SUNDERLAND STUDENT LAW JOURNAL

University of Sunderland

Foreword

Welcome to the second issue of the University of Sunderland Student Law Journal: a peer-reviewed, Open Access academic journal. Publishing is the backbone of academic studies - it is the traditional means of disseminating research results, communicating new ideas and techniques. Dissemination of ideas, results and methods via publications are a well-established means to build on personal or institutional reputations and form networks for future collaborations furthering the legal discipline. At the University of Sunderland Law School, we want our students to not only publish, but be involved with the logistics of an academic Journal. Our students have the opportunity to become members of the Editorial Board, peer-reviewers and to have their research published. Dissemination of their ideas, results and methods via publications and the skills obtained through the running of the University of Sunderland Student Law Journal are a well-established means to build on personal or institutional reputations and form networks for future collaborations and be the cornerstone of future developments within the legal discipline. Dissemination of ideas, findings and innovations can stimulate new strategies, methodologies or technologies aiding both academic scholarship and, if the right audience is reached, those practicing in the legal field. The Sunderland Student Law Journal, therefore provides an opportunity for aspiring authors to publish their graduate work. This is a unique recourse and allows our students to promote and disseminate their hard work to the wider public.

We hope that you enjoy the second issue.

Ashley Lowerson *(Editor-in-Chief)*

Senior Lecturer
University of Sunderland
Sunderland Law School

Structure of Sunderland Student Law Journal

Every journal depends upon its editor(s) and peer-reviewers for its success. A special thanks to the following:

Editorial Board

Peer-Reviewers

Contents

Research Articles

Article 4 & Human Trafficking

Sophie Bennett (2021) SSLJ 2, 5-10

Stage Two LLB Student, University of Sunderland

Abstract

This article explores why Article 4 of the European Convention on Human Rights, which states that 'no one shall be held in slavery or servitude' and that 'no one shall be required to perform forced or compulsory labour', should be the first right included into a proposed British Bill of Rights. In the UK, trafficking is developing into an ever- increasing problem and it is questionable as to whether the UK can improve and extend their current legislative provisions.

Keywords

Article 4; ECHR; Trafficking; UK

While slavery or servitude is strictly prohibited by Article 4 of the European Convention on Human Rights, the issues in relation to trafficking are ongoing and worsening in the UK, 'the number of potential trafficking and modern slavery victims reported to the authorities has risen by 36% in a year, National Crime Agency figures show', and it is questionable as to whether or not the UK can extend their legislative provisions and enforce further implementation to prevent trafficking under the proposed British Bill of Rights.[1]

Article 4 is an absolute right, 'these do not allow for any exception at all.'[2] The Article is incorporated into the UK by the Human Rights Act 1998, this was 'a logical step forward for a government seriously committed to individual rights and freedoms and represents a significant extension of the rule of law.'[3] The Act has changed the court process in the United Kingdom as human rights can now be relied on in court. Previous to this, Lord Irvine, who served as Lord Chancellor outlined the framework, 'our citizens should be able to secure their human rights not only from a court in Strasbourg but from our own judges.'[4] The Human Rights Act 1998 gives further effect to the ECHR, the Act takes convention rights and Strasbourg jurisprudence into account when interpreting UK law. Lord Bingham in R (Ullah) v Special Adjudicator [2004] stated courts should 'follow any clear and constant jurisprudence of the Strasbourg court.'[5] At each stage of every case, prosecutors must apply the principles of the ECHR in accordance with the Human Rights Act 1998, 'the Convention itself did not provide individuals with rights; it was only the enactment of a statute specifically awarding such rights that enabled individuals to take action.'[6] However, in 2010, there was a proposal for new primary legislation.

The British Bill of Rights was proposed by David Cameron in 2010 to replace the Human Rights Act 1998 with a new piece of primary legislation. This was part of the 'Conservative plans to dramatically change the human rights landscape in the UK.'[7] The new legislation would mean that the ECHR and Strasbourg jurisprudence would no longer be directly enforceable before

[1] Claire Jones, 'Modern slavery cases 'rise by over a third'' (BBC News, 16 March 2019) <https://www.bbc.co.uk/news/uk-47582353> accessed 4 March 2020.
[2] Scott Slorach and others, *Legal Systems & Skills* (3rd edn, OUP 2017) 136.
[3] Hilaire Barnett, *Constitutional and Administrative Law* (13th edn, Routledge 2020) 463.
[4] Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (8th edn, OUP 2018) 518.
[5] *R (Ullah) v Special Adjudicator Do v Immigration Appeal Tribunal* [2004] 2 AC 323.
[6] Peter Halstead, *Unlocking Human Rights* (2nd edn, Routledge 2014) 27.
[7] Katja Ziegler, *The UK and European Human Rights: A Strained Relationship?* (Hart Publishing 2018) 19.

domestic courts. Geoffrey Cox QC is behind the idea, 'European Convention of Human Rights…had not won the affection of the British people.'[8] As a result, Article 4 of the ECHR should be the first article included into a proposed British Bill of Rights, as trafficking and slavery is an ongoing problem.

Breaches of Article 4

A case which illustrates a breach of Article 4 is R (TDT) v Secretary of State for the Home Department (2018).[9] In this case, a Vietnamese national was found in the back of a lorry in Kent, the national was seen as a potential victim of trafficking. He was placed in immigration detention and shortly after he was released. After his release he had disappeared, with it likely that the traffickers had captured him. It was seen that there was sufficient evidence that he was a trafficking victim and that there was a risk of him being re-trafficked when released. Underhill LJ stated, 'it is prudent to regard any past victim of trafficking as a potential victim of re-trafficking.'[10] As there were no measures in place to protect him, the Secretary of State for the Home Department had breached Article 4 of the ECHR, and the European Convention on Action against Trafficking in Human Beings 2005.[11] This case illustrates that Article 4 should be included first into a proposed British Bill of Rights, as it is clear that there is a lack of implementation in regards to preventing trafficking and that the UK should extend their legislative provisions.

The breach of Article 4 relates directly to the leading case of Rantsev v Cyprus and Russia (2010) as it was concluded in that case, and referred to in TDT v Secretary of State (2018) that 'the court concludes that trafficking itself, within the meaning of article 3(a) of the Palermo Protocol and article 4(a) of the Anti-Trafficking Convention, falls within the scope of article 4 of the Convention.'[12] The Palermo Protocol supplements the Convention against Transnational Organised Crime, and Article 3 specifically has the purpose of 'prevent,

[8] Andrew Woodcock, 'New Bill of Rights could be 'hugely constructive', chief law officer says' Independent (12 February 2020) <https://www.independent.co.uk/news/uk/politics/human-rights-act-new-bill-law-government-geoffrey-cox-a9332386.html> accessed 26 February 2020.
[9] *R (TDT) v Secretary of State for the Home Department* [2018] 1 WLR 4922.
[10] Ibid.
[11] Council of Europe Convention on Action against Trafficking in Human Beings [2005] CETS 197.
[12] *Rantsev v Cyprus and Russia* [2010] 51 EHRR 1.

suppress and punish trafficking.'[13] This links to how the right regarding that no one shall be held in slavery and servitude and no one shall be required to perform forced or compulsory labour should be included first into the proposed British Bill of Rights. This is because the same mistakes keep appearing and that there is not enough enforcement regarding legislation preventing trafficking, 'government's proposal will require changes to primary legislation and no commitments have been made on timing for this.'[14] Victims are getting released too early and the initial investigations into cases seem to be ineffective, 'criminal investigation into human trafficking cases is generally complex and time consuming.'[15] The challenge is implementation and enforcement. There are faults in the existing system which need to be rectified to minimise trafficking within the UK. In the journal Human trafficking, vulnerability and the state, Fouladvand states that:

> states do not only provide, or fail to provide, the resources needed to sustain the resilience of potential trafficking victims, i.e., their ability to recover when they have been harmed. Rather, they often create, either as a matter of deliberate policy … or by ineptitude and corruption, the very vulnerabilities (in the sense of increased risks of harm to their basic interests) that traffickers exploit.[16]

Domestic Legislation and its Issues

Following on from this in regard to domestic legislation, the Modern Slavery Act 2015 may have to be changed as it links directly to Article 4 as it has the aim to prevent trafficking, slavery, and servitude. The Government issued an independent review of the Act which was published in May 2019. The review stated that:

[13] United Nations, 'United Nations Convention against Transnational Organised Crime and the Protocols Thereto (*United Nations*) <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> accessed 28 July 2020.
[14] Lexis PSL, 'The Modern Slavery Act 2015 and Multinational Organisations' (*Lexis Nexis*) <The Modern Slavery Act 2015 and multinational organisations - Lexis®PS... (lexisnexis.com)> accessed 23 March 2021.
[15] Philip Reichel and others, *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (Taylor and Francis Group 2012) 131
<https://ebookcentral.proquest.com/lib/sunderland/reader.action?docID=1446761> accessed 28 July 2020.
[16] Shahrzad Fouladvand and Tony Ward, 'Human Trafficking, Vulnerability and the State' (2019) 83 JCL 39.

> 'the Act has contributed to a greater awareness of modern slavery in companies' supply chains, but it emphasised that "a number of companies are approaching their obligations as a mere tick-box exercise" and estimated that 40 per cent of eligible companies are not complying with the legislation at all.'[17]

This is another reason as to why the right regarding trafficking should be included first within the British Bill of Rights as it is clear that businesses need to take more care in ensuring that legislation is adhered to as currently businesses can be seen to be in a 'trap of a lengthy, complicated process.'[18] The overall problem regarding trafficking is vast and enforcement of legislation is needed to minimise the problem, however as the 'financial aspects of human trafficking are not priority at local level', this is a reason as to why some cases of human trafficking are left ignored.[19] In the UK alone, the UK Human Rights Blog states 'estimates vary hugely as to how many victims of trafficking or modern slavery there are in the UK, from 13,000 to 136,000,'[20] this highlights how ambiguous the situation regarding trafficking is in the UK as it is not even known how many victims there are. It can be seen that the Modern Slavery Act 2015 does not work effectively enough as Mantouvalou states there is a 'lack of clarity when it comes to accountability, that the identity, support and protection of victims is inadequate, and that there have been few prosecutions.'[21] This is why it should be first right incorporated within the proposed British Bill of Rights as it will help support the growing problem and existing legislation.

In regards to both cases, R (TDT) v Secretary of State for the Home Department (2018) and Rantsev v Cyprus and Russia (2010), but particularly Rantsev (2010), Sarah Champion MP, stated in the House of Commons that:

> sexual exploitation does not end when you turn 18. Indeed, it is the main driver of modern slavery and trafficking of women in this country. So will the Prime Minister

[17] Jonathan Tuck and Laura Bentham, 'Modern Slavery – Where Are We Now?' (2019) 8 CRisk 2.
[18] Ben Middleton and Others, 'The Financial Investigation of Human Trafficking in The UK: Legal and Practical Perspectives' (2019) JCL 34.
[19] Ibid.
[20] Alasdair Henderson, 'Human trafficking: is our system for combatting it fit for purpose?' (*UK Human Rights Blog,* 28 September 2018) <https://ukhumanrightsblog.com/2018/09/28/human-trafficking-is-our-system-for-combatting-it-fit-for-purpose/> accessed 3 March 2020.
[21] Virginia Mantouvalou, 'The UK Modern Slavery Act 2015 Three Years On' [2018] MLR 1017-1045.

> join other countries around the world by bringing in legislation to end demand, making it illegal to buy sexual consent?[22]

It is highlighted here that the UK needs to update its domestic legislation in regards to sex trafficking.[23] This should be included first into the British Bill of Rights as it highlights that the case of Rantsev 2010 was not enough to enforce change in the United Kingdom, there needs to be a greater push in order for substantial change to happen. Trafficking is a huge problem which affects many people, not just in the UK but in the world. The International Labour Organisation states 'in 2016, an estimated 40.3 million people are in modern slavery, including 24.9 million in forced labour and 15.4 million in forced marriage.'[24]

In conclusion, it is clear that the right regarding trafficking, slavery and servitude should be included first within the British Bill of Rights. This is down to the importance of the rights and what it intends to prevent. The right seems to need some further and improved legislation, as the Modern Slavery Act 2015 lacks clarity and fails to give the victim any support or protection, combined with a low prosecution rate. A greater implementation and enforcement process is needed in order to minimise the risk of trafficking and slavery to current victims and potential future victims.

[22] HC Deb 29 January 2020, vol 670, col 773.
[23] Ibid.
[24] International Labour Organization, 'Forced Labour, Modern Slavery and Human Trafficking' (*International Labour Organization*) <https://www.ilo.org/global/topics/forced-labour/lang--en/index.htm> accessed 3 March 2020.

Effectiveness of Juries
In Rape Trials

Jake Bowman (2021) SSLJ 2, 11-19

Stage Three LLB Student, University of Sunderland

Abstract

This journal article outlines keys issues surrounding the use of juries in rape cases. It looks into some of the reasons why juries are failing, supported by relevant sources. Other aspects are also evaluated such as alternate reasons for why conviction rates are low in rape cases, looking at areas such as the CPS and funding. The journal alludes to alternate uses of juries and concludes that juries are fundamental in rape cases and in the British legal system, with suggestions to possible solutions and advancements to the use of using juries in trials overall.

Keywords

Jury; Rape; Trials; Crime

Juries have been used in trials throughout history, dating back to 1215 in Article 39 of the Magna Carta, signed by King John stating. 'No free man shall be imprisoned or deprived of his standing in any other way except by the lawful judgement of his equals or by the law of the land.'[1] It has become the norm that your peers decide whether you are guilty or not guilty but with the guidance of a judge. There have been several instances of trials without juries over the years and they have all came to a demise over time.[2]

Such as the Court of Star Chamber, where the court would consist of privy councillors and judges of common law courts in the time. They were responsible for dealing out justice directly in absence of juries which was abolished in 1614 due to Charles the first using the court for political gain which made the court a symbol of oppression.[3] Diplock courts are another form of trial without jury, which were used in Northern Ireland since 1973 to deal with jury intimidation. These were abolished by the Justice and Security Act 2007 (Northern Ireland).[4] Finally the Criminal Justice Act 2003 provides that where there is fear or danger or jury tampering whereby a jury may be at risk of harm or threats a trial without jury can take place.[5]

In 2018, a Labour MP Ann Coffey for Stockport submitted a freedom of information request to the Crown Prosecution Service (CPS) in relation to conviction rates for rape. She spoke about this in the House of Commons raising issues surrounding rape myths and juries being the main cause of decline in convictions. Due to the response from the CPS bringing to her attention that there are very few men, especially those from a younger demographic such as; men aged 18 to 24 that are rarely convicted and that the most convictions are found in older age groups ranging from 25 to 59.[6] This raises the question of what is causing there to be

[1] Magna Carta 1215, Article 39.
[2] The Guardian, 'Reviewing the Case for Trials Without a Jury' (The Guardian, 19 June 2021) accessed 30 March 2021.
[3] The Editors of Encyclopaedia Britannica, 'Star Chamber English Law' (*Britannica*) <https://www.britannica.com/topic/Star-Chamber> accessed 14 April 2020.
[4] Joshua Rozenberg, 'The right to a jury trial in Northern Ireland' (*The Law Society Gazette*, 1 October 2018) < https://www.lawgazette.co.uk/commentary-and-opinion/the-right-to-a-jury-trial-in-northern-ireland/5067717.article> accessed 14 April 2020.
[5] Criminal Justice Act 2003 s.44 to s.55.
[6] Cps, 'Annual Violence against Women and Girls report published' (*CPS*, 12 September 2019) <https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2019.pdf> accessed 14 April 2020.

record high numbers of reports of rape and date rape cases, a 150% increase over 5 years.[7] But the charge rate is at its lowest falling by 23% in one year.[8]

These figures show that there could be a reluctance to convict young men, due to the attitudes in society surrounding women being blamed for their own rape. Also, society not wanting to tarnish a young man's reputation at a young age. Natalie Taylor supports this in a Criminology journal article.[9] As her results found that jurors judgements rely heavily on their own beliefs and attitudes opposed to that of the facts presented to them. As jurors are from the community, they bring with them the stereotypical beliefs that exists within the community. Conviction rates will not increase until there is clearer information on the belief structure and how this is impacting juries' decisions. According to the Office for National Statistics only 17% of people who have experienced sexual assault report it to the police.[10] The ongoing decrease in convictions will not only raise concerns relating to juries in rape cases but the vitalness for people to be believed is an important principle which could be seriously harmed.[11]

There are several theories relating to juries and how they decide a guilty or not guilty verdict. The American Psychological Association found that human behaviour plays a significant role. They found that a person's personal characteristics such as attractiveness and sexual promiscuity had a significant effect on the decision made.[12] This could be argued as standard human behaviour as we are programmed to make assumptions within seconds of meeting a stranger and longer exposure to that person does not necessarily change the first

[7] ibid
[8] ibid
[9] Natalie Taylor, 'Juror Attitudes and Biases in Sexual Assault Cases: Trends & Issues in Crime and Criminal Justice' (2007) AIC 344.
[10] OFNS, 'Sexual offences in England and Wales: year ending March 2017' (*Office for National Statistics*, 8 February 2018) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesinenglandandwales/yearendingmarch2017> accessed 14 April 2020.
[11] ibid
[12] Henry Field, 'Rape Trials and Jurors' Decisions: A Psycholegal Analysis of the Effects of Victim, Defendant, and Case Characteristics' (1979) LHB 3(4), 261–284.

impression.[13] If it is standard human behaviour to act in this way an alternate to juries could be unlikely.

Another theory is that the Jurors view on rape has the ultimate deciding factor in rape cases.[14] Instead of removing juries from rape cases, it could be that the use of rape attitudes be part of a selection criteria when excluding jurors. The British Journal of Criminology suggests that individual factors of the rape and its motivations has an impact on jurors and the attribution of blame and stereotyping.[15] Such as the use of drugs and intoxicants, this creates a stereotypical view on consent and creates a blame factor. *R v Bree 2007* is a significant case in relation to intoxication and consent as this brought the phrase 'drunken consent is still consent'.[16] This case was quashed because it was unsafe due to the lack of direction from a judge in the case. The significance of this case not only shows that myths and assumptions could prove an issue but that lack of proper directions from a judge could be a significant factor in jury decisions. As there is a grey area between losing capacity to consent which would result in rape, and then voluntarily being intoxicated but being capable of consenting to having intercourse.[17]

The suggestion that juries and rape myths are the key reason for lack of convictions is a broad and dangerous suggestion. There is evidence to show that this is not the sole issue.[18] The reports referred to above also include cases where there have been false allegations made and those on trial have been acquitted.[19] This gives an inaccurate representation of unprosecuted cases and these types of cases that are acquitted are amongst the reports. Max

[13] Monica Harris & Christopher Garris, *You Never Get a Second Chance to Make a First Impression: Behavioral Consequences of First Impressions* in Nalini Ambady & John Skowronski, *First impressions* (Guilford Press 2008) 147–168.
[14] ibid
[15] Emily Finch & Vanessa Munro, 'Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Findings of a Pilot Study' (2005) BJC 45(1), 25-38.
[16] *R v Bree* [2007] EWCA Crim 256; [2007] 2 All ER 676.
[17] ibid
[18] Hannah Quirk, ' Scrapping Juries in Rape Trials Risks Rise in Miscarriages of Justice' (*The Guardian*, 22 November 2018) <https://www.theguardian.com/commentisfree/2018/nov/22/scrapping-juries-rape-trials-miscarriages-justice> accessed 14 April 2020.
[19] BBC, 'Student Liam Allan 'Betrayed' After Rape Trial Collapse' (*BBC News*, 15 December 2017) < https://www.bbc.co.uk/news/uk-england-london-42366629> accessed 14 April 2020.

Hill the director of public prosecutions referred to the 23% drop in prosecutions saying it is due to the prosecution trying to improve the quality of cases brought to trial.[20]

Although this gives support that it is not solely rape myths causing the decline in convictions it raises the concern that the CPS are screening cases and that the most vulnerable and unsuitable victim are not being considered.[21] A report from the Ministry of Justice found that juries are fair, effective and efficient.[22] It shows that juries tended to convict opposed to acquit which shows that juries are not the only primary source for low convictions rates. The argument made by Coffey that juries do not convict young men is only based on the smaller conviction rate, however this could be equally argued that the younger generation are more inclined to be intoxicated creating poor recollections.[23] Making it harder to prove beyond reasonable doubt to a jury.

Contrary to this, a report from The European Journal of Psychology Applied to Legal Context shows that the rape myths issue is prolific, the myths mentioned are that jurors believe that rapes cause serious vaginal injury and that strangulation and weapons are used, that these attacks take place outdoors and at night. This is called the 'real rape' myth.[24] When this ideology is compared with 400 different cases that were reported to UK police not one of them had all of these characteristics that juries believe are present in rapes. In contrast to these myths the same article states that 70.7% of cases were actually indoors, resulted in no injury and were by people known to the victim.[25] Although there is strong evidence to support both arguments, It cannot be denied that a greater education of rape myths could only be of

[20] ibid
[21] Women's Equality, 'Survivors of Sexual Violence Should Be Believed' (*Women's Equality Party*, No Date) <https://www.womensequality.org.uk/survivors_of_sexual_violence_should_be_believed>accessed 14 April 2020.
[22] Cheryl Thomas, 'Are Juries Fair?' (*Ministry of Justice*, February 2010) <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf>accessed 14 April 2020.
[23] Nidirect, 'Young People and Risks of Alcohol ' (*Nidirect government services*) < https://www.nidirect.gov.uk/articles/young-people-and-risks-alcohol> accessed 14 April 2020.
[24] Genevieve Waterhouse, 'Myths and legends: The Reality of Rape Offences Reported to a UK Police Force (2016) EJPALC 8(1), 1-10.
[25] Ibid

benefit to not only juries but the wider society to alleviate the inaccurate perception of what a 'real rape' is.[26]

The criticism of how effective juries are and whether the directions they receive have any real effect on them raises the issue of what the alternate is or what can be done. The report by Prof Thomas also analysed the topic of judges' directions on several levels across 68,000 verdicts. Overall, it concluded that juries are unable to recall accurately the information provided by the judge and they actively looked for information online when directed not to by the judge.[27] This poses serious concerns as the judge of a case is responsible for informing the jury on all aspects of law. Along with making sure they fully understand the case and how each aspect of the law should be considered, to avoid a miscarriage of justice and so they can ultimately understand what consent is.

A suggestion in the report was from Prof Thomas it was that written direction cards be used, and more visual information be readily available to support the jury. In 2008 the Lord Chief Justice also suggested that more visual material ought to be used in court. The Chief Justice did summarise that trial by jury is fundamental to administer justice and that the judiciary is a particular interest.[28] Based on these findings it raises more concern with the judiciary than the jury, how can a jury perform properly if the directions they are receiving are not sufficient. Although judges already give directions.[29] an alternate could be that technology have a more prominent role in the jury system, the legal system has become more and more technologically advanced, the use of a programmed tablet with all of the material uploaded to it for the jury could prove beneficial.[30] By having the information and directions more readily available, then it can be controlled what the jury has access to opposed to relying on them taking notes and taking all of the information in.[31]

---

[26] Olivia Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Palgrave 2018).
[27] ibid
[28] Matt Dickinson, 'Jurors Don't Understand Judge's Directions, Study Finds' (*The Independent*, 17 February 2010) <https://www.independent.co.uk/news/uk/crime/jurors-dont-understand-judges-directions-study-finds-1901927.html> accessed 14 April 2020.
[29] *R v Miller* [2010] EWCA Crim 1578
[30] Laura W McDonald and Others, 'Digital Evidence in the Jury Room: The Impact of Mobile Technology on the Jury' (2015) CICJ 27 179-194.
[31]Peter Grieves-Smith, 'Trial Evolution?' (*Counsel Magazine*, December 2015) < https://www.counselmagazine.co.uk/articles/trial-evolution> accessed 14 April 2020.
< https://www.counselmagazine.co.uk/articles/trial-evolution> accessed 14 April 2020.

On the contrary to this there have been several other suggestions on alternates to juries. A PhD candidate from the University of Aberdeen has presented an idea of using quantitative methodology in trials. This is a none proven hypothesis but raises the idea that a probability on innocent and guilty can be calculated.[32] This research raised the proposal that Judges could hear rape trials alone to remove the bias factor from cases. David Lorimer concluded from his research that both judges and juries could be replaced by a tribunal style system using experts in the field. Harriet Wistrich a campaigning feminist solicitor who set up Centre for Women's justice also supports the notation to scrap juries. She suggested that a discrimination panel with a judge and two specialists could be used in placed of juries.[33] She went onto to repeat that it would be fairer as juries just don't convict young men and that their own views are used too much.[34]

This raises the argument of would that really be fairer for those on trial. Article 6 of the Human Rights Act 1998 protects your right to a fair trial. In summary the article grants you right to a fair and public trial or hearing if you are charged with a criminal offence and have to go to court, which is heard by an independent and impartial decision maker and is followed by a public decision. Currently it is engraved in UK legislation and is a right, therefore removing juries would be a big decision which would have to be decided by parliament. In a bill briefing regarding removing juries from fraud trials the House of Lords briefly stated that public confidence will decline, judges will become case hardened, and may believe that defendants in fraud cases should not have safeguards, they also went on to say that removing juries would not necessarily fix the problem and that other measure should be given the chance to take effect. Ultimately it stated that it was oppose to the bill in its entirety.[35] An article written by a criminal law partner, Jonathan Grimes, in The Law Society Gazette went on to say that polls routinely find that people think jurors are much fairer than judges. He went on to point out

[32] David Lotimer, 'Academic Suggests Abolishing Juries in Rape Trials' (*University of Aberdeen School of Law Blog*, 30 September 2018) <https://www.abdn.ac.uk/law/blog/academic-suggests-abolishing-juries-in-rape-trials/> accessed 14 April 2020.

[33] Catherine Baksi, 'Championing Women's Justice' (*Centre for Women's Justice*, 26 July 2019) < https://www.lag.org.uk/?id=206977> accessed 14 April 2020.

[34]Nic Mainwood, 'Press Release: Should Juries Be Abolished in Rape Trials? - "My Jury is out"' (Centre for Women's Justice, 8 October 2019) <https://www.centreforwomensjustice.org.uk/news/2019/10/8/press-release-should-juries-be-abolished-in-rape-trials-my-jury-is-out> accessed 14 April 2020.

[35] Fraud (Trials without a Jury) Bill Briefing for House of Lords Second Reading HL Bill (2007-07) 49.

that complex trials don't rarely collapse due to juries but due to prosecutors and mistakes due to lack of resources which then caused a failure to investigate the cases properly.[36] This would likely be the same argument if the proposal of removing juries from rape trials was brought.

