March 2024
Issue 8

THE QUEEN'S UNIVERSITY BELFAST
STUDENT LAW JOURNAL

Contents

FOREWORD

I am delighted to present the Eighth Issue of the Queen's University Belfast student Law Journal and the first issue of 2024. It has been a pleasure to reinstate the journal from its hiatus since 2021 and to be able to build upon the foundations diligently created by our alumni at the law school.

Our mission at the QUBSLJ is to provide a platform for excellent undergraduate legal writing and to increase the reach and audience of undergraduate scholarship. I am pleased to say that the submissions we received from across the law school at Queen's were outstanding in both their variety and quality. I thank all of the law students who chose to submit their work with us.

The writing featured in this issue has been read, selected and edited carefully by fellow undergraduate students at the School of Law. I would like to thank our Reviewers Hisvary Hisvary, Natasha Dunlop and Katie Archibald and my Assistant Editor Jade Hughes for their support and effort in the creation of this issue.

I would also like to thank our PhD Supervisor Anurag Debb and our Faculty Liaison Dr. Ciara Hackett for their ongoing assistance and support.

The work featured in this issue is of an exceptional quality. I thank our contributing writers Hannah Pryor, Edeline Lim, Joel Hames, Danny Neill and Alexia Lenton for entrusting us with their work.

I am delighted to offer you Issue Eight of the Student Law Journal. Enjoy!

Katherine
Macdonald Smith

EDITOR-IN-CHIEF

‘One of the key issues in the dissolution of familial ties is that of fair and just property division.’ Evaluate critically the accuracy – or otherwise – of this statement, making reference to legal authority.

Hannah Pryor

This essay will engage in a critical discussion of property division upon divorce, and whether cases have been concluded with fairness as a paramount consideration. The first section will outline the principle of equal sharing and demonstrate the onus placed on this guiding principle within case law.[1] This will be followed by an examination of the varying other principles directing property upon separation (the principle of compensation, the principle of meeting needs and the principle of autonomy).[2] Next, the disadvantages of the equal sharing principle will be examined to illustrate the lack of fairness in property disputes, particularly where outcomes appear to be discriminatory. This analysis will present two areas of the law that appears to be discriminatory – *the gendered argument* and *the classist argument*, suggesting decisions have unacceptably infringed on the right to fair and just property division upon the dissolution of familial ties. The research from scholar Hitchings,[3] in conjunction with judgements from Lord Nicholls, Baroness Hale, and Baroness Deech,[4] will be used in support of this argument. In conclusion, it will be contended the law appears to place undue weight on the principle of equal sharing, which is not legitimate in cases of property division dealing with the most vulnerable in society.

The Equal Sharing Principle

To substantiate the argument the law on property division is not always just in every circumstance, it is first important to evaluate the contemporary position taken by the courts. With wide judicial discretion,[5] of the Matrimonial Causes Act 1973 (and subsequently the Matrimonial Causes (Northern Ireland) Order 1978), it can be perceived the judiciary favor the principle of equal sharing when dividing property upon familial dissolution. Although unclear in its precise application, the principle of equal sharing was discussed at great length in the decision of the House of Lords in *White v White*;[6] Lord Nicholls stated “*as a general guide equality should only be departed from if, and to the extent that, there is good reason for doing so*” [7]. Although dismissing

[1] *White v White* [2000] UKHL 54, [2001] 1 A.C. 596 (HL), 605 (Nicholls J).
[2] *Miller v Miller: McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 A.C. 618 [140].
[3] Emma Hitchings and Joanna Miles, ‘Rules Versus Discretion in Financial Remedies on Divorce’ (2019) 33 Int J. Law Policy Fam 24.
[4] *White* (n 1); *Miller* (n 2); Ruth Deech (2017) Divorce (Financial Provision) Bill [2017-19] https://services.parliament.uk/ bills/2017-19/divorcefinancialprovision.html.
[5] *White* (n 1) 600.
[6] [2000] (n 1).
[7] *Ibid* 605.

the claim equality should be a "*starting point*" in such cases,[8] Lord Nicholls affirms the conclusion provided by the Court of Appeal with the principle of equal sharing at the heart of his discussion. It can be assumed every property division case should initially conclude a half-and-half split for the parties,[9] which can only be altered depending on the circumstantial facts of the case, rather poetically evidenced as "*fairness, like beauty, [lying] in the eyes of the beholder*".[10]

The judgement appears keen to advocate for the principle of equal sharing in its ability to provide a clean break for the parties (a lump sum payment will be provided with no ongoing spousal support).[11] Although arguably advantageous for allowing prompt emotional and financial freedom from previous familial ties, and allowing for the possibility of remarriage as a human right under Article 12 of the European Convention on Human Rights;[12] clean break orders promote the principle of equal sharing as fundamental to their conclusions. Despite Lord Nicholls referring to the misinterpretation of the principle of meeting needs as being unfairly construed as a reasonable requirements approach,[13] his judgement unjustly disregards the other principles guiding the law on property division. The principles of compensation and autonomy are virtually non-existent in his judgement, raising significant doubts over the reliability of relying on this case as leading authority. It is only natural, following case-law has been widely confused in applying this judgement, resulting in what appears to be a return to pre-*White* appreciation for the principle of equal sharing in *Lambert v Lambert*.[14] With no conclusive interpretation of the principle of equal sharing, and much discussion whether to regard it as the "*yardstick*"[15] or cross- *"check*"[16] approach, Lord Nicholl's judgement leaves much to the imagination of the judiciary, resulting in unclear conclusions. Already unjustly discriminated against members of society (namely women and those of a lower income) are disadvantageously affected by unclear decisions lacking adherence to the rule of law,[17] it is no surprise, a misunderstanding of the onus placed on the principle of equal sharing will unfairly affect them.

The Gendered Argument

This section will take what can be described as *the gendered argument* and assert a reliance on the equal sharing and clean break principles are detrimental to the standard of living for many women

[8] *Ibid* 606.
[9] S. Arthur and others, *Setting Up: Making Financial Arrangements After Separation* (National Centre for Social Research, London) 56.
[10] *White* (n 1) 599.
[11] Matrimonial Causes (Northern Ireland) Order 1978, Article 27A(1).
[12] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 12; *Babiarz v Poland* (application no. 1955/10) [35].
[13] *White* (n 1) 607.
[14] [2002] EWCA Civ 1685; Rebecca Bailey-Harris, 'Lambert v Lambert - Towards the Recognition of Marriage as a Partnership of Equals' (2003) 15 Child & Fam L Q 417, 421.
[15] *White* (n 1) 608.
[16] *Ibid* 615.
[17] Eduardo Barjas-Sandoval., et al. 'Gender Inequality and the Rule of Law' (2023) 15 HJRL 95.

