THE BRISTOL LAW REVIEW

VOLUME 7

2021 EDITION

THIS PAGE IS INTENTIONALLY LEFT BLANK

BRISTOL LAW REVIEW

ISSN 2515-4427
www.bristollawreview.com

VOLUME 7 - 2021 EDITION

Edited by

THIS PAGE IS INTENTIONALLY LEFT BLANK

TABLE OF CONTENTS

Introduction to the Edition

Dr Philip A Burton 5

Foreword

The Rt. Hon. Dame Elizabeth Gloster DBE, PC 7

Letter from the Editor

Timothy Lo, Editor-in-Chief 9

The Legal Profession and Climate Change: A Consideration of the Lawyer's Role and an Investigation into the Possible Existence of Related Duties

Thomas McInerney 11

The Judicial Review of Employers' Decisions: About the Transferability of Public Law to Private Law in the Employment Context as a Legal Comparison between United Kingdom and Germany

Benedict Seiwerth 29

A Critical Examination of How Artificial Intelligence Should Be Regulated in the United Kingdom

Roxanna Sathya Yaghmai 59

Non-Consensual Genetic Testing: An Equitable Breach of Confidence?

Henry Gallagher 84

Dying, Disability, and Dangerous Decisions: Protecting Patient Safety in Assisted Dying in England and Wales

Louise Hayes 110

The 'Epidemic' of Fake News: Should Social Media Sites Such as Facebook Have a Duty of Care for Fake News and Misinformation Content on Their Sites?

Maya Sterrie 144

Tackling The Impunity of Transnational Child Sex Offenders in Madagascar: The International Human Rights Obligations of Sending States

Ashleigh Guest 174

Does The Friedman Doctrine that the Sole Social Responsibility of Business is to Increase Its Profits Stand True in the Contemporary Corporate Governance Landscape?

Concobhar Jolliffe-Grimes 198

Third Country Capacity-Building as a Means of Extraterritorial Migration Control: A Doctrinal Analysis of the European Union's Support for the Libyan Coastguard in Light of the Human Right to Leave and the Obligation of Non-Refoulement

Fabian Othmerding 226

Critically Evaluating the International Criminal Court Through a Realistically Utopian Lens: A Pragmatic Appraisal

Ethan Gren 256

THIS PAGE IS INTENTIONALLY LEFT BLANK

INTRODUCTION TO THE EDITION

Dr Philip A Burton
Law Review's Academic Adviser

Within academia in general, and legal academia in particular, age is revered. Who can resist the temptation to burnish our advocacy and research with references to obscure ancient precedents and past masters? In legal discourse, systems of pedigree and prestige venerate the wisdom of elders.

This edition of the Bristol Law Review stands as a rebuke to such tendencies. The breadth and nature of the topics covered are testament of the radical ambition of youth. Individually and collectively, they demonstrate an unflinching eye and a keenness of perception, a willingness to gaze directly at the grave challenges, and radical potentialities, of our time. The studies cover diverse and fundamental topics, encompassing the professional ethics of lawyers in the face of catastrophic climate change, the challenges of regulating non-human intelligence, the relation of individual autonomy and consent to our underlying genetic make-up and how to reconcile dignity with protection in assisted dying. Perhaps unsurprisingly in light of the apparent disintegration of orthodox political economy, we find numerous contributions reflecting on the relations of public and private, of politics and markets. In this vein, the edition contains provocative works on the applicability of 'public' functions and mechanisms of accountability to 'private' actors, considering, for example, the role of social media giants in upholding the integrity of public debate, the scope for judicial review of employment decisions and the sufficiency of the profit motive as an ethos for 21st century capitalism. Lastly, this edition eschews parochialism, embodying instead an earnest and practical humanitarianism which aspires to prevent and alleviate suffering across the globe, with contributions examining the responsibility of states to prevent trafficking, the legality of contemporary practices of non-entrée in relation to maritime migration and challenging pervasive critiques of legitimacy of the International Criminal Court.

This critical ambition, and the craft and skill embodied in the execution of these texts, augurs well for the futures of the contributors and legal scholarship more generally. However, these virtues are also testimony to the dedication, diligence and open-mindedness of the team of student editors based here in Bristol. It is through their labour that we are able to offer a platform for our contributors. In particular, it is necessary to recognise and credit the role played by Timothy Lo and Isaac Chambers, the Editor in Chief and Managing Editor respectively. Their vision and determination has reanimated the Bristol Law Review. It has been my humbling pleasure to work alongside them.

THIS PAGE IS INTENTIONALLY LEFT BLANK

FOREWORD

The Rt. Hon. Dame Elizabeth Gloster DBE, PC

It is a privilege to have been asked to write the foreword to this exciting and frontier-pushing 2021 edition of The Bristol Law Review. In my year as Patron of the Bristol Bar Society, which is a partner of The Bristol Law Review, I have been impressed with the enthusiasm and intellectual rigour of the students' approach to some of the incredibly important socio-legal issues of today. It is no surprise, therefore, to see these qualities reflected in the impressive and well-written articles that make up this year's contribution to the Review.

As Timothy Lo, the Editor in Chief, says in his "Letter from the Editor", the Review has attracted contributions internationally by reaching out "to the greater legal world". And, certainly, there is nothing inward-looking or parochial about the diversity and breadth of topics addressed by contributors.

Might I dare to suggest something practical which might be considered for next year? As a student I always relied on, and so appreciated, the latest - and often very critical (but nonetheless scholarly) - analyses of recent English cases written by dons or students and published in the Cambridge Law Journal. These critiques were invaluable in informing the last-minute, would-be, assiduous student of the likely exam questions that summer. Such articles do not address global issues, and perhaps might be characterised as "parochial", but nonetheless might be regarded as a welcome and useful addition for your student readership.

Your contributors, together with Timothy Lo, Isaac Chambers, the Managing Editor, and the whole editorial team are to be congratulated for producing an intellectually stimulating collection of articles in this year's edition of The Bristol Law Review.

Elizabeth Gloster
One Essex Court,
Temple EC4Y 9AR

THIS PAGE IS INTENTIONALLY LEFT BLANK

LETTER FROM THE EDITOR

Timothy Lo
Editor-in-Chief

On behalf of the Editorial Board, it is with great pleasure that I present the seventh edition of the Bristol Law Review.

I begin by noting this academic year is an extraordinary one. Amid coronavirus, most of the work has been carried out without any in-person contact, but the Board has gone from strength to strength when our fortitude was put to the test. I must extend my thanks to all members of the Board for their travails throughout the year to ensure all articles met a rigorous academic standard. It is truly my privilege to have worked with a team of gifted and committed editors. The Board would like to thank our academic adviser Dr Burton for his supervision and thorough review of our drafts. We are also deeply grateful to Dame Elizabeth Gloster for writing us an inspiring foreword and for supporting the Board's endeavours.

Despite challenging constraints, the Law Review was not at all stopped from broadening its horizons by reaching out to the greater legal world. We have received a high amount of submissions from Bristol and beyond - ranging from Ireland to Australia - and it must be said that the Editorial Board is enormously impressed by the originality, persuasiveness and clarity that are marshalled in the legal literature we are presented with. Taken together, this edition of Law Review embodies a serious reflection on a wide array of legal topics. We sincerely hope that all the published Articles will provide valuable insights to both British and international audiences. Additionally, even though the Law Review's operation is met with physical restrictions, we cultivated new relationships beyond Bristol. For the first time ever, we have successfully fostered collaborative partnerships with the Cambridge Law Review, the LSE Law Review as well as the Oxford University Undergraduate Law Journal. These partnerships are critical in laying the foundations for the Law Review's continued exchanges with other student groups in the realm of academic publishing.

The Law Review is equally committed to sparking interest in vexed yet timely legal discussions. To this end, in conjunction with the University of Bristol's Bar Society, we have earlier organised an essay competition sponsored by Brick Court Chambers, which allowed fresh views to be channeled on how the Law should respond to racial inequalities. We are grateful for Brick Court Chambers for their generosity in encouraging legal scholarship. Congratulations go to Tochi Ejimofo and Sam Allibone for winning the competition and earning the runner-up prize respectively. Both thought-provoking pieces are now published on the Law Review's online blog.

The production of the Law Review signifies the depth of legal talents in our University's Law School, and I am confident that this long tradition of legal excellence will continue.

THIS PAGE IS INTENTIONALLY LEFT BLANK

THE LEGAL PROFESSION AND CLIMATE CHANGE: A CONSIDERATION OF THE LAWYER'S ROLE AND AN INVESTIGATION INTO THE POSSIBLE EXISTENCE OF RELATED DUTIES

Thomas McInerney[1]

ABSTRACT

Climate change is one of the most pressing issues of our time, but crucially for many, it may not be pressing in this lifetime. This fact has birthed an inter-generational ignorance and/ or selfishness, which may not be malicious, but certainly is not admirable. And while lawyers are not expected to be moral exemplars, and legal truth is not the same as moral truth, one might hope that a commitment to justice, good faith and values which respect the society, and thus the environment in which we live, ought to be an aspect of the professional legal pursuit.

The lawyer's role is one steeped in tradition. As a result, change comes slowly and reluctantly, but lawyers play a crucial role in a society which is changing rapidly and unpredictably, and with potentially dire consequences. Traditional notions of professionalism lack nuance in this new world. It is submitted that an unwavering commitment to such notions can lead to a practice of law which ultimately fails to uphold some of its own fundamental values. A re-evaluation of a number of lawyer's duties in the context of climate change might hopefully show how the role of the lawyer in society can in fact change with the times, and how some of the cracks in traditional understandings of professionalism can be mended with an acceptance of an element of nuance.

[1] LLB Law at Trinity College Dublin. LLM in Global Environmental and Climate Change Law at University of Edinburgh.

> *"In all spheres of social and economic life, globalisation, with its unprecedented compression of time and space, and connection of far-flung processes and events, creates and amplifies new territorially unbounded commonalities and also new territorially unbounded differences in respect of interests, identities and values. Law is no exception".*[2]

INTRODUCTION

The lawyer's role has always held inextricable links to the notion of nation state. Outward expressions of this connection are apparent in professional rules of conduct and in practices which vary from state to state. From nation-based professional practice courses to professional oversight carried out by regulatory bodies, there are expressions of characteristics reflective of the ethos and idiosyncratic culture of the society in question. In the maintenance of their legitimacy, lawyers' have generally operated as independent advocates in self-regulatory, or partly so, operational environments. Though, despite their relative regulatory independence, no realistic examination of the lawyer's role can ignore the relevance of the political and cultural norms dominant at any given time. Such an examination is particularly difficult in a society evolving at the rate we now see. As a result, a full assessment of the lawyer's role is not the intention of the present article.

Rather, this is at first instance an acceptance that practical difficulties arise alongside a stubborn commitment to rigid traditional ideas of the lawyer and his or her place in society. An attempt will be made to diagnose some of the cracks in the traditional conception of the lawyer's role. A consideration will follow as to whether a more nuanced conception, which reflects more realistically on the practice of law in the modern world, can be envisaged. Far from attempting to provide a complete picture of all conceptual and practical problems, this will involve a focus on lawyer's duties which might be applicable to one particular aspect of legal practice. The light here is shone on lawyers' duties in the realm of environmental law, in particular, where issues of climate change arise. This analysis will conclude with a consideration of some potential cures to the systemic maladies of legal practice. It is possible that, if the role is re-envisaged to reflect the changing societal and environmental landscape, there could be a change in the commonly held belief as to a crisis of professionalism in the practice of law. Moreover, the climate crisis needs action from all aspects of society and all parts of the world, something which international law is slow to effectively mobilise. Lawyers are well aware of their importance in society, but to direct that peculiar influence towards the betterment of society requires conscious attention and constant re-evaluation. Hopefully, some insight can be gleaned from this analysis and some discussions around positive changes from within the legal profession could at least be inspired in its wake.

Change does not come lightly to a role steeped tradition. Under the standard conception of the lawyer's role, partisanship, neutrality and non-accountability are seen as foundational.[3] Acting in the best interests of the client is primary and moral considerations need not bear much weight. Arguably, this relatively simple notion of legal professionalism no longer provides an adequate account of what lawyers do, why they do so and how they go about it. One reason for this increasingly defunct description is because the where and when of the lawyer's role have shifted as a global society has developed rapidly and unpredictably over the last century. The combination of globalism and capitalism has brought about novel modes of governance, complex balances of power, and a more privatised and deregulated global economy. Multinational corporations, international institutions and agreements, and cross-border law firms bring about an array of challenges to traditional ideas of national sovereignty and the operation of legal practice.[4]

---

[2] Neil Walker, 'The jurist in a global age' (2017) in R van Gestel, HW Micklitz & EL Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press, 2017) 84, 97

[3] David Luban and Bradley Wendel, 'Philosophical Legal Ethics: An Affectionate History' (2017) 30 Georgetown Journal of Legal Ethics 337, 343

[4] Laurence Etherington and Robert Lee, 'Ethical Codes and Cultural Context: Ensuring Legal Ethics in the Global Law Firm' (Winter 2007) Indiana Journal of Global Legal Studies, Vol. 14, No. 1, 95-118

This new world order means that there are new expectations on lawyers if they are to adapt with the times and retain their connection to the ever-evolving society in which they operate. It has been suggested that multinationals and their lawyers "are ever more the makers of public policy for an interconnected world".[5] This is hard to deny when one considers the financial resources and political influence of large multinationals such as oil and gas companies. In many instances, their power outshines that of the states that supposedly govern them. Though it is not just the clients that have gone global. Many law firms now provide an international service. As a result, issues of ethics have become more convoluted and the resolution of ethical dilemmas less complete. It has been argued that the classic style of regulatory control "may be replaced by a fluidity in which clearly defined rules and duties are not easily discernible".[6] Thus, the 'where' is no longer a straightforward national legal system. Rather, it consists of a network of both complementary and contradictory authorities pervasive on a global scale.

By 'when', what I mean to speak to is the fact that the lawyer's role no longer holds the preeminent temporal significance it once had. In a world where untested rules amass to deal with novel problems, and arise from a range of sources, ties to the legal past lose value and predictions about where we are heading become less accurate. This does not change the fundamental reality of the law, described by Walker as a "cultural product".[7] Rather it involves an evolution of the context, and thus, the content of the law. Walker states that the meaning of this "artefact" is a matter of "interpretative or speculative judgment and of reflection on deep tradition".[8] Arguably, as our global society evolves and morphs into novelty, such reflections become blurred by history and such judgments become more speculative due to the tide of change.

In some regards, it can be said that this new world order actively encourages, through financial, professional and other types of reward, those who are willing to act for the present and disregard the utility of tradition and any participation in a better future. The reality of this changing landscape for lawyers inevitably means that personal and professional judgment can come into conflict more and more in their day-to-day work. Such judgments must be made in the light of multitudinous, and not always clear cut, responsibilities to clients, colleagues, the courts, and to society generally. An obvious dilemma arises where clients' desires are out of alignment with certain ethical considerations held by their lawyers. More and more we are learning how our activities have negative consequences for the environment, for example.

A further alteration of the legal landscape has occurred within the relationship of lawyer and client. Often, powerful clients will hold an expectation that their lawyers exist solely to act as "hired guns",[9] or at least to turn a blind eye to morality and to use their specific skill, knowledge and influence towards the realisation of the single-minded, client-focused goal. Increased competition in the legal market means that such clients can shop around for the legal advice that is best suited to their interests. Though this problem is not solely one which leans on the morality of lawyers, and frankly, its consequences are significantly more far-reaching. As Rhodes puts it, longstanding problems of professionalism in the practice of law "are a matter of public as well as professional concern", in that, "the principles that guide professional practice have crucial social consequences".[10] Lawyers hold valuable information and unique influence. This should not be forgotten in the current milieu rife with debate about withering ideas of professionalism and growing commercialism in the practice of law.

---

[5] Martha Nussbaum, 'Cultivating Humanity in Legal Education', The University of Chicago Law Review, 70:1, Centennial Tribute Essays (Winter, 2003) 265-279, 275

[6] *ibid* 95

[7] Neil Walker, 'The jurist in a global age' (2017) in R van Gestel, HW Micklitz & EL Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press, 2017) 84, 87

[8] *ibid.*

[9] Robert W Gordon, 1.3, 'Why Lawyers Can't Just Be Hired Guns', in Deborah L Rhode, *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation'* (Oxford University Press, 2000)

[10] Deborah L Rhode, 'Ethics in Practice' in Deborah L Rhode, *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation'* (Oxford University Press, 2000) 8

While traditional ideas of professionalism may not persist into the future, as long as lawyers operate, their role will be scrutinised by reference to the original notions of what service they ought to provide. An examination of the difficulties that arise from an unwavering commitment to traditional ideas of the lawyer's role forms the basis of the first part of this article. This will lead into a consideration of a more nuanced, and hopefully realistic, conception of the modern lawyer. Ultimately consisting of an attempt to inform a theoretical understanding of the lawyer's role, the function of this first part is to lay the foundations for the second part's more practical investigation into specific duties. As Suttle notes, "theoretical clarity is important for defining the broad contours of the landscape and can lead to more effective practical applications".[11] In this vein, the current analysis seeks to outline the academic discussion on the lawyer's role and at the same time to bring some clarity to the grey area between theory and practice.

The second part is intended as a natural progression from the first. Climate change is one of the most pressing issues of our time, but crucially for many, it may not be pressing in this lifetime. This fact has birthed an inter-generational ignorance and/ or selfishness, which may not be malicious, but is certainly not admirable. And while lawyers are not expected to be moral exemplars, and legal truth is not the same as moral truth, one might hope that a commitment to justice, good faith and values which respect the society, and thus the environment in which we live, ought to be an aspect of the professional legal pursuit.

To the extent that climate change is a contested moral or political question, positive action is not easily argued against as doing so involves either ignoring or contesting the best science that we have. The Intergovernmental Panel on Climate Change reported in 2018 with high confidence that, continuing at its current rate, global warming is likely to reach 1.5 degrees Celsius between 2030 and 2052.[12] Anything beyond 2 degrees would technically be a breach of the main commitment of the Paris Agreement, to which there are 191 signatory parties. The repercussions of climate change cannot simply be cured *ex post facto*. Yet we learned from a report in 2019 that governments around the world are planning to produce around 120% more fossil fuels by 2030 than a 1.5 degree pathway, and 50% more than a 2 degree pathway, would allow for.[13] The latest report from the IPCC is stark and specific. The world's most authoritative body on issues of climate science earlier this year reported that the world is likely to reach or exceed 1.5 degrees of warming within the next two decades.[14] Imminent drastic action is clearly required. A quote from Kassie Siegel, Senior Counsel and Director of the Centre for Biological Diversity's Climate Law Institute in the US lays a solid foundation for the themes and questions which have motivated the present analysis. She says:

> Some of the most important legal issues today are large corporations lying about climate change and being able to pollute a few more years. The role of lawyers helping them do that and the ethical considerations governing our profession will increasingly come under the microscope.[15]

---

[11] Brooks A Suttle, 'Reframing Professionalism: An Integral View of Lawyering's Lofty Ideals' (2011) 61 Emory JJ 161, 205

[12] IPCC, 2018: *Summary for Policymakers*. In: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* [Masson-Delmotte, V., P. Zhai, H. O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]. In Press, 4

[13] SEI, IISD, ODI, Climate Analytics, CICERO, and UNEP. (2019). *The Production Gap: The discrepancy between countries' planned fossil fuel production and global production levels consistent with limiting warming to 1.5°C or 2°C*, 2

[14] Lee, J. Y., J. Marotzke, G. Bala, L. Cao, S. Corti, J. P. Dunne, F. Engelbrecht, E. Fischer, J. C. Fyfe, C. Jones, A. Maycock, J. Mutemi, O. Ndiaye, S. Panickal, T. Zhou, 2021, *Future Global Climate: Scenario Based Projections and Near-Term Information*. In: *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Masson-Delmotte, V., P. Zhai, A. Pirani, S. L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M. I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J. B. R. Matthews, T. K. Maycock, T. Waterfield, O. Yelekçi, R. Yu and B. Zhou (eds.)]. Cambridge University Press. In Press

[15] Joshua Gostel, 'Ethics, Energy and the Environment: A Proposal to Hold Attorneys to Certain Standards in Protecting Our Planet' (2017) 30(4) Geo J Leg Ethics 819, 823

The second part of this article will depart from an essentially descriptive analysis of the lawyer's role in society and begin a more explicit examination of externally sourced duties which lawyers may bare in relation to climate change. It is widely acknowledged that extensive duties in relation to human rights already exist, and some comparisons with these duties may prove useful. The leap to climate change from the realm of human rights is not a major one given the ever-increasing incidences of catastrophic events caused by climate change, and the particular vulnerability of certain communities.[16] Left to its own devices, the current global machine will ensure that these impacts become more frequent and more dramatic. And there will be no rolling back of those 'few more years' to which Siegel refers.

PART 1: THE ROLE OF THE LAWYER IN SOCIETY

A. Varying Conceptions:

(i) Traditional Professionalism

Professionals hold positions of responsibility and authority in which one is generally expected to have a certain level of skill, knowledge and competence. Professionalism then, though notoriously difficult to define, must to some degree involve an ethic and a practice of living up to these expectations. While the professional nature of the practice of law is widely accepted, it may be worthwhile to begin by asking: what is it that makes the practice of law a profession? Kronman offers a reasonable explanation based on four observations. First, he claims that legal practice is "a public calling which entails a duty to serve the good of the community as a whole".[17] Second, he notes the non-specialised nature of the practice of law enabling the carrying out of a wide variety of work. The third justification for the professional classification is lawyer's supposed capacity for judgment. On this point, Kronman claims that lawyers must develop their "perceptual and emotional powers" in addition to the pre-supposed level of intellectual skill.[18] Finally, Kronman argues that the enduring nature of the law justifies a claim to respect it, and that this "must be considered and weighed even when we reject it".[19]

There is nothing unreasonable about Kronman's four-part justification of the lawyer as a professional. It positively informs the idea that the lawyer takes on a responsibility, which, by way of an interplay between their personality, their intellectual judgment and their legal knowledge, ought to be carried out in a manner which respects the society in which they operate, thus ensuring its endurance over time. This responsibility is summarised by Walker in referring to legal practice as a "pervasively value-relevant activity".[20] He argues that the responsibility of the jurist is to take this seriously and to look beyond a narrow client-focused approach, taking into account the broader ethical implications of one's work. Relevant to the current analysis of professionalism, is this idea of a duty which extends beyond the demands of a client, and into the vague but socially important realm of the good of the community. While the good of the community can and does change over time, is there something theoretically tangible and lasting about the idea of professionalism? Or is any concept of professionalism merely an evanescent ideal reflective of the prevalent norms and practices at the time of its conception?

(ii) Morality: How does it inform the role of the lawyer?

---

[16] See; Oppenheimer, M., B.C. Glavovic , J. Hinkel, R. van de Wal, A.K. Magnan, A. Abd-Elgawad, R. Cai, M. Cifuentes-Jara, R.M. DeConto, T. Ghosh, J. Hay, F. Isla, B. Marzeion, B. Meyssignac, and Z. Sebesvari, 2019: *Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities Supplementary* Material; in*: IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (2019) [H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegría, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)]. In press; accessed at https://report.ipcc.ch/srocc/pdf/SROCC_FinalDraft_Chapter4_SM.pdf on 1 June 2020

[17] Anthony T Kronman, 'The Law as a Profession' in Deborah L Rhode*, Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* (Oxford University Press, 2000), 32

[18] *Ibid,* 33

[19] *Ibid,* 34

[20] Neil Walker, 'The jurist in a global age' (2017) in R van Gestel, HW Micklitz & EL Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press, 2017) 84, 96

As opposed to codes of ethics, rules of conduct and those duties which are drawn from the principles embedded in the framework of law, professionalism idealises self-motivated action. Thus, here we venture into what has been described as the "murky waters" of intention and morality.[21] What we have then is a spectrum. On one end of the extreme is the standard conception of the lawyer. This type of lawyer has been described as operating with "atomistic self-interest"[22], and with a prerogative to ignore the morality of the actions of their client. One such image is that of the "business servant".[23] It tends to be the client's desires which take precedence at the cost of other concerns. In this sense the business servant, conceptually at least, fails to balance their duty to the client with other broader duties. The idea that some lawyers have utilised their position to manipulate the system in direct opposition to the public interest has led to commentary on a crisis of professionalism.

Towards the other end of this spectrum would be a lawyer whose adherence to morality would not be ignored, but rather incorporated into, thus informing their work. Simon, whose 'Ideology of Advocacy' provided the definition of the standard conception of ethics noted at the outset, proposed a de-professionalisation of sorts whereby such moral convictions would be part of legal practice, though did later abandon this idea.[24] Clearly, settling on one idea of the legal professional as the all-encompassing and persisting one is not a simple task and may in fact be impossible in today's world. It is clear then that legal ethics can be understood in two very different ways. From one perspective, an ethic manifests in the normative rules laid down in professional codes of ethics. From another, it is guided by individual conscience along with an understanding of, and respect for, morality in the practice of law. Yet, in the reality of legal practice, there is at all times a balancing between the two.

In teasing out the foundations of this struggle, Nussbaum gazes back to the Greek and Roman Stoics and their focus on a shared common humanity. From this universal idea, she notes that "we have moral obligations to (people) that transcend the reach of current positive law".[25] These obligations to humanity formed the basis for the development of international law "especially in the area of war and peace".[26] Thus, it would seem that the resolution of nation-based conflicts requires a return to an objective morality and an understanding of the interconnectedness of the world and its seemingly separate components. Arguably, the prevention of climate change deserves the same depth of consideration given that its consequences could be devastating to society at large. Moreover, the timescale involved is not enclosed by the same human limitations of war. Whether or not being bound to certain ethical standards equates to a duty to consider environmental harm is an issue for consideration in Part B. For now, it suffices to accept this stoic idea of a common humanity and ask how this has manifested in legal practice.

Ethical codes are essentially a codification of moralistic principles into a set of generally accepted and expected practices. The introduction of binding rules based on notions of the 'right kinds' of professional duties is a relatively recent development. The American Bar Association introduced binding rules for the first time in 1969 and since then "there has been an outpouring of codification, commentary, and curricular initiatives on professional responsibility".[27] While professional codes have seen very little change over the years, the profession continues to face ever-more complex ethical dilemmas. Rhode believes that the failure of the codes to evolve is partly due to "a lack of consensus about what the problems are, and what values should be most central to

---

[21] Brooks A Suttle, 'Reframing Professionalism: An Integral View of Lawyering's Lofty Ideals' (2011) 61 Emory JJ 161, 163
[22] Eli Wald and Russell G Pearce, 'Being Good Lawyers: A Relational Approach to Law Practice' (2016) 29 Geo J Legal Ethics 601
[23] *See* Eli Wald and Russell G Pearce, 'Being Good Lawyers: A Relational Approach to Law Practice' (2016) 29 Geo J Legal Ethics 601, p609. *See also;* Russel G Pearce, 'The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar' (1995) 70 NYULR 1229, 1243-44
[24] David Luban and Bradley Wendel, 'Philosophical Legal Ethics: An Affectionate History' (2017) 30 Georgetown Journal of Legal Ethics 337, 343
[25] Martha Nussbaum, 'Cultivating Humanity in Legal Education', The University of Chicago Law Review, 70:1, Centennial Tribute Essays (Winter, 2003) 265, 266
[26] *Ibid,* 267
[27] Deborah L Rhode, 'Ethics in Practice' in Deborah L Rhode, *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* (Oxford University Press, 2000), 3

professional life."[28] This failure to underline the problems must be considered in the context of the overall role of the lawyer. If, as has been submitted, defining a concrete role is potentially impossible for reasons such as the changing legal environment and the variety of work carried out by lawyers, then the failure to identify the problems must be seen in light of this malleable reality. Just as an organism and its environment cannot be understood without reference to one and other, the ethical dilemmas faced by lawyers, and the values which must be weighed against each other, cannot be solved in the absence of a realistic attempt to understand the societal role of the modern lawyer.

The value of formal ethical codes in defining and guiding legal practice is a hotly contested issue consisting of reasonable commentary on either side of the debate. Nicolson and Etherington and Lee express scepticism as to the ability of duty-based codes to uphold high ethical standards.[29] Some of the problems with a deontic approach are identified by Nicolson and include, a reduction of standards to the lowest common denominator; requiring the reduction of moral issue to formulae; minimising sensitivity to issues; and neglecting the need for judgment in identifying and analysing problems and solutions.[30] A further problematic outcome of such approaches might be a felt sense that this tick the box exercise marks the end of the line in terms of fulfilling one's moral obligations. This is undeniably a worry given that, as noted by Nicolson, it is the lowest common denominator which one can expect to see codified.

National Codes of Ethics commonly give primacy to the duty which is owed to the client with the subjugation of other concerns. However, the IBA has made some positive developments recently in this regard. It published a 'Climate Crisis Statement' in May 2020.[31] The statement begins, unsurprisingly, by making it clear that lawyers are required to treat their client's interests as paramount. Though it goes on to urge lawyers to take some positive ethical action in their daily practice, including but not limited to, advising clients of the potential risks, liability, and reputational damage arising from activity that negatively contributes to the climate crisis; encouraging clients to disclose risks posed by the climate crisis to their operations when reporting to regulators, investors and stakeholders; and engaging in climate dispute resolution on a pro-bono, volunteer, or reduced-fee basis.[32]

The utility of these recommendations might be questioned by some, but for others, the codification of rules and guidance is a necessary addition to self-motivated morality. For Cranston, as the legal profession has become larger and more variegated, a need has developed for the profession to be assimilated and disciplined by "rules and a bureaucratic machinery".[33] He adds that the profession has had to give more attention to ethical standards because "in many ways they are symbolic of how the profession sees itself".[34] Unlike Nicolson and Etherington and Lee, Cranston calls for codes of conduct to be refined. He argues that the "linchpin" of the current rules around confidentiality and loyalty is the assumption that a lawyer serves justice by single-mindedly serving the interests of their clients. Some difficulties with this are identified. Firstly, he believes there is a public perception that this particular formulation of the idea of serving justice is merely a method of obscuring the reality of lawyer's self-interest. Cranston opines that inequality in access to legal services, along with the varying quality of such services, undermines this model's validity. The second difficulty identified is that the notion of lawyers acting as a hired gun has practical limitations. He notes that "in some circumstances, the law and the profession's ethical rules recognise that unquestioning zeal in a client's interest may cause social harm".[35] Cranston opines that a move to more specific

---

[28] *Ibid*

[29] Laurence Etherington and Robert Lee, 'Ethical Codes and Cultural Context: Ensuring Legal Ethics in the Global Law Firm' (Winter, 2007) Indiana Journal of Global Legal Studies, Vol. 14, No. 1, 95, 110

[30] Donald Nicolson, 'Making Lawyers Moral? Ethical Codes and Moral Character' (2005) 25 Legal Stud. 601, 608

[31] International Bar Association, Climate Crisis Statement (5 May 2020) accessed at https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=cac6e15d-ec80-4669-9025-2773e9019519 on 1 May 2020

[32] *Ibid*

[33] Ross Cranston, Chp.1 'Legal Ethics and Professional Responsibility' in Legal Ethics and Professional Responsibility (Oxford University Press, 1995), 31

[34] *Ibid*

[35] *Ibid,* 33

rules of ethics is desirable but also inevitable, and that "intuition or appeals to secular or other morality are no substitute for a framework of rules".[36] The chapter, written twenty five years ago, concludes with some salient questions still relevant today:

> When do the interests of others and the public interest trump devotion to the client's interests? When should a lawyer question his or her client's intentions and activities and be justified by code provisions in doing so? When should a lawyer cease to act for a particular client or indeed disclose suspected wrongdoing to the relevant regulatory agency?[37]

While calls are regularly made to set out and uphold the foundational principles of the legal profession, agreement on what these are, and how they should be realised, is not easily reached.[38] And whether one believes in the moral conviction of the individual or the imposition of rules which guide ethical decision-making, it is this lack of agreement which provides one of the biggest obstacles to mending some of the problem-areas in the complex relationship consisting of lawyer-client-and everyone else.

B. A Modern Understanding of the Lawyer's role

(i) New dynamics in the lawyer-client relationship

Of course, all relationships evolve as the surrounding circumstances and the relative power of the parties change overtime. The important question in this instance is whether there are aspects of the traditional relationship which ought to be regarded as sacrosanct. Or alternatively, whether some aspects of the traditional relationship are no longer fit for purpose, and thus, in need of adaptation and refinement. Complicating matters is the fact that lawyers provide an array of services to a variety of clients. Traditional client loyalty, when focused on an individual in relation to some personal matter, would usually pose no fundamental threat to the interests of the wider community. However, the same cannot always be said of corporate clients. While the generation of profit is often given statutory importance in the legislation which govern the duties of companies and their boards, this should not, for reasons already elaborated, apply equally to the lawyers who advise them.

Pepper argues that corporations are a novel type of client and should be treated as such.[39] Large business operations are generally more powerful than individuals. As a result, they have the capacity to cause greater harm.[40] Another idiosyncrasy of many of these clients is the limited motivations informing their decision-making. Pepper comments on the "dangerously limited" nature of the idea of shareholder profit in comparison to "the complexity and range of individual human motivation, values and ends".[41] A further unique characteristic of the corporate client is a tendency to be more price-conscious in their selection of representation. Recent decades have seen a steady increase in the numbers of practicing lawyers in many countries. This trend has facilitated the selective tendencies of certain clients with the capacity to be so inclined.

Statistics from the Solicitors Regulation Authority of England and Wales tell us that between December 2011 and December 2020, there was an increase in the number of practicing solicitors in those countries by almost 27,000.[42] One consequence of this trend common to developed economies, and noted by Rhode, is a heightened pressure

---

[36] *Ibid,* 31
[37] *Ibid,*33
[38] *See;* Brooks A Suttle, 'Reframing Professionalism: An Integral View of Lawyering's Lofty Ideals' (2011) 61 Emory JJ 161, abstract.
[39] Stephen L Pepper, 'Three Dichotomies in Lawyers' Ethics (with Particular Attention to the Corporation as Client)' (2015) 28 Geo J Legal Ethics 1069, 1131
[40] *Ibid*
[41] *Ibid*
[42] 'Population of solicitors in England and Wales', *Solicitors Regulation Authority* <https://www.sra.org.uk/sra/how-we-work/reports/statistics/regulated-community-statistics/data/population_solicitors> accessed 7 August 2020

on lawyers "to accept troubling cases or satisfy clients' short-term desires at the expense of other values".[43] It is arguably fair to assume that increased competition in the legal services market makes it more difficult for lawyers to raise issues of ethics, or to challenge demands which would be regarded by many as unreasonable. This is especially so in the absence of any guidelines or codes encouraging this type of consultation, through which a lawyer could justify their unease with a specified and legitimised course of action.

It has even been suggested that the pendulum has swung so far in favour of client's interests that lawyers "are increasingly bound by a set of norms and codes of conduct that embody notions of 'social responsibility' that originate from their clients' understanding of their own social responsibility".[44] This is a worrying proposition and flies directly in the face of any hope of the profession maintaining its calling to professionalism, independence, and the a practice of the highest ethical standards. Whelan and Ziv, with an air of pessimistic realism, note how in this neo-liberal age driven by forces of competition and deregulation, the legal profession's claim to professionalism has become "a leveraged business consideration".[45] They see a real risk of lawyer's losing their special privileges with this trend towards being considered as merely service-providers. As noted, Kronman has averred that four features justify the claim that legal practice is a profession. However, the so-called "crisis of professionalism" caused him to conclude that commercialisation, particularly in the larger firms, has compromised each of these features. He believes that many lawyers now view their responsibilities to the public "as a luxury they can no longer afford in the frantic scramble to attract business by appealing to the self-interest of clients".[46]
Putting this analysis in the broader context of the evolution of the role of the lawyer over time, what becomes clear is that a rigid adherence to client loyalty at the expense of broader duties to the community is both harmful to society and to the legal profession itself. Whether there is one fix to the systemic maladies is highly unlikely. It is also unclear what such a fix might look like. Moreover, proposals based on hindsight are inherently blurred by the inaccuracy and emotional nature of memory. On this particular intellectual limitation, Galanter and Palay note that "it is easy to believe that the way it is supposed to be is the way it used to be".[47] It is submitted that a reasonable point of departure is to re-assess our understanding of the lawyer's role in an effort to understand why so many are writing about a crisis, and to attempt to understand the role in light of the new and ever-changing global society.

(ii) The introduction of nuance

There are those who believe that even reaching a consensus on a definition of professionalism may no longer be possible.[48] But what if the fundamental nature of the definition is altered? What if we no longer limit the definition by reference to the circumstances of its original framing? Some lawyers advise multinational corporations while others advise individuals. Others act as government agents and others become judges. This is just the beginning of a long list of positions of influence which lawyers hold globally. Nussbaum notes how the variety of work that lawyers engage in creates possibilities to "set the norms and directions for public life".[49] For Suttle, the concept of professionalism is not only complicated, but also dynamic.[50] He notes how the oft-cited professionalism crisis stems from developments in society generally, and in the practice of law in particular. Many of these developments are irreversible. The cure is not to be found in attempts to reverse the tide, but through a process of oversight

---

[43] Deborah L Rhode, 'Ethics in Practice' in Deborah L Rhode, *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* (Oxford University Press, 2000), 4
[44] Christopher J Whelan and Neta Ziv, 'Law Firm Ethics in the Shadow of Corporate Social Responsibility' (2013) 26 Geo J Legal Ethics 153, 181
[45] *Ibid*
[46] Anthony T Kronman, 'The Law as a Profession' in Deborah L Rhode, *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* (Oxford University Press, 2000) 37
[47] Marc Galanter and Thomas Palay, Chp.9 'Large Law Firms and Professional Responsibility' in *Legal Ethics and Professional Responsibility (Oxford University Press* (1995) 193
[48] Brooks A Suttle, 'Reframing Professionalism: An Integral View of Lawyering's Lofty Ideals' (2011) 61 Emory JJ 161, p164.
[49] Martha Nussbaum, 'Cultivating Humanity in Legal Education', The University of Chicago Law Review, 70(1), Centennial Tribute Essays (Winter, 2003) 265-279, 278
[50] *Ibid.* 205

and management. Thus, Suttle believes that "this problem does not lend itself to a final and permanent solution".[51] His proposal is to view the tensions surrounding professionalism not in terms of a crisis, but rather as "an inherent symptom of continuing social progress".[52]

This theory is line with a parallel concept which views the journey to professional responsibility as the learning of a culture rather than a code of rules.[53] Once a perspective of this kind is realised, ameliorative efforts can hopefully be more effective. The idea of professionalism as a process, which needs to be overseen and managed, arguably provides the most practical basis on which lawyers themselves, and those who make the rules, could begin to establish a mutually acceptable set of ethical duties which are appropriate for the times. Suttle concludes with a call to the bar to remain vigilant, to ensure lawyers are instructed in contemporary aspirational values, and holds hope that these values will retain their relevancy while society and the legal profession evolve.[54] It is not just the range and diversity of the work, but the complexity and also the specificity of the issues called to be advised upon with which justifies an attempt to reenvisage the role of the lawyer.

What then could a new model for legal practice look like? While not attempting to provide a full account of such a model, one can imagine some changes to the current realities of practice which could provide a service more aligned with ethical standards, and thus more beneficial to society, clients, the profession itself, the environment, and so on. Part B will turn to the intricacies of altering or adding to lawyer's duties with this goal in mind.
By way of general overview, one positive development might be to accept something akin to Wald and Pearce's concept of a "relational approach". Not unlike the present discourse, the authors do not attempt to provide a full account of a professional ideology, but rather explore some of the difficulties with a profession they believe has come to be dominated by the "pervasive influence of atomistic self-interest".[55] They note how the atomistic model "has come to celebrate and embody aggressive self-interest as morally desirable".[56] Their proposed solution is to pay more heed to the relationships which exist between people and organisations.[57] This approach has benefits both for those directly involved and for the wider community. For Wald and Pearce, such an approach requires "an ethic of mutual benefit in relationships that includes basic values, such as honesty, trust and cooperation, as well as consideration of the public good".[58] They argue that on a practical level, this approach, when applied to counselling, could allow for a "plurality of values" rather than a single-minded iteration of client loyalty. Moreover, an unconstrained loyalty to clients, which the authors believe to be ineffective, could be replaced by a duty of loyalty which would go beyond the avoidance of conflicts and incorporate "a fiduciary commitment to wise counselling and representation".[59] The feasibility of such an approach will be considered in the next part.

Of course, any positive change needs a realistic catalyst. Arguably, lawyers are best situated to redefine their role. They are not solely beholden to the profit-generating ends of their clients, and as noted, often hold a range of influential positions. Thus, redefining their own role is undeniably a realistic endeavour. In the absence of uniform and widespread change, the uncertain interplay between individual responsibility and a commitment to codified duties, be they national or international, will remain a constant aspect of the daily practice of lawyers.

PART 2: CLIMATE CHANGE AND LAWYER'S DUTIES

---

51 Brooks A Suttle, 'Reframing Professionalism: An Integral View of Lawyering's Lofty Ideals' (2011) 61 Emory JJ 161, 205-206.
52 *Ibid,* 206
53 Anthony T Kronman, 'The Law as a Profession' in Deborah L Rhode, Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation (Oxford University Press, 2000) 29
54 Brooks A Suttle, 'Reframing Professionalism: An Integral View of Lawyering's Lofty Ideals' (2011) 61 Emory JJ 161, 207
55 Eli Wald and Russell G Pearce, 'Being Good Lawyers: A Relational Approach to Law Practice' (2016) 29 Geo J Legal Ethics 601, 629
56 *Ibid,* 613
57 *Ibid,* 616
58 *Ibid*
59 *Ibid,* 630

Widespread action is needed, across sectors and regardless of borders, if something akin to 'Paris Alignment' is to be achieved by those countries committed to doing so. That being the case, we learned recently in a report from the Climate Accountability Institute that just 20 fossil fuel companies caused over one third of all greenhouse gas emissions since 1965.[60] Though since that time many others have turned a blind eye. In the mid-sixties, the impacts on the environment from the burning of fossil fuels were arguably known, or at least becoming known, by those in politics and the energy industry. While one might expect a broader spectrum of moral concern to be held by national governments than private companies, twelve of these top emitters are in fact state-owned.[61] The CAI Report concludes with the following plea:

> It is incumbent on companies that value their social license to operate to respect climate science, manage corporate risks accordingly, commit to reducing future production of carbon fuels and their emissions in alignment with the Paris Agreement pathway under 1.5 °C (net zero by 2050), support the decarbonization of the global economy, and shift their capital investments toward renewables, carbon sequestration, and low-carbon fuels in line with science-based targets.[62]

The introduction to this article closed with a quote from Director of the Centre for Biological Diversity's Climate Law Institute, Kassie Siegel. In it she opined that the lawyers assisting large corporations to continue in their polluting activities, and the ethical considerations governing the profession, "will increasingly come under the microscope".[63] To the extent that lawyers hold various duties to the public as well as to their clients, however contested or uncertain they may be, adherence to certain standards must be a prerequisite to the profession maintaining its status and respect in society. This is particularly so when the consequences of legal advice, in the absence of a radical reassessment of underlying values, are as potentially detrimental as the changing of the climate. This investigation will begin by laying out three foundational criteria on which the subsequent selection of duties will be based. Whether or not a principled ethical framework can be delimited will be considered thereafter.

A. Criteria on Which to Base the Selection of Duties

In all reality, we know for the most part what is required of corporations and states to prevent the devastating effects of climate change, but what is less discussed and understood is what basic values the legal profession ought to operate under to achieve the same end. The following criteria are assumed to be foundational commitments of a lawyer that need little justification. For this reason, they provide a useful starting point in the elucidation of more specific duties. They have also been selected because they are broad enough to cover the whole range of legal practice.

(i) Criterion 1: A commitment to the law

As well as being students, experts, and teachers of the law, lawyers are also officers of the legal system and of the courts. The American Bar Association speaks of lawyer's having a duty to "conform to the requirements of the law", to "use the law's procedures only for legitimate purposes", to "demonstrate respect for the legal system" and to "uphold the legal process".[64] Thinking one step further, Gordon hopes that lawyers will "carry out their public function of recommending improvements in the legal framework that will reduce the danger of their clients' and

---

[60] 'Carbon Majors: Update of Top Twenty Companies 1965 – 2017', Climate Accountability Institute, Press Release (9 October 2019)
[61] *Ibid*
[62] *Ibid*
[63] See; Joshua Gostel, 'Ethics, Energy and the Environment: A Proposal to Hold Attorneys to Certain Standards in Protecting Our Planet' (2017) 30:4 Geo J Leg Ethics 819, 823
[64] 'Model Rules of Professional Conduct: Preamble & Scope: A Lawyer's Responsibilities', American Bar Association <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/> accessed on 22 July 2020

their own subversion of that framework".[65] This responsibility includes the provision of an important societal service as representatives of the legal interests of others. This commitment to the law in the provision of a service is not then a selective one and the legitimacy of the entire body of law must be respected and upheld.

In relation to climate change, the practicalities of this commitment to law are complicated by the fact that international law tends to lack bite. There are of course sacrifices in relation to stringency and specificity which must be made at international negotiating tables. Diplomacy can only go so far when there are 191 voices, as there are parties to the Paris Agreement. That said, while often lacking in substantive sanctions or genuine enforcement mechanisms, international law entails explicit commitments between states at the highest level and, as such, lawyers' various commitments to the law ought to incorporate the treaties, protocols and conventions established at international level. For Walker, the "jurist of the global age must perforce be interested in the rich diversity of transnational law".[66] He refers to Twining's idea of an engagement with a "general jurisprudence" and the study of "legal traditions, cultures, or orders… from the micro-comparative to the universal".[67] While the International Bar Association provides a standard guide of professional rules at this level, national professional rules take primacy. And while client loyalty is recognised as the first and foremost concern of the lawyer, national rules also recognise the importance of professional conduct in legal practice at the international level.[68] Thus, a commitment to the law is a commitment to all applicable law; and in those states who are parties to the Paris Agreement, the commitments therein are a part of the legal framework which lawyers ought to respect and uphold.

(ii) Criterion 2: Independence

As elaborated upon in the first part, lawyer's responsibilities are multi-faceted and have the capacity to require the making of difficult ethical decisions. Finding a path forward that maintains the highest ethical standards can be extremely complex. Crucial to the effective management of this precarious situation is the retention of the profession's independence. Independence underlies many of the privileges which form the basis of lawyers' professional standing. They need to be able to turn down clients' requests for legitimate reasons. They must have the capacity to define their own work because, as discussed, they are officers of the legal system, and thus cannot be blind servants of their clients' interests. Rather they are advisers, advocates, and representatives. The Irish guide to professional conduct puts it as follows:

> Independence is essential to the function of solicitors in their relationships with all parties and it is the duty of solicitors that they do not allow their independence to be compromised. Solicitors should not allow themselves to be restricted in their actions on behalf of clients or restricted by clients in relation to their other professional duties.[69]

Retaining the independence of the legal professional is essential to ensure that lawyers have the capacity to deal with difficult ethical decisions when they inevitably arise. If a lawyer is beholden solely to their client's wishes, any duties which ought to be owed to parties outside of that relationship are subjugated to irrelevance.

(iii) Criterion 3: Honesty

---

[65] Robert W Gordon, 1.3, 'Why Lawyers Can't Just Be Hired Guns', in Deborah L Rhode, *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation'* (Oxford University Press, 2000), 54

[66] Neil Walker, 'The jurist in a global age' (2017) in R van Gestel, HW Micklitz & EL Rubin (eds), Rethinking Legal Scholarship: A Transatlantic Dialogue (Cambridge University Press, 2017) 84, 97

[67] W Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: CUP, 2015) 20-21

[68] See the Irish Law Society's *A Guide to Good Professional Conduct for Solicitors* (3rd Edition) Chapter 11; 'Conduct in International Practice', 81

[69] *Ibid,* 3

An unwavering commitment to the generation of profit has led some corporations to spend huge sums of money on campaigns which skew the truth or proffer false alternatives. We saw this first with cigarette companies, and again with fossil fuel companies. The climate crisis, with an immensely diverse range of causes, impacts and culprits, is particularly susceptible to biased reformulations of self-serving narratives. Whether we expect the codification of professional ethical rules, or are satisfied with the self- motivated moral judgment of lawyers, it is hard to argue against a lawyer who is committed to the truth. Whether codified or not, honesty is an aspect of the lawyer's role which one might presume to be extant given their commitment to justice. Of course, questions as to what an honest lawyer is in all possible circumstances are not clear cut. How and when a lawyer should be permitted to breach client loyalty are extremely difficult questions to answer. The next section will consider whether there might exist specific duties which could override a strict adherence to client loyalty and require certain steps to be taken by a lawyer in circumstances where a client's actions may be harmful to the environment.

B. Duties Consistent with these Moral Values

The three values above: commitment to the law, independence, and honesty have been selected as a starting point for this investigation for three reasons. Firstly, one would have a difficult time finding a lawyer who did not at least claim to hold these values at the fore in every aspect of their work. Secondly, these three values arguably cover a significant breadth of the lawyer's role. They encapsulate the lawyer's standing in relationship to the substance of their work, to the parties they encounter, and to their commitment to justice. And thirdly, in the context of climate change, one can hardly deny that widespread commitment to these values from corporations, state bodies, and their lawyers alike would amount to welcome progress in the global effort to protect the environment. This section will analyse the substance of a number of duties which seem to be consistent with these values and may provide a basis for an environmental element of ethical legal practice.

(i) Duty 1: A reformulated and limited duty of confidentiality

As has become quite clear, the prevailing idea in legal practice and in codes of ethics is that client loyalty is paramount. Of course, lawyers must ensure the trust of their clients, and to do this, they must be honest about the private nature of the relationship. But as has been seen, a lack of nuance inevitably leads to difficulties. Disputes which arise in this context tend to revolve around questions as to whether a client's confidence should be breached in the interest of some other good. It has been argued that the elevation of confidentiality from a legal right held by clients to a moral obligation placed on lawyers "created a conflict between the lawyer's duty of loyalty to the client on the one hand and his duties of candour and fairness on the other".[70] Patterson believes the new absolute concept of loyalty, which was motivated in large part by money, became logically corrupt with the creation of this exclusive moral obligation.[71] The hope was that by serving the client's interests, justice too would be served.[72] But we have seen that this has not been the case.

The first part noted some failings underlying the effectiveness of codes of ethics in formulating the parameters of this duty. The American Bar Association accepts that "attorney-client privilege is one of the more complicated and nuanced areas of an attorney's practice".[73] Yet, ethical codes are in dire need of nuance and have been for some time. Just over forty years ago, it was stated that "the ABA's attempts to promulgate and enforce guidelines for professional behaviour in the client misconduct dilemma have been resoundingly criticised as confusing and

---

[70] L Ray Patterson, 'Legal Ethics and the Lawyer's Duty of Loyalty' (1980) 29 Emory L J 909, 915
[71] *Ibid,* 955
[72] Ross Cranston, Chp.1 'Legal Ethics and Professional Responsibility' in *Legal Ethics and Professional Responsibility* (Oxford University Press, 1995) 33
[73] Doug Gallagher and Manasi Raveendran, 'Attorney-Client Privilege for In-House Counsel' (2017) *Landslide*, American Bar Association, 10(2)

ethically unsatisfactory".[74] With the ongoing absence of detailed and effective guidelines or legislative rules, one might hope that an ethical duty might evolve naturally in practice.

Moreover, one might be forgiven for assuming that such lessons might be learned in time. In 2006, information was leaked about the destruction of documents by a law firm which would have been extremely damaging to their client, British American Tobacco, in what has been labelled the "McCabe Tobacco Litigation".[75] In writing about this litigation, Parker et al speak of lawyers as the gatekeepers of justice and make a connection between the classic situation of a whistleblower and the ethically challenging situations which lawyers often find themselves in. They believe lawyers are "justified, and indeed obligated, to whistleblow where they have information about clients subverting the administration of justice".[76] They note how whistleblowing has become an essential tool for ensuring the accountability of public institutions, yet lawyers lack the same protections.[77] Large corporations are continually gaining power and influence. Their capacity to damage the environment enhances alongside this growth. But it is not fair to expect lawyers to disclose information if the rules are not in place which detail how they can do so without repercussions; apart from the expected loss of business with which they had serious reservations about in the first place.

In the United States, engineers, physicians and architects are all encouraged to adhere to the principles of sustainable development in their respective codes of ethics in order to protect the environment for future generations.[78] Lawyers, who by reason of their training and the content of their work, understand the rules and principles behind whistleblowing better than most, could go one step further and call for the incorporation of disclosure rules into the practice of law. Disclosure requirements in relation to climate change and the environment could be realised either by way of amendments to ethical codes, or through the introduction of legislation. Requirements of this nature already appear in codes which relate to crimes and fraudulent activity. The harm that will occur as a result of climate change has been noted and cannot be understated. It is submitted that these exceptions to the duty of confidentiality should include incidences of environmental harm in circumstances where the causes are clear, as are the culprits.

Lininger suggests that lawyers be permitted to disclose imminent environmental harm, whether criminal or not; that they be encouraged to engage clients in dialogue related to the environmental aspects of their activities; and that third-party harm be reconceptualised to include protection of the environment from professional misconduct.[79] The third of these proposals is aspirational and may be a stretch given the usual step-by-step nature of regulatory development. Moreover, there tends to be a greater emotional response when the harm discussed is that felt directly by people, even if this is due to environmental changes. The first of Lininger's proposals is essentially what is being suggested here; and the second will be dealt with shortly.

If one accepts the necessity, or at least the benefits, of the introduction of environmental disclosure rules, the only remaining question is whether non-binding codes or guidelines would be a sufficient medium for conveying this message. We saw the introduction in 2017 of voluntary disclosure recommendations by the Taskforce on Climate-related Financial Disclosures (TCFD).[80] This report is welcome and provides helpful guidance for companies on how to increase their transparency in relation to climate risk. Ultimately however, there is no obligation on any

---

[74] Maureen H Burke, 'The Duty of Confidentiality and Disclosing Corporate Misconduct' (1981) The Business Lawyer, 36(2), 230, 245
[75] C Parker, S Le Mire and A McKay, 'Lawyers Confidentiality and Whistleblowing: Lessons From the McCabe Tobacco Litigation' (2017) Melbourne University Law Review, 40(3) 999
[76] *ibid* p1048
[77] *ibid* 1049
[78] Joshua Gostel, 'Ethics, Energy, and the Environment: A Proposal to Hold Attorneys to Certain Standards in Protecting Our Planet' (2017) 30 Geo J Legal Ethics 819, 828
[79] Tom Lininger, 'Green Ethics for Lawyers' (2016) BCL Rev. 61, 77
[80] *Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures*, (Task Force on Climate-related Financial Disclosures, June 2017) accessed at https://www.fsb-tcfd.org/wp-content/uploads/2017/06/FINAL-2017-TCFD-Report-11052018.pdf on 23 July 2020.

company to partake. The TCFD's 2019 Status Update reported that while disclosure of climate-related financial information had increased since 2016, the level was insufficient given the speed at which changes are needed to limit the increase in global temperatures. It notes broadly that "more companies need to consider the potential impact of climate change and disclose material findings".[81] This plea is vague, though this is unsurprising in light of the voluntary nature of the work of the TCFD.

By implementing changes to legal confidentiality of this nature through legislation, the prospect of compliance is drastically increased.[82] Gostel notes that other disclosure laws already exist with the aim of protecting third parties who could be harmed by the actions of a client.[83] He adds: "because climate change can lead to the harming of innocent people, it is not too much of a stretch to create a law to help prevent this harm".[84] Climate change is no longer a future issue, something which the law often struggles to provide for. The impacts of climate change are already being felt. The protection of clients' privacy needs to be weighed against this reality.

(ii) Duty 2: Wise counselling and representation

The first criterion for the selection of duties was a commitment to the law, a trait which one would reasonably expect of all lawyers. This idea can be taken to a number of different extremes, each of which can lead to varying formulations of a resulting duty. If this commitment is seen solely as a commitment to upholding the word of the law, then a lawyer's duty may only be deemed to go as far as ensuring the lawfulness of a client's conduct and relieve the lawyers of a duty to consider the wider parameters. However, as has been submitted, lawyers are the ideal candidates to make determinations as to what a wrongful usage of the law might look like. This more expansive responsibility, if reasonably held, could oblige lawyers to consider the actions of their clients, not on a strict understanding of the letter of the law, but with a fuller consideration as to what the intended use of the law is, as well as what the repercussions of its misuse might look like. Ultimately, how the client chooses to proceed is at their discretion. However, a lawyer may find themselves in a situation where they have to choose between honesty and independence or proceeding with a lower standard of ethics and deferring to the client's proposals. While not seeking to establish an obligation, the American Bar Association's guidance on this clearly stems from a holistic conception of a lawyer who can and ought to see the fuller picture, and ultimately, is willing to convey this wider reality to their clients. They state that in giving advice, "a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation".[85] Engaging in dialogue with a client is one obvious and relatively simple potential restraint on the wrongful use of the law. The relative interests of all parties who may be affected can be discussed. Moreover, as Pepper notes, a dialogue of this kind is useful whether or not the client changes their mind, as "it enlivens and enriches our shared moral experience and understanding, while a purely legal and material perspective may well diminish and impoverish it".[86] The benefits seem obvious, but in the absence of clear guidelines or duties, it is not surprising that these kinds of discussions are unlikely in practice. Guidance of this kind already exists in relation to human rights. The Law Society of England and Wales, in relation to advising clients on the human rights impacts of their activities, states, "it is well established that where in the course of taking instructions a solicitor learns of facts which reveal the existence of obvious risks, the solicitor is required to do more than merely advise within the strict

---

[81] *Task force on Climate-Related Financial Disclosures: Status Report,* (Task Force on Climate-related Financial Disclosures, 2019) accessed at https://www.fsb-tcfd.org/wp-content/uploads/2019/06/2019-TCFD-Status-Report-FINAL-053119.pdf on 23 July 2020

[82] Joshua Gostel, 'Ethics, Energy, and the Environment: A Proposal to Hold Attorneys to Certain Standards in Protecting Our Planet' (2017) 30 Geo J Legal Ethics 819, 836

[83] *Ibid*

[84] *Ibid,* 830

[85] American Bar Association (2020), *Text of the Model Rules of Professional Conduct,* ABA, accessed at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor/ on 26 July 2020

[86] Stephen L Pepper, 'Three Dichotomies in Lawyers' Ethics (with Particular Attention to the Corporation as Client)' (2015) 28 Geo J Legal Ethics 1069, 1132

limits of the retainer".[87] It is submitted that such a duty ought to extend to the environmental risks related to the conduct of a client.

(iii) Duty 3: Due diligence and the making of ethical assessments

The third and final duty is one which has the potential to enhance the efficacy of the previous two by better informing lawyers as to what issues may require discussion with a client and what information might need to be disclosed. Again, a comparison to human rights may provide some guidance. In 2019, the FAO published a report examining the responsibilities of lawyers in relation to human rights impacts on tenure rights holders when advising on agricultural investments. The Report drew from the United Nations Guiding Principles on Business and Human Rights and from relevant FAO Guidelines[88] and states the following:

> Law firms will wish to be able to demonstrate that they operate due diligence internally as well as supporting their clients to conduct appropriate due diligence. Due diligence is an ongoing process to enable businesses to 'know and show' that they are addressing their human rights impacts through assessing impacts, taking integrated action in response to identified impacts, and tracking and monitoring, and communicating the company's efforts to address its human rights impacts.[89]

Thus, in the human rights sphere, this undertaking is one which exists within the lawyer-client relationship, and also as part of a firms own ethical practice. The dual aspect of this duty makes the codification of specific rules a difficult task. Moreover, policies and processes will understandably need to vary according to a firm's size, their circumstances, and the nature of the activity being assessed. Human rights due diligence in the context of tenure rights is broadly noted to involve mapping impacts by conducting surveys; reviewing national laws; and consulting with and ensuring the participation of all potentially affected stakeholders.[90] This process arguably does not translate easily to activities which may pose environmental risks. Firstly, it is extremely difficult to single out a set of people who suffer from the effects of climate change as caused by one particular harmful activity. Secondly, a regulatory review would need to be broader, and consider what international commitments the state in question may have. Whether such commitments could extend to private activities must also be of concern. The mapping of impacts, however, is something that already occurs in environmental law in the form of Environmental Impact Assessments (EIAs), though the applicability of this process to climate change impacts is not entirely clearcut.[91]

Sok et al examine the suitability of climate change issues to the normal EIA processes. In doing so they surveyed members of the International Association for Impact Assessment. They note that, from one perspective, greenhouse gases could be treated like "any other pollutant or cumulative environmental effect".[92] However, another perspective might take into account the seriousness of climate change, and thus hold that EIAs ought to include specific requirements related to climate change issues. From the surveyed members, a majority believed that guidelines and regulations were important at all stages of the EIA process.[93] This is not something that we have seen to date in relation to climate change. Sok et al conclude with a "call to arms" on behalf of EIA practitioners in circumstances where formal regulations and higher-level policies may be too slow in the making. In the absence of these formalities, individual action provides the only hope.

---

87 Solicitors Regulation Authority, *Guide to Professional Conduct*.
88 UN FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT)
89 *Ibid*, vi
90 *Ibid.* 39
91 Vong Sok, Bryan J. Boruff & Angus Morrison-Saunders, 'Addressing Climate Change Through Environmental Impact Assessment: International Perspectives from a Survey of IAIA Members' (2011) Impact Assessment and Project Appraisal, 29(4) 317, 318
92 *Ibid*
93 *Ibid,* 324

C. A Normative Framework of Ethics

The present analysis, while initially descriptive, also intends to inform evaluative and normative considerations about the lawyer's role, and how it ought to evolve. This requires more than theoretical arguments about the lawyer's place in society and must endeavour to provide cogent justification as to why certain ethical practices are good and ought to be considered as duties. Hopefully, some insight into potential improvements can be gleaned from this. Moreover, the standard of duties framing the normative framework must fit with the descriptive concepts of the lawyer's role. As well, it is hoped that a normative framework based on re-aligned ethical duties can be justified by the changes which have occurred in the realities of legal practice over the last number of decades.

The present argument is essentially that certain modifications to our understanding of the lawyer's role in society, and to rules around confidentiality, wise counselling, and due diligence, could benefit all interested parties, including broader society. While there may not yet exist specific duties on lawyers to consider the protection of the environment in their advice to clients, some of the foundational values on which the profession is based arguably justify a renewal of some of the ethical cornerstones of legal practice. It is hoped that the rules governing or guiding lawyer's duties can be clarified and updated to appreciate the new ethical complexities of the practice of law in modern society, as well as the many relationships and affected parties therein. Ultimately, lawyers are best-placed and best-suited to steer the course of the profession.

CONCLUSION

As the opening comment from Walker notes, globalisation has created and amplified both commonalities and differences in respect of interests, identities, values and law. It has also birthed a cultural acceptance of blind economic growth and an ethic of consumption. The most recent IPCC report tells us that 'each of the last four decades has been successively warmer than any decade that preceded it since 1850'.[94] The causes of climate change are no longer blurred into obscurity by those who benefit from widespread ignorance. They are well-known and well-expressed. Possible cures however are multitudinous and uncertain. Success is required on every front. This problem is a global commonality, although its impacts will be felt first and foremost by vulnerable communities. Differences, be they of opinion or action, must be resolved and aligned.

Lawyers have always held positions of responsibility. They hold themselves to high ethical standards and society expects the same. Clearly, there are duties expected of lawyers which can and do relate to situations where a client's actions may have consequences for the climate. However, it is submitted that in their traditional iterations, as vague and unspecific guidelines set out in national and international codes of conduct, these duties cannot ensure that key values underlying the profession are upheld. A number of these shortcomings have been discussed. It is submitted that the creation of legislative duties, in areas such as disclosure, consultation and due diligence would be beneficial, not only to clients and wider society, but also to lawyers, by providing structural guidance and legislative support for their decisions. In the absence of legislation, the refinement of codes of ethics with the introduction of an element of nuance would be welcome. The IBA's Climate Crisis Statement is a positive development in this regard but, in practice, it is national codes which hold greater weight.

The aim has been to shed light on some of the problems that go along with a failure to acknowledge the need for the legal profession to evolve. In the absence of rules, lawyers themselves have the position and power to determine the responsibility which they will bear, and thus, the role which they will inhabit. A re-evaluation of

---

[94] IPCC, 2021: Summary for Policymakers. In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S. L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M. I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T. K. Maycock, T. Waterfield, O. Yelekçi, R. Yu and B. Zhou (eds.)]. Cambridge University Press. In Press, SPM-5, para. A.1.2 (accessed at https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf on 14 September 2021)

ethical practices can hopefully be expected to motivate positive change, or at a minimum, motivate discussion which could lead to such change.

THE JUDICIAL REVIEW OF EMPLOYERS' DECISIONS: ABOUT THE TRANSFERABILITY OF PUBLIC LAW TO PRIVATE LAW IN THE EMPLOYMENT CONTEXT AS A LEGAL COMPARISON BETWEEN UNITED KINGDOM AND GERMANY

Benedict Seiwerth[1]

ABSTRACT

The application of proportionality as a test in English employment law to review employers exercise of discretion is increasingly discussed. Since in German law proportionality is well established in both public law as well as employment law, this article aims to contribute to the English debate via a comparison between both jurisdictions.

This article will explore three issues: first, how the public/private divide is perceived in each jurisdiction and thus forms a potential obstacle to the translation of public law concepts into the employment field; secondly, the article will assess how the considerations on appropriate judicial restraint, by which the German labour courts are guided in the flexible formulation and application of proportionality in individual employment cases (so-called 'deference factors'), compare to those deference factors recognised by English courts. This analysis will be carried out using the example of occupational pensions, bonuses and work instructions/ relocations; thirdly, whether the implied term of 'trust and confidence' provides a sufficient basis for a proportionality test in English employment law.

The article will argue firstly that, despite the differences between both legal systems, the courts of both jurisdictions mainly consider the same deference factors in a similar manner, which allows to carry over considerations and experiences made by German labour courts. Secondly, that the wage-work bargain is apt to form a (further) deference factor for the English courts as well, which could justify proportionality rooted in the intentions of the parties. Thirdly, that the implied term of mutual trust and confidence is an appropriate basis for proportionality tests, which can be formulated and applied in a flexible way, because the purpose of many discretionary powers requires that employers, when exercising discretion, must take into account the interests of employees as well — for which proportionality is the best tool.

[1] LLM in Labour Law and Corporate Governance at University of Bristol. PhD candidate at University of Tuebingen and currently an Associate at Baker McKenzie.

1. Introduction

Employment relationships have, inter alia, two features: first, the incomplete nature of employment. Employment contracts are often agreed for an indefinite time. As the employee's role might evolve, and the employer's demand change, many particulars cannot be foreseen and regulated expressly *ex-ante*. Such particulars may even concern essential elements of the bargain (e.g. pay, place or hours of work). To address the 'incompleteness problem', employers are often given or reserve contractual discretionary powers in the employment contract. However, there is a risk inherent in every power that it may be abused, misused or at least used opportunistically, which becomes even more significant when one considers the second feature of an employment relationship: employers' unequal bargaining power relative to their employees.[2]

Since *Braganza*, the established standard of contractual review on the outcome of a decision is whether an employer did not reach a decision which no reasonable decision-maker could have reached (*Wednesbury* reasonableness).[3] A mere glance at the formulation of the test indicates the enormous margins of discretion of the employer. At the same time, as *Transco* illustrates, the protection provided by statutory rights as an alternative means is only fragmentary.[4] As a result, decisions made by employers may be reasonable and thus valid, but nonetheless be far from legitimate employee expectations or, at least, contractual fairness.

By applying *Wednesbury*, a public law test, *Braganza* acknowledges parallels between employers and public bodies in the exercise of power over a person. Drawing on this, this article will examine whether and how proportionality, as a more sensitive test, is adequate to inspire a development that leads to more intensive contractual review as a way of securing fairness in the exercise of discretionary powers. Since in German law proportionality is established in both public law and in the review of contractual powers in the employment contract, this examination shall be carried out as a comparison between both legal systems. To this end, the article will assess the prospects for a doctrine of proportionality in English employment contracts based upon the German experience. Since both legal systems differ in many regards, the limitations on 'transplantation' in comparative method will be assessed. In particular, the article will explain how proportionality as a ground for judicial review in English public law is less well-established than its position in German public law. With these issues in mind, the article will explore three issues: first, how the public/private divide is perceived in each jurisdiction and thus forms a potential obstacle to the translation of public law concepts into the employment field (3.); secondly, the article will assess how the considerations on appropriate judicial restraint, by which the German labour courts are guided in the flexible formulation and application of proportionality in individual employment cases (so-called 'deference factors'), compare to those deference factors recognised by English courts. This analysis will be carried out using the example of occupational pensions, bonuses and work instructions/ relocations (4.);[5] thirdly, whether the implied term of 'trust and confidence' (referred to as "TC" hereafter) provides a sufficient basis for a proportionality test in English employment law. The article will conclude by suggesting that the flexible German approach may thus provide guidance to establish proportionality as a ground for contractual review in English employment law as well (5).

2. Preliminary: Potential Pitfalls

---

[2] Würdinger, M., in 'MÜNCHENER KOMMENTAR ZUM BGB (8th ed.)' (2019), [Section 315 BGB] para 63

[3] *Braganza v BP Shipping Ltd and another* [2015] UKSC 17, [2015] ICR 449, 457 [19] (Baroness Hale), 460 [30] (Lord Hodge), 476 [103] (Lord Neuberger), referring to *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223, 233-234; application of *Wednesbury* reasonableness recently confirmed by *IBM United Kingdom Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212, [2018] 1681

[4] *Transco Plc (formerly BG Plc) v O'Brien* [2002] ICR 721-728

[5] In German understanding, a relocation is a subset of the general term of 'work instruction'. When an employer relocates an employee, the employer simply issues an instruction specifying the place where the work is to be performed. In more detail see below in Ch 4.2.1

As made clear at the outset, this article will demonstrate that proportionality does not have to be a peculiarity of German employment law. However, although the methodologies applied in comparative law are generally recognised as a *sui generis* academic discipline,[6] it is important to clarify what expectations can be placed on how comparative methods is used in this piece. To this end, this section intends to establish the purpose of comparisons made between English law and German law.

Kahn-Freund identified three purposes of comparative law for the use of legal reform.[7] In his view, foreign law could first be considered with the aim to unify legal systems; secondly, to give legal effect to social change taking place in a foreign country in a similar way to that in one's own country; and thirdly, to promote social change in one's own country, which foreign law is 'designed either to express or to produce'.[8]

When it comes to proportionality limiting the employer's power over its employees and thus serves to protect the latter, it cannot be said with certainty whether its establishment in English law would keep abreast of social changes already occurring or whether its establishment would facilitate social change. Either way, it is recognised that employment relationships are characterised:

> 'by an imbalance of economic power. Recognising the vulnerability of employees to exploitation, discrimination, and other undesirable practices, and the social problems which can result, Parliament has long intervened in those relationships […] rather than leaving their rights to be determined by freedom of contract.'[9]

Hence, the endeavour of this article can cautiously be categorised as pursuing the second purpose identified by Kahn-Freund, namely to adapt common law to the social changes already happening.

However, this cannot be achieved by a mere 'transplantation' of proportionality into English law, as understood in German law. Because, as Kahn-Freund put it in a nutshell, even though:

> 'all purely intellectual obstacles to assimilation are, in practice, surmountable; the real obstacles are to be found in the widely differing histories, political and social structures of European countries.'[10]

At this point, one might be inclined to refer to the shared history and common developments between Germany and the United Kingdom since the latter joined the European Union in 1973;[11] and to highlight those legal changes that the United Kingdom has undergone driven by the vision of a social Europe.[12] However, one cannot conceal

---

[6] Zweigert, K., & Kötz, H., 'Introduction to comparative law (3th ed. reprinted)' (2011), The Functions and Aims of Comparative Law, 13

[7] Kahn-Freund, O., 'On Uses and Misuses of Comparative Law' (1974), The Modern Law Review, 37(1), 1-27

[8] *Ibid*, 2

[9] *Regina (UNISON) v Lord Chancellor (SC(E))* [2017] 3 WLR 409, 417[6]

[10] Kahn-Freund, O., 'Common Law and Civil Law: Imaginary and Real Obstacles to Assimilation' (1978), in Cappelletti, M., 'New Perspectives for a Common Law of Europe' (1978), 137, 163-4

[11] Back then, until the Maastricht Treaty of 1992, the European Community as its predecessor.

[12] Cf. Davies, A.C.L., 'Perspectives on Labour Law (2th ed.)' (2009), 'The UK joined the EC in 1972. Although the Community began life as an economic union, its role in labour law has increased over time. During the 1980s and early 1990s, Community law was a source of new developments in workers' rights against their employers'.

Or the 'Good Work: The Taylor Review of Modern Working Practices' (July 2017), p 107, available at: https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices: 'The principles that underpin the employment law framework we use today have developed over decades – a combination of domestic policy intervention, *European legislation* and a plethora of case law'.

that proportionality as a ground for judicial review is less well-anchored in English law than in German law, due to historical and political differences.

The German constitutional law, referred to as Basic Law (Grundgesetz — GG), is largely shaped by experiences made during the cruel Nazi regime.[13] Correspondingly, human dignity and the right to personal freedom are at the heart of the German constitution.[14] Constitutionally, people enjoy fundamental rights which they cannot be deprived of.[15] In this vein, the Federal Constitutional Court ruled that the principle of proportionality arises from the very nature of fundamental rights, and — as an element of the German principle of substantive *Rechtsstaat*[16] expressing that all three powers are bound by law and justice — has constitutional status.[17] Proportionality seeks to safeguard the position that the actions of the state do not intervene in fundamental rights more than necessary. To this end, the general German understanding of proportionality works on four limbs:

> 'A decision must pursue a legitimate aim (a), be appropriate (b), be necessary (c) and there must be an adequate relationship of proportionality between the benefits resulting from achieving the legitimate aim on one hand and the impact on the interests affected on the other ('narrow proportionality')'[18]

The significance of proportionality as a ground for judicial review is different in English public law. The English constitution is originally not based on the idea of fundamental rights but on the idea of *residual freedom* according to which citizens may do or say whatever they want, unless it is so prohibited by law.[19] The requirement that

---

For an interesting overview of the Labour Party's relationship to the EU single market and its prerequisite of a social Europe, see: Cole, J., 'UK Labour and the EU Single Market: 'Social Europe' or 'Capitalist Club'?' (2020), The Political Quarterly, Volume 91, Issue 2, 430-441.

13 Whittaker, S., & Zimmermann, R., 'Good faith in European contract law: surveying the legal landscape' (2000), in Whittaker, S., & Zimmermann, R., 'Good Faith in European Contract Law' (2000), p 22.

14 This is reflected in the fact that both values are laid down at the very beginning in Article 1 and 2 of the Basic Law.

15 Article 19 (2) GG: 'In no case may the essence of a basic right be affected'.

16 *Rechtsstaat* can be translated as 'state under the rule of law'.

17 Federal Constitutional Court of 19 October 1982 – 1 BvL 34/80, 1 BvL 55/80, in NEUE JURISTISCHE WOCHENSCHRIFT [1983] 559, p 559.

The principle of substantive *Rechtsstaat* means that the German constitution embodies certain values to all of which the legislature, executive and judiciary must have regard to when exercising their task. Freedom as protected by German Basic Law therefore does not mean unlimited freedom, since the constitution itself is rampart trying to prevent a further regime like the Nazi one. Böckenförde, a scholar and former member of the Federal Constitutional Court, describes substantive *Rechtstaat* as follows in Böckenförde, E.W., 'State, Society and Liberty' (1992), p 67:

'The logic of thinking about values and justice demands that the constitution conceived along the lines of the material *Rechtstaat* should lay claim to an absolute validity extending to all spheres of social life. […] It no longer guarantees liberty unconditionally by way of formal legal demarcation; it does so only *within* the fundamental system of values (*Wertgrundlage*) embodied in the constitution'.

18 Federal Constitutional Court of 27 February 2008 – 1 BvR 370/07, in NEUE JURISTISCHE WOCHENSCHRIFT [2008] 822, p 828-829, para 218 and 227.

This understanding similar to the 'structured test' described by Lord Neuberger in *Lawrence and another v Fen Tigers Ltd and others (No 3) (SC(E))* [2015] USKC 50, [2015] 1 WLR 3485, p 3497, para 31; and as explained in Forsyth, C.F., & Wade, W., 'Administrative Law (11th ed.)' (2014), p 307 and in Elliot, M., & Robert, T., 'Public Law (3th ed.)' (2017), p 543.

However, the respective first limbs are different to the German understanding, as German courts do not ask whether an objective is 'sufficiently important' but 'legitimate'. An objective is usually 'legitimate' if it is consistent with the purpose of the legislation on which the administrative decision is based.

19 *Attorney General v Guardian Newspapers Ltd (No.2)* [1988] 2 W.L.R. 805, p 869; or as the former Prime Minister John Major put it even in 1997: 'We have no need of a Bill of Rights because we have freedom', as cited in Lord Irvine of Lairg, 'The Lord Chancellor, The Development of Human Rights in Britain under an Incorporated Convention on Human Rights, Law Society Hall, London, 16 December 1997 (The Tom Sargent Memorial Lecture).

Historically, the protection of fundamental rights is warranted only fragmentary. One example is the Habeas Corpus Act 1679 requiring a court to examine the lawfulness of a detention and therefore prevent unlawful or arbitrary imprisonment, Farbey, J., & Sharpe, R.J., & Atrill, S., 'The Law of Habeas Corpus' (2011), p 16.

freedom may only restricted by law is one aspect of the *rule of law* coined by Dicey.[20] In this respect, the English *rule of law* is comparable with the German principle of *Rechtsstaat*. However, the *rule of law* does not require a floor of rights.[21] In theory, parliament, due to its *sovereignty*, has unlimited legislative authority and does not need to respect fundamental rights.[22] As parliament is superior to the judiciary, the traditional understanding of the role of the courts is limited to supervision that public authorities do not overstep the limits of their powers (jurisdiction) given by parliament (*ultra vires* doctrine).[23] Where courts want to review a public act on grounds of abuse, they cannot invoke fundamental rights or values to justify their own jurisdiction unless parliament has enacted them, as in the Human Rights Act 1996 (HRA).[24] Outside the scope of such express rights, courts justify their review on the outcome of public decisions by the implicit intent of parliament that no delegated power shall be used irrational (*Wednesbury* unreasonableness).[25]

Indeed, the concept of irrationality or unreasonableness evolved over time and became more protective of citizens, which is demonstrated by the so-called *sub-Wednesbury* test, according to which a public decision intensely interfering with fundamental rights is subject to a 'most anxious scrutiny':[26] A decision which encroaches on the rights of a citizen is unreasonable if there is no important public interest in the restriction of the right. In such cases, mere plausibility is not sufficient. In addition, there has been an impetus to develop proportionality as a general common law test in English public law.[27] However, according to the European Court of Human Rights, the *sub-Wednesbury* test — preferred to a separate test of proportionality[28] — is less intense than a proportionality test.[29] As a result, despite its relevance to cases concerning fundamental rights and European law,[30] proportionality is not yet formally recognised as a general common law test replacing the *Wednesbury* standard, but part of an ongoing vigorous debate.[31] There is, however, a silver lining: in the more recent case of *Pham v Secretary of State*, where a citizen appealed against the deprivation of his citizenship, the UK Supreme Court

---

[20] Dicey, A.V., 'Introduction to the study of the law of the constitution (1885)', p 167-168; the principle of legality was articulated first in *John Entick, Clerk v Nathan Carrington and Three Others, Messengers in Ordinary to the King* (1765) 2 Wilson, K. B. 275 95 E.R. 807-818, holding a raid on a citizen's home as unlawful due to the lack of statutory or common law powers.

[21] Forsyth, C.F., & Wade, W., 'Administrative Law (11th ed.)' (2014), p 20.

[22] *Ibid*, p 19. Jean Louis Delolme describes the sovereignty of parliament somewhat smugly as: 'It is a fundamental principle with English lawyers, that Parliament can do everything but make a woman a man, and a man a woman', as cited in Dicey, A.V., 'Introduction to the study of the law of the constitution (1885)', p 39.

[23] Forsyth, C.F., & Wade, W., 'Administrative Law (11th ed.)' (2014), p 27; critical about the *ultra vires* doctrine: Craig, P., 'Competing models of judicial review' (1999), Public Law, Aut, 428-447; Craig, P., 'Ultra Vires and the Foundations of Judicial Review' (1998), The Cambridge Law Journal, Volume 57, Issue 1, 63-90; Arden, M.D., 'The Changing Judicial Role: Human Rights, Community Law and the Intention of Parliament" (2008), 67 The Cambridge Law Journal, Volume 67, Issue 3, 487-507.

[24] Forsyth, C.F., & Wade, W., 'Administrative Law (11th ed.)' (2014), p 27.

[25] This is illustrated by the fact that proponents of the so-called *ultra vires* doctrine explain the judicial review on ground of, say, irrationality as being justified by the implicit will of parliament that no decision should be taken irrationally, cf. Forsyth, C.F., & Wade, W., 'Administrative Law (11th ed.)' (2014), p 28-29.

[26] *Regina v Ministry of Defence Regina, ex p Smith* [1996] ICR 740; *R v Secretary of State for the Home Department, ex p Bugdaycay* [1987] AC 514.

