Human Rights Law Conference October 2015

Handout – Felicity Gerry QC

- Joint Enterprise – R v Jogee. Listed 27th and 28th October 2015.
- http://www.iclr.co.uk/news-events/supreme-court-applications/
- Human Trafficking – Mary Jane Veloso.
- *http://www.news.com.au/lifestyle/real-life/saving-mary-jane-death-row-mothers-last-minute-rescue-was-thanks-to-darwin-lawyer/story-fnq2o7dd-1227432389443* .
- Cyber Rights – *Microsoft* case.
http://www.sciencedirect.com/science/article/pii/S0267364915000874
- Costs – Henderson.
- http://ukhumanrightsblog.com/2015/01/28/acquitted-defendants-costs-regime-not-incompatible-with-echr/
- FGM – health and criminal law.
https://www.youtube.com/watch?v=5rZwJLcX8us&feature=youtu.be
- Rape – global uniformity – IBA survey launched October 2015.

FGM and the Law - Serious Crime Act 2015

BHRC Report here
https://barhumanrights.org.uk/sites/default/files/documents/news/bhrc_fgm_submission_12_feb_2014.pdf

Government Fact Sheet – here
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/416323/Fact_sheet_-_FGM_-_Act.pdf

Sexual Offending

Proper Investigations - Rotherham Report
http://www.rotherham.gov.uk/downloads/file/1407/independent_inquiry_cse_in_rotherham

International Uniformity on Rape – IBA Survey Update

Joint Enterprise

In a few weeks time the Supreme Court will have the chance to put right a judicially-created injustice when the appeal of Ameen Jogee is heard. We are fortunate enough to be part of the team representing Mr Jogee and argue that clear-eyed assessment of the law by the Supreme Court is long overdue. The law of "joint enterprise" strikes fear into the heart of families. The phrase is conceptually nebulous. For the legal practitioner it is either accommodatingly broad (when prosecuting) or distressingly lacking in justice (when defending). For the person caught up in the process it can be bewilderingly harsh and illogical.

The law on complicity is an old problem which continues to give rise to frequent appeals, particularly in cases of murder. This is because the law incorrectly changed to a fault test of foresight which over-criminalises secondary parties. The Jogee appeal gives the Supreme Court the opportunity to decide the correct legal foundation to determine whether a secondary party is guilty of murder, manslaughter or a non-fatal offence or should be acquitted.

It is the Appellant's case that his conviction for murder is unsafe because there was no case to answer and because the jury were not properly directed as to the requirements of accessorial liability. As a broad overview, there was no evidence to support basic accessorial liability or common purpose and Jogee did not fall within so-called "joint enterprise" doctrine for murder or manslaughter. In addition it is submitted that "joint enterprise" (hereafter referred to as parasitic accessorial liability) is flawed as it has insufficient foundation in legal principle or policy terms and this court should take the opportunity to correct this aberration in the law of

secondary liability. We also submit that parasitic accessorial liability is contrary to the principle of legality and Article 7 ECHR.

What is the law on accessories?

As a defendant does not necessarily commit an offence entirely alone, the law has had to decide how to deal with others with varying levels of involvement in the offence. So far, so obvious. English criminal law puts participants initially into one of two categories: principals and accessories. The principal has the guilty mind (mens rea) and does the external elements of the offence (the actus reus). More than one person can be a principal in which case they are joint principals. For instance, assuming A is female and B is male, A and B kick a man on the ground, causing injuries which, taken together, amount to actual bodily harm. A and B are joint principals as they both did the external elements of the offence (assaulting the victim and occasioning him actual bodily harm) and if they both did this with the requisite guilty mind (intending or being subjectively reckless as to the assault) they are both guilty of the same offence (here, assault occasioning actual bodily harm) by the same route.