who maintain the role of primary care giver.[18] For the purpose of this essay, the phrase primary care giver shall relate solely to women, who still maintain the role more often than men despite an increase of women with children in paid employment.[19] The court following the authority *White* judgment, although with a paramount statutory consideration for the welfare of the child,[20] are reluctant to provide spousal support with a favourable leaning towards one lump sum payment.[21] The rationale provided by Baroness Hale is the aim of divorce which is to completely sever previous familial ties, and strive for "*independent finances and self-sufficiency*"[22]. Arguably unfair where children are a product of engaging in married behaviour,[23] the judgements of the courts have a propensity to totally disconnect the prior relationship with the objective of being able to find a future family and enter the workforce again. This is not fair or legitimate for primary caregivers often resulting in a "*rapid increase in the breadwinner's*"[24] earning capacity. Where clarity fails to rear its head in case law, it is natural the courts will turn to conventional "*gender differences*" when aiming to provide a clean break for the parties;[25] often resulting in the woman having lost economic opportunities due to,[26] for example, giving up work to provide care for the child, which is rarely considered when splitting assets equally. If the law on property division were to place greater importance on the principle of compensation, coined by Baroness Hale in her judgement in *Miller v Miller*,[27] the courts may be more inclined to promote the issuing of spousal support. Even where spousal support is provided, the courts are keen to provide a prompt termination for the payments with the objective of eventually severing ties,[28] which may not be appropriate in all circumstances, particularly where the future of the parties is uncertain. *The gendered argument* provides a demonstration the onus placed on the equal sharing principle in property division does not place fundamental consideration on fairness because women often face unjust economic losses in comparison to men.[29]

The Classist Argument

This section will take what can be called *the classist argument* and maintains that a focus on the principle of equal sharing, is neither applicable nor fair when analyzing the 'everyday cases' (for

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[18] *Miller* (n 2) [142].
[19] Catherine Jones, Sarah Foley, Susan Golombok, 'Parenting and Child Adjustment in Families with Primary Caregiver Fathers' (2022) 36(3) JFP 406.
[20] Matrimonial Causes (NI) Order 1978 (n 9).
[21] *Ibid* art 27(A)(1).
[22] *Miller* (n 2) [133].
[23] Gillian Douglas, 'Towards an Understanding of the Basis of Obligation and Commitment in Family Law' (2016) 36 Legal Stud 1, 18.
[24] *Miller* (n 2).
[25] Tess Wilkinson-Ryan and Deborah Small, 'Negotiating Divorce: Gender and the Behavioural Economics of Divorce Bargaining' (2008) 26 Law & Ineq. 109, 111-12.
[26] Ellen Gordon-Bouvier, 'The Open Future: Analysing the Temporality of Autonomy in Family Law' (2020) 32 CFLQ 1742.
[27] [2006] (n 2) [140].
[28] *Ibid* [130].
[29] Hayley Fisher and Hamish Low, 'Recovery from Divorce: Comparing High- and Low-Income couples' (2016) 30(3) Int J. Law Policy Fam 338, 339.

the purposes of this essay, 'everyday cases' shall relate to all cases dealing with couples on lower incomes) which comprise most scenarios dealt with by the courts on the division of assets. Where the couple is less financially stable (for example receiving state benefits or on a relatively low income), the focus of the courts should be on assuring the parties are provided with their basic needs, as opposed to equal distribution, to ensure neither party unjustly struggles to meet an independent sufficient standard of living following a divorce.[30] Emma Hitchings, in her study of '*Rules Versus Discretion in Financial Remedies on Divorce*',[31] metaphorically describes the current debate on property division for everyday families as having two poles, of absolute judicial discretionary power and stricter statutory guidelines.[32] Drawing on the rejected proposals of Baroness Deech,[33] Hitchings suggests neither pole would be sufficient in reforming the law – absolute discretion proposes too much regional ambiguity, contrary to the clarity set forth in the rule of law and unfair those unable to avail to legal support due to financial unavailability,[34] whereas proposing strict statutory guidelines put forward by the legislature would fail to consider the subjective nature of each family situation.[35] As mediation, Hitchings proposes "*greater access to legal advice*" in the form of legal aid.[36] This reform supports *the classist argument*, suggesting 'everyday cases' are discriminately deprived by the current policy on divorce settlements. Authoritative case law dealing with large sums of money to be divided is inapplicable to the 'everyday cases' which concern, more primarily, the basic needs of each party.[37] Although Hitchings fails to purport a legislative answer to the unjust nature of the current system, her proposals of financial aid to those often dealing with divorce would unarguably result in fairer property decisions, taking in to account all principles outlined by Baroness Hale,[38] and administrating a wider access to justice.

It is submitted the law on property division for divorcing couples is unjustly discriminatory to both women and those on lower incomes, therefore it cannot be asserted that property division law is focused on fairness. The wide discretion provided by statute has resulted in leading authority illegitimately focused on the principle of equal sharing and providing a clean break,[39] which has been demonstrated as not working adequately through *the gendered* and *the classist arguments*.

Careful analysis of critical opinions from Hitchings and Baroness Deech have shown an increase in the accessibility of legal aid will bridge the gap between wide discretionary powers and stricter guidelines,[40] but this should be acquired in conjunction with a greater focus on all principles

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[30] *Ashley v Blackman* [1988] FCR 699, [1988] 2 FLR 278.
[31] Hitchings (n 3).
[32] *Ibid* 45.
[33] Deech (n 4).
[34] Hansard HL Deb, col 946-947, 27 January 2017, Divorce (Financial Provision) Bill [HL], col 948.
[35] Hitchings (n 29) 27.
[36] *Ibid* 41.
[37] *Davies & Another v Davies* [2016] EWCA Civ 463, [67].
[38] *Miller* (n 2) [140].
[39] *White* (n 1) 600.
[40] Hitchings (n 3) 41.

suggested by Baroness Hale in her *Miller* judgment,[41] departing from the inherent focus on the principle of equality by Lord Nicholls in *White*,[42] to ensure a fair and considered analysis of all subjective cases where property division is examined in the future.

[41] *Miller* (n 2) [140].
[42] *White* (n 1) 605.

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The Rights of The Child in Family Law

Edeline Lim

Lord Justice Thorpe in *Mabon v Mabon*[1] stressed that children's right to freedom of expression and participation 'outweighed the paternalistic judgment of welfare.' For the past decade, the family courts have been hounded by cases demanding judicial guidance regarding conflicting interests within the family unit. This essay outlines the voice of a child within the scope of medical treatments, arguing that whilst there is a consensus that the voice of the child is fragile in the face of family law, the court itself is realistically a greater deterrent to child autonomy compared to parental rights.

Child Rights

Article 12 of the United Nations Convention on the Rights of the Child (UNCRC)[2] states that 'It is every child's/young person's right to have their voice heard in decisions that affect them' and this has been ratified by the UK Government.[3] Theoretically speaking, child rights, as suggested by Eekelaar, come in the form of basic interests, developmental interests and autonomy interests.[4] He asserts that basic interests are paramount over autonomy and developmental interests. His argument is complemented by Freeman, also agreeing that autonomy rights should not infringe other rights. The repression of child autonomy rights is further exacerbated by domestic law whereby when the voice of a child comes into friction with section 1 of the Children Act 1981[5], or article 3(1) [6] of its Northern Irish counterpart, the courts will uphold the welfare of the child through the 'paramountcy principle'. Section 3[7] of the same Act also enshrines parental responsibility over a child. Thus, the voice of the child, manifested through child autonomy, is ostensibly threatened on multiple ends.

Child Autonomy vs Parental Rights/Interests

Although child autonomy has been given some form of statutory protection in recent years, it is at the mercy of an existing mental capacity, the lack thereof defined as the inability to 'make a decision for himself' due to an impairment or disturbance of the mind or brain.[8] In Northern

[1] [2005] EWCA Civ 634 [28] (Thorpe LJ).
[2] UN Convention on the Rights of Children 1989, art 12(1).
[3] Children Act 1989.
[4] John Eekelaar, 'The Emergence of Children's Rights' (1986) 6 OJLS 161.
[5] Children Act 1981, s 1(1).
[6] Th e Children (NI) Order 1995.
[7] Children Act 1981, s 3.
[8] Mental Capacity Act 2005, ss 2(1) and 3(1).

