D E L E G E
F E R E N D A

VOLUME V

ISSUE I

SPRING 2022

Editors-In-Chief

Andreas Samartzis and Alec Thompson

Editor-in-Chief's Introduction to the Spring Issue of Volume V of the De Lege Ferenda

It is with great pleasure that I introduce the first Issue of Volume V of De Lege Ferenda. Conceived as the Cambridge Law Review's supplementary undergraduate law journal, De Lege Ferenda serves as a platform for undergraduate students to make their first entry into academia. The high quality of submissions combined with the rigorous review of the Editorial Board have made De Lege Ferenda, in a short period of time, one of the most successful undergraduate law reviews worldwide.

This year we were fortunate to have received an impressive number of submissions of high merit. In the article "The Shadow Pandemic and Access to Justice: A Critical Assessment of the English and Welsh Legal Regime's Effectiveness in Tackling Domestic Abuse", Maisie Ng questions the effectiveness of the English and Welsh legal framework for tackling domestic abuse, a phenomenon which has been exacerbated within the pandemic. The author argues that the fundamental reason behind the legal framework's ineffectiveness in tackling domestic abuse lies in the obscurity of the legal definition of domestic abuse. The article suggests reforms to achieve a more comprehensive definition of domestic abuse, which better addresses structural inequalities and encapsulates an extensive list of domestic abuse-related offences.

Kai Jie Marcus Ho and Ma Chao Jun discuss the challenges arising from the increasing use of robo-advisors in the wealth management industry. In their article "Robo-Advisors: A Comparative Analysis in the Context of Fiduciary Law", they argue for an adaptable standard of care in fiduciary law and for transparent AI development. Based on their analysis of US law, they draw conclusions for the regulation of robo-advisors in the UK and Singapore.

Georgina Pressdee proposes a new framework that the European Court of Human Rights could adopt to address current criticisms regarding its approach to the application of Article 6(1) of the European Convention on Human Rights to administrative decisions. Her

article "In Search of a Principled Approach—Article 6(1) ECHR and Administrative Decisions Through the Lens of UK Housing Assistance" seeks to minimise the exclusionary effect of the notion of a "civil right" in Article 6(1) by shifting focus to the existence of a "right" for determining whether Article 6(1) is applicable. Once the existence of a right is ascertained, its characterisation as a civil one may exclude the article's application only in the anomalous cases which fall within the "hard core of public authority prerogatives". The author applies the proposed framework to resolve disputes on the applicability of Article 6(1) to Section 193 of the Housing Act 1996.

In his analysis in "The End of the Road? Equitable Easements as Overriding Interests under Schedule 3 Paragraph 2 of the Land Registration Act 2002", Fred Halbhuber explores whether there are cases in English and Welsh law in which the exercise of an easement can have the effect of placing the owner of a dominant tenement in actual occupation of a servient tenement. By investigating the reasoning of the main authority on the issue, the author arrives at three indicia that determine whether the exercise of an easement crosses the threshold from use to occupation of land. The relevant indicia are (a) the proportion of the burdened land being used in the enjoyment of the easement; (b) the frequency of use of the land; and (c) the permanence of presence on the land. The indicia are then applied to different types of easements.

Gustavo Yanez examines the debate between the seat and delocalisation theories in international arbitration in "Legitimacy and Legality within the Seat and Delocalisation Theory of International Commercial Arbitration". The author argues in favour of the seat theory, according to which the arbitration must be supervised by a court of law to sustain the validity of the arbitration agreement and the final award. Nevertheless, it emphasises that support for the seat theory does not undermine the legitimating foundation of international arbitration, namely party autonomy.

The issue concludes with an article by Afif Khan and Shifa Qureshi. In "*Shikha Roy v Jet Airways*: A New Approach to Algorithmic Collusion", the authors comment on the Competition Commission of India's decision in *Shikha Roy v Jet Airways*. The case concerned the risks posed by the use of algorithms across industries in enabling antitrust offences, such as cartels. Examining the Competition Commission of India's decision against the background of these risks and the relevant theoretical discussion, the authors conclude that its current approach is the appropriate one.

It is my hope that readers will engage with each of these articles with interest. Finally, I would like to express my gratitude to the Honorary Board for their invaluable guidance and

to the Editorial Board for their tireless work, without which this Issue would not have been possible. I look forward to the Autumn Issue which will be published later in the year.

Andreas Samartzis
Editor-in-Chief

De Lege Ferenda

TABLE OF CONTENTS

De Lege Ferenda (2022) Vol V, Issue i, 1–19

The Shadow Pandemic and Access to Justice: A Critical Assessment of the English and Welsh Legal Regime's Effectiveness in Tackling Domestic Abuse

MAISIE NG*

ABSTRACT

Since the COVID-19 outbreak, domestic abuse has intensified in regions that have implemented "stay at home" measures, including England and Wales. The phenomenon has been coined the "Shadow Pandemic" by the United Nations. This article questions the effectiveness of the newly introduced interim measures, combined with the traditional English and Welsh legal regime, in tackling domestic abuse. In terms of interim measures, it considers the effectiveness of exemptions to movement restrictions compromised by a low public awareness concerning their existence and a lack of supporting services. Efforts to increase accessibility to the criminal justice system remain hampered by burdensome evidentiary requirements and excessive limitation periods. Regarding the traditional legal regime, this article asserts that the effectiveness of non-molestation orders is hampered by an excessively wide definition of associated persons, unclear distinctions between civil and criminal offences and practical barriers to obtaining the order. It also contends that the coercive control offence is inherently obscure and provides a platform for renewed abuse. Finally, concerning Domestic Violence Protection Notices and Orders, this paper criticises their complex application process, where obtaining victims' prior consent is unjustifiably not a necessity.

This article argues that the fundamental reason behind the legal framework's ineffectiveness in tackling domestic abuse lies in the obscurity of the legal concept of domestic

* LLB (London School of Economics and Political Science). In memory of my aunt, Rachel. I am grateful to Dr Sarah Trotter, Claudia-Skye Lee, Allison Wu, Tevž Sitar and the anonymous reviewers for their invaluable comments on earlier drafts. All errors remain my own. maisiengoilam@gmail.com.

abuse itself. It discusses three prominent but divergent definitions of domestic abuse at the time when the Shadow Pandemic unravelled, including Dempsey's account, Stark's conceptualisation and the cross-government definition. It contends that the newly introduced Domestic Abuse Act only offers a partial solution to the definitional problem. Notably, its unified statutory definition attracts further disputes given its failure to recognise types of domestic abuse experienced disproportionately by BME and migrant women. Finally, this article suggests reforms to achieve a more comprehensive definition of domestic abuse, which better addresses structural inequalities and encapsulates an extensive list of domestic abuse-related offences.

Keywords: The Shadow Pandemic; COVID-19; access to justice; England and Wales; domestic abuse

I. INTRODUCTION

According to World Health Organisation (WHO) statistics, the number of confirmed COVID-19 cases surpassed 200 million in August 2021.[1] Since the COVID-19 outbreak, emerging data have shown that violence against women, particularly domestic abuse, has intensified in countries where "stay at home" measures were in place.[2] The phenomenon was coined the "Shadow Pandemic" as part of a public awareness campaign launched by the United Nations (UN) to combat domestic violence amid the health crisis.[3]

In England, the National Domestic Abuse Helpline received more than 40,000 calls and contacts during the first three months of lockdown, 80% higher than usual.[4] In addition, 50% of respondents interviewed under a survey by Women's Aid reported that the abuse they experienced had escalated during the pandemic.[5] Statistics from the Welsh Women's Aid in June 2020 found that 94% of service providers supporting domestic abuse survivors

1 World Health Organisation, 'WHO Coronavirus Disease (COVID-19) Dashboard' (*World Health Organisation*, 4 August 2021) <https://covid19.who.int/> accessed 4 August 2022.

2 International Rescue Committee, 'IRC Data Shows an Increase in Reports of Gender-Based Violence across Latin America' (*Rescue.org*, 9 June 2020) <https://www.rescue.org/press-release/irc-data-shows-increase-reports-gender-based-violence-across-latin-america> accessed 8 February 2021.

3 United Nations, 'COVID-19 and Violence Against Women and Girls: Addressing the Shadow Pandemic' (Policy Brief No. 17, 2020) (*United Nations*, 2020) <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2020/Policy-brief-COVID-19-and-violence-against-women-and-girls-en.pdf> accessed 8 February 2021.

4 June Kelly and Sally Graham, 'Coronavirus: Domestic Abuse Helpline Sees Lockdown Surge' *British Broadcasting Corporation* (London, 23 July 2020).

5 Women's Aid, 'A Perfect Storm: The Impact of the Covid-19 Pandemic on Domestic Abuse Survivors and the Services Supporting Them' (*Women's Aid*, 18 August 2020) <https://www.womensaid.org.uk/wp-content/uploads/2020/08/A-Perfect-Storm-August-2020-1.pdf> accessed 8 February 2021.

experienced increased demand in one or more of their services, including online support, communications or information services support, child contact cases support and financial abuse support.[6] Upon witnessing the Shadow Pandemic unfold in England and Wales, Domestic Abuse Commissioner Nicole Jacobs remarked, "so much of this crisis is showing us some of the vulnerabilities and cracks in our system where people fall through the net and have been for many years."[7] The Shadow Pandemic raises important questions about the effectiveness of the traditional English and Welsh legal regime, combined with newly introduced interim measures, in tackling domestic abuse. This paper argues that the Shadow Pandemic elucidates the flaws of the legal regime in tackling domestic abuse, mainly because of a failure to address a fundamental problem—the obscurity of the notion of "domestic abuse". It further contends that the newly introduced Domestic Abuse Act offers only a partial solution to the definitional problem, with its unified statutory definition attracting further disputes given its failure to adequately recognise forms of domestic abuse experienced disproportionately by BME and migrant women. Finally, it suggests reforms to achieve a more comprehensive definition of domestic abuse, which better reflects structural inequalities and encapsulates a non-exhaustive list of domestic-abuse related offences.

II. CONNECTING THE DOTS: LINKING COVID-19 TO DOMESTIC ABUSE

First and foremost, this article seeks to connect the surging rates of domestic abuse to the widespread COVID-19. It argues that there are three main reasons behind the linkage between the pandemic and domestic abuse. Firstly, the public policy of "stay at home" directives has led to surging domestic abuse rates. According to Caroline Bradbury-Jones and Louise Isham, in practice, heightened movement restrictions obstruct access to avenues of escape and help-seeking. They are likely to be manipulated by abusive partners within the domestic home, with abuse taking place behind closed doors and away from public scrutiny. In theory, "stay at home directives" exacerbate socially idealised representations of the home and the family, making it difficult for people to talk about and counter domestic abuse because of feelings of shame and urges to keep family affairs private.[8] These views are shared by Emma Williamson,

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6 Welsh Women's Aid, 'Impact of COVID-19 on Violence Against Women, Domestic Abuse and Sexual Violence specialist services in Wales: June Report Summary' (*Welsh Women's Aid*, December 2020) <https://www.welshwomensaid.org.uk/wp-content/uploads/2020/12/WWA-COVID-19-Impact-Report-Summary_JUNE_FINAL.pdf> accessed 20 February 2022.

7 Home Affairs Committee, *Oral Evidence: Home Office Preparedness for Covid-19 (Coronavirus)* (2020-21, HC 232) (*Home Affairs Committee*, 15 April 2020) 10.

8 Caroline Bradbury-Jones and Louise Isham, 'The Pandemic Paradox: The Consequences of COVID-19 on Domestic Violence' (2020) 29(13-14) Journal of Clinical Nursing 2047.

Oona Brooks-Hay and Nancy Lombard, who argue that perpetrators are able to use the lockdown measures as a tool of control and coercion by, for example, either insisting on strict lockdown or failing to protect the health of family members.[9]

Secondly, surging rates in domestic violence stem from the economic downturn caused by COVID-19.[10] Erika Fraser suggests that violence against women increases when partners experience financial stress.[11] Insecurity over money, jobs, health and food supplies brought by COVID-19 have also been proved to correlate with domestic violence.[12] Research by the Women's Budget Group indicates that women are more likely to be in categories of the population disproportionately affected by the pandemic, such as low earners and temporary employees.[13] Such trends create greater financial dependency, leading to difficulties in leaving an abusive relationship.[14]

Thirdly, the COVID-19 pandemic has led to a worsening deficit in supporting services that help combat domestic abuse. As Phumzile Mlambo-Ngcuka, Executive Director of UN Women argues, as health systems are stretched beyond their capacity, domestic violence shelters are also at a breaking point, especially when centres are repurposed for additional response to COVID-19.[15] According to Women's Aid, 84.4% of service providers were forced to reduce or cancel one or more services because of the pandemic,[16] impeding access to supporting services. Fundraising activities have also been hindered, with 68.9% of service

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9 Emma Williamson, Oona Brooks-Hay and Nancy Lombard, 'Domestic Violence and Abuse in Lockdown Needs More Accurate Media Reporting' (*Transforming Society*, 15 June 2020) <https://www.transformingsociety.co.uk/2020/06/15/domestic-violence-and-abuse-in-lockdown-needs-more-accurate-media-reporting/> accessed 8 February 2021.

10 Dharshini David, 'Coronavirus: UK Worst Hit Among Major Economies' *British Broadcasting Corporation* (London, 26 August 2020).

11 Erika Fraser, 'Impact of COVID-19 Pandemic on Violence against Women and Girls' (VAWG Helpdesk Research Report No. 284) (*UK Aid from the Department for International Development*, 16 March 2020) <https://www.sddirect.org.uk/media/1881/vawg-helpdesk-284-covid-19-and-vawg.pdf> accessed 8 February 2021.

12 Sandra Walklate, Jane Richardson and Barry Godfrey, 'Domestic Abuse-Family Violence, Disasters and Restrictions under Covid-19: An Overview' (Working Paper No. 1, Domestic Abuse: Responding to the Shadow Pandemic, University of Liverpool) (*University of Liverpool, Research Councils UK*, 2020) <https://www.liverpool.ac.uk/media/livacuk/law-and-social-justice/3research/Working,Paper,No1,-,Domestic,Abuse,-,Responding,to,the,Shadow,Pandemic.pdf> accessed 20 February 2020.

13 Women's Budget Group, 'Crises Collide: Women and Covid-19' (*Women's Budget Group*, April 2020) <https://wbg.org.uk/wp-content/uploads/2020/04/FINAL.pdf> accessed 8 February 2021.

14 Dana Harrington Conner, 'Financial Freedom: Women, Money and Domestic Abuse' (2014) 20 William and Mary Journal of Race, Gender and Social Justice 339.

15 Phumzile Mlambo-Ngcuka, 'Violence Against Women and Girls: The Shadow Pandemic' (*UN Women*, 6 April 2020) <https://www.unwomen.org/en/news/stories/2020/4/statement-ed-phumzile-violence-against-women-during-pandemic> accessed 8 February 2021.

16 Women's Aid, 'The Impact of Covid-19 on Domestic Abuse Support Services: Findings from an Initial Women's Aid Survey' (*Women's Aid*, May 2020) <https://www.womensaid.org.uk/wp-content/uploads/2020/05/The-impact-of-Covid-19-on-domestic-abuse-support-services-1.pdf> accessed 8 February 2021.

providers reporting concerns about a future loss in income from fundraising.[17] Such changes have made access to supporting services more difficult, leading to the increased frequency and intensity of domestic abuse cases.

Therefore, it is evident that the prevalence of COVID-19 has led to a surge in domestic abuse rates, mainly because of a public policy embrace of "stay at home" directives in the pandemic, COVID-19-induced economic downturn and a worsening deficit in supporting services combating domestic abuse.

III. Questioning Existing Measures: Assessing the Effectiveness of the English and Welsh Legal Regime in Tackling Domestic Abuse

The increasing prevalence of domestic abuse in England and Wales raises questions on whether their legal framework effectively combats the problem. In addition to the current legal regime, which comprises the use of civil orders and criminal law measures, England and Wales have also introduced interim measures during the COVID-19 pandemic to alleviate the spike in domestic abuse rates. In March 2021, the Domestic Abuse Bill was introduced to provide a statutory definition of domestic abuse. The Bill received royal assent on 29 April 2021 and is hereinafter referred to as the Domestic Abuse Act.

Despite such efforts, the interim measures introduced to combat the Shadow Pandemic have fallen short of the mark in providing an adequate solution to the problem. On the contrary, the Shadow Pandemic reveals fundamental flaws of the English and Welsh legal regime governing domestic abuse that have long pre-dated COVID-19 but have been exacerbated by the pandemic.

A. Evaluation of Interim Measures

Various interim measures have been introduced to combat surging rates of domestic abuse, such as exemptions to movement restrictions and increased accessibility to the criminal justice system. It is, however, argued that such measures are ineffective in tackling domestic abuse, with such ineffectiveness exacerbated by a lack of public awareness of the measures, a lack of supporting services and unnecessary burdens imposed on victims of domestic abuse.

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17 ibid.

(i) Exemptions to movement restrictions

During the pandemic, the government introduced the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020,[18] imposing movement restrictions to curb disease transmission. According to section 6, no person may leave the place where they live without a reasonable excuse during the emergency period.[19] Section 2(m), however, confirmed that a reasonable excuse would include avoiding injury or illness or escaping a risk of harm.[20] Subsequent government guidance confirmed that restrictions do not apply if victims find the need to leave their homes to escape domestic abuse.[21]

In theory, such exemptions allow for the restoration of avenues of escape and help-seeking. In practice, however, the low awareness of such exemptions in the community has largely compromised their effectiveness. For example, Welsh Deputy Minister Jane Hutt voices fears that domestic abuse victims may equate a national lockdown with the possibility that they would be mandated to stay at home with their perpetrator. Similar fears are expressed in England.[22] While victims leaving their homes would need substitute sites of residence,[23] corresponding supporting services have proved inadequate. For example, while women's refuges were already struggling to meet pre-pandemic demand, the pandemic has only served to escalate such shortages.[24] Moreover, despite £76 million in extra funding by the government to support victims and survivors of domestic abuse during the COVID-19 pandemic, reports have shown that the increased funding is not adequate in resolving the deficiency in supporting services.[25] Such inadequacies have led to glaring gaps in the existing legal framework.

(ii) Accessibility to the criminal justice system

During the lockdown, the government introduced measures to make the criminal justice system more accessible to domestic abuse victims. These include the relaxation of evidentiary

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

19 ibid s 6.

20 ibid s 2(m).

21 Gov.UK, 'National lockdown: Stay at Home' (*Gov.UK*, 29 March 2021) <https://www.gov.uk/guidance/national-lockdown-stay-at-home#when-you-can-leave-home> accessed 8 February 2021.

22 Mary O'Hara and Katie Tarrant, 'Fears Grow for Those Facing Domestic Abuse as England Enters Second Lockdown' *The Guardian* (London, 5 November 2020).

23 Home Affairs Committee (n 7).

24 Women's Aid, 'The Domestic Abuse Report 2021: The Annual Audit' (*Women's Aid*, January 2020) <https://www.womensaid.org.uk/research-and-publications/the-domestic-abuse-report/> accessed 8 February 2021.

25 Home Affairs Committee (n 7).

requirements needed to qualify for legal aid and the publication of information on how unrepresented victims can apply for an injunction in the family court.

While these measures appear *prima facie* useful, Nicole Jacobs and Vera Baird have criticised evidentiary requirements for legal aid applications. They argue that these requirements pose unnecessary burdens on applicants and that legal aid should be granted automatically to domestic abuse victims. This is because victims residing with their abusers may find it difficult to report abuse during the lockdown, and the delay in reporting domestic abuse may increase the difficulty in gathering evidence to support the case.[26] Moreover, some common offences in a domestic abuse context, such as common assault and battery, are subject to a time limit of six months from the commencement of proceedings at a Magistrates' Court under section 127 of the Magistrates' Courts Act 1980.[27] If victims are unable to report such offences during the lockdown, a significant proportion of this six-month limit may have elapsed by the time they are able to.[28] The limitations of current measures in considering practical difficulties have been extensively criticised.

Therefore, the effectiveness of interim measures to combat domestic abuse is hampered by their limitations. Unfortunately, it soon becomes apparent that the same trends characterise the fundamental English and Welsh legal framework.

B. EVALUATION OF THE EXISTING LEGAL FRAMEWORK

Currently, there is no specific offence of domestic abuse.[29] The existing English and Welsh legal framework include a combination of civil law orders and criminal law measures. Such measures, however, are ineffective in tackling domestic abuse and merit rethinking given their increasing importance as safeguards against the Shadow Pandemic. Three examples support the proposition: the non-molestation order (NMO), the offence of coercive control and the Domestic Violence Protection Notices and Orders (DVPNs and DVPOs).

(i) Civil law orders: Non-molestation orders

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26 ibid.

27 Magistrates' Courts Act 1980, s 127.

28 Home Affairs Committee (n 7). This has recently changed with the abolition of the six-month limitation period. From 4 January 2022 onwards, there will be an overall time limit of two years from the offence's occurrence to bring a prosecution. See Gov.UK, 'Domestic abuse victims in England and Wales to be given more time to report assaults' (*Gov.UK*, 4 January 2022) <https://www.gov.uk/government/news/domestic-abuse-victims-in-england-and-wales-to-be-given-more-time-to-report-assaults> accessed 20 February 2022.

29 Sentencing Council, 'Overarching Principles: Domestic Abuse' (*Sentencing Council*, 2018) <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/domestic-abuse/> accessed 6 March 2021.

Under section 42 of the Family Law Act 1996, an NMO prohibits the respondent from molesting another person associated with the respondent or a relevant child. An NMO can be applied for by a person associated with the respondent or the court.[30] During the pandemic, applications for NMOs from April to June 2020 were up 26% compared to 2019.[31] While bearing in mind the noble aim to combat harassment suffered by domestic abuse victims, the measure is not without flaws.

The first of such shortcomings concerns the definition of NMOs. Under section 62(3) of the FLA 1996, a person is defined as associated with another person upon marriage, civil partnership, cohabitation, co-living, blood relationships, agreement to marry, engagement in an intimate personal relationship of significant duration, parenting of any child, or being parties to the same family proceedings.[32] Notably, the definition of associated persons in NMOs is the most expansive conception of "family" in law. Helen Reece has argued that the expansion of the definition is regressive. This is because the uniqueness of domestic abuse lies within its asymmetry of impacts on men and women, its combination of proximity and isolation, its encapsulation of controlled emotions in unequal power, barriers to leaving relationships and financial dependence. A failure to recognise domestic violence's distinctive features as opposed to conventional violent crime, in turn, trivialises the offence. Her argument presents the very paradox that "if domestic violence occurs everywhere, then domestic violence occurs nowhere".[33]

The second shortfall with NMOs lies within the blurring of the demarcations of civil and criminal offences. Under section 42A, a person who breaches an NMO without reasonable excuse is guilty of a criminal offence. On the one hand, critics argue the civil-criminal "hybridisation" of NMOs provides a quasi-criminal alternative to criminal law, which may deter the police from pursuing substantive criminal charges.[34] On the other hand, victims may also be disincentivised to apply for NMOs because of potential criminal consequences and their wishes not to prosecute their partners. For example, Jackie Barron and Emma Hitchings have noted that while civil law empowers victims by giving them a choice about how and when they

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30 Family Law Act 1996, s 42.

31 Gov.UK, 'Family Court Statistics Quarterly: April to June 2020' (*Gov.UK*, 24 September 2020) <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-april-to-june-2020> accessed 8 February 2021.

32 Family Law Act 1996, s 62(3).

33 Helen Reece, 'The End of Domestic Violence' (2006) 69(5) Modern Law Review 770.

34 Marianne Hester, 'Making It through the Criminal Justice System: Attrition and Domestic Violence' (2006) 5(1) Social Policy and Society 79.

can access protection, criminalising a breach of civil law orders may strip them of their comparative advantage and disempower victims.[35]

The third weakness of NMOs manifests itself in the barriers to acquiring NMOs. These include solicitors' advice that obtaining NMOs might make victims look "hostile in family proceedings", difficulties "proving" non-physical abuse, applications being downgraded to undertakings and unaffordability because of cuts in legal aid and so on.[36] Such barriers hinder access to justice by victims of domestic abuse.

Therefore, it is clear that the shortcomings of NMOs impact their effectiveness in combating domestic abuse.

(ii) Criminal law measures: Coercive control

Coercive control is defined in section 76 of the Serious Crime Act 2015. A person (A) commits the offence if he repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive. At the time of the behaviour, A and B must be personally connected. The behaviour must have a serious effect on B, and A must know or ought to know that the behaviour will have a serious effect on B.[37] Research by Women's Aid has found increased instances of coercive control during the pandemic, with perpetrators using lockdown restrictions as an excuse to exert increased monitoring and surveillance of behaviour or to move back in with victim-survivors and refusing to leave. Some have utilised the virus itself as a threat, coughing and spitting at victims or threatening to do so.[38] The relatively new offence was put to the test during the COVID-19 pandemic and has drawn the public's attention to its various shortcomings.

The first major flaw lies in the obscure notion of coercive control itself. As Conrad Brunk argues, identifying an intervention as coercive indicates that it departs from common practice and violates a norm of morality, custom, or the law.[39] Therefore, a consideration of normalcy, which remains an ambiguous and contested concept, logically applies to any attempt to define coercion. The same is observed by Tamara Kuennen, who argues that the offence of coercive

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35 Jackie Barron, *Not Worth the Paper…? Effectiveness of Legal Protection for Women and Children Experiencing Domestic Violence* (London National Institute for Social Work 1990); Emma Hitchings, 'A Consequence of Blurring the Boundaries – Less Choice for the Victims of Domestic Violence?' (2005) 5(1) Social Policy and Society 91.

36 Lis Bates and Marianne Hester, 'No Longer a Civil Matter? The Design and Use of Protection Orders for Domestic Violence in England and Wales' (2020) 42(2) Journal of Social Welfare and Family Law 133.

37 Serious Crime Act 2015, s 76.

38 Women's Aid, 'A Perfect Storm: The Impact of the Covid-19 Pandemic on Domestic Abuse Survivors and the Services Supporting Them' (n 5).

39 Conrad Brunk, 'The Problem of Voluntariness and Coercion in the Negotiated Plea' (1979) 13(2) Law and Society Review 527.

control requires the law to draw the difficult line between abusive and non-abusive relationships.[40] Such theoretical ambiguities have led to difficulties in practice, given that the existing policing and justice system has proved incapable of understanding and tackling the complexities of coercive control. Prosecution rates for the offence have remained low, with only 584 defendants prosecuted and 293 offenders convicted of, and sentenced for, controlling or coercive behaviour in 2019,[41] with police reporting that coercive control charges are "hard to achieve" and "challenging to prove".[42] Potential explanations are offered by Robinson, Pinchevsky and Guthrie—that the police tends to hold the misconception that only physical violence and isolated events constitute a crime, but not psychological violence nor a series of interrelated events.[43] Notably, coercive control falls into the latter two categories.

On the other hand, the criminal justice system is criticised for acting as a platform for renewed abuse. Victims have reported facing victim-blaming and denigration at court.[44] Providing compelling evidence of a mainly psychological pattern of behaviour in court, where the charges are contested, has proved difficult for many.[45] The criminal justice system has also inadvertently allowed abusive partners to continue their abuse post-separation[46] upon challenging their partner's account in court.[47]

Therefore, it is evident that the flaws of the coercive control offence highly compromise its utility in combating domestic abuse.

(iii) Criminal law measures: Domestic Violence Protection Notices and Orders[48]

DVPNs and DVPOs are governed by section 24-33 of the Crime and Security Act 2010. A DVPN is an initial notice issued by the police to provide emergency protection to an

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40 Tamara Kuennen, 'Love Matters' (2014) 56(4) Arizona Law Review 977.

41 Office for National Statistics, 'Domestic Abuse and the Criminal Justice System, England and Wales: November 2020' (*Office for National Statistics*, 25 November 2020) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseandthecriminaljusticesystemenglandandwales/november2020> accessed 8 February 2021.

42 Maeve McClenaghan and Charles Boutaud, 'Questions Raised over Patchy Take-up of Domestic Violence Law' (*The Bureau of Investigative Journalism*, 24 November 2017) <https://www.thebureauinvestigates.com/stories/2017-11-24/coercive-control-concerns> accessed 8 February 2021.

43 Amanda Robinson, Gillian Pinchevsky and Jennifer Guthrie, 'Under the Radar: Policing Non-violent Domestic Abuse in the US and UK' (2016) 40(3) International Journal of Comparative and Applied Criminal Justice 195.

