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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 North East Law Review would not be possible.

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Foreword by the Editor-in-Chief

I would like to welcome you to Volume 7, Issue 1 of the North East Law Review. This year's edition of the Review is an exemplary illustration of the quality of Newcastle University students in what can only be described as the most trying of times. The COVID-19 global pandemic may well have altered norms of life in almost every aspect possible, yet one norm has remained unscathed. That is the ability of Newcastle University students to produce high-quality work, displayed here for the pleasure of you, the reader. It has been a tremendous honour and privilege to work with the Academic Leads and my Deputy Editor to revive the North East Law Review after a couple of dormant years. To have played but a small part in bringing together this celebration of legal academia has truly been a pleasure, and one which I personally shall treasure beyond the walls of this University.

The North East Law Review cannot be a one person show. Rather, it demands the tireless attention of a multitude of individuals who have been involved in the creation of this issue. Firstly, to my Deputy Editor, Colette Monahan. Thank you for being a brilliant sounding board and great a source of inspiration when working to revive this Review. It has been a pleasure to work in your company on this. Secondly, a huge debt of gratitude must go to the Academic Leads, Dr Ruth Houghton and Dr David Reader. They have both been an ineffable source of support for every person involved in the work of the review this year, and without their tireless effort, the North East Law Review would undoubtedly be a shadow of what it is currently. Thirdly, my sincere thanks must go to the Editorial Team. Whilst battling the trials and tribulations of a challenging academic year, they have displayed the highest professional standards and work ethic in editing the pieces contained in this review. Finally, none of this would be possible without the brilliant work of the Authors. They deserve all the plaudits for producing brilliant academic work that we get the privilege of showcasing. I hope that what awaits you inspires and fosters an essence of debate about some of the legal issues which dominate modern society. It has been a joy to read the scholarship contained in this journal, and I hope you share a similar experience.

James Merryweather

Foreword by the Deputy Editor-in-Chief

We would like to welcome you to Volume 7, Issue 1 of the North East Law Review. It has been a pleasure editing the North East Law Review this year, a collaborative journal which has allowed us to put together the best of Newcastle Law School despite the ongoing challenges of Covid-19. The aim of the North East Law Review is twofold; it serves to demonstrate the outstanding work of student authors but has also provided an important opportunity for students to contribute to legal debate and provide their own opinions on controversial topics. These range from decriminalising sex work, to what constitutes a 'family', to the impact of the Lisbon Treaty and its effect on 'competence creep'. We would like to take this opportunity to thank all those who helped in this issue of the review. Firstly, thank you to the article writers for allowing us to publish their words; they are a testament to Newcastle University, and we hope you enjoy reading their pieces as much as we have. Secondly, to the Editorial Team, without whom this could not happen and whose tireless work editing these pieces has been nothing short of remarkable. Thirdly, we must of course thank our Academic Leads, Ruth Houghton and David Reader, for their consistent encouragement and support. Finally, thank you to the readers of this issue – we hope you are as fascinated by these articles as we are.

Colette Monahan

North East Law Review Editorial Board 2020-2021

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The Outdated Rules on the Disclosure of Unused Material Undermine the Fairness and Effectiveness of the Criminal Trial

Matthew Andrews

1. Introduction

The disclosure of evidence to the defence, upon which the prosecution does not intend to rely, is essential to ensure a fair trial in a criminal justice system rooted in adversarialism.[1] Failure to disclose relevant unused material can result in miscarriages of justice, as seen in the recent spate of sexual offence acquittals.[2] Such wrongful convictions erode public confidence and have led to a number of reviews.[3]

This article examines the legal rules surrounding the disclosure of unused material, laid out in the Criminal Procedure and Investigations Act 1996, and the effects it has on the fairness and effectiveness of the criminal trial. In discussing the apparent miscarriages of justice that can occur when relevant material fails to be disclosed, this article concludes that the legal rules no longer align with the shift away from adversarialism towards a managerialism system and the emergence of new technologies. It is therefore advocated that systematic reform should take place, supported by funding, to ensure fairness and effectiveness in criminal trials.

2. The Current Rules

The procedure of disclosure is governed by the Criminal Procedure and Investigations Act (CPIA) 1996, which was introduced after the acquittal of Judith Ward, who served 17 years because of evidence proving her innocence having been withheld.[4] It introduced a raft of new rules and obligations for both the prosecution and defence in criminal trials.

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[1] Steve Wilson, Helen Rutherford, Tony Storey, and Natalie Wortley, *English Legal System* (3rd edn, OUP 2016) 479
[2] Steve Forster, 'Undisclosed Evidence in Criminal Proceedings: Part 2' (2018) 182 C.L. & J. 250, 252
[3] Ian Dennis, 'Prosecution disclosure: are the problems insoluble?' (2018) 10 Crim. L.R. 829, 832-835
[4] *R v Ward* [1993] 1 W.L.R. 619, 674

According to the CPIA, the prosecution must make an initial disclosure of any unused material capable of undermining their case or assisting that of the defendant.[5] Within 28 days of the initial disclosure, the defence must submit a Defence Statement and Witness Table in response.[6] Subsequently, the prosecution has 28 days to supply any additional unused evidential material capable of assisting the case of the defendant as per their statement.[7]

The CPIA Code of Practice places a duty on the police to "pursue all reasonable lines of enquiry, whether these point towards or away from the suspect".[8] This means that investigating officers have an obligation to seek the truth, whether it incriminates the suspect or not. These rules were established in an attempt to ensure fairness in criminal trials, despite the adversarial nature of the justice system. They also seek to promote truth-seeking, as opposed to making judgements on who has the better-performing advocate, as well as avoiding ambushes in court.

3. Departing from Adversarialism

The criminal justice system's gradual move away from adversarialism, in favour of a more managerial model, renders the current rules of disclosure outdated. A typical managerial approach to the criminal justice procedure favours minimising litigant control and enabling a state actor a case management ability.[9] According to Ed Johnston and Tom Smith, the Criminal Procedure Rules (CPR) and the Early Guilty Plea (EGP) incentives are evidence of a move towards managerialism.[10] The overriding objectives of the CPR include "dealing with cases efficiently and expeditiously".[11] This objective represents a clear departure from the adversarial model according to which the criminal trial was built, instead encouraging judicial case management. Furthermore, the introduction of greater guilty plea incentives, a policy aimed at "[saving] the public time and money on investigations", pushes courts to manage criminal trials more closely.[12] Minimising litigant control is inevitably at odds with the current adversarial disclosure rules of unused material, as the CPIA process gives the prosecution complete control over which pieces of evidence make it to trial.

[5] Criminal Procedure and Investigations Act 1996, s 3
[6] Ibid, s 5
[7] Ibid, s 7A
[8] Criminal Procedure and Investigations Act 1996, s 23, Code of Practice, 3.5
[9] Jenny McEwan, 'From adversarialism to managerialism: criminal justice in transition' (2011) 31 L.S. 519
[10] Ed Johnston and Tom Smith, 'The early guilty plea scheme and the rising wave of managerialism' (2017) 181 C.L. & J. 210
[11] The Criminal Procedure Rules 2015, 1.1
[12] Sentencing Council, 'Reduction In Sentence For A Guilty Plea: Definitive Guideline' (2017)

It could be argued that the CPIA-dictated time limits already represent a managerialist approach in the existing rules, potentially safeguarding them from requiring modernisation.[13] However, the aforementioned degree of power afforded to the prosecution remains incompatible with the fundamental aims of managerialism. Following on from the introduction of the CPR and EGP incentives, a complete move towards a managerial model would see this power removed from both parties in favour of efficiency and cost management.

4. Overreliance on the Prosecution

The scale of power given to the police and CPS by the CPIA undermines fairness in the criminal justice system. Firstly, the adversarial and prosecutorial attitude of police officers has been documented in a number of reports into the effectiveness of the current disclosure regime. In her investigation into the situation, Dr Hannah Quirk criticised the CPIA for requiring the "culturally adversarial police" to undertake an "effectively inquisitorial function".[14] Quirk found evidence of police being unwilling to commit resources to pursuing defence arguments in favour of pursuing a 'win' for the prosecution.[15] Officers see themselves as part of the prosecution, which leads them into building a case around a suspect, rather than following all lines of inquiry.[16] The fairness of criminal trials is undermined by disclosure officers holding these attitudes, as it leads to crucial pieces of evidence being withheld, or defence arguments not being investigated. Crucially, this can result in wrongful convictions.

In terms of sexual offence cases, police have been known to become susceptible to confirmation bias, whereby they begin an investigation having already decided in favour of the complainant. This issue was raised by Lord Justice Leveson, who pointed out that the police have been known to adopt tunnel vision and operate a selective approach in relation to disclosure in sexual offence cases.[17] Indeed, in the case of Liam Allan, the police failed to disclose 40,000 of the complainant's text messages, which they claimed to be personal and irrelevant. It was later found that the messages successfully demonstrated her state of mind and consent, therefore proving his innocence.[18] This attitude is not

[13] CPIA (n 7)
[14] Hannah Quirk, 'The significance of culture in criminal procedure reform: why the revised disclosure scheme cannot work' (2006) 10 Int. J. of E. & P. 42, 46
[15] Ibid.
[16] Tom Smith, 'The "near miss" of Liam Allan: critical problems in police disclosure, investigation culture and the resourcing of criminal justice' (2018) 9 Crim. L.R. 711, 728
[17] Lord Justice Leveson, 'The Pursuit of criminal Justice' (Speech at the Criminal Cases Review Commission Annual Lecture, London, 25 April 2018)
[18] Forster (n 2) 252

unique to Allan's case; it has also been uncovered in other sexual offence cases.[19] In order to avoid confirmation bias, Professor Ian Dennis advocates the introduction of an independent party to oversee disclosure, especially in sensitive cases.[20] Such a systemic change will go some way to eliminating unfair confirmation bias.

Aside from the attitudes of the police and CPS, their lack of defence experience means they fail to recognise what would be useful to the other side.[21] This was highlighted by Lord Justice Gross, who noted a number of incorrect assumptions among disclosure officers as to what would be useful to the defence.[22] Moreover, a recent HMCPSI report found a "culture of acceptance" of poor police schedules by the CPS, which also implies either an unwillingness to assist the defence or a lack of knowledge as to what they would find useful.[23] This clearly undermines fairness in the criminal trial, as it can lead to the defence failing to obtain vital evidence to prove innocence. Combined with adversarial attitudes, this can lead to wrongful convictions. The HMCPSI report failed to recommend any substantive changes, only improvements in training and mindset.[24] However, the problems are inherent. Only structural change to the disclosure regime can ensure fairness in criminal trials, which means removing sole responsibility for disclosure from the prosecution.

5. Developments in Technology and Limits on Resources

The effectiveness of criminal trials has been undermined by the emergence of new technology, which renders the 1996 rules outdated. With the average person spending around 25 hours online every week,[25] digital evidential material has increased both in volume and importance.[26] Failures of the current system are demonstrated in *Kay*, in which the police assumed the complainant's message log to be accurate, despite protestations by the defendant.[27] Only after a wrongful conviction was it discovered that 29 messages had been deleted from the complainant's phone.[28] This case demonstrates a lack of officer training in new technology, and a lack of resources.

[19] Ibid, 251
[20] Dennis (n 3) 829
[21] Quirk (n 14) 52
[22] Lord Justice Gross, 'Disclosure – Again' (Speech at the Criminal Bar Association Disclosure Event, London, 12 June 2018)
[23] HMCPSI and HMIC, 'Making It Fair - A Joint Inspection Of The Disclosure Of Unused Material In Volume Crown Court Cases' (2017), para 5.2
[24] Ibid, para 1.4
[25] OFCOM, 'Adults: Media Use And Attitudes Report 2019' (2019)
[26] *Regina v DS, TS* [2015] EWCA Crim 662, [2015] 1 W.L.R. 4905 [51]
[27] Forster (n 2) 251
[28] Forster (n 2) 251

In *R v DS*, the defendant's mobile phone records alone covered 502 pages of A3 paper and was only disclosed on the first day of trial.[29] Such a large amount of information would take years for even a number of officers to examine in detail, meaning that key pieces of evidence could go undiscovered as police try to deal with the material efficiently, therefore undermining both the fairness and effectiveness of criminal trials. In fact, a recent report by Dame Elish Angiolini QC confirmed that vast amounts of digital material are placing a "great strain on the resources of the police", which can lead to oversights and miscarriages of justice.[30]

It was recently suggested by LJ Gross that solutions to the problem presented by technology can be found in technology itself. He believes that artificial intelligence, in the form of advanced search methods and the automatic grouping of material, will "go a long way" in solving the issue.[31] Such methods are likely to improve the examination of digital material, however a willing attitude, training and adequate investment will be required. The investment will need to be substantial and continuous, enabling investigative technology to evolve as quickly as market-leading devices.[32] Adversarial and prosecutorial attitudes still pose a challenge to the efficacy of new examination techniques, as David McNeill has highlighted.[33] He points out that is it "simply unrealistic" for the significance of one message in a 50,000-page download to be noticed by one officer looking at it out of context.[34] Therefore, the issue of uncertainty over what is useful to defence counsel will remain a problem, despite advances in technology used by investigators.

6. Modernising the rules of disclosure

One potential solution to the problem of the criminal justice system moving away from adversarialism, and the issue of overreliance on the prosecution, is a 'keys to the warehouse' approach.[35] This would involve both parties having access to essentially all evidential material. However, such an approach has been denounced by The Judicial Protocol on the Disclosure of Unused Material in Criminal Cases which claims that past trials of the approach have lacked "any proportionate benefit to the cause of

[29] Ibid.
[30] Dame Elish Angiolini QC, 'Report Of The Independent Review Into The Investigation And Prosecution Of Rape In London' (Crown Prosecution Service 2015), para 619
[31] Gross (n 22)
[32] Jessica Parker, 'Sex, Texts and Disclosure' [2018] 182 C.L. & J. 75, 76
[33] David McNeill, 'Weighing up the Digital Downloads Issue' [2018] 182 C.L. & J. 81, 82
[34] Ibid.
[35] Judiciary of England and Wales, 'Judicial Protocol On The Disclosure Of Unused Material In Criminal Cases' (2013), para 14

justice",[36] as they simply resulted in large bills being run up by defence counsel. Indeed, this is particularly problematic when Criminal Legal Aid has been cut by 29% between 2010 and 2018.[37] Alongside the financial issues, granting the defence access to a complainant's personal communications simply increases unfairness and could potentially deter victims from complaining.

A preferable alternative suggested by Dennis, as well as the Centre for Criminal Appeals, is the involvement of a legally-trained third party. [38] The CCA proposes an Independent Disclosure Agency, which would have full access to all evidence in a case and would ensure equal levels of disclosure after removing genuinely sensitive material.[39] Nevertheless, this still presents the issue of increased costs for the defence. Instead, Dennis's suggestion of an independent body to choose what to disclose to the defence, "free from a mind-set that grounds disclosure decisions in adversarial decisions", seems more appropriate.[40] This approach would remove the unfair advantage currently enjoyed by the prosecution and, although substantial resourcing may be needed from central government, costs could be offset by savings made by the police. Furthermore, Dennis recognises the lack of appetite within government for such an overhaul, therefore stressing that it could first be adopted solely for sexual offence cases to avoid police confirmation bias.[41]

7. Conclusion

In conclusion, it is clear that the current rules on the disclosure of unused materials, designed more than two decades ago, have become outdated. The CPIA is out of place in a justice system becoming more managerial in nature, favouring greater judicial case management over the traditional adversarial model. Furthermore, the fairness of criminal trials is undermined by the attitudes adopted by disclosure officers and prosecutors, allowing bias within the disclosure process, particularly with confirmation bias in sexual offence matters. The influence of the prosecution teams ought to be controlled to restore fairness and trust in the disclosure process. Improved mind-sets and training, as suggested by the HMCPSI report, can only go so far; the ingrained prosecutorial attitude of the police is impossible to overcome. As such, the introduction of an independent third party, at least in sexual offence cases, will better

[36] Ibid.
[37] Alison Pratt, Jennifer Brown and Georgina Sturge, 'Briefing: The Future Of Legal Aid' (House of Commons Library 2018), p 4
[38] Dennis (n 3) 829
[39] 'Written evidence from the Centre for Criminal Appeals and the Cardiff Law School Innocence Project (DIS0032)' (House of Commons Justice Committee, Disclosure of evidence in criminal cases inquiry 2018), para 19-22
[40] Dennis (n 3) 829
[41] Ibid.

protect against miscarriages of justice at the hands of the police and CPS. In addition, without adequate funding and a departure from combative attitudes, the use of artificial intelligence in examining digital material will fall short. Nevertheless, when combined with the introduction of an independent third party it will help eliminate the current threat posed by technology to fair and effective trials. Summarily, systemic change supported by adequate funding is required to ensure that the outdated rules of disclosure are no longer allowed to undermine the fairness and effectiveness of criminal trials.

The Impact of the Lisbon Treaty on the EU's 'Competence Creep'

Eleanor Fox

1. Introduction

Article 2(1) of the TFEU begins by defining competences as allowing the Member State or the European Union to 'legislate or adopt binding acts in that area', clarifying however that the Member State can no longer act once the European Union has exercised its competence.[1] The issue of 'competence creep' stems from this as the Member States want to limit what competences the Union may have, in areas of shared competence,[2] in order to preserve the sovereignty of national parliaments. However, competence creep occurs when the Union acts outside of its powers and slowly expands its competences beyond what is conferred upon it by its members. Reforms introduced by the Lisbon Treaty had the purpose of overcoming this issue by putting into place new mechanisms of security to hold the Union accountable. However, this paper will explore how, despite improvements arising from the introduction of the Treaty, the competence creep does still occur and the Treaty has not been entirely successful in eliminating the issue.

This article will first show how the Lisbon Treaty has succeeded to some extent by placing limitations upon the flexibility clause, which was previously used frequently. However, it will then go on to consider how, despite the heavy focus on subsidiarity, the way in which the principle works in practice is ineffective as it contains too many flaws to be truly useful in reducing the competence creep. Similarly, the doctrine of implied powers (a useful tool in making Union competences work) means that a competence creep will be inevitable because it will always lead to expanding powers. The article will therefore show how, in spite of the efforts made, the Lisbon Treaty has only worked to a certain extent, as there still remain issues that result in a competence creep.

[1] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47
[2] ibid, art 4

2. The Flexibility Clause

Used as a mechanism to 'fill gaps' where the Treaties did not provide, the flexibility clauses in past Treaties have been abused and used in abundance, which leads them to contribute heavily to the issue of competence creep. Article 308 of the Treaty of Nice sets out such a clause stating that 'if action by the Community should prove necessary to attain… one of the objectives of the Community… [then] the Council shall… take the appropriate measures' where the Treaty does not provide.[3] This gives the Union the chance to expand its competences without explicit reference to the Treaty, meaning the Member States are deprived of the opportunity to ratify or reject such actions. The phrase "should prove necessary" has been interpreted in such a broad way that has resulted in heavy use of the clause,[4] even where there may be an alternate legal basis such as in the *Massey-Ferguson* case.[5] This meant there was a serious need for reform in the Lisbon Treaty. Removing it entirely would be insufficient as flexibility clauses are essential 'in order to ensure the Treaties haven't been overly rigid' and ensures the Treaty is 'able to cope with contemporary challenges'.[6] It is therefore clear that completely removing them would not solve the problem.

Instead, the Lisbon Treaty dramatically improves the flexibility clause by enhancing the role of the European Parliament in the wording. Set out in Article 352(1) TFEU, it provides that it will only operate 'after obtaining the consent of the European Parliament' as well as being a unanimous decision from the Council.[7] Unlike previous occasions where the clause had been used, it will now have 'the support of the EU members' which also acts as a 'mechanism of political control'.[8] This has resulted in the use of the flexibility clause being limited, which is successful in reducing its contribution to the competence creep. Furthermore, Article 352(2) goes on to show that 'using the procedure for monitoring the subsidiarity principle… the Commission shall draw national parliaments' attention to proposals based on this article'.[9] The

[3] Treaty establishing the European Community (Nice consolidated version) [2002] OJ C325/1, art 308
[4] Robert Schütze 'Dynamic Integration – Article 308 EC and Legislation 'in the Course of the Operation of the Common Market' (2003) 23(2) OJLS 333, 336
[5] Case C-8/73 *Hauptzollamt Bremerhaven v Massey-Ferguson GmbH* [1973] ECR I-879
[6] Graham Butler, 'The EU Flexibility Clause is Dead, Long Live the EU Flexibility Clause' in Antonina Bakardjieva Engelbrekt and Xavier Groussot (eds), *The Future of Europe: Political and Legal Integration beyond Brexit* (Bloomsbury 2019) 87
[7] TFEU (n 1), art 352(1)
[8] Viljam Engström, 'How to tame the elusive: lessons from the revision of the EU flexibility clause' (2010) 7(2) IOLR 343, 367 and 369
[9] TFEU (n 1), art 352(2)

involvement of national parliaments in this way acts as a method of scrutiny so that it is used less frequently by making it more difficult to use. It has been seen to be used far less frequently in practice since the conditions have been introduced by the Lisbon Treaty. This then means that 'EU competences will no longer be able to 'spontaneously' emerge from practice… outside the boundaries of the Treaty and without democratic control'.[10] It can therefore be suggested that, in this aspect, the Lisbon Treaty has been successful in reducing the competence creep, perhaps more so than in regards to the principle of subsidiarity.

However, it can be argued that Article 352 still raises concern for many, such as in the Czech Republic. A petition brought by 17 members of the Czech's senate to their constitutional court brought about a review of this aspect of the Lisbon Treaty.[11] It was brought "on the grounds that it is a blanket norm enabling the adoption of measures beyond the union competences".[12] However, it was ultimately found to be compatible with their constitutional order due to the additions made by the Lisbon Treaty; these act to narrow the occasions on which such a clause can be applied which significantly reduces the expansion of competence.[13] This example ultimately shows how the Lisbon Treaty substantively rewrites Article 352 in such a way that results in limitations surrounding its use and therefore is also successful in minimising its contribution to such a competence creep in this area. Although the extent of competence creep is reduced here, it is only one contributor to the issue and so the matter is not completely resolved, only improved.

3. The Principle of Subsidiarity

[10] Lucia Serena Rossi, 'Does the Lisbon Treaty Provide a Clearer Separation of Competences between EU and Member States?' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (OUP 2012) 106

[11] Government of the Czech Republic, 'Opinion on the petition lodged by a group of Senators on 29 September for a review of the Lisbon Treaty by the Constitutional Court' (Press Release, October 2009) <www.vlada.cz/en/media-centrum/tiskove-zpravy/czech-government-opinion-on-the-petition-lodged-by-a-group-of-senators-on-29-september-for-a-review-of-the-lisbon-treaty-by-the-constitutional-court--63085> accessed 17 April 2021

[12] Petr Bříza, 'The Czech Republic: the Constitutional Court on the Lisbon Treaty decision of 26 November 2008' (2009) 5(1) EuConst 143, 155

[13] Case Pl ÚS 29/09 on petition from a group of senators of the Senate of the Parliament of the Czech Republic for review of the Treaty of Lisbon (Ruling of the Constitutional Court of the Czech Republic, 3 November 2009) <www.cvce.eu/content/publication/2013/10/22/c746a974-58eb-4907-b022-c9f486b6c3d2/publishable_en.pdf> accessed 17 April 2021

The principle of subsidiarity is frequently referenced throughout the Treaty in an attempt to bring decision-making closer to the individual citizens and reduce the competence creep that regularly occurs. Great improvements have been made in order to rein in the Union's powers through subsidiarity; however, it may not work effectively in practice. Article 5 TEU claims the 'Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States' or where it can be better achieved by the Union.[14] This is significant as it places boundaries upon the Union as to when it is able to act, limiting their competences and ensuring 'each institution… ensure[s] constant respect for the principles of subsidiarity'.[15]

One of the most significant introductions was the Early Warning Mechanism, as seen within Protocol (No 2) TFEU.[16] This is where draft legislative acts are forwarded to national parliaments, including them within the decision-making process. A national parliament will then have 8 weeks to produce a reasoned opinion as to why it does not comply with subsidiarity before then returning to the European Parliament. This engages 'national parliaments as the 'watchdogs' of subsidiarity' ensuring compliance from the Union.[17] With this extra measure of scrutiny, it can be said that the competence creep is partially reduced as it is giving a certain level of power back to the national parliaments where they can ensure the Union is not expanding its competences beyond what is conferred to it by the Treaties. However, in response to the reasoned opinion, the Commission can either amend, withdraw or maintain the draft so long as it gives a reason as to why; this brings into question the effectiveness of subsidiarity in restraining the Union's competences.

There are several limitations to this principle that mean, in practice, it is not successful in reducing the competence creep. The size of national parliaments can often mean a reasoned response is difficult to produce. 'There may simply be a shortage of MPs to undertake a subsidiarity review which, had it taken place, could culminate with an objection being raised'.[18]

[14] Consolidated version of the Treaty on European Union [2012] OJ C326/13
[15] Protocol (No 2) on the application of the principles of subsidiarity and proportionality [2012] OJ C115/206, art 1
[16] ibid, arts 4–6
[17] Thomas Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?' (2012) 50(2) J Com Mar St 267, 269
[18] Adam Cygan, 'The Parliamentarisation of EU decision-making? The impact of the Treaty of Lisbon on National Parliaments' (2011) 36(4) EL Rev 480, 486

If Member States do not have the capacity to bring a complaint, the Union cannot be scrutinised and the regime becomes powerless to the Union expanding their competences. Ultimately, this is a flaw that cannot be overcome by the Lisbon Treaty.

Furthermore, the 8-week period to return reasoned opinions has come under heavy criticism as the 'deadline is extremely short for a careful examination of European legislative proposals'.[19] In order to properly assess whether the proposal complies with the principle of subsidiarity and does not overstep the Union's competences, it can take a long period of time to thoroughly review – particularly for smaller parliaments or those who already have a heavy workload at the time. Looking at the Sixteenth Bi-annual Report from the Union, it is clear that this remains an issue for many Member States. This includes the Czech Republic, whose response was to conclude that 8 weeks was insufficient due to the way their senate works. Even when members did not render it insufficient, most states said it was extremely tight to comply with.[20] This therefore leads to the conclusion that, despite attempts to reduce competence creep through new mechanisms like the Early Warning System, they are insufficient and poorly constructed in order to fully reach their potential as a mechanism of scrutiny. Subsidiarity may work to a small extent in limiting the Union's growing competences, but ultimately more must be done to improve the way it works in practice before it can truly prevent a competence creep.

4. The Doctrine of Implied Powers

The doctrine of implied powers occurs where the 'existence of a given power also implies the existence of any other power that is reasonably necessary for the exercise of the former';[21] often seen as another method of 'gap filling' where powers are implied from the Treaty. However, as with the flexibility clauses, they are very controversial as they facilitate the competence creep through allowing the Union to imply powers that are not expressly stated in the Treaties. In spite of this, 'they are [still] necessary for the exercise of an explicitly given

[19] Marian Enache, 'Parliamentary Scrutiny on European Union Draft Legislative Acts – Rules and Practices from Romania' (2012) 9 US-China L Rev 392
[20] COSAC, *Sixteenth Bi-annual Report on Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny* (October 2011) <www.cosac.eu/documents/bi-annual-reports-of-cosac> accessed 18 April 2021
[21] Paul Craig and Grainne de Burca, *EU Law: Text, Cases and Materials* (5th edn, OUP 2011) 77

competence',[22] and so cannot be removed completely. This means that even after the reforms of the Lisbon Treaty, a competence creep is inevitable as the Union needs to imply powers in order to work efficiently.

In circumstances where the Treaty gives a competence that cannot be achieved without the existence of a further competence, this doctrine allows for the second competence to be implied – without this mechanism, many of the Treaty-given competences would be useless and unachievable. There is no doubt that through implying powers the Union is slowly expanding its areas of competence, but the Union would also not function effectively without it – case law suggests that without this function, provisions in the Treaty could not be given proper meaning and so could not be reasonably and usefully applied.[23] It was held in a case of *Germany v Commission* that in order to make binding decisions where there are not explicit competences "it confers on the Commission necessarily and per se the powers which are indispensable to carry out the task" so that the "provision is not rendered wholly ineffective".[24] It can therefore be said that because this doctrine facilitates the functioning of the EU as a whole, the competence creep will always occur, even after the changes brought about by the Lisbon Treaty.

5. Conclusion

Ultimately, although steps have been taken, the Lisbon Treaty was not successful in reducing the competence creep to such an extent that it can now be put to rest. There have been significant changes to the way in which the flexibility clause is used that has successfully reduced its frequent use; however, the principle of subsidiarity is not yet sufficient to significantly limit these expanding competences of the EU. The flaws in the procedures of the Early Warning Mechanism are to such an extent that it is too difficult to use in practice and so rendered ineffective. Furthermore, with the presence of the implied powers doctrine, competences will continue to expand from the Union, yet this is desirable in order for the

[22] Luigi Corrias, *The Passivity of Law: Competence and Constitution in the European Court of Justice* (Springer 2011) 8
[23] Case C-8/55 *Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community* [1956] ECR I-291 suggests this in action.
[24] Joined Cases C-281 and 283–285/85 *Germany v Commission* [1987] ECR I-3203, para 28

Union's actions to be successful. This suggests that the Lisbon Treaty has not been successful in preventing a competence creep because it is inevitable.

A Utilitarian Approach to a Duty of Care

Cameron Wilson

1. Introduction

The traditional understanding of liberty is perhaps best summarised by Charles Montesquieu as the freedom to do as one wills, and in not being forced to do as one does not will.[1] Infringements on this conception of liberty are justified through the 'social contract', by which Locke states individuals sacrifice some personal freedoms in exchange 'for the mutual preservation of their Lives, Liberties and Estates', [2] forming the basis of state authority and law. A classical liberal view on the social contract is that government intervention should be minimal, and to place an involuntary duty to perform acts on citizens would be for the state to act grossly *ultra vires* in creating an unnecessary restriction on individual liberties.[3] In sharp contrast, a utilitarian or communitarian view would hold that government mandated acts can be soundly justified through the outcome produced outweighing the individual's natural right to choose to act based on their personal morals.[4] In this article it will be argued that a general duty to rescue can be justified through the lives saved, the social responsibility promoted, and the alignment of morality and legality. These results would not only benefit society greatly, but the underlying principles of unity and co-operation are 'both good and necessary for the realisation of individual autonomy' in the view of Ashworth,[5] challenging Montesquieu's traditional view of liberty, and suggesting that the concept must be reviewed in an increasingly connected and co-operative world to better reflect a modern understanding of freedom.

2. The Case for a Duty to Rescue

In English law, there is currently no general duty to rescue. When considering hypothetical rescue laws, sceptics often raise the question as to what extent such a duty would operate,

[1] Charles Montesquieu, *The Spirit of the Laws* (first published 1748, T Evans 1777) Book 11, 196
[2] John Locke, *The Second Treatise* (first published 1689, CUP 1960) 123
[3] Robert Hale, 'Prima Facie Torts, Combination, and Non-Feasance' (1946) 46(2) Colum L Rev 196, 214
[4] Alberto Giubilini, Thomas Douglas and Julian Savulescu, 'The Moral Obligation to be Vaccinated: Utilitarianism, Contractualism, and Collective Easy Rescue' (2018) 21(4) J. Med Health Care & Philos 547
[5] Andrew Ashworth, 'The Scope of Criminal Liability for Omissions' (1989) 105 LQR 424, 432

doubting the clarity as to when a duty arises or what is required of citizens.[6] In answering the commonly posed question of whether a duty to rescue would extend to one devoting all their time and efforts to alleviate the suffering of strangers everywhere,[7] the French approach to a duty to rescue,[8] as summarised by Ashworth & Steiner, provides at the very least a blueprint in approaching questions on the practicality similar law in the English system. Balancing the safety and rights of both the rescuer and rescued can be achieved by ensuring that only 'easy rescues' be mandated, and that infringements on individual autonomy are proportionate by avoiding unclear legislation and providing appropriate public information.[9]

2.1 The Preservation of Life

The most obvious utilitarian reason presented for a general duty to rescue is the lives saved. Preservation of life is the first reason given by Locke for the individual sacrifices made in the social contract, and today its importance is enshrined and reflected in Article 2 of the European Convention of Human Rights which, amongst other duties, assigns states a duty to prevent loss of life in certain situations.[10] While Article 2 does not confer obligations on citizens, its existence is relevant when contemplating the goals of the state, which should ultimately align with the goals of society at large. As explained by Lord Coleridge CJ, '[i]t would not be correct to say that every moral obligation involves a legal duty, but every legal duty is founded on moral obligation',[11] and it is reasonable that morality surrounding the protection of life is important enough to the framework of a compassionate and progressive society to justify a legal duty to rescue.