Ireland, the Mental Capacity Act 2016 reflects a similar position. Nevertheless, common law has seen progression in terms of child autonomy where the courts have respected the choice of a mentally competent or 'Gillick-competent' child provided they had sufficient understanding of the treatment. This has been widely attributed to the case of *Gillick v West Norfolk & Wisbeck Area Health Authority*[9] where it was held that a Gillick-competent children under the age of 16 could receive contraceptive advice without parental consent. This case has been declared by multiple child autonomy advocates and academics such as Eekelaar and Gingwall as a seminal departure from parental responsibility.[10] However, how legitimate are these claims regarding the liberation from parental rights?

Prima facie, parental rights appear to be a contending authority against child rights, but to what extent do parental rights exist? These rights briefly crystalise through the **Children Act**[11] and Eekelaar and Hall argue in their favour, despite them existing in a fragmented state.[12] However in practise, their existence is debatable. In the *Gillick* case[13], Lord Fraser stressed that parental rights exist for the benefit of the child/ a child, cementing the paramountcy principle. It can be deduced that even if parents seemingly have rights, it is subject to the child's wellbeing and is therefore a child-centered approach rather than a parent-centered approach, especially where the health of a child is concerned, as suggested by McCall Smith.[14] He proceeds to elaborate that albeit the wishes of responsible parents will be respected, ultimately the courts are the arbitrators of what falls into the purview of 'best interests'. This is evident through recent cases which will be considered subsequently.[15] Hence, it is asserted that the concept of 'parental rights' is partially illusory, as is its supposed liberation.

Even if parental rights pose a virtual issue in certain cases, the court's continual promotion of child autonomy in some post-Gillick cases has diminished its presence. In *Mabon v Mabon*[16], the *Gillick* case[17] was cited alongside Article 12 of the Convention[18] and Article 8 of the European Convention on Human Rights[19] where Lord Justice Thorpe advocated a keener appreciation for child autonomy. In *R (Axon) v Secretary of State for Health*[20], Lord Justice Silber also delivered a judgement emphasising the significance of child autonomy, especially among mature minors. Although child autonomy seemingly overrode parental consent in these judgements, it

[9] [1986] AC 112.
[10] Michael Freeman, 'Rethinking Gillick' (2005) 13 IJCR 201.
[11] Children Act 1989, s 3(1).
[12] Susan Maidment, 'The Fragmentation of Parental Rights' (1981), 40(1) CLJ 135.
[13] *Gillick* (n 8).
[14] Jonathan Herring, *Family Law* (10th edn, Pearson 2021) 1127.
[15] ibid 1128.
[16] *Mabon* (n 1) [15] (Thorpe LJ).
[17] *Gillick* (n 8).
[18] ibid (n 1).
[19] European Convention on Human Rights, art 8.
[20] [2006] EWHC 37.

was only restricted to consenting to medical treatment. There is instead a clearer materialisation of judicial deterrence against child autonomy in cases pertaining to refusals of medical treatment.

Child autonomy vs the courts

Post-Gillick cases such as *Re R*[21] and *Re W*[22] are regarded as a retreat from children's autonomy rights established in Gillick. The judgements of these cases were met with trenchant criticism, principally against Lord Donaldson who was notably vocal in that even though the child was Gillick-competent, he/she may not refuse treatment. Nonetheless, these criticisms are rather ineffectively evidenced. The cases are factually different and were distinguished by Lord Donaldson in *Re R*, [23] one concerning refusal to treatment and the other consent to treatment.[24] Although a cogent argument would be that both are two sides of the same coin and hence should both be decided by competent minors, Gilmore and Herring's article provides a comprehensive review on why a higher level of competency required of refusal cases is justified, mainly because refusing treatment that promotes a child's welfare carries a higher risk of harm compared to consenting to treatment.[25] Even the heralded beacon of child autonomy rights - the *Gillick* case was a decision which acceded to children's welfare, as per Stephen Gilmore's observation that Lord Scarman asserted his 'Gillick competency test' in agreement with Lord Fraser's welfare approach.[26]

For too long the courts and academics alike have been fixated on the contention between child autonomy and parental consent. While parental interests might have been the most visible detriment to absolute child autonomy in the past, relatively recent cases reveal the underlying reality that the courts do not necessarily give in to parental interests. This is evidenced in *Re E*[27], *Re P*[28] and *Re X (A Child) (No 2)*[29] where the courts overrode the views of both the parent and child, along with the recent case of *Bell v Tavistock*[30] where the courts declined considering parental consent altogether. It is rarely the case, such as in *Re T (A Minor) (Wardship: Medical Treatment)*[31], that the courts decide it would not be in the child's best interests for life-saving treatment to proceed, or where authorising treatment would be painful or threaten the dignity of

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[21] *Re R (A Minor) (Medical Treatment)* [1993] 2 FLR 757.
[22] *Re W (a minor) (Medical Treatment: Court Jurisdiction)* [1992] 4 All ER 627.
[23] *Re R* (n 19).
[24] Emma Cave, 'Adolescent Consent and Confidentiality in the UK' (2009) 16 EJHL 309.
[25] Stephen Gilmore and Jonathan Herring, 'No Is the Hardest Word: Consent and Children's Autonomy' (2011) 23 Child & Fam L Q 3.
[26] Jonathan Herring, Rebecca Probert and Stephen Gilmore, *Great Debates in Family Law* (2nd edn, Palgrave 2015) 68.
[27] *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386.
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[29] [2021] 2 FLR 1187.
[30] *Bell and another v The Tavistock and Portman NHS Foundation Trust* [2021] EWCA Civ 1363.
[31] [1997] 1 WLR 242.

the child.[32] The orthodox approach of welfare seems to dominate the bulk of judicial discourse, mostly free from parental interest which reduces the unconscious supposition that every child comes from a stereotypical 'normal family' with good parents who are in step with the best interests of the child.[33] Nonetheless, this implies that whether a case is decided in favour of a child, a parent or neither solely hinges on the inherent jurisdiction of the courts, which is too expansive at times. For example, the court was inconsistent in its ruling of the recent case of *Kings College Hospital NHS Foundation Trust v Ms Thomas, Mr Haastrup and Isaiah Haastrup*[34], where the withdrawal of treatment was held to be of the best interests of the children despite vehement opposition of the parents, differing from the conventional rulings of previous judgements. It is now clear that the overriding control vested in the courts is the primary 'threat' against child autonomy.

A valid query is whether court intervention is justified by the 'best interests theory' or the 'paramountcy principle', theoretical concepts of which hinge on the court's subjective interpretation. This candidate argues to the affirmative to a certain extent, for the court is the final arbiter and protector of the fundamental rights of children, notably those who are very young and lack the capacity to make healthcare decisions on their own.[35] However, where a child is sufficiently competent or reaches the age of 16, their view should be respected under Section 8 of the Family Reform Act[36], bearing in mind the fact that the threshold for sufficient competency is varied according to different situations, namely refusing and consenting to medical treatment. This broad categorisation of such cases could be problematic and overly generalised; therefore, the application of Herring's 'risk-relative approach' is proposed as the most pragmatic solution to the persisting refusal-consent conundrum.[37] Although this approach provides a cogent balance between allowing the vigilance of the courts in protecting a child without extinguishing their autonomy, it is by no means a panacea as it is susceptible to potential misuse, for instance a child could still be deemed insufficiently competent if the court does not agree with their decision.[38] Nevertheless, it is argued that the competency threshold for high risk cases should not be ridiculously high that even 'sufficient intelligence to be able to take decisions about his own well-being' is deemed insufficient due to a lack of full understanding, as it is unrealistic to expect even legal adults to possess a full understanding of what their refusal of treatment implies.[39] It is therefore contended that even if court intervention is justified at times, it should give more weight to the competency of the child in conjunction with the magnitude of risk involved.

