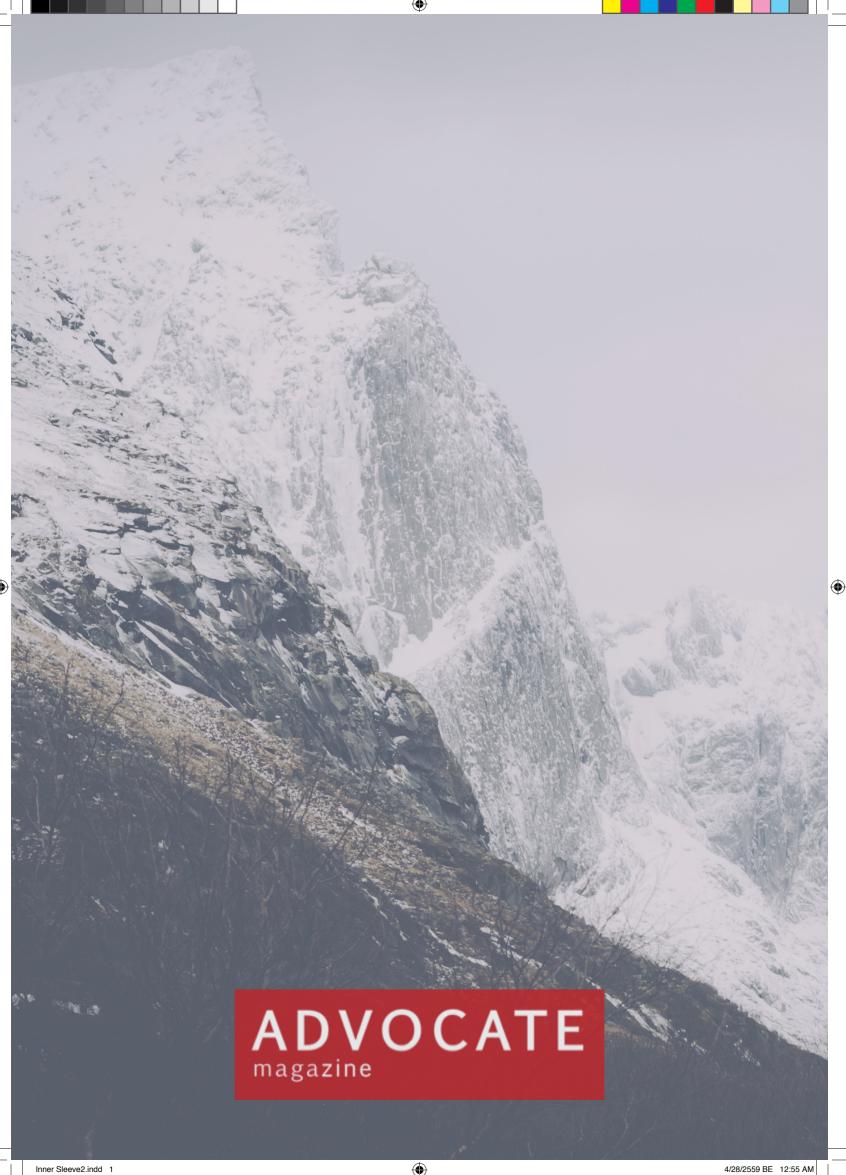
## ADVOCATE

SPRING/SUMMER EDITION 2016

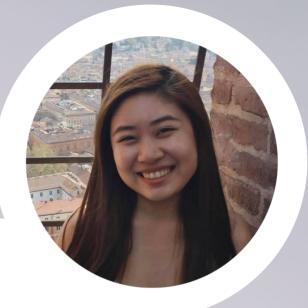


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Dear Advocate readers,

Welcome to the Spring/Summer 2016 edition of Advocate Magazine!

Our theme for this edition is "Changing Landscapes", which aptly describes the nature of the world at the moment: the United Kingdom debates the Brexit, while the United States enters into the key stages of its Presidential Elections, among other notable events. Key changes in our socio-economic and political landscape, both internationally and domestic, are underway and it is important as law students to be alert to the implications. This issue will also bring to the limelight some of the important, but under-reported, current affairs that are nonetheless influential. I thank all the writers for their contributions to this edition, who have undoubtedly spent a lot of time, effort and dedication on their articles.

Penning this foreword is a bittersweet moment for me as it is Advocate's last edition for the year and my very last one. My time as President has been eye-opening and instructive, and Advocate has given so much more than I could have contributed. I would first like to extend my thanks to the best Vice-Presidents one could have asked for, Lucy Hanson and Lucinda Chow, who have supported me with so much patience. Thank you also to the editorial team, helmed by Janelle Joseph, and the design team, headed by Jaisai Wongpitchet, for putting the magazine together, and last but not least, Advocate's dedicated treasurer, Mario Cogliati. As I retire, I wish to express my excitement for the team who will be taking over the reins, which will be led by Tan Ee-Hsien. Under her leadership, I have no doubt that Advocate will flourish.

I sincerely hope you've enjoyed our publications this year. Best of luck to all for the upcoming exams!

Yours sincerely, Trina Tan President







## CONTENT

02 British Bill of Rights:

A good idea or a political proposition to appease the 'right'? By Daniel Allison

- 04 Parliament's Current Stance Makes My Blood Boil By Bethany Webb-Strong
- 06 Let Me Take A \$elfie

  By Ammar Thair
- 08 Should heterosexual couples be allowed civil partnerships?

  By Alice Gould
- 09 The Insanity Defence:
  Illogical or Just Plain Nutty?
  By Bethany Webb-Strong
- 11 Modifying the Ministerial Code By Rhiannon Jackson
- 12 The EU Mythbuster By Filip Sys
- 14 Immigration Detention Centres or Illegitimate Prisons?

  By Martha M Tengenesha
- 16 Life Changing Insights: The Human Library Initiative By Nikoletta Zinonos

A Peace Agreement that Actually Brings War?  $\frac{20}{\text{By Charlotte Ng}}$ 

China's Green Public Procurement Policy: 22

Effective implementation or unenforced guidelines?

By Lucinda Chow

Changing Landscapes 24
Keeping Up: The Evolution of the Hotel Industry
By Ern Ee Lim

Oscars, We Have a Problem! 26By Filip Sys

By Mandrit Kamolli

Frankenstein's Monster: The Rise of Donald Trump  $\frac{28}{\text{By Daniel Adejumo}}$ 

Is 'Soft Kitty' a Copycat? 32

Patel v Mirza in the Supreme Court: 30

Changing the Rationale For the Illegality Defence (again)?
By Claudia Barry

## British Bill of Rights:

A good idea or a political proposition to appease the 'right'?

BY DANIEL ALLISON



he Conservative Government has taken it upon itself to introduce a Bill of Rights and repeal the current Human Rights Act introduced by the Labour Government. The decision to UK has lost its parliamentary sovereignty and the European Court of Human Rights (ECHR) has developed a 'mission creep'. The ECHR has arguably expanded into areas that the Convention was not originally supposed to have competency legislating. Yet, the expansion can be

Since the ECHR was created in 1953 attitudes and policies have adapt to cope with modern issues. However, the British Bill of Rights may have been proposed due to the difference in political opinion between the parties. It remains to be seen whether the Conservative Party's long-standing ideological opposition to the Labour Party is a good enough reason to repeal the Human Rights Act.

that prisoners should not vote as they have committed a crime, thus changing their normative position in society. The enactment of the British Bill of Rights may be politically motivated; it would support public opinion and enhance the Conservatives' political position.

it gives protection to everyone's rights including the minority on the basis that they are human beings and deserve respect. If you weaken one fundamental right then it becomes a very slippery slope as to which rights should be limited and removed.

The Conservatives also suggest that a key aim of the Bill is to 'limit the use of human rights laws to the most serious of cases' and to 'limit the reach of human rights cases to the UK'. Limiting the use of the HRA to the most serious cases erodes the fundamental nature of human rights: namely that they should apply equally toleveryone at all times. More importantly, who determines what a serious case of human rights is? Surely that statement alone is a contradiction, any breach of human rights constitutes a serious issue? We cannot allow human rights to be limited. If they are limited to within the UK they no longer become human rights but UK rights, dictated and controlled ome human rights but UK rights, dictated and controlled ernment. A hidden agenda may be A hidden agenda may be introduced to ignore

human rights breaches. If we allow them to extend their powers in this manner then we are allowing them to create a draconian state

The Conservatives claim the British court is being undermined by the Court' (S.2 HRA) affecting the sovereignty and democratic accountability of the UK Parliament. S.2 is a provision that requires the judiciary take into consideration Strasbourg judgement; the courts are entitled to go against it if they wish.<sup>5</sup> In practice if they go against a Strasbourg decision then it will be challenged before the ECHR, where the UK will have the opportunity to present its case before the ECHR passes judgment.

the UK courts must interpret legislation as closely as they can within convention rights; some argue this interpretation distorts legislation and undermines sovereignty. S.3 acts as another check and balance on the powers of the state and ensures that the Government does not introduce legislation contrary to human rights. The legislation is in place to protect human rights not undermine governmental powers and we need to think closely which ought to take precedent. S.3 also highlights the issues raised surrounding the separation of powers. More importantly, if the interpretation of UK legislation through S.3 HRA can be misinterpreted this would be due to poor drafting by the legislator, which effectively points to the flaws in the

The separation of powers issue is further highlighted by whom the judiciary would follow if the HRA were repealed as this would also sever the link to the ECHR, which would, in turn, put pressure on the UK-EU relationship. This has political and topical significance due to the upcoming EU referendum. It could be argued that the EU referendum is effectively creating a smoke screen for the transposition of the British Bill of Rights. The public are so focused on the EU referendum vote that they are not paying attention to the ramifications that a British Bill of Rights could have. Even though the Conservative Party say they are committed to staying in the EU this 'backdoor' exit would appease the right who want to leave the EU and promote nationalistic ideas.

Thus, the Conservatives have proposed this Bill without considering its full effect on the British public. It appears that the government are attempting to appease the nationalists who believe that the UK should have their own Bill of Rights. The Bill would be detrimental to the protection of human rights, paving the way for an increased risk of abuse rather than achieving the aim of protecting those rights. Our rights would be better protected if the law was let be.

oogle Spain v AEPD and Mario Costeja González [2014] C-131/12

of the decision of the court in other than the court in of the House of Lords Constitu

► hanging the law on the restrictions upon men who have sex with men (MSM) donating blood would appear to be harder than getting blood out of stone.

Physician: Thank you so much for coming today to donate blood. Is it okay if I ask you a few questions?

Patient: Of course. I feel privileged to be able to help.
Physician: Yes, stocks are low currently and we really are anxious for donations. Let's get started. Have you travelled recently? Have you had any vaccinations?

Patient: No

Physician: Lovely. Have you had any piercings or tattoos on the last 6 months?

Patient: No

Physician: Great, oh and before we get started, can you tell me if you've had sex with a man in the last 12 months?

Patient: Well, yes, with my boyfriend, but we always use protection. Physician: Sorry, the exit is on the left.

The UK currently enforces a twelve month deferral period for men who have sex with men (MSM). Scientists previously believed it could take this period for individuals to test positive for HIV AIDS and the Hepatitis B virus. However, the p24 antigen and Nucleic acid methods have been proven to be more effective and only take around twelve days.

This new information brings to light significant questions regarding the cost-effectiveness of decisions and organisation of blood banks. With tests that guarantee an accurate result within days, the question remains as to why we are implementing a deferral period of twelve months.

In summary, there are two categorical injustices created by the ban. The law limits an individual's autonomy by restricting him from donating blood, reinforcing harmful stereotypes about gay and bisexual men. Supplies are so desperately needed in hospitals, and yet, the ban's discriminative nature leads to hospitals turning away eligible, healthy donors.

Patient: But I'm a rare blood type and you need donations. I'm AB negative.

Physician: The law is the law.

The discriminatory nature of this system is exposed by a simple example. A heterosexual man practicing unsafe sex can donate blood whilst a homosexual man in a monogamous relationship practicing safe sex cannot. It appears that the rule is not based on proportionate risk of contaminated blood but instead on attitudes entrenched due to the HIV scare in the 1980s. entrenched due to the HIV scare in the

During the 1980s, there was an epidemic fear that HIV could only be transmitted through homosexual sexual acts of the 1980s, homosexuals have been unable to donate United Kingdom due to concerns regarding contamination of th

blood supply with HIV and the Hepatitis B virus. The law was framed to reflect such concerns that have been recently proved unfounded by scientific research. While it is true that MSM are in a higher risk group, it remains illogical to ban the entire group from donating irrespective of whether they practice safe sex.

Apart from being morally abhorrent, the law is arguably a violation of rights under the Equality Act 2010. Health providers are bound by the Act to avoid treating any individual differently on the basis of sexual orientation. Clearly the rules that dictate MSM cannot donate blood if they have had sex in the last twelve months violate these provisions. Furthermore, it is arguable that one could oppose the law on the basis that patients seeking blood donations have a right to treatment. However, this argument fails on the front that medical discourse refers primarily to duties of physicians. In fact, there is not a prima facie right to treatment in any of the human rights treaties, which makes an argument on this basis unlikely to succeed.

