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A Tale of Two Doctrines: Revaluating Bifurcation in Substantive Review before the Supreme Court

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Irrationality; Judicial decision-making; Judicial review; Proportionality; Supreme Court; Wednesbury unreasonableness

Debates over bifurcation in substantive review persist; should Wednesbury *review subsist alongside a proportionality-based model, or should substantive review depend solely upon proportionality? Drawing on an analysis of UK Supreme Court decisions between 2014 and 2018, we argue that the academic debate and much recent jurisprudence misconstrue substantive review. Both proportionality and* Wednesbury *display their own internal ("intra-doctrinal") bifurcation between judge-centric and deferential approaches. Although proportionality's application under the Human Rights Act 1998 has generated culture of justification in rights cases, fixation on the test's rights/aims balancing aspects has embroiled judges in value adjudication. Faced with preferring either legal or policy aims, the Court has at times fluctuated between strong and weak oversight. Traditional* Wednesbury *review, while methodologically distinct, can also swing between highly deferential reasonableness review and more robust review drawing, for example, on statutory purpose. Substantive review thus currently risks contradictory pathologies; deploying legal trumps to preclude political decision making and permitting clear policy failures. These pathologies stem from UK public law's inadequate engagement with substantive decision making. We therefore re-evaluate functionalist constitutionalism, advancing an active functionalist model which urges public lawyers, outwith instances of illegality, to maximise institutional effectiveness. By prioritising legitimacy as an organising principle for judicial review, this approach sustains political decision making within the bounds of a liberal democratic order.*

Judicial review of public authorities' substantive decisions engages deep questions about the judicial role in a democracy and exposes the fault line between

[*] Our thanks to Hélène Tyrrell (Newcastle), T.T. Arvind (York) and Paul Scott (Glasgow) for their encouragement and comments upon earlier drafts of this article, and to *Public Law* reviewers. Our early thinking was shaped by the annual doctoral workshop on constitutional theory at the University of Strathclyde (June 2018). Any errors remain our own.

Reimagining Public Procurement Law: Proposals for Post-Brexit Reform

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Brexit; Public procurement

The Westminster Government is currently preparing to reform public procurement law, prompted by the desire to take advantage of the flexibility offered by Brexit, although within the constraints of the World Trade Organization's Agreement on Government Procurement (GPA). Against this background, this article puts forward proposals for the key elements of a new legal regime. It proposes, first, that a new hard law regime should regulate not mainly to ensure open markets, as with the current regulations that give effect to EU requirements, but also to achieve domestic procurement objectives, including value for money and integrity; and that such domestic objectives should be set out in the legislation itself to guide interpretation of the new rules. It then argues that reform should be based on seven key principles. These are an open contracting approach; a single and uniform regime for the Westminster jurisdiction; significant legislative simplification involving a shift from hard to soft law; use of familiar concepts, rules and terminology where appropriate; a rebalancing of interests, away from open market objectives towards value for money, sustainability and reduced procedural costs, and a related shift in regulatory strategy to increase flexibility; a more effective and balanced approach to enforcement; and a common framework across UK jurisdictions. Translating these into concrete reforms, the article proposes a single legal framework, replacing the different four sets of regulations that transpose the EU directives with uniform rules based broadly on the early EU Utilities Directive 90/531, and also including all "domestic" procurement rules. This would offer to a large extent the maximum flexibility afforded by the GPA, allowing the public sector to balance different procurement objectives in a manner not possible under EU law. At the same time it would improve the quality of legislation, but also preserve benefits of familiarity and certainty.

Public procurement law in the UK derives mainly from EU requirements, and in the context of Brexit the UK Cabinet Office has been looking at reform options. The Government set up a Procurement Transformation Advisory Panel in October 2019[1] and a Green Paper is expected in late 2020 or early 2021. The primary motivation is the greater freedom of action Brexit provides: in November 2019 the Prime Minister, Boris Johnson, announced his intention to build a "bonfire"

[*] I am grateful to my research assistant Serban Filipon for excellent technical help.
[1] The author is a member and has already made these proposals in that context, but the views expressed are solely attributable to the author and do not in any way represent those of the Government or panel.

Testing the Limits of the Common Law Right to Trial by Jury: A Critical Analysis of *Re Hutchings*

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Common law rights; Mode of trial; Northern Ireland; Ouster clauses; Review grounds; Trial without jury

The constitutional status of the right to trial by jury is reflected in its recognition as a fundamental right at common law. In Re Hutchings*, this right was confronted by a far-reaching statutory provision empowering the Director of Public Prosecutions for Northern Ireland to issue a certificate ordering trial by judge alone if satisfied that trial by jury would pose a risk to the administration of justice. The power is accompanied by a partial ouster clause restricting judicial review to the narrowest of grounds. In confirming the breadth of the statutory provisions and degree of discretion granted to the Director, the Supreme Court's judgment in* Re Hutchings *is of special significance for a series of high-profile "legacy" cases in the prosecutorial pipeline in Northern Ireland. Beyond this local context, though, two issues highly relevant to contemporary public law debates emerge out of* Re Hutchings*. The article critically engages with each of these. The first is the status and implication of fundamental rights at common law—as distinct from rights driving from the European Convention of Human Rights—when confronted with statutory provisions that equip the decision-maker with expansive powers. The second is the ongoing issue of how the courts approach far-reaching partial-ouster clauses that limit the grounds upon which a discretion to abrogate a fundamental common law right can be challenged.*

