Queen Mary Law Journal

Volume 4, Winter 2013

Queen Mary Law Journal

Volume 4, Winter 2013

The Queen Mary Law Journal seeks to publish innovative student legal scholarship.

Published by the Queen Mary Law Society in the United Kingdom.

Queen Mary Law Journal
c/o School of Law
Mile End Road
London E1 4NS

http://www.law.qmul.ac.uk/undergraduate/lawsociety/qmlj/index.html
Email: editor@qmlawjournal.org

ISSN (print): 1470-3335
ISSN (ONLINE): 2049-1883

Queen Mary Law Journal

Volume 4, Winter 2013

Contents

Offer and Acceptance Appraised - The Postal Rule

Sanel Susak
LLB, University of Oxford

INTRODUCTION

The purpose of this article is to critically explore the legal history behind the 'postal rule' in an effort to reveal some infelicities of thinking which led to its creation and propagation as an exception to the ordinary rules of offer and acceptance. It will highlight problems with the various rationales for having the rule, including the original 'ad infinitum' problem in *Adams v Lindsell*,[1] commercial worries about expediency and the communication gap, and the argument from tradition. It will also demonstrate the obvious problems with the posited method of using the postal service as an 'agent' for the parties: a construction which has been particularly artificial and harmful to the legal principle.

Ultimately, this analysis will highlight a different way of thinking about contractual formation, where had it been considered in *Adams,* might have avoided the need for the postal rule in the first place. The conclusion is that any delay in communication naturally affects the process of contractual formation in a certain way but does not in itself alter the balance of convenience between the parties. The reasons for deviating from this natural continuation when it comes to postal communication certainly do not justify the rule adopted in *Adams*.

A better way to conceive of ordinary contractual formation is by segregating the two points in time at which the parties to a contract become bound; each party has their own separate point at which the contractual obligations should and do arise. For the offeror, the relevant point is the time at which communication of acceptance is received. For the offeree, it is the point at which they transmit their acceptance. Though this may at first seem to be a drastic in-road into the idea that both sets of obligations should arise at the same point, through further elaboration, this new way of thinking can be easily accommodated within the current framework of contractual principles. One may even go so far as to say that it is the logical consequence of breaking down the ordinary rules of contractual formation by way of reference to the stages of communication.

Ad Infinitum...et Ultra

Originally, the perceived need for an exception to the general rules of offer and acceptance in the case of postal communications stemmed from the inevitable delay in communication and the resulting difficulty in achieving a meeting of minds within sufficient temporal proximity to create a contract. More simply, neither party could ever be sure that the other is agreeing to the same thing at the same time:

> that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so

1. [1818] EWHC KB J59 , [1818] 106 ER 250.

> it might go on ad infinitum. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter.[2]

The problems with this reasoning are twofold:

First, the infinite loop does not necessarily follow in terms of the form of communication. Notification of acceptance is required because, without it, the offeror does not have the complete picture. He has no idea what the response will be. By its very nature, an offer seeks feedback from the offeree. For example, if I offer my sofa to somebody for £500, I am implicitly asking for their assent to the transaction or a rejection. From the offeree's perspective, his acceptance does not inherently seek any assent or communication in return – it seeks performance. If, for example, they say 'offer accepted', they are clearly not anticipating further communication but are instead purporting to bind the offeror to the offer. One might retort that the offeree does not have enough of the whole picture to know whether there is an agreement in the case of delayed communication because, theoretically, the offer may have been revoked in the interim. If he does not know that the offeror has received the acceptance or already sold the property before receiving the acceptance, and proceeds with the fulfilment of any obligations, it would lead to expenditure on his part without any return. This is a pertinent concern. However, it is not entirely relevant to the exchange of communication itself. Rather, this point is directed at the related issues of risk-taking and the relevancy of the meeting of minds principle, which will be addressed in more detail below. There is nothing in the structure of the offer-acceptance communication exchange which causes any unjust imbalance in itself.

Second, there are severe problems with the conclusion that the offeror must be considered to be making the same offer throughout the letter's transit. The main reason is that this is a very artificial construction formed in order to remedy the *ad infinitum* problem. From a plain view of the scenario, the offer is made at the time that it is sent, either by post, word of mouth, or some form of telephonic or electronic communication. Though the offer may be open to acceptance for weeks or months after this event, it is clearly not true that the offeree is 'transmitting' the same offer at all times. He may immediately send another letter revoking the offer. In that case, is he still 'transmitting' the offer in any real way? Any offeree can infer when the offer was actually made from the date on the letter. Failing that, he can make an estimate from the ordinary course of the post. In terms of justice, the crucial point is that the offeree knows that the offer itself was made some time ago and that the situation may have changed by then – by sending an acceptance through the post he is necessarily taking a risk. The postal rule thus operates by creating a 'curtain' between the offeror akin to the curtain principle within the law on land registration. The offeree need not concern himself with any potential contrary actions by the offeror such as a withdrawal of the offer before the acceptance arrives. Nor does he need to concern himself with any mishap in the course of post, the consequences of which would, assuming the Post Office has excluded liability, fall on his shoulders. In creating this barrier, all of the risk is placed on the shoulders of the offeror. He may not even get the basic information he has invited through the offer before a contract is created. One might defend this position by arguing that offerors are taken to know about the postal rule and so any steps they take are made in full knowledge of the protection afforded to the offeree. This is clearly not true for the first few cases where the ordinary rule was derogated from and, furthermore, fails to acknowledge the resulting imbalance in positions. *Henthorn v Fraser*[3] is one case where the imbalance is clearly brought to light. In this case, the offeror sent a notice of withdrawal by post after the acceptance was already sent. However, the postal rule was deemed not to apply to notices of withdrawal – such notices being governed by the ordinary rule and thus, requiring actual receipt to be effective. The 'curtain' clearly aims to protect one side at the expense of the other. Furthermore, even if the offer is considered as 'transmitting' at all times during the communication, it is only received – and can

2. ibid 251.
3. [1892] 2 Ch 27.

therefore only change the legal position of the offeree – when it is received. The Court in *Adams* should have recognised the converse – that an acceptance can be deemed as transmitting at all stages but cannot change the legal position of the offeror until it is received.

Household Fire Insurance

Household Fire and Carriage Accident Insurance v Grant[4] further illustrates the 'curtain' that the postal rule draws between the offeror and the offeree. There, the acceptance was deemed effective even though the letter never actually reached the offeror. This is the logical continuation of the rule and was nothing new at the time[5]. It was clear that, once the acceptance had been sent, the offeree could continue with his obligations without worrying about any delay or other mishap whatsoever. The case is significant not merely for Thesiger LJ's use of Post Office mutual agency and his comments illustrating potential bases for the rule, but also for Bramwell LJ's spirited dissent and criticism of the postal rule.

The main difference in approaches between *Adams* and *Household Fire Insurance* is the change in conceptualisation. In *Adams*, the offeror is considered as making the offer at all times until the acceptance letter is sent. However in *Household Fire Insurance*, Thesiger LJ mentions that the Post Office is instead treated as the mutual agent of both parties:

> as soon as the letter of acceptance is delivered to the Post Office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger, sent by the offeror himself as his agent, to deliver the offer and receive the acceptance. What other principle can be adopted short of holding that the contract is not complete by acceptance until and except from the time that the letter containing the acceptance is delivered to the offeror, a principle which has been distinctly negatived?[6]

The final sentence is illuminative because it overlooks the *Adams* construction of considering the offer as being made at all stages of the delivery. According to Thesiger LJ, if the ordinary rule is to be rejected, the only answer must be agency. Needless to say, it is overly artificial to resort to this mutual agency construction. As Bramwell LJ points out, "How does the offeror make the Post Office his agent because he gives the acceptor an option of using that or any other means of communication?"[7]

It is also unclear what exactly the terms of the agency are and at what point it is set up. In terms of the tasks assigned to the Post Office, the most straightforward answer is to regard it as a neutral body with whom either party may set up a contract to send a document. If taken to extremes, this agency argument could deem that a telecommunications company is a mutual agent simply because any form of fast communication is impliedly acceptable. It could create dozens of potential mutual agents for the offeree to use. The Post Office could be considered an agent, as can any messenger, but this is better limited to the task of sending the message. Even in terms of its purpose, treating the Post Office as mutual agent clearly aims to charge the fault of late or non-delivery on the shoulders of the offeror. It was his fault that his agent did not deliver the communication. However, by its very nature as mutual, it does not discharge the offeree from fault. It could be argued that his agent did not deliver the acceptance and therefore he should not get the benefit of it. All it does is tell us something we already know. The two parties on either side of the transaction are innocent and that any blame for late delivery can only sensibly be attributed to the Post Office. It is not surprising that in later cases, such as *Henthorn*, the courts chose instead to focus on foreseeability of delay rather than agency constructions.

---

4. [1878-79] LR 4 Ex D 216.
5. *Dunlop v Higgins* [1848] 9 ER 805 (HL) had already confirmed the same 30 years earlier.
6. *Household Fire Insurance* (n 5) 922.
7. ibid. 931.

Bramwell LJ's dissent is more realistic. In particular, he highlights the problems with treating the post as something special and attributing to it peculiar rules. The form of communication is the same; it is merely the delay between messages which is longer than other forms. He regards the distinction between sending a message by post and sending it by hand as "arbitrary" and that "there is no reason in it".[8] Thesiger LJ voiced his concern that if actual receipt of the acceptance letter was required, it would leave the way open to "the perpetration of much fraud", as well as causing considerable delay to commercial transactions.[9] The offeree would "never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination".[10] However, what is the unstated fraud that the offeror could carry out? If it is to deny receipt, then this is simply an evidential problem of the time. By focusing on this, as well as the fact that the offeree would never be completely safe in relying on his acceptance being sent, Thesiger LJ highlighted the more prominent basis for the rule. Rather than principle, it is grounded in pragmatism. Rather than stopping an *ad infinitum* loop, the rule encourages confidence in commercial transaction. The offeree can ignore any unknowns on the offeror's side and can accept the offer free of commercial risk. Bramwell LJ highlighted poignantly that "so much has been said on the matter that principle has been lost sight of".[11]

Henthorn v Fraser

The primary significance of *Henthorn* is, of course, Lord Herschell LC's formulation of the circumstances which the rule operates in:

> I should prefer to state the rule thus: Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.[12]

However, the case also further strengthened the 'curtain' effect in that the formulation is limited solely to acceptances. Kay LJ states:

> As to the acceptance, if it was contemplated that it might be sent by post, the acceptor, in Lord *Cottenham's* language, has done all that he was bound to do by posting the letter, but this cannot be said as to the notice of withdrawal. That was not a contemplated proceeding. The person withdrawing was bound to bring his change of purpose to the knowledge of the said party[13]

The problem with this distinction is that it does not follow. Kay LJ mistakenly assumed that the offeree was 'bound to' accept whereas, as demonstrated above, an offer seeks an acceptance in the same way that a question seeks an answer. In both cases one is looking for feedback and it is no more certain that the offeree will accept than it is that he will decline. It is uncertain, from a postal point of view, whether the offer will even reach the offeree. One might reply that any of these eventualities are contemplated proceedings since the offeror should know that they could happen. However, the same could be said of the notice of withdrawal. Any businessman knows that if he receives an offer, there is the chance that a subsequent withdrawal will be sent or that the property in question may be sold to somebody else in the meantime who has offered a higher price. One could misinterpret *Henthorn* as a retreat from the postal rule in the sense that communication of withdrawal is not 'sped up' in the same way as communication of acceptance. In reality, it protects the 'curtain' mechanism the rule operates through. Since *Henthorn*, the offeree need not concern himself about the offeror

8. ibid 929.
9. ibid 924.
10. ibid.
11. ibid 931.
12. *Henthorn* (n 4) 33.
13. ibid 37.

sending a withdrawal just before he sent his acceptance.

Retreats from the Rule

True retreats from the postal rule are evidenced by the cases of *Entores v Miles Far East Corporation*[14] and *Holwell Securities v Hughes*.[15]

Entores was a retreat from the postal rule in the sense that the Court refused to expand the doctrine when it had ample opportunity to do so[16]. It decided that the rule does not apply to instantaneous forms of communication. Denning LJ explained that one can generally tell if there is a break in communication when it is instantaneous and if they do not act upon that information by not asking for a message to be repeated, they are at fault and should be bound. However, Denning LJ's reasoning is somewhat self-contained because it focuses on particular situations rather than general rules. For example, if the offeree's telex fails to record a message of acceptance but he does not trouble to report this to the other party who reasonably believes he has received it, he should be bound by estoppel. Denning LJ's final scenario addresses the situation where neither party is at fault:

> But if there should be a case where the offeror without any fault on his part does not receive the message of acceptance— yet the sender of it reasonably believes it has got home when it has not—then I think there is no contract.[17]

Denning LJ seems to reach this conclusion without giving any reasons. It seems like an arbitrary decision to revert to the original rule when, in actuality, this scenario is reminiscent of messages sent through the post – with two innocent parties and the sender reasonably believing that the message has arrived. Furthermore, it is unclear what the status of e-mail is. Unlike telex, e-mail does not require a person to be on-hand to operate the machine and, though the sending of the message itself is instantaneous, the receipt and reply can be days apart leading to slower overall communication.

Holwell Securities was a retreat from the postal rule in terms of the critique it received at the hands of the Court. It confirmed that requirements of the form of acceptance within the offer contrary to the postal rule would displace it. Therefore, since the offer stated that acceptance could only be achieved 'on notice in writing', the postal rule did not apply. This contrasts with the approach taken in *Adams* where the postal rule applied even though the offer stipulated 'receiving your answer in course of post'.[18] Furthermore, Russell LJ explicitly stated that the rule was an "'artificial concept of communication by the act of posting'".[19] Lawton LJ went further to say that the rule "'probably does not operate if its application would produce manifest inconvenience and absurdity'".[20] In referring to this absurdity, his examples highlight cases where the letter is never received, thereby casting some doubt on the decision in *Household Fire Insurance*.

The Overriding Rationale

Lord Wilberforce's leading speech in *Brinkibon* clarified the key rationale for the postal rule by supporting Mellish LJ's reasoning in *Re Imperial Land Co. of Marseilles, ex p Harris*.[21] The focus is "the extraordinary and mischievous consequences which would follow if it were held that an offer might be revoked at any time until the letter accepting it had been actually received".[22] Lord

14. [1955] EWCA Civ 3, [1955] 2 QB 327.
15. [1973] EWCA Civ 5, [1974] 1 WLR 155.
16. Lord Fraser in *Brinkibon v Stahag Stahl und Stahlwarenhandels GmbH* [1983] 2 AC 34 (HL), 43 states that "'in strict logic there is much to be said for applying it also to telex messages' " but goes on to say: "'Nevertheless...[it]...should be treated as if it were instantaneous communication between principals, like a telephone conversation...[because *Entores*]... seems to have worked without leading to serious difficulty or complaint from the business community.'"
17. *Entores* (n 15) 333.
18. *Adams* (n 2) 681.
19. *Holwell Securities* (n 16) 157.
20. ibid 161.
21. (1872) LR 7 Ch App 587.
22. ibid 594.

Brandon, in the other leading speech stated:

> That reason of commercial expediency applies to cases where there is bound to be a substantial interval between the time when the acceptance is sent and the time when it is received. In such cases the exception to the general rule is more convenient, and makes on the whole for greater fairness, than the general rule itself would do.[23]

Clearly the focus is not on any *ad infinitum* problem but on the worry that the offeror will withdraw the offer just before. Nor is there any pretence that the rule operates because the Post Office is nominated as an agent. The current attitude is to apply the rule as an imposed extraneous rule of law which can be excluded in the offer itself. It is applied not only because of the potential mischievous and extraordinary consequences but also because it is settled case law. It is time to examine the problem of delay itself and some of the potential consequences of requiring actual notification in greater depth.

The Underlying Problem – Uncertainty of Position

As mentioned in much of the case law, the key problem with using the post as a form of communication is the inescapable delay between messages. It is easy to see how the postal rule may have risen historically because of increasing use of letters for important commercial decisions, which demanded ever-faster delivery times. Offerees would seek to defend their acceptances as binding if an offeror decided to send a withdrawal of the offer because of a market fluctuation, which rendered it a liability. With greater delay, the risks are increased for both sides. For example, what if the delivery time between two people is two days? The offeree proceeds to send his acceptance and waits for four days – enough time to be reasonably confident that the contract is formed on ordinary principles. He has not received a withdrawal so, even if withdrawals were effective as soon as they are sent, he would be safe to carry on with performance of the contract. Of course, there is the possibility of delay which would result in the offeree losing a lot of money without any other party's liability. However, delay poses its risks for the offeror as well. If he sends an offer to sell a certain product for a certain price calculated from predicted market conditions two days later, any delay may cause that offer to look very unattractive to the offeree when it is finally received. This is also a situation where there would be nobody to claim the loss from. Thus, in terms of loss, the situation is fairly balanced. Conceptually, the fault of any delay naturally rests on the shoulders of the Post Office. However, as a neutral party that excludes liability, any person who uses the post necessarily takes the risks associated with that form of communication. In that limited sense, they are not a completely innocent party.

Potential fraud deserves some mention in terms of the evidential convenience of Post Office timestamps. One practical reason for having the rule is the ease of proving when a particular communication was made. However, many deliveries are also recorded nowadays so it is not clear how useful this consideration is in providing contemporary support for the postal rule.

The key problem is that of cross-communication and how to deal with it in this context. Ideally, contractual formation results from a meeting of minds. However, with any form of delayed communication, there is no point at which both parties are hearing or seeing the same agreement at the same time – which is as close as one can get to a meeting of minds. As such, we can either conclude that there is a certain interval of time at which it becomes impossible to communicate sufficiently to form any kind of binding contract, or we can revert to the objective indicators. By accepting an offer sent by letter, the offeree is also impliedly accepting that he may be bound by a contract formed through such delayed communication. Ordinarily the courts look to objective indicators of assent such as this and not subjective intentions. There must be something that has

23. *Brinkibon* (n 17) 48.

been done irrevocably such as an acceptance actually received by the offeror or by communication to a third party who delivers the message but cannot be stopped once invoked. What if the offeree sends an acceptance and, whilst it is in transit, the offeror sends a withdrawal of the offer which reaches the offeree just after the acceptance is received? What if the withdrawal reaches just before the acceptance is received? This would appear to be the nightmare scenario but it is relatively simple to solve on ordinary principles, as long as one remembers Oliver Wendell Holmes' words:

> In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs — not on the parties' having meant the same thing but on their having said the same thing[24]

The Solution

One must recognise that there is some delay in all communication and, no matter how much this delay is increased or decreased, the requisite steps in communication each carry their own consequences and have their own role to play in the formation of an agreement. Transmission of the offer indicates an intention to be bound to certain terms in the event of a positive answer. Similarly, transmission of the acceptance also exhibits the relevant objective intention to be bound but, by making this second transmission, the offeree is naturally one step ahead of the offeror in terms of information. *In sending you my acceptance, I know that as soon as you receive it, you will be bound to the terms of the original offer since you will then have notice of my intention matching yours*. As such, the offeree will always be the first person to know that the contract has been formed and, conversely, the offeror will be the last. This does not change even if the scenario changes from verbal communication in each others' presence to an exchange of letters with substantial delay on both sides.

One might reply that this must be wrong. How can it be that the offeree is the first to know that the contract is formed when the offeror must receive notification before he becomes bound? The necessary qualification is that the contract is formed first from the offeree's point of view. He is the first to know that he has done everything he needs to do in order to be bound by the contract. Furthermore, any attempt by the offeror to enforce the contract would require knowledge, and therefore notice, of the acceptance. It is knowledge of the acceptance that binds both parties or, rather, knowledge that there has been an offer and an acceptance of that offer. This point in time necessarily occurs sooner for the offeree than for the offeror.

How is it then that there can be an interval of time when the offeree is bound by a contract but the offeror is not? The problem is solved by considering a contract as a set of relational obligations and rights enforceable by each party against the other, and ultimately by the courts against both. The offeree's obligations exist sooner than the offeror's. Indeed, they exist as unenforceable obligations as soon as the acceptance is sent. They become enforceable as soon as the offeror acquires knowledge of them. The offeror's own obligations are activated in turn and the contract becomes concrete and enforceable against both parties. When broken down to this level we can see that the offeree's set of obligations can be conceived of largely in terms of potential. The most likely scenario might be that the acceptance will arrive in two days. However, there is a chance that it will arrive sooner through some mistake in the post, or it could arrive later, or even never. As such, unless the offeree is planning on beating the post to it and cancelling the acceptance before it arrives, he can only assume that his obligations will become concrete and begin to perform them. Notably, he ordinarily does this in full knowledge of the risks associated with merely potential obligations and willingly takes them in order to make a profit.

