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Foreword

Message from the Editor-in-Chief

It is with great pleasure that we welcome you to the fifth volume of the North East Law Review. For five years our journal has provided a forum for undergraduates in the North East to engage with and experience the world of legal scholarship. The purpose of the North East Law Review is primarily to display the skill and accomplishment of our student authors, however it also serves the vital purpose of encouraging law undergraduates to be courageous with their written work. A law degree is not simply a qualification; it is an education. We encourage students to strive for goals beyond grades and to utilise their new skills to seek out their own individual voice. I feel confident that our student authors, both in this edition and those who have contributed in the past, have shown that even the youngest members of our academic community can make a valuable contribution to the legal debates of the day.

Of course the core of this journal belongs to our talented undergraduate authors, but I would also like to take this opportunity to extend my gratitude to our dedicated team of editors. None of this would be possible without their keen eyes and stylistic proficiency. I would also like to thank our events coordinator, Alvina Grasun, for her handling of the journal's launch and to Richard Hogg for his graphic design work. A further thanks goes to my deputy editor, Shauna O'Neil, for her constant support and hours of hard work. Lastly, I am deeply indebted to our staff coordinator (and previous editor-in-chief) Derek Whayman for his insight and guidance throughout this process. I know very well that my job this year was made far easier as a result of the legacy (i.e. formatting software) he left behind. I could not be more appreciative of the team of students and staff whose efforts brought this issue to completion.

To our readers, I hope you will enjoy, learn from and engage with the many diverse articles published here.

Simran Lajmi

The Editorial Board would like to thank all of the staff and students from Newcastle University who have helped in the creation of this issue. Without their support, the North East Law Review would not be possible.

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POETHICS IN *THE TEMPEST*: REVITALISING THE ETHICAL COMPONENT OF LAW

Chloe Abbott[*]

Shakespeare's *The Tempest* is a compelling example of how, in its attention to legal communication and the plight of the 'other', poethics revitalises the ethical component of law. This paper will argue that the creation of a 'great globe'[1] as a metaphor and the figure of Prospero as ruler of the island communicates effectively matters of law because of the completeness of the human picture that is created. Therefore, the island will be considered as an effective parallel to human society in legal communication. Jurisprudential discourse of the Tudor period, in particular Utopia and colonialism in the legal and ethical debates will be examined so as to provide a context.[2] It will then consider how Shakespeare demonstrates the plight of the 'other' through Caliban and how, through an exploration of differing productions, the ethical preoccupations of the time have led to differing directorial interpretations of Caliban – thereby presenting evidence of the revitalising effect of poethics to new generations. Finally, this paper will argue that Shakespeare presents a compelling argument for the fundamental consideration of mercy and forgiveness in law. It is this above all that propels the ethical component of law.

Central to the argument of this paper is an understanding of what Kinsella refers to as a three-way engagement between text, author and reader.[3] However, this paper extends this to a four dimensional relationship of text, author, reader and director. This places some emphasis upon the directors' varying interpretations and the way in which these reflect and inform ethical issues at the time of performance. In this way, it will demonstrate that Posner's view that 'literature is largely irrelevant to moral enquiry' is incorrect.[4]

The island as a metaphor enables the audience to see the play as a parallel world by which to understand one's own. The *tabula rasa* of the almost uninhabited island enables Shakespeare to communicate the nature and functions of law in society as they are formulated by Prospero himself. Shakespeare, by creating a microcosm, follows in the convention of legal communication through poethics rekindled by More's *Utopia*. Also an island, Utopia can be seen as an ideal commonwealth. As More was a trained lawyer, it is unsurprising that his commonwealth revitalises the ethical component of law. For example, he talks about reducing sentences when the behaviour of the criminal demonstrates that 'they regret the crime more than the punishment.'[5] Admittedly, Peter Ackroyd argues that More's training 'taught him how to put the case for that which is false and impossible' and therefore More is being ironic not idealistic.[6] However, Shakespeare revitalises the debate of an ideal commonwealth through Gonzalo's speech. Gonzalo uses Utopian language when describing a new and better 'commonwealth'.[7] Furthermore, similarities between the governor Ademus in Utopia and Prospero in *The Tempest* strengthen the argument that Shakespeare is consciously alluding to Utopia. Ademus means without people[8] and Prospero, as Caliban reminds him, has a severely limited population: 'For I am all the subject that you have'.[9] Shakespeare is deploying the

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[*] Newcastle University, LLB (Hons) Law.

[1] William Shakespeare, The Tempest (CUP 2014) 4.1.153.

[2] Thomas More, *Utopia* (Folio Society, London 2011).

[3] Elizabeth Kinsella, 'Hermeneutics and Critical Hermeneutics: Exploring Possibilities within the Art of Interpretation' (2006) 7 Forum Qual Soc Res (see sections 2.2 and 2.4).

[4] J Seaton, 'Law and Literature: Works, Criticism and Theory' (1999) 11 Yale J L & Human 25.

[5] More (n 2) 75.

[6] ibid 14.

[7] Shakespeare (n 1) 2.1.144.

[8] Daniel Boscaljon, *Hope and Longing for Utopia: Futures and Illusions in Theology and Narrative* (James Clarke & Co 2015) 52.

[9] Shakespeare (n 1) 1.2.342.

island genre in the same way as More – to revitalise the ethical component of law.

Whilst *The Tempest* is distinctive in Shakespeare's canon, being set on an island, it is also notable in that it is concerned with matters of jurisprudential discourse. Unlike *Measure for Measure*[10] and *The Merchant of Venice*,[11] it does not contain a court scene. Prospero imprisons the courtiers without a trial.[12] This expounds his tyrannical nature, leaving the audience to sympathise with the courtiers and reflect upon the inherent lack of due process which offends the rule of law. A reflection upon this may enable an audience to consider their own experiences of law, revitalising the ethical component of the law. Prospero submits the courtiers to a trial by suffering, not a legal trial. He subsequently releases them when he is advised by Ariel that they are remorseful.[13] Shakespeare encapsulates the ethical component of law when he equates humanity with empathy for another's suffering.[14]

Shakespeare is clearly adept at understanding both the psychology of the individual and the philosophical understanding of the law.[15] As in *King Lear*, Shakespeare has distilled his exploration of the human condition; his enquiry into 'what a piece of work is a man'.[16] Like Lear's heath, the island of *The Tempest* is another psychological terrain where remorse and suffering can engender reform. Indeed, Mark Rylance's production presented the play with just three actors depicting how every character represented an element in Prospero's struggle.[17] In this way, *The Tempest* is an inspiring form of legal communication. Literature prompts lawyers to see law as operating within a world of human psychology and philosophical understanding.

One aspect of legal communication in *The Tempest* is the critical theme of usurpation. Although *The Tempest* is not set in England, Prospero's initial usurpation took place in the realistic terrain of Milan and Naples which had experienced political intrigues for decades. Additionally, Stephano, Trinculo and Caliban plot the violent murder of Prospero in order to usurp his rule on the island. Shakespeare is exploring areas of law which were of significant concern to James I. The first audiences of 1611, despite the peaceful accession of the Stuart king to the throne, inhabited an England that was thoroughly unstable.[18] Usurpation and rightful succession had troubled both the general population and lawyers for centuries. The common people knew they had paid the price in Civil War. As Ian Ward asserts, the 'seeds of 1649 were already sown and rooted.'[19] In this exploration, *The Tempest* is a convincing mode of legal communication about usurpation.

The Tempest communicates the notion of the divine right of kings, with Prospero embodying this concern of Stuart England. He behaves as God; he has his book and magical powers.[20] Indeed, at the end of the play he renounces his God-like powers as he speaks of how graves at his 'command have waked their sleepers'.[21] Although we may accept that these are the activities of Shakespeare in his art, even to raising the dead in *A Winter's Tale*, there is a parallel to the Monarch at the time. James I declared in Parliament 'Kings are justly called Gods, for that they exercise a manner of resemblance of Divine power upon earth.'[22] A Monarch who believes he is above the law risks unethically abusing his power. However, in practice James I adhered to the delicate mixed Monarchy consensus as described by Burgess as a constitutional consensus.[23] This consensus meant 'symbolically the king being quasi-divine remained above the law, but in practice as a political institution he remained subject to

[10] William Shakespeare, *Measure for Measure* (OUP 1998).
[11] William Shakespeare, *The Complete Works, The Merchant of Venice* (OUP 2005).
[12] Shakespeare (n 1) 5.1.9.
[13] ibid 5.1.28.
[14] ibid 5.1.19–24.
[15] John Hannigan, 'Shakespeare and the Young Lawyer' (1926) 6 BU L Rev 169.
[16] William Shakespeare, *The Complete Works, Hamlet* (OUP 2005) 2.2.305.
[17] Tim Carroll, *The Tempest Programme Notes* (Shakespeare's Globe 2005).
[18] Ian Ward, *Law and Literature* (CUP 1995) 60.
[19] ibid.
[20] S Reginald, 'Caliban to the Audience: The Tempest as Colonialist and Anti-Colonialist Text' *Reginald Shepherd Blog* (2007) <http://reginaldshepherd.blogspot.co.uk/2007/08/caliban-to-audience-tempest-as.html> accessed 3 January 2015.
[21] Shakespeare (n 1) 5.1.48–49.
[22] Johann P Somerville, *King James VI and I: Political Writings* (CUP 1994) 181.
[23] Ward (n 18) 63.

it.'[24] Therefore, although James I did not act above the law, through Prospero the audience are reminded of how the balance can be lost.

Additionally, the balance is threatened when a ruler does not listen to counsel. Sir John Fortescue, who first expressed the notion of mixed Monarchy, argued that the English Monarchy ruled well when it was well counselled.[25] Shakespeare presents Prospero as a ruler who does not listen but bad-temperedly insists that Miranda attend him.[26] Shakespeare embodies in Prospero the risk of a ruler who, in not listening, becomes tyrannical. It is not until the end of the play, when the wise counsel of Ariel tells Prospero that the imprisoned courtiers are now remorseful,[27] that Prospero releases them. Prospero accepts Ariel's counsel and decides, 'the rarer action is in virtue, than in vengeance'.[28] Shakespeare is therefore endorsing to the audience the view presented by Fortescue: that good governance requires a listening Monarch.

The conduct of rulers was of significant interest in the period following Machiavelli's *The Prince*[29] which although placed on the Index was available. As a form of legal communication *The Prince* is now viewed as an early work of political science. Prospero's conduct on the island demonstrates Machiavelli's argument that the Prince 'must learn how not to be virtuous, and to make use of this or not according to need.'[30] For example, Prospero subdues the inhabitants Caliban and Ariel quickly on arrival to the island, thereby demonstrating that he knew how not be virtuous. Admittedly, this is in sharp contrast to his naïve neglect of his Dukedom in Milan which resulted in his usurpation. However, Prospero's conduct creates something of a critique of *The Prince* in dramatic form and initiates an exploration into the conduct of a ruler. Prospero learns that the ethical component of the law is more valuable than Machiavelli's pragmatism.

Prospero is illuminating in the context of the sermons and writings of the Elizabethan and Stuart era. Sermons, like the theatre, were a considerable vehicle of legal communication. The Elizabethan *Homily Against Disobedience and Willful Rebellion* states that a tyrant ruler is sent by God and the subjects should not 'shake off their curse',[31] but by the end of the 16th Century 'writers both Catholic and Protestant had argued for the right to remove a tyrant.'[32] Therefore, when Caliban calls Prospero a tyrant this is Shakespeare engaging in the legal debate concerning the proper response to a tyrannical ruler.

However, removing a tyrant was not the daily concern of Shakespeare's groundling audience, instead it was the legal communication concerning the behaviour of masters in relation to their servants. Writings of the time by Rycharde Robinson and Ferdinando Pulton present contrasting views of a ruler's behaviour. Robinson translated Francesco Patrizi who advised that a master in relation to his servants ought 'to thinke that they are men, and not brute beasts and that he should not rage with cruelty against them … or chayning of them'.[33] In contrast, Ferdinando Pulton wrote in 1609: 'If a villaine will not be justified by this Lord, nor obedient onto him it is lawful for the Lord to beat or imprison him'.[34] Shakespeare demonstrates in Prospero's treatment of Caliban and Ariel an example of a master mistreating his servants. Through Prospero, as the ruler of the 'great globe', Shakespeare provides a platform for both directors and the audience to reflect upon how a ruler should behave in the formulation and application of law.

The portrayal of Caliban communicates much about the ethical component of the law. Caliban is the archetypal 'other'. Arguably he represents the uncivilised inhabitants of colonised lands, the 'wilde Irish' and the racially abused. This exploration shows poethics aiding the understanding of dilemmas in law and ethics at the time of varying productions.

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[24] ibid 66.
[25] ibid 63.
[26] Shakespeare (n 1) 1.2.
[27] ibid 5.1.17–18.
[28] ibid 5.1.27–28.
[29] Niccolo Machiavelli, *The Prince* (Folio Society 2006).
[30] ibid 86.
[31] William Shakespeare, *The Tempest* (David Lindley ed, CUP 2013) 52.
[32] ibid.
[33] Shakespeare (n 31) 53.
[34] ibid.

Shakespeare's contemporary and postcolonial audiences could interpret Caliban as an exploration of the treatment of the indigenous peoples of colonised countries.[35] As Caliban was an inhabitant of the island before it was reached, like the indigenous populations, he believes that 'This island's mine.'[36] In the Elizabethan era, the Americas had been reached and therefore colonisation was a contentious area of legal debate. Prospero can be seen as representing the repressive behaviour of a coloniser such as Sir Francis Drake.[37] Prospero criticises Caliban as one whose nature cannot be changed by his nurture.[38] Indeed, Caliban is vicious in his description of how Prospero might be killed.[39] In one respect this may confirm the fears of the colonisers regarding the dangers of the 'savages' in the Americas thereby vindicating colonialism. However, the debate stretched to more humane views such as Queen Isabella of Spain, who said natives were morally equal to all her other subjects.[40]

The presentation of Caliban reflects these divergent views of the status of the indigenous population as an 'other'. This can be seen in that Caliban suggests that it is the Europeans, Stephano and Trinculo, who would perform the violence, not him. This alludes to Montaigne's view in *Of Cannibals* about which Shakespeare was familiar. Montaigne argued that indigenous people adopted 'extreme forms of vengeance',[41] mirroring what they had seen perpetrated by the civilised Portuguese themselves. Therefore, it can be argued that Prospero's harsh treatment of Caliban brutalised him, leading the audience to empathise with the plight of the 'other', revitalising the ethical component of law. This presentation enabled the audience to engage in the moral aspect of the Treaty of London in 1604 which provided the 'first formal opportunity for England to state its emerging legal formulas',[42] including the treatment of indigenous people.

Shakespeare is encouraging the audience to empathise with the perspective of the 'other'. Caliban's assertion: 'This island's mine'[43] has clear authority both in poetic expression and in the law. In the former because the statement is unambiguous and pure, in the latter because Prospero would not have had legitimate claim to the title of the isle. From the end of 16th Century 'the English believed that for a claim to territorial acquisition to be complete in Roman law both *animus* and *corpus* were necessary.'[44] Prospero did not fulfil the *animus* requirements that 'there must be mental intention to annex the land, which involved certain knowledge of the region being claimed',[45] as evidenced by the fact that he had no 'sail nor mast'[46] to direct his journey. Therefore, he did not have legitimate claim to the land, igniting empathy with the 'other'.

However, there are suggestions that Caliban was intended by Shakespeare to evoke the Irish. He is described as 'a freckled whelp,'[47] and Dympna Callaghan argues that the gabardine under which Caliban hides is the conventional dress of the Irish.[48] If Shakespeare intended the audience to reflect upon the recent activities of the English in Ireland, they may indeed have seen Caliban as the uncivilized 'wild Irish' as depicted in the art of the period.[49] Furthermore, Caliban's extreme progeny casting him as sub-human equates to the propaganda of the period. Callaghan recounts that after the Cashel Massacre of 1647 the English militia swore that after stripping the Irish corpses of their long cloaks 'they found them to

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[35] Clayton E Jewett and John O Allien, *Slavery in the South: A State by State History* (Greenwood 2004) 259.
[36] Shakespeare (n 1) 1.2.332.
[37] ibid 1.2.308.
[38] ibid 4.1.188–189.
[39] Shakespeare (n 1) 3.2.80–83.
[40] Gale Encyclopedia of US Economic History, 'Native Americans Treatment of Spain v England Issue' (2000) <http://www.encyclopedia.com/doc/1G2-3406400630.html> accessed 22 December 2015.
[41] Michel de Montaigne, 'On Cannibals 1580' <http://public.wsu.edu/~brians/world_civ/worldcivreader/world_civ_reader_2/montaigne.html> accessed 1 January 2016.
[42] Ken MacMillan, S*overeignty and Possession in the English New World: The Legal Foundations of Empire 1576– 1640* (CUP 2006) 180.
[43] Shakespeare (n 1) 1.2.332.
[44] MacMillan (n 42) 180.
[45] ibid.
[46] Shakespeare (n 1) 1.2.147.
[47] ibid 1.2.283.
[48] Dympna Callaghan, *Who was William Shakespeare: An Introduction to the Life and Works* (John Wiley & Sons 2012).
[49] Maire and Conor O'Brien Cruise, *Ireland: A Concise History* (Thames & Hudson 1999) 58.

have tails nine inches long.'[50] It can be argued that Shakespeare's attitude to the Irish is ambivalent, his only clear Irish character is Macmorris in *Henry V*[51] who is presented as both servant and soldier, conquered and conqueror and does not fulfil the stereotype of the barbaric Irish. Thus, whilst it is not conclusive that Shakespeare intended to revitalise the ethical component of the law if Caliban is seen to represent the Irish, it is clear that Shakespeare has at least posed a question in the audience about the legitimacy of English behaviour in Ireland.

Another way in which Caliban is presented is as a figure of racial abuse. A particularly effective production drawing upon this presentation of the 'other' was the 2009 RSC South African Baxter production. This is a key example of the director's pivotal role in the creation of meaning, demonstrating that 'language is the essential medium for social change'[52] in this case mediated through a director. Here, Caliban is presented in a similar mode to Nelson Mandela.[53] The production consciously evoked the apartheid era and Prospero speaks directly to Caliban, not the audience, when he is craving pardon. It has been seen by many as mirroring the Truth and Reconciliation Commission in South Africa,[54] in that for the nation to be healed, those who have wronged need to be remorseful and those who have been wronged need to forgive. This is a compelling example of how poethics have revitalised the ethical component of the law.

The Tempest presents a world where Caliban as the 'other' is alienated. His alienation is succinctly expressed in Robin West's thesis that: 'Obedience to legal rules to which we would have consented relieves us of the task of evaluating the morality and prudence of our actions … The impulse to legitimate our submission to imperative authority also has within it, of course, the seeds of tragedy'.[55] Whilst the West thesis, which is analogous to Weisberg's 'ressentiment thesis',[56] would not have been expressed in such terms by Shakespeare, the incitement to violence of the murderers in Macbeth where they are convinced that Banquo has held them back, is evidence of Shakespeare's understanding of the psychology of alienation. Caliban's readiness to serve the unworthy Stephano as a new master, 'I'll show thee the best springs … I'll fish for thee … thou wondrous man,'[57] mirrors exactly his initial willing service to Prospero. This encapsulates exactly West's account of the impulse to submit to authority. It is a compelling dramatic communication of the plight of the 'other' and revitalises the ethical component of the law.

On the fundamental theme of mercy and forgiveness to which firstly Miranda and latterly Ariel urges Prospero, John Hoskin states unequivocally: 'to pardon and forgive is the part of a man; to revenge is the part of the beast'.[58] *The Tempest* in its presentation of the sensitive yet angry Caliban and the controlling Prospero demonstrates in its denouement that pardon and forgiveness, rather than vengeance are the nobler course.[59] Fulfilling the role of a judge, Prospero instructs Ariel to release the penitent courtiers and Caliban. However, the resolution is not brought about through a deft piece of legal argument as in *The Merchant of Venice* but through exhortations to mercy and forgiveness. The importance of mercy as a quality has been highlighted in the 21st Century as having regrettably 'drifted to the twilight zone of sentencing.'[60] This being said, whilst in sentencing the quality of mercy is considerably strained, a compassionate concern for the 'other', whether it be for example the homosexual, the transgender or the ethnic minority clearly underpins anti-discrimination

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[50] Callaghan (n 48).
[51] William Shakespeare, *The Complete Works, Henry V* (OUP 2005).
[52] Ward (n 18) 15.
[53] C Spencer, 'The Tempest at Courtyard theatre, Stratford-review' *The Telegraph* (18 February 2009) <http://www.telegraph.co.uk/journalists/charles-spencer/4690654/The-Tempest-at-Courtyard-Theatre-Stratford-review.html> accessed 1 January 2016.
[54] D Cavendish, 'Antony Sher on The Tempest' *The Telegraph* (10 February 2009) <http://www.telegraph.co.uk/culture/4582564/Antony-Sher-on-The-Tempest-Stratford.html> accessed 1 January 2016.
[55] Ward (n 18) 10.
[56] ibid.
[57] Shakespeare (n 1) 2.2.137–141.
[58] William Shakespeare, *The New Cambridge Shakespeare* (David Lindley ed, CUP 2013) 48.
[59] Shakespeare (n 1) 5.1.28 and 5.1.26.
[60] John Cooper, 'The Ancient Principle of Mercy' (2010) 174 CL & J.

legislation and surrounds current enquiries such as the Transgender Equality Inquiry.[61]

This paper has demonstrated how poethics in *The Tempest* has revitalised the ethical component of law. The island is effectively presented as a microcosm compelling the audience to consider the nature and function of law in society. It explores the jurisprudential discourse on the conduct of a ruler through Prospero. Furthermore, directorial interpretations of Caliban mirror the ethical concerns of the periods of production and demonstrate that poethics in *The Tempest* does stir the ethical component of law. It presents an effective challenge to Posner's view regarding literature's divorce from morality. Finally in the play's resolution Shakespeare through the law maker Prospero depicts the compulsion towards forgiveness and invites us all, to pursue mercy rather than vengeance. 'As you from crimes would pardoned be, let your indulgence set me free.'[62]

[61] HC Women and Equalities Committee, 'Women and Equalities Committee Transgender Equality Inquiry' (2015–16, HC 390) <http://www.Parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/inquiries/Parliament-2015/transgender-equality/> accessed 3 January 2016.
[62] Shakespeare (n 1) 5.epilogue.19–20.

THE EUROPEAN CONVENTION OF HUMAN RIGHTS: OUR RIGHTS

Chelsea Cullen[*]

The European Convention on Human Rights ('ECHR') was ratified by the UK on March 8, 1951.[1] Thereafter, the European Court of Human Rights ('ECtHR' or the 'Strasbourg Court') was set up as an international court in 1959, though the substantive laws were only incorporated into the domestic legal system in 1998 through the enactment of the Human Rights Act 1998, which is 'one of the most contentious pieces of legislation on the UK statute books.'[2] Relatedly, the Conservative government has recently made a proposal 'to repeal the Human Rights Act 1998 and replace it with a British Bill of Rights.'[3] This proposal has been the subject of vast controversy and throughout will be the main subject of this paper.

Appropriately, the focus of this exploration will be on the fundamental relationship that exists between the ECtHR and the UK domestic courts, with consideration as to whether Strasbourg jurisprudence should indeed represent the minimum that is accepted before an English court. Accordingly, the argument proposed will unfold as follows, contrary to the diet of misinformed press articles (in particular those printed in *The Sun*), the ECtHR is not a radical court. Subsequently, the Strasbourg court does indeed look for consensus and additionally does provide a more nascent view of human rights. Ultimately, it will be demonstrated that although confusion and inconsistencies have ascended in relation to the Human Rights Act, a repeal and replacement of it with a British Bill of Rights could potentially 'place our relationship with international and European human right law in jeopardy,'[4] and thus instead of repealing the Act, more guidance and education should be given. Therefore, in contrast to the views of the Conservative government and other opponents, it will conclude that the ECtHR should indisputably be seen as representing the minimum that is accepted before an English court.

The European Court of Human Rights is a supranational body comprising of forty-seven Justices, including one from each Member State of the Council of Europe. Furthermore, it operates as 'the most authoritative source of Convention law for national judges.'[5] Relatedly, the multinational court has fittingly been described by Mahoney as 'the proverbial ivory tower'[6] of jurisprudence. However, since the implementation of the ECtHR and the enactment of the Human Rights Act in 1998, the tabloid press appear to have 'had a field day, inventing stories based on cases that never happened.'[7] Coincidently, *The Sun*, a well-known British newspaper, has recently published articles which excessively describe Strasbourg jurisprudence as 'idiotic' in relation to the deportation of foreign 'crooks' out of England.[8] It has also promoted campaigns for the Government to 'rip up the Human Rights Act.'[9] Consequently, this has led to vast misconceptions that English judges are subordinates to Strasbourg and subsequently have little authority when considering cases involving ECtHR jurisprudence. Accordingly, these negative observations can further lead the public to believe that the domestic judges 'are

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[1] Jonathan Lewis, 'The European Ceiling Human Rights' [2007] PLR 720, 722.

[2] Ronagh McQuigg, 'The Human Rights Act 1998 – Future Prospects' [2014] 35 Stat LR 120.

[3] Steve Foster, 'Repealing the Human Rights Act – No Not Delay, Just Don't Do It' [2015] CLJ 9, 9.

[4] ibid 15.

[5] Paul Mahoney, 'The Relationship Between the Strasbourg Court and the National Courts' [2014] LQR 568, 576.

[6] ibid.

[7] Francesca Klug, 'A Bill of Rights: Do We Need One or Do We Already Have One?' [2007] PL 701, 714.

[8] Tom Goodenough, 'Unable to Be Booted out of Britain' *The Sun* (London, 3 August 2013) <http://www.thesun.co.uk/sol/homepage/news/politics/5800602/European-Court-of-Human-Rights-laws-stop-745-foreign-lags-from-being-deported.html> accessed 1 March 2016.

[9] Graeme Wilson, 'PM: I Will Rip up the Human Rights Act' *The Sun* (London, 3 October 2011) <http://www.thesun.co.uk/sol/homepage/news/politics/3849624/PM-I-will-rip-up-Human-Rights-Act.html> accessed 1 March 2016.

steeped in a system of binding precedent and a linear judicial hierarchy'[10] and further persuade them to view the European court as a radical and inconsistent supranational superior. Additionally, many UK judges themselves have appeared to cast doubt on the extent of their domestic authority, and thus believe they 'are effectively subordinate (in a vertical relationship) to the ECHR.'[11] This was shown in the case of *Alconbury*,[12] where Lord Slynn made a contentious statement, namely that UK judges 'should follow any clear and constant jurisprudence of the European Court of Human Rights.'[13] However, the European court is not radical; it 'does not operate under a strict system of *stare decisis*' and is not bound by its own judgments,[14] thus 'there is good reason why the domestic courts should not be.'[15]

Furthermore, the precise wording of the Human Rights Act 1998, s 2(1) that British judges need only 'take into account' ECtHR case law, appears to suggest that the ECtHR is actually a 'persuasive rather than determinative authority.'[16] Appropriately, Lord Irvine has convincingly articulated that the Strasbourg court is evidentially not radical as the intentional wording of section 2(1) 'means that the domestic court *always has a choice.*'[17] However, recent concerns have arose which directly challenge Lord Irvine's speculation. These relate to whether 'take into account' actually binds domestic courts to 'mirror' Strasbourg jurisprudence, and thus amounts to a *ceiling* of rights in contrast to a *floor*. Fundamentally, this mirror principle originated from Lord Bingham's controversial speech in the case of *Ex p Ullah.*[18] Lord Bingham essentially 'added a gloss to the statutory language,'[19] by stating:

> The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.[20]

Accordingly, the 'no more, but certainly no less' part of this statement would appear to tie UK cases tightly to Strasbourg authority, and in doing so place UK courts in danger of 'fettering themselves to a shifting jurisprudence.'[21] Therefore, it would appear that there is a fundamental gap amongst different members of the domestic judiciary as to what section 2(1) is actually asking the courts to do and on this basis, proposals for repealing the Human Rights Act could be justified. However, Lord Scott has persuasively critiqued Lord Bingham's mirror principle and asserted that although ECtHR case law is 'very important material that must be taken into account,'[22] UK courts are actually 'not bound by the Strasbourg Court's interpretation of an incorporated article.'[23] Accordingly, Lord Scott's assertion is thus implying that UK courts are not completely tied to ECtHR jurisprudence. This is persuasive because in *Campbell*[24] the House of Lords successfully developed human rights protection beyond the minimum jurisprudence provided by Strasbourg. Therefore, if the judiciary, as evidenced in *Campbell*, can indeed go beyond that required by Strasbourg, there is no need for confusion as to what their powers are when considering cases that relate to the Human Rights Act.

Relatedly, it is hard to ignore the obvious wording of Section 2(1); 'take into account' visibly does not mean courts are *bound* to Strasbourg jurisprudence, nor are they expected to be. This is further demonstrated in the white paper that brought

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[10] Lord Irvine, 'A British Interpretation of Convention Rights' [2012] PLR 237, 246.
[11] ibid 246–247.
[12] [2001] UKHL 23, [2002] 2 AC 295.
[13] ibid [26] (Lord Slynn).
[14] Philip Sales, 'Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine' [2012] PLR 253, 256.
[15] ibid.
[16] Roger Masterman, 'Section 2(1) of the Human Rights Act 1998: Binding Domestic Courts to Strasbourg?' [2004] PL 725, 736.
[17] Irvine (n 10) 241.
[18] [2004] UKHL 26, [2004] 2 AC 323.
[19] Richard Clayton QC, 'Smoke and Mirrors: The Human Rights Act and the Impact of Strasbourg Case Law' [2012] PLR 639.
[20] *Ex p Ullah* (n 18) [20] (Lord Bingham).
[21] Masterman (n 16) 736.
[22] *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312 [44]–[45] (Scott LJ).
[23] ibid.
[24] [2005] UKHL 61, [2005] 1 WLR 3394.

Strasbourg jurisprudence into the UK constitution, *Rights Brought Home.*[25] This significant declaration clearly stated:

> British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe.[26]

If Parliament wanted Strasbourg jurisprudence to be binding, it could have easily made it so. It is inevitable that to have authority, UK courts must 'act, and be seen to act, as an autonomous institution.'[27] Therefore, as Foster has fittingly noted, repealing the Human Rights Act would appear to constitute 'a backward step'[28] in the fundamental protection of human rights, and the relationship the UK has developed with the 47 members of the Council of Europe and the ECtHR.

Moreover, although the Strasbourg court is 'the Platonic guardian of universal humanity,'[29] it also searches for consensus; it provides a more nascent view of human rights than the founding members of the Council of Europe as it now replicates the 'cultural heritage'[30] of 47 different countries. Accordingly where there is no consensus reached, the Strasbourg court attempts to 'accommodate variations in state practice through the margin of appreciation doctrine.'[31] The margin of appreciation doctrine introduced by the ECtHR itself plays a crucial role in the preservation of a smooth relationship with domestic courts; it gives state authorities a sense of freedom.[32] However, this space for freedom of action is limited, as illustrated in *Handyside*[33] where it was stated, 'the domestic margin of appreciation … goes hand in hand with a European supervision'[34] and thus this freedom will inevitably come under scrutiny of the ECtHR. Nonetheless, because the ECtHR is the commanding authority of human rights for 47 opposing constitutions, it would be difficult to argue that it does not search for consensus. Furthermore, as the margin of appreciation doctrine was introduced by the European court itself, thereby allowing domestic authorities space for freedom, this exemplifies that the relationship existing between the ECtHR and the UK judiciary is 'complementary, not decisive.'[35]

However, even if the ECtHR finds that a particular issue or action is within a State's margin of appreciation, a UK domestic court may still issue a declaration of incompatibility under Section 4 of the HRA 1998. A declaration of incompatibility returns the issue to Parliament to 'legislate to reverse the position.'[36] Therefore, it is tempting to see through the implementation of the margin of appreciation doctrine and section 4 of the Human Rights Act, that courts do have freedom to put their own domestic stamp on human rights cases. However, Lewis argues that the common law of the UK 'has been deprived of its inherent power'[37] through its relationship with Strasbourg and as a result, 'English human rights law finds itself to be nothing more than Strasbourg's shadow.'[38] Arguably, whilst these bold assertions of the ECtHR appear suitable given the current explosive debate over the repealing of the Human Rights Act, the very fact that judges of the ECtHR 'are not part of any one country's judicial culture,'[39] would appear to suggest that they do not deprive anybody, let alone a constitution of its inherent power. Instead as noted above, they represent a base of authority for 47 different Member States. Thus, it appears rather convincing that the ECtHR in providing a more nascent view of human rights to all 47 members of the

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[25] Secretary of State for the Home Department, *Rights Brought Home: The Human Rights Bill* (White Paper, Cm 3782, 1997).
[26] ibid ch 5.
[27] Irvine (n 10) 247.
[28] Foster (n 3) 10.
[29] Sir Louis Blom-Cooper, 'The Road to Rome and Strasbourg via San Francisco: Human Rights in Charters and Declarations' [2015] PLR 571, 579.
[30] ibid 580.
[31] David John Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (first published 1943, Butterworths 1995) 10.
[32] Marie Amos, *Human Rights Law* (Hart 2014).
[33] [1976] 1 EHRR 737.
[34] ibid [49].
[35] Blom-Cooper (n 29) 579.
[36] Irvine (n 10) 246.
[37] Lewis (n 1) 742.
[38] ibid 730.
[39] Blom-Cooper (n 29) 580.

Council of Europe, should indeed represent the minimum to be applied in the UK constitution.

Furthermore, one of the main arguments for a repeal of the Human Rights Act is the fact that it 'has never been sufficiently 'owned' by British people as *their* bill of rights.'[40] However, the foundational aim of the Human Rights Act was primarily to 'bring rights home'[41] and thus essentially 'the Convention is effectively our *Bill of Rights.*'[42] Although discrepancies arise between how, when, and to what extent UK judges should apply Strasbourg precedent; it is clear that a 'replacement of the Human Rights Act with a UK Bill of Rights will never provide a solution' because both that Bill and the existing Act implement the same jurisprudence.[43] Moreover, by maintaining ECtHR jurisprudence as the minimum that is accepted within an English court, this gives domestic citizens wider protection of their fundamental rights and freedoms. Additionally, proposals for repeal of the Human Rights Act would further limit the remedies available to citizens when human rights violations occur. It appears that 'from a legal perspective, the Act is working in an effective manner.'[44] Instead of proposing for a repeal of the Human Rights Act, the UK Government should concentrate more on 'rebutting false stories; promoting good ones and speaking about human rights in plain English.'[45] Therefore, a more appealing route to take could be to introduce human right campaigns that aim at educating domestic bodies and domestic citizens on how to consistently apply human rights law. Educational focused campaigns would seem to constitute:

> a more logical approach than that of attempting to produce a UK Bill of Rights when there is clear opposition to such a measure.[46]

It has been made clear that question of a UK Bill of Rights remains in a 'state of uncertainty.'[47] Firstly, a diet of misinformation from *The Sun* regarding the ECtHR was exposed, revealing the unnecessary extent of censure aimed at the ECtHR. Accordingly, it was illustrated that the Strasbourg court is indeed not radical; instead it 'is the guardian (not the determiner)'[48] of domestic human rights. Secondly, as the authoritative body for 47 different members of the Council of Europe, the ECtHR does indeed look for consensus, and if consensus is not achieved it has incorporated alternative remedies that assist domestic courts and provide them with discretion. Ultimately, it is hard to disagree that proposals for the repeal and replacement of the Human Rights Act are 'both preposterous and absurd'[49] and are difficult to justify. This is because a British Bill of Rights would not provide a solution to the constant problems that arise with interpretation of international law. Instead what should be of primary focus is further guidance, to both courts and individuals, to help replenish views and prevent judicial uncertainty for the future. It is apparent that the Human Rights Act has achieved more success than it has not, and thus the ECtHR should indeed represent the minimum that is accepted within an English court.

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[40] Klug (n 7) 713.
[41] Lewis (n 1).
[42] Clayton (n 19) 656.
[43] McQuigg (n 2) 132.
[44] ibid, 122.
[45] Klug (n 7) 719.
[46] McQuigg (n 2).
[47] ibid 130.
[48] Blom-Cooper (n 29) 580.
[49] ibid 571.

SUPREMACY AND DIRECT EFFECT: NECESSARY MEASURES?

Eleanor Gilbert[*]

Ever since its beginnings as the European Coal and Steel Community in the early 1950s, the European Union has undoubtedly been controversial. More so perhaps, because its political cousin, the Court of Justice of the European Union ('CJEU') has been criticised due to its alleged 'activism'[1] in pushing European integration and creating new doctrines that national courts are legally bound by. In the early 60's the 'big bang'[2] of case law created the doctrines of direct effect[3] and supremacy,[4] holding that not only was Union law supreme over national law but also that individuals can sue a Member State if a right conferred upon them by Union law has been breached. These doctrines, whilst being controversial at the time,[5] have now become established parts of EU law. However, the doctrine of state liability was developed much later into the development of the Union,[6] after new Treaties had been developed and new countries joined. This is where the line between cooperative partnership and being merely acting agents was crossed as the CJEU held that it could essentially punish a MS for their 'failure'[7] to implement Union law correctly. Undoubtedly the case law produced by the CJEU has changed the relationship between itself and national courts, especially after the CJEU held that they had jurisdiction to review the actions of national courts of final instance in *Köbler*.[8] It is important to take both a theoretical and pragmatic approach when discussing this matter in order to assess whether national courts are indeed agents of Union law in practice or whether the threat of the CJEU reviewing national courts actions is merely the CJEU showing their 'tendency of political self-enhancement'[9] and not actually putting it into practice.

The CJEU is one of the seven institutions of the European Union[10] and its sole function is to 'ensure that in the interpretation and application of the Treaties the law is observed.'[11] Both Member States and the institutions of the European Union are under a legal duty of 'sincere cooperation'[12] to ensure EU law is adequately applied and followed however, when this does not occur, the CJEU intervenes. The CJEU deals with cases referred to it either by direct actions brought by the European Commission[13] or by a Member State, against another Member State for not complying with EU rules,[14] or by a preliminary reference from a national court.[15] It should be first noted that over two-thirds of proceedings by the CJEU are preliminary references[16] and that this indicates that some form of cooperative relationship is still occurring;[17] as Stacey Nykios notes, preliminary references help national

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[1] Trevor Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union' (1996) 112 LQR 95; Takis Tridimas, 'The Court of Justice and Judicial Activism' (1996) 21 EL Rev 199.

[2] Alec Stone Sweet, 'The European Court of Justice and the Judicialization of European Governance' (2012) 5 LREG 23, 29.

[3] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

[4] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

[5] Hjalte Rasmussen, 'Between Self-Restraint and Activism: A Judicial Policy for the European Court' (1988) 13 EL Rev 28.

[6] Combined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci v Italian Republic* [1991] ECR I-05357.

[7] ibid 37.

[8] Case C-224/01 *Köbler v Republik Österreich* [2003] ECR I-10239.

[9] *Re Ratification of the Treaty of Lisbon* (2 BvE 2/08) [2010] 3 CMLR 13, para 213.

[10] Consolidated Version of the Treaty on European Union [2012] OJ C326/13 (TEU) art 13.

[11] TEU, art 19(1).

[12] TEU, art 4.

[13] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/13 (TFEU) art 258.

[14] TFEU, art 259.

[15] ibid art 267.

[16] Court of Justice of the European Union, 'Annual Report 2014' (Luxembourg 2015) <http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-03/en_ra14.pdf> accessed 3 December 2015, 94.

[17] Mary Arden, 'Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe' (2010) 29 YEL 3, 6.

courts by increasing 'their knowledge, their tools, their experience.'[18] However, as the principles developed by the CJEU become increasingly invasive on the autonomy of a national court, it must be considered whether this is through choice or through obligation. This will be discussed later on, but first it is essential to consider the history of CJEU jurisprudence.

In the early existence of the European Union the case of *Van Gend en Loos*[19] held that individuals could assert the rights conferred upon them by the European Union in national courts if the EU law in question has direct effect. The CJEU developed this doctrine predominantly using the pragmatic reasoning that it was sensible to give individuals the ability to affirm their rights conferred upon them by the Union[20] so the Union could impact individuals in the way that it intended. However, the use of words such as 'legal heritage'[21] came as a shock to Member States who initially simply signed up to a Community that shared coal and steel. Holland, Belgium and Germany, half of the six founding Member States at the time, all argued that the CJEU was acting out of its jurisdiction in deciding whether article 12 was directly applicable.[22] The controversy was riled further in the case of *Costa v ENEL*.[23] This case created a 'cornerstone of Community law'[24] which is the doctrine of supremacy. The impact of this principle cannot be understated; it is one that has impacted on the way the CJEU and national courts interact significantly, because if EU law were not supreme, none of the following doctrines or case law produced would be binding on Member States or affect the way national courts rule on Union matters. Again, the reasoning given had a strong element of common sense; Union law must be supreme over national law if it is to be applied uniformly across all 27 Member States. Both cases followed the principle, later enshrined in international law, that Treaties should be interpreted 'in good faith in accordance with the ordinary meaning [and] in context of their object and purpose'.[25] This principle coupled with a strong emphasis on the Treaty provisions[26] makes the reasoning more legitimate due to the more democratic nature of Treaties.

Rasmussen however argued that the 'ever closer union' maxim contained in what is now the Treaty on European Union[27] has influenced the judges of the CJEU[28] and hence they took a very pro-EU approach, insinuating that they automatically *assumed* that EU law has a higher position than that of national law and that EU law is directly applicable to individuals in Member States. This may be the case as the CJEU is renowned for being pro-EU,[29] after all they do work within the institution and it would be somewhat strange if their ideologies were otherwise. However, Rasmussen places disproportionate emphasis on the role that the CJEU played in integration of the European Union. Although the CJEU has certainly helped, it is unjust to claim that their role in 1988, was so great it amounted 'to little more than [entrusting] the guardianship of cabbage to goats.'[30] This is because 'the courts cannot by themselves achieve European integration';[31] they are only one of seven institutions of the European Union and for the Union to obtain its goals Member States need to implement and enforce much, if not all, of its application.[32]

Inevitably, these two doctrines shaped the relationship of the CJEU with national courts because they asserted a new hierarchy of courts and new rights on individuals that national courts have to implement. However, the argument that they became mere 'acting agents' at this point is weak. Following *Costa*, Inspen

[18] Stacey Nyikos, 'Strategic Interaction among Courts within the Preliminary Reference Process – Stage 1: National Court Preemptive Opinions' (2006) 45 EJPR 527, 544.
[19] *Van Gend en Loos* (n 3).
[20] ibid para 12.
[21] ibid.
[22] ibid 8.
[23] *Costa* (n 4).
[24] Council Opinion 11197/07 of 22 June 2007 on the Opinion of the Legal Service, Subject: Primacy of EC Law JUR 260/1.
[25] Vienna Convention on The Law of Treaties, 23 May 1969, entered into force January 1980, art 31(1).
[26] *Van Gend en Loos* (n 3) [10]–[13]; *Costa* (n 4) 592-8.
[27] TEU, art 1.
[28] Rasmussen (n 5) 32–33.
[29] Gareth Davies, 'Activism relocated. The Self-Restraint of the European Court of Justice in its National Context' (2012) 19 J Eur Public Policy 76, 85; Mancini and Keeling. 'Democracy and the European Court of Justice' (1994) 57 MLR 175, 186.
[30] ibid 35.
[31] T Koopmans 'The Role of Law in the Next Stage of European Integration' (1986) 35 ICLQ 925.
[32] Damian Chalmers, 'The Positioning of EU Judicial Politics within the United kingdom' (2000) 23 West Eur Polit 169, 169–170.

stated that the relationship between the European Union and national law was the same as that between any other international legal orders,[33] being that EU law was just a guideline. Additionally, despite Germany's initial unhappiness with Union law being declared supreme over their *Grundgesetz,*[34] all Member States eventually accepted the two principles, with supremacy becoming part of primary law in the Lisbon Treaty.[35] This is more than likely because of the CJEU's teleological reasoning that Member States recognised, along with many academics,[36] that there needs to be a court to take charge of the European Union and supremacy and direct effect are essential for this to work in practice. For Member States to argue against supremacy today would damage their own credibility.[37]

Yet once the controversy surrounding these cases had subsided, the CJEU went on to expand its jurisdiction into the system of decentralised enforcement of EU law. In its earlier cases, the CJEU accepted that it was up to the national courts to decide what remedies were effective when a breach of EU law was found;[38] in *Rewe-Zentralfinanz*[39] the time limit on getting a remedy was exceeded under national law. However, as there was an absence of Union legislation, the case was held to be solely for German courts to determine.[40] In *Francovich*,[41] those representing the Italian employees who had not been compensated for their redundancies brought up the prospect of Italy being liable in damages for failure to implement an EU directive.[42] Nobody could have predicted the 'minor legal earthquake'[43] created nor the effect it would have on the relationship between the CJEU and national courts. The CJEU held that the effectiveness of EU law would be hindered if individuals cannot obtain compensation for their rights being breached[44] and hence state liability was created in a mere nine short paragraphs.[45] Whilst legal scholars 'widely accept the legitimacy of the [CJEU's] teleological approach to interpretation,'[46] the fact the CJEU used mainly its own jurisprudence, attributing one sentence to the provisions in the Treaties,[47] to create state liability is clearly a departure from the strong emphasis on the Treaties in *Van Gend en Loos* and *Costa*. Thus, not only did *Francovich* create an important doctrine with little reasoning, the reasoning is also less legitimate as it is based on its own previous decisions and not the more democratic means of Treaty interpretation.