But it may be that A and B are not quite joint principals, even though they are jointly committing the offence. Taking a different scenario, where B goes into a house to burgle it and A stands lookout outside, A has not done the external element of burglary (entering as a trespasser) although she is playing a pivotal role in its execution. A cannot be a principal, but is closely connected to the offence; she is an accessory. In this situation A has abetted B in B's commission of the burglary. This is a form of basic accessorial liability ("BAL"). This is often explained as "you were in it together" and overlaps with the doctrine of "common purpose": A is liable for B's actions which were in pursuance of their common purpose.

The "common purpose" strand of liability grew out of poaching and riot cases where A and B were both members of a group which acted with a common purpose (rioting or poaching) during which B killed someone who tried to stop the group. A would be convicted on the basis that the act of one of the group was the act of all. Although reasoning is rather lacking in these cases from the 16th to the 18th century, the common thread appears to be that the poachers or rioters shared a common intention to resist all opposition. The killing of someone trying to oppose them was therefore within their common purpose.

A may, however, be further removed from B's crime. For instance, if B goes to A and asks to be supplied with a gun to kill V, which A duly supplies and B then kills V, A has not pulled the trigger and caused V's death (the external elements of this murder) but is involved in the killing by supplying the gun. Again, A is an accessory, this time before the offence takes place rather than while it is going on: A provides the gun knowing that B is later going to use it to kill V. This is basic accessorial liability by aiding B.

A could be further removed either counselling the offence – that is advising, soliciting or encouraging – or procuring it – that is endeavouring to produce the commission of the offence by B. These are the other two ways of being an accessory by means of BAL. These two routes do not currently concern us. All of them are caught by the law on "joint enterprise".

So far, so straightforward (if loose with the term "joint enterprise"), but of course life is often more complicated and messy than our examples so far. What if B does not tell A what he has planned? Or if B suddenly does something which was no part of the original plan, explained or not? How does the law determine A's liability in this situation?

Going back to the supply situation, imagine that A supplies B with some oxygen cutting equipment. A believes that B is going to do something illegal, perhaps cutting up stolen goods with it. In fact, B uses it to break into and steal from a bank. Here A does not know what B is going to do, so should A be an accessory to the bank burglary? These were the facts in a case called *Bainbridge* [1960] 1 QB 124 in which the Court of Appeal held that what mattered was whether A knew the type of offence which B was going to commit. It was not enough that A knew that B intended an illegal venture. It would also not be enough merely to suspect the type of offence. A must know the essential matters that B has possession of cutting equipment which he intends to use to commit a dishonest offence and A has acted in a way that indicates she intends B to carry out such an offence (even if she doesn't know the precise details). Bainbridge's conviction as an accessory to the bank burglary was upheld. He aided the principal's commission of the bank burglary.

In common purpose cases B's actions going beyond the common purpose or intention did not make A liable. Sometimes A will not be liable as an accessory to B's offence, but will be liable for a lesser offence, and it is for that that she should be prosecuted.

We can see, from these examples, the importance of both A's connection to the crime and her mental culpability. If she has insufficient knowledge of the essential matters, or only suspects

them, she is not an accessory to B's crime. There is a clear scope to A's liability; she is not liable for all of B's actions, only those she knowingly authorises by both her acts and her intention which can be inferred from all the circumstances. This strikes the balance between prohibiting the aiding of others' crimes with criminalising suspicion or mere connection with a crime.

What is the law on "joint enterprise"?

We now come to the most troublesome and troubling use of the term "joint enterprise": parasitic accessorial liability ("PAL"). Sadly the inelegant name is far from the greatest problem with this strand of the law. PAL has developed to the point that it is now used by the prosecution to cover allof the above situations and has extended the law to cover the situation where B does something outside of any plan, express or implied, sometimes referred to as "departure from common purpose". The "parasitic" element of the name is due to this liability which is supposed to only come into existence when A and B were already jointly involved in offence 1, from which B then departs to commit offence 2. The common purpose doctrine we looked at earlier does not make A liable as B's actions are *outside* the common purpose but PAL makes A equally liable without any subjective assessment of her knowledge or intention.