While the major debate surrounding a duty to rescue has traditionally been one of the extent of individual autonomy or of causation and legal responsibility, Freeman argues '[t]he issue is one of the worth society assigns to human life',[12] signalling that previous commentators have been over-exaggerating the effect that a general duty to rescue would have on individual liberty,

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[6] Joshua Dressler, 'Some Brief Thoughts (Mostly Negative) About "Bad Samaritan" Laws' (2000) 40 Santa Clara L Rev 971
[7] Ashworth (n 5) 429
[8] Code pénal, art 233-6
[9] Andrew Ashworth and Eva Steiner, 'Criminal Omissions and Public Duties: The French Experience' (1990) 10 LS 153, 157-160
[10] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (6th edn, OUP 2014) 56
[11] *R v Instan* [1893] 1 QB 450, 453
[12] Samuel Freeman, 'Criminal Liability and the Duty to Aid the Distressed' (1994) 142(5) U Pa L Rev 1455, 1482

while suggesting that specific liberties are valued for reasons other than liberty itself holding any inherent value.[13] Freeman's belief that liberty must be fulfilled and valued by and because of social responsibility introduces a new line of reasoning for a duty to rescue, grounded in social good as opposed to pure legal philosophy. In contrast, Moore's belief that in the exploration of the moral differences between drowning a child versus merely failing to rescue it from drowning – namely, that '[d]rowning [a child] makes the world a worse place, whereas not preventing its drowning only fails to improve the world' – is one which applies the legal and linguistic technicalities of acts, omissions and responsibility too heavily to reality, losing sight of the horrific outcome of common to both decisions.[14] The same can be said of Honoré's view that non-intervention absolves agents of responsibility for the consequences of their non-intervention.[15]

In addition, introducing a duty to rescue ultimately enables one of the key tenants of liberalism: maximising the total liberty enjoyed by the general population, as life is necessary for the exercise of any other right, further evidencing that the enhancement of overall liberty and the introduction of a duty to rescue are far from mutually exclusive. As argued by Ashworth, true individual autonomy must be fulfilled by social principles,[16] and the protection of life is one such principle which both justifies a limitation on natural freedom and ultimately prevents the enjoyment of liberty lost in death, showing again that not only can liberty be justifiably restrained in the name of societal benefit, but that the two are both reliant on and enhanced by one another on a larger scale.

2.2 Social Responsibility

By introducing a general duty to rescue, the social responsibility held by every citizen would undoubtably increase, but other public duties such as taxation are justified by Kant as being part of the natural commitment citizens make to support one another and fall well within the scope of legitimate government. [17] While it would be dangerous and immoral for individual

[13] ibid 1485
[14] Michael S Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (first published 1993, OUP 2010) 59
[15] Tony Honoré, 'Are Omissions Less Culpable?' in Peter Cane and Jane Stapleton (eds), *Essays for Patrick Atiyah* (Clarendon Press 1991) 41
[16] n5, 430
[17] Immanuel Kant, *The Metaphysical Elements of Justice* (originally published 1797, Library of Liberal Arts 1965) 93-94

autonomy to be unduly infringed upon in the name of overbearing social responsibility, it is arguably just as dangerous and immoral for the values of social responsibility and common morality to be cast aside in the name of a cold and narrow conception of liberty. Although the discussion surrounding responsibility for omissions leading to harm is focused on harm to individuals, Eser argues that the appropriate line of argument should instead be that inaction leading to social harm is just as bad as causing the social harm.[18] This suggests liability for a failure to rescue can be justified on grounds of social responsibility and owing a duty to society itself, as opposed to the usual common law refusal to impose liability unless a statute or common law duty exists to aid an individual.[19] It is therefore reasonable that the approach taken when considering the arguments surrounding a duty to rescue should be viewed through an altogether different lens than omissions in other areas of law, due to the traditional principles surrounding omissions being inappropriate when applied to the elevated stakes of life and death.

A noteworthy point made by Weinrib is that other social responsibilities such as taxation occur routinely and all citizens cannot possibly benefit equally, while the duty to rescue and the right to be rescued are neither likely to arise in the average life, nor do they effect citizens disproportionately; they are short-term obligations blind to external factors.[20] From this it is arguable that a duty to rescue is more justifiable than taxation when viewed from the perspective of interference with liberty, as the regular duty placed on an individual to sacrifice a large portion of their capital ultimately restricts their ability to pursue their own goals far more than a temporary obligation to act to save another. Given that the significant assistance provided to all citizens in achieving their individual aims through the services funded by taxation can justify the heavy interference with liberty, it is irrational from a social responsibility perspective that the ultimate protection of the ability of individuals to pursue their individual aims through a duty to rescue should be considered disproportionate or unjust,[21] given the comparatively minor and temporary interference with the rescuers' individual autonomy. The view that the sacrifice of social responsibility is necessary for the realisation of liberty and vice versa is mistaken, and in introducing a duty to rescue, both values are protected and advanced.

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[18] Albin Eser, 'The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests' (1965) 4 Duq L Rev 345, 413
[19] *R v Miller* [1983] 2 AC 161
[20] Ernest J Weinrib, 'The Case for a Duty to Rescue' (1980) 90(2) Yale LJ 247, 292
[21] Kant (n 17) 95

3. The Alignment of Legality and Morality

While it is true that the law and morality should not align in every aspect, the morality and legality surrounding a duty to rescue is an area in which such an alignment is desirable. The moral argument for the imposition of a duty to rescue is not based on how morally offensive a failure to act is perceived to be on an individual basis, but rather that the morals displayed through the introduction and performance of such a duty should be promoted throughout society. Morally offensive acts and omissions such as adultery or breaking important personal promises remain legal due to being fundamentally private, and not so obviously important to society at large, while a duty to rescue is relevant enough to the general good of society to be legally enforced. The symbiotic relationship between legality and morality is key, as individual morality is ultimately moulded and learnt from the conduct of others.[22] Indeed, studies exploring the topic have found that where a duty to rescue is legally mandated, a higher proportion of the population view it as morally mandated.[23] The creation and enforcement of a legal duty to rescue would not only punish agents who act immorally, but also aid in the development of common morals which improves the health of society as a whole, aiming to correct the inhumane lack of empathy and perverted morals shown by potential rescuers such as David Cash.[24]

The argument that wrongful action and wrongful inaction are almost always distinguished between morally as advanced by Williams is sound,[25] but a distinction does not mean that wrongful inactions are to be morally accepted, or that they should bear no legal repercussions. As a result, it can be argued that the moral reasoning behind a duty to rescue far outweighs that of the protection of individual liberty when viewed in light of the generally accepted norms both in the law and public psyches of liberal democracies.

4. Conclusion

[22] Anthony D'Amato, 'The "Bad Samaritan" Paradigm' (1976) 70 NWUL Rev 798, 809
[23] Marc A Franklin, 'Vermont Requires Rescue: A Comment' (1972) 25(1) Stan L Rev 51, 58-60
[24] Don Terry, 'Mother Rages Against Indifference' *The New York Times* (New York, 24 August 1998) 10
[25] Glanville Williams, 'Criminal Omissions – The Conventional View' (1991) 107 LQR 86, 88

The view that a duty to rescue can never be justified due to the interference with liberty that comes with it is mistaken. There is undoubtedly an infringement on individual liberty with a duty to rescue, as with all duties and most laws, but the view that individual liberty equates to general liberty (or is to be valued as such) relies on an outdated and isolationist conception of liberty. Ashworth's view that primary reasoning behind a duty to rescue should be the role that co-operation and social responsibility play is necessary for the realisation of individual autonomy, rather than the lives saved or the actual increase in social co-operation, shows the wide array of legitimate argument for the implementation of such a duty. The fact that the philosophical basis for a duty to rescue may be founded on utilitarian, social responsibility and moral grounds suggests that the common view of significant benefits to the protection of life, society as a whole, and liberty itself justifying minor infringements on individual liberty is not only logically defensible, but is likely to be a relatively unoffensive proposition to most members of the public.

An assessment of institutional design: the features of a well-functioning competition authority

Maya Ffrench-Adam

1. Introduction

Competition authorities today are viewed as modern public institutions, with increased duties to deliver a service to their constituencies in effective and efficient ways.[1] In turn, authorities must continually evaluate and re-assess whether their institutional design is fit for purpose.[2] This article explores the procedural and substantive features of current competition authorities and assesses their relevance in light of effectiveness concerns. Acknowledging that there is no single indictor of effectiveness however,[3] the merit of different features is measured according to their input and output value, and how they contribute to the realisation of competition authority aims.

The structure of this article is two-part. Section 2 discusses the most fundamental features within established regimes, focusing on independence, accountability and enforcement mechanisms. Section 3 then considers which of these features should be the first priority when setting up a new competition authority. Drawing on the experience of young competition authorities,[4] the article concludes that the most crucial feature is securing a minimum standard of formal/structural independence,[5] from which de facto independence becomes a longer-term goal. Yielding both institutional,[6] and outcome value,[7] independence plays its most important role as a buffer to state 'capture'. In turn, it becomes fundamental

[1] András G Inotai and Stephen Ryan, 'Improving the effectiveness of competition agencies around the world – a summary of recent developments in the context of the International Competition Network' (2009) 2 EC CPN 27, 31

[2] Frédéric Jenny, 'The Institutional Design of Competition Authorities: Debates and Trends' in Frédéric Jenny and Yannis Katsoulacos (eds), *Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Impacts* (Springer 2016) 1

[3] Roderick Meiklejohn, 'The Effectiveness of Competition Authorities: Four Questions' (2014) 10(1) CPI J 110, 111

[4] ICN, *Lessons to be learnt from the experience of young competition agencies: An update to the 2006 report* (2019) 46 <www.internationalcompetitionnetwork.org/wp-content/uploads/2019/06/SGVC_YoungerAgenciesReport2019.pdf> accessed 17 November 2019

[5] OECD, 'Independence of Competition Authorities – from designs to practices' (Background Note to OECD Global Forum on Competition, December 2016) 18 <https://one.oecd.org/document/DAF/COMP/GF(2016)5/en/pdf> accessed 17 November 2019

[6] Stephen Wilks and Ian Bartle, 'The Unanticipated Consequences of Creating Independent Competition Agencies' (2002) 25(1) W Eur Pol 148, 148

[7] OECD 'Designing Independent and Accountable Regulatory Authorities For High Quality Regulation' (Proceedings of an Expert Meeting in London, United Kingdom, January 2005) 106 <www.oecd.org/regreform/regulatory-policy/35028836.pdf> accessed 17 November 2019

to the overall purpose of an authority, safeguarding its ability to promote competitive markets and the maximalisation of consumer welfare.[8]

2. Fundamental features of competition authorities in established regimes

2.1 Independence

There is broad consensus that independence is a pre-requisite to good regulatory governance in liberal market economies.[9] Indeed, supranational bodies such as the Organisation for Economic Co-operation and Development (OECD) emphasise the importance of such, especially in the context of competition authorities where state-owned and private companies are regulated under the same framework.[10] In turn, competition authorities need to be free from government interference in order to secure equal treatment between national and non-national entities.[11] Authority independence also encourages competitive neutrality between the various non-efficiency objectives of competition authorities such as market integration, the protection of small medium enterprises (SMEs), and individual economic freedom.[12] As a result, independence secures better quality *outcomes*, because it levels the playing field between competing interests and makes it less likely that a case will be decided on reasons extraneous to the logic of competition.[13]

Moreover, given the trade-offs in competition policy, independence also acts as a necessary safeguard against agency 'capture'[14] by select interest groups.[15] Capture of the political/governmental kind is particularly harmful, because it can lead to large ideological shifts in the application of competition law

[8] Massimo Motta, *Competition Policy, Theory and Practice* (CUP 2004) 30; and Herbert Hovenkamp, *The Antitrust Enterprise: Principles and Execution* (Harvard University Press 2006) 39
[9] UNCTAD Trade and Development Board, 'Independence and accountability of competition authorities: Note by the UNCTAD secretariat' (July 2008) 3 <https://unctad.org/meetings/en/SessionalDocuments/CCPB_IGE2014_UNCTADNOTE_EMCF_en.pdf> accessed 18 November 2019; Tay-Cheng Ma, 'Competition authority independence, antitrust effectiveness, and institutions' (2010) 30 IRLE 226, 226
[10] OECD, 'Recommendation of the Council on Regulatory Policy and Governance' (March 2012) 14 <www.oecd.org/governance/regulatory-policy/49990817.pdf> accessed 18 November 2019
[11] Wouter PJ Wils, 'Independence of Competition Authorities: The Example of the EU and its Member States' (2019) 42(2) W Comp 149, 158
[12] Ben Van Rompuy, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy? Non-efficiency Considerations under Article 101 TFEU* (Wolters Kluwer 2012) 52-58
[13] Jenny (n 2) 32
[14] John Vickers, 'Central Banks and Competition Authorities: Institutional Comparisons and New Concerns' (2010) BIS Working Paper No 331, 20 <www.bis.org/publ/work331.htm> accessed 18 November 2019
[15] Wils (n 11) 158

and policy.[16] This undermines the predictability of enforcement,[17] and weakens an authorities' value as a credible commitment mechanism, which is necessary for investor confidence in the stability and application of whole system.[18] Given that capture is a very real possibility then, formal and structural forms of independence act as a necessary 'buffer'[19] to ministerial intervention.[20] For example, this is illustrated in the institutional design of the US Federal Trade Commission (FTC), which has been structured to protect the Commission's bipartisan composition. [21] Important here has been ensuring that the elections for the heads of the FTC are not concurrent with US presential elections, in order to make the appointment process far less politicised.[22] Structural considerations can also reduce the risk of industry[23]/regulatory capture.[24] For example, opting for a multi-purpose authority over a single-purpose authority means the agency acts as a 'one stop shop'[25] for all competing interests, making it far less susceptible to capture by a single group.[26]

However, authorities should not be *wholly* independent from the political process,[27] given their important advocacy role within competition policy.[28] Indeed, agencies have a responsibility to ensure a competitive market, and they often do this by reviewing regulation and performing market studies in order to provide recommendations on how the government can best protect competition.[29] By being informed on government proposals, authorities can therefore advise on matters which may have harmful effects on competition, and, if needed, advocate against them.[30] Indeed, this is the justification given as to why the head of the Korean Fair Trade Commission (KFTC) both participates and contributes within cabinet meetings.[31] Total independence is therefore undesirable, given the important role authorities play in the dialogue around competition policy.[32]

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[16] Meiklejohn (n 3) 112
[17] ibid
[18] OECD, 'Independence of Competition Authorities' (n 5) 5
[19] ibid 12
[20] ibid 5
[21] William E Kovacic and Marc Winerman, 'The Federal Trade Commission as an Independent agency: Autonomy, Legitimacy and Effectiveness' (2015) 100 Iowa L Rev 2085, 2087
[22] Meiklejohn (n 3) 115
[23] ibid 112
[24] Richard Posner, 'The Concept of Regulatory Capture: A Short Inglorious History' in Daniel Carpenter and David Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (CUP 2014) 49
[25] Meiklejohn (n 3) 125
[26] ibid 124
[27] Kovacic and Winerman (n 21) 2090
[28] Jenny (n 2) 33
[29] Enrico Alemani and others, 'New Indicators of Competition Law and Policy in 2013 for OECD and Non-OECD Countries' in Frédéric Jenny and Yannis Katsoulacos (eds), *Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Impacts* (Springer 2016) 65
[30] Jenny (n 2) 33
[31] ibid
[32] ibid

2.2 Accountability

Alongside independence, accountability is also fundamental within the institutional design of competition authorities. Primarily, accountability ensures there is requisite oversight,[33] and therefore acts as a safeguard to the misuse of power.[34] Indeed, by making their operations publicly known, agencies are forced to justify their actions (or lack thereof),[35] to the government,[36] stakeholders, and consumers.[37] An interesting a new feature of the UK regulatory landscape in this respect has been the introduction of a document known as the 'strategic steer', which transparently sets out the aims of the Competition and Markets Authority (CMA).[38] Moreover, the CMA is also now subject to a performance framework, having to report annually on a number of benchmarks, including the financial benefits it delivers to consumers.[39] In turn, accountability is synonymous with transparent communication,[40] because it recognises that enforcement must go in hand with the communication of its benefits to consumers and businesses.[41] The possibility of appeal and review of agency decisions is also crucial for procedural accountability. This goes to the integrity of the decision-making process,[42] and is therefore symbolic of the authorities' commitment to due process and the rule of law.[43] Indeed, as the ECJ have emphasised, judicial review is an essential element of the whole decision-making process because authorities must be 'entitled to participate, as a defendant or respondent, in proceedings before a national court which challenge a decision that the authority itself has taken'.[44]

Despite having substantive merit, there is however limited empirical evidence to suggest that accountability improves the *outcome quality* of regulatory decision making.[45] Certainly, when Koop et al tested this hypothesis, accountability had no correlation to increased performance outcomes of

[33] Inotai and Ryan (n 1) 29
[34] Christel Koop and Chris Hanretty, 'Political Independence, Accountability, and the Quality of Regulatory Decision-Making' (2018) 51(1) Comp Pol Stud 38, 40
[35] Marc Quintyn and Michael W Taylor, 'Robust regulators and their political masters: Independence and accountability in theory' in Donato Masciandaro and Marc Quintyn (eds), *Designing financial supervision institutions: Independence, Accountability and Governance* (Elgar 2007) 35
[36] Wils (n 11) 152
[37] Inotai and Ryan (n 1) 29
[38] Jenny (n 2) 37
[39] ibid
[40] Inotai and Ryan (n 1) 29
[41] Philip Lowe, 'The design of competition policy institutions for the 21st century — the experience of the European Commission and DG Competition' (2008) 3 EC CPN 1, 3
[42] UNCTAD Trade Development Board (n 9) 10
[43] Ian Forrester, 'Standard of review by courts in competition cases' (Overview of discussions from the OECD Working Party No 3 on Co-operation and Enforcement roundtable, Paris, 4 June 2019) <www.youtube.com/watch?v=kBvmbp_teVI> accessed 20 November 2019
[44] Case C-439/08 *VEBIC* [2010] ECR I-12471, paras 58-59
[45] Koop and Hanretty (n 34) 45

agencies.[46] Accordingly, it may be concluded that accountability's main value is seen in its ability to frame long-term independence.[47] This is because increased accountability results in an increased willingness to concede more independence to an authority.[48] Furthermore, accountability itself safeguards independence, given that it is much harder to capture an agency which is transparent and publicly accountable.[49] In this sense, accountability and long-term independence can be seen as *interdependent*,[50] frequently being referred to as 'two sides of the same coin'.[51]

2.3 Enforcement powers

The core purpose of competition authorities is to protect competitive markets, and in turn, ensure the maximalisation of consumer welfare.[52] To this degree, enforcement powers provide the necessary 'teeth' to these aims, encompassing mechanisms such as (i) investigative powers, (ii) sanctions, (iii) remedies, (iv) fines, and (v) leniency programmes. Ideally then, authorities should intervene in the right markets, at the right time, in relation to the right problems and with the adequate remedies.[53] Effective enforcement systems should also use a combination of ex-ante (per se) rules and case-by-case analysis.[54] However, an authority's ability to engage in this mixed framework is highly dependent on the amount of resources it has at its disposal.[55] Indeed, this is particularly true of *young* competition authorities, where financial limitations can make it much harder to detect anticompetitive practices.[56] In turn, competition authorities which face these budgetary restraints often benefit from a well-functioning leniency policy, as illustrated by the Competition Commission of South Africa.[57]

When considering the outcome-focused benefits of enforcement mechanisms, much of this is based on deterrence rationales – i.e. where risk of detection/harm deters the undertaking from engaging in such

[46] ibid 68
[47] OECD, 'Independence of Competition Authorities' (n 5) 19
[48] UNCTAD Trade Development Board (n 9) 5
[49] Frédéric Jenny, 'Competition Authorities: Independence and Advocacy' in Ioannis Lianos and Daniel Sokol (eds), *The Global Limits of Competition Law* (Stanford University Press 2012) 158-176; and Michal S Gal 'When the Going Gets Tight: Institutional Solutions When Antitrust Enforcement Resources Are Scarce' (2010) 41 Loy U Chi LJ 417, 417-441
[50] UNCTAD Trade Development Board (n 9) 5
[51] Annetje Ottow, *Market & Competition Authorities: Good Agency Principles* (OUP 2015) 85
[52] Motta (n 8) 30
[53] Lowe (n 41) 2
[54] ibid
[55] Tay-Cheng Ma, 'The effect of competition law enforcement on economic growth' (2011) 7(2) JCL & E 301, 334
[56] ICN (n 4) 18
[57] ibid

behaviour in the first place.[58] However, authors are conflicted as to whether fines can actually serve this end.[59] Moreover, there are also differing views on how deterrence calculations should be made, as traditional models conflict with contemporary models such as the internalisation approach[60] (as advanced by Becker[61] and Landes[62]). The lack of consistency here illustrates just how hard it is to empirically measure the outcome-focused benefits of enforcement powers, thus making it less relevant to this analysis. On the contrary, studies suggest that considerations of institutional design are far more relevant to the intensity of competition in the market.[63] Formal independence, in turn, is often a necessary prerequisite to better enforcement outcomes further down the line.[64]

3. A first priority for new competition authorities

In light of the above analysis, it is argued that new authorities should first prioritise securing minimum standards of formal/structural independence.[65] This merits the most attention because, out of the discussed features, independence is the only one which clearly yields reputational[66] and output/outcome value.[67] Indeed, while having important output/input merit and increasing total factor productivity,[68] independence also ensures better outcomes in decision making, by ensuring decisions are made on the logic of competition alone.[69] In the context of new authorities then, independence plays its greatest role as a buffer to government capture.[70] A case study to highlight this can be seen in the experience of South Africa, regarding the statutory powers which allow ministers to intervene in mergers on public interest grounds.[71] Troubling recently has been that ministers are not just acting as a party to the proceedings, but are also entering into private negotiations with the merging parties.[72] Arguably then, South Africa

[58] Meiklejohn (n 3) 118
[59] Wouter PJ Wils, 'Is Criminalisation of EU Competition Law the Answer?' (2005) 28(2) W Comp 117, 117
[60] Wouter PJ Wils, *Efficiency and Justice in European Antitrust Enforcement* (Hart 2008) 56-57
[61] Gary S Becker, 'Crime and Punishment: An Economic Approach' (1968) 76(2) J Pol Econ 169, 169
[62] William M Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 U Chi L Rev 652, 652
[63] Mark Dutz and Maria Vagliasindi, 'Competition Policy Implementation in Transition Economies: An Empirical Assessment' (2000) 44(4) EER 762, 772
[64] ibid
[65] OECD, 'Independence of Competition Authorities' (n 5) 18
[66] Wilks and Bartle (n 6) 150
[67] OECD, 'Designing Independent and Accountable Regulatory Authorities' (n 7) 106
[68] Stefan Voigt, 'The Effects of Competition Policy on Development – Cross-Country Evidence Using Four New Indicators' (2009) 45(8) J Dev Stud 1225, 1248; and Paolo Buccirossi and others, 'Competition Policy and Productivity Growth: An Empirical Assessment' (2013) 95(4) Rev Econ & Stat 1324, 1336
[69] Jenny (n 2) 32
[70] UNCTAD Trade Development Board (n 9) 14
[71] David Reader, 'Response to Department of Economic Development (South Africa): Invitation to comment on Competition Amendment Bill, 2017' (Consultation response from the Centre for Competition Policy, January 2018) 2 <www.academia.edu/35759836/Consultation_Response_Department_of_Economic_Development_South_Africa_Invitation_to_comment_on_Competition_Amendment_Bill_2017> assessed 23 November 2019
[72] ibid 4

would benefit from better defined structural independence, to give these 'informal'/implied powers statutory footing or, alternatively, remove them entirely.[73]

There has also been a shift towards securing such formal/structural independence internationally. For example, the Belgian Competition Authority, which previously operated under the Ministry of Economic Affairs, has now been re-established as an autonomous authority.[74] Furthermore, there has also been pressure to improve the operational independence of China's three anti-monopoly agencies,[75] by merging them into a single agency whose sole mandate is competition law and policy.[76] Although, as is clear from this analysis, there is no 'one size fits all' model of independence, nor should there be.[77] In turn, any minimum standards of independence must be flexible, and it is often more helpful to measure formal independence by looking at internationally recognised *indicators* of independence such as the terms of heads of agency, the appointment and dismissal of heads, and the source of budget.[78]

Lastly, independence is fundamental to the effectiveness of an authority because it gives it the ability to priority-set.[79] For new authorities, this is necessary because it allows them to concentrate their limited resources on only the highest impact projects.[80] This leads to better enforcement, because it forces an authority to be selective about the merits of a case and how to best allocate its budget. Independent priority setting also facilitates long-term strategic planning, putting in place measures for agency evaluation and review.[81] Indeed, review is particularly important for new authorities,[82] because it allows them to move from their short-term priorities, to considering its longer-term aspirations. In the context of independence, this also enables longer term goals such as de facto independence, which may not have been considered originally, to be brought into focus.[83]

4. Conclusion

[73] ibid
[74] OECD, 'Independence of Competition Authorities' (n 5) 13
[75] Wendy Ng, 'The independence of Chinese competition agencies and the impact on competition enforcement in China'(2016) 4(1) JAE 188, 209
[76] Yong Huang, 'Pursuing the Second Best: the History, Momentum, and Remaining Issues of China's Anti-Monopoly Law' (2008) 75 Antitrust LJ 117, 125; and Xiaoye Wang, 'Highlights of China's New Anti-Monopoly Law' (2008) 75 Antitrust LJ 133, 145
[77] Gal (n 49) 441
[78] OECD, 'Independence of Competition Authorities' (n 5) 8
[79] Inotai and Ryan (n 1) 28
[80] ibid
[81] ibid
[82] Jenny (n 2) 53
[83] Wils (n 11) 165-166

This article has weighed up the merit of competition authority features relative to their input/outcome value and how they contribute to the realisation of competition authority aims. Whilst both accountability and enforcement powers have substantive merit, it is not obvious how this translates into performance outcomes, making them less important for the purpose of this analysis. Independence then, yielding both reputational,[84] and output value, is the most important feature of any competition authority.[85] This is because, alongside safeguarding authorities as a credible commitment mechanism, independence also translates into better quality outcomes for authorities, because it helps to ensure that its decisions are based on the logic of competition alone.[86] It follows from this that in the context of new competition authorities, the first priority must be securing minimum standards of formal/structural independence. Indeed, as is illustrated in the case study of South Africa, independence is a crucial safeguard, given the very real likelihood of government capture. Independence also gives authorities autonomy over their own agendas, facilitating a framework for strategic review and the realisation of longer-term priorities such as de facto independence. By enabling authorities to pursue a sole mandate of competition law and policy, independence is thus fundamental to the overarching aims of competition authorities, namely in maintaining competitive markets and in turn, the maximisation of consumer welfare.[87]

[84] Wilks and Bartle (n 6) 150
[85] OECD, 'Independence of Competition Authorities' (n 7) 106
[86] Jenny (n 2) 32
[87] Motta (n 8) 30

The Hillsborough Disaster and Subsequent Inquests have Seriously Undermined Public Confidence in the Police and the Criminal Justice System as a Whole

Eliza Kay

This article examines the extent to which the criminal justice system's response to the Hillsborough disaster undermined the public's confidence in a system which is meant to protect. The aftermath of the disaster had affects far beyond the South Yorkshire Police and reached a wide-spread scale of zero public confidence in policing. It concludes that the lies and betrayal that took place in the events following Hillsborough had a detrimental impact on the public's confidence in the criminal justice system as a whole.