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[32] *Alder Hey Children's NHS Foundation Trust v Evans and Another* [2018] EWHC 308 (Fam); *Great Ormond Street Hospital v Yates and Others* [2017] EWHC 972 (Fam).
[33] Jonathan Montgomery, 'Children as Property?' (1988) 51 MLR 326.
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[36] Family Law Reform Act 1969, section 8.
[37] Gilmore and Herring (26).
[38] Jonathan Herring, 'Losing It - Losing What - The Law and Dementia' (2009) 21 Child & Fam L Q 3.
[39] Glennon (n 22) 456.

Conclusion

The voice of a child and the law enveloping it are ambiguous, underdeveloped and highly contentious, especially where a life is at stake. Nonetheless, the courts should depart from taking the overly-protectionist and frankly outdated approach identified by Freeman in the 19th century.[40] Taking into consideration the fact that children these days are increasingly literate, socially aware and intellectually mature, the courts and parents should likewise mirror their evolving capacities, guiding them to make their own informed decisions rather than playing the role of a dictator.

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The funeral of the late Queen Elizabeth II was a supreme example of what Walter Bagehot

described as the 'dignified' version of the UK Constitution, focused on the ancient, complex, and ceremonial aspects that help explain how a modern system of government evolves within the shell of an ancient constitution. Discuss.

Joel Hames

Intro

The shifting view of the monarch throughout British history has been the catalyst for seminal constitutional reforms. Speaking contemporaneously, Bagehot writes "The use of the Queen, in a dignified capacity, is incalculable."[1] While in that instance he was commenting on Queen Victoria, in our own time we see this 'incalculable dignity' embodied in the late Queen Elizabeth and expressed through her funeral. There is a modern trend to dismiss and diminish the legitimacies of constitutional monarchy both in its functional and metaphysical capacity. However, those who dismiss must take note of the global and national outpouring for a ninety six year old grandmother. The British monarchy is the means by which the British constitution is accessible to the masses as Bagehot notes 'it has a comprehensible element for the vacant many'.[2] The monarchy is vested with the actions of the past, and a symbol of the future through the heirs, it is one means by which someone can come to know their own county. Further to the symbolic, the Sovereign does indeed hold political capital in the United Kingdom being the entity in which laws come into being through royal assent and having a weekly meeting with the current Prime Minister. The Monarchy is an arm of government and thus managed as such. Everything they say or do is managed in order to present the monarchy and by extension Britain in the best light possible. The passing of the Queen and following funeral has sent shockwaves around the Commonwealth. It is right to look at the potential evolution of Monarchy not just from a domestic perspective but also through the lens of the Commonwealth.

The Living Constitution

Bagehot opens his second edition of *The English Constitution* with an anthropomorphosis of the constitution itself. It is a document at work, before him, during him and after him. As he says it is a 'living constitution'[3]. There is something unquestionably religious in its etymology, particularly Christian. Bagehot sets aside two chapters to expound on the virtues of constitutional monarchy and while he litters his writing with legitimate critiques, broadly he extols Kingship. It was in the Victorian era that constitutional monarchy adopted its modern form[4], all Monarchs since Victoria have aimed to follow the fundamental precepts established

[1] Walter Bagehot, *The Collected Works of Walter Bagehot*, vol 5 *Political Essays* (first published 1974, The Economist 1974) 226.
[2] Ibid. 166.
[3] Ibid. 165.
[4] Vernon Bogdanor, The Monarchy and the Constitution (Oxford University Press, USA 1998) 40.

by Bagehot. Based on Bagehot's writings Chrimes establishes a working definition of constitutional monarchy:

> 'The essence of the Constitution today is the temporary entrusting of great power to a small Cabinet or body of ministers, who are formally appointed to office by and dismissible by the King, but who are politically responsible to the electorate, through the House of Commons, which is periodically elected on a wide, popular franchise, and who are legally responsible under the law, and who are served by a corps of permanent civil servants.'[5]

This definition is a little utilitarian and fails to make reference to what F.W. Maitland in his lecture series calls the "spiritual things"[6] of the British state. Combining Chrimes definition with what political theorist Michael Oakeshott remarked that 'a constitution is that in which rulers and subjects express their beliefs about the authority of a Government',[7] a sentiment shared with Maitland[8], demonstrates both the pragmatism and mysticism of the British constitution. In a codified system this relationship to government and the executive is outlined in clear parameters. Within the fluid British system beliefs about authority have been flexible throughout history. While this flexibility has created the state as is today, it always leaves the potential for monarchical reform or abolition on the table. Chrimes goes on to establish potential complications of having such a fluid constitution, he writes 'The elasticity of the English Constitution is one of the greatest merits, but it is also a source of some danger, for the ease with which the Constitution can be amended and modified tends to obscure the significance and consequences of changes which may be slight in themselves, but may be of profound accumulative effect.'[9] Yet it is this 'profound accumulative effect' that underpins modern government. It is the accumulation of ceremonial, complex and ancient statehood that allows for the theoretical processes of government to manifest.

Malleability/ Fluidity of the Constitution

Unlike countries with a codified constitution the British constitution is demonstrably alive. It rises and falls to meet the requirements of the age in which it finds itself. New laws sit atop old laws like a great painting. The funeral was the most recent layer of paint being added. Modern government therefore emerges through a process of piecemeal reforms. One of the best examples of modern government emerging from the ancient complexity of the British constitution is the development of British firearms legislation. Following the Dunblane massacre in 1997, parliament swiftly acted to pass tighter legislation in an effort to prevent something similar occurring in the future. The Firearms (amendment) Act 1997[10] changed the nature of firearm ownership across the country without the constitutional uprooting that would be required in America. The ancient uncodified nature of the British constitution allows for sweeping and immediate law reforms, this is in contrast to countries with codified constitutions

[5] Stanley Bertram Chrimes, English constitutional history (2nd edn) 10.
[6] Frederic William Maitland, The constitutional history of England (The University Press 1946) 101.
[7] Oakeshott, M. J. (1990). On human conduct. Clarendon Press.
[8] Frederic William Maitland, The constitutional history of England (The University Press 1946) 101.
[9] Stanley Bertram Chrimes, English constitutional history (2nd edn) 188.
[10] Firearms (Amendment) Act 1997.

such as America where the rigidity of their constitution causes inflexibility. This inflexibility is due to the fact that political and cultural stability lie not in a person or institution like the Monarchy but rather in a document. This difference, evidently, can present challenges in modern government as while a codified constitution provided certainty and stability it fails in pragmatism. Vesting a national identity in a person rather than a single document allows government to conduct business more efficiently whilst maintaining a symbolic figurehead. Additionally, the constitution allows for difference within the home nations yet the maintenance of constitutional rigor. British firearms legislation again deals with this complexity. There are marked differences in firearms legislation between each legal jurisdiction. The differences between Scotland, Northern Ireland, and England in their firearms law allows each constituent part to meet its own needs within the constitutional framework of the United Kingdom. The ancient components of the British constitution are by their very nature complex given the nations longevity, yet the age and complexity of the legislative process are no impediment to the demands of modern governance.