[27] *Council of Civil Service Unions and others v Minister for The Civil Service ('GCHQ')* [1985] ICR 14, p 37, para E: 'That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice'.

[28] *Regina v Secretary of State for the Home Department, ex p Brind* [1991] AC 696, p 722: 'As Watkins L.J. pointed out, acceptance of "proportionality" as a separate ground for seeking judicial review rather than a facet of "irrationality" could easily and speedily lead to courts forgetting the supervisory nature of their jurisdiction and substituting their view of what was appropriate for that of the authority whose duty it was to reach that decision'.

[29] *Smith and Grady v UK* (2000) 29 EHRR 493.

[30] Following the ECtHR decision *Smith and Grady* (2000) 29 EHRR 493 and the enactment of the HRA 1998, in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] ICLR 532-549, the court recognised proportionality as the relevant test for cases concerning Convention Rights.

[31] Lewans, M., 'The Legacy of the Diceyan Dialectic.', in 'Administrative Law and Judicial Deference' (2016), p 73-80; Sales, Sir P., 'Rationality, Proportionality and the Development of the Law' (2013), 129 Law Quarterly Review 223, p 224; Leigh, I., 'The standard of judicial review after the Human Rights Act', in Fenwick, H., & Masterman, R., & Phillipson, G., 'Judicial Reasoning under the UK Human Rights Act' (2007), p 174-178: Thomas, R., 'Legitimate Expectations and Proportionality in Administrative Law' (2000), p 77.

suggested — *obiter* — that the proportionality test might become more widespread in the domestic law.[32] In this spirit, Lord Sumption doubted

> 'whether it is either possible or desirable to distinguish categorically between ordinary and fundamental rights, applying different principles to the latter. There is in reality a sliding scale, in which the cogency of the justification required for interfering with a right will be proportionate to its perceived importance and the extent of the interference.'[33]

But how should one deal with the remaining differences between developments in Germany and the UK? First, recognising the fact that there are degrees of transferability, Kahn-Freund uses a metaphor according to which a transplantation might be of a 'mechanic' or an 'organic' nature.[34] While some legal institutions are linked closely to their original political and historical environment (organically), others are linked more loosely (mechanically) and thus easier to compare. Second, Teubner argues that institutional transplants are 'irritating' in two dimensions. Foreign law, so Teubner, impacts the domestic legal discourse but also the social discourse the domestic law is linked to.[35] Teubner concludes that both 'irritating' effects lead to an individual development within the domestic idiosyncrasies.

Drawing on this, this article will not try to 'transplant' the German understanding of proportionality into English law, as a 'walled garden'. Instead, this article can only provide impulses for the domestic legal discourse around a more sensitive judicial review in English employment law as already conducted. To this end, this article focuses on the comparison between the deference factors considered by English courts and German labour courts for two reasons: first, the individual deference factors are easier to compare than a 'ready-made system' of proportionality that, in its concrete form, is closely linked to the German legal and social discourse. To put it like Kahn-Freund, proportionality, as concretely applied in German law, is 'organic' and thus runs the risk of repulsion, while the deference factors are rather 'mechanical' and thus easier to carry over. Finally, deference factors — as we will see — are a vital part of the domestic legal discourse on a more sensitive judicial review in English employment law.[36] This fact increases the chance that considerations and experiences made by German labour courts may contribute to the English discourse — that these considerations are fruitfully 'irritating'.

3. Perception of the 'Public-Private Divide'

3.1 German Law

In German law, administrative law is generally perceived as a special law empowering the state to exercise power over its citizens and is therefore separated from private law.[37] Historically, according to Otto Mayer, a formative figure for German administrative law who lived during the monarchy of the German Empire,[38] an administrative act is a decision made by the authorities determining what is right for 'the subordinate' in the individual case.[39] This idea of subordination is still applicable today. Section 40 (1) Code of Administrative Court Procedure (Verwaltungsgerichtsordnung — VwGO) confines the jurisdiction of administrative courts to 'public-law

---

[32] *Pham v Secretary of State for the Home Department (Open Society Justice Initiative intervening)* [2015] UKSC 19, [2015] 1 WLR 1591-1630.

[33] *Ibid*, p 1626, para 106.

[34] Kahn-Freund, O., 'On Uses and Misuses of Comparative Law' (1974), The Modern Law Review, Volume 37, Issue 1, 1, p 5-6.

[35] Teubner, G., 'Legal Irritants: Good faith in British Law or How Unifying Law Ends Up in New Divergences' (1998), The Modern Law Review, Volume 61, Issue 1, 11, p 32.

[36] Cf. Ch 4.1. ('Deference Factors in English Employment Law'), p 14.

[37] Hufen, F., 'Verwaltungsprozessrecht (11th ed.)' (2019), § 11 Verwaltungsrechtsweg und zuständiges Gericht, para 14.

[38] *German Empire* describes in retrospective the phase of the German Empire from 1871 to 1918 to clearly distinguish it from the period after 1918. In the German Empire, the German nation state was a constitutional monarchy organised as a federal state.

[39] Mayer, O., 'Deutsches Verwaltungsrecht' (1895), Volume 2, p 95.

disputes'.[40] According to interpretations developed over time, a 'public-law dispute' is given where the relevant law establishes special rights or obligations for public authorities (*Sonderrechtstheorie*), or where the case involves a *de facto* relationship of subordination (*Subordinationstheorie*).[41] Contrastingly, private law is commonly characterised by private autonomy and equality of rights and power.[42]

However, this divide has been pierced since the landmark decision of *Lüth* in 1958.[43] According to the Federal Constitutional Court, German Basic Law binds private law indirectly. The court extended the scope of the Basic Law beyond the relationship between government and the people to the field of private law. The Basic Law does not bind citizens, but the lawmaker in creating private law and the judiciary in interpreting it. The argument is that Basic Law not only provides protection against the state, but also forms an objective value system for social coexistence. As interpreting the law is the main mean by which courts give *horizontal effect* of Basic Law, considerations into private law relationships, vague provisions, so-called 'undefined legal concepts', such as Section 242 German Civil Code (Bürgerliches Gesetzbuch — BGB), are the most relevant. Their broad and very normative wording gives courts a wide scope of interpretation enabling them to 'create' unwritten quasi-statutory legal provisions.[44]

As a result, although the principle of proportionality derives initially from public law, and although public law and private law are generally perceived as separate, the public-private divide does not form an insurmountable obstacle. Proportionality, understood as a technique for balancing competing interests, can be implemented in private law by the means of interpretation of vague statutory provisions or, as some would argue, by the judicial development of law.[45] As we will see in the next chapter, this very mechanism of 'constitutionalising' is also used for the application of proportionality in the context of employment, where German labour courts interpret statutory provisions containing the requirement of 'reasonable exercise of discretion'.

3.2 English Law

---

[40] Section 40 (1) VwGO: Recourse to the administrative courts shall be available in all *public-law disputes* of a non-constitutional nature insofar as the disputes are not explicitly allocated to another court by a federal statute.
Translation as officially provided by the German Federal Ministry of Justice and Consumer Protection, and the Federal Office of Justice (emphases supplied). Translation available at:
https://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.html#p0164.

The requirement set out by Section 40 (1) VwGO is comparable to the requirement of 'public function' as laid down in Practice Direction 54.1 (2) — Judicial Review.

[41] Hufen, F., 'Verwaltungsprozessrecht (11th ed.)' (2019), § 11 Verwaltungsrechtsweg und zuständiges Gericht, para 13-17.

[42] Correspondingly, where a public authority acts like a normal citizen, for example by buying office supplies, no 'public-law dispute' is given and the ordinary courts are competent for disputes arising from the purchase contract.

[43] Federal Constitutional Court of 15 Januar 1958 – 1 BvR 400/51, in VERWALTUNGSRECHTSPRECHUNG [1958] 419-434.

[44] Waas, B., 'Good Faith in the Law of the Employment Relationship: Germany' (2011). 32 Comp Lab L & Pol'y J 603, p 604.

In employment law, until 1984, the Federal Labour Court went even further. In a former case, a contract of employment contained a so-called 'celibacy clause' according to which the employment relationship of a female employee terminates when she marries a superior. The Federal Labour Court held that the Basic Law has direct effect between private parties, and thus the celibacy clause is void due to infringement of Art. 6 Basic Law (Freedom of Marriage). The court argued that public and private law are distinct mainly due to the values of private autonomy and freedom of contract, both underpinning the private law. However, so the court, both values are limited by other constitutional rights of higher importance, cf. Federal Labour Court of 10 May 1957 – 1 AZR 249/56, in NEUE JURISTISCHE WOCHENSCHRIFT [1957] 1688-1691.

Eventually, since 1984, the Federal Labour Court acknowledged that Basic Law does not have *direct effect* on private law, but only an 'indirect' *horizontal effect* as established by Federal Constitutional Court in *Lüth* for general private law; cf. Federal Labour Court of 20 December 1984 – 2 AZR 436/83, NEUE JURISTISCHE WOCHENSCHRIFT [1986] 85-87.

This leaves the freedom of association as the only constitutional provision directly applicable in private, because Article 9 (3) GG expressly states: Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful.

[45] Whittaker & Zimmermann stress the fact that the line between mere interpretation and judicial-development is rather fuzzy, Whittaker, S., & Zimmermann, R., 'Good faith in European contract law: surveying the legal landscape' (2000), in Whittaker, S., & Zimmermann, R., 'Good Faith in European Contract Law' (2000), p 22.

In English law, the transfer of public law considerations on proportionality to private law is less natural than in German law. First, the mechanism of 'constitutionalised' private law norms as a basis for private law developments based on public law values is less established in English law. In particular, *good faith* established by TC, as basis for judicial review,[46] is not a constitutionalised private law norm.[47] Secondly, even if the latter were to be assumed, proportionality is not yet fully recognised as an independent ground for review in public law, but confined to fundamental rights and European law. This could be an obstacle in cases where the exercise of contractual discretion does not affect fundamental rights. Nevertheless, as we have seen in *Pham v Secretary of State*, the acknowledgment of proportionality as a stand-alone test is looming on the horizon.[48]

As the question of whether proportionality should be applied in private law is closely related to the question of whether its general applicability in public law is given and the latter is still under development,[49] the means by which proportionality can be introduced in private law cannot be a means of 'transplantation'. Moreover, such 'transplantation' would be open to considerable criticism, such as that expressed by Himsworth.[50] Himsworth argues that, in succinct terms, the differences between the public law functions of the courts in judicial review and their private law functions in the interpretation of contracts would be too wide to allow a transplantation of the review of discretionary powers.[51]

Instead, a proposal by Davies provides a 'bridge'.[52] Davies upholds the public-private divide. She acknowledges that 'in public law […] the courts' aim in developing deference has been to keep within their own constitutional limits [considering] the separation of powers [, and that] in labour law, these issues do not apply'.[53] However, she demonstrates two important aspects: firstly, Davies describes how courts utilise different standards of review when examining public decisions.[54] These different standards reflect varying degrees of deference by the courts. The latter, so Davies, depends on two deliberations: 'the formulation of the standard of review to be applied and the application of that standard to the facts of the case'.[55] Secondly, she observes a sophisticated discussion in public law on 'deference factors' which are considered by the courts when assessing 'due deference'. Davies argues that those deference factors could instruct a development in labour law as well. This approach provides fruitful ground for the purpose of this article for three reasons:

First, as Lady Hale observed in *Braganza*, 'there is an obvious parallel between cases where a contract assigns a decision-making function to one of the parties and cases where a statute […] assigns a decision-making function to a public authority'.[56]

Second, different to civil law systems like Germany, in English law no formal divide between public and private law exists.[57] Both are rooted in, and have developed under, common law. This is reflected in the absence of a separate court system for public law disputes.[58] This 'root argument' applies especially to the jurisdiction in judicial

---

46 The implied term of mutual trust and confidence (TC), as the basis for judicial review in the context of employment, is discussed in more detail below in Ch 5., p 54.

47 Bogg, A., 'Good Faith in the Contract of Employment: A Case of the English Reserve' (2011), Comparative Labor Law & Policy Journal, Volume 32, Issue 3, 729, p 733.

48 *Pham v Secretary of State for the Home Department (Open Society Justice Initiative intervening)* [2015] UKSC 19, [2015] 1 WLR 1591, p 1626, para 106.

49 Bogg, A., & Freedland, M., 'Pensions Law, *IBM v Dalgleish*, and the Public/Private Divide' (2020), in Agnew, S., & Davies, P.S., & Mitchell, C., 'Pensions Law, Policy and Practice' (2020), p 240.

50 Himsworth, C., 'Transplanting Irrationality from Public to Private Law: Braganza v BP Shipping Ltd' (2019), Edinburgh Law Review, Volume 23, Issue 1, 1-21.

51 Himsworth, C., 'Transplanting Irrationality from Public to Private Law: Braganza v BP Shipping Ltd' (2019), Edinburgh Law Review, Volume 23, Issue 1, p 20.

52 Davies, A.C.L., 'Judicial Self-Restraint in Labour Law' (2009), Industrial Law Journal, Volume 38, Issue 3, 278-305.

53 *Ibid*, p 289.

54 *Ibid*, p 280.

55 *Ibid*, p 280.

56 *Braganza v BP Shipping Ltd and another* [2015] UKSC 17, [2015] ICR 449, p 457 para 19.

57 Schwarze, J., 'Europäisches Verwaltungsrecht (2th ed.)' (2005), p 133. Dawn Oliver questions whether a line can be drawn, cf. Oliver, D., 'Common Values and the Public-Private Divide' (1999), p 14.

58 De Smith, S.A., & Woolf, H., & Jowell, J.L. 'Judicial Review of Administrative Action' (1995), p 156.

review, as the latter's basis can be seen in common law's 'ancient function in putting injustices right'.[59] Since this idea of equity is universal, it seems logical that, as Davies suggests, both sides, private and public, could learn from each other.

Finally, common law already experiences interactions across different areas of law. One important example for such interaction is the common law *doctrine of illegality* according to which a private law claim might be barred if allowing the claim would run counter public policy.[60] Essentially, the *doctrine of illegality* aims to preserve the integrity of the legal system.[61] To this end, the *doctrine of illegality*, although part of private law, considers relevant values enshrined throughout the whole legal system. In the light of this, there must be a reasoned justification as to why other common law 'institutions' should be confined to the area of law they have originally been developed for.

So altogether, focusing on deference factors allows us to kill two birds with one stone, since — as explained earlier — deference factors can potentially form a 'bridge' also from German law to English law.

4. German Approach: A Worthwhile Guide?

4.1 Deference Factors in English Employment Law

Davies identifies three deference factors recognised which are involved in judicial review in English public law and which she considers as potentially relevant to employment law.[62] The first deference factor, named by Davies, is institutional competence which 'addresses the fact that judicial proceedings may not be well suited to resolving polycentric disputes in which more than two competing interests are at stake'.[63] Second, courts may have regard to their potential lack of expertise when reviewing employers' decisions because 'employers know best how to run their business'.[64] She mentions an objection that the expertise of employers should not be overestimated, since both the Employment Tribunals (ET) and the Employment Appeals Tribunal (EAT) have expertise because of their lay members. This first objection should be treated with caution for the purposes of this article, since the courts are competent for contractual review and not the tribunals.[65] However, her second objection is relevant: as an argument for less deference due to expertise, Davies points out that — different to an administrative law context — no assumption can be made that an employer will use their expertise for the good of employees.[66] Third, she considers democratic accountability as apt to guide courts when assessing an appropriate degree of

---

[59] Oliver, D., 'Common Values and the Public-Private Divide' (1999), p 44, who suggests that judicial review and the exercises of supervisory jurisdictions in private law represent moves towards a 'civil' version of democracy requiring that private bodies should exercise power with regard to those affected. Oliver's suggestions resemble the German idea of an 'objective value system for social coexistence' as described above (*constitutionalisation*), cf. p 15.

[60] *Hounga v Allen* [2014] UKSC 47, [2014] ICR 847, p 861, para 42.

[61] *Ibid*, p 862, para 44.

[62] Referring to Laws LJ in *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158; [2003] QB 728, p 765-767, para 83-87:

'[**first**] greater deference is to be paid to an act of Parliament than to a decision of the executive or a subordinate measure [**second**] there is more scope for deference "where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified" (per Lord Hope in *ex parte Kebeline*) [**third**] greater deference will be due to the democratic powers where the subject matter in hand is peculiarly within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts [**fourth**] greater or less deference will be due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic powers or the courts'.

[63] Davies, A.C.L., 'Judicial Self-Restraint in Labour Law' (2009), Industrial Law Journal, Volume 38, Issue 3, 278, p 290. Davies stresses that institutional competence should not be conceptualised as an absolute category. In fact, so Davies, courts should consider whether the employer had been in a better position 'to balance the variety of competing interests and was making positive efforts in this regard'.

[64] *Ibid.*

[65] The fact that the contractual review of the employer's decision falls within the jurisdiction of the courts and neither ET nor EAT will be considered more closely in Ch 4.3, p 38.

[66] Davies, A.C.L., 'Judicial Self-Restraint in Labour Law' (2009), Industrial Law Journal, Volume 38, Issue 3, 278, p 290-291; according to Davies, in administrative law, several doctrines are in place which are upstream to reasonableness or proportionality.

deference.[67] Democratic accountability means that courts might show more deference where an employer's decision had been agreed in advance with the workforce. Davies concludes that expertise is of particular relevance and that courts are 'particularly ill qualified to scrutinise decisions with serious economic consequences.[68] Both of these are, as we will see, highly relevant considerations for German labour courts as well.[69]

Bogg and Freedland draw on Davies' work and advocate for less judicial restraint.[70] According to them, employees' legitimate expectations should be protected by the courts — calling for a more detailed scrutiny. As a normative justification for this, they suggest that courts should consider the nature of the employee's right and be less restrained when the employee's central capabilities matter.[71] According to Bogg and Freedland, the central capabilities approach aims, in short, to establish a 'minimum threshold for a life that is worthy of human dignity' encompassing 'life; bodily health, bodily integrity; senses, imagination, and thought, emotions; practical reason; affiliation; relations with other species; play; and control over one's environment (political and material)'.[72] This proposal has been selected for the purpose of this article for three reasons: first, its perspective. The central capabilities' thrust is to demand a more detailed scrutiny. Its positive engagement with judicial review is more apt to guide a development towards less restraint. Second, setting a minimum threshold for a life worth living, which governs the relationship between the private parties to an employment relationship, is comparable to the German mechanism of 'constitutionalisation' of private law described above.[73] Admittedly, the German Basic Law as the basis for objective values embedded in private law, provides more than a mere minimum for a life worth living, namely an order of social coexistence.[74] However, the values set by German Basic Law involve those central capabilities enumerated above ('common denominator').[75] Consequently, despite the differences between the two legal systems, because of this overlap, comparisons based on central capacities are — to put it like Teubner — less 'irritating'.[76] Finally, as central capabilities are not rooted in public law, they are less prone to objections based on the public-private divide.

4.2 Deference Factors in German Employment Law

In order to assess how the deference factors by which the German labour courts are guided compare to those discussed in English law, at first, it is necessary to give a brief overview of the legal basis for the judicial review of employers' exercise of discretion in German law (4.2.1.). Next, as the main focus in this section, the relevant deference factors will be analysed (4.2.2.) and evaluated (4.2.3.). Finally, this section discusses how to take account of the difference that German labour courts are specialised courts (4.3.).

---

[67] Davies, A.C.L., 'Judicial Self-Restraint in Labour Law' (2009), Industrial Law Journal, Volume 38, Issue 3, 278, p 291. Davies points out that democratic accountability might not safeguard the protection for minorities. Her example of a male dominated union failing to represent female workers interests falls on historic ground, as evidenced by the Ford sewing machinists strike of 1968 and the subsequent introduction of the Equal Pay Act 1970; cf. Moss, J., 'The Ford Sewing machinists' strike, 1968, Dagenham' (2019), in Moss, J., 'Women, workplace protest and political identity in England, 1968–85' (2019), Chapter 2.

[68] Davies, A.C.L., 'Judicial Self-Restraint in Labour Law' (2009), Industrial Law Journal, Volume 38, Issue 3, 278, p 304-305.

[69] Cf. in particular, Ch 4.2.2.2, p 25.

[70] Bogg, A., & Freedland, M., 'Pensions Law, *IBM v Dalgleish*, and the Public/Private Divide' (2020), in Agnew, S., & Davies, P.S., & Mitchell, C., 'Pensions Law, Policy and Practice' (2020), p 223-248.

[71] *Ibid*, p 242-244.

[72] *Ibid*, p 243; referring in particular to Nussbaum, M.C., 'Creating Capabilities: The Human Development Approach' (2011).

[73] Cf. an explanation of 'constitutionalisation' above Ch 3.1., p 9; cf. also Bogg, A., 'Good Faith in the Contract of Employment: A Case of the English Reserve' (2011), Comparative Labor Law & Policy Journal, Volume 32, Issue 3, 729, p 731.

[74]Petersen, N. 'Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa' (2017), p 97.

[75] The Basic Law, especially Article 1 and 2 GG, can be understood as a reaction to the inhuman totalitarianism of the Nazi regime, with which the editors sought to safeguard, among other things, human dignity and the right to personal freedom, cf. Whittaker, S., & Zimmermann, R., 'Good faith in European contract law: surveying the legal landscape' (2000), in Whittaker, S., & Zimmermann, R., 'Good Faith in European Contract Law' (2000).

[76] Teubner, G., 'Legal Irritants: Good faith in British Law or How Unifying Law Ends Up in New Divergences' (1998).

4.2.1 Legal Basis for contractual review

The legal basis for contractual review is mainly provided by three provisions, depending on the context in which discretion is exercised. Employment contracts are treated as amenable to general principles of contract law under the BGB.[77] However, if the legal assumptions made for general contracts differ too much from those made for employment contracts, the general principles are selectively overridden by provisions that apply only to employment contracts (*lex specialis*).[78] For example, the parties to a commercial contract may agree that they exercise discretion 'freely', meaning that discretion need not be exercised 'reasonably'.[79] This is not possible for the parties to an employment contract. Given the unequal bargaining power, the requirement of reasonable exercise of discretion is mandatory.

The first provision is Section 315 BGB which is part of general contract law (*lex generalis*) and therefore relevant for both commercial contracts and employment contracts. The provision is relevant where one of the parties to a contract is reserved contractual discretionary power to specify either a performance or a consideration under the contract. In a commercial context, a typical example is price adjustments by energy suppliers.[80] In an employment context, Section 315 BGB is relevant where employers specify discretionary bonuses or adjust an occupational pension scheme. Section 315 BGB states that:

> (1) Where performance is to be specified by one of the parties to the contract, then in case of doubt it is to be assumed that *the specification is to be made at the reasonably exercised discretion* of the party making it. […]
>
> (3) Where the specification is to be made at the reasonably exercised discretion of a party, the specification made is *binding* on the other party *only if it is equitable*. If it is not equitable, the specification is made by judicial decision; the same applies if the specification is delayed.[81]

One feature must already be addressed at this stage. Paragraph three empowers the court to make a specification by judicial decision. At first blush, the court seems to be in a position to adjust decisions of employers – which would be diametrically opposed to the conception of their British counterparts. It is therefore necessary to clarify that this is not the case: first, courts can only specify a performance where they found the original specification was not made at reasonably exercised discretion (unequitable). At this first 'quashing' stage, when assessing the reasonableness, courts only assess whether the specification made by the employer falls within the limits of a

---

[77] The German counterpart to Section 230 Employment Rights Act 1996, defining the employee status is Section 611a BGB according to which a contract of employment is given if:
'The contract of employment obliges the employee to perform work in the service of another person in personal dependency and in accordance with the instructions of the other party. The right to issue instructions may relate to the content, performance, time and place of the work. An employee is bound by instructions if he is not essentially free to organise his work and determine his working hours. The degree of personal dependency also depends on the nature of the respective activity. In order to determine whether an employment contract exists, an overall view of all circumstances must be taken. If the actual implementation of the contractual relationship shows that it is an employment relationship, the designation in the contract is irrelevant.'

[78] Preis, U., in 'ERFURTER KOMMENTAR ZUM ARBEITSRECHT (20th ed.)' (2020), [Section 611a BGB] para 4-7.

'Special law' is implemented not only by the legislator but also by the courts by interpreting vague general contractual provisions in a way that protects employees.

[79] Würdinger, M., in 'MÜNCHENER KOMMENTAR ZUM BGB (8th ed.)' (2019), [Section 315 BGB] para 33.

[80] Kühne, G., 'Gerichtliche Entgeltkontrolle im Energierecht'(2006), in NEUE JURISTISCHE WOCHENSCHRIFT [2006] 654-657.

[81] Translation as officially provided by the German Federal Ministry of Justice and Consumer Protection, and the Federal Office of Justice (emphases supplied). Translation available at:
https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1156.

As the original wording '*nach billigem Ermessen*' is very vague even in German, it might be helpful to keep in mind that '*Ermessen*' means discretion and '*billig*', as the decisive word, can also be translated as fair, just or equitable.

reasonably exercised discretion.[82] Several specifications may be 'reasonable'.[83] The fact that there are alternative decisions which give greater weight to the interests of employees does not affect the validity of the decision made by the employer.[84] Second, having found the original specification as unreasonable, courts must consider the criteria laid down in the contract or established by employer's conduct when making a specification. At this second stage, the approach is essentially the same as that applied in *Horkulak* where the court awarded damages after an employer had unreasonably denied to pay a discretionary bonus.[85] According to the court, its task is then to

> 'assess, without unrealistic assumptions, what position the employee would have been in had the employer performed its obligation. That will involve the court in assessing the employee's bonus, on the basis of the evidence before it, and thus to that extent putting itself in the position of the employer.' [86]

Finally, as we will see in more detail, courts may feel ill-equipped to specify a performance or consideration in some cases and thus do not make any specification.

The second provision is Section 106 Trade, Commerce and Industry Regulation Act (Gewerbeordnung — GewO):[87]

> 'The employer may, *at its reasonably exercised discretion*, specify the subject matter, place and time of the work performance, provided that these working conditions are not specified by the employment contract, provisions of a works agreement, an applicable collective agreement or statutory provisions.'[88]

Section 106 GewO is central where an employer issues work instructions or the relocation of an employee. Section 106 GewO was introduced in 2002 and supplements the general contract law provisions of Section 315 BGB.[89] Section 106 GewO is *lex specialis* to Section 315 (1) BGB, since a work instruction issued is a 'performance […] specified' within the meaning of Section 315 (1) BGB. Section 315 (3) BGB remains relevant for empowering the labour courts to review work instructions issued or 'specified' by the employer.

Conversely to the suggestive wording of Section 106 GewO, the employer's right to issue instructions is not statutory but contractual.[90] The provision is purely declaratory. For the sake of clarity, the legislature intended to

---

[82] Maschmann, F., in 'BECK-ONLINE.GROSSKOMMENTAR (Ed. September 2018)', [Section 106 GewO] para 78.

[83] The restraint in this respect is explained below by the example of the work instructions on p 36 (courts self-perception) and p 37 (resemblance to 'band of reasonable responses').

[84] Maschmann, F., in 'BECK-ONLINE.GROSSKOMMENTAR (Ed. September 2018)', [Section 106 GewO] para 78.

[85] *Horkulak v Cantor Fitzgerald International* [2005] ICR 402-433.

[86] *Ibid*, p 422 para 56, quoting Burton J in *Clark v Nomura International Plc* [2000] IRLR 766, p 775.

[87] The Trade, Commerce and Industry Regulation Act (GewO) is not an act regulating the individual employment relationship comprehensively. It contains only few provisions concerning the contract of employment (e.g. work instructions, job reference). Unlike English law, there is no uniform Employment Right Act in German law. Although there have been repeated attempts by the legislator to issue a code containing all individual employment rights, individual employment rights are widespread over several codes. For example, unlike the Employment Rights Act 1996, the protection against unfair dismissal is regulated by a distinct act regulating only this topic.

[88] No official translation available. Therefore, Section 106 GewO has been translated by the author of this article. As far as the German wording of § 106 GewO is identical to § 315 BGB, the official translation of § 315 BGB was consulted for the translation of § 106 GewO. In particular, the phrase 'at reasonably exercised discretion' is identical in the original wording of both (emphases supplied).

[89] Contrary to § 315 BGB ('in case of doubt it is to be assumed'), an employer must always exercise his discretion reasonably when issuing work instructions or relocations. An opt-out from Section 106 GewO is not possible.

[90] Federal Labour Court of 23 September 2004 – 6 AZR 567/03, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [2005] 359, p 360.

express the principles already developed by the courts in the light of Section 315 BGB.[91] As the identical wording of Section 315 BGB and Section 106 GewO indicates, ('reasonable exercised discretion') the standard of judicial review has the same origins.
Finally, the third provision is Section 242 BGB. This provision is relevant in the context of dismissals, where an employee falls outside the scope of statutory protection against unfair dismissal.[92] According to Section 242 BGB,

> 'an obligor has a duty to perform according to the requirements of *good faith*, taking customary practice into consideration.'[93]

Common to all three provisions is their very vague wording ('reasonably, good faith') reflecting an 'undefined legal concept'.[94] As explained earlier, such vague wording gives courts a wide scope for interpretation by which courts, bound to Basic Law, give *indirect effect* to the Basic Law and thus implement objective values for social coexistence into contract law.[95] The purpose of Section 315 BGB and Section 106 GewO, to prevent abusive exertion of discretion and facilitate fair exchange,[96] can be understood as a subset of Section 242 BGB's overarching aim of doing justice to each individual case (*Einzelfallgerechtigkeit*).[97] Correspondingly, the former are closely linked to *good faith* as expressed by Section 242 BGB.[98] Finally, due to the broad meaning of 'reasonably exercised discretion' and 'good faith', courts have considerable scope to formulate the applicable standard of review and apply that standard to the facts of the individual case, which is comparable to the *modus operandi* observed by Davies in English courts.[99]

4.2.2 Deference Factors

Since situations in which employers exercise power over employees are manifold, the following explanation is not exhaustive. Analysing cases in German labour law, it can be seen that the deference factors are considered as identified by Davies, and proposed by Bogg and Freedland for English courts. However, whereas institutional competence, central capabilities (4.2.2.1.) and expertise (4.2.2.2.) are vital part of both English and German courts considerations when reviewing employers' exercise of discretion, democratic accountability (4.2.2.3.) is difficult metric to compare.[100] In addition, German labour courts consider the wage-work bargain as a factor for less deference (4.2.2.4.).

4.2.2.1 Institutional Competence/ Central Capabilities

---

91 Parliamentary Documentation of 17 April 2002 – No 14/8796, p 24: Although the employer's right to issue instructions is generally recognised in case law and literature today as an essential part of the employment contract, an explicit regulation of the content and limits of the right to issue instructions is required in the interest of legal clarity and legal certainty in the employment relationship.

92 Waas, B., 'Good Faith in the Law of the Employment Relationship: Germany (2011)', Comparative Labor Law & Policy Journal, Volume 32, Issue 3, 603, p 624.

93 Translation as officially provided by the German Federal Ministry of Justice and Consumer Protection, and the Federal Office of Justice (emphasis supplied). Translation available at:
https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0731.

94 Also called 'general provisions', 'general clauses', 'vague legal terms', cf. above detailed explanation in Chapter 3.1 (Perception of the 'Public-Private' Divide—German Law), p 8.

95 See above Ch 3.1., p 17.

96 Würdinger, M., in 'MÜNCHENER KOMMENTAR ZUM BGB (8th ed.)' (2019), [Section 315 BGB] para 6.

97 Waas, B., 'Good Faith in the Law of the Employment Relationship: Germany (2011)', Comparative Labor Law & Policy Journal, Volume 32, Issue 3, 603, p 606.

98 *Ibid*, p 618.

99 Davies, A.C.L., 'Judicial Self-Restraint in Labour Law' (2009), Industrial Law Journal, Volume 38, Issue 3, 278, p 280.

100 Dogmatically, collective agreements usually do not restrict the way in which employer can exercise their discretionary powers but limit the contractual scope for possible outcomes in advance. For example, this is expressed by Section 106 GewO: The employer may, at its reasonably exercised discretion, specify the subject matter, place and time of the work performance, *provided that these working conditions are not specified* by the employment contract, *provisions of a works agreement, an applicable collective agreement* or statutory provisions.

A noticeable field where proportionality is flexibly formulated are adjustments to occupational pension schemes.[101] Since occupational pension schemes represent a particularly long-term commitment for employers ('incompleteness problem'), such schemes are open to amendment, adjustment or restructuring by the employer. When employers make (reasonable) changes to pension schemes,

> they must respect the principles of proportionality and legitimate expectations. Measured against the purpose of the new regulation, interventions must be appropriate, necessary and proportionate. The reasons for change must be weighed up against the interests of the employees in protecting their rights. The greater the degree of intervention in employees' rights, the more serious the justification must be.[102]

This formulation of the standard of review is both rather vague and essentially a mere rendition of the concept of proportionality as prevalent in German public law.[103] However, drawing on this general formulation, courts developed subtler review standards, subject to the individual case.[104] For example, the Federal Labour Court has developed three different standards of review ('three level model') where an employer wants to change their employees' occupational pension entitlements:

> '(1) Changes to entitlements already earned (vested) must be protected because they are a consideration for the work already performed by the employee and his loyalty to the employer. Therefore, changes can be made only in exceptional cases and for *imperative reasons*.[105] Imperative reasons are only given if the (economic) assumptions on which the pension scheme was built have changed significantly or become obsolete.[106] For example, if an employer's company is at risk of going bankrupt.[107]
>
> (2) Changes to vested entitlements to future increases of a pension's defined-benefits are only proportionate where employer can demonstrate *compelling reasons*. The change must be necessary to avoid endangering the existence of the company in the long term.[108]

---

[101] Direct pension promises (*Pensionszusage or Direktzusage*), where employees receive pension payments directly from their employer, represent approximately 40 percent of all German occupational pension schemes, according to Kirchner, J., Kremp, P., & Magotsch, M., 'Key Aspects of German Employment and Labour Law (2th ed.)' (2018), p 365.

Larger employers sometimes set up a funding vehicle legally separate from the employer's legal entity, so-called *Contractual Trust Arrangements* (CTAs). However, such CTAs are not trusts as understood by English law; cf. Kirchner, J., Kremp, P., & Magotsch, M., 'Key Aspects of German Employment and Labour Law (2th ed.)' (2018), p 366; Höfer, R., et al., 'Betriebsrentenrecht (25th ed.)' (2020), Volume 1, Chapter 3, para 17.

As a result, the question whether such occupational pension schemes should be subject to the principles of employment law or the principles underlying trust law does not arise in the same way as in *IBM United Kingdom Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212, [2018] 1681-1774 —
categorisation discussed in more detail by Bogg, A., & Freedland, M., 'Pensions Law, *IBM v Dalgleish*, and the Public/Private Divide' (2020), in Agnew, S., & Davies, P.S., & Mitchell, C., 'Pensions Law, Policy and Practice' (2020), 223-247.

[102] Federal Labour Court of 16 July 1996 – 3 AZR 398/95, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [1997] 533, p 534.

[103] See above at p 11.

[104] The first vague definition/ formulation of reasonableness can be understood as a linguistic intermediate step of the interpretation process. Starting with of the undefined legal concept of 'reasonableness', courts try to specify such concepts in several steps. In every step the wording becomes more specific, while courts aim to develop a predictable set of applicable rules, while linguistically maintain the link to the original vague wording of the undefined legal concept.

[105] Federal Labour Court of 16 July 1996 – 3 AZR 398/95, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [1997] 533, p 534.

[106] *Ibid.*

[107] Kirchner, J., Kremp, P., & Magotsch, M., 'Key Aspects of German Employment and Labour Law (2th ed.)' (2018), p 372.

[108] Federal Labour Court of 16 July 1996 – 3 AZR 398/95, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [1997] 533, p 534; for example, if future pension entitlements could not be financed from the income and the increase in value of the company.

(3) For changes to entitlements not yet earned, reasons are sufficient which are *not arbitrary* and which provide a transparent explanation of the facts and considerations on which the intended change is based.'[109]

It is apparent that German labour courts demonstrate considerable flexibility in formulating and applying proportionality as a test. At the first level, *imperative reasons*, understood as a potential risk of bankruptcy, leave the employer only little discretionary scope, as a relevant prognosis concerns the near future. This immediacy makes it easier for the courts to review the plausibility of the prognosis made by the employer. At the second level, *compelling reasons*, understood as long-term risks, employers will inevitably have a greater margin of discretion. It is in the nature of a long-term perspective, where many causes are potentially relevant, that the courts are less able to question the plausibility of the long-term risks of a company, as predicted by the employer. At the third level, the *not arbitrary level*, the relevant test leaves an employer a wide margin of discretion and comes close to *Wednesbury* reasonableness.

So, which are the relevant deference factors? To begin with, as judicial review becomes significantly more detailed when an entitlement has already been accrued, the legitimate expectations of employees are clearly a factor for less judicial self-restraint. The rationale for this is twofold: first, if the changes only affect future entitlements, employees have the opportunity to adjust to possible reductions, for example by entering into a supplementary private pension insurance or by changing employer.[110] Employees maintain control over their material circumstances. Conversely, where this is not ensured, the courts must keep a closer eye on adjustments. Thus, this ratio is close to the *central capability* approach as supported by Bogg and Freedland.[111] Second, entitlements already earned are not altruism but a (deferred) remuneration for the work already performed by the employee.[112] Protecting these entitlements ultimately means protecting the wage-work bargain.

Next, at the third level, where neither material control nor wage-work bargain are at stake, the decisive factor for significant judicial self-restraint is institutional competence. This is expressed by a more recent judgment: an employer adjusted payments to be made on basis of a defined-benefit plan. The court found that the adjustment was disproportionate and thus exceeded the limits of reasonably exercised discretion.[113] However, although it would have been up to the court to specify a reasonable adjustment by judicial decision, the court found itself unable to do so

---

[109] *Ibid,* p 534.

[110] Federal Labour Court of 16 July 1996 – 3 AZR 398/95, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [1997] 533, p 534: These interventions [changes to the pension scheme] are all characterised by the fact that a gap in pension benefits arises in comparison with what the employee was entitled to expect on the basis of the pension promise originally made to him. The pension level initially attainable for the employee is diminished in all cases. Depending on its extent, the resulting pension gap can be a reason for the employee to try to compensate for it with private pension insurance in the remaining time until the end of active working life. Where this is no longer possible – as is regularly the case with interventions in vested entitlements – due to the time that has passed in working life, or only at disproportionate expense, greater protection is required.

[111] Bogg, A., & Freedland, M., 'Pensions Law, IBM v Dalgleish, and the Public/Private Divide' (2020), in Agnew, S., & Davies, P.S., & Mitchell, C., 'Pensions Law, Policy and Practice' (2020), p 242-244.

[112] Federal Constitutional Court of 19 October 1983 – 2 BvR 298/81, in NEUE JURISTISCHE WOCHENSCHRIFT [1984] 476, p 477-478: The assumption that occupational pensions should also be regarded as remuneration is supported by their historical development. In general, today's occupational pension schemes date back to the post-war period. This period was characterised by the reconstruction of the German economy, which experienced an extraordinary recovery that ultimately culminated in a long period of economic boom. There was a general shortage of labour. Occupational social benefits therefore became a preferred mean for companies to gain an advantageous position in the increasingly competitive labour market and to build up and maintain a permanent workforce. In this situation, many companies felt induced to bind their employees to them through pension promises. […] This illustrates the reciprocal relationship between loyalty to the company and pension promises and thus the remuneration character of the latter. […] The employee has earned the pension benefits through his loyalty to the company. He has performed his work over a long period of time, possibly over a whole working life. It is then obvious that the employer must now be liable for the consideration and can only withdraw from this consideration by means of a withdrawal tied to objective reasons.

[113] Federal Labour Court of 13 November 2007 – 3 AZR 455/06, in RECHTSPRECHUNGS-REPORT ARBEITSRECHT [2008] 520, p 522.

> 'because this would be an intervention in a complex pension system which would not only affect the claimant but would have a polycentric effect. Therefore […] a judicial specification of an adjustment, which corresponds to a reasonable discretion, is not possible here, […].'[114]

4.2.2.2 Expertise

Most evidently, courts consider their potential lack of expertise when reviewing an employers' decisions. Dogmatically, judicial self-restraint in this regard is due to Article 12 GG laying down the basic right of 'occupational freedom.[115]

Factually speaking, however, there is also an economic rationale. Since it is the employer who bears the entrepreneurial risks and not the state, courts must not make business decisions on behalf of the employer.[116] Employers' discretion in running their business is emphasised on several occasions. For example, according to the Federal Labour Court, it must be respected if an employer decides to outsource work originally carried out by its own employees and assign it to subcontractors[117] or to reduce its workforce for having the same task done by fewer employees in future.[118] In this context, the Federal Labour Courts regularly states that

> 'it is not for the labour courts to dictate a 'better' or 'more appropriate' business strategy to the employer and thus intervene in the employer's cost calculation. The organisation of a business, the question whether and in what way someone wants to engage in economic activity, is part of the occupational freedom protected by basic rights. In general, [this] also includes the right of the employer to give up his business, to decide for himself what size it should be and to decide whether certain work should continue to be carried out in his own company or be subcontracted.'[119]

As Lord Steyn put it for English law, in order to strike a balance 'between an employer's interest in managing his business as he sees fit and an employee's interest in not being unfairly and improperly exploited',[120] when reviewing on the ground of proportionality, the German labour courts have established five subtleties to ensure that sufficient weight is given to the expertise of employers in running their business.

First of all, how the courts consider their role when reviewing employers' decisions: according to the Federal Labour Court, the employer, for reasons of business, is left with a margin of discretion when issuing instructions, which must be exercised reasonably.[121] Within this margin of discretion the employer may have several choices.[122] Several decisions may be 'correct' or reasonable.[123] The courts' role here, so the Federal Labour Court, is to review

---

[114] *Ibid*, p 523; consequently, it is for the employer to make a new decision, taking into account the considerations and concerns expressed by the court when reviewing the employer's original decision, in order to avoid a new quashing.

[115] Article 12 para 1 GG: All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training […].

[116] Junker, A., 'Grundkurs Arbeitsrecht (19th ed.)' (2020), para 14.

[117] Federal Labour Court of 17 June 1999 – 2 AZR 141/99, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [1999] 1098, p 1100.

[118] Federal Labour Court of 20 November 2014 – 2 AZR 512/13, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [2015] 679, p 682.

[119] Federal Labour Court of 26 September 2002 – 2 AZR 636/01, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [2003] 549, p 550.

[120] *Malik v Bank of Credit and Commerce International SA (In Liquidation)* [1997] ICR 606, p 622, para A.

[121] Federal Labour Court of 30 November 2016 – 10 AZR 11/16, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [2017] 1394, p 1397, para 28.

[122] *Ibid.*

[123] Maschmann, F., in 'BECK-ONLINE.GROSSKOMMENTAR (Ed. September 2018)', [Section 106 GewO] para 78.

whether the employer has observed the limits of his discretion.[124] As already mentioned for Section 315 BGB,[125] the courts ask whether the employer's decision took adequate account of the employee's legitimate interests, but not whether an alternative decision would give more weight to the employee's interests.[126]

Second, when courts apply proportionality to the facts, they leave employer a margin of appreciation (*Beurteilungsspielraum*). As stated before, the general German understanding of proportionality works on four limbs: a decision must pursue a legitimate aim (a),[127] be appropriate (b), be necessary (c) and there must be an adequate relationship of proportionality between the benefits resulting from achieving the legitimate aim on one hand and the impact on the interests affected on the other ('narrow proportionality') (d).[128] When courts review whether a decision was appropriate (b) and necessary (c), they are restrained. This can be exemplified by a case where a nurse was transferred from one department of the hospital to another.[129] One reason for this was her conduct, which had led to tensions with her colleagues. She argued that the transfer was unreasonable because the transfer was not a necessary response. It would have been sufficient, so the nurse, to give her a written warning. The court held that it was up to the employer to decide how to respond to the complaints made by the colleagues.[130] An employer, the court held, is not obliged to use the mildest means, as it is usually not certain that the milder is equally effective.[131] The approach on limbs (b) and (c) essentially comes close to the 'range of reasonable response' test as laid down in *Iceland Frozen food*, where Brown-Wilkinson J said: 'In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another'.[132] Thus, 'the function of the industrial tribunal […] is to determine whether in the particular circumstance of each case the decision [under review] fell within the band of reasonable responses which a reasonable employer might have adopted'.[133]

Third, when the courts apply limb (d), 'narrow proportionality', to an employer's decision and attach weight to the interests of an employee affected, an important consideration is the purpose of the contract as foreseeable when concluded. For example, a flight attendant was permanently assigned to another airport, which would have required her to move her home from Hamburg to Munich. She argued that this relocation was disproportionate given the impact that the move would have on her family life. The court dismissed her claim. When applying the 'narrow proportionality', the court held that

> 'it is important to note that, according to the *purpose of the contract*, a flight attendant cannot have the legitimate expectation to enjoy the social and other benefits of a permanently unaltered place of work. Longer periods of absence are generally part of the job description. The relocation

---

124 Federal Labour Court of 24 October 2018 – 10 AZR 19/18, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [2019] 619 p 621, para 26.

125 See above Ch 4.2.1.

126 Maschmann, F., in 'BECK-ONLINE.GROSSKOMMENTAR (Ed. September 2018)', [Section 106 GewO] para 78.

127 The test on limb (a), legitimate aim, usually does not cause frictions in the context of an employment relationship. In principle, any aim related to business reasons is a legitimate one to pursue. Hence an employer can often conceal his true motivation, it is hard for employees to demonstrate that an instruction was given on, say, discriminatory grounds. A rare example where the Federal Labour Court held an instruction as not pursuing a legitimate aim is an instruction issued by the employer asking his employee to hire a tax consultant chosen by the employer. Since the instruction concerned the employee's private tax return, the court held that the employer could not demonstrate any legitimate business interest justifying the instruction; cf. Federal Labour Court of 23 August 2012 – 8 AZR 804/11, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [2013] 268, p 270.

128 Federal Constitutional Court of 27 February 2008 – 1 BvR 370/07, in NEUE JURISTISCHE WOCHENSCHRIFT [2008] 822, p 828-829, para 218 and 227.

129 Federal Labour Court of 24 April 1996 – 5 AZR 1031/94, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [1996] 1088.

130 *Ibid*, p 1089; confirmed in a recent judgment of the Federal Labour Court of 24 October 2018 – 10 AZR 19/18, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [2019] 619, p 621, para 30.

131 Federal Labour Court of 24 April 1996 – 5 AZR 1031/94, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [1996] 1088, p 1089.

132 *Iceland Frozen Foods Ltd. v Jones* [1983] ICR 17, p 24-25.

133 *Iceland Frozen Foods Ltd. v Jones* [1983] ICR 17, p 25.

> emphasises these particularities, but does not cause them. The undoubtedly occurring burdens and additional costs must be borne by the claimant.'[134]

This approach stresses that proportionality, in a private law context, aims to ensure contractual fairness. Especially, the factor of 'foreseeability' shows the strong correlation between proportionality and the 'incompleteness problem'.[135] The importance that German courts attach to the purpose of the contract is similar to that attached by English courts. The latter is highlighted as central to judicial review, for example in *Braganza*.[136]
Fourth, as with occupational pension schemes, the courts forego their power to issue instructions on behalf of the employer under Section 315 (3) BGB because such a decision is regarded as an 'unlawful encroachment on the employer's business organisation'.[137]

Finally, and most important, depending on whether an instruction is implementing a so-called *business decision* or was issued 'separately', the Federal Labour Court formulate two different standards of review.[138] A *business decision* can be defined as a decision by which the employer decides what his business objective is and how to organises his business.[139] An example of an instruction based on a *business decision* is the relocation (instruction) of employees to another site as a result of site closure (*business decision*).[140] If a court were to annul the relocation of a single employee, such a decision potentially jeopardises the (wider) *business decision* to close the original site and thus strongly interferes with the employer's business strategy. An example of a 'separate' instruction is the assignment of an individual worker to another task or to different working hours for health reasons.[141] Here the employer could adapt to a court's decision without the necessity to change his business concept or his business strategy.
In the case of a 'separate' instruction, considered as the normal case, as the initial point of any review, the Federal Labour Court formulate 'reasonably exercised discretion' as follows:

> 'A specification made at reasonably exercised discretion requires a weighing of the mutual interests according to constitutional and statutory values, *the general evaluation principles of proportionality and appropriateness* as well as common practice and fairness.'[142]

Where an instruction cannot be viewed as 'separate' because this instruction implements a *business decision*, courts restrict the formulation quoted above:

> 'If an instruction is based on a *business decision*, the latter is of particular importance. The organisational concept is not to be reviewed for its expediency. Labour courts cannot require the

---

[134] Federal Labour Court of 30 November 2016 – 10 AZR 11/16, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [2017] 1394, p 1400, para 53 (emphases supplied).

[135] For the comparable provision Section 315 BGB: Rieble, V., in Rieble, V., & Schwarze, R., & Löwisch, M. 'Staudinger BGB – Volume 2: Recht der Schuldverhältnisse (16th ed.)' (2020), [Section 315] para 327-328: Section 315 aims at specifying the obligation in conformity with the contract. The decision [of the employer] must (similar to the supplementary interpretation of the contract) respect and further consider the will of the contracting parties expressed in the contract, namely the discretionary power. [For the court,] Section 315 is not an instrument for correcting contracts […] This means in particular that no correction of the originally agreed condition may be made via the equity control.

[136] *Braganza v BP Shipping Ltd and another* [2015] UKSC 17, [2015] ICR 449, p 460, para 27, para H: '[…] the law's object is also to limit the decision-maker to some relevant contractual purpose'.

[137] Federal Labour Court of 18 October 2017 – 10 AZR 330/16, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [2017] 1452, p 1461, para 75.

[138] To recap, dogmatically, the different formulations of proportionality are 'simply' different interpretations of the vague wording of 'reasonably exercised discretion' according to Section 106 GewO.

[139] Since a (wider) *business decision* usually expresses a concept how an employer intend to organise his business, the expression *business decision* is equally common, cf. Dütz, W. & Thüsing, G., 'Arbeitsrecht (24th ed.)' (2019), para 410b.

[140] Federal Labour Court of 30 November 2016 – 10 AZR 11/16, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [2017] 1394-1400.

[141] Federal Labour Court of 18 October 2017 – 10 AZR 47/17, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [2018] 162-166.

[142] Federal Labour Court of 24 October 2018 – 10 AZR 19/18, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [2019] 619 p 621, para 26 (emphases supplied).

> employer to make *business decisions* which he does not intend to make. However, a *business decision* does not mean that the weighing of interests of the employee is excluded from the outset and that the employee's interests can only prevail within the framework set by the employer through the business decision. The business decision is an important, but not the sole consideration aspect. In individual cases*, particularly serious, in particular constitutionally protected, interests of the employee may prevail.* It depends on whether the employer's interest in implementing his business decision justifies the instruction in the individual case. This is the case if the underlying business decision *suggests* the instruction issued despite the disadvantages arising for the employee and does not make it appear arbitrary or abusive.'[143]

Although it is apparent that the court attempts to give employees a leg up, it cannot conceal the fact that under this formulation, work instructions are disproportionate only in exceptional cases. As a consequence, the applicable test drawing on this limiting formulation shows a high degree of deference and deviates from the 'normal' test of proportionality as explained above:[144]first, the courts do indeed consider both the business decision (e.g. site closure) and the subsequent instruction/ relocation. However, the business decision is only reviewed as to whether it was actually taken (a), whether it was put into practice (b) and whether it was not taken irrationally, capriciously or arbitrarily (c). Second, where an employer can show that the subsequent instruction implements ('suggests') the *business decision* (d), the instruction may only be disproportionate due to severe infringements of employee's contractual and fundamental rights ('limited narrow proportionality') (e).

The rationale for the deference on limbs (a), (b) and (c), that is to say the business decision, is all about expertise:

> 'The judicial review of a business decision does not aim to impose organisational requirements on the employer. It is not intended to examine the validity of the considerations which led him to adopt the very concept he had chosen. *The sole purpose is to prevent abuse.* Such abuse can exist if the employer's concept is solely aimed at 'getting rid of' the employee and justifies this with a business decision.
>
> A business decision that has been made and carried out *can be assumed to be made on rational* - not least economic - grounds and is not based on abusive motives. […] the employee must explain […] circumstances from which it should be apparent that the business measure taken is obviously irrational, capricious or arbitrary.'[145]

It is noteworthy that although a *business decision* (e.g. restructuring) usually affects many employees not involved in the proceeding and its adaption has considerable polycentric effects, German labour courts do not use institutional competence as an argument for their deference in this context.

In detail, Limb (c), irrational, capricious or arbitrary, clearly states that a business decision itself is not susceptible to a proportionality test. This high level of deference mirrors, as the quote above points out, the concerns expressed by Lord Hodge in *Braganza* when he emphasises that 'the court is not entitled to substitute its own view of what is a reasonable decision for that of the person who is charged with making the decision'.[146] German labour courts feel ill-equipped not only because of the potentially harsh impact a judgment might have on employers'

---

[143] Federal Labour Court of 30 November 2016 – 10 AZR 11/16, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [2017] 1394, p 1397, para 30 (emphases supplied).

[144] To recap: A decision must pursue a legitimate aim (a), be appropriate (b), be necessary (c) and there must be an adequate relationship of proportionality between the benefits resulting from achieving the legitimate aim on one hand and the impact on the interests affected on the other ('narrow proportionality') (d); cf. above p 25.

[145] Federal Labour Court of 18 June 2015 – 2 AZR 480/14, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [2015] 1315, p 1318-1319, para 35.

[146] *Braganza v BP Shipping Ltd and another* [2015] UKSC 17, [2015] ICR 449, p 465, para 52 (Lord Hodge).

business strategies — which is consistent with Davies' observation for English courts according to which they are 'particularly ill qualified' to review decisions with high economic relevance.[147] Moreover, since every business strategy is inherently risky, it is simply difficult to say where the justifiable taking of business risks stops and irrationality begins.[148]

The approach taken by the German labour courts on limb (c) is easier to grasp if one bears in mind the legal consequence if an employer can demonstrate that a business decision implements an instruction: on limb (e), an employee is no longer protected by the full set of 'narrow proportionality', but only in cases of severe infringements of his fundamental or contractual rights. Thus, on limb (c), German labour courts ask, in a nutshell, whether there are indications that the business decision had been taken only ostensibly in order to lower the standards for the 'narrow proportionality' test.[149] For example, a business decision which has conspicuously only been taken for an insignificant, easily manageable, period of time or the withdrawal of which is apparent may be an indication of an arbitrary exercise of discretion.[150] However, this test is just as difficult to satisfy as the *Wednesbury* test, since German labour courts presume a *business decision* which is taken and carried out to be reasonable, as long as a worker cannot raise reasonable doubts.[151]

Limb (d), 'implementation', replaces both appropriateness and necessity of the original proportionality test. The employer must demonstrate that an instruction of an individual employee is 'required' to 'implement' the *business decision*. Consequently, this test is much stricter than a 'reasonable response'.

On limb (e), the subsequent instruction is susceptible to a test of 'limited narrow proportionality', meaning — and this is of utmost importance — the instruction is disproportionate only in severe cases (e.g. fundamental right infringement). The rationale is twofold: first, the very idea of 'narrow proportionality', understood as an adequate relationship between the employer's benefits resulting from an instruction on one hand and the impact on the employee's interests affected on the other. Where an instruction implements a business decision, it is difficult for the courts to distinguish between the benefit achieved by the instruction and the benefit achieved by the business decision when weighting the employer's interests — the former is issued for the sake of the latter. Only particularly severe consequences for an individual employee can justify an employer having to adapt the organisation of his business beyond the scope of that individual employee.[152] Second, by considering *a priori* only severe

---

147 Davies, A.C.L., 'Judicial Self-Restraint in Labour Law' (2009), Industrial Law Journal, Volume 38, Issue 3, 278, 305.

148 Kiel, H., in Ascheid, R., & Preis, U., & Schmidt, I., 'Kündigungsrecht (5th ed.)' (2017), [Section 1 KSchG] para 460.

149 It might also be helpful to bear in mind that the distinction between the *business decision* and the subsequent instruction derived from concepts originally developed for redundancy. According to the Federal Labour Court, an employee is redundant if the employer has surplus labour. Such a surplus does not already result from external influences (e.g. decline in sales), but only from the employer's decision to adapt to the situation (produce less). An employer might as well produce on stock.

The *business decision* to produce less is distinct from the (selective) decision to dismiss a particular employee. The *business decision* is only scrutinised through the lens arbitrariness and capriciousness (essentially, if it is only a pretence for lay-offs). This is very similar to the approach taken by English courts in cases of redundancies.

The dismissal is in principle susceptible to a proportionality test. However, given the surplus labour, the dismissal is basically never disproportionate. Instead, the courts focus on the procedure, namely the 'selection out'.

On instructions, the approach is similar. However, since an instruction is usually no reaction to surplus labour, the interests of employers are usually less affected, which leaves the courts considerably more scope to balance the interests of the employer and the employee.

150 Federal Labour Court of 26 September 2012 – 10 AZR 412/11, in NEUE JURISTISCHE ONLINE-ZEITSCHRIFT [2013] 457, p 460, para 37.

151 See the above quote for the rationale/ presumption made by the courts, p 42.

152 From this point of view, the different formulation of the 'limited narrow proportionality' can be seen as anticipating a result of the weighing which the courts would normally reach in individual cases even under the normal 'narrow proportionality' when an instruction implements a wider business decision. The different formulation ultimately serves to increase legal certainty and predictability for the employer. If he can show that limbs (a) to (d) have been satisfied, he need not worry much about whether the instruction will be found by the courts to take adequate account of the employee's interests.

The different formulations for a separate instruction and an implementing one follow a pattern which is typical for German courts, where they are dealing with very normative concepts such as 'reasonable exercised discretion'. For the sake of legal certainty and predictability, courts try to identify decisive factual points/ questions recurring in similar context—thus easier to grasp for lay persons—and formulate tiered standards of review around these factual points. In the context of work instruction this 'turning point'

encroachments on important employee interests, the courts ensure that the employer's business strategy expressed by his business decision is in principle not reviewed for its expediency through the back door of 'narrow proportionality'.

So how does the German approach to proportionality in the context of work instructions work in practice? This shall be exemplified on basis of case of *United Bank v Akhtar*.[153] In this case, an employee's contract contained an express mobility clause referring to employer's discretion. [154] After the employee had received notification of a relocation with three days' notice and without allowance, he informed his employer about his wife's illness and an impending house sale. His request to postpone the transfer was refused.[155] The court held that the employer breached TC: due to factual obstacles (illness and sale), it would had been impossible for the employee to follow the instruction within such a short time and without allowance.[156] An order 'frustrating' the employee's attempt to perform his obligations, is a 'conduct […] to destroy or seriously damage [TC] between employer and employee'.[157] Therefore, the relocation required an appropriate period.

According to Germany, the decision to increase the headcount in the other branch would be regarded as a *business decision* which can only be reviewed through the lens of arbitrariness. The selection of the claimant would be considered as the *instruction*. If the employer can demonstrate that the selection of the claimant was required to implement the *business decision*, e.g. because the claimant meets special skills required for the position in question, the instruction could only be reviewed through the lens of 'limited proportionality'. In this case, a German judgement would probably be similar in outcome. An order frustrating an employee's attempt to fulfil his obligations would be considered a severe breach of his contractual rights, because such an order would circumvent the employee's protection against unjustified dismissal. However, even the German courts would confine themselves to requiring a longer period and an allowance, and would not consider it disproportionate that the employee was transferred at all. Otherwise, such a judgment would indirectly call into question the employer's *business decision*, something to which the courts regard themselves as not entitled.

This might be different if the employer cannot demonstrate that the new position does require the particular employee to be relocated ('no implementation') because, say, several employees are suitable. In this case, the employee could, given his burdens, potentially claim to not be relocated at all. A court decision allowing such a claim would not interfere with the employer's *business decision*, since the employer could transfer another colleague who is equally capable but less burdened.

4.2.2.3 Democratic Accountability

Democratic accountability, understood as situations where the workforce had been able to influence an employer's decisions, conferring legitimacy to those decisions, is not equally evident as a deference factor in German employment law.

First, German employment law provides a sophisticated set of rules facilitating employees' participation in employer decisions. This is realised on two separate levels. First, through the involvement of works councils,

---

is limb (d) — implementation. In the former example of occupational pension schemes, the 'turning point' is the question whether the entitlements are already vested.

Cf. a more detailed explanation below Ch 4.3., p 53 et seq.

153 *United Bank v Akhtar* [1989] IRLR 507-513.

154 *Ibid*, p 509, para 8: 'The bank may from time to time require an employee to be transferred temporarily or permanently to any place of business which the bank may have in the UK for which a relocation or other allowance may be payable at the discretion of the bank'.

155 *Ibid*, p 507, 'the facts'.

156 *Ibid*, p 512, para 45.

157 *Ibid*, p 512, para 49.

elected employees who represent the workforce's interests at company level.[158] Second, through trade unions and collective bargaining, which usually represent the interests of employees from several employers.[159]

At firm level (works council), in central issues, participation is not primarily achieved through consultation rights but through negotiating rights (co-determination). For example, Section 87 Works Constitution Act (Betriebsverfassungsgesetz — BetrVG) contains a wide range of co-determination rights, as such employers' obligation to negotiate with the works council any temporary reduction or extension of the hours normally worked in the establishment.[160] When an agreement is concluded, it is directly binding on the employer and fetters his discretion.[161]

Next, while there are consultation rights not fettering employers' discretion. For example, if the employer makes a *business decision* resulting in a reorganisation of an establishment, as in the example of the relocated flight attendants described,[162] such a decision is subject to consultation with the works council.[163] As explained, courts show a high degree of self-restraint when reviewing such business decisions (*arbitrariness*).[164] However, and surprisingly, although democratic accountability would provide a perfect argument for this self-restraint, the courts are only concerned with questions of expertise.[165]

Finally, collective bargaining achieved by trade unions is indeed subject to very limited judicial review. According to the Federal Labour Court, there is an assumption that the interests of employees have been adequately considered in collective agreements (*Richtigkeitsgewähr*).[166] However, this assumption is based less on the rationale of democratic accountability than on the idea of equal bargaining power:[167]

> 'Collectively agreed terms are assumed to be in the interests of both sides and not to give either side an unacceptable preponderance. Due to the equal bargaining power, in contrast to the parties to the employment contract, the parties to the collective agreement must be left an extensive discretion. It is not for the courts to review whether the fairest and most expedient regulation has been found.'[168]

---

158 Richardi, R., & Maschmann, F., in Richardi, R., 'Betriebsverfassungsgesetz mit Wahlordnung (16th ed.)' (2018), [Section 1 BetrVG] para 3-5.

159 Löwisch, M., & Rieble, V., 'Tarifvertragsgesetz (4th ed.)' (2017), [Section 1 TVG] para 1-8.

160 E.g., Section 81 para 1 no 10 BetrVG: The works council shall have a right of co-determination in the following matters in so far as they are not prescribed by legislation or collective agreement: […] Questions related to remuneration arrangements in the establishment, including in particular the establishment of principles of remuneration and the introduction and application of new remuneration methods or modification of existing methods.

161 Cf. Section 77 para 4 BetrVG: Works agreements shall be mandatory and directly applicable. Any rights granted to employees under a works agreement cannot be waived except with the agreement of the works council. Such rights cannot be forfeited […].

162 See above Ch 4.2.2.2.

163 Cf. Section 111 BetrVG: In establishments that normally have more than twenty employees with voting rights the employer shall inform the works council in full and in good time of any proposed alterations which may entail substantial prejudice to the staff or a large sector thereof and consult the works council on the proposed alterations [...].

164 See above Ch 4.2.2.2.

165 See above Ch 4.2.2.2.

166 Federal Labour Court of 4 September 1985 – 5 AZR 655/84, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [1986] 225, p 226.

167 Dütz, W., & Thüsing, G., 'Arbeitsrecht (24th ed.)' (2019), Chapter 12: Tarifrecht, para 640.

168 Federal Labour Court of 4 September 1985 – 5 AZR 655/84, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [1986] 225, p 226.

Democratic aspects play a role in so far as the 'assumption of correctness of collective agreements' only functions if it is ensured to a minimum extent that the collective bargaining power has potentially been used in the interests of the employees affected by the agreement; cf. in more detail: Federal Constitutional Court of 11 July 2017 – 1 BvR 1571/15 in para 202-204, the translation of the judgment into English provided by the Federal Constitutional Court is available at: http://www.bverfg.de/e/rs20170711_1bvr157115en.html.

A theoretical basis is provided by the *concept of countervailing power* described by Nobel Prize winner John Kenneth Galbraith. The 'equality of arms' of the contracting parties is achieved by a balance of power between interest groups organised in associations; the

4.2.2.4 Wage-Work Bargain

As already seen in the context of occupational pension schemes, German labour courts consider the wage-work bargain as a deference factor.[169] This approach can also be observed in cases concerning bonus pay.

To begin with, the degree of deference depends on whether a bonus is intended to remunerate the work done by the employee or whether it is a so-called *gratuity payment*. The latter means a payment which serves other than remuneration purposes.[170] Examples are payments rewarding an employee's loyalty to the employer or covering an employee's additional expenses due to holiday travel or Christmas.[171]

While employers remain a wide scope of discretion on *gratuity payments*, courts have a much closer eye where a bonus pay is intended to be part of employee's remuneration. The latter is illustrated by a case following the financial crisis where an employee claimed a bonus pay (remuneration) for 2008 which had been denied, although the employee met the relevant individual performance criteria.[172] The employer — a bank — argued that the refusal was reasonable given the tremendous loss the bank suffered in 2008 and the fact that the bank had to be stabilised by the government.[173] The court sided with the employer. However, this was due to the 'serious and extraordinary circumstances which, *exceptionally*, justify' rejecting 'any' performance bonus.[174] The court hinted that losses reflecting the 'normal' risks inherent in the employer's business are not per se a sufficient reason to refuse any bonus payment if an employee has achieved the performance targets set for him.[175] This is due to the purpose of a performance-based bonus which is to incentivise an employee to perform better in a particular way (either qualitatively or quantitatively). Where an employee had 'delivered' the required performance, the employer has benefited regardless of his residual business risks.[176] Variations of the performance bonus ultimately affect the wage-work bargain and thus might fail employee's legitimate expectation of consideration.

---

collective agreement brings contractual freedom to an upper level where it can function better than at the individual contractual level; cf. Galbraith, J.K., 'American capitalism: the concept of countervailing power (2th ed.)' (1980).

In this vein, by determining the working conditions for a large number of employees and thus eliminating competition on the labour market, trade unions and collective agreement have a cartel effect. In the interest of worker protection, this cartel effect is to a certain extent considered desirable in the labour market, as opposed to other markets; cf. Junker, A., 'Grundkurs Arbeitsrecht (19th ed.)' (2020), para 20; Rieble, V., 'Arbeitsmarkt und Wettbewerb: der Schutz von Vertrags- und Wettbewerbsfreiheit im Arbeitsrecht' (1996), p 335, para 1117.

169 See above Ch 4.2.2.1.

170 Hexel, C., in 'MÜNCHENER ANWALTSHANDBUCH ARBEITSRECHT (4th ed.)' (2017), Ch 20, para 122.

171 German employment contracts often contain clauses stating that any *gratuity payment* is only granted voluntarily or that the employer can withdraw from a promise originally made in the employment contract. *Gratuity payment*, which are intended to reward the loyalty of the employee, are often granted on condition that the employer can reclaim the payment if the employee subsequently gives notice before a certain date; cf. Junker, A., 'Grundkurs Arbeitsrecht (19th ed.)' (2020), para 253-254.

172 Federal Labour Court of 20 March 2013 – 10 AZR 8/12, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [2013] 970-974.

173 *Ibid*, p 973, para 37: In the financial year 2008, the employer's loss amounted to EUR 2.8 billion. The financial support provided by the Special Financial Market Stabilization Funds (SoFFin) amounted to EUR 6.4 billion.

174 Federal Labour Court of 20 March 2013 – 10 AZR 8/12, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [2013] 970, p 973, para 37 (emphasis supplied).

175 *Ibid*.

176 This rationale is expressed by a court in a parallel decision when assessing, one step earlier, whether the right to withdraw from a performance bonus after the employee has already performed his extra work is an unfair contractual term:

'By concluding a target agreement which is related to remuneration, the employer sets performance incentives for the employee and thus determines how, from his point of view, the employee should perform his work in a certain period in an optimal way. The promised performance-related remuneration is thus in return for performance; it is part of the consideration for the work performed by the employee. It is not compatible with this character of consideration if the employer reserves the right, despite the work performed and even if the employee achieves the agreed objectives, to waive the claim to remuneration and not, as in this case, to have to decide on it at his own discretion.', cf. Federal Labour Court of 19 March 2014 – 10 AZR 622/13, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [2014] 595, p 601, para 52.

Next, with regard to bonuses which have a remuneration purpose, the less a bonus is linked to the concrete work performed by the individual employee, the more reluctant the courts are to award bonuses.[177] This can be exemplified by a comparison between a performance bonus and a bonus tied to the employer's business success (*profit sharing*). First, the latter gives employees only a more generic incentive — mainly promoting loyalty through the prospect of a piece of the employer's cake. In the absence of individual performance thresholds, such a bonus is granted irrespective of the individual contribution of the employee.[178] Consequently, although part of the employee's remuneration, the individual wage-work bargain is less concerned. Second, it is apparent that its purpose is also to protect the employer by sharing the economic business risks between employer and employee.[179] And thirdly, from a factual point of view, the assessment of business success is broad and naturally leaves the employer a greater scope of discretion.[180]

As a result, German labour courts vary the detail of judicial review depending on the purpose for which a payment is intended. The more a payment is linked to the individual work performed by an employee, the less deferent the courts are.

Looking closely, the different approach on clauses promising an individual performance bonus compared to such promising a profit share can be justified not only by the importance of the wage-work bargain, but also by the parties' implicit intent. Compared to the promise of profit-sharing, an employer promising a performance bonus implicitly expresses that the individual performance of the employee should play a more decisive role in the exercise of the employer's discretion than the success of the company — and vice versa.
Furthermore, the fact that German labour courts scrutinise bonus pay through the lens of the wage-work bargain — emphasising their contractual nature — is accentuated by the following: according to the Federal Labour Court, even where an employer unreasonably denied any bonus, the courts cannot specify an reasonable amount instead if the proceedings do not bring to light any relevant criteria on the basis of which the employer normally exercises his discretion and which were established either by contract or by the employer's remuneration policy.[181]

4.2.3 Evaluation

The first conclusion that can be drawn is that the German legal basis for judicial review simplifies a comparison. The legal provisions enabling the courts to review the employer's decision are only marginally defined by the legislator. Instead, the provisions contain 'undefined legal concepts' leaving the courts a considerable scope in

---

It is straightforward that, if an employer cannot reserve an unrestricted right to withdraw from a promise of a performance bonus, he must provide substantial reasons when exercising his discretion and denying any performance bonus if the employee already fulfilled his part of the agreement.

177 Lingemann, S., & Otte, J., 'Bonuszahlungen und Freiwilligkeitsvorbehalt: Die Gewichte verschieben sich' (2014), in NEUE JURITSISCHE WOCHENSCHRIFT [2014] 2400, p 2402.

178 Preis, U., in 'ERFURTER KOMMENTAR ZUM ARBEITSRECHT (20th ed.)' (2020), [Section 611a BGB] para 495.

179 Davies, A.C.L., 'Employment Law' (2015), p 102, para 4.

180 In addition, although German courts do not name these factors in this context, bonuses linked to the employer's company success trigger much more the deference factors expertise and institutional competence, as it must be up to the employer to allocate the profits. For example, to decide whether profits should be reinvested in development of new products, or to pay it to employees in order to strengthen the workforce, or to distribute profits to shareholders as dividends to attract the capital market.

181 Federal Labour Court of 3 August 2016 – 10 AZR 710/14, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [2016] 1334, p 1338, para 30.

In the relevant case, the court found the refusal made as unreasonable, because the employer did not meet his burden of proof. The employer did not provide any criteria for his decision and thus failed to proof, comparable to limb (a) of the *Wednesbury* test, that he had taken into account relevant considerations.

However, in the next step, when the courts have to specify a reasonable bonus pay, the employee can present criteria contractually agreed or usually used by the employer. An example might be the employer's explanation for bonuses paid in previous years. As a result, cases in which the courts do not find any admissible criteria are admittedly rather rare.

interpreting its purpose and in developing the law. Therefore, the role of the German courts in this area of law is very similar to the role of the English courts in common law.
Second, German labour courts are equally concerned about their jurisdiction and 'due deference' as English courts. Employers' expertise is a vital reason for their self-restraint. The latter is evident in the distinction between an instruction and an upstream *business decision*. But also, in cases without a *business decision*, German labour courts leave employers a considerable scope of discretion when applying proportionality, as their approach on appropriateness and necessity is close to the reasonable response test well-known in English law. Another example is the formulation of proportionality in relation to occupational pension schemes. Where neither material control nor wage-work bargain are at stake, the formulation of proportionality is similar to that of *Wednesbury* reasonableness, leaving a wide margin of discretion to the employer.

Third, German labour courts are essentially governed by the same deference factors as identified by Davies and proposed by Bogg and Freedland for English courts. However, two differences can be observed: first, although German employment law provides vivacious means for the workforce to influence on employers' decisions, either via works council or trade unions, German labour courts do not express considerations based on democratic accountability when reviewing employer decisions. Next, a vital consideration for the German labour courts is the wage-work bargain. The wage-work bargain could be of particular interest to English courts, as it is closely linked to the contract and is therefore less prone to objections based on arguments rejecting *good faith* in English contract law and based on the public-private divide. Moreover, the wage-work bargain, understood as a deference factor calling on the courts to ensure that employers cannot simply pass on their economic risks to employees, is in line with the leitmotif that employees, unlike employers and freelancers, are not entrepreneurs. The latter is expressed by the 'economic reality' test used in the cases of *Quashie* and *Market Investigation*, according to which employees normally do not work for their own account and do not to bear the economic risk associated with their work.[182]

Fourth, when formulating and applying proportionality, German labour courts utilise these factors 'alongside the proportionality test so that courts ask, at each stage […], how much respect should be afforded to' employers' initial evaluation, which is exactly the approach as called for by Davies for English employment law.[183]

As a result, the German approach to proportionality contains many considerations and values that also prevail in English law (especially the importance of the purpose of the contract). German courts also share the concerns of English courts regarding courts' jurisdiction, in particular that courts may not substitute their view for that of the employer. Consequently, the German discussion on the judicial review of employer decisions can provide valuable impulses for the discussion in English employment law.

4.3 German Labour Courts as a Feature: no 'Deal Breaker'

Davies observed that English courts are particularly deferent due to their potential lack of expertise and due to the economic consequences, a court's decision might have.[184] In terms of expertise, German labour courts have lay members and are thus more comparable with ET and EAT than with English courts.[185] This imposes the question on how to take account of the fact that German labour courts are specialised courts.[186]

---

[182] *Stringfellow Restaurants Ltd v Quashie* [2013] IRLR 99, CA; *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173; Davies, A.C.L., 'Employment Law' (2015), p 102.
[183] Davies, A.C.L., 'Judicial Self-Restraint in Labour Law' (2009), Industrial Law Journal, Volume 38, Issue 3, 278, p 283.
[184] *Ibid*, p 304-305.

[185] Section 6 Labour Court Act (Arbeitsgerichtsgesetz — ArbGG): 'The labour court shall give decisions sitting with one professional judge and two honorary judges [lay members], one from the employer side and one from the employee side'.

[186] Besides the participation of lay members, proceedings before German regular courts and German labour courts differ primarily in the faster proceedings and a lower cost risk in the latter. Both reflect the fact that the employment relationship is usually the basis of an employee's livelihood (Rationale: easy access to justice). These rules on procedure have no influence on substantive law. The described purposes is comparable to the ones emphasised by the Donovan Report in 1968 for the UK Employment Tribunals (back then

First of all, the answer to this question can hardly be to completely shy away from a sensitive judicial review where expertise matters.[187] Even cases 'about money' (pension schemes, bonus pay) invoke critical deference factors such as the wage-work bargain or central capabilities, which require a more employee protective approach.

Instead, the answer to this question lies in the approach already adopted by English courts, namely to formulate the relevant review standard flexibly and to apply the respective standard sensitively to the individual context of a case. As with their English counterparts, the German labour courts are very cautious about the fact that the employer bears the residual economic risks associated with his business. That is why German labour courts have developed, alongside a common understanding of proportionality,[188] subtle variations taking account of the individual context. Central to the variations in each example presented above is the identification of a 'fulcrum' — meaning factual points/ questions recurring in similar contexts. These serve, on one hand, to respect the expertise of employers and mitigate the economic consequences of a judgement and,[189] on the other hand, to ensure that the legitimate expectations of employees are protected. In the example of adjustments to occupational pension schemes the 'fulcrum' is whether entitlements are already earned (vested). For work instructions it is pivotal whether an instruction implements a *business decision*; and for bonus pay it is whether a payment is part of the remuneration and how closely a bonus is tied to an employee's individual performance. These variations are, dogmatically, often different formulations of the 'narrow proportionality' anticipating a result of the weighing which the courts would usually reach anyway because a specific context usually generates a recurring pattern of considerations. For example, where entitlement to a pension payment has vested, employees have spent part of their working life (non-recoverable) with one employer.

This approach could be a tool also for English courts, although probably different in detail.[190] To begin with, such 'tiers' are not vague notions of equity, but can be explained by the purpose of a discretionary power. This can be seen in the distinction between *gratuity payments*, bonuses paid in return for an employee's individual performance and those aimed at sharing the employer's profits. If an employer, having the choice,[191] deliberately decides to promise a bonus based on an employee's individual performance, this (contractual) intention of the employer justifies expecting him to keep his promise.[192] Consequently, such an approach is in line with Lady Hale's argument, when quoting *British Telecommunications v Telefónica*, that a contractual discretion 'must be exercised consistently with its contractual purpose'.[193]

Next, 'tiered' review standards building upon a 'fulcrum' facilitate legal certainty and predictability. Since such 'fulcrums' reflect factual points/ questions recurring in similar contexts, they are easier to grasp for lay persons. For example, if a work instruction implements a *business decision*, the formulation of proportionality is much more

---

Industrial Tribunals): 'easily accessible, informal, speedy and inexpensive', cf. 'The Royal Commission on Trade Unions and Employers' Associations, 1965–1968' (1968), Cmnd 3623, para 572, as cited in Morgenweck, J., 'Die Arbeitsgerichtsbarkeit in England' (2013), p 7.

187 This holds true for institutional competence as well, since the boundaries between expertise and institutional competence are — as Davies pointed out — sometimes rather blurred, cf. Davies, A.C.L., 'Judicial Self-Restraint in Labour Law' (2009), Industrial Law Journal, Volume 38, Issue 3, 278, p 286.

188 For the understanding of proportionality as established in German law see above Ch 2, p 11.

189 Again, this is also relevant to institutional competence.

190 As Teubner has observed, and as stressed at the beginning of this article, 'irritating' effects caused by such a comparison lead to an own development within the British domestic idiosyncrasies, cf. Teubner, G., 'Legal Irritants: Good faith in British Law or How Unifying Law Ends Up in New Divergences' (1998), The Modern Law Review, Volume 61, Issue 1, 11, p 32.

191 This consideration becomes even more relevant if one takes into account employers' unequal bargaining power relative to their employees.

192 That the purpose of a contractual discretion is not only instructive for the formulation of the relevant review standard but also for its application to the facts, can be seen by the German cases already described above. For example, in the case dealing with the flight attendant who had been relocated (p 38), the court held (when assessing the narrow proportionality) that the attendant could not invoke the harmful impact the required house move would have on her family life, since it is inherent in the job of a flight attendant to be deployed to different airports.

193 *Braganza v BP Shipping Ltd and another* [2015] UKSC 17, [2015] ICR 449, p 460, para 27; where she quotes *British Telecommunications plc v Telefónica O₂ UK Ltd* [2014] Bus LR 765, p 780-781, para 37.

confined to arbitrariness or capriciousness and thus much closer to *Wednesbury* reasonableness. As a result, an employer knows much better in which situations he has a wide margin of discretion or in which he must be more sensitive to the employer's interests. This would strengthen Lady Hale's argument in *Braganza*, where she expects an employer to 'inform themselves of the principles which are relevant to the decisions which they have to make'.[194]

5. *Trust and Confidence* as a Sufficient Basis for Proportionality?

TC provides a foundation for proportionality in English employment law, as TC's formulation, establishing a standard of *good faith*, is flexible enough (5.1.), and the purpose of many discretionary powers suggests an interpretation of TC towards proportionality (5.2.).

5.1 *Good Faith* as a foundation

The key implied term providing principles constraining the exercise of employers' power is TC.[195] TC requires, according to *Malik v BCCI*, that 'the employer shall not without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee'.[196] Drawing on the general duty of cooperation,[197] via TC courts imply an increasing standard of *good faith* in employment law.[198] As such, TC provides a foundation flexible enough to allow courts an interpretation of TC towards proportionality.