---

24. Oliver Wendell Holmes Jr, "*The Path of the Law*" (1897) 10 Harvard Law Review 457.

Now, if we return to the cross-communication example involving an acceptance and a withdrawal sent at roughly the same time the answer should be clear. As soon as the acceptance reaches the offeror, it will concretise the contract. Therefore, in order for the purported withdrawal to become an effective withdrawal, it must reach the offeree before the contract is formed – i.e. before the acceptance is received. It does not matter if the withdrawal is sent just before the acceptance is received because, although it exhibits an objective intention to terminate the offer, it is still merely potential and thus revocable until it is received by the offeree. This is the answer to Lord Wilberforce's concern in the *Brinkibon* case since the offeree will generally be safe in the knowledge that, as long as he does not receive a withdrawal before he expects the acceptance to arrive, he can usually assume that the contract will be binding.

It must be stressed at this point that the perceived mischief of risk to the offeree does not arise in an unfair manner. If the ordinary rule applies, it is true that the offeree may incur irrecoverable expenditure due to premature action. However, he is giving his consent to such a risk by accepting the contract by letter. If the parties are unwilling to accept the realities of the postal service they do not have to conclude business by post. There is nothing to stop the offeree from sending a rejection along with an explicit counter-offer if he wishes to protect his position so there is no injustice in holding him accountable to his risk-taking. This would be the sort of risk-allocation and forward-thinking which is desirable of the parties.[25] The postal rule, on the other hand, creates a manifest injustice by ensuring that the offeror is *prima facie* bound to a contract which he has no knowledge of. At the stage of sending an acceptance, an offeree knows that an offer and an acceptance are both objectively ascertainable from the communications. The offeror, however, only has knowledge of an offer and is in a position where he cannot safely act by making the offer to others. His interests are potentially damaged through cautious inaction. The manifest unfairness of the postal rule would only be acceptable in the case of some form of culpability on the part of the offeror. However, the typical case is one between innocent parties who assess the risks for themselves and, as such, the general rule should prevail.

Two final advantages of reverting to the original rule exist in the modern age. The first is the opportunity for the offeree to reconsider. If he wants to nullify the letter of acceptance he can simply send an e-mail before it is received. The second is the consistency and certainty provided by the general rule. The current status of e-mail is uncertain because it is not instantaneous in the same way as a telephone conversation or a telex message – the parties need not be engaging in communication at roughly the same time. In terms of commercial risk, however, e-mails arrive fast enough to minimise the opportunity for mischief. Furthermore, they often 'bounce back' when undelivered, thereby informing the sender. Therefore, it is difficult to place them in either category at present because of the existence of the postal rule. However, had the postal rule never existed, the answer would be obvious. Notice would be reasonably defined as the next point in time at which one can expect the offeror to open the letter or email after delivery. For example, if I send a letter or e-mail of acceptance to a company with business hours of 9.00 a.m. to 5.00 p.m. Monday-Friday and the letter or e-mail is delivered on Saturday morning, the acceptance will be binding from 9.00 a.m. on the following Monday. This is the point at which the information is freely available to the offeror.

Conclusion

Although serving a historically useful evidential role, the postal rule has thwarted sound and reasoned development of our approach to contractual formation. It was the result of faulty reasoning and has been acknowledged as artificial and unprincipled. On balance, there is no inherent injustice or commercial inappropriateness in using letters as a medium for legally binding communication as long as both parties are aware of what risks they are taking. Even if

25. Likely referring to sound business practice guiding the conduct of the parties, Bramwell LJ pointed out in his dissent in *Household Fire Insurance* (n 5) 931: "Mischief may arise if my opinion prevails. It probably will not', which is likely referring to the sound business practice that is guiding the conduct of the parties..."

there was, the doctrine we have arrived at demonstrates an unwillingness to expand reasoning and to seek further alternatives because it is simply too harsh on the offeror. Perhaps it was the result of too strict an adherence to the meeting of minds principle, or an overestimation of that doctrine's usefulness and applicability. Either way, this detour from principle and logic could have been avoided by deconstructing, step by step, the format of an offer and acceptance and focusing on the objective communication itself rather than giving undue weight to the subjective mental states of the parties and the risks to the offeree.

An Evaluation of the Principles Governing the Prohibition on Direct Age Discrimination in the UK: A Case Study of Seldon v. Clarkon, Wright & Jakes [2012] UKSC 16

Dr. Elaine Dewhurst
Postdoctoral Research Fellow - Max Planck Institute for Social Law and Policy

Introduction

As demographic change, characterized by longer lives, reduced fertility and migration, sweeps over Europe[1], one of the greatest challenges facing citizens and states in the European Union (EU) is the problem of age discrimination, particularly among older workers.[2] This trend is also emphasized in the age discrimination cases that have been brought before the Court of Justice of the European Union (CJEU).[3] 50 per cent of the age discrimination cases before the CJEU relate to individuals over the age of 60 years and 90 per cent of these cases involve mandatory retirement clauses. In 2011, Eurofound reported that only 46 per cent of workers between the ages of 55 and 64 were involved in active employment and this figure drops to 30 per cent over the age of 60 years.[4] These figures demonstrate that age discrimination in the hiring and termination processes (in particular, mandatory retirement policies) is having a significant impact on the activity levels of workers, particularly those over the age of 55 years.

The case of *Seldon v Clarkson, Wright and Jakes*[5] was the first direct age discrimination case examined by the UK Supreme Court and highlights a number of significant features relating to the definition, interpretation and application of direct age discrimination principles in the UK. The case involved Mr. Seldon, a partner in a law firm, who was requested to resign at the age of 65 years pursuant to a provision in a Partnership Agreement. Mr. Seldon claimed that this mandatory retirement

---

1.2009 Aging Report: Economic and Budgetary Projections for the EU-27 Member States (2008-2060)' (Luxembourg: European Commission, 2009), 19 and 21.
2. Special Eurobarometer Study 296, 'Discrimination in the European Union: Perceptions, Experiences and Attitude' (2008) *European Commission*, 63.
3. At the time of writing: *Werner Mangold. v. Rüdiger Helm (Mangold)* (C-144/04) [2005] ECR I-09981; *Maria-Luise Lindorfer. v. Council of the European Union (Lindorfer)* (Case C-227/04) [2007] ECR I-06767; *Félix Palacios de la Villa. v. Cortefiel Servicios SA* (Palacios de la Villa) (Case C-411/05) [2007] ECR I-08531; *Birgit Bartsch. v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH (Bartsch)* (Case C-427/06) [2008] ECR I-07245; The Queen, on the application of: The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform (Age Concern England) (Case C-388/07) [2009] ECR I-01569; *Seda Kücükdeveci. v. Swedex GmbH & Co. KG (Seda Kücükdeveci)* (Case C-555/07) [2010] ECR I-00365; *David Hütter v Technische Universität Graz (Hütter)* (Case C-88/08) [2009] ECR I-05325; *Colin Wolf. v. Stadt Frankfurt am Main (Wolf)* (Case C-229/08) [2010] ECR I-00001; *Domnica Petersen. v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe (Petersen)* (Case C-341/08) [2010] ECR I-00047; *Ingeniørforeningen i Danmark v Region Syddanmark* (Ingeniørforeningen i Danmark) (Case C – 499/08) [not yet published]; *Gisela Rosenbladt v Oellerking Gebäudereinigungsges (Rosenbladt)* (Case C-45/09) [not yet published]; *Bulicke v Deutsche Büro Service GmbH (Bulicke)* (Case C-246/09) [2010] I-06999; *Vasil Ivanov Georgiev v Tehnicheski universitet - Sofia (Georgiev)* (Case C-268/09) [not yet published]; *Reinhard Prigge and Others v Deutsche Lufthansa AG* (Prigge and Others) (Case C-447/09) [not yet published]; *Fuchs and Köhler* (Joined Cases C-159/10 and C-160/10) [not yet published]; *Hennigs and Mai* (Joined Cases C – 297/10 and C-298/10) [not yet published]; *Torsten Hörnfeldt v Posten Meddelände AB* (Hörnfeldt) (Case C-141/11) and *Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH* (Tyrolean Airways) (Case C-132/11).
4. European Foundation for the Improvement of Living and Working Conditions, *Older Workers and Employment* (Dublin: Eurofound, 2011), 5.
5. *Seldon v Clarkson, Wright & Jakes* [2012] UKSC 16; Court of Appeal decision is cited at [2010] EWCA Civ 899; Employment Appeals Tribunal is cited at UKEAT/0063/08.

clause amounted to direct age discrimination within the meaning of Employment Equality (Age) Regulations 2006, which give effect to Directive 2000/78/EC (Directive).[6] These Regulations provide that a difference of treatment on grounds of age will not constitute age discrimination if it can be shown that the treatment is a proportionate means of achieving a legitimate aim.[7] While there was no dispute as to the existence of a difference in treatment in this case[8], the Supreme Court essentially had to examine whether there were legitimate aims in this case justifying the difference in treatment and whether the measures taken to achieve those aims were proportionate.[9]

The Supreme Court held that mandatory retirement amounts to direct age discrimination, but that in principle it may often be justifiable and therefore lawful under a test of proportionality. In this case, the issue of proportionality was remitted to the Employment Tribunal to consider whether the particular age of 65, chosen as the age of mandatory retirement in this case, was justifiable. While the Supreme Court decision in this case has clarified the law significantly in relation to age discrimination, the judgment offers an insight into the challenges faced by both employers and employees in mandatory retirement cases, including the choice of legitimate aims that may justify discrimination, the proportionality of such measures and the relevance of the consent of the employee to the particular mandatory retirement clause. However, the judgment also reveals the manner in which the law continues to tilt in favour of the flexibility of the employer at the expense of the protection of the equality rights of the individual worker.

Legitimate aims justifying age discrimination: A Case Study of *Seldon*

While the directly discriminatory nature of mandatory retirement policies was not in issue in the *Seldon* case, the legitimate aims justifying such discrimination and the proportionality of such measures were a direct concern for the Supreme Court. Several key issues emerged relating to what constitutes a legitimate aim, how such aims should be expressed and the manner in which the courts will consider whether a legitimate aim is sufficient to justify direct discrimination.

a. *Should legitimate aims be express and contemplated at the time of the measure?*

Justifying a difference in treatment on grounds of age involves an analysis of whether the difference in treatment so identified can be considered to be objectively and reasonably justified by a legitimate

6. Council Directive 2000/78/EC of 27 Nov2000 establishing a general framework for equal treatment in employment and occupation. (OJ, 2000, L 303, p. 16–22).
7. Employment Equality (Age) Regulations 2006, regulation 3.
8. It was conceded by all the parties that the imposition of a mandatory retirement age was a form of direct discrimination on grounds of age as a younger partner would not have been subjected to the same treatment.
9. *Seldon,* n. 5 *above* (EAT) 13 (*per* Elias P.)

aim, including legitimate employment policy, labour market and vocational training objectives.[10] The partnership agreement in the case of *Seldon* contained a clause which provided for mandatory retirement at the age of 65 years. However, the partnership agreement did not specify any legitimate aims and it was doubtful whether any such aims were in contemplation at the time of the signing of the agreement. The question for the Supreme Court was whether such legitimate aims need to be express and in contemplation at the time the measure was adopted.

An examination of the case law of the CJEU reveals that Member States have a very broad discretion in relation to the choice of aims and subsequent measures which they may take in the field of social and employment policy[11] which do not need to be expressly stated but can be implied from the circumstances of each case.[12] The test, at a European level, is one of express or easily implied legitimacy:

> 'It is clear from those judgments that, if the national legislation does not specify the aims which it pursues, it is important that other elements, taken from the general context of the measure concerned, enable the underlying aim of that law to be identified for the purposes of judicial review of its legitimacy and whether the means put in place to achieve that aim are appropriate and necessary'.[13]

Further still, it has been accepted by the CJEU that a legitimate policy may change and that other policies could take its place and the measure would still be considered legitimate under the Directive. Advocate General Bot in the *Petersen*[14] case took

> '…the view that the foregoing factors do not mean that an examination of the justification for a difference of treatment on grounds of age must always be limited to the aims initially pursued by the national legislature. A measure may be maintained even if it pursues new aims, in the light of developments in social, economic, demographic and budgetary conditions'.[15]

The UK, in implementing the Directive into national law, has equally given a lot of flexibility

---

10. Article 6, Directive 2000/78/EC, *above* n.6. See cases *Werner Mangold. v. Rüdiger Helm (Mangold)* (C-144/04) [2005] ECR I-09981; *Maria-Luise Lindorfer. v. Council of the European Union (Lindorfer)* (Case C-227/04) [2007] ECR I-06767; *Félix Palacios de la Villa. v. Cortefiel Servicios SA* (Palacios de la Villa) (Case C-411/05) [2007] ECR I-08531; *Birgit Bartsch. v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH (Bartsch*) (Case C-427/06) [2008] ECR I-07245; The Queen, on the application of: The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform (Age Concern England) (Case C-388/07) [2009] ECR I-01569; *Seda Kücükdeveci. v. Swedex GmbH & Co. KG (Seda Kücükdeveci)* (Case C-555/07) [2010] ECR I-00365; *David Hütter v Technische Universität Graz (Hütter)* (Case C-88/08) [2009] ECR I-05325; *Colin Wolf. v. Stadt Frankfurt am Main (Wolf)* (Case C-229/08) [2010] ECR I-00001; *Domnica Petersen. v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe (Petersen)* (Case C-341/08) [2010] ECR I-00047; *Ingeniørforeningen i Danmark v Region Syddanmark* (Ingeniørforeningen i Danmark) (Case C – 499/08) [not yet published]; *Gisela Rosenbladt v Oellerking Gebäudereinigungsges (Rosenbladt)* (Case C-45/09) [not yet published]; *Bulicke v Deutsche Büro Service GmbH (Bulicke)* (Case C-246/09) [2010] I-06999; *Vasil Ivanov Georgiev v Tehnicheski universitet - Sofia (Georgiev)* (Case C-268/09) [not yet published]; *Reinhard Prigge and Others v Deutsche Lufthansa AG* (Prigge and Others) (Case C-447/09) [not yet published]; *Fuchs and Köhler* (Joined Cases C-159/10 and C-160/10) [not yet published]; *Hennigs and Mai* (Joined Cases C – 297/10 and C-298/10) [not yet published]; *Torsten Hörnfeldt v Posten Meddelande AB (Hörnfeldt)* (Case C-141/11) and *Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH (Tyrolean Airways)* (Case C-132/11).
11. *Mangold,* n. 10 *above*, 31 and *Palacios de la Villa, above* n. 10, 68.
12. *Palacios de la Villa*, n. 10 *above*, (opinion of A.G. Mazák at 71) and judgment of the court at 55.
13. *Petersen*, n. 10 *above*, opinion of A.G. Bot, 43.
14. *Petersen*, n. 10 *above*.
15. *Petersen*, n. 10 *above*, opinion of A.G. Bot, 49.

to employers and partners in the manner in which they choose legitimate objectives and does not require that the objectives be expressly stated as long as they may be implied from all the circumstances of the case. Such objectives also do not need to be in contemplation at the time the difference in treatment was imposed but can be rationalized *ex post facto.*[16] The Supreme Court effectively held in *Seldon* that

> '…the UK has chosen to give employers and partnerships the flexibility to choose which objectives to pursue, provided always that (1) these objectives can count as legitimate objectives of a public interest nature within the meaning of the Directive and (ii) are consistent with the social policy aims of the State and (iii) the means used are proportionate'.[17]

Therefore, even though an employer or a partnership may impose a difference in treatment on grounds of age on an employee or partner, there is no need for them to have a legitimate justification in mind at the time of imposition. It is perfectly acceptable that this is capable of justification at a later stage when this difference in treatment is challenged.

Therefore, in this case, although the partners had not considered what the legitimate objectives were behind their decision to implement a mandatory retirement clause, and certainly never expressly delineated them, they were still able to rationalise their decision during the course of the proceedings. From an employer perspective, this is a very flexible model by providing that legitimate aims can be rationalised *ex post facto* and can also alter with the changing labour market conditions. From an employee perspective, this essentially makes a challenge based on age discrimination a difficult task. The employee will not have any indication as to the reason behind the imposition of the mandatory retirement clause and will effectively have to wait until the legal proceedings to establish the legitimate justification behind the measure. This interpretation of the legitimate justification rule is sensible, in one respect, as it recognizes the importance of flexibility and adaptability in the labour market, but it does make it more difficult for employees to challenge such policies directly. However, the Supreme Court has chosen to err on the side of flexibility, following the CJEU in this context, and for the foreseeable future at least, *ex post facto* justification of a mandatory retirement clause will be possible in the UK.

b. What constitutes a legitimate aim?

Another issue which arose for consideration was whether the aims put forward by the partnership could be legitimate aims within the context of the Regulations. Two major issues arose in this context, firstly whether legitimate aims must be public policy aims and secondly, whether the aims pursued by the partnership fell within this category of aims.

The aims as put forward by the partnership in the *Seldon* case were ostensibly applicable to the particular circumstances of the business, whereas the CJEU has always held that only public social

16. *Seldon,* n.5 *above*, 55 (*per* Lady Hale) See also the decision of the EAT, n.5 *above*, 50 (*per* Elias P.) and the Court of Appeal, n.5 *above*, 35 (Sir Waller) both of whom held that this form of ex post facto rationalization was acceptable under EU law.
17. *Seldon,* n. 5 *above*, 55 (*per* Lady Hale).

policy objectives, such as those related to employment policy, the labour market or vocational training, will be considered to be legitimate objectives under the Directive.[18] Some examples of legitimate aims accepted by the CJEU in recent years include policies promoting 'intergenerational employment'[19] and policies to protect the dignity of the employee.[20] One of the only restrictions that the CJEU has placed on what constitutes a legitimate policy objective is what can be referred to as the 'public interest test'. The CJEU has drawn a very clear distinction between aims which are individual to a particular organization (which is not generally considered to be in the public interest) and those which have a clear public interest objective. In a sensible reading of the Directive and the case law, the Court of Appeal held that in the context of individual employers, 'their actions must also be consistent with the social or labour policy of the UK'.[21] This approach certainly narrows the range of objectives that employers will be able to rely on in justifying age discrimination.

The Supreme Court in examining the legitimate objectives put forward by the partnership in this case accepted that some of the aims of the partnership were capable of being public policy aims and justifying a difference in treatment on grounds of age. These aims were referred to as the 'Dead Men's Shoes'[22] or 'Intergenerational Fairness'[23] aims (hereinafter referred to as 'intergenerational fairness') and the 'Collegiality'[24] or 'Dignity'[25] aims (hereinafter referred to as 'dignity'). In relation to the intergenerational fairness aims, the Supreme Court accepted that 'ensuring associates are given the opportunity of partnership after a reasonable period as an associate, thereby ensuring that associates do not leave the firm'[26] and 'facilitating the planning of a partnership and workforce across individual departments by having a realistic long term expectation as to when vacancies will arise',[27] could be legitimate aims within the meaning of the Regulations. It also held that the dignity aim of 'limiting the need to expel partners by way of performance management, thus contributing to a congenial and supportive culture in the Respondent firm'[28] could also be a legitimate aim.

The Employment Tribunal, the Employment Appeals Tribunal and the Court of Appeal all agreed that such objectives (intergenerational fairness and dignity) could be considered to be social policy aims. The Supreme Court held that the importance of providing 'employment prospects for young people and [encouraging] young people to seek employment by holding out good promotion prospects'[29] was not only a legitimate aim for the business but was also consistent with the social policy aims of the State.[30] The Supreme Court held that the aim of intergenerational fairness could incorporate a variety of policies depending on the particular circumstances including 'facilitating access to employment by young people;…enabling older people to remain in the workforce;…sharing limited opportunities to

18. *Age Concern England*, n. 10 *above*, 46, and *Hütter*, n. 10 *above*, 41; *Prigge*, n. 10 *above*, 81.
19. *Palacios de la Villa*, n. 10 *above*, opinion of A.G. Mazák, 71.
20. For example in the case of *Fuchs*, the CJEU noted that it was a legitimate aim to "encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age' n. 10 *above*, 50.
21. *Seldon,* n. 5 *above* (Court of Appeal) 20 (*per* Sir Waller).
22. *Seldon,* n. 5 *above* (Court of Appeal), 1 (*per* Sir Waller).
23. *Seldon,* n.5 *above*, 56 (*per* Lady Hale).
24. *Seldon,* n. 5 *above* (Court of Appeal), 1 (*per* Sir Waller).
25. *Seldon,* n.5 *above*, 57 (*per* Lady Hale).
26. *Seldon,* n.5 *above*, 9 (*per* Lady Hale).
27. *Seldon,* n.5 *above*, 9 (*per* Lady Hale). See also the decision of the Employment Tribunal ats 51.3 – 51. 5, 53.3-53.4 and 54.5-54.6 quoted in paras 17-21 of the decision of the EAT (n. 5 *above per* Ellias P.
28. *Seldon,* n.5 *above*, 9 (*per* Lady Hale).
29. *Seldon,* n. 5 *above* (Court of Appeal), 20 (*per* Sir Waller).
30. *Seldon*, n. 5 *above* (EAT), 19 (*per* Elias P.) where the EAT relied on the case of *Secretary for Trade and Industry v Rutherform* [2005] ICR 119 in support of the proposition that the protection of advantages for young employees was a legitimate aim and (Court of Appeal) n. 5 *above* at 20 (*per* Sir Waller) which held that such a policy was consistent with the social or labour policy of the UK.

work in a particular profession fairly between the generations;…promoting diversity and interchange of ideas between younger and older workers'.[31]

While the Supreme Court gave a very wide remit to employers in relation to the intergenerational fairness objective, it had a much more difficult time in accepting the dignity objective and subjected it to a much greater level of scrutiny. The Court of Appeal held, in relation to this issue, that 'an aim intended to produce a happy work place has to be within or consistent with the Government's social policy justification' and it was 'not just within partnerships that it may be thought better to have a cut-off age rather than force an assessment of a person's falling off in performance as they get older'.[32] While the Supreme Court agreed that 'avoiding the need to dismiss older workers on the grounds of incapacity or underperformance, thus preserving their dignity and avoiding humiliation, and… avoiding the need for costly and divisive disputes about capacity or underperformance'[33] could be a social policy objective, the Supreme Court did consider this to be a much more controversial one.