The Hillsborough disaster was a tragic event that shook the nation.[1] The Criminal Justice System's (CJS) response that followed, carried detrimental impacts on public confidence within the system. This is seen through the bereaved families' response, with many having vocalised their distraught at the insensitive reaction.[2] The weakening of public confidence found its roots in: the police's deceitful response, the CJS reaction following the immediate aftermath and the unjust actions of the judiciary. Although it has been said that the above argument may be overstated as we cannot directly relate the given statistics to the Hillsborough event itself, these arguments are flawed and the event 'severely damaged, if not destroyed' Liverpudlian's confidence,[3] resulting in 'absolutely zero confidence' on a national scale.[4]

The police's response must be questioned, with Duckenfield responding inadequately to the first signs of disaster by opening the exit gates to 'relieve pressure'.[5] This caused the surge of people into the pen that required a quick reaction, but Duckenfield lacked capacity to make relevant orders and take decisions.[6] Although the police were in 'kicking distance' of the disaster, they failed to activate the emergency plan,[7] or react in a way expected of them,[8] leading to the disaster being labelled as

[1] HC Deb 27 April 2016, vol 608, col 1452
[2] Hillsborough: The Report of the Hillsborough Independent Panel (September 2012) HC 581, para 58
[3] HC Deb 27 April 2016, vol 608, col 1443
[4] HC Deb 27 April 2016, vol 608, col 1461
[5] <http://www.contrast.org/hillsborough/history/pens.shtm> accessed 6 February 2020
[6] Lord Justice Taylor, 'The Hillsborough Stadium Disaster: Final Report' (15 April 1989) Cm 962, page 50
[7] Phil Scraton Lecture, Hillsborough: Researching 'Truth', Delivering 'Justice' (2017)
[8] Lord Justice Taylor, 'The Hillsborough Stadium Disaster: Interim Report' (15 April 1989) Cm 765, para 50

'avoidable' due to the delayed police response.[9] Perceptions of the police are driven by the way officers behave and treat members of the public when in contact with them.[10] This failure to embrace the importance of community policing can lead to a loss of confidence in the 'police, the CJS and likely the government as a whole'.[11] This is because those who are dissatisfied with the contact they have with the police - who are the most public-facing dimension of the CJS - are less likely to have confidence in them because their opinion on other sections is affected.[12] Tyler maintains that every encounter a police officer has with a member of the public is a 'teachable moment',[13] that sends signals about the moral values of the police.[14] Therefore, when they get such encounters wrong, the effects can be incredibly damaging to public confidence.[15] Reiner emphasised this decline by looking at the BCS surveys, which show a reduction of 92% of people thinking the police were doing a 'very' or 'fairly good job' in 1982 to 79% in 2000,[16] and maintains that there is 'a crisis of public confidence in and consent to policing.'[17] However, the public tend to have a short memory when assessing the police; they are fairly forgiving and will respond to any improvements the police make in their service.[18] Thus, this decrease in public confidence may be overstated. Furthermore, it is important to note that the dramatic decrease in confidence may only be asserted to the South Yorkshire Police (SYP),[19] rather than the national system as a whole, as they were the specific force that undertook these miscarriages of justice. However, even if this negative response can only be linked to the SYP, it is still incredibly telling because reaction to the CJS response at local levels are more demonstrative of public confidence as it is based on people's direct experience, whereas nationally it is influenced by other factors such as the media.[20]

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[9] Bernard McCloskey, 'Morality, rights and the black letter law: judicial responsibilities in context' (2010) 36(2) Commonwealth Law Bulletin 255, 255

[10] Tom Tyler, 'Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?' (2001) 19 Behavioural Sciences and the Law, 215–35

[11] James Albrecht, Garth den Heyer and Perry Stanislas, *Policing and Minority Communities: Contemporary Issues and Global Perspectives* (Springer 2019) 3

[12] Mike Hough, Ben Bradford, Jonathan Jackson and Julian Roberts, 'Attitudes to Sentencing and Trust in Justice: Exploring Trends from the Crime Survey for England and Wales', Ministry of Justice Analytical Series, Ministry of Justice (London, UK 2013), 5.5

[13] Tom Tyler, 'The Virtues of Self-Regulation', in Adam Crawford and Anthea Hucklesby (eds.) *Legitimacy and Compliance in Criminal Justice* (London: Routledge 2012) 11

[14] Policing For A Better Britain: Report of the Independent Police Commission (2013), page 48 <http://www.lse.ac.uk/socialPolicy/Researchcentresandgroups/mannheim/pdf/PolicingforaBetterBritain.pdf> accessed 4 February 2020

[15] ibid

[16] Ian Loader and Aogan Mulcahy, *Policing and the Condition of England: Memory, Politics and Culture* (Oxford: Oxford University Press 2003) 6

[17] Robert Reiner, 'Myth vs. Modernity: Reality and Unreality in the English Model of Policing', in Jean-Paul Brodeur, *Comparisons in Policing: An International Perspective* (Aldershot: Avebury 1995) 30

[18] Katy Sindall, Patrick Sturgus and Will Jennings, 'Public Confidence in the Police: A Time-Series Analysis' (2012) 52 Brit J Criminol 744, 759

[19] HC Deb 27 April 2016, vol 608, col 1452

[20] Alison Liebling, Shadd Maruna and Lesley McAra, *The Oxford Handbook of Criminology* (6th edition, New York: Oxford University Press 2017) 251

Following the initial reaction, a blaming scenario ensued, whereby the CJS began to 'shift the blame and look for scapegoats' instead of taking responsibility for their actions.[21] This extended right through to the government. Although some MPs called for authoritative members to stop avoiding their responsibilities and that fans must be treated as humans not enemies, most blamed the fans.[22] The Secretary of State subsequently put forward plans to remove standing areas and terraces in major football clubs,[23] to 'root out' hooliganism.[24] Sir Bernad Ingham stated that what he learnt 'on the spot' when visiting Hillsborough was that 'there would have been no Hillsborough if a mob, who were clearly tanked up, had not tried to force their way onto the ground. To blame the police is a cop out'.[25] This avoidance of truth was also encompassed in the lies made by the police to the media, which included allegations of fans attacking firemen and urinating on a police officer as they gave the kiss of life.[26] Chibnall said the media has an influential hold over the public through 'banner headlines' such as these, [27] and according to Young, they cause the mass manipulation of the gullible public,[28] especially with the rapid rate at which local newspapers spread information.[29] This resulted in public confidence in the police growing as they were seen to be the heroes. However, with Duckenfield later admitting that he did not 'communicate fully the situation',[30] and the truth eventually being revealed, the public lost faith in the police due to the monumental 'cover up'.[31] Many research studies conclude that 'negative' incidents that raise distrust in the professionalism of the police, more so when sensationalized by the media, tend to dramatically reduce their generally positive image.[32]

The blame culture extended to the questioning of the families. It became more of an interrogation based on alcohol consumption and rowdiness than an enquiry.[33] The police attached labels throughout the questioning process and maintained a stereotypical idea of the football fan,[34] leaving the families and

[21] HC Deb 17 October 2011, vol 533, col 663
[22] ibid, col 24
[23] HC Deb 17 April 1989, vol 151, col 20
[24] ibid, col 30
[25] Phil Scraton, *Hillsborough: The Truth* (Edinburgh 1999) 120
[26] Mark Calvart, Dominic Cheetham, John Highfield and Jane Tadman, 'Fans in Drunken Attacks on Police' *Sheffield Star* (Sheffield, 18 April 1989)
[27] Steve Chibnall, *Law and order News: An Analysis of Crime Reporting in the British Press* (Routledge 1977)
[28] Jock Young, 'Mass Media, Drugs and Deviance' in P Rock and M McIntosh, *Deviance and Social Control* (London: Tavistock 1974)
[29] Susan Smith, 'Crime in the News' (1984) 24 British Journal of Criminology 289-295
[30] Lord Justice Taylor, Inquiry into the Hillsborough Stadium Disaster: Transcripts of Proceedings (May-June 1989), notes of J Harphan Ltd, Sheffield Day 8, 112-13
[31] Martin Beckford, 'Hillsborough Prosecutions Likely Over "The Biggest Cover up in History"' *The Telegraph* (London, 12 Sep 2012) < https://www.telegraph.co.uk/sport/football/teams/liverpool/9539424/Hillsborough-prosecutions-likely-over-the-biggest-cover-up-in-history.html> accessed 29 January 2020
[32] For one of these see: Paul Jesilow and Jon'A Meyer, 'The Effect of Police Misconduct on Public Attitudes: A Quasi-Experiment' (2001) 24(1) Journal of Crime and Justice, 109–121
[33] Phil Scraton, 'The Legacy of Hillsborough: Liberating Truth, Challenging Power' (2013) 55(2) Race and Class 1, 4
[34] HC Deb 27 April 2016, vol 608, col 1449

football enthusiasts nationally feeling subjected to a discriminatory justice system.[35] This form of wrongful policing is an example of abuse of state power that undermines public confidence in 'the administration of judicious control', producing 'crises in the popular confidence in the impartiality of legal state apparatuses'.[36] Encounters that are procedurally fair – where people are given a voice and treated with respect – generate and sustain public confidence in the police,[37] thus the wrongful actions taken by the police will have reduced confidence levels. In his 'working credos', Rutherford maintained the third credo of 'care',[38] and Bottoms later asserted his three conceptual fields, with the third being 'community'.[39] Both of these represent adherence to the rule of law to restrict state powers and a following of accountable procedures,[40] which were clearly contravened through the police's actions. The public have argued that the most important function of the CJS is fairness,[41] and in order to have public confidence, the police must treat the public with dignity and objectivity.[42] We have seen a decrease in the proportion of people who believe their police are doing a very good or fairly good job – dropping from 90% in 1982 to 75% in 2002/3,[43] and only 48% of people thinking the CJS is fair as a whole in 2015, and this may be explained by the actions of the police at Hillsborough.[44] Although this displays a significant decrease in confidence, it is difficult for us to assert this directly to the effects of the Hillsborough disaster. Nevertheless, high profile events normally exert a short-sharp shock to confidence, and it is difficult for the police to regain trust after them.[45]

The dishonest approach of the police continued with the amending of statements, with 116 out of 164 being changed to remove comments unfavourable to the SYP.[46] The legal counsel of the police maintained that the process 'couldn't be better. They can put all the things in that they want and we will

[35] Loraine Gelsthorpe and Nicola Padfield, *Exercising Discretion: Decision-making in the Criminal Justice System and Beyond* (Willan Publishing,2003) 3
[36] Frank Burton and Pat Carlen, *Official Discourse: on discourse analysis, government publications, ideology and the state* (London, Routledge and Kegan Paul 1979), page 13
[37] Policing For A Better Britain: Report of the Independent Police Commission (2013) 90 <http://www.lse.ac.uk/socialPolicy/Researchcentresandgroups/mannheim/pdf/PolicingforaBetterBritain.pdf> accessed 4 February 2020
[38] Andrew Rutherford, *Criminal Justice and the Pursuit of Decency* (Winchester: Waterside Press 1993) 18
[39] Anthony Bottoms, 'The Philosophy and Politics of Punishment and Sentencing' in Chris Clarkson and Rod Morgan, *The Politics of Sentencing Reform* (Oxford: Clarendon Press 1995) 34
[40] Andrew Rutherford, *Criminal Justice and the Pursuit of Decency* (Winchester: Waterside Press 1993)18
[41] MORI, *Public Confidence in Criminal Justice* (London: MORI 2003)
[42] Jonathan Jackson and Jason Sunshine, 'Public Confidence in Policing: A Neo-Durkheimian Perspective' (2007) 47 Brit J Criminol 214, 214
[43] Sian Nicholas and Alison Walker, 'Crime in England and Wales 2002/03: Supplementary Volume 2: Crime, Disorder and the Criminal Justice System: Public Attitudes and Perceptions' (London, Home Office 2004)
[44] Krista Jansson, 'Public Confidence in the Criminal Justice System: Findings from the Crime Survey for England and Wales (2013/14)' (London, Ministry of Justice 2015)
[45] Katy Sindall, Patrick Sturgus and Will Jennings, 'Public Confidence in the Police: A Time-Series Analysis' (2012) 52 Brit J Criminol 744, 759
[46] Hillsborough: The Report of the Hillsborough Independent Panel (September 2012) HC 581, para 132

sort them out'.[47] Following the disaster, it was discovered that 'they all knew' about the altered statements (the police investigation team, Lord Justice Taylor, the Coroner, the Home Office) - the situation 'had become institutionalised'.[48] Lord Justice Stuart-Smith was aware of these immensely amended statements, yet he held that 'at worst' this was 'an error of judgement' but not 'unprofessional conduct'.[49] The process has since been described as 'a black propaganda unit'[50] as the CJS seemed to have teamed together against the fans. Police also ran criminal record checks on the victims,[51] and the coroner tested all blood alcohol levels - even for children,[52] implying that each victim could have contributed to their own or other's deaths.[53] This discretionary form of decision-making allowed police officers to engage in these discriminatory activities, which directly contravened Peelian principles.[54] Peel maintained that in order to 'secure and maintain the respect of the public', the police must demonstrate impartial service to the law.[55] The police actions encompassed the opposite of this and left a bitter taste for the bereaved,[56] with the police going from the 'sacred' to the 'profane' and public confidence now being 'tentative and brittle'.[57] It has been argued that a series of scandals, such as Hillsborough,[58] have shaped public attitudes and damaged police reputation.[59] Although the police did eventually admit to negligence and compensate the families, this was not enough as public confidence had already been shattered.[60] Thus, along with other failures, Hillsborough 'badly dented public confidence in the integrity of the police' and created a sense that policing was 'out of control'.[61]

[47] Minutes of meeting with Counsel, 26 April 1989
[48] Phil Scraton Lecture, Hillsborough: Researching 'Truth', Delivering 'Justice' (2017)
[49] Lord Justice Stuart-Smith, Scrutiny of Evidence Relating to the Hillsborough Football Stadium Disaster (Cm 3878, 1998) para 80
[50] David Bartlett, 'Garston MP Maria Eagle: Hillsborough disaster resulted in "orchestrated campaign of blame shifting by South Yorkshire police"' *Liverpool Echo* (7 May 2013) <https://www.liverpoolecho.co.uk/news/liverpool-news/garston-mp-maria-eagle-hillsborough-3334453> accessed 30 January 2020
[51] Phil Scraton Lecture, Hillsborough: Researching 'Truth', Delivering 'Justice' (2017)
[52] HC Deb 27 April 2016, vol 608, col 1458
[53] Phil Scraton, *Hillsborough: The Truth* (Edinburgh 1999) 89
[54] Loraine Gelsthorpe and Nicola Padfield, *Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond* (Willan Publishing 2003) 1
[55] James Albrecht, Garth den Heyer and Perry Stanislas, *Policing and Minority Communities: Contemporary Issues and Global Perspectives* (Springer 2019) 3
[56] HC Deb 17 October 2011, vol 533, col 666
[57] Robert Reiner, *The Politics of the Police* (3rd edition, Oxford: Oxford University Press 2000) 162
[58] Policing For A Better Britain: Report of the Independent Police Commission (2013), page 27 <http://www.lse.ac.uk/socialPolicy/Researchcentresandgroups/mannheim/pdf/PolicingforaBetterBritain.pdf> accessed 4 February 2020
[59] Ian Loader and Aogan Mulcahy, *Policing and the Condition of England: Memory, Politics and Culture* (Oxford: Oxford University Press 2003) 30
[60] *R. v. H.M. Coroner for South Yorkshire ex parte Stringer and Others* (1993) 158 JP 453
[61] ibid, page 28

The judicial response lacked accountability, as throughout the first inquests the families had no right of appeal and limited routes of redress,[62] despite many identifying evidential inconsistencies.[63] Furthermore, the second stage seemed to simply be an opportunity for the police to respond to criticisms made in the Taylor report,[64] making the process adversarial rather than inquisitorial.[65] During the hearings, eight families were processed each day and thus had a limited opportunity to reflect on evidence given to the jury,[66] and this crime control method,[67] of 'conveyer belt justice' came across as insensitive and unprofessional.[68] Furthermore, the 3.15 cut-off point set by the coroner meant he would not hear any evidence after this time because by then 'the real damage was done'.[69] This meant each death 'lost its individual circumstances to a collective interpretation of the events leading to the disaster'.[70] Also, with the coroner persuading the jury to reach the 'fatally flawed' conclusion of accidental death,[71] by saying this could still be seen as negligent, the police were not brought to account.[72] This contravenes Packer's due process model which maintains there must be controls on the criminal process to prevent tyranny,[73] and protect the individual from the state,[74] whilst accepting that there will sometimes be mistakes in the system, such as the police encouraging bias.[75] For the families at Hillsborough, the 'due processes of investigation, inquiry and criminal justice failed',[76] like the Birmingham six case, this displayed how public confidence relies on the conviction of the guilty and acquittal of the innocent, which did not occur at Hillsborough.[77] Conversely, the 2014-16 inquests were more humanised as families were allowed to talk about loved ones,[78] and following this the 'accidental

[62] The Right Reverend James Jones KBE, 'The Patronising Disposition of Unaccountable Power: A Report to Ensure the Pain and Suffering of the Hillsborough Families is not Repeated' (1 November 2017) HC 511, para 2.25
[63] Phil Scraton, 'The Legacy of Hillsborough: Liberating Truth, Challenging Power' (2013) 55(2) Race and Class 1, 10
[64] Lord Justice Taylor, 'Hillsborough Stadium Disaster Inquiry: Interim Report' (15 April 1989) Cm 765
[65] Hillsborough: The Report of the Hillsborough Independent Panel (September 2012) HC 581, page 19
[66] Phil Scraton, 'The Legacy of Hillsborough: Liberating Truth, Challenging Power' (2013) 55(2) Race and Class 1, 10
[67] Herbert Packer, 'Two Models of the Criminal Process' (1964) 113(1) Penn Law Rev 1, 13
[68] Herbert Packer, *The Limits of The Criminal Sanction Part II* (Stanford, California: Stanford University Press 1968) 159
[69] Phil Scraton, 'The Legacy of Hillsborough: Liberating Truth, Challenging Power' (2013) 55(2) Race and Class 1, 12
[70] Phil Scraton, *Hillsborough: The Truth* (Edinburgh 1999) 143
[71] Jon Robins, 'Lessons from Hillsborough: institutional defensiveness plays no part in campaigns for justice' (2017) 167(7753) New Law Journal 6, 6
[72] Phil Scraton, 'Policing With Contempt: The Degrading of Truth and Denial of Justice in the Aftermath of the Hillsborough Disaster' (1999) 26(3) Journal of Law and Society 273, 291
[73] Herbert Packer, 'Two Models of the Criminal Process' (1964) 113(1) Penn Law Rev 1, 16
[74] Michael King, *The Framework of Criminal Justice* (London: Croom Helm 1981) 15
[75] Andrew Sanders, Mandy Burton, Richard Young, *Criminal Justice* (4th edition, Oxford: Oxford University Press) 23
[76] Phil Scraton, 'Policing With Contempt: The Degrading of Truth and Denial of Justice in the Aftermath of the Hillsborough Disaster' (1999) 26(3) Journal of Law and Society 273, 296
[77] HC Deb 14 March 1991, vol 187, col 1109
[78] The Right Reverend James Jones KBE, 'The Patronising Disposition of Unaccountable Power: A Report to Ensure the Pain and Suffering of the Hillsborough Families is not Repeated' (1 November 2017) HC 511, para 2.39

killing' verdict was overruled,[79] which may explain the stabilisation of public confidence in the CJS in recent years.[80] Nonetheless, families had to wait two decades for this 'echo and answer' to be received and the 27 years of 'concealment of the truth and mudslinging at dead innocents' will never be forgotten.[81] Justice is not found until the individuals responsible are held criminally liable, and with them being acquitted, this was never done.[82] After the 2019 trial of Duckenfield,[83] Chairman of the Hillsborough Family Support Group referred to the CJS as 'a system that's so morally wrong within this country',[84] highlighting the correlation between decreased public confidence and the CJS failing to bring people to justice.[85]

In conclusion, Hillsborough weakened public confidence in the police and the CJS as a whole due to the immense 'cover-up' orchestrated.[86] The lies, blame shifting, use of insensitive methods and denial left bereaved families angry and the public feeling let down by the process.[87] We can see this through the slow decline in public confidence since the 1960s,[88] and a drop specifically in relation to the local police in the 90s and 00s.[89] Although it has been argued that this may not correlate to Hillsborough specifically, we can conclude that it most likely had a detrimental effect from looking at the public response at the time, and the points made in parliamentary debate more recently. The actions of the CJS contravened the principle of due process and exhibited strong discretionary decision-making powers which resulted in a lack of accountability and intensely reduced public confidence.

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[79] Andrew Bounds, 'Hillsborough Victims Unlawfully Killed, Jury Rules' *Financial Times* (London, 26 April 2016) <https://www.ft.com/content/fb9366e8-0b88-11e6-9456-444ab5211a2f> accessed 31 January 2020

[80] Ben Bradford, Mike Hough, Jonathan Jackson and Stephen Farrall, 'Trust and Confidence in Criminal Justice: A Review of the British Research Literature' (Social Science Research Network Working Paper, 2008)

[81] HC Deb 27 April 2016, vol 608, col 1442

[82] ibid, col 1447

[83] *R v David Godfrey Duckenfield* (2019)

[84] David Conn, 'Hillsborough Families Voice Outrage at Not Guilty Verdict' *The Guardian* (London, 28 November 2019) < https://www.theguardian.com/uk-news/2019/nov/28/hillsborough-families-outraged-david-duckenfield-not-guilty-verdict> accessed 31 January 2020

[85] Dominic Smith, 'Public Confidence in the Criminal Justice System: Findings from the British Crime Survey 2002/03 to 2007/08' (Ministry of Justice, July 2010), page 1

[86] Martin Beckford, 'Hillsborough Prosecutions Likely Over "The Biggest Cover up in History"' *The Telegraph* (London, 12 Sep 2012) < https://www.telegraph.co.uk/sport/football/teams/liverpool/9539424/Hillsborough-prosecutions-likely-over-the-biggest-cover-up-in-history.html> accessed 29 January 2020

[87] Phil Scraton, 'The Legacy of Hillsborough: Liberating Truth, Challenging Power' (2013) 55(2) Race and Class 1, 17

[88] Daniel Gilling, 'Crime Control and Due Process in Confidence-Building Strategies: A Governmentality Perspective' (2010) 50(6) Brit J Criminal 1136, 1137

[89] Andy Myhill and Kristi Beak, 'Public confidence in the police: research, analysis and information', National Policing Improvement Agency (November 2008), p 1

The Interdependence of Means and Ends: Towards a Hegelian Social Order

Adele Wells

1. Introduction

Law is a means to the realisation of a good social order as reflecting shared societal values, although there are conditions that must be satisfied for this end to be realised. To begin, the tensions within the instrumental conception of law will be explored. It will ultimately be decided that focusing on ends or means in isolation is not helpful to understanding the nature of law.[1] Instead, it is more prudent to adhere to an integrative approach as advanced by Fuller, emphasising the interdependence of ends and means in order to adequately address the complexities of the law in striving towards a just social order.[2] The necessary conditions to actualise such a social order will then be discussed; namely, social participation and acceptance, the responsibility of legal actors, and providing adequate latitude to judges so that they may reach sound judgments.[3]

2. A Good Social Order as a Moral End

Society is highly dependent on the social order, which can be conceived in two aspects.[4] In the first aspect, the social order represents the connection between institutions, traditions, morals and shared values that impose certain standards of behaviour.[5] In the second aspect, the social order operates to ensure the development, not deterioration, of society. Hobbes reasoned that, in the absence of social order based upon collective morals, human beings lived 'solitary, poor, nasty, brutish and short' lives, and were prevented from constituting a society and culture.[6] According to Leviathan, society and the law provides a remedy to this dismal and downtrodden state of affairs; a means to establish order and maintain it justly. Yet it is after the publication

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[1] Lon Fuller, 'Means And Ends' in K. Winston *The Principles Of Social Order: Selected Essays Of Lon L. Fuller* (Duke University Press, 1st edition, 1981)
[2] ibid
[3] Peter Read Teachout, 'The Soul of the Fugue: An Essay on Reading Fuller' (1986) Minnesota Law Review 2072
[4] Anne Warfield Rawls, Social Order as Moral Order' in Steven Hitlin and Stephen Vaisey (eds), *Handbook of the Sociology of Morality* (Springer 2010) 95-121
[5] ibid
[6] Thomas Hobbes, *Leviathan* (Penguin Books, 1968)

of Leviathan that the modern state becomes more ambitiously programmatic, with notions of the law striving for a good social order with the elimination of discrimination and privilege as the ultimate end. This is aptly embodied in Hegel's concept of 'ethical communities', which operates as an anthropology of egalitarianism. As our understanding of one another deepens and evolves,[7] we can progress towards a common social purpose of mutual recognition and respect.[8] In reconciling humans with the ethical life of their communities, humans proceed to live and embrace fulfilling lives. A good social order, therefore, can be likened to Hegel's 'ethical communities'. In this respect, we can perceive a well-functioning legal system as one that brings us closer to this moral, reciprocal end.

3. Tensions Within the Instrumental Conception of Law

In mid-20th century America, an increasing interest towards means and process started to emerge into mainstream legal thought.[9] The timing of this movement was not accidental; this generation of American scholars saw the spread of totalitarianism across Europe, and in the wake of the trauma of the Second World War, they focused their energies on the challenge of pluralism in democracy.[10] Morton Horwitz, a legal historian, discerned that a dominant theme in post-war American academic legal thought was 'the effort to find a 'morality of process' independent of results.'[11] The legal process school, led by Hart and Sacks,[12] endeavoured to 'redefine the focus of legal thought from that of substantive arrangements to that of process, and to locate the basis of legitimate social ordering in 'constitutive' procedural arrangements rather than in a set of shared values.'[13]

As such, legal process scholars resisted assigning law any significant moral purpose. Kelsen, for instance, remained firm in his belief that 'law is a means, a specific social means, not an end."[14] Likewise, one cannot, according to Hart, allocate overarching ends or purposes to law

[7] David Hume, *An Enquiry Concerning Human Understanding* (Oxford University Press, 2000) 68
[8] Rudolph von Jhering, 'Struggle for Law' in Brian Tamanaha (ed.) *Law as a Means to an End* (Cambridge University Press, 2006) 60-67
[9] Helen Cheng, 'Beyond Forms, Functions and Limits: The Interactionism of Lon L. Fuller and Its Implications for Alternative Dispute Resolution' (2013) 26 Can J L & Jurisprudence 257
[10] ibid
[11] Morton Horwitz *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (Oxford University Press, first edition, 1992) 247-68
[12] ibid
[13] See (n 9)
[14] Hans Kelsen, *General Theory of Law and the State* trans A Wedberg (Harvard University Press, 1949) 20

'as a whole.'[15] Hart did maintain, however, there are things that the law *does*. For example, law 'subject[s] human conduct to the governance of rules', but that is not law's end.[16] Hart considered law's means to fall into two broad classes: those that are 'means of social control,' and those that provide individuals with 'facilities for the realization of wishes and choices.'[17] Law does both via the 'creation, recognition and application of rules.'[18]

These ideas lay at the heart of Fuller's debates with Hart over the nature of law.[19] As Fuller observes, '[a] statute is obviously a purposive thing, serving some end or congeries of related ends. What is objected to is not the assignment of purposes to particular laws, but to law as a whole.'[20] If law does have moral ends, then is it not more prudent to organise our theories of law around those ends, so that we may obtain them sooner, instead of concentrating on the means, procedures and structures of legal systems?[21] Yet, how are we to ascertain and adequately articulate these ends? For while they may have been at work in the public mind for centuries, it is intrinsically difficult to ever have complete consciousness of human motives and purposes.[22] Hence the unreality of using law as a 'conduit directing human energies' toward some single known destination.'[23]

Emphasising law simply as a 'means' avoids these complex considerations of law's variable ends, with the Legal Process School claiming that this is a better way to understand law.[24] While Fuller accepts Hart's thesis that law 'subject[s] human conduct to the governance of rules,'[25] he argues that fixation with means and process results in Hart's failure to grasp the upshot that law must therefore be a 'purposeful enterprise.'[26] In this way, while these writers share an instrumental conception of law, what distinguishes them is their *instrumental thesis*

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[15] H.L.A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) Harvard Law Review 593
[16] Lon Fuller, *Morality of Law* (New Haven: Yale University Press, 1969) 74
[17] See (n 15); Leslie Green 'Law as a Means' *in* Peter Caine (ed.) *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing 2010)
[18] Leslie Green 'Law as a Means' *in* Peter Caine (ed.) *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing 2010)
[19] ibid
[20] See (n 16) at 146
[21] Leslie Green 'Law as a Means' *in* Peter Caine (ed.) *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing 2010)
[22] Charles L. Barzun 'Jerome Frank, Lon Fuller, and a Romantic Pragmatism' (2018) 29(2) Yale J.L. & Humanities 129
[23] Lon Fuller, 'Means And Ends' in *The Principles Of Social Order: Selected Essays Of Lon L. Fuller* (K. Winston Ed. 1981) 53
[24] See (n 21)
[25] See (n 16)
[26] Ibid at 145; See (n 21)

about law.[27] Green classifies Fuller as belonging to the group of theorists on the other end of the spectrum to the Legal Process School, believing that 'law is better understood by focusing on its ends.'[28] Yet, this is not accurate. While Fuller does insist upon the purposiveness of law,[29] he develops a unique thesis 'about the relationship between process and substantive ends' which is distinguished 'by an interactionism that emphasizes the interdependence of the two, rather than the primacy of one over the other.'[30] This thesis is helpful in demystifying the nature of law, rendering vague ends much more accessible through the use of concrete means, and visa versa.

4. Alleviating the Tension Between Means and Ends

In Fuller's thesis,[31] 'processes and institutions represent concrete patterns of social arrangement and interaction, and it is through these concrete means of organizing our collective life that substantive social goals acquire their practical form.'[32] While Fuller 'saw concrete institutional arrangements and processes of implementation as reflecting substantive goals,' he simultaneously 'saw processes and institutions as representing an active and organic force, capable of forming, defining, even altering the values and attitudes of social actors.'[33]

Fuller argues that when we think about the relationship that exists between means and ends in the context of social design, we should instead consider this from the perspective of an architect.[34] Firstly, we should recognise 'that our ultimate vision is necessarily shaped by the limitations and possibilities of the materials with which we have to work.'[35] In this way, Fuller understood that we cannot meaningfully consider the ends without also considering the limitations and possibilities of available means.[36] He therefore cautions over ascribing 'unconditional primacy to ends over means in thinking about creative human effort.'[37] Yet, we

[27] Anthony J. Sebok, 'Comment on 'Law as a Means'' *in* Peter Caine (ed.) *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing 2010)
[28] Ibid
[29] See (n 9)
[30] Ibid
[31] See (n 23)
[32] See (n 9)
[33] Ibid
[34] Peter Teachout, 'The Soul of the Fugue: An Essay on Reading Fuller' (1986) Minnesota Law Review 2072; See (n 1) at 50
[35] Ibid
[36] See (n 34)
[37] See (n 1) at 50

must not exhaustively fret over the available means until we have some idea of the ultimate vision.[38] This demonstrates that '[t]he activity of social design is one that in the end must necessarily proceed in terms of a complex reciprocal movement involving 'circles of interaction.''[39] In sum, Fuller believed substantive goals (the ends), and the processes and institutions that implement those goals (the means), 'to be in constant interaction, mutually influencing and defined by the other.'[40] This ultimately conveys that the effort to secure a good social order is a continuous and never-ending process.[41]

5. The Necessary Conditions to Actualise a Good Social Order

5.1 Active Participation of All Citizens

Wertheim, in his analysis of the literary work of Charles Dickens, notes Dickens' belief of 'the inadequacy of law as a means to achieve moral ends.'[42] Wertheim cites an example in Oliver Twist, observing how 'Mr. Bumble is advised of the common law presumption that a wife who commits a crime in the presence of her husband is presumed to have done it under his coercion,'[43] to which he responds that the law is an 'idiot' and wishes its eye 'may be opened by experience-by experience.'[44] Wertheim notes that Dickens wrote at a time when many lawyers and legal institutions were conservative in orientation and prioritised 'the welfare of the few at the expense of the many.'[45] This conveys the potential use of law as a political tool of the ruling class, giving expression to the ideologies of that class over the general welfare of society. Dickens' perceptions of law therefore 'reflects a humanistic and popular hostility to such institutions' that fundamentally questioned the social and moral viability of law, compromising the extent to which citizens will align their behaviour with the dictates of the law.[46] Wertheim observes that this hostility towards law is not so much reflected in present times, with more people now believing law to be 'the vanguard of social change' as a result of

[38] See (n 34)
[39] Ibid
[40] See (n 9)
[41] Ibid
[42] Larry Wertheim, 'Law, Literature and Morality in the Novels of Charles Dickens' (1994) 20(1) William Mitchell Law Review 112, 112
[43] Ibid 116
[44] Charles Dickens, *Oliver Twist* (Kathleen Tillotson Ed., Penguin Books 1966) (1837-39), Ch. 51 at 461-62.
[45] See (n 42)
[46] See (n 42)

increased citizen participation and emphasis on their acceptance of policies.[47] The inclusion of citizenry participation is therefore critical to actualise a social order that is representative of shared vision and values.