First, as Davies points out,[199] TC shows a striking resemblance to proportionality when one considers Lord Steyn's further statement in *Malik v BCCI*, where he describes TC as

> 'apt to cover the great diversity if situations in which *a balance has to be struck* between an employer's interest in managing his business as he sees fit and an employee's interest in not being unfairly and improperly exploited'.[200]

Second, the flexibility of the TC is demonstrated by the remarkable development it has already undergone. This is expressed by *French v Barclays* where the employer lent money to his employee and subsequently demanded a readjustment of the loan agreement.[201] The court sided with the employee because the readjustment, which would have meant an enormous loss for the employee, would have destroyed his legitimate expectations and thus a breach of TC.

Third, freedom of contract and private autonomy do not form convincing counter-arguments. To begin with, TC is a term implied in law and — different to terms implied in fact — not based on parties' will.[202] Next, the justification for both ('free will') requires a balance of bargaining power which is not given in an employment

---

194 *Braganza v BP Shipping Ltd and another* [2015] UKSC 17, [2015] ICR 449, p 462, para 36.

195 *Johnson v Unisys Ltd* [2001] ICR 480, p 495, para 36: 'The contribution of the common law to the employment revolution has been by the evolution of implied terms in the contract of employment. The most far reaching is the implied term of trust and confidence'; Davies, A.C.L., 'Judicial Self-Restraint in Labour Law' (2009), Industrial Law Journal, Volume 38, Issue 3, 278, p 294-295; Bogg, A., & Freedland, M., 'Pensions Law, *IBM v Dalgleish*, and the Public/Private Divide' (2020), in Agnew, S., & Davies, P.S., & Mitchell, C., 'Pensions Law, Policy and Practice' (2020), p 235.

196 *Malik v Bank of Credit and Commerce International SA (In Liquidation)* [1997] ICR 606, p 621, para D.

197 Brodie, D., 'Beyond Exchange: The New Contract of Employment' (1998), Industrial Law Journal Volume 27, Issue 2, 79, p 80.

198 Bogg, A., 'Good Faith in the Contract of Employment: A Case of the English Reserve' (2011), Comparative Labor Law & Policy Journal, Volume 32, Issue 3, 729, p 732.

199 Davies, A.C.L., 'Judicial Self-Restraint in Labour Law' (2009), Industrial Law Journal, Volume 38, Issue 3, 278, p 295.

200 *Malik v Bank of Credit and Commerce International SA (In Liquidation)* [1997] ICR 606, p 622, para A (emphases supplied).

201 *French v Barclays Bank Plc* [1998] IRLR 646, CA.

202 For terms implied in law see: Bogg, A., & Freedland, M., 'Pensions Law, *IBM v Dalgleish*, and the Public/Private Divide' (2020), in Agnew, S., & Davies, P.S., & Mitchell, C., 'Pensions Law, Policy and Practice' (2020), p 232; Peel, E., & Treitel, G., 'The law of contract (14th ed.)' (2015), para 6-044. For terms implied in fact see: *Shirlaw v Stouthern Foundries Ltd* [1940] AC 701.

context. This inequality has become even more alarming as collective bargaining has declined massively since the Thatcher government.[203] The focus of the law has shifted from collective *laissez-faire* to the protection of individual employment rights.[204] Eventually, this led to the recognition of employment law as a special field of law aiming to protect employees.[205] This 'transition' allows for the development of the TC liberated from values of general contract law not equally applicable in an employment context.[206]

Fourth, an expansion of TC towards proportionality is underpinned by the nature of employment contracts as so-called *relational* contracts.[207] *Relational* regards contracts as relations and not as 'discrete transactions'.[208] This continuous relationship makes the especially the weaker party dependent. No relationship other than employment allows such a high degree of control over a person.[209] It is not without reason that control is a decisive factor in determining employee status.[210] At the same time, as Lord Hoffmann noted in *Johnson v Unisys*, 'a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem'.[211] The combination of both, the employer's control and the employee's vulnerability, creates a responsibility on the part of the employer underpinning the requirement that decisions be taken in a proportionate manner.

5.2 The Purpose of the Respective Discretion as a Determining Factor

Pivotal for the formulation and application of reviewing standards — all varying in their sensitivity — is the purpose of the relevant discretionary power.

This is expressed not only in the reasoning in *Braganza*,[212] but can be drawn from commercial cases like *Socimer*.[213] The latter takes place in the financial market. The parties entered into a forward sale agreement which gave the defendant bank the discretion to value certain assets if, as happened, the claimant bank defaulted. The claimant bank criticised the valuation made by the defendant bank as too low. The court held that the discretion conferred to the defendant bank was 'limited as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality'.[214] However, given the difficult market conditions, the purpose of the discretionary power to value the assets, which was to self-protect the defendant bank, and that the agreement was made between sophisticated trading partners, the court held,

---

[203] Machin, S., 'Union Decline in Britain' (2000), British Journal of Industrial Relations, Volume 38, Issue 4, 631, p 631-632. To this end, the Thatcher government enacted the Employment Act 1980.

[204] This is reflected in particular by tremendous increase of claims brought to tribunals which led the government to the enactment of the Employment Act 2002. The latter aimed to reduce the number of proceedings by introducing a grievance procedure (abolished in 2009). Another example is the ET and EAT Fees Order 2013 which introduced fees before bringing a tribunal claim (declared as unlawful in 2017).

[205] *Regina (UNISON) v Lord Chancellor (SC(E))* [2017] 3 WLR 409, p 417, para 6.

[206] For the flaws of the general contract law when dealing with relational contracts see for more detail: Gaudel, P.J., 'Relational Contract Theory and the Concept of Exchange' (1998), Buffalo Law Review, Volume 46, Issue 3, 763-798.

[207] Brodie, D., 'How Relational Is the Employment Contract?' (2011), Industrial Law Journal, Volume 40, Issue 3, 232.

[208] MacNeil, I.R., 'The Many Futures of Contracts' (1974), Southern California Law Review, Volume 47, Issue 3, 691, p 693-694.

[209] As Bogg and Freedland put it: 'to sell one's labour power is in fact to sell oneself', cf. Bogg, A., & Freedland, M., 'Pensions Law, *IBM v Dalgleish*, and the Public/Private Divide' (2020), in Agnew, S., & Davies, P.S., & Mitchell, C., 'Pensions Law, Policy and Practice' (2020), 223, p 246.

[210] *Ready Mixed Concrete Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, p 515.

[211] *Johnson v Unisys Ltd* [2001] ICR 480, p 495-496, para 37-38.
This understanding is very similar to the German one as expressed by the Federal Constitutional Court: The workplace is the economic livelihood for him [the employee] and his family. The lifestyle and living environment are determined by it, as are social status and self-esteem.
Cf. Federal Constitutional Court of 27 January 1998 – 1 BvL 15/87, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [1998] 470, p 471.

[212] *Braganza v BP Shipping Ltd and another* [2015] UKSC 17, [2015] ICR 449, p 460, para 27.

[213] *Socimer International Bank v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] Bus LR 1304-1360.

[214] *Ibid*, p 1333, para 66.

> 'that in coming to its assessment, subject to the limitations of good faith and rationality, [the defendant bank] is entitled primarily to consult its own interests.'[215]

What seems sobering at first glance becomes all the more enlightening when the rationale is carried over to employment relationships, because the purpose for which the discretionary power was granted shall be decisive for the degree of judicial review.

First of all, the parties to an employment relationship are usually not equally sophisticated and well-versed.[216] Next, the reason for many discretionary powers for the employer is not the *antiquated* idea of master and servant, nor is it the protection of the employer, but it is the incomplete nature of employment contract. The power of discretion is usually given for matters that cannot be regulated in detail at the time the contract had been concluded ('discretion as gap filler'). This incomplete nature does not favour one party over the other. It is rather a necessity to conclude a contract of employment at the first place. As such, the purpose of 'gap filling' is neutral and requires that the interests of both parties are considered.

Through the lens of incompleteness, applying proportionality aims to sustain contractual fairness. Both sides of an employment enter the relationship with the expectation that the relationship will be conducted, as Lord Nicholls put it in *Malik v BCCI*, 'in the manner the employment contract implicitly envisages'.[217]

Consequently, employers are required to consider the interests and expectations of employees. Where one does not allow the decision maker to act only in his interest, but requires him to have regard to the others party's interest as well, it is natural to ask (as a test) whether the decision's aim justifies the impact on the other party — or to put it like Lord Steyn, whether a balance has been struck.[218] It follows from the very nature of balancing that an employer remains a wide margin of discretion where he can demonstrate that a decision either does only have little effect on employees interests (pension entitlements not vested) or that the decision is necessary to pursue his legitimate business interest (work instruction implementing wider *business decisions*) — and vice versa. Moreover, as shown above, the purpose of discretionary powers is sometimes not only neutral but favours the employee. For example, bonus pay tied to the individual performance of an employee. Its purpose is to incentivise employees to contribute to their employer's business and not to reserve employer the opportunity to lower their costs by withholding bonus pay for any reason which is not 'so outrageous in its defiance of logic as to be perverse'.[219]

6. Conclusion

As Davies, Bogg and Freedland suggest for English law, the German labour courts use expertise, institutional competence and central capabilities as deference factors, alongside the proportionality test, to assess at each stage the extent to which the evaluation of the employer as the original decision-maker should be respected. As the example of occupational pensions schemes, work instructions and bonus pay have shown, proportionality can be formulated and applied with a great degree of flexibility. Its formulation ranges from mere *Wednesbury* reasonableness (e.g. adjustments to non-vested pension entitlements, *business decision*) and similarity to the 'reasonable response test', to the full set of 'narrow proportionality' requiring an adequate relation between employers' aim and employees' interests affected. The fact that these formulations resemble those already used by

---

[215] *Socimer International Bank v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] Bus LR 1304, p 1493, para 112.
A similar case with a similar reasoning is provided in *WestLB AG v Nomura Bank International Plc* [2012] EWCA Civ 495.

[216] The fact that employers are not only economically stronger, but also have a knowledge advantage and easier access to legal advice is recognised, for example, by Section 2 (3) Employment Right Act 1996 (particulars). This provision obliges the employer to inform the employee not only about the agreed contractual terms but also, and this is remarkable, about the applicable law, although in theory its content is equally publicly available to the employee.

[217] *Malik v Bank of Credit and Commerce International SA (In Liquidation)* [1997] ICR 606, p 610, para F.

[218] *Ibid*, para A.

[219] *Hayes v Willoughby* [2013] UKSC 17, [2013] 1 WLR 935, p 943, para 14.

English courts demonstrates that German labour courts and English courts share important considerations, which provides fertile ground for exchange.

In addition, German labour courts consider the wage-work bargain as an important deference factor. This factor is not only helpful to underpin the application of proportionality in the first place. Moreover, it can be used to identify different formulations of proportionality ('tiers'), as seen in the examples of adjustments to pension entitlements and the different reviewing standards for bonus pay. But most importantly, the work-wage bargain is closely linked to intentions of the parties to an employment contract. The wage-work bargain is less prone to objections based on the public-private divide, but constitutes a valid justification based on the values prevailing in general contract law. The wage-work bargain emphasis that proportionality serves to ensure contractual fairness, a part of *good faith*, and does not 'smuggle in' values alien to contract law.

Next, the German method of developing 'tiers' of proportionality could be a fruitful tool to take account of the fact that the English courts are not specialised courts. Such tiers would allow courts to predictably distinguish between situations where a high degree of deference is justified and situations where employees' interests call for a detailed scrutiny.

Finally, *trust and confidence* and *good faith* provide a basis for proportionality in English employment law. As stated in *Socimer* and *Braganza*, the purpose of the relevant discretionary power is decisive for the degree of judicial review. Through the lens of the 'incompleteness problem', many discretionary powers are at least 'neutral' and therefore require the employer to consider also the interests of employees. The best way to balance these interests is through the use of the proportionality test — flexibly formulated and applied.

A CRITICAL EXAMINATION OF HOW ARTIFICIAL INTELLIGENCE SHOULD BE REGULATED IN THE UNITED KINGDOM

Roxanna Yaghmai[1]

ABSTRACT

In an age of technological revolution, Artificial Intelligence continues to grow at an exponential rate, playing an increasingly active role in society. Although these entities generate tremendous opportunities, the risks which accompany their uses are undeniable. The United Kingdom's current lack of regulatory oversight to govern these applications has led to concerns regarding their safety. As although there have been attempts by the administration to regulate AI by introducing bodies such as the Office for AI and CDEI, there is still no concrete framework. This article will explore the various existing proposals ranging from government intervention, self-regulation and co-regulatory strategies to assess how AI can be regulated in the United Kingdom. Arguably, however, each proposed framework has its caveats which make it unsuited to regulating AI individually. Therefore a wholly new framework, one which draws inspiration from other successfully regulated industries such as the pharmaceutical drug sector, as well as one which addresses the ambiguities of the aforementioned frameworks will be considered. The Artificial Intelligence Regulation Agency will be responsible for regulating AI in the United Kingdom under a singular regulatory umbrella, endeavoring to construct an innovative approach that is both practical and realistic. By introducing binding Codes of Conduct and Essential Requirements alongside the adoption of a risk-based regulatory structure, the Agency hopes to achieve uniform standards for AI within the United Kingdom.

[1] LLB Law degree at University of Exeter and LLM in Public Law at University of Bristol.

I. Introduction

Artificial Intelligence (AI) continues to traverse into almost every aspect of society, proceeding to develop at an exponential rate as computational capabilities double every two years.[2] Current AI applications have the capacity to increase road safety through autonomous vehicles, predict when earthquakes will occur,[3] and detect potentially cancerous cells.[4] The commercial applications of these algorithms appear limitless, with illustrations such as DeepMind's AlphaGo, which successfully overcame a human master at a Chinese board game,[5] or Microsoft's Chatbot Zo, which integrates AI into personal agents who can perform a multitude of tasks and respond to questions.[6] Although the benefits of these algorithms are unequivocal, they pose new and unknown risks which current laws and regulations are unequipped to face. Concerns including algorithmic bias, autonomous vehicle safety, and AI explainability and transparency are some instances of issues that require immediate regulatory redress.

Much of AI's development has occurred in a regulatory vacuum, with few laws or regulations existing to specifically address the unique difficulties they raise. It also appears that there is a general absence of legal scholarship discussing potential regulatory approaches for AI[7] - especially concerning institutional competence, examining which government establishment may be best equipped to confront these novel matters. Traditional methods of regulation including Command & Control type approaches appear particularly unsuited to manage these intelligent algorithms. Therefore, by observing the limited dialogue of existing AI-specific proposals, as well as drawing on lessons from other successfully regulated industries such as that of the medical drug sector, this paper hopes to find a practical regulatory framework that could be implemented in the United Kingdom.

Though there is an extensive scholarly debate regarding whether AI should be regulated, resolving this dispute is beyond the scope of this paper. Instead, this discussion will proceed on the assumption that AI should be regulated, specifically concentrating on how the UK should proceed. As navigating existing regulatory stances is only one piece of the puzzle,[8] arguably regulators face a much larger task to formulate a new architecture which caters specifically to AI. Therefore, this article will advance this discourse by beginning to form a new coherent structure which addresses existing ambiguities.

Chapter II begins by exploring the background of AI, examining the unique risks it poses including bias, safety, and explainability, as well as the difficulty of regulating algorithms. Chapter III expands upon this discourse, focusing on establishing the patchwork of recommendations which have been proposed by the UK and EU thus far in an attempt to regulate AI. Chapter IV begins to analyse some of the existing regulatory strategies and proposals within the literature. These include government intervention, self-regulation, and co-regulatory strategies, which could form the foundation of future regulation of AI in the UK. Finally, Chapter V outlines a wholly new framework – and one which considers the shortcomings of the aforementioned proposals, drawing

---

[2] Pedro Domingos, The Master Algorithm: How the Quest for the Ultimate Learning Machine Will Remake Our World (1st edn, Basic Books 2015) 287

[3] Thomas Fuller and Cade Metz, 'AI Is Helping Scientists Predict When and Where the Next Big Earthquake Will Be' (*The New York Times*, 26 October 2018) <https://www.nytimes.com/2018/10/26/technology/earthquake-predictions-artificial-intelligence.html> accessed 2 July 2020

[4] ARM Al-shamasneh and UHB Obaidellah, 'Artificial Intelligence Techniques for Cancer Detection and Classification: Review Study' [2017] 13(3) European Scientific Journal 342

[5] Deepmind, 'AlphaGo' (*DeepMind*, 10 March 2017) <https://deepmind.com/about/deepmind-for-google> accessed 30 July 2020.

[6] Aimee Riordan, 'Microsoft's AI vision, rooted in research, conversations' (*Microsoft News*, 13 December 2016) <https://news.microsoft.com/features/microsofts-ai-vision-rooted-in-research-conversations/> accessed 30 July 2020

[7] Matthew Scherer, 'Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, And Strategies' [2016] 29(2) Harvard Journal of Law & Technology 356.

[8] Clifford chance, 'The challenges of regulating artificial intelligence Robots and regulation' (*Talking Tech, Emerging Technologies*, 27 April 2017) <https://talkingtech.cliffordchance.com/en/emerging-technologies/artificial-intelligence/ai-and-the-law.html> accessed 9 August 2020

inspiration from other successfully regulated industries and creating a model which specifically caters to the novel characteristics of AI. The Artificial Intelligence Regulation Agency is a centralised government Agency, tasked with regulating AI in the UK under a singular umbrella. This agency will introduce binding Codes of Conduct and Essential Requirements for AI alongside a risk-based certification topography.

II. The Future of Artificial Intelligence

This Chapter will explore the background as to the definitional ambiguity surrounding AI. The risks it poses such as bias, safety, explainability, and transparency, as well as some difficulties which regulators may encounter. This will form the backdrop for the issues which require regulatory redress when considering how the UK should regulate AI.

A. Defining AI

There is currently no singular accepted definition for AI.[9] This is something that must be resolved before effective regulation can begin and it can be predominantly attributed to the conceptual ambiguity surrounding the term 'intelligence', the precise essence of which has become the subject of considerable scholarly debate due to its enigmatic essence.

Widely attributed as coining the term 'Artificial Intelligence', John McCarthy stated that there is no 'solid definition of intelligence that doesn't depend on relating it to human intelligence' as 'we cannot yet characterise in general what kinds of computational procedures we want to call intelligent'.[10] This characterises AI by its 'human-like' qualities but fails to demarcate the boundaries of what constitutes AI more broadly.[11] Wang in contrast offers a contemporary reading, finding that AI should signify a system which can adapt with insufficient knowledge and resources.[12] The European Commission adheres to the latter school of thought, defining AI as 'systems that display intelligent behaviour by analysing their environment and taking actions - with some degree of autonomy. [13]'

Due to the lack of definitional clarity, AI has become a broad vernacular term for a range of programmes, algorithms, and networks[14], the resolution of which is beyond the scope of this article. Therefore, this article will utilise the following working definition: AI is an entity which combines a collection of technologies which can learn through trial and error,[15] handling different tasks by itself and adapting itself to various situations which would normally be attributed to requiring human intelligence. This discussion will also place AI and algorithms under the same intellectual umbrella, as although algorithms are simplified versions of AI, AI applications generally rely heavily on algorithms, thus making them inseparable.

B. The Problematic Characteristics of AI

---

[9] Builtin, 'What is Artificial Intelligence?' (*Builtin*, 1 May 2019) <https://builtin.com/artificial-intelligence/ai-companies-roundup> accessed 17 July 2020

[10] John McCarthy, 'What is Artificial Intelligence?' (*Stamford University Computer Science Department,* 12 November 2007) <http://jmc.stanford.edu/articles/whatisai.html> accessed 27 June 2020

[11] Miriam C. Buiten, 'Towards Intelligent Regulation of Artificial Intelligence' [2019] 10(1) European Journal of Risk Regulation 43.

[12] Pei Wang, 'On Defining Artificial Intelligence' [2019] 10(2) Journal of Artificial General Intelligence 1.

[13] European Commission 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on Artificial Intelligence for Europe', Brussels, 25.4.2018 COM (2018) 237 final

[14] Michael Guihot et al., 'Nudging Robots: Innovative Solutions to Regulate Artificial Intelligence' [2017] 20(2) Vanderbilt Journal of Entertainment & Technology Law, Forthcoming 395

[15] Laura Onita, 'Trial and error advances artificial intelligence in robots' (E&T Engineering and Technology, 22nd May) <https://eandt.theiet.org/content/articles/2015/05/trial-and-error-advances-artificial-intelligence-in-robots/> accessed 17 June 2020

AI brings enormous potential but also gives rise to a cacophony of dangerous implications if not regulated appropriately. This section will outline some of the main controversies which require the most urgent regulatory address.

i. Bias

Algorithms identify patterns in data and codify them into predictions, rules and decisions.[16] Therefore, if those patterns reflect existing biases within the creator, it is likely that the AI will amplify that particular bias in its outcomes, potentially 'reinforcing existing patterns of discrimination'.[17] Some common patterns include unintended sexism, racism, and discrimination in the outcomes of data analysis.[18] Bias is difficult to detect, therefore caution is advised as it can 'become part of the logic of everyday algorithmic systems'.[19]

A recent investigation for prejudice can be observed in a gender discrimination complaint arising from Apple Card's spending limits.[20] It was discovered that Apple Card, when viewing the same profile of a man and a woman who both possessed identical financial profiles and credentials, offered the man a credit line twenty times higher than was offered to the woman. Apple was unable to comment on how this bias arose, raising concerns regarding explainability[21] which will be discussed below. Crawford sees these complications as part of a wider algorithmic bias issue, calling for more vigilance in AI system design and training to avoid built-in bias.[22] These issues are unlikely to require regulatory capture if they are addressed within the system design.[23] However, these issues can be ameliorated with the incorporation of regulations which require careful designing or prompt shooting[24] at the early stages.

ii. Safety

A range of safety concerns have been expressed[25] regarding physical and non-material AI application usage including vehicle safety, data privacy, and security.[26]

Physical safety issues can be illustrated through autonomous vehicle usage. These applications can potentially improve road safety by reducing accidents resulting from slow reaction times, inattention, and inappropriate risk-taking[27] caused by human error. However, the first fatal accident in 2016 involving Tesla's autonomous vehicle has raised a host of novel concerns.[28] Vehicle accidents caused by software or hardware errors, as well as unethical decision making in the context of multi-risk scenarios[29] are all real possibilities.

---

16 Titu-Marius Băjenescu, 'The Risks of Artificial Intelligence ' [2018] 25(4) Journal of Engineering Science 51
17 *Ibid*
18 Kate Crawford, 'Can an Algorithm be Agonistic? Ten Scenes from Life in Calculated Publics' [2016] 41(1) Science, Technology & Human Values 77
19 Kate Crawford, 'Artificial Intelligence's White Guy Problem' (*The New York Times*, 25 June 2016) <https://www.cs.dartmouth.edu/~ccpalmer/teaching/cs89/Resources/Papers/AIs%20White%20Guy%20Problem%20-%20NYT.pdf> accessed 5 August 2020
20 Neil Vigdor, 'Artificial Intelligence's White Guy Problem' (*The New York Times*, 10 November 2019) <https://www.nytimes.com/2019/11/10/business/Apple-credit-card-investigation.html> accessed 5 August 2020
21 *Ibid*
22 See Crawford supra note 17, at 77
23 See Guihot et al. supra note 13, at 405
24 I*bid*
25 Patrick Lin et al., 'Robot ethics : Mapping the issues for a mechanized world' [2011] 175(5) Artificial Intelligence 942
26 David D. Luxton, Ethical Issues and Artificial Intelligence Technologies in Behavioral and Mental Health Care. in Luxton et al., (eds), Artificial Intelligence in Behavioral and Mental Health Care (Elsevier 2016) 255
27 See Crawford supra note 17, at 77
28 Kacey Deamer, 'What the First Driverless Car Fatality Means for Self-Driving Tech' (*Scientific America*, 1 July 2016) <https://www.scientificamerican.com/article/what-the-first-driverless-car-fatality-means-for-self-driving-tech/> accessed 2 July 2020
29 See Lin supra note 24 at 945

This is further complicated by the highly context-specific dangers which these algorithms face. These could include unique cultures, geographical terrain, or indigenous fauna.[30] Volvo is facing this dilemma in relation to its animal detection system, where its vehicles struggle to comprehend the unusual way in which kangaroos move.[31] However, in contrast, Google's autonomous driving division Waymo, illustrates the potential that these AI possess. This vehicle has passed over two million miles in the United States[32] and has only been at fault in one accident, demonstrating that in real-world scenarios, these issues may have little impact on the day-to-day functioning of these vehicles.

The safety and reliability of non-physical software systems are critical in protecting consumers' data and ensuring algorithmic integrity. Software technology must safeguard all data and communications within its algorithms, ensuring security against unauthorised access and changes.[33] Healthcare robots which encompass surgical, routine-task, and personal care robots[34] are particularly at risk. These applications often require access to personal and medical data, as well as 'know[ing]…and possibly shar[ing] the location of medical objects and people'[35] with hospitals.[36] This leads to an unprecedented volume of personal information which could potentially be remotely accessed by unauthorised parties – or worse, leaves devices such as pacemakers[37] and drug infusion pumps[38] vulnerable to hacking. This could result in immeasurable health complications and damages, illustrating the need for robust protection.

iii. Explainability and Transparency

Explainability and transparency are both tools that promote fair AI decision making by providing a meaningful explanation[39] as to how the AI may have reached an outcome. As learning algorithms become more sophisticated, difficulties relating to the explainability[40] and transparency of AI will need to be confronted. The Financial Conduct Authority (FCA) has raised concerns that current AI algorithms lack the ability to explain how they derive their results, and thus advises caution in 'blindly accepting 'computer-generated answers.[41]

Demonstrating transparency of AI-driven decision making is challenging. This can be attributed to the fact that when an algorithm has trained itself iteratively on datasets, it can be difficult to provide an accessible explanation of the precise factors for the ultimate decision.[42] Explaining the weights learned in a multilayer neural net with a

---

30 *Ibid*

31 Riley Morgan, 'Volvo's driverless cars can't work out kangaroos because their hopping confuses their systems - but they have no issue dodging deer and moose' (*The Daily Mail Online*, 27 June 2017) <https://www.dailymail.co.uk/us/mobile/news/article-4643496/Volvo-s-driverless-cars-attempting-work-kangaroos.html> accessed 5 August 2020

32 Kyle Wiggers, 'Waymo' s autonomous cars have driven 20 million miles on public roads ' (Venture Beat The Machine Making Sense of AI, 6th January) <https://venturebeat.com/2020/01/06/waymos-autonomous-cars-have-driven-20-million-miles-on-public-roads/> accessed 7 July 2020

33 See Băjenescu supra note 15, at 54

34 See Luxton supra note 25, at 255

35 Drew Simshaw, 'Regulating Healthcare Robots: Maximizing Opportunities While Minimizing Risks' [2016] 22(3) Richmond Journal of Law and Technology 11

36 European Commission 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on Artificial Intelligence for Europe', Brussels, 25.4.2018 COM (2018) 237 final

37 See Luxton supra note 25, at 156

38 BBC news, 'Hospital drug pumps are hackable, experts warn' (*BBC News Technology*, 9 June 2015) <https://www.bbc.co.uk/news/technology-33063345> accessed 2 August 2020

39 Panel for the future of science and technology, 'A governance framework for algorithmic accountability and transparency ' (*European Parliament* , March 2019) 76, <https://www.europarl.europa.eu/RegData/etudes/STUD/2019/624262/EPRS_STU(2019)624262_EN.pdf> accessed 14 July 2020.

40 Yu Zhang et al, 'Plan Explainability and Predictability for Cobots' [2015] 151108158(1) ArXiv 1

41 Financial Conduct Authority, 'Market abuse requires a dynamic response to a changing risk profile' (*Financial Conduct Authority Website*, 13 February 2019) <https://www.fca.org.uk/news/speeches/market-abuse-requires-dynamic-response-changing-risk-profile> accessed 9 July 2020

42 Bryce Goodman and Seth Flaxman, 'European Union regulations on algorithmic decision-making and a "right to explanation"' [2016] 38(3) ArXiv 4

complex architecture[43] will inevitably be complex. This issue will only continue to escalate as AI becomes more complex and its degree of autonomy increases.

However, explainability and transparency are arguably not novel concerns, as complex systems such as pharmaceutical drugs have previously confronted them.[44] When companies begin to develop these drugs, the hypothesis regarding why they may prove effective are often little more than smart guesses.[45] Therefore, drugs could be used as a point of reference for developing future regulations which incorporate explainability and transparency into algorithms. This notion will be further explored in Chapter V where the proposed framework will take inspiration from the MHRA which is the UK's pharmaceutical drug regulatory authority.

C. The Difficulties of Regulating AI

Regulation is often referred to as 'state intervention into the economy by making and applying legal rules'[46] which are designed to ensure safety and protect society from harm. The section above illustrates the tangible risks which AI pose, emphasising the need for regulation to protect against AI's dangers. However, governments have struggled thus far to regulate AI due to the highly context-dependent and ambiguous nature of this field which encompasses a broad range of applications. From data privacy in deep learning healthcare networks to autonomous vehicles, the need for *specificity* when determining the permissible uses of AI[47] has made it challenging to create a legislative framework that addresses every aspect of AI algorithms.

The issue is further compounded by a 'pacing problem', where existing governance structures are unable to respond to the changes posed by rapid technological development.[48] This has led legal and ethical oversight to lag behind technological advancement,[49] leading some to believe that regulation is a 'blunt and slow-moving instrument which is easily subject to political interference and distortion'.[50] To solve this, governments often opt for excessively strict regulation, which, though justifiable in inherently harmful industries such as nuclear waste or fossil fuel manufacturing, can ultimately lead to stifled innovation in those which are not, reducing the potentially world-changing capacity of AI.[51] Two strategies have been proposed to tackle this dilemma. One is to slow the pace of technological advancement so regulatory initiatives are less likely to lag, which is arguably impossible; the second involves accelerating the adaptability and responsiveness of initiatives to AI development.[52]

Although introducing initiatives to keep pace with progress is likely to stimulate enhanced regulation, this will be challenging. Horst argues that it will be difficult for states to agree on a singular framework, leading to a divergent and competitive'[53] regulatory spectrum due to jurisdictions diverse array of 'deep normative structures'.[54] This may result in states competing to incentivise large corporations to invest in their countries by promoting lax

---

[43] *Ibid*
[44] Andrew Tutt, 'An FDA for Algorithms' [2017] 69(1) Administrative Law Review 101
[45] *Ibid*
[46] Bronwen Morgan and Karen Yeung, An Introduction to Law and Regulation Text and Materials (1st edn, Cambridge University Press 2007) 16
[47] Horst Eidenmüller, 'Oxford Business Law Blog, Commercial Law' (The Rise of Robots and the Law of Humans, 7th April) <https://www.law.ox.ac.uk/business-law-blog/blog/2017/04/rise-robots-and-law-humans> accessed 7 June 2020
[48] Gary E. Marchant, The Growing Gap Between Emerging Technologies and the Law. in Marchant and others (eds), The Growing Gap Between Emerging Technologies and Legal-Ethical Oversight (Springer 2011) 19-33
[49] Mark D. Fenwick, 'Regulation Tomorrow: What Happens When Technology Is Faster than the Law?' [2017] 6(3) American University Business Law Review 571
[50] Oren Etzioni, 'Point: Should AI Technology Be Regulated?: Yes, and Here's How' [2018] 61(12) Communications of the ACM 30
[51] *Ibid*
[52] See Marchant supra note 47, at 19
[53] *Ibid*
[54] Horst Eidenmüller, 'Oxford Business Law Blog, Commercial Law' (The Rise of Robots and the Law of Humans, 7th April) <https://www.law.ox.ac.uk/business-law-blog/blog/2017/04/rise-robots-and-law-humans> accessed 7 June 2020

regulations and robot friendly laws.[55] Formulating a regulatory response may be problematic, but, however, with the right regulatory mechanisms it will be possible to ensure cohesive and safe AI regulation in the UK.

III. Contemporary Legal Frameworks

Chapter II established the fundamental principles and problematic characteristics of AI. This Chapter will expand upon this discussion, focusing on existing regulatory initiatives proposed by the UK and the European Union. These will be utilised in Chapter V's discussion to assess whether they could form the building blocks for future regulation.

A. United Kingdom

i. House of Lords Select Committee on AI

In its consideration, the Select Committee created an ethical framework to guide AI development.[56] However, these guidelines were criticised for their vagueness. Principles including regulating AI for the 'common good of humanity' and the inclusion of 'integrity and fairness'[57] demonstrate this. The committee further concludes that, at this stage, blanket AI-regulation would be inappropriate as existing regulators, such as the Information Commissioner's Office (an independent authority tasked with upholding information rights in the public interest),[58] are best placed to consider AI regulation.[59] Although this deliberation showcases the early stages of a framework, the vagueness of the ethical proposals and lack of AI-specific expertise possessed by the ICO indicates that a far more concrete mandate and regulator must be created in the future.

ii. Office for Artificial Intelligence

The Office for AI published guidance in June 2019[60] on ethical principles for data-driven technologies and AI. The report urges a framework of ethical values which 'respects the dignity of individuals' and 'care for the wellbeing of all'.[61] Similarly to the Lord's considerations, as discussed above, these ethical frameworks are extremely broad and are unlikely to prove useful due to their non-obligatory nature and vagueness. Although the Office was an attempt by the UK government to catalyse AI research and development, it is evident that these guidelines are a work in progress, despite failing to propose an actionable regulatory framework; the Office itself and its existing expertise could potentially be utilised in the future.

iii. Centre for Data Ethics and Innovation

---

[55] *Ibid*
[56] UK House of Lords Artificial Intelligence Committee, AI in the UK: ready willing and able? (HL 2017-2019 100) para 105
[57] *Ibid*
[58] Information commissioner's office, 'Home ' (*ICO Website*, 2020) <https://ico.org.uk/> accessed 7 October 2020.
[59] Louis Wihl, 'The EC white paper shows that AI regulation is at a crossroads: where is the UK now and where is it going?' (BCLP Law Website, 4 March) <https://www.bclplaw.com/en-GB/insights/the-ec-white-paper-shows-that-ai-regulation-is-at-a-crossroads-where-is-the-uk-now-and-where-is-it-going.html> accessed 6 October 2020
[60] Office for Artificial Intelligence*, 'Office for Artificial Intelligence*' (*GovUK Website*, 2017) <https://www.gov.uk/government/organisations/office-for-artificial-intelligence/about> accessed 21 August 2020
[61] Gov.uk, 'Understanding artificial intelligence ethics and safety' (*Gov.UK Website*, 10 June 2019) <https://www.gov.uk/guidance/understanding-artificial-intelligence-ethics-and-safety> accessed 6 October 2020

The Centre for Data Ethics and Innovation (CDEI) operates as an independent public sector adviser to the government to specifically tackle AI regulation.[62] The CDEI is currently attempting to address 'issues of public concern' such as 'data bias',[63] which is one of the primary risks associated with AI as discussed in Chapter II.

The Committee on Standards in Public Life in its 'Artificial Intelligence and Public Standards Review' concluded that the government should establish the CDEI as a centre for regulatory assurance to assist regulators.[64] Establishing the CDEI as a central body, the review concluded that the UK does not need a 'specific AI regulator, but all regulators must adapt to the challenges that AI poses to their specific sectors'.[65] However, a following CDEI consolation paper stated that the main purpose of the body is to advise the government on how to address potential gaps in the regulation, denoting that it will not regulate the uses of AI[66] and has no intention of becoming a 'central body' as the committee suggests above. Veale is concerned that the CDEI 'will descend into one of many talking shops, producing a series of one-off reports looking at single abstract issues'[67] if it is forced into this role. This is further evidenced by the CDEI's lack of statutory footing. However, the government has implied that it intends to place the CDEI on a legislative basis after its initial phase of operation,[68] although, this does not guarantee that that CDEI will be able or willing to fulfil the proposed role the government intends to impose upon it. However, the CDEI's expertise and its ability to advise the government specifically on AI regulation suggests that this will allow this body to play an active role in future regulatory strategies.

Overall, it is evident that the UK is yet to devise a coherent regulatory framework for AI. Although the work of the Office for AI and CDEI is commendable, there is still an urgent need for practical guidance and enforceable regulations.[69] It has been argued that these bodies are best placed to devise regulatory frameworks. However, their limited scope, vague ethical guidelines, and lack of statutory footing suggest that more concrete measures must be considered in the future. Chapter V will explore how some of these existing bodies could be incorporated into a new regulatory structure, utilising their existing expertise and knowledge to form a coherent framework.

B. European Union

In contrast to the UK, the EU has taken a more proactive approach in developing a comprehensive regulatory strategy for AI.[70] Below, some of the most significant recommendations will be discussed to ascertain whether they could provide the grounding pillars for future AI regulation within the UK.

i. General Data Protection Regulation

---

62 Centre for Data Ethics and Innovation, *Interim report: Review into online targeting* (25 July 2019) <https://www.gov.uk/government/publications/interim-reports-from-the-centre-for-data-ethics-and-innovation/interim-report-review-into-online-targeting> accessed 18 July 2020

63 *Ibid*

64 The Committee on Standards in Public Life, *Artificial Intelligence and Public Standards Review* (February 2020) 4, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868284/Web_Version_AI_and_Public_Standards.PDF> accessed 4 June 2020

65 *Ibid*

66 Department for Digital, Culture, Media & Sport, *Centre for Data Ethics and Innovation Consultation* (June 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/715760/CDEI_consultation__1_.pdf> accessed 6 July 2020

67 Jacob Turner, Robot Rules: Regulating Artificial Intelligence (1 edn, Palgrave MacMillan 2019) 227

68 See *Committee on Standards in Public Life Review* supra note 63, at 13

69 See *Committee on Standards in Public Life Review* supra note 63, at 4

70 Anne Bajart, *'Artificial Intelligence Activities'* (*European Commission Directorate-General for Communications Networks, Content and Technology*, 2018) <https://ec.europa.eu/growth/tools-databases/dem/monitor/sites/default/files/6%20Overview%20of%20current%20action%20Connect.pdf> accessed 18 July 2020

The General Data Protection Regulation (GDPR)[71] 2018 was the first piece of legislation which explicitly addressed algorithmic discrimination and explainability. Article 22 of GDPR provides that individuals have 'the right not to be subject to a decision based solely on automated processing'. However, the GDPR's narrow focus on personal data and restrictions may make its applicability for regulating AI marginal.[72] Article 22 only applies to 'significant' decisions',[73] and therefore, it is unlikely that this legislation could enforce accountable and transparent algorithmic decision making[74] as many decisions made by AI algorithms are unlikely to fit into this 'specific' category.

Furthermore, this legislative measure was not specifically intended to encompass AI.[75] It could, thus, be 'premature to speculate on GDPR outcomes generally, let alone in terms of AI'.[76] However, it could be argued that this established piece of legislation could provide the building blocks for future AI regulation specifically concerning personal data and explainability.

ii. White Paper On Artificial Intelligence

The European Commissions February 2020 White Paper[77] on AI and accompanying Report and Liability Framework consults on a possible new AI-specific regulatory framework that imposes additional legal requirements to facilitate trustworthy and secure development of AI in Europe.[78] The accompanying Report analyses the existing legal frameworks, ultimately determining that 'at this stage' current product safety legislation[79] and privacy protections (GDPR) adequately safeguard against a multitude of risks. The Commission concludes however that these frameworks will likely need adjustments to cover new risks presented by AI[80] and collaborate with new AI-specific legislation[81] which addresses novel risks without duplicating existing functions.[82]

The Liability Framework recognises the unique nature of AI which makes it challenging to attribute liability. In response, a risk-based approach with additional binding requirements for high-risk AI was proposed which focused on areas where the public was at risk.[83] To distinguish between high-risk and low-risk AI, a list of high-risk sectors such as healthcare and transport were considered.[84] However, the current lack of a comprehensive criteria could potentially lead to ambiguity.[85] Overall, it appears that the Commission is leaning towards a light-

---

71 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation or GDPR) [2016]

72 Lawrence Chung et al, On Non-Functional Requirements in Software Engineering. in Goos and others (eds), Conceptual Modeling: Foundations and Applications (Springer-Verlag Berlin Heidelberg 2009) 363-379

73 See GDPR Article 22 supra, note 70

74 Lilian Edwards and Michael Veale, 'Slave to the Algorithm? Why a 'Right to an Explanation' Is Probably Not the Remedy You Are Looking For' [2017] 16(18) Duke Law & Technology Review 51

75 See Turner supra note 66, at 229

76 Ron Iphofen and Mihalis Kritikos, 'Regulating artificial intelligence and robotics: ethics by design in a digital society' [2019] 1(1) Journal of the Academy of Social Sciences 9

77 European Commission, *On Artificial Intelligence - A European approach to excellence and trust* (White Paper, COM 65, 2020).

78 European Commission, On Artificial Intelligence - A European approach to excellence and trust (COM (2020) 65 final) 10, <https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf> accessed 15 June 2020

79 Directive (EU) 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety [2002]

80 European Commission, *On Artificial Intelligence - A European approach to excellence and trust* (White Paper, COM 65, 2020)

81 *Ibid* at 16

82 *Ibid* at 25

83 *Ibid*

84 See Wihl, 'The EC white paper shows that AI regulation is at a crossroads' supra note 58.

85 Harriet Kingaby, 'The EC' s risk based approach to AI regulation is inadequate, here' s why' (*Medium Website*, 17 June 2020) <https://medium.com/@hello_95259/the-ecs-risk-based-approach-to-ai-regulation-is-inadequate-here-s-why-6fd6da4d5aba> accessed 1 July 2020

touch approach, focusing on existing rules and sector-specific risk-based regulation, rather than blanket regulation or bans.[86]

Although the EU's AI regulatory agenda remains at an elementary stage, the efforts made thus far show encouraging signs and sensible recommendations. Despite much more detail being required, the EU has expressed a strong sentiment to establish a regime of mandatory requirements, especially for high-risk AI.[87] In contrast, the UK's findings indicate a reluctance to place an EU-style AI regulator, opting to utilise existing mechanisms. The UK will likely need to devise its own regulatory AI strategy which this paper will attempt to guide in the following Chapters.

IV. Existing Regulatory Proposals

Chapter III outlined the current patchwork of recommendations and proposals intended to regulate AI in the UK and EU. This Chapter will build upon this discussion by examining some of the existing regulatory strategies and proposals within the literature. These could inspire, or be implemented, in part by future AI governance strategies. Although there is a diverse array of proposals, the most prominent shall be discussed below to initiate a dialogue. These include government intervention, self-regulation, and finally, co-regulation. The merits and drawback of each model will be carefully considered to ascertain whether they are practically workable, ultimately assessing whether they are adequate to regulate AI in the UK.

A. Government Intervention

Traditionally, responsive government regulation is designed to prevent harm and protect the public interest. Although having the power to direct behaviour with effective sanctions, these institutions are often inflexible,[88] responding slowly to industry change.[89] When applied to a dynamic environment like AI, delayed or misplaced regulation has the potential to derail innovation. The following proposals will stray from a draconian Command-and-Control style[90] regulation whereby the state sets standards and controls performance by monitoring adherence.[91] Even though this offers a high level of predictability, it is likely to be inflexible and insufficient[92] when considering AI. More innovative and flexible approaches including risk-based regulation and various levels of government agency influence will be discussed in this section to assess whether this is an adequate method to regulate AI.

i. Risk-Based Regulation

Risk-based regulation informs government resource allocation by providing a distinct regulatory focus which establishes what risks require the most urgent regulatory redress,[93] such as those which present a significant public risk.[94] Given the breadth and complexity of AI, regulators are advised to adopt a risk-based approach to decipher

---

[86] Natasha Lomas, 'EU lawmakers are eyeing risk-based rules for AI, per leaked white paper' (*Tech Crunch Website*, 17 January 2020) <https://techcrunch.com/2020/01/17/eu-lawmakers-are-eyeing-risk-based-rules-for-ai-per-leaked-white-paper/> accessed 10 August 2020

[87] See Wihl, 'The EC white paper shows that AI regulation is at a crossroads' supra note 58

[88] See Guihot supra note 13, at 430

[89] Andrew Tutt, 'An FDA for Algorithms' [2017] 69(1) Administrative Law Review 116

[90] Ibid, 454

[91] José Rodríguez Ovejero, 'The future of AI regulation in Europe' (*Frontier Economics Website*, May 2020) <https://www.frontier-economics.com/uk/en/news-and-articles/articles/article-i7081-the-future-of-ai-regulation-in-europe/> accessed 9 June 2020

[92] Neil Gunningham and Darren Sinclair, Smart Regulation: Designing Environmental Policy (1 edn, Oxford University Press 1998) 3

[93] Ofqual, 'Outlining our Regulatory Risk Framework' (GovUK Corporate Report, 19 July) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727140/Outlining_our_regulatory_risk_framework_-_FINAL.pdf> accessed 10 August 2020

[94] Natasha Lomas, 'EU lawmakers are eyeing risk-based rules for AI, per leaked white paper' (*Tech Crunch Website*, 17 January 2020) <https://techcrunch.com/2020/01/17/eu-lawmakers-are-eyeing-risk-based-rules-for-ai-per-leaked-white-paper/> accessed 10 August 2020

where to focus its limited resources.[95] The European Commission's White Paper 2020 as discussed in Chapter III emphasises the use of this framework, exemplifying the strong momentum behind this approach.[96] By working through the different applications of AI and identifying where to focus its efforts, the government can offer a tailored approach to regulating AI.

The initially proposed typology presents three risk categories: low-, medium-, and high-risk applications.[97] Low-risk applications are those which arguably do not pose a threat to safety or human life. In contrast, high-risk applications include more concerning issues, for instance, breach of privacy and causing unemployment.[98] This framework often follows the pattern where firstly, the regulator sets the level and type of risks it will accept. Secondly, the regulator conducts extensive risk assessments. Finally, evaluating and classifying the risks, allocating resources accordingly - which is arguably the most crucial stage in understanding how regulatory strategies could be adapted. This process will commonly be conducted by a regulatory agency after consulting those within the industry.[99] By working closely with the industry, regulators will have 'access to accurate information so that they have a clear idea of the risks they are regulating',[100] allowing enhanced targeted regulation.

Nevertheless, risk-based regulation cannot alone regulate AI. Thus, the government will likely need to work collaboratively alongside the industry. Black and Baldwin's 'Really Responsive Risk-Based Regulation' is perhaps the most appropriate method which addresses this matter. The extra 'responsiveness' of this framework emanates from blending self-regulation by the industry and risk-regulation in the form of soft-law government influence, by developing a strategy of applying a variety of regulatory instruments in a flexible and sensitive manner.[101] This is accomplished by being responsive to the behaviour, attitudes, and cultures of the industry.[102] The regime's institutional setting, performance over time, and finally, changes in each of these elements, will foster a controlled strategy which may be capable of regulating AI.[103]

However, this model also has its shortcomings. This framework may decipher high-risk application actions quickly,[104] while lending less assistance in identifying intervention methods for low- or medium- risk applications, as they are deemed less important. Therefore, it will be crucial to maintain the same level of scrutiny when assessing each level of risk within AI applications to 'ensure consistency'.[105] Furthermore, in relation to AI specifically, many of these applications will likely work differently in distinct contexts, possibly falling in-between categories, making it imperative for the government to consider varying applications, uses, and possibilities to prevent regulatory asymmetry. Although applying a risk-based regulatory model may be challenging, the benefits and certainty it provides arguably outweigh such concerns.

ii. The Artificial Intelligence Development Act

Attorney and legal scholar Matthew Scherer calls for an Artificial Intelligence Development Act (AIDA), alongside the creation of a government agency to certify AI applications. The Agency will promulgate rules defining AI,

---

95 Deloitte, 'AI and risk management: Innovating with confidence Report' [2018] 1(1) Centre for Regulatory Strategy 23.
96 Federation of European risk management associations, 'European Commission considers a risk-based approach to Artificial Intelligence' (*FERMA Website*, 30 March 2020) <https://www.ferma.eu/european-commission-considers-a-risk-based-approach-to-artificial-intelligence/> accessed 10 August 2020
97 See Guihot et al supra note 13, at 389
98 *Ibid* at 411
99 *Ibid* at 393
100 Bridget M. Hutter, A Risk Regulation Perspective on Regulatory Excellence, in Achieving Regulatory Excellence 101 (2017)
101 Julia Black and Robert Baldwin, 'Really Responsive Risk-Based Regulation' [2010] 32(2) Law and Policy 2
102 *Ibid*
103 *Ibid*
104 *Ibid* at 7
105 *Ibid*

ensuring safety, and protection from discriminatory harms.[106] Although the proposal fails to detail who exactly will staff this agency, it is proposed that it will be staffed by AI specialists with relevant 'academic or industry experience',[107] exemplifying the high level of expertise. Also tasked with overseeing pre-certification research, the Agency gives developers a secure environment to test their designs and gather data. This will give developers a 'regulatory-sandbox' which offers immunity from liability, allowing the opportunity for improvements and observe how applications will work in practice.[108] Although this 'safe-space' works to replicate how these applications will work in practice, it is important to note that this is within a controlled environment, therefore is unlikely to reflect the unpredictable nature of the real-world.

a. Utilising the Existing Tort Law System

Scherer presupposes that damage caused by AI is already actionable under traditional UK tort law.[109] A tort can be characterised as a civil claim in which a party requests damages for injuries caused by harmful acts.[110] AIDA fastens onto this existing liability system where the designers, manufactures and sellers of certified systems would enjoy limited tort liability, whereas uncertified systems will be subject to strict joint and several liability.[111] This is intended to incentivise companies to accredit their AI under the Act as well as compel manufacturers to internalise the costs associated with harm, ensuring the safety of their systems.[112]

b. The Court's Role

As AIDA works conjointly with the existing tort system, it is proposed that the courts should adjudicate individual tort claims arising from AI induced harms by allocating responsibility and applying 'the rules governing negligence'.[113] This utilisation of the courts has also been advocated by Turner, who adds that judges could potentially lay down principles from individual cases which may apply in future scenarios.[114] However, many cases of harm do not reach the stage of judicial determination,[115] as is demonstrated in the few notable fatalities caused by self-automated vehicles being settled swiftly out of court.[116] Therefore, it is unlikely that new laws or regulations for AI will be adjudicated by the courts. Suggesting that in terms of AIDA, the court's role will likely be redundant in determining outcomes.

Overall, AIDA's utilisation of the existing tort system, as opposed to new stringent regulations, allows scope for future development. Encompassing a middle-ground between providing incentives for developers to embody AI system safety, as well as being workable; choosing not to impose bans on companies which choose not to certify. However, the voluntary nature of this act could lead to asymmetries between companies and the industry, resulting in some choosing not to adhere to basic safety standards which certification encourages. This is more likely to occur within larger corporations that can absorb the potential financial burden of the joint and several liability.[117] Whereas small- and medium-sized AI manufactures, who will need the financial protection offered under AIDA's

---

[106]Matthew Scherer, 'Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, And Strategies' [2016] 29(2) Harvard Journal of Law & Technology 394
[107] *Ibid* at 395
[108] *Ibid*
[109] *Ibid*
[110] Iria Giuffrida, 'Liability for AI Decision-Making: Some Legal and Ethical Considerations ' [2019] 88(2) Fordham Law Review 447.
[111] See Scherer supra note 6, at 357
[112] *Ibid*
[113] *Ibid* at 397
[114] See Turner supra note 66, at 224
[115] *Ibid*
[116] Jack Stilgoe and Alan Winfield, 'Self-driving car companies should not be allowed to investigate their own crashes' (*The Guardian*, 13 April 2018) <https://www.theguardian.com/science/political-science/2018/apr/13/self-driving-car-companies-should-not-be-allowed-to-investigate-their-own-crashes> accessed 13 July 2020
[117] *Ibid*

limited tort liability, have little choice over whether they want to be agency-certified or not, leading to potentially disjointed standards and inequality between manufacturers.

Furthermore, although Scherer[118] presupposes that damages caused by AI are already actionable under tort law, this in itself may be problematic as applying the aforementioned liability system may be challenging as the law 'is built on legal doctrines that are focused on human conduct, which when applied to AI, may not function'[119] effectively. Traditional tort law may not be sufficiently adaptable to address the unique risks associated with AI solutions. Therefore, they may appear particularly unsuited to manage the challenges and risks associated with AI.[120] Moreover, although the courts are proposed to enforce AIDA and adjudicate individual tort claims, they are unlikely to have a significant role in AIDA since most claims are settled outside of court. Therefore, to regulate AI, the UK will need to adopt a much more stringent compulsory regulatory regime or an obligatory; higher standard of certification which does not fasten onto an existing system of liability.

iii. An FDA for AI

Contrasting to the approach discussed above, a heavier-handed AI regulatory agency resembles that of the US Food and Drug Administration's (FDA)[121] drug approval programme. Under this notion, products cannot be sold in the absence of agency approval, which involves numerous phases of rigorous safety testing.[122] Arguably, as discussed in Chapter II, issues surrounding AI explainability and transparency are similar to those surrounding pharmaceutical drugs.[123] Therefore, drawing an analogy between these fields, a rigorous approach to regulation is warranted considering the dangerous risks both sectors pose.

a. A Central Government Agency

Given AI's unique characteristics and risks, a government agency specifically tasked with overseeing its development and applications may be appropriate. AI's complexity, opacity, and dangerousness[124] may warrant a national regulatory solution requiring premarket approval. The opaque nature of algorithms may benefit from a government regulators expert evaluation.[125] Furthermore, algorithms pose an immediate threat to humans in a way that other applications do not[126] due to their current lack of safety and explainability. Therefore, trying to incorporate AI into existing regulatory structures, such as the aforementioned tort law liability system or data protection provisions of the GDPR, is redundant. This is due to the fact that these instruments were not designed to specifically target AI and are unlikely to have the capacity to respond to the complexities and novel issues presented by algorithms. Based on these considerations, Tutt articulates that a central regulatory agency with pre-market review will be best placed to regulate algorithms.[127]

Acting as a standard-setting body, the Agency will coordinate and develop classifications, design standards, and best practices[128] for AI. The centralised nature of this body will allow a rich house of diverse AI experts, ranging

---

118 See Scherer supra note 6, at 397
119 Yavar Bathaee, 'The Artificial Intelligence Black Box and the Failure of Intent and Causation' [2018] 31(2) Harvard Journal of Law & Technology 891
120 See Giuffrida note 109, at 451
121 Andrew Tutt, 'An FDA for Algorithms' [2017] 69(1) Administrative Law Review
122 U.S. Food & Drug Administration, 'How Drugs are Developed and Approved' (*US Food & Drug Administration Website*, 1 July 2019) <https://www.fda.gov/drugs/development-approval-process-drugs/how-drugs-are-developed-and-approved> accessed 3 August 2020
123 U.S. Food & Drug Administration, 'Artificial Intelligence and Machine Learning in Software as a Medical Device' (*US Food & Drug Administration Website*, 28 January 2020) <https://www.fda.gov/medical-devices/software-medical-device-samd/artificial-intelligence-and-machine-learning-software-medical-device> accessed 3 August 2020
124 See Tutt supra note 120, at 116
125 *Ibid*
126 *Ibid* at 117
127 *Ibid*
128 See European Parliament: A governance framework for algorithmic accountability and transparency supra at 48

from psychologists, sociologists, programmers and economists[129] to be pooled. The Agency will also possess the power to prevent the introduction of certain AI onto the market 'until their safety and efficacy has been proven through evidence-based pre-market trials'.[130]

b. Analogy Between Drugs and AI

As aforementioned in Chapter II, pharmaceuticals operate on elaborate complex systems similar to AI. Due to the complexity of the human body, it is difficult to predict the side-effects if drugs in advance.[131] Future AI will likely operate similarly, raising a host of questions regarding explainability and predictability without extensive controlled trials.[132] Therefore, given the similar relationship between complex drugs and AI, it may be wise to create a centralised government agency specifically tasked with regulating AI similar to that of drugs.

However, the FDA addresses drugs, which have a singular function of operating on the human body. Conversely, algorithms apply across multiple domains, requiring a wider variety of expertise which a single agency may find difficult to tackle.[133] This brings into question whether a centralised system will be viable to regulate AI within the UK. Additionally, the FDA has received criticism for reacting slowly to demands for personalised medicines,[134] raising concerns as to whether this regulatory regime would be 'nimble enough'[135] to keep pace with the rapidly evolving landscape of AI. However, given the risks which AI pose, it would be wise to take inspiration from an equally hazardous field.

Overall, these proposed regulatory models offer distinct levels of agency certification and regulation. Endorsed by the EC's White Paper, a risk-based approach will likely allow the effective regulation of the most dangerous high-risk AI's. However, since this method regards low- and medium-risk AI's as less important, many applications are likely to be forgotten. Therefore, risk-based regulation alone is unlikely to provide an all-encompassing solution. However, the latter school of thought which considers certification by a centralised agency could potentially fill in the gaps where some AI applications are overlooked in risk-based regulation. AIDA offers a state regulator who certifies AI following safety testing and voluntary certification, alongside the utilisation of the existing tort law system of liability. Variations on this are offered by Tutt who recommends a singular agency approach. Encapsulating all forms of algorithms, drawing inspiration from the pharmaceutical industry which arguably poses a similar degree of societal harm as AI. Although a risk-based approach and a centralised government agency have unequivocal benefits, alone, they are unlikely to have the capacity or scope to regulate AI effectively in the UK. Therefore, various other proposals will be discussed below.

B. Self-Regulation

In the absence of government regulatory efforts, private companies have begun to act unilaterally. Tech giants such as Apple, Google, and Microsoft, which hold the lion's share of the regulatory resources in the AI industry[136] have started promoting soft law alternatives[137] to self-regulation. These soft-law mechanisms are not directly enforceable,[138] - unlike government requirements. While not legally binding, these instruments offer advantages in

---

129 Wired, 'AI Algorithms Need FDA-Style Drug Trials' (WIRED Opinion, 15 August) <https://www.wired.com/story/ai-algorithms-need-drug-trials/> accessed 3 August 2020

130 See Tutt supra note 120, at 117

131 *Ibid*

132 *Ibid* at 122

133 Algorithmic fairness world press, 'An FDA for algorithms?' (Can algorithms be fair?, 25 March) <https://algorithmicfairness.wordpress.com/2016/03/25/an-fda-for-algorithms/> accessed 22 August 2020

134 *Ibid*

135 *Ibid*

136 Christopher Hood and Helen Margetts, The Tools of Government in the Digital Age (3 edn, Palgrave Macmillan 2007) 5-6

137 See Guihot supra note 13, at 385

138 Gary E. Marchant and Brad Allenby, 'Soft law: New tools for governing emerging technologies' [2017] 73(2) Bulletin of the Atomic Scientists 108-114

areas of emerging technologies such as AI as they allow regulators to adapt quickly to changes, addressing issues as they arise without stifling innovation.[139] These can often take the form of codes of conduct, set industry standards, ethic committees and informal guidance by the government.[140]

i. Codes of Conduct

Codes of conduct are designed to guide principles of behaviour to developers of algorithms and AI systems.[141] Although in theory codes provide assurances and encourage beneficial behaviours, they often lack the enforcement measures of binding law.[142] The voluntary nature of these codes could lead to asymmetry within the market, with some organisations adopting much stricter policies than others. Without one unifying regulatory regime for AI, this could lead to chaos and confusion between companies adopting divergent codes.

Dolmans *et al.* encourages introducing codes for 'ethical AI' that allow experimentation before turning to stringent regulation, which should be a measure of last resort.[143] However, they also note not to 'leave it all to the market', understanding that self-regulation has its limitations. Furthermore, although codes carry the possibility of sanctions for violators, the extent to which they are enforced internally within organisations varies widely and there is often a lack of external scrutiny[144] which brings into question their impartiality. Moreover, these codes often contain abstract terminology, with expressions including 'moral responsibility', 'judicial transparency', and 'commitment to bias mitigation'.[145] These vague terms foster ambiguity and are subject to interpretation,[146] providing little actionable assistance to those navigating daily issues in practice.[147]

ii. Ethics Committees

The importance of internal ethics committees is increasingly receiving recognition[148] in response to controversies such as Google's NHS royal free health data transfer where Deepmind received 1.6 million identifiable personal records without the consent of patients.[149] Since then, DeepMind, the Google-owned market-leading AI company launched a new internal ethics board in 2017. This was an attempt to 'help technologies put ethics into practice, and to help society anticipate and direct the impact of AI'.[150] Although industry leaders appear optimistic, without any checks and balances, self-regulation, as seen here, could lead to dangerous outcomes. Although corporate social responsibility and ethical practices are encoded into company codes, company directors have a duty to promote the success of the company and profit maximisation is incentivised by UK corporate law. This could lead to a conflict between the corporation's legal duties and ethical standards. This could suggest that the government,

---

139 William Mcgeveran, 'Friending the Privacy Regulators ' [2016] 16(1) Arizona Legal Review 987
140 See European Parliament: A governance framework for algorithmic accountability and transparency supra at 42
141 *Ibid.*
142 See Turner supra note 66, at 212
143 Maurits Dolmans and others, 'Pandora's box of online ills: We should turn to technology and market-driven solutions before imposing regulation or using competition law' [2017] 1(1) Concurrences Conference Oxford 6
144 *Ibid*
145 Future of life institute, 'Asilomar AI Principles ' (*Future of Life Institute Website*, 2017) < https://futureoflife.org/ai-principles/> accessed 22 July 2020
146 Consultancy.uk, 'The top five ethical | moral principles for digital transformation' (Consultancy.uk, 11 April) <https://www.consultancy.uk/news/16602/the-top-five-ethical-moral-principles-for-digital-transformation> accessed 14 July 2020
147 Stuart Ferguson et al., 'Beyond codes of ethics: how library and information professionals navigate ethical dilemmas in a complex and dynamic information environment' [2016] 36(4) The Journal for Information Professionals 553
148 See European Parliament: A governance framework for algorithmic accountability and transparency supra note 38
149 Timothy Revell, 'Google DeepMind NHS data deal was 'legally inappropriate'' (*New Scientist Website*, 16 May 2017) <https://www.newscientist.com/article/2131256-google-deepmind-nhs-data-deal-was-legally-inappropriate/> accessed 22 July 2020
150 Verity Harding and Sean Legassick, 'Why we launched DeepMind Ethics & Society' (*DeepMind*, 3 October 2017) <https://deepmind.com/blog/announcements/why-we-launched-deepmind-ethics-society> accessed 10 August 2020

whose primary focus is to protect the safety of society is better placed to regulate AI as they do not face these conflicting interests.

Furthermore, the extent to which these internal committees have an impact within technology companies is difficult to assess, leading to public frustration due to their lack of visible impact.[151] This has led to concerns attributing ethics committees' primary function with maintaining a company's public image to avoid government regulation.[152] In response, Deepmind emphasises that their oversight bodies include independent experts who are not public relation tools, illustrated through their partnership with non-governmental organisations such as the United Nations Children's Emergency Fund.[153] Although on the surface, it appears that these companies are taking responsibility to ensure the safety of their applications, there is a risk that if governments do not respond with their own independent AI agencies, 'a significant proportion of thought-leaders in the field will become aligned to one corporate interest or another',[154] leading to the absence of impartiality.

The dangers associated with allowing industries to self-regulate by promoting 'independent boards' was made apparent in the tobacco industry. The notorious 'Frank Statement to Cigarette Smokers' published in hundreds of US newspapers in 1954 announced that they were establishing a joint industry group known as the Tobacco Industry Research Committee.[155] They noted that there would be an 'Advisory Board of scientist disinterested in the cigarette industry…[such as] distinguished men from medicine, science, and education'.[156] Since, researchers have attributed the success of the tobacco industry's campaign for self-regulation to millions of extra deaths from smoking each year.[157] The tobacco industry tells a cautionary tale of the dangers and high humanitarian costs which self-regulation can lead to if adequate government checks and balances are not in place. Though understanding how self-regulation failed in this industry, caution must be taken when utilising this framework within the AI industry. With the potential high humanitarian cost which AI poses, it would be unwise to allow unregulated internal ethic boards and unbinding codes of conduct to operate independently without a government oversight body present.

iii. Influencing the Industry - 'Nudging'

Elizabeth Denham, the UK's information commissioner, has noted that regulators should develop broad ethics so that the industry can develop its own standards aligned with them,[158] ultimately allowing regulators to then certify the standards developed by private companies. Guihot et al. builds upon this notion, proposing a soft-law approach where the government helps to shape the AI regulatory environments at a 'very board policy level by nudging or influencing beneficial development'.[159] The corporation will be free to choose whether to adopt the government's intentions without any repercussions, ultimately relying on self-regulation to implement government

---

[151] Sam Shead, 'The biggest mystery in AI right now is the ethics board that Google set up after buying DeepMind' (Business Insider Technology, 26 March) <https://www.businessinsider.in/The-biggest-mystery-in-AI-right-now-is-the-ethics-board-that-Google-set-up-after-buying-DeepMind/articleshow/51561313.cms?utm_source=ten_minutes_with&utm_medium=Referral&utm_campaign=Content_Patnership&utm_source=taboola&utm_medium=referral> accessed 22 July 2020

[152] Ben Wagner, Ethics as an Escape from Regulation: From ethics-washing to ethics-shopping?. In Emre Bayamlioglu (ed), Being profiled: Cogitas ergo sum: 10 years of profiling the European citizen (Amsterdam University Press 2018) 4

[153] See Shead, supra note 150, at 151

[154] See Turner supra note 66, at 212

[155] University of Bath, 'Tobacco Industry Research Committee' (*Tobacco Tactics University of Bath* , 7 February 2020) <https://tobaccotactics.org/wiki/tobacco-industry-research-committee/> accessed 12 July 2020

[156] *Ibid*

[157] Kelly Brownell and Kenneth Warner, 'The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died How Similar Is Big Food?' [2009] 87(1) The Milbank Quarterly 259-294

[158] Testimony of Elizabeth Denham, United Kingdom information commissioner, before the House of Commons Committee on Science and Technology, January 23, 2018 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/science-and-technology-committee/algorithms-in-decisionmaking/oral/77536.html> accessed 22 July 2020

[159] Richard Whitt, 'Adaptive Policymaking: Evolving and Applying Emergent Solutions for US Communications Policy' [2009] 61(3) Federal Communications Law Journal 483, 487, 576

intentions. In comparison to the purely internal self-regulatory approaches as discussed above, 'nudging' offers an increased level of government oversight and influence. However, due to the non-obligatory nature of this form of regulation, it's suitability for regulating AI will be discussed below.

Governments can set expectations and send signals to influence, or 'nudge'[160] participants in AI development. 'Nudge theory' is a concept in behavioural economics which can be characterised as 'any aspect of the choice architecture that predictably alters people's behaviour without forbidding any opinions'.[161] Applying this to AI, government policies, such as incorporating safety measures and bias checks to ensure the appropriate use of AI, could be 'nudged' towards the industry by the government. This could be done through policy statements presented to company's boards of directors,[162] fostering ethical and safe AI development. Examples of traditional policy tools include offering subsidies or tax and financial incentives.[163] The government could offer tax reductions and subsidies to companies that embody their regulatory agenda, which could include AI safety and explainability mechanisms.

Nudging's inexpensive nature and potential effectiveness appear appealing. However, there is little authority of an initiative similar to this succeeding. The voluntary nature means that it is unlikely to be willingly adopted across the industry, particularly by larger deep pocketed corporations where financial incentives and tax subsidies provide little motivation. This could result in smaller companies, who benefit more from these monetary incentives due to their smaller size and revenue intake, with little choice but to adopt the government's vision as they are more likely to need this additional financial support, leading to industry asymmetry. Moreover, the multitude of different AI applications would likely make nudging improbable at the micro-level of individual applications.[164] However, it could be argued that it is precisely this reason the government is unequipped to cover the variability of AI. Therefore, regulation should be left to the industry, as they have the expertise and scope to regulate their own applications. Overall however, the lack of enforceability and statutory backing for this proposed regulatory rout makes it unlikely to be formed as a foundation for AI regulation in the UK.

Due to the UK government's current lack of regulatory scope, private companies are likely to continue to drive the agenda for AI regulation. If this continues, it will become increasingly difficult for the government to introduce new regulatory regimes, bodies, or agencies in the future. This could result in the government having no choice but to 'endorse the systems of regulation already adopted by the industry'[165] as these would have likely already shaped internal regulatory regimes.[166] This section addressed how although self-regulation can save the government time and resources and provide field expertise, leaving a potentially dangerous field such as AI to be self-regulated when industry which has proven to be ineffective in the past, through instances such as the tobacco industry, would be dangerous. Furthermore, the lack of enforceability of codes of conduct and lack of oversight associated with internal ethics committees means that if this form of regulation is to be utilised in the future, a strict overarching umbrella of enforceability will be needed to monitor these forms of self-regulation. This is something which could be difficult considering the current lack of government resources, therefore, other proposals which may be more viable to regulate AI will be considered below.

C. Co-regulation

[160] Richard Thaler and Cass Sunstein, Nudge: Improving Decisions About Health, Wealth, And Happiness (1 edn, New Haven: Yale University Press 2008) 4
[161] *Ibid*
[162] See Guihot et al supra note 13, at 447
[163] Brigitte Madrian, 'Applying Insights from Behavioral Economics to Policy Design' [2014] 1(1) National Bureau of Economic Research 32
[164] See Guihot et al supra note 13, at 391
[165] See Turner supra note 66, at 212
[166] *Ibid*

Co-regulation adopts somewhat of a 'middle-ground' between government intervention and self-regulation as detailed above. It involves strong government oversight paired with private sector 'regulatory markets',[167] which reflects the needs of all parties without leaning too heavily to one side.[168] When applied to AI, co-regulation could reduce friction between static rules and dynamic technologies,[169] introducing a constructive dialogue among various stakeholders who may otherwise be less amenable to compromise.[170] Firms are more likely to adhere to voluntary codes of conduct if faced with credible threats of stricter government regulation if they fail to abide by the agreed-upon standards.[171] The high-level of ethics, dynamic technological prowess and enforceable rules[172] makes co-regulation particularly attractive to regulators.

The GDPR as detailed in Chapter II exemplifies a successful co-regulatory strategy. Revolving around the 'principle of accountability',[173] this framework is regulated through established legal rules while also leaving room for self-regulatory measures. The GDPR effectively strikes a balance between government oversight and industry expertise. Although this legislation was not specifically aimed to encapsulate AI, the successful use of a co-regulatory model could be utilised in AI regulation. Co-regulation has the prospect of enabling the progressive development and adaptation of effective AI regulation[174] in the UK. By devolving some of the responsibility to independent bodies, this model theoretically gives agility and flexibility to regulators[175] due to existing industry knowledge and reduced workload. This approach is responsive to emerging technology environments[176] where there are many variables and high context dependency.[177]

However, this framework also has limitations, with it arguably being inadequate to address the challenges presented by AI.[178] Pagallo alleges that co-regulation is not strong enough to tackle the complex challenges which AI presents.[179] Similar to self-regulatory 'nudging' as discussed above, co-regulation is dependent on implementation by the private sector. Therefore, it could be suggested that this means of regulation is only suited in cases where fundamental rights or major political choices are not called into question,[180] which AI does. However, contrasting to 'nudging' where the corporation is free to choose whether to adopt these intentions without repercussions, co-regulation offers tangible threats of stricter government regulation if they fail to abide by the agreed-upon standards. However, the private sector will likely be unwilling to relinquish its ambition to influence AI regulation.[181] Hirsch criticises this model, suggesting that the 'industry will not reveal insider knowledge to regulators but will instead use its informational upper hand to obtain weaker standards'.[182]

---

167 Gillian Hadfield, 'Venture Beat The Machine Making Sense of AI ' (An AI regulation strategy that could really work, 8 February) <https://venturebeat.com/2020/02/08/an-ai-regulation-strategy-that-could-really-work/> accessed 9 August 2020

168 Roger Clarke, 'Regulatory Alternatives for AI' (*Roger Clarke's Website*, 9 February 2019) <http://www.rogerclarke.com/EC/RAI.html#RAI> accessed 9 August 2020

169 Johannes Brake, 'Co-regulation or Capitulation? Addressing conflicts arising by AI and standardization' [2020] 25(2) Lex Electronica 13

170 William D. Eggers et al, 'The future of regulation Principles for regulating emerging technologies' (Deloitte Insights, 19 June) <https://www2.deloitte.com/us/en/insights/industry/public-sector/future-of-regulation/regulating-emerging-technology.html> accessed 11 August 2020

171 Michael Spiro, 'The FTC and AI Governance: A Regulatory Proposal ' [2020] 10(1) Seattle Journal of Technology Environmental & Innovation Law 48

172 See Brake supra note 168, at 13

173 GDPR Article 5(2)

174 See Clarke supra note 167

175 European Parliamentary Research Service, 'Regulating disinformation with artificial intelligence ' [2019] 1(1) Panel for the Future of Science and Technology European Science-Media Hub 58

176 See Spiro supra note 170, at 47

177 *Ibid*

178 Ugo Pagallo et al, 'The middle-out approach: assessing models of legal governance in data protection, artificial intelligence, and the Web of Data' [2019] 7(1) The Theory and Practice of Legislation 1

179 *Ibid*

180 Official Journal of the European Communities, European Governance - A White Paper (White Paper, COM 287, 2001)

181 See Brake supra at note 168, 13

182 Dennis D. Hirsch, 'The Law and Policy of Online Privacy: Regulation, Self-Regulation, or Co-Regulation?' [2011] 34(439) Seattle University Law Review 468

While co-regulation is more robust than less interventionist regulatory designs such as self-regulation, it is unsuitable for regulating AI in the UK. This is primarily due to the fact that this framework will likely find it challenging to tackle the complex structures surrounding AI applications. Although the GDPR displayed a successful use of this regulatory strategy, this framework only grapples with the singular requirement of protecting personal data and explainability. In contrast, if the same principles were to be applied to algorithms, a co-regulatory model will likely become confused and disjointed due to the vast variability of AI applications which it will need to encapsulate. Therefore, a regulatory regime which has a stronger government agency presence alongside more minor industry influence may be more suitable.

This Chapter has offered a comprehensive examination of government intervention, self-, and co-regulatory methods which could be utilised to regulate AI in the UK. Risk-based regulation and a centralised government agency as seen in Tutt's[183] proposal appear particularly capable of encapsulating AI's novel risks. Although there has been a push for self-regulation by the industry resulting from a lack of existing intervention, this method appears to accomplish little due to its voluntary nature in relation to codes of conduct and internal ethics committees. Co-regulation attempts to strike a middle ground between self-regulation and government intervention. However, since this model is still dependent on implementation by the private sector, as well as being inadequate to tackle the complex challenges which intelligent algorithms present, it is unsuitable for regulating AI. Although the various proposals as outlined above are all commendable, many of them are inadequate on their own to regulate AI effectively. Therefore, in Chapter V, a new framework that is specifically targeted to tackle the unique risks which AI pose will be introduced. This model will address some of the issues with current structures, as well as take inspiration from other successfully regulated industries to form a coherent framework to regulate AI in the UK.

V. The Artificial Intelligence Regulation Agency

The current lack of AI-specific regulatory intervention in the UK has seen an array of ordinance proposals, ranging from government intervention to self- and co-regulatory approaches. As discussed above, many of these models appear particularly unsuited to regulating AI individually. This Chapter will build upon these models, accounting for their flaws as best as possible, endeavoring to design a comprehensive structure which could be implemented in the UK. This article will not offer an exhaustive blueprint as to how this may work in practice. Instead, intends to initiate a discussion that draws on lessons from other successfully regulated industries to regulate AI.

The proposed regulation will need to address issues including algorithmic bias, safety, explainability, and transparency. The following model will endeavor to capture these issues, creating an efficient framework which addresses these dangers. The proposed Artificial Intelligence Regulation Agency (AIRA) will form a new AI-specific central government agency, tasked with regulating algorithms and ensuring the safety of AI applications in the UK.

A. The Centralised Nature of AIRA

As a centralised government agency, the AIRA will be best placed to specifically oversee the novel applications and risks which AI present. Its singular nature will allow for policy coordination[184] and certainty, as well as possess the capacity to meet the complex, systemic regulatory challenges which AI poses.[185] As noted above, some such as Scherer have proposed an overarching agency that has the power to establish a certification process for AI systems.[186] Similarly, Tutt contemplates the creation of an agency tasked with supervising the development,

[183] See Tutt, supra note 120, at 117
[184] Peter Cihon et al. 'Should Artificial Intelligence Governance be Centralised? Six Design Lessons from History' [2020] 1(1) ArXiv:200103573 1
[185] See Tutt, supra note 120, at 114
[186] See Scherer, supra note 6, at 393

deployment, and use of algorithms.[187] The AIRA will take inspiration from these models, building upon their designs to pioneer an effective regulatory framework.

The Committee on Standards in Public Life, however, argues against the creation of an AI-specific agency, concluding that a singular regulator is unnecessary in the UK as all regulators must adapt to the challenges that AI pose to their specific sectors.[188] However, Bar-Gill and Warren contest this notion, suggesting that trying to adapt existing regulations around the novel risks which AI pose will lead to an overall lack of expertise[189] to regulate AI consistently and effectively. Existing regulatory frameworks are inadequate to provide effective, meaningful and timely oversight of emerging technologies[190] as their structures only exert authority over a small slice of the AI spectrum.[191]

The introduction of a uniform regulator which has the power to set standards for all developers and users of AI systems[192] will bring uniformity. The AIRA will endeavor to perform this role, developing comprehensive policies which respond quickly to new applications and risks by utilising its expertise arising from its centralised nature. Nevertheless, the singular nature of this Agency does not require it to take on all the roles of a regulator. Therefore, by delegating some of its roles to different actors under the umbrella of the Agency, which will be discussed more in detail later in this Chapter, the AIRA can operate efficiently. In this manner, the AIRA can overcome the downfalls of Tutt's aforementioned FDA proposal which was criticised for being slow-reacting in cases of personalised medicines,[193] which could be argued as being attributable to its lack of delegation.

B. Looking Towards the MHRA

As discussed in previous Chapters, an analogy can be drawn between pharmaceutical drugs and AI due to their similar risks, potentially destructive consequences and lack of explainability. Due to these factors, the medical drug industry will be utilised to provide inspiration for the AIRA as it is a long-standing successfully regulated industry. The Medicines and Healthcare products Regulatory Agency[194] (MHRA) which is the UK equivalent to the FDA and is what Tutt's proposal[195] focused upon, could be utilised as a guide to how an agency could regulate AI within the UK. This body is the government agency responsible for the regulation of medicines, medical devices, and product liability in the UK.[196] Although the AIRA will take inspiration and reference the MHRA below, it is essential to formulate novel ideas which can keep pace with the technological field, rather than simply deferring to established regulations that has been built in a unique, and different, albeit similar context.

C. AIRA's Scope

The centralised nature of this Agency will allow a rich house of diverse AI experts to be pooled, attracting industry talent and thereby guiding its expertise.[197] The AIRA will be staffed by government officials, AI experts, and industry professionals who are impartial members form the technology industry with extensive expertise in AI

---

187 See Tutt, supra note 120, at 91

188 The Committee on Standards in Public Life, *Artificial Intelligence and Public Standards Review* (February 2020) 4, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868284/Web_Version_AI_and_Public_Standards.PDF> accessed 4 June 2020

189 Oren Bar-gill and Elizabeth Warren, 'Making Credit Safer ' [2008] 157(1) University of Pennsylvania Law Review 70.

190 See Marchant, supra note 47, at 109

191 See Spiro, supra note 170, at 47

192 ZarinaI Khisamova et al, 'On Methods to Legal Regulation of Artificial Intelligence in the World' [2019] 9(1) International Journal of Innovative Technology and Exploring Engineering 5159

193 See Tutt, Supra note 120, at 116

194 Gov.uk, 'About us' (*Gov.UK Website*, 2019) <https://www.gov.uk/government/organisations/medicines-and-healthcare-products-regulatory-agency/about> accessed 7 October 2020

195 See Tutt, supra note 120, at 116

196 *Ibid*

197 See Wired, 'AI Algorithms Need FDA-Style Drug Trials' supra note 128

research. The rationale behind this diverse array of actors is to allow the Agency to gather the top talent from all aspects of intelligent algorithm design, manufacturing and production. Thereby increasing the level of expertise, making it more likely to construct a well-balanced method to regulate AI.

The AIRA's main aim is contending with AI-specific issues: algorithmic bias, safety, and explainability. To do this, the Agency will create an Ethics Committee with mandatory Codes of Conduct which implement algorithmic explainability and transparency into its design, as well as to eliminate built-in bias[198] by capturing this at the system's design. To ensure the safety of AI, the Agency will adopt a risk-based classification that separates AI into low-, medium- and high-risk categories similar to the categorisation proposed by Guihot *et al.*[199] above. This will have the effect of allowing the Agency to concentrate primarily on high-risk AI which requires the most urgent regulatory redress. This risk-based classification will be discussed more in detail later in this Chapter.

The MHRA Innovation Office assists the MHRA with novel medicines, being the first point of call for regulatory queries regarding these novel applications.[200] Similarly, as discussed in Chapter III, the CDEI will continue to fulfil its function as an advisory body.[201] Acting under the umbrella of the AIRA, the CDEI will continue to address regulatory gaps and provide counsel to the Agency on how each AI application should be regulated. This advisory role will allow the CDEI to offer its AI expertise to the Agency. Furthermore, the CDEI will be entrusted to conduct quarterly reviews on various AI applications which show more than a 15% growth in computational power compared to the previous quarter. This will help to tackle the 'pacing problem' as illustrated in Chapter II, as the CDEI will have the ability to identify and address areas of significant growth regularly. Advising the Agency how best to accommodate these new growths so that regulations can keep pace with technological change.