The Supreme Court expressed some sympathy with the idea that the dignity objective could be based on stereotyping and referred to the fact that just because 'most women are less physically strong than most men does not justify refusing a job requiring strength to a woman candidate just because she is a woman. The fact that this particular woman is not strong enough for the job would justify refusing it to her'.[34] Lady Hale went on to argue that it would be 'consistent with this principle to hold that the fact that most people over a certain age have slower reactions than most people under that age does not justify sacking everyone who reaches that age irrespective of whether or not they still do have the necessary speed of reaction'.[35] There may be other less discriminatory ways, such as performance management systems, of achieving the same aim. However, despite the uncertainty and uneasiness with accepting this as a legitimate objective, the Supreme Court relied on the fact that the CJEU had found it capable of being a legitimate aim in many cases and that therefore, held it was capable of being a legitimate aim in this case.

While this aspect of the judgment highlights some uneasiness with the dignity aim, it is disappointing that the Supreme Court relied so readily on the decisions of the CJEU which have not addressed the stereotype argument and have only considered this concept in relation to specific sectoral areas of the labour market, such as academia (which is a particularly specialised employment scenario).[36] It would have been interesting for the Supreme Court to challenge more vigorously the arguments based on 'substantive' and 'process' rationality which form the foundation of the dignity aim.[37] The substantive rationality argument is based on the idea that older workers are more expensive and less productive because productivity declines with age and older workers are more likely to draw on the health and social benefits offered by employers.[38] The 'process rationality' argument advocates that it is not desirable to conduct individual assessments of employees (particularly older employees) and that it is

31. *Seldon,* n.5 *above*, 56 (*per* Lady Hale).
32. *Seldon,* n. 5 *above* (Court of Appeal), 22 (*per* Sir Waller).
33. *Seldon,* n.5 *above*, 57 (*per* Lady Hale).
34. *Seldon,* n.5 *above*, 56 (*per* Lady Hale).
35. *Seldon,* n.5 *above*, 58 (*per* Lady Hale).
36. *Georgiev*, n.10 *above* (a case involving the mandatory retirement of a university professor based on inter-generational fairness and dignity objectives).
37. M. Levin, 'Four Models for Age Work Policy Research' (1980) 20(5) *The Gerontologist* 561, 562.
38. European Foundation for the Improvement of Living and Working Conditions, *Older Workers and Employment* (Dublin: Eurofound, 2011), 11.

much easier and more in keeping with the dignity of the employee to have age related policies in place to deal with the average assumption about age[39] as opposed to assessing each individual employees' capacity to perform their work. The main challenge to these arguments was touched upon by the Supreme Court but unfortunately was not developed further. A reliance on the dignity aim assumes that all workers of a certain age are homogenous and does not take into account the heterogeneity of age cohorts. It also fails to acknowledge the indignity inherent in mandatory retirement systems and advocates discrimination in cases where it is too 'distasteful (because of its feared impact on congeniality) not to discriminate'.[40]

c. Does the legitimate aim have to be considered in light of general or particular contexts?

The Supreme Court was also tasked with considering whether, in fact, the aims identified were legitimate in the particular context before them. In one of the very positive aspects of the decision, from the employee perspective, the Supreme Court held that there was a distinction between justifying the application of the rule to a particular individual, which in many cases would negate the purpose of having a rule, and justifying the rule in the particular circumstances of the business. All businesses will now have to give careful consideration to what, if any, mandatory retirement rules can be justified'.[41] Therefore, it is necessary for businesses to examine any mandatory retirement measures to see whether the aims relied upon to justify such a rule are actually required in the particular context of their business.

Lady Hale held that while intergenerational fairness may be a legitimate aim in order to achieve a balanced and diverse workforce, 'if there is in fact no problem in recruitment of the young and the problem is in retaining the older and more experienced workers then it may not be a legitimate aim for the business concerned'.[42] Equally, while avoiding performance management might be in furtherance of a happy workplace, 'if in fact the business already has sophisticated performance management structure in place, it may not be legitimate to avoid them for only one section of the workforce'.[43] The determination as to whether this was in fact the case was the task of the Employment Tribunal. This decision will require the employer to provide evidence that the legitimate aim is required in their particular workplace.

The approach adopted by the Supreme Court would appear to be consistent with the approach of the CJEU in relation to this question. While the CJEU generally gives a wide margin of appreciation to Member States in determining what constitutes a legitimate aim,[44] the CJEU has held that it is for the national courts to balance the legitimate aim of the Member State with a suitable measure 'on the basis of political, economic, social, demographic and/or budgetary considerations and having regard to the *actual* situation in the labour market in a particular Member State, to prolong people's working life or, conversely, to provide for early retirement' (own emphasis added).[45] Therefore, the CJEU expects,

39. J. MacNicol, *Age Discrimination: A Historical and Contemporary Analysis* (Cambridge: Cambridge University Press, 2006), 30.
40. Equality and Human Rights Commission, *Submission to the Supreme Court* (2008), 362.
41. *Seldon,* n.5 *above*, 66 (*per* Lady Hale).
42. *Seldon,* n.5 *above*, 61 (*per* Lady Hale).
43. *Seldon,* n.5 *above*, 61 (*per* Lady Hale).
44. *Rosenblatt,* n. 10 *above*, 44. See also Schiek, 'Age Discrimination Before the Court Of Justice – Conceptual and Theoretical issues' (2011) 48 *Common Market Law Review* 777, 788.
45. *Palacios de la Villa*, n. 10 *above*, 70.

in the context of the review of a national measure introduced to meet certain aims, that national courts in Member States will review the *actual* situation in that Member State to see if the aim is legitimate in the particular context of the national labour market. In the UK, because of the wording of Regulation 2(2)(b), the focus is on the employer and their employment practices, as opposed to the Member State. Therefore, where the measure is one that is adopted to pursue the aims of an individual organisation, then the measure should be examined in the particular context of that organization and not in a general or abstract sense.

The concept of proportionality

The other key issue for determination before the court was that of proportionality, involving a complex consideration of the appropriateness and necessity of the legitimate aim pursued.[46] In the CJEU, the concept of 'appropriateness' involves a measurement of the suitability of the measure in relation to the aim sought to be achieved and only where the measure is deemed to be 'manifestly unsuitable' will the CJEU consider it to be inappropriate.[47] The concept of 'necessity' requires a consideration of whether the legitimate aim pursued could have been achieved 'by an equally suitable but more lenient means'.[48] While two questions would naturally flow from this assessment (whether mandatory retirement is a proportionate means of achieving the aims of intergenerational fairness and dignity and whether a mandatory retirement age of 65 years is appropriate in this context), the Supreme Court limited themselves to deciding whether the choice of 65 years was a proportionate measure in the circumstances as this was the question that was being remitted to the Employment Tribunal.

a. The proportionality of a mandatory retirement measure

It is unfortunate that the Supreme Court did not consider the concept of alternatives to mandatory retirement clauses including performance management systems or processes of negotiation. Such a consideration would have clarified the position in relation to less discriminatory means of meeting intergenerational fairness and dignity aims for the lower courts and tribunals. Considering the Supreme Courts acceptance that performance management systems might interfere with the dignity aims of a business (where such a system is not already in place), it is unlikely that the Supreme Court would have accepted the imposition of such a system in this case. This would probably be a sensible conclusion in this case as it would be potentially undesirable for the courts to impose specific termination processes on businesses, where they are not aware of the culture within that business and where such businesses are opposed to such measures on the grounds that to impose such a system would have a potential 'adverse effect upon the culture of congeniality' in their business.[49] However, this should not mean that the court should avoid examining other suitable solutions in other cases.

In this case, Counsel for Mr. Seldon made a number of sensible suggestions, as alternatives to a performance management structure or mandatory retirement, which could potentially have been workable within the business concerned. For example, they suggested the development of flexible leave packages which could be adopted where a partner would have to leave in circumstances where

46. *Ingeniørforeningen i Danmark*, n. 10 *above*, opinion of A.G. Kokott, 46.
47. *Ingeniørforeningen i Danmark*, n. 10 *above*, opinion of A.G. Kokott, 53.
48. *Ingeniørforeningen i Danmark*, n. 10 *above*, opinion of A.G. Kokott, 60.
49. *Seldon,* n. 5 *above* (EAT), 25 (*per* Elias P.).

they were told that their performance was unsatisfactory, the extension of already existing negotiation strategies to older staff members (which were already in place in relation to underperforming younger partners) [50] and the development of the concept of a 12 month notice period from the age of 64 if such notice was necessary to accommodate the desire to promote an individual to a partnership.[51] The response of the lower courts and tribunals was to dismiss these alternative means as either inconsistent with intergenerational fairness (due to the uncertainty that would ensue for a younger partner waiting for these positions to become available or the partners waiting for retirement[52]) and collegiality (due to the 'the unpleasantness that could accrue').[53] In response to the concerns in relation to intergenerational fairness, the Equality and Human Rights Commission drew on the inevitable uncertainties inherent in business life which can arise from the folding or merging of a business, the contractual extension of a partner's contract beyond retirement age and the potential emergence of a superior choice from the external market.[54] Equally, it could be argued that reliance on the collegiality aim to deny the operation of other alternatives merely on the basis that such systems might be unpleasant, ignore the inherent unpleasantness existent in mandatory retirement systems and the importance of respecting the voluntary choice of employees to submit themselves to alternative systems such as negotiation or flexible leave packages.

While it is unfortunate that the Supreme Court did not deal with this issue and make some determination as to the potential proportionality of mandatory retirement as a concept, this means that mandatory retirement clauses can continue to operate and it will have to be determined on a case by case basis by Employment Tribunals as to whether it is the most proportionate method of achieving legitimate aims.

b. The proportionality of the choice of 65 years

The more immediate focus of the Supreme Court was the specific choice of age 65 years as the age for mandatory retirement. In the Supreme Court, Lady Hale held that

> 'it is one thing to say that the aim is to achieve a balanced and diverse workforce….it is one thing to say that the aim is to avoid the need for performance management procedures. It is another thing to say that a mandatory retirement age of 65 is both appropriate and necessary to achieving this end'.[55]

While this issue was not decided directly by the Supreme Court, as it is to be remitted to the Employment Tribunal for determination, the comments of the Supreme Court are indicative of the line of reasoning that it expects the Employment Tribunal to take.

Firstly, the Supreme Court expects that the Employment Tribunal will impose an exacting standard on employers to justify their choice of age for the purposes of mandatory retirement. Lady Hale held

50. *Seldon,* n. 5 *above* (EAT), 29 (*per* Elias P.).
51. *Seldon,* n. 5 *above* (EAT), 29(5) (*per* Elias P.).
52. *Seldon,* n. 5 *above* (EAT), 65 (*per* Elias P.).
53. *Seldon,* n. 5 *above* (EAT), 64 (*per* Elias P.)
54. Equality and Human Rights Commission, n.40 *above*, 390.
55. *Seldon,* n. 5 *above*, 62 (*per* Lady Hale).

that there was a distinction between 'justifying a retirement age and justifying this retirement age'.[56] She felt that taken to extremes, the intergenerational fairness arguments could be 'thought to justify almost any retirement age'[57] indicating an uneasiness with simple reliance on legitimate aims and proposing a more exacting standard on employers in justifying their choice of age. Lady Hale urged the Employment Tribunal to 'unpick the question of the age chosen and discuss it in relation to each of the objectives'.[58] Employers are now expected to provide 'evidence of a considered and reasoned explanation as to why the particular age had been chosen. Mere assertion would not be enough'.[59] The Supreme Court agreed that the age of 65 would need to be justified by the partners before it could be chosen as the age at which the mandatory retirement clause would be allowed to take effect. The rationale behind this approach was explained in the Employment Appeals Tribunal where it was held that choosing the age of 65 years was based on a stereotypical assumption that persons over the age of 65 are incapable of performing their job satisfactorily[60] and that it was reasoning of this kind 'that the legislation is seeking to avoid'.[61]

Secondly, the Supreme Court, even though imposing a high standard on employers, noted that at the time this case of discrimination occurred, there was a designated retirement age for employees which was set at 65 years. Lord Hope held that 'the question is whether the treatment which Mr. Seldon received was discriminatory at the time when he was subjected to it. The fact that it was lawful for others to be subjected to a designated retirement age may help to show that what was agreed to in this case was, at the relevant time, an acceptable way of achieving the legitimate aim'.[62] This would suggest that the Supreme Court was giving leeway to the Employment Tribunal to make a determination that at the time of this case, such a choice of age would have been appropriate, but that this may no longer be the case.

The Supreme Court's reasoning in this latter aspect of the case is commendable. If it is ultimately decided by the Tribunal that a mandatory retirement age is justifiable by reference to the legitimate aims of the business, it is then a relevant consideration as to what the relevant cut-off age should be. According to the Supreme Court, this should not be some randomly chosen age but should be ascertained by reference to evidential proof that this is required in the particular workplace concerned.

c. The relevance of consent

One of the other interesting aspects of the decision was the reference to the relevance of consent in the determination of the proportionality of mandatory retirement clauses. The Supreme Court held that consent, in the form of signing the Partnership Agreement, was a relevant consideration in determining the proportionality of the measure. This approach is consistent with the decisions of the CJEU who has always been heavily influenced by the existence of consensual provisions in a

56. *Seldon,* n. 5 *above*, 68 (*per* Lady Hale).
57. *Seldon,* n. 5 *above*, 68 (*per* Lady Hale).
58. *Seldon,* n. 5 *above*, 68 (*per* Lady Hale).
59. *Seldon,* n. 5 *above*, 75 (*per* Lady Hale).
60. *Seldon,* n. 5 *above*, 74 (*per* Lady Hale).
61. *Seldon,* n. 5 *above*, 74 (*per* Lady Hale).
62. *Seldon,* n. 5 *above*, 77 (*per* Lady Hale).

particular case. For example, in *Palcios de la Villa*[63] and *Rosenblatt*[64], the CJEU emphasised the fact that the workers in both cases had been party to the collective bargaining agreement laying down the mandatory retirement age and, therefore, had consented to the terms of the agreement. In other cases, the CJEU has been persuaded by the fact that the worker had worked out a more flexible package with their employer allowing them to work beyond the mandatory retirement age for a limited period of time subject to certain conditions (for example, *Georgiev*[65], *Petersen*[66], *Age Concern UK*[67] *and Fuchs and Köhler*[68]), thus ameliorating the rigid effect of the mandatory retirement rule. The Employment Tribunal and the Employment Appeals Tribunal, in this case, seemed influenced by the fact that the 'partners perceived the rule to be in their collective interests'[69] and the Court of Appeal held that it was a 'legitimate consideration that a rule of this kind has been agreed by parties of equal bargaining power'.[70] The Supreme Court also referenced the consensual element of the agreement and noted that it could not 'be entirely irrelevant that the rule in question was re-negotiated comparatively recently between the partners'.[71]

One of the persuasive arguments put forward by the claimant was that it is not possible to contract out of the right to the principle of non-discrimination[72] and that as the consent was given prior to the adoption of the Age Regulations, 'it is hard to see that this agreement is any more relevant than was the agreement of a woman prior to the Equal Pay Act 1970 to undertake a job in which there was a married woman's rate of pay that was less than that which applied to a man once the Act gave her rights'.[73] However, the Employment Appeals Tribunal could see no reason in principle not to consider the relevance of the agreement here.[74]

There is certainly much to commend in the approach of the arguments of the claimants in this case. However, the Supreme Court did seem to be influenced by the fact that the agreement here was not between an employer and employee, in which there may be an unequal bargaining power, but between equal partners in a business. Therefore, the agreement in this case was closer to a commercial agreement in which the partner willingly took part. Therefore, it may be the case that in circumstances involving an employee and an employer, that the consent to the clause may not be a relevant consideration. It is hoped that the courts in future cases would place little if no import on the issue of consent. As outlined in the argument of the claimant, it is of little relevance to the determination of such a dispute and only seeks to place too great an emphasis on contractual relations at the expense of worker's rights.

Conclusions

The decision of the UK Supreme Court in this first case on direct age discrimination clarifies the

63. *Palacios de la Villa,* n. 10 *above*.
64.*Rosenblatt,* n. 10 *above*.
65. *Georgiev*, n. 10 *above*.
66.*Petersen,* n. 10 *above*.
67.*Age Concern UK,* n. 10 *above*.
68.*Fuchs and Köhler,* n. 10 *above*.
69. *Seldon,* n. 5 *above*, 48 (*per* Lady Hale).
70. *Seldon,* n. 5 *above*, 30 (*per* Lady Hale).
71. *Seldon,* n. 5 *above*, 65 (*per* Lady Hale).
72. *Seldon,* n. 5 *above* (EAT), 51 (*per* Elias P.).
73. Equality and Human Rights Commission, n.40 *above*, 370.
74. *Seldon,* n. 5 *above* (EAT), 54 (*per* Elias P.): Quoting *Loxley v BAE Land Systems Ltd* [2008] ICR 1348, 42 (*per* Elias P.) where it was held that while the fact that a rule is agreed does not render an otherwise unlawful scheme lawful, 'a tribunal will rightly attach some significance to the fact that the collective parties have agreed to a scheme which they consider to be fair'.

law in relation to potential legitimate justifications and proportionality, while also strengthening and tightening these rules so as to provide stronger protection for employees. In some respects, from an employee perspective, the Supreme Court decision espouses a 'more rights based approach to aging so that older people can act as empowered subjects instead of objects'.[75] The Supreme Court achieved this more rights based approach by significantly narrowing the flex
ibility given to employers in the context of their choice of legitimate aims. Employers must ensure that the aims chosen have a social policy objective and must justify their choice of aim in the context of their particular business, a standard that places a significant burden of proof on the employer. Similarly, employers must justify the proportionality of the age at which they choose to impose mandatory retirement clauses. Mere reliance on labour market trends will not meet the standard imposed by the Supreme Court.

However, despite these measures, many of the protections afforded by the Supreme Court to employees are reduced in their effectiveness by the broad discretion given to employers in other areas. So while employers must prove that the discriminatory measures satisfy a social policy aim, this aim can be rationalised *ex post facto* and can be legitimated by reference to the particular concerns of the business. The Supreme Court did not consider potential legitimate alternative measures to mandatory retirement clauses and attached some relevance to the issue of consent to the clause, despite the very cogent arguments presented by the claimants against such an approach.

Overall, the efforts made by the Supreme Court to strike a fair balance in this first direct age discrimination case are commendable. However, there are still many problems with the decision, such as the failure to attach more significance to the potential alternatives to mandatory retirement clauses or to disregard the issue of consent. Arguably the Supreme Court was hindered in this respect by the broad discretionary approach adopted by the CJEU in interpreting the Directive. However, given the social, economic and human rights implications of age discrimination, it is unfortunate that the Supreme Court did not take this opportunity to strengthen the law on age discrimination in the UK by reading the Regulations and the Directive more restrictively.

75. 'Role of women in an ageing society', European Parliament resolution of 7 Sep. 2010 on the role of women in an ageing society (2009/2205(INI)) OJ, 2011, C 308E, 49–55 at point D.

The Fundamental Rights of Irregular Migrants in the European Union

Alina Alexe
LLM, Queen Mary University of London

"Human rights belong to human beings and we remain human beings even if we do not have a visa or a residence permit"[1]

INTRODUCTION

1.1 General considerations

This dissertation focuses on the fundamental rights to work and healthcare of irregular migrants within the EU territory. It covers aspects such as the notion of "regular" and "irregular" immigration. The first chapter aims to answer the question "who is an irregular migrant", covering a whole spectrum which includes: peoples who arrive in the respective Member State through clandestine routes, those who stayed over their allowed residence period, immigrants who have access to healthcare without possessing a national health insurance or without fulfilling other legal requirements. This notion also includes people who possess and use false documents in order to enter a certain EU Member State or those regularized who regress again into an irregular status. The concept is often outlined in opposition with the notion of regularity.