44 Heather Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30(3) Sydney Law Review 439.

45 Emma Williamson, 'Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control' (2010) 16(12) Violence Against Women 1412.

46 Heather Douglas and Robin Fitzgerald, 'Legal Processes and Gendered Violence: Cross-applications for Domestic Violence Protection Orders' (2013) 36(1) University of New South Wales Law Journal 56.

47 Jan Jordan, *Serial Survivors: Women's Narratives of Surviving Rape* (Federation Press 2008).

48 DVPNs and DVPOs formed part of the legal regime safeguarding victims against domestic abuse when the Shadow Pandemic first unravelled. They will, however, be repealed by s 55 of the Domestic Abuse Act 2021. DVPNs will be replaced by Domestic Abuse Protection Notices (DAPNs) and DVPOs will be replaced by

individual believed to be a victim of domestic violence. This notice, which a police superintendent must authorise, contains prohibitions that effectively prevent the suspected perpetrator from returning to the victim's home or otherwise contacting the victim for 48 hours.

DVPOs are civil orders that protect victims by enabling the police and magistrates' courts to put in place protective measures in the immediate aftermath of a domestic violence incident. A magistrate grants DVPOs, and the application must take place within 24 hours from the issuance of the DVPN. Courts must be satisfied on the balance of probabilities that the perpetrators have been violent toward or threatened to be violent towards another and that making the order is necessary to protect the victim. The order can last from 14 to 28 days.[49] During the pandemic, a total of 26 police forces provided data on both the number of DVPNs applied for and granted from April to June 2020. 91% of DVPNs applied for were granted (1,628 out of 1,797 applications). A total of 36 police forces provided data on the number of DVPOs applied for and the number of DVPOs granted by a magistrates' court. 88% of DVPOs applied for were granted (1,657 out of 1,873 applications).[50]

The complex application process of DVPNs and DVPOs, however, has evidently hindered its practical usage. High levels of time pressure and bureaucracy have caused police officers to struggle when complying with application requirements.[51] Police attitudes towards the issuance of DVPNs have proved to influence the frequency of using these orders. Research has indicated that a significant proportion of police officers view DVPNs and DVPOs as "disproportionate", especially for low-level violence, downplaying the importance of non-physical violence among the police force. In addition, senior officers are not always readily available to authorise DVPNs, and junior officers are sometimes anxious about contacting them. These factors have led to the limited use of DVPNs and DVPOs.[52]

Domestic Abuse Protection Orders (DAPOs). Other protective orders, such as NMOs and Restraining Orders, will remain in place to be used in cases which are not domestic abuse-related, such as cases of stalking or harassment where the perpetrator is not a current or former intimate partner or a family member. This is to unify the different orders that can be applied for by domestic abuse victims into a single, comprehensive, and flexible order. DAPNs and DAPOs are now piloted in a small number of areas across the UK to assess the effectiveness and impact of the new model prior to national roll out. See Gov.UK, Domestic Abuse Protection Notices/Orders Factsheet (*Gov.UK*, 31 January 2022) <https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-protection-notices-orders-factsheet> accessed 21 February 2022.

49 The Crime and Security Act 2010, s 28.

50 Office for National Statistics (n 41).

51 Liz Kelly, Joanna Adler, Miranda Horvath, Jo Lovett, Mark Coulson, David Kernohan and Mark Gray, 'Evaluation of the Pilot of Domestic Violence Protection Orders' (2013) Home Office Research Report 76 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/260897/horr76.pdf> accessed 20 February 2022.

52 ibid.

Moreover, the fact that DVPNs and DVPOs can be made without the victim's consent poses a further obstacle to their effectiveness. This poses a *prima facie* interference of victims' rights under Article 8 of the European Convention of Human Rights (ECHR).[53] It is also argued that such non-consensual intervention by external agencies is in effect replicating the abuse by the perpetrator, which further disempowers the victim. Moreover, it is questionable whether a DVPN issued against the victim's wishes can be effective as the enforcement of the DVPN will ultimately rely on the victim's cooperation in reporting any breach.[54] It is therefore clear that the effectiveness of the usage of DVPOs is questionable.

IV. The Fundamental Problem: An Obscure Definition of Domestic Abuse

The inadequacies of different legal measures, civil or criminal, seem to converge into one common fundamental problem—the obscurity of the notion of "domestic abuse" itself. For example, the effectiveness of NMOs was hindered by uncertainties regarding the coverage of stakeholders encompassed within the concept and whether domestic abuse should be classified as a civil or criminal offence. The effectiveness of the coercive control offence was hampered by an inability to ascertain the nature of coercive control, a subcategory of domestic abuse. The issuance of DVPNs and DVPOs remained heavily dependent on the police's subjective conception of domestic abuse, given the lack of a comprehensive definition that captures the nature of the phenomenon.

Indeed, when the Shadow Pandemic unravelled, there was no statutory definition of domestic abuse. Instead, the government described the difficulties of formulating an appropriate response to the phenomenon—"Domestic abuse is a complex area, which is often misunderstood and goes unrecognised or unidentified. To transform our response to domestic abuse, we would first need to ensure that it is properly understood."[55] Therefore, the Shadow Pandemic coincided with a legal regime centred on a phenomenon bearing divergent definitions.

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53 Mandy Burton, 'Emergency Barring Orders in Domestic Violence Cases: What Can England and Wales Learn from Other European Countries?' (2015) 27(1) Child and Family Law Quarterly 25.

54 Kelly and others (n 51) 76.

55 HM Government, 'Transforming the Response to Domestic Abuse: Government Consultation' (HM Government, 31 May 2018) <https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf> accessed 21 February 2022.

Michelle Madden Dempsey provides one of the leading accounts of domestic abuse.[56] She argues that domestic abuse encompasses three components: violence, domesticity, and structural inequality. She conceives violence as the direct, physical use of force; domesticity as tied to the location of the home and domestic relationships characterised by intimacy, familial ties or a shared household; and structural inequality as the sustenance and perpetuation of the uneven distribution of social power.[57] Other scholars, however, have demonstrated the narrowness of her conceptualisation of violence, as it is limited to physical violence and neglects other categories of abuse, such as emotional and economic abuse.[58] Moreover, domestic abuse could happen outside the home in the form of surveillance and behavioural regulation, such as stalking and cyberstalking.[59] Domesticity also raises questions of privacy and concerns of trivialism, with critics such as Jennifer Nedelsky[60] and Elizabeth Schneider[61] arguing that the notion perpetuates the unjustified belief that the state should not intervene in the private sphere.

Evan Stark provides an alternative account of domestic abuse. He describes domestic abuse as a form of coercive control, characterised by a range and pattern of non-physical abusive behaviour concerning violence, intimidation, isolation, and control, resulting in women's entrapment in abusive relationships.[62] While his account extends the notion of domestic abuse beyond physical violence to a form of emotional abuse and control, the concept remained obscure, as illustrated by the aforementioned difficulties in defining the coercive control offence at law.

The third leading account stems from a cross-government definition of domestic abuse pre-dating the Domestic Abuse Act. Domestic abuse is defined as any incident or pattern of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members, regardless of gender or sexual orientation. The abuse can encompass, but is not limited to, psychological, physical, sexual, economic and emotional abuse. It also includes controlling and coercive behaviour.[63] While having been used by government departments, the police, the Crown Prosecution Service and the UK Border Agency to identify domestic violence cases, the definition remained

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56 Michelle Madden Dempsey, 'What Counts as Domestic Violence? A Conceptual Analysis' (2006) 12(2) William and Mary Journal of Women and the Law 301.
57 ibid.
58 Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (OUP 2007) 198.
59 ibid.
60 Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (OUP 2011) 310.
61 Elizabeth Schneider, 'The Violence of Privacy' (1991) 23 Connecticut Law Review 973.
62 Stark (n 58).
63 HM Government (n 55) 11.

non-statutory and open to contestation and divergence in application. For example, from a survey conducted by the Home Office, 36% of respondents thought that government departments did not apply the definition correctly, 38% found that local governments did not do so, and 40% regarded frontline practitioners to have failed to do the same. Instead, these institutions and their members created their own definitions, leading to a general lack of understanding of domestic violence.[64]

Hence, there is no consensus on a definition of domestic abuse, which has contributed to the existing legal framework's ineffectiveness in tackling the phenomenon. By blurring the demarcations of the scope of conduct that constitutes domestic abuse, and consequently, when political, legal or social intervention should occur, obscurity in the definition hinders target-efficiency by impeding the cultivation of a defined focus for response. Moreover, upon the lack of a defined scope of protection offered by the legal regime, it is easy for authorities to lose sight of their target audience in policy formulation, leading to uncertainties over the enforcement of such rules. Quoting Lucy Hadley of Women's Aid, formulating the "right" definition of domestic abuse is crucial for guiding policies, strategies, priorities, and funding locally and in public sector agencies.[65] Therefore, the lack of definition of domestic abuse would impede the prioritisation of needs and hence hinder the responsiveness of measures to the most pressing needs under time and resource constraints.

V. THE DOMESTIC ABUSE ACT: THE LIGHT AT THE END OF THE TUNNEL?

In this context, the government introduced the Domestic Abuse Act to provide a statutory definition of domestic abuse. Section 1 of the Act provides that behaviour of a person towards another constitutes domestic abuse if both are aged 16 or over and are personally connected, and the behaviour is abusive, with the notion of abuse spanning across physical or sexual abuse, violent and threatening behaviour, controlling or coercive behaviour, economic abuse and psychological, emotional or other abuse.

The Act unified divergent definitions of domestic abuse under a common, statutory and authoritative definition. The definition was, however, not without dispute. In terms of the scope of the offence, the Joint Committee on the Act raises concerns that certain types of abuse

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64 Home Office, 'Cross-Government Definition of Domestic Violence - A Consultation: Summary of Responses' (*Home Office*, September 2012) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/157800/domestic-violence-definition.pdf> accessed 21 February 2022.

65 HM Government (n 55) 11.

experienced disproportionately by BME and migrant women were not recognised adequately by the Act. These types of abuse involve honour-based violence, forced marriage and spousal abandonment previously included in the cross-governmental, non-statutory definition. Such thoughts are echoed by the NGO Liberty, which argues the definition risked being "inadvertently discriminatory by not recognising coercive control related to immigration status".[66]

The scope of the victims covered is also disputed. The campaign group Step Up Migrant Women argues that the Act does not help some migrant women who fall victim to domestic abuse because of their immigration status. The group calls for a provision that allows all women, regardless of their immigration status, to access public funds, support and routes to safety.[67] Similarly, the NGO Women's Aid regards the Domestic Abuse Act to have "failed to deliver equal protection and support for migrant women".[68] While the Act is a welcome first step towards a comprehensive definition of domestic abuse and a holistic legal framework, it would not and should not be the last word on the matter.

VI. Proposals for Reform: Towards a more Comprehensive Definition of Domestic Abuse

It is argued that steps should be taken to establish a more comprehensive definition of domestic abuse—one that addresses structural inequalities to a greater extent and encapsulates an extensive list of domestic-abuse related offences.

A. Addressing structural inequalities

Firstly, the definition should address structural inequalities to a greater extent. Structural inequality is integral to Dempsey's account of domestic abuse, which she conceptualises as an imbalance of power and control within social structures,[69] where power is the ability or entitlement to exert control over another person.[70] In any relationship, the more powerful person may use their power as an instrument of control over their less powerful counterpart.

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66 House of Commons Library Briefing Paper, 'Domestic Abuse Bill 2017-19' (House of Commons Library, 30 September 2019) <https://researchbriefings.files.parliament.uk/documents/CBP-8630/CBP-8630.pdf> accessed 21 February 2022.

67 ibid.

68 Farah Nazeer, Domestic Abuse Act (*Women's Aid*, 29 April 2021) <https://www.womensaid.org.uk/womens-aid-statement-on-the-royal-assent-of-the-domestic-abuse-bill/> accessed 21 February 2021.

69 The Duluth Abuse Intervention Project, 'The Power and Control Wheel' (*Domestic Abuse Intervention Programs*, 2022) <https://www.theduluthmodel.org/wheels/> accessed 20 February 2022.

70 Hannah Arendt, *On Violence* (Harcourt Brace Jovanovich Publishers 1970) 44.

Dempsey views structural inequality as an element that exacerbates domestic abuse and what constitutes domestic abuse in the "strong" sense. As opposed to domestic abuse in the "weak" sense, which does not feature structural inequality, relevant authorities should prioritise tackling domestic abuse in the "strong" sense considering limited resources to alleviate the most harm. In the modern context, potential structural inequalities include patriarchy,[71] racial disparity,[72] discrimination based on citizenship and immigrant status[73] and so on.

Contrary to Dempsey's suggestions, it is clear that the government has failed to fully consider structural inequalities in tackling domestic abuse and resource allocation. Currently, statutory guidance accompanying the Domestic Abuse Act provides that the fact that most victims are female must be considered, directing the attention of the Domestic Abuse Act towards alleviating domestic violence exacerbated by patriarchy.[74] Other forms of structural inequality, such as racial disparity and citizenship-based discrimination, however, were not addressed in the Act. Arguably, to address such instances of inequality entrenched in societal reality, the Act should afford recognition to abuse currently experienced disproportionately by BME and migrant women, such as female genital mutilation (FGM).

Additionally, a provision allowing all domestic abuse victims, regardless of their immigration status, to access public funds and support should also be promulgated. The establishment of such provisions will elevate the protection of victims' rights to those under the Human Rights Act 1998 (HRA), which may be exercised by all residents in the UK regardless of citizenship.[75] This is justified given domestic abuse's direct relevance to human rights, as confirmed by case law on the interpretation of the ECHR, which the HRA seeks to incorporate into English and Welsh law. In particular, it was noted in cases such as *Kontrová v Slovakia, Bevacqua and S v Bulgaria, ES and Others v Slovakia*, and *Opuz v Turkey*, that domestic abuse may potentially fall within the scope of Articles 2 (right to life), 3 (freedom from torture and inhuman and degrading treatment), 8 (respect for private and family life, home and correspondence) and 14 (protection from discrimination in respect of the rights and freedoms in the Convention) ECHR, and that a state can be held to be in breach of those rights

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71 Michelle Madden Dempsey, 'Toward a Feminist State: What Does "Effective" Prosecution of Domestic Violence Mean?' (2007) 70(6) The Modern Law Review 908.

72 Stokely Carmichael and Charles Hamilton, *Black Power: The Politics of Liberation* (Vintage Books 1992).

73 The Migration Observatory at the University of Oxford, 'Migrants and Discrimination in the UK' (*The Migration Observatory,* 20 January 2020) <https://migrationobservatory.ox.ac.uk/resources/briefings/migrants-and-discrimination-in-the-uk/> accessed 20 February 2022.

74 Home Office, 'Domestic Abuse: Draft Statutory Guidance Framework' (*Gov.UK*, 19 October 2021) <https://www.gov.uk/government/consultations/domestic-abuse-act-statutory-guidance/domestic-abuse-draft-statutory-guidance-framework> accessed 20 February 2022.

75 Liberty, 'The Human Rights Act' (*Liberty*, 2022) <https://www.libertyhumanrights.org.uk/your-rights/the-human-rights-act/> accessed 6 March 2021.

if it has not taken sufficient steps to protect victims from further abuse.[76] Scholars such as Jeremy Birchall and Shazia Choudhry have even gone further in arguing for "a right not to be abused".[77] The provision would extend protection against domestic abuse to all victims, irrespective of immigration status, and thus alleviate structural inequalities based on citizenship.

B. AN EXTENSIVE BUT NON-EXHAUSTIVE LIST OF DOMESTIC ABUSE-RELATED OFFENCES

Secondly, an extensive but non-exhaustive list of domestic abuse-related offences can be included within the Act. While the Domestic Abuse Act provides a theoretical definition of the phenomenon, it could merit an equally comprehensive definition of the offence in practice. Domestic abuse is not currently a specific offence at law in England and Wales. Different domestic abuse-related offences and remedies are manifested in a wide array of criminal and civil measures, contained in different statutes (such as the Domestic Abuse Act, Family Law Act 1996, Serious Crime Act 2015 and Crime and Security Act 2010; see Section III above) scattered across the legal framework in a disorganised manner.

At present, there is no complete statutory list of such offences and consequent remedies. For example, the Domestic Abuse Act only provides a narrow list of offences involving abusive and violent behaviour in Part 6 ("Offences Involving Abusive or Violent Behaviour"). The list encapsulates controlling or coercive behaviour in an intimate or family relationship, threats to disclose private sexual photographs and films with intent to cause distress, strangulation or suffocation and serious harm for sexual gratification.[78] This is, however, far from a complete list, with common offences, such as common assault and battery in a domestic context, and molestation, falling beyond the scope of the statutory list. This omission has the potential to lead to confusion from victims and practitioners in domestic abuse cases.

These problems can be alleviated by providing a comprehensive list of domestic abuse-related offences in practice, which would enhance the law's accessibility and clarity and offer a one-stop-shop for anyone seeking to ascertain the law on domestic abuse. In practice,

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[76] *Kontrová v Slovakia* App no 7510/04 (ECtHR, 1 May 2007); *Bevacqua and S v Bulgaria* App no 71127/01 (ECtHR, 12 June 2008); *ES and Others v Slovakia* App no 8227/04 (ECtHR, 15 September 2009) and *Opuz v Turkey* ECHR 2009-III 107.

[77] Jenny Birchall and Shazia Choudhry, 'What about my right not to be abused? Domestic Abuse, Human Rights and the Family Courts' (*Women's Aid*, 2018) <https://1q7dqy2unor827bqjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2018/05/Domestic-abuse-human-rights-and-the-family-courts-report.pdf> accessed 20 February 2022.

[78] Domestic Abuse Act 2021, s 68–71.

such a comprehensive list is adopted by Tasmania in Part 2 ("Family Violence Offences") of the Family Violence Act 2004. Family violence is defined in section 7 to encapsulate the offences of assault (including sexual assault); threats, coercion, intimidation or verbal abuse; abduction; stalking; attempting or threatening to commit the aforementioned conduct, economic abuse; emotional abuse or intimidation; contravening an external family violence order, an (interim) Family Violence Order (FVO) or a Police Family Violence Order (PFVO); and damaging property jointly owned by the respondent and their spouse or partner, or owned by the respondent's spouse or partner, or owned by an affected child.[79] Guidelines on penalties including arrest and detention, bail and sentencing factors are detailed in the same part. Enforcement mechanisms, such as the PFVO and the FVO, are described in Part 3 ("Police Family Violence Orders") and Part 4 ("Family Violence Orders") of the same Act.[80] Such a comprehensive list allows one to anticipate the extent of legal action per the severity and context of domestic abuse, which improves legal certainty. This may encourage victims to recognise their rights and remedies under the current legal regime and potential perpetrators to regulate their behaviour correspondingly.

VII. Conclusion

Such discussions lead to a further question: Do we need an independent offence of domestic abuse? There have recently been discussions in Scotland regarding the establishment of such an offence. Reasons cited include the current legal regime's lack of recognition of domestic abuse's precise nature and consequences. Respondents noted that Scotland's existing legal framework focuses on individual incidents instead of a pattern of abusive behaviour over time and that it had failed to recognise coercive and controlling behaviour.[81] Such justifications are however inapplicable in the England and Wales context since these considerations are already incorporated into the Domestic Abuse Act. Moreover, construing domestic abuse as a separate offence is unlikely to allow for the divergent consequences and remedies of various forms of domestic abuse currently afforded under individual offences, undermining the current framework's flexibility. On the contrary, the legal framework is likely to benefit from a comprehensive account of all existing offences grouped under the umbrella term "domestic abuse" to confer legal protection and certainty.

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79 Family Violence Act 2004, s 7.

80 ibid s 14, 15–29.

81 The Scottish Government, *Scottish Government Consultation Paper, a Criminal Offence of Domestic Abuse* (2015) 5.

All in all, the Shadow Pandemic has shed light on the importance of the legal regime in tackling domestic abuse and the fundamental flaws of the English and Welsh legal framework, which have overshadowed its achievements in combating the global problem. These flaws mainly stem from an obscure definition of "domestic abuse" as a concept and are only partially alleviated by the introduction of the Domestic Abuse Act, which arguably triggers more disputes pertaining to the definition. The Shadow Pandemic's converse effects are, however, not to be neglected—by raising awareness of the phenomenon and creating a context where thinking about this question is necessary, the pandemic surely also poses a timely reminder for constructive change.

De Lege Ferenda (2022) Vol V, Issue i, 20–34

Robo-Advisors: A Comparative Analysis in the Context of Fiduciary Law

KAN JIE MARCUS HO* AND MA CHAO JUN**

ABSTRACT

This article conducts a comparative analysis of robo-advisors in fiduciary law. Rapid technological evolution has ushered in an increased need for equity to evolve and embrace changes in the wealth management industry, with the rise of robo-advisors starting to challenge incumbents in rendering digital investment advice and personal portfolio management services. This article adopts a two-part analysis. First, the article canvasses a current financial perspective of the Robo-Advisor market in the banking industry. Second, the article examines the legal framework governing robo-advisors in the United States (US); in particular, the Investment Advisors Act of 1940 and various Securities Exchange Commission (SEC) regulations. In response to the concern that robo-advisors are unable to address market failures and meet the duty of care standard, this article argues that such contentions are unfounded, as US doctrine demonstrates. There, the fiduciary standard of care is malleable, and various SEC reports suggest modifications can be made to said standard of care to robo-advisors. Further, the duty of avoiding conflicts is unlikely to apply in the context of robo-advisors, so long as full and fair disclosure can be made. However, this paper acknowledges that black-box issues continue to plague the way robo-advisors operate, though one way out of this rabbit hole might be to encourage transparent AI development. Having explored US doctrine, this paper then seeks to bring the knowledge gained to both the UK and Singapore, where the Financial Conduct Authority (for the UK) and Monetary Authority of Singapore (for Singapore) have

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begun to look at potential ways forward to develop the law relating to robo-advisors. This paper concludes that fiduciary law provides the answer, for clearer disclosure requirements, coupled with stronger private-public understandings of regulatory requirements, would invite a new dawn in the wealth management industry.

Keywords: artificial intelligence law; comparative law; equity; fiduciary law; Robo-Advisors; financial regulation

I. INTRODUCTION

The advent of the fourth industrial revolution has heralded new solutions in the wealth management industry. As a rapidly emerging investment service challenging incumbents within the wealth management industry, robo-advisors are automated digital investment advisors, providing personal portfolio management services. After signing up for an account on a typical robo-advising platform that is rendered to clients online, clients undergo an online Know Your Customer (KYC) form, inputting their risk tolerance and financial goals. Utilizing the inputs, the robo-advisor's algorithms recommend the most suitable portfolios for each client and automatically invest in them.[1]

For clients, robo-advisors provide a simple, convenient alternative to low-interest savings accounts offered by banks. This is particularly important in the current environment, considering the low yields from fixed-income instruments. Furthermore, as algorithms replace the human element in managing portfolios, robo-advisors charge affordable management fees of around 0.25-0.50% per annum.[2] In essence, robo-advisors are straightforward investment instruments meant for passive, long-term investors. They are not used to generate short-term gains by regular trading.

This article will be divided into two parts. In the first, it seeks to explore the growth and use of robo-advisors in the United Kingdom ("UK") financial industry, with a particular focus on client segmentation, and the way forward for said innovation in the private banking arena. In the second, this article deep dives into the fascinating issues raised by robo-advisors in the domain of fiduciary law and examines how various jurisdictions—namely, the United States (US), UK, and Singapore - have sought to regulate said innovation to date. It will tap into the

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1 Dinesh Dayani, 'Robo Advisors in Singapore (2021): What You Need to Know Before Investing' (*Yahoo!*, 23 October 2021) <https://sg.finance.yahoo.com/news/robo-advisors-singapore-2021-know-024018759.html> accessed 9 February 2022.

2 Miranda Marquit and Benjamin Curry, 'How To Invest With a Robo-Advisor' (*Forbes Advisor*, 13 May 2021) <www.forbes.com/advisor/investing/what-is-robo-advisor/> accessed 15 March 2022.

rich doctrine of the US and examine lessons for the remaining two jurisdictions in the final analysis.

II. ROBO-ADVISORS – A FINANCIAL PERSPECTIVE

A. POSITION AT PRESENT

In 2020, robo-advisors' assets under management (AUM) in the UK were about US$18 million. From 2022 to 2026, the AUM are projected to show an annual growth rate of 14.99%, resulting in a forecasted total amount of US$3,130 billion by 2026.[3]

Nutmeg was one of the very first UK robo-advisors to enter the scene. Since 2011, it has grown to become the largest with over £600 million AUM. Other main players include Moneyfarm, Scalable Capital and Wealthify. Most UK robo-advisors offer various types of accounts to their clients. The three main categories are Individual Savings Accounts (ISAs), pension accounts and general investment accounts. Essentially, ISAs are an investment class created by the UK government providing tax-free allowances of up to £20,000 annually.[4] Utilizing the money in their accounts, clients could then invest their money into the portfolios recommended to them by the robo-advisor's algorithm. Currently, most UK robo-advisors have a prefixed range of portfolios constructed to suit different investors' risk tolerance. For example, UK robo-advisor Wealthify has five investment plans for a general investment account, ranging from the "Cautious Plan" to the "Adventurous Plan".[5]

B. ROBO-ADVISORS: WHAT DO THEY OFFER?

As robo-advisors are passive investment vehicles that charge low fees, they mainly invest in exchange-traded funds (ETFs). An ETF is a type of security and exchange-traded product that is commonly traded on stock exchanges. Essentially, an ETF is a basket of securities traded like a stock on the exchange market. Although ETFs can be constructed to track anything including various investment strategies, they are most often used to track indices, industries,

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3 Statista, 'Robo-Advisors—United Kingdom' (*Statista*) < www.statista.com/outlook/dmo/fintech/digital-investment/robo-advisors/worldwide?currency=usd> accessed 16 March 2022.

4 Andrew Meola, 'Nutmeg Investing Review 2020: Fees, Returns, Services, and Competitors' (*Business Insider*, 14 January 2020) <www.businessinsider.com/nutmeg-review> accessed 3 March 2021.

5 Damien Fahy, 'Wealthify Review – Is it the Right Investment Choice for You?' (*Money To The Masses, 10 March 2022*) < www.moneytothemasses.com/saving-for-your-future/investing/wealthify-review-is-it-the-right-investment-choice-for-you > accessed 16 March 2022.

commodities or other types of assets. The SPDR S&P 500 ETF (SPY) is a notable ETF used to track the S&P 500 index.[6]

On the contrary, mutual funds are rarely used by robo-advisors due to the need for active management. In an attempt to beat the market, mutual funds employ experienced human managers and advisors for active management. Therefore, they often charge higher management fees of 1–3% per annum to cover their costs. Some robo-advisor providers, however, do offer mutual funds as separate products to their clients.[7]

C. BANKING CLIENT SEGMENTATION

The personal banking industry can be segmented into three main profiles depending on their investable assets. First, the "Retail" profile corresponds to clients who have less than US$100,000 in investable assets; they make up the general population. They are only able to access basic investment products and tend to be very fee sensitive. This segment is commonly referred to as retail or consumer banking. Second, the "Affluent" profile represents clients who have US$100,000 to US$1 million investable assets. They generally want some control over their investments and are open to advice. Lastly, the "High-Net-Worth Individuals" (HNWIs) profile corresponds to clients who have over US$1 million investable assets and are able to access complex investment products entailing high risks.[8] Besides investment advice, they require holistic wealth management solutions such as tax guidance and estate and philanthropic planning. This segment is referred to as private banking.[9]

D. ROBO-ADVISORS: WHO ARE THEY FOR?

Currently, given the services they provide, robo-advisors mainly target the "Retail" and "Affluent" profiles. Driven by their desire for control, HNWIs prefer to make self-directed investments and thus find robo-advisors unattractive. In addition, HNWIs tend to have a higher risk tolerance and are constantly searching for strategies capable of consistently outperforming the market. On the contrary, the "Retail" and "Affluent" profiles find robo-advisors attractive

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6 James Chen, 'Exchange-Traded Fund—ETFs' (*Investopedia*, 2 February 2021) <www.investopedia.com/terms/e/etf.asp> accessed 4 March 2021.

7 Marquit and Curry (n 2).

8 Christian Gilmour and others, 'Robots Are Here: The Rise of Robo-Advisors in Asia Pacific' (*Deloitte,* 2019) <www2.deloitte.com/content/dam/Deloitte/sg/Documents/financial-services/sea-fsi-robo-advisers-asia-pacific.pdf> accessed 4 March 2021.