PAL does not require knowledge of the essential matters, such as the possession of equipment and an intention by B to use them for offence 2, and does not require authorisation by acts which demonstrate A's intention. In their place is inserted foresight; suspicion or contemplation of a possibility by A which is taken to provide sufficient mental culpability to justify criminalisation of A for B's actions, which, by definition, fall outside A and B's common purpose in relation to offence 1. This is far less mental culpability than is required to convict B who actually commits the offence. It is at its starkest in cases of murder where B must be proved to have intended to kill or cause really serious harm whereas in the new formulation created by PAL, A need only have foreseen the possibility that B might intentionally cause grievous bodily harm. The development of the law conflates contemplation with authorisation so that only the former remains – association with someone who might do something becomes liability for whatever they might do – guilt by association.

The problems with PAL

The conflation of foresight with authorisation is a fundamental flaw in the reasoning in the cases on PAL. This strand of liability developed in cases from the 1950s. From the way the

cases developed the concept of PAL it is clear that there was no unifying principle at work. Instead the driver appears to have been the fear of group crime going beyond its intended scope and how to make it as easy as possible to prosecute the group. The result is that when prosecuting in reliance upon PAL the prosecution does not need to particularise what A has done, just the fact of being with B, B's crime and A's foresight of the possibility that it might happen. Evidence of that foresight will almost inevitably be inferences from the circumstances where inferences in other cases are usually preserved for deciding intention.

The result has been to give the prosecution wide and simple scope resulting in those on the very periphery of an incident being convicted of serious crimes including murder without regard to foundational principles of knowledge and intention. PAL has effectively trampled over from BAL as it is so much easier for a prosecution to put their case on broad PAL grounds than the legal framework of BAL. Justice has not flowed from this development. Dr Matthew Dyson who has assisted in our research has called the judicially created changes a legal "race to the bottom". The Supreme Court is being asked to consider the effect of PAL in the over-criminalisation, particularly of young people who are convicted of murder despite being only tenuously connected to the killing. The argument accepts there has been a murder but raises the important question of how prosecutions can be fairly brought so that the case against each defendant is considered, evaluated and particularised agsint a background of solid legal foundation.

1. Directions on secondary participation in murder / manslaughter must focus on the evidence. Only then can the directions, as set out in *ABCD*[1], function effectively. The most assistance is gained from the formulations in *R v Chapman and others*[2] on basic accessorial liability and in *ABCD*[3] on common purpose
2. When considering whether the legality principle is satisfied in relation to a particular system, one must look not only at the provisions of the statute or other relevant instrument which gives rise to the system in question but also at how that system actually works in practice. Jogee's case exposes that the current system breaches the principle of legality.

3. Article 7 requires an element of accountability in the conduct of the material author of the crime. Otherwise, the penalty cannot be justified. There is no accountability in

[1] *R v ABCD* [2011] QB 841.
[2] [2015] 2 Cr App R 10.
[3] Ibid n1.

parasitic accessorial liability cases such as the current one, as there is no logical connection between the actions of the defendant and the penalty arising from a murder conviction.

The Supreme Court recently considered *Gillan* in *Beghal v Director of Public Prosecutions.*[4] It concluded that the ant-terrorism stop and search powers under review in that case were compatible with the principle of legality. Lord Hughes (with whom Lord Hodge agreed) stated at para. 45 that "*[t]he need for safeguards is measured by the quality of intrusion into individual liberty and the risk of arbitrary misuse of the power".* Lord Neuberger (with whom Lord Dyson agreed) stated at para. 86 that "*When considering whether the legality principle is satisfied in relation to a particular system, it appears clear from the reasoning in the judgment in* Gillan *that one must look not only at the provisions of the statute or other relevant instrument which gives rise to the system in question but also at how that system actually works in practice*"[5].