Upon further research, juries are more than likely not the problem and have been used for 800 years in the legal system and have now been cemented into British society and into its rule of law. Not only would it be a massive legislative change it would currently underwrite a human right which is still in force in the UK. Even if juries were ineffective, due to these points parliament would be unlikely to enforce any changes and alternates to juries. However as outlined above, it could be argued that better funding into the CPS and the criminal legal sector would be beneficial. As this would lead to more resources and better investigative powers. This in turn would mean more rape cases would be better investigated when they would have normally been passed aside and in cases that do get taken to court, the CPS could be able to build stronger cases which would see an increase in conviction rates.

Attorney General Geoffrey Cox QC stated that the organisation cannot handle further spending cuts and admitted that they had suffered a 30% cut in funding and significant reduction in staff.[37] Finally a study by HM Crown Prosecution Service Inspectorate, which was commissioned by Criminal Justice Board, reinforces this as it's clearest conclusion to the decline in rape convictions was due to the police and prosecutors being deprived of funding. The report also found no evidence to prove that the CPS was cherry picking cases and only taking forward easy cases.[38]

[36] Jonathan Grimes, 'Remove Juries from Fraud Trials? Bad Idea' (*The Law Society Gazette*, 5 August 2014) < https://www.lawgazette.co.uk/legal-updates/remove-juries-from-fraud-trials-bad-idea/5042541.article> accessed 14 April 2020.

[37] John Hyde, 'CPS Can Take No More Cuts - Attorney General' (*The Law Society Gazette*, 23 January 2019) < https://www.lawgazette.co.uk/news/cps-can-take-no-more-cuts-attorney-general-/5068981.article>accessed 14 April 2020.

[38] Owen Bowcott, 'Fall in Rape Convictions Due to Justice System at Breaking Point'' (*The Guardian*, 17 December 2019) <https://www.theguardian.com/law/2019/dec/17/fall-in-convictions-due-to-justice-system-at-breaking-point> accessed 14 April 2020.

In the mist of all of this the current government under Boris Johnson has already awarded a further 85million pounds funding to the CPS to help combat all of the issues outlined above, alongside other problems they naturally have due to lack of funding. And has begun the recruitment of 20,000 more police officers which will naturally provide further resources and lift some pressure on the system. In response to this the CPS has begun its own campaign hiring 390 new prosecutors by the end of June 2020 and to also recruit 100 paralegals and administrators. Therefore, although there had been a decline, the current state has investigated and reviewed the problems raised in juries and a possible solution has been implemented.

In conclusion, with reference to the effectiveness of juries in rape cases and in relation to the question of ignoring judges' directions. It is human nature to judge and use personal views to make assumptions. The ideology of the jury is to be judged by your peers and they are used to represent societies views. Therefore, they are doing exactly what they are intended to do by bringing outside views that are present in society with them, to make decisions. The jury is a representative proportion of society and using its beliefs to make these decisions. Effectiveness cannot solely be judged by statistics of conviction rates and surveys on juries' views. It must be accepted that human nature will be present in any form of judgement and that directions on stereotyped thinking are not the reason juries are ineffective.

The reasons juries are ineffective seams to stem from poor directions and an overwhelming amount of information. The advancement of using technology in trials such as an iPad, would improve cases management for juries and make information more accessible and less overwhelming decreasing the risk of seeking outside information and googling outside of the trial. If juries were directed in a different way it could alleviate some of the issues that have been suggested. An impartial none biased information folder could be used on the iPad to educate juries in rape matters before they are exposed to the facts. This poses fair for all involved, that way the victim has a fairer possibly non-bias none stereotypical trial and the information would be factual, and none bias therefore not damaging the case for the defendant in any way.

The Legal Sector Is Yet to Deal With the Requirements of the Equality Act 2010

Chris Gibson (2021) SSLJ 2, 20-43

LLM LPC Student, University of Sunderland

Abstract

This article will illustrate the extent to which the Equality Act 2010 has been adopted throughout the legal sector. This specifically relates to discrimination against the protected characteristic of sex under s.4 amongst solicitors, barristers, and the judiciary. It will further consider how sex is regarded as one of the most prevalent types of discrimination which lingers throughout the legal sector. Data will be analysed from reports prepared by the various regulatory bodies, in addition to the academic opinion surrounding this area of law. The data will be reflected in self-created bar charts and tables. Case law will also be used throughout to support points made. The article will demonstrate that whilst women have broken through the glass ceiling and emerged into the highest ranks of the judiciary, women are still discriminated against as solicitors and barristers. Furthermore, the apparent preference towards applicants from specific academic institutions will be indicated. Nevertheless, emphasis will be placed on the shift in attitudes towards women, and indeed the increase in female representation across the legal sector.

Keywords

Equality; Women; Legal Profession; Discrimination

Introduction

Sex is a protected characteristic under s.4 Equality Act 2010. This article will discuss both direct and indirect sex discrimination within the legal sector – focusing on individuals in the roles of solicitors, barristers, and members of the judiciary. This article will outline the rise of women in the legal sector, and indeed consider how some have become the most well-recognised figures in the law throughout England and Wales. This article will identify that there has been a monumental shift in female representation in an environment that was stereotypically occupied by men.

Direct Discrimination

Direct discrimination is where 'a person discriminates against another if, because of a protected characteristic, [he] treats that person less favourably than [he] would treat others'.[1] Scott and Philips state the treatment of a claimant must be compared with that of an actual or hypothetical person – the comparator – who does not share the same protected characteristic as the claimant, and whose circumstances are not materially different from the claimant.[2]

However, the notion of comparators is complex. A claimant may compare their treatment with that of a real comparator or ask the Employment Tribunal to infer that the employer would have treated a hypothetical comparator more favourably.[3] The circumstances relating to the case of a claimant and that of their chosen comparator (real or hypothetical) must not be materially different.[4] Essentially, the tribunal will consider the exact characteristics which have influenced the respondent to treat the claimant in a particular way.[5] It is therefore

[1] Equality Act 2010 s 13(1).
[2] Gillian Phillips and Karen Scott, *Employment Law 2017* (2017 edn, College of Law Publishing 2017) 354.
[3] *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285.
[4] Lexis PSL, 'Direct discrimination' (*Lexis PSL* 2021) <https://www.lexisnexis.com/uk/lexispsl/employment/document/393759/55T3-HSN1-F18B-S4VB-00000-00/Direct_discrimination> accessed 28 March 2021.
[5] Curzon Green Solicitors, 'Direct Discrimination' (*Curzon Green Solicitors* 2021) <https://www.curzongreen.co.uk/direct-discrimination.html> accessed 2 April 2021.

imperative that the correct comparator is chosen.[6] Furthermore, performing the comparison with an actual comparator will usually be straightforward, whereas it will be more difficult using hypothetical comparators, as it may be necessary to look at factors such as how other workers were treated in situations that were not identical, but instead only similar to the claimant's circumstances.[7]

Direct discrimination was shown in Bullock [1993] ICR 138, where a retirement age of 60 was established for all employees, excusing gardeners, who could retire at 65 (and were all male). A female employee's claim for sex discrimination failed given the difficulty in recruiting gardening staff, which justified an extended retirement age. If a protected characteristic is one of the reasons for the treatment, then that is enough to establish direct discrimination.[8] In James [1990] it was held that in determining whether there has been direct discrimination, the motive, purpose or intention of alleged discrimination is irrelevant.[9] Sex discrimination will be established if persons from one sex are given preferential treatment when being recruited by the employer.[10] Nevertheless, an employer will not be seen to have unlawfully discriminated against a woman if he failed to treat her more favourably than a man, and likewise if the individual was male.[11]

Indirect Discrimination

A person indirectly discriminates another whose protected characteristic is sex if he applies a provision, criterion or practice that is discriminatory of that person, puts him/her at a disadvantage, and that treatment cannot be shown to be a proportionate means of achieving a legitimate aim.[12] The understanding of indirect discrimination was shown in Eweida

[6] *HM Chief Inspector of Education, Children's Services and Skills v Interim Executive Board of Al-Hijrah School (Secretary of State for Education intervening) [2018] IRLR 334:* the issue of direct sex discrimination was proven as boys and girls were segregated. The Court of Appeal looked at boys as a collective and recognised they could not interact with girls, and vice versa. Both sexes were seen to have faced the same treatment.
[7] Lexis PSL (n 4)
[8] *Nagarajan v London Regional Transport* [1999] IRLR 572, HL.
[9] ICR 554 and Ian Smith, Aaron Baker and Owen Warnock, *Smith and Wood's Employment Law* (13th edn, Oxford University Press 2017) 262.
[10] Astra Emir, *Selwyn's Law of Employment* (20th edn, Oxford University Press 2018) 145.
[11] *Kenny v Ministry of Defence (Unreported).*
[12] Equality Act 2010, s 19(2).

[2010].[13] The Court of Appeal voiced that claimants may have to show not just that they were adversely affected by the employer's provision, criterion or practice but also that there were others who were similarly adversely affected.[14] The important distinction between direct and indirect discrimination is that for indirect discrimination a defence can be raised if, as stated above, the treatment had a proportionate means of achieving a legitimate aim.[15] It is for the Employment Tribunal to not only determine whether the treatment was appropriate and reasonably necessary, but also that the application of the provision is proportionate, and the aim is legitimate.[16]

As Emir emphasises, an objective balance must be drawn between the reasonable needs of the employer and the discriminatory effect of the provision.[17] The test used by the Employment Tribunal is objective and it does not depend on whether the recipient believes the treatment is less favourable.[18] As Emir concludes, there is a contrast between discrimination amongst the sexes (i.e. how males and females are to dress for work) and discrimination against one or another of the sexes, which is ultimately not permitted.[19]

Harassment

Although not referred to later in this article in more detail, it is important to consider 'harassment' as this forms part of discrimination.[20] Harassment is defined as the 'unwanted conduct of a sexual nature which has the purpose or effect of violating someone's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them'.[21] A single act can amount to harassment under this section.[22] Thornton declares that sexual

[13] ICR 890.
[14] Spencer Keen, 'The Equality Act 2010: Direct discrimination & harassment' (2010) 160 NLJ 1329.
[15] Emir (n 12) 145-146.
[16] *Briggs v North Eastern Education and Library Board* [1990] IRLR 181.
[17] Emir (n 12) 145-146.
[18] *Burrett v West Birmingham Health Authority* [1994] IRLR 7.
[19] Emir (n 12), 146.
[20] Citizens Advice, 'If you're being harassed or bullied at work' (*Citizens Advice* 2020) <https://www.citizensadvice.org.uk/work/discrimination-at-work/checking-if-its-discrimination/if-youre-being-harassed-or-bullied-at-work/> accessed 16 August 2020.
[21] Equality Act 2010 s 26.
[22] *Bracebridge Engineering Ltd v Darby* [1990] IRLR 3, EAT.

harassment is not confined to overtly sexualised behaviour and includes sex-based harassment (such as sexist comments).[23]

Middlemiss outlines that there has been a steady increase in reports of sexual harassment within the legal sector throughout England and Wales.[24] Sexual harassment disproportionately, but not exclusively, affects females.[25] Connelly indicates complaints of sexual harassment to the Solicitors Regulation Authority (SRA) have risen 152% in less than five years, with 25 cases in 2014-15 increasing to 63 in 2018-19.[26] Sexual harassment has major effects.[27] It has been linked to reduced job satisfaction, commitment and productivity, as well as deteriorating relationships with colleagues and withdrawal from the workplace.[28] In Stedman [1999] Morison J outlined the key characteristic of sexual harassment is words or conduct of a nature that is unwelcome to the recipient.[29] Furthermore, the recipient must determine what is acceptable to them and what they regard as offensive.[30]

WWI and Universal Suffrage

The role of women during WWI is important for context. Large numbers of women were recruited into jobs vacated by men who had gone to war, particularly in industries such as manufacturing and agriculture.[31] During 1918 munitions factories would become the largest single employer of women.[32] However, as Gosling illustrates, the war halted any further

[23] Margaret Thornton, 'Sexual Harassment Losing Sight of Sex Discrimination' (2002) 26 MULR 422.
[24] Sam Middlemiss, 'New developments in the law of sexual harassment' (2019) 3 Juridical Review 269.
[25] Kieran Pender, 'Us Too? Bullying and Sexual Harassment in the Legal Profession' (*International Bar Association*, 2019) <file:///C:/Users/user/Downloads/IBA-Us-Too-Bullying-and-Sexual-Harassment-in-the-Legal-Profession-23.07%20(2).pdf> accessed 20 March 2020.
[26] Thomas Connelly, 'Reports of sexual misconduct at law firms hit all-time high in wake of #MeToo' (*Legal Cheek*, 20 January 2020) <https://www.legalcheek.com/2020/01/reports-of-sexual-misconduct-at-law-firms-hit-all-time-high-in-wake-of-metoo/> accessed 20 March 2020.
[27] Heather McLaughlin, Christopher Uggen and Amy Blackstone, 'The Economic and Career Effects of Sexual Harassment on Working Women' (2017) 31 Gender & Society 333.
[28] ibid.
[29] *IRLR 299, EAT.*
[30] ibid.
[31] Striking Women, 'World War I: 1914-1918' (*Striking Women*, 2020) <https://www.striking-women.org/module/women-and-work/world-war-i-1914-1918> accessed 19 March 2020.
[32] ibid.

attempts by women to enter the legal sector, though the work of women during the war did much to disprove the archaic view they could not excel in certain professions.[33]

Legislation was designed to reflect the value of the role women played during WWI.[34] On 6 February 1918 it became law that women would be entitled to vote in parliamentary elections.[35] This was possible because of the Representation of the People Act 1918.[36] Regarding the legal sector, the Law Society made the decision to admit women in 1918.[37] Even so, as Rackley tells, the Bar 'stood firm' and refused to open its doors to women until it was forced to under the Sex Disqualification (Removal) Act 1919.[38] Even then, they did so 'grudgingly'.[39]

Lord Desai reflects that Parliament recognised the need for some degree of equality:

> "Had women not worked as a vital part of the wartime economy, men would not have realised that women could do more than just sit at home and cook. The suffragettes, the suffragists and the First World War—together were very helpful in building the case for women's suffrage."[40]

In 1919 the Sex Disqualification (Removal) Act had the potential to revolutionise the legal sector as it opened doors for women to enter the roles within.[41] However, getting to the door proved to be difficult.[42] The Act signified the government were starting to take the point seriously, and it was no longer only men who could become solicitors and barristers.[43]

[33] Daniel Gosling, 'Women & the Law: the road to the Sex Disqualification (Removal) Act, 1919' (*Gray's Inn*, 23 June 2017) <https://www.graysinn.org.uk/history/women/women-the-beginnings> accessed 7 June 2020.
[34] Birgitta Bader-Zaar, 'Controversy: War-related Changes in Gender Relations: The Issue of Women's Citizenship' (*International Encyclopaedia of the First World War* 8 October 2014) <https://encyclopedia.1914-1918-online.net/article/controversy_war-related_changes_in_gender_relations_the_issue_of_womens_citizenship> accessed 8 June 2020.
[35] Gosling (n 36).
[36] ibid.
[37] Erika Rackley and Rosemary Auchmuty, *Women's Legal Landmarks: Celebrating the History of Women and Law in the UK and Ireland* (1st edn, Hart Publishing 2018) 150.
[38] ibid.
[39] ibid.
[40] HL Deb 5 February 2018, vol 788, col 1870.
[41] Elena Rossi, '100 years of women in the professions: The Sex Disqualification (Removal) Act 1919' (*The National Archives* 23 December 2019) <https://blog.nationalarchives.gov.uk/the-sex-disqualification-removal-act-1919/> accessed 17 August 2020.
[42] ibid.
[43] Carrie-Ann Randall, '100 years of women in law: a timeline of sexism and equality' (*The Law Society Gazette*, 8 November 2019) <https://www.lawgazette.co.uk/women-in-the-law/100-years-of-women-in-law-a-timeline-of-sexism-and-equality/5102081.article> accessed 20 February 2020.

Originally, as per Bebb [1914], women were unable to enter the law due to their sex. [44] The Act enabled women to take the necessary examinations and qualify to become solicitors.[45]

Heilbron and Butler-Sloss

The lack of diversity within the judiciary has made it difficult for women.[46] Nonetheless, Heilbron became one of the first women to receive a first class honours law degree and is known as the first woman to be awarded a scholarship to Gray's Inn in 1936.[47] The timing of Heilbron's early career coincided with WWII, with a shortage of men to serve as barristers given much of the male population were serving overseas.[48] Furthermore, Heilbron is recognised as being the first female barrister as leading counsel in a murder trial in England and Wales.[49]

Heilbron would further become the first woman to hold regular judicial office – being appointed the Recorder of Burnley on 6 November 1956.[50] The reason for this is the selection process of the judiciary, with appointments based solely on who 'merited' the position, in addition to the fact they were a white male with 30 years of practising as a barrister.[51] When determining what 'merit' is, McNally implied 'it is often deployed by people who, when you scratch the surface, are really talking about 'chaps like us''.[52] Bingham voices that whilst

[44] 1 Ch 286.
[45] Christina Blacklaws, '100 Years since women became people' (*The Law Society*, 1 November 2017) <https://www.lawsociety.org.uk/news/blog/one-hundred-years-since-women-became-people/> accessed 27 February 2020.
[46] Erika Rackley, 'In conversation with Lord Justice Etherton: revisiting the case for a more diverse judiciary' (2010) 4 PLJ 656.
[47] First Hundred Years, 'Rose Heilbron' (*First Hundred Years*, 7 July 2014) <https://first100years.org.uk/rose-heilbron/> accessed 21 March 2020.
[48] Ibid.
[49] Natalie Smith, 'Rose Heilbron and the Cameo Cinema murders' (*The Justice Gap*, 26 January 2018) <https://www.thejusticegap.com/rose-heilbron-cameo-cinema-murders/> accessed 21 March 2020.
[50] Sarah Asplin, '100 years of women in the Law' (*University of Oxford*, 2019) <https://www.law.ox.ac.uk/sites/files/oxlaw/sarah_asplin_mm_2019_talk.pdf> accessed 1 March 2020.
[51] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 292.
[52] Geoffrey Bindman, 'White male judges: The Supreme Court and judicial diversity' (*Open Democracy*, 6 July 2012) <https://www.opendemocracy.net/en/opendemocracyuk/white-male-judges-supreme-court-and-judicial-diversity/> accessed 21 March 2020.

proven professional achievement is a key ingredient to justify appointment to the judiciary, sex should also be considered.[53]

In 1956, of the 68 women at the Bar, only 45 were practising barristers, with Heilbron the only registered QC.[54] In the 1960s rights regarding sex took a huge turn.[55] Aside from the Dagenham walk out in 1968, it was clear there was an overriding groundswell in a desire for a change in attitude towards women, and this was evidenced by campaigns for women's equal rights.[56] Lunn stipulates, a statute was needed to 'eliminate discrimination as regards terms and conditions of employment between men and women…and to ensure women were given the same right to equal pay as men.'[57] The impact of policies and practices from the government and the legal profession saw minimal input until the early 1970s.[58] Despite many years of reform, the growth of female solicitors from 1918-1970 was minimal – with the most significant period of change being from 1963, where the total number of female solicitors admitted grew from 37 to 222 by 1970.[59]

In 1974 Heilbron became only the second female after Lane in 1962 to be appointed a High Court judge.[60] It is worth noting that whilst the Equal Pay Act 1970 allowed for equal pay and rights to women, it did not give equal pay and rights to women in what was deemed to be a 'female' job.[61] Rackley and Auchmuty state that Heilbron revolutionised the legal profession and unintentionally became a pioneer for women, ultimately impacting on women's legal rights.[62] This included presiding over cases such as C v S [1988], where she denied a man the

[53] Lord Bingham, *'The Law Lords: Who has Served'* in Louis Blom-Cooper, Brice Dickson and Gavin Drewry, *The Judicial House of Lords 1976-2009* (1st edn, Oxford University Press 2009) 126.
[54] Asplin (n 53).
[55] Nadine Muller, 'Gender in the 1960s' (*NadineMuller.org*, 12 March 2013) <http://nadinemuller.org/wp-content/uploads/2013/03/Gender-in-the-1960s-Lecture-Handout.pdf> accessed 28 February 2020.
[56] British Library, 'The campaign for women's suffrage: an introduction' (*British Library*, 6 February 2018) <https://www.bl.uk/votes-for-women/articles/the-campaign-for-womens-suffrage-an-introduction> accessed 26 August 2020.
[57] J Lunn, 'Equal pay legislation—time for reform?' (2001) 151 NLJ 806.
[58] Ulrike Schultz and Gisela Shaw, *Women in the World's Legal Professions* (1st edn, Hart Publishing 2003) 142.
[59] ibid.
[60] Asplin (n 53)
[61] *Fildes v Gwent County Council (Unreported)*: A housemother in a children's home was denied equal pay as the court regarded her circumstances as 'ordinary life', in which mothers take care of children.
[62] Rackley and Auchmuty (n 40), 260.

right to prevent his wife from having an abortion.[63] They add that Heilbron's influence in the Advisory Committee on rape shaped the way in which evidence is now used in criminal trials.[64]

The European Commission introduced several directives during the 1970s to address equality and discrimination, meaning the UK had to follow suit.[65] Grazia Rossilli describes the 1970s as the 'best period for advancing social policies.'[66] The directives included the principle of equal pay for 'work of equal value' in 1975, equal treatment at work in 1976, and the promotion of equal opportunity for men and women.[67] The introduction of the Sex Discrimination Act 1975 made it unlawful for women (or men) to be treated less favourably because of their sex.[68] Originally, the purpose of the Act was to prevent banks requiring women to provide male guarantors when applying for a credit card or loan, regardless of her income.[69] However, the Act also permitted women to take maternity leave and prevented them from being discriminated against due to pregnancy.[70] The Employment Protection Act 1975 later meant women could not be dismissed for being pregnant or be discriminated against for taking time off for childcare.[71]

The late 1980s saw women finally break into the highest-level posts within law and the state.[72] Butler-Sloss became the first female Court of Appeal judge in England and Wales in 1988 and to date is the only female to have been President of the Family Division.[73] In 1990 the legal sector was criticised for 'not ensuring that a successful legal career is equally open to all'.[74] Ames highlights that upon qualification, a solicitor would almost certainly be a man as 'the position of women in the legal profession rarely extended beyond that of tea lady'.[75] Notwithstanding, it would now appear that there has been a momentum towards

[63] QB 135.
[64] Rackley and Auchmuty (n 40) 260.
[65] European Commission, 'Tackling discrimination at work' (*European Commission*, 2020) <https://ec.europa.eu/social/main.jsp?catId=158&langId=en> accessed 17 August 2020.
[66] Maria Grazia Rossilli, 'The European Union's Policy on the Equality of Women' (1999) 25 Feminist Studies 173.
[67] Ibid 173-174.
[68] Randall (n 46).
[69] ibid.
[70] ibid.
[71] s 34(1)
[72] Rebecca Probert, 'Women's Legal Landmarks: Celebrating the History of Women and Law in the UK and Ireland' (2019) 1 CFLQ 169.
[73] ibid.
[74] Donald Nicolson, 'Affirmative Action in the Legal Profession' (2006) 33 JLS 112.
[75] Jonathan Ames, 'The joys of youth' (2011) 108 EL 12.

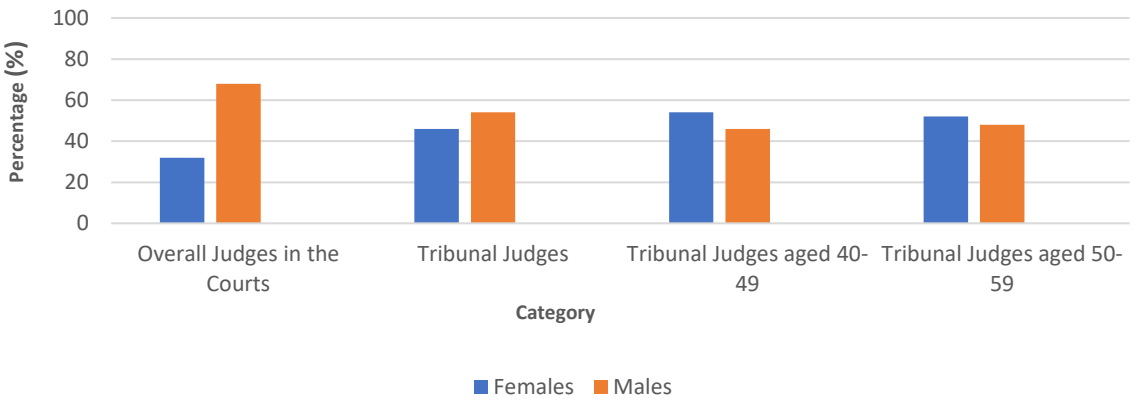
empowerment of women in the workplace, with increased numbers of women in the legal sector.[76]

Women 'Not Taken Seriously'

Asplin illustrates the first perspective of women was that they could only practice in works that women 'knew about', such as Family.[77] Lindsay comments how female solicitors were often led to 'an involuntary specialism in family law'.[78] This is further supported by Lammasniemi, who affirms in her biography of Heilbron, 'it was symptomatic of gender bias at the time that, despite being one of the leading criminal lawyers in the country, Heilbron was appointed to the Family Division'.[79] Women faced further obstacles in practice given men were uncertain about taking advice from a female in predominantly 'male-dominated' commercial and business cases.[80] In reality, it was recognised that good quality academics or female solicitors being trained could practice in all areas men could.[81] The data below indicates diversity within the judiciary today and women breaking through the glass ceiling. The judicial diversity figures for 2019 identify that there has been a shift in attitudes towards women in judicial roles, with women now occupying a third of the overall profession and having almost an equal holding to men in tribunals.[82] Furthermore, women now outnumber men as tribunal judges aged 40-59.[83]

[76] The Law Society, 'Women in Leadership in Law' (*The Law Society*, 2020) <https://www.lawsociety.org.uk/campaigns/women-in-leadership-in-law> accessed 19 July 2020.
[77] Asplin (n 53).
[78] Probert (n 75).
[79] ibid.
[80] Asplin (n 53).
[81] ibid.
[82] Courts and Tribunals Judiciary, 'Judicial Diversity Statistics 2019' (*Courts and Tribunals Judiciary*, 21 February 2020) <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/diversity/judicial-diversity-statistics-2019/> accessed 23 February 2020.
[83] ibid.