9 Adam Hayes, 'High-Net-Worth Individuals (HNWI)' (*Investopedia*, 06 September 2021) <www.investopedia.com/terms/h/hnwi.asp> accessed 16 March 2022.

because of their simplicity and the low level of investor involvement required. Clients who lack financial knowledge can benefit from these automated digital investment advisors that charge low fees.

E. BENEFITS OF ROBO-ADVISORS

Besides being a straightforward and cost-effective investment option for clients, robo-advisors offer automated rebalancing and require low-to-no minimum balance. Algorithms ensure the clients' investment mix remains constant even if markets fluctuate.[10] Here, investment mix refers to the breakdown of asset classes such as stocks, bonds, and cash in a client's portfolio. Algorithms help rebalance and maintain a consistent percentage allocation to a particular asset class. Furthermore, with robo-advisors, clients are able to access basic financial planning guidance based on their risk profile. Robo-advisors provide asset allocation suggestions that help clients meet long-term financial goals without being exposed to behavioral biases that causes inefficiencies.[11]

F. DISADVANTAGES OF ROBO-ADVISORS

Robo-advisors can act as a double-edged sword. Due to their simplicity, robo-advisors induce investor passivity, leading to clients being unwilling to acquire more financial knowledge.[12] Most importantly, there is a lack of personalization as many UK robo-advisors are only able to offer a prefixed range of portfolios. Clients are simply grouped into categories and presented with a handful of portfolios to invest in based on general questions they answered in their KYC form. There are also constraints on investing in other asset classes that algorithms are not programmed to evaluate.[13] In addition, robo-advisors are impersonal. As past data are not guarantees of future performance, during market downturns like the Covid-19 sell-off, robo-advisors are unable to address their clients' emotions and provide nuanced personal guidance.

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10 Marquit and Curry (n 2).

11 Jessica Bown and Georgie Frost 'What Is a Robo-Adviser?' (*The Times*, 22 December 2021) <www.thetimes.co.uk/money-mentor/article/robo-adviser/> accessed 16 March 2022.

12 Gordon Tan Kuo Siong, 'Commentary: Letting a Robo-Adviser Decide How to Invest Your Money is a Double-Edged Sword' (*Channel News Asia*, 29 January 2021) <www.channelnewsasia.com/news/commentary/robo-adviser-invest-stock-market-bank-finance-wealth-planning-13824986> accessed 5 March 2021.

13 Bown and Frost (n11).

G. FUTURE OF ROBO-ADVISORS

At the current rate of development, robo-advisors will continue to appeal to the mass market only as many of them are unable to capture the nuances that private banking offers. Given the complexity of their financial situation pertaining to their wealth, private banking clients require tailored solutions for wealth management.

In the future, with increased personalization, robo-advisors may be integrated into private banks to reduce labor costs. However, with increased personalization, operating costs are bound to escalate as well. Due to the low management fees currently charged, the business models of many robo-advisors are unsustainable. Despite growing its customers from 50,000 to 85,000, in 2018, Nutmeg still reported operating widening losses from £12.3 million in 2017 to £18.6 million.[14] Rising regulatory costs, investments into both technology and employees have been major factors affecting profitability.[15]

In the coming years, a market consolidation is the most likely outcome. Given the unsustainable business models, incumbents will be forced to merge and combine forces. In addition, established private banks and wealth managers may cooperate with robo-advisors, forming a hybrid offering where client relationship managers will need to continually review clients' overall portfolio to optimize their investments.

III. ROBO-ADVISORS AND FIDUCIARY LAW

The seminal English position on a fiduciary is set out by Lord Millet in *Bristol and West Building Society v Mothew*.[16] In sum, a fiduciary is "[one] who has undertaken to act for and on behalf of another in a particular matter in circumstances which gives rise to a relationship of trust and confidence".[17] This definition has been espoused by the England and Wales Law Commission as one that is not understood in isolation, but is instead better viewed as "legal Polyfilla," moulding itself flexibly around other legal structures, and sometimes filling in the gaps.[18] The first subsection will explore the doctrine in the United States, where the concept of fiduciary law as applicable to robo-advisors has developed to an advanced stage. The lessons

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14 Jessica Clark, 'Nutmeg Widens Losses as Wealth Manager Targets New Customers' (*City A.M.*, 6 October 2019) < www.cityam.com/nutmeg-widens-losses-as-wealth-manager-targets-new-customers/> accessed 16 March 2022.

15 Alexander Jones, 'Why Robo-Advisors Are Struggling to Break Even' (*International Banker*, 3 July 2019) <https://internationalbanker.com/brokerage/why-robo-advisors-are-struggling-to-break-even/> accessed 5 March 2021.

16 *Bristol and West Building Society v Mothew* [1996] EWCA Civ 533.

17 ibid 711.

18 Law Commission, *Fiduciary Duties of Investment Intermediaries* (Law Com No 350, 2014) para 3.11.

gained from this deep dive will then be applied to the UK and Singapore contexts, with both jurisdictions still fresh on their quest to find a way to unravel the problems that have arisen following the emergence of robo-advisors.

A. UNITED STATES

The legal framework governing investment advisors in the United States is the Investment Advisers Act of 1940 (Advisors Act),[19] which frames the specific fiduciary obligations and duty of care standards imposed upon an investment advisor. However, the advent of robo-advisors has largely disrupted the orthodoxy of investment advisors being mere human entities, and this has brought problems for the Advisors Act. As aptly outlined by Huxley & Kim (2016), because robo-advisors do not and cannot reach the standard of the duty of care imposed on conventional investment advisors, the current legal standard is inapt to apply to them. This flows from the belief that robo-advisors typically generate results worse than their human counterparts.

This assertion is substantially shaky, for two counterarguments may be offered to shake the bedrock of this entrenched orthodoxy. First, as explained earlier, "Retail" and "Affluent" customers form the main substantive base of demand from robo-advisors. Jason Traff emphasises that most investment decisions can be conceptualised as "math problems".[20] Citing behavioural scientist Simon Swift, Traff contends that basic investment decisions can rightly be made by robo-advisors, hence providing the same services at a slashed cost compared with hiring an investment advisor. Secondly, Megan Ji asserts that robo-advisors can "rebalance and tax-loss harvest more efficiently than human advisers".[21] Viewed thus, a plausible argument may be made that robo-advisors are indeed capable of meeting the duty of care as set out by fiduciary law. This allows the incursion of robo-advisors to neatly fit within the ambit of fiduciary law.

Nevertheless, detractors of the adoption of robo-advisors have advanced a cautionary stance, especially amongst state-level authorities. The Massachusetts Securities Division has particularly disagreed against the entrance of robo-advisors into fiduciary law, taking a bright-line position that "fully automated robo-advisors" at present are "inherently unable to carry out

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19 15 USC § 80b-1–21 (2012).

20 Jason D Traff, 'The Future of the Wealth Management Industry: Evolution or Revolution?' <https://dspace.mit.edu/handle/1721.1/104548> (MBA thesis, Massachusetts Institute of Technology 2016).

21 Megan Ji, 'Are Robots Good Fiduciaries? Regulating Robo-Advisors Under the Investment Advisers Act of 1940' (2017) 117 Colum L Rev 1543.

the fiduciary obligations of a state-registered investment advisor".[22] The crux of the argument put forward by detractors is that robo-advisors are ineffective in addressing market failure. This, Melanie Fein argues, is fatal to the ability for these entities to be conceptualised as fiduciaries.[23] Without doubt, Kara Stein posits that the issue of whether a fiduciary duty could be imposed on a robo-advisor is ambiguous. Instancing the scenario of a market crash, Stein cautions that robo-advisors will not be "on the phone providing counsel".[24] Indeed, Michael Wursthorn and Anne Tergensen are of the view that in times of crisis, a human advisor could guide individuals to avoid them taking rash action that could scar to their long-term interests.[25]

Moreover, the limited reach of questionnaires exposes a lacuna in terms of fulfilling the duty of care placed on conventional investment advisors. Fein asserts that "robo-advisors do not meet the high fiduciary standard of care that normally governs the provision of investment management services by a registered investment advisor or ERISA fiduciary".[26] This is undergirded by the argument that pre-prepared questions are otiose in ensuring that all vital information is captured, particularly relating to assets held outside a client's account. This is problematic because, as the Massachusetts Securities Division observed, "assets held outside of a client's account directly impact the client's total financial picture and, accordingly, the investment adviser's ability to personalise advice and make appropriate investment decisions".[27]

Taken together, the main arguments of dissenters are mainly that robo-advisors are unable to address market failure, nor can robo-advisors reach the fiduciary standard of care of a financial advisor. This paper nevertheless contends that this assertion is nothing but a hollow drum, as will be made clear in the next subsection.

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22 Massachusetts Securities Division, 'Policy Statement: Robo-Advisers and State Investment Adviser Registration' (2016) <www.sec.state.ma.us/sct/sctpdf/policy-statement--robo-advisers-and-state-investment-adviser-registration.pdf> accessed 25 July 2021.

23 Melanie L Fein, 'Robo-Advisors: A Closer Look' (2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2658701> accessed 25 July 2021.

24 Kara M Stein, 'Surfing the Wave: Technology, Innovation and Competition' (Harvard Law School Fidelity Guest Lecture Series, 9 November 2015) <www.sec.gov/news/speech/surfing-wave-technology-innovation-and-competition-remarks-harvard-law-schools-fidelity> accessed 25 July 2021.

25 Michael Wursthorn and Anne Tergesen, 'Robo Adviser Betterment Suspended Trading During "Brexit" Market Turmoil' (2016) <www.wsj.com/articles/robo-adviser-betterment-suspended-trading-during-brexit-market-turmoil-1466811073> accessed 25 July 2021.

26 Fein (n 23).

27 Massachusetts Securities Division (n 22).

B. THE FIDUCIARY STANDARD OF CARE

The Restatement of the Law (Third) Agency, §8.01 stresses that just as "fiduciary obligations [are] not monolithic in [their] operation…an agent's fiduciary duties to the principal [likewise] vary depending on the parties' agreement and the scope of the parties' relationship".[28] This echoes the mutable nature of fiduciary duties—for, as the common law recognises, fiduciary duties act as a gatekeeper, providing a level of security to stakeholders in situations where (i) market incentives are not effective in protecting an entrustor from a fiduciary's self-interest, and (ii) where an entrustor lacks the ability to self-protect. As Ji recognises, the acknowledgment of fiduciary duties in such scenarios encourages an entrustor and a fiduciary to continue interacting, which maximizes market efficiency in the long run. Indeed, Tamar Frankel stresses that the common law fiduciary duty recognises that it largely depends on the dynamic of a fiduciary's relationship. Citing *SEC v Chenery Corp* at 85–86,[29] Frankel argues that lawyers and doctors, for example, are held to high standards of fiduciary duties, because of the wide sphere of influence espoused by their services,[30] impacting their clients or patients to a large degree. Likewise, Frankel notes that US law holds investment advisors to a higher standard than corporate directors and officers. The House and Senate versions of the Advisers Bill has recognised the personalised nature of the relationship between an investment adviser and a client (the former using the words "personalised character" and the latter using the words "personalised relationship") which varies depending on the agreement finalised between the parties.[31] This idea was entrenched into case law following *SEC v Capital Gains Research Bureau*, where the Supreme Court performed a "remedial reading" of the Advisors Act 1940 in an effort to "preserve the personalised nature of the services of investment advisors".[32]

Viewed thus, it becomes apparent that the standard of care for an investment advisor is not set at such a high level as often assumed by detractors. Instead, it is adaptable and depends largely on the circumstances. Indeed, a Dodd-Frank study has observed that the US Securities and Exchange Commission has occasionally permitted investment advisers to disclaim responsibility should they provide advice on a sole component of a client's portfolio. Likewise, it has also allowed responsibility to be limited in cases where a client's financial plan is updated

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28 *Restatement (Third) of Agency* §8.01 cmt c (2006).
29 *SEC v Chenery Corp* 318 US 80, 85–86 (1943).
30 Tamar Frankel, *Fiduciary Law* (OUP 2011) 43.
31 HR Rep No 76–2639, p 28 (1940) and S Rep No 76–1775, p 22 (1940).
32 *SEC v Capital Gains Research Bureau, Inc* 375 US 180, 191 (1963).

on a rolling basis, considering the fact that plans are only prepared pertaining to a point in time, and not indefinitely.[33]

Hitherto, no cogent authority in the law requires a detailed information gathering framework nor human judgment to be imbued in the financial advising process at present. Therefore, the application of said fiduciary duty to robo-advisors does not face any legal impediments going forward. Indeed, as the then SEC Chair Jo White opined, "in many respects our assessment of robo-advisors is no different than for a human-based investment advisor…there is variation in the content and flexibility of information gathered by robo-advisors before advice is given".[34] Support is indeed building up for the introduction of robo-advisors into the financial advisors landscape.

Notwithstanding, it remains apt to address one remaining dissent—that robo-advisors, nevertheless, are incapable of reaching the standard of care at present. However, as argued earlier, fiduciary standards are not cast in stone, and a modification of the duty of care can be possible. As Frankel correctly points out, fiduciary duties are better viewed as "form ready-made contracts" which are capable of being changed via agreement between the parties. In his view, five factors ought to guide the analysis of when fiduciary duties can be modified under the common law.[35] These are the following:

1. The entrustor has independent will such that he is able to properly enter into a contract;
2. The entrustor has full information about the conflict should conflicts of interests exist;
3. The fiduciary provides the entrustor with notice of the modification;
4. The substance of the modification is fair to the entrustor; and
5. The entrustor gives clear and specific consent to the modification.

Applying Frankel's five-pronged test, robo-advisors are clearly capable of jumping through all these hoops. On (1), clients clearly possess independent will in deciding between investment services; (2), the SEC has required Form ADVs to be filled out when a robo-advisor is deployed (Form ADVs is the uniform form that is used by investment advisors to register

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33 Staff of the US Securities and Exchange Commission, 'Study on Investment Advisers and Broker-Dealers' (2011) <www.sec.gov/files/913studyfinal.pdf> accessed 26 July 2021.

34 Mary Jo White, 'Keynote Address at the SEC-Rock Centre on Corporate Governance Silicon Valley Initiative' (31 March 2016) <www.sec.gov/news/speech/chair-white-silicon-valley-initiative-3-31-16.html> accessed 29 July 2021.

35 Frankel (n30) ch 4.

with both the Securities and Exchange Commission (SEC) and state securities authorities);[36] (3), notice is forthcoming, particularly given that any propounded modification would be a result of information provided through an online questionnaire, independent of any external human input; (4), said modification is on balance acceptable, particularly given lower service fees associated with the services of a robo-advisor; and (5), said clients access such services with full awareness of the capacities of a robo-advisor, and hence the requirement for "clear and specific consent" is satisfied. There is therefore a tenable argument that even if robo-advisors do not meet the duty of care of a financial advisor, modification of said duty is warranted in this scenario.

C. AVOIDING CONFLICTS OF INTEREST

Any discussion of fiduciary duties would be incomplete without an evaluation of conflicts of interests. Nevertheless, this is unlikely to be of issue in the context of robo-advisors. The starting point is the duty of loyalty, as outlined by the Restatement of the Law (Third) Agency, from §8.01-8.05, which requires a fiduciary to "refrain from acting adversely or in competition with [client's] interests" and omit using "[client's] property for the advisor's benefit or for a [third-party]". This is reflected in the Federal Regulatory framework, a largely disclosure-based regime which does not preclude an investment advisor from acting in the event of a conflict of interest, so long as full and fair disclosure is made to his clients.[37]

As made clear in Part I of this paper, robo-advisors mainly invest in ETFs. Such a portfolio, when juxtaposed with mutual funds, sees far and fewer opportunities for the inflow of revenue streams and payment shares which could risk creating conflicts of interest for robo-advisors. In the US, this could range from subtransfer agent fees to the 12b-1 fees. Moreover, any conflict concerns at the representative level are largely rendered irrelevant by human financial advisors stepping out of the picture, for a robo-advisor, programmed correctly, is unlikely to take sides in a transaction when acting in a representative capacity. This is because robo-advisors do not strive needlessly for incentive-based compensation, unlike humans which might be heavily swayed by such incentives. As the US Financial Industry Regulatory

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[36] US Securities and Exchange Commission, 'Investor Bulletin: Form ADV—Investment Adviser Brochure and Brochure Supplement' (2016) <www.sec.gov/oiea/investor-alerts-bulletins/ib_formadv.html#:~:text=Form%20ADV%20is%20the%20uniform,SEC)%20and%20state%20securities%20authorities.&text=The%20brochure%20is%20the%20primary%20disclosure%20document%20for%20investment%20advisers> accessed 9 February 2022.

[37] US Securities and Exchange Commission, 'Final Rule: Amendments to Form ADV, Investment Advisers Act Rules' (Release No IA–4509) <www.sec.gov/rules/final/2010/ia-3060.pdf> accessed 29 July 2021.

Authority observes, "purely digital client-facing tools eliminate the [employee vs client] conflict because finance professionals are not involved in the advice process".[38] This view has been echoed by regulators, such as the Department of Labour Secretary Thomas E. Perez, who viewed robo-advisors as an entity able to render fiduciary investment advice at significantly lower fees than traditional advisors, as well as the Department of Labour (DOL) itself, which noted that "the marketplace for robo-advice is still evolving in ways that both appear to avoid conflicts of interest that would violate the prohibited transaction rules and minimize cost".[39]

Accompanying the fiduciary duty of loyalty sees the Best Interest Contract Exemption Rule, as propounded by the Department of Labour.[40] In essence, this rule enables selected entities to receive compensation in certain situations validly, without falling foul of a prohibited transaction when acting in the capacity of a fiduciary. This is, however, subject to certain caveats. Amongst other requirements, the rule mandates such entities to (i) acknowledge fiduciary status with respect to investment advice; (ii) adhere to Impartial Conduct Standards, which include giving advice that is in the retirement investor's best interest; (iii) charge no more than reasonable compensation; and (iv) make no misleading statements whatsoever about investment transactions, compensation, and conflicts of interest.

Notably, in its rulebook, the DOL hinted at the possibility for robo-advisors to be classified as "Level Fee Fiduciaries". The DOL has established that "such providers may rely on the exemption with respect to investment advice to engage the robo-advice provider for advisory or investment advice". Indeed, the DOL has drawn a distinction between robo-advisors that receive level compensation and those which receive nonlevel compensation, barring the latter from availing of the exemption. This is because the DOL views that opening the floodgates for the latter would "adversely affect the incentives currently shaping the market for robo-advice", particularly in the way robo-advisors are implemented in the current marketplace.

D. UNRAVELLED KNOTS

We may not be out of the woods yet. Notably, issues relating to conflicts of interest may continue lingering as a spectre. This is particularly apt on the issue of black box programming.

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38 Financial Industry Regulator Authority, 'Report on Digital Investment Advice' (2016) <www.finra.org/sites/default/files/digital-investment-advice-report.pdf> accessed 29 July 2021.

39 Employee Benefits Security Administration, 'Best Interest Contract Exemption' (2016) <www.federalregister.gov/documents/2016/04/08/2016-07925/best-interest-contract-exemption> accessed 29 July 2021.

The current problem is that conflicts that are programmed into the algorithm of a robo-advisor, and conflicts that may affect how the algorithm is designed, are not required to be disclosed at present. Prima facie, a level of ambiguity continues to linger throughout most robo-advisor products. For example, Charles Schwab, in promoting the Schwab Intelligent Portfolios, states that the parameters are set based on "a disciplined portfolio construction methodology designed to balance performance with risk management appropriate for a client's goal, investing time frame, and personal risk tolerance, just as with other Schwab managed products."[41] Future Advisor, a robo-advisor owned by BlackRock, disclosed that "BlackRock, Inc. may receive directly or indirectly advisory fees and other compensation from the affiliated product that are in addition to the fees it will receive from the Adviser's client."[42] Along the same lines, Vanguard, in promoting its services, highlights that "competing interests that arise between [Vanguard] and its clients [are addressed] by relying on our time-tested investment philosophies and beliefs, such as the benefits of low costs, diversification, and indexing".[43]

From this brief survey, it remains unclear which specific conflicts are expected to be disclosed. Indeed, a mask continues to shroud the impact of conflicting interests, an issue which remains unaddressed by the SEC. In this regard, this paper argues that the SEC should explicitly require, going forward, that all robo-advisor owners disclose clearly whether a robo-advisor algorithm has been programmed to be biased, and if so, to what degree.

Ji makes a convincing point: the types of conflicts that a robo-advisor faces are not binary in nature. In his view, "conflicting incentives that exist, but that are not intentionally programmed into algorithms, should be disclosed as traditional investment advisor conflicts are". This is because such incentives "could subconsciously influence algorithm programmers, but it would be impossible to determine if they actually do and, if so, to what extent". In this regard, Schwab's approach is commendable to some extent. In its disclosure brochure, Schwab states that it

> makes a nominal calculation that fully offsets in the amount of 0.30% of the compensation that it or its affiliates receive from ETF transactions…[which

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41 Charles Schwab and Co, 'Schwab Intelligent Portfolios and Schwab Intelligent Portfolio Premium' (2018) <www.schwab.com/public/file/SIP-SCHWAB-WEALTH-ADVISORY-DISCLOSURE-BROCHURE> accessed 14 August 2021 (Schwab).

42 FutureAdvisor, 'Form ADV Part 2A: The Brochure', p 5 (2016) <http://perma.cc/W6LE-F5HQ> accessed 14 August 2021.

43 Vanguard Advisers, Inc, 'Advisor Client Relationship Summary (Form CRS)' (2021) 17 <https://personal.vanguard.com/pdf/vpabroc.pdf> accessed 14 August 2021.

> includes] advisory fees for managing Schwab ETFs and fees earned for providing services to third-party ETFs participating.[44]

Ji argues that Schwab has informed "clients as to how much it is earning on each portfolio, but it does not state how much clients are forgoing as a result of the conflict". Viewed thus, further disclosure is preferable, particularly given the largely inexperienced client base in the industry for robo-advisors. This would alleviate the potential information gap, ensuring that such clients are better poised to evaluate the risks and rewards, particularly considering the conflicts of interest in a particular algorithm.

E. UNITED KINGDOM AND SINGAPORE

Both the United Kingdom and Singapore are at a crossroad relating to the regulation for robo-advisors. In the former, the Financial Conduct Authority remains the SEC parallel as the key regulator, whereas in the latter, the Singapore Monetary Authority of Singapore maintains the bastion regulating all financial activity within the city-state. Both authorities are of the view that the advent of robo-advisors is currently in its infancy.

In the UK, the HM Treasury and the FCA have released a Financial Advice and Markets Review in 2016[45], with the FCA thereafter following up with a targeted article strategizing the way forward for regulation.[46] The FCA continues to see robo-advisors as a "valuable vehicle to help tackle the issues faced by those consumers who are unserved or underserved by more traditional advice models," and therefore seems to develop an "aims-focused approach." Bob Ferguson has remarked that the UK approach will be very much dependent on "what the model [actually] generates". Taken together, this paper views it likely that the UK regulatory space will likely be rife with activity in the coming years as technology accelerates in the private banking arena.

For Singapore, the legal basis governing robo-advisors is found in the Financial Advisers Act[47] and the Securities and Futures Act.[48] These are supplemented by MAS's "Guidelines on

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44 Schwab and Co (n 41) 9.

45 Financial Conduct Authority, 'Financial Advice Market Review' (2016) <https://www.fca.org.uk/publication/corporate/famr-final-report.pdf > accessed 14 August 2021.

46 Bob Ferguson, 'Robo Advice: An FCA Perspective' (Westminster and City: 2017 Annual Conference on Robo Advice and Investing: From Niche to Mainstream, 11 October 2017) <https://www.fca.org.uk/news/speeches/robo-advice-fca-perspective> accessed 14 August 2021.

47 Financial Advisers Act (Cap 110).

48 Securities and Futures Act (Cap 289).

Provision of Digital Advisory Services,"[49] which improves clarity about the rules and covers expectations on the supervision of algorithms. It is commendable that MAS has taken heed of the black box risk[50] and Ji's concerns relating to conflicts of interests.[51]

The Guidelines also enable robo-advisors to be licensed under the ambit of the Financial Advisors Act, so long as said entities are well equipped to gather customer data and perform a risk profile evaluation to prevent the incorrect type of investments from being recommended. All the same, the MAS has propounded a Fund Management Exception to enable robo-advisors to sidestep the requirement of having a corporate track record, with the necessary requirements outlined in Section I of the 2018 Guidelines.

Though UK and Singapore fiduciary laws are still very much at their genesis with respect to seeking the best approach to regulate robo-advisors, the experience of the US will prove helpful in the UK and Singapore's seafaring journey through uncharted waters.

IV. Conclusion

In the final analysis, this paper argued that robo-advisors are capable of respecting fiduciary law. Indeed, this paper has contended that fiduciary law is capable of handling technological developments, with robo-advisors lending themselves particularly well to trigger a modification of the fiduciary duty relating to investment advisers. At the same time, this paper has identified that although conflicts of interest may not be, at first glance, a stumbling block for robo-advisors, the issue of black-boxes and disclosure requirements ought to be ironed out further to prevent robo-advisors from hiding behind a mask, largely to the detriment of inexperienced investors. The lessons gained from US doctrine ought to be applied in both the UK and Singapore—and it is encouraging to see the MAS taking steps akin to that as recommended in this paper. As technology further evolves, balancing consumer security with innovation becomes an increasingly challenging task, although clearer disclosure requirements, coupled with stronger public-private understandings on regulatory requirements, will allow robo-advisors to flourish, heralding a new dawn in the wealth management industry.

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49 Monetary Authority of Singapore, 'Guidelines on Provision of Digital Advisory Services' (2018) < https://www.mas.gov.sg/-/media/MAS/Regulations-and-Financial-Stability/Regulations-Guidance-and-Licensing/Securities-Futures-and-Fund-Management/Guidelines-on-Provision-of-Digital-Advisory-Services--CMGG02.pdf> accessed 14 August 2021.

50 ibid at [39].

51 ibid at [40]-[41].

De Lege Ferenda (2022) Vol V, Issue i, 35–53

In Search of a Principled Approach—Article 6(1) ECHR and Administrative Decisions Through the Lens of UK Housing Assistance

GEORGINA PRESSDEE*

ABSTRACT

This article proposes a new framework which could be adopted by the ECtHR to address current criticisms of its unprincipled approach to the application of Article 6(1) ECHR to administrative decisions. The framework proposed focuses on the existence of a "right", according to its substantive content and effect, as the determining factor for the application of Article 6(1). The exclusionary effect of the term "civil" is then restricted to the anomalous cases which fall within the "hard core of public authority prerogatives". In doing so, this framework breaks away from the ECtHR's historic approach of analogising certain public law rights with superficially similar private law rights to justify the application of Article 6(1). The proposed framework is explored through Section 193 of the Housing Act 1996 and this exploration shows two things. First, that the proposed framework can resolve points of contention by settling the dispute between the ECtHR and UKSC over Article 6(1)'s application to Section 193. Second, that the proposed framework is neither inconsistent with the terms of Article 6(1) itself nor the ECtHR's caselaw in its current state.

Keywords: Article 6(1) ECHR; civil rights; administrative decisions; Ali v UK; Poshteh

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I. INTRODUCTION

Under Section 193(2) of the Housing Act 1996, a local authority has a duty to make accommodation available for occupation by an applicant, provided they are unintentionally homeless and in priority need. This duty is terminated if the applicant refuses suitable accommodation (Section 193(5), (7)), or can no longer be considered unintentionally homeless (Section 193(6)). The duty will be discharged when the local authority makes suitable council or private accommodation available or provides advice and assistance to ensure that accommodation is available (Section 206). Section 202 provides for a review by a housing officer of, *inter alia*, any decision concerning eligibility for assistance, termination or discharge of the local authority's duty, and suitability of the accommodation offered. Section 204 then provides a right of appeal to a county court on a point of law.

Article 6(1) of the European Convention on Human Rights[1] (Article 6(1)) is engaged by decisions determining an individual's "civil rights and obligations". In *Fazia Ali v The United Kingdom*,[2] the Chamber of the European Court of Human Rights (ECtHR) extended its application to decisions that end the local authority's duty under Section 193(2). Importantly, however, the Chamber held there had been no violation of Article 6(1) since the county court had sufficient jurisdiction to remedy the lack of independence of the prior decision-makers. The procedure as a whole, therefore, complied with Article 6(1). A mere two years later, the UK Supreme Court (UKSC) in *Poshteh v Royal Borough of Kensington and Chelsea* declined to follow the Chamber,[3] instead affirming its earlier decision of *Ali v Birmingham City Council* (*Ali v BCC*) that Article 6(1) is not engaged by these decisions.[4]

The ECtHR has been criticised for its failure to provide a coherent set of guiding principles to determine Article 6(1)'s application to administrative decisions.[5] *Ali v UK*—described by Elliott as "another expansionist decision" that dismantles the limiting principles which formerly existed in the realm of social welfare but "makes little, if any, effort to articulate any other serviceable principle" that might guide further decision making in this area—can be seen as an unfortunate continuation of this pattern.[6] The UKSC in *Poshteh* expressed similar

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1 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Article 6(1).