PAL has, unsurprisingly, become a much-criticised doctrine, both academically and more widely in the Justice Committee's 2012 and 2014 reports, the activities of campaign groups (like Joint Enterprise Not Guilty by Association "JENGbA") and even documentaries and dramas on TV. In *Gnango* [2012] 1 AC 827 the Supreme Court dealt with what looked very like a PAL case. They decided it was not and thus missed the opportunity to deal decisively with PAL.

In *Jogee* the Supreme Court has another chance. It has the opportunity to return to the essence of joint enterprise liability by requiring both connection to the offence and culpability based on knowledge of the essential matters as to what B is doing and authorisating acts which can demonstrate an intention to participate. Before its PAL tangent, the law dealt relatively well, and clearly, with joint principals and accessories. Clear, fair limits to liability were set.

Importantly, the Supreme Court have before them on the 27th of October not just submissions from the prosecution and the defence but also from interveners JENGbA and Just for Kids Law. They have consolidated another appeal on similar issues and we have provided a full history of the development of joint enterprise law with substantial assistance from Dr Matt

[4] [2015] UKSC 49.
[5] Taken from submissions drafted by Adam Wagner 1st junior for Jogee and Diarmuid Laffan 3rd junior.

Dyson of Trinity College, Cambridge who has researched the area at length. They have before them the tools to reconsider and reshape the law. We hope they use them wisely[6].

Human Trafficking

Article 3 of the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Particularly Women and Children ("the Trafficking Protocol") defines trafficking as follows:

> Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or removal of organs.[7]

Some of these forms of exploitation are defined elsewhere. For instance, the 1926 Slavery Convention defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[8] The 1930 ILO Forced Labour Convention (C29) defines forced labour as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".[9]

Unsurprisingly given the global scale, the practice of human exploitation is highly lucrative.[10] One of the conclusions of the 2014 International Labour Office report was that 'there is an urgent need to address the socio-economic root causes of this hugely profitable illegal practice

[6] Taken from a forthcoming piece by Catrina Sjölin 2nd junior for Jogee and Felicity Gerry QC, leading.
[7] The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organised Crime
[8] 1926 Slavery Convention
[9] 1930 C29 ILO
[10] Polaris Project Human Trafficking An Overview <http://www.polarisproject.org/human-trafficking/overview>

if it is to be overcome."[11] In 2013, the UNODC reported on transnational organised crime in East Asia and the Pacific (the UNODC Report).[12] The UNODC Report identified human trafficking as a major issue and found that human trafficking is on the rise in a quarter of countries around the world.

The UNODC Report highlights key issues and implications for response to transnational organised crime including improving victim identification systems to enable the provision of protection and support and investing in a victim centred approach with appropriate training for law enforcement to include the vital importance of ensuring the protection of victims.[13]All require standardised mechanisms, collaborative responses and inter-agency coordination with data collection and properly trained specialists. It also requires a re-think of attitudes away from the traditional view of (our example) "illegal immigrants" or "drug traffickers" in order to differentiate between traffickers and victims.

These issues and opportunities for improved victim identification are particularly highlighted by the experience of Mary Jane Veloso[14]. Ms. Veloso is a young Filipina woman who had sought work abroad with the intention of supporting her family; but was arrested at Indonesia's Yogyakarta Airport for alleged possession of 2.6 kilograms of heroin and was subsequently sentenced to death. Ms. Veloso came from a background of abject poverty and was an easy target to be utilised as a drug 'mule' given her position of vulnerability relative to her recruiters and employers; in addition to her transportation between states under the promise of work. Had Ms. Veloso's possible status as a victim of human trafficking been credibly identified by trained law enforcement professionals at the outset, she may have been able to take advantage of Indonesia's existing mandatory protection mechanisms, potentially avoiding charge and been diverted into support programs but, at the very least receiving a short sentence that reflects both her mitigating circumstances and the assistance she has provided to the authorities to identify those further up the chain of command. At the time of writing Ms. Veloso has spent 5 years on

