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Safeguarding free speech: navigating economic crime and SLAPP reforms in the UK

Introduction

In the heart of a robust democracy, the freedom to express oneself is indispensable. However, an increasing menace – strategic lawsuits against public participation (SLAPPs)[1] – poses a challenge to critics such as journalists and activists, aiming to stifle their voices. Countries worldwide are recognising this threat and are actively engaging in legal reforms. Notably, the United Kingdom is taking a leading role, especially in addressing SLAPPs within the realm of economic crime proceedings. This article delves into the ongoing initiatives aimed at reforming SLAPPs, exploring the landscape of economic crime, recent legislative interventions, and the intricate relationship between the fundamental right of free speech and the foundational principles of the rule of law.

Evolving government responses

The genesis of the current SLAPP reforms traces back to the UK government's acknowledgment of the issue in response to the 2022 Call for Evidence.[2] SLAPPs pose a direct threat to the disclosure of information crucial to societal matters. In July 2022, the government proposed a three-part criteria system to identify SLAPP claims, coupled with the notion of early dismissal and a formal cost protection scheme.[3] However, as of one year later, these reforms have not been implemented as originally outlined.

Legislative milestones: defining SLAPPs in economic crime proceedings

A significant turning point in the fight against SLAPPs occurred with the Economic Crime and Corporate Transparency Act 2023,[4] which received Royal Assent on 26 October 2023. This Act brings forth comprehensive reforms, introducing the first legal definition of a SLAPP and a mechanism for early dismissal specifically in economic crime proceedings. A SLAPP claim, as per the Act, involves behaviour intending to restrain freedom of speech related to economic crime, with the claimant bearing the burden of proving merit.[5]

Critical tests and burden of proof

Under the new legislation, economic crime-related SLAPP cases undergo two tests for early dismissal. The first test assesses whether the claim falls under the definition of a SLAPP, while the second gauges the claim's realistic chance of success. The burden of proving the claim's merit shifts to the claimant, introducing a crucial shift in the traditional legal dynamic.[6]

Commentary and concerns

While these reforms represent a pivotal step, they currently apply solely to economic crime proceedings, raising concerns among anti-SLAPP campaigners regarding their limited scope.[7] The interpretation of the SLAPP test remains a focal point of discussion, particularly concerning claimant behaviour and intentions. Clarity is sought to ensure fair implementation and to guard against potential abuse of the legal system.

Media and advocacy influence

Media entities and advocacy groups play a crucial role in shaping the discourse around SLAPPs. The Bureau of Investigative Journalism (TBIJ) actively supports the government's measures to protect free speech.[8] TBIJ's evidence submission, testimonies to the House of Lords and engagement in discussions underscore the collaborative effort to safeguard journalism against SLAPP-related threats.

International collaboration and legislative context

Recognising the transnational nature of SLAPPs, the UK actively collaborates with international partners, engaging with organisations like the Council of Europe Working Group on SLAPPs. Moreover, the government's participation in discussions with the Organization for Security and Cooperation in Europe reflects a commitment to a global stance against legal threats. The absence of specific anti-SLAPP laws in the UK, in contrast to jurisdictions like Australia, Canada and certain states in the United States, accentuates the need for comprehensive national legislation.[9]

Specific protections for journalists: a step forward

In a notable development, an amendment to the Economic Crime Bill introduces specific legal protections for journalists and individuals vulnerable to SLAPPs.[10] This government-backed amendment aims to curtail the ability of powerful entities to employ SLAPPs against critics. The focus on economic crime, coupled with an early-dismissal mechanism, signifies a step forward in shielding journalists from intimidation through legal battles.

Regulation, costs and comparative analysis

The regulatory landscape surrounding SLAPPs is undergoing scrutiny, with a focus on legal advisors' roles and potential disciplinary proceedings. Proposed measures include the cap on costs through secondary legislation, which aims to rectify the imbalance of resources between parties in SLAPP cases. A comparative analysis with jurisdictions like the US, where anti-SLAPP laws are widespread, adds depth to the ongoing conversation.[11]

Challenges and debates: a dynamic landscape

Challenges and debates persist as SLAPP reforms progress. The recent Court of Appeal decision in the Arron Banks libel case exemplifies the subjectivity in classifying litigation as SLAPP, highlighting the need for ongoing vigilance.[12] The Solicitors Regulation Authority's focus on improving solicitors' handling of SLAPP risks reflects the evolving regulatory landscape.[13]

Looking ahead: the unresolved questions

As the UK marches towards a comprehensive legal framework to combat SLAPPs, several unresolved questions loom large. The pending impact of the Economic Crime and Corporate Transparency Act on restraining economic crime-related SLAPP claims remains uncertain. The ongoing debate over SLAPP test interpretation and potential accountability of legal advisors adds layers to the narrative. Continued observation is crucial to gauge the actual impact of proposed reforms and to adapt legislation to the dynamic nature of SLAPP threats.[14]

Conclusion: striking a balance in legal evolution

In the intricate dance between freedom of speech and the rule of law, the UK stands at the cusp of a legal evolution aimed at curbing the abusive use of SLAPPs. The Economic Crime and Corporate Transparency Act marks a significant stride forward, but challenges persist in defining, identifying and countering SLAPPs. As the legal landscape adapts, finding a delicate balance that safeguards free speech without compromising justice remains the ultimate goal.