Customary law provides a clear illustrative example of the necessity of participation.[48] Custom is 'a pattern of reciprocal expectations arising out of past interactions,'[49] and acquires its compulsive force when a 'sense of obligation' is associated with the 'interactional expectancies,' such that legal subjects 'guide their conduct toward one another by these expectancies.'[50] To Fuller, customary law was significant because it challenges the positivist belief that law derives its power from 'some identifiable center of authority.'[51] Instead, 'it owes its force to the fact that it has found direct expression in the conduct of men toward one another.'[52] Thus, the focus here is on law in action: 'the more receptive people are towards a given law, the more it guides individual action.'[53] The force of law is therefore highly dependent on the extent to which 'it engages the support of the grassroots with regard to its purpose, content, and application.'[54] The more meaningful citizen participation in decisions affecting 'purposes and functioning of social institutions, the more effective those institutions will be in responding to their diverse and changing needs.'[55] Therefore, advancing towards a good social order depends on 'the interactions of social actors—with each other, with social groups, or with the state.'[56] Thus, 'Fuller's interactionist thesis brings into perspective the interconnection between the individual and the collective, the private and the public.'[57]

This exposes the power individuals hold, and the importance of that power, as exercised through their daily choices and actions.[58] This resultantly influences and shapes the

[47] ibid
[48] See (n 9)
[49] Lon Fuller, 'Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction' (1975) BYUL Rev 89
[50] See (n 9); Lon Fuller, 'Human Interaction and the Law' (1969) 14(1) Am J Juris 1
[51] See (n 9); Lon L Fuller, 'Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction' (1975) BYUL Rev 89
[52] Lon Fuller, 'Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction' (1975) BYUL Rev 89
[53] Helen Cheng, 'Beyond Forms, Functions and Limits: The Interactionism of Lon L. Fuller and Its Implications for Alternative Dispute Resolution' (2013) 26 Can J L & Jurisprudence 257
[54] ibid
[55] ibid
[56] ibid
[57] ibid
[58] ibid

development of society.[59] Fuller found Austin's positivism inherently problematic, because while it may reflect 'changes in an abstract thing called sovereign', it cannot perceive changes in citizen's 'daily lives' or the 'little' revolutions that 'go on all the time'.[60] Austin's positivism lacks 'a consciousness of the continuing role' of ordinary people at the grassroots level in making the social order. In this way, the small everyday decisions of citizens, when 'perceived through Fuller's interactionist lens', obtain 'a broader social meaning' which regards these 'small decisions as a form of political participation and an exercise of democratic choice.'[61]

5.2 The Responsibility of Legal Actors

Legal actors have a duty as 'trustees of the law' to accord an attitude of respect towards legal norms, and to not use law purely as a means to *their* ends by manipulating 'legal norms to defeat the substantive meaning of these norms.'[62] Yet, this duty is not always respected. There will always be lawyers who act unethically by using law instrumentally, as an inconvenient 'obstacle to be planned around.'[63] There also may be instances of 'ethical solipsism of lawyers who sincerely believed they were right, despite the weight of legal authority against their position.'[64] But it does not follow to suggest that this reflects the general practices of lawyers and judges who interpret and apply legal rules.[65] When observing Fuller's jurisprudence, the crucial aspect in work is that the legal actor is not depicted as one of 'them', but one of 'us'- as someone who is largely motivated by 'the same complex ethical and practical considerations that motivate the rest of us.'[66] Therefore, the model legal figure in Fuller's jurisprudence 'is not some mean-minded, rule-bound authoritarian figure', but Justice Jackson at Nuremberg.[67] Fuller praised Jackson's creative ethical use of our common law traditions, his performance typifying on a global scale what Fuller perceived to be the main activity of the lawyer: the

[59] ibid
[60] Lon Fuller, *The Law in Quest of Itself* (Northwestern University Press, 1st edition, 1940) 34; Helen Cheng, 'Beyond Forms, Functions and Limits: The Interactionism of Lon L. Fuller and Its Implications for Alternative Dispute Resolution' (2013) 26 Can J L & Jurisprudence 257
[61] Helen Cheng, 'Beyond Forms, Functions and Limits: The Interactionism of Lon L. Fuller and Its Implications for Alternative Dispute Resolution' (2013) 26 Can J L & Jurisprudence 257
[62] W. Bradley Wendel, 'Legal Ethics and the Separation of Law and Morals' (2005) Cornell Law Faculty Publications, paper 4
[63] ibid
[64] ibid
[65] ibid
[66] Peter Teachout, 'The Soul of the Fugue: An Essay on Reading Fuller' (1986) Minnesota Law Review 2072
[67] ibid

creative use of the traditions of our culture 'toward the end of helping to realize a more just and decent world.'[68]

One can regard the common law as a general reflection of this, where judges make reference to shared purposes in order to understand the rationale of their predecessors.[69] Fuller called this process a 'collaborative articulation of shared purposes,'[70] in which current judges tried to understand what earlier judges were trying to say, but did not or could not because these ends were 'not stirred into active consciousness [of the previous court] by the facts of the case being decided.'[71] Thus, when there is 'a line of cases developing one particular doctrine',[72] it can be reasoned that the facts and circumstances of the later cases allowed subsequent judges to 'see more truly what they were all trying to do from the beginning.'[73] Inherent in this view is the suggestion that formal positive law was 'never in perfect conformity with the purposes' it is based on, ultimately because 'it was never possible to discover with certainty what those purposes were.'[74]

This type of reasoning is illustrated in the case law on marital rape. A line of cases developed in the 20th century that progressively narrowed the exemption of marital rape. For instance, in *R v Clarke*, it was found that a court order for non-cohabitation had revoked the wife's consent to sexual intercourse, and therefore the husband was guilty of rape.[75] A similar result occurred in *R v O'Brien* after a decree nisi effectively terminated a marriage.[76] These judgments culminated in *R v R,* where it was concluded that the complete abolishment of the exemption of marital rape 'is the removal of a common law fiction...we consider that it is our duty having reached that conclusion to act upon it.'[77]

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[68] ibid
[69] Charles L. Barzun 'Jerome Frank, Lon Fuller, and a Romantic Pragmatism' (2018) 29(2) Yale J.L. & Humanities 129
[70] Lon Fuller, 'Human Purpose and Natural Law' (1958) 3(1) American Journal of Jurisprudence 68
[71] ibid; Charles L. Barzun 'Jerome Frank, Lon Fuller, and a Romantic Pragmatism' (2018) 29(2) Yale J.L. & Humanities 129
[72] see (n 69)
[73] Lon Fuller, 'A Rejoinder to Professor Nagel' (1958) Natural Law Forum 83
[74] see (n 69)
[75] *R v Clarke* [1949] 2 All ER 448
[76] *R v O'Brien* [1974] 3 All ER 663
[77] *R v R* [1991] UKHL 12

Indeed, it may never even be possible to ascertain whether any goal was truly the end sought after or instead merely a means to achieve some further end.[78] But ultimately, one chose an end in part by evaluating the means available to achieve it.[79] For example, one cannot decide whether 'euthanasia should be legalized without first considering the social manageability of the task of selecting the right people to put to death.'[80] In essence, it is critical to 'hold means and ends open for a reciprocal adjustment with respect to each problem.'[81] This reiterates the 'the inherent difficulty of knowing precisely what one's own values and motives were so that one had to discover them as one worked through a problem.'[82] Thus, law requires the constant assessment of both ends and means, with each considering the other, resulting in law continually changing and adjusting.[83]

There have been challenges to this line of reasoning. Rather than engaging in this problem-solving process, legal realists Lasswell and McDougal submit that a legal actor must develop 'goal-thinking', which will enable effective 'policy making'.[84] This necessitates a 'clear conception of goal' which means that one must clarify their 'moral values (preferred events, social goals).'[85] It is idealistic to assume that a person can ever truly have complete consciousness of human motives and purposes.[86] Indeed, Fuller rightly ridiculed this approach, noting that one would never say 'let us first decide what kind of enjoyment we seek from our projected game. Then let us draw up rules for a game that will yield this form of enjoyment.'[87] Instead, when inventing a game, 'we shall have to start with ends vaguely perceived and held in suspension while we explore the problem of devising a workable system of play.'[88] Thus, rather than focusing on how to control the judge, we should concentrate on how to 'provide adequate latitude to allow for sound judgment, honest explanation, reasonable certainty and uniformity.'[89]

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[78] see (n 69)
[79] ibid
[80] Lon Fuller, 'American Legal Philosophy at Mid-Century, A Review of Edwin W. Patterson's Jurisprudence, Men and Ideas' (1954) 6(4) Journal of Legal Education 457
[81] See (n 69)
[82] ibid
[83] ibid
[84] Harold Lasswell and Myres McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest' (1943) 52(2) YALE L.J. 203
[85] ibid
[86] See (n 69)
[87] See (n 80) at 457
[88] ibid
[89] Peter Teachout, 'The Soul of the Fugue: An Essay on Reading Fuller' (1986) Minnesota Law Review 2072

This integrative approach towards law's means and ends advises against the form of legal positivism endorsed by realists such as Austin, which insists upon the separation between law as it *is* and law as it *ought* to be.[90] As explored, this is not a productive or helpful way for lawyers or judges to think about law. As typified in the example of marital rape, in deciding cases, common law judges were struggling to 'articulate adequately the true motives and purposes for their decisions' (thus the need for legal fictions).[91] Yet, the legal realist who examines the 'behaviour' of judges fails to recognise such motives as 'part of the law since they were only (unobservable) aspirations of law as it 'ought to be'.'[92] By neglecting to consider these ends and aspirations of law, legal positivists (including legal realists) direct the attention of legal actors and scholars away from the motive which 'should properly serve as the law's guide for reform and growth' towards the realisation of an improved social order. [93]

6. Conclusion

In summary, by adhering to an approach that emphasises the interdependence of ends and means, we can see more clearly the realities and complexities of the law in striving towards a just social order. Law requires the constant assessment of both ends and means, resulting in law continually changing over time, and, significantly, progressing towards a Hegelian social order that reflects the needs and values of society as a whole.[94]

[90] Lon Fuller, *The Law in Quest of Itself* (Northwestern University Press, 1st edition, 1940) 55
[91] See (n 69)
[92] ibid
[93] ibid
[94] See (n 69)

Gewirth's Principle of Generic Consistency: Respect for Fundamental Human Rights as a Condition of Legal Validity

Lucy Mann

1. Introduction

There is widespread consensus that human beings have certain fundamental rights. However, the evocation of these rights can be a highly contentious matter in socio-political climate, "to which inductive and deductive reasoning do not give one right answer arise incessantly."[1] Illustrating the success of Gewirth's Principle of Generic Consistency, through an analysis of purpose, rights and action, this article will demonstrate, via a mosaic institutionalisation of Hobbes' account of sovereignty, that law and morality are necessarily connected. The Principle of Generic Consistency is the touchstone of legal validity, inescapably requiring the respect of fundamental human rights.

2. Gewirth's Principle of Generic Consistency

Gewirth's assertoric Principle of Generic Consistency (PGC) holds that: "Every agent ought to act in accord with the generic rights of his recipients as well as of himself."[2] This is derived from the dialectical PGC that: "Every agent logically must accept that he ought to act in accord with the generic rights of his recipients as well as of himself."[3] A Hohfeldian "claim-right"[4] is supported by Gewirth[5] because "the desiderated removal of adversarial relationships and the fostering of community may well depend on the implementation rather than the rejection of rights."[6] Importantly, 'generic rights', according to Gewirth, are "freedom and well-being."[7] "No agent can act to achieve any of his purposes without having these conditions."[8] The inclusion of 'well-being' "indicates Gewirth's commitment to a broad scope of moral duties."[9]

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[1] S. Turner, 'The Political Face of Rational Morality' (1988) 17(4) *Theory and Society* 551, 563
[2] A. Gewirth, *Reason and Morality* (*Chicago: University of Chicago Press* 1978) 152
[3] Ibid 152
[4] J. Thompson, 'The Rights Network: 100 Years of the Hohfeldian Rights Analytic' (2018) 7(3) *Laws* 28, 31
[5] See: A. Gewirth, 'Are There Any Absolute Rights?' (1981) 31(122) *The Philosophical Quarterly* 1, 2
[6] A. Gewirth, *The Community of Rights* (Chicago: Chicago University Press 1996) 91
[7] A. Gewirth, 'The Basis and Content of Human Rights' (1981) 23 *Nomos* 119, 129
[8] A. Gewirth, 'The Rationality of Reasonableness' (1983) 57 *Synthese* 225, 230
[9] R. Claassen, M. Düwell, 'The Foundations of Capability Theory: Comparing Nussbaum and Gewirth' (2013) 16 *Ethic Theory Moral Prac* 493, 502

However, Kramer and Simmons[10] dispute his argument for failing to highlight why one *ought* to respect the generic rights of another. This also rings true of Singer, who argues that "a prudential right has not been shown to be correlative to any moral oughts."[11] Thus, in order to bridge the gap between prudential agent rights and moral universal oughts of all actual and prospective purposive agents (PPA), and thus present *reason* why a 'premoral' agent would respect the rights of another, one has to understand the relationship between action, purpose and rights.

Gewirth's account of action provides a normative structure by which certain "evaluative and deontic judgments on the part of agents are logically implicit in all action."[12] Analysing the relationship between action, purpose and rights will accord validity to the normativity asserted. Gewirth believes that "rights are the necessary conditions for action, logically implied by human purpose."[13] For Gewirth, 'action' is defined as voluntary and purposive behaviour.[14] Professor Held argues that "many behaviours that *should* count as actions do not have a purpose."[15] She provides the example of "a person who is tapping a pencil…She is just doing it, but not for any purpose, certainly not one she thinks good in any sense."[16] For Gewirth, such an example epitomises the purpose within action; "why the agent did *it* rather than something else."[17] In light of the agent pursuing an action because they believe it to be good, Held should appreciate the modesty of Gewirth's claim: "[the agent] regards the object of his action as good, whatever be his further beliefs about the conformity of his action to moral, legal, or even prudential criteria."[18] Therefore, the relation of purpose to action is as follows: "the act itself is never the purpose, but only a means to the purpose."[19] Where one engages in any action, it is '*because*' of their freedom and well-being that one can do so. Consequently, freedom and

[10] See: M. Kramer and N. Simmonds, 'Reason Without Reasons: A Critique of Alan Gewirth's Moral Philosophy' (1996) 34(3) *The Southern Journal of Philosophy* 301
[11] M. Singer, 'On Gewirth's Derivation of the Principle of Generic Consistency' (1985) 95(2) *Ethics* 297, 298
[12] A. Gewirth, *Reason and Morality* (Chicago: University of Chicago Press 1978) 25-26
[13] J. Pennock, 'Rights, Natural Rights, and Human Rights – A General View' (1981) 23 *Nomos* 1, 12
[14] S. Cohen, 'Gewirth's Rationalism: Who is a Moral Agent?' (1979) 89(2) *Ethics*179
[15] D. DeGrazia, 'Gewirth and Held on Action and Methodology: A Response to Virginia Held's The Normative Import of Action' in M. Boylan (ed), *Gerwirth: Critical Essays on Action, Rationality and Community (*Rowman & Littlefield Publishers 1999) 29-35, 29
[16] V. Held, 'The Normative Import of Action' in M. Boylan (ed), *Gerwirth: Critical Essays on Action, Rationality and Community (*Rowman & Littlefield Publishers 1999) 13-29, 14
[17] D. DeGrazia, 'Gewirth and Held on Action and Methodology: A Response to Virginia Held's The Normative Import of Action' in M. Boylan (ed), *Gerwirth: Critical Essays on Action, Rationality and Community (*Rowman & Littlefield Publishers 1999) 29-35, 29
[18] A. Gewirth, 'The Normative Structure of Action' (1971) 25(2) *The Review of Metaphysics* 238, 242
[19] R. von Ihering, *Law as a Means to an End* (*Boston: The Boston Book Company* 1913) 9

well-being are "logically involved in the structure of action."[20] A connection is established "through the particle 'because', only where the phrase 'in order to' is concealed behind it. The *reason* in action is only another form of expressing *purpose.*"[21] Thus, *any* action is synonymous to action with purpose. From this entails that any PPA inherently values their freedom and well-being because this is pivotal for action.

From a universal standpoint, Gewirth intends "to force the agent to concede that other agents implicitly make a deontic judgment which he must *respect,* that is, which gives him reason to promote their freedom and well-being."[22] The deontic judgment Gewirth attributes to his agents "must ascribe reasons for action of the required sort to other agents."[23] Kramer and Simmons assert that "when the only available reasons for action are prudential reasons, the judgment that 'other agents ought to do ϕ in *my* interest' is indeed unintelligible if it amounts to the judgment that 'other agents ought to do ϕ in *my* interest and *not* in *their* interest."[24] On this interpretation, Kramer and Simmons believe Gewirth's argument to be 'unintelligible' because "one cannot in general infer from the fact that there is a good reason for some agent to bring about a certain state of affairs that there is good reason for others to assist him."[25] This links with Hume's empirical account of human nature, to which he believes a normative claim cannot be deducted from a factual claim because "the value part of a statement encapsulating the value is added to judgment of fact and is in its nature no more than a subjective psychological attitude."[26] This view appreciates how individuals sometimes think teleologically.[27] Therefore, when X performs an action to achieve E; X regards E as good, and thus E *is* good.[28] "The 'is' is not derived from the 'ought', as deduced or inferred; rather the object sought is simultaneously constituted as…being good."[29] When it is claimed that "other agents ought to do ϕ in *my* interest and *not* in *their* interest"[30] is unintelligible; it is only unintelligible by failing to understand that

[20] A. Gewirth, 'The Basis and Content of Human Rights' (1981) 23 *Nomos*119, 125
[21] R. von Ihering, *Law as a Means to an End* (*Boston: The Boston Book Company* 1913) 10
[22] C. McMahon, 'Gewirth's Justification of Morality' (1986) 50(2) *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition* 261, 267
[23] Ibid 268
[24] M. Kramer and N. Simmonds, 'Reason Without Reasons: A Critique of Alan Gewirth's Moral Philosophy' (1996) 34(3) *The Southern Journal of Philosophy* 301, 308
[25] C. McMahon, 'Gewirth's Justification of Morality' (1986) 50(2) *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition* 261, 279
[26] K. Butler, *The Idea of a Right: A Treatise on the Concept of Natural Rights* (*NewMedia Publishing* 2001) 190
[27] Ibid 190
[28] See: L. Lomasky, 'Gewirth's Generation of Rights' (1950) 31(124) *The Philosophical Quarterly* 248
[29] K. Butler, *The Idea of a Right: A Treatise on the Concept of Natural Rights* (NewMedia Publishing 2001) 190
[30] M. Kramer and N. Simmonds, 'Reason Without Reasons: A Critique of Alan Gewirth's Moral Philosophy' (1996) 34(3) *The Southern Journal of Philosophy* 301, 308

"the agent's ought judgment is made from within the agent's own standpoint in purposive action."[31] The 'ought' is not necessarily moral because it is an error to "reduce all 'oughts' to moral ones."[32] However, as will be illustrated, through the Principle of Universalizability, Gewirth successfully derives a moral ought.

Gewirth utilises the Principle of Universalizability,[33] which enables him to successfully overcome the empiricist position of Hare (following Hume), and subsequently derive a prescription from a description. Hare suggests the possibility that "there could be all sorts of eccentrics, fanatics, and masochistic terrorists. And their acts of violence…,could not be shown to be wrong as long as they assent to having such acts done against them."[34] However, on reflection of the Principle of Universalizability, Gewirth has "disclosed a desire which does not vary among agents: All agents, fanatical Nazis and the rest – value their own purposes and want to be able to act to attain them."[35] Therefore, "every agent ought to act in accord with the generic rights of his recipients as well as of himself."[36] The 'ought' connotes morality in line with Gewirth's definition of morality: where one utilises their freedom and well-being in "…furthering the interests, especially the most important interests, of persons other than, or in addition to, the agent or speaker."[37] Although the definition of morality is another topic of debate, Gewirth's link between action and purpose ingeniously recognises that "all moralities have it in common that they are concerned with actions."[38] Consequently, an agent is "rationally committed to taking favourable account of the generic interests of others."[39] It is, "the dialectical necessities of prudential reason [which] oblige[s] the agent to value, and thus defend, his general capacity to act…when universalised logically…[this] results in the recognition of reciprocal duties to others."[40] Therefore, evidently, Gewirth succeeds in logically deriving a prescription upon an agent from the description of the necessary conditions of agency. "The PGC is the supreme principle of morality because its interpersonal requirements, derived from the generic features

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[31] A. Gewirth, 'The Justification of Morality' (1988) 53(2) *Philosophical Studies: An International Journal for Philosophy in the Analytical Tradition* 245, 251
[32] A. Gewirth, 'The Agent Prescriber's Ought' (1998) 36(1) *The Southern Journal of Philosophy* 141, 143
[33] A. Gewirth, 'The 'Is-Ought' Problem Resolved' (1973) 37 *Proceedings and Addresses of the American Philosophical Association* 34, 54
[34] P. Allen III, '"Ought" from "is"? What Hare and Gewirth Should Have Said' (1982) 3(3) *American Journal of Theology and Philosophy* 90, 91; R. Hare, *Freedom and Reason* (Oxford University Press 1963) 151 and 157ff
[35] P. Allen III, '"Ought" from "is"? What Hare and Gewirth Should Have Said' (1982) 3(3) *American Journal of Theology and Philosophy* 90, 94
[36] A. Gewirth, *Reason and Morality* (Chicago: University of Chicago Press 1978) 152
[37] ibid 1
[38] A. Gewirth, 'The Basis and Content of Human Rights' (1981) 23 *Nomos*119, 124
[39] J. Scheuermann, 'Gewirth's Concept of Prudential Rights' (1987) 37(148) *The Philosophy Quarterly* 291, 304
[40] P. Olsen and S. Toddington, 'Legal Idealism and the Autonony of Law' (1999) 12 *Ratio Juris* 286, 307

of action, cannot rationally be evaded by any agent."[41] Inevitably, if one disputes the definition of morality proposed by Gewirth, it appears that they cannot except the derivation of a 'moral ought' from a prudential right. Therefore, Gewirth argues that "the basis of the obligation to obey the law, then, is not simply that it is the law but rather that the law is instrumentally justified by the PGC."[42] It will be illustrated how the law is instrumentally justified by the PGC.

3. PGC and Legal Validity

If one understands law to be "the enterprise of subjecting human conduct to the governance of rules, "[43] for it to be effective Beyleveld and Brownsword argue "it is dialectically necessary to regard the PGC as the supreme principle of legality."[44] Thus, there is a necessary connection between law and morality. However, Coleman argues that "because the demands of morality are controversial and the source of conflict and disagreement…,"[45] the legal validity of a norm cannot depend on moral content. Such a view misunderstands that Gewirth does not claim that the PGC produces perfect, objective answers. Rather, in light of Kant, it acts as "a moral compass in human affairs,"[46] and thus moral permissibility is the margin. Therefore, "if we can see a route from *prudential reason* to *morally rational reason* (through the process of *logical* universalisation, as we see in Gewirth's PGC) and consider that it is *morally rational* to establish legal authority…then it is *logically* attached both at the point of ontological transformation and beyond throughout continuation."[47] It is viewed as morally rational to form legal authority because generic rights cannot be exercised "where there is an inadequate level of security and subsistence."[48] As Thompson questions, "if…moral rationality is sufficient to initiate the institutionalisation process, then why and at what point is it to be dismissed from the practical reasoning of the institution?"[49] Such questions can be legitimately aimed at Hart who rejects that there is a necessary connection between law and morality.[50] However, Hart is mistaken. For example, Hobbes believed a sovereign has to be established to avoid the

[41] A. Gewirth, 'The Basis and Content of Human Rights' (1981) 23 *Nomos*119, 132
[42] A. Gewirth, *Human Rights* (Chicago: University of Chicago Press 1982) 201
[43] L. Fuller, *The Morality of Law* (Yale University Press 1969) 106
[44] P. Capps and S.D Pattinson, *The Past, Present and Future of Ethical Rationalism* (Hart 2017) 8
[45] J. Coleman, 'Authority and Reason' in R. George, *The Autonomy of Law* (Claredon Press 1996) 292
[46] See: J. Sobel, 'Kant's Compass' (1997) 46(3) *Erkenntnis* 365
[47] J. Thompson, 'Law's Autonomy and Moral Reason' (2019) 8(1) *Laws* 6, pp.1-17 at p.5
[48] S. Turner, 'The Political Face of Rational Morality' (1988) 17(4) *Theory and Society* 551, 557
[49] J. Thompson, 'Law's Autonomy and Moral Reason' (2019) 8(1) *Laws* 6, pp.1-17 at p.6
[50] See: H.L.A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593

hypothetical "state of nature."[51] In absence of authority, "all men are equal in both strength and mind, and if two men desire the same object, which they cannot both enjoy, they become enemies."[52] Despite PPAs having the capacity to realise and respect the rights of other PPAs, Gewirth himself appreciates the need for a sovereign "in the face of the fact that all will not voluntarily consent to rules consistent with the [PGC]."[53] Therefore, individuals "as empowered by rational thought, are capable of conceiving means to end that 'state of war' by institutionalisation through a social contract and the creation of a sovereign."[54] This social contract mirrors Gewirth's idea of "voluntary association."[55] Thus, the generic conditions of agency are "the conditions that enable the agents to form the judgment that bargaining is better than fighting, that co-operation and compromise are better than conflict..."[56] Therefore, it is argued that "morality initiates the move from the state of nature to institutionalised reasoning."[57] As a repercussion, one can only logically conclude that "legal validity is essentially based upon moral rationality,"[58] by virtue of the PGC.

However, Hobbes has been regarded as "the purported founder of legal positivism,"[59] suggesting that he would reject the premise of this article. Nevertheless, Hobbes appears to deny the Separation Thesis through his belief that a sovereign has "no other bounds, but such as are set out by the unwritten Law of Nature."[60] The Law of Nature forbids one "…to do that which is destructive of his life…"[61] It thus appears that "there can, according to him, be no conflict between positive law and morality or natural law."[62] It is on this interpretation that this article seeks to infiltrate the PGC as Hobbes' Law of Nature.

When looking at the form of the sovereign, for the purposes of simplicity, the institutional design of Parliament in the United Kingdom is the sovereign. Parliament has an obligation to

[51] T. Hobbes, *Leviathan* (W. Pogson Smith ed. *Oxford Clarendon Press* 1909) xi
[52] T. Hobbes, *Leviathan* (R. Tuck ed. Oxford Clarendon Press 2004) 82
[53] R. Brooks, 'The Future of Ethical Humanism, The Re-Introduction of Ethics into the Legal World: Alan Gewirth's Reason and Morality' (1982) 31(3) *Journal of Legal Education* 287, 298
[54] J. Thompson, 'Law's Autonomy and Moral Reason,' (2019) 8(1) *Laws* 6, pp.1-17 at p.10; T. Hobbes, *Leviathan* (Chestnut Hill: Elibron Classics 2005) 119-28
[55] A. Gewirth, 'The Basis and Content of Human Rights' (1981) 23 *Nomos* 119, 140
[56] D. Beyleveld and R. Brownsword, *Consent in the Law* (Hart Publishing 2007) 330
[57] J. Thompson, 'Law's Autonomy and Moral Reason' (2019) 8(1) *Laws* 6, pp.1-17 at p.11
[58] ibid 11
[59] D. Dyzenhaus, 'Hobbes and the Legitimacy of Law' (2001) 20(5) *Law and Philosophy* 461, 465
[60] T. Hobbes, 'The Moral and Political Works of Thomas Hobbes,' (1750) *London,* chap. XXII, pp.195-196
[61] T. Hobbes, *Leviathan* (R. Tuck ed. Oxford Clarendon Press 2004) 86
[62] D. Dyzenhaus, 'Hobbes and the Legitimacy of Law' (2001) 20(5) *Law and Philosophy* 461, 466

secure the *salus populi.*[63] In identifying what constitutes law, one can recognise it through Kelsen's idea of the 'basic norm'. "The basic norm is the *basic regulator of the creation of the legal order*."[64] It is layman knowledge that what Parliament enacts constitutes law. However, Kelsen believes that "the validity of laws must be understood as legal, not moral validity,"[65] and the basic norm is the means in achieving legal validity. This would grant unconstrained power to Parliament to enact any law regardless of its moral permissibility. It will be illustrated that historically, in times of political emergencies, Parliament have *had* such unconstrained power; undermining the fundamental rights of individuals.

In political reality, emergency situations give rise to "ill-conceived rushed legislation…granting excessive powers to executive governments which compromise the rights and liberties of individuals beyond the exigencies of the situation."[66] In theory, this provides a sovereign with what Schmitt refers to as the state of exception. When a state is faced with contingencies, the sovereign "decides whether there is an extreme emergency as well as what must be done to eliminate it."[67] A good example is the 1942 wartime case *Liversidge v Anderson.*[68] Under regulation 18B of the Defence (General) Regulations 1939,[69] the Home Secretary had the authority to detain a person if there was "reasonable cause to believe any person to be of hostile origin or associations…"[70] Lord Macmillan held "it is right so to interpret emergency legislation as to promote rather than to defeat its efficacy."[71] Effectively, Simpson notes, "the courts did virtually nothing for the detainees, either to secure their liberty, to preserve what rights they did possess under the regulation, [or] to scrutinize the legality of Home Office action."[72] Therefore, the Regulation derived its validity from the 'basic norm'. This is deeply problematic for the PGC by allowing fundamental rights of agency to be undermined. In light of this, it has been argued that Gewirth abstracts himself from historical reality; ironically producing a theory of human rights with little recognition of the vast

[63] T. Hobbes, *Leviathan* (W. Pogson Smith ed. Oxford Clarendon Press 1909) 1
[64] H. Kelsen, 'The Concept of the Legal Order' (1982) 27(1) *The American Journal of Jurisprudence* 64, 68
[65] J. Raz, 'Kelsen's Theory of the Basic Norm' (1947) 18(1) *American Journal of Jurisprudence* 97,101
[66] J. Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53(1) *International & Comparative Law Quarterly* 1
[67] C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press 2005) 7
[68] *Liversidge v Anderson* [1942] A.C. 206
[69] The National Archives, 'Home Office: Defence Regulation 18B, Advisory Committee Papers,' accessible at https://discovery.nationalarchives.gov.uk/details/r/C9147 (last accessed 01/04/2020)
[70] G. Keeton, 'Liversidge v Anderson,' (1942) 5(3-4) *Modern Law Review* 162
[71] *Liversidge v Anderson* [1942] A.C. 206, 252 (per Lord Macmillan)
[72] A.W. Brian Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* (Oxford University Press 1994) 418

discrimination and destructions of liberty that have taken place, which ultimately gives his theory "an air of unreality."[73] However, Hegel[74] and Unger[75] highlight that "the moral value attributed to individual voluntariness and purposiveness is reflective of a stage of historical development."[76] Following this, it will be illustrated that "the integration of rights with community does not signal the end of law – on the contrary, this [is] precisely where law (properly conceived) begins."[77]

In *Liversidge v Anderson,*[78] Lord Atkin's famous dissent criticised the majority for abdicating their obligation to justice by being "more executive minded than the executive."[79] Lord Atkin's words, accompanied by the horrors of unconstrained sovereign power witnessed during the Third Reich, referred by Radbruch as "statutory lawlessness,"[80] influenced a political and judicial shift. The implementation of the European Convention of Human Rights (ECHR) and the latter incorporation domestically of the Human Rights Act 1998, protects fundamental human rights. Olsen and Toddington correctly assert, "a document like the ECHR presupposes the validity of the PGC even if its originators and signatories dispute the methodology of *arriving at* the PGC, or are entirely unaware of the PGC."[81] For example, the ECHR Preamble explicitly confirms the importance of "freedom"[82] and such rights entailing this. As a result, "the PGC is singularly appropriate for securing that process,"[83] because "the PGC's central moral requirement is the *equality of generic rights.*"[84] Therefore, the PGC imposes moral norms indirectly into the law-making process,[85] which can be achieved through judicial

[73] R. Brooks, 'The Future of Ethical Humanism, The Re-Introduction of Ethics into the Legal World: Alan Gewirth's Reason and Morality' (1982) 31(3) *Journal of Legal Education* 287, 292
[74] G. Hegel, 'The Philosophy of Right; The Philosophy of History' (1952) *Encyclopedia Britannica*
[75] R. Unger, *Knowledge and Politics* (Free Press 1975)
[76] R. Brooks, 'The Future of Ethical Humanism, The Re-Introduction of Ethics into the Legal World: Alan Gewirth's Reason and Morality' (1982) 31(3) *Journal of Legal Education* 287, 292
[77] R. Brownsword, 'A Synthesis of Rights and Community: In a Different Register?' p.143 in Association for Legal and Social Philosophy, 'Socialism and the Law,' (1991) *Seventeenth Annual Conference, University of Bristol,* Issues 45-49
[78] *Liversidge v Anderson* [1942] A.C. 206
[79] Ibid 244 (per Lord Atkin)
[80] See: G. Radbruch, 'Statutory Lawlessness and Supra-Statutory Law (1946),' (2006) 26(1) *Oxford Journal of Legal Studies* 1
[81] H. Olsen and S. Toddington, *Architectures of Justice Legal Theory and the Idea of Institutional Design* (Ashgate Publishing 2007) 12
[82] European Convention on Human Rights, accessible at https://www.echr.coe.int/Documents/Convention_ENG.pdf (last accessed 01/04/2020)
[83] R. Kelly, 'Beyond Sovereignty and Nationhood: An Analysis of the Principles Governing the Founding of the European Court of Human Rights and the Legitimacy of its Autonomy and Intervention' (2018) Doctoral Thesis, *University of Huddersfield,* at p.89 accessible at http://eprints.hud.ac.uk/id/eprint/34900/ (last accessed 01/04/2020)
[84] A. Gewirth, 'The Basis and Content of Human Rights' (1981) 23 *Nomos* 119, 131
[85] Ibid 139

interpretation. The PGC is the 'supreme principle of legality', because "conventions on human rights must, as convention on human rights, be interpreted to conform with the PGC."[86] For example, the case *Ahmed v HM Treasury*[87] explicitly illustrates an indirect application of the PGC. The Supreme Court quashed the Terrorist Asset-Freezing etc Bill 2010[88] for being *ultra vires.* Learning from the mistakes in *Liversidge v Anderson*,[89] Lord Hope held that "even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty."[90] This illustrates that, regardless of whether legislation is legitimately enacted through the 'basic norm', the judiciary have an obligation to ensure that it does not unreasonably infringe the fundamental rights of an individual. However, "law that results from decisions by courts remains law by virtue of the sovereign's failure to repeal or replace it."[91] According to Hobbes, judges provide "authentic interpretation of the Law, in which the nature of law consiseth."[92] Thus, Parliament will be unconstitutional in failing to repeal quashed legislation which could inexorably lead to revolution. This highlights how judges are not, what Montesquieu would call, "the mouth of the law."[93] Therefore, the PGC is the 'supreme principle of legality' borne through the judiciary.

