MANCHESTER LAW JOURNAL

at

Manchester Metropolitan University

FIRST EDITION

2021

MANCHESTER LAW JOURNAL

First edition **September 2021**

EDITORIAL BOARD

MANCHESTER LAW JOURNAL

First edition **September 2021**

CONTENTS

MANCHESTER LAW JOURNAL

First edition **September 2021**

FOREWORD

Professor Andrew Francis
Head of School

Manchester Law School integrates high quality legal education, training and research with a key focus on social change and sustainability in its connection to the world around us. The School has a commitment to asking and addressing some of the biggest challenges that society faces and the research papers in this journal are a wonderful showcase of the work of some of our staff and students.

The research undertaken within Manchester Law School shapes our students' education in so many ways; from the inspiration generated by the impact that our academics' work has in society, to the diverse range of optional subjects that they can study, to the focus on critical thinking, creativity, and practical impact in the way in which they engage with the Law on their degree programmes. In this journal, we are able to see examples of how our students have embraced the excitement of undertaking research, in thinking through complex problems and demonstrating the confidence to articulate their own views. Our students are doing this across their subjects and this journal is a wonderful showcase of some of that work.

Within our Law School, we are committed to sustaining a warm, supportive and inclusive community of staff, students and alumni. This journal has been the product of close and collaborative working relationships between Dr Jorge Nunez and other members of staff and students (who have continued their involvement as alumni) led by Arya and Sam. There has been drive and ambition from everyone involved and I really am delighted to see this first edition. The value of this collaborative process isn't simply this completed volume that you are now reading, but the process of development and engagement as students have worked together to improve and develop each other's work.

This volume contains a fascinating cross-section of topics with papers written by staff and students. I hope you enjoy reading them and look forward to the next edition.
Many, many congratulations to everyone who has been involved.

MANCHESTER LAW JOURNAL

First edition **September 2021**

FOREWORD

Arya Tabrizi and Sam Morgan
Editors-in-Chief

The purpose of setting up the MLJ was to provide Manchester Law School students with an opportunity to sharpen their critical writing, on entirely self-selected topics. The only requirement beyond word limits was the topic had some 'anchor' to law. The broadness of scope was to give students an opportunity to write about topics they felt passionate about, but also to gain experience selecting a specific topic appropriate for a journal entry. My ambition for the first edition was more on the value we could add to the student experience, than on developing any particular type of voice or style.

As you will see when reading, this has led to an eclectic mix of articles on focused areas of discussion, and in that, we could not be prouder. Some of the writers in this journal had not even completed their undergraduate degrees at the time of final submission. Accordingly, we decided to take a more hands on approach than other editorial boards and arranged a series of seminars from academics and MMU faculty members, covering the entire process of academic writing at this level. I believed each student improved substantially during the process and I hope they feel the Journal has played a significant part in their legal education.

The Covid-19 pandemic hit just as we were in the process of completing our editing and as many on the Board were finishing our own undergraduate or postgraduate degrees. That this edition has made it into publication is testament to the determination of everyone involved.

I am indebted especially to Dr Jorge Nunez who provided expertise, support, and enthusiasm from the time when the MLJ was just an idea myself, Sam Morgan and Lynsey Handley broached in an ice cream parlour.

I also wish to thank Prof. Andrew Francis and Jackie Panter for their trust in the project from day one, and their unwavering support in its execution. We have an esteemed list of Honorary Editors, which I think speaks for the reputation and quality that Manchester Law School now possesses nationally, and I am grateful to them for their backing and interest.

This will be my first and final stint as Editor-in-Chief of the MLJ, and I could not be more excited to see what Sam Morgan does with the Journal over the coming years. I look forward

to reading future issues, and to the Journal developing an identity beyond that which I could accomplish in my short time.

Arya Tabrizi

We are pleased to present the first issue of the Manchester Law Journal. This edition showcases Manchester Metropolitan's students outstanding skills and dedication to research, critical analysis, and writing. The journal contains a wide range of articles covering an array of topics grounded in law and demonstrates the talent and knowledge of each individual student involved. The first edition also showcases the commitment and hard work of the editorial-board who, throughout the Covid-19 pandemic worked as a team to ensure its publication.

I would like to thank Dr Jorge Nunez for his time, support, and gentle guidance throughout the process which has encouraged the editorial board every step of the way. I would also like to thank Dr Kay Lalor for her article and contribution to this edition.

The Manchester law journal has provided a space for students to engage, share and present different ideas and perspectives of the law and I look forward to continuing this work.

Sam Morgan

MANCHESTER LAW JOURNAL

First edition **September 2021**

ARTICLES

SECRET TRUSTS – AN 'ORGANISED CHAOS'

*SAMSON ZI JIAN LEE**

INTRODUCTION

According to Hudson, 'a secret trust arises when a testator wishes to benefit some person without revealing his identity.'[1] In such a trust, secret arrangement is made by the testator to ask a trusted confidant to agree to receive a property ostensibly absolutely under the will but to secretly hold it on trust for the intended beneficiary.[2] Secret trusts are enforced by courts despite being at odds with the statutory formalities governing conventional testamentary dispositions made in a will (including a trust) stipulated in s.9 of the Wills Act 1837 (WA 1837) (i.e. a will is only valid if it is in writing, signed by the testator and attested by two witnesses).[3] The policy behind the statutory requirement for stringent compliance of formalities is closely linked with the will's sacrosanct nature as a conclusive evidence of testamentary intent upon the testator's death, eliminating fraud and ambiguity,[4] ensuring effective transfer of property.[5] Whilst legal academics have sought to justify the enforcement and retention of secret trusts with different theories despite their deviation from WA 1837, Challinor unsparingly criticised secret trusts for being an anomaly operating against Parliament's legislative intent without a valid basis sustained to fulfill purposes which have largely become obsolete, so much so that relevant laws should be revised or abolished.[6]

* PCLL Candidate, School of Professional and Continuing Education, The University of Hong Kong.

[1] A Hudson, Equity and Trusts (9th edn, Routledge 2017) 263.
[2] ibid 263.
[3] Wills Act 1837, s 9.
[4] JH Langbein, 'Substantial Compliance with the Wills Act' (1975) 88 HarvLRev 491-496.
[5] E Challinor, 'Debunking the Myth of Secret Trusts?' (2005) Conv 492.
[6] ibid, 498-500.

In exploring whether the enforcement of secret trusts can be justified, this essay will discuss and examine the two mainstream theoretical justifications - the fraud theory and the *dehors* theory, followed by an analysis on the alternative approach based around unconscionability.

THE FRAUD THEORY

Based on the maxim 'Equity will not allow a statute to be used as an instrument of fraud', prevention of fraud has been a long-standing doctrine to justify the enforcement of secret trusts by the courts.[7] In *McCormick v Grogan*, Lord Westbury held that it is on personal fraud that such jurisdiction of the court is entirely founded and it is incumbent to indisputably prove that the alleged trustee has acted *malo animo* by inducing the testator to dispose the property to him with a promise to perform his obligation as a trustee.[8] A similar position was adopted in *Rochefoucauld v Boustead* requiring conveyance of land for fraud that justifies the enforcement of an orally declared trust of land. Although not an authority involving secret trusts, it was nevertheless decided for the prevention of fraud based on the classical maxim. As per Lindley LJ, 'it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself.'[9] Such view of fraud can be known as the orthodox view, it identifies the testator as the injured party and is confined to deceit and unjust enrichment by the trustee.[10]

On the other hand, the extended view of fraud takes a wider perspective that mitigates the theoretical limitations of the orthodox view, particularly in justifying the application of half-secret trusts, where personal gain by the trustee may not be the crux of a fraud. With the introduction of some extrinsic references, Allan provided a more extensive interpretation of Lord Westbury's judgment in *McCormick*, proposing that fraud was in fact considered to be a scenario where a trustee reneges on his undertaking of trust obligation as agreed and denying the intention of the testator.[11] In Hodge's view, under such assertion, the secret beneficiaries are also classified as an injured party, whose interests are defrauded as a result of the testator's

[7] M Ramjohn, *Unlocking Equity and Trusts* (6th edn, Routledge 2017) 336.
[8] (1869) LR 4 HL 82 (HL) 88.
[9] [1897] 1 Ch 196 (CA) 206 (Lindley LJ).
[10] S Ho, 'Keeping Secrets: A Critical Analysis of the Justifications for the Doctrine of Secret Trusts' (2015) 3 NE L Rev 77.
[11] GW Allan, 'The Secret is out There: Searching for the Legal Justification for the Doctrine of Secret Trusts through Analysis of the Case Law' (2011) 40 CLWR 319, citing *Lomax v Ripley* (1855) 3 Sm & Gif 48, 63, *Cullen v Attorney-General for Northern Ireland* (1866) LR 1 HL 190 (HL); *McCormick* (n 8).

wish being failed by the trustee's deceitful action.[12] Thus, it is general fraud rather than personal fraud where the essence of fraud is found.[13] Hudson on the other hand observed that such conception of fraud is taken as a 'synonym for conscience'.[14] The extended view of fraud is endorsed notably in *Blackwell v Blackwell*, where Lord Buckmaster held where 'a testator having been induced to make a gift on trust in his will in reliance on the clear promise by the trustee ...', the trust obligation will be enforced upon the trustee for otherwise the object of the trust would be destroyed, in fraud of the beneficiaries.[15] Apparently, the extended view allocates significant weight to whether the testator's intention is being observed in the assessment of fraud.

The extended view of fraud has seen its application in other areas of trust as well. In *Rouchefoucauld v Boustead*, Lindley LJ found an expressed trust of land based on a parol evidence to that effect.[16] Similarly, in *Bannister v Bannister*, Scott LJ formulated a constructive trust respecting land based on fraud which was held to have arisen 'as soon as the absolute character of the conveyance is set up for defeating the beneficial interest.'[17] While these decisions demonstrated how the Courts have been able to come up with some innovative approaches in addressing fraud in desperation to do so, the issue of proof has for a long time been an unsolved concern.

The law lacked a clear instruction as to the proof of secret trusts until the 1970s. In *Ottaway v Norman*, Brightman J held that clear evidence akin to the standard required for the rectification of a written instrument is necessary for the Court to assume that a gift which is in terms absolute is only meant to be ostensibly so by the testator.[18] As it shall be raised below, a higher standard of proof where allegation of fraud is involved is justifiable. The key question as to what amounts to an allegation of fraud is inextricably intertwined with the conception of fraud which is explored next.

FRAUD THEORY AS A JUSTIFICATION FOR SECRET TRUSTS

The conception of fraud is essential for exploring the fraud theory as a doctrinal justification for enforcing secret trusts due to the distinction between full secret trusts and half-secret trusts.

[12] D Hodge, 'Secret Trusts: The Fraud Theory Revisited' (1981) Conv 343-348.
[13] ibid 343-348.
[14] Hudson (n 1) 283.
[15] [1929] AC 318 (HL) 328-329.
[16] *Rouchefoucauld* (n 9) 206 (Lindley LJ).
[17] YK Liew, 'Rouchefoucauld v Boustead (1897)' in C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2012) 447, citing *Bannister v Bannister* [1948] 2 All ER 133 (CA) 136 (Scott LJ).
[18] [1972] 2 WLR 50 (Ch) (Brightman J).

In a full-secret trust, there is no reference whatsoever to a trust in the will, whereas in a half-secret trust, trust is evident in the will and only the identity of the beneficiary and the terms of the trust are concealed.[19]

Generally, in full-secret trusts, the justification provided by fraud theory does not appear to be problematic as all elements of fraud identified by both the orthodox and extended versions of the theory are possibly present (i.e. unjust enrichment, defiance of testator's wishes and deprivation of beneficiary's interests). In half-secret trusts however, the orthodox view which mandates personal fraud falters as it is impossible for the trustee to benefit by denying the trust's existence.[20] Allan notes that the extended view appears to mitigate the hurdle as it embraces any failure by the secret trustee to perform his trust obligation which amounts to fraud on the testator and the secret beneficiaries.[21]

However, while it seems to provide a stronger ground for the fraud theory, the generalisation of fraud of the extended view is not trouble-free. Challinor fiercely criticised this variant of fraud for being a 'bald assertion' overestimating testator's intention and unduly inculpating breach of agreement – a mild form of fraud that does not justify equitable intervention at the expense of statutory provisions as much as a *malus animus* does.[22] Chung casted doubt over the significance of testators' wishes in the eyes of the court, citing authorities where they are not recognised due to the testator's failure to meet the necessary formalities, such as *Milroy v Lord* and *Re Fry*.[23] It is worth noting that there are exceptions to these authorities which place emphasis on testators' intention, such as *Re Rose*.[24]

Challinor's 'mildness of fraud' argument against the extended view of fraud is not flawless. Griffin rightly pointed out that in cases of secret trusts, testators' intentions are defeated by the trustees' breach of agreement rather than the testators' own fault.[25] Furthermore, the lack of personal gain in the extended view of fraud does not make the fraud so mild that the theory should be dismissed altogether, as personal gain is never a prerequisite for the concept of fraud in tort or criminal law.[26] In reality, even in half-secret trust scenarios, it is possible for a trustee to defraud by nominating his/her preferred beneficiary(ies). Under such circumstances, the presence of the factor of personal gain around which the orthodox view

[19] Hudson (n 1) 264-265.
[20] Challinor (n 5) 496.
[21] Allan (n 11) 313.
[22] Challinor (n 5) 497.
[23] B Chung, 'Fraud Prevention? Dehors? Or What?: why secret trusts are enforced? (2018) 24(2) Trusts & Trustees 163, citing *Milroy v Lord* [1862] EWHC J78 (CA); *Re Fry* [1946] Ch 312 (Ch).
[24] [1952] EWCA Civ 4 (CA).
[25] J Griffin, 'The need for the abolition of secret trusts' (2017) 23(4) Trusts & Trustees 375-376.
[26] ibid.

centres is latent and indirectly possible. Griffin suggested that rather, the crux of the theory lies with its circularity founded on the presumption that a legal obligation exists without examining the agreement from which it derives.[27]

Even though a valid argument, the circularity issue raised by Griffin serves limited practical sense, given that the law imposes certain requirements on enforceable agreements in secret trusts - a certain intention,[28] communication (as per *Re Boyes*),[29] and acceptance.[30] Furthermore, where fraud is involved, a higher standard of proof may arguably be imported, in light of the nature and gravity of the issue (as per Lord Westbury in *McCormick*, who referred to it as "the clearest and most indisputable evidence).[31] The implementation of these principles indicates that the courts do not take the enforcement of secret trusts lightly.

In *Rochefoucauld*, the formality that declaration of trust in land is to be made in writing under s 53(1)(b) of the Law of Property Act 1925 (LPA 1925) was dispensed with and parol evidence alluding to a trust was admitted.[32] While this seems to suggest that the possibility of fraud on the part of the claimant seeking to enforce the trust may have been overlooked, in practice, this is mitigated by the parol evidence rule generally adopted by the court where parol evidence in direct contradiction of the terms of the will may not be enforced, as in the case of *Re Keen*.[33]

Apparently, the theoretical limitations of the fraud theory are mitigated by other conditions imposed by the common law such as the requirements for the creation of secret trusts, the higher standard of proof for fraudulent cases, and the parol evidence rule. The fraud theory is significant in providing a valid cause for secret trusts. However, this still does not change the fact that their enforcement involves circumventing the statute and arguably undermining Parliamentary Sovereignty.

THE DEHORS THEORY IN ESSENCE

Another theoretical justification widely adopted for the enforcement of secret trusts is the *dehors* theory. The essence of the theory is that secret trusts operate outside the will, hence they are not subject to the governance and formalities of WA 1837.[34] The core of this view is

[27] ibid.
[28] Hudson (n 1) 270, citing *Ottaway* (n 18) (Brightman J); *Re Snowden* [1979] 1 Ch 528 (Ch); *McCormick* (n 8).
[29] (1884) 26 Ch D 531 (Ch).
[30] Hudson (n 1) 272-273, citing *Re Keen* [1937] Ch 236 (Ch); *Wallgrave v Tebbs* (1855) 25 LJ Ch 241 (Ch).
[31] *McCormick* (n 8) (Lord Westbury).
[32] Ho (n 10) 77-78, citing *Rochefoucauld* (n 8) 207; Law of Property Act 1925, s 53(1)(b).
[33] Hudson (n 1) 278, citing *Re Keen* (n 30).
[34] R Pearce, J Stevens and W Barr, *The Law of Trusts and Equitable Obligations* (5th edn, OUP 2010) 260.

that secret trusts are not testamentary but *inter vivos* express trusts declared by the testator during his lifetime, constituted when the trust property is vested in the trustee upon death.[35] Under such mechanism, the will merely serves as a vehicle to complete the constitution of the trust by vesting the property in the trustee concerned.[36]

The judicial basis for the *dehors* assertion traces its roots back to *Cullen v Attorney-General for Northern Ireland*, where Lord Westbury held, 'The title of the party claiming under the secret trust … is a title *dehors* the will, and which cannot be correctly termed testamentary.'[37] The *dehors* justification has since been given its judicial blessings in *Blackwell,* and more recently in *Re Snowden*. In *Blackwell*, Viscount Sumner took the view that the rules of probate in WA 1837 is altogether irrelevant to the enforcement of secret trusts.[38] In *Re Snowden*, Megarry VC provided a plain rendition of the theory by stating that secret trusts 'operate outside the will, changing nothing that is written in it, and allowing it to operate according to its tenor, but then fastening a trust on to the property in the hands of the recipient.'[39] The application of the *dehors* doctrine is most notably illustrated in *Re Young*, where the court disapplied s.15 WA 1837 which provides that any gifts in the will made to its attesting witness shall be void[40] - in favour of a secret trust.[41]

The Theoretical Limitation of The Dehors Assertion

As compatible as it seems with the conventional rules of probate due to the split deliberately drawn between secret trusts and WA 1837, the *dehors* theory does not stir less debates than the fraud theory. Challinor's criticism against the *dehors* doctrine is mainly founded on secret trusts' defiance of established trust principles and Critchley's argument that secret trusts are fundamentally not *inter vivos,* but rather, testamentary dispositions.[42]

[35] RH Maudsley, 'Incompletely Constituted Trusts', in R Pound and others (eds), *Perspectives of Law: Essays for Austin Wakeman Scott* (Little, Brown and Company 1964) 255.
[36] D Fox, 'Secret Trusts' in J McGhee (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) 663.
[37] Allan (n 11) 319, citing *Cullen*.
[38] *Blackwell* (n 15) 334.
[39] *Re Snowden* (n 28) 533.
[40] Wills Act 1837, s 15.
[41] [1951] Ch 344 (Ch). 350.
[42] Challinor (n 5) 494-495, citing P Critchley, 'Instruments of Fraud, Testamentary Dispositions, and the Doctrine of Secret Trusts' (1999) 115 LQR 635, 641.

In Compatibilities with Trust Laws

The characterisation of secret trusts as *inter vivos* express trusts under the *dehors* doctrine is unconvincing as secret trusts do not conform to the fundamental principles established for the enforcement of express trusts.