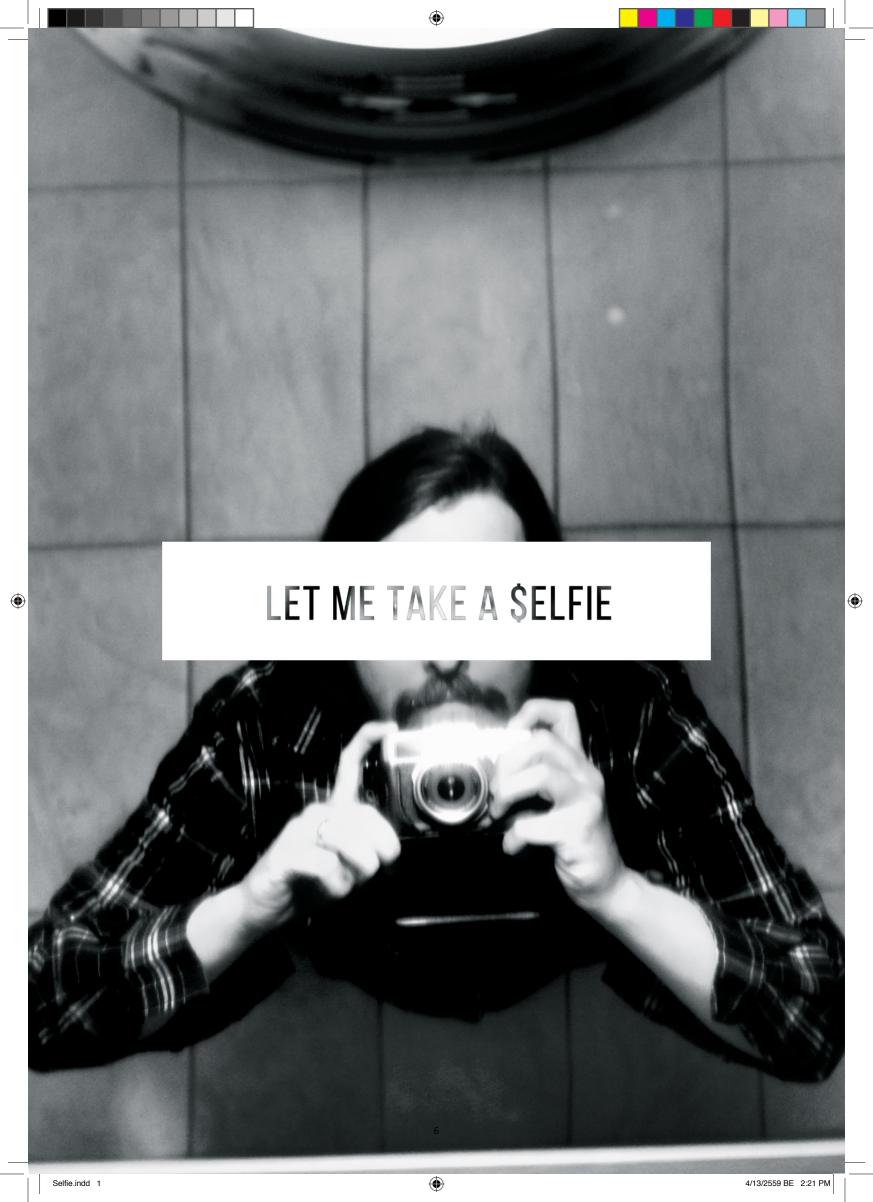
Despite the issues with such legal reasoning, one cannot ignore the scientific evidence that proves the inaccuracies that the ban is founded upon. JP Brooks asserts, 'rights of blood recipients should supersede any asserted rights of blood donors'. Clearly, the primary concern regarding using MSM blood is the higher risk of infected blood samples. However, is the risk higher than the benefit of saving

Other nations have been quicker to expel such injustice. Last September, Argentina lifted the deferral period for homosexuals with the full support of Health Minister Daniel Gollan, who asserted the decision was 'scientifically and technically accurate'. Furthermore, Spain and Italy have systems that screen on the basis of risky sexual activity. It can be contended that discrimination is not established globally and these recent changes mark the path for a legal shift in the UK.

 $\bigoplus$ 

There have been some who have spoken out against the ban. #PutTheRedBack is a campaign which uses the image of the LGBT flag with the colour red removed, the LGBT community wish to return the red to the flag when MSM are able to donate blood. Voice Your Rights is a student-led organization that created the 'Bloody Homophobia campaign, aiming to gain government attention to remedy the current discrimination. Parliament has agreed to consider the issue and now, we await their decision on the matter.







Have you ever wondered if you could purchase an item by taking a selfie? No? Well, me neither, but Amazon has. Reportedly, Amazon has recently filed a patent for the technology to do just that. What's more surprising is that they're not the first company to consider doing this, with news of MasterCard attempting something similar as far back as July 2015. Perhaps unexpectedly, this futuristic yet far-fetched idea may actually become a reality. Now I'm going to let you in on a secret; I can hear your thoughts, all of them, and right now they all centre on one word: 'why'?

In a world where consumer payment is being streamlined as much as possible, with the phasing out of cheques, the advent of Chip and PIN, and the development of Contactless, it's clear that organisations are fixated on making it as easy as possible for us to part with our money. Perhaps it should not be surprising then that in the age of the selfie (I'm sorry for having to use that phrase), Amazon and others are keen to exploit this trending phenomenon and modernise as much as possible. Amazon itself is a pioneer when it comes to keeping up with innovations and social trends, having utilised the technology of drones for a distinctly commercial purpose, in a pilot program to use drones to deliver packages in certain areas of the United States and London.

However, with this focus on swift technological advancement, one must ask, have we entered into a climate of easy spending at the expense of personal security? After all, an inherent danger of the financial system, and perhaps a root cause of each economic crisis has been the large-scale easing of regulations. Yet, this lack a daisical approach to regulation is now considered synonymous with a more dynamic and fast-paced global economy. Whilst it is clear that both the easing of regulations and the increase in speed has the potential to cause both legal and socio-economic problems, could we say the same here?

## **Legal ramifications of Contactless**

Back in 2015, the consumer group Which? warned that personal data from contactless cards was potentially an easy target for criminals to obtain. The clear implication was that if someone takes your card, they would have the ability to make several purchases at face value if they were under the maximum limit. Further, they introduced the possibility of a criminal using a card scanner to gain key details from a contactless card, just by brushing past it.

However, soon after these warnings The UK Cards Association confirmed that actual related fraud was 'extremely low', amounting to under 'one penny for every £100 spent'. They also stated that the rate of fraud for contactless payments is 'far lower than overall card fraud', and that most retailers require additional data including 'the card's security code, along with the cardholder's address', before they allow an online purchase to go through. Thus, both its presence and viability was accepted.

It is perhaps strange that the act of 'tapping away money' has become so carefree and socially ingrained. Soon after the use of these cards increased, so did the maximum spending limit from an initial £20 to £30. I was even left embarrassed recently when I tried to tap my card on the reader to buy a textbook. Horrified to see it was actually £30.99, I stopped tapping, and found myself apologising for even trying. Tap away £30? Of course, that's fine... but £30.99, well that's just taking liberties.

There is clearly a stigma attached to the advancement of technology and indeed the failure to do so. Whenever I hover my card over

a reader, only to be told by the cashier, 'Oh... we don't have contactless, our system is not quite as advanced yet', I always find myself uncomfortably smiling, both at my perceived 'rejection of the old ways' and the charming words of the cashier. However, the very fact that as a consumer I assumed it would have been implemented by now, surely illustrates societal expectation, that one should have sufficiently modernised one's technology where the facilities do exist.

Crucially, it is perhaps this fear of 'falling behind' that both pressures and motivates companies to modernise, whether it be with regard to their payment technology or use of technology on a wider scale. For instance, Amazon's drone programme, 'Prime Air', is described as a 'future delivery system', with 'great potential to enhance the services [they] already provide...' through hoping to deliver select packages in thirty minutes or less. Their greatest problem is that the commercial use of UAV technology is still illegal in the US. On Amazon's website, they admit that putting Prime Air into service 'will take some time' and will depend upon 'the regulatory support [needed] to realise [their] vision'. Congressional regulations in the US forced the company to begin testing at a secret Canadian site, 2,000 feet from the US border, and the plans also face public concerns over safety, package security and privacy (particularly given the potential for data collection via the use of drones).

Technology therefore is something that takes time, legal, and social consideration before it can truly be implemented. An article written for E&T (The Engineering & Technology Magazine) in July 2013 posed a question of whether contactless payments would ever gain full acceptance. Although the article referenced a failed prediction of the UK becoming a 'cashless society by 2012' (from the former CEO of Visa Europe), it described how the adoption of contactless payment was slowly evolving. Nonetheless, today in 2016 a sea change has undoubtedly occurred and with Visa's contactless payments soaring by at least 250% in the UK, we have arguably becomea 'cash-second' nation. The landscape of consumer payment has clearly changed before and it will surely change again.

## Payment by Selfie: The future?

This brings us on to payment by selfie. Amazon already holds a separate patent for the ability to authenticate a user via photographic means. However, contrary to this patent, the recent application Amazon has just made relates specifically to payment transactions. While contactless payments and Chip and PIN have had the primary aim of making a transaction easier and faster, this feature is for something different: safety. Once you reach the checkout, you'll be asked to 'perform certain actions' ranging from smiling or blinking, to tilting one's head- a novel way to combat the hilarious image of an imposter, holding up your photograph to the camera. Furthermore, Amazon states that traditional passwords can be easily stolen, or indeed deciphered by a hacker, and thus such a unique method of authentication will offer a greater level of security for the customer.

Now, whether it would protect a person's safety is one thing, whether it would force you to look yourself in the face and blink while you spend a large sum of money online, is clearly another. What is also clear is that exciting times surely lie ahead. Just imagine; you're about to complete your online purchase when someone calls out your name asking for your help... Well, thanks to the good folks at Amazon, you could one day legitimately shout the words, 'Ok, but first, let me take a selfie.' Ah, technology!



7



As the world changes and develops, human rights have changed alongside it. A prominent example of this is the rights relating to LGBT persons. The European Court of Human Rights (ECtHR) ruled in 2002 that it is a breach of Articles 8 and 12 of the European Convention of Human Rights (ECHR) to not allow legal recognition of transgender persons. Arguably in response to this, 23 countries in the world have legalised same sex marriage – with polls showing rising support in further countries to do the same.

As support rises for LGBT persons to gain the same rights as heterosexual and cisgender persons, one couple are claiming that their rights are being infringed on the basis of their heterosexuality. Rebecca Steinfeld and Charles Keiden wanted a civil partnership to formalise their relationship. They strongly believe that marriage is a sexist and outmoded institution. However, they were not able to as under section 3(1)(a) of the Civil Partnership Act 2004 (CPA) two people are only eligible to register as civil partners if they are the same sex.

proportionally.  $^3$  In  $M v SSWP ^4$  it was held by the House of Lords that the unique feature of Article 8 is respect of a person's private life and there must be a breach of this respect to constitute a breach. Less serious interferences would not fall within this ambit.

On the present facts, there was no suggestion that not being able to enter into a civil partnership devalues the couples' relationship, or interferes with their relationship in anyway. They can also gain a formal recognition of their relationship another way - through marriage. The only thing that stops them getting legal recognition for their relationship is their belief that marriage is a sexist institution, something the MSSCA has not affected. There is no lack of respect for their private lives that, as an opposite sex couple, they cannot have another means of recognition of a formalised relationship. Therefore, the claim failed at the first step and a declaration of incompatibility was not given.

Whilst not considered a breach, there still seems to be a question surrounding the responsibility

It was the claimant's case that since the of the law in such cases. As previously mentioned, enactment of the Marriage (Same Sex and discussed in the case, the Government have acknowledged the issue of civil Couples) Act 2013 (MSSCA) that the CPA was no longer compatible with Article partnerships remaining in the law. 14 in conjunction with Article 8 of the As the MSSCA is such a young ECHR. They claimed they were piece of legislation, the being discriminated against 'wait-and-see' Government's on the basis of their sexuality approach does seem an and sought a declaration of appropriate response. incompatibility under s.4 of However, at the moment, the Human Rights Act 1998. even if the judiciary have decided it is not severe The case was novel as it enough to constitute a was not argued that the breach of the ECHR - it Act was in breach when cannot be denied that it was first enacted, only the law does discrimiafter a subsequent piece nate based on sexuality. legislation enhanced by Alice) Goulo Illustration by Adril/llick the rights of others was would therefore argue the Act considered to be that one of two routes a breach. If the case had that should be taken: partnerships been brought before the civil either MSSCA came into force the should be phased out (with claimant's case would conflict specific provisions for those with the case of Wilkinson v Kitzwho have already entered into civil partnerships and do not wish to inger<sup>2</sup> where a same-sex couple who married in Canada failed to have their convert this into a marriage) or marriage recognised as other than a civil civil partnership should be opened to all partnership when in the UK. irrespective of the sex of the parties.

When giving her judgment, Mrs Justice Andrews DBE made clear that this was not an issue the UK Government had been idle about – instead they had chosen to wait to discover how the MSSCA affects civil partnerships (albeit not giving a time limit for this). Government consultations on whether partnerships should be made available to opposite sex couples have been inconclusive. The Government held it was unnecessary to allow opposite-sex couples to attain a civil partnership, particularly as civil partnerships were created to extend rights to same-sex couples, not as an alternative to marriage.

In terms of the specific breaches, Mrs Justice Andrews did not dispute that discrimination based on sexual orientation fell within Article 14. To invoke Article 14 an applicant has to show that, if not a substantive breach of another Article, an interest that is central to the right has been infringed by discriminative treatment.