Gewirth submits that "human rights are only *prima facie,* not absolute, in that certain circumstances they may justifiably be overridden."[94] The condition of this is that "the PGC sets the criteria for the justifiable overriding of one moral right by another and hence for the resolution of conflicts among rights."[95] From this, Turner refers to an "obligation to rescue,"[96] incidental to the PGC, ultimately being "the source of its key political implications."[97] As a result, "the whole mighty parade of the modern welfare state"[98] assembles through this

[86] D. Beyleveld, 'Legal Theory and Dialectically Contingent Justifications for the Principle of Generic Consistency' (1996) 9(1) *Ratio Juris* 15
[87] *Ahmed v HM Treasury* [2010] 2 A.C. 534
[88] Ibid 535
[89] *Liversidge v Anderson* [1942] A.C. 206
[90] *Ahmed v HM Treasury* [2010] 2 A.C. 534, 612 (per Lord Hope)
[91] M. Goldsmith, 'Hobbes on Law,' in T. Sorell (ed) *The Cambridge Companion to Hobbes* (Cambridge: Cambridge University Press 1996) 282
[92] T. Hobbes, *Leviathan* (R. Tuck ed. Oxford Clarendon Press 2004) 321-2
[93] N. Campagna, 'Leviathan and its Judges' (2000) 86(4) *Archives for Philosophy of Law and Social Philosophy,* 499, 500
[94] A. Gewirth, 'The Basis and Content of Human Rights' (1981) 23 *Nomos* 119, 136
[95] Ibid. 137
[96] S. Turner, 'The Political Face of Rational Morality' (1988) 17(4) *Theory and Society* 551, 552
[97] Ibid 552
[98] J. Narveson, 'Negative and Positive Rights in Gewirth's Reason and Morality' in Edward Regis Jr ed., *Gewirth's Ethical Rationalism. Critical Essays with a Reply by Alan Gewirth* (Chicago: University of Chicago Press 1984) 106

"loophole."[99] The PGC justifies "dynamic-instrumental"[100] social rules, enabling positive state interference to ensure individuals have access to the basic goods essential to agency. Parliament are therefore justified in imposing "taxes in order to secure the economic rights of those who are more deprived."[101] This provides affluent citizens with "reduced social divisiveness,"[102] and consequently promotes an egalitarian society. Paying taxes are "the society's contributions to effectuating the human rights of its members."[103] This illustrates how agents respect the fundamental rights of other agents in need. However, one should not expect that society will be perfect; the PGC is the categorical imperative which acts as an "ethical yardstick"[104] to ensure the balance and protection of rights within society. To this extent the PGC empowers moral law-making.

4. Conclusion

To conclude, the PGC universally confers respect for the fundamental rights of individuals. Parliament have been empowered by the PGC to impose legislation which promotes an egalitarian society. Although unprecedented political emergencies arise, the PGC ensures an equitable balance between the human rights of individuals. "Consequently, *all* legal systems that recognise human rights…*all* who view law as a matter of obligation, and *all* who consider that there are categorically binding requirements on action, must take the PGC to be a necessary criterion of legal validity."[105]

[99] Ibid 106
[100] A. Gewirth, 'The Basis and Content of Human Rights' (1981) 23 *Nomos* 119, 141
[101] A. Gewirth, 'The Community of Rights' (University of Chicago Press 1996) 179
[102] J. Bhabha, 'The Right to Community? (Reviewing The Community of Rights by Alan Gewirth)' (1997) 64(3) *The University of Chicago Law Review* 1117, 1119
[103] A. Gewirth, 'The Community of Rights' (University of Chicago Press 1996) 83
[104] D. Beyleveld and R. Brownsword, 'Emerging Technologies, Extreme Uncertainty, and the Principle of Rational Precautionary Reasoning,' (2012) 4(1) *Law, Innovation and Technology* 35, 64
[105] D. Beyleveld, 'Legal Theory and Dialectically Contingent Justifications for the Principle of Generic Consistency' (1996) 9(1) *Ratio Juris* 15

The End of Human Rights: A Pragmatic Rejoinder

Ethan Gren

1. Introduction

Recently, various scholars have posited the "end of human rights". However, in doing so, they are mistaken; it is not the end of human rights. In order to illustrate this, a brief history of human rights will firstly be provided before subsequently analysing three core challenges: universality, non-enforcement and proliferation. This article will then demonstrate that although they are serious challenges, they do not constitute the end of human rights, with universality and non-enforcement being overstated. In alleviating such challenges, especially proliferation, a greater degree of pragmatism is required. It will then be concluded that speculating the end of human rights is neither helpful nor desirable.

2. Setting the Descriptive Stage

Human rights embodies the egalitarian view that all individuals are equal.[1] As humans, we all possess the same dignity and inherent rights.[2] They regulate individuals' relationship with the state,[3] by prescribing how governments can behave and treat their populations,[4] providing "moral assurances" that rights, such as to life, will not be unjustly violated.[5] In 1948, the international community enacted the Universal Declaration of Human Rights in response to the fascism which permeated the previous two decades and to prevent its reoccurrence.[6] Individual natural rights thus "attained the dignity of law."[7] Governments being required to protect a list of universal, individual rights was revolutionary,[8] underpinning contemporary human rights

[1] Conor Gearty, *Can Human Rights Survive?* (CUP 2006) 4
[2] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) art 1
[3] Hurst Hannum, *Rescuing Human Rights: A Radically Moderate Approach* (CUP 2019) 23-24
[4] Frédéric Mégret, 'International Human Rights Law Theory' (2010) 13 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539591> accessed 16 November 2019
[5] Emilie M Hafner-Burton, *Making Human Rights a Reality* (Princeton University Press 2013) xv
[6] Eric Posner, *The Twilight of Human Rights Law* (OUP 2014) 123
[7] Ole W Pedersen and Colin RG Murray, 'Examining Critical Perspectives on Human Rights: An Introduction' in Rob Dickinson and others (eds), *Examining Critical Legal Perspectives on Human Rights* (CUP 2012) 3
[8] Hannum (n 3) 1

law.[9] For instance, national constitutions subsequently enshrined and protected human rights,[10] and internationally, the ICCPR and ICESCR were adopted in 1966.[11] Prior, repressive leaders enjoyed near full impunity due to a lack of constraints.[12] Individuals became "subject[s] of international law" by virtue of bearing rights and having the ability to bring claims.[13] There now exists an abundance of human rights norms and institutions to safeguard and implement them.[14] Nevertheless, human rights remain paradoxical; although part of the dominant discourse,[15] their increased prominence has brought increased challenges. Some scholars argue these challenges constitute the 'end of human rights',[16] but to adequately address this charge, these challenges must firstly be discussed.

3. Challenges

3.1 Universalism

International human rights are encountering serious challenges.[17] Universalism, the aspiration for universal adherence to human rights norms, poses one of the system's biggest threats.[18] It denotes a common standard for everyone, everywhere,[19] transcending "time, location and culture."[20] It equates justice with adopting and securing universal human rights.[21] This goal of universality is challenged by the vast array of cultures and political systems around the world.[22] For instance, the West views the cultural practice of female genital mutilation as abhorrent, violating physical integrity rights, but in some cultures it is perceived as acceptable and

[9] Hafner-Burton (n 5) 45-46
[10] Jochen Von Bernstorff, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law' (2008) 19(5) EJIL 903, 909
[11] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)
[12] Kathryn Sikkink, *Evidence for Hope: Making Human Rights Work in the 21st Century* (Princeton University Press 2017) 185
[13] Ilias Bantekas and Lutz Oette, *International Human Rights: Law and Practice* (2nd edn, Cambridge University Press 2016) 72-73
[14] David Kennedy, 'The International Human Rights Regime: Still Part of the Problem?' in Rob Dickinson and others (eds), *Examining Critical Legal Perspectives on Human Rights* (CUP 2012) 19
[15] Richard Rorty, 'Human Rights, Rationality, and Sentimentality' (1998) 118 *Headline Series* 116, 126
[16] Bantekas and Oette (n 13) 29
[17] Gearty (n 1) 1
[18] Hafner-Burton (n 5) 16
[19] UDHR (n 2) Preamble
[20] Bantekas and Oette (n 13) 31
[21] Kennedy, 'The International Human Rights Regime' (n 14) 25
[22] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 96

necessary to retain their tribal and family place.[23] Human rights law is undermined because universal norms are not accepted and implemented globally.[24] This is the consequence of a strict interpretation of universality which embraces a "one-size-fits-all emancipatory practice" and does not permit variation.[25] Nevertheless, universality as a challenge to human rights is overstated.

Cultural pluralism does not necessarily undermine the universality of human rights.[26] Universality *ought* not narrowly require adherence to all norms, but recognise universality as everyone having an equal voice, an idea found in practically all cultures.[27] Human rights' utility is found in its capacity to provide a "language for the voiceless, vulnerable, and marginalised."[28] On this view, universality is the "moral vernacular" through which the oppressed can, and do, act as "moral agents", rising up against repressive, culturally condoned practices like FGM.[29] Human rights' purpose is not to eliminate different cultural and moral values.[30] The lack of universal adherence is alleviated when universality is viewed less stringently as providing a voice to the powerless, rather than requiring unqualified adherence to norms. The aspiration for the universality of human rights has also been charged with imposing Western values as a form of neo-colonlialism.

Neo-colonialism via universality is imperialist in nature; the West regaining control and domination of their former colonies through the imposition of human rights.[31] Since the West no longer has "direct imperial rule," this is achieved by the "universalizing language of human rights" which imposes Western values that are incompatible with other cultures.[32] For instance, Singaporean culture emphasises the *Asian value* of social harmony over public dispute which is perceived as incompatible with rights like freedom of expression, arguing they are exclusively Western.[33] Consequently, human rights' integrity is undermined when perceived to merely promote Western interests,[34] as opposed to providing individuals with greater

[23] Michael Ignatieff, 'The Attack on Human Rights' (2001) 80(6) Foreign Aff 102, 112
[24] Hafner-Burton (n 5) 113
[25] David Kennedy, 'International Human Rights Movement: Part of the Problem?' (2002) 15 Harv Hum Rts J 101, 111
[26] Charles R Beitz, 'Human Rights as a Common Concern' (2001) 95(2) APSR 269, 270
[27] John Tasioulas, 'Making Human Rights Ordinary Again: A Response to Ignatieff' (2019) 30(3) KLJ 341, 342
[28] Gearty (n 1) 67
[29] Ignatieff (n 23) 109
[30] Hannum (n 3) 115
[31] Posner (n 6) 66
[32] Ignatieff (n 23) 104
[33] Beitz (n 26) 271
[34] Bantekas and Oette (n 13) 27-28

protection. Although values do vary, the extent to which human rights constitute a forced imposition of uniquely Western values with a hidden imperialist agenda is exaggerated.

For example, the ICCPR's and ICESCR's drafting involved countries from all around the world, ensuring the representation and approval of numerous political and religious views.[35] Likewise, the Universal Declaration of Human Rights (UDHR) is a "pragmatic common denominator" intended to facilitate agreement within cultural plurality.[36] Rather than a tool for Western domination, human rights are a global fight for increased protection against discrimination and oppression.[37] Neo-colonialism is rarely advanced by the oppressed who are anxious to benefit from human rights; states are its main proponents.[38] Repressive governments argue imperialism to detract critical attention from their own unacceptable rights practices.[39] The Neo-colonialist critique suggests returning to a pre-human rights state, often entailing a lack of democracy, torture and widespread violence.[40] Thus, the charge of imperialism is overstated and not well-founded. Advocating for a strict universality of human rights necessitates universal enforcement,[41] indicating the taxing disparity between human rights theory and practice.

3.2 Non-enforcement

Governments are principal human rights violators.[42] The UN Secretary-General in 2016 stated that the world is experiencing human suffering akin to the period in which the UN was conceived.[43] It has been recognised for decades that a disparity exists between the recognition of human rights in, for example, treaties and their enforcement.[44] Saudi Arabia is party to CEDAW,[45] yet their laws and practices consistently subordinate women.[46] States acceding to

[35] Higgins (n 22) 98
[36] Ignatieff (n 23) 106
[37] Sikkink (n 12) 29
[38] Higgins (n 22) 96
[39] Sikkink (n 12) 9
[40] Posner (n 6) 68
[41] Mégret (n 4) 5
[42] Hafner-Burton (n 5) xv
[43] Ban Ki-moon, 'Opening remarks at press conference with President Erdogan of Turkey at the World Humanitarian Summit' (World Humanitarian Summit, Istanbul, 24 May 2016) <www.un.org/sg/en/content/sg/speeches/2016-05-24/opening-remarks-press-conference-president-erdogan-turkey-world> accessed 20 November 2019
[44] Hersch Lauterpacht, *International Law and Human Rights* (FA Praeger 1950) 27
[45] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979 UNGA Res 34/180) (CEDAW)
[46] Posner (n 6) 71

international treaties does not denote compliance, especially with the absence of substantive enforcement mechanisms;[47] there exists no world police force to enforce international human rights laws.[48] Outside of the European Court of Human Rights,[49] victims often have no judicial means for redress beyond domestic courts, if competent.[50] For instance, the Human Rights Council is powerless to ensure compliance; at best overseeing reporting and complaints procedures which states often ignore.[51] When peremptory norms such as the prohibition of torture are not complied with, or even openly endorsed,[52] human rights' utility is seriously brought into question.[53] If rights have no remedy, this undermines their legitimacy,[54] weakening their normative character.[55] Yet, this challenge is not as fundamental as some scholars perceive.

The enforcement of human rights ultimately depends on the will of states; ironically, the biggest perpetrators.[56] However egregious such violations, they do not represent an "abysmal failure" of human rights, but rather the inherent limits of relying on a system which is underpinned by the consent and willingness of states.[57] Compliance is more likely if states' interests are satisfied in doing so.[58] A lack of enforcement is not limited to human rights, it pervades the general corpus of international law.[59] Equally, the international criminal court lacks power to ensure states implement arrest warrants, exemplified by *Al-Bashir's* prolonged impunity.[60] Non-enforcement is obviously problematic, but a right remains a right nonetheless.[61] A more pragmatic approach can be used to address such difficulties.

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[47] Sikkink (n 12) 140
[48] Hafner-Burton (n 5) 9
[49] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, entry into force 3 September 1943) (ECHR) art 19
[50] Beitz (n 26) 269
[51] Hafner-Burton (n 5) 110
[52] Sikkink (n 12) 6
[53] Keith D Ewing, 'What is the point of human rights law?' in Rob Dickinson and others (eds), *Examining Critical Perspectives on Human Rights* (CUP 2012) 58
[54] Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84(4) AJIL 866, 875
[55] Higgins (n 22) 19
[56] Mahmoud Cherif Bassiouni, 'A Critical Introduction Assessment of the UN Human Rights Mechanisms' in Mahmoud C Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery* (Intersentia 2011) 3
[57] Bantekas and Oette (n 13) 27
[58] Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (CUP 2012) 122
[59] Hannum (n 3) 159
[60] Patricia Galvao Teles, 'The ICC At the Centre of an International Criminal Justice System: Current Challenges' (2017) 8(1) Janus.Net 61, 62
[61] Higgins (n 22) 99

Pragmatism entails a greater understanding of what human rights can actually achieve.[62] Consent and sovereignty restrict human rights enforcement,[63] but instead of fleeing ship, it is better to acknowledge this difficulty and continue to urge compliance with norms, even when facing an uphill battle.[64] Sometimes remedies are confined to the influential, but "unenforceable mechanisms of moral persuasion and damning reports."[65] NGOs like Amnesty carry persuasive weight; they monitor state compliance with human rights, pressuring violators into compliance and humiliating oppressive governments through the media.[66] This is better aligned with human rights' "real-world capabilities."[67] Rather than accepting this in lieu of extensive enforcement, it highlights the difficulties in realizing human rights claims using law, a "largely conservative force."[68] Law alone cannot achieve over-ambitious goals such as securing worldwide rights enforcement.[69] Most violations occur within widespread instability and conflict.[70] With implementation contingent on domestic capability, it is too much to expect human rights to produce solutions to these deep, complex problems.[71] Juxtaposing international enforcement to the sometimes swift, domestic enforcement will inevitably cause disappointment: establishing flawless international enforcement mechanisms is practically impossible.[72] The problem of enforcement is exacerbated by human rights' continuous proliferation, further diminishing their legitimacy.

3.3 Proliferation: a self-inflicted challenge?

Human rights is suffering from "rule naivete," the mistaken assumption that more rules and norms will enhance citizens' protection.[73] The international system has focussed too narrowly on "legal, rather than social, religious, or other remedies,"[74] causing a proliferation of human

[62] Hannum (n 3) 4
[63] Higgins (n 22) 1
[64] ibid 19
[65] Terry Collingsworth, 'The Key Human Rights Challenge: Developing Enforcement Mechanisms' (2002) 15 Harv Hum Rts J 183, 183-184
[66] Posner (n 6) 82
[67] Hafner-Burton (n 5) 82
[68] Gearty (n 1) 12
[69] Hafner-Burton (n 5) 136
[70] Posner (n 6) 60-61
[71] Hannum (n 3) 113
[72] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (3rd edn, OUP 2014) 13
[73] Posner (n 6) 144
[74] Kennedy, 'The International Human Rights Regime' (n 14) 24

rights treaties, declarations and institutions.[75] In particular, the UN Commission on Human Rights (now the UN Human Rights Council) demonstrated an unqualified reluctance to expand human rights into areas of tourism and disarmament.[76] This reflects an insatiable desire for the legalisation of rights.[77] At its extreme, rights can be equated with anything of good value.[78] The inordinate proliferation of rights constitutes a fundamental challenge to the project,[79] entailing numerous negative consequences and encompassing the potential to exacerbate the project's other problems such as non-enforcement and universality.

The implementation gap is ever-expanding.[80] Proliferation will compound this; more rights, more violations, further decreasing human rights' credibility and legitimacy.[81] Similarly, it adds to the charge of neo-colonialism.[82] The failure to accommodate cultural pluralism will not be alleviated by attempting to conjure up normative rights foundations for food or housing.[83] Continuously expanding human rights and its interests into these areas risks collapsing the system "into an undifferentiated welfarism" whereby rights are aligned with public good.[84] Attempting to use human rights to address all social problems will not work; more is needed.[85] The endless expansion entails a too narrow focus on framing issues in rights terms "instead of addressing underlying structural problems and inequalities or fostering solidarity."[86] Equally vis-à-vis too many rights, states can justify violations by arguing the exhaustion of their resources from compliance with other rights, rendering criticism even more difficult than it already is.[87] Empirical research indicates proponents of expanding these third-generation rights are countries with appalling human rights records.[88] Consequently, consenting to new rights for ulterior motives, as opposed to protection, reduces the value of designating something a human right and the opprobrium attached to violation.[89] To mitigate the adverse problems

[75] Rosa Freedman and Jacob Mchangama, 'Expanding or Diluting Human Rights?: The Proliferation of United Nations Special Procedures Mandates' (2016) 38 Hum Rts Q 164, 164
[76] Philip Aston, 'Conjuring up New Human Rights: A Proposal for Quality Control' (1984) 78(3) AJIL 607, 607
[77] Costas Douzinas, 'The End(s) of Human Rights' 26(2) MULR 445, 460-461
[78] Kenneth Cmiel, 'The Recent History of Human Rights' (2004) 109(1) Am Hist Rev 117, 119
[79] Posner (n 6) 91
[80] Sikkink (n 12) 168
[81] Hafner-Burton (n 5) 130
[82] Beitz (n 26) 280
[83] Higgins (n 22) 103
[84] Posner (n 6) 94
[85] Hannum (n 3) 1
[86] Bantekas and Oette (n 13) 34-35
[87] Posner (n 6) 137
[88] Freedman and Mchangama (n 75) 187
[89] Higgins (n 22) 105

stemming from undue proliferation, akin to the preceding section, a greater degree of pragmatism is required.

Instead of expanding rights, procedures and institutions, prudence is needed whereby focus is centred upon materialising existing aims and their effectiveness.[90] Given the disparity between theory and enforcement, ensuring governments increased compliance with existing rights and obligations ought to be prioritised.[91] Not all rights merit the designation of a human right, although there exists no defined criteria of what constitutes a human right.[92] Jobs and housing are important necessities, but it is not useful ascribing them human rights status; difficulties arise in how these infringements should be remedied.[93] A sensible balance is needed between human rights' "integrity and credibility," and remaining dynamic vis-à-vis changing needs that "responds to new threats to human dignity and well-being".[94] Undue proliferation does not achieve this. Evaluating human rights' success by virtue of how many rights can be accumulated internationally is no longer tenable.[95] Although proliferation is a serious challenge, it does not rise to the potency which could end human rights. Proliferation is self-inflicted and can be remedied by gaining a better understanding of human rights' inherent limitations and acting accordingly. It now is apt to consider whether human rights really are at their end.

4. The End?

It is not the end of human rights. There is no mass withdrawal from treaties, nor widespread denouncement of norms.[96] Such a charge indicates human rights' "paucity of good critiques."[97] Individuals are consistently exposed to extreme rights violations, for instance via the media, creating the perception the world is getting worse.[98] A few instances of egregious practices do not alter "the status of the normative prohibitions."[99] This is not to say that these challenges

[90] Hafner-Burton (n 5) xv-xvi
[91] Hannum (n 3) 39
[92] Tomuschat (n 72) 3
[93] Claudio Munoz, 'Stand up for Your Rights' *The Economist* (22 March 2007) <www.economist.com/leaders/2007/03/22/stand-up-for-your-rights> accessed 21 November 2019
[94] Aston (n 76) 609
[95] Gearty (n 1) 63
[96] Posner (n 6) 140
[97] Makau Mutua, 'Human Rights in Africa: The Limited Promise of Liberalism' (2008) 51(1) Afr Stud Rev 17, 23
[98] Sikkink (n 12) 178
[99] Higgins (n 22) 22

are not serious concerns, but instead that they do not signal the end of human rights. Speculating the end is non-sensical because it rejects the proposition that all individuals share fundamental rights which ought to be safeguarded and implemented by their states.[100] Going forward, the best approach is to understand and acknowledge the limits of human rights, thinking practically.[101] Progression is contingent on perseverance,[102] alongside a better understanding of what human rights can actually achieve. Simply speculating the end will achieve nothing.

5. Conclusion

It has been illustrated that universality, non-enforcement and proliferation, although serious challenges, do not constitute the end of human rights, speculation of which is not wise. A greater degree of pragmatism is needed to partially alleviate concerns going forward.

[100] Hannum (n 3) 4
[101] Kennedy, 'The International Human Rights Regime' (n 14) 22
[102] Sikkink (n 12) 179

Decriminalising Sex Work: Securing the Protection of Women under a Harm Minimisation Approach

Beatrice Baskett

1. Introduction

The Sexual Offences Act defines a prostitute as a person who "offers or provides sexual services to another person in return for payment or a promise of a payment".[1] Whilst this definition is submitted, the etymology of 'prostitute' originates from words such as 'public shame' and 'dishonour'.[2] Due to the duality of the word prostitute to be used as an insult, and the power of language to drive social attitudes, this group shall herein be referred to as sex workers.[3] Whilst the term sex worker is gender neutral, this article focuses on the impacts and protections needed specifically in relation to non-trafficked women over the age of 18.[4] Primarily, the harms of stigmatisation and violence that sex workers experience are analysed. The harms to the community that sex work allegedly cause are dismissed. Secondly, the current approach of the English and Welsh legal system is criticised for prioritising unproven community harms at the expense of exacerbating the harms sex workers are subjected to. Finally, the model of decriminalisation is advanced under a harm minimisation approach to ensure women selling sex are best protected.

2. Stigmatisation and Violence

Sex workers are subjected to a stigma which vilifies them as "bad, dirty and immoral".[5] The majority of sex workers are women, indicating the gendered undertones within this condemnation.[6] The stigmatisation of sex workers is well-entrenched as these attitudes can be traced throughout history. The 1860s Contagious Diseases Acts forced women to undergo invasive medical inspection to ensure they did not put the military, who had a 'natural' need

[1] Sexual Offences Act 2003 s54(2)
[2] Kate Lister, 'Sex Workers or Prostitutes? Why words matter' (inews, 5 October 2017) <https://inews.co.uk/opinion/columnists/sex-workers-prostitutes-words-matter/amp/> accessed 14th March 2020
[3] Ibid
[4] See (n 1)
[5] Lisa Hung, 'A radical feminist view of prostitution: towards a model of regulation' (1999) UCL Juris. Rev. 123, 123
[6] House of Commons Home Affairs Committee, *Prostitution, Third Report of Session 2016 – 17,* 4 <https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/26/26.pdf> accessed 20 March 2020

for their sexual services, at risk of contracting sexually transmitted diseases.[7] More recently, the majority of HIV literature in the 1980s – 2000s focused solely on the risk posed to customers.[8] Multifaceted harm is caused through this perception and attribution of blame. Notably, sex workers are categorised as "sub-human", less deserving of protection from the law, hindering effective law enforcement.[9] Section 14 of the Sexual Offences Act aims to prevent exploitation of sex workers, but it has not been deployed by the majority of police forces, leading to research suggesting that stigmatisation may have resulted in a failure by the police to view sex workers as capable of being victims.[10] Secondly, harm has been caused to women generally and the notion of gender equality as stigmatisation of one group of women correlates to women being divided as either 'good' or 'bad'; from the 'respectful wife' to the 'fallen woman' objectified to serve the natural male sexual need.[11]

Sexual violence and assault are considered the 'norm' for women in sex work.[12] In one survey, 49% of sex workers said that they were worried about their safety.[13] In addition, research suggests that some sex workers assume that, due to the nature of their work, it is not possible for them to be raped. [14] Due to fears "that the police will not take their claim seriously or believe that they are in some way responsible for their own victimisation" many will not report this violence.[15] Therefore, the accentuation of these harms through a failure of legal protection appears to be two-fold, with failure to report and questionable enforcement statistics.

It has been alleged that harms are not confined to women and sex workers, but exist also within the communities in which they operate, due to an increase in organised crime, the spread of venereal diseases, and public nuisance.[16] It is not disputed that there is a legitimate interest for

[7] Contagious Diseases Acts 1864, 1866, 1869; Teela Sanders, Maggie O'Neill and Jane Pitcher, *Prostitution:Sex Work, Policy and Politics* (London SAGE 2009) 116
[8] Melissa Farley, '"Bad for the Body, Bad for the Heart": prostitution harms women even if legalised or decriminalised' (2004) 10 Violence Against Women 1087, 1109
[9] See (n 5) 130; Sarah Kingston and Terry Thomas, 'The Police, Sex Work, and Section 14 of the Policing and Crime Act 2009' (2014) 53(3) Howard J. Crim. Just. 255, 255
[10] See (n 1) s14; Kingston and Thomas (n 9) 262, 263
[11] See (n 5) 143, 138
[12] See (n 8) 1094
[13] See (n 6) 3
[14] See (n 8)1100
[15] See Kingston and Thomas (n 9) 263
[16] Tirath Kudhail, 'Should Prostitution be legalised?' (1999) UCL Juris. Rev. 165, 170; Home Office, *Tackling the Demand for Prostitution: A Review* (2008) 8 <https://webarchive.nationalarchives.gov.uk/20100408141223/http://www.homeoffice.gov.uk/documents/tackling-demand2835.pdf?view=Binary> accessed 20 March 2020

ensuring community safety,[17] but these harms are unsubstantiated by empirical evidence.[18] Priority should therefore be ensuring safety for sex workers, as recognised and valued members of the community, rather than focusing on a perceived nuisance which they have allegedly caused.[19]

3. The Legislative Framework

In England and Wales, sex work is not illegal per se, but several related actions are, for example: soliciting (persistently loitering in a street or public place for sexual services) and the keeping of a brothel. [20] Our laws are criticised for originating from an outdated position which focuses on unproven community harms and for perpetuating the harms currently facing sex workers. The Wolfenden Report outlined the importance of shielding the "ordinary citizen" from the public nuisance of the "common prostitute", indicating its priority in protection of the former and its stigmatisation of the latter.[21] An analysis of the harmful impacts our laws currently have on sex workers demonstrates the continuation of this mis-placed prioritisation. An estimated 152 sex workers were murdered between 1990 and 2015.[22] The murder of Mariana Popa in 2013 demonstrates the appalling effects of the illegality of soliciting.[23] Popa was working alone to try and avoid police detection and was allegedly working later than usual in an attempt to pay off a fine she had received for soliciting. [24] Criminalising this action did not prevent it from occurring, but rather made Popa work more frequently and in more vulnerable circumstances.[25] Criminal records create "an unsurmountable barrier for sex workers wishing to exit [sex work] and to move into regular work",[26] whilst fines for breach often result in women working longer hours, creating a 'revolving door' situation.[27] Thus, a

[17] Laura Graham, 'Governing sex work through crime: creating the context for violence and exploitation' (2017) 81(3) J. Crim. L. 201, 205
[18] See Kudhail (n 16)
[19] See (n 17)
[20] Street Offences Act 1959 s1(1); Sexual Offences Act 1956 s33(A)
[21] The Wolfenden Committee, *Report of the Committee on Homosexual Offences and Prostitution* (1957) Cmnd 247
[22] See (n 6) 3
[23] Janet Eastham, 'Prostitution, A radical moment for Britain's sex workers' (The Guardian, 4 July 2016) <https://www.theguardian.com/global/2016/jul/04/sex-workers-commons-inquiry-prostituion-brothels-soliciting-legalised-womens-safety-stunning-victory> accessed 15 March 2020
[24] Diane Taylor, 'Mariana Popa was killed working as a prostitute. Are the police to blame?' (The Guardian, 19 January 2014) < https://www.theguardian.com/society/2014/jan/19/woman-killed-prostitute-police-blame> accessed 15 March 2020
[25] See (n 23)
[26] Ibid
[27] Ibid; See (n 17) 204, 205

criminal model is misplaced in dealing with the structural, economic and social reasons why women may be selling sex. [28] Rather than recognising that there is 'safety in numbers', we have adopted a dangerous 'out of sight, out of mind' approach.[29]

Lack of legal protection is re-emphasised through the prohibitions of brothels.[30] In *Stevens v Christy* it was confirmed that more than one woman occupying the same premises would constitute a brothel, and so be illegal.[31] The effect of these laws is that the safeguard of collective working is outlawed. Instead of the legislation being preventative, we are asking sex workers to make a choice between working safely or working legally.[32] This approach is criticised from a human rights perspective, drawing analogy to the Canadian Supreme Court judgment in *Bedford.*[33] Specifically focusing on the Canadian 'Bawdy-house law', which made it illegal for sex workers to work in familiar indoor locations on a regular basis, the court held the law to be unconstitutional due to it causing an unreasonable interference to "the right to life, liberty and security" secured by the Canadian Charter of Rights and Freedoms.[34] It was noted that the law was primarily concerned with preventing public nuisance and that compliance of this law meant that sex workers were exposed to dangerous conditions and prevented from taking steps to minimise risks.[35] Parallels can be drawn to our jurisdiction where analysis has highlighted the manner in which our criminal laws incorrectly focus on public nuisance at the expense of perpetuating the harms facing sex workers.[36] Whilst not governed by the Canadian Charter of Rights and Freedoms,[37] Article 5 of the European Convention on Human Rights contains similar wording outlining a "right to liberty and security".[38] Therefore, the impact of our current legal framework is not only troubling in terms of harm exacerbation but the lack of rights and protections accorded to sex workers.