The Natural Yearning for Authority

"The tendency of advanced civilisation is in truth to pure monarchy"[11] writes Disraeli in his novel *Sybil*. Now it's easy to look at this statement and dismiss it immediately, after all there are many a prosperous nation without a monarchical government. However, there seems to be, by nature, a desire for hierarchical structure in the administration of government. This desire most often culminating in Monarchy. Modern government is an emanation of monarchical rule, countries without monarchs often try to emulate elements of monarchical rule be it constitutionally or ceremonially. Even during the formation of America, it was proposed that Washington should become King rather than President[12]. Following the revolution in England, which was undertaken expressly to remove Charles I, the newly formed government sought to make Cromwell King. Instead of taking the title King Cromwell was the Lord Protector, making him King in all but name. Monarchy is so ingrained in the human condition one can observe monarch like dynasties in a plethora of countries. The Kennedy's and Bush's in America or the De Gaulle or Le Penn families in France for example. The funeral of Queen Elizabeth demonstrated a global and domestic fascination with monarchy, the French president pronounced 'To you, she was your Queen. To us, she was *The* Queen.'[13] There are layers behind Macron's sentiment, the most profound perhaps is the implication of a metaphysical quality to *The* Queen. Macron's statement is laced with an ethereal component. If one examines the religious implications of Monarchy we can see how the monarch symbolises God.[14] Thus, the sovereign is the medium by which subjects can relate, in part, to the transcendent. This

[11] Benjamin Disraeli, Sybil: Or The Two Nations (Oxford University Press 2017)
[12] Nicola Lewis, 'Founders Online: To George Washington from Lewis Nicola, 22 May 1782' (Founders Online: Home, 22 May 1782) <https://founders.archives.gov/documents/Washington/99-01-02-08500> accessed 17 December 2022.
[13] Emmanuel Macron, 'To you, she was your Queen. To us, she was The Queen. She will be with all of us forever.' (9 September 2022) 2.09 – 2.22 <www.youtube.com/watch?v=UBubNPQe0Vc> accessed 17 December 2022.
[14] The Editors of Encyclopaedia Britannica, 'Divine right of kings | Definition, History, & Facts' (Encyclopedia Britannica, 20 July 1998) <www.britannica.com/topic/divine-right-of-kings> accessed 17 December 2022.

notion directly comes from biblical tradition where the Israelites seek a King and one is raised up for the people.[15] The funeral 'reminded people how a constitutional monarchy had been effective in certain ways, particularly with the personality of the queen, and it was the longevity, the sense of security… and that she was a bulwark.'[16] The Queen, as a personality, established and maintained the symbol of political and cultural power rather than see this vested in successive party political governments.

The British Psyche

The Queen's funeral was an enacted manifestation of the ethereal conception of the Monarchy in the British Psyche. Professor Hazell identifies the position of the Monarchy in British culture stating, 'it's hard to overstate the cultural significance of the British monarchy, partly because it's a very ancient monarchy, it's existed for over 1000 years, and that longevity is multiplied by the sheer longevity of the queen herself.'[17] The position of the crown in the minds of the citizenry has, as Hazell notes, been enhanced by the Queen's lifespan. The Queen has been a stalwart figure in the national consciousness for seventy years. This permanence and scandal free reign of the Queen has contrasted to the operations of governments, but the constitutional monarchy is set up to detract from, while also holding to account modern processes of government. The respect for the Queen went beyond an ordinary public figure, this is due to the fact that the Sovereign is the symbolic embodiment of the state. The link between the physical and the mythological, between government and 'Britannia'. This serves to satisfy the highest calling of her constitutional role. In conducting herself beyond reproach, set aside from but not entirely removed from politics, the Queen allows for flexibility within government but also between governments. The monarch is the permanent head of state, having this position removed from the political arena provides unparalleled stability. Had recent political uncertainties occurred in a republic the fabric of society may have been stretched too far. We see contemporarily in America how this emergence of Executive and head of state has led to an exceedingly polarised politics and the fermentation of civil unrest.

Ceremonial role of Monarchy

The greatest reason for the pre-eminence of the monarchy on the national consciousness comes through the ceremonial duties performed by the royals. Monarchical ceremonies were established to form a positive view of monarchy. They have been constructed to seem ancient and mystical. Historian David Cannadine notes, "ceremonies thought to be hallowed by time

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[15] Collins Anglicised ESV Bibles, Holy Bible: English Standard Version (Collins 2010) 1 Samuel 8.
[16] PoliticsJOE, 'Ian Hislop reviews an insane year of British politics' (6 December 2022) 19.30 – 22.00 <www.youtube.com/watch?v=ENC5c73ETLM> accessed 12 December 2022.
[17] Robert Hazell, 'Harry & Meghan' (Netflix, 8 December 2022) <https://www.netflix.com/watch/81478159?trackId=255824129&tctx=0%2C0%2CNAPA%40%40%7Cec5d2cb4-0c53-4e64-96cf-fdb1d5dea113-682005111_titles%2F1%2F%2Fmeg%2F0%2F0%2CNAPA%40%40%7Cec5d2cb4-0c53-4e64-96cf-fdb1d5dea113-682005111_titles%2F1%2F%2Fmeg%2F0%2F0%2Cunknown%2C%2Cec5d2cb4-0c53-4e64-96cf-fdb1d5dea113-682005111%7C1%2CtitlesResults%2C81439256> accessed 9 December 2022.

immemorial… were consciously created to attach popular sentiments to the monarchy"[18] While much of the content of ceremonies has its basis in the ancient British tradition, the amalgamation into performance came relatively recently, predominantly the Victorian age. The funeral was a unifying focal point within Great Britain, Roger Scruton suggests 'We must look for an institution that occupies a place in the heart of the ordinary citizen, while remaining above and beyond the turmoil of politics, a court of appeal to which every faction, every ethnic group and every religious confession may address itself.'[19] While this statement is true, ceremony has a very real purpose beyond its amorphous, empyrean sentiment. One instance in which the pomp and spectacle of monarchy demonstrates its effectiveness is at state dinners and functions. Ceremony here fulfils a pragmatic role in international diplomacy. State dinners foster enhanced relationships with both allies and adversaries. United Kingdom state dinners are unique in that the monarch is the host and being apolitical they tacitly advance the aims of global Britain but restrain themselves from becoming marred in political discourse. This establishes a 'good cop, bad cop' dynamic with the monarch and the Prime Minister. This has proved an effective interplay for Britain on the world stage for time in memoriam.

Intelligent government recognises the efficacy of using a state dinner as political currency[20] and deploys the uniqueness and novelty of the British Monarchy domestically and internationally in diplomatic mission. 'The British monarchy is different from the other monarchy's in western Europe, in being an international monarchy with the queen being head of state of over a dozen other countries around the world.'[21] Encapsulated within the position of 'Head of State' is the recognition of a pseudo-governmental role for the British government on the world stage. The performance of this role is unique in a global context as in the division between the 'government' and 'Head of state' is not pronounced at all in a country like France for example, where Macron is both 'Head of state' and governor. This distinction helps to further British aims in a more tacit manner.