Notes

1 The term generally refers to a lawsuit filed by powerful subjects (eg, a corporation, a public official or a high-profile businessperson) against non-government individuals or organisations who expressed a critical position on a substantive issue of some political interest or social significance. *Sofia Verza,* 'SLAPP: the background of Strategic Lawsuits Against Public Participation' (European Centre for Press and Media Freedom), see www.ecpmf.eu/slapp-the-background-of-strategic-lawsuits-against-public-participation, accessed 15 January 2024.

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Ceren Ince

Unveiling a global crisis: child labour

Child labour, as defined by the International Labour Organization (ILO), is 'work that deprives children of their childhood, their potential, and their dignity, and that is harmful to physical and mental development'. It is characterised by (1) being detrimental to the mental, physical, social state or morality of the child and/or (2) depriving the child of education.[1]

The major causes of child labour are often deeply rooted in socio-economic crises, such as non-international arms conflicts and lack of education. As of 2022, 160 million children[2] between the ages of five and 14 are working in hazardous jobs and are being robbed of a proper childhood – one that provides for their developmental needs and makes them feel safe and secure.

Child Labour: Global estimates 2020, trends and the road forward, a report published as a result of the joint work of the International Labour Organization and the United Nations International Children's Fund (UNICEF), states that progress in the fight against child labour has stopped for the first time in 20 years, and the number of child workers has increased all over the world. According to the report, the number of children employed as child labourers has increased by 8.4 million[3] and reached 160 million worldwide. More than half of these children are between the ages of five and 11. As emphasised in the report, with the impact of the Covid-19 epidemic, 8.9 million more children around the world are at risk of being pushed into child labour by the end of 2022.

The endeavour to eradicate child labour – a detrimental practice that robs children of their rightful childhood, impairs their potential and dignity, and adversely affects their physical and mental growth – has been ongoing for years. Research on the globally acknowledged issue of child labour identifies significant factors such as poverty, limited education, migration, traditional beliefs, family dynamics and shortcomings in legislation as the primary drivers of this problem.

Legal initiatives: a directive proposal's crucial role

To start with the legal regulations at the international level to eliminate or at least minimise child labour, which threatens the future of societies by destroying countries' next generations, the Directive Proposal on Corporate Sustainability Due Diligence and Amendments to Directive No 2019/1937[4] was accepted by the European Parliament and Council on 23 February 2022.

The Corporate Sustainability Due Diligence Directive proposal stands as a legal measure to fortify efforts against child labour. This directive mandates

that companies bear accountability for human rights transgressions, including child and forced labour, as well as adverse environmental impacts within their supply chains. Such responsibility encompasses both administrative and civil liabilities, potentially subjecting companies to compensation payments and regulatory fines in instances of child labour within their operations or supply chains. The Directive Proposal is in line with the European Union's zero-tolerance approach to child labour[5] and with the EU Strategy on the Rights of the Child, which commits EU companies to ensure that their supply chains are free of child labour. With the implementation of the Directive, companies will be obliged to monitor, identify, evaluate, prevent, terminate, and improve possible and existing negative human rights violations and environmental impacts in their affiliated organisations and supply chains.

The Council Conclusions on Human Rights and Decent Work in Global Supply Chains of 1 December 2020[6] called on the European Commission to submit a proposal for establishing a EU legal framework on sustainable corporate governance, including cross-sectoral corporate due diligence obligations across global supply chains. In its decision dated 10 March 2021, the European Parliament invited the Commission to propose EU rules for a comprehensive corporate due diligence obligation. In the Joint Declaration on EU Legislative Priorities for 2022, the European Parliament, the Council of the European Union, and the Commission committed to delivering an economy that works for people and improving the regulatory framework for sustainable corporate governance. Following all these calls and commitments, the Directive Proposal was implemented.

Regulations regarding child labour are included in the ninth, tenth, and eleventh paragraphs of the 'right violations and prohibitions in international human rights conventions' section of the first part of the Annex of the Directive Proposal. These paragraphs highlight the type of work that falls within the scope of child labour which companies should consider in their corporate sustainability due diligence processes:

- in paragraph nine, the violation of certain articles of the Convention on the Rights of the Child;[7]
- in paragraph ten, the violation of the ILO Minimum Age Convention No 138;[8] and
- in paragraph 11, the violation of the Convention on the Rights of the Child and the ILO Convention No 182 on the Prohibition and Elimination of the Worst Forms of Child Labour.