In terms of Article 8 the Judge needs to go through two steps to find whether there is a breach or not. The first step asks if there has been an interference with private or family life. If this test is passed, the next step asks whether the interference was justified When the CPA was released there were immediate calls for reform and as has been seen through the past years, the campaign to gain equal marriage for same-sex couples has been strong.<sup>5</sup> However, this is arguably more to do about giving all persons equal rights regardless of their sexuality, rather than a desire for the reinstatement of the institution of marriage itself.

It is easy to see why the claimants would want to engage in a civil partnership rather than a marriage. Marriage is a cultural institution still enshrined in sexism both in terms of tradition (a father 'giving away' his daughter) and legally (there only being room for the fathers' names on marriage certificates). Whilst Rebecca Steinfeld and Charles Keiden's inability to attain a civil partnership as opposed to marriage is not considered a breach of human rights, a country such as the UK (which prides itself on being modern and pro-LGBT) should not have family life legislation that excludes couples based on their sexuality.

1.Steinfeld and Another v Secretary of State for Education [2016] EWHC 128.
2.Wilkinson v Kitzinger and another (No 2) [2006] EWHC 2022 (Fam).
3.Article 8(2) European Convention on Human Rights.
4.M v Secretary of State for Work and Pensions [2006] UKHL 11.



## WHO DO YOU THANK SHOULD RELY ON THE INSANITY DEFENCE?



CIRCUMSTANCE A: X, A DIABETIC, DRIVES MER CAR AFTER MAVING CHECKED MER BLOOD SUGAR LEVELS BEFORE SME SETS OFF.

SHE EXPERIENCES A HYPOGLY CAEMIC "IN UNAWARENESS EPISODE (THROUGH NO FAULT OF HER OWN) DUE TO A DROP IN BLOOD SUGAR LEVELAND BEGINS TO DRIVE ERRATICALLY, RUNNINGOVER AND INSURINGA PEDESTRIAN.

CIRCUMSTANCE B:

Y, A SCHIZOPHRENIC

HAS NON-CONSESUAL

SEX WITH ZIN THE

IN DELUDED BELIEF

THAT SHE HAS

CONSENTED.

By Bethany Webb-Strong Illustrations by Jane Paludanus//flickr

Answer: Believe it or not, X, the diabetic, is forced to rely on the insanity defence whilst Y cannot do so. Are you confused?

Many commentators, including Baker, have criticized the current state of the criminal law. The insanity defence is a prime example of the messy, incoherence that often infiltrates our legal system. Latham LJ asserts, '[this] is a notorious area for debate and quite rightly so. There is room for reconsideration of rules and, in particular, rules which have their genesis in the early years of the 19th century' it is indisputable that the attempts to shoehorn modern problems to fit within the ambits of the ancient law have been met with wide criticism and dissatisfaction.

In order to rationalize the current law, it is important to understand what the purpose of the defence is. There are two obvious aims. It clearly operates to protect society from recurring violent behaviour. Furthermore, it appears to seek to prevent individuals who lack responsibility for their choices from being subject to criminal liability.

The insanity defence can be invoked when the three required elements are satisfied: (i) a defect of reason (ii) caused by a disease of the mind (iii) which means the D did not know what he was doing, or, if he did know, he did not know the act was wrong. Although the Mc'Naghten<sup>1</sup> rules above appear clear, interpretations of them have been contentious and have led to confusion and inconsistency.

The first issue arises with the second requirement: the disease of the mind. 'Disease of the mind' has been interpreted widely to include physical diseases that affect brain functions. Unfortunately, this has meant that conditions such as arteriosclerosis<sup>2</sup>, epilepsy<sup>3</sup>, sleepwalking<sup>4</sup> and even diabetes<sup>5</sup> have come under the label of the insanity defence. Genuinely mentally ill people may be disbarred from relying on the defence and yet those suffering with conditions such as diabetes may be caught under the defence.

Another problem with the defence is that it has been regarded irrelevant if the malfunctioning of the brain is temporary (Sullivan<sup>6</sup>). This problem appears to directly contradict the core aim of the criminal law, which is to protect society from the likelihood of recurring violent behaviour. In such a case, the defect of reason is purely temporary and unlikely to recur and yet the insanity defence leads to a special verdict of not guilty by THOUAN NUT. insanity. This verdict could lead to a hospital order. Again, there is a lack of logic to the rules that govern this defence.

It is unambiguous that diabetes is not regarded by any medical professional as a condition to be treated in terms of a disease of the mind. However, the law recognizes it as such because of its impact on the functioning of the brain. Due to the required existence of an internal trigger to satisfy the insanity defence, *Quick*<sup>7</sup> illustrates how an anomalous distinction forms between a diabetic suffering hypoglycaemic unawareness due to an overdose of insulin or a drop in blood sugar. Thus, a diabetic who has overdosed on insulin is seen to have been affected by an external trigger which means he can rely on the defence of non-insane automatism (which is a complete defence and leads to acquittal). On the other hand, a diabetic who suffers from a drop in blood sugar is seen by the law as under an internal influence and, therefore, must rely on the defence of insanity, which could lead to a hospital order.

Not only can this lead to inappropriate sentencing, it creates confusion around the operation of the law and exposes the outdated nature of the terms such as 'insanity'. In addition, the insanity defence has been argued to be a violation of convention rights. Where D is caught under insanity rules because of diabetes or another physical illness deemed to be a disease of the mind, her right to be detained does not satisfy the requirements for detention in relation to 'unsound mind'. This appears to be a breach of Art 5 of the European Convention on Human Rights.

As stated above, the law also operates to exclude individuals who ought to be able to rely on the defence. Windle<sup>8</sup> illustrates this, where the defendant, who was suffering from depression, killed his suicidal wife. As he was taken in for questioning, he stated he thought he would be imprisoned for this and it was taken that he knew at the time of committing the crime that he was acting contrary to law. Therefore, he was unable to rely upon the defence despite his inability to make meaningful choices due to a defect of reason.

Equally, in the case of B9 the defendant was declared to be unable to use the defence in the hypothetical situation that his insane delusion caused him to believe V was consenting. This set of facts appears to epitomize the entire purpose of the provisions: to prevent liability in cases where a defect of reason causes the defendant not to know that his act is wrong.

The way the insanity defence operates is senseless. It seems it could be acceptable that some physical disorders come within the defence if they affect deployment of reason. However, conditions like diabetes should not fall within the insanity defence due to the inappropriate labelling and sentencing results. Far more importantly, arbitrary distinctions should not be made to allow one diabetic to claim under one defence and another to fail to do so. The insanity defence is rarely invoked because other defences can afford better protection. Indeed, it has become almost otiose since the implementation of the diminished responsibility defence.

> Having identified the issues with the current state of the law, it remains to be assessed how the rules should be reformed. Child and Sullivan highlight the proposal to change the name and scope of the defence from the insanity defence to the 'recognized medical condition defence'10. It is considered this reform would have a positive impact on dispelling the stigma associated with using the defence. In addition, it is indisputable that the legal terms are archaic and should be updated to fit with the modern law. This proposal partially fulfils this desire. The defence should be exclusionary and it should be clear when and why it operates<sup>11</sup>.

> > 8.R v Windle [1952] 20B 826 9.B v R [2013] FWCA Crim 3 10.Child and Sullivan, "When Does the Insanity Defence
> > Apply? Some Recent Cases" [2014] Crim LR 787.
> >
> > 11.Rumbold and Wasik, 'Diabetic Drivers, Hypoglycaemic Unawareness and Automatism' [2011] Crim LR 863.

10

<sup>1.</sup>Daniel McNaghten (1843) 10 Cl & Fin 200 2.R v Kemp (1957) 1 QB 399 3.Bratty v A-G for NI [1963] AC 386 4.R v Burgess [1991] 2 WLR 1206 5.Bingham [1991] Crim Lr 433 6.R v Sullivan [1984] AC 156 7.R v Quick [1973] QB 910

## MODIFYING THE MINISTERIAL CODE

## BY RHIANNON JACKSON

n October 2015, the Cabinet Office issued the latest (and most controversial) Ministerial Code which, removing all references to international law, was drafted with a view to 'make Great Britain greater still'. The Code sets out the rules and standards expected of ministers in the discharge of their duty and the seemingly spontaneous removal sparked debate amongst many legal and political commentators.

## Since October 2015, 1.2 has read:

The Ministerial Code should be read against the background of the overarching duty on Ministers to comply with the law and to protect the integrity of public life.

## Formerly, paragraph 1.2 appeared as follows:

The Ministerial Code should be read alongside the Coalition agreement and the background of the overarching duty on Ministers to comply with the law including international law and treaty obligations and to uphold the administration of justice and to protect the integrity of public life.

91 words were dedicated to discussion of air miles but a total of zero to international law obligations.<sup>2</sup> In response, Sir Paul Jenkins, former head of the Government Legal Service, revealed the 'immense irritation' that the previous reference to international law had caused Prime Minister David Cameron.<sup>3</sup> Indeed, it is not difficult to infer that the revision was a 'disingenuous' act to minimise this irritation and reassert the principle of parliamentary sovereignty.4 Despite this, the Cabinet Office was quick to state that: 'The code is very clear on the duty that it places on ministers to comply with the law ('Comply with the law' includes international law).' However, Mark Elliot, Professor at the University of Cambridge, is not alone in the view that this declaration 'stretches credibility'. Indeed, Phillipe Sands QC described the move as 'another slap to the Magna Carta and the idea of the rule of law' by a government who seeks to 'free itself from the constraints of international law and the judgments of international courts'.

Others have sought to highlight the futility of the debate;

the current statement in 1.2 is perhaps a more accurate reflection of the domestic constitutional obligations on

ministers. It is clear that international law obligations

rest with the state, as opposed to individual ministers.

For instance, an individual bringing a claim before the

European Court may only do so against the UK as a

signatory to the European Convention.<sup>6</sup> The distinction

between the state and its ministers is exemplified in the

debate around Iraq: the answer to whether

the UK breached international law does

not necessarily answer the question of

whether any minister breached their

legal duty.<sup>7</sup> Consequently, the revision

is unlikely to effect any real change,

particularly from a legal examination of its implications. Nevertheless, the

in 1.2 can still be said to amount to an 'oversimplification'. While international law obligations rest with the State, as opposed to holding individual ministers accountable, diverging from such law would have implications for democracy and would seem to infringe the principle of the rule of law.

It is perhaps best to view the amendment simply as an act of political symbolism, especially with regard to the Conservative Party's 2014 Policy Document which sought to 'remove any ambiguity in the current... duty of ministers to follow the will of Parliament in the UK'.8 The Administrative Court in R (on the application of Gulf Centre for Human Rights) v Prime Minister9 refused permission for judicial review; the action having no realistic prospect of success. Judge Mitting asserted the wording change was 'plainly' lawful and did not, in reality, affect ministers' legal duty. Mitting's comments go some way to settling, or at least limiting to hypotheticals, the debate. As Professor Mark Elliot suggests, unless Parliament expressly legislates for a breach of international law then it would be reasonable to expect ministers to exercise compliance.<sup>10</sup> This suggests that the revision to 1.2 is a better reflection of the conflict surrounding the UK's position on the international stage rather than any change of constitutional significance, especially in light of the forthcoming referendum.

The probable reasoning behind the removal remains clear. From the perspective of Parliament or the Executive, it is not difficult to imagine a circumstance in which non-compliance with an international obligation would be easier or even advantageous. The issue of prisoners' voting rights, following the judgments of *Hirst v* UK<sup>11</sup> and Scoppola v Italy, <sup>12</sup> is just one example of this. Even having to contemplate giving prisoners the right to vote is said to make David Cameron 'physically ill' and the stance advocated in 1.2 would justify evasion of the judgments in these cases. The move also has the benefit of symbolically serving to satisfy some Eurosceptic voters who fear that national supremacy is being increasingly eroded.

This argument is supported by the judgment of Judge Mitting who makes clear that the statement in 1.2 makes no realistic difference.

Perhaps what is most troubling then is the clear desire of the government to escape such obligations so broadly in the first place. It would surely be inappropriate to view the issue as one of legal technicality, as distinct from political reality. To state that there is no general duty on ministers to comply with these obligations, while simultaneously asserting that compliance is to be expected, is arguably contradictory. Such an expectation is surely indicative of an existing duty. International law obligations (which should be

followed pacta sunt servanda) are easily reconciled with parliamentary sovereignty: the acceptance of such obligations in themselves is an exercise of sovereignty. Why then are we so keen to avoid them on this basis?

¹https://www.gov.uk/government/uploads/ system/uploads/attachment\_data/file/468255/Final\_draft\_ministerial\_code\_No\_AMENDS\_14\_Oct.

<sup>2</sup>https://twitter.com/adamwagner1/sta-

tional-law-and-the-ministerial-code?CMP=share\_btn\_tw

rial-code-and-international-law/

https://spinninghugo.wordpress.com/2015/10/24 the-ministerial-code-re-write/ 8https://www.conservatives.com/~/media/files/

downloadable%20Files/human\_rights.pdf °R (on the application of Gulf Centre for Human Rights) V Prime Minister (QBD, 17 March 2016). 10Above n 5

11(2006) 42 E.H.R.R. 41. 12(2013) 56 E.H.R.R. 19



## 1. All foreigners in the UK will be chucked out - a disaster for the NHS!

Scare-mongering of the highest degree. No immigrant (including myself) should be fearful of being detained Stasi-style and shipped back over the Channel. Step in the Vienna Convention on the Law of Treaties (1969) - ratified by the UK in 1971. Article 70.1 (b) states that if a treaty is terminated, like the European Communities Act 1972, then you cannot be deprived of the rights granted under that treaty retrospectively. Therefore, many EU citizens would be able to stay in the UK.