Figure 1: Gender of Judges in the Courts of England and Wales in 2019 (%)



[84]

Although not reflected in the data, it should be noted that, of the 143 judges appointed to a senior judicial role in 2018-19, 64 were women.[85] Attitudes towards women can be evidenced in the case of Popal. Popal was informed by the acting solicitor that his client had asked for a change of barrister after discovering Popal was not only of Afghan origin, but also a female.[86] The reason given by the solicitor was that the client believed 'an English judge was far more likely to believe and respect a white male barrister.'[87]

The increased numbers of women within the Supreme Court demonstrates there has been a transition.[88] In 2009 Lady Hale became the first female Justice of the Supreme Court, and is now joined by Lady Arden who also holds the same position.[89] Although now retired, Hale did not go through the traditional route expected of extended practice, and is the first academic to become Justice and President of the Supreme Court.[90] This rise to President of the Supreme

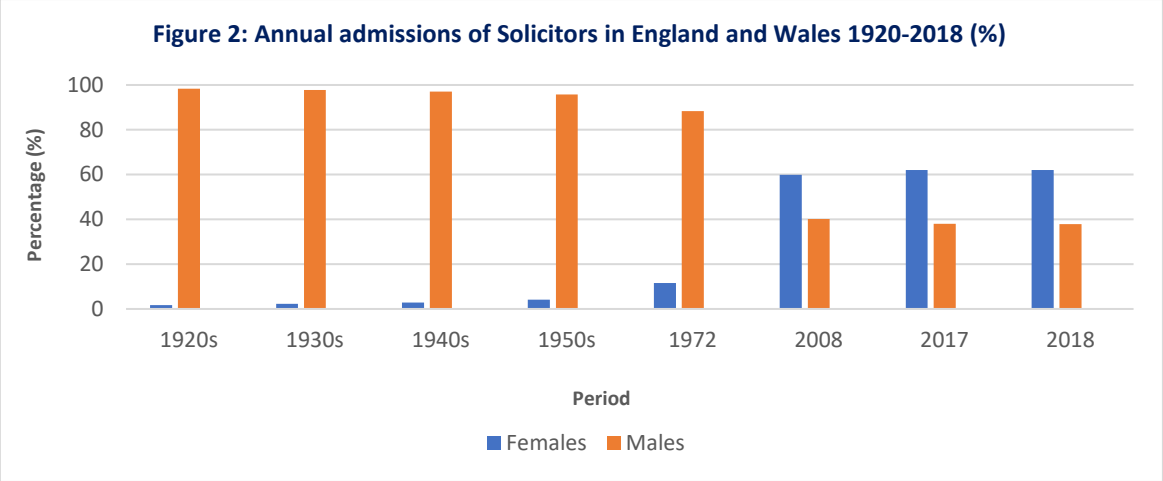
[84] ibid.
[85] ibid.
[86] Rehana Popal, 'Discriminatory instructions' (*Counsel Magazine*, April 2019) <https://www.counselmagazine.co.uk/articles/discriminatory-instructions> accessed 22 March 2020.
[87] Jonathan Ames and Frances Gibb, 'Ditched Asian lawyer Rehana Popal had been stripped of six cases' *The Sunday Times* (London, 10 November 2018) <https://www.thetimes.co.uk/article/ditched-asian-lawyer-rehana-popal-had-been-stripped-of-six-cases-3mh95267z> accessed 22 March 2020.
[88] Cambridge Law Faculty, 'Cambridge Women in Law Launch: In discussion with Lady Hale and Lady Arden' (3 October 2019) <https://www.youtube.com/watch?v=fEBAMyjvtRM> accessed 10 June 2020.
[89] The Supreme Court, 'Biographies of the Justices' (*The Supreme Court*, 2020) < https://www.supremecourt.uk/about/biographies-of-the-justices.html> accessed 9 June 2020.
[90] Durham University, 'Lady Brenda Hale' (*Durham University*, 23 October 2019) < https://www.dur.ac.uk/international/global-lectures/ladyhale/> accessed 15 June 2020.

Court would have been unheard of years ago, as the position was always filled by men, prior to Hale's appointment.[91]

Female Solicitors

Historically, women struggled to progress within firms.[92] Nicolson illustrates it was thought at the time that women were unsuitable to the 'rigours and intellectual demands of legal practice', with male solicitors having a desire to retain their 'gentleman's club' and privileged market position.[93] As such, the door to entry was opened 'only a crack' for women intent on pursuing a career in law.[94] From 1920, it took 50 years before women made up 10% of new Law Society entrants.[95] More recently, Cownie relays that female solicitors described the solicitors profession as 'male-shaped' or 'masculine'.[96] Braithwate postulates that male solicitors have always been, and still are, far more likely than females to be promoted to the most senior ranks within a firm.[97] Cownie reveals that according to the years of admission, a much larger percentage of male solicitors became partners compared to females.[98] Of the annual admissions of solicitors in England and Wales in the 1920s, women made up 1.7%.[99] This rose periodically to 11.6% in 1972.[100] However, more recent data shows females have begun to significantly outnumber male solicitors admitted to the roll.[101] Nicolson adds those who did become solicitors were consistently paid less than men, and 'relegated to female specialisms, and generally made to feel unwelcome'.[102]

[91] Jane Croft, 'UK Supreme Court names first female president' *Financial Times* (London, 21 July 2017) <https://www.ft.com/content/bc91cb9c-6df7-11e7-b9c7-15af748b60d0> accessed 11 August 2020.
[92] Donald Nicolson, 'Demography, discrimination and diversity: a new dawn for the British legal profession?' (2005) 12 IJLP 203.
[93] ibid.
[94] ibid.
[95] ibid.
[96] Fiona Cownie, Anthony Bradney and Mandy Burton, *English Legal System in Context* (6th edn, Oxford University Press 2013) 144.
[97] Joanne P. Braithwaite, 'The Strategic Use of Demand-side Diversity Pressure in the Solicitors' Profession' (2010) 37 Journal of Law and Society 444.
[98] Cownie, Bradney and Burton (n 99) 143.
[99] Richard Abel, 'The Legal Profession in England and Wales' (1988) 14 University of New South Wales Law Journal 173.
[100] ibid.
[101] The Law Society, 'Trends in the solicitors' profession Annual Statistics Report 2018' (*The Law Society*, August 2019) <file:///C:/Users/user/Downloads/annual-statistics-report-2018%20(12).pdf> accessed 11 June 2020.
[102] Nicolson (n 95).



[103]

However, whilst women have exceeded 50% of 'on the roll' solicitors since 1995, a gender pay gap has been underlined.[104] McNabb and Wass reveal that in 2001, in England and Wales, the gap in median salaries was £1,250 for assistant solicitors, £12,000 for salaried partners and £21,000 for equity partners.[105] The Law Society's 2019 Gender Pay Gap Report identified that the hourly pay is 10% more for men compared to women.[106] This demonstrates a failure to address sex discrimination. McNabb and Wass add the reason for this difference cannot be put down solely to experience and the differences in size and locality of firms.[107] Whilst Nicolson and Cownie state seniority in firms is male-dominated, gradual reform has taken place.[108] In 2001 males made up 52.4% of solicitors in England and Wales, whilst females made up 23.9%.[109] Conversely, it is now revealed that although 34% of women constitute partners of firms, this sex gap of seniority has been closing ever so gradually over the past five years – up 1% since 2017 and 3% since 2014.[110]

Nevertheless, despite progress regarding the rise of females to partners within law firms, the treatment of females is still a concern. In 2017 the Lawyer conducted a survey of 1,000

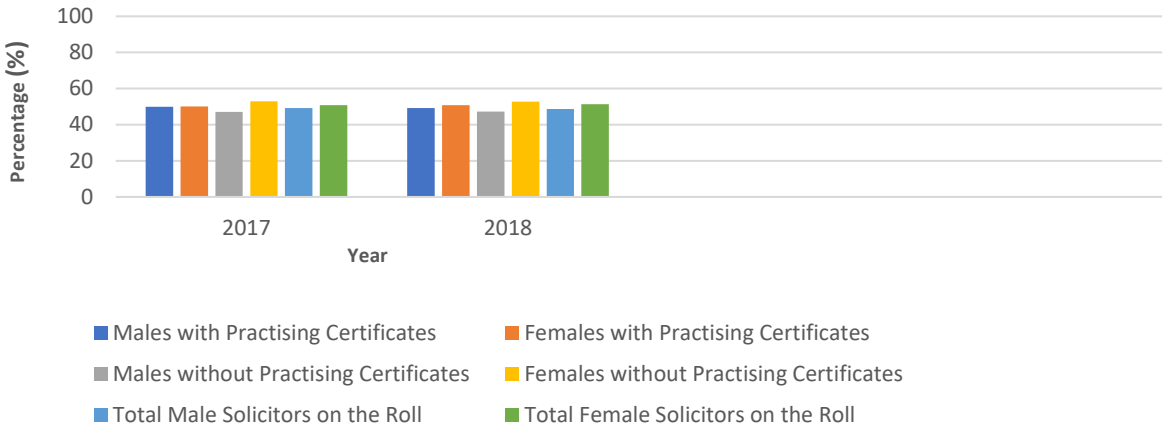
[103] Data collected from n.102 and n.104.
[104] The Law Society (n 101).
[105] Robert McNabb and Victoria Wass, 'Male-female earnings differentials among lawyers in Britain: A legacy of the law or a current practice?' (2006) 13 LE 78.
[106] The Law Society, 'The Law Society Group 2019 Gender Pay Gap Report' (*The Law Society*, February 2020) <file:///C:/Users/user/Downloads/law-society-gender-pay-gap-report-2019-february-2020%20(4).pdf> accessed 9 June 2020.
[107] McNabb and Wass (n 105).
[108] The Law Society, 'How diverse is the legal profession?' (*The Law Society*, 20 March 2020) <https://www.sra.org.uk/sra/equality-diversity/key-findings/diverse-legal-profession/> accessed 9 June 2020
[109] Nicolson (n 95).
[110] The Law Society (n 101).

solicitors.[111] It transpired that 42% of female solicitors had experienced sexual harassment.[112] This ranged from inappropriate comments to unwanted contact and propositions.[113] In a more recent survey, one in every seven female solicitors affirmed they had suffered some form of discrimination.[114] It was also revealed that 4% of male solicitors had fallen victim to the same treatment.[115]

Practising and Non-Practising Solicitors

A gap regarding the sex of practising and non-practising solicitors appears to exist. Below demonstrates the number of male and female solicitors who were entitled (and were) practising in England and Wales, in addition to those who did not hold a practising certificate.[116] The overall statistics indicate that females outnumber males whether it be in practice, former practioners, or indeed those on the roll.[117]

Figure 3: Gender of Practising / Non-Practising Solicitors 2017-2018 (%)



118

[111] Richard Simmons, 'Revealed: The scale of sexual harassment in law' (*The Lawyer*, 1 March 2018) <https://www.thelawyer.com/metoo-lawyers-sexual-harassment-survey-2018-2/> accessed 23 March 2020.
[112] ibid.
[113] ibid.
[114] Neil Rose, 'One in seven female solicitors suffer bullying or discrimination' (*Legal Futures*, 16 April 2020) <https://www.legalfutures.co.uk/latest-news/one-in-seven-female-solicitors-suffer-bullying-or-discrimination> accessed 10 June 2020.
[115] ibid.
[116] The Law Society (n 101).
[117] ibid.
[118] ibid.

Reasons Women are 'Disadvantaged'

Women also regard themselves to be 'disadvantaged' compared to men.[119] In 2001 the Law Society identified one of the reasons women felt this way, was due to the fact women are more likely to take extended periods of leave and work part-time due to childcare commitments.[120] Furthermore, women are seen to want to enter practice areas which large firms do not specialise in.[121] Sommerlad and Sanderson argue that:

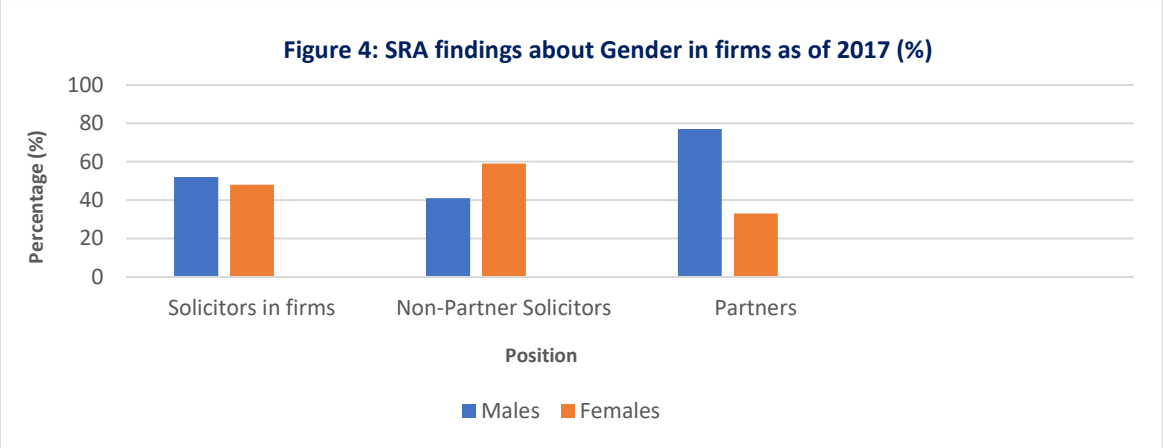
> 'The core form of a lawyer's cultural capital [understanding as a result of where you work] has always been those attributes socially constructed as male and considered to be absent in women: rationality, aggression, unemotional technical skill, etc. Having the correct cultural capital is particularly important because of the extent to which 'personalist' or 'clientist' relationships "underpin power hierarchies and key decision-making" in legal practice.'[122]

The Law Society maintained their earlier observations and recognised women will continue to be disadvantaged by 'a career structure modelled on the working life of someone unencumbered by domestic responsibilities.'[123] Joly identifies that it is an expectation women are committed to family life, and take substantially more career breaks than men, and usually at a time most crucial for promotional prospects and are less available to work extensive hours.[124] Socialising after hours and experience is regarded as important for progression, something which women are unable to execute as frequently due to family commitments.[125] Nicolson further stipulates that women who have children before their legal career commences, struggle in obtaining training contracts.[126] Moreover, those women with

[119] Nicolson (n 95) 204.
[120] ibid.
[121] ibid.
[122] Pete Sanderson and Hilary Sommerlad 'Professionalism, discrimination, difference and choice in women's experience in law jobs' in Phil Thomas, *Discriminating Lawyers* (1st edn, Routledge-Cavendish Publishing 2000) 7.
[123] Nicolson, 'Demography, discrimination and diversity: a new dawn for the British legal profession?' (n 95), 205.
[124] Camille Joly, 'The overrepresentation of Men at the Top of City Law Firms: Power, culture, structure and the paradox of time' (DPhil thesis, Queen Mary University of London 2019) 101.
[125] Jennifer White, 'Gendered Practice in the Provincial Law Firm: Pay, Progression and Parenthood' (DPhil thesis, University of Southampton 2016) 37.
[126] Nicolson (n 77).

children who do secure a training contract, struggle to complete it and ultimately become a fully qualified solicitor.[127]

Glazebrook writes in 2016, whilst females made up 60% of employees within multi-law firms, only 24% were partners.[128] In 2017 the Solicitors Regulation Authority (SRA) collected data from 92% of firms across England and Wales.[129] Whilst females equated for almost half of all solicitors, males still outnumbered females at partner level (although increasing from 2014).[130]



[131]

Overall, Nicholson affirms that despite feminism entering the law a considerable time ago, women are still consistently subjected to discrimination and hostility.[132] Whilst women should have been accepted, in response to an increased female presence, it is believed that male solicitors have 'protectively intensified the masculinist culture.'[133]

Women at the Bar

[127] ibid.
[128] Suzan Glazebrook, 'Gender myths and the Legal profession' (2016) 22 Canterbury Law Review 171.
[129] Solicitors Regulation Authority, 'How diverse are law firms?' (*Solicitors Regulation Authority*, 2017) <https://www.sra.org.uk/sra/equality-diversity/archive/law-firms-2017/#:~:text=There%20has%20been%20an%20increase,the%20UK%20workforce%20were%20BAME.> accessed 23 February 2020.
[130] ibid.
[131] ibid.
[132] Nicolson (n 95) 206.
[133] ibid.

Pinto indicates that women have struggled at the Bar.[134] Only 20 women were called to the Bar in 1921.[135] By 1929 this number had risen to 67, and in 1970 stood at 147.[136] Consequently, Pinto emphasises 'it is little wonder that, for women graduating with law degrees in the 1980s, the Bar did not seem to be a realistic career option.'[137] Fast forward to current times, and she adds much more needs to be done to promote equality of sex progression.[138] A 1992 study revealed almost twice as many female barristers earned below £25,000 and almost twice as many men as women earned more than £100,000.[139] Despite equal numbers of women and men now being offered pupillages, more males are given tenancies, and not through any lesser ability than female pupils.[140] Nonetheless, 2013 was a monumental year for women in law. A v A [2013] would be the first case where all four counsel were female: Scotland QC appearing alongside Kirby, Chisholm and O'Rourke.[141] This case coincided with further key landmarks for women. This included Turnquest becoming the youngest individual to qualify as a barrister in 600 years.[142] However, more notably, Lady Hale was appointed Deputy President of the Supreme Court.[143]

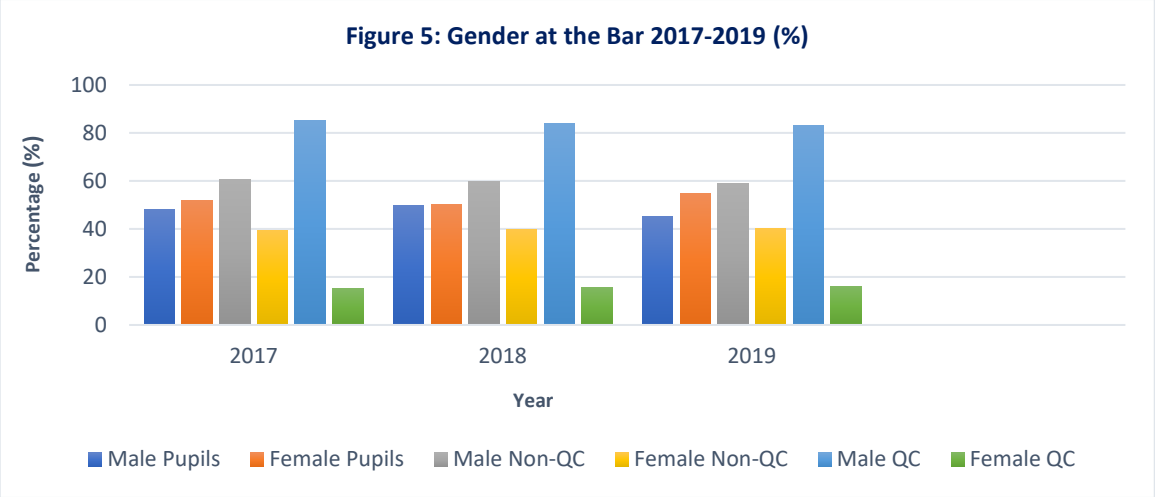
Despite this apparent success, there have been inconsistencies in pay and opportunity between male and female pupillages. Between 2004-2008 Zimdars and Sauboorah found that women, and those older than 25, earned significantly less during their pupillage.[144] It was also revealed that the same groups are more likely to join the employed Bar.[145] The employed Bar allows barristers to train in specialist areas of law, as well as allow them to benefit from financial security and a broader range of employee benefits (including paid leave) and

[134] Amanda Pinto, Kerry Hudson, Justice McGowan, '100 years of women in the legal profession - some personal reflections from three perspectives' (2019) 12 CLR 1002.
[135] ibid.
[136] ibid.
[137] ibid.
[138] ibid.
[139] Lesley Holland and Lynne Spencer, *Without Prejudice? Sex Equality at the Bar and in the Judiciary* (1st edn, TMS Management Consultants 1992) 11.
[140] Pinto, Hudson and McGowan (n 137).
[141] UKSC 60 and Chris Hanretty and Steven Vaughan, 'Patronising Lawyers? Homophily and Same-Sex Litigation Teams before the UK Supreme Court' (2017) 3 Public Law 426.
[142] First 100 Years, 'Timeline' (*First 100 Years*, 2020) <https://first100years.org.uk/digital-museum/timeline/> accessed 9 June 2020.
[143] ibid.
[144] Anna Zimdars and Jennifer Sauboorah, 'The profile of pupil barristers at the Bar of England and Wales 2004–2008' (2010) 17 IJLP 131.
[145] ibid.

protections as an 'employee'.[146] This is unlike the majority of barristers, who are self-employed, either working solely or on a self-employed basis with other barristers in chambers.[147]

Recent reports published by the Bar Standards Board (BSB) go against Pinto's original observations. The chart below depicts great strides have been made, with increased female pupils at the Bar across 2017[148], 2018[149] and 2019[150] respectively. As stated earlier, Pinto indicated that only 147 females were at the Bar in 1970 and more strides were needed to promote equality.[151] However, recent analysis shows that as of 2017 there were 6,240 females at the Bar[152], 6,368 in 2018[153], and 6,600 in 2019.[154] Whilst a consistent trait of greater numbers of male QC's compared to female QC's can be identified, there is no doubt a shift in attitude towards women, as specified earlier, can be seen. Pinto proposes that in 2020 'there will be more women barristers in practice than ever, and, as well as having a female chair of the Bar Council, there will be more women chairing committees and Specialist Bar Associations.'[155]

[146] The Bar Council, 'Who are the employed Bar?' (*The Bar Council*, 2020) <https://www.barcouncil.org.uk/support-for-barristers/employed-bar.html> accessed 12 June 2020.
[147] Bar Standards Board, 'Information about barristers' (*Bar Standards Board*, 2020) <https://www.barstandardsboard.org.uk/for-the-public/about-barristers.html> accessed 12 June 2020.
[148] Bar Standards Board, 'Report on Diversity at the Bar 2017' (*Bar Standards Board*, January 2018) <https://www.barstandardsboard.org.uk/uploads/assets/93b6a398-49eb-4664-afb9361b148d9ad2/diversityreport2017.pdf> accessed 10 June 2020.
[149] Bar Standards Board, 'Diversity at the Bar 2018' (*Bar Standards Board*, February 2019) <https://www.barstandardsboard.org.uk/uploads/assets/1fda3d4b-c7e3-4aa8-a063024155c7341d/diversityatthebar2018.pdf> accessed 10 June 2020.
[150] Bar Standards Board, 'Diversity at the Bar 2019' (*Bar Standards Board*, January 2020) <https://www.barstandardsboard.org.uk/uploads/assets/912f7278-48fc-46df-893503eb729598b8/Diversity-at-the-Bar-2019.pdf> accessed 10 June 2020.
[151] Pinto, Hudson, and McGowan (n 137).
[152] Bar Standards Board (n 149).
[153] Ibid.
[154] Bar Standards Board (n 150).
[155] Pinto, Hudson and McGowan (n 137).



[156]

Blackwell conveys that despite the changes regarding the appointment process of QC's, females remain less likely than males to be appointed.[157] However, this has been blamed on the fact females 'under-apply' for QC positions as they believe, stereotypically, male candidates will have preference.[158] Blackwell writes that the reformation of the selection process was designed to eradicate this attitude of females, yet this does not appear to be the case.[159] Notwithstanding, Blackwell identifies that there has also been a trend with regards to education.[160] This particularly relates to those with an Oxbridge background - with a large proportion of applicants being awarded pupillages due to these institutions appearing on their CV.[161]

Rogers notes the Bar promotes itself to prospective entrants and how a 'discrimination session' was timetabled at a recruitment event she had attended.[162] Would-be female and minority ethnic student entrants to the Bar were warned by panellists that they would face pressure to work in the 'caring, less financially secure areas', such as Family or Crime.[163] The fact this session was scheduled appears to suggest the Bar is aware sex discrimination does exist within its corridors.

[156] Data collected from n 146 – n 150.
[157] Michael Blackwell, 'Taking Silk: An Empirical Study of the Award of Queen's Counsel Status 1981–2015' (2015) 78(6) MLR 971.
[158] ibid.
[159] ibid.
[160] ibid.
[161] ibid.
[162] Justine Rogers, 'Representing the Bar: how the barristers' profession sells itself to prospective members' (2012) 32(2) LS 202.
[163] ibid.

There is further evidence to indicate the Bar has failed. In 2014 the Equality, Diversity and Social Mobility Committee of the Bar Council came to two strong conclusions regarding sex.[164] Firstly, their report determined that an overall balance between males and females at the Bar is 'unlikely to ever be achieved' (because of high rates of attrition of female barristers); and secondly, a balance of sexes amongst QCs and those barristers with over 15 years of experience is unlikely 'in the foreseeable future.'[165] Current Chair of the Criminal Bar Association (CBA), Goodwin, asserts she will have failed in her duty to the Criminal Bar, and ultimately to tomorrow's judiciary and the wider society if, over the next 25 years, there are only one or two more females who become chairs of the CBA.[166]

Further reports and surveys indicate not enough has been done to prevent sex discrimination. In 2016 the Bar Standards Board (BSB) published a report regarding women at the Bar. One major concern of women was the impact of having children.[167] Many considered maternity leave had a negative influence upon their practice, with impacts on work allocation, progression and income underlined.[168] Responses also indicated negative attitudes from employers of those returning from maternity leave as hindering a successful return to practice.[169] Hanretty and Vaughan also support this, outlining 'a hostile environment, inappropriate behaviours and discrimination in the allocation of work when they started their working lives.'[170]

The report also stated that women at the Bar were subjected to harassment.[171] In Howd [2017] a barrister was brought before a tribunal on eight charges of inappropriate conduct towards female colleagues at his former chambers. [172] The report indicated that two in every

[164] Martin Chalkley, 'Momentum Measures: Creating a Diverse Profession — Summary Findings' (*Report for the Bar Council of England & Wales*, July 2015), < https://www.barcouncil.org.uk/uploads/assets/bd3cbc4c-674d-4ca5-b0c27bd1585177e9/barcouncilmomentummeasurescreatingadiverseprofessionsummaryreportjuly2015.pdf> accessed 27 February 2020.
[165] ibid.
[166] The Bar Council, 'Roll on the next century for equality of opportunity at the Bar' (*Twitter*, 6 March 2020) <https://twitter.com/thebarcouncil/status/1235892893023379457> accessed 8 March 2020.
[167] Bar Standards Board, 'Women at the Bar' (*Bar Standards Board*, July 2016) < https://www.barstandardsboard.org.uk/uploads/assets/14d46f77-a7cb-4880-8230f7a763649d2c/womenatthebar-fullreport-final120716.pdf> accessed 1 March 2020.
[168] ibid.
[169] ibid.
[170] Hanretty and Vaughan (n 145) 429.
[171] Bar Standards Board (n 167).
[172] 4 WLR 54.

five respondents had suffered harassment at the Bar, with only one in five reporting it.[173] The most common reason cited for not reporting harassment was the fact that victims were conscious about the potential effects upon their career, in addition to the prevailing attitudes at the Bar towards harassment and the reporting of it.[174] A further concern was that half of those who reported harassment were not satisfied with the response of the Bar to their allegations.[175]

Women Take Time Off For Children

A further reason why women are discriminated in the legal sector is due to the fact they leave to start a family, which arguably means putting their parental role before their career.[176] Webley and Duff pay close attention to the human capital theory – the dominant theory that seeks to explain why women are responsible for their own lack of progression, indicating that if women invest more heavily in their career, they will 'reach the higher echelons of the profession.'[177] Case law illustrates that sex discrimination lingers within firms due to the prospect of solicitors having time off to start a family. In Sinclair Roche & Temperley two female solicitors were awarded £400,000 and £500,000 respectively in damages after making a discrimination claim against their employer, due to their lack of progression within the firm and limited opportunities compared to male solicitors. [178] Guyard-Nedelec regards maternity, motherhood and general family responsibilities as the most frequent reasons why women do not renew their practising certificate, whereas for men it is generally due to anticipated retirement.[179] However, flexible working policies are increasingly being offered amongst firms where appropriate.[180] For example, Allen & Overy LLP introduced part-time working policies for full equity partners in a deliberate bid to retain more women.[181]

[173] Bar Standards Board (n 167).
[174] ibid.
[175] ibid.
[176] Liz Duff and Lisa Webley, 'Women Solicitors as a Barometer for Problems within the Legal Profession - Time to Put Values before Profits' (2007) 34 JLS 377.
[177] ibid.
[178] UKEAT/0168/05.
[179] Alexandrine Guyard-Nedelec, 'A Legal Maternal Wall? No Revolution in Motherhood for Women Lawyers in England' (2018) 23 FJBS 8.
[180] Jan Miller, 'Female solicitors fear for promotion prospects' (2010) 160 NLJ 434.
[181] ibid.

