not *Montgomery.*[25] In rationalising the result in *Montgomery,* the Supreme Court stated that the claimant there should have been informed of the *risk* of vaginal delivery based on the *Montgomery* test and of the *reasonable alternative* of a caesarean section based on the *Bolam* test.[26]

Secondly, the Supreme Court cited *Duce* to support their categorical reasoning for subjecting all matters of 'professional skill and judgment' to the *Bolam* test. *Duce* adopted a two-stage test, with the stages being divided between issues of 'professional skill and judgment' and issues that are not.[27] The first stage – identification of medical risks – is subject to the *Bolam* test because it requires professional skill and judgment.[28] The second stage of the test – whether a patient should have been told about

---

[24] *Montgomery* (n 3); *Duce v Worcestershire Acute Hospitals NHS Trust* [2018] EWCA Civ 1307; [2018] PIQR P18.
[25] *McCulloch* (n 1) [60].
[26] Since there was no responsible body of medical opinion denying that a caesarean section was a reasonable alternative procedure to vaginal delivery, the professional practice test states that a doctor of ordinary skill, taking ordinary care would have advised the patient of the alternative procedure.
[27] *McCulloch* (n 1) [53].
[28] *Duce* (n 24) [33].

such risks – is determined by the *Montgomery* test since it is not something that can be determined by medical expertise alone.[29] The Supreme Court then attempted to analogise the duty to advise patients of alternative treatment options to the two-stage test in *Duce*. However, this article will demonstrate why this analogy does not withstand scrutiny.

2. Critique of the judgment

A. Misinterpretation of Bolam and Hunter v Hanley

The Supreme Court misinterpreted the operation of the test in *Bolam* and *Hunter v Hanley*, which leads to the result that the court was specifically trying to avoid – 'that the doctor can simply inform the patient about the treatment option or options that the doctor himself or herself prefers'.[30] Put differently, the original ambit of the *Bolam* test can only determine a doctor's liability when scrutinising *any one specific* conduct – often, a treatment or procedure– adopted by a doctor. However, it is incapable of determining whether there is a duty to inform patients of other reasonable treatments deemed reasonable by other practitioners but not adopted by the doctor in question. In insisting that *Bolam* is the correct test to apply to determinations of the range of reasonable alternative treatments patients should be informed of,

[29] ibid [27]: the test of materiality is whether 'a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it'.

[30] ibid [58].

doctors are at liberty to circumscribe the range of reasonable treatments offered to a patient.[31]

The professional practice test is negative in nature

The original language used in *Bolam* and *Hunter v Hanley* casts the test as a negative one, which entails that a doctor *cannot be found negligent* if she acts in accordance with a practice accepted as proper by a RBMO. In other words, a doctor is shielded from liability under the *Bolam* test even if she commits a clinical error, as long as the course of conduct adopted is supported by a RBMO.[32] The following statement from McNair J in *Bolam* is instructive:[33]

---

[31] As long as the permutation of reasonable treatments is supported by a RBMO, the range of treatments offered to a patient at any one time could be much smaller than the full spectrum of reasonable treatments, as determined by the medical profession, as opposed to a singular doctor.

[32] Kumaralingam Amirthalingam, 'Medical duty to advise, patient autonomy and reasonable alternatives' (2024) 140 LQR 11, 14: there are two senses in which a doctor, adopting a course of conduct supported by a RBMO, is shielded from liability. Firstly, if a doctor elects to advise a patient of a particular high-risk procedure, and the risk eventuates, she is shielded from liability if the conduct is supported by a RBMO. Secondly, if a doctor elects for a certain procedure based on a given set of information, but it turns out that said procedure is inappropriate, but a RBMO would have elected for the same procedure based on the same limited amount of information, the doctor is shielded from liability.

[33] *Bolam* (n 2) 587, emphasis added; *Maynard v West Midlands Health Authority* [1984] 1 WLR 634 (HL) 639: in a similar vein, Lord Scarman confirmed in *Maynard v West Midlands Health Authority* that a doctor cannot be found negligent simply because a court prefers one expert opinion over another. Therefore, in *Maynard*, while the doctor undertook an exploratory mediastinoscopy, based on a misdiagnosis of possible Hodgkin's lymphoma, which resulted in nerve damage, he

> '[a doctor is] not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.'