Situations that are contrary to the Emergency Action Convention have been regulated.

Corporate responsibility: navigating the regulatory landscape

In the Directive Proposal, companies were asked to prevent and end child labour in their own activities and in the activities of their subsidiaries and companies with which they have established trade relations. The Directive Proposal primarily covers large-scale EU companies with high turnover returns worldwide and non-EU companies operating in the EU with the same turnover threshold. However, suppose the Directive Proposal, which includes rules that will be effective throughout the entire supply chain of companies, is approved and comes into force. In that case, all other companies in trade relations with these companies will also be indirectly affected by the Directive's rules.

The main companies within the scope of the Directive, which do not want to be subject to sanctions within the framework of the liability provisions stipulated in the Directive, will also control the activities of other companies in their supply chains and try to prevent these companies from using child labour in their activities.

With all these aspects, the Directive Proposal has received great attention, especially in EU countries. It is a valuable legal text that will contribute positively to the efforts to combat child labour in other countries. While there have been justified criticisms from various institutions towards the Directive Proposal, if some changes are made to the proposal, and the Directive is finalised and becomes law, another important step towards preventing child labour will be taken.

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Grace Bennetts

Leveraging professional indemnity insurance to enhance how law firms think about ESG and the climate crisis

Professional indemnity insurance could play an important role in keeping legal professionals accountable with respect to providing advice on environmental, social and governance (ESG) factors and climate change risk.

Professional indemnity insurance is defined by the authors of the 2023 IBA report, *IBA International Principles on Professional Indemnity Insurance for the Legal Profession* as 'insurance made available to professionals to cover the consequences of breach of professional duty'.[1]

From the 1960s, professional indemnity insurance began to provide assurance across multiple industries. The primary purpose of this type of insurance is to provide financial protection against the risks and personal losses that professionals are heavily exposed to, and to fairly compensate those who suffer loss as a result of errors made by the professional.

The 2023 IBA report outlined which countries have mandated professional indemnity insurance for legal practitioners, and sought to provide an analysis of the issues at stake. For example, professional indemnity insurance is mandatorily required for lawyers in the United Kingdom under the Solicitors Regulation Authority Indemnity Insurance Rules,[2] in Australia under state and territory legislation, in Singapore under the Legal Profession Act[3] and in certain states in the United States, specifically in Oregon and Idaho. In jurisdictions where insurance is not mandatory, expensive litigation claims could cause firms to become insolvent.

The role of lawyers in achieving net zero

Businesses (including law firms) are increasingly under pressure from clients, climate activists and shifting societal attitudes to demonstrate their ESG performance. In addition, increased ESG-related litigation since 2015 (following the implementation of the Paris Agreement), reflects the importance that consumers and investors place on ESG and the climate crisis as well as a push towards achieving the states' commitment to net zero carbon emissions by 2050. One type of litigation involving lawyers concerns their failure to consider climate risks when providing advice to their clients.

Lawyers have professional duties to exercise reasonable skill, care and diligence, and to bring attention to risk. In undertaking these duties, lawyers work towards reducing a company's environmental impact by monitoring and reporting on advised emissions or combatting greenwashing. Lawyers are also being held accountable where a company whom they are advising is sued for misleading ESG claims, or for failing to meet its climate and environmental protection commitments.

Therefore, lawyers who provide advice in any matter that pertains to, or could potentially pertain to, their client's adverse impact on climate change should consider making their client aware of these potential risks. This would require the lawyer to look beyond the narrow scope of their retainer. However, this carries with it the issue of lawyers not being qualified to give such advice, and thus they must seek specialist advice when in doubt. Incorrect advice or failing to warn their client of their ESG or climate-related risks will constitute a breach of the duty to act with reasonable care, thus subjecting them to a professional liability claim.

By mandating the requirement for law firms to take out liability insurance, it would provide third parties with an avenue for redress where associated environmental harm was caused because of the advice provided. This would have the effect of keeping legal professionals accountable by ensuring that they disclose the climate risks associated with their client's actions, because insurance will cover them and prevent expensive litigation claims against them or their firm.

On the other hand, a lack of insurance can deter or prevent lawyers from providing climate risk advice altogether, thus perpetuating the environmental harm caused by the corporation's actions or omissions.

However, there has been significant debate relating to the use of insurance as a mechanism to regulate behaviour and redress to victims of adverse climate change and environmental impacts, despite it being an effective risk management tool. Professional indemnity insurance can be leveraged by consumers and investors to hold lawyers accountable in this context.

Corporate lawyers have a role in ensuring that they are educated on the climate crisis, and that they understand the rapidly evolving policy and regulatory regimes around ESG and corporate disclosure when advising companies on disclosure and reporting obligations.