In lieu of regulating research and development which could lead to stifled innovation, the AIRA will work collaboratively with the industry[202] to provide 'regulatory sandboxes', which allow AI developers to test their applications without having to follow all the standard regulations.[203] The trials taking place within these sandboxes will be reviewed by the Office for AI's Ethics Committee, which will be discussed more in detail below. Before trials can begin, similarly to the MHRA, when conducting clinical trials, the Office for AI and the AIRA must conclude that the benefits of the AI application outweigh the risks.[204] This method has proven to be effective before as seen in the case of the FCA, which launched the first successful fintech regulatory sandbox in June 2016.[205] Although they provide a safe environment to test products, as discussed in Scherer's AIDA proposal[206] above, these sandboxes will not provide an accurate reflection of how these algorithms will work in real life. To combat this, the AIRA will introduce a new two-step process. Firstly, manufacturers will have the opportunity to test their products in this confined and controlled environment. Then, if vigorous tests show adequate levels of safety, manufacturers will have the opportunity to test their algorithms in a real-world scenario. This will, however, be accompanied by strict human oversight by the Office's Ethics Committee. Moreover, similar to the

198 See Crawford, supra note 17, at 77
199 See Guihot et al, supra note 13, at 389
200 Gov.uk, 'MHRA Innovation Office' (*Gov.UK Website*, 2019) <https://www.gov.uk/government/groups/mhra-innovation-office> accessed 7 October 2020
201 See Centre for Data Ethics and Innovation, *Interim report: Review into online targeting* supra note 61
202 Deloitte and confederation of indian industry, 'Deloitte Website ' (Regulatory sandbox: Making India a global fintech hub, July) <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media-telecommunications/in-tmt-fintech-regulatory-sandbox-web.pdf> accessed 7 October 2020
203 *Ibid*
204 Mike Knapper et al, 'Medicinal product regulation and product liability in the UK (England and Wales): overview' (*Practical Law Website*, 1 November 2018) <https://uk.practicallaw.thomsonreuters.com/3-500-9763?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 4 July 2020
205 Financial conduct authority, 'Financial Conduct Authority' s regulatory sandbox opens to applications' (*Financial Conduct Authority Website*, 9 May 2016) <https://www.fca.org.uk/news/press-releases/financial-conduct-authority%E2%80%99s-regulatory-sandbox-opens-applications> accessed 7 October 2020
206 See Scherer supra note 6, at 395

aforementioned MHRA's clinical trials, the manufactures of these AI applications will need appropriate insurance to cover any liabilities which may arise from these trials.[207]

Concerning how liability may be attributed to damages resulting from AI, the AIRA will be responsible for creating standards that manufacturers must adhere to. As discussed above, especially regarding high-risk AI, existing tort law liability is unlikely to prove effective. Therefore, an obligatory insurance scheme for high-risk AI could provide a possible solution to this dilemma.[208] This will ensure that these applications, which have catastrophic risks, are insured to secure compensation for potentially detrimental damage[209] that they may cause. Manufacturers and AI system operators could procure insurance from approved carriers specifically designed for AI systems which are ratified by the AIRA, although this will be dependent on when the insurance industry introduces coverage specifically targeted at high-risk AI. Concerning low- and medium-risk AI, the current law governing negligence in tort law could provide a possible interim solution until the AIRA configures an applicable liability scheme. This is as low- to medium-risk AI are less likely to cause detrimental damage which means that they could be encapsulated into existing frameworks for now.

D. Ethics Committee

Under the umbrella of the AIRA, the Office for AI as discussed in Chapter III will form an Ethics Committee, introducing binding ethical 'Codes of Conduct' and 'Essential Requirements' that those involved in the AI application process will be bound by. The Committee will strive to form a well-balanced board that is staffed by both government officials within the Office itself, as well as industry professionals such as the members of AI companies' internal ethics committees. Together, their main objective is to produce applicable frameworks for AI which incorporates provisions which eliminates bias and incorporates transparent and explainable system design into algorithms. As discussed in Chapter IV, the voluntary nature of Codes of Conduct and internal Ethics Committees demonstrated that self-regulation is unlikely to work in the context of AI. Therefore, the mandatory nature of these Codes under the AIRA is likely to ensure that all provisions are adopted equally across the board. Moreover, the independent nature of this committee will prevent it from being swayed by industry influence.

As discussed in Chapter III, the Office for AI and Lords' Select Committee both attempted to introduce ethical guidelines which were ultimately too vague, including those such as 'care for the wellbeing of all'[210] which provided of little use. However, the AIRA's Codes will introduce practical guidance, becoming essential requirements similar to the highly specific requirements seen in that of the MHRA. These will be required to be inbuilt into all algorithmic systems regardless of the level of risk they pose. Some instances of these requirements could include 'bias checks' to eliminate any pre-existing prejudices, 'thorough explainability' for decisions taken by algorithms and 'transparency of design'. To show compliance, the AI manufacturer must follow the certification procedure which will be determined on a risk-classification of the application as detailed below.

If there is an unintended breach of these Codes by a manufacturer, the Ethics Committee will be lenient and take steps to support them, especially if they come forwards themselves. However, if a producer is well-aware of a Code breach, the Committee will have the discretion to impose strict fines to the violator. Furthermore, depending on the severity of the breach, if an actor is seen as behaving unethically or anti-competitively, the Committee will have the power to impose an immediate 3-month ban which can be extended on any actors, deterring unethical behaviours.

E. Risk-Based Regulation

---

[207] See Knapper et al, 'Medicinal product regulation and product liability in the UK supra at 204

[208] European commission, 'Liability for Artificial Intelligence' [2019] 1(1) Report from the Expert Group on Liability and New Technologies – New Technologies Formation 30

[209] *Ibid*

[210] See Gov.uk, 'Understanding artificial intelligence ethics and safety' supra note 60

As discussed in Chapter IV, a risk-based approach will provide an effective medium to regulate AI by separating AI categories, allowing regulators to concentrate on the most urgent risks. Endorsed by the European Commission's White Paper 2020 as detailed in Chapter III, this model has the potential to effectively tackle the dangers which AI pose by addressing the safety concerns relating to algorithms.[211] However, issues with current risk-based frameworks could make it unsuitable for regulating AI. Firstly, current frameworks focus heavily upon 'high-risk' AI, potentially leading to lower-risk applications being forgotten. Secondly, as demonstrated by the EC's proposal, currently no framework elaborates on the notion of 'risk'.[212] Finally, risk-based regulation cannot alone regulate AI effectively due to finite government resources. The AIRA will strive to address these issues, elaborating upon a risk-based framework by creating a structure unique to AI which tackles its complexities.

The AIRA's approach will focus equally on each risk category, delegating each class of risk to appropriate actors to ensure that they are catered to individually. Furthermore, arguably risk-based regulation alone will not be sufficient in regulating AI, thus, by taking inspiration from Black and Baldwin's 'Really Responsive Risk-Based Regulation' as detailed above, which concentrates on blending self- and risk-regulation by applying a variety of regulatory instruments[213] may be most appropriate. In turn, this will allow the Agency to concentrate upon the most urgent algorithmic applications which require regulatory redress.

The AIRA's risk-based regulation will operate on a certification framework. Manufactures of applications with low risk will have the ability self-certify and regulate their applications. Additionally, applications which can already be encapsulated into existing frameworks and only require minimal 'tweaks' will fall into medium-risk categories. These algorithms will be able to obtain certification following an assessment by the CDEI which will affix an 'AC' mark to prove agency certification. Finally, high-risk AI will require mandatory certification which can only gain approval from the AIRA.

i. Low-Risk Applications

Under the AIRA, low-risk applications will be delegated to the industry to be self-regulated. Having this element theoretically gives flexibility to the Agency to concentrate on more pressuring high-risk applications. Low-risk applications are those which arguably do not pose a threat to safety or human life,[214] therefore can be entrusted to private companies as there is less at stake. Arguably, these companies will best understand the risks and capabilities of these algorithms and are therefore best placed to set standards.[215] Although the industry will be permitted to certify its applications, they will first need to be approved by the Agency as having complied with the ethical principles and Essential Requirements which the AIRA Ethics Committee set. Certification could be offered through companies such as Cathy O'Neil's 'ORCAA' Algorithmic Auditing, which are offering 'algorithmic accuracy, bias & fairness' certification'.[216] Showcasing that the industry can self-regulate its products and could therefore, theoretically, successfully certify low-risk applications.

ii. Medium-Risk Applications

Unlike academic proposals, new regulatory regimes rarely land onto a blank canvas, often falling into existing norms and rules.[217] Therefore, although the AIRA is a new centralised agency, this does not mean that it should

---

211 See European Commission White Paper On Artificial Intelligence supra note 83
212 See Kingaby, ' The EC' s risk based approach to AI regulation is inadequate, here' s why' supra note 84
213 See Black, supra note 100, at 2
214 See Guihot et al, supra note 13, at 411
215 See Turner, supra note 66, at 210
216 Rajaetal Chatila et al, 'The IEEE Global Initiative for Ethical Considerations in Artificial Intelligence and Autonomous Systems [Standards]' [2017] 24(1) IEEE Robotics & Automation Magazine 110
217 Julia Black and Andrew Murray, 'Regulating AI and Machine Learning: Setting the Regulatory Agenda' [2019] 10(3) European Journal of Law and Technology 16

operate in isolation from existing regulatory regimes.[218] Under the Agency's risk-classification scheme, medium-risk applications should be categorised as those which can already be implemented into existing structures. These will be scrutinised by the CDEI who will identify any regulatory gaps which may be left alongside a conformity test.

Although the GDPR is not AI-specific, the provisions surrounding personal data could be utilised. However, the GDPR only applies to 'significant' decisions, which is not sufficiently elaborated upon within the legislation and will likely fail to encompass 'non-significant' applications of AI. This is where the CDEI, who's main aim is to identify gaps[219] in the regulation, could utilise its role to identify and recommend amendments by performing a conformity test to regulators which do not yet cater specifically to AI. Similarly to the MHRA which affixes a 'CE mark'[220] for certified applications, once the medium-risk AI has been deemed safe and encompassed under the legislation, the CDEI could affix an 'AC mark' standing for 'Agency Certified'. This demonstrates that it has undergone through the official conformity assessment and all gaps have been bridged in accordance with the Essential Requirements.

iii. High-Risk Applications

High-risk applications are arguably the most dangerous, having the potential to have high humanitarian costs if not regulated adequately. Many of the proposals explored in previous Chapters concentrate on regulating this area in particular. Due to its hazardous nature, high-risk AI will be directly regulated by the AIRA which will impose strict disclosure and mandatory certification requirements. These mandatory risk-based requirements reflect applications within equally harmful sectors. These will include healthcare, transport, and policing where the applications 'poses risk of injury, death or significant material damage'.[221] The applications will be required to have pre-market approval by the Agency, with various levels of safety testing and pre-market trials. In addition, being required to provide evidence of conforming to the Essential Requirements. Furthermore, additional obligations may be imposed for hazardous AI which will be predetermined by the AIRA, such as those including remote biometric identification[222] software.

Similarly to the MHRA where certain medical manufactures must be registered with the Agency,[223] all manufacturers of high-risk AI will be required to be registered with the AIRA. The AIRA is the only body which can certify these algorithms, and without Agency certification, these algorithms will be unable to enter the market. The AIRA will also have the discretion to ban certain applications which it considers to be of 'humanitarian risk'. These could include 'Any type of biometric monitoring, such a voice or facial recognition'[224] software. The Agency will ban these products 'until their safety and efficacy has been proven through evidence-based pre-market trials'.[225] Showcasing the rigorous regiments which accompany high-risk AI.

Overall, the AIRA attempts to capture the existing risks associated with AI, creating an AI-specific regulatory framework that accounts for the flaws of the models aforementioned in Chapter IV, as well as taking inspiration from the MHRA, which regulates an equally hazardous field. The centralised nature of the Agency enables policy

---

218 *Ibid*
219 *Ibid*
220 See Knapper et al, 'Medicinal product regulation and product liability in the UK supra note 203
221 Natasha Lomas, 'EU lawmakers are eyeing risk-based rules for AI, per leaked white paper' (*Tech Crunch Website*, 17 January 2020) <https://techcrunch.com/2020/01/17/eu-lawmakers-are-eyeing-risk-based-rules-for-ai-per-leaked-white-paper/> accessed 10 August 2020
222 See BCLP, The EC white paper shows that AI regulation is at a crossroads: where is the UK now and where is it going? supra note 58
223 See Knapper et al, 'Medicinal product regulation and product liability in the UK supra note 203
224 Natasha Lomas, 'EU lawmakers are eyeing risk-based rules for AI, per leaked white paper' (*Tech Crunch Website*, 17 January 2020) <https://techcrunch.com/2020/01/17/eu-lawmakers-are-eyeing-risk-based-rules-for-ai-per-leaked-white-paper/> accessed 10 August 2020
225 See Tutt, Supra note 120, at 117

coordination and uniformity as well as allowing a diverse house of AI experts to be pooled. The AIRA, although a new centralised agency, expertly utilises existing bodies such as the CDEI and Office for AI, allowing the Agency to save time and resources by harnessing the functions and capabilities of these established bodies.

Although this is a centralised agency, this does not require it to take on all regulatory roles. Therefore, adopting a staggered risk-based regulatory approach which devolves power for low-risk AI's to the industry and medium-risk AI's to be encapsulated into existing frameworks, gives the Agency time and resources to concentrate on high-risk AI's which have potentially disastrous consequences. Although the AIRA aims to eliminate most of the weaknesses of the aforementioned frameworks, it could be criticised on certain matters. One of these is regarding liability attributed to AI-derived harms. Although high-risk applications are accounted for by mandatory insurance, there is still yet to be an adequate proposal for low- and medium-risk AI's which are currently encapsulated by the existing tort-based system. Furthermore, concerning these low-risk AI's, some could argue that self-certification by the industry under the risk-based classification is unwise due to the risks which this form of regulation poses as discussed above, although arguably, their low-risk, coupled with the industry's expertise could justify industry certification.

Although this proposal may have its caveats, it is not intended to offer an exact blueprint as to how this framework may be implemented in practice. Instead, by taking inspiration from other proposed frameworks and understanding their strengths and flaws, the AIRA attempts to construct a proposal that could provide the future building blocks of AI regulation within the United Kingdom.

VI. Conclusion

In conclusion, this article attempts to answer the question: How should Artificial Intelligence be regulated in the United Kingdom? In answering this, the background of AI, its definitional ambiguity and problematic characteristics were considered. This led to a discussion on the existing proposals from the UK and EU, as well as various frameworks submitted by academics and legal scholars. Through assessing these models, the current patchwork of laws and recommendations was made apparent. Focusing primarily on government intervention, self-regulation, and co-regulatory strategies, it was evident that there is currently no singular accepted or applicable strategy to encompass AI. Although some proposals were commendable, including the risk-based regulation endorsed by the EU or thoroughly conceptualised centralised government agencies proposed by those such as Tutt, it was clear that the proposed models in Chapter IV could not effectively regulate AI within the UK individually. Building upon this existing discourse, Chapter V attempts to formulate a wholly unique framework that could be best utilised. The Artificial Intelligence Development Agency takes inspiration from existing schools of thought as well as other successfully regulated industries, such as pharmaceutical drugs which pose similar risks to those of AI. The centralised nature of this Agency enables policy uniformity and its utilisation of existing bodies such as the Office for AI and CDEI allow for government resources to be salvaged. By devolving its powers within the risk-based classification system, the AIRA can concentrate upon the most dangerous high-risk categories which have potentially high humanitarian costs. Although it is yet to be seen how this proposal will work in practice, this model endeavours to encapsulate the most dangerous features of AI. By successfully accounting for the flaws in the existing proposals, the AIRA works to effectively regulate this fast-evolving technological field within the United Kingdom.

NON-CONSENSUAL GENETIC TESTING: AN EQUITABLE BREACH OF CONFIDENCE?

Henry Gallagher[1]

ABSTRACT

This article proposes that an equitable action for breach of confidence may provide a mechanism for redress against non-consensual genetic testing. Direct-to-consumer genetic testing offers a novel means of violating the bodily autonomy and informational privacy of others, yet the present legal landscape offers victims of such testing limited remedies against parties who secretly collect and analyse their genetic material. The application of equitable actions to protect non-consensually obtained genetic information has received limited academic and judicial analysis, which is surprising given their flexibility and powerful remedies. It is submitted that knowledge of the confidential nature of genetic information and the plaintiff's absence of consent to testing binds the conscience of a surreptitious tester, enabling equity to take cognisance in its exclusive jurisdiction and provide a remedy.

[1] Tipstaff to the Honourable Acting Justice Emmett, Court of Appeal of New South Wales, Australia

I. Introduction

The access and analysis of genetic data is a profoundly useful scientific development. However, scientific advances often steer into uncharted legal waters. This article specifically considers the non-consensual collection and genetic analysis of human tissue, a matter of legitimate public concern and uncertain legal consequence.

Raw genetic material is everywhere. For instance, any public garbage bin would contain used tissues, chewing gum, cigarette butts and a host of other objects containing genetic material. These materials can be collected and analysed. In many cases, notably forensic investigations, such testing has a great public benefit. However, the highly personal nature of genetic data is of some concern where non-consensual testing is carried out for purposes that do not carry a public interest. There is no obvious remedy to restrain the use of extracted genetic data. Australian law is regularly criticised as 'too narrow',[2] and 'far from clear'[3] with respect to human tissue and genetic material, necessitating an investigation into whether any protection is currently available.

The primary objective of this article is to consider if equity's protection of personal information under an action for breach of confidence can provide a remedy for non-consensual genetic testing. Breach of confidence is occasionally cited as a plausible action to protect genetic information,[4] but there are no detailed academic or judicial attempts to apply the doctrine to genetic testing.

Genetic analysis produces highly personal information, especially regarding an individual's health and family. An enforceable means of protecting personal control over such sensitive information may in some circumstances thus be critical to protecting individual autonomy.[5] Articulating this equitable action may dissuade non-consensual testing by identifying tangible legal consequences. Incidentally, articulating an action to protect genetic information also offers a valuable opportunity to address several doctrinal uncertainties surrounding breach of confidence.

This article has two major sections. Part II explains non-consensual genetic testing and briefly considers existing statutory frameworks, including the Human Tissue Act 1983 (NSW)[6] and the Privacy Act 1988 (Cth).[7] Part III assesses equitable breach of confidence and applies it to surreptitiously obtained genetic information. The part sets out the conceptual foundations of the doctrine and attempts to anticipate the difficulties facing a prospective plaintiff.

The article concludes that surreptitious genetic testing *arguably* falls within the accepted scope of breach of confidence without requiring any significant doctrinal extension. The central proposition is that a party who knowingly tests a plaintiff's genetic material without their consent could owe an enforceable obligation of confidence to the plaintiff.

II. Non-consensual Genetic Testing

---

[2] Imogen Goold, 'Tissue Donation: Ethical Guidance and Legal Enforceability' (2004) 11 Journal of Law and Medicine 331, 332.
[3] Jennifer Falcon, 'Privacy of Bodily Samples' (2010) 18 Journal of Law and Medicine 344, 349.
[4] See for example Dianne Nicol et al, 'Time to Get Serious about Privacy Policies: The Special Case of Genetic Privacy' (2014) 42 Federal Law Review 149, 163–164; Margaret Otlowski and Diane Nicol, 'The Regulatory Framework for Protection of Genetic Privacy in Australia' in Terry Sheung-Hung Kaan and Calvin Wai-Loon Ho (eds), *Genetic Privacy: An Evaluation of the Ethical and Legal Landscape* (Imperial College Press, 2013) 283, 286; Australian Law Reform Commission and Australian Health Ethics Committee (ALRC/AHEC), *Essentially Yours: The Protection of Human Genetic Information in Australia* (Report No 96, May 2003) vol 1, 530 ('*Essentially Yours*').
[5] Elizabeth Joh, 'DNA Theft: Recognizing the Crime of Nonconsensual Genetic Collection and Testing' (2011) 91 Boston University Law Review 665, 679.
[6] ('Human Tissue Act 1983').
[7] ('Privacy Act 1988').

Non-consensual or 'surreptitious' genetic testing occurs when a person collects and analyses the DNA of a subject without that subject's consent. The practice is common among law enforcement agencies that conduct it in the public interest, but concern arises when other third parties collect and test genetic material for nefarious purposes including stalking, blackmail and political espionage.[8] Unlike samples held by law enforcement or other agencies which are regulated under statutory schemes subject to public law remedies,[9] private individuals who seek to test samples are not so bound.

A. *Testing Genetics*

Deoxyribonucleic acid ('DNA') defines the genetic structure of an individual and is the molecular foundation of each person's 'uniqueness'.[10] Humans are not exclusively determined by genetics as environmental factors have considerable developmental influence,[11] but inherited traits encoded in DNA are immensely important.[12] Aside from sex cells and mature red blood cells,[13] every cell contains a complete copy of an individual's DNA contained within twenty-three chromosome pairs.[14] Consequently, almost anything that contains cells also contains DNA, including hair follicles,[15] saliva[16] and fingernails.[17] The double helix of a DNA strand unifies two 'chains' made of molecules called nucleotides. Every nucleotide in a chain contains one of four nucleobases: adenine (A), thymine (T), guanine (G) or cytosine (C).[18] Similar to binary code which uses ones and zeros to store information, these four 'letters' constitute a chemical language so that a nucleotide chain can be read as comprising a long code (e.g., AATTGCTAGGC…).

Covalent bonds between their nucleobases link the two chains, forming the 'rungs' in the double helix ladder.[19] These strands determine how cells create proteins,[20] driving a molecular process that transforms the chemical code into complex life. A 'gene' is a sequence of nucleotide pairs that codes for a particular molecular function. A complete human genome contains approximately three billion base pairs, comprising between 20,000-25,000 genes.[21]

Three forms of genetic testing are relevant. The first is 'DNA profiling' which is used to determine whether two different genetic samples match, commonly for parentage or forensic investigation purposes. Short Tandem Repeat (STR) analysis is a widely used method.[22] An STR is a short sequence of nucleotide bases (e.g. TAGCT) that repeats itself many times throughout a DNA code.[23] By comparing the locations on the DNA strand where a particular STR appears to where it appears, if at all, on another sample strand, a match can be determined with

---

[8] Colin McFerrin, 'DNA, Genetic Material, and a Look at Property Rights: Why You May Be Your Brother's Keeper' (2013) 19 Texas Wesleyan Law Review 967, 980.
[9] See for example *In re Z (Children) (DNA Profiles: Disclosure)* [2015] 1 WLR 2501.
[10] Jessica Gabel, 'Probable Cause from Probable Bonds: A Genetic Tattle Tale Based on Familial DNA' (2010) 21 Hastings Women's Law Journal 3, 5.
[11] Leon Rosenberg and Diane Rosenberg, *Human Genes and Genomes: Science, Health, Society* (Elsevier, 1st ed, 2012) 135-136.
[12] Ibid 27–50.
[13] *Essentially Yours* (n 3) 132 [3.18].
[14] TA Brown, *Genomes* (Wiley-Liss, 2nd ed, 2002) <https://www.ncbi.nlm.nih.gov/books/NBK21122/#A9026>; 'Deoxyribonucleic Acid (DNA) Fact Sheet' *National Human Genome Research Institute* (Web Page, 16 June 2015) <https://www.genome.gov/about-genomics/fact-sheets/Deoxyribonucleic-Acid-Fact-Sheet> ('DNA Fact Sheet').
[15] James Robertson, *Forensic Examination of Hair* (Taylor & Francis, 1st ed, 1999).
[16] April Matthews et al, 'Saliva Collection Methods for DNA Biomarker Analysis in Oral Cancer Patients' (2013) 51 British Journal of Oral and Maxillofacial Surgery 319.
[17] Lisa Hebda, Ashley Doran and David Foran, 'Collecting and Analyzing DNA Evidence from Fingernails: A Comparative Study' (2014) 59(5) Journal of Forensic Sciences 1343.
[18] Neil Campbell and Jane Reece, *Biology* (Pearson, 6th ed, 2002) 82.
[19] Peter MacFarlane and Betty Kontoleon, 'Some Legal Issues Regarding the Patenting of Human Genetic Materials' (2016) 24 Journal of Law and Medicine 181, 185–186.
[20] Ibid.
[21] Brown (n 13).
[22] Pankaj Shrivastava et al, 'Application of DNA Fingerprinting Technology in Forensic Investigation' (2012) 2(10) International Journal of Scientific and Research Publications 1.
[23] Ibid.

high probability.[24] Second, 'genotyping tests', which place DNA on genotyping chips that are incubated, allowing probes on the chips to detect predefined genetic variants that are associated with particular traits, disease risks or ancestry groups. These constitute the majority of direct-to-consumer genetic testing (DTC-GT) services. Finally, full genome sequencing identifies the entire set of base pairs in a DNA sample. However, while the complete genetic code becomes available, any predictive information about the individual relies on accurately identifying specific genes.

Certain harms relate to the disclosure or use of genetic information. Information may be sensitive, embarrassing, or distressing if it relates to the possibility of a genetic disease developing. Damage to social networks or relationships is possible, especially where parentage and kinship testing can refute assumptions about blood relationships. Discrimination, access to social services and insurance are also possible concerns.[25] Affordable 'direct-to-consumer' testing services has placed such information within reach of the unscrupulous and morbidly curious. Notably, a failed conspiracy to retrieve a strand of Prince Harry's hair in order to use genetic testing to prove he was an illegitimate child attracted entertaining headlines,[26] but also speaks to the serious implications of non-consensual testing.

As testing technology improves, DTC-GT companies can identify genetic predispositions toward certain disease and other health risks, further expanding the scope for unethical testing. For instance, health is increasingly a political issue, particularly for candidates whose fitness for office is a point of obsessive debate[27] with a recent US-American campaign publishing a doctor's report concluding the candidate 'will be the healthiest individual ever elected to the presidency'.[28] A well-timed publication of a politician's genetic predispositions could help label that person as subversive, inadequate or dangerous.[29] The world of espionage has embraced the practice with leaked diplomatic cables ordering American diplomats to collect 'biometric data', including 'fingerprints, facial images, DNA, and iris scans' of African leaders.[30]

The success of DTC-GT companies is central to the growing concern surrounding non-consensual genetic testing. In 2003 there were no DTC-GT providers in Australia,[31] but by 2014 there were at least sixteen,[32] combined with a growing host of international services. Genetic testing was once costly and primarily controlled by scientists and doctors, but DTC-GT companies now offer the public comparatively affordable genetic testing services without the ethical obligations that apply to healthcare providers,[33] enabling some unsettling enterprises. Zealous amateur genealogists reportedly fill out their family trees by testing strangers' discarded objects containing DNA.[34] An eBay user attempted to advertise a cough drop allegedly retrieved from a bin in which Arnold Schwarzenegger tossed it, enticing buyers to 'own a piece of DNA from the man himself'.[35] The website removed the $500 listing after ruling it was a sale of body parts.[36]

---

[24] Ibid.
[25] Falcon (n 2) 346.
[26] Peter Guarnieri, 'Prince Harry and the Honey Trap: An Argument for Criminalizing the Nonconsensual Use of Genetic Information' (2011) 48 American Criminal Law Review 1789.
[27] Robert Green and George Annas, 'The Genetic Privacy of Presidential Candidates' (2008) 359(21) New England Journal of Medicine 2192.
[28] Letter from Dr Harold Bornstein to Whom it May Concern, 4 December 2015 <https://media.npr.org/assets/img/2018/05/02/trump-doctor-2_sq-d596615e9ef020d3c1ccd5c34f8c5f78cf04a08f-s1600-c85.jpg>.
[29] Green and Annas (n 26) 2193.
[30] Wikileaks, 'Reporting and Collection Needs: African Great Lakes (Droc, Burundi, Rwanda)', *Public Library of US Diplomacy* (Web Page, 16 April 2009) <https://wikileaks.org/plusd/cables/09STATE37561_a.html>.
[31] *Essentially Yours* (n 3) vol 1, 347.
[32] Nicol et al (n 3) 151.
[33] Sivan Tamir, 'Direct to Consumer Genetic Testing: Ethical-legal Perspectives and Practical Considerations' (2010) 18 Medical Law Review 213, 222.
[34] See for example Amy Harmon, 'Stalking Strangers' DNA to Fill in the Family Tree', *The New York Times* (online, 2 April 2007).
[35] Robert Salladay, 'Want to Own a Tiny Piece of the Governor?', Los Angeles Times (online, 22 May 2004) <http://articles.latimes.com/2004/may/22/local/me-coughdrop22> cited in John Burchill, 'Mr. Stillman, DNA and Discarded Evidence in Criminal Cases' (2008) 32(2) Manitoba Law Journal 5.
[36] Ibid.

B. *The Legal Lacunae*

Common law and existing legislation do not offer obvious avenues for redress following an instance of non-consensual genetic testing being carried out. An exhaustive analysis of the common law treatment of genetic information is not possible within the scope of this article, although relevant candidates would include property law and certain torts including defamation. That being so, a brief discussion of a mooted privacy tort in Australia is relevant on account of its overlap with breach of confidence.

Genetic information is the kind of information a privacy tort might protect, but the existence of such an action is, again, uncertain. New Zealand courts expressly recognised a privacy tort[37] and in the United Kingdom, where privacy rights from the European Convention on Human Rights are relevant,[38] courts expanded the scope of breach of confidence to protect against the misuse of private information, with the latter now generally regarded as a separate tort.[39]

Domestically, *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor*[40] was long considered a conclusive rejection of an Australian privacy tort.[41] Following *Australian Broadcasting Corporation v Lenah Game Meats*,[42] this is no longer certain. All members of the Court linked privacy cases to breach of confidence in one way or another,[43] and Gummow and Hayne JJ doubted that *Victoria Park Racing* should be taken to preclude a tort protecting individual privacy,[44] while Callinan J considered the 'time is ripe' to consider a privacy tort.[45]

The High Court left the door open to a privacy tort in *Lenah*,[46] but after nearly two decades, the response from lower courts is mixed and parties appear to avoid attempting to argue the existence of a privacy tort.[47] Some recognise a privacy tort exists in Australia,[48] some maintain there is none,[49] and others refuse to decide without ruling it out.[50] The ALRC, ACCC, NSW Law Reform Commission and Victorian Law Reform Commission have all recommended introducing a statutory privacy tort,[51] but reform is not forthcoming. However, if a privacy tort emerges, many of the matters considered under breach of confidence will apply.

---

[37] *Hosking v Runting* [2005] 1 NZLR 1.
[38] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) arts 8(1)–(2) ('*ECHR*').
[39] *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457, 465 (Nicholls LJ) ('*Campbell*'); *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch), [143] (Mann J). *Vidal-Hal v Google Inc* [2016] 2 All ER 337, 355; *PJS v News Group Newspapers Ltd* [2016] AC 1081.
[40] (1937) 58 CLR 479 ('*Victoria Park*').
[41] Greg Taylor, 'Why is there No Common Law Right of Privacy?' (2000) 26 Monash University Law Review 235, 237; Megan Richardson, 'Breach of Confidence, Surreptitiously or Accidentally Obtained Information and Privacy: Theory Versus Law' (1994) 19 Melbourne University Law Review 673, 675 ('Theory Versus Law').
[42] *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199 ('*Lenah*').
[43] Robert Dean, 'A Right to Privacy?' (2004) 78 Australian Law Review 114, 119.
[44] *Lenah* (n 41) 258.
[45] Ibid 328.
[46] Dean (n 42) 120; Mark Johnston, 'Should Australia Force the Square Peg of Privacy into the Round Hold of Confidence or Look to a New Tort?' (2007) 12 Media and Arts Law Review 441, 447.
[47] *Smethurst v Commissioner of the Australian Federal Police* [2020] HCA 14 at [48].
[48] *Grosse v Purvis* [2003] Aust Torts Reports 81-706; *Doe v Australian Broadcasting Corporation* [2007] VSC 281.
[49] *John Fairfax Publications Pty Ltd v Hitchcock* (2007) 70 NSWLR 484, 515 [124] (McColl J); *Kalaba v Commonwealth* [2004] FCA 763; *Giller v Procopets* [2004] VSC 113 [188]–[189]; *Sands v South Australia* [2013] SASC 44.
[50] *Dye v Commonwealth Securities Ltd* [2010] FCA 720; *Gee v Gurger* [2009] NSWSC 149; *Moore-McQuillan v Work Cover Corp* [2005] SASC 13.
[51] ALRC, *Serious Invasions of Privacy in the Digital Era* (Report No 123, June 2014) 74–76 ('*Serious Invasions of Privacy*'); ALRC, *For Your Information: Australian Privacy Law and Practice* (Report No 108, May 2008) vol 3, 2584 ('*For Your Information*'); Australian Competition and Consumer Commission (ACCC), 'Recommendation 19: Statutory tort for serious invasions of privacy,' *Digital Platforms Inquiry* (Final Report, June 2019) 37; Victorian Law Reform Commission, *Surveillance in Public Places* (Report No 18, May 2010) 17–18 ('*Surveillance in Public Places*'); New South Wales Law Reform Commission (NSWLRC), *Invasion of Privacy* (Report No 120, April 2009) 3 ('*Invasion of Privacy*').

No Australian legislation directly applies to surreptitious genetic testing and the absence of protection is considered problematic.[52] Following the ALRC's *Essentially Yours* report, the Standing Committee of Attorney-Generals produced a draft offence,[53] but reform has since 'stalled'.[54]

A web of overlapping state and federal laws regulate privacy, including the Privacy Act 1988 (Cth), the Health Records and Information Privacy Act 2002 (NSW) and the Health Records Act 2001 (Vic). These laws regulate the collection and processing of personal information by government agencies and private enterprises but do not protect privacy between individuals.[55] Under the Privacy Act 1988, health information encompasses any health-related genetic information.[56] The Act provides greater protection for 'sensitive' information, which includes all health information as well as any non-health related genetic information.[57] Except in NSW,[58] privacy legislation does not apply to genetic samples, nor are samples considered part of a health record. Furthermore, the Commonwealth rejected the ALRC's recommendation to protect genetic samples within the Privacy Act 1988.[59] While DTC-GT companies have obligations under these statutes, many entities are international, and the Privacy Act 1988 only applies if the provisions of s 5B of the Privacy Act are met.[60]

Each State has a human tissue statute that regulates research and imposes significant restrictions on the trade and exploitation of human tissue and derivative products.[61] Unfortunately, surreptitiously collected samples are currently beyond the scope of these Acts as the Acts are primarily directed toward regulating how tissue products are dealt with in a clinical setting. However, the United Kingdom and New Zealand implemented criminal offences of general application for non-consensual DNA testing under their respective human tissue acts,[62] suggesting that these statutes may be a viable location for a non-consensual testing offence in future.

Until the statutory landscape changes, plaintiffs must look to other remedial frameworks such as breach of confidence.

III. Equitable Breach of Confidence

The strength of equity is its ability to respond flexibly to new situations. While human tissue and its associated genetic information may fall outside of the strictures of the common law, equitable protection of confidential information is comparatively unconstrained. The doctrine of breach of confidence is capable of restraining the use of surreptitiously obtained personal information, rendering it a viable remedial avenue against non-consensual genetic testing.

A. *Nature of an Action to Protect Genetic Information*

---

52 Model Criminal Law Officer's Committee of Standing Committee of Attorneys-General (Model Criminal Law Committee), Non-consensual Genetic Testing (Discussion Paper, November 2008) 10 ('Non-consensual Genetic Testing'); *Essentially Yours* (n 3) 359–374; Margaret Otlowski, 'Establishing the Offence of Non-consensual Genetic Testing in Australia: A Call for Action' (2013) 21 Journal of Law and Medicine 335 ('Establishing the Offence'); Rebekah McWhirter and Margaret Otlowski, 'Regulation of Non-consensual Genetic Testing in Australia: Use of Samples from Deceased Persons' (2016) 24 Journal of Law and Medicine 150, 161.

53 Model Criminal Law Committee, Non-consensual Genetic Testing (n 51).

54 Otlowski, 'Establishing the Offence' (n 51).

55 Moira Paterson and Normann Witzleb, 'The Privacy-Related Challenges Facing Medical Research in an Era of Big Data Analytics: A Critical Analysis of Australian Legal and Regulatory Frameworks' (2018) 26 Journal of Law and Medicine 188, 190. See generally Peter Bartlett, 'Privacy Down Under' (2010) 3(1) Journal of International Media and Entertainment Law 145.

56 Section 6, being the meaning under s 6FA(d).

57 Section 6(b)–(c).

58 Privacy and Personal Information Protection Act 1998 (NSW) s 4(2).

59 Full Australian Government Response to ALRC Report 96 (online, 9 December 2005) <https://www.alrc.gov.au/inquiries/health-and-genetics/full-australian-government-response-alrc-report-96>.

60 Nicol et al (n 3) 160.

61 Human Tissue Act 1983 (NSW); Human Tissue Act 1982 (Vic); Human Tissue and Transplant Act 1982 (WA); Transplantation and Anatomy Act 1983 (SA); Transplantation and Anatomy Act 1979 (Qld).

62 Human Tissue Act 2008 (NZ) s 23; Human Tissue Act 2004 (UK) s 45.

Breach of confidence is well understood within Australia and the United Kingdom; however, the scope of its protection is difficult to define.[63] Broadly, the action protects three kinds of information: trade secrets which are the subject of most cases,[64] government secrets, and personal information.[65] It is equity's protection of personal information that is most relevant to genetic testing.

The vast array of circumstances where obligations of confidence may arise render it impossible to define 'confidential information' with precision.[66] Instead, it is usually more expedient to examine the kinds of *relationships* that give rise to obligations of confidence.[67] For instance, information exchanged between doctor and patient is readily considered confidential because the communication occurs within a confidential relationship.[68] Consequently, relationships form the heart of the majority of confidentiality cases, supporting a misconception that equity can only intervene where a communicative relationship existed.[69]

This article argues that a communicative relationship was never essential to an obligation of confidence. A misplaced devotion to ascertaining a relationship causes confusion in two significant areas: first, over the existence of equity's exclusive jurisdiction to protect confidence, and secondly, over the role of conscience as the basis for equitable intervention.

A preliminary point must be emphasised. Although surreptitious genetic testing involves an invasion of privacy, it is not necessary to reshape breach of confidence into a general action to protect privacy. In its present state, the law of confidence does not protect general expectations of privacy. Confidentiality and privacy overlap,[70] but they are distinct concepts.[71] Private information is often confidential, but this is not always the case.[72] Many argue that altering breach of confidence to protect general privacy interests distorts the law of confidence by protecting non-confidential information and hampers the development of a clearly defined privacy tort.[73] While not universal,[74] there is significant support for an independent privacy tort that avoids adopting those distortions.[75]

---

63 Raymond Wacks, *Privacy and Press Freedom* (Blackstone Press, 1995) 49.

64 Andrew McRobert, 'Breach of Confidence: Revisiting the Protection of Surreptitiously Obtained Information' (2002) 13(2) Australian Intellectual Property Journal 69, 71; Gavin Phillipson and Helen Fenwick, 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era' (2000) 63 The Modern Law Review 660, 674.

65 Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (Lexis Nexis Butterworths, 3rd ed, 2016) 177; Gino Dal Pont, Don Chalmers and Julie Maxton, *Equity and Trusts: Commentary and Materials* (Lawbook Co, 2nd ed, 2000) 173–90.

66 Radan and Stewart (n 65) 177; *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 449–450 (Gummow J).

67 Radan and Stewart (n 65) 177.

68 Jill McKeough and Andrew Stewart, *Intellectual Property in Australia* (Butterworths, 2nd ed, 1997) 106–107.

69 Nyuk Yin Nahan, 'Duty of Confidence Revisited: The Protection of Confidential Information' (2015) 39 University of Western Australia Law Review 270, 293; Andrew McRobert, 'Breach of Confidence: Revisiting the Protection of Surreptitiously Obtained Information' (2002) 13(2) Australian Intellectual Property Journal 69, 74; PJ McCafferty, 'Protecting Private Information Improperly or Surreptitiously Obtained from Public Disclosure: A 'New Species of Breach of Confidence?' (2004) 9 Media & Arts Law Review 205, 210.

70 David Lindsay, 'Playing Possum? Privacy, Freedom of Speech and the Media Following ABC v Lenah Game Meats Pty Ltd Part II: The Future of Australian Privacy and Free Speech Law, and Implications for the Media' (2002) 7(3) Media & Arts Law Review 161, 177.

71 *Hosking v Runting* [2005] 1 NZLR 1, 16 [48] (Gault and Blanchard JJ); Gino Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) 177 ('*Equity and Trusts*'); see generally Gordon Hughes, *Dean's Law of Trade Secrets & Privacy* (Thomas Reuters (Professional), 3rd ed, 2018) 882–991.

72 Dal Pont, *Equity and Trusts* (n 70) 177.

73 Jonathan Morgan, 'Hello! Again: Privacy and Breach of Confidence' [2005] Cambridge Law Journal 549, 550; Jonathan Morgan, 'Privacy in the House of Lords Again' (2004) 120 Law Quarterly Review 563, 564; Mark Elliott, 'Privacy, Confidentiality and Horizontality: The Case of the Celebrity Wedding Photographers' [2001] Cambridge Law Journal 231, 232; Gavin Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy Under the Human Rights Act' (2003) 66 Modern Law Review 272; Lindsay (n 69) 192.

74 See for example Megan Richardson, 'Whither Breach of Confidence: A Right of Privacy for Australia?' (2002) 26(2) Melbourne University Law Review 381 ('Wither Breach of Confidence'); Dean (n 42); McCafferty (n 68).

75 *Serious Invasions of Privacy* (n 50) 74–76; *For Your Information* (n 50) vol 3, 2584; *Surveillance in Public Places* (n 50) 17–18; NSWLRC, *Invasion of Privacy* (n 50) 3; Johnston (n 45); Jillian Caldwell, 'Protecting Privacy Post Lenah: Should the Courts Establish a New Tort or Develop Breach of Confidence?' (2003) 26(1) UNSW Law Journal 90.

The relational requirement is often considered as a desirable impediment against breach of confidence becoming a de facto privacy action.[76] The concern is that removing the requirement of a relationship tempts courts to awkwardly 'shoehorn' substantive privacy protections into the existing action,[77] as opposed to declaring an independent tort. Without the limitation of a relationship, it is possible to argue that the nebulous concept of 'confidential information' could encompass 'private information'.[78] English jurisprudence applied this 'radical' privacy adjustment to breach of confidence,[79] but the development occurred under the impetus of the Human Rights Act 1998 (UK) s 6, which requires courts to act consistently with European human rights, including the right to respect for private life.[80] New Zealand took the alternative path of fashioning a tortious action for breach of privacy[81] while maintaining a continuing equitable action to protect personal information communicated in relationships.[82]

Australian courts have neither the statutory impetus of a 'right' to privacy to justify replicating the UK's profound alterations to breach of confidence nor the judicial willingness to widely endorse a tortious action. However, judicial comments suggest that equity should be more astute to protect privacy rights,[83] contributing to the status of privacy protection under Australian law as 'one of confusion'.[84] This article argues that the accepted scope of breach of confidence is sufficient to protect non-consensually tested genetic information and provides *incidental* protection for privacy interests.

1. *The Exclusive Jurisdiction*

The jurisdictional basis to protect confidential information is subject to lingering uncertainty.[85] As Professor Jones observes, courts have variously claimed property, contract, bailment, trust, fiduciary relationship, good faith and unjust enrichment as a basis of judicial intervention,[86] a list to which tort may now also be added.[87] These reflect attempts to establish breach of confidence upon various common law or equitable relationships.

An initial problem for surreptitious genetic testing arises out of the distinction between equity's auxiliary and exclusive jurisdictions. In the auxiliary jurisdiction, courts grant equitable remedies such as injunctions to enforce underlying common law rights.[88] Alternatively, where a right is purely equitable, courts exercise their exclusive jurisdiction, which operates without reference to common law rights.[89] The distinction is no arid technicality. If breach of confidence were contingent upon equity's support of common law rights, there would be no remedy for non-consensual genetic testing as the practice falls outside the common law.

Furthermore, if breach of confidence was contingent upon an equitable obligation like a fiduciary relationship, it is uncertain how those principles could apply to surreptitious parties who do not have a direct relationship with the plaintiff.

---

[76] Dal Pont, *Equity and Trusts* (n 70) 178.
[77] RG Toulson and CM Phipps, *Confidentiality* (Sweet and Maxwell, 2nd ed, 2006) 28–29 [2-025]–[2-027]; Dal Pont, *Equity and Trusts* (n 70) 178.
[78] Ibid 178.
[79] Toulson and Phipps (n 76) 21 [1-055].
[80] Ibid; Dal Pont, *Equity and Trusts* (n 70) 179. It should also be noted that UK courts now recognise a separate tort of misuse of private information, thus the privacy adjustments to breach of confidence are less relevant.
[81] *Hosking v Runting* [2005] 1 NZLR 1.
[82] Tanya Aplin, 'Coco v AN Clark (Engineers) Ltd (1969)' in Jose Bellido (ed) *Landmark Cases in Intellectual Property Law* (Hart Publishing, 2017) 253, 284 ('Coco v AN Clark').
[83] *Lenah* (n 41) 225 [40] (Gleeson CJ).
[84] Hughes (n 70) 884 [200.530]; Dean (n 42) 115.
[85] Francis Gurry, *Breach of Confidence* (Oxford University Press, 1st ed, 1984) 25; Toulson and Phipps (n 76) 19; Gareth Jones, 'Restitution of Benefits Obtained in Breach of Another's Confidence' (1970) 86 Law Quarterly Review 463.
[86] Jones (n 84).
[87] Gurry (n 84) 56–57.
[88] Frederic Maitland, *Equity and the Forms of Action at Common Law* (Cambridge University Press, 1929) 21.
[89] Ibid 20.

Fortunately, leading authority confirms equity protects confidence as an independent equitable right within its exclusive jurisdiction,[90] dispensing with the need to construct what Sedley LJ termed an 'artificial relationship' between parties before equity will intervene.[91] As Deane J authoritatively stated in *Moorgate Tobacco Co Ltd v Philip Morris Ltd*:

> A general equitable jurisdiction to grant such relief has long been asserted and should in my view, now be accepted … Like most heads of exclusive equitable jurisdiction its rational basis does not lie in proprietary right. It lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained.[92]

The exclusive jurisdiction has two crucial advantages. First, equity may permit judicial intervention notwithstanding an absence of proprietary or contractual rights.[93] Second, a wide range of equitable remedies become available without the need to demonstrate the inadequacy of damages as would be required in the auxiliary jurisdiction.[94]

2. *Conscience as a Basis of Intervention*

Accurately stated, breach of confidence rests on 'an obligation of conscience arising out of the circumstances in or through which the information was communicated or obtained'.[95] This position was evident in earlier breach of confidence jurisprudence but became obscured as later cases became narrowly focused on ascertaining a relationship of confidence.

The following discussion of what 'conscience' demands has three interrelated objectives: first, establish why there is no requirement for a relationship between parties and define the elements of a test that can apply to non-consensual genetic testing. Secondly, explain why underlying illegality is not required to bind the conscience of surreptitious testers. Thirdly, clarify third-party liability in breach of confidence.

(a) *Identifying a Test*

Relationships are integral to the 'orthodox' approach to breach of confidence,[96] epitomised by Megarry J's three element test in *Coco v (AN) Clark Engineer Ltd*:

> First, the information itself … must "have the necessary quality of confidence about it". Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.[97]

Surreptitiously collected and tested genetic materials do not fall within this articulation because Megarry J's words require information to be 'imparted' or 'communicated'. These apparent relational limitations underpin criticism

---

[90] *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 50–52 (Mason J); *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 181 (Lord Goff) ('*Spycatcher*'); JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (LexisNexis Butterworths, 5th ed, 2014) 1165 [42-070].
[91] *Douglas v Hello! Ltd* [2001] QB 967, 1001.
[92] (1984) 156 CLR 414, 437–438 (Deane J, Gibbs CJ, Mason and Wilson JJ agreeing at 421, Dawson J agreeing at 446) ('*Moorgate*').
[93] See for example *Seager v Copydex Ltd* [1967] 1 WLR 923.
[94] Radan and Stewart (n 65) 212; RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (LexisNexis Butterworths, 4th ed, 2002) 1117 [41-040].
[95] *Moorgate* (n 91) 438 (Deane J).
[96] Nahan (n 68) 279.
[97] *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47 (Megarry J) ('*Coco*').

of breach of confidence's ability to protect privacy, notably by Warren and Brandeis,[98] whose critique catalysed the development of several privacy torts in America.[99] As Professor Wacks identified:

> The requirement of a confidential relationship effectively precludes the action from having any utility in two crucial 'privacy' areas – intrusion by physical means and the public disclosure of private facts.[100]

Inconveniently, Megarry J's formulation has gained 'foundational status' in the law of confidence.[101] Professor Aplin quantified *Coco's* reach, finding 170 UK cases and 202 Australian cases citing its authority.[102] *Coco's* ubiquity superficially implies it is definitive of breach of confidence. This is not the case.

Older cases reveal that a communicative relationship was relevant, yet never fundamental to breach of confidence. Over a century ago, Swinfen-Eady LJ commented in *Lord Ashburton v Pape*:

> The principle upon which the Court of Chancery has acted for many years has been to restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged.[103]

Gummow J observed that *Lord Ashburton* indicates that improperly obtained confidential information and information imparted in confidence are 'two species of the same genus'.[104] His Honour considered *Coco* was relevant for imparted information,[105] but information *obtained* (without a 'communication') would nevertheless be capable of protection.

This conclusion accords with Deane J's previously extracted analysis in *Moorgate*, which refers to information that has been either communicated or 'obtained'[106] and is widely approved.[107] The implication is that *Coco* is a partial, not exhaustive, statement of where obligations of conscience arise, a conclusion expressly confirmed in the NSW Supreme Court.[108]

English authorities follow a similar vein. Lord Nicholls concluded the test had 'firmly shaken off' the need for a confidential relationship and the law imposed a duty of confidence where individuals receive information they know or ought to know is confidential.[109] Prior to the Human Rights Act 1998 (UK) Lord Goff remarked in *Spycatcher*:

> In the vast majority of cases, in particular those concerned with private information, the duty of confidence will arise from a transaction or relationship between the parties – often a contract … It is in such cases as these that the expressions "confider" and "confidant" are perhaps most

---

98 Samuel D Warren and Louis D Brandis, 'The Right to Privacy' (1890) 4 Harvard Law Review 193.
99 Lindsay (n 69) 164–165.
100 Raymond Wacks, 'The Poverty of "Privacy"' (1980) 96 Law Quarterly Review 73, 82.
101 Tanya Aplin, Lionel Bently, Philip Johnson and Simon Malynicz, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd ed, 2012) [2.139].
102 Aplin, 'Coco v AN Clark' (n 81) 258.
103 *Lord Ashburton v Pape* [1913] 2 Ch 469, 475 ('*Lord Ashburton*').
104 *Smith, Kline and French Laboratories (Australia) Ltd and Others v Secretary, Department of Community Services and Health* (1990) 95 ALR 87, 101 ('*Smith, Klein and French*').
105 Ibid 101–102.
106 *Moorgate* (n 91) 437–438.
107 See for instance *Breen v Williams* (1996) 186 CLR 71, 81 (Brennan J), 92 (Dawson and Toohey JJ), 128 (Gummow J); *Smith, Klein and French* (n 103) 135 (Gummow J); *Smith Kline & French Laboratories (Australia) Ltd v Secretary to the Department of Community Services & Health* (1991) 99 ALR 679, 691.
108 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* (2012) 295 ALR 348, 370–371 [100] (Campbell JA, Macfarlan JA agreeing at 395 [195], Sackville AJA agreeing at 395 [196]) ('*Armstrong*') (overturned on appeal, but not on this point).
109 *Campbell* (n 38) 464–465 [14] (Lord Nicholls) cited in *Ewing v The Times Newspapers Ltd* [2010] NIQB 7, [17] (Coghlin LJ).

> aptly employed. But it is well settled that a duty of confidence may arise in equity independently of such cases.[110]

Hughes ventures that *Coco* has now suffered a 'demise' in Australia[111] and notes its importance in England and Wales has waned.[112] Heydon, Leeming and Turner suggest *Coco* remains applicable but is subject to two caveats.[113] First, that duties of confidence can extend over individuals who surreptitiously or improperly obtain confidential information.[114] Secondly, the requirement for detriment is questionable, especially in the context of personal information.[115] On this latter point, Gummow J emphasised that the obligation is to respect confidence, not refraining from causing detriment.[116]

In response to this body of judicial consideration, Heydon, Leeming and Turner[117] propose the Full Federal Court's restatement of *Coco's* elements in *Optus Networks Pty Ltd v Telstra Corporation Ltd* is a better reflection of the modern law of confidence, which requires:[118]

> (1) the information in question must be identified with specificity;
> (2) it must have the necessary quality of confidence;
> (3) it must have been received by the person to whom it was provided in circumstances importing an obligation of confidence; and
> (4) there must be an actual or threatened misuse of the information without the authority of the provider.

Respectfully, this appears to be the best articulation of the action, supported by its subsequent application in the NSW Supreme Court.[119] Where information has been 'obtained', the second and third elements become closely interrelated. This is because the confidential quality of the information becomes central to the circumstances importing an obligation of confidence.

Before the Human Rights Act 1998 (UK), English authorities already indicated that the characteristics of information could establish equitable protection. Lord Goff remarked that the duty could extend to innocent recipients who found an 'obviously confidential document wafted by an electric fan out a window' or a private diary on the street.[120] Laws J in *Hellewell v Chief Constable of Derbyshire* observed *obiter* that taking telephoto images of a private act could constitute a breach of confidence, as would a party who stole a private letter or diary.[121] Both those remarks were cited with approval by Gleeson CJ in *Lenah*.[122]

Lower courts now vigorously affirm equity's flexible capacity to protect confidential information, epitomised by Campbell JA in *Armstrong*:[123]

---

110 *Spycatcher* (n 89) 281, cited in *Douglas v Hello! Ltd* [2006] QB 125, 151–152 [58] (Lord Phillips MR).
111 Hughes (n 70) 1006.
112 Aplin, 'Coco v AN Clark' (n 81) 270.
113 Heydon, Leeming and Turner (n 89) 1170.
114 See *Lord Ashburton* (n 102) 475 (Swinfen Eady LJ); *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 50 (Mason J); *Franklin v Giddins* [1978] Qd R 72.
115 Meagher, Heydon and Leeming (n 93) 1121 [41-050]; see also Gurry (n 84) 407–408.
116 *Smith, Klein and French* (n 103) 126 (Gummow J).
117 Heydon, Leeming and Turner (n 89) 1170 [42-100].
118 (2010) 265 ALR 281, 290 (Finn, Sundberg and Jacobson JJ) ('*Optus*').
119 *Jane Doe v Fairfax Media Publications Pty Limited & Anor* [2018] NSWSC 1996, [221] (Fullerton J); *LGS v Francesco Barbagallo (No 3)* [2012] NSWSC 1099, [93] (McDougall J); *Australian Leisure and Hospitality Group Pty Ltd & Anor v Dr Judith Stubbs &* Anor [2012] NSWSC 215, [23] (Nicholas J). Note criticism of *Optus* (n 117), but not on this point: *Streetscape Projects (Australia) Pty Ltd v City of Sydney* [2013] NSWCA 2, [150] (Barrett JA, Meagher JA agreeing at [1], Ward JA agreeing at [239]).
120 *Spycatcher* (n 89) 281 (Lord Goff).
121 [1995] 1WLR 804, 807.
122 *Lenah* (n 41) 224–225. See also *Bathurst City Council v Saban* (1985) 2 NSWLR 704, 706 (Young J).
123 *Armstrong* (n 107) 370–371 [100] (Macfarlan JA agreeing at 395 [195], Sackville AJA agreeing at 395 [196]).

> [T]here can sometimes be an obligation of confidence that attaches to information that is inherently confidential or private if that information is illegally or surreptitiously obtained, or is come across in the street, or is received unsolicited.[124] In such a case there is "an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained."[125] An obligation of confidentiality can be recognised even if there is no particular relationship between the parties and no deliberate malfeasance, but where a person receives information that, by virtue of the circumstances in which it is received, he or she knows or ought to know is confidential…[126]

Knowledge of the confidential nature of information determines whether disclosure or use is unconscionable. If a defendant finds 'obviously' confidential information, they either would know or ought to know it is confidential. This includes facts known at the time of obtaining the information, as well as what defendants know by the time the court considers an action.[127] Gummow J accepted that equity could impose obligations upon either a subjective or objective knowledge standard, and believed that eavesdroppers and thieves would know or ought to have known that they should not have obtained the relevant information.[128] The unanimous English Court of Appeal concluded in *Tchenguiz v Imerman* that examining, retaining or copying documents that one appreciates or ought to appreciate would be confidential to the plaintiff is a breach of confidence.[129]

This approach accords with Professor Finn's theoretical framework of conscience, which proposes that recognition of a person acting 'unconscionably' towards another suggests that there has been an exploitation of the other person's vulnerability by the offender.[130] 'Exploitation' derives from the individual's actual or constructive knowledge of the other party's vulnerability, combined with a misuse of that advantage.[131] Richardson argues this approach is not only consistent with Australian jurisprudence but also offers desirable utilitarian protection of personal information.[132]

In a relational context, knowledge of confidentiality similarly establishes a duty; however, this is primarily ascertained through reference to the character of the relationship. Where there is no relationship, the defendant's liability turns on their knowledge of whether the information is confidential, but as already noted, 'confidential information' lacks precise definition. Therefore, the final question is to ascertain when information is 'confidential'. Gleeson CJ's judgement in *Lenah* is a rare attempt is to establish what constitutes confidential information. The case concerned video images obtained by hidden cameras that had been installed by trespassers in Lenah Game Meats' (LGM) abattoir. LGM sought to restrain the Australian Broadcasting Commission (ABC) from televising the footage it had obtained from the trespassers. LGM did not seek relief for a breach of confidence, but the Chief Justice made several comments regarding privacy and breach of confidence, noting:

> If the activities filmed were private, then the law of breach of confidence is adequate to cover the case. I would regard images and sounds of private activities, recorded by the methods

---

[124] *Lenah* (n 41) 224–225 (Gleeson CJ), 225 (Gummow and Hayne JJ, Gaudron J agreeing at 231) 271–272 (Kirby J), 288–289, 319 (Callinan J, dissenting as to the result); *Franklin v Giddins* (n 113) 79–80 (Dunn J); *Sullivan v Sclanders* (2000) 77 SASR 419, 428 [50]–[51] (Gray J); *Campbell* (n 38) 464–465 [14] (Lord Nicholls), 472 [47] (Lord Hoffman), 480 [85] (Lord Hope), 504 [166] (Lord Carswell); *Douglas v Hello! Ltd* [2006] QB 125.

[125] *Moorgate* (n 91) 438 (Deane J).

[126] *Spycatcher* (n 89) 281 (Lord Goff); *Campbell* (n 38) 464–465 [14] (Lord Nicholls); *Trevorrow v South Australia (No 4)* (2006) 94 SASR 64, 74 [39] (Doyle CJ), 80–81 [80] (Debelle J), 90 [118] (White J); *West Australian Newspapers v Bond* (2009) 40 WAR 164, 175–176 [42] (Buss JA).

[127] *Lenah* (n 41) 227–228 [46] (Gleeson CJ); *Johns v Australian Securities Commission* (1993) 178 CLR 408, 459–460 (Gaudron J) ('*Johns*').

[128] *Smith, Klein and French* (n 103) 111.

[129] [2011] 1 All ER 555, 578.

[130] Paul Finn, 'The Fiduciary Principle' in Timothy Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989) 1.

[131] Ibid 6.

[132] Richardson, 'Wither Breach of Confidence' (n 73), 697.

> employed in the present case, as confidential. There would be an obligation of confidence upon the persons who obtained them, and upon those into whose possession they came, if they knew, or ought to have known, the manner in which they were obtained.[133]

His Honour proceeded to observe that certain information including health information would be easy to identify as private,[134] then drew upon aspects of the US-American tort of unreasonable intrusion into seclusion or private affairs to offer a possible test for determining whether information is private:

> The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.[135]

Lindsay J in *Douglas v Hello! Ltd* believed these remarks concerned a purported law of privacy, and that they 'did not purport to be a description of what may be confidential for the purposes of the law of confidence'.[136] With great respect, this is not the case. First, the initial extract frames the judgment as an application of breach of confidence, not a privacy action. Secondly, his Honour was not proposing to shoehorn privacy rights into breach of confidence by allowing 'private' information to be automatically 'confidential'. Several paragraphs earlier, Gleeson CJ provides a frequently overlooked qualification:

> The nature of the information must be such that it is capable of being regarded as confidential. A photographic image, illegally or improperly or surreptitiously obtained, where what is depicted is private, *may* constitute confidential information.[137]

His Honour's use of the word 'may' suggests that the test for private information is not conclusive. Nothing in the judgment suggests that confidentiality would survive if the information entered the public domain. This avoids the 'startlingly radical' changes that occurred within English law prior to recognition of a separate tort,[138] whereby breach of confidence now protects private information that is not confidential. Furthermore, the 'highly offensive' test is stricter than 'reasonable expectations of privacy', which UK courts apply,[139] with English judgments often disclaiming the 'highly offensive' test.[140]

Lindsay submits Gleeson CJ's approach focusses attention on the nature of the information rather than the obligation of confidence.[141] Phillipson critiques this information-focused approach on the basis that it renders breach of confidence indistinguishable from a pure privacy tort.[142] A better view is that Lindsay is correct, but to emphasise that where information is more obviously confidential, a defendant is more likely to know it is confidential, which is what imposes the obligation of confidence. On this reading, Gleeson CJ's test reflects the accepted doctrine and is a helpful guide to ascertain when information is 'confidential' in the absence of a relationship. If it is an extension, it is modest.

(b) *Improper or Illegal Conduct*

---

133 *Lenah* (n 41) 225 [39].
134 Ibid 226 [42].
135 *Lenah* (n 41) 226.
136 [2003] EWCA 786 [189].
137 *Lenah* (n 41) 224 [34] (emphasis added).
138 Phillipson (n 72) 764.
139 *A v B Plc* [2002] 3 WLR 542, 551.
140 *Campbell* (n 38) 466 (Lord Nicholls), 495–496 (Baroness Hale).
141 Lindsay (n 69) 171–172.
142 Phillipson (n 72) 746.

A curious result of attempts to anchor the law of confidence in relationships are suggestions that surreptitiously obtained information can be protected, but only if a breach of some other law is involved.[143] An illegality requirement is problematic for non-consensual genetic testing due to the absence of a violation of common law or statute.

This illegality proviso does not appear to apply in Australia. Mason J endorsed *Lord Ashburton's* unqualified protection of 'improperly or surreptitiously obtained' information as reflective of the scope of the law without reference to illegality.[144] Further, in *Moorgate*, Deane J's judgment simply referred to circumstances in which information was obtained, which provides a broad scope for protecting surreptitiously obtained information.[145] Campbell JA specifically noted that an obligation of confidence could arise without 'deliberate malfeasance'.[146]

An illegality requirement is not entirely unsupportable. Most cases concerning information obtained outside a communicative relationship involve a breach of law including theft,[147] trespass[148] or abuse of police powers.[149] Wei proposes that an 'illegality of means' approach could establish if an eavesdropper acted in bad faith or conscience.[150] This logic is motivated by a concern that because breach of confidence is an action *in personam*, restraining surreptitious observers who lack a relationship with the plaintiff undesirably imbues confidential information with the character of a right *in rem*.[151] An illegality requirement thus preserves breach of confidence's *in personam* character as the action is referenceable to a breach of the plaintiff's legal rights, creating a relational nexus between the parties.

Meagher, Heydon and Leeming reject this approach, regarding it a 'fundamental misconception' to conclude that because equity acts *in personam*, some personal dealing between the parties is necessary.[152] If an obligation crystallises upon a surreptitious party when they obtain information in circumstances where they knew or ought to have known it was private and undisclosed,[153] neither a relationship nor illegality are necessary.

(c) *Third Party Liability*

Third-party liability for breach of confidence is highly relevant for plaintiffs seeking to protect their genetic information. DTC-GT necessarily involves third parties in testing, while extracted information is easily distributed to further parties. Members of the High Court recognise third party liability for breach of confidence,[154] but the basis for imposing liability is an 'enigma'.[155] As Gaudron J observed, the law has 'not comprehensively or definitively identified matters that would determine if a duty devolved on the third party'.[156]

---

143 George Wei, 'Surreptitious Takings of Confidential Information' (1992) 12 Legal Studies 302.
144 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 50, (Mason J), citing *Lord Ashburton* (n 102) 475 (Swinfen Eady LJ).
145 Richardson, 'Theory Versus Law' (n 40) 692–693.
146 *Armstrong* (n 107) 370–371.
147 *Franklin v Giddins* (n 113).
148 *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457; *Emcorp Pty Ltd v Australian Broadcasting Corporation* [1988] 2 Qd R 169; *Church of Scientology Inc v Transmedia Productions Pty Ltd* [1987] Aust Torts Rep 80-101.
149 *Donnelly v Amalgamated Television Services Pty Ltd* (1998) 45 NSWLR 570*;*
150 Wei (n 142) 308–309.
151 Ibid 303–305.
152 Meagher, Heydon and Leeming (n 93) 1119 [41-045].
153 *Spycatcher* (n 89) 281 (Lord Goff); *Campbell* (n 38) 464–465 (Lord Nicholls); *Trevorrow v South Australia (No 4)* (2006) 94 SASR 64, 74 [39] (Doyle CJ), 80–81 [80] (Debelle J) and 90 [118] (White J); *West Australian Newspapers v Bond* (2009) 40 WAR 164, 175–176 (Buss JA).
154 *Johns* (n 126) 459–460 (Gaudron J); *Breen v Williams* (n 106) 129 (Gummow J); *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 537 (Gaudron J), 567 (Gummow J); *Lenah* (n 41) 259 (Kirby J).
155 Nahan (n 68) 273.
156 *Johns* (n 126) 460 (Gaudron J).

The term 'third party' distinguishes parties outside the relationship of confidence from those within. Consequently, the surreptitious gatherer of information and a 'third party' are conceptually identical,[157] as neither shares a communicative relationship with the plaintiff. This has two significant consequences.

First, the principles that impose an obligation of confidence upon surreptitious parties also applies to 'third parties' such as DTC-GT companies. This desirably rationalises the law of confidence under a unitary principle, as a duty arises wherever a defendant knows there are restrictions on their use of the confidential information.[158] There is no need for different tests for different circumstances and parties. Gleeson CJ supported this position, noting that third parties would be bound if they know, or ought to have known that the information they received was confidential.[159] If a DTC-GT company knows that a plaintiff had not consented to testing, an obligation will crystallise as the knowledge that the testing was not consensual would impart knowledge that the information is confidential.

Secondly, authorities justifying third party liability can be used to provide further support for equity's protection of surreptitiously obtained information. Advocates of developing breach of confidence along a 'fiduciary analogue' suggest liability is founded on a party's participation in a breach,[160] rendering the party accountable under the second limb (knowing assistance) of *Barnes v Addy*.[161] The position asserts the principle that there is an equitable fraud where a third party knowingly assists in a breach of trust, confidence or contract.[162]

This approach is not reliant on a pre-existing breach. Heydon, Leeming and Turner indicate innocent receivers of information become participants in a dishonest and fraudulent design if they use the information after being notified of its confidential character.[163] Toulson and Phipps[164] identify several cases supporting this principle.[165] In *English & American Insurance Ltd v Herbert Smith*,[166] confidential papers were mistakenly sent to Herbert Smith, a firm of solicitors. The defendants read and copied the documents before sending them to the intended recipients. Sir Nicolas Browne-Wilkinson VC rejected Herbert Smith's contention that breach of confidence did not apply to accidental disclosures, observing that a person who received a document in error marked 'private and confidential' and proceeded to read it would be implicated in the leakage of the contained information.[167] Toulson and Phipps suggest the same principle applies to Lord Goff's example of a diary picked up in the street,[168] which is closely analogous to genetic material gathered from public places.

B. *Application of Breach of Confidence*

Equitable breach of confidence can remedy non-consensual genetic testing if the four elements articulated in *Optus* are satisfied.

1. *Specificity*

157 Nahan (n 68) 279–280. This conclusion also assumes that both are bound in conscience.
158 Ibid 278.
159 *Lenah* (n 41) 225 [35].
160 Meagher, Heydon and Leeming (n 93) 1117 [41-035].
161 (1874) LR 9 Ch App 244, 251 (Lord Selbourne LC) ('*Barnes v Addy*').
162 *Abernethy v Hutchinson* (1824) 47 ER 1313; *Prince Albert v Strange* (1849) 47 ER 1302; Toulson and Phipps (n 76) 73 [3-051].
163 Meagher, Heydon and Leeming (n 93) 1131; see also *Franklin v Giddins* (n 113); *Vivid Entertainment LLC v Digital Sinema Australia Pty Ltd (No 3)* [2007] FMCA 748.
164 Toulson and Phipps (n 76) 71 [3-004].
165 *Goddard v Nationwide Building Society* [1987] 1 QB 670; *Guinness Peat Ltd v Fitzroy Robinson* [1987] 1 WLR 1027; *English & American Insurance Ltd v Herbert Smith* [1988] FSR 232 ('*Herbert Smith*'); *Webster v James Chapman & Co* [1989] 3 All ER 939; *Derby & Co Ltd v Weldon* (No 8) [1991] 1 WLR 73; *Fayed v Commissioner of Police of the Metropolis* [2002] EWCA Civ 780.
166 [1988] FSR 232.
167 Nahan (n 68) 238.
168 Toulson and Phipps (n 76) 72 [3-047] citing *Spycatcher* (n 89) 281.

Plaintiffs must identify confidential information with specificity, or a claim will fail.[169] Equity courts enforce their orders on pain of contempt, which necessitates precise indication of what defendants are not permitted to do.[170] Terms like 'genetic information' lack sufficient clarity. 'Genetic information' could refer to physical DNA molecules or the biological materials that contain them. More broadly, any observable feature such as hair colour, freckles or visual signs of disorders like Down Syndrome, are all expressions of underlying genetic 'information'.[171] Dunn J's analysis in *Franklin v Giddins* is illuminating.[172] Here, a defendant took cuttings of budwood from a unique nectarine tree variety that the plaintiff selectively bred. The defendant grafted the cuttings to rootstock, producing identical trees. Dunn J likened the parent tree to a safe within which were locked copies of a formula for making a nectarine tree with particular characteristics.[173] The genetic structure of the budwood represented 'information' that enabled the defendant to obtain a trade secret, the secret being the technique of propagating Franklin Early White Nectarines.[174] From this position, his Honour could establish that all the nectarine trees derived from the original wood were a breach of confidence, and ordered their destruction.[175]

Surreptitious testing of genetic samples should be treated the same way. Like the budwood, hairs and skins cells do not of themselves disclose any information. DNA analysis produces the contained secret information, similar to how the budwood required grafting to a rootstock before the trade secret emerged. Thus, the relevant fact obtained from testing, such as, for example, the parentage of the victim of non-consensual testing, could be identified as the subject of the action. Alternatively, genetic analysis could simply be conceptualised as analogous to how information marked 'private and confidential', such as in *Herbert Smith,* is, when opened and read by an unintended recipient, subject to a breach of confidence. Consequently, plaintiffs should identify the personal information represented by their genetic structure and contained in their biological samples, copies of their DNA and derivative information such as test results.

Finally, information is traditionally not protected where it amounts to 'trivial tittle-tattle'.[176] Caldwell notes this negative requirement rarely prevented plaintiffs from obtaining relief,[177] suggesting a low threshold for plaintiffs to meet.

2. *Necessary Quality of Confidence*

As discussed, the necessary quality of confidence and circumstances importing a duty of confidence are closely interrelated in breach of confidence actions that do not involve a relationship. This section focuses on how genetic information can remain 'secret' despite biological material often being available in public places. The characteristics that establish genetic information as 'confidential' are considered in the next section.

(a) *Public Domain*

Information only possesses the necessary quality of confidence if it is not 'public property and public knowledge'.[178] Information in the 'public domain' is incapable of protection.[179] This creates a problem for

---

169 See for example *O'Brien v Komesaroff* (1982) 150 CLR 110, 326–8 (Mason J); *De Maudsley v Palumbo* [1996] FSR 447.
170 *Lawrence David Ltd v Ashton* [1991] 1 All ER 385, 393; *American Cyanamid Co v Alcoa of Australia Ltd* (1993) 27 IPR 16, 20.
171 Lawrence Gostin and James Hodge, 'Genetic Privacy and the Law: An End to Genetics Exceptionalism' (1999) 40 Jurimetrics 21, 51.
172 *Franklin v Giddins* (n 113).
173 Ibid 74.
174 Ibid 80.
175 Ibid 83.
176 *Coco* (n 96) 48 (Megarry J).
177 Caldwell (n 74) citing *Stephens v Avery* [1988] Ch 449, 454 (Sir Nicolas Browne-Wilkinson V-C), applied in *Michael Barrymore v News Group Newspapers Ltd* [1997] FSR 600.
178 *Saltman Engineering Co Ltd v Campbell* (1948) 65 RPC 203, 215 (Lord Greene MR). See also *Spycatcher* (n 89) 282 (Lord Goff); *Woodward v Hutchins* [1977] 1 WLR 760, 764 (Lord Denning MR).
179 Hughes (n 70) 140; *Attorney-General v Times Newspapers Ltd* [2001] 1 WLR 885, 892 (Lord Phillips MR).

restraining surreptitious genetic testing as genetic materials are commonly found in public places and arguably are in the public domain. Several factors suggest that the genetic information is still secret.

First, the presence of genetic *material* in public places does not necessarily introduce the contained *information* into the public domain. Inaccessibility of information is the fundamental measure of secrecy,[180] and the genetic information is not readily accessible. This contention is analogously supported by reverse engineering cases where information derived from publicly available items was still confidential. Prichard J,[181] drawing on several authorities,[182] concluded that merely because 'information can be obtained by a member of the public by process of reverse engineering or analysis of the plaintiff's product this does not mean that the information is readily available to the public'.[183] Subsequent cases question this principle with respect to commercial trade secrets. *Mars v Tecknowledge* indicated that encrypted data contained in products sold to the public are not considered confidential if decoded.[184] However, Jacob J stressed that his comments had no bearing on personal or surreptitiously obtained information.[185]

Secondly, courts generously protect *personal* information even where there is a degree of publication. Injunctions remain available until the degree of publicity destroys the purpose of protecting confidentiality by rendering orders to restrain further publication futile.[186] For trade secrets, confidentiality protects a confider's mental process that produced information that is inaccessible to all except those who go through a similar process.[187] Thus, the purpose of confidentiality is to prevent a confidant from taking unfair advantage of another's mental labours.[188] Even a small degree of publication destroys confidentiality because the information is no longer inaccessible, removing any unfairness in using the information.

Contrastingly, personal information is protected out of concern for a plaintiff's privacy and wellbeing.[189] This might also extend to the interests of children and other related parties.[190] If restraining further dissemination will prevent additional harm to the plaintiff, protecting confidentiality retains utility despite a degree of publication.[191] Professor Tettenborn suggests that personal information remains capable of protection until it becomes 'notorious'.[192] Even where personal information has been produced in court,[193] or broadcast on television and discussed in online discussion forums,[194] equity can still intervene.[195] Prior decisions indicate secrecy remains if the disclosure is transitory and brief,[196] not recorded in permanent form,[197] unlikely to be remembered,[198] or was 'evanescent…on a limited scale…or in a remote or restricted area'.[199] As genetic information is not observable before the non-consensual testing occurs, there would still be utility in restraining its publication.

---

180 Gurry (n 84) 98.
181 *Aquaculture Corporation v New Green Mussel Co Ltd* (1985) 5 IPR 353, 379 ('*Aquaculture*').
182 *Ackroyds (London) Ltd v Islington Plastics Ltd* [1962] RPC 97, 104 (Havers J); *Yates Circuit Foil Co v Electrofoils Ltd* [1976] FSR 345, 387 (Whitford J); *Conveyor Co of Australia Pty Ltd v Cameron Bros Engineering Co Ltd* [1973] 2 NZLR 38.
183 *Aquaculture* (n 180) 379.
184 *Mars UK Ltd v Teknowledge Ltd* (1999) 46 IPR 248.
185 Ibid 256 [33].
186 *Australian Football League v The Age Company Ltd* (2006) 15 VR 419, 427 (Kellam J) ('*AFL v The Age*').
187 *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* [1967] RPC 375, 389 (Roxburgh J); *Interfirm Comparison (Aust) Pty Ltd v Law Society of NSW* [1977] RPC 137, 151 (Bowen CJ in Eq); *Mense v Milenkovic* [1973] VR 784, 800 (McInerney J); Gurry (n 84) 70.
188 Gurry (n 84) 90; *Coco* (n 96) 49 (Megarry J).
189 Hughes (n 70) 982–983 [200.4170]; Gurry (n 84) 97–98; Dean (n 42) 122.
190 See discussion in *PJS v News Group Newspapers Ltd* [2016] AC 1081, 1101–1102 (Lord Mance) 1111–1112 (Baroness Hale of Richmond), albeit in respect of misuse of private information.
191 *Westpac Banking Corp v John Fairfax Group Pty Ltd* (1991) 19 IPR 513.
192 AM Tettenborn, 'Breach of Confidence, Secrecy and the Public Domain' (1982) 11 Anglo-American Law Reveiw 273, 274.
193 *G v Day* [1982] 1 NSWLR 24 ('*G v Day*'); *Falconer v Australian Broadcasting Corporation* [1992] 1 VR 662; *Wigginton v Brisbane TV Ltd* (1992) 25 IPR 58, 64 (White J).
194 *AFL v The Age* (n 185).
195 Dean (n 42) 122.
196 *G v Day* (n 192) 40 (Yeldham J).
197 *Wilson v Ferguson* [2015] WASC 15, [61] (Mitchell J) ('*Wilson*'); *G v Day* (n 192) 40 (Yeldham J).
198 *Kwok v Thang* [1999] NSWSC 1034, [33] (Austin J).
199 *Aquaculture* (n 180) 379 (Prichard J).

Finally, even if the genetic information is not regarded as confidential due to public accessibility, generally it would be indistinguishable from the mass of other materials found in public. What is confidential is the association between an otherwise anonymous piece of genetic information and a particular identity. As Dr Gurry explains, 'confidentiality inheres not so much in the information itself, but in the *association* of the information with a particular context'.[200] Therefore, two pieces of public information – the sample and the identity of the source – are not individually secret, but the connection between them is confidential. This principle explains why secrets like customer lists can constitute confidential information despite being collections of public domain information.[201] Conversely, private medical information may be published without breaching confidence, [202] so long as the court judges it sufficiently anonymised.[203]

This approach was adopted in *G v Day*. G was a 'mystery witness' who gave evidence to the Corporate Affairs Commission.[204] Yeldham J indicated that taken in isolation, G's evidence was public due to the Commission's open proceedings, and there was nothing secret about G as an individual. However, his Honour granted an injunction restraining publication of 'the fact it was the plaintiff whose information set in train the application …[which] is not at present…public property'.[205]
Similarly, in *Falconer v Australian Broadcasting Corporation*,[206] a police informer, formerly known as Rajicic, assumed a new identity. The ABC sought to publish photographs of the person formerly known as Rajicic and identify them as such. These photos had appeared in the public domain in a committal hearing.[207] Ashley J considered it was fairly arguable that while the images themselves were not secret, their *association* with the identity of Rajicic was confidential and had not yet been disclosed.[208]
These factors collectively demonstrate that surreptitiously collected genetic information can remain sufficiently secret.

3. *Circumstances Importing an Obligation of Confidence*

Where a defendant knows or ought to know that genetic information is confidential, those circumstances impose a duty of confidence that restricts their use or disclosure of that information. This section establishes why genetic information contained in biological materials is appropriately regarded as 'confidential information'. It is submitted that genetic information is so obviously confidential that a surreptitious tester would be bound in conscience.

Gleeson CJ's previously discussed comments on 'private information' and confidentiality[209] have received favourable treatment in some cases.[210] If courts accept this approach to confidential information, genetic information falls within the 'kinds of information about a person relating to health, personal relationships, … [that] may be easy to identify as private'.[211] Alternatively, his Honour's 'highly offensive to a reasonable person' test may be a useful guide.[212] The Privacy Act 1988 is a useful normative signal that genetic information is probably within this test. As noted in Part II, genetic information is deemed 'sensitive',[213] attracting a higher level of

---

200 Gurry (n 84) 78.
201 *Coco* (n 96); *Robb v Green* [1895] 2 QB 1, 18–19 (Hawkins J).
202 *R v Dept of Health; Ex Parte Source Informatics Ltd* [2000] 1 All ER 786, 796 (Brown LJ).
203 See for example *Local Authority v Health Authority (disclosure: restriction on publication)* [2004] 1 All ER 480, 503 (Dame Butler-Sloss P).
204 *G v Day* (n 192) 26.
205 Ibid 35–6 (Yeldham J).
206 [1992] 1 VR 662.
207 Ibid 669.
208 Ibid 671.
209 *Lenah* (n 41) 226 [42].
210 *Wilson* (n 196) [53] (Mitchell J); *Windridge Farm Pty Limited v Grassi & Ors* [2011] NSWSC 196, [112]–[113] (Hall J); *Giller v Procopets* (2008) 24 VR 1, 102 (Neave JA) ('*Giller*'); *John Fairfax Publications Pty Ltd v Hitchcock* (2007) 70 NSWLR 484, 520 [143] (McColl JA).
211 Ibid.
212 *Lenah* (n 41) 226 [42].
213 Section 6(a)(c).

protection than ordinary personal information. Legislative recognition of genetic information's inherently private nature is paralleled within academia and law reform.[214]

Even if Gleeson CJ's test is not accepted, analogies to information that equity treats as confidential provide additional evidence that surreptitious genetic testers will fall under an obligation of confidence. Health and cultural information are especially relevant.