[11] 2014 International Labour Office report, "Profits and Poverty: The economics of forced labour" <http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_243391/lang--en/index.htm>
[12]UNDOC Report "Transnational Organised Crime in East Asia and the Pacific: A threat Assessment" < http://www.unodc.org/documents/data-and-analysis/Studies/TOCTA_EAP_web.pdf>
[13] UNDOC Report "Transnational Organised Crime in East Asia and the Pacific: A threat Assessment" p139. < http://www.unodc.org/documents/data-and-analysis/Studies/TOCTA_EAP_web.pdf>

[14] Felicity Gerry QC assisted: News report here *http://www.news.com.au/lifestyle/real-life/saving-mary-jane-death-row-mothers-last-minute-rescue-was-thanks-to-darwin-lawyer/story-fnq2o7dd-1227432389443*.

death row, albeit currently with a temporary reprieve while investigation of her claims to victim status are examined, and her alleged traffickers are trialled at home in the Philippines.

If a referral mechanism is to be effective, credible evidence of the person's status as a victim of human trafficking ought to be obtained at the investigation stage when the drug trafficking charges are being considered. This is an opportunity to divert the person to support rather than to prosecute. If the investigation has not been done, not done effectively or further evidence is adduced at trial, the responsibility continues to ensure that decisions are made to stop inappropriate prosecutions or, depending on the allegation, to impose a reduced sentence from that which might otherwise be available. It is here that states must work together transnationally to take the opportunity to ensure that the protection intended for victims of human trafficking is actually effective.

Identification of victims is the most vital since progress will never be made unless efforts are made to separately identify bosses from workers, victims from perpetrators, conspirators from pawns, terrorists from innocents. It is in this context of dealing with transnational organised crime that states must establish suitable mechanisms to seek out and identify victims of human trafficking. From a criminal law perspective, if the person accused of being a drug "mule" has acted voluntarily where the relevant mental element in relation to the drug trafficking has priority over the coercion or deception or other aspects of the trafficking definition, then the person will proceed as normal through criminal justice system[15]. However, to reach a reliable assessment on whether the person acted voluntarily, the proportionate response is to ensure that such assessments are made on a case by case basis. The question is not simply whether the person can be identified as a perpetrator or as a victim, but what influences were operative upon them and what factors caused the crime. This balanced approach allows for rational conclusions, based on evidence as to whether the person's condition is as a victim, whether their status is a mitigating factor or whether the assertion of victimhood can be rejected. Blanket laws and policies in relation to drug trafficking prevent such an assessment taking place, and commonly cause conflict between provisions designed for individual protection and those seen as protective of the general society. In the context of human trafficking, the case by case approach recognises the complex and societal issues that arise in the individual coercion as part of global human exploitation[16].

[15] Taken in part from a forthcoming publication by Felicity Gerry QC and 4 other international academics.
[16] Adapted in part from *The role of technology in the fight against human trafficking: reflections on privacy and data protection concerns* by Gerry QC, Muraszkiewicz and Vavoula (forthcoming)

Victims, who may otherwise be viewed solely as criminal offenders, are often most at risk of receiving death penalties as retentionist states also experience high volumes of human trafficking. It is only through a harmonised, collaborative approach that recognition of their appropriate status can be credibly confirmed by appropriately trained law enforcement officers, legal representatives and members of the judiciary in each relevant jurisdiction.