Introduction

Those who are unfamiliar with Northern Irish law would be forgiven for thinking that judge only trials are a remnant of the past. This is not the case, however.[1]

* We are grateful to the anonymous reviewer, Professor Sandra Fredman QC and the Oxford Human Rights Research Group for their helpful feedback on an earlier draft of the article.

[1] There has been an average of 18 non-jury trial certificates (and one refusal) issued per year in Northern Ireland since 2007. See D. Seymour, *Eleventh Report of the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007* (TSO, 2019), para.17.3.

The Challenges of Multi-Layered Governance and the Fight for Same Sex Marriage in Bermuda and the Caribbean Overseas Territories

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Bermuda; British overseas territories; Caribbean; Cayman Islands; Constitutional rights; Human rights; Marriage; Same sex partners

This article examines the UK's responsibility for the governance of Bermuda and its Caribbean Overseas Territories with regard to the contentious issue of same sex marriage. Up until now the policy of the UK Government has been to encourage, but not compel, the governments of these Overseas Territories to repeal laws that prohibit same sex marriage and to leave it to local courts to determine the constitutionality of such laws. So far this has resulted in two judgments of note: one is a judgment of the Court of Appeal of Bermuda, Attorney General for Bermuda v Ferguson*, striking down a law prohibiting same sex marriage: the other is a judgment of the Court of Appeal of the Cayman Islands*—Day and Bush v Governor of the Cayman Islands—*upholding a law prohibiting same sex marriage, but requiring the Cayman Islands Government to make legal provision for civil partnerships. The judgments raise important questions about the outer limits of judicial power with regard to the issue of same sex marriage as well as the political justifications that were advanced by the UK Government in defence of its policy. The article first examines the respective judgments of the Courts of Appeal of Bermuda and the Cayman Islands, adopting a contextual approach which takes into account the political, social and cultural forces that have informed the public debate about the issue of same sex marriage in both jurisdictions. The article then proceeds to examine the UK's constitutional responsibility for the implementation of human rights norms in these Overseas Territories. The article concludes with a critique of the UK Government's policy and makes the case for the UK Government to intervene by legislating directly for these Overseas*

* The authors would like to thank Professor Peter Clegg and Professor Nicola Barker for their comments on an earlier draft of this article. The authors would also to thank the anonymous reviewers for their very helpful comments and suggestions. The authors remain responsible for any errors and omissions.

Territories in the face of the continuing refusal of their governments to make legal provision for same sex marriage.

The relationship between the UK and its Caribbean Overseas Territories (COTs)—Anguilla, British Virgin Islands, Cayman Islands, Montserrat and the Turks and Caicos islands—has not always been harmonious.[1] This is particularly so in the area of human rights where there have been two infamous instances of COTs being unwilling to co-operate with the UK Government in giving local effect to Britain's international human rights obligations, requiring the UK Government to legislate directly for the COTs by means of Orders in Council[2] to abolish the death penalty and to decriminalise homosexuality. Though Bermuda is something of an outlier in Caribbean terms, being located in the West Atlantic rather than the Caribbean, it has strong historical and cultural links with the Caribbean and, like the COTs, it has not always shared Britain's views about the need to comply with international human rights norms. Thus, whilst Bermuda did eventually relent and enact its own law to decriminalise homosexuality, it only did so after Britain threatened to legislate directly for it on the matter.

Most recently, the issue of same sex marriage has put the relationship between Britain and the elected governments of Bermuda and the COTs under increasing strain as they have each steadfastly refused to change local marriage laws to permit same sex couples to marry. To date, the UK Government has resisted entreaties by local LGBT+ groups in Bermuda and the COTs and by UK parliamentarians to intervene in this matter, preferring instead to allow the issue to be determined judicially by the local courts. So far, this has resulted in two judgments of note. The first is a judgment of the Court of Appeal of Bermuda—*Attorney General for Bermuda v Ferguson*[3]—in which the Court of Appeal struck down a law which provided that a marriage was void unless the parties are respectively male and female.[4] The second is a judgment of the Court of Appeal of the Cayman Islands—*Day and Bush v Governor of the Cayman Islands*[5]—declaring that the failure of the government to make legislative provision for civil partnerships violated the right to a private life under s.9 of the Cayman Bill of Rights, but reversing an earlier declaration by the Grand Court that the definition of marriage in Cayman's marriage law should be rewritten so as to define marriage as "a union between two people as one another's spouses".[6]

Both judgments are important to the extent that they advance the cause of LGBT+ rights in the region. Because of the similarity of the COTs' constitutions, it is likely that *Day and Bush v Governor of the Cayman Islands*, in particular, will make it difficult for the governments of the other COTs to refuse to follow suit and make

[1] P. Clegg, "The United Kingdom Overseas Territories: Reform and Renewal" (2013) 102(3) *The Round Table* 295.