The doctrine itself was met with criticism. Scott and Barber argue that the case significantly challenged principles of legal certainty, the hierarchy in domestic courts and the operation of preliminary references, to state but a few.[48] The focus here however, is how *Francovich*, and subsequent rulings on State liability, changed the relationship between national courts and the CJEU from a partnership into a unilateral relationship. As Hartley recognises, a common way for the CJEU to introduce new principles is gradually,[49]

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[33] H P Ipsen, 'The Relationship between the Law of European Communities and National Law' (1964) CM L Rev 379, 379–380.
[34] *Internationale Handelsgesellschaft N Einfuhr-Und Vorratsstelle Getreide ('Solange I')* (Case 2 BVerfG 52/71); [1974] 2 CMLR 540, paras 20–24.
[35] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306 (Treaty of Lisbon) declaration 17.
[36] Arden (n 16) 12; J H Weiler and U R Haltern, 'The Autonomy Of The Community Legal Order – Through The Looking Glass' (1996) 37 Harv Int'l L J 411, 431–432; Dieter Grimm, 'Defending Sovereign Statehood against Transforming the European Union into a State' (2009) 5 EuConst 353, 364.
[37] Arthur Dyevre, 'European Integration and National Courts: Defending Sovereignty under Institutional Constraints?' (2013) EuConst 139, 155.
[38] Case C-158/80 *Rewe-Handelsgesellschaft Nord v Hauptzollamt Kiel* [1981] ECR 1805; Case C-45/65 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043.
[39] Case C-33/76 *Rewe-Zentralfinanz v Landwirtshaftskammer fur das Saarland* [1976] ECR-1989.
[40] ibid para 5.
[41] *Francovich* (n 6).
[42] ibid para 28.
[43] D Wyatt, 'Injunctions and Damages against the State for Breach of Community Law: A Legitimate Judicial Development' in M Andenas and F Jacobs (eds), *European Community Law in the English Courts* (Clarendon 1998) 93.
[44] *Francovich* (n 6) para 33.
[45] ibid [28]–[37].
[46] Thomas Horsley 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration' (2013) 50 CM L Rev 931, 937.
[47] *Francovich* (n 6) para 30.
[48] H Scott and N W Barber, 'State Liability Under Francovich for Decisions of National Courts' (2004) 102 LQR 403.
[49] Trevor Hartley, *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community* (6th edn, OUP 2007) 76.

arguably to avoid controversy, and this is indeed what happened with state liability. In *Brasserie* and *Factortame III*,[50] the CJEU continued to assert more power over how Member States should interact with EU law by expanding the principle to include not only directives but also *any* breach by the Member States of its Treaty obligations.[51] This was then subsequently applied to cases to cover breaches from national administration[52] to incorrect implementation of directives.[53] It must be acknowledged that the CJEU did not develop this doctrine in an exceptionally broad way; the breach must have been a sufficiently serious breach of Union law that imposes rights on individuals and causation must be proved.[54] These conditions give national courts some discretion as to whether there is liability or not, however, as discussed with *Köbler* below, it is clear the final decision rests with the CJEU.

Köbler declared that not only are the executive and legislative branches of Member States liable for incorrectly implementing Union law, if a breach is 'manifest'[55] enough then the judiciary may also be criticised for failing to refer a question to the CJEU for assistance. This is important as it places a much stronger obligation onto a national court to ask for the CJEUs help, especially as damages are at stake. This essentially leads to the conclusion that if national courts want to avoid the possibility of making their Government liable, they 'had better ask for a preliminary ruling.'[56] This may be the reason that the majority of the rulings in the CJEU are preliminary ones; it may be more than simply evidence of the cooperative relationship Arden describes.[57] Alternatively, it could be that national courts are responding to the decision in *Köbler*; referring more questions to the CJEU in fear of subsequent reprisal. A second effect of *Köbler* is that it created a quasi-appellate mechanism between national courts and the CJEU. This may cause, as Monica Claes puts it; '*La Guerre des Juges*'[58] because in Member State the courts of final instance have historically always been just that; a final court whose ruling cannot be appealed. However, since *Köbler* the CJEU can not only declare the national courts interpretation of Union law incorrect but also evaluate that court's use of its own discretion,[59] similar in the way the Supreme Court in the UK can review the Court of Appeal.

Hence *Köbler* impacted the relationship between the courts by almost making the CJEU another superior court of appeal when the claimant does not get the desired outcome from a court of final instance in their Member State. *Köbler* may be interpreted as the CJEU undermining the national court competency; requiring them to ask for clarification in all but certain circumstances and giving itself jurisdiction to effectually overrule national court rulings may create a hostile environment as opposed to a cooperative one. The mere fact the CJEU can order damages to be paid if a national court does not act in a way that they agree with certainly implies that national courts have now became 'acting agents' of the CJEU. *Traghetti*[60] soon followed, which reinforced the principle laid out in *Köbler*[61] and holding that although national courts did have some jurisdiction to define the nature and extent of the criteria needed for state liability to occur, yet more restraints were put on national courts by the CJEU. This is because those restraints cannot 'impose requirements stricter than that of a manifest infringement […] as set out in […] *Köbler*.'[62] This ruling is the most significant in supporting the idea of national courts being 'acting agents' of the CJEU; the judgment is essentially the CJEU allowing national courts some powers yet restraining them so much that it compels national courts to stay in line with European case law, thus implying that national courts should follow their jurisprudence, in line with supremacy discussed above.

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[50] Combined Cases C-46/93 and C-48/93 *Brasserie du Peucher* and *Factortame III* [1996] ECR I-1029.
[51] ibid paras 18–22.
[52] Case C-5/94 *Ex p Hedley Lomas* [1996] ECR I-2553.
[53] Case C-392/93 *Ex p British Telecommunications* [1996] ECR I-1631.
[54] *Brasserie du Peucher* and *Factortame III* (n 50) para 51.
[55] ibid para 53.
[56] P J Wattel, 'Köbler, CILFIT and Welthgrove: We Can't Go On Meeting Like This' (2004) 4 CM L Rev 177, 178.
[57] Arden (n 17).
[58] Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006) 385.
[59] Scott and Barber (n 48) 406.
[60] Case C-173/03 *Traghetti del Mediterraneo SpA v Repubblica Italiana* [2006] ECR I-05177.
[61] G Bertolino, 'The Traghetti Case: A New ECJ Decision on State Liability for Judicial Acts – National Legislations under Examination' (2008) 27 CJQ 448, 448–449.
[62] *Traghetti* (n 60) para 43.

Nonetheless, at this point it is vital to take a more pragmatic approach as Stone Sweet does when evaluating the impact of CJEU rulings on national courts[63] and ask what is the practical implication of *Köbler*, or indeed any of the CJEUs case law? Nykios found that just two out of three hundred rulings by the CJEU refused to be implemented by the five Member States studied.[64] This raises questions as to whether *Köbler* really did have such a great effect on the relationship as it first appears or is *Köbler* simply 'token jurisprudence?'[65] Of course there are other ways liability may be imposed upon Member States as outlined above and statistics are almost always misleading, however noncompliance of Member States is clearly a rare occurrence.[66] The fact that in *Köbler* itself, the breach by the court was not 'manifest' enough speaks volumes about just how narrow this doctrine is and indeed the cases in which it has been used are very few.[67]

The principles of supremacy and direct effect, developed by the CJEU are necessary for the efficient functioning of the European Union, others, like state liability are simply expressions of power. *Traghetti* was the CJEU making a 'full circle'[68] of asserting dominance over national courts, however whether that dominance has led national courts to become 'agents' of Union law is debateable because although the rulings in *Köbler* and *Traghetti* imply an aspect of review on the part of the CJEU, in practice this rarely happens. Nonetheless, the principle still stands that the CJEU, whilst stressing that 'the principle of liability in question concerns not the personal liability of the judge,'[69] they effectively declared themselves as more competent than national courts. So long as the pressure is there from the CJEU, effectively looking down on national courts to ensure compliance, then national courts will always to some extent be acting in favour of the CJEU and its strong pro-EU ideologies. Thus far, national courts have been fairly complacent with State liability; whether that be because it is rarely put into place or because they simply cannot challenge it for fear of punishment, is open to interpretation. However, one thing is certain. Union judges will have to be careful about developing the principles discussed any further. If they are not, they will certainly not have the 'close bond'[70] they appeared to have with their national counterparts for much longer.

[63] Stone Sweet (n 2) 23.
[64] Stacey Nyikos, 'The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistment' (2003) 4 EUP 397.
[65] Wattel (n 56) 182.
[66] W Phelan, 'Why do the EU Member States Accept the Supremacy of European Law? Explaining Supremacy as an Alternative to Bilateral Reciprocity' (2011) 18 Eur Public Policy 766.
[67] Davies (n 29) 85.
[68] Dimitra Nassimpian, '… And we Keep on Meeting: (De)fragmenting State Liability' (2007) 32 EL Rev 819, 820.
[69] *Köbler* (n 8) para 42.
[70] Arjen Meij, 'Courts In Transition: Administration of Justice and How to Organize It; Celebrating Six Decades of the Court of Justice in a Close Community of Magistrates' (2013) 50 CM L Rev 3, 3.

THE ROLE OF THE JURY IN PUTTING THE LAW INTO THE HANDS OF THE PEOPLE

Bethany Hutchinson[*]

This paper will focus on public law in terms of the institutions of government, those being the judiciary, Parliament and the Monarch, in the eighteenth and early nineteenth centuries. The primary focus will be on the judiciary and the role of juries in putting the law into the hands of the people. During this period there was a noticeable shift in power from the traditional law-makers to the general public – although this was not without its limitations. Arguably, the laity had a much stronger influence over the institutions, and by extension the law, in this period than at any other preceding point in history. In terms of the judiciary, the law became the property of the laymen through jury trials which were widely used.[1] The power of the Monarch and Parliament (the other two institutions of government) also illustrated a move towards the law as property of lay people as Parliament, which was made up of representatives of the general population, and was superior in power to the Monarch. However, there were major limitations to this transition of power as despite laymen participating more actively in the law, their role is severely restricted by the traditional law-makers.

For the law to be the property of those it affects, public involvement is essential. Therefore, to assess whose hands the law was in, it is crucial to look at the ways in which the common people were involved in the law and its creation.[2] The most obvious and direct participation common people had in the law was through jury trials.[3] Juries were used in the 'majority'[4] of criminal and civil cases during this period and were a major platform for 'lay participation' in the law.[5] Lemmings recognises that juries created a 'microcosm of the country' meaning that they essentially represented everyone for whom they created law for.[6] Therefore their widespread use meant that the law was, in some ways, being given to the people for them to mould for themselves, rather than left to those who traditionally had been in charge of the laws creation. Similarly, Maitland described juries as 'familiar', again suggesting that their use made the common people feel involved in the law-making process.[7] This illustrates that the law was not restricted to being merely the property of those in higher rankings, instead moving towards being the property of the masses.

However this control over the law was extremely limited by judges. The use of juries may have seemed to provide the public with power over the law, however McGowan observes that ultimately in the courts the judges were the substratum of the decisions.[8] The judge orchestrated a court room and the elements within it including the jury. Despite the jury providing some role for the common people in the law, judges often overruled their verdicts or influenced their decisions, suggesting that the law was in fact in the hands of bureaucrats, in this case the judges.[9] Furthermore, judges held the power to pardon those jurors who had been disqualified from service, suggesting that they had some input into who sat on a particular jury allowing them even more control over juries, limiting the control over the law to those in power, rather than all of those within its jurisdiction.[10]

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[1] Richard Meredith Jackson and J R Spencer, *Jackson's Machinery of Justice* (first published 1940, CUP 1989) 382.
[2] Thomas E Patterson, *The Vanishing Voter: Public Involvement in an Age of Uncertainty* (Knopf Doubleday 2009).
[3] Sir Patrick Devlin, *Trial by Jury* (Stevens & Sons 1956).
[4] Meredith and Spencer (n 1).
[5] David Lemmings (ed), *The British and Their Laws in the Eighteenth Century* (Boydell Press 2005) 25.
[6] ibid 25.
[7] F W Maitland, *Justice and Police* (Macmillan 1885) 164.
[8] Randall McGowan, 'The Image of Justice and Reform in Early 19th Century England' (1983) 32 Buff L Rev 89.
[9] Suja A Thomas, 'Blackstone's Curse: The Fall of the Criminal, Civil and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary and the States' (2014) Md L Rev 1195.
[10] Maitland (n 7).

Clearly judges limited the amount of control the common people had over the law, though this does not mean that the input of the common people was bypassed. Essentially the use of juries 'requires the recognition of the people'; they are central to the courts and thus cannot be ignored completely, meaning that jury trials in this period did make the law the property of the common people and not just those who had traditionally held the law-making role, even if this was only slightly.[11] Furthermore, operationally, any effort by the judge to influence the jury was limited during this period by the introduction of the more adversarial[12] nature of the courts which, according to Gittens, meant that the role of lawyers broke down a large amount of the direct communication between the jury and the judge.[13] This will have allowed the jury more freedom and therefore provided the common people with more genuine control over the law as they could make their own decisions on how the law should develop within the powers of the judicial institution.

Although juries were useful in putting the law partly into the hands of everyone within its jurisdiction, limitations on this feature of the law meant that in many ways the law was still limited to being the creation of a specific group of people rather than the whole of society. A clear example of this can be seen when analysing juries during this period in the form of property qualifications.[14] Under the Juries Act[15] there was a requirement for jurors to 'occupy a house with not less than fifteen windows'.[16] During this period ownership of property was closely related to status,[17] thus juries were 'predominantly male, middle-aged, middle-minded and middle-class'.[18] Although these people may not be classed as traditional law-makers it does show that the law was the property of only a small section of the general population rather than everyone in its jurisdiction. However, Jackson observes that the property qualification was merely an 'administrative convenience' rather than a way for those traditional creators of the law to limit the potential influence of the population.[19]

Therefore, although there were limitations on the law being the property of the common people, they were not completely prevented from participating in the law meaning there was a gradual but clear transition of power from those who traditionally controlled the law, to the general people. Devlin recognises the transition in this period from an 'oligarchy' to the first steps of a 'democracy'.[20] It can be argued that as a more modern writer on this period, Devlin's opinions have fallen victim to the 'fallacy of hindsight'.[21] Devlin observes there is still progress for society to make in order to reach an acceptable idea of democracy, as through living in more modern times he has a different standard of what democracy is.[22] This contrasts to Maitland, whose opinion was discussed earlier in this article. Maitland, writing in the nineteenth century, showed a more accepting attitude and viewed public participation during the focus period in a much more favourable light, as society was the most democratic it had been so far.[23] However, both agree that the law was becoming more the property of those in its jurisdiction, even if their perspectives see this happening at different paces. Furthermore, both viewed juries as a vehicle of this transition.

Evidently the direct participation of the laity through jury trials did allow the law to become the property of the common people to some extent. However, it is important to explore the possibility that even without lay people being directly involved in the law, the law can still be their property and be used for developments which would be advantageous to them. During this time period, this is clearly illustrated through special juries, which were made up of 'persons with special qualifications'[24] rather than standard

[11] Devlin (n 3) 3.
[12] John Hostettler, *A History of Criminal Justice in England and Wales* (Waterside Press 2009).
[13] Jodie Gittens, 'An Evaluation of the Scope and Importance of Judicial Discretion from 1750–1850' (2012) MRLC E 31.
[14] Devlin (n 3).
[15] Juries Act 1825.
[16] Meredith and Spencer (n 1) 276.
[17] Marian Sawer, 'Constructing Democracy' (2003) IFJP 361.
[18] Devlin (n 3) 20.
[19] R M Jackson, 'Jury Trial To-day' (1938) CLJ 367, 373.
[20] Devlin (n 3) 17.
[21] Peter Charles Hoffer, *The Historians' Paradox: The Study of History in Our Time* (NYU Press 2010) 74.
[22] Devlin (n 3).
[23] Maitland (n 7).
[24] Devlin (n 3) 18.

property qualifications, and like regular juries were extensively used in both civil and criminal cases.[25] These juries were made up of experts in order to create a basis for new areas of law, for example commercial law. An example of a case in which a special jury was used to shape commercial law[26] is *Lilly v Ewer* in which the court developed the technicalities of insurance within commerce.[27] Although these special juries did not consist of the general people or a representation of them, their use can still make the law the property of everyone within its jurisdiction as they fulfil the needs of the people as a whole by developing law which has been called for. Poser supports this idea explaining that special juries did not take the law from the common people, but instead worked for them allowing the law to be theirs without direct participation in order to allow for expertise.[28]

Of course, similarly to the other ways in which the courts allow the law to be the property of the people, this feature was limited by the traditional law-makers of this institution: judges. Judges had great influence over who participated in special juries, especially as there were a much smaller group from which jurors were chosen when looking at expertise.[29] Lieberman observes that though theoretically, judges did not have the power to choose who would take part in specific special juries, they often made arrangements with the Court Official.[30] For example, Lord Mansfield, whose special juries very often included Edward Vaux suggesting the merchant was requested perhaps to the judge and had a direct source of influence over the jury.[31] Therefore, although special juries were able to use their professionalism to create laws for everyone in the law's jurisdiction, judges were able to direct this development and guide it, meaning the power of creating the law rested with those who had traditionally been the creators of it, to some extent. Despite this, special juries did effectively pave the way to laws which the general people called for and thus they did make the law the property of the people even without their direct contribution to it. Furthermore, as experts in their respective fields they were able to make effective decisions. Due to the specialised nature of these juries, any influence of judges was limited as they did not hold the extent of understanding of these new areas of law to make a huge impact on them.

As has been discussed, jury trials were an effective way of involving laymen in the creation of law whether that be directly or indirectly, though there were limitations on this where the traditional creators of law held power over creating the law. There are conflicts in academic opinion as to what extent juries allowed the law to become the property of the people rather than belonging to the judges in the case of the institution of the courts. This was even the case during this period; writers were divided in opinion as to whether jury trials gave the public a voice, or whether they were used as puppets for judges to gain power. Maitland viewed juries as a praiseworthy feature of the law in terms of bringing it into the hands of the population.[32] He described the positive role of the jury and emphasised their independence from the judges' influence, suggesting that in his view, the people the law ruled over did have an important role in the law. Similarly, Hale believed that the role of the court should be the main law-making institution, rather than Parliament.[33] In contrast, Bentham, who wrote in the same century as Maitland, held an opposing view on the independence and therefore the effectiveness of juries in being able to bring the control of the law to the people.[34] Bentham observed that giving power to juries was essentially giving power to 'the judge himself' and that juries were merely 'servants' of judges and the crown.[35]

To assess the validity of these contrasting views, it is crucial to understand the perspectives from which they were formed. Bentham was a philosopher and an individual independent from the institution. As well as this, Bentham was the founder of modern

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[25] Jackson (n 19).
[26] James Oldham, *English Common Law in the Age of Mansfield* (University of North Carolina Press 2004).
[27] *Lilly v Ewer* (1779) 1 Doug KB 72, 99 ER 50.
[28] Norman S Poser, *Lord Mansfield: Justice and the Age of Reason* (McGill Queen's University Press 2013).
[29] Jeremy Bentham, *Elements of the Art of Packing as Applied to Special Juries Particularly in Cases of Libel Law* (Effingham Wilson 1821).
[30] David Lieberman, *The Province of Legislation Determined* (CUP 1989).
[31] Warren Swain, *The Law of Contract 1670–1870* (CUP 2015).
[32] Maitland (n 7).
[33] J Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (Yale University Press 2008).
[34] Bentham (n 29).
[35] ibid.

utilitarianism, a movement which supported following the needs of the majority.[36] If this is to be applied to the power struggle over the creation of the law between the traditional creators and the general people, then it can be assumed he would be in support of the general people having all of the power over the law[37] which was obviously not the case in this period as has been discussed. Therefore his standard may have been idealistic and unrealistic. Whereas, Maitland was a lawyer who was directly involved in the courts, and Hale a prominent judge. From their positions it can be assumed that they would support the view that juries were effective, perhaps biased towards the role of the courts. Of course it is impossible to know exactly why the academics held the views that they did, though their positions do support their perspectives in this way.[38]

In terms of the role of the Monarch, the law was becoming much more the property of the people rather than the king. After the Glorious Revolution[39] in the preceding century, which saw the intense shift of power from the Monarch to Parliament, the role of the Monarch in law-making continued to decline throughout the eighteenth century and beyond.[40] Spielvogel recognised this movement from shared power between the Monarch and Parliament, to 'Parliament gradually gaining the upper hand'.[41] Although George II, the Monarch during this period, did still hold some power, this was much more theoretical than practical[42] meaning it had more 'influence'[43] over the law rather than genuine power, showing that the creation of the law was not down to the Monarch in this time as the king held much more of a 'constitutional' role.[44]

Clearly, the power of the creation of law was transitioning to Parliament from the Monarch. Although, those people who made up Parliament could be considered bureaucrats, which would mean the creation of the law still did fall to the original law-makers rather than the general people; Parliament was a representative body of everyone within the jurisdiction of the law meaning that by extent it could be considered as making the law the property of those it presided over.[45] Lemmings observed that the movement of power from the Monarch to Parliament allowed for 'a broad measure of access, participation and justice among competing interests', suggesting that the increasing power of Parliament did lead to public participation in the law, making the law the property of the people as more access means that the law does, to some degree, fall into their hands.[46]

Although Parliament may have been 'dominated' by the nobility, this does not mean that at the time it was ineffective to facilitate the needs of the people, and therefore in some way provide them with say over the law.[47] Ossess recognised that despite Parliament at this time being 'unrepresentative' of the whole population, this is by modern standards.[48] During this period Parliament was changing in how much public opinion[49] it was subject to and active towards, allowing the people whom were in the jurisdiction of the law to be a great part of its creation. The Reform Act 1832 exemplifies this change as this statute was the first movement towards a more democratic society which is expected in modern day,[50] which occurred towards the end of the study period of this essay. Bogdanor explains how this Act provided 'a new electoral system which could reach out to new voters'[51] showing that Parliament was expanding and improving to give the lay people a voice in the creation of law. This illustrates that Parliament gaining power from the Monarch did not mean it was merely passed to bureaucrats who were another one of the traditional

[36] James E Crimmins, *Utilitarian Philosophy and Politics: Bentham's Later Years* (A&C Black 2011).
[37] Bart Schultz and Georgios Varouxakis, *Utilitarianism and Empire* (Lexington Books 2005).
[38] John H Langbein, 'Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources' (1983) U Chi L Rev 1, 2.
[39] Edward Vallance, *The Glorious Revolution* (Hachette Digital 2006).
[40] Jackson J Spielvogel, *Western Civilisation: Volume II: Since 1500* (8th edn, Wadsworth 2011).
[41] ibid 544.
[42] Kirstin Osses, *Daily Life in 18th Century England* (Greenwood 1999).
[43] Vernon Bogdanor, *The Monarchy and the Constitution* (OUP 1995) 10.
[44] ibid 1.
[45] David Lemmings, *Law and Government in England during the Long Eighteenth Century* (Palgrave Macmillan 2015).
[46] ibid 162.
[47] Spielvogel (n 40) 544.
[48] Osses (n 42) 5.
[49] Lemmings (n 5).
[50] Eric J Evans, *The Great Reform Act of 1832* (Routledge 2008).
[51] ibid 16.

creators of society, but that the power transition was providing the general people with a say over their laws and therefore making the law their property. This shift in power had 'transformed' the role of the people in the creation of the law.[52]

Clearly, in terms of creation of the law in this period, the power was in many ways in the hands of the people whether that be through jury trials or through representation in Parliament. Although these methods were limited and did not allow the laity full property of the law, the role of the traditional law-makers, especially the judiciary and the Monarch, was being reduced. Similarly, the power priests and religious leaders had over the creation of the law followed suit; this was illustrated through the ecclesiastical courts which declined in power over the law and became almost insignificant in its creation as the period continued.[53] Outhwaite describes religious power over the law as collapsing over the course of the eighteenth century suggesting that although priests and religious officials had been important elements of law creation in the history of Britain, during this period their involvement in the law was diminished.[54] Out of all the traditional creators of the law, priests became the least possessive over the law as 'the rule of law displaced religion'.[55] Evidently Parliament and the idea of democracy was advancing in this period, giving the law to the common people to a large degree. This can be seen in the increase of statutory law during the period which dominated the law showing Parliament, representatives of the laity, as the main power over the creation of the law rather than the other traditional creators.[56] The nobility suffered power loss as this transition took place, especially any strong religious influence over the law which was rapidly disappearing. Lemmings observed that the idea of an effective government came to be a successful relationship between 'Parliament and people', with no inclusion of religious influence.[57]

Overall, within this period the law was not completely the common property of all those in its jurisdiction, as the traditional law-makers still held a significant influence over it. However, there was a clear shift of power from complete control by the 'priests, bureaucrats or kings' to a more democratic approach to law-making. The institutions of government illustrate this transition of power well, especially the judicial sector which saw widespread use of direct participation of the laity, even if there were restrictions to their power over the law. Furthermore, the authority of the Monarch and religious representatives over the law declined in this period allowing the law to become much more the property of the people through their representatives in Parliament.

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[52] Lemmings (n 5) 26.
[53] R B Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts, 1500–1860* (CUP 2006).
[54] ibid.
[55] Lemmings (n 5) 2.
[56] ibid.
[57] Alexander Locke and Jonathan Sims, 'Invoking Magna Carta: Locating Information Objects and Meaning in the 13th to 19th Centuries' [2015] LIM 74, 80.

THE ROLE MODEL ARGUMENT: A FUNDAMENTALLY FLAWED CONCEPT?

Michael Lamb[*]

1 INTRODUCTION

In the context of the English law of privacy, a determination that an individual is seen by the general public as a 'role model' is likely to have a significant detrimental effect on their chances of succeeding in a claim under the tort of misuse of private information. In order to succeed in such a claim the claimant must satisfy the court that their case is capable of passing through two separate stages. At stage one the claimant must demonstrate that they had a reasonable expectation of privacy regarding the material complained of.[1] At this stage, the argument that the claimant is in fact a role model will serve only to lower their reasonable expectation of privacy and thus make it harder to advance to the second stage. Stage two is often referred to as the ultimate balancing test, and here the claimant must successfully argue that their article 8 right to a private and family life carries greater weight than the defendant's article 10 right to freedom of expression, and is therefore more worthy of receiving protection.[2] Here, the role model argument will be used by the defendant to attempt to tip the ultimate balancing test in favour of their own article 10 rights.[3]

The role model argument is however, fundamentally flawed and is therefore unsuitable for use at either of these stages. As such, it is submitted that the courts should no longer rely upon such arguments in privacy cases. Instead the courts ought to adopt elements of the line of reasoning set out in *AMC v News Group Newspapers Ltd* and shift their focus towards whether the material complained of possesses 'reasonable relationship'[4] with the claimant's suitability to perform their *primary role as a public figure*. This distinct concept will be illustrated further below.

In order to justify this change in the law three arguments will be put forward. These relate to the vague, self-defeating, and empirically unsound nature of the role model argument respectively. The reform will be defended against some potential criticism by illustrating how the reasoning used in *AMC* would be utilised better in arguments regarding the suitability of public figures, as opposed to the (then obsolete) role model argument. No reforms will be suggested regarding the court's assessment of who amounts to a public figure (a class of individuals currently understood by English law to be wider than role models), nor to the popular argument that the press may put right any misleading statements given by public figures (the 'hypocrisy argument')[5] as these arguments rely far more upon article 10 concerns and are therefore beyond the scope of this article.

2 THE VAGUE, SELF-DEFEATING AND EMPIRICALLY UNSOUND ROLE MODEL ARGUMENT

A finding that the claimant is a role model can be fatal to privacy claims. The concept however, is simply too vague and indeterminate to be deployed in this manner. The courts have shown a tendency to treat designation as a role model as capable of making any behaviour by the claimant which crosses the line of 'public morality'[6] open to unrestricted public scrutiny.[7] Despite this, attempts at setting the boundaries of the concept have been ineffective and

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[1] *A v B & C* [2002] EWCA Civ 337, [2003] QB 195 [11] (Lord Woolf CJ).

[2] *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593. See also *Axel Springer AG v Germany* (2012) 55 EHRR 6 [91]; *Ferdinand v News Group Newspapers* [2011] EWHC 2454 (QB); *McClaren v News Group Neswpapers Ltd* [2012] EWHC 2466 (QB), [2012] EMLR 33.

[3] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10.

[4] [2015] EWHC 2361 [20] (Elizabeth Laing J).

[5] John Devine, 'Privacy and Hypocrisy' (2011) 3 JML 169.

[6] Stephen Sedley, 'Towards a Right to Privacy' *London Review of Books* (London, 8 June 2006) 20.

[7] *Ferdinand v News Group Newspapers* [2011] EWHC 2454 (QB); *McClaren v News Group Neswpapers Ltd* [2012] EWHC 2466 (QB), [2012] EMLR 33; *A v B & C* (n 1).

heavily reliant upon the concept of the public figure. Lord Woolf's oft-cited judgment in *A v B & C* set out the general definition as: a public figure who 'may hold a position where higher standards of conduct can be rightly expected by the public.'[8] In applying this the courts have concocted a bizarre mixture of persons who are deemed to have less of a right to privacy than others by virtue of their occupation. Amongst others, such positions have been found to include footballers;[9] headmasters; surgeons; journalists;[10] a TV presenter;[11] and 17 year-old rugby players.[12] On any assessment, the scope of this test is largely indeterminate and the inconsistent definition makes it extremely uncertain who will fall within it before they arrive at court.[13] Left unchecked, this uncertainty alone may deter those lacking in resources from attempting to assert their article 8 right to privacy.[14] This fear was confirmed by Sir Stephen Sedley, who observed (extra-judicially) that his experience suggested 'it was those with the longest purses, the loudest voices and the sharpest elbows who would be at the head of the human rights queue.'[15] Whilst realistically these issues arise in any area of law and are certainly not unique to privacy actions, the concept of role model lacks determinable boundaries to the extent that almost any public figure runs the risk of being 'saddled with that dubious sobriquet.'[16]

However, these shortcomings are comparatively minor alongside the most significant flaw in the role model argument – that if it is taken to its logical conclusion it is completely self-defeating. In the leading case of *Campbell v MGN Ltd*, Baroness Hale noted (albeit *obiter*) that '[i]t may be questioned why, if a role model has adopted a stance which all would agree is beneficial rather than detrimental to society, it is so important to reveal that she has feet of clay.'[17] The role model argument primarily seeks to assert that certain individuals are 'admired and emulated'[18] and so their behaviour is likely to 'set the fashion.'[19] As such, what would otherwise be considered private information becomes, by some ill-defined mechanism, the 'legitimate subject of public attention.'[20] Despite this, Baroness Hale's observation must surely be correct, as one cannot emulate behaviour they are unaware of, and information which would otherwise be private has no business becoming public just because others might copy it. It is arguable that it may instead be in the public interest to prevent widespread dissemination of the information and avoid the risk of emulation altogether.[21] Behaviour which is merely immoral, as opposed to illegal, and conducted in private will cause no real harm to society until it is published and made publicly known.[22] Violating an individual's privacy rights in order to distribute materials concerning activities which may go on to cause harm in they are indeed emulated is not justified by the argument that the claimant is a 'role model'. Furthermore, it may even give rise to a greater level of aggregate harm than if the material was simply not published at all.

Finally, the role model argument has so far been seen to be empirically unsound and relies upon several factual assumptions to the extent that it becomes unsustainable. The suggestion appears to be that role models are capable of influencing young people, and so through a Millian argument from truth[23] we ought to argue in favour of revealing their misbehaviours to facilitate young people choosing suitable role models.

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[8] (n 1) [11] (Lord Woolf).
[9] ibid.
[10] *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73 [58] (Buxton LJ).
[11] *Theakston v MGN Ltd* [2002] EWHC 137 (QB), [2002] EMLR 22 [69] (Ouseley J).
[12] *Spelman v Express Newspapers* [2012] EWHC 355 (QB) [44] (Tugendhat J).
[13] Jacob Rowbottom, 'In the Shadow of the Big Media: Freedom of Expression, Participation and the Production of Knowledge Online' [2014] PL 491, 505.
[14] ibid 505.
[15] Sedley (n 6) 20.
[16] *Cox v MGN Ltd* [2006] EWHC 1235 (QB), [2006] 5 Costs LR 764 [31] (Eady J).
[17] *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 [151] (Baroness Hale).
[18] ibid.
[19] *A v B & C* (n 1).
[20] ibid.
[21] Max Mosley, 'Role Models and Hypocrites – Max Mosley on Tabloids, Privacy and the Law' *Legal Week* (21 October 2011) <http://www.legalweek.com/sites/legalweek/2011/10/21/role-models-and-hypocrites-max-mosley-on-tabloids-privacy-and-the-law/?slreturn=20170216101349> accessed 26 December 2015.
[22] Paul Wragg, 'A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after Mosley and Terry' (2010) 10 JML 295, 315.
[23] John Stuart Mill, *On Liberty* (first published 1859, Penguin 1974) 142.

Notwithstanding Baroness Hale's comments in *Campbell*, the extent to which the more positive aspects of behaviour emulation occur is also highly dubious. Wragg argues that the court assumes that the behaviour of certain persons will be influential to young people without any real requirement that evidence be submitted to support this.[24] On the one hand, one Government report argued that it was 'impossible to over-estimate the impact and influence'[25] of (sporting) role models, while on the other, some academics have argued that this notion is 'unsupported by empirical evidence.'[26] The reality will surely lie somewhere in between, and broad generalisations such as 'people in positions of responsibility must be seen as "role models" and set us all an example'[27] will be ineffective at assessing this and incompatible with the idea of an 'intense focus'[28] on the rights of the parties. Different young people will doubtlessly have different role models even within what is already a fairly limited class of people (such as footballers), and it is not for the court to make assumptions on the matter.

An argument from truth in this area also makes the assumption that young people will frequently change their role models, and shun those who are ever revealed to have engaged in any (case law would strongly suggest sexual) misdemeanours. Sedley is highly critical of this view, and wonders what judges believe goes on in the minds of young people when they hear of their role models' misdeeds.[29] The revelation that their sporting role model has had an affair is unlikely to compel any young person to invest their faith in a different sportsman. The more likely outcome is that most will either be too young to grasp the significance of such activity, or will be old enough to see it as just one of the 'added extras' which arise from celebrity status.[30] The factual assumptions in this area have shown a significant departure from reality as it is highly questionable. 'Who seriously takes a Premier League footballer these days as a role model for domestic virtue?'[31]

3 IN DEFENCE OF THE REFORM

However, the recent case of *AMC* did develop one conceptually valuable argument out of the role model case law. This idea ought to be subsumed within the suitability argument regarding public figures in order to better balance article 8 and 10 rights.

In *AMC*, Elizabeth Laing J held that a true assessment of the class of the claimant could only be made by determining precisely what sort of example he was responsible for setting:

> He is a role model for … aspiring sportsmen … The fact that he is a prominent sportsman does not mean that he impliedly pontificates publicly about private morality.[32]

It is this strict test of relevance between the class of the claimant and the subject matter of the information complained of which ought to be salvaged from the abolished concept of 'role model', and instead employed in the suitability argument pertaining to public figures.

Suitability for a public position is a far more theoretically safe basis for infringing an individual's article 8 rights, and the 'reasonable relationship' argument from *AMC* would be utilised far more effectively in this area. The European Court of Human Rights ('ECtHR') has long accepted that article 10 rights may outweigh those of article 8 in cases involving the transparency and democratic legitimacy of political figures, and conceded in *Von Hannover v Germany* that this may also be the case with other public figures.[33] The idea of a 'public figure' has achieved a far greater consensus on its meaning and has been set out numerous times in the case law of the

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[24] Wragg (n 22) 315.
[25] Culture, Media and Sport Committee, Drugs and Role Models in Sport: Making and Setting Examples (HC 2003–04, 499–I) para 119.
[26] Jack Anderson, 'Doping, Sport and the Law: Time for Repeal of Prohibition?' (2013) 9 Int JLC 135, 145.
[27] *Cox* (n 16) [12] (Eady J).
[28] *Re S* (n 2).
[29] Sedley (n 6) 20.
[30] Howard Johnson, 'Editorial' (2011) 4 Comms L 125, 125.
[31] ibid.
[32] *AMC* (n 4) [20] (Elizabeth Laing J).
[33] *Von Hannover v Germany (No 1)* (2005) 40 EHRR 1 [10].

ECtHR[34] as well as a resolution of the Parliamentary Assembly of the Council of Europe.[35]

It is accepted that this definition is undoubtedly even broader than that of 'role model', but by combining this concept with the reasonable relationship argument put forward by Elizabeth Laing J in *AMC* a better balance can be struck between privacy and freedom of expression. This argument would assess whether or not the material which the media seeks to publish relates strictly to the claimant's suitability to perform their primary public figure role or whether it is merely to satisfy the public's curiosity. In doing this the courts would be able to differentiate more clearly between material which makes a genuine contribution to a debate of public interest relating to the very reason why the claimant is a public figure, and that which simply seeks to invade privacy for the sake of publishing 'vapid tittle-tattle'.[36]

For example, information relating to sexual activity has long been recognised by the law as having a quality of privacy about it,[37] but in cases such as *A v B & C* and *Ferdinand v News Group Newspapers* this notion was set aside due to a conflation of the concepts of 'public figure' and 'role model' in tandem with some general test of suitability for the role (taken as a whole).[38] Removing the unnecessary confusion created by the concept of role model and applying a close scrutiny to the primary function of the public figures in question would have compelled one to arrive at the conclusion that '[s]ex is not the reason for [their] fame nor the reason [they're] admired. It's irrelevant to [their] 'role' which is playing football.'[39] Arguably this new framework does not create too great a restriction on freedom of expression. Had the materials complained of borne a reasonable relationship to the claimants' primary public figure roles as footballers (for example accusations of match fixing, or evidence of gross misconduct on the pitch) then the press would have been free to fulfil its function as a 'public watchdog'[40] and publish the materials.

The argument that 'role models' have a lower reasonable expectation of privacy and weaker article 8 rights should no longer be employed by judges when deciding privacy cases. The boundaries of the concept are intolerably vague, and have produced a worryingly diverse range of applications. The role model argument is also self-defeating and can only logically result in one concluding that it would actually serve the public interest better if the material was kept private. Finally, the entire argument relies upon factual assumptions which bear little resemblance to reality, and have insufficient empirical evidence to allow the court to properly assess them. As such the court should instead continue to rely on the concept of a public figure, and assess whether or not the materials complained of bear a reasonable relationship with the claimant's primary role as a public figure, in order to better balance the parties' competing article 8 and 10 rights.

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[34] ibid; *Von Hannover v Germany (No 2)* (2012) 55 EHRR 15; *Axel Springer AG v Germany* (2012) 55 EHRR 6.
[35] Parliamentary Assembly, 'Resolution 1165: Right to Privacy' (Final Version, Council of Europe 1998) <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16641&lang=en> accessed 26 December 2015.
[36] *Jameel v Wall Street Journal Europe SPRL (No 3)* [2006] UKHL 44, [2007] 1 AC 359 [147] (Baroness Hale).
[37] *Stephens v Avery* [1988] Ch 449 (Ch).
[38] *A v B & C* (n 1); *Ferdinand* (n 7).
[39] Mosley (n 21).
[40] *Von Hannover v Germany (No 2)* (n 34) [90].

MONTGOMERY: A SYMBOLIC OR SUBSTANTIVE CHANGE TO THE LAW?

Michael Lamb[*]

1 INTRODUCTION

Montgomery v Lanarkshire Health Board provides long overdue confirmation of the legal standard to which doctors will be held when the courts assess whether adequate information concerning risk has been disclosed to patients during the process of obtaining consent to medical procedures.[1] The courts have grappled with the nature and development of this standard since the problematic judgments in *Sidaway v Board of Governor of the Bethlem Royal Hospital*[2] (in cases such as *Pearce v United Bristol Healthcare NHS Trust*[3] and *Chester v Afshar*),[4] though *Montgomery* marks the undisputed primacy of the patient-centred approach over its practitioner-orientated counterpart in law.

Despite this, the judgment will arguably have very little practical medico-legal impact. It will be argued that: (i) whilst *Montgomery* does indeed command substantial, symbolic significance it makes negligible substantive change to the law; and (ii) the patient-orientated standard articulated in the judgment has long been the norm in professional and ethical guidance to doctors; to the extent that (iii) this, among other more practical factors, will isolate doctors and their patients from any potential practical impact of the judgment.

2 MONTGOMERY AS A SYMBOLIC LEGAL JUDGMENT?

In *Montgomery*, Lord Kerr (with whom all the other Justices agreed) made clear the position of the Supreme Court in this area, removing any historical doubts as to the correct legal standard for risk disclosure in negligence cases. It was confirmed that the law would require doctors to take reasonable care to make patients aware of any 'material risks', and that the test for materiality was a subjective one which focused on whether the reasonable person in the position of that 'particular patient' would 'attach significance to the risk.'[5] This is symbolically valuable as previous decisions from the highest court have been far more ambiguous. The initial position[6] set out by the House of Lords in *Sidaway* was known for its notoriously unclear *ratio*, with judgments from Lords Scarman and Diplock which were subsequently described as 'polar opposite[s]'.[7] This ambiguity was acknowledged by Lord Kerr in *Montgomery* who noted that the judgments were at opposite ends of a spectrum.[8] In an effort to ease this confusion, *Sidaway* was often interpreted (in cases such as *Gold v Haringey Health Authority* [9] and *Abbas v Kenney*)[10] as setting a firmly practitioner-oriented standard in law, by applying the *Bolam*[11] test to the disclosure of risk. Despite the perceived clarity of this solution, even at the time, it was still not without its problems. In *Gold*, Stephen Brown LJ cited Lord Diplock's judgment in *Sidaway* and applied the *Bolam v Friern Hospital Management Committee* test[12] – a complete departure from the approach of Schiemann J, who did not consider himself 'essentially concerned with [*Sidaway* and *Bolam*] at all.'[13]

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[*] Newcastle University, LLB (Hons) Law.

[1] [2015] UKSC 11, [2015] AC 1430.
[2] [1985] 1 AC 871 (HL).
[3] (1998) 48 BMLR 118 (CA).
[4] [2004] UKHL 41, [2005] 1 AC 134.
[5] (n 1) [87] (Lord Kerr).
[6] Emily Jackson, *Medical Law: Text, Cases and Materials* (3rd edn, OUP 2013) 177.
[7] Jose Miola, *Medical Ethics and Medical Law: A Symbiotic Relationship* (Hart 2007) 63.
[8] (n 1) [43] (Lord Kerr).
[9] [1988] QB 481 (CA).
[10](1995) 31 BMLR 157 (QB); see also *Moyes v Lothian Health Board* [1990] SLT 444 (CS(OH)); *Smith v Tunbridge Wells Health Authority* (1994) 5 Med LR 334 (QB).
[11] [1957] 1 WLR 582 (QB).
[12] (n 9) 492 (Stephen Brown LJ).
[13] *Gold v Haringey Health Authority* [1987] 1 FLR 125 (QB) 139 (Schiemann J).

However, by 2004 it was sufficiently clear that Lord Diplock's practitioner-orientated *Bolam* standard was no longer the preferred judgment in *Sidaway*, and a decade later *Montgomery* did little more than confirm this. The shift to a patient-orientated standard was set into motion by Lord Woolf MR in *Pearce*, who stated (albeit *obiter*) that doctors would be under a duty to disclose significant risks 'which would affect the judgment of a reasonable patient.'[14] This was confirmed to be the correct standard by Lord Steyn in *Chester*, alongside his famous assertion that 'in modern law medical paternalism no longer rules.'[15]

Some have asserted that *Montgomery* was required to provide firm clarification in this area, but case law 2004–2015 arguably proved that this was not the case. MacLean argues that before *Montgomery*, *Sidaway* was 'the only House of Lords case where the standard of disclosure was the *central* issue'[16] and Johnston complements this argument by suggesting the House in *Chester* 'stopped short of settling the uncertainty created by *Sidaway*.'[17] However, as case law between *Chester* and *Montgomery* invariably followed the approach from *Pearce*, these arguments do not appear to have a strong grounding in practical reality and instead focus on the nuances of the rules of precedent. This view was alluded to by Cranston J in *Birch*, who regarded any discussion of the 'legal nuances' behind the *Pearce* line of authority as 'unduly pedantic.'[18] A pragmatic approach is surely to be preferred from a legal perspective, in light of the historical '"hotch potch" of speeches'[19] in *Sidaway*.