The second chapter presents the most important legal provisions applicable through analogy to irregular migrants when exercising the right to work: the Charter of Fundamental Rights of the European Union, the International Covenant on Economic, Social and Cultural Rights, various international conventions and secondary EU legislation. The practice of different EU Member States in regard to the use of the right to work, distinct obstacles encountered by irregular immigrants when exercising this right and ideas for improving their access to the fundamental right to work are analyzed.

The last chapter concludes that the right analyzed in the previous chapter is under exercise in the EU. However, there is a need for improvement of national and European policies and legislation on immigration. Furthermore, there is a huge demand for reform and legislative measures in this particular area of law which is very under researched and characterized by scarcity of case law and legal provisions, secondary EU legislation being almost absent. For these reasons, this dissertation represents an attempt to contribute to the existing literature on irregular migrants and has experienced that the topic can be contrasted to a similar position of the irregular migrants, less written about, in the shadow of the regular migrants.

1.2 The notion of "irregular" migrant

The term "migrant" covers all people trying to migrate. Although everyone is "free to leave any country,

1. Morten Kjaerum, Director of the European Union Agency of Fundamental Rights.

including his own"[2] there is not a correlative right to enter and fix the residence in another state's territory.[3] Irregular migrants are foreign citizens, third party nationals, who do not respect immigration regulations.[4] The notion refers to people who arrive in a clandestine manner in the respective EU Member State, to those who prolong their stay after the allowed period of residence expires or to immigrants who work without possessing a permit or violating employment regulations.[5] The term also includes people who use forged papers in order to enter the country, as well as regularized migrants who lose the regularization status and become undocumented again.[6] Those born into irregularity are also covered. Tolerated persons are staying illegally and consequently included in the category of irregulars from a technical point of view even if authorities are aware about their status.[7] The legal framework does not explicitly enunciate all these categories neither at the European nor at the national level. With the exception of Portugal, national legislations do not define precisely the notion of "irregular migrant". Generally, "irregularity" is defined in opposition with "regularity".[8] What is not included in the umbrella of regularity becomes automatically irregular.

One of the few elaborated definitions in the field of irregular migration regards the notion of "irregular entry" as representing "crossing borders without complying with the necessary requirements for legal entry into the receiving State".[9] Similarly, the Return Directive defines "illegal stay" as "the presence on the territory of a Member State of a third-country national who does not fulfill or no longer fulfills the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State".[10] But to define "irregular" or "undocumented" migration is notoriously complicated. The practice of Member States is very different in regard to who is an "irregular migrant" and this contributes to the difficulties in approaching this term.

Generally, irregular migrants are seen as being outside the national societies. As outsiders, they are mistakenly presumed not to have any duties towards the state of residence and, correlatively, any rights. Because of the continuous breach of immigration regulations they are perceived as a danger to society and, despite of their behavior, are usually criminalized.[11] Their vulnerable situation makes them easily exploitable. In fact they represent "an ideally exploitable source of labour".[12] Actually, they perform the "three-D" jobs: dirty, degrading and dangerous[13] and EU nationals benefit from their illegal presence paying them lower wages than they would normally pay to a national or regular migrant doing the same job, under unsecure and unhealthy conditions, in extremely long hours of work, without contributing to the tax and social security systems.[14] And, despite all these, undocumented migrants as "human

2. Article 12, International Covenant on Civil and Political Rights (ICCPR).
3. Julian M. Lehmann, 'Rights at the Frontier: Border Control and Human Rights Protection of Irregular International Migrants' (2011) 3 *Goettingen Journal of International Law* 740.
4. S. Da Lomba, 'Immigration Status and Basic Social Human Rights: A Comparative Study of Irregular Migrants' Right to Health Care in France, the UK and Canada, Netherlands' (2010) Vol 28, Number 1 *Quarterly of Human Rights* 7.
5. Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyszczac, *Irregular Migration and Human Rights: Theoretical, European and International Perspectives, Elspeth Guild, Who is an Irregular Migrant?* (2004), 3.
6. Da Lomba, 7.
7. Albert Kraler, 'Regularization: A misguided option or part and parcel of a comprehensive policy response to irregular migration?' (2007) No. 24 *IMISCOE Working Paper* 10.
8. Bogusz, 15.
9. Article 3 lit. b, The Smuggling Protocol.
10. Article 3(2), the Return Directive.
11. Da Lomba, 12.
12. G. L. Neuman, *Strangers to the Constitution* (1996), 185.
13. P. A. Taran and E. Geromini, *Globalization, Labour and Migration: Protection is Paramount, Perspectives on Labour Migration* (2002), 4.
14. UN Economic and Social Council, Specific Groups and Individuals, Migrant Workers, Report of the Special Rapporteur, Gabriela Rodriguez Pizarro, submitted pursuant to commission on Human Rights Resolution 2000/48, UN Doc. E/CN.4/2001/83, January 2001, paragraph 54.

beings, are disqualified by being called illegal"[15], especially bearing in mind that their status may be regularized one day,[16] becoming subjects to "any state procedure by which illegally staying third country nationals are awarded a legal status".[17]

2. The fundamental right to healthcare

"Nobody would suggest that an asylum seeker or undocumented person, who is charged with a criminal offence, should be denied their human right to a fair trial. Equally, a sick asylum seeker or undocumented person should not be denied their right to medical care without discrimination."[18]

2.1 The Charter of Fundamental Rights of the European Union

According to the Charter of Fundamental Rights of the European Union, "Everyone has the right of access to preventive healthcare and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities."[19] From a theoretical point of view the EU is involved in health protection but from a practical point of view national regulations have a main role in accessing this right. The Charter does not provide for implementing mechanisms, theoretical provisions being totally unsatisfactory for a good exercise of this right. In theory everyone has the right to treatment but this right is subject to national regulations and depends on national practices, which are very different in relation to irregular migrants.

The Charter applies, in conformity with article 51, to actions and activities of institutions and bodies of the EU and to actions and activities of the Member States when they are implementing EU law. That means that the rights enshrined in the Charter have effect on healthcare matters which fall within the EU field of competence.[20] This competence is not very broad and predominantly regards public health problems while Member States are responsible of establishing the circumstances in which the health insurances can be accessed and the benefits granted under the national law systems, the health services and medical care.[21] The health related rights regulated by the Charter seem powerless in the interpretation of article 51 as long as they do not influence the circumstances under which EU institutions take action or under which the Member States implement EU law.[22] However the Charter, representing binding EU law, has direct effect, its provisions can be invoked by individuals before national courts, it can confer rights on individuals, can be invoked before a Member State organism and can enforce obligations on a private party.[23]

Article 35 is based on Article 152 of the EC Treaty, the current Article 168 of TFEU, also on Articles 11 and 13 of the Social Charter[24], appears in the chapter entitled "Solidarity" and does not contain a

15. Bogusz, Introduction, xix.
16. Ibid.
17. Martin Baldwin-Edwards, Martin &Albert Kraler, *REGINE, Regularizations in Europe. Study on practices in the area of regularization of illegally staying third-country nationals in the Member States of the EU* (2009), 1.
18. Paul Hunt, former UN Rapporteur on the right to the highest attainable standard of health.
19. Article 35, Charter of Fundamental Rights of the European Union.
20. Steve Peers and Angela Ward, *Health Care Law, The EU Charter of Fundamental Rights, Essays in European Law*, (2004), 287.
21. Ibid., 290.
22. Ibid., 307.
23. Craig, de Burca, *EU Law: Text, Cases, and Materials* (2011).
24. Official Journal of the European Union C303/17-14.12.2007.

definition of the words "health", "healthcare" or of the notion "human health".[25] It does not use the term "equal access to healthcare" but simply guarantees the right to benefit from medical care according to national law and practice. Thus, the fundamental right to healthcare is subordinated to the "conditions established by the national laws and practices"[26] while, in opposition with this statement, "a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities"[27]. The first statement confirms an individual right while the second one, by way of contrast, is applicable to states and European organs.[28] It is true that guaranteeing equal access to care would have had repercussions on social security systems, which, despite all measures taken, never come into practice to ensure equal treatment to all citizens.[29] Especially the situation of irregular migrants is very delicate taking into consideration their status, destitution, lack of enforcement mechanisms and social security. For them it is even tougher than for the other social categories even though, according to the Strasbourg Court, the expelling of an alien when the result consists in interrupting the administration of care palliatives represents inhuman treatment.[30] Therefore, the mismanagement of the right to healthcare for aliens in general and undocumented migrants in particular can degenerate in serious breaches of the most basic human rights. The secondary EU law will not limit the applicability of the Charter.

The protection of the fundamental right to healthcare becomes effective through the national framework of practices and regulations. The EU Charter of Fundamental Rights creates instruments to improve the protection of this fundamental right even though it is difficult to enforce it. The multi-cultural perspectives in approaching this right make it difficult to be developed from a unique EU angle. The EU has to pay attention to the religious and cultural dimension and to respect diversity as well. Furthermore, the scope of the Charter is limited to the competence of the EU, the right applies in regard to the EU institutions, not to national ones which are the primary healthcare providers.[31] The connection with national legislation and the need for specific secondary EU legislation is present in ***Fransson case*** too. The Advocate General concludes that the interests of the EU in relation with fundamental rights have priority over those of Member States, therefore their exercise by Member States is in accordance with EU interpretation. In ***McB case,*** the ECJ, on the basis of article 51(1) and 52(2) of the EU Charter, distinguished between the national and European competences, the application of the Charter being more extensive than the implementation of European law in national law.[32]

The right to health is so important that not only health practitioners are concerned. Thus, the International Union of Lawyers adopted at the Congress of Fez in September 2005, a health charter, which proclaims that "the right to health is personal and inalienable. Any infringement of this right is a violation of human dignity".[33] The personal nature of this fundamental right is emphasized. The right cannot be alienated. It belongs to every human being, regular or irregular. The immigration status is not taken into consideration when exercising it.

---

25. *EU Network of Independent Experts on Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union*, June 2006, 304, translated by the author of this paper Alina Alexe on 29.07.2012.
26. Article 35, The EU Charter.
27. Ibid.
28. Peers, 291.
29. Commentary of the Charter of Fundamental Rights of the European Union, June 2006.
30. Ibid.
31. Jean McHale, *Fundamental rights and healthcare* (2010), 312, 313.
32. Marek Safjan, *Areas of application of the Charter of Fundamental Rights of the European Union: fields of conflict?* (2012), 11.
33. Article 1, The Health Charter, International Union of Lawyers.

In order to have a healthy Europe, all its inhabitants, documented or not, must remain healthy. Like in a vicious circle, this implies medical treatment for everybody, including for those with an uncertain irregular status. Otherwise the consequences would be negative for the whole society. Finally, to advance health regulations to a more evolved stage implies the advancement of the whole European society.[34]

The access to both preventive health and medical treatment is very broad and too general to be legally definable and subject to the effects of national regulations governing the healthcare systems, therefore it is not an individual right enforceable before the European Court of Justice.[35] The correlative national rights are part of this broad spectrum which constitutes the fundamental right to healthcare.

Even when health is described as an individual fundamental right, being a broad area, protection and prevention in this area involve a series of measures taken to promote public health. The jurisdiction of the European Union is in areas that have direct impact on health since it is competent to adopt measures for the public health.[36] Recently, the Advocate General in ***Aikaterini Stamatelaki v. NPDD Organismos Asfaliseos Eleftheron Epangelmation*** made reference to the Charter.[37] He stated that the fundamental right to healthcare enshrined in article 35 became very important at the European level "being a fundamental asset health cannot be considered solely in terms of social expenditure and latent economic difficulties. This right is perceived as a personal entitlement unconnected to a person's relationship with social security and the Court of Justice cannot overlook that aspect".[38]

Even though the EU Charter is drafted in unconditional, absolute terms, the final chapter contains some limitations.[39] "Any limitation must be provided by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if there are necessary and genuinely meet objectives of general interest recognized by the Unions or the need to protect the rights and freedoms of others".[40] And there is just one step till the conflict of rights arises. The question is how this conflict can be resolved. There are no rights more important and valued than others. For instance, irregular migrants benefiting from the right to healthcare can generate high financial costs which can impose higher duties on nationals or documented migrants and can affect their resources.

The solution is very difficult to reach in practice. On a case by case basis, fundamental rights have to be respected and applied even though this involves for instance economic financial implications in a long term, especially in this particular circumstance where healthcare represents a fundamental asset for everybody, no matter the immigration status. Article 51(2) provides expressly that the Charter "does not establish any new power or task for the Community or the Union, or modify powers and tasks as defined by the Treaties".[41] Therefore, the role of the Charter is to strengthen the current legal framework and its compulsory character adds firmness.

2.2 The International Covenant on Economic, Social and Cultural Rights

34. Commentary of the Charter of Fundamental Rights of the European Union, June 2006, 311.
35. Ibid., 308
36. Ibid., 309
37. Fund McHale, 304.
38. AG Opinion, Case C-444/05, Stamatelaki (2007) ECR I-3185, paragraph 40.
39. McHale, 305.
40. Article 52(1), EU Charter.
41. Article 51(2), EU Charter.

The International Covenant on Economic, Social and Cultural Rights, ratified by all EU Member States, put up the most powerful enunciation of the right to health.[42] It is recognized "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"[43]. This right is also applicable to undocumented migrants according to general comments made by the Committee on Economic, Cultural and Social Rights. According to the Committee "all persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care".[44] General Comment 14 deals with equal treatment and non-discrimination[45]. The latter is vital for the exercise of all the rights enshrined in ICESCR and especially the right to healthcare. This has to be accessed by everyone, including the most vulnerable society members. Investment has to be made in preventive and primary healthcare, which has to be easily accessed by non-privileged social groups.[46] Furthermore, Member States have the obligation to facilitate access to basic medical treatment and to legislate this fundamental right in international instruments of which they are members.[47] General Comment 3 emphasizes that, in areas such as health, it is difficult to fight against discrimination in the absence of adequate legislation.[48] The Convention is denied its *raison d'ĕtre* in case "any significant number of individuals is deprived of (…) essential primary healthcare".[49] All possible efforts have to be made to meet the minimum requirements.

According to the Committee on Economic, Social and Cultural Rights, "health is a fundamental right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity".[50] The term "every human being" is comprehensive enough to refer to all social categories, regardless of their immigration status, therefore to irregular migrants. Undoubtedly, the right to health is closely related to other rights, such as human dignity, which are certainly applicable to everybody, therefore to undocumented migrants.

The right to health is not equivalent with the right to be healthy. On the contrary, the *travaux préparatoires* of article 12.2 confirm that the right to health concerns a wide area of social and economical preconditions and resources for a healthy life. Among the causal factors, we can mention: nutrition and food, potable water, housing, proper sanitation and a healthy working environment.[51] They are basic entitlements, related to every social category. Despite their elementary nature, the use of the right to health still remains a remote goal for many destitute people in the whole world,[52] including undocumented migrants which live in difficult conditions. It is also mentioned "the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health".[53] The concept of "the highest attainable standard of health" in article 12.1 regards biological, social and economical preconditions, as well as financial resources of a state[54]. The latter should be distributed unbiased, regardless of immigration status or other considerations.

42. Da Lomba, 3.
43. Article 12(1), ICESCR.
44. General Comment no. 19, The Right to Social Security, paragraph 37.
45. General Comment 14, paragraph 18.
46. Ibid., paragraph 19.
47. Ibid., paragraph 39.
48. General Comment no. 3, paragraph 3.
49. Ibid., paragraph 10.
50. General Comment no. 14: The Right to the Highest Attainable Standard of Health, paragraph 1.
51. Ibid.. paragraph 4.
52. Ibid., paragraph 5.
53. Ibid., paragraph 8.
54. Ibid., paragraph 9.

Vital and interrelated elements are further outlined. They are: availability, accessibility, acceptability and quality. Availability means that "functioning public health and healthcare facilities, goods and services, as well as programs, have to be available in sufficient quantity within the state party".[55] Accessibility means that "health facilities, goods and services have to be accessible to everyone without discrimination"[56], while acceptability regards the obligation of state parties to guarantee that "all health facilities, goods and services must be respectful of medical ethics and are culturally appropriate"[57]. At last, quality involves states which safeguard that "health facilities, goods and services are scientifically and medically appropriate".[58]

Non-discrimination in access to health on any grounds is expressly enforced. Despite the interpretative declaration of Belgium which appreciates that the concept refers to the exclusion of any discretionary behavior but not to differences in treatment between nationals and foreigners[59], discrimination which generates the consequence of diminishing or preventing an equal exercise of the right to health is expressly prohibited.[60] Three obligations are imposed on states: to protect, to respect and to fulfill. The obligation to protect involves the responsibility of states to legislate and take different measures in order to guarantee equal access to healthcare.[61] The violation of this obligation consists in the omission of states to take appropriate measures in order to prevent the infringement of this right.[62] In relation to the obligation to respect, the states have the mission to "refrain from denying or limiting equal access for all persons, including (…) illegal immigrants to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a state policy".[63] The breach of this obligation leads to unrepaired harm and mortality.[64] And, finally, the obligation to fulfill imposes on states the duty to regulate national health policies within the main aim of facilitating and ensuring the access of this fundamental right.[65] Its violation is represented by inadequate national health policies, improper use of public sources which leads to the denial of accessing this right by vulnerable social categories, practical impossibility to diminish inequities among marginalized groups.[66] But the implementation of those mentioned in the Convention varies from state to state. The Covenant only imposes the final aim: to assure an appropriate level of healthcare, accessible for everybody, in order to reach "the highest attainable standard of physical and mental health". National strategies should be adopted in this respect.[67]

2.3 Other Legal Provisions

The Convention on the Elimination of Discrimination against Women, which is ratified and therefore applicable in all EU Member States, provides for women "appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation"[68]. Therefore, this special social category should be

55. Ibid., paragraph 12.
56. Ibid.
57. Ibid.
58. Ibid.
59. Fundamental Rights of Migrants in an irregular situation in the European Union, FRA Report 2011, page 72.
60. General Comment no. 14: The Right to the Highest Attainable Standard of Health, paragraph 18.
61. Ibid., paragraph 35.
62. Ibid., paragraph 51.
63. Ibid., paragraph 34.
64. Ibid., paragraph 50.
65. Ibid., paragraph 36.
66. Ibid., paragraph 52.
67. Ibid., paragraph 53.
68. CEDAW, Article 12(2).

protected. Free services shall be provided prior and post pregnancy to irregular migrant women.

According to the International Convention on the Elimination of All Forms of Racial Discrimination, racial discrimination is prohibited in relation to the "right to public health, medical care, social security and social services"[69]. Hence, the exercise of the right to health is not subject to racial discrimination. The UN Committee on the Elimination of Racial Discrimination, in its General Comment no. 30, which regards discrimination against non-nationals, including irregular ones, stipulates that the undocumented non-citizens group became an important group to be concerned with.[70] The Committee recommended to safeguard that "states' parties respect the right of non-citizens to an adequate standard of physical and mental health by, inter alia, refraining from denying or limiting their access to preventive, curative and palliative health services".[71] This Convention is also ratified by all EU Member States.

According to the Convention on the Rights of the Child, applicable in all EU Member States, "states parties recognize the right of the child to the enjoyment of the highest attainable standard of health"[72], to maximum benefits in the health sector. There is a negative obligation: not to deprive the children of their fundamental right to health.[73] Special emphasis is put on primary healthcare in order to fight against malnutrition and disease using adequate technology, proper foods and drinking water[74], even though attention is paid to preventive healthcare.[75]

The European Social Charter, which is ratified by all EU Member States except Bulgaria, Cyprus, Estonia, Lithuania, Poland, Romania, Slovakia and Slovenia, stipulates that, in order to assure the fundamental right to medical assistance, the parties guarantee conditions for persons without financial possibilities to benefit from medical treatment[76] "on an equal footing with nationals granting effective exercise of the right to social and medical assistance for persons without adequate resources".[77] The notion "persons without adequate resources" is large enough to include irregular migrants, therefore it is applicable the similarity of treatment between irregular migrants and nationals. An "effective exercise of the right to (…) medical assistance" is granted for both categories. The medical assistance in support of undocumented migrants is emphasized by the European Committee of Social Rights which stated in ***FIDH v. France***, Complaint no.14/2003, that "legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter."[78] This statement has important practical consequences for irregular migrants as long as it stipulates expressly the term "illegal" and makes explicit references to the fact that denial of treatment for this social category contravenes to the EU Charter principles.