Human trafficking involves the recruitment, transportation or transfer of persons, by means of the threat, coercion, deception or the abuse of power, for the purpose of exploitation. According to the UN, individuals who meet these criteria and who have been coerced into trafficking drugs should be considered victims of human trafficking.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, which supplements the United Nations Convention against Transnational Organized Crime, stresses that prosecution and punishment should not endanger the safety of the victim. Unfortunately the obligations imposed by the Convention are not always well understood even by signatory states, and protections which should be afforded to trafficked persons are not always guaranteed. The Trafficking protocol places responsibility on signatories to identify and not to punish trafficked victims:

> *Article 26- Non-punishment provision*
>
> *Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so*

Putting aside pre conceived notions of criminal liability, the modern approach to modern slavery must involve non-punishment, that is; not to prosecute even clear criminal offending that occurs due to exploitation. For any prosecution authority (or investigating judge) that has to balance the public interest in prosecuting or not, these are issues that ought to be taken into account. In the right case, it ought to be possible to argue that a trafficked individual should not be prosecuted at all, or that they should not be punished. With or without the protocol this is a

simple solution that can be achieved which will have even greater effect with the right support services in place. European cases have dealt with the factual need to identify an individual's status as a victim on credible evidence[17]. Any jurisdiction would require the same. On an evidential basis this can means more than testimony but following up and tracking histories. For those victims apprehended committing crime (national or transnational) if such evidence is sensitively gathered at an early stage, prosecutors (or investigating judges) can give consideration to the question of whether to proceed with prosecuting a suspect who might be a victim of trafficking, particularly where the suspect has been compelled or coerced to commit a criminal offence as a direct consequence of being trafficked. Guidance in the UK is that prosecutors should adopt a three stage assessment:

- Is there a reason to believe that the person has been trafficked? if so,
- If there is clear evidence of a credible defence of duress, the case should be discontinued on evidential grounds; but
- Even where there is no clear evidence of duress, but the offence may have been committed as a result of compulsion arising from trafficking, prosecutors should consider whether the public interest lies in proceeding to prosecute or not[18].

The rationale for non-punishment of victims of trafficking is that, whilst, on the face of it, a victim may have committed an offence, the reality is that the trafficked person acts without real autonomy. They have no, or limited, free will because of the degree of control exercised over them and the methods used by traffickers, consequently they are not responsible for the commission of the offence and should not therefore be considered accountable for the unlawful act committed. The vulnerable situation of the trafficked person becomes worse where the State fails to identify such a person as a victim of trafficking, as a consequence of which they may be denied their right to safety and assistance as a trafficked person and instead be treated as an ordinary criminal suspect[19]. This requires qualified and trained officials. If evidence or information obtained supports the fact that the suspect has been trafficked and committed the offence whilst they were coerced, informed consideration can be given to diverting the victim away from prosecution and into programmes at home. It requires Governments to ensure

[17] Rantsev v Cyprus and Russia Application no. 25965/04 (Strasbourg 7 January 2010) and CASE OF M. AND OTHERS v. ITALY AND BULGARIA Application no. 40020/03 (31st July 2012)
[18] Taken from UK CPS Legal Guidance at www.cps.co.uk

[19] 'Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking': <http://www.osce.org/secretariat/101002?download=true>

support is available nationally, transnationally and internationally. Cooperation is required to ensure that those who have acted under coercion will be sympathetically treated wherever they are apprehended and, not subjected to the risk of the death penalty[20].

Not every drug offender can be considered a trafficked person, however it is increasingly recognised that the vast majority of individuals apprehended with drugs in their possession – so-called 'drug mules' - are not the primary initiators, financiers, or profiteers behind drug trafficking operations. In recognition of the low status that most drug traffickers occupy within drug syndicates, Singapore recently amended its mandatory sentencing[21] to allow judicial discretion in cases where an offender could be considered a 'courier', rather than a supplier or organizer.

The duties in England to protect trafficked victims arise from the recently enacted *Modern Slavery Act 2015* which creates a defence for slavery or trafficking victims who commit an offence and improved reporting mechanisms. This follows EU Directive 2012/29/EU which establishes minimum standards on the rights, support and protection of victims of crime and *Directive 2011/36/*EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings

In relation to post conviction appeals, the process is already underway: In ***R v N; R v LE,***[22] the Court of Appeal considered four unconnected appeals involving offenders who, at different stages after conviction, had been found to be victims of trafficking in human beings and to have been coerced into committing the offences which were integrally related to their exploitation. In giving judgement, the Court of Appeal gave guidance on:

'how the interests of those who were or might be victims of human trafficking and who became enmeshed in criminal activities in consequence, in particular child victims, should be approached after proceedings had begun.'