Therefore, from a legal perspective *Montgomery* may be regarded as a symbolically significant, 'declaratory judgment'[20] which performs a ''tidying up" of the law,'[21] but little more. This was the view demonstrated by McKenna J in *Lunn v Kanagaratnam*, one of the few recent cases which have already applied *Montgomery* directly, who candidly referred to the judgment as setting out 'in a convenient form guidance as to the appropriate response.'[22] Although *Montgomery* did symbolically promote the autonomy of patients, from a legal standpoint it is indeed little more than a convenience. Perhaps the only real substantive legal change it did introduce was a more subjective focus on the particular patient than was outlined in *Pearce*, but as will be discussed below, the practical impact of this will be negligible.

3 PROFESSIONAL AND ETHICAL STANDARDS IN PRACTICE

Concerns have been raised regarding the practical impact of *Montgomery*. Such arguments typically focus on a perceived difficulty in doctors having to identify which risks will be considered material by patients[23] as well as 'litigation-conscious doctors'[24] regularly 'overloading the patient with information'[25] in order to satisfy their legal obligations. Some academics fear this will result in an increase in litigation,[26] and the court in *Montgomery* expressly recognised that the judgment might generate unpredictability in future litigation due to the subjective nature of the particular patient test.[27] However, these concerns invariably overstate the problem and it is unlikely that a slightly greater focus on the particular patient contained within a largely symbolic judgment will lead to any real practical impact on the day-to-day actions of doctors. This is partly because, in practice, the prevailing professional

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[14] (n 3) [21] (Lord Woolf).
[15] (n 4) [16] (Lord Steyn).
[16] Alasdair MacLean, 'From Sidaway to Pearce and Beyond: Is the Legal Regulation of Consent Any Better Following a Quarter of a Century of Judicial Scrutiny?' (2012) 20 Med L Rev 108, 116 (emphasis added).
[17] Lesley Johnston, 'Informed Consent and the Lingering Shadow of Chester v Afshar' (2015) 20 SLT 85, 86.
[18] *Birch v University College London Hospital NHS Foundation Trust* [2008] EWHC 2237 (QB), [2008] 104 BMLR 168 [73] (Cranston J).
[19] Tracey Elliott, 'A Break with the Past? Or More of the Same?' (2015) 31 PN 190, 191.
[20] Charles Foster, 'The Last Word on Consent?' (2015) 165 NLJ 8, 9.
[21] Elliott (n 19) 194.
[22] [2016] EWHC 93 (QB), [2016] All ER (D) 195 [18].
[23] Colm P McGrath, '"Trust Me, I'm a Patient …" Disclosure Standards and the Patient's Right to Decide' (2015) 74 CLJ 211, 214.
[24] Christopher Stone, 'The Decision in Birch Marks Another Step Away From the Much Criticised Sidaway Approach to Consent' (March 2010) <http://www.medicalandlegal.co.uk/wp-content/uploads/2012/05/The-decision-in-Birch-marks-another-step-away-from-the-much-criticised-Sidaway-approach-to-consent.pdf> accessed 21 March 2016.
[25] (n 19) 191.
[26] (n 23) 214.
[27] (n 1) [93] (Lord Kerr).

and ethical standards in the medical profession have long been higher than those required by law.

For example, guidance from the British Medical Association has always respected patient autonomy beyond the minimum standard set out by law. Unsurprisingly, the third (2012) edition encouraged a 'strong emphasis on patient autonomy and choice'[28] and acknowledged that risk disclosure was 'an integral aspect of the duty of care owed by the doctor,'[29] but evidence of this approach can be traced as far back as the first edition published in 1993. This advised doctors that 'good practice is not necessarily interchangeable with the legal minimum' and, contrary to case law at the time, argued 'Lord Scarman's comments in the *Sidaway* case … are held by many to encapsulate the true ethical position.'[30] Although this guidance is not binding on healthcare professionals, it does suggest that medical paternalism had lost its prominence within the profession long before cases such as *Pearce* confirmed this was the position in law.

Similarly, the General Medical Council ('GMC') had mandated an approach rooted in patient autonomy long before this change was reflected in the law, and so it is difficult to see how medical practice could have remained attached to the traditional, paternalistic approach to healthcare in the face of this guidance. The GMC's guidance of 1995 avoided mention of the precise term 'autonomy,' but stated doctors must 'give patients the information they ask for or need about their condition, its treatment and prognosis.'[31] As early as 1998 the language of autonomy began to permeate this guidance when it was confirmed that doctors 'must respect patients' autonomy … patients must be given sufficient information.'[32] Such imperative language in guidance from the GMC is of particular practical importance to doctors as 'medical practice in the UK remains dominated by the NHS.'[33] To practise in the National Health Service without being registered (with the GMC) or to falsely hold oneself out as being registered is a criminal offence,[34] leading Miola to conclude that the GMC and its guidance effectively decides 'who can and who cannot practise medicine.'[35]

In light of this, Foster goes as far as to argue that cases such as *Pearce*, *Chester* and *Montgomery* 'were all unnecessary' as no reasonable doctor would have done anything but comply with what was specified as mandatory by these 'authoritative regulatory bodies.'[36] This approach perhaps understates the importance of the modern case law. Without the *Pearce* line of authority, litigation would have remained overly dependent upon the application of the *Bolam* test, along with all of its undertones of medical paternalism. Such an approach would not reflect 'the broader shift towards a more patient-centred approach to the delivery of healthcare in the 21st Century'[37] and fails to acknowledge that towards the end of the 20th Century a 'still considerable body of medical opinion'[38] considered that patient autonomy was adequately observed by providing an explanation of the 'broad general nature'[39] of the proposed treatment. However, Foster is correct to be sceptical about the practical impact of mere 'declaratory' legal judgments in this area, given its history of highly progressive professional regulation. In terms of regulating the everyday activities of doctors, the law, whilst arguably not 'unnecessary', has been less responsive to the wider move towards patient autonomy than other similarly influential sources. *Montgomery* appears to be playing catch-up with standards that are already imposed through self-regulation by the medical

[28] British Medical Association Ethics Department, *Medical Ethics Today: The BMA's Handbook of Ethics and Law* (3rd edn, BMJ Books 2012) 22.
[29] ibid 66.
[30] Ann Sommerville, *Medical Ethics Today: Its Practice and Philosophy* (BMJ Books 1993) 10.
[31] General Medical Council, 'Good Medical Practice' (1995) <http://www.gmc-uk.org/good_medical_practice_oct_1995.pdf_25416576.pdf> accessed 9 March 2016, 4.
[32] General Medical Council, 'Seeking Patients' Consent: The Ethical Considerations' (1998) <http://www.gmc-uk.org/Seeking_patients_consent_The_ethical_considerations.pdf_25417085.pdf> accessed 9 March 2016, para 1.
[33] Mark Davies, 'The Demise of Professional Self-Regulation? Evidence from the "Ideal Type" Professions of Medicine and Law' (2010) 26 PN 3, 37.
[34] Medical Act 1983, s 49.
[35] (n 7) 30.
[36] (n 20) 9.
[37] Anne Maree Farrell and Margaret Brazier, 'Not so New Directions in the Law of Consent? Examining Montgomery v Lanarkshire Health Board' (2016) 42 J Med Ethics 85, 88.
[38] Margaret Brazier, 'Patient Autonomy and Consent to Treatment: The Role of the Law?' (1987) 7 LS 169, 173.
[39] ibid.

profession, and so it is unlikely any real impact on the behaviour of doctors during risk disclosure will occur.

4 OTHER INFLUENCES ON MEDICAL DECISION MAKING AND RISK DISCLOSURE

This lack of practical impact can also be attributed to the fact that ethical decision making 'does not occur in a vacuum', and a myriad of factors will influence these decisions as well as the law.[40] Amongst others, these influences will include the personal experiences of each doctor[41] and the 'organisational culture'[42] in which they practise. Even at the individual, 'micro'[43] decision-making level, it is not the case that legally correct ethical decision making by each doctor always necessarily leads to the 'correct moral action.'[44] Influences as diverse as the gender, age, race and temperament of the patient have been found to affect the clinical procedures used by doctors[45] and, rather than the law, a recent survey found that the most powerful of these influences was the doctor's 'early stages of medical training.'[46] In 2007, the vast majority of final year medical students considered informed consent to be important due to an ethical or professional, rather than legal, basis.[47] This perhaps illustrates that law is often influential rather than imperative when it comes to controlling the precise standards and practices of the medical profession. That is not to suggest doctors will consistently act in breach of the law. However, in highly subjective, practical and interpersonal areas such as risk disclosure, the law is often 'too blunt an instrument … and too far removed from the practical realities of the consultation room'[48] to effectively influence doctors beyond the prescribed minimum legal standard.

This has led Heywood to conclude that 'rather than the legal rules having any direct effect [on doctors], it is the perceived threat of liability that causes concern.'[49] As *Montgomery* does not notably depart from either recent case law or professional guidance, and arguably does not change the minimum standard set out by law, it is unlikely that even this trickle-down type impact will materialise. Therefore, the already minor substantive content of the judgment will be diluted and lost among the other factors which influence doctors when making decisions regarding risk disclosure.

5 CONCLUSION

Montgomery is undoubtedly a symbolically significant legal judgment which provided clarification by the highest court on a historically unclear area of law. Whilst it confirms that the patient-centred approach is the one to be favoured under UK medical law, if one sets the minutiae of the rules of precedent aside this was already apparent as early as 2004 due to cases such as *Pearce* and *Chester*. Furthermore, whilst this does demonstrate a stark contrast to earlier cases such as *Bolam* and *Sidaway*, mandatory professional standards set within the medical profession reflected a patient-centred approach long before the law. As such, standards are highly influential on the actions of doctors, and also have to compete with a variety of other day-to-day influences it is extremely unlikely *Montgomery* will manifest any practical impact.

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[40] Søren Holm, *Ethical Problems in Clinical Practice: The Ethical Reasoning of Health Care Professionals* (Manchester University Press 1997) 167.
[41] Fadi M Hajjaj and others, 'Non-Clinical Influences on Clinical Decision-Making: A Major Challenge to Evidence-Based Practice' (2010) 103 JR Soc Med 178, 184.
[42] Emily Scraggs and others 'Factors that Encourage or Discourage Doctors from Acting in Accordance with Good Practice' (2012) <http://www.gmc-uk.org/Barriers_and_enablers_of_good_practice___final_research_report.pdf_50388604.pdf> accessed 16 March 2016, ix.
[43] ibid x.
[44] (n 40) 7.
[45] Hajjaj and others (n 41) 184.
[46] Scraggs (n 42) ix.
[47] Rob Heywood, Ann Macaskill and Kevin Williams, 'Medical Students' Perceptions of Informed Consent: Legal Reflections on Clinical Education' (2007) 23 PN 151, 155.
[48] Michael A Jones, 'Informed Consent and Other Fairy Stories' (1999) 7 Med L Rev 103, 133.
[49] Rob Heywood, Ann MacAskill and Kevin Williams, 'Informed Consent in Hospital Practice: Health Professionals' Perspectives and Legal Reflections' (2010) 18 Med L Rev 152, 169.

THE CRIMINALISATION OF HATE CRIMES IN A DEMOCRATIC SOCIETY: ATTEMPTING TO ACHIEVE EQUALITY

Emma Purser[*]

1 INTRODUCTION

This article will argue that hate crimes are harmful in a way that justifies criminalisation, with particular emphasis on the value of equality. Firstly, there will be an explanation of the legal definition of hate crime. Secondly, there will be analysis on the harm caused through basic offences motivated by hostility and whether these harms are worthy of legal protection. Consequently, it will be proposed that reformation of the current law is needed in order for criminalisation to adequately reflect the nature of harm suffered. Finally, the same analysis will be conducted with the stirring up of hatred offences ('SOHOs').[1]

2 WHAT IS A HATE CRIME?

Hate crimes are not specifically defined within the legal framework.[2] They are recognised at law as aggravated offences,[3] offences which may be subject to enhanced sentencing provisions[4] and SOHOs.[5] Aggravated offences apply to a specified list of offences set out in the Crime and Disorder Act 1998. If racial or religious hostility is demonstrated, or found to be a motivating factor for the offence,[6] the court has the power to extend a sentence beyond the maximum that is available for an offence committed without hostility.[7] Enhanced sentencing provisions, regulated by the Criminal Justice Act 2003, apply to any offence where an element of hostility is found towards a victim based on their (presumed) belonging to any of five categories recognised at law (race, religion, sexual orientation, disability and transgender).[8] The Criminal Justice Act 2003, it is said,[9] does not apply to basic offences regulated by the 1998 Act.[10] Enhanced sentencing provisions may also apply to characteristics not explicitly stated due to the requirement to acknowledge whether any harm was intended or likely to have been caused.[11] SOHOs, regulated by the Public Order Act 1986, are offences in their own right; they do not attach to basic offences.[12] Whilst the same conduct is criminalised for each of the three protected categories,[13] the shape of protection is different. For the stirring up of racial hatred, it is an offence to intend or be 'likely to' stir up hatred through 'threatening, abusive or insulting words'.[14] For the stirring up of hatred against a religion or sexual orientation, the scope is narrower as conduct *must* be intended and 'threatening'.[15] Additionally, there is a provision emphasising freedom of expression towards religion and sexual orientation.[16] Now defined, discussion can ensue with regard to whether the harm hate crimes seek to protect is of a level worthy of criminalisation.

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[*] Newcastle University, LLB (Hons) Law.

[1] Public Order Act 1986, pt 3.

[2] Law Commission, *Hate Crime: The Case for Extending the Existing Offences* (Law Com No 213, 2013) para 1.11.

[3] Crime and Disorder Act 1998, pt 2.

[4] Criminal Justice Act 2003, ss 143–146.

[5] Public Order Act 1986, pt 3.

[6] Crime and Disorder Act 1998, s 28.

[7] ibid ss 29–32.

[8] Criminal Justice Act 2003, ss 145–146.

[9] *R v O'Callaghan* [2005] EWCA Crim 317, [2005] 2 CrAppR(S) 83 [18]; Richard Taylor, 'The Role of Aggravated Offences in Combating Hate Crime – 15 Years after the CDA 1998 – Time for a Change?' (2014) 13 CIL 76 <http://clok.uclan.ac.uk/11328/2/11328_taylor.pdf> accessed 3 December 2015, 10–13.

[10] Criminal Justice Act 2003, s 145(1).

[11] ibid s 143(1).

[12] LAC213 (n 2) para 2.51.

[13] Public Order Act 1986, ss 18–22, 29B–F.

[14] ibid s 18(1)–22(1).

[15] ibid s 29B(1)–F(1).

[16] ibid s 29JA.

3 DO HATE CRIMES AFFECT THE VICTIM ALONE?

To avoid diversion into a philosophical analysis of what 'harmful' means and the extent to which a state can (legitimately) restrict liberty of its citizens, the following will be accepted: 'harm' is 'damage, pure and simple'.[17] Correspondingly, whilst there have been many formulations of the 'Harm Principle',[18] several theorists agree that in its basic form, the harm principle suggests a state can regulate liberty if doing so prevents harm to others.[19] It is submitted that due to the broad understanding of both of these principles, they can meaningfully accommodate for the purposes of this discourse.

With regard to actual harm suffered, research shows victims of crime who are specifically targeted for being perceived as going against 'social norms',[20] experience more harm than their non-specifically targeted counterparts.[21] There are higher levels of violent crime towards targeted individuals compared to crime levels overall;[22] 68% of victims (compared to 37% for overall crime) are likely to be affected emotionally by a hostility motivated incident 'very much' or 'quite a lot';[23] 39% (compared to 15% for overall crime) experience fear;[24] and 22% (compared to 9% for overall crime) suffer from panic attacks.[25] Hate crimes are seriously underreported[26] so the extent of actual harm suffered cannot be established. Gellman notes harm can occur 'on several levels' and that stigmatisation can result in isolation and self-hatred.[27] These statistics alone may prove a worthy enough reason to criminalise hateful behaviour. If harm suffered by a victim of hate crime is greater than that of an 'ordinary' crime, and the state should prevent harm suffered, surely criminalisation is justified in this respect.

However, it has been contended that criminalisation is not justified due to being more harmful to victims than the hate crime itself. Gellman says explicitly protecting specified groups at law identifies members of those groups as 'weak and vulnerable'.[28] This point is also advanced by Johann Hari who, in relation to homosexuals, says 'hate crime laws undermine one of the most persuasive arguments' of their movement.[29] He says homosexuals have asked for equal rights and that criminalising hate turns them into a 'special category' where committing an offence against a defined group, is deemed more wrong than if it were done to someone not within a 'group'.[30] By solely focusing on the harm individuals suffer in this

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[17] Seana Valentine Shiffrin, 'Harm and Its Moral Significance' (2012) 18 LT 357, 359.
[18] James Edwards, 'Harm Principles' (2014) 20 LT 253.
[19] John Stuart Mill, *On Liberty* (4th edn, Longman, Roberts & Green 1869); Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (OUP 1984); Victor Tadros, 'Harm, Sovereignty, and Prohibition' (2011) 17 LT 35, 35; John Gardner and Stephen Shute, 'The Wrongness of Rape' in John Gardner, *Offences and Defences* (OUP 2007).
[20] Neil Chakraborti and Jon Garland, 'Reconceptualizing Hate Crime Victimization Through the Lens of Vulnerability and "Difference"'(2012) 16 Theo Crim 499, 503.
[21] Ruth Hunt and Sam Dick, 'Serves You Right: Lesbian and Gay People's Expectations of Discrimination' (2008) <http://www.stonewall.org.uk/sites/default/files/Serves_You_Right__2008_.pdf> accessed 30 November 2015; April Guasp, 'The School Report: The Experiences of Gay Young People in Britain's Schools in 2012' <http://www.stonewall.org.uk/sites/default/files/The_School_Report__2012_.pdf> accessed 30 November 2015; April Guasp, Anne Gammon and Gavin Ellison, 'Homophobic Hate Crime: The Gay British Crime Survey 2013' <http://www.stonewall.org.uk/sites/default/files/Homophobic_Hate_Crime__2013_.pdf> accessed 1 December 2015; Home Office, Office for National Statistics and Ministry of Justice, 'An Overview of Hate Crime in England and Wales' (December 2013); Hannah Corcoran, Deborah Lader and Kevin Smith, 'Hate Crime, England and Wales, 2014/15' (Statistical Bulletin 05/15, October 2015).
[22] Home Office (n 21) 20.
[23] ibid 9.
[24] ibid 46.
[25] ibid 46.
[26] HM Government, 'Challenge it, Report it, Stop it: The Government's Plan to Tackle Hate Crime' (March 2012) <https://www.gov.uk/government/publications/hate-crime-action-plan-challenge-it-report-it-stop-it> accessed 3 April 2017, para 1.13.
[27] Susan Gellman, 'Sticks and Stones Can Put You in Jail, But Words Can Increase Your Sentence?' (1991) 39 UCLA Law Rev 333, 341.
[28] ibid 385.
[29] Johann Hari, 'Gay-bashing Should Not be a Hate Crime' *The Independent* (20 October 2011) <http://www.independent.co.uk/voices/commentators/johann-hari/johann-hari-gay-bashing-should-not-be-a-hate-crime-396532.html> accessed 2 December 2015.
[30] ibid.

respect, both proponents fail to acknowledge a fundamental reason for criminalisation.

The harm that results from hate crimes is not solely endured by the individual victim; it resonates forcefully through democracy. Gellman herself notes that the prevalence of intolerance in society and failure to offer redress for victims shows that our democratic commitment to egalitarian ideals are not 'as strong as we might like to believe.'[31] Without seeking to address inequality, we cannot hope to call our society democratic. Whilst Gellman and Hari argue criminalisation reinforces inequality in society, it is hard to see how this argument has weight when looking at democratic ideals. Not criminalising hate crimes is harmful to the principles that form the fabric of our society and thus, is indirectly harmful to each individual who values democracy. It seems illogical to think the substantive rights of individuals can be recognised equally if the formal law governing a society fails to do this. If equality, a principle integral to democracy, is not recognised at a formal level, a state fails to satisfy democracy by allowing the marginalisation of individuals[32] who *are* in fact vulnerable.[33] Prejudicial attitudes between members of a society cannot hope to change if the institutions which govern it do not recognise that a problem of inequality exists.[34] The general society disapproves of identity prejudice and supports criminalisation;[35] is it not democratic to reflect the people's desires and prevent harm to the social framework?

4 DOES THE LAW ON HATE CRIMES NEED REFORMING?

If hate crimes are harmful enough to justify criminalisation, an issue is raised on how criminalisation should be structured. The current legal framework for hate crimes supports Gellman's and Hari's criticisms well, as there are clear inequalities (as explained prior) that are reflected in the defined groups being offered different levels of protection within the legislation.[36] To remedy this, all basic offences with a hostility element should be captured under the enhanced sentencing provisions.[37] Aggravated offences should be removed.[38] This would remedy the problem of mutual exclusivity between the aggravated offences and the enhanced sentencing provisions,[39] existing complexity[40] and inefficacy.[41] However, as the enhanced sentencing provisions only explicitly recognise five characteristics, it is submitted that this should be revised to include a provision expressing that these characteristics are non-exhaustive. The government recognises that more characteristics should be equally protected.[42] This would allow the importance of equality to be formally recognised, thus serving as an example for members of society to uphold in practice. Unfortunately, more detailed discussion on the current problems and potential remedies within the current law is beyond the ambit of this essay.

5 WHAT ABOUT THE HATRED OFFENCES (SOHOS)?

The argument for equality at law may have some force with the stirring up of hatred offences. However, there are stronger arguments (compared to the aggravated offences and enhanced sentencing provisions) that more harm would be done if there was criminalisation. This is because the SOHOs are closely tied to the right of expression. 'Freedom of expression is one of the most widely accepted rights'[43] and thus there is a presumption against restricting it.[44] It allows hateful

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[31] Gellman (n 27).
[32] Chakraborti and Garland (n 20).
[33] Frances Kamm, 'A Philosophical Inquiry Into Penalty Enhancement' [1992] Annu Surv Am Law 629, 635.
[34] David Garland, *Punishment and Modern Society: A Study in Social Theory* (Clarendon 1990) 287; Gail Mason, 'The Symbolic Purpose of Hate Crime and Law: Ideal Victims and Emotion' (2014) 18 Theo Crim 75, 75–76.
[35] YouGov, 'YouGov Hate Crime Survey Results' (16 May 2013) <https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/i4jqy1c3rk/YG-Archive-hate-crime-results-150513.pdf> accessed 30 November 2015.
[36] Crime and Disorder Act 1998, pt 2; Criminal Justice Act 2003; Taylor (n 9); Chara Bakalis, 'Legislating Against Hatred: The Law Commission's Report on Hate Crime' (2015) 3 Crim LR 192.
[37] Taylor (n 9) 9.
[38] ibid.
[39] *O'Callaghan* (n 9); *R v McGillivray (Atholl)* [2005] EWCA Crim 604, [2005] 2 Cr App R (S) 60; Taylor (n 9); LC213 (n 2) para 3.24; Law Commission, *Hate Crime: Should the Current Offences be Extended?* (Law Com No 348, 2014) para 4.169.
[40] Taylor (n 9); Bakalis (n 36) 200.
[41] Abenaa Owusu-Bempah, 'Improving Sentencing of Hate Crimes Offences' (2013) 177 CL&J 559, 560.
[42] Government (n 26) para 2.3.
[43] Stuart Chan, 'Hate Speech Bans: An Intolerant Response to Intolerance' (2011) 14 TCLR 77, 78; Mill (n 19).
[44] Chan (n 43) 79.

content to be challenged and without it, much debate would be silenced.[45] Laws which are too restrictive on free speech may have chilling effects[46] on important discussion if society becomes afraid that their actions may be prosecuted. Criminalising the stirring up of hatred would thus be harmful to these interests.

Yet, these harms of criminalisation are more trivial if we consider that freedom of expression is not a right shared equally by everyone.[47] The true justification of criminalisation of hate speech stems from whether targeted groups have the equal ability to respond with equal weight.[48] Formal equality of freedom of expression at law does not equate to it being a right enjoyed equally in practice. By upholding freedom of expression over the harm of non-criminalisation, some individuals are being denied an equal stake in this right. As a matter of equality, it is better to criminalise hateful speech in a way which has the potential to protect anyone who may be targeted for a certain characteristic and at the same time, afford everyone the same level of freedom of expression.[49] Some restriction on freedom of expression is permissible. The European Convention on Human Rights notes sometimes restrictions are 'necessary in a democratic society'.[50] Nevertheless, the court in *The Sunday Times v United Kingdom*[51] said for a restriction to be necessary, it must correspond to a 'pressing social need'.[52]

It is proposed that there *is* a pressing social need which needs addressing. Chan, even as an opponent of criminalisation, notes that hate speech inflicts 'undeniable harm' and is a problem that is 'hardly insignificant and … cannot be easily ignored.'[53] The extent of harm resulting from the stirring up of hatred has been difficult to determine, largely due to a problem of underreporting.[54] Dimopoulos notes the amount of victims of the stirring up of hatred is considerably higher than what is reported.[55] His argument carries further weight considering his focus on the disabled, a group not currently protected against the stirring up of hatred. This begs the question of how much harm goes unnoticed. The Ministry of Justice said hate speech in itself is 'divisive and damaging' and leads to social marginalisation.[56] It is within society's best interests that public order is maintained.[57] The nature of the SOHOs makes the harm more likely to spread prejudice against groups in society than the basic offences committed with hostility. This runs contrary to democratic ideals of equality and respect which we seek to protect.[58] Therefore, criminalisation of the stirring up of hatred is justified. Without criminalisation, there would be a serious gap within the law which may prove even more harmful to society. This gap is further unjustified considering the main reason for its existence (freedom of expression) would not be a liberty enjoyed by all.

The shape criminalisation should take is more problematic with the stirring up of hatred. The extent of the problem is unknown and so investigation into this would be beneficial. However, it can be submitted that the current SOHOs are unsatisfactory primarily for the same reason as the basic offences. They do not adequately reflect equality.[59] Inequality is demonstrated not only in the lack of protection for a wide variety of characteristics, but also in the different standards that have to be achieved for different protected groups. For criminalisation to adequately reflect the nature of harm suffered, a way to reconcile equality and necessity[60] needs to be achieved. Equality is needed both in the specification of who can be protected under such provisions, as well as the standard that has to be met.

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[45] ibid 83.
[46] Gellman (n 27) 358.
[47] Kay Goodall, 'Incitement to Religious Hatred: All Talk and No Substance?' (2007) 70 MLR 89, 113.
[48] ibid 113.
[49] Abigail Bright, 'Hate Speech and Equality' (2005) 12 UCL Juris Rev 112, 115–116.
[50] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10.
[51] (1979) 2 EHRR 245.
[52] ibid [59].
[53] Chan (n 44) 91.
[54] Andreas Dimopoulos, 'Balancing Disability Protection Against Freedom of Speech: Should an Offence of Incitement to Disability Hatred be Introduced?' [2015] PL 79, 81.
[55] ibid 81, 92.
[56] LC213 (n 2) para 4.9.
[57] ibid appendix B.57.
[58] ibid para 4.44.
[59] Dimopoulos (n 54) 91.
[60] LC213 (n 2) para 3.66; Bakalis (n 36) 204.

6 CONCLUSION

As is the nature of society, there are many competing interests. Whilst these interests are numerous and extensive, those believed to be the main ones in relation to this issue have been raised. Whilst a great deal of harm is dealt to a direct victim of a hate crime, democratic society suffers indirectly from the existence of hateful conduct. The protection of equality is fundamental to individuals' interests in terms of redress and protection. However it is also important to individual interests in the benefits that are reaped from a successful democracy. Equality cannot hope to be achieved whilst the current law demonstrates the kind of discrimination it aims to justifiably eradicate. The harm to equality suffered due to hate crimes needs to be addressed through criminalisation and there is no better role model for substantive equality than formal equality created by those institutions we have elected.

THE DIRECTIVE ON ANTITRUST DAMAGES ACTIONS: AN ASSESSMENT

Nicolae Revin[*]

Despite private enforcement's increasing significance within the European Union, there is 'total underdevelopment' in damages actions for breaches of antitrust laws.[1] Most victims do not obtain compensation,[2] particularly those who face financial and evidential difficulties such as indirect purchasers.[3] The Directive on Antitrust Damages Actions aims to alleviate these limitations.[4] This article evaluates indirect purchasers' chances in proving standing and showing causation and harm within the new framework. The following obstacles are assessed: the lack of an efficient collective redress mechanism, limited disclosure of information and the complexity of quantifying harm. It is argued that indirect purchasers are strengthened under the new framework, but litigants still face multiple hurdles in claiming damages. This is due to the European Union's continuing preference of public enforcement over private enforcement and their reluctance to implement more far reaching measures.

The right for 'any individual to claim damages' was introduced by the European Court of Justice in *Courage*,[5] and later confirmed in *Manfredi*.[6] The Commission clearly interpreted this right to encompass damages actions brought by indirect purchasers;[7] more specifically 'all categories of victims, all types of breach and all sectors of the economy'.[8] However, this has been inconsistently interpreted by the domestic courts of Member States. The Supreme Court of Germany, for instance, only recognised indirect purchasers' standing in 2011.[9] The Directive clearly requires that domestic law provides a means for harmed parties to effectively claim damages from the infringers,[10] 'irrespective of whether they are direct or indirect purchasers'.[11]

It has been suggested that the Directive lacks a precise positive provision for indirect purchasers' standing. Strand noted that a '[r]ight to full compensation' is expressly granted,[12] but that it should be distinguished from the supposed indirect purchasers' *locus standi* to sue.[13] Thus, as Milutinović argues, it is not certain that indirect purchasers have gained unfettered access to court.[14] On the contrary, the wording of the case law and the Directive provisions are clear on this matter – indirect purchasers should be able to claim damages and their standing is

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[1] Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules' *Ashurst* (Brussels, 2004) <http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf> accessed 13 December 2015.

[2] Commission, 'Proposal for a Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union' ('Proposal for a Directive on Antitrust Damages Actions') COM (2013) 404 final, 4.

[3] Joaquin Almunia, 'Developments in EU competition policy' (European Competition Day, Athens, 10 April 2014) SPEECH/14/312, 2.

[4] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union [2014] OJ L349/1 (Directive on Antitrust Damages Actions).

[5] Case C-453/99 *Courage* [2001] ECR I-6297, para 26.

[6] Joined Cases C-295–298/04 *Manfredi* [2006] ECR I-6619, para 60.

[7] Commission, 'White Paper on Damages actions for breach of the EC Antitrust Tules' COM (2008) 165 final, 4.

[8] ibid 3.

[9] BGH, 28.6.2011 – KZR 75/10.

[10] Directive on Antitrust Damages Actions (n 4) art 1.

[11] ibid art 12(1).

[12] ibid art 3.

[13] Magnus Strand, 'Indirect Purchasers, Passing-on and the New Directive on Competition Law Damages' (2014) 10 ECJ 361, 372.

[14] V Milutinović, *The "Right to Damages" under EU Competition Law* (Kluwer 2010) ch 10, cited in Strand (n 13) 373.

already a 'firmly embedded concept of EU law'.[15] To be given a right to claim compensation is concordant with the right to sue. However, indirect purchasers at the very end of the supply chain (end-consumers and small and medium enterprises) are indeed likely to face hurdles when deciding to claim damages. They are financially limited and the cost of litigation can significantly outweigh the potential benefits.

It was suggested in the 2005 Green Paper on antitrust damages that judges ought to have the discretion to expose claimants to cost recovery, or to expose them only if they acted in a manifestly unreasonable manner.[16] The European Commission was right to discard it and reiterate the 'loser-pays' principle that dissuades plaintiffs with unmeritorious claims.[17] Moreover, in the words of Neelie Kroes, having 'over 10,000 separate individual actions is highly inefficient' for everyone in the court and it leads to abusive litigation strategies.[18]

However, it means that an effective collective redress mechanism has to be implemented instead, especially considering that at least 10% of collective redress cases involve cross-border litigation.[19] The Directive says nothing about collective redress, and the Commission decided to take a non-binding horizontal approach applying in all fields where EU rights exist.[20]

The Commission's explanation that this framework is necessary because competition law is 'not the only field of EU law in which … it is difficult for consumers and SMEs to obtain damages for the harm suffered' is unsatisfactory.[21] Moreover, only 'opt-in' collective actions are recommended.[22] The United Kingdom's experience showed that 'opt-out' actions are more desirable. Only one collective action has been taken on behalf of consumers in England and albeit successful,[23] the representative body involved decided not to take any further actions due to the limitations of the 'opt-in' system.[24] Gamble suggests that the Commission's approach is due to its politics of pragmatism and compromise.[25] Indeed, during public consultations, businesses and business associations feared that 'opt-out' collective actions will have a negative impact on them.[26] Consumer associations and the five Member States that responded, however, favoured 'opt-out' actions.[27] Thus, the Consumer Rights Act 2015 allows for both opt-out and opt-in collective actions within the UK.[28] This is problematic as it prevents uniformity amongst the Members States from being reached. Forum shopping will continue to occur and indirect purchasers will have better standing in some Member States than others.

Proving causation provides further complexities for indirect purchasers in the current system. The Directive creates a rebuttable presumption of loss in favour of the claimant. This is subject to the existence of a cartel infringement that resulted in an overcharge for the direct purchaser, who sold the products or goods containing them to indirect purchasers.[29] It will be especially helpful in follow-on cases since final

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[15] Andrea Hamilton and David Henry, 'Bricks, Beer and Shoes: Indirect Purchaser Standing in the European Union and the United States' [2012] GCLR 111, 117.
[16] Commission, 'Damages Actions for Breach of the EC Antitrust Rules (Green Paper)' COM (2005) 672 final, 9.
[17] (n 7) 9.
[18] Neelie Kroes, 'Consumers at the Heart of EU Competition Policy' (Address at BEUC Cinner (The European Consumers' Association), Strasbourg, 22 April 2008) SPEECH/08/212, 3.
[19] Commission, 'Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union (Final Report)' COM (2008) 4 final.
[20] Commission Recommendation 2013/396/EU of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law [2013] OJ L201/60 (Recommendation on Collective Redress Mechanisms).
[21] Commission, 'Damages actions for breach of the EU antitrust rules (Executive Summary of the Impact Assessment)' COM (2013) 204 final, para 22.
[22] Recommendation on Collective Redress Mechanisms (n 20) pt 5, para 21.
[23] *Consumers' Association v JJB Sports Plc* [2009] CAT 3, [2009] Comp AR 125.
[24] Department for Business Innovation and Skills, *Private Actions in Competition Law: A Consultation on Options for Reform – Final Impact Assessment* (Cm 0357, 2013) para 155.
[25] Roger Gamble, 'The Parliament, the Commission and the Court – Three Institutions and their Effect on Private Enforcement of Anti-Competitive Conduct in the EU' [2015] ECLR 501, 502 n 6.
[26] Commission, 'Damages Actions For Breach of the EU Antitrust Rules (Impact Assessment Report)' COM (2013) 203 final, para 148.
[27] ibid.
[28] Consumer Rights Act 2015, sch 8(5)(1)(7)–(11).
[29] Directive on Antitrust Damages Actions (n 4) art 14(2).

decisions of competition authorities have to bind national courts or constitute *prima facie* evidence.[30]

However, any improvement in the position of indirect purchasers because of the Directive is undermined by limited disclosure of information. National courts can order disclosure of information from defendants or third parties.[31] Access to documents is subject to fact-pleading and strict judicial control,[32] which is based on the approach taken in the Intellectual Property Directive.[33] Moreover, wider disclosure rules are not discouraged by the Commission.[34] However, there is an absolute restriction on disclosure of evidence contained in leniency statements and submissions for settlement.[35] The Commission considers leniency programmes to be key element in countering cartel infringements.[36] This is unsurprising as three-quarters of the Commission's cartel investigations are triggered by leniency applications.[37]

Nevertheless, this area is a source of tension between European Union executive bodies and the European Court of Justice. In *Pfleiderer vs Bundeskartellamt*,[38] the Court refused to recognise any rule conferring absolute prohibition on disclosure of documents to competition authorities by leniency applicants.[39] Furthermore, in *AGC Glass Europe v Commission*,[40] the Court asserted that the only advantages that undertakings can expect from the Leniency Notices of 2002 and 2006 are the conditions for immunity from fines or a reduction in fine.[41] There was no reasonable expectation that voluntarily provided information will remain confidential.[42] The Commission's response was unambiguous. The recent amendments to Regulation 773/2004 introduced the concepts of leniency and settlement programmes into hard law.[43] Leniency programmes are undoubtedly effective. However, the absolute restriction is clearly disproportionate and conflicts with article 47 of the Charter of Fundamental Rights of the European Union.[44] Distinctions between pre-existing documents and voluntary self-incriminating statements should be drawn, as the Advocate Generals did in *Pfleiderer* and *Bundeswettbewerbsbehörde v Donau Chemie AG*.[45] Indeed, as Kwan noted, 'it would be a very rare case where every sentence in a leniency statement is self-incriminatory'.[46] Judges should conduct a balancing exercise on a case-by-case basis.[47] *National Grid Electricity Transmission Plc v ABB Ltd* is a firm example of proportionality being effectively used on inspection of documents and in determining whether to grant disclosure.[48] An evident shortcoming of such an approach, however, is the increased participation of the courts and subsequently increased cost of litigation.

With regards to quantification of harm, another rebuttable presumption is provided. To prevent claimants from failing due to unproven quantum of loss, (see *Enron Coal Services Ltd (In Liquidation) v English Welsh & Scottish Railway Ltd* for example),[49] the Directive requires that cartel infringements are

[30] ibid art 9.
[31] ibid art 5.
[32] ibid art 5(3).
[33] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights [2004] OJ L195/16.
[34] Directive on Antitrust Damages Actions (n 4) art 5(8).
[35] ibid art 6(6).
[36] ibid para 26.
[37] Niamh Dunne, 'Courage and compromise: the Directive on Antitrust Damages' [2015] EL Rev 581, 595 citing Commission Staff Working Document, 'Ten Years of Antitrust Enforcement under Regulation 1/2003' SWD (2014) 230, 17, 41.
[38] Case C-360/09 *Pfleiderer v Bundeskartellamt* [2011] ECR I-5161.
[39] ibid Opinion of AG Mazák, para 37.
[40] Case T-465/12, *AGC Glass Europe v Commission* [2015] ECR II-0020.
[41] ibid para 66.
[42] ibid para 70.
[43] Commission Regulation (EU) 2015/1348 of 3 August 2015 Amending Regulation (EC) No 773/2004 Relating to the Conduct of Proceedings by the Commission Pursuant to Articles 81 and 82 of the EC Treaty [2015] OJ L208/3.
[44] Charter of Fundamental Rights of the European Union [2000] OJ C364/1.
[45] *Pfleiderer* (n 38) paras 43–47; Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG* [2013] 5 CMLR 19, paras 55–56.
[46] John Kwan, 'The Damages Directive: End of England's Eminence?' [2015] ECLR 455, 458.
[47] *Pfleiderer* (n 38) paras 31–32.
[48] *National Grid Electricity Transmission Plc v ABB Ltd* [2012] EWHC 869 (Ch), [2012] ECC 12 [56]–[60].
[49] *Enron Coal Services Ltd (In Liquidation) v English Welsh & Scottish Railway Ltd* [2009] CAT 36, [2010] ECC 7.

presumed to cause harm.[50] This is based on the finding that 93% of cartels cause an illegal overcharge.[51] Moreover, it ought not to be practically impossible or excessively difficult to claim damages. Indirect purchasers who find it difficult to estimate the harm suffered will be assisted by domestic courts or,[52] upon the court's request, by National Competition Authorities.[53] The amount quantified shall be for full compensation only, which includes compensation for actual loss, loss of profit and payment of interest.[54]

The accompanying Practical Guide to the quantification of harm provides for various ways of estimating the loss suffered.[55] It is non-binding, but due to the quantification of loss being a highly complex and uncertain process based on complicated econometric models, it is indeed better to leave it to Member States who will have to apply relevant models in accordance with the principles of effectiveness and equivalence.[56] As mentioned by Stakheyeva, there is no best approach and the choice of method will depend on the legal rules and principles applicable in a certain jurisdiction.[57] However, the analysis of the market is of a 'largely hypothetical nature'.[58] Often only approximate numbers will be available.[59] Thus, it was suggested that the presumption could benefit from an additional assertion as to the amount of overcharge passed-on.[60] The Hungarian law, for example, facilitates damages claims by a presumption that cartels increase prices by 10%.[61]

The UK Government similarly proposed a presumption of 20% level of overcharge.[62] It might seem beneficial for indirect purchasers at first sight, but there are clear disadvantages. It dissuades claimants from engaging in further quantification which may result in under-compensation.[63] Moreover, it is unworkable where damages are sought from claimants at different levels in the supply chain.[64]

It was further suggested that the Directive reduces options available for claimants as it allows only for compensatory damages.[65] Contrast this with the United States, for instance, where treble damages are available.[66] It would be impractical to allow for such damages in the European context. Public enforcement heavily fines the infringers and further exemplary or punitive damages in private enforcement can have a significant impact on the market. Moreover, awarding exemplary damages where the Commission has already imposed a fine would be contrary to the principle of *non bis in idem*, as asserted in *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)*.[67] However, it would indeed be better to depart from the absolute restriction of overcompensation.[68] It is fair to predict that, theoretically, damages claims should not fail due to complexities of quantification as courts and competition authorities will be required to assist claimants in estimating the loss suffered after the Directive's transposition into national law. To avoid under-compensation of claimants, undertakings that breach antitrust laws should rather be expected to

[50] Directive on Antitrust Damages Actions (n 4) art 17(2).
[51] Assimakis Komninos and others, 'Quantifying Antitrust Damages – Towards Non-Binding Guidance for Courts' (Study Prepared for the European Commission, December 2009) 91 in Proposal for a Directive on Antitrust Damages Actions (n 2) 18.
[52] Directive on Antitrust Damages Actions (n 4) art 17(1).
[53] ibid art 17(2).
[54] ibid art 3(2).
[55] Commission, 'Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (Practical Guide)' COM (2013) 205 final, paras 166–167.
[56] Directive on Antitrust Damages Actions (n 4) art 4.
[57] Hanna Stakheyeva, 'Removing Obstacles to a More Effective Private Enforcement of Competition Law' [2012] ECLR 398, 402.
[58] Joined Cases C-104/89 and C-37/90 *Mulder v Council* [2000] ECR I-203, para 79.
[59] Commission, 'Communication from the Commission on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' (2013) COM 167/19, para 9.
[60] COM (2013) 203 (n 26) para 89.
[61] Tilman Makatsch and Arif Sascha Mir, 'The new EU Directive on Cartel Damage Claims from a German-Law Perspective' [2015] GCLR 60, 61.
[62] Stephen Wisking and others, 'European Commission Finally Publishes Measures to Facilitate Competition Law Private Actions in the European Union' [2014] ECLR 185, 189.
[63] COM (2013) 203 (n 26) para 89.
[64] Wisking (n 62) 189.
[65] Strand (n 13) 378.
[66] Clayton Antitrust Act 1914, s 4 (US).
[67] [2007] EWHC 2394, [2008] 2 WLR 637 [40].
[68] Directive on Antitrust Damages Actions (n 4) art 3(3).

overcompensate in cases where it is highly difficult to estimate approximate losses. It would efficiently serve such aims as compensating the victims of cartelists, deterring those who engage in such conduct and saving the court's resources.

The Directive certainly strengthens indirect purchasers. However, such strengthening could be ineffective due to the obstacles discussed above. Advocate General Mazák maintained that Regulation No. 1/2003 and the relevant case law have not established priority of public enforcement over private enforcement.[69] As Moussis showed, the stronger private enforcement brought by the Directive is likely to encourage cartelists to remain silent about their conduct in order to prevent being subject to both civil fines and private damages.[70] Thus, rather than focusing on a strong public enforcement supplemented by a relatively strong private enforcement, it would be more rational to have equally strong public and private branches of enforcement to counter anticompetitive behaviour. A legal distinction between indirect purchasers higher in the supply chain (such as retailers) and end-consumers and SMEs at the other end would probably incentivise EU legislators to carefully reconsider some of the measures discussed in the White Paper. Measures which were subsequently regarded as 'radical' and discarded.[71] Moreover, as suggested by Cengiz, judicial cooperation and dialogue between domestic courts *inter se* should be improved.[72] Considering the complexities of quantifying harm discussed above, it would lead to a more uniform adjudication of damages claims. Some aspects of the European Competition Network, such as the interactive database of ongoing investigations, can be taken as an example of efficient cooperation.[73]

In conclusion, the Directive enhances indirect purchasers' standing and makes it easier to prove causation and harm. However, it is difficult to predict whether damages claims will increase in the future as it does not provide an efficient tool to supplement the strengthening of indirect purchasers. An effective collective redress mechanism and wider disclosure rules encompassing certain information from leniency programmes may do so. It is also unclear how the courts and competition authorities will cope with numerous claims that require assistance in quantifying the harm. European Union executive and legislative bodies need to ensure a commitment to providing congruence between private and public branches of enforcement.