The proper application of the Bolam test

Returning to the hypothetical example given by Lord Hamblen and Lord Burrows, the court was right in stating that a doctor *cannot be found negligent* if they choose to administer any one of the ten medically sanctioned treatment options since these courses of conduct are *protected* by the *Bolam* test. However, this does not engender that the doctor cannot be under a duty to inform a patient of the *nine other alternatives* as the *Bolam* test is silent on the issue. The *Bolam* test's ambit of protection extends only as far as the specific course of conduct adopted by a doctor. Indeed, this distinction was recognised in *Montgomery*, where Lord Kerr and Lord Reed stated that there is a 'fundamental distinction between […] the doctor's role when considering possible investigatory or treatment options and […] her role in discussing with the patient any recommended treatment and possible alternatives'.[34] It is a *non sequitur* to conclude that since the former is a matter of purely professional judgment, the latter is as well.[35]

---

could not be found negligent as there was a RBMO supporting his conduct. The *Bolam* test serves to negate liability for negligence that would otherwise have been established under ordinary tort law principles. Where the ordinary standard of proof requires a balance of probabilities, *Bolam* permits a minority view to be determinative.

[34] *Montgomery* (n 3) [82], emphasis added.

[35] ibid [83].

Therefore, in the hypothetical example, the *Bolam* test cannot do the heavy lifting of determining whether a doctor is under a duty to advise a patient of reasonable alternative treatment options since that is not a matter of *purely* professional judgment. Whereof one cannot speak, thereof one must be silent.[36]

Reaching the result that the Supreme Court was specifically trying to avoid

The above conclusion might be met with the following rebuttal: if the act of only considering four out of the ten possible treatment options is protected by *Bolam,* why should the doctor be under an additional duty to inform the patient of the other six? Yet, this rebuttal yields itself to what the Supreme Court was specifically seeking to guard against – 'that the doctor can simply inform the patient about the treatment option or options that the doctor himself or herself prefers' – since doctors would be able to choose any combination of medically-sanctioned treatment options as long as they find support from a RBMO. This is likely to be straightforward given that the treatment options being selected are already RBMO-sanctioned. Concomitantly, a patient would be robbed of the right to information on alternative, potentially superior alternative treatments that were excluded by doctors, and, consequently, their ability to make a fully informed decision about their treatment.[37] The range of risks a patient can choose to undertake for their treatment is thereby circumscribed

---

[36] Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (first published 1921, Gutenberg 2021), 23.
[37] Kumaralingam Amirthalingam, 'Medical duty to advise, patient autonomy and reasonable alternatives' (n 32),14.

by a doctor's potentially arbitrary choices.[38] This perpetuates medical paternalism and arbitrariness, as a patient's options are filtered and limited by medical professionals' divergent opinions and respect for patients instead of divergent schools of thought.[39] Accordingly, it was already contemplated in *Montgomery* that the application of *Bolam* to the question of a doctor's advisory duty for alternative treatments is inapposite as it risks arbitrariness.

Indeed, in *McCulloch* itself, the selection of treatment options by the medical team indicates such arbitrariness.[40] The medical team did not prescribed Mr McCulloch NSAIDs because they were concerned that doing so would aggravate his existing gastrointestinal issues.[41] Yet, on Mr McCulloch's first admission, he was treated with steroids, which have indicated similar gastrointestinal adverse effects in the medical literature.[42] While it was not submitted into evidence that the steroidal treatment harmed Mr McCulloch or that the choice of treatments was arbitrary, the thorn in the issue remains – the risks and benefits of the prescribed treatment and its alternatives were not discussed with Mr McCulloch, which introduces arbitrariness into the

[38] Robert Weir KC, 'Bolam returns by the back door: McCulloch v Forth Valley Health Board and the duty to disclose alternative treatments' [2023] JPI Law, 4, 231 – 238, 234.
[39] Lauren Sutherland QC, 'Montgomery: myths, misconceptions, and misunderstanding' (2019) JPI Law 3, 157 – 167 at [164]; *Montgomery v Lanarkshire Health Board* (n 3), [84].
[40] It is beyond the scope of this article to question medical practices, so the evidence cited is merely illustrative.
[41] *McCulloch* (n 1) [27] – [28], [31].
[42] Liu D, Ahmet A, Ward L, Krishnamoorthy P, Mandelcorn ED, Leigh R, Brown JP, Cohen A, Kim H., 'A practical guide to the monitoring and management of the complications of systemic corticosteroid therapy' (2013) Allergy Asthma Clin Immunol. Aug 15;9(1):30.

selection of treatments.[43] To guard against such unfortunate eventualities, Lord Kerr and Lord Reed stated in *Montgomery* that that the doctor is 'under a duty to take reasonable care to ensure that the patient is aware of […] any reasonable alternatives or variant treatments' and 'to explain to her patient why she considers that one of the available treatment options is medically preferable to the others'. Therefore, to mitigate the arbitrariness in the range of treatments available to a patient, patients should have a right to be informed of the whole range of RBMO-sanctioned alternative treatments and not just the ones favoured by a doctor.

In short, it remains an open question whether a doctor is under a duty to advise patients of reasonable alternative treatment options that the doctor does not favour.[44] The *Bolam* test cannot provide an answer to the question since it is not a matter of professional clinical judgment, lest the Supreme Court wishes to regard it as such, and sanction arbitrariness in the selection of medical treatments.

