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	Contents	2
	Editorial	3
<i>Martin Kwan</i>	Should there be a tort for Section 4A of the Public Order Act 1986?	4-28
<i>Holly Littlewood</i>	The Boundary Between Education and Healthcare Provision in Education, Healthcare Plans: To what extent does the <i>SEND Tribunal Single Route Of Redress National Trial</i>, represent a move towards a more holistic approach?	29-55
<i>Bachar Hakim</i>	Syrian War: The Historical Context	56-67
<i>Michael Grayflow</i>	Treating Young Offenders in Early Rome	68-77
<i>Javier García Oliva and Helen Hall</i>	The Phoenix and the Mocking Bird: How fantasy and children's literature has shaped the recognition and protection of human rights.	77-87

Editorial

It is a great honour to be the editor of this inaugural edition of the *Journal of Rights and Justice* (“*JRJ*”), a publication produced by the *Centre for Rights and Justice* of Nottingham Law School, Nottingham Trent University. As might be expected, the journal reflects the broad and eclectic remit of the centre itself, bringing together a wide range of topics, all bound together by the common theme of rights and justice. We are therefore thrilled to have such a rich variety within this first iteration of the *JRJ*.

It is fitting that the discussion opens with an examination by Martin Kwan of the need for a tort in respect of Section 4A of the Public Order Act 1986, as this draws out the interplay between private and public law, in a fascinating and highly topical context. Unlike many other rights focused journals, the *JRJ* aims to keep private law very much on its radar, given the importance of this dynamic of the juridical system when it comes to realizing rights and making them real in the world.

Our attention then shifts to questions relating to the boundary between healthcare and education, and the adequacy of current mechanisms for ensuring that the interests of an especially vulnerable category of citizens are properly guarded, young people who are at potentially disempowered by virtue of both their age and additional needs. The issues brought to light by Holly Littlewood are of both academic and practical importance, given their focus on the effectiveness of the present oversight of the decision-making by public authorities in this arena.

Then as a counterpoint to the immediacy and topicality of the opening articles, we shift to three historical discussions, which address a longer-view of the development and outworking of rights, but which all in different ways raise critical questions for twenty-first century justice. Bachar Hakim sets the Syrian war in context, providing a very helpful overview for anyone interested in understanding the backdrop to the conflict and human tragedies which have unfolded. Then Michael Grayflow probes the treatment of juvenile offenders by the criminal justice of early Rome, casting light on a topic which has hitherto been underexplored, and certainly does not feature prominently in most undergraduate courses on Rome Law. Finally, García Oliva and Hall examine how the cultural space of fantasy and children’s literature has enabled social dialogue to advance in ways which have enabled legal reform.

Certainly from my perspective, it has been a great pleasure to engage with the variety of ideas and subject material covered within this edition. I am extremely grateful to all of the authors, not only for their academic contributions, but also their patience and graciousness throughout the editorial process. I would also like to take this opportunity to thank Prof Tom Lewis, Director of the Centre for Rights and Justice, for his dedication to this project, and very practical as well as moral support. I am indebted as well to Kerri Gilbert for her efficiency and kindness in addressing administrative and technical challenges.

The Rev’d Dr Helen Hall, Editor, March 2020

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SHOULD THERE BE A TORT FOR SECTION 4A OF THE PUBLIC ORDER ACT 1986?

MARTIN KWAN*

ABSTRACT

Where a person is insulted and distressed by a wrongdoer who intentionally causes him/her distress, the act constitutes a criminal offence under s 4A of the Public Order Act 1986. This article argues that there is no actionable tort for the insult under the current English law. The only way to seek private recourse is to have a private prosecution (assuming there is not a public one). Whilst this can lead to a compensation order, there are shortcomings with this option. It will then explore whether the misconduct in s 4A POA should be recognised as actionable in tort. It is argued that the misconduct constitutes a private wrong. Furthermore, other jurisdictions have comparable torts. Therefore, Parliament should consider introducing a statutory tort.

INTRODUCTION

Where a person is insulted by a wrongdoer who intentionally causes him/her distress or alarm, and the victim feels distressed as a result, the act constitutes a criminal offence under s 4A of the Public Order Act 1986 (POA). The natural question that follows is whether the victim can have any private recourse against the offender, especially when the victim has suffered “harm” in the form of distress.

Robert Stevens commented that the “law of insults is interesting both comparatively and, more importantly, theoretically”, because there is not a specific tort of insult under English law; whilst the laws of other jurisdictions make it actionable.¹ Whilst this article is not a comparative law analysis, it is partly inspired by the Singaporean Protection of Harassment Act (2014), which has made its s 4A POA-equivalent both a criminal offence and a tort. This article thus explores whether the existing English common law doctrines can provide any cause of action for insults. It will be concluded that there is no actionable tort. Despite so, it will be noted that

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¹ Robert Stevens, ‘Private rights and public wrongs’, in Matthew Dyson (ed), *Unravelling Tort and Crime* (CUP 2014) 111, 137.

recently in *Rhodes v OPO*, dissenting Lord Neuberger and Lord Wilson signalled a willingness to expand the current law to cover for intentional act causing distress.² This forms a striking contrast with the previous judicial attitude towards humiliation in 2004, where the House of Lords voiced strongly against creating such tort.³ Nevertheless, it is unlikely a common law tort will be created.

It has been commented that one “would have to have a very bleak view of human life” if one is to disagree that humiliation is a bad thing.⁴ Therefore, it will also explore whether the misconduct in s 4A POA should be recognised as an actionable tort. Whilst private prosecution (assuming there is not a public one) is a possible way to seek private recourse, it does not always provide a satisfactory result. Also, it will be argued that the misconduct constitutes a private wrong. Furthermore, it is particularly interesting to note that other jurisdictions have already introduced comparable torts. Therefore, there should be a statutory tort.

SECTION 4A OF THE PUBLIC ORDER ACT 1986

Section 4A of the POA provides that:

A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he—

- (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
 - (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,
- thereby causing that or another person harassment, alarm or distress.⁵

The offence can be committed in both public and private places, except in dwellings.⁶ It is a defence for the defendant to prove that his/her conduct is reasonable.⁷ It is a summary offence⁸ and has been described as one of the “most serious summary offences”.⁹

The words “threatening or abusive” and “insulting” under s 4A should be accorded their ordinary and natural meaning¹⁰. There is a minimum threshold for the harm: whilst

² [2015] UKSC 32 [119].

³ *Wainwright & Anor v Home Office* [2003] UKHL 53 [62].

⁴ Anthony Quinton, ‘Humiliation’ (1997) 64(1) *Social Research* 77, 77.

⁵ Similar offence committed by electronic means are additionally covered by s 1 Malicious Communications Act 1988 and others. Those with a discrimination element (e.g. based on race) are covered by Racial Discrimination Act.

⁶ Public Order Act 1986, s 4A(2).

⁷ Public Order Act 1986, s 4A(3)(b).

⁸ Public Order Act 1986, s 4A(5).

⁹ John Sprack, *A Practical Approach to Criminal Procedure* (OUP 2018) para 8.03.

¹⁰ Neil Parpworth, *Constitutional and Administrative Law* (OUP 2018) para 20.56, citing *Brutus v Cozens* [1973] AC 854.

the harassment or distress does not have to be grave, it should not be trivial.¹¹ Distress and harassment are different. “Distress by its very nature involves an element of real emotional disturbance or upset”.¹² Yet, for harassment, one “can be harassed, indeed seriously harassed, without experiencing emotional disturbance or upset at all”.¹³

For example, regarding “fuck you” or “fuck off”, it has been held that:

... frequently though they may be used these days, we have not yet reached the stage where a court is required to conclude that those words are of such little significance that they no longer constitute abuse. Questions of context and circumstance may affect the court’s ultimate conclusion as to whether, in an individual case, they are abusive... I stress that the decision on an issue of this kind will always be fact dependent.¹⁴

It should be noted that Parliament has not made it an offence to swear in public.¹⁵ For “fuck” or “fucking”, whilst they are potentially abusive, Bean J commented that they are “rather commonplace swear words”. Therefore, in the absence of evidence of the victim testifying that he/she has experienced harassment, alarm or distress, the court will not automatically draw such inference from the mere fact of swearing.¹⁶ Generally, rude or offensive words and behaviour are not necessarily insulting.¹⁷ Furthermore, just because offensive words are used, it does not mean that the defendant has the intention to cause distress.¹⁸ ‘Not everything which is offensive is distressing’.¹⁹

WHY WOULD A VICTIM WANT A REMEDY?

There are two reasons why a victim would want a remedy through private recourse. First, a person who is insulted may feel that he/she has been wronged, especially when the insults involve some sort of humiliation.²⁰ In other words, there is a personal sense of injustice. The victim may want to vindicate the wrong against the defendant *personally* irrespective of whether the public authority (e.g. police and prosecution)

¹¹ *Southard v DPP* (2006) EWHC 3449 (Admin) [23] (regarding s 5 of Public Order Act 1986). See also *R v DPP* [2006] EWHC 1375 (admin).

¹² *Ibid*.

¹³ *Southard* (n 11) [23].

¹⁴ *Ibid* [22].

¹⁵ *Harvey v Director of Public Prosecutions* [2011] EWHC 3992 (Admin) [6] (commenting in the context of s 5 POA).

¹⁶ *Ibid* [13].

¹⁷ *Ambrose* (1973) 57 Cr App R 538.

¹⁸ David Ormerod and Karl Laird, *Smith, Hogan, and Ormerod’s Criminal Law* (15th edn, OUP 2018) [31.8], quoting *CPS v Weeks* ((2000) 14 June, unreported, DC, which held that the intention to cause distress is not automatically established by saying ‘black bastard’. It still depends on the context and circumstances, and is a question of fact.

¹⁹ *DPP v Smith* [2017] EWHC 3193 (Admin) [17].

²⁰ Phil Leask, ‘Losing trust in the world: Humiliation and its consequences’ (2013) 19(2) *Psychodynamic Practice* 129, 131.

has taken action. It should be made clear that this vindictory objective of the victim is not necessarily about rage and revenge against the offender. Instead, the victim may simply want the public and the society (through the courts) to *recognise* that the humiliation/insult is a (private) “wrong”, and is not something to be ignored.²¹

Secondly, the victim may want compensation for the harm suffered, namely being harassed, alarmed or distressed. Given the nature of insults is personal, there are other more abstract harm such as harm to the victim’s dignity.

The scenario in contemplation for the present analysis

For the purpose of this article, the analysis will mainly focus on verbal insults causing distress. Otherwise, the scope will be too large, given that s 4A POA covers also behaviour and threats. It is useful to suggest a contemplated scenario for the analysis below.

In the contemplated scenario, the insult has no sexual or discriminatory element or in any way related with the Internet (for which otherwise other statutes would be applicable). It is not made in the household setting between a couple as a spontaneous outburst out of a normally affectionate relationship. It involves severe insults or verbal abuse, to the extent that one would describe it as humiliation in order to signal its seriousness and nature. The insults are not necessarily made in circumstances where the wrongdoer was verbally or physically offended by the complainant first. The insults can occur in various social settings, such as workplace bullying.²²

For example, it can be a situation where a person uses the foul language f-word and abusive language to insult the others. It can also be a situation involving taunts regarding someone’s intelligence, appearance, family, social status or morality, through using invectives. The invectives can be further worsened when used with the f-word.

²¹ R A Duff, ‘Torts, crimes and vindication: whose wrong is it?’, in Matthew Dyson (ed), *Unravelling Tort and Crime* (CUP 2014) 146, 148.

²² In the workplace setting, an action against the employer is possible by relying on employment law. The ‘EAT decided as long ago as 1990 (in *Hilton International Hotels v Protopapa*) that rebuking someone in a humiliating or degrading manner constituted a breach of the implied term’ of mutual trust and confidence: Stephen Taylor and Astra Emir, *Employment Law: An Introduction* (OUP 2015) 192. Yet, an action in negligence against the employer may not always cover the misconduct in s 4A POA, because of two reasons. First, it requires a recognised psychiatric harm. Secondly, in *Waters v Commissioner of Police for the Metropolis* [2000] 1 WLR 1607, Lord Hutton said that ‘not every course of victimisation or bullying by fellow employees which would give rise to a cause of action against the employer, and an employee may have to accept some degree of unpleasantness from fellow workers. Moreover, the employer will not be liable unless he knows or ought to know that the harassment is taking place and fails to take reasonable steps to prevent it’.

IS THERE ANY WAY TO SEEK A REMEDY?

This part will evaluate whether a victim can have a private recourse against the defendant. Six torts will be evaluated to see if they cover the wrong in s 4A POA. They include actions based on (1) Protection from Harassment Act 1997 (PHA), (2) defamation, (3) public nuisance, (4) negligence, (5) the tort in *Wilkinson v Downton* and (6) breach of statutory duty. It will be concluded that none of the torts can provide a recourse for the victim with certainty. It will also explore whether there is a generic tort that provides a remedy for any criminal offence, and will conclude that there is none. The only way to seek a remedy is to rely on private prosecution in order to obtain a compensation order (if there is no public prosecution).

Protection from Harassment Act 1997

The PHA prohibits a person from pursuing a course of conduct which amounts to harassment where the defendant knows or ought to know that it will amount to harassment.²³ It can constitute both a criminal offence²⁴ and a civil action²⁵. Damages may be awarded for (among other things) any anxiety and any financial loss caused by the harassment.²⁶ Although it has been criticised that the PHA is being over-expanded to cover more situations than the originally envisaged stalking situation²⁷, the courts nevertheless accept its wide application. For example, it now covers:

... workplace disputes, conflicts among neighbours and family members, debt collection and litigation practices, the pursuit of private grievances and campaigns, public protests, blackmail attempts via threatened disclosures of information, and, increasingly, press activities and publications as well as the dissemination of images, opinions and information on the web.²⁸

With such a wide coverage, it would seem that the PHA could provide a private/civil recourse to victims who is offended by the conduct described in s 4A POA.

In addition, a criminal prosecution or a civil action based on the PHA has an advantage over a private prosecution based on the POA (further details on private prosecution will be discussed below). This is because the PHA adopts an objective

²³ Protection from Harassment Act 1997, s 1(1).

²⁴ *Ibid*, s 2.

²⁵ *Ibid*, s 3.

²⁶ *Ibid*, s 3(2).

²⁷ *Veakins v Kier Islington* [2009] EWCA Civ 1288 [17] (per Maurice Kay LJ). See also Joanne Conaghan, 'Enhancing Civil Remedies for (Sexual) Harassment: s.3 of the Protection from Harassment Act 1997' (1999) 7 *Feminist Legal Studies* 203, 210.

²⁸ François du Bois, 'Harassment: A Wrong without a Right?', in Eric Descheemaeker & Helen Scott (eds), *Iniuria and the Common Law* (Hart Publishing 2013) 215, 215.

test, which would cover situations where the defendant *ought to* know that his/her conduct amounts to harassment. Therefore, it was held that a person with schizophrenia could nevertheless be convicted under the PHA for sending threats to a Member of Parliament.²⁹ By contrast, the POA adopts a subjective test, which requires the defendant to have the intention to cause a person harassment, alarm or distress.

Nevertheless, despite the similarity in the scope of the POA and the PHA³⁰, it is submitted that the PHA may still be unable to provide a private recourse. First, the PHA requires a “course of conduct”, which entails at least two occasions. By contrast, s 4A POA covers one-off incidents. Furthermore, the word “course” means that there must be a link/nexus between the two incidents.³¹ Establishing a link can be a significant hurdle for the victim, because “the fewer the occasions and the wider they are spread, the less likely it would be that a finding of harassment can reasonably be made”.³² Thus, where a wrongdoer insulted the victim once and did it again several months later, there is unlikely to be an successful action based on the PHA, despite the trouble caused to the victim.³³

Besides, in practice, “the police may tend to wait before arresting a suspect until at least three complaints have been made by the victim in order to ensure that a course of conduct can be proved”.³⁴ Given such, it has been commented that the criminal offence in the POA remains the only option when there is only a single incident.³⁵

Defamation

There are two reasons why the law of defamation will not be useful. First, abusive words, such as calling someone a “fat, syphilitic slag”, are not defamatory when “they are uttered and heard as such”. This is because right-thinking people would realise that they are uttered in anger and should not be taken seriously.³⁶ “Exhibitions of bad manners or discourtesy are [not to be] placed on the same level as attack on character”.³⁷

²⁹ *R v Colohan* [2001] EWCA Crim 1251; [2001] 2 FLR 757 [21].

³⁰ *AMP v Persons Unknown* [2011] EWHC 3454 [42]: ‘Section 4A of the Public Order Act 1986 uses almost identical words to those in the 1997 Act’.

³¹ *Hipgrave v Jones* [2005] 2 FLR 174 [74]. See also Nigel V. Lowe and Gillian Douglas, *Bromley’s Family Law* (11th edn, OUP 2015) 174.

³² *Lau v DPP* [2000] 1 FLR 799 [15], approved in *Pratt v DPP* [2001] EWHC Admin 483 [9-10]. See Christian Witting, *Street on Torts* (15th edn, OUP 2018) 256.

³³ See e.g. *R v Hills* [2010] EWCA Crim 123, where the defendant’s wrongdoing on six different occasions during a nine-month period was held not to be a “course” of conduct.

³⁴ Lowe and Douglas (n 31) 175.

³⁵ *Ibid* 174.

³⁶ Nicholas J McBride and Roderick Bagshaw, *Tort Law* (6th edn, Pearson 2018) 504.

³⁷ *Sim v Stretch* (1936) 2 All ER 1237, 1242 (per Lord Atkin).

However, a statement would still be considered defamatory if it *exposes* a claimant to ridicule by right-thinking people.³⁸ Under this ridicule test, the majority in *Berkoff* was of the view that “hideously ugly” could potentially be defamatory, depending on whether the jury thinks that a person’s standing is damaged by being exposed to ridicule.³⁹ The test is based on public reaction, rather than the defendant’s intention.

Nevertheless, there are two points in reply, which suggest that the ridicule test may not always be helpful. First, Neill LJ expressly said that “insults which do not diminish a man’s standing among other people do not found an action for libel or slander”.⁴⁰ McNamara supplemented that “while a plaintiff’s feelings may be hurt by harsh ridicule, it does not mean their standing in the community will be diminished”.⁴¹ Similarly, Phillips LJ said that merely making “a simple statement of opinion” that a person is hideously ugly “could never be defamatory”.⁴² Secondly, dissenting Millet LJ observed that it was arguable that the “cheap joke” of calling somebody “hideously ugly” was to *ridicule* the claimant only, but not to *expose* him to ridicule.

There is a second reason why it would be difficult to fit the offensive words/behaviour within the tort of defamation. There is a requirement that the statement must be published to a third party.⁴³ For example, in *Berkoff*, the statement was made by the defendant-journalist in an article in the Sunday Times. Whereas in our present situation, not only does the tort of defamation fail to cover “threatening, abusive or insulting” *behaviour*, the offensive words are most likely not published to a third party.

Public nuisance

Given the nature of s 4A POA is to disrupt the public order through uncivil behaviour, the tort of public nuisance seems at first sight relevant. However, it is submitted that this tort cannot provide a civil remedy for our situation. To constitute public nuisance, the conduct must “interfere unreasonably... with the comfort, convenience or safety of the public”.⁴⁴ The nuisance must be “so widespread in its range or so indiscriminate in its effect”.⁴⁵ McBride and Bagshaw stress that the *public*, as opposed to *some individuals*, must be affected.⁴⁶ In terms of how many people must be affected, whilst there is not a minimum, a judge should ask whether “the neighbourhood” is affected

³⁸ McBride and Bagshaw (n 36) 505 (taking into account the Defamation Act 2013).

³⁹ *Berkoff v Burchill* [1996] 4 All ER 1008.

⁴⁰ *Ibid* 1013 (Neill LJ).

⁴¹ Lawrence McNamara, *Reputation and Defamation* (OUP 2007) 179.

⁴² *Berkoff* 1021 (Phillips LJ).

⁴³ McBride and Bagshaw (n 36) 511. Defamation Act 2013, s 1, 15.

⁴⁴ McBride and Bagshaw (n 36) 611.

⁴⁵ *Attorney-General v PYA Quarries* [1957] 2 QB 169, 191 (per Denning LJ). See McBride and Bagshaw (n 36) 614.

⁴⁶ *R v Madden* [1975] 1 WLR 1379, 1383. See also McBride and Bagshaw (n 36) 614.

by the defendant's activity and should then consider whether "the local community within that sphere comprises a sufficient number of persons to constitute a class of the public".⁴⁷ In our situation, the conduct envisaged by s 4A POA is directed at private individual personally, rather than to a number of people. Therefore, it is out of the scope of public nuisance. Moreover, there is a further hurdle: isolated incidents cannot amount to nuisance.⁴⁸

Furthermore, it is uncertain whether the court would accept such a broad conception of disruption of public order as a shared harm to the community. For example, where a victim is insulted in a private place with no other citizens around, it is hard to argue there is a shared harm.

Negligence

Establishing a duty of care can be difficult. Conceptually, a distinction should be drawn between (1) psychiatric illness and (2) mere distress. "It is well settled that mental injury is only actionable in the tort of negligence if it takes the form of a recognized psychiatric illness".⁴⁹

Therefore, where the victim only suffers distress (which is the threshold under s 4A POA), there will not be a duty of care.⁵⁰ Distress "is not sufficient to ground an action in negligence per se, but may be recoverable sometimes as a head of consequential loss".⁵¹ Similarly, humiliation and fear are not sufficient as long as they do not amount to psychiatric illness.⁵² A similar approach is taken in Australia, as explained by the Australian High Court:

In Australia... Grief and sorrow are among the "ordinary and inevitable incidents of life"; the very universality of those emotions denies to them the character of

⁴⁷ *PYA Quarries* (n 45) 184-5 (per Romer LJ).

⁴⁸ *Stone v Bolton* [1949] 1 All ER 237, 238 (per Oliver J). McBride and Bagshaw (n 36) 646.

⁴⁹ Donal Nolan and John Davies, 'Torts and Equitable Wrongs', in Andrew Burrows (ed), *Principles of the English Law of Obligations* (OUP 2015) 133, 233. See also McBride and Bagshaw (n 36) 107, 135-6. McBride and Bagshaw make a distinction between accident and non-accident cases on psychiatric illness. Notable accident cases include e.g. *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310 and they involve more complicated issues, such as the distinction between primary and secondary victims. Whilst accident cases may provide some precedential value, they are factually distinguishable from the present non-accident situation involving insults. Therefore, those cases will not be discussed.

⁵⁰ *Rothwell v Chemical & Insulating Co Ltd* [2006] EWCA Civ 27 [63]: 'The law does not recognise a duty to take reasonable care not to cause anxiety'. See also *Hinz v Berry* [1970] 2 QB 40; *Alcock* (n 49). See McBride and Bagshaw (n 36) 139; Nolan and Davies (n 49) 233.

⁵¹ Jenny Steele, *Tort Law: Text, Cases, and Materials* (4th edn, OUP 2017) 79.

⁵² Tsachi Keren-Paz, 'Compensating Injury to Autonomy: A Conceptual and Normative Analysis', in Kit Baker, Karen Fairweather and Ross Grantham (eds), *Private Law in the Twenty-First Century* (Hart Publishing 2017) 411 435.

compensable loss under the tort of negligence. Fright, distress or embarrassment, without more, will not ground an action in negligence. Emotional harm of that nature may be evanescent or trivial.⁵³

The tort in Wilkinson v Downton

The tort in *Wilkinson v Downton* does not provide a remedy for cases solely based on distress. However, it is worth exploring this tort, because there is increasing judicial support (though in dissent only, but a strong one) in favour for including distress.

The three requirements for the tort in *Wilkinson v Downton* are defined in the Supreme Court decision of *Rhodes v OPO*, which include (1) the conduct element, (2) the mental element and (3) the consequence.⁵⁴ For the conduct element, there needs to be “words or conduct directed towards the claimant for which there is no justification or reasonable excuse, and the burden of proof is on the claimant”.⁵⁵ The mental element requires an “intention to cause physical harm or severe mental or emotional distress”.⁵⁶ In terms of the required consequence, there needs to be either physical or recognised psychiatric illness.⁵⁷

Whilst the mental element takes “distress” as the basis, this tort nevertheless requires consequential “psychiatric illness”. Yet, exactly because of this difference, Lord Neuberger (with whom Lord Wilson agreed), in dissent, argued that:

... there is a plainly a powerful case for saying that, in relation to the instant tort, liability for distressing statements, where intent to cause distress is an essential ingredient, it should be enough for the claimant to establish that he suffered significant distress as a result of the defendant’s statement. It is not entirely easy to

⁵³ *Tame v New South Wales* (2002) 211 CLR 317, 191 ALR 449 (HCA) [193]-[194] (per Gummow and Kirby JJ). See also e.g. Civil Liability Act 2002 (NSW), s 31: “There is no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness”. However, it is noteworthy that in Canada, it was held in *Saadati v Moorhead* [2017] 1 SCR 543 [35]-[37] that mental injury is recoverable, and it does not have to be a *recognised* one. However, Brown J emphasised that “mental injury is not proven by the existence of mere psychological upset”. “Claimants must, therefore, show much more — that the disturbance suffered by the claimant is ‘serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears’ that come with living in civil society”. Thus, even if the Canadian approach is applied in England and Wales, it may still be unable to cover the situation in s 4A POA, because the misconduct in s 4A does not necessarily cause mental injury.

⁵⁴ *Rhodes* (n 2).

⁵⁵ *Ibid* [74].

⁵⁶ *Ibid* [89].

⁵⁷ *Ibid* [88] (per Lady Hale And Lord Toulson, with whom Lord Clarke and Lord Wilson agree).

see why...the claimant should have established that he suffered something more serious than significant distress before he can recover compensation.⁵⁸

This recent argument in favour of including *serious* distress as an actionable harm can be seen as a huge step forward from the previous judicial conservativeness towards distress. A striking contrast can be seen in the 2004 House of Lords decision of *Wainwright v Home Office*.⁵⁹ Lord Hoffmann was of the view that even if the defendant *intentionally* cause distress (which is not true now as the mental element includes the intention to cause distress), there will not be an action under *Wilkinson v Downton*.⁶⁰ This is because:

... In institutions and workplaces all over the country, people constantly do and say things with the intention of causing distress and humiliation to others. This shows lack of consideration and appalling manners but I am not sure that the right way to deal with it is always by litigation.⁶¹

Is there a generic tort which covers any breach of criminal statutes?