[69] *Pfleiderer* (n 38) Opinion of AG Mazák para 40.
[70] Vassili Moussis and others, 'Private Enforcement and Leniency in Japan: Towards a "European" Model for Reform?' [2014] GCLR 64, 68.
[71] Proposal for a Directive on Antitrust Damages Actions (n 2) 12.
[72] Firat Cengiz, 'Antitrust Damages Actions: Lessons from American Indirect Purchasers' Litigation' [2010] ICLQ 39, 62.
[73] ibid.

RESTORATIVE JUSTICE – SENSIBLE, YET NOT NATURAL

Jade Rigby[*]

A plethora of debate surrounds restorative justice, a 'broad intellectual church' comprising a 'myriad of ideas and practices'.[1] Restorative justice conferencing is a process wherein a trained facilitator manages offenders and victims meeting in person, sometimes with other community members, 'to resolve collectively how to deal with the aftermath of the offence and its implications for the future'.[2] Restorative justice conferencing is 'sensible' if it 'works in practice'; restoring victims and offenders' respective needs and finding mutually agreeable resolutions.[3] A 'natural' response to crime denotes an innate personal or community response, in contrast to 'individualistic' intervention through artificial institutions, such as courts and prisons.[4] This article argues that restorative justice conferencing can be sensible, but it is not 'a natural thing to do'.[5] Firstly, restorative justice conferencing is sensible because increasing victim participation in criminal processes restores their sense of empowerment and works to repair the harm, but procedural safeguards and individual's needs should inform the process. Secondly, restorative justice conferencing is sensible because it restores offenders to the community, giving them the 'feeling of having a future', but, in practice, achieving the mutually agreed 'way forward' is problematic.[6] Finally, legal anthropology demonstrates that restorative justice conferencing is not 'natural'; indeed, restorative justice conferencing is vulnerable to politicisation.

Firstly, bringing victims and offenders together to find mutually agreeable resolutions is sensible because increasing victim participation in criminal processes restores their sense of empowerment 'by giving them a voice'[7] and repairs the harm suffered.[8] For example, the Justice Research Consortium found victims welcomed the opportunity for greater participation; 66 percent felt that expressing their feelings and speaking directly to offenders was important and 76 percent felt that contributing to resolutions was important.[9] Studies also evidence restorative justice conferencing repairing psychological harm, reducing clinical levels of post-traumatic stress and accelerating 'natural recovery'.[10] Admittedly, such statistics should 'be approached very carefully' because they represent only participating victims, not all victims of crime.[11] Moreover, small sample sizes render results indicative, not representative.[12] However, these results are promising, suggesting that increasing victim participation in conflict resolution through restorative justice conferencing enables victims to 'take ownership of their disputes' and 'gain emotional relief',[13] in stark contrast to court processes, which

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[1] T Ward and R Langlands, 'Repairing the Rupture: Restorative Justice and the Rehabilitation of Offenders' (2009) 14 Aggress Violent Behav 205, 207.

[2] T Marshall, 'Restorative Justice: An Overview' (Home Office Research Development and Statistics Directorate Publications 1999) 5.

[3] J J Choi and M Severson, '"What! What kind of apology is this?": The Nature of Apology in Victim Offender Mediation' (2009) 31 Child Youth Serv Rev 813, 813.

[4] S Cohen, *Visions of Social Control* (Polity Press 1985) 116.

[5] P Wallis, *Understanding Restorative Justice: How Empathy can Close the Gap Created by Crime* (Policy Press 2014) 3.

[6] J Braithwaite, 'Restorative Justice and a Better Future' in G Johnstone (ed), *A Restorative Justice Reader* (2nd edn, Routledge 2013) 61.

[7] HC Deb 9 September 2014, vol 585 col 753.

[8] M J Gilbert and T L Settles, 'The Next Step: Indigenous Development of Neighbourhood Restorative Community Justice' (2007) 32 Crim Justice Rev 5, 7. See also HL Deb 27 March 2012, vol 736, col 1338.

[9] J Shapland and others, 'Restorative Justice In Practice: The Second Report from the Evaluation of Three Schemes' (Centre for Criminological Research, Sheffield University, Occasional Paper 2, 2006) 8.

[10] C Angel and others, 'Short-Term Effects of Restorative Justice Conferences on Post-Traumatic Stress Symptoms among Robbery and Burglary Victims: A Randomized Controlled Trial' (2014) 10 J Exp Criminol 291, 292–302.

[11] HL Deb 18 November 2015, vol 767, col 130.

[12] M Wright, *Justice for Victims and Offenders* (Open University Press 1991) 99.

[13] ibid 100.

relegate victims 'to the role of a witness'.[14] Beneficially, increasing recognition that restorative justice conferencing can prevent victims feeling powerless has had practical significance,[15] motivating substantial Government investment in restorative justice conferencing.[16] Hence, it seems that the Government is finally 'putting victims first'.[17]

Admittedly, restorative justice conferencing is not always sensible; it may not work in practice for all victims. Indeed, although generally critical of traditional criminal justice systems,[18] feminist criminologists such as Ptacek criticise restorative justice conferencing for undermining women's safety, and perpetuating dominant gender politics,[19] particularly for victims of violence against women.[20] For example, whilst 'dire predictions of explosive conferences, intimidation or coercion' are largely unsubstantiated,[21] the 'possibility of intimidation, reprisals or a significant power imbalance'[22] remains, especially because offenders are often victim's family members.[23] This necessitates careful research and competent control from trained facilitators, particularly to ensure that resolutions are genuinely mutual. However, consistent care and control is unlikely, because 'there is no standardised way of delivering restorative justice' across England and Wales.[24] Indeed, whilst victims must consent to participate,[25] mismanagement of the process itself jeopardises women's safety, particularly because such specifically targeted or vulnerable victims face 'a risk of greater re-victimisation'.[26] Additionally, utilising restorative justice conferencing for violence against women offences may perpetuate dominant gender politics. Restorative justice conferencing individualises the offence, which 'is at odds with research' demonstrating that violence against women 'is commonly recurrent and escalating,'[27] thus failing to appreciate and react to a widespread, enduring epidemic.[28]

However, despite Ptacek's legitimate concerns, withholding restorative justice conferencing from willing violence against women victims succumbs to traditional generalisations of women as 'passive' victims.[29] This stereotype fails women; whilst some may be unable 'to speak in their own interests',[30] others may find restorative justice conferencing

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[14] J Wemmers, 'Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Right to Participate' (2010) 23 LJIL 629, 640. See also J Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32 JL & Soc'y 294; M Wade and others, 'Well-informed? Well Represented? Well Nigh Powerless? Victims and Prosecutorial Decision-making' (2008) 14 European Journal on Criminal Policy and Research 249; C Englebrecht and J Chavez, 'Whose Statement Is It? An Examination of Victim Impact Statements Delivered in Court' (2014) 9 Vict Offender 386.

[15] Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (Green Paper, Cm 7972, 2010) 22, para 82.

[16] HL Deb 18 November 2015, vol 767, col 131.

[17] HC Deb 12 November 2013, vol 570, col 786.

[18] S Dasgupta, 'Safety and Justice for All: Examining the Relationship between the Women's Anti-Violence Movement and the Criminal Legal System' (Ms Foundation for Women, 2003) <http://www.ncdsv.org/images/Ms_SafetyJusticeForAll_2003.pdf> accessed16 November 2016 .

[19] J Ptacek, 'Resisting Co-Optation: Three Feminist Challenges to Anti-violence Work', in J Ptacek (ed), *Restorative Justice and Violence against Women* (OUP 2010) 19.

[20] Crown Prosecution Service, 'Violence against Women and Girls Crime Report 2014–2015' (September 2015) <www.cps.gov.uk/publications/docs/cps_vawg_report_2015_amended_september_2015_v2.pdf> accessed 16 November 2016.

[21] J Shapland and others 'Implementing Restorative Justice Schemes (Crime Reduction Programme) A Report on the First Year' (Home Office Online Report 32/04, London 2004) 38.

[22] ibid 54.

[23] HL Deb 27 March 2012, vol 736, col 1340.

[24] HL Deb 18 November 2015, vol 767, col 130.

[25] Crime and Courts Act 2013, sch 16(5)(3); HL Deb 7 February 2012, vol 735, col 240.

[26] C Cunneen and C Hoyle, *Debating Restorative Justice* (Hart 2010) 75.

[27] J Stubbs, 'Restorative Justice, Gendered Violence, and Indigenous Women' in J Ptacek (ed), *Restorative Justice and Violence against Women* (OUP 2010) 105.

[28] World Health Organisation, 'Global and Regional Estimates of Violence against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence' (World Health Organization Press, 2013) <http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf?ua=1> accessed 16 November 2016; J Malone, 'Ending Domestic Violence: Changing Public Perceptions/Halting the Epidemic' (1998) 27 Sociol 649.

[29] R Wright, 'Women as "Victims" and as "Resisters": Depictions of the Oppression of Women in Criminology Textbooks' (1995) 23 Teach Sociol 111, 111.

[30] J Stubbs, `Shame, Defiance and Violence against Women' in J Bessant and S Cook (eds), *Women's Encounters with Violence: Australian Experiences* (Sage 1997) 122.

personally empowering and curative.[31] Indeed, violence against women victims may benefit most from restorative justice conferencing, as the severity and intrusive nature of violence against women necessitates significant restoration and empowerment.[32] Unfortunately, to date, there is little 'empirical evidence' for either argument.[33] However, Project Restore, New Zealand, provides promise; victims of sexual crimes experienced both 'personal healing' and 'a sense of justice' after restorative justice conferencing, although not always immediately.[34] Admittedly, it is questionable whether international findings are 'generalisable to England and Wales, given the differences in context.'[35] However, Project Restore is significant because it 'demonstrates that specially tailored processes' can benefit victims of sexual violence.[36] Such success may have practical benefits, influencing best practice in England and Wales. Prescriptively, offering restorative justice conferencing to all victims could legitimise the process, validating proponents' central claim that restorative justice conferencing is 'victim-orientated,'[37] rather than reserved for some victims at 'the shallow end of criminal justice'.[38] To an extent, therefore, restorative justice conferencing is sensible because it can 'restore' victims, but procedural safeguards and individual's needs should inform the process.

Secondly, Braithwaite supports restorative justice conferencing, because it restores offenders to the community, giving them the 'feeling of having a future' outside of crime.[39] This is because restorative justice conferencing involves 'reintegrative shaming'; the law-abiding community expresses disapproval at criminal behaviour, shaming the offender and causing them to feel remorse. Agreeing reparations, the community forgives and reintegrates the offender.[40] Conversely, retributive criminal justice ostracises offenders, forcing them to return to criminal subcultures.[41] Australian studies suggest that restorative justice conferencing is more reintegrative than court processes.[42] A study called the 'Reintegrative Shaming Experiments' found that, in cases of drunk driving and juvenile shoplifting, more of those participating in restorative justice conferencing felt 'forgiven' than those undergoing court processes.[43] This recognises the importance of emotions in crime and justice debates.[44] Indeed, the power and effectiveness of restorative justice conferencing correlates to participants' 'emotional engagement', whereas court processes marginalise participants' emotions.[45] Although a sceptical review of restorative justice conferencing literature reveals

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[31] C McGlynn and others, '"I Just Wanted Him to Hear Me": Sexual Violence and the Possibilities of Restorative Justice' (2012) 39 JL & Soc'y 213, 232.
[32] Wright (n 12) 100.
[33] F Marsh and N Wager, 'Restorative Justice in cases of Sexual Violence' (2015) 62 Prob LJ 336, 341.
[34] S Jülich and others, 'Project Restore: An Exploratory Study of Restorative Justice and Sexual Violence' (AUT University 2010) <https://www.academia.edu/274691/Project_Restore_An_Exploratory_Study_of_Restorative_Justice_and_Sexual_Violence> accessed 16 November 2016, 57–58.
[35] J McGuire, 'Analytical Summary 2015: What Works in Reducing Reoffending in Young Adults? A Rapid Evidence Assessment' (National Offender Management Service, 2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/449347/reducing-reoffending-in-adults.pdf> accessed 16 November 2016, 3.
[36] McGlynn and others (n 31) 221.
[37] J Wemmers, 'Restorative Justice for Victims of Crime: A Victim-Oriented Approach to Restorative Justice' (2002) 9 Int Rev Victimol 43, 43.
[38] Cunneen and Hoyle (n 26) 72.
[39] J Braithwaite 'Restorative Justice and a Better Future' (n 6) 61.
[40] J Braithwaite, *Crime, Shame and Reintegration* (CUP 1989) 55–57.
[41] ibid 12.
[42] N Harris, 'Reintegrative Shaming, Shame, and Criminal Justice' (2006) 62 J Soc Issues 327, 340.
[43] H Strang and others, 'Experiments in Restorative Policing: Final Report' (Australian National University, November 2011) ch 6.
[44] T J Scheff and S M Retzinger, *Emotions and Violence: Shame and Rage in Destructive Conflicts* (Lexington 1991) 60; A McAlinden, *The Shaming of Sexual Offenders: Risk, Retribution and Reintegration* (Hart 2007) 46. See also W De Haan and I Loader, 'On the Emotions of Crime, Punishment and Social Control' (2002) 6 Theor Criminol 243.
[45] L Sherman, 'Reason for Emotion: Reinventing Justice with Theories, Innovations, and Research – The American Society of Criminology 2002 Presidential Address' (2003) 4 Criminology 1, 11. See also H Strang 'Justice for Victims of Young Offenders: The Centrality of Emotional Harm and Restoration' in A Morris and G Maxwell (eds), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Hart 2001).

'dramatic', potentially exaggerated, stories of personal transformations,[46] social sciences suggest that emotions and positive relationships can actually make 'an enormous difference' to offenders' lives.[47] Additionally, from a crime control perspective, Braithwaite's theory is beneficial because it suggests that restorative justice conferencing is more 'effective than traditional justice in preventing' reoffending.[48] Indeed, UK Government research indicates that restorative justice conferencing reduces recidivism.[49] Admittedly, these findings are limited; results were 'not statistically significant', and therefore may have been coincidental.[50] Moreover, the unreported 'dark figure of crime'[51] renders it impossible to measure reoffending exactly.[52] However, these results are encouraging, suggesting that some offenders can achieve a future without crime. Hence, restorative justice conferencing is 'sensible' for offenders because it can be 'a deeply affecting experience', with tangible influence over future behaviours.[53]

However, in practice, reintegrating offenders to ensure a future devoid of crime is problematic. For example, offenders rarely receive sufficient social support after restorative justice conferencing;[54] most providers consider their work 'finished' after the conference.[55] Critically, this undermines offenders' likelihood of successful reintegration, because any severe, interrelated personal and social problems, which are products of and catalysts for social exclusion and criminality, remain unaddressed.[56] This also suggests that emphasis on 'reintegration' is 'inappropriate';[57] such 'chaotic lives and complex histories' may have excluded offenders from mainstream society to begin with.[58] Indeed, some offenders are 'well integrated', but into criminal subcultures.[59] Consequently, 'reintegration' fails to recognise 'broader social relations'[60] and inequalities, disconnecting restorative justice conferencing from 'social justice' and reconstruction.[61] Indeed, 'reintegration' appears to affirm offenders' 'supposed freedom, their moral responsibility, and their capacity to have acted otherwise.'[62] Critically, this ignores 'the relationship between social structure and human agency', an interplay which dominates criminological social theory.[63] Hence, reintegrating offenders is problematic without continued support and wider societal changes to 'reduce the criminogenic nature of offenders' lives.'[64]

Despite such criticisms, research suggests that restorative justice conferencing is sensible because it can 'move beyond' conventional responses to offending, securing personalised and future-orientated

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[46] K Daly, 'Restorative Justice: The Real Story' (2002) 4 Punishm Soc 55, 66–68. See also D Sullivan and others, 'The Transformation of Self and Other: Restorative Justice in Richard Wright's Native Son' (2006) 9 Contemp Justice Rev 401; K Bender and M Armour, 'The Spiritual Components of Restorative Justice' (2007) 2 Vict Offender 251.
[47] HL Deb 21 January 2016, vol 768, cols 929–930.
[48] H Hayes, 'Reoffending and Restorative Justice' in G Johnston and D van Ness (eds), *Handbook of Restorative Justice* (Willan 2007) 427.
[49] McGuire (n 35); J Shapland and others, 'Does Restorative Justice Affect Reconviction? The Fourth Report from the Evaluation of Three Schemes' (Ministry of Justice Research Series 10/08, London 2008).
[50] Shapland and others, 'Does Restorative Justice Affect Reconviction? The Fourth Report from the Evaluation of Three Schemes' (n 49) 67.
[51] M De Castelbajac, 'Brooding over the Dark Figure of Crime: The Home Office and the Cambridge Institute of Criminology in the run-up to the British Crime Survey' (2014) 54 Br J Criminol 928, 930–1.
[52] Shapland and others, 'Does Restorative Justice Affect Reconviction? The Fourth Report from the Evaluation of Three Schemes' (n 49) i.
[53] HL Deb 18 November 2015, vol 767, col 13.
[54] P Gray, 'The Politics of Risk and Young Offenders' Experiences of Social Exclusion and Restorative Justice' (2005) 45 Brit J Criminol 938, 952.
[55] Shapland and others, 'Restorative Justice In Practice: The Second Report from the Evaluation of Three Schemes' (n 9) 67–69.
[56] Gray (n 54) 952.
[57] P Raynor, 'Community Penalties and Social Integration: "Community" as Solution and as Problem' in A Bottoms, L Gelsthorpe and S Rex (eds), *Community Penalties: Changes and Challenges* (Willan 2001) 192.
[58] HL Deb 21 January 2016, vol 768, col 911.
[59] Cohen (n 4) 122.
[60] Cunneen and Hoyle (n 26) 105.
[61] D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (OUP 2001) 198–199.
[62] ibid 198–199.
[63] T Seddon, 'Drugs, Crime and Social Exclusion: Social Context and Social Theory in British Drugs-Crime Research' (2006) 46 Brit J Criminol 680, 690.
[64] Cunneen and Hoyle (n 26) 49.

goals.[65] Parties usually consolidate mutually agreed resolutions in Outcome Agreements, commonly requiring offenders to apologise, make reparations and seek employment.[66] Encouragingly, the Justice Research Consortium found that, with follow up support, 36 percent of offenders fully completed agreements, 52 percent partially completed, and only 11 percent did not complete.[67] These statistics are promising, and have practical significance, demonstrating both the importance of tailoring agreements to be realistic for individual offenders and providing continuing support.[68] Furthermore, liberals commend the voluntary nature of Outcome Agreements, which respects individual autonomy and indicates that resolutions are indeed mutual, rather than coerced.[69] To an extent, therefore, restorative justice conferencing is sensible for offenders, but continuing support is necessary for their success.

Thirdly, legal anthropology illustrates that bringing conflicting parties together 'and helping them find a mutual way forward' is not 'natural',[70] despite claims that this has 'deep roots in long-standing … cultural traditions'.[71] Indeed, 'the approved means of handling disputes' are exceptionally diverse across and inside different societies.[72] For example, Wallis argues that Aboriginal practices exemplify restorative conflict resolution.[73] However, Wallis fails to acknowledge that many Aboriginal groups resolve conflicts with violence.[74] Additionally, in 18th century England, conflict resolution was essentially 'local, personal and entrepreneurial',[75] 'equals' resolved conflicts in mutually agreeable ways, but lower class, less wealthy offenders were 'hanged, burned, drowned or mutilated'.[76] Critically, therefore, the suggestion that bringing conflicting parties together to 'find a mutual way forward'[77] is 'natural' is little more than 'a romantic idealization'.[78] Despite emphasis on reparation, such systems are hardly 'mutual' or 'restorative', particularly because they disregard significant protections ensuring equality before the law, including fundamental human rights and ''rule of law' values.'[79]

Conversely, for Christie, restorative justice conferencing is 'natural' because it returns conflicts, imagined as 'property' and 'stolen' by state control over the criminal law, to the victim and community.[80] This has potentially major benefits for victims who have become 'increasingly alienated by what they view as the inflexible, impersonal nature of contemporary justice procedures.'[81] Comparatively, restorative justice conferencing appears to bring 'humanity back into the criminal justice system.'[82] Indeed, international[83] and domestic[84] law and policy appear to share Christie's concern that the criminal

[65] Shapland and others, 'Restorative Justice In Practice: The Second Report from the Evaluation of Three Schemes' (n 9) 67.
[66] H Hayes and others, 'Agreements in Restorative Justice Conferences' (2014) 54 Brit J Criminol 109, 109.
[67] Shapland and others, 'Restorative Justice In Practice: The Second Report from the Evaluation of Three Schemes' (n 9) 68.
[68] ibid 67.
[69] C Bennett, 'Satisfying the Needs and Interests of Victims' in G Johnston and D van Ness (eds), *Handbook of Restorative Justice* (Willan 2007) 258.
[70] Wallis (n 5) 3.
[71] T Winfree Jr, 'Peacemaking and Community Harmony: Lessons (and Admonitions) from the Navajo Peacemaking Courts' in Elmar G M Weitekamp and Hans-Jürgen Kerner (eds), *Restorative Justice: Theoretical Foundations* (Willan 2002) 285.
[72] S Roberts, *Order and Dispute: An Introduction to Legal Anthropology* (Penguin 1979) 16.
[73] Wallis (n 5) 3.
[74] H Ross, 'Aboriginal Australians' Cultural Norms for Negotiating Natural Resources' (1995) 19 Cultural Survival Quarterly <https://www.culturalsurvival.org/ourpublications/csq/article/aboriginal-australians-cultural-norms-negotiating-natural-resources> accessed 16 November 2016.
[75] Cunneen and Hoyle (n 26) 8–9.
[76] Wright (n 12) 2.
[77] Wallis (n 5) 3.
[78] M Cain, 'Beyond Informal Justice' in R Matthews (ed), *Informal Justice?* (Sage 1988) 56.
[79] A Ashworth, 'Responsibilities, Rights and Restorative Justice' in G Johnstone (ed), *A Restorative Justice Reader* (2nd edn, Routledge 2013) 375.
[80] N Christie, 'Conflicts as Property' (1977) 17 Brit J Criminol 1, 7.
[81] Ward and Langlands (n 1) 205.
[82] J Mongold and B Edwards, 'Reintegrative Shaming: Theory into Practice' (2014) 6 Journal of Theoretical & Philosophical Criminology 205, 208.
[83] European Parliament and Council Directive 2012/29/EU of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57; United Nations General Assembly Resolution 55/59 (17 January 2001) UN Doc A/RES/55/59.
[84] Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (Green Paper, Cm 7972, 2010) 22, para 82.

justice system marginalises victims,[85] becoming increasingly 'victimological' and placing greater importance on victims' participation, support and rights.[86] Moreover, from a sociological perspective, wherein society is a 'network of co-operation through communication', returning conflicts to the community is beneficial because it establishes 'an ethic of communication.'[87] Restorative justice conferencing, therefore, provides useful opportunities for 'norm-clarification' and socio-legal discussion.[88] Contemporary debates frequently recognise the practical importance of this approach, considering that 'part of the answer to the problem' of crime is greater social cohesion, often exemplified by small, rural communities.[89] However, this is unpersuasive because 'social cohesion' may disguise a 'hotbed of suffocating social control'.[90] Communities are social constructs, which reflect and establish 'power, difference, inequality' and exploitation.[91] Hence, Christie is naïve to assume that 'natural' community responses to crime are just.

Furthermore, Christie's 'natural' argument is unconvincing because the state still 'owns' conflicts. restorative justice conferencing services in England and Wales are state 'creatures'; funded, justified, operated, and evaluated by state personnel.[92] For example, the Government commissioned the most comprehensive evaluations of restorative justice conferencing in England and Wales.[93] Moreover, restorative justice conferencing providers primarily work with court referrals.[94] Unavoidably, therefore, restorative justice conferencing takes 'for granted most of the language, assumptions and structures' of artificial court intervention.[95] Critically, this dependence suggests that state-developed restorative justice conferencing is actually covert public regulation, a mere 'extension of the criminal law', disguised as a nostalgic 'return' to 'natural' justice.[96] This may well solve the problem that 'we cannot make people good by Act of Parliament.'[97] This argument is particularly convincing because a review of restorative justice conferencing literature reveals an absence of 'both a theory and a politics of criminalisation'.[98] For example, 'natural' advocates have failed to explain credibly restorative justice conferencing's sudden political popularity 'at a particular historical juncture and increasingly within a globalised context'.[99] Indeed, it is suspicious that the Government has only recently questioned the 'prison works' mantra.[100] Hence, failing to expose 'the political context and its influence' on policy obscures the true nature of restorative justice conferencing.[101]

Ultimately, restorative justice conferencing can be sensible, but it is not 'a natural thing to do'.[102] Restorative justice conferencing is sensible because increasing victim participation in criminal processes can restore their sense of empowerment and work to repair the harm suffered, but restorative justice

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[85] Christie (n 80) 7.
[86] A Bottoms, 'Some Sociological Reflections on Restorative Justice' in G Johnstone (ed), *A Restorative Justice Reader* (2nd edn, Routledge 2013) 411; HC Deb 21 October 2010, vol 516, col 366.
[87] G Mannozzi, 'From the "Sword" to Dialogue: Towards a "Dialectic" Basis for Penal Mediation' in Elmar G M Weitekamp and Hans-Jürgen Kerner (eds), *Restorative Justice: Theoretical Foundations* (Willan 2002) 233.
[88] Christie (n 80) 8.
[89] HL Deb 8 December 2004, vol 667 col 931.
[90] L Walgrave, 'From Community to Dominion: In Search of Social Values for Restorative Justice' in Elmar G M Weitekamp and Hans-Jürgen Kerner (eds), *Restorative Justice: Theoretical Foundations* (Willan 2002) 76.
[91] Cunneen and Hoyle (n 26) 175.
[92] Cohen (n 4) 123.
[93] Marshall (n 2); Shapland and others, 'Implementing Restorative Justice Schemes (Crime Reduction Programme) A Report on the First Year' (n 21).
[94] Shapland and others, 'Implementing Restorative Justice Schemes (Crime Reduction Programme) A Report on the First Year' (n 21) 2.
[95] G Johnstone, *Restorative Justice: Ideas, Values, Debates* (Willan 2002) 8.
[96] G Pavlich, 'Deconstructing Restoration: The Promise of Restorative Justice' in Elmar G M Weitekamp and Hans-Jürgen Kerner (eds), *Restorative Justice: Theoretical Foundations* (Willan 2002) 96–97.
[97] Hansard HL vol 667 col 931 (08 December 2004).
[98] Cunneen and Hoyle (n 26) 106.
[99] ibid 109.
[100] G Garton Grimwood and G Berman, 'Reducing Reoffending: The "What Works" Debate' (2012) House of Commons Library Research Paper 12/71 <http://researchbriefings.files.Parliament.uk/documents/RP12-71/RP12-71.pdf> accessed 16 November 2016.
[101] S Walklate, 'Researching Restorative Justice: Politics, Policy and Process' (2005) 13 Critical Crim 165, 176.
[102] Wallis (n 5) 3.

conferencing providers must avoid generalising victims. Additionally, restorative justice conferencing is sensible because it can restore offenders' to the community, but achieving the 'way forward' out of criminality requires further support and societal change. Finally, legal anthropology demonstrates that restorative justice conferencing is not 'natural'. Indeed, contemporary restorative justice conferencing services are state 'creatures'.[103]

[103] Cohen (n 4) 123.

FAMILY LAW AND THE 21ST CENTURY FAMILY

Derin Tolgay[*]

1 INTRODUCTION

Family law is a unique and complex area of law that is difficult to define, with a 'tangled terrain of conflicting ideas'.[1] This difficulty is due to the ever-changing and fluid family forms that are as diverse as the individuals within them.[2] The definitional problems of families, and family law's incoherent nature are illustrated by the theoretical approaches of functionalism, the private/public dichotomy and feminism. Although family law appears to be chaotic, the flexibility of the law in responding to social changes is preferable to a systematic model in order to ensure equality and a comprehensive legal framework.[3]

2 'FAMILY'

In order to understand what is meant by family law, it is pivotal to define what a 'family' is because law provides a 'privileged legal' standing through obligations and rights.[4] Although there is no statutory definition, a dominant 'family ideology' of family in society is the traditional 'cornflake family' with two parents and 1.8 children.[5] Nonetheless, 'family', is taxing to define as there has been a 'sea of change' in familial relationships.[6] The transition from a formalistic to a functional definition is apparent where previously it was an 'abuse' to consider unmarried couples as a family, whereas now same-sex couples are considered as families.[7]

Furthermore, social changes demonstrate a more individualistic society focused on child welfare with reduced marriages, normalisation of divorce, cohabitation, same-sex relations and single-parent households. Social change is also evidenced by non-traditional families accounting for 76% of family forms.[8] Law privileges certain familial structures and deprives benefits or acknowledgment to others.[9] A case-by-case approach would facilitate the law's reflection of family but would inevitably lead to unworkable results with increased court interaction.[10] Although the definition of family is inconstant, it is 'dangerous' to study family law without an understanding of what a 'family' is.[11] Whilst 'family' is based on personal experiences, conceptual limits are necessary to distinguish between families and friendships to balance the exclusion and inclusion of individuals with a wider definition.[12]

3 FAMILY LAW

The lack of a legal definition of 'family' contributes to difficulties of understanding what family law is. Generally, family law regulates 'relationships between children and guardians, and adults in close emotional relationships.'[13] Family law is unique because it is a fluid and incoherent subject compared to other systematic disciplines, with less judicial interaction.[14] This could result from being 'newly' founded on concepts of familial relations that precede law as opposed to tort or contract law, which are both legal

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[1] John Dewar, 'Family Law and its Discontents' [2000] IJLPF 59, 60.

[2] Andrew Bainham, 'Family Law in a Pluralistic Society' [1995] JL & Soc'y 234, 236.

[3] Alison Diduck, 'What is Family Law For?' [2011] CLP 287, 288.

[4] Jenni Millbank, 'The Role of the "Functional Family" in Same-Sex Family Recognition Trends' [2008] CFLQ 155, 166.

[5] Katherine O'Donovan, *Family Law Matters* (Pluto 1993) 30; Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State* (3rd edn, Hart 2012) 21.

[6] Kris Franklin, 'A Family Like Any Other Family: Alternative Methods of Defining Family in Law' [1990] NYU Rev L & Soc Change 1027, 1029; Diduck (n 3) 288; Clare Huntington, 'Postmarital Family Law: A Legal Structure for Nonmarital Families' [2015] Stan L Rev 167, 169.

[7] *Gammans v Ekins* [1950] 2 KB 328 (CA); *Fitzpatrick v Sterling Housing Association Ltd* [2000] 1 AC 27 (HL).

[8] Jonathan Herring, *Family Law* (7th edn, Pearson 2015) 2.

[9] Diduck and Kaganas (n 5) 24.

[10] Franklin (n 5) 1077.

[11] Herring (n 8) 5.

[12] ibid; David Archard, 'The Future of the Family' [2012] Ethics & Social Welfare 132, 136–137.

[13] ibid 16; Rob George, *Essays and Debates in Family Law* (Hart 2012) 6.

[14] John Dewar, 'The Normal Chaos of Family Law' [1998] MLR 467, 469.

constructs.[15] The fluctuating nature of family law is both inevitable and preferable, as it interlinks not only with other legal doctrines, but also with dynamic academic fields such as sociology and politics.[16] However, a retreat towards a rule-based system is visible in fatherhood movements and increased focus on children's rights following the Human Rights Act 1998.[17] Nevertheless, as family law primarily assumes an outcome-oriented discretionary approach to ensure equal treatment, it should not be confined by a narrow definition that may marginalise minorities.

4 SOCIETAL CHANGE

With rapid societal changes, the gap between law and 'family' is generally wide.[18] As the definition is ever-changing, it is important that the law reflects what is meant by 'family' to ensure law's applicability, and to remain functional.[19] For example, diversification of familial types and advancement of scientific technology illustrates the need for law to represent the actual family.[20] The discrepancy between law and 'family' produces a hierarchy of relationships as evidenced by the law's inability to cope with cohabiting non-marital couples.[21] Moreover, homosexual relationships were not formally recognised by statute for years after *Fitzpatrick v Sterling Housing Association Ltd*, and essentially resulted in discrimination.[22] The inequality and uncertainty created by the law's failure to reflect 'family' is also apparent in the increasing methods of having children, specifically assisted reproduction cases involving same-sex couples.[23] When a couple undergoes in vitro fertilisation treatment, and the relationship ends shortly after, the 'co-mother' has limited legal standing, and is often alienated from the child.[24] Therefore, it is crucial that the law progresses at a similar rate with these social changes.

5 DIFFUSION OF LEGAL AUTHORITY

Although it is arguable whether the role of law is to send messages, modern family law aims to 'radiate messages' about the manner in which the fragmented family should be reshaped.[25] Due to social changes, shifts in legal language can be observed; from a paternalistic tone to a more egalitarian tone in the 1990s, and recently to a more private/individualistic tone.[26] These shifts have not only communicated 'good family living' goals, but additionally produced divergent consequences for those who could not meet them.[27] For example, a justification for legal aid cuts was that it would encourage individuals to behave responsibly and reasonably in resolving familial problems.[28] In reality the number of litigants in person increased as a consequence, and mediation took place 'in the shadow of the law' (meaning the threat of litigation was always present and this influenced the mediation process).[29] This resulted in undesirable and unequal outcomes with the weak being oppressed.[30] As laws have power to 'reflect and transform ideologies,' it is pivotal that laws reflect current realities of 'family' to prevent conveying arbitrary and undesirable messages.[31]

6 FUNCTIONALISM

Whilst each theoretical approach has drawbacks, they portray the difficulties in defining and aid in assessing family law as a subject. Through the emergence of varied relationships, family law's focus has shifted to

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[15] Rebecca Probert, '"Family law" – A Modern Concept?' [2004] Fam Law 1, 4.
[16] George (n 13) 7.
[17] Dewar, 'Family Law and its Discontents' (n 1) 66–67; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 8.
[18] Martha Minow, 'All in the Family & in all Families: Membership, Loving, and Owing' [1992] W Va L Rev 275, 278; and Probert (n 15) 4.
[19] Martha Fineman, 'Progress and Progression in Family Law' [2004] U Chi Legal F 1, 16.
[20] Deborah Zalesne, 'The Contractual Family: Role of the Market' [2015] Cardozo L Rev 1027, 1027.
[21] Nan Hunter, 'Marriage, Law, and Gender: A Feminist Inquiry' [1991] Law & Sexuality Rev Lesbian & Gay Legal Issues 9; Alison Diduck, 'A Family by Any Other Name … Or Starbucks™ Comes to England' [2001] JL & Soc'y 290, 307.
[22] (n 7); Civil Partnership Act 2004.
[23] Jamie Stroops, 'Law and its Impact on Non-Traditional Families' [2005] Sw UL Rev 597, 599.
[24] Huntington (n 6) 172; Millbank, 'The Role of the "Functional Family" in Same-Sex Family Recognition Trends' (n 4) 181.
[25] Dewar, 'Family Law and its Discontents' (n 1) 68.
[26] Diduck (n 3) 287–303.
[27] ibid 293.
[28] Herring (n 8) 56.
[29] Bill Atkin, 'Harmonising Family Law' [2006] Victoria U Wellington L Rev 465, 481.
[30] George (n 13) 14; Dewar, 'Family Law and its Discontents' (n 1) 77–78.
[31] Diduck (n 3) 303.

practices rather than structures.[32] The functionalist theory provides coherence and facilitates defining family law by examining the function of families rather than form.[33] According to Eekelaar, family law has 'protective, adjustive, and supportive functions' that provide a framework for measuring law's success.[34] The functionalist school was initially welcomed and described as 'social Darwinism' due to its ability to adapt to and reflect the role of family in society.[35] For instance, functionalism has procured rights for same-sex families by embracing the law's role as reflecting *de facto* family experiences instead of channelling individuals into a predetermined 'black box.'[36] However, it has been argued that this does not reflect reality as there is no agreed purpose, and the lack of uniform-functional families undermines the functional model.[37] Furthermore, the strict and inherent-patriarchal application of functionalism could result in inequality by excluding families, namely non-marital couples and same-sex couples, from legal protection.[38]

This approach is also narrower in comparison to feminist approaches as it has limited scope of inquiry.[39] For example, unmarried couples are often denied government benefits because they 'function' as a married couple, and functionalism grants limited status to non-biological parents.[40] As the focus is on roles, birth-mothers can allege that the 'co-mother' no longer functions as a caregiver, therefore restricting their access claims.[41] As a result, due to the law's incoherence, inequalities may ensue if this approach is not applied in an inclusive way. Overall, functionalism has provided insights into divergent family structures, and enables the law to respond effectively to societal changes due to a clear functional-focus.[42]

7 PRIVATE/PUBLIC

The private/public dichotomy has furthered the understanding of family law through a focus on state intervention; however, this has a tendency to inhibit equality.[43] According to the liberal-social philosophy, 'public' and 'private' are social realms distinguished by legal regulation from state. The former realm relates to an 'ethos of individualism', the market and men, whilst the latter relates to an 'ethos of altruism', family and women.[44]

Whilst non-intervention is a way to protect privacy in families, the public/private dichotomy is 'meaningless' as the law also indirectly impacts on the family by inaction.[45] This stance on privacy often leaves the vulnerable at risk of reduced autonomy and harm.[46] The limited legal intervention to intact families has further resulted in questioning the role of state intervention and privatisation. However, arguably privatisation may only increase the inequalities rather than curtail them.[47] The legal aid cuts may contribute to inequality by reducing access, lead to costlier cases, and result in undesirable outcomes for the vulnerable, arguably fragmenting family law.[48] Secondly, the distinction is overly simplistic as the difficulty in distinguishing between the two realms is evident in the societal impact that child abuse and domestic violence

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[32] Carol Smart, 'Law and Family Life: Insights from 25 Years of Empirical Research' [2014] CFLQ 14, 24–28.
[33] John Dewar, *Law and the Family* (Butterworths 1989) 3; O'Donovan (n 5) 19; John Eekelaar, 'Family law: Keeping Us "On Message"' [1999] CFLQ 387, 38.
[34] Herring (n 8) 17.
[35] Franklin (n 6) 1037–1038.
[36] Jenni Millbank, 'The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family' [2008] IJLPF 149, 168; Millbank, 'The Role of the "Functional Family" in Same-Sex Family Recognition Trends' (n 4) 156, 182.
[37] Franklin (n 6) 1047; Millbank, 'The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family' (n 36) 151.
[38] Paris Baldacci, 'Pushing the Law to Encompass the Reality of Our Families: Protecting Lesbian and Gay Families from Eviction from Their Homes – Braschi's Functional Definition of "Family" and Beyond' [1993] Fordham Urb LJ 973, 988.
[39] O'Donovan (n 5) 20.
[40] Millbank, 'The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family' (n 36) 152; Hunter (n 21) 20.
[41] Millbank, 'The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family' (n 36) 156, 168.
[42] Baldacci (n 38) 995; Dewar, 'The Normal Chaos of Family Law' (n 14) 468.
[43] John Dewar, 'Family, Law and Theory' [1996] OJLS 725, 732.
[44] John Eekelaar, 'What is "Critical" Family Law?' [1989] LQR 244, 248–250; Dewar, *Law and the Family* (n 33) 5; O'Donovan (n 5) 23.
[45] Franklin (n 6) 1067; Eekelaar (n 44) 250.
[46] Dewar, 'Family, Law and Theory' (n 43) 732.
[47] ibid 733; Dewar, 'The Normal Chaos of Family Law' (n 14) 474.
[48] Smart (n 32) 24; Herring (n 8) 45; Dewar, 'Family Law and its Discontents' (n 1) 76–78.

produces. The state in response will not be neutral to these situations, and as a result, the public sphere 'spills-over' to enforce private responsibilities.[49] The intrusion on privacy by public policy is evidenced by the introduction of the child support system and exemplifies how the distinction can become blurred.[50] Additionally, this theory focuses primarily on law, neglecting other ways in which families are regulated. Intrusion by the state is apparent with social housing and benefit schemes, obscuring the distinction and portraying that not all social classes have uniform privacy from regulations.

Lastly, feminist opponents emphasise that categorising elements as private, therefore inhibiting state intervention, reinforces oppression and inequality by designating power to the husband.[51] Similarly to functionalism, family life is regarded as a 'black box' under the public/private divide, with women assigned to the private sphere or burdened with a 'double bind.'[52] Whilst it highlights the need to balance privacy and the protection of vulnerable individuals, exclusively focusing on this theoretical approach is unbeneficial. The dichotomy does not bring about significant change or address the gendered distinction of the realms, as this approach does not challenge the 'fixed' patriarchal paradigm of law.[53]

8 FEMINIST APPROACHES

The feminist theoretical approach provides a valuable insight into family law by scrutinising the law's impact on women in order to 'push the law' to generate equality.[54] The advancement of feminism has transformed the law to reflect societal views towards divorce, marriage, and sexuality. These changes shaped understandings of familial structures and functions.[55] Formerly direct discrimination towards women was apparent in statute, where there were differing basis for divorce as women were required to satisfy an additional aggravated factor.[56] Indirect discrimination was also identifiable in property allocation, as men often financially contributed towards the household due to earning higher incomes, as a result gained increased ownership rights.[57] Feminist concepts occasioned reform by creating uncertainty in 'traditional patriarchal' law and focusing on equality to reconstruct equal marital relationships. The current gender-neutrality of family law is apparent in the criminalisation of marital rape and domestic violence.[58]

The differing feminist perspectives are reflective of the progression and incoherent nature of family law. Liberal feminists strive for equality between men and women so that 'gender matters as little as eye colour'.[59] In contrast, difference feminists assert that law should not disadvantage, but recognise and value biological differences between men and women. The weakness of varying feminist perspectives is that it may alienate some women.[60] Liberal feminist views could force women to assume masculine roles and enter the job-market whilst difference feminism could stigmatise women that do not wish to conform to the ideology of motherhood. The responsive nature of the feminist approach is highlighted by the current strive for a new model that protects women's role in the workplace whilst valuing the nurturing ethos.[61] Although the feminist approach has challenged societal inequality, the traditional ideology of family law is 'simultaneously changing and remaining amazingly the same.'[62] For instance, by gender-neutralising the law it is thought to have achieved equality, this is not the case.[63] Studies showed that merely 13% of men concluded taking care of the home

[49] Martha Fineman, 'Feminist Legal Theory' [2005] Am UJ Gender Soc Pol'y & L 13, 22; Minow (n 18) 329.
[50] Child Support Act 1991; Dewar, *Law and the Family* (n 33) 6.
[51] Eekelaar (n 44) 250.
[52] Martha Fineman, 'Fatherhood, Feminism and Family Law' [2001] McGeorge L Rev 1031, 1048; Janet Rifkin, 'Toward a Theory of Law and Patriarchy' [1980] Harv Women's LJ 83, 85.
[53] Rifkin (n 52) 95; Dewar, 'Family, Law and Theory' (n 43) 731–733; Fineman, 'Feminist Legal Theory' (n 49) 20.
[54] Dewar, 'The Normal Chaos of Family Law' (n 14) 475; Baldacci (n 38) 995.
[55] Franklin (n 6) 1042.
[56] Herring (n 8) 18.
[57] Fineman, 'Progress and Progression in Family Law' (n 19) 7; Macarena Saez, 'Transforming Family Law Through Same-Sex Marriage: Lessons from (and to) the West [2015] Duke J Comp & Int'l L 125, 168; Herring (n 8) 19.
[58] Fineman, 'Fatherhood, Feminism and Family Law' (n 52) 7; Katharine Bartlett, 'Feminism and Family Law' [1999] Fam LQ 475, 494.
[59] Herring (n 8) 20.
[60] ibid.
[61] ibid.
[62] Diduck (n 21) 306; Susan Boyd, 'Family, Law and Sexuality: Feminist Engagements' [1999] Soc Leg Stud 369, 377.
[63] Fineman, 'Progress and Progression in Family Law' (n 19) 7.

was a woman's role; however, the study also revealed that only 30% of men endorsed the idea of a 'stay at home dad.'[64] Coupled with the fact that women perform most housework, it is clear that there is still room for improvement.[65] Nonetheless, familial relations are now more flexible to change with an increased emphasis of choice in structure.[66]

9 CONCLUSION

Modern family law's unique and fluid nature reflects the 'chaotic' varieties of themes and myriad of family forms in society. Although family law may be incoherent, it enables the law to adapt to ideological shifts rather than serve as a systematic 'gatekeeper' that imposes specific norms.[67] Therefore, the definition should derive from relationships, rather than be imposed by law.[68] Recent social movements coupled with the growing forms of parenthood highlight the importance of agreement between law and 'family' to ensure that all are equal before the law. Each theoretical approach provides valuable insight; however, it is clear that functionalist and feminist theories offer a more accurate understanding. Nonetheless, it is most beneficial for family law as a subject if it is examined by a multitude of approaches to see the bigger picture of family law.