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[28] See (n 17) 204, 205, 214
[29] Cambridge Dictionary, 'There's safety in numbers' (Cambridge Dictionary) <https://dictionary.cambridge.org/dictionary/english/there-s-safety-in-numbers> accessed 26 March 2020; Cambridge Dictionary, 'Out of sight, out of mind' (Cambridge Dictionary) <https://dictionary.cambridge.org/dictionary/english/out-of-sight-out-of-mind> accessed 26 March 2020. accessed 26 March 2020
[30] See Sexual Offences Act (n 20)
[31] *Stevens v Christy* [1987] Cr. App. R. 249
[32] See (n 17) 214
[33] *Attorney General of Canada v Bedford and Others* [2013] SCC 72; [2014] 4 LRC
[34] Ibid; Canadian Criminal Code 1985 s197; Canadian Charter of Rights and Freedoms s7, Constitution Act 1982
[35] See (n 33) 82 and 94
[36] See (n 27)
[37] See Canadian Charter of Rights and Freedoms (n 34)
[38] ECHR, 'Article 5,The European Convention on Human Rights' (ECHR) <https://www.echr.coe.int/Documents/Convention_ENG.pdf > accessed 26 March 2020

4. Reform

Reform to a model of decriminalisation, removing all laws criminalising the selling of sex, should be implemented.[39] This position has been advocated for by the English Collective of Prostitutes and Amnesty International, stating "laws often make sex workers less safe and provide impunity for abusers with sex workers often too scared of being penalized to report crime... Laws on sex work should focus on protecting people".[40] It should be noted that decriminalisation does not make sex work a completely lawless area, with our criminal laws still operating, for example in situations of rape, assault and violence.[41] The benefits of decriminalisation are evidenced from a harm minimisation analysis, where sex workers do not need to operate underground, an element of the stigma they receive is removed (through treating them as "ordinary citizens") and thus cooperation with the police is improved, making it more likely that crimes will be reported.[42]

Alongside a decriminalised model should be a focus on creating an educative and supportive system, whereby assistance is available to those involved in sex work to develop routes out. [43] Research has indicated economic reasons to be the primary basis upon which women enter the industry, indicating the importance of reviewing "personal factors such as health, family, housing [and] welfare".[44] It is a false premise to assume that those involved are knowledgeable about pregnancy, birth control and sexually transmitted diseases, whilst a decriminalised model allows for frank discussions, more transparency from those involved and increased willingness to cooperate and be educated (with no fear of criminal punishment).[45] Whilst theoretical discussion has acknowledged the harms to gender equality that the stigmatisation of sex work perpetuates, one does not have to agree with the morality of sex work to be an advocate of a decriminalisation model. It is necessary to divide theoretical criticisms from reality, and thus

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[39] See Sander (n 7) 114
[40] English Collective of Prostitutes, '#MakeAllWomenSafe' (English Collective of Prostitutes) <http://prostitutescollective.net/> accessed 20 March 2020; Amnesty International, 'Amnesty International publishes policy and research on protection of sex workers' rights' (Amnesty International, 26 May 2016) <https://www.amnesty.org/en/latest/news/2016/05/amnesty-international-publishes-policy-and-research-on-protection-of-sex-workers-rights/> accessed 20 March 2020
[41] See (n 1); Offences Against the Person Act 1861
[42] See (n 5) 128; See (n 8) 1093
[43] See Home Office (n 16) 2
[44] Gillian Abel, Lisa Fitzgerald, Cheryl Brunton, 'The Impact of Decriminalisation on the Number of Sex Workers in New Zealand' (2009) 38(3) Jnl Soc. Pol. 515, 528-529
[45] See (n 8) 1098

it is emphasised that we do not live in an ideal society where criminalisation or regulation of sex work prevents its operation, instead sending it underground and to black markets.[46] Therefore, irrespective of theoretical conceptions, decriminalisation is the best model to minimise harms that sex workers in practice are confronted with.

New Zealand provides a useful case study, as the Prostitution Reform Act decriminalised sex work in 2003.[47] The act states that whilst "not endorsing or morally sanctioning" it, this framework allows "safeguards", "promotes the welfare and occupational health and safety of sex workers" and "is conducive to public health".[48] Therefore, this approach emphasises that, in practice, this model is the most instrumental in ensuring protection. Research has shown that sex workers feel empowered to: report misconduct, ask clients to abide by rules (such as wearing protection) and have frank negotiations in safe environments.[49] Moreover, working conditions have improved due to greater visibility and a reduction in stigmatisation.[50] It is heralded from "a public health, harm minimisation and human rights perspective", all outcomes which would be beneficial in England and Wales.[51] The worry that decriminalisation will lead to expansion of the sex industry has not been realised as research shows little impact on the number of sex workers and the prevalence of men who purchase sexual services.[52] In 1999, it was estimated that 375 sex workers were operating in Christchurch, compared to post reform in 2006, where the number was at 392.[53] Whilst New Zealand is a differing jurisdiction, and decriminalisation may be experienced differently, there is nothing to suggest that the outlined benefits would not be attained in England and Wales.[54]

Adopting a decriminalisation model provides for a framework where sex work "is service work and… sex workers operate under the same employment and legal rights accorded to any other

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[46] See (n 5) 126
[47] Prostitution Reform Act 2003
[48] Ibid, s3
[49] Gillian Abel, 'A decade of decriminalization: Sex work 'down under' but not underground' (2014) 14(5) Criminology and Criminal Justice 580, 585 and 587
[50] See (n 23); Jane Scoular and Maggie O'Neill 'Chapter 1: Legal Incursions into Supply / Demand: Criminalising and Responsibilising the Buyers and Sellers of Sex in the UK' in Vanessa Munro and Marina Della Gusta (eds), *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Ashgate 2008) 3.
[51] See (n 49) 583
[52] See (n 44) 526; Teela Sanders and Rosie Campbell 'Chapter 10: Why Hate Men Who Pay for Sex? Exploring the Shift to 'Tackling Demand' in the UK' in Vanessa Munro and Marina Della Gusta (eds), *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Ashgate 2008) 176
[53] See (n 44) 523
[54] Ibid, 581

occupational group".[55] Pateman condemns this contractual model asserting it implies the sale of the female body, as their service is provided through their anatomy.[56] However, Radin's analysis is advanced whereby "relationships can be seen as partly based on mutual inter-personal sharing, and partly on economic reasons" and are thus subjected to incomplete commodification.[57] This approach is commended as "it balances the need to preserve the self-identity of individuals, whilst acknowledging the fact that certain non-ideal conditions cause women to resort to the commodification of sexual services."[58] This creates a system "where partial market inalienability could substitute complete non-commodification since although the latter may accord with our ideals, it may cause too much harm in our non-ideal world".[59] Irrespective of theoretical understandings of the commodification of sex as a service, in practice sex workers are currently marginalised, their existence is not stopped through a legislative framework, and market inalienability would perpetuate identified harms.[60] This approach ensures that sex workers are protected, their rights are recognised and the supportive aims of developing routes out of sex work are not detracted from.[61]

5. Conclusion

In conclusion, stigmatisation and violence are commonplace within sex work. The laws in England and Wales have exacerbated these harms and failed to adequately protect women selling sex, through adoption of an 'out of sight, out of mind' approach, and compliance with our laws meaning certain safeguards cannot be adopted.[62] Decriminalisation, with a service framework, yields a plethora of benefits, including greater safety and rights, thus ensuring better protection.

[55] Ibid
[56] See (n 5) 133; Carole Pateman, 'Defending Prostitution: Charges against Ericcson' (1983) 93 Ethics 561
[57]See Kudhail (n 16) 178, 182, 184; Margaret Radin, 'Market Inalienability' (1987) 100 (8) Harv. L. Rev. 1849
[58] See Kudhail (n 16) 182
[59] See Kudhail (n 16) 178, 182; See Radin (n 57)
[60] See Kudhail (n 16) 184
[61] See Home Office (n16) 2
[62] See (n 29)

Evaluating the United Kingdom's Domestic Access to Justice Regime for Environmental Matters in Light of its Implementation of the Aarhus Convention

Rosie Brain

1. Introduction

In 2005, the United Kingdom ratified the Aarhus Convention, a UNECE treaty designed to improve access to information, public participation in decision-making and access to justice in environmental matters. This is important because the environment cannot seek redress for itself before a court so there is considerable debate on the most effective means for achieving justice for breaches of environmental law. In this article, I will seek to prove that the UK's domestic implementation of the access to justice pillar, in Article 9 of the Aarhus Convention, is inadequate. In order to prove this, I will illustrate the significance of access to justice in the environmental context and examine the domestic implementation of Article 9. As part of this, I will consider the effectiveness of the Environmental Cost Protection Regime by looking at variable cost caps and private environmental claims. The result will show that access to justice under ECPR is insufficient: the variable cost cap causes uncertainty which has a chilling effect on environmental litigation and the omission of private nuisance from an appropriate cost protection regime leads to prohibitive expense. In light of these two failings, it is concluded that the domestic implementation has ultimately failed in addressing the wide access to justice aims of the Convention. This emphasises the importance of an effective implementation because as long as the UK fails in this area, the ensuing benefits from access to justice will remain limited.

2. Access to Justice

The objective of the Aarhus Convention is 'to contribute to the protection of the right of every person' to live in a healthy environment.[1] To achieve this aim, it sets out three procedural rights which focus on enhancing public participation for all citizens, the third of which is access to

[1] UNECE, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998), art 1 <www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> accessed 26 March 2020

justice.[2] The Article 9 provisions ensure access to justice by requiring accessible and effective legal review procedures for potential breaches of environmental law.[3] These provisions are intended to grant wide access to justice.[4]

It is very important for the protection of the environment that the public have such access to justice. This is fundamentally because the environment cannot represent itself before a court when it has suffered harm.[5] Whilst there are environmental enforcement agencies operating in England to protect the environment,[6] they are not capable of spotting every breach of environmental law and policy.[7] Without other mechanisms acting as a check on environmental decision-making, undetected environmental harms would continue. The access to justice right fills in this lacuna by enabling citizens to engage in review procedures and act on behalf of the environment. It allows more questionable environmental activities to be subjected to thorough legal scrutiny,[8] contributing to environmental protection.

This link between participation and the protection of the environment may be doubted.[9] As access to justice is just a procedural right, it does not guarantee any substantive improvements. However, this focus on outcome takes too narrow a view of the benefits that public participation can have.[10] The more that citizens are able to engage with review procedures, the more empowered society will be to participate in future environmental processes.[11] This further increases the likelihood that decision-makers will be held accountable to the public,[12] putting pressure on them to ensure that environmental protection remains a priority.[13] Therefore, despite not guaranteeing substantive outcomes, access to justice has a positive effect on the

[2] ibid art 9
[3] ibid
[4] UNECE, *The Aarhus Convention: An Implementation Guide* (2nd edn, United Nations 2014) 188
[5] Case C-260/11 *Edwards v Environment Agency (No 2)* [2013] 1 WLR 2914, Opinion of AG Kokott, para 42
[6] Environmental Agency, 'Environmental Agency enforcement and sanctions policy' (Policy Paper, 20 December 2019); and Natural England, 'Enforcement laws: advice on protecting the natural environment in England' (Guidance document, 20 October 2013)
[7] Jonas Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1997) 8(1) Yb Intl Env L 51, 63; and UNECE (n 4) 197
[8] Ebbesson, 'The Notion of Public Participation' (n 5) 63-64
[9] Joshua C Gellers and Chris Jeffords, 'Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice' (2018) 18(1) GLEP 99, 101
[10] ibid 102
[11] ibid 104
[12] ibid 102; Achim Halpaap, 'Understanding the Democracy-Environmental Interface' (2008) 38(6) EP & L 323, 323 and 324
[13] Marianne Dellinger, 'Ten Years of the Aarhus Convention: How Procedural Democracy is Paving the Way for Substantive Change in National and International Environmental Law' (2012) 23(2) Colo J Intl Env L & Pol 309, 315

development of environmental regulation, ultimately leading to 'enhanced environmental outcomes'.[14]

These environmental benefits will not be attained, however, if access to justice is limited owing to legal costs. Legal costs are widely regarded as a significant barrier to justice,[15] as they can discourage potential litigants from bringing meritorious claims. In the UK, this deterrent effect is heightened by the loser pays principle which covers environmental claims,[16] as it means that legal action can regularly exceed five-figure sums.[17] Furthermore, legal aid is unable to support claimants as it is 'notoriously difficult to obtain for environmental cases'.[18] To address the potential barrier of costs, Article 9(4) of the Convention requires environmental review procedures to 'be fair, equitable… and not prohibitively expensive'.[19] This provision has no direct legal force in the UK,[20] meaning that it is up to domestic law to implement it. Unfortunately, in contrast with the broad aims of the Convention, the approach taken in England and Wales significantly limits access to justice.

3. Domestic Implementation

The way that the UK has attempted to ensure that litigation costs do not prevent access to justice is through the implementation of the ECPR, located in the Civil Procedure Rules (CPR).[21] This regime has been amended numerous times since its introduction in 2013,[22] yet as of March 2020, the Aarhus Compliance Committee (ACC) still finds the UK to be in breach of its Article 9 obligations.[23] They recognise multiple failings of the regime,[24] but the

[14] Jonathan Pickering, Karin Bäckstrand and David Schlosberg, 'Between environmental and ecological democracy: theory and practice at the democracy-environment nexus' (2020) 22(1) J Env Pol & Plan 1, 3
[15] David Robinson and John Dunkley, *Public Interest Perspectives in Environmental Law* (Wiley Chancery 1995) 179; and Bende Toth, 'Public Participation and Democracy in Practice – Aarhus Convention Principles as Democratic Institution Building in the Developing World' (2010) 30(2) J Land Res & Env L 295, 326
[16] Toth (n 15) 311
[17] Carol Hatton and Franziska Mischek, 'No Reason to Celebrate' (2008) 38(6) EP & L 338, 340
[18] Donald A Reid, 'The Aarhus Convention and access to justice' (2004) 16(2) ELM 77, 79
[19] UNECE, Convention on Access to Information (n 1) art 9(4)
[20] David Hart and Jonathan Metzer, 'The Aarhus Costs Rules – Past, Present and Future' (2018) 23(2) JR 83, 84
[21] The Civil Procedure Rules 1998, rr 45.41-45.45
[22] The Civil Procedure (Amendment) Rules 2013; The Civil Procedure (Amendment) Rules 2017; and The Civil Procedure (Amendment No.3) Rules 2019
[23] Second progress review of the implementation of decision VI/8k on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention (6 March 2020)
[24] Decision VI/8k, *Compliance by United Kingdom with its obligations under the Convention*, Excerpt from the addendum to the report of the sixth session of the Meeting of the Parties (ECE/MP.PP/2017/2/Add.1)

subsequent discussion will only focus on what are considered to be the two most significant: the uncertainty of the variable cost caps and the failure to address private environmental claims.

3.1 Uncertainty of Variable Cost Caps

When the ECPR was first introduced,[25] the cost caps were fixed at £5,000 for an individual claimant, £10,000 for all other claimants and £35,000 for a defendant. These caps 'had the merit of being clear and certain',[26] a step in the right direction for ensuring environmental claims were heard in court.[27] Regrettably, in 2017 the CPR were amended to allow this cost cap to be varied, moving domestic law further away from a costs regime that ensures access to justice under Article 9.[28]

The problem with the variable cost cap is that it creates uncertainty,[29] an obstacle to public access.[30] The cap can only be varied once the claim has already been brought.[31] This means that when a prospective litigant is deciding whether to bring a claim, he has no way of knowing what his ultimate liability will be.[32] Furthermore, it is not just claimants who can apply to vary their cost protection, but defendants can also apply to lower claimants' cost protections.[33] It has been suggested that applications by defendants may become a matter of course,[34] increasing the potential for satellite litigation and cost uncertainty. In the face of this unknown liability, parties may decide that bringing a meritorious claim is too much of a financial risk,[35] limiting their access to justice.

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[25] The Civil Procedure (Amendment) Rules 2013
[26] Jasveer Randhawa and Shameem Ahmad, 'Changes to environmental costs protection regime: the loose threads' (2017) 8 J Plan & Env L 790, 790
[27] Ole W Pedersen, 'What Happened to Environmental Justice?' (2014) 16 Env L Rev 87, 89
[28] RSPB and Friends of the Earth, *A pillar of justice: The impact of legislative reform on access to justice in England and Wales under the Aarhus Convention* (Policy Paper, 1 November 2019) <https://policy.friendsoftheearth.uk/sites/files/policy/documents/2020-01/A%20Pillar%20of%20Justice_.pdf> accessed 27 March 2020
[29] Jorren Knibbe, 'New costs limits for environmental claims under the Aarhus Convention' (2017) 7 J Plan & Env L 663, 666; and Hart and Metzer (n 20) 86
[30] Brooke LJ, 'Environmental justice: the cost barrier' (2006) 18(3) JEL 341, 345
[31] The Civil Procedure Rules 1998, r 45.44
[32] Robert Carnwath, 'Environmental Litigation – A Way Through the Maze?' (1999) 11(1) JEL 3, 10
[33] The Civil Procedure Rules 1998, r 45.44(5)(b)
[34] Decision VI/8k, Comments on Party's second progress report by observers RSPB, Friends of the Earth, and Friends of the Earth Scotland, 29 October 2019, para 10; Second progress review of decision VI/8k (n 23) 7
[35] *R (Royal Society for the Protection of Birds) v Secretary of State for Justice* [2017] EWHC 2309 (Admin) [26]; and Stuart Bell and others, *Environmental Law* (9th edn, OUP 2017) 338-339

Furthermore, a litigant in an environmental claim may not be pursuing their private interests, but is instead protecting the public interest in the environment.[36] This often means that a 'significant element of altruism' is present in a decision to bring a claim, and a fixed cost cap can allow a claimant to evaluate whether the altruism is worth the cost in advance.[37] Conversely, the uncertainty of the level of the cost cap under the current approach prevents this assessment from being made, limiting the likelihood of altruistic environmental claims being brought in the public interest. Consequently, the enhanced environmental outcomes which access to justice can ensure are unlikely to be achieved.

It could be argued that the uncertainty is mitigated, because 'as a matter of practice' the court should resolve the matter of whether to vary the cost cap 'at the earliest possible stage of litigation'.[38] This suggests that the claimant would have certainty at a point where they can discontinue without incurring significant costs.[39] However, this does not completely remove the deterrent effect. For some, even the costs of this initial stage may be too much of a financial risk just to provide the chance to make an informed decision. This is especially so given that if they decide to discontinue after their protection has been lowered they are liable for the defendant's costs thus far, a figure that they cannot control.[40] Therefore, as long as applications by defendants are frequently being made,[41] the early determination of the cost cap will not stop the initial uncertainty from limiting access to justice.

During the consultation process leading up to the 2017 amendment, the government denied that the regime would lead to uncertainty regarding the determination of the level of the cap,[42] suggesting that it provides predictability for the claimant. They argued that the amendment would establish a clear process for courts to follow, which would only allow for variation where it would not make costs prohibitively expensive for the claimant.[43] This supposed 'clear process', found in CPR rule 45.44,[44] implements the ruling in *Edwards v Environment*

[36] David Hart, 'Aarhus: CJEU rules against UK costs regime' (2013) 21(6) Env Liability 231, 231
[37] Hart and Metzer (n 20) 83
[38] *RSPB* (n 35) [38]
[39] ibid [27] and [31]
[40] UN Economic and Social Council, 'Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland' (24 August 2011) 9
[41] Decision VI/8k, Comments on second progress report (n 34) para 10; Second progress review of decision VI/8k (n 23) 7
[42] Ministry of Justice, *Costs Protection in Environmental Claims: The government response to the consultation on proposals to revise the costs capping scheme for eligible environmental challenges* (November 2016) 7
[43] ibid 7
[44] The Civil Procedure Rules 1998, r 45.44

Agency,[45] which requires the court to have regard to both an objective and subjective test when determining the cap. This appears to be a fair approach to take. By ensuring costs are not objectively unreasonable, the public interest in the protection of the environment is taken into account.[46] Furthermore, the subjective assessment of the claimant's financial resources allows for the cost cap to prevent any unnecessary public expense.[47]

Despite the reasoning behind this 'hybrid' approach, the process itself still lacks the clarity to allow claimants to predict their cost liability, meaning the chilling effect on access to justice still exists. This is because it is overly complex, having adopted the 'everything in the mix' approach which Hart warned would make the exercise of varying a cap 'extremely wide-ranging'.[48] On top of this, the factors under the objective test bring their own intricacies. For example, the requirement to determine what is at stake for the claimant and the environment can entail a detailed assessment which is technical for the courts,[49] let alone a claimant. Furthermore, the express recognition of the complex relevant law and procedure that the court must have regard to makes it clear that this is an assessment which non-expert claimants will struggle with.[50] In these circumstances, claimants are unlikely to be able to accurately determine whether their cap will be varied, let alone by how much,[51] reiterating the uncertainty which was shown above to deter environmental claims. The fact that the amendment was so recent makes this uncertainty worse, as it means that case law is unlikely to provide any further guidance.

Therefore, despite the government's attempt to defend their amendments, they should have listened to the 230/234 consultation respondents who opposed the 'hybrid' approach.[52] As it stands, it 'create[s] uncertainty and additional complexity'[53] which will deter many from accessing justice. Whilst it may appear to be a fair way of determining the cost cap,[54] it is certainly not fair or equitable if it comes at the expense of the wide participation rights which the Convention requires, and the associated benefits for the environment.

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[45] *Edwards* (n 5)
[46] ibid [39]-[40]
[47] Ministry of Justice (n 42) 8
[48] David Hart, 'The CJEU on 'prohibitively expensive' and the new protective costs order regime' (2012) 20(6) Env Liability 257, 258
[49] Randhawa and Ahmad (n 26) 793-794
[50] Ole W Pedersen, 'The price is right: Aarhus and access to justice' (2014) 33(1) CJQ 13, 14-15
[51] Hart and Metzer (n 20) 86
[52] Ministry of Justice (n 42) 16-17
[53] Knibbe (n 29) 668
[54] Ministry of Justice (n 42) 8

3.2 Failure to Address Private Environmental Claims

A further significant failing of the ECPR is that it neglects the private law environmental claim of private nuisance.[55] Environmental private nuisance can fall under Article 9(3),[56] as confirmed by domestic case law.[57] This means it is also subject to Article 9(4) and the requirement to be 'not prohibitively expensive'.[58] Costs in environmental nuisance proceedings are typically very expensive, almost always exceeding £100,000 and often reaching millions.[59] Without some form of protection from such high costs, claimants are prohibited from taking effective legal action,[60] a breach of Article 9(4). Unfortunately, the only cost protection that is currently provided for such claimants under domestic law is a Protective Cost Order (PCO). This is not only a complicated and expensive mechanism,[61] which suffers from the same uncertainty problems discussed above,[62] but also one which will be shown to be inappropriate for private environmental claims. Thus, the ACC have found that cost allocation in private nuisance does not ensure that such proceedings are not prohibitively expensive.[63] By failing to consider how cost protection might be improved for private nuisance claimants in the ECPR, domestic law has not ensured access to justice in private environmental litigation.

The current cost protection that private nuisance claimants might be able to obtain, PCOs, developed in response to the need for costs to be limited in public interest litigation.[64] The

[55] Hart, 'The CJEU on 'prohibitively expensive'' (n 48) 258
[56] UN Economic and Social Council, 'Findings and recommendations with regard to communications ACCC/C/2013/85 and ACCC/C/2013/86 concerning compliance by the United Kingdom of Great Britain and Northern Ireland' (29 November 2016)
[57] *Austin v Miller Argent (South Wales) Ltd* [2014] EWCA Civ 1012 [17]; *Coventry v Lawrence* [2014] UKSC 46; and Benjamin J Pontin, 'Private Nuisance in the Balance: *Coventry v Lawrence (No 1) and (No 2)*' (2015) 29 JEL 119, 135
[58] UNECE, Convention on Access to Information (n 1) art 9(4)
[59] UN Economic and Social Council, 'Findings and recommendations on ACCC/C/2013/85 and ACCC/C/2013/86' (n 56); and *Coventry* (n 57) [32]-[34]
[60] UN Economic and Social Council, 'Findings and recommendations on ACCC/C/2013/85 and ACCC/C/2013/86' (n 56)
[61] David Hart, 'When does a case become "prohibitively expensive"?' (*UK Human Rights Blog*, 24 October 2012) <https://ukhumanrightsblog.com/2012/10/24/when-does-a-case-become-prohibitively-expensive/> accessed 27 March 2020
[62] UNECE Working Group on Access to Environmental Justice, *Ensuring access to environmental justice in England and Wales* (Report, May 2008) app 3, paras 11–14; and UN Economic and Social Council, 'Findings and recommendations on ACCC/C/2008/33' (n 40) 23
[63] UN Economic and Social Council, 'Findings and recommendations on ACCC/C/2013/85 and ACCC/C/2013/86' (n 56); *Coventry* (n 57); Second progress review of decision VI/8k (n 23) 19
[64] Bell and others (n 35) 340

established *Corner House* principles for granting PCOs reflect this public interest purpose,[65] making them unsuitable for dealing with private law claims. This is clearly illustrated by the condition that claimants must not have a private interest in the outcome of the case,[66] an impossibility in private nuisance.[67] Furthermore, the requirement that the issue is of 'general public importance' is difficult to argue in a private nuisance claim where only a few houses may be affected.[68] As the case law on PCOs has developed, it has been accepted that the principles should apply more flexibly to Aarhus Convention claims.[69] Ultimately, however, there still appears to be a judicial reluctance to grant a PCO for private nuisance where the public benefit is limited, evidenced in *Austin v Miller Argent*.[70] The Convention does not suggest that any significant public benefit is required, as it focuses on the right of every person.[71] Thus, contrary to this broad objective, private nuisance claimants are faced with prohibitive expenses which preclude their access to justice.

In light of this clear barrier to justice, it is difficult to understand why the government has not considered private nuisance claims under their ECPR. When the ECPR was introduced in 2013,[72] it was in response to findings that PCOs were not compliant with the Aarhus Convention.[73] Arguably, given the above discussions, this non-compliance is even more unfavourable for private claimants. Yet despite private environmental claims equally falling within the Convention,[74] the government has not made an equal attempt at preventing prohibitive expense.

The government have explained why the ECPR in its current form 'would not necessarily be appropriate' for private claims, as it was not designed with such claims in mind.[75] It is agreed that there might be different characteristics between challenges to private persons and challenges to public authorities.[76] Unlike for public defendants, private defendants are unable

[65] *R (Corner House Research Ltd) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192 [74]
[66] ibid [74]
[67] *Hunter v Canary Wharf Ltd* [1997] AC 655
[68] *Austin* (n 57) [45]; UNECE Working Group on Access to Environmental Justice (n 62) 20
[69] *R (Garner) v Elmbridge Borough Council* [2010] EWCA Civ 1006; *Austin* (n 57) [40]-[44]; *Maugham v Uber London Ltd* [2019] EWHC 391 [44]
[70] *Austin* (n 57)
[71] UNECE, Convention on Access to Information (n 1) art 1
[72] The Civil Procedure (Amendment) Rules 2013
[73] Annabel Graham Paul, 'Protective Costs Orders in environmental cases' (2015) 159(3) Solicitors J 28; UN Economic and Social Council, 'Findings and recommendations on ACCC/C/2008/33' (n 40) 29-31
[74] Hart, 'The CJEU on 'prohibitively expensive'' (n 48) 258
[75] Ministry of Justice (n 42) 6
[76] UN Economic and Social Council, 'Findings and recommendations on ACCC/C/2013/85 and ACCC/C/2013/86' (n 56) 22

to recover their expenses from the public purse when a claimant has cost protection.[77] Furthermore, the fact that a claimant will have a private interest in the outcome of the case might make their costs more tolerable.[78] Therefore, a different balance may be required between the public interest in facilitating environmental litigation and the private interests of the two parties.[79]

However, even if the variable cost cap in its current form is inappropriate for private environmental claims, this argument still fails to justify why no other steps have been taken to limit the prohibitive expense for private claimants. Currently, domestic law swings the balance very far in favour of private defendants at the cost of private claimants.[80] Yet the Aarhus Convention is only concerned about the prohibitive expense of an environmental claimant, not a defendant.[81] Whilst the government does have flexibility in how they balance the interests, this should be done whilst upholding the wide access to justice required by the Convention,[82] which it clearly fails to do. Therefore, until this imbalance is appropriately addressed, domestic law is a barrier to access to justice for private parties in environmental litigation.

4. Conclusion

To conclude, the domestic implementation of Article 9 fails to respect the wide access to justice aims of the Aarhus Convention. By making the ECPR so complex, the ensuing uncertainty acts as a deterrent to all potential claimants who are unwilling to take the financial risk. As for the omission of private nuisance from any appropriate cost protection regime, the resulting prohibitive expense further means that 'access to justice… is not ensured in practice'.[83] As long as the UK continues to be negligent towards its obligations under the Convention,[84] the benefits arising from access to justice will remain limited.

[77] Tom Mullen, 'Protective Expenses Orders and Public Interest Litigation' (2015) 19(1) Edin LR 36, 57
[78] Hart, 'Aarhus: CJEU rules against UK costs regime' (n 36) 231
[79] Mullen (n 77) 57
[80] Randhawa and Ahmad (n 26) 792
[81] *Coventry* (n 57) [48]
[82] UNECE, *The Aarhus Convention* (n 4) 188
[83] Jonas Ebbesson, 'The Aarhus Convention, access to justice and compliance by the UK' (2013) 25(3) ELM 56, 60
[84] Second progress review of decision VI/8k (n 23)

The Paris Agreement: An Exercise in Failure

Emma Cockett

1. Introduction

The Paris Agreement (PA) has failed in its overall contribution to the global fight against climate change. Climate change is the product of an increase in anthropogenic emissions, causing global warming through the greenhouse effect.[1] Whilst the Agreement's goal is ambitious, its content is detrimental to the chance of meeting the 1.5°C above pre-industrial level target.[2] Particular weaknesses include the absence of legally binding 'outcome duties', along with the adoption of a 'bottom-up' approach and the inability to sanction non-complying Parties. Initial excitement was based upon the notion that there was an *agreement,* rather than the content itself, which largely serves the interests of the U.S. rather than developing Parties.[3] Whilst it is prima facie an 'important milestone', the U.S. withdrawal represents the agreement's weaknesses; it undermines the core foundations the PA has been merited for, weakening the principles of universality, co-operation and equity.[4] Thus, Paris 'has not served its purpose' as a symbol of universal cooperation.[5] Overall, the PA is not strong enough to 'put aside the world from the devastating consequences of climate change'.[6] Since a global temperature of higher than 2°C is an 'unacceptable risk',[7] non-state private bodies will be fundamental in making up for the U.S. withdrawal to curb the impacts climate change will have on the planet.