The Monarchy's role in government

'The King never expresses any opinion on political matters except on the advice of his responsible ministers.'[22] This convention observed by Bagehot and voiced by King Edward VIII is the bedrock of the 'dignified' constitution upon which the Monarchy in government is enacted. The government of the United Kingdom belongs to His or Her majesty, yet the monarch presiding over the government does not involve themselves in administration. In this respect the monarch transcends politics. This political adjacency was not always the case. Historically the monarchy wielded direct power with varying degrees of grip upon the reigns.

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[18] David Cannadine, 'The Context, Performance and Meaning of Ritual: The British Monarchy and the 'Invention of Tradition' (eds), Hobsbawn and Rogers: The invention of tradition (Cambridge University Press 2012)

[19] Roger Scruton, England an Elegy (Continuum, 2006) 191

[20] Kate Bennett and Christopher Hickey, 'How a cancelled state dinner highlights a fading White House tradition' (CNN, 22 April 2020) < https://edition.cnn.com/2020/04/22/politics/white-house-state-dinners-tradition/index.html> accessed 9 December 2022.

[21] Hazell (n 17).

[22] Bagehot (n 1).

'The magic of monarchy… is dependant on the withering-away of its prerogatives, of its power.'[23] While generally speaking the advancements in expanding the democratic franchise within the UK, parliamentary sovereignty, universal suffrage for example have whittled away the prerogative powers of the monarchy. It is true that in the day to day practicalities the monarchy has no direct power, and any direct power that the institution does hold is theoretical, yet it is far from impotent. Having the prerogative vested in an individual outside of politics can be comforting to many as well as be a very real check upon abuses of power. The monarchy's' role in the British constitution was seen relatively recently with the attempts by Boris Johnson to prorogue parliament. The prorogation of parliament happens on the advice of the Prime Minister but is not enacted by them directly. In 2019, Johnson's attempts to prorogue parliament were deemed unconstitutional by the United Kingdom Supreme Court,[24] as the power he attempted to invoke was unjustifiable. The monarch in these situations acts as a breakwater, preventing executive power getting completely out of hand.[25] As the monarch is the ultimate power broker of all three branches of government, their role in government, indirectly, is to settle disputes between the branches and thereby acknowledge the concerns of the citizens as an intermediary. This scenario in particular demonstrated that parliamentary sovereignty, ie. The Queen/King in parliament is 'the dominant characteristic of our political institutions.'[26]

Political Freedom in Monarchy

American revolutionary Thomas Paine wrote 'A country calling itself free… are like bondmen for ever.'[27] Now on the surface this is a fair criticism, after all British people are subjects rather than citizens. However, the developments in constitutional monarchy since Paine reveal a freedom that a republican system does not provide. Legal theorist John Austin claims the 'object of constitutional law… is to define the sovereign.'[28] Within a monarchical system the sovereign is clearly defined, whereas in a republic, although theoretically the sovereign is defined, what the sovereign actually is, is far more nebulous. Is it the people? If so, what constitutes a citizen? Having a clear definition and culturally cognisant sovereign gives greater political freedom both personally and institutionally. Philosopher Michael Oakeshott recognises this freedom, writing "a modern state was for many an experience of release, if only from civil commotion."[29] Here Oakeshott is writing about the continental political and civil unrest in the late 19th and early 20th century. Constitutional monarchy has in this vein afforded a distinct stability for the British Isles in contrast to the experiences of the majority of continental counterparts. This is due to the unique nature and qualities of its framework. The political centre of gravity in Britain is the Monarch, briefly the political centre became the

[23] Bogdanor (n 4) 62.
[24] R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland [2019] UKSC 41.
[25] Hislop (n 16)
[26] A.V Dicey in Maitland (n 8) 372.
[27] Thomas Paine, 'Rights of man: Common sense : and other political writings.' (Oxford University Press, 2008) 143.
[28] Maitland (n 8)
[29] Michael Oakeshott, 'On Human Conduct' (Clarendon Press, 1975) 182.

people during the British Interregnum, but following the restoration the monarch was re-established and reaffirmed. British Jurist Holland's writing during this period commented 'the primary function of constitutional law is to ascertain the political centre of gravity of any given state.'[30] The British nation had gone through the process long before other parts of the continent as well as the new world. Having this solidity in constitutional law has provided the plasticity necessary for modern government to emerge and evolve. 'Not being elected by popular vote, the monarch cannot be understood as representing the interests only of the present generation. He or she is born into the position, and also passes it on to a legally defined successor.'[31] A defining characteristic of freedom in monarchy comes from its entrenched antiquity. It connects the past to the present to the future. Constitutional monarchy has facilitated a legal freedom that has been the envy of the world. A freedom that has been passed down from one's ancestors, a freedom that the present do not own, but rather are custodians of, and a freedom that will endure to be passed on to the future generation. The institution of Monarchy therefore is 'a focus of loyalty that is higher than the nation.'[32]

Beyond the funeral

With the succession of King Charles III following the death and funeral of the Queen questions around the appropriateness of monarchy will undoubtedly be raised. As newer generations come through, each one being removed further from the personality of the Queen, public affinity with the monarchy could begin to wear thin. Especially given public sentiment towards the King and the wider Royal family personally, who it would seem are enjoying a short term heightened public perception post-funeral but were generally viewed unfavourably in respect to Queen Elizabeth prior to her death. This observation has drawn commentary about the survival of the monarchy, with suggestions that 'in order for the institution to survive it has to modernise but it also needs mass popular support.'[33] The glaring issue with the 'modernisation' line of thinking is that if one seeks to modernise an institution as ancient as the British monarchy, is that it loses its link to the past. A modern monarchy would take on the banality of modernity and sacrifice the grandeur of the tapestry of history on which it is built. 'The ceremonial aspects of monarchy, the regalia, and the deference which monarchy attracted, all served to reinforce this sense of its magic".[34] Lose this magic and what's left is something similar to the remains of continental monarchy, where the King goes to work on a push-bike and the prime minister is de-facto head of state. There is no publicly facing symbol of unity, no individual in a leadership position above and removed from party politics, and no internationally recognised figurehead of relative neutrality. Yet the tide of cultural sentiment may be too great to bear for the British monarchy. 'Today, monarchy has to accommodate itself to a society which has ceased to venerate tradition, much less to regarded it as a source of

[30] Maitland (n 8)
[31] Scruton (n 19)
[32] Roger Scruton, 'The monarchy created peace in Central Europe, and its loss precipitated 70 years of conflict.' (LA Times, 16 June 1991) < https://www.latimes.com/archives/la-xpm-1991-06-16-op-1275-story.html > accessed 24 December 2022.
[33] Hislop (n 16)
[34] Bogdanor (n 4) 305.

legitimacy, under society in which deference is no longer a significant factor in politics'.[35] Shifting views on the nature of government would be a legitimate evolution of the British constitution and one with historical precedent[36] an outgrowth of which may see a new form of modern government either with a slimmed down and symbolically impotent monarchy or the abolition of monarchy altogether in favour of a republican system of government.