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[20] Taken from Gerry, F., Let's talk about slaves...Human Trafficking: Exposing hidden victims and criminal profit and how lawyers can help end a global epidemic (2015) 1 Griffith Journal of Law and Human Dignity 1.

[21] Mohamed Faizal Mohamed Abdul Kadir & Wong Woon Kwong. Changes to the Mandatory Death Penalty Regime - An Overview of the Changes and Some Preliminary Reflections 2012 [cited 2015 30 August]. Available from: http://www.lawgazette.com.sg/2013-09/842.htm.

[22] [2012] EWCA Crim 189

The court had the advantage of European Directive 2011/36 and previous decisions.[23] The court noted that the reasoning for what is effectively immunity from prosecution is that "the culpability of the victims might be significantly diminished, and sometimes effectively extinguished, not merely because of age, but because no realistic alternative was available to them but to comply with those controlling them." The court went on to state that 'where a court considered issues relevant to age, trafficking and exploitation, the prosecution would be stayed if the court disagreed with the decision to prosecute.' The Court made clear that the international frameworks did not prohibit the prosecution or punishment of victims of trafficking *per se*, but did require the Prosecutor to give careful consideration as to whether public policy calls for a prosecution at all.[24] The court quashed the convictions of more than one of the appellants effectively on the basis that the whole proceeding had been an abuse of process.[25]

Where there is credible evidence that an individual is a victim of human trafficking they must have avenues to pursue non-prosecution and non-punishment or to mitigate their offending. The consequence of failure to allow for this undermines overall efforts to tackle THB. The central principle underpinning this argument is that in committing a crime, victims of human trafficking do not act voluntarily and thus the position of guilt cannot be reached. It follows from this that to tackle the global exploitation of people in the drugs trade, in addition to effective and supportive law enforcement, courts and other law enforcement bodies need to develop robust methods of application and interpretation of law to allow ongoing protection for a victim of trafficking who appears to commit a drug trafficking offence[26].

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[23] R. v LM [2010] EWCA Crim 2327, [2011] 1 Cr. App. R. 12 and R. v N [2012] EWCA Crim 189, [2013] Q.B. 379 applied.

[24] See also R v O [2008] EWCA Crim 2835, R v LM, MB, DG, Talbot and Tijani [2010] EWCA Crim 2327 and R v O [2011] EWCA Crim 226. Emphasis added.

[25] R v N; R v LE [2012] EWCA Crim 189 paras 45, 54-55, 67, 74

[26] Taken in part from a submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade: Australia's Advocacy for Abolition of the Death Penalty by Felicity Gerry QC and Reprieve Australia intern (CDU student) Narelle Sherwill on 2/10/15.

Cyber Rights – Cambodia, the *Microsoft* Case[27] and Costs[28]....

In the late 70's, a Group of Experts on Transborder Data Barriers and Privacy Protection was set up within the OECD. This expert group developed guidelines on basic rules governing the transborder flow and the protection of personal data and privacy. The purpose was to "facilitate a harmonization of national legislations, without this precluding at a later date the establishment of an international Convention." The Guidelines are described as "minimum standards for adoption in domestic legislation...and...capable of being supplemented by additional measures for the protection of privacy and individual liberties at the national as well as the international level." Decades on, there remains no internationally accepted set of principles, leaving states with piecemeal legislation.[29]

The draft Cybercrime Law for Cambodia is just the latest in this long line of laws that attempt to resolve this issue. This Article will demonstrate, however, that the draft Cybercrime Law for Cambodia exposed a dangerous drift away from international human rights standards regarding protection of speech and right to privacy on the Internet. We will also propose possible redrafting of the Cambodian law, to bring it in line with their international human rights obligations and provide for easier implementation along with a possible framework for an international construct dealing with this pressing legal issue[30].