Former chairwoman of the Association of Women's Solicitors, McConnell, indicated that it was a target to have more firms examine the benefits that flexible working hours can bring.[182] Nevertheless, Guyard-Nedelec outlines there are increased difficulties associated with part-time work for women.[183] He argues juggling family and work often leads to career changes – from a mere change of specialism to the decision to work in a completely different sector or sometimes, to stop working altogether.[184] Conversely, flexible working at the Bar is dissimilar.[185] As Sommerlad illustrates, 'the long working hours and workaholism of solicitors places women on the side of deviance due to parenting responsibilities.'[186] However, barristers are at the timetable of the court, which makes part-time working difficult.[187] Guyard-Nedelec voices barristers cannot juggle their responsibilities due to the unpredictability– namely the unknown of how long the case will be, whether it will come in early, late, or be rescheduled.[188] With regards to discrimination, the Bar Standards Board (BSB) revealed that 48.6% of female barristers who had childcare responsibilities had experienced discrimination at the Bar.[189]

Numbers Attending University and Further Study

A gap appears to exist between male and female numbers studying Law. In 2017 the Law Society illustrated that 18,850 students were accepted to study LLB Law in the UK.[190] Of this number, 68.8% were female and 31.2% were male.[191] In 2018 the trend of more females continued, with 17,565 successful applicants compared to 8,510 male applicants.[192] The data below reflects the number of male and female students undertaking the LPC (Legal Practice

[182] ibid.
[183] Guyard-Nedelec (n 183)
[184] ibid.
[185] Hilary Sommerlad, "Women Solicitors in a Fractured Profession: Intersections of Gender and Professionalism in England and Wales" (2002) 9 IJLP 217.
[186] ibid, pp.217-218.
[187] Guyard-Nedelec (n 183) 7.
[188] ibid.
[189] Bar Standards Board (n 167)
[190] The Law Society, 'Undergraduates and graduates in Law' (*The Law Society*, 2018) <https://www.lawsociety.org.uk/law-careers/becoming-a-solicitor/entry-trends/> accessed 1 March 2020.
[191] ibid.
[192] Katie King, 'New female law students outnumber males two to one for first time ever' (*Legal Cheek*, 12 January 2018) <https://www.legalcheek.com/2018/01/new-female-law-students-outnumber-males-two-to-one-for-first-time-ever/> accessed 1 March 2020.

Course) and BPTC (Bar Professional Training Course). A consistent theme at BPTC level is that female students have continued to outnumber male students.[193] This trend was further observed across the LPC.[194]

Figure 6: Number of male and female students undertaking the LPC and BPTC 2015-2017

[195]

Course	Year	Male numbers	Female numbers	% Difference
BPTC	2015	363	445	22.58
BPTC	2016	346	460	32.94
BPTC	2017	368	485	31.79
LPC	2015	3952	6729	70.26
LPC	2016	4490	8579	91.06
LPC	2017	4490	8579	91.06

Conclusion

Research indicates that sex discrimination appears to be ubiquitous within the legal sector. Whilst Heilbron, Butler-Sloss and Hale appear to have broken the glass ceiling in relation to judges, there is evidence to indicate the same cannot be said with the Bar and solicitors.[196] Unconscious bias is regarded as a fundamental reason why women do not achieve senior partnership.[197] Notwithstanding, there appears to have been a shift in the overall number of

[193] Bar Standards Board, 'BPTC Key Statistics 2019' (*Bar Standards Board*, 2019) <https://www.barstandardsboard.org.uk/uploads/assets/b3a1297e-30c2-4798-bd6c68d3305358df/bptckeystatisticsreport2019-appendices.pdf> accessed 20 March 2020.

[194] Solicitors Regulation Authority, 'Regulation and Education Authorisation and Monitoring Activity September 2017—August 2018' (*Solicitors Regulation Authority*, 2018) <https://www.sra.org.uk/globalassets/documents/sra/research/monitoring-activity-2017-2018.pdf?version=48e48c> accessed 11 June 2020.

[195] Data collected from (n 193)

[196] LawCareers.Net, 'Feminist lawyers: the fight for gender equality in the legal profession' (*LawCareers.Net*, 6 June 2017) <https://www.lawcareers.net/Explore/Features/06062017-Feminist-lawyers-the-fight-for-gender-equality-in-the-legal-profession> accessed 16 September 2020.

[197] The Law Society, 'Influencing for Impact: The need for Gender Equality in the Legal Profession' (*The Law Society*, March 2019) <https://www.law.ox.ac.uk/sites/files/oxlaw/influencing_for_impact_-_the_need_for_gender_equaluty_in_the_legal_profession_-_women_in_leadership_in_law_report.pdf> accessed 10 September 2020.

women becoming solicitors, barristers, judges and indeed law students at both undergraduate and postgraduate level. Nevertheless, this does not detract from the fact discrimination still exists.[198] This is particularly the case regarding sexual harassment, with cases rising by 152% in less than five years.[199] The desire to start a family is a further reason for discrimination against women, with a suggestion that women put children before their career, which ultimately results in reduced numbers excelling within their specialist field.[200] However, in an attempt to combat sex discrimination, firms have offered part-time working practices to retain women.[201] Overall, it is evident that discrimination against the protected characteristic of sex still exists across the legal sector. Whilst increased diversity can be seen throughout the legal sector, even greater strides are still required.

[198] Thomas Connelly, 'Over half of female lawyers have experienced or witnessed sexism at work' (*Legal Cheek*, 18 February 2020) <https://www.legalcheek.com/2020/02/over-half-of-female-lawyers-have-experienced-or-witnessed-sexism-at-work/> accessed 16 September 2020.
[199] Connelly (n 28).
[200] Duff and Webley (n 180).
[201] Miller (n 184).

Modern Social Security

and Beveridge's Giants

Luke Gray (2021) SSLJ 2, 44-60

LLM LPC Student, University of Sunderland

Abstract

The system of social security in the UK is comprised largely of Universal Credit. This benefit is the newest version of social security for the UK but the aims are largely similar to those proposed by William Beveridge in 1942. Universal Credit was intended to simplify the system of social security in the UK, whilst also ensuring claimants receive the best possible service along with the help and support they need. However, despite these intentions Universal Credit has faced a number of issues and criticism, not only from claimants but also from organisations such as the Trussell Trust, the Joseph Rowntree Foundation and Shelter. Universal Credit is still are facing these issues with little reform in sight. This research will explore and analyse Universal Credit and the issues inherent within it along with the consequences of these issues. This research will also analyse whether these benefits still tackle William Beveridge's social evils.

Keywords

Social Security; Universal Credit; Sanctions; Poverty; Digital by Default

The system of social security introduced after the Beveridge report was intended to tackle the giants of "Want…Squalor and Idleness".[1] It was thought that if people were helped into a position where they could help themselves, the level of poverty, homelessness and unemployment would fall. This led to Beveridge's belief that social security should 'not stifle incentive, opportunity [or] responsibility'.[2] Instead, the government were to offer help and support to those most in need in exchange for 'service and contribution'.[3] Since the release of the Beveridge report, there have been a number of attempts at building a comprehensive system of welfare including the introduction of Jobseekers Allowance, Employment Support allowance and Child Tax Credits amongst others, now referred to as legacy benefits.[4] However, the system of welfare in the early 2000's was complex and lacking incentives for people to move into work.[5] As such, the 2010 coalition government proposed Universal Credit in an attempt to simplify the system of legacy benefits.[6]

Universal Credit, introduced under s 1 of the Welfare Reform Act 2012 and managed by the Department of Work and Pensions (DWP), is the newest system of benefits to attempt to fulfil Beveridge's ideals. This was to abolish 6 legacy benefits including; income-based Jobseekers Allowance, income-based Employment Support Allowance, Income Support, Housing Benefit, Council Tax Benefit and Child and Working Tax Credits.[7] This was designed to achieve a number of aims under the Conservative-Liberal Democrat coalition government. The first of these was to make the system of benefits fairer and affordable for claimants. The second was to 'reduce poverty, worklessness and welfare dependency'.[8] The final aim was to reduce the levels of fraud and error in the old system of legacy benefits.[9] The DWP also lists one of their priorities to be maintaining an effective system of welfare in order to enable people to achieve independence financially by assisting and guiding claimants into employment, whilst also increasing security and affordability for claimants.[10] They also list one of their

[1] Sir William Beveridge, *Social Insurance and Allied Services* (Her Majesty's Stationary Office 1942) 6.
[2] ibid 7.
[3] ibid 6.
[4] Department for Working Pensions, '2010 To 2015 Government Policy: Welfare Reform' (*GOV.UK* 2020) <https://www.gov.uk/government/publications/2010-to-2015-government-policy-welfare-reform/2010-to-2015-government-policy-welfare-reform> accessed 8 March 2020.
[5] ibid.
[6] ibid.
[7] Welfare Reform Act 2012 s 33.
[8] Department for Working Pensions (n 4).
[9] ibid.
[10] Department for Working Pensions, 'About Us' (*GOV.UK* 2020)

responsibilities as understanding and resolving the causes of poverty instead of simply dealing with the symptoms thereof.[11]

Since the introduction of Universal Credit there has been a considerable amount of criticism from all sides of parliament and independent organisations including the Trussell Trust, Shelter and the Joseph Rowntree Foundation. The issues facing Universal Credit according to these groups are wide ranging and contrary to its aims. Philip Alston described Universal Credit as a 'potentially major improvement in the system' but that the issues surrounding it means 'it is fast falling into Universal Discredit'.[12]

UN Special Rapporteur

The United Nations (UN) Special Rapporteur's report in 2018, conducted by Professor Phillip Alston, highlighted a number of issues surrounding the system of Universal Credit and the levels of poverty facing the UK.[13] Commissioned by the UN Human Rights Council, the Special Rapporteur reports any alleged human rights violations or abuses thereof in any given country.[14] The UN Special Rapporteur's report on extreme poverty in the UK was especially critical of Universal Credit and the government for their handling of the system of welfare. Professor Phillip Alston found a number of issues with Universal Credit, ranging from the delay in payments to the levels of rising poverty, the digital by default system and the 5-week wait among other issues.[15]

Amber Rudd, former Minister for the DWP, responded to this stating that she thought the 'UN rapporteur's report [was] wrong'.[16] Whilst Alston was conducting his research, he found that Ministers were 'almost entirely dismissive' of the impact of Universal Credit. [17] Alston went on to say that when asked about the issues surrounding Universal Credit, ministers

<https://www.gov.uk/government/organisations/department-for-work-pensions/about> accessed 9 March 2020.

[11] ibid.

[12] Professor Philip Alston, *Statement on Visit to the United Kingdom: United Nations Special Rapporteur on Extreme Poverty and Human Rights (United Nations 2018)* 4.

[13] ibid p1.

[14] United Nations, 'OHCHR | Special Procedures of The Human Rights Council' (*Ohchr.org* 2019) <https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> accessed 3 November 2019.

[15] Alston (n 12)

[16] HC Deb 19 November 2018, vol 649, col 570.

[17] Alston (n 12) 5.

blamed 'political opponents for… sabotage… and that Universal Credit was unfairly blamed for problems rooted in the old legacy system of benefits'.[18]

Reduce the Level of Poverty

One of the major aims of Universal Credit was to reduce the levels of poverty in the UK.[19] However, research from the Trussell Trust shows the opposite outcome. The trust has conducted a variety of research into Universal Credit and the supposed issues facing it. Their main focus has been the use of foodbanks across the United Kingdom. Their research shows an increase in the use of foodbanks nationally of 13% or 52% where Universal Credit has been rolled out for 12 months or more.[20] Given the increase in the necessity and reliance on foodbanks, this would suggest an increase in the levels of poverty rather than a decrease since the introduction of Universal Credit.

The number of emergency food parcels handed out has also increased by a total of 73.4% in the five years between 2013/14 and 2018/19 from 913,138 in 2013/14 to 1,583,668 in 2018/19.[21] Research also shows that in the year 2018/19 alone the amount of emergency food parcels given out increased by 30%.[22] The main reasons for this sharp increase are; low income, accounting for 33.1% of referrals, delays in benefit payments, accounting for a further 20.3% and 17.3% as a result of changes to benefits.[23] In 2018, when asked about the increase in the use of foodbanks and emergency food parcels, former Prime Minister, Theresa May, stated that the government 'do not want to see anybody having to use food banks' and that they have listened to concerns over Universal Credit and changed its arrangements accordingly.[24] However, with these issues still present two years later it would seem as though these concerns have yet to be addressed. Research from the Trussell Trust also shows that

[18] ibid 5.
[19] Department for Working Pensions (n 4).
[20] The Trussell Trust, 'The next stage of Universal Credit' (*TrussellTrust.org* 2018) <https://www.trusselltrust.org/next-stage-universal-credit/> accessed 9 March 2020.
[21] The Trussell Trust, 'Record 1.6M Food Bank Parcels' (*TrussellTrust.org* 2020) <https://www.trusselltrust.org/2019/04/25/record-1-6m-food-bank-parcels/> accessed 8 March 2020.
[22] The Trussell Trust, '#5weekstoolong: Why We Need to End the Wait for Universal Credit' (*TrussellTrust.org* 2019) < https://www.trusselltrust.org/next-stage-universal-credit/> accessed 8 March 2020.
[23] The Trussell Trust (n 21).
[24] HC Deb 09 May 2018, vol 640, col 675.

those most likely to be in need of a food bank are single male households, single parent households and the disabled.[25] When challenged about this, Theresa May stated, that the government delivers a system that supports vulnerable people, whilst also encouraging people to get into work.[26] May went on to say that work was the best way out of poverty in keeping with the intention of Universal Credit to decrease the levels of 'worklessness'.[27]

It would seem that this goal has been achieved to some extent. According to the Office for National Statistics, the level of unemployment when Universal Credit was introduced in 2013 stood at 7.8%.[28] As of December 2019, that figure stands at 3.8%, the lowest level since 1974.[29] However, whilst it seems the government have made progress with one of their aims of Universal Credit in relation to the levels of unemployment, the levels of poverty have not decreased. Research has shown that the levels of poverty have increased, showing that Theresa May's belief that work is the best way out of poverty is not the case.

The difficulty in defining poverty is that there is no singular or definitive definition of poverty.[30] The government have broken poverty into two distinct categories. The first is relative poverty where a person has an income less than 60% of the median annual household income for that year.[31] The second category is absolute poverty where a person has an income of less than 60% of the median annual household income for 2010/11, uprated after inflation.[32] The Social Metrics Commission found that as of 2017/18 there were 14.3 million people in poverty in the UK including 8.3 million working age adults and 4.6 million children.[33] This represents 22% of the overall population, 34% of all children and 53% of lone parent families in the UK.[34] To combat this, the Joseph Rowntree Foundation (JRF) proposed the introduction of a Minimum Income Standard (MIS) to ensure people have enough money to

[25] Rachel Loopstra & Doireann Lalor, *Financial Insecurity, Food Insecurity, and Disability: The Profile of People Receiving Emergency Food Assistance from The Trussell Trust Foodbank Network in Britain* (Oxford University) 15-20.
[26] HC Deb 12 September 2018, vol 646, col 745.
[27] See, ibid and Department for Working Pensions (n 4).
[28] Office for National Statistics, 'Unemployment Rate (Aged 16 And Over, Seasonally Adjusted) - Office for National Statistics' (*Ons.gov.uk* 2020) <https://www.ons.gov.uk/employmentandlabourmarket/peoplenotinwork/unemployment/timeseries/mgsx/lms> accessed 8 March 2020.
[29] ibid.
[30] Brigid Francis-Devine, *Poverty in the UK: Statistics* (House of Commons Library 2019) 7.
[31] ibid 7.
[32] Ibid.
[33] Social Metrics Commission, *Measuring Poverty* (Social Metrics Commission 2019) 28.
[34] ibid 28.

have a 'decent' standard of living. [35] They believe that with this there would be three levels of poverty; MIS, income below MIS/not enough money and destitution.[36] The JRF found that in 2019, a lone parent with two children being supported by Universal Credit, needed to earn £28,700 per annum to meet the MIS and achieve a decent standard of living, whereas a couple with two children supported by Universal Credit only need to earn £17,000 each per annum to achieve the same standard.[37]

Research from the Trussell Trust has also shown that in 2018, only 8% of Universal Credit claimants thought their full payment was enough to pay their living costs.[38] In comparison, the same research shows that 59% of claimants thought their full Universal Credit payment was not enough. [39] Only 6% of respondents to the research who stated they had no issues with Universal Credit thought the full payment was enough.[40] For this 6%, Universal Credit is working as it was intended to. Despite this, these people still need access to foodbanks to make ends meet.[41] This clearly shows that even when Universal Credit works as it should, it is still not sufficient to work effectively. Given that the welfare state was designed to support people in poverty, 63% of claimants stated they received no support or assistance in relation n to issues arising from Universal Credit and those who did receive support was most likely in the form of foodbank vouchers.[42]

5-week Wait

The issues surrounding Universal Credit are not simply limited to the awards people receive. The 5-week wait for a claimant's first payment under Universal Credit has left people struggling to get by.[43] The Trussell Trust's research shows that 70% of claimants stated that

[35] Donald Hirsch, *A Minimum Income Standard for the United Kingdom in 2019* (Joseph Rowntree Foundation 2019) 3.
[36] Joseph Rowntree Foundation, 'What Is Poverty?' (*JRF.org* 2020) <https://www.jrf.org.uk/our-work/what-is-poverty> accessed 9 February 2020.
[37] Hirsch (n 35) 9.
[38] The Trussell Trust, *Left Behind: Is Universal Credit Truly Universal?* (The Trussell Trust 2018) 22.
[39] ibid 22.
[40] Ibid.
[41] ibid 23.
[42] ibid 13-14.
[43] Trussell Trust (n 22) 12.

'debt was a direct outcome' of the 5-week wait time for their first payment. [44] The same research shows that 56% of claimants face issues surrounding their housing including rent arrears and eviction.[45]

This results from the fact that the housing element of a claimant's benefits used to be paid directly to their landlord for ease of the claimant. However, under Universal Credit, this is paid directly to the claimant and not the landlord causing issues for claimants that are unaware they are under an obligation to pay their landlord. [46] This obligation can only be changed if it can be established that the claimant cannot effectively manage their finances.[47] This issue affects a number of people and has led to 43% of private landlords placing a bar on renting property to those on housing benefit, with a further 18% of landlords stating they would prefer not to let to these claimants.[48] To rectify this, the Scottish Government allow claimants to have their housing element of Universal Credit directly to their landlord.[49] They also allow claimants to be paid fortnightly as opposed to monthly in order to allow claimants to better manage their payments. [50]

The number of claims from landlords resulting in repossessions by county court bailiffs has fluctuated since the introduction of Universal Credit. As of 2013 the number of these claims stood at 37,792.[51] This figure peaked in 2015 with a total of 42,729 claims resulting in repossession by bailiffs.[52] However, since then the number of these claims has decreased relatively quickly, standing at 33,534 in 2018.[53] This number is set to have decreased further in 2019 with provisional figures estimated to be at 30,804.[54] The Trussell Trust also found that 57% of claimants developed mental or physical health issues as a result of the 5-week wait

[44] The Trussell Trust (n 38) 9.
[45] Ibid.
[46] Department for Working Pensions, 'Universal Credit And Rented Housing: Guide For Landlords' (*GOV.UK* 2020)<https://www.gov.uk/government/publications/universal-credit-and-rented-housing--2/universal-credit-and-rented-housing-guide-for-landlords#universal-credit-payments> accessed 31 March 2020.
[47] ibid.
[48] Shelter, *From the Frontline Universal Credit and the Broken Housing Safety Net* (*Shelter* 2019) 5.
[49] Scottish Government, 'Social Security: Universal Credit (Scottish Choices)' (*Gov.scot* 2020) <https://www.gov.scot/policies/social-security/universal-credit/> accessed 16 March 2020.
[50] ibid.
[51] Ministry of Justice, 'Landlord Possession Actions in the County Courts of England and Wales, 1990-2020: Table 4, (*Gov.uk* 2020) <https://www.gov.uk/government/statistics/mortgage-and-landlord-possession-statistics-january-to-march-2020> accessed 14 May 2020.
[52] ibid.
[53] ibid.
[54] ibid.

time.[55] However, whilst Universal Credit has a built-in wait of 5-weeks for initial payments, there are instances where claimants have had to wait in excess of 12 weeks with an average wait time of 7.5 weeks for most claimants.[56] A House of Commons select committee report for the DWP on Universal Credit stated that, as of March 2018, the DWP failed to pay 21% of claimants their full award on time with an additional 13% not receiving their payment on time at all.[57] The National Audit Office (NAO) estimated that the number of late payments from 2017 could potentially triple in number during 2018.[58]

The Trussell Trust have looked more recently at the 5-week wait for initial payments and found that in order to manage the wait, 66% of claimants were forced to borrow money from their family members, 31% of claimants were unable to afford to heat their homes and 30% of claimants were left with insufficient money to afford to eat.[59] As such, it seems that the 5-week wait for payments has had a profound effect on claimants. This has led the JRF to the conclusion that the 5-week wait time is too long and recommendations to scrap or at least reduce the 5-week wait time from Shelter[60] and the Trussell Trust.[61]

In relation to the 5-week wait, former Prime Minister, Theresa May stated the government were decreasing the waiting time for a claimant's first payment.[62] Weeks later, responding to similar questions in the commons, May, stated that claimants do not need to wait for their first payment if they need to access it earlier.[63] She assured claimants they could get all of their first payment up front.[64] However, Jeremey Corbyn stated this was merely a loan available for some claimants to be re-paid at a later date as a deduction from future Universal Credit payments.[65] In a letter from Esther McVey, former Minister for Work and Pensions, to Frank Field, Chair of the Work and Pensions Select Committee it was made clear that the

[55] The Trussell Trust (n 39) 10.
[56] Gateshead Council, '*"It's Hitting People That Can Least Afford It the Hardest": The Impact of the Roll Out of Universal Credit in Two North East England Localities: A Qualitative Study* (Newcastle University 2018) 15.
[57] House of Commons Committee of Public Accounts, *Universal Credit* (House of Commons 2018) 12.
[58] National Audit Office, *Rolling out Universal Credit* (Department for Work & Pensions 2018) 40.
[59] Trussell Trust (n 22) 14.
[60] Shelter (n 49) 56.
[61] Trussell Trust (n 22) 37.
[62] HC Deb 24 October 2018, vol 648, col 270.
[63] HC Deb 05 December 2018, vol 650, col 880.
[64] ibid 880-881.
[65] See, ibid and Department for Working Pensions, Letter from Esther McVey to Frank Field (*parliament.uk* 12 September 2018) <https://www.parliament.uk/documents/commons-committees/work-and-pensions/Letter-from-Esther-McVey-MP-re-NAO-report-on-tackling-problem-debt.pdf< accessed 1 April 2020.

reason for the need to have this loan re-paid was an obligation to the tax payer to recover these advances 'without undue delay'.[66] However, the JRF have found that repaying these advances contributes to rising destitution.[67] This results from the short window for the repayment of these loans which is taken through a deduction in a claimants Universal Credit entitlement.[68] For many claimants the only alternative to this is to receive no money during this period which can often lead to rent arrears, further debt and 'exacerbate an already difficult situation' for those most in need.[69] This shows clear divide on Universal Credit's issues within parliament, potentially validating the Special Rapporteur that the government is in 'denial'.[70] To address this issue, there is currently a private members bill before parliament designed to place a duty on the relevant Secretary of State to prevent evictions as a result of Universal Credit claimants suffering from rent arrears and similar purposes.[71] However, this bill has only passed the first reading, with the second reading scheduled for February 2021.[72] As such, it seems there is little light at the end of the tunnel for claimants suffering eviction as a result of Universal Credit and rent arrears.

Rough Sleeping and Destitution

This has also led to an increase in the level of rough sleeping since the introduction of Universal Credit. Statistics from the Ministry of Housing, Communities and Local Government show that in 2010, with the proposal of Universal Credit, there was an estimated 1,768 people sleeping rough[73]. When Universal Credit was introduced in 2013, this number was at 2414 rough sleepers.[74] These statistics also show that in 2018 this number had risen by 165% since 2010 to 4,677.[75] These figures show an exponential increase in the levels of rough sleeping

[66] ibid.
[67] Joseph Rowntree Foundation, *Briefing: where next for Universal Credit and tackling poverty?* (Joseph Rowntree Foundation 2019) 4.
[68] Department for Working Pensions (n 65).
[69] Shelter (n 49) 8.
[70] Alston (n 12) 1.
[71] UK Parliament, Private Member's Bill: Evictions (Universal Credit Claimants) Bill 2019-21 (*Parliament.uk* 2020) <https://services.parliament.uk/bills/2019-21/evictionsuniversalcreditclaimants.html> accessed 17 May 2020.
[72] ibid.
[73] Ministry of Housing, Communities & Local Government, *Rough Sleeping Snapshot in England* (Ministry of Housing, Communities & Local Government 2020).
[74] ibid 4.
[75] Ibid.

since the proposal and introduction of Universal Credit. However, this figure dropped by 2% between 2017-18, and is estimated to have decreased by a further 9% from 2018 totalling 4266, this is still 141% higher than 2010 when Universal Credit was proposed. [76] Whilst there are less individuals sleeping rough, in 2019 there was an increase in the number of households sleeping rough during the application process for housing by 7.8% from 2018.[77]

The system of Universal Credit has also impacted the levels of destitution in the UK. The JRF have defined destitution as any person that lacks two or more of the following; adequate food, shelter, heating or lighting for their home for 5 days or more, appropriate clothing and footwear based on the weather, basic toiletries or if the income of a person is so low that they cannot afford these.[78] In 2017, the JRF estimated that 1,550,000 people met the definition of destitution, of these, 365,000 were children.[79]

Digital by Default

The digital by default service for Universal Credit has also caused a number of issues. The DWP intended to make the service more efficient for users and claimants whilst cutting costs. It was designed to be 'intuitive enough for most people to use without any further intervention'.[80] However, Alston described this system as a 'digital barrier that effectively obstructs' claimants. [81] He also drew from the DWPs own research into the success of the digital by default system. This found that only 54% of claimants were able to register their claim online without help and 21% requiring help to register a claim.[82] The research goes on to show that 25% of claimants could not apply online at all due to difficulties using or accessing a computer.[83] This research also shows that 39% of claimants were unaware that

[76] Homeless, 'Rough Sleeping - Our Analysis' (*Homeless.org*) <https://www.homeless.org.uk/facts/homelessness-in-numbers/rough-sleeping/rough-sleeping-our-analysis> accessed 17 April 2019 and Ministry of Housing, Communities & Local Government (n 73).
[77] Ministry of Housing, Communities & Local Government, *Statutory Homelessness, April to June (Q2) 2019: England (*Ministry of Housing, Communities & Local Government 2019) 13.
[78] Joseph Rowntree Foundation, *Destitution in the UK 2018* (Joseph Rowntree Foundation 2018) 2.
[79] ibid p13.
[80] Department for Work and Pensions, *Digital Strategy* (Department for Work and Pensions 2012) 13.
[81] Alston (n 12) 8.
[82] ibid p8.
[83] Department for Work and Pensions, *Universal Credit Full-Service Survey* (Department for Work and Pensions 2018) 13.