(a) *Health Information*

Equity courts readily deem health information confidential, protecting a plaintiff's HIV/AIDS status,[215] a psychiatric assessment of a schizophrenic[216] and medico-legal reports regarding the impact of working conditions on a plaintiff's health.[217] As DNA encodes every protein in the body, genetic analysis can be used to test for various health risks.[218] DTC-GT companies offer a range of health-related insights. For example, 23andMe advertises 'Health Predisposition Reports'[219] that predict risks including lung and liver disease, celiac disease and late onset-Alzheimer's, while others claim to test for allergies,[220] caffeine tolerance,[221] carrier status of inheritable conditions[222] and many others.[223] Baroness Hale noted it has 'always' been accepted that a person's health information is both private and confidential.[224] Although this comment was made in the context of European Human Rights jurisprudence,[225] Australian courts adopt a similar position.

In *Earl v Nationwide News Pty Ltd*,[226] a media company somehow obtained the plaintiff's medical records. In holding the plaintiff entitled to orders restraining publication of the records,[227] White J accepted that a knowledgeable reader could infer the medical conditions that the plaintiff was being treated for and considered that confidential.[228] His Honour found that irrespective of whether the defendant obtained the information from the doctor, the medical practice or a third party, the defendant ought to have known that the information had to be kept confidential.[229] Analogously, surreptitious genetic testers should know or ought to know that genetic materials contain the plaintiff's confidential health information.

(b) *Cultural Information*

Australian precedent recognises cultural information as confidential.[230] In *Foster v Mountford & Rigby Ltd*,[231] Muirhead J enjoined publication of an anthropologist's book on the Pitjantjara People's cultural practices. His

---

214 Otlowski, 'Establishing the Offence' (n 51); Nicol et al (n 3); Robert Curley and Lisa Caperna, 'The Brave New World Is Here: Privacy Issues and the Human Genome Project' (2003) 70 Defence Counsel Journal 22; *Essentially Yours* (n 3) vol 1, 359; *Serious Invasions of Privacy* (n 50) 98–107; NSWLRC, *Invasion of Privacy* (n 50) 6–7.
215 *X v Y* [1988] 2 All ER 648, 656 (Rose J).
216 *W v Edgell* [1990] 1 835, 845 (Sir Stephen Brown P), 848 (Bingham LJ): Although the information was confidential, public interest considerations precluded a breach of confidence.
217 *Cornelius v De Taranto* [2001] EMLR 12, [1] (Morland J).
218 'DNA Fact Sheet' (n 13).
219 'DNA Reports List', *23andMe* (Web Page) <https://www.23andme.com/dna-reports-list/>.
220 'DNA Allergy Testing', *New Life Genetics* (Web Page) <https://newlifegenetics.com/dna-allergy-testing/>.
221 'Featured Products', *Orig3n* (Web Page) <https://shop.orig3n.com/collections/featured-products/products/caffeine-tolerance>.
222 'Products', *Helix* (Web Page) <https://www.helix.com/products/sema4-carriercheck>.
223 See Jennifer Cacchio, 'What You Don't Know Can Hurt You: The Legal Risk of Peering into The Gene Pool with Direct-To-Consumer Genetic Testing' (2018) 87 UMKC Law Review 219.
224 *Campbell* (n 38) 499.
225 Ibid.
226 [2013] NSWSC 839.
227 Ibid [31].
228 Ibid [11].
229 Ibid [13].
230 *Western Australia v Ward* (2002) 213 CLR 1, 84–85 (Gleeson CJ, Gaudron, Gummow, Hayne JJ).
231 *Foster v Mountford & Rigby Ltd* (1976) 14 ALR 71 ('*Foster*').

Honour referred to their 'deep religious and cultural significance' in finding the information confidential.[232] The principle has been approved in the Federal[233] and High Courts,[234] and subsequent cases have treated customary beliefs and traditions as confidential information.[235] DNA reveals potentially secret familial relationships and is considered sacred by various groups.[236]

This is significant as certain cultural groups face a heightened risk of non-consensual genetic testing because their hereditary isolation renders their genetic information valuable research material.[237] When the Havasupai people consented to a limited set of genetic tests, researchers ignored those parameters and used the samples to prove migratory patterns that contradicted Havasupai beliefs that the Grand Canyon was the birthplace of humanity.[238] Axys Pharmaceuticals obtained lucrative patents derived from genetic information collected from a small Jewish community in India with questionably valid consent.[239] Unsurprisingly, actions to recover Australian Indigenous remains held in English museums are partly motivated by a desire to prevent DNA analysis.[240]

4. *Actual or Threatened Misuse without Authority*

Once a defendant is under an obligation of confidence, a breach of that obligations crystallises upon an unauthorised misuse. Similar to how an individual who finds an envelope marked 'secret and confidential' commits a breach upon opening,[241] a defendant would misuse genetic information when they test a sample knowing the plaintiff did not consent. If the defendant mistakenly believed the sample was their own or from a person who had consented, their conscience will be bound upon learning that the extracted information was actually the plaintiff's.[242]At this point, any subsequent disclosure or unauthorised use of information constitutes a breach. Finally, if a defendant obtained samples, then threatened to subject them to testing, the threat would constitute a breach and equity would restrain unconscionable use.

C. *Public Interest Defence*

There is a legitimate concern that legal protection of confidentiality can suppress the flow of information where there is a countervailing public interest in disclosure.[243] Genetic information has a familial quality,[244] so if a woman has a gene mutation that increases her risk of ovarian cancer, that fact is of significant concern to her daughters.[245] Other members of the public may also be directly 'interested' in her gene mutation, including employers, insurers, cancer researchers, her spouse and extended family, children, doctors, the media and tissue banks that hold her material. The issue is whether any of these parties could rely on a 'public interest defence' if they surreptitiously tested her genetic information.

---

232 Ibid 73 (Muirhead J).
233 *Wyman on behalf of the Bidjara People v State of Queensland* [2012] FCA 397, [27].
234 *Breen v Williams* (n 106) 128 (Gummow J).
235 *Coulthard v South Australia* (1995) 63 SASR 531, 534 (King CJ), 537 (Perry J), 547–548 (Debelle J).
236 Harriet Washington, *Deadly Monopolies: The Shocking Corporate Takeover of Life Itself — and the Consequences for Your Health and Our Medical Future* (Doubleday, 2011) 295.
237 Debra Harry, 'Indigenous Peoples and Gene Disputes' (2009) 84 Chi Kent Law Review 147, 150-51, 182-84; Lorrie Ann Santos, 'Genetic Research in Native Communities' (2008) 2 Progress Community Health Partnerships 321, 321; see also Washington (n 235) 289.
238 LA Santos, 'Genetic Research in Native Communities' (2008) 2(4) Progress in Community Health Partnerships: Research, Education and Action 321; R Dalton, 'When Two Tribes Go to War' (2004) 430 Nature 500; Lori Andrews, 'Havasupai Tribe Sues Genetic Researchers' (2005) 31 Privacy 5.
239 Ibid 290; Jessica Roberts, 'Progressive Genetic Ownership' (2018) 93 Notre Dame Law Review 1105.
240 See for example *In Re an Application by the Tasmanian Aboriginal Centre Inc* [2007] TASSC 5, [2] (Underwood CJ).
241 See *Herbert Smith* (n 164).
242 *Spycatcher* (n 89) 281 (Lord Goff); *Xchanging Integrated Services (Australia) Pty Ltd v Dale Williams* [2015] NSWSC 692; *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] 4 All ER 781, 789 (Lord Neuberger).
243 Paul Finn 'Confidentiality and the "Public Interest"' (1984) 58 Australian Law Journal 497, 506.
244 McWhirter and Otlowski (n 51) 336.
245 Otlowski 'Australian Reforms Enabling Disclosure of Genetic Information to Genetic Relatives by Health Practitioners' (2013) 21 Journal of Law and Medicine 217, 218 ('Disclosure of Genetic Information').

The law recognises that in some circumstances an individual may be justified in disclosing confidential information in the public interest,[246] but the extent of this exception is contested. Mason J considered it was legitimate to publish confidential information 'so as to protect the community from destruction, damage and harm'.[247] Other authorities doubt whether the public interest constitutes a 'defence', suggesting it merely reflects equitable principles of clean hands or iniquity.[248] English courts adopt a broad approach that inquires whether the public interest in publication outweighs the public interest in confidentiality,[249] yet Australian authority is critical of this approach.[250] In *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)*, Gummow J referred to the English treatment of a public interest defence as 'picturesque but somewhat imprecise'.[251] His Honour went on to explain that notions of a public interest defence could be understood in the sense that information will not have the necessary quality of confidence and attendant equitable protection if it relates to 'crimes wrongs, and misdeeds',[252] and with respect to unclean hands, there are circumstances where it would be unconscionable to allow a defendant to claim equitable remedies to enforce non-disclosure.[253] Thus, the emphasis rests on equity's protection being denied to inequitable parties as opposed to permitting parties to breach confidence in the name of a subjective 'public interest'.

If there is scope for a defence, any disclosure must be of real concern to the public, not merely something the public is interested in.[254] Furthermore, the law does not balance the public interest in disclosing confidential information against the individual's private interest in non-disclosure.[255] Instead, courts weigh the public interest in preserving private information against the public interest in disclosure.[256] Alternatively, if the defence is understood as iniquity, equity would only refuse to protect confidentiality where to do so would conceal a plaintiff's fraudulent or criminal conduct.[257]

Some argue that the defence could cover a wide range of circumstances involving genetic information,[258] but the ALRC/AHEC point out there is no case law permitting genetic testing in the public interest.[259] In light of Australian scepticism, any public defence would probably be narrowly interpreted and only available for 'exceptional circumstances' where another's life is in immediate danger, or where there is a real danger to the public.[260] Even if a plaintiff had engaged in some iniquitous conduct, such as lying to their insurance company, it is doubtful whether courts would permit a positive act of surreptitious genetic testing. The ALRC specifically argued that while a government minister's health might be of public interest, this should not warrant active surveillance or following her into the doctor's room.[261]

---

246 Kathryn Ries, 'Confidential Information and the Media' (1999) 15 QUT Law Journal 126, 130.
247 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 57.
248 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 445–52 (Gummow J); *Sullivan v Sclanders* (2000) 77 SASR 419; *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 464; *AFL v The Age* (n 185) 436 (Kellam J).
249 *Lion Laboratories Ltd v Evans* [1984] 2 A11 ER 417.
250 *Castrol Australia Pty Ltd v Emtech Associates Pty Ltd* (1980) 33 ALR 31; *David Syme & Co Ltd v GMH Ltd* [1984] 2 NSWLR 294.
251 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 451 (Gummow J).
252 Ibid 456 (Gummow J).
253 Ibid 457 (Gummow J).
254 Ries (n 245) 130; *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129, 178 (McMullin J); *Lion Laboratories Ltd v Evans* [1984] 2 All ER 417.
255 Roger Magnusson, 'Confidentiality and Consent in Medical Research: Some Recurrent, Unresolved Legal Issues Faced by IECs' (1995) 17 Sydney Law Review 549, 565.
256 Ibid citing Law Reform Commission of Western Australia, *Report on Confidentiality of Medical Records and Medical Research* (Report No 65, August 1990) 415, 420.
257 *Gartside v Outram* (1856) 26 LJ Ch 113, 114; *Minister for Immigration and Citizenship v Kumar* (2009) (2009) 238 CLR 448, 456 [26].
258 J Hamblin and Dean Bell, 'Confidentiality' in J Golden and D Grozier (eds), *The Laws of Australia* (Law Book Co Limited, 2004) vol 20, [31].
259 *Essentially Yours* (n 3) vol 1, 553.
260 Dean Bell and Belinda Bennett, 'Genetic Secrets and the Family' (2001) 9(1) Medical Law Review 130, 149. But see also Privacy Act 1988 (Cth), s 16A and Sch 1, cl 6.2(c) for statutory guidance that may suggest a lower standard.
261 *Serious Invasions of Privacy* (n 50) 148–9.

These conclusions suggest plaintiffs should be confident that a public interest exception would not enable a surreptitious tester to escape liability. However, this may raise concerns for healthcare providers, researchers and other parties that hold genetic samples. However, where these parties adhere to applicable laws, notably the Privacy Act 1988 and State laws including the Health Records and Information Privacy Act 2002 (NSW), it is unlikely that they would become liable even though the statutes do not displace obligations of confidence.[262]

The Privacy Act 1988, s 95AA is illustrative, which implements the ALRC's *Essentially Yours* recommendation to enable the disclosure of genetic information obtained in the course of providing healthcare to relatives. Disclosure is possible under approved guidelines issued by the National Health and Medical Research Council (NHMRC) guidelines,[263] as well as in a 'permitted health situation'.[264] Guideline 3.4.2 notes disclosure should avoid identifying the patient.[265] Professor Otlowski, considering prior guidelines in the same words, indicated that avoiding identification may avoid a breach of confidence.[266] Furthermore, the ALRC also noted that if its recommendation to reform the Privacy Act 1988 were accepted, it would be likely that courts would be willing to accept a public interest defence where the statutory requirements were adhered to.[267] The ALRC expressly did not form a view as to whether formal protection for breach of confidence was required.[268] In 2012, the New South Wales government introduced a similar exception into the Health Records and Information Privacy Act 2002 (NSW).[269]

Similar considerations apply to Privacy Act 1988, ss 95 and 95A where the NHMRC guidelines make provision for limited circumstances where research on samples may be conducted without consent. Various State jurisdictions have equivalent statutes.[270]

D. *Remedies*

In equity's exclusive jurisdiction, plaintiffs have numerous remedial avenues against defendants who subject their genetic material to testing without authorisation.

1. *Injunction*

Injunctions are integral to protecting genetic information as they operate to preserve the secrecy of information. As breach of confidence concerns a purely equitable obligation,[271] the injunction stems from the exclusive jurisdiction avoiding the need to prove that damages would be inadequate.[272]

When considering injunctions, the prior analysis is essential because the remedy will not issue where the information has entered the public domain because there is no utility in attempting to restrain further publication.[273] Courts start from the premise that 'as a general rule', an injunction should follow the misuse of a secret.[274] Where personal information is concerned, and the detriment suffered is a loss of privacy, courts usually

---

262 Otlowski, 'Disclosure of Genetic Information' (n 244) 225; NHMRC, *Use and Disclosure of Genetic Information to a Patient's Genetic Relatives Under Section 95AA of the Privacy Act 1988 (Cth): Guidelines for Health Practitioners in the Private Sector* (March 2014) 10 ('*Disclosure Guidelines*').
263 Privacy Act 1988 (Cth) s 95AA(1).
264 Ibid s 16B.
265 *Disclosure Guidelines* (n 261) 47.
266 Otlowski, 'Disclosure of Genetic Information' (n 244) 232.
267 *Essentially Yours* (n 3) vol 1, 559.
268 Ibid.
269 Schedule 1 Health Privacy Principles (HPP) s 11(f).
270 See for example Health Records and Information Privacy Act 2002 (NSW) Sch 1 HPP s 10(f); Health Records Act 2001 (Vic) Sch 1 HPP s 2(g); Health Records (Privacy and Access) Act 1997 (ACT) s 5 Privacy Principle 10.3.
271 *Moorgate* (n 91) 437–438 (Deane J).
272 Radan and Stewart (n 65) 212; Meagher, Heydon and Leeming (n 93) 1117 [41-040].
273 *Westpac Banking Corp v John Fairfax Group Pty Ltd* (1991) 19 IPR 513; *Spycatcher* (n 89); See generally Hughes (n 70).
274 *AB Consolidated Ltd v Europe Strength Good Co Pty Ltd* [1978] 2 NZLR 515, 526.

grant an injunction unless a countervailing public interest can be established.[275] Unlike commercial secrets where even small degrees of publication destroy confidentiality, for personal information, courts recognise that injunctions can still prevent a repeat of the abuse and avoid further detriment to the plaintiff even if there has been some degree of publication.[276]

2. *Delivery Up or Destruction*

Equity courts can order delivery up or destruction of material containing confidential genetic information or derived from the misuse of that information.[277] The order is discretionary, and courts occasionally refuse to make the order where the materials could serve a useful purpose and compensation or damages are adequate.[278] However, a successful plaintiff seeking this order will usually be granted the remedy, especially where defendants cannot be relied upon to destroy it.[279]

3. *Pecuniary Remedies*

Non-consensual genetic testing may attract two forms of monetary compensation. First, 'equitable compensation', which allows equity courts in the exclusive jurisdiction to remedy purely equitable wrongs.[280] Secondly, 'equitable damages', which are damages in substitution or in addition to injunctions and specific performance, as provided by the modern descendants of the Chancery Amendment Act 1858 (Lord Cairns Act).[281] An account of profits and constructive trust are also possibilities.

(a) *Equitable Compensation*

Equitable compensation originally remedied breaches of fiduciary duty.[282] Eventually, courts recognised that compensation for violations of other equitable duties was not 'beyond the pale of Equity',[283] including obligations of confidence.[284] Gummow J's support for an inherent equitable jurisdiction to grant monetary compensation for breaches of trust and confidence[285] is widely accepted.[286]

However, as Dr Turner argues, the duty of confidentiality emerged from the obligations owed by trustees, including their obligations of confidence.[287] As Street J articulated, 'the obligation of a defaulting trustee is essentially one of effecting a restitution to the estate'.[288] Restitution in that 'non-technical' sense is how Australian courts approach the obligation of defaulting confidants.[289] Therefore, compensation restores parties to the position they would have been in had the misuse of confidential information not occurred,[290] likely limiting recovery to

---

275 *Argyll v Argyll* [1967] Ch 302; *G v Day* (n 192); *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] QB 613.
276 *Creation Records v News Group Newspapers* (1997) 39 IPR 1; *Falconer v Australian Broadcasting Corporation* [1992] 1 VR 662, 668-670 (Ashley J).
277 *Franklin v Giddins* (n 113) 82 (Dunn J); *Blockbuster Australia Pty Ltd v Karioi Pty Ltd* [2009] NSWSC 1089; *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37.
278 See for example *Saltman Engineering Co v Campbell Engineering Co Ltd* (1948) 65 RPC 203, 219.
279 *Industrial Furnaces Ltd v Reaves* [1970] RPC 605, 627.
280 Radan and Stewart (n 65).
281 Ibid.
282 David Capper, 'Damages for Breach of the Equitable Duty of Confidence' (1994) 14 Legal Studies 313, 321.
283 Ian Davidson, 'The Equitable Remedy of Compensation' (1982) 13 Melbourne University Law Review 349, 351.
284 Charles Rickett, 'Equitable Compensation: Towards a Blueprint?' (2003) 25 Sydney Law Review 31, 32.
285 *Smith, Kline and French* (n 103) 98 (Gummow J).
286 *Ithaca Ice Works Pty Ltd v Queensland Ice Supplies Pty Ltd* [2002] QSC 222, [13] (Philippides J) ('*Ithaca Ice Works*'); *HK Frost Holdings v Darville McCutcheon* [1999] FCA 570, [73] (Finn J) ('*HK Frost Holdings*'); *Vasco Investment Managers Ltd v Morgan Stanley Australia Ltd* (2014) 108 IPR 52, 89–90 (Vickery J).
287 PG Turner, 'Equitable Compensation for Breach of Confidence' [2017] (Spring) Journal of the New South Wales Bar 39, 41.
288 *Re Dawson (dec'd)* [1966] 2 NSWLR 211.
289 Turner (n 286) 41; MJ Leeming, 'A Response by the Hon Justice Mark Leeming' in Turner (n 286) 42; *Concept Television Productions Pty Ltd v Australian Broadcasting Corporation* (1988) 12 IPR 129, 136 (Gummow J); *Smith, Kline and French* (n 103); *Ithaca Ice Works* (n 285) [14]–[16] (Philippides J).
290 *HK Frost Holdings* (n 285) [73] (Finn J).

economic loss.[291] Problematically, many plaintiffs would suffer embarrassment or other non-economic harms from the disclosure of their genetic information. However, judges appear open to compensating for mental harm caused by a breach of confidence.

English decisions readily award 'damages' for mere distress.[292] In *Giller,*[293] Neave JA, with Maxwell P agreeing,[294] noted those decisions do not distinguish between equitable compensation or equitable damages.[295] Her Honour analysed equitable compensation,[296] concluding it was available for a breach of confidence causing pure mental harm. The rationale was that because injunctive remedies do not require proof of possible financial loss, by parity of reasoning, equitable compensation should not be confined to financial loss.[297] Similarly, Ashley JA highlighted the anomaly in permitting injunctions against *potential* breaches while denying a remedy where an *actual* breach occurs.[298]

Giller controversially alters the restitutionary character of equitable compensation. However, as a Court of Appeal decision, intermediate appellate courts and trial judges in other jurisdictions should not depart from it unless convinced its interpretation is plainly wrong.[299] In Western Australia, Mitchell J denied that Neave JA's judgement was 'plainly wrong',[300] and considered it 'an appropriate incremental adaptation'.[301] His Honour awarded equitable compensation for embarrassment, distress and anxiety to a plaintiff after her former partner posted to his Facebook page explicit images and videos of the plaintiff which were exchanged in the course of their romantic relationship.[302] Mitchell J reasoned *obiter* that a purpose of the obligation of confidence was to protect citizens from distress caused by the disclosure of personal information, and that that could inform the remedy available.[303] Mitchell J appropriately confined his remarks to breach of confidence concerning personal information and excluded other obligations more concerned with economic interests.[304] With respect, his Honour's justification is a compelling application of equitable compensation's recognised flexibility,[305] and gives effect to the 'cardinal principle of equity that the remedy must be fashioned to fit the nature of the case'.[306]

Whether equitable compensation includes exemplary 'damages' enlivens the bitter dispute over the fusion between common law and equity. In *Digital Pulse Pty Ltd v Harris*,[307] Heydon JA determined there was a fundamental objection to the concept of punishment as part of compensation in equity.[308] Spigelman CJ also rejected exemplary damages for breaches of fiduciary duty but considered it 'unnecessary and undesirable' to conclude that punitive monetary awards could never be awarded in equity,[309] leaving the matter open for breach of confidence. In contrast, Mason P's dissent advocated coherency between common law and equity by enabling punitive remedies irrespective of whether wrongs were tortious or equitable.[310] Eady J considered in *Mosley v News Group Newspapers*

---

291 Capper (n 281). Although note that *Giller* (n 209) and the UK cases applied there makes this open to doubt.
292 *Douglas v Hello! Ltd* [2006] QB 125, 163 (Lord Phillips MR); *Campbell* (n 38) 493 (Lord Hope), 502 (Baroness Hale), 505 (Lord Carswel); *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [216], [235] (Eady J).
293 (n 209).
294 Ibid 5.
295 Ibid 99–101
296 Ibid 100 [422]–[424] citing *Cornelius v De Taranto* [2001] EMLR 12, [66]–[67], [69] (Moreland J).
297 *Giller* (n 209) 100 [423].
298 Ibid 32 [150].
299 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–152 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).
300 *Wilson* (n 196) [76], [83].
301 Ibid [82].
302 Ibid [85].
303 Ibid [84].
304 *Wilson* (n 196) [84].
305 *Coles v Miles* [2002] NSWCA 150, [63] (Heydon JA).
306 Ibid [82]; *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 599 (Mason CJ, Brennan, Dean, Dawson Gaudron JJ).
307 (2003) 56 NSWLR 298.
308 Ibid 360–91.
309 Ibid 304.
310 Ibid, 305.

Ltd that there was not yet sufficient authority to suggest that exemplary damages were available, [311] and this article adopts the same position.

Aggravated damages are, to a lesser extent, implicated in the fusion debate. These damages relate to 'injury to the plaintiff's dignatory interest … which is heightened by reference to the defendant's reprehensible conduct'.[312] In awarding such damages, Neave JA held that '[s]uch damages are compensatory, not punitive',[313] indicating it could be appropriate for courts to integrate consideration for aggravation in awarding equitable compensation.[314]

(b) *Equitable Damages*

The amplitude of remedies in the exclusive jurisdiction means there is little need to attempt to argue that pecuniary relief for equitable breach of confidence is available under the modern equivalents of Lord Cairns' Act.[315]
In the statute's traditional wording, damages can only be awarded where an injunction could be granted against a breach of a covenant, contract or agreement or against the commission or continuance of any wrongful act.[316] This implies the statute applies to support common law rights in the auxiliary jurisdiction. However, in *Talbot v General Television Corp Ltd*,[317] Harris J held an equitable breach of confidence constituted a 'wrongful act'.[318] *Obiter*, the High Court suggested an incidental object of Lord Cairns Act was to enable damages 'in lieu of an injunction or specific performance, even in the case of a purely equitable claim'.[319] However, Gummow J subsequently criticised Harris J's decision in *Talbot*,[320] suggesting the question remains unresolved.

Under the amended Victorian statute,[321] the court can simply award damages in addition to or in substitution of an injunction or specific performance. In *Giller,* Neave JA noted that damages were now clearly available in all instances where an injunction was available.[322]

(c) *Account of Profits*

A defendant might sell revelations gained from a genetic test to the media or use them as part of a book or article. Rather than seek compensation, plaintiffs could pursue an account of profits for an equitable breach of confidence.[323] The objective in taking account of profit is to determine the profit derived by the wrongdoer from the use of the confidential information.[324] The quantum must be an approximation that will do justice to both parties.[325] Notwithstanding the principle that wrongdoers must not profit from breaches of fiduciary duty (or duties of confidence), courts make allowance for the defendant's skill, expertise and other expenses to prevent a plaintiff from unduly benefitting.[326] However, the defendant bears the onus of establishing any allowance.[327]

---

311 [2008] EWHC 1777.
312 M Tilbury and G Davis, 'Equitable Compensation' in Patrick Parkinson (ed), *The Principles of Equity* (Law Book Co, 2nd ed, 2003) 797, 809.
313 *Giller* (n 209) 104.
314 Ibid 105.
315 Meagher, Heydon and Leeming (n 93) 1141 [41-135]; *Smith, Klein and French* (n 103) 98 (Gummow J).
316 Supreme Court Act 1970 (NSW) s 68.
317 *Talbot v General Television Corp Ltd* [1980] VR 224.
318 Ibid 241.
319 *Wentworth v Woollahra Municipal Council (No 2)* (1982) 149 CLR 672, 676 (Gibbs CJ, Mason, Murphy and Brennan JJ).
320 *Concept Television Productions Pty Ltd v Australian Broadcasting Corporation* (1988) 12 IPR 129, 136.
321 Supreme Court Act 1986 (Vic) s 38.
322 *Giller* (n 209) 96 [407]. See further discussion in Megan Richardson, Marcia Neave and Michael Rivette, 'Invasion of Privacy and Recovery for Distress' in Jason NE Varuhas and Nicole A Moreham (eds), *Remedies for Breach of Privacy* (Oxford: Hart Publishing, 2018) 180.
323 *Testel Australia Pty Ltd v KRG Electrics Pty Ltd* [2013] SASC 91, [93]–[94] (Blue J); *Optus* (n 117) 287–289; Radan and Stewart (n 65) 986; Meagher, Heydon and Leeming (n 93) 1139–1140 [41-135].
324 *BlueScope Steel Limited v Kelly* [2007] FCA 517, [166] (*'BlueScope*').
325 *Dart Industries Inc v Decor Corporation Pty Ltd* (1993) 179 CLR 101, 119–120 (Mason CJ, Deane, Dawson, Toohey JJ).
326 *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 562.
327 *BlueScope* (n 323) [166]; *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 372–5, 384 (Heydon JA).

(d) *Constructive Trust*

Constructive trusts are available to remedy a breach of confidence.[328] Meagher, Leeming and Turner argue that property obtained as a result of a breach of confidence could mirror how a fiduciary can be accountable as a constructive trustee in respect of an acquisition of property occasioned by their breach of duty.[329] However, their utility against non-consensual genetic testing is probably limited as it is unclear what property could be obtained directly as a result of the breach.

IV. Conclusion

This article has attempted to consider one possible solution for prospective plaintiffs seeking redress for non-consensual testing of their genetic information. Primarily, it has been argued that breach of confidence may usefully be regarded as a pathway to obtaining a remedy. A breach of confidence in the exclusive jurisdiction is not contingent on the uncertain common law rights. Genetic information is clearly a 'privacy' interest. However, this article has not advocated for the doctrinal extensions previously observed in the United Kingdom. Instead, it has argued that breach of confidence has always provided relief where confidential information is surreptitiously obtained. Non-consensually tested genetic information is protected because it is confidential information. Critical to this conclusion is displacing a dominant misconception that a relationship of confidentiality is an essential element in an action for breach of confidence. The accepted scope of the doctrine provides incidental protection to privacy interests, not because breach of confidence protects privacy *per se*, but because privacy and confidentiality are overlapping concepts.

Although individuals shed and discard their genetic materials in public, it is arguable that their genetic information has not entered the public domain and remains confidential. The nature of genetic information is otherwise readily regarded in equity as confidential. A person who surreptitiously tests the genetic material of another in the knowledge that that person has not consented to their genetic information being extracted, is under a duty of confidentiality. Equity possesses a formidable armoury of remedies that can restrain further use and disclosure, and possibly offer compensation.

Breach of confidence relies on expensive court proceedings which are not accessible to all potential victims. This is a justifiable critique. However, establishing that legal redress is available accomplishes an important normative objective in signalling to the community that non-consensual genetic testing is neither acceptable nor without consequence.

---

[328] *LAC Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574.

[329] Meagher, Heydon and Leeming (n 93) 1142 [41-135]. See also Tang Hang Wu, 'Confidence and the Constructive Trust' (2003) 23 Legal Studies 135.

DYING, DISABILITY, AND DANGEROUS DECISIONS: PROTECTING PATIENT SAFETY IN ASSISTED DYING IN ENGLAND AND WALES

Louise Hayes[1]

ABSTRACT

Copious academic scholarship has considered legalising assisted dying (AD). However, notwithstanding its obvious importance, safety has been relatively excluded from the AD debate. The debate has now reached an impasse and can arguably be distilled to one bone of contention: "slippery slope" fears. Opponents argue proposed safeguards will be unable to prevent the development of slippery slopes, in which vulnerable populations (namely the mentally ill, dying, and disabled) will be implicitly or explicitly pressured into receiving assistance in dying. Whilst safeguards are a valid field of inquiry, they represent just one facet of safety. Safety is conceived broadly as the prevention of harm, interdependent on timeliness, quality, effectiveness, and access. Whereas safeguards are predominantly concerned with employing preventative, defensive measures to avoid the emergence of harm, patient safety also depends on the improvement of latent conditions and active failures according to Reason's Swiss Cheese Model of safety, which this thesis subscribes to. A myopic focus on safeguards has facilitated the premature and unduly defeatist conclusion that AD and patient safety are mutually exclusive. This thesis seeks to rebut opposition by identifying potential risks to patient safety throughout the AD process and advancing proposals to protect safety under four themes: communication, symptom management, data monitoring, and safety cultures. This dissertation explicitly endorses an overarching focus on patient recovery, achieved via a multidisciplinary approach to symptom management prior to AD authorization. Thoroughly investigating patient motivations behind AD requests is more conducive to patient safety than perfunctory 'safeguards' which restrict eligibility to terminally ill patients with a six-month life expectancy or exclude disabled or mentally ill individuals. Thus, to ensure that AD remains an absolute last resort, several proposals are advanced, including a specific AD statute, a specialist national monitoring committee with regional subdivisions, and ongoing medical AD education.

[1] LLB Law and LLM in Health Law at University of Bristol. Future Pupil Barrister at Guildhall Chambers.

1. Introduction

The legalisation of assisted dying (AD) continues to attract a prodigious amount of political, academic, and public attention. However, despite its "obvious importance", safety has been relatively excluded from this debate.[2] The British Medical Journal of Quality and Safety currently offers no relevant results on the subject. The AD debate can arguably be reduced to one bone of contention: "slippery slope" concerns. Opponents dismiss proposed safeguards as ineffective, unable to prevent the pressurisation and premature deaths of vulnerable populations via AD, particularly disabled, dying, and mentally ill persons. Although a valid inquiry, safeguards preventing slippery slopes represent a mere fraction of safety. Patient safety is concerned with the avoidance of harm, threatened by unsafe communication, poor symptom management, workforce secrecy, and suboptimal data monitoring, which proposed safeguards largely overlook. The exclusion of safety from the debate has enabled opponents to assume that AD inherently threatens patient safety. This article seeks to rebut this unduly defeatist conclusion. As the debate has reached an impasse, ideally, examining AD from a safety lens will reignite interest in the arena and pacify opponents. Although the legalisation of AD appears doubtful for the foreseeable future, particularly given political focus on the ongoing COVID-19 pandemic, a safety analysis of AD remains long overdue.

Somewhat controversially, this article does not encourage restricting AD eligibility to individuals with a terminal illness or a six-month life expectancy. Although these conditions have been included in every Bill proposed in UK Parliament, hailed as "the best protection against [AD] misuse,"[3] such conditions are unethical and injurious to patient safety. Instead, this article argues eligibility should be restricted to adults with mental capacity enduring irremediable and unbearable suffering. Whereas Australian legislation arbitrarily prohibits AD on disability or mental health grounds alone,[4] this article advances a framework which enables physicians to thoroughly explore AD motivations, rather than disregarding the suffering of vulnerable individuals. To ensure AD remains a last resort, this piece champions the relief of suffering through multifaceted and patient-centred treatments, allowing peaceful deaths only in exceptional cases where suffering remains irremediable and intolerable. This article does not dispute the possibility of slippery slopes arising under this configuration, and is thus informed by research in palliative, disabled, and mental health disciplines. These vulnerable populations are already "doubly disadvantaged" by both existing medical prejudice and typically a physical inability to commit suicide.[5] Unfairly and unsafely, the current prohibition on AD effectively punishes the neediest in our society for failing to transform water into wine.[6]

This article comprises seven chapters. Chapter two provides a background to AD. Chapter three explores and defines patient safety. Marrying these topics, chapter four argues AD is justified on both ethical and safety grounds by analysing AD through the lens of Beauchamp and Childress' four seminal bioethical principles. The fifth chapter explores patient safety risks in the context of AD under four themes: communication, symptom management, monitoring, and safety culture. Discussion is necessarily limited to the most impactful factors on patient safety. The relationship between, for example, safety and bereavement support in the context of AD, cannot meaningfully be addressed.[7] Chapter six advances a series of proposals to protect patient safety in AD under four themes: statute, education, monitoring, and safety culture. Chapter seven concludes the article.

---

[2] Oliver Quick, *Regulating Patient Safety: The End of Professional Dominance?* (CUP, 2017) 29

[3] David Orentlicher, 'International Perspectives on Physician Assistance in Dying' (2016) Hastings Center Report 6

[4] Voluntary Assisted Dying Act 2017 (Victoria, Australia) s9(2), (3)

[5] Christopher A Riddle, 'Assisted Dying and Disability' (2017) 13 Bioethics 487

[6] *Re B (Adult: Refusal of Treatment)* [2002] EWHC 429 (Fam) [94] (Dame Butler-Sloss); David Wasserman, 'Physical Disability, Dignity, and Physician-Assisted Death' in Sebastian Muders (ed), Human Dignity and Assisted Death (2017, OUP) 101; Sarah-May Blaschke et al, 'Common dedication to facilitating good dying experiences: Qualitative study of end-of-life care professionals' attitudes towards voluntary assisted dying' (2019) 33(6) Palliative Medicine 566

[7] On this, see Nikkie B Swarte et al, 'Effects of euthanasia on the bereaved family and friends: a cross sectional study' (2003) 327 British Medical Journal 189; Birgit Wagner, Julia Müller, and Andreas Maercker, 'Death by request in Switzerland: Post-traumatic stress disorder and complicated grief after witnessing assisted suicide' (2012) 27(7) Eur Psychiatry 542

Unfortunately given the breadth of the subject, this article cannot meaningfully address the funding of AD. However, in justifying the legalisation of AD on ethical and safety grounds, this article lays the foundation for and validates future research on financing. As this paper makes clear in its discussion of symptom management, AD cannot be safely legalised unless the standard of palliative, disability, and mental health care is excellent (and necessarily adequately funded).[8] Additionally, this piece will not consider AD for individuals without mental capacity. Unavoidably, individuals suffering as much as, if not more than patients with capacity, are thereby excluded.[9] Pell and Harding argue this undermines the point of legalising AD,[10] but this overlooks the significant number of individuals with capacity who could benefit from reform.[11] Capacity provides an important safeguard in ensuring AD is autonomous and informed,[12] and, unlike safety, has already attracted significant academic attention.[13] Similarly, legalising euthanasia, which is "fundamentally different" from AD, is not considered here.[14] AD has received significantly greater support; addressing AD first is logical.[15] Only AD legalisation in England and Wales is considered. Whilst UK-wide legalisation would provide valuable consistency, regional legal differences are beyond the scope of this article.

2. AD Background

This chapter provides an overview of AD in both England and Wales and globally. The first section defines AD and analyses the legal and political developments in England and Wales, whereas the second section examines international approaches to legalisation.

2.1 Assisted Dying in England and Wales

Although definitions vary worldwide, assisted dying generally involves a registered medical practitioner prescribing life ending drugs for a mentally competent patient.[16] In England and Wales a mentally competent patient is one able to make a decision without "impairment or disturbance in the functioning of the mind or brain."[17] The individual must "understand the information relevant to the decision, retain the information, weigh up the information" and "communicate their decision."[18] Conversely to euthanasia, drugs are self-administered: "the final act" is always achieved by the patient.[19] AD is legal in Switzerland, the Netherlands, Luxembourg, Colombia, Belgium, Canada, Western Australia, Victoria (Australia), and nine US states. [20] Nor is it explicitly prohibited in

---

8 Select Committee on the Assisted Dying for the Terminally Ill Bill HL, Evidence by Dr Jane Campbell (Disability Rights Commission, 2005) [21], [25], [29]; Jonathan Herring, 'Escaping the Shackles of Law at the End of Life: R (Nicklinson) v Ministry of Justice' (2013) 21 Medical Law Review 487. Infra Chapter 5.

9 Jukka Varelius, 'On the Moral Acceptability of Physician-Assisted Dying for Non-Autonomous Psychiatric Patients' (2015) 30 Bioethics 227

10 Elizabeth Pell and Rosie Harding, 'A right to 'dying well' with dementia? Capacity, choice and relationality' (2015) 25 Feminism & Psychology 139

11 Campaign for Dignity in Dying, 'The Inescapable Truth: How 17 people a day will suffer as they die' (September 2019) passim

12 Supra (n2) David Orentlicher 6

13 Supra (n9) Elizabeth Pell and Rosie Harding 137; Eva Elizabeth Bolt et al, 'Can physicians conceive of performing euthanasia in case of psychiatric disease, dementia or being tired of living?' (2015) 41 JME 592; Kenneth Chambaere et al, 'End-of-life decisions in individuals dying with dementia in Belgium' (2015) 63 Journal of the American Geriatrics Society 290; David Gibbes Miller, Rebecca Dresser, and Scott YH Kim, 'Advance euthanasia directives: a controversial case and its ethical implications' (2019) 45 Journal of Medical Ethics 84

14 Andrew Saunders, 'The CPS, policy-making and assisted dying: towards a 'freedom' approach' (2017) Journal of Criminal Law 5

15 Ibid.

16 Owen Dyer, Caroline White and Aser Garcia Rada, 'Assisted dying: law and practice around the world' (2015) 351 The BMJ 4481

17 Mental Capacity Act 2005 s2(1)

18 Mental Capacity Act 2005 s3(1)

19 Assisted Dying Bill 2016-17 [HL] s4(4)c

20 Swiss Criminal Code 1937 Article 115; Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2001; Government Bill (House of Commons) C-14 (42-1); California End of Life Option Act 2016; End of Life Options Act of 2016; Death with Dignity Act of 2018; Oregon Death with Dignity Act, 1994; Washington Death with Dignity Act of 2008; District of Columbia Death with Dignity Act of 2016; New Jersey Dignity In Dying Bill Of Rights Act of 2019; Maine Death with Dignity Act of 2019; Patient Choice and Control at End of Life Act of 2013; Law of 16 March 2009 on euthanasia and assisted suicide; Voluntary Assisted Dying Bill 2019; Voluntary Assisted Dying Act 2017

Germany or Montana (USA).[21] However, a right to assisted suicide has never existed in England or Wales.[22] Encouraging or assisting suicide in England and Wales is punishable by a maximum 14-year custodial sentence.[23] Whilst suicide itself is not a crime, there is no *stricto sensu* right to commit suicide in our jurisdiction, nor to assistance in doing so.[24]

There are valid reasons for criminalising the encouragement and assistance of suicide. The manipulation of vulnerable persons by malicious individuals can prove devastating.[25] In *Howe,* the defendant intentionally supplied a friend with petrol fluid and a lighter by which to commit suicide (the harms of which are obvious).[26] *McGranaghan*, in a uniquely "appalling" act,[27] repeatedly urged a fellow inmate to commit suicide, constructed a noose for him, and aided his final climb.[28] *Gordon* failed to honour the online suicide pact she made with a stranger, neglecting to alert family members or police of her co-conspirator's intentions.[29] Assisting or encouraging a suicide beyond the parameters proposed in this article should remain criminal.

Legalisation in England and Wales has been attempted via the Courts and Parliament for over 50 years. The following sub-sections explain why the Judiciary have rejected law reform for constitutional reasons, and why Parliament remain opposed to legalisation.

2.1.1 Legal Developments

AD has "now received significant judicial attention" from the English Courts.[30] Seven cases directly appealing for legalisation have been heard.[31] Of these, four claimants suffered from terminal illnesses.[32] Three applicants suffered from serious degenerative conditions.[33] Judges have expressed heartfelt sympathy for claimants,[34] particularly individuals enduring indefinite suffering, irrespective of whether their conditions are terminal.[35]

The Courts have rejected appeals to legalise AD for two key reasons. Firstly, legalising AD through litigation would be unconstitutional.[36] The unelected Judiciary understandably defer to Parliament, who "represent the community at large."[37] Additionally, litigation pertains to very specific factual matrices; Judges lack the wider information

---

21 Baxter v. Montana MT DA 09-0051, 2009 MT 449
22 Suicide Act 1961 s2(1); British Medical Association, 'Responding to patient requests relating to assisted suicide: guidance for doctors in England, Wales and Northern Ireland' (June 2019) 3
23 Suicide Act 1961, s2(1)
24 *R (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38 [159] (Lord Mance); [216], [255.1] (Lord Sumption); *R (on the application of Pretty) v DPP* [2001] UKHL 61 [35] (Lord Bingham)
25 Director of Public Prosecutions, *Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide* (Crown Prosecution Service, 2010) 43 (Public interest factors tending in favour of prosecution). See also: Sean Sweeney, 'Deadly Speech: Encouraging Suicide and Problematic Prosecutions' (2017) 67(3) Case Western Reserve Law Review 941; Supra (n13) Andrew Saunders 14
26 *R v Howe (Kevin James)* [2014] EWCA Crim 114 [32], [33] (Treacy LJ)
27 *R v McGranaghan (Terence)* [1987] 11 WLUK 17 [3] (Croom-Johnson LJ)
28 Ibid [2] (Croom-Johnson LJ)
29 *R v Gordon* [2018] EWCA Crim 1803 [2] (Treacy LJ)
30 *The Queen on the application of Philippe George Newby v The Secretary of State for Justice* [2019] EWHC 3118 (Admin) [9] (Irwin LJ and May J)
31 Supra (n23) *Pretty 2001*; *R (on the application of Purdy) v DPP* [2009] UKHL 45; Supra (n23) *Nicklinson 2014*; R (on the application of Kenward) v DPP [2015] EWHC 3508 (Admin); *R (T) v Secretary of State for Justice* [2018] EWHC 2615 (Admin); *R (on the application of Conway) v Secretary of State for Justice* [2018] EWCA Civ 1431, Ibid *Newby 2019*
32 Supra (n23) *Pretty*; Supra (n30) *Conway*; Supra (n30) *T*; Supra (n29) *Newby*
33 Supra (n30) *Purdy*; Supra (n23) *Nicklinson*; Supra (n30) *Kenward*
34 Supra (n23) *Pretty* [1] (Lord Bingham), [70], [71] (Lord Steyn), [108] (Lord Hope), [124] (Lord Scott); Supra (n30) *Purdy* [32] (Lord Hope), [89] (Lord Neuberger); Supra (n23) *Nicklinson* [1], [14], [123] (Lord Neuberger), [171] (Lord Mance), [256] (Lord Sumption), [313], [317] (Lady Hale), [358] (Lord Kerr); Supra (n30) *Kenward* [11], [20] (Longmore LJ); *R (on the application of Conway) v Secretary of State for Justice* [2017] EWHC 2447 Admin [5], [21], [31-32] [117] (Sales LJ); Supra (n30) *Conway* [3] (Sir Terence Etherton MR, Sir Brian Leveson P, and King LJ); Supra (n29) *T* [1-2] (Irwin LJ); Supra (n29) *Newby* [5-7], [25] (Irwin LJ and May J)
35 Supra (n30) *Purdy* [32] (Lord Hope), [68] (Baroness Hale as she then was), [71] (Lord Brown); Supra (n23) *Nicklinson* [4], [16], [14], [122] (Lord Neuberger), [186] (Lord Mance), [258] (Lord Hughes)
36 Supra (n23) *Pretty* [57] (Lord Steyn); Supra (n23) *Nicklinson* [300] (Lady Hale), [363] (Lord Kerr); Supra (n30) *Conway* [186], [188] (Sir Terence Etherton MR, Sir Brian Leveson P and King LJ); Supra (n29) *Newby* [40], [50] (Irwin LJ and May J)
37 Supra (n23) *Nicklinson* [230] (Lord Sumption)

available in Parliamentary debates.[38] Whilst the dissenting judgments in *Nicklinson* demonstrate a judicial readiness to proclaim the prohibition on AD incompatible with the Human Rights Act (HRA),[39] the majority of the Supreme Court appear extremely unwilling to encroach on Parliamentary territory.[40] However, in their disinclination, the majority arguably misinterpret and overstate the effect of a declaration of incompatibility.[41] Furthermore, Judges frequently question the appropriacy of an unelected Judiciary imposing moral views on society by legalising AD.[42] However, this reasoning does not hold water: the existing ban on AD forces a blanket objection on everyone, whereas legalisation would provide people with a choice.[43]

The second reason why the Courts have not legalised AD is due to fears of a "slippery slope" developing: "the main justification advanced for an absolute prohibition on assisting suicide."[44] A slippery slope begins with a seemingly innocuous matter (such as the legalisation of AD).[45] This catalyses a negative domino effect, for example, the legalisation of euthanasia or the expansion of AD eligibility criteria.[46] The central fear is that AD will pressure vulnerable people into taking fatal drugs as a cheaper, faster, and easier alternative to remedying suffering.[47] Rationalising the elimination of the "inconvenient" could well develop from virtuous intentions.[48] The especially vulnerable are the disabled, dying, and mentally ill.[49] A disability is a physical or mental condition which has a "substantial and long-term impact on one's ability to do normal day to day activities."[50] Thus, 'disability' encompasses a spectrum of conditions, from tetraplegia to blindness.[51] Palliative care aims to relieve the symptoms of an incurable disease or disorder.[52] Although definitions of mental health vary, a mental health disorder is generally defined as a condition which impacts mood, thinking, cognition and/or behaviour, such as depression.[53] A mental illness will not necessarily disturb mental capacity.[54]

---

38 Supra (n23) *Nicklinson* [175], [177], [187] (Lord Mance), [232] (Lord Sumption); Supra (n29) *Conway* [189] (Sir Terence Etherton MR, Sir Brian Leveson P and King LJ); Supra (n30) *T* [16] (Irwin LJ)

39 Supra (n23) *Nicklinson* [324] (Lady Hale), [366] (Lord Kerr)

40 Supra (n23) *Nicklinson* [230-232] (Lord Sumption)

41 Supra (n23) *Nicklinson* [300] (Lady Hale), [326] (Lord Kerr); Elizabeth Wicks, 'The Supreme Court Judgment in Nicklinson: One Step Forward on Assisted Dying: Two Steps Back on Human Rights' (2015) 23 Medical Law Review 144; Steve Martin, 'Declaratory misgivings: assisted suicide in a post-Nicklinson context' (2018) Public Law 209; Clark Hobson, 'Is it now institutionally appropriate for the Courts to consider whether the Assisted Dying Ban is Human Rights Compatible? Conway v Secretary of State for Justice' (2018) 26 Medical Law Review 514

42 Supra (n23) *Pretty* [2] (Lord Bingham), [85] (Lord Hope); Supra (n23) *Nicklinson* [104], [116] (Lord Neuberger), [191] (Lord Mance), [207], [230] (Lord Sumption), [293] (Lord Clarke), [296] (Lord Reed), [311], [325] (Lady Hale), [344] (Lord Kerr; Supra (n30) *Conway* [135], [181], [186], [189] (Sir Terence Etherton MR, Sir Brian Leveson P and King LJ); Supra (n29) Newby [38] (Irwin LJ and May J)

43 Emily Jackson and John Keown, *Debating Euthanasia* (Hart Publishing, 2011) 81

44 Supra (n23) *Pretty* [54] (Lord Steyn); Supra (n23) *Nicklinson* [91] (Lord Neuberger), [171], [185] (Lord Mance) [201], [228] (Lord Wilson); Supra (n29) *Newby* [42] (Sir Terence Etherton MR, Sir Brian Leveson P, and King LJ); Supra (n23) *Nicklinson* [171] (Lord Mance); Stephen W Smith, *End-of-Life Decisions in Medical Care: Principles and policies for Regulating the Dying Process* (CUP, 2012) 261

45 Tom L Beauchamp and James F Childress, *Principles of Biomedical Ethics* (OUP, 2009) 178

46 Yale Kamisar, 'Physician assisted suicide: the last bridge to voluntary euthanasia' in John Keown, Euthanasia Examined: ethical, clinical and legal perspectives (CUP, 1995) 230; Dieter Giesen, 'Dilemmas at Life's End: A Comparative Legal Perspective' in John Keown (ed), *Euthanasia Examined* (CUP, 1995) 200; John Keown, 'Euthanasia in The Netherlands: Sliding Down the Slippery Slope' (2012) 9.2 Notre dam Journal of Law, Ethics and Public Policy 407; HC Deb 4 July 2019, vol 662, col 1439 (Lyn Brown MP)

47 Marie T Hilliard, 'Utilitarianism Impacting Care of Those with Disabilities and Those at Life's End – Baltimore Symposium' (2011) 78(1) The Linacre Quarterly 62

48 Paul Longmore, 'Elizabeth Bouvia, Assisted Suicide, and Social Prejudice' in *Why I Burned My Book and Other Essays on Disability* (Philadelphia: Temple University Press, 2003) 153

49 Ilora G Finlay and Roger George, 'Legal physician-assisted suicide in Oregon and the Netherlands: evidence concerning the impact on patients in vulnerable groups— another perspective on Oregon's data' (2011) 37 Journal of Medical Ethics 171

50 Equality Act 2010 s6(1)

51 David Richard Walega, 'Determination of Disability' in Honorio T Benzon et al (eds), *Essentials of Pain Medicine*, (Elsevier, 2018) 99

52 Andrew Dickman, *Drugs in Palliative Care* (OUP, 2010) v; Christina Faull and Kerry Blankley, *Palliative Care* (OUP, 2015) 3

53 Laurie A Manwell et al, 'What is mental health? Evidence towards a new definition from a mixed methods multidisciplinary international survey' (2015) BMJ Open e007079

54 Mental Capacity Act 2005 s2(3)(b); Herman Nys, 'A Discussion of the Legal Rules on Euthanasia in Belgium Briefly Compared with the Rules in Luxembourg and the Netherlands' in David Albert Jones, Chris Gastmans and Calum MacKellar, *Euthanasia and Assisted Suicide: Lessons from Belgium* (CUP, 2017) passim

Evidence does not explicitly suggest that slippery slopes have developed following AD legalisation.[55] However, this evidence is not conclusive.[56] The Netherlands have expanded eligibility criteria to include psychiatric and dementia patients, Belgium has legalised euthanasia for children since legalising AD, and more individuals than ever receive assistance in dying every year.[57] Dutch AD approval rates are up to three times higher than approval rates in Oregon.[58] In Oregon, applicants have increasingly cited "being a burden" on family and friends and "financial implications" for requesting AD.[59] Judges are wise to be fearful of slippery slopes. However, whilst assisted deaths are increasing globally, without further analysis, this evidence is not indicative of the emergence of a slippery slope .[60] Given the elderly nature of most recipients, the global prevalence of ageing populations, and the compression of morbidity, it may simply be the case that more people have been suffering each year.[61]

The European Court of Human Rights (ECtHR) has heard five cases directly challenging the illegality of AD.[62] A person's right to determine how they die arguably falls under Article 8 of the HRA, the right to private and family life.[63] The ECtHR have openly authorized blanket prohibitions on AD, given states' wide margin of appreciation on what is a qualified right.[64] A right to life does not encompass a right to die or a right to assistance in dying.[65] Thus, law reform via litigation appears unlikely.[66]

2.1.2 Political Developments

Parliament has debated and rejected AD Bills on "numerous occasions."[67] All Bills have required applicants to have capacity and be terminally ill.[68] All but Lord Joffe's 2003 Bill (met with fierce criticism and later amended accordingly) have required recipients to have an approximate six-month life expectancy.[69] Notwithstanding significant sustained public support for AD, Parliamentary aversion is unsurprising.[70] MPs rely on popularity to sustain their tenure; to preserve the existing prohibition is less disruptive than to resolve slippery slope anxieties.[71] Although political progress towards legalising AD at first blush appears slim, "cultural redefinition" is a tumultuous

---

55 Dan W Brock, 'Voluntary active euthanasia' (1992) Hastings Centre Report 10; Danny Scoccia, 'The Disability case against assisted dying' in Adam Cureton, David Wasserman (eds), *The Oxford Handbook of Philosophy and Disability* (OUP, 2018) 287

56 Supra (n43) Stephen W Smith 282, 287; Supra (n23) *Nicklinson* [88] (Lord Neuberger)

57 José Pereira, 'Legalizing euthanasia or assisted suicide: the illusion of safeguards and controls' (2011) 18(2) Current Oncology e38; Supra (n45) John Keown 407; Sigrid Dierickx et al, 'Comparison of the expression and granting of requests for euthanasia in Belgium in 2007 vs 2013' (2015) 175(10) JAMA Internal Medicine 1703; Robert Preston, 'Death on demand? An analysis of physician administered euthanasia in The Netherlands' (2018) 125 BMB 148

58 Guenther Lewy, *Assisted death in Europe and America* (OUP, 2011) 137; Alliance Vita, *Euthanasia in the Netherlands* (2017)

59 Public Health Division Center for Health Statistics, *Oregon Death with Dignity Act: Data Summary* (2020) 12

60 Gian Domenico Borasio, Ralf J Jox, and Claudia Gamondi, 'Regulation of assisted suicide limits the number of deaths' (2019) 393 The Lancet 983

61 Passim Bram Wouterse et al, 'The effect of trends in health and longevity on health services use by older adults' (2015) 15 BMC Health Services Research

62 Pretty v United Kingdom (2346/02) [2002] ECHR 606; Haas v Switzerland (31322/07) [2011] ECHR 2422; Koch v Germany (497/09) [2012] ECHR 162; Gross v Switzerland (67810/10) [2013] ECHR 429; Nicklinson and Lamb v The United Kingdom (inadmissibility decision 2478/15 and 1787/15) [2015] ECHR 245

63 Supra (n29) *Newby* [12] (Lord Justice Irwin and Mrs Justice May DBE)

64 Supra (n61)

65 Supra (n61) *Pretty* [7] (Mr Ellonpää, Sir Ratza, Mrs Alm, Mr Akarczyk, Mr Ischbach, Mr Asadevall, and Mr Avlovschi)

66 Charles Foster, 'Suicide tourism may change attitudes to assisted suicide, but not through the courts' (2015) 41 J Med Eth 8

67 Supra (n30) *Conway* [52] (Sales LJ)

68 Assisted Dying for the Terminally Ill Bill [HL] 2004 (Lord Joffe) s2(2)(b), s2(2)(c); Assisted Dying Bill [HL] (Lord Falconer) 2014-15 s2, s3(3)(b); Assisted Dying (No.2) Bill (Robert Marris) [HC] 2015-16 s2, s2(c)(ii); Assisted Dying Bill [2016-17] s2, s2(c)(ii); Assisted Dying Bill [HL] 2019-21 s2, s2(c)(ii)

69 Assisted Dying Bill [HL] (Lord Falconer) 2014-15 s2(1)(b); Assisted Dying (No.2) Bill (Robert Marris) [HC] 2015-16 s2(1)(b); Assisted Dying Bill [2016-17] s2(1)(b); Assisted Dying Bill [HL] 2019-21 s2(1)(b)

70 Maggie Hendry et al, 'Why do we want the right to die? A systematic review of the international literature on the views of patients, carers and the public on assisted dying' (2013) 27 Palliat Med 23; Populus, 'Largest ever poll on assisted dying conducted by Populus finds increase in support to 84% of the public' <https://www.populus.co.uk/insights/2019/04/largest-ever-poll-on-assisted-dying-conducted-by-populus-finds-increase-in-support-to-84-of-the-public/> accessed 18 August 2020; British Social Attitudes, *Moral Issues: Sex, Gender identity and Euthanasia* (NatCen Social Research, 2017) 26-27

71 Supra (n45) HC Deb col 1433 (Steve McCabe MP)

and protracted process, as evidenced by numerous initial rejections to the legalisation of AD in Australia.[72] Continued Parliamentary debate demonstrates AD is worth considering.

2.2 International Approaches

Globally, AD eligibility criteria and legal frameworks vary significantly.[73] An expansive 'European' eligibility approach is adopted by the Benelux countries.[74] In the Netherlands, a medical diagnosis of "hopeless and unbearable suffering" is required, however, AD is permissible in cases of "anticipated suffering."[75] Suffering must be deemed lasting and unbearable by at least one independent physician.[76] The decision must be voluntary and there must be no other reasonable solution to cure the person's suffering.[77] In Switzerland, assisting a suicide is only a crime if the facilitator assists with a "selfish motive."[78] Only limited guidance is available on what constitutes a "selfish motive[s]."[79] Prosecutions are generally confined to cases where the capacity of a patient is doubted.[80] However, given the lack of a central Swiss database on AD, how capacity is established in many cases remains unclear.[81] In theory, anyone with altruistic motivations (notwithstanding a lack of medical expertise) may assist a person of any age.[82] This undermines the effectiveness, transparency, regulation of, and equal access to AD.[83] Outside of Switzerland, AD is overwhelmingly confined to physicians.[84]

US states generally adopt a stricter approach.[85] Modelled on the Oregon legislation, all US legislation requires individuals to be over 18, have capacity, suffer from a terminal illness, and have six months or less to live.[86] Victoria, Australia, and proposed legislation in New Zealand similarly requires recipients to be over 18, mentally competent, diagnosed with a terminal illness, experiencing unbearable suffering, and expected to die within six months.[87] Canada has adopted a "hybrid" arrangement between the restrictive American approach and the expansive European model.[88] Patients need not expect to die within six months, but must suffer from a serious and incurable illness or disability from which their natural death has become reasonably foreseeable.[89] David Orentlicher theorizes that stricter AD eligibility criteria suggests decreased public trust in government.[90] Although superficially logical, this correlation is shallow; strict eligibility criteria are unsurprising given AD's contentious nature. Ultimately, different regimes appear to suit different countries.[91]

---

72 Margaret P Battin, *Ending Life: Ethics and the Way We Die* (OUP, 2005) 16; Lindy Willmott et al, '(Failed) voluntary euthanasia law reform in Australia: Two decades of trends, models, and politics' (2016) 39(1) University of New South Wales Law Journal 1

73 Supra (n30) *Conway* [184] (Sir Terence Etherton MR, Sir Brian Leveson P and King LJ)

74 Samantha Halliday, 'Comparative reflections upon the Assisted Dying Bill 2013: a plea for a more European approach' (2013) 13 Medical Law International 135; Supra (n4) Christopher A Riddle 489

75 Supra (n46) Marie T Hilliard 62

76 Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2001 (Netherlands) Article 2(1)(b), Article 2(1)(e)

77 Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2001 (Netherlands) Article 2(1)(a) and (d)

78 Swiss Criminal Code 1937 Article 115

79 Swiss Academy of Medical Sciences, *End-of-life care* (Swiss Academy, 2004) 9 [4.1]

80 Samia Hurst and Alex Mauron, 'Assisted suicide and euthanasia in Switzerland: allowing a role for non-physicians' (2003) 326 BMJ 271

81 Christine Bartsch et al, 'Assisted Suicide in Switzerland: An Analysis of Death Records from Swiss Institutes of Forensic Medicine' (2019) 116 Dtsch Arztebl Int 545, 555

82 Supra (n79) Samia Hurst and Alex Mauron 271

83 Roberto Andorno, 'Nonphysician-Assisted Suicide in Switzerland' (2013) 22 Cambridge Quarterly of Healthcare Ethics 250

84 Ibid 252.

85 Supra (n2) David Orentlicher 6

86 Oregon Death with Dignity Act, 1994 s1(1), s1(2), s1(3), s1(4), s1(6), s1(7), s1(12) and s1 of: Washington Death with Dignity Act 2008; (Vermont) Patient Choice and Control at End of Life Act of 2013; California End of Life Option Act 2016; District of Columbia Death with Dignity Act of 2016; Colorado End of Life Options Act 2016 (USA); Medical Aid-In-Dying Law 2018 (Hawaii); New Jersey Dignity In Dying Bill Of Rights Act of 2019; Maine Death with Dignity Act of 2019;

87 Voluntary Assisted Dying Act 2017 (Victoria, Australia) s4(1), s4(4), s5, s6; End of Life Choice Act 2019 (New Zealand) s2A, s3, s4, s4A

88 Supra (n2) David Orentlicher 6

89 An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying) 2016 s227, s241.1, s241.2

90 Supra (n2) David Orentlicher 7

91 Supra (n13) Andrew Saunders 10

3. Patient Safety

This section defines patient safety. It adopts a systems approach to safety and considers synergies between safety and quality.

3.1 Safety

Broadly, patient safety is "the avoidance, prevention and amelioration of adverse outcomes or injuries stemming from the process of healthcare."[92] Simply put, safe healthcare is that which does not cause harm.[93] Safe healthcare is not simply the avoidance of errors, since many errors never result in harm.[94] The harm to be avoided depends on context; neurosurgery risks inevitably differ from mental health evaluation risks. Harm can be caused by various acts and omissions, including negligence, recklessness, errors, accidents, and wilful acts.[95] Both unintended actions and intended actions can cause harm.[96] The former concerns lapses in concentration for example, whereas the latter denotes knowledge-based mistakes or violations (such as deliberate patient harassment), which may be considered "culpable" or "non-culpable."[97]

3.1.1 Systems vs Bad Apples

As revealed by NHS Inquiries, safety failures very rarely materialise randomly.[98] Even if the immediate cause of harm appears isolated, such as fatal drug administration,[99] harm often materialises in complicated ways.[100] Upstream flaws, such as drug disorganisation, prescription errors, an absence of allergy notes, and failures to challenge administering physicians, can all facilitate a patient receiving the wrong drug.[101] According to James Reason's "Swiss Cheese Model", accident trajectories materialise progressively to produce subsequent harm.[102] This occurs when a combination of active failures, latent conditions, and inadequate defences collectively coincide to breach safety barriers within systems and create limited windows of "accident opportunity."[103]

Reason's model aligns with a systems view of safety, which notes the "multiplicity of elements interacting to impact [healthcare] in…a holistic way."[104] Safety is a delicate house of cards, potentially disrupted by even the slightest

---

92 Charles Vincent, *Patient Safety* (John Wiley & Sons, 2010) 31,32

93 Nils Hoppe, 'Medical ethics and patient safety' in John Tingle and Pippa Bark, *Patient Safety, Law Policy and Practice* (Taylor & Francis Group, 2011) 54

94 Supra (n91) Charles Vincent 33

95 Donald M Berwick, *A promise to learn – a commitment to act: Improving the Safety of Patients in England* (National Advisory Group on the Safety of Patients in England, August 2013) 12

96 James Reason, *Human Error* (CUP, 1990) 207; Supra (n92) Nils Hoppe 55

97 Ibid (James Reason)

98 Ian Kennedy, *The Report of the Public Inquiry into children's heart surgery at the Bristol Royal Infirmary 1984-1995: Learning from Bristol* (Secretary of State for Health, 2001) 8 [37 – 39], 9 [41], [43], 10 [51], 16 [82]; Kieran Walshe and Nigel Offen, 'A very public failure: lessons for quality improvement in healthcare organisations from the Bristol Royal Infirmary' (2001) 10 Quality in Healthcare 250; Margaret Flynn, *Winterbourne View Hospital: A Serious Case Review* (South Gloucestershire Safeguarding Adults Board, 2012) iv -v; Robert Francis QC, *The Mid Staffordshire NHS Foundation Trust Public Inquiry Volume 1: Analysis of evidence and lessons learned (part 1)* (HC 898-I, 2013) 17 [19], 19 [23], [24], 24 [40]; Angie Ash, *Whistleblowing and ethics in health and social care* (Jessica Kingsley Publishers, 2016) 108

99 Brian Toft, *External Inquiry into the adverse incident that occurred at Queen's Medical Centre* (Department of Health, January 2001) 29

100 Supra (n91) Charles Vincent 146, 147; Bawa-Garba v General Medical Council [2018] EWCA Civ 1879 [75], [77], [87] (Lord Burnett LCJ, Sir Terence Etherton MR, and Rafferty LJ)

101 Edward Etchells, Catherine O'Neill, and Mark Bernstein, 'Patient Safety in Surgery: Error Detection and Prevention' (2003) 27 World Journal of Surgery 937; Supra (n92) Nils Hoppe 61

102 James Reason, *The Human Contribution: Unsafe Acts, Accidents and Heroic Recoveries* (Routledge, 2008) 94. See also: Justin Larouzeea and Jean-Christophe Le Coze, 'Good and bad reasons: The Swiss cheese model and its critics' (2020) 126 Safety Science 104663

103 Ibid

104 Alexander Komashie et al, 'Systems approach to health service design, delivery and improvement: a systematic review and meta-analysis' (2021) 11 BMJ Open e037667

shift in a wholly disparate department.[105] A systems approach does not consider harm to be eliminable. Unavoidably, physicians can be fatigued, computers can malfunction, and patients can react unpredictably.[106] Instead, a systems view aspires to the highest levels of safety and perceives safety as an ongoing, multidimensional process.[107]

The alternative to a systems approach to safety is a "bad apples" view, which seeks to minimise harm to patients by weeding out malicious characters (for example, Harold Shipman), who intentionally endanger patients.[108] Because "bad apples" are so rare in the NHS, this methodology is flawed: overwhelming evidence suggests that most NHS staff are well-intentioned.[109] An accusatory preoccupation with purging "bad apples" may prove counterproductive to safety by discouraging transparency around errors and furthering a culture of secrecy.[110] Physicians are already deterred from disclosing errors in our "increasingly litigious society",[111] arguably exacerbated by our "fault-based" liability system.[112] Conversely, a systems approach prevents "bad apples" by improving "bad barrels", which actively acknowledge, learn from, and improve after mistakes.[113]

3.2 Quality

A wide definition of safety invites comparisons with quality.[114] Healthcare quality is defined by the World Health Organization as "the extent to which health care services…improve desired health outcomes."[115] Accordingly, care must be "safe, effective, timely, efficient, equitable and people-centred."[116] This definition arguably underestimates safety. Safety is not a mere element of quality. Nor are safety and quality discrete concepts.[117] Effectiveness, timeliness, efficiency, equitableness, and people-centredness all have a directly causal impact on safety. Treatment in the first instance is provided due to medical need, but if treatment is unsafe, it undermines the point of treatment entirely.[118] Therefore, safety and quality are closely connected and interdependent, and since harm is arguably "what patients care most about", safety in particular warrants close analysis.[119]

4 Ethical and Safety Justification

This chapter justifies AD on ethical and safety grounds by analysing AD through the lens of Beauchamp and Childress' four principles of biomedical ethics: autonomy, beneficence/non-maleficence and justice.[120] Nils Hoppe

---

105 cf Hari Tsoukas and Miguel Pina e Cunha, 'On Organizational Circularity: Vicious and Virtuous Cycles in Organizing' in Wendy K Smith (et al), *The Oxford Handbook of Organizational Paradox* (OUP, 2017) 1; cf John Clarkson et al, 'A systems approach to healthcare: from thinking to practice' (2018) 5(3) Future Healthcare Journal 154

106 Supra (n91) Charles Vincent 32, 112

107 Tejal K Gandhi et al, 'Transforming concepts in patient safety: a progress report' (2018) 27 BMJ 1020

108 Supra (n91) Charles Vincent 16

109 Supra (n91) Charles Vincent 16; Supra (n94) *A promise to learn – a commitment to act* 4; Maja Wessel et al, 'Bad apples or bad barrels? Qualitative study of negative experiences of encounters in healthcare' (2014) 9(2-3) Clinical Ethics 85

110 Supra (n97) *Kennedy Report* 16 [86]; Supra (n94) *A promise to learn – a commitment to act* 4

111 Supra (n92) Nils Hoppe 55; Ross M Mullner, 'Patient Safety and Medication Errors' (2003) 27(6) Journal of Medical Systems 500; Nancy Berlinger and Albert W Wu, 'Subtracting Insult from Injury: Addressing Cultural Expectations in the Disclosure of Medical Error' (2005) 31 Journal of Medical Ethics 106; Kumaralingam Amirthalingam, 'Medical dispute resolution, patient safety, and the doctor-patient relationship' (2017) 58(12) Singapore Med J 681; Terrence F Ackerman and Carson Strong, *A Casebook of Medical Ethics* (OUP, 1989) 197; Mary Gottwald and Gail Lansdown, *Clinical Governance: Improving the Quality of Healthcare for Patients and Service Users* (McGraw-Hill Education, 2014) 122, 151; Robert Dingwall (ed) *Socio-legal aspects of medical practice* (RCP, 1989) 17

112 Supra (n1) Oliver Quick 89, 98. Infra, specifically chapter 6.4.

113 Cf Supra (n110) Maja Wessel et al 82, 83

114 Supra (n91) Charles Vincent 31; Munish Gupta, Roger Soll, and Gautham Suresh, 'The relationship between patient safety and quality improvement in neonatology' (2019) 43(8) 151173

115 World Health Organization, 'What is Quality of Care and why is it important?' (WHO) <https://www.who.int/maternal_child_adolescent/topics/quality-of-care/definition/en/> accessed 12 August 2020

116 Ibid

117 Supra (n91) Charles Vincent 40

118 Supra (n91) Charles Vincent 31; Supra (n92) Nils Hoppe 53

119 Supra (n91) Charles Vincent 40

120 Supra (n44) Tom L Beauchamp and James F Childress passim

explains that medical treatment which respects these principles often has a positive impact on patient safety.[121] Thus, in establishing the moral rationale for legalising AD, this chapter also explains how AD can constitute safe treatment, thereby justifying closer analysis of AD risks in chapter five.

4.1 Autonomy

The overarching rationale for the legalisation of AD is respect for patient autonomy.[122] Autonomy represents the very "nucleus" of medical law and decision-making in England and Wales.[123] It epitomizes patient "self-rule."[124] An autonomous patient is one who exercises their mental capacity to provide informed consent or refusal to treatment.[125] Informed consent is a two-fold objective and subjective test: firstly, the patient must be advised of the "material risks inherent in the treatment", a material risk being significant in the eyes of a "reasonably prudent patient."[126] From a subjective lens, the physician must also inform the patient of risks where the doctor is or should reasonably be aware that "the particular patient would be likely to attach significance to [the risk]."[127] The objective and subjective limbs minimise harm by enabling patients to make judgments based on their factual matrix.[128] Theoretically, their decisions should inform effective, patient-centred care which patients are engaged with and willing to commit to, thereby preventing the emergence of harm.[129]

Throughout life, English law respects patient autonomy, regardless of whether "rational, irrational, or no reasons at all" are provided for medical decisions they make for themselves.[130] Even for incapacitous persons, personal "wishes and feelings" must be respected as far as possible.[131] Autonomy is prioritised above the "sanctity of life" by patients who refuse life-sustaining treatments.[132] The "sanctity of life" denotes holding "an intrinsic value in human life, irrespective of whether it is valuable to the person concerned or…anyone else."[133] In an increasingly secular society, "sanctity of life" arguments in opposition to AD cut little ice.[134] Despite some reluctance in making decisions with fatal consequences,[135] the Judiciary are averse to forcing futures on individuals which they have "no appetite for."[136] Human desire for control over death is expressed in do not resuscitate orders,[137] advance

---

121 Supra (n92) Nils Hoppe 53
122 Ronald Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (Harper Collins, 1993) 210, 211; Supra (n58) *Oregon Report 2020* 6
123 Supra (n92) Nils Hoppe 56
124 Supra (n44) Tom L Beauchamp and James F Childress 99
125 *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 [108] (Lady Hale)
126 Ibid [87] (Lord Kerr and Lord Reed)
127 Ibid [87] (Lord Kerr and Lord Reed)
128 Ibid [75-77] (Lord Kerr and Lord Reed)
129 Kelly B Haskard Zolnierek and Robin DiMatteo, 'Physician communication and patient adherence to treatment: a meta-analysis' (2009) 47(8) Med Care 826, 834; Rafael Zambelli Pinto et al, 'Patient-centred communication is associated with positive therapeutic alliance: a systematical review' (2012) 58(2) J Pysiother 77
130 *Airedale NHS Trust v Bland* [1993] AC 789 [842B] [816F] (Sir Thomas Bingham MR). See also: Supra (n5) *Re B* [80], [94] (Dame Butler−Sloss); *Heart of England NHS Foundation Trust v JB* [2014] EWHC 342 (COP) [7], [42] (Jackson J); *Kings College Hospital NHS Foundation Trust v C*, V [2015] EWCOP 80 [8] [30] (MacDonald J)
131 Mental Capacity Act 2005 s1(4) s1(5), s1(6), s2(3)(a), s2(3)(b), s4, s4(6)(a), s(4)(6)(b); *Re T (Adult: Refusal of Treatment)* [1993] Fam 95 [652] (Lord Donaldson); Ibid (*Bland*) [9] (Sir Thomas Bingham); Gloucestershire Clinical Commissioning Group v AB [2014] EWCOP 49 [2] (Baker J); *Wye Valley NHS Trust v B* [2015] EWCOP 60 [43], [46] (Jackson J); *M v N* [2015] EWCOP 76 [74] (Hayden J); *PL v Sutton Clinical Commissioning Group* [2017] EWCOP 22 [15] (Cobb J); *Salford Royal NHS Foundation Trust v P* [2017] EWCOP 23 [37] (Hayden J)
132 Supra (n129) *Bland* [351F] (Hoffmann LJ)
133 Ibid [826C] (Hoffmann LJ)
134 Sheila McLean and Gerry Maher, *Medicine, Morals and the Law* (Dartmouth Publishing Co Ltd, 1983) 46; Margaret Brazier and Emma Cave, *Medicine, patients and the law* (MUP, 2016) 7. See also Jonathan Romain, 'Desmond Tutu's testimony proves that you can be 'religious' and support assisted dying' *The Independent* (London, 8 October 2016)
135 *A Local Authority v E* [2012] EWHC 1639 (Fam) [140] (Jackson J)
136 Supra (n130) *B* [45] (Jackson J). See also: Supra (n130) *PL* [83] (Cobb J)
137 Ian Olver and Jaklin Eliott, 'The perceptions of do-not-resuscitate policies of dying patients with cancer' (2008) 17 Pscyho-Oncology 349

directives,[138] soaring visits to DIGNITAS,[139] and growing public support for the legalisation of AD.[140] However, despite death's "special symbolic importance",[141] the autonomy so resolutely protected throughout life does not enable patients to control their deaths through AD.[142]

Conceptually, autonomy is a negative right: patients may technically refuse, but not demand treatments, such as AD.[143] Paradoxically, however, autonomy allows patients to demand fatal interventions, such as the withdrawal of life-support.[144] Notwithstanding the "physical intrusion" necessary to deactivate machines, these acts are legally deemed "omissions."[145] Technically, this 'omission' does not break the chain of causation: the disease remains the operating cause of death.[146] Relatedly, the doctrine of 'double-effect' allows physicians to legally provide patients with parenthetically life shortening drugs, provided they serve a pain-relieving effect: the doctor supposedly *foresees*, but does not intend the acceleration of death.[147] These distinctions are deeply artificial and illogical,[148] privileging those fortuitously reliant on life-sustaining treatment.[149] These actions, "functionally equivalent" to AD, are overwhelmingly "physician-led", unrecorded and unstudied, thus making corroborating patient autonomy and capacity very difficult.[150] Those without life-support to withdraw from have no alternative but to attempt suicide without expert assistance (often resulting in debilitating injuries)[151], or to enlist the criminal assistance of others.[152] Approximately a third of all suicides are committed by patients with a chronic physical illness.[153] Oftentimes, a "catch-22 situation" arises: an individual is not yet unbearably suffering, but the foreseeable degeneration of their

---

138 Harvey Max Chochinov, 'Dignity-Conserving Care-A New Model for Palliative Care: helping the patient feel valued' (2002) 287(17) JAMA 2256

139 Supra (n65) Charles Foster 8

140 Supra (n69) Populus 2019, British Social Attitudes 26-27

141 Supra (n121) Ronald Dworkin 210, 211; Roi Livne, *Values at the End of Life: The Logic of Palliative Care* (HUP, 2019) 80

142 Supra (n71) Margaret P Battin 11; Raymond Tallis, 'Assisted Dying: Why the RCP should be neutral' (*Royal College of Physicians*, 14 January 2019) < https://www.rcplondon.ac.uk/news/assisted-dying-why-rcp-should-be-neutral> accessed 26 June 2020

143 John Keown, *Euthanasia, Ethics and Public Policy: An Argument against Legalisation* (CUP, 2002) 54; Supra (n44) Tom L Beauchamp and James F Childress 190; Supra (n45) Dieter Giesen 201; Supra (n23) Pretty [100] (Lord Hope)

144 Supra (n129) *Bland* [866B-F] (Lord Goff); Supra (n23) *Nicklinson* [304] (Lady Hale)

145 Ibid (*Bland*) [866B-F] (Lord Goff)

146 Ibid

147 R v Adams [1957] Crim LR 365; R v Cox [1999] Crim LR 2000 [568-90] (Ognall J)

148 Supra (n129) *Bland* [885G] (Lord Browne-Wilkinson). See also: Glanville Williams, *Sanctity of Life and The Criminal Law* (Faber, 1957) 286; David Orentlicher, 'The alleged distinction between Euthanasia and the Withdrawal of Life-Sustaining Treatment: Conceptually Incoherent and Impossible to Maintain' (1998) University of Illinois Law Review 837; RG Frey, 'Distinctions in Death' in Gerald Dworkin, RG Frey and Sissela Bok, Euthanasia and Physician-Assisted Suicide: For and Against (Cambridge, 1998) 36; Hazel Biggs, 'A Pretty Fine Line: Life, Death, Autonomy and Letting It B' (2003) 11:3 Feminist Legal Studies 300; Alastair Campbell, Grant Gillett and Gareth Jones, *Medical Ethics* (OUP, 2005) 213; Sheila McLean, *Assisted Dying: Reflections on the Need for Law Reform* (Routledge-Cavendish, 2007) 84; Supra (n42) Emily Jackson and John Keown 33, 109; John Griffiths, 'Euthanasia and assisted suicide should, when properly performed by a doctor in an appropriate case, be decriminalised' in Amel Aghrani, Rebecca Bennett and Suzanne Ost, *Bioethics, Medicine and the Criminal Law: Volume 1: The Criminal Law and Bioethical Conflict: Walking the Tightrope* (CUP, 2012) 15, 23; Supra (n23) *Nicklinson* [304] (Lady Hale); Supra (n30) *Conway* [24] (Sales LJ); Supra (n10) Campaign for Dignity in Dying 56; Dieter Birnbacher, 'Doing and Allowing in the Context of Physician-Assisted Suicide' (2020) 85 Erkenntnis 575; Helga Kuhse, *The Sanctity-of-Life Doctrine in Medicine: A Critique* (Oxford University Press, 1987) 165

149 Supra (n23) *Nicklinson* [304] (Lady Hale); Supra (n29) *Newby* [27] (Irwin LJ and May J)

150 Agnes van der Heide et al, 'End of life decision-making in six European countries: descriptive study' (2003) 362 The Lancet 345; Roger S Magnusson, 'Euthanasia: above ground, below ground' (2004) 30 JME 441; Tom Vink, 'Self-Euthanasia, the Dutch Experience: In Search for the Meaning of a Good Death or Eu Thanatos' (2016) 30 Bioethics 681; Supra (n13) Andrew Saunders 17

151 Pola Grzybowska and Ilora Finlay, 'The incidence of suicide in palliative care patients' (1997) 11(4) Palliative Medicine 313; Mahendra Kumar et al, 'Delayed Pulmonary Oedema Following Attempted Suicidal Hanging – A Case Report' (2009) 53(3) Indian J Anaesth 355; Penney Lewis, 'Informal legal change on assisted suicide: the policy for prosecutors' (2011) 31 Legal Studies 129; John Bingham, 'Assisted dying: more than 300 terminally ill people a year committing suicide' The Telegraph (London, 15th October 2014); Mohammed Turab Jawaid et al, 'Neurological Outcomes Following Suicidal Hanging: A Prospective Study of 101 Patients' (2017) 20(2) Ann Indian Acad Neurol 106; Supra (n5) Sarah-May Blaschke et al 562; South West London and St George's Mental Health NHS Trust, *Suicide Factsheet* (undated)

152 Aser García Rada, 'Assisted dying: case of man who helped his wife to die reignites Spain's euthanasia debate' (2019) 365 BMJ 1764; BBC News, 'Mercy killing' family call for change in assisted dying law' BBC News (Stoke and Staffordshire, 6 November 2019)

153 The University of Manchester, *The National Confidential Inquiry into Suicide and Homicide by People with Mental Illness Annual Report 2015: England, Northern Ireland, Scotland and Wales* (Health Quality Improvement Partnership, July 2015) 9, 87; Jackie Doyle-Price (Minister for Mental Health, Inequalities and Suicide Prevention), *Preventing suicide in England: Fourth progress report of the cross-government outcomes strategy to save lives* (HM Government, January 2019) 15 [1.14]

capacity or physical abilities necessitates a premature death before they become unable to commit suicide.[154] At present, all patients are denied the peaceful death fatal drugs can provide.[155] Withdrawing from life-support often involves starvation, the retreat of the eyes into their sockets, and the dehydration of the tongue, rendering the illegality of AD, which relies on rapid-onset prescription drugs, deplorably cruel.[156]

Significant scholarship hypothesises that if a slippery slope develops, vulnerable individuals may succumb to explicit and implicit pressure to receive assistance in dying which would undermine their autonomy.[157] Indisputably, autonomy is not exercised "in a vacuum":[158] persons could be pressured into AD.[159] However, inaction on a "projected moral erosion" is inexcusably pessimistic,[160] particularly since there is no evidence to suggest that consequences which have materialised overseas would be replicated here.[161]

Some scholars doubt the validity of informed consent in the arena when life expectancy prognoses can be remarkably faulty: many individuals go on to outlive their six-month prognosis.[162] The logical solution is to exclude this unnecessary requirement from AD legislation. One may suffer far more throughout the course of a disease than at the end of life.[163] In any event, evidence from Oregon consistently indicates around 35% of patients never use their fatal prescription.[164] Instead, the drugs offer "peace of mind" if they do prove necessary, preventing "catch-22" suicides.[165] Further, a terminal prognosis is not a pre-requisite to withdrawing from life-sustaining treatment, so to introduce this as an additional criterion for AD would introduce legal unfairness and inconsistency.