This change would force the government to create a more efficient immigration system, not giving preferential treatment to EU citizens and treating all migrants equally. George Galloway was absolutely right when he said on Twitter (@georgegalloway): The immigration set up is the most racist we've ever had in Britain. Overwhelmingly white EU welcome overwhelmingly black Commonwealth not. The NHS could benefit from a Brexit because there would be a fresh injection of global talent.

## **Busted!**

## 2. The EU is better for our economy.

Think: would a Brexit really cause an economic catastrophe? The real disaster is the EU and the policies it forces on the UK.

'Common' seems to be the EU code-word for disaster. Take the example of the Common Agricultural Policy (CAP). A policy relentlessly pushed through the EU Parliament and one which aimed to reduce waste and promote sustainability amongst farmers. It is funny that a project meant to reduce waste actually costs €57.5 billion (yes, billion) a year! CAP ignores the basic principles of supply and demand, resulting in horrendous levels of overproduction and waste, plus it costs, in management fees, an average of €700 per farm ¹

The great British fish 'n' chips is now most probably caught by French or Spanish ships (the fish that is). The Common Fisheries Policy which is meant to sustain fish stocks and protect fishing communities, has destroyed a traditional British industry. The time when Britain had the largest fishing fleet in Europe is over. Britain is now only 'allowed' to fish 13% of its own waters; decimating fishing communities across the country.<sup>2</sup>

What is clear, is that the EU has squandered our money and destroyed some of our previously thriving industries.

## **Busted!**

## 3. Trade will suffer.

Ring, Ring, Ring! Frau Merkel wakes up for her morning Oragensaft on the morning of the Brexit. She picks up: "Ja, was ist los?". The normally calm and collected voices of the heads of Mercedes and BMW scream down the phone: "Why has Germany and the EU closed trade relations with the UK? This is one of our biggest markets!"

The image of perspiring Germans is a sight to worry any continent, but it is abundantly clear that it is an absolute farce to claim that the rest of the EU would not trade with the UK if a Brexit were to happen. The UK is the second largest VAT contributor to the EU budget, so it would be advantageous for the EU to keep good trade relations with the UK if a Brexit occurred.<sup>3</sup>

The EU is not where all the action is. The Office of National Statistics found in 2013 that the UK had increased its exports to China by 11% and, astonishingly, increased exports to India by 79%. The EU is dying on its feet. It is time the UK looked to its best interests and entered into more prospering trading platforms.

Europhiles love to use the baton of tariffs to counter the above argument. However, the World Trade Organisation has sought over the past five years to reduce tariffs across global trading countries. Plus, countries within Europe have a much better deal. For example, the Swiss Bank estimated they dodged the 3.4 billion francs annual EU membership fee, by paying only 600 million francs annually for virtually free access to EU trading. It seems Britain fails to be awarded such advantages.

## **Busted!**

## 4. We will lose our influence in the world without the EU.

We have surrendered our Parliamentary Sovereignty, we are undermined in the Council of Ministers time and time again, and we are not liked. Come on, last year Israel (not even in Europe) got 97 points in Eurovision and we got 5.

It is delusional to think that the UK has any grand influence in the EU. The UK currently only has 8.4% voting power, which will be watered-down further by the EU's desire to integrate more nations.<sup>5</sup> If Britain leaves the EU, we can take back our seat at the World Trade Organisation (which we relinquished to an EU ambassador), to represent the UK's best interests and not that of the European Commission.

Britain leads the Commonwealth, sits on the G8 and boasts the 5th largest economy in the world. Give us a break, the UK can stand on its own two feet!

## Busted!

## 5. Coming out of the EU will threaten peace.

"The Nobel Peace Prize for 2012 is awarded to..." Yes, you guessed right - it was the EU. For a union that was founded on borderless trading and then adopted the ethos of peace, the prize is almost laughable, especially when you also consider various awkward episodes for the EU in recent European history. This award must be a joke, mustn't it?

As Dr Chris Bickerton of the University of Cambridge states, the EU is 'stuck in a constant time loop', failing to act decisively and cohesively on the international stage, costing lives in the process. <sup>6</sup>The most embarrassing example is the Yugoslavian Civil War in the 1990s, which took place in the EU's backyard. It was left to NATO (led by America) to stop the senseless killing. The Nobel Prize is, quite frankly, an insult to those murdered in that bloody conflict. Peace? Try telling that to the families of 8,000 murdered Muslim men and boys in Srebrenica.<sup>7</sup>

Plus, the Euro does not promote peace amongst different sized economies, allowing stronger economies to dictate the politics of economically weaker nations in the EU; the prime example being the shameful behaviour of Germany towards Greece. This can only provoke unrest, not peace, in the future.

## **Busted!**





# IMMIGRATION DETENTION CENTRES OR ILLEGITIMATE PRISONS?







The ability to seek asylum is an international human right, allowing an individual to seek protection from persecution and severe human rights violations in their domestic country. Accordingly, the right to seek asylum is enshrined within the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees. An 'asylum-seeker' refers to an individual who applies for refugee status, but whose application has not been concluded. Article 31 of the 1951 Refugee Convention provides that asylum-seekers 'shall not be penalised for their illegal entry'. Thus, asylum-seekers are not criminals by definition, nor should they be treated as such. However, the treatment of asylum-seekers and the conditions within UK Immigration Detention Centres closely emulate those within the Criminal Justice System. The similarities between detention centres and prisons has been acknowledged by the 2015 Government Joint Inquiry into the Use of Immigration Detention in the UK, which declared that current conditions are 'tantamount to high security prisons'.1





According to Rule 3(1) of the Detention Centre Rules 2001, the purpose of Immigration Detention Centres is to 'provide for the secure but humane accommodation of detained persons in a relaxed regime with as much freedom of movement and association as possible'.2 Rule 3 (2) also provides that 'due recognition will be given at detention centres to the need for awareness of the particular anxieties to which detained persons may be subject'.3 However, the conditions of UK Immigration Detention Centres do little to offer protection and healing processes for the traumas often experienced by detainees. An investigation by Channel 4 News in March 2015 showed officials at Yarl's Wood Detention Centre treating detainees with derogative and abusive language. 4 Additionally detainees' rooms appeared to be cell-like in size, with prison features such as a toilet inside the cell, forcing individuals to eat beside the toilet. The arrangement of UK Immigration Detention Centres also fails to provide adequate treatment for detainees suffering from mental health problems. Consequently, attempted suicides in UK Detention Centres are not uncommon. Since January 2007 there have been 2,175 attempted suicides across UK Immigration Detention Centres. 5 The poor conditions of immigration detention centres and their similarity to prisons is exacerbated when one considers the fact that children are detained in these exact conditions. For instance, Tinsley House is equipped with a family unit to accommodate families with children. The Home Office revealed that 155 children were detained in the year ending June 2015. 6

Although Immigration Detention Centres are intended to be short term holding facilities, the lack of statutory limitations means that in practice, individuals can be detained for excessively long periods of time. In June 2015, Home Office statistics conveyed that approximately 187 people were detained for one or two years and 29 people were detained for two years or more.7 One of the most significant problems with the current immigration detention process is the lack of judicial oversight. At present, a decision to detain a person is made by an Individual Immigration Officer. Considering the fact that immigration detention results in the deprivation of an individual's liberty in a similar way to the Criminal Justice System, the magnitude of this issue becomes evident. Arguably, it is this lack of judicial accountability that is in conflict with the rule of law and established human rights principles.

Detainees in UK Immigration detention centres also face barriers to ac-cessing legal representation; an issue which raises concerns over human rights and the Right to a Fair Trial under Article 6 of the European Con-vention on Human Rights. Despite the claim by detention officials that mechanisms are in place to access legal advice, controversy relating to detainees' access to legal justice remains paramount in detention centres. Due to financial limitations, detainees in immigration detention centres are often only able to access legal representation through legal aid solicitors. However, under the Legal Aid contracts offered by the Legal Aid Agency, lawyers are restricted to a 30-minute session with each.8 When one considers the complexity of the cases, language barriers and eligibility tests that need to be done, it is not surprising that the quality of advice given within such a short time frame could be poor and ineffective. UK immigration policy provides detainees with the right to apply for bail. This right allows asylum applicants to live at a designated address whilst their immigration case is resolved. Although the government accepted the need for legislation providing for automaticbail hearing in 1999, this legislation was never implemented and was eventually repealed by the 2002 Nationality, Immigration and Asylum Act.9 Despite the existence of bail hearings and institutions such as Bail for Immigration Detainees (BID) offering support to bail applicants; once an individual is detained it is often difficult for detainees to be approved for bail. According to the Home Office, only 1% of immigration detainees were approved bail in 2015.10

Evidently, reformation of the existing system is essential. Transformation of the systematic process of detention and the enhancement of practical conditions is necessary to ensure that living conditions of detention centres reflect the standards provided by law. Furthermore, judicial intervention is particularly necessary to ensure that the detention process itself adheres to the rule of law and does not breach human rights. The prolonged uncertainty that immigration detainees encounter is unjustified. Statutory limits and judicial intervention is imperative to ensuring that the boundaries of arbitrary detention are not crossed, and that detention centres are not synonymous to prisons.

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<sup>1.</sup> Joint Inquiry by the All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration, 'The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom', 3 March 2015, Page 42, Para 5 2. Immigration, The Detention Centre Rules 2001, No. 238, Rule 3 (1)

<sup>3.</sup> As n.2 above, Rule 3(2)

A. Channel 4 News Investigates, Yarl's Wood Undercover in the Secretive Immigration Centre, (Channel 4, 2 March 2015). < http://www.channel4.com/ news/yarls-wood-immigration-removal-detention-centre-investigation

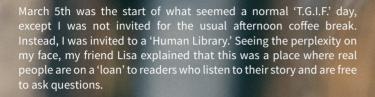
<sup>5.</sup> No Deportation, Residence Papers for All. (No Deportation, 10 March 2016) <a href="http://www.no-papers">http://www.no-papers</a> deportations.org.uk/Media-6-4-2011/DeathInRemovalCentres.html> Accessed: 15 March 2016

 $<sup>6. \</sup> Home\ Office, National\ Statistics\ Detention, (Home\ Office, 27\ August\ 2015) \\ < https://www.gov.uk/government/publications/immigration-statistics-april-to-june-2015/detention#length-of-une-2015/detention#len$ detention > Accessed: 15 March 2016

<sup>8.</sup> Bail for Immigration Detainees, 'Bail in Dentention' (BID UK, September 2014) <a href="http://www. biduk.org/sites/default/files/BID%20submission%20to%20detention%20inquiry\_separated%20families%20Sept%202014\_0.pdf Accessed: 15 March 2016

<sup>9.</sup> Joint Committee On Human Rights, Seventh Report 'Memorandum from Bail for Immigration Detainees' (Parliament, June 2002) < http://www.publications.parliament.uk/pa/ jt200102/jtselect/jtrights/132/13211.htm > Accessed: 15 March 2016





The event was hosted by the Copenhagen Central Library and the organizers had set out simple rules regarding potential 'loans': for a duration of up to 30 minutes, with the opportunity for an extension if no other readers are waiting for your bestseller; bring back your book in time and in the same condition as it was given to you; treat the book with care; and do not take your book home with you. The instructions had put a smile on my face and the initiative sounded interesting, so I attended the event and had what I'd classify a life changing experience.

## What is the 'Human Library?'

The Human Library Initiative is a worldwide movement that encourages people to share their experiences. It facilitates respectful conversations in which difficult questions are not simply expected, but are appreciated and answered. The aim of the dialogue is to eliminate social stigmas, break down cultural stereotypes, and change attitudes towards members of our communities who are at risk of exclusion or marginalization.

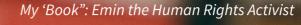
"Menneskebiblioteket", its Danish name, was designed in Copenhagen in the spring of 2000. The project first ran for four consecutive days, with a selection of 50 different titles, giving hundreds of readers the opportunity to challenge their own prejudices. Today, the events hosted in Copenhagen are shorter and much more specific. For example, on March 19th readers could 'borrow' a refugee and on May 21st the World Culture Centre invites us to borrow a homeless person.

A major advantage of the 'Human Library' is its mobility, and subsequently, its ease of replication. To date, it is estimated that the Human Library has been presented in more than 70 countries, including Romania, Iceland, Finland, Norway, Italy, Holland, Slovenia, Belgium, Portugal and Australia.

LIFE CHANGING INSIGHTS:

By Nikoletta Zinonos





I chose to borrow Emin Huseynov, a high profile Azerbaijani journalist and director of the Institute for Reporters' Freedom and Safety (IRFS). In 2008, Emin reported on the crackdown of peaceful rallies by Azerbaijani police. He subsequently faced detention, was beaten up by the local authorities and charged for abuse of power and tax evasion, a conviction which carried 12 years in prison. Emin had to hide in the Swiss Embassy for a year before he flew to Switzerland in June 2015; he is now applying for political asylum in Switzerland. I remained still as Emin shared his story. It was shocking for me to realize that the reason this man had to leave his country, and the reason for his classification as an asylum seeker, was simply because he exercised his right to freedom of expression, a fundamental right which we often take for granted.