Lawyers must uphold the principle of integrity and undertake a responsibility to develop an understanding of the insurance-specific terminology and the scope of their insurance policies. However, for lawyers to accurately communicate climate risks to their client, they must also educate and inform themselves on the scientific and physical aspects of the climate crisis. Therefore, educating lawyers on this topic is the first fundamental step to ensuring that they do not provide incorrect advice in the first place, so they do not have to rely on their professional indemnity insurance policy for protection.

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Enoch Akinlabi

Examining 21st century military coups in Africa: Implications for human rights and governance

Africa is a continent not only characterised by diverse geographical features such as the Sahel region and expansive savannahs, but also by the myriad of cultures and heritages of its inhabitants. However, one of the most persistent challenges faced by many of these inhabitants is the consistent and flagrant disregard for human rights, which occurs with alarming frequency. This violation of human rights is perpetrated not only by autocratic military regimes[1] but also by so-called 'democratic' civilian governments.[2] Even during periods of civilian rule,[3] the foundational principles of the rule of law – essential for fostering a society that respects and upholds human rights – are either absent or deeply corrupted. This lamentable state of affairs is often a consequence of recurring electoral rigging, pervasive corruption spanning decades, and the perpetuation of tribalism by increasingly inept kakistocracies.

It is crucial to acknowledge that this essay does not seek to downplay the severe human rights violations and the associated disregard for human dignity that characterise military coups. Instead, it aims to contextualise these events within the broader spectrum of human rights abuses prevalent in Africa. It intends to dispel the misconception that human rights violations are confined solely to periods of significant upheaval brought about by military coups.

Since 1950, a total of 486 military coups – both attempted and successful – have occurred globally. Notably, Africa has experienced the highest number, accounting for 214 coups, with at least 106 of them resulting in a successful seizure of power.[4] This trend is evident across 45 out of the 54 countries on the African continent.[5] Military coups emerged as a prevailing phenomenon in many African nations shortly after gaining independence. This pattern persisted until the 1990s, when a wave of democratisation began to reshape the political landscape.

The catalyst for this proliferation of military coups can be traced back to 13 January 1963, marked by the tragic coup in Togo. This event – the first of its kind in Africa – witnessed the assassination of President Sylvanus Olympio and triggered a contagious wave that swept across the continent.[6]

It is crucial to underscore that the threats to liberal democracies in Africa extend beyond military coups. Constitutional coup-making, electoral manipulation, the influence of political godfathers and an array of other challenges further complicate the pursuit of democratic governance. However, military regimes stand out as particularly problematic due to their inherent propensity for arbitrariness and lack of accountability, making them – at least in theory – diametrically opposed to the principles of human rights and democratic rule.[7]

Following a period of what could be termed as 'democratic stability' within the ongoing wave of liberal democracy across the African continent, there has been a notable resurgence of military coups.[8] Notably, the August 2023 takeover in Gabon[9] occurred merely one month after soldiers seized power in Niger.[10] This trend is particularly pronounced in West and Central Africa,[11] where military leaders are capitalising on widespread disenchantment with democratic governance, exacerbated by deteriorating economic conditions.[12]

In a departure from conventional expectations, citizens in these nations have exhibited support for these disruptions to democratic norms.[13] However, it is essential to clarify that this exuberance does not necessarily translate into unequivocal support for military takeovers. Rather, it signifies an opportunity for the populace to assert that the ousted governments do not adequately represent their best interests.[14] This has

been a fundamental driving force behind military coups on the continent over the years, alongside other issues such as electoral irregularities, economic and security crises, rampant embezzlement, corruption, dire living conditions and a conspicuous absence of democratic dividends for the broader population.

Nevertheless, there exists a prevailing consensus that coup actions significantly heighten the likelihood of, and create a favourable environment for, severe violations of fundamental freedoms.[15] This propensity arises primarily from the initial act of suspending the grundnorm of the state, which typically serves as the bedrock for the protection of fundamental human rights. Subsequently, these actions tend to be accompanied by a persistent use of violence, encompassing killings, arbitrary detentions, torture, sexual violence and enforced disappearances, all aimed at suppressing any form of dissent.

Furthermore, there is a distinct pattern of stringent restrictions on the freedoms of expression and assembly, driven by concerns about potential reprisals. With the sense of impunity that often accompanies these actions, this cycle can escalate into even graver infringements upon fundamental human rights, including the displacement of civilian populations and the obstruction of humanitarian access. In this context, human rights in Africa invariably become ensnared in the struggle for political power, the preservation of incumbency and the systematic neutralisation of opposition forces.[16]

In an era marked by significant advancements in the safeguarding of human rights and the promotion of democratic transitions, it is deeply disconcerting to witness the persistent recurrence of military takeovers in Africa. This trend appears akin to employing 20th century solutions to address 21st century challenges. It becomes increasingly evident that African citizens should engage in substantive dialogues regarding the adaptation of liberal democracy to their unique cultural and environmental contexts. While these citizens undoubtedly value the rights and freedoms that democracy affords,[17] they are often left disillusioned by the governance systems prevalent on the continent.[18]

Above all, these dialogues must prioritise the significance of human rights. In an interconnected world, we can no longer afford to ignore crises in Africa, especially when the human rights situation within the continent remains undeniably intertwined with issues like migration congestion and the '*Japa*' culture.[19] In embracing a future that transcends military coups and embraces the principles of democracy and human rights, Africa has an opportunity to redefine its path toward progress, guided by the ideals of justice, freedom and dignity for all.

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Cindy Rojas

Legal accountability of companies in addressing climate change: overview from Paraguay

The business sector is one of the leading contributors to greenhouse gas emissions, thus significantly contributing to climate change. As a primary contributor, the private sector bears the responsibility to actively mitigate the adverse effects caused and transition its activities toward a more sustainable approach.

Internationally, there are norms and mechanisms in place to promote the implementation of sustainable practices and raise environmental awareness within the business sector. This article will compare the European and Paraguayan regulatory frameworks regarding environmental companies' liability, aiming to raise awareness about the importance of driving the development of existing legal frameworks to address global climate change issues.

The European Union

The EU has positioned itself as a global leader in the fight against the climate crisis, implementing a comprehensive set of policies and regulations to address greenhouse gas emissions and promote sustainable practices in the business sector. These directives establish ambitious emission reduction targets and measures to foster renewable energy, energy efficiency and the circular economy. Furthermore, these directives have established emissions trading systems and require companies to report their emissions and mitigation measures to EU regulatory bodies.

Main regulations for the private sector

Corporate Sustainability Due Diligence Directive (CSDDD)

The CSDDD proposal aims to establish obligations for companies to conduct due diligence processes and disclose the impact they produce on their supply chain in terms of human rights and the environment. It also empowers EU Member States to supervise the effects generated by these companies.

The main purpose of the CSDDD is that companies shall ensure that their business model is in harmony with the transition of a sustainable economy and with the goal limiting global warming to 1.5°C in line with the Paris Agreement. There are also emission reduction objectives in its business plan.[1] This proposal is still pending approval by the EU Parliament.

The Corporate Sustainability Reporting Directive (CSRD)

The CSRD is in force[2] and enhances the existing sustainability reporting requirements for companies operating in the EU. The CSRD builds upon the existing Non-Financial Reporting Directive (NFRD)[3] and expands the scope of reporting obligations to include

additional environmental, social, and governance (ESG) indicators.

With the CSRD replacing the NFRD, the regulations concerning sustainable corporate governance have evolved to enhance and expand the reporting framework. The CSRD aims to strengthen corporate sustainability reporting by introducing more comprehensive and standardised company disclosure requirements. These requirements cover a broader range of sustainability matters, ensuring that relevant information is reported transparently and consistently across the EU.

The CSRD Directive requires that the management reporting of companies includes only information necessary to understand the results, evolution and financial position of the company, along with information that allows understanding of the impact of the company's activities on sustainability issues.

Both directives consider the commitments made in the European Green Deal,[4] which is a strategic initiative proposed by the European Commission to achieve climate neutrality in Europe by 2050.

Paraguay: overview

Paraguay, located in the heart of South America, is a country rich in biodiversity and natural resources. The business sector in Paraguay is diverse and encompasses various industries. Small and medium-sized enterprises play a significant role in the economy, and key sectors such as agriculture and livestock hold substantial weight.

Although Paraguay does not have specific directives and regulations for the business sector, and even though the environmental situation in Paraguay is still developing, the country has established mechanisms to reduce emissions in various sectors. Paraguay is one of the countries that has ratified the Paris Agreement, an international commitment signed by several countries to reduce their greenhouse gas emissions.

One of these mechanisms is the implementation of the National Climate Change Law No 5875, approved in 2017.[5] This law establishes the regulatory framework to plan and respond urgently, appropriately, coordinately and sustainably to the impacts of climate change. Additionally, Paraguay has a National Development Plan for 2030,[6] which aims to coordinate the actions of the business sector in the fight against climate change.

The Environmental Impact Assessment Law[7] also plays a significant role in the fight against climate change by requiring companies and individuals to submit an environmental study that identifies, predicts and estimates environmental impacts for any planned or ongoing project in the country. This law includes the obligation to present an Environmental Management Plan that describes the mitigation measures to be taken in case the project has negative effects on the environment, as well as a monitoring system to control the impact produced.

Different scenarios, different approaches, same goal

Although Paraguay still has a long way to go in implementing specific legal frameworks to address the effects of the climate crisis in the business sector, significant progress is being made in the right direction.

Taking a global perspective when addressing corporate environmental responsibility and the climate crisis in different contexts, such as in Paraguay and the EU, provides a broader understanding of the legal approaches being used in diverse parts of the world. This broader perspective is key to promoting stronger international negotiations and the formulation of fairer and more effective international agreements and commitments, all aimed at a common goal.

Notes

1 See Article 15 of the CSDDD proposal.
2 Corporate Sustainability Reporting Directive, see https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022L2464, accessed 15 January 2024.
3 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, see https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0095, accessed 15 January 2024.
4 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: the European Green Deal', see https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN.
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6 Decree 2,794: National Development Plan for 2030, see https://climate-laws.org/document/decree-2794-national-development-plan-2030_417d, accessed 15 January 2024.
7 Environmental Impact Assessment Law, see www.bacn.gov.py/leyes-paraguayas/2374/ley-n-294-evaluacion-de-impacto-ambiental, accessed 15 January 2024.

Ishaan Bhardwaj

Londongrad

'Londongrad' is a frequent headline in UK newspapers. It reflects the prevalence of money-laundering from the former USSR within London's financial sector. Russian wealth has been hoarded by oligarchs since the 1990s and systematically funnelled into London banks, abetted by lawyers and lax enforcement.[1] Despite sanctions against Russia in 2022, Londongrad will remain as a business model. It originated historically in the post-war period. Overseas territories and mechanisms of British imperial rule were refashioned to serve a new, global elite.[2] While a smaller proportion will be Russians, Londongrad will continue to service a diverse global kleptocracy from developing countries, from Nigeria to India.[3] Legal reform will not help; only better enforcement will, per the US model.

History: the rise of Moneyland as the 'model'

Globalisation has systematically empowered corrupt elites through loopholes within the international financial system. Money taken by elites in developing countries is 'layered' or distanced from the source through offshore structures. Companies are registered thousands of miles away, often in the British Virgin Islands (BVI), while the owner continues to reside in London.[4]

The legal devices are 'shell' companies outside Russia. Rather than buy property in their own name, an oligarch laundering dirty money will purchase property through one such shell company. Shell companies have no active business operations or physical presence. This makes it extremely difficult to identify the beneficial owner of the property, as companies purchase properties in London through real estate investment. The corporate veil and distinct legal personality of such shell companies renders dirty money difficult to trace. By 1997, the BVI was registering more than 50,000 companies annually.[5]

The Pandora Papers, leaked in 2021 outline how these legal mechanisms operate. One case study is Igor Shuvalov, the chair of Vnesheconombank (VEB), who systematically used shell companies to purchase luxury property in London.[6] His lifestyle, far beyond his salary (£112,000 per year) raised questions from Russian anti-corruption activist Alexei Navalny. In 2015, Navalny documented Shuvalov's use of a BVI shell company to own apartments in Whitehall. Shuvalov controlled the BVI company owning the apartments. His daughter Maria, a 19-year-old ballet student, further became the owner of another BVI company, with $60m assets.[7]

These stories are common to the elites of many developing countries. They reflect how London has repurposed its residual overseas territories into offshore legal structures to service a global kleptocratic elite, as part of a global 'looting machine' as Tom Burgis calls it.[8]

This is not a historical accident but a business model. A uniform legal framework was not created for scattered colonies like the BVI – they never wanted independence. Yet there was no mechanism by which a colony could join the UK. So, they remained in a form of jurisdictional limbo.[9] Oliver Bullough argues this archipelago of distinct legal jurisdictions form 'Moneyland'.[10] Offshore territories can claim independence when profitable to their clients and seek protection using British law when convenient. According to Global Witness, more than seven times more money has flowed from Russia to overseas territories than from the UK itself.

Sanctions: limits of legal reform

Following the Russian invasion of Ukraine, sanctions on oligarchs like Shuvalov and Abramovich have had hefty impacts. The number of new properties bought by Russians using offshore structures declined sharply. The Brookings Institution's study of the UK property market confirmed purchases by companies in tax havens fell substantially relative to companies in other countries.[11]

However, the Economic Crime (Transparency and Enforcement) Act of 2022 faced challenges in implementing innovative legal ideas such as public registers of overseas entities or unexplained wealth orders (UWOs). Multiple owners could dilute the individual ownership below 25 per cent so none were beneficial owners. The legislation makes no provision for related parties.

A family of six could each own 16.67 per cent shares of a company, outmanoeuvring registration requirements. Furthermore, individuals could transfer properties into irrevocable trusts in the names of family members. UWOs seem promising but have been bedevilled by low funding and morale, with £4.3m available for the International Corruption Unit. Consequently, the NCA has been ineffective in prosecuting oligarchs supported by well-resourced city law firms.[12]

Enforcement: looking ahead

New laws will not resolve the situation. Devising rules and failing to allocate resources for enforcement creates a lax environment and more money-laundering. Deterrence is necessary, as per the US enforcement model. Records show that in 2015 the FCA imposed regulatory fines for breaches of AML rules amounting to £380m. US agencies, for the same period issued $5.62bn relating to AML failures. Even allowing for the greater GDP and population this is a significant difference between both countries.[13] This essay proposes three solutions.

Firstly, a cost cap would enable aggressive asset recovery. Capping the cost of pursuing an unsuccessful UWO, either by letting courts assess costs, setting pre-determined rates or awarding no costs would level the playing field between state prosecutors and law firms.

Secondly, granting whistleblowers financial awards will improve the incentive structure. In the US such awards, popularised after the Madoff Ponzi scheme, are applicable to enforcements above $1m.[14] This enhances the forensic capabilities of investigators, including evidence collection.

Thirdly, building a sustainable model of investment. Prosecuting financial crime is a lucrative enterprise. The SEC in the fiscal year 2022 generated over $6.4bn in fines, settlements and confiscations.[15] This success resulted from paying high-quality staff to attract talent and maintain morale. Now, NCA salaries are lower than police officer salaries, creating an exodus to the private sector. A long-term strategy of reinvestment from the proceeds of prosecution can help drive greater morale, prosecutions, and in time, profits as part of a virtuous cycle. The price is patience. The UK, recognising this, announced a £100m investment funded by an economic crime 'levy' on institutions in the AML regulated sector.[16] This proposal should be more ambitious with such profits reinvested in wages for NCA and SFO officers.

Prosecuting economic crime is a profitable enterprise. It is also a moral obligation to thwart the diversion of corrupt proceeds from developing countries. For practical and moral reasons, the UK should strive to be a global leader in prosecution.

Notes

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2 Tom Burgis, *Kleptopia* (William Collins, 2020) p 273.
3 *Ibid* p 272.
4 Global Witness, 'Missing the bigger picture?'(9 April 2018) https://www.globalwitness.org/en/blog/missing-bigger-picture-russian-money-uks-tax-havens/. Accessed 9 February 2024.
5 Oliver Bullough, *Butler to the World* (Profile Books, 2022) p 79.
6 Scilla Alecci, 'Russian bankers shuffled wealth offshore long before latest sanctions' (11 April 2022) https://english.elpais.com/international/2022-04-11/russian-bankers-shuffled-wealth-offshore-long-before-latest-sanctions-pandora-papers-show.html. Accessed 9 February 2024.
7 *Ibid*.
8 Tom Burgis, *The Looting Machine* (William Collins, 2015) p 8.
9 Oliver Bullough, *Butler to the World* (Profile Books, 2022) p 243.
10 Oliver Bullough, *Moneyland* (Profile Books, 2018) p 21.
11 Matthew Collin, David Szakonyi and Florian M Hollenbach, 'The UK's landmark effort to stop dirty money flowing into its real estate sector may be working' (21 March 2023) www.brookings.edu/articles/the-uks-landmark-effort-to-stop-dirty-money-flowing-into-its-real-estate-sector-may-be-working/. Accessed 9 February 2024.
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Altai Ismailovi

ECtHR's position on the preliminary ruling procedure of the EU: A comment from the viewpoint of Opinion 2/13

The intertwined relationship between the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) has sparked considerable discussion, particularly concerning the potential impact of Protocol 16 of the European Convention on Human Rights (ECHR) on the European Union's (EU) preliminary ruling procedure outlined in Article 267 of the Treaty on the Functioning of the EU. Opinion 2/13 of the CJEU highlighted the absence of provisions addressing the interplay between these mechanisms in the context of the EU's accession to the ECHR.[1] This essay delves into the contentious terrain, questioning whether the ECtHR's stance on the Article 267 procedure poses concerns for the EU and briefly considering whether the finalised draft Accession Agreement offers a reconciliatory pathway to address the CJEU's apprehensions.

The main aim of the ECtHR's advisory opinion mechanism is different from that of the EU's preliminary ruling procedure. On the one hand, the former is primarily focused on creating a judicial dialogue between the national courts and the ECtHR by giving guidance to domestic judges in their examination of the ECHR rights. On the other hand, the EU's procedure is chiefly aimed at fostering the uniformity of EU law among the EU Member States.[2] However, it is not deniable that the questions raised before the ECtHR in advisory opinion proceedings might involve EU law questions. This was the concern of the CJEU because, allegedly, it could infringe on the autonomy of EU law. In this regard, it is necessary to take a look at the ECtHR's position on this matter as well as the final version of the draft Accession Agreement in order to see whether a conciliatory approach can be established that would eliminate the CJEU's concern.

First, the ECtHR requires EU Member State courts to refer the case to the CJEU for a preliminary ruling where the applicants raise such a request.[3] If a Member State court denies such a request, it must explicitly justify its decision not to refer, otherwise, there will be a violation of Article 6, Section 1 of the ECHR.[4] In other words, such a possibility of EU law is seen as an element of an applicant's right to a fair trial. Moreover, in such cases the ECtHR sometimes considers the most possible solution to put an end to such a violation is to reopen the case and examine the preliminary reference request again at the domestic level.[5]

Second, the ECtHR shows judicial sensitivity toward the CJEU where the latter had rendered a preliminary ruling in a case that was later brought before the ECtHR without applying the given CJEU ruling at the domestic level and waiting for the final judgment in that regard. For example, in *Laurus*, the ECtHR, after having regard to the ruling given by the CJEU, noted that this method of examination closely resembles the one applied by the ECtHR for the purpose of the right to property, and the CJEU explicitly applied its case law in the ruling.[6] Therefore, it decided not to 'substitute its own assessment for that of the national courts as guided by the CJEU, without awaiting the outcome of those proceedings'.[7]

Third, when a novel question under EU law arises in domestic proceedings and the national court refuses to refer the case to the CJEU, this can lead to a rebuttal of the equivalent protection (the so-called 'Bosphorus') presumption. Thus, in a recent case of *Bivolaru and Moldovan*, the ECtHR said that EU law had not deployed its whole potential in the context of a European arrest warrant. Mr Bivolaru, a Romanian citizen, was in an unusual situation because of his refugee status in Sweden which had been

given prior to Romania's accession to the EU. The ECtHR deemed that this fact created 'a real and serious question regarding the protection of fundamental rights by EU law [...] on which the CJEU has never ruled'.[8] Namely, this novel issue should have been raised before the CJEU for elaboration.

Besides the ECtHR's practice, mentioning as a last point the position of the final draft version of the revised Accession Agreement would also be enlightening here. Article 5 of the Agreement tries to take the CJEU's concern into account saying that an EU Member State court or tribunal will not be considered a 'highest' one under Protocol 16 if the question they encounter comes within the area of application of EU law.[9] Essentially, this clause prevents a Member State court from employing Protocol 16 where EU law is at stake. According to the Explanatory Report, the aim of Article 5 is to reconcile the Protocol 16 mechanism with the EU judicial system.[10]

In examining the ECtHR's approach to the preliminary ruling mechanism of the EU it becomes evident that the Court manifests a profound deference to this procedural framework. Through its jurisprudence, the ECtHR displays a judicious sensitivity towards the actions of EU domestic courts engaging in preliminary ruling matters. The advisory opinion mechanism of the ECtHR, while distinct in its primary aim, recognises instances where questions related to EU law intertwine with human rights issues. Moreover, the final draft version of the revised Accession Agreement attempts to assuage the CJEU's concerns by delineating the scope of Protocol 16 in relation to EU law matters. This evolving landscape necessitates a nuanced balance between judicial dialogue, safeguarding the autonomy of EU law, and ensuring the protection of fundamental rights under the ECHR. Ultimately, a harmonious coexistence between these mechanisms appears feasible, provided a conciliatory approach is adopted that respects the distinct functions of both the ECtHR's advisory opinion mechanism and the EU's preliminary ruling procedure.

Notes

1 Case Opinion 2/13 [2014] EU:C:2014:2454, paras 196–199.
2 Maria Dicosola, Cristina Fasone and Irene Spigno, 'The Prospective Role of Constitutional Courts in the Advisory Opinion Mechanism Before the European Court of Human Rights: A First Comparative Assessment with the European Union and the Inter-American System' (2015) 16 German Law Journal 1387, 1401.Protocol No 16 to the European Convention on Human Rights (ECHR
3 Morten P Broberg, 'National Courts of Last Instance Failing to Make a Preliminary Reference: The (Possible) Consequences Flowing Therefrom' (2016) 22 European Public Law 243, 245.Member State courts may – and sometimes must – refer questions on the interpretation or validity of EU legal measures to the Court of Justice of the European Union for a binding preliminary ruling. But what are the consequences if a Member State court fails to make a preliminary reference in a situation where it was legally obliged to do so? The article shows that such failure may constitute an infringement of the right to a fair trial as laid down in Article 6.
4 *Sanofi Pasteur v France* App no 25137/16 (ECtHR, 13 February 2020), para 78. See also *Harisch v Germany* App no 50053/16 (ECtHR, 11 April 2019); *Rutar and Rutar Marketing v Slovenia* App no 21164/20 (ECtHR, 15 December 2022).
5 *Georgiou v Greece* App no 57378/18 (ECtHR, 14 March 2023), para 33.
6 *Laurus Invest Hungary Kft and Others v Hungary* App no 23265/13 (ECtHR, 8 August 2015), paras 40–41.
7 *Ibid*, para 42.
8 *Bivolaru and Moldovan v France* App nos 40324/16; 12623/17 (ECtHR, 25 March 2021), para 131.
9 Council of Europe, 'Report to the CDDH' (2023) 7, Article 6.
10 *Ibid* 26, para 86.