2 *Fazia Ali v The United Kingdom* [2015] ECHR 924.

3 *Poshteh v Royal Borough of Kensington and Chelsea* [2017] UKSC 36, [2017] AC 624.

4 *Ali v Birmingham CC* [2010] UKSC 8, [2010] 2 AC 39.

5 Thomas Cross, 'Is There a "Civil Right" under Article 6? Ten Principles for Public Lawyers' (2010) 15 JR 366, 366.

6 Mark Elliott, '*Ali v United Kingdom*: Article 6(1) ECHR and Administrative Decision-making' (Public Law for Everyone, 13 March 2016) <https://publiclawforeveryone.com/2016/03/13/ali-v-united-kingdom-article-61-echr-and-administrative-decision-making/> accessed 21 February 2022.

concern at the ECtHR's failure to provide a clear stopping point to the expansion of Article 6(1) and its disregard for the practical implications of that expansion.[7] This article will suggest a principled framework for the application of Article 6(1) to administrative decisions which satisfies these criticisms and would justify the application of Article 6(1) to Section 193.

II. A New Principled Approach

Strasbourg has been criticised by Craig and Lord Millett for its unprincipled approach to the scope of civil rights. In particular, the ECtHR determines Article 6(1)'s scope by making superficial analogies with private law rights, leading to "casuistic distinctions" with "little normative merit".[8] This formalistic approach makes it difficult to determine and predict the boundaries of Article 6(1).[9] Addressing these criticisms, this article proposes an approach which focuses on the existence of a right, according to its substantive content and effect,[10] as opposed to whether that right is "civil". This approach enables national legislatures to make a normative assessment of what citizens should be entitled to but allows the courts to ensure that those entitlements receive appropriate procedural protection.

A. Do qualifying section 193 applicants have a right?

It should be noted that much of the discussion in the caselaw conflates the interest being a *civil* right with the interest being a *right* in the first place. It is, therefore, difficult to separate the two completely within this caselaw. Doing so, however, could facilitate a more structured and principled approach. This section will proceed on the basis that a right is something to which an applicant is entitled, and which cannot be revoked outside legally prescribed circumstances.[11]

In *Tsfayo v The United Kingdom*,[12] UK housing benefits were classed as a civil right. Though this point was conceded by the Government, the ECtHR expressly agreed that Article 6(1) was applicable.[13] *Tsfayo* produces a curious position whereby applicants qualifying for housing *benefits* have the protections of Article 6(1), but applicants qualifying for housing

7 *Poshteh* (n 3) [36] (Lord Carnwath).
8 Paul Craig, 'The Human Rights Act, Article 6 and Procedural Rights' [2003] PL 753, 758–59.
9 *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5, [2003] 2 AC 430.
10 *König v Germany* (1978) Series A no 27, para 89.
11 The ECtHR has generally been unwilling to apply Article 6(1) to administrative decisions if a local authority has discretion to refuse an entitlement despite the statutory criteria being met. See Cross (n 5) 372–73.
12 *Tsfayo v The United Kingdom* [2007] ECHR 656.
13 Cross (n 5) 372.

assistance do not. As Lord Kerr opined in *Ali v BCC*, it is difficult to reach a principled basis for distinguishing between the two when both involve spending public resources, both provide a valuable resource to the beneficiary, and both are activated by the need of that beneficiary.[14]

The UKSC and Loveland have sought to justify this distinction by reference to the precise content of the alleged right.[15] Unlike in *Feldbrugge v The Netherlands*,[16] *Salesi v Italy*,[17] and *Tsfayo*, which all concerned a largely fixed monetary sum, the entitlement under Section 193 is to a "benefit in kind",[18] the substantive content of the Section 193(2) duty being one "loosely structured by principles rather than tightly determined by rules".[19] As such, the right cannot be considered individual, economic, and flowing from specific rules laid down in statute.[20] In particular, decision-makers have discretion when terminating or discharging their duty under Section 193(2). Loveland's argument permeates the judgments of *Begum v Tower Hamlets LBC*,[21] *Ali v BCC*,[22] and *Poshteh*[23] and received express endorsement from Lord Hope.[24] Loveland relies first on the phrase "suitable accommodation".[25] This provides the local authority with limited discretion when satisfying their duty under Section 193(2). Unlike a monetary sum, "suitable accommodation" cannot be considered a fixed entitlement. Loveland further relies on two decisions which concerned the Housing Act 1996's predecessor: *R v Brent LBC, ex p Awua*[26] and *Puhlhofer v Hillingdon LBC*.[27] *Awua* determined that there was no requirement that the local authority provide *permanent* accommodation. This supports Loveland's contention that the predecessor act was not intended to provide a lifelong home.

Loveland, however, relies on the following passage by Lord Brightman in *Pulhofer*: "it is an Act to assist persons who are homeless, not an Act to provide them with homes …".[28] This reliance is misplaced. Lord Brightman was making the same point about *permanence* as

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14 *Ali v BCC* (n 4) [75].

15 Ian Loveland, 'Does Homelessness Decision Making Engage Article 6(1) of the European Convention on Human Rights?' [2003] European Human Rights Law Review 176; *Ali v BCC* (n 4); *Poshteh* (n 3). As Cross neatly outlines, this was the crux of the decision in *Ali v BCC* and a reading of Lord Hope's judgment as suggesting that the evaluative nature of the criteria under Section 193(1) (leading to an entitlement under Section 193(2)) precludes the application of Article 6(1) would be contrary to a clear line of ECtHR authority: Cross (n 5) 373–76.

16 *Feldbrugge v The Netherlands* (1986) Series A no 99.

17 *Salesi v Italy* (1993), Series A no 257–E, para 19.

18 *Begum* (n 9) [61] (Lord Millett), [67] (Lord Hoffmann); *Ali v BCC* (n 4) [42], [49] (Lord Hope).

19 Loveland (n 15) 184.

20 *Salesi* (n 17) para 19; Loveland (n 15) 184.

21 *Begum* (n 9) [67], [69] (Lord Hoffman), [91] (Lord Millett).

22 *Ali v BCC* (n 4) [36], [49] (Lord Hope).

23 *Poshteh* (n 3) [34] (Lord Carnwath).

24 *Ali v BCC* (n 4) [27].

25 Housing Act 1996, Section 206.

26 *R v Brent LBC, ex p Awua* [1996] 1 AC 55 (HL).

27 *Puhlhofer v Hillingdon LBC* [1986] AC 484 (HL).

28 ibid 517.

the court in *Awua*. In citing this passage without context, Loveland implies that there is no duty to house a qualifying applicant. Yet, the local authority's duty under the predecessor act was to make suitable accommodation available for the applicant.[29] While this is not an obligation to *home* an applicant, it is an obligation to *house* an applicant. The duty under Section 193(2) is substantively the same: "[the local authority] shall secure that accommodation is available for occupation by the applicant". That obligation can only be terminated in circumstances strictly circumscribed by statute.[30] Outside these circumstances, the entitlement is irrevocable. Although Loveland is right to highlight that the local authority has some flexibility in respect of what constitutes "suitable accommodation", once the applicant qualifies under Section 193(1), they have a minimum entitlement to some form of accommodation.[31] For instance, for the local authority's decision on suitability to not be considered irrational,[32] it can be expected that any accommodation provided *must* meet some basic requirements, such as adequate sanitation and running water. As the ECtHR noted, the local authority's discretion has "clearly defined limits"[33] and, as Hale LJ pointed out in *Adan v Newham LBC*, a failure to exercise that discretion would be unlawful.[34] Once the local authority is satisfied that the statutory criteria for providing accommodation are fulfilled, they must provide it. Lord Carnwath criticised the ECtHR for citing Hale LJ's statement out of context.[35] He opined it was unclear whether Hale LJ was merely recording the basis of counsel's concession that Article 6(1) applied, particularly given her endorsement of Lord Hope's judgment in *Ali v BCC*.[36] However, Hale LJ was quite clear that an applicant owed a duty under Section 193(2) has a right. Her endorsement of Lord Hope's judgment, which acknowledged that applicants have a right to assistance but that this is not a civil right,[37] does not cast doubt on this.

The question, then, is whether the existence of limited discretion over the content of the entitlement excludes the application of Article 6(1). The ECtHR noted the existence of some discretion over the content of the right in the prior case of *Schuler-Zgraggen v Switzerland*,[38]

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29 Housing Act 1985, Section 65(2).
30 See Section I.
31 Baker has convincingly analogised the right to *some* accommodation, without that right being to any specific accommodation, to making a hotel reservation. The client has a right to *a* room, but not to any specific room. See Christopher Baker, '*Tomlinson*: A Supreme Case of Clutching at Straws in the Wind: Part 1', (2010) 13 Journal of Housing Law 76 (note), 81.
32 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL).
33 *Ali v UK* (n 2), para 59.
34 *Adan v Newham LBC* [2001] EWCA Civ 1916, [2002] 1 WLR 2120 [55].
35 *Poshteh* (n 3) [33].
36 ibid [34].
37 *Ali v BCC* (n 4) [27].
38 *Ali v UK* (n 2), para 59.

where the authority had to judge the applicant's level of incapacity to determine the amount of benefit she would receive. As pointed out in *Poshteh*,[39] however, this is unconvincing. Once incapacity of at least 66.66% was established, the financial benefit followed as a matter of right with no further discretion. Nevertheless, while *Ali v UK* went further than the prior caselaw on social welfare, the existence of discretion after the right has been established is not novel to Article 6(1) more generally. This feature is present in decisions about the provision of licences, such as *Pudas v Sweden*.[40] In *Pudas*, the applicant acquired consequential rights after the administrative decision-maker exercised their discretion to grant the applicant a licence to operate public transport.[41] The decision to terminate that licence thus engaged Article 6(1).[42] This was despite two significant elements of discretion: the licence was subject to conditions by the licensing authority, such as particular routes and timetables;[43] and the licence could be revoked if the authority deemed the holder no longer suitable.[44] The court noted that, according to generally recognised legal and administrative principles, the authorities "did not have an unfettered discretion" in these decisions.[45] Licensing cases such as *Pudas* show that the existence of fettered discretion after a right is established cannot exclude Article 6(1).[46]

A broader point can be made about why it was legitimate for the ECtHR to extend the scope of rights within the meaning of Article 6(1) in *Ali v UK*. It is trite to observe that the ECtHR is competent to develop the ECHR progressively.[47] As the next step in a chain of incremental developments regarding social welfare, *Ali v UK* did not exceed the ECtHR's competence. These developments began with *Feldbrugge*, which concerned statutory sickness allowance.[48] The ECtHR found Article 6(1) to be applicable on the basis of identifiable private law characteristics, which were held to outweigh the public law characteristics of the right. In particular, the applicant had participated in the financing of the scheme, making it akin to private insurance, [49] and the right was closely linked to the contract of employment and was personal, economic, and individual.[50] The next notable development was *Schouten and*

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39 *Poshteh* (n 3) [35].
40 *Pudas v Sweden* (1987) Series A no 125–A.
41 ibid paras 34, 37.
42 ibid.
43 ibid para 17.
44 ibid para 21.
45 ibid para 34.
46 This is also expressed in *Jacobsen v Sweden* (1989) Series A no 163, which concerned the granting of a building permit. See Cross (n 5) 372.
47 *Tyrer v The United Kingdom* (1978) Series A no 26, para 31.
48 *Feldbrugge* (n 16).
49 ibid para 39.
50 ibid paras 37–38.

Meldrum v The Netherlands[51] and *Salesi*.[52] In the former, concerning contributions to social welfare, the ECtHR suggested that even welfare assistance granted unilaterally by the state could fall within Article 6(1).[53] In the latter, the ECtHR then applied Article 6(1) to unilaterally granted welfare assistance (a monthly disability allowance). Finally, in *Tsfayo*, Article 6(1) was applied to UK housing benefits,[54] which, as Lord Kerr opined, are difficult to distinguish from housing assistance on a principled basis.[55] While *Ali v UK* went a step further by applying Article 6(1) to a "benefit in kind", this was a step, not a leap.

B. DEFINING THE "CIVIL" IN CIVIL RIGHTS AND OBLIGATIONS

It is clear that rights straightforwardly derived from private law ("private law rights"), such as the law of tort or real property, are civil rights for the purposes of Article 6(1).[56] Far more vexing for the ECtHR have been rights which are produced by an administrative decision ("public law rights"). This section will suggest that "civil" should be given the broadest possible definition and should not be tied to the misconceived analogies with private law rights from the ECtHR's earlier caselaw.[57] The social welfare context is a particularly useful lens, as it distinctly captures how such analogies have led to laboured and unsatisfactory judgments.

In their dissenting opinion in *Maaouia v France*, Judges Louciades and Traja suggested that "civil" should be interpreted as "non-criminal".[58] They argued that the term "criminal charge" necessitated another term to encompass all other (non-criminal) adjudicative procedures.[59] Yet, depriving the term "civil" of any real restrictive scope would conflict with the ECtHR's reticence to intervene in matters it considers within the "hard core of public authority prerogatives".[60] This category includes the obligation to pay tax,[61] the right to hold a passport,[62] and the right to stand for election.[63] It is suggested that these areas reflect what the ECtHR believes to be the hard limits of Article 6(1), beyond which the ECtHR would receive backlash from the Convention States for over-extending Article 6(1). It must therefore be

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51 *Schouten and Meldrum v The Netherlands* (1994) Series A no 304.
52 *Salesi* (n 17).
53 *Schouten and Meldrum* (n 51), para 47.
54 *Tsfayo* (n 12).
55 *Ali v BCC* (n 4) [74]; text to n 11.
56 Cross (n 5) 366.
57 See, for example, *Le Compte, Van Leuven and De Meyere v Belgium* (1981) Series A no 43, para 28.
58 *Maaouia v France* (2001) 33 EHRR 42, Dissenting Opinion of Judge Loucaides Joined by Judge Traja, para 5.
59 ibid.
60 *Ferrazzini v Italy* ECHR 2001–VII 349, para 29.
61 ibid.
62 *Smirnov v Russia* App no 14085/04 (ECtHR, 6 July 2006).
63 *Pierre-Bloch v France* ECHR 1997–VI.

accepted that there is *some* limit to the scope of Article 6(1), as both originally and presently conceived of by the Convention States, beyond which any extension of Article 6(1) would be illegitimate.[64] This acceptance of hard limits has produced some rather paradoxical and unsatisfactory caselaw. Van Dijk and others rightly point out that the resulting dividing line, between civil and non-civil rights and obligations, appears arbitrary.[65] They cite the curious outcome that an obligation to pay a contribution under a social security scheme is a civil obligation,[66] but that an obligation to pay a wage tax is not,[67] despite both having close links to the contract of employment. Craig has provided criticism on two further fronts: that the "hard core of public authority prerogatives" criterion is extremely vague, and that it does not justify the exclusion of Article 6(1).[68] In particular, the expectation that citizens undertake the obligation and the state's right to demand its performance do not tell us whether process rights should attach to the administration of the legislation imposing that obligation.[69] Craig rightly points out that there is a disconcerting lack of logic behind the court's reasoning in these cases. Yet, as suggested above, perhaps this is because the court's approach is not rooted in logic, but pragmatism about how far Article 6(1) can be extended without backlash.

Accepting that "civil" cannot be deprived of all meaning, three things are suggested. Firstly, that rights not falling within the hard core of public authority prerogatives should be considered civil rights. Secondly, the hard core of public authority prerogatives should be circumscribed as restrictively as possible, to give "civil" its broadest possible meaning. Thirdly, that Section 193 does not fall within the hard core of public authority prerogatives. This approach represents a compromise. On one hand, it accepts the reality that the hard core of public authority prerogatives has been firmly entrenched in ECtHR jurisprudence. On the other, it acknowledges the adverse consequences that category has, namely introducing illogicality and uncertainty into the law, and seeks to mitigate them. It would allow for an *assumption* that Article 6(1) applies whenever there is a right engaged, which could only be rebutted by the State demonstrating that this right falls within the anomalous hard core of public authority prerogatives. With this approach, Article 6(1) would be applied in a principled way (being determined by whether a right is engaged) save for these anomalous cases. Furthermore, the

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64 Alastair Mowbray, 'Between the Will of the Contracting Parties and the Needs of Today' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2014) 36–37.

65 Pieter van Dijk and others, *Theory and Practice of the European Convention on Human Rights* (3rd edn, Kluwer Law International 1998) 403–06.

66 *Schouten and Meldrum* (n 51).

67 *Ferrazzini* (n 60).

68 Craig (n 8) 758.

69 ibid 758–59.

assumption that Article 6(1) applies would introduce certainty into the law, as States would bear the burden of proving an exception to the general rule.

The primary objection to considering the Section 193 entitlement a civil right is that it is not analogous to a private law right. In response, it will be shown that, firstly, the equation of civil rights with private law rights was erroneous and, secondly, such analogies no longer prevail in the context of social welfare.

(i) The Conflation of "Civil" with "Private"

In *Delcourt v Belgium*, the court provided the guideline that in a democratic society, the right to a fair administration of justice within the meaning of the Convention holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and purpose of that provision.[70] If this is so, why has the ECtHR restrictively interpreted "civil" by equating it with "private", which significantly confines the scope of Article 6(1)? A positive justification is required.

In *König v Germany*,[71] the ECtHR first weighed the private law characteristics of the right against its public law characteristics.[72] Yet, it provided no justification for why resemblance to a private law right was to be the sole determinant for the applicability of Article 6(1). It seems the court understood from *Ringeisen v Austria* that Article 6(1) would always apply where the outcome was determinative of a private law right.[73] In *Ringeisen v Austria*, the applicant had a contract for the sale of land. The decision, although applying rules of administrative law, would affect his property rights.[74] The court held that Article 6(1) applies to all proceedings "the result of which is decisive for private rights and obligations".[75] The question is therefore whether, in so holding, the court equated civil with private. If so, the court provided no explanation for doing so. It is suggested that the court was not exhaustively defining the remit of Article 6(1), but merely pointing out that where a private right will be affected by the outcome Article 6(1) will clearly be engaged. So why, in *König*, did the ECtHR appear to adopt the approach that Article 6(1) would *only* apply where the outcome was determinative for a *private* (as opposed to *civil*) law right? The separate opinion of Judge Matscher in *König* helps in answering this question.

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70 *Delcourt v Belgium* App no 2689/65 (ECtHR, 17 January 1970), para 25.
71 *König* (n 10).
72 ibid.
73 ibid paras 86–96.
74 *Ringeisen v Austria* (1971) Series A no 13, para 94.
75 ibid.

Judge Matscher made the following insightful points. Firstly, one cannot obtain an idea of Article 6(1)'s scope from its legislative history. Secondly, the majority failed to understand and correctly apply *Ringeisen*. Thirdly, the majority confused the applicant's private law relations that were affected by the decision with the right at issue (a right to practice his profession). Fourthly, the Convention's authors did not appear to intend to bring all public law disputes under Article 6(1) simply because their outcome might affect the applicant's private law relations.[76] Judge Matscher rightly criticised the majority's approach—in particular, their failure to directly address whether Article 6(1) should be confined to private law rights, or whether it can also encompass public law rights. Perhaps this was a deliberate, strategic move by the majority to avoid openly acknowledging that Article 6(1) had been extended to what was really a public law right. Judge Matscher, however, appears simply to have assumed that Article 6(1) applies exclusively to private law rights.

Judge Matscher's separate opinion in *Le Compte v Belgium* provides some further explanation.[77] He opined that it is not the function of an international court to give recognition to rights which the authors of the Convention did not intend to include.[78] One key point Judge Matscher makes in support of his view of the drafters' intentions is that applying only some, and not all, of the procedural guarantees within Article 6(1) whenever it is engaged would be incompatible with the provision and could be dangerous for the interests of those involved in litigation.[79] Two points can be made in response. Firstly, had the majority in *König* and *Le Compte* been open about applying Article 6(1) to public law rights, a clear distinction could have been drawn between private law rights, which merit the full force of Article 6(1), and public law rights which do not. Secondly, there are instances where parties can waive some of the protections of Article 6(1). In particular, a claimant can waive their right to participate in a public hearing,[80] and the text of Article 6(1) itself provides exceptions when the presence of the press and public can be excluded. This casts doubt on Judge Matscher's assertion that Article 6(1) must always be applied in full.

A more comprehensive attempt to justify the equation of "civil" with "private" is the Dissenting Opinion of Sir Vincent Evans.[81] He argued that equating "civil" with "private" is consistent with the French text and borne out by the negotiating history of Article 6(1), which

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76 *König* (n 10), Separate Opinion of Judge Matscher.
77 *Le Compte* (n 57).
78 *Le Compte* (n 57), Partly Dissenting Opinion of Judge Matscher, para 1.
79 ibid para 5.
80 *Le Compte* (n 57), para 59.
81 *Le Compte* (n 57), Dissenting Opinion of Judge Sir Vincent Evans.

supports the view that "civil" should be given a restrictive meaning, particularly in the realm of administrative law.[82] This was elaborated on in the Joint Dissenting Opinion in *Feldbrugge*.[83] The dissenters' key point was that the drafters had deliberately restricted Article 6(1) to *civil* rights and obligations.[84] They made several points in support of this view. Firstly, the nature of the safeguards provided shows that the object and purpose of Article 6(1) does not extend to the administration of statutory schemes for distribution of public welfare. Judicialisation is less appropriate for administrative proceedings, and neither the humanitarian objective of the Convention nor the extreme importance of the protection of entitlement to social security benefits to the individual is sufficient to bring it within the scope of Article 6(1).[85] Secondly, "criminal" and "civil" cannot be seen as a comprehensive reference to all systems of adjudicative proceedings under domestic law.[86] Thirdly, not extending Article 6(1) to social security benefits is corroborated by the fact that the domestic legislation predated the elaboration of the Convention by some decades.[87] Fourthly, the drafting history of the Convention confirms this view.[88] Fifthly, state practice has not developed to this point and the approach of states has been very inconsistent.[89] Sixthly, evolutive interpretation does not allow entirely new concepts and spheres of application to be introduced into the Convention.[90]

In response, the following points can be made. On their first point, there is nothing in the text to suggest that Article 6(1) must always be applied in full.[91] The curative principle has given much flexibility to Article 6(1): administrative decision-makers need not be independent and impartial tribunals if there is supervision by a court or tribunal which is independent and impartial.[92] This does constitute some level of judicialisation, but judicial review is already common across the Convention States. On their second point, it is reasonable to suggest that the terms "civil" and "criminal" were not intended to be a comprehensive reference to all systems of adjudicative proceedings. Even assuming that is correct, however, there are many adjudicative proceedings in administrative law which concern no conceivable right at all, and

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82 ibid para 4.
83 *Feldbrugge* (n 16), Joint Dissenting Opinion of Judges Ryssdal, Bindschedler-Robert, Lagergren, Matscher, Sir Vincent Evans, Bernhardt, and Gersing.
84 ibid para 4.
85 ibid para 15.
86 ibid para 16.
87 ibid para 19.
88 ibid.
89 ibid para 24.
90 ibid.
91 Text to n 80.
92 This will be discussed in Section III.A.

will always be outside the scope of Article 6(1).[93] Therefore, "civil" could encompass all rights cases without Article 6(1) encompassing all systems of adjudicative proceedings. Indeed, it was argued in the dissenting opinion of Judges Loucaides and Traja in *Maaouia* that the interpretation that "civil" encompasses all rights cases is a viable one.[94] Alternatively, "civil" could be seen to exclude the hard core of public authority prerogatives.[95] On their fourth point, the analysis in paragraphs 20–23 of their dissenting judgment (based on the drafting history of the International Covenant on Civil and Political Rights (ICCPR)) does not support the proposition that "civil" ought to be equated with "private". In particular, they assert the following:

> [it is] reasonably clear that the intended effect of the insertion of the qualifying term '*de caractère civil*' in the French text of the draft International Covenant was to exclude from the scope of the provision certain categories of disputes in the field of administration "concerning the exercise of justice in the relationships between individuals and governments".[96]

Two rebuttals can be made. First, "*certain*" does not mean *all* administrative disputes. An intention to exclude *certain* administrative disputes could be seen to exclude the hard core of public authority prerogatives, or disputes which do not engage any rights. It should be noted that the drafters of the ICCPR never resolved which administrative disputes they intended to exclude.[97] Further, the word "*certain*" implicitly suggests that *some* administrative disputes were intended to be included. It would therefore be wrong to equate "civil" with "private", which could exclude *all* administrative disputes.

The fifth and sixth arguments presuppose that Article 6(1) was originally intended to apply exclusively to private law rights. According to the dissenters, the drafting history of Article 6(1) ECHR and Article 14 ICCPR (which Article 6(1) was modelled on) supports their view that Article 6(1) was not intended to apply to administrative decisions. Yet, the in-depth studies of the drafting history of Article 14 ICCPR by Velu, Patsch, Buergenthal, Kewenig, and Newman reveal no intention that this right should be restricted to determinations of rights

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93 See, for example, *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61.
94 *Maaouia* (n 58).
95 Text to n 60.
96 *Feldbrugge* (n 16), Joint Dissenting Opinion of Judges Ryssdal, Bindschedler-Robert, Lagergren, Matscher, Sir Vincent Evans, Bernhardt, and Gersing, para 22.
97 Frank C Newman, 'Natural Justice, Due Process and the New International Covenant on Human Rights: Prospectus' [1967] Public Law 274, 306–09.

and obligations of a private law character.[98] To the contrary, proposals which might have risked implying such a restriction were criticised because of that risk, and were rejected or amended.[99] Newman reinforces this point by explaining that the deletion in the French text of "*en matière civile*" after "*droits et obligations*" demonstrates that the majority of contracting parties wished to reinforce their intention *not* to confine procedural justice to justice in court.[100] Newman further points out that the Universal Declaration of Human Rights (UDHR) was adopted without the term "civil", and therefore clearly covers administrative proceedings. The drafting history shows that the inclusion of "suit at law" in Article 14 ICCPR was not intended to change the provision's meaning from that of the UDHR. The suggestions of US advisers to do so were not adopted by the majority of contracting parties.[101]

Additionally, Newman makes the compelling point that, if the drafting history does not will it, there is simply no good reason to confine the phrase "suit at law" to a lawsuit in court. Given that administrative proceedings tend to be less procedurally fair, it would be strange to ensure due process only in judicial proceedings where the right to fair hearing is already best observed.[102] In his separate opinion for the Commission in *Salesi*, Mr Sperduti makes a similar point: any suggestion that Article 6(1) should be restricted to cases where the law confers a prior right of access to the court was firmly rejected in *Golder v The United Kingdom*.[103]

At its lowest, the drafting history of Article 14 ICCPR and Article 6(1) ECHR shows a lack of unanimity in the intentions of its drafters on whether Article 6(1) should be confined to private law rights,[104] and provides no positive justification for equating "civil" with "private".[105] At its highest, the drafting history shows a majority view contradicting the findings of the dissenting judges in *Feldbrugge*. On this view, equating "civil" with "private" would directly contradict the intention of the Convention States. At least, "civil" *should not* be equated with "private"; at most, "civil" *cannot* be equated with "private".

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98 van Dijk and others (n 65) 392–93. The conclusions of van Dijk and others have been relied on because of the unavailability of translated editions of such studies.
99 ibid.
100 Newman (n 97).
101 ibid.
102 ibid 293–94.
103 *Salesi* (n 17), para 5.
104 Mowbray (n 64). Cf Cross (n 5) 367.
105 ibid.