The man sitting in front of me was a real human rights activist. I had studied the European Convention on Human Rights last year and read about the importance of freedom of expression, or Article 10, in guaranteeing the 'watchdog role' of the media. I was also aware of violations of Article 10 around the world, but talking to Emin was a completely different experience. It was different to see the scars this man suffered from the abuse, and it felt different to realize that human rights violations are not confined to a Strasbourg ruling but rather, they define the lives of hundreds of people. Emin described the life of an Azerbaijani journalist as 'a life with fear, where reports against the state pose a threat to you and your family.'

"I was never accused of reporting something illegal, but because of my report they examined my background and found evidence for accusing me of tax evasion. If it wasn't tax evasion, it would have been something else. That's how it works." **(** 

I left the Human Library with a new kind of knowledge; it is a knowledge that I will not just pack away with my lecture notes at the end of an exam period; a knowledge marked with intense emotion; and a knowledge that has made me more aware about what is happening in the world around me.

I called the experience 'life-changing', not simply because I had the opportunity to talk with a very inspiring man, but also because it served as a reminder that knowledge is not always about reading books, articles and cases. It is about changing landscapes through sharing experiences, engaging in conversations, and treasuring real insights.

I dare to conclude that each person in this world is a book. We should not be afraid to 'borrow' each other, to challenge, and to learn from one another. And to always remember, 'never judge a book by its cover.'

Information about forthcoming Human Libraries can be found on http://humanlibraryuk.org/events.

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## 'If liberty means anything at all, it means the right to tell people what they do not want to hear.'

## **George Orwell**

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Over the past few years, Turkey has made admirable progress in its democratic development and economic growth. Nevertheless, three years ago, when everything seemed to be going well, the first flaw started to show - a country still seriously suffering from a lack of rule of law. In the wake of the mass protests in the summer of 2013 which began in Istanbul, the government implemented a policy of controlling the media, especially the Internet, to clamp down on the critics. During that tumultuous time, I happened to be in Istanbul where I saw, and heard, many frustrated protesters. Their frustration towards the media being controlled by the government was ferociously voiced on the streets of Istanbul that summer.

Corruption allegations involving the government in December 2013 were followed by leaked telephone calls which circulated on social media. The leaked calls incriminated ministers and family members involved in corruption and, did indeed support the allegations of corruption. The government responded to such use of social media by tightening Internet laws and blocking Twitter and YouTube in Turkey for several weeks. The sites eventually reopened after the Constitutional Court ruled against the blocking orders.1 However, the fight against free media did not cease. State authorities continued to fight the media by the rise of broadcasting watchdog disciplinary fines applied selectively to anti-government media, criminal defamation cases against journalists, firing some prominent journalists, and issuing blocking orders on particular social media accounts.

The data from recent months on the freedom of press in Turkey shows a critical situation and raises questions about the future of the country. Constant intimidation by legal action applies to journalists not in line with government's propaganda, who are on occasion, arrested. Publishers and media owners have been constantly under threat and there is extreme pressure from authorities to dismiss the reporters and writers considered undesirable. Businessmen close to the government have invested heavily in the media. Turkish authorities arrested two leading journalists, Can Dündar and Erdem Gül, for allegedly exposing state secrets and aiding a terrorist group after the newspaper published an article which claimed that the government had supported extremist rebels with weapons in Syria.2 Regulatory restrictions have been applied widely to foreign journalists and many have been deported.

The government is increasingly using the law to silence those they do not want to hear. A particularly unprecedented law is one that criminalizes the critics who insult President Erdogan. Since August 2014, 1,845 trial cases have been registered against Turkish citizens for allegedly insulting their president. When contemplating the current state in Turkey, former US president Harry Truman's comment on terror comes to mind: 'Once a government is committed to the principle of silencing the voice of opposition, it has only one-way to go, and that is down the path of increasingly repressive measures, until it becomes a source of terror to all its citizens and creates a country where everyone lives in fear.'3

The latest victim of the government's wrath is the most largely circulated newspaper in the country, Zaman, which was seized by the police on March 5 under the administration of the Turkish authorities. Tear gas and violence were used against protesters trying to prevent the police from entering the headquarters of the newspaper, both editors and journalists were fired by administrators appointed by the government.

On the morning of March 5th, Zaman, in its last issue before the execution of the court decision, openly opposed the seizure and the appointment of state newspaper management. The front-page headline of newspaper declared, 'Constitutions Lifted', alleging that the seizure was unlawful. On Sunday March 6th, the first day under state control, Zaman was filled with pro-government articles that echoed the government's work.

<sup>1.</sup> Daily News, Turkey's top court rules YouTube ban violates freedom of speech, 29 May 2014, available at < http://www.hurriyetdailynews.com/turkeys-top-aspx?pagelD=238&nID=67172&NewsCatID=339 >

aspx:pagerio=2spx:mews.catin=3337 2. Daily News, Two journalists arrested for story on intelligence trucks bound for Syria, 26 November 2015, available at < http://www.hurriyetdailyntrucks-bound-for-syria.aspx?PageID=238&NID=91722&NewsCatID=339>



## MEDIA FREEDOM IN TURKEY

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It is still unclear from the court decision what violations or illegal actions the newspaper committed, but it is clear why the government lists it as an enemy. The Zaman newspaper supported the influential 'Hizmet' movement in Turkey. A movement inspired by the US-based cleric Fethullah Gulen, whom the government has accused of exerting an undue influence on state institutions, the police, the judiciary, and of attempting a coup against Erdogan's government.4 At first, the 'Hizmet' movement supported the democratic reforms taken by the Turkish government. But that support ended in 2013 after corruption scandals were exposed and differences between them emerged, mainly regarding the government's policies on Kurds and the government's proposals to close schools.

However, the war on freedom of media in Turkey has revealed another worrying question. What is the EU, as guarantor of fundamental rights, doing? One would think this backlash in freedom of media and human rights would risk Turkey's progress toward EU integration. However, the EU is now busy with another issue, the refugee crisis. The EU seems to have turned a blind eye to these violations, prioritizing the signing of deals with Turkey on the migrant crisis. The EU should act based on trust and credibility if they wish to lead by example in human rights protection. Instead, the EU has taken a seemingly hypocritical position based purely on their own interests. In the EU, the right to freedom of media is enshrined as a fundamental principle of a democratic society. It is now time for the EU to show how much it really cares about freedom of media in Turkey as an EU candidate country.

3. Special Message to the Congress on the Internal Security of the United States, 8 August, 1950 < http://www.presidency.ucsb.edu/ws/?pid=13576> 4. Human Rights Watch, World Report 2015, p 547



sually, one would think that an agreement between two nations would bring about more harmony and peace, rather than discontent and resentment. This is certainly not the case with regard to the agreement between the United States and China to impose tougher sanctions against North Korea. Instead of reining in North Korea's nuclear weapon and rocket testing tendencies, the agreement has had the opposite effect. Following unanimous approval of the United Nations (UN) Security Council on the imposition of tougher sanctions against North Korea, North Korea fired several short-range missiles into the sea.

This is not the first time that North Korea has carried out live firing in close proximity to its borders when faced with international condemnation. As a response to the economic sanctions approved by the UN in 2013, North Korea threatened to nullify all agreements of non-aggression and denuclearisation with South Korea. Professor Yang Moo-Jin at the University of North Korean Studies in Seoul has commented that the launches in late February were considered a low-level response to the UN sanctions.

In early 2016, Pyongyang had conducted a nuclear test in January and a satellite launch into orbit in February. These were in clear condemnation of the UN Security Council's resolution regarding the prohibited use of ballistic-missile technology.

The new resolution would effectively cut the supply of many mineral resources to North Korea. This includes export of coal, iron, iron ore, gold, titanium ore, vanadium ore, rare earth minerals and aviation fuel.

Moreover, the new resolution will give the US Treasury the authority to sanction any individual should they trade in large quantities of metals with North Korean entities. Countries are also required to freeze the assets of companies and other entities which are linked to North Korea's nuclear and missile programmes. The resolution

also prohibits all countries from opening new branches and offices with North Korean banks, and imposes a ban on financial institutions establishing new joint ventures or maintaining relationships with North Korean banks.

The agreement has a double-pronged effect as it is also intended to strengthen China's resolve in cutting off its economic lifeline to North Korea. However, China has been taken aback by the US's strongarmed response with respect to North Korea's launch test, and the Chinese are reluctant to impose strict sanctions in fear of further antagonising North Korea. Prior to this, China had shown caution when imposing measures that could threaten the stability of North Korea and inevitably cause its economy to collapse.

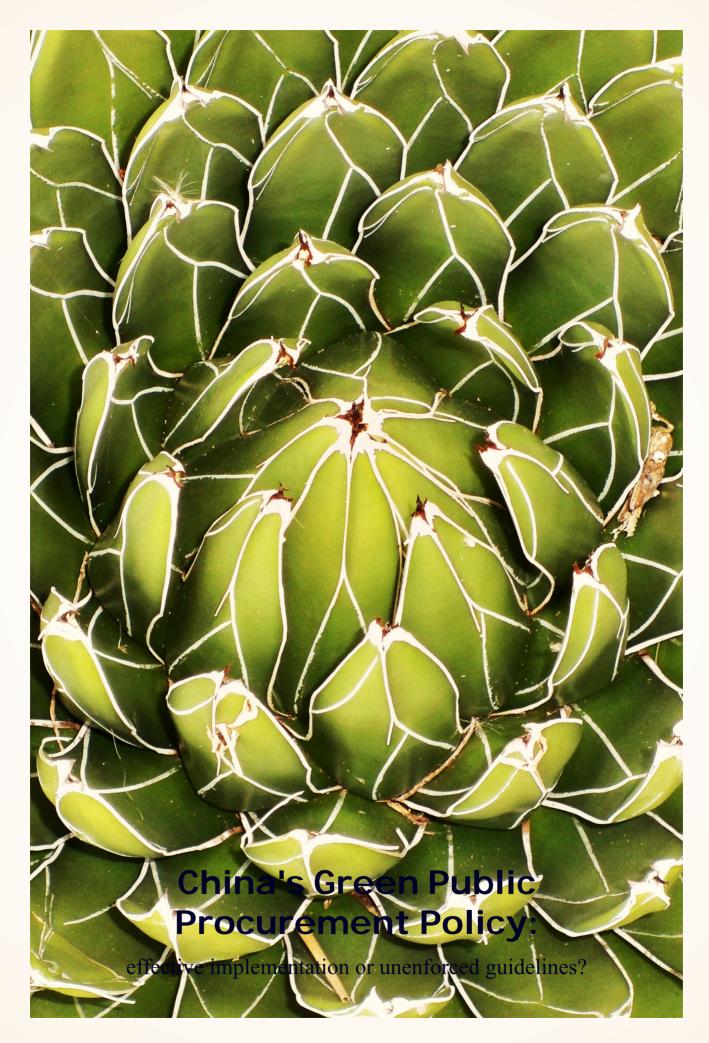
China's stance is that while they hope the sanctions will have some effect in preventing North Korea's development of its nuclear and missile programme, the sanctions should not be the only method employed to resolve this issue. As Liu Jieyi, the Chinese envoy to the United Nations, stated, 'The resolution should pave the way for a negotiated solution down the road, not be a stonewall.'

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Japan, US and South Korea have independently undertaken steps against North Korea to halt its nuclear development. This agreement is the first substantial action by China against its diplomatic ally. China's non-acceptance of North Korea as a nuclear weapons state is a concrete starting point in curbing Kim Jong-Un's nuclear regime. Yet, it is abundantly clear that more diplomatic steps need to be taken to ensure that there are no severe repercussions. Having a hard-handed approach may only serve to antagonise North Korea and this may cause undesirable retaliation with armed measures. History has shown that previous sanctions had little effect in curbing North Korea's desire to develop its nuclear and ballistic missile programme. Instead of letting history repeat itself, more peacealigning measures should be adopted.













China's astonishing economic growth has caught the world's attention, with the country dominating headlines ever since. Unsurprisingly, it has come at a cost - notably to the nation's environment. The level of environmental pollution in China is by any standard a hazardous one, contributing to around 400,000 deaths per year.

It has therefore become crucial to integrate environmental targets into economic policies. Green Public Procurement (GPP) is often referred to synonymously with Sustainable Public Procurement (SPP). However, GPP is rather a sub-concept focusing purely on the environmental aspect. It is one of the many policy tools being implemented by China to push forward the uncomfortable transition from the obsessive focus on GDP growth to a more balanced approach, with a strong awareness of shaping the future of China. Ultimately, the question is whether such policies are achieving their desired effect. As is the problem with much of China's policies, implementation proves to be the biggest barrier to its success. To their credit, the country does hold some impressive titles: it is the leading global producer of solar cells, wind turbines, solar water heaters, and also a world leader in installed renewable energy capacity. Jiangsu Province, whose public procurement amounts to around 10% of the country's total expenditure on public procurement, imposes a policy of compulsory green purchasing and has been actively implementing GPP since 1998.

The implementation of a compulsory green procurement list, which includes nine types of products such as electric water heaters and air conditioners, has been a strong motivating factor for suppliers to go green. In China, the public authorities are extremely powerful consumers; the extra demand they create is enough to shift environmental products from a niche market into a mainstream one. Increased demand and supply encourages quicker technological breakthroughs and advancements, resulting in lower unit costs and mass production availability. Yet, public procurement still only makes up a narrow sector of the Chinese market; a wider spectrum of businesses need incentives to take environmental factors into account in order to make their products more environmentally friendly, while maintaining a high quality standard.