---

[43] To guard against such unfortunate eventualities, Lord Kerr and Lord Reed in *Montgomery* stated that it is 'the doctor's responsibility to explain to her patient why she considers that one of the available treatment options is medically preferable to the others', with due care taken to explain each option's pros and cons. This is to be read in conjunction with paragraph 87 of *Montgomery* where it states that the doctor is 'under a duty to take reasonable care to ensure that the patient is aware of […] any reasonable alternatives or variant treatments'. Therefore, the treatment options here refer to the whole range of RBMO-sanctioned alternative treatments and not just the ones favoured by a doctor.

[44] To be clear, a hypothetical doctor, upon determining four out of ten of the medically sanctioned treatment options to be reasonable, is still required to advise the patient of all four treatment options. This duty to inform is not at issue.

B. Inconsistency with case law: *Montgomery v Lanarkshire Health Board*

Beyond the conflicts identified in the foregoing section, the biggest gap in the Supreme Court's attempt to square their decision with *Montgomery* lies in their demarcation of when the duty to discuss alternative treatments with a patient arises.[45]

Contradicting the judgment in Montgomery

Firstly, the proposition in *McCulloch* that *Montgomery*'s application is limited to informing patients of material risks associated with a particular treatment is clearly at odds with the judgment in *Montgomery*. The duty established in *Montgomery* reads as follows:[46]

> 'The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments.'

Evidently, the Supreme Court's first proposition cannot be reconciled with the judgment in *Montgomery* since it clearly

---

[45] In summary, the thrust of the *McCulloch* judgment was that *Montogomery* only established a duty to inform patients of material risks associated with a particular treatment. However, the Supreme Court did not think that *Montgomery* goes as far as establishing a duty to inform a patient of all the reasonable treatment options, favoured by the presiding doctor or otherwise. Therefore, the determination of what constitutes a reasonable alternative treatment remains governed by the *Bolam* test because it is 'a matter of professional skill and judgment'. Both propositions appear to be shaky upon deeper analysis.
[46] *Montgomery* (n 3) [87], emphasis added.

established a duty to advise patients of *any* reasonable alternative treatments.

Therefore, for the decision in *McCulloch* to be consistent with that in *Montgomery,* the Supreme Court would have needed to qualify their test. Namely, it should have provided that a 'doctor is under a duty of care to inform the patient of a possible alternative treatment that, applying the professional practice test, he or she does not regard as reasonable alternative treatment…where the doctor is aware (or perhaps ought to be aware) that there is a [RBMO] that does regard that alternative treatment as reasonable.' Yet, the court dismissed this qualification on the grounds that it would (i) cause a conflict in the doctor's role and (ii) make the law more difficult to apply. However, these concerns are misplaced. First, there is no conflict in the doctor's role, as they are free to *recommend* only the treatments they regard as reasonable, while *disclosing* all other available alternatives. More confusingly, Dr Labinjoh was not opposed to, and, in fact, did discuss what she thought to be an *unreasonable treatment option* – pericardiocentesis – with Mr McCulloch. Second, it is highly unconvincing to argue that a legal development should be eschewed simply because of its complexity. If a legal development enhances the integrity of the law and promotes the values of justice, a court ought not to shy away from it. In fact, the law as established in *Montgomery* appears to demand it.

An untenable distinction – matters of professional skill and judgment

Secondly, it is questionable whether the line drawn between matters of professional skill and judgment and matters that fall outside of its ambit is as clear as the Supreme Court posits if the Supreme Court still wishes to uphold the principle of patient autonomy. Lady Hale emphasised in *Montgomery* that the principle of patient autonomy entails that 'it is <u>not possible to consider a particular medical procedure in isolation from its alternatives</u>' and its attendant risks, as one's consideration thereof comprises the complex weighing of the benefits and drawbacks of each procedure.[47] This is well illustrated by Robert Weir KC's example:[48]

> 'While the risk of a particular treatment can be expressed in absolute terms ('this treatment has a 1 in 10 chance of causing severe side-effects'), a patient can only fully understand how 'risky' the treatment is by knowing the risks inherent in other treatments. Possible treatment A might have what appears to be a low chance of causing side-effects. But if possible treatments B and C carry even lower risks than this, the patient might well conclude that treatment A is a risky option.'

Therefore, a patient needs to be advised of a reasonably wide range of RBMO-sanctioned alternative treatments for their understanding of the materiality of certain risks to be contextualised. As established above, this range cannot be

---

[47] *Montgomery* (n 3) [109], emphasis added.
[48] (n 38) 237.

determined purely as a matter of professional skill and judgment. Confusingly, the Supreme Court in *McCulloch* recognised that the identification of risks and reasonable alternative treatments are closely linked, yet nevertheless reached the conclusion that both should be governed by *Bolam* instead of *Montgomery*.