4.2 Beneficence/Non-maleficence

Beneficence comprises doctors "doing good" for their patients.[166] Non-maleficence denotes "do no harm."[167] The concepts represent two sides of the same coin, best conceived of as "a commitment not to intentionally act in a

---

154 Rinat Nissim, Lucia Gagliese and Gary Rodin, 'The desire for hastened death in individuals with advanced cancer: a longitudinal qualitative study' (2009) 69 Social Science & Medicine 165; Supra (n150) Penney Lewis 129; Atul Gawande, *Being Mortal: Medicine and What Matters in the End* (Profile Books, 2014); Supra (n13) Andrew Saunders 13; Helen Blanken, "My death is not my own": the limits of legal euthanasia' *The Guardian* (London, 10 August 2018); Supra (n141) Raymond Tallis; Supra (n29) Newby [27] (Irwin LJ and May J); Mark Easton, 'Assisted dying: I just wish the law would allow me to have him for a little longer' *BBC News* (London, 7th February 2019)

155 James Rachels, 'Active and passive euthanasia' (1975) 292 New England Journal of Medicine 79; Sylvia A Law, 'Physician-Assisted Death: An Essay on Constitutional Rights and Remedies' (1996) 55 Maryland Law Review 292; Supra (n150) Penney Lewis 129

156 Supra (n23) *Nicklinson* [4] (Lord Neuberger); Supra (n13) Andrew Saunders 7

157 Supra (n46) Marie T Hilliard 63; Supra (n54) Dan W Brock 10; Supra (n45) Dieter Giesen 200; John Bingham, 'Lord Falconer's right-to-die bill a 'blank cheque' for suicide, says Baroness Butler-Sloss' The Telegraph (London, 5 November 2013); Supra (n142) John Keown 54, 55

158 Susan M Wolf, 'Pragmatism in the Face of Death: The Role of Facts in the Assisted Suicide Debate' (1998) 82 Minnesota Law Review 1063; David Velleman, 'A Right of Self-Termination?' (1999) 109 Ethics 618; Carol Gill, 'Disability, Constructed Vulnerability, and Socially Conscious Palliative Care,' (2006) 3 Journal of Palliative 188; Supra (n13) Andrew Saunders 19; David Albert Jones, 'Euthanasia and Assisted Suicide in Belgium: Bringing an End to an Interminable Discussion' in David Albert Jones, Chris Gastmans and Calum MacKellar, *Euthanasia and Assisted Suicide: Lessons from Belgium* (CUP, 2017) 255; Supra (n54) Danny Scoccia 281

159 Supra (n30) *Purdy* [65] (Lady Hale); Supra (n23) *Nicklinson* [81], [86] (Lord Neuberger)

160 Supra (n54) Dan W Brock 10; Emily Jackson, 'Whose Death is it Anyway? Euthanasia and the Medical Profession' (2004) 57 Current Legal Problems 415; Supra (n44) Tom L Beauchamp and James F Childress 179; Supra (n4) Christopher A Riddle 489

161 Stephen Smith, 'Fallacies of the Logical Slippery Slope in the Debate on Physician-Assisted Suicide and Euthanasia' (2005) 13 MLR 224

162 Nicholas A Christakis and Elizabeth B Lamont, 'Extent and determinants of error in physicians' prognoses in terminally ill patients' (2000) 320 BMJ 469; Stephanie Stiel et al, 'Evaluation and comparison of two prognostic scores and the physicians' estimate of survival in terminally ill patients' (2010) 18 Supportive Cancer Care 43; Supra (n23) *Nicklinson* [143] (Lord Sumption); National Council on Disability, *The Danger of Assisted Suicide Laws* (2019, Bioethics and Disability Series) 21

163 Supra (n73) Samantha Halliday 135; Supra (n23) *Nicklinson* [122] (Lord Neuberger); Supra (n2) David Orentlicher 6
7; Supra (n5) David Wasserman 9186

164 Supra (n58) *Oregon Report 2020* 5; Public Health Division Center for Health Statistics, *Oregon Death with Dignity Act: Data Summary* (2019) 5; Public Health Division Center for Health Statistics, *Oregon Death with Dignity Act: Data Summary* (2018) 5; Public Health Division Center for Health Statistics, *Oregon Death with Dignity Act: Data Summary* (2017) 5

165 Supra (n153) Rinat Nissim, Lucia Gagliese and Gary Rodin 165; Supra (n153) Atul Gawande; Supra (n144) Raymond Tallis

166 Supra (n44) Tom L Beauchamp and James F Childress 149

167 Supra (n44) Tom L Beauchamp and James F Childress 197

harmful way."[168] Safe and exemplary medical practice cannot be reduced to exclusively "doing good" for patients.[169] Some immediate harm may be required for subsequent good, such as breaking ribs in order to perform open heart surgery.[170] Unsurprisingly, safe treatment is necessarily beneficent.[171] Unnecessary tests, for example, might provide a patient with no benefits and expose them to unnecessary risks, thereby rendering it unsafe and maleficent.[172] Whether treatment is beneficent or not depends on the overall objectives of the healthcare system. The purpose of healthcare in the NHS is not to preserve life at all cost,[173] but to alleviate as much medical suffering as possible.[174] AD, able to facilitate peaceful and patient-centred deaths, is beneficent in recognizing that "death is not always an evil to be avoided."[175] Thus, achieving a "good death" is not novel, nor incompatible with the "healing" character of physicians.[176] Whilst opinion varies on what constitutes a "good death",[177] at present, medical treatment is incapable of alleviating physical and psychological suffering for all patients, leaving those suffering intolerably with seemingly no alternative but to attempt suicide.[178]

4.3 Justice

Healthcare justice eludes precise definition.[179] It generally denotes "fair and equal access to health resources and the allocation of these resources."[180] Equal accessibility is ethical, but also imperative from a safety lens: if practice is suboptimal in Dagenham but excellent in Dorset, this may have a negative feedback effect on the overall cycle of safety. AD enables the equal alleviation of suffering. The current system privileges those reliant on life-support or wealthy enough to attend overseas providers such as DIGNITAS, typically costing well over £10,000.[181] The uneven application of the law also benefits persons with loved ones willing to assist their death: only 0.02% of cases involving compassionate circumstances have led to prosecutions, and in any event invite very lenient sentences.[182] However, many individuals do not have relatives they can rely on, so access to "a good death" remains uneven.[183]

5. AD and Patient Safety

168 Supra (n92) Nils Hoppe 57
169 Ibid
170 Ibid
171 Ibid
172 Infra Chapter 6.4 for a more detailed discussion of defensive medicine.
173 Supra (n129) *Bland* [351F] (Hoffmann LJ); *Re A (Children) (Conjoined Twins)* [2000] EWCA Civ 254 [110], [112] (Walker LJ); General Medical Council, *Withholding and Withdrawing Life-Prolonging Treatments: Good Practice in Decision-Making* (General Medical Council, 2006) 12; Howard Bauchner and Phil B Fontanarosa, 'Death, Dying, and End of Life' (2016) 315(3) JAMA 270; Daniele Bryden, 'Redefining Death?' in Simon Woods and Lynn Hagger (eds), *A Good Death?: Law and Ethics in Practice* (Taylor & Francis Group, 2013) 44; *Briggs v Briggs* [2017] 4 WLR 37 [7] (Charles J); Supra (n29) *Conway* [110] (Sir Terence Etherton MR, Sir Brian Leveson P and King LJ); *Barnsley Hospital NHS Foundation Trust v MSP* [2020] EWCOP 26 (Hayden J) [22]
174 Ronald Bayer, 'Introduction' in Ronald Bayer et al (eds), *Public Health Ethics Theory, Policy, and Practice* (OUP, 2006) 27
175 Ian Kennedy, *Treat Me Right: Essays in Medical Law and Ethics* (Clarendon Press, 1991) 323
176 Ibid. See contra Supra (n46) Marie T Hilliard 63; Justin Welby, 'Why I believe assisting people to die would dehumanise our society for ever' *The Guardian* (London, 5 September 2015); Barron Lerner and Arthur Caplan, 'Euthanasia in Belgium and the Netherlands on the slippery slope?' (2015) 175(10) JAMA Internal Medicine 1640; Felipe E Vizcarrondo FE, 'Euthanasia and Assisted Suicide: The Physician's Role' (2013) 80(2) Linacre Q 102
177 Ezekiel Emanuel and Linda Emanuel, 'The promise of a good death' (1998) 351(suppl 2) Lancet S1121; Supra (n137) Harvey Max Chochinov 2254; Supra (n153) Atul Gawande; Kathy Davis, 'Dying, self-determination, and the (im)possibilities of a "good death"' (2015) 25 Feminism & Psychology 143; Andrew Davies et al, 'Good concordance between patients and their non-professional carers about factors associated with a 'good death' and other important end-of-life decisions' (2016) 9 BMJ Support Palliat Care 340; Supra (n5) Sarah-May Blaschke et al 562
178 Judith A Paice, 'Management of pain at end of life' in Honorio T Benzon et al (eds), *Essentials of Pain Medicine*, (Elsevier, 2018) 309; Supra (n10) Campaign for Dignity in Dying 6
179 Supra (n92) Nils Hoppe 59
180 Ibid
181 Jamie Doward, 'Assisted Dying will be made legal in the UK within two years' *The Guardian* (London, 8 November 2014)
182 The Law Commission, Partial Defences to Murder (Report No 290, 2004) [2.34]. See also: Supra (n136) Sheila McLean and Gerry Maher 56; ADF International, 'First Euthanasia Case in 13 Years Referred to Prosecutor' *ADF International* (Europe, 29 October 2015); Owen Dyer, 'Doctor cleared of act "tantamount to euthanasia"' (2007) 335 British Medical Journal 67; HC Deb 4 July 2019, vol 662, col 1428 (Fiona Bruce MP)
183 Supra (n10) Campaign for Dignity in Dying 14

This chapter explores the risks of AD. The first section provides a holistic overview of harms which could arise throughout the AD process, loosely modelled on the appeal of Elizabeth Bouvia.[184] The remainder of the chapter explores AD risks under four themes: unsafe communication, ineffective symptom management, opaque workplace cultures, and unproductive regulation.

5.1 AD Specific Harm

Before consulting a practitioner about AD, an individual may experience physical and/or psychological suffering due to inappropriately managed symptoms. Symptom management may be underfunded, which could encourage individuals to idealise death as the only solution.[185] Doctors might overlook the unique factual matrix of the patient, failing to identify or conflating the cause of their suffering. Subsequently, ineffective treatments which the patient fails to engage with might be recommended. Physicians may perceive wellbeing myopically as the minimisation of physical pain. Surveys to monitor symptoms may focus unduly on physical pain or prove difficult to complete, further isolating the patient from the clinician.[186]

At a consultation, a physician may inadvertently encourage a patient to consider themselves a suitable applicant for AD by mentioning AD unprompted. The patient may disguise a cry for help in a plea for AD, seeking validation in a fear that society deems their life worthless. The physician may overlook or fail to identify symptoms indicating psychological suffering. The pressurising vested interests of family members may go undetected. A patient may feel bewildered by the AD process. A conscientious objector may feel unable to voice their opposition to AD, subsequently treating the patient dispassionately. Different consultations throughout AD proceedings may prove burdensome for socioeconomically disadvantaged individuals or rural populations.[187] Once AD is authorised, an inappropriate means of achieving death might be recommended. Prescription errors may be made. The drugs might be accessed by the wrong person. Staff may notice shortcomings throughout the process but feel unable to speak out about them. Data on AD might go unrecorded, prove unacceptably scarce, inconsistent, unstandardized, or go unanalysed, concealing dangerous trends.

The above series of events represents a foreseeable extension of the case of Elizabeth Bouvia, which demonstrates the dangerous consequences of prejudice, paternalism, and inappropriate symptom management.[188] Elizabeth was 23 when she attended hospital in California with suicidal ideations.[189] She was abandoned by her mother at an early age due to the social stigma of having a quadriplegic child with cerebral palsy, thereafter confined to institutions exclusively for disabled persons.[190] Financing independent, suitable living arrangements and care at 18 proved impossible.[191] Her studies were curtailed: no fieldwork adjustments were offered to accommodate Bouvia's physical disabilities.[192] She was advised by tutors that quadriplegics "could not work."[193] Her marriage broke down.[194] She received no psychiatric testing or advice from disability experts.[195] Her suffering was misdiagnosed as attributable to her physical disability, whereas her bedridden state was in fact a consequence of depression.[196]

---

184 *Bouvia v Superior Court*, 179 Cal. App. 3d 1127

185 Supra (n7) Select Committee on the Assisted Dying for the Terminally Ill Bill HL [19], [20], [21]; Supra (n7) Jonathan Herring 487; Ron Summers and Harish Pesala, 'Palliative care management system' (2018) Phys Conf Ser 1065; Supra (n5) Sarah-May Blaschke et al 562

186 Asimina Lazardiou et al, 'Pain Assessment' in Honorio T Benzon et al (eds), *Essentials of Pain Medicine*, (Elsevier, 2018) 40

187 Brigette M Hales et al, 'Improving the Medical Assistance in Dying (MAID) process: A qualitative study of family caregiver perspectives' 17 (2019) 594

188 Supra (n47) Paul Longmore 156

189 Ibid

190 Ibid

191 Ibid

192 Ibid

193 Ibid

194 Ibid

195 Ibid

196 Ibid

Her treatment comprised sleeping and watching TV.[197] Although Elizabeth did not accept AD due to physical weakness, the case is a haunting example of what unsafe AD could become. The following subsections categorise these harms into four themes: unsafe communication, ineffective symptom management, opaque workplace cultures, and unproductive regulation. These inform subsequent proposals advanced in chapter six.

5.2 Communication

Doctor-patient communication is an essential component of safety.[198] Safe communication is respectful of patient autonomy and necessarily places clinicians and patients on an equal playing-field, thereby enabling mutual trust to develop.[199] Safe communication is also achieved through active listening on the part of the physician, which enables the detection and exploration of verbal and non-verbal cues.[200] Thereafter, clinicians can provide the patient with clear and relevant information, explain any jargon, and reassure patients to establish a clear plan of action.[201] In theory, this kind of communication should enable physicians to make accurate diagnoses and informed recommendations which the patient feels motivated to engage with, thereby minimising distrust or treatment disengagement.[202] Whilst the impact of communication on safety has been explored in many disciplines,[203] it remains overlooked in the context of AD.[204] Unsafe communication in the AD realm involves explicitly or implicitly encouraging AD, stigmatising AD applicants, and misjudging or overlooking the cause of a patient's suffering. Thus, safe doctor-patient communication throughout the AD process must be well-informed, non-prejudicial, and focused on rehabilitation.

5.2.1 Well-informed and non-prejudicial

AD consultations must focus primarily on effectively treating patient suffering. Unless every reasonable attempt has been made to rehabilitate the patient, AD cannot safely be considered a last resort.[205] Most countries, including Belgium, Switzerland, and Canada, only stipulate that the patient must have considered, rather than attempted reasonable alternatives to AD to alleviate their suffering.[206] This approach introduces doubt as to whether AD truly represents "the final recourse."[207] To make effective rehabilitation suggestions, physicians must be well-

---

197 Beverly Beyette, 'The Reluctant Survivor: 9 Years After Helping Her Fight for the Right to Die, Elizabeth Bouvia's Lawyer and Confidante Killed Himself--Leaving Her Shaken and Living the Life She Dreaded' *Los Angeles Times* (Los Angeles, 13 September 1992)

198 Institute of Medicine, *To Err is Human: Building a Safer Health System* (National Academy Press, 2000) 31 [7.2]; Catherine Dingley et al, 'Improving Patient Safety Through Provider Communication Strategy Enhancements' in *Advances in Patient Safety: New Directions and Alternative Approaches (Vol. 3: Performance and Tools)* (Agency for Healthcare Research and Quality, 2013) 1; Report of the Patient Safety Initiative Group, Much More Than Words: *Spoken communication and patient safety in the NHS* (NHS Improvement, July 2018) 2-3; Daniel Kinyuru Ojuka, Lydia Okutoyi, and Frederick Otieno, 'Communication in Surgery for Patient Safety' (2019) 4 Vignettes in Patient Safety 79740; Rick Iedema et al, 'Spoken communication and patient safety: a new direction for healthcare communication policy, research, education and practice?' (2019) 8 BMJ Open Quality e000742; Pauline Campbell et al, *A scoping review of evidence relating to communication failures that lead to patient harm* (NMAHP Research Unit, 2019) 50

199 Johanna Birkhäuer et al, 'Trust in the health care professional and health outcome: A meta-analysis' (2017) 12(2) PLoS One e0170988

200 Peter Vermeir et al, 'Communication in healthcare: a narrative review of the literature and practical recommendations' (2015) 69(11) Int J Clin Pract 1257

201 Ibid; Cynthia Chan et al, 'Communication skill of general practitioners: Any room for improvement? How much can it be improved?' (2003) 37 Medical Education 517

202 Ibid (Cynthia Chan et al); Supra (n198) Johanna Birkhäuer et al e0170998

203 Ibid (Cynthia Chan et al) 519; Peter Salmon et al, 'Voiced but unheard agendas: qualitative analysis of the psychosocial cues that patients with unexplained symptoms present to general practitioners' (2004) 54 British Journal of General Practice 171; Tonje Stenstrud, Trond Mjaaland, and Arnstein Finset, 'Communication and mental health in general practice: physicians' self-perceived learning needs and self-efficacy' (2012) 9(3) Ment health Fam Med 202; Liz Boardman, Jane Bernal, and Sheila Hollins, 'Communicating with people with intellectual disabilities: a guide for general psychiatrists' (2014) 20 Advances in Psychiatric Treatment 27; Supra (n201) Daniel Kinyuru Ojuka, Lydia Okutoyi, and Frederick Otieno 79740

204 Ina C Otte et al, "'We need to talk!" Barriers to GPs' communication about the option of physician-assisted suicide and their ethical implications: results from a qualitative study' (2017) 20(2) Med Health Care Philos 249

205 Robert Orr, 'Pain Management Rather Than Assisted Suicide: The Ethical High Ground' (2001) 2(2) Pain Medicine 135

206 Bill C-14 Chapter 3 Statutes of Canada 2016 s241.2(e); Swiss Academy of Medical Sciences, *Care of Patients in the End of Life* (2013) 9; Loi relative l'euthanasie (Act Concerning Euthanasia) 2002 (Belgium)

207 Etienne Montero, 'The Belgian Experience of Euthanasia since its legal implementation in 2002' in David Albert Jones, Chris Gastmans and Calum MacKellar, *Euthanasia and Assisted Suicide: Lessons from Belgium* (CUP, 2017) 33; Raphael Cohen-Almagor,

informed of the patient's needs and non-prejudicial to their situation. Evidence suggests that unfortunately, this is currently not the case in many consultations. Doctors often feel doubtful of prognoses in palliative care and are ill-prepared for moving conversations about death.[208] Physician ambiguity could foreseeably isolate patients and encourage them to catastrophize, potentially prompting independent suicides without expert advice.

Furthermore, evidence suggests many doctors assume an air of superiority in respect of knowledge around physical disabilities, despite having a "disturbing lack of familiarity with living long-term with extensive impairments" and potentially fatal misinformation on ventilators.[209] Consequently, individuals report being perceived as "abnormalities and deficiencies", eroding the trust between doctors and patients.[210] Pronounced stigma stems from myopic presumptions which assume an existence reliant on "support, technology, [and/] or caregivers" is worse than death.[211] Many clinicians are unable to reconcile physical dependence with cognitive intelligence and contentment.[212] 82% of emergency care providers hypothesized they would not want to live following a spinal cord injury, however, 92% of spinal cord injury survivors report a high quality of life.[213] Although this study is 26 years old, the results remain relevant; society has since only further ostracised disabled people.

In many respects, this is unsurprising: the devaluation of disabled persons is deeply ingrained in our society.[214] It manifests itself in the villainization of subhuman "handicapped monsters or crippled criminals" in films, the exclusion of disabled people from adverts, music, TV series, plays, literature, and art.[215] Disabled people are rejected from discourses in beauty, parenting, and sex.[216] Popular narratives in the arts imply that if disabled people put in enough effort, they can overcome their "disadvantages."[217] The possibility that modern civilization discriminates against people with disabilities is rarely, if ever, acknowledged.[218] Disabled people are not well-accommodated in society.[219] Transport is challenging: wheelchair lifts for buses are frequently broken, modified hire cars are expensive, the metro is crowded and restrictive.[220] Airline travel is even harder.[221] This has a detrimental impact on already slim employment prospects and subsequently psychological wellbeing for people with disabilities.[222] Socially, shop aisles are cramped, braille information is exceptional, deaf fire alarms are

---

'Euthanizing people who are 'tired of life', in David Albert Jones, Chris Gastmans and Calum MacKellar, *Euthanasia and Assisted Suicide: Lessons from Belgium* (CUP, 2017) 196; Calum Mackellar, 'Some possible consequences arising from the normalisation of Euthanasia in Belgium' in David Albert Jones, Chris Gastmans and Calum MacKellar, *Euthanasia and Assisted Suicide: Lessons from Belgium* (CUP, 2017) 231; Supra (n157) David Albert Jones 251

208 Elaine M Wittenberg-Lyles et al, 'Communicating a terminal prognosis in a palliative care setting: deficiencies in current communication training protocols' (2008) 66 Soc Sci Med 2356; Jerome Groopman, *How doctors think* (Houghton Mifflin, Boston, 2008) 58; Atul Gawande, *The checklist manifesto* (Profile Books, 2010) 8; Irene Tuffrey-Wijne et al, 'Communicating about death and dying: developing training for staff working in services for people with intellectual disabilities' (2017) 30 J Appl Res Intellect Disabil 1105

209 Supra (n157) Carol Gill 185

210Supra (n5) Sarah-May Blaschke et al 562; Supra (n157) Carol Gill 183, 184

211 Supra (n7) Select Committee on the Assisted Dying for the Terminally Ill Bill [3], [6], [8], [9]; Supra (n157 Carol Gill 184; Stella Young, 'Disability – a fate worse than death?' *The Guardian* (London, 18 October 2013); Supra (n54) Danny Scoccia 281; Supra (n161) *National Council on Disability Report* 15

212 Paul Longmore, *Why I Burned My Book and Other Essays on Disability* (Temple University Press, 2003) 167; Supra (n157) Carol Gill 185; Dulce M Cruz-Oliver et al, 'Age as a Deciding Factor in the Consideration of Futility for a Medical Intervention in Patients Among Internal Medicine Physicians in Two Practice Locations' (2010) Journal of the American Medical Directors Association 424

213 Kenneth Gerhart et al, 'Quality of life following spinal cord injury: Knowledge and attitudes of emergency care providers' (1994) 23(4) Ann Emerg Med 807

214 Lynn A Jansen, Steven Wall, and Franklin G Miller, "Drawing the line on physician-assisted death' (2019) 45 Journal of Medical Ethics 190

215 Paul Longmore, "Screening Stereotypes: Images of Disabled People in Television and Motion Pictures" in, *Why I Burned My Book and Other Essays on Disability* (Philadelphia: Temple University Press, 2003) 131, 144

216 Ibid 141; Virginia Kallianes and Phyllis Rubenfeld, 'Disabled Women and Reproductive Rights' (1997) 12(2) Disability & Society 203; Disability Rights in the UK, *UK Updated Submission to the UN Committee on the Rights of Persons with Disabilities in advance of the public examination of the UK's implementation of the UN CRPD* (2017) 28; Julia N Daniels, 'Disabled Mothering? Outlawed, Overlooked and Severely Prohibited: Interrogating Ableism in Motherhood' (2019) 7(1) Social Inclusion 114

217 Supra (n214) Paul Longmore 133, 138, 140

218 Supra (n157) Carol Gill 183; Supra (n54) Danny Scoccia 279

219 Supra (n214) Paul Longmore 29

220 Ibid 21, 22, 24

221 Ibid 23

222 Ibid 20, 23, 29

overlooked, restaurant tables are too high, and school buildings are inaccessible.[223] There is an overwhelming shortage of disabled modified housing.[224] Some scholarship argues that assuming disabled persons are more vulnerable to pressure in the AD context is stigmatising in itself,[225] but to ignore vulnerability caused by social stigma would be "disingenuous."[226] Existing misinformation and prejudice surrounding physical disabilities is deeply unsafe and must be improved if AD is to be confined to the neediest few.

5.2.2 Respectful of autonomy, without encouraging AD

Conversations about AD will inevitably be challenging.[227] A physician must balance competing objectives: informing the patient about AD and respecting their autonomy, whilst not encouraging AD.[228] Deciphering AD requests may prove challenging due to a patient's intellectual vulnerabilities,[229] language barriers,[230] or implicit oppression which manifests itself in awkwardness, particularly common amongst ethnic minority and female patients.[231] Additionally, conscientious objectors must respect patient autonomy, notwithstanding their own personal opinions.[232] Insensitivity towards AD seekers might foreseeably encourage patient isolation, treatment disengagement, distrust, and in the worst case scenario, attempted self-harm or suicide.[233] In many countries, conscientious objectors are not explicitly required to refer patients to an AD provider, which effectively abandons patients in an uncertain purgatory.[234] Clarity on how to respect patient autonomy without encouraging AD is imperative to protect patient safety and ensure clinicians can navigate potentially fraught interactions confidently.

5.3 Symptom management

AD should only ever be permissible where a patient's suffering cannot be alleviated to a point at which it is tolerable. In theory, if suffering is better identified and treated, AD is confined only to the neediest few, preventing the unsafe expansion of eligibility criteria.[235] The rationale for seeking an assisted death varies from patient to patient and is rarely attributable to one single cause but instead prompted by a mixture of physical and psychological suffering.[236] Two patients may suffer from identical diseases but endure very different levels of suffering.[237] Suffering is a uniquely internal and personal experience.[238] Whilst physicians arguably have no "special

---

223 Ibid 25, 27

224 Ibid 25

225 Anita Silvers, 'Protecting the Innocent from Physician-Assisted Suicide' in Margaret P Battin, Rosamund Rhodes and Anita Silvers (eds), *Physician Assisted Suicide: Expanding the Debate* (Routledge, OUP) 133; Lawrence J Nelson, 'Respect for the Developmentally Disabled and Forgoing Life-Sustaining Treatment' (2003) 9 Ment Retard Dev Disabil Res Rev 3; Supra (n54) Danny Scoccia 291

226 Supra (n4) Christopher A Riddle 484, 489

227 Supra (n203) Ina C Otte et al 254

228 Joris Vandenberghe, 'Euthanasia in patients with intolerable suffering due to an irremediable psychiatric illness' in David Albert Jones, Chris Gastmans and Calum MacKellar, *Euthanasia and Assisted Suicide: Lessons from Belgium* (CUP, 2017) 159

229 Ilinka Haverkate et al, 'Refused and granted requests for euthanasia and assisted suicide in the Netherlands: interview study with structured questionnaire' (2000) 321 BMJ 865

230 Keith G Wilson et al, 'Attitudes of Terminally Ill Patients Toward Euthanasia and Physician-Assisted Suicide' (2000) 160 Arch Intern Med 2455

231 Tina Sikka, 'Barriers to Access: A Feminist Analysis of Medically Assisted Dying and the Experience of Marginalized Groups' (2019) OMEGA—Journal of Death and Dying 10, 15

232 Supra (n5) Sarah-May Blaschke et al 568

233 Terry E Hill, 'How clinicians make (or avoid) moral judgments of patients: implications of the evidence for relationships and research' (2010) 5 Philos Ethics Humanit Med 8, 9

234 Supra (n5) Sarah-May Blaschke et al 568

235 Supra (n161) *National Council on Disability Report* 24; Supra (n137) Harvey Max Chochinov 2257

236 Kathleen M Foley, 'The relationship of pain and symptom management to patient requests for physician-assisted suicide' (1991) 6(5) Journal of Pain and Symptom Management 289

237 National Council on Disability, *Quality-Adjusted Life Years and the Devaluation of Life with Disability* (2019, Bioethics and Disability Series) 28

238 Supra (n185) Asimina Lazardiou et al 39

expertise" in judging the extent of suffering or tracing suffering to a "particular source",[239] suffering can be addressed relatively objectively through careful investigation and symptom tracking.[240]

5.3.1 Physical symptoms

Although pain is cited comparatively infrequently as a reason for requesting AD,[241] physical suffering cannot be overlooked; severe physical discomfort is reported in up to 90% of patients with an advanced disease.[242] Symptoms include, but are not limited to, malignant fungating tumours, metastases, nausea, vomiting of the faeces, neuropathic pain, discomfort due to pressure ulcers or immobility, mucositis, myalgia, dyspnea, severe headaches, and acute constipation.[243] Symptoms vary considerably between individuals.[244] Many patients receiving palliative care suffer from several comorbidities, so establishing causation in "symptom clusters" can prove challenging.[245] Given the heterogeneity of patient experiences, tolerances and priorities, patient-centred symptom management is critical.[246] In determining global palliative care rankings, The Economist's criterion of "availability of opioid analgesics"[247], whilst useful from a justice lens, is not necessarily conducive to beneficent treatment, since appropriate and effective solutions will inevitably differ from patient to patient.[248] First- or second-line pharmacological interventions often prove ineffective for various reasons.[249] Some medication may effectively treat pain, but induce unbearable mental fog.[250] Results may be better achieved through the use of adjuvant analgesics.[251] Additionally, evidence suggests that prescription, administration, and dosage errors occur frequently and sometimes simultaneously, resulting in ineffective symptom management.[252]

5.3.2 Psychological and Holistic Symptom Management

Physical pain is only one element of patient suffering: it is also critical to address psychological suffering.[253] Whereas some studies suggest mental health problems are not disproportionately common in individuals seeking

---

239 Supra (n2) David Orentlicher 7; Supra (n5) David Wasserman 92

240 Supra (n5) David Wasserman 88

241 Ellen Wiebe, 'Reasons for requesting medical assistance in dying' (2018) 64(9) Can Fam Physician 674; Marie-Estelle Gaignard and Samia Hurst, 'A qualitative study on existential suffering and assisted suicide in Switzerland' (2019) 20 BMC Medical Ethics 34; Supra (n58) *Oregon Report 2020* 12

242 Supra (n10) Campaign for Dignity in Dying 28-30; Cicely Saunders, 'Current views on pain relief and terminal care' in Mark Swerdlow, *The Therapy of Pain* (Springer, 1981) 36; Sebastian Probst, Anne Arber and Sara Faithfull, 'Malignant Fungating Wounds: the meaning of living in an unbounded body' (2013) 17(1) Eur J Oncol Nurs 38; Supra (n177) Judith A Paice 311; Karen A Kehl and Jennifer A Kowalkowski, 'A systematic review of the prevalence of signs of impending death and symptoms in the last 2 weeks of life' (2013) 30 Am J Hosp Palliat Care 601; Supra (n51) Andrew Dickman 35

243 Russell K Portenoy, 'Symptom Prevalence, Characteristics and Distress in a Cancer Population (1994) 3 Quality of Life Research 183; Adam E Singer et al, 'Symptom trends in the last year of life from 1998–2010: a cohort study' (2015) 162 Ann Intern Med 175; Supra (n177) Judith A Paice 310

244 Marilyn J Field and Christine K Cassel, *Committee on Care at the End of Life, and Institute of Medicine, Approaching Death: Improving Care at the End of Life* (National Academies Press, 1997) 125

245 Supra (n177) Judith A Paice 310

246 Kate M Tredgett, 'Pain control in palliative care' (2019) 48 Medicine (Physical Problems) 2

247 The Economist Intelligence Unit, *Quality of Death Index: Ranking Palliative Care Across the World* (2015, The Lien Foundation) 7

248 Marianne K Dees et al, '"Unbearable suffering": a qualitative study on the perspectives of patients who request assistance in dying' (2011) 37 JME 727; Charles McKhann, 'Is There a Role for Physician-Assisted Suicide in Cancer? Yes' in Vincent T Devita, Samuel Hellman and Steven A Rosenberg (eds), Important Advances in Oncology (Lippincott-Raven Publishers, 1996) 271; Sheera F Lerman and Jennifer Haythornthwaite, 'Psychological Evaluation and Testing' in Honorio T Benzon et al (eds), Essentials of Pain Medicine, (Elsevier, 2018) 47

249 Supra (n51) Andrew Dickman 41

250 Supra (n243) *Improving Care at the End of Life* 148; Supra (n51) Andrew Dickman 30, 32

251 Supra (n51) Andrew Dickman 33

252 Supra (n243) *Improving Care at the End of Life* 126, 127; Agency for Healthcare Research and Quality, *Guide to Patient Safety Indicators* (Department of Health and Human Services, 2004) 7; Supra (n91) Charles Vincent 35, 63, 65

253 Supra (n243) *Improving Care at the End of Life* 128; Supra (n247) Sheera F Lerman and Jennifer Haythornthwaite 47

an assisted death,[254] others indicate many patients endure concurrent psychological suffering.[255] Psychological suffering can encourage patients to catastrophize, occasioning a "negative reinforcement loop" which inhibits resilience and self-efficacy.[256] Suicidality and poorly controlled pain are often connected.[257] This is complicated by the fact that many terminal illnesses trigger symptoms associated with depression, such as impaired sleep, loss of appetite and weakness, so establishing causation is often difficult.[258] Thus, physicians should be particularly vigilant for signs of mental health problems and sympathetic to the possibility of symptom exaggeration.[259] Worryingly, most countries and states do not require psychological assessments for AD applicants as a pre-requisite, including US States,[260] Switzerland, the Netherlands,[261] Belgium, Luxembourg, and Victoria.[262] Given the correlation between terminal conditions and mental disorders, it is concerning that just one patient of all applicants in Oregon in 2019 was referred for psychological evaluation.[263]

Psychological suffering can be alleviated through a diverse range of multidisciplinary approaches, such as introducing patients to new social interactions, physiotherapy, spiritual wellbeing remedies, physical activity, and recreational activities.[264] A patient-centred approach is imperative to inform recommendations. Asking individuals what they find meaningful, how they want to be remembered, whether they are at peace with their situation, the routines they enjoy, and the social support that suits them best are useful starting points.[265] Ideally, this approach will effectively alleviate suffering, even if patient joy looks very different from conventional standards or how individuals defined their contentment prior to suffering.[266]

Recording symptoms is a common practice to assess the extent of patient suffering.[267] Patient questionnaires can assess everything from depressive symptoms, arthritis, anxiety, suicidality, and pain.[268] However, many

---

254 Linda Ganzini, 'Commentary: Assessment of Clinical Depression in Patients Who Request Physician-Assisted Death' (2000) 19(6) Ethics Rounds 474; Linda Ganzini et al, 'Prevalence of depression and anxiety in patients requesting physicians' aid in dying: cross sectional survey' (2008) 337 BMJ 1682; Scott YH Kim, Yeates Cornwell, and Eric Caine, 'Suicide and Physician-Assisted Death for Persons with Psychiatric Disorders: How Much Overlap?' (2018) 75(11) JAMA Psychiatry 1099

255 Supra (n204) Robert Orr 135; Eric Widera and Susan Block, 'Managing grief and depression at the end of life' (2013) 86 Am Fam Physician 259; Udo Schuklenk and Suzanne VD Vathorst, 'Treatment-resistant major depressive disorder and assisted dying' (2015) 41 Journal of Medical Ethics 577; Supra (n227) Joris Vandenberghe 155; Kirsten Evenblij et al, 'Euthanasia and physician-assisted suicide in patients suffering from psychiatric disorders: a cross-sectional study exploring the experiences of Dutch psychiatrists' (2019) 19(74) BMC Psychiatry 6

256 Michael J Sullivan, Wendy M Rodgers and Irving Kirsch, 'Catastrophizing, depression, and expectancies for pain and emotional distress' (2001) 91 Pain 147; Michael K Nicholas, 'The pain self-efficacy questionnaire: taking pain into account' (2007) 11 Eur J Pain 153; Dennis C Turk, Hilary D Wilson, 'Fear of pain as a prognostic factor in chronic pain: conceptual models, assessment, and treatment implications' (2010) 14 Curr Pain Headache Rep 88; Supra (n247) Sheera F Lerman and Jennifer Haythornthwaite 49

257 Nicole K Y Tang and Catherine Crane, 'Suicidality in chronic pain: a review of the prevalence, risk factors and psychological links' (2006) 36 Psychol Med 575; Jennifer Brennan Braden and Mark D Sullivan, 'Suicidal thoughts and behavior among adults with self-reported pain conditions in the national comorbidity survey replication' (2008) 9 J Pain 1106; David A Fishbain, John E Lewis, and Jinrun Gao, 'The pain suicidality association: a narrative review' (2014) 15 Pain Med 1835; Raffaella Calati, Camelia Laglaoui Bakhiyi, Sylvaine Artero et al, 'The impact of physical pain on suicidal thoughts and behaviors: meta-analyses' (2015) 71 J Psychiatr Res 16; Julie H Huang-Lionnet, Chad Brummett, and Srinivasa N Raja, 'Central Pain States' in Honorio T Benzon et al (eds), *Essentials of Pain Medicine*, (Elsevier, 2018) 259

258 Supra (n254) Eric Widera and Susan Block 259; Supra (n242) Adam E Singer et al 175; Paul Scholten, Kiran Chekka and Honorio T Benzon, 'Physical Examination of the patient with pain', in Honorio T Benzon et al (eds), *Essentials of Pain Medicine*, (Elsevier, 2018) 27; Supra (n247) Sheera F Lerman and Jennifer Haythornthwaite 47; Supra (n177) Judith A Paice 309

259 Supra (n247) Sheera F Lerman and Jennifer Haythornthwaite 52

260 Oregon Death with Dignity Act, 1994 s3.03

261 Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2001 (Netherlands) Article 2

262 Voluntary Assisted Dying Act 2017 s18(1), s27(1)

263 Supra (n58) *Oregon Report 2020* 6

264 Supra (n50) David Richard Walega 102; Supra (n247) Sheera F Lerman and Jennifer Haythornthwaite 49, 53; Supra (n256) Julie H Huang-Lionnet, Chad Brummett, and Srinivasa N Raja 255, 257; Supra (n157) Carol Gill 189

265 Supra (n137) Harvey Max Chochinov 2253

266 Supra (n210) Raphael Cohen-Almagor 195

267 Gregory E Simon et al, 'Risk of suicide attempt and suicide death following completion of the Patient Health Questionnaire depression module in community practice' (2016) 77(2) J Clin Psychiatry 221; Supra (n247) Sheera F Lerman and Jennifer Haythornthwaite 48, 49, 51

268 Kate Lorig et al, 'Development and Evaluation of a Scale to measure perceived self-efficacy in people with arthritis' (1989) 32(1) Arthritis and Rheumatology 38; Alexandra L Terrill et al, 'The 7-Item Generalized Anxiety Disorder Scale as a Tool for Measuring

questionnaires are flawed. For example, some evidence suggests that clinicians favour questionnaires which have an overriding focus on pain.[269] Given the diverse causes of suffering, multidimensional inventories which can assess both obvious and imperceptible suffering are preferable.[270] Additionally, many questionnaires also usually assume equal intervals between adjectives.[271] Theoretically, the gap between "none" and "mild" is identical to the distance between "moderate" and "severe", which is not necessarily true.[272] Furthermore, some surveys are visually or semantically perplexing, discouraging completion.[273] Where patients are asked to recall symptoms retrospectively, their results are potentially coloured by memory bias.[274] Thus, recording symptoms daily would be valuable.[275] Physicians should also be alert to the fact that reporting varies significantly between cultures.[276] For example, Asimina Lazardiou notes that some Asian cultures tend to champion stoicism, which may potentially underpin a sociocultural reluctance to open up to medical practitioners.[277] Just because a patient has not recorded their symptoms does not mean that they are not suffering.[278]

5.4 Monitoring AD

Recording and monitoring data is an essential element of safety: in order to uncover and improve on failings, NHS Trusts must record and analyse their current performance.[279] This is especially the case in AD, where there is no ideal number of annual deaths.[280] Belgium seemingly collects the least evidence on AD, recording patient sex, date of birth, date, time, place of death, and the nature of the incurable condition.[281] Conversely, Oregon collects extensive evidence by recording the educational background of the patient, the time between ingestion and death, prescription type, and the expertise of involved physicians.[282] The recording of AD data could be improved in all countries. Socioeconomic disadvantages have a significant impact on suicide rates,[283] but factors such as debt levels, housing conditions, family background, and employment type are not recorded in AD applicants. Given significant correlations between suicide rates and gender,[284] sexual orientation,[285] and ethnicity,[286] recording more personal data would enable a closer analysis of trends within AD recipients.

Generalized Anxiety in Multiple Sclerosis' (2015) 17(2) Int J MS Care 49; Supra (n247) Sheera F Lerman and Jennifer Haythornthwaite 48;

269 Supra (n137) Harvey Max Chochinov 2253

270 Robert J Gatchel et al, 'A preliminary study of multidimensional pain inventory profile differences in predicting treatment outcome in a heterogeneous cohort of patients with chronic pain' (2002) 18 Clin J Pain 139; Supra (n247) Sheera F Lerman and Jennifer Haythornthwaite 47

271 Supra (n185) Asimina Lazardiou et al 40

272 Ibid

273 Ibid

274 Ibid 39, 42

275 Supra (n247) Sheera F Lerman and Jennifer Haythornthwaite 48

276 Robert R Edwards et al, 'Ethnic differences in pain tolerance: clinical implications in a chronic pain population' (2001) 63(2) Psychosom Med 316; Claudia M Campbell and Robert R Edwards, 'Ethnic differences in pain and pain management' (2012) 2(3) Pain Manag 219

277 Supra (n185) Asimina Lazardiou et al 44

278 Infra Chapter 6.33, Anita Ho and Oliver Quick, 'Leaving patients to their own devices? Smart technology, safety and therapeutic relationships' (2018) 19(18) BMC Medical Ethics 2

279 Charles Vincent et al, 'Redesigning safety regulation in the NHS' (2020) 368 BMJ 762

1. 280 Paul Komesaroff, Cameron Stewart, and Camille La Brooy, 'One year of voluntary assisted dying in Victoria: 400 have registered, despite obstacles' The Conversation (Victoria, 30 June 2020)

281 Loi relative l'euthanasie (Act Concerning Euthanasia) 2002 (Belgium) s7

282 Supra (n58) *Oregon Report 2020* 9

283 Samaritans, *Dying from Inequality: Socioeconomic disadvantage and suicidal behaviour* (March 2017) 8

284 Susan Wolf, 'Gender, Feminism and Death: Physician-Assisted Suicide and Euthanasia' in *Feminism and Bioethics: Beyond Reproduction* (OUP, 1996) 282; Hazel Biggs, 'I don't want to be a burden! A Feminist Reflect on Women's Experiences of Death and Dying' in Sally Sheldon and Michael Thomson (eds) Feminist Perspectives on Health Care Law (Cavendish, 1998) 279; Katrina George, 'A woman's choice? The gendered risks of voluntary euthanasia and physician-assisted suicide' (2007) Medical Law Review 1

285 Sue Westwood, 'Older lesbians, gay men and the "right to die" debate: "I always keep a lethal dose of something, because I don't want to become an elderly isolated person"' (2017) 25 Social and Legal Studies 606; Ben Hunte, 'Lockdown: Suicide fears soar in LGBT Community' *BBC News* (London, 2 July 2020)

286 Supra (n152) *Preventing suicide in England* 28

5.5 Safety Culture

Achieving a "safety culture" amongst staff is imperative to protecting patient safety.[287] A safety culture is an environment in which staff are collectively well-educated, mutually supported, and, whilst aspiring to the highest level of safety, accept and learn effectively from their mistakes.[288] Studies on staff safety in the context of AD are practically non-existent. In England and Wales, physicians have expressed concerns that divergence in personal and professional stances on AD could "divide teams" and injure "staff morale."[289] Whilst some studies suggest a significant proportion of doctors support the legalisation of AD,[290] clinician opinions on AD are ultimately mixed.[291] Given the controversial nature of AD, it is imperative to respect staff autonomy by allowing physicians to conscientiously object from advising patients on or assessing their eligibility to receive assistance in dying. If compelled, unwilling staff might potentially endanger patients through unsympathetic communication.[292] However, if not appropriately managed, divisiveness could contribute to internal workplace hostility and exacerbate existing staff opacity about errors.

Patient safety failings are frequent and involve physicians of all seniorities.[293] 153 patient safety incidents resulting in death were recorded at one NHS Trust between March 2019 and February 2020 alone.[294] Evidence overwhelmingly suggests that physicians find it difficult to be open and honest about errors.[295] Identifying and disclosing mistakes is vital to facilitating a safety culture which continually improves from mistakes.[296] Numerous NHS schemes explicitly encourage speaking up, including a direct helpline, guardian schemes in which physicians can consult other doctors about their concerns, and NHS policies.[297] Why then, are physicians secretive about errors and failings? Arguably for many reasons, but at the outset, evidence suggests physicians fear being ignored.[298] None of the 51 formal concerns regarding Ian Paterson, a breast surgeon who subjected over 1,000 patients to unnecessary and harmful operations, were investigated.[299] In theory, employees may make "protected disclosures" of information they believe to be "substantially true" without punishment as a whistle-blower.[300] However, in reality, whistle-blowers risk demotions, dismissal, ostracization, humiliation, and mental health problems, so most

---

287 HC Deb 28 March 2019, Vol 638, Col 902 (Rachael Maskell)

288 The Health Foundation, *Does improving safety culture affect patient outcomes?* (2011) 5; Russell Mannion and Huw Davies, 'Understanding organisational culture for healthcare quality improvement' (2018) 363 BMJ 4907

289 Supra (n5) Sarah-May Blaschke et al 562

290 Richard J Bold et al, 'Resident Experience and Opinions About Physician-Assisted Death for Cancer Patients' (2001) 136(1) Arch Surg 60; Jacky Davis, 'Most UK doctors support assisted dying, a new poll shows: the BMA's opposition does not represent members' 360 (2018) 301

291 Ruaidhri McCormack, Margaret Clifford, and Marian Conroy, 'Attitudes of UK doctors towards euthanasia and physician-assisted suicide: a systematic literature review' (2011) 26(1) Palliative Medicine 23; Rebecca Smith, 'Royal College of Nursing drops opposition to assisted suicide' *The Telegraph* (London, 24 July 2009); Supra (n5) Sarah-May Blaschke et al 562; Laura Donnelly, 'Nearly half of GPs would want assisted death, poll suggests' *The Telegraph* (London, 5 February 2019); Royal College of GPs, 'Royal College of GPs remains opposed to change in the law on assisted dying' (Royal College of GPs, 21 February 2020) <https://www.rcgp.org.uk/about-us/news/2020/february/royal-college-of-gps-remains-opposed-to-change-in-the-law-on-assisted-dying.aspx> (accessed 23 August 2020)

292 Supra (n186) Brigette M Hales et al 592

293 Supra (n91) Charles Vincent 146

294 National Reporting and Learning System, *Number of Patient Safety Incidents Uploaded per month by provider in England: Mar 2019 to Feb 2020* (NHS, 2020)

295 Supra (n106) Tejal K Gandhi et al 1025

296 Charles Vincent et al, 'COVID-19: patient safety and quality improvement skills to deploy during the surge' (2020) International Journal for Quality in Health Care 2

297 NHS Improvement, 'Freedom to Speak Up: Whistleblowing Policy for NHS Staff' 3,4, NHS, Whistleblowing <https://www.england.nhs.uk/ourwork/whistleblowing/> accessed 31 August 2020

298 General Medical Council Training Environments, Key findings from the national training surveys (GMC, 2018) 61

299 Ian Kennedy, *Kennedy Review: Review of the Response of Heart of England NHS Foundation Trust to Concerns about Mr Ian Paterson's Surgical Practice, Lessons to be Learned and Recommendations* (Solihull Hospital Kennedy Breast Care Review, 2013) 21

300 Human Rights Act 1998 (Article 10 Freedom of Expression); Public Interest Disclosure Act (PIDA) 1998 s1(1), s43(1)(b)(i), s2; Employment Rights Act 1996

remain silent, operating in a "climate of fear."[301] Last year, an NHS Trust was found to have unfairly investigated, suspended, and dismissed a whistle-blower after she raised concerns when her team received approximately 1,000 extra visits each month without additional resources.[302] These cases are common, but litigation only represents the tip of the iceberg.[303] A significant majority of surgeons in 2018 reported safety and bullying concerns, but over half did not escalate their anxieties due to fears of "vilification" or adverse consequences on their careers.[304] It is difficult to overstate the impact of whistleblowing on safety.[305] The discovery of Harold Shipman's murders, dangerous mortality rates at the Bristol Royal Infirmary, and the abuse of residents at Winterbourne View relied on whistle-blowers.[306] If AD is to be legalised safely, attempts must be made to dismantle secretive cultures which threaten patient safety.

6. Proposals

In response to the above safety concerns, this section advances several legislative and regulatory proposals under four themes: statute, education, monitoring, and safety culture.

6.1 Statute

Assisted dying must be legalised via statute to provide clarity. The Swiss framework, which does not have a separate AD statute, discourages physician participation because doctors are insufficiently guided throughout the AD process.[307] As above, legalisation through litigation would be constitutionally inappropriate. Ideally, statute should be passed as a Private Members Bill to prevent party politics from impeding legalisation.

The terminology of the Act is important. It must be informative, without deterring, encouraging, or stigmatizing those who seek to rely on it. Logically, AD constitutes suicide.[308] In a similar vein, so do "death hastening" withdrawals of life support, although 'hastening' implies that omissions simply accelerate the inevitable.[309] In reality, few individuals who withdraw from life support will die from their disease. Instead, the intervening act introduces a "distinct causal chain" which brings about the death of the patient.[310] Despite benevolent insistence to the contrary,[311] the new means of death divorces the act from the natural progression of their disease. Since the patient foresees, intends, and causes her own death, it is suicidal.[312] However, 'suicide', commonly associated with curable mental despair, may confuse or stigmatize applicants.[313] Although less precise, 'dying' as a neutral term is a safer choice. Consistently, no other AD legislation includes the word suicide. Conversely, 'the Assisted Dying

---

301 Russell Mannion et al, *Understanding the knowledge gaps in whistleblowing and speaking up in health care: narrative reviews of the research literature and formal inquiries, a legal analysis and stakeholder interviews* (NHS National Institute for Health Research, 6(3) August 2018) 68; Supra (n293) HC Deb 28 March 2019 Col 900 (Dr Caroline Johnson)

302 *Fairhall v University Hospital of North Tees and Hartlepool NHS Foundation Trust* 2501673/2018 [114], [124] (Johnson J)

303 Ibid (*Fairhall*); *Pal v General Medical Council* [2004] EWHC 1485 (QB) passim; Stephen Bolsin et al, 'Whistleblowing and patient safety: the patient's or the profession's interests at stake?' (2011) 104(7) J R Soc Med 278; Irene Gafson, Kanika Sharma and Ann Griffin, 'Raising concerns in the current NHS climate: a qualitative study into exploring junior doctors' attitudes to training and teaching' (2019) 6(3) Future Healthc J 156; *Mid Essex Hospital Services NHS Trust v Andrew Smith* UKEAT/0239/17/JOJ passim.

304 Christina A Fleming et al, 'Supporting doctors as healthcare quality and safety advocates: Recommendations from the Association of Surgeons in Training (ASiT)' (2018) 52 International Journal of Safety 349

305 Dame Jane Smith, *Fifth Report of the Shipman Inquiry, "Safeguarding Patients: Lessons from the Past - Proposals for the Future"* (The Shipman Inquiry, 2004) 81 [23], 329 [11.50]

306 Supra (n97) *Kennedy Report* 9 [41]; Supra (n304) *Shipman Inquiry* 81 [23], 329 [11.50]; Supra (n97) *Winterbourne View Hospital Review* ii, ix, 52, 57, 87, 109; Supra (n97) *The Mid Staffordshire Inquiry* 49

307 Georg Bosshard, 'Assisted suicide and euthanasia in Switzerland' (2003) 327(7405) BMJ 51

308 Phoebe Friesen, 'Medically Assisted Dying and Suicide: How are they different and how are they similar?' (2020) 50(1) Hastings Center Report 32

309 Philip Reed, 'Is "aid in dying" suicide?' (2019) 40 Theoretical Medicine and Bioethics 127

310 Ibid 128

311 Death with Dignity, 'Terminology of Assisted Dying' (Death with Dignity) <https://www.deathwithdignity.org/terminology/> accessed 28 August 2020; American Association of Suicidology, *Statement of the American Association of Suicidology: 'Suicide' Is Not the Same as 'Physician Aid in Dying'* (2017) 2

312 Philip Reed, 'Is "aid in dying" suicide?' (2019) 40 Theoretical Medicine and Bioethics 128; Supra (n315) Phoebe Friesen 33

313 Bernardo Carpiniello and Federica Pinna, 'The Reciprocal Relationship between Suicidality and Stigma' (2017) 8 Front Psychiatry 35

Rights Act' conceals the "last resort" spirit of the legislation by placing entitlements front and centre, which could prove misleading.

6.1.1 The Process

A patient must first explicitly or implicitly request AD. The physician must never independently suggest AD to a patient. Although "diametrically opposed" to most doctor-patient communication, this limitation reinforces the exceptional nature of AD and prevents inadvertent encouragement.[314] Some scholarship argues this restraint could create an unjust asymmetry in access to AD due to patient ignorance.[315] This theory is severely undermined by the fact that AD legalisation will likely attract unprecedented media and public attention. A physician must inform the patient whether they are willing to work as a consulting practitioner or whether they conscientiously object within 24 hours. 7 days, as specified in Victoria, is unhelpfully protracted.[316]A language translator should be provided if necessary.

The first consultation should be scheduled as soon as possible, but ideally it should take place no later than two weeks after AD is first requested. 24 hours after the first consultation, the results should be recorded and made available to the independent physician. The same time limits apply to this, and subsequently to the psychiatric evaluation to confirm the patient has capacity. Provided all physicians approve, a specialist in the ailment(s) of the patient should be consulted to provide paper-based recommendations. From thereon, the patient must engage with the reasonable suggestions of the specialist. If, after having exhausted all reasonable solutions to alleviate their suffering, the patient is still suffering irremediably and unbearably, a final capacity test must follow before a fatal prescription can be provided.

6.1.2 Irremediable and Unbearable Suffering

AD should only be available for patients experiencing irremediable (incurable) and unbearable suffering. The suffering need not be attributable to a terminal illness to be irremediable. All *reasonable* remedies which may alleviate suffering should be pursued.[317] Ideally, specialist recommendations will be multifaceted: socialising, therapy, attending support groups, and new hobbies represent pertinent starting points.[318] However, symptom management necessitates a careful balancing exercise in order to respect patient autonomy.[319] For example, if a specialist proposes experimental therapy only available in Singapore which offers very minor benefits, the patient may reasonably be excused from undertaking this treatment. However, such concessions should only be permissible in limited circumstances. The desirable approach is to explore the reasoning behind the patient's lack of enthusiasm and consider whether a treatment can be adapted to suit the needs of the patient.[320] Reasons for not pursuing recommended treatment(s) must be explained in writing prior to the receipt of fatal drugs. After all reasonable options to alleviate suffering have been exhausted, if the patient continues to experience irremediable and unbearable suffering, a final capacity check should follow before life-ending drugs are prescribed. A signature will

314 Carey DeMichelis, Randi Zlotnik Shaul, and Adam Rapoport, 'Medical Assistance in Dying at a paediatric hospital' (2019) 45 Journal of Medical Ethics 60

315 Mara Buchbinder, 'Aid-in-dying laws and the physician's duty to inform' (2017) 43 J Med Ethics 666; Supra (n321) Carey DeMichelis, Randi Zlotnik Shaul, and Adam Rapoport 60; Lucy Willmott et al, 'Restricting conversations about voluntary assisted dying: implications for clinical practice' (2019) 10(1) BMJ Support Palliat Care 105; Lauren Vogel, 'Marginalized Canadians may lack information about end-of-life options' (2018) 190 Can Med Assoc J E1487

316 Voluntary Assisted Dying Act 2017 s13(1)

317 Supra (n210)

318 Supra (n267)

319 *B v D* [2017] EWCOP 15 [54], [60] (Baker J)

320 Supra (n161) *National Council on Disability Report* 24

be necessary to confirm the patient's decision. A digital signature will suffice. Several nursing homes have already successfully utilised electronic signatures.[321]

Specific "cooling off period[s]" between consultations are discouraged.[322] Distilling the contemplation of life's "biggest decision" to an arbitrary number of days fails to actively facilitate patient recovery or explore why an individual is seeking AD. In any event, the timeframe between a first consultation and the receipt of a prescription will very rarely be less than two weeks, since the process engages at least four clinicians and patients must have exhausted all reasonable means of alleviating their suffering. Joris Vandenberghe estimates that one year is a reasonable length of time between first requesting AD and receiving a fatal prescription, which this article concurs with.[323] In a similar vein, Canada is considering extending the minimum length of their eligibility assessments to 3 months unless the patient is due to "soon lose capacity."[324] Regrettably, determining an objective threshold of "soon to lose capacity" is likely to prove extremely difficult, if not impossible. Although a focus on rehabilitation will necessarily disadvantage individuals suffering from degenerative conditions, it is necessary to ensure AD is truly the last resort.

6.1.3 Capacity and Age

Assisted dying should only be available to adults with mental capacity over the age of 18. The existing age and capacity tests provide essential clarity. The medicalised "impairment of or disturbance in the functioning of the brain" test mirrors most international AD standards and is most appropriate, given the medical nature of patient suffering.[325] A potential alternative is the *Gillick* test, which would be a capacity test that enables children to make treatment decisions provided they have "sufficient understanding and intelligence to…understand fully what is proposed."[326] It is decision-specific and "commensurate with the gravity of the decision made."[327] However, this article does not recommend the use of the *Gillick* test for AD. Allowing children to choose an assisted death would likely prove extremely controversial.[328] Expanding AD eligibility to include children has proven exceptionally contentious in Belgium.[329] In any event, since the Court has set an unattainable threshold of maturity required to achieve *Gillick* competence on several occasions, it would most likely resist making decisions with fatal consequences, thus undermining the utility of employing this test.[330] Moreover, the AD capacity test should not require a higher standard of competence than the existing capacity test, since this would generate incoherence in the law.

6.1.4 Conscientious Objections

---

321 Vincent Mor et al, 'PRagmatic trial Of Video Education in Nursing Homes (PROVEN): The design and rationale for a pragmatic cluster randomized trial in the nursing home setting' (2017) 14(2) Clin Trials 140; Emmanuelle Belanger, 'Shared decision-making in palliative care: Research priorities to align care with patients' values' (2017) 31(7) Palliative Medicine 585

322 Contra Death with Dignity Act 1997 (Oregon) §3.01 (1)(h); Loi relative l'euthanasie (Act Concerning Euthanasia) 2002 (Belgium) §3(2); Bill C-14, An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying) 2016 (Canada) 241.2 (3) (g)

323 Supra (n227) Joris Vandenberghe 162

324 Government of Canada, *Proposed changes to Canada's medical assistance in dying legislation* (February 2020)

325 Oregon Death with Dignity Act, 1994 s7; Supra (n76) Swiss End-of-life care 10 [2.1]; Voluntary Assisted Dying Act 2017 (Victoria, Australia) s4; End of Life Choice Act 2019 (New Zealand) s4A; Mental Capacity Act 2005 s2(1)

326 *Gillick v West Norfolk and Wisbech AHA* [1984] QB 581, [189] (Lord Scarman)

327 *Re S (A Minor) (Consent to Medical Treatment)* [1994] 2 FLR 1065 (Johnson J); *Re JA (A Minor) (Medical Treatment: Child Diagnosed with HIV)* [2014] EWHC 1135 (Fam) (Baker J)

328 Carmelle Pesiah, Linda Shahan, and Ben P White, 'Biggest decision of them all – death and assisted dying: capacity assessments and undue influence screening' (2019) 49(6) Internal Medicine Journal 792

2. 329 Jo Samanta, 'Children and euthanasia: Belgium's controversial new law' (2015) 12(1) Diversity and Equality in Healthcare 4; Senay Boztas, 'Three euthanasia cases face investigation in Netherlands' *The Guardian* (Amsterdam, 23 June 2019)

330 Supra (n334) *Re S*; *R E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386 (Ward J); *Re L (Medical Treatment: Gillick Competency)* [1998] 2 FLR 810, [1999] 2 FCR 524

Conscientious objection provisions in statute exempt physicians from participating in morally contentious work, such as abortion.[331] Forcing physicians into assessing eligibility criteria, conducting capacity tests, or providing specialist advice for patients if they disagree with AD could prove unsafe, since apprehensions could confuse or alienate patients.[332] A certificate exempting physicians from working in AD, including conducting consultations, assessing patient capacity, providing specialist advice, or any prescription matters should be stored on their professional record. Physicians should not be required to provide a reason for their objection; disclosing sensitive reasons may well prove unsettling. Accompanying AD guidance must explain that this does not mean objectors can avoid AD entirely. For example, conscientious objectors need not explain the process of AD to a patient, but physicians must always record the request of the patient and refer the patient to a practising physician, as is currently the case in Belgium.[333] Guidance should also remind physicians to respect patients equally, irrespective of their autonomous desires. Evidence in Canada indicates that physician "coldness" can engender patient anxiety, which can lead to harmful consequences.[334]

Allowing staff to be conscientious objectors could potentially undermine equal access to treatment.[335] In Australia, one study demonstrates only approximately 30% of practitioners are willing to consult or advise patients on AD.[336] Providing physicians with a choice could also seriously disadvantage individuals with limited transport access, since the proposed process involves at least three in-person consultations.[337] The AD Clinical Ethics Committee (addressed below at 6.3.1) should record and analyse data on the relationship between conscientious objections and access accordingly.

6.1.5 Location and Method

Legalizing AD necessarily involves approving acceptable methods.[338] Globally, AD is usually achieved through the prescription and oral ingestion of fatal drugs.[339] However, evidence on the effectiveness of drugs is mixed.[340] Until recently, US evidence suggested that most fatal drugs acted quickly and effectively, usually within a matter of minutes.[341] However, in rare cases, deaths can take hours, days, or even weeks, and in extraordinary circumstances the drugs may prove entirely ineffective.[342] Longer deaths could potentially involve discomfort for the patient comparable to a lack of anaesthesia during surgery or a burning sensation.[343] Although no expected timeframe is

---

331 Bernard M Dickens, 'The Continuing Conflict between Sanctity of Life and Quality of Life: From Abortion to Medically Assisted Death' (2006) 913(1) Annals New York Academy of Sciences 102

332 Thomas Bodenheimer and Christine Sinsky, 'From triple to quadruple aim: care of the patient requires care of the provider' (2014) 12 Ann Fam Med 573; Rishi Sikka, Julianne M Morath, and Lucian Leape, 'The Quadruple Aim: care, health, cost and meaning in work' (2015) 24 BMJ Qual Sad 608; Udo Schuklenk, 'Conscientious objection in medicine: accommodation versus professionalism and the public good' (2018) 126(1) British Medical Bulletin 47

333 Loi relative l'euthanasie (Act Concerning Euthanasia) 2002 (Belgium) CHVI s14

334 Supra (n186) Brigette M Hales et al 592

335 Kenneth Stevens, 'Cornering the market on physician-assisted suicide' *The Oregonian* (Portland Oregon, 10 March 2010); Supra (n331) Udo Schuklenk 48

336 Rosalind McDougall and Bridget Patt, 'Too much safety? Safegaurds and equal access in the context of voluntary assisted dying legislation' (2020) 21 BMC Medical Ethics 42

337 Marijke C Jansen-van der Weide, Bregje D Onwuteaka-Philipsen and Gerrit van der Wal, 'Requests for euthanasia and physician-assisted suicide and the availability and application of palliative options' (2006) 4 Palliat Support Care 399

338 Smruti V Sinmyee et al, 'Legal and ethical implications of defining an optimum means of achieving unconsciousness in assisted dying' (2019) 74(5) Anaesthesia 635

339 Russel D Ogden, William K Hamilton, and Charles Whitcher, 'Assisted suicide by oxygen deprivation with helium at a Swiss right-to-die organisation' (2010) 36 Law, Ethics, and medicine 174

340 Supra (n337) Smruti V Sinmyee et al 633

341 Supra (n166) *Oregon Report 2018* 7, 12

342 Hanny Groenewoud et al, 'Clinical problems with the performance of euthanasia and physician-assisted suicide in The Netherlands' (2000) 342 New England Journal of Medicine 551; Robert H Vander Stichele et al, 'Drugs used for euthanasia in Flanders, Belgium' (2004) Pharmacoepidemiology and Drug Safety 91; Arief Lalmohamed and Annemieke Horikx, 'Experience with Euthanasia since 2007: Analysis of problems with execution' (2010) 154 Nederlands Tijdschrift Voor Geneeskunde A1882

343 Jennie Dear, 'The doctors who invented a new way to help people die' *The Atlantic* (NYC, 22 January 2019); Supra (n345) Smruti V Sinmyee et al 633

stipulated in any international guidance, deaths should ideally take place within a few minutes of ingestion.[344]Most evidence suggests that time between ingestion and death is longer if patients already have a tolerance to opioids, whereas "a combination of barbiturate and curare-like substance[s]" seems more effective.[345] Some papers endorse a mask or hood method of oxygen deprivation, particularly for patients who suffer from dysphagia.[346] The lack of international guidance and standardization on the matter is troubling. Ultimately, more research is required on the available options, relevant variables, and storage of drugs. Emergency procedures if drugs are vomited, for example, also need to be considered.

Death method and location are interrelated. Overwhelmingly, individuals want to die at home.[347] Dying at home respects individual autonomy, promoting a calm mindset in which patients control and enjoy their final moments. However, this raises numerous potential issues, particularly on safely storing the drugs. Additionally, safeguards are necessary to ensure that the patient has not been coerced into taking the drugs.[348] To address these concerns, the legislation should include a provision which requires a physician to provide the drugs when requested and remain present with the patient at the time of their death. To corroborate the absence of coercion, video surveillance is recommended. Although the impact of surveillance on patients is not well documented, foreseeably, patients might feel anxious about their last moments being filmed.[349] To mitigate this, obtaining advance patient approval and recording discreetly using a wearable camera is recommended. Additionally, an attending physician will be able to record the time taken between ingestion and death, provide expert advice in emergencies, and reassure patients and family members.[350]

6.1.6 Recording consultations

The electronic recording of consultations could potentially improve safety by enabling cross-referencing checks to confirm patients have capacity and choose AD autonomously. However, the use of surveillance in consultations is very contentious.[351] Being recorded may precipitate stress and anxiety for doctors, who could embark on a defensive tick box exercise and overload patients with information, rather than offering patient-centred material. Additionally, concerns may arise over whether physicians comply out of genuine desire, or simply "because the technologically managed environment gives them no other option."[352] If the latter were true, safety would be seriously undermined in instances of technological failure.[353] Accordingly, the video or audio recording of AD consultations is discouraged.

6.1.7 Criminal Provisions

As aforementioned, outside of the proposed medical framework, there are good public policy reasons for criminalising the assistance or encouragement of suicide. Thus, s2 of the Suicide Act 1961 should not be altered, except to include a provision which stipulates that AD under the new AD Bill is an exception to s2. Additionally,

---

344 Gerrit K Kimsma, 'Euthanasia Drugs in the Netherlands' in David C Thomasma et al (eds), *Asking to Die: Inside the Dutch Debate about Euthanasia* (Springer, 1998) 136

345 Ibid; Supra (n341) Robert H Vander Stichele et al 89

346 Supra (n338) Russel D Ogden, William K Hamilton, and Charles Whitcher 174

347 Supra (n246) The Economist *Quality of Death Index* 39; Emily West et al, 'Hospice care in the Netherlands: who applies and who is admitted to inpatient care?' (2016) 16(33) BMC Health Services Research 1; (The Netherlands) Regional Review Committees, Annual Report 2017 (RTE, 2018) 15

348 Supra (n161) *National Council on Disability Report* 12

349 Anja M Jansen et al, 'The influence of the presentation of camera surveillance on cheating and pro-social behaviour' (2018) 9 Front Psychol 1937

350 Supra (n186) Brigette M Hales et al 594

351 Roger Brownsword, 'Regulating Patient Safety: Is it Time for a Technological Response? Law, Innovation and Technology' (2014) 6(1) 1

352 Ibid 4

353 Ibid 14

the legislation should confirm that DPP investigations, which are usually very distressing for grieving family members, are unnecessary in cases under the new legislation.[354]

6.2 AD Education

Educating all staff thoroughly on AD is imperative at the outset of and throughout medical education. Even for conscientious objectors, an awareness of the AD framework will enable physicians to identify breaches in practice and potentially change their minds on objecting in the future. Overseas, increased education on AD has enabled improved transparency in conversations about death with patients generally.[355] Additionally, through AD requests Oregon has recorded earlier referrals to hospice care,[356] thereby minimising "aggressive" sudden end of life treatment.[357] As explored in this article, numerous different challenges could arise in consultations and AD will inevitably attract a wide variety of patients.[358] Diverse role play scenarios involving disabled patients, reserved patients, and terminally ill patients should familiarise students with some of the challenges they might encounter in a supportive group setting. Education and training should continue throughout the course of a physician's career, particularly if regulations are revised and updated. By comparison, the lack of postgraduate education in Switzerland causes unacceptable and unsafe levels of anxiety for staff.[359] As a means of ensuring education is standardised, web-based interactive tests could be utilised (which have proven effective in several disciplines during COVID-19).[360] Without providing physicians with a script, junior medics must be informed of what constitutes appropriate communication in the AD context. Doctors must tread carefully to decipher implicit requests without encouraging AD.[361] Additionally, education must aim to better understand disabilities, terminal illnesses, and mental health disorders if we are to treat symptoms effectively.[362] Written AD practice guidelines which physicians can refer to are highly recommended to simplify each stage of the process, the relevant legislation, and the principles which underpin AD.

6.3 Monitoring

6.3.1 Clinical Ethics Committee (CEC)

To monitor trends and resolve safety issues in the AD process, it is imperative that England and Wales collect sufficient, consistent data on AD from the outset.[363] To this end, an expert data review and advisory AD Clinical Ethics Committee, comparable to many overseas AD commissions, should be established.[364] CECs are

---

354 Phoebe Southworth, 'Mavis Eccleston, 80, cleared of murdering husband was 'hung, drawn and quartered' by police, family say' *The Telegraph* (London, 22 September 2019); BBC News, 'Mercy killing' family call for change in assisted dying law' *BBC News* (Stoke and Staffordshire, 6 November 2019)

355 Timothy Quill, 'Legal regulation of physician-assisted death—the latest report cards' (2007) 365 New England Journal of Medicine 1911

356 Linda Ganzini et al, 'Oregon physician attitudes about and experiences with end of life care since the passage of the Death with Dignity Act' (2001) 285 Journal of the American Medical Association 2363; Edgar Dahl and Neil Levy, 'The case for physician assisted suicide: how can it possibly be proven?' (2006) 32 Journal of Medical Ethics 335

357 Thomas J Smith et al, 'American Society of Clinical Oncology provisional clinical opinion: the integration of palliative care into standard oncology care' (2012) 30 J Oncol 880; Supra (n246) The Economist *Quality of Death Index* 48; Colin Scibetta et al, 'The costs of waiting: implications of the timing of palliative care consultation among a cohort of decedents at a comprehensive cancer center' (2016) 19(1) J Palliat Med 69; Alexi A Wright et al, 'Family perspectives on aggressive cancer care near the end of life' (2016) 315(3) JAMA 284; Supra (n177) Judith A Paice 313

358 Els van Wijngaarden EV, Carlo Leget, and Anne Goossensen, 'Experiences and motivations underlying wishes to die in older people who are tired of living: a research area in its infancy' (2014) 69(2) Omega 191

359 Supra (n203) Ina C Otte et al 253

360 Supra (n106) Tejal K Gandhi et al 1020

361 Reginal Deschepper et al, 'Communication on end-of-life decisions with patients wishing to die at home: the making of a guideline for GPs in Flanders, Belgium' (2006) 56(522) Br J Gen Pract 14

362 Supra (n161) *National Council on Disability Report* 14

363 Eirini Oikonomou et al, 'Patient safety regulation in the NHS: mapping the regulatory landscape of healthcare' (2019) 9 BMJ Open e028663 1

364 National Luxembourg Commission for Control and Assessment of the Law on Euthanasia and Assisted Suicide, *Review Commissions Report* (2009); Voluntary Assisted Dying Act 2017 (Victoria, Australia) s92; Dutch RTE, *Annual Report* (Regional Euthanasia Review

heterogeneous panels which may focus on general issues or consider a specific topic such as AD, performing diverse functions from advising on specific cases to developing policies.[365] Their composition can span legal counsel, philosophers, and subject specialists. However, in practice, the majority of participants are usually medical professionals, who typically account for around two thirds of the 15 members.[366] The CEC should consist of a national panel supported by regional sub-divisions, divided according to county across England and Wales. The CEC should consist of medical, legal, and data specialists, remunerated for their full-time positions to guarantee commitment to this critical work.[367] Committee members should meet in groups at least once monthly and more frequently in emergencies.[368] The duties of the CEC should be specified within the AD statute to provide clarity, as has proved useful in Australia and Belgium and is proposed in New Zealand.[369] Medical information such as the rates of requests, the number of deaths, the number of prescriptions provided, the type of prescriptions, the expertise of physicians involved, the ailments of patients, time spanned between requesting and receiving prescriptions, and the time between ingestion and death, should be recorded. Additionally, recording the age, gender, sexual orientation, education, socioeconomic background, race, religion, occupation, and family backdrop of patients is imperative. Data should be recorded by existing mortality data collection services, who may wish to develop a new AD specific arm to this end. Following collection, the data is to be analysed and published by the CEC in an accessible format on a biannual basis. The Oregon reports provide an exemplary model which the CEC should aspire to.[370] The combination of legal, medical, ethical, and data analysts should enable the CEC to carefully scrutinize results and advance suitable proposals.[371] Although Baroness Finlay has expressed concerns on the ability of committees to handle data on a national level, she unfairly hypothesises based on Oregon statistics.[372] The replication of US results in England and Wales is unlikely, since patients must go through more regulatory checks and foreseeably a longer rehabilitation process. Thus, CEC panels in England and Wales will probably analyse comparatively fewer deaths than in Oregon.

However, unfortunately, recording data in the NHS is notoriously complicated.[373] The "complexity", "overlaps of remit", and "gaps between different [regulatory] agencies" is "bewildering."[374] An NHS England Trust may interact with up to 126 organisations with "regulatory influence."[375] Across so many providers, accountabilities and responsibilities become diffused.[376] The duplication of requests from different external agencies involves repackaging the same information to satisfy different regulators.[377] Poorly defined "jurisdictional boundaries", accountabilities, and responsibilities of organisations creates uncertainty and regulation-fatigue.[378] This fragmentation results in myopic focus on compliance, rather than perceiving safety holistically as a virtuous cycle.[379] Unsurprisingly, significant regulatory reform has been widely encouraged,[380] since 80% of Trusts consider the

---

Committees, 2017); New Zealand End of Life Choice Act 2019 s20; Belgium's Federal Commission for Control and Evaluation of Euthanasia

365 Judith Hendrick, 'Legal aspects of clinical ethics committees' (2001) 27 Journal of Medical Ethics 50; Richard Lancaster et al, 'Snapshots of five clinical ethics committees in the UK' (2001) 27 J Med Ethics 9

366 Ibid.

367 Supra (n364) Richard Lancaster et al 14

368 Ibid 10.

369 Voluntary Assisted Dying Act 2017 (Victoria, Australia) s92; New Zealand End of Life Choice Act 2019 s20; Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2002 Ch3 A3

370 Supra (n58) *Oregon Report 2020*

371 Supra (n53) Herman Nys 22

372 Ilora Finlay, 'What if 'Assisted Dying' were legalised' (The King's Fund, 1 July 2016) <https://www.kingsfund.org.uk/reports/thenhsif/what-if-assisted-dying-legalised/> accessed 28 August 2020

373 Supra (n362) Eirini Oikonomou et al e028663 8

374 Supra (n94) *A promise to learn – a commitment to act* 30

375 Supra (n278) Charles Vincent et al 762

376 Mary Dixon-Woods and Peter Pronovost, 'Patient safety and the problem of many hands' (2016) 25(7) BMJ Qual Saf 485; Supra (n94) *A promise to learn – a commitment to act* 4

377 Kieran Walshe, 'The rise of regulation in the NHS' (2002) 324 (7343) BMJ 967

378 Supra (n278) Charles Vincent et al 762

379 Ibid 763

380 Supra (n94) *A promise to learn – a commitment to act* 30; Supra (n375) Mary Dixon-Woods and Peter Pronovost 485;

framework unclear.[381] A draft Bill was proposed in 2014, but unfortunately it overlooks the principal issue and instead attempts to streamline the different professional bodies which regulate doctors, nurses, and dentists into one "single merger super-regulator", which is unnecessary and unhelpful.[382] Instead, clarity on the objectives of each organisation, data sharing between agencies, and the elimination of unnecessary groups is essential and warrants urgent government attention.[383] This is vital if AD data is to be collected effectively and consistently.