Universal Credit is an 'online and self-service system'.[84] The findings also suggest that the process of making a claim online was more difficult for those with long term health conditions and the elderly.[85]

The DWP are reluctant to allow alternative methods of application and stated that these alternatives should be 'kept to a minimum' wherever possible. [86] The DWP also work from the presumption that the majority of claimants are 'digitally skilled', despite the resounding evidence to the contrary.[87] As such, claiming Universal Credit has been made almost impossible for some claimants. According to Ofcom, in 2018, when asked what the reasons for not completing government processes online; 8% of semi-skilled or unskilled workers and the unemployed were not aware it could be done, 11% don't feel safe giving out information online, 25% prefer to fill out a paper form and 30% stated they preferred verbal contact.[88] These figures increased from 2017 with a steady 4% of people stating that the websites are too difficult to use.[89] According to figures from Lloyds Bank, 11.9 million people lack at least 1 in 5 essential digital skills for life, up from 11.3 million in 2018.[90] As such, it would seem the DWP's presumption of digitally skilled claimants was out of touch with the reality of the situation. Whilst the digital by default system appears to have had good intentions; to save time, money and simplify the process of making a claim, its implementation has not been so effective seemingly causing more problems for those most vulnerable and disadvantaged.

However, the government have responded to the issues surrounding Universal Credit. In 2018 they announced in their budget that they were increasing the funding for Universal Credit by £1.7 billion annually.[91] The JRF stated that this change is welcome but that this is not enough.[92] Neil Gray MP stated that the further delay to 2024/25 for the full roll-out of Universal Credit will make its completion seven years late and at a potential further cost of

[84] Ibid.
[85] ibid 34-35.
[86] Department for Work and Pensions, *Universal Credit: Welfare That Works* (Her Majesty's Stationary Office 2010) 38.
[87] Alston (n 12) 7.
[88] Ofcom, 'Interactive Data' (*Ofcom.org* 2020) <https://www.ofcom.org.uk/research-and-data/media-literacy-research/adults/adults-media-use-and-attitudes/interactive-tool> accessed 16 February 2020.
[89] ibid.
[90] Department for Digital, Culture, Media and Sport, *UK Consumer Digital Index 2019* (Lloyds Banking Group 2019) 27.
[91] Her Majesty's Treasury, *Budget 2018: Universal Credit* (Her Majesty's Stationary Office 2018) 1.
[92] Rowntree (n 62) 2.

£500 million, suggesting that the reason for this new delay was to avoid further hardship to claimants.[93] In response to this, Will Quince, Parliamentary Under-Secretary for the DWP stated that the extra cost associated with the delay would go to 'the pockets of our claimants' and act as transitional protection moving forward. [94] However, with this further delay to the roll-out of Universal Credit and the issues inherent within the system, it seems the DWP have yet to learn their lesson and help claimants effectively.

Sanctions

Another issue inherent in the Universal Credit system is the issuing of sanctions to claimants. Intended as an incentive for claimants to meet their responsibilities, claimants will incur a reduction in their benefit award for a variable period when they fail to meet these responsibilities. [95] However, this is not always the case. As early as 2012 there were concerns raised about the impact of sanctions on Universal Credit claimants including sanctions being applied more disproportionately to vulnerable claimants and the wellbeing of claimants with longer sanctions made against them. [96] In 2017, benefit sanctions accounted for 17% of all household reported to have a loss of income, surpassed only by a loss of benefits accounting for 21%.[97]

Despite concerns over the use of sanctions, the number of sanctions issued against claimants has risen exponentially. In the period between May 2016 and April 2017, a total of 5911 sanctions were issued against claimants.[98] In the same period between 2017/18 this number rose to a total of 31,592, more than 5 times than the previous year. [99] The number of sanctions issued between the same period in 2018/19 also rose to 133,988, over 4 times the year

[93] HC Deb 04 February 2020, Vol 671, Col 175-176.
[94] Ibid 176.
[95] See, Department for Work and Pensions, *Universal Credit: Welfare That Works* (Her Majesty's Stationary Office 2018) 28 and Gov.uk, 'Understanding Universal Credit - Sanctions' (*gov.uk* 2020) <https://www.understandinguniversalcredit.gov.uk/already-claimed/sanctions/> accessed 1 April 2020.
[96] Social Security Advisory Committee, *Universal Credit and Conditionality* (Social Security Advisory Committee 2012) 3-14.
[97] Loopstra & Lalor (n 25).
[98] Department for Work and Pensions, "Benefit Sanctions Statistics" (*gov.uk* 2020) <https://www.gov.uk/government/statistics/benefit-sanctions-statistics-to-october-2019-experimental> accessed 1 April 2020.
[99] ibid.

previously. [100] In October 2015, the total number of claimants with sanctions still affecting their Universal Credit payments was 6,956 accounting for 6.31% of all claimants.[101] In October 2016, the percentage of claimants suffering from sanctions dropped to 4.09%, however, the number of claimants affected stood at 11,934.[102] As of October 2019, the number of claimants with sanctions against them stood at 40,018, the highest ever recorded but only accounting for 2.57% of total number of claimants receiving Universal Credit.[103] Whilst it seems the percentage of claimants with sanctions is decreasing the amount of people actually affected by them increases year on year.

The length of these sanctions differs considerably as well with the minimum sanction lasting up to 7 days. Until recently, the maximum sanction allowed under the Universal Credit Regulations 2013 was 1095 days or 3 years without payment. [104] However, this has now changed with the current maximum sanction length standing at 182 days or 6 months. [105] In December 2015, 3,220 sanctions were issued to last 4 weeks or less with the majority lasting between 8 and 14 days.[106] As of October 2019, this number had risen to 12,989 with the majority, some 4,105, lasting between 22 and 28 days.[107] The number of higher-level sanctions has also increased over the course of Universal Credit's roll out. As of December 2019, only 43 sanctions were issued to last 27 weeks or more.[108] In November 2019, this number had risen to 1,143 with the highest number of sanctions of this length occurring in March 2018 at 1,726.[109]

In evidence submitted to House of Commons Work and Pensions Select Committee, the JRF acknowledged that sanctions in their very nature must threaten some level of hardship but that this should never result in destitution.[110] They also state that sanctions should only be

[100] ibid.
[101] ibid.
[102] ibid.
[103] ibid.
[104] s 102(2)(a)(iii).
[105] The Jobseeker's Allowance and Universal Credit (Higher-Level Sanctions) (Amendment) Regulations 2019 s 3(a)(i).
[106] Department for Work and Pensions (n 98).
[107] ibid.
[108] ibid.
[109] ibid.
[110] Joseph Rowntree Foundation, 'Written Evidence from Joseph Rowntree Foundation (ANC0068)' (*parliament.uk* 2018) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/work-and-pensions-committee/benefit-sanctions/written/83494.pdf> accessed 12 April 2020 25.

used as a last resort.[111] Giving evidence in the same report, Citizens Advice stated that those suffering from sanctions are more likely to start borrowing money, fall into arrears and cut spending on essential items such as food.[112] The Child Action Poverty Group also gave evidence on the impact of sanctions, showing that sanctions cause 'significant damage to physical and mental health'.[113] The effect of sanctions is so adverse, the Work and Pensions Select Committee stated they are 'counterproductive'.[114] In response to this the government have changed the maximum length a sanction can be issued from 3 years to 6 months, effective from 27th November 2019.[115] However, as the use of sanctions has increased and is still growing it seems more active reform is needed.

Conclusion

The UN Special Rapporteur has been especially critical of the government's handling of Universal Credit, referring to is as a system of 'Universal Discredit', not least as a result of the rise in poverty and homelessness but also with the ineffectiveness of the systems in place designed to help claimants. [116] With the Trussell Trust reporting an increase in foodbank usage of 52%[117] and a 73.4% increase in emergency food parcels, it is hard to see how the government believe they deliver a system that works for those most in need and most vulnerable and encourage them into work.[118]. Despite this the government have reduced the levels of unemployment to their lowest level since 1974. However, with 14.3 million people in poverty including 4.6 million children, it seems a small victory for Universal Credit and the government, especially when taken in conjunction with the revelation that only 6% of

[111] ibid 4.
[112]Citizens Advice, 'Written Evidence from Citizens Advice (ANC0067)' (*parliament.uk* 2018) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/work-and-pensions-committee/benefit-sanctions/written/83492.pdf> accessed 12 April 2020 5.3.
[113] Child Action Poverty Group, 'Written Evidence from Child Poverty Action Group (ANC0056)' (*parliament.uk* 2018)<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/work-and-pensions-committee/benefit-sanctions/written/83464.pdf> accessed 12 April 2020 1(c).
[114] House of Commons Work and Pensions Committee (n 98).
[115] Jobseeker's Allowance s 1 (n 105).
[116] Alston (n 12) 4.
[117] See, The Trussell Trust (n 20) and The Trussell Trust (n 21).
[118] HC Deb 12 September 2018, vol 646, col 745.

Universal Credit claimants have had no issues with Universal Credit and believe their full award is enough.[119]

The 5-week wait built into Universal Credit has also caused its own issues for claimants. With 70% of claimants suffering debt as a direct outcome of the 5 week wait, 56% of claimants facing rent arrears and eviction and 57% of claimants developing mental or physical health issues as a result of the 5-week wait it seems hard to justify this.[120] Former Prime Minister, Theresa May stated that claimants could receive their first payment early. However, it was only when Jeremey Corbyn and later Esther McVey, former Minister for Work and Pensions, explained this was a loan to be repaid as deductions from future payments that the reality becomes apparent.[121] The JRF have found that this is directly contributing to the rising level of destitution in the UK.[122] It seems there are only two hopes for claimants in this respect. The first is the hope that the improvements made in Scotland are rolled-out nationally.[123] The second would be the Evictions (Universal Credit Claimants) Bill that promises to place a duty upon the relevant minister to ensure those suffering from rent arrears on Universal Credit do not face eviction.[124] However, with the second reading scheduled for February 2021, it seems this is a distant hope for most claimants.[125]

A rise in the levels of rough sleeping of 165% between 2010 and 2018 shows yet further flaws with Universal Credit. However, this is estimated to have dropped since 2018 by 9% showing some improvement on the part of the government.[126] Despite this the level of rough sleeping is still 141% higher than in 2010 and in 2019 the number of rough sleepers during the Universal Credit application process rose by 7.8% on the previous year. [127] Despite this, there are still significant improvements that have yet to be made. The digital by default approach to Universal Credit has also been less successful than intended. The DWP designed the system to be simple to use without intervention.[128] Despite this 39% of claimants were unaware of

[119] Social Metrics Commission (n 33) 22-28.
[120] The Trussell Trust (n 38) 9-10.
[121] See, HC Deb 05 December 2018, vol 650, col 881 and Esther McVey (n 65)
[122] Rowntree (n 67) 4.
[123] Scottish Government (n 49).
[124] UK Parliament (n 71).
[125] ibid.
[126] Ministry of Housing, Communities & Local Government (n 73).
[127] Ibid and Ministry of Housing, Communities & Local Government (n 77).
[128] Department for Work and Pensions (n 80) 13.

the online system, combined with the 11.9 million people lacking at least 1 in 5 essential digital skills for life highlights a severe disconnect between the DWP and the reality of Universal Credit.[129]

The use of sanctions has also had a severe impact on some claimants. Between May 2016 and April 2017, the total number of sanctions issued against claimants stood at 5911.[130] Between the same period in 2018/19 the total number of sanctions issued soot at 133,988, more than a 20-fold increase in the number of sanctions in two years.[131] When broken down into differing lengths of sanctions, these figures seem even more difficult to comprehend. In December 2015, the number of sanctions issued to last 27 weeks or more stood at 43.[132] In November 2019, this number had risen to 1,143, a 26-fold increase. [133] The only saving grace for claimants in this respect is the DWP's change to the maximum length of sanctions from three years to six months.[134]

Overall, Universal Credit promised to be a 'potentially major improvement' in the system of benefits in the UK and was a good idea in theory.[135] However, when the theory is separated from reality and given the extent of the issues facing, not only the system of benefits but also claimants, it appears Universal Credit has not been a success by its own aims and those of William Beveridge. Universal Credit set out to reduce unemployment, poverty and welfare dependency.[136] However, the only one of these aims that appears to have been achieved is a reduction in the levels of unemployment highlighting Universal Credit' attack on idleness. Despite this, evidence suggests that poverty and welfare dependency has increased, not least with the JRF stating that Universal Credit is directly contributing to destitution. The use of sanctions seems to be actively fuelling the social evils of want and squalor, especially where claimants are left issued with a sanction of 27 weeks or more and no other source of income.

[129] See, Department for Work and Pensions, *Universal Credit Full Service Survey* (Department for Work and Pensions 2018) 3 and Department for Digital, Culture, Media and Sport (n 90) 27.
[130] Department for Work and Pensions (n 98).
[131] ibid.
[132] ibid.
[133] ibid.
[134] Jobseeker's Allowance s3(a)(i) (n 105).
[135] Alston (n 12) 4-5
[136] Gov.uk (n 4).

It seems the most apt description is that of Philip Alston describing it as Universal Discredit with a government in denial about the issues facing claimants.[137]

[137] Alston (n 12) 4-5.

Father's Rights

In The

21st Century

Penny Jones (2021) SSLJ 2, 61-71

Stage Three LLB Student, University of Sunderland

Abstract

Today we can reflect back on the 20th and 21st century and conclude that they were worlds apart. However, there is one correlation which can be drawn from the recent history of the United Kingdom and that is an increase in equality and a change in the family structure. Equality for parents has been predominantly navigated by legislation thus, highlighting the importance of influences of the legislative process. The 20th Century had seen the implementation of the Children Act 1989, which aimed to 'put children at the centre of the court's decision making. Whereas in the 21st century, we have seen fathers' chain themselves to railings in order to bring change to the custody rights of fathers. However, with it being submitted that society still holds the view that 'women are the care givers within the family and fathers are the bread-winners', then poses a question: To what extent has the law adapted to reflect the view of a modern society: Fathers should have equal rights, compared to mothers when it comes to matters relating to that of their children.

Keywords

Fathers' Rights; Fathers4Justice; Children; Reform

It is evidenced that over the years 'familial demographics in the United Kingdom have changed'.[1] According to statistics, the traditional nuclear family has decreased in popularity, whilst the 'number of lone parent families has risen'.[2] Across the UK, out of the 2.85 million lone parent families, only 0.40 million are headed by fathers, whilst the majority (2.45 million) are headed by mothers.[3] With that said, between 1999 and 2019, 'the number of lone parent fathers has grown at a faster rate than lone parent mothers', and the reasons for such argued.[4] Although the dissolution of family units is said to be 'private matters', the complexity of the responsibilities of those involved, has resulted in judicial involvement being seen as necessary in some circumstances.[5] For 'the family is its own social security system and thus, the more the private family can look after its own, the less the state will have to do so'.[6]

Through various acts of Parliament and sources of law, it is clear that throughout the 20th Century, the court has always had regard to the child's welfare. The case of J v C [19] made precedent that when deciding child custody cases, the child's welfare is 'paramount', meaning the child's welfare is what 'will determine the course of action which is to be followed'.[7] The Guardianship of Minors Act 1971 confirming this approach, legislated that the 'child's welfare was the first and paramount consideration'.[8] This approach taken by the legislators and the judiciary has become known as the 'paramountcy principle', with the Children Act 1989

[1] Alan Brown, '*What is the Family of Law? The Influence of the Nuclear Family*' (1st end, Hart Publishing 2019) 3.
[2] Office for National Statistics, 'Families and households in the UK: 2018' (ons.gov 7 August 2019) Figure 1 <www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2018> accessed 3 July 2020 and [2] Office for National Statistics, 'Families and households in the UK: 2019' (ons.gov 15 November 2019) Figure 3 <www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2019#:~:text=In%202019%2C%2014.9%25%20of%20the,parent%20families%20(2.9%20million).&text=However%2C%20from%201999%20to%202019,statistically%20significant%20(Figure%203) > accessed 23 June 2019.
[3] Ibid.
[4] Ibid. From the year of 1999 to the year 2019, the rate of lone parent families headed by mothers has increased by 13.4% where the rate of lone parent families headed by fathers has increased by 22%. It is submitted that the increase of fathers heading lone parent families is because they are more likely to have suffered a bereavement, compared to that of women. It is also submitted that another reason is as a consequence of the dissolution of their marriage. Sumi Rabindrakumar, 'One in four: A profile of single parents in the UK' (allcatsgrey.org, February 2018) 3 <http://allcatsrgrey.org.uk/wp/download/children/One-in-four-a-profile-of-single-parents-in-the-UK.compressed-1.pdf> accessed 5 July 2020.
[5] Lady Justice Hale, '*What is a 21st Century Family'* (supremecourt.uk, 1 July 2019) International Centre for Family Law, Policy and Practice 2019, 2 < www.supremecourt.uk/docs/speech-190701.pdf> accessed 5 July 2020; *Hayman v Hayman* [1929] AC 601 614.
[6] Ibid.
[7] J v C [1970] AC 688 710-711.
[8] S 1.

recognising this principle, 'making it quite clear: [9] "When a court determines any question with respect to…the upbringing of a child…the child's welfare shall be the court's paramount consideration."[10] However, for fathers and others involved in the custody process, the paramountcy principle appears to have caused disappointment.

Pressure Groups, Campaigns, and the Power of the Law

Within the UK 'Fathers4Justice, a high-profile pressure group, has brought gender bias in residence and contact disputes very much to the forefront'.[11] By 2004, the United Kingdom had seen various campaigns conducted by Fathers4Justice.[12] The shadow cabinet at the time, recognised that as a 'consequence of the campaigns and protests conducted by Fathers4Justice, the climate had shifted and this needed to be reflected in law reform'.[13] However, the extent to which they have been successful has said to have been 'limited'.[14]

One campaign which has played a part in progressing reform of the law in relation to fathers' rights and contact was the 'Equal Parenting' campaign, which is still currently being pursued.[15] In 2004, it was submitted that there were 'no guidelines on how much time a non-resident parent should have with their children'.[16] This is evident as seen in the case of A v A [1994], where it was stated that shared residency orders are at 'the discretion of the judge, on the special facts of the individual case'.[17] The objective of the Equal Parenting Campaign is to

[9] Helen Reece, 'The Paramountcy Principle: Consensus or Construct' (1996) 49/1 Current Legal Problems < https://doi.org/10.1093/clp/49.1.267 > accessed 15 July 2020.
[10] Children Act 1989 s 1(1) and Lady Justice Hale, '30 Years of the Children Act 1989' (Scarman Lecture, Law Commission 13 November 2019) 7 < https://www.supremecourt.uk/docs/speech-191113.pdf> accessed 10 July 2020.
[11] Nigel Lowe 'The Allocation of Parental Rights and Responsibilities – the Position in England and Wales' (2005) 39 FLQ 267, 285.
[12] Richard Collier, 'Fathers 4 Justice, law and the new politics of fatherhood' (2005) 511 CFLQ 511. Fathers 4 justice carried out a number of campaigns, for example: 'Two men threw packages of flour dyed purple at Tony Blair during prime minister's questions in May 2004, and a man dressed as Spiderman climbed the London Eye and staged an 18-hour protest that closed the attraction in September 2004. 'Profile: Fathers 4 Justice' (*BBC News*, 22 April 2008) < http://news.bbc.co.uk/1/hi/uk/3653112.stm > accessed 6 June 2020.
[13] Collier (n 22).
[14] Ibid.
[15] Fathers4Justice, 'Our Campaigns' (*We Are Fathers4Justice*) < www.fathers-4-justice.org/our-campaign/our-campaigns/#equal-parenting > accessed 10 July 2020.
[16] BBC 'Equal parenting rights rejected' (*BBC News*, 21 July 2004) <http://news.bbc.co.uk/1/hi/uk_politics/3912311.stm> accessed 10 July 2020.
[17] [1994] 1 FLR 669.

campaign for the courts to 'presume that divorced parents are to 'have 50/50 spilt in relation to custody of their children', with the objective being their focus point since 2004.[18]

Family law became the topic of debate in the House of Commons, with the issue of shared parenting and Fathers4Justice being at the centre of the discussion.[19] The impact of Fathers4Justice and their campaigns is demonstrated by the fact the House of Commons acknowledged the issues raised and called on the Government to review the operation of the family courts in general and their decision-making, in relation to fathers' access to children in the context of family breakdowns'.[20] Consequently, as the Bill proceeded through the relevant legislative stages, the 'shared parenting presumption was introduced to Parliament as clause 12'.[21] However, the clause received criticism and it has been argued that the presumption could expose the child to a risk of being harmed.[22]

To exemplify, a study concluded that if legislation was to provide for a strict split in relation to children having contact with their parents, they may feel trapped and unable to object to contact.[23] With children often having good reason for objecting, it is submitted that this in turn may cause phycological problems for the child.[24] The problem of emotional and Psychological harm in relation to the presumption that both parents are entitled to have custody of their child 50% of the time has been recognised by the judiciary, as illustrated by the case of N (a child) [2009].[25] The case had seen the Judge refuse to give an order regarding the child.[26] This was as a consequence of the behaviour of the parents and the impact it was having on the child. The child was experiencing emotional distress, due to the parents thinking they had a *right* to have a certain amount of time with the subject child.[27]

[18] Ally Fogg, 'Fathers4Justice: the solution lies in our families, not our family courts' *The Guardian* (Thu 4 Jul 2013); Fathers4Justice, 'Our Blueprint' (We Are Fathers4Justice) < www.fathers-4-justice.org/our-campaign/our-10-point-blueprint-for-family-law/> accessed 10 July 2020. `
[19] Shared Parenting Rights and The Family Courts HC Bill (2013-14).
[20] Ibid.
[21] A Newnham, *Family Law* (Ruth Lamont ed 1st edn, OUP 2018) 350.
[22] Liz Trinder, 'Shared Residence: A Review of Recent Research Evidence' (2010) 22 CFLQ 475.
[23] Jane Fortin, Joan Hunt and Lesley Scanlan 'Taking a longer view of contact: The perspectives of young adults who experienced parental separation in their youth' (University of Sussex Law School 2012) 1- 11.
[24] Newnham (n 32) 360-367.
[25] EWHC 1807 (Fam).
[26] Ibid 149.
[27] Ibid 195, 213-232.

In addition, the presumption of 50/50 shared parenting has the potential to cause issues logistically.[28] For instance, if one parent moves a considerable distance from the other, in cases where a 50/50 shared parenting order has been granted, the child is likely to suffer from exhaustion from travelling.[29] In such instances, the presumption would be impractical.[30] The view that 50/50 shared parenting may not be appropriate has even been supported by *Families Need Fathers*, another campaign group centred around fathers being involved in their child's life.[31] Families Need Fathers further submitted that it is not the quantity of time within which fathers need with their children, but the quality of it.[32] With the issues that could potentially arise through incorporating the presumption, a petition to prevent it from passing was formed.[33]

Consequently, Baroness Butler-Sloss, a senior judge and President of the Family Division, successfully amended the Children Act of 1989.[34] Parliament agreed that shared parenting should not be split 50/50 between the resident and non-resident parent and it was stressed that such ought to be legislated.[35] Thus, the Children and Families Act 2014 successfully amended the Children Act 1989, stating that 'there is no presumption of equal division.'[36] However, the issue did not cease to be addressed by the Acts. The Children and Families Act 2014 instated in the Children Act 1989, that it ought to be 'presumed that involvement of *that* parent in the life of the child concerned will further the child's welfare', unless the contrary is proven.[37] In addition, it was further legislated via the implementation of the Children and Families Act that 'involvement' means 'involvement of some kind, either direct or indirect, but not any particular division of a child's time'.[38] Thus, it is evident that 'the law and courts

[28] Newnham (n 32) 367.
[29] Cherry Harding, 'What has further research and experience taught us about the effects of shared parenting?' [2020] FamL 72.
[30] Ibid.
[31] Families Need Fathers, 'Shared Parenting' (fnf.org, 11 January 2019) < https://fnf.org.uk/information/shared-parenting-link/shared-parenting > accessed 11 July 2020.
[32] Joan Hunt and Others, 'Shared Parenting: The Law, the Evidence and Guidance from Families Need Fathers' [2009] FamL 831, 834.
[33] HL Deb 2 July 2013, vol 746, col 1188 -1189.
[34] Newnham (n 32) 350.
[35] UK Parliament 'The Children and Families Bill (2013-14), 3rd reading: House of Lords' (5 February, 2014) < https://publications.parliament.uk/pa/ld201314/ldhansrd/text/140205-0001.htm#14020581000654 > accessed 10 July 2020.
[36] The Children Act 1989 s 1(2B).
[37] Children Act 1989 s 1(2A).
[38] Children Act 1989 s 1(2B).

are unbiased towards fathers and indeed mothers however, the emphasis is very much placed on the child', with the child's safety being at the centre, adhering to the 'paramountcy principle.[39]

Upon reflection, '*individualism* has been the principal catalyst for legal change'.[40] This has been demonstrated by the campaign group Fathers4Justice, where they have campaigned for the law to take the view that parenting ought to be shared 50/50.[41] Although the shared parenting presumption was not exactly reflected in the legislation, which came as a result of Parliamentary debates sparked from the campaigns, recent legislation amended the law to better reflect societies change in gender roles within the family. However, it has been made clear, that throughout the case law[42] and primary legislation[43], the reasoning behind the decisions which have been made is primarily centred around the child's welfare and not that of father's or indeed mother's rights.[44]

The result of fathers campaigning groups, such as Fathers4Justice, has assisted in the progression of the law since 1997.[45] This is evident throughout case law and the discussions which surrounded the relevant Bills through Parliament. However, there is one view which has predominantly remained consistent, and that is the view that the law courts' show 'bias towards fathers', which has been condemned.[46]

Men: A Prisoner of Their Own Crime?