Longevity of the Commonwealth

The major question that is yet to be answered is the endurance of the union as well as, perhaps more pertinently, the commonwealth. During his time as the Prince of Wales, King Charles III signalled his commitment to 'modernising' the Monarchy, for instance, "The coronation will be multi faith and compared to a lot of people of his generation he is engaged with social issues'.[37] Even with this in mind it's hard to envisage certain countries staying within the commonwealth, particularly Australia who have seen an uptick in republicanism, as well as many of the Caribbean nations who may follow in the footsteps of Barbados.[38] The breakup of the commonwealth in and of itself wouldn't present too many complexities in regards to domestic government, however disruptions within the community may bolster calls for independence among the home nations. Any independence referendum would see the British constitution stretched to its limit and would see a complete restructuring of the relationship between the population and the sovereign. Domestic independence would alter how modern government is enacted day to day. This may lead to the abandonment of the 'old' constitutional order in favour of a codified document, a national bill of rights or something similar in effect. It is fairly clear there are legitimate claims for independence, most convincingly in former colonised nations who may see the crown as the legacy of a darker time in the nation's past. If the Commonwealth is to endure it is right to seek a restructuring, currently it is a collective based on deliberately indistinct concepts such as 'shared values'. Instead, it would be prudent to turn it into a trading and strategic group. This would both be of utility to Britain but also serve to alter the perception of the monarchy as a distant, impersonal operation to one of real tangible value. Pertinently, this move would also be the newest development in the ancient constitution and in a very real sense embolden modern government.

Conclusion

The diaspora of peoples that constitute modern countries have brought into question the longevity of monarchy in Britain. The Queen's personal longevity combined with her popularity staved off calls for republicanism both domestically and in the commonwealth. However, 'the vastness and mobility of modern societies have effectively destroyed the

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[35] Ibid. pg. 303.
[36] The Editors of Encyclopaedia Britannica, 'Instrument of Government: England 1653' (Britannica, 2015) <https://www.britannica.com/place/England/Drainage> accessed 23 December 2022.
[37] Hislop (n 4)
[38] Daniela Relph, 'Barbados becomes a republic and parts ways with the Queen' (BBC News, 30 November 2021) <https://www.bbc.co.uk/news/world-latin-america-59470843> accessed 23 December 2022.

possibility of a common culture.'[39] It is the absence of a common culture that has seen the monarchy fall from its position of being a unifying force. Combine this with the relative unpopularity of Charles compared to Queen Elizabeth and the series of scandals that currently plague, and seemingly will continue to plague, the institution it is hard to see how monarchy will remain unchanged if not abolished within the next two to three generations. Yet the benefits of a constitutional monarchy in the administration of modern government as well the cultural benefits it can provide are undeniable. Robust and stable government is a symptom of a culturally rich and thriving nation. Effective modern government is the outgrowth of a people with a knowledge and propinquity to the sacred. Whether this reverence for the sacred is a religious one or a traditional one is irrelevant in many ways. The reverence for institutions comes from the historic complexity and ceremony littered throughout the British constitution. The current strain upon and difficulties with modern government come from the desacralisation and demystification of institutions. The Queen's funeral could well be the last breath of Bagehot's 'dignified' constitution. It is highly probable that the next evolution of modern government will be one with a slimmed down monarchy, ultimately with a view towards abolition. However, this in itself would be the constitution working by design as the next outgrowth of a complex, ceremonial, and ancient constitution.

[39] Roger Scruton, Modern Culture. Continuum (2005) 121.

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Contract Law Case Note - Fisher v Bell (1961)

Danny Neill

Facts:

In this case it was stated that on October 26th, 1959, the defendant James Charles Bells displayed a flick knife with a price ticket in his shop window. The same day, Police Constable John Kingston saw this knife on display.[1] This led to Chief Inspector George Fisher bringing information against the defendant on December 14th, 1959, for offering to sell a flick knife which violated Section 1(1) of the Restriction of Offensive Weapons Act 1959.[2] The court heard the information on February 3, 1960.[3] The Bristol Judges found that as there was no definition in the 1959 Act for 'offer for sale', they must construe the words to be in line with the standard law of contract.[4] Therefore, displaying the knife was found to be an invitation to treat, and so the defendant was not liable.[5] The prosecutor appealed this decision to the Divisional Court.[6]

Issues:

The key issue is whether displaying the knife is an invitation to treat or an offer to sell.[7] This leads to another issue about how section 1(1) of the Restriction of Offensive Weapons Act 1959 should be interpreted.

Decision:

The decision in the Divisional Court was stated by Lord Parker C.J.[8] Firstly, it was explained that the statute must be read in line with the law of the country and in the general law of contract, displaying the knife in a window with a price ticket is clearly an invitation to treat, not an offer to sell.[9] Secondly, it explained that statutes will use terms to include displaying of goods such as 'exposing for sale,' which were absent in the 1959 Act.[10] Furthermore, it was stated that when parliament looks to expand the definition for the term 'offer to sell' to include displaying goods for sale, they will usually include a definition section in the statute, I.e., in the Price of Goods Act 1939,[11] which was not present in the 1959 Act.[12] Finally, it is stated even if this was a "cases

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[1] *Fisher v Bell* (1961) 1 Q.B. 394 [1961] 1-2.
[2] Ibid
[3] *Fisher* (n 1) 2.
[4] Ibid
[5] Ibid
[6] Ibid
[7] *Fisher* (n 1) 3.
[8] Ibid
[9] Ibid
[10] Ibid
[11] Price of Goods Act 1939

[12] *Fisher* (n 1) 4.

omissus," the court should not supply the omission.[13] Due to these reasons, the court dismissed the appeal.[14]

Critical Analysis:

I strongly agree that displaying the knife in the shop window was merely an invitation to treat and not an offer to sell.[15] One may argue that displaying a good in a shop window is an offer to the public to sell this item, however, the case law states otherwise. *Pharmaceutical Society of Great Britain v Boots Cash Chemist Ltd (1953)* establishes that displaying a good in a shop window is an invitation to treat and not an offer to sell.[16] The facts in *Fisher v Bell (1961)* state that the knife was displayed in the shop window, therefore, it was an invitation to treat.[17]

Despite this, I strongly disagree with aspects of the judgement. The key point I disagree with is that if invitations to treat not being included within the statute was a "casus omissus," which the judge said may not be the case, the court should not supply the omission.[18] Firstly, it was clearly an unintentional "casus omissus" as the Restriction of Offensive Weapons Act 1959 aimed to limit the manufacturing and selling of flick knives; therefore, it would be illogical for Parliament to intend to allow invitations to treat for these knives, as this would facilitate the illegal act of selling them.[19] Furthermore, The Restriction of Offensive Weapons Act 1961 was passed to amend this gap in the law indicating that exposing goods for sale was unintentionally omitted from the original statute.[20] The Hansard for the 1961 Act stated the omission was unintentional and required rectification further displaying that it was a "casus omissus".[21] Therefore, clearly this exclusion was an unintentional "casus omissious".

Secondly, I strongly disagree that the court should not supply the omission. The judgement used a literal approach to statutory interpretation to prevent judicial legislating, however, I disagree with this approach for two key reasons.[22] Firstly, the key role of statutory interpretation is to interpret legislation as Parliament intended and as the omission was unintentional, supplying the omission would allow the statute to be enforced as Parliament intended.[23] The 1961 act further displays Parliament's intention to include exposing goods for sale in the original statute, therefore the court should have included it within the 1959 Act.[24] Secondly, the 'golden rule' to statutory

[13] Ibid
[14] Ibid
[15] *Fisher* (n 1) 3.
[16] *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] EWCA Civ 6 [1953] 1 All ER 482
[17] *Fisher* (n 1) 2.
[18] *Fisher* (n 1) 4.
[19] Restriction of Offensive Weapons Act 1959
[20] Restriction of Offensive Weapons Act 1961
[21] HL deb May 1961, vol 231, col WA121
[22] *Fisher* (n 1) 4.
[23] Brice Dickson, *Law in Northern Ireland,* (3rd edn, Hart, 2012) 104.
[24] ROWA 1961

interpretation, established in *Grey v Pearse* 1875, could be used.[25] This rule allows statutes to be interpreted in a manner that rectifies an absurdity within it.[26] It can be argued that because the 1959 act makes manufacturing, selling or offering to sell flick knives illegal but allows invitations to treat for these same knives, it leads to an absurdity were exposing these knives with the intention to sell is legal but actually selling them is illegal.[27] Therefore, the court should have read invitations to treat into the statute to prevent absurdity.