(ii) Social Welfare and the Private-public Distinction

Harris and others have noted that it is difficult to explain many of the rights and obligations that now fall within Article 6(1) on the basis of the private-public law distinction.[106] Instead, increasing weight is given to the pecuniary nature of the right or whether the state action affecting that right will have pecuniary consequences for the applicant.[107] This shift from a focus from the private law aspects of the right to its individualised nature and economic consequences for the applicant is clear from the development of caselaw on social welfare. In *Feldbrugge*, the application of Article 6(1) to social welfare was premised on the identifiable private law elements of the right.[108] Less than a decade later, the ECtHR in *Schuler-Zgraggen v Switzerland* held that the most important factors in favour of applicability were the interference with the applicant's means of subsistence, and that the right was individual and economic, and flowed from specific legal rules.[109] Evident public law features were afforded little weight—a clear shift away from the private-public distinction as the ECtHR's central analytical tool. The biggest shift can be seen in *Salesi*. The decision of the Commission is particularly useful in revealing how Article 6(1) applied, despite the relevant scheme being non-contributory[110] and having no link to a contract of employment,[111] and therefore lacking two of the three key private law elements present in *Feldbrugge*. The individual and pecuniary nature of the right and the interference with the applicant's means of subsistence were decisive.[112] The abandonment of the private-public law distinction is clear from the dissenting opinion, which stressed that the extension renders meaningless any reference to the court's criteria based on the relative importance of the public and private law features of the right.[113]

It is true that the right or obligation being of an individual and pecuniary nature will not always lead to the conclusion that Article 6(1) applies, as demonstrated by *Ferrazzini v Italy*,[114] which concerned a supplementary tax assessment. The ECtHR held that merely showing the dispute was pecuniary was insufficient to attract the application of Article 6(1),[115] and that

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106 David J Harris and others, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (4th edn, Oxford University Press 2018) 381–82.
107 ibid 383–84. Cross (n 5) 373.
108 Text to n 49 and n 50.
109 *Schuler-Zgraggen v Switzerland* (1993) Series A no 263, para 46.
110 *Salesi v Italy* App No 13023/87 (Commission Decision), 20 February 1992, para 30.
111 ibid para 32.
112 ibid para 31; *Salesi* (n 17), para 19.
113 *Salesi* (n 17), Dissenting Opinion of MM C A Nørgaard, S Trechsel, F Ermacora, G Jörundsson, H Danelius, Mrs J Liddy, Mr L Loucaides, and Mr P Pellonpää, para 6. Cf Cross (n 5) 369–372.
114 *Ferrazzini* (n 60). See also *Pierre-Bloch* (n 63); Cross (n 5) 374.
115 *Ferrazzini* (n 60), para 25.

rights and obligations existing for an individual are not necessarily civil in nature.[116] However, *Ferrazzini* falls within the hard core of public authority prerogatives.[117] As an anomaly, it should not detract from the otherwise clear and consistent rationale of the ECtHR's caselaw.[118]

C. Preliminary Conclusions

This section has proposed a structured and principled approach to determine the application of Article 6(1) to administrative decisions—one which focuses on the existence of a right and limits the qualifying influence of the term "civil" to the anomalous cases which fall within the hard core of public authority prerogatives. It has shown that adopting this approach would neither be inconsistent with the terms of Article 6(1) itself nor the ECtHR's caselaw in its current state. In the following section, two further concerns about the alleged consequences of over-extending Article 6(1) will be addressed: institutional concerns about the role of the courts (Section III.A), and practical concerns about local authority and court resources (Section III.B).

III. Concerns About Over-Extension

A. Institutional Concerns

In *Begum*, Lords Bingham, Hoffmann, and Millett expressed concern about the "emasculation",[119] by over-judicialisation, of administrative welfare schemes.[120] Firstly, Lord Hoffmann stressed that when determining the scope of judicial review of social welfare schemes, democratic accountability, efficient administration, and Parliamentary sovereignty must be taken into account.[121] Granting review under Section 204 an expansive scope and allowing for harsh scrutiny of even factual findings would ignore these concerns. The court lacks democratic accountability, and an intense review would increase the administrative burden on local authorities and ignore Parliament's expression of policy in respect of the review procedure in enacting Section 202 and 204. Craig has similarly highlighted that requiring findings of fact to always be made by a body independent from the primary decision-maker would be extremely difficult in practice, particularly as those findings can be inseparable from decisions of policy.[122] Secondly, Lord Millett stressed that the nature of the decisions, as

116 ibid para 28.
117 ibid para 29.
118 The same applies for *Pierre-Bloch* (n 63).
119 *Begum* (n 9) [5] (Lord Bingham).
120 ibid [5] (Lord Bingham), [56], [59] (Lord Hoffmann), [91], [93] (Lord Millett).
121 ibid [43].
122 Craig (n 8) 771.

involving discretionary policy choices, makes their determination by the ordinary judicial process inappropriate.[123] Thirdly, Lord Kerr expressed concern in *Ali v BCC* that judicial review was unsuitable for examining issues of credibility, which were central to the appeals in that case.[124] The rebuttal of these arguments rests on the ECtHR's approach to the curative principle. Admittedly, that approach can be criticised for the strained reading of Article 6(1) that it involves,[125] but this article does not have the capacity to address this.

The review procedure under Sections 202 and 204 has already been held to satisfy the curative principle by both the UKSC and ECtHR.[126] This is crucial, as there is no need for the courts to extend their jurisdiction any further, since Section 204 includes the full range of issues that could be raised in a judicial review.[127] The ECtHR in *Ali v UK* in fact displayed an acute sensitivity to the institutional concerns of the UKSC. To satisfy the curative principle, the supervising court of a non-independent decision-maker must have "full jurisdiction".[128] In *Ali v UK*, the court was prepared to adjust this requirement based on contextual factors, and accepted the lesser requirement of "sufficient review".[129] The ECtHR noted that the Review Officer lacked independence (but not impartiality)[130] and that the scope of the County Court's review over facts is limited.[131] However, the ECtHR also considered that the enquiries under Section 202 are not purely factual,[132] and require a level of administrative discretion. The ECtHR therefore concluded that the procedural safeguards built into the Section 202 review and the existence of a certain level of review of both the facts and fact-finding procedure (including review of irrelevant considerations and fundamental mistake of fact) by the County Court under Section 204[133] were sufficient to secure compliance with Article 6(1).

It is true that the curative principle has its limits.[134] In *Tsfayo*, an asylum seeker had successfully applied for housing benefits but failed to submit her renewal form to the council in time because of her unfamiliarity with the benefits system and poor English. Only her prospective claim, and not her backdated claim, succeeded. The Housing Benefit and Council

123 *Begum* (n 9) [91], [93].
124 *Ali v BCC* (n 4) [78].
125 Harris and others (n 106) 396.
126 *Ali v BCC* (n 4) [55]; *Ali v UK* (n 2) paras 85, 87, 88.
127 *Nipa Begum v Tower Hamlets LBC* [2000] 1 WLR 306 (CA).
128 *Le Compte* (n 57), para 29.
129 *Ali v UK* (n 2), para 76.
130 *Ali v UK* (n 2), para 74.
131 ibid para 83.
132 ibid para 80.
133 ibid paras 82–83.
134 Christopher Forsyth, 'Article 6(1) of the European Convention and the Curative Powers of Judicial Review' (2001) 60 CLJ 449 (note).

Tax Benefit Review Board, which included five councillors from the local authority responsible for paying large sums of any backdated benefits, rejected evidence that she had not received a letter about renewal and so dismissed her appeal. The Chamber held that judicial review could not rectify this lack of independence, owing to the limited scrutiny of the Board's findings of fact coupled with the danger that the independent judgment of such findings may be infected by the direct connection between the Board and the Council. The procedure under Section 202 and Section 204, however, does not exceed the curative principle's limits.[135] Furthermore, the limitations of the curative principle are an important safeguard. A core advantage of applying Article 6(1) to Section 193 is that it will prevent future governments from attempting to weaken the current appeal procedure.

B. PRACTICAL CONCERNS

Another core concern of the UKSC has been that judicialising decisions under Section 193 will have significant negative implications for public authorities' resources.[136] *Poshteh* echoed Lord Hope's concern in *Ali v BCC* that it was not in the public interest for funds that had been allocated to a social welfare scheme to be unduly consumed in the administration of legal disputes.[137] Furthermore, extending Article 6(1) to Section 193 could swamp the courts with (unmeritorious) claims. This section will address these concerns.

Firstly, Article 6(1) will remain confined to where the individual has an established right. Only once the local authority has exercised their discretion in the applicant's favour (under Section 193) will an applicant receive the protection of Article 6(1). A local authority can therefore find that an applicant does not qualify under Section 193, without engaging Article 6(1) and its accompanying procedural obligations. Unmeritorious claimants will therefore have no right to which Article 6(1) can attach. Furthermore, the need for the benefit to be a right provides a backstop against the alleged over-expansion of Article 6(1) into a miscellany of other administrative law matters.[138]

Secondly, in *Poshteh,* the Supreme Court criticised the ECtHR in *Ali v UK* for its failure to address the judicialisation of welfare services and the negative implications for resources.[139] Yet, Strasbourg indirectly addressed this issue by finding that the existing procedure (under

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135 *Ali v BCC* (n 4) [54]; *Ali v UK* (n 2), paras 85, 87, 88.
136 *Begum* (n 9) [44] (Lord Hoffmann); *Poshteh* (n 3) [33].
137 *Poshteh* (n 3) [23].
138 ibid [19]. The Secretary of State expressed concern about the effect Article 6 might have if extended into other areas of government activity relating to community care and education.
139 ibid [33].

Sections 202 and 204) satisfies the curative principle.[140] There is no need for the courts to extend their jurisdiction further than that which already exists under judicial review or reassess the local authority's decision on the facts—something which would otherwise significantly protract litigation and increase the burden on local authority and court resources. This addresses Lord Hoffmann's two primary concerns: that Parliament can take the view that it is not in the public interest for an excessive proportion of welfare scheme funds to be consumed by legal disputes; and that the sheer volume of applications and appeals makes it inappropriate to require that findings of fact are made by an independent body.[141] Following *Ali v UK*, the procedure specified by Parliament requires no adjustment.

Thirdly, the court in *Poshteh* opined that the ECtHR jurisprudence before *Ali v BCC* was uncertain, that case having been intended to resolve this.[142] In *Ali v BCC*, Lord Hope was concerned that this uncertainty was encouraging unnecessary litigation, wasting resources better deployed elsewhere.[143] Ironically, however, it is now the UKSC's decision in *Poshteh* that may give rise to uncertainty. At present, the ECtHR and the UKSC are in disagreement. This is problematic for applicants who must exhaust all domestic remedies before petitioning to the ECtHR.[144] They will not succeed with an Article 6(1) claim in the UK courts after *Poshteh*, but, depending on their grounds, may have some prospect of success before the ECtHR. Although Poshteh's application to the ECtHR was declared inadmissible, this was because her grounds were materially identical to the applicant in *Ali v UK* in which no violation of Article 6(1) was found.[145] Were an applicant to bring a claim on different grounds, for example breach of the reasonable time requirement, it is possible they would succeed before the ECtHR. Such an applicant's prospects of success would be very uncertain, and they would expend a significant amount of their own resources, as well as local authority and court resources, before that uncertainty could be resolved by the ECtHR. Litigation would be not nearly as protracted and resource-intensive if the claim could be dealt with conclusively at first instance.

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140 *Ali v UK* (n 2), paras 85, 87, 88.
141 *Begum* (n 9) [44]–[46].
142 *Poshteh* (n 3) [32]–[34].
143 *Ali v BCC* (n 4) [32].
144 ECHR (n 1) Article 35.
145 *Poshteh* (n 3) [38].

IV. Conclusion

It is perhaps unsurprising that the ECtHR has been heavily criticised for its judgment in *Ali v UK*. The UKSC's primary refrain has been that the local authority has substantial discretion in fulfilling its duty under Section 193(2). The two paragraphs the ECtHR devoted to this objection can hardly be considered a comprehensive rebuttal.[146] Moreover, the UKSC's secondary concerns about institutional competence and the practical consequences of expanding Article 6(1) were not expressly addressed. This article has sought to provide what the judgment in *Ali v UK* lacked: a comprehensive articulation of why the extension of Article 6(1) to Section 193 of the Housing Act 1996 was justified.

Ali v UK need not be the death knell for any hopes of a principled and coherent approach to the application of Article 6(1). This article has proposed a principled framework, which applies Article 6(1) where the applicant can be said to hold a right under domestic law. This could only be rebutted by the State showing that the right falls within the hard core of public authority prerogatives. This framework has potential beyond the context of social welfare, and could be adopted to avoid further criticism of the ECtHR's approach.

[146] *Ali v UK* (n 2), paras 58–59.

De Lege Ferenda (2022) Vol V, Issue i, 54–65

The End of the Road? Equitable Easements as Overriding Interests under Schedule 3 Paragraph 2 of the Land Registration Act 2002

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ABSTRACT

This past November marked the 10th anniversary of *Chaudhary v Yavuz*, the landmark Court of Appeal decision in which Lloyd LJ declined to hold that the exercise of a purported equitable right of way over a stairway amounted to actual occupation of the land under Schedule 3 Paragraph 2 of the Land Registration Act 2002. *Chaudhary* is often cited in support of the proposition that enjoyment of an easement does not generally amount to actual occupation. However, this conclusion begs two further questions. First, can the enjoyment of an easement ever have the effect of placing the owner of the dominant tenement in actual occupation of the servient tenement? Second, and if so, in what circumstances can the enjoyment of an easement have this effect? This article addresses these two related questions. By considering the reasoning in *Chaudhary* and subsequent case law it will be demonstrated that the exercise of an easement can amount to actual occupation. Pre- and post-LRA 2002 case law will then be used to identify several indicia of actual occupation to assist courts in determining whether the exercise of an easement crosses the threshold from "use" to "occupation" of land. The relevant indicia are: (a) the proportion of the burdened land being used in the enjoyment of the easement; (b) the frequency of use of the land; and (c) the permanence of presence on the land. Finally, the practical implications of this analysis will be explored by applying these indicia to different types of easements. The easements that will be considered are (a) rights of way; (b) rights to use land for recreational purposes; (c) rights to park; and (d) rights of storage. It is hoped that this exercise will assist courts and practitioners applying *Chaudhary*.

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Keywords: easements; *Land Registration Act 2002*; *equitable proprietary interests*; *actual occupation*; *overriding interest*

I. INTRODUCTION

The Land Registration Act 2002 is a powerful weapon in a purchaser's back pocket. Under section 29(1), all pre-existing unregistered interests in land are postponed to an interest acquired by a disponee for valuable consideration unless these are "protected" at the time of registration. The priority of an easement can be protected in three ways. First, a notice may be entered in the register of the servient estate and, if the dominant estate is registered, in the register of the dominant estate.[1] Second, if the easement is legal, its priority may be protected under Schedule 3 Paragraph 3 if it was used in the past year[2] or was known or discoverable upon a reasonable inspection of the land.[3] Finally, the priority of the easement may be protected under Schedule 3 Paragraph 2 if the dominant owner is in actual, discoverable occupation of the transferred land.[4]

This article is concerned with the third of these methods. Unlike Schedule 3 Paragraph 3, Paragraph 2 applies to both legal and equitable easements. In practice, however, the owner of the dominant tenement will only rarely need to raise Paragraph 2 in order to safeguard the priority of an unregistered legal easement. In most cases, Paragraph 3 will provide comprehensive protection. The analysis in this article is therefore primarily directed at equitable easements and related equitable interests that are excluded from the scope of Paragraph 3. An equitable easement may arise upon the express grant of an easement by specifically enforceable contract or deed.[5] If a purchaser acquires the servient tenement for valuable consideration before registration of the easement, the priority of this equitable easement is postponed to the interest of the purchaser. Perhaps more common, however, is the case where a proprietary equity by estoppel[6] arises as a result of a representation made by one party to another. To satisfy this equity, the court may use its "wide judgmental discretion"[7] to require the grant of an easement.[8] In both of these cases, the absence of a legal interest leaves the owner of the equitable easement or equity by estoppel without the protection of Paragraph

1 LRA 2002, Schedule 2 Paragraph 7.
2 LRA 2002, Schedule 3 Paragraph 3(2).
3 LRA 2002, Schedule 3 Paragraph 3(1).
4 LRA 2002, Schedule 3 Paragraph 2.
5 Equity deems to be done what ought to have been done: *Walsh v Lonsdale* (1882) 21 Ch D 9.
6 LRA 2002, section 116(a).
7 *Jennings v Rice* [2002] EWCA Civ 159 [51].
8 See, for example, *Chaudhary v Yavuz* [2011] EWCA Civ 1314 (discussed below) and *Hoyl Group Ltd v Cromer Town Council* [2015] EWCA Civ 782.

3.[9] To safeguard their equitable interest against postponement, the interest-holder must therefore rely on the protection by actual occupation under Paragraph 2.

This article will first discuss the orthodox position that exercising an easement does not amount to actual occupation and evaluate the reasoning underpinning this position. It will be demonstrated that this orthodox position is not the "end of the road": judicial reasoning does not preclude the possibility that the enjoyment of an easement might constitute actual occupation. Next, this article will consider the limits of the orthodox position by drawing from case law analysing actual occupation under the LRA 2002 and the LRA 1925. A number of factors will be gleaned from these authorities to help delimit the orthodox position going forward. Finally, these factors will be applied to four common and contentious easements in order to assess whether the exercise of these easements might amount to actual occupation.

II. The Orthodox Position And Its Justifications

Chaudhary v Yavuz stands for the orthodox proposition that the mere exercise of an easement does not amount to actual occupation.[10] Yavuz's predecessor in title had promised Chaudhary, the owner of a neighbouring property, that Chaudhary could replace an external stairway and use it to access the upper floors of Chaudhary's property. Chaudhary claimed that this promise gave rise to a proprietary equity by estoppel under section 116(a) LRA 2002. However, no notice of this promise was placed on the register. When Yavuz purchased the property, he sought to sever the connection between the staircase and his property. The question for the court was therefore whether Yavuz was bound by Chaudhary's pre-existing equitable interest (and therefore precluded from severing the connection).[11] Since Yavuz was a disponee acquiring for valuable consideration, his registration as freehold proprietor of the neighbouring property triggered the postponement rule in section 29. Chaudhary would therefore only be able to exercise his right if it had been protected against postponement. Since Chaudhary's interest was merely equitable, Chaudhary relied on Schedule 3 Paragraph 2 to argue that his equity by estoppel was protected by actual occupation. Departing from the first instance decision of Judge Cowell, Lloyd LJ held that the "correct view" was that Chaudhary's interest

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9 Even if the equity by estoppel would subsequently be satisfied through the grant of an easement by deed which may be registered so as to become legal, Schedule 3 Paragraph 3 refers to a legal easement which has certain characteristics "at the time of the disposition"; a potential future legal easement is therefore not covered.

10 *Chaudhary* (n 8).

11 Since the court found that the equity by estoppel may have arisen in Chaudhary's favour based on his discussions with Yavuz's predecessor in title: *Chaudhary* (n 8) [26].

had not been so protected: "the enjoyment of a right such [as] an easement over burdened land does not amount to actual occupation of the land for this purpose".[12]

In support of this conclusion, Lloyd LJ drew a distinction between "use" and "occupation"—adopting the position taken by Ruoff & Roper on Registered Conveyancing.[13] In other words, while the owner of the dominant tenement will invariably "use" the servient tenement when exercising the easement, this use does not necessarily establish "occupation" of the servient tenement. Lloyd LJ also made the important observation that, since "not every piece of land is occupied by someone", Chaudhary was not in occupation merely because no one else had any better claim to occupation.[14]

The distinction between "use" and "occupation" offers a logically sound justification for the general approach taken in *Chaudhary*. As Lord Oliver observed in *Abbey National Building Society v Cann*,[15] occupation "involve[s] some degree of permanence and continuity".[16] The "mere fleeting presence" of a dominant tenement owner on the servient land will generally not suffice to establish actual occupation.[17] It is important to appreciate, however, that this reasoning does not necessitate the conclusion that the enjoyment of an easement is incapable of amounting to actual occupation under Paragraph 2. Rather, Lloyd LJ merely recognised that, owing to the nature of easements as limited property rights, exercising an easement will *typically* fail to cross the threshold from "use" to "occupation". On the facts of *Chaudhary*, this general approach was surely applicable. The stairway was used for little more than "to get to and from [the] flats on the upper floors"[18]—hardly use which points towards "permanence and continuity of presence".[19] However, a departure from the general position may be justified where the specific facts demand it. Indeed, Lloyd LJ implicitly acknowledged that his reasoning may not apply in all cases by reserving opinion as to whether "the use of the servient land in the case of an easement such as a right to park, where the dominant owner may place a large object on the relevant land" might be treated differently.[20]

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12 ibid [27].

13 *Chaudhary* (n 8) [28]. See T.B.F. Ruoff and R.B. Roper, The Law and Practice of Registered Conveyancing (Sweet & Maxwell, 2021) [36.005].

14 ibid [31].

15 *Abbey National Building Society v Cann* [1991] 1 AC 56.

16 ibid 93.

17 ibid.

18 ibid [31].

19 *Link Lending Ltd v Bustard* [2010] EWCA Civ 424, [27] (Mummery LJ).

20 Lloyd LJ sought to support his view as a matter of precedent by distinguishing some pre-LRA 2002 authorities and citing another in support of his view. A more detailed analysis of the relevant pre-LRA 2002 authorities is carried out below.

Approval of Lloyd LJ's reasoning in *Chaudhary* can be found in the academic literature[21] as well as in subsequent case law. In *Cornerstone Telecommunications Infrastructure Limited v Compton Beauchamp Estates Limited*[22] Lewison LJ identified the reasoning at the core of *Chaudhary* when he noted that in certain contexts, including the exercise of an easement, the "cases draw a distinction between occupation of land and use of land".[23] *Chaudhary* was also explicitly referenced in *Pezaro v Bourne*.[24] Here the facts of *Chaudhary* were reversed: the servient owners were asserting occupation of the right of way. Important for present purposes is that the court again applied Lloyd LJ's reasoning that exercising the easement "did not amount to actual occupation of the land for that purpose as opposed to actual use".[25] The orthodox position articulated in *Chaudhary* therefore continues to accurately reflect the law ten years on.

However, since the reasoning underpinning Lloyd LJ's judgement is not inherently tied to easements, the decision in *Chaudhary* does not preclude the possibility that exceptions might develop to this general rule. This article now considers what factors may drive the court to depart from the position in *Chaudhary*.

III. Indicia of Actual Occupation

Three factors can be gleaned from pre- and post-LRA 2002 case law to assist courts in applying Schedule 3 Paragraph 2 to the exercise of an easement. This article does not suggest that these are the only potentially relevant factors. In fact, these factors certainly do not constitute an exhaustive list. Nor does this article suggest that the factors identified herein are always free-standing and mutually independent. Instead, these factors act as a useful starting point when considering actual occupation of the servient tenement through the exercise of an easement.

A. Proportion of the Burdened Land Used

It is not a requirement of actual occupation that there remains no reasonable use for the land. Indeed, it may well be that two or more people are in actual occupation of the same plot of land at the same time. Nevertheless, the greater the share of the burdened land that is "used" by the exercise of the easement, the more the easement's enjoyment resembles the "physical

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21 Megarry & Wade: The Law of Real Property (9th Ed) [6–096]; Ruoff and Roper (n 12) [17.027]; Gale on the Law of Easements (21st Ed) [5–21].

22 *Cornerstone Telecommunications Infrastructure Limited v Compton Beauchamp Estates Limited* [2019] EWCA Civ 1755.

23 ibid [47].

24 *Pezaro v Bourne* [2019] EWHC 1964 (Ch).

25 ibid [53] (Master Teverson).

presence" required for actual occupation.[26] As a result, the issue whether the enjoyment of an easement amounts to actual occupation is closely connected to the size of the land purportedly occupied. For example, parking one car in a ten-car garage is much further removed from actual occupation of the garage than is parking the same car in a single-car garage. Importantly, the size of the plot of land should have no impact on whether the spot in which the car is parked is under actual occupation within the meaning of Schedule 3 Paragraph 2. Since occupation of part no longer amounts to occupation of the whole,[27] it may well be that long-term, consistent parking on the same part of the land will protect the right to park on that one part but not the right to park on the land as a whole.[28]

B. Frequency of use

The frequency with which an easement is exercised also contributes to the success of an actual occupation argument by increasing the "degree of permanence" required for occupation.[29] Although "[r]egular and repeated absence" can be consistent with "actual occupation",[30] prolonged absence may suggest that the requisite "permeance and continuity" of presence is not satisfied. The relevance of frequency of use is demonstrated by the Schedule 3 Paragraph 2 dispute in *Thomas v Clydesdale Bank*.[31] Although the relevant property was not being used as a permanent residence, Ramsey J held that the fact that "Ms Thomas was present at the property on a regular, almost daily basis" demonstrated that she was in actual occupation.[32]

C. Permanence of presence

Ramsey J in *Thomas* also attached importance to the "permanence and continuity of the presence of the person concerned".[33] As a consequence, physical structures on the land which can establish a continuous or permanent presence on the land are powerful evidence of actual

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26 *Williams & Glyn's Bank Ltd v Boland* 1981 AC 487, 505 (Lord Wilberforce); see also, Law Com No 271 para 8.22: "A person is only to be regarded as being in actual occupation of land if he or she, or his or her agent or employee, is physically present there".

27 As it did under section 70(1)(g) of the LRA 1925: *Wallcite Ltd v Ferrishurst Ltd* [1999] Ch 355.

28 Under Schedule 3 Paragraph 2(1), an interest is overriding so far as it "relat[es] to land … in actual occupation". For a discussion of the meaning of "relating to" in this context, see Fred Halbhuber, 'The Forgotten Question: Clarifying the Extent of the Protection Afforded by Actual Occupation under the Land Registration Act 2002', The Cambridge Journal of Law, Politics, and Art, Issue 2, Summer 2022 (forthcoming).

29 *Abbey National* (n 15) 93.

30 *Kingsnorth Finance v Tizard* [1986] 1 WLR 783, 788.

31 *Bernice Thomas v Clydesdale Bank Plc* [2010] EWHC 2755 (QB).

32 ibid [32].

33 *Thomas* (n 31) [38].

occupation. It is well-established in the case law that the presence of belongings on a plot of land might evidence actual occupation. In the context of section 1 of the Matrimonial Homes Act 1967, Sir David Cairns in *Hoggett v Hoggett*[34] found that "the presence of … furniture provides the 'corpus' of occupation",[35] something which has been echoed in subsequent judicial interpretation of "actual occupation" in section 70(1)(g) of the LRA 1925.[36]

Therefore, where the enjoyment of an easement requires some form of physical presence on the land that persists even while the dominant owner is not personally on the land (such as the parking of a car in a garage) the claimant will have a far easier time establishing actual occupation. This is well illustrated by the pre-LRA 2002 case of *Kling v Keston Properties*,[37] where Vinelott J accepted that parking a car in the garage amounted to actual occupation of the garage so as to protect the claimant's right of pre-emption under section 70(1)(g) of the LRA 1925.[38]

The importance of a permanent presence was also raised in *Chaudhary* itself. Here, counsel for Chaudhary argued that since the presence of chattel can contribute to actual occupation, Chaudhary's erection of a more invasive structure must do the same. This was rightly rejected by Lloyd LJ. Under ordinary property law principles, the structure in *Chaudhary* ceded to the land and "thus became part of what could be used or occupied" rather than the thing "doing the occupying".[39] There existed no point in time where the structure on the servient tenement could be said to evidence occupation on Chaudhary's behalf as his property. The extent to which the structure would have evidenced actual occupation if it had not ceded to the land is likewise immaterial. Importantly, however, Lloyd LJ did not doubt the suggestion that, had the structure not acceded to the land, it would have assisted in establishing actual occupation.

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34 *Hoggett* (1979) 39 P & CR 121.

35 ibid 128.

36 See, for example, *Chhokar v Chhokar* [1984] FLR 313.

37 *Kling v Keston Properties Ltd* (1985) 49 P & CR 212.

38 ibid 219. Lloyd LJ distinguished *Kling* in *Chaudhary* on the basis that the use of the garage in *Kling* was founded on a right under licence rather than an easement. However, as has been argued elsewhere (see Ben McFarlane, 'Eastenders, Neighbours and Upstairs Downstairs: Chaudhary v Yavuz', Conv. 2013, 1, 74–82), this point of distinction is unconvincing. As will be recalled, Lloyd LJ's central argument against recognising the exercise of purported right in *Chaudhary* as overriding—the distinction between use and occupation—is not inherently connected to the status of the purported right as an easement. Therefore, the fact that the claimant in *Kling* was occupying under a license rather than an easement is immaterial. The relevant question—whether the exercise of the right amounts to occupation—is one of fact and is unaffected by any legal entitlement. Indeed, this is made explicitly clear by the inclusion of the word "actual" to modify "occupation" in Schedule 3 Paragraph 2 of the LRA 2002. As Lord Wilberforce noted when interpreting the identical wording in section 70(1)(g) LRA 1925, "what is required is *physical presence*, not some entitlement at law": *Boland* (n 26) 505. Therefore, the analysis should be the same regardless of the right under which the claimant permitted to park in the garage.