[39] See, Chloe Smith, 'No anti-father bias in family courts, research finds' The Law Society Gazette (2 June 2015) < www.lawgazette.co.uk/law/no-anti-father-bias-in-family-courts-research-finds/5049142.article> accessed 12 June 2020*; and* Ministry of Justice and Department for Education, The Government Response to the Family Justice Review: A System with Children and Families at its Heart (Cm 8273, February 2012) 61; and Annika Newnham, *Private Child Law* in Ruth Lamont (ed), *Family Law* (1st edn, OUP 2018) 360-368.
[40] Nigel Lowe and Gillian Douglas, *Bromley's Family Law* (11th edn, OUP 2015) 307-308.
[41] Fathers4Justice, 'Our Blueprint' (We Are Fathers4Justice) < www.fathers-4-justice.org/our-campaign/our-10-point-blueprint-for-family-law/ > accessed 10 July 2020.
[42] The case of *J v C* [1970] AC 688 710-71, reinstated the view that the child's welfare is 'paramount' when deciding the outcome of a case.
[43] The Children and Families 2014 s 1(2B).
[44] Lady Justice Hale, '30 Years of the Children Act 1989' (Scarman Lecture, Law Commission 13 November 2019) p 7-8 < https://www.supremecourt.uk/docs/speech-191113.pdf> accessed 10 July 2020.
[45] Richard Collier, 'Rethinking Fathers' Rights' (2009) 45 UKFL 45.
[46] Chloe Smith, 'No anti-father bias in family courts, research finds' (*The Law Society Gazette,* 2 June 2015) < www.lawgazette.co.uk/law/no-anti-father-bias-in-family-courts-research-finds/5049142.article > accessed 12 June 2020.

With '1.37 million defendants prosecuted in the latest year', what does the law allow in respect of contact, when a father has committed a serious offence, and does the law make sufficient provision for the needs of fathers? [47] In 2019, the Children Act 1989 came under intense scrutiny in the House of Commons, when Louise Haigh, the Labour MP for Heeley (Sheffield), recommended that the Act be amended, so as to 'remove the *parental right* of any man who has fathered a child through rape'.[48] The current position is that the Act, as well as the Family Procedural Rules 2010 allows those who are and are not registered as the biological father of the subject child, to be party to proceedings, and may allow the child to have contact with that person.[49] Thus, the Act facilitates fathers, who have committed criminal offences to exert 'certain rights', even if they have committed a serious criminal offence and the subject child is 'under a care order'.[50]

Allowing a man to be party to family proceedings where he is considered to be relevant, is recognised as his 'right'.[51] This is said to protect fathers, who may not necessarily be registered on the child's birth certificate.[52] However, as evidenced by the case of Sammy Woodhouse the Children Act 1989 can be viewed as adversely impacting the wellbeing of the child and other parties, which over the years has been seen to have taken precedence over the rights of fathers. [53]

In the case of Sammy Woodhouse, Arshid Hussain, who was party to the case *of* Regina v Qurban Ali, Basharat Hussain, Arshid Hussain [2017], had his appeal against his conviction for sexual offences dismissed and remained imprisoned.[54] Whilst committing sexual offences, Arshid Hussain had fathered a child with one of his victims, Sammy Woodhouse. Due to the trauma she experienced, Sammy Woodhouse and the local authority wanted to place the

[47] Office of National Statistics, 'Criminal Justice Statistics quarterly, England and Wales, July 2018 to June 2019' (14 November 2019) Ministry of Justice <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/846386/criminal-justice-statistics-quarterly-june-2019.pdf > accessed 2 July 2020.
[48] HC Deb 10 April 2019, vol 658, col 343.
[49] The Children Act 1989, s.4; Family Procedural Rules 2010, pt 12J.
[50] For example, the right to 'reasonable contact'; The Children Act 1989, s.34.See also, Department of Education, 'The Children Act 1989 guidance and regulations' (2015) Vol 2: care planning, placement and case review, 45 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/441643/Children_Act_Guidance_2015.pdf > accessed 2 July 2020.
[51] The Children Act 1989 s 4; ECHR art 8.
[52] Nigel Lowe and Gillian Douglas, Bromley's Family Law (11th edn, OUP 2015) 307-312.
[53] HC Deb 10 April 2019, vol 658, col 343.
[54] *Regina v Qurban Ali, Basharat Hussain* [2017] EWCA Crim 1211 para [1-47], [62].

child under a care order.[55] An application for the order was made, with Arshid Hussain having been notified and told he could 'seek contact with the child', with the Children Act 1989 omitting to prevent him from doing so. [56] This decision unsettled groups in society, as the fear was that, allowing fathers to have contact and be party to proceedings would cause unnecessary trauma to those involved, mainly the child.[57]

The government heard Louise Haigh's recommendation and subsequently interjected, defending the rights of fathers, stating that the proposed reform would undermine the convicted rapist's 'right to a family life'.[58] It was further stated that the FPR[59] acts as a safeguard, giving the judiciary the jurisdiction to decide when it is appropriate to prevent fathers having contact, if they pose a risk to the child. The case of Local Authority v XYZ [2019] exemplifies this.[60]

In the case of Local Authority v XYZ, the father of the subject child had murdered the child's mother, whilst the child was present.[61] The child was then subject to care proceedings, of which the father was an automatic respondent as a consequence of the Family Procedure Rules 2010, to which the Children Act of 1989 is subservient to.[62] However, the local authority acted to remove the father as a party to the proceedings, and prevent him from having contact with the child.[63] This was in the interest of the child's wellbeing, as if the father was present to proceedings and proceeded to communicate with the child, psychological and emotional harm may have been caused.[64] The potential detriment to the child was such that

[55] HC Deb 10 April 2019, vol 658, col 343.
[56] Andrew Norfolk, 'Rotherham rape victim reveals new care scandal; Mother demands change in law after council gave abuser chance to meet her son' (*The Times,* 28 November 2018) <www.thetimes.co.uk/article/rotherham-council-invited-paedophile-to-see-his-victim-s-child-jntcgdv3t> accessed 06 July 2020 and Helen Pidd, 'MPs call for change of law on rapist fathers after Rotherham case' (*The Guardian* 28 November 2018) < www.theguardian.com/society/2018/nov/28/mps-call-for-change-of-law-on-rapist-fathers-after-rotherham-case > accessed 6 July 2020.
[57] Andrew Norfolk, 'Rotherham rape victim reveals new care scandal' *The Times* (London, 28 November 2018) <www.thetimes.co.uk/article/rotherham-council-invited-paedophile-to-see-his-victim-s-child-jntcgdv3t > accessed 06 July 2020.
[58] ECHR, art.8 and HC Deb 10 April 2019, vol 658, col 343-344.
[59] 2010, 12J.
[60] EWHC 2166 (Fam).
[61] Ibid [13].
[62] The Family Procedure Rules 2010, SI 2010/2955.
[63] Local Authority v XYZ (Restriction on Father's Role in Proceedings) [2019] EWHC 2166 (Fam) [7].
[64] Ibid 57-61.

the child's 'right to a private life, including such correspondence' overridden the fathers 'right to a private life', and 'right to a fair trial'.[65]

That said, lawyers have argued that the courts 'implementation of the procedural rules has been patchy, as seen in the case of Sammy Woodhouse'.[66] The argument for rejecting Louise Haigh's reform proposal was heard by the House of Commons.[67] In response, Louise Haigh suggested an alternative; that 'fathers should instead have to apply for an s.8 order' to obtain contact with that child or be party to proceedings.[68] Doing so would only allow fathers with criminal convictions of rape, to obtain contact through a Child Arrangements Order, which is currently governed by the Children Act 1989.[69] The proposed recommendation was not implemented, as Louise Haigh's Private Members' bill; 'The Parental Rights (Rapists) and Family Courts Bill' did not proceed onto the second reading.[70]

Lucy Reed, a barrister, submitted 'the calls for reform are broad', and argued that Parliament would have to consider many factors to determine whether reforming the current legislation would be suitable and compatible with the European Commission on Human Rights (ECHR).[71] However, with the Children Act being focused on the welfare of the child, rather that of the mother or the father, Lucy Reed argues that 'any draft legislation would likely be controversial and would require a shake-up of the Family Court system, which is unrealistic'.[72]

It is clear that a father's criminal activity does not completely prevent them from having contact with the child or being party to proceedings.[73] However, the extent to which they have is limited, as evidenced by case law and legislation.[74] Although there are safeguards in

[65] ECHR art.8 and *Local Authority v XYZ* [2019] EWHC 2166 (Fam) 54-58.
[66] HC Deb 5 February 2019, vol 654, col 150.
[67] HC Deb 10 April 2019, vol 658, col 344.
[68] Ibid.
[69] As ammended by the Children and Families Act 2014.
[70] UK Parliament 'Parental Rights (Rapists) and Family Courts Bill 2017-19 (19 September 2020) <https://services.parliament.uk/bills/2017-19/parentalrightsrapistsandfamilycourts.html > accessed 8 July 2020.
[71] Lucy Reed (Barrister), 'The Sammy Woodhouse Story and Associated Campaigns – An Update' (*The Transparency Project* 1 December 2018) < www.transparencyproject.org.uk/the-sammy-woodhouse-story-and-associated-campaigns-an-update/ > accessed 8 July 2019.
[72] Lucy Reed (Barrister), 'The Sammy Woodhouse Story and Associated Campaigns – An Update' (The Transparency Project 1 December 2018) </www.transparencyproject.org.uk/the-sammy-woodhouse-story-and-associated-campaigns-an-update/ > accessed 8 July 2019.
[73] As evidenced by the Children Act 1989 s 4 where the court is to notify those who are relevant to the proceedings of the subject child.
[74] The Family Procedural Rules 2010, part 12J gives the judiciary the jurisdiction to decide whether the father should be removed from being party to proceedings. In the case of *Local Authority v XYZ* [2019] EWHC 2166

place, society is clearly divided in relation to whether the father should have contact or even be permitted to be party to proceedings, when crimes are of a serious nature like that of rape.[75] That said, the law again is consistent as the child's welfare is paramount and will be at the forefront of the courts mind during proceedings.[76] Thus, the law could be said to be reflective of father's rights, as well as societies views but this extent is limited due to the child's welfare being paramount.

Overall, the last 50 years has 'seen the law respect individual autonomy in adult decision making by both men and women'.[77] Individuals and campaign groups have expressed their opinion of why the law should change in respect of father's rights. Men are evidently wishing to become more involved in the parenting of their children and are of the opinion that the law should adapt to reflect their rights. Their views on the subject have been brought to the attention of the media and consequently, they have also been the subject of debates within the Houses of Parliament.[78] However, as evidenced by the failing of the Children and Families Bill[79] to pass through Parliament on its first attempt resulting from comments made throughout parliamentary debates and the *obiter* of case law, the family unit is complex and there are many factors which ought to be considered if changes to the current law were to be made.[80] Yet, there is one consistency within the law and the legislative process, being the child's welfare. It is evident that the law has held and will continue to hold the rights and the

(Fam) [54-58], the judiciary deemed it in the child's best interests to remove the father from being party to the proceedings.

[75] Louise Haigh, 'Rapist fathers should not have rights over their victims' children', *The Guardian* (29 November 2018) <https://www.theguardian.com/commentisfree/2018/nov/29/rapist-father-victim-children-sammy-woodhouse-rotherham-child-abuse> accessed 13 July 2020.

[76] Local Authority v XYZ [2019] EWHC 2166 (Fam) [12], [29]-[34], [50]-[54]; X (Children) Re [2018] EWCA 451 (Fam).

[77] Lady Justice Hale, 'What is a 21st Century Family' (1 July 2019) International Centre for Family Law, Policy and Practice 2019 p 12< www.supremecourt.uk/docs/speech-190701.pdf > accessed 5 July 2020.

[78] ' Profile: Fathers 4 Justice' *BBC News* (22 April 2008) <http://news.bbc.co.uk/1/hi/uk/3653112.stm > accessed 6 June 2020; HL Deb 2 July 2013, Vol 746, Col 1188 -1189; HC Deb 10 April 2019, vol 658, col 344; Helen Pidd, 'MPs call for change of law on rapist fathers after Rotherham case' The Guardian (28 November 2018) < www.theguardian.com/society/2018/nov/28/mps-call-for-change-of-law-on-rapist-fathers-after-rotherham-case> accessed 6 July 2020.

[79] The Children and Families Bill (2013-14) (n 47).

[80] See, *J v C* [1970 AC 688 [710]-[711]; *X (Children) Re* [2018] EWCA 451 (Fam); HL Deb 2 July 2013, Vol 746, Col 1188 -1189; HC Deb 10 April 2019, vol 658, col 344; *Local Authority v XYZ* [2019] EWHC 2166 (Fam) [50]-[54] and, Lucy Reed (Barrister), 'The Sammy Woodhouse Story and Associated Campaigns – An Update' (The Transparency Project 1 December 2018) <www.transparencyproject.org.uk/the-sammy-woodhouse-story-and-associated-campaigns-an-update/ > accessed 8 July 2019.

welfare of a child over that of a parent.[81] Yet, the nature of the English Legal System and the Rule of Law will continue to facilitate the opportunity for individuals, groups, MP's and thus, society as a whole, to reform and change the law. The Family Court recognises the importance of its' involvement in respect of where a child should live and who the child should have contact with.[82] Thus, in light of any discrepancies that may arise from laws and precedent made, democracy demands for such to be governed by the people and change as society does.[83]

[81] Lady Hale, '30 Years of the Children Act 1989' (Scarman Lecture, Law Commission 13 November 2019) p 7-8 <www.supremecourt.uk/docs/speech-191113.pdf > accessed 10 July 2020.
[82] Lady Hale, '30 Years of the Children Act 1989' (Scarman Lecture, Law Commission 13 November 2019) p 7-11<https://www.supremecourt.uk/docs/speech-191113.pdf> accessed 10 July 2020.
[83] Tom Bingham, *Rule of Law* (2nd edn, Penguin Books 2011) 6.

How Effective are Jury Directions in Preventing Jury Bias in Cases Involving Rape?

Penny Jones (2021) SSLJ 2, 72-86
Stage Three LLB Student, University of Sunderland

Abstract

Juries in England and Wales have been an essential part of the legal system for centuries. They are designed to act as a fair and equal representation of society to allow for an impartial verdict on the guilt of any given individual. However, jury trials have been a growing source of contention in rape trials for many years. This is as a result of a range of factors including the ability of lay people to understand complex legal requirements and tests along with the inherent prejudicial bias of a jury. Given the debate around the issues surrounding the place of juries in rape trials and their suitability, this research will evaluate the effectiveness of juries in such cases and what alternatives could be implemented in their place.

Keywords

Jury bias; Rape trials; Sexual assault

The jury has played an 'essential role in criminal trials for centuries'[1], 'repeatedly', acting as a protector of freedom'.[2] In rape trials it is for the jury to decide the defendants' guilt".[3] The jury also burdens the role of having to 'establish the credibility of witnesses and further evidence put before them', whilst remaining 'unbiased and impartial' throughout.[4] However, the 'continued use' of juries in rape trials is the subject of debate.[5] One of the reasons for this is because, it has been argued that it is difficult for juries in 'controversial trials' (such as rape) to keep their 'objectivity'.[6] Thus, their ability to remain effective has been criticised. In order for the jury to be effective in taking part in the 'decision making process', they are directed.[7] Jury directions are contained in the Crown Court Compendium (CCC); they are 'orders to the jury, which are deemed *necessary* for the fair conduct of the trial, therefore, must be followed'.[8]

Where a defendant is tried for rape, the law is often 'complex' and naturally, juries are likely to come into court with a 'preconceived bias or prejudice' and think in a stereotypical manner, which influences the 'jury deliberation process'.[9] Therefore, it is expected that the trial judge directs the jury as follows: 'experience shows that people react differently to the trauma of a serious sexual assault… there is no classical response; some complain immediately, whilst others feel ashamed and will not complain for a long time; a late complaint does not necessarily mean it is a false complaint'.[10] Such direction evolved as a result of the courts being 'increasingly prepared to acknowledge the need for a direction that deals with 'stereotypical assumptions' about issues, such as 'delay in reporting allegations of sexual crime and distress'.[11] The recent case of *R v Beale* highlights the continued issue of juries

[1] Tom Bingham, *The Rule of Law* (Penguin 2011) 97.
[2] Alfred Denning, *Freedom Under the Law* (The Hamlyn Lectures, Stevens and Sons 1949) 55.
[3] Sexual Offences Act 2003 s (1) (1a-c).
[4] Terence Imgman, *The English Legal Process* (OUP 2011) 232; *R v Caley Knowles* [2006] 1 WLR 3181.
[5] Scott Slorach and Others, Legal Systems and Skills (3rd edn, Oxford University Press 2017) 81.
[6] Ibid.
[7] Martin Hannibal and Lisa Mountford, *Criminal Litigation 2019-2020* (15th edn, OUP 2019) Ch 14; Steve Wilson and Others, *English Legal System* (3rd edn, OUP 2018) 10.
[8] Ibid.
[9] Jeremy Horder, *Ashworth's Principles of Criminal Law* (9th edn, OUP 2020) 359 and Gillian Daly and Rosemary Pattenden, 'Racial Bias and the English Criminal Trial Jury' [2005] 64 CLJ 678.
[10] Maddison Ormerod and Tonking Wait, 'Crown Court Compendium Part 1: Jury and Trial Management and Summing Up' (Judicial College 2018)20-21.
[11] *R v D* [2008] EWCA Crim 2557; *R v Breeze* [2009] EWCA Crim 255 and Ormerod and Wait (n 11) 12-13.

thinking in 'stereotypical' and 'prejudiced' ways in rape trials and the importance of jury direction today.[12] In R v Beale [2019], it was held that the purpose of the advised direction was to 'avoid the possibility that a jury would hold preconceived ideas on what to expect from a genuine complainant of rape… which left uncorrected could lead to illegitimate reasoning'.[13]

The success of the direction and guidance currently given to the jury has had a limited impact on juries thinking in stereotypical ways.[14] The study conducted by Dominic Willmott (an academic specialising in jury decision making), found that jury prejudice and stereotypical thinking does still exist.[15] Despite the study having incorporated the jury direction, it was concluded that: '43%' of jurors chose a pre-deliberation guilty verdict, with this figure rising to 83 % within jurors with personal experiences of sexual victimisation.[16] With nearly half of jurors choosing a pre deliberated verdict, the study suggests that the jury is not wholly effective in disallowing prejudicial and stereotyped thinking to affect their judgment. Consequently, exemplifying how the jury direction does not completely prevent jurors from thinking in a stereotypical and prejudiced manner.

The study conducted by Dominic Willmott, however, can be criticised. The study 'selected people at random from the electoral roll, researchers sent out mock summonses to members of the public… and nine mock juries were assembled, with nine verdicts taken'. As the juror is normally restricted to conduct their jury service at a court located within their local justice area, the study conducted by Dominic Willmott ought to have grouped jurors with others from the same geographical area. This would have enabled the study to be more reflective of what would actually happen in a live trial and allow the study to identify whether the juror's location influenced their decision making/ impact their bias towards the defendant. This is because where a juror lives can impact their social values and what they constitute as acceptable behaviour, which in turn effects whether they believe the case for the defence or prosecution. That said, researchers are not permitted to conduct studies during a real trial,

[12] [2019] EWCA Crim 665.

[13] EWCA Crim 665 33-54.

[14] Leveson, *Criminal Trials: The Human Experience* (Faculty of Laws, University College London, 13 June 2019).

[15] Dominic Willmott and Others, 'Juries in Rape Trials' (2017) 181 JPN 662, 663.

[16] Barrister, '*Half of rape jurors make guilty verdict before deliberation' (*The Barrister Magazine, 12 September 2017) < www.barristermagazine.com/half-of-rape-jurors-make-guilty-verdict-before-deliberation/> accessed 12/04/2020.

and the study conducted by Dominic Willmott has been said to have been 'the nearest that any psychological research has ever got to real-world testing'.[17]

Despite the above submission, the direction regarding the 'corroboration of evidence'[18] in rape trials exemplifies how the CCC has successfully allowed the jury to become increasingly effective, in disallowing preconceived bias and prejudice to affect decisions in rape trials.[19] This is consequential of the CCC being subservient to the Criminal Justice and Public Order Act 1994 (CJPOA).[20] Section 32(1) of the CJPOA decided juries were no longer required to be given the direction that: 'it was dangerous to convict on the evidence of the complainant alone… experience had shown that female complainants had told false stories without reason' at every trial, no matter the circumstances.[21] It can be argued that the direction given to the jury before s.32(1) was implemented, would have brought the myth (that 'women often lie about rape, unless the rape happened in the context of an ambush') to the juries minds.[22] Therefore, suggesting that prior to 1994, the direction limited the jury from being effective, as it is their role to remain free from prejudice and stereotypical thinking, when considering the verdict.

Although suggested that the jury direction limits the jury's ability to be effective, it is submitted jurors with prejudice and 'stereotyped thinking' can be educated to prevent aforesaid issues. To exemplify, the study conducted by Dominic Willmott concluded that '13% of jurors who did have prejudice, did change their decision following discussions with fellow jurors', indicating jurors were able to acknowledge their pre-existing bias and act accordingly.[23] As the study suggests jurors can change 'their decisions following discussions with fellow jurors', it can be argued that: it is the procedure of how a trial by jury is conducted,

[17] Ibid.

[18] The direction regarding corroboration of evidence gives a warning to the jury about the need for caution in the absence of supporting evidence. Courts and Tribunals Judiciary, 'Crown Court Compendium- updated December 2019' (First published 7 June 2016) p 10-5 < www.judiciary.uk/publications/crown-court-compendium-published/ > accessed 6 April 2020; *R v Makanjuola* [1995] 1 WLR 1348 at p.1351D.

[19] Mike McConville and Geoffrey Wilson, 'The Handbook of The Criminal Justice Process' (OUP 2002) 328.

[20] Courts and Tribunals Judiciary, 'Crown Court Compendium- updated December 2019' (First published 7 June 2016) <www.judiciary.uk/publications/crown-court-compendium-published/> accessed 6 April 2020.

[21] David Wolchover and Anthony Heaton-Armstrong (2010) 174 'Rape Trials' Criminal Law & Justice Weekly 244, 245.

[22] Michael Allen and Ian Edwards, *Criminal Law* (15th edn, OUP 2019) at Ch 11 and Wolchover and Heaton-Armstrong (n 24).

[23] Dominic Willmott and Others, *The English Jury on Trial* (Custodial Review 2018).

that allows jurors with 'prejudice and stereotyped thinking' to decide accordingly.[24] Thus, it is the procedure itself that limits the jury's effect in coming to a decision based on the true 'standard of proof', rather than the judge's direction to the jury.

To ensure that the jury are effective in a rape trial, the previous Director of Public Prosecutions (DPP) suggested reforming the way a trial by jury is conducted. The DPP proposed that juries were educated and given a 'briefing by the judge at the start of the trial' and that this would help overcome 'unconscious bias'.[25] It was proposed that the briefing would be 'similar to that of the Judge's current direction (given at the end)'.[26] The objective would be to condition the jury 'at the start' of the trial, to think in a 'non- prejudicial manner', rather than at the end when it is likely to be too late.[27] Support for such reform alike has been displayed in relation to increasing the efficiency in jury trials. For example, it was recommended that directions should be provided 'before speeches', allowing the advocate to 'tailor their remarks to the law' and thus, 'avoiding repetition of the legal principles'.[28]

It is inferred by the Judicial College, that such a position has been considered and acted upon to a considerable extent and the objective for reform, met. This is evidenced in recent versions of the CCC.[29] The CCC advised that directions should be given 'as and when it may be appropriate, including at the beginning of the trial, if required'.[30] Therefore, the direction of the CCC, appears to be more effective than merely briefing the jury at the beginning. This is due to the involvement of the judges' knowledge and experience. The fact that the judge is likely to know when a 'direction is to be of benefit'[31] to those involved in the trial, means that such guidance can be standardised although each rape case is unique.[32] Therefore, increasing the opportunity for the judge to prevent the jury from thinking in a 'prejudicial and stereotypical manner', as well as ensuring consistency.[33]

[24] Ibid.
[25] David Barrett, 'Judges should give advice to juries in rape cases, says DPP' (Daily Telegraph, 10 June 2014) 2.
[26] Ibid.
[27] Barrett (n 29).
[28] Brian Leveson, *Review of Efficiency in Criminal Proceedings* (Judiciary of England and Wales 2015) 309.
[29] See, Ormerod and Wait (n 11)
[30] Ormerod and Wait (n 11) 20-24.
[31] Ibid 1-13.
[32] *R v Miller* [2010] EWCA Crim 1578 [79]-[80].
[33] Ibid.

Although this shows that the jury is not fully effective, the advice regarding the timing of the direction does increase how effective they are.[34] This is because, the guidance allows the jury (at the earliest opportunity) to recognise that: although stereotyped/ prejudicial thinking may be present, it is their duty to 'supress' such views.[35] For if the jury allow their prejudice to overlook the evidence before them, it may result in an 'inaccurate verdict'.[36] Consequently, leading the trial being 'unjust' and the jury to have been ineffective within their role. Even though the CCC is mere 'guidance', the guidance given in respect of the timing of the jury direction has been enshrined into the judicial practice, as evidenced in the Criminal Procedural Rules.[37] Thus, in theory, maximising the efficiency of the jury being consistent.

Statistics show that there are clear discrepancies between the amount for cases that are 'prosecution worthy' and those cases where the defendant has been convicted.[38] To illustrate, in 2019-2020 (rolling year to date), '32,934 prosecutions' were brought by the CPS.[39] Out of the 32,934 prosecutions that were brought, '5,654' prosecutions were dropped.[40] With 27,294 cases having been put through the criminal procedure (bearing in mind 457 cases were 'administratively finalised'), 1,430 defendants were acquitted whilst 1,871 convicted after a trial.[41] It has been submitted that one of the main reasons for the discrepancies, is that jurors are 'ineffective in tacking rape myths.[42]

A 'myth' in the context of rape, is defined as a 'commonly held belief, idea or explanation that is not true but is that of which arises from people's need to make sense of acts that are senseless, violent or disturbing'.[43] The CPS recently submitted that rape myths 'arise from and

[34] Allen and Edwards (n 25).

[35] Ibid.

[36] Ibid.