6.3.2 Electronic Health Records (EHRs)

Throughout the AD process, patient information must necessarily be shared between coordinating, consulting, psychiatric, and expert physicians, pharmacists, and physicians attending the deaths of patients. Given the varied geographical location of physicians and the "information-centric future" of healthcare, a centralised digital database to store patient data is likely to become useful and necessary.[384] EHRs, which primarily serve a "record-keeping function" of test results, allergies, medication lists, diagnoses, advance directives, clinician notes and patient demographics, could prove useful for storing patient data.[385] EHRs usually rely on cloud-computing, "a model enabling ubiquitous, convenient access to a shared pool of resources that can be rapidly provisioned and released with minimal management effort."[386] The practical benefits of cloud-computing are considerable: no fixed infrastructure or location is required, facilitating flexible access and scalability.[387] EHRs enhance safety by providing physicians with all the relevant patient data, ideally aiding seamless data transfer between physicians and avoiding harm as a result of information inaccuracies or omissions, which can arise in poor cross-team communication.[388] Moreover, EHRs aid safe clinical decision-making by providing clinicians with medical alerts or reminders, a "potentially lifesaving feature" minimising human error in fatal drug administration, for example.[389]

Although some one-off studies do not establish a directly causal relationship between EHRs and improved safety outcomes such as mortality rates,[390] wider studies demonstrate how the use of EHRs contributes to the virtuous

---

381 NHS Providers, *Regulation Survey Report: The Changing Nature of Regulation in the NHS* (2018) 4; Supra (n282) Charles Vincent et al 764

382 Draft Regulation of Health and Social Care Professions Etc. Bill 2014; Clare Dyer, 'Healthcare regulation will change, government says' (2017) 356 BMJ 742

383 Supra (n282) Charles Vincent et al 763, 764

384Yazan AI-Issa, Mohammad Ashraf Ottom, and Ahmed Tamrawi, 'eHealth Cloud Security Challenges: A Survey' (2019) Journal of Healthcare Engineering 1; Marc Mitchell and Lena Kan, 'Digital Technology and the Future of Health Systems' (2019) 5:2 Health Systems & Reform 113; Eric W Ford, Bradford W Hesse, and Timothy R Huerta, 'Personal Health Record Use in the United States: Forecasting Future Adoption Levels' (2016) 18(3) J Med Internet Res e73; Yasser K Alotaibi and Frank Federico, 'The impact of health information technology on patient safety' (2017) 38(12) Saudi Med J 1173; Ronen Rozenblum, Paula Miller, Disty Pearson, and Ariane Marelli, 'Patient-centred healthcare, patient engagement and health information technology: the perfect storm' in Maria Adela Grando et al, *Information Technology for Patient Empowerment in Healthcare* (De Gruyter, Inc, 2015) 18

385 Sharona Hoffman, *Electronic Health Records and Medical Big Data* (CUP, 2016) 10

386 Peter Mell and Timothy Grance, *The NIST Definition of Cloud Computing: Recommendations (Special Publication 800-145)* (The National Institute of Standards and Technology, 2011)

387 Irena Bojanova, Jia Zhang and Jeffrey Voas, "Cloud Computing" [2013] IEEE Computer Society 15(2) 13

388 Michelle O'Daniel and Alan H Rosenstein, 'Professional Communication and Team Collaboration' in Ronda G Hughes (ed), *Patient Safety and Quality: An Evidence-Based Handbook for Nurses* (Agency for Healthcare Research and Quality, 2008) 2-271

389 David Bates and Atul Gawande, 'Improving Safety With Information Technology' (2003) 348(25) N Engl J Med 2526; Andrew Balas et al, 'Improving Preventive Care by Prompting Physicians' (2000) 160(3) Arch Intern Med 301; Alan H Morris, 'Treatment Algorithms and Protocolized Care' (2003) 9(3) Curr Opin Crit Care 236; Donna Manca, 'Do electronic medical records improve quality of care?' (2015) 61(10) Can Fam Physician 846; Robert El-Kareh et al, 'Trends in primary care clinician perceptions of a new electronic health record' (2009) 24(4) J Gen Intern Med 464; Pengli Ja et al, 'The Effects of Clinical Decision Support Systems on Medication Safety: An Overview' (2016) 11(12) PloS ONE 1; Supra (n393) Sharona Hoffman 10

390 Eiman Al-Jafar, 'Exploring patient satisfaction before and after Electronic Health Record (EHR) Implementation: The Kuwait Experience' (2013) 10 Perspect Health Inf Manag 1

cycle of safety overall.[391] Tzuchi University Hospital of Taiwan (ranked the best palliative care provider in Asia),[392] has recorded reduced unplanned admission rates, improved communication, lower patient anxiety, and savings of up to 20% after introducing EHRs.[393] However, storing and sharing data via cloud-computing engenders serious security and privacy risks due to the high number of "devices, parties and applications" involved.[394] These risks include data theft and misuse,[395] identity spoofing, and malicious data alterations.[396] Thus, treatment could potentially be informed by inaccurate data, which would pose obvious risks to patient safety. Additionally, security and confidentiality breaches compromise patient trust in healthcare systems, discouraging patient engagement with their treatment.[397] Whilst encryption, digital signatures, and watermarking can protect data, the risks remain significant.[398] Uncertainty remains over data ownership, the possibility of system failures, and legal liability for erroneous advisory alerts.[399] Numerous scholars have proposed solutions on how to manage the complicated technology, but none have achieved holistic success.[400] Devising a workable solution requires expertise beyond the scope of this article: the government should launch a thorough investigation into the best approach. Given the technological and organisational obstacles which hindered the implementation of an effective COVID-19 test and trace system, unprecedented research and analysis will be necessary before introducing EHRs if patients are to maintain their confidence in government.[401]

6.3.3 Personal Health Records (PHRs)

To effectively record and subsequently manage symptoms of suffering, this piece recommends the use of PHR Apps for patients considering AD. PHRs are patient-centric databases where patients can "store, access, update, and share their health data."[402] There are currently over 250 PHR apps in the Google Play store, demonstrating the ever-increasing popularity of "mhealth."[403] Evidence suggests that patients can recover more quickly and

---

391 Clemens Scott Kruse, 'The use of Electronic Health Records to Support Population Health: A Systematic Review of the Literature' (2018) 42(11) J Med Syst 214; Amy E Metroka, 'Effects of Health Level 7 Messaging on Data Quality in New York City's Immunization Information System' (2016) 131(4) Public Health Rep 583; Tracy L Flood et al, 'Electronic Health Records and Community Health Surveillance of Childhood Obesity' (2016) Am J Prev Med 234; Earle C Chambers et al, 'Combining Clinical and Population-Level Data to Understand the Health of Neighborhoods' (2015) 105(3) Am J Public Health 510; Sheryl L Silfen, 'Increases in Smoking Cessation Interventions After a Feedback and Improvement Initiative Using Electronic Health Records — 19 Community Health Centers, New York City, October 2010–March 2012' (2014) 63(41) MMWR Morb Mortal Wkly Rep 921; John Haskew, 'Implementation of a Cloud-Based Electronic Medical Record to Reduce Gaps in the HIV Treatment Continuum in Rural Kenya' (2015) 10(8) PLoS One e0135361; Clemens Scott Kruse and Amanada Beane, 'Health Information Technology Continues to Show Positive Effect on Medical Outcomes: Systematic Review' (2018) 20(2) J Med Internet Res e41; Supra (n388) Robert El-Kareh et al 464

392 George Liao, 'NCKU Hospital President: Taiwan's Palliative Care Ranked No.1 in Asia' *Taiwan News* (Taiwan, 20 August 2017)

393 Yingwei Wang, 'Cloud-based platform for palliative care at home' (European Association for Palliative Care Blog, 29 June 2015) <https://eapcnet.wordpress.com/2015/06/29/cloud-based-platform-for-palliative-care-at-home/> accessed 7 August 2020; Li Fu Chen, Chun-Ming Chang, and Chih-Yuan Huang, 'Home-Based Hospice Care Reduces End-of-Life Expenditure in Taiwan: A population-based study' (2015) 94(38) Medicine (Baltimore) e1613

394 Supra (n383) Yazan AI-Issa, Mohammad Ashraf Ottom, and Ahmed Tamrawi 4

395 Karim Aboeulmehdi, Abderrahim Beni-Hessane and Hayat Khaloufi, 'Big healthcare data: preserving security and privacy' (2018) 5 Journal of Big Data 1

396 Priya Metri and Geeta Sarote, 'Privacy issues and challenges in cloud computing' (2011 5(1) International Journal of Advanced Engineering and Technology 5

397 Cristina M Beltran-Aroca et al, 'Confidentiality breaches in clinical practice: what happens in hospitals?' (2016) 17 BMC Medical Ethics 52

398 Supra (n383) Yazan AI-Issa, Mohammad Ashraf Ottom, and Ahmed Tamrawi 4, 5

399 Ibid 5

400 Ibid 11

401 Passim Jon Excell, 'Poll: Why has the UK still not got a COVID-19 contact tracing app?' *The Engineer* (London, 4 August 2020); Sarah Neville and Laura Hughes, 'Official data show UK's test and trace target missed' *The Financial Times* (London, 9 July 2020); Haroon Siddique and Kevin Rawlinson, 'UK coronavirus live: Boris Johnson defends 'world beating' test-and-trace system despite fall in contacts reached – as it happened' *The Guardian* (London, 6 August 2020); Jim Waterson, 'Public trust in UK government over coronavirus falls sharply' *The Guardian* (London, 1 June 2020)

402 Martha Jean Minniti et al, 'Patient interactive healthcare management, a model for achieving patient experience excellence' in Charlotte A Weaver et al, *Healthcare Information Management Systems* (Springer, 2016) 257; Supra (n383) Yazan AI-Issa, Mohammad Ashraf Ottom, and Ahmed Tamrawi 10

403 Sanjeev P Bhavnani, Jagat Narula, and Partho P Sengupta, 'Mobile technology and the digitization of healthcare' (2016) 37(18,7) European Heart Journal 1428; Myeunghee Han and Eunjoo Lee, 'Effectiveness of Mobile Health Application Use to Improve Health

significantly when actively engaging with their treatment.[404] Convincing evidence also demonstrates that monitoring personal progress can often promote self-efficacy and cultivate a positive recover-focused mindset.[405] In the AD context, this could be achieved by daily use of PHRs, providing patients with an overall picture of their progress and encouraging resilience or open-mindedness to new remedies. Digitally inputting symptoms daily minimises recollection bias and enables physicians to make recommendations in real time and from a distance if necessary.[406] Ideally, PHRs should provide patients with more "testimonial credibility" in corroborating their symptoms by enabling them to refer to and rely on their data.[407] However, PHRs could create "a double-edged sword": if patients forget to record their symptoms or their recorded symptoms conflict with objective evidence, such as blood sugar levels, physicians may subsequently underestimate patient concerns.[408] A study in Kuwait also suggests that physicians have become overly reliant on recorded evidence to the detriment of face-to-face interactions with patients, who have since reported confusion and distrust of clinicians following shorter consultations and rushed treatment explanations.[409] Additionally, the effectiveness and use of PHRs can vary significantly between patients depending on factors including age, socio-economic background, and ethnicity.[410] At the outset, the PHR technology must be accessible and the language used must be clear.[411] Simply worded questions such as "do you feel depressed?" prevents misinterpretation amongst both patients and physicians.[412] To encourage completion and accurate results, question formatting should remain consistent throughout: a horizontal scale with verbal anchors at either end scaling from 1 to 10 is recommended.[413] Although questions types will inevitably vary depending on symptoms, the PHR should order matters logically, minimising the need for patients to refer back to preceding questions or answers.[414] A single NHS app designed by healthcare professionals and technological experts is essential to ensure the app is fit for purpose and amenable to standardized regulation.[415] The independent deletion of evidence by patients must also be prevented.[416] CEC reporting on the use and effectiveness of PHRs would be useful.

6.4 A Learning Culture

Behavior Changes: A Systematic Review of Randomized Controlled Trials' (2018) 24(3) Healthc Inform Res 207; Simon P Rowland et al, 'What is the clinical value of mHealth for patients?' (2020) 3(4) NPJ Digital Medicine 1

[404] Christine K Cassel, 'The epitaph of profession' in Donald M Berwick, *Promising Care: How we can rescue health care by improving it* (Jossey-Bass, 2014) 166-167; Julia James, 'Patient Engagement. People actively involved in their health and health care tend to have better outcomes—and, some evidence suggests, lower costs' (2013) Health Policy Brief 2-3; Kate R Lorig et al, 'Evidence suggesting that a chronic disease self-management program can improve health status while reducing hospitalization' (1999) 37(1) Medical Care 5; Angela Coulter, 'Patient engagement-what works?' (2012) 35(2) J Ambul Care Manage 80; Judith H Hibbard and Jessica Greene, 'What the Evidence Shows about Patient Activation: Better Health Outcomes and Care Experiences; Fewer Data on Costs' (2013) 32(2) Health Affairs 207; Howard Koh et al, 'A Proposed 'Health Literate Care Model' Would Constitute a Systems Approach to Improving Patients' Engagement in Care' (2013) 32(3) Health Affairs 357; Alex H Krist, 'Engaging primary care patients to use a patient-centred personal health record' (2014) 12(5) Ann Fam Med 418; Catalina Danis et al, 'Patient engagement at the point of care: technology as an enabler' in Maria Adela Grando et al, *Information Technology for Patient Empowerment in Healthcare* (De Gruyter Inc, 2015) 202

[405] Susan Michie et al, 'Effective techniques in health eating and physical activity interventions: a meta-regression' (2009) 28(6) 690; Susan Michie, Maartje M Van Stralen, and Robert West, 'The behaviour change wheel: a new method for characterizing and designing behaviour change interventions' (2011) 6(42) Implementation Science 1; Supra (n403) Catalina Danis et al 202

[406] Supra (n185) Asimina Lazardiou et al 42

[407] Supra (n277) Anita Ho and Oliver Quick 2

[408] Supra (n277) Anita Ho and Oliver Quick 1

[409] Supra (n389) Eiman Al-Jafar 1

[410] Eung-Hun Kim et al, 'Usage Patterns of a Personal Health Record by Elderly and Disabled Users' (2007) AMIA Ann Symp Proc 409; Melissa Lester, 'Personal Health Records: Beneficial or Burdensome for Patients and Healthcare Providers?' (2016) 13 Perspect Health Inf Manag 1; Kyungsook Kim and Eun-shim Nahm, 'Benefits of and Barriers to the Use of Personal Health Records (PHR) for Health Management among Adults' (2012) 16(3) Online Journal of Nursing Informatics; Cyrus K Yamin et al, 'The digital divide in adoption and use of a personal health record' (2011) 171(6) Arch Intern Med 568

[411] Mehnaz Adnan, Jim Warren, and Hanna Suominen, 'Patient empowerment via technologies for patient-friendly personalized language' in Maria Adela Grando et al, *Information Technology for Patient Empowerment in Healthcare* (De Gruyter, Inc, 2015) 153

[412] Supra (n177) Judith A Paice 313

[413] Supra (n185) Asimina Lazardiou et al 40

[414] Phil Edwards, 'Questionnaires in clinical trials: guidelines for optimal design and administration' (2010) 11(2) Trials 3

[415] Charles M Denison and Elizabeth L Montevoy, *Transforming Healthcare with Health Information Technology* (Nova Science Publishers, 2011) 36; Supra (n277) Anita Ho and Oliver Quick 3

[416] Matthew J Witry, 'Family physician perceptions of personal health records' (2010) 1(7) Perspect Health Inf Manag 1d

As aforementioned, closed workplace cultures encourage secrecy and the practice of defensive medicine, inhibiting a culture which promotes learning from harm.[417] Some scholarship argues that a learning culture could be better facilitated by a no-fault lability model.[418] No-fault models vary significantly worldwide, utilised in New Zealand, America, France, Sweden, Denmark, Norway, Finland, and Iceland.[419] No-fault liability models essentially provide fixed compensation for individuals who have suffered medical harm without placing blame on doctors.[420] This approach is widely deemed more "efficient" and ethical by avoiding litigation.[421] At present, liability operates on a tortious "fault-based" system: harm caused by a breach of duty must be established (usually in a legal claim).[422] Significant evidence suggests that this has encouraged the practice of defensive medicine, which is closely related to error opacity.[423] Defensive medicine is the intentional use of unnecessary medical treatment by physicians in order to avoid litigation, potentially involving both positive practice through "assurance behaviour", such as subjecting patients to additional tests, or intentionally confining practice to minimise exposure to high-risk patients or procedures.[424] Defensive medicine is not usually conducive to patient safety because treatment is not patient-centred and it exposes patients to unnecessary risks.[425] Upwards of 60% and in some cases well over 90% of physicians report practising defensive medicine.[426] However, these results are undermined by the fractional number of responses to each survey, at most 504 doctors.[427] Additionally, those who consider themselves to have performed defensive medicine are far more likely to respond to surveys on the matter.[428] Moreover, these studies only record self-reporting, so results are likely inaccurate due to perception bias.[429] One study attempted to objectively calculate the extent of defensive medical practice, however, the study relied on self-reporting and vague categories such as "once a month" and "a little."[430] Although this article considers the evidence on defensive practice unreliable and exaggerated, regardless, it is "unlikely that the tort system helps improve patient safety."[431] Whilst some scholarship argues that litigation acts as a deterrent to encourage safer medicine, this theory relies on flawed "individual blame logic", which assumes that "people make mistakes because they do not pay enough

---

417 Robert Francis QC, *Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry Volume 3: Present and future* (The Mid Staffordshire NHS Foundation Trust Public Inquiry, 2013) 1357

418 Paul Weiler, 'The case for no-fault medical liability' (1993) 52(4) Maryland Law Review 937; Anne-Maree Farrell, Ms Sarah Devaney, and Ms Amber Dar, No-Fault Compensation Schemes for Medical Injury: A Review (Interim Report) (University of Manchester and Scottish Government Social Research, 2010) 9, 37; David Weisbrot and Kerry J Breen, 'A no-fault compensation system for medical injury is long overdue' (2012) 197 MJA 296; Shivkrit Rai and Vishwas Devaiah, 'The need for healthcare reforms: is no-fault liability the solution to medical malpractice?' (2019) 11 Asian Bioethics Review 93

419 Supra (n417) Shivkrit Rai and Vishwas Devaiah 86

420 Ibid 86

421 Ibid 91; Supra (n417) Paul Weiler 948

422 Supra (n124) *Montgomery* passim

423 Maurizio Catino, 'Blame culture and defensive medicine' (2009) 11 Cognition Technology and Work 248; Louise M Nash et al, 'Perceived practice change in Australian doctors as a result of medicolegal concerns' (2010) 193 MJA 579; Eric D Katz, 'Defensive Medicine: A Case and Review of Its Status and Possible Solutions' (2019) 3(4) Clin Pract Cases Emerg Med 329

424 Erik Renkema, Manda Broekhuis, and Kees Ahaus, 'Conditions that influence the impact of malpractice litigation risk on physicians' behaviour regarding patient safety' (2014) 14 BMC Health Services Research 38

425 Sandro Vento, Francesca Cainelli, and Alfredo Vallone, 'Defensive medicine: it is time to finally slow down an epidemic' (2018) 6(11) World J Clin Cases 407

426 David M Studdert et al, 'Defensive medicine among high-risk specialist physicians in a volatile malpractice environment' (2005) 293(21) JAMA 2609; Toru Hiyama et al, 'Defensive medicine practices among gastroenterologists in Japan' (2006) 12(47) World J Gastroenterol 7671; Osman Ortashi et al, 'The practice of defensive medicine among hospital doctors in the United Kingdom' (2013) 14 BMC Medical Ethics 42; Alex Jingwei He, 'The doctor-patient relationship, defensive medicine and overprescription in Chinese public hospitals: Evidence from a cross-sectional survey in Shenzhen city' (2014) 123 Social Science & Medicine 64; Massimiliano Panella et al, 'Prevalence and costs of defensive medicine: a national survey of Italian physicians' (2017) 22(4) Journal of Health Services Research & Policy 212; Homaile Mascarin do Vale and Maria Cristina de Oliveira Santos Miyazaki, 'Defensive medicine: a practice in whose defense?' (2019) 27(4) Rev bioét (Impr) 749; Erik Renkema et al, 'Triggers of defensive medical behaviours: a cross-sectional study among physicians in the Netherlands' (2019) 9 BMJ Open 1; Elif Oksan Calikoglu and Aysun Aras, 'Defensive medicine among different surgical disciplines: A descriptive cross-sectional study' (2020) 73 Journal of Forensic and Legal Medicine 101970

427 Supra (n425) Alex Jingwei He 64

428 Michelle M Mello et al, Changes in Physician Supply and Scope of Practice During a Malpractice Crisis: Evidence from Pennsylvania (2007) 26 Health Aff w433

429 Gijs van Dijck, 'Should physicians be afraid of tort claims? Reviewing the empirical evidence' (2015) 6(3) Journal of European Tort Law 296

430 Supra (n425) Homaile Mascarin do Vale and Maria Cristina de Oliveira Santos Miyazaki 749

431 Supra (n1) Oliver Quick 98

attention to the tasks they are doing."[432] Whilst a tort model might deter intentionally culpable acts of sabotage, most mistakes are unintentional, so using a deterrent model is unlikely to minimize harm.[433]

Safety is determined by an overwhelming number of different factors. Thus, a no-fault liability alone is unlikely to be an omnipotent force in achieving patient safety.[434] Whilst litigation is probably not conducive to patient safety,[435] there is no evidence to suggest that no-fault liability systems encourage greater transparency regarding errors.[436] In any liability system, physicians must still report errors and receive complaints.[437] Unrealistic societal expectations in the "infallibility" of doctors is common to both models.[438] Thus, whilst this article does not discourage an inquiry into the benefits of a no-fault liability system, it does not specifically encourage liability reform, nor consider no-fault liability a particularly useful pre-requisite to the legalisation of AD.

Facilitating treatment as significant as AD will likely prove emotionally challenging and potentially traumatising for staff. Distressing work can contribute to staff burnout and fatigue, which corresponds with increased risks of errors.[439] To encourage much needed sincerity and support in this domain about obstacles and errors,[440] AD 'death cafés' should be established on a national level.[441] These would operate as relatively informal staff meetings which take place on a regular basis and provide a platform for group discussions about dealing with death. These should be attended by physicians of diverse ranks, but led by a senior physician, who should open conversations with an anecdote about the personal difficulties they have encountered in AD practice. If those at the top can accept their infallibilities, learn from mistakes, and share their experiences, this should encourage junior physicians to be open about their own mistakes, thereby contributing to the formation of a safety culture.[442] Non-specialist 'death cafés' have been successfully utilised in the US and in Taiwan, where doctors have reported increased confidence in handling difficult conversations around death, suicide, and abortion.[443] Additionally, the recording of positive information on data systems, such as the exemplary work of others, has been shown in several studies to directly boost physician self-esteem and increase overall incident reporting and transparency.[444] In light of this, introducing a system for excellence reporting on a standardized national basis is highly recommended.

Normalising whistleblowing and emphasising that "no news is not always good news" is critical to facilitate a learning culture which learns and improves from harm.[445] In a similar vein to AD education, role-playing whistleblowing scenarios should form an essential element of undergraduate education, ideally sustained

---

[432] Supra (n422) Maurizio Catino 247
[433] Supra (n1) Oliver Quick 97
[434] Supra (n424) Sandro Vento, Francesca Cainelli, and Alfredo Vallone 406
[435] Supra (n1) Oliver Quick 88, 89
[436] Marie Bismark and Ron Paterson, 'No-fault compensation in New Zealand: harmonizing injury compensation, provider accountability and patient safety' (2006) 25 Health Affairs 282; Supra (n1) Oliver Quick 101
[437] Katharine A Wallis, 'No-fault, no difference: no-fault compensation for medical injury and healthcare ethics and practice' (2017) 67(654) Br J Gen Pract 38
[438] Supra (n423) Erik Renkema, Manda Broekhuis, and Kees Ahaus 38; Tsachi Keren-Paz, Tina Cockburn, and Alicia El Haj, 'Regulating innovative treatments: information, risk allocation and redress' (2019) 11(1) Law, Innovation, and Technology 2
[439] Louise Hall et al, 'Healthcare Staff Wellbeing, Burnout, and Patient Safety: A Systematic Review' (2016) 11(7) PLoS One e0159015
[440] Passim Albert Wu, 'Medical error: the second victim. The doctor who makes the mistake needs help too' (2000) 320 BMJ 726
[441] Supra (n207) Irene Tuffrey-Wijne et al 1099
[442] Kathleen McFadden, Stephanie Henagan, and Charles Gowen, 'The patient safety chain: Transformational leadership's effect on patient safety culture, initiatives, and outcomes' (2009) 27(5) Journal of Operations Management 403; Lorna McKee et al, *Understanding the dynamics of organisational culture change: Creating safe places for patients and staff* (National Institute for Health Research Service Delivery and Organisation Programme, 2010) 92, 95; Yong-Mi Kim and Donna Newby-Bennett, 'The Role of Leadership in Learning Culture and Patient Safety' (2012) 15(1) International Journal of Organization Theory and Behavior 151; Supra (n426) *Mid Staffordshire Future Report* 1357; Michael West et al, *Leadership and Leadership Development in Health Care: The Evidence Base* (The King's Fund, 2015) 10, 16; Robert McSherry and Paddy Pearce, 'What are the effective ways to translate clinical leadership into health care quality improvement?' (2016) 8 J Healthc Leadersh 11; Erin Rogers et al, 'A just culture approach to managing medication errors' (2017) 52(4) Hosp Pharm 308; Supra (n106) Tejal K Gandhi et al 1025; Supra (n300) *Knowledge gaps in whistleblowing* 86, 87
[443] Supra (n246) The Economist *Quality of Death Index* 8
[444] David Sinton et al, 'Excellence reporting (GREATIX): Creating a different paradigm in improving safety and quality' (2016) 33 Emergency Medicine Volume 901
[445] Supra (n97) Angie Ash 145

throughout practice.[446] The whistleblowing Guardians scheme should be reviewed and potentially adapted since advisory "guardians" are employed by the NHS, necessarily lacking independence and thereby deterring disclosures.[447] In the interim, an independent employment law specialist on the AD CEC could provide a suitable alternative in the context of AD. Given the impact of whistleblowing on safety overall, an NHS-wide inquiry into encouraging whistleblowing would be prudent. Introducing financial incentives for whistleblowing is strongly discouraged.[448] It may prompt over-reporting,[449] or deter thorough investigations, since managers may assume whistle-blowers are reporting purely for financial gain.[450] Additionally, a financial response to the "livelihood-destroying experiences of many whistle-blowers" is deeply inappropriate and incompatible with the publicly funded nature of the NHS.[451]

7. Conclusion

This piece has been considered how patient safety can be protected throughout the AD process. After the introductory chapter, the second and third chapters provided general overviews of AD and safety respectively. Chapter four justified the legalisation of AD generally from both ethical and safety standpoints through the lens of Beauchamp and Childress' four seminal principles. Chapter five explained how AD risks extend beyond slippery slope concerns to include harms under four main themes: stigmatising communication, inappropriate symptom management, inadequate data monitoring, and closed cultures. In response, chapter six advanced five proposals: a carefully drafted statute, education on AD for physicians, the introduction of a specialist CEC to monitor AD data, 'death cafés', and excellence reporting to promote a learning culture amongst physicians. Although legalisation is a long way off, particularly considering government focus on COVID-19, patient safety in the context of AD has been unacceptably overlooked. Having demonstrated that safety and AD are not incompatible, ideally, this article will aid in pacifying AD opponents, encouraging further research into the practicalities of legalisation, and inform improved education on symptom management for vulnerable populations.

---

[446] Matthew Limb, 'Whistleblowing training should be mandatory for medical students, BMA says' (2015) 350 h2848; Luke Johnson et al, 'Improving patient safety by enhancing raising concerns at medical school' (2018) 18 BMC Medical Education 178; Supra (n310) Irene Gafson, Kanika Sharma and Ann Griffin 156

[447] Paul Rauwolf and Aled Jones, 'Exploring the utility or internal whistleblowing in healthcare via agent-based models' (2019) 9 BMJ Open e021705 2

[448] Supra (n300) *Knowledge gaps in whistleblowing* 86, 87 82; Robert Francis QC, *Freedom to Speak Up: A Review of whistleblowing in the NHS* (2015) 113 [5.7.4]

[449] The Whistleblowing Commission, *The effectiveness of existing arrangements for workplace whistleblowing in the UK* (Public Concern at Work: The Whistleblowing Charity, 2013) 13 [54], 14 [60]

[450] Ibid 14 [60e]

[451] Phil Hammond and Andrew Bousfield, 'Shoot the messenger' *Private Eye* (London, 22 July 2011); Supra (n97) Angie Ash 145

THE 'EPIDEMIC' OF FAKE NEWS: SHOULD SOCIAL MEDIA SITES SUCH AS FACEBOOK HAVE A DUTY OF CARE FOR FAKE NEWS AND MISINFORMATION CONTENT ON THEIR SITES?

Maya Sterrie[1]

ABSTRACT

The rise and increasing sophistication of fake news and misinformation content on social media sites has become problematic in recent times. Especially on Facebook, fake news and misinformation content has developed rapidly, taking advantage of the site's evolving multi-tiered platform nature and selective algorithms to reach users who are more inclined to believe it and share it. This has resulted in fake news and misinformation becoming an almost automatic phenomenon, and as social media sites such as Facebook have begun to play an increasing role in political discourse, scholarship has debated whether Facebook ought to be considered akin to a publisher and fall within the remit of publishing laws. Yet, statute and common law have neglected to affirm this status. In turn, a fragmented approach to regulating online content has emerged. Further, whilst Facebook has adopted behavioural and algorithmic regulations seeking to address the harms raised by such content, they are not ideal and are not subject to official oversight. For these reasons, the government has proposed to introduce a statutory duty of care for social media sites over harmful content. However, the White Paper which proposed the duty of care possesses various flaws. Notably, the Paper does not mention that the duty of care will cover fake news and misinformation content, neglecting to provide a definition for such content. Therefore, this article argues that social media sites should not be subject to a duty of care, but rather proposes such sites be subject to greater disclosure requirements such as the auditing of Facebook's algorithmic processes. This article also suggests that Facebook provide greater education to its users on fake news and misinformation content, and work collaboratively with other platforms experiencing similar challenges.

[1] LLB Law at University of Leeds. LLM in International Commercial Law at the University of Bristol (Distinction). Future Trainee Solicitor at Katten Muchin Rosenman LLP.

Introduction

Social media sites such as Facebook have had an immense impact on our daily lives.[2] In today's society, the average internet user spends around 6 hours each day online,[3] much of which is spent on social media sites.[4] Reports estimate that over 3 billion people globally use social media sites each month.[5] Social media sites such as Facebook, Twitter, Instagram, YouTube and TikTok provide the everyday citizen with 'unprecedented scope for expression, connection and selection [of content].'[6] As social media sites become increasingly engrained in our daily lives fostering a 'culture of connectivity'[7] through virtual communities,[8] it is important that such online spaces remain safe for users. Social media sites ought to protect their users' fundamental human rights in this electronic dimension[9] such as one's right to freedom of expression and speech,[10] non-discrimination and privacy (especially personal data protection).[11] However, fake news and misinformation content on social media sites presents a risk to human rights,[12] and potentially harming users, as evidenced by a plethora of cases brought before the courts[13] and recent geopolitical events, calling into question the content regulation policies of such sites.

1. Context

Whilst there is a general consensus in the literature that more needs to be done to address the harms arising from online content, little has been said on how the law can tackle fake news and misinformation content specifically. In this article, the online harm of focus will be fake news and misinformation. Broadly speaking, "fake news" refers to, 'false information that could mislead readers',[14] which is oftentimes propaganda-based.[15] Tarlach McGonagle provides a more comprehensive definition, stating that fake news is, 'information that has been deliberately fabricated and disseminated with the intention to deceive and mislead others into believing falsehoods or doubting verifiable facts'.[16] However, there is no consensus on what fake news encompasses,[17] with the term often appearing in speech marks, indicating its disputed meaning.[18] The lack of definition has left its meaning

---

[2] A Phippen and E Bond, 'The Online Harms spearmint paper - just more doing more?' (2019) 30(6) *Entertainment Law Review* 170; Z W Y Lee, C M K Cheung, and D R Thadani, 'An investigation into the problematic use of Facebook' (2012) *45th Hawaii International Conference on System Sciences* 1768; A Vranaki, 'Social Networking Site Regulation: Facebook, Online Behavioral Advertising, Power and Data Protection Laws' (2017) 43(2) *Rutgers Computer & Technology Law Journal* 2.

[3] We are Social, 'Digital 2019: Global Internet Use Accelerates' (30 January 2019) < https://wearesocial.com/blog/2019/01/digital-2019-global-internet-use-accelerates> Accessed 23/09/2020 (We are Social); also see House of Commons, *Report on the Impact of Social Media and Screen-Use on Young People's Health* (HC 2017-19, 5) 5.

[4] ibid (House of Commons Report).

[5] We are Social (n2).

[6] D Mangan and L E Gillies (eds), *The Legal Challenges of Social Media* (Edward Elgar, 2017) 2.

[7] ibid; also see J van Dijck, *The Culture of Connectivity: A Critical History of Social Media* (Oxford University Press, 2013).

[8] D J Kuss and M D Griffiths, 'Online Social Networking and Addiction—A Review of the Psychological Literature' (2011) 8(9) *International Journal of Environmental Research and Public Health* 3528 - 3529. Also see House of Lords Select Committee on Communications, *Regulating in a digital world* (HL 2017-19, 299-II) 3 (House of Lords Select Committee on Communications).

[9] *See* S Rodotà, 'Data Protection as Fundamental Human Right', in S Gutwirth, Y Poullet, P De Hert, C de Terwangne, and S Nouwt (eds), Reinventing Data Protection? (Springer, 2009).

[10] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) (adopted 4 September 1950, entered into force 3 September 1953), Articles 8 and 10; Human Rights Act 1998, Article 10.

[11] General Data Protection Regulation (EU) 2016/679 OJ L119/1 (GDPR); Data Protection Act 2018.

[12] T Zarsky, 'Incompatible: The GDPR in the Age of Big Data' (2017) 47 *Setton Hall Law Rev* 996; *Kuss (n7);* S Grey, 'The World Wide Web: Life Blood for the Public or Poison for the Jury?' (2011) 3(2) *Journal of Media Law* 200.

[13] See ***Richardson v Facebook*** **[2015] EWHC 3154;** *JR20 v Facebook Ireland Ltd* [2017] 9 WLUK 80;
Case C-18/18, Eva Glawischnig-Piesczek v. Facebook, judgment of Oct. 3, 2019, ECLI:EU:C:2019:821.

[14] *See* House of Commons Digital, Culture, Media and Sport Committee, *Disinformation and 'fake news': Interim Report* (HC 2017–19, 363), paras. 2, 11- 14 (House of Commons Digital, Culture, Media and Sport Committee); H Allcott and M Gentzkow, 'Social Media and Fake News in the 2016 Election' (2017) 31(2) *Journal of Economic Perspectives* 211.

[15] E Tandoc et al, 'Defining "Fake News": A Typology of Scholarly Definitions' (2018) 6(2) *Digital Journalism* 137.

[16] T McGonagle, '"Fake News" - False fears or real concerns' (2017) 35(4) *Netherlands Quarterly Human Rights* 203 (McGonagle).

[17] House of Commons Digital, Culture, Media and Sport Committee (n13).

[18] McGonagle (n15).

open-ended, with some interpreting the term to include honest mistakes, opinion, satire and parody:[19] all of which on the surface seem harmless (and legal), yet have the potential to result in harmful consequences.[20]

Whilst Mark Zuckerberg, founder of Facebook, initially thought it was a "crazy idea" that fake news and misinformation content on Facebook could influence elections in *any way,*[21] there is good reason to be concerned about Facebook's seemingly "omnipresent" nature. Facebook has begun to play an increasing role in social, political and legal landscapes,[22] ultimately becoming a "primary keeper of cultural discussions". [23] The use of Facebook has been widely discussed following recent political events internationally including the Brexit referendum in 2016, the UK general elections of 2017 and 2019, the US Presidential elections in 2016 and 2021,[24] and the unsuccessful attempts to use Facebook to influence the German and French elections in 2017.[25] These events have highlighted the concerning influence Facebook can have on politics and democratic discourse.[26]

Hence, the focus of this article will be primarily on Facebook as this is the largest social network in the world, currently valued at around $664 billion,[27] and ranked number 5 on Forbes' most valuable companies.[28] In 2012, Facebook became the first social media site to surpass one billion active users.[29] Now, in 2021, Facebook's active user base is just over 2.89 billion, [30] and Facebook was found to be the most downloaded mobile app of the past decade.[31] With such a large reach, it is concerning that scholars like Paul Bernal claim Facebook is, 'tailor-made for the spreading of fake news and for political manipulation.'[32] This is especially concerning as Facebook has become the main news source for 49% of the UK population.[33] In fact, Ofcom (the Office of Communications: an independent regulator)[34] found that 63% of people did not believe that news on social media sites can be considered impartial.[35] Public opinion is growing increasingly intolerant of harmful content which such sites are failing to eliminate,[36] and two thirds of adults in the UK have expressed concerns about online content more

---

[19] ibid, para. 2; **A Subedar, 'The Godfather of Fake News'** ***BBC*** **(27 November 2018)** <https://www.bbc.co.uk/news/resources/idt-sh/the_godfather_of_fake_news> Accessed 17/09/2020; House of Commons Digital, Culture, Media and Sport Committee (n13).

[20] ibid (Subedar).

[21] **ibid.**

[22] S O'Leary, 'Balancing rights in a digital age' (2018), *Irish Jurist* 60; A Han, 'The Facebook IPO's Face-Off With Dual Class Stock Structure' (2012) 45(1) *U of Michigan J of LReform* 50; A Perrin, Social Media Usage: 2005-2015' (Pew Research Center, 8 October 2015) <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/> Accessed 21/09/2020.

[23] T Gillespie, 'The politics of "platforms"' (2010) 21(3) *New Media & Society* 348; A Murray, *Information Technology Law: The Law and Society* (4th edn, Oxford University Press, 2019) 74.

[24] O'Leary (n21).

[25] A Murray, *Information Technology Law: The Law and Society* (4th edn, Oxford University Press, 2019) 74.

[26] ibid; J M Grygiel, 'Algorithmic propaganda: how Facebook meddles with democracy' (2020) 35(1) Comms. L. 23; O'Leary (n21).

[27] Macroaxis, 'Facebook current valuation' <https://www.macroaxis.com/invest/ratio/FB--Current-Valuation> Accessed 12/08/2020; Macroaxis, 'Facebook Financial Statements From 2010 to 2020' <https://www.macroaxis.com/invest/financial-statements/FB> Accessed 12/08/2020.

[28] FXSSI, 'Most Valuable Companies in the World – 2020' (27 January 2020) < https://archive.vn/20200127180010/https:/fxssi.com/top-10-most-valuable-companies-in-the-world> Accessed 21/09/2020.

[29] Statistica, 'Number of monthly active Facebook users worldwide as of 1st quarter 2020 *(in millions)'*

(2020) <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> Accessed 09/07/2020.

[30] Statistica, 'Number of monthly active Facebook users worldwide as of 2nd quarter 2021 *(in millions)'*

(2021)https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/#:~:text=With%20roughly%202.89%20billion%20monthly,the%20biggest%20social%20network%20worldwide> Accessed 03/10/2021.

[31] C Miller, 'These were the most-downloaded apps and games of the decade' (17 December 2019) <https://9to5mac.com/2019/12/16/apps-and-games-of-the-decade/> Accessed 10/09/2020.

[32] P Bernal, 'Facebook: why Facebook makes the fake news problem inevitable' (2018) 69(4) *Northern Ireland Law Quarterly* 519.

[33] Ofcom, 'Half of people now get their news from social media' (24 July 2019) <https://www.ofcom.org.uk/about-ofcom/latest/features-and-news/half-of-people-get-news-from-social-media> Accessed 17/09/2020.

[34] *See* Commission for Countering Extremism, *Challenging Hateful Extremism* (October 2019) 8.

[35] ibid.

[36] House of Lords Select Committee on Communications (n7) 5.

broadly.[37] Zuckerberg stated that he founded the site to, 'give people a voice and bring people together' and to help, 'build a more inclusive society.'[38] However, this is increasingly being challenged and Zuckerberg himself has acknowledged that giving people a voice is driving division, 'with more people believing that achieving political outcomes is more important than every person having a voice and being heard.'[39] This has largely been influenced by concerns that technology platforms have centralised power, [40] and in times of social tension, Zuckerberg states that "our impulse is to hold back on free expression."[41] However, free expression is the "lifeblood" of a democracy:[42] 'without it an effective rule of law is not possible.'[43]

Nevertheless, Facebook has become a virtual playground for the spread of fake news and misinformation:[44] as John Suler once wrote, 'if you build it, some will abuse it.'[45] As online communication, interactions and behaviour generally have evolved, scholarship has begun to debate issues related to "virtual misbehaviour".[46] Due to the lack of regulation and oversight required before users post content on social media sites, misinformation and fake news circulates on Facebook with great ease.[47] In light of the increasing presence of such content, there is a need for greater refinement of the law. [48] The UK government announced in its 2019 Online Harms White Paper ('White Paper')[49] that it will introducing a statutory duty of care for social media sites stating that, 'online harms are widespread and can have serious consequences.'[50] This followed research revealing that over one in four adults in the UK have experienced some form of harm relating to online content.[51] However, the proposed duty has attracted criticism as scholars contemplate how a duty of care can be enforced between a social media site like Facebook and its users. Further, the duty is set to address a 'comprehensive spectrum of online harms in a single and coherent way',[52] becoming the first legislation globally to combine "online harms" under one framework,[53] as opposed to introducing different regulatory frameworks each addressing specific harms. However, this article contends that this approach is unsatisfactory in addressing the problem of fake news and misinformation, and the harms that arise from such content.

2. Structure

The first chapter of this article will discuss policy considerations surrounding the regulation of social media sites, considering relevant legislative instruments in the context of fake news and misinformation content on Facebook and addresses the significance of social media sites' status as a platform and not a publisher for users who may suffer online harm. The second chapter discusses challenges for the law in regulating fake news and misinformation, addressing the actual problem of fake news and misinformation, the lack of geographical borders, the difficulty in processing and analysing mass data, and the multi-tiered nature of Facebook. The third chapter

---

37 ibid 3.
38 Georgetown University, 'A conversation with Mark Zuckerberg on free expression' (October 2019) <https://www.facebook.com/georgetownuniv/videos/2193972280707148/?v=2193972280707148> Accessed 03/09/2020.
39 ibid.
40 Financial Times Collections, 'The Economics of Big Tech', <https://www.ft.com/economics-of-big-tech> Accessed 11/08/2020.
41 ibid.
42 *R v Secretary of State for Home Department, ex parte O'Brien and Simms* [2000] 2 AC 115, para 126 per Lord Steyn; J Raz, 'Free Expression and Personal Identification' (1991) 11(3) *Oxford J of Legal Studies* 306.
43 ibid (Lord Steyn).
44 Murray (n22).
45 See J R Suler and W L Phillips, 'The Bad Boys of Cyberspace: Deviant Behavior in Multimedia Chat Communities' (1998) 1(3) *Cyber Psychology and Behavior* 275 - 294.
46 J Sternberg, *Misbehaviour in Cyber Places: The Regulation of Online Conduct in Virtual Communities on the Internet* (UPA, 2012) 11.
47 Lee (n1) 583; J H Rowbottom, 'To rant, vent and converse: Protecting low level digital speech' (2012) 71(2) *Cambridge Law Journal* 1.
48 ibid; House of Lords Select Committee on Communications (n7).
49 See Department for Digital, Culture, Media & Sport, Online Harms White Paper (12 February 2020) <https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper> accessed 12/08/2020.
50 ibid.
3. 51 Ofcom, 'Internet users' concerns about and experience of potential online harms' (24 June 2020) <https://www.ofcom.org.uk/research-and-data/internet-and-on-demand-research/internet-use-and-attitudes/internet-users-experience-of-harm-online> Accessed 23/09/2020.

52 Online Harms White Paper (n48).
53 ibid, para. 2.17.

considers the ways in which Facebook has tackled fake news and misinformation, namely through behavioural and algorithmic regulation, albeit such mechanisms are self-regulatory. This means that Facebook's current attempts to regulate harmful content including fake news and misinformation are self-governed, lacking any independent oversight. The fourth chapter turns to address the government's proposed statutory duty of care, picking apart its flaws and offering three reform proposals. Ultimately, this article will conclude that whilst social media sites like Facebook should regulate fake news and misinformation, a statutory duty of care is not the desirable vehicle in which to address such content and its resultant harms online.

Chapter 1. Regulating Social Media Sites: Policy Considerations

In order to discuss whether social media sites like Facebook should have a duty of care for harmful content on its site, it is necessary to explore the current legal framework surrounding online content and define what social media sites are. This chapter will begin by identify the main legal instruments at play in this context, before going on to discuss whether Facebook is a platform or a publisher, arguing it is a platform due to its collaborative and host-nature for user-generated content. This will set the groundwork to begin analysing whether social media sites like Facebook ought to be responsible for fake news and misinformation content.

1. Legal Framework Surrounding Online Content

Whilst regulation of online content is by no means a "Wild West",[54] progress in the protection of online harms, especially fake news and misinformation, has been slow and inconsistent.[55] This has resulted in overlaps and gaps in the law:[56] it is clear that self-regulation by social media sites in its existent form has failed.[57] This is largely due to the fact that there is no overseeing body or regulator that deals with harmful online content.[58] A 2019 House of Lords Select Committee Report acknowledged that significant activity online has occurred which would not be tolerated offline, for example, incitement of violence, abuse and hate speech,[59] despite claims that "the criminal law applies to online activity in the same way as to offline activity."[60] In some instances this is certainly true. For example, Section 1 of the Malicious Communications Act 1988 prohibits the sending of threatening or grossly offensive messages via post or electronic communication.[61] Similar protections exist for content that is defamatory (encompassing libel or slander),[62] encompasses malicious falsehood,[63] infringes data protection, or is considered to constitute harassment.[64] Legislation targeting online behaviour has also been introduced, such as the Computer Misuse Act 1990,[65] although this applies to cybercrime and fake news and misinformation is not a recognised crime.

This chapter will explore relevant legislation in the human rights context, and broader online context.

A. Freedom of Expression

---

54 See Rowbottom (n46); A Yen, 'Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace' (2002) 17 *Berkeley Technology L J* 1207.
55 Online Harms White Paper (n48).
56 House of Lords Select Committee on Communications (n7).
57 ibid 5; See Elliot and Thomas (n82) 751.
58 House of Commons, *Briefing Paper' on Social Media Regulation* (26 February 2020) <https://commonslibrary.parliament.uk/research-briefings/cbp-8743/> page 4; House of Lords Select Committee on Communications (n7).
59 ibid, ch 9, para 11.
60 House of Commons Briefing Paper (n57) 4; also see HM Government, 'Internet Safety Strategy - Green paper' (October 2017) 37; Online Harms White Paper (n48), para. 2.7.
61 Malicious Communications Act 1988, s 1.
62 Defamation Act 2013.
63 Defamation Act 1952, s 3(1).
64 Protection from Harassment Act 1997.
65 House of Lords Select Committee on Communications (n7) ch 9, para 11.

There is a need to ensure social media sites like Facebook allow freedom of expression to flourish online, whilst simultaneously protecting users from harm.[66] The difficulty lies in achieving this balance without censoring speech. As David Mangan acknowledged, 'regulation of online expression affects the deeply cherished democratic principle of free speech.'[67] Further, whilst Facebook has arguably taken a "hands-off" approach to political speech, framing themselves as apolitical and unbiased,[68] Jennifer Grygiel argues this has resulted in Facebook assisting in the distribution of fake news and misinformation.[69] Still, there is a need to prevent fake news and misinformation from spreading on social media sites and being used as a vehicle for harm.[70]

Various legal instruments protect freedom of expression internationally including the European Convention on Human Rights,[71] the Treaty on the Functioning of the EU,[72] the EU Charter of Fundamental Rights,[73] the European Convention for the Protection of Human Rights and Fundamental Freedoms,[74] and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[75] Importantly, the Human Rights Act 1997 ('HRA') is the main source of legislation protecting human rights in the UK. In particular, Article 10(1) of the HRA states that, 'everyone has the right to freedom of expression.'[76] This includes the right to, 'hold opinions and to receive and impart information and ideas without interference by public authority.'[77] In other words, freedom of expression, 'protects people's freedom to communicate in public',[78] encouraging individuals to contribute to the public culture,[79] and participate in democracy.[80] Importantly, Article 10 protection includes expression which may, 'shock, disturb or offend the deeply-held beliefs of others.'[81] From a non-consequentialist perspective, Mark Elliot and Robert Thomas explain that the value of speech should not be judged solely by its consequences: 'offending others does not *necessarily* mean that such speech should be prohibited and the law must give weight to the intrinsic value of allowing individuals to express themselves.'[82] Further, it is necessary for people to be able to discuss news freely and publicly: praising, blaming or criticising if they wish.[83]

Importantly, the scope of Article 10 is unclear as the word "includes" indicates that this is a non-exhaustive list,[84] raising questions as to what other forms of speech (such as misinformation) can be protected under Article 10. As

---

66 Online Harms White Paper (n48), para. 1.22.
67 Mangan (n5) 4; Raz (n4); M Herz and P Molnar, *The content and context of hate speech: rethinking regulation and responses* (Cambridge University Press, 2012) 13; K Wagner and N Nix, Facebook Considers a Political Ad Ban for Election, Pleasing No One (12 July 2020) <https://www.bloomberg.com/news/articles/2020-07-11/facebook-mulls-a-political-ad-ban-for-election-pleasing-no-one?cmpid=BBD071220_TECH&utm_medium=email&utm_source=newsletter&utm_term=200712&utm_campaign=tech> Accessed 13/07/2020.
68 Grygiel (n25)
69 ibid, 25.
70 Mangan (n5) 4; Online Harms White Paper (n48), para. 1.22; Also see D Solove, *The Future of Reputation* (Yale University Press, 2007); I Brown and C T Marsden, *Regulating Code: Good Governance and Better Regulation in the Information Age* (MIT Press, 2013) 117; L Edwards, 'Privacy, Law, Code and Social Networking Sites' in I Brown, *Research Handbook on Governance of the Cyberspace* (Edward Elgar Publishing, 2013).
71 ECHR (n9).
72 Treaty on the Functioning of the European Union DATE, Article 16.
73 Charter on Fundamental Rights, Article 8.
74 ECHR (n9), Article 10.
75 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); J Spigelman, 'The Forgotten Freedom: Freedom from Fear' (2010) 59 *International and Comparative Law Quarterly* 1 543 – 544.
76 Human Rights Act 1998, Article 10(1).
77 ibid.
78 Raz (n41) 303.
79 ibid 304.
80 ibid 305; W Sadurski, *Freedom of Speech and Its Limits* (Dordrecht, 1999) 17; N Moreham and M Warby, *Tugendhat and Christie: The Law of Privacy and the Media* (Oxford University Press, 2011, 2nd edn) 599.
81 Also see No 6538/74 *The Sunday Times v The United Kingdom* [1979] 2 EHRR 245, para 65; *R v Central Independent Television plc* [1994] Fam 192, para 204 per Lord Justice Hoffman.
82 M Elliot and R Thomas, *Public Law* (Oxford University Press, 2nd edn, 2014) 744.
83 ibid 746.
84 ibid 747.

of yet, however, the courts have not addressed whether misinformation or fake news could gain Article 10 protection and such commentary is merely speculative. Whilst freedom of expression is vital to protecting public debate,[85] Article 10 is a conditional right,[86] recognising the ability of speech to cause harm and safeguard against such harm.[87] Further, the HRA requires the courts to balance Article 10 with the exercise of other Convention rights, [88] acknowledging that there may be circumstances where Article 10 "might have to come second best"[89] to competing rights such as the right to privacy,[90] reputation[91] and the right to a fair trial.[92] Balancing any two fundamental rights can take various forms and is no easy feat as such rights are incommensurable, inevitably resulting in conflict.[93] Still, any restrictions on freedom of expression must be clearly prescribed by the law and be, 'necessary in a democratic society for a legitimate aim, and proportionate.'[94] Conor Gearty emphasises that, 'restrictions on freedom of expression are regarded as the most serious conceivable breach of civil liberties'[95] and the Adam Smith Institute has called the regulation of free speech, 'the most comprehensive online censorship regime in the democratic world'.[96]

However, scholarship has challenged the prevalence of free speech,[97] calling its importance a "mystery".[98] Joseph Raz goes as far to argue that "words do not kill" (so long as they do not infringe other's interests),[99] however the 2017 Pizzagate incident suggests otherwise.[100] In December 2017, a man opened fire at the Comic Ping Pong pizzeria in Washington DC, USA, believing a fake news story that claimed a paedophilia ring involving members of the Democratic Party was operating there.[101] Hence, even when considering harmful content like fake news and misinformation, it is imperative that the law is able to balance freedom of expression with the protection of users from such harm, as Article 10(2) offers users limited protection against a broad range of speech that could encompass misinformation. However, whilst social media sites have enabled users to enjoy greater freedom of expression, a greater amount of user's expression is now also likely to become subject to regulation[102] such as the proposed statutory duty of care.[103]

B. Online Protection

---

85 *Commission for Countering Extremism (n33)*; *The Sunday Times v The United Kingdom (n).*
86 Human Rights Act 1998, Article 10(2); Also see No 21980/93 *Bladet Tromsø A/S and Stensaas v Norway* [1999] 29 EHRR 125, para 59.
87 ibid (Human Rights Act); S Foster, 'Do we want free speech or not? Modern challenges to free speech' (2019) 24(2) *Coventry L J* 70; Elliot and Thomas (n82).
88 Human Rights Act 1998, ss 2-4, 6; See S Foster 'Interfering with Editorial judgement, making "good television' and the loss of the public interest defence' (2019) Communications Law 102; No 41615/07 *Neulinger and Shuruk v. Switzerland* [2010] ECHR 1053; No 73604/01 *Monnat v Switzerland* [2006] ECHR 64.
89 ibid (Foster) 71.
90 Human Rights Act 1998, Article 8; *also see* Human Rights Act 1998, ss 2-4, 6.
91 Defamation Act 2013; A Mullis, 'Tilting at Windmills: the Defamation Act 2013' (2014) 77(1) MLR 87; See M Jones, 'The Defamation Act 2013: a free speech retrospective' (2019) 24(3) *Communications Law,* 117.
92 Contempt of Court Act 1981, ss 2 and 10 especially.
93 O'Leary (n21) 60; Mangan (n5) 2; Spigelman (n75) 566; Also see N Foster, 'Freedom of Religion and Balancing Clauses in Discrimination Legislation' (2016) 5(3) *Oxford J of L and Religion* 385 – 430.
94 Human Rights Act 1998, Article 10; Commission for Countering Extremism (n33); Moreham and Warby (n80); Elliot and Thomas (n82).
95 C Gearty, *Civil Liberties* (Oxford University Press, 2007) 122.
96 A Mendonca-Richards and E Perkins, 'Tackling online abuse: a look at the online harms White Paper' (2019) 25(5) *Computer and Telecommunications Law Review* 135 – 136.
97 Also see W Sadurski, *Freedom of Speech and Its Limits* (Dordrecht, 1999).
98 Raz (n41) 304.
99 ibid.
100 BBC, 'The saga of 'Pizzagate': The fake story that shows how conspiracy theories spread'

4. (2 December 2016) <https://www.bbc.co.uk/news/blogs-trending-38156985> Accessed 20/09/2020; Amanda Robb, 'Anatomy of a fake news scandal' (*The Rolling Stones,* 16 November 2017) <https://www.rollingstone.com/feature/anatomy-of-a-fake-news-scandal-125877/> Accessed 03/10/2021.

101 ibid.
102 ibid.
103 Online Harms White Paper (n48).

Largely due to the novelty of social media sites and their amorphous quality, existing communications laws such as the Broadcasting Act 1996 and the Communications Act 2003 are silent on the subject of social media sites,[104] neglecting to address the problem of fake news and misinformation.[105] In the UK, various other regulatory frameworks have therefore been introduced to address harms online and entitle users to take legal action. This list includes the Political Parties, Elections and Referendums Act 2000 (overseeing political party activity on social media sites), the Digital Economy Act 2017 (creating age verification requirements)[106] and the Data Protection Act 2018 (protecting the processing of personal data online). [107] Users can also take legal action where posts incite violence, hatred, terrorism, are defamatory or invade privacy.[108]

Yet, none of the aforementioned statutes address fake news and misinformation content. Further, whilst the UK left the European Union on December 31st 2020, it is illustrative to consider EU legislation regarding online content as UK citizens previously could have made use of such legislation to claim for damages should they suffer any harm arising from fake news and misinformation. In Europe, the following frameworks provide various forms of protection against online harms: the 2019 Digital Single Market Directive requires Facebook to take more responsibility for infringed copyright material shared on its site,[109] the E-Commerce Regulations[110] protect innocent disseminators of defamation content online and importantly, the E-Commerce Directive[111] protects online platforms from liability for user-generated illegal content they host until they are notified of it or, 'if their technology has identified such content, and subsequently failed to remove it from their services in good time.'[112] However, in the case of *Delfi v Estonia,*[113] Delfi, an Estonian news site, were held liable for defamatory comments posted anonymously on their website. Here, Delfi had a "notify-and-take-down" system in place, however, the European Court of Human Rights upheld the domestic court's finding that Delfi were liable for not immediately removing defamatory comments posted on their website from third party users, having taken over eight weeks to do so.[114] Whilst eight weeks is certainly too long, the court's expectation of Delfi to take down the content "immediately" seems unrealistic when applied to a social media context. Illustratively, in *R v Blackshaw*,[115] the defendant was sentenced to four years in prison for creating a page entitled "The Warrington Riots" whilst drunk, shortly after the August 2011 riots in England. The defendant took the page down after "several hours" stating that it had been a joke, yet was sentenced to four years in prison.[116] Whilst the user was held liable in this instance, the case nevertheless illustrates there is a need for coherence in the law in addressing harmful content online.

Nevertheless, the E-Commerce Directive mandates that platforms ought to apply voluntary duties of care "which can reasonably be expected from them."[117] However, member states cannot require platforms to undertake general monitoring and are not deemed responsible for content until it has been pointed out to them.[118] Social media sites therefore rely heavily on users reporting content to them.[119] Facebook's terms of service state that, 'if we learn of content or conduct like this, we will take appropriate action - for example, offering help, removing content, blocking access to certain features, disabling an account, or contacting law enforcement.'[120] As Zuckerberg explains, this is because, 'there are billions of posts, comments and messages across our services each day, and

---

[104] *See* Murray (n22) 109.
[105] Rowbottom (n46).
[106] Digital Economy Act 2017, s 16.
[107] Also see the GDPR.
[108] ibid, also see Human Rights Act 1998; Defamation Act 2013; Data Protection Act 2018.
[109] Digital Single Market Directive 2019/790 OJ L130/92; Murray (n22) 91.
[110] Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013).
[111] Electronic Commerce Directive 2000/31/EC OJ L178/01, Articles 12 – 15.
[112] Online Harms White Paper (n48), para. 2.6; Murray (n22) 71.
[113] No 64569/09 *Delfi AS v Estonia* 2015 [2015] ECHR 586.
[114] ibid.
[115] [2011] EWCA Crim 2312.
[116] R v. Blackshaw [2011] EWCA Crim 2312 at paras 59-64.
[117] House of Commons Briefing Paper (n57) 6.
[118] Mendonca-Richards and Perkins (n96).
[119] House of Lords Select Committee on Communications (n7), ch 5, para 184.
[120] Facebook, 'Terms of Service' <https://www.facebook.com/terms.php> Accessed 03/09/2020 - effective October 1st 2020.

since it's impossible to review all of them, we review content once it is reported to us."[121] Zuckerberg also acknowledged that, 'there have been terribly tragic events… that perhaps could have been prevented if *someone* had realized what was happening and reported them sooner."[122] In turn, it is apparent that some form of oversight is necessary to prevent Facebook's becoming a nesting-ground for fake news and misinformation.

C. Proposed Statutory Duty of Care

The UK government is introducing a statutory duty of care to, 'make companies take more responsibility for the safety of their users and tackle harm caused by content.'[123] The proposed duty was introduced in response to the government's 2017 Internet Safety Strategy Green Paper.[124] The Green Paper raised concerns around technology companies' ability to operate without official oversight, transparency or accountability,[125] resulting in what the paper deemed, 'a failure to act in the users' best interests.'[126] Ultimately, Facebook is a private limited company, with a vested interest to act in the best interest of its shareholders, and not its users.[127] Whilst introducing a duty of care is a step in the right direction, the lack of definition for misinformation, and other harms listed, is problematic. Further, the proposed duty's combination of online harms into one legislative regime seemingly blurs the boundary between harmful and illegal content.[128] Unsurprisingly, the White Paper has been criticised for its ambiguity, lack of focus and oversimplification.[129] Though some form of regulation holding Facebook accountable for misinformation and fake news content that can cause severe harm is desirable, the introduction of a statutory duty of care is not the best vehicle to achieve this.

2. Are Social Media Sites Platforms or Publishers?

It is important to discern whether social media sites like Facebook ought to be seen as platforms or publishers as the law accords each status with a different level of rights and responsibilities, with platforms possessing less onerous duties. The House of Commons Digital, Culture, Media and Sport Committee ('DCMS') acknowledged that "social media companies cannot hide behind the claim of being merely a 'platform' and maintain that they have no responsibility themselves in regulating the content of their sites."[130] Whilst there is no universally accepted definition of both terms, the European Commission described a platform as an undertaking that, 'enable[s] interactions between two or more distinct but interdependent groups of users.'[131] Publishers are broadly understood to be organisations responsible for the publication and distribution of an array of printed works including newspapers and broadcasting organisations.[132] The Law Commission defined social media as encompassing, 'websites and apps that enable users to create and share content or to participate in social

---

5. [121] K Wagner and K Swisher, 'Read Mark Zuckerberg's full 6,000-word letter on Facebook's global ambitions' *Vox* (16 February 2017) <https://www.vox.com/2017/2/16/14640460/mark-zuckerberg-facebook-manifesto-letter> Accessed 09/10/2021.

[122] ibid.
[123] Online Harms White Paper (n48), para 16.
[124] HM Government Green Paper (n59).
[125] HM Government, 'Response to the Internet Safety Strategy Green Paper' (May 2018) 5.
[126] ibid.
[127] Facebook UK Limited <https://beta.companieshouse.gov.uk/company/06331310> Accessed 10/09/2020.
[128] House of Commons Briefing Paper (n57) 3.
[129] Phippen and Bond (n1).
[130] House of Commons Digital, Culture, Media and Sport Committee (n13), paras. 14, 51, 57.
[131] European Commission, 'White Paper on Artificial Intelligence - A European approach to excellence and trust' COM (2020) 65 final; European Commission, *Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy* (2015) 5.
[132] Cambridge English Dictionary, 'Publisher' <https://dictionary.cambridge.org/dictionary/english/publisher> Accessed 22/09/2020. Also see Licensing Act 1662; Statute of Anne 1710; *Donaldson v Becket* (1774) 17 Parl Hist Eng 953, 2 Brown's Parl. Cases 129; Copyright Act 1814; Copyright Act 1911; Copyright Act 1956; Copyright, Designs and Patents Act 1988; Berne Convention on the Protection of Literary and Artistic Works 1886; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (adopted 26 October 1961, entered into force 18 May 1964) 496 UNTS 43 (Rome Convention), Information Society Directive 2001/29/EC OJ L167/10, Article 5; Copyright and Related Rights Regulation 2003.

networking',[133] albeit this definition is rather vague. However, the nature of social media sites like Facebook is difficult to define as their services are constantly evolving, driven by user-generated content.[134] Facebook users can create public profiles, connect with other people, create events, join groups, and post or share content such as status updates, photos, videos, and stories.[135] In other words, Facebook's platform is multi-tiered, providing a 'global consumer phenomenon'[136] beyond just an image sharing or chat service such as WhatsApp.[137]

A. Comparison with the Press

Due to Facebook's intermediary role in disseminating information,[138] many have compared social media sites to publishers, especially the press (newspapers and broadcasting organisations),[139] who perform an invaluable function as an essential foundation of a democracy.[140] The transformation of Facebook and the growth of its services has enabled anyone with internet access to reach the same mass audience, if not more, that the press traditionally could.[141] Historically the press have played a gatekeeper role, acting as a "watchdog of the public,"[142] and continue to be seen as an "organized, expert scrutiny of government".[143] Interestingly, research has shown that the press play an important role in reducing the spread of misinformation on social media sites by, 'debunking and denying false rumours.'[144]

If social media sites like Facebook were deemed publishers, they would become subject to numerous legislation and guidelines that the press are subject to. For example, the press is subject to various regulatory bodies including Ofcom, the Press Recognition Panel,[145] IMPRESS (an independent self-regulator)[146] and the Independent Press Standards Organisation: all of which seek to prevent the publication of harmful material, but are voluntary.[147] Newspaper journalists also follow voluntary ethics codes such as the Editors' Code of Practice[148] and the National Union of Journalists Code of Conduct,[149] albeit there have been serious ethical breaches in recent times such as the phone hacking scandal,[150] which exposed the failure of these organisations and these codes to enforce ethical journalistic practices.[151] In light of such scandals, US commentators coined the term "yellow journalism", referring

---

133 Law Commission, *Abusive and Offensive Online Communications: A Scoping Report* (HC 1682, 2018) p ix.
134 ibid; Lee (n1).
135 ibid (Lee); Facebook Terms of Service (n123).
136 Kuss (n7); Mangan (n5).
137 Grygiel (n25); Murray (n22) 91.
138 G Smith and L Woods, 'Take care with that social media duty of care' (2018) 1 <https://www.regulation.org.uk/library/2018-Graham_Smith-Take_care_with_that_social_media_duty_of_care.pdf>.
139 ibid; Y Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, 2006) 271; *See* (n131).
140 *Francome v Mirror Group Newspapers* [1984] 1 WLR 892, para 989 per Sir John Donaldson MR.
141 Benkler (n139).
142 *Re S* [2004] UKHL 47, at para. 18 per Lord Steyn; J H Rowbottom, 'Leveson, Press Freedom and the Watch Dogs' (2013) 21(1) *Oxford Legal Studies Research Paper* 59.
143 J P Stewart, 'Or of the Press' (1975) 26(3) *Hastings L J* 634.
144 K Starbird, D Dailey, O Mohamed, G Lee and E Spiro "Engage Early, Correct More: How Journalists Participate in False Rumors Online during Crisis Events" (2018) *Proceedings of the 2018 CHI Conference on Human Factors in Computing Systems* <https://www.researchgate.net/publication/322665656_Engage_Early_Correct_More_How_Journalists_Participate_in_False_Rumors_Online_during_Crisis_Events>
145 Press Recognition Panel, <https://pressrecognitionpanel.org.uk/> Accessed 23/09/2020.
146 *See* https://impress.press/.
147 Elliot and Thomas (n82) 750 – 751.
148 IPSO, 'Editor's Code of Practice' < https://www.ipso.co.uk/editors-code-of-practice/> Accessed 23/09/2020.
149 The National Union of Journalists, 'The National Union of Journalists Code of Conduct' <https://www.nuj.org.uk/about/nuj-code/> Accessed 23/09/2020; Eli Pariser, 'Beware of online "filter bubbles"' (1 May 2011) <https://www.ted.com/talks/eli_pariser_beware_online_filter_bubbles/up-next?language=en> Accessed 27/08/2020.
150 CNN Editorial Research, 'UK Phone Hacking Scandal Fast Facts' *CNN* (26 April 2020) <https://edition.cnn.com/2013/10/24/world/europe/uk-phone-hacking-scandal-fast-facts/index.html> Accessed 21/09/2020.
151 *See* Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Report* (HC 780, 2012); T Aplin and J Davis, *Intellectual Property Law: Texts, Cases, and Materials* (3rd edn, Oxford University Press, 2017) 564.

to dishonest journalistic practices and the sensationalism of content.[152] Even so, Section 10 of the Contempt of Court Act 1981 protects journalists from having to reveal their sources, presuming in favour of the journalist.[153] Further, in the case of *Newspaper Licensing Agency v Meltwater Holding,*[154] the court considered whether copyright protection existed over newspaper headlines and article extracts, holding that newspapers and journalists can gain protection not only over the content of their published work, but also the headlines and titles.[155] Therefore, were social media sites seen to be publishers, user-generated content, including content that is misinformed, could hypothetically gain protection from the Contempt of Court Act 1981 and copyright protections.

Illustratively, in the US the First Amendment of the Constitution grants constitutional protection for a free press explicitly:[156] the only organised private business to be mentioned.[157] In *Citizens United v Federal Election Commission,*[158] Justice Scalia suggested that if newspapers have broad First Amendment protections, so must corporations.[159] Further, Chomsky argued that a corporation's rights exceeds the ordinary citizen's as, 'corporations can engage sovereign nations in policy enactment and legal issues.'[160] This is arguably true for social media sites like Facebook, already playing an influential role in politics, knowing "no boundaries:"[161] only subject to piece-meal legislation.[162] However, the shift from twentieth century mass media to online platforms has allowed individuals to become speakers, producing their own content and possessing, 'a greater say in their governance than the mass media made possible.'[163] Whilst the press are not an entirely "neutral vehicle for the balanced discussion of diverse ideas,"[164] this transition from "listener" to "speaker" has altered the ecology of communication systems.[165] This has led some scholarship to consider whether users on Facebook are "citizen journalists,"[166] entitled to the aforementioned journalistic protections.[167]

However, it is also necessary to look at the nature of social media sites and the content posted on them considering their proximity to traditional journalistic practices such as fact checking, verification and whether editors exist who have control mechanisms.[168] For these reasons in the US case of *Too Much Media v Hale,*[169] message board posts were not granted constitutional protection. By contrast, in the New Zealand case of *Slater v Blomfeld,*[170] the court held that blogging was sufficiently close in practice to traditional journalism to claim the benefit of non-disclosure of source revealing.[171] Whilst this supports the claim that the press, 'comprehends every sort of publication which affords a vehicle for information and opinion',[172] the UK courts have taken a more restrictive approach. In *Author of a Blog v Times Newspaper,*[173] Eady J rejected a blogger's interim injunction request to stop the Times Newspaper

6. [152] A Samuel, 'To Fix Fake News, Look to Yellow Journalism' *JSTOR* (29 November 2016) <https://daily.jstor.org/to-fix-fake-news-look-to-yellow-journalism/> Accessed 22/09/2020.

[153] *See* Contempt of Court Act 1981, s 10.
[154] [2010] EWHC 3099 (Ch), [2011] RPC 7, [2011] EWCA Civ 890.
[155] ibid.
[156] Constitution of the United States 1789, First Amendment; S R West, 'Awakening the Press Clause' (2011) 58 *University of California Los Angeles Law Review* 1026.
[157] Stewart (n61) 633.
[158] (2010) 130 S. Ct. 876.
[159] ibid at 928 per Scalia J; West (n156).
[160] *See* Noam Chomsky, 'Who Rules the World?' (1st US ed., Metropolitan Books & Henry Holt and Company 2016); Grygiel (n25) 24.
[161] B McLachlin, 'Courts, Transparency and Public Confidence – To the Better Administration of Justice' (2013) 8(1) *Deakin Law Rev* 6.
[162] House of Lords Select Committee on Communications (n7) 4.
[163] Benkler (n139) 271.
[164] Stewart (n61).
[165] Murray (n22) 87 – 88.
[166] See I Cram, 'Keeping the demos out of liberal democracy? Participatory politics, 'fake news' and the online speaker' (2019) 11(2) *J of Media L* 113 – 141; Also see I Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (Hart Publishing, 2002).
[167] See Contempt of Court Act 1981, s 10 and *Newspaper Licensing Agency v Meltwater Holding BV, Meltwater News UK Ltd, Public Relations Consultants Association Ltd* [2010] EWHC 3099 (Ch), [2011] RPC 7, [2011] EWCA Civ 890.
[168] Cram (n168).
[169] NJ (2011) 20 A 3d 364.
[170] [2014] NZHC 2221.
[171] ibid.
[172] *Lovell v Griffin* (1938) 303 US 444, at para. 450 per Hughes CJ; also see *Branzburg v Hayes* (1972) 408 US 665, at para. 704 per White J.
[173] [2009] EWHC 1358 (QB); [2009] EMLR 22.

from identifying him, commenting that, 'blogging is essentially a public rather than private activity.'[174] Though users on social media sites are not bloggers, it is not so easy to discern the nature of social media sites. Scholars like Orla Lynskey highlighted how Netflix, for example, labels itself as a platform when its services are currently single-sided:[175] simply offering a service in exchange for remuneration.[176] In a similar vein, Facebook offers its users free communication service access in exchange for them agreeing to sell their data to advertisers.[177] In fact, Facebook is the largest online advertiser in the world,[178] with online advertising accounting for over 99% of the company's revenue.[179] Nevertheless, the nature of Facebook posts by users is informal, and does not reflect typical journalistic practices.

Jacob Rowbottom further distinguishes between different levels of speech, arguing that it is important to recognise the distinction between "high level" and "low level" speech. Rowbottom defined the former as speech that is, 'professionally produced, aimed at a wide audience, is well resourced and researched in advanced',[180] whereas the latter refers to "amateur content that is spontaneous, inexpensive to produce, and is often akin to everyday conversation".[181] However, such an argument creates an artificial hierarchy in protecting and favouring some forms of speech over others, oftentimes linked to the identity of the speaker. Yet, in *AG v Observer Ltd,*[182] as well as in *Steel and Morris v UK*,[183] the courts rejected the notion that free speech claims ought to be treated differently dependent on whether the speaker was a journalist or not.[184] However, such cases were decided before the rise of social media sites and scholars like Sonja West emphasise the policy considerations behind the distinction of speech: the privileges granted to journalists for publishers are earned,[185] and to grant any content producer journalistic privileges would result in either weakening protections for journalists, or the floodgates opening for the courts as users of social media sites seek journalistic protection over online content like posts which may be misinformed.[186] Whilst scholars like Rowbottom have argued that speech, whether high level or low level, ought to be afforded the same protection as the press,[187] this article agrees with West as it is undeniable that the quality of speech and content on social media sites like Facebook is varying.[188] Hence, this article contends that social media site users are not equivalent to published journalists and cannot claim journalistic privileges over their content: such privileges, 'ought to be limited to those who have repeatedly committed time, resources and advanced skills'.[189]

B. Speech as a Check on Power

---

[174] ibid (EMLR), at para. 11 per Eady J.
[175] O Lynskey, 'Regulating Platform Power' (January 2017), *LSE Law Society and Economy Working Paper Series* 5 <http://eprints.lse.ac.uk/73404/1/WPS2017-01_Lynskey.pdf>.
[176] ibid 5 – 6; Murray (n22).
[177] ibid (Murray); Online Harms White Paper (n48), para. 1.36.
7. [178] M Rosoff, 'Facebook is not a monopoly, and breaking it up would defy logic and set a bad precedent'(9 May 2019) <https://www.cnbc.com/2019/05/09/facebook-should-not-be-broken-up-commentary.html#:~:text=Facebook%20is%20not%20a%20monopoly%2C%20or%20even%20the%20leader%2C%20in,a%20single%20source%3A%20online%20advertising.> Accessed 23/09/2020.

[179] ibid; Murray (n22).
[180] Rowbottom (n46) 2.
[181] ibid.
[182] *Attorney General v Observer Limited* [1990] AC 109 (HL).
[183] No 68416/01 *Steel and Morris v UK* [2005] EMLR 314, [2005] ECHR 103, [2005] 41 EHRR 403, [2011] ECHR 2272.
[184] ibid; *Attorney General v Observer Limited* [1990] AC 109 (HL).
[185] West (n161).
[186] ibid.
[187] Rowbottom (n46) 3.
[188] West (n161).
[189] ibid 1058; P Horwitz, 'Or of the [Blog]' (2006) 11 *NEXUS* 59.

The increased use of Facebook as a source for news has enabled the wider public to be exposed to more diverse viewpoints,[190] and not just those the press wishes to portray.[191] Whilst freedom of expression has historically been a check on political power,[192] it has now evolved into a check on commercial power too. Facebook[193] is a subsidiary of Facebook Incorporated, a US social media conglomerate that has acquired companies including Instagram, WhatsApp, and Giphy, the latter being an online database with over 700 million daily users.[194] In light of such growth,[195] Facebook has become a "systemically important institution."[196] Whilst Facebook does not consider itself to be a "publisher" and therefore does not actively monitor or edit content on its site, its position in the market gives Facebook great power, becoming a gatekeeper of freedom of expression online.[197] Greater exposure to a range of ideas and perspectives online, 'promotes… a broad-minded society',[198] with scholars like Eric Barendt arguing that a right to express political opinions, both offline and online, reflects what it means to be human.[199] Two notable court decisions support Barendt's stance: in *Derbyshire County Council v Times Newspapers,*[200] Lord Keith emphasised the value of "uninhibited public criticism"[201] and in *R v BBC,*[202] the Court of Appeal gave strong protection to political speech, with commentators suggesting the court raised its value above other forms of speech.[203] However, there are some instances where a degree of co-opting of non-mainstream bloggers and mainstream media companies has taken place, blurring the lines of impartiality.[204] For example, the Huffington Post, which was originally a news aggregator website and blog site, was acquired by AOL (an online service provider) in 2011.[205]

C. Social Media Sites are Platforms

Further, it is important to acknowledge that a crucial differentiator between social media sites and the press are their distribution mechanisms. Whereas press distribution lacks direct personal interaction or conflict, this is a

---

190 *Online Harms White Paper (n48),* para. 1.22.
191 Mangan (n5) 2; Grey (n11) 200-201; Wagner (n123); Benkler (n139).
192 Scott v Scott [1916] AC 417, at para. 15; *First National Bank v Bellotti* (1978) 435 US 765, at paras. 801-2 per Burger CJ.
193 Facebook UK Limited <https://beta.companieshouse.gov.uk/company/06331310> Accessed 10/09/2020.
8. 194 K O'Flaherty, 'What Is Facebook Going to Do With 700 Million Giphy Users' Data?' *Forbes* (16 May 2020) <https://www.forbes.com/sites/kateoflahertyuk/2020/05/16/facebook-just-gave-700-million-giphy-users-a-reason-to-quit/#10145dcc1b4d> Accessed 21/09/2020. Also see M Baumann, J P M Marsh, M Bruneau, F Carloni and P Torbol, 'Germany's Highest Antitrust Court Published the Detailed Written Statement of Reasons of its Facebook-Decision - With Consequences for the Entire Industry'

(The National Law Review, 9 September 2020) <https://www.natlawreview.com/article/germany-s-highest antitrust-court-published-detailed-written-statement-reasons-its> Accessed 14/09/2020; J Browning, 'Facebook Fights U.K. Merger Regulator Over Giphy Acquisition' (Bloomberg, 28 August 2020) https://www.bloomberg.com/news/articles/2020-08-28/facebook-fights-u-k-merger-regulator-over-giphy-acquisition> Accessed 10/09/2020; J Carrie Wong, 'The Cambridge Analytica scandal changed the world – but it didn't change Facebook' (The Guardian, 18 March 2019) <https://www.theguardian.com/technology/2019/mar/17/the-cambridge-analytica-scandal-changed-the-world-but-it-didnt-change-facebook> Accessed 21/09/2020; M Grenfell, 'Facebook Scraping, Still A Privacy Disaster' (Medium, 13 December 2019) <https://medium.com/swlh/facebook-scraping-still-a-privacy-disaster-c70dd1896286> 21/09/2020.
9. 195 ibid.

196 R Foroohar, 'Echoes of Wall Street in Silicon Valley's grip on money and power' (Financial Times, 3 July 2017) <https://www.ft.com/content/3d5425ac-5dbf-11e7-b553-e2df1b0c3220> Accessed 03/09/2020.
197 House of Lords Select Committee on Communications (n7) 4.
198 A Meiklejohn, 'The First Amendment is an Absolute' (1961), *The Supreme Court Review* 255 – 256; Raz (n41) 303; Online Harms White Paper (n48), para. 1.22.
199 E Barendt, L Hitchens, R Craufurd-Smith and J Bosland, *Media Law: Texts, Cases and Materials* (Pearson, 2014) 56 – 58; E Barendt, 'Bad News for Bloggers' (2009) 1(2) *J of Media L*144.
200 [1993] AC 534.
201 ibid, para. 547 per Lord Keith.
202 [2002] 2 All ER 756.
203 Murray (n22) 108.
204 J Bercovici, 'AOL Buys the Huffington Post for $315 Million' *Forbes* (7 February 2011) <https://www.forbes.com/sites/jeffbercovici/2011/02/07/aol-buys-the-huffington-post-for-315-million/#4cfc11e45ed8> Accessed 23/09/2020.
205 ibid.

common feature on social media sites.[206] Whilst the DCMS argue Facebook is not entirely passive, providing a platform for users to generate content and rewarding the most engaging content via algorithms,[207] Facebook does not perform an editorial function, nor does the process of content production have to adhere to journalistic practices prior to it being posted. For these reasons, this article contends it is a platform and not a publisher. Even so, it is important to acknowledge that if Facebook were to be considered a publisher, the liability for published content is limited[208] and the media are not required to act responsibility as they are a "free" press.[209] Nevertheless, a "platform" status for Facebook means social media sites do not fall within the remit of the aforementioned publishing laws and guidelines. However, such a classification results in a lack of accountability for fake news and misinformation content on social media sites, for which the piece-meal laws inadequately protect against. Therefore, it is ripe for this article to consider the introduction of a statutory duty of care for such sites.

Chapter 2. Challenges Posed by Fake News and Misinformation for the Law

Whilst many contend that social media sites like Facebook are beneficial to public discourse in a democratic society,[210] the lack of accountability and enforceability for content regulation on such sites raise complex legal challenges for which the law does not adequately protect against at present.[211] This chapter will consider the challenges posed by fake news and misinformation; firstly, discussing the problem of fake news and misinformation in-depth. Secondly, this chapter will consider the global dimension to social media sites. Thirdly, this chapter will discuss the problem of mass data, and lastly, this chapter will discuss the ways in which Facebook's multi-tiered nature structurally facilitates fake news, highlighting the difficulty in attempting to regulate such a complex subject-matter.