In this case, the International Federation of Human Rights League (FIDH) alleged that France violated the right to medical treatment because it ended the facility of irregular migrants with a minimum level of wages in general and the children of those undocumented migrants in particular to benefit from

69. ICERD, Article 5(e)(iv).
70. Preamble, General Comment no. 30, UN Committee on the Elimination of Racial Discrimination.
71. General Comment no. 30, UN Committee on the Elimination of Racial Discrimination, paragraph 36.
72. CRC, Article 24 (1).
73. Ibid.
74. CRC, Article 24(2) (c).
75. Ibid., (d).
76. ESC, Article 13(1).
77. Ibid., Article 13(4).
78. FIDH v. France, paragraph 32.

medical and hospital care without paying charges. The complaint is in fact based on articles in the Revised European Social Charter related to social and medical assistance and the right of young persons and children to legal, social and economic protection. In fact, FIDH required the European Committee of Social Rights to state that practice and legislation in the medical field is discriminatory. FIDH appreciated as unjustifiable a total denial of medical assistance for undocumented migrants because the practical consequences would be damaging for both this social category and the society in whole.

On the contrary, the State was of the opinion that undocumented migrants in general and their children in particular are not covered by the notion of protected persons defined in the Appendix to the Charter. Therefore, they do not benefit from the rights stipulated in the Charter. But the Committee established the opposite. It considered that the legislation and practice which refuse medical treatment in all circumstances to illegal foreigners is contrary to the Charter. Therefore, medical care for irregular migrants' children in France has to be provided for cases which involve immediate threat to life. In other words, medical assistance is not denied in all circumstances and to every category of irregulars. This has important practical consequences and encourages the undocumented migrants to ask for medical treatment for the benefit of their children. The case raises their level of awareness and combats their fear of asking for medical benefits.

Continuing with the same approach, TFEU stresses the fact that EU policies involve health protection and a great amount is presumed to be ensured in their implementation "a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities".[79] The EU activity is subsidiary to national approaches with the aim of enhancing the public health system.

The EU Return Directive contains provisions referring to healthcare provided expressly for irregulars. Emergency healthcare and essential treatment of illnesses are provided"[80] for migrants waiting voluntary return and during procrastinated expulsion. Basic medical treatment is provided to vulnerable persons while staying in detention centres.[81]

The exercise of the fundamental right to healthcare by undocumented migrants and the issue of mitigating health disparities fell under the attention of the European Parliament. "The reduction of health inequalities is considered an essential priority".[82] The effects of the economic crisis on this sector and the fact that irregular migrants are more likely to be in a critical position are also taken into consideration. Special attention shall be given to disadvantaged migrants[83], Member States are encouraged to invest in healthcare and to guarantee "healthy life conditions for all children, including actions to support pregnant women and parents".[84] "Pregnant women and children, irrespective of their status, are entitled to and actually receive social protection as defined in their national legislation"[85]. Again, national legislation has a strong impact and role on granting basic protection for special social categories. A bigger amount of money spent in this field will lead to the reduction of disproportions between distinct social groups in general, the most disadvantaged group: undocumented migrants, in

79. TFEU, Article 168.
80. The EU Return Directive, Article 14(1)(b).
81. Ibid. Article 16(3).
82. European Parliament Resolution 2010/2089(INI), 8.
83. Ibid., 2.
84. Ibid, 7.
85. Ibid.

particular. They are "entitled to and are provided with equitable access to healthcare"[86]. The Member States are called to provide a definition for healthcare for the benefit of undocumented migrants based on elements provided by national legislations.[87] Hence, the connection between national and European level while issuing new legislation for the benefit of irregular migrants.

2.4 Obstacles in accessing the right to healthcare; different practices of the EU Member States

Even though in none of the EU Member States' legal framework the access to medical treatment is expressly forbidden for irregular migrants, access to financially covered health care is not fully ensured. Healthcare provided only after payment is a real burden for undocumented migrants if they cannot afford it. Moreover, the obligation to report them to immigration authorities makes their exercise of the right to healthcare even more difficult. The obligation of welfare offices to report undocumented migrants when they submit an application for cost payment or reimbursement in case of treatment which is not an emergency still persists. Even in situations where there is not such an obligation, an exchange of information with immigration authorities can still take place.[88] The absence of clear terms or the use of ambiguous concepts, as well as the lack of legislation on the access to medical care for irregular migrants contribute to this outcome.[89]

Because of these reasons, healthcare providers are hesitant to provide treatment to undocumented migrants if they do not benefit from a fund specially designed to cover the medical costs. Moreover, even in circumstances where irregular migrants are entitled to certain rights, the lack of awareness and information on their rights prevents them from exercising some medical services. This is due in part to the difficulty of accessing and understanding the current legislation on healthcare. Also, the difficult procedures applicable to irregular migrants contribute to this outcome, as well as the discretionary power of medical staff who determines what an emergency is or what an essential treatment is.[90]

Also, the fear of being detected is a major obstacle which prevents migrants from undergoing medical treatment. The fear has been heightened by public debates in regard to irregular migrants' access to healthcare. For instance, Italy promoted such a public discussion with the aim of introducing an obligation to report. Even if the aim was not realized, and the obligation not introduced, the debate produced a great fear among the migrant population and discouraged them from asking for medical help.[91] This fear also precludes migrants from seeking medical treatment prior emergencies occur, with negative consequences on their medical condition and cost of treatment.[92]

Giving guidelines on the access of undocumented migrants to treatment without clear provisions on payment or exemption from payment is another factor which makes the exercise of medical services difficult. An example in this respect is that issued by Stockholm city council in 2009. It directed health providers to offer emergency and immediate necessary healthcare in case of serious diseases and pregnancy, but did not mention anything about payment.[93]

86. Ibid., 5.
87. Ibid.
88. FRA Report, Fundamental rights of migrants in an irregular situation in the European Union, 83.
89. PICUM (2007), Access to healthcare for undocumented migrants in Europe, 7.
90. FRA Report, Fundamental rights of migrants in an irregular situation in the European Union, 82.
91. Ibid., 83.
92. Migrants in an irregular situation: access to healthcare in 10 European Union Member States, 10.
93. Ibid., 21.

Another obstacle is represented by the impossibility to cover the cost of healthcare in cases when this is not provided for free or the impossibility to present the documentation required. Their state of destitution and the administrative difficulties encountered impede their access to healthcare.[94]

Barriers in procuring a medical history or the inexistence of medical records are further impediments. The particular example of Belgium is relevant. In Belgium, the keeping of medical records is conditioned by the legal entitlement to primary and secondary care. In Germany, Italy, Greece and Belgium, if the expenses are covered, medical records are kept in hospitals.[95]

2.5 Ideas for improving the access of irregular migrants to the fundamental right to healthcare

Public campaigns shall be organized with the main purpose of raising the awareness of nationals with regard to difficulties faced by undocumented migrants and of educating the nationals and regular migrants to contribute to the integration of irregular ones into society and to facilitate their access to medical treatment as well as to manifest tolerance towards them;

Special training programmes shall be developed for medical employees, administrative hospital staff, NGOs, irregular migrants, in order to make them aware of the rights and vulnerabilities of this social category, to promote projects in their benefit and to ensure a well-functioning medical system;

Medical authorities or administrative hospital personnel shall not ask for documentation because, in many cases, this requirement prevents migrants in irregular situation to benefit from medical treatment; the activity of providing healthcare to undocumented migrants shall be included in the list of humanitarian actions and, consequently, not sanctioned by the legislation in force in the EU Member States;

The reporting and data exchange regarding undocumented migrants to immigration authorities shall be forbidden in all EU Member States; the professional secrecy should be maintained and this conduct should be communicated to migrants;[96] it is advisable that media involved in assisting the immigration operations related to reporting of undocumented migrants to present the actions impartially and to inform the public about the difficulties this social category encounters. Workshops, public campaigns, seminars, demonstrations, forums should be also organized to make the government and population aware of their plight; accordingly, irregular migrants should be informed about their rights as patients;

The facility for irregular migrants to benefit from free of charge emergency healthcare shall be expressly stipulated in the national legislation of EU Member States[97] and enforced by local medical staff with the obvious objective to help these migrants maintain a normal physical and mental status that will give them the possibility to integrate in the respective society; this facility regarding primary and secondary care should also be granted in cases of extreme destitution, by paying special attention to the most vulnerable groups such as pregnant women, children, disabled, the elderly, persons with mental and chronic illnesses, as well as in cases of communicable diseases or failed asylum seekers; the reimbursement of treatment by the social welfare offices at the request of the medical providers

94. Ibid., 37.
95. Ibid., 49.
96. PICUM (2007), Access to healthcare for undocumented migrants in Europe, 107.
97. Ryszard Cholewinski, *Study on obstacles to effective access of irregular migrants to minimum social rights* (2005), 52.

should be kept confidential for both emergency and non-emergency treatment[98]; *de lege ferenda*, EU Member States should adopt flexible and easy to understand legislation regarding the procedures of reimbursement[99]; if it is impossible to cover the cost of treatment this becomes non-returnable and the state will reimburse the healthcare provider, even though, in a first stage, this procedure creates anxiety among the undocumented migrants;[100]

Local councils in the area of residence and NGOs should develop medical schemes in order to subsidize the cost of medical treatment and medicines.[101] All these actions should take place in conditions of confidentiality and anonymity. Social establishments which provide healthcare services, including welfare ones, as well as counseling centers for undocumented migrants should also be created.[102] Professional expertise and assistance, appropriate medical and psychological counseling should be provided for free in order to evaluate and reintegrate this social category into society and to avoid the deterioration of their medical condition; "humanitarian consultation hours"[103] shall be established; voluntary activities of medical personnel shall be encouraged;[104] the criminalization of these activities shall be banned in every EU Member State;[105] temporary stay permits shall be provided to irregular migrants in difficult situations: pregnant women, children, sick people in a severe condition, victims of abuses, trafficking;

The religious establishments and clerical representatives shall be involved in the support of this category; homes for medical emergencies and pregnancies for this group shall also be created; they shall also benefit from a medical income scheme; public subsidies for medical programmes and projects designed to build and develop healthcare assistance are also necessary (in order to convince hospitals, doctors and administrative medical staff to perform such unprofitable activities, they should benefit from a more favorable regime of taxation); more organizations, NGOs shall raise funds, gather donations through concerts, festivals or clerical charities, shall involve local municipalities in financing healthcare for irregular migrants; the identity of the beneficiaries should be kept confidential; illegal persons have to be treated with dignity and recognized as human beings by a personnel characterized by expertise; Social workers subordinated to local councils should develop activities related to the exercise of the fundamental right to healthcare for irregular migrants in order to raise government awareness about this problem: information, translation and interpretation services in and around hospitals or other medical facilities; their actions should involve activities with the main aim to facilitate their access to medical treatment, especially emergency one, to legalize the status of irregular migrants, to obtain residence and health insurances or to suspend the removal of special categories such as pregnant women; children belonging to this social category shall be granted medical assistance in similar conditions with national children;[106] at the same time it should be established a balance between the attempt to regularize their status and the fact that this can cause a "pull factor", attracting more illegal migrants in the EU;

A separate medical fund, designed for the needs of irregular migrants, should be established.

98. FRA Report, Migrants in an irregular situation: access to healthcare in 10 European Union Member States, 16.
99. Ibid., 43.
100. FRA Report, Fundamental Rights of migrants in an irregular situation in the European Union, 81.
101. FRA Report, Migrants in an irregular situation: access to healthcare in 10 European Union Member States, 17.
102. Ibid., 22, 23.
103. Ibid., 36.
104. FRA Report, Fundamental Rights of migrants in an irregular situation in the European Union, 77.
105. PICUM (2007), Access to healthcare for undocumented migrants in Europe, 108.
106. FRA Report, Migrants in an irregular situation: access to healthcare in 10 European Union Member States, 26.

Undocumented migrants should benefit from the rules of payment, the medical costs and the exemptions from payment under the same conditions as nationals;[107] undocumented migrants should be included in the European Social Inclusion-Social Process and the National Action Plan at both EU and Member State level[108];

The EU Member States shall respect any international regulation which is implemented in its territory and shall guarantee the right to "the highest attainable standard of physical and mental health"[109] for everybody, no matter the immigration status[110]. Furthermore, the International Convention on the Protection of All Migrant Workers and Members of their Families, which states that emergency treatment cannot be denied to irregular migrants[111], shall be ratified by the EU Member States.[112]

In regard to the health inequalities of undocumented migrants, the EU should expressly encompass this vulnerable group in its health policies.[113] In fact, the European Commission acknowledged migrants as being among the social categories most disadvantaged by health inequalities.[114]

3. Conclusions

It is obvious from the analysis made in the previous chapter that the fundamental rights of irregular migrants to healthcare are not properly exercised in the EU. Undocumented migrants are underrepresented in courts such for reasons ranging from fear of reprisals or of deportation, the lack of awareness about their entitlements to the use of fundamental rights which prevents them from benefitting from medical treatment.

The current legal framework lacks specific provisions related strictly to undocumented migrants. It is made use of only when referring to general terms. When analyzing these conventions, the interpretations enable irregulars to benefit from them. The general terms include every social status, and the particular status of irregularity is contained in the broad terms.

After the entry into force of the Lisbon Treaty, the EU Charter has become legally binding and the heart of EU institutions' activities. The Charter is relevant when we take into consideration the protection it gives to irregular migrants. After December 2009, it became an essential instrument for the protection of the fundamental rights of this social category inside the EU legal order. As concluded in the second and third chapter, all the rights mentioned in the Charter apply to undocumented migrants within the scope of EU law, even though provisions in regard to this category are not expressed. Therefore, it is not applicable in areas which do not fall under the EU competence. On the other hand, according to article 151 and 152 TFEU, the EU sustains and supplements the activity of Member States regarding issues dealt with in this paper, these initiatives being the attribute of local, regional and national authorities of Member States. Because of this, the insufficiency of secondary law is problematic for the exercise of

107. Ibid.
108. PICUM (2007), Access to healthcare for undocumented migrants in Europe, 108.
109. Article 12, ICESCR.
110. PICUM (2007), Access to healthcare for undocumented migrants in Europe, 107.
111. Article 28, ICRMW.
112. PICUM (2007), Access to healthcare for undocumented migrants in Europe, 108.
113. Sergio Carrerra and Massimo Merlino, Access to healthcare for undocumented migrants, Michele LeVoy and Kadri Soova, *Assessing EU Policy on Irregular Immigration under the Stockholm Programme* (2010), 22.
114. European Commission, Communication on Solidarity in Health: Reducing Health Inequalities in the EU, COM(2009) 567 final, Brussels, 20 October 2009.

the fundamental rights.

The attention of the European legislators and practitioners should be focused on proposals to improve the situation of this social category, bearing in mind that a healthy Europe, from a social and physical point of view, implies a healthy life of every inhabitant in Europe, regular or irregular, no matter the status. All people are interconnected and a fair distribution of social benefits, a comprehensive and particular legal framework which expressly addresses the undocumented migrants' concerns, as well as a good legal practice and a proper exercise of their rights in national and European courts would contribute to social cohesion and to the development of a healthy Europe.

The fundamental right is analyzed in one chapter and the end of every chapter provides recommendations for further improvement. The need to create mechanisms designed to help irregular migrants to file complaints against authorities which deny their right to healthcare is expressly mentioned. Examples of action in certain EU countries are provided in this respect. Similarly, proposals to amend legislation were made with the purpose of including these rights.

Another recommendation regards the possibility to use mediation and conciliation in order to solve disputes. The conduct of official investigations to clarify a particular case has to be done. This activity involves the conferral of non-sanction guarantees for illegal migrants who engage in these investigations. Medical inspections have to be done. This should be followed by the development of the legal framework in the field of healthcare for undocumented migrants. Some other recommendations regard the instituting of procedural protection guarantees for the benefit of illegal migrants, the issuing of stay permits on humanitarian grounds and, finally, the development of regularization schemes.

The obligation not to disclose personal data to immigration authorities shall be enforced. The organization of public campaigns, special programmes, help desks and information centers is also advisable. The same regime should allow for the use of the services of an interpreter. And finally, the improvement of national and European immigration policies and legislation would contribute to the creation of a better climate for irregular migrants. There is a huge need for reform and legislation in this particular area of law, but the crucial part regarding "everybody" focuses on how the reform is being implemented by every Member State.

Aguan Biogas Project and the UK Government: Legal and International Human Right Assessment

Damilola S. Olawuyi
LL.M (Calgary), LL.M (Harvard), Clarendon Scholar and Doctoral Candidate, Faculty of Law, University of Oxford

INTRODUCTION

Generally, the Kyoto Protocol provides three flexible mechanisms through which industrialized countries such as the United Kingdom (UK) could achieve their emission reduction objectives anywhere in the world, at the lowest cost possible.[1] These flexible mechanisms provide legal incentives and basis for the UK to invest in emission reduction projects in other countries while getting credits for the emission reduction achieved. The overall aim is to promote global emission reductions at the least cost possible.[2] For example, studies confirm that while it requires US $50 to mitigate one ton of CO_2 eq. in developed countries, the same reduction can be accomplished in developing countries at US $15 per ton of CO_2 eq.[3] Of the three flexible mechanisms, it is only the CDM that brings developing countries into the picture.[4] The CDM allows developing countries to host climate change mitigation projects sponsored by industrialized countries. The CDM aims to assist developing countries in achieving sustainable development by boosting their economies and by promoting environmentally friendly investment from industrialized countries governments and businesses. Estimates indicate that by 2015, foreign investments through the CDM in a developing country could be US$4752 Million annually.[5]

As innovative as the Kyoto Protocol is, its implementation has been fraught with challenges.[6] For example, the CDM has been criticised for not delivering on its sustainable development

---

1. The three flexible mechanisms: Joint Implementation (JI), Emission Trading (ET) and the Clean Development Mechanism (CDM) allow industrialized countries to meet their emission reduction targets by investing in projects abroad rather than through domestic actions alone. For a detailed and excellent discussion of these mechanisms, see F Yamin and J Depledge, *The International Climate Change Regime* (CUP 2005) 25.
2. United Nations Environmental Programme, *CDM Information Book* (UNEP 2004) 2-3; K Olsen and J Fenhann,'Sustainable Development Benefits of Clean Development Mechanism Projects: A New Methodology for Sustainability Assessment Based on Text Analysis of the Project Design Documents submitted for validation' (2008) 36 Energy Policy 2819-2830.
3. See F Ackerman, 'Financing the Climate Mitigation and Adaptation Measures in Developing Countries' (2009) <http://sei-us.org/Publications_PDF/SEI-WorkingPaperUS-0910.pdf> accessed 02 June 2012. See also United Nations Framework Convention on Climate Change (2008), 'Investment and Financial Flows to address Climate Change: An Update' FCCC/TP/2008/7.
4. Joint Implementation (JI) and Emission Trading (ET) take place between two industrialized countries with emission reduction targets.
5. G Guangshen *et al,* 'Clean Development Mechanism in China; Taking a Sustainable and Proactive Approach' (2004) *Sino Sphere Journal* 3.
6. See generally N Roht-Arriaza, 'Human Rights in the Climate Change Regime' (2010) 1(2) *Journal of Human Rights and the Environment* (where the author identifies areas where current climate change regimes may cause human rights violations in local communities. These include some projects under the Clean Development Mechanism, large hydropower and biomass projects, use of biofuels, choices on energy and adaptation, and REDD+ projects.

promises.[7] A number of CDM projects approved by the CDM Executive Board have been criticised for resulting in the violation of existing human rights.[8] It is estimated that climate change mitigation and adaptation projects already displace over 20 million people a year.[9] These tend to be the poorest and the most vulnerable members of the society. In addition, there are issues related to pollution caused by the transfer of out dated and inefficient technologies for emission credits. Other human rights concerns include the lack of opportunities for participation by citizens in project planning and implementation,[10] citing of projects in poor and vulnerable communities, lack of governmental accountability on projects and the absence of judicial and quasi-judicial remedies for victims of the above mentioned problems.[11]

One of the most recent examples that have dominated international discussions is the case of the Aguan biogas CDM project in Honduras, which was approved on the 18th of July, 2011 by the CDM Executive Board.[12] This project, sponsored by the UK Government, has been heavily criticized internationally for its gross human rights violations.[13]

Using this project as an example, this paper x-rays how projects and policies aimed at combating climate change could result in serious human rights concerns and violations of existing international, regional and human rights instruments which the UK is under obligations to protect, respect and fulfill. This paper argues that unless underpinned by human rights considerations, efforts by the UK Government to pursue emission reductions abroad may bring about human rights repressions and violations. As such, people abroad may continue to suffer oppression and human rights violation arising from projects sponsored and funded by the UK. The paper calls for a rights-based review and reform of U.K climate change mitigation policies, to ensure that international projects that violate fundamental human rights are not authorized and funded by the UK.