[64] Herring (n 8) 1.
[65] Archard (n 12) 134–135.
[66] Smart (n 32) 26.
[67] Fojan Nourouzi, 'Should the Law Reflect Changes in Society or Should it Act as a Gatekeeper?' (*Justis Blog*, 16 September 2015) <http://blog.justis.com/cohabitation-should-the-law-reflect-changes-in-society-or-should-it-act-as-a-gatekeeper> accessed 5 March 2016.
[68] Franklin (n 6) 1062.

CAPITAL PUNISHMENT IN THE CARIBBEAN: A NEED FOR CHANGE

Freya Maclean-Boyd[*]

1 INTRODUCTION

In recent years the role of the Judicial Committee of the Privy Council ('the Judicial Committee') as a supreme constitutional court in cases concerning the death penalty in the Caribbean have become increasingly problematic in a region that predominantly supports the use of this punishment for murder, while global trends suggest that the appetite for the death penalty is subsiding.[1] As a final appellate court in the Commonwealth Caribbean, Whitaker states that the Judicial Committee's role is of a very different nature to the United kingdom because its task, 'as the Supreme Constitutional Court, [is to] interpret the Constitution and to ensure that citizens receive its full protection, and to ensure that all actions of the executive are taken in accordance with it and the rule of law'.[2] This need to protect the fundamental rights of Caribbean citizens should however not overshadow the need to safeguard the rule of law to ensure that constitutional provisions are not construed beyond what they truly mean.

Accordingly, this article does not aim to assess the role of the Judicial Committee in the Caribbean generally. Instead, it will aim to discuss the question of whether the Judicial Committee has acted, to the exclusion of all moral or political bias, as a supreme constitutional court should in cases concerning the death penalty alone or whether the judges of the Judicial Committee have acknowledged their own anti-capital punishment bias and construed constitutional provisions beyond their true meaning in order to render the punishment unconstitutional. This analysis is crucial as it will determine whether the Judicial Committee has acted in a manner that adequately balances the need to protect the fundamental rights and freedoms of Caribbean citizens with the need to adhere to the rule of law.

It is first necessary to provide an account of why this article focuses specifically on the Caribbean. Prior to independence from the United kingdom, the death penalty was used as a method of law enforcement in the Caribbean and the Judicial Committee acting as the supreme court to the colonies regularly handed down judgments concerning its use. The motivation behind this was the maintenance of power and control.[3] After independence, the Judicial Committee remained the Caribbean's final appellate court for many of the new countries. Laws valid at the time of independence were enshrined within constitutions in special savings clauses. These clauses have since ensured that the death penalty is to date lawful.

During the 1970s and 1980s the Judicial Committee interpreted the savings clauses in a strict manner, failing to give weight to constitutional concerns regarding cruel and unusual treatment. Although the case *Abbott v Attorney General of Trinidad and Tobago*[4] hinted at the possibility of ruling a death sentence as unconstitutional where a delay extends beyond months into years, the Judicial Committee ultimately held that the death penalty was constitutional. The stimulus for change came in 1994 when, in the case of *Pratt v A-G of Jamaica*,[5] the Judicial Committee held that a delay exceeding five years would duly be rendered unconstitutional on grounds that it would constitute cruel and unusual treatment. Although Campbell called the judgment 'an undemocratic and ironic form of neocolonialism',[6] the

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[1] Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, OUP 2015) 15–48, 123–128.

[2] Quincy Whitaker, 'Challenging the Death Penalty in the Caribbean: Litigation at the Privy Council' in Jon Yorke (ed), *Against the Death Penalty: International Initiatives and Implications* (Ashgate 2008) 101.

[3] Ezekiel Rediker, 'Courts of Appeal and Colonialism in the British Caribbean: A Case for the Caribbean Court of Justice' (2013) 35 Mich J Intl L 213, 242.

[4] [1979] 1 WLR 1342 (PC).

[5] [1994] 2 AC 1 (PC).

[6] James Campbell, 'Murder Appeals, Delayed Executions and the Origins of Jamaican Death Penalty Jurisprudence' (2015) 33 LHR 435, 438.

judgment should be welcomed because it showcases the Judicial Committee's ability to interpret a constitution in an appropriate manner, ensuring that the fundamental rights and liberties of the citizen are preserved, without construing constitutional provisions beyond their proper meaning.

However, upon entering into the 21st century, the Judicial Committee's decisions in cases concerning the mandatory death sentence and the issue of whether it had the jurisdiction to act in such cases have become more fragmented, with the Judicial Committee arguably construing constitutional principles beyond what they mean in a significant number of cases. For example, in *Ramdeen v State of Trinidad and Tobago*[7] the Judicial Committee stated that it is 'a jurisdiction, if on the proper language of the Constitution no such jurisdiction exists.'[8] *Hunte v Trinidad and Tobago*[9] came to the correct conclusion, but the failings of the Judicial Committee in earlier case law throw up a great deal of uncertainty. Where an individual's life is at stake it is unjust that the Judicial Committee, a foreign court, should be presiding over such matters where its jurisdiction is disputed. Thus, it will be argued that the Judicial Committee should be replaced by the Caribbean Court of Justice because, not only are the judges in the court of the highest calibre, but they also do not suffer from the cultural disconnect suffered by judges who sit in the Judicial Committee in London.[10]

The first part of this article will address why this inquiry focuses on the Caribbean and analyse the contextual development of the death penalty from its British colonial roots to the evolution of the Judicial Committee as the Caribbean's supreme constitutional court. It will be argued that the Judicial Committee's Caribbean appellate jurisdiction is a remnant of imperialism and a reflection of British absolutist control which questions its legitimacy from the outset since the death penalty has been abolished in English law. The second part will discuss the evolving constitutional protection in the Commonwealth Caribbean and whether the Judicial Committee has acted as a legitimate constitutional court through an analysis of the Caribbean's relevant case law. It will be submitted that in the light of its fragmented nature the Judicial Committee has failed to act as a legitimate constitutional court in the majority of the case law. Finally, the third part of this article will discuss whether, in light of the divided case law, the Judicial Committee should be replaced by the Caribbean Court of Justice and concluding that it should become the Caribbean's final court of appeal.

2 DEVELOPMENT OF CAPITAL PUNISHMENT IN THE CARRIBEAN

This part will analyse the contextual development of capital punishment from its British colonial roots to the evolution of the Judicial Committee as the supreme constitutional court within the Caribbean. Various stages of development will be assessed starting with the reasons why this inquiry focuses specifically on the Caribbean. This will be followed by an analysis of the historical perspective of the use of the death penalty in the United kingdom and the Caribbean in order to understand why, ultimately, the Judicial Committee's Caribbean jurisdiction is an imperial remnant of British colonial rule and law enforcement which from the outset, questions its legitimacy as a Caribbean constitutional court since the death penalty is no longer present in English law.

2.1 Why the Caribbean?

An assessment of why this article focuses on the Caribbean specifically is important in ironing out initial concerns arising from the choice of jurisdiction. The Commonwealth comprises 53 member countries spanning across Africa, Asia, the Americas, Europe and the Pacific.[11] Originally established by the Judicial Committee Act 1833,[12] the Judicial Committee was tasked to exercise control over the Empire by listening to the final appeals of the British territories.[13] By the 1930s, the Judicial Committee's jurisdiction covered over a quarter of the world.[14] However, in recent years the number of Member States deciding to utilise the

[7] [2014] UKPC 7, [2015] AC 562.
[8] ibid [53] (Lord Toulson).
[9] [2015] UKPC 33, [2016] 1 LRC 116.
[10] Bonny Ibhawoh, 'Asserting Judicial Sovereignty: The Debate over the Abolition of Privy Council Jurisdiction in British Africa', in Shaunnagh Dorsett and John McLaren (eds), *Legal Histories of the British Empire: Laws, Engagements and Legacies* (Routledge 2014) 33.
[11] The Commonwealth, 'Member Countries' <http://thecommonwealth.org/member-countries> accessed 13 April 2016.
[12] (3 & 4 Wil 4 c 41).
[13] Ibhawoh (n 10) 37.
[14] Judicial Committee of the Privy Council, 'Jurisdiction' <https://www.jcpc.uk/about/jurisdiction.html> accessed 13 April 2016.

Judicial Committee in this manner has dwindled,[15] with only 31 continuing to accede.[16]

A core reason for this is the general feeling that there is a severe disconnect between the judges sitting in Westminster and the different local realities of the Commonwealth.[17] Associated with this concern is the fact that, because of this detachment, Judicial Committee appeal proceedings have often incurred lengthy delays which have undermined its efficiency.[18] Nonetheless, in spite of the Judicial Committee's diminishing global role,[19] it crucially remains the court of final appeal for the majority of countries in the Caribbean.[20] Only Barbados, Belize and Guyana have severed ties with the Judicial Committee, to adopt the Caribbean Court of Justice as their final appellate court.[21]

A further core reason for the retention of the Judicial Committee in the Caribbean has been the notion that its judges are of a particularly high standard and immune from political influence.[22] In 2009, Sir Probyn Inniss, a practicing lawyer and former Governor-General of St Kitts and Nevis, stated in a BBC interview that 'the Caribbean Court has been established, but almost from the beginning it has become the victim of partisan politics.'[23] Maintaining the Judicial Committee to evade the propensity for judicial misconduct in the administration of justice is accordingly idealised because the Caribbean's citizens perhaps perceive the Judicial Committee to be more cohesive.[24]

Furthermore, of the fourteen Caribbean countries that maintain the jurisdiction of the Judicial Committee,[25] nine also retain the death penalty within their constitutions.[26] Capital punishment therefore, by virtue of the conflicting case law concerning its constitutionality, provides an interesting and controversial platform from which to assess whether the Judicial Committee has interpreted the constitutions of the Caribbean in a manner that appropriately protects the rights of citizens within the rule of law.

2.2 Historical Perspective

Since ancient times capital punishment has predated theories of state and civilization,[27] with the earliest English record dating back to 695 AD.[28] However, it was in the late-18th century that the death penalty was applied most widely, making England Europe's largest capital jurisdiction.[29] In 1769 there were 160 capital crimes.[30] By 1810 this number had increased and it was suggested that there were a minimum of 223 capital offences in England.[31] Known as 'The Bloody Code', punishments espoused a lack of proportionality between the crime and the punishment threatened; it randomly inflicted the death penalty with few

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[15] B. Mahendra, 'Empire's Law – Sun Sinks Lower' (2003) 153 NLJ 1689.
[16] JCPC (n 14).
[17] Ibhawoh (n 10) 33.
[18] Derek O'Brien, 'The Caribbean Court of Justice and its Appellate Jurisdiction: A Difficult Birth' (2006) PL 344, 346–347.
[19] Kate Malleson, 'Promoting Judicial Independence in the International Courts: Lessons from the Caribbean' (2009) 58 ICLQ 671, 672–673.
[20] JCPC (n 14).
[21] Caribbean Court of Justice, 'About the CCJ' <http://www.caribbeancourtofjustice.org/about-the-ccj/faqs> accessed 13 April 2016.
[22] O'Brien (n 18) 346–347; Patrick Robinson, 'The Monarchy, Republicanism, and the Privy Council: The Enduring Cry for Freedom' (2012) 101 Round Table 447, 451.
[23] BBC, 'Privy Council's Complaint' (24 September 2009) <http://www.bbc.co.uk/caribbean/news/story/2009/09/090922_privyccjphillips.shtml> accessed 4 May 2016.
[24] Mathew Gayle, 'Caribbean Court of Justice or the Judicial Committee of the Privy Council? A Discussion on the Final Appellate Court for the Commonwealth Caribbean' (2012) 3 King's Student L Rev 126, 143.
[25] Judicial Committee of the Privy Council, 'Role of the JCPC' <https://www.jcpc.uk/about/role-of-the-jcpc.html#Commonwealth> accessed 13 April 2016.
[26] Amnesty International, 'Death Penalty in the English-Speaking Caribbean: A Human Rights Issue' (2012) 4 <https://www.amnesty.org/en/documents/amr05/001/2012/en/> accessed 19 April 2016.
[27] Fenton Bresler, *Reprieve: A Study of a System* (George G Harrap & Co 1965) 16.
[28] Harry Potter, *Hanging in Judgment: Religion and the Death Penalty in England* (SCM Press 1993) 2.
[29] ibid 3.
[30] Bresler (n 27) 32.
[31] Hood and Hoyle (n 1) 10.

indemnities ensuring the punishment was applied with any great certainty.[32]

Potter argues that the 18th century mindset centred itself on the notion of liberty[33] and the importance of property[34] which gave way to the successful argument in Parliament that the utilisation of capital punishment would be an effective penal control.[35] This is unsurprising. It is likely that the landed gentry were influenced by the contemporary opinions of theorists such as John Locke who attempted to distort traditional natural law principles to elevate the accumulation of wealth beyond any moral control. On Locke's account, 'government has no other end but the preservation of property'.[36] The value of property over life was therefore seemingly deemed of greater importance.

Furthermore, in the 17th and 18th centuries in England, within the ruling classes, there was a fear of the 'hermetically sealed underworld of crime'[37] consisting of the poorest members of society.[38] Far from being an effective form of punishment, executions were instead 'the central event in the urban contention between the classes'.[39] The desire to protect personal liberty, property and later the capitalist economy[40] created a power struggle and the extensive use of capital punishment became the tool to deter the lower levels of society from transgressing into the upper social sphere. Ballinger stated 'public executions were not merely displays of brutality, but rather attempts by the authorities to exert ideological control, to reassert certain values of obedience and conformity.'[41] Society therefore advocated itself as an 'executive body'[42] and in exacting revenge against an individual guilty of an offence provided protection against potential injury thus establishing a power hierarchy and a form of deterrence.[43]

Just as capital punishment was a significant feature within British society domestically, so too was its impact on the British colonies. In the Caribbean the use of slaves was vital to the operation of the Empire as a body of resources. Regarded as mere property, their colonial masters feared the constant threat of a mass revolt.[44] Dominant slave owners were elected into legislative assemblies which passed enforcement laws sanctioned by imperial officials and facilitated by principles found both in the common law and statutes of England.[45] The Barbados Slave Code 1661 represented British 'angst'[46] towards the native people describing them as 'heathenish', 'brutal' and a 'dangerous kind of people' whose 'naturally wicked instincts' should at all times be suppressed.[47] Such laws thus reflected the paranoia and anxiety of the settlers and, in much the same way as the Bloody Code, those found guilty or suspected of committing crimes were put to death in a public manner for the purposes of control and deterrence.[48]

However, during the 20th century, while the use of the death penalty was declining in England, in the Caribbean there were calls for its further stringent use. Although Westminster-style constitutions had been created in each of the countries at the point of

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[32] Leon Radzonwicz, *A History of Criminal Law, The Movement for Reform,* vol 1 (Stevens and Sons 1948) 5; Douglas Hay, 'Property, Authority and the Criminal Law', in Douglas Hay and others (eds), *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Pantheon Books 1975) 62-63.
[33] Potter (n 28) 4.
[34] ibid 2.
[35] ibid 5.
[36] John Locke, *The Second Treatise of Government* (Hackett 2010) 94.
[37] Peter Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century* (Verso 2003) 72.
[38] ibid 72.
[39] ibid 19.
[40] Whitaker (n 2) 46.
[41] Anette Ballinger, *Dead Woman Walking* (Ashgate 2000) 16.
[42] George Ryley Scott, *The History of Capital Punishment* (Torchstream Books 1950) 4.
[43] ibid 4.
[44] Will Kaufman and Heidi Slettedahl Macpherson, *Britain and the Americas: Culture, Politics and History: A Multidisciplinary Encyclopaedia* (ABC-CLIO 2005) 895.
[45] Hilary Beckles, 'Social and Political Control in the Slave Society' in Franklin W Knight (ed), *General History of the Caribbean: The Slave Societies of the Caribbean,* vol 3 (UNESCO 1997) 198.
[46] Robinson A Milwood, *Western European and British Barbarity, Savagery and Brutality in the Transatlantic Chattel Slave Trade: Homologated by the Churches and Intellectuals in the Seventeenth-Nineteenth Century A Critical Study* (Xlibris Corp 2013) 319.
[47] ibid 319.
[48] Beckles (n 45) 201.

independence,[49] certain 'savings clauses' regarding the death penalty had ensured that existing law at the time of independence had been inherited. While the death penalty in England was gradually restricted to particular types of aggravated murder under the Homicide Act 1957, ss 5–7 and eventually abolished altogether under the Murder (Abolition of Death Penalty) Act 1965, the use of the punishment continues to be lauded as a method of deterrence in the Caribbean.[50]

In 2013, the United Nations reported that the global average homicide rate stood at 6.2 per 100,000 people.[51] In contrast, in the Caribbean the figures were higher, standing at between 16–23 homicides per 100,000 people.[52] This number has increased over the past twelve years as there have been increasing fluctuations in violent and organised crime, linked to changes in drug trafficking and gang violence.[53] The consequence of this is that many Caribbean governments have adopted a 'tough-on-crime stance' to tackle crime and appeal to the public.[54] For example, in Barbados, a legislative amendment passed in 2002 limited the time period for prisoners (including those on death row) to appeal to external bodies such as the Human Rights Committee or Inter-American Commission on Human Rights. In Jamaica, the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, which has been incorporated into the Constitution, appears to reverse precedent that provides protection for prisoners on death row against inhumane and degrading treatment. Furthermore, in Trinidad and Tobago, 86% of the citizens maintained that inhumane and degrading treatment was no reason to abolish the death penalty.[55] Although not implemented, the draft Constitution (Amendment) (Capital Offences) Bill 2011 was described at the time by Kamla Persad-Bissessar, Prime Minister of Trinidad and Tobago, as:

> crucial to overcoming the hindrances to the implementation of the death penalty arising from the Judicial Committee's jurisprudence and … a necessary measure to … respond to the high number of murders that each year are committed in Trinidad and Tobago.

The Judicial Committee therefore now finds itself having to balance the tendency of these Caribbean countries to favour a more aggressive approach to the death penalty. Meanwhile prevailing attitudes in the United Kingdom and elsewhere seek its abolition.[56] O'Brien would therefore be justified in stating that the countries of the Caribbean remain 'conservative rather than transformative'[57] in their attitudes towards the death penalty.

An analysis of the Judicial Committee's decisions in the Caribbean's relevant case law is therefore required, in order to assess whether the Judicial Committee has acted as a legitimate constitutional court in interpreting the constitutions within the rule of law or whether the Judicial Committee have construed constitutional provisions to mean something beyond what the original drafters had intended.

3 EVOLVING CONSTITUIONAL PROTECTION: A CASE ANALYSIS

It will now be discussed whether the Judicial Committee has acted as a legitimate constitutional court ought to in protecting the citizens of the Caribbean within the rule of law through an examination of the relevant case law. This will be done firstly through an analysis of the case law in the 1970s–1980s. These cases are important even though the Judicial Committee did not make any real progress in rendering the death penalty unconstitutional. The

[49] Whitaker (n 2) 104.
[50] Saul Lehrfreund, 'International Legal Trends and the "Mandatory" Death Penalty in the Commonwealth Caribbean' (2001) 1 OUCLJ 171, 172.
[51] United Nations Office in Drugs and Crime, 'Global Study On Homicide 2013: Trends, Contexts, Data' (Vienna, 2013) <https://www.unodc.org/documents/data-and-analysis/statistics/GSH2013/2014_GLOBAL_HOMICIDE_BOOK_web.pdf> accessed 3 April 2017, 12.
[52] ibid 12.
[53] ibid 33.
[54] Amnesty International (n 26) 24.
[55] Roger Hood and Florence Seemungal, 'A Report to the Death Penalty Project and the Rights Advocacy Project of the University of the West Indies Faculty of Law' (University of the West Indies Faculty of Law 2011) 11.
[56] Hood and Hoyle (n 1) 15–48, 123–128.
[57] Derek O'Brien, 'The Caribbean Court of Justice and Reading Down the Independence Constitutions of the Commonwealth Caribbean: The Empire Strikes Back' (2005) 6 EHRLR 607, 609.

obiter dicta in the judgments suggests that the Judicial Committee were partial to a future savings clause overhaul. This will be followed by a breakdown of judgments made in the 1990s and how the emergence of a number of established principles restricted the power of the savings clauses. Finally, it is important to understand that the Caribbean has inherited from colonial times a 'two-tier' appellate system protected by the constitutions of the Caribbean countries.[58] As such, the court system consists of a trial court, a domestic appeal court, a further court of appeal and finally the Judicial Committee.[59] However, because the majority of the constitutions of the Caribbean protect the death penalty from direct constitutional challenge in the courts, the scope for review is limited. It follows that it is perhaps unjust for the Judicial Committee as a final court of appeal to intervene where it has construed a jurisdiction that it is not entitled to, regardless of where the Judicial Committee's moral intention lies. As the most recent cases concern the conflicting parameters of the Judicial Committee's jurisdiction a critical analysis of each is required and will be provided in the final part of this section.

3.1 Delay and Progression through Obiter Dictum: the 1970–1980s

Case law from the 1970s and 1980s related predominantly to the question of delay and how long a prisoner could remain on death row before their incarceration is rendered unconstitutional.

The first case to come before the Judicial Committee on this point was *De Freitas v Benny*.[60] The appellant argued that: (1) despite the presence of a savings clause, the delay contravened the prohibition on cruel and unusual treatment contained in the Constitution of Trinidad and Tobago 1962, s 2(b);[61] (2) the imposition of the sentence would infringe his rights under section 1(a*)* not to be deprived of life 'except by due process of law';[62] and (3) there was a distinction between the passing of a death sentence (which was a judicial act and therefore immune from challenge) and the executing of such a sentence (which as an executive act, was open to challenge).[63] The Judicial Committee, however, dismissed the appeal.

In relation to argument (3), the Judicial Committee held that the distinction did not 'bear examination'[64] because it was 'clear beyond all argument'[65] that the executive act of carrying out the death penalty is authorised by savings clauses that were in force prior to the enactment of the Constitution. This included the Offences Against the Person Ordinance 1925, s 4(1), which stated that 'Every person convicted of murder shall suffer death as a felon' and the Criminal Procedure Ordinance, s 59, which authorised the handing of a prisoner over to the prison marshal for execution.

In relation to argument (1) concerning delay, the Judicial Committee had some 'difficulty in formulating the alternative argument'.[66] This was because the appellant sought to argue that prior to independence the 'average'[67] time spent on death row did not exceed five months and the fact that he had spent more than five months was enough to give rise to an infringement of an 'unwritten rule of law' within the definition of 'law' found in section 105(1) of the Constitution. The Judicial Committee placed a significant degree of emphasis on the word 'average'. They held that because the average time spent on death row had increased, that this substituted a new 'unwritten rule of law' which 'conflicts with the very concept of the nature of a law' and would leave nothing to legalise the carrying out of any death sentences regardless of delay.[68] *De Freitas* thus showed how the Judicial Committee initially strictly interpreted a Caribbean constitution.

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[58] Edward Fitzgerald, 'Commonwealth Caribbean' in Peter Hodgkinson and Andrew Rutherford (eds), *Capital Punishment: Global Issues and Prospects* (Waterside Press 1996) 145.
[59] ibid 145.
[60] [1976] AC 239 (PC).
[61] Trinidad and Tobago (Constitution) Order in Council 1962) (SI 1962/1875), s 2(b).
[62] ibid s 1(a).
[63] *De Freitas* (n 60) 245 (Lord Diplock).
[64] ibid 245 (Lord Diplock).
[65] ibid 246 (Lord Diplock).
[66] ibid 246 (Lord Diplock).
[67] ibid 245 (Lord Diplock).
[68] ibid 247 (Lord Diplock).

However, in regards to the nature of constitutional interpretation, it was noted in the Canadian case of *Hunter v Southam Inc* that a constitution must:

> be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The Judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind.[69]

Naturally, it is predictable that the average delay on death row can fluctuate for a host of all manner of reasons and it is surely not unreasonable that a prisoner facing death should exhaust all modes of appeal before their impending execution. Thus the Judicial Committee stunted the growth and development of the Constitution by taking an overly narrow and inflexible reading of the Constitution and focusing primarily on the 'average delay'. The Judicial Committee should have placed a greater emphasis on section 2(b) of the Constitution (which proscribes cruel and unusual treatment) because they failed to prevent the execution of an individual in circumstances where it was not completely legitimate to authorise the punishment. As such, the Judicial Committee failed to act as a legitimate constitutional court.

The case of *Abbott v A-G Trinidad and Tobago* nevertheless brought hope. The appellant argued that between a seven to eight month delay on death row in disposing of a petition for reprieve constituted cruel and unusual treatment. The Judicial Committee ultimately dismissed this argument. In line with *de Freitas*, the Judicial Committee held that an appellant cannot complain about a delay caused by his action of appealing against conviction. However, the Judicial Committee went on to state that an appeal regarding a delay and time spent on death row may be admissible so long as:

> the time allowed by the authorities to elapse between the pronouncement of a death sentence and notification to the condemned man that it was to be carried out was so prolonged as to arouse in him a reasonable belief that his death sentence must have been commuted to a sentence of life imprisonment. In such a case, which is without precedent and, in their Lordships' view, would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not 'by due process of law'; but since nothing like this arises in the instant case, this question is one which their Lordships prefer to leave open.[70]

The Judicial Committee accordingly seemed willing to accept a more innovative approach in interpreting the Trinidad and Tobago Constitution because a 'delay measured in years, rather than in months'[71] suggested that some form of delay may be rendered unconstitutional in the future when applying the principle against cruel and unusual treatment. Despite this *obiter dictum*, it must be asked: why did the Judicial Committee ultimately leave the issue open? In handing down their judgment, the Judicial Committee additionally stated that:

> Their Lordships would in any event hesitate long before substituting their own opinion for that of the judges in Trinidad and Tobago, as to what constitutes a reasonable time for dealing with petitions for reprieve in that country. Judges who sit in the courts in Trinidad and Tobago know the practice in these matters and the local circumstances much better that their Lordships can hope to do.[72]

The tension between adhering to fair treatment principles and respecting the rule of law is thus proven significant. However, the failure of the Judicial Committee to develop an established principle to deal with the dilemma gives way to a degree of uncertainty.

The case of *Riley v A-G Jamaica*[73] is testament to this uncertainty. It was held that a prisoner on death row for a period exceeding five years was constitutional and not a violation of the Jamaica Constitution 1962, s 17(1), which proscribes cruel and unusual treatment. Lord Bridge stated 'delays necessarily occasioned by the appellate procedures pursued by the applicant [do not] lie in any applicants

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[69] [1984] 2 SCR 145 (Supreme Court of Canada) 155 (Dickson J).
[70] (n 4) 1348 (Lord Diplock).
[71] ibid 1348–1349 (Lord Diplock).
[72] ibid 1349 (Lord Diplock).
[73] [1983] 1 AC 719 (PC).

mouth to complain'[74] Hanging, as enshrined in section 17(2), was held constitutionally sound irrespective of delay which as Lord Scarman in his dissent stated was the wrong approach to the interpretation of a constitutional instrument'.[75] The outcome is subsequently reconcilable with *de Freitas* because the Judicial Committee ultimately adopted an exceedingly strict interpretation of the Jamaican Constitution which failed to protect the fundamental rights of the citizens of Jamaica.

Ghany asked to what extent would the Judicial Committee allow the decisions of domestic judges before they would decide to substitute those decisions with their own ruling?[76] In *Riley*, the Judicial Committee arguably went beyond merely hesitating to substitute the opinion of the domestic judges, instead failing to acknowledge the dicta relating to years in *Abbott* completely.

3.2 Established Principles: The 1990s

The 1990s oversaw significant inroads in rendering the savings clauses unconstitutional due to the issue of delay being largely amended by the establishment of a principle in *Pratt v A-G Jamaica* which took note of concerns regarding cruel and unusual treatment. Adopting a more activist approach,[77] the case concerned two men who, at the point of final appeal, had spent almost fourteen years on death row. Referring to the Jamaica Constitution 1962, ss 17(1) and 25(2),[78] the appellants argued that to hang them would be unconstitutional. Although the Judicial Committee recognised that, in line with the savings clause in section 17(2), the punishment for murder prior to independence was hanging and therefore it could not be described as an inhumane penalty, the Judicial Committee also recognised that section 17(2) did not deal with the specific issue of delay.[79] The Judicial Committee held that:

> The primary purpose of the Constitution was to entrench and enhance pre-existing rights and freedoms, not to curtail them. Before independence the law would have protected a citizen from being executed after unconscionable delay, and their Lordships are unwilling to adopt a construction of the Constitution that results in depriving Jamaican citizens of that protection.[80]

It was therefore decided that if an individual were to be executed after having spent more than five years on death row then that would be a violation of the prohibition of inhuman and degrading punishment or treatment in line with section 17(1) of the Constitution. As such a death sentence should be commuted to one of life imprisonment utilising the power under section 25(2).[81]

However, the precise definition of what constitutes an unconscionable delay is ambiguous. Why is five years deemed an acceptable delay and not say two years which, as suggested by the Judicial Committee,[82] was the amount of time it should take to complete the entire appeal process? The Judicial Committee considered that it is our humanity that discharges an 'instinctive revulsion'[83] in hanging a man after he has spent 'many years'[84] on death row. This rationale alone is inadequate in calculating the five-year time limit. The reasoning behind such decisions should be based upon the construction of the Constitution, rather than the Judicial Committee's 'own predilections and moral values'.[85] To solicit emotive language alone would render the decision 'tenuous'.[86]

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[74] ibid 724 (Lord Bridge).
[75] ibid 727 (Lord Scarman).
[76] Hamid A Ghany, 'The Death Penalty, Human Rights and British Law Lords: Judicial Opinion on Delay of Execution in the Commonwealth Caribbean' (2000) 4 IJHR 30, 35.
[77] (n 6) 436.
[78] Section 25(2) provides that 'orders [to commute a death sentence to life imprisonment] as it may consider appropriate for the purpose of enforcing … any of the provisions [relating to human rights and fundamental freedoms.]'
[79] (n 5) 29 (Lord Griffiths).
[80] ibid 29 (Lord Griffiths).
[81] ibid 35 (Lord Griffiths).
[82] ibid 34 (Lord Griffiths).
[83] ibid 29 (Lord Griffiths).
[84] ibid 29 (Lord Griffiths).
[85] *Reyes v The Queen* [2002] UKPC 11, [2002] 2 AC 235 [26] (Lord Bingham).
[86] Gayle (n 24) 141.

Nonetheless, the Judicial Committee stated that a number of other factors must be weighed in the balance. For one, if the defendant abuses the appellate system either by escaping or through embarking on 'frivolous'[87] time wasting then they may not escape punishment.[88] Conversely, it may also be argued that allowing a defendant every opportunity to appeal to the appropriate appellate bodies to prolong his life cannot be inhuman or degrading no matter how long the delay.[89] Settling somewhere in the middle, the Judicial Committee concluded that it is perfectly natural for someone to want to appeal against a sentence of death.[90] However they also stated that where an appellate system permits a delay amounting in years 'the fault is to be attributed to the appellate system that permits such a delay and not to the prisoner who takes advantage of it'.[91]

Campbell has argued that in intervening in the Jamaican Constitution in this way, the Judicial Committee:

> have performed a volte-face since independence, undermining, in an undemocratic and ironic form of neocolonialism, penal practices that were once endorsed and enforced by British officials.[92]

The inequitable premise of this argument would have been politically persuasive during the passing of the judgment in *Pratt* due to the Caribbean's high murder rates.[93] However, in striking a balance between the two approaches the Judicial Committee theoretically should have avoided this criticism because, in providing a generous interpretation of section 17(1), they were able to adhere to principles that prohibited cruel and inhuman treatment while also respecting the savings clause in section 17(2). They have not rendered the mandatory death sentence entirely unconstitutional, only an element of the process concerning delay. Furthermore, in light of political concerns regarding high murder rates and the propensity for the restrictive nature of Judicial Committee judgments to 'irk'[94] the governments of the Caribbean, the Judicial Committee ensured it did not recklessly impose this new limitation on the savings clause. In exercising a degree of rationality the Judicial Committee emphasised their regard for these concerns noting that:

> Their Lordships are very conscious that the Jamaican government faces great difficulties with a disturbing murder rate and limited financial resources at their disposal to administer the legal system.[95]

However, the Judicial Committee rightly went on to state that if capital punishment was retained, 'it must be carried out with all possible expedition' to avoid acting in a disproportionately cruel manner.[96] Thus, in providing a time limit, the Judicial Committee remedied uncertainties concerning delay. Moreover, the Judicial Committee did not act beyond its competence because it protected the fundamental freedoms of the people of Jamaica by interpreting the Constitution in a flexible manner thus giving weight to provisions that seek to safeguard the citizens against cruel and unusual treatment.

The success of the *Pratt* decision was further evidenced in its spread throughout the Caribbean.[97] However, the principle did not account for cases that just fell short of the 5 year limit. This was the issue that faced the appellant in *Reckley v Minister of Public Safety and Immigration (No 1)*.[98] As the petitioner had spent four and a half years on death row, the *Pratt* principle was deemed 'hopeless'.[99] Nonetheless, the problem was remedied in *Guerra v Baptiste*.[100] In adopting a more pragmatic approach, the Judicial Committee concluded that the time limit should not be

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[87] *Pratt* (n 5) 29 (Lord Griffiths).
[88] ibid 29 (Lord Griffiths).
[89] ibid 30 (Lord Griffiths).
[90] ibid 33 (Lord Griffiths).
[91] ibid 33 (Lord Griffiths).
[92] *Campbell* (n 6) 438.
[93] UNODC (n 51) 12.
[94] Darcus Howe, 'A Quaint Colonial Relic – But at Least It Saves the People from being Hanged' (2003) 132 New Statesman 13.
[95] *Pratt* (n 5) 34 (Lord Griffiths).
[96] ibid 34 (Lord Griffiths).
[97] *Bradshaw v Attorney-General of Barbados* [1995] 1 WLR 936 (PC).
[98] [1995] 2 AC 491 (PC).
[99] ibid 498 (Lord Browne-Wilkinson).
[100] [1996] AC 397 (PC).

used in any way the state wished but as an upward limit that would only be acceptable if the proceedings had been carried out with all possible expedition. It was not intended to allow any procrastination up to that five-year point. Lord Goff stated that 'the period of five years was not intended to provide a limit, or a yardstick'[101] As such, *Guerra* represents a welcomed further progression of constitutional protection as it established as a relatively flexible guideline that allowed for a proportionate amount of judicial discretion.

However, there remained the case *Walker v The Queen,*[102] which came as an exception following the decision in *Pratt*. The appellants were convicted of murder and sentenced to death. They were granted permission to appeal to the Judicial Committee because they had suffered an abnormally long delay on death row and as a result there was a supposed violation of their constitutional rights in line with *Pratt*.[103] They also contended that, because the jurisdiction of the Judicial Committee was founded on the royal prerogative, the Judicial Committee had sufficient width to enable them to become 'seised'[104] of the case. As a result, the Judicial Committee could have assumed a jurisdiction which would have allowed them to render the proposed execution inhumane and constituting of unusual treatment under the Judicial Committee Act 1833, s 3 Section 3. preserves the same jurisdiction for the Judicial Committee as was previously exercised by the Sovereign in Council. Alternatively, they also contended that under section 25(2) of the Jamaican Constitution, the Judicial Committee could have ordered a permanent stay on terms or that the death sentence should be commuted by the Governor-General.

Their appeal was ultimately rejected by the Court of Appeal of Jamaica because the jurisdiction of the Judicial Committee was held to be an appellate jurisdiction and derived from the Judicial Committee Act 1833, s 3 and Judicial Committee Act 1844, s 1.[105] Due to the fact that the appellants had not appealed against the sentence of death because of its mandatory nature, this was not an appeal against the judgment of the Court of Appeal. If it had been, then the Court of Appeal would have had no jurisdiction to alter the mandatory nature of the sentence by virtue of the Jamaican Judicature (Appellate Jurisdiction) Act 1962, s 13(1)(c)[106] in any case. Although the time taken between conviction and appeal was longer than was desirable, at no point was it suggested to the Court of Appeal or to the Judicial Committee that at the time of hearing the Court of Appeal decision was wrong. Thus, the respondents vehemently contended that there is a difference between an appeal from a Court of Appeal or any other inferior court and a first instance challenge brought against an act of the executive, the Judicial Committee only having the jurisdiction in the case of the former. The Judicial Committee cannot preside over such matters until they have been exhausted by the Jamaican domestic courts.[107]

Consequently, the Judicial Committee found for the respondents in that the Judicial Committee was not seised of the case and did not have the jurisdiction to preside over such matters. The death penalty could not have been removed from the case ambit as it was lawfully imposed and because the Judicial Committee did not have the jurisdiction to act as it essentially was acting as an ordinary appeal court the mandatory death sentence could not be removed. There can be little doubt that this case introduces a significant degree of uncertainty into the jurisprudence. If the Judicial Committee does indeed have the jurisdiction to act should it preside over such issues where someone's life is at risk in the light of such uncertainty?

The answers to these questions will be discussed in the next section. However, for the purposes of the present case, although a morally unsatisfactory outcome (particularly considering that five years had lapsed) it is logical that a first instance appeal should be taken through the domestic courts before reaching the Judicial Committee as the final court of appeal.

3.3 Mandatory Death Sentence: The 21st Century

The 21st century has seen a shift in appeals from matters relating to delay, to issues concerning the

[101] ibid 414 (Lord Goff).
[102] [1994] 2 AC 36 (PC).
[103] ibid 43–44 (Lord Griffiths).
[104] ibid 44 (Lord Griffiths).
[105] (7 & 8 Vict c 69)
[106] Section 13(1)(c) states: 'A person convicted on indictment in the Supreme Court may appeal under this Act to the Court with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.'
[107] *Walker* (n 102) 44 (Lord Goff).

constitutionality of the mandatory death sentence and concerns regarding the Judicial Committee jurisdiction.

In *Roodal v Trinidad and Tobago*[108] the appellant was convicted of murder and sentenced to a mandatory death sentence under the Offences Against the Person Act 1990, s 4. Appealing against his sentence on the grounds that section 4 was construed by the Interpretation Act 1980, ss 64 and 68, (which prescribed the maximum and not the only penalty for murder) the appellant successfully argued that section 4 could, in fact, be modified by means of the Constitution of Trinidad and Tobago 1976, s 5(1). This would have brought the case in line with section 5(2)(b) of the Constitution which proscribes cruel and inhuman treatment. Section 5(1) permits 'such modifications, adaptions, qualifications and exceptions as may be necessary to bring [existing laws] into conformity with' the Constitution.

However, this proposed ability to modify section 4 must be balanced against the savings clause in section 6 Trinidad and Tobago (Constitution) Order in Council 1962, which stated that section 5 'will not apply' to existing law. This 1962 Constitution differs to the post-republic 1976 Constitution of Trinidad and Tobago which states that section 5 'shall not invalidate' an existing law. The Judicial Committee contended that the change was intended to lessen the 'austerity of tabulated legalism'[109] or harshness of the savings clause.[110] Unable to cite any supporting authorities due to the unprecedented nature of the case, the Judicial Committee justified its reasoning by giving broad interpretation to section 5 while giving a narrow interpretation to the savings clause in section 6,[111] thus remedying the tension between the two. Accordingly, the Judicial Committee accepted that a modification could be made to the Offences Against the Person Act 1990, s 4, regarding the mandatory nature of the death penalty to render it discretionary.

Lords Millett and Rodger, however, presented a robust and highly persuasive dissenting judgement arguing that the Court of Appeal was correct in rejecting the appellant's appeal calling for the abolition of the mandatory death sentence. They stated that the most fundamental flaw in the majority's reasoning relates to the nature of the Interpretation Act 1980 because nowhere else in the Offences Against the Person Act 1990 lies an alternative sentence for murder other than section 4 which states that 'every person convicted of murder shall suffer death.' The relevant provisions of the Interpretation Act 1980 are found in statutes and as a result they are not intended to confer on the courts the substantive powers of punishment. Thus there is no authorisation for administering a sanction for the crime of murder other than death.[112] They argued that section 4 could only have been modified if it was inconsistent with the Constitution, which in their opinion, was not the case.[113] Section 5(1) is not applicable, and thus, section 4 is not void.[114] To suggest that everyone in the preceding years had been mistaken as to the existence of a mandatory death penalty was 'far-fetched and indeed more than a little patronising'.[115] They even went as far to state that the opinion advanced by the majority was 'liable to subvert the operation of the Constitution'.[116]

The dissenting judgment bears significant weight. The difference in wording between section 5 of the 1962 Constitution ('will not apply') and section 6 of the 1976 Constitution ('shall not invalidate') is, by definition, minor. True, it appears slightly less harsh however it has not been changed so drastically as to legitimise such a broad interpretation that will render the entirety of the mandatory death sentence unconstitutional. The criticism that the judgment of the minority is austere 'tabulated legalism'[117] is consequently overstated because the action of not applying and the action of not invalidating both continue to incur similar negative and restrictive connotations. Furthermore, the attempt to give greater weight to cruel and inhuman treatment is admirable as

[108] [2003] UKPC 78, [2005] 1 AC 328.
[109] *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC) 328 (Lord Wilberforce).
[110] *Roodal* (n 108) [28] (Lord Steyn).
[111] ibid [26] (Lord Steyn).
[112] ibid [46].
[113] ibid [46].
[114] ibid [46].
[115] ibid [47].
[116] ibid [76].
[117] *Fisher* (n 109) 328 (Lord Wilberforce).

it shows that, to an extent, the Judicial Committee is acting to protect the fundamental rights of the citizens of the Caribbean. However, ultimately, in rendering the mandatory death sentence discretionary considering the continued strength of the savings clause even after the Trinidad and Tobago 1976 Constitution, the Judicial Committee failed to act as a legitimate constitutional court because they construed the Constitution's provisions beyond their correct meaning.

Nonetheless, the case *Matthew v Trinidad and Tobago*[118] remedied the situation by overruling *Roodal.* The majority referred to section 2 of the 1976 Constitution whereby Trinidad and Tobago law is supreme and that any other law 'shall be void to the extent of the inconsistency.'[119] The judgment also referred to section 4, the right to life and section 5(2)(b) that Parliament may not impose 'cruel or unusual treatment or punishment'. Yet, as seen in the dissenting opinion in *Roodal*, an overwhelming emphasis was correctly placed on section 6(1) of the 1976 Constitution that nothing in sections 4 and 5 shall invalidate an existing law. Since the language of section 6(1) was 'so clear',[120] the mandatory death sentence could not be rendered unconstitutional, meaning that the Judicial Committee did not construe the law beyond its true meaning.

However, because *Roodal* had been decided only a year previously, the Judicial Committee nevertheless decided to commute the sentence to life imprisonment under section 14(2) of the 1976 Constitution.[121] It was plausible the appellant had anticipated that a judge would use his discretion to set aside his death sentence (in line with *Roodal*) and to execute him after official communication would be cruel and would not uphold an acceptable level of human rights.[122] In doing so, the Judicial Committee exercised its power by analogy with the Judicial Committee's decision in *Pratt:* here the Judicial Committee exercised power vested in the Supreme Court of Jamaica in accordance with section 25(2) of the Jamaican Constitution.[123] This may, to an extent, seem encouraging because it displays the Judicial Committee's regard for protecting fundamental rights and liberties. It is hard to imagine that the overturning of *Roodal* to render the mandatory death sentence for murder constitutional would be anything other than distressing when a defendant would likely expect to have their sentence commuted. However, it seems contradictory to read the 1976 Constitution as it should have been read, only to reduce the sentence in any case. It would have perhaps been more to the point for the Judicial Committee to establish a legal principle as it did in *Pratt.*

The return of the law to a pre-*Roodal*, state whereby if you commit murder you will receive the mandatory death sentence, opens the Judicial Committee up to the criticism that court took an overly passive approach regarding the protection of the fundamental rights and freedoms. A by-product of that criticism is that this judgment has the effect of setting a defined precedent that sentences murderers to death who should not have been sentenced as such.[124] What is more, *Matthew* establishes a principle, the strict nature of which could have been applied to the interpretation of all existing laws.[125] This development could be seen as a limitation because it may limit the scope for protecting fundamental rights in the future.

However, the majority 'anxiously considered'[126] whether there was any way to give weight to the argument that section 5(1) of the 1976 Constitution could modify the existing provisions to give way to a discretionary death sentence. Considering the strength of the savings clause, the Judicial Committee thus did not act in an unreasonably submissive manner in failing to render the death sentence discretionary because it did not wholly omit to consider the alternative, i.e. a discretionary sentence. What is more, Lord Hoffman accepted that the Constitution is a

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[118] [2004] UKPC 33, [2005] 1 AC 433 (PC).
[119] ibid [1] (Lord Hoffman).
[120] ibid [2] (Lord Hoffman).
[121] Section 14(2) states that 'The High Court shall have original jurisdiction [where] any person alleges that any of the provisions [relating to fundamental rights and freedoms] of this Chapter has been, is being, or is likely to be contravened in relation to him'.
[122] (n 118) [31] (Lord Hoffman).
[123] Section 25(2) states: 'orders to commute a death sentence to life imprisonment … as it may consider appropriate for the purpose of enforcing … any of the provisions [relating to human rights and fundamental freedoms.]'
[124] *Khan v Trinidad and Tobago* [2003] UKPC 79, [2005] 1 AC 374 [25]–[26] (Lord Steyn).
[125] Graeme Broadbent, 'Trinidad and Tobago: Constitutionality of Mandatory Death Penalty' (2004) 68 JCL 488, 498.
[126] *Matthew* (n 118) [6] (Lord Hoffman).