Sustaining a high quality standard would not only benefit the local citizens, but could effectively enable them to expand outside of China with products that meet international standards in the long term. Production costs for green products are typically higher than non-green products. The most obvious way to combat higher costs as a disincentive would be through governmental measures, such as tax exemptions and financial subsidies. There have also been more radical suggestions such as levying higher taxes on products that cause over-consumption and pollution. These are commonly used methods proven effective by many developing and developed countries. The fact that a culture of 'greenwashing' exists, where non-green products are deceptively sold as green products, furthers the need for government support.

There are several other hindrances to the successful implementation of GPP policies. Firstly, weak social awareness in green consumption is a pressing problem due to the sheer lack of media promotion and general publicity. Currently, only a quarter of consumers are real green consumers, not to mention that the government procurement personnel are insufficiently informed or trained in green procurement. Continuous improvement demands a strong initiative to engage the public to acknowledge and understand the importance of conservation and environmental protection. Effective initiatives should lead to active involvement from citizens through daily consumption, e.g. through the provision of widely accessible advice on how to make households more energy-efficient.

Issues also arise when GPP is viewed from a legal perspective. There is no legislation written with regards to GPP; instead it appears to fall under Article 9 of China's Government Procurement Law (2003), which states that environmental protection is one of the goals of implementing government procurement. Local procurement decisions for green procurement are guided by two 'Public Procurement Lists' one for 'Environmental Labelling Products' and one for 'Energy Saving Products', backed by government ministries. The main concerns surround the absence of specific rules and regulations, requirements are far too general and are more suggestive than instructive.

For example, a provision stating that priority should be given to hightech and eco-friendly products fails to define these terms. When given, definitions are often inconsistent and the evaluation criteria provided has been criticised as confusing. Energy-efficient and environmentally friendly products are governed by regulations that only necessitate a preference given to a list in the official catalogue, failing to specify the margin or explain the procedure involved.

Further questions are raised with regards to the issue of possible incompatibility with Article X.3 GPA of the revised text (WTO). Considering that China's accession to the WTO Government Procurement Agreement is still reasonably new, these lists were determined by administrative organs that simply do not attempt to align with international or foreign standards. Even if incompatibility were not an issue, in cases where agencies have to choose between an energy-efficient and an environmentally friendly product, which preference should prevail? The government appears to have not considered such a scenario.

China has been comparatively late with their adoption of a green public procurement system, so inevitably an analysis of its effectiveness will be difficult and contain inaccuracies. Within five years of implementing the Government Procurement Law, US\$747 million has been saved in government procurement costs. Therefore, it can safely be said that the effects up to this point have been significant. It is still hoped, however, that the government will speed up its efforts in GPP enforcement. More capital needs to be directed towards technological investments, and clear strategic plans to develop and promote the green industry are required to coordinate and harmonise the relevant agencies.

Nevertheless, it is also important to recognise that the majority of the problems discussed are not unique to China - many countries around the world face the same obstacles in attaining truly effective GPP policies. What sets China apart is the scale; the sheer size of the country will undoubtedly magnify any environmental issue.

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23

## CHANGING

BY ERN EE LIM

n March, Christopher J. Nassetta, the Chief Executive of Hilton Worldwide Holdings Inc, revealed that the global hospitality company was considering the addition of a new hotel chain to the broad portfolio of hotels and resorts it currently manages. If the plan should materialise, the new hotel will be targeted at price-savvy millennials. At first glance, Hilton's development plans to create a new affordable brand of hotels does not seem significant. After all, the creation of new hotel chains and the acquisition of existing ones is common in the hotel industry. However, upon closer inspection it surfaces that major leaders in the hotel industry such are responding to certain new and significant economic and social trends.

It is immediately clear that Hilton's move is motivated by competition. In 2013, the budget hotel chain Moxy, the brainchild of Hilton's long-time rival Marriott and Ikea, was launched in Europe. Moxy offers functional and well-designed guestrooms that are competitively priced. However, with the increasingly popular concept of room or house-renting, made popular by Airbnb, competition has become fiercer. Airbnb, if you do not already know, connects people who desire to rent out their homes with those wishing to stay in them. Having established its presence in over 34,000 cities and 190 countries, Airbnb is becoming a favourite alternative to the traditional method of putting up at a hotel. The burgeoning scope of Airbnb's global presence poses a severe threat to mega hotel chains like Hilton and InterContinental Hotels Group which are located in around 100 countries. A key factor contributing greatly to Airbnb's success is its strategy of empowering the consumer. By allowing travellers to determine the price they are willing and able to pay, and enabling them to choose from a wide range of accommodation, Airbnb offers its customers what traditional hotels are lacking – a wider variety of choices.

Despite intense competition from its old rivals and newcomers seeking to redefine the hospitality industry, Hilton's purported strategy of starting a new 'hostel-like' hotel chain is arguably more driven by the changing tastes and preferences of its customer-base.

## The Rise of the Millennials

Millennials are referred to as Generation Y (or Gen Y) and were born between 1980 and 2000. Accounting for about one-third of all business travel expenses currently, it is predicted that Gen Y will eventually account for 50% of all employees worldwide. With high purchasing power, Gen Y will have both the greater ability, and the greater willingness to spend on travel in the next decade. In response to the rise of financially independent millennials who enjoy travelling, the hotel industry is remarketing itself in a bid to stay relevant. Before recent talks about a hostel-competitive hotel chain, Hilton had launched Tru by Hilton, their thirteenth hotel concept. Tru is specifically catered to millennials.<sup>2</sup> It boasts a fitness centre and a 2,770-square-foot lobby called 'The Hive', consisting of a game area with ping-pong tables, lounge and work spaces. The layout of Tru by Hilton is centred on the idea that millennials are social beings who prioritise social interaction over face-to-face contact. A phenomenon called 'isolated togetherness' whereby people share a common physical space, yet somewhat ironically, interact virtually epitomises the millennials' focus on digitised platforms for communication.

However, staying relevant in this day and age for hotel chains does not merely mean catering to a specific group of customers, but also riding on global economic trends and following the resultant



## TANDSCAPES

## · · · · OF THE HOTEL INDUSTRY

economic actor – the consumer. It is undeniable that the notel industry is a volatile one, heavily dependent on the global economic outlook which in itself is unpredictable. Take for example, the impact of the 1980s recession on the US hotel industry. Four years of constant fall in demand caused occupancy rates to fall from 72% in 1979 to 60% by 1984.<sup>3</sup> This phenomenon was exacerbated by the reluctance of financial institutions to lend for hotel expansion, resulting in a lack of growth in the hotel industry. With the global economy on the brink of recovery from another global financial crisis in 2011, the focus has shifted. The IMF earmarked 2014 as the year China would surpass the US to become the largest economy in the world in terms of its GDP, based on the purchasing power parity indicator.<sup>4</sup> That year, China reached \$17.6 trillion or 16.48% of the world's purchasing power adjusted GDP, indeed surpassing the USA's \$17.4 trillion or 16.28%.

## **The East Beckons**

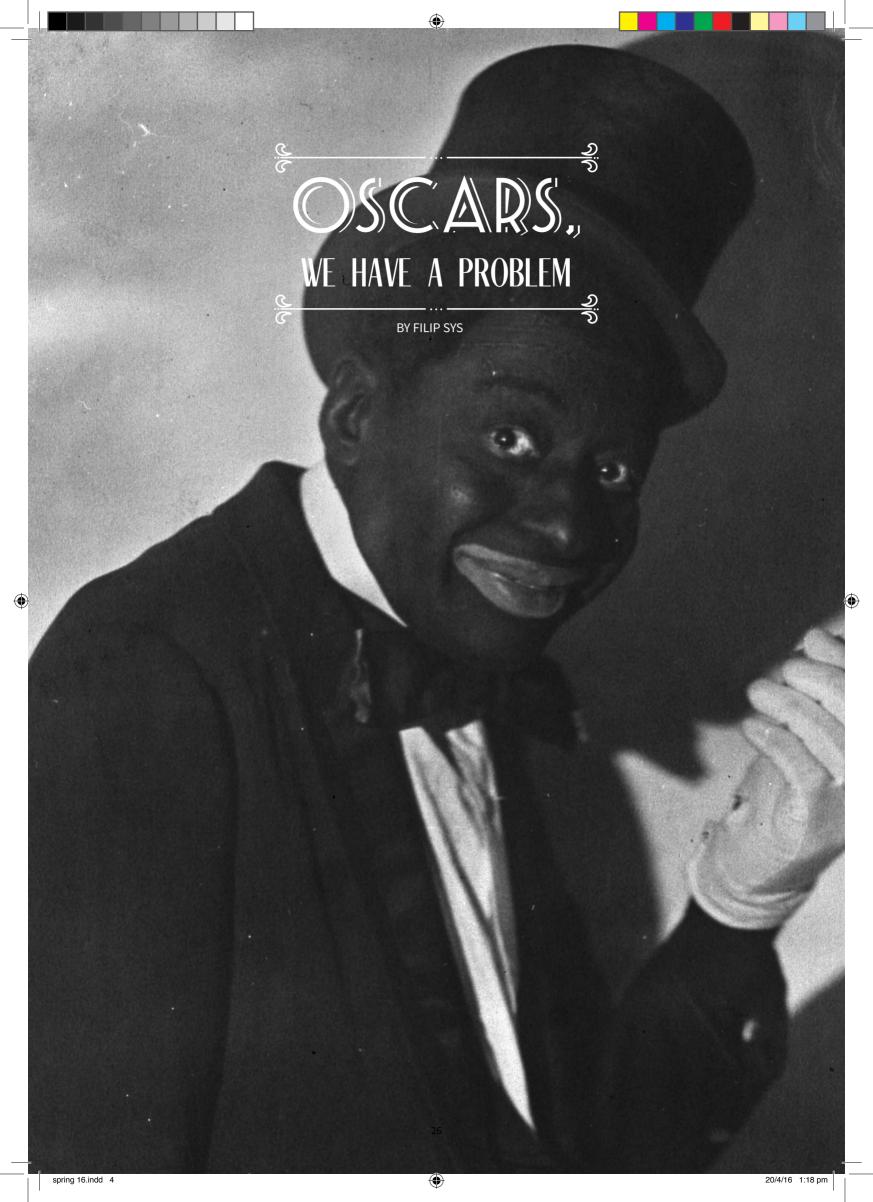
Despite an economic slowdown and the depreciation of the yuan, the Chinese are still travelling. The China Tourism Research Institute estimates that in 2015, China had 120 million outbound visitors who spent a total of \$104.5 billion abroad. Asia dominated China outbound tourism market, with South Korea, Taiwan and Japan being the top destinations for the Chinese. Unsurprisingly, the hotel industry is moving to Asia. In 2012, Marriott International Increvealed its plan to invest \$2 billion in global expansions. Its plan for 105,000 new rooms by 2014 saw 27% of the rooms being targeted in Asia alone. Following suit in 2014, Rosewood Hotel Group opened a hotel in Beijing and will be opening another in Phnom Penh by the end of this year. By tapping into Southeast Asia's exotic landscapes, Rosewood Hotel Group has set its sight on capturing the regional market by building more beach resorts.

China's economy is currently undergoing a major restructuring, shifting from an export-oriented economy in the manufacturing sector, to a consumer-based economy. Travelling within China has been made easier with further expansions of China's high-speed rail in 2014. A key push factor for more rail lines is to increase the interconnectivity between more cities like Guiyang and Guangzhou, and Hangzhou and Changsha. A 'closer' China effectively enables more people to travel from the outskirts to gateway cities for work with the aim of higher pay. Hotel chains have thus responded to the anticipated increase in domestic travel. Domestic travellers form a large part of the emerging Chinese middle class; new hotel brands are looking to capitalize on the rise of domestic travel and the middle class by specifically marketing to this audience. In February, Marriott International Inc came to an agreement with the Chinese firm Eastern Crown Hotels Group. The pair are set to open at least 100 hotels under the former's Fairfield label – a mid-tier brand targeting young Chinese professionals travelling to other parts of China for work.<sup>8</sup>

The direction large hotel chains are heading towards serves as a good indicator of how well the economy is doing and reflects the changing global balance of power measured by China's everincreasing economic might. Although major players in the hotel industry seem set on expanding towards and settling within Asia for the time being, it must be remembered that travellers still have the final say. Economic and geographical factors are crucial aspects of the hotel industry's growth plans. But individuals are ultimately the driving forces behind these factors and should remain at the heart of new development plans.

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he Oscars (the Academy Awards) this year were tainted by the #OscarsSoWhite shaming campaign on Twitter, with various black and mixed ethnic background actors (BME actors) dubbing the prestigious ceremony as the 'Lily White Oscars'. Many BME actors and equal rights campaigners accused the Academy of institutional racism and flippantly splurted buzz-words like 'prejudice'. The mainstream media were quick to jump on the bandwagon, earnestly supporting and providing high coverage of the controversy. However, when reflecting back on this unfortunate episode, it appears to be all very strange. In fact, many of the arguments made were startlingly paradoxical.

If we look at what happened, it is apparent that those who boycotted the ceremony, or threatened to do so, were the ones who did the damage. It not only undermined the talent that was represented at the Oscars, but also the success of BME actors past and present. What this sort of action has achieved is a clear avenue for BME actors to be subject to prejudicial treatment in the future, whilst also exposing blatant racism towards white nominees.