[2] The Caribbean Territories (Abolition of Death Penalty for Murder) Order 1991 and the Caribbean Territories (Criminal Law) Order 2000.

[3] *Attorney General for Bermuda v Ferguson*, Court of Appeal for Bermuda, Civil Appeal, Nos 11 and 12 of 2018 at 9, available at *https://www.gov.bm/sites/default/files/The-Attorney-General-v-Roderick-Ferguson.pdf* [Accessed 17 October 2020].

[4] Domestic Partnership Act 2018 s.53.

[5] *Day and Bush v Governor of the Cayman Islands*, Court of Appeal of the Cayman Islands CICA No.9 of 2019, unreported but available on file with the author.

[6] *Day and Bush v Governor of the Cayman Islands*, Grand Court Cayman Islands, Civil Cause No.111 of 2018, unreported but available on file with the author.

Data Governance in the Cloud: Of Scarce Regulatory Resources and Tactical Delegated Enforcement[1]

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Cloud computing; Data protection; Delegation; Enforcement; EU law; Multinational companies

European data protection authorities (EU DPAs) play crucial roles in protecting the data privacy rights of individuals. However, many EU DPAs do not have adequate resources to be effective regulators. Although, the data privacy law and regulation literature recognises that many EU DPAs operate within such constraints, to date, there has been a dearth of empirical studies on how limited resources can impact on enforcement and data governance in practice. This article makes a modest attempt to address this empirical gap by analysing selected findings from the author's empirical study of the investigations of multinational cloud providers by EU DPAs (Cloud Investigations). This article draws on the fields of socio-legal studies and regulation to interpret these empirical findings and advances three arguments. First, due to their resource constraints, some EU DPAs often have to make tactical enforcement decisions, such as whether to initiate Cloud Investigations or determine their methods and scope. This decision-making process is often not transparent to individual stakeholders. It can also be challenging for EU DPAs who have to not only consider but also balance several factors including external pressures, compliance motivations and enforcement styles. Second, during enforcement activities, such as Cloud Investigations, the "regulatory space" can often be complex, diffuse and diverse as EU DPAs delegate certain regulatory tasks to private and other governmental actors due to their limited or finite resources. Finally, this article suggests that delegated enforcement requires careful thought and design to ensure effective and robust data governance. Suggestions are made on how the "regulatory space" can be designed to promote accountability, trust, effective and robust data protection and multi-actor collaboration.

Academics, policy-makers, legislators, judges and other stakeholders have long recognised that European data protection authorities (EU DPAs) play crucial roles

[1] This article is derived from the research that the author undertook for the "Accountability for Cloud" research project, which was funded by the European Commission Seventh Framework Programme, from 2014 to 2015. The author is grateful to the European Commission for its funding and to István Fancsik for his research assistance. The author is also grateful to Professor Chris Reed, the Centre for Commercial Law Studies at Queen Mary University of London colleagues, the University of Bristol Private Law Primary Unit colleagues, the *Public Law* reviewer and Emmanuel Vranakis for their comments and feedback on earlier drafts of this article. Responsibility for all omissions and opinions remains with the author.

Legislative Approaches to Recognising the Vulnerability of Young People and Preventing their Criminalisation

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Children; Comparative law; Criminal liability; Defences; Scotland; Socio-legal studies; Trafficked victims; Wales; Young persons

Section 45 of the Modern Slavery Act 2015 introduced a defence for child victims of modern slavery who commit offences consequent on slavery and/or exploitation. Statutory recognition of the vulnerability of young people who have engaged in offending behaviour as a consequence of their experience of being trafficked provides a new and compelling argument for those vulnerabilities to be recognised in relation to all children who offend, and not just to those who have been victims of trafficking and slavery. However, the relationship between youth and vulnerability becomes obscured when young people, who are not deemed to be victims of slavery or trafficking, engage in offending behaviour. In this context young people are regularly cast as autonomous deviants who should accept the consequences of their actions and choices. In this article we argue that a more general defence, based on s.45 but not limited to victims of trafficking and slavery, together with an increase in the minimum MACR, would help to acknowledge the limitations of the criminal justice system as a means of preventing and dealing with youth crime and antisocial behaviour . We also consider whether the child's needs would best be met by non-criminal methods of social intervention.

Section 45 of the Modern Slavery Act 2015 (MSA) introduced separate defences for adult and child victims of modern slavery who commit offences consequent on slavery and/or exploitation. In particular it provides a defence to those over the