39 *Chaudhary* (n 8) [32].

The relevance of establishing a permanent presence was specifically approved in *Cornerstone Telecommunications Infrastructure v Compton Beauchamp Estates*.[40] Here, Lewison LJ held that, in the context of the exercise of an easement, "the mere presence of physical structures on land will not amount to occupation, especially where those structures have become part of the land".[41] The first part of this comment—that the presence of physical structures belonging to the dominant owner on the servient land will not of itself suffice for actual occupation—is surely correct in the vast majority of cases.[42] It may be going too far to say that the presence of physical structures "will not" ever suffice in and of itself to constitute actual occupation; although *Chaudhary* is cited in support of this statement, Lloyd LJ made no such sweeping statement in his judgement. More importantly, Lewison LJ's statement does not doubt the utility of such physical structures as further evidence of actual occupation in addition to the claimant's own personal (even if more sporadic) presence on the land. Therefore, the enjoyment of an easement which necessitates the frequent placing or keeping of chattel on the servient land is, all else equal, more likely amount to actual occupation under Schedule 3 Paragraph 2 than an easement which does not.

IV. The Indicia in Practice

Having identified three indicia to guide the application of Schedule 3 Paragraph 2, this section now considers how these indicia might be applied in practice. This piece confines itself to four common and controversial easements: rights of way, rights of recreation, rights to park and rights to storage. It is also important to note at the outset that the application of Schedule 3 Paragraph 2 always requires a case-specific analysis. The analysis below will therefore only discuss general characteristics of these easements without suggesting that the same conclusion will be reached in every case.

A. Right of Way

A claimant asserting the overriding status of a right of way faces an uphill battle. The stretch of land over which a right of way is typically exercised is rarely a small *locus in quo* and, although a right of way might be frequently used, enjoyment rarely involves using more than a small fraction of the relevant land. Moreover, exercising a right of way does not

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40 *Cornerstone Telecommunications* (n 22).

41 ibid [47].

42 For example, in *Strand Securities v Caswell* [1965] Ch 958, the Court of Appeal held that the presence of the defendant's belongings was not sufficient to render the defendant in actual occupation of the property: 983.

generally result in any permanent presence on the land. Therefore, even if the owner of Plot A enjoys his right to walk over a path on Plot B every day, the owner of Plot A only exercises any factual control over the land for a very short period of time each day. The decision in *Chaudhary* is therefore entirely defensible in light of the indicia identified in this piece.

This is further evidenced by judicial hesitance—beyond the decision in *Chaudhary*—to recognise the use of a right of way as amounting to actual occupation. In the landmark *Re Ellenborough Park*[43] decision, Sir Raymond Evershed MR was tasked with deciding whether a right to "the full enjoyment at all times hereafter in common pleasure" of a communal garden adjoining a number of properties could take effect as an easement. In concluding that the right did not raise any issues under the ouster principle, Sir Raymond Evershed MR noted that

> the right conferred no more amounts to a *joint occupation* of the park with its owners, no more excludes the proprietorship or possession of the latter, *than a right of way granted through a passage*.[44]

Sir Raymond Evershed MR therefore rejected the idea that the exercise of a "right of way…through a passage" would amount to "occupation" of the passage. This comment aligns with the indicia considered above and suggests that the exercise of a right of way will only rarely, if ever, fall within Schedule 3 Paragraph 2.

B. RIGHT TO USE LAND FOR RECREATIONAL PURPOSES

The question whether English law recognises a right to use land for recreational purposes (*jus spatiandi*) as an easement has long been disputed, with the key questions being whether recreational rights accommodate the dominant tenement and whether they are sufficiently definite. However, in the recent *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd*[45] decision, the Supreme Court accepted that the right to use purely recreational facilities at the Broome Park estate and surrounding lands was capable of constituting an easement.[46]

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43 *Re Ellenborough Park* [1956] Ch 131.

44 ibid 176 (emphasis added).

45 *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57.

46 For a more detailed analysis of the impact of the *Regency Villas* (n 45) decision, see Chris Bevan, 'Opening Pandora's box? Recreation pure and simple: easements in the Supreme Court Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd [2018] UKSC 57; [2018] 3 W.L.R. 1603', Conv. 2019, 1, 55–70.

Owing to the broad nature of this category of easements,[47] it is difficult to generalise as to whether the exercise of a right to recreational purposes will constitute actual occupation. However, it seems that much of the same reasoning applied to easements conferring a right of way would also be relevant to easements conferring a right to use a particular recreational facility.[48] The *locus in quo* is typically quite large, only a small share of the land is used at any particular time, and, even if the land is used frequently, typically no permanent or continuous presence is established on the land. Exercising a right to use land for recreational purposes is therefore highly unlikely to amount to actual occupation of the land.

C. RIGHT TO PARK

As with rights of recreation, whether a right to park is capable of constituting an easement has long been debated. Although the right has historically raised significant concerns under the ouster principle,[49] recent authorities have been more willing to accept that a right to park amounts to an easement.[50]

The extent to which a right to park aligns with the indicia identified will vary significantly from case to case. Where the easement is granted over a designated parking spot, such as a garage[51] or other designated parking space, the *locus in quo* will be quite small and clearly defined. Exercising the easement by parking a vehicle in the spot would use the vast majority of the relevant servient land and therefore weigh in favour of actual occupation. The same would not be true of an easement granting a right to park on a large plot of land without any designated parking spot. The exercise of a right to park which is connected to a home[52] or a place or work, and is therefore frequently used, is also more likely to give rise to actual occupation. This is further strengthened where a car does not leave the servient tenement for an extended period of time, as in the pre-LRA 2002 *Kling* decision. When explaining his conclusion that Kling was in actual occupation of the garage, Vinelott J discussed at length the fact that there was "a considerable period" during which a car was "confined in the garage because the garage door was blocked."[53] Although Vinelott J notes that the same result would

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47 The rights in Broome Park alone included, among others, rights to use the swimming pools, golf courses, TV room, billiards, saunas.

48 See, for example, the quote of Sir Raymond Evershed MR above that the right to full enjoyment "no more amount[ed] to a joint occupation" than a right of way: *Re Ellenborough Park* (n 44) 176.

49 See, for example, *Moncrieff v Jamieson* [2007] UKHL 42.

50 See, for example, *Virdi v Chana* [2008] EWHC 2901 (Ch) and *Kettel v Bloomfold Ltd* [2012] EWHC 1422 (Ch).

51 Such as the licence in *Kling* (n 37).

52 As in the pre-LRA 2002 authority of *Saeed v Plustrade Ltd* [2001] EWCA Civ 2011.

53 *Kling* (n 37) 219.

probably have been reached even if the car had not been trapped, the fact that the car physically could not have left (and was therefore continuously present in the garage) certainly strengthened Vinelott J's decision on the facts.[54]

Therefore, while the exercise of a right of way and right of recreation is unlikely in practice ever cross to the threshold from use to occupation, it seems that the exercise of a right to park has that potential. While clearly not every (or even most) parking rights will be protected under Schedule 3 Paragraph 2, those cases where the right to park is granted over a single parking spot and where the car is parked for extended periods of time are most likely to constitute actual occupation.

D. RIGHT OF STORAGE

Many parallels can be drawn between an easement conferring a right of storage and an easement conferring a right to park.[55] The *locus in quo* over which the easement is exercised is typically quite small, exercise of the easement often requires much of the relevant land to be used and this use is typically frequent if not continuous by virtue of the storage of items on the land.

Some judicial support for the proposition that exercise of a right of storage might amount to actual occupation can also be found in the pre-LRA 2002 case of *Malory Enterprises v Cheshire Homes*.[56] Although the suggestion in *Malory* that only equitable, not legal, title passes when a disposition is forged has been held *per incuriam*,[57] the Court of Appeal's decision with respect to actual occupation under section 70(1)(g) LRA 1925 has not been questioned. Important for present purposes is that Arden LJ, in concluding that Malory Enterprises was in actual occupation, held that "using the land for storage" was a relevant factor pointing towards actual occupation.[58] Therefore, although the specific facts of each case will ultimately be

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54 ibid. At 219, Vinelott J comments more generally that "the plaintiff should be treated as being in continuous occupation of the garage while he was using it in the ordinary course for the purpose for which the licence was granted, that is, for garaging a car as and when it was convenient for him to do so". Importantly, however, this is not an affirmation that using a right as intended necessarily suffices for actual occupation. Such a rule would be significantly overinclusive and finds no support in the case law. Instead, this statement reaffirms the relevance of the parked car to establishing actual occupation, since it is only when "garaging a car" that the plaintiff could be "treated as being in continuous occupation".

55 Indeed, parking has been described as "a form of storage": *Wilcox v Richardson* (1997) 8 BPR 15, 491 (Handley JA).

56 *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151.

57 *Swift 1st Ltd v Chief Land Registrar* [2015] EWCA Civ 330.

58 *Malory* (n 56) [82]. It was also relevant that the land included "derelict buildings" which did not allow for other forms of occupation and the land was fenced and locked.

determinative, both principle and precedent suggest that the exercise of a right to storage may—much like the exercise of a right to park—situationally amount to actual occupation of the land.

V. Conclusion

This article has considered the question whether—and, if so, when—the owner of an unregistered equitable easement may rely on Schedule 3 Paragraph 2 of the LRA 2002 to safeguard her interest against postponement. The orthodox position advanced in *Chaudhary*—that the dominant owner is not in actual occupation of the servient tenement merely by exercising an easement—remains authoritative in the majority of cases. However, Lloyd LJ's core distinction between "actual use" and "actual occupation" merely reflects the fact that exercising an easement does not typically exhibit characteristics which the courts have found to be determinative of actual occupation. Exceptional cases may arise where the dominant owner's enjoyment of his easement does cross the threshold from use to occupation. This article identified three guiding factors which, although certainly not conclusive, may help courts and practitioners to identify these exceptional cases. The relevant indicia are: (i) the proportion of the land used, (ii) the frequency of the use, and (iii) the permanence of the presence on the land. To illustrate the utility of these indicia, this article has considered their application to four different types of easements. The exercise of rights of way and rights of recreation are, in practice, unlikely ever to amount to actual occupation of the servient estate. By contrast, exercising a right to park and a right to storage may situationally constitute actual occupation of the land.

De Lege Ferenda (2022) Vol V, Issue i, 66–83

Legitimacy and Legality within the Seat and Delocalisation Theory of International Commercial Arbitration

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ABSTRACT

Within the world of international commercial arbitration, two opposite views consider the arbitration procedure differently. The seat theory, also known as jurisdictional theory, asserts that the arbitration must be supervised by a court of law to sustain the validity of the arbitration agreement and the final award. On the contrary, the delocalisation theory alleges that the arbitration proceedings should not be anchored to the legal system where the award has been issued. Proponents of this theory focus on the party autonomy principle stating that parties have chosen the seat due to its neutrality and are not subject to its legal system. As a result, several scholars have debated which theory is appropriate to rule the international arbitration practice. In that respect, this article will support the seat theory and the importance of the lex arbitri within the arbitration procedure. Nevertheless, a potential problem of the seat theory is that it might allow excessive court intervention, thus, undermining the efficiency of arbitration. Greenberg and Weeramantry agree that the jurisdictional view is the more appropriate, albeit a more diluted approach is the best solution. This article acknowledges that the legitimacy of the arbitration is conferred by the party autonomy of the disputants who have submitted their controversy to arbitration. In terms of legality, the article asserts that the court's supervision and intervention are imperative to support the arbitration procedure and its award. Such intervention must not be seen as an intrusive action but rather a supportive tool for the parties.

Keywords: lex arbitri, seat theory, delocalisation theory, legitimacy, legality

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I. INTRODUCTION

This article will first outline the fundamental principles of arbitration including a brief definition of the lex arbitri, explore why the lex arbitri is important, and the significant power of the national courts. Following that, the essay will highlight the two different international arbitration perspectives, the traditional view and the delocalised view. The analysis will focus on illustrating the seat theory and its approach under the common law perspective. Thereupon, the essay will elucidate the wording of the New York Convention; particular importance will be given to articles V and VII which have been the subject of much debate among scholars due to the facultative wording of the provisions. In the second part of this article, the paper will explain the delocalisation theory and its foundations, such as the party autonomy principle and the fact that an award should not be anchored to the lex arbitri of the country of origin. The paper will take the French system as an example of jurisdiction that applies delocalisation concepts. Afterwards, the article will discuss the judicial intervention of the courts and its effect on arbitration proceedings. To conclude, this paper will criticise the pure delocalised view by introducing a possible hybrid approach. Moreover, the essay will discuss the statement proposed by Greenberg and Weeramantry, which states that the legitimacy of the arbitration is conferred by the lex arbitri. Thus, this essay proposes that the legitimacy aspect of the arbitration agreement is conferred by the autonomy of the parties; nevertheless, the supervision and intervention of the courts are necessary to uphold the legitimacy and legality of the arbitration procedure.

II. FUNDAMENTAL PRINCIPLES OF INTERNATIONAL ARBITRATION

When two contracting parties draft a commercial contract, they include an arbitration clause where they autonomously agree to refer their eventual disputes to an arbitral tribunal. The consent given by the parties to the arbitration agreement is of utmost importance in the context of international arbitration.[1] The arbitration procedure depicts the intention of both contracting parties to arbitrate; indeed, such intention is included in the 'party autonomy' principle.[2] The arbitration clause stipulates, inter alia, the place of the arbitration, the substantive law

1 M Dickson, 'Party Autonomy and Justice in International Commercial Arbitration' (2018) 60(1) International Journal of Law and Management 114.

2 C Lau and C Horlach, 'Party Autonomy– The Turning Point?' (2010) 4(1) Dispute Resolution International 121; S Fagbemi, 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?' (2015) 6 Journal of Sustainable Development Law and Policy 222.

governing the contract, and the applicable law governing the arbitration clause (hereinafter lex arbitri).[3] Indeed, arbitration is a convoluted synergy of laws; thus, it is feasible to have different laws governing the dispute.

While the lex arbitri is the law governing the arbitration agreement, the dispute itself may be judged on a different law, sometimes referred to as the 'substantive law' of the dispute. Indeed, such distinction of laws is possible under the principle of separability which provides that an arbitration clause is separate and distinct from the main contract.[4] This principle is further reflected in the idea that even where the main contract containing the arbitration clause is terminated or invalid, the arbitration clause itself is deemed to survive.[5]

A. WHY IS THE LEX ARBITRI IMPORTANT?

The lex arbitri plays an essential role in the context of international arbitration. For instance, it defines the arbitration agreement and how it should be expressed i.e., writing. It also specifies which matters can be settled by arbitration, i.e., arbitrability of the dispute. Indeed, the concept of arbitrability bestows powers to the arbitrators to deal only with issues circumscribed by the law governing the arbitration agreement. This principle is paramount since some issues affecting public policy or third parties' rights cannot be addressed to arbitration.[6] Nevertheless, if a particular matter is not arbitrable in one country due to the infringement of national public policy, it could be arbitrable in another jurisdiction whereby the dispute does not infringe on public policy concerns. The lex arbitri covers a wide range of aspects of the arbitration procedure such as the constitution of the arbitral tribunal, the procedure to nominate arbitrators, and the concession of interim measures of protection such as anti-suit injunctions to protect the arbitral proceedings.[7] More importantly, it inspects the validity and finality of the award provided by the arbitrators.[8]

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3 N Blackaby and C Partasides QC, *Redfern and Hunter on International Arbitration* (6th edn, 2015) 71.

4 *Fiona Trust and Holding Corporation and ors v Privalov and ors* [2007] EWCA Civ 20, [2007] 1 ALL ER (Comm) 891, [2007] Bus LR 686, [2007] 2 Lloyd's Rep, [2007] ALL ER (D) 169 (Jan); A Mustafayeva, 'Doctrine of Separability in International Commercial Arbitration' (2015) 1 Baku State University Law Review 93.

5 Arbitration Act 1996, section 7; *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701, [1993] 3 WLR 42, [1993] 3 ALL ER 897, [1993] 1 Lloyd's Rep 455, [1993] 1 WLUK 964. See also, *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Ltd* [2013] EWHC 1063 (Comm), [2013] 2 ALL ER (Comm) 463, [2013] 2 Lloyd's Rep 61, [2013] 5 WLUK 30, [2013] 1 CLC 906.

6 *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 at 40, [2012] Ch 333, [2012] 2 WLR 1008, [2012] 1 ALL ER 414, [2012] 1 ALL ER (Comm) 1148, [2012] Bus LR 606, [2011] 7 WLUK 630, [2011] BCC 910, [2012] 1 BCLC 335, [2012] 1 CLC 850, [2011] Arb LR 22, [2012] CLY 517.

7 Arbitration Act 1996, section 15-29.

8 ibid, section 46–58.

In the case of *Paul Smith Ltd*,[9] Steyn J asserted that '[t]he law governing the arbitration [lex arbitri] comprises the rules governing interim measures, the rules empowering the exercise by the Court of supportive measures to assist an arbitration […] and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitrations.'[10] More importantly, the lex arbitri is characterised by mandatory rules that apply directly to the arbitration procedure; hence, the lex arbitri inspects the proceedings and ensures that it complies with certain legal requirements in order to be admissible for enforcement.[11]

III. SEAT THEORY – JURISDICTIONAL PERSPECTIVE

The seat theory derives its principles from the jurisdictional perspective of arbitration, which asserts that the supervision of the national law is a fundamental aspect of the legitimacy of the arbitration procedure. The jurisdictional view declares that the validity of the arbitration agreements and its procedure must be supervised by the domestic laws; therefore, the seat of the arbitration bestows the validity of the arbitral award.[12] The ratio is that the lex arbitri ensures the legality and legitimacy of the arbitration procedure and its resulting award.

Advocates of the jurisdictional view, such as Francis Mann supported the importance of the lex arbitri in the arbitration proceedings.[13] He proposed that '[i]n the legal sense no international arbitration exist[s]'[14] and that there is no legal system which would allow individuals '[…] to act outside the confines of a system of municipal law […].'[15] Indeed, he believed that '[…] the idea of the autonomy of the parties exists only by virtue of a given system of municipal law […].'[16]

Furthermore, Mann argued that, since the procedural law of the country supervises the arbitral proceedings, '[…] every arbitration is a national arbitration, that is to say, subject to a specific system of national law.'[17] It can be noticed the insistent focus on the municipal law (lex arbitri) of the country. Other scholars such as Luzzatto have also made clear their stance in terms of the lex arbitri and the arbitration proceedings; indeed, he stated that the international commercial arbitration practice is capable of performing by virtue of the legal system of the

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9 *Paul Smith Ltd v He&S International Holding Inc* [1991] 2 Lloyd's Rep 127.
10 ibid 130.
11 Steyn J, Towards a New English Arbitration Act (1991) 7 Arbitration International (No.1) 17-26.
12 Yu Hong-Lin, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1(2) Contemporary Asia Arbitration Journal 255, 258.
13 FA Mann, '*The UNCITRAL Model Law – Lex Facit Arbitrum*' (1986) 2(3) Arbitration International 241.
14 ibid 245.
15 ibid.
16 ibid.
17 ibid.

seat.[18] Luzzatto has declared that '[…] international commercial arbitration cannot exist as a legal institution truly international in character [and] is subject to alterations […] as a result of the operation of municipal principles […].'[19]

However, the seat selection is of utmost importance for the seat theory since it is an expression of the parties' intention to be subject to that situs and its lex arbitri. Saville LJ stated that '[b]y choosing a country in which to arbitrate the parties have, ex hypothesi, created a close connection between the arbitration and that country and it is reasonable to assume from their choice that they have attached some importance to the relevant laws of that country […].'[20] As such, in the United Kingdom, the courts have been prone to support the parties' choice of law, and nonetheless, in the absence of a clear expression of the lex arbitri, the court will clarify the parties' intention.

A. SEAT THEORY – COMMON LAW PERSPECTIVE

The approach adopted by English courts has always been characterised by their pro-arbitration stance and supervisory role. Indeed, judges have been supportive of the seat theory in a wide range of cases. For instance, in the case of *Naviera Amazonia Peruana,*[21] the court provided a coherent analysis of the choice of the seat and whether the lex arbitri was English or Peruvian. In particular, Kerr LJ claimed that '[…] every arbitration must have a "seat" or locus arbitri or forum which subjects its procedural rules to the municipal law which is there in force.'[22]

Such a stance has been confirmed in the modern case of *Enka Inssat Ve,*[23] which established that in the absence of an express choice of law, the arbitration agreement would be governed by the law which has the closest connection to it.[24]Furthermore, it was concluded that English courts will always have jurisdiction to intervene in the proceedings and grant anti-suit injunctions notwithstanding the interference of the law of another country. Popplewell LJ

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18 R Luzzatto, 'International Commercial Arbitration and the Municipal Law of States' in Collected Courses of the Hague Academy of International Commercial Law (1977).

19 ibid 50.

20 *Union of India Ltd v McDonnell Douglas Corp* [1993] 2 Lloyd's Rep 48, 50.

21 *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116. See also, M Parish, 'The proper law of an arbitration agreement' (1986) 52(1) Chartered Institute of Arbitrators.

22 *Naviera Amazonica Peruana* (n.23) 4. See also, *Union of India v McDonnell Douglas Corporation* [1993] 2 Lloyd's Rep 48; cf *Star Shipping AS v China National Foreign Trade Transportation Corp* [1993] 2 Lloyd's Rep 445.

23 *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117, [2020] Bus LR 2242, [2020] 2 Lloyd's Rep 449, [2020] 10 WLUK 70. See also, F De Ly, 'The Place of Arbitration in the Conflict of Laws in International Commercial Arbitration: An Exercise in Arbitration Planning' (1992) 12(1) Northwestern Journal of International Law & Business 48.

24 *Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors* [2013] 1 WLR 102, [2012] 2 ALL ER (Comm) 795.

asserted that the intervention of the curial court granting anti-suit injunctions is an essential characteristic of the court to safeguard the integrity of the agreement to arbitrate.[25] Indeed, his Lordship declared that the anti-suit injunction would bring into effect '[…] the parties' legitimate expectations of certainty and business efficiency arising from their agreement to arbitrate and choice of seat are to be given effect.'[26]

In *PT Garuda Indonesia*,[27] a dispute arose between two contracting parties concerning a lease agreement being held in Jakarta. Nevertheless, the chairman of the tribunal held that for the purposes of the forum non conveniens rule, Singapore shall be the proper forum for hearing the arbitration. The Court of Appeal of Singapore held that notwithstanding the hearing was being entertained in a different place, the seat of the arbitration had not been replaced. In particular, Chao Hick Tin JA declared that '[t]he significance of the place of arbitration lies in the fact that for legal reasons the arbitration is to be regarded as situated in that state or territory […] whose laws will govern the arbitral process.'[28] For this reason, the seat theory is also named as the jurisdictional view since it is the legal concept behind the chosen place that matters;[29] hence, the seat will not be jeopardised by the peripatetic character of proceedings.[30] The nature of the arbitration agreement is purely procedural and not substantive; as a result, it derives its validity from procedural law which is the law of the seat of the arbitration.[31]

IV. International Convention

The importance of the seat is illustrated in several international conventions such as the 1923 Geneva Protocol and the United Nations on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention 1958). Indeed, the former states that '[t]he arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.'[32] The New York Convention (NYC) supports the fact that the seat is an important aspect when a party desires to enforce its award. Indeed, Article V of the Convention stipulates the grounds under which a requesting party could be denied recognition and enforcement. An award might

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25 *Enka* (n.24) para 55.

26 ibid. See also, *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2014] 1 ALL ER (Comm) 1, [2013] UKSC 35.

27 *PT Garuda Indonesia v Birgen Air* [2002] 5 LRC 560, [2002] 1 SLR 393 (CA), [2001] SGHC 262.

28 ibid 561.

29 *ABB Lummus Global Ltd v Keppel Fels Ltd* (1998) 12 CLN 1, 26.

30 *Himpurna California Energy Ltd v Indonesia* (2000) 15 Mealey's International Arbitration Report 1, A-i.

31 A Tweddale and K Tweeddale, '*Arbitration of Commercial Disputes: International and English Law and Practice*' (OUP 2007) 234.

32 Geneva Protocol 1923, Article 2.

be refused if the law of the country of issuance is satisfied that: the competent arbitral authority has not been composed in conformity with the domestic law;[33] or the award has been suspended or set aside by the same country;[34] or the agreement is invalid under the same domestic law; or one of the parties is under some incapacity.[35] This clearly demonstrates a strong link between the lex arbitri of the place of origin and the country where recognition and enforcement are sought. Indeed, a suspended award in a particular country could negatively compromise the enforceability of the award in another state.

A. FACULTATIVE ASPECT OF THE CONVENTION

Furthermore, it must be stated that refusal is discretional, and it depends on the court where recognition is sought.[36] Article V of the NYC states that '[r]ecognition and enforcement of the award may be refused […].'[37] The use of the word 'may' has led to an extensive debate between proponents of the seat and delocalised perspective.[38] The flexible wording in the article demonstrates that national courts are not obliged to refuse recognition or enforcement of a foreign arbitral award.[39] Further complexities arise if article V is read in conjunction with article VII of the Convention. The latter states that the provisions of the Convention should not '[…] deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law […].'[40] Therefore, article VII permits a country to enforce an award since parties should not be deprived of their right to have the award enforced; thus, an annulled award is legally enforceable in other jurisdictions.[41]

By virtue of Article VII of the Convention, certain countries have adopted a liberal approach to creating their legislation regarding the enforceability of awards. This stance might increase the problem of forum shopping in the enforcement phase; thus, parties will seek countries with similar attitudes towards annulled arbitral awards.[42] In practice, the winning

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33 New York Convention 1958, Article V(1)(e).
34 ibid Article V(1)(d).
35 ibid Article V(1)(a).
36 R Seyadi, 'Enforcement of arbitral awards annulled by the court of the seat' (2018) 84(2) Arbitration 128.
37 New York Convention, Article V(1).
38 J Hill, 'The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958' (2015) Oxford Journal of Legal Studies 1.
39 U Mayer, 'The Enforcement of Annulled Arbitral Awards: Towards a Uniform Judicial Interpretation of the 1958 New York Convention' (1998) 3 Uniform Law Review 583.
40 New York Convention 1958, Article VII (1).
41 K Davis, 'Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2002) 37 Texas International Law Journal 43.
42 R Kreindler, 'Arbitral Forum Shopping' in J Lew, B Cremades and others (eds), *Dossiers ICC Insitute of World Business Law: Parallel State and Arbitral Procedures in International Arbitration* (ICC Publishing 2005)

party of an award will seize the assets of the losing party where such assets are located, leading to multiple enforcement proceedings.[43]

V. DELOCALISATION THEORY

The delocalisation theory professes that international arbitration should not be anchored to the legal system where the award was issued, i.e., lex arbitri.[44] Contrary to the jurisdictional perspective, some scholars believe that international arbitration should be free from any municipal law; nevertheless, the only connection should be with the place where enforcement is sought.[45] Therefore, the award is considered 'a-national' and free to float from the national legal system where it was created. Indeed, under of Article VII of the NYC, suspended awards in the country of origin will not be deprived of their right to be enforced in other jurisdictions; hence, they can float and be recognised elsewhere.[46]

Jan Paulssen, an ardent proponent of the delocalisation theory, claimed that '[s]o the question is not so much whether an award may float […] but whether it may also drift, that is to say enjoy a potential for recognition in one or more enforcement jurisdictions without being ultimately anchored in the national legal system of the country where it was rendered.'[47]He advocates that if an arbitral award is rendered in a certain country and the courts of such a place have overruled the decision, it might be enforced in a different country nonetheless.[48] He supports this position by stating that many judicial systems are inclined to enforce an award provided that it is satisfied that the award is binding in their national law.[49]

According to Paulssen, instead of having two places of judicial control, such as the lex arbitri and the country of enforcement, only the latter should prevail.[50] Such an approach would not consider the grounds for refusal established in Article V(1)(e) of the NYC, which states that if an award has been suspended in the country of origin, it may be refused enforcement in another jurisdiction. This is possible by virtue of Article VII of the New York Convention, which asserts that an interested party should not be deprived of the right to have its arbitral

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43 L Silberman and M Scherer, 'Forum Shopping and Post-Award Judgments' (2014) 2(1) PKU Transnational Law Review 115.

44 Li, 'The Application of the Delocalisation Theory in Current International Commercial Arbitration' [2011] ICCLR 1.

45 J Paulssen, 'Delocalisation of International Commercial Arbitration: When and Why it Matters' (1983) 32(1) International and Comparative Law Quarterly 53.

46 ibid. See also, Seyadi (n.37).

47 J Paulsson, 'Arbitration Unbound' (1981) 30(2) International and Comparative Law Quarterly 358.

48 ibid 363.

49 ibid.

50 ibid.

award enforced in the country where enforcement is sought.[51] Indeed, several countries follow this type of theory, such as the French and the US system.[52] A pure delocalised system, however, has been proved to be inappropriate in Belgium. The country prevented its national courts to annul an award unless one of the disputants was Belgian. The criticism forced the country to follow the Swiss approach, whereby parties are allowed to exclude judicial supervision if they so agree.[53] Nevertheless, it seems that most foreign disputants do not exclude the intervention of the courts. This demonstrates that parties do prefer to have some supervision of their dispute.[54]

A. DELOCALISATION – PARTY AUTONOMY

The delocalisation theory is characterised by its focus on the party autonomy principle.[55] The theory declares that both parties should have decided voluntarily to be subject to a specific legal system. Therefore, without a clear expression of the legal system in their arbitration agreement, the parties should not be anchored to the place chosen only for its geographical convenience or its neutrality.[56] Indeed, some parties might choose a specific place to have the arbitration proceedings due to the lack of connection of both parties to such a place in order to obtain fairness and equal treatment.

Dumoulin developed the concept of party autonomy, asserting that the principle was the cornerstone of contract law.[57] Therefore, the contracting parties' intention is crucial to determine the law that will govern the contract.[58] The New York Convention seems to endorse the principle of party autonomy in Article V, which states that an award might be refused if '[…] the procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.'[59]

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51 New York Convention 1958, Article VII (1).

52 M Barry, 'Enforcing Awards Following a Decision at the Seat: the US or the French Approach' (*Kluwer Arbitration Blog*, 27 November 2014) < http://arbitrationblog.kluwerarbitration.com/2014/11/27/enforcing-awards-following-a-decision-at-the-seat-the-us-or-the-french-approach/> accessed 20 March 2021.

53 J Savage and E Gaillard, '*Fouchard, Gaillard and Goldman on International Commercial Arbitration'* (Kluwer Law 1999) 74.

54 B Leurent, 'Reflections on the International Effectiveness of Arbitration Awards' (1996) 12 Arbitration International 269.

55 C Chatterjee, 'The Reality of the Party Autonomy Rule in International Arbitration' (2003) 20 Journal of International Arbitration 539.

56 H Yntema, 'Autonomy in Choice of Law' (1952) 1(4) The American Journal of Comparative Law 341.

57 E Lorenzen 'Validity and Effects of Contracts in the Conflict of Laws' (1921) 30(6) The Yale Law Journal 565.

58 M Zhang, 'Party Autonomy and Beyond: International Perspective of Contractual Choice of Law' (2006) 20 Emory International Law Review 511.

59 New York Convention 1958, Article V(1)(d).

Several provisions contained in the UNCITRAL Model law enshrine the principle of party autonomy. For instance, article 28(3) states that arbitrators can act ex aequo et bono or as amiable compositeur only if both parties have bestowed them with such powers.[60] Furthermore, article 19 states that 'subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.'[61] Additionally, arbitrators possessed the principle of Kompetenz-Kompetenz, which confers to them the authority to rule on their jurisdiction.[62] Some scholars argued that this power is derived from the arbitration agreement;[63] conversely, others asserted that it derives from domestic law since if the arbitral tribunal regards the agreement void, they do not have to require the court to provide support in such matters.[64]

However, there are certain limitations to the party autonomy principle;[65] for instance, both parties must adhere to certain mandatory provisions stated in the law governing the arbitration agreement.[66] Indeed, Schedule 1 of the English Arbitration Act 1996 enumerates a number of mandatory requirements, such as the immunity of the arbitrator,[67] the stay of legal proceedings,[68] general duties of parties,[69] et cetera.[70]

B. DELOCALISATION – THE FRENCH APPROACH

The French jurisdiction has been favourable to the delocalisation theory to enforce annulled awards and consider the arbitration 'anational'. For instance, in the case of *Société Pabalk Ticaret Limited Sirketi*,[71] the Court of Appeal of Paris stated that pursuant to Article V(1)(e) of the New York Convention, it would refuse recognition and enforcement of an award

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60 UNCITRAL Model Law, Article 28(1).

61 UNCITRAL Model Law, Article 19(1). See also, E Gaillard and J Savage, '*Fouchard, Gaillard, Goldman on International Commercial Arbitration*' (Kluwer Law International 1999) para 1550.

62 UNCITRAL Model Law, Article 16. See also, A Kawharu, 'Arbitral Jurisdiction' (2008) 23 New Zealand Universities Law Review 238.

63 J Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22(2) Arbitration International 179.

64 A Kawharu (n.63) 240.

65 G Cordero, 'International Commercial Arbitration – Party Autonomy and Mandatory Rules' (1999) 68(3) Nordic Journal of International Law 375.

66 V Luke, 'Breaking in the 'unruly horse': the status of mandatory rules of law as a public policy basis for the non-enforcement of arbitral awards' (2011) 18 Australian International Law 155.

67 Arbitration Act 1996, s 29.

68 ibid, ss 9, 10, and 11.

69 ibid, s 40.

70 O Perepelynska, 'Party Autonomy vs. Mandatory Rules in International Arbitration' [2012] Ukrainian Journal of Business Law 38.

71 *Société Pabalk Ticaret Sirketi v Société Anonyme Norsolor*, Court of Cassation, France, 83-11.355, 9 October 1884; G Petrochilos, 'Enforcing Awards Annulled in their State of Origin under the New York Convention' (1999) 48(4) International & Comparative Law Quarterly 856. See also, S Gravel and P Peterson, 'French Law and Arbitration Clauses – Distinguishing Scope from Validity: Comment on *ICC Case No. 6519 Final Award*' (1992) 37 McGill Law Journal 510.

since it has been set aside by a competent authority in the country of origin. As a result, the Court of Appeal concluded to deny the enforcement of the award partially. Nevertheless, the Supreme Court of Paris overruled the judgement of the Court of Appeal by asserting that the enforcement of an award is possible if the law of the country where enforcement is sought permits it.[72] Indeed, the Supreme Court stated that the Court of Appeal should have revised the French Civil Code to analyse whether Palbak could enforce the award under French law.

French courts have been reluctant to accept an arbitral procedure attached to the country where the award is rendered. Indeed, despite the situs being chosen for its neutrality, the place of the arbitration is considered irrelevant since it is not an expressed intention of the parties to be subject to it.[73] This approach is illustrated in the case of *Gotaverken Arendal*,[74] where Gotaverken and the Libyan Maritime Transport (LG) entered into a lease agreement regarding the construction of three oil tankers. LG was reluctant to accept the delivery of the tankers due to the alleged breach committed by Gotaverken. Indeed, Gotaverken utilised some components from Israel to construct the tankers, which clearly violated Libyan law. Furthermore, LG argued that the way the tankers were built was not in accordance with the detailed conditions both parties had agreed. The arbitration agreement provided Paris as the place of the arbitration under the ICC rules. However, the tribunal rendered an award in favour of Gotaverken; consequently, LG challenged the award before the Court of Appeal in Paris and argued that French law governed the arbitration agreement; ergo, it had jurisdiction over the dispute. Subsequently, the court dismissed the appeal that the nationality of the award was not French; instead, the arbitral award had an 'international' hallmark.[75] Consequently, Gotaverken went to Sweden to have the award enforced; indeed, it was argued that the court of Sweden was the most appropriate to deal with such a matter. However, by virtue of the New York Convention 1958, the exequatur of the award in the country of origin is not a necessary requirement to enforce it in another State. The conclusion taken by the court is that, firstly, both parties did not have any connection to the French legal system; indeed, both parties had different nationalities. Secondly, the transactions undertaken by both parties did not have any relationship with the French territory; the two contracting parties had chosen Paris as the seat of the arbitration for neutrality purposes and did not consent to be subject to the French legal system.

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72 Société Pabalk (n 72).

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

74 *Gotaverken Arendal AB v Libyan General National Maritime Transport Co*, Cour d'Appel de Paris (21 February 1980).

75 M Amed (n 74) 409.

As mentioned at the beginning of the article, the grounds of refusal in the New York Convention are discretional. Legal systems are entitled to shape their criteria in their own manner. French courts do not consider certain awards to have nationality as in the case of Gotaverken; hence, if an award is suspended or set aside in one country, it can still be enforced in France.

In the case of *Hilmarton Ltd v Ommium de Traitement et de Valorisation (OTV),*[76] the arbitral tribunal found itself favouring OTV and issued an award. Subsequently, Hilmarton challenged the decision before the Swiss courts, which ruled to set aside the award. Nevertheless, OTV enforced the arbitral decision before the French courts despite the Swiss court had set it aside. Indeed, the Cour de Cassation recognised the international aspect of the award and asserted that it would not compromise its enforcement in France despite being challenged in another jurisdiction. The court stated as follows: "the award is not integrated in the legal system of that State, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy."[77] Likewise, in *PT Putrabali v Rena Holding,*[78] the Cour de Cassation dealt with two awards, with the former being set aside. However, the court, influenced by the *Hilmarton* case, enforced the first award despite being set aside in London.

It is evident how French courts consider foreign arbitral awards as being 'international' and not attached to the legal system where it was issued.[79] Nevertheless, some countries have acknowledged the approach taken by the French system, but do not follow it. For instance, in the case of *Dallah Real Estate,*[80] the UK Supreme Court enlightened the French approach, which believes that the "[…] the arbitration agreements derive their existence, validity and effect from supra-national law, without it being necessary to refer to any national law."[81] However, Kerr LJ had expressed his reluctance to approve the delocalisation theory in the case of *Bank Mellat,*[82] whereby he declared that "our jurisprudence does not recognise the concept

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76 *Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation (OTV)* [1994] (cour de cassation).

77 ibid. See also, *Omnium de Traitement et de valorisation (OTV) v Hilmarton Ltd* [1999] 2 All ER (Comm) 146.

78 *Société PT Putrabali Adyamulia v Société Rena Holding et Société Mnogutia Est Epices* [2007] Rev Arb 507

79 ibid.

80 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, [2010] 3 WLR 1472, [2011] 1 AC 763, [2011] 1 ALL ER 485; See also, Star Shipping SA v China Foreign Trade Transportation Corp (The Star Texas) [1993] 2 Lloyd's Rep 445.

81 Dallah Real Estate [2010] UKSC 4 [15].

82 *Bank Mellat v Helleniki Techniki SA* [1984] QB 291, [1983] 3 WLR 783, [1983] 3 ALL ER 428, [1983] 6 WLUK 200.

of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law."[83]

C. DELOCALISATION – US APPROACH

The US seems to take a similar stance to the French system. In the case of *Cromalloy*,[84] the US court and the Court of Appeal of Paris enforced a foreign award that was set aside in Egypt. The enforcement in the two jurisdictions was possible since neither the US nor the French system regards the annulment of an arbitral award as a ground to refuse enforcement in their jurisdictions. Indeed, the US and French system consider that if an award is in breach of public policy in a certain state, it might not be contrary to the public policy system in France or the US; thus, enforcement is possible. As mentioned earlier, the interpretation of Article V of the New York Convention is discretional. The US court highlighted that the word 'may' in the article leads to a permissive approach to approve annulled foreign arbitral awards. Furthermore, the court sustains its position by arguing that the wording of Article VII of the Convention allows the State to support the right of the parties to have their awards enforced, despite being challenged in another jurisdiction.[85]

D. CRITICISM OF THE DELOCALISATION THEORY

The delocalisation theory has been criticised as "wholly unrealistic" or "far-fetched reality".[86] International arbitration cannot exist in a legal vacuum whereby there is no control or supervision of the arbitration proceedings.[87] The theory has been considered deceptive and impractical for many scholars; indeed, the theory not only provides uncertainty for both disputants but also unfairness for the losing party. The possibility to enforce an award in another jurisdiction despite being set aside is controversial from a legal perspective and does not respect the finality principle of the award.[88] Indeed, it is evident from the French cases that

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83 ibid 3. See also, *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 ALL ER (Comm) 315, [1999] 1 WLUK 570, [1999] CLC 647; *Whiworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd* [1970] AC 583, [1970] 2 WLR 728, [1970] 1 ALL ER 796; *International Tank and Pipe SAK v Kuwait Aviation Fuelling Co KSC* [1975] QB 224, [1974] 3 WLR 721, [1975] 1 ALL ER 242.

84 *Chromalloy Aeroservices v Arab Republic of Egypt* [1997] 95/23025 Paris Court of Appeal; *Chromalloy Aeroservices v The Arab Republic of Egyp*t 939 F. Supp 907 (DDC 1996).

85 New York Convention 1958, Article VII(1); Chromalloy (n.54) 909.

86 W Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32 International & Comparative Law Quarterly 21; Li, 'The Application of the Delocalisation Theory in Current International Commercial Arbitration' [2011] ICCLR 1.

87 Tweeddale (n.32) 250.

88 R Goode, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration' (2001) 17(1) Arbitration International 19, 21.

the issue in dispute reached the highest court; thus, the French system has not promoted the principle of finality in its own jurisdiction. In conjunction with this approach, the losing party of an arbitral award might have to litigate in several jurisdictions where he has assets.[89] Consequently, the arbitration would be costly for a party who has to use its economic sources to finance the litigations in different countries.[90]

The support given to the party autonomy principle in the delocalisation theory is controversial. In the *Chromalloy* case, both parties agreed in their arbitration clause to be subject to Egyptian law and chose Cairo as the seat of the arbitration. As such, Roy Goode argues that '[…] on what basis could the Court of Cassation disregard the express choice of the parties and instead determine that the award was not integrated into the Egyptian legal system?'[91]

VI. JUDICIAL INTERVENTION

Frequently, contracting parties choose the place of the arbitration in a country that is considered 'neutral' and is commonly a place where neither of the disputants has residence or assets. Indeed, Lord Hoffman stated that '[…] the situs and governing law are generally chosen by the parties on grounds of neutrality, availability of legal services, and the unobtrusive effectiveness of the supervisory jurisdiction.'[92] Therefore, the place chosen by the disputants is crucial since it may influence the conduct of the arbitration proceedings. For instance, in circumstances where parties order interim measures of protection or anti-suit injunctions, it is necessary to intervene in order to provide assistance to the arbitration procedure.[93] A legislative illustration of this situation is laid down in Article 9 of the Model Law, which states that '[i]t is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.'[94]

The supervisory role of the courts has been supportive of respecting the parties' legitimate expectations to arbitrate.[95] For instance, there are several cases concerning petitions to liquidate companies for overdue payments despite having an arbitration agreement

89 ibid.
90 ibid. 35.
91 ibid. 31.
92 *West Tankers v RAS (the Front Comor)* [2007] 1 Lloyd's Rep 391 [12].
93 Fiona (n.5).
94 UNCITRAL Model Law on International Commercial Arbitration, Article 9.
95 J Goldring, 'The Supervisory Jurisdiction of the Courts over Decisions of Law by the Tribunals' (1973) 9(4) Melbourne University Law Review 669.

governing their disputes.[96] Therefore, courts have been willing to dismiss those petitions to enforce the arbitration agreement between the disputants. Indeed, it is evident the proclivity of English courts to strike a balance between the party autonomy principle and judicial interference.[97] Indeed, the latter should not be regarded as intrusive; instead, it has been acknowledged as supportive. For this reason, the lex arbitri is a fundamental aspect of the arbitral proceedings if parties want to have their expectations to be respected.[98]

There are several risks of living in a jurisdiction that permits arbitral awards to be invulnerable from judicial review. Firstly, there might be a collision of opposite decisions concerning the same argument from two different tribunals, as happened in *PT Putrabali*. A further concern might be that, without judicial review, arbitrators might not perform their duty competently. On the other hand, excessive intervention from the courts might induce parties to avail themselves of their right to appeal to a country's judicial hierarchy, compromising the privacy aspect of international arbitration. Indeed, Secomb argues that '[…] if there is an opportunity to challenge an arbitral award, no matter what the nature is, the party would like to take it.'[99] A possible solution has been proposed by article 5 of the UNCITRAL Model Law stating that '[…] no court shall intervene except where so provided in this Law.'[100]

In extraordinary circumstances, English courts have decided obiter dictum the possibility to grant anti-arbitration injunctions. The guidance provided in the case of *Compagnie Nouvelle*,[101] has conferred an illustration whereby courts could grant anti-arbitration injunctions if the court is satisfied that the participation to arbitration would be '[…] oppressive and vexatious […].[102] Those circumstances were re-examined in the modern case of *Sabbagh*,[103] which despite the court did not grant such an injunction, it was agreed that it could be possible for English courts to grant such an injunction '[…] if England is the natural forum for the dispute.'[104] The foregoing does not represent the beginning of anti-arbitration injunctions in England; however, it simply clarifies the supervisory powers of English courts

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96 *Telnic Limited v Knipp Medien Kommunikation GmbH* [2020] ALL ER (D) 164 (Jul), [2020] EWHC 2075 (Ch). See also, *Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449; *Dayang (HK) Marine Shipping Co Ltd v Asia Master Logistics* [2020] HKCFI 311.

97 *West Tankers* (n.11).

98 cf Z Saghir and C Nyombi, 'Delocalisation in international commercial arbitration: a theory in need of practical application' (2016) 27(8) International Company and Commercial Law Review 269.

99 M Secomb, 'Shade of Delocalisation Diversity in the Adoption of the UNCITRAL Model Law in Australia, Hong Kong and Singapore' (2000) 17(5) Journal of International Arbitration 129.

100 UNCITRAL Model Law, Article 5.

101 *Compagnie Nouvelle France Navigation SA v Compagnie Navale Afrique du Nord (The Oranie and The Tunisie*) (1966) 1 Lloyd's Rep 477, [1966] 3 WLUK 22.

102 ibid 487.

103 *Sabbagh v Khoury* [2019] EWHC 3004 (Comm), [2020] 1 WLR 187, [2019] 11 WLUK 177.

104 ibid [115].

and the significant influence of the chosen seat. Therefore, this type of intervention is only possible by the law governing the arbitration agreement.

In this sense, it can be argued that if several international jurisdictions allow the intervention of the court, this indicates that the arbitration procedure alone is not an efficient system to ensure that both parties receive a fair proceeding. Comparably, there would be a substantial risk of injustice among disputants in a pure delocalised world, where all sort of court intervention is removed.[105]

VII. HYBRID THEORY

Roy Goode believes that the lex arbitri and the principle of party autonomy do not constitute a dichotomy but rather a spectrum.[106] Nevertheless, it has been argued that a pure delocalisation model does not enhance the legal system, and it would not be possible to exist. A delocalised arbitration could bring concerns about whether a competent and professionally reliable arbitrator had issued an appropriate award.[107] Without the judicial supervision of the country of origin, the legality of an award could be doubted. Indeed, legality stands for 'the fact that something is allowed by the law.' Therefore, the State and its lex arbitri bestow legality to the arbitration procedure and its award. For that reason, a pure delocalisation approach might compromise the legality of the award.

Furthermore, the legitimacy of the arbitration is conferred by the intention of the parties to submit their dispute to arbitrate; therefore, the role of the court is only for supportive measures. As mentioned earlier, the comments of Popplewell LJ in the *Enka* case asserted that the injunction of the court is to support the legitimate procedural expectations; thus, the intervention of the courts does not harm the predictability of the parties that their autonomy will be protected. Therefore, it can be concluded that the party autonomy principle will be safeguarded despite the intervention of the court.

Goode had proposed six feasible models which countries could adopt.[108] Particularly, the second model proposes the right of a sovereign state to rule on matters that occur in its own

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[105] J Lew, 'Does National Court Involvement Undermine the International Arbitration Processes?' (2009) 24(3) American University International Law Review 489.

[106] Roy Goode (n.89) 24.

[107] A Trend, 'Who will rid me of this turbulent arbitrator? Applications to Remove Arbitrators under English Law– Part 2: Procedural Impropriety and Loss of the Right to Object' (*Kluwer Arbitration Blog*, 16th August 2016) < http://arbitrationblog.kluwerarbitration.com/2016/08/16/who-will-rid-me-of-this-turbulent-arbitrator-applications-to-remove-arbitrators-under-english-law-part-2-procedural-impropriety-and-loss-of-the-right-to-object/?print=pdf> accessed 30 March 2021.

[108] Goode (n.89) 24.

country.[109] Nevertheless, Goode states that recognition of such decisions should not be erga omnes, and the foreign court of enforcement should respect the decision of setting aside an award made by the country of origin.[110]

A. GREENBERG – DILUTED VERSION

The utopian approach of the delocalisation theory has influenced the Model law, which prevents the excessive interference of the courts. Despite the Model law being influenced by the theory, there must be jurisdictional supervision of the arbitration procedure. Indeed, the ideological stance of the theory has resulted in a noticeable decrease in the amount of court intervention in several legal systems; nevertheless, to support both disputants, the role of the lex arbitri is of extreme importance.

Greenberg and Weeramantry argued that without the lex arbitri, an arbitration proceeding would not exist legally,[111] otherwise known as the traditional view. Furthermore, they have asserted that every arbitration procedure must be attached to the law of the seat of the arbitration. It follows from this assertion that it is the jurisdiction of the seat that grants legitimacy and legality to the arbitration procedure and the eventual award. However, they concluded that a pure delocalisation theory is impossible to exist; indeed, the need of the law of the seat is a fundamental aspect of the arbitration procedure.[112] Consequently, they asserted that a more diluted version of the traditional view is the most convenient form to supervise arbitration agreements. Furthermore, they argue that despite having a hybrid approach of the theories "[…] there is an essential link to the seat of the arbitration".[113] To conclude, they asserted that the delocalisation perspective of arbitration "[…] is not a phenomenon in its own right, but rather permitted by the state."[114]

VIII. CONCLUSION

The practice of international arbitration has led to two diverse positions regarding its procedure and its consequential award. The two main theories underpinning arbitration are the traditional

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109 ibid.

110 ibid. See also, A van den Berg, 'Residual Discretion and the Validity of the Arbitration Agreement in the Enforcement of Arbitral Awards under the New York Convention of 1958' in K Sood Teo, *Current Issues in International Commercial Arbitration* (University of Singapore, 1997) 335.

111 S Greenberg, Kee and JR Weeramantry, 'International Commercial Arbitration: An Asia-Pacific Perspective' (Cambridge University Press 2011) 66.

112 ibid.

113 ibid para 2.90.

114 ibid.

and delocalised perspective. The former allocates the validity of the arbitration procedure in the seat of the arbitration and recognises the importance of the law governing the arbitration (lex arbitri) as a fundamental aspect of the procedure. On the contrary, the delocalised perspective stipulates that the arbitration proceedings should be detached from the lex arbitri of the country of origin; nevertheless, proponents of such a view claimed that the country of enforcement should be the only jurisdiction to supervise the award resulting from the arbitration procedure.

Furthermore, the delocalised view is founded on the principle of party autonomy; indeed, the theory states that despite both parties having chosen a seat, they have chosen it due to neutrality purposes and not to be subject to the lex arbitri of that country. In that respect, under what circumstances a court would rule that both disputants did not want to be subject to the chosen seat despite having expressly stated it in their arbitration agreement?

From the seat theory perspective, Mann argued that it is inconceivable to believe that a legal system could permit individuals to act outside of the law of that country. He drastically considered all arbitration procedures to be 'national' since they work under the aegis of the law. Luzzatto contributed to this viewpoint by stating that international arbitration cannot exist in an international context since it is continuously subject to municipal law alterations. For that reason, the chosen seat where the arbitration will take place is of utmost importance.

Additionally, the choice of the seat has allowed courts to intervene in the arbitration proceedings in a supportive manner. Indeed, in several cases, the courts have been eager to confer specific measures that protect the legitimacy of the arbitration procedure. For that reason, it is concluded in this paper that the lex arbitri is an essential instrument to enforce the predictability of the arbitration procedure and conserve the autonomy of the parties. Despite the legitimacy of the arbitration procedure being justified by the arbitration agreement, it is supported by the supervision of the courts. It is the latter that confers the legality of the arbitration procedure. Indeed, legality means that the arbitration procedure or award is allowed by the law.

Detaching an arbitration procedure from the lex arbitri is comparable to removing the reasoning from an individual and allowing him to make decisions based solely on his feelings, resulting in dire consequences.

De Lege Ferenda (2022) Vol V, Issue i, 84–98

Shikha Roy v Jet Airways: A New Approach to Algorithmic Collusion

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ABSTRACT

There has been tremendous growth in the use of algorithms across industries. The use of such algorithms has triggered a debate over how competition authorities should regulate the challenges that these new-age technologies pose, especially with respect to enabling traditional antitrust offences such as cartels. Scholars at one end of the spectrum suggest that the challenges are nothing but old wines in new bottles, the others at the opposite end of the spectrum regard them as the end of antitrust as we know it. One thing on which both these schools of thought agree upon is the need for a standardised procedure and developing new tools of investigation for cases concerning algorithmic collusion. It is in this context that this article aims to critically examine the Competition Commission of India's decision in *Shikha Roy v Jet Airways*. The authors attempt to juxtapose the already existing jurisprudence concerning cartels, coupled with the jurisprudence developed in *Shikha Roy's* case concerning algorithmic collusion, with the theoretical framework proposed by Ariel Ezrachi and Maurice Stucke in their seminal work, *Virtual Competition: The Problems and Perils of Algorithm-Driven Economy*. By doing so, the authors attempt to assess whether the Indian framework of competition law in general and cartels, in particular, is sufficient to deal with the dangers highlighted in *Virtual Competition*. Additionally, while making this assessment, the authors also propose a two-step test developed from the judgement and apply it to the

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framework of Ezrachi and Stucke. Finally, this article concludes that the current approach of the Commission is appropriate to deal with the challenges highlighted by Ezrachi and Stucke.

Keywords: algorithmic collusion; virtual competition; competition law; airline industry; India

I. INTRODUCTION

On 3 June, 2021, the Competition Commission of India ('CCI' or 'Commission') delivered its order in *Shikha Roy v Jet Airways (India) Limited*[1] ('*Shikha Roy v Jet Airways*' or '*Shikha Roy*'), where it gave its decision relating to the question of whether there was an increase in the price of air tickets because of algorithmic collusion between different airlines during the protests by the *Jat* community on certain routes. Although the CCI had no choice but to close the case because of lack of evidence of any such algorithmic coordination, nevertheless, the order becomes significant because it is for the first time that the CCI has recognised the possibility of collusion through the widespread use of algorithms without any formal agreement or human interaction.

This article aims to critically examine the CCI's analysis in the *Shikha Roy* case against the backdrop of Ariel Ezrachi and Maurice Stucke's ('Ezrachi and Stucke') theoretical framework on algorithmic collusion.[2] The authors have undertaken to study the previous decisions rendered by CCI concerning algorithmic collusion and derive a parallel of standardisation in its approach. The authors also propose a two-step test, developed from the judgement, and apply it to the framework of Ezrachi and Stucke[3] to show that the Commission's approach has matured over the years and further, that the current approach of the Commission is appropriate to deal with the threats highlighted by Ezrachi and Stucke.

The paper is structured into five sections. After this introductory portion in Section I, the authors, in Section II, lay down the legislative provisions, the procedure for investigation under the (Indian) Competition Act, 2002 ('Act') and the background of the *Shikha Roy* case. Further, they also discuss the investigation report by Director General ('DG') and finally explore the CCI's order and its findings. Section III delves into the theoretical framework laid down by Ezrachi and Stucke, briefly touching upon the debate on whether the current framework of law is sufficient to deal with algorithms. Section IV analyses the judgement and its implications in

1 *Shikha Roy v Jet Airways (India) Limited and Others*, CCI, Case No. 32 of 2016 (3 June 2021).
2 Ariel Ezrachi and Maurice E Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press 2016).
3 ibid.

the light of the *In Re: Alleged Cartelization in the Airlines Industry*[4] ('Re: Alleged Cartelization') case. This section is further divided into three sub-sections: Denial, Acknowledgement, and Practical Change in Approach of the CCI, where an attempt has been made to develop a two-step test to deal with future cases concerning algorithmic collusion. Finally, Section V provides the concluding remarks emerging out of the analysis made in the other parts of the article.

II. LESGISLATIVE PROVISIONS, FACTUAL BACKGROUND AND JUDGMENT

A. LEGISLATIVE PROVISIONS AND PROCEDURE FOR INVESTIGATION UNDER THE ACT

Cartelisation is generally condemned across multiple jurisdictions,[5] and under the Indian competition law regime, cartels have been levied the highest fines for violations.[6] There are two reasons why cartelisation is a much-condemned practice. First, cartels stifle competition by colluding to fix prices or reducing output. Second, because of the secretive nature of cartels, direct evidence of collusion is rarely available.[7] The problems of lack of evidence and direct harm to competition and consumers are intensified in cases concerning algorithmic collusion.