In addition, the exercise of assigning a course of treatment is not just one of professional skill and judgement. Issues such as the patient's goals, risk-tolerance, and other idiosyncrasies must be taken into consideration. For instance, a patient suffering from late-stage cancer, who wishes to maximise the time they have with their family but is risk-averse, may well wish to forgo experimental treatments that have an unproven chance of curing them and favour treatment options that guarantee life extension. Another hypothetical patient in a similar situation, who is less risk-averse, might choose otherwise because her goal is to attend her child's university graduation which is years away. This example illustrates the complexity inherent in how patients and doctors narrow down treatment options. Simply applying the *Bolam* test fails to respect patient autonomy in the way advocated for by Lady Hale.

C. Inconsistency with case law: *Duce v Worcestershire Acute Hospitals NHS Trust*

The Supreme Court's analysis of *Duce* is afflicted by the same issues as its analysis of *Montgomery* in that it is unclear whether the determination of reasonable alternative treatments is *purely* a matter of professional judgment and medical expertise and yet, the Supreme Court presumes that it is clear with little justification.

To reiterate, the structure of the Supreme Court's argument for arguing that *McCulloch* is consistent with *Duce* goes as follows:[49]

> (1) All matters of professional skill and judgment are subject to the professional practice test, including the identification of risks associated with any treatment as established in *Duce*;
> (2) The *Montgomery* test only applies to issues that are not a matter of professional skill and judgment;
> (3) Determining alternative treatment options is a matter of professional skill and judgment as much as the identification of risks associated with any treatment;
> (4) Therefore, the process of determining alternative treatment options is subject to the professional practice test and not the test in *Montgomery*.

While premises (1) and (2) are unproblematic propositions drawn from the case law, the argument starts to collapse in (3). This is quite simply because (3) is an unproven premise. To use (1) and (2) to arrive at (4), the Supreme Court needed to justify why, beyond intuition, the determination of alternative treatments is a matter reserved *only for* professional medical skill and judgment. Yet, the Supreme Court did little more than repeatedly assert, with little justification, that the determination of reasonable alternative treatments is a matter of professional medical skill and judgment.[50] This characterisation is not incontrovertible as

[49] *McCulloch* (n 1) [63] – [64].
[50] In *Duce*, the question of whether a patient has a right to be informed of risks identified by a RBMO, but not deemed appropriate by a doctor, remains open. The same issue plagues *McCulloch*. Therefore, analogising

demonstrated in the foregoing section. Indeed, the Supreme Court seemed to be confused about this characterisation when it stated that the discussion of risks is closely associated with the discussion of treatment alternatives since it is precisely because of this close link that *Montgomery* should apply to both.

The only evidence cited by the Supreme Court in support of premise (3) demonstrates the collaborative nature of determining which alternative treatments are reasonable.[51] For instance, the General Medical Council submitted that a doctor needs to collaborate with the patient throughout the clinical encounter to ensure that they arrive at the optimal treatment plan.[52] Therefore, premise (3) remains unproven and the Supreme

---

the two merely restates the question without providing further elucidation of the issue.

[51] *McCulloch* (n 1) [68] – [69]: 'The BMA observed that 'the discussion of diagnosis, prognosis and treatment options (including the risks of such treatment options) is a matter which is heavily influenced by the doctor's learning and experience, and to that extent is itself an exercise of professional skill and judgment. […] The GMC, while making clear the need throughout for a collaborative discussion with the patient, observed that 'once a diagnosis has been made, the doctor will [be required] to consider what treatment options are clinically appropriate. That again turns on clinical judgment, based on knowledge and experience … a consideration of reasonableness in this context cannot be shorn of professional judgment.' (emphasis added).

[52] Both the General Medical Council and British Medical Association's submissions go on to state that the determination of alternative treatment options turns on professional clinical skill and judgment. However, it is submitted that this applies to the determination of what constitutes the *total range* of reasonable alternative treatments for a *specific* diagnosis and does not detract from the original point that the determination of reasonable alternative treatments for a *specific* patient is not purely a matter of professional skill and judgment. There are non-medical factors to consider, such as risk-tolerance and health goals,

Court cannot, as a matter of logic, arrive at (4). Nonetheless, the Supreme Court is free to disregard *Duce* since it is not analogous to the issues in *McCulloch*.[53] However, it would be disingenuous for the Supreme Court to maintain that its decision is consistent with *Duce*. The frailties identified in the first part of this article provide grounds for it to make the following recommendation.[54]

Part II

1. An omission fatal to the case

The clinical encounter has three distinct stages – diagnosis, treatment and prognosis.[55] While proper diagnosis and treatment are crucial in ensuring that an illness is controlled and cured whilst a patient is under a doctor's care, prudent prognosis is equally important in keeping the same illness or its complications at bay.[56]

---

before a determination of reasonableness can be made. This reading is more in alignment with Lord Kerr and Lord Reed's analysis in Montgomery, and the case law since *Bolam*, as explained in the foregoing sections.; *Montgomery* (n 3) [82] – [83].

