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School of Law and Social Justice

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## Contents

# Foreword

The University of Liverpool Law Review launched last year, as a collaboration between the Law School and our students. The first issue was a great success, showcasing the quality and versatility of our students and the dedication of the Review's Editorial Board. The current issue has built on this strong start and we are sure that readers will agree it once again demonstrates the high calibre and great breadth of Liverpool's law students.

A key mission of the Law School – as part of the wider School of Law and Social Justice – is to examine law's social effects, with particular attention being paid to the way in which law promotes and inhibits social justice. Accordingly, the research and teaching at the Law School aims to be dynamic and outward facing: We do not simply study the 'law in the books' but also the 'law in action'. The articles in this issue of the Review reflect perfectly this ethos, covering some of the most important issues facing society today: the death penalty, banking reform, terrorism, and armed conflict.

We offer warm congratulations to both the Editorial Board and authors for putting together such an interesting and important issue.

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# Preface

A year passed and a new one has begun. Entering 2016, the UOLLR would like to introduce some changes to make our publications more enjoyable for everyone. These include a change in internal procedures as well as external communications with the Academic Advisory Board which will hopefully set UOLLR's development and expansion in the right direction.

As in our inaugural issue of the last academic year in 2014-2015, our aim remains to publish and showcase our students' extraordinary academic works outside the boundaries of our curriculum. However, the UOLLR has decided to introduce an article of shorter length to test the waters in this issue – readers will hopefully find the 1500-word article a quick but enjoyable read.

The UOLLR also looks forward to meeting with the Advisory Board more often to steer the publication to maintain an engaging and unifying forum for students to publish their thoughts on contemporary legal issues and render their views to the wider world. As always, the UOLLR is looking ahead: with each issue, we have a better understanding of what worked, what did not, and what we can do to improve our next issue.

The current issue delivers a diverse selection of contemporary legal issues which our readers will find relevant. In the order the articles are presented, this issue features discussions on four topics: the US's death penalty in the wake of constitutional and moral developments, the banks' lack of accountability after the financial crisis in the UK, a universal definition of terrorism, and finally, the tortious immunity of the UK's military combat units. The first two topics were chosen with the intent of giving our readers a better understanding of our ever globalising world through legal issues with an international or comparative element. The latter two articles were decided after the many recent terrorist attacks and military retaliations around the world.

We warmly welcome our readers to accept, challenge, or even fiercely debate your stance against our submissions' arguments – never stop being the critical and independent minds you are.

*Vito Pun*
*Editor-in-Chief*

# The Death Penalty in the United States: To What Extent are Incremental Constitutional Restrictions and the Evolving Standards of Decency Leading to its Abolition?

*Katherine Elizabeth Dingley*

## Abstract

*This article is a study of the death penalty in the United States of America post-1976. Specifically, this article analyses the extent to which abolition is foreseeable by reference to incremental constitutional restrictions and the evolving standards of decency doctrine. Section I is an analysis of the incremental constitutional restrictions enforced by the Supreme Court in a series of case law, which have resulted in the narrowing administration of the death penalty and which have contributed to the requirement of consistency and fairness. Reconciliation of these requirements is given a broad focus in the Section II, which is a thorough analysis of Justice Blackmun's dictum in Callins v Collins. Lastly, Section III focuses on the retention of alternative methods of execution and how they could provide a 'back up' for the death penalty in light of the problems encompassing the lethal injection.*

## I. Introduction

Both ethically and politically divisive, the administration of the death penalty in the United States (**'the US'**) has received considerable constitutional challenge, academic scrutiny and judicial debate over the past century. The objective of this article is to analyse whether abolition of the death penalty is foreseeable in light of constitutional restrictions and the evolving standards of decency. It will be argued that abolition of the death penalty is indeed foreseeable. This argument will be illustrated in three sections. Section I will refer to landmark decisions of the United States Supreme Court, and the extent to which they have narrowed the administration of the death penalty, making it less frequently implemented. Following that, the dictum of Justice Blackmun in *Callins v Collins* will be analysed in Section II, with a focus on the friction between fairness and individualism.[1] Finally, the retention of alternative methods of execution and their possible reintroduction are explored in Section III.

## II. An Incremental Perspective: Narrowing the Application of the Death Penalty through Individualism

At present, a Gallup poll shows that 63% of the US public support the death penalty, a significant shift from 80% in 1994.[2] Although the majority of the public still favour the death penalty as a method of punishment, the decreasing support suggests a change in attitude. This is particularly reflected by another Gallup poll where 45% favoured life imprisonment without parole to the death penalty.[3] It has been hypothesized that high media and public attention of the wrongfully convicted have contributed to this waning support.[4] Additionally, it is likely that following a series of botched lethal injection executions in 2014 (for example, Clayton Lockett and Dennis McGuire),[5] public

[1] 510 US 1141 (1994).
[2] Jeffrey M Jones, 'Americans' Support for Death Penalty Stable' (*Gallup*, 23 October 2014) ‹www.gallup.com/poll/178790/americans-support-death-penalty-stable.aspx›
[3] ibid.
[4] Talia Harmon and William Lofquist, 'Too Late for Luck: A Comparison of Post-Furman Exonerations and Executions of the Innocent' (2005) Crime & Delinquency 498, 499.
[5] Ed Pilkington and Alan Yuhas, 'Lethal injections: a brief history of botched US executions' *The Guardian* (London, 30 April 2014) ‹www.theguardian.com/world/2014/apr/30/oklahoma-execution-history-botched-execution› accessed 17 May 2015.

dissatisfaction has been amplified, which will be discussed further. As Haines notes, flawed executions play an important role in death penalty politics, as the public clearly favours a death penalty that is clean and painless.[6] Public support often cited as a major justification for the death penalty raises difficult questions.[7] If the death penalty is to survive at all, a correct, constitutional, and publicly acceptable manner of administration is imperative.

The Justices have recognised administrative difficulties encompassing the death penalty. Justice Day O'Conner expressed her concern about its administration, 'After 20 years on (the) high court, I have to acknowledge that serious questions are being raised about whether the death penalty is being fairly administered in this country'.[8]

It is the administration of the death penalty that has caused controversy and concern throughout history. Unease was particularly felt in the 1950s and 1960s as a shift towards possible and alternative avenues for legal challenge began to surface. For example, although not a death penalty case, *Trop v Dulles* was instrumental in the respect that Chief Justice Warren recognised the scope of the Eighth Amendment, 'The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society'.[9] Expanding on the decision in *Weems v United States* in which it was held that the Eighth Amendment is progressive and does not just prohibit the punishments in 1689 and 1787,[10] the court in *Trop v Dulles* accepted that the Eighth Amendment was not a fixed standard and was dependent on societal standards and norms. Chief Justice Warren's dictum paved the way for death penalty opponents to invoke their arguments that the death penalty as it was administered at the time was not of contemporary standard. Additionally, Justice Goldberg's dissent in *Rudolph v*

[6] Herbert Haines, 'Flawed Executions, the Anti-Death Penalty Movement, and the Politics of Capital Punishment' (1992) Social Problems 125, 135.
[7] Gregg Murray, 'Raising Considerations: Public Opinion and the Fair Application of the Death Penalty' (2003) Social Science Quarterly 753.
[8] Gina Holland, 'Justices Buck Tradition, Get Personal' *Associated Press* (New York, 5 February 2002) ‹www.apnewsarchive.com/2002/Justices-Buck-Tradition-Get-Personal/id9b00a399c324a1170lf38 d0c742ec397› accessed 22 August 2015.
[9] 356 US 86 (1958), 101.
[10] 217 US 349 (1910).

*Alabama* also proved an influential argument.[11] Ultimately, it persuaded the National Association for the Advancement of Coloured People's Legal Defense Fund and others to organise a court-based attack on capital punishment.[12] A movement towards constitutional challenge rather than a moral one, it focused on using the courts – rather than sentiments – to dismantle the death penalty.[13] As Haines states:

> 'The wrongfulness of executing human beings for their crimes was no longer to be cast as merely *morally* objectionable, but as violations of specific provisions of the Eighth and Fourteenth Amendments: capital punishment wasn't just *wrong*, it was contrary to 'evolving standards of decency' and thus *cruel and unusual*; it wasn't merely *discriminatory*, it was inconsistent with equal protection under the law and with standards of due process to which every citizen is entitled.'[14]

This is a convincing argument as it demonstrates the friction between the Eighth and Fourteenth Amendments and the death penalty, illustrating that it was not the death penalty *per se* that was unconstitutional, but the way it was being administered.

In response to this concern, *Furman v Georgia* held that the death penalty practiced at the time was unconstitutional and constituted cruel and unusual punishment.[15] Although there was no concurring opinion between the Justices, there was a general consensus that it was the infrequency of death sentences to the class of people eligible for it that was so arbitrary that it violated the Eighth Amendment.[16] As Justice Potter Stewart stated, 'These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual'.[17]

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[11] 375 US 889 (1963).
[12] Jeffrey Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty* (OUP 2015) 70-76.
[13] ibid 80.
[14] Herbert Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (Oxford University Press USA 1999) 44.
[15] 408 US 238 (1972).
[16] Sam Kamin and Justin Marceau, 'Waking the Furman Giant' (2015) UC Davis Law Review 981, 983.
[17] *Furman* (n 15) 309.

This created significant impact; 35 of the (then) 39 states revised their death penalty statutes, reforming the way they administered the death penalty.[18] However, hopes that this moratorium would lead to abolition were soon dashed by *Gregg v Georgia*.[19] *Gregg* held that the death penalty does not violate the Eighth Amendment and the new legislative measures ascertained contemporary standards of decency and were neither capricious nor arbitrary.[20]

Significantly, the ruling in *Gregg* held that Georgia's statute required consideration of the mitigating circumstances of the offender: youth, police cooperation and the type of crime.[21] The Supreme Court gave little guidance to the legislatures, which allowed the states to interpret the guidance as they wished, provided their statutes abided with the constitution.[22] Application of the death penalty was instantly restricted; the requirement for the jury to find at least one aggravating factor added subjectivity and each case to be decided on its own merit, thus reducing an automatic death sentence.

Consistency of administration was further established in *Coker v Georgia*[23] and *Kennedy v Louisiana*[24] which abolished the death penalty for the rape of adults and children respectively. In both cases, the Justices of the Supreme Court were keen to emphasise the Eighth Amendment bars any punishment which is 'excessive'.[25] Reference was made to the evolving standards of decency where the Supreme Court considered actions of other states, noting that there was already a national consensus against executing those convicted of rape.[26] Although Justice White recognised the severity of rape and the impact it can have on the victim in *Coker*, noting that 'short of homicide, rape is the

[18] Carol Steiker and Jordan Steiker, 'The Death Penalty and Mass Incarceration: Convergences and Divergences' (2014) American Journal of Criminal Law 189.
[19] 482 US 153 (1976).
[20] ibid.
[21] Kermit L Hall, *The Oxford Guide to the Supreme Court of the United States* (2nd edn, Oxford University Press 2009) 113.
[22] ibid 114.
[23] 433 US 534 (1977).
[24] 554 US 407 (2008).
[25] *Coker* (n 23) 591-592; *Kennedy* (n 24) 419.
[26] *Coker* (n 23) 593-597; *Kennedy* (n 24) 419-420.

ultimate violation of self',[27] Justice Kennedy in *Kennedy,* writing for the majority nevertheless stated that:

> 'Consistent with evolving standards of decency and the teachings of our precedents we conclude that, in determining whether the death penalty is excessive, there is a distinction between intentional first-degree murder on the one hand and non-homicide crimes against individual persons, even including child rape, on the other. The latter crimes may be devastating in their harm, as here, but in terms of moral depravity and of the injury to the person and to the public, they cannot be compared to murder in their "severity and irrevocability" '.[28]

The main distinction and justification for abolishment is that rape does not take a person's life, again reducing the application of the death penalty.[29] According to the National Crime Victimization Survey, 300,175 people reported that they had been raped or sexually assaulted in the US in 2013.[30] Although it is granted that number would be reduced after discounting sexual assault cases, acquittals and the lack of executions for rape, the abolishment instantly rejects a large number of offenders eligible for the death penalty. Consistency has also been established throughout the states; the impact of *Coker* and *Kennedy* leaves only murder and treason punishable by death penalty, which are also restricted in the aftermath of *Gregg's* subjective mitigating factors requirement.

Since 1973, 22 juveniles (16-17 years of age) have been executed;[31] today this is forbidden. *Roper v Simmons* prohibited the implementation of the death penalty sentence on those under the age of 18 on the basis that it constituting cruel and unusual punishment.[32] Agreed by a close majority of 5-4, the Justices recognised that due to the immaturity and impulsivity of juveniles, they are less culpable and less likely to be deterred by the threat

[27] *Coker* (n 23) 597.
[28] *Kennedy* (n 24) 438.
[29] *Coker* (n 23) 597-598.
[30] US Department of Justice, *Criminal Victimization, 2013* (NCJ 247648, 2014) 2.
[31] Victor Streib, 'The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 – February 28 2005' ‹www.deathpenaltyinfo.org/studiesdeath-penalty-female-offenders› accessed 17 May 2015.
[32] 543 US 551 (2005).

of punishment.[33] Further convincing mitigating factors were put forward by Simmons' defence, referencing his other legal limitations to 'drink, serve on juries, or even see certain movies'.[34] These practical elements signalling his lack of maturity, combined with the fact that the court recognised that other states had abolished the death penalty for juvenile's years ago, are a clear example of the evolving standard of decency doctrine in action.[35] This is also reflected by public and societal opinion: research has demonstrated that the public express a general unwillingness to execute juveniles.[36] Therefore, the evolving standard of decency has narrowed the circumstances under which the death penalty may be applied and added consistency to the extent that there is now a definite age restriction for the death penalty.

*Atkins v Virginia,*[37] which struck down the previous ruling of *Penry v Lynaugh,*[38] held that executing mentally retarded criminals is prohibited by the Eighth Amendment. Notably, there were no guidelines in defining 'mental retardation', leaving it to state discretion. The Justices justified their verdict on both legal and ethical grounds. First, that a mentally ill person can face a special risk of wrongful conviction due to an unwitting confession or inability to assist counsel.[39] Secondly, that there was a serious question as to whether retribution and deterrence can apply to mentally ill offenders as their cognitive and behavioural impairments make them morally less culpable.[40] Again, this bears striking similarity to the progression of the evolving standards of decency for juveniles. In 2000, two thirds of states already recognised mitigating factors relating to mental or emotional disturbances and lack of capacity, suggesting that the Supreme Court was simply responding to a practice that was already well established, parallel with public opinion.[41] Nonetheless, this has shown how the evolving standards of

[33] ibid 569-571.
[34] ibid 558.
[35] ibid 559-560.
[36] Denise Paquette Boots, Kathleen M Heide and John K Cochran, 'Death Penalty Support for Special Offender Populations of Legally Convicted Murderers: Juveniles, the Mentally Retarded, and the Mentally Incompetent' (2004) Behavioural Sciences & the Law 223, 229.
[37] 536 US 304 (2002).
[38] 492 US 302 (1989).
[39] *Atkins* (n 37) 320-321.
[40] ibid 320.
[41] Christopher Slobogin, 'Mental Illness and the Death Penalty' (2000) Mental & Physical Disability Law Reporter 667, 669.

decency have restricted the application of the death penalty. By ensuring all states do not execute the mentally retarded, consistency of the type of offender eligible for the death penalty has been established.

The impact of incremental constitutional restrictions by the Supreme Court in contributing to the decline of the death penalty cannot be overstated. Throughout these constitutional restrictions, the evolving standards of decency doctrine has been woven in and been the predominate factor in narrowing the administration of the death penalty. As the past century has passed, so have societal views, and society has demanded more consistency, ethicality and constitutionality if the US is to maintain the death penalty. However, in light of the dissent of Justice Blackmun, it is debatable whether the US has achieved this.

## III. The Dictum of Justice Blackmun in *Callins v Collins:* Consistency versus Fairness

In her blog, Diann Rust-Tierney, Executive Director of the National Coalition to Abolish the Death Penalty states, 'If we get to work now, someday, the Supreme Court will recognize what we already know: the death penalty is not up to our standards'.[42] Citing *Roper* and other changing circumstances in the past decade – such as six states abolishing the death penalty altogether, and eight other states stopping executions and others with moratoriums – as examples of the evolving standards of decency, she argues that abolition is foreseeable.[43] Her reference to the evolving standards of decency provides a convincing argument, particularly when read alongside the dictum of Justice Blackmun in *Callins v Collins.*[44] *Callins* was by no means an exceptional case. Callins had been convicted of robbery and murder and his petition for writ of certiorari was dismissed. What was significant however, was the passionate dissent of Justice Blackmun, announcing he had made a mistake in voting with the majority in *Gregg* and

[42] Diann Rust-Tierney, 'An Anniversary of Our Evolving Standards of Decency' (National Coalition to Abolish the Death Penalty, 9 March 2015) ‹www.ncadp.org/blog/entry/an-anniversary-of-our-evolving-standards-of-decency› accessed 30 March 2015.
[43] *Roper* (n 32).
[44] *Callins* (n 1).

finding the death penalty, as administered, unconstitutional as a result of conflict between the need to achieve individualized sentencing and consistency:

> 'Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death … can never be achieved without compromising an equally essential component of fundamental fairness--individualized sentencing'.[45]

The case of *Penry v Lynaugh* aptly demonstrates this conflict.[46] Although the ultimate ruling in relation to mental retardation and the death penalty in *Penry* has since been struck down, it provides a useful demonstration of the friction between individualized sentencing and consistency. The defendant, Johnny Penry had challenged Texas' death penalty statute on the basis that it failed to allow the sentencing jury to give full mitigating effect to his evidence of mental retardation and history of child abuse. The Texas statute required the jury to answer three 'special issues' and if each issue was agreed, the trial court was obligated to impose a death sentence. However, only one of the three issues was related to the evidence Penry had offered in mitigation. Although the Court reversed Penry's death sentence, Justice Blackmun rightly points out that while Texas had complied with the requirements in *Furman* by severely limiting the sentencer's discretion, it was these limitations had rendered Penry's death sentence unconstitutional.[47]

Consistency and achieving individualized sentencing are all constitutional requirements in the administration of the death penalty, as held on numerous occasions by the Supreme Court.[48] Although stating the holding of *Furman* to have been correct, Justice Blackmun argues that the Court has achieved none of these, '[The Court] has engaged in a futile effort to balance these constitutional demands, and now is retreating not only

[45] ibid 1144.
[46] *Penry* (n 38).
[47] *Callins* (n 1) 1152.
[48] *Furman* (n 15); *Gregg* (n 19); *Lockett v Ohio* 438 US 586 (1978).

from the *Furman* promise of consistency and rationality, but from the requirement of individualized sentencing as well'.[49]

Subsequent cases illustrate Justice Blackmun's argument that consistency is still not yet established. In *McCleskey v Kemp,* the defendant Warren McCleskey submitted an argument, supported by statistical evidence, that his sentence should be nullified due to there being a constitutionally impermissible risk that both his and his victim's race played a significant role in the decision to sentence him to death.[50] Despite Justice Powell suggesting in *Furman* that an equal protection claim could be made if a defendant 'could demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense,'[51] the Supreme Court held the statistical evidence was insufficient in *McCleskey*.[52]

Additionally, Justice Blackmun argues in his dissent that the Court's refusal to afford Leonel Torres Herrea an evidentiary hearing, 'despite his colourable showing of actual innocence' demonstrates how the Court has strayed from its statutorily and constitutionally imposed obligations.[53]

To retreat from these requirements could create a worrying outcome for the death penalty itself. In *Lockett v Ohio,* the Supreme Court held that the Eighth and Fourteenth Amendments require the sentencer, in all but the rarest kind of capital case, not to be precluded from considering a mitigating factor that the defendant might proffer for a sentence lesser than death.[54] Therefore, a failure to consider individualized sentencing could amount to a violation of the Eighth and Fourteenth Amendments. Citing a further number of cases where the Court has strayed away from the *Furman* principles, Pascucci

[49] *Callins* (n 1) 1145.
[50] 481 US 279 (1987).
[51] *Furman* (n 15) 389.
[52] *McCleskey* (n 50).
[53] *Herrea v Collins* 506 US 390 (1993), 1158.
[54] *Lockett* (n 48), 604-605.

further emphasises how capital sentencing errors occur when the judge or jury imposes the death sentence in an arbitrary or discriminatory manner.[55]This failure to apply consistency could bring the death penalty back to pre-*Furman,* inconsistent and susceptible to constitutional challenge.

Although the requirement of consistency and mitigating factors for individualized sentencing was seen as a welcomed prospect, the administration of the death penalty today is still encumbered in difficulties. Justice Blackmun describes the possible outcome of this:

> 'In my view, the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution ... I may not live to see that day, but I have faith that eventually it will arrive. The path the Court has chosen lessens us all.'[56]

This statement demonstrates how foreseeable abolition of the death penalty is, providing the Supreme Court does not step in to reform it soon. Justice Blackmun's reference to the 'futility of the effort to harmonize them' raises a strong ground for legal challenge, not merely based on sentiment. Whilst the case law in Section I demonstrates a narrower application of the death penalty, the dictum of Justice Blackmun, considered in Section II shows how it could be abolished altogether.

[55] Raymond Pascucci, Capital Punishment 1984: Abandoning the Pursuit of Fairness and consistency (1984) 69 Cornell L. Rev. 1129
[56] *Callins* (n 1).