This paper is divided into four parts; this introduction is the first. Part two provides an overview of the Aguan project, while part three provides an in-depth assessment of the human rights questions that have trailed the UK sponsorship of the project; it also discusses why human rights principles must form the basis of UK's emission reduction programs and policies; the paper concludes in part four.

---

7. See C Sutter, 'Does the Current Clean Development Mechanisms Deliver its Sustainable Development Claims' (2005) *HWWA Report* 1; R Saner and A Neiderberger, 'Hype or Reality: Can the CDM trigger FDI?' (2005) 2 *E.C.P* 12.
8. E Meijer, 'The International Institutions of the Clean Development Mechanism Brought Before National Courts: Limiting Jurisdictional Immunity to Achieve Access to Justice' (2007) 39 *New York University Journal of International Law and Politics* 873.
9. See A de Sherbinin, *et al*, 'Preparing for Resettlement Associated with Climate Change' (2011) Science 334.6055, 456–457; R Bronen, 'Climate-Induced Community Relocations: Creating an Adaptive Governance Framework Based in Human Rights Doctrine' (2011) 35 *New York University Review of Law & Social Change* 357–407.
10. See F Seymour, 'Forests, Climate Change, and Human Rights: Managing Risks and Trade-offs' in S Humphreys, ed., *Human Rights and Climate Change* (CUP 2010) 207.
11. See Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming caused by Acts and Omissions of the United States, by the Inuit people of the Arctic Regions of the United States and Canada, 7 December 2005. Available at< http://inuitcircumpolar.com/files/uploads/iccfiles/FINALPetitionICC.pdf.> accessed 12 July, 2011.
12. See UNFCCC, 'Lists of Registered CDM projects' (2011) < http://cdm.unfccc.int/Projects/DB/TUEV-SUED1260202521.42/view> accessed 02 August, 2011.
13. See BIOMASS Hub, 'Human Rights Violations Linked to CDM Biogas Project in Honduras' (2011) <http://biomasshub.com/human-rights-violations-linked-cdm-biogas-honduras/> accessed 12 July, 2011. See also CDM Watch, 'Press Release: United Nations under Pressure to denounce Human Rights Abuses in Carbon Offsetting Scheme' (2011) <http://www.cdm-watch.org/?p=1872> accessed 02 August, 2011.

2. The Aguan Biogas Project and Human Rights

The Aguan biogas project is undoubtedly one of the most controversial emission reduction projects that have recently dominated international discussions. Located in the Bajo Aguan region in Honduras, this project is designed to reduce greenhouse gas emissions by collecting biogas from methane emissions and replacing fossil fuels utilized for heat generation in a mill of a palm oil plantation of Grupo Dinant's subsidiary Exportadora del Atlantico. Its emission reduction projections are large scale and monumental. Estimates suggest that it would reduce about 23,000 tonnes carbon dioxide annually, generating about US$ 2.8 million between February 2010 to January 2017.[14]

However, this project has been heavily criticized internationally for its gross human rights violations.[15] According to a report submitted to the Inter-American Commission on Human Rights, the local project developer Grupo Dinant is alleged to have been at the centre of violent conflicts with local people, mass displacements of people from their ancestral lands, violent repressions of protesters; and the killing of about 23 peasants.[16] A coalition of over seventy international human rights groups called on the UK to withdraw sponsorship for the project and for the CDM Executive Board not to approve or register the project.[17] Despite the petitions and protests, this project was authorized by the UK Environment Agency, approved by the Government of Honduras and subsequently registered by the CDM Executive Board on the 18th of July, 2011.[18] The CDM Board argued as in most cases that it has no mandate to investigate human rights violations; and the host country has the final say on all sustainable development and human rights concerns about a project.[19]

The decision of the U.K Government to continue to sponsor this project in the face of the human rights issues such as repressive land grabs without compensation, mass murder of peasants and land owners and the environmental pollution brought about by the project (to mention but a few), raise fundamental questions on the need for an internal process or mechanism through which the U.K Environment Agency could be compelled to consider the human rights consequences of its international mitigation policies and projects.

---

14. CDM Watch, United Nations Under Pressure to denounce Human Rights Abuses in Carbon Offsetting Scheme' (2011) <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/04/180411_PR_UN_under_Pressure_to_denounce_human_rights_abuses_in_carbon_offsetting_scheme.pdf> accessed 12 December, 2011.
15. See BIOMASS Hub, 'Human Rights Violations Linked to CDM Biogas Project in Honduras' (July 2011) <http://biomasshub.com/human-rights-violations-linked-cdm-biogas-honduras/> accessed 12 July, 2011.
16. For comprehensive details of human rights violations by this project, see CDM Watch, *Petition to the CDM Executive Board on Aguan Gas project* (February 2011) <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/unsolicited_letter_cdmproject_application_3197_honduras.pdf.> accessed 02 August, 2011.
17. CDM Watch, 'Open Letter: UK Government must withdraw authorisation for Aguan and Lean CDM projects linked to assassinations and other human rights abuses in Honduras' (2011)<http://www.cdm-watch.org/?p=1648> accessed 02 August, 2011. For the official response of the UK Government, s*ee* Letter by Rt. Hon Chris Huhne M.P, (April 2011) <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/UK_Gov_reponse_on_aguan_130411.pdf > accessed 31 July, 2011.
18. See UNFCCC, Lists of Registered CDM projects (2011) < http://cdm.unfccc.int/Projects/DB/TUEV-SUED1260202521.42/view> accessed 02 August, 2011.
19. See 'The Response of the CDM Executive Board to the Petition'<http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/EB59-14_CDM-Watch_Concerns-on-CDM-project-in-Honduras-Ref.-3197_Response.pdf > accessed 02 August, 2011.

Authorizing such projects and funding them with taxpayers' funds arguably diminishes the gains that have been made under international human rights law. Such approvals also go against the preventive and precautionary principles of international environmental law that advocate the need to prevent and avoid policies or projects that could produce short and long term environmental consequences.[20].

3. Human Rights Critiques: A Summary

The Aguan biogas project demonstrates how policy measures and projects aimed at mitigating climate change could lead to human rights repressions. The Aguan biogas project has resulted in far-reaching human rights concerns in Honduras, some of which are discussed below.

3.1 Forced displacements and the right to property

One of the most repressive aspects of the Aguan project is the reported forceful land grabs and the massive displacement of citizens from their homes without compensation. This is a fundamental violation of human rights law that affects the rights of individuals to exclusively own and enjoy their properties. The right to exclusively own and possess property is guaranteed under international law and under the U.K Human Rights Act.[21] Article 17 of the Universal Declaration of Rights (UDR) recognises the right of individuals to the exclusive possession and use of property.[22] This right is also recognised in Article 21 of the American Convention on Human Rights,[23] in Article 14 of the African Charter on Human and Peoples Rights,[24] and in Article 1 of Protocol No. 1 to the European Convention on Human Rights.

Even though these instruments provide States with a 'margin of appreciation' to restrict the right of individuals to the use of their property for public interest, for example for construction projects, they are to provide just compensation whenever deprivation of property occur.[25] Whenever States deprive individuals of the use of land without compensation, international human rights courts are quick to provide for compensation. In a number of cases, the European Court has held that States have exceeded their margin of appreciation.[26] For example in the case of *Sporrong and Lonnrith v Sweden* where a Stockholm city ordinance allowed State to expropriate

---

20. R Andorno, 'The Precautionary Principle: A New Legal Standard for a Technological Age' (2004) 1 *Journal of International Biotechnology Law* 11–19.
21. See Art. 1 of the First Protocol to the Human Rights Act 1998. This right has been confirmed in *Howard v United Kingdom (1985); and in J.A. Pye (Oxford) Ltd v United Kingdom (2005).* Both cases confirm that property owners who lose their title because of adverse possession may be entitled to compensation from the UK government.
22. See UDHR, adopted 10 Dec.1948, G.A Res.217A9 (III), 3 UN GAOR, UN Doc. A/810 at 71 (1948).
23. See American Convention on Human Rights (pact of San Jose) signed 22 Nov. 1969, entered into force 18 July, 1978, 1144 UNTS 123, OASTS 36, OASTS 36.
24. Charter on Human and Peoples Right, adopted 27 June 1981, entered into force 21 Oct. 1986, O.A.U Doc. CAB/LEG/67/3 Rev. 5.
25. See for example Art 21(2) of the American Convention on Human rights. See also American Convention on Human Rights (pact of San Jose) signed 22 Nov. 1969, entered into force 18 July, 1978, 1144 UNTS 123, OASTS 36, OASTS 36.
26. See *Hentrich v. France*, A 296-A (1994); *Holy Monasteries v. Greece*, A 301-A (1994); *Spacek v. the Czech Republic* (9 November 1999); *Beyeler v. Italy* (5 January 2000); *Chassagnou v. France* (29 April 2000); *Carbonara and Ventura v. Italy* (30 May 2000); *Former King of Greece and Others v. Greece* (23 November 2000).

land without compensation, the European Human Rights Court held that states must strike a fair balance between the interests of the community and the rights of the individual including minimum procedural guarantees against decisions concerning expropriation, the control of use of private property or compensation.[27] The court ruled that such expropriation violated Article 1 of the First Additional Protocol to the ECHR and awarded substantial compensation for the applicants. The court also upheld this right in *Marckx v Belgium*.[28]

Many climate change projects are indeed public interest projects as they could benefit the general public. However, as the court held in the above cases, whenever such projects could displace individuals from homes, states must provide minimum procedural guarantees to ensure the active participation of individuals in such decisions and to ensure just compensation is provided for them. As such, the human rights violations alleged in the execution of the Aguan gas project, arguably places the United Kingdom in direct violation of its duty to respect, protect and fulfil the international human rights to property.

3.2 Loss of benefits of culture and tradition

The displacements of people from their homes are intricately intertwined with the loss of some important aspects of their traditional lifestyles and culture. For example, the Aguan people of Honduras are known to be peasant farmers who depend on their subsistence farming for food and as part of their cultural life. Their massive displacements due to the biogas project have resulted in the loss of these elements of their culture.[29]

This is a fundamental violation of the international human right to protection to enjoy the benefits of culture. Article 27 of the ICESCR for example provides that persons belonging to minorities have the right to enjoy their own culture.[30] Article 27 of the ICCPR also provides that 'persons belonging to minorities shall not be denied the right in community with other members of the group to enjoy their own cultures...'[31]Access to the resources through which indigenous people could enjoy or express elements of their culture is undoubtedly a major part of their cultural rights. In the *Case of the Mayan Indigenous Communities from the Toledo District, Belize* the Inter American Human rights Court held that certain indigenous peoples maintain special ties with their traditional lands and a close dependence, as such the use and enjoyment of the land and its resources are integral components of the survival of the indigenous communities.[32] Similarly, in the case of *Saramaka People v Suriname* the court held that the use of traditional lands was critical to the cultural structure of the Saramaka Tribe, as such the Government of Suriname violated fundamental human rights law when it denied them these benefits through the

27. Series A52 (1982); See also *Jacobson V Sweden* Series A 163.
28. Case No 00006833/74, (13/06/1979).
29. See BIOMASS Hub, 'Human Rights Violations Linked to CDM Biogas Project in Honduras' (July 2011) <http://biomasshub.com/human-rights-violations-linked-cdm-biogas-honduras/> accessed 12 July, 2011.
30. International Covenant on Economic Social and Cultural Right (Adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, reprinted in 6 ILM 360 (1967).
31. International Covenant on Civil and Political Rights (Adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
32. Report No. 40/04, Case 12.053, Merits, Mayan Indigenous Communities from the Toledo District, Belize, 12 Oct. 2004.

forceful acquisition of their land.[33] The same conclusions were formed by the court in the *Case of the Indigenous Community Yakye Axa v Paraguay*.[34]

Summarily, the inability of peasants to farm and hunt due to the Aguan biogas project portends a violation of the fundamental right of the Aguan people to the benefits of their culture and tradition.

3.3 Loss of subsistence rights

Cultural rights aside, emission reduction projects could deny citizens of their rights to earnings from farming especially in rural communities where most of the local food supplies and income are generated from farming. When citizens are ejected from their lands, they lose the right to their subsistence through local hunting and farming. This violates the provisions of Article 25 of the UDR, Article 11 of the ICESR which provide that as a minimum, everyone shall enjoy the necessary subsistence rights and that in no case should people be deprived of their own means of subsistence.[35] The UN has also recognised subsistence rights as inherent human rights, which must be protected by states, this includes the right to food.[36]

Loss of arable land also violates the fundamental right to work as provided by Article 23 of the UDR and Article 6 of the ICESR. States are enjoined to pursue reforms that would ensure that citizens and particularly the rural communities continue to have access to arable lands. [37] As such emission reduction projects that deny citizens the opportunity of farming and hunting pose major threats to the enjoyment of their subsistence rights.[38] In the *Toledo Maya* case, the Commission acknowledged the importance of economic development, but noted that 'development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being.[39] The court held that the state's contraventions had a negative impact on the natural environment upon which they depend for subsistence.[40]

---

33. *Saramaka People v Suriname,* Judgment of August 12, 2008 *(Interpretation of the Judgment on Preliminary objections, Merits, Reparations, and Costs).*
34. Merits, Reparations and Costs). Judgment of June 17, 2005 Series C No. 125, para. 96.
35. See International Covenant on Economic Social and Cultural Right (Adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, reprinted in 6 ILM 360 (1967).
36. The UN Special Report on the Right to Food analyses that the right to adequate food is a human right, inherent in all people to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of people to which the consumer belongs, and which ensures a physical and mental, individual and collective fulfilling and dignified life free of fear. J Ziegler, *The Right to Food* (Report by the Special Rapporteur on the right to food to the Commission on Human Rights 57th session, 2001) UN Doc E/CN.4/2001/53 at p. 2. <http://daccessdds.un.org/doc/UNDOC/GEN/G01/110/35/PDF/G0111035.pdf?OpenElement> accessed 23 April 2012.
37. See also Art. 11(2) and Art 14(2) (g) of the ICESCR which deal with agricultural reform to ensure access to arable land.
38. Green Peace International, 'Human Rights and the Climate Crisis: Acting Today to Prevent Tragedy Tomorrow' A Briefing Paper by Greenpeace (2008) 4. <http://www2.ohchr.org/english/issues/climatechange/docs/submissions/Greenpeace_HR_ClimateCrisis.pdf> accessed 12 March 2012.
39. Toledo *Maya Case;* see also Inter-Am. C.H.R., *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V/II.97 Doc. 29 rev.1, ch. VI (Sept. 29, 1997).
40. ibid 53 and 147.

Similarly in *Yanomami Case* the Inter American commission recognised the right of indigenous people in Brazil to use their land for farming, hunting and subsistence. The Commission therefore called on States to take the measures aimed at restoring, protecting, and preserving the rights of indigenous peoples to their ancestral territories, which they depend upon for subsistence and continuity of life.[41]

The subsistence right of local communities is closely intertwined with their property rights. As such, forceful land grabs and displacements of citizens from their homes due to this project is a gross violation of fundamental human rights.

3.4 Loss of life

The fact that climate change projects could lead to the direct and indirect loss of life was also brought to the fore by the Aguan biogas project. It is estimated that over 23 peasants in the Bajo Aguan region of Honduras were killed by national authorities. According to the human rights petition, national authorities acted in order to force through the commencement of the project.[42] Despite the evidence of loss of life, the U.K Government did not act to withdraw sponsorship of this project.

The right to life is a fundamental guarantee under international law. It is a supreme human right from which no derogation is permitted even in times of war or public emergency.[43] Article 6(1) of the ICCPR prohibits the arbitrary deprivation of life.[44] This is echoed in Article 4(1) of the American Convention on Human Rights (ACHR) and Article 4 of the African Charter on Human and Peoples Rights (AfCHPR).[45] The UN Human Rights Committee has held in numerous cases that state repressions, summary executions by police and army are violations of the right to life.[46]

The protection of the right to life also includes the obligation of governments to take all possible measures to reduce mortality and to increase life expectancy.[47] Thus, the right to life includes the duties of government to prevent projects that threaten human life and survival. In *Yanomami's case*, the Inter American Commission established a link between environmental quality and the right to life.[48] The court held that the failure of the Brazilian Government to preserve environmental quality by approving a construction project which led to the spread of disease and loss of life; was a direct violation of the fundamental right to life guaranteed by Article 1 of the American Declaration. The court held inter alia that the right to have one's life respected is not limited to the protection against arbitrary killing, and that the realization of the right to life is in many

41. *See, e.g., Yanomami Case*, Rep. No. 12/85, Case 7615 (Brazil), (1985).
42. See CDM Watch, *Petition to the CDM Executive Board on Aguan Gas project* (2011) <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/unsolicited_letter_cdmproject_application_3197_honduras.pdf.> accessed 23 March 2012.
43. M Nowak, 'Civil and Political Rights' in J Symonides, *Human Rights Concepts and Standards* (Ashgate, 2000) 75.
44. International Covenant on Civil and Political Rights (Adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
45. African Charter Human and Peoples Rights (Adopted 27 June 1981, entered into force 21 October 1981) OAU Doc. CAB/LEG/67/3 Rev. 5, reprinted in 21 ILM 58 (1982); American Convention on Human Rights (Adopted 22 November 1969, entered into force 18 July, 1978) O.A.S. Res. 447 (IX-0/79).
46. Annual Reports of the UN Special Rapporteur on summary and Arbitrary Executions UN-Doc. E/CN.4/1995/61.
47. See United Nations General Comment 6/16 of 27 July 1982, para. 5.
48. *See, e.g., Yanomami Case*, Rep. No. 12/85, Case 7615 (Brazil), (1985); *Mary and Carrie Dann V United States* Report No. 99/99, Case 11.140 (United States) (1999).

ways dependent upon one's physical environment. In Suriname in the case of *De Vereninig van Saramakaanse* the court highlighted that the right to life includes the right to prevent any source of environmental pollution. The court established that the duty of the State to protect, respect and fulfil the right to life includes the duty to take precautions in protecting the environment from pollution.[49]

One thing that is crystal clear from the foregoing is that when States engage in acts such as killing citizens who oppose projects, repressions and executions, in the rush to attract emission projects from abroad or in a bid to push through the registration of as many CDM projects as possible, the right to life is threatened and affected. This diminishes the integrity of the climate change regimes and reduces support for emission reduction schemes as a whole.[50] Advanced democracies such as the U.K are often looked upon not to be parties to such human rights repressions as is the case with the Aguan biogas project. Taking the lead in this regard would include not sponsoring or facilitating projects that violate human rights of the citizens of the host country.

3.5 Health Issues

The construction of projects without detailed environmental impact assessments have brought about health concerns to local residents. There is also the issue of citing projects in residential areas, especially in poor neighbourhoods. These practices have resulted in air and water pollution leading to much health related concerns, for example it has also been estimated that many residents of the Aguan community would be diagnosed with cancer in their lifetime due to effluents from the biogas project.[51] Studies have also shown that the gas and other chemicals connected with biogas production are reported to contaminate water resources and give rise to health problems.[52]

These concerns are violations of the international human right to health. Article 25 of the Universal Declaration on Human and People's Rights (UDR) provides that everyone has the right to a standard of living adequate for the health and well-being of themselves and their family.[53] Article 12 of the European Social Charter recognises the 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.[54] One of the steps listed in Article 12 (2) for states to achieve this is the improvement of all aspects of environmental and industrial hygiene. This would include environmental sustainability and the prevention of industrial and environmental health hazards.

---

49. *De Vereninig van Saramakaanse* (Suriname) (August 8, 2002).
50. See S Kravchenko, 'Right to Carbon or Right to Life: Human Rights Approaches to Climate Change' (2008) 9 *Vermont Journal of Environmental Law* 513.
51. CDM Watch, 'Open Letter: UK Government must withdraw authorisation for Aguan and Lean CDM projects linked to assassinations and other human rights abuses in Honduras' (2011)<http://www.cdm-watch.org/?p=1648> accessed 02 August, 2011; see also See also FIAN, Human Rights Violation in Bajo Arguan (July 2011), <http://www.fian.org/resources/documents/others/honduras-human-rights-violations-in-bajo-aguan/pdf> accessed 02 August, 2011.
52. C Furgal and J Seguin, 'Climate Change, Health, and Vulnerability in Canadian Northern Aboriginal Communities' (2006) 114 *Environmental Health Perspectives* 1964-1968.
53. Universal Declaration on Human and Peoples Rights, adopted on December 10, 1948) G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).
54. See also European Convention for the Protection of Human Rights and Fundamental Freedoms (Signed 4 Nov. 1950, entered in to force 3 Sept. 1953, 213 UNTS 221, ETS 5).

Article 11 of the American Declaration of the Rights and Duties of Man also provide that every person has the right to the preservation of his health; while Article 10 of the first protocol to the American Convention on Human Rights provides that 'everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social wellbeing'. Article 16(1) of the AfCHPR provides that every individual shall have the right to enjoy the best attainable state of physical and mental health.