The facts of this case clearly show the displaying the knife was an invitation to treat. However, I believe the court should have interpreted the statute to also prohibit invitations to treat for flick knives to enforce Parliament's intention and prevent absurdity. Therefore, the court should have accepted the appeal.

[25] *Grey v Pearson* (HL 9 Mar 1957), [1857] EngR 335

[26] All Answers ltd, 'Critical Analysis of the Literal, Golden, and Mischief Rules' (Lawteacher.net, March 2022) <https://www.lawteacher.net/free-law-essays/administrative-law/critical-analysis-of-the-literal-golden-and-mischief-rule-law-essay.php?vref=1> accessed 14 March 2022

[27] ROWA 1959, s 1(1)

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Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. ..." (Article 17.2 TEU). Critically examine the balance of power between the European Commission, the Council of the EU and the European Parliament, in legislative matters.

Alexia Lenton

The European Union (EU) has an Ordinary Legislative Procedure, known as the 'Codecision Procedure', which is outlined in Article 294 of the Treaty on the Functioning of the European Union (TFEU)[1]. This states that the European Commission (EC), The Council of the EU (the Council) and the European Parliament (EP) are the three institutions that should equally conduct the legislative process. The EC submits a proposal to the EP and the Council. The EP then forms its position on the matter and if the Council agrees, the act is adopted, if not it is put towards a second reading where it's either approved or failed as a proposed law. Therefore, the power of each institution makes no sense without regard to the power of another.[2] Article 17.2 of the Treaty of the European Union (TEU)[3] is significant in examining the balance of powers among the three institutions as it separates the European Commission from the other two institutions, creating a hierarchy with the Commission having formally exclusive power of legislation initiative, thus the true balance of power between the three institutions may appear to differ from what is explicitly stated in treaties and constitutions.

The imbalance of power can be noted by the current climate between the three, with the President of the European Commission, Ursula von der Leyen, currently dominating the legislative triad with her allied nature with the Council, thus forcing the EP out of its once prevalent control. This is recognised in Dutch Liberal MEP Sophie In 't Veld's book 'The Scent of Wild Animals',[4] in which she comments on the need for von der Leyen's removal as president due to her paralyzing the EP in the legislative process by teaming up against them with the Council. This is portraying an imbalance of power due to the alliance between the two institutions which creates a lack of checks and balances between the Council and the EC. Dave Keating, a Brussels correspondent, notes the clear position Ursula von Der Leyen has taken in turning her back to the EP and by doing so, she has jeopardized the constitutional fairness of the EU's legislative process, in his article relating to the changing dynamics of the EU's balance of power.[5] This creates a democratic deficit, relating to the fact that it is supposed to be the Council and the EP that work with each other to pass legislation, with the EC only adopting the act. It appears that despite the EP's notable transfer from being a consultative assembly to being a key part of the legislative process following the ratification of the Lisbon Treaty,[6] the other two institutions are reluctant to share the power.

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[1] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326, Article 294
[2] Jean-Paul Jacque, *The Principle of Institutional Balance,* CML Rev. 2004
[3] Consolidated Version of the Treaty on European Union [2012] OJ C 202/25, Article 17(2)
[4] Sophie In 't Veld, *The Scent of Wild Animals*, 2021
[5] Dave Keating, *Changing the EU's Internal Balance of Power*, Internationale Politik Quarterly, September 6th 2021
[6] Treaty of Lisbon [2009] OJ C 306

However, due to constitutional checks and balances in place, the EP can diminish the EC's position in the legislative process. This is through the EP's right to dismiss the EC, bestowed upon the EP through Article 17(8) TEU[7] in which the EC are responsible to the EP due to their ability to conduct a vote on a motion of censure of the EC which if gone through with, members of the EC must resign. In 1999, the Santer Commission, led by Jacques Santer, voluntarily stepped down after having a motion of censure debated against them, being the only semi-successful censure. Crombez states that the EP is 'powerless' under the consultation procedure and relies on its power of dismissal for its limited amount of power granted through constitutions and treaties.[8] A motion of censure appears as a strong check against the EC in favour of the EP whilst also being democratically beneficial by holding the EC accountable for its actions.

It can be apparent that the balance of power does however tilt away from the EC due to its inability to engage in further discussions with the EP and the Council after they adopt legislation. This is recognised by Crombez and Hix[9] in which the EC is not only bound to introduce the legislation but is also bound to the status quo of the political climate and the institutions. Thus, restricting the supposedly dominant power of exclusively initiating legislation. Informal trilogue meetings are now an established norm of the legislative procedure and do not decrease the disparities in the balance of power between the institutions. Despite the inclusion of the EC in these negotiations, they only act as the mediator and nonetheless have a reduced presence in such discussions. This is recognised by Bressanelli[10] stating the evidently reduced role in these meetings. Furthermore, trilogue meetings are already problematic due to their secluded nature which is recognised by Curtin and Leino[11] who note how they 'lack transparency'. This is despite the loudly spoken aspect of 'public control' scattered throughout EU treaties. Thus, not only do the ever-present trilogue meetings create a cloud over the legislative procedure, but they also lack a supposed balance of power between the three legislative branches; undermining the principles and duties of the legislative branch of the EU.

Ultimately, with the ordinary legislative procedure requiring an agreement between the three branches for legislation to pass alongside the EP's right to dismiss the EC as two of few checks and balances to the legislative branch, there is still an apparent disparity in the balance of power between these institutions. However, despite a motion of censure being adopted seven times, none of them have passed. Thus, for it to have never successfully been established in the seven times it was tabled demonstrates itself as a weak check, almost only being granted to the EP for cosmetic purposes which exemplifies the imbalance of power amongst the three institutions. Furthermore, the codecision procedures' legitimacy is now being damaged by the increasingly occurring and secretive trilogue meetings that as aforementioned, lack an equal share of power between the three institutions. Inevitably, with the three institutions working together to

[7] Consolidated Version of the Treaty on European Union [2012] OJ C 326/25, Article 17(8)
[8] Christophe Crombez, *The Co-Decision Procedure in the European Union*, February 1997, page 112
[9] Christophe Crombez & Simon Hix, *Legislative Activity and Gridlock in the European Union*, February 2014
[10] Edoardo Bressanell, Christel Koop & Christine Reh, *The Impact of Information: Early Agreements and Voting Cohesion in the European Parliament*, 2016
[11] Deidre Curtin & Paivi Leino, In Search of Transparency for EU Law-Making: Trilogues on the Cusp of Dawn, 2017, Vol. 54

establish legislation there is no apparent arbitrary behaviour being conducted within the legislative branch yet this doesn't wholly prevent a misbalance of power which this essay has concluded to be the matter.

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