The Paris Agreement was a source of great excitement that the fight against climate change could finally begin, yet it fails in offering reassurance that it will be the mechanism to ensure the battle is won. This article explores the key weaknesses that remain fundamental to the

[1] Oxford English Dictionary, 'Anthropogenic', meaning emissions 'resulting from human activities', https://www.lexico.com/definition/anthropogenic
[2] The Paris Agreement to the United Nations Framework Convention on Climate Change, United Nations (entered into force November 4th 2016), Article 2(1)(a)
[3] R Clémençon, 'The two sides of the Paris Climate Agreement: Dismal failure of historic breakthrough?' (2016) 25(1) *Journal of Environment & Development* 3, 18
[4] T Odendahl, 'The Failures of the Paris Climate Change Agreement and How Philanthropy Can Fix Them' (2016) *Stanford Social Innovation Review* https://ssir.org/articles/entry/the_failures_of_the_paris_climate_change_agreement_and_how_philanthropy_can#
[5] S K Mahapatra, 'Paris climate accord: Miles to go' (2016) 29(1) *Journal of International Development* 147
[6] Ibid, 148
[7] M Denchak, 'Paris Climate Agreement: Everything You Need to Know', *NRDC*, https://www.nrdc.org/stories/paris-climate-agreement-everything-you-need-know

agreement's inadequacies, such as the absence of legally binding 'outcome duties' and the inability to sanction Parties who do not comply. Central to this analysis is that whilst the agreement seemed to have the correct intentions in combating climate change, the execution is insufficient to meet these needs. It is argued that if no changes are made to the agreement in its current state, achieving the target of 1.5°C increase is more and more unlikely.

2. The Absence of Legally Binding 'Outcome Duties'

Despite the 'vicious effects' of climate change which are 'sweeping the planet', [8] the PA prioritised acquiring the U.S. and its interests over enforcing legally binding 'outcome duties'. Outcome duties place an obligation on Parties 'to ensure the achievement of a specified outcome'.[9] Indeed, the U.S. demanded 'severe restrictions on the legal form of the Agreement',[10] leaving the interests of the poorest nations 'inadequately served'.[11] It is important to note the 'burden' is particularly high on low-lying small island states vulnerable to rising sea levels, and those poorest African communities poorly equipped to adapt.[12] It is credible to claim, "in the bid to win United States' participation, countries adopted a treaty that could lose the planet.".[13] This is because there are no outcome duties obliging Parties to achieve the goals set out in the Agreement. Nonetheless, in order to secure universality and with the determination to 'above all' avoid a Copenhagen-style failure,[14] developing Parties consented to this 'toothless deal', [15] which lacks the strength to ensure the reduction of anthropogenic emissions. Some applauded the non-binding components to the Agreement, claiming they ensured 'durability and flexibility'.[16] However, this stance can be challenged on the basis that flexibility allows Parties to act with less urgency, failing to ensure the reduction of their emissions. Thus, a more convincing stance is that the non-binding nature of the PA detriments

[8] (n 5) 147
[9] C T Reid, 'A new sort of duty? The significance of "outcome" duties in the climate change and child poverty Act' (2012) 4 Public Law 749, 749
[10] M Doelle, 'The Paris Agreement: Historic Breakthrough or High Stakes Experiment?' (2016) Forthcoming, Special Issue: 6(1-2), *Climate Law*
[11] A Sharma, 'Precaution and post-caution in the Paris Agreement: adaption, loss and damage and finance' (2017) 17(1) *Climate Policy* 33, 33
[12] A Rossati, 'Global Warming and Its Health Impact' (2017) 8(1) *International Journal Occupational and Environmental Medicine* 7, 10
[13] J I Allan, 'Dangerous Incrementalism of the Paris Agreement' (2019) 19(1) *Global Environmental Politics* 4, 9
[14] Ibid 6
[15] (n 5) 147
[16] A Savaresi, 'The Paris Agreement: a new beginning?' (2016) 34(1) *Journal of Energy & Natural Resources Law* 16, 21

the likelihood of meeting the 1.5°C target and its contribution to the global fight against climate change.

Whilst it has been argued that the PA "sets an ambitious 'direction of travel' for the climate regime", this ignores the weak language which fails to bind Parties to achieve results.[17] Thus, a more convincing argument is that since it *only* sets the direction of travel, it merely "kicks the can down the road".[18] This argument holds weight, with Parties not legally obliged to immediately limit emissions to achieve the targets of the PA, they must only '*aim*' to reach the emissions peak '*as soon as possible*'.[19] This only requires Parties to *try* to reach peak emissions, rather than guarantee immediate action in order to peak by a specified date.[20] As time is limited, this fails to curb the severe impacts of climate change, particularly on vulnerable Parties. Furthermore, NDCs (nationally determined contributions) set out what a Party '*intends*'.[21] Parties are merely obliged to have a goal; there is no duty on States to achieve the desired result. Thus, despite some meriting the PA for 'attracting signatures' through its elasticity, this stance lacks weight.[22] A more successful Agreement would oblige Parties to act with urgency to achieve the desired result, halting the rate of climate change. The absence of legally binding outcome duties 'encourages free-riding',[23] evidencing that the PA is too 'weak' to achieve the desired result and contribute to the global fight against climate change. This is detrimental considering the 'very possible future realities'.[24] Consequently, labelling Paris a 'monumental success' ignores its feeble content.[25]

3. Bottom-up approach occasioning an ambition deficit

[17] T Fransen, E Northrop, K Mogelgaard, K Levin, 'Enhancing NDCs by 2020: Achieving the goals of the Paris Agreement' (2017) *World Resource Institute Working Paper*, 1, 2. Available at: http://www.ourenergypolicy.org/wp-content/uploads/2017/11/WRI17_NDC.pdf Last Accessed 3rd April 2020
[18] T Bawden, 'COP21: Paris deal far too weak to prevent devastating climate change, academics warn' (January 2016 *Independent*), https://www.independent.co.uk/environment/climate-change/cop21-paris-deal-far-too-weak-to-prevent-devastating-climate-change-academics-warn-a6803096.html
[19] The Paris Agreement to the United Nations Framework Convention on Climate Change, United Nations (entered into force November 4th 2016), Article 4(1)
[20] Ibid
[21] Ibid, Article 4(2)
[22] M L Banda, The Bottom-Up Alternative: The Mitigation Potential of Private Climate Governance After the Paris Agreement, (2018) 42 *Harvard Environmental Law Review,* 325, 333
[23] Ibid
[24] (n 11) 33
[25] (n 13) 4

Alongside the absence of legally binding emission limits and targets, the 'bottom-up' approach adopted in the PA permits unambitious target setting through NDC's due to being 'self-determined rather than centrally set'.[26] The PA favoured the adoption of any universal agreement on climate change over top-down ambitious target setting, an approach which is implemented through legally binding targets and time schedules, as in Kyoto.[27] Evidence suggests Parties' are 'setting weak national targets',[28] which highlights the error in adopting a lenient bottom-up approach. To demonstrate, combined commitments 'currently fall far short of what is required to achieve the treaty's objectives'.[29] Rather than the 2°C temperature increase, a more realistic figure is that the world is on track for a 4°C warming by 2100.[30] Thus, the PA's failure to implement a stronger 'top-down' approach has proven disadvantageous. A plausible argument is that a top-down approach 'was needed' if emissions were to be 'reduced at the rate, and to the level' demanded by the PA because this approach centrally sets targets, ensuring Parties do not set less ambitious targets.[31] Increasing Parties' mitigation ambition will become ever challenging in a bottom-up agreement "deeply entrenched" with the incentive to free-ride.[32] This issue is further emphasised by the U.S. withdrawal, as the motivation to cooperate will be weakened. In order to 'rapidly decrease' greenhouse gas emissions,[33] Parties' mitigation ambition within their NDCs must be increased through its scope and coverage urgently. [34] This will prevent the dismal failure of the PA and avoid the 'catastrophic impacts' of increased anthropogenic emissions.[35] Nonetheless, the difficulty in encouraging climate action through the use of NDCs reduces the scope for success of the PA.

4. Enforceability

[26] S Bell, D McGillivray, O Pederson, E Lees, E Stokes, *Environmental Law* (9th edition, Oxford University Press 2017) 546
[27] W Hare et al., 'The architecture of the global climate regime: a top-down perspective' (2010) 10(6) *Climate Policy* 600, 601; Kyoto Protocol to the United Nations Framework Convention on Climate Change, United Nations (entered into force February 16th 2005)
[28] (n 22) 336
[29] Ibid 327
[30] (n 3) 12
[31] (n 27) 608
[32] (n 22) 338
[33] G P Peters et al., 'Key indicators to track current progress and future ambition of the Paris Agreement' (2017) 7 *Nature Climate Change* 118
[34] (n 17) 15
[35] Ibid, 1

A further flaw in the PA is that there are no sanctions for Parties' non-compliance with their NDC pledges, besides the 'opprobrium' of other Parties.[36] Ironically, this is largely due to negotiations with the U.S., whom insisted against 'placing undue burden on Parties'.[37] This was a serious mistake as the only penalty now available for non-compliance is global disappointment. Some claim that 'the force of the PA… relies on… peer pressure [which] will lead countries to deliver on their voluntary pledges and increase ambition over time'.[38] This statement is largely unconvincing as reliance on 'peer pressure' and global disappointment does not ensure universal compliance with the targets necessary to meet the goals of the PA. Global disappointment does not impose any loss so as to deter Parties from defying the Agreement. Furthermore, the absence of penalties further incentivises Parties to free-ride on other States' emission reductions, rather than increase their own ambitions to reduce their greenhouse gas emissions.[39] This demonstrates the limitations in the claim that the PA is a monumental success. Rather, the absence of sanctioning mechanisms to ensure the Agreement's targets are met weaken the Agreement as a whole, lessening the extent to which the PA has contributed to the global fight against climate change.

5. Insufficient accountability by means of a 'ratchet-up' mechanism

The PA implements the 'ratcheting-up' mechanism, the notion that the global response 'will be strengthened over time', in 'continuous cycles of ambition' every 5 years.[40] In other words, the PA 'seeks to counteract these structural incentives to free-ride' previously discussed, holding Parties to account by imposing 'a binding process for disclosure, reporting, and review'.[41] Whilst some claim this 'lessened the sting of adopting an insufficient agreement', it still does not go far enough to justify labelling the PA a monumental success.[42] First of all, there is no guidance as to exactly how much the ambitions need to be increased by. The Agreement merely requires that successive NDCs represent progression, reflecting its highest possible ambition.[43] In other words, urging Parties to 'try to do a little better every five years'

[36] (n 22) 336
[37] The Paris Agreement to the United Nations Framework Convention on Climate Change, United Nations (entered into force November 4th 2016), Article 13(3)
[38] (n 22) 335
[39] Ibid, 338
[40] (n 17) 34
[41] (n 22) 334
[42] (n 13) 6-7
[43] The Paris Agreement to the United Nations Framework Convention on Climate Change, United Nations (entered into force November 4th 2016), Article 4(3)

is just "worthless words".[44] Similarly, the issue of an inability to sanction applies here because if Parties fail to 'ratchet-up' ambitions and demonstrate progression, there are no means to sanction the non-complying country Party. Thus, like NDCs, the ratchet-up mechanism does little to increase ambition and ensure that the 1.5°C target is met.

More specifically, prolonged delays between raising ambition demonstrates that the PA's contribution to the global fight against climate change will be considerably slow. This is detrimental for the planet and its people, particularly considering that urgent action is needed to curb the effects of climate change. Whilst some have claimed the PA is "an aspirational global accord that will trigger and legitimise more climate action around the world", 5-year delays to increase ambition which are not even legally binding is a failure on part of the Agreement to act quickly enough.[45] A more convincing argument is that whilst emission rates are intended to decline gradually by increasing ambition every 5 years, the decline is actually "too slow to meet the pledges… made in Paris".[46] This is persuasive as the rate of global warming is faster now than for over a thousand years,[47] and CO_2 remains in the atmosphere for hundreds of years, meaning that greenhouse gases will continue to accrue and raise the global temperature.[48] Thus, 'as long as we emit more than we capture or offset through carbon sinks, concentrations of CO_2 in the atmosphere will keep rising'.[49] In other words, such delays in cumulating ambition "will render these goals [in the PA] increasingly difficult, and soon impossible, to reach".[50] On the basis that "enhanced action cannot wait" given the frightening realities of the impact of climate change, the 'ratchet-up' mechanism is too slow to have a significant contribution to the global fight against climate change.[51]

6. U.S. withdrawal and the impact on developing nations

[44] Oliver Milman, 'James Hansen, father of climate change awareness, calls Paris talks 'a fraud'' (The Guardian, 2015) https://www.theguardian.com/environment/2015/dec/12/james-hansen-climate-change-paris-talks-fraud
[45] (n 3) 3
[46] D J Victor et al., 'Prove Paris was more than paper promises' (2017) 548 (7665) *Nature* 25, 26
[47] (n 12) 8
[48] A Vogt-Schilb and S Hallegatte 'Climate policies and nationally determined contributions: reconciling the needed ambition with the political economy, (2017) 6(6) *WIREs Energy and Environment* 1, 2
[49] Ibid
[50] (n 17) 34
[51] Ibid

The U.S. indication of an intent to withdraw from the PA in 2017, [52] due to Trump's 'personal preferences' and ties with the fossil fuel industry, has challenged the foundations of the Agreement.[53] Whilst some applaud the PA due to the 'emergence of a cooperative spirit that will continue in the years to come',[54] this spirit has already been shattered. A more convincing assertion is therefore that "the withdrawal undercuts the foundations of global climate governance and upsets the process of climate cooperation".[55] The PA has been merited on the grounds that it signals universal cooperation between both developing and developed States to mitigate, lessening the impact of global warming. Nonetheless, withdrawing from the Agreement 'undermines' this universality, since it now lacks legitimacy for effective and universal cooperation.[56] Given that the U.S. has historically been and continues to be a large contributor to global warming, demonstrated by its contribution of 14% of global production-based emissions in 2017,[57] withdrawing diminishes the incentive for Parties with lower emission rates to comply. Essentially, the U.S. 'will be free-riding on other countries' mitigation efforts', whilst continuing to contribute to the greenhouse effect.[58] This lack of cooperation will 'render the PA's targets unachievable'.[59] Ultimately, the U.S. withdrawal demonstrates the PA cannot be merited on the grounds of its universality, nor as a signal of global cooperation.

The inequity faced by developing nations in the PA is heightened by the forthcoming withdrawal of the U.S. due to delays and financial implications. In terms of financing, the pending withdrawal threatens developing nations whom rely on the U.S. to provide aid in order to adapt to climate change.[60] The principle of common but differentiated responsibility obliges developed states to provide financing to developing Parties.[61] The loss of U.S. aid will be a blow to developing nations whom have been the greatest contributor to the Global Environment

[52] M R Pompeo (Secretary of State), On the U.S. Withdrawal from the Paris Agreement (Press Statement), U.S. Department of State, November 4 2019. Available at https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/ Last Accessed 5 April 2020
[53] HB Zhang et al., 'U.S. withdrawal from the Paris Agreement: Reasons, impacts, and China's response' (2017) 8 *Advances in Climate Change Research* 220, 222
[54] (n 16) 26
[55] (n 53) 220
[56] Ibid 222
[57] Climate Analysis Indicators Tool (CAIT) Version 2.0. (Washington, DC: World Resources Institute, 2014) in (n 53) 221
[58] (n 53) 222
[59] Ibid
[60] The Paris Agreement to the United Nations Framework Convention on Climate Change, United Nations (entered into force November 4th 2016), Article 9
[61] Ibid, Article 2(2) and 9(1)

Facility, amounting to 21% of its total shares.[62] This demonstrates how President Trump's decision to withdraw was 'a deep betrayal' following the initial excitement of the Agreement for the entire globe.[63] To further the inequity on developing Parties, the delay to climate action as a result of President Trump's indication of withdrawal is damaging considering the limited time available to curb the impacts of global warming. This is likely to forfeit the globe 'a window of opportunity in climate mitigation',[64] as greenhouse gases continue to be emitted which pose a high threat to low-lying Parties vulnerable to the result of rising sea-levels.[65] Thus, despite the 'hollow cheering' by many of a universal agreement, the PA can hardly be deemed a monumental success due to its failure to ensure equity for vulnerable Parties given the 'threat climate change poses to the undeveloped world'.[66]

7. The rise of the private climate governance

Following the U.S. withdrawal, it appears that the rise of private climate governance will be fundamental in ensuring that the PA is not a complete missed opportunity.[67] Some claim non-state actors 'offer the last remaining hopes in global efforts to catalyse climate action'.[68] This is highly convincing as large corporations can collectively reduce emissions, going some way to meet the goals set out in the PA. To demonstrate, if businesses cut their annual emissions by 3.2-4.2 billion tons, 'they would help remove an estimated 7-9% of the world's 2010 emissions from the atmosphere'.[69] Thus, if global businesses co-operate to reduce emissions, this will be significant in helping to meet the goals of the PA. Furthermore, this may encourage government's themselves to comply with the PA, as the pressure of large corporations can 'seek to shape state behaviour'.[70] Therefore, it is important that non-state private actors "now lead and not depend on government", particularly in the U.S., to prevent the total failure of the PA.[71]

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[62] GEF Replenishment. https://www.thegef.org/gef/GEF-Replenishment
[63] (n 13) 9
[64] (n 53) 223
[65] M Denchak, 'Paris Climate Agreement: Everything You Need to Know', *NRDC*, https://www.nrdc.org/stories/paris-climate-agreement-everything-you-need-know
[66] (n 4)
[67] (n 22) 335
[68] (n 13) 4
[69] (n 22) 340
[70] Ibid, 347
[71] Ibid, 328

8. Conclusion

Given the frightening impacts climate change has on the planet and its people, the PA has not been a success in terms of its contribution to the global fight against climate change. Immediate emission reductions are 'crucial' in order to 'avoid the worst impacts' of climate change.[72] By contrast, the absence of legally binding emission limits and deadlines, along with a weak 'bottom-up' approach and an inability to impose sanctions on non-complying Parties has been detrimental to the long-term chances of avoiding the catastrophic impact of climate change. This is particularly due to the deep-rooted incentive for States to free-ride. Similarly, the Agreement largely served the interests of the U.S. to the detriment of developing nations, whom insisted against being burdened with legally binding targets. The U.S. withdrawal poses a real threat to the overall success of the PA and specifically to those living in low-income and low-lying vulnerable countries. Thus, the reality is that the 1.5°C target of the PA is becoming more and more unachievable, with vulnerable nations increasingly at risk of experiencing the catastrophic consequences of climate change.

[72] Ibid, 387

A discussion of the problems that arise in seeking to define Family Law and a 'family' – deliberating the need for a definition and how different theoretical approaches can help in this regard

Lucy Ayoubi

1. Introduction

In the absence of a universal 'family' definition, the traditional 'nuclear family', involving a heterosexual married couple with children became the default definition.[1] This affected people's everyday lives as only those within the 'family' concept benefitted from the supportive and protective functions of family law.[2] This article will highlight 'family's' ambiguity despite 'significant developments' towards greater inclusivity, after utilisation of a functionalist and rights-based approach.[3] It will show the extent to which the legal status of 'family' lags behind social practice.[4] This will be done in the context of the potential decentralisation of marriage; the retainment of binary legal parenthood;[5] and the fading gender-based roles for parenthood.[6] It will explain how family law uses symbolic controls to radiate messages to society regarding family values.[7] It will conclude, consistency in family law is unmanageable and undesirable due to changing forms of relationships; making the 'chaos' of

[1] Jonathan Herring, *Family law* (9th edn, Pearson 2019) 2; Alan Brown, *What is The Family Of Law? The Influence of the Nuclear Family* (Hart 2019) 20; *Corbett v Corbett* [1970] 2 All ER 33, [48] (Ormrod J); Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State: Text, Cases and Materials* (3rd edn, Hart 2012) 13 and 21; *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27, [42] (Lord Nicholls)

[2] Sonia Harris-Short, Joanna Miles and Bob George, *Family Law: Text, Cases, and Materials* (3rd edn, OUP 2015) 2; Alison Diduck and Katherine O'Donovan, *Feminist Perspectives on Family Law* (Routledge-Cavendish 2006) 7; John Dewar, 'Family law and its discontents' (2000) 14(1) IJLPF 59, 59; Rebecca Probert, *Family Life and the Law: Under One Roof* (Routledge 2007) 2; Herring (n 1) 23

[3] *Fitzpatrick* (n 1) [51] (Lord Clyde), [41] (Lord Nicholls), [32] (Lord Slynn); Brown (n 1) 19 and 24; Lisa Glennon, '*Fitzpatrick v Sterling Housing Association Ltd* – an endorsement of the functional family?' (2000) 14(3) IJLPF 226, 226; Deborah Chambers, *A Sociology of Family Life: Change and Diversity in Intimate Relations* (Polity Press 2012) 54; Herring (n 1) 2, 7 and 16

[4] Mary Ann Mason, Mark A Fine and Sarah Carnochan, 'Family Law in the New Millennium: For Whose Families?' (2001) 22(7) J Fam Iss 859, 860; Nicola Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave 2013) 196

[5] Harris-Short, Miles and George (n 2) 2; Diduck and O'Donovan (n 2) 6

[6] Diduck and O'Donovan (n 2) 6

[7] Gillian Douglas and Nigel Lowe (eds), *The Continuing Evolution of Family Law* (Family Law 2009) 1; John Dewar, 'The Normal Chaos of Family Law' (1998) 61 MLR 467, 470; Alison Diduck, 'What is Family Law For?' (2011) 64(1) CLP 287, 289; Ann Berrington, 'Lone parents in the UK' in Fabienne Portier-Le Cocq (ed), *Fertility, Health and Lone Parenting* (Routledge 2017) 15; Judith Masson, Rebecca Bailey-Harris and Rebecca Probert, *Cretney's Principles of Family Law* (8th edn, Sweet & Maxwell 2008) 281; Diduck and Kaganas (n 1) 21; Barker, *Not the Marrying Kind* (n 4) 196; Herring (n 1) 27-28

family law tolerable.[8] Therefore, showing while the underlying ideology of family has not changed, family is extended to those similar to the ideal.[9]

2. The Legal Development of Marriage and Familial Relations

Marriage is seen as 'the ultimate commitment'.[10] Thus providing the most stable and loving environment, which is beneficial to the parties, their children and society.[11] This public nature of marriage justifies state intervention.[12] Policy tends to support and encourage marriage.[13] For example, tax benefits flow from marital status which incentives marriage.[14] Whilst tight regulations on who can marry reinforces its 'privileged' status as well as providing certainty, some exclusions are justified.[15] S For example, close relatives. This is due to genetic concerns for offspring and is consistent with the criminalisation of sex between immediate family members.[16] However, the previous exclusion of same-sex couples was wrongly influenced by religious and political views that homosexuality was unnatural, whilst heterosexual relationships was the ideal.[17] This exclusion did not mirror the decriminalisation of gay relationships.[18] Nor did it stress the change in public opinion, with only 22% of Britain in 2012 thinking homosexuality was wrong, compared to 64% in 1987.[19] This exclusion was demeaning and left many unprotected and stigmatised.[20] The law's effectiveness is also questionable, with the presence of same-sex couples, implying that the lack of opportunity to

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[8] Dewar, 'Family law and its discontents' (n 2) 79; Dewar, 'The Normal Chaos of Family Law' (n 7) 468; Diduck and Kaganas (n 1) 19 and 21

[9] *Fitzpatrick* (n 1) [39] (Lord Slynn); Brown (n 1) 26 and 104; Glennon (n 3) 226 and 235; Diduck and Kaganas (n 1) 3 and 13

[10] HM Government, 'Equal Marriage: The Government's Response' (Consultation response, December 2012) 4 (Rt Hon Maria Miller MP) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/133262/consultation-response_1_.pdf> accessed 1 April 2021; Centre for Social Justice, *The Family Law Review: An Interim Report* (Breakthrough Britain, November 2008) 20 <www.centreforsocialjustice.org.uk/library/family-law-review-interim-report> accessed 1 April 2021; Diduck and Kaganas (n 1) 40

[11] CSJ, *The Family Law Review* (n 10) 18 and 20; Diduck and Kaganas (n 1) 39-40; Barker, *Not the Marrying Kind* (n 4) 36

[12] CSJ, *The Family Law Review* (n 10) 14; Diduck and Kaganas (n 1) 15

[13] *Granatino v Radmacher* [2010] UKSC 42, [2011] 1 AC 534 [584] (Baroness Hale)

[14] CSJ, *The Family Law Review* (n 10) 14; Diduck and Kaganas (n 1) 40; Herring (n 1) 23

[15] Matrimonial Causes Act 1973, s 11; Masson, Bailey-Harris and Probert (n 7) 13; Harris-Short, Miles and George (n 2) 2

[16] Sexual Offences Act 2003; Masson, Bailey-Harris and Probert (n 7) 49

[17] Masson, Bailey-Harris and Probert (n 7) 49; Suzanne A Kim, 'Marital Naming/Naming Marriage: Language and Status in Family Law' (2010) 85(3) Ind LJ 894, 910; Herring (n 1) 73

[18] Sexual Offences Act 1967; Herring (n 1) 105; Alison Park and Rebecca Rhead, 'Personal relationships: Changing attitudes towards sex, marriage and parenthood' in Alison Park and others (eds), *British Social Attitudes* (30th edn, NatCen 2013) 14; Sexual Offences Act 1967

[19] Park and Rhead, 'Personal Relationships' (n 18) 1

[20] Diduck and O'Donovan (n 2) 21

legally recognise relationships does not stop them from forming.[21] The judiciary responded to this, albeit slowly, by purposively interpreting the Rent Act[22] to provide more protection for those unprotected outside the ideal.[23]

The Rent Act aims to prevent homelessness, averting social instability of 'spouses' and 'family members' when a tenant dies.[24] Case law demonstrates using the 'ordinary man' test results in a dynamic 'popular meaning' of family; enabling protection of new emerging relationships.[25] Originally, the judge's discretion to define popular morality was problematic as it could be confused with personal opinion,[26] leading to the restrictive view in *Gammans*[27] that a childless, unmarried couple being seen as a family was 'an abuse of the English language'.[28] However, this view was rejected in *Dyson*[29] which took a purposive approach, looking beyond status towards underlying functions.[30] Subsequentially, the majority in *Fitzpatrick*[31] acknowledged the 'hallmarks' of marriage: involving 'mutual interdependence; caring; commitment and support',[32] were equally operational for same-sex couples.[33] Accepting a functional family is not exclusive to traditional family structures.[34] However, this was a hollow victory, as they were only understood as 'family members' not 'spouses' through fear of having judge-made law.[35] Consequentiality, fundamental change stemmed from the implementation of the Human Rights Act 1998, which was relied on in *Ghaidan*[36] to deem the current law incompatible.[37] Necessarily, the law was then interpreted as 'living as if husband and wife', incorporating same-sex couples.[38] These expansive interpretations were not facilitating social change but

[21] Masson, Bailey-Harris and Probert (n 7) 50; Diduck and Kaganas (n 1) 19 and 654
[22] Rent Act 1977
[23] Brown (n 1) 26-27; Glennon (n 3) 226 and 235; Diduck and Kaganas (n 1) 24; Probert, *Family Life and the Law* (n 2) 11
[24] Rent Act 1977, sch 1; Probert, *Family Life and the Law* (n 2) 11 and 13
[25] *Brock v Wollams* [1949] 2 KB 388 [395] (Cohen LJ); *Dyson Holdings Ltd v Fox* [1976] QB 503 [508] (Lord Denning), [511] (James LJ); Brown (n 1) 28; Diduck and Kaganas (n 1) 21; Probert, *Family Life and the Law* (n 2) 11; Chambers (n 3) 54
[26] Brown (n 1) 29
[27] *Gammans v Ekins* [1950] 2 KB 328
[28] ibid [331] (Asquith LJ)
[29] *Dyson Holdings Ltd v Fox* [1976] QB 503
[30] Herring (n 1) 16; *Dyson Holdings Ltd v Fox* (n 29) [509] (Lord Denning); Brown (n 1) 29; Diduck and Kaganas (n 1) 12 and 26; Probert, *Family Life and the Law* (n 2) 12
[31] *Fitzpatrick* (n 1)
[32] ibid [38] (Lord Slynn), [44] (Lord Nicholls)
[33] Barker, *Not the Marrying Kind* (n 4) 34
[34] Glennon (n 3) 224, 226, 236 and 247; Probert, *Family Life and the Law* (n 2) 12
[35] Glennon (n 3) 226, 228 and 234; Probert, *Family Life and the Law* (n 2) 20-21
[36] *Ghaidan v Godin-Mendoza* [2004] UKHL 30
[37] ibid [24] and [30]; Human Rights Act 1998, s 3, arts 8 and 14; Diduck and Kaganas (n 1) 31; Barker, *Not the Marrying Kind* (n 4) 34; Probert, *Family Life and the Law* (n 2) 21
[38] Herring (n 1) 6; Barker, *Not the Marrying Kind* (n 4) 34

rather responding to social change that had already occurred.[39] Though these interpretations were restricted to the Rent Act,[40] they catalysed the introduction of new legal recognition for same-sex couples in the Civil Partnership Act 2004 (CPA),[41] which in turn provided relational equality.[42]

The CPA weakened the view that same-sex couples were a 'pretend family' by giving them legal status and respecting their societal value.[43] The CPA lets them gain virtually all the same rights and responsibilities which marriage provides.[44] Therefore, their social inclusion could be seen as wanting to regulate diverse informal relationships to enhance their stability; rather than about rectifying injustices more broadly.[45]Consequently, the utilisation of Herring's function-based definition of family still upheld heterosexual marriage as the ideal 'benchmark'.[46] The CPA did not attempt to compete with marriage,[47] instead it merely recognises those with marriage-like functions.[48] The CPA further affirmed heterosexual marriage as the ideal by diminishing the backlash of dismissing same-sex marriage, whilst rejecting the Civil Partnership Bill amendment to include heterosexuals.[49] Similarly, the CPA's lack of sexual reference, unlike marriage, suggests same-sex couples as less stable due to missing consummation and monogamy requirements with no prohibition of adultery.[50] Although the sexual silence might decentralise marriage by inferring commitment is more essential than sexuality,[51] it might also reflect the difficulty with legislating to include same-sex couples into explicitly heterosexual definitions.[52] However, Canada was capable of

[39] Glennon (n 3) 226 and 235
[40] Herring (n 1) 5
[41] Civil Partnership Act 2004
[42] Herring (n 1) 5; Lisa Glennon, 'Obligations between adult partners: Moving from form to function?' (2008) 22(1) IJLPF 22, 27; Masson, Bailey-Harris and Probert (n 7) 2; Probert, *Family Life and the Law* (n 2) 12
[43] Civil Partnership Act 2004; Local Government Act 1988, s 28; Diduck and O'Donovan (n 2) 21
[44] Masson, Bailey-Harris and Probert (n 7) 3
[45] Diduck and O'Donovan (n 2) 29; Diduck and Kaganas (n 1) 12
[46] Herring (n 1) 3-4, 16; Brown (n 1) 26; Diduck and Kaganas (n 1) 12 and 27
[47] Government Equalities Office, *Implementing Opposite-Sex Civil Partnerships: Next Steps* (July 2019) 2; Nicola Barker, '"Sex and the Civil Partnership Act": The Future of (Non) Conjugality' (2006) 14(2) Feminist Legal Studies 241, 249; Diduck and Kaganas (n 1) 73
[48] Brown (n 1) 26 and 80
[49] Hansard, HL Vol662 col1389; Hansard, HC Standing Committee, col007 (October 19th 2004); Diduck and O'Donovan (n 2) 23; Government Equalities Office (n 47) 5; Lisa Glennon, 'Strategizing for the Future through the Civil Partnership Act' (2006) 33(2) J Law & Soc 244, 245; Diduck and Kaganas (n 1) 61; Civil Partnership Bill 2002
[50] Nicola Barker, 'Sex and the Civil Partnership Act: The Future of (Non) Conjugality' (2006) 14(2) Fem LS 241, 241 and 248; Matrimonial Causes Act 1973, s 12; Herring (n 1) 107-108; Civil Partnership Act 2004 ss 5 and 44(5)
[51] Barker, *Not the Marrying Kind* (n 4) 65-66; Barker, 'Sex and the Civil Partnership Act' (n 50) 248
[52] Barker, 'Sex and the Civil Partnership Act' (n 50) 250; Masson, Bailey-Harris and Probert (n 7) 83

defining adultery to include gay sex, demonstrating it is possible.[53] Equally, a range of sexual acts could be drawn on from the Sexual Offences Act.[54] Therefore, the final step in detaching gender discrimination from adult relationships came from the introduction of same-sex marriage and heterosexual civil partnership.[55] These combined insinuate marriage and the CPA are not declarations of sexual orientation but rather declarations of loving commitment.[56] They also enhance the significance of marriage's social status.[57] For example, same-sex marriage helps eliminate homophobia, whilst allowing them to encounter the symbolic traditions marriage entails.[58] Therefore, strengthening the institution by removing its previous discriminatory faults.[59] Equally, heterosexuals can choose between the two legal recognitions; benefitting those against marriage's traditions.[60] Although, marriage remains the dominant family form,[61] its decentralisation becomes apparent in the regulation of adult-child relationships.[62]