As laid down by Turner LJ in *Milroy*, an ordinary express trust will take effect subject to an effective transfer of legal title of the trust property to the trustee;[43] on the contrary, the operation of secret trusts attempts to create a trust binding after-acquired properties.[44] As far as trusts in land are concerned, they have to be made in writing by virtue of s 53(1)(b) LPA 1925, save for resulting, implied and constructive trusts as per s 53(2) of the Act.[45] However, in *Ottaway v Norman*, a secret trust involving land was upheld even though it was not compliant with such requirement.[46] Furthermore, in *Re Maddock*, it was held that a secret trust would become void if the trustee is outlived by the testator, contrary to the maxim that 'equity will not permit a trust to fail for want of a trustee'.[47]

The Testamentary Nature of Secret Trusts

Critchley argued that those embracing the *dehors* theory are taking WA 1837 and Lord Westbury's judgment in *Cullen* out of context and the theory is in fact 'fatally flawed'.[48] She hit the nail on the head by pointing out that the application of s 9 WA 1837 is not confined to the will,[49] as s 1 of the Act provides that the scope of application of the Act encompasses 'any testamentary disposition'.[50] Therefore, the pertinent question is whether secret trusts are testamentary dispositions or *inter vivos* trust for the purpose of determining whether the statutory formalities should be applied.[51] Critchley submitted that secret trusts belong to the former due to the common "key indicia" they share with testamentary dispositions, in particular their state of being ambulatory and revocable before the death of the testator.[52] *Re Gardner (No. 2)* which suggests otherwise (that a gift would not lapse as a result of the beneficiary predeceasing the testatrix) is utterly unjustifiable, as it ignores the fundamental trust principle

[43] *Milroy* (n 23).
[44] Challinor (n 5), citing *Williams v C.I.R.* [1965] NZLR 395.
[45] Law of Property Act 1925, s 53(1)(b), s 53(2).
[46] D Kincaid, 'The Tangled Web: the Relationship between a Secret Trust and the Will' (2000) Conv 442, citing *Ottaway* (n 18).
[47] ibid, citing *Re Maddock* [1902] 2 Ch 220 (Ch).
[48] Critchley (n 42) 634, 641.
[49] ibid, 634.
[50] Wills Act 1837, s 1.
[51] Critchley (n 42) 634.
[52] ibid, 639-640.

that before a trust is fully constituted, the beneficiary merely gets a *spes*.[53] In fact, the testator is at liberty to subvert a secret trust by diverting the trust property to someone other than the trustee through amending the will.[54] Likewise, the testator's right of ownership is not restricted upon the declaration of a secret trust.[55]

Upon a more extensive review, it is not hard to discover that the interpretation of testamentary dispositions in *Cullen* are to be confined to the context of certain tax statutes and ought not be crudely applied to the context of formalities, in support of secret trusts. Otherwise, it would amount to a fallacy that implausibly equates "*dehors* the will" to "*dehors* the Wills Act".[56]

According to Kincaid, there exists an entanglement between secret trusts and the will that cannot be easily unfastened.[57] Functionally, save for the scenario of intestacy, secret trusts do not take effect entirely independently from the will as it relies on the will to vest property in the trustee.[58] The validity of the will therefore has a direct impact on the status of the secret trust attached to it, substantially eroding the basis of *dehors* theory.

In any event, even in the face of resistance and controversies in the academia, the *dehors* approach has been well embraced by the courts in the enforcement of secret trusts. For that reason, it will not be easily toppled.

AN ALTERNATIVE APPROACH – THE CONSTRUCTIVE TRUST CLASSIFICATION OF SECRET TRUSTS

Despite attracting overwhelming criticisms from the academia, the *dehors* concept is not completely meritless. An overhaul to its conception is required for it to work. As it shall be seen below, the classification of secret trusts as constructive trusts will rectify the theoretical defects of the existing *dehors* rationale and offer a rather comprehensive justification for the enforcement of secret trusts by incorporating elements from the fraud theory as well.

As discussed earlier, fraud provides a valid purpose for the enforcement of secret trusts. However, the argument that secret trusts are express trusts enforced for the prevention of fraud still lacks persuasiveness as it nevertheless fails to conform to the statutory formalities, albeit

[53] ibid, 640, citing *Re Gardner (No. 2)* [1923] 2 Ch 230 (Ch).
[54] Pearce, Stevens and Barr (n 34) 262.
[55] Ho (n 10) 88.
[56] Critchley (n 42) 641, citing *Cullen* (n 11).
[57] Kincaid (n 46) 442.
[58] ibid 442.

for the right cause. Moreover, as discussed, secret trusts are non-compliant with the conventional trust principles governing express trusts.

In its broader sense, fraud occurs upon a trustee's intentional failure to fulfill the testator's intention as promised and the destruction of the secret beneficiary's interests as a result, resulting in unconscionability. Under such circumstances, the operation of law gives rise to a constructive trust to prevent the trustee's unconscionable conduct, and to effectuate the testator's intention.[59] In his analysis of the irrevocability of assurances in *Gillett v Holt*, Robert Walker LJ pointed out that it is unconscionable for a secret trustee to resile from his prior agreement with the testator to confer benefits to the beneficiary.[60] The extension of fraud to unconscionability provides an effective solution to the crux that half-secret trusts can only be express trusts rather than a result of the operation of law due to the disclosure of fiduciary duty in the will under such arrangements.[61]

More importantly, as a derivative of the operation of law, constructive trusts take the advantage of escaping from s 9 WA 1837 and s 53(1)(b) LPA 1925 formalities which would otherwise apply to testamentary dispositions and ordinary trusts in land respectively,[62] a predicament which secret trusts as express trusts have consistently failed to deal with convincingly. This also helps rationalising many existing authorities insisting upon secret trusts' detachment from the application of statutory formalities such as *Blackwell* and *Ottaway*.

It is important to note that constructive trust characterisation of secret trusts is also acknowledged in some authorities. In *Re Cleaver*, Nourse J held, where a secret trustee resiles from his agreement with the testator to hold a property on trust for a secret beneficiary, 'equity will intervene by imposing a constructive trust on the property ...'[63] This has subsequently been approved by the Court of Appeal in *Kasperbauer v Griffith*.[64]

CONCLUSION

To sum up, Challinor has been selective in the cases and evidence she cites in support of her position. For instance, she went so far as to suggest that secret trusts are no longer socially

[59] Allan (n 11) 342; A Hudson, 'Conscience as the Organising Concept of Equity' (2016) 2 Can J Comp & Contemp L 275.
[60] [2001] Ch 210 (Ch) 228.
[61] Hudson (n 1) 284, citing AJ Oakley, *A Constructive Trusts* (3rd edn, London: Sweet & Maxwell 1997) 243.
[62] Ho (n 10) 95.
[63] [1981] 1 WLR 939 (Ch) 947.
[64] J Garton, G Moffat, G Bean and R Probert, *Law in Context: Moffat's Trusts Law: Text and Materials* (6th edn, Cambridge University Press 2015) 175, citing *Kasperbauer v Griffith* [2000] WTLR 333 (CA).

relevant,[65] whilst Meager, a practitioner in wills and probate, conducted a survey study in 2003 which showed how common it was for solicitors specialising in the area to receive enquiries about setting up secret trusts (the survey showed that in 2001, 35% of the respondents had received such enquiries).[66] Further, there continue to be cases involving disputes arising from the use of such device, such as the recent high profile case of *Rawstron v Freud*.[67]

Challinor's argument also overemphasises on the uniform application of statutory and common law rules.[68] It overlooked the fundamental purpose of equity - to mitigate the harshness resulted from the rigid application of the common law and statutes, for the sake of conscience which is the 'moral centre' of this area of law.[69] As Hudson suggests, equity is by nature an "improvised jazz music" based on well-considered concepts, but reacting to issues before it in an inventive and flexible manner.[70] It is necessary to bear this in mind in order to hold any meaningful study in relation to secret trusts.

Neither fraud theory nor *dehors* theory provides a watertight justification for the enforcement of secret trusts. The extended version of the fraud theory is capable of justifying the cause of enforcing both FSTs and HSTs, however, it is not ideal to apply the theory on the presumption that secret trusts are express trusts as it nevertheless contravenes statutory provisions on the face of it. On the other hand, the conventional *dehors* theory is flimsy in asserting that secret trusts as *inter vivos* express trusts are non-testamentary and independent from the will. Despite unsettled debates surrounding the two theories, they are each favoured by a line of substantial authorities.

After all, it does not take just a single theory to construct the theoretical foundation for the enforcement of secret trusts. By classifying secret trusts as constructive trusts, the enforcement of secret trusts bypasses the hurdles individually faced by the fraud theory and *dehors* theory by reorganising and combining the two theories in an alternative formula. On the one hand, fraud in its extended form creates the prerequisite for constructive trusts to arise. On the other, *dehors* the will and *dehors* WA 1837 can be achieved in their true sense, detaching secret trusts from the application of statutory formalities. The constructive trust classification of secret trusts therefore offers a more refined and organised theoretical solution

[65] Challinor (n 5) 499.
[66] R Meager, 'Secret trusts – do they have a future?' (2003) Conv 204.
[67] [2014] EWHC 2577 (Ch).
[68] Challinor (n 5) 498-500.
[69] Hudson (n 1) 261, 284.
[70] A Hudson, *Understanding Equity & Trusts* (4th edn, Routledge 2013) 232.

for the enforcement of secret trusts amidst longstanding confusions. Therefore, the enforcement of secret trusts can be described as an 'organised chaos'.

THE EROSION OF 'FAIRNESS' AND 'EQUALITY' IN THE LAW ON FINANCIAL REMEDIES

*SAM MORGAN**

INTRODUCTION

Financial remedies is currently governed by Section 25 of the Matrimonial Causes Act 1973. Section 25(1)[71] provides the court with the power to distribute income and capital and Section 25(2)[72] provides a list of factors, (a) through to (h)[73] to assist a judge in developing an order which is suitable for a particular case. However, judges are also guided by the principle of fairness, which is labelled the overarching aim to a financial remedies case[74]. Fairness derived from caselaw, has been described as an elusive concept[75] and criticised insofar as it does not provide clear guidance or aims.[76] The absence of guidance, therefore, has led the judiciary in search of principle to assist their decision making. In *White v White*[77] two elements of fairness, were the non-discrimination principle and the sharing principle. The two were considered essential at the time of the judgement insofar as they transformed the approach to financial remedies which was to regard marriage as analogous to a partnership.[78]

The change in trajectory was essential to the development of financial remedies insofar as it acknowledged potential gender discrimination which could occur if all marital contributions were not equally appreciated as contributing to the partnership. Nonetheless, the absence of clear statutory guidance within English jurisdiction creates broad judicial discretion. A benefit of a discretion-based system is that it can create unique orders which may better suit the circumstances of individual parties. It has also allowed the judiciary to establish the principles such as non-discrimination. However, judicial discretion also presents challenges. These challenges have presented themselves in concepts which, it has been argued, demonstrate a shift away from the overriding principle of fairness.[79] The concepts of

* LLM Candidate, Manchester Law School, Manchester Metropolitan University.
[71] Section 25 of the Matrimonial Causes Act 1973.
[72] Section 25 of the Matrimonial Causes Act 1973.
[73] Matrimonial Causes Act 1973.
[74] *White v White* [2001] 1 AC 596.
[75] *Miller v Miller* [2006] UKHL 24 [4].
[76] Jonathan Herring, *Family Law* (9th Ed, Pearson 2019).
[77] [2001] 1 AC 596.
[78] Jonathan Herring, *Family Law* (9th Ed, Pearson 2019).
[79] Jonathan Herring, *Family Law* (9th Ed, Pearson, 2019).

non-matrimonial property and special contribution have been identified as concepts which have added complexity to the law as well as attempting to diminish the significance of the decision[80] in *White.*[81] Moreover, the article will analyse the development of the two concepts. It will argue that the original aims from *White*[82] which were set out to eliminate gender discrimination and ensure that all contributions were deemed equal to the partnership, have been diminished.

THE ORIGIN OF THE UNIVERSAL PRINCIPLES

To understand the development and current position of financial remedies which will be considered in the dissertation, an analysis of how the principles originated is essential. Therefore, an initial discussion will reveal how the law stood before the ground-breaking case of *White.*[83] This analysis considers the once leading case *Dart v Dart*[84] and provide the social context in which *White*[85] arose. It will then discuss *White*[86] to demonstrate how by removing the ceiling of reasonable requirements, *White*[87] attempted to eradicate the gender discrimination which had arisen in cases before it. Further, it will centre on the principles which arose from White[88] and which were deemed essential to the development of the law.[89] These principles will then become the focus of discussion to contextualise the argument that the post-White development of the law has eroded the principles of sharing and non-discrimination.

Case Analysis: Dart v Dart

As previously identified, the court derive their authority to re-distribute assets and create orders from The Matrimonial Causes Act 1973. Section 25[90] contains the checklist which the courts utilise to create an order. The statute did not set out an overriding objective. Therefore, it is left to the courts to utilise their discretion to create an order. The courts approach prior to *White*[91] meant that an applicant's award was determined based on the court's valuation of the

[80] Jonathan Herring, *Family Law* (9th Ed, Pearson 2019).
[81] [2001] 1 AC 596.
[82] [2001] 1 AC 596.
[83] [2001] 1 AC 596 P 605.
[84] *Dart v Dart* [1996] 2 FLR 286.
[85] [2001] 1 AC 596.
[86] [2001] 1 AC 596.
[87] [2001] 1 AC 596.
[88] [2001] 1 AC 596.
[89] Jonathan Herring, *Family Law* (9th Ed, Pearson 2019).
[90] Matrimonial Causes Act 1973.
[91] [2001] 1 AC 596.

applicant's reasonable requirements despite the value of what is then left for the respondent. *Dart*[92] is illustrative of this approach. The court awarded Mrs Dart, £9M of the assets which totalled over £400M on the basis that the requirements she claimed to have were 'unreasonable'. Lord Justice Thorpe believed that her argument to have post-divorce resources to enable her to leave a legacy for her children, and additional funds to meet her daily needs, were both unreasonable.[93] Additionally, he stated that "the essential function of the Judge in big money cases, is to declare the boundary between the applicant's reasonable and unreasonable requirements applying all the statutory criteria to the facts of the individual case."[94]

Therefore, *Dart*[95] demonstrates the previous discourse which restricted the economically weaker spouse. It was argued that the approach imposed a ceiling on the economically weaker spouses claim and reinforced the patriarchal structure in creating obligations for the breadwinner to provide for a non-earning spouse's needs.[96] The implications of this method however, embedded gender inequality insofar as the traditional gender binary at the time usually saw that the husband as the breadwinner, whilst the wife primarily undertook domestic work. Further, reasonable requirements created a discourse which supported the assumption that the breadwinner is responsible to share his financial contribution. It was this assumption however which legitimised the 'rule' that financial contributions were considered of greater value than a domestic contribution.[97] Moreover, the statute was used in *Dart*[98] and previous caselaw to justify the reasonable requirements approach despite its implications. However, as will be discussed, the statute has been used to justify a radically different approach in *White,*[99] demonstrating a change in direction in accordance with the change in social discourse.

[92] [1996] 2 FLR 286
[93] [1996] 2 FLR 286 p 303
[94] [1996] 2 FLR 286 p 296
[95] [1996] 2 FLR 286
[96] Miles Geffin, 'The Judiciary: Shifting the Constitutional Boundary and Usurping Parliament's role?' [2008] Family Law Journal.
[97] Susan SM Edwards, 'Division of assets and fairness – Brick lane – Gender, Culture and Ancillary Relief on Divorce' [2014] Fam Law.
[98] [1996] 2 FLR 286.
[99] [2001] 1 AC 596.

Deconstruction of The Traditional Discourse

Nonetheless, leading up to *White,*[100] the language amidst caselaw was changing slightly. *Conran v Conran*[101] saw Lord Justice Wilson exercising his discretion to acknowledge Mrs Conran's contribution in assessing her reasonable requirements more generously. Lady Hale proposed that she should be entitled to some compensation for the reason that she had made personal sacrifices for her family. Although this was articulated through the language of compensation, it saw a change by allocating some value to the Mrs Conran's non-financial contributions. A feminist discourse can be seen throughout the judgement which encourages equality and acknowledges that choosing a traditional division of labour, should not remove all of a woman's entitlement. Moreover, the beginnings of the shift in discourse can be seen to reflect the surrounding societal attitudes. The language of rights, equality and non-discrimination can be seen in societal discourse alongside the enactment of the Human Rights Act 1998, which was implemented just prior to the decision in *White.*[102] Although the family courts had taken a restrained attitude to the Human Rights Act[103] it is observed that the societal and political discourse had taken a diluted form within financial remedies cases.[104] Notwithstanding its dilution the discourse is present in *White*[105] whereby the significance of equality is illustrated.

Case Analysis: White v White

White[106] concerned a couple who were married for thirty-three years and throughout the marriage had a farming business partnership.[107] During the marriage both farmed the two farms together, and at the end of the marriage both wished to continue farming. In the court of first instance, bound by the reasonable requirements principle it was deemed that Mrs Whites desire to continue farming was unreasonable and she was awarded 20% of the overall assets. Mrs White appealed and was awarded 40% of the assets on the basis that if she had applied for a formal dissolution of a farming partnership, she would have got a comparable

[100] [2001] 1 AC 596.
[101] *Conran v Conran* [1997] 2 FLR 615.
[102] [2001] 1 AC 596.
[103] Human Rights Act 1998.
[104] Alison Diduck, 'Ancillary Relief: Complicating the search for principle, Journal of Law and Society' (2011) 38(2).
[105] [2001] 1 AC 596.
[106] [2001] 1 AC 596.
[107] [2001] 1 AC 596, at the outset both contributed roughly £2,000 to the business however, in 1974 Mr White acquired a loan from his father which was used towards the farming business and in 1993 Mr White acquired Rexton Farm which was in his sole name.

sum. Nonetheless, Mr White appealed to the House of Lords, seeking a restoration of the original order. Mrs White cross-appealed and sought an order for an equal share of all the assets. Both appeals were dismissed.

The approach which was used to conclude this decision differed massively to a calculation of reasonable requirements. In removing the rule of reasonable requirements Lord Nicholls articulated that the statutory provision does not secure an overriding objective. Overall, he confirmed that judges must use their judicial discretion to determine what is fair on the facts of each case and a claimant wife should no longer be confined to an assessment of her reasonable requirements. He stated that contributions directly to a business or indirectly at home are both equally valuable in contributing to family life. Thus, despite the type of contribution, there is no place for discrimination between a husband and wife.

The Emerging Principles

A closer consideration of the principles which emerged demonstrates the re-conceptualisation of the overall rationale behind contributions to a marriage, and the radical departure from *Dart.*[108] Lord Nicholls stated that fairness is the overall objective, despite the concept's absence in statute. Instead of financial contributions from the breadwinner requiring distribution, the language throughout *White*[109] echoes the above social discourse of equality and fairness. Furthermore, the introduction of the ideology of a partnership of equals became the lens through which judges should exercise their discretion. The first transformative principle which underpinned this rationale was the yardstick of equality. Lord Nicholls stated that the judge in each case should "check their tentative views against the yardstick of equality,"[110] and equality should only be departed from if there is good reason for doing so. Moreover, the yardstick was to be a guide whilst fairness is the essential touchstone in the exercise.

The second essential principle is non-discrimination. Lord Nicholls articulated that there should be no discrimination in fairness's application, stating that, "there should be no bias in favour of the money-earner as against the home-maker."[111] Lady Hale affirmed this approach asserting that "couples throughout their lives together have to make choices about who will do what… the need generated by such choices are a perfectly sound rationale for

[108] [1996] 2 FLR 286.
[109] [2001] 1 AC 596.
[110] [2001] 1 AC 596 P 605.
[111] [2001] 1 AC 596 P 605.

adjusting the parties' respective resources in compensation."[112] Furthermore, the judgement demonstrates an acknowledgement that spouses contribute to the partnership in different ways, however all contributions should be considered equal in value. By removing the possibility of legitimising additional worth to financial contributions, Lady Hale's judgement in particular attempts to address feminist concerns by "reinforcing the rights-based gender equality discourse."[113]

Moreover, it is argued that by equalising the value of all contributions, it creates a stronger presumption of sharing capital on divorce which is implicitly based on the joint efforts of the marital enterprise.[114] Nevertheless, it will be argued that the judicial developed concepts of special contribution and non-matrimonial property diminish the significance of *White*.[115] It will be demonstrated that although *White*[116] was entrenched in the language of equality which demonstrated radical change to financial remedies, the caselaw post-White is unharmonious with this approach. Nonetheless, the special contribution doctrine was not discussed in-depth within the *White,*[117] however its effect on caselaw post-White will be discussed later.