[53] As explained in the skeleton of the Supreme Court's analysis of *Duce*, *Duce* deals with how to apply *Montgomery* in relation to a doctor's duty to advise patients of risks associated with a treatment, whereas *McCulloch* is contending with the issue of the appropriate test to apply for determining the range of reasonable alternative treatments.

[54] The recommendation made is more of a restatement of the trend that courts have been increasingly willing to apply *Montgomery* at various stages of the clinical encounter.

[55] P. Croft, D.G., Deeks, J.J. *et al.* 'The science of clinical practice: disease diagnosis or patient prognosis? Evidence about 'what is likely to happen' should shape clinical practice' BMC Med 13, 20 (2015).

[56] Prognosis is not a term of art here, and simply means the likely course of a medical condition based on a medical opinion.

The importance of taking due care in prognosis was emphasised in *Spencer v Hillingdon Hospital NHS Trust*, a case guided by the principles in *Montgomery*.[57] In that case, it was established that a doctor is under a duty to inform patients about both *material* and *non-material* risks prior to their discharge.[58] In other words, the doctor must ask themselves: '… would the ordinary sensible patient be justifiably aggrieved not to have been given the information at the heart of this case when fully appraised of the significance of it?' [59]

Application to McCulloch v Forth Valley Health Board

In relation to *McCulloch*, it is submitted that this ought to have been an issue taken up by the Supreme Court had the submissions been framed differently. Indeed, it coheres with the approach favoured by the Supreme Court when dealing with the determination of alternative treatments. The Supreme Court in *McCulloch* approved of the two-staged approach in *Duce*, where the first stage applies *Bolam* to issues of professional skill and judgment before applying *Montgomery* to determine whether an issue would be material to a patient and, concomitantly, whether

[57] *Spencer v Hillingdon Hospital NHS Trust* [2015] EWHC 1058 (QB); this was a case guided by the principles in the *Montgomery* judgment as evident at [32] – 'there is force in the contention…that the basic principles – and the resulting duty of care – defined in Montgomery are likely to be applied to all aspects of the provision of advice given to patients by medical and nursing staff.'

[58] What constitutes the full range of material and non-material risks is still determined by the *Bolam* test. This judgment merely adds a *Montgomery* gloss to the *Bolam* test, much like the two-staged approach in *Duce*.

[59] *Spencer* (n 57) [76].

there was a duty to inform the patient of said issue. The approach in *Spencer* mirrors the two-staged test in *Duce* and similarly adds a *Montgomery* gloss to *Bolam*.

Firstly, there was no evidence submitted about the prognosis given to Mr McCulloch beyond Dr Fuller's note stating that the plan was for Mr McCulloch to be discharged.[60] Despite Mr McCulloch's condition at discharge being described as 'very unwell', including his complaints of his chest pains and severe sore throat there was no further aid rendered.[61] The omission here goes much further than in *Spencer* given that no pre-discharge advice or risks were flagged to Mr McCulloch. Had it been submitted to the Supreme Court that Mr McCulloch's physicians were under a duty to be informed of material post-discharge risks, pursuant to *Spencer*, the test in *Spencer* would have likely been satisfied and a breach of duty would have been established.

Secondly, the approach in *Spencer* accords with the Supreme Court's interpretation of the two-stage test in *Duce* in their *McCulloch* judgment. In *Spencer*, the full range of risks that a patient should be advised of prior to discharge is determined by the *Bolam* test, much like how treatment risks are determined by the *Bolam* test in *Duce.* However, the question of which portion of the range of risks identified through the *Bolam* test the patient should be advised of is governed by *Montgomery*. This aligns with the operation of the second stage of the test in *Duce.* Therefore, it should have been unproblematic for the Supreme Court to reach the conclusion in the foregoing paragraph.

[60] *Jennifer McCulloch* (n 6) [12].
[61] ibid [14].

Nonetheless, given that this submission was not made on behalf of the claimant, it would be fruitless to speculate any further. The salient point in this section is that the scope of *Montgomery*'s application is still unclear, and it remains to be seen whether the Supreme Court will accept the *Montgomery* gloss in cases of negligent prognosis or relegate it to a matter of *pure* professional judgment and skill, and subject it to just the *Bolam* test. However, what is clear is that *Montgomery*'s reach extends beyond advising patients of material risks for the treatment that they are adopting. It is on that basis that this article makes proposals for reform in the following section.