Racism is inextricably linked to the prejudice and victimisation experienced by BME communities throughout history. However, when the actor Charlotte Rampling said that the Oscar boycott was 'anti-Whites', she was slammed by the media who did a good job, as they always do, of destroying any sort of sensible debate around an issue that also affects white actors. Rampling made an extremely obvious point when she was quoted saying, '...perhaps the black actors did not deserve to make the final list'. If a film or performance was not as impressive as someone else's, why should it be nominated? That is fundamentally the definition of competition.

Racism should not be a term that is claimed by one community and used as a weapon to target and attack others over their opinions or, in this case, their nominations. It would have been advisable if all sides looked at what the Oscars and what every other award represents celebrating merit. Yes, actors should be proud of their backgrounds, but as Sir Michael Cain commented, nominations should reflect a 'good performance' and not colour. If I were a nominated actor this year, as Rampling was herself, I would have been highly insulted that my fellow performers thought I was nominated merely because I was white. 'Anti-White' racism is just the flip side of the coin when looking at the Oscar Race Row.

Whilst the boycotters were insulting white actors, they overlooked the great damage inflicted to the outstanding BME talent that has

been celebrated at the Oscars in the past. It is unimaginable that the boycotting actors meant to undermine the five nominations and one Oscar won by Morgan Freeman, or Denzel Washington's six nominations and two Oscars. However, this was inadvertently the outcome. It is imperative for any actor to believe that they were nominated not because of their skin colour, but their talent. Morgan Freeman and Denzel Washington were not nominated just to fulfil a social quota which the Academy felt compelled to fill, but on the back of both their memorable performances on screen. It was merit that led to their nominations, not their skin colour.

Furthermore, if the Academy this year felt so pressured that it decided to replace a white actor with a BME actor on the nomination listings, it would have been far more insulting, even potentially racist, than the original omission. The other nominees would have automatically thought that the nominee was a token nomination and had been selected only on the basis of his or her colour. BME actors - any actor for that matter - must feel that their performance, dedication, and talent has got them to that position; not because the colour of their skin was darker than other nominees. Clearly, calling for quotas on Oscar nominations is not only unfair, but will undermine past, present and future BME talent.

This risk is similarly attached to arguments favouring affirmative action or championing all-female or all-BME shortlists. Being a female, or being the 'right colour', should not be a one-way ticket to managerial roles or positions on company boards. How insulting would it be to a female employee, who had worked herself all the way up to a board position, to be sat alongside another woman who was just there to tick a box? This distinction should not be made in the first place, but affirmative action and other similar initiatives allow this thought-process. The same thing will undoubtedly apply when dealing with the Oscars.

Since the initial Oscar outrage, the Academy voted, ironically with their President Cheryl Boone Isaacs (the first African-American President of the Academy), to increase the membership of its BME members. However, this decision is merely gesture politics. Although no one can deny that there will always be a risk of discrimination, the members of the Academy will continue to choose nominees based on their performances and not according to their origins or colour. If there is an all-white or an all-black list of nominees, so be it.

Ultimately, an award without merit is meaningless.

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Frankenstein is a novel about a scientist who creates a monster. The scientist loses control of the monster and by the end of the novel the monster has completely destroyed his creator. If titans of the Republican Party such as Mitt Romney had studied the moral lessons from Mary Shelley's novel, perhaps Donald Trump would not be on the verge of winning the Republican Primary. Mitt Romney recently incurred the wrath of Trump's supporters by asserting that Trump's racism and misogyny had no place in the Republican Party. I am with most Trump supporters in thinking that Romney's speech was wholly inappropriate. Not because I am a Trump supporter, but because men like Romney were complicit in creating the monster that is Donald Trump.



Obama-hatred, a racially driven phenomenon acquiesced to and cultivated by the Republican Party, has been a feature of American politics for the last seven years. This is not to say that Obama's policies cannot be legitimately criticised from both the left and the right. Instead of a sensible debate however, the criticism of Obama has always been charged with ugly and unprecedented vitriol: Obama is not just wrong he is evil; he is not a liberal he is a communist; he is not incompetent he wants to destroy America; he is not African-American he is Kenyan. The Republican Party has been complicit in all of this, hoping to construct the narrative that Obama and the Democrats want to turn America into a Godless, Mexican-infested, communist state where gay doctors are paid taxpayers' money to murder unborn babies in Planned Parenthood Clinics. Slowly but surely, by encouraging this ridiculous narrative, the Republicans have inadvertently fired up their base to a point of no return.

There is a real problem of illegal immigration from South and Central America into the United States. It is estimated that there are around 11 million illegal immigrants in the country, most of them entering through the unsecured southern border shared with Mexico. Rather than look for sensible solutions, the Republican Party has exploited the fears, and in many cases, prejudices of voters. Attacks on Obama's policy of shoring up the border but providing citizenship to law-abiding illegal immigrants already in the country, became central to the mainstream Republican message. The plan was of course to rally voters to the anti-immigrant party and short-term political gain. The result was that the tone of the immigration debate became toxic and then, blatantly racist. The groundswell of anger encouraged by moderate Republicans has, in a twist of irony, engulfed them. One by one, moderate Republican Party favourites such as Scott Walker, Jeb Bush and John Boehner were turned against for being too weak on immigration policies by the voters they had energised. Republican voters are no longer satisfied with vague promises to seal the borders; they now want a leader who is not afraid to call Mexicans rapists. They are no longer satisfied with a promise not to allow illegal immigrants to integrate into American society; they now want a leader who promises to send them all back. Enter Donald Trump.

In America, religion is still hugely influential in politics, particularly in the rural South. Millions of American Christians are disturbed by the socially liberal changes in their nation under Obama. To them, the Supreme Court's ruling that marriage was a constitutional right available to everyone regardless of sexuality became a symbol of the eradication of religious tradition. Again, the Republican Party saw an opportunity. The Republican Party declared that Obama's democrats had waged a 'war on Christianity'. Rather than explain to their

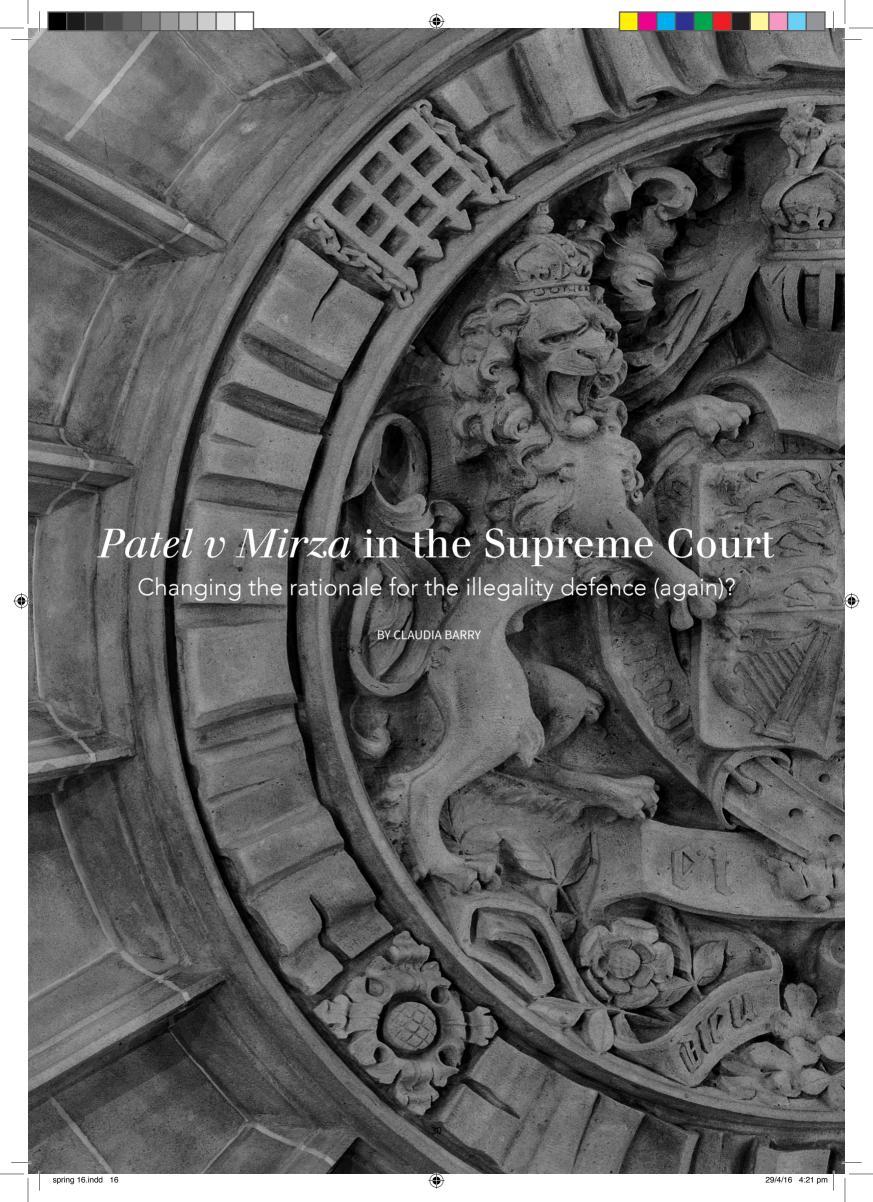
voters that the Constitution does not give Christians the freedom to take away the liberties of others, the Republican Party exploited this turn of events. Ted Cruz, a candidate for the 2016 Republican nomination, declared that there was a 'jihad' against 'people of faith' being waged by Godless liberals. Carly Fiorina, a candidate for the Republican nomination repeatedly lied to the country, alleging that a nonprofit women's health organisation was selling the organs of aborted babies. Both Fiorina and Cruz succeeded in stirring up many Christians to a fever pitch and gained a short-term bump in popularity for their efforts. Perhaps not surprisingly, a lone gunman then shot and killed three innocent people in an abortion clinic, and of course, Donald Trump swept up millions of votes in the deeply religious south.

In 2011, an extremely successful businessman from Queens, New York aggressively insisted he had proof that Barrack Obama had forged his birth certificate and far from being an American, was an illegal immigrant. As the controversy unfolded in the national media, the Republican Party saw an opportunity for more votes – after all, who would vote for a Kenyan President? When Obama revealed his full birth certificate, the Republican Party was unruffled. Nor were they concerned by the businessman who was subsequently lambasted in the media as pandering to bigotry. Why should they care? To them he was just a loudmouth idiot who had served his purpose by inciting the racists and the conspiracy theorists into hysterics. The Party assumed that the businessman would lick his wounds and go away quietly.

Now, five years later, that same businessman is doing what he did in 2011. Donald Trump is once again stirring up racial hatred in America and appealing to those who have hated the socially liberal black President since day one. The problem for the Republican Party is that the businessman is no longer a useful demagogue outside of the party; he is now an unelectable embarrassment who will probably represent the party at the general election. Now he is very much their problem.

The story of the last seven years in American politics is the story of Frankenstein's Monster. By spending the last seven years encouraging paranoia and racism for short-term political gain; the party of Abraham Lincoln, the party that once freed slaves, has facilitated the rise of a monster. Whilst Donald Trump is wildly popular amongst Republican voters, he remains singularly unpopular when the independents and democrats are factored in. According to polling data, Trump looks set to face off against Hilary Clinton in the general election, but set to lose the election for the Republican Party by a landslide. It will be a fitting end to this story, should the monster destroy the very party that created him.

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If there was ever a perfect example of 'hard cases make bad law' it would be ex turpi causa which means 'no claim may arise from an illegal cause'. The illegality 'defence' stops a claimant (C) from making an otherwise legitimate legal claim against a defendant (D) because of C's illegal conduct.

The first problem is classification. Is it a defence? It certainly operates as one, although it arises from C's wrongdoing rather than D's justification or merit. So is it a bar to C's cause of action? Or perhaps it is merely a rule of judicial abstention, an application of the court's policy not to assist a wrongdoer.

Numerous rationales for illegality are deployed in the case law, namely: 1) C's need to rely on his illegal conduct to bring his claim, 2) no duty/standard of care can be owed/ascertained from D to C, 3) the legislature's intention to bar C's claim, 4) allowing C's claim would produce inconsistency in civil and criminal law, 5) C is the operative cause of the harm, 6) C's conduct is inextricably linked to the harm, 7) C's moral turpitude and, finally 8) balancing competing policy concerns between allowing C or D to succeed.

Many of the relevant cases are doctrinally irreconcilable. Illegality basically means what the present judge thinks it means at the point of application. It has been interpreted on a piecemeal basis which leads to ambiguity. This uncertainty of *legal principle* is unacceptable, but is the result right in most cases? Largely, yes. So it would be better, or at least more intellectually honest, for courts to stop pretending they are applying an inviolable legal principle and instead admit that when in the penumbra of doubt, they go with their gut instinct and mould the rules to accommodate their desired outcome.

The current Supreme Court (SC) is hopelessly split on rationale for illegality, despite many academics believing Lord Hoffmann's judgement in *Gray v Thames Trains* [2009] 3 WLR 167 had ended the debate, at least for negligence claims. The split is evident from the stark differences in Lord Wilson's judgement in *Hounga v Allen* [2014] UKSC 47 and Lord Sumption's judgment in *Les Laboratoires v Apotex* [2014] UKSC 55. Lord Wilson proposed to balance the competing merits of C and D, whereas Lord Sumption favoured C's moral turpitude as the litmus test for applying illegality. This schism led Lord Neuberger to call for an urgent review of illegality in *Jetivia SA v Bilta* (UK) [2015] UKSC 23. Now, thanks to *Patel v Mirza*, the Court has another chance to give some clarity to the law.