3. The Regulation of Adult-Child Relationships

Legal motherhood is obtained by giving birth.[63] However, before DNA testing it was less certain who the biological father was.[64] Therefore, to uphold the sanctity of marriage, fatherhood was presumed based on marital status only.[65] Consequently, children born outside of marriage were fatherless, alongside fathers dodging responsibilities.[66] Children were socially stigmatised as 'illegitimate' which is a term now removed.[67] Therefore, the law has evolved from an underlying traditional dynastic purpose towards promoting stable and loving

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[53] Barker, 'Sex and the Civil Partnership Act' (n 50) 251
[54] Herring (n 1) 108
[55] Herring (n 1) 105; Barker, *Not the Marrying Kind* (n 4) 93-94; Marriage (Same Sex Couples) Act 2013; Civil Partnerships, Marriages and Deaths (Registration) Act 2019, s 2
[56] Government Equalities Office (n 47) 5
[57] ibid
[58] Diduck and O'Donovan (n 2) 28; Barker, *Not the Marrying Kind* (n 4) 103
[59] Barker, *Not the Marrying Kind* (n 4) 93-94
[60] ibid 153; Masson, Bailey-Harris and Probert (n 7) 5; Government Equalities Office (n 47) 5
[61] CSJ, *The Family Law Review* (n 10) 16
[62] Dewar, 'Family law and its discontents' (n 2) 61; Masson, Bailey-Harris and Probert (n 7) 2; Diduck and Kaganas (n 1) 40
[63] Human Fertilisation and Embryology Act 2008, s 33(1); Brown (n 1) 109 and 116; Masson, Bailey-Harris and Probert (n 7) 527; Brenda Hale, 'Equality and Autonomy in Family Law' (2011) 33(1) J Soc Wel & Fam L 3, 4
[64] Hale, 'Equality and Autonomy in Family Law' (n 63) 4
[65] ibid; Brown (n 1) 109; Diduck and O'Donovan (n 2) 62; Andrew Bainham, Shelley Day Sclater and Martin Richards, *What Is a Parent? A Socio-Legal Analysis* (Hart 1999) 143
[66] Bainham, Sclater and Richards (n 65) 143; Brenda Hale, 'The 8th ESRC Annual Lecture 1997 Private lives and public duties: What is family law for?' (1998) 20(2) J Soc Wel & Fam L 125, 128
[67] Bainham, Sclater and Richards (n 65) 143; Family Law Reform Act 1987; Richard Collier and Sally Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Hart 2008) 182; Herring (n 1) 28

families.[68] This is reflected by the different legal methods used to obtain fatherhood, ensuring children are supported regardless of their parents' status.[69] This is important with the increase of unmarried childbirths.[70] Although, the value of marriage is upheld as it is still a valid legal route,[71] admitting that a family is not always a 'safe haven' justifies state intervention to protect children when the family has failed to do so.[72] For example, regardless of parental status, children can be taken away from their parents to a safer environment in cases of abuse.[73] The law has also reduced biological privilege to accommodate both the genetic and social parent, assuming both contribute to the child's upbringing.[74] For example, the Children Act 1989[75] replacing parental rights with parental responsibilities,[76] giving greater significance to social parents who are the day-to-day carers.[77] Although this could only be 'cosmetic rewording',[78] with legal parenthood being underpinned by the binary nuclear family, not acknowledging the value and status of multiple different relationships.[79]

Increased divorces and remarriages has led to blended families.[80]Consequently, the limit of two legal parents is becoming increasingly inconsistent with social practice, with more children having multiple parental figures, such as step-parents.[81] The arbitrariness of selecting two amongst many presumptive parents might undermine decision-making and family harmony.[82] It is also confusing for children when their social parents do not match their legal parents.[83] This concern has been heightened by technological developments enabling non-traditional reproductive methods.[84] For example, surrogacy introduces a third party into reproduction,

[68] Hale, 'Private Lives and Public Duties' (n 66) 125
[69] Dewar, 'Family law and its discontents' (n 2) 63; Masson, Bailey-Harris and Probert (n 7) 445; Diduck and Kaganas (n 1) 40; Herring (n 1) 365-369
[70] Collier and Sheldon (n 67) 101; Masson, Bailey-Harris and Probert (n 7) 2
[71] Herring (n 1) 365
[72] Bainham, Sclater and Richards (n 65) 197; Martha Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004) 228; Masson, Bailey-Harris and Probert (n 7) 241
[73] Herring (n 1) 21; Simon Duncan and Miranda Phillips, 'New Families? Tradition and Change in Partnering and Relationships' in Alison Park and others (eds), *British Social Attitudes* (24th edn, SAGE 2008); Masson, Bailey-Harris and Probert (n 7) 553; Diduck and Kaganas (n 1) 654
[74] Children Act 1989 s 2(5); Andrew Bainham, 'Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions' in Bainham, Sclater and Richards (n 65) 29
[75] Children Act 1989
[76] ibid ss 2 and 3
[77] Brown (n 1) 108; Masson, Bailey-Harris and Probert (n 7) 525; Herring (n 1) 383
[78] Masson, Bailey-Harris and Probert (n 7) 525
[79] Brown (n 1) 107
[80] Herring (n 1) 7
[81] Diduck and O'Donovan (n 2) 68; Dewar, 'Family law and its discontents' (n 2) 66
[82] Judith Daar, 'Multi-Party Parenting in Genetics and Law: A View from Succession' (2015) 49(1) Fam LQ 71, 85
[83] Diduck and O'Donovan (n 2) 59
[84] Bainham, Sclater and Richards (n 65) 73; Dewar, 'The Normal Chaos of Family Law' (n 7) 481

which goes against binary parenthood.[85] Surrogacy has allowed motherhood to become negotiable by allowing contractual public arrangements into private affairs, therefore 'fragmenting motherhood'.[86] However, instead of acknowledging three parental roles, the law maintains the binary position by issuing parental orders which transfers the legal status to the intended parents from the host mother.[87] This can only happen post-birth.[88] This delay causes uncertainty as until the parental order is issued there is only an informal surrogacy agreement.[89] This was an issue in *Re AB (Surrogacy: Consent),*[90] where the host mother refused consent, despite the intended parents being the biological parents.[91] The alternative legal route was adoption, which was inconsistent with the child's life story as the intended parents were already the social and genetic parents.[92] Additionally, prior to parental order, the host mother retains the power to make decisions about the child despite the intended parents sometimes being the day-to-day carers.[93] These regulations, though, help protect low-income women from exploitation or just being seen as a 'walking incubator',[94] shrinking the idea that children are commodities easily sold.[95] Nevertheless, there is a proposal for reform, which introduces a new pathway to legal parenthood; allowing intended parents to have legal parenthood from birth.[96] Moreover, it includes greater safeguards and requirements, alongside introducing a surrogacy regulator for protection.[97] However, this law remains at the consultation stage.[98] The law has also tried to redress the gendered roles of parenthood enshrined in the nuclear family due to influence from the public-private divide.[99]

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[85] Rachel Cook and Shelley Day Sclater (eds), *Surrogate Motherhood: International Perspectives* (Bloomsbury 2003) 4; Masson, Bailey-Harris and Probert (n 7) 883; Dewar, 'The Normal Chaos of Family Law' (n 7) 481; Herring (n 1) 374

[86] Cook and Day Sclater (n 85) 4; Diduck and O'Donovan (n 2) 59; Diduck and Kaganas (n 1) 131

[87] Human Fertilisation and Embryology Act 2008, s 54; Law Commission and Scottish Law Commission, *Building Families through Surrogacy: A New Law* (Summary of Consultation Paper, June 2019) 5; Brown (n 1) 129; Herring (n 1) 374

[88] Human Fertilisation and Embryology Act 2008, s 54

[89] Children Act 1989, sch 13, para 56; Surrogacy Arrangements Act 1985, s 1A; Rachel Cooper, 'Surrogacy: BBC Radio 4's 'The Archers' storyline highlights legal issues for parents' (*Family Law Week*, 3 October 2019) <www.familylawweek.co.uk/site.aspx?i=ed203434> accessed 1 April 2021; Masson, Bailey-Harris and Probert (n 7) 883; Herring (n 1) 379

[90] *Re AB (Surrogacy: Consent)* [2016] EWHC 2643

[91] Andrew Powell, 'Surrogacy and HFEA Update: Summer 2019 – Part 2' (*Family Law Week*, 13 August 2019) <www.familylawweek.co.uk/site.aspx?i=ed202278> accessed 1 April 2021

[92] ibid

[93] Law Commission and Scottish Law Commission (n 87) 7; Cooper, 'Surrogacy' (n 89); ibid

[94] Diduck and Kaganas (n 1) 133; Herring (n 1) 381

[95] Diduck and Kaganas (n 1) 133

[96] Law Commission and Scottish Law Commission (n 87) 5; Powell (n 91)

[97] Law Commission and Scottish Law Commission (n 87) 5; Powell (n 91)

[98] Law Commission and Scottish Law Commission (n 87)

[99] Brown (n 1) 53; Diduck and Kaganas (n 1) 34; Collier and Sheldon (n 67) 25-26; Herring (n 1) 10 and 20

A change in the labour market caused the traditional view of fathers being the sole breadwinners and mothers the sole carers, to not be the norm.[100] Previously, fathers' expression of care was valued higher than the mothers'; labelling them as 'good fathers' whilst deeming care to be part of the mother's natural role.[101] Traditionally, the reproductive role of mothers has led to their oppression and confinement to the private sphere.[102] There was a need to remove their demotion rooted in biology and culture; but the suggestion of freeing women from mothering was 'too radical and undesirable'.[103] Therefore, the law took a more liberal approach by deprivileging motherhood to let fatherhood flourish, allowing women to enter the public sphere.[104] For example, family law shifted focus onto supporting relationship breakdowns,[105] because they are a 'key pathway to poverty',[106] with separation causing harm to children's well-being.[107] Therefore, to create 'an illusion of permanence in the face of instability' the assumption of shared parental responsibility upon separation was created.[108] This ensures the continuity of contact and support for the children regardless of the parental status.[109] This benefits fathers who are genuinely the non-resident parent and removes the stigma of fathers not wanting to be 'hands-on', whilst encouraging society to accept fatherhood's shifting role from 'cash to care'.[110] However, these equal rights to parenting deflect from the core issue that no one should have a right to a child, only responsibilities to them.[111] Moreover, this formal equality undermines the social importance of mothers who still tend to be the sole carers.[112] Although, substantial equality for mothers is exhibited in maternity leave being longer than paternity leave, acknowledging the physical changes mothers go through during birth.[113] This helps support mothers 'have it all',[114] whilst facilitating employment to meet labour market

[100] Collier and Sheldon (n 67) 24; Probert, *Family Life and the Law* (n 2) 152, 156; Harris-Short, Miles and George (n 2) 14-15; Herring (n 1) 10
[101] Brown (n 1) 156
[102] Harris-Short, Miles and George (n 2) 14-15
[103] ibid
[104] ibid
[105] ibid 3
[106] Ann Berrington, 'The Changing Demography of Lone Parenthood in the UK' (ESRC Centre for Population Change Working Paper 48, April 2014) 2 <https://eprints.soton.ac.uk/364230> accessed 1 April 2021
[107] Berrington, 'Lone parents in the UK' (n 7) 5; Masson, Bailey-Harris and Probert (n 7) 280; Diduck and Kaganas (n 1) 75
[108] Diduck and Kaganas (n 1) 368
[109] Dewar, 'Family law and its discontents' (n 2) 63 and 69
[110] Collier and Sheldon (n 67) 4, 102 and 142; Diduck and Kaganas (n 1) 367
[111] Patricia Fronek and Marilyn Crawshaw, 'The 'New Family' as an Emerging Norm: A Commentary on the Position of Social Work in Assisted Reproduction' (2015) 45(2) Brit J Soc Work 737, 739
[112] Harris-Short, Miles and George (n 2) 16; Berrington, 'Lone parents in the UK' (n 7) 17; Diduck and Kaganas (n 1) 368; Probert, *Family Life and the Law* (n 2) 156
[113] Employment Rights Act 2002, s 1, ch 2
[114] Diduck and O'Donovan (n 2) 2

demands and reducing benefit dependency.[115] Moreover, case law concerning ancillary relief, which decides the distribution of a couple's finances upon separation, has radiated an important message about the value of a mother's care.[116] For example, the use of the term 'disadvantaged' in *SRJ v DWJ*[117] helped make the 'normalised and unseen' domestic work of women 'visible'.[118] Showing family work to be of equal significance to market work.[119] Confirming the new rights-based idea that men and women's contributions to family can be different but that it is due to mutual choice not a moral obligation.[120]

4. Conclusion

On closer inspection, the changes in the law are less radical at displacing the nuclear model than they first seem.[121] Marriage is still the 'golden standard' which non-marital relationships are measured against.[122] The Children Act helps acknowledge existence of diversity of parenting forms, but the nuclear model of binary parents still remains central and unquestioned legally.[123] Parents' traditional gender roles have been destabilised.[124] In conclusion, the recognition of new families acknowledges demographic and societal changes.[125] However, legally they are still judged against the ideological family standard of the traditional nuclear family model with binary parents.[126]

[115] Masson, Bailey-Harris and Probert (n 7) 207
[116] Matrimonial Causes Act 1973; Diduck, 'What is Family Law For?' (n 7) 290, 291; Herring (n 1) 228
[117] *SRJ v DWJ* [1998] 3 FCR 153 CA
[118] Diduck, 'What is Family Law For?' (n 7) 293 and 297; Herring (n 1) 226
[119] Diduck, 'What is Family Law For?' (n 7) 297, 301 and 314; Diduck and O'Donovan (n 2) 12
[120] Diduck, 'What is Family Law For?' (n 7) 297; *Lambert v Lambert* [2002] 3 FCR 673 per Thorpe LJ;
[121] Brown (n 1) 104 and 200
[122] ibid 82; Diduck and Kaganas (n 1) 3
[123] Brown (n 1) 117-118; Diduck and Kaganas (n 1) 13
[124] CSJ, *The Family Law Review* (n 10) 22; Diduck and Kaganas (n 1) 34
[125] Douglas and Lowe (n 7) 1
[126] Brown (n 1) 104 and 200; Glennon (n 3) 226 and 235; Diduck and Kaganas (n 1) 3 and 13

Mediation: An Unrealised Form of Commercial ADR

Chetana Marwaha

1. Introduction

Mediation, with its focus on mutual interests, harmony and overriding justice, is an invaluable yet understated commercial tool. It conserves time and expense, providing an accessible legal system that is commercially progressive and responsive to the market. Where parties respect it, and one-another, mediation provides insight into the relationship and the underlying rationality of commercial practice. Perceived disadvantages of mediation, including strategic fears and disdain at its subordination to litigation, push parties to avoid mediation, rendering it a minority form of dispute resolution, further alienated by a lack of diversity. This undermines the growth of mediation: it is court-driven but does little to address the underlying concerns which prevent parties seeking it as a norm. Parties still favour adjudication: mediation has not yet been fully realised.

2. Efficiency

Mediation can resolve a dispute without need for expensive litigation, aligned with the overriding objective of resolution 'at proportionate cost'.[1] It presents a picture of what is most valuable to both parties, 'identifying issues at an early stage',[2] encouraging co-operation[3] and minimising dispute time.[4] This enables a just and satisfactory outcome at reasonable expense. Concomitantly, mediation provides efficiency, key to both meeting the demands of our globalised economy[5] and minimising the economic/time pressure which cultivates frustration in disputes.[6] A duty upon lawyers to avoid litigation[7] has developed in recognition of these

[1] CPR 1.1(1).
[2] CPR 1.4(2)(b).
[3] CPR 1.4(2)(a).
[4] CPR 1.1(2)(e).
[5] Anthony Clarke, 'Civil Justice: The Importance of the Rule of Law' (2009) 43 International Law 39.
[6] *Thakkar v Patel* [2017] EWCA Civ 117, [2017] 2 Costs LR 233 [31] (Lord Justice Jackson).
[7] *R v Plymouth CC* [2002] EWCA Civ 1935, [2002] WLR 803 (Lord Woolf).

benefits, especially where resolution is realistic.[8] This is significant to the growth of mediation, prompting party engagement in ADR. Mediation should not merely be stated as desired;[9] the parties must fulfil this commitment to engage,[10] without delay.[11] The Courts all but compel parties to mediate,[12] with efficiency at the forefront of the civil-procedure system.[13]

Mediation is useful even where parties do not ultimately reach an agreement. It is not for the mediator to determine rights; this is where litigation is useful.[14] However, it can clarify the weaknesses within their arguments,[15] producing a better picture of future litigation. This allows parties to determine the risk associated with their dispute,[16] influencing their response and ultimately the time and expense of litigation and allowing for predictability. As noted by Holmes, this is necessitated by the law: parties must know the outcome of their actions.[17] Yet, parties decide not to mediate for this very reason: they worry about revealing their strategy,[18] without consideration of the benefits of predictable litigation. Where parties falsely believe their argument is strong, they are driven on a futile 'litigation bandwagon',[19] driving up costs under the impression they will 'win' the dispute: positions become entrenched.[20] *Egan* is emblematic of this, with the parties spending ~16% more than the amount in dispute, determined to 'win'.[21] Mediation hauls parties into reality,[22] ensuring efficiency is at the forefront of resolution.

3. Mediation: Undesirable

[8] *Hurst v Leeming* [2002] EWHC 1051 (Ch), [2003] 1 Lloyd's Rep. 379.
[9] *SITA v Wyatt Co (UK) Ltd (Costs)* [2002] EWHC 2401 (Ch), [2002] 11 WLUK 393.
[10] *Leicester Circuits Ltd v Coates Brothers Plc (Costs)* [2003] EWCA Civ 333.
[11] *Thakkar* (n 6) [27] (Lord Justice Jackson).
[12] *Halsey v Milton Keynes NHS Trust; Steel v Joy (Joint Appeal)* [2004] EWCA Civ 576, [2004] 1 WLR. 3002.
[13] Clarke (n 5).
[14] Lon L Fuller, 'Mediation - Its Forms and Functions' in Kenneth Winston (ed), *The Principles of Social Order: Selected Essays of Lon L. Fuller* (1981 Duke University Press) 125-150.
[15] *Hurst* (n 8).
[16] Guiditta Cordero-Moss, *International Commercial Contracts* (2014 Cambridge University Press).
[17] Oliver Wendell Holmes, Jr, 'The Path of the Law' (1897) 10 Harv LR 457, 159.
[18] SI Strong, 'Realizing Rationality: An Empirical Assessment of International Commercial Mediation' [2016] 73 Wash. & Lee. L Rev. 1973 <https://scholarlycommons.law.wlu.edu/wlulr/vol73/iss4/7> accessed 14 March 2020.
[19] *Hurst* (n 8).
[20] *Egan v Motor Services (Bath Ltd)* [2007] EWCA Civ 1002, [2008] 1 WLR. 1589 [10].
[21] ibid.
[22] ibid.

Acknowledging the 'delay, inefficiency and the disproportionate costs of litigation',[23] the Courts not only penalise argumentative parties, taking into account the conduct of the parties[24] but also those who 'unreasonably refuse'[25] mediation via cost orders[26] under CPR Rule 44.3.[27] The growth of mediation is symptomatic of the Courts inciting parties to mediate, more-so than a growth in party desire to mediate.

Parties who avoid mediation often do so as they are looking for a more 'legitimate' judgement: mediation is perceived as a lesser form of resolving a dispute. Mediators derive their power from the parties' need, rather than the authority judges assume by tradition.[28] They inherently hold less power than judges, a 'servant' of the Courts.[29] Their actions are constrained by common law principles and ideals of justice,[30] dependent on the Courts' strengthening of the law where the rule of law is weak.[31] They aid the Courts in representing the democratic interest of people,[32] through the aforementioned efficiency benefits, but do not have the same powers as the Courts.[33] They are not enabled to make principles, to constrain the sovereign:[34] their role is merely to guide parties with pre-existing law. Unlike adjudication, where the process works towards a desired solution, with an open-texture allowing arbitrators to reach a binding outcome in pursuit of justice,[35] mediators are constrained. Mediation outcomes are not binding until satisfactory to both parties and must serve pre-existing ideals of justice, at the behest of their superior, the Court.[36] This intrinsic inferiority weakens the perception of the power of the mediatory process. Concomitantly, parties do not realise the use of this form of dispute resolution, leaving this a minority.

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[23] Clarke (n 5).
[24] *Royal Bank of Canada v Secretary of State for Defence (Costs)* [2003] EWHC 1841 (Ch).
[25] *Dunnett v Railtrack* [2002] EWCA Civ 303, [2002] 1 WLR 2434.
[26] *Royal Bank of Canada* (n 24).
[27] CPR 44.3.
[28] Helen Cheng, 'Beyond Forms, Functions and Limits: The Interactionism of Lon L. Fuller and Its Implications for Alternative Dispute Resolution' (2013) 26(2) Canadian Journal of Law and Jurisprudence 1.
[29] Fuller (n 14).
[30] Cheng (n 28).
[31] ibid 21-22.
[32] Clarke (n 5).
[33] Cheng (n 28).
[34] ibid.
[35] Ole Lando, 'The Lex Mercatoria in International Commercial Arbitration' (1985) 34(4) International and Comparative Law Quarterly 747, 752.
[36] Cheng (n 28).

These parties ignore the normative force of mediation. Litigating polycentric concerns is unproductive and costly for both the State and the parties.[37] The dispute may not need an adjudicative determination of rights and duties, it may simply need enabled discussion in the form of mediation,[38] yet parties feel pushed towards litigation as a culturally ingrained,[39] defensive form of dispute resolution. They seek guidance *and* control,[40] fearing the party-dependant dispute resolution they have no experience with. Individual referrals to mediation have slowed, with growth most prevalent in large-business or court-driven, organised schemes.[41] Engagement with mediation has been driven by these schemes, leading to its growth as a form of ADR, but little focus is paid to encouraging mediation as the norm. The concerns of international commercial parties are subsumed by the influence of English courts pushing mediation, with uncertainty in the legitimacy of mediation reflected by smaller parties who are inexperienced and seek the authority of adjudication.

Manifestly, diversity within mediation is lower than the judiciary, particularly in seniority.[42] In part, this infers an alienation of clients contributes to their unease in engaging with mediation. CEOs of large-business are predominantly white males[43] while the small-business parties who are apprehensive of mediation are more likely to be minorities.[44] Mediation is dependent on the parties. Mediators must facilitate their negotiation and have some understanding of their client behaviours, yet they are unsympathetic to differences in approach culturally or by gender.[45] Fully realised, mediation adapts its structure to social norms, rather than conforming,[46] allowing diversity in a relationship to be accommodated. In turn, this opens up

[37] ibid.
[38] Fuller (n 14).
[39] Cheng (n 28).
[40] Aristotle, *Politics* (H Rackham (tr), Harvard University Press 2014) 78-80.
[41] CEDR, 'The Eighth Mediation Audit: A survey of commercial mediator attitudes and experience in the United Kingdom' (10 July 2018) <https://mk0cedrxdkly80r1e6.kinstacdn.com/app/uploads/2019/10/The_Eighth_Mediation_Audit_2018.pdf> accessed 14 March 2020.
[42] ibid.
[43] Amanda Hess, 'Why Women Aren't Welcome on the Internet' Pacific Standard (first published 6 January 2014, 14 June 2017) <https://psmag.com/social-justice/women-arent-welcome-internet-72170> accessed 19 November 2019.
[44] Department for Business, Energy & Industrial Strategy, 'Leadership of Small and Medium Enterprises' (2019) <https://www.ethnicity-facts-figures.service.gov.uk/workforce-and-business/business/leadership-of-small-and-medium-enterprises/2.0> accessed 19 November 2019.
[45] CEDR (n 41).
[46] Fuller (n 14).

discussion. The lack of diversity within mediation undermines its potential and fails to reassure the parties who doubt it most.

4. Harmony and Mutual Interests

Mediation, in its spirit of shared problem-solving, encourages respect for mutual interests.[47] With its ambition of producing social harmony, mediation is pertinent where parties are interdependent,[48] reliant on harmonious relations for their commercial interests. This is where it works best: the process requires an 'intermeshing of interests […] sufficient to make the parties willing to collaborate'.[49] Negotiation often fails where parties are diametrically opposed:[50] this is where mediation can succeed, enabled by a mediator to focus on a harmonious outcome. Its aim of social harmony is not to cement a relationship,[51] it is to achieve a just solution, satisfactory to both parties with minimal conflict. A mediator provides impartial insights into the process,[52] eliminating factors that may hinder co-operation such as 'vituperation and recrimination'.[53] Mediators prevent us returning to a Hobbesian state of competitive, selfish beasts,[54] providing the authority necessary to avoid discussions turning sour. They optimise reciprocity, taking into account parties' tactful, self-protective, competitive stance[55] to facilitate negotiation and extricate what is most important to each party, where their arguments are flawed/strong, and where miscalculations may occur in their negotiation. It produces a 'sounder agreement',[56] whereas negotiation can ignore miscalculations and lack impartial, experienced support with focus on 'winning' not fairness.[57] As Lord Clarke observes, fairness is crucial to the adequacy of a process.[58] Where the outcome of negotiation is not fair, parties are likely to progress to court or face further conflict in their

[47] Carrie Menkel-Meadow, 'Roots and Inspirations: A Brief History of the Foundations of Dispute Resolution' in Michael Moffitt and Robert Bordone (eds) *The Handbook of Dispute Resolution* (2005 Jossey-Bass).
[48] Fuller (n 14).
[49] ibid.
[50] Cheng (n 28).
[51] ibid.
[52] Fuller (n 14).
[53] ibid.
[54] Thomas Hobbes, *Leviathan* (first published 1651, Taylor and Francis 2016) 81-85.
[55] Fuller (n 14).
[56] ibid.
[57] ibid.
[58] Clarke (n 5).

relationship. Justice requires equality of opportunity:[59] mediation focuses on the parties' demands, enabling their voice to be heard. In commercial disputes, where the parties may fester a 'bilateral monopoly',[60] their interests dependent on co-operation, mediation serves to prioritise mutual interests.

Mediation lacks statutory regulation which inhibits complete equality of opportunity. The mediator is chosen by the parties, unhelpful in recognising mutual interests *where parties have an inequality of bargaining power*. Parties must enter mediation as equals:[61] what if the fairness of the mediation itself is compromised? This highlights the concern that mediation may lack certainty, threatening justice[62] where questions of law are mediated[63] by nefarious mediators. Strides have been made to resolve fears of inexperienced, unregulated mediators with the establishment of CEDR. Moreover, mediators continue to face the same restrictions as judges face: their interpretations are constrained by rules of recognition and adjudication,[64] their role is to aid in the application of law, not to make law. Where the outcome does not justly bring 'human relations into a workable and productive order',[65] the dispute can still be subject to litigation. Mediation's subordination to the Courts, as aforementioned, protects justice. It allows the centralised power of the Courts to intervene where fairness is at risk.

While the Courts encourage mediation, judges will interfere with commercial decisions if they are 'based on a wrong appreciation of the law' or 'conspicuously unfair' to one party.[66] It recognises and is willing to intervene where parties may be subject to 'constraint'.[67] Further penalisation via costs orders[68] dissuades powerful commercial parties from abusing mediation. It does not 'preclude parties from entering into court proceedings in the same way an arbitration agreement does'.[69] Mediation aims to achieve fair and balanced mutual interests, in favour of

[59] Rudolph von Jhering, *Struggle for Law* (2nd edn, Callaghan and Company 1879) in Brian Tamanaha, *Law as a Means to an End* (Cambridge University Press 2006) 60-67.
[60] Fuller (n 14).
[61] *Deweer v Belgium 6903/75* [1980] ECC 169 (ECHR).
[62] Cheng (n 28).
[63] *Royal Bank of Canada* (n 24).
[64] HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 94.
[65] Fuller (n 14).
[66] *Re C E King Ltd (In Administration)* [2000] 2 BCLC 297.
[67] *Deweer* (n 61).
[68] *Halsey* (n 12).
[69] Baskind, Osbourne and Roach, *Commercial Law (Additional Chapter – Alternative Dispute Resolution)* (3rd Edition, 2019 Oxford University Press) 14.

harmony. Authority is to be used to empower parties, not control parties.[70] Where parties have nefarious intent or no intent to settle,[71] mediation is futile: attempts at harmony are ineffective. Here, litigation is best with its application of 'impersonal act-orientated rules',[72] salvaging justice without aim of protecting the commercial relationship.

5. A Progressive Tool

In part, this provides an explanation for the growth of mediation. Mediation will only continue to grow if we are on path to the Hegelian end of history: one of reciprocal recognition[73] culminating from a broadening of human understanding.[74] As this evolves, we progress towards respect of mutual interest. Well-functioning legal systems advance towards this common social purpose:[75] mediation is advantageous in recognising and establishing our developing social practices as law.

Mediation offers a solution to a common concern that law, as a process-orientated force,[76] ignores social structures and is slow to respond to social change. The adaptability of the law is key to its effectivity, yet this is a significant issue within our legal system.[77] Centralisation aims to enact laws to remedy perceived problems but ignores pluralism within society.[78] It does not integrate commercial actors into the process, directly responding to real concerns within the dynamic, fast-paced business sector. The underlying causes of issues are not questioned,[79] and responses are often too late to reflect changes in the sector. Mediation focuses on the reasons why parties have an interest, aiming to give 'order and coherence' to their relationship,[80] justifying their mutual interests. Its inherent focus on commercial parties aims to understand the root of their issues and what practices are *de facto* normalised in the sector.

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[70] Cheng (n 28).
[71] *Wyatt* (n 9).
[72] Fuller (n 14).
[73] Alan Patten, *Hegel's Idea of Freedom* (Oxford University Press 2002) 132.
[74] David Hume, *An Enquiry Concerning Human Understanding* (Oxford University Press 2000) 68.
[75] Jhering (n 59).
[76] Fuller (n 14).
[77] Clarke (n 5).
[78] Cheng (n 28).
[79] ibid.
[80] ibid.

The interactions between the parties, brought to light and directed during mediation, can provide 'social order'.[81] By affirming commercial practices, the authority for legal change is provided concomitant of 'general societal acceptance'.[82] Where multiple parties agree X is in their mutual interest, implying a standard interest in the sector, X can become law: a consequence of the interactionism[83] mediation provides.[84] Mediation observes the 'dynamic interactions of social actors',[85] extracting power from traditional centralised forces into the hands of social actors. It provides a 'framework of participation that gives effect to individual choice'.[86] This aspect of 'process pluralism'[87] enables a 'diversity of norms'[88] to be recognised, it can be used to generate 'systemic change',[89] going further than courts to address commercial perceptions and ultimately remedy lacunas or inaccuracies within the law. Mediation is a powerful tool, understated yet only growing.

6. Conclusion

While the legitimacy and judicial appreciation of mediation has made great strides in recent years, mediation remains undermined, not yet fully realised as the progressive, justice-focused mechanism it is. Greater strides must be made to enhance growth beyond that driven by the Courts, enacting mediation as a desirable norm in commercial dispute resolution

[81] ibid.
[82] ibid.
[83] Fuller (n 14).
[84] Cheng (n 28).
[85] ibid.
[86] ibid.
[87] ibid.
[88] ibid.
[89] Susan Sturm and Howard Gadlin, 'Conflict Resolution and Systemic Change' (2007) J Disp. Resol. 1.


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