2. The principled approach

This article proposes that the *Montgomery* test of materiality be applied whenever issues of patient autonomy arise on the facts.[62] This ought to be the approach for the following five reasons:

A. The judgment in *Montgomery* contemplates its application in such a fashion; and
B. As a matter of principle, only *Montgomery* can fill in the gaps where *Bolam* cannot do the heavy lifting; and
C. The case law has already demonstrated the courts' willingness to apply *Montgomery* whenever issues of patient autonomy arise; and
D. The law should be fully responsive to the principle of patient autonomy, while respecting the professionalism of medical practitioners.

[62] This is not a novel approach, but merely a restatement of what the case law has already shown willingness for. Namely, the application of the *Montgomery* test to issues of patient autonomy.

Given that points (A) and (B) have already been explained earlier in the article, this section will focus on points (C) and (D).

The courts' application of Montgomery whenever issues of patient autonomy arise

In the same vein as *Spencer*, *Gallardo v Imperial College Healthcare NHS Trust* demonstrates a similar willingness to apply *Montgomery* at the prognosis stage of the clinical encounter, where a patient has a right to know what risks he ought to be looking out for on discharge.[63] There, the judge, applying *Montgomery*, held that the defendant was under a duty to disclose to the claimant the malignancy of a suspected stomach ulcer, which turned out to be a stromal tumour and the risk of recurrence.[64] In accordance with the article's analysis of *Bolam,* the judge recognised that certain parts of the clinical encounter, including prognosis and follow-up, are not purely a matter of professional judgment and skill, leading to the conclusion that *Bolam* cannot provide any answer. Where patients retain discretion to know about or choose from a certain range of options, and have a right to make an informed choice, only *Montgomery* provides guidance. Should this be applied to *McCulloch*, the doctors would have been under a duty to inform

---

[63] *Gallardo v Imperial College Healthcare NHS Trust* [2017] EWHC 3147 (QB).

[64] ibid [70], [75]: 'By analogy [with *Montgomery*], it is the patient's right to be informed of the outcome of the treatment, the prognosis, and what the follow-up care and treatment options are. […] Such decisions involve the exercise of judgment but it is not a judgment that turns on the exercise of expert medical learning or experience alone. The decision must be made with due regard to the patient's right to be told.' (emphasis added).

Mr McCulloch of the possibility of undergoing steroidal treatment and the post-discharge risks.

Similarly, in *Webster v Burton Hospitals NHS Foundation Trust*, the court evinced a willingness to extend *Montgomery* to the diagnosis stage of the clinical encounter, at least where uncertainty in a patient's condition warrants a differential diagnosis.[65] While the determination of the range of risks indicated by certain medical presentations is a matter of professional skill and judgment, whether said risks are sufficiently material to warrant a differential diagnosis, which could lead to treatment, is a matter for the patient to decide.[66]

---

[65] *Webster v Burton Hospitals NHS Foundation Trust* [2017] EWCA Civ 62; a differential diagnosis is warranted where a patient's observable symptoms accords with a range of different conditions; In *Webster*, the issue was whether a failure to undertake additional ultrasound scans for an expectant mother, where the first scan showed inconclusive signs of foetal abnormalities, was negligent. *Bolam* was applied at first instance. However, the Court of Appeal, sitting after the decision of *Montgomery*, decided that the *Bolam* test was not the appropriate test to apply due to the test's inconclusive results which warranted a differential diagnosis. The 'differential diagnosis' was described as a treatment in the judgment, but that choice of language was adopted from *Montgomery,* and does not alter the nature of 'differential diagnoses' as a diagnostic issue.

[66] The judgment from a Singaporean case, *Hii Chii Kok*, is highly instructive on all of the points made above; *Hii Chii Kok v (1) Ooi Peng Jin London Lucien; (2) National Cancer Centre* [2017] SGCA 38 [138], [143]: 'Material information should not be limited to risk-related information [… and should include …] as follows: (a) the doctor's diagnosis of the patient's condition; (b) the prognosis of that condition with and without medical treatment; (c) the nature of the proposed medical treatment; (d) the risks associated with the proposed medical treatment; and (e) the alternatives to the proposed medical treatment, and the advantages and risks of those alternatives. […] Where the diagnosis in uncertain, more information pertaining to other possible diagnoses will also become

Taken together, the case law already evinces a willingness to extend the application of *Montgomery* to all stages of the clinical encounter, wherever issues of patient autonomy arise on the facts.