'living instrument'[127] and should be flexibly interpreted. However he also circumstantially envisaged that a number of limiting factors could mean that 'not all parts of a constitution allow themselves to be judicially adapted … in the same way'.[128] Although contrary to British values concerning the death penalty, it must, therefore, be respectfully accepted that the majority were correct. It is not archaic, nor is it retrograde to recognise that the 'living instrument' principle cannot construe a legal provision to mean something that it does not.[129] To do so would be for the Judicial Committee to undermine itself as a legitimate constitutional court.

3.4 Jurisdictional Uncertainty: The 21st Century

Alongside constitutional issues concerning delay and the mandatory sentence, the Judicial Committee has also had to increasingly deal with questions concerning jurisdiction and whether the Judicial Committee can act. In *Ramdeen v Trinidad and Tobago*, the appellant argued that carrying out a death sentence more than 5 years after conviction would constitute inhuman and degrading treatment in line with *Pratt*. The respondent argued that the Judicial Committee should refuse leave to appeal because it had no jurisdiction to entertain such an appeal in line with *Walker*. Thus, two questions were asked: (1) does the Judicial Committee indeed have the jurisdiction to act? And (2) should the Judicial Committee have the jurisdiction to act?[130] In answering these questions, it was considered whether the Court of Appeal would have the jurisdiction to do that which the Judicial Committee was being invited to do and whether the Judicial Committee would be exercising an original jurisdiction.[131] In line with *Walker*, the case concerned the imposition of the mandatory death sentence and therefore it is not susceptible to valid appeal due to the mandatory nature of the punishment.[132] However, the same was true for *Matthew* where the Judicial Committee nevertheless struck a balance and held that it had the jurisdiction to commute the sentence where carrying it out after reassuring the appellant into a false sense of security in the short space of time post-*Roodal* would infringe the prohibition on cruel and unusual treatment under section 14(2) of the 1976 Constitution. What is more, appellant procedures had resulted in a time lapse that put the prospect of the imposition of the death sentence at odds with the decision in *Pratt.*

The majority accepted that in appeal cases concerning conviction or sentence where there is an objection to a death sentence, the Judicial Committee cannot consider carrying out a death sentence where the original lawfulness of the sentence is not challenged. However, where there is a genuine appeal against conviction, the majority held that the Judicial Committee is 'seised'[133] of the case and proceedings as a whole and thus has a monopoly over the power to decide or recommend, accordingly rendering the death penalty discretionary.[134] Moreover, the Judicial Committee considered the case in the light of unalloyed fairness concluding that they should 'do everything it properly can' to bring the appellants suspense to an end.[135]

However, the dissenting judgments of Lords Mance and Lord Sumption take a different and, ultimately, the correct view that the Judicial Committee did not have the jurisdiction to act as it did. Referring to Matthew and the utilisation of section 14 of the 1976 Constitution to commute the sentence, the dissent held, as summarized by Lord Toulson, that:

> Factors which might make it extremely desirable to exercise a jurisdiction, if it exists, cannot justify the Court arrogating itself a jurisdiction, if on the proper language of the Constitution no such jurisdiction exists.[136]

Thus, Lord Mance argued that the Judicial Committee 'is not seised of any appeal against sentence'[137] and therefore had no jurisdiction to preside over such issues because the appellant should have sought to have her sentence stayed and commuted or remitted by

[127] *Boyce v The Queen* [2004] UKPC 32, [2005] 1 AC 400 [28] (Lord Hoffman).
[128] ibid [29] (Lord Hoffman).
[129] Thomas Roe, 'Living Instruments and the Death Penalty' (2005) 64 CLJ 14, 17.
[130] *Ramdeen* (n 7) [35] (Lord Toulson).
[131] ibid [40] (Lord Toulson).
[132] ibid [47] (Lord Toulson).
[133] ibid [68] (Lord Neuberger).
[134] ibid [68] (Lord Neuberger).
[135] ibid [69] (Lord Neuberger).
[136] ibid [53] (Lord Toulson).
[137] ibid [73] (Lord Mance).

the President by virtue of sections 87–89 of the 1976 Constitution. Failing that, the appellant should then have applied at first instance to the High Court under section 14 of the 1976 Constitution rather than to the Judicial Committee because applicants must exhaust the domestic court system before applying to the Judicial Committee.

Moreover, in highlighting this strategy, Lord Mance went to lengths also to emphasise that in Trinidad and Tobago no one had been executed since 1999[138] and that the President, aided by an Advisory Committee and the High Court, would 'consider all of the circumstances, of the offence and as they exist now'.[139] Additionally, Lord Mance stated that because of the expiration of the five-year time limit there would be a good chance that the sentence would be commuted as the *Pratt* principle was binding in Trinidad and Tobago.[140] Lord Mance further contended that 'the Privy Council should not lightly usurp all or any part of a local jurisdiction of either nature'.[141] While there is a clear desire to protect the interests of the appellant against the principles of unfair and inhumane treatment in the judgment of the majority, the Judicial Committee must not create a jurisdiction for itself that it does not have.

What is more, it seems ambiguous as to what constitutes being 'seised' of the case. To the majority in *Ramdeen*, it meant that because permission had been given to appeal against her conviction, the Judicial Committee was seised of the case and thus had the jurisdiction to commute the sentence. However, the minority argued that the Judicial Committee was not seised of the case, it was in fact the President or the High Court of Trinidad and Tobago which was seised of the case. This uncertainty ultimately brings the role of the Judicial Committee into question. As an international court of final appeal it is undesirable that it should preside over an individual's life in a situation where it is unclear whether the Judicial Committee has the jurisdiction to decide such matters.

Finally, the most recent case to have been considered by the Judicial Committee was *Hunte v Trinidad and Tobago*. Concerning similar issues to *Ramdeen,* the majority here adopted a more principled stance with Lord Toulson admitting that 'I am now persuaded that it [his decision in *Ramdeen*] was wrong'.[142] The appellants initially appealed to the Court of Appeal against their convictions and their case was duly dismissed. They then appealed to the Judicial Committee against the dismissal of their appeal. In addition, they sought permission to appeal against the mandatory sentence of death for the first time before the Judicial Committee on the grounds that 'a) it would now be unconstitutional for the sentence of death which was passed on each of them to be carried out and, b) the Board has the necessary jurisdiction to order commutation.'[143] The respondent did not question the constitutionality of the mandatory death sentence but it did submit that the Judicial Committee does not have jurisdiction to commute the sentences. The respondent argued that the High Court had the jurisdiction to order the commutation of the sentences on an application made under sections 14(1) and (2) of the 1976 Constitution.[144]

The majority correctly stated that in accordance with section 109 of the 1976 Constitution, the Judicial Committee's jurisdiction is statutory and was based upon the same jurisdiction of the Court of Appeal in Trinidad and Tobago.[145] Since the mandatory death sentence was lawful at the time it was handed down to the appellants; it was agreed that the Court of Appeal did not have the jurisdiction under the Supreme Court of Judicature Act 1962 to entertain appeals against the sentence.[146] Furthermore, because the appellants did not submit an application in regards to delay rendering the death penalty unconstitutional, sections 14(1) and (2) of the 1976 Constitution granting original jurisdiction to determine applications concerning constitutional violations to the High Court of Trinidad and Tobago could not have been applicable because no application had been made.[147]

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[138] ibid [77] (Lord Mance).
[139] ibid [77] (Lord Mance).
[140] ibid [77] (Lord Mance).
[141] ibid [79] (Lord Mance).
[142] (n 9) [50] (Lord Toulson).
[143] ibid [44] (Lord Toulson).
[144] ibid [51] (Lord Toulson).
[145] ibid [51] (Lord Toulson).
[146] ibid [55] (Lord Toulson).
[147] ibid [68] (Lord Toulson).

Therefore, in line with *Walker*, if the Judicial Committee allowed the appeal against the sentence and ordered a commutation of the death sentence they would have made an order which the Court of Appeal would not have had any jurisdiction to make and would be exercising an original jurisdiction it did not have.[148] In terms of the case in relation to *Matthew*, Lord Toulson explained that the notion that the Judicial Committee had the Jurisdiction to set aside the mandatory death sentence under section 14(2) 'seems to have been made without the benefit of any argument'[149] and with no clear explanation of the case in terms of the decision in *Walker*. The two cases could not, in the view of the majority, be reconciled.[150] Lord Toulson then asked whether the decisions in *Matthew* and *Ramdeen* should be held to constitute an exception to the rule in *Walker*.[151] As such, Lord Toulson noted that the decision in *Matthew* lacked full reasoning and although the decision in *Ramdeen* was fully reasoned, much of the precedent used was founded on *Matthew*.[152] Moreover, if the Judicial Committee takes on a judicial power which it did not possess contrary to the provisions of the 1976 Constitution, then it would essentially be damaging respect for the rule of law.[153]

Finally, allowing *Matthew* and *Ramdeen* to stand as exceptions to the rule in *Walker* would only cause more uncertainty in regards to where the Judicial Committee's jurisdiction begins and ends. Lord Neuberger convincingly noted that we should avoid uncertainty[154] and that because the decision in *Ramdeen* was very recent, questions as to its legitimacy refer to whether it was decided correctly rather than whether its legitimacy has faded through the passage of time.[155] Where it is questionable whether the Judicial Committee has jurisdiction or not, it is favourable that Judicial Committee should not construe the law in order to create a jurisdiction it does not have because, however distasteful to Western moral dogma the death penalty may be, the Judicial Committee must interpret the principles of a constitution proportionately. What is more, Lord Toulson's point regarding the reasoning in *Ramdeen* being based upon *Matthew* is interesting. In *Matthew*, the death sentence was commuted under section 14 of the 1976 Constitution in consideration of the short time period that had passed in the interest of proscribing cruel and unusual treatment. However, no guidelines regarding this time period were provided and it is difficult to ascertain at what point section 14 can be invoked. This adds to the inherent uncertainty concerning the Judicial Committee's jurisdiction.

In contrast, Lady Hale dissented on the issue of sentence holding that *Ramdeen* was decided correctly.[156] In her dissent, she asked whether the Judicial Committee was 'obliged to prolong the "death row" experience [which is a] violation of constitutional rights, because the matter has become before it on a criminal appeal rather than by way of constitutional motion?'[157] In answering that question, she stated that to prolong the death row experience where section 14 of the 1976 Constitution clearly states that the violation of constitutional rights can be remedied would be wrong.[158] What is more, in terms of *Walker*, she goes on to state that it was a 'pragmatic decision, designed to stop all *Pratt* "death row" cases from being brought before the Board rather than the local authorities'.[159] Thus, Lady Hale concluded that the majority decision is 'morally unacceptable and, more importantly, not what the Constitution intended'.[160] Yet, whilst Lady Hale adopts an admirably rights-based discourse, she construes the law disproportionately beyond what it should be. The notion that *Walker* was a practical decision is overly presumptive given the sound reasoning that underpins that case. What is more, the fact that the outcome is 'morally unacceptable' is ill-founded because, as noted previously, the Judicial Committee should not ingrain its own moral 'predilections'[161] into interpreting the constitutions of the Caribbean. To do

[148] ibid [56]–[58] (Lord Toulson).
[149] ibid [61] (Lord Toulson).
[150] ibid [62].
[151] ibid [63].
[152] ibid [67].
[153] ibid [68].
[154] ibid [75].
[155] ibid [77].
[156] ibid [106].
[157] ibid [96].
[158] ibid [96].
[159] ibid [106].
[160] ibid [106].
[161] *Reyes* (n 85) [26] (Lord Bingham).

so would be to undermine the legitimacy of the Judicial Committee as a constitutional court.

Consequently, although the power of the savings clause in maintaining the death penalty as a constitutional form of punishment can be seen throughout the period, clear inroads have been made in rendering aspects of the process of carrying out the death penalty unconstitutional. However, by the 21st century, much of the case law surrounding issues to do with the mandatory death penalty, court jurisdiction and the interpretation of constitutional principles has been interpreted differently thereby leading to the fragmentation of the Caribbean's case law. This has added a significant amount of uncertainty and demonstrates that the Judicial Committee has not acted as a legitimate constitutional court should because they have not acted in accordance with the rule of law.

4 REPLACING THE JUDICIAL COMMITTEE WITH THE CARIBBEAN COURT OF JUSTICE

This section will focus on whether, in the light of the Caribbean's fragmented death penalty case law, the Judicial Committee should be removed in favour of accession to the Caribbean Court of Justice. Since attitudes towards the death penalty vary dramatically between the United Kingdom and the Caribbean, Judicial Committee judges have likely found themselves embroiled in a 'moral paradox'.[162] This has impacted the way in which the Judicial Committee has interpreted the constitutions as evidenced by the fragmented case law. The importance of this cannot be understated because the uncertainty that ensues renders many of the Judicial Committee's decisions tenuous, especially where matters of jurisdiction are at issue. Considering that a human life is at risk, it is unjust that the Judicial Committee, as a foreign court, should interpret constitutions to mean something that they do not. Thus, this section will highlight how and why accession to the Caribbean Court of Justice, a court with an intimate understanding of the Caribbean's local politics and cultures, would lead to a more discerning reading of the constitutions of the Caribbean. This will be done firstly through a further analysis of the uncertainty surrounding the Judicial Committee's jurisdiction. This will then be followed by an assessment of the uncertainty that has ensued from the Caribbean's fragmented death penalty case law.

4.1 The Caribbean Court of Justice as a Final Court of Appeal: Is There Jurisdictional Uncertainty?

A principal concern regarding the viability of the Judicial Committee versus that of the Caribbean Court of Justice is the issue of inherent uncertainty. The matter was first raised in *Walker* (and later addressed in *Ramdeen* and *Hunte*) and concerned whether the Judicial Committee had the jurisdiction to act, and if it did, should it have acted?[163] As explained in *Walker,* the Judicial Committee must become 'seised' of a case for it to obtain jurisdiction to act. Weighing in the balance was the notion that as the Judicial Committee was founded under the royal prerogative it may have the width to assume jurisdiction. There was also the notion that at no point was it argued that the decision of the Court of Appeal of Jamaica was wrong, merely that the appellants wished to appeal against the fact that delay on death row violated their constitutional rights. The appellant's prior appeals to the Court of Appeal of Jamaica were concerned only with a conviction of murder, not delay. Thus, it was legitimate that the Judicial Committee should only have the jurisdiction to act where all domestic avenues have been exhausted, and therefore it was correctly held that the Judicial Committee was not seised of the case. The Judicial Committee could thus not impose *Pratt* and commute the sentence because it did not have the jurisdiction to do so. This reasoning was later rejected in *Ramdeen*, but then adopted again in *Hunte.*

Nevertheless, whilst *Hunte* was decided correctly it cannot be detracted from the fact that the fragmentation inherent in the case law does cast a shadow of uncertainty over the Judicial Committee's decisions in the Caribbean's death penalty case law. Considering that an individual's life is at risk it may be unjust that a foreign final court of appeal should take such decisions. Furthermore, where there is also a significant degree of uncertainty relating to whether the Judicial Committee does in fact have the jurisdiction to act in such cases, it may be preferable for it not to act. It may be more appropriate for the Caribbean Court of Justice to handle such cases because it is comprised of local judges who are aware

[162] Gayle (n 24) 139.
[163] *Ramdeen* (n 7) [35] (Lord Toulson).

of the local realities[164] which may make them more accountable. This would remedy the criticism that there is a severe disconnect between the Judicial Committee in Westminster and the realities of the Caribbean.[165] Moreover, the continuation of the Judicial Committee as the final court of appeal in cases where matters of jurisdiction are questioned may lead to the Judicial Committee construing a jurisdiction, as it did indeed do in *Ramdeen*, where it should not. Even in *Hunte*, where the majority interpreted the Trinidad and Tobago 1976 Constitution correctly, Lady Hale's dissent focusing on her revulsion of the sentence and her own moral guilt, reflects that the Judicial Committee judges may have another agenda and are perhaps willing to undermine entrenched constitutional law in the furtherance of their own opinions. This in turn begs the question of whether the Judicial Committee should be presiding over such issues altogether, especially as the death penalty no longer forms a part of English law.

4.2 The Caribbean Court of Justice: A Guard Against Judicial Activism?

In lamenting the quality of the Judicial Committee's judges,[166] Morrison finds weight in Belle Antoine's contention that the constitutions of the Caribbean are of a 'norm-building and evolutionary character'[167] and that in acting in a fair and flexible manner Judicial Committee judges have ensured that the region stays in line with increasingly abolitionist driven international human rights norms.[168] The *Pratt* case is a practical example of this. Reasons for the refusal of the permission to appeal to the Jamaican Privy Council by the Court of Appeal were delayed for 4 years, after which the Governor-General refused to commute the sentences. Requests from the Inter-American Commission on Human Rights and the United Nations Human Rights Committee, applying international norms concerning human rights, requested unsuccessfully that the sentences be commuted. Ultimately, after almost fourteen years had passed since sentencing, the Judicial Committee became seised of the case and, in declaring that a prisoner who spends more than five years on death row should have their sentence commuted on grounds of inhuman and degrading treatment, the Judicial Committee showed their ability to adapt in order to ensure 'the integrity of the decision-making process'[169] was executed fairly through providing a minimum level of protection which did not exist prior to the judgment. Thus, in engaging with external legal norms, Morrison's argument is bolstered by the contention that accession to the Caribbean Court of Justice would bring with it problems concerning the politicisation of the Caribbean judiciary and the threat of corruption. This was illustrated in 2006 by the suspension of Chief Justice Sharma of Trinidad and Tobago on corruption allegations.[170] Such allegations play into the hands of the argument that wishes to retain the Judicial Committee. Although the Judicial Committee ruled that a legislative attempt by Jamaica to replace the Judicial Committee with the Caribbean Court of Justice was inconsistent with the Constitution on the basis that it did not guarantee the independence of the Caribbean Court of Justice's judges,[171] there are very few cases to support claims that the Caribbean Court of Justice is corrupt. The issue is thus largely unfounded.

Furthermore, the fragmentation throughout the cases *Roodal*, *Matthew* and *Ramdeen* have all in one way or another undermined Morrison's contention that the Judicial Committee is ensuring the veracity of its decision making process because each case exhibits the Judicial Committee's overly activist tendencies to construe a constitution beyond its meaning. In *Roodal*, the Judicial Committee attempted to construe the wording of the 1976 Constitution 'shall not invalidate' an existing law to justify lessening the harshness of the savings clause. However, the original wording found in the 1962 Constitution stated 'will not apply', the negative connotations are seemingly not too dissimilar to justify a complete modification of the Constitution. The motive behind the attempt to give greater weight to cruel and inhuman treatment was admirable as it shows that the Judicial Committee is acting to protect the fundamental rights of the citizens of the Caribbean to an extent. Ultimately, however, in rendering the

[164] S Vasciannie, 'The Caribbean Court of Justice: Further Reflections on the Debate' (1998) 23 WILJ 37, 53.
[165] Ibhawoh (n 10) 33.
[166] Dennis Morrison, 'The Judicial Committee of the Privy Council and the Death Penalty in the Commonwealth Caribbean: Studies in Judicial Activism' (2006) 30 Nova L Rev 403, 406.
[167] Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (Cavendish 2008) 81.
[168] Morrison (n 166) 410.
[169] ibid 416.
[170] Malleson (n 19) 675.
[171] *Independent Jamaica Council for Human Rights (1998) Ltd v Marshall-Burnett and the A-G of Jamaica* [2005] UKPC 3, [2005] 2 AC 356.

mandatory death sentence discretionary and considering the continued strength of the savings clause even post the 1976 Constitution, the opinion advanced by the majority in *Roodal* construes those provisions beyond their true meaning. It would have perhaps been more appropriate for such views to remain as strong *obiter dicta*. Likewise, in *Matthew* and *Ramdeen*, the Judicial Committee acted in an overly activist manner because it construed the 1976 Constitution to ensure that they could argue that they did not have the original jurisdiction to implement the death penalty, despite having accepted the constitutionality of the punishment in *Matthew*, and their acknowledgment of the savings clause in *Ramdeen.* Thus, there is significant weight in the notion that appeals to the Judicial Committee have represented a 'vestigial incongruity [and] a contradiction in the constitutional symbolism of a politically independent sovereign order'[172] because the Judicial Committee has bypassed laws relating to the death penalty which are expressly incorporated into the rule of law. As Sir David Simmons pointed out, the Judicial Committee has 'in case after case went beyond acceptable judicial activism and was clearly [legislating] on the issue of social policy'.[173] In overstepping their competence, the Judicial Committee's moves to render parts of the process of the death penalty unconstitutional are not attempts to interpret the Caribbean's constitutions, rather it is an attempt to prevent the use of the death penalty in the Caribbean. This has, unsurprisingly, led to anger and frustration from the Caribbean people and governments.[174]

Additionally, Belle Antoine further points out that the Judicial Committee's ever-increasing strive for compliance with international norms regarding the death penalty is disproportionate to how other constitutional issues in the Caribbean such as religious/gender discrimination and political victimisation are interpreted because in those instances the general approach is more conservative.[175] It surely seems unreasonable that ordinary individuals who have not committed crimes but who also wish to voice a constitutional grievance should be treated in a less favourable manner at the hands of foreign judges to someone who has committed a murder for which the death penalty is constitutionally mandated as an appropriate sanction. The injustice of this is perpetuated even more considering the fragmentation of the death penalty case law. As such it has been legitimately contended that 'English judges in the Privy Council may not fully appreciate the nuances of Caribbean culture, modes of thought and social circumstances, in reaching decisions of fundamental importance for the region'.[176] Therefore, if the Judicial Committee were to be replaced with the Caribbean Court of Justice, this would allow for more protection against overt judicial activism because the Caribbean's best judges,[177] with an intimate understanding of the intricacies of the Caribbean's local and regional culture and politics, would be able to interpret the constitutions in accordance with Caribbean norms as opposed to international norms. What is more, although the Caribbean Court of Justice's headquarters are based in Port of Spain, Trinidad and Tobago, it is 'itinerant',[178] meaning that it can move throughout the Caribbean. This enhances its connection with the people of whom it is tasked to protect. Article IV(1) Agreement Establishing the Caribbean Court of Justice 2002 furthermore requires that 'at least three judges shall possess expertise in international law including international trade law'; which is a 'highly progressive and desirable innovation'[179] because it is a reflection that Caribbean judges are not simply willing to completely disregard internationally recognised legal norms. Indeed, the Eastern Caribbean Court of Human Rights has found in the past that the mandatory death sentence for murder is unconstitutional.[180] Similarly, although Barbados amended its Constitution to allow for any delay in the proceedings of cases concerning the death penalty,[181] the Caribbean

[172] Simeon C R McIntosh, Caribbean Constitutional Reform: Rethinking the West Indian Polity (Ian Randle 2002) 265.
[173] Sir David Simmons, 'The Caribbean Court of Justice: A Unique Institution of Caribbean Creativity' (2005) 31 CLB 69, 80.
[174] ibid 80.
[175] Rose-Marie Belle Antoine, 'New Directions in Public Law in the Commonwealth Caribbean – Some Reflections' (2009) 35 CLB 31, 36.
[176] Vasciannie (n 164) 53.
[177] Simmons (n 173) 84.
[178] Caribbean Court of Justice (n 21).
[179] Simmons (n 173) 85.
[180] *Spence and Hughes v The Queen* (CA of St Vincent & The Grenadines, 2 April 2001); *Fox v The Queen* [2002] UKPC 13, [2002] 2 AC 284; *Reyes* (n 85).
[181] Barbados Constitution (Amendment) Act, No 14 of 2002, arts 2, 5.

Court of Justice continued to endorse principles concerning cruel and unusual treatment in *Attorney-General v Boyce*, stating that:

> The practice of keeping persons on death row for inordinate periods of time, is unacceptable and infringes constitutional provisions that guarantee human treatment[. Consequently] *Pratt* has served as a reminder to all … that rights must be respected.[182]

To therefore suggest that Caribbean judges are of an 'awful quality [and possess] sheer incompetence'[183] in comparison to English judges, shows nothing more than a degree of arrogance and proves that claims suggesting that the Judicial Committee is the only court concerned about preventing human rights violations concerning the death penalty are unsubstantiated.[184]

It would thus appear that in the light of such uncertainty, with regard to whether the Judicial Committee has the jurisdiction to act, it is more desirable that a domestic court of final appeal should decide on such cases as they should be held accountable, especially when there is a life at stake. Moreover, the arguments that suggest that English judges are of a higher calibre to corrupt Caribbean judges possesses an air of arrogance and are completely unfounded. The Caribbean Court of Justice is comprised of the Caribbean's best legal minds who, unlike the Judicial Committee, have an intricate understanding of the local realities at play within the differing countries and are itinerant. Ultimately, if the majority of Caribbean countries were to finally accede to the Caribbean Court of Justice then they would be able to finally complete the process of becoming completely independent from their past colonial ties.[185]

In light of this analysis the Judicial Committee should be replaced by the Caribbean Court of Justice.

5 CONCLUSION

This article has considered whether the Judicial Committee has acted as a legitimate constitutional court in interpreting the constitutions of the Caribbean countries in cases concerning the death penalty. The main tenets of this analysis have focused on: delay and how long a prisoner should remain on death row before their incarceration is rendered unconstitutional; the mandatory death sentence; and uncertainty relating to the Judicial Committee's jurisdiction in cases concerning the death penalty. It has been shown that, initially, the Judicial Committee adopted an exceedingly strict and narrow interpretation of the constitutions by failing to give weight to constitutional principles concerning cruel and unusual treatment. The issues associated with this were nonetheless remedied in *Pratt* which held that when a prisoner was held on death row for a period exceeding five years then a death sentence should be rendered unconstitutional by the need to prevent cruel and unusual treatment. However, upon entering into the 21st century, the case law has become more fragmented with evidence of the Judicial Committee construing constitutional principles beyond what they truly mean. In conclusion, it would be favourable for the countries of the Caribbean to adopt legislation to outlaw the use of the Judicial Committee, and adopt the Caribbean Court of Justice as the final court of appeal.

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[182] *A-G v Joseph* [2006] CCJ Appeal No CV 2 of 2005, 47.
[183] Darcus Howe, 'Caribbean Leaders Know That Hanging Wins Votes' (1999) 12 New Statesman 24.
[184] Dominic Bascombe, 'The Introduction of the Caribbean Court of Justice and the Likely Impact on Human Rights Standards in the Caribbean Commonwealth' (2005) 31 CLB 117, 124–125.
[185] O'Brien (n 57).

IS PROPORTIONATE PAY THE WAY AHEAD?

Ewan Smith[*]

1 INTRODUCTION

The weaknesses of equal pay law, which this work seeks to explore, are neatly encapsulated by the fact that from 9th November 2015 – 'Equal Pay Day'[1] – the current 19.1% gender pay gap means women effectively work for 'free' until 1st January 2016.[2] Although 'the most overt discriminatory practices have now been eliminated',[3] the effectiveness of equal pay law has dwindled over time, with statistics confirming the known difficulty of making a successful equal pay case.[4] It would be naïve to suggest that a stand-alone legal reform could possibly eradicate the gender pay gap,[5] especially when the individual complaints approach to discrimination used by the UK is a 'painful, cumbersome and ineffective way' to address it.[6] However, the weaknesses inherent in the current law could, it is argued, be reformed incrementally to increase the scope for lodging sex discrimination claims with regards to pay.

This paper proposes that *proportionate pay for work of comparable value* ('proportionate pay') would logically extend the current principle of 'equal pay for work of equal value' ('EPEV').[7] Reforming the cause of action – by disaggregating both pay and value from the restrictiveness of equality – would put a lesser burden on the claimant and overcome the inhibitive effect that occupational segregation has on the effectiveness of equal pay law.[8] Furthermore, acknowledging the hypothetical comparator would harmonise EPEV or proportionate pay with other anti-discrimination law.[9] This paper comprises four substantive sections: 2 – the law of equal pay; 3 – the weaknesses of EPEV; 4 – the actual and hypothetical comparator; and 5 – proportionate pay as a workable solution. Although equal pay legislation is gender-neutral, for the purposes of this paper the claimant is assumed to be female – discrimination with regards to pay more commonly affects women – and the comparator is consequently assumed to be male.[10]

2 THE LAW OF EQUAL PAY

2.1 Introduction

This opening section summarises the present state of equal pay law in Great Britain, as codified by the Equality Act 2010. This replaced the Equal Pay Act 1970, which itself was amended by the Equal Pay (Amendment) Regulations 1983,[11] as a result of reforms initiated by the purposive approach of the Court of Justice of the European Union ('CJEU').[12] As

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[1] Fawcett Society, 'Equal Pay Day' <http://www.fawcettsociety.org.uk/our-work/campaigns/equal-pay-day-2/> accessed 3 May 2016.

[2] Government Equalities Office, 'Closing the Gender Pay Gap' – Consultation Paper (July 2015) <https://www.gov.uk/government/consultations/closing-the-gender-pay-gap > accessed 3 April 2017, para 1.1.

[3] New JNCHES Equality Working Group, 'The Gender Pay Gap – A Literature Review' (February 2011) <http://ucea.ac.uk/en/publications/index.cfm/njgpygap> accessed 15 November 2016, para 4.2.

[4] Richard W Painter and Ann Holmes, *Cases and Materials on Employment Law* (OUP 2015) 171; Rob Moss, 'Employment Tribunal Claim Statistics Released' *Personnel Today* (September 2015) <http://www.personneltoday.com/hr/employment-tribunal-claim-statistics-remain-subdued/> accessed 21 April 2016; Alice M Leonard, 'Judging Inequality' (1987) 16 EOR 17.

[5] Michael Rubenstein, *Equal Pay for Work of Equal Value: The New Regulations and their Implications* (Macmillan Press 1984) 33.

[6] Jeanne Gregory, 'Equal Pay for Work of Equal Value: The Strengths and Weaknesses of Legislation' (1992) 6 Work, Emp & Soc 461, 470.

[7] Equality Act 2010, s 65(1)(c); Morley Gunderson, 'The Evolution and Mechanics of Pay Equity in Ontario' (2002) 28 Can Public Policy 117, 119.

[8] Sandra Fredman, *Women and the Law* (OUP 1997) 279; Claire Kilpatrick, 'Deciding When Jobs of Equal Value can be Paid Unequally: An Examination of s 1(3) of the Equal Pay Act 1970' (1993) 23 ILJ 311, 325.

[9] Iain Steele, 'Beyond Equal Pay?' (2008) 37 ILJ 119, 123; Michael Malone, 'Reforming Equal Pay Law in Britain: Some Proposals' (2015) 256 EOR 10.

[10] Explanatory Notes to the Equality Act 2010, paras 217–219; Brian W Napier, 'Equal Pay and Equal Value' (1984) 43 CLJ 40, 41.

[11] Equal Pay (Amendment) Regulations, SI 1983/1794.

[12] Case 61/81 *Commission of the European Communities v United Kingdom* [1982] ECR 2601.

the general aim of the Equality Act 2010, ss 64–80, was to codify the common law and statutes that existed beforehand – ensuring that pay is determined without sex discrimination or bias – cases judged and approved before 2010 generally remain good law.[13]

2.2 Framing the Equal Pay Claim

An equal pay claim, or an 'equality of terms' claim as rebranded by the Equality Act 2010,[14] can be lodged by an employee, a worker or even a self-employed person (hereafter 'claimant') with regards to their terms of employment,[15] 'contained in the … contract of employment … or contract to do work personally.'[16] Pay is defined as 'the ordinary basic or minimum wage or salary … which the [claimant] receives, directly or indirectly, in respect of [her] employment.'[17] The claim requires 'a comparison between the work done by two or more individuals.'[18] The claimant must identify an actual comparator that does like work, work rated as equivalent, or work of equal value.[19] The same issues arise when selecting a comparator using any of these three surprisingly complex causes of action.[20] The comparator is required to be employed by the same employer,[21] or an associate of said employer,[22] and be working at the same establishment.[23] If the comparator works at another establishment run by the same employer, then common terms must apply to their contracts.[24] The burden of proof lies with the claimant to prove, on the balance of probabilities, that this is established.[25] Where any of the causes of action are established, the Equality Act 2010 reads a sex equality clause into the contract, as it is presumed that the pay difference is due to the difference in gender.[26]

2.2.1 The Material Factor Defence

The Equality Act 2010, s 69, excludes the sex equality clause if the employer can show that the difference in pay is due to a 'material factor that is relevant and significant and does not, directly or indirectly, discriminate against the [claimant]' on the basis of gender.[27] Employers frequently cite material factors such as the 'market rate' being paid to both parties or that higher pay was needed to recruit the comparator in the first place.[28] There may also be explanations submitted regarding geographical differences,[29] experience and length of service.[30] In such instances, the burden shifts back to the claimant to prove, on the balance of probabilities, that the explanation is tainted by discrimination.[31]

Broadly, three types of discrimination may prevent the employer from relying on the material factor defence. First, there is direct discrimination: if the claimant is paid less than her comparator because she is a woman.[32] Second, there is indirect discrimination where an apparently neutral 'provision, criterion or practice' exacerbates inequality by disguising a bias against women.[33] A typical example would be part-time workers being treated less favourably than full-

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[13] Explanatory Notes to the Equality Act 2010, paras 219, 221, 226, 239; Rhodri McDonald and Sophie Buckley, 'Equal Pay' (2010) ELB 6; Laura Gow and Sam Middlemiss, 'Equal Pay Legislation and its Impact on the Gender Pay Gap' (2011) 11 IJDL 164, 171, 180.
[14] Section 64.
[15] *Quinnen v Hovells* [1984] ICR 525 (EAT); Gow and Middlemiss (n 13) 173.
[16] Equality Act 2010, s 80.
[17] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 (TFEU), art 157 (art 141 TEC); Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889; Gow and Middlemiss (n 13) 172.
[18] Steele, 'Beyond Equal Pay?' (n 9).
[19] Equality Act 2010, s 65.
[20] IDS Employment Law Handbook, *Equal Pay* (2nd edn, IDS 2008) 157.
[21] Equality Act 2010, s 79(3)(a).
[22] ibid s 79(3)(a).
[23] ibid s 79(3)(b).
[24] ibid ss 79(4)(b), 79(4)(c).
[25] Eleanor J Russell, 'Equal Pay: A Vision or a Reality?' (1997) SLT 157, 158.
[26] Explanatory Notes to the Equality Act 2010, para 217.
[27] ibid para 236.
[28] IDS Employment Law (n 20) 258–263.
[29] *Navy, Army and Air Force Institutes v Varley* [1977] ICR 11 (EAT).
[30] *Baker v Rochdale HA* (CA, 14 January 1994); Case C-1/95 *Gerster v Freistaat Bayern* [1997] ECR I-5253.
[31] Darren Newman, 'Repeal the Law on Equal Pay' (2012) 223 EOR 8.
[32] Equality Act 2010, s 13; Explanatory Notes to the Equality Act 2010, para 246; IDS Employment Law (n 20) 222; Aileen McColgan, *Discrimination, Equality and the Law* (Hart 2014) 14.
[33] Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 177–180.

time workers as women tend to dominate part-time jobs.[34] Third, there will be a presumption of *prima facie* indirect discrimination, even without an identifiable provision, criterion or practice, where there are 'cogent, relevant and sufficiently compelling statistics demonstrating that women are adversely affected as a group with regards to pay when compared to men.'[35] This was established in *Enderby v Frenchay Health Authority*.[36] The Equality Act 2010 requires objective justification of any reason shown to be indirectly discriminatory – hence,[37] the employer must show that it is a proportionate means of achieving a legitimate aim.[38]

2.2.2 The Pivotal Role of the Court of Justice of the European Union

It is enshrined in EU primary law that '[e]ach Member State shall ensure that the principle of equal pay for … equal work or work of equal value is applied.'[39] This was originally in article 119 EEC Treaty, then article 141 EC Treaty and now article 157 of the Treaty on the Functioning of the European Union ('TFEU'). This has forced UK equal pay legislation to become more receptive to the claimant in three key areas.

First, the UK was obliged to extend the scope of its domestic legislation by introducing a third free-standing cause of action: equal pay for work of equal value.[40] The European Commission convinced the CJEU that the UK law that existed previously did not fulfil its obligations according to the Treaty and the Equal Pay Directive.[41] The CJEU, therefore, held that UK domestic law had denied the right to equal pay because it required that a job evaluation study should be carried out voluntarily by the employer before an equal value claim could be made.[42] This had made it too easy for the employer to bar a claim for EPEV.[43]

Second, the requirement that a comparator must be working contemporaneously with the claimant was also found to be inconsistent with article 157 TFEU in the seminal case of *Macarthys v Smith*.[44] The Equality Act 2010, s 64(2), now provides that the comparison is not restricted to work done contemporaneously with the claimant's work.[45] This has led to controversy over whether a comparison with the claimant's immediate successor is permissible which is considered in section 4.[46]

Third, arguably the most promising reform contained in the Equality Act 2010, s 71, was the removal of the requirement for an actual comparator if there is direct sex discrimination.[47] Nevertheless, as there is no equivalent provision for cases of indirect discrimination, it has encountered criticism for being incompatible with EU law.[48] Section 71 becomes operative if an employer tells a female worker 'I would pay you more if you were a man,'[49] as the claimant can now argue that she was treated less favourably than a man 'would have been' in that situation.[50] However, given that well informed employers normally avoid direct discrimination, this crude example highlights the limited utility of this provision.[51]

2.3 The Problems with the Equal Pay Framework

Meritorious claimants can be prevented from claiming equal pay due to the rigidity of EPEV.[52] The segregated nature of the labour market often results in

[34] IDS Employment Law (n 20) 222.
[35] ibid.
[36] Case C-127/92 *Enderby v Frenchay HA* [1993] ECR I-5535.
[37] Explanatory Notes to the Equality Act 2010, para 237.
[38] Case 170/84 *Bilka-Kaufhaus GmbH v Weber Von Hartz* [1986] ECR 1607, paras 35–36.
[39] TFEU art 157.
[40] Equal Pay (Amendment) Regulations, SI 1983/1794.
[41] *Commission v UK* (n 12); TFEU, art 157; SI 1983/1794 Council Directive 75/117/EEC of 10 February 1975 on the Approximation of the Law of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women [1975] OJ L45/19 (Equal Pay Directive).
[42] IDS Employment Law (n 20) 156.
[43] Napier (n 10) 41; Sandra Fredman, 'Reforming Equal Pay Laws' (2008) 37 ILJ 193, 201–202.
[44] Case 129/79 *Macarthys Ltd v Smith* [1980] 2 CMLR 217.
[45] Equality Act 2010, s 64.
[46] *Diocese of Hallam Trustee v Connaughton* [1996] 3 CMLR 93 (EAT).
[47] Equality Act 2010, s 71(1); Gow and Middlemiss (n 13).
[48] HL Deb 19 January 2010, vol 716, col 941 (Lord Lester).
[49] Explanatory Notes to the Equality Act 2010, para 246.
[50] Michael Rubenstein, 'No Comparison with a Successor' (2008) 178 EOR 25.
[51] Michael Connolly, 'The Gender Pay Gap, Hypothetical Comparators and the Equality Act 2010' [2011] ELB 6; Gow and Middlemiss (n 13) 173.
[52] Steele, 'Beyond Equal Pay?' (n 9) 119.

a woman being 'comparator-less' because she is unable to find a comparator doing work of 'exactly' equal value.[53] This gives rise to two distinct issues, which the courts have failed to answer satisfactorily.

First, what if a claimant does work worth 80% of the work done by the comparator, for example, yet her pay is just 50% of his? This begs the question: can an equal pay claim be for a proportion of the comparator's wage, rather than 100%?[54] The Employment Appeal Tribunal answered the question negatively in *Maidment v Cooper*.[55] The court held that the Equal Pay Act 1970 offered no redress in such a situation as 'like work' or 'work of equal value' was not established,[56] even though the difference in work value and the difference in pay were not commensurate.[57] The CJEU and the Employment Appeal Tribunal have suggested that a proportionate pay award may be used if the material factor defence explains only a proportion of the pay differential.[58] However, there was no mention of how such an award would be calculated, nor does it aid the claimant who cannot locate an actual comparator of equal value in the first place.[59]

Second, where the claimant does work that is more valuable than the comparator's but is paid less than he is, it seems logical that as there is no work of equal value there would also be no claim for equal pay.[60] This matter came before the Employment Appeal Tribunal in *Waddington v Leicester*.[61] The claimant sought equal pay for like work as she was paid less than a man she supervised. The Employment Appeal Tribunal, applying the Equal Pay Act 1970 strictly, judged that the Act was inapplicable because like work was not established.[62] However, the more flexible approach of the CJEU when interpreting article 157 TFEU became clear in a later judgment in *A Murphy v An Bord Telecom Eireann*, where EPEV was interpreted purposively to enable a claimant in a similar situation to demand pay equal to the comparator.[63] Whilst it is promising that a 'successful' EPEV claim can be made,[64] it is an 'unattractive' state of affairs that the claimant is restricted to an award for equal pay to the comparator.[65]

2.3.1 'Equal Pay for Unequal Work'[66]

In *Murphy*, a doctrine accommodating 'equal pay for unequal work' was established.[67] Female employees who dismantled, cleaned and reassembled telephones sought to claim pay equal to that of a man working in the same factory but in a different role as a stores labourer.[68] The domestic court first held that the work was of unequal value as the women's work was more valuable than the man's, therefore it did not constitute work of equal value.[69] Using a strict interpretation of domestic law, it held that an equal pay claim would create an illogical result of 'equal pay for unequal work' because the facts did not indicate an issue of unequal pay for work of equal value.[70]

Murphy was referred to the CJEU where the Advocate General took a more purposive approach to article 157 TFEU:[71] the case was to be treated as a claim 'for less than equal pay for equal work.'[72] The CJEU, consequently, held that a woman doing work of 'greater value' than a man could claim pay equal to the

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[53] Aileen McColgan, 'Legislating Equal Pay? Lessons from Canada' (1993) 23 ILJ 269, 278; Bob Hepple QC, Mary Coussey and Tufyal Choudhury, *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart 2000) 77.
[54] ibid.
[55] [1978] ICR 1094 (EAT).
[56] ibid 1100.
[57] Fredman, *Women and the Law* (n 8) 232.
[58] *Enderby* (n 36) para 27; *Cumbria County Council v Dow (No 1)* [2008] IRLR 91 (EAT).
[59] Steele, 'Beyond Equal Pay?' (n 9); IDS Employment Law (n 20) 215.
[60] ibid.
[61] [1977] ICR 266 (EAT).
[62] Fredman, *Women and the Law* (n 8) 233.
[63] Case C-127/92 *Murphy (No 2)* [1988] ECR 673; *SITA UK Ltd v Hope* (EAT, 8 March 2005).
[64] Steele, 'Beyond Equal Pay?' (n 9).
[65] ibid 122.
[66] *Murphy* (n 63) Opinion of AG Lenz, para 7.
[67] (n 63) paras 9–10.
[68] (n 63).
[69] *Murphy v An Bord Telecom Eireann (No 1)* [1987] 1 CMLR 559, paras 6–7 (Keane J).
[70] Anti-Discrimination (Pay) Act 1974; ibid.
[71] *Murphy (No 2)* (n 63) Opinion of AG Lenz, 682–685.
[72] ibid.

comparator.[73] If the claimant could not claim equal pay for work of 'greater value' it would be 'tantamount to rendering the principle of equal pay … nugatory,'[74] not least because employers would be able to avoid EPEV by paying women less but assigning them extra responsibilities.[75] However, apparently sidestepping the logical solution, Advocate General Lenz chose to dismiss the notion of proportionality.[76] He stated, 'It must be stressed that the application of the principle of equal pay is not [about] achieving proportionality between work and pay.'[77] The CJEU merely wanted to eradicate the fear of 'institutionalis[ing] … abuse'.[78]

The *Murphy* approach was followed in the later case of *SITA UK v Hope*.[79] Here the claimant had actually replaced her comparator to fulfil the identical role in the same workplace. The Employment Appeal Tribunal concluded that, although the claimant had taken on more duties than her male predecessor, this could not result in a determination of 'unlike' work.[80] To have accepted that there was no 'work of equal value' would have realised the fear of employer abuse mentioned by the CJEU in *Murphy*.[81] Notwithstanding that there is still only a right to have the equality clause read into the employment contract so that the woman's contract is no less favourable than the man's.[82] In order to be paid more, the woman would have to locate another comparator being paid more than the original comparator and show that she is doing work of at least 'equal value' to his.[83] Therefore, the claimants were limited to claiming equal pay to the comparator: still an unsatisfactory result when their work was more valuable.[84]

2.3.2 Occupational Segregation

On the one hand, EPEV was introduced to help overcome the effect of horizontal occupational segregation on equal pay law.[85] This occurs when both men and women work for the same employer but are isolated by gender in a particular sector or job within the same establishment.[86] Under the pre-1983 law,[87] women working in a segregated occupation were unable to establish 'like work' with a comparator.[88] However, since equal value was introduced, two completely different jobs, such as a manual job and an administrative job in the same establishment, have become comparable if they are of 'equal value.'[89] In *Hayward v Cammell Laird Shipbuilders Ltd (No 2)*, when a canteen assistant successfully established work of equal value to a joiner,[90] the employer was prohibited from paying the typically *female* occupation less than the male-dominated one.[91] As Miller recognises, it is 'hard to believe' how narrow the law was before EPEV became the third cause of action.[92]

On the other hand, EPEV is powerless to address sex discrimination with regards to pay within vertically segregated workplaces.[93] Statistics indicate that men dominate higher paid jobs, whereas a greater proportion of women tend to be employed in lower paid jobs.[94] As no equal pay claim is actionable without a comparator doing work of equal or 'higher

[73] ibid; Steele, 'Beyond Equal Pay?' (n 9) 120.
[74] *Murphy* (n 63) para 10; Steele (n 9) 120.
[75] Steele, 'Beyond Equal Pay?' (n 9) 121.
[76] ibid.
[77] *Murphy* (n 63) Opinion of AG Lenz, para 9.
[78] ibid para 16.
[79] (n 63).
[80] ibid para 13; Steele, 'Beyond Equal Pay?' (n 9) 120.
[81] *Murphy* (n 63) Opinion of AG Lenz, para 16; Rubenstein, *Equal Pay for Work of Equal Value: The New Regulations and their Implications* (n 5) 27–28.
[82] IDS Employment Law (n 20) 161.
[83] *Evesham v North Hertfordshire HA* [2000] ICR 612 (CA); IDS Employment Law (n 20) 161.
[84] Steele, 'Beyond Equal Pay?' (n 9) 122.
[85] Michael Wynn, 'Case Comment – Equal Pay and Gender Segregation' [1994] LQR 556; Gow and Middlemiss (n 13) 165; Kilpatrick (n 8) 325.
[86] Wynn (n 85).
[87] Equal Pay Act 1970.
[88] ibid s 1(2)(a); Stephen Miller, 'Time to Re-Evaluate Equal Value?' [2014] ELB 4.
[89] Equality Act 2010, s 65; *Pickstone v Freemans plc* [1989] AC 66 (HL); Colin Bourn, 'Equal Pay' (1989) 139 NLJ 1152; Gerry R Rubin, 'Case Comment – Equal Pay: Equal Value' [1987] JBL 392.
[90] [1988] AC 894 (HL); IDS Employment Law (n 20) 157.
[91] Equality Act 2010, ss 64–80.
[92] Miller (n 88) 4.
[93] Fredman, 'Reforming Equal Pay Laws' (n 43) 199; Wynn (n 85).
[94] JNCHES (n 3) 19–22.

value,'[95] there is inadequate anti-discrimination protection for many women in lower value employment than their male colleagues.[96] This indicates that the current law renders many disproportionately low-paid women 'comparator-less' and without remedy.[97]

There are further flaws with UK equal pay legislation that have also inhibited its ability to address sex discrimination.[98] The Equality Act 2010 has, however, introduced new rules about the disclosure of pay information, making it easier for an individual to discover how they are paid in comparison to their colleagues.[99] The Act also created a power to make regulations obliging large employers to publish gender pay gap statistics.[100] Despite this, the current equal pay regime still relies 'very heavily on the aggrieved individual' bringing proceedings against a discriminatory employer.[101] Understandably, many individuals decide against pursuing their employer for fear of harming their future employment prospects.[102]

2.4 Conclusion

A fundamental weakness in the current law is the lack of proportionality between pay and work value. This causes two unsatisfactory outcomes: equal pay being awarded for work of unequal value where the claimant does work of a greater value than the comparator; and disproportionately lower pay left unaddressed where the claimant's work is less valuable than her comparator's.