## Patel v Mirza

Mr Patel transferred money to Mr Mirza for Mirza to illegally bet on share price movements based on inside information – some 'wheeling and dealing' as it were. The contract was essentially frustrated as the inside information Mirza would have used never materialised. So Patel sued for his money back. It may seem reprehensible to allow C to reverse his loss, but otherwise D will get an undeserved windfall, which seems equally problematic. Perhaps the money could be confiscated instead.

Patel v Mirza focuses heavily on the tricky rationale of reliance. The question is whether C needs to rely on his illegality to establish his claim. The rationale stems from Lord Mansfield's dictum in Holman v Johnson (1775) 1 Cowp 341., that 'no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act'. That sounds fairly clear, but it tells us virtually nothing about applying reliance to the facts and raises more problems than it solves. Firstly, the definition of reliance is unclear. It is unclear whether it is different from the alternative grounds used like 'founded upon', 'inextricably linked' or 'closely connected'. If it is different, how so? Are we not simply talking of a necessary legal connection? Secondly, why should

it matter if C does need to rely? C's reliance has nothing to do with the gravity of C's wrongdoing. Perhaps it should, which is benefit of Lord Sumption's turpitude test. Thirdly, Trusts students who were concentrating in lectures will remember the conflicting results created by the presumptions of advancement and resulting trust in *Tinsley v Milligan* [1993] UKHL 3 and *Collier v Collier* [2002] EWCA Civ 1095. Whilst Miss Milligan could use her proprietary interest from the resulting trust to establish her claim, Mr Collier had to rely on his fraud to rebut the presumption of a gift. Fourthly, to top it all off, Lord Phillips in *Stone & Rolls* [2009] UKHL 39. suggested that even if C does need to rely, his claim will not necessarily fail.

In the Court of Appeal (CA), only two out of three judges found that Patel was relying on his illegal conduct. However, all three judges held that he was able to recover his money owing to the *Locus Poenitentiae* doctrine, or the right of withdrawal. *Locus Poenitentiae* raises further complications concerning: whether C must genuinely repent, the timing of the withdrawal, and communication of the withdrawal. The CA's result will probably be upheld, but the SC must grapple with the application of illegality and the right of withdrawal more generally. There is potential that the SC will overturn the CA's finding that *Locus Poenitentiae* can operate in cases of involuntary withdrawal where the illegal contract is frustrated. Hopefully the SC will also scrap the reliance test altogether.

## **Options for the Supreme Court**

Patel v Mirza is a perfect opportunity for the SC to delimit illegality as a legal principle. Despite extra-judicial calls by Lords Mance and Sumption, it is not favourable for the Law Commission to re-assess the defence. The Law Commission made it clear they were happy to leave it to the courts in their 2009 report. Unfortunately, it would not seem preferable for a statutory defence to go through Parliament either owing to the potential hijacks by political pressure groups.

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So what should the SC do? Maintaining consistency in the law is a popular and logical rationale for the illegality defence. It operates when allowing C to recover in the civil law would undercut punishment in the criminal law. Tests based on causation are also popular, but again, as *Gray v Thames Trains* [2009] 3 WLR 167 illustrates, the causal test is legal rather than factual, so essentially we're back to a policy question. Lord Wilson's proposal to balance policy concerns may do justice on the facts, but traditionally illegality has never been concerned with the parties' relative inequities. The fact that D owes no duty/standard of care in joint enterprise cases is purely a policy consideration and works harshly for criminals engaging in crime with a high risk of physical harm (like a burglary) as opposed to no risk (like white collar crime in *Patel v Mirza*).

Perhaps a key reason for the splintering of rationales for the defence lies in its all-or-nothing application. Either C is unimpaired by his wrongdoing in bringing his claim, or D receives an undeserved windfall. Both parties are morally culpable, although the extent of their relative culpability will vary. Arguably, a lot would be solved in illegality cases if courts would apportion the loss between both C and D under the Civil Liability (Contribution) Act 1978, as was done for two fraudsters in *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL

Until apportionment is available, it would seem that whatever rule(s) the SC choose to apply, they will be unable to cater for every case. Illegality is an area where exceptions are unavoidable. So the best the Court can do is to exercise some intellectual honesty and admit that the outcomes of illegality cases are largely unconstrained by legal principle.



## Is 'Soft Kitty' a Copycat?

By Ammar Thair

You all know it, you've all heard it, you've all sung along to it. It's the one true cure for Sheldon's sickness, and arguably the twenty-first century's answer to the legendary 'Smelly Cat'. I am, of course, referring to the song 'Soft Kitty' from The Big Bang Theory. Indeed, the room was frighteningly quick to correct me when I attempted to the sing the lyrics at my film society's pub quiz a week ago. So ingrained is our love for this lullaby that we imagine it to be as innocent as its purpose, and as such, we imagine it to be untouched by the law. However, a few months ago the unthinkable happened... Look at Sheldon's face. Now look here. The makers of *The Big Bang* Theory were sued for copyright infringement in allegedly 'stealing' 'Soft Kitty'... While you wait for a Bazinga! which may never arrive, allow me to explain the background to this intriguing story.

The song itself has been around for almost 90 years under the moniker 'Warm Kitty' and was created as a nursery rhyme in the 1930s. The original author, Edith Newlin, was a former schoolteacher and well-known children's writer and poet from New Hampshire. Newlin wrote the lyrics which were later published with her permission in a book called Songs for the Nursery School. Interestingly, the nursery rhyme has been played for decades in Australia, and continues to be popular to this day.

It is clear that the origin of our feline friend goes back further than many initially would have thought. So why is it that on the credits of several episodes and items of merchandise the song can be seen attributed to Bill Prady, a Principal of Chuck Lorre Productions and one of the producers of The Big Bang Theory? In 2007, Kentucky-based Willis Music (the owner of the copyright of the original book containing the lyrics) supposedly made a deal with Warner Brothers, in order to transfer elements of the rights allowing them to be used in the show. Needless to say, Newlin's daughters do not see it this way.

In the book of nursery rhymes, the lyrics to 'Warm Kitty' are credited to Newlin on the Acknowledgements page as well as on page 27. The book was registered in the US Copyright Office by Willis Music in 1937, and was later renewed in 1964. The lawsuit alleges that under the relevant US law at the time (the Copyright Act of 1909), this registration and renewal by consequence served to register and renew Newlin's copyright in the 'Soft Kitty' lyrics as well. Despite Newlin's passing in 2004, the suit alleges that the two daughters of Newlin, Ellen and Margaret, are now the exclusive owners of the copyright. They argue that Willis Music were not in any position to grant such rights in 2007, that the class of defendants in the suit had "not only wilfully infringed [the] Plaintiffs' copyright, but they failed to credit... Newlin as the author", whilst taking particular issue with the crediting of Bill Prady, one of the show's producers.

The lawsuit itself is a 43-page document, containing around 22 pages of written argument, with 21 pages of attached 'exhibits', ranging from photos of Soft Kitty merchandise to original source documents for the song itself. Specifically the claim targets Warner Brothers, CBS, Fox Broadcasting Company and around half a dozen other broadcasting companies for "wilfully [infringing]" the Plaintiff's copyrighted song lyrics, "by repeatedly using the lyrics in their entirety on... one of the world's most popular television sitcoms". Further, it cites the use as being "without authorisation", but something that "[contributed] materially to the program's enormous success and in promotion and advertising for the show... [especially] merchandise items".

Apparently the daughters only became aware of the show's 'wilful infringement' in 2014 and claimed that the permission of Newlin or her heirs was never sought by any of the defendants. Crucially, without such permission, any deals to obtain rights or authorisation could not have been lawful. The lawsuit is still at an early stage, yet, interestingly the issue of duration of copyright could be the fault of none other than Disney. In the US, the very first Mickey Mouse cartoon (Steamboat Willie in 1928) was expected to enter the public domain in 1984. However, Disney lobbied Congress to extend copyright law to a term of 75 years, before pursuing another extension in 1998, meaning that the works of 1923 "are now set to enter public domain in 2018". Had 'Warm Kitty' been published a decade earlier, Sheldon could have slept easy knowing the song would have entered the public domain.

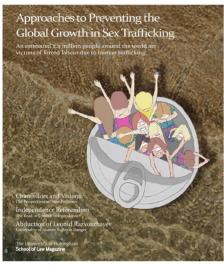
Of course, the claim before us is a US one, but how would the same claim fare in the present-day UK context? Under UK Copyright law, any such claim would now be handled through the Copyright, Designs and Patents Act of 1988. It is important to know that a song cannot in itself be protected; instead, one of the things that can be protected is the underlying literary work (the lyrics, as per section 3(1) of the CDPA 1988). Assuming the rights are registered after 1988, we would have to consider the relevant UK law on duration of copyright. For a literary work, this would be 70 years from the end of the calendar year in which the last remaining author of the work dies (s.12 CDPA 1988). Thus, UK protection would actually last 70 years from Newlin's death in 2004 (if it were registered in 1937, The Copyright Act 1956 would have applied, and the duration would last for 50 years from Newlin's death). Clearly, this is a very simple application without consideration of authorship, moral rights, or fair dealing arguments, but it could be said that the protection afforded here in the UK would do less to cure Sheldon's headaches than what is currently available in the US. Nonetheless, the problem for the show's producers would most likely remain in either jurisdiction.

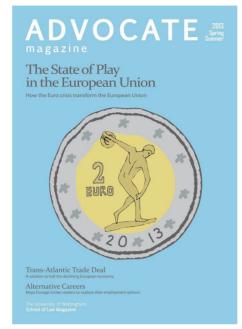
Now, after making it through to the end of this story, I have just one thing to say to you... Bazinga! No, I'm sorry, that was cruel... This article was not one of Sheldon's classic pranks. I checked and sadly everything is true. It's also true that our beloved 'Soft Kitty' may actually be a copycat, but we can take comfort in the fact that at this early stage, we simply don't know yet. With the lawsuit only recently being filed and with no official response from either of the defendants, we must reserve our judgment, if not



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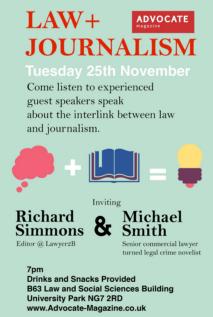














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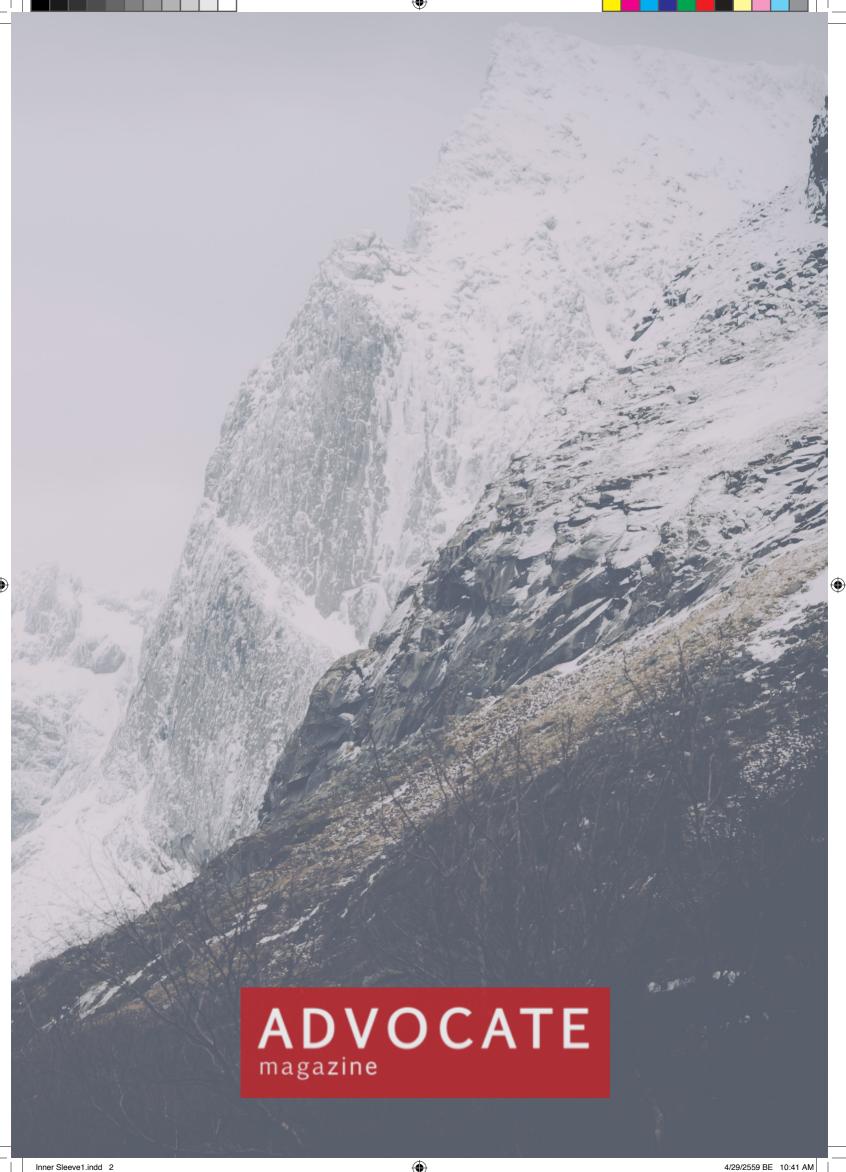
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