In order to foster the protection of the right to health, States are to take public health measures to prevent epidemic, endemic, occupational or environmental diseases. For example, Article 11 of the European Social Charter enjoins member states to remove as far a possible the causes of ill health. One way to reduce the short and long term impacts of climate change projects is to ensure that transparent environmental impact assessments (EIA) are conducted before the approval of such projects to show clearly their likely environmental and health impacts.[55] In the 2006 case of *Sawhoyamaxa Indigenous Community v Paraguay*, the Inter-American Court of Human Rights unanimously found Paraguay in violation of rights to health, life, and property of the Sawhoyamaxa indigenous community for failing to remove projects that caused pollution, ill health and diseases in these indigenous communities.[56] The Court called on the State to demarcate the indigenous lands and provide a development fund, among other remedies.[57]

It is pertinent for U.K's Environment Agency which is the Designated National Authority (DNA) for the CDM in the United Kingdom to put in place mechanisms to ensure that projects that threaten human health are not approved or sponsored; and for international supervisory agencies such as the CDM Executive Board to ensure that projects approved without an EIA are not registered. Without good health, the enjoyment of a number of the existing fundamental rights becomes impossible.[58]

3.6 Consultative/Participatory Rights

Although human rights are critical to climate change mitigation projects, neither the Kyoto Protocol nor the UK Project Approval guidelines talk about human rights.[59] Not only are both instruments silent on the above mentioned impact on human rights caused by climate change projects, but in addition they do not give supervisory boards (such as the CDM Executive Board or the UK Environment Agency) any authority to consider human rights issues in approving projects.[60] In fact, the Kyoto Protocol places the decision to host a project in the hands of national

55. See UNECE, The Espoo Convention on Environmental Impact Assessment in a Transboundary Context adopted February 25, 1991 EmuT 991:15.
56. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, 248(1)–(3) (Mar. 29, 2006).
57. ibid 239–241.
58. As Herophilus the Physician to Alexander the Great wrote in his often quoted poem: 'When health is absent Wisdom cannot reveal itself, Art cannot become manifest, Strength cannot fight, Wealth becomes useless and intelligence cannot be applied' *Encyclopedia of World Biography Supplement* (Vol. 25, Thomson Gale 2005).
59. Environmental Agency, 'U.K Guidance on CDM Project Approval' <http://www.environment-agency.gov.uk/static/documents/Business/UK_Guidance_on_CDM_project_approval.pdf> (accessed 12 June 2012). For an excellent and detailed discussion of the procedural rights shortcomings of the Kyoto Protocol, see N Eddy & G Wiser, 'Public Participation in the Clean Development Mechanism of the Kyoto Protocol' in C Bruch, ed., *New Public: The Globalization of Public Participation* (ELI 2002) 203.
60. See S Jodoin, 'Lost in Translation: Human Rights in the Climate Change Negotiations' CISDL Legal Working Paper (January 2010) <http://www.cisdl.org/pdf/working_papers_climate/Jodoin.pdf> accessed 02 June, 2011.

governments if it meets their sustainable development needs.[61] Placing such a crucial decision in the hands of a country that is interested in such projects has led to a culture of 'approvals' under which all sorts of projects, even the ones that lead to loss of life and the violation of human rights are approved by host governments and registered by the CDM Executive Board.[62]

Due to the scramble by developing countries to host CDM projects, there have been increased tendencies to lower sustainability standards and to encourage foreign CDM projects despite their potential short and long term effects on human rights enjoyment.[63] As such, states have been more concerned with hosting climate change projects at all costs, irrespective of the human rights consequences of such projects.[64] These concerns are more serious in developing countries such as Honduras with poor human rights records.

This gap calls for a right-based reform of international and domestic climate change regimes to mainstream human rights perspectives and standards for project approval and implementation. The UK Environment Agency can play a part in this regard by mainstreaming human rights standards and threshold into its project approval guidelines and framework for climate change mitigation projects. There is a need for the UK Environment Agency to set standards on the nature of information that must be given to citizens before approving projects. ATI through an exhaustive and transparent EIA is crucial to the realization and protection of human rights in the process of planning and executing climate change projects.

C. Participation

One of the allegations against the Government of Honduras and the U.K Government is the lack of participatory opportunities for the public in the design and approval of the Aguan project. Reportedly, the people of Aguan were not provided the opportunities to express their approval or rejection of the project. This is a fundamental violation of the notions of participatory democracy and prior informed consent procedures that have become increasingly recognised in international law.[65]

For example, the Aarhus Convention provides that the public must be given adequate opportunities to participate in environmental decision-making processes. Article 2(4) of the defines 'the public' as 'one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups' This definition of the public would include individuals, NGOs, grassroots organizations, youth, women groups, and corporations and other business organizations.[66]

---

61. See Art. 12.5(a) of the Kyoto Protocol, see also the CDM Modalities and Procedures, 3/CMP.1 (2005) <http://cdm.unfccc.int/Reference/COPMOP/08a01.pdf> accessed 12 July, 2011.
62. N Eddy & G Wiser, `Public Participation in the Clean Development Mechanism of the Kyoto Protocol` in C Bruch, (ed.), *New Public: The Globalization of Public Participation* (ELI 2002) 203.
63. M Jung, 'Host Country Attractiveness for CDM non-sink projects'(2006) Energy Policy 2174; A. Silayan, 'Equitable Distribution of CDM Projects Among Developing Countries' HWWA Report 255 at 1; K. Olsen, 'The Clean Development Mechanism's Contribution to Sustainable Development: A Review of the Literature', <http://cd4cdm.org/Publication/ > accessed 21 January 2011.
64. See CDM Watch Group News Letter (February 2011) <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/cdm_watch_newsletter_15_february_2011.pdf> accessed 23 July, 2011.
65. M Fitzmaurice, 'Some Reflections on Public Participation in Environmental Matters as a Human Right in International Law' (2002) 2 *Non-State Actors and International Law* 12.
66. In fact, most of the communications to the Committee regarding non-compliance with the provisions of the Convention by member states to the Convention were submitted by NGOs. See, UNECE website: <http://www.unece.org/env/pp/pubcom.htm>.

Article 25(a) of the International Covenant on Civil and Political Rights (ICCPR) also stipulates that every citizen shall have the right and opportunity to participate, without distinction and without unreasonable restrictions, in the conduct of public affairs, directly or through freely chosen representatives.[67] Article 27 also provides that in states in which ethnic, religious or linguistic minorities exist, persons belonging to minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. Article 23 of the Inter American Convention on Human Rights also provides that every citizen shall enjoy the right to take part in the conduct of public affairs, directly or through freely chosen representatives.[68]

A more expansive provision on participation is contained in the UN Declaration on the Rights of Indigenous Peoples which confers on indigenous peoples the right to choose the modalities of participation and the right to participate fully 'through representatives chosen by themselves in accordance with their own procedures'[69] and through procedures determined by them**,** in devising legislative and administrative measures that may affect them.[70] Article 18 provides that indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.[71]

The Human Right Council (HRC) has interpreted these provisions to include giving real and direct opportunities to the public to have an input in the decision-making process regarding matters that directly affect them, it involves more than mere consultation.[72] According to the HRC, in the case of *Ilmari Lansman et al v Finland,* the essential thing is that the people have an adequate opportunity to express their concerns fully about a proposed activity that may affect them, thus to determine their priorities and that those concerns are taken into consideration in the design and implementation of the project.[73]

In *Saramaka People v. Suriname*, where the Inter American Court on Human Rights held that large scale development projects that would have a major impact within an indigenous people's territory can only proceed with the free, prior, and informed consent of the people, according to their customs and traditions.[74] Similarly, in *Maya Toledo* , the Inter American Human Rights Commission observed that one of the central elements to the duty to protect indigenous property rights is the requirement that States undertake effective and fully informed consultations with

---

67. International Covenant on Civil and Political Rights adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), available at http://www2.ohchr.org/english/law/ccpr.htm accessed 12 December, 2011.
68. American Convention on Human Rights (Adopted 22 November 1969, entered into force 18 July, 1978) O.A.S. Res. 447 (IX-0/79).
69. Art. 18, United Nations Declaration on the Rights of Indigenous Peoples, GA Res, A/RES/61/295, 61st Sess.,UN Doc/ A/61/L.67 (2007).
70. ibid Art. 19.
71. Ibid. See also Art. 32 (2).
72. See D Shelton, `The UN Human Rights Committee's Decisions` *Human Rights Dialogue: Cultural Rights* (2005) <http://www.cceia.org/resources/publications/dialogue/2_12/section_3/5151.html>.
73. Communication No. 511/1992, UN Doc. CCPR/C/52/D/511/1992 (1994), UNHCHR, <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/7e86ee6323192d2f802566e30034e775?Opendocument> accessed 17 February, 2011. See also *Apirana Mahuika et al. v. New Zealand* Communication No. 547 /1993.
74. *Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 28, 2007. Series C No. 172.

indigenous communities regarding acts or decisions that may affect their traditional territories.[75] The authorization of emission reduction projects by State authorities without adequate participation by citizens through a free, fair and transparent consultative process is a human rights violation that has resulted in a number of incidents of negative publicity for the climate change mitigation agenda.[76] It has also been a dominant source of petitions and protests by human rights groups and environmental activists.[77]

D. Access to Justice: Complaints Procedure

One other gap in the process that led to the approval of the Aguan project is the absence of a dispute resolution mechanism through which the public could block the approval of the project or seek a review before and after its approval. Currently, only governments or three CDM Executive Board members can request a review of projects under the CDM rules.[78] As expected, States that have approved projects would most unlikely instigate such review processes. As such, Stakeholders whose rights are violated or interested private citizens do not currently have any way to request a review of a CDM project prior to registration. This creates a one-way mechanism in which the decision of the project proponent and the host country are most times final. It freezes out the common citizen whose fundamental human rights may be repressed by the home state; it also prevents non-governmental organizations in the UK, opportunities to prevent such international human rights violations.

International law emphasises access to justice as a cornerstone for protecting, respecting and fulfilling human rights. For example, virtually all international human rights treaties establish individual complaint procedures that allow private citizens to bring actions at an international forum for human rights abuses. It is important to establish similar grievance mechanisms and processes under the Kyoto Protocol. This aside, project proponents and sponsors must provide internal mechanisms that allow the public to raise human rights objections to projects. For example, though not legally binding, Paragraph 29 of the UN Norms and Responsibilities of Transnational Corporations and other Businesses with Regard to Human Rights provides that: To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.[79]

Grievance mechanisms support the identification of any adverse human rights impact as part of the human rights due diligence on a project; they also make it possible for grievances, once

---

75. *Maya Indigenous Communities of the Toledo District,* Report No. 40/04, Case No. 12.053, (Belize) (October 12, 2004), 142. This case was relied upon in the Panama Petition.
76. See N Eddy & G Wiser, 'Public Participation in the Clean Development Mechanism of the Kyoto Protocol' in C Bruch, ed., *New Public: The Globalization of Public Participation* (ELI, 2002); Brunee, and E Hey, eds., *The Oxford Handbook of International Environmental Law* (OUP 2007)681, 688; F MacKay, "Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's extractive Industries Review," *Sustainable Development Law & Policy*, Special Issue: Prior Informed Consent, summer 2004, pp. 43-65.
77. See International Alliance of Indigenous and Tribal Peoples of Tropical Forests, "Tiohtiáke Declaration: Statement to the State Parties of the COP 11/MOP 1 of the UNFCCC," International Indigenous Peoples Forum on Climate Change, 9 December 2005, available at www.international-alliance.org/unfccc.htm;
All African News, 'Protests Mount against the West African Pipe line Project' <http://allafrica.com/stories/200411230238.html> accessed 19 January, 2011.
78.CDM Modalities & Procedures, 3/CMP.1 (2005)<http://cdm.unfccc.int/Reference/COPMOP/08a01.pdf> accessed 12 July, 2011.
79. UN Doc/E/CN.$/Sub 2/2003/38/Rev. 2.

identified, to be addressed and for any adverse impact to be remediated early and directly by project proponents, thereby preventing harm from being compounded and grievances from escalating.[80] As new project information emerges, new human rights issues could also emerge. As such, it is not enough to only provide updated information on projects, there must also be a project review dispute resolution platform for stakeholders to seek a review of projects and to address any human rights concerns that might arise. A review mechanism complements wider stakeholder engagement as it provides opportunities for stakeholders to raise emerging issues that were not discussed or during the pre-approval consultations.

4. Conclusion: Bringing Human Rights to the Table

The CDM provides flexible opportunities for the United Kingdom (UK) to achieve its emission reduction objectives by investing in sustainable projects in developing countries. However, the UK has been criticised internationally for its role in sponsoring the Aguan Biogas project, and for colluding with the Government of Honduras in fostering a violation of the fundamental human rights of the people of Honduras. The Aguan project highlights the need to review and examine how efforts aimed at attaining emission reductions outside the UK would not result or bring about the violation of international human rights. It is important to access and examine how UK's climate change mitigation objectives and programs could be coherently harmonized and systemically integrated with its fundamental human rights obligations to respect, protect and fulfil human rights.

This paper has discussed the need to reform current national climate change policies and CDM project sponsorship/approval framework to take into account the interactions between climate change projects and human rights. The way forward lies in adopting an approach that mainstreams human rights principles into the processes and procedures for the approval of climate change policies and project approval frameworks. A human rights based approach (HRBA) to mitigation would require the UK Environment Agency to consider the impacts of a particular project on the enjoyment of human rights. Through the HRBA, human rights would be harmonized and integrated into project approval guidelines, to ensure that projects that carry human rights impacts are not approved and sponsored by the UK. Before sponsoring and funding projects, it is important to ask, what are the likely human rights impacts of this project in the host country?

Procedural human rights norms and principles discussed in this paper, such as access to information (ATI); participation and inclusion; accountability; and access to justice could provide rights-based reinforcements for U.K's climate change project approvals and sponsorship policies. These procedural rights provide opportunities to assess and examine how a project could affect human rights in the host country; they also provide opportunities for the public to raise concerns associated with a project. When such complaints are brought to the fore at the planning stages through a robust participatory process, it would provide an opportunity to either redesign the project to avoid unintended human rights consequences or to totally stop the project at the

80. ibid.

earliest time possible.

Tejas Kishore Motwani
LL.M Candidate, National University of Singapore

"Nothing Falls Beyond the Purview of Judicial Review; the World is Filled With Law; Anything and Everything is Justiciable."
- Aharon Barak, Former President of the Supreme Court of Israel

INTRODUCTION

The Courts across the globe have determined issues on diverse range of topics such as abortion rights,[1] homosexuality,[2] right to privacy,[3] right to education,[4] to name a few. Time and again, the Courts have moved beyond the doctrinal principles and ventured into issues which would fall into the domain of the executive or the legislature. The growth of "public interest litigation" and relaxation of doctrinal principles such as that of *locus standi and* separation of powers has further boosted this approach of the courts, which is generally referred to as "judicial activism".[5] Few courts, mostly from democratic jurisdictions, have entertained issues, which were in principle "political questions".[6] Traditionally these questions were those, which courts ought to refuse to entertain as they fell exclusively within the ambit of the legislature or the executive. However, over the last few decades, the courts have moved beyond this principle and have not only answered questions of policy and politics but have

---

1.Roe v. Wade, 410 US 113 (1973), the United States Supreme Court legalized abortion stating that the women and her family had the right to decide over the issue of abortion and the balancing test applies in protecting prenatal life and life of the mother; Gonzales v. Carhart, 550 US 124 (2007), the US Supreme Court upheld the Partial-Birth Abortion Ban Act, 2003 which prohibited late-term abortion; Tremblay v. Daigle, [1989] 2 SCR 530, the Canadian Supreme Court legalized abortions in Canada, stating that fetal does not constitute as person.

2. Lawrence v. Texas, 539 U.S. 558 (2003), US Supreme Court struck down sodomy laws in Texas validating same sex marriage; Naz Foundation v. Government of NCT of Delhi, 160 Delhi Law Times 277, Delhi High Court struck down section 377 of the Indian Penal Code thereby decriminalizing same sex marriages.

3. Griswold v. Connecticut, 381 U.S. 479 (1965), US Supreme Court held that right to privacy is protected under the Constitution; Maneka Gandhi v. Union Of India, AIR 1978 SC 597, law abridging right to privacy must be fair, just and reasonable.

4. Brown v. Board of Education, 347 U.S. 483 (1954), US Supreme Court struck down laws allowing establishment of separate schools for black and white students; Unni Krishnan J.P. v. State of A.P. and Others, AIR 1993 SC 2178, Indian Supreme Court held that right to education is right under personal liberty; 86th Amendment to the Constitution was later passed in the Parliament which made right to education a Fundamental Right under the Constitution of India, 1950.

5. For discussion of principle of relaxation on the rule of *locus standi* in Pakistan and India *see* Supreme Court of Pakistan in the case of Benazir Bhutto v. Federation of Pakistan, PLD 1988 SC 416, stated that 'law is not a closed shop' and if a person acting in *bona fide* public interest can approach the Court for violation of any constitutional right on behalf of a determinable class of people whose grievances would otherwise go unnoticed; Supreme Court of India in S. P. Gupta v. Union of India, AIR 1982 SC 149, where it stated that if an aggrieved person, due to poverty, disability, other socio-economic factors, is unable to move the Court, any other person acting *bona fide* can approach the Court for relief.

6. For further discussion on 'political question', *see,* Ran Hirschl, Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend, 15 Can. J. L. & Jurisprudence 191 (2002) available at http://heinonline.org.libproxy1.nus.edu.sg/HOL/Page?handle=hein.journals/caljp15&collection=journals&set_as_cursor=0&men_tab=srchresults&id=193 (last accessed on December 12, 2012); L. Fisler Damrosch, "Constitutional Control Over War Powers: A Common Core of Accountability in Democratic Societies?" (1995) 50 U. Miami L. Rev. 181 available at http://heinonline.org.libproxy1.nus.edu.sg/HOL/Page?handle=hein.journals/umialr50&collection=journals&set_as_cursor=6&men_tab=srchresults&id=191 (last accessed on December 12, 2012)

also stepped into law making at times.

This paper tries to analyze the very recent decision of the Supreme Court of Pakistan in which Court asked the Prime Minister of the country Mr. Gillani ("Gillani case") to vacate his seat. The Court in effect mandated the executive i.e. the Speaker of the National Assembly (one of the house of the Parliament) and the Election Commission (quasi-judicial independent authority to decide only on election matters) to act in consonance with the decision of the Court. The paper also compares this activist approach of the Pakistan Supreme Court with the approach taken by courts in other countries such as United States, Canada and India.

I then look into the question of "why" courts have taken this approach and moved into the areas which were initially not within their ambit. I rely on scholars who have stated that the independence of judiciary, social activism and awareness, acceptance and respect of judiciary and institutional mechanisms for recourse to judiciary are reasons for the Judiciary to look into other domains. I also try to analyze other important the history of the country and the necessity for judicial activism in that context. I argue that the Pakistan Supreme Court in the *Gillani* case failed to highlight the most apposite reason of necessity for entertaining this case within its jurisdiction; which it had done in previous cases.

Then I answer what are the implications of this activist approach of court. It is possible that certain court decisions may have highly varied short term and long term effects. The decisions also have high impact on politics in the country and in turn may lead to various other effects such as acceptance by the people, benefit or harm to the society, international image of the country, economics and commerce of the country. To emphasize my point, I cite certain celebrated decisions by the Pakistan Supreme Court (Pervez Musharaff – misuse by him leading to lawyers movement case) and Indian Supreme Court's (i.e.*Vishaka* Case) and look at their impact.

Background of Judicial History of Pakistan

In order to provide context to the readers about the Gillani case, I will briefly describe the judicial system in Pakistan and its role in the past.