It seems logically strange if a victim of a criminal offence has no civil recourse in private law. This view is especially strengthened by Blackstone's old saying that "every public offence is also a private wrong".⁶² It is interesting to note that there are two different interpretations of this statement by academics. However, both interpretations of Blackstone's statement are no longer correct today. The first interpretation is irrelevant for our present purpose, but should be described for clarifying the analysis.

The first interpretation is that if a person is criminally liable, it must mean he/she must also be liable for the corresponding tort. Hence, this first interpretation is only applicable to those situations where a corresponding tort already exists. This interpretation can be shown to be false by way of an example. Stevens suggests there are both *existing* applicable criminal offence and tort (e.g. battery) covering sadomasochistic sexual acts. Yet, an offender may not necessarily be liable in tort, due to the availability of private law defences such as consent and *volenti non fit iniuria*.⁶³

The second interpretation is different, and is relevant for our purpose. It takes Blackstone's statement to mean that every criminal offence impliedly *creates* a corresponding tort.⁶⁴ In other words, if this interpretation is right, s 4A POA would impliedly create a corresponding tort.

⁵⁸ *Ibid* [119] (per Lord Neuberger, with whom Lord Wilson agreed).

⁵⁹ *Wainwright* (n 3).

⁶⁰ *Ibid* [46].

⁶¹ *Ibid* [46].

⁶² Blackstone, *Commentaries*, vol. IV, ch.1, 5.

⁶³ Stevens (n 1) 117-118.

⁶⁴ Academic literature has proved this statement to be false. For example, see Jerome Hall, 'Interrelations of Criminal Law and Torts: II' (1943) 43 Columbia Law Review 967, 968, which proves that under US law (as in 1943), sedition, possession of counterfeit dies, and attempt to commit suicide are examples which are not concurrently both tort and crime.

There have been judicial attempts to create a generic tort which covers any breach of criminal statutes.⁶⁵ Lord Denning attempted to do so by holding that if “a private individual can show that he has a private right which is being interfered with by the *criminal* act, thus causing or threatening to cause him special damage over and above the generality of the public”, then he/she can ask for damages *and/or* injunction.⁶⁶

Yet, Lord Denning’s principle was rejected in *Lonrho Ltd v Shell Petroleum Co. (No. 2)* (a case on breach of statutory duty).⁶⁷ It affirmed the usual breach of statutory duty principles, holding that the victim can sue only when (1) “on the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit of a particular class of individuals”, or (2) the statute creates a public right and the individual suffers a “particular, direct and substantial damage other and different from that is common to the rest of the public”.⁶⁸ This will be discussed below.

Breach of statutory duty

This tort is relevant because statutory duties are not only owed by public authorities, but can also be owed by private entities.⁶⁹ However, it is uncertain as to whether this tort can provide a civil remedy for our contemplated situation, and there are several difficult hurdles to overcome.

This action has two main requirements. Firstly, “the defendant’s breach has resulted in the claimant suffering the kind of loss that the [statutory duty] breached by the defendant was imposed on him in order to avoid”.⁷⁰ Secondly, “Parliament intended that a breach of the [statutory duty] should be civilly actionable”.⁷¹

Whilst there is no clear authority saying that s 4A POA imposes a statutory duty, it is arguable that it imposes a duty not to cause harassment, alarm or distress by abusive words or behaviour. It is not difficult to pass the first requirement, as long as the victim has suffered harassment, alarm or distress. Yet, the second requirement poses a lot of challenges and uncertainty for our case.

⁶⁵ Patrick Elias and Andrew Tettenborn, ‘Crime, Tort and Compensation in Private and Public Law’ (1981) 40(2) Cambridge Law Journal 230, 231: “A commits a crime, knowing that he is thus causing loss to B. Can B sue A?... After all if A commits a tort or breach of contract against a third party, C, with intent to damnify B, B can sue him... why not if A commits a crime?”.

⁶⁶ *Ex parte Island Records* [1978] Ch. 122, 135, 139 (Emphasis added). Simon F. Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin’s Tort Law* (7th edn, OUP 2012) 309.

⁶⁷ [1982] AC 173, 188 (per Lord Diplock). See also Witting (n 32) 472.

⁶⁸ *Lonrho* (n 67) 186.

⁶⁹ See e.g. *Gorris v Scott* [1874] LR 9 Exch 125 where the statutory duty could be applicable to ship owner as imposed by Contagious Diseases Act 1869.

⁷⁰ *McBride and Bagshaw* (n 36) 600.

⁷¹ *Ibid* 600.

“The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action”.⁷² Despite this discouraging starting point, it still depends on the legislative intention. “It must be established that the Parliament intended to confer a right to compensation”.⁷³ “It is not enough to show that a statute was designed to protect the claimant in some general sense”.⁷⁴ In Lord Jauncey’s words:

... The fact that *a particular provision* was intended to protect certain individuals is *not of itself sufficient* to confer private law rights of action upon them, something more is required to show that the legislature intended such conferment.⁷⁵ (Emphasis added)

In that case, when construing the act as *a whole*, it was held that the legislature did not intend to confer a right of action.

Applying this judicial reasoning to our scenario, s 4A POA should not be analysed in isolation, and the general scheme of the *whole* POA should be taken into account. Section 4A concerns misconduct of a *personal* nature and is arguably designed to protect the victim from verbal humiliation; by contrast, the *whole* POA is apparently broader and is more about the order of the *collective* public. From this perspective, it would be hard to argue that the legislature intended to confer a right of action.

In determining the legislative intention, McBride and Bagshaw point out that it is relevant to consider whether there is any means of enforcement.⁷⁶ This would point against allowing an action, because the “existence of a criminal penalty for breach of a given [statutory duty] may count as an indication that Parliament intended that breach of that [statutory duty] should be sanctioned through the criminal law, and not through a civil action”.⁷⁷

One may counter-argue that the lack of existing civil remedies to the claimant is a factor supporting an action for breach of statutory duty.⁷⁸ Therefore, allowing a civil action can serve some “useful purpose”.⁷⁹ Yet, this is not a powerful counter-argument, because the victim can obtain a compensation order upon successful public or private prosecution (further details on compensation orders will be elaborated in the next section).

One may further counter-argue that a compensation order is insufficient, as compared to a civil remedy. This is because criminal courts cannot deal with more

⁷² *X v Bedfordshire County Council* [1995] 2 AC 663, 731 (per Lord Browne-Wilkinson)

⁷³ Witting (n 32) 475.

⁷⁴ *Ibid* 475.

⁷⁵ *R v Deputy Governor of Parkhurst Prison Ex p Hague* [1992] 1 AC 58, 170-71. See also Steele (n 51) 889.

⁷⁶ McBride and Bagshaw (n 36) 602-3.

⁷⁷ *Ibid* 603.

⁷⁸ Margaret Fordham, ‘Breach of Statutory Duty - A Diminishing Tort’ (1996) *Singapore Journal of Legal Studies* 362, 367. Glanville Williams, ‘The Effect of Penal Legislation in the Law of Tort’ (1960) 23(3) *Modern Law Review* 233, 246.

⁷⁹ McBride and Bagshaw (n 36) 604.

complicated questions of damages.⁸⁰ Leigh argues that in “complex cases, then, the victim should be left to pursue a remedy through the civil courts”.⁸¹ Lay magistrates (given s 4A POA is a summary offence) may not have sufficient training to handle complex dispute regarding the extent of the damage or loss.⁸² Dyson suggests that where “time, effort and expertise to solve uncertain facts or law” are required, a compensation order is refused and the matter will be left to the civil courts.⁸³

However, this counter-argument is over-stated for four reasons. First, the nature of s 4A POA is unlikely to involve complicated questions of fact, given it is a summary offence with simple elements. The relevant tariff clearly establishes the compensation for distress will have a starting point of £500.⁸⁴ This tariff ensures consistency and assists in determining the amount.

Second, lay magistrates are assisted by a qualified court legal adviser, “who is a barrister or solicitor of at least five years’ standing”.⁸⁵ Moreover, for more complicated cases where a defendant has committed both s 4A POA and a more serious offence (e.g. indictable-only ones), the summary offence will be sent to Crown Court if it is related to the indictable offence.⁸⁶

Third, a compensation order will be made as long as the loss or damage could fairly be said to have resulted from the offence, without the need to consider the civil principles of causation.⁸⁷ In other words, the criminal rules are sometimes more straightforward.

Fourth, the scope of a compensation order is arguably wider. Criminal compensation recognises different heads of damages from civil law. In other words, criminal compensation may be available even if no civil remedy is available.⁸⁸ For example, criminal compensation recognises mental distress (as said above).

Nevertheless, there are circumstances where a civil action is preferable, as it may lead to more damages than a criminal compensation order. This is because the means of the defendant will be taken into account under s.130(11) *Powers of Criminal Courts*

⁸⁰ LH Leigh, ‘English Criminal Procedure’, in David Feldman (ed), *English Public Law* (OUP 2009) para 28.106.

⁸¹ *Ibid* para 28.106, citing cited *R v Donovan* (1981) 3 Cr App R (S) 192. See also Matthew Dyson, ‘Tort and Crime’, in Mauro Bussani, Anthony J. Sebok (eds), *Comparative Tort Law: Global Perspectives* (Edward Elgar Publishing 2015) 93, 102, citing *R v Liverpool Crown Court, ex parte Cooke* [1996] 4 All ER 589, 595.

⁸² Leigh (n 80) para 28.106, citing *R v Donovan* (1981) 3 Cr App R (S) 192.

⁸³ Dyson (n 81) 102, citing *R v Liverpool Crown Court, ex parte Cooke* [1996] 4 All ER 589, 595.

⁸⁴ David Ormerod and David Perry (eds), *Blackstone’s Criminal Practice 2018* (OUP 2017) para SG-373.

⁸⁵ Robert McPeake (ed), *Criminal Litigation and Sentencing* (29th edn, OUP 2018) [5.5].

⁸⁶ Crime and Disorder Act 1998, s 51.

⁸⁷ Ormerod and Perry (n 84) para E16.4, citing *R v Thomson Holidays Ltd* [1974] QB 592 and *Rowlston v Kenny* (1982) 4 Cr App R (S) 85.

⁸⁸ *R v Chappell* (1985) 80 Cr App R 31 (CA), 34-5: “It does not however follow that the criminal remedy is the mirror of an underlying civil remedy”.

(*Sentencing*) Act 2000; whereas the means is rarely relevant in private law.⁸⁹ Even so, this point should not be over-stated. Compensation is expected by the tariff to be only £500. Furthermore, compensation has to be paid before any imposed fine.⁹⁰ If the victim suffers more severe harm than distress (e.g. psychiatric illness), he/she can bring an action of negligence or the tort in *Wilkinson v Downton* (where both torts have a threshold of requiring psychiatric illness). In those circumstances, obtaining a compensation order will not preclude the victim from bringing a civil claim (and the civil damages will deduct the portion from the compensation order).⁹¹ Therefore, there is no reason why an action of breach of statutory duty should be allowed.

Private prosecution

Given this article is about whether a victim can have recourse against the defendant regarding the wrongdoing under s 4A POA, this part assumes that there is no public prosecution. Furthermore, a reason why private prosecution is worth exploring is because there are successful examples of private prosecution on this matter in England and Wales.⁹²

For clarity, one may wonder if it is legally appropriate for a disgruntled victim to bring a private prosecution for being wronged. *It has been held that private prosecution for “individual grievance” will not constitute an obstacle.*⁹³ *In terms of the motive (e.g. bringing the prosecution out of grief), there is no suggestion that it would constitute an obstacle (unless the claim is vexatious⁹⁴, frivolous or there is an abuse of process⁹⁵).*⁹⁶

⁸⁹ Dyson (n 81) 102.

⁹⁰ Powers of Criminal Courts (Sentencing) Act 2000, s 130(12).

⁹¹ Dyson (n 81) 101.

⁹² Anil Rajani and Iskander Fernandez, ‘DIY justice: are private prosecutions the future?’ (*The Times*, 23 October 2014) (noting that there was a successful record of private prosecution on the Public Order Act 1986).

⁹³ *R (Ewing) v Davis* [2007] EWHC 1730 [10].

⁹⁴ For a magistrate to issue a summon, this issue must be considered. See *R v West London Justices ex parte Klahn* [1979] 2 All ER 221; *R v Bros* (1901) 85 LT 581. For vexatious claimants, see *Senior Courts Act 1981, s 42*. See also Matthew Dyson and Paul Jarvis, ‘Remedies of the Criminal Courts’, in Graham Virgo and Sarah Worthington (ed.), *Commercial Remedies: Resolving Controversies* (CUP 2017) 515, 530.

⁹⁵ If so, it will be stayed. See Dyson and Jarvis (n 94) 530: However, “mixed motives on the part of the private prosecutor will not risk the prosecution being stayed as an abuse of process so long as the ‘improper’ motive is not the primary motive”, citing *Re Serif Ltd* [1997] CLY 1373, *Speed Seal Products Ltd v Paddington* [1985] 1 WLR 1327 (CA) as authorities. See e.g. *R v Bow Street Metropolitan Stipendiary Magistrate ex p. South Coast Shipping Co. Ltd* [1993] QB 645; *D Ltd v A & Ors* [2017] EWCA Crim 1172 [59].

⁹⁶ See, e.g., *Kelly & Anor v District Judge Ann Ryan* [2013] IEHC 321 [42]: “vindication of private grievances is nearly always a motivation for the private prosecutor”. This will not render the

An attractive feature is that a criminal court *must* consider making a compensation order in respect of any personal injury, loss or damage suffered.⁹⁷ “The court should consider two types of loss”, one of them being “pain and suffering caused by the injury (including terror, shock or distress)”.⁹⁸

Most importantly, for “temporary mental anxiety (including terror, shock, distress)” which is “*not* medically verified” will have a starting point of compensation of £500⁹⁹ in magistrates’ court (though the court will take into account the means of the offender). In other words, this avoids the legal hurdle of whether distress is a recognised harm.¹⁰⁰ For mental injury with medical verification, the starting point will be higher.

Besides, the costs of private prosecution will most likely (despite not always¹⁰¹) be paid out of public funds under s 17(1)(b) Prosecution of Offences Act 1985 for an amount “reasonably sufficient to compensate the prosecutor for any expenses”. Thus, this gives a financial advantage to the victim in terms of costs.

Nevertheless, there are five notable challenges. Firstly, the criminal standard of proof is higher.

Secondly, the Director of Public Prosecutions (DPP) has power to discontinue a private prosecution.¹⁰² The DPP can take over the case and discontinue it if it cannot pass the Prosecution’s evidential sufficiency test (i.e. whether there is a “reasonable prospect of conviction”¹⁰³) and the public interest test¹⁰⁴. However, the first two hurdles would not be problematic if the case is strong, especially bearing in mind there have been successful examples before.

Thirdly, for summary offence that is tried in the magistrates’ court, there is a time limit of six months from the time when the offence was committed.¹⁰⁵ This is significantly less than the civil torts outlined above. The limitation period for torts is six

action to be abusive. See also *R (Dacre) v City of Westminster Magistrates’ Court* [2008] EWHC 1667 (Admin) [30]: “it is inevitable that many private prosecutions will be brought with mixed motives”. However, private prosecutor “must observe the highest standards of integrity, of regard for the public interest and duty to act as a Minister for Justice”: *Zinga* [2014] 1 Cr App R 27 [61].

⁹⁷ Ormerod and Perry 2018 (n 84) para SG-372. Powers of Criminal Courts (Sentencing) Act 2000, s 130(1), (2A).

⁹⁸ Ormerod and Perry (n 84) para SG-372.

⁹⁹ *Ibid* para SG-373.

¹⁰⁰ Matthew Dyson and John Randall, ‘England’s splendid isolation’, in Matthew Dyson (ed), *Comparing Tort and Crime: Learning from across and within Legal Systems* (CUP 2015) 18, 55.

¹⁰¹ *Gujra, R (on the application of) v Crown Prosecution Service* [2012] UKSC 52 [57].

¹⁰² Prosecution of Offences Act 1985, s 6. See Dyson and Jarvis (n 94) 529.

¹⁰³ *Gujra* (n 101) [34].

¹⁰⁴ *Ibid* [25].

¹⁰⁵ Magistrates’ Courts Act 1980, s 127.

years (subject to exceptions).¹⁰⁶ However, this is not an issue if the victim is well-advised on the limitation period.

Fourthly, if “there has been misconduct on the part of the prosecution a Private Prosecutor should not be awarded costs out of Central Funds”.¹⁰⁷ Additionally, the court may order the payment of any costs incurred as a result of any unnecessary or improper act or omission by or on behalf of any party to the proceeding to be met by the party responsible for that conduct.¹⁰⁸

A private prosecutor bears the obligations as a public Minister for Justice.¹⁰⁹ Yet, a code of conduct tailored for private prosecutors was only introduced fairly recently, and adherence to it is voluntary except for members of the Private Prosecutors’ Association.¹¹⁰ With a binding guideline, it could lead to some uncertainty and debates on the appropriateness of the way a private prosecution is conducted. In *D Ltd v A*, one of the issues was whether the alleged misconduct on the part of the private prosecutor prejudiced a fair trial.¹¹¹ This case illustrated the potential conflict of interests between the roles as a private prosecutor and as a lawyer working for the lay client. On the facts, the private prosecutor “had got very close indeed to her client’s case and had enthusiastically been trying to promote it”.¹¹² The private prosecutor approached the lawyer of one of the defendants for documents as a “personal favour”. The court found the private prosecutor’s conduct “blinkered” and “bad”.¹¹³ Despite so, it was held that the misconduct had no actual prejudicial effect, because the defendant’s lawyer did not accede to the private prosecutor’s inappropriate request. The point made here is that, given the (1) potential conflict of interests, (2) lack of a binding code of conduct, and (3) bad conduct is allowed as long as there is no actual prejudicial effect, there may be incentives for a private prosecutor to conduct the case on the verge of crossing the line. This is not entirely satisfactory.

The fifth challenge is arguably the biggest obstacle. Where the police have decided to caution the defendant instead of bringing a public prosecution, a subsequent private prosecution *may* be stayed as an abuse.¹¹⁴ It would depend on whether the consent form for being cautioned has precluded private prosecution.¹¹⁵ If

¹⁰⁶ Limitation Act 1980 (‘LA’), s 2. For negligence causing personal injury, the limitation period is three years where the cause of action is known at the date of accrual (s 11 LA). For latent personal injuries caused by negligence, the limitation is six years (s 14A). Section 33 provides for the court’s power to exclude the limit under s 11 if it prejudices the claimant.

¹⁰⁷ Practice Direction (Costs in Criminal Proceedings) 2015, para 2.6.4, citing *R v Esher and Walton Justices ex p Victor Value & Co Ltd* [1967] 111 Sol Jol 473.

¹⁰⁸ Section 19 Prosecution of Offences Act 1985; Reg. 3 Costs in Criminal Cases (General) Regulations 1986.

¹⁰⁹ See n 96 above.

¹¹⁰ Private Prosecutors’ Association, ‘Code of Conduct’ (18 July 2019) <<https://private-prosecutions.com/wp-content/uploads/PPA-Code-for-Private-Prosecutors.pdf>>.

¹¹¹ *D Ltd* (n 95).

¹¹² *Ibid* [62].

¹¹³ *Ibid* [62], [66].

¹¹⁴ Ormerod and Perry (n 84) para D2.23, citing *Jones v Whalley* [2007] 1 AC 63.

¹¹⁵ *Ibid* [D2.23], citing *Hayter v L* [1998] 1 WLR 854.

the terms exclude such, the victim would have to apply for judicial review to quash the decision to caution.¹¹⁶

A simple caution would be used as “a proportionate response to low-level offending where the offender has admitted the offence”.¹¹⁷ It is considered to be a “swift, simple and effective justice”, which saves the police’s time for other more serious offence.¹¹⁸ It is applicable to summary offences. It can be done, as long as (1) the Prosecution’s evidential and public interest tests are passed, (2) the offender makes a clear and reliable admission and (3) the offender consents to be cautioned in an informed manner.¹¹⁹ Therefore, even though the victim may feel seriously wronged, the police may prefer to administer a simple caution. This means private (and also public) prosecution may not always be available to vindicate the wrong and to compensate the victim.

DO WE NEED A TORT?

The above analysis raises the concern that a private recourse may not be available for the victim. Tort law presently provides no recourse; whilst private prosecution may not always be viable especially if the police has opted to issue a simple caution. Moreover, relying on criminal private prosecution does not reflect the nature of s 4A POA as a private wrong.

It is submitted that Parliament should consider creating a statutory tort. However, conceptually, it is helpful to clarify that expanding the scope of the tort in *Wilkinson v Downton* (by adopting the view of Lord Neuberger and Lord Wilson in *Rhodes v OPO*) is different from creating a tort for s 4A POA. Although there is overlap in scope, the specific focus of the suggested statutory tort is on threatening, abusive or insulting conduct causing distress etc. (so the focus is both on the *wrong* and *harm*); whereas the expanded tort in *Wilkinson v Downton* merely focuses on distress (i.e. the focus is only on the *harm*). In other words, the latter would be wider in scope, and the courts do not seem to be willing to expand it.¹²⁰

There are four reasons why a statutory tort should be introduced, and each of them will be elaborated in detail below. Firstly, it is submitted that the misconduct in s 4A POA is by nature tortious. It is not only a public wrong, but is also a private wrong. Secondly, introducing a civil tort for s 4A is compatible with the freedom of speech under Art 10 of the European Convention of Human Rights (ECHR). Thirdly, comparable torts exist in other jurisdictions. Fourthly, insults, as a form of humiliation,

¹¹⁶ *Ibid* [D2.23]. See also Leigh (n 80) para 23.87.

¹¹⁷ Ministry of Justice, ‘Simple Cautions for Adult Offenders’ (13 April 2015) [5].

¹¹⁸ *Ibid* [5].

¹¹⁹ Ormerod and Perry (n 84) paras D2.25-2.27, citing the Ministry of Justice, ‘Simple Cautions for Adult Offenders’ (13 April 2015).

¹²⁰ See e.g. Nolan and Davies (n 49) 233: ‘The recognition of a separate tort of intentionally causing emotional distress, while not excluded by the House of Lords, now seems unlikely’.

can cause profound psychological consequence if the victim is left powerless with no recourse.

A private wrong

First, a “civilized society is one whose members do not humiliate one another”.¹²¹ “Insults are, or almost always are, *wrongful* as a matter of virtue”.¹²² This is because insults infringe the dignity of individuals and they “interfere[] with or diminish[] that person’s ability to lead a normal autonomous life in the community”.¹²³ Respect is constitutive of human dignity.¹²⁴ In John Murphy’s words (although spoken in a different context):

... wherever an individual is subjected to conduct that constitutes or implies some form of disregard for the innate values associated with personhood - be it their deliberate humiliation or objectification - that person can be said to have suffered an affront to his or her dignity... It is treating them as though they were somehow worth less than oneself.¹²⁵

Secondly, given that “criminal law prohibits *wrongful conduct*”, *the conduct in s 4A POA is therefore by nature wrongful*.¹²⁶ A criminalised wrong is a non-trivial wrong “that the victim ought to pursue, that it would be wrong to shrug off or ignore”.¹²⁷ Besides, Robert Stevens thinks that it is problematic for something to be a crime whilst not a tort, because, in effect, s 4A “create[s] a crime based upon conduct being an interpersonal wrong, whilst denying that it constitutes tort”.¹²⁸ Hence, it should be recognised as a private wrong.

Thirdly, it is arguable that causing distress, harassment or alarm is an unauthorised and intentional attempt to interfere with the victim’s mental integrity. Mental capacity is part of the body or personhood that one owns.¹²⁹

Fourthly, just like the PHA, s 4A POA helps maintain civility (though they concern different types of incivility). The PHA aims to deal with harassment of at least two occasions; whereas s 4A POA deals with *another type* of incivility, namely insults,

¹²¹ Avishai Margalit, *The Decent Society* (Harvard University Press 1998) 1.

¹²² Stevens (n 1) 126 (Emphasis added).

¹²³ Joseph Raz, *The Morality of Freedom* (OUP 1986) 421.

¹²⁴ du Bois (n 28) 240.

¹²⁵ John Murphy, ‘The Nature and Domain of Aggravated Damages; (2010) 69(2) Cambridge Law Journal 353, 361.

¹²⁶ Jesse Wall, ‘Public Wrongs and Private Wrongs’ (2018) 31(1) Canadian Journal of Law & Jurisprudence 177, 189.

¹²⁷ Antony Duff and Sandra Marshall, ‘Public and Private Wrongs’, in James Chalmers and others (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press 2010) 70, 82-3.

¹²⁸ Stevens (n 1) 126.

¹²⁹ See e.g. Arthur Ripstein, *Private Wrongs* (Harvard University Press 2016) 29, 40.

abuse or threats. Incivility affects our private interests because citizens have an interest in “a reasonably civil social environment” which respects individual personality.¹³⁰ It also infringes our right of social participation by discouraging it. In addition, it “stymie[s] the various dimensions of individual and communal development that are fostered by the lubrication of social interaction through civility rules.”¹³¹

If the PHA affords both a tort and a criminal cause of action, it is hard to justify why s 4A POA does not equally afford the same. It is not persuasive to say that the misconduct under the PHA is more serious simply because it involves at least two incidents. This is particularly the case, given that the misconduct in both s 4A POA and the PHA can cause the same degree of harm - harassment.

The compatibility of having a civil tort with the freedom of speech

There are three arguments that a civil tort is compatible with the freedom of speech, which will be expanded in detail below. Firstly, given the criminal s 4A is compatible, its civil equivalent should also be compatible. Secondly, the proportionality principle, which balances the defendant’s freedom of speech, is relevant only for determining the reasonableness of the defendant’s conduct. A claimant does not have to justify the proportionality and necessity of his/her decision to instigate a civil claim. This means the proportionality issue will not act as a threshold to hinder/block such a claim. Thirdly, the courts play a safeguarding role by carefully balancing the defendant’s freedom of speech. This prevents any undue interference with the freedom.