Bangalore

"The tradition of strict dualism, from decisions such as *R v Secretary of State for the Home Department; Ex parte Bhajan Singh*,[31] which expounded the classical divide has changed. Modern theoretical underpinning of dualist systems (national and international) recognise that courts can accommodate international law whether given effect by valid legislation or by assisting in the development of the common law. Even in cases where international law has not,

[27] In re Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp., __ F. Supp. 2d. __, No. 13 Mag. 2814, 2014 WL 1661004, at *11 (S.D.N.Y. Apr. 25, 2014).
[28] R (on the application of Henderson) v. Secretary of State for Justice [2015] EWHC 130 (Admin)
[29] ILRC comparative research related to Cambodia's Cybercrime Law prepared for the ABA Justice Defenders Programme by Felicity Gerry QC and Catherine Moore and teams of students from Charles Darwin University (Australia) University of Baltimore School of Law (United States).

[30] Gerry, F., Moore, C., A slippery and inconsistent slope: How Cambodia's draft cybercrime law exposed the dangerous drift away from international human rights standards Computer Law & Security Review 31 (2015) 628–650

[31] [1976] 1 QB 198 at 207.

by legislation or valid executive action, been incorporated into national law, there are occasional circumstances where that law may be used by judges and other independent decision-makers in the national legal system to influence their decisions. This is particularly so in the case of international human rights principles as they have been expounded, and developed, by international and regional bodies.

An expression of what the Hon Justice Michael Kirby AC CMG has called this 'modern approach' was given in February 1988 in Bangalore, India, in the so-called *Bangalore Principles* which state, in effect:[32]

- International law (whether human rights norms or otherwise) is not, in most common law countries, part of domestic law.
- Such law does not become part of domestic law until Parliament so enacts or the judges (as another source of law-making) declare the norms thereby established to be part of domestic law.
- The judges will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty -- even one ratified by their own State.
- But if an issue of uncertainty arises (by a gap in the common law or obscurity in its meaning or ambiguity in a relevant statute), a judge may seek guidance in the general principles of international law, as accepted by the community of nations.
- From this source material, the judge may ascertain and declare what the relevant rule of domestic law is. It is the action of the judge, incorporating the rule into domestic law, which makes it part of domestic law.

In terms, the *Bangalore Principles* declare:

- [T]here is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law -- whether constitutional, statute or common law -- is uncertain or incomplete *(Bangalore Principles* No 4)
- It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes -- whether or not they have been incorporated into domestic

[32] Taken in part from Michael Kirby, 'Domestic Implementation of International Human Rights Norms' (1999) 5(2) *Australian Journal of Human Rights* 109.

> law -- for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law (*Bangalore Principles* No 4)

Laws develop in line with international law, particularly in the context of Commonwealth land rights.[33] Here we have property rights in the context of the contents of a server. This is logical to ensure conformity where, for example, the law of one country has been opened up to international remedies to individuals pursuant to accession to international instruments such as the Optional Protocol to the International Covenant on Civil and Political Rights [ICCPR]. This brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The law of an individual State may not necessarily conform to international law, but international law is a legitimate and important influence on the development of domestic interpretation, especially when international law declares the existence of universal human rights. A doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values to entrench a discriminatory rule.[34]

It follows that international obligations *must* be considered in the performance of an administrative decision-making process"[35]....or does it?

All thought for today's conference.

Thank you.

Felicity Gerry QC

[33] See the remarks of Justice Brennan (with the concurrence of Chief Justice Mason and Justice McHugh) in *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
[34] See *Derbyshire County Council v Times Newspapers Ltd* [1993] 1 All ER 1011.

[35] Svantesson, D., & Gerry, F. (2015). Access to extraterritorial evidence: The Microsoft cloud case and beyond. Computer Law & Security Review, 31(4), 478-489.