[37] Alisdair Gillespie, Siobhan Weare, '*The English Legal System' (*6th edn OUP 2017) 498, and The Criminal Procedure Rules 2015 SI 2015/1490, r 25.14

[38] Rachel Schraer, 'Why are rape prosecutions falling?', (*BBC News*, 30 January 2020) <www.bbc.co.uk/news/uk-48095118 > accessed 13 March 2020.

[39] Crown Prosecution Service. 'CPS Quarterly Publication: Prosecution Outcomes by Crime Types Management Information' <www.cps.gov.uk/publication/cps-data-summary-quarter-2-2019-2020 > accessed 13 March 2020.

[40] Ibid.

[41] Crown Prosecution Service, 'Rape and Sexual Offences – Social Myths' Ch 21. <www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-21-societal-myths> accessed 11 March 2020.

[42] Charles Hymas, 'Juries rape myths challenged amid slump in convictions in trials' (*The Telegraph*, 7 January 2020) <www.telegraph.co.uk/politics/2020/01/07/juries-rape-myths-challenged-amid-slump-convictions-trials/> accessed 20 March 21 March 2020.

[43] Crown Prosecution Service (n 41).

reinforce our prejudices and stereotypes'.[44] The danger of such is that rape myths limit the efficiency of the jury in a rape trial, as they 'lead juries to improperly reject complaints of sexual offending and acquit those, who should be convicted'.[45] With that in mind, a conclusion that juries are not effective, could be taken from the 'assertion that juries acquit more often than they convict in rape cases'.[46]

In the study conducted by the Home Office in 2005, conviction rates were lower than acquittal rates.[47] However, it has been alleged that the assertion of juries acquitting defendants more than convicting in rape trials is now untrue.[48] In the years between 2000-2010, the jury convicted the defendant in '55%' of rape trials.[49] Also, statistics show that between 2014-2015, the conviction rate was '56.90%'.[50] To add, during the years of 2018-2019, '65.7%' of rape trials resulted in a conviction.[51] In comparison to 2014-2015, the conviction rate in 2018-2019 is significantly higher than that between 2014-2015. Therefore, with such an assertion having been disproved, it is suggested that juries are likely to be more effective than previously thought. Nevertheless, the extent to which juries are effective is still evidently limited and the reasons why, broad.

In 2018, it was suggested that society's attitude towards gender roles allow for legal professionals to 'utilise gender to undermine witness's credibility', making jurors more likely to 'accept the rape myth being deployed in trials'.[52] This view is supported by Lees (1996), who observed rape trials in the Old Bailey and argued that both judges as well as legal professionals 'invoke' such myths.[53] Although rape myths maybe invoked, it appears that the

[44] Ibid.

[45] Brian Leveson, *Criminal Trials: The Human Experience* (University College London 2019) 12; HC Deb, 18 October 1982, vol 29, col 206.

[46] *Leveson* (n 50) 13.

[47] Elizabeth Kelly, Jo Lovett and Others, 'A Gap or Chasm? Attrition in Reported Rape Cases', (Home Office Research Study 293 2005) 1.

[48] Leveson (n 45).

[49] Cheryl Thomas, *Are Juries Fair* (Ministry of Justice 2010) V.

[50]Crown Prosecution Service, 'Rape_Table_3_Prosecution_Outcomes_0809_1415' <www.cps.gov.uk/underlying-data/cps-rape-prosecution-outcomes-2008-2015> accessed 13 March 2020.

[51] Crown Prosecution Service, 'CPS Quarterly Publication: Prosecution Outcomes by Crime Types Management Information' <www.cps.gov.uk/publication/cps-data-summary-quarter-2-2019-2020 > accessed 13 March 2020.

[52] Olivia Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Palgrave Macmillan US 2018) 129.

[53] Olivia Smith and Tina Skinner, *'How rape myths are used and challenged in rape and sexual assault trials'*, (2017) SLS 26, 441.

juries tend to believe in the less obvious myths' surround rape, rather than those which are obvious. To exemplify, it has been submitted that there is a presumption that victims "ask for it" by wearing provocative clothing.[54] Recently, it was suggested that the 'jury should reflect on the underwear worn by the victim'.[55] This is because it was stated by the defence counsel to the jury 'You have to look at the way she was dressed. She was wearing a thong with a lace front'.[56] Stating such to the jury, reinstates the view that individuals think society (and the jury) would believe that what the victim was wearing, automatically reflected consent.

Contradictory to the presumption regarding provocative clothing, a survey found that very few jurors believed that a woman 'who wears provocative clothing' or goes out 'alone at night puts herself in a position to be raped'.[57] With less jurors believing in such a myth, it is implied that juries are more effective than originally thought, despite the influence of counsel. Following the rape trial in Ireland, the '#thisisnotconsent' campaign, which often included pictures of women's underwear 'trended in the UK and further afield'.[58] With 'thousands of women' having took part in the campaign, it is evidenced that there is support for the lack of belief in the myth that women, who wear provocative clothing are 'asking for it' and that there is a change in social attitudes towards rape.[59] However, the less obvious rape myths are 'still present' amongst jurors.[60] For example, it is submitted that jurors still insisted that they were 'unsure' of the fact that most rape victims are raped by a 'known person'.[61] Thus, supporting the belief that ' it isn't likely to be rape, if the accused was known to the victim',

[54] Dame Vera Baird and Baroness Newlove, 'Why Disclosure Must Put Victims First!', (Police and Crime Commissioner, 25 July 2018) <www.northumbria-pcc.gov.uk/article-dame-vera-baird-baroness-newlove-disclosure-must-put-victims-first/?__cf_chl_jschl_tk_> accessed 13 March 2020.

[55] Maya Oppenheim, 'Protest held after teenage girl's underwear considered as evidence against her in rape trial' *(Independent,* 13 November 2018) < www.independent.co.uk/news/world/europe/cork-rape-trial-protest-rally-teenage-girl-underwear-evidence-criminal-court-a8631361.html> accessed 14 March 2018.

[56] Liam Heylin, 'Irish outcry over teenager's underwear used in rape trial', (*BBC News*, 14 November 2018) < www.bbc.co.uk/news/world-europe-46207304> accessed 13 March 2020.

[57] YouGov, *End Violence Against Women End Violence Against Women Coalition Survey Results* (YouGov 2018).

[58] Jack Aitchison, 'Why are women tweeting #ThisIsNotConsent - the hashtag and pictures of underwear explained' (*The Daily Record*, 15 November 2018) < www.dailyrecord.co.uk/news/scottish-news/women-tweeting-thisisnotconsent-hashtag-pictures-13595120> accessed 13 March 2020.

[59] Harriet Sherwood, 'Thong protest in Belfast raises concerns over rape trials' **(***The Guardian***,** 15 November 2018) <www.theguardian.com/uk-news/2018/nov/15/thong-protest-in-belfast-raises-concerns-over-trials> accessed 13 March 2020.

[60] Leveson (n 45).

[61] Ibid 13-14.

even though it has been proven that in most rape cases 'the perpetrator was known to the victim'.[62] It is, therefore, evidenced that jurors are largely 'out of touch' with the facts surrounding rape.[63] If the jury cannot comprehend the facts and are not knowledgeable of the situation women face, then it is unlikely they will be able to view evidence from an objective and unbiased viewpoint.

With regards to reform, it has been submitted that the jury is 'removed from rape trials' and should be replaced by a 'judge or by a judge and two lay people'.[64] The proposition was held to improve the 'transparency of the process'.[65] This is because, the jury are 'not permitted to disclose their reasoning for their decision', unless in circumstances stated in s. 20E and s. 20F of the Juries Act 1974. [66] Therefore, the jury can potentially base their decision on prejudicial thoughts and the court may not be aware.[67] However, a judge hearing a trial would be required to give the ratio decidendi thus, their decision would need to be unprejudiced or their 'professional integrity would be questioned'.[68] With a judge having been trained prior to taking up their role, they are taught how to remain 'impartial' and thus, are 'more likely' to resist rape myths, when compared to the jury.[69] However, the proposal to replace the jury with a judge alone has said to be 'no more effective' than a trial by jury, due to the judiciary still facing similar 'difficulties with stereotypes'.[70]

Despite the adverse impact of removing a jury, legislation has provided for situations where a jury will be 'removed' from trials where the defendant is charged with rape.[71] For example, the Criminal Justice Act 2003 permits a jury to be removed when the jury is deemed to be

[62] Zoe Peterson and Charlene Muehlenhard, 'Was It Rape? The Function of Women's Rape Myth Acceptance and Definitions of Sex in Labelling Their Own Experiences', (2004) 51 Research Gate 132 and Ministry of Justice, Home Office and Office for National Statistics, 'An Overview of Sexual Offending in England and Wales' (Office for National Statistics 2013) 6.

[63] Allen and Edwards (n 25), 426.

[64] HC Deb 21 November 2018, vol 649, col 345-346; Crime and Courts Act 2013 c. 22.

[65] Alec Samuels, 'Trials on Indictment without a Jury' (2004) JCL 68, 125.

[66] Juries Act 1974, s.20D.

[67] Samuels (n 71).

[68] Ibid.

[69] Richard Jackson, 'Jury Trial To-day' (Cambridge University Press 1938) 367-378.

[70] Rebecca McEwen and Others, 'Differential or Deferential to Media? The Effect of Prejudicial Publicity on Judge or Jury' (2018) 22 IJEP 124.

[71] Louis Blom-Cooper, *Unreasoned Verdict: The Jury's Out* (Bloomsbury Professional 2019) 2.

inefficient in (or potentially) being impartial and without prejudice, due to having (or having been) tampered with.[72] The case of R v McManaman [2016] exemplifies the extent to which s.44 is implemented and how a judge alone can be more effective in 'rape trials', than a jury.[73] In McManaman, the Court of Appeal permitted the rape trial to be heard by the judge alone. This was due to the court holding that the fact a third party had sent a 'Facebook request to one of the jurors', suggested that the impartiality of the jury was compromised.[74]

The court, when making the decision on whether permission for the jury to be removed and heard by a judge alone should be granted, was only concerned with the reasoning behind the 'purpose of the Criminal Justice Act 2003, which was to protect the 'integrity of a jury', not that the defendant 'instigated the tampering of the jury'. Consequently, permission for removal of the jury was granted.[75] With permission for the jury to have been removed granted, the case of *R v McManaman* emphasises that the benefit of having a trial heard solely by a judge, which is that the issue of 'jury tampering and impartiality' is removed.[76] The fact that the 'judge must give leave' for the jury to be dismissed and the trial to be heard by the judge alone, it is evident that the extent of the reform is not full.[77]

Furthermore, the case of J, S, M v R [2010] shows that the courts value the jury 'significantly' by holding the threshold for allowing a trial by judge alone to a high standard.[78] To exemplify, the Court of Appeal stated that where a 'serious criminal offence has been committed, the jury could only be removed as a 'last resort' and when the court is '*sure*' the statutory requirements have been met'.[79] Although the court stated there was a 'real and present danger of jury tampering', the provisions needed to protect the jury would not cause unreasonable intrusion into the lives of the jurors'.[80] Furthermore, it was stated that the provisions would not involve a constant police presence in or near their homes, or police

[72] Criminal Justice Act 2003, s.44, s.46.
[73] [2016] EWCA Crim 3.
[74] Ibid.
[75] [2016] EWCA Crim 3 [22].
[76] Liz Campbell and Andrew Ashworth and Mike Redmayne, *The Criminal Process* (5th edn, OUP 2019) 11.
[77] Criminal Justice Act 2003 s 44(2).
[78] EWCA Crim 1755 and *Campbell* (n 76) 358- 360.
[79] Ibid 8.
[80] Ibid.

protection at all times'.[81] Thus, the 'bar has been set high, in terms of detriment to the jury' for the jury to be dismissed in a 'complex case'.[82]

Overall, the law has shown willingness to move away from using juries in complicated cases. However, the continued use of juries in trials involving 'complex fraud and rape' is evident of the fact that the courts are 'not willing to abolish trial by jury'.[83] Thus, demonstrating jurors are highly valued.[84]Alternatively, the Chair of the Criminal Bar Association has argued that trial by jury should 'not be abandoned'; with the jury bringing 'objectivity' to trials', the solution to the problems surrounding rape myths is to 'educate' jurors.[85] It has been suggested that the education of jurors could consist of the jury partaking in an 'exercise based on rape myths and reactions to trauma', as well as the 'issues of consent'.[86] It is further submitted that this provision would 'serve to reinforce the clear judicial directions jurors receive', leading the jury to competently and fairly trying an allegation of rape'.[87]

Improving education is an approach widely supported by MP's. MP's compared the English criminal procedure to that of Scotland, concluding England should 'mirror' Scotland's procedure, in a bid to allow the jury to be more 'effective' within their role.[88] In Scotland, prosecutors are permitted to 'call expert evidence at trial'.[89] The calling of an expert witness enables jurors to 'understand typical psychological responses' to rape, and deterrers them from forming stereotypes and acting on such views.[90] Consequently, this would facilitate the

[81] Ibid.

[82] Campbell (n 75).

[83] Robert Verkaik, 'Abolition of jury trials *'is an attack on justice'* (*Independent*, 22 June 2005). <www.independent.co.uk/news/uk/crime/abolition-of-jury-trials-is-attack-on-justice-496121.html> accessed 20 May 2020.

[84] Ibid.

[85] Jonathan Ames, 'Lawyer calls for juries in rape trials to be ditched', (*The Times*, 8 October 2019) <https://www.thetimes.co.uk/article/axe-juries-biased-against-rape-victims-says-solicitor-wfmwk2t93> accessed 20 May 2020.

[86] Joanna Hardy, 'Judging the jury: Why rape trials can still be in safe hands' (*The Law Society Gazette,* 11 December 2018) <www.lawgazette.co.uk/commentary-and-opinion/judging-the-jury-why-rape-trials-can-still-be-in-safe-hands/5068627.article> accessed 20 May 2020.

[87] Ibid.

[88] HC Deb 21 November 2018, vol 649, col 347.

[89] Criminal Procedure (Scotland) Act 1995, s275 C.

[90] Hansard (n 97).

elimination of the preconceived bias of the jury and allow the jury to become more effective within their role.[91]

It has been submitted that the law being unclear facilitates the jury to be ineffective. In R v Olugboja [1982] it was highlighted that the law surrounding rape and consent 'failed to meet a minimum requirement of clarity and certainty'.[92] This is because the Sexual Offences Act 1956, s 1 governed the law on rape, did not provide a statutory definition for consent. It was therefore, established that consent was to be given its' ordinary meaning' as Parliament intended'.[93] However, as a result of 'consent' holding its' ordinary meaning', juries were then allowed to apply their 'own understandings of when someone consents'.[94] With the jury applying their own understanding, it allows for them to be influenced by rape myths such as, 'It isn't rape if the woman shows no obvious signs of being subject to physical violence'.[95] Thus, the case demonstrates the importance of legislation needing to be clear, as if it is not, the jury cannot be expected to understand the case and then deliver a legitimate judgment.

With a 'need to clarify the law regarding consent and rape', the Criminal Justice Act 2003 (CJA 2003) was implemented.[96] It is submitted that the CJA 2003, has clarified the law but the extent to which can be argued. For example, it was submitted that the definition of consent needed to allow individuals to know what the law recognises as a criminal offence, and what is acceptable within a sexual relationship'.[97] In doing so, the jury would be more effective, as the jury would be less able to misunderstand the evidence in front of them.[98] This is because, 'verbal and non-verbal messages can potentially be mistaken for consent', leading the jury to then misunderstand the situation and thus, the evidence Infront of them.[99] In 2003, the CJA stated that 'if the complainant agrees by choice, and has the freedom and capacity to make that choice', then the complainant consented.[100] It has been argued that the Act has been

[91] Ibid.
[92] QB 320 and Jennifer Temkin, *Rape and the Legal Process* (2nd edn, Oxford 2002) 93.
[93] *R v Olugboja* [1982] QB 320.
[94] David Ormerod and Karl Laird, *Smith, Hogan, & Ormerod's Criminal Law* (15th edn, OUP 2018) 759.
[95] Home Office, Setting the Boundaries: Reforming the law on sex offences (Home Office Consultation Paper, 2000 vol 1) 10.
[96] HL Deb 13 Feb 2003, vol 644, col 772.
[97] Home Office (n 95).
[98] Ibid.
[99] Ibid.
[100] S 74.

successful, as the legislation makes clear that: 'even though the claimant has not protested or been subject to injury, it does not necessarily signify the complainants' consent'.[101] Albeit an improvement, s.74 of the CJA 2003 still prevents the jury from being completely effective, as the definition does not provide for when juries have to assess whether the complainant 'consented to sex when they were intoxicated'.[102] This is because, the statutory definition is 'silent as to the precise moment at which B's consent or agreement must be present'.[103] With it being to the jury to decide the issue of 'consent', it has been proposed that as different jurors hear different cases, 'inconsistency is created'.[104] With the law and courts valuing consistency, as well as fairness and the jury being a part of that system, it is submitted that the jury are therefore, ineffective within their role.

Although English law has not yet decided when consent ends, in situations where the complainant has become heavily intoxicated after giving consent when sober, Canadian law holds that consent ceases when an individual is unconscious.[105] It has been suggested that English law will soon see the law regarding the timing of consent, mirror that of Canadian law.[106] It is not just the judge's direction to the jury, or the juries own stereotyped thinking, prejudice, and beliefs in rape myths, which limit the jury's effect in rape trials. It is submitted that disclosure also poses a 'large issue'.[107] Disclosure is the 'process by which material collected by the police during an investigation is made available'.[108] It is for the prosecutor to disclose to the defence 'any unused investigative material which might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the accused'.[109] As disclosure has been described as a 'fundamental question of fairness' in criminal proceedings, when the disclosure process does not work as it should, 'crucial

[101] David Ormerod and Karl Laird, *Smith, Hogan, & Ormerod's 'Criminal Law'* (15th edn, OUP 2018) 759.
[102] Ibid 759-764.
[103] Ibid.
[104] *R v Olugboja* [1982] QB 320 [332].
[105] *AG of Canada* [2011] 2 SCR 440.
[106] *Ormerod and Laird* (n 101) 765.
[107] HM Crown Prosecution Service Inspectorate, 'Making it Fair: The Disclosure of Unused Material in Volume Crown Court Cases' (Criminal Justice Joint Inspection 2017) <www.justiceinspectorates.gov.uk/cjji/inspections/making-it-fair-the-disclosure-of-unused-material-in-volume-crown-court-cases/> accessed 13 March 2020.
[108] Justice Select Committee, *Disclosure of evidence in criminal cases***:** *The failures in disclosure* (HC 2018, XI) 6.
[109] Criminal Procedure and Investigations Act 1996, s 3(1(a)).

evidence may be omitted'.[110] This can adversely impact the jury from fulfilling their role, as evidenced by the events in the case of R v L [2015].[111] Two sets of jurors gave two inconsistent verdicts yet, on appeal a different outcome was decided – based on the evidence which was provided and evidence which had previously been omitted. In turn, highlighting situations where juries are ineffective in rape trials.

In R v L the defendant was tried for the offence of rape, found not guilty, but then re-tried and convicted. However, the defendant then appealed under s 9 Criminal Appeal Act 1995. The defendant appealed because, 'fresh evidence' was that of a previously undisclosed social worker's note.[112] The content of that note, indicated that the complainant had been raped 'previous to the current incident'.[113] This fact is important, as the medical evidence that was put in front of the jury, was that the complainant had 'been a virgin at the time of the alleged rape by the appellant'.[114] Consequently, the fresh evidence undermined (at the retrial) the prosecutions 'assertion that the evidence of hymenal penetration had resulted from the rape by the appellant'.[115] However, the jury (in the previous trial) were likely to have relied heavily on the medical evidence in conjunction with the complainant's evidence-in-chief, to conclude that the appellant was guilty.[116] This eventuality resulted in the jury not having had the opportunity to question the credibility of the witness. Consequently, it can be seen to be just that the court 'quashed' the appellants conviction of rape, holding that the 'fresh evidence undermined the integrity of the medical evidence, which was placed before the jury at the re-trial by the prosecution and so directed by the judge.[117] The effect of disclosure failings has said to have 'undermined public confidence in the justice system' and future juries could be 'deterred from convicting defendants in 'sexual assault trials', including rape.[118] It is therefore

[110] Justice Select Committee, Disclosure of evidence in criminal cases (Oral Evidence, HC 2018, XI) 53 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/disclosure-of-evidence-in-criminal-cases/oral/85452.html> accessed 15 May 2020 and Justice Select Committee (n120), 4.

[111] EWCA Crim 741.

[112] *R v L* [2015] EWCA Crim 741 [5].

[113] Ibid 6.

[114] Ibid

[115] Ibid 6.

[116] Ibid.

[117] Ibid.

[118] David Bowman and Frances Gibb 'Former lord chief justice warns of rape trials under threat' (The Times, 20 January 2018).

clear, that the jury are only effective within their role of 'assessing the credibility of the witness and 'determining a person's guilt', if they are given all of the facts surrounding the case.[119]

Overall, through the use of the CCC, it is evident that Nigel Booth is correct in stating that 'throughout the UK, the judiciary has warned the jury against stereotyped-thinking' in relation to rape cases.[120] However, it is clear that the extent is limited. Thus, the view that the jury directions are having a 'limited if any real effect' is too true; although, the view that the guidance has hardly had 'any real effect' may be seen as an exaggeration.[121] This is because, despite the existence of the CCC, of which the primary purpose is to allow the judiciary to give consistent guidance on the matter of stereotyped thinking to juries, the study conducted by Dominic Willmott evidenced that the jurors (despite having been given the same guidance) acted upon their bias and stereotypical thinking.[122] Yet, the CCC has proven to have been effective when used in conjunction with legislation. For example, the CJPOA[123], decided that the jury should no longer be directed that: 'it is dangerous to convict on the evidence of the complainant alone'. This has said to have allowed the CCC to be effective, as doing so would prevent the jury from being exposed to the myth that 'women often lie about rape, unless the rape happened in the context of an ambush'.[124] It is perhaps the timing of the direction and the procedure of disclosure that needs to improve to allow the jury directions to be effective to the fullest extent. To exemplify, the recent version of the CCC allows for the jury direction to be given at any time within a trial; this in -turn allows for the judge to decide when the direction will be most effective.[125] Thus, it is not the jury directions themselves which are ineffective, but how and when they are used.

[119] Louis Blom-Cooper, 'Unreasoned Verdict: The Jury's Out', (Bloomsbury Professional 2019) Ch 2.
[120] Nigel Booth, 'Juries in Rape Trials' (2017) 181 JPN 662, 663.
[121] Ibid.
[122] Maddison Ormerod and Tonking Wait (n 11) and Dominic Willmott and Others, 'Juries in Rape Trials' (2017) 181 JPN 662, 663.
[123] s.32(1).
[124] Allen and Edwards (n 25) 11 and Wolchover and Heaton-Armstrong (n 24).
[125] Allen and Edwards (n 25), Ch 11; Ormerod and Wait (n 11) 1-13, 20-24.

Director's Duties

Luke Phillips (2021) SSLJ 2, 87-92

LLM LPC Student, University of Sunderland

Abstract

The introduction of the Companies Act 2006 brought significant changes as regards to the duties owed by directors to a company. It can be argued that the restrictions on company's directors under s175 Companies Act 2006 are strict and inflexible. The result of the rule could possibly mean that a director can never make a profit from a transaction outside of their company without it amounting to a conflict of interest and therefore will be liable to account for any profit made. However, certain rules and case law surrounding directors' duties may prove s175 Companies Act 2006 to not be as strict and inflexible as it seems at first glance. If a director was to follow a correct procedure, it is entirely possible they may make profit despite the issues surrounding conflicts of interests. This paper explores these possibilities.

Keywords

Business Law; Conflict of interest; Director's Duties

Prior to the Companies Act 2006 (CA 2006), the majority of directors' duties were founded on common law rules and equitable interests.[1] This foundation still remains in place as explained by CA 2006 they 'have effect in place of those rules and principles as regards the duties owed to a company by a director'.[2] The duties of directors to their companies are set out between ss 170 - 177 of the Act. This is including a 'duty to avoid conflicts of interest' which has been suggested to be strict and inflexible regarding a director being able to make a profitable transaction outside of their company.[3] This is due to the transaction having a 'direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company' which the Act states must be avoided.[4] So, if a director wished to become a director of another company, or enter into an external contract for personal interest, it may prove to be a difficult task. Although on first appearance the Act may seem strict and inflexible, a closer inspection may prove otherwise.

There are subtle but valuable statutory relaxations of the strict equitable requirement to obtain members' approval to authorise what would otherwise be breaches of fiduciary obligations.[5] A fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.[6] Therefore, unless a private company invalidates it (or a public company permits it) section 175 expresses that through the authorisation of the other directors, a director can act upon what would otherwise be a conflict of interest.[7] This is of course without the inclusion in any vote or quorum from the director it concerns or interests.[8] This can however be stated differently in a company's articles of association, which outline the rules and restrictions relating to the way a company operates and is governed, and therefore is subjective. The rule that the director in question is forbidden to vote may be foreseen as a 'strict' one, but is arguably fair, as he would only vote in favour of himself. Furthermore, it can be argued that the process in which the conflict of interest is decided upon is objectively balanced fairly. This is because it is decided through ordinary resolution at a general meeting.

[1] J. Scott Slorach and Jason Ellis, *Business Law* (26th edn, OUP 2018) 72.
[2] Companies Act 2006 s 170(3).
[3] Ibid s 175.
[4] Ibid s 175(1).
[5] Stephen Acton, 'A new direction?' (2008) 158 NLJ 606.
[6] *Bristol and West Building Society v Mothew* [1996] 4 All ER 698.
[7] CA 2006 s 175(5) & 175(4)(b).
[8] CA 2006 s 175(6).

An ordinary resolution is one which requires a simple majority of votes in favour if it is to be passed.[9] 'Simple majority' means more votes in favour than against and an equality of votes is not sufficient.[10] For example, 51% or above. Therefore, if there were four members (shareholders), presuming they all had equal shares in the company, three out of the four of them would be required to vote in favour of the potential conflict in order to allow it. Depending on the circumstances of the directors' relationship with the other members, this may be a hard obstacle to overcome in the case of a conflict. Thus, illustrating a subjective process in the case of conflicts of interest. This ultimately conveys that if a director who is in the midst of a conflict of interest with the company, and manages to persuade his fellow directors' and shareholder's approval for that conflict to go ahead, the general duty of section 175 is one of flexibility.[11] It is true that if the majority of other members of that company fail to authorise the transaction, that ends the possibility for the director to enter into that transaction. Thus, signifying a strict, but flexible element to the restrictions of the director's duties under the CA 2006.