Regarding the first argument, on the basis that the criminal offence is compatible with human rights, it is hard to argue that a civil tort is incompatible. It has been held that s 4A is compatible with the freedom of speech under Art 10 ECHR, because it contains a defence under s 4A(3)(b) which applies when the defendant’s conduct is reasonable.¹³² Additionally, this argument is reinforced by the fact that a civil action interferes with the freedom to a lesser extent than a criminal action, as it does not result in any criminal sanction.

The next question then turns on when it is justifiable to interfere with the defendant’s freedom of speech. On the one hand, Bettinson suggests that “to preserve the right to freedom of expression a democratic society must tolerate not only acceptable opinions expressed in varying forms but also the offensive and

¹³⁰ du Bois (n 28) 235.

¹³¹ *Ibid* 236.

¹³² *James v Director of Public Prosecutions* [2015] EWHC 3296 [34] (per Ouseley J), [51] (per Davis LJ).

shocking”.¹³³ She further argues that “allowing individuals to vent their dissent prevents recourse to violence”.¹³⁴

On the other hand, Art 10(2) ECHR clearly contemplates that the freedom of speech is not absolute, and it can be undermined for a couple of legitimate purposes, which notably include “the prevention of disorder or crime” and “the protection of health or morals”. Whilst it is true that the freedom of speech allows one to “offend, shock or disturb”¹³⁵, the European Court of Human Rights (ECtHR) has recognised that the nature of ‘insult’ is different:

...a clear distinction must be made between criticism and insult. If the sole intent of a particular form of expression is to insult a person, an appropriate sanction would not, in principle, constitute a violation of Article 10 of the Convention...¹³⁶

The second argument in favour of the workability of having a civil tort is that, by analogy to the way the proportionality principle is applied to s 4A, (1) a claimant does not have to justify the proportionality of the decision to instigate a civil claim. Furthermore, (2) the proportionality requirement does not require the claimant to establish the necessity to prevent public disorder. These two points would ensure that the instigation of a civil claim is not pre-emptively hindered/blocked by any burdensome threshold.

To explain this argument in detail, the court has clarified that the proportionality principle is relevant for considering the reasonableness of the defendant’s conduct, but not for determining whether the decision to prosecute under s 4A is proportionate and necessary. Previously, the focus of the proportionality issue was misplaced and it was wrongly held that the decision to prosecute under s 4A has to be a proportionate and necessary response to prevent public disorder.¹³⁷ The correct position was

¹³³ Vanessa Bettinson, ‘Section 4A Public Order Act 1986: accommodating freedom of expression, *Dehal v Crown Prosecution Service*’ [2006] 5 *Web Journal of Current Legal Issues*, citing *Handyside v UK* (1976) 1 EHRR 737 [49]: “Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population”; and *Redmond-Bate v DPP* [2000] HRLR 249 [20]: “Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having”.

¹³⁴ *Ibid.*

¹³⁵ *Handyside v UK* (n 133) [49]; *Tammer v. Estonia* 41205/98 [2001] ECHR 83 [59].

¹³⁶ *Annen v. Germany (No. 6)* [2018] ECHR 851 [24] (criminal conviction for insulting scientists’ human stem cell research as equivalent to Nazi’s human experiment); *Genner v. Austria*, no. 55495/08, § 36, 12 January 2016 [36]. See also *Skatka v. Poland*, application no. 43425/1998 (27 May 2003) [38] (a case on criminal contempt of court based on insulting the court), approved in *Kincses v. Hungary*- 66232/10 - Chamber Judgment [2015] ECHR 82; *Tammer* (n 135) [67]: “could have formulated his criticism of Ms Laanaru’s actions without resorting to such insulting expressions”, and therefore the criminal conviction for the insult did not breach of Art 10.

¹³⁷ *Dehal v CPS* [2005] EWHC 2154 (Admin) [7]-[12]

clarified in *James v Director of Public Prosecutions*, which held that *Dehal* was wrongly decided, because whether to prosecute is a question for the prosecution to determine by itself under the Crown Prosecution Service Code of Practice, and is not for the court to review such a decision.¹³⁸ In other words, the prosecution does not have to prove and justify such in court. It is strongly arguable that the same logic equally applies to the proposed tort. This would greatly facilitate the instigation of a civil claim.

Nevertheless, it does not mean that the defendant's freedom of speech will be unduly hindered. The third argument is that the court will safeguard such by carefully balancing it. The court will pay close attention to the circumstances and context in which the alleged conduct is made. Moreover, the courts are particularly mindful to protect certain types of speeches. Lady Hale has helpfully listed the types of speech that deserves protection in a democratic society, which includes (1) political, (2) intellectual and educational, (3) artistic and (4) others.¹³⁹ Although Lady Hale did not make a comprehensive list, it is untenable to include mere insults intended to cause distress as a type of speech worthy of protection.

For example, for political speech, it has been recognised that "the Court should be slow to infer that Parliament intended to create a general power to disperse a protest when the statutory threshold to issue dispersal directions is pitched as low as the causing of 'alarm' or 'distress'".¹⁴⁰ This reinforces the fact that the context is highly relevant. As an illustration, in the context of a public protest, "people are likely to communicate their ideas vocally and in strong terms, and by its very nature a protest is reasonably likely to be 'intimidating', at any rate to some".¹⁴¹ This alone does not sufficiently justify limiting the freedom of expression. Nevertheless, the court reminds (in the context of s 5 Public Order Act 1986, but still highly comparable) that it is important to balance with the others' right of not to be subject to unnecessarily frightening, intimidating and distressing situation.¹⁴² After all, the freedom of speech is not absolute.¹⁴³

The same safeguard is also provided by the ECtHR. For example, in *Oberschlick v. Austria (No. 2)*, the defendant was criminally convicted for calling a politician an "idiot" ("trottel" in German) and he argued that his freedom of speech was

¹³⁸ [2015] EWHC 3296 [24], [28] (per Ouseley J); [57]-[58] (per Davies LJ). This point was seemingly accepted and recanted by Moses LJ in *Bauer and others v DPP* [2013] EWHC 634 (Admin) (who was the judge in *Dehal*).

¹³⁹ *Campbell v MGN* [2004] UKHL 22 [148].

¹⁴⁰ *Singh, R (on the application of) v Chief Constable of West Midlands Police* [2006] EWCA Civ 1118 (28 July 2006) [49] (a case on the now-replaced Anti-social Behaviour Act 2003, which was highly comparable as it defined "anti-social behavior" as conduct that "causes, or is likely to cause, harassment, alarm or distress to any person". Similar provision now exists under the Anti-social Behaviour, Crime and Policing Act 2014.).

¹⁴¹ *Ibid* [50].

¹⁴² *Ibid* [75].

¹⁴³ *Ibid* [76].

unnecessarily interfered with.¹⁴⁴ Although the ECtHR accepted that the word itself may be “insulting”¹⁴⁵ and “polemical”¹⁴⁶, it found that it was not “a gratuitous personal attack as the author provided an objectively understandable explanation” as a reaction of the politician’s controversial speech.¹⁴⁷ The choice of word was not “disproportionate to the indignation knowingly aroused by [the politician]”.¹⁴⁸ In other words, it is consistent with the English jurisprudence which emphasises that (1) the context matters even if a strong word has been used and (2) the proportionality issue assesses the reasonableness of the defendant’s conduct (e.g. why he/she uses strong language in a certain context).

Comparable torts exist in other jurisdictions

Another justification is the existence of comparable torts in other jurisdictions. Those torts provide a practical justification for recognising a tort based on s 4A POA.

Under the Singaporean Protection from Harassment Act (2014, as amended in 2019), s 3 provides for the same criminal offence as is found in s 4A POA. Section 11(1) provides that the victim can bring a civil action. Section 11(2) provides that “if the court is satisfied on the balance of probabilities that the respondent has contravened that section as alleged by the victim, the court may award such damages in respect of the contravention as the court may, having regard to all the circumstances of the case, think just and equitable”. Therefore, the Singaporean Act serves as a solid example of implementing the proposed statutory tort.

Other jurisdictions also have comparable torts. For example, Scotland and South Africa adopt Roman-Dutch law and in particular the concept of *actio iniuriarum*, which includes honour and dignity besides reputation.¹⁴⁹ In the US, there is a tort of intentional infliction of emotional distress. The requirements are (1) intentionally or recklessly (2) doing an act that is outrageous (3) which causes extreme emotional distress to the victim.¹⁵⁰ Although the US tort in principle has a high threshold¹⁵¹, the

¹⁴⁴ *Oberschlick v. Austria (No. 2)*, 1997-IV Eur. Ct. H.R. 1266 [27] (the claimant was convicted of criminal insult in Austria, which he successfully the conviction as incompatible with the freedom of speech in the ECtHR).

¹⁴⁵ *Ibid* [27].

¹⁴⁶ *Ibid* [33].

¹⁴⁷ *Ibid* [33].

¹⁴⁸ *Ibid* [34].

¹⁴⁹ Stevens (n 1) 137.

¹⁵⁰ John J. Kircher, ‘The Four Faces of Tort Law: Liability for Emotional Harm’ (2007) 90(4) *Marquette Law Review* 789, 799.

¹⁵¹ It is argued that it may not be entirely accurately to say the threshold is high, but rather the judges’ determination of whether a conduct is ‘outrageous’ is arbitrary. For example, in *Wilson v Monarch Paper Co* 939 F2d 1138 (5th Cir. 1991), the company executive was being forced out from his role by being asked to do janitor work. It was held that the conduct was outrageous. See Catherine L Fisk, ‘Humiliation at Work’ (2001) 8 *William & Mary Journal of*

argument is that at least the US recognises such a tort. This is an affirmative choice on distributive justice, which demonstrates the courts' willingness to help victims who have been treated in an outrageous way.

Although "mere insults" are not covered by the US tort¹⁵², this does not necessarily mean the US tort is much narrower and does not cover the conduct described in s 4A POA. This is because one should not assume English law has a low threshold either. As outlined above, even swearing the f-word will not automatically lead to a successful conviction under s 4A POA. There must be evidence that the swearing leads to distress, harassment or alarm.

There are US examples where this tort provided remedies to victims; but where the same facts happen in England and Wales, there would most likely be no cause of action. For example, the US Restatement cites a case where a school principal abruptly accuses a high school girl of immoral conduct with various men and bullied her for an hour with threats with prison and with public disgrace to the girl and her parents unless she confessed. She suffered severe emotional distress and resulting illness.¹⁵³ Assuming the same facts happen in England and Wales but with no resulting illness (otherwise the tort in *Wilkinson v Downton* would apply), arguably there is not an actionable tort under English law (given negligence does not recognise mere distress as a harm), especially when there is not any physical touching or threat of violence.

Psychological impact of not having a recourse available to the insulted victim

There is another argument justifying the proposed tort: if there is not an available legal recourse, the victim will suffer from a sense of powerlessness caused by the humiliating insults. It is vital to address this powerlessness, because it can have profound consequences. Depending on the personality of the victim and the seriousness of the humiliation/insults, different victims may experience different

Women and the Law 73, 88, who commented that it is "difficult to rationally explain why working as a janitor may have dignity for some, be humiliating but not actionable for others". Similarly, Fisk at 89 further cited the example where strip-searching was outrageous and humiliating to a 'shy, modest, young woman' working as a K-Mart cashier (who was being suspected for theft), but not to a prison guard (contrasting *Bodewig v K-Mart, Inc.*, 635 P.2d 657 (Or. Ct. App. 1981) with *McDonell v Hunter* 809 F.2d 1302 (8th Cir. 1987)).

Despite the above examples demonstrate the judicial approach applying a rather low threshold to those circumstances, there are also counter examples where the court applied a high threshold. For example, in *Aileen Mariano v Liberty Dialysis-Hawaii LLC No. 13-15452* (9th Cir. 2014), where it was held the conduct was not outrageous despite the defendant exposed its "employees to the needless risk and harm of continued sexual harassment, and defend its action because the harasser falsely told the employer he did not engage in the harassing conduct, which the employer knew to be untrue".

¹⁵² US Restatement (Second) of Torts §46(e).

¹⁵³ *Ibid*, §46(e), illustration 6.

negative emotions, which would include (1) dangerous feelings, (2) sad feelings, and (3) worsening ones.

Regarding the creation of dangerous emotions, being humiliated or insulted provokes “powerless rage, the urge to protest, and a strong desire to seek redress”:

... humiliated individuals, who have now lost the status of persons who can effectively make status claims on their own behalf within their communities, no longer have any voice within these communities to make their case and have it considered. Thus, although their anger is often intense, they are powerless to act within their communities to recover their former status.¹⁵⁴

Therefore, he/she may then turn the rage into revenge, which can potentially be dangerous.¹⁵⁵

Some may experience sad feelings like sense of injustice and powerless¹⁵⁶, loss of trust¹⁵⁷, feeling violation of core self and soul¹⁵⁸. In turn, one may have lower job performance, which could in turn lead to “long-term economic and psychological consequences.”¹⁵⁹

There are also non-dangerous, but worsening emotions. Some may turn rage into despair; whilst others may experience despair without experiencing rage first.¹⁶⁰ There can also be paranoia and depression.¹⁶¹ For persons with low self-esteem, they may experience shame¹⁶², worthlessness and helplessness¹⁶³ and feel like they deserved to be ill-treated. It may then worsen into recognised psychiatric illness.¹⁶⁴

Given the potential to cause psychiatric illness, it constitutes another reason why it should be seen as a private wrong. This is because “impairing someone else’s mental health will seriously setback someone’s ability to choose how to live their life”.¹⁶⁵

CONCLUSION

¹⁵⁴ Walter J. Torres and Raymond M Bergner, ‘Humiliation: Its Nature and Consequences’ (2010) 38(2) *Journal of the American Academy of Psychiatry and the Law Online* 195, 200.

¹⁵⁵ Fisk (n 151) 79. Arthur Ripstein, ‘Responses to Humiliation’ (1997) 64(1) *Social Research* 90, 101.

¹⁵⁶ Leask (n 20) 138.

¹⁵⁷ *Ibid* 130.

¹⁵⁸ *Ibid* 138.

¹⁵⁹ Fisk (n 151) 78-9.

¹⁶⁰ *Ibid* 79.

¹⁶¹ Leask (n 20) 137.

¹⁶² *Ibid* 136.

¹⁶³ Torres and Bergner (n 154) 196.

¹⁶⁴ *Ibid* 199.

¹⁶⁵ Stevens (n 1) 139.

This article has surveyed a number of tort actions and the option of private prosecution. It has been established that it would be difficult for a victim to have a private recourse under current laws. Given the misconduct in s 4A POA is not only a public wrong, but is also a private wrong, it should be recognised as tortious. Furthermore, Parliament should explore the possibility of introducing a statutory tort for s 4A, especially when Singapore has already created one and the US has recognised a similar tort.

It should be stressed that this article is not proposing a statute prohibiting swearing. As seen in the case of *Harvey v DPP*, the mere use of foul language will not automatically lead to criminal liability under s 4A POA. There must be evidence of distress, alarm or harassment. Therefore, both the *wrong* (e.g. insult) and *harm* (e.g. distress) are essential components of the wrong in question.

THE BOUNDARY BETWEEN EDUCATION AND HEALTH CARE PROVISION IN EDUCATION, HEALTH AND CARE PLANS: TO WHAT EXTENT DOES THE SEND TRIBUNAL SINGLE ROUTE OF REDRESS NATIONAL TRIAL REPRESENT A MOVE TOWARDS A MORE HOLISTIC APPROACH?¹⁶⁶

HOLLY LITTLEWOOD[□]

Abstract

Part 3 of the Children and Families Act 2014 aims to promote a holistic approach to meeting children's and young people's needs across education, health and social care. This article considers how well the statutory framework achieves this aim, focusing on children and young people whose needs cross the boundaries of education and health care. Having examined the distinction between education and health care provision in EHC plans, it finds that the statutory framework in fact creates tensions between the local authority and the responsible commissioning body. It further finds that the dispute resolution mechanisms available to parents and young people wishing to challenge a decision on an EHC plan with both education and health aspects are not always satisfactory, in spite of the introduction of new FtT powers to make non-binding recommendations in relation to health. It concludes that the 2014 Act has not yet achieved its aim, and proposes that further progress could be made by empowering the FtT to make binding rulings across all aspects of EHC plans, and by introducing a funding system at national level, contributed to by all three statutory agencies, for children and young people with complex SEND.

INTRODUCTION

Part 3 of the Children and Families Act 2014 ("the 2014 Act") introduced a new statutory regime of support and services for children and young people¹⁶⁷ with special

¹⁶⁶ I would like to thank Kay Wheat for her invaluable advice and support in the production of this article.

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¹⁶⁷ Defined in the Children and Families Act 2014 s 83(2) as "a person over compulsory school age but under 25".

educational needs and disabilities (“SEND”) in England, with the key aim of promoting a more holistic approach to meeting needs across education, health and social care. The 2014 Act places various duties upon local authorities and responsible commissioning bodies to collaborate and to cooperate with one another. It also replaces the Statement of Special Educational Needs¹⁶⁸ with the Education Health and Care Plan (“EHC plan”), designed to bring together a child’s or young person’s education, health and social care needs and provision into one cohesive document.

At the same time, the 2014 Act continues to recognise a clear division between education, health and social care. Separate agencies, subject to separate statutory regimes, are responsible for the delivery and funding of each aspect, and there are different routes to challenge decisions made by each agency.

This article considers the extent to which the 2014 Act is achieving its aim of promoting a more holistic approach, with a focus on children and young people whose needs cross the boundaries of education and health care. It will argue that the statutory requirement to separate a child’s or young person’s education and health needs, when they may in fact be intrinsically linked, can generate unnecessary disputes, along with creating inherent tensions between the local authority and the responsible commissioning body.

This article will further argue that the dispute resolution mechanisms available to parents and young people who wish to challenge decisions on EHC plans with both education and health aspects are not consistently able to deliver holistic outcomes which consider the needs of children and young people in the round. Whilst mediation provides a forum to bring both the local authority and the responsible commissioning body to the table, it cannot be relied upon as a complete answer to resolving disputes of this nature. Further, the First-Tier Tribunal (“FtT”) has jurisdiction in relation to the educational aspects of an EHC plan only. Although the FtT has now been empowered, on a trial basis, to make non-binding recommendations in relation to the health care aspects of EHC plans, this article will argue that this development is not sufficient to achieve a fully integrated approach.

DISTINGUISHING BETWEEN EDUCATION AND HEALTH CARE PROVISION

The statutory separation of educational and health care needs and provision is reflected in the mandated format and contents of EHC plans. EHC plans must set out¹⁶⁹ *inter alia*:

- (i) The child or young person’s SEN (at Section B).
- (ii) The child or young person’s health care needs which relate to their SEN (at Section C).

¹⁶⁸ Education Act 1996 s 324.

¹⁶⁹ Special Educational Needs and Disability Regulations SI 2014/1530 reg 12(1).

- (iii) The special educational provision required by the child or young person (at Section F). This could for example include support from a specialist teacher, access to a specialist teaching programme, specialist ICT equipment or a specialist job coach¹⁷⁰.
- (iv) Any health care provision reasonably required by the learning difficulties or disability which result in the child or young person having SEN (at Section G). This could for example include medical treatments and delivery of medications, occupational therapy and physiotherapy, nursing support, specialist equipment, wheelchairs or continence supplies¹⁷¹. Any health care provision in this section must be agreed by the responsible commissioning body¹⁷².

An EHC plan may specify other health care (and social care) provision reasonably required by the child or young person¹⁷³, which is not linked to their learning difficulties or disabilities, but which should sensibly be co-ordinated with other services in the plan¹⁷⁴. This could for example be a long-term health condition which might need management in a special educational setting¹⁷⁵.

Section 42(2) of the 2014 Act places a duty upon the local authority to secure the special educational provision specified in Section F. Section 42(3) of the 2014 Act places a duty upon the responsible commissioning body¹⁷⁶ to arrange any health care provision specified in Section G.

Whilst education and health care needs and provision may in reality be closely intertwined¹⁷⁷, appropriate categorisation is nonetheless highly relevant to local authorities, responsible commissioning bodies and to parents and young people. Categorisation as education or health care provision will determine:

- (i) Whether the local authority or the responsible commissioning body is responsible for securing and funding the provision; and,
- (ii) The extent of the FtT's jurisdiction to hear an appeal regarding that provision.

¹⁷⁰ Government's Explanatory Note to the Children and Families Act 2014, para 168.

¹⁷¹ Department for Education and Department of Health, *Special Educational Needs and Disability Code of Practice: 0 to 25 Years* (January 2015), 167.

¹⁷² Special Educational Needs and Disability Regulations 2014 reg 12(2).

¹⁷³ Children and Families Act 2014 s 37(3).

¹⁷⁴ Code of Practice (n 5) 167.

¹⁷⁵ Code of Practice (n 5) 165.

¹⁷⁶ This will typically be the relevant Clinical Commissioning Group ("CCG"), but may also be the NHS Commissioning Board (NHS England): Government's Explanatory Note to the Children and Families Act 2014, para 235.

¹⁷⁷ Jennifer Thelen, 'What is Educational Provision? The interplay between health care, social care and educational provision', (2017) Nov E.L.G.L.B. 1, 5.

How, then, does one determine whether a particular type of provision should fall within education (Section F) or health care (Section G)?

Statutory Backdrop

The statutory definitions of special educational needs and special educational provision set out in the 2014 Act replicate those set out in the Education Act 1996¹⁷⁸. Section 20 of the 2014 Act provides that:

- (1) A child or young person has special educational needs if he or she has a learning difficulty or disability which calls for special educational provision to be made for him or her.
- (2) A child of compulsory school age or a young person has a learning difficulty or disability if he or she –
 - (a) has a significantly greater difficulty in learning than the majority of others of the same age, or
 - (b) has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions.
- (3) A child under compulsory school age has a learning difficulty or disability if he or she is likely to be within subsection (2) when of compulsory school age (or would be likely, if no special educational provision were made).

Special educational provision is defined in the 2014 Act as educational or training provision that is different from, or additional to, that made generally for other pupils or students of the same age¹⁷⁹. Special educational provision for a child aged under two means educational provision of any kind¹⁸⁰.

In line with previous statutes on this subject, the 2014 Act provides no specific definition of education¹⁸¹, although section 83(4) clarifies that in this context it includes both part-time and full-time education but does not include higher education. Section 83(2) adopts the definition of training set out at section 15ZA of the Education Act 1996, which states that training includes: full-time and part-time training; vocational, social, physical and recreational training; and, apprenticeship training.

Section 21(5) of the 2014 Act provides that health or social care provision which educates or trains a child or young person is to be treated as special educational provision (described in *East Sussex County Council v TW*¹⁸² as “deemed” special educational provision, as opposed to “direct” special educational provision¹⁸³).

¹⁷⁸ Education Act 1996 s 312.

¹⁷⁹ Children and Families Act 2014 s 21(1).

¹⁸⁰ *Ibid* s 21(2).

¹⁸¹ Melinda Nettleton & John Friel, *Special Needs and Legal Entitlement: The Essential Guide to Getting out of the Maze* (2nd edn, Jessica Kingsley Publishers 2017) 55.

¹⁸² [2016] UKUT 528 (AAC).

¹⁸³ Paul Greatorex, ‘Special educational needs: contents of education health and care plan’, (2017) 18(2) Ed. Law 126, 128.

The SEND Code of Practice: 0 to 25 Years¹⁸⁴ gives guidance on the operation of section 21(5) of the 2014 Act¹⁸⁵ as follows:

- (i) Decisions about whether health care or social care provision should be treated as special educational provision must be made on an individual basis;
- (ii) Speech and language therapy and other therapy provision can be regarded as either education or health care provision;
- (iii) Since communication is so fundamental in education, addressing speech and language impairment should normally be recorded as special educational provision unless there are exceptional reasons for not doing so.

Health care provision is defined in the 2014 Act as the provision of health care services as part of the comprehensive health service in England continued under section 1(1) of the National Health Service Act 2006¹⁸⁶, that is, a service designed to secure improvement (a) in the physical and mental health of the people of England, and (b) in the prevention, diagnosis and treatment of physical and mental illness.

Case Law

The case law shows that the categorisation of provision in any given case is highly fact sensitive. Decision makers generally have an element of discretion, particularly in cases which fall in the “grey area” between education and health care provision.

The overlapping nature of educational and non-educational needs was recognised in the Court of Appeal case of *Bromley LBC v Special Educational Needs Tribunal and others*¹⁸⁷, in which Sedley LJ held that there was no “sharp dichotomy” between the categories of educational and non-educational provision. Rather, whilst some provision was “unequivocally educational”, and some provision was “unequivocally non-educational”, in between those two existed a “potentially large” area of provision which could intelligibly be ranked as either. It was the job of the local authority (and on appeal, of the FtT) to exercise a case-by-case factual judgment as to how provision should be categorised.¹⁸⁸

¹⁸⁴ Department for Education and Department of Health, *Special Educational Needs and Disability Code of Practice: 0 to 25 Years* (January 2015).

¹⁸⁵ *Ibid*, paras 9.73 – 9.76.

¹⁸⁶ Children and Families Act 2014 s 21(3).

¹⁸⁷ [1999] EWCA Civ 3038.

¹⁸⁸ *Ibid*, pp 12-13.

This rationale was applied by HHJ Gilbert QC in *A v Hertfordshire County Council*¹⁸⁹, who held that, provided that activities which could *only* be described as educational or non-educational provision were treated as such, it was for the judgment of the decision maker how the remainder of the activities should be categorised. The court would “not interfere with the expert judgment of the Tribunal if it has reached a properly reasoned decision”¹⁹⁰.

Whilst there is no “bright line test”¹⁹¹ to determine whether provision is education or health care related, the case law nonetheless provides guidance on the factors which should be taken into account when reaching a decision on classification.

It was held in *Bromley LBC v Special Educational Needs Tribunal and others*¹⁹² that physiotherapy, occupational therapy and speech and language therapy, even out of school hours and out of term-time, could amount in law to special educational provision as opposed to health care provision.

The case concerned a 12 year old boy, S, who had spastic quadriplegic cerebral palsy, epilepsy and impaired vision, and was considerably developmentally delayed, with most functioning below the 12 month level. The Court of Appeal accepted that for S, the purpose of education was to maximise his control over his own environment and to learn the basic functions of his day, including eating, drinking, toileting, and dressing, and co-operating with these activities¹⁹³. In these circumstances, S’s parents submitted that S required educational provision in the form of physiotherapy, occupational therapy and speech and language therapy in full-time residential care. The local authority submitted that these forms of therapy could not be classified in law as educational, and that to do so would be to collapse the distinction, recognised in the Education Act 1996, between educational and non-educational provision¹⁹⁴.

Sedley LJ acknowledged as a starting point the Oxford English Dictionary definition of “education” as “systematic instruction, schooling or training given to the young... in preparation for life”, whilst going on to recognise that the word was “protean” and could be construed broadly¹⁹⁵. He defined special educational provision as “in principle, whatever is called for by a child’s learning difficulty”¹⁹⁶. As such, speech and language therapy, occupational therapy and physiotherapy could all constitute special educational provision in appropriate circumstances.

¹⁸⁹ [2006] EWHC 3428 (Admin).

¹⁹⁰ *Ibid*, para 24.

¹⁹¹ *DC v Hertfordshire CC* [2016] UKUT 379 (AAC) para 15.

¹⁹² *Bromley* (n 21).

¹⁹³ *Ibid*, p 4.

¹⁹⁴ *Ibid*, p 12.

¹⁹⁵ *Ibid*, p 10.

¹⁹⁶ *Ibid*, p 12.

The decision in *Bromley LBC v Special Educational Needs Tribunal and others*¹⁹⁷ was referred to in the Upper Tribunal (“UT”) case of *H v A London Borough (SEN)*¹⁹⁸. This case considered the appropriate division of responsibilities between the local authority and the responsible commissioning body in the context of a child, Z, who had Asperger’s Syndrome and a significant history of mental health difficulties. Z had been exposed to pornographic material and had experienced sexual bullying and abuse whilst at a residential school, and had gone on to engage in sexual behaviour towards his young sister. The FtT held that, as Z’s harmful sexual behaviour was “learned” as opposed to “inherent”, a sex education programme designed to address this behaviour could not be said to be directly related to Z’s learning difficulties, and could not therefore be categorised as educational provision. The FtT gave the fact the proposed sex education programme was “at the medical rather than the educational end of the spectrum” as a further reason why it could not be categorised as special educational provision.¹⁹⁹

This decision was overturned on appeal by UT Judge Ward, who held that the appropriate question was not whether Z’s harmful behaviour was learned, but whether the particular provision required to address it was directly related to his learning difficulty²⁰⁰. The FtT had erred in law by applying the test as to whether a child or young person had a learning difficulty²⁰¹ to the question of whether a particular type of provision was educational, thereby approaching the link which there must be between the learning difficulty and the provision in an unduly restrictive manner²⁰². UT Judge Ward did not rule definitively as to whether the proposed sex education programme was educational in nature, stating that it was “not impossible” that it might fall within the category of non-educational provision once the legally correct approach was taken²⁰³.

The UT case of *DC v Hertfordshire CC*²⁰⁴ built on the decisions in *Bromley LBC v Special Educational Needs Tribunal and others*²⁰⁵ and *H v A London Borough SEN*²⁰⁶. This case considered the “vexed”²⁰⁷ question of whether or not a particular type of

¹⁹⁷ *Bromley* (n 21).

¹⁹⁸ [2015] UKUT 0316 (AAC).

¹⁹⁹ *Ibid*, para 27.

²⁰⁰ *Ibid*, para 25.

²⁰¹ Stated by Sedley LJ in *Bromley LBC v Special Educational Needs Tribunal and others* [1999] EWCA Civ 3038 at p 12 to be “anything inherent in the child which makes learning significantly harder for him than for most others or which hinders him from making use of ordinary school facilities”.

²⁰² *H v A London Borough* (n 32), para 26.

²⁰³ *Ibid*, para 28.

²⁰⁴ [2016] UKUT 379 (AAC).

²⁰⁵ *Bromley* (n 21).

²⁰⁶ *H v A London Borough* (n 32).

²⁰⁷ *DC v Hertfordshire* (n 38), para 15.

provision should be considered educational, in the context of a child, L, who had complex special educational needs including challenging defiant behaviour, anger management issues, ADHD and specific learning difficulties, and whose parents argued that psychiatric input was required as part of L's special educational provision.

UT Judge Lane gave the following guidance on how to determine whether provision is educational in nature²⁰⁸:

- (i) Taking as a starting point the definition of education adopted in *Bromley LBC v Special Educational Needs Tribunal and others*²⁰⁹ as “systematic instruction, schooling or training”²¹⁰, one or more of these factors is likely to be discernible in provision which is asserted to be educational²¹¹;
- (ii) The provision should relate to a specified educational objective and it should be possible to see what the provision is trying to instil, teach or train the pupil to do²¹². Building on this, if a form of provision relates to a matter within the curriculum, it is highly likely to be educational²¹³;
- (iii) That said, education should not be construed too narrowly, and even provision requiring the adaptation of a school's physical environment may constitute educational provision, for example the provision of a low noise or low distraction environment for a child or young person with a sensory disorder²¹⁴;
- (iv) The fact that provision is “at the medical end of the spectrum” does not automatically exclude it from being categorised as special educational provision²¹⁵;
- (v) The important question is whether the provision is directly related to, or called for by, the child's or young person's learning difficulty or disability²¹⁶.

UT Judge Lane gave examples to illustrate where the line between educational and non-educational provision may be drawn in relation to support for emotional and behavioural problems:

- (i) A [statement of special educational needs] provides mindfulness training for a pupil with an anxiety disorder. The objective is to enable the pupil to remain calm, keep focussed in class and relate to other children at playtime. Mindfulness is based on principles and practice to

²⁰⁸ Thelen, (n 11) 2-3.

²⁰⁹ *Bromley* (n 21).

²¹⁰ *Ibid*, p 3.

²¹¹ *DC v Hertfordshire* (n 38), para 17.

²¹² *Ibid*, para 17.

²¹³ *Ibid*, para 16.

²¹⁴ *Ibid*, para 16.

²¹⁵ *Ibid*, paras 11-14.

²¹⁶ *Ibid*, para 17.

secure what is learned. (ii) The same pupil is also provided with cognitive behavioural therapy to teach him how to deal with anxiety that pops up suddenly. (iii) The pupil also undergoes hypnosis regularly to help him stop self-harming. In the first two examples, the child is receiving systematic training and learning coping strategies to help him learn in the classroom and learn to get along with fellow pupils, as a member of the school community. Both appear to be educational. In the third examples the child is being practiced upon in order to change his behaviour. His behaviour is affected subliminally. It may be thought unlikely that this would be educational provision any more than taking an anti-biotic for a sore throat.²¹⁷

On the above basis UT Lane ruled that, whilst psychiatric support could be categorised as special educational provision in appropriate circumstances²¹⁸, a programme of psychological and psychiatric support designed to address L's self-esteem and self-confidence and minimise the risk of mental health breakdown did not amount to special educational provision on the facts of L's case, lacking as it did any element of instruction or training²¹⁹.

Whilst in older case law it was held that nursing care fell "fairly and squarely"²²⁰ into the category of non-educational provision, the more recent case law has developed a more nuanced approach. It was held in *DC v Hertfordshire CC*²²¹ that the fact provision is medical in nature does not inevitably exclude it from constituting special educational provision. Further, in *East Sussex County Council v KS*²²², UT Judge Ward held that "even if medical and nursing support is ... essential for [a child or young person] to be educated, that does not *of itself* make it special educational provision"²²³. This leaves open the possibility that medical and nursing support may be categorised as special educational provision in appropriate circumstances, that is, if the provision *itself* educates or trains in some way.

As the case law illustrates, distinguishing between education and health care provision is not always straightforward, particularly in cases where the child or young person has complex or pervasive SEND. The requirement to tease out these aspects into separate sections of the EHC plan can generate disputes which lead to delay, or risk the child or young person falling between two stools in terms of funding.

²¹⁷ *Ibid*, para 18.

²¹⁸ *Ibid*, para 11.

²¹⁹ *Ibid*, para 35.

²²⁰ *Bradford Metropolitan District Council v A* [1997] ELR 417, 428.

²²¹ *DC v Hertfordshire* (n 38).

²²² [2017] UKUT 273 (AAC).

²²³ *Ibid*, para 89; emphasis added.

Collaborative Working and the Potential for Conflicts of Interest

The 2014 Act and Code of Practice require the integration of education and health care provision²²⁴, and place duties upon local authorities and responsible commissioning bodies to make joint commissioning arrangements²²⁵ and to cooperate with one other²²⁶. That said, the statutory framework arguably also creates inherent tensions between the local authority and the responsible commissioning body²²⁷.

As set out above, the local authority is responsible for securing the special educational provision included in an EHC plan²²⁸, whilst the responsible commissioning body is responsible for securing any health care provision included in an EHC plan²²⁹. Health care provision can only be included in an EHC plan with the responsible commissioning body's consent²³⁰. There is no "hard edge"²³¹ between educational or health care provision, and indeed there is a potentially large grey area where the two overlap. In these circumstances, it is not difficult to envisage circumstances where a conflict may arise between the local authority and responsible commissioning body as to how provision should be categorised, or as to whether a particular type of provision is necessary under any relevant joint commissioning arrangements. This may particularly be the case where a child or young person has particularly complex needs which require costly provision, and where (as is the case) local authorities and responsible commissioning bodies are operating under significant budgetary constraints²³².

The case of *East Sussex County Council v KS*²³³ exemplifies this problem. The case concerned a 5 year old girl, L, who had complex medical needs including a chromosomal disorder, epilepsy, respiratory issues and gastrointestinal issues, for which she required monitoring by nursing staff in school, as well as input from physiotherapists, dieticians and speech and language therapists.

L's parents wished L to attend Chailey Heritage School ("CHS"), a non-maintained special school²³⁴. CHS worked in close partnership with Chailey Heritage Clinical Services ("CCS"), which was a part of Sussex Community NHS Trust, and which met

²²⁴ Children and Families Act 2014 s 25. This duty reflects the duty placed on responsible commissioning bodies by the National Health Service Act 2006 s 14Z1.

²²⁵ Children and Families Act 2014 s 26; Code of Practice (n 5) Ch 3.

²²⁶ Children and Families Act 2014 s 28, s 29 and s 31; Code of Practice (n 5) paras 9.70 – 9.72.

²²⁷ Richard Freeth, 'Potential for Conflict', (2014) 164 N.L.J. 18.

²²⁸ Children and Families Act 2014 s 42(2).

²²⁹ *Ibid* s 42(3).

²³⁰ Special Educational Needs and Disability Regulations 2014 reg 12(2).

²³¹ *Bromley* (n 21), 13.

²³² Freeth (n 61), 18.

²³³ [2017] UKUT 273 (AAC).

²³⁴ As defined in the Education Act 1996, s 337A and s 342.

the clinical needs of the pupils attending CHS. CHS operated a funding model which distinguished between educational fees and clinical fees, with the latter being provided by the relevant commissioning body (in this case, the NHS Hastings and Rother Clinical Commissioning Group (“the CCG”)).

CHS had offered L a place, conditional upon 1. the local authority agreeing to pay the education fees; and 2. the CCG agreeing to pay the clinical fees. However the CCG, having assessed L, considered the provision unnecessary and refused to fund it. The local authority instead named a maintained special school, Grove Park School, in Section I of L’s EHC Plan. Whilst the Code of Practice requires local authorities and CCGs to have a disagreement resolution procedure as part of their joint commissioning arrangements²³⁵, there is no indication as to whether the local authority and the CCG attempted to resolve this issue using this procedure or otherwise.

L’s parents made no direct challenge to the CCG’s decision not to fund the clinical fees for L’s place at CHS (which challenge would have had to be via judicial review proceedings or a complaint to the Parliamentary and Health Services Ombudsman²³⁶). They did however appeal to the FtT in an attempt to have CHS named at Section I of L’s EHC Plan, which appeal was successful in the first instance.

The local authority appealed to the UT. It submitted that in naming CHS in Section I of the EHC plan, the FtT was effectively wrongly overturning the decision of the CCG, and was requiring the local authority to act as a funder of last resort for health care provision which the CCG had determined to be unnecessary²³⁷. L’s parents, on the other hand, submitted that “the local authority’s grounds rely on ‘artificial divisions’ rather than addressing the severe and complex needs which L has, which require a high level of specialist support in order for her to attend education”²³⁸. They argued that, given the nature of the difficulties experienced by L, it would be incorrect to construe educational provision otherwise than widely²³⁹.

The UT set aside the decision of the FtT and referred the case back to the FtT for rehearing, on the basis that the FtT’s decision to name CHS in Section I of the EHC plan provided an unworkable outcome based on an error of law.

UT Judge Ward recognised that “the systems of special educational needs, care provision and health provision are the subject of differing statutory provisions, with differing duties imposed on differing bodies and differing governance arrangements”,

²³⁵ Code of Practice (n 5), para 9.71.

²³⁶ *East Sussex CC v KS* (n 56), para 31.

²³⁷ ‘Special educational needs: health provision in EHC plans’ (2017) 24(7). Ed. L.M. 8, 9.

²³⁸ *East Sussex CC v KS* (n 56), para 55.

²³⁹ *Ibid*, para 55.

and that these differences are “carried through into the provisions of the SEN regime under the 2014 Act”²⁴⁰. The FtT had jurisdiction only in relation to the educational aspects of an EHC plan, and could make no ruling in respect of health care provision. The effect of s.21(5) of the 2014 Act was to give the FtT jurisdiction over health care provision only to the extent that it educates or trains a child or young person and could therefore be classified as “deemed” special educational provision²⁴¹. Save for possible problems of classification of particular provision, the matter was clear: health care provision was not the responsibility of the local authority, and the local authority had no statutory power to fund it.

UT Judge Ward described the limitations of collaborative inter-agency working in the following terms:

...the fact that the differing bodies are exhorted to collaborate, in the interests of delivering a more integrated result to the children and young people affected, does not mean that the underlying statutory distinctions do not exist, nor that the powers of the various bodies concerned can be stretched so as to yield a joined-up solution in the interests of the child where such a solution does not otherwise emerge.²⁴²

The November 2017 Lenehan Review²⁴³ (an independent review commissioned by the Department for Education to evaluate the experiences and outcomes of children in residential special schools) suggests that *East Sussex County Council v KS*²⁴⁴ is not an isolated case, with local authorities reporting difficulties in getting responsible commissioning bodies to commit to funding for residential placements, and with parents reporting that funding disputes between local authorities and responsible commissioning bodies were delaying their children being offered suitable placements²⁴⁵.

It may be concluded that the statutory requirement to separate a child’s or young person’s education and health care needs and provision can generate disputes between local authorities, responsible commissioning bodies and parents and young people. To what extent can these disputes be adequately resolved by use of the available dispute resolution mechanisms?

DISPUTE RESOLUTION MECHANISMS

²⁴⁰ *Ibid*, para 64.

²⁴¹ As confirmed in *East Sussex County Council v TW* [2016] UKUT 0528.

²⁴² *East Sussex CC v KS* (n 56), para 65.

²⁴³ Christine Lenehan and Mark Geraghty, *Good Intentions, Good Enough? A review of the experiences and outcomes of children and young people in residential special schools and colleges* (Department for Education, 2017).

²⁴⁴ *East Sussex CC v KS* (n 56).

²⁴⁵ Lenehan and Geraghty (n 77), 28.

Models of Administrative Justice

Two of the most important dispute resolution mechanisms available to parents and young people under the 2014 Act are mediation and an appeal to the FtT. An analysis of the relative quality and effectiveness of these mechanisms brings into play the key concept of administrative justice²⁴⁶. Administrative justice can be defined as “the justice inherent in administrative decision making”²⁴⁷, and can be subdivided into procedural fairness (how individuals are treated throughout the decision-making process), and substantive justice (the outcomes of that process)²⁴⁸.

Mashaw proposes three models of administrative justice: bureaucratic rationality; professional treatment; and moral judgment²⁴⁹. Each model has different legitimating values and primary goals, and represents a different normative approach as to how administrative justice decisions should be reached²⁵⁰. Whilst these models are not mutually exclusive, they are competitive with one another²⁵¹.

The bureaucratic rationality model has as its primary goal the implementation of pre-established policy in an accurate, efficient and cost-effective manner. Decision-making is predicated on the collation and processing of information, and is coordinated along hierarchical lines.²⁵² In contrast, the primary goal of the professional treatment model is client satisfaction, delivered through the provision of a professional service to clients. Decision-making is based on the application of clinical knowledge and professional judgment to the facts of a particular case, and is built around an interpersonal structure²⁵³. Finally, the moral judgment model (also known as the legal model²⁵⁴) has as its goal the fair adjudication of disputes. Decisions are made by an independent decision-maker, who applies the law to the facts of an individual’s claim for legal entitlement²⁵⁵.

²⁴⁶ Neville Harris, ‘Dispute Resolution in Education: Roles and Models’, in Neville Harris and Sheila Riddell (eds), *Resolving Disputes about Educational Provision: A Comparative Perspective on Special Educational Needs*, (1st edn, Routledge, 2016), 25.

²⁴⁷ Michael Adler, ‘Understanding and Analysing Administrative Justice’, in Michael Adler (ed), *Administrative Justice in Context*, (London, Hart Publishing: 2010), 129.

²⁴⁸ *Ibid*, 131.

²⁴⁹ Jerry Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims*, (Yale University Press: 1983).

²⁵⁰ Robert Thomas and Joe Tomlinson, ‘Mapping current issues in administrative justice: austerity and the ‘more bureaucratic rationality’ approach’, (2017) 39(3) *J. Soc. Wel. & Fam. L.*, 380, 396.

²⁵¹ Mashaw (n 83) 23-25.

²⁵² *Ibid*, 26.

²⁵³ *Ibid*, 26-29.

²⁵⁴ Thomas and Tomlinson (n 84), 396.

²⁵⁵ Mashaw (n 83), 29-31.

Reflecting more recent trends in the governance of public services²⁵⁶, Riddell adds three further, interconnected, models of administrative justice to Mashaw's typology: managerialism; markets; and consumerism²⁵⁷. Managerialism focuses upon accountability via the scrutinising of work-related performance, and has the legitimating goal of improved efficiency²⁵⁸. The markets model places emphasis on parental choice, and like managerialism, has the legitimating goal of improved efficiency²⁵⁹. Consumerism focuses on active user participation and influence, and has the legitimating goal of consumer satisfaction²⁶⁰.

How then do the rights of parents and young people to mediate or to appeal under the 2014 Act fit within these models of administrative justice? To what extent are these dispute resolution mechanisms able to achieve the values and goals which might be expected of them pursuant to these models, where both education and health care issues are at play?

Mediation

Mediation is a structured process, whereby the parties identify and discuss areas of disagreement and explore possible ways of resolving them, facilitated by a mediator who acts as an independent third party²⁶¹.

The 2014 Act introduced new rights and requirements in relation to mediation²⁶², with the aim of increasing the uptake of mediation and reducing the volume of adversarial legal proceedings²⁶³. Parents and young people have a right to mediation when *inter alia* an EHC plan is made, amended or replaced²⁶⁴. This includes a right to mediation on the health²⁶⁵ (and social care²⁶⁶) elements of an EHC plan, in spite of the fact that there is no right to appeal these elements to the FtT. Concurrently, in the vast majority of cases²⁶⁷, parents and young people are now required to show that they have

²⁵⁶ Harris, 'Dispute Resolution in Education: Roles and Models' (n 80), 42.

²⁵⁷ Sheila Riddell, 'Procedural justice and special educational needs assessments in England and Scotland' (2003) 7(3), *International Journal of Inclusive Education*, 201, 204.

²⁵⁸ *Ibid*, 204.

²⁵⁹ *Ibid*, 204-205.

²⁶⁰ *Ibid*, 205.

²⁶¹ Harris, 'Dispute Resolution in Education: Roles and Models' (n 80), 35.

²⁶² Steve Broach, Luke Clements and Janet Read, *Disabled Children: A Legal Handbook, 2nd Edition*, (London: LAG Education and Service Trust Limited, 2016), para. 11.48.

²⁶³ Neville Harris, 'SEN Issues: A Less Adversarial System?', (2012) 13(2) *Ed. Law*, 93, 97.

²⁶⁴ Children and Families Act s 52(1)(b).

²⁶⁵ *Ibid*, s 53(1).

²⁶⁶ *Ibid*, s 54.

²⁶⁷ Pursuant to Children and Families Act 2014 s 55(2), parents and young people are not required to obtain a mediation certificate before proceeding to appeal where the appeal relates solely to the name or type of placement or the fact that no placement has been named.

considered mediation by obtaining a mediation certificate before they can proceed to appeal²⁶⁸.

Where parents or young people have disagreements about more than one element of an EHC plan, the local authority should arrange one mediation covering all areas of disagreement²⁶⁹. Where a mediation includes health care issues, the responsible commissioning body must participate in the mediation²⁷⁰, and indeed, where a mediation relates solely to health care issues, the responsible commissioning body must arrange it²⁷¹. Mediators must be independent of both the local authority and the responsible commissioning body²⁷².

Where, then, does mediation fit within Mashaw's and Riddell's administrative justice models? To the extent that mediation requires direct participation from parents and young people, and that it aims in the direction of a mutually satisfactory outcome, it reflects the consumer model. Mediation may also display features of the professional treatment model, for example where the parties rely upon professional assessments as part of their negotiations. Finally, mediation has some features of the moral judgment model, in that it provides a forum in which parents and young people may assert their rights, overseen by an independent mediator.²⁷³

To what extent does mediation deliver the values and goals of these models, where both education and health care issues are at play? Looking first at consumerism, this model's legitimating goal of consumer satisfaction is arguably more relevant in terms of 'customer care' throughout the process of mediation, than in terms of satisfaction with the outcome itself²⁷⁴. As a *process* of dispute resolution, mediation certainly has recognised advantages. Mediation is generally less stressful for parents and young people than an appeal. It can enable the parties to resolve disputes more swiftly, particularly by helping the parties to identify and focus on the key issues. It assists parents and young people to maintain good long-term relations and effective communication with the local authority and responsible commissioning body. It also allows parents and young people to become more directly involved in the decision-making process.²⁷⁵

Mediation may be particularly advantageous where both education and health issues are at play, providing as it does an opportunity to bring together representatives from each relevant statutory body to deal with all aspects of an EHC plan at one venue, and in a holistic manner²⁷⁶. This may be preferable to pursuing a separate health care

²⁶⁸ Children and Families Act 2014 s 55.

²⁶⁹ Code of Practice, (n 5) para 11.37.

²⁷⁰ Children and Families Act s 53(3)(c); s 53(4)(b).

²⁷¹ Special Educational Needs and Disabilities Regulations 2014 SI 2014/1530 reg 35.

²⁷² Code of Practice, (n 5) para 11.15.

²⁷³ Harris, 'Dispute Resolution in Education: Roles and Models' (n 80), 42.

²⁷⁴ *Ibid*, 43.

²⁷⁵ *Ibid*, 36.

²⁷⁶ Code of Practice (n 5) para 11.37.

complaint under the NHS complaints arrangements²⁷⁷, which lacks the independent oversight of a mediator²⁷⁸ and will not necessarily look at the needs of the child or young person in the round.

Turning to consumer satisfaction with the substantive results of mediation, it is of potential benefit that the parties are not limited to outcomes based on their legal rights, but can agree interest-based solutions which might lie outside of the FtT's remit²⁷⁹. Further, by the nature of mediation, outcomes are not imposed on parties but must be reached by mutual agreement, meaning that any resolution should be one which parents and young people can "live with"²⁸⁰.

Conversely, there will be occasions where no mutually agreeable solution is found and the mediation is unsuccessful, leading to consumer dissatisfaction. This may particularly be the case where both education and health issues are at play. For example, complex cases involving substantial expenditure, such as residential placement disputes, or disputes which turn on a question of law, are less likely to be resolved by way of mediation²⁸¹. Further, where the local authority and the responsible commissioning body are in dispute over the funding or necessity of a type of provision, then parent-initiated mediation is unlikely to assist.

Finally, in order for both education and health issues to be resolved, both statutory agencies must be prepared to come to the table. The responsible commissioning body is not generally made a party to any subsequent appeal to the FtT, and the FtT only has the power to make non-binding recommendations in relation to health. Without a credible background threat of judicial determination, it is questionable to what extent the responsible commissioning body will meaningfully engage in the mediation process²⁸². Moreover, the March 2017 CEDAR Review²⁸³ (an independent research report commissioned by the Department for Education and Ministry of Justice to review the arrangements for disagreement resolution in SEND cases) noted that for mediations involving both educational and health or social care aspects, health or social care representatives were not always able to attend, meaning that the health or social care issues were not able to be resolved during the course of the mediation²⁸⁴.

Turning then to moral judgment, mediation only achieves this model's legitimating goal of fairness to a very limited extent. In citizen-versus-state disputes, there is an inherent imbalance of power between the individual and the representative of the relevant

²⁷⁷ See Code of Practice (n 5) paras. 11.101 – 11.104 for a description of the complaints system for health care provision.

²⁷⁸ Nettleton and Friel, (n 15), 58.

²⁷⁹ Harris, 'Dispute Resolution in Education: Roles and Models' (n 80), 36.

²⁸⁰ Hazel Genn, *Judging Civil Justice* (Cambridge University Press, 2010), 117.

²⁸¹ Nettleton and Friel, (n 15), 163.

²⁸² Genn, (n 114) 125.

²⁸³ Cullen, M A, and others, *Review of arrangements for disagreement resolution (SEND): Research Report* (Department for Education and Ministry of Justice 2017) ("CEDAR Review").

²⁸⁴ *Ibid* 112.

government department²⁸⁵. The process of mediation is arguably not robust enough to correct this inequality and to create a level playing field for parents and young people.

Whilst Adler argues that it would “take a very skilled mediator” to be able to deal effectively with the inequalities inherent in this type of dispute²⁸⁶, there are concerns about the consistency of SEND mediators’ training and knowledge. On one hand, SEND mediators are required by statute to be independent of the relevant state agencies, have received accredited training²⁸⁷, and have sufficient knowledge of the legislation relating to special educational needs, health and social care²⁸⁸. On the other hand, the CEDAR Review found that not all SEND mediators were knowledgeable about the relevant legislation and statutory guidance, and that there was no nationally recognised accreditation or national standards for becoming a SEND mediator²⁸⁹.

Further, the mediator’s role is ultimately one of neutral facilitator rather than pro-active decision-maker²⁹⁰. This was noted by CEDAR Review interviewees (including parent support representatives), who commented that “unlike the Tribunal, [mediators] do not use ‘the legal test’, are required to be impartial and (at least some) understand their role to exclude pointing out illegal or questionable practice”²⁹¹.

Concerns about an imbalance of power are exacerbated by the fact that parents and young people are not expected to seek professional legal representation for SEND mediations²⁹² (although they may seek assistance from charities such as Independent Parental Special Educational Advice (“IPSEA”) or their local statutory Information, Advice and Support Service (“IASS”)²⁹³). This may lead to a situation where parents and young people have insufficient legal knowledge to assert their rights as against the relevant statutory agency, and where the mediator is unable to question the feasibility of the latter’s position. This may pose a particular problem where the presence of both education and health care issues brings additional legal complications to the dispute.

Even where parents and young people feel able to assert their legal rights in the context of mediation, the process itself encourages parties to “shift away from a focus on legal entitlement to a problem-solving frame of reference”²⁹⁴. As Genn pithily concludes, mediation is “not about *just* settlement, it is *just about settlement*”²⁹⁵. The clear risk, therefore, is that parents or young people may settle for less than their legal

²⁸⁵ Michael Adler, ‘Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice’, (2006) 69(6) M.L.R. 958, 977.

²⁸⁶ *Ibid* 978.

²⁸⁷ Code of Practice (n 5) para 11.15.

²⁸⁸ Special Educational Needs and Disability Regulations 2014 SI 2014/1530 reg 40.

²⁸⁹ CEDAR Review (n 117) 120.

²⁹⁰ Adler, ‘Tribunal Reform’ (n 119), 978.

²⁹¹ CEDAR Review (n 117) 119.

²⁹² Code of Practice (n 5) para 11.38.

²⁹³ Children and Families Act 2014 s 32.

²⁹⁴ Genn, (n 114) 81.

²⁹⁵ *Ibid* 117; emphasis *per original*.

entitlement or may agree to provision which is not consistent with that achieved by others²⁹⁶.

Looking more broadly at the public interest, mediation is less able than tribunal proceedings to ensure that state agencies are held to account for incorrect or unfair decisions²⁹⁷, or to create opportunities for “organisational learning”²⁹⁸ by way of objective feedback from an independent tribunal panel. The accountability and “lessons learned” functions of tribunal proceedings may be particularly valuable for cases where both education and health care issues are at play. Given the relatively recent introduction of the EHC plan as a holistic “wraparound care document”²⁹⁹, one might hope that developing and improving best practice in this field would be an ongoing concern for the relevant statutory agencies.

Overall, whilst there may be a place for mediation, offering as it does a more accessible and proportionate means of resolving disputes relating to the education and health aspects of an EHC plan than an appeal to the FtT, it is questionable whether it can consistently deliver administrative justice in an area of such fundamental importance as a child’s right to appropriate education³⁰⁰ and health care.

Where mediation is unsuccessful, or has not been attempted, parents or young people may look to tribunal proceedings to challenge the aspects of an EHC plan which they disagree with.

Appeal to the First-Tier Tribunal

The FtT (Special Educational Needs and Disability) is part of the First-Tier Tribunal Health, Education and Social Care Chamber, and hears appeals against local authority decisions relating to children’s and young people’s EHC needs assessments and EHC plans, as well as disability discrimination claims against schools and local authorities³⁰¹.

A right of appeal lies against the educational aspects of an EHC plan only³⁰². The FtT is empowered to order amendments to an EHC plan insofar as they relate to special educational needs and/or provision³⁰³, and/or the name or type of school or institution

²⁹⁶ Harris, ‘Dispute Resolution in Education: Roles and Models’ (n 80), 37.

²⁹⁷ Neville Harris and Emily Smith, ‘On the Right Track? The Resolution of Special Educational Needs Disputes in England’, in Neville Harris and Sheila Riddell (eds), *Resolving Disputes about Educational Provision: A Comparative Perspective on Special Educational Needs*, (1st edn, Routledge 2016), 71.

²⁹⁸ Thomas and Tomlinson (n 84), 385-386.

²⁹⁹ Lauren Boesley and Laura Crane, ‘“Forget the health and care and just call them education plans”: SENCOs’ perspectives on Education, Health and Care Plans’, (2018) 18(S1) JORSEN 36.

³⁰⁰ Harris, ‘Dispute Resolution in Education: Roles and Models’ (n 80), 37-38.

³⁰¹ Code of Practice (n 5) para 11.42.

³⁰² Children and Families Act s 51(2).

³⁰³ Special Educational Needs and Disability Regulations 2014 SI 2014/1530 reg 43(2)(f).

to be attended³⁰⁴, and to make any consequential amendments as it thinks fit³⁰⁵ (for example to the education and training outcomes at Section E of the EHC plan).

An appeal to the FtT sits squarely within Mashaw's moral judgment model of administrative justice. To what extent, however, is the FtT able to deliver the values and goals of this model, where both education and health issues are at play?

The FtT is independent, operates according to a clear set of procedural rules³⁰⁶, and is presided over by a legally qualified chair who is assisted by non-legally qualified expert members. The possibility of an appeal to the UT on a point of law provides a check on the FtT's decisions. Overall, the FtT has historically had a good reputation for its fairness, independence and expertise³⁰⁷.

However, the FtT does not meet the requirements of administrative justice in one key respect: its power to deliver a suitable remedy³⁰⁸ does not extend to making binding rulings in relation to health care. The FtT has jurisdiction in relation to the educational aspects of an EHC plan only, and has no power to order amendments to the health care (or social care) aspects of an EHC plan (although it has since 3 April 2018 had the power to make non-binding recommendations).

There is a clear tension between the concept of an EHC plan as a cohesive "wraparound care document"³⁰⁹, and the fact that the jurisdiction of the FtT is limited to the educational aspects of an EHC plan only. This can create difficulties for children or young people whose needs span both education and health care, by limiting the ability of the FtT both to take a holistic, person-centred view of their needs and, more practically, to ensure that both the local authority and responsible commissioning body contribute to a complete package of provision. Further, it creates additional burdens for parents or young people who may need to pursue multiple routes of challenge.³¹⁰

These concerns were raised in debate during the passage of the 2014 Act through the Houses of Parliament, with a number of sector organisations, including parent carer forums, pressing for a single route of appeal against decisions relating to EHC plans³¹¹. In response, section 79 of the 2014 Act required the Government to carry out a review of how effectively disagreements under Part 3 of the 2014 Act were being resolved, to involve a pilot scheme empowering the FtT to make recommendations about the health and social care elements of EHC plans³¹².

³⁰⁴ *Ibid* reg 43(2)(g).

³⁰⁵ *Ibid* reg 43(2)(f).

³⁰⁶ Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 SI 2008/2699.

³⁰⁷ Harris and Smith, 'On the Right Track?' (n 131) 83.

³⁰⁸ Harris, 'Dispute Resolution in Education: Roles and Models' (n 80), 43.

³⁰⁹ Boesley and Crane (n 133) 36.

³¹⁰ Department for Education, *Explanatory Memorandum to the Special Educational Needs and Disability (First-Tier Tribunal Recommendations Power) Regulations 2017* (December 2017), para. 7.3.

³¹¹ *Ibid* para. 7.3.

³¹² Department for Education and others, *Explanatory Notes to the Children and Families Act 2014* (March 2014), para. 329.

Expanding the Powers of the First-Tier Tribunal

To date, there have been two schemes trialling the expansion of the FtT's powers to make recommendations about health and social care needs and provision. The first scheme ran from April 2015 to August 2016, with a relatively small number of local authority participants. The second scheme was rolled out nationally in April 2018 and is due to conclude in April 2020.

The first pilot scheme commenced on 1 April 2015, brought into effect by regulations³¹³ made under sections 51(4) and (5) of the 2014 Act. Local authority participation was optional³¹⁴, and a total of 17 local authorities chose to take part (four of which joined the scheme with effect from 1 February 2016³¹⁵). The pilot scheme ended on 31 August 2016³¹⁶.

In "pilot" local authorities, where a child's parent or young person brought an appeal under one of the grounds in section 51(2)(b) – (f) of the 2014 Act (that is, an appeal with an educational aspect), then the FtT was empowered to make recommendations in respect of health and social care needs and provision³¹⁷. In relation to health care, this gave the FtT the power to recommend:

- (i) That Section C of an EHC plan (a child or young person's health care needs which relate to their SEN) be amended, or that health care needs or health care needs of a particular kind be specified in Section C where those needs had not already been so specified;
- (ii) That Section G of an EHC plan (any health care provision reasonably required by the learning difficulties or disability which result in the child or young person having SEN) be amended, or that health care provision or health care provision of a particular kind be specified in Section G where that provision had not already been so specified.

Where the First-Tier Tribunal made a recommendation in respect of health care needs or provision, it was required to issue a copy of the recommendation to the relevant responsible commissioning body³¹⁸. The responsible commissioning body was in turn

³¹³ Special Educational Needs and Disability (First-Tier Tribunal Recommendation Power) (Pilot) Regulations 2015 SI 2015/358.

³¹⁴ Laxmi Patel, 'The new SEND pilot recommendations – what's it all about?' (*Boyes Turner Solicitors*, 3 April 2018) <<https://www.senexpertsolicitors.co.uk/site/news/the-new-send-pilot-recommendations>> accessed 16 February 2019.

³¹⁵ Special Educational Needs and Disability (First-Tier Tribunal Recommendation Power) (Pilot) (Amendment) Regulations 2016 SI 2016/2.

³¹⁶ Special Educational Needs and Disability (First-Tier Tribunal Recommendation Power) (Pilot) (Revocation and Transitional Provision) Regulations 2016 SI 2016/822.

³¹⁷ Special Educational Needs and Disability (First-Tier Tribunal Recommendation Power) (Pilot) Regulations 2015 SI 2015/358, regs. 3-4.

³¹⁸ *Ibid* reg. 5(1).

required to respond in writing to the child's parent or young person, and the local authority responsible for maintaining the EHC plan, within 5 weeks from the date of the recommendation³¹⁹ (or such other time limit as directed by the First-Tier Tribunal³²⁰), stating what steps, if any, the responsible commissioning body had decided to take following consideration of the recommendation, and giving reasons for any decision not to follow the recommendation, or any part of it³²¹.

The CEDAR Review³²² examined the outcomes of the pilot scheme as part of its review into disagreement resolution arrangements under Part 3 of the 2014 Act. It noted that the pilot scheme had produced only thirty pilot appeals, with just nine of these resulting in full pilot appeal hearings³²³. Out of those nine hearings, the tribunal had made six health and/or social care recommendations³²⁴. No UT rulings have emerged out of pilot scheme cases. There had therefore been too few cases to definitively judge the effectiveness of the pilot³²⁵.

Nonetheless, the CEDAR Review tentatively noted some positive results, including: more joined up working across education, health and social care; increased knowledge of each sector's relevant legal frameworks and practices; and, the FtT's increased powers acting as a "lever" to promote resolution prior to hearing³²⁶. Almost all of those interviewed as part of the CEDAR Review (including parents, local authorities, mediators and representatives of parent support organisations) supported the principle that the FtT should have powers in relation to the health and social care aspects of EHC plans along with the education aspects. Parents were particularly positive about having the ability to present the health and social care needs of their children alongside their education needs³²⁷.

In its report to Parliament in March 2017 on the outcomes of the CEDAR Review³²⁸, the Government announced that it would expand the pilot scheme to a two-year national trial to commence in 2018. This national trial would allow the Government to further evaluate the effectiveness of the power to make non-binding

³¹⁹ *Ibid* reg. 5(3).

³²⁰ *Ibid* reg. 5(4).

³²¹ *Ibid* reg. 5(5).

³²² CEDAR Review (n 117).

³²³ *Ibid* 186.

³²⁴ *Ibid* 198.

³²⁵ *Ibid* 183.

³²⁶ *Ibid* 183.

³²⁷ *Ibid* 183.

³²⁸ Department for Education and Ministry of Justice, *Special Educational Needs and Disabilities: Disagreement Resolution Arrangements in England, Government report on the outcome of the review conducted by the Centre for Educational Development, Appraisal and Research (CEDAR)* (March 2017).

recommendations, including the scale of demand, the impact on health and social care sectors, and the extent of local area compliance.³²⁹

The Single Route of Redress National Trial ('the National Trial') commenced on 3 April 2018, and as previously, was brought into effect by regulations³³⁰ made under sections 51(4) and (5) of the 2014 Act. The National Trial was originally conceived to last for two years to 31 March 2020, following which a decision would be taken on its continuation³³¹. In November 2019, the Department for Education announced that the National Trial would be extended to 31 August 2020, with an evaluation report to be finalised in February 2020 and a decision on the way forward to be made in March or April 2020.

The regulations governing the National Trial mirror those which brought the 2015-2016 pilot scheme into effect, and give the FtT the same powers as previously to make recommendations in relation to health and social care needs and provision³³².

Evaluation of the National Trial is ongoing. Local authorities are required to send a copy of all written responses to the FtT's recommendations to the Department for Education within one week of completing them³³³ or of receiving them from the responsible commissioning body³³⁴, as the case may be. This will allow the Department for Education to collate data as to health and social care responsiveness to recommendations³³⁵. Alongside this, an independent evaluation of the trial is being carried out³³⁶.

So, to what extent can the FtT's expanded powers under the National Trial alleviate the difficulties faced by parents and young people who wish to appeal a decision which has both education and health aspects? Whilst the final evaluation of how successful the National Trial has been in practice will not be available until after its conclusion in 2020, it is possible at this stage to identify potential pitfalls in the principles of the scheme.

³²⁹ *Ibid* 28.

³³⁰ Special Educational Needs and Disability (First-Tier Tribunal Recommendations Power) Regulations 2017 SI 2017/1306.

³³¹ Department for Education, *Explanatory Memorandum to the Special Educational Needs and Disability (First-Tier Tribunal Recommendations Power) Regulations 2017* (December 2017), para 4.4.

³³² Special Educational Needs and Disability (First-Tier Tribunal Recommendations Power) Regulations 2017 SI 2017/1306, regs 4-5.

³³³ *Ibid* reg 7(4).

³³⁴ *Ibid* reg 6(6).

³³⁵ Department for Education, *SEND Tribunal: Single Route of Redress National Trial Guidance for Local Authorities, Health Commissioners, Parents and Young People*, March 2018, 18.

³³⁶ *Ibid* 29-30.

The National Trial: A More Holistic Approach?

Whilst the National Trial does, to a point, encourage a more holistic approach to considering children's and young people's needs across the spectrum of education, health and social care, it does not go as far as to bring these three areas onto an equal footing.

Firstly, in order to register an appeal under the National Trial, parents and young people must be able to bring their dispute under one of the grounds in section 51(2)(b) – (f) of the 2014 Act. That is, the appeal must have an educational element³³⁷. If the dispute relates only to the health aspects of an EHC plan, or if the educational aspects of the dispute are settled at mediation leaving only the health aspects outstanding³³⁸, then the FtT will not have jurisdiction. Parents and young people in this position will have to revert to the NHS complaints arrangements, a complaint to the Parliamentary and Health Service Ombudsman ("PHSO"), or exceptionally, an application for judicial review.

Secondly, recommendations made under the National Trial are non-binding, with responsible commissioning bodies having five weeks from the date of issue to confirm whether they are going to implement them. This puts health care needs and provision on an unequal footing with educational needs and provision. It also creates continued uncertainty for parents and young people following the conclusion of the FtT appeal. Indeed, where the recommended health provision is a necessary component of a child or young person's package of provision, then a negative decision by the responsible commissioning body could render the EHC plan as a whole unworkable. For example, it was noted by UT Judge Ward in *East Sussex County Council v KS* that the grant of "powers to *make recommendations* in respect of health, appears unlikely to provide a complete answer in a case of this type"³³⁹.

There is an expectation that recommendations will generally be followed and should not be rejected without careful consideration³⁴⁰. Responsible commissioning bodies are required to justify in writing any decision not to implement a recommendation, and Ofsted and the Care Quality Commission will review responsible commissioning bodies' responses to recommendations as part of their pre-inspection analysis³⁴¹. That said, the CEDAR Review reported concerns about the non-binding nature of the recommendations arising out of the 2015-2016 pilot scheme, with some interviewees expressing scepticism that recommendations would be acted upon without a formal order³⁴². Of the three health care recommendations made during the 2015-2016 pilot

³³⁷ Laxmi Patel, 'The new SEND pilot recommendations – what's it all about?' (*Boyes Turner Solicitors*, 3 April 2018) <<https://www.senexpertsolicitors.co.uk/site/news/the-new-send-pilot-recommendations>> accessed 16 February 2019.

³³⁸ *Ibid.*

³³⁹ [2017] UKUT 273 (AAC), para 62; emphasis *per original*.

³⁴⁰ Department for Education, *SEND Tribunal: Single Route of Redress National Trial Guidance for Local Authorities, Health Commissioners, Parents and Young People*, March 2018, 24.

³⁴¹ *Ibid.* 24.

³⁴² CEDAR Review (n 117) 184.

scheme, two were implemented and one was rejected on the basis that the relevant evidence submitted to the FtT was privately commissioned and not an NHS report³⁴³.

Where a responsible commissioning body declines to implement a recommendation, parents and young people will be able to complain to the PHSO or may seek to have the decision judicially reviewed³⁴⁴. This represents a further hurdle through which parents and young people may have to jump in order to secure appropriate health care provision.

Thirdly, the National Trial arguably does not require responsible commissioning bodies to take sufficient ownership of EHC plans, with responsibility primarily remaining with the local authority. Appeals registered under the National Trial will be brought against the local authority as respondent, with the responsible commissioning body generally not being joined as a party. The local authority is required to obtain and to submit to the FtT evidence from the relevant health care body in response to the issues raised in an appeal, and to seek permission to bring additional witnesses from the relevant health care body as necessary³⁴⁵ pursuant to the Tribunal Procedure Rules³⁴⁶. The responsible commissioning body is expected to respond to requests for information and evidence from the FtT, and to send a witness to attend the hearing and to give oral evidence as required³⁴⁷.

The fact that the responsible commissioning body may be less engaged than the local authority in the appeals process is problematic for two reasons. Firstly, it may increase the risk of the responsible commissioning body failing to provide information, or sufficiently detailed information³⁴⁸. Secondly, it may give the responsible commissioning body greater latitude to refuse FtT recommendations following the outcome of an appeal. Whereas a respondent to an appeal might be expected to make all relevant arguments against the inclusion of a particular type of provision in an EHC plan, in order for the FtT to make a fully informed and incontrovertible decision (subject to an appeal to the Upper Tribunal on a point of law), as a witness the responsible commissioning body may rely in its response refusing to implement a recommendation on matters which were not necessarily argued before, or fully dealt with by, the FtT.

This point is starkly illustrated by the recent UT case of *NHS West Berkshire Clinical Commissioning Group v The First-tier Tribunal (Health, Education and Social Care Chamber) (interested parties: (1) AM; (2) MA; (3) Westminster City Council)*³⁴⁹. In this

³⁴³ *Ibid* 198.

³⁴⁴ Department for Education, *SEND Tribunal: Single Route of Redress National Trial Guidance for Local Authorities, Health Commissioners, Parents and Young People*, March 2018, 28.

³⁴⁵ *Ibid*, 9.

³⁴⁶ Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 SI 2008/2699, r 15(1).

³⁴⁷ Department for Education, *SEND Tribunal: Single Route of Redress National Trial Guidance for Local Authorities, Health Commissioners, Parents and Young People*, March 2018, 10.

³⁴⁸ Laxmi Patel, 'The new SEND pilot recommendations – what's it all about?' (*Boyes Turner Solicitors*, 3 April 2018) <<https://www.senexpertsolicitors.co.uk/site/news/the-new-send-pilot-recommendations>> accessed 16 February 2019.

³⁴⁹ [2019] UKUT 44 (AAC).

case, the NHS West Berkshire Clinical Commissioning Group (“CCG”) unsuccessfully applied to be joined as a party to appeal proceedings before the FtT. Proceedings had been brought against Westminster City Council by AM and MA, parents of a young person, BB, who had severe autism and required an unusually extensive amount of specialist care. The local authority had decided to cease to maintain BB’s EHC plan, on the basis that the CCG would be meeting all of his needs pursuant to his NHS Continuing Healthcare package. The CCG disagreed with the local authority’s position, arguing that its NHS Continuing Healthcare obligations did not extend to meeting BB’s special educational needs. In the circumstances, the FtT appeal was likely to address the question of the legal boundaries between the NHS legislation and the Children and Families Act 2014, and may well have resulted in the FtT issuing a healthcare recommendation pursuant to the powers granted to it by the National Trial³⁵⁰.

The local authority unsuccessfully applied to the FtT for the CCG to be added as a second respondent to the appeal³⁵¹. The CCG itself then applied to the FtT to be added as a party, with the local authority and the parents in support of the application. This application was once more refused. The FtT held that it had “no power” to resolve disputes between local authorities and CCGs, and that “internal” disputes of this type should be resolved outside of the tribunal process³⁵². It further held that adding the CCG as a party would add unnecessary complexity to the proceedings and extend the duration of the final hearing³⁵³.

The CCG applied to the UT for relief from the FtT’s decision, pursuant to the UT’s judicial review jurisdiction³⁵⁴. The CCG argued that if it was not made a party to the FtT appeal, it would be unable to address issues as they developed throughout the course of the hearing, or to question the other party’s witnesses.³⁵⁵ Further, it would be unfair to expect the local authority to appropriately advance the CCG’s position where the two statutory agencies were in fact in disagreement with one another.³⁵⁶

In a rolled up hearing, the UT granted the CCG permission to apply for relief, but dismissed its application, on the basis that the FtT had made no error of law and had not treated the CCG unfairly³⁵⁷. UT Judge Mitchell held that, as a matter of general principle, fairness did not require the FtT to grant an application by the CCG to be added as a party to appeal proceedings where it was envisaged that healthcare recommendations may be made³⁵⁸. In reaching this conclusion, UT Judge Mitchell emphasised the non-binding nature of healthcare recommendations, stating that they

³⁵⁰ Special Educational Needs and Disability (First-Tier Tribunal Recommendations Power) Regulations 2017 SI 2017/1306.

³⁵¹ Pursuant to Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 SI 2008/2699, r 9(2).

³⁵² *West Berkshire CCG v The FtT* (n 183) para. 23.

³⁵³ *Ibid*, para 23.

³⁵⁴ Tribunals, Courts and Enforcement Act 2007, s 18(3).

³⁵⁵ *West Berkshire CCG v The FtT* (n 183) para. 77.

³⁵⁶ *Ibid*, para. 78.

³⁵⁷ *Ibid*, para. 88.

³⁵⁸ *Ibid*, para. 90.

do “not determine a CCG’s legal obligations”³⁵⁹. Whilst the making of a healthcare recommendation had “legal consequences” for a CCG, in that they were required to consider the recommendation and to supply written reasons if they decided not to follow it, these could be characterised as “procedural requirements” which were unlikely to be “unduly onerous”³⁶⁰.

Further, UT Judge Mitchell highlighted that where a CCG refused to follow a healthcare recommendation, a legal challenge by the parents or young person was not inevitable. Further, as long as a CCG’s reasons for, and procedure adopted in, refusing to follow a recommendation were compliant with the criteria applied by the High Court on a judicial review claim and/or the relevant Ombudsman, the claim would be dismissed³⁶¹. This logic implicitly recognises that both of these arenas for challenge are more limited in scope than appeals to the FtT, judicial review being confined to reviewing the lawfulness of a decision³⁶², and the Ombudsman being limited to considering allegations of maladministration³⁶³.

This case illustrates the extent to which education and health care provision continue to operate on an unequal footing within the appeal system. The UT judgment arguably downplays the legal significance of health care recommendations, and uses the right of responsible commissioning bodies to refuse to enact recommendations as a counterbalance to address any potential unfairness arising from their lack of party status within the proceedings. Further, the UT judgment quotes uncritically the FtT’s rationale that it cannot involve itself in resolving disagreements between the local authority and the responsible commissioning body, and that these must be left to be resolved by the agencies’ own internal dispute resolution procedures. This highlights a significant lacuna in the appeals process.

Finally, the introduction of the National Trial does not remove the requirement to resolve disputes about whether a particular type of provision should be categorised as education or health care. Categorisation will continue to be necessary in order to determine: whether the FtT can order the provision to be included in an EHC plan, or can merely recommend that it is, and whether the local authority or the responsible commissioning body will be responsible for securing and funding that provision.

Whilst ever education and health care provision within EHC plans are subject to different appeal and funding arrangements, the FtT will have to go through the sometimes artificial exercise of dividing provision into separate categories, rather than simply considering the needs of the child or young person in the round. This exercise can generate disputes and delays for families already dealing with the day to day difficulties of caring for children and young people with complex SEND.

In conclusion, distinguishing between education and health care needs and provision is not always straightforward; indeed, where a child or young person has complex

³⁵⁹ *Ibid*, para. 90.

³⁶⁰ *Ibid*, para. 91.

³⁶¹ *Ibid*, para. 92.

³⁶² Broach, Clements, and Read (n 96) para. 11.89.

³⁶³ *Ibid*, para. 11.38.

SEND, the two may be practically inseparable. Whilst the 2014 Act has made progress towards more integrated working between education and health care, most obviously by way of the introduction of the EHC plan itself, difficulties remain for children and young people whose needs cross the boundaries of these two areas.

The requirement to separate out education and health care needs and provision can generate disputes between parents and young people, the local authority and the responsible commissioning body, particularly in relation to funding. Further, the powers currently available to the FtT do not allow it to consistently deliver holistic outcomes in cases where both education and health care issues are at play.

So, what steps can be taken to build upon the approach introduced by the 2014 Act and subsequently, the National Trial? Acknowledging that this is an evolving area of law, and that the process of bringing together differing legal frameworks across the education, health and social care sectors must be a gradual one³⁶⁴, it is to be hoped that the eventual goal would be for the FtT to be empowered to make binding orders in relation to all aspects of an EHC plan³⁶⁵. This, combined with a funding system at national level for children and young people with the most complex SEND contributed to by all three statutory agencies³⁶⁶, would remove the need for many of the disputes about the categorisation of provision and dissipate funding issues, freeing the FtT to take a holistic view of the needs of the child or young person in the round. ³⁶⁷

³⁶⁴ CEDAR Review (n 117), 203.

³⁶⁵ Laxmi Patel, 'In person: My legal life: Talking SENS', (2018) 9 Apr 26(1) LS Gaz.

³⁶⁶ *Ibid.*

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SYRIAN WAR – THE HISTORICAL CONTEXT

Bachar Hakim

ABSTRACT

This paper describes the historical development of modern Syria and examines the impact of religion, ethnicities and nationalities on the country's political life.

Key milestones of Syria's history and ruling empires are presented. The Egyptians, Hittites, Sumerians, Mitanni, Assyrians, Babylonians, Canaanites, Phoenicians, Arameans, Amorites, Persians, Greek, Roman, Byzantines, Arabs, Crusaders, Mongols and Ottomans ruled Syria over the ages.

Due to its geographical location between Asia, Arabia and Europe, Syria has been key to international trade throughout the history. Agriculture, in addition to oil and tourism, are the main source of income in modern Syria.

The majority of Syrians are Muslim Sunni (around 76%). The Alawite, Shia and Ismaili represent around 11% of the population, the Druze represent 3%, whereas various Christian denominations make up 11% of the population. Around 80% of Syrians are ethnic Arabs, other ethnicities include Kurds, Armenians, Assyrians, Turkmans and Circassians. However, due to the recent displacement of Syrians post-2011, current population statistics are not available.

The first half of the twentieth century, namely the period from the end of the Ottoman Empire until Syria's independence in 1946, has played a major role in shaping modern Syria. The rise of Arab nationalism and the union with Egypt under Nasser in 1958 brought an end to Syria's unstable period of parliamentary democracy, and paved the way for totalitarian regimes. Human right violation, political arrests and tortures, army control, and economic corruption increased since the Baath Party came to power. And although these anomalies continued to rise when Assad took power in 1970, his reign did bring a degree of political stability to the country. Members of the Baath Party and Assad's Alawite community were given many privileges. Increased oppression and declined economy, along with the optimism brought about by the eruption of the Arab Spring, led to the Syrian revolution in 2011 to demand equality, dignity and justice.

1.0 HISTORICAL BACKGROUND

The nation history is a key factor in shaping its current political, economic and social affairs. Definition of a country is problematic, as boundaries change with time, and affected by invasions and human migration and settlement. Throughout history, countries, nations and empires were created, expanded, shrank, defeated, became

extinct or their sovereignty redefined. Most nations are characterised by a combination of geography, ethnicity, race and language such as Egyptians, Chinese, Greeks, Romans and Babylonians. Empires concurring other nations can behave in a variety of fashions. They might allow citizens of concurred nations to retain their ethnic identity, language, and religion. They might introduce the concurred nations to their language, culture, and religion, or they might oppress and discriminate against citizens of the concurred nations. More than 95% of modern-day countries were established in the past 100 years and then re-defined after World War II, as sovereign states and members of the United Nations.

Due to its geographical location, Syria has been under the rule of various empires throughout its history, which spans more than 5000 years. Egyptians, Hittites, Sumerians, Mitanni, Assyrians, Babylonians, Canaanites, Phoenicians, Arameans, Amorites, Persians, Greeks, Romans, Byzantines, Arabs, Crusaders, Mongols and Ottomans ruled the Syrian land as defined in its current geography. People migration and settlement within the empires and marriages between different ethnicities have produced the population of modern Syria. Therefore, Syrians today are not a pure race but a mixture of different ethnicities, backgrounds and cultures, as evidenced by the wide varieties of their physical features. Syrians today have a mixture of brown skin from Arabia, light skin from the Romans and Crusaders or dark hair from the Ottomans and Mongols.

This paper describes the history of Syria in the context of defining the country as an evolving nation of multi-cultures, languages, races and ethnicities. It focuses on the impact of politics, economy, and religion during the past 100 years on Syrian life.

2.0 HISTORICAL MILESTONES

Syria's history can be divided into three main stages, the pre-Islamic era (until to 636AD), the Islamic era (until 1918AD) and contemporary Syria. During the Islamic era, the Crusaders (1097-1183) and Mongols (1260-1300) ruled parts of Syria. However, for the purpose of this paper, and in order to assess the impact of recent history on current political and social issues, more focus is placed on the era of contemporary Syria. This comprises the Syrian Kingdom (1918-1920), the French Mandate (1920-1946), Post-Independence Democratic Syria (1946-1958), the United Arab Republic (1958-1961), the Syrian Arab Republic including the Separatist Period (1961-1963), the Early Baath Party rule (1963-1970), the Assad dynasty reign of Hafez (1970-2000) and Bashar (2000-date) and post-2011 Arab Spring.

The following chronological history represents key milestones of Syria

- 3000BC: Early Semites settled in Syria
- 2100BC: Amorites came from the Arabian Peninsula
- Phoenicians, Canaanite, Arameans and Assyrians lived in different parts of Syria
- 538BC: Syria became part of the Persian Empire

- 532BC: Alexander the Great conquered Syria
- 300BC: Greek Colony
- 300BC: Antioch became the capital of Syria
- 64AD: Roman defeated Seleucid Antiochus XIII, Syria became a Roman Province
- 244AD: Roman Empire was ruled by a native Syrian, Marcus Philippus (Philip the Arab)
- 270AD: Zenobia of Syria proclaimed herself as Queen of Syria, but later defeated by the Romans
- 274AD: Byzantines (Eastern Roman Empire) ruled Syria
- 636AD: Muslim Army defeated the Byzantines in Yarmouk Battle and entered Syria
- Rashidun, Omayyad, Abbasid, Toloni and Fatimid Dynasties ruled Syria as a part of Islamic Caliphate
- 1079-1183AD: The Crusaders occupied parts of Syria
- 1183-1265AD: Ayyubid Dynasty ruled Syria after defeating the Crusaders
- 1285-1516AD: Mamluk Dynasty ruled Syria
- 1260-1300AD: Mongols occupied large parts of Syria
- 1516-1918AD: Ottoman Caliphate ruled Syria after Marj Dabek battle near Aleppo
- 1916: Sykes Picot Agreement was secretly signed between the UK and France to divide the Asia Minor region including Syria
- 1918: Syrian Kingdom declared with Faisal bin Hussain as King of Syria
- 1920: French forces occupied Syria under the United Nations Mandate, implementing Sykes Picot Agreement and Conference of San Remo recommendations
- 1946: Syria obtained independence and became a founding member of the United Nations
- 1958: United Arab Republic was formed by the union of Syria and Egypt, led by Nasser
- 1961: Following a military coup, Syria seceded from the United Arab Republic and re-establishing itself as the Syrian Arab Republic
- 1963: Baath Party comes to power after a military coup (“8th of March Revolution”)

- 1970: Following a “bloodless” military coup to reform the ruling Baath Party, Hafez Assad become the President of Syria
- 2000: Bashar Assad assumed power after the death of his father Hafez and was declared as the President of Syria
- 2011: The Arab Spring started in Tunisia, followed by Egypt, Libya, Yamen and then Syria to claim justice, equality, reform and democracy.

3.0 SYRIAN ECONOMY THROUGH HISTORY

Thanks to its geographical location on the crossroads between Asia, Arabia and Europe, Syria was key to international trade throughout the history. Phoenicians who lived on the Mediterranean coast of Syria flourished and developed trade within the Mediterranean region and beyond. Aleppo in northern Syria was an important trade city on the Silk Road connecting China and Asian countries to Europe. In the Seventh Century, Damascus was the capital of the Omayyad Caliphate which ruled a large part of the world, including Arabia, North Africa, Spain and Central Asia.

In addition to commerce and trade, agriculture has been the main source of income, especially around the Euphrates River. In the early Twentieth Century, the oil was discovered in the eastern regions of Syria, and it was commercially exploited in the sixties and seventies. Additionally, in the past 50 years, tourism has become a major contributor to the Syrian economy, given the rich archaeological heritage and climatic conditions. However, tourism remained underdeveloped due to corruption, and lack of investment.

Political instability and Middle Eastern conflicts, as well as the systematic social and economic corruption during the past 50 years, have resulted in poor economy and lack of prosperity.

4.0 SYRIAN ETHNICITIES

The majority of today’s Syrians define themselves ethnically as Arabs, which represent around 80% of the population. Other ethnicities include Kurds and other minorities of Armenians, Assyrians, Turkmans and Circassians.

However, there are different views of defining the ethnicity of the Syrian population, due to the country diverse culture, languages religions, ethnicities and backgrounds. The author’s opinion is that Arabic speakers are considered as Arabs regardless of their religion, origin and ethnicity. Some Syrians consider themselves as non-Arabs and belong to other historical cultures such as Phoenicians and Amorites. Kurds and Assyrians lived in the north-eastern Syria and north of Iraqi for many centuries, and preserved their language and culture. During the Ottoman period, Kurds and Assyrians were mostly living within the Empire. However, after the political division of Asia Minor at the end of the Ottoman Empire, and following Sykes Picot Agreement and the Conference of San Remo recommendations, Kurds became part of various modern countries such as Syria, Iraq, Iran and Turkey. Many Armenians were living within the

Ottoman Empire, and have migrated to and settled in modern Syria after the Arminian Massacre in the early 20th century.

5.0 SYRIAN RELIGIONS

The religions and beliefs of Syria's population changed throughout history. Early settlers were non-believers and pagans. Some Syrians followed the call of Patriarch Abraham to worship a single Devine, and then believed in Judaism after it revelation. During the First Century many Syrians converted to Christianity after its adoption as the religion of the Roman Empire, which Syria was part of. After the Islamic Conquest of Syria in the Seventh Century, many Syrians converted to Islam as the religion of the Caliphate. However, the Muslim leaders did not force Syrians to convert to Islam, and many kept their own religions, as evidenced from today's Syrian Christian and Jewish communities.

The majority of today Syrians are Muslim Sunni (around 76%), whereas the Alawite, Shia and Ismaili represent around 11% of the population. The Druze represents 3% and various Christian dominations make up 11% of population. There were a few Jewish communities in Aleppo and Damascus (1, 2), but most have left the country after the creation of Israel in 1948. However, it should be noted that the mass population displacement that took place since 2011 has had a major impact on the population mix, but no accurate data is currently available.

The Muslim Sunnis comprise the majority of Arabs, Kurds, Turkmans and Circassians, whereas Christians include Syriac and Greek Orthodox, Armenians, Catholics of various rites, Assyrians, and Protestants (2, 3). The Catholics are divided into several groups of Greek Catholics, Latin rite, Armenian Catholics, Syriac Catholics, Chaldean Catholics and Maronites (1, 3).

Therefore, the belief and religion of the Syrian population should not be mixed with nationality and ethnic origin. Arab Syrians are Muslims, Christians and non-believers, and the majority of Kurds are Muslim but have minority of Christians.

6.0 CONTEMPORARY SYRIAN HISTORY

This section analyses the political, social and economic changes during the past 100 years.

6.1 The End of Othman Empire and Kingdom of Syria (1918-1920)

During the early twentieth century and after the end of World War I, the Ottoman Empire became weak and could not control its large territories in Africa, Syria and Arabia. The rise of Arab nationalism led to the Great Arab Revolution of 1916, which was led by Sharif Hussain of Arabia and supported by the British Army. The British Arab Army entered Damascus and Aleppo in 1918 and declared Syria's independence as a kingdom, with Faisal bin Hussain as its King.

However, the Kingdom of Syria did not last long, as the French invaded Syria in 1920 and divided the country into various zones. King Faisal was expelled to London. Under

the League of Nations mandate and based on the recommendations of the Conference of San Remo, the French controlled today's Syria and Lebanon, and the British controlled Iraq, Jordan and Palestine.

6.2 *The French Mandate to Syria (1920-1946)*

Syria was divided into three autonomous regions by the French, with separate areas for the Alawites on the coast and the Druze in the south. Lebanon is separated off entirely. However, Nationalist agitation against French rule developed into an uprising in 1925 and the French forces bombarded Damascus (4).

During the French Mandate, Syria economy was stabilised after many years of war. The French invested in infrastructure and built roads, water supply and sewerage systems in major cities, introduced electricity and encouraged modern education. However, they identified and supported the elites and bourgeois, as well as the Catholic minorities within the Syrian society. The French modern education system was introduced by missionary and Christian religious schools. As a result, a big social and economic gap was created in the society between the rich and poor. Agriculture, internal and external trade also flourished, but the wealth of the nation was owned by a small percentage of the population.

The French introduced a new western culture to major Syrian cities including dress code, society relationships, values, laws and judicial systems. They portrait the educated society who adopt the western culture as superior to Syrian traditionalist, but many Syrians refused the changes. The French introduced a new civil law based on the French experience, to replace the traditional Islamic law, and limit Islamic and Christian laws to religious matters such as marriage and inheritance.

Political parties were formed with various backgrounds of reform, nationalism and traditionalism. Governments were elected and media and newspapers became available.

Syrians revolted and fought against the occupation to demand freedom, equality and self-governance, and many Syrians were killed by the French in three main armed uprisings in the north, south and coastal areas.

6.3 *Post Independent Democratic Syria (1946-1958)*

Syria obtained independence on 17 April 1946 and became a founding member of the newly formed United Nations. The first post-independence Syrian government was established and Shukri al-Kuwatli was elected as the President of Syria.

A new constitution was written, and major political parties became active and influential. During this period, the Baath Party was formed in 1947, as well as Islamic, socialist, communist and nationalist parties. Many parties had large membership base and representatives in the Syrian parliament.

Private businesses, manufacturing and textile industries developed and competed in local and regional markets. Capitalism helped the Syrian economy and increased the

county's wealth. The revenues from agricultural products like cotton, wheat, fruits and vegetables increased, and agriculture became industrialised. However, it remained controlled by few wealthy landlords.

Although rapid economic development followed the declaration of independence, Syrian politics from independence through the late 1950s was marked by upheaval. The creation of the State of Israel and the Arab Israeli War in 1948 have affected the economic and political life in Syria. A series of military coups, starting in 1949, undermined civilian rule and led to Army Colonel Shishakli seizing power in 1951. After the overthrow of President Shishakli in a 1954 coup, continued political manoeuvring supported by competing factions in the military, eventually brought Arab nationalist and socialist elements to power (5). The rise of the great powers of the USA and Soviet Union, and the creation of NATO and Warsaw Pact had a major influence on Syrian politics during this period. Political parties and different factions allied with the great and local powers, which led to political instability and many military coups.

6.4 United Arab Republic (1958-1961)

A united Arab country was a dream of many Syrian nationals, especially after the rise of socialism led by the Soviet Union against the Western imperialism. Fighting the newly established State of Israel and the European aggression on Egypt's Suez Canal in 1956 played a major role in forming the United Arab Republic of Egypt and Syria in 1958. Egyptian President Gamal Abdel Nasser headed the new state. He ordered the dissolution of Syrian political parties, to the dismay of the Baath Party, which had campaigned for union.

During this period President Nasser established a socialist regime to reform the county and provide equal opportunities to all citizens. He provided access to education and jobs to workers and farmers in order to establish a socialist state. He nationalised the well-established Syrian manufacturing industry and limited the agricultural land ownership, which had a negative impact on the economy. Many Syrian businessmen, manufacturing and private industry owners left the country after losing their factories and properties. Private investment became limited due to nationalisation and uncertainty. The public sector could not provide quality products to compete and support the economy.

Influenced by Stalin, the Egyptian dominated and controlled the Syrian economy and political power. The regime suppressed political oppositions and party members, human rights were violated and political prisoners were tortured in jails. Discontent with Egyptian domination prompted a group of Syrian army officers to seize power in Damascus and dissolve the union (4).

6.5 Syrian Arab Republic Separatist Period (1961-1963)

After the declaration of the Syrian Arab Republic as an independent country, a government of civilian statesmen was formed and elections took place. Among the first tasks of this government was to change the electoral law and prepare a provisional

constitution. However, Nazim al-Kudsi who served as a President for 18 months between 1961 and 1963 was ousted in a Baath Party coup.

6.6 Early Baath Party Rule (1963-1970)

The Baath Party seized power in 1963 in a coup known as the Baath Revolution. In 1966, a group of army officers carried out a successful, intra-party coup, imprisoned the President, dissolved the cabinet and abrogated the provisional constitution. In 1967, during the Six Day War, Israel seized the Golan Heights located in southwestern Syria. In 1970, Minister of Defence Hafez Assad carried out a “bloodless” military coup, ousting the civilian Baath Party leadership, and assumed the role of President.

The socialist leftist regime continued to nationalise assets and seize private properties and agricultural land from owners. Human right violations and political imprisonment increased and freedom of speech and free media were stifled.

6.7 Hafez Assad Reign (1970-2000)

Following Assad’s seizure of power in October 1970, the Baath Party held its Regional Congress in March 1971, and elected a new 21-member Regional Command headed by Assad. In the same month, a national referendum was held to confirm Assad as President for a 7-year term. In March 1972, to broaden the base of his government, Assad formed the National Progressive Front, a coalition of parties led by the Baath Party, and elections were held to establish local councils in each of Syria's 14 governorates. In March 1973, a new Syrian constitution went into effect followed shortly thereafter by parliamentary elections for the People's Council, the first such elections since 1962 (6). The new constitution enforced a single party rule, and the Baath Party became the leader of state and people.

In 1973, Syria and Egypt launched the October War on Israel, but did not gain much land, and Israel continued to occupy the Golan Heights. In 1976, the Lebanese Civil War started and the Arab League provided mandate for the Syrian army to intervene militarily in Lebanon. The civil war ended in 1991, but the Syrian army stayed in Lebanon, imposed political and economic control, and considered by many as an occupation force. In 1980, the Muslim Brotherhood organized a rebellion against the Assad regime in many Syrian cities, and Assad arrested, tortured and killed rebels and political opponents. In 1982, the regime crushed the opposition uprising in the city of Hama, levelling the old historical city with artillery fire and causing the death of many thousands. Assad strengthened his position of power with military and police control, violation of human rights and restriction of any political activities. The media was controlled by the government and tight censorship was imposed on opposition. During the rest of his reign, public manifestations of anti-government activity have been very limited. Syria joined the international coalition in 1990 in the Gulf War against Iraq invasion of Kuwait.

During this period, the regime implemented sectarian approach, by promoting members of Assad’s minority Alawite sect to senior army ranks and key influential

political and economic positions. Senior civil servants and heads of public administrative and educational institutions were limited to senior Baath Party members and Alawites.

The economic condition worsened due to corruption, international economic sanction, army expenses, and employing incapable/unexperienced people in positions of power. The inflation became significant and the Syrian pound lost its value by a factor of 10 between 1985 and 1990. Many young Syrians did not see a bright future or economic prosperity. They migrated, mainly to the Gulf countries, in search for work.

During Assad reign, there were no active political parties, oppositions or alternative candidates for government or presidential elections. However, the Syrian constitution states that presidential election must be held every seven years. Assad was the only candidate during the three electoral cycles of his reign. Therefore, referendums on Assad as a President, rather than elections, were performed. After each referendum, Assad appoints the Syrian cabinet and ministers. Parliamentary elections were carried out, however the regime nominate candidates to represent various regions, and independent candidates required regime approval before their nomination can be accepted. Additionally, elected members of parliament have no real power over politics or legislation.

Assad was preparing his oldest son Basel as his successor to power. However, Basel sudden death in a car accident in 1994 led Assad to consider his other son Bashar as the future President of Syria. He introduced him to political affairs and prepared him for the future position.

6.8 *Bashar Assad Reign (2000-Date)*

After the death of Hafez Assad in 2000, there were argument between the old guards of senior officials on who should assume power, but Bashar was the obvious choice by the influential Alawite and Syrian political powers. However, a constitutional change was required, as it stipulates the minimum age of the Syrian President as 40 years. Bashar was 34 then. An emergency parliamentary meeting was held, and it was decided by a majority vote to change the minimum age to 34 years to suit Bashar.

During the first few years of Bashar's rule, he tried to reform the economic and administrative system and encourage investment. He proposed to limit corruption and police control over people lives. However, this has changed quickly and the Assad regime resumed the practice of arresting and torturing political opponents.

He provided economic privileges to members of his family and close friends and loyalists. Investment, large projects and government civil and military contracts required partnership with members of his inner circles. Monopolies over large projects such as commodities import, cell phone licenses and trade zones were limited to his family members and cronies. Corruption and government official bribery became the norm. Food and product prices became very high. The middle class all but disappeared from the society, and the poor and very few very rich people dominated the Syrian social scene. Youth migration to the Gulf countries in search for better lives and to Europe and America for education and works became common.

The Syrian population did not see bright future, potential work or prosperity in their country. Inequality, economical corruption, oppression and lack of justice and equal opportunities was a major cause to the Syrian uprising and call for justice and dignity leading to the revolution after the Arabic Spring in 2011.

6.9 The Syrian Revolution (2011-date)

Influenced by the Arab Spring in Tunisia, Egypt, Libya and Yamen, young Syrians of the southern city of Dara demonstrated against the arrest of school children who wrote on their school wall “Your Turn Next” after the resignation of the Egyptian President. The regime refused to release the children and latter open fire on demonstration. Demonstrations started in other Syrian cities and peacefully spread over most Syrian town and villages, but the regime killed many of its own citizen and peaceful demonstrators. These continued for 6 months before a small cohort of Army officers and personnel defected, refusing to point their weapons against their own people. The regime arrested thousands and kill similar numbers in the first few months. People carried arms to defend their families and villages. The Free Syrian Army was formed and liberated large areas of Syrian land. The regime used planes and tanks to bomb cities and towns and invented the “barrel bomb” due to lack of traditional munition.

More international powers interfered and armed different opposition groups. In the meantime, the regime brought Shia sectarian militias from Lebanon, Iraq, Iran and Afghanistan to fight and kill its Syrian opponents. Then, the regime released Islamist political prisoners from its jails, and various Jihadist groups, including ISIS, gained ground in the east and entered the country from Iraq after being released from Iraqi prisons. The regime used chemical weapons in eastern Damascus in 2013, and killed more than 3000 civilians in one attack, but the international community and United Nations failed to respond or punish the criminals.

The American then led a war against ISIS in east of Syria and supported the Kurds to gain territory. Later, the regime enlisted military help from Iran and then Russia to help in his war against its own people, claiming to fight terrorist groups. The Russians used excessive air force to bomb cities and towns, including civilian areas, to help the regime and sectarian Iranian, Iraqi and Lebanese troops to gain territories on the ground. They besieged cities and towns for years in “starve-to-surrender” strategy and the civilised world kept watching as the Syrian people death over more than 9 years.

In 2016, from an estimated pre-war population of 22 million the United Nations identified 13.5 million Syrians requiring humanitarian assistance, of which more than 6 million are internally displaced within Syria, and around 5 million are refugees outside of Syria. A total registered Syrian refugees in surrounding countries accounts for 5,625,452 as shown in Table 1 (7). Estimates of deaths in the Syrian Civil War, per opposition activist groups, vary between 364,792 and 522,000. On 23 April 2016, the United Nations and Arab League Envoy to Syria put out an estimate of 400,000 that had died in the war (8).

Table 1. Syrian Refugees in Surrounding Countries (7)

Location name	Source	Data date	Population	
Turkey	Turkey, UNHCR	11 Oct 2018	63.7%	3,585,738
Lebanon	UNHCR	30 Sep 2018	16.9%	952,562
Jordan	UNHCR	9 Oct 2018	11.9%	671,919
Iraq	UNHCR	30 Sep 2018	4.4%	250,184
Egypt	UNHCR	30 Sep 2018	2.3%	131,504
Other (North Africa)	UNHCR	15 Mar 2018	0.6%	33,545

7.0 CONCLUSIONS

Nations exist, evolve and change throughout history, and Syria is no exception. Key milestones of Syria history spanning more than 5000 year highlight various empires that ruled Syria including the Persians, Greeks, Romans, Byzantines, Arabs and Ottomans.

The geographical location of Syria has played a major role in its economic, social and political life. Syria's religions, ethnicities and nationalities have a significant impact of the country's history, particularly during the past 100 years.

During the first half of the Twentieth Century, the fall of the Ottoman Empire, and the French Mandate, have played a major role in shaping the politics of modern Syria. The rise of nationalism and the formation of the United Arab Republic in 1958 ended Syria unstable but democratic period, and paved the way for totalitarian regimes. This was followed by Baath Party rule and Assad dynasty reign, where violation of human rights, political arrests and tortures, economic corruptions and instability were the main features. Important economic and political positions were limited to Baath Party members and Alawites of Assad family. Oppression and corruption increased, which led to the Syrian revolution demanding equality, dignity and justice.

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TREATING YOUNG OFFENDERS IN EARLY ROME.

Michael Grayflow

Oddly, while the Romans like us had a wide range of terms for young people, few if any of them seem to have connoted legal liability.³⁶⁸ It is odd because from a very early period Rome developed a number of legal categories for people (mostly to do with citizenship and obligations), and the frequent reference to guardianship in Roman law shows they were very much aware of the presence of young people in their midst. Since Rome from the days of the kings through the early Republic (c. 753-280 BC) was perennially at war there were always young men needing legal guardians because their fathers had perished in battle.³⁶⁹ Later Roman practice from the time of Augustus (27 BC – AD 14) ended guardianship for males at age fourteen, when the young Roman became legally an adult, able to vote, manage his properties, and so forth; though his relative innocence in business affairs was protected by a law that prescribed double damages for anyone cheating him until he reached twenty-five. Girls and women were always allocated a legal guardian whatever their age, due to what the jurists called “lightness of mind” (*levitas animi*).³⁷⁰

In the earliest days of Rome however puberty was what determined reaching legal adulthood, which made it something of a variable for individuals. In the case of males this was decided by a simple test conducted by the father or guardian to see if he showed the capacity to reproduce (*qui generare potest*).³⁷¹ Whereas a guardian

³⁶⁸ Liability for military service at age seventeen supposedly went back to the days of the kings, and the Plaetorian

(or Laetorian) Law punishing defrauders of the young and inexperienced existed by Plautus’ day (c. 200 BC).

Gellius *Attic Nights* 10.28.; F. Schulz *Classical Roman Law* (Oxford 1961) pp. 190-191.

³⁶⁹ Dates are approximate. 753 BC is the traditional date for the founding of the monarchy (Rome becoming a

republic in 510 BC), and 280 BC represents Rome’s first war with a non-Italian foe (Pyrrhus of Epirus), by which

time Roman control extended over much of central Italy.

³⁷⁰ Gaius *Institutes* 1.190. Gaius was lecturing in Rome c. AD 160. J.F. Gardner *Women in Roman Law and Society*

(Bloomington 1991) pp. 5-22; E. Cantarella *Pandora’s Daughters* (Baltimore 1987) pp. 113-124.

³⁷¹ There was a long debate later over whether puberty or age should determine adulthood. Gaius *Institutes* 1.196.

might have an interest in denying puberty's arrival in his ward, a father would normally welcome it. Even so, the 'adult' son remained in the fearsome power of his father (*patria potestas*).

The Romans were proud of their *patria potestas* which distinguished them from most other peoples, and even Greek admirers were tempted to compare it favorably with the difficulties of fathers and sons in their homeland.³⁷² According to the "Laws of the Kings" (*Leges Regiae*) which were probably not as old as they were claimed, *patria potestas* was instituted by Rome's traditional founder Romulus. The father was given power over a son for the son's whole life, whether to imprison him, scourge him, chain him up at hard labor, sell him, or even kill him (though after a third sale the son became free, and Romulus' successor Numa Pompilius banned selling the son if the son had married with his father's consent).³⁷³ The son was a *res Mancipi*, something that could be sold. *Patria potestas* may originally have been more restricted than it afterwards became, and by the late republic its extreme application was no longer considered appropriate.³⁷⁴

Censorinus (third century AD) thought all males except natural eunuchs reached puberty by seventeen: *On the*

Birthday 7.2-4. Physical examination undoubtedly continued in conservative-minded families and was only

formally abolished by Justinian in AD 529. A. Corbett *The Roman Law of Marriage* (Oxford 1930) pp. 51-52.

Girls were deemed to have reached puberty when they were old enough to "please men"; though Augustus

fixed it at age twelve. Cf. Plautus *Casina* prolog. 47-48; Augustine *City of God* 15.12; Labeo in *Digest* 36.2.30.

³⁷² Gaius *Institutes* 1.55; Justinian *Institutes* 1.9.2; Dionysius Halicarnassus *Roman Antiquities* 2.27; P. Veyne *A*

History of Private Life from Pagan Rome to Byzantium (Cambridge Mass. 1987) p. 27; J. A. Crook *Law and Life of*

Rome 90 BC – AD 212 (Ithaca 1967) pp.107-111; A. Watson *The Law of the Ancient Romans* (Dallas 1970) pp.

37-39.

³⁷³ Dionysius Halicarnassus *Roman Antiquities* 2.26-27.

³⁷⁴ Watson *Ancient Romans* p.11. When around 100 BC Q. Fabius Maximus had his slaves kill his son he was roundly

condemned, and a century later a certain Tricho who flogged his son to death was only rescued from an

infuriated mob by the emperor Augustus. Orosius *Against the Pagans* 5.16; Seneca *On Clemency* 1.15.1. Even so,

the jurist Ulpian (d. AD 223) pronounced that sons remained in their father's power even if the father was raving

mad. *Digest* 1.6.8. However individual fathers were often more indulgent than *patria potestas* would suggest.

Cicero's daughter married against his wishes and his nephew regularly disobeyed his father. Whether sons should

The *patria potestas* of the Roman father went with his role as *paterfamilias*, the head of the *familia* that embraced not only what we would call family but also everyone that he owned (slaves) and those who owed him deference (freedmen). As such, and certainly in the early Roman period before the emergence of special courts, he presided over a domestic tribunal which had virtually sacrosanct authority to deal with matters affecting his dependents, even when the offences touched the public good.³⁷⁵ The father's authority was buttressed by an ancient law ascribed to one of the kings that if a son struck his father "so that he cried out", the son would be devoted to the parental gods; meaning put to death.³⁷⁶ Parricide was not unknown and always attracted a peculiar horror, though there was a strong tradition that all murders were originally called parricides.³⁷⁷ It is against this background of *patria potestas* that laws relating to juveniles in early Rome need to be understood.

Two things are clear. There was no category of juvenile crimes, only crimes committed by juveniles; and in all criminal cases intent was a paramount consideration.³⁷⁸ The later jurists almost certainly reflected older tradition in holding that a child under seven was incapable of forming evil intent, and those older but under puberty (*impuberes*) were generally considered equally innocent unless they could be proven otherwise.³⁷⁹ Those who had attained puberty (*puberes*) if they had no father or grandfather living (*patria potestas* could leap a generation) and were *sui iuris* would have been treated as any other adult male. In the case of debt, a major issue in early Rome and for centuries later, the oldest law code (the Twelve Tables) provided ferocious penalties. The insolvent debtor became a bondservant (*nexus*) of his creditors, who might in theory divide his body between them; though it was later claimed that this extremity had never actually occurred.³⁸⁰

The Twelve Tables (*Duodecim Tabulae*) dated traditionally from 451-450 BC and were the product of an extraordinary elected commission which took over government until its members overreached themselves and were ousted in a popular revolt.³⁸¹ They were not a law code but a collection of brief injunctions on particular issues (and as one law made clear designed in part to prevent blood feuds); and the laws stood even after the abrupt ending of the commission, revered by later

always obey their fathers was something philosophers debated. Gellius *Attic Nights* 2.7.11-19.

³⁷⁵ O.E. Robinson *The Criminal Law of Ancient Rome* (London 1995) p. 41.

³⁷⁶ Ascribed to king Servius Tullus (trad. 578-535 BC): Festus *On the Meaning of Words* 320. (Festus' book is an epitome of a work by Verrius Flaccus, d. c. AD 20).

³⁷⁷ Cicero *On Behalf of Sextus Roscius* 13.37; *Stoic Paradoxes* 25;

³⁷⁸ Robinson *Criminal Law* p.16.

³⁷⁹ Ulpian in *Digest* 9.2.5.2.

³⁸⁰ Gellius *Attic Nights* 20.19, 39-52.

³⁸¹ M. Cary & H.H. Scullard *A History of Rome down to the Reign of Constantine* (New York 1979) pp. 66-68; Watson

Ancient Romans pp. 10-16; R.M. Ogilvie *Early Rome and the Etruscans* (Glasgow 1976) pp. 119-124.

generations as the fountainhead of Roman law.³⁸² As with the laws attributed to the early kings, the Twelve Tables are no longer extant and are only known from later citations, though Cicero (d. 43 BC) claimed that in his day every Roman schoolboy still learned them by heart.³⁸³

Despite its almost annual wars with its neighbors Rome of the Twelve Tables was still very much an agricultural community, with no police or public lighting at night, and apparently continual disputes about farming boundaries.³⁸⁴ Not surprisingly a number of the laws relate to damages and torts, theft, and violence. In all cases the issue of responsibility inevitably reared its head, and in the case of sons in *potestate* this meant their fathers.

We cannot know what percentage of young Roman males were still under *patria potestas* at this time, though the laws assume enough were to warrant legal provision. The eldest agnate male in the family held *patria potestas*, so that even if his son died or fell in battle all the son's children would still be in the grandfather's power. Equally the laws referring to guardians and male wards suggest that the number of young Romans who were *sui iuris* were only a part of the population.

With *patria potestas* went legal responsibility for the doings of sons and grandsons.³⁸⁵ Damages and thefts carried out by sons still under paternal power raised a claim against the father. The son owned nothing in law; everything he had belonged to his father, or to his grandfather if his father was dead but the grandfather was still living. (The father might provide resources to be used at the son's discretion, but these and any profits arising from them still belonged in law to the

³⁸² Law 8.24a, following Johnson's numeration. It related to accidental wounding.

³⁸³ Livy *History of Rome* 3.34.6; Cicero *On the Laws* 2.4.9. Reconstruction in Latin of the Twelve Tables are found in

Fontes Iuris Romani Antiqui C.G. Bruns ed. (Tubingen 1909), with a version by Theodor Mommsen; and in S.

Riccobono *Fontes Iuris Romani Anteiustiniani* (Florence 1941). There is an English version in *Ancient Roman*

Statutes A.C. Johnson et al. edd. (Austin 1961), and a Latin and English version in the Loeb Classics series under

Remains of Old Latin Vol. III, E.H. Warmington ed. (Cambridge Mass. 1938).

³⁸⁴ Roman legends delighted in ancient heroes hauled off from the plough to save the state who after victory

went back happily to their fields. Cicero *On Old Age* 16; Livy *History of Rome* 3.26-29; Florus *Epitome of Roman*

History 1.5.11-15. On the extent of Roman power at this period cf. Scullard *History of Rome* pp. 70-72; C.Scarre

The Penguin historical Atlas of Ancient Rome (London 1995) pp. 14, 22-23; T. Cornell & J. Matthews *Atlas of the*

Roman World (Oxford 1982) pp. 28-30.

³⁸⁵ The patrician Quinctius Cincinnatus was supposedly ruined when his son Caeso jumped bail, though as a surety

Cincinnatus would have been liable anyway. The whole story is suspect, Livy *History of Rome* 3. 11.6 -13.10.

father.)³⁸⁶ Should a son in his father's power commit some offence involving damages the father could not, or was unwilling to, pay for (which in those days meant real goods of some kind), the father had the option of noxal surrender.³⁸⁷ *Noxa* was harm or injury done by a son or slave for which the father / owner was held responsible; and noxal surrender meant the culprit was handed over to the injured party as a bondservant (*nexus*).³⁸⁸ The *nexus* was never legally a slave, but his free exercise of Roman citizenship (*ingenuitas*) was effectively suspended, and he occupied (perhaps only for a time) an indeterminate status between free and slave. Freeman who were *sui iuris* could voluntarily enter into this status if they could not meet their debts.

Although no term seems to have been specified the period of *nexum* was likely to last until the damages were made well and truly good. However some specific offences involving a son who had reached puberty but was still under *patria potestas* were sometimes not allowed the option of only noxal surrender. In the small Roman world of this time wealth was land, crops, and beasts; and if farming was not exactly at the subsistence level for some, it was not far above it for many.³⁸⁹ Agricultural crimes therefore weighed heavily in popular sentiment. Adults *sui iuris* caught stealing at night were put to death as a sacrifice to Ceres the goddess of crops (similarly during the day if they defended themselves with a weapon). Those caught unarmed during the day were scourged and handed over to the injured party as *nexi*.³⁹⁰ Adults in their father's *potestas* brought the consequences of their crimes on him, leaving him only with the option of noxal surrender or suffering himself. We do not know how many chose latter option.

However a special case existed for sons under puberty caught running their animals on someone else's fields or cutting their crops secretly by night. The Romans recognized that since these were boys it was wildly unlikely that their nocturnal depredations were carried out on their own initiative, the guilt therefore belonged to

³⁸⁶ This allowance was later termed a *peculium*, the same term used for moneys given to a slave to make profit

with. At this period it cannot have been coins. Crude bronze weights were used for trade at an early period but

true Roman coinage only dates from around 300 BC. F. Schulz *Classical Roman Law* (Oxford 1951) p. 154; D.L.

Vagi *Coinage and History of the Roman Empire* (Sidney OH 1999) Vol. 2, p. 24.

³⁸⁷ The provision is listed as law 12.2b in all versions, and derives from citation in Gaius *Institutes* 4.75-77. According

to Gaius it would be unjust for the son's misdeeds to cause loss to the father.

³⁸⁸ *Nexum* for debt was abolished by the Poetilian Law of 326 / 313 BC when a handsome youth who was *nexus* for

his father's debts was flogged by the creditor for refusing his sexual advances, leading to a public outcry. Livy

History of Rome 8.28; Varro *On the Latin Language* 7.105.

³⁸⁹ Later jurists spelled out what numbers were required to qualify as rustling. Robinson *Criminal Law* p. 25.

³⁹⁰ *Twelve Tables* 8.9, 24b; Gellius *Attic Nights* 11.18.6-9

their father or guardian. The injured party therefore appealed the case to the praetors, Rome's two senior magistrates.³⁹¹ The Twelve tables allowed that at the praetor's discretion either the boy would be scourged or the father should pay double damages. Since adults *sui iuris* were ordered first scourged and then reduced to *nexus* status, clearly scourging was not meant to be fatal; and in the case of boys it would be comforting to think that the scourging was not as brutal as for adults. We do not know who carried out the scourging, probably by one of the praetor's lictors or adjutants though it is not inconceivable that at this stage in Roman history the job was given to the injured party.

For scourging two versions of these laws use the verb *verberare*, which can mean anything from a beating to a brutal flogging.³⁹² Slaves were flogged using the *flagellum* or *flagrum*, a multi-thonged leather strap with bone or metal encrusted cords. One poet distinguished the *horribile flagellum* from the simple rod (*ferula*), and noted its use could be fatal. In popular usage it was different from the punishment rod (*virga*), but by the Porcian Law of 195 BC both were prohibited from use on Roman citizens.³⁹³ (An old tradition taking this ban back to a Valerian Law of 509 BC is refuted by the Twelve Tables presuming the legality of scourging citizens.)³⁹⁴

The exercise of the praetor's discretion between scourging the boy and having the father pay double damages was almost certainly governed by the father's ability to meet the claim, and presumably by whether the praetor determined that the boy had acted on his own or at his father's behest. Running the family animals on someone else's pastures or stealing someone's crops by night would hardly seem to have been just some boyish prank, so the probability in most if not all cases would have been to presume the boy acted on instructions; which under *patria potestas* the boy could not refuse. The father then would have been faced with owning his responsibility and either paying the damages or seeing his son scourged. The law's existence suggests that the offence was no uncommon occurrence, which in its turn raises the possibility that in the tight Roman community of those days a father might already have witnessed a boy being scourged.³⁹⁵ In any event if the father had no way of paying the damages and was faced with the distinct possibility that he himself would be adjudged as a *nexus*, having his son scourged might have seemed the

³⁹¹ The praetors were elected annually. From the fourth century BC renamed consuls ('praetor' being downgraded

for the next senior magistrate), they combined civil and military authority. Livy *History of Rome* 3.55.12.

³⁹² Pliny *Natural History* 18.3.12; Gellius *Attic Nights* 11.18.8.

³⁹³ Horace *Satires* 1.2.41; 3.119; Cicero *On Behalf of Rabirius in his Treason Case* 4.12; Sallust *The War with Catiline*

51.21. Akin to the *ferula* and the *virga* was the *vitis* used by centurions in the army. Tacitus *Annals* 1.23.

³⁹⁴ Livy *History of Rome* 10.9; Cicero *On the Republic* 2.31.

³⁹⁵ Estimates of Rome's population in the early republic are just learned guesses, but one suggestion is that in the

fifth century it was around 120,000. *A Dictionary of Ancient History* G. Speake ed. (Oxford 1994) p. 515.

only viable alternative. Obviously if the father could afford to pay double damages he could avoid this outcome, though he may not have chosen to do so.³⁹⁶

A similar provision about *impuberes* occurs in another law from the Twelve Tables. Theft was obviously a major concern, along with false accusations and planted evidence.³⁹⁷ Convicted thieves caught in the act at night could be lawfully killed, but during the day only if they defended themselves with a weapon. If they had not carried a weapon they were scourged and handed over to the injured party as *nexi*; obviously after the praetor had become involved. However boys under puberty (*pueri impuberes*) were to be flogged, again at the praetor's discretion, and whatever damage they had done was to be made good.³⁹⁸ Much remains unclear. The issue of what happened if the boy was taken at night, or with a weapon during the day, remains unanswered. That the boy's father or his guardian was ultimately responsible for making good any damages must have been the case, and in this law the scourging of the boy does not obviate the claim for damages. Although there were no doubt unattached waifs and strays in early Rome the agnatic family and clan (*gens*) structure meant that it is unlikely that the praetor could not track down someone whom the law determined had some kind of responsibility for the boy. Romans were very conscious of their narrower family and wider clan relationships, which figured prominently in arguments over wardship and inheritances (something else addressed in the Twelve Tables).³⁹⁹

Nowhere do the Twelve tables directly attribute the misdeeds of those under *patria potestas* to the machinations of their father or (in the case of slaves) of their owner; yet the idea that those under *patria potestas* would carry out crimes on their own initiative or in defiance of their father or owners would have struck the Romans of this period as outlandish. The presumption would almost certainly have been that the culprits were acting under orders. That becomes clear in one of the laws where the father of a guilty son or owner of a guilty slave is given the choice of being assessed for damages or turning over the culprit for punishment.⁴⁰⁰ The punishment is

³⁹⁶ While fathers celebrated the birth of sons with wreaths on their doors and even exalted fathers found time to

teach their sons themselves, there are also stories of fathers refusing to leave their official duties when told

their sons had just died and even killing their sons for disobeying military orders. Juvenal *Satires* 9.85-86;

Catullus 17.13; Plutarch *Cato Major* 20; *Aemilius Paulus* 6; Suetonius *Divine Augustus* 44; Valerius Maximus

Memorable Doing and Sayings 5.10.1,3; Augustine *City of God* 5.18.

³⁹⁷ *Twelve Tables* 8.12-18b. Convicted perjurers were executed. Those searching a house for suspected stolen goods

were required to wear only a loincloth and carry a platter. Gaius *Institutes* 3.192.

³⁹⁸ *Twelve Tables* 8.14; Gellius *Attic Nights* 11.18.7-9.

³⁹⁹ E.T.Salmon & T.W. Potter 'Gens' *The Oxford Classical Dictionary* S. Hornblower & A. Spawforth edd. (Oxford

1996) pp. 631-632.

⁴⁰⁰ *Twelve Tables* 12.2b; Gaius *Institutes* 4.75-77.

unspecified, but in the case of a son would have been noxal surrender, while a slave might simply have been awarded to the injured party. The option would have followed an investigation under the praetor's authority and the identification of the father or owner, something very hard to conceal in Rome of this early period. The two parties might come to an agreement on their own but this still required a public announcement to this effect by the praetor. Failing to reach an agreement could result in both parties pleading their case before the assembly, and if one party failed to appear the praetor would judge in favor of the one present. These gatherings had to convene before noon and could not go beyond sunset.⁴⁰¹

Although all classes had a vested interest in protecting property and punishing theft laws about such crimes tended as elsewhere to originate with the wealthy; though in early Rome this would be a relative term. The references to slaves in the Twelve Tables illustrate their existence; though how far down the social scale ownership extended is unknown. Sons and daughters were a different matter, though despite a law attributed to Romulus that all male offspring and first born girls should be raised (unless maimed or monstrous) it is likely that many girl babies were exposed to die.⁴⁰² The scourging or noxal surrender of sons under *patria potestas* therefore could affect all fathers not just the rich. Although the laws of the Twelve Tables had been ratified by popular vote, seeing them applied to any particular youth may well have aroused mixed feelings.

Here the sources are basically silent though the case of T. Manlius Imperiosus Torquatus in the next century may, despite its legendary character, throw some light on popular feelings. As a supposedly dim-witted youth he had been sent off to toil as a laborer on the family farm by his hard-hearted father, but when the same father was threatened with criminal prosecution by one of the tribunes young Manlius armed with a knife terrified the representative of the people into dropping the charge. For this display of apparently undeserved filial devotion, despite the manifest illegality of the act he won popular acclaim. Subsequently attaining further glory by slaying an enemy soldier in a duel he was later consul in 340 BC when he executed his own son for disobeying orders and fighting (and winning) a similar duel. In a speech attributed to the father the son is condemned both for ignoring the father's authority as consul and also his father's *patria potestas*. Manlius' severity passed into legend, and he apparently spent the rest of his life hated by at least the younger Romans.⁴⁰³ Their reaction suggests that while all agreed that laws and authority should be upheld, their actual application on individuals may not always have met with popular sympathy.

Alongside *patria potestas* and guardianship later Romans certainly had categories for youthful stages of life, though these had little relevance for issues of criminality. Nor did writers agree about the limits for various stages. Varro (d. 27 BC), according to his friend Cicero the most learned Roman of his day, had a first stage

⁴⁰¹ *Twelve Tables* 1.6-9.

⁴⁰² Dionysius Halicarnassus *Roman Antiquities* 2.15. Cf. *Twelve Tables* 4.1.

⁴⁰³ Livy *Roman History* 7.4 – 5.9; 8.7, 12; Valerius Maximus *Memorable Doings and Sayings* 6.9.1.

⁴⁰⁴

up to fifteen of *pueri*, usually translated as 'boys' or more broadly 'children'; Varro apparently connecting *puer* with *purus* (pure), equating it with *inpubes* and thinking of sexual purity. His next stage ran to thirty and comprised *adulescentes*, a word giving us our 'adolescents' and deriving from a verb meaning 'to grow'.⁴⁰⁵ The poet Ovid (d. AD 17) compared life to the seasons, the first that of the *pueri*, and the second that of a youth (*iuvenis*).⁴⁰⁶ Most writers opted for life being divided into seven-year periods, reflected in the jurists denying culpability to children under seven and the fixing of puberty at fourteen for boys which became normal from the time of Augustus (d. AD 14). It is possible that another way of dividing life went back to very early times. According to the jurist Tubero (*fl.* c. 40 BC) quoted by Aulus Gellius, in the days of the kings *pueri* went up to seventeen; after which, up to age forty six, "young men" (*iuniores*) were liable to serve in the legions.⁴⁰⁷ The age of Roman citizens was known from the periodic census, and a law of 124 BC fixed seventeen as the age for beginning military service, though there are stories of younger boys attending their fathers on campaign.⁴⁰⁸ Alongside all of this writers and poets use a range of terms for young men (and girls) alluding to characteristics which they attributed, with varying degrees of approval or dismay, to youth in general. None of this made any difference in law.

The real issue in all cases involving young offenders was whether or not they were *sui iuris* or under *patria potestas*. That they may have become legal adults (with voting rights etc.) after attaining puberty was not the main focus. Children under seven were presumed incapable of deliberate criminality, but between seven and puberty whether they were personally culpable was left up to the praetor's decision. Exactly what this meant is unclear since they would still be under either *patria potestas* or a guardian; and while tutelage ended with puberty *patria potestas* continued until the death of the eldest male ascendant. Guardians were normally male agnates if no testamentary one had been appointed, and would likely have a strong interest in protecting the integrity of family property from law suits.

It was a fundamental principle of Roman law that there could be no crime without intent. Torts they certainly recognized, and provided a range of consequences; but actual crime required intent, and intent involved accountability. In dealing with young offenders in the early Republic the issue was always where did the accountability lie.

⁴⁰⁵ Varro in Censorinus *On the Birthday* 14.2. According to Censorinus (*fl.* c. AD 240) Varro divided all human life into

fifteen year stages, although knowing that the Etruscans had divided life into twelve seven-year periods: 14.6.

⁴⁰⁶ Ovid *Metamorphoses* 15.199-207. *Iuvenis* gives us our 'juvenile'.

⁴⁰⁷ Aulus Gellius *Attic Nights* 10.28.1-2.

⁴⁰⁸ Cf. Plutarch *Caius Gracchus* 5; Cicero *On Behalf of A. Caecina* 24.99; *Augustan History* 'Hadrian' 10; M.

Rostoftzeff *Rome* (New York 1960) p. 30. The Younger Pliny (c. AD 100) uses *adulescentuli*, a diminutive of

adulescentes, for youths beginning military service: *Letters* 8.14.4-6.

THE PHOENIX AND THE MOCKINGBIRD: HOW FANTASY AND CHILDREN'S LITERATURE HAS SHAPED THE RECOGNITION AND PROTECTION OF HUMAN RIGHTS

JAVIER GARCÍA OLIVA AND HELEN HALL⁴⁰⁹

Introduction

The role which literature can play in shaping social evolution and political change is unquestionable. Fictional accounts rooted in current issues not only raise popular awareness, they also perform a feat of emotional alchemy, transforming abstract questions into personal ones, sparking the readers' empathy and interest. Narrative can be a decisive factor in winning the battle for hearts and minds which is needed to drive reform. The authentic depictions of injustice and human suffering in the pages of works like *To Kill A Mockingbird*,⁴¹⁰ *Things Fall Apart*⁴¹¹, *Sybil*⁴¹² or *The Tenant of Wildfell Hall*⁴¹³ reverberated in public and private debates around race, colonialism, poverty and women's rights with contemporary readers, and continue to inform discussions today.

Yet in addition to the stark realism of the 'protest novel' genre, there is the often-overlooked contribution made by fantasy and children's literature. This article explores the significance of this form of story-telling in propelling the progress of human-rights, and the ways in which it is uniquely placed to usher in new modes of thought. We suggest that there are two phenomena which are at the heart of this: firstly, fantasy and children's works provide a forum in which transgressive and experimental ideas can be expressed without jeopardy; and secondly, it has the potential to enable excluded voices to enter into the public dialogue.

A Safe Space for Dangerous Ideas

Stories which play out in a fantastic realm, inviting their audience to suspend disbelief, are imbued with a paradoxical quality, almost worthy of magic itself. On the one hand, there is an acceptance that ordinary rules and expectations are disapplied, freeing both author and reader to think the unthinkable. Yet at the same time, there is the security of knowing that what is being presented is not the "real" world, meaning that there is no immediate threat from any disturbing or unorthodox

⁴⁰⁹ University of Manchester and Nottingham Trent University

⁴¹⁰ H Lee, 'To Kill A Mockingbird' (J B Lipincott) 1960

⁴¹¹ C Achebe 'Things Fall Apart' (William Heineman) 1958

⁴¹² B Disraeli 'Sybil: Or The Two Nations' (Henry Colburn) 1845

⁴¹³ A Bronte 'The Tenant of Wildfell Hall' (Newby) 1848

ideas which might be presented. There is an inbuilt plausible deniability, which can shield writer and audience alike from attack.