3 THE WEAKNESSES OF EQUAL PAY FOR WORK OF EQUAL VALUE

3.1 Introduction

This section suggests that the weaknesses inherent in EPEV are the compelling cause of the problems identified in section 2. EPEV first requires an assessment of value in order to determine whether the right to equal treatment is activated. When analysed through the prism of Aristotelian formal equality, the operation of the principle fairs poorly.[103] The substantive notion of equality is also considered, but it is argued that a solution ought to be rooted in the foundational principle of equal treatment.[104] A possible way forward is an alternative principle of pay comparability: *proportionate pay for work of comparable value*.

3.2 The Measurement of Value

The notion of equal value – based on the premise that women are entitled to equal pay with men for work that is equally demanding – requires that the value of at least two different jobs is measured.[105] This analytical evaluation, normally carried out by an independent expert appointed by the tribunal, determines the comparability of several, salient factors including skill, responsibility, training, working conditions and effort.[106] Only then, if the job values are sufficiently commensurate, can the equal treatment principle be applied.[107]

The valuation is a series of subjective judgments which risk producing inconsistencies – virtually unavoidable, as there is no objective framework for particular values being attached to specific roles and responsibilities.[108] A job can be undervalued: if the job

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[95] *Murphy* (n 63) para 9; Steele, 'Beyond Equal Pay?' (n 9).
[96] Steele, 'Beyond Equal Pay?' (n 9).
[97] McColgan, 'Legislating Equal Pay? Lessons from Canada' (n 53) 278; Hepple, Coussey and Choudhury (n 53) 77.
[98] Russell (n 25) 158.
[99] Equality Act 2010, s 77; McDonald and Buckley (n 13) 7.
[100] ibid s 78; Small Business, Enterprise and Employment Act 2015, s 147.
[101] Russell (n 25) 160.
[102] Equality Act 2010.
[103] Aristotle, *Ethica Nicomachea* (W Ross tr 1925) vol 3, 1131a–1131b; Hans Kelsen, *Aristotle's Doctrine of Justice*, in Hans Kelsen, *What is Justice?* (University of California Press 1957) 110, 127–28; McColgan, *Discrimination, Equality and the Law* (n 32) 14–15; Peter Westen, 'The Empty Idea of Equality' (1982) 95 Harv L Rev 537, 539–540.
[104] Case 43/75 *Defrenne v Sabena* [1976] ECR 455, 458, para 12 .
[105] Kay Gilbert, 'Promises and Practices: Job Evaluation and Equal Pay Forty Years On!' (2012) 43 IRJ 137, 139; Steele, 'Beyond Equal Pay?' (n 9).
[106] Gilbert (n 105) 143; Equality Act 2010, s 80(5); Equal Pay Act 1970, s 1(5); Peggy Kahn and Elizabeth M Meehan (eds), *Equal Value/Comparable Worth in the UK and the USA* (Macmillan 1992).
[107] Westen (n 103) 537; Gilbert (n 105) 143.
[108] Joyce M S Shimmin, 'Job Evaluation and Equal Pay for Work of Equal Value' (1984) 13 Personnel Rev 27, 29; Gilbert (n 105); Thomas Flanagan, 'Equal Pay for Work of Equal Value: Some Theoretical Criticisms' (1987) 13 Canadian Public Policy

is defined too narrowly and if the assessment does not take account of the work actually done.[109] If both stereotypically male and female jobs are undervalued consistently, then the result of the comparative valuation is unaffected as it is the relative values which determine whether the claimant does work of equal value.[110] Yet research indicates that the job evaluation method is more likely to undervalue work done by women because their skills are often overlooked.[111] For example, a report by the Equal Opportunities Commission found it necessary to emphasise that 'dexterity' in a woman's job must not be underrated in comparison to the 'physical effort' involved in a man's job.[112] Admittedly, when a job evaluation scheme is instituted by an employer, there is real motivation to 'get it right' to prevent costly tribunal cases claiming the scheme was improperly implemented or overtly discriminatory.[113] Nevertheless, a lack of consistency hinders the fundamentally important job evaluation process.

3.2.1 Dealing with Discriminatory Evaluations

In *Rummler v Dato-Druck GmbH*, the CJEU established the test for a discriminatory job evaluation scheme.[114] If any of the factors are considered to advantage one gender, then the evaluation is deemed discriminatory.[115] Arguments were made in the *Rummler* case to have a female norm of valuation to overcome the bias associated with the stereotypically male qualities of 'physical effort' and 'heaviness.'[116] The CJEU rejected these arguments;[117] it chose instead to equate the male norm with objectivity, and it reasoned that a comparison with a female norm would constitute unlawful discrimination.[118] Arguably, by denying the application for explicitly different treatment on the grounds of gender, the court refrained from approving the outdated notion that men and women deserve different treatment because they are naturally different.[119] Notwithstanding that, the objective standard may still implicitly endorse male standards of value.[120] Recently, the Supreme Court in *North v Dumfries and Galloway Council* accepted that jobs requiring 'physical strength' have traditionally been better rewarded than those requiring 'dexterity.'[121] As a result, their function is to determine where different jobs are of 'genuinely equal value.'[122]

Proportionate Pay for Work of Comparable Value would not avoid the problem with inconsistent job evaluations. Under-valuing the female's job could make the difference in value either too large – where the woman does work of lesser value – or too small – where the woman does work of greater value. The net result would be to make the pay due to the claimant disproportionately low. Paradoxically, it could even render the value difference so large or small that it would justify the employer paying the claimant less

435, 441; Miller (n 88) 5; John Cavanagh QC, 'Equal Pay: Why We Should Feel Sorry for Public Sector Employers and Unions' (2008) 178 EOR 6.

[109] Peggy Kahn, 'Unequal Opportunities: Women, Employment and the Law' in Susan Edwards (ed), *Gender, Sex and the Law* (Croom Helm 1985) 93; Ellen E Hodgson, 'Equal Pay for Work of Equal Value in Ontario and Great Britain: A Comparison' (1992) 30 Alberta Law Rev 926, 983; Gilbert (n 105) 140.

[110] Gilbert (n 105) 140.

[111] Frederick P Morgeson and Michael A Campion, 'Social and Cognitive Sources of Potential Inaccuracy in Job Analysis' (1997) 82 J Appl Psychol 627–665; Sara Horrell, Jill Rubery and Brendan Burchell, 'Gender and Skills' (1990) 4 Work, Emp & Soc 189; Paula England, Michelle Budig and Nancy Folbre, 'Wages of Virtue: The Relative Pay of Care Work' (2002) 49 Research Library 204–225; Hepple, Coussey and Choudhury (n 53) 77; Fredman, *Women and the Law* (n 8) 243.

[112] Equal Opportunities Commission, 'An Illustration of Developing an Analytical Job Evaluation System Free of Sex Bias' <http://www.eoc.org.hk/EOC/Upload/UserFiles/File/EPEV/EPEVBook1Web-e.pdf> accessed 15 February 2016, para 2.3.

[113] Gilbert (n 105) 146; Kay Gilbert, 'Exploring Equal Value Dispute Procedures: Power and Conflict Under Labour' (2004) 26 Employee Relations 392; Rubenstein, *Equal Pay for Work of Equal Value: The New Regulations and their Implications* (n 5) 75–87.

[114] Case C-235/84 *Rummler v Dato-Druck GmbH* [1986] ECR 2101 ; Fredman, *Women and the Law* (n 8).

[115] *Rummler* (n 114); Gilbert (n 105) 144; Equality Act 2010, s 65(5).

[116] *Rummler* (n 114) para 18; Fredman, *Women and the Law* (n 8) 242.

[117] Fredman, *Women and the Law* (n 8) 242.

[118] *Rummler* (n 114) para 14; Fredman, *Discrimination Law* (n 33) 11.

[119] *Noble v David Gold Ltd* [1980] ICR 543 (CA) 552 (Lawton LJ); Fredman, *Women and the Law* (n 8) 241–242.

[120] Fredman, *Women and the Law* (n 8); McColgan, *Discrimination, Equality and the Law* (n 32); Gow and Middlemiss (n 13) 170.

[121] [2013] UKSC 45, [2013] 4 All ER 413; Secretary of State for Education, 'Memorandum to the Women and Equalities Select Committee on the Post-Legislative Assessment of the Equality Act 2010' (July 2015) <https://www.gov.uk/government/publications/post-legislative-memorandum-the-equality-act-2010> accessed 4 April 2017, 43.

[122] 'Memorandum to the Women and Equalities Select Committee on the Post-Legislative Assessment of the Equality Act 2010' (n 121) 43.

than before.[123] Therefore, removing discrimination from the measurement of value to ensure consistently gender-neutral evaluations would remain a priority even if proportionate pay were pursued.[124]

3.3 Formal Equality

EPEV is imperfectly conceived and implemented because it does not observe the foundational theory of formal equality. Formal equality is best defined by Aristotle: that just as 'like cases should be treated alike … unalikes should be treated differently in proportion to their unalikeness.'[125] The principle of equal treatment invokes an idealistic notion of consistency which ought to resonate with the right to EPEV.[126] Indeed, it does for those claimants that can establish genuinely 'equal value',[127] so when the woman is treated less favourably than the man because she is female there is direct discrimination which is explicitly prohibited by the requirement for equal treatment.[128] However, where equality in the relevant sense (value of work) is not established, then EPEV, due to its 'all-or-nothing' formulation,[129] is impotent to address disproportionate pay differentials.

3.3.1 Equal Treatment of Different Value

When implementing the principle of EPEV, the courts have to ensure that its literal meaning is not distorted, otherwise injustice arises where 'unequals' are treated equally.[130] This could occur on one hand, where a claimant does work of lesser value than her comparator but is able to claim equal pay to him. The Employment Appeal Tribunal in *Evesham v North Hertfordshire Health Authority* simplified a test alluded to by the Court of Appeal in *Shields v E Coomes Holdings Ltd* that there could not be equal value where there is 'an overall measurable and significant difference between the demands of the respective jobs.'[131] The Employment Appeal Tribunal added that the point scores in an analytical job evaluation should only be a guide to what is equal value, as they are not regarded as a 'precise mathematical science.'[132]

This test ought to prevent EPEV being interpreted too widely, although it can be argued that is exactly what happened on the facts of *Wells v F Smales and Son (Fish Merchants) Ltd.*[133] In this case, one of the claimants was rated as having a job value worth 79% of the comparator's.[134] The tribunal ruled that there was work of equal value because there was 'no overall measurable and significant difference' between the 79% valuation and the comparator.[135] This was, perhaps, a fair outcome as she was doing similar, although mathematically less valuable, work to the fourteen other claimants.[136] On the other hand, for the comparator it would appear his work is being under-paid if the claimant can have pay parity despite doing 21% less valuable work than he does. Clearly, this represents a significant and measurable 'mathematical' difference.[137] Furthermore, the outcome in this case leads to the conclusion that the valuation was shoehorned into the principle of EPEV.[138] This ensured that one applicant (of fifteen) was not left without a claim, but it is inconsistent with the principle that only 'like cases should be treated

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[123] Gilbert (n 105) 146; 'Council Pay Cuts Have Hit Morale, Warns City Cabinet Member' *Birmingham Mail* (Birmingham, 1 December 2007) <http://www.birminghammail.co.uk/news/local-news/council-pay-cuts-have-hit-morale-47302> accessed 22 April 2016.
[124] Parbudyal Singh Ping Peng, 'Canada's Bold Experiment with Pay Equity' (2010) 25 Gender in Management: An International Journal 570, 576–578; Judith A McDonald and Robert J Thornton, 'Private-Sector Experience with Pay Equity in Ontario' (1998) 24 Can Pub Pol 185, 187.
[125] Aristotle, *Ethica Nicomachea* (n 103); Kelsen (n 103) 127–28; McColgan, *Discrimination, Equality and the Law* (n 32) 14–15; Westen (n 103) 539–540.
[126] Fredman, *Discrimination Law* (n 33) 2; Catherine Barnard and Bob Hepple, 'Substantive Equality' (2000) 59 CLJ 562, 563.
[127] Equality Act 2010, s 65.
[128] Fredman, *Discrimination Law* (n 33) 2.
[129] Fredman, *Women and the Law* (n 8) 233.
[130] Aristotle, *Ethica Nicomachea* (n 103); Kelsen (n 103) 127–28; Winnie Chan, 'Mothers, Equality and Labour Market Opportunities' [2013] ILJ 224, 227; McColgan, *Discrimination, Equality and the Law* (n 32) 14–15.
[131] [1978] 1 WLR 1408 (CA); *Evesham v North Hertfordshire HA* [1999] IRLR 155 (EAT) [26] (Kirkwood J); *Southampton and District HA v Worsfold* (EAT, 28 April 1999) (Holland J).
[132] *Springboard Sunderland Trust v Robson* [1992] ICR 554 (EAT) 558; Shimmin (n 108) 30.
[133] Industrial Tribunal 10701/84–10715/84 (26 March 1985).
[134] ibid.
[135] ibid para 30–32; *Shields* (n 131) 1428 (Bridge LJ).
[136] *Wells* (n 133).
[137] *Springboard Sunderland Trust v Robson* [1992] ICR 554 (EAT) 558; Shimmin (n 108) 30.
[138] Aristotle, *Ethica Nicomachea* (n 103); Kelsen (n 103) 127–28.

alike.'[139] Arguably, theoretical defensibility of the law had to be sacrificed for pragmatic reasons due to the 'all-or-nothing' formulation of EPEV.[140]

Where the claimant does work of greater value than any available comparator, the CJEU has also resorted to treating 'unequals' equally.[141] In the *Murphy* case the CJEU interpreted the case facts as a claim 'for less than equal pay for equal work' which could not be refused.[142] This process of reasoning was illogical when the claimant was already paid less than the comparator, despite doing more valuable work, and did not allude to what extent her pay would be less than equal.[143] This pointed to a just solution of proportionality – the pay deserved would be measured with reference to the difference in value – but as both the Advocate General and CJEU rejected that possibility,[144] the final judgment lacked justification in formal equality. Equal pay law, if truly founded in formal equality, did not intend for a claimant to achieve less pay than the value of their work deserves as this would be remedying inequality with further inequality.[145] Nor does the stated *ratio* of the case – that one can claim for equal pay if doing work of equal or 'higher value' – align with the right to equal treatment.[146] At least where equal pay was available, in principle, only to the claimant who established 'equal value,' the law was compatible with the maxim that 'like cases should be treated alike.'[147] Now, though, an equal pay claim for work of substantially greater value than the comparator results in the injustice of equal treatment of 'unalikes.'[148]

In its defence, the CJEU was put in a remarkably difficult position, as it would have been more morally reprehensible to treat the claimant in *Murphy* differently to her comparator.[149] By giving the claimant a right to equal pay in spite of there being no comparator of equal value, it meant she was no longer paid less than him.[150] Though the result was not justifiable in formal equality terms, as the comparator was still paid better relative to his job value, it was less unequal than before.[151] Furthermore, without the *Murphy* precedent, an employer would have been able to employ a woman in work of almost identical but slightly greater value than a male colleague and legally pay her less than the man.[152] Therefore, perhaps it was preferable in practice for the CJEU to imply a 'presumption' in favour of 'like cases [being] treated alike,'[153] in spite of the implications it has for the theory of formal equality.

3.3.2 Treating 'Unequals' Differently in Proportion to their Difference

The second way in which EPEV detracts from Aristotelian equality is that it fails to treat 'unequals' differently in proportion to their difference.[154] Although *Maidment v Cooper* is an old case, the point is still relevant to this discussion.[155] To recapitulate the salient points briefly: like work was not established and equal value would not have been established either,[156] even though the court agreed that the pay difference was disproportionately larger than the difference in work value.[157] It was theoretically justified that these claimants had no claim to equal pay as the job values were not alike, and should not have been treated alike.[158] However, it is an injustice,

[139] ibid; McColgan, *Discrimination, Equality and the Law* (n 32) 14–15; Westen (n 103) 539–540.
[140] *Worsfold* (n 131) [7] (Holland J); Fredman, *Women and the Law* (n 8) 233.
[141] *Murphy* (n 63); Aristotle, *Ethica Nicomachea* (n 103); Kelsen (n 103) 127–28; Winnie Chan, 'Mothers, Equality and Labour Market Opportunities' [2013] ILJ 224, 227; McColgan, *Discrimination, Equality and the Law* (n 32) 14–15.
[142] *Murphy* (n 63) Opinion of AG Lenz, para 9.
[143] Steele, 'Beyond Equal Pay?' (n 9).
[144] *Murphy* (n 63) Opinion of AG Lenz, para 9; Steele, 'Beyond Equal Pay?' (n 9) 121.
[145] Aristotle, *Ethica Nicomachea* (n 103); Kelsen (n 103) 127–28; Fredman, *Discrimination Law* (n 33) 2.
[146] *Murphy* (n 63) para 9; Fredman, *Discrimination Law* (n 33) 2; Barnard and Hepple (n 126) 563.
[147] Aristotle, *Ethica Nicomachea* (n 103); Kelsen (n 103) 127–28.
[148] ibid; Aristotle, *Ethica Eudemia* (W Ross ed, Clarendon 1925) vol 7, 9.1241b.
[149] Rubenstein, *Equal Pay for Work of Equal Value: The New Regulations and their Implications* (n 5) 61–62.
[150] Steele, 'Beyond Equal Pay?' (n 9).
[151] Aristotle, *Ethica Eudemia* (n 148); Westen (n 103) 557.
[152] *Shields* (n 131) 141 (Lord Denning); Steele, 'Beyond Equal Pay?' (n 9) 120.
[153] Westen (n 103) 572.
[154] Aristotle, *Ethica Nicomachea* (n 103); Kelsen (n 103) 127–28.
[155] *Maidment* (n 55).
[156] ibid; Fredman, *Women and the Law* (n 8).
[157] *Maidment* (n 55).
[158] Aristotle, *Ethica Nicomachea* (n 103); Kelsen (n 103) 127–28.

according to Aristotle, for these workers to be in unequal positions where the inequality of pay does not reflect the inequality in work value.[159] This demonstrates that EPEV, where both pay and value are limited by the 'all-or-nothing' requirement of equality,[160] does not achieve formal equality, as it cannot help the claimant suffering disproportionately different treatment.[161]

Murphy is an example where the individual case had a more just outcome by distorting EPEV but it does, however, breed inconsistency in the law.[162] The foregoing examples show that not all unequal cases are treated equally; only the few that appeal to the courts' sense of individual justice are treated as though they are equal.[163] In *Wells*,[164] equal value was established, despite the value being formally less according to the job evaluation, because the court appeared to ignore an 'overall measurable [and] significant difference.'[165] Contrast that factual anomaly with the *Murphy* principle: that there is a claim to equal pay if equal or 'higher value' is established.[166] So the courts have resorted to treating cases of less than equal value differently to cases of greater value, yet managed, in some cases, to treat both types as if they were of equal value. It seems arguable that the best way to overcome this inconsistency would be to explicitly disaggregate equality from both pay and value.[167] The proposal of proportionate pay would achieve this.[168]

3.4 Substantive Equality

This competing theory criticises formal equality because it requires equal treatment but does not specify the substance of the treatment or the criteria by which likeness is measured.[169] Therefore, formal equality is often 'characterized as tautologous [and] devoid of moral content' by proponents of substantive equality.[170] They say that most academic references to formal equality implicitly include moral standards, so that equal treatment is rarely actually formal.[171]

The substantive equality discourse encompasses two different approaches. First, there is equality of opportunity which aims to equalise the starting points between the advantaged and disadvantaged groups,[172] as often it may be harder for the disadvantaged group to reach the same starting point.[173] This theory has become increasingly favoured in EU equality law.[174] Second, there is a more radical approach to substantive equality: equality of results.[175] Here the argument is that historic disadvantage may necessitate different treatment in the pursuit of a fair outcome.[176] 'There is [after all] no point having more equal treatment in the world … if people … do not end up equally situated.'[177]

It is arguable that substantive equality is irreconcilable with the fundamental notion of consistency in the Aristotelian definition of formal equality.[178] It would be inconsistent to remedy past discrimination against a minority with present discrimination against the other group.[179] As in

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[159] Aristotle, *Ethica Eudemia* (n 148); Westen (n 103) 557.
[160] Fredman, *Women and the Law* (n 8) 233.
[161] Fredman, *Discrimination Law* (n 33) 13.
[162] *Murphy* (n 63); Aristotle, *Ethica Eudemia* (n 148); Westen (n 103) 557; Fredman, *Discrimination Law* (n 33) 2.
[163] Aristotle, *Ethica Eudemia* (n 148); Westen (n 103) 557.
[164] *Wells* (n 133).
[165] ibid.
[166] *Murphy* (n 63).
[167] Fredman, *Women and the Law* (n 8) 279.
[168] Steele, 'Beyond Equal Pay?' (n 9).
[169] Patrick S Shin, 'The Substantive Principle of Equal Treatment' (2009) 15 LT 149, 151.
[170] ibid; John Rawls, A *Theory of Justice* (rev edn, Harvard 1999) 50–51.
[171] Bernard Williams, 'The Idea of Equality' in Peter Laslett and Walter G Runciman (eds), *Philosophy, Politics and Society* (Wiley 1962) 110, 111; Westen (n 103) 547.
[172] Barnard and Hepple (n 126) 565; Fredman, *Discrimination Law* (n 33) 2.
[173] ibid.
[174] Barnard and Hepple (n 126) 566; Sergiu Balan, 'Formal and Substantive Equality of Opportunity' (2012) 4 Multidisciplinary Research Journal 85, 88.
[175] Fredman, *Discrimination Law* (n 33) 14–19.
[176] Barnard and Hepple (n 126) 565.
[177] Elisa Holmes, 'Anti-Discrimination Rights Without Equality' (2005) 68 MLR 175, 178–179.
[178] Westen (n 103) 551; Fredman, *Discrimination Law* (n 33) 2.
[179] Fredman, *Discrimination Law* (n 33) 2.

Murphy,[180] where the Court felt that an imperfect remedy was better than no remedy, substantive equality may remedy inequality with further inequality.[181] Equal treatment remains the general rule in anti-discrimination law;[182] however, indirect discrimination – an example of substantive equality – departs from that general rule.[183] Indirect discrimination takes account of the disadvantage suffered by the protected group due to a provision, criterion or practice that appears to apply equally.[184] Equal treatment is not permitted in these circumstances because it disadvantages the protected group, but its substantive nature is tempered significantly by the availability of the material factor defence.[185]

3.4.1 Enderby v Frenchay Health Authority[186]

Substantive equality, it can be argued, was recognised in the *Enderby* case.[187] This has been justified as a necessary expansion to equal pay law due to the persistence of occupational segregation tainted by sex considerations as 'history continues to leave its mark on pay structures.'[188] The *Enderby* case concerned a female speech therapist seeking EPEV to a male clinical psychologist and a male pharmacist.[189] The Court of Appeal referred the matter to the CJEU;[190] which held that:

> If the pay of speech therapists is significantly lower than that of pharmacists and if the former are almost exclusively women while the latter are predominantly men, there is a prima facie case of sex discrimination, at least where the two jobs in question are of equal value and the statistics in that situation are valid.[191]

On the facts, the proven disparate impact on women compared to men in male-dominated jobs of equal value was sufficient for a *prima facie* case of indirect discrimination in lieu of 'any [provision, criterion or practice] preventing or hindering access to the advantaged group.'[192] The judgment was greeted by commentators as 'supportive of substantive equality', giving the appearance of a 'results-oriented' approach.[193] Indeed, the CJEU had held that there was *prima facie* discrimination even though both sexes, in theory, had equal opportunity to work in the group that was paid higher wages.[194] By presenting valid statistics showing men and women being paid differently for work of equal value, the CJEU said it inferred a presumption of past discrimination.[195]

To conclude that *Enderby* endorsed substantive equality is, however, erroneous.[196] If the CJEU had held that a disparate effect on a particular group is sufficient on its own to make a case of *prima facie* indirect discrimination, perhaps that conclusion would be different.[197] In the later *Gebietskrankenkasse* case the applicants presented this optimistic argument:[198] that as psychotherapists they should be classified equally with fully qualified doctors – who inevitably had more qualifications, training and experience – because some of the functions they carried out were identical.[199] If their argument had been accepted, it would have suggested that all work was deserving of

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[180] *Murphy* (n 63).
[181] Fredman, *Discrimination Law* (n 33) 2; Steele, 'Beyond Equal Pay? (n 9) 120.
[182] Hugh Collins, 'Social Inclusion: A Better Approach to Equality Issues?' (2005) 14 Transnat'l L and Contemp Probs 897, 900.
[183] ibid 899; Elisa Holmes, 'Anti-Discrimination Rights Without Equality' (2005) 68 MLR 175, 183.
[184] Equality Act 2010, s 19; McColgan, *Discrimination, Equality and the Law* (n 32) 136.
[185] Collins (n 182) 899–900; Kilpatrick (n 8).
[186] *Enderby* (n 36).
[187] Annette Abanulo, 'Equal Pay for Work of Equal Value: The 'Results-Oriented' Approach that Never Was' (1999) 28 ILJ 365.
[188] *Middlesborough Borough Council v Surtees* [2007] ICR 1644 (EAT) [50] (Elias P); IDS Employment Law (n 20) 223.
[189] Iain Steele, 'Sex Discrimination and the Material Factor Defence under the Equal Pay Act 1970 and the Equality Act 2010' (2010) 39 ILJ 264, 266.
[190] *Enderby v Frenchay HA (No 1)* [1992] IRLR 15 (CA).
[191] *Enderby* (n 36) para 16.
[192] *Enderby v Frenchay HA* [1994] ICR 112 (CA) 127 (Neill LJ).
[193] Helen Fenwick and Tamara Hervey, 'Sex Equality in the Single Market: New Directions for the European Court of Justice' (1995) 32 CMLR 443, 461; Angus Campbell and Meropi Voyatzi, 'Sex Discrimination and the Burden of Proof' (1994) 13 SLT 127, 129; Abanulo (n 187).
[194] Abanulo (n 187).
[195] *Enderby* (n 36) Opinion of AG Lenz, para 18.
[196] Abanulo (n 187).
[197] ibid 368.
[198] Case C-309/97 *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v Wiener Gebietskrankenkasse* [1999] 2 CMLR 1173.
[199] ibid para 12.

equal pay whether it was of equal value or not.[200] As this was evidently inconsistent with *Enderby*, the argument was rejected.[201] In doing so, the CJEU emphasised three things: first, the statistics must demonstrate an 'appreciable difference in pay;'[202] second, there must be proof that there is actually work of 'equal value;'[203] and, third, the statistics must also demonstrate that one occupation is undertaken almost exclusively by women and the other predominantly by men.[204] Since then, the Court of Appeal in *Home Office v Bailey* has made it even easier to establish *prima facie* indirect discrimination.[205] Even where the lower paid group contains only a '*significant* number … of female workers' rather than being almost exclusively female, and the higher paid group is predominantly male, a *prima facie* case of indirect discrimination can be established.[206] This reduces the likelihood that an employer could employ a small number of men in a lower paid group in order to prevent women making an EPEV case.[207]

3.4.2 A Substantive Approach to Equal Pay

If EPEV were rebranded using substantive equality, it could become fair pay.[208] Few would disagree that in principle fair pay is a desirable outcome.[209] Before the Equality Act 2010 was enacted, the Discrimination Law Review Commission considered taking a substantive approach to equal pay by removing the comparative basis of discrimination law.[210] A claimant would have had a claim if they were paid badly, rather than having to show that they were paid worse than someone of a different gender.[211] Fortunately, it was realised that the comparative nature of the current mechanism better reflects the foundational principle of equal treatment, which ought to remain the primary aim of equal pay law.[212]

As was held in *Gebietskrankenkasse*, a substantive notion of fair pay could have meant a right to equal pay regardless of work value.[213] Elias P observed in another case that its effect would be 'to convert a law which is designed to eliminate [sex] discrimination … into fair wages legislation.'[214] In contrast, the new approach advocated in this paper uses proportionality to better implement formal equality without exceeding the purposes of the existing legislation.[215] Proportionality appears to be a logical route to take, as it is already used by the European Union to ensure that more substantive legislative goals do not become disproportionate violations of the fundamental principle of equal treatment.[216]

3.5 A Comparative Right to Proportionate Pay

As this paper advocates a formal disaggregation of equality from pay and value,[217] the comparative element would be necessarily different. For proportionate pay to properly implement formal equality as conceived by Aristotle, it would necessarily rely on a comparison between the work done by a man and the work done by a woman. A comparison of sorts is unavoidable, otherwise the notion would result in fair pay between all workers in all jobs regardless of work value or gender.[218] The proposal logically requires that the pay difference is proportionate to the value difference between comparable work. It is submitted that this would be achieving comparative justice between male and female workers, as well as

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[200] Abanulo (n 187) 369.
[201] ibid 367.
[202] *Enderby* (n 36) para 16.
[203] ibid.
[204] ibid para 19.
[205] [2005] EWCA Civ 327, [2005] ICR 1057.
[206] ibid [30] (Peter Gibson LJ).
[207] IDS Employment Law (n 20) 112–113.
[208] Fredman, *Women and the Law* (n 8).
[209] ibid; McColgan, *Discrimination, Equality and the Law* (n 32).
[210] 'Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain – A Consultation Paper' *Department for Communities and Local Government* (June 2007) paras 1.15–1.16.
[211] ibid.
[212] *Defrenne* (n 104) 458, para 12; Collins (n 182) 900.
[213] *Gebietskrankenkasse* (n 198); Abanulo (n 187) 369.
[214] *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 (EAT) [131] (Elias P); Steele, 'Sex Discrimination and the Material Factor Defence under the Equal Pay Act 1970 and the Equality Act 2010' (n 189).
[215] Collins (n 182) 902.
[216] ibid.
[217] Fredman, *Women and the Law* (n 8) 279.
[218] *Gebietskrankenkasse* (n 198); 'Discrimination Law Review' (n 210) paras 1.15–1.16.

can be done by adhering to the fundamental principles of formal equality.[219]

3.5.1 Conclusion

It may appear radical to advocate removing the cause of action for a gender pay discrimination claim from the great moral weight of equality.[220] However, the scope of protection would be expanded incrementally, rather than a remedy of equal pay being available only to those fortunate enough to locate an actual comparator doing work of 'equal value.'[221] Whether this would expand the scope of UK protection beyond EU limits is immaterial, as '[c]ommunity law merely provides minimum guarantees for [workers].'[222] Nor is it expanded as radically as it would be if a notion of fair pay were introduced.[223] Theoretically, proportionate pay is justifiable as it appropriately manifests substantively equal results within a formal equality framework,[224] whereas EPEV does not aid women who cannot establish equal or 'greater value' with a comparator but are paid disproportionately less than the value of their work demands.[225]

4 THE ACTUAL AND HYPOTHETICAL COMPARATOR

4.1 Introduction

Requiring a valid comparator to be an actual 'flesh and blood' individual seems to exacerbate the weaknesses of EPEV.[226] This requirement raises two important issues.[227] Originally, the actual comparator had to work contemporaneously with the claimant,[228] since rejected to an uncertain extent by the CJEU in *Macarthys'* case.[229] This begs the first question: why should the courts treat a comparison with the claimant's immediate predecessor differently to one with her successor?[230] Second, it is worth exploring whether a solution to the problem might entail making the hypothetical comparator 'available,'[231] even in cases of indirect sex discrimination.[232]

4.2 The Contemporaneous Comparator

The contemporaneity requirement – substantiated by the Court of Appeal in *Macarthys*[233] – meant that claimants could only claim equal pay with a male working concurrently with them.[234] The majority held that by employing a literal interpretation of Equal Pay Act 1970 section 1(2)(a) – equal pay for like work – 'the words, by the tenses used, look to the present and the future but not to the past' and,[235] on that basis, it was Parliamentary intention to which they were giving effect.[236] Lord Denning dissenting noted that if the jobs were rated as equivalent, then the woman could claim equal pay, no matter whether employed concurrently or immediately after the comparator.[237] Furthermore, the Sex Discrimination Act 1975, also in force at the time, allowed the claimant to use her immediate male predecessor to remedy sex discrimination against her regarding other work benefits excluding pay.[238] Therefore, Lord Denning argued that both statutes ought to be read as 'a harmonious whole' intended to

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[219] Craig L Carr, 'The Concept of Formal Justice' (1981) 39 Phil Stud 211, 217–218.
[220] ibid; Collins (n 182) 901.
[221] *Walton Centre v Bewley* [2008] ICR 1047 (EAT) [51] (Elias J); Richard W Painter and Ann Holmes, *Cases and Materials on Employment Law* (OUP 2015) 171.
[222] *Wilson v Health and Safety Executive* [2009] EWCA Civ 1074, [2010] 1 CMLR 24 [67] (Arden LJ).
[223] Fredman, *Women and the Law* (n 8).
[224] Fredman, *Discrimination Law* (n 33) 14–19.
[225] Steele, 'Beyond Equal Pay?' (n 9) 120.
[226] IDS Employment Law (n 20) 88.
[227] ibid.
[228] *Macarthys Ltd v Smith* [1979] ICR 785 (CA) 793 (Lawton LJ).
[229] *Macarthys* (n 44) 198; Steele, 'Beyond Equal Pay?' (n 9) 123–124; Discrimination Law Review (n 210) paras 3.25–3.29, 'Comparison with Successor's Pay' (1996) 70 EOR 52.
[230] *Bewley* (n 221) [51] (Elias J); 'Comparison with Successor's Pay' (n 229); Rubenstein, 'Equal Pay: No Comparison with Successor' (n 50); Connolly (n 51).
[231] *Bewley* (n 221) [24] (Elias J); Case C-200/91 *Coloroll Pension Trustees Ltd v Russell* [1994] ECR I-4397; Connolly (n 51); Darren Newman, 'Are Comparators Necessary in Direct Discrimination Claims?' (2010) 206 EOR 20; Fredman, 'Reforming Equal Pay Laws' (n 43).
[232] Equality Act 2010, ss 64(2), ss 65(1)(c).
[233] *Macarthys* (n 228) 793 (Lawton LJ); Malone (n 9) 11.
[234] *Macarthys* (n 228); Fredman, 'Reforming Equal Pay Laws' (n 43); Fredman, *Women and the Law* (n 8); McColgan, *Discrimination, Equality and the Law* (n 32).
[235] Equal Pay Act 1970, s 1(2)(a); *Macarthys* (n 228) 793 (Lawton LJ).
[236] *Macarthys* (n 228) 793 (Lawton LJ), 792 (Lord Denning); IDS Employment Law (n 20) 106.
[237] Equal Pay Act 1970, s 1(2)(b); *Macarthys* (n 228) 790–791 (Lord Denning).
[238] Sex Discrimination Act 1975.

eliminate discrimination against women,[239] thus 'it is just and reasonable to make a comparison' with a predecessor.[240] The case was referred to the CJEU to determine whether article 157 TFEU could apply.[241]

4.2.1 The Rejection of the Contemporaneity Requirement

The CJEU overruled the majority of the Court of Appeal.[242] It held that article 157 TFEU could 'not be restricted by … a requirement of contemporaneity.'[243] Thus, a comparison was permissible where the claimant was paid less than her male predecessor.[244] Nevertheless, it was still for the tribunal to determine whether the pay difference between two non-contemporaneous periods of employment was explained by the material factor defence.[245]

This judgment was, first and foremost, justified textually: Article 157 TFEU explains that 'equal pay … for equal work or work of equal value'[246] applies throughout 'the time [that] rates shall be the same for the same job.'[247] This drafting lacks clarity, but it can be deduced that both predecessors and successors to the claimant are implicitly included, as it can be presumed that someone employed within a reasonably short time from the claimant's employment beginning or ending would still be subject to the same pay rates.[248] On the facts of *Macarthys*,[249] a delay of four months between the predecessor leaving and the claimant joining was a reasonable intervening period.[250] This stance was justified beyond doubt by the Equal Pay Directive which read that: 'the principle of equal pay … means … the elimination of *all* discrimination on the grounds of sex'.[251]

The rejection of the contemporaneity threshold was also justified in a practical sense. The stereotypical form of direct sex discrimination – an employer deliberately replaces a male worker with a woman, lower-paid because she is female – would otherwise have been unactionable.[252] Allowing directly discriminatory recruitment decisions would also have been at odds with the competitiveness agenda of the European Union;[253] it would have put compliant employers at a competitive disadvantage with the discriminatory employer trying to reduce his wage bill.[254] Lawton LJ responded weakly to those criticisms, claiming that lower pay for a female replacement could occur legitimately because of economic pressures or more accurate job evaluation.[255] However, should these reasons exist, it is up to the employer to establish the material factor defence.[256]

4.3 The Immediate Successor

Once the contemporaneity requirement was ousted in *Macarthys*,[257] it was inevitable that it would be asked whether its *ratio decidendi* made a comparison with an immediate successor possible.[258] In *Hallam v Connaughton*,[259] the claimant handed in her notice to leave a job that paid £11,138pa but, before the notice period expired, the employer found a man to replace her on a starting salary of £20,000pa.[260] Importantly, the male successor did not sign the contract of employment to that effect until after the claimant's

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[239] *Macarthys CA* (n 228) 791 (Lord Denning).
[240] ibid 792 (Lord Denning).
[241] *Macarthys* (n 44); IDS Employment Law (n 20) 107.
[242] ibid 198.
[243] ibid 198; IDS Employment Law (n 20) 107.
[244] *Macarthys Ltd v Smith (No 2)* [1981] 1 QB 180 (CA) 200 (Lord Denning).
[245] *Macarthys* (n 44) 198.
[246] TFEU art 157.
[247] ibid.
[248] *Macarthys CA* (n 228) 790 (Lord Denning).
[249] *Macarthys* (n 44).
[250] *Macarthys No 2* (n 244).
[251] Equal Pay Directive (n 40); Malone (n 9) 11.
[252] *Macarthys Ltd v Smith* [1978] ICR 500 (EAT) 502 (Phillips J).
[253] *Macarthys* (n 44) Opinion of AG Caportorti 184.
[254] ibid.
[255] *Macarthys CA* (n 228) 793 (Lawton LJ).
[256] Equality Act 2010, s 69.
[257] *Macarthys* (n 44) 198.
[258] Rubenstein, 'Equal Pay: No Comparison with Successor' (n 50); Malone (n 9) 11; 'Comparison with Successor's Pay' (n 229); Fredman, *Women and the Law* (n 8); Rachael Heenan and Daniella McGuigan, 'Comparators: The Before and After Arguments' (2008) 92 Emp LJ 17.
[259] *Hallam* (n 46).
[260] ibid.

contract expired.[261] The claimant brought an equal pay case against her ex-employer whose Counsel made one especially persuasive argument in reply.[262] That due to the contractual basis of equal pay law, the equality clause could not be enforced as part of her employment contract since it had already expired.[263] Arguably, it would create manifest uncertainty if employers could not know whether they had breached the contract until they employed the claimant's successor.[264] Nevertheless, the Employment Appeal Tribunal was not persuaded, therefore this argument is not evaluated in detail in this dissertation. It suffices to say that the argument did, however, 'illustrate powerfully the unreality of the contractual mechanism' in equal pay law.[265]

The Employment Appeal Tribunal held that the claimant could use her immediate successor as a comparator because 'his contract was so proximate to her own as to render him an effective comparator, as effective as if [an actual comparator.]'[266] In reaching its conclusion, however, the Employment Appeal Tribunal mistakenly relied on an argument which supported hypothetical comparators – made to the CJEU in *Macarthys* – that did not feature in its final judgment.[267] The CJEU had, in fact, discounted them already confirming that the appraisal had to refer to work that had already been performed.[268] The Employment Appeal Tribunal did make it clear, though, that as the claimant would encounter more evidential difficulties in attempting to establish sex discrimination with a successor, it would be correspondingly easier for the employer to establish the material factor defence.[269]

Hallam was subsequently declared *per-incuriam* by the Employment Appeal Tribunal in *Walton Centre v Bewley*;[270] Elias J had no choice as the mistake in the Employment Appeal Tribunal's judgment made its reasoning 'fundamentally defective.'[271] However, it can be argued that this subsequent negative treatment was, in part, due to the different circumstances of both cases.[272] *Hallam* concerned an aggrieved individual whose claim hinged upon the male successor being paid more than she was;[273] *Bewley* concerned a back pay claim which included a period before the comparators were actually employed, thus effectively making them successors to the claimant.[274] There was, therefore, a necessity for a successor comparison present in *Hallam* that was absent in *Bewley*, where there was still a claim for the period of contemporaneous employment.[275] Supporting the validity of the *Hallam* decision – despite the flawed reasoning – is vindicated by Elias J's concurrence that successor comparisons ought to be 'logically permissible.'[276]

4.3.1 A Commentary on Walton Centre v Bewley

Prior to *Bewley* coming before the Employment Appeal Tribunal,[277] the CJEU had the opportunity to clarify its stance on successor comparisons in *Coloroll Pension Trustees v Russell.*[278] The CJEU held that the pension trustees were to implement the principle of equal treatment with regard to all employees and dependants of the scheme.[279] However, the court still appeared undecided about the legality of the successor

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[261] ibid 94 (Holland J).
[262] *Hallam* (n 46); Malone (n 9) 11.
[263] ibid 97.
[264] IDS Employment Law (n 20) 108.
[265] Malone (n 9) paras 11–14.
[266] *Hallam* (n 46) 100 (Holland J); IDS Employment Law (n 20) 108; Malone (n 9) 11.
[267] *Macarthys* (n 44) 197; *Bewley* (n 221) [11]–[13] (Elias J).
[268] ibid 199.
[269] *Hallam* (n 46) 100 (Holland J); IDS Employment Law (n 20) 107–108; Malone (n 9) 11.
[270] (n 221) [13] (Elias J); Malone (n 9) 12.
[271] ibid; IDS Employment Law (n 20) 108.
[272] Malone (n 9) 12; Rubenstein, 'Equal Pay: No Comparison with Successor' (n 50).
[273] *Hallam* (n 46).
[274] *Bewley* (n 221); Rubenstein, 'Equal Pay: No Comparison with Successor' (n 50); IDS Employment Law Handbook (n 20) 108–109.
[275] Malone (n 9) 12; Rubenstein, 'Equal Pay: No Comparison with Successor' (n 50).
[276] *Bewley* (n 221) [13], [43] (Elias J).
[277] ibid.
[278] *Coloroll* (n 231).
[279] ibid.

comparison.[280] First, the Court held that 'comparisons were also possible between workers of a different sex performing the same work but at different periods.'[281] This statement, in its own right, is consistent with the principle of comparison with a successor.[282] In contradiction, however, the court says that article 157 TFEU will only operate if a comparison can be made with a worker of the opposite gender doing work of equal value in the same undertaking 'now or in the past.'[283] Therefore, a 'concrete appraisal' demanded a comparison with work that had actually been performed.[284] However, it is suggested that equating a successor comparison with a hypothetical comparison is a specious argument. Wherever there can be a comparison with an actual worker subsequently employed by the same employer,[285] this, arguably, commands greater legal certainty than a purely hypothetical comparison.[286] It seems logical, for example, to presume that there would be more factual evidence to justify any assumptions about the future pay of the comparator in a successor comparison than in a purely hypothetical comparison.[287]

A successor comparison should not, therefore, be treated differently to a predecessor comparison.[288] There are, undoubtedly, evidential difficulties with both, but if they could be overcome with a predecessor, why not with a successor?[289] Elias J was fearful of the speculation required by a successor comparison: for example, the assumption that a male successor would have been paid more in the past just because he is now, did not seem certain, especially when comparing different jobs of equal value.[290] It would be difficult, he argued, to predict the payment policies for jobs whose wages may be set by different people.[291] Arguably, the courts have to make a similar assumption in a predecessor comparison: that the comparator would have been paid at least the same at the time when the claimant was employed.[292] It can also be inferred that it would be easier for an employer to establish the 'market forces' material factor defence where there is a longer period between the successive periods of employment.[293] However, just because it would be harder for the claimant to discharge the evidential burden should not rule out its availability in principle.[294] As *Macarthys* involved a four-month intervening period, claims of a non-contemporaneous nature using both predecessors and successors could have genuine utility.[295] To remove the contemporaneity requirement but bar successor comparisons therefore seems unjustified.