However, the formation of the concept non-matrimonial property found its origins in *White.*[118] By leaving behind the principle of reasonable requirements, there became a need to address how surplus property was to be divided. Thus, emerged the principle of non-matrimonial property, that which could be treated differently for the reason that it comes from a source entirely external to the marriage.[119] Lord Nicholls stated that in future cases judges can consider classes of property in their assessment of fairness, this would include considering all the circumstances surrounding the time when the property was acquired. Thus, it could be a reason to depart from equality. Nonetheless, Lord Nicholls also stated that "it represents a contribution to the welfare of the family."[120] This demonstrates the heavy presumption of sharing despite the origin of property insofar as it is a contribution to the partnership. However, the judgement does not extend further to explain how judges should

[112] [2001] 1 AC 596 P 138.
[113] Alison Diduck, 'What is Family For?' (2011) Current Legal Problems 64(1) 287-314.
[114] Lisa Glennon, 'Obligations Between Adult Partners: Moving from Form to Function' (2008) International Journal of Law, Policy and the Family 22(1) 22-60.
[115] [2001] 1 AC 596.
[116] [2001] 1 AC 596.
[117] [2001] 1 AC 596.
[118] [2001] 1 AC 596.
[119] This was a central part of the discussion in *White* insofar as Mr White received an initial £14,000 loan from his father and was able to acquire Rexton Farm on advantageous terms which stemmed from his father's purchase of the Willet Estate.
[120] [2001] 1 AC 596 P 610.

approach the concept and due to the discretionary nature of financial remedies no formula was articulated for future caselaw. Furthermore, the approach to be was left unanswered. However, it was non-matrimonial property in addition to special contributions which, it will be argued, undermine the heavy presumption of sharing and non-discrimination which was intended to have "universal application."[121] Notwithstanding this re-interpretation of statute to justify a departure from the prior approach, the introduction of new principles of universal application posed new challenges when interpreted on a case-by-case basis. Therefore, White'*s* legacy will be assessed through an examination of those cases and the impact they had on the development of the principles laid down in *White.*[122]

The transformative principles of fairness and non-discrimination from *White*[123] as examined are illustrative of the envisioned landscape in financial remedies, that which reflected an equality-based discourse. An analysis of equality and the essential principle of non-discrimination demonstrates the judiciary's attempt to eradicate decades of gendered prejudice.[124] However, the article seeks to illustrate the argument that the importance of this principle has been diminished, subsequently impacting gender equality, and seek to demonstrate how these concepts eroded the pathway which *White*[125] set-out.

THE MIX OF DISCOURSES

Following *White,*[126] Cooke suggests there was a "pressing need to find coherent rationale for the yardstick of equality"[127] which was not adequately addressed. *Miller*[128] introduced three principles, needs compensation and sharing which a judge must consider in ensuring fairness. What follows is an examination of how *Miller*[129] and *Charman*[130] developed the concepts of non-matrimonial property and special contribution. It will assess how the development of the two principles have given weight to financial rather than domestic contributions illustrating that the application of universal principles of sharing and non-discrimination have challenged the judiciary.

---

[121] [2001] 1 AC 596 P 615.
[122] [2001] 1 AC 596.
[123] [2001] 1 AC 596.
[124] Susan SM Edwards, Division of assets and fairness – Brick lane – Gender, Culture and Ancillary Relief on Divorce [2014] Fam Law.
[125] [2001] 1 AC 596.
[126] [2001] 1 AC 596.
[127] Elizabeth Cooke, 'Case Commentary, Miller/McFarlane: Law in search of discrimination' (2007) CFLQ 98.
[128] [2006] UKHL 24.
[129] [2006] UKHL 24.
[130] [2007] EWCA Civ 503.

Case Analysis: Miller v Miller

Miller[131] attempted to refine the position on non-matrimonial property from *White.*[132] However, *Miller*[133] is criticised for opening up the question so wide that "it is difficult to give clear advice about it."[134] Further, the following analysis highlights the significance of *Miller*[135] as the discussion centres on the development of non-matrimonial property and the sharing principle. *Miller*[136] was a marriage of 3 years, during which Mrs Miller left her job to renovate their joint property in France. In the initial proceedings, Mrs Miller was awarded £5M on the basis that she had a legitimate expectation that she would live at a higher standard on marriage,[137] and the court did not allow the husband to rely on the length of the marriage because he was the reason for its breakdown. Mr Miller appealed this decision. However, the appeal was dismissed. It was held that Mrs Miller was entitled to a fair share of the assets despite the length of the marriage.

The Rationale Behind the Sharing Principle

Lord Nicholls in his leading judgement, identified that *White*[138] had created a need for some further judicial enunciation on general principle.[139] Lord Nicholls suggested three essential strands underpinned the concept of fairness. Need, compensation and sharing. Initially, these principles were praised for fleshing out the 'elusive' concept of fairness.[140] However, Crowley persuasively argues that the aims are redundant without a framework of governance which identifies how to secure those aims.[141] Furthermore, although *Miller*[142] advanced the law by establishing aims to achieve a concept of fairness, a clearer framework is required to ensure the law is effective.

Additional problems with the application of the 'yardstick of equality' were highlighted within *Miller*[143] which have further implications the division of property. The central problem with the yardstick is identifying the rationale behind it. It is unclear whether

[131] [2006] UKHL 24.
[132] [2001] 1 AC 596.
[133] [2006] UKHL 24.
[134] Elizabeth Cooke, 'Case Commentary, Miller/McFarlane: Law in search of discrimination' (2007) CFLQ 98.
[135] [2006] UKHL 24.
[136] [2006] UKHL 24.
[137] [2006] UKHL 24 [6].
[138] [2001] 1 AC 596.
[139] [2006] UKHL 24 [8]
[140] Alison Diduck, 'What is Family For?' (2011) Current Legal Problems 64(1) 287-314.
[141] Louise Crowley, 'Dividing the spoils on divorce: Rule-based regulation versus discretionary-based decision' (2012) IFL.
[142] [2006] UKHL 24.
[143] [2006] UKHL 24.

equality is achieved by assessing the contributions of each party to the marriage, thereby the yardstick becomes a valuation tool or whether sharing is a starting point. Utilising the yardstick in the former way would necessitate an evaluation of the contributions, benefits and sacrifices that each party made during the marriage thereby reflecting that within the decision.[144] Cooke identifies that this creates an assumption that once needs are exceeded a value must be put upon the contributions each party makes to the family[145]. Utilising the yardstick as a valuation tool has been criticised insofar as it places emphasis on contributions but does not state precisely how domestic and financial contributions are to be measured in value.[146] Additionally, it becomes challenging if a judge must consider the value of a domestic contribution as a whole insofar as there are no means to measure this.

Alternatively, it is argued that equality of sharing could be a starting point for both parties. This would establish that the rationale of the sharing principle is founded by marriage itself, parallel to the partnership model emphasised in *White.*[147] It also parallels legitimate expectation, an argument which proposes that marriage can give rise to a legitimate expectation of a certain lifestyle to be reflected in a financial award. Although, the standard of living enjoyed by the parties can be a factor of consideration,[148] the purpose of a Section 25 exercise is not to put both the parties in the financial position they would have been if the marriage had not broken down. This argument has been the source of criticism, it has been suggested that it embed the notion that one party to the marriage in relying on legitimate expectation is able to share affluence on the basis of marriage.[149] Further, the implications are it inserts an unconscious gender bias. Nonetheless, legitimate expectation was discredited in Miller and the fundamental issue of when an expectation give rise to an argument was left inconclusive.

Furthermore, it remained unclear whether equal sharing is something to be enjoyed by the state of marriage or equivalent to contributions.[150] The challenges which the application of the sharing principle presents however, have implications on the concept of non-matrimonial property and special contributions. For the former concept it becomes unclear which property the sharing principle is to apply and whether non-matrimonial property is to

[144] Elizabeth Cooke, Case Commentary, Miller/McFarlane: Law in search of discrimination (2007) CFLQ 98.
[145] Elizabeth Cooke, Case Commentary, Miller/McFarlane: Law in search of discrimination (2007) CFLQ 98.
[146] Elizabeth Cooke, Case Commentary, Miller/McFarlane: Law in search of discrimination (2007) CFLQ 98.
[147] [2001] 1 AC 596.
[148] [2006] UKHL 24 [59].
[149] Roger Bird, '*Miller v Miller*: Guidance or Confusion?' [2005] Fam Law 787.
[150] Joanna Miles, 'Principle or Pragmatism in Ancillary relief: The virtues of flirting with academic theories and other jurisdictions' (2005) International Journal of Law and Policy and the Family 19, 242-256.

be deemed an unmatched financial contribution much like the stellar contribution argument. Furthermore, non-matrimonial property and special contributions become analogous insofar as both legitimise that additional weight be added to financial contributions thus undermining the sharing principle. If the sharing principle is a valuation tool and unmatched financial contributions can be made either through non-matrimonial property or stellar contributions, it may prejudice the position of the spouse whose primary role was domestic. Furthermore, undermining the principles of fairness and non-discrimination.

The Development of Non-Matrimonial Property

In addition to the new aims, the judgement attempted to establish a clearer definition of non-matrimonial property. Additional to the special contributions doctrine it is argued that non-matrimonial property potentially legitimises the idea that financial contributions should be elevated above domestic contributions, contrary to the principle of non-discrimination. The statutory framework leaves open the possibility for the courts to treat non-matrimonial property differently depending on its source. It is not surprising therefore, that from the *Miller*[151] judgement arose two competing explanations in which to define non-matrimonial property.

Lord Nicholls suggests a narrow definition of non-matrimonial property which included pre-marital property, inheritance and gifts.[152] However, he suggests that if inheritance and gifts accumulated during the marriage are part of the party's joint endeavour[153] and the source of assets is likely to diminish over-time. Thus, it can be drawn from Lord Nicholls definition of non-matrimonial property that the sharing principle is likely to apply to all property regardless of the categorisation insofar as he deems it a "financial product of the parties common endeavour."[154] Furthermore, Lord Nicholls approach appears to encompass a heavier presumption of sharing, prominent in *White.*[155] The approach also encompasses the partnership model, this approach is less likely to undermine the sharing principle or add value to a financial contribution for the reason that all contributions are equal within the sharing principle.

[151] [2006] UKHL 24.
[152] [2006] UKHL 24 [11].
[153] [2006] UKHL 24 [22].
[154] [2006] UKHL 24 [22].
[155] Lisa Glennon, 'Obligations between adult partners: Moving from form to function' (2008) Internal Journal of Law, Policy and the Family 22(1), 22.

On the other hand, Lady Hale in her majority judgement adopted a much wider definition of non-matrimonial property thereby, limiting the application of the sharing principle. She asserts that pre-marital property, inheritance and gifts are non-matrimonial. However, she provides further categories for business assets (unilateral assets) which may be a reason to depart from equality.[156] These assets are not part of the 'joint endeavour' but rather formed solely by one party. This in her view differs from family assets,[157] which following *White,*[158] should all hold the same value for redistribution.[159] Therefore, by Lady Hale's definition business assets can be non-matrimonial which indicates that they are an unmatched contribution which can be considered outside the sharing principle, attaching greater weight to a financial contribution which a domestic contribution cannot match. It is argued that this approach is similar to the valuation-based model, which could potentially prejudice the main domestic contributor. However, throughout the development of the financial remedies, Lady Hale has found herself firmly within the feminist discourse. Her article *'Equality and Autonomy in Family Law'* highlights her efforts in encouraging equality, whilst also acknowledging that once the yardstick of equality took over the judiciary began to look for reasons to depart from it,[160] ultimately impacting the economically weaker spouse. Nonetheless, her judgement in *Miller*[161] appears to limit the position of the economically weaker spouse contrary to her efforts in protecting it.

The Development of Special contributions

The additional category that Lady Hale creates could also strengthen the position of a special contribution's argument, for the reason that labelling business assets and financial assets as an unmatched contribution, enhances their position within an argument for an unequal division. The origin of special contributions derives from *Lambert,*[162] which demonstrates how an unmatched contribution can strengthen a party's position. The initial proceedings saw the husband argue he had made an exceptional contribution, similar to *Cowan.*[163] The wife on the other hand sought 50% of the assets arguing she had a significant role in the husband's business, and she had made an equal contribution to the marriage by also providing all

[156] [2006] UKHL 24 [148]
[157] [2006] UKHL 24 [151]
[158] [2001] 1 AC 596
[159] [2006] UKHL 24 [150]
[160] Brenda Hale, 'Equality and Autonomy in Family Law' (2011) Journal of Social Welfare and Family Law 33(1) 3-14.
[161] [2006] UKHL 24.
[162] [2002] EWCA Civ 1685.
[163] *Cowan v Cowan* (2001) EWCA Civ 679.

domestic contributions. The wife, successful in her appeal, argued that the initial judge had "fallen into the trap of gender discrimination"[164] by valuing entrepreneurial success greater than domestic contributions. The judge held it was incorrect to value financial contributions greater than domestic. Nonetheless, the court found that special contributions are to remain a possibility in exceptional cases. This will only be the case if it can be shown that the special contribution is 'genius' or 'extraordinary'. The use of these terms has since been criticised as unhelpful.[165] Nevertheless, it demonstrates the courts search for principle whilst attempting to remain within the parameters of statute.

The court in *Lambert*[166] did attempt to ensure that the special contribution argument remain narrow, to avoid any discrimination. However, it also sets the context in which Lady Hale in *Miller*[167] placed an emphasis on financial contributions and non-matrimonial property to the detriment of the economically weaker spouse, despite her strong position on providing protection for this spouse. By asserting that they can in-fact be deemed unmatched contributions which a domestic contribution cannot achieve. It can be argued that the trajectory of the law in *Miller*[168] changed the direction intended from *White.*[169] Herring suggests that it is the development of judicial concepts which have attempted to diminish the decision of *White*,[170] both *Miller*[171] and *Lambert*[172] demonstrate how the principles undermine the application of the sharing principle. Furthermore, it can be argued that Lady Hale's definition of non-matrimonial property in addition to the stellar contribution argument demonstrates a "reluctance to accept the principle of equality that was at the heart of the decision of *White.*"[173]

Miller v Miller's Application

Charman[174] in following *Miller*[175] attempted to apply the principles established to its facts. *Charman*[176] involved both non-matrimonial business assets, as well as a special contributions

[164] Rebecca Bailey-Harris, 'Case Commentary: *Lambert v Lambert* – Towards the Recognition of Marriage as a Partnership of Equals' (2003) 15 Child & Fam LQ 417.
[165] *Gray v Wok* [2015] EWHC 834 (Fam).
[166] [2002] EWCA Civ 1685.
[167] [2006] UKHL 24.
[168] [2006] UKHL 24.
[169] [2001] 1 AC 596.
[170] [2001] 1 AC 596.
[171] [2006] UKHL 24.
[172] [2002] EWCA Civ 1685.
[173] J Herring, *Family Law* (9th Ed, Pearson 2019).
[174] [2007] EWCA Civ 503.
[175] [2006] UKHL 24.
[176] [2007] EWCA Civ 503.

argument put forward by the husband. Therefore, it is an essential case to consider in highlighting the trajectory of the concepts developed in *Miller.*[177] *Charman*[178] involved a marriage of 27 years, Mrs Charman had given up her job whilst Mr Charman continued working acquiring an asset value of roughly £131M. The central issue within the judgement was whether the sharing principle should apply as a starting point in relation to all the assets or only as Lady Hale suggested, unilateral assets from which a departure may be made.

Throughout the judgement it is evident that the original debate from *Miller*[179] still resonates. The rationale behind the sharing principle and its application to property remains unclear. The judgement attempts to clarify whether the yardstick is to be used as a valuation tool, or if it should be based on the partnership model, thereby equality is an applicable starting point. Although it does leave the fundamental issue open, the judgement clearly adopts a presumption that all assets should be shared equally. Therefore, the approach appears to imply "a deep, universal partnership."[180] However, *Charman*[181] did not clarify whether this was the approach to be followed. *B v B*[182] did not apply equality as a presumption, the Court of Appeal highlighted that *B v B*[183] raised no new point of principle and "ought not to be used as precedent."[184] It can be argued therefore that the judiciary did not adequately address the rationale. Furthermore, the rationale behind the yardstick was inconsistent to that applied in *Charman.*[185] Moreover, by obscuring the position further, it illustrates the absence of clarity behind the yardstick. Lord Justice Hughes applied the yardstick at the end of the exercise which is contrary to the strong sharing presumption as part of the partnership model. Further, *B v B*[186] was regarded as retreat away from the principles of sharing and non-discrimination in the post-White era.[187]

It is evident that the rationale behind the sharing principle also remains uncertain whilst the judicially developed concepts non-matrimonial property and special contribution

[177] [2006] UKHL 24.
[178] [2007] EWCA Civ 503.
[179] [2006] UKHL 24.
[180] Joanna Miles, 'Case Commentary: *Charman v Charman (No4)* Making sense of need, compensation and equal sharing after Miller/McFarlane' (2008) 20 Child & Fam. LQ 378.
[181] [2007] EWCA Civ 503.
[182] *B v B (ancillary relief)* [2008] EWCA Civ 543.
[183] [2008] EWCA Civ 543.
[184] Joanna Miles, 'Case Commentary: *Charman v Charman (No4)* Making sense of need, compensation and equal sharing after Miller/McFarlane (2008) 20 Child & Fam. LQ 378.
[185] [2007] EWCA Civ 503.
[186] *B v B (ancillary relief)* [2008] EWCA Civ 543.
[187] Joanna Miles, 'Case Commentary: *Charman v Charman (No4)* Making sense of need, compensation and equal sharing after Miller/McFarlane (2008) 20 Child & Fam. LQ 378.

continue to undermine this principle, subsequently diminishing the significance of *White.*[188] Caselaw has been used to critique the development of the law, despite its attempts to "clamp down"[189] any doctrines which may prejudice the weaker spouse.

ANALYSIS OF JUDICIAL DOCTRINES

What follows in an analysis of caselaw post-White, to demonstrate that the principles intended for universal application have been challenging for the judiciary to apply in light of the developments non-matrimonial property and special contributions. To better demonstrate this aim, caselaw will be reviewed in a table to highlight the similarities and trends which occurred, to highlight and inform the discussion and conclusions drawn.

Current Position of Non-Matrimonial Property

Two schools of thought emerged from *Miller*.[190] Lady Hale who had a wide interpretation of non-matrimonial property, encompassing all property which is deemed unilateral and Lord Nicholls, who applied a narrow approach, encompassing gifts and inheritance, however leaving out all property acquired during the marriage including one party's business activities.[191] Lord Nichols argued that there should not be a dividing line between matrimonial and non-matrimonial property. This approach emphasises the need for flexibility[192] to ensure that the sharing principle is not restricted. It is likely that by Lord Nicholls approach there are better reasons to depart from equality in individual cases. Therefore, it is unlikely that the sharing principle would be undermined by this definition.

Despite Lord Nicholls authority, more recent caselaw demonstrates a preference for Lady Hales approach. As identified, it encompasses a wider definition of non-matrimonial property, including business and investment assets generated mainly by the efforts of one partner during the marriage. It can be drawn from this position that the financial gain generated by one partner is likely to prejudice the economically weaker spouse if their contribution is mainly domestic. Furthermore, demonstrating the central argument that the

[188] [2001] 1 AC 596.
[189] Joanna Miles, 'Case Commentary: *Charman v Charman (No4)* Making sense of need, compensation and equal sharing after Miller/McFarlane (2008) 20 Child & Fam. LQ 378.
[190] [2006] UKHL 24.
[191] [2006] UKHL 24 [22]-[26].
[192] [2006] UKHL 24 P169.

universal principles from *White*[193] have eroded. Nonetheless, domestic contributions will be considered later.

The preference for Lady Hale's approach has led to the creation of an entrenched divide between matrimonial and non-matrimonial assets. Caselaw illustrates non-matrimonial property has been dealt with differently on a case-by-case basis, leading to criticism that this area is now completely "arbitrary and lacks consistency."[194] Lady Hale's approach can be further criticised for undermining the sharing principle and so adversely affecting the economically weaker spouse. By creating a strong requirement to divide assets, it restricts the application of the sharing principle which was previously deemed essential to equality. This restriction is further embedded by Lady Hales definition of non-matrimonial property which gives equal sharing a "narrower ambit."[195]

In addition to the different definitions, subsequent caselaw has attempted to provide a means of dealing with non-matrimonial property. *Jones v Jones*[196] is illustrative of the preferred approach by the Law Commission, the approach is split into two stages. Firstly, applying the equal sharing principle to matrimonial property. Secondly, only bringing non-matrimonial property into consideration if on the facts needs dictate it. The alternative approach however proposes that non-matrimonial property be taken account by adjusting away from the equal sharing principle. Therefore, all property acquired during the marriage is to the discretion of the judge. The following table is illustrative of the approaches. Moreover, the following assessment will demonstrate the unpredictability present within caselaw and support the central argument that the development of non-matrimonial property undermines the sharing principle, by prejudicing the weaker spouse and countering those principles which were intended to be 'universal'.

[193] [2001] 1 AC 596.
[194] Bethany Hardwick 'What's Mine is (Not) Yours – The Treatment of Non-matrimonial Property: No Longer a Lawless Science' (2016) Family Law LexisNexis.
[195] Joanna Miles, 'Case Commentary: *Charman v Charman (No4)* Making sense of need, compensation and equal sharing after Miller/McFarlane (2008) 20 Child & Fam. LQ 378.
[196] *Jones v Jones* [2011] EWCA Civ 41.

Cases	**Approach to Non-matrimonial property**	**Justification**
Jones v Jones[197]	Non-matrimonial property ring-fenced	• The case concerned the husband's pre-marital business asset, equating to £32M at the time of proceedings. • The sharing principle was not applied to non-matrimonial property in this case. The principle extracted from the judgement is non-matrimonial property is to be ring-fenced in circumstances where the availability of assets demonstrates that needs are met. • Jones[198] is the leading case for the concept of non-matrimonial property
N v F[199]	Non-matrimonial property ring-fenced	• The case concerned the husband's pre-marital wealth, equating to £9.7M at the time of proceedings • The case adopted the same approach as Jones.[200] The wife's award was based on a need's assessment, the sharing principle was not engaged
Robson v Robson[201]	Sharing principle is engaged to all property	• The assets at the time of proceedings equated to £22.3M, most of which was the husband's inheritance • The method allowed judicial discretion to dictate the proportions in which property is shared, rather than excluding property entirely

[197] [2011] EWCA Civ 41.
[198] [2011] EWCA Civ 41.
[199] *N v F* [2011] 2 FLR 533.
[200] [2011] EWCA Civ 41.
[201] *Robson v Robson* [2010] EWCA Civ 1171.

		• The approach adopted was likened to Charman[202] and Rossi v Rossi[203] which found that non-matrimonial assets are not to be ring-fenced from the court's powers[204]
***AR v AR*[205]**	Sharing principle is engaged to all property	• The case concerned assets equating to £24M which consisted of the husbands inherited assets • The first school of thought applied in Jones[206] was deemed too rigid[207] • The Court of appeal emphasised the need for judicial discretion in handling non-matrimonial property. Justice Moylan concluded that to limit discretion "would in my view risk re-imposing the ceiling identified as resulting in unfairness in White"[208] • It followed the authority of Charman,[209] reaching the conclusion that that sharing principle "applies to all the party's property, but, to the extent that their property is non-matrimonial, there is likely to be a better reason for departure of equality"[210]

The Impact of Ring-Fencing

The above caselaw demonstrates two distinct methods. The first method discussed enables the party with the non-matrimonial asset to ring-fence it from the sharing principle. Thus,

[202] [2007] EWCA Civ 503.
[203] *Rossi v Rossi* [2006] EWHC 1482.
[204] [2006] EWHC 1482 4 [24].
[205] *AR v AR (Treatment of Inherited Wealth)* [2011] EWHC 2717.
[206] [2011] EWCA Civ 41.
[207] [2011] EWHC 2717 [80].
[208] [2011] EWHC 2717 [80].
[209] [2007] EWCA Civ 503.
[210] [2007] EWCA Civ 503 [66].

limiting judicial discretion. This approach has been praised and labelled a principled approach[211] for the reason that by removing non-matrimonial property from judicial consideration it clearly demonstrates how a decision was reached. It has been suggested that this approach is more formulaic as a judge is able to show how they got to their decision. Additionally, by cross-checking the decision at the conclusion confirms whether the decision made is within the correct bracket.[212] Nonetheless, restricting judicial discretion poses challenges. *White*[213] in establishing fairness as the universal aim made clear that full judicial discretion is required. However, by limiting judicial discretion and ring-fencing the sharing principles application, it undermines the decision. In addition, the inconsistent application of the two approaches also creates unpredictability within caselaw. Furthermore, undermining the concept of sharing as it is unclear which facts dictate when it is or isn't to be applied to non-matrimonial property.

Additional criticism can be drawn from the leading approach insofar as ring-fencing property from judicial discretion and the sharing principle poses a risk to the economically weaker spouse. The current legislation does not provide a framework to govern how the courts should segregate property. However, by following the approach in *Jones,*[214] it enables one party to exercise their autonomy in attempting to segregate their property from the courts power by labelling it non-matrimonial at the expense of the economically weaker spouse,[215] Nevertheless, the principle of autonomy has become a central part of the discourse within financial remedies over more recent years. It has been praised insofar as it encompasses social discourse which encourages personal autonomy, enabling parties to organise their finances as they choose. A consideration of the Law Commission report 2014, demonstrates the shift in emphasis.

The report demonstrates a shift in importance from sharing, to the principle of autonomy. The principle was also a catalyst for the Law Commissions consideration of qualifying-nuptial agreements. Nonetheless if the agreements were implemented, they could operate as a method for couples to keep their property separate whilst providing a framework in which personal autonomy can operate without jeopardising the economic position of either spouse. However, the current preferred position of financial remedies leaves the

[211] [2011] EWCA Civ 41.
[212] Bethany Hardwick 'What's Mine is (Not) Yours – The Treatment of Non-matrimonial Property: No Longer a Lawless Science' (2016) Family Law LexisNexis.
[213] [2001] 1 AC 596.
[214] [2011] EWCA Civ 41.
[215] Katherine Landells, '*Jones v Jones*: Springboards, Non-matrimonial Property, Castles and Companies' (2011) Fam Law.

economically weaker spouse vulnerable because the courts discretion is compromised by ring-fencing. Additionally, the sharing principle is undermined for the reason that it is inconsistently applied, and in the majority, cases will not apply to all property.

The preference for the approach in *Jones*[216] emphasises that the rationale behind the sharing principle remains unclear. The sharing principle derives from a need to "ensure the absence of discrimination"[217] as well as acknowledging both parties have contributed to the marriage in different ways.[218] However, following *Jones,*[219] non-matrimonial property is deemed an unmatched financial contribution to be excluded from the sharing principle. The leading approach therefore demonstrates a discord amongst the principles from *White*[220] and the development of non-matrimonial property. This illustrates how post-White the courts have struggled to maintain the universal principles, instead the courts have diminished the decision in *White*[221] by placing emphasis on enhancing an argument which looks to ring-fence property and legitimising the view that financial contributions are 'unmatched' therefore should be ring-fenced. Therefore, it can be argued that excluding non-matrimonial property from the sharing principle, undermines its application as well as undermining the non-discriminatory principle. Moreover, Murray suggests it demonstrates a move away from equality and the partnership model which can be seen in Whites discourse.[222] Overall, it has been argued that the non-matrimonial property debate and approach has threatened both the sharing principle and non-discrimination. The focus will now turn to the doctrine of special contribution to further demonstrate the discord amongst principle.

How the Non-discrimination Principle is Undermined

The non-discrimination principle has also been threatened by the development of the special contribution's argument. Although it was largely limited by the *Charman*[223] judgement, the argument persists. However, the discourse has centred on how financial contributions can attain special status rather than domestic. Furthermore, the following table seeks to demonstrate how judicial discretion has attempted to deal with the term special contribution.

---

[216] [2011] EWCA Civ 41.
[217] [2001] 1 AC 596 [24].
[218] J Herring, *Family Law* (9th Ed, Pearson 2019).
[219] [2011] EWCA Civ 41.
[220] [2001] 1 AC 596.
[221] [2001] 1 AC 596.
[222] Ashley Murray, 'Sharing Non-Matrimonial Assets: "As a rare White Leopard": JL v SL (No. 2) [2015] EWHC 360 (Fam)' (*Ashley Murray Chambers*) <http://www.ashleymurraychambers.co.uk/wp-content/uploads/2015/04/Flyer-52.pdf> accessed 14 May 2021.
[223] [2007] EWCA Civ 503.

Following the table, will be an analysis of the doctrine to demonstrate how it undermines non-discrimination, negatively impacting gender-equality.

Case	**Special financial contribution matched?**	**Justification and principle**
Cooper-Hohn v Hohn[224]	The husband's contribution was deemed special. The wife's domestic contribution was deemed unequal.	• It was deemed that the husband had a special effort which survives as a material consideration despite the partnership aspect of a marriage
XW v XH[225]	The husband's contribution through his company was deemed special. The wife's domestic contribution and devotion to childcare were not deemed special.	• Ms Stone argued the court had not considered her husband's contributions in the whole context, including her role in caring for their child • Nonetheless, it was submitted by the husband that the wife could not claim she had made a special contribution as a "raising shield"[226] to the husband's case, she would have to actively pursue a special contribution argument herself. • It was accepted in her appeal that the judge had not adequately considered her contributions thus, had not followed the guidance that a judge must consider any disparity in contributions to the welfare of the family

[224] *Cooper-Hohn v Hohn* [2014] EWHC 4122.
[225] *XW v XH* [2017] EWHC 792 (Fam).
[226] [2017] EWHC 792 (Fam) [235].

Gray v Work[227]	The husband and wife's special contributions arguments was rejected. However, the case remains significant for the reason that the court rejected that special contribution were discriminatory.	• Where a judge is considering a special contribution, they must not only consider the amount of wealth that has been generated, but simultaneously consider the characteristics of the party who claims to have made a special contribution and whether there is a disparity in respective contributions "that make it inequitable to disregard."[228] • Domestic contributions cannot attain special status. • The Court of Appeal took the position that the special contribution argument is not discriminatory insofar as there were so few cases which it applied.

The above caselaw is important to demonstrate how the special contribution argument has developed. The term special contribution it can be seen has been restricted to ensure that all the circumstances surrounding the contribution are considered, rather than the individual quality which makes the contribution 'genius' as previously discussed. Therefore, the focus appears to have shifted to also acknowledge the whole context of the contributions from each partner, as seen in *XW v XH.*[229] Although this appears fairer, to acknowledge all the circumstances, the above judgements do not acknowledge that a special contribution argument could be applicable to domestic contributions. The above judgements demonstrate the doctrine is only applicable where there is a disparity in contribution to the welfare of the

[227] *Gray v Wok* [2015] EWHC 834 (Fam); Upheld in [2017] EWHC Civ 270.
[228] [2015] EWHC 834 (Fam) [15].
[229] [2017] EWHC 792 (Fam).

family. Therefore, suggesting that only financial contributions can create such a disparity deemed special.

Despite the argument that this is discriminatory against a primary domestic contributor insofar as domestic contributions cannot be seen as more exceptional than financial contributions, the courts have taken the position that the special contribution argument is scarcely discriminatory. As identified above, it is suggested that it is not discriminatory for the reason that it rarely succeeds in caselaw.[230] Nonetheless, this position held by the courts is inadequate. Herring persuasively criticises this argument suggesting that although the cases are rare, it does not remove the discriminatory nature.[231] Furthermore, the principle of non-discrimination is undermined by the courts for the reason that even though it undermines the principle that all contributions are equal, it is not deemed discriminatory for the reason it rarely occurs. Furthermore, this area of contention demonstrates the courts difficulty in applying the universal principles post-White.

In addition, by considering the available statistics it demonstrates that women are still the primary domestic contributors to a partnership, thereby, disproportionately affected by the special contribution's argument. The statistics show that on average women undertake 13 hours of housework and 23 hours of caring for family rather than men who took 8-10 hours.[232] Although it is clear that societal attitudes have changed regarding family responsibilities, the division of work reflected in childcare and employment, still suggest that domestic contributions such as childcare are primarily a role which women still undertake. In 2016, the ONS data demonstrated a similar split in unpaid work. Women's unpaid work totalled 25.54 hours per week as compared to 15.99 hours for men.[233] Therefore, illustrating how the traditional allocation of responsibility still commonly exists within a family structure. It is important to recognise the structure still exist as it demonstrates the social structures in which financial remedies operates. Furthermore, it illustrates the argument that by not acknowledging domestic contributions as special, it primarily negatively impacts women and the importance of gender-equality and non-discrimination within the context of financial remedies is eroded.

[230] [2015] EWHC 834 (Fam); Upheld in [2017] EWHC Civ 270.
[231] J Herring, *Family Law* (9th Ed, Pearson 2019).
[232] J Scott and E Clery, *'Gender roles'* in British Social Attitudes the 30th Report Nat Cen Social Research 2012.
[233] Office for National Statistics, *Women shoulder the responsibility of 'unpaid work'* (ONS Digital, 2016).

CONCLUSION

It is argued that both the concepts of non-matrimonial property and special contribution have undermined the universal principles in *White.*[234] The impact is felt by the domestic contributor and in light of the family structure that exists, disproportionately impacts women.[235] This has been emphasised particularly through a consideration of the special contribution doctrine which safeguards additional value given to financial contributions. However, both the judicial developed concepts have led to the money-earner receiving much more of the assets, to the disadvantage of the home maker,[236] despite the principles of sharing and non-discrimination intended to be at the heart of fairness. Moreover, it is evident that the courts have struggled to apply the principles of universal application and even undermined the principles in some cases. In light of the discord, it is crucial that reform is considered.

[234] [2001] 1 AC 596.
[235] [2006] UKHL 24 [13].
[236] J Herring, *Family Law* (9th Ed, Pearson 2019).

SHOULD ASSISTED DYING BE LEGAL IN THE UK? A COMPARATIVE ANALYSIS OF THE LAW ON ASSISTED DYING IN THE UNITED STATES, OREGON, AND THE UNITED KINGDOM

*AMANDA BEGBY**

INTRODUCTION

To many, the idea of orchestrating their own death sounds alien and impossible. Yet, to some, death through assisted dying would, in their mind, be the only way in which they are able to keep some control over their reality and preserve their dignity.[237] There are people who strongly oppose this belief, believing that allowing assisted dying would be a disservice to society as a whole, which would open the floodgates and lead to active euthanasia,[238] and that 'individual choice should be limited when it has a profound effect on others'.[239] Assisted dying (also referred to as assisted suicide or physician assisted suicide (PAS)), is the term used to describe when a physician prescribes life ending drugs to a terminally ill patient for self-administration. This is not to be confused with voluntary euthanasia, in which a doctor injects a patient with life ending drugs with their consent.[240] Assisted dying is currently legal in several countries such as Switzerland, Belgium and Canada, and it appears as though more jurisdictions are warming to the idea of extending the right to personal autonomy to include situations whereby a person wishes to control the way in which they die. In October 2020, New Zealand became the most recent country to legalise assisted dying after a referendum resulted in a majority in favour of passing the End-of-Life Choice Act 2019. This act will make it possible for terminally ill adults to access assisted dying and will come into force on 7th November 2021.[241]

*Final Year LLB Candidate, Manchester Law School, Manchester Metropolitan University.

[237] Maggie Hendry, Diana Pasterfield, Ruth Lewis and others, 'Why do we want the right to die? A systematic review of the international literature on the views of patients, carers and the public on assisted dying' (2013) Palliative Medicine 27(1) 13-26.

[238] Angelika Albaladejo, 'Fear of assisted dying: could it lead to euthanasia on demand or worsen access of palliative care?' (2019) BMJ 364.

[239] Tony Delamothe, Rosamund Snow and Fiona Godlee, 'Why the assisted dying bill should become law in England and Wales' (2014) BMJ 349.

[240] The British Medical Journal, 'Assisted Dying' < https://www.bmj.com/assisted-dying> accessed 27 March 2020.

[241] Clare Dyer, 'New Zealanders vote to legalise assisted dying for terminally ill adults' (2020) 371 BMJ.

This article will attempt to answer the question of whether assisted dying should become legal in the United Kingdom, and to do this, a comparative analysis of the law on assisted dying in the UK and in the US state of Oregon, where assisted dying is legal,[242] will be carried out. The state of Oregon has been chosen as a comparison to the UK due to the proposed UK legislation on assisted dying having great similarities with the Oregon legislation. In this article, the laws on assisted dying in Oregon and the UK will be set out, followed by a discussion on the ethical considerations and an analysis of whether assisted dying should be included as a right within the Human Rights Act 1998 (HRA 1998).

A COMPARATIVE ANALYSIS

The Law on Assisted Dying in Oregon

Assisted dying in Oregon is governed by the Death with Dignity Act 1997 (DWDA). It states that an adult (person over the age of 18)[243] who is capable and a resident of the state of Oregon, who has been determined to be suffering from a terminal disease, and has voluntarily expressed a wish to die may request medication to end their life.[244] The term 'capable' refers to someone who; in the opinion of the court, or in the opinion of the patient's attending physician, consulting physician, psychiatrist or psychologist, possess the ability to make and communicate health care decisions to health care providers. This includes communication through persons familiar with the patient's manner of communicating if those persons are available.[245] In addition, 'terminal disease' refers to an incurable and irreversible disease that have been confirmed and will produce death within six months.[246] It is up to the physician to determine whether the patient has a terminal illness, and that they are capable and have made the request voluntarily.[247]

If these requirements have been met, the process of obtaining the medication can begin. It includes various safeguards such as a 15-day waiting period between making the

[242] In the United States, assisted dying is currently legal in California, Colorado, District of Columbia, Hawaii, Maine, New Jersey, Oregon, Vermont and Washington.
Death with Dignity 'Death with Dignity Acts' < https://www.deathwithdignity.org/learn/death-with-dignity-acts/> accessed 30 November 2020.
Suggested further reading on assisted dying in the United States; Howard Ball '*At Liberty to Die: The Battle for Death with Dignity in America,* (New York University Press 2012).
[243] Death with Dignity Act 1997, 127.800 §1.01(1).
[244] Death with Dignity Act 1997, 127.805 §2.01.
[245] Death with Dignity Act 1997, 127.800 §1.01(3).
[246]Death with Dignity Act 1997, 127.800 §1.01(12).
[247]Death with Dignity Act 1997, 127.815 §3(1)(a).

first request and when the request can be reiterated.[248] In addition, the request must be witnessed by at least two individuals, and alternatives to assisted dying, as well as the right to rescind must be presented.[249] Section 4(4) DWDA provides that no healthcare provider is under a duty to prescribe the medication to end a patient's life, and if they cannot do this for any reason they shall transfer them to another healthcare provider. When the medication has been prescribed, the act only permits physician assisted suicide (PAS) in the form of 'a prescription for lethal medication to be self-administered by the patient'.[250]

Since the enactment of the DWDA 1997, prescriptions have been written for 2,518 people, from this, 1,657 people (66%) died from taking the medications prescribed under the Act.[251] In 2019, 188 people died from ingesting the medication. Out of the 290 patients that received a prescription, 170 (58%) of them died from taking the mediation, with an additional 18 people who received a prescription in previous years ingesting it.[252] The number of people who choose not to ingest the medication is substantial. However, one could hypothesise that the reason for seeking the prescription in the first place could be driven by the wish to maintain control over their life in the face of uncertainty. It is not difficult to imagine that receiving the prescription could in itself provide the patients with comfort knowing that they will not have to endure their health declining dramatically without any other options available to them.[253] Family members of the patients participating in the DWDA echo this by describing them as individuals who value being in control of their own life and maintaining independence, for whom the estimated loss of abilities and quality of life would be intolerable.[254] The fact that the three most reported end of life concerns for patients concern loss of autonomy, loss of dignity and being unable to engage in activities that makes life enjoyable, seemingly supports this notion.

Deaths under the DWDA account for 0.2% of the total deaths in the state each year.[255] Since 1997, there has been a steady increase in people who receive medication under the Act,

---

[248] Death with Dignity Act 1997, 127.840 §3.06.
[249] Death with Dignity Act 1997, §s.3(1)(e), §3.07.
[250] Penney Lewis and Isra Black, 'Reporting and scrutiny of reported cases in four jurisdictions where assisted dying is lawful: A review of the evidence in the Netherlands, Belgium, Oregon and Switzerland' (2013) MLI 13(4).
[251]Oregon Health Authority, 'Oregon Death with Dignity Act: 2019 data summary' < https://www.oregon.gov/oha/PH/PROVIDERPARTNERRESOURCES/EVALUATIONRESEARCH/DEATHWITHDIGNITYACT/Documents/year22.pdf > accessed 15 August 2020.
[252] Ibid.
[253] Li Way Lee, *'The Oregon Paradox'* (2009) Journal of Socio Economics 39(2) 204-208.
[254] Linda Ganzini, Elizabeth R. Goy, Steven K. Dobscha, 'Why Oregon Patients Request Assisted Death: Family Members' Views' (2008) Journal of General Internal Medicine 23(2) 154-157.
[255] Ibid.

with 129 people receiving medication between 1998-2002, 212 between 2003-2008, 340 between 2008-2012, and 778 between 2013-2018.[256] This could suggest that assisted dying is becoming a more common choice for the terminally ill, and that society as a whole has become more open to the concept. In addition, compared to the late 90s where the concept of the internet was relatively new, information is now more accessible than ever, which could play a huge part in why attitudes have changed. It is becoming more and more common to discuss the legality of assisted dying in various countries around the world. And although Oregon was the first US state to introduce legislation legalising assisted suicide, nine states have now followed suit, with Maine introducing their Death with Dignity Act in 2019.

The Law on Assisted Dying in the United Kingdom

The Suicide Act 1961 (SA 1961) decriminalised suicide;[257]however, it is illegal to aid someone in committing suicide. The 1961 Act provides that 'a person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding 14 years'.[258] In addition, aiding someone in accessing assisted dying abroad could be considered an offence under s.2(2).[259] Section 2(4) of the Suicide Act 1961 provides that proceedings for an offence under s.2(1) must have the consent of the Director of Public Prosecutions (DPP). Following the case of *Purdy v DPP,*[260] the House of Lords requested the DPP to publish guidelines as to what he would consider when deciding whether to prosecute someone under s.2(1) Suicide Act 1961.[261] The DPP was told to 'clarify what his position is as to the factors that he regards as relevant for and against prosecution'.[262] The guidelines were published in February 2010, and set out factors that will weigh for and/or against prosecution, such as whether or not the victim was a minor, whether or not the victim was capable, and whether or not prosecution would be in the public interest.[263]

---

[256] Ibid.
[257] Suicide Act 1961, s.1.
[258] Suicide Act 1961, s.2(1).
[259] Clare Dyer, 'House of Lords vote against immunity from prosecution for relatives who help in assisted suicide abroad' (2009) BMJ 339.
[260] *R (on the application for Purdy) v Director of Public Prosecutions* [2009] UKHL 45.
[261] Richard Nobles, David Schiff, 'Disobedience to Law – Debbie Purdy's Case' (2010) The Modern Law Review 73(2) 295-304.
[262] *R (on the application for Purdy) v Director of Public Prosecutions* [2009] UKHL 45 [55].
[263] The Director of Public Prosecutions, 'Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide' < https://www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide > accessed 17 December 2020.

However, these guidelines have been criticised. Especially so for its unpredictability and vagueness, they do not make it clear which aspects of the guidelines will be considered when the decision whether to prosecute is being made.[264] Suggesting it is difficult to predict the outcome as it could potentially vary on a case-by-case basis. In addition, the guidelines fail to define many essential terms such as 'minimal assistance' and 'determined wish', which means the guidance is difficult to interpret.[265] Furthermore, the creation of the guidelines have been criticised. It is easy to see that the guidelines might be interpreted as the DPP stating when something the government has made a serious offence, will or will not be prosecuted.[266] Greasley suggested that these guidelines have pushed the law towards an "unnecessarily ethically dubious track". [267] However, Keir Starmer, whilst acting as Director of Public Prosecutions, defended the guidelines stating that they were essential, not only due to the directions received by the court, but to guarantee prosecutors' discretion whether to prosecute based on the facts of each individual case.[268]

There have been multiple attempts to change the law on this area throughout the years, Lord Joffe proposed the Assisted Dying for the Terminally Ill Bill in 2006, which would, similar to the Oregon legislation, have allowed a capable person suffering from a terminal illness to access assisted dying,[269] it was ultimately rejected, but resulted in similar bills being proposed in following years.[270] The last bill to be voted on was the Assisted Dying Bill (No2) 2015, proposed by labour MP Rob Marris. It was based upon Lord Falconer's bill, and shared multiple similarities to the Oregon legislation. Notably the requirement for capacity to make the decision, a terminal illness with expected death within six months and a 14-day cooling off period.

The UK Bill would, in contrast to the Oregon legislation, require an assisting health professional to 'remain with the person until the person has – (a) self-administered the medicine and died; or (b) decided not to self-administer the medicine'.[271] This does not mean

[264] Stephen W. Smith, 'New Guidelines on Assisted Suicide: Will Nurses be Prosecuted?' (2009) 18 British Journal of Nursing 22.
[265] Rob Heywood, 'The DPP's Prosecutorial Policy on Assisted Suicide' (2010) King's Law Journal 21(3) 425-443.
[266] J.R. Spencer, 'Assisted Suicide and the Discretion to Prosecute' (2009) The Cambridge Law Journal 68(3) 493-523.
[267] Kate Greasley, '*R(Purdy) v DPP* and the Case for Wilful Blindness' (2010) Oxford Journal of Legal Studies 30(2) 301-326.
[268] Keir Starmer QC, 'Assisted suicide guidelines – 3 years on' (2014) Medico-Legal Journal 82(2) 48-56.
[269] Assisted Dying for the Terminally Ill Bill [HL] (2005-6).
[270] Daniel Gordon, Claire E. Raphael, Vassilios Vassiliou, 'Assisted Dying – should the UK change its stance?' (2015) 55(2) Medicine, Science and the Law.
[271] Assisted Dying HL Bill (2014-15), s.7(a)(b).

that the medical professional must be next to the patient, indeed close proximity such as the next room would be sufficient[272] Additionally, it is stricter than legislation in other European countries such as Belgium, Switzerland and the Netherlands where various forms of euthanasia has been decriminalised.[273] However, similar to the Oregon Act, the Act would not have imposed a duty on the medical professional to participate in the suicide itself.[274]

A key difference between the proposed bill and the Dying with Dignity Act 1997 is that it would not leave it to the discretion of the physician(s) to make the final decision as to whether the patient would receive the prescribed medication or not, as it is in Oregon. Rather, it is at the discretion of the High Court (family division) as to whether the individual should be provided with assistance to end his or her own life.[275] This would presumably have worked as another safeguard to make sure that the person in question was truly capable and not being coerced into assisted dying for any reason. However, as Keown pointed out, it could be impossible or very hard to find clear evidence of coercion in these cases.[276] It is not impossible that Keown is right, and that rare cases of coercion go undetected. Yet, it appears unlikely that with the proposed safeguards in place, that this is something an ordinary person would be able to achieve without red flags being detected at one of the stages in the process prior to obtaining the life ending medication.

When the Assisted Dying Bill (No.2) 2015 was debated in Parliament, the suggestion of legalising assisted dying was not only supported by a significant number of MPs. Indeed, in 2015, a large portion of the public (82%), also supported the legalisation of assisted dying.[277] Nevertheless, the concept of assisted dying faced strong opposition, perhaps especially from religious establishments in the UK, with leaders of major religions signing a petition urging MPs to reject the bill due to a belief that it was morally wrong.[278] The Archbishop of Canterbury also published a commentary on this Bill arguing that the prospective legislation would 'cross a fundamental legal and ethical rubicon'.[279] In addition, multiple disabled rights organisations publicly opposed the legislation, fearing that it would negatively impact disabled people.[280]

---

[272] Assisted Dying HL Bill (2014-15), s.4(7)(b).
[273] Carol Haigh, *'Exploring the case for assisted dying in the UK'* (2012) Nursing Standard 26(18).
[274] Assisted Dying HL Bill (2014-15), s.5.
[275] Assisted Dying HL Bill (2014-15), s.1(1).
[276] John Keown, *Euthanasia, Ethics and Public Policy*: *An Argument Against Legalisation* (Cambridge University Press 2002).
[277] Populus/ Dignity in Dying < https://www.populus.co.uk/poll/dignity-in-dying/> accessed 17 February 2020.
[278] Talha Khan Burki, 'Controversy about UK assisted dying bill' (2015) Lancet Oncology 16(13).
[279] Ibid.
[280] George Gillett, 'Assisted dying bill to prompt debate on right to die' (2015) 305 BMJ 4389.

The argument that it would hurt the most vulnerable people in society, was supported by a significant number of MPs; notably, Conservative MP Sarah Wollaston stated that 'the duty of a doctor should be to improve the quality at the end of life, not to shorten it'.[281] Conversely, Labour MP Sarah Champion argued that Parliament should not ignore the overwhelming majority of the population that supported a change in the law on assisted dying.[282] Nonetheless, the Bill was ultimately rejected.

ETHICAL CONSIDERATIONS RELATING TO ASSISTED DYING

Autonomy

Autonomy is perhaps one of the main arguments advanced to support the legalisation of assisted dying.[283] Beauchamp and Childress stated that 'personal autonomy is, at minimum, self-rule that is free from both controlling interference by others and from limitations, such as inadequate understanding, that prevent meaningful choice. The autonomous individual acts freely in accordance with a self-chosen plan, analogous to the way an independent government manages its territories and sets its policies'.[284] This principle has been reflected in the law by the decriminalisation of suicide in the Suicide Act 1961, an understanding that the government cannot control, through law, whether a person wishes to end their own life.

The question then becomes whether one can extend this principle to assisted dying. It is not difficult to imagine that a person, who finds themselves in a situation out of their control (such as being diagnosed with a terminal illness), will be concerned about not being able to retain any control over their own life. The availability of assisted dying might make it possible for a lot of individuals to feel as though they still have their personal autonomy.[285] The argument against this is often that autonomy cannot be endorsed in this context, as it would not only affect the individual, but also persons surrounding that person.[286] Yet, forcing someone to always consider the effect their decisions might have on other people, rather than their own personal reasons, needs and values is hard to justify in the case of assisted dying.[287]

---

[281] Claire Dyer, 'Assisted Dying Bill is Defeated in House of Commons by 330 to 118 Votes' (2015) 351 BMJ 4917.
[282] Ibid.
[283] Charles A Foster, 'Time to legalise assisted dying? What Autonomy Really Means' (2005) 331 BMJ 7520.
[284] Tom Beauchamp and James F. Childress, *Principles of Biomedical Ethics* (5th edn, OUP 2001).
[285] Maggie Hendry, 'Why Do We Want the Right to Die? A Systematic Review of the International Literature on the Views of Patients, Carers and the Public on Assisted Dying' (2013) 27 Palliative Medicine 1.
[286] John Keown, *Euthanasia, Ethics and Public Policy: An Argument Against Legalisation* (Cambridge University Press 2002).
[287] Sheila McLean, *Autonomy, Consent and the Law* (1st edn, Routledge 2010).

Slippery Slope

The slippery slope argument concerns the worry that were assisted dying to become legal, it would be, as Albaladejo described the Oregon legislation: a 'slippery slope toward more permissive practice, endangering vulnerable people and reducing access to palliative care'.[288] In addition, the *House of Lords Select Committee on Medical Ethics* took the view that were one to make an exception in the law to the prohibition of intentional killing, that this would either by 'design, by inadvertence, or by the human tendency to test the limits of any regulation' lead the way to 'further erosion' of the law.[289] Furthermore, Hedberg mentions how assisted dying would fundamentally change the role of the physician and their duties, as well as how they are viewed by society. Suggesting that the acceptance of a physician as not only being there to prolong and improve a patient's life, but also as someone who could provide one with the means to end life, would lead to a slippery slope in itself.[290]

Yet, this argument does appear to be flawed. There is no evidence suggesting that assisted dying has negatively affected vulnerable people in Oregon, and that those groups have been underrepresented in data showing the people who have chosen assisted dying.[291] In addition, a study focusing on Oregon and the Netherlands found that those who received assisted dying mostly enjoyed high social, economic, educational and other privileges,[292] which suggests that vulnerable groups have not been overly exposed to assisted dying.

Taking an example from tort law, the 'opening the floodgates' argument has frequently been used to justify limiting the scope of when someone can successfully claim damages. This due to the belief that a wider scope would 'open the floodgates' to an uncontrollable number of new cases. However, there are not any clear cases of this actually taking place in the areas where the scope has been widened, and as Grey commented when defending emotional harm claims, the already existing limitations on tort recovery paired with new boundaries would be sufficient to avoid opening the floodgates.[293] As to the danger of the slippery slope - the lower number of assisted dying cases in Oregon, compared to the Netherlands, might be explained by the various safeguards in place to ensure it is only

[288] Angelika Albaladejo, 'Fear of Assisted dying: could it lead to euthanasia on demand or worsen access to palliative care?' (2019) BMJ 364.
[289] Hansard, *Medical Ethics: Select Committee Report* (HL Deb 09 May 1994 vol 554 cc1344 – 412).
[290] Katrina Hedberg, Craig New, 'Oregon's Death with Dignity Act: 20 Years of Experience to Inform the Debate' (2017) Annals of Internal Medicine 167(8).
[291] Ibid.
[292] Philip Berry, 'Giving Dying People What They Want' (2013) 347 BMJ 7921.
[293] Betsy J. Grey, 'The Future of Emotional Harm' (2015) 83 Fordham Law Review 2605.

available to a limited number of people.[294] This could indicate that were the UK to introduce legislation allowing assisted dying in very limited circumstances, and using existing medical law principles together with clear protective measures similar to those in the Oregon legislation, it could potentially prevent more abuse than letting assisted dying remain illegal. There are currently very limited circumstances in which British citizens would be stopped from travelling abroad to access assisted dying if they wished to do so.[295] If able, they could potentially go to countries such as the Netherlands, with very liberal requirements for assisted dying. In those instances, they would not be protected by the UK government (other than the possibility of prosecution). Protecting citizens and avoiding the slippery slope is not solved by ensuring that assisted dying remains illegal, but rather ensuring that there are sufficient protective measures against abuse and the slippery slope.[296]

ASSISTED DYING AND THE HUMAN RIGHTS ACT 1998

The case of *R (Pretty) v DPP* [2002],[297] which upon appeal to the European Court of Human Rights became *Pretty v UK* [2002],[298] concerns Diane Pretty, who was suffering from motor neuron disease. She was unsuccessful in arguing incompatibility between her Convention rights and the Suicide Act 1961, which prohibits assisted dying.

There have been similar cases after *Pretty*, concerning people with severe disabilities and seeking the right to assisted dying in the UK. In *R v (Nicklinson) v Ministry of Justice,*[299] mentioned above, Nicklinson appealed to the Supreme Court against the lower court's refusal to issue a declaration of incompatibility on the statutory ban of assisted dying in Section 2 of the Suicide Act 1961, contrary to Article 8 of the ECHR (the right to private and family life).[300] When advanced to the Strasbourg court, the majority found that Nicklinson could not show that there had been significant developments in this area of law that would lead to a

[294] Gian Domenico Borasio, Ralf J. Jox, Claudia Garmondi, 'Regulation of assisted suicide limits the number of assisted deaths' (2019) The Lancet 393.
[295] Charles Foster, 'Suicide tourism may change attitudes to assisted suicide, but not through the courts' (2015) Journal of Medical Ethics 41.
[296] Peter Rogatz, 'Avoiding a Slippery Slope in PAD' (2014) The Hastings Cent Rep 44(4).
[297] *R (Pretty) v DPP* [2002] 1 AC 800.
[298] *Pretty v UK* [2002] ECHR 423.
[299] *R (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38.
[300] Stevie S. Martin, 'A Human Rights Perspective of Assisted Suicide: Accounting for Disparate Jurisprudence' [2017] Medical Law Review 26

different decision than the one in *Pretty* in which the interference with the Article 8 rights were deemed to be proportionate.[301]

The right to respect of private and family life (Article 8 ECHR) is often used to argue for the right to assisted dying, indeed it was a central argument in both the *Pretty*[302] and *Nicklinson*[303]case. As suicide is not illegal in the UK, able bodied people would be able to commit suicide without fear of legal prosecution. However, people that are not able-bodied, would be statute barred from any form of suicide as they would not be able to get assistance in any way to do so. Therefore, the law on this area treats disabled people differently from able bodied people. In the cases that have been taken to Strasbourg, the Court has justified this interference by stating it is required to protect vulnerable people.

However, commenting on the *Pretty* case specifically, Keown observed that 'critics of the court's reasoning argue that it attached insufficient importance to individual autonomy and to the alleviation of human suffering and exaggerated the difficulties of framing and enforcing adequate safeguards against abuse'.[304] This argument is emphasised by the fact that the court agreed that there was no evidence that she was vulnerable.[305] This appeared to be the case in *Nicklinson* as well, as there was no suggestion that he did not possess mental capacity, which could indicate that the court is more inclined to leave this area of law for Parliament to potentially change, rather than the judiciary.[306]

Some argue that were assisted dying to become available for a small group of people such as those with a terminal illness or disability, s.2 of the Suicide Act 1961 would no longer protect those people against the potential dangers of allowing someone to assist in one's death as it would all other citizens.[307] [308] In the United States, the citizens' rights are protected within the constitution; the fourteenth amendment guarantees equal protection of the laws.[309] In an Oregon case concerning the Death with Dignity Act, 'Chief Judge Hogan

---

[301] Elizabeth Wicks, 'Nicklinson and Lamb v United Kingdom: Strasbourg Fails to Assist on Assisted Dying in the UK' (2016) Medical Law Review 24.
[302] *Pretty v UK* [2002] ECHR 423.
[303] *R (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38.
[304] John Keown, 'European Court of Human Rights: Death in Strasbourg—assisted suicide, the Pretty case and the European Convention of Human Rights' (2003) International Journal of Constitutional Law 1(4).
[305] Ibid.
[306] Elizabeth Wicks, '*Nicklinson and Lamb v United Kingdom*: Strasbourg Fails to Assist on Assisted Dying in the UK' (2016) Medical Law Review 24.
[307] Jacky Davis and Ilora Finlay, 'Would judicial consent for assisted dying protect vulnerable people?' (2015) 351 BMJ 4437.
[308] Annabel Price, 'Mental capacity as a safeguard in assisted dying: clarity is needed' (2015) 351 BMJ 4461.
[309] William D. Araiza, *Enforcing the Equal Protection Clause: Congressional Power, Judicial Doctrine and Constitutional Law* (NYU Press 2016).

accepted this equal protection argument in *Lee v. Oregon*, holding that the Oregon Death with Dignity Act violates the Equal Protection Clause because the terminally ill are deprived of a benefit afforded to those who are not terminally ill, namely the protection of the statutory ban on assisted suicide.'[310] Yet, this argument does not consider the various safeguards mentioned earlier in the DWDA, such as the requirement of mental capacity in order to provide valid consent, which would protect those with access to assisted dying from harm. Furthermore, should certain groups of people be exempt from the statutory ban on assisted suicide in the UK, similar safeguards would surely be present, thereby questioning the validity of this argument.

Presently, the ECtHR has not been willing to state that assisted dying is a right contained within the Convention. However, if in the future more cases like *Pretty*[311] and *Nicklinson*[312] come before the Strasbourg court, it is still possible that the court will hold that the Convention rights contain the right to assisted dying.

CONCLUSION

The question as to whether assisted dying should become legal in the UK does not have a straightforward answer. There are certainly many opinions as to why it should be lawful, and equally, many opinions as to why it should not. However, after careful consideration and analysis of existing practices, this article concludes that assisted dying should become legal in the United Kingdom. Throughout the world, more and more countries (such as New Zealand) are introducing assisted dying legislation, or at least debating whether it should be introduced. These developments could indicate that this area of law might change drastically across multiple jurisdictions in the next decades. As previously mentioned, an overwhelming majority of the UK population appears to support assisted dying legislation. Yet, as the courts appear unwilling to take any clear-cut stance, it will be up to Parliament to decide whether legislation should be passed. For it ever to do so, there must be some form of consensus in Parliament that legislation to legalise assisted dying is needed, and that there are sufficient protective measures in place to ensure it is accessed in the proper way. Perhaps it should again be based upon Oregon's Death with Dignity Act 1997, which has been in place for over 20 years with no reports of abuse.

---

[310] Penney Lewis, *Assisted Dying and Legal Change* (OUP 2007).
[311] *Pretty v UK* [2002] ECHR 423.
[312] *R (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38.

The current legal position has left vulnerable people in a situation whereby they are forced to access voluntary euthanasia in secret, without any mechanisms to screen for potential abuse. If assisted dying were to become legal, those who qualify would be able to access services that have been created with their welfare in mind. In addition, the dying would not have to watch their loved ones risk imprisonment in order to help them access assisted dying services, which they believe will offer them an autonomous and dignified death.

30 YEARS OF HURT: LIABILITY FOR PSYCHIATRIC ILLNESS - A RENEWED CALL FOR REFORM

*LYNSEY HANDLEY**

INTRODUCTION

In considering the law relating to psychiatric harm, Lord Oliver remarked: 'I cannot, for my part, regard the present state of the law as either entirely satisfactory or as logically defensible'.[313] Whether the law is satisfactory or logical is of paramount importance, particularly since psychiatric injuries are now recognised as equally devastating as physical ones,[314] and because the law has a moral obligation to keep up with advancing medical understanding.

In determining whether a duty is owed, the law categorises claimants as either primary or secondary victims. Primary victims are those who fear for their own safety. By contrast, secondary victims are those who witness incidents and sustain psychiatric injury because of their fear for the safety of others. In relation to the latter category of claimants, the courts have applied a highly restrictive approach, based on issues of public policy and concerns surrounding a flood of claims and disproportionate liability.[315] A line has been drawn, and control mechanisms invoked, requiring victims to satisfy additional proximity elements over and above the usual negligence requirements.[316] Arguably, this is an unreasonable burden to place on claimants, and both judicial and academic opinion is that reform is long overdue. In this article it is submitted that Parliament should dispense with the additional proximity requirements, and instead restrict the categories of claimants by reference to their relationship with the immediate victim.

* LLM Candidate, Manchester Law School, Manchester Metropolitan University.
[313] *Alcock v Chief Constable of South Yorkshire Police* [1991] 3 WLR 1057 [418].
[314] *McLoughlin v O'Brian* [1983] 1 AC 410 [433] (Bridge LJ).
[315] *Alcock v Chief Constable of South Yorkshire Police* [1991] 3 WLR 1057(HL) 416-417 (Oliver LJ).
[316] *Alcock v Chief Constable of South Yorkshire Police* [1991] 3 WLR 1057 (HL) 397-398 (Keith LJ); 402-405 (Ackner LJ); 416-417 (Oliver LJ); 419-420 (Jauncey LJ).

THE CURRENT LAW

The current position in England and Wales was set out in the case of *Alcock v Chief Constable of South Yorkshire Police*.[317] The case concerned a football match played at Hillsborough Football Stadium on 15th April 1989. As a result of poor crowd control by the police, too many spectators were crammed into pens behind the goal. Over 400 were injured and 96 crushed to death.[318] This year marks the 30th anniversary of the litigation that followed the tragedy, and which included claims by family members who suffered psychiatric harm as a result of the negligent death of their loved one(s).

The House of Lords affirmed that to set out categories of relationship within which claims may succeed would be too 'rigid' and there was 'no logic and no policy reason' for laying down such rules.[319] Their Lordships did, however, express that a close tie of love and affection *must be proved* by the claimant except in relationships such as a parent, child, and spouse where the closeness of a tie can be presumed. Lord Keith noted that 'It is common knowledge that such ties exist, and reasonably foreseeable that those bound by them may […] be at real risk of psychiatric illness if the loved one is injured or put in peril'.[320] Be that as it may, concerns of indeterminate liability meant the test of 'foreseeability' alone was considered insufficient to connect the harm suffered by the claimant to the negligence of the defendant.[321] Additionally, their Lordships invoked control mechanisms, that the claimant must (i) directly perceive either the scene of the accident or its immediate aftermath; and (ii) suffer psychiatric injury through a sudden appreciation of the horrifying event which violently agitates the mind.[322]

In *Alcock*, those claimants who were at the stadium, although they were related to the 'immediate victims' were dismissed, as there was insufficient evidence to prove a close tie of love and affection with the immediate victim.[323] The claims by those watching television suffered the same fate because although they were closely related to the immediate victims, they did not satisfy the requirement of direct perception of the tragedy.[324]

---

[317] [1991] 3 WLR 1057.
[318] n 5 at [392] (Keith LJ). The 96th victim, Anthony Bland, sustained severe brain damage because of the incident and remained in a vegetative state for almost four years following the disaster. Anthony died on 3rd March 1993.
[319] n 5 at [415] (Lord Oliver).
[320] n 5 at [397] (Lord Keith) (emphasis added).
[321] n 3.
[322] n 4.
[323] n 5 at [398] (Keith LJ); [402]-[405] (Ackner LJ); [424] (Jauncey LJ).
[324] n 11 above.

Undoubtedly, their Lordships were influenced by the speech of Lord Wilberforce in *McLoughlin v O'Brian*: '…there remains, in my opinion, just because 'shock' in its nature is capable of affecting so wide a range of people, a real need for the law to place some limitation upon the extent of admissible claims'.[325] The court in *McLoughlin* went on to outline three elements to be considered in psychiatric injury claims '…the class of persons whose claim should be recognised; the proximity of such persons to the accident; and the means by which the shock is caused'.[326]

At first glance, the controls advocated by Lord Wilberforce and applied in *Alcock* appear reasonable on the grounds that they control the floodgates, assist in the prevention of potentially fraudulent or exaggerated claims; and protect defendants from disproportionate liability. However, (as explained below) utilising determinants such as sudden shock, proximity in time and space and means of perception, not only goes too far, but defies medical understanding of how psychiatric conditions arise.[327]

RENEWED CALL FOR REFORM

Despite calls for reform from the Law Commission over two decades ago,[328] and the more recent Negligence and Damages Bill in 2015,[329] to-date Parliament has chosen not to enact legislation to reform the law on psychiatric harm. Preferring instead 'to allow the courts to continue to develop the law in this area'.[330] This suggestion appears flawed considering judicial comments that the current control mechanisms are 'difficult to justify' and that it would be morally indefensible for the courts to attempt further development of the law surrounding liability for mental injury.[331] The courts have been clear - the law on psychiatric harm is 'beyond judicial repair',[332] and Parliamentary reform is the *only* solution.[333] This paper suggests that the necessary reforms are threefold, and include:

(1) Ending the process of subjecting psychologically vulnerable claimants to the ordeal of proving the existence of a close tie of love and affection with the immediate victim,

[325] *McLoughlin v O'Brian* [1982] 2 WLR 982 [422].
[326] Ibid.
[327] Nicholas J Mullany and Peter R Handford, 'Moving the Boundary Stone by Statute – The Law Commission on Psychiatric Illness' (1999) UNSWLawJI 22(2) 350, 394.
[328] Law Commission, *Liability for Psychiatric Illness* (Law Com Report No. 249, 1998).
[329] A Private Members Bill in the 2015/16 Parliament.
[330] Department for Constitutional Affairs, *The Law on Damages* (Consultation Paper 9, 2007) para 97.
[331] *White v Chief Constable of South Yorkshire Police* [1999] 2 AC [500].
[332] Harvey Teff, *Causing Psychiatric and Emotional Harm* (1st edn, Hart Publishing 2009) 185.
[333] *White v Chief Constable of South Yorkshire Police* [1999] 2 AC [504] (Hoffmann LJ).

by providing a predetermined category of claimants with a statutory right to claim damages for psychiatric illness, subject to the ordinary requirements of foreseeability.[334] Such a list should be limited to relatives living in the same household or spouse, parent, child, sibling, civil partner, or cohabitant.

(2) Abandoning the need for direct perception of the tragic event or its immediate aftermath.

(3) Extending the right to claim to victims whose psychiatric illness has developed over time, so that they have the same entitlement to damages as those who suffer a sudden shock.

None of these is new, each of them features in the Law Commission's recommendations for reform,[335] but not in the same format and not in the overall context outlined above, which seeks to remove the injustice and unfairness associated with points (2) and (3), whilst keeping the floodgates closed through utilising the existence of predetermined relationship categories, where it is reasonable to assume that a close tie of love and affection exists.

Each of the three suggestions is addressed in turn:

(1) The Close Tie of Love and Affection

Whilst *Alcock* applied a narrow interpretation of the requirement of 'close ties', their Lordships speeches imply a receptiveness to future extensions of the right to recover compensation for psychiatric injury.[336] That is to say, claimants other than the immediate victim's spouse, parent or child are not ruled out.

It is arguable that the refusal to set out any clear parameters, has led to an abhorrent regime that requires a claimant, who is suffering from a psychological illness as a result of the death, injury or imperilment of a loved one, being put to proof that a close tie of love and affection existed between them.[337] Although just how many vulnerable individuals have been exposed to distressing cross-examination, is impossible to tell,[338] the process is undoubtedly

[334] Law Commission, *Liability for Psychiatric Illness* (Law Com Report No. 249, 1998) para 6.18.
[335] n 17.
[336] n 5 at [397] (Keith LJ).
[337] Law Commission, *Liability for Psychiatric Illness* (Law Com Report No. 249, 1998) para 6.24.
[338] KJ Nasir, 'Nervous Shock and Alcock: Judicial Buck Stops Here' (1992) 55(5) MLR 705, 712; see also Julio A Diaz, 'Non-Physical Damage A Comparative Perspective' (2010) Business and Law Reports, 26.

contrary to good policy and an unnecessary requirement for justice.[339] Robert Alcock, for example, was present at Hillsborough Stadium where his brother-in-law was crushed to death. The House of Lords held that his claim for psychiatric harm must fail because there was no proof that he had loved his brother-in-law enough, to warrant such a reaction to his death.[340] The legal system failed Mr Alcock. He would have been better served by a clear rule that the immediate victim's brother-in-law is not entitled to recover for psychiatric injury.[341]

Legislative provisions outlining a predetermined list of claimants is not a new concept. Fatal accidents legislation lists family members presumed to be closest to the deceased, and thus most likely to suffer grief, and grants them a statutory entitlement to bereavement damages.[342] Furthermore, the introduction of legislation in Australia has granted fixed categories of claimants the right to recover damages for psychiatric injury.[343] As for those who should be included, the Law Commission suggested that 'the further one moves away from the nuclear family, the more difficult it becomes to generalise about the degree of commitment involved in a relationship'.[344] This comment is valid. Therefore, the list of predetermined claimants should not extend beyond that set out above.

(2) Direct Perception of a Tragic Event or its Immediate Aftermath

Whilst the possibility of indeterminate liability is a valid concern, the proximity requirements of 'time and space' and 'direct perception', applied by the English common law, goes too far. In the seminal judgment of *Donoghue v Stevenson,*[345] Lord Atkin observed that the duty of care based on reasonable foreseeability had to be 'limited by the notion of proximity', which he held as '*not* confined to mere physical proximity' but extending to 'such close and direct relations that the act complained of directly affects a person'.[346] The Australian courts have applied a broad and flexible approach to the concept of proximity. In *Coates v Government Insurance Office of New South Wales*,[347] Kirby P strongly advocated that:

---

[339] Michael A Jones, 'Liability for Psychiatric Illness - More Principle, Less Subtlety' (1995) 4 Web JCLI <http://www.bailii.org/uk/other/journals/WebJCLI/1995/issue4/jones4.html> accessed 16 September 2020.
[340] n 5 at [417]-[418] (Oliver LJ); at [398] (Keith LJ); at [406] (Ackner LJ); see also David Robertson, 'Review: Liability in Negligence for Nervous Shock' (1994) 57(4) MLR 649, 662-663.
[341] David Robertson, 'Review: Liability in Negligence for Nervous Shock' (1994) 57(4) MLR 649, 662-663.
[342] The Fatal Accidents Act 1976, s.1A.
[343] n 17 at para 6.14.
[344] Ibid at para 6.32.
[345] [1932] AC 562.
[346] Ibid at [581] (emphasis added).
[347] (1995) 36 NSWLR 1.

> *…it is as much the direct emotional involvement of a plaintiff in an accident or perilous situation, as her or his physical presence at the scene or directly at its aftermath that is pertinent to the level and nature of the injury suffered, and the consequence psychological damage*.[348]

Likewise, in *Jaensch v Coffey*, Deane J observed that:

> *A requirement based upon logical or causal proximity between the act of carelessness and the resulting injury is plainly better adapted to reflect notions of fairness and common sense in the context of the need to balance competing and legitimate social interest and claims than is a requirement based merely upon mechanical considerations of geographical and temporal proximity*.[349]

As against this view, in *McLoughlin*, Lord Scarman argued that space, time, distance, the nature of injuries sustained, and the relationship of the plaintiff to the immediate victim are factors to be weighed, if the law is to avoid the social-economic consequences associated with an unrestricted test of reasonable foreseeability.[350] However, his Lordship did stress that the factors should not be treated as 'legal limitations'. Similarly, Lord Bridge accepted the factors as 'indicators' that the claimant's psychiatric illness was foreseeable but refused to endorse their use as a 'hard and fast' limitation.[351] To do so, he insisted, would 'freeze the law in a rigid posture' denying justice to individuals who, in the application of the ordinary principles of negligence outlined in *Donoghue v Stevenson*, ought to succeed.[352] Despite the strong arguments against limiting liability by reference to temporal and spatial proximity, the court in *Alcock*, endorsed the rule of direct perception of the tragic event or its immediate aftermath, reasoning that free from such limitation foreseeability would lead to indeterminate and disproportionate liability.[353] This concern does little to weaken the case for reform, given that it is possible to restrict the number of claimants, simply by reference to their connections with the immediate victim. Furthermore, notwithstanding the relationship, any inquiry into foreseeability of psychiatric harm should take into account the surrounding

[348] n 35 at [11] (Kirby P); see also Harvey Teff, 'Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries', CLJ (1998), 57(1) 91, 110.
[349] *Jaensch v Coffey* (1984) 155 CLR 549 [584] (Deane J).
[350] *McLoughlin v O'Brian* [1982] 2 WLR 982 [431].
[351] *McLoughlin v O'Brian* [1982] 2 WLR 982 [442] (Bridge LJ).
[352] *McLoughlin v O'Brian* [1982] 2 WLR 982 [443] (Bridge LJ).
[353] n 4 above.

circumstances - of particular importance would be the nature of the accident and extent of the injury suffered by the immediate victim.[354]

The requirement of direct perception of the tragic event or its immediate aftermath is outdated. Unlike the situation in 1989, it is now usual for individuals to carry mobile phones, which incorporate photographic and video recording functions, with internet connection capabilities.[355] In England the common law has failed to appreciate how modern communication equipment has bridged the physical distance between individuals who use their devices to stay connected with loved ones and share *unregulated* footage[356] captured live, to a worldwide audience via the internet. Conversely, the Australian courts are keeping pace with technological advancements.[357] In *Jaensch* the High Court referred to expert opinion that suggests where a close tie of love and affection exists between the claimant and the immediate victim, 'it is largely immaterial whether the close relative is at the scene of the accident or how he or she learns of it'.[358] Similarly, Kirby P, in *Coates v Government Insurance Office of New South Wales*[359] dismissed the need for direct perception, mainly because it fails to appreciate the modern world of communication. He added: 'telephones may bring on occasion, shocking news, as immediate to the senses of the recipient as actual sight and sound of catastrophe would be'.[360] Kirby P's sentiments were endorsed by the court in *Quayle v State of New South Wales*,[361] where the claimant was awarded damages for mental harm after hearing, via the telephone, of his brother's suicide, which had negligently occurred whilst in police custody. The English common law's insistence on temporal and physical proximity is at odds with the realities of the modern world. And, whilst *Alcock* remains good law, courts will be prohibited from considering the capability of modern technology to deliver a message or image as horrifying and injurious as if it had been perceived by one's own unaided senses.

Medical science suggests that the rules of temporal and spatial proximity are unjustified. Mullany highlights that psychiatric research does not support the contention that

[354] KJ Nasir, 'Nervous Shock and Alcock: Judicial Buck Stops Here' (1992) 55(5) MLR 705, 712.
[355] Eugene C Lim, 'Proximity, Psychiatric Injury and the Primary/ Secondary Tortfeasor Dichotomy: Rethinking Liability for Nervous Shock in the Information Age' (2014) 23 Nott L J, 1.
[356] Ibid.
[357] Ibid at 3.
[358] *Jaensch v Coffey* (1984) 155 CLR 549, 600 (Deane J); see also n 17 at para 6.11.
[359] (1995) 36 NSWLR 1.
[360] *Coates v Government Insurance Office of New South Wales* (1995) 36 NSWLR 1 [10]-[11] (Kirby P); see also Harvey Teff, 'Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries' CLJ (1998), 57(1) 91, 110.
[361] *Quayle v State of New South Wales* (1995) Aust. Torts Rep 81.

psychological trauma is more severe if the event is directly perceived.[362] The English courts insistence on direct perception is, he concludes, 'an affront to all reasonable, compassionate and right-thinking members of contemporary society and an embarrassment to the common law'.[363] This sentiment is all the more compelling considering the Royal College of Psychiatrists classification of '*hearing* about the injury or violent death of a family member' as a trigger for PTSD.[364]

(3) How the Shock is Caused

The sudden shock requirement is outmoded and artificial. The UK Government defend the rule as being an effective filter, adding that without shock it is costly to investigate and difficult to prove whether the claimant's illness was caused by the tragic event in question.[365] Conversely, *In Campbelltown City Council v Mackay*, Kirby P stressed, that the requirement does not correspond with contemporary scientific views of how psychiatric injury is sustained .[366] Further, in the Law Commission report, Mandelson, a clinical psychologist, confirmed that psychological injuries could develop over time. Such an injury, he suggests, is caused by the brain's ability to recall past events, or because the final outcome of the tragedy remains uncertain for a prolonged period of time.[367] Similarly, Professor Wessely highlighted that a sudden event is not a prerequisite of a psychiatric illness, 'nor is it the most common cause of such a disorder'.[368] In *White v Chief Constable of South Yorkshire Police,* Lord Goff endorsed the appeal courts view that 'what matters is not the label on the trigger for psychiatric damage, but the fact and foreseeability of psychiatric damages, by whatever process,'[369] and his Lordship supported the call to abandon the requirement of nervous shock.[370]

As a restriction on liability, retention of the 'sudden shock' rule exhibits the same difficulties as the requirements of temporal and spatial proximity. The limitation cannot be justified because it bars many worthy cases such as those who experience psychiatric illness

[362] Nicholas J Mullany, 'Recovery for Psychiatric Injury by Report: Another Small Step Forward' (1996) 4 Tort L Rev. 96, 101; see also Harvey Teff, 'Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries' (1998) CLJ 57(1) 91, 110.
[363] Ibid.
[364] Royal College of Psychiatrists, 'Post Traumatic Stress Disorder' < https://www.rcpsych.ac.uk/mental-health/problems-disorders/post-traumatic-stress-disorder > accessed 07 September 2020 (emphasis added).
[365] Department for Constitutional Affairs, *The Law on Damages* (Consultation Paper 9, 2007) 41.
[366] (1998) 15 NSWLR 501 [503]; see also n 16 above.
[367] n 17 at para. 5.29.
[368] Ibid.
[369] *Frost v Chief Constable of South Yorkshire Police,* [1998] QB 254 [271] (Henry LJ).
[370] *White v Chief Constable of South Yorkshire Police*, [1998] 3 WLR 1537 (Goff LJ).

due to watching a loved one slowly die in hospital following the tortfeasor's negligent act or omission.[371] Nasir noted that a protracted experience, as opposed to a sudden shock, is unlikely to mean that a claimant has suffered any the less – in reality he will usually have suffered more.[372]

Other jurisdictions have discarded the requirement of 'sudden shock'. In Singapore, in *Pang Koi Fa v Lim Djoe Phing*, the High Court held that it would be possible to recover compensation, despite the absence of a shocking event, where there is a high degree of foreseeability that the claimant will suffer injury and that injury flowed from the defendant's negligence.[373] Likewise, the South African Supreme Court of Appeal, in *Barnard v Santam Bpk*, rejected that psychiatric harm must, in all cases, arise as a result of a sudden assault to the senses to be compensable.[374] In Australia, in *Annetts v Australian Stations Pty Ltd*,[375] the High Court dismissed the *Alcock* control mechanisms, and instead, accepted that the claimant suffered a psychiatric injury not through sudden shock, but by a slow and protracted process.[376] This approach is pragmatic, logical and fair, and yet the English courts have failed to follow suit.

CONCLUSION

In relation to secondary victims, *Alcock* fails to provide a suitable framework for determining liability for psychiatric injury. The decision ignores medical understanding of how psychiatric conditions arise and the link between the defendant's negligence and the claimant's suffering. Their Lordships justifications for imposing the requirements of proximity in time and space alongside the need for direct perception of the tragic event were centred around a fear of opening the floodgates and exposing defendants to disproportionate liability. Nonetheless, it is possible to restrict the number of claimants, solely by reference to their connections with the immediate victim.

Although the use of a predetermined list will, on occasion, exclude a worthy claimant, it is submitted that the line must be drawn somewhere. The relationship between the claimant and immediate victim is a material factor to be considered when determining

[371] *Sion v Hampstead Health Authority* [1994] 5 WLUK 348.
[372] KJ Nasir, 'Nervous Shock and Alcock: Judicial Buck Stops Here' (1992) 55(5) MLR 705, 709; see also n 17 at para 5.29(4).
[373] [1993] 3 SLR 317; see also n 16.
[374] [1999] (1) SA 202; see also Nicholas J Mullany and Peter R Handford, 'Moving the Boundary Stone by Statute – The Law Commission on Psychiatric Illness' (1999) UNSWLawJI 22(2) 350 [395].
[375] (2002) 211 CLR 317.
[376] Ibid (Gaudron J); see also Bela B Chatterjee, 'Rethinking Alcock in the New Media Age' (2016) JETL 7(3) 272.

whether the injury was reasonably foreseeable, and it might be supposed that the likelihood of injury would be less in the case of a friend or nephew than in that of a spouse or child.[377]

Legislation outlining a predetermined list of claimants takes this policy mechanism into the correct forum – politics. Society should select where the line is drawn. The proper function of the judiciary is to apply the ordinary rules of negligence and determine whether the harm suffered was reasonably foreseeable. It is not the role of the courts to 'litigate love'.

LGBTQ AND COVID-19

*KAY LALOR**

INTRODUCTION

The impact of Covid-19 on LGBTQ individuals and communities is both far reaching and still emerging. It will be a long time before the fallout of the pandemic is fully accounted for. It is clear however, Covid-19's impact upon the LGBTQ community devolved along predictable, well-established, fault lines. Already existing problems faced by queer communities became starker during 2020-21 and historically rooted tensions contributed to how the pandemic played out in LGBTQ lives in the UK. There is a danger in the UK and other western states of assuming that LGBTQ equality is now a settled issue, a legally protected category and community. Reflecting on the various issues faced by the LGBTQ community during the first year of the Covid-19 pandemic exposes the extent to which LGBTQ 'progress' is fragmented and unfinished. We cannot view the pandemic as an isolated and extraordinary event, but as a continuation of the UK's ongoing LGBTQ histories and politics.

COMMENTARY

Reports from UK and global NGOs working with LGBTQ communities have exposed specific vulnerabilities faced by LGBTQ individuals because of Covid-19.[378] Isolation and lockdown has cut off LGBTQ individuals from community support and has created situations in which LGBTQ people have had to lockdown with households or family members who may be homo or transphobic.[379] This increases the risk of domestic violence faced by LGBTQ people and has forced some back into the closet. LGBTQ people are also more likely to face barriers to or discrimination in access to healthcare and higher instances of mental ill health – a particularly acute problem during a global pandemic with extended periods of isolation and lockdown.[380]

*Senior Lecturer, Manchester Law School, Manchester Metropolitan University.

[378] LGBT Foundation *Hidden Figures: The Impact of the Covid-19 Pandemic on LGBT Communities in the UK* (LGBT Foundation, 3rd edn. May 2020); Maria Munir 'How COVID-19 is affecting LGBT communities' (Stonewall, 21 April 2020) https://www.stonewall.org.uk/about-us/news/how-covid-19-affecting-lgbt-communities, accessed 30 March 2021; Graeme Reid 'Global Trends in LGBT Rights During the Covid-19 Pandemic, Human Rights Watch, 24 Feb 2021 https://www.hrw.org/news/2021/02/24/global-trends-lgbt-rights-during-covid-19-pandemic.

[379] LGBT Foundation (n1).

[380] Ibid.

As such, the order to 'stay home save lives' works to reduce infection rates and increase public safety, but it carries considerable risk for those who do not have a safe private space at home – a group in which LGBTQ individuals are over-represented. Equally however, public spaces and public policy are risky arenas for many LGBTQ groups. There has been a recent surge in both trans and homophobic hate crime.[381] Indeed, report from the Galop Foundation reports 'startlingly high' levels of transphobic violence in the UK.[382] At a policy level, the government has been accused of dragging its feet on promised introductions of anti-conversion therapy legislation, with the recent resignations of three of the government's LGBT advisors amid accusations that the government is creating a hostile environment for LGBT people.[383] Similarly, in the courts, trans children's access to vital, gender affirming care through the NHS in England and Wales has been effectively ended by the recent *Bell v Tavistock* decision in which it was found that children under 16 could not consent to puberty blockers.[384]

Two points follow from this very short overview of some of the LGBTQ related issues that have arisen during the pandemic. First, not all queer people have been impacted: those with property, stability and the capacity to work from home, are more likely to more easily weather the restrictions of the pandemic. Marginalised queer people, living in poverty, working in essential services, in precarious employment or at risk of homelessness, face much more seismic changes to their lives. Trans teens seeking treatment, queer individuals locked down in homophobic spaces or LGBT asylum seekers detained and forced to 'prove' their sexual or gender identity are likely to find these protections less useful.

Inequalities within LGBTQ communities do not just devolve along lines of wealth. Racism and the marginalisation of LGBTQ people of colour within queer spaces is an ongoing problem.[385] Non-white queer histories have often been unrecognised or undervalued. The 2021 resignation of every member of Pride London's community advisory board in response to a

[381] Ben Hunte, 'Transphobic hate crime reports have quadrupled over the past five years in the UK' (BBC News 11 October 2020; https://www.bbc.co.uk/news/av/uk-54486122 accessed 30 March 2021, Ben Hunte, ''I thought I was going to die' in homophobic attack' (BBC News, 9 October 2020) https://www.bbc.co.uk/news/uk-54470077, accessed 30 March 2021.

[382] Cerys Bradley, 'Transphobic Hate Crime Report: The Scale and Impact of Transphobic Violence, Abuse and Prejudice (Galop Foundation, 2020), 2.

[383] Aubrey Allegretti, 'Three UK government LGBT advisers quit with rebuke of 'ignorant' ministers' (The Guardian, 11 March 2021) https://www.theguardian.com/world/2021/mar/10/government-adviser-quits-over-hostile-environment-for-lgbt-people, accessed 30 March 2021.

[384] [2020] EWHC 3274 (Admin).

[385] Nina Held and Tara Leach '"What Are You Doing Here?": The 'Look' and (Non) Belongings Of Racialised Bodies in Sexualised Spaces in A. Kuntsman and E. Miyake (eds) *Out of Place: Interrogating Silences in Queerness/Raciality.* (Raw Nerve Books, 2008).

culture of bullying and hostility towards people of colour indicates the degree of institutionalisation of marginalisation and racism within some of the most established symbols of LGBTQ acceptance and progress.[386] Taken in tangent with the increase risk that Covid presents to Black and Asian communities, the fallout from Pride London serves as a reminder of how solidarity can fail and how viewing LGBTQI as a monolith hides very real and deadly inequalities. These differential vulnerabilities in LGBTQ communities expose the fact that at stake here are not just questions of sexual orientation or gender identity, but intersections of sexuality, gender, race, class, age and much more.

Second, inequalities in the LGBTQ community indicate the limits of turning to law – or turning to state power generally – for safety and recognition. In living memory, queer people have faced state sanctioned criminalisation and unequal treatment. Institutions of law and state have failed to protect queer people from inequality, marginalisation and violence. Moreover – and again within living memory – queer, gay and trans people have faced a devastating pandemic in which a government that was slow to act greatly exacerbated their suffering and death.[387] Pointing out this recent history is not intended to dismiss the gains that LGBTQ communities have won in recent years, but to highlight how Covid exposes the limits of those gains. A suite of legislation from decriminalisation to equality protections to the Gender Recognition Act to gay marriage has been enacted in support of LGBTQ people. Yet legislative gains have unequal effects. Equal marriage and equality protections are most useful to those who have the desire, property, stability and capital to make use of those rights and protections. Statutory protections of equality have not been enough to prevent health and other inequalities caused by austerity and marginalisation,[388] hate crime legislation has not stopped violence against queer and trans communities.

As such, inequality of access to legal recognition and protection for different members of the LGBTQ community corresponds to increased vulnerability in the face of the Covid-19 pandemic. This is not a new problem: the 1967 decriminalisation of homosexuality in England and Wales decriminalised same sex behaviour in private.[389] Those who lacked a private space or those who could not pass as straight within public spaces still faced criminalisation,

[386] Aamna Mohdin 'Calls for overhaul of Pride in London after series of resignations' (The Guardian, 20 March 2021) https://www.theguardian.com/world/2021/mar/20/calls-overhaul-pride-in-london-after-resignations accessed 30 March 2021.
[387] The ongoing consequences of the AIDS pandemic have become apparent once again during Covid-19, with people living with HIV considered to be 'at risk' and those with extremely low CD4 counts considered to be clinically extremely vulnerable.
[388] Although they do reduce likelihood of partners being excluded from decision-making.
[389] Sexual Offences Act 1967.

surveillance and persecution.[390] During the pandemic, those who lack access to safe private space or lack the ability to pass as straight in public face an ongoing risk of violence. Just as in 1967 therefore, it is those who are affluent, able to access private space and able to pass as straight, who face a smaller risk of harm. The law may have changed, but history repeats itself in homonormative forms.

Thus, the situation of LGBTQ during Covid is more than a single story – precarity for the most vulnerable, differential access to safe private space, law and policy that offers only limited legal protection. All these tensions represent points of conflict, fragmentation, and challenge to the narrative that homonormative assimilation into neo-liberal capitalism can be enough to secure full freedoms for all LGBTQ individuals. Moreover, and without romanticising queer history or downplaying the importance of other work, queer organising in recent decades has relied upon protest, direct action, and ambiguous relations with the state. From the Stonewall Riots, to AIDS activist die-ins to Lesbian and Gays Support the Miners, to 'kiss-ins' organised to protest police entrapment queer protest has been a vital part of securing queer freedoms. This history seems particularly urgent as the Policing, Crime and Courts Bill makes its way through Parliament.

CONCLUSION

Perhaps the most apt conclusion to draw here therefore, is that reflecting on Covid-19 for LGBTQ people cannot be done without also reflecting on LGBTQ history – the tactics, the victories, the exclusions and the compromises that were made in the past influence the situation in the present. Covid-19 did not necessarily expose anything that we did not already know about LGBTQ lives and politics, but it did make many of the questions that we were asking that much more urgent.

[390] Kate Gleeson, 'Freudian Slips and Coteries of Vice: The Sexual Offences Act of 1967' (2008) 27 Parliamentary History 393, 409.

TIME IS OF THE ESSENCE: COVID 19 AND THE NEED FOR DEROGATION UNDER ARTICLE 15 OF THE ECHR

*HANNAH BHATTI**

INTRODUCTION

Upon hearing an urgent case in the wake of the Coronavirus (Covid-19) pandemic, Justice Hayden palpably stated within his judgement in *BP v Surrey County Council*[391] that, 'It strikes me as redundant of any contrary argument that we are facing a public emergency which is threatening the life of the nation'. This extraordinary event has amassed disruption to the rights and freedoms jurisprudence of individuals, rendering the government, acquiescent to enacting emergency measures. For the purpose of this article, the most prominent reason that such measures are necessary, is to restrict the movements of individuals, by commissioning a 'stay at home' mandate, for the duration of the emergency period, with the exception to only leave one's place of residence, with a reasonable excuse.[392] Inevitably, this has impeded the regular continuation of rights and freedoms, which are guaranteed under the European Convention on Human Rights (ECHR). Such rights should be lawfully restricted to allow the government adequate leeway to control the pandemic, whilst ensuring fundamental rights remain protected. A mode of restriction is to exercise derogation from the ECHR, to ensure that emergency measures are compatible with Human rights.

This article will analyse whether it would be effective for the British Government to derogate from the ECHR, by virtue of Article 15, when Covid-19 is deemed a serious and imminent threat to public health. The meaning of 'effective' in the context of this article pertains to whether, derogation can ultimately control the spread of the virus; and concurrently protect human rights, during their restriction. This article will not consider how human rights have been impacted but will focus on whether derogation is the most suitable form of their lawful restriction. This article is split into four sections. Firstly, the domestic emergency legislation in response to Covid-19, will be outlined. Secondly, the right to derogate under Article 15 and its legal operation will be described. Thirdly, the ability to

*Final Year LLB Candidate, Manchester Law School, Manchester Metropolitan University.
[391] *BP v Surrey County Council and RP*, [2020] EWCOP 17 [27].
[392] The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020.

restrict rights by limitation clauses and whether their influence is adequate, will be discussed. Lastly, the article will explore whether derogation is an effective or ineffective form of restriction, during the time of which Covid-19 is declared a serious and imminent threat. The last section is split into two parts. Each part will discuss whether derogation is effective or ineffective in restricting human rights. The first will discuss this with regards to the margin of appreciation and the European Court of Human Rights (ECtHR). The second will analyse the concept of derogation as per the notification requirement to the Council of Europe and the ineluctable notification to the wider public.

EMERGENCY LEGISLATION ENACTED IN RESPONSE TO COVID-19

The state's power to enforce restrictions in response to matters that threaten public health, derive from the Public Health (Control of Disease Act) 1984.[393] When Covid-19 was deemed a serious and imminent threat to public health, the Coronavirus Act 2020, as well as the controversial Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, were brought into force.

The aforementioned measures carry the foreseeable curtailment to Articles 5, 6, 8, 9 and 11 of the Convention, which attracted a great criticism, due to the latter.[394] Particular concern was drawn to Regulation 6, which is disputed for being ultra vires.[395] A more inescapable matter is the issue that numerous human rights have been impacted by the pandemic. The protection of fundamental rights and freedoms derives from the ECHR, which is enshrined into domestic law by the Human Rights Act 1998 (HRA).

THE RIGHT TO DEROGATE UNDER ARTICLE 15 AND ITS LEGAL OPERATION

Article 15 of the ECHR allows for derogation in times of emergency. It provides as follows:

> 1. *In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under*

[393] As amended by the Health and Social Care Act 2008.
[394] David Ormerod, 'Coronavirus and emergency powers' (2020) 6 Criminal Law Review 473-477.
[395] David Anderson QC, 'Can we be forced to stay at home?' <https://www.daqc.co.uk/2020/03/26/can-we-be-forced-to-stay-at-home/> accessed 31 September 2020.

> *this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*
>
> 2. *No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.*
>
> 3. *Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate, and the provisions of the Convention are again being fully executed.*[396]

The coronavirus pandemic almost certainly falls into the bracket of a public emergency, which threatens the life of the nation. An emergency was defined in *Lawless v Ireland (No. 3)* as 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.'[397] To lawfully derogate, the relevant criteria stated, must be fulfilled. Essentially, Article 15 is not enshrined into domestic law. Instead, the HRA defines a designated derogation to be: 'Any derogation by the United Kingdom from an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the Secretary of State'.[398]

Saliently, derogating under Article 15 compromises a margin of appreciation to determine the presence of an emergency (*Ireland v UK).*[399] This is a doctrine which refers to the permittance of deviation, by national authorities in their fulfilment of obligations under the ECHR.[400] The doctrine was first executed in the application of derogation clauses, within *Greece v United Kingdom.*[401] The commission provided that the Contracting States, 'should

[396] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) Article 15.
[397] *Lawless v Ireland (No. 3)* [1961] ECHR 2.
[398] Human Rights Act 1998 s.14(1).
[399] *Ireland v United Kingdom* (2018) App no. 5310/71.
[400] Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights* (Vol. 17, Council of Europe 2000).
[401] *Greece v United Kingdom* (1956) App No. 176/56.

be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation.'[402]

THE ALTERNATIVE OPTION TO RESTRICTING RIGHTS: CLAUSES OF LIMITATION

A range of rights and freedoms have been impacted by the pandemic. Evidential impacts include, but are not limited to, Articles 8, 9 and 11 of the ECHR.[403] These rights commonly involve the socialisation of individuals, when exercising such rights, and are therefore impacted in a range of ways, as a result of prohibitions upon mixing between households.[404] These are qualified rights, calling for a balance between the rights of individuals and societal interests. Qualified rights allow for a proportional interference for the protection of health, without the need for a state declared emergency. Where the best interests of the public are of a primary interest, states are inclined to omit complete adherence towards upholding such rights, except those that are absolute.[405] Thus, qualified rights permit an interference provided that: '(1) there is a clear legal basis for the interference; (2) the action seeks to achieve a legitimate aim set out in the Convention's Articles; and (3) the action is in response to a pressing social need and is proportionate.'[406]

Balancing the rights of individuals between a societal interest, gives rise to important considerations. This is because the greater scope of the societal interest, which in the present context is the protection of public health, the greater requirement for the right in question to be restricted.[407] Therefore, the process of balancing can subdue the negative effects of competing interests, through proportionality.[408] However, balancing rights has been disparaged for having the ability to swallow up rights,[409] rendering the most vulnerable

[402] Onder Bakircioglu, 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases' (2007) 8 German Law Journal 711.
[403] European Convention on Human Rights Article 8; Article 9; Article 11.
[404] BBC News, 'Bradford mosque leader's legal bid over lockdown prayer ban' (2020) <https://www.bbc.co.uk/news/uk-england-leeds-52767583> accessed 07 January 2021: The matter regarding a disruption to qualified rights, can be understood through this report.
[405] Oren Gross and Fionnuala Ní Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23(3) Human Rights Quarterly 625, 638.
[406] Equality and Human Rights Commission, *The Human Rights: Human Lives A Handbook for public authorities* (2014).
[407] Başak Çalı, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29(1) Human Rights Quarterly 251.
[408] Ibid.
[409] Bert B. Lockwood, Jr. and Janet Finn and Grace Jubinsky, 'Working Paper for the Committee of Experts on Limitation Provisions' (1985) 7(1) Human Rights Quarterly 35.

unprotected and impotent. Thus, the *Greek* case provides that states can resort to derogations where limitation clauses are deemed inadequate in tackling the exceptional threat in the instant circumstance,[410] and leaves uncertainty surrounding the continuation on normal community life.[411]

On the contrary, other rights that are impacted include Articles 5 and 6.[412] These are limited rights which, in comparison to qualified rights, cannot be balanced between the rights of individuals and societal interests. Article 5 is of paramount relevance, as per the actions of the government, in ordering individuals to remain in their places of residence, throughout the lockdown period. Article 5(1) details a list of reasons for when depriving an individual of their liberty is lawful. Thus, derogation is essential to enable an interference to Article 5, in the context of the current situation, whereby such deprivation falls out of the scope of the established reasons.[413] Significantly, Justice Hayden in *BP v Surrey*, affirmed this position, whereby an attempt to derogate from Article 5, was made. It was asserted that: 'the spread of this insidious viral pandemic particularly, though not uniquely, threatening to the elderly with underlying comorbidity, establishes a solid foundation upon which a derogation becomes not merely justified but essential'. [414]

To date, ten countries have exercised their right to derogate and have issued their Note Verbale, which is a formal communication to the Secretary general of the council of Europe, regarding their derogation.[415] These are Albania, Armenia, Estonia, Georgia, Latvia, North Macedonia, Republic of Moldova, Romania, San Marino, and Serbia. These countries have a noticeable level of violations in comparison to the total number of ECtHR judgements in their accord. [416] Chiefly, this represents a level of fragility in their rule of law systems.[417] As much of a controversial decision to derogate may be, it accompanies its own merits in

---

[410] The *Greek* case Commission Decision (Denmark, Norway, Sweden and the Netherlands v. Greece, no. 3321/67 et al.)
[411] Müller, Amrei, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 *Human Rights Law Review* 557.
[412] European Convention on Human Rights Article 5; Article 6.
[413] Tom Hickman QC, 'The coronavirus pandemic and derogation from the European Convention on Human Rights' (2020) 6 EHRLR 593.
[414] *BP v Surrey County Council and RP* [2020] EWCOP 17 [27].
[415] Council of Europe, 'Notifications under Article 15 of the Convention in the context of the COVID-19 pandemic' (2020) <https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354> accessed 1 September 2020
[416] European Court of Human Rights, 'Violations by Article and by State' (2019) https://www.echr.coe.int/Documents/Stats_violation_1959_2019_ENG.pdf accessed 1 September 2020
[417] Patricia Zghibarta, 'The Whos, the Whats, and the Whys of the Derogations from the ECHR amid COVID-19' (EJIL:Talk! Blog of the European Journal of International Law, 2020) < https://www.ejiltalk.org/the-whos-the-whats-and-the-whys-of-the-derogations-from-the-echr-amid-covid-19/> accessed 1 September 2020.

how it may be effectively utilised, and due rationale to the contrary. Whether derogation will be effective or ineffective is considered below.

WOULD DEROGATION BE EFFECTIVE? THE MARGIN OF APPRECIATION AND THE SUPERVISORY ROLE OF THE ECtHR

(1) The Margin of Appreciation

The first element to explore in assessing whether it would be effective for the British Government to derogate from the ECHR, is the margin of appreciation. It was established in *Ireland v UK*[418] that each state has a responsibility to determine whether life is threatened by a 'public emergency', and how far it is necessary to go in attempting to overcome the emergency. Vis à vis the emergency situations associated with Article 15, *A. and Others v. The United Kingdom*[419] provides that the margin of appreciation is given effect by reason that the national authorities are in a better position to form a judgement upon whether an emergency exists and whether derogation is required, due to their direct and continuous contact, with the circumstances at hand. Therefore, the use of the doctrine, is justified by the present situation. A wide margin of appreciation is of dire necessity for the government, because Covid-19 stands as an unprecedented threat, rendering the type of derogation measures needed, uncertain. The number of reported cases also fluctuate on a daily scale, as well as affecting certain groups, more so than others.[420] This means that the wide margin of appreciation which comprises Article 15, can prove not only useful, but necessary, in such unpredictable and inconsistent circumstances. Consequently, the state can benefit from this contained discretion under Article 15, by applying it in a flexible and tailored manner, to produce derogating measures, which correspond with the severity level of the emergency. The ability to derogate on this basis, emphasises the premise of the convention as a living instrument, thereby being applicable in an ever-changing situation. This in turn, strengthens the protection of rights and freedoms under the convention. Therefore, it would be effective for the British Government to derogate from the ECHR, when Covid-19 is deemed a serious and imminent threat to public health.

[418] *Ireland v United Kingdom* (1978) App no. 5310/71.
[419] *A. and Others v The United Kingdom* (2009) App no. 3455/05.
[420] Gov.uk 'Covid-19 Dashboard' (Cases in England) <https://coronavirus.data.gov.uk/cases> accessed 2 September 2020

(2) Supervision by the European Court of Human Rights (ECtHR)

The second element to explore is the supervision by the ECtHR, when derogation from the convention is executed. Triestino Mariniello[421] indicates that the discretion evinced by the margin of appreciation is not an unlimited power. This is because it is left to the ECtHR to determine whether the state has remained within the margin of appreciation or has taken measures which are not strictly required by the exigencies of the situation. In making this assessment*, Brannigan and McBride v UK*[422] established that the ECtHR will have regard to: 'the nature of the rights affected by the derogation, the circumstances leading to, and the duration of the emergency situation'. Supervision by the ECtHR allows for a strict and considered level of observance, over what derogating measures states have taken to cover an emergency period. *A. and Others v. The United Kingdom*[423] denotes that the court will deliberate upon whether the measures were a genuine response to the emergency and whether they are justified by the special circumstances. Therefore, states will not have carte blanche. This means that it would be effective to derogate as the wide margin of appreciation allows for an abundance of discretion to facilitate appropriate derogating measures, which can be closely observed and reviewed by the ECtHR, to ensure that such measures are necessary[424] and proportionate,[425] in tackling the novel Covid-19 pandemic.

(3) Keeping Emergency Powers Temporary

The third element to explore is the need to ensure that emergency powers remain of temporary existence. Derogating measures are only valid at the time of an emergency that threatens the life of a nation. They are no longer valid when such measures have ceased to operate and the provisions of the Convention are being fully executed.[426] Greene has noted this effect of Article 15, to constitute a different form of legality, which can be used to contain and isolate exceptional powers to exceptional situations, consequently preventing a

[421] Triestino Mariniello, 'Prolonged Emergency and Derogation of Human Rights: Why the European Court Should Raise Its Immunity System' (2019) 20 German Law Journal 46.
[422] *Brannigan and McBride v. UK* (1993) App No. 14553/89 and 14554/89.
[423] *A. and Others v. The United Kingdom* (2009) App No. 3455/05.
[424] *Ireland v. United Kingdom* (1978) App no. 5310/71: 'It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency'.
[425] *A. and Others v. The United Kingdom* (2009) App no. 3455/05: It was found by the court, in concurrence with the House of Lords, that contrary to the Government's contention, the derogating measures taken were disproportionate, by discriminating unjustifiably between nationals and non-nationals.
[426] European Convention on Human Rights Article 15.

recalibration of ordinary legal norms.[427] This would render the state in a de facto state of emergency, which allows the same powers to operate, however, such powers would operate without the important supervision by the ECtHR, that would otherwise accompany the state during a period of a declared emergency.[428] By merely enforcing emergency powers, the government risks subjecting individuals to exceedingly harsh measures, thereby restricting their rights unlawfully, in an absence of the reassuring observance by the ECtHR. Therefore, it would be effective for the British Government to derogate, to ensure a strong level of scrutiny and observance of derogating measures, for the time that such rights should operate, to control Covid-19 and lawfully restrict rights.

WOULD DEROGATION BE INEFFECTIVE? THE MARGIN OF APPRECIATION AND THE SUPERVISORY ROLE OF THE ECtHR

(1) The Margin of Appreciation - an 'Over Subjective and Unprincipled Portion of Discretion'[429]

The first element to explore in assessing whether it would be ineffective for the British Government to derogate from the ECHR when Covid-19 is deemed a serious and imminent threat to public health, is the margin of appreciation. The doctrine is but far from flexible, allowing for a controlled application during the pressing circumstances. Onder Bakircioglu advocates that the doctrine is an over-subjective and an unprincipled portion of discretion, which has the ability to weaken legal certainty and the current fragile structure of the European Convention, which depends highly upon member state co-operation.[430] *Z v. Finland*[431] provides that States can become overpowered, by having access to such discretion to impose derogating measures, without any assurance that the ECtHR will rule upon as being incompatible with Human Rights. Utilising Article 15 at a time whereby human rights are at their most vulnerable, can result in the creation of ill proportioned derogating

[427] Alan Greene 'States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic' (Strasbourg Observers, April 2020) <https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/> accessed 1 September 2020: Greene provides a detailed discussion upon this matter.

[428] Ibid.

[429] Onder Bakircioglu, 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases' (2007) 8 German Law Journal 711.

[430] Ibid.

[431] *Z v Finland* (1997) App no. 22009/93: Judge De Meyer provides an interesting critique as per the doctrine.

measures, which can adversely impact specific individuals, more than others.[432] This means that human rights will be inadequately protected, as the state will have the discretion to impose potentially damaging measures. Owing to the strong influence evinced by the pandemic, it is plausible to deduce that the state could miscalculate the type of derogating measures that are needed to control the virus, whilst ensuring fundamental rights remain protected. Therefore, it would be ineffective for the British Government to derogate as the state holds an alarming level of discretion, which could be used disproportionately, consequently exacerbating the protection of human rights, during their restriction.

(2) The ECtHR Lacks Adequate Supervision Over the Derogation Measures in Place

The second element to explore in assessing whether it would be ineffective to derogate, is the ECtHR's supervisory role. Despite the judicial oversight that the court holds over measures enforced by states, their supervision can deplete significantly. This is because ECtHR judgements focus on the facts of an individual complaint and, consequently, cannot address the entirety of human rights concerns related to the derogation measures.[433] Covid-19 is exceptionally novel in its element as its impact rate, appertaining to rights and freedoms is formidably high across the country. As a result, the door is left wide open to abuse, without effective supervision by the Court. The ECtHR is inadequately resourced to systematically address the effects of derogating measures on human rights and whether the state has taken measures which are not strictly required by the exigencies of the situation.[434] In essence, this drawback would defeat the purpose of derogating to begin with and cloud the supervision of restricted rights. Therefore, it would be ineffective for the British Government to derogate as the Court is unable to ensure ample observance over the derogation measures implemented during Covid-19, which reduces the level of certainty that derogating could offer the state.

For the wider region, it is only once the period of implementation has passed, or an application alleging a violation reaches the court, that the necessity and proportionality of the measures can be analysed.[435] Given the rigorous, albeit time consuming, procedure in which

---

[432] *BP v Surrey County Council and RP* [2020] EWCOP 17: The concept of human rights varying in the level of which they are affected, is made evident in this case.

[433] Kushtrim Istrefi, 'Supervision of Derogations in the Wake of COVID-19: a litmus test for the Secretary General of the Council of Europe' (EJIL:Talk! Blog of the European Journal of International Law, 2020) <https://www.ejiltalk.org/supervision-of-derogations-in-the-wake-of-covid-19-a-litmus-test-for-the-secretary-general-of-the-council-of-europe/> accessed 1 September 2020.

[434] Ibid.

[435] Georgiana Epure 'Strengthening the supervision of ECHR derogation regimes. A non-judicial avenue (Strasbourg Observers, April 2020) <https://strasbourgobservers.com/2020/04/17/strengthening-the-supervision-of-echr-derogation-regimes-a-non-judicial-avenue/> accessed 1 September 2020.

the court undertakes in supervising derogation measures, the number of pending applications pertaining to abuse before the Court was noted to be approximately 60,000.[436] This alludes to the intimidating pressure that the court are under, to address potential violations.

WOULD DEROGATION BE EFFECTIVE? THE NOTIFICATION PRINCIPLE IN THE COUNCIL OF EUROPE

(1) The Obligation to Make the Derogation Public and Known to Other States

A further element to explore as to whether it would be effective to derogate, is the requirement of notification.[437] Kresimir Kamber[438] notes that the obligation to keep the Secretary General of the Council of Europe fully informed of the derogating measures implemented, are for the purpose of making the derogation public and known to the other Member States of the Council of Europe. This also allows for inter-state complaint,[439] and implies a necessity to keep the need for derogating, under constant review.[440] The requirement of notification is also contested to be an important protective element, enshrined in Article 15, and is a safeguard against abuse of the clause.[441] In essence, by increasing the level of oversight undertaken by the Strasbourg Organs, as with the council, during Covid-19, this signifies the government's honest efforts to ensure that such measures are necessary and proportionate, thereby protecting fundamental rights. This level of transparency allows for co-operation between states, which will set in motion a syndication to control the spread of Covid-19. Therefore, it would be effective for the British Government to derogate from the ECHR, to keep restrictive measures publicly observed as well as increasing state co-operation, which can allow for states to intercede for one another where necessary, to control Covid-19.

---

[436] 'Annual Report 2019 of the European Court of Human Rights' (Council of Europe) <https://www.echr.coe.int/Documents/Annual_report_2019_ENG.pdf> accessed 1 September 2020.
[437] European Convention on Human Rights Article 15(3).
[438] Kresimir Kamber, 'Limiting State Responsibility under the European Convention on Human Rights in Time of Emergency: An Overview of the Relevant Standards' (2017) 5(1) European & Comparative Law Journal 11.
[439] Mohamed M. Zeidy, 'The ECHR and States of Emergency: Article 15 - A Domestic Power of Derogation from Human Rights Obligations' (2003) 4 San Diego Int'l L.J. 277, 295.
[440] Kresimir Kamber, 'Limiting State Responsibility under the European Convention on Human Rights in Time of Emergency: An Overview of the Relevant Standards' (2017) 5(1) European & Comparative Law Journal 11.
[441] Aly Mokhtar 'Human rights obligations v. derogations: Article 15 of the European convention on human rights' (2004) 8(1) The International Journal of Human Rights, 65.

WOULD DEROGATION BE INEFFECTIVE? THE NOTIFICATION PRINCIPLE IN THE COUNCIL OF EUROPE AND THE INEVITABLE NOTIFICATION TO THE WIDER PUBLIC

(1) Uncertainty Around the Impact of Failing to Comply with the Notification Requirement

As per the requirement of notification, the next issue to explore is whether it would be ineffective to derogate, pertains to the lack of clarification around what the impact of failing to stipulate absolute compliance with the notification requirement is on derogation and implemented measures.[442] In *Lawless v Ireland (No. 3),*[443] it was contended that the Irish notice of derogation was invalid under Article 15(3). The Irish Government professed that the right of derogation was not conditional on providing such information in question. The commission responded by stating: '[t]he Commission is not to be understood as having expressed the view that in no circumstances whatever may a failure to comply with the provisions of paragraph 3 of Article 15 attract the sanction of nullity of the derogation or some other sanction'. The Commission therefore declined to determine whether a state's reliance upon Article 15, shall be impeded, should a state fail to provide absolute compliance with the requirement in question[444]. In the instant circumstance, this is problematic for the British Government as such an uncertainty can affirm potential breaches under the convention. This can occur through the state's action of unintentionally failing to comply with the notification requirement, or inadequately complying.[445] As a result, this unaddressed crack can be viewed as a risk that the government should not take, to prevent a nullified derogation or a sanction. Without clarification around this matter, the state holds an excessive level of manoeuvrability which can radiate confusion, when utilising Article 15.[446] This means that it would be ineffective for the British Government to derogate, as it is unclear whether a failure to comply with the notification requirement will nullify an attempted derogation, or attract a sanction, leading to the unlawful restriction of rights.

---

[442] Mohamed M. Zeidy, 'The ECHR and States of Emergency: Article 15 - A Domestic Power of Derogation from Human Rights Obligations' (2003) 4 San Diego Int'l L.J. 277.
[443] Lawless v Ireland (No. 3) (1961) App no 332/57.
[444] Natasha Holcroft-Emmess, 'Derogating to Deal with Covid 19: State Practice and Thoughts on the Need for Notification' (EJIL:Talk! Blog of the European Journal of International Law, 2020) <https://www.ejiltalk.org/derogating-to-deal-with-covid-19-state-practice-and-thoughts-on-the-need-for-notification/> accessed 1 September 2020.
[445] Ibid.
[446] Mohamed M. Zeidy, 'The ECHR and States of Emergency: Article 15 - A Domestic Power of Derogation from Human Rights Obligations' (2003) 4 San Diego Int'l LJ 277.

(2) Notifying the Public of Derogating from the ECHR can have Negative Political Impacts

The second element to consider in assessing whether it would be ineffective to derogate, is the adverse political effect that will arise, after declaring a national state of emergency. Merris Amos provides that promulgating a derogation, albeit, for a limited time, will exacerbate the state of panic that encompasses the public already.[447] This can do more harm than good, by publicising the discretion that the state possess, to deny individuals of a crucial protective device. Subsequently, individuals may lose confidence in the state, leading to non-compliance with enforcements, thereby defeating the purpose of putting into place restrictive measures. Greene elaborates on the aforementioned, by explaining that the executive has the ability to 'frame an event as a crisis', which will affect the perception of the public, regardless as to whether an emergency is declared.[448] In consideration of this stance, the government must recognise the need to reassure the public, during a time when individuals are overwhelmed by a pool of uncertainty, and are clinging to any shards of protection that the state can afford for their rights. Thus, declaring a state of emergency will not mitigate the ramifications of imposing measures, which seemingly damage human rights.[449] When all is said and done, the state will have no choice but to display the title that they hold, and accept the consequences that follow. This means that it would be ineffective for the British Government to derogate from the ECHR when Covid-19 is considered a serious and imminent threat, because to notify the public of a national state of emergency, can fearsomely incite a destructive state of panic within the public.

CONCLUSION

When Britain was confronted by Covid-19, the rights and freedoms of individuals were at the centre of uncertainties. The matter as to how such rights and freedoms should be lawfully restricted is of great significance. This article focused upon whether derogation would be the most effective mode for their restriction, when Covid-19 is deemed a serious and imminent threat to public health. The article firstly provided an overview of the emergency legislation, enacted by the government. Secondly, the law governing derogation under Article 15 of the

[447] Merris Amos, 'Human Rights Law and the COVID-19 Pandemic in the United Kingdom Part 1' (*SSRN*, 15 April 2020) <https://ssrn.com/abstract=3576496> accessed 1 September 2020.
[448] Alan Greene, 'Derogating from the European Convention on Human Rights in response to the coronavirus pandemic: if not now, when?' (2020) 3 EHRLR 262.
[449] Ibid.

ECHR and its legal functioning was described. Thirdly, the possibility of restricting rights under limitation clauses, without immediately resulting to derogation was considered. The influence of such clauses was briefly analysed, to ascertain why a state may be inclined to derogate from the ECHR. Lastly, the article explored in depth upon whether derogation is an effective or ineffective form of restriction.

Overall, derogation is not an unmitigated approach to restricting human rights lawfully, to enable the government adequate discretion to control Covid-19. This is firstly evident through the detrimental effect that the margin of appreciation, within Article 15, produces. The doctrine can be applied precariously, subsequently overpowering states with such discretion. Secondly, the individualistic approach of judicial scrutiny by the ECtHR, upon derogation measures, cannot adequately address the effects of derogating measures on human rights. Thirdly, clarification is required around what the consequences are in failing to comply with the notification requirement under Article 15(3). Should non-compliance with the requirement attract a sanction or nullification, the derogating state should be fully informed, in order to prevent the unlawful restriction of rights. Lastly, by derogating, a national state of emergency can produce an adverse political effect, by placing the public in a state of panic. Ultimately, the foregoing factors stand as plausible reasons as to why it would not be effective for the British Government to derogate from the ECHR. However, it is questionable whether exceptional circumstances should be confronted by merely standardised measures.

There remains, amongst other things, compelling factors as to why derogation is the only conceivable option to lawfully restricting human rights during the pandemic. The article firstly identified that the wide margin of appreciation, accompanying Article 15 is necessary, due to the state's direct and continuous contact with the present circumstances. Thus, exercising Article 15, can give the government adequate discretion to mitigate the ramifications of Covid-19. Secondly, the paramount supervisory role of the ECtHR, promotes greater observance and scrutiny of any measures taken, which protects rights from abuse. Thirdly, by derogating, any measures that are implemented during the emergency, cease to apply once Covid-19 is no longer deemed an emergency. This reserves emergency measures for emergencies. Lastly, the notification requirement to the council, increases transparency of the measures, which promotes overall acknowledgement of which states are not exercising their obligations under the convention. As a result, Member states of the Council of Europe, have a base for inter-state complaint, as well as additional observance for human rights.

On balance, it comes as no easy task for any state to restrict the rights and freedoms of individuals. Ultimately, when the exigencies of a situation, strictly require the government to take measures that temporarily dispose of their obligations the government should endeavour to do so, by enacting controlled measures, which enable greater observance by Strasbourg organs, to the rights of all. Therefore, it would be effective for the British Government to derogate from the ECHR by virtue of Article 15, when Covid-19 is deemed a serious and imminent threat to public health.