Strong evidence from past events illustrate duties from directors can be perceived as strict. A prime example being the case of Regal (Hastings) Ltd v Gulliver.[12] In this case, after the defendants sold their company (3 cinemas) they were found to have made a 'secret profit' from shares they sold from subscribing for as previous directors. The House of Lords decided that it was a secret profit since the opportunity to invest in the new company only came to the defendants because they were directors of Regal (Hastings).[13] This rule is further supported by the CA 2006 as it states the Act 'applies in particular to the exploitation of any property, information or opportunity'.[14] This demonstrates that any potential profit that is to be made from a conflicting transaction is at risk of being in breach of duties as a director. Therefore, supporting the claim that S.175 of the CA 2006 is strict and could perceive to be inflexible.

It's not section 175 alone that restricts a director from an external contract that may conflict with their companies' interests. Section 177 of the CA 2006 explains the director's 'Duty to

[9] Slorach and Ellis (n 1) 139.
[10] CA 2006 s 282(1).
[11] Ben Griffiths, 'Dealing with directors' conflicts of interest under the Companies Act 2006' (2008) 6 JIBFL 292.
[12] (1967) 2 AC 134.
[13] Slorach and Ellis (n 1) 74.
[14] CA 2006 s 175(2).

declare interest in proposed transaction or arrangement'. The director must declare the nature and extent of that interest to the other directors.[15] Cases such as 'Cullen Investments Ltd and others v Brown and others' convey the necessity of disclosing any personal investments made which may conflict with a director's business.[16] In this case, managing the conflict was impossible because it was concealed, so the company could not have consented to it.[17] The defendant was found 'in breach of his director's duties under s.175 of the 2006 Act by reason of the conflict of interest, and was in breach of both s.172 and s.177 by reason of his failure to disclose the interest giving rise to that conflict.'[18] This judgment presents itself with a strict avenue of necessary steps that must be taken in order to enter profitable transactions outside of a directors' company. This includes S.172 CA 2006 which is the duty to promote the success of the company.[19] This implies that when a director is making a transaction, they must always have in mind any consequences that may affect the company. This includes the interests of employees and any other consequences that may impact the company.[20] This can evidently limit a director when entering into a transaction and must therefore always be aware of restrictions. Furthermore, if a director is dishonest and not disclosing profits, he will be found in breach of his directors' duty and liable to account for any profits made.[21] If on the other hand, there was full and frank disclosure to the members of the company and their approval had been obtained by ordinary resolution at a general meeting, an obligation to account for profits made would not arise.[22] As long as the director in question declares their interests before the company enters into the transaction or arrangement and avoids dishonesty among other directors, personal and profitable interests outside their company is achievable.[23]

Consequences due to breach of Section 177 CA 2006 have seen transactions reversed. In the case of Knightsbridge Property Development Corporation (UK) Ltd v South Chelsea Properties Ltd and Others a director of both companies had transferred land from one company to

[15] CA 2006 s 177(1).
[16] [2017] EWHC 1586.
[17] Ali Tabari & Kate Rogers, 'Carrying the can: focus on directors' duties' (2018) 2 CRI 52.
[18] [2017] EWHC 1586 (per Lord Justice Barling) 283(4).
[19] CA 2006 s 172.
[20] CA 2006 s 172(1)(a) and s 172(1)(b).
[21] *Belmont Finance Corporation v. Williams Furniture Ltd (No 2)* [1980] 1 All ER 393.
[22] Tahir Ashraf, *Directors' Duties with a Particular Focus on the Companies Act 2006* (Emerald Group Publishing Limited 2012), 125-140.
[23] CA 2006 s 177(4).

another.[24] The Defendant was acting in the interests of one company over the other and failed to consult any of the other directors before the transactions. This found the transaction of property to not be binding.[25] The ruling here proves to be strict, but the Defendant had a flexible solution he did not pursue. If the director in this case had followed the rules set in S.175 and consulted the other directors of the company, the process of an ordinary resolution by means of a general meeting would have taken place.[26] If then successful, the director in question would have completed his transaction as intended. As stated by Lord Goldsmith to the Lord Grand Committee 'there is no prohibition of a conflict or potential conflict as long as it is has been authorised by the directors in accordance with the requirements set out in (the CA 2006).'[27] This suggests that openness ought to feature when carrying out directorial functions and in particular, where a proposed transaction may cause a conflict of interest between the director and company.[28] This would further comply with the rules set out in Section 175(4) CA 2006 and the ratification process set out in the Act.[29]

More evidence of how a full disclosure can allow a director to make profitable interests can be seen in the case of Kleanthous v Paphitis and others.[30] After the defendants failed to persuade other directors of their company to enter into a contract, they took it upon themselves to do so. They then created a new company to proceed with the purchase of the contract. The claimant's brought the case against the defendants for breaching their duty not to accept benefits from third parties.[31] It was decided there was no conflict of interest due to the full disclosure to the board, and was therefore processed correctly.[32] This amplifies the rules laid out in the CA 2006. Through appropriately following the regulation of section 175(4), the director effectively entered into a contract outside of his company and was found not liable to account for any profit he has made. This successfully eliminates the stereotype directors' duties being inflexible.

[24] [2017] EWHC 2730.
[25] Tabari & Rogers (n 17)
[26] CA 2006 s 175(4).
[27] Lord Goldsmith, Lords Grand Committee, 6 February 2006, (column 288).
[28] Ashraf (n 22).
[29] CA 2006 s 239.
[30] [2011] EWHC 2287.
[31] CA 2006 s 176.
[32] [2011] EWHC 2287.

Although it may be true that S.175 CA provides a stricter approach towards directors being able to make profitable transactions outside their company, it is evidently flexible. There are numerous cases that imply there are strict restrictions on possibly conflicting transactions. However, we can see that if the correct procedure is complied with, in particular a director being open and honest about his possible proceedings, then the possibility of entering into conflicting transactions is achievable. Furthermore, liability to account for any profit made will only be pursued if found in breach of the Act. Section 175 CA 2006 can therefore be a strict rule but can be flexible depending on the circumstances. As long as a director follows the rules set out in the act from S.170 to S.177, namely S.175(4) in particular, then there is a significant opportunity to enter into a profitable transaction outside of their company. Therefore, to conclude, it is evident the statement that 'the restrictions on company directors under S. 175 Companies Act 2006 are strict and inflexible' can be seen as incorrect. For it is possible for a director to enter into a transaction outside of their company without it amounting to a conflict of interest. Therefore, the statement of flexibility is incorrect as it has proven through cases such as Kleanthous v Paphitis and others, and the statute itself to be flexible.[33] On the other hand, there is little evidence that a director can in fact make a profitable transaction without being open and confront with his company's board, as supported by cases such as Cullen Investments Ltd v Brown and Knightsbridge Property Development.[34] This suggests a significant element of 'strictness' is present in the CA 2006 with regards to directors' duties.

[33] ibid.
[34] [2017] EWHC 1586 and [2017] EWHC 2730.

Is the Gender Pay Gap Another Feminist Myth? If Not, Is It Finally Time for The Status Quo To Be Redefined?

Eirini Spentzari (2021) SSLJ 2, 93-101

Stage Three LLB Student, University of Sunderland

Abstract

With feminism on the rise, the word about the gender pay gap is gaining more awareness by the day gets more and more attention each day. The gender pay gap is defined as the difference in the average gross hourly earnings calculated and compared between women and men. In specific, it is based on salaries paid directly to employees before any added income tax and with the deduction of social security contributions. There are some commentators, however, who argue that the gender pay gap is largely a myth, mainly because of the argued lack of depth in the detailed comparison of the pay gap figures. According to the relevant statistics, however, working women in the EU earn on average 16% less per hour than men. The statistics agency Eurostat reports that the UK has the fourth-largest gender pay gap in the European Union. In the UK, according to the Office for National Statistics' latest review, the gender pay gap among all employees, was at 17.3% in 2019. It therefore needs to be ascertained why the gender pay gap still exists and it also needs to be explained, why some academics regard it as a myth.

Keywords

Gender pay gap; pay gap; feminism

Historic Background

Women's fight for equal pay has a long historic background.[1] On an international level during WW1 & WW2, women worked jobs which were ordinarily undertaken by men.[2] Despite working the same role, they were paid a lower wage than their male counterparts.[3] Women did not keep a passive position towards this. A motion of strikes started among women workers nationwide.[4] Also, later during the 1920s and 30s women workers in the UK, continued the campaigns, with women's suffrage and other unions supporting women.[5] The reactions became more broadly solidified during World War II and from the 1950s and afterwards, when women's presence has been significantly increased in the labour force and in trade unions.[6] In 1968 a big strike by the women machinists at the Ford Car Plant in Essex was held.[7] This paved the way for the 1970's Equal Pay Act, which became implemented in 1976.[8] This piece of legislation allowed equal pay and terms of employment for both sexes to become legally binding for the first time. However, employers seem to continue up to this date to ignore it, just as females worldwide continue to campaign against it.[9]

Causes

The reasons why the gender pay gap exists may need to be searched in the wider phenomenon of gender inequality. In the Victorian times for example, women were thought

[1] Striking Women, 'Gender pay gap and the struggle for equal pay' (*Striking Women*) <https://www.striking-women.org/module/workplace-issues-past-and-present/gender-pay-gap-and-struggle-equal-pay> accessed 24 March 2020.
[2] Drew Lamberger, 'History of the Gender Pay Gap' (*Sutori*) < https://www.sutori.com/story/history-of-the-gender-pay-gap--ytEHzgHk3j9jUGdfBJkPFo1E > accessed 24 April 2020.
[3] Ibid.
[4] Striking Women, 'Women and Work: World War I: 1914-1918' (*Striking Women*) <https://www.striking-women.org/module/women-and-work/world-war-i-1914-1918 > accessed 24 April 2020.
[5] Striking Women (n 7)
[6] Striking Women, 'Women and Work: Post World War II: 1946-1970' (*Striking Women*) <https://www.striking-women.org/module/women-and-work/post-world-war-ii-1946-1970 > accessed 24 April 2020.
[7] Kevin Wilson, 'The Ford sewing machinists strike and the history of the struggle for equal pay' (*British Politics and Policy*, 7 June 2018) <https://blogs.lse.ac.uk/politicsandpolicy/the-1968-ford-sewing-machinists-strike-and-the-history-for-equal-pay-for-women/ > accessed 24 April 2020.
[8] Equal Pay Act 1970.
[9] Wilson (n 13); Jon Henley, 'Swiss women strike to demand equal pay' (*The Guardian*, 14 Jun 2019) <https://www.theguardian.com/world/2019/jun/14/swiss-women-strike-demand-equal-pay> accessed 24 April 2020.

from their nature to be destined in doing the housework and raise the children.[10] This inequality has existed through most, if not all, human societies around the world.[11] Most given explanations for the gender pay gap indicate that, the reason behind it is the low quality work that women undertake.[12] Either that would be because they would need to take frequent leaves for family reasons, or because of the nature of their work in general, since it is believed that they are more frequently employed in part-time jobs and rarely in the science and engineering field.[13] Some arguments even include women as having a more agreeing personality trait, something that makes more likely the chance to be paid less.[14] The main argument that is put forward towards this, is that men would need to do the jobs outside the house, since they would be more demanding and they are physically stronger than females.[15] This does not justify however, the reason why men should not do the household chores or that women are not able to drive a tram. As it was later proven in World War I and after the Industrial Revolution, this is all a matter of tradition and not really a muscle issue.[16] These traditions consequently created a never-ending vicious cycle for women.[17] They have grown to become the roots of the mindset that people have, influencing in this way the job choice that young females take.[18] In the past, this resulted in females not getting paid sufficiently to be able to live independently, so they had to be economically dependent on men.[19] It is argued that low wages were a way which allowed men define their dominance over women.[20]

[10] Kara L. Barret, 'Victorian Women and Their Working Roles' (*State University of New York College at Buffalo - Buffalo State College Digital Commons at Buffalo State*, May 2013) <https://digitalcommons.buffalostate.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1009&context=english_theses > accessed 24 April 2020.

[11] Emma Griffin, 'What's to blame for the gender pay gap? The housework myth' (The Guardian, 12 Mar 2018) <https://www.theguardian.com/commentisfree/2018/mar/12/history-blame-gender-pay-gap-housework> accessed 25 March 2020.

[12] Dr Charlotte Gascoigne, 'The real reasons behind the gender pay gap' (*Timewise*) <https://timewise.co.uk/article/article-real-reasons-behind-gender-pay-gap/ > accessed 24 April 2020

[13] 'The Gender Pay Gap and Pay Discrimination – Explainer' (*Fawcett Society*, October 2019) <https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=7aed6cd4-5e2e-4542-ad7c-72dbbbe14ee3 > accessed 24 April 2020.

[14] Zoe Williams, 'Why gender pay-gap truthers are on the rise' (*The Guardian*, 23 April 2019) <https://www.theguardian.com/world/2019/apr/23/gender-pay-gap-alt-right > accessed 16 March 2021.

[15] Griffin (n 17).

[16] Striking Women (n 10).

[17] Striking Women (n 7).

[18] Ibid.

[19] Griffin (n 17).

[20] Ibid.

Contemporary Reality

This historic background has paved the road for today's society's norms and reasons. This is prominent that one of them is discrimination towards the female sex.[21] The undervalue of the skills that women have is a usual phenomenon and one of the prominent examples of this are jobs specifically addressed traditionally to women or men respectively.[22] Allegedly, more than 40% of women work in the health, education and public administration fields, while only 29% of scientists and engineers in the EU are females.[23] This phenomenon is called "occupational/sectoral segregation".[24] Women working in technology or that hold executive positions are also fewer than men.[25] In particular, less than 6.9% of top companies' CEOs are women.[26] Also, according to the Office for National Statistics women over 40 years are more likely to work in lower-paid occupations and less likely to work as managers, directors or senior officials in comparison to younger women.[27] In terms of different occupations, female managers are at the greatest disadvantage, earning 23% less per hour than male managers.[28]

Nevertheless, the gender pay gap is not always being excused by the reason of a different occupation. Pure discrimination for women in the workplace includes work within the same occupational categories or even being demoted after returning from maternity leave.[29] Other than that, since women are directly connected with motherhood and being the caretakers of the entire family, this frequently has a negative reflection on their career.[30]

The median hourly pay for full-time employees, which is the point at which half of people earn more and half earn less, was 8.9% less for women than men in April 2019.[31] Many big

[21] Brigid Francis-Devine, Douglas Pyper, Feargal McGuinness, 'The gender pay gap' (*House of Commons Library*, 6 March 2020) <https://commonslibrary.parliament.uk/research-briefings/sn07068/ > accessed 25 March 2020.
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] European Parliament (n 2).
[26] Ibid.
[27] Smith (n 6).
[28] Eurostat, 'The life of women and men in Europe — A statistical portrait — 2017 edition' (*Eurostat*) <https://ec.europa.eu/eurostat/en/web/products-digital-publications/-/KS-02-17-602 > accessed 25 March 2020.
[29] European Parliament (n 2).
[30] Striking Women (n 7).
[31] Francis-Devine, Pyper, McGuinness (n 27).

companies still also insist on illegal pay culture.[32] Among them seems to be the BBC with various pay gap allegations and one of them was the resignation of its China editor, Carrie Gracie.[33] Allegedly, only a third of its 96 top earners are women, while the top seven are all men.[34] A reality is also, that women get paid 22% less on apprenticeships than their male equivalents.[35] There are stats that show other than that, women resemble the 60% of those earning less than the living wage.[36] They are thus, more likely to live in poverty than men.[37] As single parents women are more likely to be in charge of their children following a separation, along with the issue of discrimination in the job market. When public services are cut also, women are more affected since it is often the case that they use them more and they are more likely to work in the sector.[38] Women of an older age are especially faced with an advanced risk of poverty and social exclusion.[39] This is justified by the fact that the gap is rather prominent in pension income, which stood at 35.7% in 2017.[40]

The Antipode

According to the EU's statistics, the pay gap in the UK is amongst the highest within the EU at 20.8%.[41] Those who believe that the gender pay gap is a myth, however, are focusing on the

[32] Alexandra Topping, 'Gender pay gap: companies under pressure to act in 2019' (*The Guardian*, 01 January 2019) <https://www.theguardian.com/world/2019/jan/01/gender-pay-gap-2018-brought-transparency-will-2019-bring-change > accessed 14 March 2021.
[33] Marie Anne Denicolo, 'BBC gender pay gap sparks human rights probe' (2018) CRJ 7 1, 1.
[34] Graham Ruddick, 'BBC facing backlash from female stars after gender pay gap revealed' (*The Guardian*, 20 Jul 2017) <https://www.theguardian.com/media/2017/jul/19/evans-lineker-bbc-top-earners-only-two-women-among-best-paid-stars > accessed 25 March 2020.
[35] Julia Kollewe, 'Gender pay gap: women effectively working for free until end of year' (*The Guardian*, 9 Nov 2015) <https://www.theguardian.com/world/2015/nov/09/gender-pay-gap-women-working-free-until-end-of-year > accessed 25 March 2020.
[36] Ibid.
[37] European Parliament, 'The Parliament's fight for gender equality in the EU' (*European Parliament*, 5 August 2019) <https://www.europarl.europa.eu/news/en/headlines/priorities/social/20190712STO56961/the-parliament-s-fight-for-gender-equality-in-the-eu > accessed 25 March 2020.
[38] 'Maria Arena: Female poverty is the result of a lifetime of discrimination' (*European Parliament*, 19 April 2011) <https://www.europarl.europa.eu/news/en/headlines/society/20160418STO23760/maria-arena-female-poverty-is-the-result-of-a-lifetime-of-discrimination > accessed 14 March 2021.
[39] European Parliament (n 2).
[40] Denitza Dessimirova, Maria Audera Bustamante, 'The gender gap in pensions in the EU' (European Parliament, July 2019).
<https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/631033/IPOL_BRI(2019)631033_EN.pdf > accessed 25 March 2020.
[41] European Parliament (n 2).

significant decrease of the percentage.[42] Another argument is that women working part time are being paid better than men.[43] Reportedly, the counterpart median hourly pay was 3.1% higher for women than for men, excluding the overtime pay.[44] Also the firm believers of the non-existence of the phenomenon, argue that the higher the level of education is the higher the monetary recompense will be.[45] This argument is based on the rapid increase in the female higher education levels which exceed these of the opposite gender, over the past decades.[46] Women have also been engaging more in our contemporary times with historically, men-dominated pre-occupations.[47] In July 2019 there have been more women than ever in the European Parliament, accounting for 41% of MEPs.[48] Another argument people denying the gender pay gap have is that statistics never showcase the exact reality of the phenomenon.[49] Also, there are employment fields were women represent the majority of the working hands.[50] For example, sewers, therapists or nurses.[51] Other than that, there is the argument that women tend to be more socially active whereas, men find it more difficult to reach out and engage with civil society.[52]

The Answer to the Pay Gap Deniers

Nevertheless, the truth is that the gap is decreasing very slowly, especially in recent years.[53] Among all employees, the gap fell from 17.8% in 2018 to only 17.3% in 2019.[54] The figures

[42] Ibid.
[43] Rachel Krys, 'Women earning more than men in part-time work' (*Inclusive Employers*) <https://www.inclusiveemployers.co.uk/news/equality/women-earning-more-men-part-time-work > accessed 25 April 2020.
[44] Francis-Devine, Pyper, McGuinness (n 27).
[45] Ibid.
[46] Stéphan Vincent-Lancrin, 'The Reversal of Gender Inequalities in Higher Education: An On-going Trend' (*OECD Centre for Educational Research and Innovation (CERI)*, 2008) <https://www.oecd.org/education/ceri/41939699.pdf > accessed 25 April 2020.
[47] 'Women in Male-Dominated Industries and Occupations: Quick Take' (*Catalyst*, 05 February 2020) <https://www.catalyst.org/research/women-in-male-dominated-industries-and-occupations/ > accessed 14 March 2021.
[48] European Parliament (n 43).
[49] Andrews (n 3).
[50] Eli Lehrer & Catherine Moyer, 'Putting Men Back to Work' (*National Affairs*, 2017) <https://www.nationalaffairs.com/publications/detail/putting-men-back-to-work > accessed 2 April 2020.
[51] Ibid.
[52] Ibid.
[53] Smith (n 6).
[54] Ibid.

from 2019 only represent a decline of 3.3 percentage points, in correlation to them from a decade ago, which were up to 12.2%, while there is only 0.6 percentage points difference since 2012.[55]

Also, while a much higher share of women are employed part-time than men, it is only logical and consequential that they would earn much less per hour as part-time workers than those working full-time.[56] Nevertheless, even the part time job gap is measured, according to the Simpson's paradox.[57] Experience working part-time also appears to have very little impact on growth in hourly wages compared to experience in full-time work.[58] Moreover, women tend to do more hours of unpaid work and in contrast to men fewer are occupied in the workforce.[59] For men, employment advancement rates are not essentially affected by the arrival of a first child, whereas women were shown to be significantly more likely than men to still work in part-time jobs by the time their first child reaches adulthood.[60] Additionally, even though, the gap has been reduced among workers qualified to GCSE or A level standard, little change has been noticed within the group workers qualified to degree level over this period.[61]

Solutions

In terms of legislation, gender pay equality was introduced in the European Union, as early as the Treaty of Rome, also known as the Treaty on the Functioning of the European Union, article 157.[62] It set out the European principle that the two genders should receive equal pay for equal work. In the UK, the Equal Pay Act and the Sex Discrimination Act were repealed on

[55] Ibid.
[56] Francis-Devine, Pyper, McGuinness (n 27).
[57] Jonathan Athow, 'Decoding the gender pay gap: how a Bletchley Park codebreaker helped explain a strange paradox' (*Office for National Statistics*, 16 April 2019) <https://blog.ons.gov.uk/2019/04/16/decoding-the-gender-pay-gap-how-a-bletchley-park-codebreaker-helped-explain-a-strange-paradox/> accessed 4 April 2020.
[58] Francis-Devine, Pyper, McGuinness (n 27).
[59] European Parliament (n 43).
[60] Richard Partington, 'Mothers working part-time hit hard by gender pay gap, study shows' (*The Guardian*, 5 Feb 2018) <https://www.theguardian.com/society/2018/feb/05/mothers-working-part-time-hit-hard-by-gender-pay-gap-study-shows > accessed 5 April 2020.
[61] Francis-Devine, Pyper, McGuinness (n 27).
[62] Art. 157 Treaty on the Functioning of the European Union 1957.

1 October 2010 and replaced by the all-encompassing Equality Act 2010.[63] In the Equality Act, sections 64 -71, legislate sex equality, including work, pay and pension.[64]

In December 2010, the coalition government, published its report "Equality strategy — building a fairer Britain". In the report it was stated: "We expect and want the voluntary approach to work."[65] In 2015, the UK Government, via the "Think Act Report" scheme, sought to encourage businesses to report on their gender pay gaps voluntarily.[66] Only 7 organisations signed up for it and it was consequently proved unsuccessful.[67] Thus, it included in the Equality Act 2010 legislation, the Gender Pay Gap Information Regulations 2016 ("GPGR"), which would regulate mandatory gender pay gap reporting.[68]

Starting from 2017/18, public and private sector employers with 250 or more employees are required annually to publish data on the gender pay gap within their organisations.[69] According to the later published statistics, in the years 2018 and 2019, approximately 78% of employers disclosed that median hourly pay was higher for men than for women in their reporting organisation, while 14% of employers stated median hourly pay was higher for women.[70] Only 8% stated that median hourly pay was the same for both women and men.[71]

In the recent successful case of Brierley and others v Asda Stores Ltd, which is the first large scale equal pay claim brought in the private sector, hundreds of female Asda shop workers are claiming that they do work of equal value to men working in its distribution centres.[72] In

[63] Gov. UK, 'Equality Act 2010: guidance' (*Gov.UK*, 27 February 2013) <https://www.gov.uk/guidance/equality-act-2010-guidance > accessed 10 April 2020.
[64] S. 64 – 71 Equality Act 2010.
[65] Members of the Inter-Ministerial Group on Equalities, chaired by Theresa May, Home Secretary and Minister for Women and Equalities, 'The Equality Strategy - Building a Fairer Britain' (*Government Equalities Office*, December 2010).
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/85301/equality-strategy-large-print.pdf > accessed 10 April 2020.
[66] 'Policy paper Think, Act, Report' (*Government Equalities Office*, 16 July 2015)<https://www.gov.uk/government/publications/think-act-report/think-act-report > accessed 12 April 2020.
[67] Kim Sartin, Cecilie Justesen, 'Employment compliance update: Modern slavery, gender pay equality, and employee privacy' (2016) CRJ 5 4.
[68] 'Guidance Gender pay gap reporting: overview' (*Gov.UK*, 22 February 2017) <https://www.gov.uk/guidance/gender-pay-gap-reporting-overview> accessed 12 April 2020.
[69] Francis-Devine, Pyper, McGuinness (n 27).
[70] Ibid.
[71] Ibid.
[72] *Brierley and others v Asda Stores Ltd (No 2); Ahmed and others v Sainsbury's Supermarkets Ltd and another; Fenton and others v Asda Stores Ltd* [2019] 3 All ER 1046.

his judgment, Lord Justice Underhill ruled that Asda applied common terms and conditions for both retail workers and distribution workers.[73] The hearing took into consideration whether the job roles are comparable, of equal value and if there is a reason other than sex discrimination that justifies the roles not being paid equally.[74]

It is obvious that steps have been taken in the UK for the minimization of the problem. However, these regulations do not apply to micro-businesses and SMEs (small and medium-sized enterprises), who are the employers of approximately 60% of the UK's working hands. Thus, they should not be seen as a solution to the nation's gender inequality issues.[75]

Conclusion

To conclude, the gender pay gap has become a widely controversial subject of the contemporary ages. It mostly derives as a result from the general gender inequality, that dates back to the start of the known worldwide human history.[76] With women claiming their equality next to men, it is argued that in 2020 it has long become part of the past.[77] This is far from true, however. There has been evidently a significant progress towards its elimination, but this does not override the fact that it still exists.[78] The existence of the phenomenon is more complex and deeply rooted in various causes, most of which are of social origin and originate from an obsolete view of the women's role in civil society.[79] This may indicate that a sole set of equal pay regulations may not be adjudged sufficient to redress the balance.[80] Social gender norms must become challenged and balanced, in so that gender equality and subsequently gender pay equality, may be achieved. Maybe women do not need 'women traffic lights' after all, but just equal pay.[81]

[73] Ibid.
[74] Ibid.
[75] Louise Blacker, 'Mandatory gender pay reporting: a way to bridge the gap?' - ELN June 2015.
[76] Griffin (n 17).
[77] Andrews (n 3).
[78] European Parliament (n 2).
[79] Griffin (n 17).
[80] Blacker (n 81).
[81] Siobhan Simper, 'What the 'female' traffic light response reveals about how society views women' (*Independent Australia*, 29 March 2017) < https://independentaustralia.net/life/life-display/what-the-response-to-female-traffic-lights-taught-me-about-how-society-views-women,10157 > accessed 24 March 2020.


ISSN: