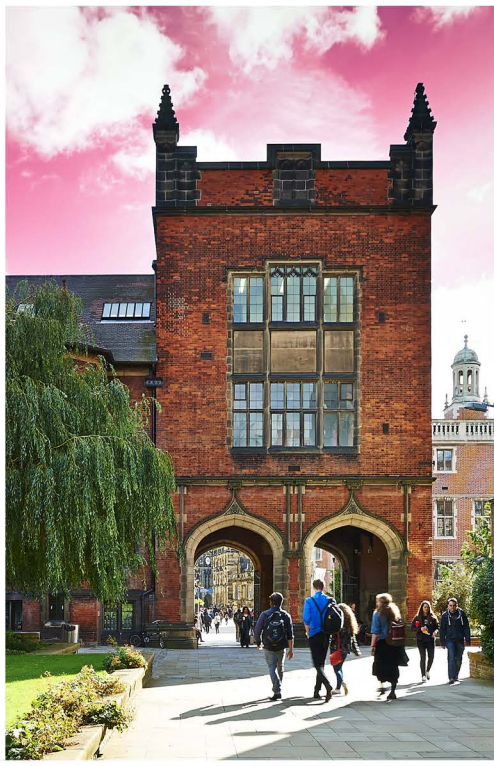
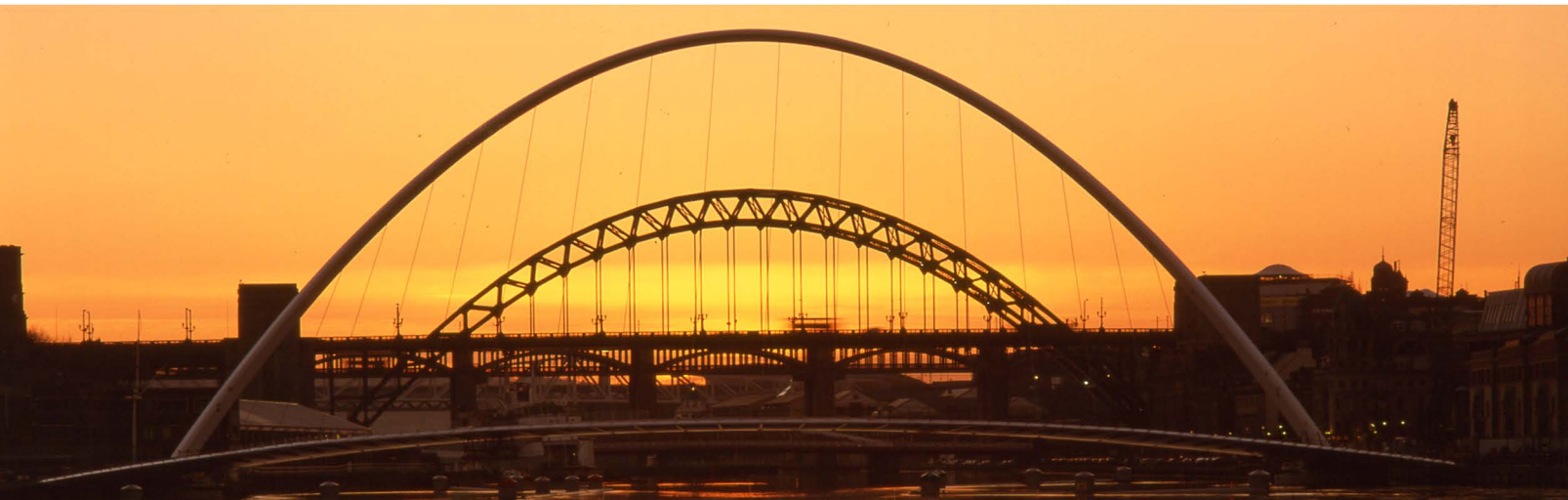
NORTH EAST LAW REVIEW

NEWCASTLE UNIVERSITY

EST. 2013

Volume 2
Issue 2
2014





North East Law Review

Volume 2
Issue 2

June 2014

North East Law Review

Newcastle University

Board of Editors

Foreword

Message from the General Editor

Thank you for choosing to read the North East Law Review. It has been an enormous pleasure to have been the General Editor this year. This year, our student Editorial Board has worked tirelessly to create a Review to be proud of. So much work has gone on behind the scenes of this publication to engage students with all aspects of the Review – including our educational seminars, law & film nights, and blog competition. This issue marks the start of a closer involvement of Universities within the North East with our guest publication from Ruth Houghton of Durham University. Ruth's paper has been included in this issue as the winner of the best paper at the 2014 Newcastle Law School's Postgraduate Research Conference. On behalf of the Editorial Board, I wish to thank our contributors for allowing us to publish their work. It is a delight to edit work of such a high standard, and to share this work with the wider legal community. My continued thanks go to the following, without whom this Review would not be possible: the Head of School, Professor Christopher Rodgers, for helping us to gain financial support, to our staff liaisons, Mr Colin Murray and Dr Nikki Godden for their advice, and to Mr Richard Hogg, Mr Jamie Stogden and Miss Catherine Dale for the many hours that they have spent assisting us with graphic design, imagery and printing. Finally, I would like to thank each and every member of the Editorial Board for their time and effort spent on the Law Review this year. The combination of enthusiasm, hard-work, dedication and camaraderie shown by these students makes for an excellent Law Review which has been a joy to be part of.

Catherine Caine

Message from the Managing Editor

A warm welcome to all new and returning readers of the North East Law Review. This issue once again contains an eclectic mixture of the very best work from both undergraduate and postgraduate students at Newcastle Law School, as well as our guest publication from Ruth Houghton of Durham University. The North East Law Review provides a great platform for collaboration between postgraduate and undergraduate students as it provides them the opportunity to exchange ideas on contemporary legal issues. Alongside the Law Review, this year's editorial board has run a blog competition for students who are passionate about law with the aim of providing opportunities for students to get involved with the legal writing and learning process. Following the success of American Law Reviews, the North East Law Review can be regarded as a powerful tool that not only encourages student engagement with the legal academic community but also provides them with the knowledge, skills and values to succeed in their future legal career. I am therefore delighted to celebrate the publication of Volume Two Issue Two and look forward to future editions and further development of the North East Law Review.

Lida Pitsillidou

The Editorial Board would like to thank all of the staff and students from Newcastle University who have helped in the creation of this Issue. Without their support, the Law Review would not be possible. Particular thanks are owed to Mr Richard Hogg who has spent many hours designing the front cover for this issue.

For its financial support, the North East Law Review is indebted to Newcastle University Law School for providing funding for printing costs.

University of Newcastle upon Tyne
NE1 7RU

This volume should be cited as (2014) 2(2) N.E.L.R.

Table of Contents

A Puzzle for International Law: NGOs at the United Nations 1
Ruth Alice Houghton

Copy or Paste – UK Copyright Law in Light of Modern Education 25
Rachael Thompson

Incompletely Constituted Gifts: A Historical Assessment of Case Law 33
Oliver Smith

A Review of the Draft Assisted Dying Bill 39
Paul White

Should Arbitrator Immunity be Preserved under English Law? 45
Hazem Hebaishi

Duty of Care – Haunting Past, Uncertain Future 75
Jessica Randell

The Codification of Judge-made Norms in the Criminal Law: A Response to the Law Commission Reports 83
Jack Verbruggen

Halting the Decline of Biodiversity in England: Developing an Ecosystem Based Approach to Conservation Laws and why Localism will Not Work 111
Sarah Mackie

Media, Politics and Criminalisation: An Increasingly Problematic Relationship 121
Louise Johnson

A PUZZLE FOR INTERNATIONAL LAW: NGOS AT THE UNITED NATIONS

RUTH ALICE HOUGHTON[*]

A challenge for contemporary international lawyers is the democratic deficit in the United Nations. One suggestion that has been used to address this deficit is the introduction of NGOs into the decision-making processes. This paper seeks to address whether this 'inclusion' is democratic. Once the progressive history of liberal democracy in international law is contested, alternative models and standards of democracy can be and have been expected of NGOs. Rather than seeking to suggest which model is desirable, it is the aim of this paper to explore the way in which the current procedures for granting consultative status to NGOs manage the tensions between functionalism, internal and external accountability, participatory and representative democracy. In January 2014, the United Nations Committee for NGOs decided on the consultative status of over 400 NGOs. Whilst the terms of reference for the Committee refers to the democratic status of the NGOs and their accountability mechanisms, the questions permitted by states at the Committee reflect states' concerns with the 'interests' NGOs represent rather than their internal governance structures. Using these decisions from the Committee, it will be shown how the Committee manages the tension by leaning in favour of representation and expertise at the expense of accountability.

1 INTRODUCTION

On 25th March 2014, a number of non-governmental organisations (NGOs) stood up in The Human Rights and Alliance of Civilizations Room, in *Palais des Nations*, holding photos or hand drawn pictures of human rights defender Cao Shunli. It was the Universal Periodic Review of China at the United Nations Human Rights Council, and the NGO, International Service for Human Rights (ISHR) had just made a statement, at the end of which a minute's silence was called for to mark the death of Cao Shunli. Shunli had been detained by the Chinese authorities in September 2013 for protesting against the refusal to allow the public to participate in a national human rights review.[1] China reacted, interrupting ISHR's statement, to highlight that a minute's silence went beyond what an NGO could contribute to discussions. The President moved onto the next NGO statement, ISHR and the NGOs that joined them were 'silenced'.

The stifling of NGOs at the United Nations Human Rights Council raises concerns about the undemocratic nature of the United Nations (UN). The participation of NGOs

[*] Ruth Alice Houghton, Durham University, PhD Candidate.

[1] Jonathan Kaiman, 'Chinese activist Cao Shunli dies after being denied medical help, says website' (*The Guardian*, 14 March 2014) <http://www.theguardian.com/world/2014/mar/14/china-activist-cao-shunli-dies-human-rights> accessed 23 April 2014.

in international decision-making was supposed to mitigate against the democratic deficit. This instance also raises concerns about the relations between states and civil society at the UN. The history of participation by NGOs at the UN highlights a tensional relationship between state and non-state actors, but it is the procedures for access to the UN bodies that are at the crux of this problematic relationship. Access to the United Nations is predominantly managed through the UN Economic and Social Council (ECOSOC) Resolution 1996/31. Although other specialised bodies have their own procedures, the consultative status granted by ECOSOC is the main mechanism. ECOSOC Resolution 1996/31 outlined criteria that the United Nations Committee on NGOs should take into account when considering applications from NGOs. This includes, the prioritisation of representation from developing countries and those countries that have transitional economies,[2] as well as providing that NGOs should have a representative structure, possess accountability mechanisms, and should exercise voting or other appropriate democratic and transparent decision-making processes.[3] Consultative status is divided into general status and special status, with a roster for those NGOs that are considered useful.[4] Broadly speaking, general status grants more participatory rights than special status, as NGOs with general consultative status are able to submit an increased amount of material.[5] General status is reserved for those NGOs that are 'international' or are more widely representative.[6] These criterion or principles highlight the puzzle for international law. Tensions between internal and external accountability, representation, participation, and expertise underpin the language of Resolution 1996/31. The Preamble to Resolution 1996/31 shows the balance that it is attempting to strike between representation and expertise. It acknowledges the democratic pluralism of the 'full diversity' of NGOs, whilst also paying heed to the 'breadth of expertise'.[7] Though carefully balanced in the text of the resolution, there is much overlap between these themes, such as the ability of the UN Committee on NGOs to prioritise representation over participation.

The problem of reconciling these tensions has not gone unaddressed in the scholarship. In 2006, Peter Willetts analysed the approach taken in the Cardoso Report on the UN and Civil Society. He argued that the report attempts to combine three irreconcilable frameworks; functionalism, neocorporatism, and democratic pluralism. If, he suggests, functionalism and neocorporatism are focused on expertise (and expertise within the government), then democratic pluralism which is premised on the diversity of participants,[8] is not possible. This 'confused' approach, combined

[2] ECOSOC 'Consultative relationship between the United Nations and non-governmental organizations' Resolution 1996/31 (25 July 1996) para 6.
[3] ibid para 12.
[4] ibid paras 22, 23, 24.
[5] ibid para 31.
[6] ibid para 22.
[7] ibid Preamble.
[8] Peter Willetts, 'The Cardoso Report on the UN and Civil Society: Functionalism, Global Corporatism, or Global Democracy?' (2006) 12 Global Governance 305, 317.

with the panel's ignorance of the current ECOSOC procedures,[9] means that the Cardoso reforms to the ECOSOC procedure are weak. Willetts criticises the report for overlooking the current ECOSOC procedures, but he does not acknowledge that those procedures are manifestations of a similarly confused and combined framework. It is the aim of this paper to show the tension, first at the superficial level, between functionalism and democratic pluralism in the ECOSOC procedures. Secondly, the tension is much deeper because democratic pluralism has to be unpacked, namely what form or 'model' this democratic pluralism takes. Maria Ludovica Murazzani suggests that democratic pluralist approaches bring about 'transparency, participation and accountability', but she does not note the tension between these.[10] Analysing the criteria for ECOSOC and the meetings, there are a further three tensions between accountability, representative democracy and participatory democracy. These tensions sit at the heart of the debate on the democratic credibility of non-state actors.

This paper is separated into three sections. Firstly, the role of NGOs at the United Nations will be outlined. The increasing influence of NGOs in international decision-making raises concerns about the democratic nature of NGOs and the possible threat to democracy from the inclusion of NGOs. Secondly, the question of democracy is addressed. Challenging the dominant narrative of liberal democracy in international law, the particularities of NGOs allows for discussion of alternative models. The approach to democracy and NGOs has predominately centred on four themes: expertise, accountability, participation and representation. These four themes are in a tensional relationship, the overlaps will be analysed to show the questions that a procedure managing access to the United Nations, such as the ECOSOC Resolution, would need to address. Thirdly, using the ECOSOC procedures and the decisions from the United Nations Committee on NGOs, the approach of states to NGOs will be explored. Taking in turn the four theoretical themes that give rise to tension, the criteria and the questions put to applicant NGOs will be discussed. Ultimately, the Committee on NGOs leans towards prioritising questions of representation because then the states can control what issues, persons and peoples are represented.

2 THE UNITED NATIONS, CIVIL SOCIETY AND NON-GOVERNMENTAL ORGANISATIONS

Before discussing the role of civil society and NGOs at the UN, it is beneficial to outline the debates on the meaning of civil society and NGOs. The contested meanings of the terms lead into a debate on the contested role of these non-state actors at the UN. From awareness-raising to standard setting, the roles of NGOs at the UN are varied. Analysing ECOSOC Resolution 1996/31 shows how the plethora of diverging roles have been managed to balance both expertise and participation. Looking at the documentation on the meeting of the UN Committee on NGOs, the

[9] Peter Willetts, 'The Cardoso Report on the UN and Civil Society: Functionalism, Global Corporatism, or Global Democracy?' (2006) 12 Global Governance 305, 306.
[10] Maria Ludovica Murazzani, 'NGOs, Global Governance and the UN: NGOs as "Guardians of the Reform of the International System"' (2009) 16 Transit Stud Rev 501, 506.

balance of these roles is different, as the Committee is seen to favour particular interests or 'expertise'.

The meaning and contents of civil society is contested. At its broadest, it might mean 'a sphere of social life that is public but excludes government activities'.[11] Missoni has noted that rather than speak of the more formal NGOs, the United Nations Development Programme (UNDP) and the World Bank have shown their 'desire to engage with a wider range of groups' by using the vocabulary of civil society.[12] Despite the shift in some international organisations to talk of their relations with civil society,[13] the majority of civil society participants at the UN are NGOs and the ECOSOC accreditation procedures that will be discussed in detail later, are geared towards the access of NGOs.

What is meant by an NGO (as opposed to civil society more broadly, or social movements), is not initially clear either.[14] The UN Charter defines NGOs in the negative, as 'not governmental organizations [sic]'.[15] Whilst this does allow for a broad scope of organisations, Dianne Otto has noted that this puts NGOs at the peripheries in international law.[16] Paragraph 18 of ECOSOC Resolution 1996/31 refers to Article 71 of the UN Charter and confirms that the nature of participation of organisations is more limited than the participation of states. In fact, Otto has shown that Article 71 'limited the earlier practices by confining mandated consultation to the areas covered by ECOSOC'.[17] These provisions confirm that states are the primary actors, and the role of NGOs is secondary. Such exclusion, even in the definition, runs throughout the relationship between NGOs and states.

Despite this secondary position, NGOs play an important role in decision-making at an international level. Initially in 1946 there were 41 NGOs, but these numbers grew. There was a dramatic increase in the 1990s and there are currently over 3,910 NGOs that have ECOSOC consultative status at the UN. Missoni notes that since the 1970s NGO participation at the UN has extended beyond ECOSOC.[18] Against this lineal history of progress, Thomas Davies in his recent history of NGOs exposes the non-

[11] Errol Meidinger, 'Law Making by Global Civil Society: The Forest Certification Prototype' (Baldy Center for Law and Social Policy, State University of New York, 2001) cited in Barbara Gemmill and Abimbola Bamidele-Izu, 'The Role of NGOs and Civil Society in Global Environmental Governance', 4 <http://environment.research.yale.edu/documents/downloads/a-g/gemmill.pdf > accessed 23 April 2014.
[12] Eduardo Missoni, 'International Non-Governmental Organisations' in Eduardo Missoni and Daniele Alesani (eds), *Management of International Institutions and NGOs: Frameworks, practices and challenges* (Routledge, Oxon 2013) 53.
[13] ibid 53.
[14] Balakrishnan Rajagopal, *International Law from Below; Development, social movements and third world resistance* (CUP 2003).
[15] Dianne Otto, 'NGOs in the UN System: The Emerging Role of International Civil Society' (1996) 18(1) HRQ 107.
[16] ibid 110.
[17] Otto (n 15) 109.
[18] Missoni (n 12) 64.

lineal, cyclical history of the rise of NGOs in international institutions. With peaks in the 1930s and the 1990s, rather than a gradual increase, the inclusion of NGOs has not been a steady process. Focusing on numbers, however, overlooks the actual activity of these NGOs.

There has been a shift in the role played by NGOs, which is reflected in the rhetoric used to describe the relationship between the UN and NGOs. Whereas initially NGOs had 'consultative status', there is a shift in favour of discussing the 'partnership' with NGOs.[19] Willetts notes that the 'term *consultative status* was deliberately chosen to indicate a secondary role'.[20] Coupled with the negative definition of NGOs, that places them on the peripheries, this secondary role reinforces the state-centric nature of international law. Consultation evoked advice giving, rather than the NGOs being part of the decision-making process.[21] Placing NGOs in partnership with states invokes equality,[22] yet the places in which NGOs are acting, and the procedures for accreditation suggest that these non-state actors are not equal.

Taking part in 'informal mechanisms such as lobbying and other political processes',[23] NGOs are able to have influence on states. For Christine Chinkin et al, this lobbying role played by non-state actors is minimal,[24] but for Tinker these are 'real contributions of "non state" groups to the process of international law making'.[25] The size or importance of the role played by NGOs is determined by the approach to international law. Whereas, Gunther Teubner has a broader understanding of law making, and notes that agreements take place between 'semi-public, quasi-private or private actors',[26] for commentators that have a state-centric understanding of international law, non-state actor involvement is secondary. Nevertheless, this debate on the size of the role of non-state actors is suggestive at least, of a function for NGOs.

At the UN Human Rights Council, NGOs can attend and observe proceedings at the Council, submit written statements and make oral interventions, and organise events alongside Council Sessions.[27] More importantly for the purposes of facilitating democracy at the UN and for the purpose of ensuring the robust protection of human rights, NGOs can participate in debates, interactive dialogues, panel discussions and

[19] Peter Willetts, 'From "Consultative Arrangements" to "Partnership": The Changing Status of NGOs in Diplomacy at the United Nations' (2000) 6 Global Governance 191.
[20] ibid 191.
[21] ibid.
[22] Willletts (n 19) 192.
[23] Christine Chinkin, Dianne Otto, John Jackson, Mark Janis and Virginia Leary, 'Wrap-Up: Non-state actors and their influence on international law' (1998) ASIL 380.
[24] ibid.
[25] C Tinker, 'The Role of non-state actors in international law-making during the UN decade of international law' (1995) 89 American Society of International Law 177, 179.
[26] Gunther Teubner, 'Societal Constitutionalism: Alternatives to State-centred Constitutional Theory' (Storrs Lectures 2003/2004 Yale Law School, 2004) 13
< http://www.jura.uni-frankfurt.de/42852793/societal_constitutionalism.pdf > accessed 23 April 2014.
[27] UNGA Res. 60/251, 'Human Rights Council', 15 March 2006, UN Doc. A/RES/60/251, para 11.

informal meetings. NGOs working with the International Labour Organisation (ILO) had involvement with standard-setting. Erik Bluemel shows the example of the ILO Minimum Age Convention No. 38.[28] Bluemel also shows that NGOs involved in working against climate change can help supervise and implement the Convention; Article 7(2)(a) of the UNFCCC provides that NGOs may contract with the Conference of the Parties, where appropriate, to supervise and implement the Convention.[29] Many bodies allow NGOs to 'act as enforcement agents' who can inform non-conforming states.[30]

Whilst NGOs have functions as diverse as agenda-setting, norm-setting and enforcement,[31] looking at the places NGOs are found highlights their peripheral status. NGOs at the Human Rights Council are often found in side panels that they organise. For example, the World Federation of UN Associations (WFUNA), which is within the framework of the NGO Committee on Human Rights held a side panel at the twenty third Human Rights Council Session, to share concrete advice on how NGOs can engage effectively with the Human Rights Council.[32] Observational research from the Human Rights Council shows that NGOs are often paid less attention than state delegates; delegates go to the back of the room or use their phones.[33] This approach to NGOs that side-lines their participation, has an impact on the extent to which NGOs can be said to play a part in the democratisation of international organisations.

2.1 NGOs and Democracy

The way in which NGOs are defined or described has an impact on the role they are seen to play at the UN. At times NGOs are described as 'represent[ing] a global polity' and are included in 'deliberative processes as a way of overcoming what might otherwise be deemed a "democratic deficit"'.[34] Some argue that NGOs facilitate 'more direct citizen participation'.[35] These conceptualisations invoke the role NGOs play in representative or participatory democracy. At other times 'NGOs are more appropriately seen as interest groups focused on specific issues [rather] than as

[28] Erik B Bluemel, 'Overcoming NGO Accountability concerns in International Governance' (2005) 31 Brooklyn J Intl L 139, 169.
[29] ibid 167.
[30] ibid 177.
[31] ibid 162-164, 175.
[32] WFUNA, 'Side Event to 23rd Session of the Human Rights Council: Introduction to the Human Rights Council' <http://www.wfuna.org/side-event-to-23rd-session-of-the-human-rights-council-introduction-to-the-human-rights-council> accessed 23 April 2013.
[33] Rosa Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment* (Routledge, Oxon 2013) 113-114.
[34] Peter L Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community' (1999) 99(3) Columbia Law Review 628.
[35] Magdalena Bexell, Jonas Tallberg and Anders Uhlin, 'Democracy in Global Governance: The promises and pitfalls of transnational actors' (2010) 16 Global Governance 81-101, 82.

representatives of bottom-up constituencies'.[36] In contrast to the representative or participatory role played by NGOs, this conceptualisation favours the 'expertise' of the NGO. The debate between whether NGOs are facilitators of democracy or experts creates a tension that runs throughout the ECOSOC resolution and the approach by the UN Committee on NGOs.

If, however, NGOs are solely to provide representation and participation in an attempt to generate democratic practices at the UN, they do not always meet expectations. The 'paradox' of the NGOs in international governance is that whilst on the one hand they are seen as a tool for democratisation, on the other their lack of accountability and transparency undermines their democratic credentials.[37] The involvement of NGOs can be either a sign of health or an 'indicator of its anti-democratic nature'.[38] Some organisations operate without a public mandate,[39] whereas others are overrepresented at the international level, to the detriment of more vulnerable voices.[40] There is a concern that the inclusion of NGOs is elitist, as it is the well-funded and better organised groups that can participate.[41] Despite Thomas Davies in his history of transnational NGOs showing that there are both Eastern and Western organisations,[42] there has been a western bias at the United Nations. These criticisms raise concerns about the internal accountability mechanisms of NGOs, as well as, the representative nature of the organisations individually and as a group. Internal accountability and representation are questions that the Committee have to ask of applicant NGOs. The way in which the Resolution and the Committee deal with these questions is discussed in section four.

The extent of the influence of NGOs in international decision-making raises concerns about their undemocratic nature. By way of an example, those groups that control the agenda have 'control over the scope of the governance system and its ability to change over time'.[43] If that group is an NGO, or group of NGOs that are not accountable, self-interest or biased agendas may dominate.[44] However, the issue is what democracy means in this context. It has already been suggested that NGOs have an inherent tension between democracy and expertise, making them susceptible to

[36] Kenneth Anderson, 'The Ottawa Convention Banning Landmines, The Role of International Non-governmental Organizations and the Idea of International Civil Society' (2000) 11(1) European Journal of International Law 91 cited in Paul Schiff Berman, 'From International Law to Law and Globalization' (2005) 43 Colum J Transnatl L 485, 548.
[37] Pauline Jones Luong and Erika Weinthal, 'The NGO Paradox: Democratic Goals and Non-democratic Outcomes in Kazakhstan' (1999) 51(7) Europe-Asia Studies 1267-1284.
[38] See Kal Raustiala, 'What is the democracy problem in International Law' in Sovereignty and Multilateralism (2000) 1 Chicago Journal of International Law 401, 409.
[39] Jan Aart Scholte, 'Civil society and democratically accountable global governance' (2004) 39(2) Government and Opposition 211, 231.
[40] Magdalena Bexell, Jonas Tallberg and Anders Uhlin, 'Democracy in Global Governance: The promises and pitfalls of transnational actors' (2010) 16 Global Governance 81-101, 87.
[41] ibid.
[42] T Davies, *NGOs; A New History of Transnational Civil Society* (Hurst, London 2013).
[43] Bluemel (n 28) 162.
[44] ibid.

being labelled undemocratic. The following section will consider the meaning of democracy in context, and explore the different models or standards that are already present in the approach to NGOs.

3 WHAT IS DEMOCRACY?

There is no agreed definition of international democracy.[45] Usually, a liberal, nation-state model of democracy is held up to the international level as a template to follow. Terry MacDonald and Kate MacDonald have shown how cosmopolitan democrats have sought to replicate 'some version of the legal and electoral structures that are employed within states'.[46] However, the particularities of international decision-making necessitates an examination of democracy. As Murazzini suggested, democratic pluralism can be broken down into firstly, internal and external accountability, and secondly, the different models that are discussed at the international level: participatory democracy or representative democracy.[47] The particular functions of NGOs in international decision-making require a discussion on the relation between democracy, as well as expertise. This particular context of NGOs in international decision-making facilitates a challenge to the prevailing narrative of liberal democracy. Before accountability and the models of democracy are discussed, it is useful to recount the problems with this progressive narrative of liberal democracy in international law.

The end of the Cold War confirmed, for some, that liberal democracy was the only legitimate form of governance. Liberalism in international law gave rise to a drive for democracy and a '"consensus" on the benefits of the rule of law'.[48] The emphasis on liberal democracy is derived from the Kantian liberal peace, the perceived failure of alternative forms of government and the legitimacy that attaches to a liberal democracy. Coupled with the evidence that other forms of government failed, a rationale for the call for democracy is the increased stability and the promise of international peace.[49] There is a 'common belief' that democracy increases 'prosperity and even quells terrorism'.[50] Democracy is rising in prominence in international instruments, a few examples include; the Independent Expert on the on the promotion of a democratic and equitable international order as part of the Human Rights Council Special Procedures, and the 'Millennium Development Goals'. Highlighting the connection between democracy, human rights and gender equality, as well as the

[45] Same Varayudej, 'A Right to Democracy in International Law: its implications for Asia' (2006) 12(1) Annual Survey of International & Comparative Law 1, 14.
[46] Terry MacDonald and Kate MacDonald, 'Non-electoral accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry' (2006) 17(1) The European Journal of International Law 89, 90.
[47] Murazzani (n 10) 506.
[48] Balakrishnan Rajagopal, 'Invoking the Rule of Law in post-conflict rebuilding: a critical examination' (2007-2008) 49 William and Mary 1347, 1349.
[49] E Hay, 'International(ized) Constitutions and Peacebuilding' (2014) Leiden Journal of International Law 149.
[50] Jean d'Aspremont, 'Legitimacy of governments in the age of democracy' (2006) 38 NYU Journal of International Law and Politics 878, 885.

consolidation of democracy in Africa to ensure peace, the Millennium Goals show that democratic governance has become increasingly intertwined with various international projects.[51] This focus on liberal democracy means that it is not sufficient to be an 'illiberal democracy'.[52] Democracy and the rule of law have become an international benchmark not only for national governance,[53] but for international law.

The liberalism approach to international law comes with a history of progression or 'liberal millenarism'.[54] Francis Fukyama announced that the fall of the Soviet Union was the end of history, the only form of government left was liberalism, or the liberal democracy. However, there is a problem with these progressive narratives of history. Thomas Franck wrote that the eventual victory of democracy was a gradual process,[55] and yet 'liberal democracy' only emerged in the 19th Century.[56] This progressive approach to the history of democracy overlooks the centuries of philosophers who criticised democracy for being dangerous.[57] For example, Tocqueville bemoans the 'election of inferior people to office'.[58] Plato in *The Republic,*[59] and similarly Hegel, argues against democracy. Their complaints focus on the lack of 'coherent unity' in a democratic, anarchic society and the propensity 'to follow their citizens' impulses and desires, rather than any concern for the common good.[60] Hegel argues that it would be better to 'have those with expertise'.[61] The tension between expertise and democracy is not, then, a contemporary phenomenon resulting from the technological age.[62] Rather, this tension underlies democratic governance, but it becomes more visible in a discussion on NGOs because of the joint role they are seen to play.

The absence of a definition of democracy at the international level has given rise to comment on whether the liberal model is appropriate. Liberalism in international is not without its critics. It has been widely critiqued for being homogeneous. Eriksen criticises the futility of a 'one size fits all' approach that does not take into account the

---

[51] UNGA Resolution 55/2, 'Millennium Development Goals', 18 September 2000, UN doc. A/RES/55/2 para. 6 and para. 27.
[52] d'Aspremont (n 50) 879-880.
[53] Catherine Turner and Ruth Houghton, 'International Law, Constitution Drafting and Post Conflict Reconstruction Policy' in M Saul and J Sweeney (eds) *International Law and Post-Conflict Reconstruction Policy* (forthcoming).
[54] Susan Marks, 'The Emerging Norm: Conceptualising Democracy Governance' (1997) ASIL 373, 374.
[55] T Franck, *Fairness in international law and institutions* (Clarendon Press 1995) 85.
[56] Christopher Hobson, 'Beyond the End of History: The Need for a "Radical Historicisation" of democracy in International Relations' (2009) 37(3) Millennium 631, 639.
[57] ibid 362.
[58] Marc F Plattner, 'Reflections on Governance' (2013) Journal of Democracy 17-28, 25.
[59] Thom Brooks, 'Is Plato's Political Philosophy anti-democratic?' in Erich Kofmel, *Anti-democratic thought* (SCIS, 2008) 117.
[60] Simone Chambers, 'Rhetoric and the Public Sphere: has deliberative democracy abandoned mass democracy?' (2009) Political Theory 323-350, 327.
[61] Thom Brooks, *Hegel's Political Philosophy: Systematic Reading of the Philosophy of Right* (Edinburgh University Press, Edinburgh 2013) 116.
[62] Frank Fischer, 'Professional Expertise in a Deliberative Democracy: Facilitating Participatory Inquiry' (2004) 13(1) The Good Society 21, 21.

idiosyncrasies of power-sharing or local knowledge in the individual state.[63] Commentators deny the homogeneity of the liberal peace, noting that creation of the liberal democratic state has been varied.[64] These criticisms are intensified when the focus shifts from states to non-state actors. Although, the liberalisation of international law has cemented liberal democracy as the benchmark, some commentators suggest that NGOs should be held to a different standard than states,[65] and that they can be 'measured against different democratic theories and normative ideals'.[66]

Discourses on NGOs in international decision-making have already adopted a set of rhetorical tools to discuss democracy in relation to NGOs. There is an underlying question on the tension between functionalism, or expertise, and democracy. In addition, some commentators have discussed the paradox between internal and external accountability. Others have debated the role of NGOs in participatory democracy because NGOs can, as discussed above, facilitate the participation of other non-state actors. Finally, some commentators have noted the contested meaning of representation and have sought to explore this in contemporary decentralised politics. These four approaches to NGOs and democracy will be discussed in turn. It will become apparent that there is a tension between these four approaches, a tension that ECOSOC Resolution 1996/31 attempted to address and an ongoing tension that the UN Committee on NGOs has to manage.

3.1 Functionalism and Democracy

Firstly, the debate on the tension between democracy and expertise has been long drawn out. Scholarship has sought to suggest models that can reconcile the two. Dewey argued that the two could be divided, that experts would 'identify basic social needs' and that citizens 'would set a democratic agenda for pursuing them'.[67] The problem with separating out the experts from the citizens is that it can give rise to 'a more top-down technocratic form of consultation and decision making'.[68] An alternative is to merge the two together, through dialogue.[69] Frank Fischer proposed that democracy and expertise could potentially be reconciled through a participatory style democracy.[70] Similarly, Lawrence B Mohr attempts to reconcile expertise and

[63] S Sundstøl Eriksen, 'The Liberal Peace is neither: peacebuilding, state building and the reproduction of conflict in the Dominion Republic of Congo' (2009) 16(5) International Peacekeeping 652-666, 660.
[64] Jonathan Goodhand and Oliver Watton, 'The Limits of Liberal Peacebuilding? International engagement in the Sri Lankan Peace Process' (2009) 3(3) Journal of Intervention and Statebuilding 303, 307.
[65] Eva Erman and Anders Uhlin (eds), *Legitimacy Beyond the State? Re-examining the Democratic Credentials of Transnational Actors* (Palgrave MacMillian, New York 2010) 4-5.
[66] ibid 5.
[67] J Dewey, *The Public and Its Problems* (Shallow 1927) cited in Frank Fischer, 'Professional Expertise in a Deliberative Democracy: Facilitating Participatory Inquiry' (2004) 13(1) The Good Society 21.
[68] Frank Fischer, 'Professional Expertise in a Deliberative Democracy: Facilitating Participatory Inquiry' (2004) 13(1) The Good Society 21, 22.
[69] ibid 25-26.
[70] ibid 21.

democracy through voluntary democracy.[71] This voluntary model invokes compromise, whilst an expert can lead in ways 'consistent with organizational [sic] task democracy' as the others 'exercised their right under such a democratic system to defer to expertise',[72] this compromise could easily become coercion. This voluntary model is also premised on a participatory style democracy, yet, the UN is predicated on a representative model of democracy, with states acting as intermediaries.[73]

Willetts, however, suggests that expertise 'is not necessarily antidemocratic'; rather, democracy is undermined if 'policy networks are limited to "relevant" actors' such as experts.[74] Willetts is correct to argue that the participation of experts who can inform the public is contributing to the debate.[75] However, as Mohr highlights, expertise and the opinions of experts in contemporary society are often accepted without challenge; their opinion has the power to drown out the more vulnerable voices.[76]

It has been suggested that functionalism is so far entrenched in the UN as to undermine the chances of democracy.[77] Willetts spots a functionalist approach in the specialist bodies at the UN. This functionalist approach, he suggests, is present in the language of expertise used in the Cardoso report. The report, he notes, talks of 'expertise, skills, evidence, knowledge, experience, efficiency, independent specialists, mutual learning, and objectivity-and of being results-focused, technical and more effective'.[78] Arguably, the specialisation of different tasks has 'created levels of fragmentation that now make it quite difficult to bring decisions under the control of elected representatives'.[79]

However, in the NGO, both functionalism or expertise and democracy collide. Willetts argues that 'democratic pluralism' is 'a reason for why NGOs have influence in the UN' and that functionalism, such as expertise, is the tool NGOs need to use to have 'better chances to influence'.[80] This suggestion overlooks the ways in which NGOs are classified and selected in the ECOSOC procedures. The role of the NGO at the UN is to simultaneously provide expertise and to represent interests or facilitate the participation of those usually excluded from decision-making. According to ECOSOC, NGOs have a dual function: they provide expert information and advice to the international organisation, and they also allow representation of 'important

[71] Lawrence B. Mohr, 'Authority in Organizations: On the Reconciliation of Democracy and Expertise' (1994) 4(1) J-PART 49, 63.
[72] ibid 63.
[73] See, Anne Peters, 'Dual Democracy' in Jan Klabbers, Anne Peters, and Geir Ulfstein (eds), *The Constitutionalisation of International Law* (OUP 2009) 264.
[74] Willetts (n 8) 317.
[75] ibid 317.
[76] Mohr (n 71) 54.
[77] Willetts (n 8) cited in Maria Ludovica Murazzani, 'NGOs, Global Governance and the UN: NGOs as "Guardians of the Reform of the International System"' (2009) 16 Transit Stud Rev 501, 507.
[78] Willetts (n 8) 305-324.
[79] Fischer (n 68) 21.
[80] Willetts (n 8) cited in Murazzani (n 77) 506.

elements of public opinion'.[81] The need to balance expertise and democracy is more visible in discussions on NGOs at the UN.

3.2 Internal and External Accountability

Secondly, throughout the discourse on the democratic 'credentials' of NGOs,[82] there is a paradox between external and internal accountability. The recognition that state-based electoral accountability is not appropriate in the international, decentralised system, has led academics to discuss alternative notions of accountability. However, as noted by MacDonald and MacDonald, forms of accountability will differ from those that occur within states.[83] MacDonald and MacDonald have posited that it is 'possible instead to devise certain forms of non-electoral democratic accountability'.[84] Breaking down the advantages of democratic accountability, MacDonald and MacDonald show that transparency and public disempowerment are desired traits.[85] It is possible, therefore, that NGOs could become more transparent, and as watchdogs, NGOs often perform the task of challenging and therefore disempowering public powers. In positing this shift towards non-state accountability, MacDonald and MacDonald have not abandoned the internal and external accountability paradigm. Enhanced transparency works to increase internal accountability, and the act of disempowering public powers is a form of external accountability as it results from holding those powers to account.

Whilst NGOs have made international institutions 'more publicly answerable',[86] NGOs themselves are not always answerable to the people they represent. Backstrand draws on this distinction between external and internal accountability to say that, 'External accountability means that decision-makers have to justify their action vis-à-vis stakeholders that are affected by their decisions.'[87] An example of this in practice, she suggests, are the consultations with civil society held by The World Bank.[88] Yet, looking at the role of NGOs, external accountability is broader than the international organisation justifying their decision. It includes the holding to account of states or international organisations. NGOs through their awareness raising, lobbying and implementation roles are playing a part in holding states and international organisations accountable. Internal accountability, by contrast, can be described as the mechanisms within the NGOs that make it accountable to its members.[89]

---

[81] ECOSOC Resolution 1996/31, para 20.
[82] Erman and Uhlin (n 65).
[83] MacDonald and MacDonald (n 46) 98.
[84] ibid 90.
[85] ibid 105, 112.
[86] Scholte (n 39) 217.
[87] Karin Backstrand, 'Democratizing Global Environmental Governance? Stakeholder Democracy after the World Summit on Sustainable Development' (2006) 12 *European Journal of International Relations* 467, 478.
[88] ibid.
[89] ibid.

This binary distinction between internal and external is not fixed. Rana Lehr-Lehnardt collapses the distinction between internal and external accountability when she suggests that 'accountability is the responsible representative of issues and problems in the global community'.[90] Where the representative issues would act to hold to account the states and international organisations as a form of external accountability, the pressure to do this 'responsibl[ly]' is a comment on the organisations' internal accountability. Yet, even in this more closely linked forms of internal and external accountability; both are needed for legitimate non-state actors participation in international affairs. When discussing the tension between democracy and expertise, Mohr notes that the tension may also be 'managed by hypocrisy'.[91] Hypocrisy, or the incorporation of different organisational processes for the internal and the external parts of the organisation, as developed by Nils Brunsson,[92] not only allows for the reconciliation between democracy and expertise, but can also be used to discuss the tension between internal and external accountability. Hypocrisy would suggest that the NGO could play a part in external accountability without being internally accountability. Whilst this might happen in practice, the ECOSOC Resolution focuses too heavily on internal accountability for hypocrisy to underpin the access of NGOs to the UN.

The role of the NGO as watchdog or holding states accountable cannot be democratic without having internal accountability mechanisms in place within that NGO. The ECOSOC procedures highlighted above and developed further below, focus on the internal accountability of the NGOs. States are asked to consider the democratic nature of the structures within the organisation. Less is provided for about the external accountability of the NGO, but the documentation from the Committee on NGOs shows that it is the external accountability, the ability of the NGO to hold certain states to account, that preoccupies the UN Committee on NGOs.

3.3 Participation

Thirdly, it is often assumed that '[p]articipation of a wider range of social and other stakeholders interests add to the legitimacy of outcomes'.[93] NGOs, it is argued, 'can open political space for social circles' which means that vulnerable or often excluded groups can participate in the decision-making processes.[94] The question to consider is what is meant by participation. Despite the drive for liberal democracy in international law, free and fair elections are not a frequent occurrence in the decision-making

[90] Rana Lehr-Lehnardt, 'NGO Legitimacy: Reassessing Democracy, Accountability and Transparency' (*Cornell Law School Inter-University Graduate Student Conference Papers*, 2005) 26 < http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1020&context=lps_clacp > accessed 23 April 2014.
[91] Mohr (n 71) 59.
[92] Nils Brunsson, *The Organization of Hypocrisy: Talk, Decisions and Actions in Organizations* (Copenhagen Business School Press 2002); Nils Brunsson, 'The Necessary Hypocrisy' (1993) International Executive 1, 4.
[93] Backstrand (n 87) 472.
[94] Jan Aart Scholte, 'Civil Society and Democracy in Global Governance' (2002) Global Governance 281, 293.

processes in international organisations. The involvement of NGOs at the UN does not include voting.[95] This lack of voting, however, does not mean that the NGOs do not participate. Rather it highlights again that democratic practice in international decision-making has to be distinguished from national practice. Alternatively, participation is akin to discussion, and it has been shown that NGOs can participate in the meetings through written submissions and sometimes oral statements. The rules on consultative status show that participation can vary according to the body or the status granted to the NGO. Participation is used in the rhetoric on NGOs, as UN specialised bodies make known their support for the participation of NGOs. For example, UN Women state that 'the active participation of non-governmental organizations [sic] (NGOs) is a critical element in the work of the Commission on the Status of Women'.[96] However, the varying degrees of participation and the forbidding of negotiation by NGOs in 1996, which severely reduces the influences that NGOs can have in the decision-making processes, shows the tension underlying procedures managing access to the UN. Although, as Willett notes, there is not a clear line between what amounts to negotiation and what does not,[97] suggesting that NGOs still have a role to play in negotiating deals, the step to forbid negotiation shows the step taken by states to limit the participation of NGOs.

Participation alone is not sufficient to be democratic; it has to be democratic participation. As Kal Raustiala highlights, 'widened participation' 'may affirmatively worsen the situation if information is asymmetric and participation not balanced'.[98]At the UN, one of the concerns is the western bias of NGOs. The richer, more resourced NGOs from Western states are more capable of being heard at the UN. Participation, then, is not balanced. However, Kilby argues that even 'participatory democracy has been at the expense of representative democracy'.[99] Using examples from domestic governance, Kilby shows that the participation of more resourced NGOs can replace the interests of the citizens as a whole. Similarly, at the international level the stronger voices of the Western or larger NGOs might overwhelm the less powerful voices. This negative effect on representational democracy, in a broader sense, shows the tensions that persist in discussions on the democratic credentials of NGOs.

3.4 Representation

The final theme is that of representation. Representative democracy, mainstay across the democratic states, has 'become a dominant idea' in governance.[100] The domestic, and therefore traditional, way of conceptualising representative democracy is through

[95] Willetts (n 19) 206.
[96] UN Women, 'NGO Participation' < http://www.unwomen.org/ru/csw/ngo-participation > accessed 23 April 2014.
[97] Willetts (n 19) 207.
[98] Raustiala (n 38) 401.
[99] Patrick Kilby, 'Nongovernmental Organisations and Accountability in an Era of Global Anxiety' (2004) *Seton Hall Journal of Diplomacy and International Relations* 67, 78.
[100] Dilek Yigit, 'Democracy in the European Union from the perspective of representative democracy' (2010) 6(22) Review of international law and politics119, 120.

the free and fair election of representatives. Yet, what is meant by representation is contested and the definition of representation is 'hidden behind a cloud of countless definitions'.[101] The standard definition of representation is 'to make present what is absent'.[102] Yet, this does not address what it is that needs to be made present, and by whom or how. In addressing the 'whom or how' element, Yigit has shown how in the European Union there are examples of both direct representation (via the Parliament) and indirect representation (via the Council).[103] Although this acknowledges the different sources of representation, it is still premised in electoral-based representation. EU citizens elect Members of the European Parliament and their domestically elected Ministers represent them in the Council. In contrast, Pollak et al., challenge the definition of representation, suggesting that its current form was crafted for a 'remarkedly different [political community] from the [current] ones'.[104] The shift away from monolithic systems, to political systems 'inhabited by various kind of actors, formal and informal ones', makes 'elections as the *differentia specifica*' no longer 'a defining criteria for political representation'.[105] The example of NGOs in international decision-making, noting that some commentators have already suggested that a different standard can be applied them,[106] shows that traditional forms of representation through elections is not appropriate at the international level.

Shifting to the international level, there are a number of questions that need to be addressed. In contrast to politicians, NGOs might not be an appropriate actor in a representative democracy. There is a suggestion that 'being like the people is a necessary but not sufficient condition [and that] representatives also need to act like the people'.[107] Often NGOs are not like the people, nor do they act like the people, whose interests they represent. However, Pollak et al., note that representatives can be selected on the basis of their expertise.[108] Indeed, as will be discussed, the ECOSOC Resolution 1996/31 places particular emphasis on the expertise of NGOs. However, as Willetts has suggested, the balance between representation and expertise can err on the side of being undemocratic if it excludes actors. Similarly, there is a concern that the interests of some can prevail to the detriment of other, more vulnerable interests. This tension between representation and participation has already been noted, but it is worth highlighting that the factors of expertise can undermine participation from the diversity of NGOs.

---

[101] J Pollak, J Batora, M Mokre, E Sigalas, P Slominski, 'On Political Representation: Myths and Challenges' (RECON Online Working Paper 2009/03) 1
< http://www.ihs.ac.at/vienna/resources/Political%20Science/Publications/RECON_wp_0903.pdf> accessed 23 April 2014.
[102] ibid.
[103] Yigit (n 100) 141.
[104] Pollak et al. (n 101) 2.
[105] ibid 16.
[106] Erman and Uhlin (n 65).
[107] Pollak et al. (n 101) 4.
[108] ibid 5.

The second question to consider is whether representative democracy can overcome the accountability gaps. Michael Young in 'Non-state Actors in the Global Order' showed how he included NGOs in international discussions because he 'knew that these NGOs and the interests they represented were often precluded from participating in internal domestic dialogues'.[109] Young emphasised representation and participation above internal accountability. This shows that there is a divide, similar to that between internal and external accountability, between internal and external representation. Internal representation addresses whether an NGO represents its members, but external representation is more concerned with the breadth of that representation. The ECOSOC Resolution seeks to address both questions of representation. Yet, the Committee of NGOs is more preoccupied with 'external representation' and the activities of NGOs in states.

4 ECOSOC AND THE UNITED NATIONS COMMITTEE ON NGOS

The discussions on the tensions within discussions on international democracy, and democratic theory, have highlighted those themes that run throughout the management of NGO participation at the UN. Focusing on the ECOSOC Resolution 1996/31 that provides for the consultative status of NGOs, these tensions will be addressed. The Resolution, whilst acknowledging the different themes, does not adequately engage with the particular tensions and overlaps. This allows for the manipulation of the process by the Member States of the UN Committee on NGOs. Before addressing internal accountability, participation and representation, the provisions of the ECOSOC Resolution will be outlined in detail.

4.1 Access and Participation at the United Nations

The bodies within the UN have a myriad of processes for providing access to NGOs. However, given that many of the bodies mimic or reflect the ECOSOC procedure, the starting point for NGOs and access at the UN is the granting of ECOSOC consultative status. A subsidiary body of the Economic and Social Council, the United Nations Committee on Non-governmental organisations, comprises nineteen member states that recommend NGOs for consultative status. Responding to criticisms of a western bias within the Committee, membership is based on equitable geographical distribution.[110] Nevertheless, as will be expanded upon below, the Committee is still shrouded in an undemocratic politicisation.

ECOSOC Resolution 1996/31 outlined criteria for the granting of access to NGOs. This Resolution attempts to address concerns about the undemocratic nature of NGOs. When the Committee on NGOs is selecting, there are a number of principles which should guide them. The principles to take into account highlight the importance of representation, for example the principles prioritise representation from developing

[109] Michael K Young, 'Non-state Actors in the Global Order' (2010) Utah Law Review 81, 89.
[110] Otto (n 15) 115.

countries and those countries that have transitional economies.[111] The principles also pay attention to the internal democratic structures of NGOs. NGOs should have a representative structure, possess accountability mechanisms, and they should exercise voting or other appropriate democratic and transparent decision-making processes.[112] These criteria, then, address the paradox of NGOs, by making sure that both representation and accountability are considered.

However, in the ECOSOC resolution on the participation of NGOs, there is a tension between expertise and representativeness. NGOs are acknowledged not only for their representative nature, but also for their expertise.[113] 'Competence' or the 'representative character' of an NGO is necessary to obtain consultative status.[114] The Resolution states that:

> Consultative arrangements are to be made, on the one hand, for the purpose of enabling the Council or one of its bodies to secure expert information or advice … and, on the other hand, to enable international, regional, subregional and national organizations [sic] that represent important elements of public opinion to express their views.[115]

The clash between representation and expertise is seen most clearly in paragraph five of the Resolution, where the two principles the Committee should take into account when considering the application are outlined. Whilst the Committee should 'ensure, to the extent possible, participation of non-governmental organizations [sic] from all regions, and particularly from developing countries, in order to help achieve a just, balanced, effective and genuine involvement of non-governmental organizations [sic] from all regions and areas of the world', the Resolution also provides that 'The Committee shall also pay particular attention to non-governmental organizations [sic] that have special expertise or experience upon which the Council may wish to draw.'[116] Whereas the inclusion of NGOs from all regions is evocative of Willetts' 'democratic pluralism', the focus on expertise limits the types of NGOs that will be included in such a 'pluralism'.

Whereas general observation status applies to those organisations that are more broadly representative, special status invokes a special competence.[117] The number and length of written submissions is then limited depending on the nature of the status granted: General status allows 2,000 word submissions and Special status allows only 500 words for submissions to the ECOSOC, and 1,500 words to other subsidiary

[111] ECOSOC Resolution 1996/31, para 6.
[112] ibid para 12.
[113] ibid Preamble.
[114] ibid para 9.
[115] ibid para 20.
[116] ibid para 5.
[117] ibid para 22 and 23.

bodies.[118] Expert groups then are granted less space to participate than those broader representative groups. This is suggestive of a prioritisation of the representation of interests. The recent decisions by the UN Committee on NGOs on NGO consultative status highlight how these tensions between expertise, accountability, representation, and participation play out in the questions and decisions.

4.2 Internal Accountability

Towards the end of January 2014, the United Nations Committee on NGOs met to decide the consultative status of some 400 NGOs. Comparing the criteria set out in Resolution 1996/1 with the questions that are asked by the Committee, shows that there is a lack of emphasis placed on the internal accountability of the NGOs by the Committee.

Resolution 1996/31 provides that the NGO's internal governance structure should be democratic. The NGO must have 'a democratically adopted constitution',[119] 'a representative structure', and must 'possess appropriate mechanisms of accountability to its members, who shall exercise effective control over its policies and actions through the exercise of voting rights or other appropriate democratic and transparent decision-making processes'.[120]

Some of the questions addressed to the organisations attempt to probe the democratic nature of these organisations. Relying on resolution 1996/31 and the reference to the democratic status of the NGOs and their accountability mechanisms,[121] some of the questioning from states refers to the transparency of the organisations and their funding. The question posed by China to *Collectif des Familles de Disparu(e) en Algerie (Coalition of Families of the Disappeared in Algeria)* on why sixty per cent of the organisation's expenditures were for administrative purposes, is not a rare type of question. Many states ask organisations to provide information about their finances. Concern with the internal accountability mechanisms of the NGO can be seen when India 'asked for clarification about why responses to questions posed to the NGO seemed to represent the view of only one person, rather than the organization [sic] as a whole.'[122] The failure to reflect the views of the NGO as a whole, suggested that the internal accountability mechanisms or the democratic structure were not strong enough. It also highlights, however, the overlap between the concern for internal accountability and the internal representative nature of NGOs. The question from the Indian representative not only comments on the democratic nature of the NGO, but it also comments on the extent of its representation.

---

[118] ibid para 31(d) and (e) and 37(e).
[119] ibid para 10.
[120] ibid para 12.
[121] ibid para 12.
[122] UN News, 'Seventeen Non-Governmental Organizations Recommended for Status with Economic and Social Council, as Committee Session Enters Second Week' (*United Nations* 27 January 2014) <http://www.un.org/News/Press/docs//2014/ecosoc6593.doc.htm> accessed 23 April 2014.

However, this overlap between internal accountability and representation is not explicitly dealt with in the ECOSOC Resolution. Questions relating to the democratic structure invoke a narrow, elections based accountability. It is the rules on types of consultative status where questions of representation arise, yet these are focused on the external representation or the extent to which an NGO's work represents a number of countries.

4.3 Participation

Comparing the ECOSOC resolution with other procedures at the UN, the approach to participation by ECOSOC is quite restrictive.[123] The procedure for membership to the Department for Public Information section devoted to NGOs (DPI/NGO) is more lax than the ECOSOC procedure. However, the benefits of being a member of the DPI/NGO are less desirable. There is an Annual Conference where around 1,500 NGOs take part in discussing a topic that is part of the UN agenda, but this connection seems to be a one-way conversation. The UN provides access and information to the NGOs so that they can disseminate information about the UN to their members, rather than the NGOs being able to disseminate information about their specific concerns.

Before 1996, the exclusion of national organisations from consultative status particularly disadvantaged Third World NGOs.[124] The reform of the ECOSOC resolution in 1996 helped to address the disadvantaged position of Third World NGOs. One of the debates in the academic commentary is over whether ECOSOC includes national NGOs. It is now agreed that the 1996 Resolution allows national and regional NGOs to apply for consultative status. Eduardo Missoni highlights that the ECOSOC definition of NGOs did not include 'international' NGOs.[125] However, the condition that general consultative status NGOs are 'representative of major segments of society in a large number of countries in different regions of the world'[126] can be read to suggest that regional and national NGOs cannot fulfil the criteria of general consultative status.[127] Instead, national NGOs are encouraged to apply for special status or Roster status.[128] Yet, Missoni notes that it was the practice before 1996 to classify national NGOs as 'Category II'.[129] The question then is whether this is a change that increases participation, or whether this just reflects practice.

Beyond the particulars of the criteria, attendance and participation at United Nations conferences by NGOs has increased. Willetts shows that the process has changed from invitation to 'all NGOs recognised by ECOSOC having an automatic right to

[123] Procedures for UNCED, Office of President of the Millennium Assembly, 55th Session of UNGA, 1 August 2001.
[124] Otto (n 15) 115.
[125] Missoni (n 12) 50.
[126] Resolution 1996/31 para 12.
[127] Missoni (n 12) 67.
[128] ibid.
[129] ibid.

register'.[130] UN Conferences now allow 'other "interested"' NGOs to apply to attend.[131] Since the United Nations Conference on Environment and Development (UNCED) in 1992, there have been a number of attempts to drive reform in the relations between the UN and civil society. In July 1997, the Secretary-General report: *Renewing the UN: A Programme for Reform* advocated for engagement with civil society.[132] This report had little impact, and in 2002 another report, *Strengthening the UN* reiterated the growing importance of NGOs.[133] Whilst there are a number of mechanisms that facilitate engagement with NGOs, such as the NGO Liaison Committee (NGLS) or Department of Economic and Social Affairs, NGO Branch (UNDESA NGO), the procedure that grants consultative status is still problematic. Prior to these UN led mechanisms, as early as 1948 the Conference of NGO in Consultative Status (CONGO) aimed to facilitate participation in the UN.[134] This 'independent, international, non-profit membership association of NGOs', arranged NGO committees that allowed discussion between members and UN officials and agencies.[135] Membership to CONGO was on the basis of consultative status, but NGOs could be associate members if they were associated with the UN system.[136] In addition to these facilitating bodies, one of the ways in which the UN attempts to combat the exclusion of Third World NGOs, is to take into account 'geographical representation' when drawing up lists of NGOs that can attend UN conferences.[137]

Although symbolically these bodies enhance the visibility of NGOs, there is still the procedural bar of the ECOSOC process which is highly politicised, being described as having the worst reputation.[138] There are also other procedural reasons why access or participation at the UN is curtailed for NGOs. ISHR have noted the often short deadlines for NGOs to apply for accreditation.[139] This highlights that despite some improvements in the extent of participation allowed by ECOSOC and the modalities of conferences or forums, NGOs still have a secondary position. ECOSOC and the UN are not prioritising the participation of NGOs, rather than is a biased process of selection.

---

[130] Willetts (n 19) 193-194.
[131] ibid 194.
[132] UNGA, 'Renewing the United Nations: A Programme for Reform: Report of the Secretary-General' (14 July 1997) UN Doc. A/51/950.
[133] UNGA, 'Strengthening of the United Nations: an agenda for further change' (9 September 2002) UN Doc. A/57/387.
[134] Missoni (n 12) 70.
[135] ibid 70.
[136] ibid 71.
[137] UNGA, Resolution 67/219 'International migration and development' (26 March 2013) UN Doc. A/RES/67/219.
[138] K Martens, 'By Passing Obstacles to Access: How NGOs are taken piggy-back to the United Nations' (2004) Human Rights Review 80, 84.
[139] ISHR, 'Accreditation procedure threatens to undercut civil society participation at UN meeting' (24 April 2013, updated 1 May 2013) <http://www.ishr.ch/news/accreditation-procedure-threatens-undercut-civil-society-participation-un-meeting> accessed 23 April 2014.

4.4 Representation

Although the terms of reference for the NGO Committee in Resolution 1996/31 provides criteria that should be taken into account when selecting NGOs, the reports from the Committee show that states are obstructing the selection of organisations by persistent, and irrelevant questioning. Asking questions of NGOs can postpone the application for consultative status. The questions permitted by states at the Committee often reflect states' concerns with the 'interests' NGOs represent, rather than their internal governance structures. Examples from the January 2014 Committee on NGOs, show how the preoccupation of states with the representative nature of NGOs allows them to control what interests are being represented.

Questioning from the Committee is heavily politicised. States will often be concerned with NGO activities in their own territories. China repeatedly asks NGOs to state their position on Tibet or Taiwan. States often ask about the scope of an NGOs work, showing a particular interest in the states that NGOs will work in. For example, Cuba asked the *Korea Differently Abled Federation* if it intended to establish a presence there,[140] and Nicaragua asked Italian NGO *Casa Generalizia della Societa del Sacro Cuore* whether it planned to carry out activities in Central America.[141] The questioning of NGO, the *Islamic African Relief Agency (IARA) (Sudan)*, shows the politicisation of the process as the US, Pakistan and Israel debate the relevance of the questions being asked. The extent of the politicisation is apparent in the questioning of *Human Life International* on 29th January, when Israel asked for their opinion on gay marriage.[142] The extent to which state interests dominate raises the question of who is deciding what a legitimate interest amounts to.

Although Willetts argues that activists are over-exaggerating to suggest that NGOs are rejected for political reasons, this undermines the effect of the persistent questions and constant delays.[143] Smaller NGOs cannot afford to keep going through the process and stop trying. In any case, the 'hostility from particular governments' is sufficient to show that the politicised process is undermining any democratic credibility.[144] This sort of politicisation shows the problem that arises if a representative model of democracy is prioritised at the expense of the necessary checks on the accountability of participants. It is worth noting, in the domestic context, in ancient history, representative government was supposed to prevent democracy, by denying the unruly

[140] UN News, 'Seventeen Non-Governmental Organizations Recommended for Status with Economic and Social Council, as Committee Session Enters Second Week' (30 January 2014) <http://www.un.org/News/Press/docs//2014/ecosoc6596.doc.htm> accessed 23 April 2014.
[141] UN News, 'Seventeen Non-Governmental Organizations Recommended for Status with Economic and Social Council, as Committee Session Enters Second Week' (27 January 2014) <http://www.un.org/News/Press/docs//2014/ecosoc6593.doc.htm> accessed 23 April 2014.
[142] UN News, 'Seventeen Non-Governmental Organizations Recommended for Status with Economic and Social Council, as Committee Session Enters Second Week' (29 January 2014) <http://www.un.org/News/Press/docs//2014/ecosoc6595.doc.htm> accessed 23 April 2014.
[143] Willetts (n 19) 192.
[144] ibid.

masses direct participation in decision-making.[145] At the contemporary international level the rhetoric of 'representative' is being used to exclude NGOs.

The current procedures on the participation of NGOs in international decision-making shows that focus on representation is dominated by state interests. In the ECOSOC resolution, NGOs are acknowledged not only for their representative nature, but also for their expertise. However, the ECOSOC procedure overlooks the problem that representation lacks a definition. Pollak et al, have shown how to talk of representative 'assumes that the object of representation can be discerned and then represented'.[146] Representation, they suggest 'requires simplification',[147] which is further simplified through this process of classification. The tension between representation and expertise is evident in the approach taken by the committee and the distinction between general and consultative status. As has already been shown, general status, applicable to those organisations that are more broadly representative, are allowed 2,000 word submissions. Yet, special status NGOs, granted status for their special competence,[148] are allowed only 500 words for submissions to the ECOSOC, and 1,500 words to other subsidiary bodies.[149] Expert groups then are granted less space to participate than those broader representative groups. This is suggestive of a prioritisation of the representation of interests.

5 SILENCING OF NGOS

Access to the UN, the specialised bodies and other forums is surrounded by a tension that has largely been managed in favour of representation. States can control who or what they want to be represented. The power that states wield to exclude NGOs is great and even the discussion on access does not highlight the increasingly common practice of silencing NGOs. It has already been discussed that NGOs have a secondary status to states. The ECOSOC resolutions provide for the suspension for up to three years or withdrawal of NGOs on the basis that they have acted against the United Nations Charter, which includes 'politically motivated acts against Member States'. Other criteria for suspension include if the NGO has received proceeds from criminal activity, or if for three years the NGO made no contribution to the work of the UN or ECOSOC.[150] Few NGOs have been suspended,[151] but the threat of suspension of an NGO on the basis that it has undertaken 'politically motivated acts against Member States',[152] shows the power of the states over the NGOs. What

[145] N Urbinati, 'Condorcet's Democratic Theory of Representative Government' (2004) 3(1) European Journal of Political Theory 53, 54 cited in Pollak et al. (n 101) 8.
[146] Pollak et al. (n 101) 13.
[147] ibid.
[148] ECOSOC Resolution 1996/31, para 22 and 23.
[149] ibid para 31(d) and (e) and 37(e).
[150] Resolution 1996/31, para 57.
[151] Peter van den Bossche, 'Regulating Legitimacy of the role of NGOs in global governance: legal status and accreditation' Anton Vedder (eds), *NGO Involvement in International Governance and Policy: Sources of Legitimacy* (Martinus Nijhoff Publishers 2007) 159.
[152] Resolution 1996/31, para 57.

amounts to a politically motivated act is not further defined and is open to abuse by states.

In addition to the ECOSOC procedures, the modalities of various High Development Panel sessions highlight this trend to deny participation to NGOs. States have started to introduce a 'non-objection' rule whereby NGOs are allowed to attend only if no state objects. In October 2013, the UNGA, despite wishing to create a participatory procedure for the High Level Dialogue on International Migration and Development,[153] the draft resolution planned only to let relevant NGOs with consultative status that states did not object to participate.[154] Moreover, the states do not have to provide reasons for their objection.[155] Whilst the procedure was modified somewhat for the Migration and Development Dialogue, other similar meetings have included the same no-objection rule. This steady process of chipping away at the participation of NGOs has been matched by a public display of exclusion at the Twenty Fifth Human Rights Council Session.

As described above, at the Human Rights Council session in March 2014, the ability of NGOs to participate was restricted. The NGO, International Service for Human Rights (ISHR), made a statement at China's Universal Periodic Review (UPR) and at the end call for a minute's silence to mark the death of the human rights defender Cao Shunli.[156] China made a point of order, stating that under Resolution A/HRC/RES/5/1, paragraph 31 NGOs are only allowed to make 'general comments', and that a moment's silence would not fall under that remit. The President of the Council called for a vote on whether he could postpone his decision, but only thirteen states voted for allowing ISHR to continue. Twenty states supported China and voted against and twelve abstained. This meant that ISHR were prevented from holding their moment's silence and the President moved onto the next NGO. The silencing of these organisations (especially when this is supported by undemocratic states) shows the undemocratic nature of international law and suggests that NGOs do have an important function in challenging that undemocratic force. It shows the power of states to decide what interests and persons should be represented.

6 CONCLUSION

The silencing of NGOs at the Human Rights Council shows the current trend of excluding NGOs from international decision-making. Included in processes to help cure the democratic deficit, NGOs have facilitated participation, represented vulnerable voices, and held states and International Organisations accountable. Yet,

[153] ibid para 16.
[154] ISHR, 'States should reject procedure that results in exclusion of non-government organisations from UN' (1 February 2013) < http://www.ishr.ch/news/states-should-reject-procedure-results-exclusion-non-government-organisations-un > accessed 23 April 2014.
[155] ibid.
[156] UPR Info, 'China prevents moment of silence in memory of human rights defender' (25 March 2014) <http://www.upr-info.org/en/news/china-prevents-moment-silence-memory-human-rights-defender> accessed 23 April 2014.

this potential democratic force is being undermined in a strong undemocratic move by some states. This silencing is a manifestation of the tensional relationship between states and NGOs at the UN. Despite increased participation by NGOs over the years, this singles strongly that NGOs are secondary to states.

As gatekeepers of NGO access to the United Nations, states have the ability to exclude NGOs according to their own state interests. Focusing on the ECOSOC procedures for consultative states, this paper has shown how an underlying tension between accountability, representation, participation and expertise is written into the text of Resolution 1996/31. The overlaps between these themes has allowed for Member States to manipulate proceedings to exclude those NGOs that are representing interests a state disagrees with.

The particularities of NGOs in international decision-making, the disassociation from a state, the inappropriateness of elections, shows that the model of liberal democracy is not plausible at the international level. Rather, discussions on NGOs and their democratic credentials have highlighted four themes; expertise, accountability, participation and representation. These themes, some of which are models of democracy themselves, overlap and are not clearly demarcated. It has been shown that there is a tension between certain of these themes, for example the irreconcilability of expertise and participation. It was these themes that create the puzzle which the ECOSOC Resolution 1996/31 had to balance or manage, and it has been shown that while the text balances these themes, it does not engage with the overlaps or the potential clashes. Instead, these clashes have been manipulated by the United Nations Committee on NGOs. When asked to consider questions of accountability and to take into account participation, the Committee focused on representation and more loosely expertise. Focusing on the representative nature of NGOs allows states to manage which interests are heard at the UN.

COPY OR PASTE? - UK COPYRIGHT LAW IN LIGHT OF MODERN EDUCATION

RACHAEL THOMPSON[*]

British law of copyright makes an exception to copyright infringement for educational establishments. This paper provides an analysis of relevant sections of the Copyright, Design and Patents Act 1988 in light of technological advances in contemporary society and in comparison to the US 'fair use' approach. When contrasted with 'fair use', British law seems to insufficiently address the educational needs in light of technological advancements. Thus, reform of the British law is considered necessary. The 'fair use' approach has shortcomings which render it an unsuitable model for Britain to follow; rather, the British Government's proposals provide a better alternative.

Britain, under the Copyright, Design and Patents Act 1988,[1] caters for numerous exceptions to copyright infringement. Focusing on education, sections 32-36A[2] contain provisions specifically allowing educational establishments to perform acts that ordinarily would infringe copyright, while sections 37-44A[3] cover exemption criteria relating to libraries and archiving. Additionally, the fair dealing exception for 'research and private study'[4] permits literary, dramatic, musical and artistic works, and published editions, to be copied for non-commercial research, providing such copying constitutes 'fair dealing'.[5]

The British provisions 'define with extraordinary precision and rigidity the ambit of various exceptions to copyright protection'.[6] The message is clear: infringement is tolerated only for uses explicitly defined by statute. Positively, this approach offers certainty.[7] Yet, undesirably, 'it is as if every tiny exception... has had to be fought hard for, prized out of the unwilling hand of the legislature'.[8] Inevitably, situations will arise where use may be considered fair, but judicial discretion is inhibited by these stringent statutory provisions. Meanwhile, the US maintains a general 'fair use' exception.[9] Although fair use examples are provided - of which teaching, scholarship and research are specified - the list is non-exhaustive, hinging primarily on whether use is deemed 'fair'. Fairness is determined by considering the character of use, the

---

[*] Rachael Thompson, Newcastle University, LLB (Hons) Law.
[1] Copyright, Designs and Patents Act 1988 (CDPA 1988).
[2] ibid s 32-36A.
[3] ibid s 37-44A.
[4] ibid s 29.
[5] ibid s 29(1).
[6] *Pro Sieben Media AG v Carlton UK Television Limited and Another* [1997] EMLR 509 [516] (Laddie J).
[7] Robert Burrell, 'Reining in Copyright Law: Is Fair Use the Answer?' [2001] IPQ 361, 365.
[8] Hugh Laddie, 'Copyright: Over-strength, Over-Regulated, Over-rated?' [1996] EIPR 253, 258.
[9] Copyright Act of 1976, 17 U.S.C. § 107.

nature of the work to be used, the amount used and the effect of use on the market.[10] This approach, although criticised as 'abandoning certainty',[11] is unconstrained by statutorily defined exceptions, 'enabl[ing] judges to take a view as to whether emerging activities in relation to copyright works should legitimately fall within the scope of copyright protection or not'.[12] The task here is to, firstly, determine how adequately Britain's exceptions address educational needs when compared with the US' approach, and, secondly, determine the desirable extent of reform if required.

Principally, Britain's inflexible exception criteria cater inadequately for technological advances which aid modern education, 'simply because those technologies were not imagined when the law was formed'.[13] For example, the fair dealing exception for research and private study excludes sound recordings, films and broadcasts. Yet, the Government acknowledges that such resources comprise 'a large proportion of modern research material'.[14] This failing, criticised as 'absurd'[15] and 'inconsistent',[16] is heightened now that 'low-cost consumer equipment makes copying and study of this type of content possible for a wide range of students'.[17]

Furthermore, although educational establishments may copy certain works for instructional purposes,[18] this cannot be performed by reprographic means,[19] excluding the use of photocopiers, printers and interactive whiteboards.[20] Where reprographic copying is permitted, copying is limited to 1% of any work per quarter.[21] This low limit appears 'meaningless when applied to small works'[22] and, since it prevails only where no relevant licensing scheme exists, is even more restricting in practice.[23] Instead, educators must pay large amounts for licenses to copy – despite many works having been originally 'produced at public expense by academics and research students'[24] – and cannot adequately cater for web-based and distance learning via

[10] ibid.
[11] Burrell (n 7) 364-365.
[12] Ian Hargreaves, 'Digital Opportunity: A review of Intellectual Property and Growth' (*Intellectual Property Office*, 2011) <http://www.ipo.gov.uk/ipreview-finalreport.pdf> accessed 17 January 2013, 44.
[13] ibid 41.
[14] HM Government, Intellectual Property Office, 'Consultation document - Proposals to change the UK's copyright system' (*Intellectual Property* Office, 14 December 2011) <http://www.ipo.gov.uk/consult-2011-copyright.pdf> accessed 5 January 2013, 7.74.
[15] Lionel Bently, 'Driving UK research. Is Copyright a help or a hindrance? A perspective from the research community' (*British Library*, 2010) <http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=628> accessed 31 January 2013, 5.
[16] Consultation on Copyright (n 14) 7.74.
[17] ibid 7.74.
[18] CDPA 1988 (n 1) 36(1).
[19] CDPA 1988 (n 1) 32(1).
[20] Consultation on Copyright (n 14) 7.124.
[21] CDPA 1988 (n 1) 36(2).
[22] Consultation on Copyright (n 14) 7.132.
[23] ibid 7.135.
[24] Hargreaves (n 12) 41.

online platforms,[25] strengthening concerns that current provisions 'unduly harm the educational, research and lifelong learning environments'.[26]

Libraries and archives, which play an important role in supporting the educational needs of society, face similar problems. Whilst the British Library and Google are conjointly undertaking to digitise thousands of books from the Library's collections, they may only legally digitise fully out of copyright books.[27] With copyrighted works users will only receive basic information, such as short extracts and details about where it can be bought or found.[28] Copying for preservation is also restricted,[29] applying only to prescribed libraries and archives[30] and excluding artistic works, sound recordings, films or broadcasts, and the making of copies where purchase of a replacement would have been 'reasonably practicable'.[31]

Contrastingly, the US' general focus on 'fair use' has allowed the defence, to be applied to new technology as it has emerged, addressing extensively the technological inadequacies under British law. Key cases have involved the photocopying of literary materials useful in education[32] and Internet diffusion of numerous copyrightable works, including thumbnail images.[33] Unconstrained by pre-determined exemption categories, the US has also utilised their law's flexibility more recently to specifically address the increasing trend of digitising books, and bring it within the remit of fair use. In *Cambridge University Press et al v Patton et al*,[34] concerning the digitisation of unlicensed sections of copyrighted books for student use, the judge found in favour of fair use on the first two grounds, since the material was 'strictly for non-profit educational purposes'[35] and involved books which were 'properly classified as informational in nature'.[36] In considering amount and substantiality, stringent quantitative limits laid out in the Classroom Guidelines[37] were labelled 'an impractical, unnecessary limitation'[38] which, when coupled with the absence of judicial precedent, left educational establishments 'guessing about the permissible

[25] Consultation on Copyright (n 14) 7.128.
[26] Libraries and Archives Copyright Alliance, 'Copyright: The Future' (*Intellectual Property* Office, 6 February 2009) <www.ipo.gov.uk/responses-copyissues-laca.pdf> accessed 28 January 2013, 5.
[27] Ollie Rickman, Google UK, 'The British Library and Google to make 250,000 books available to all' (*The British Library, Policy and Press Releases*, 20 June 2011) <http://pressandpolicy.bl.uk/Press-Releases/The-British-Library-and-Google-to-make-250-000-books-available-to-all-4fc.aspx> accessed 1 February 2013.
[28] ibid.
[29] CDPA 1988 (n 1) 42(1).
[30] ibid.
[31] CDPA 1988 (n 1) 42(2).
[32] *American Geophysical Union v. Texaco, Inc.* (1994) 60 F3d 913 (2d Cir).
[33] *Perfect 10 v. Google, Inc*. (2006) 416 F Supp 2d 828 (CD Cal).
[34] No. 08-01425 (D Ga. May 11, 2012) (ongoing) <http://docs.justia.com/cases/federal/district-courts/georgia/gandce/1:2008cv01425/150651/423/0.pdf?ts=1337225450> accessed 12 January 2013.
[35] ibid 49.
[36] ibid 52.
[37] Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals ("Classroom Guidelines") (1976).
[38] *Cambridge University Press* (n 34) 71.

extent of fair use'.[39] Favouring the 10% or one chapter approach,[40] she concluded that 'a 10% excerpt would not substitute for the original'[41] thus 'the unpaid use of the excerpts caused no actual or potential damages to the value of the books' copyrights',[42] again favouring fair use. Although, 'other judges are also not bound by this opinion... they are not likely to want to start from scratch'.[43]

Alongside demonstrating greater adequacy in catering for the educational needs of society, as regards the digitisation of books and technology in general, this case places more generous limits than UK law on the quantity of works which may be copied, providing 'a safe harbour beyond which libraries may nevertheless choose to sail'.[44] Federal courts went even further and have held the copying of whole works to constitute fair use, particularly where use is transformative. This further addresses society's educational needs as it circumvents the need for numerical limits on copying, eases financial burdens triggered by the need for licenses and allows the use of work to be more meaningful.

In *AV ex rel Vanderhye v iParadigms LLC,*[45] North Virginian students brought a copyright infringement claim against iParadigms' TurnItIn.com, a service in which student papers are compiled in a database then pattern-checked for signs of plagiarism. Finding in favour of iParadigms, under the fair use defence, the court held use to be transformative in nature because it had '[an] entirely different function and purpose than the original works'.[46] Furthermore, although iParadigms uses whole works, they deemed its use 'limited in purpose and scope'[47] as a digitised record for electronic comparison purposes only. Returning on the final point to the question of transformation, use by iParadigms was found not affect students' abilities to sell their work, as 'customers will not be dissuaded by their existence in the database'.[48]

Importantly, this case gave great emphasis to the wider educational good of the contended use,[49] a consideration that is seemingly overlooked or at least neglected in the rigidness of British law. Such recognition is also evident in *The Authors Guild Inc v HathiTrust*[50] - concerning search facilities run by libraries – endorsing suggestions that fair use helps in creating 'a positive environment in the US for innovation and

[39] ibid 69.
[40] ibid 74.
[41] ibid 74.
[42] ibid 79.
[43] Brandon C Butler, Director of Public Policy Initiatives 'Issue Brief: GSU Fair Use Decision Recap and Implications' (Association of Research Libraries, May 11 2012) <www.arl.org/bm~doc/gsu_issuebrief_15may12.pdf> accessed 25 January 2013, 7.
[44] ibid.
[45] (4th Cir 2009) 562 F 3d 630.
[46] ibid 639.
[47] ibid 642.
[48] ibid 644.
[49] ibid 638.
[50] (2012) 11 CV 6351 (HB).

investment in innovation'.[51] Focusing on the public interest in recognising the importance in promoting scientific and artistic progression,[52] the judge held the purpose of reproduction for search facilities to be 'superior search capabilities, rather than actual access to copyrighted material.'[53]

Having established through comparison with the fair use doctrine that British law suffers many inadequacies in terms of society's educational needs, it is submitted, in opposition of the given proposition, that the reform is strongly needed. However, it is important to acknowledge that adopting the US' approach in Britain is not necessarily a viable option, due to shortcomings stemming from its existence in a context larger than simply an educational setting.[54] As previously mentioned, fair use has been criticised as 'vague',[55] making it 'hard to determine in advance whether a given use would be fair'.[56] Judicial opinions 'reflect widely differing notions of the meaning of fair use',[57] supporting claims views that it is 'an accident-prone conceptual area' and meaning parties 'can only guess and pray'[58] as to whether specific uses will be held 'fair'.[59] Instead, the US Copyright Office advises obtaining permission from copyright owners before using copyrighted material.[60] As Mazzone observes, 'if the Copyright Office does not put much stock in fair use, it is hard to expect members of the general public to rely on fair use either'.[61] This uncertainty was the driving factor of Lord Denning's reluctance to adopt such an approach.[62] While contractual agreements would offer better certainty, this has been criticised as 'inconsistent with the purpose of fair use'[63] since 'fair use is a use that does not require permission because it is not infringement'.[64] Nonetheless, there are concerns that fair use is becoming redundant in today's digital society as contractual arrangements are being used to 'extract from consumers their agreement that they will not use the delivered materials in ways that the Copyright Act would deem fair and therefore non-infringing'.[65]

Some degree of certainty emerges through litigation[66] but this litigation, key in fashioning the limits of 'fair use', may be impossible for Britain to replicate.[67]

---

[51] Hargreaves (n 12) 44.
[52] ibid 21.
[53] ibid 16.
[54] Burrell (n 7) 381.
[55] Jason Mazzone, 'Administering Fair Use' (2009-2010) 51 Wm & Mary L Rev 395, 398.
[56] ibid 400.
[57] Pierre Leval, 'Toward a Fair Use Standard' (1990) 103 Harv L Rev 1105, 1107.
[58] ibid 1107.
[59] Jonathan Gingerich, 'A.V. Ex. Rel. Vanderhye V.Iparadigms, Llc: Electronic Databases And The Compartmentalization Of Fair Use' (2010) 50 IDEA 345, 345.
[60] U.S. Copyright Office, 'Fair Use Factsheet' (FL 102, Reviewed June 2012) <http://www.copyright.gov/fls/fl102.html> accessed 1 February 2013.
[61] Mazzone (n 55) 408.
[62] HL Deb 8 December 1987, vol 491, cols 85-136.
[63] ibid 404.
[64] ibid 404.
[65] ibid 408.
[66] Mazzone (n 55) 401.
[67] Burrell (n 7) 382.

Similarly, imitation of the 'complex web of understandings, agreements and policy statements'[68] which support the defence – for example the 'Classroom Guidelines' – may 'not have the desired result'.[69] Fair use is also closely allied with 'constitutional guarantees',[70] including free speech, and may be inoperable in a 'legal environment', which does not afford these values the same prominence.[71] More specifically, it is doubtful whether such a general defence meets international treaty obligations,[72] including the Information Society Directive which harmonises aspects of copyright in the digital environment and also affects European copyright law more generally.[73] In particular, it lists exhaustively the basis on which Member States may provide for exceptions, raising questions of compatibility.

Thus, although the inadequacies of British law in terms of the educational needs of society indicate a strong need for change, these concerns render the adoption of the fair use doctrine a questionable reform option. Regarding other options, the Government has recently published its response statement on modernising copyright,[74] following consultation.[75] This statement, whilst retaining statutorily defined exception criteria, incorporates numerous amendments which would allow copyright exceptions to more adequately address society's educational needs.

In terms of the fair dealing exception for research and private study, the Government proposes altering the scope of copyright law 'to allow copying of all types of copyright works for non-commercial research purposes and private study',[76] alongside introducing 'an exception to allow various educational establishments to offer access to all types of copyright works on the premises by electronic means at dedicated terminals for research and private study'.[77] In terms of specific educational exceptions, the Government suggests the introduction of 'a fair dealing exception for non-commercial use of copyright materials in teaching',[78] coupled with expansion of 'the type and extent of copyright works that can be copied by educational establishments'[79] and 'the exceptions to enable distance learners to access educational materials over secure network'.[80] Advantageously, in terms of education, these

[68] ibid 382.
[69] ibid 382.
[70] ibid 382.
[71] Brian Fitzgerald, 'Underlying Rationales of Fair Use: Simplifying the Copyright Act' (1998) 2 S Cross U L Rev 153.
[72] Burrell (n 7) 376.
[73] ibid 385.
[74] HM Government, Intellectual Property Office, 'Modernising Copyright: A modern, robust and flexible framework' (Government response to consultation on copyright exceptions and clarifying copyright law, 20 December 2012) <http://www.ipo.gov.uk/response-2011-copyright-final.pdf> accessed 5 January 2013.
[75] Consultation on Copyright (n 14).
[76] Modernising Copyright, Response Statement (n 74) 16.
[77] ibid 16.
[78] ibid 16.
[79] Ibid 16.
[80] Ibid 16.

changes are anticipated to be more 'meaningful to future technologies, not just today's or yesterday's',[81] whilst avoiding the problems of an extensive US approach.

One other option, worthy of note, is implementation of a hybrid fair use and fair dealing model, such as that used in Singapore.[82] Described as 'cherry picking',[83] the difficulty is that it involves balancing the two discussed approaches and, once developed, such a balance may quickly become inadequate. It may also attract some of the concerns associated with the US approach, such as incompatibility with international treaty obligations.

Conclusively, British exceptions to infringement in copyright law have been shown to inadequately address the educational needs of society when compared with the US' more accommodating 'fair use' approach. Contrary to the given proposition, there is a strong need for reform. However, the US' approach has certain characteristics which render it inappropriate for Britain to adopt. The need for reform may, therefore, be better satisfied by implementation of the Government's recent proposals which, for the time being, tackle to a large extent the main inadequacy in terms of society's educational needs – technological backwardness.

[81] ibid 15.
[82] Copyright Act (Chapter 63) Revised Edition 1988, s35-37.
[83] Giuseppina D'Agostino, 'Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use' (2008) 53 McGill L J 309, 359.

INCOMPLETELY CONSTITUTED GIFTS: A HISTORICAL ASSESSMENT OF CASE LAW

OLIVER SMITH[*]

This paper constitutes a thorough examination of case law in the area of incompletely constituted gifts; from Milroy v Lord to recent cases including Zeital v Kaye and Curtis v Pulbrook. This evaluative assessment explains the different approaches the courts have taken to perfecting imperfect gifts and traces the timeline of case law from its original orthodox position to the current liberal stance. These concepts are then critically assessed to identify the most effective method of assessing such gifts, whilst continually recognising the underlying principles of equity, including the importance of upholding the intention of the donor.

To create a valid trust, it is a requirement that the trust property be completely constituted. This requires the vesting of the trust property in the trustees for the benefit of the beneficiaries. This paper will examine the progression of the case law from strict *Milroy v Lord*[1] orthodoxy, which served to frustrate, rather than effect a donor's clear and continuing intention, to *Pennington v Waine*[2] which introduced unconscionability as the sole criterion for handling a gift imperfect in law, effective in equity and therefore completely constituted. It will be argued that *Re Rose*[3] provided much welcomed relief to *Milroy* and, whilst *Choithram (T) International SA v Pagarani*[4] should be commended for looking to substance and not form, *Pennington* has extended this equitable concept too far. Case law post *Pennington* will also be examined. There will remain, throughout the paper, a clear focus on policy reasoning as we move from case to case.

It is 1862; Turner LJ has declared for an effective and binding settlement, 'the settlor must have done everything which, according to the nature of the property… in the settlement, was necessary to be done… to transfer the property'.[5] This begins our exploration into policy considerations with *Milroy*. *Milroy* represents a narrow interpretation of the law on constitution of trusts and is based upon the maxims that equity will not assist a volunteer nor perfect an imperfect gift; the latter maxim a subset of the former. *Milroy* undoubtedly provides certainty in this area of equity through its strict approach, which is of course essential for determining important questions of tax liability. The case can also be applauded for its encouragement of proper administration through compliance with all requisite formalities. However, in

[*] Oliver Smith, Newcastle University, LLB (Hons) Law.
[1] (1862) 4 De GF & J 264.
[2] [2002] 1 WLR 2075.
[3] [1952] Ch 499.
[4] [2001] 1 WLR 1.
[5] *Milroy v Lord* (1862) 4 De GF & J 264 [274-275] (Turner LJ).

frustrating the settlor's clear and obvious intention, *Milroy* contravenes the overarching equitable principles of fairness, justice and conscience. Indeed, Garton notes in *Milroy* that the Court of Appeal actually regretted the conclusion at which they felt compelled to arrive.[6] It is a worrying situation to learn that judges supposedly feel 'compelled' to fall in line with certain equitable maxims, when those very maxims in the individual circumstances, do not provide for a truly equitable result.

Re Rose therefore should be welcomed. It diluted strict *Milroy* orthodoxy, effectively modifying the maxim that equity will not assist a volunteer if a donor has done everything necessary in their power to transfer title. In *Re Rose*, equity was seeking to enable fairness between the parties; Evershed MR made it clear that it would be inequitable for Mr Rose to 'deny the proposition that he… transferred the shares to his wife' and reverse his promise.[7] However, *Re Rose* has promoted much criticism among academics. Todd suggests, contrary to Evershed MR's reasoning, that Mr Rose had not actually done everything in his power to effect the share transfer because the company's directors possessed a power to refuse to register the name of the transferee, which they could have exercised.[8] Whilst the directors did indeed possess a power to refuse to register the name of the transferees, a flaw with Todd's critique is illuminated through Luxton's support for the *Re Rose* decision. A donor in the position of Mr Rose could be forced to wait, potentially indefinitely, for an event outside of his control, registration in this instance, before the transfer would be completed, and the gift perfected.[9] Expanding upon Luxton, *Re Rose* could therefore be viewed as supporting a wider policy agenda of preventing and discouraging unreasonable delay in situations which require exercise of discretion by a third party. Notwithstanding differing viewpoints over the rule in *Re Rose*, it has been widely viewed as an eminently sensible decision in the context of tax liability.[10]

Milroy and *Re Rose* leave us at a situation where equity will assist a volunteer if the donor has done everything in their power to transfer title and, in doing so, effect rather than frustrate the clear and continuing intention of the donor. We now examine the Privy Council decision of *Choithram*. In *Choithram*, Lord Browne Wilkinson provided that, although equity will not aid a volunteer, it would not strive officiously to defeat a gift. *Choithram* promoted flexibility and nodded gently towards the concept of unconscionability. 'I give to the foundation' made no reference to trusts yet were interpreted by the court to mean 'I give to the trustees of the foundation trust deed to be held by them on the trusts of the foundation trust deed'. The court should be praised for departing from strict legal formalism as doing so is reflective of a fundamental principle of equity; discretion. Garton, however, criticises *Choithram* by arguing that it disregards certainty of intention; a necessary formality to create a valid

[6] Jonathon Garton, 'The Role of the Trust Mechanism in the Rule in Re Rose' (2003) Conv. 364, 366.
[7] *Re Rose* [1952] Ch 499 [507] (Evershed MR).
[8] G Todd, *Cases and Materials on Equity and Trusts* (3rd edn, Blackstone Press 2000) 69.
[9] Peter Luxton, 'In Search of Perfection: The Re Rose Rule Rationale' (2012) 76(1) Conv PL 70, 73.
[10] J Martin, *Hanbury and Martin: Modern Equity* (19th edn, Sweet and Maxwell 2012) 131.

trust. He suggests only upon a liberal interpretation of the English language can one leap from a declaration intending to transfer title to the trustees to a declaration intending that henceforth title will be held by the settlor as trustee.[11] Conversely, equity's very purpose may be seen to criticise Garton, in that to reach a fair outcome there must be liberal and flexible interpretation of the words used. It is for this reason that the Privy Council should be applauded. They gave effect to the clear intention of Mr Pagarani, the donor, instead of frustrating it for want of formalities and, in doing so, epitomised the maxim that equity looks to substance and not form.[12] Moreover, to let Mr Pagarani resile from his gift would have been unconscionable and contrary to equitable principles.

It is now 2002 and we have moved to *Pennington* and will examine Arden LJ's utilisation of the concept of unconscionability. In *Pennington*, the Court of Appeal ruled there did not need to be delivery of a share transfer form to the donee in order to effect the transfer and completely constitute the gift. Arden LJ reasoned that, as there was an undisputed intention that Ada intended to make a gift to Harold and, Harold was informed of it, a stage was reached when it would have been unconscionable for Ada to recall her gift. Her Ladyship has been widely criticised and it has been argued thus far in this paper that equity should look to substance and not form and judge upon the overarching equitable principles of justice, fairness and conscience. It is submitted, however, that *Pennington* has simply extended these concepts too far as there still remains a need for some level of certainty.

Arden LJ's approach promotes a great degree of uncertainty in the law. Providing no real definition of when something will be unconscionable but merely submitting that it 'must depend on the court's evaluation of all relevant considerations' undeniably creates unpredictability. The court's evaluation of unconscionability could arbitrarily differ on a case by case basis due to individual judges' widely differing interpretations of this broad concept. This is at the centre of Haliwell's criticism of Arden LJ's reasoning; 'it represents the situation of a court according itself unfettered discretion'.[13] Perhaps we should look to the law of contract to address this problem. To enable judges to make a better informed decision on whether an exemption clause is reasonable, schedule 2 Unfair Contract Terms Act 1977 lists general factors to consider, such as whether there was inequality of bargaining power or whether the customer received an inducement to contract.[14] If Parliament were to legislate in a similar vein concerning unconscionability, factors which must be considered before determining whether unconscionability is invoked would, whilst still allowing for a degree of discretion on part of the judges, serve to restrict this unfettered discretion which courts could potentially accord themselves. This reform would encourage

[11] Garton (n 6) 372.
[12] *Parkin v Thorold* (1852) 16 Beav 59.
[13] M. Haliwell, 'Perfecting Imperfect Gifts and Trusts: Have We Reached the End of the Chancellor's Foot?' [2003] 67 Conv 192, 197.
[14] Tham, 'Careless Share Giving' (2006) 70 Con PL 411.

certainty and consistency in the law and perhaps make it easier for individuals to administer their trust affairs accordingly, so as to avoid court action. Indeed, from a practitioner's perspective, Morris argues *Pennington* has made it 'much more difficult to know where you, and your client, stand'.[15]

Pennington is irreconcilable with *Choithram*; a decision with which her Ladyship wrongly analogised and which formed the basis of her judgment. Doggett notes, 'the unconscionability discussed in that case resulted from a duty that the donor had because he… had… been construed… a trustee'. Contrastingly, 'in *Pennington* unconscionability is being used to justify imposition of trusteeship'.[16] For her Ladyship to have drawn an analogy between the cases is incorrect; she extended the jurisdiction of unconscionability beyond its former boundaries in a manner unwarranted by *Choithram*. Delany and Ryan go further, arguing unconscionability was utilised by her Ladyship 'as a vehicle' to arrive at and explain 'a desired result'.[17] Although it must be submitted this 'vehicle' has the capability to temper strict legal formalities, even Garton, who is in defence of *Pennington's* unconscionability principle, has had to concede that it places a heavy burden upon the courts shoulders 'to ensure [unconscionability] is not used… in an arbitrary and unpredictable fashion'.[18] This is *Pennington*'s very problem. The court went too far in attempting to completely constitute the gift of shares. Unconscionability is difficult to justify on the policy ground of fairness as it is outweighed by the uncertainty, unpredictability and arbitrariness encouraged through its operation. Indeed, Haliwell refers to unconscionability as 'a very unruly beast'.[19]

The law post-*Pennington* is in a degree of confusion. In *Zeital v Kaye,*[20] the Court of Appeal returned to an approach consistent with *Milroy* in refusing to validate a transfer of shares and in turn, completely constitute a gift, when all necessary formalities were not fulfilled. *Re Rose* did not apply as he had not done everything required. Rimer LJ disapplied *Pennington* as it 'concerned… whether the legal owner… made a valid gift'; here, Mr Zeital held nothing more than an equitable interest. So as *Zeital* brings us to 2010, ironically, we appear to have reversed 148 years of doctrinal development and arrive, again, at *Milroy*. Advocates of certainty would welcome Rimer LJ's judgment, a true return to orthodoxy. This paper, however, remains hesitant. Of course, as explained with regards to the dissatisfaction of *Pennington,* a certain degree of certainty is healthy. However, too much rigidity risks circumventing equity's overarching goals of justice, conscience and fairness.

---

[15] J Morris, 'Questions: When is an Invalid Gift a Valid Gift? When is an Incompletely Constituted Trust a Completely Constituted Trust? Answer: After the Decisions in Choithram and Pennington' (2003) 6 PCB 393.
[16] Abigail Doggett, 'Explaining Re Rose: The Search Goes on?' (2003) 62 (2) CLJUK 266.
[17] H Delany and D Ryan, 'Unconscionability: A Unifying Theme in Equity' (2008) 72 (5) Conv 430.
[18] Garton (n 6) 379.
[19] Haliwell (n 13) 202.
[20] [2010] EWCA Civ 159.

Our journey through the case law concludes with *Curtis v Pulbrook*.[21] His Lordship dealt with the court's unsatisfactory reasoning in *Pennington* through invoking the concept of detrimental reliance as Harold had agreed to become Director of a company on the assumption that he had received shares in it. Luxton praises his Lordship for rationalising the decision upon such a ground as it aligns itself with proprietary estoppel.[22] However, on a practical level, its utility is very limited as surely it could only operate in situations where facts are akin with those in *Pennington*. Therefore, as it stands, utilising unconscionability in determining a gift completely constituted will likely remain a policy consideration fraught with criticism.

In effectuating rather than frustrating, the donor's clear and continuing intention equity should be praised. *Re Rose* mitigated the harshness of *Milroy* and the outcome achieved was fair. Likewise, *Choithram* should be commended as a decision which promotes equity's overarching principles of justice, fairness and conscience. However, the decision in *Pennington* to invoke unconscionability as the sole policy consideration to complete a gift is worrying; certainty was eradicated and wide far-reaching discretion was fostered. It has rightly been criticised.

Equity therefore remains in a state of doubt and much needed reform. Indeed, in *Curtis* Briggs J questioned whether the current rules governing when equity will perfect an imperfect gift serve any rational policy objective. One should commend and, perhaps follow, the Scottish Law Commission for their eagerness to examine this area of the law. They have published a discussion paper to specifically review, amongst other areas, the constitution of the trust and aim to publish its findings by early 2013.[23]

[21] [2011] EWHC 167 (Ch).
[22] Luxton (n 9) 71-72.
[23] Scottish Law Commission, *Discussion Paper on the Nature and Constitution of Trusts* (Scot Law Com No 133, 2006).

A REVIEW OF THE DRAFT ASSISTED DYING BILL

PAUL WHITE[*]

This paper argues that the draft Assisted Dying Bill would ameliorate problems inherent in this area of law, but would not alleviate them. It is submitted that voluntary euthanasia and assisted suicide ought to be legalised. It is suggested that delays in administration should be avoided, as delays in the form of cooling-off periods undermine patient autonomy. It is argued that legalisation would provide clarity, legal certainty, alleviate discrimination against the disabled, and diminish current inconsistencies. Legalisation for assisted suicide would respect the patient's personal autonomy and would shift towards a more patient-centric NHS.

Assisted dying is a polemical topic, which elicits passionate arguments on both sides of the debate. It is therefore unsurprising that the law exhibits little in the way of a clear doctrinal approach to death. The draft Assisted Dying Bill[1] (hereafter the draft Bill) will be evaluated in the context of the law's frailties, which it is contended are: a lack of clarity, severe incongruence, and a disregard for personal autonomy. It is submitted that the draft Bill would ameliorate these problems, but would not alleviate them. It is therefore argued that it ought to go further and legalise voluntary euthanasia.

The prohibition of assisted suicide suffers from a severe lack of clarity. Assisted suicide is illegal.[2] However, the Director of Public Prosecutions must consent to prosecution,[3] with reference to the Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide.[4] Unfortunately the policy merely contains relevant considerations and consent is rarely granted. This engenders uncertainty and ambiguity, the corollary of which is a lack of prospectivity. There is no useful purpose to a law which 'criminalizes [sic] behaviour which it then effectively ignores and forgives'.[5] Rather, it fosters confusion and frustration which is felt most acutely by those whom it is designed to protect, the terminally ill.

---

[*] Paul White, Newcastle University, LLB (Hons) Law.

[1] Choice at the End of Life All Parliamentary Group, 'A Safeguarding Choice: A Draft Assisted Dying Bill for Consultation' < http://www.appg-endoflifechoice.org.uk/pdf/appg-safeguarding-choice.pdf> accessed 10 November 2012 (Draft Assisted Dying Bill).

[2] Suicide Act 1961, s 2(1).

[3] Suicide Act 1961, s 2(4).

[4] The Director of Public Prosecutions, 'Policy for Prosecutions in Respect of Cases of Encouraging or Assisting Suicide' (*CPS*, February 2010) <http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html> accessed 10 November 2012.

[5] Sheila McClean, *Assisted Dying: Reflections on the Need for Law Reform* (Routledge-Cavendish 2007) 84.

The draft Bill, by legalising physician assisted suicide,[6] would elucidate the law. Assisted suicide would be lawful in strictly prescribed circumstances; assisted suicides falling outside these would be criminal. This would make a confused offence more perspicuous, achieving the aim of creating a law which is 'upfront and transparent'.[7]

However, it must be noted that the definition of 'terminal illness' which includes a prognosis that death will occur within twelve months from the date of diagnosis,[8] will obfuscate matters unnecessarily. This is an example of needless and arbitrary line drawing, which creates uncertainty. Life expectancy is notoriously inaccurate and difficult to predict. Whether an individual would fall within the ambit of the draft Bill would be premised on the subjective guesswork of a doctor, which would be likely to vary depending on the clinician. If clause 2(1)(a) were sufficient to classify an illness as terminal, the draft Bill would be clearer and would not contribute to further legal uncertainty.

The prohibition of assisted suicide and euthanasia shows a lack of respect for autonomy and imposes matters of personal morality on society. Law argues that, '[t]he right to choice is valuable, however that choice is exercised'.[9] This is undoubtedly correct as reasonable views may be held on both sides of the argument, especially in relation to contentious topics such as assisted suicide and euthanasia. It is important that the law respects this divergence of opinion. There cannot be a 'common morality'[10] in a pluralistic and diverse culture. Keown argues autonomy must be exercised within a 'moral framework'.[11] However, this assertion would inevitably fetter individual autonomy by imposing a 'moral framework', to which many would not adhere.

Greasley argues that the value of autonomy is not compatible with a choice to die as, 'death spells the end of all good options, because it spells the end of options'.[12] However, this does not take into account the freedom from bad options, which will often plight the lives of the terminally ill. Nothingness might reasonably be thought better than an afflicted existence. It must be for the individual to decide.

The draft Bill, by legalising physician assisted suicide, would ameliorate the exercise of individual autonomy, and concomitantly reduce the imposition of the views of opponents to assisted suicide upon those who wish to avail of it. However, it must be

[6] Draft Assisted Dying Bill (n 1) cl 1(1).
[7] Draft Assisted Dying Bill (n 1).
[8] Draft Assisted Dying Bill (n 1) cl 2(1)(b).
[9] Syvia A Law, 'Physician-Assisted Death: An Essay on Constitutional Rights and Remedies' (1996) 55 Md L Rev 292, 298.
[10] Patrick Devlin, *The Enforcement of Morals*, (OUP 1965) 10.
[11] John Keown, *Euthanasia, Ethics and Public Policy: An Argument against Legalisation* (Cambridge University Press 2002) 54.
[12] Kate Greasley, 'R (Purdy) v DPP and the case for wilful blindness' (2010) 30(2) OJLS 301, 316.

considered a qualified success. Individuals who cannot take the final act themselves would not fall within the ambit of the draft Bill.[13] Discrimination against the disabled was found to be justified as pursuing the legitimate aim of protecting the vulnerable, in respect of the prohibition of assisted suicide.[14] The draft Bill substitutes this discrimination, albeit justified in the opinion of the court, for another. It would discriminate between those who can and cannot take the final act. This is irrational and arbitrary discrimination, which is capable causing further suffering to the severely disabled. There is; logically, 'no justification for drawing a line at this point'.[15] This discrimination would be alleviated if the draft Bill were to legalise voluntary euthanasia.

Furthermore, the 14 day cooling off period[16] contradicts the move towards greater patient autonomy. The draft Bill seeks to respect the decision of those who wish to die, whilst also attempting to uphold the conflicting concern of delaying the assisted suicide in case there is a change of mind. The rationale is that the delay serves as a protection. However, this is superfluous. Protection is inherent in the requirement for 'a clear and settled intention'[17] which has regard to coercion[18] and whether the patient has capacity[19] to make an informed decision.[20] These safeguards must be verified by two independent doctors.[21] The delay is an example of benevolent paternalism and undermines the draft Bill's commitment to increasing the autonomy of the terminally ill. Furthermore, and perhaps more importantly, the decision to die will often be made because life is no longer tolerable. The 14 day delay will only serve to heighten the suffering of those who may be in agonising pain. It is therefore suggested that the draft Bill ought to allow assisted suicide at any time, after the individual has been successfully assessed by two independent doctors.

The law on assisted suicide presents a 'conundrum'[22] when it is viewed with the legality of the doctrine of double effect. A doctor may 'lawfully administer painkilling drugs despite the fact that... an incidental effect of that application will be to abbreviate the patient's life'.[23] In addition the distinction between an act and an omission in relation to the withdrawal of life-sustaining treatment highlights severe inconsistencies with the rationale for a blanket criminalisation of assisted suicide. A competent patient may refuse treatment, even where this will inevitably lead to

[13] Draft Assisted Dying Bill (n 1) cl 4(4).
[14] *Pretty v UK* (2002) 35 EHRR 1.
[15] *R(Pretty) v DPP* [2001] UKHL 61, [2002] 1 AC 800 [811] (Lord Bingham).
[16] Draft Assisted Dying Bill (n 1) cl 4(2)(c).
[17] Draft Assisted Dying Bill (n 1) cl 1(2)(a).
[18] Draft Assisted Dying Bill (n 1) cl 3(3)(c)(ii).
[19] Draft Assisted Dying Bill (n 1) cl 3(3)(b).
[20] Draft Assisted Dying Bill (n 1) cl 3(3)(c)(i).
[21] Draft Assisted Dying Bill (n 1) cl 3(1)(b).
[22] Greasley (n 12) 313.
[23] *Airedale NHS Trust v Bland* [1993] 2 AC 789 [867] (Lord Goff).

death.[24] The decision in *Bland*[25] goes further as the omission of life sustaining treatment was not at the behest of the patient and was therefore non-voluntary.

It is submitted that by legalising physician assisted suicide the draft Bill would diminish the inconsistency between a competent patient's refusal of life sustaining treatment and the current proscription of assisted suicide. It allows those who so wish, to end their suffering caused by a terminal illness. This would no longer be predicated on the reliance on medical treatment.

However, it does not go far enough. It does not address the incongruence with the doctrine of double effect nor with decisions like *Bland*. Double effect is quite simply a covert method of 'smuggling in euthanasia by the back door'.[26] A large overdose of diamorphine is essentially a lethal injection, with the addition of analgesic properties. The draft Bill emphasises that the final act must be taken by the patient[27] and it shows a strong commitment against legalising voluntary euthanasia.[28] However, this would perpetuate a double standard. Doctors who 'know full well what they are doing'[29] would be permitted to administer large overdoses of diamorphine, inevitably leading to death, but would be forbidden from performing voluntary euthanasia.

In *Bland* the removal of treatment was classified as an omission. *Bland* was 'not about euthanasia'[30] indeed McGhee has argued that, 'euthanasia interferes with nature's dominion, whereas withdrawal of treatment restores nature to her dominion'.[31]This is conceptually attractive. However, in practice the omission ineluctably led to Bland's death. He may have lived for years longer if it had been sustained.[32] It was irrelevant to Bland whether treatment was withdrawn or he was administered a lethal injection. Both would hasten his death. It is therefore unwise to place such emphasis on the distinction between act and omission in this case. It is submitted that *Bland* ought to be viewed as non-voluntary euthanasia, albeit passive; if the court's reasoning is followed. In view of this the law is indeed, 'morally and intellectually misshapen'[33] in upholding a ban on assisted suicide and euthanasia. The draft Bill would not address this incongruence. The law would permit non-voluntary euthanasia in cases analogous to *Bland*, yet voluntary euthanasia would remain murder.

---

[24] *Re B (Adult: Refusal of Treatment)* [2002] EWHC 429 (Fam).
[25] *Airedale NHS Trust v Bland* (n 23).
[26] Stephen Wilkinson, 'Palliative Care and the Doctrine of Double Effect', in Donna Dickenson, Malcolm Johnson, and Jeanne Samson Katz (eds), *Death, Dying and Bereavement* (2nd edn, Sage 2000) 299.
[27] Draft Assisted Dying Bill (n 1) cl 4(4).
[28] Draft Assisted Dying Bill (n 1) cl 4(5).
[29] Alexander McCall Smith, 'The Strengths of the Middle Ground' (1999) 7 Med L Rev 194, 199.
[30] *Airedale NHS Trust v Bland* (n 23) [808] (Sir Thomas Bingham MR).
[31] Andrew McGhee, 'Finding a way through the ethical and legal maze: withdrawal of medical treatment and euthanasia' (2005) 13 Med L Rev 357, 383.
[32] *Airedale NHS Trust v Bland* (n 23) [807] (Sir Thomas Bingham MR).
[33] *Airedale NHS Trust v Bland* (n 23) [887] (Lord Mustill).

It is submitted that the current law's problems would be better remedied if the draft Bill were to legalise voluntary euthanasia. This would better address the inconsistencies with *Bland* and the doctrine of double effect. Moreover, it would allow those who are unable to take the final act to exercise an autonomous choice. There would not be discrimination between varying degrees of disability. Furthermore, it would allow greater transparency, with regulation ensuring abuses were less easily concealed.

Opponents of euthanasia often advance the principle that all human life is equally and intrinsically valuable. This may be based on a religious or secular belief. The latter is rooted in disapproval of 'the denial of the ongoing worth of the lives of those reckoned to be candidates for euthanasia'.[34] Keown argues that a qualitative assessment of life equally applies to those who would be considered eligible for euthanasia, but have not expressed a wish to be euthanized, and would therefore lead to non-voluntary euthanasia.[35]

These arguments cannot justify proscription of voluntary euthanasia. In a pluralistic and secular society religious ideology, 'cannot be the foundation of public policy'.[36] Religion is a matter of private faith which must not, 'impinge on the freedoms of others'.[37] Those who have a religious objection need not engage in euthanasia, it would not be forced on those to whom it is anathema. This is in sharp contrast to palliative care, which is currently the only option for those with a terminal illness. If the draft Bill legalised voluntary euthanasia it would place a greater emphasis on personal autonomy and reflect the shift to a more patient centric NHS.

It is conceded that legalisation would involve a value of life judgment. However, Keown's assertion that it would lead to a higher level of non-voluntary euthanasia is empirically unfounded. Both Belgium and Australia, where voluntary euthanasia is illegal, have higher incidences of non-voluntary euthanasia than the Netherlands, where it is lawful.[38]

Moreover, the autonomous request of the patient and the doctor's qualitative judgment are both, 'individually necessary, and jointly sufficient, conditions for permissible voluntary euthanasia'.[39] Keown fails to take adequate account of the

[34] Luke Gormally, 'Euthanasia and Assisted Suicide: 7 Reasons why they should not be legalised' in Donna Dickenson, Malcolm Johnson, and Jeanne Samson Katz (eds), *Death, Dying and Bereavement* (2nd edn, Sage 2000) 286.
[35] John Keown, *Euthanasia, Ethics and Public Policy: An Argument Against Legalisation* (Cambridge University Press 2002) 77.
[36] Emily Jackson, 'Whose death is it anyway? Euthanasia and the Medical Profession' (2004) 57 CLP 415, 419.
[37] Margaret Otlowski, *Voluntary Euthanasia and the Common Law* (OUP 1997) 216.
[38] Stephen Smith, 'Evidence for the Practical Slippery Slope in the Debate on Physician Assisted Suicide and Euthanasia' (2005) 13 Med L Rev 17, 44.
[39] Hallvard Lillehammer, 'Voluntary Euthanasia and the logical slippery slope' (2002) 61 CLJ 545, 548.

individual's perspective. The law must be focused on the individual. It is irrelevant that those who do not wish to be euthanized would be considered a candidate for it. Fulfilment of the objective criteria only makes euthanasia an option. It must be for the patient to decide whether that is the correct option. It is not for the doctor, upon deciding euthanasia is appropriate, to force that option upon any patient.

Furthermore, it is not a sustainable argument against legalisation that human frailties may sometimes lead to these ideals not being upheld in practice. It ought to be viewed from the perspective that these inherent human failings will no longer be cloaked by the doctrine of double effect or the withdrawal of treatment, but rather subject to transparent regulation. The safeguards in the draft Bill[40] would be equally applicable to euthanasia. They would provide a robust method of ensuring that individual autonomy was truly exercised.

The draft Bill would clarify the law of assisted suicide, increase respect for individual autonomy and remedy inconsistencies with a competent refusal of life sustaining treatment. However, it cannot be regarded as a panacea. It would foster unnecessary uncertainty in the definition of terminal illness, and would not respect the autonomy of those who cannot take the final act. Moreover, the law would remain incongruous with *Bland* and the doctrine of double effect. This highlights the need for the draft Bill to extend to voluntary euthanasia, without a life expectancy criterion or a cooling off period. This would ensure that the autonomy of each individual is respected equally and go further towards remedying the law's unprincipled approach to death.

[40] Draft Assisted Dying Bill (n 1) cl 3(3).

SHOULD ARBITRATOR IMMUNITY BE PRESERVED UNDER ENGLISH LAW?

HAZEM HEBAISHI[*]

A discussion will be offered concerning the immunity offered to arbitrators under English Law. This will be examined in light of judicial immunity, drawing comparisons between the role of arbitrators and other professionals acting in a judicial or quasi-judicial capacity. Although such immunity dates back to the Seventeenth Century, its development can be seen within the more recent Arbitration Act 1996. This paper will analyse the (partial) preservation of judicial immunity within arbitration proceedings under English Law. Comparative commentary will be offered on the impact this immunity has on arbitration, within the context of professional services, in England as well as other jurisdictions. The concept of 'bad faith', qualifying the immunity provided under the current Arbitration Act will be discussed in terms of its sustainability within arbitration. This paper will also set out the potential liability in tort law, which arbitrators could still face. A conclusion will ultimately be drawn, determining whether the immunity currently in place should be preserved or abolished.

1 INTRODUCTION

Judicial Immunity from liability is a historic concept that originated from English common law. Over the years, it found its way to most common law countries, including the United States.[1] This doctrine entails that any person acting within a judicial capacity, if acting within his jurisdiction, shall enjoy immunity from any liability that may result from him discharging his duties.[2] Block states that the first case that laid down the 'policy justifications' for such immunity in England dates back to 1607.[3] These policy justifications have indirectly extended this immunity to other members of the legal profession including arbitrators, when performing quasi-judicial acts.[4] The main piece of legislation in England that governs Arbitration is the Arbitration Act 1996 (hereinafter referred to as the 'Act'), contains a provision for immunity, for all acts or omissions of arbitrators, but qualifies it with instances where the arbitrator has acted in 'bad faith'.[5] This is the only provision dealing with arbitrator immunity in English law and there is no statutory definition of 'bad faith'.

[*]Hazem Hebaishi, Newcastle University, LLM International Business Law.

[1] Timothy M Stengel, 'Absolute Judicial Immunity Makes Absolutely No Sense: An Argument For An Exception To Judicial Immunity' (2012) 84 Temp L Rev 1075-1076.

[2] J Randolph Block, 'Stump v. Sparkman and the History of Judicial Immunity' (1980) 5 Duke LJ 880.

[3] *Floyd v Barker* [1607] 77 English Reports 1305.

[4] Alan E Seneczko, 'Arbitration - Arbitrator Potentially Liable for Failure to Render a Decision' (1984) 67 Marq L Rev 150.

[5] Arbitration Act 1996, Section 29.

This, as will be examined further below, is the key issue that this paper considers: preserving such immunity under the current English Arbitration Act. It will analyse the classification of arbitrators in English Law, their functions, duties and obligations and whether or not they could be classified as 'quasi-judicial officers' for the purposes of immunity, drawing analogies with barristers. It will also examine the concept of 'bad faith', which qualifies the immunity under Section 29 of the Act, and comment on its suitability when applied in the context of arbitrators. The following section will look at arbitration from a professional service perspective, comment on the structure of the current Act and include comparative elements, to gather perspective on how other countries classify arbitrators. The following section will look in depth at the current public policy justifications put forward for preserving the immunity, determine whether or not they are still relevant, drawing further analogies with barristers. The final section will look at the current professional negligence tests, and determine whether or not they would provide sufficient protection to arbitrators in terms of liability. A conclusion will then be drawn as to whether immunity in English Law should be preserved or not.

2 LEGAL STATUS OF ARBITRATORS

The current position of arbitrators in England is complicated in terms of their classification. Domke carried out a comparative survey and found that in most common law countries including England and the United States, arbitrators are considered as *quasi-judicial officers*, performing functions akin to those performed by judges.[6] Olowofoyeku considers the true meaning of the terms *quasi-judicial* and what makes arbitrators different from ordinary members of the judiciary, stating that the term *quasi* reflects the fact that the acts performed by arbitrators are performed 'by one not a judge', or as an act or proceeding of or before an administrative tribunal… not within the judicial power defined under the constitution.[7] He further explains that the term *judicial* was indispensable when classifying arbitrators, mainly because arbitrators exercise functions of a judicial nature, namely the exercise of independent judgment and discretion in arriving at a decision upon consideration of facts and/or law.[8] Banakas argues that in one of the key English cases,[9] the issue of arbitral immunity was considered, and two of the Lordships decided that whether or not it was applicable was dependent on whether or not the arbitrator exercised a truly judicial function, but reserved their judgment on the true meaning of 'judicial acts' in the context of arbitrators.[10]

---

[6] Martin Domke, 'The Arbitrator's Immunity From Liability: A Comparative Survey' (1971) 3 University of Toledo Law Review 99.
[7] Abimbola A Olowofoyeku, 'Immunity of Quasi-Judicial Officers' (1990) March Journal of Professional Negligence 2.
[8] ibid 3.
[9] *Arenson v Casson Beckman Rutley & Co.* [1977] A.C. 405.
[10] E K Banakas, 'The Immunity of Arbitrators From Negligence' (1976) 35(1) CLJ 43.

The first case considering the requirements for judicial immunity is over four hundred years old.[11] It stated: Firstly that immunity will not attach to a judge if he were acting within his legislative, administrative or personal capacity and Secondly, that a judge will not be immune if he exercises his powers in clear absence of jurisdiction.[12] Mattera further states that in England and the United States, following this case, a string of cases in the 1970s[13] considered precisely the scope of judicial immunity, granting it only in the narrowest of circumstances and that courts still use the same criteria to determine whether or not a judge will be liable.[14] Courts continue to apply these two fundamental elements, and to better understand the qualified immunity of arbitrators, it is necessary to consider functions of the arbitrator within the arbitral process, and the different theories formulated on the nature of arbitration.

Onyema cites Professor Julian Lew, who stated that the identification of the 'legal nature' of arbitration holds the key to legal and non-legal yardsticks available to arbitrators.[15] This is certainly true, as the legal status of arbitrators can be classified under three main theories: a) contractual, b) sovereign and c) hybrid.[16] Lew, Loukas and Kroll state that no single theory has received universal support in actual commercial practice and countries take different stances on the matter.[17] According to Arvind, the contractual theory postulates that arbitration is creature of contract, the result of a voluntary arrangement by the parties to have their dispute resolved by an impartial adjudicator, with the terms of the contract grounded in parties' consent,[18] essentially treating the process of arbitration as a contractual service, where parties pay the arbitrators in exchange for an eventual award.[19]

On the other hand, the sovereign theory (*lex facit arbitrium*) postulates that both the arbitrator's powers, and the award rendered, are governed by the laws of the jurisdiction,[20] placing all aspects of the arbitral process ultimately in the control of the State (*lex arbitri*).[21] On the premise that the sovereign governs the entire process of arbitration, the status and appointment of arbitrators, are issues governed by the laws

[11] *The case of The Marshalsea* [1613] 77 English Reports 1027.
[12] Richard J Mattera, 'Has the Expansion of Arbitral Immunity Reached Its Limits After United States v. City of Hayward?' (1997) 12(3) Ohio State Journal of Dispute Resolution 781.
[13] *Stump v Sparkman* 55 Led 2d 331 (US Sup Ct 1978); *Sirros v Moore* [1975] 1 Q.B. (C.A.) 118.
[14] Mattera (n 12) 782.
[15] Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge, Oxford 2010) 32.
[16] Julian D M Lew, Loukas A Mistelis & Stefan M Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International, Netherlands 2003) 71.
[17] ibid.
[18] Thiruvallore Thattai Arvind, 'Quid facit arbitrium? The Legal Regulation of International Commercial Arbitration and its impact on the Arbitral process' (DPhil thesis, University of East Anglia 2007).
[19] Emmanuela Truli, 'Liability v. Quasi-Judicial Immunity of the Arbitrator: The Case Against Absolute Arbitral Immunity' (2006) 17 Am Rev Intl Arb 391.
[20] Arvind (n 18).
[21] Onyema (n.15) 33.

of the *situs*.[22] The only recognisable difference between a judge and an arbitrator according to this theory is that the arbitrator derives his authority from legislation of the state and his nomination is a matter for the parties, whereas a judge derives both his authority and nomination directly from the state.[23]

The third theory, which is the *hybrid theory*, supports the *qualified immunity* doctrine in English Law, as seen through section 29 of the Act. Ruttenberg states that this theory considers arbitration as a process containing both jurisdictional as well as contractual elements, with a power conferred on the arbitrator by the agreement of the parties to act as an impartial judge, but his powers to judge are derived from legislation, whereby arbitrators are seen to be acting in a quasi-judicial capacity.[24] This theory finds its place clearly in the English legal system, through a qualification on when an arbitrator could be liable (only if bad faith is proven),[25] unlike other professionals.

2.1 Arbitrators' Functions - Immunity and Liability Issues

Following a consideration of the three theories regarding arbitrator status, one can assume that English Law treats arbitration as involving both contractual and sovereign elements. Arbitrators, by nature of their profession almost always enter into a contractual arrangement with the parties to the dispute, to eventually render an award. Cremades states that in the case of *Sutcliffe v Thackrah.*[26] Lord Scarman stated that the nature of duties of arbitrators entitles them to the exact same level of protection as judges, but he argues that this is not what the current position is in practice.[27] He states that this is attributed almost mainly to the fact that the actual duties of arbitrators within the arbitral process could involve more than just decision-making. Their duties could involve investigations, inspections, providing expert determinations for instance, and that a wrongful act by the arbitrator could under the ordinary principles of professional negligence open him up to liability in tort and contract.[28] This is one of the main elements that distinguishes an arbitrator from a judge: parties settling a dispute in court do not enter into a contractual arrangement with the judge sitting the case, and the judge certainly does not perform acts such as physical investigations, and other tasks which are not inherently part of the judicial process.

Guzman states that the arbitrator's contract usually contains terms, explicit and implicit, relating to the procedure to be followed in arbitral proceedings, which could include implied obligations such as performing duties in good faith for instance (in

[22] Onyema (n 15) 33.
[23] Lew, Mistelis & Kroll (n 16) 75.
[24] Malik V Ruttenberg, 'The Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion? (2009) J Disp Resol 229-230.
[25] Arbitration Act 1996, s 29.
[26] [1974] A.C. 727.
[27] Bernardo M Cremades, 'Should Arbitrators be Immune from Liability?' (1991) 32 IFL Rev 33.
[28] ibid.

the United States), and more importantly respecting mandatory rules.[29] Unlike a judge, a breach of duties by the arbitrator under the contract should (subject to the immunity exception) open an arbitrator up to liability for breach of contract. Franck classifies the duties of arbitrators within the arbitral process as either *adjudicatory* or *administrative*, with the adjudicatory functions involving the decision-making process, permitting the submission of evidence by the parties and offering reasoned arguments, in exchange for a decision that is supported based on the record(s) available, and the adjudicator's independent judgment and analysis, with jurisdiction being granted by parties under contract.[30] Administrative duties on the other hand involve the more technical aspects of the process, including the efficient management of the process and overall administration/oversight.[31] Frank further states that the distinction between arbitrator and judge is seen clearly here, as judges have to follow rigid civil procedure rules, whereas arbitrators' duties of managing the arbitral process and ensuring the fundamentals of due process are being observed are essentially a mixture of both contractual terms and legislative provisions.[32]

It is argued that the qualified immunity concept creates practical problems, for if one were to examine the classification point raised above, an important issue arises, which arguably diminishes the arbitrator's judicial role, and creates confusion in finding liability. Frank argues that the Arbitrator's decision-making and eventual award (adjudicatory elements) could be carved out as a 'judicial acts', (and protected by immunity) with the rest of the management tasks considered 'administrative', and immunity will not protect an arbitrator if he fails to perform administrative duties. Qualified immunity creates the problem however, which is that administrative tasks could be entangled with adjudicatory tasks and sometimes it might be difficult if not impossible to separate them both. As an example, in the US, failure to render an award in a timely manner may render an arbitrator liable under tort and/or contract.[33]

The example of failure to render a timely award is a perfect example of how problematic finding liability could be, as it could involve aspects of both procedural and adjudicatory misconduct (with the arbitrator's judicial role being presumably lost), and the arbitrator could have failed to render an award either because he did not manage the case in an efficient manner or because of the complexity of the case for instance. Franck states that the US courts have developed a test in order to determine whether the failure was a result of administrative irregularities or genuine complexity

[29] Andrew T Guzman, 'Arbitrator Liability: Reconciling Arbitration and Mandatory Rules' (2000) 49 Duke LJ 1316.
[30] Susan D Franck, 'The Role of International Arbitrators' (2006) 12 ILSA Journal of International & Comparative Law 505.
[31] ibid 512.
[32] ibid.
[33] Susan D Franck, 'The Liability Of International Arbitrators: A Comparative Analysis And Proposal For Qualified Immunity' (2000) 20 NY Sch J Int'l & Comp L 5.

of the case, however the lines are and will continue to be blurry[34] and it is argued that this is not a suitable approach. The better view would be to disregard the classification argument (treating arbitrators as quasi-judicial officers), and consider that there is only functional (rather than judicial) comparability between arbitrators and judges, with the process itself being nothing more than a professional contractual arrangement governed by statute, and immunity attaching simply to encourage independent judgment.[35] The functional comparability argument will be looked at further below.

Owing to the nature of arbitration, it would be beneficial to consider the analogy with barristers. In *Arthur J S Hall,*[36] when considering barristers' immunity, Lord Hutton made an important point of relevance in this context, stating that even with barristers, trying to draw a fine line between the part of the work of the barrister that would attract immunity and that which does not would be extremely difficult if not impossible, and that in the context of barristers, even pre-trial work could attract immunity.[37] He alluded to a test developed to determine whether certain acts would attract immunity[38] but stated that this test proved difficult to apply in practice and gave rise to considerable uncertainty.[39] Eventually, Lord Hutton was in favor of fully abolishing the civil immunity enjoyed by barristers, indicating that it would actually be easier to remove the immunity altogether rather than attempt to separate the different acts performed in barrister court proceedings (arguably by qualifying their absolute immunity).

It is argued that the exact position of qualified immunity is unclear and it is suggested that attempting to divide the acts of arbitrators in terms of judicial and administrative to determine their exact classification (as quasi-judicial officers), and determine extent of their liability, would lead to practical problems and is not encouraged.

2.2 Functional Comparability - Impact of the Arbitrator's Acts

Returning to the functional comparability argument. Arbitrators derive their powers from the contract, which incorporates the laws of a specified jurisdiction to govern almost all aspects of the arbitral process, and the arbitrator is not selected by the State to resolve the dispute:[40]

> The arbitrator serves as a private vehicle for the ordering of economic relationships. He is a creature of contract, paid by the parties to perform a

[34] ibid 6.
[35] ibid 11.
[36] *Arthur J S Hall & Co (a firm) v Simons Barratt v Ansell and others (trading as Woolf Seddon (a firm)) Harris v Scholfield Roberts & Hill (a firm) and another* [2000] 3 All E.R. 673.
[37] ibid at 728 per Lord Hutton.
[38] ibid.
[39] Arthur J S Hall (n 36).
[40] Franck (n 30) 508-509.

> duty, and his decision binds the parties because they make a specific, private decision to be bound. His decision is not socially momentous except to those who pay him to decide. The judge, however, is an official governmental instrumentality for resolving societal disputes. The parties submit their disputes to him through the structure of the judicial system, at mostly public expense. His decisions may be glossed with public policy considerations and fraught with the consequences of stare decisis.[41]

This passage supports the argument that courts should dispense with the 'quasi-judicial' classification. It is difficult to perceive an arbitrator as occupying a governmental post, or being any part of government for that matter. His obligations are derived mainly from the contractual arrangement (which is arguably one of the principal advantages of arbitration over litigation: parties have a high degree of discretion to determine the arbitrator's authority) and the rules of law chosen by the parties.[42] breach of which could render him liable. He is not paid by the state, nor empowered by the constitution, and his decisions have low societal impact (no precedent-setting),[43] with the important distinction that the arbitrator serves private interests of the parties rather than the public.[44] Additionally, judges are under the public eye, operating an open judicial process, whereas arbitrators operate in a confidential environment.[45] Critics suggest that the whole point behind the qualified (as opposed to absolute) immunity is to protect the public from misconduct (as arbitration is considered a private justice system for the public),[46] not to provide a shield behind which arbitrators would be immune for any act they commit, and it is for cases where truly judicial functions are being discharged.[47] Once this connecting factor is lost, the entire basis for immunity collapses. The discussion above helps support the idea that the role of arbitrators is more functionally (rather than judicially) comparable with judges, with the elements surrounding their exact position vis-à-vis their relationship to the sovereign being minimal: only governed by statute and contract, just like most professionals.[48]

Following this analysis, it can be concluded that the judicial similarity between arbitrators and judges is quite remote. Arbitrators are not part of the state, serve private interests of the parties and are bound mainly by contractual terms and legislative provisions that could, and technically should open them up to liability. The

---

[41] Maureen A Weston, 'Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration' (2006) 88 Minn L Rev 495.
[42] Franck (n 30) 510.
[43] Horacio A G Naon, 'The Role of International Commercial Arbitration' (1999) 65(4) Arb J 276.
[44] Sara Roitman, 'Beyond Reproach: Has the Doctrine of Arbitral Immunity Been Extended Too Far for Arbitration Sponsoring Firms?' (2010) 51(2) BCL Rev 586.
[45] Weston (n 41) 460.
[46] Roitman (n 44).
[47] Franck (n 33) 12.
[48] Solicitors for instance are regulated by the Solicitors Act 1974 and are bound by contracts.

following section will analyse the 'bad faith' requirement, which qualifies the immunity of arbitrators.

3 CURRENT LAW – 'BAD FAITH' AND SECTION 29 OF THE ACT

The nature of this provision could arguably leave arbitrators open to liability in tort or contract, but the scope unclear, as there is no statutory definition of 'bad faith'.[49] The concept of bad faith appears to be one that has emerged from the English courts of Equity,[50] and applied in the context of abuse of power by public authorities.[51] Lee mentions as examples the cases of *Barlow Clowes*[52] and *Twinsectra v Yardley,*[53] stating that liability for dishonest assistance and the defence of change of position both require a finding of bad faith.[54] The key cases will be discussed to shed some light on where the concept originated from and consider its applicability in arbitration.

3.1 Bad Faith in Public Office - Case Law

According to Wade and Forsyth.[55] the case *Westminster Corp v LNWR*[56] was one of earliest cases considering the concept of bad faith. The case examined the motives of a public body (Sanitary Authority) in the selection of a site for erecting certain structures in public. In the case, Lord McNaughten, when referring to the motives of the authority, stated that it is well settled that a public authority will never have its motives questioned, subject to it acting in good faith.[57] He further stated that there is a 'duty' on the public authority to take care and ensure that it does not abuse or exceed its powers.[58] He then stated that to establish that if there has been an instance of bad faith, it must be shown that the authority had acted under false colors and pretenses.[59] This is one of the first cases touching on the issue of bad faith in the context of a public authority, empowered by statute, but the case did not specify the requirements of 'bad faith' clearly.

Another case that also shared some similarities with the one above is *Webb v Minister of Housing and Local Government,*[60] which also involved a public authority (Coast Protection) making a compulsory purchase order under the Coast Protection Act 1949.

---

[49] David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (23rd edn, Sweet & Maxwell, London 2007) 175.
[50]Patricia Shine, 'Knowledge, Notice, Bad Faith and Dishonesty: Conceptual Uncertainty in Receipt Based Claims in Equitable Fraud' (2013) 24(8) ICCLR 293.
[51] Sutton, Gill and Gearing (n 49).
[52] *Barlow Clowes International Ltd (In Liquidation) v Eurotrust International Ltd* [2005] UKPC 37; [2006] 1 W.L.R. 1476 (PC (IoM)).
[53] [2002] 2 A.C. 164.
[54] Rebecca Lee, 'Case Comment: Dishonesty and Bad Faith after Barlow Clowes: Abou-Rahmah v Abacha' (2007) March JBL 210-211.
[55] Sir William Wade and Christopher Forsyth, *Administrative Law* (10th edn, OUP, Oxford 2009) 352.
[56] [1905] A.C. 426.
[57] ibid at 430 per Lord McNaughten.
[58] ibid.
[59] ibid at 432 per Lord McNaughten.
[60] [1965] 2 All E.R 193 (CA).

Lord Denning in the case stated that bad faith in this context involves abusing powers granted by statute, stating that this is a very strong accusation, requiring cogent evidence, and should not be made unless it can be proven.[61] Another case also involving a public local board stated that in this context, acting *bona fide* is a qualification drawn from a general legal doctrine that those who hold public office have a legal responsibility to whom they represent, and must mean that they are giving their minds to the comprehension and their wills to discharge their duty towards the public, whose money and local business they administer.[62] One can notice a pattern in these cases: that all of them involve a public body, forming part of the government, are under a duty of care, and involve an allegation of abuse/excess of power/discretion. Also, none of these cases considered the actual elements bad faith, except for a few references to honest and reasonable behavior.[63] The following sub-section will consider some of the important cases that considered the requirements for a test of bad faith.

3.2 Bad Faith in the context of the Act

Oyre states that in determining the issue of immunity when drafting the Act, the Departmental Advisory Committee on Arbitration Law (hereinafter referred to as 'DAC') attempted to bridge some of the gaps seen in the 1950 Arbitration Act by inserting new provisions such as section 29 of the current Act.[64] This section arguably created uncertainty however, considering the fact that courts have had numerous interpretations of 'bad faith'.

The DAC published a report that attempted to provide guidance to the new Act. It would be crucial to consider it to look at the rationale behind the 'bad faith' qualification. The members of the committee were of the opinion that English law is:

> Well acquainted with this (bad faith) expression, and although other terms were considered by members of the committee, they concluded that it was unlikely that such a test would create any difficulties in practice.[65]

The report cites a case,[66] which lays down criteria for such a 'test', and in the judgment, Lightman J. discussed the threshold for bad faith in the context of the tort of misfeasance in public office, stating that a lack of good faith entails either: (a) malice in the sense of personal spite or a desire to injure for improper reasons or (b)

---

[61] ibid at 203 per Lord Denning.
[62] *Roberts v Hopwood* [1925] A.C. 578 [603-604] per Lord Sumner.
[63] ibid [617]; *Webb v Minister of Local Housing and Government* [1964] 3 All E.R. 473 [478].
[64] Tamara Oyre, 'Professional Liability and Judicial Immunity' (1998) 64(1) Journal of Arbitration 48.
[65] Department Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (February 2006) p. 32 at para 132.
[66] *Melton Medes Ltd v Securities and Investment Board* [1995] 3 All E.R. 880.

knowledge of absence of power to make the decision in question.[67] Initially, it appears that such a test could apply in the context of arbitration, however it is unclear what proof would be required to prove malicious conduct in the context of arbitrators, which could come in two forms: 'targeted' and 'untargeted' malice.[68] As for the second limb, whilst it might cause problems in the context of public officials, arguably it would not create problems in arbitration, as powers of arbitrators are usually clearly stated in the contractual agreement.[69] Additionally, Percival[70] states that the main purpose of the tort of misfeasance according to Lord Steyn in the *Three Rivers* case is to compensate those who have suffered loss as a result of improper abuse of power by anyone who holds public office.[71] This is based on the premise that in a legal system founded on the Rule of Law, powers exercised by the administrative and executive branches may only be exercised for the public good and not for any ulterior motive(s).[72] Arbitrators, as previously established are not part of any governmental branch, and it is difficult to see why such as test would apply to them as professionals.

Fazal[73] states that the test for bad faith is very difficult to prove, citing the case of *Kelly,*[74] which also involved a local authority repossessing a council house from the defendant. The court had the task of interpreting the acts/motives of the council and Mulcahy neatly summarises the requirements for meeting the bad faith threshold, stated by Megaw J in the case, as meaning dishonesty, not necessarily for a financial motive but still dishonesty and also stated that it involves a grave charge.[75] She further states that this is a threshold that provides a clear and workable solution to the provision of the Act, and that the other cases (aforementioned) would help provide the required guidance to courts in interpreting the threshold for finding arbitrators liable. It is important to note that the threshold applied in *Kelly* was more or less a modified version of what is known as the *Wednesbury principle*, which also dealt solely with quashing decisions of public authorities.[76] Smith, Newton and Patterson[77] mention the leading case in England,[78] which can be contrasted with *Kelly*, where Lord Hutton laid

[67] ibid 890.
[68] Anu Arora, 'The Statutory System of the Bank Supervision and the Failure of BCCI' (2006) August JBL 501-502.
[69] Andrea Mettler, 'Immunity vs. Liability In Arbitral Adjudication' (1992) March Arb J 24.
[70] Jim Percival, 'The Tort of Misfeasance in Public Office: Where now after "Three Rivers"?' (2001) 4(1) JLGL 5-6.
[71] *Three Rivers District Council and others v Bank of England (No 3)* [2000] 3 All E.R. 7.
[72] ibid.
[73] M A Fazal, 'Judicial Review Of Administrative Discretion: Anglo-American Perspectives [1]' (1985) 9 Trent LJ 33.
[74] *Cannock Chase Council v Kelly* [1978] 1 W.L.R.1.
[75] Carol Mulcahy, 'Arbitrator Immunity Under The New Arbitration Act' (1996) 62(3) Journal of Arbitration 203.
[76] *Associated Provincial Picture Houses v Wednesbury Corpn*. (1948) I K.B. 223.
[77] Joel Smith, Heather Newton and Rosie Patterson, 'Bad Faith and Honest Practices: Is it Black and White?' (2010) 5(4) JIPLP 261.
[78] *Twinsectra* (n 53).

down a two-tier (objective and subjective elements) test against which bad faith should be judged (dishonesty):

> Dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, although he should not escape a finding of dishonesty because he sets his own standards of honesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct.[79]

It is argued that Mulcahy's suggestion that the bad faith test provides clarity is not justified. This array of definitions and thresholds for bad faith arguably causes confusion, due to lack of a uniform interpretation. Courts have taken to adopting different thresholds as shown above, and the fact that the DAC report made mention of the *Milton Medes* case just as an example indicates that any of these thresholds might also be applicable. The tests formulated appear to be confusing and inconsistent,[80] but almost all the cases make some reference to a 'duty to take care'[81] and not exceed/abuse powers which points towards the fact that even public bodies that are under the control of the government are subject to a certain standard of care. The threshold is extremely high however, and in *Melton Medes,*[82] Lightman J stated:

> This hurdle in the way of a claimant is substantial, for the allegation of bad faith is… one to be made only where there exists prima facie evidence justifying the allegation. If there is no reasonable evidence or grounds to support the allegation…such an allegation will be struck out.[83]

All of the cases mentioned involve public authorities and have defined bad faith in the context of administrative law.[84] All of these tests would be suitable, if arbitrators were actually under the control of some governmental authority, maintaining public oversight, but Weston states that aspirational codes of conduct have been the closest thing the arbitration community has come to over the years in terms of ensuring some public regulation/oversight of arbitration.[85] She further states that although arbitrators ascribe to ethical precepts under these codes, compliance is voluntary and only subject to private self-enforcement,[86] unlike the cases above where it was clear that under statute they were made liable as public bodies. The fact that arbitrators derive

[79] ibid 174.
[80] Lee (n 54) 213.
[81] *Webb v Minister of Local Housing and Government* [1965] 2 All E.R. 193; *Westminster Corpn. v LNWR* [1905] A.C. 426.
[82] Melton Medes Ltd (n 66).
[83] ibid at 890 per Lightman J.
[84] Sutton, Gill and Gearing (n 49).
[85] Weston (n 41) 468.
[86] ibid 469.

their main powers from the *receptum arbitri*[87] could indicate a lack of compatibility of these tests with arbitration, since independent professionals should not be judged against the same standards put in place for governmental bodies. Also, the fact that Lord Steyn made reference to the purpose of the tort as one for compensating persons harmed by abuse of power by a public body, further proves the inapplicability of this threshold to arbitrators, who operate in secrecy, render awards in a confidential environment, and whose expenses are not covered by the taxpayers.[88]

There have been other instances where the concept of bad faith was considered in the courts of Equity, and since the DAC report only mentioned *Melton Medes* as an example, it would be logical to consider other differing thresholds, as they might be equally applicable.

3.3 Other Bad Faith Thresholds

Halliwell makes mention of other Equity cases[89] that considered 'bad faith'. All of them involved the defence of change of position, and considered whether or not the recipients have acted in bad faith.[90] She further states that bad faith is a bar to the defence of change of position, as it involves aspects of dishonest conduct.[91] These cases attempted to provide a definition of bad faith following the case of *Twinsectra*. Kiri refers to the case of *Niru Battery*,[92] stating that the court appeared to consider the case as an opportunity to provide a wider test, which could extend beyond the dishonesty test laid down in *Twinsectra*, but also stated that it would not be desirable to attempt to define the limits of good faith.[93] This is another indicator that the concept of bad faith is not easy to construe, and this could arguably be the reason why the DAC report did not specify a single threshold. Nevertheless, it would be beneficial to consider how judges attempted to define bad faith.

In the *Niru Battery* case, the judges looked at the different interpretations of bad faith. Clarke LJ, citing dictum given by Sir Richard Scott V-C in *Medforth v Blake*:[94]

> Shutting one's eyes deliberately to the consequences of what one is doing may make it impossible to deny an intention to bring about those consequences… the concepts of negligence on the one hand and fraud on the

[87] Mulcahy (n 75) 204.
[88] Franck (n 30) 509.
[89] *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548 (HL); *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All E.R. (Comm) 193; *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2003] EWCA Civ 1466.
[90] Margaret Halliwell, 'The Effect of Illegality on a Change of Position Defence' (2005) July-August Conveyancer and Property Lawyer Journal 360.
[91] ibid 361.
[92] *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2004] 1 All E.R. (Comm) 193 (CA).
[93] Nikunj Kiri, 'Dishonest Assistance: The Latest Perspective from the Court of Appeal' (2007) 22(6) JIBLR 313.
[94] [1999] 3 All E.R. 97.

> other ought, in my view, to be kept strictly apart… In my judgment, breach of a duty of good faith should, in this area as in all others, require some dishonesty or improper motive, some element of bad faith, to be established.[95]

This test appears to go beyond the one given in *Melton Medes*, requiring 'deliberate acts' and 'dishonesty', which could be beneficial in determining liability. The issue is however that the concept of dishonesty was always considered as controversial, with no uniform interpretation.[96] Additionally, arbitrator misconduct could involve aspects beyond dishonesty such as bribery, corruption, fraud or partiality that could have aspects of negligent behaviour as well.[97] Arguably, the dishonesty standard could prove inadequate and even inappropriate in some circumstances. One aspect of this threshold that does add a bit of clarity is the opinion that negligence and fraud are best kept separate. This could prove beneficial, as they could be recognised as separate causes of action, clarifying the scope for arbitrator liability as an alternative to the vague bad faith concept. Another view could be that bad faith itself could actually involve both elements of negligence and fraud. Both views could provide a little more clarity and it is argued that they could provide potentially viable solutions. But once again, this threshold was only stated *obiter dictum* and is not necessarily followed.

Arguably, the more applicable threshold was given in the concluding part of the judgment given by Clarke LJ, quoting Mr. Justice Moore-Bick:

> In my view it (bad faith) is capable of embracing a failure to act in a commercially acceptable way and sharp practice of a kind that falls short of outright dishonesty as well as dishonesty itself.[98]

It is argued that this threshold provides more clarity and applicability than the others aforementioned, mainly due to the fact that it considers liability from a commercial point of view, as it should be in the context of arbitration. Additionally, it appears to impose a standard of care (acts that fall short of what is commercially acceptable), and although the issue of dishonesty causes confusion, a standard of care coupled with a moral element could provide more clarity than the narrow and unclear *Melton Medes* definition, and the narrow 'dishonesty' thresholds discussed earlier. According to Harris, Planterose and Tecks, it is yet to be seen which of these thresholds the court would apply should a case go to court.[99]

---

[95] ibid at 112 per Sir Richard Scott V-C.
[96] Graham Virgo, 'Assisting the Victims of Fraud: The Significance of Dishonesty and Bad Faith' (2007) 66(1) CLJ 22-23.
[97] Seneczko (n 4) 153; Hans Smit, 'Delinquent Arbitrators and Arbitration Counsel' (2009) 20 Am Rev Intl Arb 43.
[98] Niru Battery Manufacturing Co (n 92) at 237 per Clarke LJ.
[99] Bruce Harris, Rowan Planterose and Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (4th edn, Blackwell Publishing, Oxford 2007) 78.

Arguably, the DAC's suggestion and Mulcahy's[100] proposition that the current qualification of bad faith on immunity of arbitrators is workable solution are in fact flawed. This is due to the reasons discussed, namely that the definition of bad faith is far from being clear, and that it cannot be applied clearly in the context of arbitration. It is inapplicable in the context of arbitrators as it involves being part of a branch of government, and arbitrators are not part of or under the control of the government. In terms of tests formulated, the thresholds involve the concept of dishonesty, which could be seen as narrow, and as history suggests, is a controversial concept. Whilst the reasons why the DAC chose not to consider what the concept of bad faith entails remain unknown, it is clear that the bad faith concept does not provide much clarity in the context of what is undoubtedly an extremely well drafted piece of legislation.[101] The next section will consider the modern structure of arbitration as a professional business service.

4 INTERNATIONAL ARBITRAITION - A GLOBAL PROFESSIONAL SERVICE

Following the discussion of the role of the arbitrator as more contractual than judicial, it is necessary to consider the nature of the arbitration environment generally within England, and comparatively in other jurisdictions to better understand how it works in practice.

International Arbitration has gained so much prominence over the past few decades that it has become the preferred method of private dispute resolution, especially for commercial disputes.[102] Smit states that the opportunity to select arbitrators of the required skill and experience in the subject matter of the dispute is one of the principal advantages of arbitration over litigation.[103] He further states that the selection process has become so competitive, that it is now commonplace that the parties actually scrutinize and challenge the qualifications and expertise of potential arbitrators prior to appointing them.[104] Cremades succinctly summarises the history of International Arbitration, stating that when it started booming in the 1970s and 80s, it was perceived to consist of a closely-knit circle of friends, suggesting that arbitration was a profession for the elite members of the legal profession, most of whom were European professors.[105] He states that due to globalisation however, arbitration became a victim of its own success and this 'obligated arbitrators to change the nature

[100] Mulcahy (n 75).
[101] Some have suggested that the impetus behind the bad faith provision is to provide a workable balance between professionalism and integrity of the adjudicatory function, however the lack of clarity tips the scales in favor of the arbitrator, indicating an uneven balance of power. *See e.g.* Thomas Carbonneau, 'A Comment on the 1996 United Kingdom Arbitration Act' (1998) 22 Tul Mar LJ 142.
[102] Hans Smit, 'The Future Of International Commercial Arbitration: A Single Transnational Institution?' (1987) 25(9) Colum J Transnat'l L 34.
[103] ibid 15.
[104] ibid 16.
[105] Bernardo M Cremades, 'International Arbitration: A key to Economic and Political Development' (1999) 2(5/6) Int ALR 149.

of their professional activity into a much more globalized [sic] arbitration', resulting in a proliferation of aggressive marketing campaigns by some of the largest arbitral institutions including the ICC and LCIA.[106] It is interesting to see how a scholar such as Cremades, who is a practicing arbitrator views the arbitration industry, as one that had to develop to keep up with the globalisation process, and has now resulted in countries actually competing amongst themselves as to who has the most attractive legislation, and providing what he describes as a 'highly specialized [sic] service'.[107]

He states that in the 1990s, the English Parliament used economic figures to show how the current legislation at the time had become obsolete and was considered as one of the main reasons for declining international interest for Commercial Arbitration in London.[108] This seems to point towards the fact that Arbitration has become an international business industry, providing a global, specialised service rendered by professionals. Arguably, the structure of the current legislation in place actually supports the arguments that Cremades has made: arbitration in England has become more of a business, run by well-paid professionals,[109] and they should be treated as such, rather than being accorded special treatment as though they were judges. This is best considered in the context of some of the literature dealing with the history of International Arbitration and the services provided in arbitration nowadays.

Rutledge suggests that arbitration has taken a market-based approach:

> The level of activity in arbitration and the interest among providers of services make it hard to distinguish arbitration, in economic terms, from any other professional services industry in which providers compete for a share of customers' business.[110]

Indeed, arbitration is better perceived as more of a service that parties can pay for, with dispute resolution service providers fighting for a slice of the market. Weston states that nowadays, arbitration service providers offer an array of services to their clients, ranging from administrative to consulting and training services.[111] She further states that even when it comes to choosing the panel of arbitrators in ad hoc arbitrations, their fees could range from $75 to over $500 an hour, with additional variable costs for booking rooms, provision of case management services and secretaries.[112] Parties nowadays have the option to choose from arbitrators with certain traits and expertise, such as arbitrators who have experience in resolving

[106] ibid 147-148.
[107] ibid 149.
[108] ibid.
[109] Truli (n 19) 401.
[110] Peter B Rutledge, 'Towards a Contractual Approach for Arbitral Immunity' (2005) 39 Ga L Rev 162.
[111] Weston (n 41) 451.
[112] ibid 454.

disputes under a particular country's law, or arbitrators who are 'contractor-friendly' in the context of construction disputes for instance.[113] Rutledge states that even amongst themselves, arbitrators compete, engaging in reputation-enhancing activities, which include serving as counsel for parties in arbitrations, publishing papers and attending conferences.[114] All of this strongly indicates that arbitration is nothing more than a professional service, which can be customised according to the needs of the clients, and that arbitral institutions are essentially service-providers who provide a service, and will continue to do so, so long as it is profitable for them,[115] whilst also bettering arbitration as a service generally to the public and ensuring retention of existing clients.[116]

The current state of English Law however partly represents the view of arbitration that prevailed in the 1970s, where arbitrators were perceived as 'grand old men', purportedly selected for their 'virtue, judgment, neutrality and expertise', but rewarded as if they were participants in international deal-making.[117] That was the era where arbitrators were truly placed on a pedestal and considered as more than just professionals, and it is argued that by virtue of the historically perceived nature of arbitration as an 'elitist club', arbitrators embraced their special status as judges even more. Indeed, Dezalay and Garth provide an example, stating that the 1970s signaled a shift in the nature of arbitration from a club of elitists to more of a profession, and the ICC secretariat took the view that arbitrators should prove their independence, by declaring all significant relationships between proposed arbitrators and counsel. The European arbitrators heavily objected, on the basis: 'That the relationships that may exist between arbitrators and counsel are irrelevant, because they cannot possibly call into question the independence of the arbitrator.'[118]

This points towards the fact that arbitrators indeed perceived themselves to be exceptional members of society, whose independence could never be called into question, and it seems that the current test of bad faith fits well with this approach: arbitrators in English Law are treated as judges, that any allegations indicating otherwise should be backed with cogent evidence, and the fact that they made it as arbitrators should erase any doubts as to their professionalism.[119] Garth and Dezalay neatly summarise the shift in arbitration from an 'elitist club' to a competitive

[113] ibid 165.
[114] Rutledge (n 110) 164.
[115] Matthew Rasmussen, 'Overextending Immunity: Arbitral Institutional Liability in the United States, England, and France' (2002) 26(6) Fordham Int'l LJ 1872.
[116] ibid.
[117] Yves Dezalay and Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago University Press, Chicago) 8.
[118] ibid 48-49.
[119] Some have gone as far as suggesting that just as a judge's independence can never be questioned by virtue of how he made it as a judge in the first place, arbitrators' independence/impartiality cannot be called into question. See e.g. Pierre Lalive, 'Irresponsibility in International Commercial Arbitration' (1999) 7 APLR 167.

business, stating that arbitrators were slowly losing the informal control that they had over a community of disciples, where loyalty could be rewarded by suggesting names for arbitration,[120] and that international arbitration was moving from a small group of self-regulating artisans to a more open and competitive business.[121] It is suggested that fragments of this old approach still exist through the bad faith provision in England, still treating them as judge-like, operating within narrow boundaries and almost fully immune. The literature however overwhelmingly points towards the slow disappearance of the sovereign theory, mainly due to the increasing emergence of arbitration as a complex contractual service.[122] As seen above, arbitration has now become extremely competitive, with institutions and arbitrators alike trying to get their share of a lucrative market.[123]

4.1 Structure of the Current Act

While considering arbitration as a developing service, it is necessary to examine the current legislation in place and how it is structured. Fraser states that the 1996 Act is close to being a definitive Act on Arbitration Law in England and that prior to it's implementation, it was necessary to consider the Arbitration Acts of 1950, 1975 and 1979, along with a large body of case law to see how the statutory provisions were applied.[124] He further states that the purpose behind introducing the Act was to promote arbitration in England by providing a clear piece of legislation governing the process.[125]

Chukwumerije mentions two of the main principles found in Section 1 of the Act, with the first being the recognition that the main reason for choosing arbitration is the speedy resolution of disputes and the second the acknowledgement of party autonomy.[126] The second principle, she suggests, follows the general trend in arbitration, whereby the system effectuates the parties' intentions to have a fully self-designed framework, with the evidence of party autonomy seen in almost all provisions of the Act.[127] Indeed, the detailed provisions of the Act relating to exactly how the parties can choose to structure the arbitral process place high emphasis on the importance of the parties' will: the process is designed by them, and should accommodate their changing needs.[128] This issue fits in well with the English

[120] Dezalay and Garth (n 117) 48.
[121] ibid 39.
[122] Judges are assigned by the State, and do not have to compete with other judges. They are under a duty to the general public, unlike arbitrators.
[123] Arvind (n 18) 33.
[124] David Fraser, 'English Arbitration Act 1996: Arbitration Of International Commercial Disputes Under English Law' (1997) 8 Am Rev Intl Arb 3.
[125] Ibid.
[126] Okezie Chukwumerije, 'English Arbitration Act 1996: Reform And Consolidation Of English Arbitration Law' (1997) 8 Am Rev Intl Arb 23-24.
[127] ibid 24.
[128] Leon Trakman, 'Legal Traditions in International Commercial Arbitration' (2007) Spring edition Am Rev Intl Arb 27.

government's efforts at fostering an overall party-friendly framework for resolving disputes through arbitration, and promoting arbitration in England. Lord Justice Saville stated that the Act attempted to demolish the differences between foreign and domestic arbitrations,[129] making it applicable in all arbitrations, stressing on the fact that changes including removing the power of the court to award costs in arbitration and express recognition of the concept of *kompetenz-kompetenz* were: changes which were badly needed to keep this country as one of the leading places for the resolution of International Disputes by Arbitration.[130]

It is clear that the changes made to the Act were indeed implemented to make England a more attractive location for resolving disputes through arbitration and it is interesting to note the reference by Lord Justice Saville to 'International Disputes' in particular. This seemingly points towards the improvement of an already existing globalised professional service.

If one were to look at the various sections of the Act, the way in which it has been drafted clearly indicates that arbitration is a professional service. For example, Section 56 of the Act considers specifically the issue of withholding an award by the tribunal if the parties fail to fully pay the fees and expenses of the tribunal,[131] and that is inextricably tied to Section 28, which makes the parties jointly and severally liable, and even has provisions on applications to court for adjustment of fees.[132] Indeed, Fraser states that the provisions of the Act point towards a less legalistic format, in an attempt to distinguish the arbitral process from procedures resembling court proceedings.[133] He provides an example of Section 34, which deals with matters such as dispensing with the exchange of Points of Claim and Defense, disregarding rules relating to admission of Hearsay Evidence, and the adoption of an inquisitorial rather than an adversarial approach in proceedings.[134] These are just a few examples. The Act consists of 110 sections, most of which concern the structuring of the arbitral process. It is very difficult to see how this process can be perceived as 'judicial', and how the concept of qualified immunity which seemingly considers the process as judicial-like finds its place within the legislative sections which portray the entire process as a service that can be customised by the parties to suit their requirements. The whole point behind the Act was to promote arbitration in England, and such an unclear provision (bad faith) with old roots in common law does not aid in the

[129] Lord Justice Saville, 'The Arbitration Act 1996: What We Have Tried to Accomplish' (1997) 13(6) Const LJ 412.
[130] ibid 413.
[131] Arbitration Act 1996, s 56.
[132] ibid s 28.
[133] Fraser (n 124) 11.
[134] ibid.

achievement of the objective of presenting England as a good location for arbitration services.[135]

4.2 Comparative Arbitral Immunity - The Civil Law 'Services' Approach

In most civil law countries, arbitration is perceived purely as a professional business, unlike in common law jurisdictions. Rasmussen states that in France, the approach to arbitrator liability differs from that in England and the United States, mainly due to the fact that the liability of judges themselves is wider than that existing in the common law countries.[136] He states that French Law considers arbitrators as professionals, not judges and hence more susceptible to liability.[137] He further states that the statutory provisions relating to liability of judges do not apply in any way to arbitrators (indicating that they are not on the same footing), and that courts are likely to hold arbitrators liable for breach of contractual obligations, such as the obligation to produce a result, or breach of a duty of care.[138] Franck states that by virtue of their appointment under contract, they could be made fully liable for any wrongful act committed, and they could even be subject to criminal penalties.[139]

Hosseraye, De Giovanni and Huard-Bourgois state that the French Code of Civil Procedure actually has provisions in place allowing parties to bring civil action claims against arbitrators, and that immunity exists, but is limited, depending on the particular arbitral mandate.[140] They further state that immunity does not cover all acts or omissions included in the scope of the arbitrator's mandate, and he could be liable for fraud, gross negligence or willful misconduct.[141] Franck states that this approach of treating the relationship between arbitrator and the party as contractual is seen in other countries including the Netherlands, Sweden, Austria and some countries actually consider the contract as one purely for the supply of services, as in the case of Germany.[142] It seems that the civil law countries do acknowledge the fact that an arbitrator has adjudicatory powers, but Rasmussen points to an important issue which arguably distinguishes the civil law approach from that of the common law: lack of a direct connection between an arbitrator and judge.[143] He mentions however that where

---

[135] Within the current framework, it is very hard to see how a concept such as bad faith (considering arbitrators as judges) would fit. The Act contains 7 Sections (59-65) dealing solely with the issue of costs of arbitrators. This clearly points towards a professionalized service rather than a quasi-judicial process.

[136] Matthew Rasmussen, 'Overextending Immunity: Arbitral Institutional Liability in the United States, England, and France' (2002) 26(6) Fordham Int'l LJ 1824.

[137] Rasmussen (n 115) 1862.

[138] ibid.

[139] For a comparative discussion of arbitral immunity, *See* Susan D Franck, 'The Liability Of International Arbitrators: A Comparative Analysis And Proposal For Qualified Immunity' (2000) 20 NY Sch J Int'l & Comp L.

[140] Jean De La Hosseraye, Stéphanie De Giovanni and Juliette Huard-Bourgois. *Arbitration in France* (CMS Legal, France 2012) 344.

[141] ibid.

[142] Franck (n 33) 8.

[143] Rasmussen (n 115) 1859.

it finds similarity with English Law is on the issues of public policy behind the retention of such immunity, the most important of which is protecting arbitrator independence in decision-making.[144] Waincymer uses the example of Austria, which actually has an express liability provision within their Code of Civil Procedure, indicating that despite being granted 'special status' by virtue of them being adjudicators, arbitrators are still liable.[145] Although this approach does provide more clarity than that in common law countries, the exact scope of liability is still blurred. The statute does provide for civil suits against arbitrators but they still have a limited scope in their contractual mandate, within which they are protected.

In conclusion, arguably the current framework in place for arbitration is more appropriately viewed as a professional service. The complexity of the services, selection of arbitrators and the process overall is consistent with that of selecting other professionals to perform a service, albeit under a *sui generis* contract. In comparison with civil law countries, some of which consider the arbitration contract as one purely for the supply of services, English Law seems to place heavy importance on the role of an arbitrator as resembling a judge, and to better understand the point behind doing so, it is necessary to consider the issue which appears to be prevalent in both common law and civil law systems: the public policy justifications behind retaining such immunity. The next chapter will consider some of the key policy justifications in detail, to analyse the strengths (or lack thereof) of these justifications.

5 JUSTIFICATIONS AND RATIONALE BEHIND IMMUNITY

5.1 Public Policy Justifications - A General overview

There have been many public policy justifications put forward to preserve the immunity of arbitrators,[146] which derive their basis from the same justifications put forward for the protection of judges. Wilhelmi states that one of the most important justifications put forward is that arbitrators should be able to perform their duties without harassment or intimidation, as that in turn would ensure that they would maintain an independent and neutral position, without fear of becoming part of the actual dispute through civil liability suits.[147] She further states that courts have supported this point, suggesting that parties have the right to have counsel present in arbitrations, and parties can have the award annulled under legislation and the New

[144] ibid 1861.

[145] Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, Netherlands 2013) 355.

[146] These include: The effect that civil suits would have on the finality of awards, decrease in the number of skilled professionals willing to take up the profession of arbitration, adverse impact on the integrity of the judicial process. *See* Maureen A Weston, 'Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration' (2006) 88 Minn L Rev 495.

[147] Elizabeth Wilhelmi, 'How Far is too Far? : Reexamining the Continuing Extension of Arbitral Immunity to Arbitral Organizations' (2006) 1 J Disp Resol 323.

York Convention (indicating that the system in place provides sufficient remedies).[148] The courts have considered this to be one of the main grounds for retaining the qualified immunity of arbitrators while absolute immunity granted to judges. Its main impetus derives from the historically recognised idea that participation in the court system raises the risks of 'entanglement in vexatious litigation',[149] a risk that judges should never have to worry about.

Sauzier and Yu[150] mention the key case in the United Kingdom, which first made explicit reference to the immunity of the legal profession:

> It is well settled that judges, barristers, solicitors, jurors and witnesses enjoy an absolute immunity from any form of civil action being brought against them in respect of anything they say or do in court during the course of a trial. It is of great public importance that they shall all perform their respective functions free from fear that disgruntled and possibly impecunious persons who have lost their cause may subsequently harass them with litigation.[151]

They also quote the case of *Bradley v Fisher*,[152] which was the first American case to recognise the doctrine of judicial immunity:

> If civil actions could be maintained in such cases against the judges, because the losing party should see fit to allege that the acts of the judge were done with partiality or maliciously or corruptly, the protection essential to judicial independence would be entirely swept away.[153]

They state that courts, following on the same approach in the quote given above, have noted that arbitrators, just like judges have no interest in in the outcome of the awards,[154] and are appointed just to perform a judicial-like function and hence should benefit from similar protections.[155] Both the fear of vexatious litigation and the interrelated issue of impartiality/independence of judges have been cited as key justifications.

---

[148] ibid.
[149] Michael D Moberly, 'Immunizing Arbitrators From Claims for Equitable Relief' (2005) 5(2) Pepperdine Dispute Resolution Law Journal 326.
[150] Eric Sauzier and Hong-lin Yu, 'From Arbitrator's Immunity To The Fifth Theory Of International Commercial Arbitration' (2000) 3(4) Int ALR 114.
[151] *Sutcliffe v Thackrah* [1974] A.C. 727 at 757 per Viscount Dilhorne.
[152] 80 U.S. (13 Wall) 335, 20 L.Ed. 646 (1872).
[153] ibid at 649-650.
[154] This is not the reality in practice. More often than not, arbitrators are disqualified for having conflicting interests. *See e.g.* Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, Netherlands 2013) 360.
[155] Sauzier and Yu (n 150) 115.

5.2 Vexations Litigation and fear of Floodgates

It is interesting to note that almost all the categories of legal professionals mentioned in the quote above have lost their immunity since that case.[156] It is argued that the judicial independence argument would apply to judges, but would not work well in the case of arbitrators due to several reasons, first of which is the fact that arbitrators are usually paid for and hand-picked by the parties themselves to resolve the dispute. Parties almost always select an arbitrator (unlike judges), because they trust in his skills as a professional, his expertise in resolving a particular type of dispute and almost invariably his independence and impartiality.[157] From the perspective of a professional service, if issues such as bribery, fraud or ulterior motives begin to materialise in the arbitral process, parties could be left without a personal remedy against the arbitrator, which would be a denial of justice. Secondly, Mettler makes a counter-argument against the independence and impartiality argument, which is that immunity might actually have an opposite effect, encouraging recklessness and misconduct, by removing the incentive to be cautious.[158] She further states that immunity would promote a system of dispute resolution with inadequate safeguards, which is a high price to pay for an apparently efficient system.[159] Waincymer states that arbitrators (in relation to their conduct) are concerned with moral incentives, beyond just financial gain, considering the respect of their peers and the social community as paramount,[160] and argues that increasing accountability of arbitrators may actually induce optimal behaviour.[161] In order to better understand whether allowing liability of arbitrators would affect impartiality or independence, it is necessary to look at how some of these arguments were considered in the context of other legal professionals.

It would be beneficial to once again return to the case that led to the removal of barrister immunity as it considered similar policy issues raised in favour for retaining arbitrator immunity. The same issues of fear of vexatious litigation and compromised independence were raised in the context of barristers, pointing to the two main arguments for retaining immunity (judicial position and protection of persons in that position):

---

[156] Expert witnesses recently lost their 400-year old immunity in *Jones v Kaney* [2011] UKSC 13. Barristers lost their immunity in *Arthur J S Hall & Co (a firm) v Simons Barratt v Ansell and others (trading as Woolf Seddon (a firm)) Harris v Scholfield Roberts & Hill (a firm) and another* [2000] 3 ALL E.R. 673. In *Stubbs v Kemp* [1979] Ch.384, courts recognized a cause of action against solicitors in both contract as well as tort. Some of these cases considered similar public policy justifications for retention of immunity. See generally J A Jolowicz, 'The Immunity of the Legal Profession' (1968) 26(1) CLJ 23.

[157] Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th edn, OUP, Oxford 2009) 258,266. *See also* Laurens J E Timmer, 'The Quality, Independence and Impartiality of the Arbitrator in International Commercial Arbitration' (2012) 78(4) Arb J 348.

[158] Andrea Mettler, 'Immunity vs. Liability In Arbitral Adjudication' (1992) March Arb J 26.

[159] ibid.

[160] Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, Netherlands 2013) 351.

[161] ibid 352.

> One strand is that a judge or counsel must be protected because otherwise he may be consciously or subconsciously influenced to deviate from his duty by fear of being sued by a litigant. But a second strand is that it is not right that… (he) be vexed by an unmeritorious action and that such an action should be summarily struck out.[162]

Interestingly, Lord Hutton referred to the passage in the previously mentioned case of *Sutcliffe v Thackrah*, indicating that the same two strands exist in relation to protecting arbitrators as well.[163] He stated that there was an obvious distinction between counsel and a judge in a trial, in that the latter owed a duty to the public at large to ensure the proper administration of justice, but no duty towards a client in a trial, like a barrister would.[164] He later stated that a barrister would owe a duty of care towards his client, just like a doctor would towards his patient, and it was once again difficult to comprehend why the same duty of care would not apply equally to arbitrators. Lord Hutton also stated that in relation to judges, full immunity is necessary not merely because judging was considered to be a 'difficult art' (judicial empathy).[165] He further stated that if that rationale were to be followed, surgeons should also be protected because they were part of a very difficult profession.[166] This argument was eventually dismissed, and it is argued that this element of judicial empathy indirectly finds its place within the qualified immunity of arbitrators. As established earlier, the duties of arbitrators are not truly judicial, and according to Dezalay and Garth, it would make sense to assume that arbitrators, and Parliament have been indirectly advocating retention of immunity due to the belief that what arbitrators do is exceptionally difficult and no one else is capable of doing what they do.[167] It is clear that arbitrators do owe duties of care, skill, diligence etc. towards their clients, but personal actions for breach of such duties have to pass the extremely unclear, and high 'bad faith' threshold before they would proceed, thereby rendering the whole 'qualified immunity' test practically useless (and arguably indifferent to absolute immunity!), as there is no clear-cut example of what evidence would be required. What adds to the difficulty is the fact that arbitration is a confidential process, and actually adducing any hard evidence as to misconduct could prove to be extremely difficult if not impossible.[168] Also interestingly, a proposition for qualified immunity was never raised in the leading judgments in *Arthur J S Hall*, potentially indicating distrust by the judiciary in the whole concept.

---

[162] Arthur J S Hall (n 36) [730] per Lord Hutton.
[163] ibid [731] per Lord Hutton.
[164] ibid [732] per Lord Hutton.
[165] ibid.
[166] ibid .
[167] Yves Dezalay and Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago University Press, Chicago).
[168] Guzman (n 29) 1288; W Michael Tupman, 'Challenge and Disqualification of Arbitrators in International Commercial Arbitration' (1989) 38(1) ICLQ 51.

It has been argued that fear of vexatious litigation (first strand aforementioned) would lead to a 'chilling effect' on arbitrator decision-making.[169] These two interrelated arguments are not fully substantiated due to two main reasons. Firstly, Rutledge makes an important point, stating that the 'chilling effect' argument assumes that arbitrators are risk-averse, and could only perform professionally with the existence of such immunity.[170] Arguably, allowing immunity to prevail over contractual provisions practically means disregarding the contract. On the contrary, Rutledge states that the quality of services provided by arbitrators do not require additional protection through immunity, and that the market provides sufficient incentives, for if arbitrators develop a reputation for independence in decision-making (which is arguably the most important part of the 'professional service' that parties pay for!),[171] honouring contractual provisions, and not engaging in behaviour that could attract liability would increase the likelihood of their reappointment.[172] Rutledge rightly states that qualified immunity is inconsistent with the market-based approach that arbitration has taken, and that their professionalism (including independent judgment) is one of the main factors that set apart one arbitrator from another, just like any other service.[173] Courts and arbitrators can dicker over terminology, but at this day and age, arbitration is just another service,[174] and arbitrators do not need immunity to perform their job well, just as engineers or doctors do not.[175] Their professionalism could and should speak for itself.

Secondly, the fear of defensive adjudication/decision-making[176] was developed in the context of public officials exercising their public duties,[177] not competing professionals bound by contractual provisions.[178] The vexatious litigation argument is a valid one, only when applied in the context of judges in trial or members of public office, but not in the context of arbitrators who are highly paid professionals. The old era of a 'closely-knit', loyal circle of arbitrators is over and Weston states that there are thousands of arbitrators worldwide who provide their services globally[179] (indicating their high degree of replaceability, unlike public officials), and that the business community is the driver of change within the arbitration environment.[180] Along these lines, it is suggested that if a general trend starts emerging, where the business community advocates that arbitrators should not be immune, countries would rush to change their legislation in the quest to be recognised as the 'leading *situs* for

[169] Moberly (n 149) 350.
[170] Rutledge (n 110) 169-170.
[171] Franck (n 33) 11.
[172] Rutledge (n110) 190.
[173] ibid 158.
[174] ibid.
[175] Rasmussen (n 115).
[176] Truli (n 19) 385.
[177] Moberly (n 149) 347.
[178] Mark A Sponseller, 'Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators' (1993) 44 Hastings LJ 430.
[179] Weston (n 41) 451.
[180] Trakman (n 128) 18.

International Arbitration'.[181] Whilst allegations against judges and public officials have to be heavily substantiated (due to the absence of contract, public duties owed, and the resultant lack of comparability), it is easy for arbitrators to breach contractual terms.[182] Arguably, judging arbitrators on the same criteria as members of public office is not a valid approach, and the 'chilling' effect, vexatious litigation argument is dismissed.

As for the second strand and whether or not it is a sustainable policy argument, the judges in *Arthur J S Hall* considered whether or not civil actions would actually proceed against barristers. Lord Hoffman stated that following the introduction of the 1998 Civil Procedure Rules, it has become much more difficult to obtain legal help for actions which have little prospect of success, citing the case *Rondel v Worsley*.[183] One of the key public policy justifications behind preserving arbitrator immunity is the 'fear of floodgates' argument.[184] Guzman states that this is a misconception, due to the fact that it assumes the court system has inadequate safeguards, but in reality most parties would be aware of their chances of success should they choose to proceed to trial.[185] He further states that arbitrators should and would be willing to settle if they know the chances of success in a civil suit are high.[186] Lord Steyn in *Arthur J S Hall* quickly dismissed the fear of floodgates argument, countering it with the point that the striking out procedures are extremely well developed, adapted to filtering out vexatious and unmeritorious claims,[187] without the need for immunity to prevent abuse of the courts.[188] Additionally, in the judgment, almost all the judges pointed out the fact that most practitioners now take out professional indemnity insurance. This is also seen in arbitration. Miller points out that since the 1990s, arbitral institutions have been advising their members to take out professional indemnity insurance,[189] and it has now become the norm rather than the exception.[190] Not only does this further the argument that arbitration is a professional service; it also shows that arbitrators who act professionally should have no reason to fear any potential litigation, due to the advanced striking out procedures, and insurance protection.

Following a consideration of these main policy issues, the conclusions can be drawn are: firstly, due to the changes in the arbitration industry, it would not make sense to

[181] Phillip D O'Neill, 'Recent Developments in International Commercial Arbitration: An American Perspective' (1989) 53(3) Journal of Arbitration 184.
[182] Truli (n 19) 410.
[183] [1967] 3 All E.R. 993, [1969] 1 A.C. 191.
[184] Guzman (n 29) 1324.
[185] ibid 1325.
[186] ibid.
[187] Arthur J S Hall (n 36) [683] per Lord Steyn.
[188] Franck (n 33) 12.
[189] Francis Miller, 'The Judicial Immunity of Arbitrators' (1993) 141 NLJ 634.
[190] Jane Ryland, 'A Comparison of The Liability of Arbitrators, Adjudicators, Experts and Advocates' (2005) 21(1) Const LJ 13.

grant arbitrators immunity, as they do not satisfy the first 'judicial position' strand (being better classified as professionals). Additionally, the existence of market incentives to act professionally and independently dispenses with the need for immunity. Secondly, the vexatious litigation and fear of floodgates arguments are unsustainable[191] mainly due to the existence of advanced striking out procedures (that would ensure only merited claims would proceed), and the availability of insurance. The final chapter will look at the current protection available to professionals, their liability and whether such protection would be suitable for arbitrators.

6 ARBITRATORS' CONTRACTUAL AND TORTIOUS LIABILITY

On the premise that arbitrators are no more than professionals who are paid to provide a service, it is crucial to look at how they could be made liable. The leading authority on English Arbitration states that professional negligence is a generic term that covers claims for damages, usually for breach of contract or breach of a duty, giving rise to liability in tort, and that would most likely be the type of claim brought against an arbitrator.[192] There is no English case law on professional negligence of arbitrators[193] but Weston states that over the years however there have been claims made against arbitrators for various allegations including breach of contract, bias, negligence, failure to follow policies etc. but none succeeded due to the impenetrable doctrine of immunity.[194]

The lack of case law however should not pose a problem as US courts have found arbitrators liable in the past. Guzman states that in the US, arbitration contracts almost always contain implicit and explicit terms and points to the duty of good faith as an example.[195] He further states that this duty cannot be waived and breach of this term could render the arbitrator liable. An example of liability of arbitrators was seen in the American case of *Baar v Tigerman*,[196] where the California Appeal court distinguished the duty to render a timely award from the quasi-judicial acts performed

[191] 10 years following the abolition of barristers' immunity, research into the floodgates/vexatious claims arguments indicates that the fears of possible floodgates did not actually materialize in the years following abolition of the immunity, that only a handful of cases actually made it to the courts, and only in a minority of them was liability founded. This is in line with the predictions of the majority of the House of Lords in *Arthur J S Hall*, that most claims would face the striking out procedures with only the merited cases surviving. Davies states 'critics of barristers' immunity argued that its survival should be attributed to considerations of professional and judicial empathy rather than to neutral legal principles'. *See* Mark Davies, 'Not an Impartial Tribunal? English Courts and Barristers' Negligence' (2010) 13(2) Journal Of Legal Ethics 114. It is argued that along the same lines, arbitrator liability is also retained due the same elements of judicial empathy and despite the fears of floodgates and vexatious litigation materializing, only a few cases will only make it to the courts due to the striking out procedures in place. If floodgates did not emerge in the context of barristers, who are even more exposed to court system than arbitrators, it is hard to see why this claim is justified in the context of arbitrators.

[192] Sutton, Gill and Gearing (n 49) 176.

[193] ibid.

[194] Weston (n 41) 458-459.

[195] Guzman (n 29).

[196] 140 Cal. App. 3d 979, 984 (Cal Ct. App. 1983).

by the arbitrator,[197] and held that he could be liable for breach of contract, negligence and other courses of action that involved him paying compensatory and punitive damages as well.[198] The court reasoned, considering the policy justifications, compared judicial proceedings with arbitrations and concluded that arbitration is essentially a private contractual arrangement between parties, thereby recognising the fundamental difference between the two processes.[199] In another case,[200] the courts applied the same principles as those in *Baar*, stating that delay in rendering an award simply amounted to defaulting on a contractual duty to both parties, rather than being protected as a quasi-judicial act.[201] What this does indicate is that courts are still not clear on when liability would attach (which can presumably, as alluded to earlier, be attributed to the difficulty in dividing the functions within the arbitral process) due to the existence of immunity hovering over the contract between the arbitrator and parties Arguably, once immunity is removed, actions could easily be brought as ordinary breaches of contract or duty of care, under contract and or tort (subject to striking out procedures). This approach is encouraged and it is suggested that it would not pose any practical problems.

Walton, Cooper, Wood and Percy state that where a task requires a special skill, the reasonable man would not attempt it unless he possessed the skill in question, and if he does undertake the task, he will be expected to exercise the skill and competence of an ordinary competent practitioner (reasonable care and skill test) in the relevant calling.[202] Mulheron states that the *Bolam* test of breach is the 'universal test' for professional negligence[203] and it is stated that the *Bolam* test is of general application, not confined to a defendant exercising or professing the particular skill of medicine, applying to barristers, brokers and other classes of professionals.[204] It is necessary to look at the relevant tests to determine liability of professionals.

The *Bolam* test, as previously mentioned requires a reasonable standard of care and skill to be exercised by the professional in the relevant field, and requires a body of professional practice or opinion to refer to in assessing the allegations.[205] This is further supported by the two-stage test to determine whether or not the negligence actually caused the damage,[206] developed in the *Bolitho*[207] case. In the context of

[197] Wilhelmi (n 147) 324.
[198] Seneczko (n 4) 148.
[199] Sponseller (n 178) 428-429.
[200] *E.C. Ernst, Inc. v Manhattan Construction Co. of Texas* 551 F.2d 1026, 1033 (5th Cir. 1977).
[201] Wilhelmi (n 147) 324.
[202] His Honour Judge Walton, Roger Cooper, Simon F Wood and His Honour Judge Rodney Percy, *Charlesworth and Percy on Negligence* (11th edn, Sweet and Maxwell, London 2006) 507.
[203] Rachael Mulheron, 'Trumping Bolam: A Critical Legal Analysis of Bolitho's "Gloss"' (2010) 69(3) CLJ 609.
[204] His Honour Judge Walton, Roger Cooper, Simon F Wood and His Honour Judge Rodney Percy (n 202) 507-508.
[205] ibid 509.
[206] Paula Case, 'Applications of Bolitho to standard of care and causation' (2007) 23(3) Professional Negligence Journal 194.

arbitration, it is fair to assume that arbitrators are more appropriately viewed as professionals, and should also be subjected to the same test and standard of care required of other professionals.[208] In the field of arbitration, where arbitrators compete for their share of clientele, it is argued that actually finding a benchmark against which the arbitrator's conduct would be judged (body of professional practice) would not be a difficult task.

When considering the liability of solicitors in England, Davies states that the general principle exists in statutory provisions, citing s.13 of the Supply of Goods and Services Act 1982 (SGSA) which requires the professional to exercise reasonable care and skill in performing the relevant task(s).[209] He further states that liability in tort will almost invariably arise in negligence, and the requirements to establish liability are: a) a duty of care must exist between the claimant and the defendant, b) the defendant must have breached the duty and c) the breach of duty must have caused damage which is legally recognised.[210] Weston states that it would be reasonable to consider that all professionals (including arbitrators) should be held accountable for their acts and omissions under the relevant standard of care.[211] Solicitors were chosen as an example due to the fact that the test for establishing liability in negligence is clear and applying the *Bolam* and *Bolitho* tests to arbitrators would arguably not create any problems in practice, since they have been applied to various classes of professionals from surgeons to solicitors.[212] These tests and thresholds could be easily extrapolated and applied to arbitrators, through a newly drafted legislative section imposing a duty of care similar to the one in the SGSA 1982 and potentially a provision dealing with breach of contractual terms.

To conclude, it is argued that the initial striking out procedures in place, which have been developed in the courts over decades, coupled with these thresholds and tests, would actually provide sufficient protection for arbitrators. They do not need the qualified, ambiguous immunity test currently in place, which is based on a misconceived assimilation to the status of judges.[213]

7 CONCLUSION

To conclude, it appears that almost all the arguments support the removal of such immunity, due to the lack of proper rationales or justifications. The current exact position of arbitrators within the legal profession is far from clear, and their powers can be described as a mixture of legislative and contractual provisions. They are in no

---

[207] *Bolitho (Deceased) v City and Hackney HA* [1998] A.C. 232 (HL).
[208] Yu-Hong Lin and Laurence Shore, 'Independence, Impartiality, and Immunity of Arbitrators—US and English Perspectives' (2003) 52(4) ICLQ 954.
[209] Mark Davies, *Solicitors' Negligence and Liability* (OUP, Oxford 2008) 27.
[210] ibid 36.
[211] Weston (n 41) 467.
[212] Davies (n 209) 49.
[213] Pierre Lalive, 'Irresponsibility in International Commercial Arbitration' (1999) 7 APLR 171.

way connected to any branch of government and cannot be perceived as occupying a public post. They are better perceived as professionals providing a specialised service.

Additionally, the requirement of bad faith, in terms of both applicability and threshold is also unclear, and despite the many tests formulated, the courts are yet to arrive at a uniform interpretation. The applicability in the context of arbitration would be inappropriate, as previously mentioned due to the fact that bad faith involves breach of duties by officials occupying public office, and arbitrators do not occupy public office. The thresholds have varied in terms of what is required to prove bad faith, and the type of evidence that would be required to prove bad faith in arbitration is yet to be seen. Also, the reference by the DAC report to the *Melton Medes* case as an example indicates that any of the other tests might be applicable.

Arbitration has grown tremendously as a service, and literature shows that even when discussed in Parliament, it was brought up in the context of 'business', indicating that it is considered as a commercialised service. The structuring of the Act and the statements made by some of the leading judges, show that this is a highly specialised professional service, having economic impact.

Finally, when considering how the judges examined the immunity of barristers, the courts never raised the issue of qualified immunity, and decided to remove immunity altogether. The immunity of barristers was in place based on the same policy justifications as arbitrators but they did not withstand scrutiny in court. Barristers lost their immunity from civil suits despite having a closer connection to the judicial process than arbitrators and there is no reason why courts should retain the qualified immunity protection. The judges pointed towards the well-developed striking out procedures, and the body of case law developed in the context of professional negligence was applied across almost all professions without any issues. There is no compelling reason to believe that it would not work just as well for arbitrators and why they should not be held liable for misconduct under contract and or tort. The court procedures and these tests provide sufficient protection as it is, and there is no reason to cloud a service that is highly paid for by retaining immunity. It is suggested that the qualified immunity of arbitrators creates problems, has no solid justifications and should be abolished.

DUTY OF CARE – HAUNTING PAST, UNCERTAIN FUTURE

JESSICA RANDELL[*]

This paper examines the tests formulated by Courts to determine the question of the duty of care, which asks whether a person is in such a relationship with another, that care should be taken to avoid injuring that other. The first test formulated in Donoghue v Stevenson is regarded as simplistic and limited in scope. Subsequently, the test deployed in the Anns case is criticised as very broad. While the components of the Caparo test are criticised for their vagueness and their emphasis on policy, the paper argues that it could provide a reform alongside the method of incrementalism.

1 INTRODUCTION

The duty of care question asks 'whether or not one person falls within a *legal relationship* with another such that care should be taken to avoid injuring that other'.[1] The first substantial attempt at ascertaining an answer to this question was in *Donoghue v Stevenson*[2] via Lord Atkin's Neighbour Principle;[3] in that 'you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour'.[4] Later, in *Anns v Merton London Borough Council*,[5] Lord Wilberforce expounded a two-stage test for ascertaining duty; in that there must be a 'sufficient relationship of proximity or neighbourhood',[6] and, if established, then one must 'consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty'.[7] This was remodelled into a three stage test in *Caparo Industries plc v Dickman*[8] as Lord Bridge pronounced that there must be 'foreseeability of damage',[9] 'a relationship characterised by the law as one of 'proximity' or 'neighbourhood',[10] and, finally, 'the situation should be one in which the court considers it fair, just and reasonable [to acknowledge a duty]'.[11]

It is submitted that the Neighbour Principle was too broadly stated,[12] overly simple and more was required to effectively ascertain a duty of care.[13] However, despite

---

[*] Jessica Randell, Newcastle University, LLB (Hons) Law.
[1] Christian Whitting, 'Duty of Care: An Analytical Approach' (2005) 25 OJLS 33, 35.
[2] [1932] AC 562.
[3] ibid [580] (Lord Atkin).
[4] ibid.
[5] [1978] AC 728.
[6] ibid [753] (Lord Wilberforce).
[7] ibid [754] (Lord Wilberforce).
[8] [1990] 1 ALL ER 568.
[9] ibid [617] (Lord Bridge).
[10] ibid [618] (Lord Bridge).
[11] ibid.
[12] *British Virgin Islands v Hartwell* [2004] 1 WLR 1273 [21] (Lord Nicholls).
[13] Michael P Reynolds, 'The rise and fall of the Atkin doctrine: searching for a will-o'-the-wisp' [2004] Const L J 105, 110.

development through the *Anns*[14] and *Caparo*[15] tests, these still rightly face criticism. In fact, the latter two tests are so similar; the 'first two elements in *Caparo* are equivalent to the first stage of the [*Anns*] test while the third element coincides with the second stage of the [*Anns*] test';[16] that they should both present comparable results[17] and face similar criticisms. However, its flaws does not mean that the *Caparo* test should be referred to as 'unduly complicated' as the principle has existed and been followed, in regurgitated forms, for many years.

Despite the similarities of the two tests, it would have been unproductive to retain the *Anns* test as it substantially existed in the form of the three stage test but, most importantly, because a change in attitude towards duty came with *Caparo.*[18] It is this attitude which justifies the test's flaws; including that the language used is linguistically deficient and there is a disproportionate weighting attached to policy considerations. It is submitted that the latter shortcoming may also need justifying through the use of another approach acting in parallel to the *Caparo* test;[19] that of incrementalism. In addition, *Anns* was rightly overruled as the extension of the duty question from positive acts causing physical harm, seen in *Donoghue*, to cases of economic loss, as was the situation in *Anns,* was too controversial.[20]

There are several tests being applied to the duty question today.[21] An approach, or approaches, must be decided upon so that the outcome of cases can be predicted, the lower appellate courts can follow previous decisions and clear, justified categories of when a duty applies can be established.[22] Reform will, therefore, be suggested for this area of law.

2 EVOLUTION AND ASSESSMENT OF CASE LAW

Lord Atkin, originally influenced by Chief Judge Cardozo of the New York Court of Appeals[23] and the judgments of Lord Esher (then Brett M.R)[24] and Smith L.J,[25] explained that a duty of care concept must not be too broad. This is because 'the more general the definition the more likely it is to omit essentials or to introduce non-essentials'[26] but, if sufficiently limited, it can act as a guide in determining duty.[27]

---

[14] [1978] AC 728.
[15] [1990] 1 ALL ER 568.
[16] Ter Kah Leng 'The search for a single formulation for the duty of care: back to Anns' [2007] Prof Negl 218, 226.
[17] *Stovin v Wise* [1996] AC 923 [949] (Lord Hoffman).
[18] S Deakin, A Johnston, B Markesinis, *Markesinis and Deakin's Tort Law* (OUP 6th edn 2008) 131.
[19] Leng (n 16) 225.
[20] ibid.
[21] Leng (n 16) 218.
[22] John Hartshorne, 'Confusion, contradiction and chaos within the House of Lords post Caparo v Dickman' (2008) 16 Tort L Rev 8, 9.
[23] Reynolds (n 13) 108.
[24] *Heaven v Pender* (1883) 11 QBD 503.
[25] *Le Lievre v Gould* [1893] 1 QB 491.
[26] *Donoghue v Stevenson* (n 2).
[27] ibid.

However, the Neighbour Principle was *not* sufficiently limited as the phraseology, 'reasonably foreseeable'[28] is too simplistic and can, therefore, encompass any number of scenarios.[29] Such open language of any requirement 'give[s] judges limited concrete guidance and considerable discretion'.[30] This leads to an inconsistent application of the principle[31] which prevents legal certainty.

Lord Atkin even stated that 'there will no doubt arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises'.[32] In accepting that this principle applies easily to the facts before him, but possibly not to others,[33] it is conceivable that he had not intended for this principle to be applied strictly. Or, at least, that it 'would [not] have been something [he] would have thought would stand for all time',[34] particularly given his levels of creativity and, thus, possible creativity of others in developing further tests.[35] Lord Atkin's 'biblical'[36] principle's main limitation can be exemplified by reference to its scope. The principle was meant to apply solely to positive physical acts,[37] which is why there is less reliance on it than there first appears.[38] Consequently, we rightly moved away from the Neighbour Principle, and its inherent vagueness, to the *Anns* test, as this simple assessment of 'reasonable foreseeability' based solely on positive acts occasioning physical harm was deemed inadequate.[39]

The later controversy surrounding the *Anns* test linked directly to the limited scope of the Neighbour Principle. The facts of *Anns* concern pure economic loss and 'omissions, like economic loss, are notoriously a category of conduct in which Lord Atkin's generalisation…offers limited help'.[40] This 'increasingly deprecated'[41] test was, therefore, overruled in the case of *Murphy v Brentwood District Council*[42] on the basis that 'it seem[ed] to have escaped… lawyers' attention…that damage consisting of pure economic loss was irrecoverable in the tort of negligence'[43] and that there was no earlier authority to justify this expansion.[44] This 'unduly'[45] extension could potentially have opened the floodgates to 'a large number of unmeritorious and

[28] ibid.
[29] *British Virgin Islands v Hartwell* (n 12) [21] (Lord Nicholls).
[30] Keith Stanton, 'Professional negligence: duty of care methodology in the twenty first century' [2006] Prof Negl 134, 136.
[31] Whitting (n 1) 34.
[32] *Donoghue v Stevenson* (n 2).
[33] ibid.
[34] Reynolds (n 13) 108.
[35] ibid.
[36] Reynolds(n 13) 108.
[37] Tony Weir, *Tort Law* (Clarendon Law Series) (OUP 2002) 33.
[38] W V H Rogers, '*Winfield and Jolowicz on Tort'* (Thomson Reuters 18th edn 2010) 158.
[39] Reynolds (n 13) 110.
[40] *Stovin v Wise* (n 17) [943] (Lord Hoffman).
[41] Hartshorne (n 22) 9.
[42] [1991] 1 AC 398.
[43] Reynolds (n 13) 111.
[44] *Murphy v Brentwood District Council* [1991] 1 AC 398 [489] (Lord Oliver).
[45] Weir (n 37) 34.

potentially oppressive claims for compensation'[46] and radical applications of it[47] led to the tests demise.[48] Therefore, the courts continued to apply the *Caparo* test which had, in essence, been in existence throughout the 'retreat' from *Anns;* a retreat which can be seen to begin as far back as the dissenting judgment in *Junior Books v Vietchi.*[49]

The *Caparo* three stage test focusses on foreseeability, proximity and what is just, fair and reasonable. Bearing in mind the critique of the phrase 'reasonably foreseeable' above, the latter two limbs of *Caparo* will now be assessed in line with similar, linguistic criticisms. With regards to proximity; it is 'not an easy notion to apply figuratively, any more than the cognate notion of "neighbour"',[50] thus the ambiguity of the language is still apparent.[51] The difference is that proximity has now been promoted to its own heading of application, supposedly giving it more weight,[52] but it is still a 'slippery word'[53] incapable of definition and easy application.[54] Proximity is not 'a concept with its own, objectively identifiable characteristics'[55] primarily because it is intrinsically linked to the third limb; in that the two parties *must be* sufficiently proximate (Latin for closeness)[56] to make it just, fair and reasonable for a duty of care to be owed.[57] In addition, with the choice of the words used in the third limb - all of which appear to have the same vague definition as one another[58] - the test can, again, apply to most situations; as it is unlikely that a result will be decided upon that is unjust, unfair or unreasonable.[59] A lack of legal certainty through the gratuitous increase of judicial discretion in the test's application is, therefore, apparent once more.[60]

Also with the third limb of *Caparo* there is an imbalanced focus on policy considerations[61] and their effect on duty. Such considerations, when disproportionately focussed upon under the 'shroud' of the third limb,[62] should be left to Parliament.[63] Review of these by the Court may thwart their quest for corrective

[46] Deakin, Johnston, Markesinis (n 18) 127.
[47] *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520.
[48] Rogers (n 38) 127.
[49] [1983] 1 AC 520 [551] (Brandon LJ).
[50] Weir (n 37) 35.
[51] Deakin, Johnston, Markesinis (n 18) 128.
[52] Whitting, (n 1) 34.
[53] *Stovin v Wise* (n 17) [931] (Lord Nicholls).
[54] ibid [937] (Lord Nicholls).
[55] ibid [932] (Lord Nicholls).
[56] Weir (n 37) 35.
[57] *Stovin v Wise* (n 17) [932] (Lord Nicholls).
[58] Weir (n 37) 41.
[59] ibid.
[60] Stanton (n 30) 136.
[61] Leng (n 16) 226.
[62] Stanton (n 30) 137.
[63] *McLoughlin v O'Brian* [1983] 1 AC 410 [110] (Lord Scarman).

justice[64] as a claim may be denied solely on the basis of policy when, otherwise, it would have succeeded;[65] which may not result in righting any wrongs that have occurred. There is also a focus on the effect of the outcome of the case on parties other than the claimant and the defendant; who should be the sole priority of the court when seeking justice.[66] In addition, judicial reasoning should not be excessively based on policy as it relies on the prediction of future behaviour[67] and forgets that there are different, conflicting policies that could be applied;[68] thus, *again*, augmenting the use of judicial discretion and subsequent legal uncertainty; which seems to be a recurring theme throughout all of the three tests.

3 CAPARO AS A POSITIVE?

Despite the above criticisms; *Caparo* has resulted in a 'far more considered approach'[69] to the duty question. Now, there is a focus on the *impact* of expanding this area of law and on the application of the test to novel cases, but only if they can be analogised to similar cases;[70] thus creating a secure legal foundation for decisions. When coupled with this change the weaknesses *Caparo* presents can be seen as positives. With regards to the broad phraseology; if there is a safeguard in place assessing any impact that invoking the test may bring about then this should prevent an extension of the type seen in *Anns.* Plus, the indefinable language which can apply to multiple scenarios can be seen as a benefit as, after all, 'the categories of negligence are never closed'[71] and formulating an all-encompassing test to cover all possible scenarios is nigh on impossible.[72] In addition, with respect to attaching undue weight to policy considerations; this could be combatted with the introduction of another approach alongside *Caparo* to limit judicial discretion; this will be discussed below with regards to reform. It seems that *Caparo* could be providing us with 'a set of fairly blunt tools'[73] with which to assess the duty question and if 'it marks the start of analysis'[74] then this could be developed into an effective test.

4 POSSIBLE REFORM

The *Caparo* test *is* the 'dominant modern "general" test'[75] but we have more than one approach.[76] One of these which could work alongside *Caparo* is incrementalism.

---

[64] Richard Mullender, 'Negligence, The Pursuit of Justice and the House of Lords' (1996) 4 Tort L Rev 9, 11.
[65] ibid.
[66] Whitting (n 1) 38.
[67] ibid 62.
[68] ibid.
[69] Stanton (n 30) 135.
[70] Deakin, Johnston, Markesinis (n 18) 131.
[71] *Donoghue v Stevenson* (n 2) [619] (Lord MacMillan).
[72] Leng (n 16) 227.
[73] *Customs & Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 [209] (Lord Walker).
[74] Deakin, Johnston, Markesinis (n 18) 130.
[75] Stanton (n 30) 135.
[76] ibid 134.

Incrementalism, in its narrowest form,[77] is the 'cautious development of the law founded on analogies to similar fact situations which have been considered in previous cases'.[78] It has its origins in Australian case law[79] and was approved in *Caparo.*[80] In its widest form,[81] incrementalism can be seen in *Anns*; 'in order to establish that a duty of care arises…it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist'.[82] This wider approach, instead of closely analogising previous case law, uses them as a guide.[83] It is suggested, on this basis, that whilst the narrow approach may not be as ideal for novel cases as it is with the wide approach, it is still 'receptive to them'[84] and, regardless, the courts should not 'create at large new principles'.[85] This was later qualified in *Anns* as Lord Wilberforce 'tempered'[86] his own statement of wide incrementalism by introducing the two-stage test.[87]

Narrow incrementalism could, therefore, act as a safeguard against the disproportionate application of policy considerations; as if the courts proceed with a 'degree of doctrine-boundness'[88] then their reasoning can be evidenced in a clear and substantiated fashion. It will 'take time to achieve a radical change of approach in lawyers',[89] however; this twin track system of approaches could work. The *Caparo* test would be applied but only in so far as the outcome would result in the law being incrementally developed in such a way that is strictly in line with previous authority relating to policy considerations. This would bring about consistency of application and help to abandon the criticisms that *Caparo* has when it stands alone.

5 CONCLUSION

'Formulas for torts are not easy to create',[90] and 'to search for any single formula [to] serve as a general test of liability is to pursue a will-o'-the-wisp'.[91] However, a '*single* formula' is not being suggested. Instead, the *Caparo* test, with its change in attitude to the duty question, alongside the approach of incrementalism to combat overuse of policy considerations, could provide the answer we seek. Retaining the *Anns* test would not have provided the same outcome, nor would the over-simple Neighbour

[77] Dolding and Mullender, 'Tort Law, Incrementalism, And The House of Lords' (1996) 47 NILQ 12, 16.
[78] Stanton (n 30) 141.
[79] *Sutherland Shire Council v Heyman* [1955-95] PNLR 238 [284] (Lord Brennan).
[80] *Caparo Industries plc v Dickman* (n 8) [617] (Lord Bridge).
[81] Dolding and Mullender (n 77) 15.
[82] *Anns v Merton London Borough* (n 5) [751] (Lord Wilberforce).
[83] Dolding and Mullender (n 77) 16.
[84] ibid.
[85] *Murphy v Brentwood District Council* (n 44) [492] (Lord Oliver).
[86] Dolding and Mullender (n 77) 15.
[87] ibid 16.
[88] ibid 17.
[89] Stanton (n 30) 149.
[90] Reynolds (n 13) 110.
[91] *Caparo Industries plc v Dickman* (n 8) [633] (Lord Oliver).

Principle; instead the suggested changes should 're-establish a degree of certainty in this field of law',[92] which is so desperately required.

[92] Stanton (n 30) 225.

THE CODIFICATION OF JUDGE-MADE NORMS IN THE CRIMINAL LAW: A RESPONSE TO THE LAW COMMISSION REPORTS

JACK VERBRUGGEN[*]

This paper addresses the contemporary scheme of codification in England and Wales. Several Law Commission Reports have endeavoured to replace most of the common law principles by a codified system of law. The purpose of this paper is to demonstrate the impracticability of effectively transplanting a judge-made norm into a codified norm. A possible reason has to do with the fact the codifiers cannot structurally accommodate a judge-made norm into a codified norm without altering its normative content.

1 INTRODUCTION

Two Law Commission Reports have highlighted the necessity of codifying the criminal law.[1] The quest for a tangible code is part of a general drive to remedy for the inadequacies of judge-made norms as a source of the criminal law. Inter alia, proponents of codification argued that judge-made norms fail to uphold the principle of legality.[2] The codifiers suggested that judge-made norms fail to uphold the principle of legality in two important respects. On the one hand, judge-made norms lack 'cognoscibility'. That is, they do not exist in a form that could easily be understood by everyone.[3] On the other hand, judge-made norms fall short in terms of 'accessibility' for they are not 'readily available to everyone'.[4] On a general level then, only a small group of judges and lawyers are able to know whether the law support their expectations.[5]

In contrast, codified norms are both cognoscible and accessible. They are cognoscible for a code exists in a form that is available to everyone. Similarly, they are accessible because they are written down.[6] Accordingly, codified rules give the individual the possibility of free choice: through codified rules, the citizen has the possibility to

[*] Jack Verbruggen, Newcastle University, LLB (Hons) Law.
Note from author: I am grateful to Shamini Ragavan for her helpful remarks on early drafts of this article. I am also indebted to Richard Mullender for educating me in relation to essay writing techniques.

[1] Law Commission, 'Criminal Law – Codification of Criminal Law – A Report to the Commission' (Law Com No 143, 1985); Law Commission, 'Criminal Law – A Criminal Code for England and Wales' (Law Com No 177, 1989).
[2] Law Commission, 'Criminal Law – A Criminal Code for England and Wales' (Law Com No 177, 1989), 2.2.
[3] ibid.
[4] ibid 2.
[5] Dean Alfange, Jr., 'Jeremy Bentham and the Codification of Law' (1969-1970) 55 Cornell L Rev 58, 60.
[6] Lord Bingham of Cornhill, 'A Criminal Code: Must We Wait for Ever?' (1998) Crim LR 694, 695.

choose between what is permitted and what is prohibited.[7] The interest of liberty as such is an interest in having as many possible with respect to various kinds of actions, omission and possession.[8] This possibility of 'free choice' is central to the principle of legality for 'no liability should be imposed on an individual unless the individual has chosen to commit a criminal offence'.[9] That is, it 'should give fair warning to citizens of the conduct which the state prohibits'.[10] On this basis, it is the desire to bring the criminal law within the ken of the layman that motivates the nurturing of a code.

It is crucial to appreciate that the codification project suggested by the Law Commission concerns structural reforms, as opposed to substantive reforms of the criminal law. Indeed, the codifiers were 'not concerned with law reform, but with codification simpliciter'.[11] This is because 'the fundamental principles of the law are well settled and it would be neither politically feasible nor desirable to depart from them'.[12] Since the codification enterprise (at least in this context) concerns structural reforms, it is necessary to approach a criminal norm from a structural perspective. Accordingly, it is useful to draw a distinction between two dimensions that exist within a legal norm. The first dimension is that of the organic identity. This amounts to the form under which a norm exists (e.g. judge-made norms are unwritten). The second dimension is that of the normative space of a given norm, which concerns the legal content of a norm (e.g. this ranges from broad legal principles to specific policy considerations). It is the combination of these two dimensions that constitute the basic structure of a norm. If one applies this new architecture in the light of the codification project, it becomes evident that the codifiers aimed to change the organic identity of judge-made norms (i.e. the form in which judge-made law exists) while preserving its normative space (i.e. the common law principles). This reform secures the principle of legality and at the same time preserves the content of the law. The question at issue is then to determine whether a structural reform of judge-made norms could preserve the common law principles and simultaneously uphold the principle of legality.

The seminal thesis of this paper is that the organic identity of codified norms constitutes a fatal blow to the scheme of codification. It should be appreciated that, while these Reports date back to the 1980s, they remain relevant today for they constitute a milestone in the code's progression. Indeed, subsequent Reports have dwelled upon these two Reports to propose codifications on specific areas of the criminal law.[13] This paper will assess the codification project by reference to one

[7] Herbert Hart, *Punishment and Responsibility* (Oxford, 1968) 10-20.
[8] Joel Feinberg, *Harm to Others – The Moral Limits of the Criminal Law* (OUP 1984) 207.
[9] Alfange (n 5) 67.
[10] Ian Dennis, 'The Critical Condition of the Criminal Law' (1997) 50 CLP 213, 216; Andrew Ashworth, *Principles of Criminal Law*, (2nd edn, OUP, 1995) 67.
[11] Celia Wells, 'Codification of the criminal law – Part 4: Restatement or reform''(1986) Crim LR 314, 314.
[12] Law Commission, 'Criminal Law – Codification of Criminal Law – A Report to the Commission' (n 1) 1.10.
[13] Law Commission, 'Legislating the Criminal Code: Intoxication and Criminal Liability' (Law Com No 229, 1995); Law Commission, 'Legalising the Criminal Code: Involuntary Manslaughter' (Law

specific sphere of the criminal law, namely the area of intoxication.[14] This paper highlights how the Report on intoxication structurally transplants the Majewski decision into a codified norm and analyses whether this structural transformation is in line with its objectives. The aim of this paper is not to defend the rationale for the Majewski decision. Rather, its objective is to analyse the ramifications on the content of the decision as a result of a change in its organic identity. Approaching codification from this perspective sheds light on the limits of the codification project in (at least) three respects:

It is structurally impracticable to alter the organic identity of a judge-made norm and preserve its normative space. The organic identity of a codified norm is such that it will inevitably prioritise certain normative considerations; thereby altering the normative space of Majewski. Since the normative space of Majewski has not been effectively transplanted into a new organic identity, there are serious doubts as to the application of the principle of legality in such instances.

No codified norm is linguistically powerful enough to cure this defect. The normative space of a judge-made norm often conceals subtle distinctions that dismiss any linguistic antidotes. As a result, the new organic identity of the codified norm does not represent the exact scope of the normative considerations that exist in the Majewski decision.

The interpretative framework aimed at constraining judicial interpretation of the code is unsatisfactory. The codifiers proposed rules of interpretation that failed to reach an adequate balance between two key concerns. One the one hand, it is necessary to allow judicial discretion to correct the linguistic deficiencies of the code. On the other hand, it is equally necessary to ensure that judicial interpretation ought to be constrained to the normative space of a previous decision if it is to uphold the principle of legality.

One cannot, therefore, conclude that the structural transformations advocated by the codifiers would be successful.

2 THE CORE OF JUDGE-MADE NORMS

2.1 Rethinking Judge-Made Norms

When one approaches codification from a structural perspective, a preliminary task is to provide a structural comparison between judge-made norms and codified norms.

Judge-made norms and codified norms do not possess the same organic identity. From a structural viewpoint, this statement has broader implications than merely saying that

Com No 237, 1996); Law Commission, 'Legalising the Criminal Code: Offences Against the Person and General Principles' (Law Com No 218, 1993).

[14] Law Commission, 'Legislating the Criminal Code: Intoxication and Criminal Liability' (n 13).

judge-made norms are unwritten, while codified norms are written down. Looking at judge-made norms, it also suggests that judge-made norms (qua unwritten) can include normative considerations without necessarily prioritising any of them. These normative elements exist within different judgments of a judicial decision and no judgment within a same decision is intrinsically superior over another. It equally means that because codified norms are written down, they will always exercise some sort of priority among different normative considerations. Unlike judge-made norms, codified norms cannot simply accommodate all normative considerations, for a codified norm is reduced to a couple of sentences. A codified norm inevitably must make 'editorial choices' by prioritising certain normative elements over others. When the codifiers argue that a judge-made norm can simply be transplanted into a codified norm, they also presume that the codified norm can assume the normative elements of a judge-made norm. This is problematic since the codifiers fail to appreciate that judge-made norms and codified norms do not possess the same organic identity. The organic identity of a codified norm is more restrictive than that of a judge-made norm.

A prominent feature of the first type of norms (i.e. judge-made norms) is that its normative considerations are incommensurable. Incommensurability (at least in this context) occurs where normative considerations cannot be aligned along a standard of valuation without doing violence to the considered judgments about how those goods are to be characterised.[15] In the context of law, incommensurability means that some normative considerations (e.g. policy arguments) are not deemed superior over others. Majewski provides a useful illustration of how these policy arguments are incommensurable. Herring correctly notes that Majewski is heavily based upon policy rather than some overreaching logic.[16] This statement can be illustrated by reference to Lord Simon of Glaisdale and Lord Elwyn-Jones' respective judgments.

Looking at Lord Simon of Glaisdale, His Lordship placed emphasis on the protection of the public.[17] He asserted that the criminal law provides for 'the protection from certain proscribed conduct of persons who are pursuing their lawful lives'.[18] He went on to say that there are situations where violence could be the consequence of alcohol or drugs, both of which obliterate the capacity of the perpetuator to know what he was doing or what the consequences of his actions were.[19] Since 'unprovoked violence' falls within the ambit of 'such proscribed conduct', then intoxication could not constitute a valid defence, as otherwise it would 'leave the citizen legally unprotected'. [20] In contrast, it is the perceived justice and morality of convicting an intoxicated offender that transpires from Lord Elwyn-Jones's judgment.[21] His Lordship highlighted that 'recklessness is enough to constitute the necessary mens rea

[15] Cass Sunstein, 'Incommensurability and Valuation in Law' (1993-1994) 92 Mich L Rev 779, 796.
[16] Jonathan Herring, *Criminal Law* (7th edn, Palgrave MacMillan Law Masters, 2011) 123.
[17] Law Commission, 'Legislating the Criminal Code: Intoxication and Criminal Liability' (n 13) 3.12.
[18] *Majewski* (1977) AC 443, 272.
[19] ibid.
[20] ibid.
[21] Law Commission, 'Legislating the Criminal Code: Intoxication and Criminal Liability' (n 13) 3.13.

in assault cases'.[22] He went on to argue that to reduce oneself by drugs and drinks to a condition where one casts off the restraints of reason and conscience is sufficient to amount to the mens rea requirement.[23] Thus, he concluded that 'no wrong is done to him [the defendant] by holding him answerable criminally for any injury he may do while in that condition'.[24] Notably, while both Their Lordships dismissed the appeal, they endorsed different policy rationales to support their conclusion. There is room to suggest that these two judgments are incommensurable, for both judgments supported the same conclusion (i.e. dismissing the appeal), but no policy reason that supports this decision is deemed legally superior over the other.

An important characteristic of the second type of norms (i.e. codified norms) is that their normative space is inevitably commensurable. Approaching codified norms from a structural perspective shows that codified norms cannot structurally preserve the incommensurability of normative considerations. This is because codified norms possess a standard of valuation. Standard of valuation refers to the 'comparison of different goods along the same dimension'.[25] One example could be money. Ten dollars and one hundred dollars can be measured by such a standard: ten dollars is a smaller quantity of the same thing of which one hundred dollars is a substantial amount.[26] One can easily apply this example in law. Judge-made norms do not possess a standard of valuation, for no judgment is deemed superior over the other. This does not mean that it is not possible to choose between different judgments. Indeed, one could prioritise the protection of the public over ethical considerations and vice versa. Rather, it argues that it is an external standard such as Parliament or a subsequent decision that will take the role of a standard of valuation. However, the situation is different with codified norms. Since a codified norm cannot structurally lay down all normative considerations, a code inevitably needs to refer to some sort of external standard when it prioritises certain normative considerations over others. There cannot be reference to the two policy considerations, for a codified norm cannot structurally include them.

An argument could be made that, in the present context, the standard of valuation has taken the form of the principle of legality. Indeed, a close look at the methodology used reveals how the code makes 'editorial choices' by reference to the principle of legality. It is this principle of legality that decides which normative elements need to be laid down in the codified norm. Looking at the methodology, the proposed Code will encompass only the 'gravest crimes' (as opposed to all criminal offences).[27] The codifiers' rationale echoes the principle of legality: 'a code that contained several

[22] *Majewski* (n 18) 270.
[23] ibid.
[24] ibid.
[25] Elizabeth Anderson, *Value in Ethics and Economics* (Harvard University Press 1993) 796.
[26] ibid.
[27] Law Commission, 'Criminal Law – Codification of Criminal Law – A Report to the Commission'(n 1) 1.4.

thousands of offences would be […] impossibly too bulky for the citizens'.[28] Similarly, when it comes to determining which offences will be incorporated, the codifiers respond that the 'governing principle is that of convenience of the users'.[29] Finally, the codifiers stressed that they specifically refused to include certain offences because those offences, standing alone, would be meaningless (e.g. road traffic offences).[30] Once again, they have due regard to the principle of legality in that the code would require 'cross-referencing that would in any case throw the user back to the other legislation'.[31] Accordingly, legality furnishes a single metric according to which normative elements can be evaluated. This is not to suggest that the codifiers have pushed the principle of legality too far. It simply means that a standard of valuation is inherent in the organic identity of a codified norm. When the codifiers make an organic transformation from a judge-made norm into a codified norm, they must inevitably establish this standard of valuation. In this context, it merely happens to take the form of legality. The problem is that it is precisely this standard of valuation that makes the normative elements commensurable. Plainly, this raises serious doubts as to the credibility of the restatement project. Thus, it is the standard of valuation that prevents codified norms from restating the normative considerations of judge-made norms completely.

Does the same reasoning apply in the context of the transplantation of the norms themselves? The next sections demonstrate precisely how the codifiers have failed to transplant the normative space of a judge-made norm into a codified norm.

2.2 The Requirement of Generality

The fact that the codified norms exhibit a strong commitment to generality vividly illustrates how the standard of valuation distorts the normative space of Majewski. A main difference between judge-made norms and codified norms is that judicial decisions relate to specific cases whereas legislation is general.[32] Viewed from a structural perspective, transforming a judge-made norm into a general rule is a complicated task.[33] The codifier must look at the case as a whole and distinguish legal principles from factual peculiarities of the case.[34] In the context of Majewski, the challenge for the codifiers is to leave out specific factual considerations of the decision (e.g. the fact that the case concerned a brawl in a public house) and simultaneously preserve the legal principles of the very same decision (e.g. evidence of intoxication may provide a partial denial of the necessary mens rea).

[28] ibid.
[29] ibid 2.10.
[30] ibid 2.11.
[31] ibid 2.10.
[32] Hunk Lücke, 'The common law: judicial impartiality and judge-made law' (1982) 98 LQ.R 29, 36.
[33] Gabriel Hallevy, *A Modern Treatise on the Principle of Legality in Criminal Law* (Springer 2010) 29.
[34] ibid 30.

One must not go very far to appreciate the efforts of the codifiers to attain this level of generality. The first section of the Draft Bill on the effects of intoxication on criminal liability reads:

> (1) This section applies where it is alleged that any mental element of an offence was present at any material time in the case of a person who was then intoxicated.[35]
>
> (2) If the person's intoxication was voluntary and the allegation is in substance an allegation that at the material time he–
> acted intentionally with respect to a particular result,
> had a particular purpose in acting in a particular way,
> had a particular knowledge or belief or,
> acted fraudulently or dishonestly,
> evidence of his intoxication may be taken into account in determining whether the allegation has been proved.[36]

It is interesting to note that that (1) and (2) include a different level of generality. Looking at (1), there is room to suggest that the draft section seems more general than the original Majewski decision. While the facts of Majewski concerned one particular type of mens rea (i.e. recklessness), this codified section applies to 'any mental element'. Similarly, the specificity of the offences involved in Majewski (i.e. assault occasioning actual bodily harm) is replaced by a general proposition, namely 'an offence'. In contrast, the second part of the same section does not include the same level of generality. Looking at (2), it seems that the draft section is paradoxically both more general and more specific than the Majewski decision. It is more general because, for instance, it refers to 'a particular result', while the Majewski case involved one specific result, namely assaulting people. It is equally more specific as its last subsection reads 'fraudulently or dishonestly'. The codifiers noted that offences of dishonesty appeared to be regarded as offences of specific intent in Majewski.[37] Nonetheless, it seems that the codified norm is more specific than Majewski in that it refers specifically to 'fraudulently' and 'dishonestly'. Notably, the codified norm (1) exhibits a higher level of generality than the codified norm (2).

Proponents of codification could perhaps argue that the normative space of a specific judge-made norm has been successfully transformed into that of a general codified norm. Indeed, whilst (1) is perhaps more general than (2), it shall be appreciated that both norms remain nonetheless more general than the Majewski provisions. In other words, the codifiers seem to have effectively left out the peculiar facts of the case, while preserving the normative space of the Majewski decision. However, embracing

[35] Law Commission, 'Legislating the Criminal Code: Intoxication and Criminal Liability' (n 13) 100-102.
[36] ibid.
[37] ibid 6.18.

such optimism is problematic.[38] As one commentator observed: 'one difficulty inherent in the articulation of such rules is that each one of the facts of a case is usually capable of being stated at various levels of generality'.[39] It seems doubtful, therefore, to suggest that the new codifier norm represents the normative space of the judge-made norm, for this codified norm operates under a broad spectrum of generality. The problem is that 'the possible levels of generality and, particularly, the possible combinations of all the facts of cases described at different levels must be almost limitless'.[40] It follows that the code is incapable of attaining a uniform degree of generality among its codified norms. The codifiers present no rationale that could justify such a lack of generality. Thus, the problem with s. 1 of the draft bill is simply that there is no normative stability in the new codified norm.[41]

The failure to reach an absolute level of generality is however not fatal when it comes to the principle of legality. Indeed, a codified norm must not exhibit an absolute level of generality to uphold the principle of legality. Fuller argues that absolute compliance with his eight principles (i.e. including the generality of law) is 'not actually a useful target for guiding the impulse toward legality'.[42] Instead, one must understand 'law' and 'legal systems' by the way in which they approximate to a certain archetype.[43] The archetype is the idea of total compliance with Fuller's eight principles of the rule of law.[44] It follows that absolute generality is not a requirement for legality; 'all legal systems will fall short of this archetype to a greater or lesser extent'.[45] On this basis then, the codifiers would fall short of restating precisely the judge-made norm, but would nonetheless be successful in upholding the principle of legality.

Yet, the codified norm does not seem to be compatible with the principle of legality if one appreciates that Fuller equally argued that the law must act 'impersonally' and that those rules 'must apply to general classes [of individuals] and should contain no proper names'.[46] The problem with the codifiers is that they fail to appreciate that a codified norm cannot remove a certain degree of specificity of individuals.[47] Arguably, a consequence of dealing with specific cases is that it deals with a specific group of individuals.[48] It follows that a particular group of individuals will always be part of the normative space of judge-made norms. Alldridge powerfully notes that

[38] Herbert F. Goodrich, 'Restatement and Codification' in A. Reepy (ed), *David Dudley Field: centenary essays: celebrating one hundred years of legal reform* (William S. Hein & Co. Inc. 2000) 242-243.
[39] Julius Stone, 'The Ratio of the Ratio Decidendi' (1959) 22 MLR 597, 603.
[40] Lücke (n 32) 39.
[41] Peter Alldridge, 'Making Criminal Law Known' in Stephen Shute, *Criminal Law Theory – Doctrines of the General Part* (Oxford University Press 2002) 103.
[42] Lon Fuller, *The Morality of Law* (Yale University Press 1964) 41.
[43] Nigel Simmonds, 'Straightforwardly false: the collapse of Kramer's positivism' (2004) CLJ 98, 118.
[44] ibid.
[45] ibid.
[46] Fuller (n 42) 47.
[47] Alldridge (n 41) 489.
[48] George P. Fletcher, *Rethinking Criminal Law* (OUP 2000) 423.

there is a 'body of rules of criminal law that cannot be expressed as permissive or mandatory norms of conduct directed towards the population as a whole'.[49] This is because they deal with the issue of responsibility.[50] As Lucas notes, the formal requirement of generality does not preclude a covert particularity of application, which entirely defeats the spirit of the ideal rule of law.[51] The codified norm essentially suggests that one could commit a criminal offence if one is not a responsible actor (i.e. provided one was intoxicated). Conversely, the codified norm implies that one could not commit a criminal offence if one is a responsible actor. Alldrige rightly concludes that this approach is problematic: the codified norm 'lack(s) the most elementary quality of a rule of conduct, which is that action is capable of being taken by reference to it'.[52]

2.3 Is Formal Publicity Absolute?

Approaching judge-made norms from a structural viewpoint is illuminating as it casts doubts on the practicability of the codification project. Indeed, the organic identity of a codified norm does not seem to marry well with the normative space of a judge-made norm. Yet, one could dismiss the relevance of this analysis by prioritising the aims of codification. As this paper explained in the introduction, the purpose of codifiers was twofold: codifying judge-made norms and upholding the principle of legality. This suggestion perhaps echoes Lavery when she argued that 'it is the concept of legality which could viably assume the legitimising role of the end to be achieved'.[53] This statement counter-argues the potential problem that the principle of legality has taken the role of the standard of valuation. On this view, legality becomes the end of codification per se and the organic difference between judge-made norms and codified norms becomes merely accessory.

Yet, the analysis proposed regarding the structural analysis of judge-made norm does not simply reveal inconsistencies in the new codified norm. The analysis is also helpful in that it demonstrates that the principle of legality is in fact not absolute in all situations. A structural analysis of how the codifiers publicise (as opposed to generalise) the codified norm highlights the difficulties of the codification project. The problem is that codification cannot structurally publicise both the ratio decidendi and the legal principles. Indeed, the codifier must inevitably choose among those normative elements, for the raison d'être of a codified norm is to provide an accessible written statement of the law. In order to publicise a judge-made norm, the codifiers must then separate the ratio decidendi from the other legal principles.[54] In this context, the codifiers highlighted the ratio decidendi and left out other legal principles

[49] Peter Alldridge, 'Rules for Courts and Rules for Citizens' (1990) 10 OJLS 487, 489 [hereinafter Alldridge Rules for Courts].
[50] ibid.
[51] John Lucas, *The Principles of Politics* (Oxford University Press 1985) 115-116.
[52] Alldridge Rules for Courts (n 49) 490.
[53] Jenny Lavery, 'Codification of the Criminal Law: An Attainable Ideal?' (2010) 74 J Crim L 557, 563.
[54] Hallevy (n 33) 62.

(such as obiter comments).[55] It follows that the principle of legality has simply no application in such situations, for the codified norm does not represent a complete picture of the range of normative considerations that existed under the judge-made norm. Three lines of arguments, all fallacious, have tended to cast doubt on the validity of this assertion.

The first argument is that the law must be open and adequately publicised.[56] If law is to guide citizens, then citizens must be able to find out what the law is.[57] A rudimentary response is that there is simply no point in directing a norm to someone who is intoxicated. For the defendant could not have checked the law in advance and therefore could not have acted by reference to it. Nonetheless, intellectual honesty requires pushing the argument further and trying to disclose more specific reasons that could justify a change in the organic identity of a judge-made norm. One commentator has argued that publicity takes the form of one further argument, namely efficiency.[58] The efficiency argument is particularly relevant in the context of criminal law as norms guide the individuals in their behaviour without involving the state.[59] Changing the organic identity is then necessary because 'maximum freedom and coercion from state interference is necessary to enable individuals to choose their life plans and pursue their own conception of good'.[60] However, this argument presupposes that the codified norm is itself structurally able to provide effective guidelines. It is unlikely that individuals could choose their life plans without the intervention of the state if the normative elements have been compressed to fit the organic identity of a codified norm. The efficiency, therefore, does not challenge the fact that the principle of legality has no application and is in fact supportive of it.

A second type of argument (which relates directly to criminal law) is that a code provides a starting point for asserting what the law is.[61] The mix of common law and statutes do not presently provide such a starting point.[62] Whilst statutes define many criminal offences, most of the general principles of liability are still to be found in case law.[63] It is therefore not possible to have a complete definition of an offence without having access to common law principles.[64] The main reason, which explains the current state of the criminal law, is that it took a very long time to establish the general principles of criminal liability.[65] Indeed, it is mainly an invention of the second half of the twentieth century (from the 1960s).[66] However, the problem with

[55] ibid.
[56] Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 214.
[57] ibid.
[58] Hallevy (n 33) 26-27.
[59] ibid.
[60] ibid.
[61] Law Commission, 'Criminal Law – A Criminal Code for England and Wales' (n 177) 2.2.
[62] ibid.
[63] Andrew Ashworth, 'Interpreting criminal statutes: a crisis of legality?' (1991) LQR 419, 420.
[64] ibid.
[65] Dennis (n 10) 232-236.
[66] ibid.

the commission lies in its methodology. Since the standard of valuation will lay down the ratio decidendi, it will equally leave out a whole bunch of legal principles and rationales. For example, a codified norm simply cannot be included by reference to the policy considerations that exist to justify the rule. A transformation in the organic identity from a judge-made norm into a codified norm is simply unnecessary, as the codified norm will not provide a definite starting point. Furthermore, since the codifiers did not intend to produce a complete criminal code, one could question the rationale for publishing some normative considerations (such as that of Majewski), while leaving out others (e.g. road traffic offences). The answer seems obvious: laying down a comprehensive version of the criminal law would make the code of 'mammoth proportions',[67] thereby making the code inherently bulky for the citizen.[68] Arguably, such a code would inevitably defeat the accessibility argument. Hence, unless the codifiers are willing to provide a complete criminal code, the starting point argument simply loses its force.

The third type of argument submits that codification is necessary in that laying down criminal norms will reinforce community values.[69] If one accepts that the criminal law is a representation of the community's morality, codified rules would force Holmes' 'bad man' to be confronted to those moral obligations that he desperately tries to avoid.[70] Transforming the organic identity of judge-made norms is therefore necessary to address those who generally seek to escape their social obligations and who are motivated to abide by such obligations only insofar as the obligations are reinforced by threat of legal sanction.[71] The aim is not (at least directly) to improve the level of understanding of the law. Indeed, as Fuller said: 'it would be foolish to try to educate every citizen into the full meaning of every law that might conceivably be applied to him'.[72] Instead, the aim is simply to ensure that citizens have access to the relevant law. However, the argument is simply impracticable. First of all, publishing community values is a particularly complicated task.[73] The codifier would have to commence by defining those 'community values'. Furthermore, it should be appreciated that 'community values' would have to be defined in the light of the Majewski decision. The problem is that the standard of valuation would make editorial choice not by reference to the normative space of the decision (i.e. the different judgments) but by reference to what community value is deemed more appropriate at the time the code is published. For example, there could be a strong commitment towards the protection of the public, which would inevitably leave out

[67] James Andrews, 'Codification of Criminal Offences' (1969) Crim LR 59, 59.
[68] Law Commission, 'Criminal Law – Codification of Criminal Law – A Report to the Commission' (n 1) 2.10.
[69] Meir Dan-Cohen, 'Decisions Rules and Conduct Rules: On Acoustic Separation in Criminal Law' (1983-1984) 97 Harv LR 627, 650.
[70] ibid; Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harv LR 457; Dan-Cohen (n 69) 650; Steven Burton, *'The path of law' and its influence: the legacy of Oliver Wendell Holmes, Jr.* (Cambridge University Press, Cambridge, 2000).
[71] Dan-Cohen (n 69) 650.
[72] Fuller (n 42) 49.
[73] Sunstein (n 15) 795.

the second policy argument. This would not respect the normative space of the Majewski decision. Hence, a codified norm is simply not structurally capable of publishing community values.

2.4 Concluding Remarks

Three conclusions could be drawn from the above discussion. The organic identity of judge-made norms and codified norms differ in that the codified norm possesses a standard of valuation. This standard of valuation inevitably restricts the normative space of Majewski. The codifiers did not successfully transform the normative space of Majewski into a general codified norm. For the normative space of the codified norm includes a certain level of specificity. Publicising criminal norms is simply unnecessary if the codified norm has left out different normative considerations from the normative space of Majewski.

3 THE FORMULATION OF THE CRIMINAL NORM

3.1 The False Virtues of Concision

The previous analysis has demonstrated that a codified norm would structurally leave out legal principles (such as obiter comments), thereby raising serious doubts as to the 'restatement' dimension of the codification project. However, this analysis does not necessarily constitute a fatal blow to the scheme of codification. Indeed, the codifiers could define criminal offences in a way that would preserve the normative space. The challenge for the codifiers is twofold when it comes to the formulation of the criminal norm. On the one hand, the codifiers need to formulate the codified norm in a way that is sufficiently powerful to include the normative space of a judge-made norm. On the other hand, the codifiers must equally provide for linguistic formulations that uphold the principle of legality.

A first distinct linguistic feature proposed by the codifiers is that of concision. The codifiers stressed that they relied on a ‘conventional method of statutory drafting’ and there was therefore no ‘experiment in drafting method’.[74] This is to ensure that users feel that they are dealing with ‘entirely familiar kind of material’ and ‘are comfortable and assured in its use’.[75] Furthermore, the code will encompass one important stylistic feature: clarity.[76] By clarity, the codifiers aim to make the language used ‘as simple as possible’ and include the use of numbered and lettered paragraphs to subdivide complex structures.[77] Finally, the codifiers also included the use of side notes to the text. The rationale put forward is (once again) to facilitate the user’s comprehension.[78] While the codifiers seem to have placed strong emphasis on the second challenge (i.e.

[74] Law Commission, ‘Criminal Law – Codification of Criminal Law – A Report to the Commission’ (n 1) 2.15.
[75] ibid.
[76] ibid 2.16.
[77] ibid 2.17.
[78] ibid.

upholding the principle of legality), there is nothing to suggest that the codifiers have tackled their first objective (i.e. respecting the normative space of the judge-made norm).

The requirement of concision does not marry well with the organic identity of judge-made norms. Majewski illustrates that the 'protection of the public' policy rationale is a broad term that can easily accommodate different sub-considerations. Lord Edmund-Davies identified at least three different dimensions that could fall within his policy argument. His Lordship argued that protecting the public is necessary 'to ensure that members of the community are safeguarded in their persons and property so that their energies are not exhausted by the business of self-protection'.[79] He further stated that the protection of the public avoids 'a sense of outrage which would naturally be felt… by the victims of such attacks',[80] and which would otherwise 'deserve and earn the contempt of most people'.[81] Arguably, the normative space of Majewski exhibits three distinct dimensions of the protection of the public rationale: (1) the establishment and maintenance of order, (2) the protection of the victims, and (3) the prevention of society outrage.

One should appreciate that it is perhaps difficult to identify which sub-category transpired from Lord Edmund-Davies' judgment. This can be illustrated by the way Lord Edmund-Davies discredited different arguments in his judgment. For example, Williams attempted to argue that condemning intoxicated defendants is 'both unethical and illogical'.[82] His Lordship dismissed this argument on the basis that 'the continued application of the existing law is far better calculated to preserve order [emphasis added] than the recommendation that he and all who acted similarly should leave the dock as free men'.[83] On this instance, it is evident from the peculiar choice of the words (i.e. 'to preserve order') that his Lordship was referring to (1). A less obvious example, which blurs the distinction between the three sub-categories, is when his Lordship dismissed the argument that 'it is unethical to punish a man for a crime when his physical behaviour was not controlled by a conscious mind'.[84] The rationale proposed by his Lordship was that the defendant 'made himself dangerous in disregard of public safety' (emphasis added).[85] Notably, his Lordship did not provide an explicit answer in the judgment as to which sub-category he was referring to.

One can speculate that there is no overreaching sub-category that transpires from his Lordship. 'Public safety' could easily apply to (1) as it could be said that the defendant made himself dangerous for society at large, which therefore affected the establishment and maintenance of order. Similarly, the reference to 'public safety'

[79] *Majewski* (n 18) 286.
[80] ibid.
[81] ibid.
[82] Glanville Williams, *The Mental Element in Crime* (Magness Press, Jerusalem, 1965) 20.
[83] *Majewski* (n 18) 287.
[84] ibid.
[85] ibid 287.

could fall within the ambit of (2). The term 'public safety' would take a broad dimension and refer indirectly to the victim. On this view then, the defendant made himself dangerous to the public and thus a priori to the victim. A last proposition (although less likely) is that 'public safety' refers to (3). One could imagine a situation where the defendant would go free as a result of his intoxication. This would lead to society's outrage and potential protests; thereby affecting the public safety. Whatever view one adopts, the point is that it is difficult to determine with certainty what exactly His Lordship meant by 'public safety'. There is obviously a temptation for the codifiers to assume that the normative space of the decision includes the broad 'protection of the public' rationale, while leaving out the potential sub-divisions. However, Lord Edmund-Davies has explicitly laid down these sub-divisions, which makes them part of the normative space of Majewski.

The challenge for the codifiers is to transform the Majewski decision into a codified norm and simultaneously rephrase these three sub-categories. These three elements are inevitably part of the normative space of Majewski and the linguistic formulation of the new codified norm must include them if it is to be in line with the restatement project. In other words, how could the Commission compress the extensive normative space of the judgment into a concise, clear and accessible codified one? This is a pertinent question for the normative values under the organic identity of judge-made norms are incommensurable. There is room to suggest that the codifiers made policy preferences by reference to their 'overall intrinsic worth'.[86] Indeed, Sustein notes that judgments can be made on the basis of reasons about 'overall intrinsic worth', even in the face of incommensurability.[87] Moreover, Sustein explains inter alia that there is no standard of valuation along which to rank listening to Mozart or watching a violent movie, but in terms of aesthetic values, Mozart ranks higher in overall worth, for reasons that involve what is appropriately valued in art, including appeal to human capacities, imagination, etc.[88] Similarly, the codifiers did not possess a standard of valuation along which to rank intrinsically the different policy considerations, but they can nonetheless make policy choices in overall worth and thus make the law more concise. Citing a leading textbook in criminal law,[89] the codifiers argued that: 'If the public needs protection against one whose condition is wholly brought about by intoxication, it also needs protection against one whose similar protection is partially so brought about'.[90]

The way in which the codifiers use the 'overall intrinsic worth' technique is evident in the context of automatism. The codifiers believed that the common law principle found in Majewski (automatism caused by voluntary intoxication should be no defence) should apply as well where automatism is caused partly by voluntary

[86] Sustein (n 15) 240-241.
[87] ibid.
[88] ibid.
[89] John Smith and Brian Hogan, *Criminal Law* (7edn, Butterworth, Oxford, 1992) 191.
[90] Law Commission, 'Legislating the Criminal Code: Intoxication and Criminal Liability' (n 13) 6.46.

intoxication and partly by some other factor.[91] The codifiers' rationale is that intoxication is no defence to a charge of a crime not requiring specific intent because this is thought necessary for the protection of the public.[92] Indeed, if the public needs protection against one whose condition is wholly brought about by intoxication, it also needs protection against one whose similar condition is partially so brought about.[93] Thus, the defendant should be found guilty of an offence.[94] The problem here, as Friedland pointed out, is that 'you do not simplify by oversimplifying'.[95] Showing a strong commitment to clarity inevitably restricts the range of possibilities and therefore leaves out the possibility to accommodate the different normative considerations. In other words, over-simplifying the normative space of Majewski does not lead to a simplification of the law. Looking at the rationale, one can see that it is the broad 'protection of the public' rationale that dominates. However, this method is unsatisfactory in that the codifiers have favoured one broad dimension of the protection of the public and left out the different sub-categories. Unfortunately, unless the codifiers take them into account in the formulation of the new codified norm, it cannot be concluded that the code has effectively transplanted the normative space of Majewski into a codified norm.

What are the implications for the principle of legality? Prima facie, these changes on the formulation of judge-made norms seem attractive. Indeed, one could describe Lord Edmund-Davies's judgment as an 'academic journey'. In Majewski, Lord Edmund-Davies's judgment is not only long but lacks any clear principle of organisation.[96] At the beginning of the judgment, his Lordship discussed the definition of 'automatism',[97] then moved on to the logic behind the intoxication rationale,[98] before drawing on comparative law,[99] and analysing trends in English case laws.[100] Lord Edmund-Davies then moved away from the discussion on 'automatism' in order to discuss the judicial history of intoxication,[101] analysed the rationale for the distinction between crimes of specific intent and basic intent (utilising both case law and academic comments)[102] and eventually settled the issue of 'automatism'.[103] The contrast with the codified norm is evident: the code summarised the provisions regarding the issue of automatism in roughly ten lines, structured in lettered paragraphs and used a side note on the right of the provision indicating 'effect of

[91] ibid.
[92] ibid.
[93] ibid.
[94] ibid 6.43.
[95] M. L. Friedland, 'The Process of Criminal Law Reform' (1969-1970) 12 Crim LQ 148, 150.
[96] Law Commission, 'Legislating the Criminal Code: Intoxication and Criminal Liability' (n 13).
[97] *Majewski* (n 18) 279.
[98] ibid 280.
[99] ibid 281.
[100] ibid.
[101] ibid 282.
[102] ibid 283.
[103] ibid.

intoxication: automatism'.[104] Arguably, the code norm seems to be more in line with the principle of legality. However, the contention is that codifiers essentially phrased a broad policy consideration (i.e. the protection of the public) and assumed that its conceptual definition was sufficiently powerful to accommodate the issue of semi-automatism. Such an approach demonstrates no more than a strong generalisation of the Majewski decision and a total disrespect for its normative space. Majewski did not deal explicitly with the issue of part automatism, so these considerations set forward by the Commission are at best speculative. It is precisely because they are speculative that they cannot provide effective control to the citizens. Compressing the law therefore leads to speculation as to the normative space of judge-made norms.

3.2 The Substitution of Legal Language for Familiar Terminology

Proponents of codification could argue that the codifiers did not restrict the normative space of Majewski in all situations. This argument perhaps finds some support when the codifiers proposed to replace technical words by familiar ones.[105] This is a good card to play for the codifiers. Such an approach goes around the problem that restricting the length of a judgment will inevitably restrict the normative space of a judgment. In this case then, the linguistic reform is more forceful and specific: it concentrates on the legal terms themselves. Moreover, such an approach upholds the principle legality since language becomes clearer to citizens.

The previous discussion, however, does not apply exclusively in the context of concision. The incommensurability of values does not take place only in the context of long statements of law but also within the legal concepts themselves. Accordingly, while legal terms do not have greater weight in law, some legal terms have nonetheless a special status in the criminal law. A given term does not have greater weight for a judge could also use synonyms and use them interchangeably in his judgment. Yet it would be a non sequitur to conclude that some of them do not have a special status. The problem with the codifiers is that they fail to respect the special status of such words because their main objective is to promote clarity. The code via its standard of valuation mechanically highlights those terms that fall short of clarity and simply removes them, thereby failing to protect the special status of those terms.

This problem can usefully be explained by reference to the mens rea requirement in Majewski. In Majewski, Lord Salmon referred to 'mens rea';[106] Lord Edmund-Davies discussed the 'guilty mind'[107] and Lord Simon talked about the 'mental element'.[108] Among these three terms, one could fall within the category of legal jargon ('mens rea') and the other two ('guilty mind' and 'mental element') within the ambit of

[104] Law Commission, 'Legislating the Criminal Code: Intoxication and Criminal Liability' (n 13) 30.
[105] Law Commission, 'Criminal Law – Codification of Criminal Law – A Report to the Commission' (n 1) 1.6.
[106] *Majewski* (n 18) 275-278.
[107] ibid 279-288.
[108] ibid 272-273.

familiar terminology. The codifiers seemed to be in line with their objectives as there is no reference whatsoever to the technical term ‘mens rea’ in its draft bill on intoxication. The question then becomes: which between these two familiar words has the Commission opted for? The answer is that of ‘mental element’. Indeed, the reference to ‘mental element’ is present in different sections (e.g. section 7(2)), while ‘guilty mind’ is present in none.

Conversely, ‘mental element’ is an unsatisfactory choice. Gardner provides a useful distinction, which helps to promote clarity and preserve the special character of those terms simultaneously. Indeed, Gardner draws a distinction between ‘textual clarity’ and ‘moral clarity’.[109] Textual clarity is secured ‘if it is stated in a straightforward, unornamented language, avoiding great technicality or complexity of drafting’.[110] In contrast, a law is morally clear by the ‘adequate reapplication in the law of clear distinctions and significances which apply outside of the law’.[111] In the present context, ‘mental element’ provides an illustration of textual clarity. For the term is used in familiar and comprehensible context. Conversely, ‘guilty mind’ involves ‘moral clarity’ since it highlights a strong condemnable dimension via the term ‘guilty’. The question then becomes; which type of clarity should the commission prioritise? Since bringing the criminal law closer to the layman is a key objective of codification, one could argue that ‘moral clarity’ ought to be protected. Indeed, moral clarity ‘helps to constitute the very intrinsic moral significance and distinctions which the law should try to capture’.[112] This is because the word ‘guilty’ bears a strong moral and condemning dimension than the whole public can immediately identify. Furthermore, if the criminal law imposes punishment for wrongful acts, it follows that its norms should include a strong moral dimension that is sufficient to justify blame and punishment.[113] Unfortunately, the Commission has simply ignored such a distinction and (once again) has no respect to the normative space of Majewski. The failure to respect the normative space in this situation takes the form of failing to respect the connotations of some legal terms (i.e. guilty mind).

Despite the fact that the normative space of judge-made norms is not completely secured, proponents of codification would perhaps argue that the principle of legality is upheld. This is because providing for familiar terminology paves the way towards legality. However, the serious defect with the commission lies in its methodology. Indeed, the codifiers have replaced some technical terms on a random basis. For example, looking at the draft bill, there are still many technical words that existed under the organic identity of judge-made norms and that have been codified as such (e.g. ‘intoxication’). Plainly, the codifiers’ attempt to remove legal jargon is merely

[109] John Gardner, ‘Rationality and the Rule of Law in Offences Against the Person’ (1994) 53 CLJ 502, 512.
[110] ibid.
[111] ibid 513.
[112] ibid.
[113] Dennis (n 10) 216.

piecemeal. Even if the principle of legality is not completely upheld, this is not sufficient to dismiss the codification process. This could be in line with what code proponents, such as Smith, had in mind: 'the advantages of a Code should not be overstated. In some respects, the aims of a Code are quite modest'.[114] That is, as long as a part of legal jargon is removed from the law, this lack of clarity does not constitute a fatal blow to the codification project. A serious obstacle to this argument is that it is probably the combination of ordinary language and technical jargon that is problematic for citizens. The use of technical terminology is not problematic per se as long as all judges apply such terminology consistently in their respective judgments. Rather, it is the lack of conformity that causes confusion. This can be seen in Majewski, where Lords Elwyn-Jones L.C. and Lord Elmund-Davies used the three terms (i.e. 'mens rea', 'guilty mind' and 'mental element') interchangeably throughout their respective judgments. The confusion comes from the fact that the citizen is left alone to decide whether technical terms derive from his familiar signification or whether they include some special code signification. Hence, unless the commission is willing to remove all technical words, the overall benefits of removing esoteric terminology is seriously impaired.

3.3 The Definition of Technical Words

The codifiers seemed unwilling to remove all technical words from the normative space of judge-made norms. '[This] is dictated by the demands of precision, consistency and (above all) brevity'.[115] The Commission attempted notwithstanding to minimise their technical effects. Indeed, the code defined certain words or expressions that were problematic.[116] The reader can then consult the subsection to see whether any expression used in the code but not explained in the clause in which he finds it has a special code meaning.[117] The Commission confidently stated that 'no ambiguity results' as a result of those definitions.[118] This approach needs to be applauded for it attempts to preserve specific parts of the normative space of Majewski, which would perhaps diminish the negative effects of an organic transformation. Furthermore, defining technical words bring the law closer to the layman who can check whether his familiar understanding of a term reflects that of the code. The word 'intoxication' provides a vivid illustration of such a definition:

For the purpose of this Act (a) 'intoxicant' means alcohol, a drug or any other substance (of whatever nature) which, once taken into the body, has the capacity to

[114] Tony Smith, 'Codification of the criminal law – Part 1: the case for a code' (1986) Crim LR 285, 286.
[115] Law Commission, 'Criminal Law – Codification of Criminal Law – A Report to the Commission'(n 1) 2.23.
[116] ibid 2.25.
[117] ibid.
[118] ibid 2.24.

impair awareness, understanding or control and (b) a person is 'intoxicated' if his awareness, understanding or control is impaired by an intoxicant.[119]

The efforts of the codifiers are seriously impaired if one notes that there is a gap to be bridged between the codifiers' intention and practical realities. The codified norm defines 'intoxicant' as involving 'alcohol' and 'drug', which clearly mirrors the facts of Majewski (the defendant claimed the defence on the basis that he had consumed 'alcohol' and 'drug'). In contrast, the other part of the definition, which states 'any other substance (of whatever nature)', was not clearly referred to in the Majewski decision. This demonstrates how the Code attempts to accommodate the normative space of Majewski but at the same time extends its definition both in substance and language so that it broadens its scope of application. The problem with the codified definition of 'intoxication' is that the second ambit of the definition does not marry well with the first one. Indeed, the codifiers do not provide any explanation as to why the codified definition includes 'any other substance (of whatever nature)' in the definition.[120] The requirement of 'any other substance' and 'of whatever nature' could easily accommodate the definition of 'alcohol' and 'drug'. As a result, the definition seems to bring more confusion than clarity. Furthermore, it is clear that 'of whatever nature' does not refer to 'alcohol' otherwise it would have simply referred to alcohol. Instead, it seems to suggest that alcohol and 'whatever nature' are given the same normative rank under Majewski. This fits uncomfortably with the normative space of Majewski.

The above discussion has also strong implications when it comes to assessing the principle of legality. It is interesting to analyse the principle of legality by reference to the definition of 'voluntary' intoxication. The problem is that the codifiers attempted to provide for an exhaustive definition of 'voluntary'.[121] This is perhaps not surprising because the Commission aims to provide norms according to which the citizens could refer to. Thus, by providing an exhaustive definition, it enables the citizen to be aware of different relevant situations. For example, under section 5(1)(a), a person is involuntary intoxicated if he took the intoxicant and he was not aware of its intoxicating tendencies.[122] Similarly, section 5(1)(b) reads that intoxication may be involuntary if the taker of a substance takes the intoxicant solely for medicinal purposes.[123] Yet, looking at the other part of section 5, Paton pertinently notes that the Report then 'conducts disproportionately detailed analysis of some relatively unlikely

[119] Law Commission, 'Legislating the Criminal Code: Intoxication and Criminal Liability' (n 13) 104-106.
[120] ibid.
[121] Ewan Paton, 'Reformulating the intoxication rules: the Law Commission's report' (1995) Crim LR 382, 386.
[122] Law Commission, 'Legislating the Criminal Code: Intoxication and Criminal Liability' (n 13) 104-106.
[123] Law Commission, 'Legislating the Criminal Code: Intoxication and Criminal Liability' (n 13) 104-106.

situations'.[124] Section 5(2), for instance, states that the defendant cannot rely upon section 5(1)(b) if he took the substance on medical advice but not in accordance with any directions given to him by the person providing the advice and was aware that the intoxicant might give rise to aggressiveness or uncontrollable behaviour.[125] Paton's comment perhaps illustrates the downside of an excessive standard of valuation, whose main focus is to prioritise the principle of legality at any costs. This is evident when reading Clause 6. Clause 6 deals with the special case of a person who consumes one intoxicant but is not aware that it has been laced with other intoxicating substances. Clause 6 and its nine subsections then provides hypothetically for the potential situations that may occur.[126] Paton pessimistically concludes: 'it is difficult to see how this provision [Clause 6] contributes to the greater "clarity and accessibility" codification is intended to bring'.[127] Thus, the paradox is that it is precisely because the codifiers applied the principle of legality too strictly that they failed to attain their objectives.

3.4 Concluding Remarks

Three conclusions could be drawn from this section. Concision is impracticable for the codifiers failed to include the sub-categories of the policy rationale that belong to the normative space of Majewski into the formulation of the codified norm. Removing legal technicalities from the normative space of Majewski has failed since the codified norm does not appreciate that certain technical terms possess a special value. Defining legal terms has failed since the codified norm does not appreciate that some terms have greater normative weight than others.

4 THE INTERPRETATION OF THE CRIMINAL NORM

4.1 The Retrospective Character of Judge-Made Norms

It is clear from the previous section that the linguistic formulations are not sufficiently powerful to include the entire normative space of a judge-made norm. Yet, it is perhaps not sufficient to argue that 'the very nature of language itself is an obstacle to the achievements of the goals (of the code)'.[128] It is indeed crucial to appreciate the ramifications of such linguistic frailties. A logical consequence is that these linguistic fragilities trigger a high level of judicial discretion when it comes to the interpretation of the code.[129] The codifiers seemed aware of such problems but remain extremely sceptical as to the potential benefits associated with wide judicial discretion. The locus classicus argument against wide judicial interpretation is that judicial discretion

[124] Paton (n 121) 386.
[125] Law Commission, 'Legislating the Criminal Code: Intoxication and Criminal Liability' (n 13) 104-106.
[126] Paton (n 121) 386.
[127] ibid.
[128] Grainne de Burca and Simon Gardner, 'The Codification of the Criminal Law' (1990) 10 OJLS 559, 560.
[129] Fairfax Stone, 'A primer on Codification' (1955) 29 Tul L Rev 303, 310; Tony Smith, 'Judicial Law-Making in the Criminal Law' (1984) 99 LQR 46.

is retrospective in its operation.[130] The codifiers have argued that judicial decisions are retroactive as the court deals only with occurrences from the past, while legislation is generally prospective.[131] The retrospective character of judge-made law is problematic as (i) it 'cast[s] doubt on the validity of the conviction in other cases' and (ii) it leads to the impression that 'convictions in earlier cases were unsafe'.[132] It follows that this has serious implications for the principle of legality, as a defendant could be found guilty even though he did not realise that his actions constituted a crime. These problems will be analysed in the light of R v Hardie.[133]

In Hardie, the defendant took five Valium tablets (a sedative drug) to calm himself when the woman with whom he had been living told him to leave the flat. He later started a fire in the flat while she and her daughter were in another room. He was charged with arson, contrary to sections 1(2) and 1(3) of the Criminal Damage Act 1971. The question at issue was inter alia whether the defendant's intoxication fell within the definition of 'self-induced intoxication' proposed by Majewski. Notably, Hardie conveniently illustrates the problems laid down by the commission. On the one hand, looking at Majewski, it should be appreciated that the case concerned alcohol and drugs, which does not deal directly with the issue of sedative drug. Looking at the codified norm, one can appreciate that sedative drugs, such as Valium tablets, are not dealt with directly either. Furthermore, Hardie concerns an appeal decision where a jury had been misdirected. The key question is then: does Hardie constitute an example of ex post facto rationalisation?

The first argument that justifies ex post facto rationalisation is based upon a misconception of judicial interpretation. The fact that a law is ex post facto presupposes the fact that the law is actually made by the judges. 'The result is that the people have no conceivable means of knowing the law until it is made by the judges'.[134] Lang argues that a more correct theory is that law is 'not made by the judges but merely found and declared by them, so that the inconvenience of the law arising from it being ex post facto is more apparent than real'.[135] Lang's argument can be illustrated by reference to the way in which Hardie was ruled. Lord Justice Parker, who delivered the leading opinion, noted that the taking of Valium is 'wholly different in kind from drugs which are liable to cause unpredictability or aggressiveness'.[136] The taking of a soporific or sedative drug such as Valium does not fall within the locus rule because 'there was no evidence that it was known to the appellant or even generally known that the taking of a Valium in the quantity taken

[130] Annabel Anton, 'Obstacles to Codification' (1982) Jud Rev 15, 27; Lon Fuller, *The Morality of Law* (Yale University Press 1964), 56-58.
[131] Hallevy (n 33) 28.
[132] Law Commission, 'Criminal Law – A Criminal Code for England and Wales' (n 1) 2.11.
[133] *Hardie* (1985) 1 WLR 64.
[134] Maurice Eugen Lang, *Codification in the British Empire and America* (The Lawbook Exchange, Ltd. 2005) 22.
[135] ibid 24.
[136] *Hardie* (n 133) 69.

would render a person aggressive or incapable of appreciating risks to others or have other side effects such that its self-determination would itself have an element of recklessness'.[137] Accordingly, there was a miscarriage of justice because the jury should have been left to determine whether the taking of the Valium was reckless itself for the purpose of voluntary intoxication. Hence, the appeal was allowed. The whole point is that the court did not say that the taking of Valium (in the quantity taken) automatically amounts to the drinking of alcohol for the purpose of voluntary intoxication. This would be ex post facto and a priori arbitrary in that there is no rationale-bridge between such a conclusion and the decision in Majewski. Rather, Lord Justice Parker stated that it is because Valium is different in nature from drugs that the jury should have been consulted; thereby acknowledging the factual differences between Hardie and the normative space of Majewski.

There is room to suggest that Lord Justice Parker's judgment is in line with the normative space of Majewski. The ethical justification for punishing a voluntarily intoxicated defendant in Majewski amounts to something along those lines: it is ethically justifiable to punish a defendant who drinks too much alcohol and becomes reckless as a result of his involuntary intoxication. From a structural perspective, the legal principle is that, 'a defendant who drinks too much is deemed to be intoxicated' and the policy rationale is that 'it is ethically justifiable' to do so. In essence, Lord Justice Parker ruled that it was not 'ethically justifiable' to punish a defendant automatically if the defendant did not know, and it was not even common knowledge that the taking of Valium could lead to aggressive behaviour. Lord Justice Parker relied on Majewski and found, among other things, two incommensurable policy considerations (the protection of the public and the ethical justification for punishing a voluntary intoxicated defendant). Arguably, there is room to suggest that Lord Justice Parker made these policy considerations commensurable by reference to the set of facts in front of him. This clearly echoes Lang: Lord Justice Parker merely 'found and declared' the relevant policy consideration by reference to the facts of the case.

It is possible to respond to the second attack vis-à-vis judicial interpretation by counter-arguing that Lord Justice Parker did not undermine the normative space of Majewski. Indeed, it is key to appreciate that His Lordship did not engage in abstract philosophical comparative analysis between the two policy considerations. His judgment does not assert that the protection of the public is intrinsically more important than the ethical justification for punishing a voluntary intoxicated defendant or vice versa. Rather, His judgment illustrates that, in any given situations, some issues are central while others are peripheral. In the case in question, his Lordship made a choice based on the facts given to him. It follows that Lord Justice Parker protected the normative space of Majewski by leaving the policy considerations incommensurable. One could even further develop the argument and highlight that his judgment does not suggest that the policy considerations are antagonistic. Indeed, the

[137] ibid 70.

judgment does not assert that the protection of the public is unsatisfactory. One even could argue that the decision could have been decided on the basis of the 'protection of the public' policy argument. The argument would be that it is necessary to determine the degree of aggressiveness that results from taking Valium tablets. Indeed, if Valium is deemed to render a defendant more aggressive, then the protection of the public could be an issue. Crucially, adopting this argument leaves Lord Justice Parker's original judgment in tact and does not alter the result of the decision (i.e. the appeal would still have been allowed). The lack of reference to the other policy consideration is not synonymous of intrinsic preference but of factual judgment.

4.2 Uncertainties as to the Scope of the Criminal Law

Once one appreciates that judges are constrained by the normative space of previous decisions, the serious challenge is then to explain how to maintain a certain degree of conformity in judicial interpretation. The problem here is that this lack of conformity could lead to uncertainties as to the scope of the criminal law.[138] The codifiers have proposed different solutions to attain this level of uniformity. While all the codifiers proposed an interpretative framework, it is interesting to note that they disagreed on the degree of discretion that should be left to the individual judge.

4.2.1 The 1985 Report

The first Commission Report on Codification suggested introducing rules of construction.[139] Indeed, under clause 3(1) of the 1985 draft Code, a provision 'should be interpreted and applied according to the ordinary meaning of the words'.[140] Under clause 3(2), the 'context' refers to inter alia 'the long title, cross-headings and side-notes'.[141] Notably, The 1985 draft rejected the idea that judges can contribute to the elaboration of substantive criminal law: 'where there are known gaps in the law, the codifier should fill them (…) Obviously there will be more than one view as to how this should be done (…) but the Code, as ultimately enacted, should settle it, one way or the other'.[142] In other words, when there are gaps in the normative space of a given decision, then it is up to the Code, not the individual judge, to fill in those gaps. This represents codification in its strongest form, echoing strong proponents of codification such as Hahlo, who envisaged the extinction of the common law once it is codified.[143] Overall then, the 1985 draft Code seeks 'to limit the scope for expansive judicial interpretation'.[144]

---

[138] Anton (n 130) 27.
[139] Law Commission, 'Criminal Law – Codification of Criminal Law – A Report to the Commission'(n 1) 3.3.
[140] ibid.
[141] ibid.
[142] ibid 1.13.
[143] Henry Hahlo, 'Here Lies the Common Law: Rest in Peace' (1967) 30 MLR 241, 251.
[144] de Burca and Gardner (n 128) 559.

Prima facie, there is some force in this proposition, for judges would be constrained by some sort of common reference. Judges must therefore interpret the code by the same reference; which would, in effect, move judicial interpretation towards the same direction (i.e. the ordinary meaning of the codified provisions). Yet, this method is perhaps appropriate in cases 'constantly recurring in similar contexts to which general expressions are clearly applicable'.[145] If a subsequent case deals with a defendant being intoxicated after consuming whisky, then the codifiers are right to assume that the judge must simply apply Majewski according to the ordinary meaning of the law.

Yet, a common theme that emerged from the third section is that many formulations of the codified norm remain fragile from a linguistic perspective. This perhaps echoes Hart who pointed out, 'there is a limit, inherent in the nature of language, to the guidance which general language can provide'.[146] It follows that the codifiers were perhaps naive to believe that the mere fact of changing the organic identity of a norm will equally remove its linguistic frailties. This has been demonstrated in Hardie where it was clear that language (e.g. a 'drug') is never sufficiently powerful to accommodate all factual situations (e.g. does Valium fall within the ambit of 'drug' for the purpose of voluntary intoxication?). An argument can be made that it is the linguistic frailties of the codified norms that prevent judges from deciding cases in reference to them. This has serious implications on the interpretative framework that the codifiers intended to put forward: 'no text proposed possessed of any subtlety whatsoever is self-interpreting; nor can it be definitionally complete'.[147] Thus, the 'judiciary retains a vital role in the making of the law, and in this sense judicial decisions are vital to completing the interpretation of the text'.[148] While the codifiers cannot act on the inherent fragility of language, they can nonetheless act on the degree of judicial discretion that results from such linguistic fragilities. At this point then, a mere change in the organic identity is not sufficient: the codifiers need to provide an interpretative framework for judicial discretion.

4.2.2 The 1989 Report

The second Commission Report on codification seems to appreciate the necessity of a higher degree of judicial discretion in the criminal law. This is evident when they stated, 'the interpretative role of the judiciary will continue to be important'.[149] While the 'common law techniques are objectionable in principle', 'where there are points to which the answer is not known in the law at present, it may be desirable to try to answer them in the Code in some cases'.[150] In other cases, 'it may be better that they

[145] Herbert Hart, *The Concept of Law* (3rd edn, OUP 2012), 126.
[146] ibid.
[147] G. Letourneau and S. Cohen, 'Codification and Law Reform: Some Lessons from the Canadian Experience' (1989) 10 Stat LR 183, 189.
[148] ibid; Tony Smith, 'Law Reform Proposals and the Courts' in I. H. Dennis (ed), *Criminal Law and Justice: Essays from the W.G. Hart Workshop 1986* (London Sweet & Maxwell 1987) 51.
[149] Law Commission, 'Criminal Law – A Criminal Code for England and Wales' (n 1) 2.6.
[150] Law Commission, 'Criminal Law – A Criminal Code for England and Wales' (n 1) 2.17.

are left to the common law to develop'.[151] It follows that 'the creative role of the judge will therefore continue to play a part in cases where the legislation does not provide an answer'.[152] Thus, the 'coexistence of the codified criminal law with a substantial common law role for the courts seems to the Commission both "inevitable and right"'.[153] If the 1989 Report is less sceptical vis-à-vis judicial discretion, the question that follows is: what kind of interpretative framework did the 1989 codifiers propose to constrain this judicial discretion?

The 1989 draft Code illustrates that 'giving a fair meaning to the words used in the particular provision or group of provisions' is sufficient.[154] It is easy to speculate as to the potential dangers that result from a strict application of such reasoning. For example, it is not difficult to imagine a situation where a defendant was voluntarily intoxicated after ingurgitating food poisoning. One central issue for the judge would be to determine whether food poisoning falls within the ambit of 'voluntary intoxication'. Looking at the relevant codified norm, section 4(1)(a) states, '"intoxicant" means alcohol, a drug or any other substance (of whatever nature)'. A strong analogical reasoning would operate in two stages. The first stage involves redefining the proposition by induction and generalised its relevant characteristics.[155] The second section has already illustrated this first stage: the codifiers have induced from Majewski the terms 'alcohol' and 'drug' and generalised these two features to mean 'any other substance (of whatever nature)'. Since the hypothetical situation involves food poisoning and not directly 'alcohol' or 'drug', it is clear then that the hypothetical situation falls within Hart's borderline cases. A second stage would then be necessary, which involves redefining the norm by deduction in the light of the specific characteristics of the case at hand.[156] It follows that it could de deduced from 'any other substances (of whatever nature)' that 'food poisoning' is sufficient to amount to an 'intoxicant'. This is particularly true if one pays close attention to the linguistic formulation of the codified norm: 'whatever nature' is arguably sufficiently broad to accommodate 'food poisoning'. Hence, the codifiers are essentially giving the judges a carte blanche to exercise their wide discretionary powers; thereby increasing the probability of uncertainties as to the scope of criminal offences. Accordingly, this method does not require judges to decide by reference to the normative space of Majewski.

A better solution to constrain the judicial interpretation would be to propose a 'purposive approach' of the code. The codifiers clearly rejected this proposition for they assumed that 'the court knows what the purpose of the legislator is'.[157] From a structural viewpoint, the verbal logic of the criminal norm (ratio verborum) is an

[151] ibid 3.33.
[152] ibid.
[153] ibid 3.38.
[154] ibid 3.5.
[155] Hallevy (n 33) 146.
[156] ibid 147.
[157] Law Commission, 'Criminal Law – A Criminal Code for England and Wales' (n 1) 3.5.

expression of its legal logic (ratio legis).[158] If the codifiers require judges to give the words a fair meaning, then the boundaries of the interpretation of the criminal norm are within the legal logic of the relevant criminal norm.[159] Indeed, the verbal logic (ratio verborum) is examined in a strict manner, based upon the plain meaning of the words that make up the relevant clause.[160] However, this is problematic in the context of codification for the verbal formulation of a codified norm could change over time. Indeed a Code could be amended whenever necessary to ensure that the codified norms are up-to-date.[161] It is crucial to appreciate that amending the code alters its formulation but leaves intact the purpose of the norm (unless of course, Parliament decides to reform an area of law). The best way to discover the legal logic of a criminal norm is therefore by revealing its purpose. If the codifiers favoured a purposive interpretation, then the boundaries of the interpretation of the criminal norm would be within the legal logic of the relevant criminal norm and not its formulation.[162] It follows that the legal logic of the criminal norm takes precedence over the verbal logic and it is applied in order to repair the error in the verbal formulation of the norm.[163] This would be in line with the previous section, which argued that the court merely states what the logic is (as opposed to inventing it): the legal logic has always been present, even if its verbal formulation has been inadequate.[164]

It follows that a purposive interpretation constrains judges to have regard to the normative space of a decision. It would provide some sort of common 'reference' that the first Report attempted to attain. However, instead of focusing on fragile linguistic reference, the new reference would be teleological. It is only when the judge understands the purpose of the norm in question that he can elaborate by reference to it. Plainly, this leaves judicial interpretation sufficiently open to decide borderline cases but at the same time ensures that the norm is effectively interpreted by reference to the purpose of the norm. This would ensure that the judicial interpretation of Majewski makes reference to either or both of the policy considerations that exist within its normative space. Hence, it is the purpose of a given norm that transcends the linguistic fragilities of its formulation.

4.3 Concluding Remarks

Three conclusions could be drawn from the above discussion. It seems doubtful to argue that judges decide ex post facto for they choose the relevant normative elements by reference to the normative space of a previous source (in this case, another case

[158] Hallevy (n 33) 147.
[159] ibid 148.
[160] ibid 149.
[161] Law Commission, 'Criminal Law – Codification of Criminal Law – A Report to the Commission' (n 1) 2.34.
[162] Hallevy (n 131) 149.
[163] ibid.
[164] William Schaefer, 'The Control of "Sunbursts": Techniques of Prospective Overruling' (1967) 42 NYU L Rev 631.

law). Constraining judicial interpretation by reference to the ordinary meaning of words is problematic if one appreciates that the linguistic deficiencies of the codified norm does not constrain judges to decide by reference to the normative space of a previous source. An alternative solution, which would be more compatible with the normative space of judge-made norms, would be to favour a purposive interpretation of the code.

5 CONCLUSION

The central issue for the codifiers was to change the organic identity of judge-made norms, while preserving its normative space.

The second section argues that the organic identity of a codified norm is incompatible with the normative space of judge-made norms. This is because a standard of valuation is inevitably part of the organic identity of a codified norm. In this context, the analysis revealed that the principle of legality has been used as a standard of valuation. This standard of valuation has prioritised certain normative elements (by reference to legality); thereby defeating the normative space of Majewski. Ironically, it is precisely because the principle of legality (via the standard of valuation) has altered the normative space that the codified norm does not uphold the principle of legality.

The third section has attempted to assess whether the linguistic formulations of a codified norm could transcend the limits of its organic identity. The codifiers have attempted to make the common law principles more concise. However, it is because the codified norm must be concise that it cannot accommodate effectively the sub-categories (and thus the normative space) of Majewski. The new organic identity of the codified norm is therefore normatively restricted. The codifiers have equally attempted to remove legal jargon and replace those technical terms by familiar terminology. However, a strict standard of valuation has simply ignored that some terms possessed a special status in Majewski and removed some of them mechanically. In essence, the normative space of the codified norm includes both familiar language and legal jargon. The codifiers have nonetheless tried to define the remaining technicalities. However, this attempt has been unsuccessful. The codifiers failed to appreciate that certain intoxicants were given greater weight in the normative space of Majewski. As a result, the codified norm is more speculative and less clear than the original Majewski decision.

The fourth section has dealt with the interpretation of the codified norms. Approaching the retrospective argument from a structural perspective demonstrates how judges merely identify the relevant policy considerations and apply them in the light of the case in question. Thus, such scepticism vis-à-vis judicial discretion is perhaps no more than ad hominem. Equally, the necessity to provide for a judicial framework quickly emerged in order to prevent uncertainties as to the scope of judge-made norms. The codifiers originally seemed to assume that a mere change in the

organic identity of the norm removed the necessity for a judicial interpretative framework. This was surprising given that section four had demonstrated the fragile linguistic formulation of the codified norm. In a subsequent Report, the codifiers broadened the scope of judicial interpretation, although they seemed to persist in the idea that a mere change in the organic identity of the norm dismissed the necessity of constraining judicial interpretation.

In sum, three main conclusions can be made. A codified norm is not structurally capable of respecting the normative space of a judge-made norm. No linguistic formulation of a codified norm is sufficiently powerful to supersede the limits of its organic identity. The methods of judicial interpretation for deciding on the linguistic deficiencies of the codified norm do not require judges to decide by reference to the normative space. In the light of these comments, the paper can reasonably conclude that a structural transformation of a judge-made norm into a codified norm would be unsuccessful.

HALTING THE DECLINE OF BIODIVERSITY IN ENGLAND: DEVELOPING AN ECOSYSTEM BASED APPROACH TO CONSERVATION LAWS AND WHY LOCALISM WILL NOT WORK

SARAH MACKIE[*]

Traditionally, conservation has concentrated on the protection of individual, threatened species rather than the ecosystems in which those species thrive. The UN Convention on Biodiversity, however, advocates an ecosystem based approach to protect entire habitats. This paper discusses to what extent the current system under English and European law provides for an ecosystem based approach and explains that, despite a partial implementation of an ecosystem based approach, there is still significant deterioration in biodiversity in English and European habitats. It concludes by suggesting measures which could be taken to improve biodiversity protection. The author disagrees with the localism agenda of the current coalition government, arguing that biodiversity protection must take place on a larger scale if we are to prevent further damage to ecosystems in England.

Natural habitats form a large part of the background against which our lives are played out. The UK National Ecosystem Assessment found that 'the natural world, its biodiversity and its ecosystems are critically important to our well-being and economic prosperity'.[1] Conservation is necessary to secure the sustainability of species which can be exploited economically and also for the intrinsic value of nature.[2] There are two models of environmental protection: the protection of individual species and the protection of entire ecosystems.[3] Each model has its own merits but the Convention on Biological Diversity advocates an 'ecosystem based approach'.[4] This paper seeks to discuss what is meant by an 'ecosystem based approach', to establish the extent to which European and English law employ such an approach and to outline the measures which could be taken to implement it fully.

The concept of biodiversity is undefined in international law although it is generally recognised as 'variety and variability among living organisms and the environments in

[*] Sarah Mackie, Newcastle University, LLM Environmental Regulation & Sustainable Development.
[1] UK National Ecosystem Assessment, *The UK National Ecosystem Assessment Technical Report* (United Nations Environment Programme – World Conservation Monitoring Centre 2011).
[2] Department for Environment, Food and Rural Affairs, *The Natural Choice: Securing the Value of Nature* (Cmd 8082, 2011).
[3] Ken Thompson, *Do We Need Pandas? The Uncomfortable Truth About Biodiversity* (Green Books 2010).
[4] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

which they occur'.[5] It is impossible to tell how many living organisms there are on earth.[6] About 1.75 million species have been classified with regular new discoveries but this is considered to be a significant underestimation of the total number.[7] In 1982 Erwin carried out a study which led him to estimate that 'there are perhaps as many as 30,000,000 species of tropical arthropods'.[8] This variety of species is constantly threatened by humans. The more intensively an animal is hunted, the greater the threat to its existence.[9] The Steller's sea cow was hunted to extinction within twenty seven years of its discovery in 1741.[10] The current rate of loss is dramatic with the Living Planet Index estimating a loss of 25% of species between 1970 and 2000.[11] The loss of one species can lead to the collapse of entire bionetworks due to the impact on the food chain.[12] From an economic stand, we do not know what species may be valuable in the future; the loss of a particular species may prevent future discoveries.[13] There is also a moral argument for protecting nature for its inherent worth.[14] Van Heijnsbergen says that conservation includes 'protection and preservation' but also 'restoration and the safeguarding of ecological processes' to achieve 'sustainable utilization [sic]'.[15]

Recognising the value of biodiversity and eager to respond to the perceived need for a global approach to its protection, the UN proposed the Convention on Biological Diversity.[16] The Convention opened for signatures at the Rio Summit in 1992 and entered into force on 29 December 1993.[17] It currently has 193 parties.[18] The Convention defines biodiversity as 'the variability among living organisms from all sources…and the ecological complexes of which they are part'.[19] The parties are 'determined to conserve and sustainably use biological diversity for the benefit of present and future generations'.[20]

---

[5] Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, OUP 2009); J. Michael Scott et al, 'Gap Analysis: A Geographic Approach to Protection of Biological Diversity' (1993) 123 Wildlife Monographs 3.
[6] Thompson (n 3).
[7] Thompson (n 3); John Dransfield et al, 'Tahina – A New Palm Genus from Madagascar' (2008) 52 Palms 31 <www.kew.org> accessed 4 May 2013.
[8] Terry L Erwin, 'Tropical Forests: Their Richness in Coleoptera and Other Arthropod Species' (1982) 36 Coleopterists Bulletin 74.
[9] Birnie, Boyle and Redgwell (n 5).
[10] Samuel Turvey and Claire Risley, 'Modelling the Extinction of Steller's Sea Cow' (2006) 2 Royal Society Biology Letters 94.
[11] Jonathan Loh et al, 'The Living Planet Index: Using Species Population Time Series to Track Trends in Biodiversity' (2005) 360 Phil. Trans. R. Soc. B 289.
[12] Thompson (n 3).
[13] ibid.
[14] ibid.
[15] Pieter van Heijnsbergen, *International Protection of Wild Flora and Fauna* (IOS Press 1997).
[16] United Nations Environment Programme, 'Convention on Biological Diversity' UNEP <www.cbd.int> accessed 29 April 2013.
[17] ibid.
[18] ibid.
[19] Convention on Biological Diversity (n 4).
[20] ibid.

The traditional approach to conservation has been to focus on specific species.[21] Scott is critical of this method saying, 'the reactive, species by species approach to conservation has proved difficult, expensive, biased, and inefficient'.[22] Franklin argues that there are 'simply too many species' for this approach.[23] Working on a species level will deplete financial and scientific resources whilst having little impact.[24] It is impossible to protect each species without taking into account the wider ecosystem in which they live.[25] Franklin states that 'larger scale approaches–at the level of ecosystems and landscapes–are the *only* way to conserve…biodiversity'.[26] Only by concentrating on efforts to conserve entire ecosystems will we protect the individual species which rely on those ecosystems.[27] This is the approach advocated by the Convention.[28]

An ecosystem is defined by the Convention as 'a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit'.[29] The benefits that humans derive from the environment are known as 'ecosystem services'.[30] Ecosystem services provide economic and non-economic benefits such as food, water, pollination and recreational opportunities.[31] Ecosystems rely on the maintenance of their biodiversity to continue to provide these services.[32] An ecosystem based approach to conservation means 'linking goals on wildlife, water, soil and landscape, and working at a scale that respects natural systems and the natural features supporting such systems'.[33] The Convention acknowledges that 'the in-situ conservation of ecosystems and natural habitats' is a 'fundamental requirement' and obliges parties to 'promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings'.[34] The Nagoya Protocol, agreed in 2010, will encourage parties to intensify their conservation efforts, encouraging the further development of an ecosystem based approach.[35]

[21] J. Michael Scott et al, 'Gap Analysis: A Geographic Approach to Protection of Biological Diversity' (1993) 123 Wildlife Monographs 3.
[22] ibid.
[23] Jerry F Franklin, 'Preserving Biodiversity: Species, Ecosystems or Landscapes' (1993) 3 Ecological Applications 202.
[24] Franklin (n 23).
[25] Thompson (n 3).
[26] Franklin (n 23).
[27] ibid.
[28] Convention on Biological Diversity (n 4).
[29] ibid.
[30] UK National Ecosystem Assessment: Technical Report (n 1).
[31] Department for Environment, Food and Rural Affairs (n 2).
[32] UK National Ecosystem Assessment: Technical Report (n 1).
[33] Department for Environment, Food and Rural Affairs (n 2).
[34] Convention on Biological Diversity (n 4) preamble; Convention on Biological Diversity (n 4) art 8(d).
[35] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (adopted 29 October 2010, opened for signature 2 February 2011) UNEP/CBD/COP/DEC/X/1 of 29 October 2010.

At a European level there are two main conservation instruments, the Wild Birds Directive and the Habitats Directive.[36] The Wild Birds Directive was first adopted in 1979.[37] It has been amended several times and a consolidated version was adopted in 2009.[38] The Directive takes two approaches to the protection of wild birds.[39] The first is a species based approach.[40] Member states are required to implement measures to protect all naturally occurring migratory and non-migratory wild birds found in their territory.[41] Member states must prohibit the 'deliberate killing or capture' of wild birds, the destruction of nests and the taking of eggs.[42] Member states must prohibit significant 'deliberate disturbance' of birds, especially in breeding seasons.[43] Annex II lists the wild birds which may be hunted outside of breeding seasons.[44] Particularly cruel hunting methods such as snares and explosives are not allowed.[45] This is very much a species based approach with protection for birds but little protection for the environment with which the birds interact. The Directive does, however, aim to protect the 'natural habitats of wild birds'.[46] Member states are required to identify 'the most suitable territories' for the conservation of the species listed in Annex I.[47] Such territories are classed as Special Protection Areas.[48] Member states are to 'take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds'.[49] The designation and management of SPAs has proved controversial.[50] In *Lappel Bank*,[51] the ECJ held that the decision to exclude the Port of Sheerness from an SPA on the Medway Estuary was wrong because economic factors should not be taken into account in deciding boundaries. The decision came too late to save the habitat which had been concreted over by the time of the ECJ ruling.[52] Likewise in *Santoña Marshes*,[53] the ECJ held that the designation must be made on ornithological grounds. In *Leybucht Dyke*,[54] the dispute related to work to strengthen a

[36] Christopher P Rodgers, *The Law of Nature Conservation: Property, Environment and the Limits of Law* (Oxford University Press 2013); Council Directive 2009/147/EC of 30 November 2009 on the conservation of wild birds [2010] OJ L 20/7 ('Wild Birds Directive'); Council Directive 92/43/EEC of 21 May 1992 on the conservation of habitats and species [1992] OJ L 206/7 (as amended) ('Habitats Directive').
[37] Council Directive 79/409/EC of 25 April 1979 on the conservation of wild birds [1979] OJ L 103.
[38] Wild Birds Directive (n 36).
[39] ibid.
[40] ibid.
[41] ibid.
[42] Wild Birds Directive (n 36) art 5.
[43] Wild Birds Directive (n 36) art 5(d).
[44] Wild Birds Directive (n 36) art 7.
[45] Wild Birds Directive (n 36) art 8 and annex IV(b).
[46] Rodgers (n 36).
[47] Wild Birds Directive (n 36) art 4.
[48] Wild Birds Directive (n 36) art 4.
[49] Wild Birds Directive (n 36) art 4.
[50] Rodgers (n 36).
[51] Case C-44/95 *R* v *Secretary of State for the Environment ex parte Royal Society for the Protection of Birds* [1996] ECR I-3805 ('Lappel Bank').
[52] ibid.
[53] Case C-355/90 *Commission of the European Communities* v *Spain* [1993] ECR I-4221 ('Santoña Marshes').
[54] Case C-57/89 *Commission of the European Communities* v *Germany* [1991] ECR I-883 ('Leybucht Dyke').

dyke to prevent flooding. The court held that work which would cause a disturbance could only be carried out in exceptional circumstances; economic and recreational grounds would not be sufficient.[55] This aspect of the Directive provides more of an ecosystem based approach to conservation as whole territories are designated for protection. There is, however, still a focus on the way the birds interact with the habitat rather than protecting the entire ecosystem and there is little done to ensure that the designated areas work together for conservation purposes.

The Habitats Directive achieves the aim of promoting 'the maintenance of biodiversity' through the 'conservation of natural habitats and of wild flora and fauna' using both a species based approach and an ecosystem based approach.[56] The species based approach is found in articles 12 and 13.[57] Annex IV provides a list of animals and plants which the member states must take measures to protect.[58] Member states must prohibit, *inter alia*, the 'deliberate capture or killing', 'deliberate disturbance' and 'destruction of breeding sites' of listed species.[59] Member states must prohibit, *inter alia*, the 'deliberate picking', destruction or sale of protect plants.[60] Member states may allow the hunting of species listed in Annex V where certain conditions are met.[61] This aspect of the Habitats Directive is species oriented. The aim is to prevent the destruction of the listed species. The protection of the habitats in which those species live is not relevant as long as the species are not targeted. The Directive does, however, provide for habitat protection.[62] Member states are required to designate 'sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II'.[63] These protected areas are known as Special Areas of Conservation ('SACs') and together form a network called Natura 2000.[64] Member states must afford high levels of protection to designated sites.[65] Sites should be managed with 'necessary conservation measures', and deterioration of the site and disturbance of Annex II species should be avoided.[66] Member states can undertake work which will have a negative impact but only for 'imperative reasons of overriding public interest, including those of a social or economic nature' and where compensatory measures are taken.[67] This is a lower level of protection than that given by the Wild Birds Directive where economic considerations may not be taken into account.[68] The establishment of the Natura 2000 network is 'an holistic, ecosystem

[55] ibid.
[56] Habitats Directive (n 36) preamble.
[57] Habitats Directive (n 36) arts 12 and 13.
[58] Habitats Directive (n 36) annex IV.
[59] Habitats Directive (n 36) art 12.
[60] Habitats Directive (n 36) art 13.
[61] Habitats Directive (n 36) art 14.
[62] Rodgers (n 36).
[63] Habitats Directive (n 36) art 3.
[64] ibid.
[65] Rodgers (n 36).
[66] Habitats Directive (n 36) arts 6(1) and 6(2).
[67] Habitats Directive (n 36) art 6(4).
[68] *Leybucht Dyke Case* (n 54).

approach'.[69] The integration of ecosystem management across Europe through the network is an ambitious project which will result in significant benefits for conservation.[70] The project has been, however, severely delayed.[71] All sites were supposed to be designated by 2004 with the Commission aiming to 'halt biodiversity decline…by 2010' but this deadline was missed.[72] A number of sites were proposed in 2012 and states have six years in which to designate these sites as SACs and implement management schemes.[73] The Commission has set itself a new deadline of reversing biodiversity loss by 2020.[74] Once the network is in place and being managed properly, the Directive will have gone a significant way towards implementing an ecosystem based approach across the EU.

English law is subject to the obligations found in the European Directives.[75] The original transposing regulations for the Habitats Directive were criticised by the ECJ as they transferred the duty to comply with the Directive onto statutory conservation bodies rather than introduce specific regulations.[76] The current regulations were introduced in 2010.[77] Under the Regulations, the Secretary of State maintains a list of identified SACs and SPAs.[78] The selection of sites is done by direct reference to the criteria in the Directive.[79] Parts 2 and 6(2) of the Regulations implement the Directive's standards for the management of designated sites.[80] Part 2 relates to operations which fall outside planning control.[81] Damaging operations can be restricted by way of notification made under the Wildlife and Countryside Act 1981.[82] If a landowner wishes to carry out an operation specified in the notification, he must apply to Natural England.[83] It is an offence to carry out the operation without consent.[84] Where operations fall within the remit of the planning system, part 6 applies strict controls on the planning authority.[85] In both cases, assessment of the conservation impacts of the development should take place and permission should not be granted where there is a negative assessment unless there is an 'overriding public

[69] Sabine E Apitz, 'European Environment Management: Moving to an Ecosystem Approach' (2006) 2 Integrated Environmental Assessment and Management 80.
[70] 'Memo on Commission Strategy to Protect Europe's Most Important Wildlife Areas – Frequently Asked Questions about NATURA 2000' (European Commission 2003).
[71] Rodgers (n 36).
[72] 'Commission Working Document on Natura 2000' (Commission of the European Communities 27 December 2002).
[73] 'Environment: A Good Day for Nature in Europe' (Press Release IP/12/1255, European Commission 26 November 2012).
[74] ibid.
[75] Rodgers (n 36).
[76] Case C-06/4 *Commission of the European Communities* v *United Kingdom* [2005] ECR I-9017.
[77] Conservation of Habitats and Species Regulations 2010, SI 2010/490 (as amended 2011 and 2012).
[78] Conservation of Habitats and Species Regulations 2010, reg 13.
[79] Conservation of Habitats and Species Regulations 2010, reg 10.
[80] Conservation of Habitats and Species Regulations 2010, part 2.
[81] ibid.
[82] Wildlife and Countryside Act 1981.
[83] Conservation of Habitats and Species Regulations 2010, reg 20.
[84] Wildlife and Countryside Act 1981, s28P.
[85] Conservation of Habitats and Species Regulations 2010, part 6.

interest' in which case compensatory measures should be taken.[86] Insofar as the Regulations deal with the protection of habitats, they closely mirror the requirements of the Habitats Directive. This is undoubtedly an ecosystem based approach to conservation. Problems will arise, however, if the protected sites are insufficiently large to cover an entire ecosystem because unregulated activity outside the protected area may affect the protected site. An example of this is the eutrophication of Northumberland coastal waters leading to an increase of phytoplankton despite its designation as a SPA.[87] The increase in nitrate level is caused by farmers outside the SPA releasing nitrates into the River Tweed.[88] The Regulations also implement the species protection obligations found in the Habitats Directive.[89] Initially there was significant overlap with domestic law but now only the Regulations deal with European protected species of animals and plants.[90] The offences parallel those found in the Habitats Directive.[91] This protection is species based and, although important, without the protection afforded to the ecosystems with which these species engage by other parts of the Regulations, the protection would be of limited value.

The primary domestic conservation legislation is the Wildlife and Countryside Act 1981,[92] introduced in order to implement the Wild Birds Directive in England.[93] Section 1(1) makes it an offence to 'intentionally kill, injure or take' a wild bird, damage its nest or steal its eggs.[94] The offence applies to any bird naturally resident in the EU.[95] Additional protection is afforded to endangered species listed in Schedule 1.[96] It is an offence to intentionally or recklessly disturb these birds during breeding.[97] There is an 'open season' during which birds listed in Schedule 2 can be hunted.[98] The Act also gives protection to wild animals making it an offence to 'kill, injure or take' any animal listed in Schedule 5.[99] These methods of conservation aim to protect species, not to protect habitats. The Act has separate measures which it uses for habitat protection.[100] Protection of habitats is achieved by 'the manipulation of property rights'.[101] Any site which is 'of special interest by reason of any of it flora, fauna, or geological or physiographical features', can be designated by Natural

[86] ibid.
[87] Natural England <www.naturalengland.org.uk> accessed 5 May 2013; Gerald Maier et al, 'Estuarine Eutrophication in the UK: Current Incidence and Future Trends' (2009) 19 Aquatic Conservation: Marine and Freshwater Ecosystems 43.
[88] Gerald Maier et al, 'Estuarine Eutrophication in the UK: Current Incidence and Future Trends' (2009) 19 Aquatic Conservation: Marine and Freshwater Ecosystems 43.
[89] Conservation of Habitats and Species Regulations 2010, part 3.
[90] Rodgers (n 36).
[91] Conservation of Habitats and Species Regulations 2010, part 3.
[92] Wildlife and Countryside Act 1981.
[93] Rodgers (n 36).
[94] Wildlife and Countryside Act 1981, s 1(1).
[95] Wildlife and Countryside Act 1981, s 27.
[96] Wildlife and Countryside Act 1981, sch 1.
[97] Wildlife and Countryside Act 1981, s 1(5).
[98] Wildlife and Countryside Act 1981, s 2 and s 5.
[99] Wildlife and Countryside Act 1981, s 9.
[100] Wildlife and Countryside Act 1981, s 28.
[101] Rodgers (n 36).

England as a Site of Special Scientific Interest ('SSSI').[102] The site notification lists 'operations…likely to damage that flora or fauna'.[103] The notification will also express Natural England's views on how the land should be managed.[104] A landowner requires consent to carry out an operation listed in the notification.[105] This system limits the land use rights of the owner by preventing him from carrying out otherwise lawful activities on his land.[106] The Act makes provision for management schemes agreed between Natural England and landowners.[107] Natural England may offer payments to landowners in exchange for positive management of their land.[108] There are a number of other land designations in England such as National Parks[109] and National Nature Reserves[110] providing various levels of protection.[111] SSSIs and other land designations provide more protection for ecosystems than a species based approach would but they do not provide protection at an ecosystems level. Many SSSIs are too small to provide adequate protection for an entire ecosystem.[112] Also, SSSIs are designated as a result of the features of the land.[113] Operations damaging to the ecosystem as a whole will not be stopped unless it will have an impact on the specified feature.[114] Although it will often be necessary to protect the entire ecosystem in order to protect the specified feature, this may not always be the case. There is, therefore, not a full level of protection for the entire ecosystem.

Legislation in Europe and England go some way towards implementing an ecosystem based approach to conservation but habitats are still deteriorating.[115] In England, '30% of the services we get from our ecosystems are declining' and in 2008, '18 out of 42 priority habitats and 120 out of 390 priority species were in decline'.[116] There is an urgent need to reverse the decline in biodiversity.[117] In Europe, this can be achieved through a renewed push for the designation of Natura 2000 sites, expanding the network throughout Europe. There is also a need to ensure that these sites are integrated, both in their management and providing corridors for wildlife to pass between protected sites. Once completed, the designation process will provide an ecosystem based approach. In England, the government has published a white paper

[102] Wildlife and Countryside Act 1981, s 28.
[103] Wildlife and Countryside Act 1981, s 28(4).
[104] ibid.
[105] Wildlife and Countryside Act 1981, s 28E.
[106] Rodgers (n 36).
[107] Wildlife and Countryside Act 1981, s 28J.
[108] Wildlife and Countryside Act 1981, s 28M.
[109] National Parks and Access to the Countryside Act 1949.
[110] Wildlife and Countryside Act 1981, s 35.
[111] Rodgers (n 36).
[112] ibid.
[113] Wildlife and Countryside Act 1981, s 28.
[114] Rodgers (n 36).
[115] Colin T Reid, 'The Privatisation of Biodiversity? Possible New Approaches to Nature Conservation Law in the UK' (2011) 23 JEL 203.
[116] UK National Ecosystem Assessment: Technical Report (n 1). Department for Environment, Food and Rural Affairs (n 2).
[117] Department for Environment, Food and Rural Affairs (n 2).

outlining proposals for improving biodiversity.[118] The report states that 'past action has often taken place on too small a scale'.[119] Ecosystems can only be conserved if the protected area is sufficiently large to encompass the entire ecosystem.[120] One threat to biodiversity is habitat fragmentation where protected areas are not large enough to sustain themselves.[121] The white paper proposes Nature Improvement Areas which are large scale conservation areas.[122] Integrating conservation measures for water, soil, plants and animals on a landscape scale through the NIAs is crucial for protecting ecosystems and reversing biodiversity decline. The proposals also recommend the introduction of 'corridors' and 'stepping stones'.[123] These enable species to move between protected areas thereby increasing the biodiversity of those protected areas.[124] In my view, in order to fully implement an ecosystem based approach, it is necessary to protect larger, more integrated areas through the introduction of NIAs and 'corridors'.[125] Many of the government's proposals involve giving power to local communities to make decisions about their area.[126] Local Nature Partnerships, comprising statutory bodies, businesses and local people, would 'influence local decisions and promote an ecosystems approach at a local level'.[127] This ties in with the coalition's localism agenda.[128] These proposals will not work. In order to implement an ecosystem approach to biodiversity, it is necessary to work on a large scale. Small-scale conservation work does little to protect ecosystems as a whole. Local partnerships may be unable to see the full scale of the work required, may lack the expertise to implement necessary measures and may be subject to the wishes of parties who have motives opposed to conservation. Instead, national oversight of large-scale conservation areas is required to arrest the decline in biodiversity and implement an ecosystem based approach to conservation.

As humans we rely on ecosystem services.[129] Ecosystems require biodiversity in order to survive.[130] By protecting biodiversity we protect the ecosystem services that we depend upon.[131] There are two main approaches to conservation: the protection of threatened species of plants and wildlife or the protection of ecosystems as a whole.[132] There is little to be gained by protecting species if the environment which they require for survival is destroyed. There are various measures in place to ensure the protection of the environment. To various degrees they implement the ecosystem based approach

[118] Department for Environment, Food and Rural Affairs (n 2).
[119] ibid.
[120] ibid.
[121] Thompson (n 3).
[122] Department for Environment, Food and Rural Affairs (n 2).
[123] ibid.
[124] ibid.
[125] ibid.
[126] ibid.
[127] ibid.
[128] The Institute for Public Policy Research <www.ippr.org> accessed 5 May 2013.
[129] Department for Environment, Food and Rural Affairs (n 2).
[130] Rodgers (n 36).
[131] ibid.
[132] ibid.

required by the Convention on Biological Diversity.[133] In order to implement the approach more fully it will be necessary for Europe to complete the designation process of Natura 2000 sites and ensure that the sites are fully integrated. In England, it will be necessary to work on a larger scale than is currently in place, integrating work to improve water, soil, plants and animals at a landscape level. Although the basis of an ecosystem approach is in place, fuller integration of site management and working on a larger scale will more fully implement the approach and secure biodiversity conservation.

[133] Convention on Biological Diversity (n 4).

MEDIA, POLITICS AND CRIMINALISATION: AN INCREASINGLY PROBLEMATIC RELATIONSHIP

LOUISE JOHNSON[*]

The relationship between the media, politics and criminalisation is subject to scrutiny due to an influx of new offences. It has been suggested criminalisation is a political response to public worries, leading to rushed legislation. The reasons behind the recent rise in criminalisation are examined, resulting in a finding that the media does promote public worries. Although politicians consider such worries, the nature of their profession is extremely competitive, thus their own agenda also influences criminalisation. Finally, the suggestion that quickly passing legislation for new criminal offences is more socially beneficial than considering alternative response options is addressed.

1 INTRODUCTION

Between May 1997 and January 2010, 14,300 new offences were created, indicating the huge rise in criminalisation in recent years.[1] The reasoning behind criminalisation is therefore a topic of great debate. Ashworth has stated that,

> [c]reating a new criminal offence may often be regarded as an instantly satisfying political response to public worries about a form of conduct that has been given publicity by the newspapers and television. The pressure on politicians to be seen to be doing something may be great and considered responses such as consultation and commissioning research may invite criticisms of indecision and procrastination.[2]

This statement raises two important issues related to criminalisation, which will be analysed in this paper. Firstly, Ashworth suggests criminalisation is the result of politicians reacting to the public's perception of forms of conduct, which has been publicised through the media.[3] To assess whether this statement is true, the effect of media must be analysed, as must other potential causes of criminalisation as well as its alternatives. This will indicate that the statement is accurate in suggesting criminalisation is 'often' the result of the portrayal of crime by the media; however, there are other factors which also have an effect, including the political agendas of politicians, the harm principle and the offence principle.

---

[*] Louise Johnson, Newcastle University, LLB (Hons) Law.

[1] Nick Collins, 'Labour Invents 33 New Crimes Every Month' (*The Telegraph*, 23 January 2010) <http://www.telegraph.co.uk/news/politics/labour/7050044/Labour-invents-33-new-crimes-every-month.html> accessed 12 February 2013.

[2] Andrew Ashworth, *Principles of Criminal Law* (5th ddn, OUP 2006) 23.

[3] ibid.

The second issue raised by Ashworth is how delaying processes 'may invite criticisms of indecision and procrastination'.[4] To analyse the truth in this statement, examination of rushed and prolonged legislation must be made individually, and consideration should be given to which is more beneficial to society. This paper will argue that the media has an increasingly compelling effect on criminalisation, yet politicians' own agendas must not be forgotten. Furthermore, it can be seen that considered responses by politicians are currently given and this can be beneficial, in that the public can become more involved in the political process of criminalisation.

2 MEDIA AND CRIMINALISATION

Ashworth implies that the media has a significant effect on criminalisation.[5] It is undeniable that the relationship between the media and crime has long been controversial.[6] There seems to be tension within the media when it comes to balancing between fulfilling 'an idealised political role' and maintaining 'audience-building strategies'.[7] However, these two roles are easily linked. The main objective of any particular media outlet is to attract an audience, and this is done by covering stories which will be interesting to the public. Coverage of crime is one such example of this. Therefore, publishing stories about serious crimes not only attracts audiences but shapes public opinion and policy, which in turn has a political effect due to the democratic nature of this country.[8] It should be noted, however, that the media also shapes criminalisation through withholding 'information substantiating the frequency with which the incidents occur'.[9] This suggestion is twofold; not only do the media suggest that crime occurs at a higher frequency in general but 'it also exaggerates the amount of violent crime… relative to property crime'.[10] This indicates how the media 'serves as a major contributor to public misperception and anxiety about crime', therefore indicating that Ashworth's statement is true to the extent that public worries result from the portrayal of crime in the media.[11]

However, it is not necessarily true that because the media shapes public opinion, criminalisation automatically follows. Therefore, it is necessary to consider exactly how the media affects legislation that is passed. Opinions greatly differ with regard to this issue. Some suggest that the media has a 'considerable influence in bringing issues to the attention of legislators'.[12] This argument is explicitly shown through

[4] ibid.
[5] ibid.
[6] P. Schlesinger, H. Tumber and G. Murdock, 'The Media Politics of Crime and Criminal Justice' (1991) 42 BJS 397, 397.
[7] ibid.
[8] A. Thompson, 'From Sound Bites to Sound Policy: Reclaiming the High Ground in Criminal Justice Policy-Making' (2010) 38(3) Fordham Urb LJ 775, 776.
[9] ibid 805.
[10] ibid 776.
[11] ibid 779.
[12] V. Jenness, 'Explaining Criminalization: From Demography and Status Politics to Globalization and Modernization' (2004) 30 Annu Rev Sociol 147, 155; J. Hagan, 'The Legislation of Crime and

coverage of the case of Jamie Bulger, which 'showed the press as a reflector and organiser of public opinion'.[13] Others go further to say politicians themselves are not only made aware of particular issues but 'opportunistically latch onto particular issues… to which they can attach legislative agendas'.[14] This indicates how legislators are driven by the desire for re-election.[15] Thompson suggests this drive 'encourages the politician… to adopt legislative stances that seem to respond to and exploit issues raised by and in the media'.[16] This is a logical submission as ultimately politicians rely on support from the public to keep them in office. However, politicians 'often devise legislative "solutions" that have no basis in fact' and can worsen the situation.[17] This implies that criminalisation may not be a direct response to public worries, as politicians may have their own agendas in mind. Nevertheless, this does indicate that the media most definitely has a role.

3 OTHER FACTORS CONTRIBUTING TO CRIMINALISATION

It has been indicated thus far that the media most definitely impacts on criminalisation and the public's potential to influence the legislator. However, the key aspect of Ashworth's statement is his use of the word 'often'.[18] This implies that there must be other factors which can also influence the types of conduct that are criminalised. Ashworth states that 'the obvious starting point of any discussion of criminalization [sic] is the "harm principle"'.[19] The essence of this principle is that criminalisation is justified where conduct will cause harm to another person.[20] However, the key issue with this principle being the basis of criminalisation is that it is difficult to determine exactly what is meant by harm. There is no explicit test as to whether a specific act will fall within the principle. It is important that a balance is struck with regards to which conduct falls within this principle, as if trivial harmful conduct is defined within the principle, it is likely to lead to over-criminalisation. An alternative theory is proposed by Feinberg, who argues that conduct simply causing offence should be criminalised.[21] Ashworth appears to support Feinberg, as he states that 'there are some general obligations of citizens that are so important that the criminal sanction may be justified to reinforce them'.[22] There are some issues that arise from adopting these two opposing principles. Firstly, the fact that both are accepted as theories yet there is no settled rule as to what conduct should be criminalised, introduces an area of ambiguity and complexity into the law. Furthermore, these principles do not offer explanations for the criminalisation of possessive conduct, for example the possession

---

Delinquency: A review of Theory, Method and Research' (1980) 14 L.& Soc'y Rev 603 ; S. Scheingold, *The Politics of Law and Order: Street Crime and Public Policy* (Longman, 1984).

[13] R. Negrine, *The Communication of Politics* (SAGE Publications 1996) 110.

[14] Thompson (n 8) 799.

[15] ibid 818.

[16] ibid.

[17] ibid 820.

[18] Ashworth (n 2).

[19] ibid 30.

[20] ibid.

[21] J. Feinberg, *The Moral Limits of the Criminal Law: Offense to Others* (OUP 1985).

[22] Ashworth (n 2) 32.

of a firearm, as mere possession neither causes harm nor offence.[23] Therefore, the harm and offence principles can be the reason for criminalisation in certain circumstances, but not all.

4 ALTERNATIVE OPTIONS TO CRIMINALISATION

It has been shown that the media often results in certain forms of conduct being criminalised, yet there are other influences. However, final consideration should be given to alternative options to criminalisation and whether this would satisfy a response to public worries. Ashworth identifies the criminal law as a preventive mechanism and goes on to recognise two other major techniques, namely civil liability and administrative.[24] Ashworth makes a logical argument in that the 'most coercive and condemnatory technique (criminalization) [sic] should be reserved for the most serious invasions of interests'.[25] This principle operates under restrictive and expansive policies.[26] The restrictive policy is that criminalisation 'should not be used if it cannot be effective in controlling conduct… or causes consequences at least as bad as non-criminalisation'.[27] Although this submission is an attempt to prevent over-criminalisation, it can raise issues of fair-labelling. It can be questioned whether it is fair for someone to conduct a harmful act and not be labelled as a committing a crime, only because of consequences of criminalisation. Non-criminalisation would in this case defeat the purpose of condemning certain conduct. The expansive policy is that criminalisation should only be used where 'it is the most efficient and cost-effective means of controlling conduct'.[28] A criticism of this approach is that this may invite over-criminalisation.[29] However, the question of what constitutes 'the most serious invasions of interests' and when criminalisation should intervene arises.[30] The Law Commission reviewed this issue and proposed that the criminal law reinforcing regulatory systems needs reviewing.[31] The Law Commission recommends that harm will only warrant criminalisation when 'an individual could justifiably be sent to prison for a first offence' or 'an unlimited fine' would be an appropriate penalty to impose.[32] Finally, with regard to civil liability, the issue of fair-labelling again arises, which acts as an argument encouraging criminalisation. It is therefore evident that alternative options are available to criminalisation, which could satisfy the response to public worries, however these, like criminalisation, have certain advantages and disadvantages.

---

[23] Firearms Act 1968.
[24] Ashworth (n 2) 33.
[25] ibid.
[26] ibid 33-34.
[27] ibid.
[28] ibid 34.
[29] ibid 35.
[30] ibid 33.
[31] Law Commission, *Criminal Liability in Regulatory Contexts* (Law Com No 195, 2010); A. Ashworth and L. Zedner, 'Prevention and Criminalization: Justifications and Limits' (2012) 15 New Crim L R 542.
[32] Law Commission (n 30) para 1.29.

5 THE PROCESS OF CREATING NEW CRIMINAL OFFENCES

Having considered the first point raised by Ashworth, attention will now be focussed on the acts of politicians when criminalising. It is suggested by Ashworth that politicians are often criticised for their delaying tactics to make a considered and informed response.[33] However, others suggest that the media increases public anxiety through its inaccurate and exaggerated reports, which leads to 'pressure for tough and immediate responses to given situations that pre-empted more considered initiatives, possibly with counter-productive results'.[34] This therefore offers an opposing view, by implying that legislation can be rushed, which would invite criticism. In order to determine which view has more elements of truth, both will be considered individually.

Regarding Ashworth's submission, there are two elements to consider. Firstly, whether politicians are under pressure to be seen doing something and secondly, whether criticisms of procrastination and inefficiency are made. Thompson recognised that 'direct evidence of legislative response to a news report is hard to come by' yet 'the media also shapes public policy indirectly'.[35] He proceeds to suggest that this is because politicians believe the portrayals by the media are the general consensus of the public on an issue.[36] Therefore, 'new policies, programs [sic], and tactics respond to issues that are "hot" in the media at that moment'.[37] This indicates that the first issue raised by Ashworth is satisfied.

The second issue to consider within Ashworth's proposition is whether politicians would be criticised for being indecisive and procrastinating. A recent example of this is evident in the news. Recently, Nick Clegg, the Deputy Prime Minister, has expressed his wish to use a parliamentary report to oppose plans for the Communications Data Bill.[38] A joint committee of MPs and peers have been given the task of considering the draft bill since the summer and it is due to issue a report in December 2012, which is expected to be critical of the bill.[39] This is an example of the length of time consumed by considering only one potential piece of legislation and it is highly likely that the bill will not be enacted, as implied by the paper. However, this paper does not indicate that politicians themselves are the subject of criticism. Furthermore, Negrine submits that on occasions 'even after the government had made concessions… opinion polls suggested that the public was still critical of the government'.[40] Therefore, quickly resolving an issue raised in the media may not

[33] Ashworth (n 2).
[34] Schlesinger, Tumber and Murdock (n 5) 398.
[35] Thompson (n 8) 807.
[36] ibid.
[37] ibid.
[38] J. Landale, 'Lib Dems May Ditch Communications Data Bill' (*BBC News*, 29 November 2012) <http://www.bbc.co.uk/news/uk-politics-20534250http://www.bbc.co.uk/news/uk-politics-20534250> accessed 9 December 2012.
[39] ibid.
[40] 'Ofcom Advice to the Secretary of State for Culture, Olympics, Media and Sport' *Media Plurality and News – A Summary of Contextual Academic Literature* (29 June 2012) 12.

remove all criticism. It follows that, although it is not ideal that legislation is delayed by consultation and research, it may be that there are advantages to this.

It has been suggested that 'political pressure to pass a bill may result in hasty or poorly planned legislation'.[41] Rose has noticed that recently there has been a reduction in the amount of legislation passed and states that 'this is not necessarily a cause for complaint'.[42] He suggests that 'the relentless legislative activity by the last Government was notable for producing some baffling legislation' and the 'more sedate pace of this Government's legislative programme is to be welcomed' as it focuses more on quality than quantity.[43] This view is supported by the Hansard Society and the Select Committee on Modernisation of the House of Commons, who both promote the use of pre-legislative scrutiny.[44] They recognise that pre-legislative scrutiny produces better laws and that it would not be 'unreasonable to assume that the subsequent passage of the bill through Parliament will be faster' as a result, although there is no evidence to support such a claim.[45] The indication is that legislation subjected to scrutiny prior to its enactment has experienced 'positive development', therefore disagreeing with Ashworth's statement as there appears to be no criticism here.[46] Furthermore, pre-legislative scrutiny 'can stimulate and assist public and media debate on a subject' and 'improve Parliament's relationship with the public', again indicating a lack of criticism. Therefore, this analysis indicates that giving legislation time and consideration can actually have more benefits and does not, in fact, invite criticisms.

6 CONCLUSION

In conclusion, it is evident that many factors contribute to ultimately result in certain conduct being criminalised. It has been indicated that although the media has an effect on public perceptions of crime and these in turn can affect politicians' legislative roles, there are other factors that have similar effects. With regard to the claim of procrastination and indecision, there is little evidence to support this. It seems that there have been efforts of promoting pre-legislative scrutiny, therefore clearly opposing Ashworth's position. Therefore, the first issue raised by Ashworth indeed has truth within it; however his second assertion is more fabricated.

---

[41] Thompson (n 8) 810.

[42] C. Rose, 'The Legislation Gap: Does Slow and Steady Really Win the Race?' (*The Halsbury Exchange*, 2 February 2012) <http://www.halsburyslawexchange.co.uk/the-legislation-gap-does-slow-and-steady-really-win-the-race/> accessed 9 December 2012.

[43] ibid.

[44] Hansard Society Briefing Paper, *Issues in Law Making: Pre-Legislative Scrutiny* (July 2004) <http://www.hansardsociety.org.uk/blogs/publications/archive/2007/09/18/issues-in-law-making-5-pre-legislative-scrutiny.aspx> accessed 9 December 2012; Select Committee on Modernisation of the House of Commons, *The Legislative Process* (HC 2005-06, 1097).

[45] Select Committee (n 44) 12-13.

[46] Hansard Society (n 44).