In his judgment, Elias J intends to criticise the rationality of a successor comparison but, in so doing, appears to condemn the comparative foundation of EPEV as a whole.[296] He states that, '[T]he existence of a successor is really no more than a fortuitous event which provides a peg on which to justify a legal comparison.'[297] He is correct to the extent that the evidence of injustice is contingent upon a higher-paid male successor being appointed which does involve an element of 'luck.'[298] However, it seems that the requirement for an actual comparator in equal pay law is so onerous that it would be very difficult for any claimant to satisfy it.[299] If no higher-paid successor is appointed, or no contemporaneous comparator is located, then the injustice that may or may not exist is not remedied.[300] However, if it is the earlier decision

[280] ibid; *Bewley* (n 221) [35] (Elias J).
[281] *Coloroll* (n 231) [102].
[282] *Bewley* (n 221) [36] (Elias J).
[283] *Coloroll* (n 231); Case C-256/01 *Allonby v Accrington and Rossendale College* [2004] ECR I-873.
[284] *Macarthys* (n 44) 199; *Bewley* (n 221) [52] (Elias J); IDS Employment Law (n 20) 109.
[285] *Bewley* (n 221) [43]–[45] (Elias J); Malone (n 9) 13.
[286] ibid [52]–[56] (Elias J).
[287] ibid [46], [55]–[56] (Elias J); IDS Employment Law (n 20) 109.
[288] *Bewley* (n 221) [44] (Elias J); Malone (n 9) 13.
[289] ibid [44]–[46] (Elias J); Malone (n 9) 13; IDS Employment Law (n 20) 107.
[290] ibid [55] (Elias J); IDS Employment Law (n 20) 109.
[291] *Bewley* (n 221) [52]–[55] (Elias J).
[292] ibid; IDS Employment Law (n 20) 109.
[293] *Macarthys* (n 44) Opinion of AG Caportorti 185, *Bewley* (n 221); *Hallam* (n 46); Malone (n 9) 12.
[294] *Bewley* (n 221) [43] (Elias J); Malone (n 9).
[295] ibid [44] (Elias J).
[296] ibid [51]–[52] (Elias J).
[297] ibid [51] (Elias J).
[298] McColgan, *Discrimination, Equality and the Law* (n 32) 15–19.
[299] ibid.
[300] *Bewley* (n 221) [51] (Elias J).

to fix the claimant's pay at a lower level – not the later decision to fix the successor's pay at a higher level – that the employer becomes retrospectively liable for, then this is arguably 'contrary to the preventive emphasis of discrimination legislation.'[301] But, in a pragmatic sense, it prevents the greater injustice of an employer being able to say to a male successor that he is being paid more because he is male, and for there to be no remedy.[302]

4.3.2 Equality Act 2010, section 64(2)

The Equality Bill initially restated the literal interpretation of the Equal Pay Act 1970 that both claimant and comparator had to be working at the same time.[303] However, once amended,[304] section 64(2) codifies *Macarthys*,[305] as the comparison with the work done by the comparator is 'not restricted to work done contemporaneously with the work done by [the claimant].'[306] It may be that *Bewley* is no longer good law anyway as the terminology of section 64(2) certainly leaves the door open to a successor comparison,[307] as there is no explicit preference for a predecessor or implicit exclusion of a successor. The accompanying non-binding explanatory notes state, however, that the law has not been widened beyond *Macarthys.*[308] There do not appear to be any cases that have gone beyond the Employment Tribunal citing section 64(2) or asserting that *Bewley* is no longer good law. Therefore, it is difficult to predict whether or not successor comparisons could be available in future, but under the current law it seems unlikely.[309]

4.4 The Hypothetical Comparator

It is, therefore, argued that explicitly hypothetical comparisons ought to be permitted,[310] as the current law is wholly inconsistent with other anti-discrimination law.[311] If they were legitimate, then the debate about the legality of the successor comparison would become mute, as the contentious dividing line between actual and hypothetical comparisons would no longer exist.[312] A hypothetical comparison permits a comparison between how the woman is treated and the way in which a hypothetical man doing work of equal value would be treated.[313] The most obvious obstacle with the concept of the hypothetical comparator is how to define the comparator consistently.[314] However, from the notions of direct and indirect discrimination which have now finally been recognised in equal pay law,[315] there is a 'well-developed methodology' for determining the hypothetical comparator.[316] In *Shamoon v Chief Constable of the Royal Ulster Constabulary*,[317] for example, the hypothetical male comparator was to resemble the woman in every 'material' respect,[318] except for her gender.[319]

Permitting the hypothetical comparator would help to redress the crippling effect of occupational segregation on EPEV.[320] In circumstances like *Murphy*,[321] where the claimant did work of greater

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[301] 'Comparison with Successor's Pay' (n 229) 53.
[302] *Bewley* (n 221) [45] (Elias J); Gregory (n 6) 470.
[303] Equality Bill HL Deb 19 January 2010, vol 716, col 938.
[304] Equality Bill 2009; Michael Rubenstein, 'Equality Bill Lords Committee Stage' (2010) 198 EOR 20.
[305] Equality Bill HL Deb 19 January 2010, vol 716, col 939; *Macarthys* (n 44).
[306] Equality Act 2010, s 64(2).
[307] Stuart Brittenden and Robert Moretto, 'Employment Law: Equality Clause' (Sweet & Maxwell 2015) para 51; Malone (n 9) 13.
[308] Explanatory Notes to the Equality Act 2010, para 223; Malone (n 9) 13.
[309] Malone (n 9) 14.
[310] Newman, 'Repeal the Law on Equal Pay' (n 31); Connolly (n 51); Fredman, 'Reforming Equal Pay Laws' (n 43).
[311] Newman (n 31); Malone (n 9); IDS Employment Law (n 20) 105.
[312] Malone (n 9) 12.
[313] Fredman, 'Reforming Equal Pay Laws' (n 43) 200; Fredman, *Women and the Law* (n 8).
[314] Fredman (n 43) 200.
[315] Equality Act 2010, ss 13, 19; Newman, 'Repeal the Law on Equal Pay' (n 31).
[316] Fredman, 'Reforming Equal Pay Laws' (n 43) 201; Newman, 'Are Comparators Necessary in Direct Discrimination Claims?' (n 231); Newman, 'Repeal the Law on Equal Pay' (n 31).
[317] [2003] UKHL 11, [2003] 2 All ER 26.
[318] ibid [4] (Lord Nicholls).
[319] Equality Act 2010, s 23; Newman, 'Repeal the Law on Equal Pay' (n 31).
[320] Steele, 'Sex Discrimination and the Material Factor Defence under the Equal Pay Act 1970 and the Equality Act 2010' (n 189); Gregory (n 6) 470; Connolly (n 51); 'The Gender Pay Gap – A Literature Review' (n 32) 19–22; IDS Pay Report: 'Understanding Reward: Gender Segregation' *Income Data Services* (June 2005); Kilpatrick (n 8) 325.
[321] *Murphy* (n 63).

value than her actual comparator, the claimant would be able to rely on a hypothetical comparator in order to claim that if she were a man she would be paid more than was the case.[322] It is suggested that an EPEV claim using the hypothetical comparator could be synonymous to a claim for proportionate pay.[323] Therefore, EPEV including the hypothetical comparator could be as effective as a new cause of action for proportionate pay.[324] In either case, there would be a better result for the claimant, as she would not be forced to seek equal pay to a male doing work of lesser value.

4.4.1 The Hypothetical Comparator in Macarthys

Advocate General Caportorti opined in *Macarthys* that hypothetical comparisons were a 'logical and necessary consequence' of rejecting the contemporaneity requirement.[325] A hypothetical comparison would be permissible where there is a method for referring to 'the wage usually paid … to male workers for the same work in the same enterprise.'[326] This implicitly suggests that a woman could only base her claim on what a male would have been paid if he had been employed previously in the same establishment doing work of equal value to the work done presently by the claimant. This seems to be intended as a response to fears that hypothetical comparisons require analyses of entire industries,[327] and would seem to limit the availability of hypothetical comparisons somewhat. Furthermore, the employer would still be able to argue the material factor in defence.[328]

In spite of the Advocate General's persuasive opinion, the CJEU came to a different conclusion.[329] The claimant had argued that she should be able to claim the pay that she would be entitled to if she were a man.[330] To identify indirect discrimination in this type of claim, the CJEU first held that 'comparative studies' of entire industries would be required,[331] which seems 'apocalyptic and unreal' when a claimant could refer to the wage normally paid by the same employer to male workers doing work of different value.[332] Second, it said that to do so would require more specific national or EU legislation.[333] For now, comparisons were to be confined to those that can be drawn from 'concrete appraisals of the work actually performed.'[334] Malone suggests that the requirement of 'concrete comparisons' is merely 'pragmatic,' as it does inevitably make the court's job simpler, rather than their being an unimpeachable principle requiring actual comparators.[335]

4.4.2 Contrasting Interpretations of Macarthys

Therefore, on closer inspection, the CJEU only seemed to reject the availability of the hypothetical comparator in relation to the principle of the direct effect of EU law.[336] This is the principle that where EU law is appropriately framed, individuals may rely on the right it confers in national courts.[337] It is appropriately framed where the measure is clear, unconditional and capable of application without further implementing measures.[338] In the seminal case of *Defrenne v Sabena*,[339] the CJEU held that the fundamental principle of equal pay for 'equal work [or work of equal value]' could have direct effect for actual comparators but that hypothetical comparators were too complex.[340] In the absence of further EU or national legislation, its direct effect was limited to a 'concrete appraisal of work actually performed.'[341]

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[322] Steele, 'Beyond Equal Pay?' (n 9).
[323] ibid; Aileen McColgan, *Just Wages for Women* (OUP 1997) 312–16.
[324] ibid.
[325] *Macarthys* (n 44) Opinion of AG Caportorti 186.
[326] ibid.
[327] *Macarthys* (n 44) 199.
[328] ibid Opinion of AG Caportorti 185.
[329] ibid.
[330] ibid 197.
[331] ibid 199; *Bewley* (n 221) [25] (Elias J).
[332] Malone (n 9) 14.
[333] *Macarthys* (n 44) 199.
[334] ibid; IDS Employment Law (n 20) 109.
[335] Malone (n 9) 14; IDS Employment Law (n 20) 109.
[336] Fredman, 'Reforming Equal Pay Laws' (n 43) 201.
[337] Paul P Craig and Gráinne de Burca, *EU Law: Text, Cases and Materials* (6th edn, OUP 2015).
[338] *Defrenne* (n 104) paras 18–19.
[339] ibid.
[340] ibid para 21.
[341] *Macarthys* (n 44) 199; Fredman, 'Reforming Equal Pay Laws' (n 43) 201.

Therefore, the judgment in *Macarthys* simply meant that there was no 'mandatory requirement for a hypothetical comparator' in EU law.[342]

It can be argued that further EU legislation enacted since the *Macarthys* case has enabled the direct effect of article 157 TFEU to apply to the hypothetical comparator too.[343] The recast Equal Treatment Directive prohibits both direct and indirect sex discrimination with regards to pay.[344] Most importantly, it defines direct discrimination as occurring where a person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.[345] Its effect was considered by Elias J in *Bewley*.[346] He held that it could not make a hypothetical comparator available as an EU Directive did not have the power to expand the scope of the Treaty.[347] To reach this conclusion, Elias J wrongly deduced from *Macarthys* that article 157 TFEU is inherently limited to actual comparators – and not that it had been inhibited by the doctrine of direct effect.[348] As *Defrenne* stated that further EU or national legislation was needed,[349] it is arguable that the Equal Treatment Directive expands its direct effect sufficiently.[350] In any event, it seems incorrect to conclude that equal pay law requires, without exception, an actual comparator.[351]

4.4.3 Equality Act 2010, section 71

The hypothetical comparator is actually made available to a 'limited' extent in the Equality Act 2010, s 71.[352] It provides that in a case of direct discrimination with regards to pay a claimant can use the hypothetical comparator rather than having to present an actual comparator.[353] If a case similar on its facts to *Hallam* were to arise involving direct discrimination, then section 71 would easily solve the problem with using a successor as a comparator.[354] However, there are no reported cases going beyond the Employment Tribunal which rely on section 71.[355] This could mean a number of things. Most likely, it suggests that section 71 is of limited utility due to the rarity of direct discrimination,[356] which has been largely eliminated.[357] Even when it does occur the claimant will mostly have an actual comparator, unless it is a male successor who is better paid simply because he is male. Alternatively, it could mean that section 71 is operating efficiently at the tribunal level.

In debate prior to the Equality Bill passing into law it was argued that limiting section 71 to direct discrimination would render domestic law incompatible with EU law.[358] In fact, the legislators had two legitimate options. First, as they chose to do, they could refrain from allowing hypothetical comparators in indirect gender pay discrimination claims because 'it is not fair to expect the government to operate on the basis of unclear law.'[359] Second, the Equality Act 2010 could have accepted the invitation of the CJEU in *Macarthys* to implement legislation that would substantiate the operation of the hypothetical comparator.[360] Imagine a similar case to *Hallam*, where a male successor was paid more as he had a particular qualification – held by many more men than women – but it was of little or no relevance to the job; as the law stands, if future comparisons are still barred, the employer would not have to justify objectively the indirectly discriminatory pay

[342] Fredman, 'Reforming Equal Pay Laws' (n 43) 201.
[343] Directive 2006/54/EC of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation [2006] OJ 204/23 (Recast Equal Treatment Directive); Fredman, 'Reforming Equal Pay Laws' (n 43) 201.
[344] Recast Equal Treatment Directive (n 343); Fredman, 'Reforming Equal Pay Laws' (n 43) 201.
[345] Recast Equal Treatment Directive (n 343) arts 1(c), 2(a).
[346] *Bewley* (n 221) [65].
[347] ibid.
[348] Fredman, 'Reforming Equal Pay Laws' (n 43) 202.
[349] *Defrenne* (n 104) para 21.
[350] Fredman, 'Reforming Equal Pay Laws' (n 43) 202.
[351] ibid; Malone (n 9) 13–14.
[352] Equality Act 2010, s 71; Gow and Middlemiss (n 13) 173–175.
[353] Equality Act 2010, s 71.
[354] Malone (n 9) 14.
[355] Gow and Middlemiss (n 13) 175.
[356] ibid 173; Malone (n 9) 13.
[357] 'The Gender Pay Gap – A Literature Review' (n 3) para 4.2.
[358] Equality Bill HL Deb 19 January 2010, vol 716, col 941.
[359] ibid.
[360] *Macarthys* (n 44) 199.

difference.[361] Were the hypothetical comparator available in indirect discrimination claims too, it could help to achieve proportionate pay results by incrementally increasing the scope of EPEV.[362] Section 71, therefore, promised much but achieved little.[363]

4.5 Conclusion

Arguments against successor comparisons fail to rationalise why they are treated differently to predecessor comparisons. Arguably either EPEV would benefit from the availability of the hypothetical comparator in indirect discrimination claims or proportionate pay would impose a necessarily hypothetical comparison system.[364] The courts already have reservations about the hypothetical comparative exercise,[365] therefore either alternative would have to establish a clear framework for comparison.

5 IS PROPORTIONATE PAY THE WAY AHEAD?

5.1 Introduction

The workability of the proposal for *proportionate pay for work of comparable value* will now be evaluated with reference to the method of 'proportional value' introduced in the Ontario Pay Equity Act 1987 (OPEA), some of the most 'progressive' legislation the world has ever seen.[366] As this has been in force for many years, its successes and failings can be evaluated to conclude tentatively whether or not proportionate pay could be the way ahead for equal pay law in the UK.[367]

5.2 Evaluation of the Relative Merits of the Ontario Pay Equity Act 1987

OPEA, like the Equality Act 2010, aims to deal with pay inequality that arises due to gender discrimination,[368] except that OPEA explicitly targets pay discrimination suffered by women.[369] It follows four generic steps:[370] gender-dominated jobs are identified;[371] a gender-neutral job evaluation is undertaken;[372] a relationship between pay and valuation results is determined;[373] finally, the pay for the female-dominated job is adjusted accordingly.[374] Its scope is relatively broad, applying throughout the public sector.[375] Private sector employers with less than ten employees are exempt;[376] all larger employers are required to implement 'pay equity' principles.[377] McDonald suggests that excluding employers of less than ten does not leave many women without redress as the majority of women in Ontario are employed by large private sector firms.[378] That may be true, but it still excludes one third of the most vulnerable female workers which creates 'new, capricious instances of inequity.'[379] A consistent framework is advocated for the UK that applies equally across all public and

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[361] Malone (n 9) 14.
[362] Fredman, 'Reforming Equal Pay Laws' (n 43); Fredman, *Women and the Law* (n 8).
[363] Connolly (n 51); Newman, 'Repeal the Law on Equal Pay' (n 31); Steele, 'Sex Discrimination and the Material Factor Defence under the Equal Pay Act 1970 and the Equality Act 2010' (n 189); Fredman, 'Reforming Equal Pay Laws' (n 43); Brittenden and Moretto (n 307).
[364] Fredman, 'Reforming Equal Pay Laws' (n 43).
[365] *Macarthys* (n 44); *Bewley* (n 221).
[366] Ontario Pay Equity Act 1987, pt III.1; Peng (n 124) 582; McColgan, *Just Wages for Women* (n 323) ch 7; Fredman, *Women and the Law* (n 8) 272.
[367] Ontario Pay Equity Act 1987, pt III.1.
[368] ibid s 4(1); Peng (n 124) 574; Phil Cowperthwaite, 'Ontario Pay Equity – Obligations and Implementation Issues' *Cowperthwaite Mehta* (2010) <http://187gerrard.com/2010/07/ontario-pay-equity-obligations-and-implementation-issues/> accessed 2 April 2016.
[369] Hodgson (n 109) 929; Nan Weiner and Morley Gunderson, *Pay Equity: Issues, Options and Experiences* (Butterworths 1990) 5.
[370] Gunderson (n 7) 120.
[371] Ontario Pay Equity Act 1987, s 1.
[372] ibid s 21.2(4).
[373] Gunderson (n 7) 120–121.
[374] Ontario Pay Equity Act 1987, s 6(1); Gunderson (n 7).
[375] Peng (n 124) 574.
[376] Ontario Pay Equity Act 1987, s 3(1).
[377] ibid ss 5.1(1) and ss 21.7; McDonald and Thornton (n 124) 187.
[378] McDonald and Thornton (n 124); ARA Consultants, *Survey of Private-Sector Firms in Selected Industrial Sectors in Ontario* (1986).
[379] Lynda J Ames, 'Fixing Women's Wages: The Effectiveness of Comparable Worth Policies' (1995) 48 ILRR 709, 723; McColgan, *Just Wages for Women* (n 323) 320; Fredman, *Women and the Law* (n 8) 274.

private sector employers to properly implement formal equality.[380]

The development of pay equity legislation in Ontario bears similarities to the development of equal pay law in the UK which makes it the ideal 'comparator.'[381] The Employment Standards Act 1951 first enforced equal pay for equal work for males and females doing identical work in the same establishment. Jurisprudence expanded the statute to apply to work that was 'substantially similar' but not identical in every respect,[382] now codified in the amended Employment Standards Act 2000.[383] This is essentially identical to the Equal Pay Act 1970 before it was amended. The first stage of OPEA introduced EPEV,[384] as the 1983 Amendment to the Equal Pay Act 1970 did in the UK.[385] The similarities end there though. The success of the Ontarian legislation was predicated on further amendments given the proven inability of EPEV to address gender pay discrimination exactly mirrored by the UK experience.[386] The Ontario Pay Equity Commission, in the Pay Equity Amendment Act 1993,[387] having realised that many women were unable to locate a comparator of equal value in the same establishment, enacted two solutions: the 'proxy method' and 'proportional value' comparisons.[388]

5.3 Expanding the Law: Beyond Equal Pay for Work of Equal Value

5.3.1 Proxy Value Method of Comparison

The more progressive 'proxy method' of comparison was applied solely to the public sector.[389] As a public sector establishment without any male comparators could compare its female job classes to other public sector employers,[390] it overcame the crippling effect of occupational segregation on pay equity. However, were it to apply in the private sector, it would arguably overstep the remit of anti-discrimination legislation.[391] Applying something akin to the 'proxy method' in the UK is,[392] therefore, redundant as enforcing different rules in the public and private sectors deflects the original aim of consistency;[393] nor is it even worthy of consideration because the legal and political landscape is not conducive to 'fair wages legislation.'[394] This is demonstrated by the outright rejection of cross-employer comparisons in UK law.[395] The CJEU in *Lawrence* took the broadest approach to this issue.[396] It held that the discrimination had to be attributable to a single source, otherwise 'there is no body which is responsible for the inequality' 'which could restore equal treatment.'[397]

The 'conservative approach' favoured by UK equal pay law is exemplified by three valid reasons for rejecting cross-employer comparisons.[398] First, it would unfairly burden employers, depriving them of

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[380] Aristotle, *Ethica Eudemia* (n 148); Westen (n 103) 557; Fredman, *Discrimination Law* (n 33) 2.
[381] Hodgson (n 109) 929.
[382] *R v Howard* (1970) 3 OR 555–557 (Ontario CA) (Greenacres Nursing Home Case); Barrie Pettmann (ed), *Equal Pay for Women: Progress and Problems in Seven Countries* (MCB Book 1975) 140; McColgan, *Just Wages for Women* (n 323).
[383] Section 42(1); Gunderson, 'The Evolution and Mechanics of Pay Equity in Ontario' (n 7) 118.
[384] Ontario Pay Equity Act 1987.
[385] Equal Pay (Amendment) Regulations, SI 1983/1794.
[386] McDonald and Thornton (n 124) 190; McColgan, 'Legislating Equal Pay? Lessons from Canada' (n 53); Richard W Painter and Ann Holmes, *Cases and Materials on Employment Law* (OUP 2015) 171.
[387] Ontario Pay Equity Commission, 'Report to the Minister of Labour by the Ontario Pay Equity Commission on Sectors of the Economy which are Predominantly Female' (1989); Ontario Pay Equity Commission, 'Step by Step to Pay Equity: Using the Proportional Value Comparison' (1993); Ontario Pay Equity Commission, 'A Guide to the Proxy Comparison Method Equal Value Comparison' (1993); Gunderson, 'The Evolution and Mechanics of Pay Equity in Ontario' (n 7) 124.
[388] Ontario Pay Equity Act 1987, pt III; Ontario Pay Equity Act 1987, r 396/93; Peng (n 124) 577; Gunderson (n 7) 120.
[389] Ontario Pay Equity Act 1987, r 396/93.
[390] ibid; McColgan, *Just Wages for Women* (n 323) ch 7.
[391] 'Limit to Equal Pay Comparison' (1999) 84 EOR 43–45; Gavin Barrett, 'Shall I Compare Thee To…? On Article 141 EC and Lawrence' [2006] ILJ 93.
[392] Gow and Middlemiss (n 13) 181.
[393] Aristotle, *Ethica Eudemia* (n 148); Westen (n 103) 557; Fredman, *Discrimination Law* (n 33) 2.
[394] *Villalba* (n 214) [131] (Elias P); McDonald and Thornton (n 124).
[395] Equal Pay Act 1970, s 1(6); Equality Act, s 79(1)–(4); TFEU art 157; *Macarthys* (n 44); *Armstrong v Newcastle-upon-Tyne Hospital Trust* (2006) IRCR 124 (CA)*; North v Dumfries and Galloway Council* (n 121); Rubenstein, *Equal Pay for Work of Equal Value: The New Regulations and their Implications* (n 5) 52.
[396] Case C-320/00 *Lawrence v Regent Office Care Ltd* [2003] ECR I-7325; IDS Employment Law (n 20) 88.
[397] *Lawrence* (n 396) para 18.
[398] Barrett (n 391) 95.

the material factor defence,[399] as they could not be expected to present objective reasons for pay differences without knowing why another employer is able to pay better rates for equal value work.[400] Second, it could endanger the financial health of employers forced to pay the same rates as others, regardless of their economic capacity to remunerate employees.[401] Third, it could be difficult to determine which employers could be used as comparators.[402]

5.3.2 Proportional Value

The 'proportional value' method is used in Ontario when there are no male-dominated jobs of equal value to a female-dominated job.[403] Value is determined in a similar way to the UK using a gender-neutral job comparison system.[404] The pay-value comparison for the male-dominated job is used to create a pay line which estimates the 'non-discriminatory' relationship between pay and value in the establishment.[405] The pay line is often extended downwards to cover the female-dominated jobs,[406] which tend to be lower value, therefore accounting for the inhibiting effect of vertical occupational segregation on the law directly.[407] It seems that it could also be extended in the other direction to ensure higher paid females are remunerated proportionately as if men were doing the same job, or one of equal value.[408] 'This yields proportionate pay for work of proportionate value … determined by the projected male pay line.'[409] This would address the injustices – created by EPEV – of both scenarios dealt with in section 2 and represents an achievable, incremental development of that law.[410]

As alluded to in section 4, the process for determining proportionate pay is similar to using the hypothetical comparator.[411] Indeed, OPEA creates hypothetical male-dominated job classes to correspond with the female-dominated job classes.[412] The pay of the hypothetical male is determined using the actual pay men receive in different value jobs by extending the pay line.[413] An employer may even use the pay line process for all his employees.[414] However, female employees, that already have male comparators doing work of equal value, are to receive the adjustment in pay from either the individual job comparison or the 'pay line' comparison, whichever is greater.[415] This suggests that proportionate pay would be a 'logical extension' to EPEV if the hypothetical comparator is not fully integrated into the current law.[416]

5.4 A Proactive versus a Complaints Based Approach

Perhaps the most distinctive feature of OPEA compared to the Equality Act is its pro-active rather than complaints based approach.[417] Whereas the Equality Act puts the burden on the claimant to prove that she is underpaid,[418] OPEA puts the responsibility with the employer to 'base pay levels on comparable-worth principles.'[419] This means that larger employers are required to have a pay equity plan whether or not there has been a complaint.[420] If the pay equity evaluation reveals that female employees' wages must

[399] *Lawrence* (n 396) Opinion of AG Geelhoed, para 56; Barrett (n 391) 95.
[400] ibid.
[401] ibid.
[402] ibid.
[403] Ontario Pay Equity Act 1987, s 21.2(1); Gunderson (n 7) 124.
[404] Ontario Pay Equity Act 1987, s 12; McColgan, *Just Wages for Women* (n 323) 290.
[405] Ontario Pay Equity Act 1987, s 6(5) and part III.1.
[406] Gunderson (n 7); McColgan, *Just Wages for Women* (n 323) 312–314.
[407] Peng (n 124); Fredman, *Women and the Law* (n 8) 273.
[408] McColgan, *Just Wages for Women* (n 323) 312–314; Jean Read, *Review of the Pay Equity Act* (Pay Equity Review Office 1996).
[409] Ontario Pay Equity Act 1987, s 21.3(1); Gunderson (n 7) 124.
[410] *Maidment* (n 55); *Murphy* (n 63); Ontario Pay Equity Commission, 'Step by Step to Pay Equity: Using the Proportional Value Comparison' (1993); Gunderson (n 7) 124.
[411] Gunderson (n 7).
[412] ibid.
[413] ibid.
[414] Ontario Pay Equity Act1987, s 21.2(2).
[415] ibid.
[416] Gunderson (n 7) 119.
[417] Patricia C McDermott, 'Pay Equity in Ontario' (1999) 40 EOR 22; Hodgson (n 109) 984; Peng (n 124).
[418] McColgan, 'Legislating Equal Pay? Lessons from Canada' (n 53).
[419] McDonald and Thornton (n 124) 186.
[420] Gunderson (n 7).

be increased to achieve pay equity, the employer must make that adjustment.[421] The 'proportional value' comparison had a positive impact because it extended the potential benefits of pay equity to a further 340,000 women previously denied comparison,[422] although a lack of ongoing monitoring makes it difficult to determine the actual impact on women's wages.[423] Notwithstanding, the legislation also appreciates any administrative or financial burden employers may face,[424] therefore, only 1% of the employer's total payroll must go towards redressing wage inequality each year.[425]

In the UK, the Small Business, Enterprise and Employment Act 2015 places a pro-active obligation on employers with more than 250 employees to publish their gender pay gap statistics,[426] whether or not there is any evidence of past or current pay discrimination by the employer.[427] Despite a promised 2016 implementation, due to considerable employer opposition, the start date has already been deferred to 2018.[428] Furthermore, as reportedly just 6000 of the 4.7 million businesses in the UK have more than 250 employees, 59% of employees will remain unaffected.[429] Clearly, there is still some way to go. Nevertheless, despite these obstacles, if proportionate pay were implemented within the 'less interventionist' model of UK equal pay law,[430] it would still make a cause of action available to more individuals or groups of female workers to redress sex discrimination with regards to pay,[431] surely a worthwhile result.

5.5 Implementing Proportional Value

5.5.1 Gender-Dominated Jobs

Identifying jobs within an establishment that are gender-dominated could be contentious if Ontario's method of determining 'proportional value' were replicated in the UK.[432] Ontario set quantitative criteria for domination:[433] a female-dominated job being at least 60% female;[434] a male-dominated job being at least 70% male.[435] The broader definition for a female-dominated job allows more female wages to be adjusted,[436] but there is no redress for women in male-dominated jobs.[437] This is an imperfect approach, but the scope of the legislation must be limited to remain part of anti-discrimination law,[438] otherwise pay adjustments would bear no correlation with sex discrimination, direct or indirect. It could already be difficult to sell this as anti-discrimination law in the UK; when the benchmark for female domination is relatively low, it means that both male and female workers could benefit whether suffering sex discrimination or not.[439] Notwithstanding that, the material factor defence and the Ontario equivalent gives employers an opportunity to justify a pay differential if there is a non-discriminatory explanation.[440] For example, in Ontario, OPEA is heavily deferent to market forces arguments.[441]

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[421] Ontario Pay Equity Act 1987, s 13(4); Gunderson (n 7).
[422] McColgan, *Just Wages for Women* (n 323) 315.
[423] ibid 315–319.
[424] Peng (n 124) 580; Nitya Iyer, 'Working through the Wage Gap' *Report of the Task Force on Pay Equity* (28 February 2002).
[425] Ontario Pay Equity Act 1987, s 13(4).
[426] Section 147; Equality Act 2010, s 78.
[427] Rowena Mason, 'Gender Pay Gap Reporting for Big Firms to Start in 2018' *The Guardian* (London, 12 February 2016) <http://www.theguardian.com/society/2016/feb/12/gender-pay-gap-reporting-big-firms-start-2018> accessed 4 April 2016; Darren Newman, 'Gender Pay Gap: the Draft Legislation Examined' *Personnel Today* (16 February 2016) <http://www.personneltoday.com/hr/gender-pay-gap-reporting-draft-legislation-examined> accessed 4 April 2016.
[428] ibid.
[429] Suzan Lewis, 'Restructuring Workplace Cultures: the Ultimate Work-Family Challenge' (2001) 16 Women in Management Review 24; Gow and Middlemiss (n 13) 178.
[430] Hodgson (n 109) 986.
[431] Fredman, 'Reforming Equal Pay Laws' (n 43) 199–201; Gow and Middlemiss (n 13) 180; Fredman, *Discrimination Law* (n 33) 13; Sandra Fredman, 'Equality: A New Generation?' (2001) 30 ILJ 145.
[432] Ontario Pay Equity Act 1987, pt III.
[433] ibid s 1(1).
[434] Gunderson (n 7) 121; Peng (n 124).
[435] Ontario Pay Equity Act 1987, s 1(1); Gunderson (n 7) 121.
[436] Gunderson (n 7) 121.
[437] ibid 119.
[438] ibid 121; *Villalba* (n 214) [131] (Elias P).
[439] Rubenstein, *Equal Pay for Work of Equal Value: The New Regulations and their Implications* (n 5) 51; Gunderson (n 7) 121.
[440] Ontario Pay Equity Act 1987, s 8(1); Equality Act 2010, s 69.
[441] Ontario Pay Equity Act 1987, s 8; Fredman, *Women and the Law* (n 8) 273.

The objective criteria for gender-dominated jobs in Ontario actually bear a striking resemblance to the *Home Office v Bailey* case considered in section 3.[442] To recapitulate briefly, the *Bailey* case incrementally expanded the *Enderby* precedent,[443] so that a *prima facie* case of gender pay discrimination could be more easily established if the lower paid group was *significantly* female, and the comparator group was *predominantly* male.[444] Although outlined in different language, the result is virtually identical to the Ontario definition of gender-domination. Therefore, both jurisdictions have already made it easier for the claimant to establish *prima-facie* discrimination. Proportionate pay would be another incremental step, taking the UK in a similar direction to Ontario.

5.5.2 Preventing Employer Abuse

Ontario had to develop its legislation to prevent employers manipulating their workforces to avoid the 'proportional value' comparison.[445] For example, by hiring one or two men to a previously 60% female-dominated job class, an unscrupulous employer can exempt his business from comparisons.[446] Similarly, a 70% male-dominated job, paid disproportionately more than other jobs in the establishment, can avoid comparison by hiring just one or two women.[447] Ontario responded to this by using subjective notions of 'historical incumbency' and 'stereotyping of work' to help determine gender dominance.[448] Gunderson points out that these subjective limits caused debate over their 'interpretation' which did not fit neatly into the largely objective framework.[449] On the other hand, the terminology of 'significant' and 'predominant,' used in the *Bailey* case, lacks superficial legal clarity,[450] but would give the UK judiciary discretion to prevent employers from circumventing a proportionate pay comparison.[451] In any event, the potential for abuse should not count against the proposal as employers have always been able to manipulate their workforces to avoid an equal pay comparison.[452] As pointed out in section 3, before the *Murphy* case, an employer could give a female worker more responsibility and pay her less than a male colleague doing less valuable work to avoid an EPEV claim, rendering the fundamental right to equal pay nugatory.[453]

5.5.3 Implementation Problems

Proponents of pay equity were content with the Ontario legislation but underwhelmed by its implementation.[454] The Equal Pay Coalition reported that non-compliance was due to both 'ignorance' and intentionality.[455] McDonald and Thornton found that 58% of firms surveyed said pay equity was 'a significant administrative burden.'[456] The cost per employee, for private sector employers to undertake the job evaluations, was estimated between $88 and $168, probably far less than a tribunal award for back pay and legal costs.[457] Crucially, it has still had significant success: as one advocacy group concluded that '[n]o other single law in Canada has resulted in such concrete results for working women right where it counts'[458] But, continual costly scrutiny is needed 'to guard against efforts to undercut legislation through

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[442] (n 205).
[443] *Enderby* (n 36).
[444] *Bailey* (n 205).
[445] Gunderson (n 7); McColgan, *Just Wages for Women* (n 323) 303.
[446] Gunderson (n 7) 120.
[447] ibid 121.
[448] Ontario Pay Equity Act 1987, s 1(5); Gunderson (n 7); Hodgson (n 109) 932.
[449] Gunderson (n 7) 121.
[450] *Bailey* (n 205) [30] (Peter Gibson LJ).
[451] Ontario Pay Equity Act 1987, pt III.
[452] Rubenstein, *Equal Pay for Work of Equal Value: The New Regulations and their Implications* (n 5) 27–28.
[453] *Murphy* (n 63) para 10.
[454] Peng (n 124) 580; Justin Coutts, 'Will Pay Equity Close the 'Pay Gap' between Men and Women?' [2004] New Zealand Roundtable Policy Backgrounder 1; Equal Pay Coalition (2001), 'Proxy Pay Equity – Backgrounder' (2001) <www.web.net/equalpay/lobby_backgrounder.html> accessed 15 April 2016; Michael Baker and Nicole Fortin, 'Comparable Worth in a Decentralized Labour Market: the Case of Ontario' (2004) 27 Can J Econ 851; Pat Armstrong and Mary Cornish, 'Restructuring Pay Equity for a Restructured Workforce' (1997) 4 Gend Work Organ 67; McDonald and Thornton (n 124).
[455] Ontario Pay Equity Coalition, 'Overview of the Pay Equity Act' (2009) <http://equalpaycoalition.org/ontarios-pay-equity-act/> accessed 10 March 2016; Peng (n 124) 580.
[456] McDonald and Thornton (n 124) 201.
[457] ibid 190; IDS Employment Law (n 20) 107.
[458] Peng (n 124) 581.

manipulation of implementation measures.'[459] All new laws present teething problems but, with lessons learned from the Ontarian experience and by avoiding a pro-active approach, the UK can sidestep known implementation issues. As the Ontario 'experiment' has had a positive effect on gender pay discrimination, *proportionate pay for work of comparable value* is advocated as a highly worthwhile reform to consider in the UK.[460]

5.6 Conclusion

Acknowledging that 'proxy value method' would be unworkable in the conservative legal climate of the UK and European Union, this section has presented persuasive arguments in favour of the 'proportional value' concept as, McColgan admits, OPEA provides a potential model for reform in the UK.[461] It is concluded that an adaptation of Ontario's 'proportional value' could be a means to remedy indirect sex discrimination with regards to pay left unaddressed by EPEV due, largely, to the effect of vertical occupational segregation.[462]

6 CONCLUSION

This article has sought to explore a way forward that remedies sex discrimination with regards to pay suffered by those without actual comparators doing work of equal value, by introducing *proportionate pay for work of comparable value*.

Section 2 highlighted two instances where equal pay law leaves the claimant either 'comparator-less' or with an insufficient remedy of equal pay.[463] It is argued that the principle of EPEV is the primary cause of these two unsatisfactory outcomes.[464] First, in a practical sense, its measurement of value is liable to be tainted by sex discrimination.[465] Second, in a theoretical sense, EPEV is not defensible using the fundamental Aristotelian principle of formal equality.[466] There has to be a better alternative to EPEV – itself the most progressive cause of action for pay discrimination in the UK – as it suffers from a lack of consistency.[467] Since discriminatory pay exists beyond the 'simplistic' notion of EPEV,[468] the proposed solution, introduced in section 3 – *proportionate pay for work of comparable value* – would achieve a system of pay comparability instead of pay equality.[469] It is argued that this would bring about two improvements: reducing the burden on the claimant, and making the law compliant with formal equality.

The requirement for an actual comparator, examined in section 4, exacerbates the frailties of EPEV making it too onerous for claimants, especially those subject to occupational segregation.[470] The Equality Act 2010 made the hypothetical comparator available in equal pay to a 'limited' extent,[471] but maintained its 'unsupportable' isolation from other anti-discrimination law.[472] Even if it means that the legislation bars fewer claims for sex discrimination with regards to pay, there remains no means of addressing disproportionate pay differentials caused by indirect discrimination.[473]

There are, in fact, two potential solutions to the problem outlined in section 2. OPEA permits claims for 'proportional value,' helping to reduce sex discrimination through its pro-active approach to pay equity.[474] If it were adapted to the individual complaints approach of UK law, it would, at least, make a cause of action available to more victims of pay discrimination than before. Furthermore, as the 'proportional value' system creates hypothetical male job classes to determine what pay men doing the same

[459] McDonald and Thornton (n 124) 195; Lynda J Ames, 'Fixing Women's Wages: The Effectiveness of Comparable Worth Policies' (1995) 48 ILRR 709, 711–712.
[460] Peng (n 124) 582.
[461] Ontario Pay Equity Act 1987, s 21.2(1); Barrett (n 391) 95; McColgan, *Just Wages for Women* (n 323) 319.
[462] Kilpatrick (n 8) 325.
[463] McColgan, 'Legislating Equal Pay? Lessons from Canada' (n 53) 278; Hepple, Coussey and Choudhury (n 53) 77.
[464] Napier (n 10) 41.
[465] Gilbert (n 105) 143.
[466] Aristotle, *Ethica Nicomachea* (n 103); Kelsen (n 103) 127–28; McColgan, *Discrimination, Equality and the Law* (n 32) 14–15; Westen (n 103) 539–540.
[467] Miller (n 88) 5; Aristotle, *Ethica Eudemia* (n 148); Westen (n 103) 557; Fredman, *Discrimination Law* (n 33) 2.
[468] Connolly (n 51) 7.
[469] Fredman, *Women and the Law* (n 8) 279.
[470] Gow and Middlemiss (n 13) 175; Kilpatrick (n 8) 325.
[471] Gow and Middlemiss (n 13) 175.
[472] Malone (n 9) 14.
[473] Connolly (n 51) 8.
[474] McColgan, *Just Wages for Women* (n 323) 315.

job would receive, it suggests that making the hypothetical comparator available, as argued in section 4, could even rescue EPEV.

Nevertheless, it is admitted that there are shortcomings to the proposals advocated in this article. For example, neither proposal would address the correlation between low pay and the proportion of female employees in a company. As there is a 100% female workforce in many of the lowest paying companies, complete occupational segregation in one employer prevents a comparative claim for equal or proportionate pay.[475] This scenario can be addressed, but the two most plausible solutions explored in sections 4 and 5 would arguably be too radical. The first would be to maintain a comparative right to equal or proportionate pay but permit cross-employer comparisons.[476] However, as the Equality Act 2010 has already imposed a stricter test for the material factor defence – it must be non-discriminatory or a proportionate means of achieving a legitimate aim – this would be too burdensome for employers.[477] The second solution would involve introducing a system of fair pay, but – and this is a key point – it would go far beyond the current scope of anti-discrimination law by allowing a claim regardless of sex discrimination.[478]

The proposed solution of *proportionate pay for work of comparable value*, on the other hand, should not appear too radical. A cause of action removed from 'equal pay' and 'equal value' would better enable anti-discrimination law in the matter of pay to comply with the foundational theory of Aristotelian equality and its principles of consistency and equal treatment.[479] Therefore, it is submitted that this is the way ahead: a logical, incremental extension to equal pay for work of equal value.[480]

[475] Gow and Middlemiss (n 13) 173.
[476] Barrett (n 391) 93; Gunderson (n 7).
[477] Steele, 'Sex Discrimination and the Material Factor Defence under the Equal Pay Act 1970 and the Equality Act 2010' (n 189) 272; Gow and Middlemiss (n 13) 174.
[478] 'Discrimination Law Review' (n 210) paras 1.15–1.16; Fredman, *Women and the Law* (n 8); McColgan, *Discrimination, Equality and the Law* (n 32).
[479] *Defrenne* (n 104) para 12.
[480] Gunderson (n 7) 119.