The modern Muslim – majority state of Pakistan was born out of the Indian Independence Act of 1947 passed by the colonial British rulers, which partitioned the Indian subcontinent into two independent Dominions.[7] Pakistan, like India, follows bicameral parliamentary form of democracy,[8]

7. The Indian Independence Act, 1947, sec. 1 available at http://www.legislation.gov.uk/ukpga/Geo6/10-11/30 (last accessed on December 12, 2012); For brief account on India – Pakistan partition history *See* The Atlantic, *The Birth and Partition of a Nation: India's Independence Told in Photos* August 15, 2012, available at http://www.theatlantic.com/international/archive/2012/08/the-birth-and-partition-of-a-nation-indias-independence-told-in-photos/261188/ (last accessed on December 12, 2012); Initially Pakistan was made up of two parts – eastern part which is the presently Bangladesh and western party which is presently Pakistan. The eastern wing was created into a separate State of Bangladesh when it seceded from Pakistan in 1971; For detailed information on secession of eastern part from the western Pakistan *See* Human Rights World Post, *People's Republic of Bangladesh* available at http://www.paxgaea.com/HRBangladesh.html (last accessed on December 12, 2012)
8. The Constitution of Islamic Republic of Pakistan, 1973, art. 50

with President as the Head of the State,[9] and Prime Minister as the Head of the Government.[10] The Supreme Court is the highest judicial body in Pakistan which functions along with various other subordinate provincial Courts.[11] Pakistan also has a Federal Shariat Court which was created through a Presidential Order in 1980,[12] and is incorporated under Part VII, Chapter 3A of the present Constitution.[13] The history of Pakistan's Judiciary, which follows the "decentralized model" as explained by Mark Tushnet (i.e. "constitutional interpretation is not limited to single court"),[14] has been volatile and has been influenced by continuous religious and military meddling, having involved itself in controversial decisions such as "legitimizing military coups, dismissing and hanging prime ministers, overturning religious freedom, hindering redistribution of income and land, persecution of minorities" and others.[15]

Post-1947 independence, Pakistan has had three constitutions. The first Constitution of Pakistan came into force nine years after independence in the year 1956. This Constitution was short lived until General Ayub Khan's military coup took over from civilian government. The Supreme Court, in its decision which is considered as the biggest blow to democracy in Pakistan, legitimized this decision on basis of Hans Kelson's theory of revolution and legal positivism.[16] General Ayub Khan implemented a new constitution which came into effect in June 1962 and *inter alia* laid down presidential form of government, unicameral legislature and indirect method of elections.[17] The military regime failed in Pakistan, specially due to its incapacity to resolve the East Pakistan issue and then leaders decided to step back to democratic form of government.[18] This led to the creation of the new Constitution in Pakistan which, after huge parlays, was enforced in August 1973. However, in 1997 another military coup was mounted and the judiciary again legitimized it under doctrine of necessity and validated suspension of the constitution and implemented military law.[19] This doctrine of necessity was applied again in the year 1999 when the court legitimized the third military coup under General Pervez Musharaff; also allowing him to amend the Constitution arbitrarily.[20] General Musharaff suspended Justice Chaudhary on grounds of corruption in March 2007, which led to uproar amongst the legal community in Pakistan leading to Lawyers Movement in Pakistan. The Lawyers Movement saw hundreds of lawyers protest against the unconstitutional orders of General Musharaff.[21] General elections were held in Pakistan in 2007 and Pakistan moved back to democracy and the then Prime Minister Yousaf Raza Gillani restored Justice Chaudhary as the Chief Justice of

9. *Id* at art. 41(1)
10. *Id* at art. 91(1)
11. *Id* at art. 175(1)
12. Constitution (Amendment) Order, 1980 (Presidential Order No. 1 of 1980), art. 3
13. The Constitution of Islamic Republic of Pakistan, 1973, art. 203A to 203J deal with establishment and powers of Federal Shariat Court.
14. *Constitutional Courts: Structure and Procedure* in Comparative Constitutional Law (Vicki C. Jakson & Mark Tushnet, eds., Foundation Press: 2006, 2ne edn), 465
15. Yasser Latif Hamdani, *Judiciary; Judgment days,* India Today (online), August 10, 2012, available at http://indiatoday.intoday.in/story/cover-story/1/212764.html (last accessed on December 12, 2012)
16. The State v. Dosso & Others, PLD 1958 SC 533
17. *See Pakistan Institute of Legislative Development and Transparency,* Overview of the Constitution of Pakistan, August 2004, available at http://www.millat.com/democracy/Constitution/briefing_paper_english_17.pdf (last accessed on December 12, 2012); *See also* Story of Pakistan, *The Constitution of 1962*, June 01, 2003, available at http://storyofpakistan.com/the-constitution-of-1962/ (last accessed on December 12, 2012)
18. *Id*
19. Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan, PLD 1977 SC 657
20. Syed Zafar Ali Shah and Others v. General Pervez Musharraf, Chief Executive of Pakistan and Others, PLD 2000 SC 869
21. *See* Sadaf Aziz, *Liberal Protagonists? The Lawyers' Movement in Pakistan* in Fates of Political Liberalism in British Post-Colony (Terence C. Halliday et.al. eds. Cambridge University Press, 2012, 305); *See also* United States Library of Congress, Suspension and Reinstatement of the Chief Justice of Pakistan: From Judicial Crisis to Restoring Judicial independence? available at http://www.loc.gov/law/help/pakistan-justice.php#t2 (last accessed on December 12, 2012)

Pakistan.[22] The restoration of Chief Justice led to further power-play between the Judiciary and the Executive which led to the case of *Dr Mubashir Hasan v. Federation of Pakistan* (famously known as the NRO Case),[23] which finally led to the removal of Prime Minister Gillani.

This brings me to the Gillani case, officially known as *Muhammad Azhar Siddique v. Federation of Pakistan*.[24] In 2007, General Musharaff issued executive order which provided amnesty to various leaders in Pakistan from pending money laundering and corruption cases in and out of Pakistan. General Musharaff lost the elections sometime after these orders were passed and Mr. Gillani was elected to office. The order passed by General Musharaff was nullified by the Court and it directed the new Prime Minister to ensure that proceedings against all leaders were resumed. The Prime Minister did not pay heed to the Court's direction and was subsequently convicted of being in contempt of Court for "willfully flouting, disregarding and disobeying the directions"[25] of the Court. The Constitution empowers the Speaker of the National Assembly ("Speaker") to decide whether the question of disqualification of the Parliamentarian has arisen or not.[26] The Speaker decided that no question of disqualification had arisen against Prime Minster Gillani.[27] Challenging this decision of the Speaker, the case came before the Supreme Court of Pakistan, where the Court stated that neither the Speaker nor the Election Commission (the authority which has been granted constitutional power to review the decision of disqualification after the decision of the Speaker) has no power to decide against the decision of the Court and has to act in consonance with the Court's decision.

Analysis of the Decision

I now analyze the Court's reasoning and suggest that in stating that this case was *per se* maintainable in the Court was a poor argument and that the Court failed to justify how its ambit extended over decisions of the Speaker or the Election Commission.

This case was filed under Article 184(3) which empowers the Supreme Court to pass an order "if it considers that a question of public importance with reference to the enforcement of any of the "fundamental rights" has arisen. Previous decisions in the Pakistan Supreme Court have stated that for a case to be maintainable under this provision two conditions must be fulfilled: (i) it is of public importance, and (ii) it pertains to enforcement of fundamental rights.[28] In the present case the Court fails to elaborate on neither of these points. On the first point of public importance, the Court just mentions since the present case concerns the Prime Minister it ought to be of public importance. On the second point, the Court mentions that certain fundamental rights are violated without justifying how these have been violated. This is very poor approach by the Court. The Court stated that the

22. BBC Bureau, *Pakistan reinstates sacked judge*, BBC (online) available at http://news.bbc.co.uk/2/hi/south_asia/7945294.stm (last accessed on December 12, 2012)
23. PLD 2010 SC 265
24. Const. Petition No.40 of 2012 & CMA No.2494/12
25. Const. Petition No.40 of 2012 & CMA No.2494/12
26. *Id* at art. 63(2)
27. The Tribune Web Desk, *PM contempt: Full text of Dr Fehmida Mirza's ruling*, The Tribune (online) available at http://tribune.com.pk/story/383630/pm-contempt-full-text-of-dr-fehmida-mirzas-ruling/ (last accessed on December 12, 2012)
28. Munir Hussain Bhatti v. Federation of Pakistan, PLD 2011 SC 407 at ¶ 9; *See* Mian Muhammad Shahbaz Sharif v. Federation of Pakistan, PLD 2004 SC 583 at ¶ 18, 19; Watan Party v. President of Pakistan, PLD 2003 SC 74 at 81

fundamental right to ensuring life and liberty of person had been violated.[29] One fails to understand, how life or liberty of any person would be infringed upon by the Prime Minister or Speaker failing to follow the orders of the Court. It can be argued that by the Prime Minister continuing on and retaining membership in Parliament when he was not supposed to, deprives the voters of the right to choose their leader and in turn depriving their liberty. However, this argument seems nonsensical, as an individual's right to vote to elect members of Parliament is specifically mentioned under different chapter of the Constitution which is not part of their fundamental rights. The Court then mentions that "due process" clause under the Constitution has been violated, without attempting to explain how.[30] Next the Court mentions article ensuring protection of dignity of individuals has been violated.[31] It can be argued that acts of Prime Minster have affected the dignity of the citizens however this again seems to be an unrealistic argument. Next the Court mentions that fundamental right to form unions / associations, which is subject to reasonable restrictions, has been violated.[32] Violation of this right could be accepted had the Court explained how the Prime Minister and his Ministers were subjected to reasonable restrictions and hence their entire Ministry was acting against the Constitution. Similarly, when Court mentioned that right to equality had been violated,[33] it could have explained that the act of the Speaker which results in non removal of Prime Minister from his post amounts to unequal treatment, as any other person if convicted of the same offence would have been removed as Member of Parliament. Court does not expand on any of the issue and makes only a blanket statement that these five fundamental rights have been violated.

I submit that the Court could have explained how these fundamental rights have been violated, specially the article which provides for freedom to form unions / associations subject to restrictions. The Court could have used its creativity and could have used its powers on a wider scale so that not only the Prime Minister but other ministers could also been brought within its cover. The Court does not even attempt to do so. At subsequent point in this paper, I also state other reasons which Court could have used to justify its power to entertain this case.

The other issues dealt with by the Courts were about the powers of the Speaker and whether the Speaker can pass a decision which is not in consonance with the decision the Court? The Court stated that in a situation in which a competent Court has already decided that a Member of Parliament is guilty of any of the acts for which he could be disqualified from the Parliament, then the Speaker does not have any power to differ from the Courts decision (nowhere stated in the Constitution). If a competent Court has in effect ruled that Member of Parliament is disqualified, then the Speaker simply has to rule that the member is disqualified. Court laid down similar rules for the Election Commission and that the Commission also should not apply its own mind but should follow the Courts decision. The other issue was if the matter should be re-referred to the Speaker for a fresh ruling. This would not make any sense, as the Court had already told the Speaker what they were supposed to do and the stated that the time given to the Speaker to make their decision had expired. The matter was therefore, not referred back to the Speaker. Hence, in the present *Gillani* case, the Court in effect held that Prime Minster whom the Court had earlier convicted for contempt, stood

29. The Constitution of Islamic Republic of Pakistan, 1973, art. 9
30. *Id* at art. 10A
31. *Id* at art. 14
32. *Id at* art. 17
33. *Id* at art. 25

disqualified and the Speaker's ruling was nullified.

As seen in Gillani case, the Court directed the Speaker to act in a particular manner based on a principle which was originally not stated in the Constitution. A similar approach can be seen in Canada. Quebec an eastern province of Canada, has been demanding a separate nationhood, for a considerable amount of time now. Two referendums have been held in Quebec regarding secession from Canada. The second referendum was voted down by very narrow margin of 0.04%. The federal government referred it to the Supreme Court of Canada. In the case of *Reference re Secession of Quebec*,[34] the court stated what the Canadian government should do in relation to the unilateral secession declaration by Quebec. The Court deciding this matter laid down that the Constitution of Canada is established on the principles of democracy, federalism, constitutionalism, th rule of law, and protection of minorities. These principles are not stated in the Constitution of Canada.[35] The Court also determined that in order for Quebec to unilaterally secede by constitutional means the legislature had to ensure that a constitutional amendment was brought into force. The Court while stating that democratic means should be used to solve this issue, also upheld application of standard international principles.

Similar to the *Gillani* and the Quebec case, the Supreme Court of India has also ventured into the domain of the legislature. The Indian Court in *Vishaka v. State of Rajasthan,*[36] laid down guidelines regarding sexual harassment of women at workplace. This case arose out of a gang rape incident of a social worker in a village in the Indian state of Rajasthan. With criminal proceedings pending in the lower criminal court, the Supreme Court entertained a petition specially for improving conditions of women at work place and for enhancement of gender equality. The Court stated that framing of law and guidelines is a legislative function; however, as there was lacuna in the law the Court would lay down guidelines to be strictly followed. The Court relying on international provisions,[37] laid down guidelines which were to be followed at all workplaces. These guidelines define what sexual harassment means, how it should be prohibited, punishments for violations of guidelines and such other detailed principles which legislature would lay down in the law. This clearly is not the function of the Court; yet, the Court considered the situation at hand and in the betterment of women at workplace, laid down this law.

Thus, from the above cases it has been seen that courts in Pakistan, Canada and India have ventured into the sphere of government. This brings me to an important aspect of why the Courts have done so, which I deal in the following part of this paper.

34. (1998) 2 SCR 217
35. Ran Hirschl, *The Judicialization of Mega-Politics And The Rise of Political Courts*, Annu. Rev. Polit. Sci. 2008, 14 available at http://ssrn.com/abstract=1138008 (last accessed on December 12, 2012)
36. AIR 1997 SC 3011
37. For eg., Convention on the Elimination of All Forms of Discrimination against Women, 1979; Fourth World Conference on Women, Beijing, 1993

Why Courts Step Into Other Domains?

Courts have at different points of time and under different situations, stepped into the areas which technically do not fall within their domain. The first reason which can be stated is the growth of the modern independent judiciary.[38] The independent judiciary, unaffected by the election results, are free from the fear of partisan retribution. This helps the Court to act in the interest of society, not in the interest of a particular person or party. This can be seen from the criticism of the United States Supreme Court decision of *Bush v. Gore*.[39] This case dealt with conflict of the 2000 US General Elections. The Court *inter alia* dealt with issue of constitutionality recounting of votes in the State of Florida. The Court, in a *per-curiam* decision held that the way in which recounting was being done violated the equal protection clause in the Constitution. However, it is important to state that this decision of the Court was criticized as "…the single most corrupt decision in Supreme Court history, because it is the only one that I know of where the majority justices decided as they did because of the personal identity and political affiliation of the litigants…"[40] These critics highlight how non-independent judges can influence cases in the interest of particular person / parties.

Secondly, social activism, awareness amongst lawyers or even the common person promoting change.[41] Since people are better aware of their rights, they engage the Judiciary often and hence there are more opportunities to act upon areas that went untouched in the past. This change is stimulated by social activism, is also referred to as "judicialization from below",[42]

Third, possible reason for activist approach by Courts is wide acceptance and respect for the Judiciary.[43] Generally in public interest cases, the decision of the Court benefits large portions of society, and compels the Courts to be more considerate towards those people concerned. These cases also set down precedents and are used in the future, thus developing activism further.

Fourthly, another reason for judicial activism can be institutional mechanisms which make the judiciary easily accessible to the public. For example, Indian Constitution under Article 32 provides for a mechanism whereby the highest Court of the land, can be approached directly for a fundamental right violation.[44] Similarly, the Pakistani Constitution under Article 184(3) provides for Supreme Court to entertain matters of public importance and fundamental rights violation.[45]

Other important reason for excessive interference of judiciary in the domain of other organs of the State can be necessity. The circumstances can be so demanding that the Court is bound to act, even if it demands moving beyond its powers. This principle of necessity was used by the Supreme Court of Pakistan in the celebrated case of *Zafar Ali Shah v. Pervez Musharraf, Chief Executive of*

38. *See* Hirschl, *Supra* note 34
39. 531 US 98 (2000)
40. Alan Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* , Oxford University Press, 2001, 174 and 198
41. *See* Hirschl, *Supra* note 34
42. *Id*
43. *Id*
44. The Constitution of India, 1950, art. 32, 'The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed...' conferred by Chapter I of Part II is involved have the power to make an order…
45. The Constitution of Islamic Republic of Pakistan, 1973, art. 184(3), '…Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights…'

Pakistan.[46] This case arose due to proclamation of General Musharaff as the Chief Executive of the country. In the year 1999, General Musharaff took up power from the then Prime Minister Nawaz Sharif and imposed military coup d'état in Pakistan. At that time Prime Minister Sharif was involved in various cases of corruption and the economy of the country had been badly affected. The act of General Musharaf of imposing military rule was challenged in the Supreme Court and the Court relying upon the principle of state necessity and *salus populi suprema lex* upheld the imposition of military rule. The Court believed that situation was such that in order to ensure that economy and management of the country is enhanced, it could allow military rule.[47]

The Supreme Court of India and Canada also use the same principle without explicitly stating it in the decision. The Indian Court stated since there is no law as of now, and the situation is urgent and laying down law would be beneficial for the society at large, it goes beyond its powers. Similarly, the Canadian Court states that it is for this situation which is affecting the large number of people, especially the people of Quebec; the Court believes that democratic choice is the best way to decide on the issue of secession. This principle of necessity could have used by the Supreme Court of Pakistan in the Gillani case which they failed to do so. The Court could have explained that circumstances are such that the Prime Minister has made it imperative for the Court to entertain this matter. Court could have used need of economy stability, protection of civil liberties, improvement of international relationship all of which Mr. Gillani had failed to ensure during his term, in order to establish doctrine of necessity. However, they failed to recognize this principle completely.

What are the Implications of Interference?

The stepping of the judiciary into other domains is sometimes highly applauded but at times can be highly criticized. The decisions of Indian Supreme Court may be the best example. In the *Vishaka case,* the Court passed guidlines for the betterment of women and sexual harassment which were widely accepted and appreciated by the society. However, the decision of the same Supreme Court in the case of *Mohammed Ahmad Kan v. Shah Bano*,[48] was widely criticized by large parts of society. In that case, the Court over-ruled a personal law principle which allowed Muslim women to claim for post-divorce maintenance irrespective of personal law being against it. This decision was not well accepted and there were huge protests against this decision. Parliament had to step in and it passed a law which in effect nullified the Supreme Court's decision. This also happened in recent tax issue. The Supreme Court passed a decision which in effect stated that Indian tax authorities cannot tax a multinational company for overseas transaction.[49] However, the tax authorities believed otherwise and the law on taxation was amended to ensure that the multinational is taxed for the mentioned kind of transactions.

Similar situation was also observed in Singapore. The Judicial Committee on Privy Council (JCPC)

46. PLD 2000 SC 869
47. *Contra* Republic of Fiji Islands v. Prasad, (2002) 2 LRC 743, the Court of Appeals in Fiji refused to recognize an interim civilian government on the basis of doctrine of necessity. In this case, I think another reason for the Court not recognizing the new government was that it believed that new government did not have consensus of citizens.
48. AIR 1985 SC 945
49. Vodafone International Holdings B.V. v. Union of India & Anr. Civil Appeal No.733 of 2012

whereby this committee sitting in London overturned a decision of Singapore District Court thereby expelling a famous leader J V Jeyaretnam from Singapore Bar Association.[50] This decision was not well accepted in Singapore and immediate amendments were made in the Constitution to check the role and powers of JCPC.

Another important issue that can arise out of activist approach by the judiciary is of different short term and long term implications. This can be understood by looking at the decision of the Court in General Musharaf case. The Court allowed military rule to ensure, economy was stabilized and management of the country was improved. The Court had also directed General Musharaff impose military rule only for 90 days and conduct democratic elections soon. The immediate effects of this decision were appreciated considering the situation of the country; however, in the long General Musharaff failed to make much difference to economy of Pakistan and continued to be the Chief Executive of the country for a period of around seven years, during which he has been highly criticized for his policies especially those of bilateral relationship with India. Hence, the judiciary should be very careful in overstepping its boundaries.

Conclusion

The above cited cases clearly show that on different occasions judiciaries in various jurisdictions have not shied away from moving beyond the doctrinal boundaries. However, the reasons for these movements have been highly varied. In some case the courts have justified their reasons and these reasons have been accepted by the parties affected and even the other organs of the States whose boundaries have been transgressed. In some other cases, the courts venture has not been appreciated and the concerned organs of the State have taken steps to ensure that the Courts activism is nullified. Can there be certain defined rules or circumstances which allow judiciary to venture beyond its powers, is a highly complex and convoluted question. However, I submit, in agreement with Justice Barok of Israel, that all actions of any of the organs of the state are to be in accordance with the law and subject to scrutiny by the judiciary. This in no way means that judiciary will run the country and all decision will have to be approved by the courts. This means that any decision of any of the organ of state, has to be consonance with the established local principles and if the action is challenged, it is subjected to judicial review. However, this venturing of judiciary in other organs of the state has to be acceptably reasoned. The judiciary while stepping beyond its power should state its reasons for doing so. This can be seen in earlier cited examples, where the Supreme Court of Pakistan in the *Musharaff Case* used the reason of necessity, the Supreme Court of India in *Vishaka Case* used the reason of lacuna in law. I submit that in case if there is a situation in which actions of the organs of the State cause impairment and do little good, the judiciary should not restrain from looking into the justicability of the act. Hence, I state, a judiciary which sits back as a mute spectator and shows no will to act when situation demands it, just on grounds of technicality and doctrinal principles of non-interference; becomes an organ with no meaning and worth.

---

50. *See* Hirschl, *Supra* note 34