Ensuring that the law is fully responsive to the principle of patient autonomy

'Every human being of adult years and sound mind has the right to determine what shall be done with his own body …'.[67]

Since the enactment of the Human Rights Act 1998, the fundamental values of self-determination and autonomy have become increasingly recognised at law, culminating in the approach in *Montgomery* where patients are treated as 'adults capable of understanding that medical treatment [is] an uncertain process, and as persons who [accept] responsibility for the risks that [affect] their *own lives*'.[68] Self-determination and autonomy also entail that the materiality of any medical issue, uncertainty and risk needs to be *contextualised to the patient* and cannot be determined by probabilities.[69] For example, a very slight risk of

---

material. […] The possibility of and reasons for a differential diagnosis, if any, will also generally be regarded as material.'

[67] *Schloendorff v Society of New York Hospital* 211 NY 125, 129, 105 N.E. 92 (NY 1914) (Cardozo CJ); see also *Chester v Afshar* [2004] UKHL 41; [2005] 1 AC 134 at [54] – [56] and *Montgomery* (n 3) [75].

[68] *Montgomery* (n 3) at [74] – [81]; The Rt Hon Lady Justice Arden DBE, 'Law of medicine and the individual: current issues. What does patient autonomy mean for the courts?', Justice KT Desai Memorial Lecture 2017 at paragraph 33.

[69] Royal College of Surgeons, 'Consent: Supported Decision-Making' <https://www.rcseng.ac.uk/-/media/Files/RCS/Standards-and-research/Standards-and-policy/Good-Practice-Guides/New-Docs-

scarring during a facial surgery may seem insignificant to most patients, but may well be important for an aspiring model.[70] Open dialogue about a patient's goals, concerns and risk-tolerance is crucial at every stage of the medical encounter since medical risk and uncertainty does not only exist at the treatment stage.

Equally important, however, is the need to respect the physician's professionalism such that finite medical resources are distributed efficaciously, and to ensure that the law remains an overseer and not a hindrance to the practice of medicine. In the UK, any proposed reform that introduces greater duties on doctors needs to be cautious of the additional stress placed on an already overloaded NHS system Nonetheless, it is submitted that should (patient) autonomy truly be a fundamental value, and should it contribute to better patient outcomes, the law should not be limited by financial constraints. After all, resources issues are budgetary issues, which are reserved for the government. As the law stands, certain stages of the clinical encounter, such as diagnosis and determination of reasonable alternative treatments, leave no room for issues of patient autonomy to arise since these are adjudged to be pure issues of professional skill and judgment. In other words, *Bolam* applies automatically in these stages. Hence, it is with both sides of the equation in mind that this article proposes that the *Montgomery* test be applied *only* when patient autonomy arises on the facts, and *not automatically*.[71] The following

---

May-2019/RCS- Consent-Supported-Decision-Making.pdf> accessed 30 November 2023.

[70] *Hii Chii Kok* (n 66) [144].

[71] The therapeutic exception presents a working model for how this could function. Despite *Montgomery* establishing that doctors are under a duty to inform patients of all material risks associated with a treatment, a doctor can withhold information about a certain risk where, in her

proposal ensures that the law is responsive to the complex and collaborative nature of the clinical encounter when it is called for on the facts. In practice, the test would look like this for all stages of the clinical encounter:[72]

(1) Is the medical issue sufficiently well-defined and certain for it to be *purely* a matter of professional skill and judgment?[73]
(2) If not, would the ordinary sensible patient be aggrieved not to have known about the issue facing the doctor when fully advised of its significance?
(3) If so, an issue of patient autonomy arises and *Montgomery* applies.[74]

---

professional judgment, disclosure would be seriously detrimental to a patient's health. Therefore, *Montgomery* does not apply automatically simply because a risk about a certain treatment was not advised upon, but only where it enhances a patient's net capacity to exercise autonomy and self-determination.

[72] This test is targeted at issues that are *prima facie* matters of medical judgment but could raise issues of patient autonomy upon further examination.

[73] This is a doctor-led standard that asks whether a doctor of ordinary skill, following GMC and BMJ's guidelines, would see a medical issue as sufficiently well-defined and certain enough for it to be purely a matter of professional skill and judgment. Criticisms about this test rehashing the issue of where to draw the line between issues that are and are not purely a matter of professional skill and judgment will be addressed below.

[74] *Montgomery* applies in a full-blooded manner, such that all the principles from *Montgomery* referred to in this article will apply.

Take diagnosis as an example.[75] If a young patient presents with nausea, vomiting and slurring of speech with a test confirming presence of alcohol in the bloodstream, the diagnosis will be purely a matter of professional skill and judgment since the illness is almost certainly some degree of alcohol intoxication. Conversely, if the same young patient presents with the same symptoms, but has not ingested nearly enough alcohol to experience intoxication, and is worried about the symptoms indicating something more serious, the medical issue is no longer well-defined enough to make it purely a matter of professional skill and judgment.[76] Instead, under the proposed test, the patient should be informed of her potential, albeit unlikely, stroke risk and be counselled regarding the pros and cons of further testing.[77].. Therefore, this proposal leaves room for medical expertise where it is apropos and ensures that the law has the capacity to respond to issues of patient autonomy as and when it arises.[78]

Applied to *McCulloch*, the diagnosis and subsequent treatment is not purely a matter of professional skill and judgment because of the uncertainty surrounding what is causing Mr McCulloch his many ailments.[79] Under stage two, an ordinary

---

[75] Diagnosis is categorised by the court as an issue of professional skill and judgment, but this example will demonstrate why this is an overly simplistic characterisation.