This may be explicit within the text, for instance, it was clearly no accident that Thomas More selected the name *Utopia* for his ideal republic, a mischievous pun, derived from the Greek for “nowhere”.⁴¹⁴ Equally, it may be self-conscious even though implicit. For instance, Shakespeare’s *The Tempest*⁴¹⁵ adopts a magical, otherworldly setting as a vehicle to explore themes of rule, legitimacy and authority, all topics best approached with extreme caution in the Jacobean era.⁴¹⁶

To this end, the island inhabited by Prospero operates as a liminal space between the fairy-tale and the recognisable, it is not quite the enchanted kingdom of *Midsummer Night’s Dream*⁴¹⁷, but neither is it an identifiable place, rooted in a concrete historical and geographical context. Mysterious, supernatural forces are not a merely peripheral influence, whose significance the audience can dial up or down, according to their own thinking. In contrast to the witches in *Macbeth*, who may be presented and understood in a multiplicity of ways, some tending towards the metaphorical⁴¹⁸, Ariel and Caliban are protagonists at the forefront of the action. For instance, when *Macbeth* asks:

“Is this a dagger which I see before me,

The handle toward my hand? Come, let me clutch thee.

*I have thee not, and yet I see thee still.”*⁴¹⁹

there is plentiful ambiguity as to whether the knife is conjured by malevolent magic or his own fragmenting mind. In contrast however, the coherence and meaning of the narrative in *The Tempest* is wholly dependent upon the audience perceiving Caliban and Ariel to be as being every bit as real as Prospero and Miranda. This significance of this is heightened by the ambiguous nature of the island setting, Caliban and Ariel are not quite as comfortably and securely creatures of make-believe as Oberon and Titania. This gives our questions about the treatment which they receive, and the discomfort which these engender about perceptions of real indigenous peoples in the New World, a much harder edge.⁴²⁰

It might even be argued that stark contrast between the presentation Ariel and Caliban, represents two different facets of the Early Modern response to indigenous peoples. The monstrous, sensual Caliban is a caricature borne of the fears and dehumanising tendencies of many Europeans when encountering Native Americans

⁴¹⁴ T More ‘Utopia’ (1516)

⁴¹⁵ W Shakespeare ‘The Tempest’

⁴¹⁶ P Coby, ‘Politics and the Poetic Ideal in Shakespeare’s *The Tempest*’ *Political Theory* 11 (2) (1983), 215, 217

⁴¹⁷ W Shakespeare ‘*Midsummer Night’s Dream*’ (1605)

⁴¹⁸ L Cole, ‘Of Mice and Moisture: Rats, Witches, Miasma and Early Modern Theories of Contagion’ *Journal for Early Modern Cultural Studies* 10 (2) (2010) 65

⁴¹⁹ W Shakespeare ‘*Macbeth*’ (1606) II, i, 33

⁴²⁰ See for example ‘*The Tempest*’ Act III Scene 2, and Caliban’s lament that he has been deprived of his land ‘*As I told thee before, I am subject to a tyrant, a sorcerer, that by his cunning hath cheated me of the island.*’

and other groups. William Bradford, chronicler of the Plimoth Plantation famously wrote of “a hideous and desolate wilderness, full of wild beasts and wild men”.⁴²¹

The perception of pre-existing inhabitants as uncivilised, and therefore lacking the claim to political and property rights enjoyed by Europeans (or at least, adult male Europeans with acceptable religious convictions), was put forward as a justification for appropriating land and oppressing societies. And yet the *Tempest* makes us uncomfortable with this. Firstly, Shakespeare makes Caliban’s servile status the consequence of his attempted rape of Miranda, Prospero having initially treated him with kindness, suggesting unease with any automatic claim to exploit him.⁴²² Furthermore, there are seeds of doubt as to whether Prospero’s account is wholly to be trusted, and even if it is, we find no rebuttal of Caliban’s assertion that he relied upon him to show him the island’s natural resources. For all of Prospero’s self-proclaimed superiority, he was dependent upon Caliban at first, a situation mirrored in countless real world experiences of colonialism.

Juxtaposed with this is the beautiful but mysterious Ariel, an avatar perhaps for the more romanticised conceptions of indigenous peoples. Although the phrase ‘*noble savage*’ was coined by Dryden towards the later part of the seventeenth century⁴²³, the mind-set from which it sprung was far older. Ariel clearly has capacities which Prospero does not, and a beguiling otherworldliness. And yet, Ariel is also depicted as childlike, at least in the eyes of Prospero, who evidently thinks that the spirit should be grateful to be his slave, instead of living under the oppression of Caliban’s witch-mother Sycorax. Whether a Jacobean audience would approach that position as critically as a contemporary one, given the acceptance of divinely appointed hierarchy on Earth as well as Heaven, is of course open to debate. But the poignancy of Prospero ultimately setting Ariel free, and the spirit’s utter elation at this, are more than enough to give pause for thought.⁴²⁴

The ambiguity in all of this raises an interesting dimension to fantasy literature in the context of developing dialogue on human rights. One function of the other-worldly “safe space” which the setting creates is to provide an intellectual sand-box in which ordinary rules are suspended. Not only can the story-teller play with ideas which would be transgressive in other contexts, the audience too have an implicit permission to break with their regular patterns of thought. Sometimes, a fantastical setting is deliberately adopted with the conscious aim of presenting a particular perspective, often with a heavily satirical agenda. Voltaire’s *Candide*⁴²⁵ and Swift’s *Gulliver’s Travels*⁴²⁶ would be archetypal examples of this genre. In contrast, there are works like the *Tempest* which pose questions but leave the audience to find their own way back through the moral labyrinth into which they have been led.

Either way however, there is a liberation from rigid expectations. There is space for sympathy and empathy with characters and situations without an immediate threat to

⁴²¹ W Bradford, “Bradford’s History of the Plimoth Plantation, From the Original Manuscript” (Wright and Potter) 1898, Electronic Version T Hilderbrandt 2002, Chapter 9, 167

⁴²² W Shakespeare ‘The Tempest’, Act I Scene ii, 395-409

⁴²³ J Dryden ‘The Conquest of Granada’ (1670) Part 1, Act I, Scene i

⁴²⁴ W Shakespeare ‘The Tempest’ Act V, Scene I, 96-100

⁴²⁵ Voltaire, ‘Candide’ (1759)

⁴²⁶ J Swift ‘Gulliver’s Travels’ (1726)

established norms. Ariel's song at the first taste of anticipated freedom has frequently been set to music, from Thomas Arne's eighteenth century aria, to the soundtrack to the 2010 film *The Tempest*, it is undoubtedly a pivotal and moving moment within the play. The character's feelings are identifiable and moving, yet at the same time, it is less threatening for a member of the Early Modern elite to consider a master/slave or master/servant relationship from the perspective of the exploited party, if that party is a creature of magic and air, rather than a flesh and blood human like the ones in their own household. Ariel's plight opens up questions about what it might be like to be subject to a master or mistress, but indirectly enough to avoid alienating the audience. A sensitive subject is approached, but from an angle which makes this bearable.

As we have already seen, the interplay between fantasy and reality is a complex one in the *Tempest*. As Berry observes, Shakespeare intentionally amalgamated various strands of thought in the creation of Ariel, encompassing both scholarly ideas and familiar folk tradition.⁴²⁷ On the one hand, he/she/it⁴²⁸ is clearly a being of a kind far removed from quotidian experience, yet at the same time, not one which adults of Early Modern England would *necessarily* scorn to accept.⁴²⁹

The possibility of conjuring spirits was an extremely serious one for the intelligentsia of the 17th century. The mathematician and alchemist John Dee, who may have been part of Shakespeare's inspiration for the character of Prospero, sought to push back the boundaries of human knowledge with "angel magic".⁴³⁰ Monarchs in Europe regarded Dee and his researches with both wary and acquisitive eyes, much as regimes in the Cold War era sought to outstrip their opponents in technological terms, and encouraged scientists to defect from the other side of the Iron Curtain.⁴³¹

Wherever a narrative embraces concept on the speculative borders of current knowledge and understanding, there is once again scope to exploit the political and social safety of an escapist paradigm, which is after all explicitly *not* the contemporary (or even historical) world, whilst at the same time posing "what if" questions with an unsettling edge of plausibility. We are perhaps most familiar with this technique from more modern, dystopian works, such as Orwell's *1984*⁴³², or Atwood's *The Hand-maid's Tale*.⁴³³ The capacity of these stories to both disturb and challenge, comes largely from the scope for elements of nightmare visions to cross the border into our daytime reality. Imagined scientific or biological events, which are invented yet conceivable, are mirrored by political paradigms which are equally invented but conceivable.

⁴²⁷ E Berry, 'Prospero's Brave Spirit' *Studies in Philology* 76 (1) (1979) 36, 36

⁴²⁸ B Charry, 'Proper Men and Tricksy Spirits: The Eunuch in disguise in *Twelfth Night* and *The Tempest*' 193-211 in *Staged Normality in Shakespeare's England* (Springer) 2019

⁴²⁹ B Mowat, 'Prospero's Book' *Shakespeare Quarterly* 52(1) 2001, 1

⁴³⁰ J Mebane, 'Renaissance Magic and the Return of the Golden Age: The Occult Tradition and Marlow, Johnson and Shakespeare' (University of Nebraska Press) 1992

⁴³¹ A Wolfe, 'Competing with the Soviets: Science, Technology and the State in Cold War America' (John Hopkins University Press) 2013

⁴³² G Orwell, '1984' (Secker and Warburg) 1949

⁴³³ M Atwood 'The Hand-maid's Tale'

At the time when Orwell was writing, his novel was an invitation to debate the future trajectory which society might take, and the balance between individual and collective interests. Seventy years on, at least some of his creations appear to have been prophetic. Although we do not have the 'Telescreen' to monitor our activities and expressions at all times, we are confronted with the reality of facial recognition technology, and legal battles over the correct balance between a right to privacy and a need for collective security.⁴³⁴ Furthermore, *1984* has shaped our vocabulary and conceptual framework in debating this issues, being directly referenced by special interest groups and in court proceedings.⁴³⁵

Yet whilst dark portrayals of future or current dysfunction are part of what fantasy literature can offer to the evolution of human rights, its potential is by no means confined to packaging portrayals of problems in a palatable form. The freedom of the safe space can also allow for visions of a better world to be tested, without ridicule or instant dismissal. The commitment to suspend disbelief allows for ideas and characters to cross the threshold, when the door in a realistic paradigm would have been firmly slammed shut.

Positive iconoclasm and plausible deniability

Fantasy literature has the freedom to break with convention, even in quite transgressive ways, such as rejecting ordinarily assigned social or gender roles, without inevitably generating anger. This gives scope for authors and readers to entertain dreams of a better, or at least a radically different kind of world.

An interesting example of this can be found in Margaret Cavendish's 1666 *The Blazing World*⁴³⁶ which amalgamates a number of different style and approaches, in the creation of what is arguably the first science-fiction novel to be written, at least in English. As Trubowitz notes, it is creation which has been regrettably overlooked by posterity, but has made an important contribution to the Utopian genre.⁴³⁷ In some respects, she uses a fantastical realm in order to explore a variety of political, philosophical and (in our terminology) scientific ideas, and in this respect perhaps echoes More and foreshadows Swift. However, her work is radically different in terms of its agenda and tone; whilst there are undeniably some passages with quite pointed humour, the work is not at its heart a satire. Instead of reflecting back the absurdity and hypocrisy of the world in which she lives, Cavendish seeks to explore it, and is more interested in debate than deconstruction, before ultimately presenting a fairy-tale happy ending.

The plot revolves around a young woman who is abducted whilst gathering seashells on the beach, by an unscrupulous man determined to make her his wife. She is bundled aboard his ship, but through his ineptitude it sails too far north, and he and the crew all freeze to death. Nevertheless, the heroine survives, drifting in the Arctic (still terra incognita when Cavendish was writing) only to be rescued by bears. It

⁴³⁴ See for example: *R (Bridges) v Chief Constable of South Wales Police* [2019] EWHC 2341 (Admin)

⁴³⁵ *Big Brother Watch v United Kingdom* (2018) (Application Nos 58170/13, 62322/14 and 24960/15)

⁴³⁶ M Cavendish, *The Blazing World* (1666)

⁴³⁷ R Trubowitz, 'The Reenchantment of Utopia and the Female Monarchical Self: Margaret Cavendish's *Blazing World*' *Tulsa Studies in Women's Literature* (1992) 11(2) 229

turns out that the bears have language, telescopes and an interest in astronomy. These are the first inhabitants which we encounter of the Blazing World, a universe populated by various species of erudite talking animals (including worms and maggots). There are humans, but of alien appearance, with a range of skin tones in primary and metallic colours as opposed to the ones found on Earth. Conveniently, there is a human Emperor, who falls in love with the young woman, makes her Empress and gives her *carte blanche* to do whatever she likes. This turns out to be mainly meeting and talking to the various learned creatures about their studies (she does have a go at political and religious reform, but rapidly concludes that this is best left well alone). The Empress' dialogues are thus a means for Cavendish to set out some of her own thinking on contemporary debates.

This is not the end of the tale however, because the Empress is keen to discover what is happening in the world which she has left, and prevails upon some of her learned friends to conjure spirits (Prospero or John Dee like) to bring her news. She discovers that her homeland is under threat of a hostile invasion, and leads a military rescue campaign, complete with a navy of submarines with talking-fish admirals, and fire-bombs supplied by the worm people.

Although much of the scientific and philosophical passages of the book are now primarily of interest to historians, being difficult terrain for a modern readership to struggle across, the overall narrative retains its charm and playfulness. Cavendish admirably fulfilled her stated intent of creating a world in which she could be Queen Margaret I, and live according to her own rules. Her Blazing World was set up as a forum in which ideas could be tested without jeopardy, and she explicitly encourages her audience to be similarly creative. Instead of a dystopian warning of possible darkness to come, it is an invitation to consider how the world might be different in attractive rather than alarming ways.

This pattern is repeated in an episode in Nesbit's *The Story of the Amulet*, the third of the Psammead Trilogy.⁴³⁸ Whilst as Rahn observes, there has at times been little focus on the Socialist themes within Nesbit's writing, they are strongly present, particularly within this book.⁴³⁹ At one stage in the narrative, the child protagonists are transported into the future, and discover a caring, egalitarian society in which HG Wells is revered as a reformer and secular prophet. Furthermore, its residents are horrified by many of the daily realities which the Edwardian characters take for granted, including household dangers and preventable accidents. Once again, we are being presented with the idea that the world does not have to be as it currently is, a kind of iconoclasm is taking place, as assumptions of inevitability are shattered.

Of course, visions of the future are not the only way of achieving this reshaping of assumptions. In *The Water-Babies*⁴⁴⁰ Charles Kingsley presents a mixture of satire and some quite hard-edged social critique; his description of climbing-boys being threatened or cajoled by sweeps into having their bleeding wounds rubbed with onion, in an effort to harden their skin, remains disturbing the better part of two hundred years later. But instead of transferring the action to a more humane future, the child-hero Tom enters a parallel universe as a water-baby, where he experiences

⁴³⁸ E Nesbit 'The Story of the Amulet' (Unwin) 1906

⁴³⁹ S Rahn 'News for E Nesbit: The Story of the Amulet and Socialist Utopia' *English Literature in Transition* 28(2) 124, 124

⁴⁴⁰ C Kingsley, 'The Water-babies, a Fairy-tale for a land baby' (Macmillan) 1863

the affection, benign adult guidance and freedom for play (not to mention sweets) of which he was previously deprived.

Of course, using the fairy realm as a mirror to reflect back aspects of the human experience, in ways which are magnified or transformed, is a very ancient tradition. Whilst the fairies of folklore tend to be far more morally ambivalent and capricious than the characters like Mrs Doyouasyouwouldbedoneby and Mrs Bedonebyasyoudid, who come to train the little amphibious Tom in the ways of nineteenth century muscular Christianity, they nevertheless often reprise familiar themes, but in stark and unsettling ways. Domestic violence is a common trope, who a man who beats his fairy-wife invariably loses her, and often his fortune as well.⁴⁴¹ In these stories, justice is done in a more immediate and predictable way than is the case in the world of the humans, much in the same manner that the protagonists in *The Water-Babies* tend to get what they deserve. In both folk-lore and Kingsley's novel, recognisable situations and behaviours are depicted, but the consequences of these actions play out in ways which do not necessarily chime with our lived experience.

In presenting an alternative world which runs alongside ours, Kingsley is inviting us to imagine how society might operate differently, if other modes of being are conceivable, why do we need to be trapped within our current paradigm? It is also perhaps not a coincidence that authors like Kingsley and Cavendish delight in playing with theories at the cutting edge of contemporary science. Not only are they peeling back concepts of how things could be, were we minded to change, they are also lifting the lid on how things might *already* be, were we as yet able to understand and perceive them.

In other words, they once again open up readers to the possibility of questioning their assumptions and certainties, but in a way which is liberating and pleasurable, rather than unsettling. Social commentary packaged within this subgenre of fantasy literature is not intended to leave a bitter taste of horror, fear or guilt. It is created to be fun, which has the double effect of both making it appealing for the audience, and giving the author the shield of plausible deniability. It is possible for the writer to spread his or her hands in response to irate critics, and if minded to do so, point out that it is *only* a story. It would be disingenuous and morally difficult to do this in relation to gritty, realistic narratives, but is far less problematic when the action takes place somewhere east of the sun and west of the moon.

In some respects, this phenomenon is even more powerful where children's literature is concerned. Certainly Kingsley was acutely aware of this in the *Water-Babies*, and uses this medium to discuss ideas around Darwinism in a sympathetic way, conscious that many of his audience would be unwilling to confront the topic in a more direct setting.⁴⁴² It is also true that children's literature has immense potential in terms of its addressees. Not only are children themselves less rigid in their thought-patterns and fettered by convention than adults, adults will read books to and with their children.

In the era in which Kingsley was writing, many women would have been discouraged from reading political or scientific material, especially biological science with its

⁴⁴¹ J Wood, 'The Fairy-Bride Legend in Wales' *Folklore* (1992) 103(1), 56

⁴⁴² J Beatty and P Hale 'Waterbabies: An Evolutionary Parable' *Endeavour* (2008) 32(4), 141

dangerous associations with sex and reproduction.⁴⁴³ In contrast, reading stories to children would have been regarded as proper, and indeed laudable, as far as societal norms were concerned. The same applied later in the century, and authors like Nesbit were understood that the socialist tracts imbibed by the Bloomsbury set would not have been approved of by the conservative, patriarchal power structures in many homes. In light of this, children's literature offered access to a far wider audience in the market-place of ideas. Adults as well as children could be influenced, including adults who would have shunned (or been made to shun) other works dealing with similar themes, even if packaged in fictional but realistic setting.

It should also be noted that even though women of the Edwardian and Victorian era were not expected to be active in the public sphere, they were regarded as spiritual guardians and caretakers of the home. It was entirely proper for a women to teach children about morality, and even encourage their husbands towards gentleness and compassion. Of course, this was not entirely uncomplicated. On the hand, "the angel of the house" sweetly influencing her family for good is placed upon a pedestal, but on the other, the figure of the manipulator or scold is still viciously condemned.⁴⁴⁴ The exercise of any female power always hovered on the edge of transgression, but nevertheless, even more conservative elements of society were prepared to acknowledge the potential for wives and mothers to mould the responses of those around them. As a consequence, the possibilities opened by children's literature to subtly introduce ideas to women in particular should be overlooked. Which brings us to a distinct, but related point, namely the scope for this type of literature of give excluded voices a place at the table.

Freeing unheard voices

The frivolous character sometimes attributed to fantasy literature, and the legitimate concern which women have for childrearing, meant that female authors could often obtain a platform via this kind of literature, when other avenues may have been closed or more difficult to access. Children's books in particular could provide a way to enter the public dialogue which was not transgressive, and therefore often unopposed.

This is not to suggest that there were no obstacles or complexity. As Lamb argues, even in the Early Modern era, folktales were often dismissed by male elites as the province of women and children, which ought properly to have been abandoned by males as they matured.⁴⁴⁵ Yet in expressing resentment and disapproval of tales told by nursemaids, mothers and grandmothers, such voices were implicitly acknowledging their power to captivate. There is no need to expend energy pushing back at forces which are not seen as a threat. Story-telling shapes how we see and experience the world, and females spinning narratives therefore has the capacity to unsettle. They may reveal secrets, or question patriarchal power. Elizabeth Gaskell

⁴⁴³ S Johnson, 'Women and Domestic Experience in Victorian Political Fiction' Greenwood (2001), 3

⁴⁴⁴ E Langland, 'Nobody's Angels: Middle Class Women and Domestic Ideology in Victorian Culture' Cornell University Press, 1994

⁴⁴⁵ M Lamb, 'Engendering the Narrative Act: Old Wives' Tales in "The Winter's Tale", "Macbeth", and "The Tempest"' *Criticism*, Vol. 40, No. 4 (fall, 1998), pp. 529-553

plays on this theme in her supernatural short story *The Old Nurse's Story*⁴⁴⁶ in which the tragic consequences of a father's cruelty are gradually revealed.

But as we have already noted, those disquieted by women (or indeed servants) telling stories are placed in an awkward position, because too much protest is tantamount to a confession that these must be taken seriously. It was a double-edged sword for both sides. The association between women and children's literature was historically not unrelated to tendencies to infantilise women⁴⁴⁷, and dismiss the value of their contribution in artistic or intellectual terms.

Yet this lack of gravity being ascribed could also be protective in terms of challenge, and gave often excluded perspectives a forum where they could emerge and experiment. For our ancestors, fantastical tales and stories for children enabled the expression of ideas which could never have been entertained in courtrooms or Parliament, or even polite society, had they emerged in a different guise. They also opened the door for voices denied access to the realm of law and politics to be publicly heard.

The role of fantasy and children's literature in the development of human rights

This is not to suggest that the authors of children's books, or fantasy literature more generally, present an exclusively positive or progressive vision for our collective future. There are elements in both Kingsley and Nesbit's works for example, which are deeply troubling to most twenty-first century e.g. Anti-Semitism and cultural stereotyping. Neither is it to suggest that authors are always necessarily setting out with a didactic or socially reforming purpose, or indeed any coherent agenda. There is always the risk of third parties reading messages into the text which bear no relation to the creator's intent. Consider the controversy over Baum and the Populist readings of the *Wizard of Oz*.⁴⁴⁸ Sometimes a fairy-tale is primarily a fairy-tale, and not a political allegory.

Even where there is fairly explicit, and indeed a modern agenda, it does not mean that it will be uncontroversial in all quarters. For instance the works of Rick Riordan, whose highly successful novels have from the start incorporated an inclusive agenda, with his first hero, Percy Jackson triumphing as a monster-slayer and romantic lead, despite the challenges of ADHD. Nevertheless, his creation of a non-binary character in later stories meets with approval in some quarters, but disquiet in others.⁴⁴⁹ Fantasy literature, in common with literature more generally, cannot point us on an incontrovertible yellow-brick road to an Emerald City of perfect human rights and equality. Yet what it does instead remains of incalculable value. It gives readers and creators alike permission to think the unthinkable, and to step into a different kind of world, shattering constrictive assumptions and prejudices in the

⁴⁴⁶ E Gaskell, "The Old Nurse's Story" (1852)

⁴⁴⁷ D Wynne, 'Charlotte Bronte's Frocks and Shirley's Queer Textiles' 147-162, in *Literary Bric-a-Brac and the Victorians: From Commodities to Oddities* J Harrison (ed) Routledge (2013), 157

⁴⁴⁸ R Dighe, 'The Historian's Wizard of Oz: Reading L Frank Baum's Classic as a Political and Monetary Allegory' Praeger (2002)

⁴⁴⁹ R Riordan, The Stonewall Award (2017) <http://rickriordan.com/2017/06/the-stonewall-award/>

process. But unlike literature which holds a mirror up to ugly realities in a direct way, the experimentation allowed by this genre is often more pleasurable than distressing.

Why is this so important in terms of the evolution of human rights? The answer lies in the nature of the evolution of law and State administered justice. In democratic societies (and arguably even non-democratic ones) legal development according formal protection to emergent rights must march in step with the drum of prevailing attitudes. When a step-change occurs, there will rarely be near universal consensus, but there must be a critical mass of the community willing to endorse it. This is demonstrably true when it comes to legislative reforms instigated by Parliament, given that politicians do not generally wish to displease the electorate. Reforms on issues like child labour, or women's autonomy in respect of their persons and property, only come about by statute if sufficient support can be gained.

The holds true however when it comes to judicial interpretation of the law. Famously, if belatedly in 1991, the highest appellate court in the UK ruled that a man could be convicted of raping his wife.⁴⁵⁰ By this point, society was simply no longer willing to tolerate the proposition that once married a woman lost her bodily autonomy. When the husband referred the case to the European Court of Human Rights on the grounds that his actions had been criminalised retrospectively, the conclusion was that it should have been apparent that the law was taking that direction.⁴⁵¹ More routinely, the way in which judges construe rights evolves over time. In the words of the Strasbourg court, the European Convention of Human Rights is a "living instrument" transforming organically as society shifts⁴⁵² and exactly the same point can be made of the British legal framework more widely.

In short, law is in dialogue with prevailing cultural norms, and must necessarily be in constant dialogue with them. The capacity which fantasy and children's literature have to set free new patterns of thought, and bring fresh perspectives to the table, means that they have a vital and enabling role in this exchange. When we reflect upon literature and human rights, it is of course crucial to consider the impact of great protest novels and plays. Yet at the same time, we should not forget the role of alternative worlds in paving the way for change in this one.

⁴⁵⁰ R v R [1991] UKHL 12

⁴⁵¹ SW v UK [1995] 52

⁴⁵² Tyrer v. the United Kingdom [1978] (application No. 5856/72)