## IV. Alternative Methods of Execution: Thwarting or Helping Abolition of the Death Penalty?

As previously stated in the Section I, public support is imperative if the death penalty is to continue as the most severe form of punishment in the US and refrain from abolishment. Justice Marshall's dissent in *Furman* is interesting in this respect:

> 'A punishment may be deemed cruel and unusual for any of the four distinct reasons … Where a punishment is not excessive and serves a valid legislative purpose, it still may be invalid if popular sentiment abhors it … For example … such punishment would, nevertheless, be unconstitutional if citizens found it to be morally unacceptable'[57]

Although a method of execution is yet to be found unconstitutional based solely on public sentiment, Justice Marshall's dissent raises questions about the future of the lethal injection and the impact it may have on the death penalty. Currently, the primary method of execution in all 32 states is the lethal injection.[58] Introduced due to the belief that it would be administered in a clinical, clean and professional manner, its use as a method of execution has significantly contributed to the decline of the death penalty. Due to expansive constitutional challenges, the impact of the European Union's refusal to export certain drugs and a shift in public opinion and approval,[59] the lethal injection has become 'constitutionally vulnerable', dominating 'much of the nation's death penalty litigation, with no end in sight'. [60]

[57] *Furman* (n 15) 430.
[58] US Department of Justice, *Capital Punishment, 2013 – Statistical Tables* (NCJ 248448, 2014) 4.
[59] For example, Council Regulation (EC) 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment [2002] OJ L200/1; Commission Implementing Regulation (EU) 1352/2011 of 20 December 2011 amending Council Regulation (EC) 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment [2011] OJ L338/31.
[60] Deborah Denno, 'The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty' (2007) Fordham Law Review 49, 54 & 123.

Although these constitutional challenges and the impact of the European Union are beyond the scope of this article, the impact they have had on the death penalty is of significance. Justice Stevens recognised this in *Baze v Rees*:

'When we granted certiorari in this case, I assumed that our decision would bring the debate about lethal injection as a method of execution to a close. It now seems clear that it will not … Instead of ending the controversy, I am now convinced that this case will generate debate not only about the constitutionality of the three-drug protocol, and specifically about the justification for the use of the paralytic agent, pancuronium bromide, but also about the justification for the death penalty itself'.[61]

Despite affirmation in *Baze* that the death penalty is constitutional, Justice Stevens clearly indicates that he believes the death penalty itself will soon be subject to intense debate with regards to its justification.[62] If we were to reconcile this with the dicta of Chief Justice Warren in *Trop* and with the dissent of Justice Marshall in *Furman*, a strong argument for the death penalty being abolished due to evolving standards of decency in the future can be made. [63] The question that arises is how foreseeable this abolishment is.

Good arguments can be put forward for stating that if the lethal injection was a stand-alone method of execution, the abolishment of the death penalty would be foreseeable. Lack of lethal injection drugs as a result of European Union export prohibitions and the impending judgment of *Glossip v Gross* in the Supreme Court have contributed to this foreseeable abolition.[64] However, this argument is weakened by the states' retention of alternative methods of execution, which strengthens the death penalty, allowing states 'back up' methods of execution. Notably, none of these alternative methods have been

[61] 553 US 35, 71 (2008).
[62] ibid.
[63] *Trop* (n 9); *Furman* (n 15).
[64] *Glossip v Gross* Docket No 14-7955 (2015); Ty Alper, 'The United States Execution Shortage: A Consequence of Our Values' (2014) Brown Journal of World Affairs 27, 31.

rendered unconstitutional, partly due to the fact that the Court did not apply the Eighth Amendment to state convictions.[65] Additionally, in *Baze,* the Supreme Court noted that it had repeatedly taken the view that the torturous modes of punishment prohibited were those 'that formed the historic backdrop of the Eighth Amendment' which have permeated the Supreme Court's method-of-execution cases.[66] Again, it was emphasised that the Eighth Amendment is aimed at methods of execution which are purposely designed to inflict pain.[67] Such executions would include burning at the stake and being disembowelled alive, being beheaded and quartered.[68] While none of the current alternative methods of execution constitute this, this article submits that the evolving standards of decency as explained in *Trop* could challenge these methods.[69]

Hanging remains an alternative to the lethal injection in both Washington and New Hampshire[70]. One of the earliest methods of execution, it has been used as recently as 1994, on Charles Campbell.[71] Replaced simply due to the introduction of other methods of execution, many have argued that to re-introduce hanging as a widely used method of execution would sit uncomfortably with the US' history. Judge Reinhart's powerful dissent against hanging in *Campbell v Wood* aptly summarises this, 'Hanging is associated with lynching, with frontier justice, and with our ugly, nasty, and best-forgotten history of bodies swinging from the trees or exhibited in public places'.[72]

Despite this dissent, the U.S. Court of Appeals for the Ninth Circuit in *Campbell's* case held that hanging did not violate the Constitution.[73] It would therefore appear that, similar to the situation before *Furman*, a robust legal challenge would be needed to challenge hanging against the Eighth Amendment, rather than a sentimental one. The

[65] *Baze v Rees* 553 US 35, 48 (2008).
[66] ibid.
[67] ibid.
[68] *Wilkerson v Utah* 99 US 130, 135-136 (1879).
[69] *Trop* (n 9).
[70] Department of Corrections Washington State, 'Capital Punishment in Washington State' ‹www.doc.wa.gov/offenderinfo/capitalpunishment› accessed 7 April 2015; US Department of Justice (n 58) 7.
[71] Death Penalty Information Center, 'Charles Campbell' ‹www.deathpenaltyinfo.org/charles-campbell› accessed 17 May 2015.
[72] 18 F 3d 662, 701 (9th Cir 1994).
[73] ibid.

Supreme Court, replacing hanging as a primary method of execution, held the electric chair was a constitutional method of punishment in *Re Kemmler* in 1890.[74] Electrocution remains an option in eight states despite ambiguous electrocution statutes.[75] Denno illustrates this, noting that none of the states provide 'information on the voltage or amperage of the electrical current that should be applied, or the way that current should be administered'.[76] Furthermore, she argues that even if electrocution were instantaneous, its effects on the body could still be considered unconstitutional.[77] Relying on evolving standards of decency, Philip Nugent agrees with Denno:

> 'In light of the "evolving standards of decency" that determine what our society is willing to consider cruel and unusual punishment under the Eighth Amendment, it is improbable that electrocution could survive such an inquiry. The supposition that the electric chair results in "instantaneous, and consequently in painless, death" ... is groundless.'[78]

A convincing argument, when read alongside the dictum of three Justices in *Poyner v Murray,* illustrating that *Kemmler* was not a 'dispositive response to litigation of the issue in light of modern knowledge' suggests that friction exists between the Eighth Amendment and electrocution, and there are reasonable grounds for a legal challenge, as recognised by the Justices.[79] The fact that Georgia and Nebraska's Supreme Courts have ruled that the use of electric chairs violates constitutional prohibitions against cruel and unusual punishment only adds to this argument.[80] In light of the decisions in previous cases, where the US Supreme Court considered actions of other states, one may argue that electrocution will take precedent from this. However, the argument is instantly struck down due to the fact that electrocution executions are still taking place, as recently as 2013, reemphasising its place as a constitutionally viable method of execution.[81]

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[74] *Re Kemmler* 136 US 436 (1890).
[75] US Department of Justice (n 58) 7.
[76] Deborah Denno, 'Getting to Death: Are Executions Constitutional?' (1997) Iowa Law Review 319, 353.
[77] ibid 359.
[78] Philip Nugent, 'Pulling the Plug on the Electric Chair: The Unconstitutionality of Electrocution' (1993) William and Mary Bill of Rights Journal 185, 203.
[79] 508 US 931 (1993), 933.
[80] *Dawson v The State* 274 Ga 327 (2001); *State v Mata* 280 Neb 849 (2008).
[81] 'Virginia inmate Robert Gleason dies by electric chair' *BBC News* (US & Canada, 17 January 2013) ‹www.bbc.co.uk/news/world-us-canada-21047468› accessed 17 May 2015.

Nevada introduced lethal gas as a method of execution in 1921 and it remains a constitutional option in Missouri, Arizona and Wyoming.[82] Similar to hanging, lethal gas has pejorative connotations, particularly in relation to the Holocaust and Nazi Germany in World War II.[83] Public repugnance of the use of lethal gas has been notable; Kirchmeier makes reference to Arizona's overwhelming vote to switch from lethal gas to the lethal injection following newspapers publicity of the execution of Don Harding.[84] In an effort to retain the death penalty, states could soon re-enact lethal gas statutes – this being constitutionally viable. Drawing on the lack of public approval and the dissent of Justice Marshall in *Furman*, it could be argued that due to the evolving standards of decency and moral opposition, lethal gas could be found unconstitutional. Again, this argument is weakened by its reliance on sentiment. Execution by lethal gas has not been used since 1999, when Walter LaGrand requested it stating that he would 'prefer a more painful execution in the gas chamber to protest against the death penalty'.[85] Furthermore, LaGrand's execution was delayed due to a federal appeal court ruling the gas chamber to be cruel and unusual punishment.[86] Although overturned, this demonstrates judicial unease in the lower courts with lethal gas. As no other lethal gas execution has taken place since LaGrand's, it is difficult to ascertain its constitutional future. Whilst public opinion could be a mitigating factor, due to the current lack of legal basis, it is unlikely to be a prevailing one.

Held in *Wilkerson v Utah* as a constitutional method of execution,[87] the firing squad is the least common method of execution in the states, only as an option in Utah if a person was convicted before 2004 or in Oklahoma if the lethal injection becomes unconstitutional.[88] Although it was last used in 2010, in the absence of drugs for the lethal injection, Utah has already voted to bring back execution by firing squad.[89]

[82] US Department of Justice (n 58) 7.
[83] Kirchmeier (n 12) 203.
[84] ibid.
[85] 'World: America's Countdown to US Execution' *BBC News* (March 4 1999) ‹http://news.bbc.co.uk/1/hi/world/americas/290243.stm› accessed 17 May 2015.
[86] ibid.
[87] 99 US 130 (1879).
[88] US Department of Justice (n 58) 7.
[89] Lauren Gambino, 'Utah lawmakers vote to bring back execution by firing squad' *The Guardian* (Los Angeles, 11 March 2015) ‹www.theguardian.com/world/2015/mar/11/utah-passes-firing-squad-bill› accessed 8 April 2015.

Whether other states will follow precedent is uncertain; Kirchmeier notes that many see the firing squad as violent and anachronistic, conflicting with modern execution.[90] Again, one could argue that it has negative connotations with World War I's and World War II's military executions. Contrastingly, DiStanislao recommended that Virginia should cease use of the lethal injection by adopting the firing squad due to the lethal injection's high botch rates.[91] Highlighting the firing squad's effectiveness, quick process and small risk of pain, his argument that four out of nine death row inmates in Utah have now requested the firing squad seems to illustrate this.[92]

Although alternative methods of execution have been challenged and found unconstitutional in the lower courts, it is significant that the Supreme Court has never struck down a method of execution as unconstitutional.[93] Problems encompassing the lethal injection; the impending case of *Glossip,* drug shortages and rise in botched executions make it undeniably foreseeable that the lethal injection could be found unconstitutional in the near future. Although *Baze* affirmed that the lethal injection was constitutional in 2008, it left the doors open for future challenge.[94] One only need look at *Glossip* to realise the truthfulness of this. However, what the unconstitutionality of the lethal injection cannot do is altogether abolish the death penalty by itself.

This section has demonstrated that alternative methods of execution can, and are, still available to selected states. The Supreme Court has maintained the stringency of the death penalty by ensuring these alternative methods are constitutional. However, constitutional challenges could arise if these methods were to be reintroduced. Dissatisfaction with the alternative methods has been highlighted, as has the evolving standards of decency; friction and litigation could develop as a result of these. Finally, the death penalty may receive further narrowing if a return to alternative methods

[90] Kirchmeier (n 12) 201.
[91] Thomas DiStanislao III, 'A shot in the dark: why Virginia should adopt the firing squad as its primary method of execution' (2015) University of Richmond Law Review 779, 782.
[92] ibid 799-801.
[93] Andrew Hilland, 'Justice Stevens and the Technologies of Death: Why Some Methods of Execution are Worse than Others, But None are Better' (2009) Dartmouth Law Journal 1, 2.
[94] ibid.

became apparent; some may choose to just altogether abolish it, or enforce a moratorium until a more attractive method becomes available.

## V. Conclusion

This article has highlighted the major difficulties facing the US death penalty. Efforts have been made by the Supreme Court to ensure the death penalty is administered in a consistent and fair manner, and the direct result of this was an instant decline in the amount of death sentences being delivered. For example, in 2014, 35 people were executed in comparison to 98 in 1999.[95] Evolving standards of decency have been a prevailing factor in the Supreme Court's decisions as they noted the actions of other states in their excision of the death penalty, establishing a national consensus. It would therefore appear that the death penalty, although rarely imposed today, is reserved for only the most heinous crimes, the ones deserving of serious punishment.

That said, strong arguments can be made due to the decreasing use of the death penalty it may be beneficial to altogether abolish it. Other arguments can contribute to this; the fact that both administrative consistency and individual fairness cannot both be achieved demonstrates that the death penalty is simply not administratively workable, as noted by Justice Blackmun. It remains possible that this friction between fairness and consistency could make serious headway in the upcoming years. The impact of this could go either way; complete reform of the death penalty or abolition. Lastly, due to the primary method of execution being the lethal injection, this article discussed whether the problems encompassing that could contribute to the foreseeability of abolition. This is unlikely; the Supreme Court has not held any alternative methods unconstitutional and they still remain as options or alternatives in a few states if the lethal injection was to ever become unconstitutional.

[95] Death Penalty Information Center, 'Executions by year since 1976' ‹www.deathpenaltyinfo.org/executions-year› accessed 18 May 2015.

# Mending the Jigsaw: the Need for Increased Accountability in the UK Banking Sector

*Caitlin Evans*

## Abstract

*This article aims to analyse the accountability measures implemented by the United Kingdom government in the wake of the 2008 financial crisis. The global financial crisis highlighted the need to defeat the illusions of a 'too big to fail' bank. Greater accountability measures were urgently needed to prevent banking groups from taking excessive risks and putting consumers at risk of another economic crisis. Banking groups have long avoided meaningful sanctions intended to limit the risks being taken, and, without safeguards, the UK government has been left with limited opportunity to hold those groups accountable. In exploring the methods being used to increase accountability, this article will focus on the ring fencing measures being used to separate risky investment services from core retail services and the effect of the London Interbank Offered Rate scandal on the initiation of sanctions against individuals and banking groups as a whole. This article will have regard to reports and papers composed by regulatory bodies, government assembled commissions, and financial news articles to examine these national measures.*

## I. Introduction: Background and History of the UK Banking Sector

In 2008, the international market witnessed the largest systemic financial crisis since the Great Depression in 1929. The failures of free market contributors resulted in irresponsible lending, poor risk management, and inadequate regulation. Lack of regulation and proper accountability measures resulted in the failing of the banking

sector in the United States ('US') and the United Kingdom ('UK'), making new regulatory structures necessary to restore these institutions.

Numerous factors led to the financial crisis in 2008. In relation to the banking sector, the impact was influenced by the mortgage crisis in the US. Dubious mortgage lenders in the US were loaning to inadequately funded borrowers who struggled to pay back personal debts; because the amounts advance were relatively small, the risks were not adequately appreciated. These high-risk mortgages were then sold to banks that pooled them into what they incorrectly assessed as low-risk securities. These low-risk securities are known as Collateralised Debt Obligations ('CDO'). These securities then failed when the real estate market which, despite a forecasted rise in property prices, continued to plummet, and these supposedly low-risk securities were bought by investors. Although CDOs had been categorised as strong A-rated securities by rating agencies such as Moody's, they were worthless when the property market failed to reach its forecasted peak.[1] Financiers were taking large market risks, and banks in the UK began borrowing from American banks in order to buy these, unknowingly at the time, high-risk securities. Trust in the financial sector was quickly fading, and British mortgage lenders, Northern Rock, were just one of the casualties to file for insolvency in 2007.

The decline in the housing market exposed major faults in the financial market. Securities rated safe created false confidence for potential investors as a result of the complete lack of regulation and accountability measures for market actors. The allowance of markets to self-regulate in the US had a detrimental effect on the UK and the international market as a whole. It has long been recognised that there is a great need to establish proper accountability systems to ensure uniform compliance from all market actors and examine the history of not only legal infrastructure accountability but also the political and social pressures in the UK, especially within the banking sector.

[1] The Economist, 'The Origins of the Financial Crisis: Crash Course' (The Economist, 7 Sep 2013) ‹› accessed 5 April 2015.

The financial crisis is an important indicator of the regulatory changes that need to be made to promote accountability and lessen the chance of another systemic crisis. This article will focus on the changes implemented by UK Parliament and regulatory bodies to ensure accountability and promote good banking practice. Two key events in recent history provides the framework for these changes: the London Interbank Offered Rate (**'Libor'**) scandal, and the ring-fencing of risky investment services from core retail services in the banking industry. The risks being taken through trading affecting retail banking services and the multiple issues around corruption and greed exposed through the Libor scandal undoubtedly called for reform. The banking sector is now witnessing extensive restructuring aimed at combating these abuses.

The UK suffered greatly during the financial crisis with banking groups, such as Lloyds TSB (**'Lloyds'**), writing off £200 million in light of the sub-par mortgage disaster of 2007.[2] As a result of this significant loss, and the revelation of the £11 billion in losses exposed after Lloyds' acquisition of Halifax Bank of Scotland (**'HBOS'**), the government began a taxpayer-funded bail out scheme to stabilise the banks and prevent a full scale economic disaster.

The National Audit Office (**'NAO'**) followed the purchase of £20 million in shares by the UK Treasury in late 2008. In a period of instability during the global financial crisis, the government had to intervene to protect the interests of businesses and households. The Treasury set objectives 'to protect depositors, maintain liquidity and capital for UK banks through the period of market closures, and to encourage banks to lend to creditworthy borrowers'.[3] The Treasury would work with the Bank of England and the Financial Services Authority (**'FSA'**) to accomplish these objectives. The measures promoted through the acquisition of shares were in place to ensure that banks could maintain the liquidity to pay back claims and outstanding debts, thereby creating a cushion for major banks, protecting them from further loss within the deteriorating

[2] Angela Monaghan, 'Lloyds Banking Group timeline: from bailout to government sale' *The Guardian* (London, 17 September 2013) ‹www.theguardian.com/business/2013/sep/17/lloyds-banking-group-from-bailout-to-selloff› accessed 25 March 2015.
[3] National Audit Office, *HM Treasury Report and Accounts 2010-2011* (HC 2010-11, 984) 4.

financial markets. Moreover, the measures encouraged banks to make safe investments to limit further damage. Through the government's intervention, the Treasury increased capital in the form of £66.3 billion in shares to both the Royal Bank of Scotland (**'RBS'**) and Lloyds in order for them to continue trading[4] and an additional public purchase of £20 million in shares in Lloyds.[5] The Treasury set idealised targets for Lloyds, although non-compliance had no real consequence. The only formal sanction introduced in 2009-2010 was the refusal to guarantee wholesale borrowing under the Credit Guarantee Scheme. An NAO report found that the management of different responsibilities was a risk for the Treasury in the years following the financial crisis, but they felt that the handling of Northern Rock's insolvency in 2007 prepared them for the crisis that had emerged in 2008. The UK Financial Investments, developed by the Treasury to manage the governments shares in banks, sold £7.4 billion in Lloyds shares between September 2013 and March 2014, reducing the taxpayer's shareholdings from 39% to 25% as of the 31 March 2014.[6]

The short and long-term effects of a full banking collapse in the UK would come at a catastrophic economic and social cost; government intervention was greatly justified but there is still more to be done to ensure those investing in risky securities are held accountable and not absolved of fault. A clear need for legal accountability enforcement by the UK government is in dire need of progression, and the Libor scandal which was exposed in mid-2012 amplifies the complete lack of regulation and societal faith in the banking sector and exhibits the final call for reform.

While the immediate effects of accountability during the financial crisis have been exposed, future scandal has not been avoided in the UK. In 2011, Sir John Vickers headed the Independent Commission on Banking and recommended a series of measures in order to reform banking standards and move to isolate core-banking services – or retail banking – from investment services, limiting the effect on unassuming retail users of a

[4] National Audit Office, *HM Treasury's 2013-14 Annual Report and Accounts* (HC 2013-14, 20) 16.
[5] ibid 19.
[6] ibid.

systemic financial crisis. A key recommendation was either the retail and investment services should be ring-fenced to insulate core services against risky investments or bodies offering these services should be fully separated. Upon the recommendations of Vickers, ring-fencing was approved to slowly isolate core services from the effects of failure of more high-risk investment activities, such as the derivatives market. Banks were allowed to self-regulate and impose the new ring-fencing requirements and, with limited incentive to participate given the complete lack of legal accountability measures imposed, isolation of retail and investment services was not being appropriately achieved.

The Libor scandal in 2012 reignited the debate about structural separation of retail and investment services offered by banking institutions and the issues relating to the self-regulation of banks. The Libor crisis occurred when key banks, such as Barclay's and HSBC, submitted falsely lowered data and interest rates to the British Bankers' Association (**'BBA'**) to 'hide their true solvency and default risk; and employees at several banks tried to manipulate interest rates submitted to BBA in order to improve their trading positions'.[7] This affected more than $450 trillion of transactions. After the 2012 Libor crisis, Parliament established the Parliamentary Commission on Banking Standards (**'PCBS'**) in order to strengthen legal accountability within the banking sector in the UK. It had become apparent that by allowing banks to self-regulate, banks were tunnelling under the ring-fence. There was an urgent need for framework to be strengthened through legislative measures and serious disincentives set to ensure there are legal repercussions to those institutions undermining the efforts of the ring-fence. The PCBS suggested 'electrification' to create 'a very significant disincentive for banks to depart from the spirit of the ring-fence by creating full structural separation as a viable alternative'.[8] This has further been cast in Part 9B of the Financial Services and Markets Act 2000 (**'FSMA'**), amended by the Financial Services (Banking Reform) Act 2013 (**'FSBRA'**),[9] which will implement ring-fence objectives in hard law devices. When discussing the idea of accountability measures to ensure compliance, the question has

[7] Michael Nwogugu, 'A critique of LIBOR/SHIBOR/EURIBOR rate-setting; and new recommendations' [2014] JIBLR 208-228.
[8] Parliamentary Commission on Banking Standards, *First Report* (2013-13, HL 98, HC 848) 69.
[9] Financial Services (Banking Reform) Act 2013, s 142A.

arisen whether or not banks could be trusted to apply the regulatory changes needed. While speaking to the PCBS, CEO of the Prudential Regulation Authority (**'PRA'**), Andrew Bailey, has stated that, when dealing with individuals who disregard ring-fencing:

> 'I am sorry but you have effectively voided the right to operate this system because we cannot be sure that we could actually resolve you in that situation because you seem to be so tricky to deal with that we could not be sure that the plans were actually operable'.[10]

It remains open for debate which measures will best ensure compliance, but the new s.142E[11] states, generally, that the Treasury can impose prohibitions on those institutions refusing to comply with ring-fence principles, aiding the improved legal accountability measures set in place for those ring-fenced institutions. In regard to UK banking, social accountability and public perceptions had been at an all-time low, trust in the banking system had been lost, and hard law initiatives needed to be made to meet the societal demand forced upon the banking sector as a whole. In light of past infrastructure failings and accountability limitations, this article will focus on how new international methods of regulation have counterbalanced past indiscretions and the effect this has had on the international market for better, or worse.

In order to analyse the issues exposed through the financial crisis of the banking industry, there are two key areas to be drawn together and examined to reveal problems at the heart of banking culture in the UK and how they ought to be being dealt with. The first area of concern is the reactive regulations imposed by the United Kingdom and any risk factors that need to be taken into account with a key focus on ring-fencing initiatives to isolate investment and retail services. If another financial crisis strikes again, retail services need to be protected ahead of other investment services not fundamental to the UK economy. The second is the impact the Libor scandal had on setting new regulations and how senior management within banks can be held accountable for their actions through legislative and managerial reforms, as suggested through the UK government

[10] Parliamentary Commission on Banking Standards (n 8) 71.
[11] FSBRA, s 142E.

and, more specifically, the Wheatley Report.[12] With a specific focus on the UK, the suggestions of both the Independent Commission on Banking (**'ICB'**) and PCBS provide a solid foundation on which to determine ways in which accountability measures can be improved. Both the ICB and PCBS aim to propose ways to promote trust in the banking sector in a number of ways, including enhancing individual responsibly, holding banks accountable for the safety and soundness of its standards, creating better functioning, reinforcing responsibilities of regulators while promoting new powers, and specifying the responsibilities of the Government and Parliament.[13] These topics will collectively contribute to analysing how the UK government and regulatory bodies are dealing with risky banking practices and examine how new UK accountability measures are being promoted to limit any potential conflict or reduce the effect of future crises occurring.

## II. Structural Reform of Banking

### A. Introduction

After the failure of the Northern Rock Bank in 2007, financial regulatory authorities re-examined how banking groups operate and what changes were needed to reduce the exposure of consumers and taxpayers to risk. The exposure to risk created by banking groups that has been placed on a number of different retail services, such as individual mortgages and small medium sized enterprises (**'SMEs'**), limited how the government could respond to banking groups and the subsequent bail outs made by virtue of UK taxpayers. Not providing bail outs to reckless banking groups would have a disastrous effect on the UK economy, so bankers lacked any desire to limit the investment risks being taken because, from their perspective, the positives outweighed the consequences which were severely limited by 'too big to fail' notion. The government is forced into the position to fund a bail out and banking groups took advantage of this, which triggered the moral hazard argument. How can the government effectively protect taxpayers while also ensuring banking groups do not cause severe damage to the economy?

[12] HM Treasury, 'The Wheatley review of Libor: Final Report' (The Wheatley Review, September 2012) ‹www.gov.uk/government/uploads/system/uploads/attachment_data/file/191762/wheatley_review_libor_finalreport_280912.pdf› accessed 10 April 2015.
[13] Parliamentary Commission on Banking Standards, *Changing Banking for Good* (2013-14, HC 175-I) 8.

The Independent Commission of Banking (**'Vickers Commission'**), established by the UK government, sought to change how banking groups operate and create financial and economic stability. The Vickers Commission, chaired by Sir John Vickers, aimed to introduce practices to isolate core services, such as retail banking, in order to absolve the widespread effects of risky speculative investment activities. This concept has been termed 'ring-fencing'. This is not a concept that can be concretely defined but the Vickers Commission's primary intention was to find a way to isolate and protect retail services within the protected 'ring' and 'fence out' riskier services so as to afford retail services protection in the event of another financial crisis, thereby minimising government funded bail outs. Rather than the full separation of banking groups, Vickers' proposals focused on the ring-fencing of British retail banks, and concluded that:

> 'Structural reform, in sharp form, would end universal banking and require retail banking and wholesale and investment banking to be carried out by separate banks. This would aim to isolate retail banking services and taxpayers from the risks of global wholesale and investment banking'.[14]

There has been significant debate about whether full structural separation would be more suitable than ring fencing and doubts have been cast over the ability of ring-fencing to prevent a systemic failure within banking groups. There also remains the question of whether there is sufficient disincentive for banks to separate services within their groups. The Vickers Commission was successful in introducing ring-fencing proposals but the Libor scandal, which will be discussed in greater detail in Chapter 3, continued to shed light on the weaknesses within the finance industry. It was not until the suggestions of the PCBS in 2012 that brought forward new legislation to offer concrete disincentives for those financial groups refusing to comply with the ring-fencing system.

## B. Vickers Commission

The recommendations suggested by the Vickers Report are based on three principal aims: create a more stable and competitive basis for UK banking for the longer term,

[14] Timothy Edmonds, *The Independent Commission on Banking: The Vickers Report* (30 December 2013, HC) 3.

generate greater resilience against future financial crises, removing risks from banks to public finances, and encourage competition among banks to deliver the services required by well-informed customers.[15] The Vickers Commission sought to make banks 'more resilient to shocks and more resolvable in the event of a failure, and reducing the severity of future financial crises'.[16] The Commission acknowledged that some risk of failure should be tolerated but protection of core services should be provided for individuals. To make banks safer, two suggestions were made: increase capital requirements so as to reinforce banking sector's ability to withstand losses and reform the banking structure through the introduction of ring-fencing proposals. These two suggestions will now be discussed in more detail

A full structural reform of banking would eliminate universal banking and require wholesale and investment services to be carried out by separate banks. This was viewed by the Commission as too risky; instead, the implementation of a ring-fencing system - the middle ground between universal banking and structural separation - was suggested. The Commission believed that ring-fencing would allow the protection needed for individuals, taxpayers, and SMEs without a complete overhaul of the banking sector, which would have pose more economic risk than stability.[17] For the ring-fence to be effective, the majority of commercial banking functions could be placed in the ring-fence, as could some wholesale lending functions, but riskier wholesale and investment services would need to be isolated. Having decided on implementation of a ring-fence, two questions remained: what should be the 'height' of the ring-fence and where should it be 'located'. The height of the fence would determine the degree of separation between ring-fenced banks and the investment banks within the same corporate group.[18] The location of the fence would determine which activities must take place within the ring-fence, and those which must remain outside of it.[19] There has been controversy regarding whether ring-fencing is enough to insulate core services, such as retail deposits, against the risky

[15] ibid 5.
[16] Legislative Comment, 'Parliamentary Commission on Banking Standards (PCBS), banking reform: a new structure for stability and growth and the impact assessment were published alongside the Bill' [2013] 34(5) Company Lawyer 159.
[17] Independent Commission on Banking, *Final Report Recommendations* (September 2011) 10.
[18] ibid 62.
[19] ibid 36.

nature of investment services. Some political criticisms question whether confidence can be restored in the banking sector and whether banks would be easier to police and regulate if they are fully separated. Vickers dealt with these criticisms by recognising that a balance needed to be drawn between the old system and full separation.

Prior to the financial crisis, poor risk management in the UK was a significant issue and, in order to fund rapid growth, banks used excessive borrowing methods. Lloyds Banking Group uncovered three similarities between banks with poor risk management cultures: liquidity risk and a maturity mismatch between assets and liabilities, credit risk exposed through the rapid growth in lending, and market risk with the rapid growth of proprietary trading business.[20] A key aim of the Vickers Commission was to instil new capital requirements on banking groups in order to make them more resilient and capable of sustaining themselves, should another crisis threaten the industry. It was proposed that increased capital requirements should be put into place to decrease the banks' taxpayer support, and to strengthen the financial institutions' resilience.

Banks have too heavily relied upon government guarantees and taxpayers' money to fund excessive risk taking and there is a need to reduce the moral hazard that has resulted from widespread support to the financial system.[21] In order to deal with moral hazard issues, the Vickers Commission sought to increase the loss-absorbing capacity of banks and require them to sustain more equity in order to deal with the types of losses that had previously been dealt with by government guarantees.[22] The financial crisis revealed banks in the UK were severely undercapitalised and small declines in assets threatened insolvency[23] - banks had not properly protected themselves against the risks they were taking and had instead relied on government funded bail outs. Without proper mechanisms in place to limit damage to retail services, banks were classed as 'too big to

[20] Lloyds Banking Group, 'Parliamentary Commission on Banking Standards: Written Submission' (Lloyds Banking Group 2012) ‹www.lloydsbankinggroup.com/globalassets/documents/media/press-releases/lloyds-banking-group/2012/parliamentarycommission.pdf› accessed 23 December 2015, 6.
[21] Franklin Allen, 'Moral Hazard and Government Guarantees in the Banking Industry' [2015] JFR 1, 31.
[22] Independent Commission on Banking (n 17) para 4.102.
[23] ibid, paras 4.1 – 4.3.

fail', a reputation that they took advantage of. Government guarantees can be effective but they are also capable of tempting financial institutions into taking excessive risk thus creating a challenge for the government in its attempts to effectively manage banking groups.[24] If crises are not effectively prepared for, even by government securities, then this can provide a greater risk. Both the government and Parliament, through legislative proposals and guarantees, need to work with banking groups to develop a mutual strategy to limit the risk threatening core services vital to the functioning of the UK. By ring-fencing activities essential to the functioning of the UK and retail clients, banks will have to rely less on these guarantees of funding on services other than retail deposits and other core services.

There are differing views on the suitability of ring-fencing versus full structural separation and these arguments will be considered along with the current legislation introduced under Part 9B of the FSMA. It has been clear that accountability is difficult to achieve when regulators, such as the Financial Conduct Authority (**'FCA'**) and PRA, find banks increasingly difficult to manage and the only way to reform the industry involves a high risk to consumers and taxpayers. Past governments have had their hands tied as to what they could do to punish those responsible for putting the economy at such a deficit but reformation of practices and structure is a step in the right direction to begin holding abusers accountable for their actions, without posing too high a risk to the economy. The Vickers Report was vague about the mechanics of ring-fencing, and was significantly lacking detail in regard to how it should be maintained and properly regulated.[25] The initial proposals were eventually altered and strengthened by the legislative measures in the FSBRA (or **'the 2013 Act'**) and the suggestions made by the Parliamentary Commission on Banking.

[24] Allen (n 21) 32.
[25] Alastair Hudson, 'Banking Regulation and the Ring-fence' (2013) 107(6) Compliance Officer Bulletin 1.

## C. Banking Reform Act 2013

In 2012, the government published the *Banking Reform: Delivering Stability and Supporting a Sustainable Economy*[26], reinforcing their commitment to implementing the Vickers' proposals for ring-fencing by bringing forward the Banking Reform Bill.[27] The 2013 Act was introduced by Parliament as a way of codifying the ring-fencing proposals recommended by the Vickers Commission. The 2013 Act assigns the responsibility of oversight and compliance of regulated financial service bodies to the FCA and PRA. Section 4 of the 2013 Act fulfils the aims of the Vickers Commission by adding Part 9B to the FSMA, which establishes the ring-fencing proposals that featured in the Report, codifying the responsibilities of banks and isolating core and prohibited services under the corresponding Act. Part 9B also includes provisions for regulatory bodies and their role in reviewing and possibly restructuring ring-fenced bodies. The 2013 Act includes a new section[28] dedicated to the criminal offences attached to the conduct of persons working in the financial services sector, providing regulators with new power to criminally prosecute individuals involved in the failure of an institution, something which the prosecutions under the Libor scandal lacked.[29] With only prospective authority, section 36 cannot implicate the actors responsible for the Libor scandal but it ought to be praised as a concrete demonstration of the government's commitment to combating financial crime.

The 2013 Act promotes four principle strategies: amend the powers and duties of regulatory bodies, create a ring-fence, prohibit excluded activities, and create powers capable of regulating the ring-fence.[30] The important powers exercised by adding Part 9B through the 2013 Act consolidate the aims proposed by the Vickers Commission and bring an increased amount of clarity to both the roles of regulators and banks themselves. The Vickers Commission were purposely vague as to what constitutes a 'ring-fence' but

[26] HM Treasury, *Banking Reform: Delivering stability and supporting a sustainable economy* (White Paper, Cm 8356, 2012).
[27] Alan Bainbridge, 'Legislative Comment: Banking Reform Act 2013' (2014) 114(3) Compliance Officer Bulletin 1.
[28] FSBRA, s 36.
[29] Steven Francis, 'Financial Crime Update' (2015) 123(2) Compliance Officer Bulletin 1.
[30] Hudson (n 25) 8.

section 142A of the FSMA clarifies the meaning of the term. 'Ring-fencing' is now defined as a UK institution which carries on one or more core activities[31] as defined in section 142B of the FSMA.

The 2013 Act also distinguishes between how core services and excluded services will be defined and separated. Section 142B and 142C defined 'core activities and services', stating that the aims of such services are to secure a degree of protection for depositors and promote the continuity of the regulated activity of accepting deposits.[32] 'Excluded services' are less appropriately defined but the 2013 Act suggests that they include principal investment activities that are not regulated either in the UK or elsewhere[33] unless authorised by discretion of the UK Treasury. Most importantly, the 2013 Act sets out the responsibilities for regulatory bodies, most of which being undertaken by the PRA, in regards to prohibitions, reviews of ring-fencing rules, and restructuring efforts.[34] The legislative measures set through Part 9B encourage more morally correct conduct from banks and better security measures to be put in place but there remains scope for improvements to be made once ring-fencing measures are fully implemented before 2019. Under section 142H, the banking group has the authority to decide itself how to organise their business in order to meet regulatory obligations and identify their own arrangements to ensure compliance.[35] This is a positive provision because it imposes less pressure on banking groups to conform to immediate standards placed upon them and offers more flexibility, ensuring that there is no interference with on-going activities. Ring-fencing was always going to be an expensive change but one that was necessary to limit the damage and functioning of financial services in the UK.

The 2013 Act included a new offence for senior managers employed by regulated bodies who conduct business, whether knowingly or recklessly, which causes a financial

[31] FSBRA, s 142A.
[32] FSBRA, s 142A(4).
[33] FSBRA, s 142D(5).
[34] FSBRA, s 142K-L.
[35] Hudson (n 25) 11.

institution to fail. Section 36[36] of this Act provides that if a senior manager is aware of the risk, or should reasonably be expected to understand the risks involved with the decision, that causes the failure of the group institution, that individual should face up to 12 months imprisonment. Does this increased accountability measure significantly increase the pressure on senior managers?

To fall under this offence, a senior manager has to produce a serious failure of his assigned duties, for which the threshold is set very high. This offence only applies when banks have become insolvent as a result of the conduct of its employees thus providing a narrow scope for prosecution.[37] Section 37[38] elaborates on the scope of section 36 by narrowing the offence to acts that have resulted in insolvency, including, although not exhaustively, bankruptcy, liquidation, and administration. Although the scope of prosecution, these sections extend the ability to prosecute individuals who risk the security of the financial services industry. This is unquestionably an offence that would have been valuable during the Libor investigations and shows the progressive commitment of Parliament and regulators.

The 2013 Act sought to influence the implementation of ring-fencing by instilling hard law capable of holding those threatening the stability of the financial sector and the economy to account. The Libor crisis of 2012 exposed the major faults in the efforts made by the Independent Commission on Banking; the lack of clarity, hard law, and conformity saw major issues exposed in the implementation efforts and the PCBS was tasked with a review of this system.

[36] FSBRA s 36.
[37] Nicholas Ryder, 'The good, the bad and the ugly' [2014] CL 221.
[38] FSBRA, s 37.

## D. Parliamentary Commission on Banking Standards

After the Libor crisis in 2012, Parliament established the PCBS to influence real change in the banking sector and the enforcement of ring-fencing standards. The government published a White Paper titled 'Sound Banking: Delivering Reform'[39], and it was this paper that the PCBS considered during their scrutiny of pre-legislative steps taken after Libor in order to discover what changes needed to be made to secure public confidence in the banking system.[40] The PCBS viewed the ring-fence as:

> '... an attempt to secure some of the benefits of structural separation while maintaining some of the benefits of synergy and diversification held to exist in organisations undertaking both retail and investment banking operations'.[41]

The PCBS aimed to reconsider Vickers' structural reforms of UK banking in their report entitled 'Changing Banking for Good'[42] and stated that, without greater legislative proposals to 'electrify' the ring-fence, and create serious disincentives for those unwilling to comply with proposals, ring-fencing would surely fail. The PRA has inherited most of the now defunct FSA's responsibilities with the focus on the strength and regulation of the ring-fenced bodies. Through the 2013 Act, banks will be given serious disincentives to test the limits of the ring-fence.

The Libor scandal only confirmed that banks would do anything to undermine ring fencing, and exploit any weaknesses in the system. If the regulators, PRA or FCA, feel the conduct of the bank has not met ring-fence standards, they can, with the Treasury's approval, require the bank to fully separate from its group, at a financial detriment to themselves. This is the biggest change since the Vickers report which ensures that banks are complying with the standards being set by regulatory bodies.

[39] HM Treasury, *Sound Banking: Delivering Reform* (White Paper, Cm 8453, 2012).
[40] Bainbridge (n 27).
[41] Parliamentary Commission on Banking Standards, *Changing Banking Standards for Good: First Report* (2013-14, HC 175-II) 27.
[42] ibid.

Part 9B of the 2013 Act sets disciplinary and compliance measures to those bodies regulated by the FCA or PRA. The PCBS appreciates that the measures set through statute are not exhaustive, and section 142J requires that the PRA, or FCA if specified, must review ring-fenced bodies and submit this review to the Treasury for observation, which will then be laid before Parliament. The 2013 Act is an important piece of legislation to ensure compliance and to hold those banks attempting to undermine the ring-fence accountable. In previous reports, like the report conducted by the ICB, there was a noted failure to take into consideration the cultural impact of banks. More legislation was required to restore public confidence and increase banking standards.

The measures that have been put in place to safeguard the UK economy from another economic crisis have not received positive reactions from banking and corporate groups. A senior manager at Credit Suisse accused the Chancellor of the Exchequer, George Osborne, of '... playing politics with the economy',[43] and that this step in banking not only creates uncertainty but increases costs for banks and corporations, making the UK less competitive than the rest of Europe.

The effects of ring-fencing will be an evolution for the industry but isolating core services and increasing the capital requirements is not proven to create uncertainty. However, allowing banking groups to recklessly invest and put the UK economy at risk has proven to have disastrous effects, as exemplified by the 2008 financial crisis and Libor scandal. What ring-fencing will do is increase much needed accountability in the finance sector and force investors to reconsider taking financial risks without having the taxpayers' safety net to fall back, should their investments fail. George Osborne had previously rejected formal ring-fencing but, after the PCBS' suggestions, he accepts these proposals, including the 'electrification' requirement, and stated in relation to these proposals that:

> 'My message to the banks is clear. If a bank flouts the rules, the regulator and the Treasury will have the power to break it up—full separation not just a

[43] Jeremy Hill and Edite Ligere 'UK: Financial Services- Financial Services (Banking reform) Bill – expect the unexpected' (2013) 28(4) Journal of International Banking Law and Regulation 47.

> ring-fence. Banks found ways to overcome and get around the rules. Greed overcame good governance. We could see that again, so we are going to arm ourselves in advance. The system is not working for consumers, so we will change it. No more rewards for failure. No more "too big to fail". No more taxpayers forking out for the mistakes of others. The same rules for the banking business as any other business in a free market. Why is it that big banks can move their money around instantly but when small business wants to make a payment is takes days? There are no incentives on the big banks to deliver new and better services for users. We will make sure that new players in the market can access these systems in a fair and transparent way'.[44]

This previous scepticism stretched beyond the views of politicians to select figures in both the corporate and banking sectors who feared the possibility of a negative blowback. There is an urgent need to strike the right balance between regulation and accountability whilst retaining the competitiveness of SMEs and protecting the interests of taxpayers.

There have been concerns about higher costs to those SMEs with deposits in retail banks as larger investment banks are disinterested in SMEs, meaning that such SMEs can find themselves operating in a restricted banking environment.[45] Having to operate their activities in two separate banks could increase the costs for corporate bodies and add to increase operation costs. An additional argument is that, with higher operation costs for banks that have to separate their activities and ring-fence core services, these costs could trickle down as higher fees for individuals and SMEs.[46]

The legislation and ring-fencing is still in its early stages and there is room for changes to be made to the structure if any failings do become apparent, a sentiment acknowledged by the UK government in their mid-term review where they stated, 'We will introduce

[44] ibid 48.
[45] Andrew Haynes, 'Banking Reform and the Corporate Sector' (2015) 36(4) Company Law 97.
[46] ibid.

any necessary amendments to legislation arising out of the PCBS, including any necessary new criminal offences and associated penalties'.[47] It is widely recognised that amendments will certainly need to be made. The legislation is adaptable but financial groups need to realise that they are no longer a product of their own making. Too many banks have taken advantage of weak laws, as well as disorganised regulatory bodies, but such leniency will no longer be tolerated. Regulatory bodies must now be more diligent in their compliance processes.

## E. Conclusion

After the final recommendation set by the PCBS in regards to ring-fencing, Chief Executive Andrew Jenkins of Barclays Bank backed confidence in the proposals and, contrary to prior opinions expressed by bankers, stated that he did not expect ring-fencing, and the separation of banking operations would be of detrimental impact to the UK economy.[48] Jenkins further criticised past banking activity and stated to the PCBS that 'the level of trading was clearly taken beyond the level of excess. It became socially destructive'.[49]

Support from bankers will make all the difference in the success of ring-fencing measures. On 5th January 2015, any banks holding over £25 million in deposits from individuals and SMEs[50] submitted plans to meet ring-fencing requirements to meet the restructuring standards due to take effect from 1 January 2019. Omar Ali, head of banking and capital markets at EY, has stated that '... unravelling decades of infrastructure, systems, processes and governance is complex, time-consuming and expensive. Some are

[47] HM Government, 'The Coalition: together in the national interest – Mid-Term Review' (HM Government 2013) ‹www.gov.uk/government/uploads/system/uploads/attachment_data/file/229486/HMG_MidTermReview.pdf› accessed 29 April 2015.
[48] 'Barclays boss 'embracing' ring-fence' *BBC* (London, 5 November 2012) ‹www.bbc.co.uk/news/business-20210684› accessed 12 May 2015.
[49] ibid.
[50] James Titcomb, 'Lenders to respond to investment bank ring-fence plans' *The Telegraph* (London, 3 January 2015) ‹www.telegraph.co.uk/finance/newsbysector/banksandfinance/11322365/Banks-respond-to-ring-fence-plans.html› accessed 12 May 2015.

likely to need waivers to meet the timetable'.[51] Implementation as such may not be as straightforward as anticipated by both regulators and banking groups. In a written submission to the PCBS from Lloyds Banking Group[52], ring-fencing is acknowledged to have the potential to help rebuild consumer trust if properly exercised.

Good regulation can provide the framework for stabilisation and improved trust in the banking sector, but regulators should only be part of the solution. Banks should rely on their own practices to regain both the public's and regulators' trust. This chapter has looked at the inherent issues with retail and investment services being tied so closely together and the moral hazard provided to taxpayers and the government. Hard law is necessary in order to hold banking groups looking to disregard ring-fencing principles accountable for non-compliance, which is absolutely crucial to create stability in the financial sector. The costs to banking groups are extravagant, an estimated £1.8-£3 billion a year[53] but they are necessary to create stability and regain consumer trust in the markets. Ring-fencing plans are still on-going and full implementation will not been seen before 2019. The Libor crisis has further acknowledged the need to strengthen banking structures if banking groups are to ever truly be held accountable for making wide-scale errors.

## III. The Libor Scandal

In order to truly grasp the importance of stricter laws and regulations within the banking sector, the Libor scandal must be examined in great detail. This example of the passive nature and lack of proactive government intervention exemplifies the scope and the actions banking groups were able to make, and the direct effect it had on the UK and global economy.

[51] Martin Arnold, 'Lloyds Banking Group seeks key ringfencing rule exemption' *Financial Times* (London, 5 January 2015) ‹www.ft.com/cms/s/43c18cdc-9502-11e4-8fc1-00144feabdc0,Authorised=false.html?_i_location=http%3A%2F%2Fwww.ft.com%2Fcms%2Fs%2F0%2F43c18cdc-9502-11e4-8fc1-00144feabdc0.html%3Fsiteedition%3Duk&siteedition=uk&_i_referer=#axzz3aVlLCPD8› accessed 12 May 2015.
[52] Lloyds Banking Group (n 20) accessed 23 December 2015.
[53] Arnold (n 51).

## A. How the Libor scandal manifested

Obsessions with financial success, drivers for promotion and bonuses, and regulator reliance on the market are all responsible factors in the manifestation of the financial crisis. During the implementation of ring-fencing proposals by regulatory bodies and banking groups alike, the Libor scandal rocked the financial sector, and threatened the progress made by the UK banking industry. The Libor, according to the definition published by the industry group, BBA is: 'The rate at which an individual contributor panel bank could borrow funds, were it to do so by asking for and then accepting interbank offers in reasonable market size just prior to 11:00 London time.'[54] The Libor was calculated by leading London banks submitting figures to the BBA based on the estimated borrowing rate from other banks. These rates were then put through the BBA to generate an average borrowing rate, which is the Libor. The Libor is calculated for 10 currencies and 15 borrowing periods, and affects a number of different instruments such as derivatives, loans, mortgages, and student loan rates.[55]

Banks, the main offenders being Barclays and RBS, are responsible for two types of manipulation in both the economic upswing and downswing to benefit traders ultimately falsifying the markets. The first events of rate manipulation occurred between 2005 and 2007 during the economic upswing. Banks manipulated rates to make profits on derivatives attached to the base rate. These rates would be coordinated with other banks, with traders often asking employees to provide figures which benefitted traders rather than the actual rates. The New York Times gained insight into the issue and, in one example of rate fixing, a senior trader in New York was quoted in 2006 as saying, 'Hi Guys, We got a big position in 3m libor for the next 3 days. Can we please keep the libor fixing at 5.39 for the next few days. It would really help. We do not want it to fix any higher than that. Tks a lot' (sic).[56]

[54] Financial Conduct Authority, 'Final Notice: Barclays Bank' (Financial Conduct Authority, 27 June 2012) ‹www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf› accessed 24 April 2015, 6.
[55] Council on Foreign Affairs, 'Understanding the Libor Scandal' (CFR, 5 December 2013) ‹www.cfr.org/united-kingdom/understanding-libor-scandal/p28729› accessed 17 April 2015.
[56] NY Times, 'Behind the Libor Scandal' (The New York Times, 2012) ‹www.nytimes.com/interactive/2012/07/10/business/dealbook/behind-the-libor-scandal.html?_r=1&› accessed 13 April 2015.

According to the FCA, sixteen individuals at Lloyds alone, including seven managers, were found to be involved in various types on rate manipulation, and these firms were found to be in breach of FCA principles in identifying and managing risk in relation to the Libor benchmarks[57]. This is just one of many examples of the pressured and deliberate falsification of rates from key senior traders in the international market.

In the peak of the financial crisis and economic downswing between 2007 and 2008, Barclays submitted artificially low rates telling Libor calculators they could borrow money at inexpensive rates to make banks appear less risky and insulate themselves.[58] They provided a false degree of stability during an unstable period giving the illusion that banks could borrow money more cheaply and appear healthier than they actually were. For traders, greed was an evident motivation for their actions, but what benefit could be held for those submitters at risk for the benchmark manipulation? According to the FSA report on Barclays,[59] senior managers were instructed by less senior managers to lower the Libor to avoid negative media comment, but it would seem the traders risked the backlash because the benefits outweighed the consequence. Reports stated that by rigging the rate by just one basis point would have made over $2 million US, in just one trade so financial gain was a clear contributor[60] as well as the benefit to a bank's trading position.[61] There had also been alleged collusion between the Bank of England and Barclays concerning threats of the bank filing for insolvency causing damage to the economy.[62] A cause for concern beyond the banks' zeal for benchmark fixing was the blackmail observable within the regulatory bodies meant to prevent scandals such as Libor. Governmental investigations were launched in 2012 to expose the rate-fixing and

[57] Financial Conduct Authority, 'Lloyds Banking Group fined £105m for serious LIBOR and other benchmark failings' (FCA, 28 July 2014) ‹www.fca.org.uk/news/lloyds-banking-group-fined-105m-libor-benchmark-failings› accessed 15 April 2015.
[58] Council on Foreign Affairs (n 55).
[59] Financial Conduct Authority (n 54).
[60] Simone Foxman, 'How Barclays Made Money on LIBOR Manipulation' *Business Insider* (New York, 10 July 2012) ‹www.businessinsider.com/how-barclays-made-money-on-libor-manipulation-2012-7?IR=T› accessed 23 December 2015.
[61] Council on Foreign Affairs (n 55).
[62] Sebastian Mallaby, 'The Libor Scandal: Three things to know' (Council on Foreign Affairs, 10 July 2012) ‹www.
cfr.org/international-finance/libor-scandal-three-things-know/p28687› accessed 12 April 2015.

hold the responsible banking groups accountable, penalising their actions through legal and administrative measures.

## B. Libor Investigations and Penalties

After rigorous investigations by international regulatory bodies in 2012, the effect of the mass manipulation of the Libor rate was exposed. Over sixteen banking groups, including Barclays and the RBS, were fined a total surpassing the $6 billion US by international regulators, such as the FSA in the UK and the Commodity Futures Trading Commission (**'CFTC'**) in the US. In February 2013, the RBS reached a settlement with the FSA and CFTC to pay fines of £87.5 million and $475 million respectively.[63]

International regulators found hundreds of attempts to manipulate Libor rates in four and a half years of investigations at RBS alone. The FSA announced during their investigation that the banks had made 219 inappropriate requests to remove or falsify Libor rate submissions.[64] Executives at the time were rightfully under pressure to resign, one notable departure being Bob Diamond, the former Chief Executive at Barclays. Although not directly implicated under the Libor scandal, the head of RBS' investment banking sector, John Hourican, also stepped down.[65] This scandal reinforced the views of regulators and politicians who feared that banks had become 'too big to fail' and were becoming, as result of the lack in proper accountability and management structures, increasingly difficult to manage.

Although fining banks for fraudulent behaviour is necessary, it is not enough to deter misconduct by traders and management. Although the fines agreed between regulators and, for example, RBS, may seem high they reportedly only account for less than 0.03 per

[63] The Economist, 'RBS and Libor: The wrong stuff' (*The Economist*, 2013) ‹www.economist.com/news/finance-and-economics/21571446-widening-scandal-threatens-suck-more-banks-and-ruin-more-careers-wrong› accessed 4 April 2015.
[64] Reuben Guttman, 'Are these Libor fines all fine?' (*The Lawyer*, 2013) ‹www.thelawyer.com/are-these-libor-fines-all-fine/3001106.article› accessed 3 April 2015.
[65] The Economist (n 63).

cent of RBS' assets.[66] The fines were financed by the reduction of bonuses but the question still remains as to whether these criminal traders, purposefully taking advantage of fraudulent rates, are able to keep the profit created from the trades made under the Libor fixing. Those who assumed roles as custodians within the financial system should be held fully accountable, not just given a slap on the wrist for greedily manipulating a system they are purportedly protecting.

In addition to the penalties imposed by regulatory bodies in the US and the UK in relation to the Libor scandal, the Serious Fraud Office (**'SFO'**) began criminal investigations into those individuals responsible for manipulating the benchmark in July 2012. As of the 28 October 2014, while working with the FCA and the US Department of Justice, the SFO has launched criminal proceedings against thirteen former employees at various banking groups for their role in the Libor scandal with intentions to defraud, with the first criminal conviction entered on 3 October 2014.[67] Although criminal proceedings have begun, there is much debate about the SFO's scope of authority to prosecute. Regulatory bodies are able to function more efficiently against banking groups as a whole, which has been witnessed by the penalties imposed, but they do not seem to have a lot of scope when in relation to individual employees. Criminal convictions are far more costly than regulatory investigations, and the cost to benefit ratio remains unclear.[68] The SFO are underfunded and may not have enough support as a government funded body to begin criminal investigations against the main offenders, and will have to pick and choose those most at fault for the manipulation. The Coalition government reduced funding to the SFO just a year before the first Libor prosecutions began, which questions the commitment of the government on tackling financial crime.[69] In light of the grand scale of the scandal, the combined efforts of both the regulatory bodies and the SFO may be the most effective way to handle the backlash of the Libor scandal. Regulatory bodies and prosecutors alike understand every individual involved cannot

[66] Guttman (n 64).
[67] Serious Fraud Office, 'LIBOR Investigation: further charge' (Serious Fraud Office, 28 October 2014) ‹www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/libor-investigation-further-charge-.aspx› accessed 3 May 2015.
[68] Richard Parlour, 'Bribery and Corruption – an international update' (2013) 34(7) Company Law 218.
[69] Ryder (n 37).

likely be held accountable for their role: the cost and timeliness of this alone would be an unsatisfactory option and not at all plausible. Banks and regulatory bodies now have the mutual role of creating a framework dedicated to tackling Bankers' greed and manipulation which is echoed in government funded reports and the proposed legislation and cornerstone of regulators codified intentions in the Financial Services Act 2012 (**'the 2012 Act'**).

Following the various investigations, the Council on Foreign Affairs' Sebastian Mallaby highlighted three key areas of focus from the scandal: the conflicts of interest between banks, the role of regulators, and the response to the scandal.[70] The Coalition government assured their position on financial crime and supported the SFO and regulatory bodies through their investigations of the banking groups involved in fraudulent behaviour. The responses, both immediate and developing through regulatory and statutory measures, are important from both international regulators and the changes initiated through the Wheatley review and how further accountability standards are suggested to be met by leading British banks through legislative measures.

## C. Administrative Reforms

In 2012, as a direct result of the Libor scandal, the UK Government established the Wheatley Review to investigate and monitor Libor, and decide whether reform or abandonment is more suitable. The review established that the best way forward would be to reform Libor rather than replace the benchmark, as any new benchmarks would pose a high risk of instability.[71] One of the steps recommended to redeem trust in the Libor was to transfer administration to the ICE Benchmark Association (**'ICEBA'**), which will be known as the ICE Libor regulated through the NYSE Euronext Rate Administration Limited.

[70] Mallaby (n 62).
[71] HM Treasury (n 12).

BBA Chief Executive Anthony Browne stated in 2012 that there is a need for greater regulatory oversight of Libor and tougher sanctions for those trying to manipulate it and that the ICEBA was better suited to manage these regulatory oversights and governance.[72] With the regulation and supervision of Libor assessed, the Review recommended that the 'acts of submitting to and administering Libor regulated activities will significantly enhance the FSA's ability to oversee these processes and take action in relation to any misconduct'.[73] The lack of regulatory control held by the BBA has been recognised and the new independent ICEBA appointed by the Hogg Tendering Advisory Committee will be responsible for the internal governance and oversight of rate compilation and distribution.[74] The Wheatley review recommended not only a new governing body, but also regulatory bodies like the FCA, to assist the ICEBA in ensuring that the conduct of the banks is honest and a scandal – like Libor – cannot reoccur. Transparency and fair, non-discriminatory access to the benchmark is essential for the new administrator, and these specific obligations, such as surveillance and scrutiny of submissions, have been codified in the ICE Libor overview containing the recommendations of the Wheatley Review's 10 point plan.[75] The regulatory goals of ICE Libor include bank participation in conjunction with national and international regulatory bodies. The regulation of Libor would be by statute and there would be a civil or criminal sanctions for non-compliance.

Procedural requirements have also been established to ensure the reduction of potential manipulation of published submissions by delaying the submissions by three months thereby ensuring credibility. There have been debates as to the usefulness of the three-

[72] British Bankers' Association, 'BBA to hand over administration of LIBOR to Intercontinental Exchange Benchmark Administration Ltd' (British Bankers Association, 2014) ‹www.bba.org.uk/news/press-releases/
bba-to-hand-over-administration-of-libor-to-intercontinental-exchange-benchmark-administration-ltd/#.
VTQC7FuxMmE› accessed 12 April 2015.
[73] HM Treasury (n 12).
[74] Hogg Tendering Committee for LIBOR, 'Press Notice: Hogg Tendering Advisory Committee announces that NYSE Euronext is to be the new LIBOR administrator' (GOV.UK, 9 July 2013) ‹www.gov.uk/government/
uploads/system/uploads/attachment_data/file/211330/Hogg_Tendering_Advisory_Committee.pdf› accessed 2 April 2015.
[75] ICE Libor, 'ICE benchmark administration limited – overview' (ICE, 20 October 2014) ‹www.theice.com/publicdocs/IBA_ICE_LIBOR_Overview.pdf› accessed 23 December 2015, 1.

month delay in submissions, with Michael Nwogugu questioning its meaningfulness.[76] Rather than a delay, a better solution may be to disclose rates at shorter intervals instead in order to prevent the influence panel members may have over the benchmarks, rather than longer stretches of submissions to reduce collusion throughout banks. Although this point is up for debate, no ideal solution could be implemented without the proper accountability measures being set into place, which is the prime aim of the Wheatley Commission's recommendations. The regulation of Libor will also be collaborated with international and European bodies to establish and promote principles for effective global benchmarks to reduce the likelihood of future benchmark manipulation, such as EURIBOR, as well as the compulsory participation of banking groups to promote regulatory aims. These recommendations have been implemented and consolidated by the UK Treasury in the Part 7 of the Financial Services Act 2012[77], repealing section 397 of the Financial Services and Markets Act 2000.[78]

The failure of the BBA in regards to Libor regulation has been exposed, and the new management of this benchmark through the clear goals of ICE Libor and the FCA seem to be an improvement, but there has not yet been a test to this system and new management systems are not enough to control the manipulation exposed from the Libor scandal. Dissolving Libor rather than salvaging it may pose greater systemic risks than moving managerial aspects to a more suitable body. It is impossible to foresee the outcome of this decision, but at a time of crisis as the banking bailouts have displayed, greater accountability measures for bodies posing a blatant disregard for policies form a more suitable approach rather than shaking up an already vulnerable market.

## D. Legal Reforms

Barclays' involvement in the Libor scandal may have resulted in the FSA issuing a fine to punish the fraudulent management of rates, but it also spearheaded a legislative reform in addition to the managerial reform of the UK banking sector. Prior to the Libor crisis,

[76] Nwogogo (n 7).
[77] Financial Services Act 2012, ss 89-91.
[78] Victoria Callaghan, 'The LIBOR scandal – the UK's legislative response' [2013] JIBLR 160.

the UK government had not done enough to insulate the UK from financial crime, even though the coalition government stated on their platform that they sought to do more to combat fraudulent behaviour.[79] The scope of criminal prosecutions for those responsible for the rate-fixing was lacklustre, with only a small number of senior managers stepping down from their roles within RBS and Barclays and thirteen facing criminal prosecutions for fraud.[80] As a direct result of the Libor scandal, key legislative changes were made altering the legal implications within the banking sector. The UK Parliament intended to create serious deterrents for a potential breakdown of the entire financial system, not simply individual parts, known effectively as reducing systemic risk to the economy.[81] Two fundamental changes were made in the Financial Services Act 2012: the abolition of the FSA to create the dual role of the FCA and the PRA, and the addition of Part 7 of the Act. Attempts are being made to limit financial fraud and hold those responsible to account.

The 2012 Act brought an important change to the regulatory structure of banking organisations. The 2012 Act abolished the FSA which was, at that time, the sole regulator for financial service firms. The FSA's responsibilities were ambiguous, and the integrated role with the HM Treasury and Bank of England, known as the tripartite system, was faulted for splitting responsibilities between three distinct bodies and lacking in collaborative efforts to take stock of accumulating risks in the banking sector, especially during the Libor scandal.[82] The Act supplied a more coherent overhaul, and dissolved the FSA to replace it with two cooperative bodies responsible for the conduct and regulation of the financial services industry to provide a clearer focus of regulatory energies. The FCA and PRA, known as the 'twin peaks', were tasked with specific aims codified in the 2012 Act. They were guided by separate core objectives and also mutual objectives, which were used to establish specific roles, something the tripartite system greatly lacked and

[79] HM Treasury, *A New Approach to Financial Regulation: Building A Stronger System* (Cm 8012, 2011) para 1.5.
[80] Serious Fraud Office (n 67).
[81] Systemic Risk Centre, 'Systemic Risk' ‹www.systemicrisk.ac.uk/systemic-risk› accessed 5 May 2015.
[82] Gerard Kelly, 'Without Fanfares: The UK's new financial regulators arrive' [2013] CIR 20.

attributed to their failure. The key to the twin peaks' success will be the close dialogue between both the PRA and FRA and the 2012 Act initiates this collaboration.

The FSA held financial crime as one of their core objectives, but it has since been removed from the 2012 Act as a core objective. This could be troublesome when dealing with events such as the Libor scandal. This issue has been defended by the inclusion of Part 7 of the 2012 Act, which created three new criminal offences in relation to financial crime. This part of the 2012 Act widens the scope of the overhauled s.397 of the FSMA, and includes the offences of: creating misleading statements under s.89; creating misleading impressions under s.90; and misleading statements etc. in relation to benchmarks. The FCA has the ability to hold financial services accountable for offences under this Act, and Part 7 allows more scope and reduces the burden of proof for regulatory bodies to prove that those responsible for the fraudulent behaviour acted dishonestly, or actually went through with the act. Giving the impression that fraudulent behaviour was anticipated would be enough under the 2012 Act to establish a criminal offence. This is an important step following the Libor scandal, and it allows the FCA more scope to protect the banking industry from systemic risk.

Although the 2012 Act does not have retrospective affect, it can eliminate future damage, which displays the commitment that has been greatly needed by the UK government in relation to targeting criminal activity within the financial services industry. Sections 89(1) and (2) of the 2012 Act essentially replicate the intentions of sections 397(1) and (2) of the FSMA, but section 90 creates a new offence while drawing from aspects from section 397(3). Section 90 makes prosecuting individuals for creating misleading impressions more effective, resulting in a greater chance of conviction. These new sections are better suited in conjunction with the powers of the FCA to combat financial crime and hold senior managers accountable for mass manipulation. While section 397 of the FSMA touched on it, the burden of proof for prosecution was higher. Under section 90, only an implication of a misleading representation is needed to convict.[83] A specific

[83] Callaghan (n 78).

section was introduced in relation to the Libor scandal under section 91 of the 2012 Act. Section 91 created a new offence relating to misleading statements or impressions when setting relevant benchmark. This followed from the recommendations made by the Wheatley Review and the lack of scope the FSA had to bring prosecutions against individuals involved in the Libor manipulation.[84] Although the FSA exercised its full civil powers to hold individuals and banking groups accountable, their criminal prosecution abilities were severely limited by its jurisdiction, and no individuals have become criminally prosecuted by the FSA. This new offence under section 90 will now offer the FSA a route to prosecute individuals for future offences of benchmark manipulation.

## E. Conclusion

Although the UK Government has spoken about implementing new legislation to give regulatory bodies such as the FCA more scope to prosecute those responsible for banking fraud, the legislation that has been passed does not have retrospective effect. In relation to Libor, regulatory bodies' hands are limited in what they can do. George Osborne MP's Mansion House speech encouraged the commitment to reviewing banking standards and maintaining trust in Libor by instilling new powers to regulatory authorities, and toughening criminal offences for market abuse in order to ensure the banking sector is fair and effective. In his concluding statement the Chancellor reiterated his position by stating, 'let me make this clear, so no one is in any doubt [,]... I am going to deal with abuses, tackle the unacceptable behaviour of the few, and ensure that markets are fair for the many who depend on them ... we're not going to wait for more scandals to hit - instead we are going to act now, and get ahead'.[85]

The Libor scandal exposed major flaws in accountability measures, and it has been appreciated within the government that more needs to be done to hold those responsible for manipulating the market. Part 7 of the Financial Services Act 2012 is a step in the right direction as far as market manipulation, and the powers that have been extended to the

[84] ibid.
[85] Ryder (n 37).

FCA through this legislation, but in order to really test their effectiveness, they need to be applied to real cases of manipulation at a scale as large as the Libor crisis provided. It is not enough for the government to enact new legislation; they need to have the conviction to go after large banking groups and their senior executives when they have acted illegally and to hold them accountable for the actions they take when they disregard fair market practices.

## IV. Conclusion: The future of accountability in the UK banking sector

In the years since the 2008 financial crisis, banks have rightfully been placed under immense pressure to change the way they observe their standards and handle risky investments. The new regulatory bodies formed after the breakdown of the FSA, FCA and PRA, are under strict guidance through the Financial Services Act 2012 to ensure financial institutions are properly conducting themselves. They are committed to changing processes to safeguard the UK economy and its consumers. The added scope of the 2012 Act allows for proper guidance and regulation of the financial industry, as well as providing methods to criminally prosecute fraudulent behaviour, which had been absent prior to the Libor scandal.

The failure and subsequent dissolution of the FSA formed a new complementary regulatory authority partnership between the FCA and PRA. Clear roles of the FSA, while working with the UK Treasury and Bank of England, were absent and allowed for financial services industries to escape liability and avoid punishment. The responsibilities of the FCA and PRA are clearly stated through both individual and mutual objectives contained in the Financial Services Act 2012 which is fundamental to guarantee that accountability in the banking sector is met in order to protect consumers and taxpayers from future crises.

As of January 2019, ring-fencing measures will be in full effect for any banking group looking to hold over £25 million in deposits for retail or SME customers, which will then

be protected inside the ring-fence and insulated from the risky investments that threatened the UK economy in 2008.[86] When ring-fencing proposals were in the early stages of implementation, banking groups were sceptical of the negative impact they could have on both borrowing costs and direct costs to retail customers. Banking groups will have to fund themselves to ensure their core retail deposits are isolated from investment services, something that was met with negativity.

The UK Treasury confirmed in July 2014, that ring-fencing implementations are estimated to cost between £1.8 billion - £3.9 billion a year, with an additional one time cost of between £500 million- £3 billion, invoking concern that these extra costs could be passed down to customers.[87]

On 5 January 2015, banking groups across the UK submitted their plans for ring-fencing, which are currently being reviewed by regulatory bodies. The Bank of England has said that these plans will:

> '... include provisional UK holding company and UK regulated entity balance sheets and profit and loss statements, enabling supervisors to assess the viability and sustainability of the entities and their level of going and gone-concern capitalisation'.[88]

Exact capital requirements to be confirmed at a later date by regulatory bodies. Some ring-fencing proposals have been met with some resistance. For example, Lloyds Banking Group is looking to have the requirement for separate Boards of Directors within the group waived. Lloyds Banking Group argues that the requirement should be waived because, after ring-fencing has been implemented in 2019, 90% of operations will be inside the new isolated entity so a separate Board of Directors to its parent group is an

[86] Jill Treanor, 'Deadline looms for major UK banks to submit ringfencing plans' *The Guardian* (London, 5 January 2015) ‹www.theguardian.com/business/2015/jan/05/banks-ringfencing-bank-of-england› accessed 10 May 2015.
[87] Arnold (n 51).
[88] Treanor (n 86).

unnecessary requirement and added expense.[89] Regulators alike appreciate some ring-fencing objectives will need to be amended, and will take a proportionate approach to implementation.

In a written submission to the PCBS in 2012, Lloyds Banking Group confirms support for ring-fencing measures, asserting that ring-fencing has the potential to help rebuild tarnished consumer trust through legislative measures and proper guidance. Investment and retail banking offer different business models. Investment banking is organised on a deal-by-deal basis, and is less secure in its make-up, while retail and commercial banking has been constructed through processes and procedures. Poor risk management led to extensive risks and fraudulent behaviour becoming prevalent in the UK banking sector, and banks with weak risk management cultures were exposed, especially following the Libor scandal.

Lloyds Banking Group published a press release in July 2014 regarding settlements with UK and US federal authorities, in relation to the Libor scandal. In this release, Lloyds publicly condemned the actions of the individuals responsible for their conduct and role in the manipulation. They confirmed in this release that individual employees involved in the scandal had, '... either left the Group, been suspended or are subject to disciplinary hearings'.[90] This is a positive move within the banking sector and ensures that unlawful actions are met with swift response, from not only regulators, but banking groups themselves.

Both banking groups and regulatory bodies need to be fully committed to a change in banking culture, and the measures being taken post-2008 financial crisis have been essential to this progress. Separating banking groups and distinguishing between

[89] Arnold (n 51).
[90] Lloyds Banking Group, 'Settlements reached on legacy Libor and BBA repo rate issues' (Lloyds Banking Group, 28 July 2014) ‹www.lloydsbankinggroup.com/Media/Press-Releases/2014/lloyds-banking-group/settlements-reached-on-legacy-libor-and-bba-repo-rate-issues/› accessed 23 December 2015.

investment and retail services will make these groups easier for regulatory bodies to manage, and prosecute if necessary. It is difficult to determine the success of ring-fencing without witnessing the effects in their entirety but joint commitment throughout the financial sector will be the difference in success versus failure. Regulatory bodies have a difficult task ahead. Banking groups throughout history have proven difficult to manage but the collaborative effort and resources split between the FCA and PRA will be essential to ensuring accountability and reducing the likelihood of another catastrophic financial crisis requiring the support of UK taxpayers.

# An International Definition of Terrorism: A Worthy Pursuit

*Joe Irwin*

## Abstract

*It has long been suggested that any attempts to comprehensively define 'terrorism' will be unsuccessful and will not, in any event, add to our understanding of the term. This article refutes that position. It focuses firstly on the reasons why an internationally agreed definition is necessary, including the increased legal significance of the term as well as its continued abuse by states. The article then examines some of the main problems inherent in defining what many consider to be a subjective term. It concludes with an analysis of how these issues are reflected in the international debates of the United Nations.*

## I. Introduction

Terrorism is a highly-contested concept which does not currently have an internationally agreed definition. To that extent, in 1987, Walter Laqueur wrote that '[disputes] about a detailed, comprehensive definition of terrorism will continue for a long time and will make no noticeable contribution towards the understanding of terrorism.'[1]

Laqueur's statement suggests two things. The first of which alludes to the difficulty of reaching consensus on the meaning of terrorism. Laqueur suggests that any attempt to do so will not be successful. Secondly, his statement suggests that efforts to reach an agreed definition will not, in any case, improve our understanding of the term. These are

[1] Walter Laqueur, *The Age of Terrorism* (Little Brown, 1987) 72.

the issues that the author would primarily address in this essay. The essay will then move on to examine the traditional problems inherent in definition, how these may be overcome, and how this is reflected in the international debates of the United Nations ('UN').

## II. Reasons to Pursue a Definition

There are several interlinked reasons why an international definition would add clarity to the term 'terrorism'.

### A. Security Council Resolution 1373

In 1997, Higgins posited terrorism as a term 'without legal significance' in claiming that it is 'merely a convenient way of alluding to activities … widely disapproved of'.[2] Yet, this can no longer be the case. Since the terrorist attack of 11 September 2001, there has been a proliferation of legal responses to terrorism. Most significantly, the UN Security Council passed Resolution 1373.[3] This resolution compels states to take extensive measures to combat terrorism. Critically, however, the resolution did not include a definition of terrorism – it '[failed] to delineate the very object of regulation'.[4] Consequently, it allows states to define the term unilaterally. Laqueur therefore states that the resolution does not require measures to be taken against terrorism itself, but against 'different terrorisms'.[5] A number of international duties now hinge on the term and it is, as Saul claims, no longer 'merely of theoretical interest'.[6] The lack of 'precision, objectivity and certainty'[7] that surrounds the term therefore compels the pursuit of an international definition. Now that the term has serious legal consequences, it is imperative to understand what it actually means.

[2] Rosalyn Higgins, 'The general international law of terrorism' in Rosalyn Higgins and Maurice Flory (eds), *Terrorism and International Law* (Routledge 1997) 28.
[3] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.
[4] Daniel Moeckli, 'Book Review: Defining Terrorism in International Law' (2007) Human Rights Law Review 643, 643.
[5] Walter Laqueur, *The New Terrorism* (Phoenix Press 2001) 79.
[6] Ben Saul, *Defining Terrorism in International Law* (OUP 2008) 48.
[7] ibid 4.

## B. State Abuse

In the absence of an international definition of terrorism, it is left to states to 'unilaterally and subjectively determine what constitutes terrorist activity'.[8] They do this without any 'legal boundaries set by the international community'.[9] This has led to states abusing the concept. Jackson notes that states favour definitions that 'tend towards over-generalisation' or 'even ambiguity' to allow themselves 'maximum flexibility in applying the term'.[10] This enables them to brand their political opponents as terrorists to delegitimise or repress them. The United Kingdom is an example of a state whose definition is widely considered to be overly broad.[11] It is thought to be wide enough to encompass many acts not generally considered as constituting terrorism, for example lawful protest.[12] Therefore, Saul right notes that some national definitions are 'so broad as to be indistinguishable from other forms of political violence'.[13] This highlights the potential for abuse and the need for an international definition.

The problem of state abuse is emphasised by the fact that terrorism is often a 'pre-text for disregard for human rights'.[14] Jackson emphatically claims that the label of terrorism transforms 'human beings – who are also husbands, sons, brothers, friends – … into a hateful and loathsome 'other' who can be … abused without remorse'.[15] This is exemplified by the conditions in Guantanamo Bay where suspected terrorists were deprived of the chance to challenge the legality of their detention for over two years.[16] Irrespective of the question of whether these rights violations go too far, it is clear that there are serious consequences attached to labelling someone a terrorist. Moeckli argues that instead of defining terrorism, it would be 'sufficient to simply insist that states comply with their human rights obligations' when fighting terrorism.[17] However, it is

[8] ibid 5.
[9] ibid 49.
[10] Richard Jackson and others, *Terrorism: A Critical Introduction* (Palgrave Macmillan 2011) 101.
[11] *R v Gul* [2013] UKSC 64, [62]-[64].
[12] *Gillan and Quinton v UK* (2010) 50 EHHR 45.
[13] Saul (n 6) 190.
[14] Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (OUP 2005) 1.
[15] Richard Jackson, *Writing the War on Terrorism: Language, Politics and Counter-Terrorism* (Manchester University Press 2005) 60.
[16] Helen Duffy, *The 'War on Terror' and the Framework of International Law* (CUP 2015) 718.
[17] Moeckli (n 4) 647.

naïve to expect this of states who are faced with a perceived terrorist threat. Moeckli's suggestion would also not solve the issue of states abusing the label to stigmatise their opponents. Considering that terrorism is currently 'an ambiguous and manipulated synonym for evil [that has justified] … all manner of repressive responses',[18] a unified definition should therefore still be sought. Whilst an international definition is unlikely to prevent all misuses of the term, it would give it a clearer meaning and would hopefully 'blunt some of [its] more excessive [uses]'. [19]

## C. Terrorism Governed by Sectoral Treaties

In the absence of a generic definition, international terrorism is governed by twelve sector-specific conventions. These, for example the 1979 Hostages Convention[20] and the 2005 Nuclear Terrorism Convention,[21] require states to prohibit much of the physical conduct that is widely considered terrorist. There is an argument, therefore, that a definition would unnecessarily duplicate existing offences. The enumeration of offences approach in sectoral treaties, however, fails to recognise and condemn the political purpose that underlies the physical conduct of terrorism. It should be noted that purpose in this context refers to what the act is intended to achieve. This is distinct from motive, which relates to the ideological reasons why that purpose is sought. Motive, as the author of this essay will later argue, is largely irrelevant to a definition. By omitting purpose from the approach to terrorism, sectoral treaties do not 'differentiate publically-oriented violence from private violence'.[22] A political purpose is a significant feature of terrorism because of the harm it causes to the political process. Saul states that terrorism 'replaces politics with violence, and dialogue with terror'[23] and Ignatieff claims that terrorism 'kills … the one process we have devised that masters violence in the name of justice'.[24] The sectoral approach is overly broad, lacks specific focus on what is distinct

[18] Saul (n 6) 68.
[19] ibid 22.
[20] International Convention Against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205.
[21] International Convention for the Suspension of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007) 2445 UNTS 89.
[22] Saul (n 6) 61.
[23] ibid 36.
[24] Michael Ignatieff, 'Human Rights, the Laws of War and Terrorism' (2002) Social Research 1137, 1157.

about terrorism, and therefore does not adequately reflect the concept. It follows then that a generic definition would contribute to our understanding of the term.

There is concern that requiring a political purpose in any terrorist offence would expose fringe political claims to the judicial process and, therefore, bring them greater public attention. As Saul notes, however, 'the political demands of terrorists will usually become prominent' through the media 'regardless of their ventilation in a courtroom'.[25] Furthermore, exposure of the demands in court would allow 'erroneous, misconceived, or poisonous ideas to be confronted and dissipated'.[26] This concern is therefore ill-founded. Another advantage that a generic definition would have over the sectoral approach is that it would 'express and articulate the wrongfulness of terrorism'[27] beyond its physical characteristics. Saul claims that the 'expressive function of [a definition] cannot be overstated'.[28] An international definition would appropriately stigmatise conduct that '[transgresses] the outermost ethical boundaries'[29] of violence. Ganor notes that expressing the wrongfulness of terrorist acts through a definition could have the practical benefit of hampering the attempts of terrorist organisations to obtain public legitimacy. This would 'erode support' for them 'among those segments of the population willing to assist them'.[30] Ganor also claims that many terrorist organisations are troubled by the moral question of whether they have the right to harm civilians. He states that definition would intensify this moral dilemma and perhaps discourage would-be terrorists from employing certain methods. On the other hand, it is quite clear that many terrorists do not have an issue with harming civilians and do not show any regret for their actions. Where terrorist organisations persists in employing terrorist means in spite of the moral dilemma, it is unlikely that the expressive condemnation of an international definition would change this.

[25] Saul (n 6) 39.
[26] ibid.
[27] ibid 317.
[28] ibid 39.
[29] ibid 320.
[30] Boaz Ganor, 'Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?' (2002) Police Practice and Research 287, 304.

Moeckli argues that there is a 'fundamental tension' between defining terrorism in order to express disapproval and to stigmatise offenders, and the rationale of preventing abuse of the term by states mentioned previously.[31] This is perhaps a valid point since in the author's opinion, emphasising the term's stigma may well increase its potential for use by states to politically delegitimise their respective opponents. On the other hand, an international definition should control the term's application and prevent states from using it selectively. Moeckli's concern should therefore be somewhat limited. Finally, it is argued that the current approach is inadequate because it is overly rigid. It is limited to certain physical acts and does not protect against new technologies or the evolving nature of terrorist methods. Together, these factors highlight the main policy rationales for pursuing an international definition of terrorism. Laqueur's suggestion that a definition would not contribute to our understanding of the term is therefore somewhat misguided.

## III. Traditional Problems Facing a Definition and Possible Solutions

The main issue in defining terrorism stems from the view that the term is subjective. It is undeniable that 'terrorism' carries derogatory overtones. Saul highlights that the term is 'ideologically and politically loaded; pejorative' and 'implies a moral, social and value judgement'.[32] To claim that an act is terrorist must be to claim that it is wrong. As Richardson succinctly notes, 'terrorism is something the bad guys do'.[33] Because of this, the determination of whether or not certain political violence is considered to be terrorism is tied to a political assessment of its legitimacy – legitimate violence is not terrorism. The view that the term is subjective stems from the view that what distinguishes terrorism from legitimate forms of political violence is the motive for which it is carried out. While it may be difficult to define what is considered legitimate, violence that are recognised as legitimate should not amount to terrorism. This view is exemplified by the oft-used phrase 'one man's terrorist is another man's freedom fighter'. Different people will inevitably have different views about what constitutes a legitimate

[31] Moeckli (n 4) 647.
[32] Saul (n 6) 3.
[33] Louise Richardson, *What Terrorists Want: Understanding the Terrorist Threat* (John Murray 2006) 19.

motive and, therein, what constitutes terrorism. Jackson therefore claims that the meaning of the concept is 'subject to the perceptions, beliefs and values of the persons defining it'.[34] He argues that it is not possible to define terrorism by the 'gradual uncovering of scientific facts through careful observation' but that its meaning is 'fluid and changeable'.[35] Some people have responded to these issues by suggesting that a definition cannot be reached. Marks claims that 'terrorism will always exceed our efforts to hold the line on what really constitutes it'.[36]

Yet what distinguishes terrorism from other political violence is not the motive or ideology for which it is carried out. Instead, it is the methods used and the purposes to which they are put that distinguishes it. It is this of terrorism that we arguably find specifically objectionable. After all, 'to call an act [terrorist] is to assert not just that it [possesses] certain characteristics, but that it is wrong'.[37] However, if we would craft a definition that reflects existing agreement about what is reprehensible by taking full account of moral judgments pertaining to terrorism, we would classify 'acts of terrorism' as terrorist *because* 'it possess certain characteristics'.[38] This replaces the subjective appreciation with an objective assessment. An act that meets the proposed definition will be illegitimate regardless of motive. This reflects Wilkinson's assertion that 'terrorism is terrorism' regardless of the 'group or regime ideology … used to justify it'.[39]

It is worth noting that in a study from 1983, Schmid and Jongman identified as many as one hundred and nine official and academic definitions of terrorism.[40] Some people point to this to highlight how difficult it is to reach consensus as to its definition. They suggest that it perhaps illustrates that it is impossible. As Saul notes, however, the definitions in Schmid and Jongman's study often differed 'mainly in emphasis or semantics … [rather]

[34] Jackson and others (n 10) 104.
[35] ibid 103.
[36] Marks and Clapham (n 14) 358.
[37] ibid 346.
[38] Saul (n 6) 7.
[39] Paul Wilkinson, 'The Utility of the Concept of Terrorism' in Richard Jackson and Samuel J. Sinclair, *Contemporary Debates on Terrorism* (Routledge 2012) 16.
[40] Alex Schmid and Albert Jongman, *Political Terrorism* (North Holland Publishing 1983) 119-152.

than in substance'.[41] Furthermore, many of these definitions – intended for academic purposes – suffer from being overly complex.[42] Trivial disputes, like that of whether terrorism needs to be 'indiscriminate', do not need to be addressed when crafting a legal definition. A legal definition need not engage in this level of detail. It must instead focus on the core elements that make terrorism distinct. Achieving a universal legal definition is therefore very much still possible and could serve to 'retrieve terrorism from the ideological quagmire' in which it has been stuck.[43]

## IV. The UN Debate on Terrorism

The UN has now largely agreed on an international definition. The only outstanding issues relate to any exceptions that might be included. As terrorism carries with it pejorative connotations, state administrations have tended to seek exclusions that would prevent the term from being associated with themselves. The sole issue currently disallowing consensus is disagreement over whether violence for reasons of national liberation should be excluded from the definition.

### A. National Liberation Movements ('NLMs')

Debates within the UN have generally reflected the assertion that motive should be irrelevant to a definition of terrorism. The UN has repeatedly claimed that terrorist acts are 'unjustifiable' regardless of 'considerations of a political, philosophical' or 'ideological … nature'.[44] The proposed exception for violence where the goal is self-determination, however, seems to specifically focus on motive. This is clearly inconsistent with the general approach. Furthermore, allowing this exception would suggest that self-determination is the only widely-recognised motive that can possibly legitimise terrorist methods. This is a highly artificial notion.

[41] Saul (n 6) 57.
[42] Jackson and others (n 10) 101.
[43] Saul (n 6) 4.
[44] UNGA Res 50/53 (29 January 1996) UN Doc A/RES/50/53, para.2.

Saul, on the other hand, argues that NLMs should be exempt from being classified within terrorism. He advocates an extension of International Humanitarian Law (**'IHL'**) and claims that this is a more appropriate framework for dealing with them,[45] though it is not entirely clear why. He claims that 'any terror-type activity by those movements' could be treated as 'breaches of IHL' instead of terrorism.[46] A breach of IHL, however, inevitably does not carry the same stigma as a criminal conviction for terrorism. This is highlighted by states' insistence on exceptions in the first place. As mentioned earlier, Saul acknowledges that one of the primary purposes of defining terrorism is to condemn reprehensible behaviour. It is not clear, then, why he thinks that NLMs who commit terrorist acts should avoid this stigmatisation. A possible and logical answer to this could be that they are in some way less deserving of it. This is what Saul seems to suggest when he states that 'legitimate self-determination units' that 'comply with the laws of armed conflict' should not be 'unfairly treated' as terrorists.[47] However, neither Saul's proposed exception nor the one drafted by the UN, distinguish between conduct that breaches IHL and that which does not. They both simply exempt parties to an armed conflict. An NLM, therefore, that targets civilians and breaches IHL would consequently also avoid the stigma of 'terrorism'. Even if one accepts that national liberation is the one specific motive that can justify terrorist acts, this idea becomes indefensible when you apply it to unjustifiable attacks on civilians. These acts clearly deserve no less stigmatisation than that is associated with terrorist acts borne of any other motive. A definition that exempts NLMs would suffer from a 'lack of moral symmetry',[48] where acts that bring about 'the same net effect' are 'ascribed different moral meanings'.[49] The illogical nature of this could potentially undermine the legitimacy any definition.

## B. Can Agreement Still Be Reached?

Political and emotional disputes over exceptions to a definition have tended to overshadow clean debate about what actually distinguishes terrorism. As has been

[45] Saul (n 6) 70.
[46] ibid 73.
[47] Ben Saul, 'International Terrorism as a European Crime: The Policy Rationale for Criminalisation' (2003) European Journal of Crime, Criminal Law and Criminal Justice 323, 337.
[48] Saul (n 6) 318.
[49] Grant Wardlaw, *Political Terrorism: Theory, Tactics and Counter-Measures* (CUP 1982) 6.

argued, the exception for NLMs is illogical and indefensible. Nevertheless, the Organisation of the Islamic Conference has made it clear that they will not agree to a definition without one.[50] The exclusion is, therefore, a necessary concession in order to achieve the benefits of a universal definition. The Western States should therefore acquiesce to it.

There have been numerous efforts to generically define terrorism since the 1920s. It could perhaps be argued that if it were possible to internationally define terrorism, it would have been done by now. Friedrichs notes that 'international conventions are mostly … agreed upon, after major events'.[51] There was impetus following the events of 9/11 to define terrorism, yet this opportunity was not taken. The issue of definition was, in fact, deliberately avoided, as consensus on Resolution 1373 could not be reached otherwise. It is possible that the urgency of the situation required practical measures to be taken, rather than lengthy debate. Nevertheless, it has been fifteen years since 9/11 and still no agreement has been possible. On the other hand, the fact that the international community has attempted to define terrorism since the 1920s does suggest the importance that they attach to it.

The era of Cold War is now over and there is near-completion of decolonisation. An NLM exclusion, whilst still relevant in the contexts of Palestine, Western Sahara and Tibet, would be of limited, and seemingly decreasing, significance. The exception, as the last remaining obstacle to agreement, is likely not significant enough to prevent it. Furthermore, the proposed definition, even with the exclusion of NLMs, still largely reflects a common understanding of terrorism. Friedrichs claims that a definition that 'would rule al Qaeda and other fundamentalist terror organisations in, and the Palestinians and Israelis out, should be acceptable'.[52] Ultimately though, whether a

[50] Jörg Friedrichs, 'Defining the International Public Enemy: The Political Struggle Behind the Legal Debate on International Terrorism' (2006) Leiden Journal of International Law 69, 72.
[51] ibid 73.
[52] ibid 90.

comprehensive convention is concluded will 'depend on the spirit of compromise' between the states.[53]

## V. Conclusion

There is an argument that even if an international definition was to be reached, this would not result in consensus on the meaning of 'terrorism'. It would not mean that states would suddenly stop using their national definitions. An international definition would, however, lay down a benchmark against which other conceptions may be judged. Laqueur was undoubtedly wrong in claiming that definition would not add to our understanding of 'terrorism'. However, Laqueur's prediction that disputes about a comprehensive definition would continue for a long time is considerably insightful. Whilst there has been 'considerable progress in recent years'[54] and that a definition new sees a possible conclusion, Laqueur's foresight of the long road nearly three decades back is nothing less that accurate.

[53] ibid 91.
[54] ibid 71.

# The Doctrine of Combat Immunity, Duty of Care and Legal Certainty in the Aftermath of the UKSC Decision in *Smith v Ministry of Defence*

*Agnieszka Wieczorek*

## Abstract

*This analysis sheds critical light on the issue of legal certainty in the aftermath of the Supreme Court decision of Smith v Ministry of Defence. This article suggests that the outcome of the case is correct, despite the uncertainty created by the decision to leave the matter of duty of care unclear on the facts. The purpose of this article is to firstly, examine the position of the doctrine of combat immunity in tort of negligence prior to the Smith case. Secondly, to analyse the Smith case and its impact on combat immunity. Thirdly, to examine the policy issues arising as a result of this decision.*

## I. Introduction

While it is the standpoint of this article that the outcome of the *Smith v Ministry of Defence* case is correct, the majority's ruling is not flawless given the significant legal uncertainty it created.[1] In order to justify this argument, this article is divided into three parts. The first part aims to set out the position of the tort of negligence in relation to the armed forces prior to the decision in *Smith.* This will be achieved by examining a consistent and clear body of case law, which demonstrates that there was not, nor has

[1] [2013] UKSC 41.

there ever been, a notion of 'military exceptionalism' in the law of tort. Subsequently, the purpose underpinning the doctrine of combat immunity will be addressed, through the evaluation of the treatment of combat immunity by the English courts in the cases of *Mulcahy v Ministry of Defence,*[2] *Multiple Claimants v Ministry of Defence,*[3] and *Bici and Another v Ministry of Defence.*[4]

The second part focuses on the Supreme Court's decision in *Smith* and its impact on the doctrine of combat immunity and duty of care in the context of training and planning decisions with focus on the Challenger claims. Whilst the majority in *Smith* did clarify the limits of combat immunity, they did not clarify the boundary between combat immunity and the duty of care in relation to the Ministry of Defence's ('MOD') training and planning decisions. It is the core claim of this article that the majority, by not stating whether the relationship between the MOD and its soldiers in this context is duty bearing, created significant uncertainty. The Supreme Court, by leaving this matter undetermined, left the MOD in a difficult positon of not knowing until the outcome of a trial whether it bears a duty of care in that context.

The third part will discuss further the uncertainty deriving from *Smith*. The relevant policy arguments will be addressed. Four reasons will be advanced as to why the outcome of the *Smith* case is correct. Meanwhile, a number of problems deriving from the majority ruling will be acknowledged and dismissed. The third part also aims to outline possible solutions to resolving the uncertainty created by the decision in *Smith*, as well as examination of their potential effectiveness.

[2] [1996] QB 732 (CA).
[3] [2003] EWHC 1134.
[4] [2004] EWHC 786.

## II. The Doctrine of Combat Immunity and Duty of Care

The doctrine of combat immunity takes the question of whether the MOD is negligent in causing injury, loss, or damage in situations of armed conflict outside the jurisdiction of the court. Combat immunity is a common law doctrine, which operates to preclude claims in negligence brought by soldiers, civilians, or family of civilians or soldiers. The defendant invokes the doctrine of combat immunity at the preliminary stage in the court proceedings to avoid a trial by striking out the claim.[5] A claim that is 'struck out', is prevented from proceeding to trial.[6] To have the claim struck out, it is the defendant who must show that the defendant engaged in the armed conflict. The moment the defendant shows that, the court has no jurisdiction to hear the negligence claim because it would be undesirable for the court to adjudicate on potentially careless decisions made whilst an actual war was raging.[7] Military decisions cannot be scrutinised by the courts if they were made during active combat. For that reason, they are non-justiciable and so legally unchallengeable, as far as the tort of negligence is concerned.[8]

## A. Liability of the Ministry of Defence as an employer

The doctrine of combat immunity does not merely bar *any* negligence claim, meaning that the MOD does not enjoy blanket immunity. In fact, the MOD can be liable as the tortfeasor in various circumstances such as nuisance, negligence, and liable vicariously as an employer.[9] The doctrine of combat immunity does not concern itself with any setting other than active combat and does not create a doctrine of 'military exceptionalism' in the law of tort.

There is a single non-delegable duty on the part of an employer to take reasonable care to ensure the safety of their workforce and this consists of four components: competent

[5] *Smith* (n 1) [13].
[6] *Mulcahy* (n 2).
[7] ibid.
[8] ibid 477.
[9] *O'Brien v Ministry of Defence* [2010] EWHC 3444.

workforce, adequate material and equipment,[10] a safe system of working (including effective supervision), and a safe workplace. [11] The MOD owes this duty to its employees like any other employer. For that reason, combat immunity will not apply to preclude a negligence claim, which arose in time of peace, a good example of this being the case of *Barrett v Ministry of Defence*.[12] Following the soldier's collapse from a heavy drinking session, he was placed by his commanding officer on a bunk lying in the recovery position. The officer moved the soldier and left him without checking his condition. The soldier was later found dead, having asphyxiated on his vomit. The Court of Appeal held that the MOD was liable in negligence because it had assumed responsibility for the deceased's care through the commanding officer's intervention. Once the officer moved the deceased, he should have taken adequate steps to care for him. The lack of supervision, not the failure to prevent the deceased from drinking, led to assumption of responsibility, since the officer's actions created the danger.[13] Had the officer left the deceased where he collapsed, it would amount to a mere omission, which would not lead to the MOD's liability.

In *Jebson v Ministry of Defence,* the claimant was a soldier returning from a trip organised by the MOD. [14] The soldier climbed out of the tailgate of the lorry in which he was travelling and onto the roof, whereupon he fell into the road and suffered serious injury. The Court of Appeal found that the MOD had a sufficient degree of control over the claimant and other soldiers. The MOD should have appreciated that the claimant's drunkenness would affect his assessment of danger and might cause him to act in a reckless manner which could result in injury. Furthermore, given the size of the gap above the tailgate and that, nobody had been supervising the rear of the vehicle; there was a risk that someone could have fallen from the lorry.

[10] *McWilliam v Sir William Arrol & Co* [1962] WLR 295 (HL).
[11] *Wilson v Tyneside Window Cleaning* [1958] 2 QB 110.
[12] [1995] 1 WLR 1217 (CA).
[13] Creation of danger is an exception to the rule against liability for omissions; *Capital & Counties Plc v Hampshire County Council* [1997] 3 WLR 331 (CA).
[14] [2000] 1 WLR 2055 (CA).

The concept of 'sufficient degree of control' was taken even further in *Ministry of Defence v Radclyffe*.[15] The claimant was a soldier and at the time of the incident, he was under command of a Captain Jones, but the claimant was not on duty. Jones was asked by soldiers for permission to jump off the bridge and he authorised it. The sufficient degree of control was present because Jones could have ordered soldiers not to jump; doing so would have prevented them from undue risks, whereas authorising the jumping meant that MOD assumed responsibility for the soldiers' safety.

*Birch v Ministry of Defence*[16] is another Court of Appeal decision concerning the MOD providing a safe system of work. In this case, the claimant was a soldier engaged in active service in Afghanistan who volunteered to drive a vehicle to the bottom of the hill in order to pick up personnel. The claimant was unqualified to drive - he did not have full UK driving licence or the relevant military driver training. Whilst driving, he lost control of the Land Rover. The claimant was severely injured. Both the soldier and the Captain were aware of the soldier's lack of experience as a driver. The Captain was also aware that it was Birch who volunteered to drive. This meant that the MOD was in breach of its duty of care as the claimant's employer.[17] The court found that it was solely the MOD's fault, which allowed the claimant 'to get into a position in which he might lose control of the vehicle precisely because he lacked the skill which experience and appropriate training would have given him'.[18]

All of the foregoing cases go to show that there is no overarching doctrine of 'military exceptionalism' that extends to the MOD in the context of negligence claims across the board. The doctrine of combat immunity does not feature in any of the above cases because the MOD can and will be liable in negligence as an ordinary employer in peacetime or circumstances sufficiently removed from the battlefield.

[15] [2009] EWCA Civ 635.
[16] [2013] EWCA Civ 676.
[17] ibid [20].
[18] ibid [34]; however, the claimant would have shared responsibility for his injuries if he would have had to assess whether he should drive, see ibid [22].

## B. The beginnings of the doctrine of combat immunity

The doctrine of combat immunity made its first appearance in the Australian case of *Shaw Savill & Albion Co Ltd v Commonwealth of Australia.*[19] Despite being an Australian precedent and therefore not directly binding on English courts, the case nevertheless remains an undisputed starting point for the doctrine of combat immunity. Furthermore, the precedential value of *Shaw Savill* increased significantly given its recent approval in the Supreme Court's decision in *Smith v Ministry of Defence.*[20]

*Shaw Savill* concerned a collision between two ships during the Second World War. Both ships were authorised by the naval authorities to proceed on their designated courses without their lights on. The claimants alleged that the sailors' failure to keep a proper lookout and the navigation of the defendant's ship at an excessive speed amounted to negligence. The Commonwealth responded to the negligence claim with the argument that it was engaged in an active combat operation and that the claimant's cause of action consisted solely of things done in the course of active naval operations. For that reason, the Commonwealth relied on 'a defence to the suit'. The question for the High Court of Australia was whether the Commonwealth could be liable either for the negligent navigation of its sailors or for the failure of the naval authority in communicating the directed course to the Commonwealth's ship.

The High Court of Australia held that all operations would be covered by the doctrine of combat immunity, so long as there was an actual war and the alleged negligence arose due to the special circumstances related to that war. The focus was on the purpose behind the operation and whether the claimant's case consisted 'solely' of matters which occurred in the course of active naval operations. If that were the case, the collision would be covered by the doctrine of combat immunity. The court drew a distinction between 'war-like operations' and 'acts of war'. It is the duty of the court to determine whether a state of war existed at the time and therefore, whether or not the act contested

[19] [1940] HCA 40; (1940) 66 CLR 344.
[20] *Smith* (n 1) [93]-[94].

was indeed 'an act of war'.[21] Acts of war fall outside of the court's jurisdiction, because war cannot be controlled or contradicted by judicial tribunals. On this point, the court in *Shaw Savill* relied on the Privy Council's decision in *ex parte DF Marais.*[22]

*Marais* was an appeal from a military tribunal, grounded on the contention that where the ordinary courts were still sitting there could not be a state of war and martial law could not have effect. The petitioner in this case was arrested by the chief constable, during the Second Boer War. The Chief Constable had no warrant and did not know the cause of arrest, but alleged that he was acting under instructions from the military authorities. The Privy Council made it clear that where actual war was raging, acts committed by the military authorities are not justiciable by ordinary tribunals. Ultimately, however the court in *Shaw Savill* found the Commonwealth liable. The claim succeeded on the ground that the captain of the Commonwealth's ship had steered a wrong course[23] and the judge found that at the time the captain was not engaged in actual operations against the enemy.[24]

## C. *Mulcahy,* the Crown Proceedings Act 1947 and the Crown Proceedings (Armed Forces) Act 1987

*Mulcahy v Ministry of Defence*[25] was the first case to discuss the application of the doctrine of combat immunity in English law. Prior to *Mulcahy,* Crown immunity[26] was in operation until 1987 and there was no direct authority on combat immunity, as there was no need for it[27] Crown immunity was a statutory immunity from tort proceedings, brought against the Crown.[28]

[21] ibid.
[22] [1902] AC 109 (PC).
[23] *Groves v Commonwealth of Australia* (1982) 150 CLR 113, 123.
[24] *Mulcahy* (n 2) 745.
[25] ibid.
[26] Crown Proceedings Act 1947, s 10.
[27] Crown Proceedings (Armed Forces) Act 1987, s 2.
[28] In other words, it was blanket immunity for the MoD to invoke.

## i. The decision in *Mulcahy*

The Court of Appeal in *Mulcahy* had to consider whether the MOD owed a duty of care to a soldier who suffered injury following a negligent order given by his commanding officer during the course of the first Gulf War. The Court of Appeal applied *Shaw Savill*, but also examined the position of English common law without the presence of the *Shaw Savill* case and held that there could not have been a duty of care established between two soldiers on the facts of *Mulcahy.* The claim was very well within the doctrine as understood in *Shaw Savill*, because there was an imminent threat of danger.[29] The operation in *Mulcahy*, from start to finish, was a military one carried out in a situation of active combat. The alleged negligence in *Mulcahy* occurred between two soldiers, both of whom were engaged in an operation against the enemy. Regardless of what the precise definition of the doctrine may be, this setting will always remain at the centre of what combat immunity aims to cover, because decisions made in such conditions are not amenable to judicial scrutiny.[30]

Lord Neill in *Mulcahy*, relying on English tort of negligence authorities, made it plain that there cannot be a novel duty of care present, as it would not be fair, just, and reasonable for it to be imposed.[31] For this, the court relied on the House of Lords decision in *Hill v Chief Constable of West Yorkshire*[32], and the Court of Appeal decision in *Hughes v National Union of Mineworkers*[33].

In *Hughes*, the claimant was an injured police officer. His injury occurred whilst the police were overseeing mineworkers' strike at a colliery. An advancing crowd of picketers knocked the claimant to the ground. When the senior police officer was making critical decisions about the coordination of the police forces, he had little or no time for considered thought, in such circumstances where individual officers might be in

[29] ibid 748-749.
[30] ibid 734-735.
[31] ibid 732; ibid 749-750.
[32] [1989] AC 53.
[33] [1991] ICR 669.

danger of physical injury. Such an attempt to control events in *Hughes* can be an illustration of what may be called 'battle conditions' in *Mulcahy*. Similarly, in *Hill*, the House of Lords held that the police did not owe a general duty of care to members of the public to apprehend an unknown criminal. The police were immune from allegations of negligence arising from their investigation and suppression of crime.

In both *Hughes* and *Hill*, it was not in the public interest to hold that such decisions are subjected to liability in negligence. It would be detrimental to the control of public order (*Hughes*) and execution of police's function (*Hill*) to hold senior police officers liable in negligence, for the alleged failures. Had duty of care been imposed in *Hughes* and *Hill,* it could result in a situation where a senior officer would be more concerned about his potential tortious liability rather than maintaining public order or effective suppression of crime. This argument is also true on the facts of *Mulcahy*; therefore, there was 'no basis for extending the scope of the duty of care so far'.[34] Lord Neill rejected the argument that there was a need to fully investigate the facts at trial in order to establish whether or not 'battle conditions' existed of the facts of *Mulcahy.* The court maintained that it may very well be a case that there had been a negligence (the negligent firing in *Mulcahy*) committed on behalf of the soldier concerned, but this is irrelevant, because 'the exigencies of battle might well provide an excuse for what in other circumstances would constitute a breach of duty'.[35]

## ii. The effects of the repeal of section 10

*Mulcahy* was decided following the prospective repeal of section 10 of the Crown Proceedings Act 1947, which set out Crown immunity.[36] This is a statutory immunity from tort proceedings in respect of injuries or deaths to and by members of the armed

[34] *Mulcahy* (n 2) 749
[35] ibid; Here reference is made to *Knightley v Johns* [1982] 1 WLR 349, where a police officer was found liable in negligence for not closing the tunnel at the outset and also in sending an officer on a motorbike back through the tunnel against the traffic to remedy his omission, which was contrary to standing orders. Because of this, police officer was liable to his subordinate, despite the circumstances constituting an emergency.
[36] Crown Proceedings Act 1947, s 10 was repealed prospectively by Crown Proceedings (Armed Forces) Act 1987, s 2.

forces, which occurred in course of the execution of their duties.[37] In *Derry v Ministry of* Defence,[38] the MOD could rely on Crown immunity in response to action in negligence for injury and loss of life expectation suffered as a result of failure of a military doctor to diagnose the claimant's pre-existing carcinoma. The Court of Appeal held that the Parliament clearly intended for the Crown – which were allegedly negligent before 15 May 1987 – to be immune from negligence in certain circumstances.[39]

Likewise in *AB v Ministry of Defence*, the alleged breaches of duty occurred in the 1950s when service members had been exposed to immediate radiation whilst atmospheric nuclear tests were carried out. [40] Nine lead claimants represented over 1000 veteran service members, most of these claims had been issued in 2005 by which time the veterans had come to believe that they had been exposed to radiation. The claims ultimately failed due to Section 33 of the Limitation Act 1980. However, the claims would have been most likely to be barred by Crown immunity in any case.

A novel argument was put forward in *Matthews v Ministry of Defence*.[41] In the House of Lords, the claimant argued an infringement of Article 6 of the European Convention on Human Rights. The argument was rejected. The exposure of the claimant to asbestos fibres occurred between 1955 and 1968. Therefore, the claim was subject to section 10 and so barred by Crown immunity.

The ground for introduction of Crown immunity in 1947 was that 'members of the Armed Forces, by the very nature of their profession, undertake hazardous tasks which ordinary members of the public do not.'[42] The reason for repeal of section 10 of the 1947 Act was

[37] Usually for Ministry of Defence to rely on.
[38] [1999] PIQR P204.
[39] ibid, P209.
[40] [2010] EWCA Civ 1317; [2012] UKSC 9.
[41] [2003] UKHL 4.
[42] HC Deb 8 December 1986, col 86; [2013] UKSC 41 [178].

to remove the disadvantage of the discrepancy between the level of damages awarded by the courts and the benefits, which the service member received.[43]

Sections 2(2) and 5(2) of the 1987 Act were advanced; in order, the two sections allow the Secretary of State to reactivate Crown immunity, should there be a 'grave national emergency'.[44] *Derry, Matthews*, and *AB* demonstrate how Crown immunity operates in relation to injuries sustained between 1947 and 1987 and that section 10 provides the MOD with blanket immunity. Crown immunity remains very strictly applied and as legally certain as it is, it creates injustice. The doctrine of combat immunity operates differently, as it never allowed the MOD to shut down *any* negligence claim outright at the start of the tort proceedings.[45] Should breaches like those in the foregoing cases happen again today, unless the Secretary of State had acted to revive Section 10, Crown immunity will have no application. In relation to combat immunity the question, in those cases, would be whether the MOD can show that it engaged in active combat and that the alleged breach was a result of carelessness arising from an operation carried out for the purposes of that war.[46]

## iii. Conclusion

The court in *Mulcahy* introduced the doctrine of combat immunity and denied the existence of duty of care on the facts of the case. A simple conclusion can be drawn: the negligent soldier cannot owe a duty of care to another soldier, generally and on the facts of *Mulcahy* in particular.[47] It may very well be the case that the firing had been negligent but this is irrelevant, since it occurred whilst engaging with the enemy.[48] The argument that the MOD must provide a safe system of work failed as well for the same reason.[49]

[43] ibid.
[44] ibid.
[45] And remains the case for the injuries sustained between 1947 and 1987 to which crown immunity still applies.
[46] *Mulcahy* (n 2) 748
[47] ibid 749-751
[48] *Mulcahy* (n 2) 748
[49] ibid 749-750

Unfortunately, the Court of Appeal did not find it necessary to explore the limits of the doctrine.[50]

## D. Defining 'combat' for the purpose of combat immunity

*Multiple Claimants v Ministry of Defence*[51] involved approximately 2,000 former service personnel, who had served in Northern Ireland, the Falklands War, the first Gulf War, or peacekeeping operations in Bosnia. They all claimed that they had suffered psychiatric injury because of exposure to the stress and trauma of combat at various points between 1969 and 1996. They alleged that this was due to the MOD failing to take any steps at all or any adequate steps to prevent psychiatric illness as well as failing to detect, diagnose, or treat their illnesses. The first group of claims failed due to section 10 being repealed prospectively only, the claims that occurred before 15 May 1987 fell within section 10 immunity of the 1947 Act. The remaining test case actions in negligence, following the 1987 Act's abolition of Crown immunity could not proceed against the MOD either. This is because the claimants failed to establish that the MOD was in breach of its duty of care with regard to its systems for the prevention, detection, and treatment of psychiatric reactions to the stress and trauma of combat.[52] In relation to a duty to maintain a safe system of work, the MOD was not under that duty whilst the personnel engaged with an enemy in the course of combat. Owen J went on to define 'combat'.

His Lordship said 'combat' has a wider meaning than circumstances in which one is in the presence of, or has made contact with, the enemy. This allowed His Lordship to extend the doctrine of combat immunity to *all* active operations in which service personnel were exposed to the risk of injury, loss, or damage. Owen J held 'combat' included planning of and preparation for operations where the armed forces might come under attack or meet armed resistance, and peacekeeping operations where the

[50] ibid 748-749.
[51] [2003] EWHC 1134 (QB).
[52] Two successful claimants did not receive general damages for suffering PTSD. They were compensated on the basis that *'symptoms would not have been as severe and would have alleviated at an earlier stage'*; *O v Ministry of Defence* [2005] EWHC 1645 [48]; *New v Ministry of Defence* [2005] EWHC 1647.

personnel were exposed to attack or threat.[53] Consequently, the High Court in *Multiple Claimants* held that combat immunity extends to all military operations. This interpretation of 'combat' went further than that adopted in *Mulcahy,* as it was described in *Shaw Savill*: the presence of at least an imminent threat of danger, allows the court to identify the conduct, which is non-justiciable.[54]

The next case to consider combat immunity was *Bici v Ministry of Defence*.[55] The case was concerned with a peacekeeping operation, which arguably fell within the specified definition of combat described in *Multiple Claimants*. However, Elias J held that *Mulcahy* and *Multiple Claimants* were inapplicable on the facts of *Bici*. Rather than denying the existence of a duty of care, Elias J reflected on the standard, which should be applied to the peacekeeping functions relying on *Attorney General for Northern Ireland's Reference (No. 1)*.[56] The purpose of the peacekeeping operation was to try to facilitate the transfer of power from the Serbs to the Kosovar Albanians, so the breach occurred during active service, but this did not equate to armed conflict or a threat thereof. For the MOD to rely on the doctrine in relation to the deliberate infliction of harm there needs to be a high degree of necessity, which fundamentally arises out of a wider and very pressing public interest, thus justifying the doctrine of combat immunity. That pressing public interest could not be established in *Bici* because there was no war.[57] Furthermore, it was insufficient to show that the claimants themselves were acting unlawfully, especially when looking at the defendants' conduct, which did not suffice for self-defence, and their function, which was policing and peacekeeping 'without any imminent and serious threat'.[58] The operation was not associated with an 'act of war' nor was there an imminent threat of danger as understood in *Mulcahy*. Therefore, no immunity from liability due to the suspension of ordinary law could stand. The soldiers

[53] *Multiple Claimants* (n 51) [31].
[54] The lack of such threat means that there is no 'apparent [reason] for treating officers as under no civil duty of care' [1940] HCA 40.
[55] [2004] EWHC 786.
[56] [1977] AC 105 (CA, NI).
[57] Stephen King, 'Personal Injury – Negligence – Armed Forces – Service Personnel' (2004) 3 Journal of Personal Injury Law C107, C112 (note).
[58] [2004] EWHC 786 [100]-[102].

owed duty of care in the circumstances of peacekeeping operation and breached that duty by firing deliberately and without lawful justification.[59]

## E. Combat immunity prior to *Smith v Ministry of Defence*

There are three interferences to be drawn as to the position of tort of negligence in relation to the armed forces prior to the decision in *Smith*.

The first interference is on the issue of jurisdiction and the clear purpose underpinning the doctrine of combat immunity. Where the doctrine of combat immunity is successfully relied on, it removes the courts' jurisdiction to decide whether or not a duty of care was owed and whether it was breached in situations of armed conflict. Combat immunity operates on an assumption that there is no question of duty of care, once the defendant shows that it engaged in the armed conflict and the alleged negligent conduct was attributable to special circumstances arising out of its involvement in that war.[60] Therefore, the MOD in such circumstances does not owe its service personnel or anyone else a duty of care. The reason for existence of the combat immunity is the need for the armed forces to be free of any control or interference of the law of negligence whilst they engage in active service. It would be undesirable to impose tortious liability on the armed forces in situations of the armed conflict, because their focus should remain on execution of their tasks and not on the potential claims in negligence arising from their actions.

Secondly, it is clear from cases such as *Barrett*, *Jebson* and *Radclyffe* that there was not, or has there ever been, a notion of 'military exceptionalism' in the law of tort. Where the MOD has not engaged in armed conflict at the time of the alleged breach, it will be subject to tort of negligence like any other defendant. The doctrine of combat immunity is not blanket immunity. The MOD remains subject to various kinds of duty of care and like any other employer owes a duty of care to its employees.

[59] King (n 57) 107-108 (note).
[60] *Mulcahy* (n 2).

Thirdly, the English courts did not give much attention to the actual scope of the doctrine of combat immunity. When the Court of Appeal in *Mulcahy* introduced the doctrine at English common law, the matters such as when exactly the doctrine applies and what it covers, had been left undefined largely. Later *Mulcahy* had been interpreted on two occasions in the High Court. *Multiple Claimants* and *Bici* were inconsistent with each other as far as the definition of the scope of the doctrine was concerned.

## III. *Smith v Ministry of Defence*

There were two groups of claims in *Smith*[61]. First, in the 'Snatch Land Rover' claims, the claimants contended that the actions of the MOD had caused or contributed to the deaths of members of the armed forces. They claimed damages for breaches of Article 2 of the European Convention on Human Rights. These claims are beyond the scope of this article. The second group of claimants related to the 'Challenger' claims. These claims arose from the deaths or injuries suffered by members of the armed forces during the course of the Iraq War in 2003. The claimants claimed that the MOD's failure to provide its troops with the relevant technology and training to protect them from the risk of 'friendly fire' was negligent. On 25 March 2003, the deceased and the two claimants were in one of a number of 'Challenger II' tanks in Iraq, which had been stationed in hull-down positions to minimise their visibility to the enemy. During an offensive by British troops, a soldier identified few hot spots through his thermal imaging sights. He described the location to the commanding officer, who was unable to identify the hot spots for himself. The soldier was given permission to fire at what was assumed to be an enemy position. The hot spots that the soldier had observed were in fact British soldiers in the Challenger II tank.

The Challenger claims were solely focused on the MOD's failures in training, including pre-deployment and in-theatre training, and the provision of technology and equipment[62]. They did not allege anything in relation to soldiers involved in the accident.

[61] *Smith* (n 1).
[62] ibid [82].

The main argument was that had the Challenger II tanks been provided with the relevant equipment and had the soldiers been provided with the necessary recognition training, the incident would not have happened. Decisions regarding training and procurement matters took place long before the commencement of hostilities[63], so the claimants claimed that steps should have been taken by the MOD to plan and to exercise better judgment.

## A. The Majority's Decision

The Supreme Court was divided when deciding *Smith* and reached the decision by a 4:3 majority with Lord Mance, Lord Wilson, and Lord Carnwath dissenting in part. The dissent was in relation to the common law doctrine of combat immunity, whether complaints of negligence were covered by the doctrine, and if not, whether it would be fair to impose a duty of care on the MOD. The majority held that complaints of negligence in *Smith* were not within the scope of the doctrine, yet whether or not it would be fair, just and reasonable to impose a duty of care was to be established at trial.

According to Lord Hope who delivered the majority's judgment, the safety of the soldiers should have been given more attention if there was time to think things through.[64] Since such decisions were not made during an engagement in the armed combat, they were not subject to the pressures and risks of active operations against the enemy. They could not have been within the scope of the doctrine of combat immunity; the claims were accordingly allowed to proceed to trial.[65] The majority's decision in *Smith* on the matter of the doctrine of combat immunity and duty of care raised four important points.

[63] ibid [91].
[64] ibid [95].
[65] ibid [95], [101].

## i. Existence, Rationale and Operation

The majority confirmed the existence of the doctrine of combat immunity. Its presence in English common law 'was not in doubt'.[66] The court reminded of the rationale underpinning combat immunity and clarified its operation. The rationale is that decisions made and actions taken whilst engaging with the enemy in armed conflict are not justiciable and it would be undesirable for the court to try to determine whether the soldier might have been more careful.[67] Doing so would be 'opposed alike to reason and to policy'.[68] The assessment of the situation made in the peace and quiet of the courtroom cannot be compared to the assessment made on the battlefield, which was subject to various combat-related pressures.

The Supreme Court held that combat immunity is a special rule. Once the claim falls within it, that is the end of the negligence claim and so it is irrelevant whether a duty of care was owed. '[Combat] immunity is best thought of as a rule, because once a case falls within it no further thought is needed to determine the question whether a duty of care was owed to the claimant.' The Challenger claims were not within the doctrine of combat immunity.

## ii. Narrow Construction

The Supreme Court in *Smith* approved *Bici*, re-emphasised the need for the narrow construction[69] of the doctrine of combat immunity and confirmed that the doctrine developed as an exception to the rule established in *Entick v Carrington*.[70]

[66] ibid [83].
[67] ibid [94].
[68] ibid [83].
[69] ibid [92].
[70] ibid [89].

The case of *Entick v Carrington* illustrates the core principle that the state cannot escape liability for an otherwise wrongful act by simply claiming immunity.[71] *Entick v Carrington* involved the King's messengers who were sued in trespass for breaking into the plaintiff's house and seizing his papers. The defendants relied on the defence of acting under a warrant of the Secretary of State. The defence failed because the executive cannot simply assert the interests of state or the public interest as a justification for the commission of wrongs. This is a general position but there can be certain circumstances where the courts will decline to determine the claims brought before them.

The doctrine of combat immunity developed as an exception to the principle established in *Entick v Carrington*[72]. The rule established in the *Entick* case demands for the narrow construction of the doctrine of combat immunity. Owen J in *Multiple Claimants* was oblivious to the core reason as to why the doctrine of combat immunity should be narrowly constructed[73]. The definition from *Multiple Claimants* was not welcomed and disproved. The main concern of the Supreme Court was that the definition was 'too loosely expressed'[74] Therefore, it could include 'steps taken far away in place and time from those operations themselves'[75] Therefore extending combat immunity in the manner in which it was done in *Multiple Claimants* was contrary to the rule established in *Entick v Carrington*[76] The exact concern as to why the doctrine needs a narrow construction was initially expressed in *Bici*. The Supreme Court's disapproval of the definition of the term 'combat' from *Multiple Claimants* in *Smith* was unsurprising and necessary.[77]

[71] (1765) 19 ST TR 1030.
[72] *Smith* (n 1) [92].
[73] ibid [90].
[74] ibid [89].
[75] ibid.
[76] Also, had the training and procurement decisions been covered by the doctrine of combat immunity, 'it is difficult to see how anything done by the MOD [would fall] beyond it.' [2012] EWCA Civ 1365 [62].
[77] Now *Multiple Claimants* remains authority for only one point: not the timing of the injury, but the timing of the breach of the duty of care that will determine whether combat immunity applies. Nick Bevan, 'Smith v Ministry of Defence: personal injury - armed forces personnel - human rights' (2013) Journal of Personal Injury Law C179, C185 (note).

## iii. Scope of combat immunity and justification for any extension of it

The majority made it clear that the doctrine covers only a situation where the alleged negligence occurred in an actual or imminent armed conflict.[78] The definition of the scope of the doctrine of combat immunity used to be flexible and very much open to interpretation. The majority transformed the doctrine from what used to be engaging in active operations where there was an imminent threat of danger (*Mulcahy* and *Shaw Savill*), to the course of actual or imminent armed conflict (*Smith*). The difference in wording is only slight, but an important one. What it means now is that unless the allegedly negligent act occurred within actual or imminent armed conflict, it will fall outside of the doctrine.[79] This is somewhat reminiscent of what was found to be 'too strict' in *Shaw Savill* – that was a limitation of the doctrine to the presence of the enemy.[80] The presence of the enemy is what the new definition seems to imply.

The Supreme Court was clear on the point that decisions concerning the training and equipment were not within the scope of the doctrine. Both in *Mulcahy* and *Shaw Savill,* the accidents occurred at the time of war and not before it started. The doctrine of combat immunity had not been previously applied to cover decisions taken at an earlier stage, that 'in itself suggests that it should not be permitted'.[81] In order for the doctrine of combat immunity to cover training and procurement decisions, which indeed occurred before the actual armed conflict, an extension of the doctrine was necessary. Extending the doctrine of combat immunity requires a justification.[82] On that point Lord Hope referred to recent Supreme Court decision in *Jones v Kaney,*[83] where immunity of expert witnesses was abolished. On the facts of *Smith*, there was nothing to justify extension of combat immunity to cover training and procurement decisions.[84] A decision made about training, long before the commencement of active combat, cannot be reasonably said to

[78] *Smith* (n 1) [92].
[79] ibid.
[80] 'To justify interference with person or property, it must, according to some, be shown that the measures were reasonably considered necessary to meet an appearance of imminent danger. But this seems a strict test ...' [1940] HCA 40, (Dixon J).
[81] *Smith* (n 1) [92].
[82] ibid.
[83] [2011] UKSC 13.
[84] *Smith* (n 1) [95].

deserve to be protected by combat immunity.[85] The reasoning is that a training decision cannot be seen as an 'act of war',[86] regardless of the fact that the training and procurement decisions are made for the purposes of the war; thus, both are connected.[87] The distinction between acts of war and all other operations carried out merely at the time of war and not for the purposes of prosecuting war is essential to the functioning of the doctrine, as combat immunity was designed to cover operations or acts of war alone.[88]

The reason for the lack of justification on the facts of *Smith* is that the decisions were 'sufficiently far removed from the pressures and risks of active operations against the enemy for it to not to be unreasonable to expect a duty of care to be exercised'.[89]

## iv. Duty of care

The majority in *Smith* found that matters of duty outside circumstances of active combat would be determined as a matter of fact on a case by case basis. Therefore, circumstances such as 'who the potential claimants are and when, where and how they are affected by the defendant's act' will need to be examined carefully in light of the evidence at trial. This is because circumstances vary greatly from theatre to theatre and from operation to operation - whether a duty should be held not to exist will depend on the circumstances. But, some guidance was given as to when it may or may not be fair, just and reasonable to impose a duty of care.

It will be much fairer to impose a duty of care where there was time to assess the risks to life that had to be planned for. As, for example, with the Challenger claims, which were

[85] ibid [94]-[95]; See also the strong dissent on this point from Lord Mance: 'in the case of the Challenger claims be divorced from consideration of the conduct of those using the equipment on the ground. Lord Hope DPSC recognises this in para 80, but draws the opposite conclusion to that which I would draw' at ibid [125].
[86] ibid [95].
[87] But this can only be decided on in light with the evidence *Smith* (n 1) [80].
[88] ibid [94]-[95].
[89] ibid [95].

primarily concerned with failures that took place at a much earlier stage. Conversely, a situation in theatre where a decision was made by someone who was constrained by decisions 'that have already been taken for reasons of policy at a high level of command beforehand or a decision which was an effect of contact with the enemy,' would be unlikely to attract duty of care.[90] As Lord Hope acknowledged, warfare-related judicial intervention must be avoided.[91]

The emphasis here was on a great care which must be exercised when imposing duty to not go too far with it, as it may be 'unrealistic or excessively burdensome'.[92] Doing so could have a negative impact on the performance of the armed forces. If there would be a duty of care which would completely protect the soldiers against death and injury, this would seriously impede their work. The armed forces would need not only to act in the national interest, but also prepare for or conduct active operations against the enemy under 'the threat of litigation should things go wrong'.[93] Surely, their focus should remain on the protection of the national interest and a successful completion of their mission. This unfortunately means that the safety of MOD employees will be compromised most of the time, given the nature of their work, but liability in negligence will not always be excused.[94] When striking the balance between what is and is not fair, just and reasonable, the courts must and will have regard to inevitable risks that are associated with the military service, the unpredictable nature of the armed conflict and the public interest.[95]

The majority held that in order to decide properly on the existence of the duty of care, evidence is essential to determine whether the decisions actually did happen whilst engaging in the actual or imminent armed conflict. The Challenger claims were not covered by the doctrine of combat immunity. Therefore, it will be reasonable to expect a

[90] ibid [99].
[91] ibid [98].
[92] ibid [100].
[93] ibid.
[94] ibid.
[95] ibid.

duty of care to be exercised, so long as the standard of care imposed has regard to the nature of these activities and to their circumstances.[96]

## B. The Dissenting Judgments

The majority's treatment of the common law negligence claims attracted strong dissenting judgments. Both Lord Mance and Lord Carnwath thought that the Challenger claims should have been struck out.[97]Their primary concern revolved around the majority not giving attention to the analogous police and emergency services precedents. As well, more should have been stated at the Supreme Court level as to whether the MOD owes a duty of care in the context of training/procurement decisions particularly. [98]

According to Lord Mance, 'in terms of the modern law of tort, … combat immunity is not so much an entirely separate principle'.[99] Lord Carnwath agreed on this point too, by stating the scope of combat immunity should have been discussed not as a separate principle, but as part of the third element of the *Caparo* test.[100] Lord Carnwath also felt that the majority had unnecessarily constrained themselves with the existing case law on combat immunity,[101] because the existing authorities until *Mulcahy* developed without reference to the modern law of negligence. Furthermore, Lord Carnwath felt it was the Supreme Court's primary responsibility to develop the common law in a coherent manner,[102] and that it was not satisfactory to send these claims to trial without the issue of duty of care determined.[103] Leaving out the issue of duty of care to be determined at trial will not be of much assistance to the trial judge, who may find no duty of care on the facts of *Smith* having heard the evidence regardless.[104]

[96] ibid [95], [100].
[97] ibid [135]-[136].
[98] ibid [154], [185].
[99] ibid [114].
[100] ibid [164].
[101] ibid [187].
[102] ibid [156].
[103] ibid [185]-[186].
[104] ibid [156], [186].