[76] In accordance with general principles cited by the BMJ and GMC in *McCulloch*.

[77] León L, Mazziotti J, et al., 'Misdiagnosis of acute ischemic stroke in young patients' Medicina (B Aires). 2019; 79(2):90-94.

[78] J Badenoch, 'Montgomery and Patient Consent: Perceived Problems Addressed' (2016) 22(1–2) Clinical Risk 12, 14.

[79] The cause of Mr McCulloch's chest pains was uncertain for two reasons. Firstly, the posited cause on first admission was pericarditis, but

sensible patient would be aggrieved not to have known about, *inter alia*, the risks of leaving the hospital untreated, not taking NSAIDs and not conducting further tests for one's symptoms I. Therefore, an issue of patient autonomy arises and *Montgomery* applies.

This article anticipates two main criticisms of the proposal. Firstly, the first step in the proposed test raises the question of how well-defined and certain a medical issue has to be for it to be purely a matter of professional skill and judgment. As the law stands, *Bolam* applies because the court decides that certain categories of issues are purely a matter of professional skill and judgment, and the line drawn has been shown to be dissatisfactory. However, this doctor-led standard asks whether a doctor of ordinary skill, following General Medical Council ('GMC') and British Medical Journal's ('BMJ') guidelines on making the clinical encounter collaborative, would see a medical issue as sufficiently well-defined and certain enough for it to be purely a matter of professional skill and judgment.[80] This formulation circumvents the uncertainty created by the law categorising the nature of medical acts in a vacuum by incorporating a doctor-led standard. Nonetheless, this formulation does not yield itself to medical paternalism since it is circumscribed by the principles of collaboration enshrined in the

---

this is merely a symptom that could be caused by, *inter alia*, infection, inflammation after a heart attack or a chest injury. The root cause was not determined. Secondly, even after pericarditis was treated after the first admission, Mr McCulloch was still experiencing debilitating chest pains. Evidently, the root cause of the chest pains was still at large.

[80] This formulation intentionally mirrors the *Bolam* formulation to ensure that the scope of a doctor's duties which (purely) engages their professional skill and judgment is demarcated by a RBMO.

GMC and BMJ guidelines. Furthermore, this is unlikely to test a doctor's judgment too greatly since doctors often work in teams and seek their colleague's opinion on whether to inform patients about clinical uncertainties. In the case of sole practitioners, their seniority should entail a greater understanding of how to practise medicine along GMC and BMJ guidelines.

Secondly, this proposal could be seen as increasing the risk of greater uncertainty being introduced into the law and, consequently, encouraging the practice of defensive medicine. However, these are not compelling reasons to shy away from developing the law in a way that respects patient autonomy. Firstly, the issue of defensive medicine is a regulatory issue that should be left to the medical authorities since they control the practice guidelines for doctors and review their conduct. Secondly, the wide application of *Bolam* generates equal, if not greater amounts of uncertainty for the aggrieved patients. Should a patient be able to prove, through expert evidence, that the majority of doctors would not have pursued a certain conduct, she would not know whether a doctor can find a small group of RBMO that would approve their conduct.[81] Should a doctor be able to do so, her conduct becomes free from liability despite the majority of doctors disapproving it. By leaving room for issues of patient autonomy to be operative at every stage, the proposal allows for a more nuanced analysis of the issue instead of deferring it medical opinion that could be potentially disapproved of by the majority of doctors. Therefore, this is the more favourable approach that does not risk greater uncertainty and respects patient autonomy.

---

[81] Subject to the small group of RBMO passing the *Bolitho* test.

Conclusion

All in all, this article has demonstrated the shortcomings in the Supreme Court's judgment in *McCulloch* – misinterpretation of *Bolam*, disregard for *Montgomery* and an overly reductionist view that disregards the reality of how doctors and patients collaboratively reach a treatment decision. The principle of patient autonomy has consequently been shorn of some of its protection in the law. Therefore, in accordance with the best practices recommended by the GMC, the Royal College of Surgeons, and the British Medical Association, this article recommends formally recognising the greater scope of application that *Montgomery* could have at every stage of the clinical encounter. This also reflects *Montgomery*'s treatment in the case law prior to *McCulloch*. While this may make the courts' role more complex, it represents the nuance demanded by the gravity of medical negligence cases, where a patient's life is at stake.