Under the Act, Section 2(c) explicitly defines a '*cartel*' as an agreement between association of producers, distributors, or service providers to limit or control the sale or price of goods, among other things.[8] Section 2(b) of the Act defines these agreements and includes any arrangement or understanding or action in concert, whether written or otherwise.[9] Further, these agreements are prohibited under Section 3 of the Act, the scope of which is to enact a general prohibition on anti-competitive agreements, with a presumption of having an Appreciable Adverse Effect on Competition ('AAEC'),[10] judged through the '*per se*'[11] rule. Additionally, the burden of proving innocence in cases involving cartelisation is on the

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4 *In Re: Alleged Cartelization in the Airlines Industry*, CCI, *Suo Motu* Case No. 03/2015 (22 February 2021).

5 OECD, 'Prosecuting Cartels without Direct Evidence of Agreement' (2009) 9 OECD Journal of Competition Law and Policy 49, 60.

6 'A Look Back at 10 Years of CCI's Penalties' (*AZB & Partners*, 1 February 2019) <https://www.azbpartners.com/bank/a-look-back-at-10-years-of-ccis-penalties/> accessed 13 October 2021.

7 *Builders Association of India v Cement Manufacturers' Association*, CCI, Case No. 29 of 2010 (31 August 2016).

8 The Competition Act, 2002, No. 12, Acts of Parliament, 2002 s 2(c).

9 ibid s 2(b).

10 ibid s 3.

11 *Competition Commission of India v Co-ordination Committee of Artists and Ors.* Civil Appeal No. 6691 of 2014 (07.03.2017 - SC) [affirmed on appeal, *Competition Commission of India v Coordination Committee of Artists and Technicians of West Bengal Film and Television Industry* (07.05.2018 - SC)].

accused,[12] and it is not necessary that harm has been caused as a consequence of such an agreement. The 'probability' that certain harm may be caused is sufficient.[13]

Specifically, Section 3(1) proscribes coming into any agreement regarding production, supply, distribution, storage, acquisition, or control of goods or provision of services that has an AAEC on competition in India. Agreements referenced in Section 3 of the Act are known as anti-competitive agreements. Section 3(2) declares such agreements as void. Section 3(3) presumes, although the presumption is rebuttable, that cartel agreements have an AAEC. This section also includes a non-exhaustive list of such agreements such as price-fixing, output or production restriction, market sharing, and bid-rigging. This section is similar to Article 101 of the Treaty of Functioning of the European Union.[14]

Though the Act does not define AAEC and does not establish a thumb rule for determining when an agreement results in or is likely to result in AAEC, Section 19(3)[15] of the Act outlines several factors to consider when determining AAEC.

Under Section 19(1)[16] of the Act, the CCI can inquire into an alleged contravention of the Act. Such inquiry can be initiated either *suo motu* or on the receipt of a complaint by any person or association or on a reference by the government.[17]

B. BACKGROUND

The present case involved an allegation pertaining to cartelisation by five airline companies, namely, Jet Airways, Indigo, SpiceJet, Go Air,[18] and Air India during the month of February 2016, specifically from 18 February to 23 February 2016. Ms Shikha Roy

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12 *Sodhi Transport Co. v State of Uttar Pradesh*, AIR 1980 SC 1099.

13 Arijit Pasayat & Sudhanshu Kumar, S.M. Dugar, *Guide to Competition Law* (7th edn, LexisNexis 2019) 3.

14 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (Treaty on the Functioning of the European Union), art 101.

15 The factors under Section 19(3) includes six factors, first three being anti-competitive remaining three being pro-competitive factors:

(a) creation of entry barrier;
(b) driving existing competitors out of market;
(c) foreclosure of competition;
(d) accrual of benefits to consumers;
(e) improvements in the production or distribution of goods or the provision of services; and
(f) the promotion of technical, scientific, and economic development.

16 The Competition Act 2002, No 12, Acts of Parliament 2002, s 19(1).

17 In case, the Commission is satisfied that a *prima facie* case exists, it directs the DG to conduct a detailed investigation into the matter and submit its report. Based on this report, the Commission passes the final order upon hearing the parties concerned. If in case, the information or reference does not satisfy the *prima facie* standard, the Commission closes the matter and passes an order accordingly.

18 Go Air has changed its name to 'Go First', however, because the judgement uses Go Air; the authors have used the former name in this article.

('Informant'), a Delhi based advocate, filed the information contending that during the Jat Agitation in February 2016, domestic airlines began charging excessive rates, especially between Delhi and Chandigarh and Delhi and Amritsar. In its decision of 3 June 2021, the CCI rejected alleged cartel claims against the five airlines.

The Informant alluded to an emerging trend in the aviation sector of an increase in air ticket prices by airlines to exploit the passengers during extraordinary conditions and further alleged that the simultaneous fluctuation in the pricing of airline tickets constituted a violation of Section 3 of the Act.

Further, with the technical innovation in the airlines' sector over the last few decades, airlines have integrated third-party software that assists them in determining, implementing, and dynamically changing the fares given to passengers in real-time. To establish the airfares, each such software uses a complicated set of algorithms that takes into account parameters such as demand, actual bookings, competitors' prices, seasonality, and so on. Therefore, in the present case, the authorities also focused on whether third-party software was being used by airlines in a coordinated manner or if it was causing or facilitating pricing collusion.[19]

It must be noted here that Jet Airways was excluded from the scope of the investigation as a result of the grounding of Jet Airways, the initiation of a corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 (IBC), and the declaration of a moratorium by the National Company Law Tribunal (NCLT) under Section 14 of the IBC.

Preliminary Conference: The Commission, noting the allegations and submissions made by the Informant, held a preliminary conference and, after considering the possibility of algorithmic collusion with or without the need for human intervention or coordination between competitors, considered that a *prima facie* case existed and directed the DG to investigate the alleged cartelisation.

C. INVESTIGATION REPORT BY DG

In its report, the DG determined the following:

1. Whether the surge in air-ticket prices during the Jat Agitation period was a consequence of an agreement amongst the operators;
2. Whether the price data suggested any price parallelism, indicating uniformity; and

[19] cf *Shikha Roy* (n 1) 9 [20], [21].

3. Whether there is a common algorithm that facilitates collusive behaviour among airlines.

The DG, in his investigation report, noted that during the Jat Agitation, from 18 February to 23 February 2016, no violation of Section 3(3) read with Section 3(1) of the Act was discovered against SpiceJet, Air India, Go Air, and Indigo. Further, in the identified six sectors (Delhi and Amritsar, Amritsar and Delhi, Delhi and Jaipur, Jaipur and Delhi, Delhi and Chandigarh, and Chandigarh and Delhi), the DG discovered no consistency in total revenue, average ticket price, peak demand experienced by the airlines in different sectors, the deployment of scheduled, or additional flights, which could be indicative of some sort of agreement or arrangement among the airlines during the period of Jat Agitation.

The DG further discovered that the seats of particular Airbus planes are segmented into Buckets, which are alphabetical codes, indicating a specific price point. This price point is based on historical data and is subject to an increase or decrease depending on demand conditions, actual bookings, price of competitors, and seasonality, among others. Further, depending on the seats booked and the proximity to the departure date, these seats are moved from a Bucket indicating a lower bracket of fare to a higher bracket of fare.

Furthermore, the DG noted that during the period of Jat Agitation, other means of transportation, such as rail and road transportation, were not easily accessible, resulting in a strong demand for air tickets. Moreover, the investigation examined the ticket pricing for different Buckets prior to 48 hours before the departure of a flight. It concluded that there was no price parallelism or identical pricing of tickets by the airlines for any of the aforementioned six sectors under examination.

In response to the issue of whether there is a common algorithm that facilitates collusive behaviour across airlines, the DG first examined the software used by different airlines and it noted that Air India employed the PROS software, whereas Go Air employed the RADIX software. Further, while both SpiceJet and Indigo used Navitaire, the versions used by them were different. Second, on a closer examination of the algorithm deployed, it observed that the algorithm of one airline differs from the algorithm of another airline. This is because the inputs given to software companies about the historical behaviour of flights differ from one airline to another. As a result, a wide range of custom-made algorithms are created, each suited to the particular needs of a certain airline. Furthermore, the route analysts of the various airlines in question use their discretion to make the final decision on inventory allocation to distribute the

inventory for different price Buckets on the basis of historical data and market conditions prevailing at that time.

D. JUDGMENT BY CCI

Taking into consideration the DG's report, the CCI came to the following findings regarding the issues mentioned previously:

Existence of an 'agreement': The CCI stated that the presence of an 'agreement' is the *sine qua non* to determine whether the agreement is anti-competitive or not in accordance with the framework of Section 3 of the Act.[20]

The formation of an 'agreement' needs a verbal or implicit agreement between the parties from which a concert may be deduced.[21] This may include, for example, the sharing of information between competitors in the form of communications (such as e-mails) or any other kind of contact, whether explicit or tacit, oral, or written, formal, or informal, including via parallel conduct that cannot be explained otherwise, and so on.[22]

In the present instance, no such evidence or e-mail was found that might have shown any exchange of information demonstrating any kind of conspiracy among the airlines either during or after the time of Jat Agitation, as could have been expected. Additionally, according to the CCI, there was no evidence of price parallelism or identical pricing of tickets by the airlines in any of the six sectors that were examined.

Usage of common algorithms: Regarding the use of common algorithms in the booking of airline tickets, the CCI stated that according to the findings of the DG's investigation, the algorithms used by the airlines are distinct from one another because the inputs for the algorithms are provided by the airlines themselves, to the software developers, regarding the historical behaviour of flights, which varies across airlines. This results in a variety of different types of custom-made algorithms that are tailored to the specific requirements of a particular airline. Furthermore, the respective route analysts of the various airlines involved in the transaction make the final decision on inventory allocation.

In this instance, the CCI, finding that there was no evidence on record to prove collusion among the airlines during the time of Jat Agitation, which was from 18 February to 23 February 2016, saw no cause to disagree with the conclusions recorded by the DG and decided to close the case.

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20 ibid [26].
21 The Competition Act, 2002, No. 12, Acts of Parliament, 2002 s 2(b).
22 cf *Shikha Roy* (n 1) 12 [27].

III. ANALYTICAL FRAMEWORK FOR VIRTUAL COMPETITION

Ezrachi and Stucke's book *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* ('Virtual Competition') provides one of the most comprehensive pieces of literature on algorithms, collusion, and their impact on competition regulation. The publication of this book in 2016 has been regarded as a pivotal moment in the debate on cartels,[23] which put collusion effectuated through algorithms in the spotlight. In fact, Professor Thibault Schrepel notes that the number of academic articles published each year discussing algorithmic collusion has risen from a mere 35 in 2016 to 187 in 2019. [24] The book assumes significance in the light of this article because it identifies four scenarios that may be present in Indian digital markets.[25]

According to this book, pricing algorithms may lead to collusion in the following manner:[26]

1. *Messenger scenario*: In this, the humans come into an agreement and leave it to the algorithms to monitor and enforce the illegal agreement;
2. '*Hub and Spoke' cartel*: In which different downstream competitors outsource their algorithms from an upstream central agency. This central agency acts as a hub, while the relationship between an individual downstream firm with an upstream algorithm provider is vertical and the overall effect of such an arrangement is akin to the classic hub and spoke cartel, which leads to the alignment of prices by such arrangement;
3. *Predictable Agent*: In which each firm uses an algorithm that monitors the actions of other competitors and then adjusts its prices accordingly. This results in a

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[23] Thibault Schrepel, 'The Fundamental Unimportance of Algorithmic Collusion for Antitrust Law' (*Harvard Journal of Law & Technology*, 7 February 2020) <https://jolt.law.harvard.edu/digest/the-fundamental-unimportance-of-algorithmic-collusion-for-antitrust-law> accessed 13 October 2021.

[24] Thibault Schrepel, 'Number of Academic Articles Discussing "Algorithmic Collusion"' (*Twitter*, 9 February 2022) <https://twitter.com/LeConcurrential/status/1491330447271350272> accessed 16 February 2022.

[25] Ministry of Corporate Affairs, Government of India, 'Report of Competition Law Review Committee' (2019) 152 <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf> accessed 13 October 2021. In this report, the Committee had examined the existing framework under Section 3 of the Indian Competition Act, 2002 to conclude that it is sufficient to cover 'collusion scenarios'.

[26] cf Ezrachi and Stucke (n 2) 35-71. See also Ariel Ezrachi and Maurice E Stucke, 'Artificial Intelligence & Collusion: When Computers Inhibit Competition' [2017] Illinois Law Review <https://www.illinoislawreview.org/print/vol-2017-no-5/artificial-intelligence-collusion/> accessed 13 October 2021.

situation where algorithms enable competitors to collect signals that may lead to a coordinated result; and

4. *Artificial intelligence or Digital Eye*: In which pricing algorithms are evolved to the point where they can learn to collude on their own, without any need for human intervention.

Thus, what follows from examining the aforementioned scenarios is that algorithms increase the likelihood of sustained collusion while leaving less evidence for a competition regulator to rely upon while investigating an offence of collusion.

There has been a debate on whether and to what extent algorithms may harm the competitive functioning of markets, particularly by enabling collusive behaviours. According to Professor Michal Gal,[27] while algorithms do not change the nature of illegal agreements, they may change the nature of the interaction, which includes: (a) reaching an agreement on trade conditions that will be profitable for all parties to the agreement; (b) detecting deviations from the supra-competitive equilibrium; (c) and creating a credible threat of retaliation to discourage deviations. Given that our understanding of how algorithms interact in the digital world is still rudimentary, the rules governing algorithms should be redesigned, taking into account these new-age practices. Professor Thibault Schrepel, however, advocates that algorithmic collusion is an 'old wine in a new bottle', and the fundamental principles of competition law will eventually evolve to deal with it.[28]

Adding to this debate, the authors submit that the analysis in *Shikha Roy* leads to the inference that the CCI has developed a framework that is sufficient to deal with three out of four situations identified by Ezrachi and Stucke, referred to above which will be demonstrated in the following section.

IV. COMMISSION'S APPROACH TO ALGORITHMIC COLLUSION

In this section of the article, the authors analyse the Commission's decision. This section is divided into three parts: Denial, Acknowledgement and Practical Change in Approach. These three parts signify the Commission's attitude towards cases concerning algorithmic collusion.

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[27] Thibault Schrepel and Michal S Gal, 'Algorithms & Competition Law: Interview of Michal Gal by Thibault Schrepel' [2020] e-Competitions Bulletin <https://www.concurrences.com/en/bulletin/special-issues/algorithms-antitrust-en/general-antitrust-3924/algorithms-competition-law-interview-of-michal-gal-by-thibault-schrepel> accessed 13 October 2021.

[28] cf Schrepel (n 23).

A. DENIAL PHASE

The first case concerning algorithmic collusion was *Samir Agrawal v ANI Technologies and Others*[29] ('*Samir Agrawal*'), in which the CCI was asked to rule on whether the use of algorithm by Uber and Ola (another taxi aggregator in India) was in the nature of a hub and spoke cartel, whereby, it was alleged that the drivers ('spokes') colluded through the use of the taxi aggregators' apps ('hubs').[30] Further, it was alleged that the drivers were required to accede to the taxi aggregators' prices, set through an algorithm, which took away their ability to compete on prices.[31] The CCI had dismissed this case on the ground that merely acceding to an algorithmically determined price will not constitute collusion, and for a contention of collusion to succeed, there needs to be evidence of an agreement to do so between the drivers *inter se,* or amongst the drivers on the one hand and the platforms on the other.

This decision was subject to criticism. First, the Commission's understanding of algorithmic collusion was questioned.[32] It was argued that the Commission should have ordered an investigation into the matter as the definition of agreement is broad enough to cover within its ambit, a hub and spoke cartel enabled by an algorithm. Second, the case was a missed opportunity for the Commission to discuss whether adhering to a common scheme effectuated by algorithms could constitute an 'action in concert'.[33] Third, the CCI did not apply the existing literature on algorithmic collusion.[34] At the first instance, it noted that the prices are determined by the algorithms on the basis of 'big data', which takes into account various variables, to rule out any contention of collusion on the basis of pricing.

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29 *Samir Agrawal v ANI Technologies Pvt. Ltd.*, CCI Case No. 37 of 2018 [affirmed on appeal, *Samir Agrawal v CCI & Others*, 29 May 2020 (2020 SCC OnLine NCLAT 81); *Samir Agrawal v CCI & Others*, 15 December 2020 ((2021) 3 SCC 136)]; Man Mohan Sharma, 'The Indian Competition Authority Dismisses Cartel Allegations against Taxi App Drivers on the Basis That They Were Following the Algorithm Pricing and Not Actively Colluding to Fix Prices (Samir Agrawal / ANI Technologies / Uber India)' [2018] e-Competitions Bulletin <https://www.concurrences.com/en/bulletin/news-issues/november-2018-en/the-indian-competition-authority-dismisses-cartel-allegations-against-taxi-app> accessed 13 October 2021.

30 ibid.

31 *Samir Agrawal v ANI Technologies* (n 29) 3 [3].

32 Basu Chandola, 'Algorithms and Collusion: Has the CCI Got It Wrong?' (*Kluwer Competition Law Blog*, 28 February 2019) <http://competitionlawblog.kluwercompetitionlaw.com/2019/02/28/algorithms-and-collusion-has-the-cci-got-it-wrong/> accessed 13 October 2021.

33 Hubert Bekisz, 'When Does Algorithmic Pricing Result in an Intra-Platform Anticompetitive Agreement or Concerted Practice? The Case of Uber in the Framework of EU Competition Law' (2021) 12 Journal of European Competition Law & Practice 217.

34 Shilpi Bhattacharya and Pankhudi Khandelwal, 'Indian Competition Law in the Digital Markets: An Overview of National Case Law' [2021] e-Competitions Bulletin 6 <https://www.concurrences.com/en/bulletin/special-issues/indian-competition-law-in-the-digital-markets-en/india-and-competition-law-in-digital-markets-an-overview-of-national-case-law-en?id_rubrique=3797> accessed 10 October 2021.

The key result of the decision was a narrow understanding of CCI vis-a-vis an allegation of algorithmic collusion. In the authors' view, this decision can be characterised as a 'denial' of the existence of a new age antitrust offence.

B. ACKNOWLEDGEMENT BY CCI

As noted above in Section IV.A, *Samir Agrawal* was a missed opportunity by the Commission to acknowledge that collusion through algorithms is possible. In this section, we discuss the change in the Commission's approach, in which there is at least a theoretical acknowledgement of the issue.

After *Samir Agrawal*, the Report of the Competition Law Review Committee ('CLRC Report')[35] discussed collusion through algorithms in great detail and concluded that (a) the current framework of law is sufficient to deal with a case involving algorithms;[36] (b) inclusion of hub and spoke cartels in the definition of agreements will further strengthen the regulatory framework;[37] and (c) for cases concerning autonomous algorithmic collusion, legislative intervention will be premature, especially, in the absence of evidence of cases concerning such collusion.[38] Further, the report also suggested that in line with mature jurisdictions, the Commission should monitor the use of machine learning and artificial intelligence to ensure that it does not lead to any antitrust harms.[39]

Second, subsequent to the CLRC Report, the CCI conducted a Market Study on E-Commerce with the objective of understanding the functioning of the e-commerce market in India.[40] The study aimed at identifying hindrances on competition, namely, but not limited to, deep discounts, price parity restrictions, unfair contract terms, platform neutrality, and so on. Although the study was not intended to be used as a legal document[41] (that is, to be used in an enforcement proceeding), it was conducted to better frame and implement the competition policy in the future.

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35 cf CLRC Report (n 25) 154 [2.7].

36 ibid 154 [2.7].

37 Ibid. The proposed amendments to the Act [Competition (Amendment) Bill, 2020] clarify the inclusion of 'hub and spoke' cartels in Section 3(3) and to make Section 3(4) inclusive that will further strengthen the framework by expanding the scope of Section 3.

38 ibid 154 [2.7].

39 ibid 153 [2.5].

40 Competition Commission of India, 'Market Study on E-Commerce' (2020) <https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf> accessed 13 October 2021.

41 ibid 1.

This study is pertinent for the present discussion because the CCI acknowledged the use of industry-wide algorithms for making pricing decisions[42] and the use of price comparison websites by the competitors to monitor the prices of each other.[43]

In both the CLRC Report and the CCI Market Study on E-commerce, there was deliberation on algorithms and their potential impact on competition law. Therefore, one can safely conclude that the Commission has passed the denial phase, albeit such acknowledgement is only theoretical.

C. PRACTICAL CHANGE IN THE APPROACH OF THE COMMISSION

The first case that marked a practical change in the approach of the Commission is *Re Alleged Cartelization*.[44] In this case, the Commission has developed a two-step test for dealing with cases of algorithmic collusion. This two-step test is further used in *Shikha Roy v Jet Airways*, which suggests the standardisation and application of this test. In this section, we will try to understand this two-step test by analysing each step.

(i) Step 1: Tackling Collusion without Algorithms

The report of Organisation for Economic Co-operation and Development on Collusion suggests that for collusive practises to be sustainable over time, three conditions are necessary, these are: (a) an agreement between the competitors, whether express or tacit, to act on a common policy; (b) transparency of market to monitor the conduct of the parties or competitors; and (c) enforcement of common policy through the punishment of deviations (collectively 'OECD Conditions').[45]

Further, cases from the European Union[46] demonstrate that in addition to these OECD Conditions, oligopolistic market structures, inelastic demand, and homogeneous products often lead to a situation of price parallelism, where supra-competitive prices may be the natural outcome. Even in such cases, the courts have developed a test of 'plus factors' whereby the

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42 ibid 15 [44].

43 ibid 8 [22], [23].

44 cf *Re: Alleged Cartelization* (n 4).

45 OECD, 'Algorithms and Collusion: Competition Policy in the Digital Age' (2017) <https://www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm> accessed 13 October 2021.

46 Case T-342/99 *Airtours plc v Commission,* [2002] ECR II-2585; Case T-102/96 *Gencor Ltd v Commission,* [1999] ECR II-753; for a comparative study of India and EU on situations leading to concerted action or price parallelism, see also Prakhar Bhatnagar and Afif Khan, 'The Curious Absence of Collective Dominance in the Indian Competition Law Regime — Is an Amendment to Section 4 the Only Answer?' (2021) 42 European Competition Law Review 206, 207.

conduct of a firm is judged on the basis of whether price parallelism is a result of market structure or a result of 'plus factors' like communications, links, or information exchanges.[47]

Therefore, in any traditional[48] collusion scenario, the Commission's analysis is focussed on communication evidence and economic evidence to check the presence of any one or all the factors mentioned above.

In the case of *Re Alleged Cartelization*, the CCI, firstly, looked for any "humans' illegal agreement", that is, communication or coordination among the airlines. Secondly, in the absence of any communication evidence, the Commission examined the market through a traditional lens and analysed the market share, cost structure, price data, and determination of such price data of the five airlines during the reference period to detect any signs of stability or parallelism. These measures would have been adequate if looked at from a traditional lens.

(ii) Step 2: Tackling Collusion through Algorithms

As noted in Section III, in cases involving algorithms, four scenarios have been identified by Ezrachi and Stucke in *Virtual Competition*.[49] These four scenarios enable reaching the OECD Conditions present in a traditional collusion scenario with ease.[50] This is because first, coordination can be done with the mere prediction of the other, without any need to enter into any agreement to do so. Second, the presence of digital price data of competitors, cheaper and easier data storage capabilities (for example, cloud), cheaper and faster internet connectivity, and advancement in the speed and volume of processing data, leads to market transparency previously unimaginable in traditional markets. Third, punishment of deviations can be inbuilt in the algorithms themselves, making punishment automatic and proportionate enough to discourage deviations.

In *Re Alleged Cartelization*, as step two, the CCI examined the role of algorithms by focussing on three factors. First, the use of algorithms by a particular airline in determining the prices of tickets sold. Second, the use of same or similar software in price setting and third, in case a common software is being used, the extent of human intervention in deciding final prices.

The aforementioned steps are crucial in analysing the presence of four situations identified by Ezrachi and Stucke as discussed above in Section III. This is because, for the first

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47 ibid.
48 The authors use the word 'traditional' to refer to cartelisation scenarios where algorithms were not present.
49 cf Ezrachi and Stucke (n 2) 35–71.
50 cf Schrepel and Gal (n 27).

situation (Messenger Scenario), human interaction is a prerequisite for an agreement through an algorithm. Analysis of communication evidence to gauge any presence of an agreement, coupled with the identification of the extent of human intervention in providing inputs to a software algorithm in step one, provides a conclusive answer to the presence of the first situation.

For the second situation (Hub and Spoke) where industry-wide use of a common software could result in a hub and spoke scenario, the Commission looked at the role of common software. It concluded that in the present case their role was limited to being a facilitator to the revenue management team, rather than a decision-maker. Therefore, the possibility of a hub and spoke situation could be ruled out.

In the third situation (Predictable Agent), a vital condition required was transparency or availability of data, and on the basis of such data, automatic prediction by algorithms. The CCI examined the revenue management team's role and the character of the Bucket system. It found that (a) the data relating to price was only available to the airlines internally; and (b) the respective route analysts, part of the revenue management team, were responsible for deciding the final prices. Therefore, because of the role of manual intervention, and the non-availability of price-sensitive data, both of which were essential for effectuating the situation of Predictable Agent, the possibility of the third situation could also be ruled out.

The fourth situation (Digital Eye), however, does not find a mention in the Commission's analysis. There might be three possible reasons for this omission. First, as already noted above, manual intervention played a key role. Second, the finding on the similarity of price data was not substantial enough in number to point to any parallelism in pricing. Third, the CLRC Report noted[51] that there have not been any cases globally of the fourth type, and therefore, the Commission might have thought it prudent to not investigate this category.

D. STANDARDISATION AND APPLICATION: *SHIKHA ROY V JET AIRWAYS*

In *Shikha Roy*, the Commission applied the *Re Alleged Cartelization* test. In step one, the CCI examined communication evidence such as e-mails to rule out any possibility of collusion through an agreement. It also examined aviation data of as many as 338 flights to check any instance of price parallelism. Further, it analysed economic evidence such as revenue, pricing, peak demand conditions, classification of fare Buckets, seating capacity of aircrafts and finally,

[51] cf CLRC Report (n 25) 153 [2.5].

the opening of Buckets at different times.[52] In the second step, the Commission looked at the role of algorithms, and in particular, the presence of common algorithms and software. It also analysed the data supplied by various airlines to the software developers to conclude that because of different inputs, the resulting algorithms also differed from each other.[53]

At this juncture, however, it must be noted that the test in *Shikha Roy* differs from the test in *Re Alleged Cartelization* on one principal ground—awareness. Unlike the *Re Alleged Cartelization* decision, in which the Commission looked at the algorithms' role in facilitating collusion after the submission of DG's first report,[54] in *Shikha Roy*, the CCI ordered the DG to look at the role of algorithms during the investigation itself, which leads one to conclude that the Commission was applying its learnings from the previous decision. It also points towards the standardisation of the two-step test that is likely to guide the Commission's future decisions.

V. CONCLUSION

It would not be an exaggeration to say that the use of algorithms is prevalent across industries. This marks a challenging era for competition regulators where cartel activities are conducted using sophisticated technologies, including algorithms, rather than in *smoke-filled rooms*. Ezrachi and Stucke have warned against the dangers of such unchecked algorithmic collusion, by proposing four situations that might circumvent existing standards of competition law. Considering the dangers posed by algorithms, it becomes imperative that a robust mechanism is developed to counter and check situations where cartel activity is effectuated through algorithms.

In this article, the authors note that the Indian Competition Regulator's approach prior to *Shikha Roy* can be described in one word—denial. However, in *Shikha Roy*, the Commission has not just acknowledged the possibility of algorithmic collusion, but beyond that, has inadvertently developed a two-step test. This two-step test, as identified by the authors, when scrutinised against the theoretical framework of Ezrachi and Stucke, leads to the conclusion that it is sufficient to deal with three out of four situations as discussed in Section IV of this article.

Given the improvement in the Commission's approach from *Samir Agrawal* to *Shikha Roy*, the authors are optimistic that this test will be further standardised and improved upon to guide future enforcement actions.

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52 cf *Re Alleged Cartelization* (n 4) 8 [27]–[30].
53 ibid 9 [31], [32].
54 ibid 8 [28].