The overall conclusion to be drawn on Lord Carnwath's point of view is that the majority approached *Smith* from an incorrect perspective,[105] in the sense that the existing precedent concerning police would be of sufficient limitation and would therefore exclude Challenger claims as a matter of policy.[106] Challenger claims should not have been decided on whether the doctrine of combat immunity extends to cover them, but rather whether or not the protection of the tort law of negligence should be extended to cover such claims.[107]

## C. Conclusion

The alleged negligence in *Smith* did not occur whilst the soldiers were engaging in active service. Therefore, combat immunity did not apply to the Challenger claims, as the alleged breaches 'had happened long before the commencement of hostilities'.[108] Despite the connection between the training and equipment decisions with the battlefield, after all, such decisions were not subject to the same pressures as the decisions which actually occurred whilst engaging in the armed conflict.[109] The outcome of the *Smith* case dictates therefore that the doctrine of combat immunity must be narrowly construed. It is not clear however whether a duty of care exists between the MOD and its soldiers in the context of the training/procurement decisions, because, according to the majority in *Smith*, this matter must be decided in light with the evidence at trial on a case by case basis.

# IV. Policy Issues

In the final section of this article, it will be argued that the *Smith* case has created legal and operational uncertainty. Had the Supreme Court decided on whether a duty of care can be present in the context of training/procurement decisions, there would be no major difficulty with the case, as far as certainty is concerned. It will be argued that the

[105] ibid [160], [188].
[106] ibid [188].
[107] ibid [157].
[108] ibid [91].
[109] ibid.

imposition of a duty of care in *Smith* would have contributed significantly to legal certainty. This part of the article also aims to set out reasons as to why the outcome of the decision is nevertheless correct vis-à-vis allowing the claims to proceed to trial. Subsequently, the relevant policy arguments, for instance, risk of defensive practices and diversion of resources will be addressed. Finally, before reaching the overall conclusion, some solutions to the existing legal uncertainty will be put forward.

## A. Uncertainty

The cause of uncertainty had already been alluded to in the second part of this article. The majority's failure to state whether the relationship between the MOD and its soldiers was duty bearing in the context of the training and procurement decisions places the MOD in rather difficult position. The MOD cannot know until the outcome of the trial, whether it owes a duty of care in the circumstances. This is unsatisfactory from the MOD's point of view. Had the issue of duty of care been dealt with by the majority in *Smith*, the case would have been less controversial and two advantages would have been produced. First, had the matter of duty of care been addressed on the facts of *Smith*; regardless of whether duty of care had been upheld or rejected, it would be certain. The MOD would know exactly where they stand, as far as their liability is concerned in the context of training/procurement decisions. Secondly, had a duty of care been imposed,[110] the fear of potential liability could act as a deterrent.[111] This in turn would ensure that further negligence of a particular kind or similar does not happen again in the future. '[We] may all be safer' if the soldiers are properly equipped and the operations are properly planned.[112] Had the majority clarified the matter of duty of care on the facts of *Smith*, the law would be far more certain.

[110] Although on this being an 'advantage' few academics, for instance Jonathan Morgan would (rather strongly) disagree. See 'Problems with the decision in *Smith*' below.
[111] 'There are four possible bases of the action for damages in tort: appeasement, justice, *deterrence* and compensation' in G Williams, 'The Aims of the Law of Tort' (1951) Current Legal Problems 137.
[112] Richard Scorer, 'The judicialisation of war?' (2013) New Law Journal 14.

## B. Duty of care should have been imposed in *Smith*

The Challenger claims were concerned with failures that took place at a much earlier stage.[113] The majority in *Smith* held that it would be much fairer to impose a duty of care, where there was, time to assess the risks to life that had to be planned for.[114] It is very much at the heart of the skill of a soldier to be able to distinguish between friend and foe. It is understood that such training seems to be fundamental, as it is obvious that a soldier should not kill comrades by mistake. What matters is that where such a mistake can be prevented or risk of which can be minimised by training, then that should have been done. As Lord Bingham put it, in his article and dissenting judgment in *Smith v Chief Constable of Sussex Police* in relation to the police immunity,[115] 'It is not easy to see how such defensive conduct could have done other than fulfil the function of the police in preventing the commission of crime and protecting the safety of the public.'[116]

On the facts of *Smith v CC of Sussex*, there existed various failures to investigate criminal threats against the victim and a failure to protect the victim from personal injury suffered in the course of a criminal assault. The victim received persistent and threatening telephone calls, text and internet messages, including threats to kill him. He provided the officers with details of his former partner's previous history of violence, his home address, and the contents of the messages. The officers declined to look at or record the messages, took no statement from him, and completed no crime form.[117] Should the police have acted 'defensively', they would have looked at the messages and so formed a judgment whether Smith was genuinely frightened. The argument that the professional judgment is best left to an individual (police officer in that case) and should remain outside the courts' scrutiny, looks particularly weak on the facts of *Smith v CC of Sussex,* because defensive conduct would actually ensure the carrying out of the investigation i.e. performing their police function properly.[118] It may very well be the case that on the facts

[113] *Smith* (n 1) [99].
[114] ibid.
[115] [2009] 1 AC 225 (HL).
[116] Thomas Bingham, 'The Uses of Tort' (2010) Journal of European Tort Law 3, 12.
[117] *Smith* (n 118).
[118] The point on exercise of the professional judgment, works even better on the example of Snatch Land Rover claims. The vehicles were known to be unsafe *for many years* and were nicknamed 'mobile coffins'. Surely, this creates a suspicion of negligence. If this had been *known*: how is it, that the relevant

of *Smith v Ministry of Defence*, the professional judgment is best left to an individual, such as what training is necessary. However, failure to provide it altogether is different – particularly where the exercise of this judgment may have been negligent. If this is the case, the courts should be allowed to look in to the decision made. Not striking out Challenger claims will allow doing exactly that.

## C. The outcome is correct

There are four reasons put forward in this article to support the proposition that the overall outcome of the *Smith* case is correct. The first is the access to justice argument and secondly, the fact that the majority clarified law revolving around the existence of combat immunity in English common law. The third is that the decision to certain extent remains in line with the wider immunity 'squeeze' trend and the fourth that the argument put forward by the MOD on the matter of allocation of resources is very weak.

The failure to state whether there was a duty of care on the facts of the *Smith* case created significant uncertainty, but this does not render the outcome of the case wrong. The majority allowed the Challenger claims to proceed to trial, so the duty of care can succeed or fail at that stage. This does not help the legal certainty, but it does meet the expectation of equal treatment and openness, because the claimants will have their claims heard. The only main concern on this point remains however, that there may occur a situation where a case falls outside of the doctrine but does not necessarily involve a duty of care. This is precisely what may happen to the Challenger claims and all similar claims that follow. Such claims essentially fall within an area of uncertainty created by the majority. There is a key disadvantage to this 'no-man's land'. It is submitted that no useful purpose will be served by allowing the claim to proceed to trial to simply fail - after finding further facts and then after considering the applicable law.[119] Whilst it is true that the whole point of a preliminary stage in tort proceedings is to dispose of weak

military personnel responsible for making procurement decisions either did not know that or failed to check this. Jan Miller, 'Supreme Defeat for MoD' (2013) New Law Journal 163.

[119] *Van Colle and another v Chief Constable of the Hertfordshire Police* [2008] UKHL 50, [140]; *Smith* (n 1) [169].

cases with lack of a prospective success early on,[120] there will be no useful purpose served either, by shutting down a valid claim upfront and leaving the claimant with no access to justice. Instead, it is far better to allow the claim to proceed to fail. So, what arguably is 'no-man's land' can and should be clarified, and decided properly in light of the evidence as to whether duty of care should be owed.

*Smith* clarified everything else except the issue regarding the duty of care. Given that the doctrine of combat immunity developed as an exception to the rule established in *Entick v Carrington*, it is not in doubt that an endorsement of the rule of law and of the system of democratic government will also explain the necessity for a narrow construction of combat immunity. This put together with the idea that:

> There is no special rule in English law qualifying the obligations of others towards fire fighters, or police officers, ambulance technicians and others whose occupations in the public service are inherently dangerous. … Such public servants accept the risks, which are inherent in their work, but not the risks, which the exercise of reasonable care on the part of those who owe them a duty of care could avoid. An employer owes his employees a duty to take reasonable care to provide safe equipment and a safe system of work, which includes assessing the tasks to be undertaken, training in how to perform those tasks as safely as possible, and supervision in performing them.[121]

Although the majority in *Smith* did not precisely put the issue in such terms, the outcome of *Smith* is consistent with the idea that there is no overarching doctrine of 'military exceptionalism', which extends to the MOD in the context of negligence claims across the board. This leads to the conclusion that not striking out the Challenger claims was reasonable and correct, but second best course for the majority to take, given that duty of care issue was not determined.

[120] Civil Procedure Rules 1998, rr 3.4, 24.2.
[121] *King v Sussex Ambulance Service NHS Trust* [2002] ICR 1413, [21], *Smith* (n 1) [171].

The recent case law illustrated a wider trend emerging. Immunities like those of expert witnesses,[122] from suit of advocates presenting cases in court,[123] or 'misdescribed' public policy immunity were all abolished.[124] *Smith* of course did not do that,[125] but combat immunity remains 'tightened' instead. *Smith* illustrates the respect for immunity 'squeeze' precedent. It remains consistently applied. The principles underpinning combat immunity, but in relation to the fire ground rather than the battlefield were interpreted in *Wembridge v East Sussex Fire and Rescue Service*.[126] The High Court held that given that there was a 'considerable emphasis [in *Smith*] on the need for specific findings of fact as governing the application of any immunity, there was not enough to support extension of combat immunity to the fire-ground on the facts of *Wembridge*.[127] The case goes to show the significant hardship inflicted on the defendant, who wishes to succeed with immunity in tort of negligence.

It can be true that there is a likelihood of diversion of resources – money, time and energy of the MOD will be better spent exercising their public function instead of defending common law negligence claims. Whilst the allocation of resources remains a relevant consideration for determination of duty of care, it 'affords no warrant for denying the existence' of it.[128] The argument being made here is that if there will be no negligence in the end, there will be no diversion of resources either.

## D. Problems with the decision in *Smith*

The unpredictability over whether the relationship between the MOD and its soldiers in this context was duty bearing causes significant concerns over the extent of the potential

[122] *Jones v Kaney* [2011] UKSC 13.
[123] *Arthur JS Hall & Co v Simons* [2002] 1 AC 615.
[124] Defence Committee, *UK Armed Forces Personnel and the Legal Framework for Future Operations* (2013-14, HC 931) Ev 36 (Defence Committee); *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 559-560, ibid Ev 36; the police, however, remains exempt from that 'trend': *Michael and others v Chief Constable of South Wales Police* [2015] UKSC 2.
[125] 'It should be said, for the sake of accuracy, that [*Smith*] did not abolish combat immunity, it restricted it' *Winstanley v Sleeman* [2013] EWHC 4792 (QB) [44].
[126] [2013] EWHC 2331 (QB) [201].
[127] ibid [204].
[128] [2012] EWCA Civ 1365 [50].

detrimental effects on the armed forces. According to the UK Armed Forces Personnel and the Legal Framework for Future Operations Report and written evidence submitted, the ruling in *Smith* is likely to have negative impact[129] on the military effectiveness.[130] The potential defensive practices on the operational independence of the armed forces and their efficiency render the decision in *Smith* 'deplorable'[131]. As a result of defensive practices there is a risk of 'bloodier engagements'[132]. Defensive practices could result in the increased number of casualties due to fear of facing liability in tort of negligence.[133] Nevertheless, most importantly, there is a significant disconnection between battlefield and courtroom.[134] So, negligence claims should not be brought against the MOD, if judges would find themselves scrutinising military decisions taken on the ground 'in the heat, smoke, and dust of battle.'[135] Policy Exchange, a think-tank, refers to a special position being created to highlight that certain court decisions, like one in *Smith,* tend to influence the MOD, in order to accommodate civilian and not military perception of risk.[136] Finally, the ability of the state to defend itself may be affected in the end, especially in the financial context.[137]

The concern over these possible negative consequences on the operation of the military is not out of place. Despite the training and equipment decisions having taken place long before the commencement of armed conflict, they cannot be entirely separated from the decisions which take place on the ground during the conflict.[138] But it is the standpoint of this article that it is not entirely true that the MOD will essentially become paralysed if the courts look into some training/procurement decisions and impose a reasonable duty of care in the given circumstances.

[129] Defence Committee (n 124) [77].
[130] ibid Ev 3.
[131] ibid Ev 31.
[132] ibid [79].
[133] ibid Ev 37-Ev 39.
[134] ibid [79].
[135] Thomas Tugendhat and Laura Croft, 'The Fog of Law: An introduction to the legal erosion of British fighting power' (Policy Exchange, 2013) 8.
[136] ibid 17.
[137] Press Association '*US army chief 'very concerned' about impact of cuts on British forces*' (The Guardian, 2 March 2015) ‹www.theguardian.com/politics/2015/mar/02/us-army-chief-of-staff-concern-defence-budget?CMP=share_btn_fb› accessed 9 May 2015.
[138] *Smith* (n 1) [135].

## E. Solutions to the uncertainty revolving around combat immunity

Realistically, any judicial intervention to remove 'the mischief of *Smith*' is unlikely to happen any time soon.[139] Since 'the Government has not ruled out legislating in the future to provide further clarity for members of the Armed Forces should it consider it necessary to do so',[140] the first solution suggested by Policy Exchange is to define combat immunity in legislation and to limit the extent of actionable duty of care; this is in relation to the 'incidents' that occur during active operations and during training.[141] The idea is to '[define] Combat Immunity through legislation to include the conduct of military operations, the [material] and physical preparation for military operations, and those persons affected by the military on operations'.[142]

A definition could be useful to clarify whether the MOD owes a duty of care to its soldiers in the context of training decisions. If the definition would in effect operate just like disapproved definition of 'combat' or now-abolished Section 10 of the 1947 Act, then Parliament would run the risk of introducing legislation which may very well be incompatible with the Art 6 of ECHR, since blanket immunities are unlikely to be consistent with the right to fair hearing.

The precise definition of combat immunity may not be much of assistance, because it is impossible 'without considering the evidence, to say, as a matter of legal principle, precisely when "active operations" start and when they finish'.[143] Therefore, any attempt of defining combat immunity may turn out to be a hopeless exercise. Similarly, to the attempt by Owen J in the Multiple Claimants case to define 'combat'. The contention here is that, with the greatest respect, Owen J was wrong, not only for the reasons explained in the Smith case but also because, such construction of 'combat' could in effect lead to the re-introduction of Crown immunity. This very generous approach taken

[139] *Defence Committee Report* (n 124) Ev 39.
[140] ibid [6].
[141] ibid; Tugendhat and Croft (n 135) 11-12, 56.
[142] ibid.
[143] [2012] EWCA Civ 1365 [60]; *Defence Committee Report* (n 124) Ev 42-43.

by Owen J in developing the doctrine of combat immunity at common law would very much clash with the parliamentary intention, clearly expressed in the Crown Proceedings (Armed Forces) Act 1987, where Crown immunity was abolished. Therefore, it is the standpoint of this article that it only makes sense that the doctrine of combat immunity is narrower in its scope to cover the essential circumstances of the armed conflict, rather than in effect operate just like the now repealed Section 10.

AA further suggestion put forward by Policy Exchange and the Defence Committee is to use the existing legislation.[144] The Crown Proceedings (Armed Forces) Act 1987 allows the Secretary of State to revive Crown immunity. This can be done when the relevant procedure is followed: Section 2 and Section 5(2) of the 1987 Act confer such powers on the Secretary of State[145]. The existing statutory framework is not as unsatisfactory as it is unpopular:

> Nowadays the law is often called upon to attempt to find a solution to impenetrable problems that no politician, if he or she is ever to be elected again, can afford to solve. It is, dare I suggest, for that reason that no Secretary of State for Defence has sought to exercise his existing statutory power to re-introduce immunity from suit in specified conflicts … You should, after all, never legislate in tears.[146]

For the above reason, the solution put forward by Morgan is unlikely to succeed.[147] He has suggested that it is for the Secretary of State to make an order under Section 2 of the Crown Proceedings (Armed Forces) Act 1987, to clarify the scope of combat immunity in tort and declare that compensation will be paid on the full tort quantum, but have no claim on a no-fault basis pursuant to the Section 2 order.[148]

[144] *Defence Committee Report* (n 124) Ev 42-43147) 12, 57.
[145] But these powers have not been exercised since their introduction.
[146] Tugendhat and Croft (n 135) 8.
[147] *Defence Committee Report* (n 124) Ev 42-43.
[148] ibid.

The third solution involves a development of common law. This option is somewhat parallel to Lord Carnwath's suggestion from his dissenting judgment in *Smith* that the majority approached Challenger claims from the wrong angle. According to Lord Carnwath it would be far more beneficial for the tort of negligence if the majority would have focused on the issue of duty of care, rather than defining combat immunity.[149] He also suggested that the existing rules governing tort of negligence would be sufficient to strike out Challenger claims. Even without combat immunity there would be no duty of care that could cover 'the heat of battle'.[150] Arguably, 'duty of care cases are really about giving the defendant an immunity against liability in negligence' anyway.[151] Given that the existence of combat immunity in English common law was 'not in doubt' in *Smith*, it is not unreasonable to allow the doctrine to remain at common law, to see how it is going to be developed by the courts in the subsequent cases. Alternatively, it is possible to achieve more certainty by simply abolishing the doctrine of combat immunity at common law and using the existing tort of negligence principles.

The fourth solution also belongs to the development at common law but is revolutionary and unsupported by any literature in the context of the MOD's liability. Nolan in his article suggests deconstruction of duty of care.[152] Without going into too much detail about reshaping the whole of tort of negligence, the point that Nolan is making in relation to immunities broadly, which is relevant to combat immunity specifically is that:

> 'As part of the process of deconstructing duty these immunities should therefore be recognised as defences, which the defendant must establish in the usual way; [particularly, this should apply to] ... the rule where a public authority acts pursuant to a statutory duty or power designed for the benefit of a particular class of persons ... cannot be liable in negligence to others whose interests are adversely affected by that action.[153]'

[149] *Smith* (n 1) [164].
[150] *Mulcahy* (n 2) 750.
[151] David Howarth, 'Negligence After *Murphy*: Time to Re-Think' (1991) Cambridge Law Journal 58, 93-94.
[152] Donal Nolan, 'Deconstructing the duty of care' (2013) Law Quarterly Review 559.
[153] ibid 574-575.

Simply, having the doctrine of combat immunity re-labelled from 'immunity' to a 'defence' could assist legal certainty. However, the very nature of this suggestion deviates from the core claim of this article, which remains to be that the majority by not stating, whether the relationship between the MOD and its soldiers in this context is duty-bearing created significant uncertainty.

## V. Conclusion

The aim of this article was to expose a fundamental flaw with the decision in *Smith* - the lack of certainty. The UKSC left the MOD in a vulnerable position: it does not know whether it owes a duty of care on the facts of *Smith*, it is also not certain whether a duty of care will exist in future cases similar to *Smith*.

The court's determination of the duty of care on a case-by-case basis is inconvenient for the MOD. However, the MOD is aware of the well-established duty of care it owes as an employer. *Barrett*, *Birch*, *Jebson* and *Radclyffe* demonstrate that the MOD can and will be liable for a breach duty of care as an employer in much more prosaic circumstances.

Nonetheless, there are two differences between *Smith* and the foregoing cases which make *Smith* less straightforward and more controversial. Unlike *Barrett*, *Birch*, *Jebson* and *Radclyffe*, the Challenger claims allege failures directly against MOD and are not concerned with vicarious liability. Also, there is a weak but possible link between the procurement and training decisions and the Iraq War, yet there was no such problem with either of the aforementioned cases.

The ruling in *Smith* does not invite the concept of 'judicialisation of warfare'; the Supreme Court in *Smith* remained alert to the fact that the claimants may have suffered a wrong and, if that was the case, it should be remedied.[154] As such, the Supreme Court

[154] *Jones* (n 122) [109], [113], [156], [160], *Smith* (n 1) [94], [162].

was clearly trying to achieve justice between the parties. However, this could have been better done by clarifying the issue of duty, thus rendering a correct decision imperfect.

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