1. The Problem of Fake News and Misinformation Content

Facebook's community standards state that, 'we want to help people stay informed without stifling productive public discourse'[212] and Zuckerberg has stated that he does not feel it is, 'right for a private company to censor politicians or the news in a democracy.'[213] Nevertheless, Facebook is struggling to contain misinformation and fake news on its platform.[214] The collaborative nature of Facebook exacerbates the momentum of such content,[215] and is particularly problematic as such content can harm "moral values."[216] Whilst many cite the 2016 US Presidential election as being the birth of fake news (when numerous made-up stories posted by teens from the Balkans went viral on Facebook),[217] misinformation has been spread throughout the ages in societies across the world.[218] For example, Herodotus, an Ancient Greek historian prominent in the Persian Empire, was known as

---

206 Smith and Woods (n141).
207 House of Commons Digital Community Media and Sport Committee (n13), para. 64.
208 ibid.
209 *Blackman v British Columbia Review Board* [1995] BCJ 95, para. 2.
210 Online Harms White Paper (n48), part 1, paras. 1.2 - 1.4.
211 Vranaki (n1) 2; See M Castells, *The Internet Galaxy* (Oxford University Press, 2001); House of Lords Select Committee on Communications (n7).
212 Facebook, 'Community Standards', Section 21: False News <https://www.facebook.com/communitystandards/false_news> Accessed 20/09/2020.
213 Georgetown University (n37).
214 Wagner and Nix (n66).
215 Lee (n5) 1769; Facebook, 'An Update to How We Address Movements and Organizations Tied to Violence' (19 August 2020) <https://about.fb.com/news/2020/08/addressing-movements-and-organizations-tied-to-violence/> Accessed 20/09/2020.
10. 216 Kuss (n7); *Also see* M D Griffiths, 'Internet Addiction - Time to be Taken Seriously?' (2009) 8(5) *Addiction Research* 413 – 418; The Telegraph, 'Twitter and Facebook could harm moral values, scientists warn' (13 April 2009) <https://www.telegraph.co.uk/news/science/science-news/5149195/Twitter-and-Facebook-could-harm-moral-values-scientists-warn.html> Accessed 13/07/2020.

217 Buzzfeed, https://www.buzzfeednews.com/article/craigsilverman/how-macedonia-became-a-global-hub-for-pro-trump-misinfo> Accessed 17/09/2020; Murray (n22) 115.
218 McGonagle (n15).

not only the "father of history", but also the "father of lies".[219] Similarly, in Ancient Rome, Octavius used fake news to influence the Republic to despise Mark Antony, writing false slogans upon coins.[220] In spite of its historical presence, legislators have long battled with addressing the harms caused by fake news, as this chapter will demonstrate.

A. The Value of Open Debate

Philosophers like Machiavelli have long-recognised the inherent value in open disputes and disagreement as a cause for celebration.[221] Broadly speaking, regulation of speech can hinder public debate and inadvertently enhance its appeal,[222] preventing citizens from rejecting false ideas expressed by others.[223] However, this argument presupposes that everyone participating in a democracy is, 'capable of making determinations that are both sophisticated and intricately rational if they are so to separate truth from falsehood.'[224] Scholars like Walter Lippmann assert that the ordinary persons lack the capacity to make such decisions.[225] However, even Lippmann believed that the ordinary person ought to be able to read what is being said.[226] This is echoed in Facebook's Community Standards where it states that Facebook wishes to empower users to, 'decide for themselves what to read, trust, and share.'[227] Users not only have the right to receive information uncensored by the state or Facebook, but also have the right to form their own beliefs and express them freely to others.[228]

Dating back to Athenian democracy, value was placed upon "collective self-government": participation in community affairs was a necessary part of citizenship.[229] Albeit, even Athenian democracy was reliant upon levels of education among the "citizenry" (property-owning male aged 21 and above).[230] Nevertheless, Thomas Scanlon argues that autonomous individuals, irrespective of education, should be able to read and consider what others have to say.[231] Further, John Stuart Mill argued that no one should interfere with freedom of speech unless it would cause "serious harm" as unimpeded debate leads to discovery of the 'truth' and this would interfere with individuality.[232] However, fake news and misinformation can cause serious harms,[233] succumbing to Mill's justification for restrictions on freedom of speech. As fake news and misinformation continue to prosper online, and so too its ability to cause harm, there is an increasing need for social media sites who host such content to be held accountable.

B. Understanding Offenders' Plural Motivations

There are various reasons why individuals create and share fake news and misinformation on social media sites.[234] Although, research by Ratkiewicz et al has found that many users on Facebook unknowingly propel the spread of misinformation when they forward misinformation to their networks.[235] Whilst some research indicates the spread

---

219 Bernal (n31) 513; See J A S Evans, 'Father of history or father of lies: the reputation of Herodotus' (1968) 64(1) *The Classical Journal* 11–17.
220 I Kaminska, 'A lesson in fake news from the info-wars of ancient Rome' *Financial Times* (17 January 2017) <https://www.ft.com/content/aaf2bb08-dca2-11e6-86ac-f253db7791c6> Accessed 22/09/2020.
221 ibid; Cram (n168).
222 Murray (n22) 92.
223 Elliot and Thomas (n82) 751; D Vick, 'Regulating Hatred' in M Klang and A Murray (eds.), *Human Rights in the Digital Age* (Glasshouse, 2005) 47.
224 S Ingber, 'The Marketplace of Ideas: A Legitimizing Myth' (1984) *Duke L J* 7.
225 See W Lippmann, *The Phantom Public* (1925).
226 ibid.
227 Facebook's Community Standards (n151).
228 F Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982) 68; Vick (n223); Murray (n22) 93.
229 Cram (n168).
230 ibid.
231 T Scanlon, 'A Theory of freedom of expression' (1972) 1(2) *Philosophy and Public Affairs* 204.
232 J S Mill, *On Liberty* (Longmans, Green and Co, 1859) ch 1-3; Martin Reddish; Schauer (n228) 15 – 34.
233 See Chapter 2.1.C.
234 Suler and Phillips (n44) 275-277.
235 J Ratkiewicz, M Conover, M Meiss, B Gonçalves, S Patil, A Flammini et al, 'Detecting and Tracking The Spread of Astroturf Memes in Microblog Streams' (2010) *Cornell University*.

could be reduced through education[236] (which the UK government plans to address through the introduction of a new online media literacy strategy),[237] research by Kahan[238] and Pennycook and Rand[239] suggests that individuals who are more educated are not only especially vulnerable to fake news, but also more likely to find it and actually spread it.[240] Hence, it is difficult for the law to address the problem of fake news and misinformation due to the lack of understanding surrounding who it chiefly affects and how it spreads. Nevertheless, it is inevitable that Facebook, a "marketplace of ideas",[241] will become distorted by those seeking to manipulate the public's perception of the "truth"[242] through the spreading of fake news or misinformation.

Whilst some individuals deliberately spread fake news for their own purposes, there are various motivators for its creation and spread.[243] Scholarship has identified three common motivators for cybercrime broadly that include a desire to circumvent security measures,[244] a desire to cause damage,[245] and a desire to send a political message and engage in civil disobedience.[246] Bernal suggested that specifically for fake news and misinformation, the motivators are even broader. [247] Perpetrators could be driven by a combination of political and financial factors or simply amusement like Christopher Blain, the "Godfather of fake news".[248] Blain wrote to provoke, 'delighted in people who took the lies for the truth and shared the stories as if they had come from real news websites.'[249] Interestingly, many of the fake news stories circulating on Facebook have been found to be content stolen from Blain, illustrating the complexity of the problem. Whilst the ideas originated from Blain, the content was presented differently, falling through the net of Facebook's existent content analysing algorithms.[250] However, Linda Zerilli argues that those who spread such content are "misunderstood", suggesting those who are motivated by political factors, for example, are actually acting out of frustration with the limited political action available in today's society.[251] In fact, Blain claims to use his fake stories to discover the most extreme users on Facebook, claiming to have taken down hundreds of Ku Klux Klan profiles.[252]

Fake news and misinformation content is also becoming increasingly sophisticated.[253] A portion of such content is beginning to spread through manipulated media intended to mislead known as "deep fakes": [254] distorted audio and video which depict a real person saying something they have not.[255] Whilst disinformation refers to the dissemination of information with the deliberate intent to mislead,[256] the White Paper explains misinformation as the "inadvertent sharing of false information".[257] Albeit, the White Paper does not officially list misinformation as

---

236 X Chen, S-C J Sin, Y-L Then and C S Lee, 'Why Students Share Misinformation on Social Media: Motivation, Gender and Study-level Differences' (2015) 41(5) *The J of Academic Librarianship* 583.
237 Online Harms White Paper (n48), para. 48.
238D M Kahan, 'Misinformation and identity-protective cognition' (2 October 2017), *Yale Law and Economics Research Paper No. 587* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3046603>.
239 G Pennycook and D G Rand, 'Who falls for fake news? The roles of analytic thinking, motivated reasoning, political ideology, and bullshit receptivity' (31 March 2019), *Yale University Working Paper* <https://onlinelibrary.wiley.com/doi/abs/10.1111/jopy.12476>.
240 Bernal (n31) 523.
241 Murray (n22) 92.
242 Elliot and Thomas (n82) 751.
243 P Grabosky, 'Virtual criminality: Old wine in new bottles?' (2001) 10(2) *Social and Legal Studies* 243 – 244.
244 Ibid; *Also see* D Rowland, U Kohl and A Charlesworth, *Information Technology Law* (5th edn, Routledge, 2016), ch 7, 272 – 305.
245 M Yar, *Cybercrime and Society* (2nd edn, Sage Publishing, 2013) 50.
246 Rowland (n246).
247 See P A Bernal, *The Internet, Warts and All: Free Speech, Privacy and Truth* (Cambridge University Press, 2018), ch 8, 196 – 9.
248 ibid; Subedar (n18).
249 ibid (Subedar).
250 Lead Stories <https://leadstories.com/> Accessed 24/09/2020; See Chapter 3.2.
251 L M G Zerilli, 'Against Civility - A Feminist Perspective' in ed A Sarat, *Civility, Legality and Justice in America* (Cambridge University Press, 2014) 107 – 131.
252 Subedar (n18).
253 House of Commons Digital Community Media and Sport Committee (n13), para. 12.
254 Facebook, 'Community Standards', Section 22: Manipulated Media <https://www.facebook.com/communitystandards/manipulated_media> Accessed 20/09/2020.
255 ibid, para. 16.
256 Online Harms White Paper (n48), para. 1.23.
257 ibid, Harm: Online Disinformation - Box 12.

a harm within the scope of the Paper,[258] merely listing disinformation under the category of "a harm with a less clear definition."[259] The DCMS outlined a plethora of content that falls under the umbrella term of fake news and misinformation, acknowledging that fake news can range from fabricated content (which is entirely false), to more sophisticated forms of content such as imposter content (defined as the "impersonation of genuine sources, for example by using the branding of an established news agency")[260] and false context of connection (where factually accurate content is shared with inaccurate contextual information).[261] This serves to illustrate the complexity of the subject-matter at hand.

2. Harmful Consequences of Fake News and Misinformation

Still, regardless of the offenders' motivations, misinformation and fake news can cause harm which the law should protect against.[262] The spreading of fake news and misinformation has become an "epidemic",[263] with scholars like Bernal suggesting such content has the, 'potential to aid in the undermining of democracy… around the world',[264] skew public debate, and fuel hate speech and violence (such as the aforementioned Pizzagate incident).[265] Beyond the threat that such content poses to politics and broader democratic discourse, Facebook was notably subject to various misinformation scandals surrounding the coronavirus,[266] posing a risk to public health.[267] It is important to acknowledge the variety and severity of harms that can arise from such content, and in doing so, understand not only the necessity for legislation, but also understand what is needed from proposed legislation to protect users against such harms.

Fake news and misinformation can result in serious mental health concerns for young people,[268] although research is correlational.[269] Social media sites like Facebook allow individuals aged 13 and above to become a user on Facebook.[270] Concerningly, research shows that younger people are not only more susceptible to "click-bait" and sensationalised news, but also more likely to believe what they read online and suffer online harms as a result.[271] At present, only data protection law,[272] including the Data Protection Act 2018 ('DPA'), discusses young people's access to social media sites.[273] Whilst the DPA protects their data (including the Children's Code, an age-appropriate design code protecting children's personal data from risks of being profiled and seeing personalised

---

[258] ibid, para 2.2. Table 1: online harms in scope.
[259] ibid.
[260] House of Commons Digital Community Media and Sport Committee (n13).
[261] ibid; C Wardle, 'Fake news. It's Complicated' *First Draft News* (16 February 2017) <https://firstdraftnews.org/latest/fake-news-complicated/> Accessed 22/09/2020.
[262] Online Harms White Paper (n48), para. 1.23.
[263] Facebook's Community Standards (n223).
[264] Bernal (n31) 514; House of Lords Select Committee on Communications (n7).
[265] See Chapter 1.1.A; McGonagle (n15); BBC, 'Pizzagate' gunman sentenced to four years' (22 June 2017) <https://www.bbc.co.uk/news/world-us-canada-40372407> Accessed 17/09/2020; B Leiter, 'Cleaning Cyber-Cesspools: Google and Free Speech' in S Levmore and M Nussbaum (eds), *The Offensive Internet* (Harvard University Press, 2010); BBC, 'The saga of 'Pizzagate': The fake story that shows how conspiracy theories spread' (2 December 2016) <https://www.bbc.co.uk/news/blogs-trending-38156985> Accessed 20/09/2020.

[266] O Robinson, A Coleman and F Carmichael**, '**QAnon: Facebook takes action on conspiracy groups' *BBC* (20 August 2020) <https://www.bbc.co.uk/news/technology-53849295> Accessed 22/09/2020.

[267] Online Harms White Paper (n48), para. 1.23.
[268] ibid, para. 1.18.
[269] ibid, para. 1.20; See Department of Health and Social Care, UK CMO commentary on 'Screen-based activities and children and young people's mental health and psychosocial wellbeing (2019).

[270] Facebook Terms of Services (n123).
[271] Online Harms White Paper (n48), para 1.18; *See* Internet Matters, *Vulnerable Children in a Digital World* (2019).
[272] The Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2020 has been signed into law but has not yet come into force as law.
[273] GDPR; Phippen and Bond (n1).

content) ,[274] they are not protected from online harms.[275] Nevertheless, misinformation can significantly impact the mental health of younger users, with the House of Commons acknowledging that the law is not doing enough, 'to ensure that children are as safe as possible when they go online, as they are offline.'[276]

Further, fake news and misinformation poses a threat to our justice system, impeding Article 6 of the HRA: the right to a fair trial.[277] Social media sites are a powerful tool capable of undermining democracy in various ways,[278] including having contributed to the infringement of Article 6 and subsequent suspension of trials. For example, in *Attorney General v Frail and Sewart,*[279] a juror contacted one of the defendants on Facebook after she had been acquitted but whilst the jury were still contemplating the verdict of a co-defendant.[280] In turn, the case had to be suspended as there had been an infringement of Article 6. Though this case did not involve misinformation, the case of *Attorney General v MGN*[281] did. Here, the Attorney General brought proceedings against two newspapers for their vilified coverage of Christopher Jefferies' arrest,[282] presenting him as guilty when in fact he was innocent. Luckily, the actual defendant came forward before the trial commenced, however this case illustrates the threat misinformation poses to Article 6 and the justice system more broadly. Additionally, research has found that in high profile cases, jurors were 70% more likely to recall coverage of the case before the trial occurred, yet 66% could not recall its slant.[283] Such statistics indicate the sincere concern that fake news and misinformation can impede the right to a fair trial. Whilst value is placed upon freedom of expression, this research highlights that where misinformation risks infringing Article 6, there is a need for the law to restrict it, protecting potential defendants from any resultant harms.

A. Global Dimension

Additionally, it is important for the law to not only reactively address the specific harms resulting from the spread of fake news and misinformation on Facebook aforementioned, but to also proactively reduce the spread. Digitalisation has posed a major challenge to lawmakers in tackling the spread of misinformation, necessitating a re-evaluation of how traditional laws can be extended online.[284] Many arguments about the regulation of online content relate to the new "properties" of the internet itself,[285] namely its global dimension. Fake news and misinformation on social media sites like Facebook are a problem for the international legal community. Whilst the "real world" possesses jurisdictional boundaries, the global nature of the internet and social media sites allows communication to cross borders and multiple jurisdictions within seconds.[286] Therefore, there is a need for the law to consider the global dimension to online activity as individuals are primarily governed by jurisdictional law. Although international laws and treaties exist, their enforcement is challenging as such instruments are voluntary.[287] David Johnson and David Post argued that "cyberspace" (referring to the internet) is distinct from the physical world due to its lack of geographical borders.[288] In turn, they argued that activity conducted in cyberspace should

---

[274] Data Protection Act 2018, Schedule 1 and 8, s 35(5); Online Harms White Paper (n48), para. 1.28.
[275] House of Commons Report on the Impact of Social Media and Screen-Use on Young People's Health (n2) 4; Online Harms White Paper (n48), paras. 46 – 48.
[276] ibid (House of Commons Report).
[277] See Human Rights Act 1998, Article 6.
[278] Phippen and Bond (n1).
[279] *Attorney General v Frail and Sewart* (2011) EWHC 1629.
[280] ibid.
[281] *Attorney General v MGN Limited and News Group Newspapers Limited* [2011] EWHC 2074 (Admin).
[282] Under the Contempt of Court Act 1981, ss 1 and 2.
[283] C Thomas, 'Are Juries Fair?' *Ministry of Justice* (2010) vii <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf>.
[284] Murray (n22) 55.
[285] Georgetown University (n37); Also see D R Johnson and D G Post, 'Law and Borders: The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Rev* 1367.
[286] O'Leary (n21); Murray (n22) 55, 92.
[287] Ibid.
[288] Johnson and Post (n285).

not be regulated by jurisdictional offline laws.[289] Notably, the global nature of social media sites has posed a significant challenge for the law in addressing the dispersion of harmful online content internationally.[290]

Smith argues that social media sites ought to be compared to public spaces, such as an office as, 'the relationship between a social media platform and its users parallels that between the occupier of a physical space and its visitors.'[291] Yet, whilst visitors are protected from harm when they go to public spaces, such protection is not afforded similarly online.[292] When one "visits" cyberspace, one does not "travel" to that place:[293] 'any online activity users engage in remains subject to the laws of the state in which they are residing in.'[294] Cyberlibertarian John Perry Barlow acknowledged the mismatch between governing acts and speech in the physical world and cyberspace, [295] arguing that real-world laws have no effect in the online world as, 'cyberspace does not lie within... borders.'[296] Barlow argued that cyberspace is its own sovereign state in which traditional lawmakers cannot enforce their laws.[297] However, scholars like Chris Reed have coined Barlow's perspective the "cyberspace fallacy"[298] as offline laws do apply online.[299] For example, the DPA and General Data Protection Regulation ('GDPR')[300] have extraterritorial scope, reaching far beyond Europe.[301] Further, there are circumstances where the law applies to criminal acts committed abroad, or to individuals who are not nationals or residents of the state.[302] Therefore, whilst some scholarship claimed cyberspace to be completely different from everything that has come before it,[303] the harms experienced from fake news and misinformation online are not "new": 'the thrill of deception characterized the insertion of the original Trojan Horse no less than did the creation of its digital descendants.'[304] Nevertheless, the ease with which users can share information globally is a challenge for the law and the drafting of any legislation ought to be harmonised with other countries'.

B. Large Mass of Data

Given both the variety of harmful content and the sheer volume of online content (over 100 billion messages are shared on Facebook every day),[305] it is difficult for social media sites like Facebook to identify and remove fake news and misinformation. The House Select Committee Report criticised Facebook's moderation processes for being, 'unacceptably opaque and slow.'[306] The Report advocated for appropriate moderation processes (to handle complaints about content) to be included in the proposed duty of care.[307] However, the site does have various mechanisms for removing such content. Notably, Facebook uses artificial intelligence ('AI') as their mechanism for enforcing their community standards and removing harmful content as AI enables an unprecedented ability to analyse and alter large data sets.[308] However, owing to the E-Commerce Directive, Facebook is under no obligation

---

289 Vranaki (n1) 5; J L Goldsmith, 'Against Cyber-Anarchy' (1998) 65 *University of Chicago Law Rev* 1221.
290 A Phippen, 'Fare thee well age verification, you will not be missed' (2020) 31(2) *Entertainment Law Rev* 44.
291 Smith and Woods (n141).
292 ibid.
293 Murray (n22) 56.
294 ibid.
295 J P Barlow, 'A Declaration of Independence for Cyberspace' (Electronic Frontier Foundation, 1996) <https://www.eff.org/cyberspace-independence> Accessed 09/09/2020.
296 ibid.
297 Murray (n22) 56; Barlow (n9).
298 See C Reed, *Internet Law: Text and Materials* (Cambridge University Press, 2nd edn, 2004).
299 Rowbottom (n46).
300 GDPR.
301 Data Protection Act 2018, Chapter 1.4. Processing which this Part applies; GDPR, Article 3.
302 See Criminal Justice and Immigration Act 2008, s 72.
303 Georgetown University (n37).
304 Grabosky (n243) 248.
305 Facebook, Company Info <https://about.fb.com/company-info/> Accessed 24/08/2020.
306 House of Lords Select Committee on Communications (n7).
307 ibid 5.
308 European Commission (n130), H; C Reed, 'How Should We Regulate Artificial Intelligence? (2018), *Philosophical Transactional Royal Society* 2 <https://royalsocietypublishing.org/doi/full/10.1098/rsta.2017.0360>.

to actively analyse data to find fake news and misinformation, relying on users, international law enforcement agencies and governments to flag content.[309]

However, as Facebook has been self-regulating, the site has been able to censor content it deems unacceptable with no formal oversight.[310] Whilst content of a violent nature is illegal and accepted as such, fake news and misinformation is technically legal, but indigestible, content. Further, it is especially difficult to swiftly identify fake news and misinformation content and control its reach among the large mass of content present on social media sites. Whilst increasing regulation potentially leads to censorship,[311] concern has been expressed by the United Nations over the monitoring of online content, arguing that states, 'should refrain from establishing laws… that would require the 'proactive' monitoring or filtering of content, which is both inconsistent with the right to privacy and likely to amount to prepublication censorship.'[312] Hence, it is questionable as to whether introducing a statutory duty of care for social media sites over fake news and misinformation will result in more harm than good.

C. Multi-tiered Nature of Facebook

Facebook's structure facilitates the spread of fake news and misinformation in various ways. Firstly, there is greater anonymity online than there is offline as users are not required to verify their identities. This discourages responsible speech as users can "hide" behind their screens. [313] Secondly, Facebook's platform is multi-tiered, encompassing a decentralised system of control allowing users to independently police groups and pages on Facebook as "admins",[314] whether they may be public, private or secret, posing a complex challenge for legislators.[315] Such groups and pages have had a positive societal impact, being influential in mobilizing environmentalists globally, 'raising people's consciousness about alternative ways of living.'[316] However, this also creates "filter bubbles":[317] where like-minded people come together, acting as echo chambers and reinforcers.[318]Concerningly, such division exacerbates the spread of fake news to an almost "automatic" phenomenon.[319]

Facebook's algorithms facilitate the propagation of fake news.[320] Facebook's algorithm tailors the 'news feed' section of the site according to the algorithm's assessment of a user's preferences: 'pushing content to users predisposed to sympathise with the message.'[321] However, this is problematic when the content is misinformed. Research has found that misinformed content is spread more successfully than real news due to its entertainment factor.[322] For example, research found that content containing threats was more likely to be shared and spread on Facebook.[323] Concerningly, Facebook's study which changed users' news feeds in attempt to manipulate their

---

[309] S Macdonald, S Giro Correia and A-L Watkin, 'Regulating terrorist content on social media: automation and the rule of law' (2019) 15(2) *International J of the L in Context* 184.

[310] Phippen (n294) 45.

[311] Mangan (n5) 4; Herz (n66); Raz (n41); Wagner and Nix (n66).

[312] United Nations General Assembly, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (2018) UN GAOR 38th Session UN Doc A/HRC/38/35

[313] See *Ohio v McIntyre* 514 U.S. 334 (1995); Barendt (n198).

11. [314] T Allison, 'Our Latest Steps to Keep Facebook Groups Safe' (Facebook, 17 September 2020) <https://about.fb.com/news/2020/09/keeping-facebook-groups-safe/> Accessed 20/09/2020.

12. [315] ibid; Murray (n22) 70 – 71.

[316] Castells (n211).

[317] C Sunstein, *Republic 2.0* (Princeton University Press, 2007) 196; E Pariser, *The Filter Bubble: What the Internet is Hiding from You* (Penguin, 2011); Murray (n22) 59.

[318] ibid (Sustein and Pariser); Bernal (n31) 514; N Negroponte, *Being Digital* (Hoddern & Stoughton, 1995) 164 – 171; Murray (n22) 115; Facebook Terms of Services (n123).

[319] Bernal (n31) 514.

[320] ibid 519.

[321] ibid 519 - 521.

[322] ibid.

[323] T Blaine and P Boyer, 'Origins of sinister rumors: a preference for threat-related material in the supply and demand of information' (2018) 39(1) *Evolution and Human Behavior* 67–75.

emotions,[324] found that Facebook's algorithms prioritised emotional content.[325] This, coupled with the targeting of users who actively engage with such content,[326] supports the 'automatic' generation of fake news.[327]
However, commentators like Paul Boutin have challenged the so-called detrimental impact of filter bubbles on civic discourse and research is mixed.[328] For example, the Reuters Institute found that people who access news online have more "diverse media diets"[329] and are exposed to a broader range of content than those who do not as not everyone within one's filter bubble will share identical opinions.[330] Nevertheless, filter bubbles isolate users in a "web of one" as ultimately, 'a personalised experience of the internet divides us from other internet users in our experience',[331] making deliberative democracy impossible.[332] Moreover, social media sites like Facebook interfere with the typical flow of information by, 'carrying, filtering, curating and cataloguing data on their platforms.'[333] Manuel Castells wrote that, 'the infrastructure of the networks can be owned, access to them can be controlled, and their uses can be biased, if not monopolized, by commercial, ideological, and political interests.'[334] Therefore, even though sites like Facebook claim to uphold freedom of express, such sites are undertaking a 'gatekeeper' role in filtering speech they deem permissible. As such control mechanisms are invisible to the user, many scholars have expressed concern over how Facebook is monitored, and by whom.[335] Hence, it is imperative that this article better understand and explore what Facebook has done to regulate fake news and misinformation content.

Chapter 3. What Has Facebook Done to Regulate Fake News and Misinformation?

Zuckerberg has said that as social media's prevalence in our lives increases, 'the question is not whether regulation is needed but rather, "what is the right regulation?."'[336] Various forms of regulation exist: self-regulation, the introduction of law, regulating through behaviour and establishing norms, regulating through the market, and regulating through algorithms and technology.[337] As the harms resulting from fake news and misinformation on Facebook are multi-faceted, scholars like Charles Raab and Paul De Hert argue that the introduction of legislation alone is inadequate as the law does not operate in a vacuum.[338] To achieve the greatest level of protection for users against harm, scholarship has argued it is important to consider adopting broader regulatory modalities,[339] and that is exactly what Facebook has done.

1. Behavioural Regulation

[324] R Meyer, 'Everything we know about Facebook's secret mood manipulation experiment' *The Atlantic* (28 June 2014) <https://www.theatlantic.com/technology/archive/2014/06/everything-we-know-about-facebooks-secret-mood-manipulation-experiment/373648/> Accessed 23/09/2020.
[325] ibid.
[326] Pariser (n64).
[327] Bernal (n31) 522.
[328] P Boutin, "Your Results May Vary: Will the information superhighway turn into a cul-de-sac because of automated filters?" *The Wall Street Journal* (20 May 2011) Accessed 28/08/2020. *See* A Murray, *The Regulation of Cyberspace: Control in the Online Environment* (Routledge, 2007).
[329] Reuters Institute, *Digital News Report* (2019).
[330] Georgetown University (n37).
[331] Murray (n22) 59, 70.
[332] Ibid; *See* Elliot and Thomas (n82).
[333] Ibid (Murray); Sunstein (n319).
[334] Castells (n211) 217.
[335] O'Leary (n21).
[336] H Boland, R Sabur, C Graham and N Allen, 'Marks Zuckerberg's testimony to Congress: Facebook boss admits company working with Mueller's Russia probe' *The Daily Telegraph* (11 April 2018) <https://www.telegraph.co.uk/technology/2018/04/10/mark-zuckerbergs-testimony-congress-latest-news-facebook-hearing/> Accessed 13/08/2020.
[337] Vranaki (n1) 5. This is not an exhaustive list.
[338] Ibid, 2; C D Raab and P D Hert, Tools for Technology Regulation: Seeking Analytical Approaches Beyond Lessig and Hood in *Regulating Technologies: Legal Futures, Regulatory Frames and Technological Features* (Roger Brownsword and Karen Yeung ed., 2008) 263.
[339] Vranaki (n1).

When users sign up to Facebook, they are required to read and agree to Facebook's terms of service.[340] Such terms require users to agree to not share content that is misleading, and also encourages users to report content which breaches Facebook's terms.[341] Facebook has also introduced community standards to further prevent harmful content ever reaching their platform.[342] Such standards are designed to engage users' "moral register",[343] emphasising the importance of users feeling safe on Facebook and encouraging users to actively report or flag content that violates Facebook's standards.[344] Importantly, encouraging users to report violations acts as a deterrence, discouraging users from posting harmful content themselves.[345] This aims to create a "normative" standard for permissible online activity.[346] However, such behavioural regulation assumes *all* users will want to foster a safe environment online, but as was highlighted in Chapter 2,[347] this is certainly not the case and it is inevitable that to some extent, deviant users will always exist online. Further, once users are signed up to Facebook, they are not required to read the terms of services or community standards again, unless Facebook has a compulsory update.[348] Even so, it is unlikely that all users will read through the documents in their entirety, especially younger users. Therefore, whilst behavioural regulation is beneficial, it is inadequate in addressing fake news and misinformation content on its own.

2. Algorithmic regulation

Sites like Facebook use algorithms to tailor the content users see. Such algorithms have significantly advanced in the past decade,[349] operating independently from human actors:[350] creating a "networked environment" with both human and non-human actors.[351] However, such technology is also susceptible to misuse, as evidenced by the mass spread of fake news and misinformation content on Facebook by users like Christopher Blain.[352] To address fake news and misinformation, Facebook uses algorithms to identify such content and significantly reduce its distribution on the news feed page.[353] Tarleton Gillespie defined algorithms as, 'encoded procedures for transforming input data into a desired output, based on specific calculations.'[354] Discussions regarding the regulation of social media sites often focus on the use of algorithms for enforcement.[355] Algorithms are highly effective at managing risk in order to achieve some pre-specified goal such as identifying misinformation content.[356] There are various forms of algorithmic regulation, with scholars like Karen Yeung identifying at least eight

---

[340] Facebook Terms of Services (n123).
[341] ibid, s 3.2.
[342] Macdonald (n311).
13. [343] R Brownsword, 'Lost in translation: legality, regulatory margins, and technological management' (2011) 26 *Berkeley Technology L J* 1321-1365.

[344] Macdonald (n311).
[345] ibid.
[346] ibid; Brownsword (n343) 1329.
[347] See Chapter 2.1.A and 2.1.C.
[348] Facebook Terms of Services (n123).
[349] House of Commons Digital, Culture, Media and Sport Committee (n13), para. 17; H Armstrong, 'Machines That Learn in the Wild' (July 2015), *Nesta,* <https://media.nesta.org.uk/documents/machines_that_learn_in_the_wild.pdf> 4; European Parliament Committee on Legal Affairs, *Report with Recommendations to the Commission on Civil Law Rules on Robotics* (2015/2103(INL)) A8-0005/27 2017, introduction (B).
[350] R van den Hoven van Genderen, 'Legal personhood in the age of artificially intelligent robots' in W Barfield and U Pagallo (eds), *Research Handbook on the Law of Artificial Intelligence* (Edward Elgar Publishing 2018) 213.
[351] Murray (n22) 65; See Castells (n211); See R Mansell, *Imagining the Internet: Communication, Innovation, and Governance* (Oxford University Press, 2012).
[352] See Subedar (n18); Rowland (n192) 277; C Cadwalla, 'Anonymous: behind the masks of the cyber insurgent' (The Guardian, 8 September 2012) <https://www.theguardian.com/technology/2012/sep/08/anonymous-behind-masks-cyber-insurgents> Accessed 20/09/2020.

[353] Facebook's Community Standards (n151).
[354] T Gillespie, 'The Relevance of Algorithms' in T Gillespie, P Boczkowski and K Foot (eds.), *Media Technologies* (MIT Press, 2014) 167.
[355] Murray (n22) 79.
[356] Murray (n22) 79 - 80; K Yeung, 'Algorithmic regulation: A critical interrogation' (2018) 12 *Regulation and Governance* 507.

classes.[357] For the purposes of this article, the focus will be on machine-learning algorithms (algorithms capable of learning and developing their decision-making processes) [358] as these are used to flag fake news and misinformation content, but also then require a human actor to review the content.[359]

Recently, Facebook imposed restrictions to limit the spread of misinformation by removing content which it deems potentially violent, including where "veiled" language and symbols are used that are associated with conspiracy groups or terrorist organisations.[360] For example, Facebook removed over 790 groups and 1,500 ads connected with QAnon.[361] QAnon are a conspiracy group that claimed the coronavirus was a "deep state hoax" and promoted misinformation about face masks,[362] adopting unrelated hashtags in attempt to avoid being flagged by algorithms such as #SaveTheChildren.[363] In turn, Facebook announced that when identifying misinformation through algorithms, their focus is on misinformation that, 'can lead to imminent, physical harm which is dangerous',[364] setting their algorithms to focus on the authenticity of the speaker, as opposed to judging the content solely on its own.[365] Facebook also stated that it will reduce misinformation that does not put users at risk of, 'imminent violence or physical harm but is rated false by third-party fact-checkers.'[366] Whilst such technology is highly intricate, arguably "indistinguishable from magic",[367] it is not perfect as Facebook is still in the process of building algorithms that can read and understand the news.[368] Zuckerberg has stated, 'it will take many years to fully develop these systems'[369] as such algorithms are in a "discursive relationship" with its environment,[370] constantly evolving.[371] Nevertheless, Facebook has had success in deploying such algorithms to analyse other forms of content such as terrorist content which Zuckerberg claims to be 99% successful.[372] However, as Zuckerberg acknowledged, 'some problems lend themselves more easily to AI solutions than others.'[373] As fake news and misinformation content is very linguistically nuanced and on a platform like Facebook, and Facebook operates in over 100 languages,[374] building effective algorithms to tackle such content is incredibly complex and will take time.[375]

A. Bias

[357] Ibid (Yeung).
[358] G Mulgan, 'A Machine Intelligence Commission for the UK: How to Grow Informed Public Trust and Maximise the Positive Impact of Smart Machines' (February 2016), *Nesta* <https://media.nesta.org.uk/documents/a_machine_intelligence_commission_for_the_uk_-_geoff_mulgan.pdf> page 2; E Abdel and R Dahiyat, 'Intelligent agents and contracts: Is a conceptual rethink imperative?' (2007) 15 *Artificial Intelligence and Law* 384; Also see L Andrews, 'Algorithms, Regulation, and Governance Readiness' in K Yeung and M Lodge (eds), *Algorithmic Regulation* (Oxford University Press, 2019), ch 9.
[359] Yeung (n356).
[360] Facebook, 'An Update to How We Address Movements and Organizations Tied to Violence' (19 August 2020) <https://about.fb.com/news/2020/08/addressing-movements-and-organizations-tied-to-violence/> Accessed 20/09/2020.

[361] ibid.
[362] Robinson (n266).

[363] M Spring and M Wendling 'How Covid-19 myths are merging with the QAnon conspiracy theory'

(BBC Trending, 3 September 2020) <https://www.bbc.co.uk/news/blogs-trending-53997203> Accessed 20/09/2020.
[364] Georgetown University (n37).
[365] ibid.
[366] Spring and Wendling (n363).
[367] See A C Clarke, *Profiles of the Future: An Inquiry into the Limits of the Possible* (Phoenix, 2000).
[368] Georgetown University (n37).
[369] ibid; Wagner (n123).
[370] Murray (n22) 80; Mulgan (n358); UK Government, 'A guide to understanding AI in the public sector' (10 June 2019), <https://www.gov.uk/government/publications/understanding-artificial-intelligence/a-guide-to-using-artificial-intelligence-in-the-public-sector> Accessed 03/09/2020; Armstrong (n355).
[371] Murray (n22) 79; Yeung (n356).
[372] Testimony of Mark Zuckerberg to Senate's Commerce and Judiciary Committees (10th April 2018) <https://www.judiciary.senate.gov/download/04-10-18-zuckerberg-testimony> Accessed 02/09/2020.
[373] ibid.
[374] ibid; Murray (n22) 81.
[375] ibid.

Algorithms have presented new challenges for the law to ensure, 'non-discrimination, due process, transparency and understandability in decision-making processes.'[376] Further, even though such algorithms are self-learning in nature, algorithms do present risks of bias and discrimination. Whilst such algorithms develop through experience, algorithms are designed by human actors, with unconscious bias, who set the initial parameters of acceptable behaviour.[377] Research has evidenced that unconscious bias is often unknowingly relayed into machine-learning algorithms.[378] Importantly, when algorithms are tasked with higher level decisions such as determining whether a post encompasses misinformation, such decision-making will be influenced by the programmer's emotional compass.[379] It is for these reasons that many argue that the trajectory of machine-learning algorithms, irrespective of developments it undergoes throughout its use, are foreseeable by the human actor(s) who design it,[380] tracing resultant consequences back to its human origins.[381] However, such arguments are "techno-deterministic",[382] assuming that human actors and algorithms can predict what forms of content will be permissible or not.[383] Yet, fake news and misinformation content is constantly evolving and difficult to foresee.

Nevertheless, as algorithms are the primary gatekeepers of fake news and misinformation on Facebook's platform, there is a need for them to be encoded with ethics akin to the ethical guidelines journalists are subject to.[384] At present, algorithms lack a sense of civic responsibility.[385] Whilst the GDPR and DPA encourage the "ethical deployment" of technology through principles like privacy by design,[386] this does not go far enough in protecting users from harm arising from fake news and misinformation.

Chapter 4. Where Do We Go from Here? The Introduction of a Statutory Duty of Care

Given the increase in use of Facebook as source for news,[387] it is an optimal time to consider introducing statutory regulation, which the government are currently doing in the form of a statutory duty of care for social media sites.[388] As an influential platform, it is crucial that Facebook not only have, but also enforce adequate policies surrounding fake news and misinformation. Whilst Facebook has behavioural and algorithmic regulation seeking to identify and remove such content, fake news and misinformation is still ripe on its site.[389] Still, some argue that the regulation of social media sites is not conducive to freedom of expression,[390] with scholars like Reed contending that, 'inactivity in regulation is likely to achieve a better long-term solution than a rush to regulate in ignorance.'[391] Nevertheless, there is a need to hold social media sites like Facebook to account where they fail in preventing fake news and misinformation spreading on their site, resulting in users suffering harm. Therefore, this chapter will discuss the proposed statutory duty of care, address the lack of definition for fake news and misinformation in the White Paper and consider enforcement concerns surrounding the duty before concluding by advocating for alternative reforms.

---

376 ibid; Genderen (n350).
377 Murray (n22) 80 – 81; D J Calverley, 'Imagining a non-biological machine as a legal person' (2008) 22 *AI and Society* 532; Online Harms White Paper (n48), para. 1.31.
378 House of Commons Science and Technology Committee, *Robotics and artificial intelligence* (HC 2016–17, 5) 145.
379 ibid.
380 G Finocchiaro, 'The conclusion of the electronic contract through "software agents" A false legal problem? Brief consideration' (2003) 19(1) *Computer Law & Security Report* 22.
381 Abdel and Dahiyat (n358) 375.
382 Murray (n22) 64.
383 V Mayer-Schonberger, 'Demystifying Lessig' (2008), *Wisconsin Law Rev* 713.
384 Andrews (n358), 204.
385 Mulgan (n358).
386 GDPR; Data Protection Act 2018; Online Harms White Paper (n48), para. 1.29.
387 Ofcom, 'Half of people now get their news from social media' (24 July 2019) <https://www.ofcom.org.uk/about-ofcom/latest/features-and-news/half-of-people-get-news-from-social-media> Accessed 17/09/2020;
388 Online Harms White Paper (n48).
389 Wagner and Nix (n65); I Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (Hart Publishing, 2002) 10; No 22714/93 *Worm v Austria* [1998] 25 EHRR 454, , para 50; Benkler (n139) 134.
390 See Chapter 1.1.A.
391 Reed (n308) 1.

1. A Statutory Duty of Care

Following the White Paper, [392] the DCMS has stated that they will introduce a statutory duty of care for social media sites in the 2021 - 2022 parliamentary session to address "online harms,"[393] identifying Ofcom as the chosen regulator.[394] The Paper encompassed various proposals to address online harms including a regulatory framework (now identified as a statutory duty of care), an independent regulator for online safety (Ofcom), the scope of companies under this duty, enforcement considerations, the use of AI and technology, and the empowerment of the end user.[395] However, the focus of this article is on the proposed duty of care as, at the time of writing, this was drafted into the proposed Online Safety Bill.[396] The introduction of a duty of care could mean that were a Facebook user to suffer from harm as a result of fake news and misinformation, Facebook could be in breach of their duty of care and liable for legal consequences (i.e. damages) to users. However, the White Paper does not establish what threshold will be required for this supposed duty of care, whether it is comparable to the duty of care threshold established in negligence, or even whether fake news and misinformation will fall within the remit of the "online harms" it seeks to protect.[397]

It is worth questioning whether a duty of care model ought to exist between social media sites like Facebook and their users over fake news and misinformation content. Scholarship has considered whether the duty of care standard established in the tort of negligence is analogous in this context.[398] Fake news and misinformation on social media sites provides a challenge for tort law which requires that causation be established,[399] combining the "promiscuity of information" with the ability to inflict harm on users.[400] In negligence, a duty of care is one of the three fundamental elements needed to be established for liability to be attributed to a negligent act that has caused damage (along with breach and causation).[401] The courts have been careful to extend categories of duty of care, doing so incrementally, paying attention to scenarios in which duties of care already exist to avoid "opening the floodgates".[402] In doing so, the courts have considered the essential components necessary to establish a duty of care identified in negligence including the foreseeability of harm, [403] the proximity of relationship between the persons by whom and to whom the duty is said to be owed, [404] and whether it is "fair, just and reasonable" to impose a duty of care in the circumstances. [405]

Arguably, the negligence model of duty of care is inapplicable to fake news and misinformation content on social media sites. Firstly, it is difficult to discern what "foreseeability" means in the context of such sites as the nature of fake news and misinformation content is constantly evolving, and is posted within seconds.[406] Even though

---

392 Online Harms White Paper (n48).
393 ibid; Urgent Question on Online harms legislation, HC Deb 13 February 2020 cc971-81.
394 Online Harms White Paper (n48).
395 ibid; Phippen and Bond (n1) 169.
396 At the time of writing, the Draft Online Safety Bill is still going through legislative process and has not yet received royal assent. *See* Draft Online Safety Bill <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/985033/Draft_Online_Safety_Bill_Bookmarked.pdf>*;* Also see House of Commons Briefing Paper (n57).
397 ibid (Briefing Paper) 8.
398 Smith and Woods (n141).
399 C E A Karnow, 'Liability for distributed artificial intelligences' (1996) 11(1) *Berkeley Technology L J* 149*;* Reed (n308) 5; Allgrove, 'Legal personality for artificial intellects: pragmatic solution or science fiction?' (2004) *Social Science Research Network* 1 – 2, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=926015>.
400 R Calo, 'Robotics and the Lessons of Cyberlaw' (2015) 103(3) *California Law Review* 515.
401 Lochgelly Iron Co. v McMullan [1934] AC 1 at page 25.
402 Smith and Woods (n141) 2.
403 Donoghue v Stevenson [1932] AC 562 597 per Lord Atkin.
404 Lochgelly Iron Co (n401).
405 Caparo Industries Ltd v Dickman (1990) 2 AC 605, (1990) 2 WLR 358; *Also see* Occupiers' Liability Act 1957, s 2(2).
406 Murray (n22) 92.

Facebook operates machine-learning algorithms, given Facebook's extensive user base,[407] it is unlikely (but also unknown)[408] that Facebook can accurately "foresee" which users will post such content. Secondly, regarding proximity, tort law considers whether a duty of care could reasonably be owed by one party to another.[409] As an online intermediary platform hosting billions of users, it seems unlikely that a close relationship could be established between social media sites and their users. However, in determining the third element, whether such a duty would be fair, just and reasonable, this article contends that whilst it is difficult to establish the first two requirements, it seems "fair, just and reasonable" to hold social media sites liable for harms arising from fake news and misinformation content.[410] Nevertheless, as social media sites seemingly fail the first two hurdles of the duty of care test established in negligence, the introduction of a duty of care for a broad category of online harms following such a model is undesirable, [411] unlikely to significantly improve Facebook's existent regulatory mechanisms for identifying fake news and misinformation content.

Moreover, damages under negligence law are typically limited to personal injury and physical damage to property:[412] not speech. [413] Fake news and misinformation content, however, by its very nature lacks any physical element. Moreover, such content can result in a variety of harms difficult to ascertain, going far beyond the personal injury and physical damage recognised in negligence. As aforementioned, harms from such content include mental health problems, impacting one's ability to participate in a democracy and also the infringement of one's right to a fair trial.[414] Such harms require a, 'deep understanding of the many potential social variables and interfaces that lead to them.'[415]

2. No Definition of Fake News and Misinformation

The Draft Online Safety Bill, akin to the White Paper, neglects to define fake news and misinformation content. Notably, the White Paper published during the consultation period stated that the government's focus is on disinformation.[416] The DCMS have acknowledged that it is necessary to define fake news and misinformation in any proposed legislation seeking to address harms arising from such content. [417] The Committee instead suggested focusing on the *intent* of the communication, using terms such as misinformation and disinformation to indicate intent.[418] Whilst this article welcomes this suggestion, it remains unclear whether the proposed duty of care will elaborate on this. Further, the proposed duty covers a broad spectrum of online harms (with the White Paper listing 23 harms).[419] As fake news and misinformation is linguistically nuanced and harms from such content vary among individuals, it is important that the duty offer a definition for such content if it wishes to have a chance of successfully protecting users against harms. Illustratively, whilst some may read and engage with a misinformed post, others scroll through Facebook quickly and their reactions to posts are "impressionistic" and "fleeting".[420] Given the disparity, it is important that the law recognise the context within which each harm occurs.[421]

---

[407] Statistica, 'Number of monthly active Facebook users worldwide as of 1st quarter 2020 *(in millions)'* (2020) <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> Accessed 09/07/2020.
[408] House of Commons Digital, Culture, Media and Sport Committee (n13), para. 84.
[409] *See* Black v Fife Coal Co Ltd [1912] A.C. 149.
[410] *See* Tomlinson v Congleton BC [2003] UKHL 47.
[411] *See* Occupiers' Liability Act 1984; *See Wheat v E Lacon & Co Ltd* [1966] 1 All ER 582.
[412] Smith and Woods (n141) 2.
[413] House of Commons Briefing Paper (n57) 7.
[414] *See* Chapter 2.1.C.
[415] House of Commons Briefing Paper (n57).
[416] Online Harms White Paper (n48), para. 1.23; Draft Online Safety Bill (n395).
[417] House of Commons Digital, Culture, Media and Sport Committee (n13).
[418] ibid; Independent High-level Group on Fake News and Online Disinformation, *A multi-dimensional approach to disinformation* (2018) 10; Murray (n22) 116.
[419] Online Harms White Paper (n48).
[420] *Stocker v Stocker* [2019] UKSC 17, paras 39-44, per Lord Kerr; *Monir v Wood* [2018] EWHC (QB) 3525, para 90, per Nicklin J.
[421] ibid (Stocker v Stocker); *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130; *Bukovsky v Crown Prosecution Service* [2017] EWCA Civ 1529; [2018] 4 WLR 13, para 13 per Simon LJ; *Waterson v Lloyd* [2013] EWCA Civ 136; [2013] EMLR 17, para 39.

Common law has also established the necessity for statutory definitions of nuanced concepts.[422] In *Stocker v Stocker,* it was held that the trial judge had erred by using dictionary definitions to analyse the meaning of "tried to strangle" posted on a Facebook wall.[423] It is therefore important to recognise that whilst judges have discretionary powers, 'courts are the mere instruments of the law.'[424] Hence, the lack of definition for fake news and misinformation is worrying.[425]

3. Enforcement Concerns

The White Paper states that, 'online safety is a shared responsibility between companies, the government and users.'[426] In the government's Interim response to the White Paper consultation,[427] it stated that the regulator should have, 'a range of enforcement powers that it uses in a fair, proportionate and transparent way.[428] However, this article notes three enforcement concerns arising from the White Paper: firstly, a strict duty threatens the right to freedom of expression, secondly, there are concerns surrounding Ofcom's suitability as the chosen regulator of the proposed duty and thirdly, the regulatory response seems oversimplistic, seemingly requiring all companies within the remit of the duty to adopt similar practices. Each will be addressed in turn.

Firstly, the proposed duty of care presents a threat to freedom of expression,[429] with Facebook initially arguing against calls for increased regulation for this reason.[430] The White Paper concerningly states that Ofcom could be given powers to block internet service providers from being accessible in the UK as a "last resort" if they, 'commit serious, repeated and egregious violations of the outcome requirements'.[431] Further, the White Paper states that, 'companies will be required to take stringent action – proactive and reactive – to monitor and address threats of child sexual exploitation and abuse activity.'[432] Importantly, the House of Commons stated that freedom of speech is derived from a set of principles that, 'collide with the kind of actions that duties of care might require, such as monitoring and pre-emptive removal of content.'[433] In the case of fake news and misinformation, the challenge lies in adequately balancing the potential harms (e.g. to political discourse: which is profound)[434] with the right to freedom of expression.[435]

Secondly, the government's choice of Ofcom as the independent regulator to oversee the proposed statutory duty of care is questionable as Ofcom's remit covers the broadcasting, telecommunications and postal industries.[436] Whilst certainly possessing a great deal of technical expertise, Ofcom lacks experience in the social media context, bringing into question their suitability as a regulator for not only the proposed statutory duty, but more specifically for the oversight of fake news and misinformation content on such sites.[437] Interestingly, it is the Information

---

422 ibid; also see *Diplock LJ in Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 172C; *Oriental Daily Publisher Ltd v Ming Pao Holdings Ltd* [2013] EMLR 7, para 138 per Lord Neuberger.
423 ibid (all).
424 *Osborn et al v The Bank of the United States* (1824) 22 U.S. 738, at 866; *See* N Isaacs, 'The Limits of Judicial Discretion' (1923) 32(4) *Yale L J* 15; F H Easterbrook, 'Judicial Discretion in Statutory Interpretation' (2004) 57(1) *Oklahoma L Rev* 9; R Hunter**,** 'More than Just a Different Face? Judicial Diversity and Decision-making' (2015) 68(1) *Current Legal Problems* 138.
425 HM Government Green Paper (n59); Smith and Woods (n141).
426 Online Harms White Paper (n48).
427 HM Government Response to the Internet Safety Strategy Green Paper (n124).
428 Online Harms White Paper (n48), para. 19.
429 Smith and Woods (n141).
430 Grygiel (n25).
431 Online Harms White Paper (n48), para. 6.5.
432 ibid, para. 7.7.
433 House of Commons Briefing Paper (n57) 7.
434 House of Commons Digital, Culture, Media and Sport Committee (n13), para. 4.
435 Human Rights Act 1998, Article 10; Smith and Woods (n141).
436 Ofcom <https://www.ofcom.org.uk/home> Accessed 23/09/2020.
437 Tandoc (n14).

Commissioner's Office ('ICO') and not Ofcom who are the recognised body responsible for regulating data protection legislation in the UK, sponsored by the DCMS:[438] acting as a "sheriff of the internet".[439]

Lastly, the proposed regulatory framework is over-simplistic,[440] assuming that, 'because this content is accessed via technology, it should be technology that prevents it:'[441] capable of providing the ideal solution to prevent the 23 harms identified in the White Paper.[442] However, this is not yet possible. Further the White Paper states that, 'companies should invest in the development of safety technologies to reduce the burden on users to stay safe online.'[443] However, this could stifle innovation and enable sites like Facebook to further their influence as smaller businesses may not have sufficient resources to invest in such technologies and compete, [444] despite the government stating that they will try to assist such businesses.[445]

Having evidenced why the proposed duty of care inadequately caters to fake news and misinformation, and how it would not change the ecosystem of social media sites, the focus of this article will now be on reforms.

4. Reforms

As this article argues that a duty of care is not desirable for the regulation of fake news and misinformation content, this section will explore alternate legislative mechanisms the government can introduce to collectively protect users from harm.

Firstly, some scholars have argued that online content ought to be regulated through the introduction of a legal obligation that requires social media sites to, 'fully disclose their self-regulatory efforts to address illegal and harmful content on their services'[446] as opposed to being liable for hosting specific types of content.[447] Specific disclosure requirements could be effective at protecting users from harm, by requiring sites like Facebook to adopt more ethical and responsible practices.[448] At present, social media sites like Facebook merely have a duty to publish and follow transparent rules under the Defamation Act 2013.[449] However, to address fake news and misinformation, the DCMS proposed that the government provide an appropriate body (which the DCMS suggested to be the ICO) to conduct "algorithm audits" on social media sites, notably reviewing the sites' security mechanisms and algorithm processes.[450] This would involve an analysis to determine whether the algorithms Facebook, for example, deploys to tackle fake news and misinformation are "responsible",[451] recognising the significance of ethical technology and AI practices. Moreover, the DCMS suggested that Facebook ought to be able to, 'properly account for the estimated total of fake accounts on their sites at any one time'.[452] Currently, Facebook is accounting for such accounts independently, however with fake news and misinformation becoming increasingly harmful to democratic discourse, it is imperative the government introduce some formal oversight of algorithmic practices (ideally overseen by the ICO).

---

438 House of Commons Digital, Culture, Media and Sport Committee (n13), para. 26.
439 ibid.
440 Abdel and Dahiyat (n358); *See* T Jaynes, 'Legal personhood for artificial intelligence: citizenship as the exception to the rule'(2019) *Artificial Intelligence and Society*; European Commission (n130)*;* also see European Patent Office, *Strategic Plan 2023* (6 July 2019) 50.
441 Phippen (n294) 43.
442 Phippen and Bond (n1) 171.
443 Online Harms White Paper (n48), para. 42.
444 *See* HM Treasury Digital Competition Expert Panel, *Unlocking digital competition* (2019).

445 ibid, para. 45.
446 M Vermeulen, 'Online content: to regulate or not to regulate' (2019) <https://www.apc.org/en/pubs/online-content-regulate-or-not-regulate-question>
447 ibid.
448 Online Harms White Paper (n48).
449 Defamation Act 2013; House of Commons Digital, Culture, Media and Sport Committee (n13), para. 66.
450 ibid (House of Commons), para. 72.
451 ibid.
452 ibid.

Secondly, the White Paper itself states that the government "alone" cannot keep social media free from harmful content, recognising the value in voluntary initiatives.[453] The White Paper lists various initiatives companies can take to tackle disinformation including, 'partnering with other platforms and independent fact-checking services.'[454] This article agrees with such an assertion, arguing that a cross-industry response is another attractive solution to tackling the spread of fake news and misinformation on social media sites. Notably, after the terrorist attacks in Westminster in 2017,[455] Big Tech companies including Facebook, Twitter and Google established the Global Internet Forum to Counter Terrorism ('GIFCT'),[456] working collaboratively to reduce terrorist content on their sites.[457] Notably, Facebook's 99% success-rate in removing terrorist content suggests a collaborative response could be the secret to success in tackling fake news and misinformation, as it is likely the success of the terrorist content removal was aided by GIFCT. As terrorist organisations operate similarly on multiple platforms, it is likely that at least some creators of fake news and misinformation also do.

The third and final reform this article advocates for is for Facebook itself to play a greater role in educating its users about fake news and misinformation. Whilst the evidence is mixed as to whether lack of education is a "cause" of such content, research supports the claim that requiring users to engages their moral register encourages users to become responsible citizens online.[458] This could be done through a compulsory pop-up update that users must read when next logging onto Facebook which not only explains what fake news and misinformation is, but provides examples, as academic discourse itself has struggled to define the term.[459] Importantly, as fake news and misinformation is linguistically nuanced, it is important that such an update explain the different "levels" of fake news: for example, varying from malicious disinformation that could result in severe harm (e.g. mental health problems, impeding Article 6 or to fictitious gossip about celebrities). Similarly, the update should explain to users how they can flag and report such content. Facebook could also consider requiring users to complete a short quiz following the update, asking users to identify whether a post would be considered misinformation. However, this presents its own challenges as a quiz could be inaccessible to older users or those who are less commercially aware if the questions use examples that users are unaware of. Further, as Facebook operates in over 100 languages and misinformation is linguistically nuanced,[460] it is imperative that such a quiz be tailored to each language accurately.

Conclusion

In conclusion, this article has demonstrated that whilst social media sites have a responsibility to address fake news and misinformation content, especially given its increasing role in public discourse, the government's proposed statutory duty of care is inadequate in addressing the harms posed by fake news and misinformation. The first chapter identified that at present, the current legal framework for online content is inadequate in protecting users from harm, considering human rights legislation as well as the plethora of legislation that affords users with protections online. This chapter also highlighted the complexity of Facebook's platform, ultimately arguing its nature is more akin to a platform, resulting in users not being able to gain protection from harm under publishing laws. The second chapter identified the challenges the law has faced in seeking to address fake news and misinformation content such as a lack of geographical borders, the large mass of data present on Facebook's site and the multi-tiered nature of Facebook's site complicating its operations and oversight. The third chapter acknowledged Facebook is attempting to actively curb the spread of fake news and misinformation on its site through behavioural and algorithmic regulation, however this is not a perfect system and the lack of oversight is a

[453] Online Harms White Paper (n48), paras. 2.9 and 2.10.
[454] ibid, para. 7.26.
[455] ibid, paras. 2.9 – 2.10.
[456] Global Internet Forum to Counter Terrorism < https://www.gifct.org/> Accessed 23/09/2020.
[457] ibid.
[458] Brownsword (n343) 1328.
[459] See Chapter 2.1.
[460] Chris Stokel-Walker, 'Facebook AI can translate directly between any of 100 languages' (19 October 2020) *New Scientist* <https://www.newscientist.com/article/2257637-facebook-ai-can-translate-directly-between-any-of-100-languages/> Accessed 10/10/2021.

cause for concern. The fourth chapter analysed the proposed statutory duty of care, arguing a negligence model would be unsuitable in this context, and instead advocates for a holistic regulatory approach encompassing the introduction of algorithm auditing, greater collaboration between platforms and greater user education. Whilst social media sites like Facebook should regulate fake news and misinformation, a statutory duty of care is not the appropriate vehicle in which to reduce such content and its resultant harms online.

TACKLING THE IMPUNITY OF TRANSNATIONAL CHILD SEX OFFENDERS IN MADAGASCAR: THE INTERNATIONAL HUMAN RIGHTS OBLIGATIONS OF SENDING STATES

Ashleigh Guest[1]

ABSTRACT

The sexual exploitation of children in the context of travel and tourism ("SECTT") affects children across the world and is becoming increasingly prevalent in Madagascar, where transnational child sex offenders act openly and with impunity. SECTT is often treated as a domestic crime and thus left to the local Malagasy authorities to deal with, with tourist-sending countries ("Sending States") playing little to no part in the fight against it. Due to limited resources and various practical problems, conviction rates in tourist "Destination States" such as Madagascar are extremely low. This Article proposes that SECTT must rather be dealt with as a human rights issue; it is not only an abhorrent crime, but also amounts to a gross violation of the human rights of the most vulnerable children in the world. It is therefore a phenomenon which all States have obligations to tackle. This Article looks specifically at the human rights obligations of Sending States, using France in particular as a case study with the highest number of international visitors to Madagascar. It proposes that Sending States must take their international obligations seriously to participate effectively in the fight against SECTT. Various international mechanisms will then be considered that can be harnessed to ensure that Sending States meet these obligations. Ultimately, this Article aims to ensure that transnational child sex offenders no longer enjoy impunity for the crimes they commit against children in Madagascar.

[1] LLB in Law with Study Abroad and LLM in Human Rights Law at the University of Bristol. PhD candidate at the University of Bristol, specialising in international human rights law.

.

I. INTRODUCTION

The sexual exploitation of children in the context of travel and tourism ("SECTT") is 'considered a worldwide, growing phenomenon, which seriously harms countless children around the world, often with irreparable consequences'.[2] The phenomenon is frequently referred to as 'child sex tourism' ("CST"), however in order to reflect the abhorrent nature of this crime this Article will use the phrase SECTT where possible, in line with the Interagency Working Group on Sexual Exploitation of Children's Terminology Guidelines (2016).[3] Whilst SECTT affects children and countries across the globe, Madagascar is increasingly becoming a destination of choice for perpetrators, where they often enjoy impunity for their crimes. This Article aims to address the growing problem of SECTT in Madagascar by utilising international human rights to ensure that transnational child sex offenders face justice for their crimes.

Chapter II explores the wider context of SECTT in Madagascar, considering the supply and demand factors that contribute to it, as well as the victims and the perpetrators. Chapter III then analyses and assesses current strategies being used to tackle the problem domestically in Madagascar to determine why they are failing. It will show that '[u]ltimately, the rate of [SECTT] offenses compared to the sparse number of convictions strongly suggests the inadequacy of current law enforcement efforts'.[4] Chapter IV therefore proposes a shift in the focus to the responsibilities that tourist-sending countries ("Sending States") have under international human rights law to tackle SECTT in countries where the crimes take place ("Destination States"), such as Madagascar. Whilst these duties apply to all Sending States, this Article will focus on France in particular, as the main country of origin of international tourists to Madagascar. This chapter will identify the human rights which are violated by SECTT, in order to identify 'the sources of these obligations', explaining 'how a State may be legally responsible for the harm caused by [SECTT], even if it did not directly cause it'.[5] Chapter V explores the various international legal mechanisms available to meet these obligations. It will consider more specifically 'how these obligations can be implemented and monitored, with a view to ensuring that States and others are held accountable for their acts and omissions'.[6] Ultimately, this Article aims to tackle the impunity of perpetrators and secure justice for victims, by ensuring that Sending States take their international human rights responsibilities seriously to tackle SECTT and to protect children in Madagascar.

II. CONTEXT OF SECTT IN MADAGASCAR

In order to establish how SECTT can be tackled effectively in Madagascar, it is necessary to understand the problem more clearly by setting out the context within which it sits. SECTT is rife in Madagascar. As highlighted by Najat Maalla M'jid, the fourth United Nations Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography (the "UN Special Rapporteur"):

---

[2] Najat Maalla M'jid, 'Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography' (Human Rights Council 22nd Session, A/HCR/22/54, December 2012) 5 <https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.54_en.pdf> accessed 30 August 2020.

[3] Interagency Working Group on Sexual Exploitation of Children, 'Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse' ("the Luxembourg Guidelines") (Luxembourg, 2016) <https://www.ohchr.org/Documents/Issues/Children/SR/TerminologyGuidelines_en.pdf> accessed 02 September 2020; INTERPOL, 'Crimes Against Children: Appropriate Terminology' (2020) <https://www.interpol.int/Crimes/Crimes-against-children/Appropriate-terminology> accessed 02 September 2020.

[4] Kalen Fredette, 'International Legislative Efforts to Combat Child Sex Tourism: Evaluating the Council of Europe Convention on Commercial Child Sexual Exploitation' (2009) 32(1) *Boston College International and Comparative Law Review* 1, 4.

[5] United Nations Office of the High Commissioner of Human Rights ("UN OHCHR"), 'Human Rights and Human Trafficking: Fact Sheet No. 36' (2014) 2 <https://www.ohchr.org/Documents/Publications/FS36_en.pdf> accessed 30 August 2020.

[6] Ibid.

> [w]hile it is impossible to provide specific figures on the true extent of the sale and sexual exploitation of children in Madagascar, given the clandestine nature of these activities, the lack of centralized, disaggregated data and, in particular, the very low number of reported cases, child sexual exploitation in Madagascar is clearly a blight on the country. It is visible everywhere and so commonplace that it has become taken for granted.[7]

For example, in the coastal and tourist town of Diego-Suarez, a study by ECPAT, a global non-governmental organisation ("NGO") that works to end the sexual exploitation of children, found that approximately 70 per cent of women, 'half of whom are minors, are involved in prostitution'.[8] Authorities and NGOs in Madagascar unanimously agree 'that child prostitution in Madagascar has reached alarming levels and has risen sharply in recent years, particularly since 2009'.[9] As explained by Austin, '[s]ocio-economic forces influence both the supply of and demand for sex with children, otherwise known as the "push" and "pull" factors'.[10] These will be briefly explored in turn below.

A. Supply Factors: Victims

As one of the poorest countries in the world, ranked 162nd out of 189 countries on the Human Development Index,[11] many Malagasy children are left vulnerable to exploitation and forced into prostitution for survival.[12] According to the World Bank, 75 per cent of the population lives on less than $1.90 per day (in purchasing power parity).[13] Furthermore, 'Madagascar has the world's fourth highest rate of chronic malnutrition, with almost one child in two under five years of age suffering from stunting'.[14] The majority of SECTT victims in Madagascar are between the ages of 12 and 18,[15] although the National Police ("*Gendarmerie Nationale*") 'confirmed child victims of sexual exploitation were increasingly younger and that their number was constantly growing'.[16] Victims are often from single-parent families and are school dropouts,[17] which is particularly problematic with approximately 1.5 million children not in primary school according to UNICEF Madagascar.[18] This is often so that they can work to provide for their families; with over 24.7 per cent of children aged between 5 and 17 already working in Madagascar.[19] This has been compounded by the country's declining economy since the 2009 political crisis, leading to a rapid reduction in employment opportunities.[20] Because of this situation, and seemingly with no other way out of poverty, sex work has become 'an individual phenomenon for survival, which allows entire families to live'.[21] Abuse is often organised by the parents and family, who 'encourage their children to have a relationship

---

[7] Najat Maalla M'jid, 'Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography: Mission to Madagascar' (United Nations Human Rights Council 25th Session, 2013) A/HRC/25/48/Add.2, 4.
[8] ECPAT International, 'Don't Look Away – Be Aware and Report the Sexual Exploitation of Children in Travel and Tourism: Assessment on Sexual Exploitation of Children Related to Tourism and Reporting Mechanisms in Gambia, Kenya, Madagascar, Senegal and South Africa' (2014) 47.
[9] Najat Maalla M'jid, 'Report of the Special Rapporteur: Mission to Madagascar' (n 6) 5.
[10] Sara L Austin, 'Commercial Sexual Exploitation of Children: How Extra-territorial Legislation Can Help' in Don Brandt (ed.), *Violence Against Women: From Silence to Empowerment* (World Vision, 2003) 40.
[11] Human Development Index, 'Madagascar: Human Development Indicators' (2019) <http://hdr.undp.org/en/countries/profiles/MDG> accessed 30 August 2020.
[12] Najat Maalla M'jid, 'Report of the Special Rapporteur 2012' (n 1).
[13] The World Bank, 'Madagascar: Overview' (2020) <https://www.worldbank.org/en/country/madagascar/overview> accessed 30 August 2020.
[14] Ibid.
[15] ECPAT International, 'Don't Look Away' (n 7) 49.
[16] Ibid, 40.
[17] Ibid, 53.
[18] UNICEF Madagascar, 'Madagascar Annual Report' (2013) 7 <https://www.unicef.org/madagascar/media/611/file/Rapport%20annuel%202013%20(EN).pdf> accessed 06 September.
[19] Institut National de la Statistique, 'Enquête Périodique Auprès des Ménages 2010: Rapport Principal' (2010) 68 <https://www.instat.mg/wp-content/uploads/2016/11/INSTAT_Epm2010-08-2011.pdf> accessed 07 September 2020.
[20] The World Bank, 'Madagascar: Measuring the Impact of the Political Crisis' (2013) <https://www.worldbank.org/en/news/feature/2013/06/05/madagascar-measuring-the-impact-of-the-political-crisis> accessed 07 September 2020.
[21] ECPAT International, 'Don't Look Away' (n 7) 40.

with a *vazaha* (Caucasian foreigner) in order to have a chance to improve their social status and wealth…. Parents even provide false ID cards and clients for the children'.[22] Whilst prostitution involving children younger than 12 is not tolerated by parents and authorities, 'when the girls reach the age of 13, they are generally not considered children anymore and are encouraged by their parents to seek a foreign tourist'.[23] The problem is exacerbated by the "'success" of some sex workers, whose connections with foreign nationals have turned them into "models" with a house, or car'.[24] As such, 'engaging with a *vazaha* is highly regarded and possibly conducive to upward social mobility',[25] gaining 'material benefits for the family'.[26] Because of these push factors, 'Madagascar has gradually acquired the sad distinction of being a major destination for sex tourism'.[27] The exploitation of children is now 'either accepted or perceived with fatalism and often leaves people indifferent, especially regarding reporting actions'.[28]

B. Demand Factors: Perpetrators

Whilst these factors 'play an important role in pushing children into commercial sexual exploitation', the existence of SECTT 'cannot be explained without analysing and understanding the issue of demand for sex with children'.[29] The poverty of children in Madagascar is 'only exploitable because of the comparative affluence of [SECTT] perpetrators'; the 'widening economic gap between developing and developed States allows for sex tourists with significant disposable income, who in turn drive demand in Destination States'.[30] The demand for SECTT has thus 'mainly originated in industrialised countries and targeted popular tourist destinations', where there is 'ease to commit such crimes with utter impunity'.[31] A rapidly expanding tourism industry (with 291,000 international visitors in 2018) and an increase in direct flights from Europe has facilitated and led to a dramatic increase in SECTT in Madagascar.[32] Fredette explains that perpetrators are drawn 'by low-risk and affordable sexual access to children, as well as the enhanced anonymity that comes in a foreign country'.[33] Furthermore, the rise of the internet, including '[w]idespread use of social media, the existence of a "darknet" that allows anonymity, and other related applications make it easier for travelling offenders to communicate and share information about vulnerable children'.[34] Many websites, such as the so-called "Wiki Sex Guide", "Hook Up Travels" and the "International Sex Guide", allow offenders to facilitate others by sharing tips and graphic imagery – albeit not explicitly discussing minors but suggesting it through language such as 'young' and 'teens'.[35] For example, on the latter forum, an excerpt from a thread on Madagascar finds a "Senior Member" advising other travelling sex offenders that:

---

[22] Ibid, 50.
[23] Ibid, ii.
[24] The New Humanitarian, 'Tackling the Rise of Sex Tourism' (1 December 2020) <https://www.thenewhumanitarian.org/fr/report/91251/madagascar-lutter-contre-la-mont%C3%A9e-du-tourisme-sexuel> accessed 30 August 2020.
[25] Najat Maalla M'jid, 'Report of the Special Rapporteur: Mission to Madagascar' (n 6) 6.
[26] ECPAT International, 'Don't Look Away' (n 7) 39.
[27] Najat Maalla M'jid, 'Report of the Special Rapporteur: Mission to Madagascar' (n 6) 6.
[28] ECPAT International, 'Don't Look Away' (n 7) 38.
[29] ECPAT International, 'The Commercial Sexual Exploitation of Children in Africa: Developments, Progress, Challenges and Recommended Strategies' (November 2014) 11 <https://www.ecpat.org/wp-content/uploads/2016/04/Regional%20CSEC%20Overview_Africa.pdf> accessed 30 August 2020.
[30] Fredette (n 3) 11.
[31] United Nations Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, '25 Years of Fighting the Sale and Sexual Exploitation of Children: Addressing New Challenges' (2016) 12 <https://www.ohchr.org/Documents/Issues/Children/SR/25YearsMandate.pdf> accessed 30 August 2020.
[32] World Bank Data, 'International Tourism: Number of Arrivals – Madagascar' (2020) <https://data.worldbank.org/indicator/ST.INT.ARVL?locations=MG> accessed 30 August 2020.
[33] Fredette (n 3) 6-7.
[34] Angela Hawke and Alison Raphael, 'Offenders on the Move: Global Study on Sexual Exploitation of Children in Travel and Tourism (2016) 49 <https://www.protectingchildrenintourism.org/resource/the-global-study-on-sexual-exploitation-of-children-in-travel-and-tourism-2016/> accessed 09 September 2020.
[35] Wiki Sex Guide, 'Madagascar' <https://www.wikisexguide.com/wiki/Madagascar> accessed 30 August 2020; Hook Up Travels, 'Madagascar' <https://hookuptravels.com/wiki/Madagascar> accessed 30 August 2020; The International Sex Guide, 'Madagascar', <http://www.internationalsexguide.nl/forum/showthread.php?905-Madagascar> accessed 30 August 2020.

> it's always best to have local contacts. Best Chef de police or Prefet or Sousprefet of the province and upwards. Then it's usually a phone call. Hand over the receiver to the goons. And voila. Problem finish. It pays to befriend some people with good contacts. Just hang out in the local expat bars.[36]

Whilst child prostitution affects the whole country, it occurs mainly in urban areas (such as the capital, Antananarivo), and tourists resorts, such as Nosy Be, Diego-Suarez, Île Sainte Marie, Fort Dauphin, Tulear, Tamatave, Mangily and Mahavelona.[37] In these tourist towns in particular, SECTT 'is experiencing a steady increase since the 2009 crisis and seems to be commonplace', and thus '[c]onsumers act openly'.[38] Nosy Be, an island situated in the north-west of Madagascar, has been described as 'one of the most popular destinations for African sex tourism'.[39] As a previous French colony, most travelling child sex offenders in Madagascar are French nationals from France and the nearby Réunion Island (making up 70% of arrivals in 2011 – the most recent statistics); followed by Italians (8%), Germans (3%) and United Kingdom ("UK") nationals (3%).[40] Perpetrators of SECTT 'can be broadly distinguished between those who have a preference for children and those who are considered to be situational offenders'.[41] The first group are generally classed as paedophiles, also known as "preferential" offenders, who have a sexual preference for children and therefore travel 'specifically with the aim of abusing children'.[42] The latter group are "opportunists" or "situational offenders", who do not usually have a preference for children but are 'driven by the search for new experiences and justify their acts on the basis of cultural or economic grounds'.[43] Situational offenders can be more difficult to identify and therefore to prosecute, as their "primary" reason for travel is often legitimate.[44] Fredette argues that this distinction is necessary, because '[a]ccurately identifying perpetrators is essential for good criminological analysis and effective law enforcement'.[45] Whilst this can be a useful distinction to devise and tailor strategies to the type of offender,[46] the UN Special Rapporteur has noted that often, individuals do not 'fit clearly into one category or another'.[47] However, an 'essential feature' of both types of offender is 'their knowledge or belief that their actions will go unpunished'.[48] Underlying this 'is the essentially racist view that people (especially children) in other countries are different and probably inferior, so exploiting them is not the morally repugnant act that it would be at home'.[49] Ultimately, it is 'a phenomenon in which children are exploited by those with the capital and freedom to travel abroad, and the power to exploit those who are more vulnerable'.[50]

This section has briefly explored the complexity of the problem, showing that 'there is no single explanation for why the industry is thriving'.[51] SECTT 'is a niche service-market that operates according to basic supply and

---

[36] Forum on The International Sex Guide, 'Post #4087 by "Neddy69"' (25 July 2020) <http://www.internationalsexguide.nl/forum/showthread.php?905-Madagascar/page2> accessed 30 August 2020.
[37] Najat Maalla M'jid, 'Report of the Special Rapporteur: Mission to Madagascar' (n 6) 5.
[38] ECPAT International, 'Don't Look Away' (n 7) 46-47.
[39] Ibid, 47.
[40] Ibid; World Bank, 'Madagascar – Tourism Sector Review' (July 2013) 30 <http://documents1.worldbank.org/curated/en/994701467992523618/pdf/820250WP0P12800Box0379855B00PUBLIC0.pdf> accessed 30 August 2020.
[41] Maud de Boer-Buquicchio, 'Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography' (Human Rights Council 31st Session, A/HRC/C/31/58, 30 December 2015) 7 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/294/64/PDF/G1529464.pdf?OpenElement> accessed 30 August 2020.
[42] Najat Maalla M'jid, 'Report of the Special Rapporteur 2012' (n 1) 7-8.
[43] Ibid.
[44] Austin (n 9) 41.
[45] Fredette (n 3) 8.
[46] Austin (n 9) 42.
[47] Najat Maalla M'jid, 'Report of the Special Rapporteur 2012' (n 1) 7-8.
[48] Maud de Boer-Buquicchio, 'Report of the Special Rapporteur 2015' (n 40) 8-9.
[49] Hawke and Raphael, 'Offenders on the Move' (n 33) 58; see also Mahathi Kosuri and Elizabeth Jeglic, 'Child Sex Tourism: American Perceptions of Foreign Victims' (2017) 23(2) *Journal of Sexual Aggression* 207.
[50] Austin (n 9) 45.
[51] Fredette (n 3) 9.

demand principles'.[52] The numerous factors contributing to the supply and demand of SECTT show that the problem cannot be tackled with a single approach. However, as a legal pursuit, this Article will focus on the legal mechanisms that have been, and can be, harnessed to tackle the problem.

III. WHY ARE DOMESTIC STRATEGIES FAILING?

This section will analyse the current strategies being used to tackle SECTT domestically in Madagascar to understand how and why they are failing.

A. Legislative Framework

Generally, a 'principal failure' of Destination States is the 'absence of laws addressing child sexual exploitation'.[53] However, in response to the problem of SECTT in the country, Madagascar 'has adopted a complete and solid legal framework'.[54] It has ratified the United Nations Convention on the Rights of the Child (1989) ("UNCRC"), and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (2000) ("Optional Protocol").[55] At the regional level, Madagascar became party to the African Charter on the Rights and Welfare of the Child in 2005, Article 27 of which specifically calls for the prohibition and prevention of sexual exploitation of children.[56] Consequently, Madagascar has international and regional duties to protect children from all forms of sexual exploitation.[57] It has incorporated these duties into domestic law; Article 66 of Act No. 2007-023 puts an obligation on the State to protect children from all forms of exploitation, through legal, administrative or social measures.[58] Article 334 of Act 2007-038 expressly makes it a crime to have 'sexual intercourse with a child in return for payment or any other consideration', punishable 'by 2 to 5 years' imprisonment and/or a fine of 1 million to 10 million Ariary'.[59] Further, in line with the UNCRC, Madagascar defines a child as 'every human being under the age of 18 years'.[60] However, the UN Special Rapporteur found, following her mission to Madagascar in 2013, that despite the 'relatively comprehensive legal framework, its implementation lacks effectiveness because of impunity and children's difficulty in accessing remedies guaranteeing their protection and safety'.[61] A report by ECPAT found that there 'is a huge loss in the number of cases followed-up throughout all the procedure; from those who report (victims, legal representatives, witnesses, etc.) to recipients (*Fokontany* [administrative unit], network protection, etc.), to Judicial Officers to Medical Corps to Court and to Conviction'.[62] Between each of these steps, 'blocking factors intervene and it is estimated that between the occurrence of the act and the end of the procedure, the loss is about 90 per cent'.[63]

B. Reporting

The first major hurdle to overcome in tackling SECTT domestically is getting the crimes reported. In Madagascar, a failure to report SECTT constitutes an act of complicity pursuant to Act No. 2007-038.[64] To facilitate the reporting of crimes practically, a national free helpline ("*Ligne Verte 147*") that operates 24 hours a day, 7 days a

---

[52] Ibid, 9.
[53] Fredette (n 3) 13.
[54] ECPAT International, 'Don't Look Away' (n 7) 40.
[55] United Nations Convention on the Rights of the Child (1989) ("UNCRC"); Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (2000) ("Optional Protocol").
[56] African Charter on the Rights and Welfare of the Child (1990) Article 27.
[57] Maud de Boer-Buquicchio, 'Report of the Special Rapporteur 2015' (n 40) 6.
[58] Act No. 2007-023 (Madagascar), Article 66; Najat Maalla M'jid, 'Report of the Special Rapporteur: Mission to Madagascar' (n 6) 10.
[59] Act 2007-038 (Madagascar), Article 334; ECPAT International, 'Don't Look Away' (n 7) 41.
[60] Act No. 2007-038 (Madagascar), Article 333.
[61] Najat Maalla M'jid, 'Report of the Special Rapporteur: Mission to Madagascar' (n 6) 20.
[62] ECPAT International, 'Don't Look Away' (n 7) 50.
[63] Ibid, 50.
[64] Act No. 2007-038 (Madagascar).

week, was set up in 2011 to respond to reports of child abuse and exploitation.[65] Furthermore, an online portal was recently created in August 2020 for people in Madagascar to report children suspected of being in danger of sexual abuse.[66] The *Gendarmerie Nationale* has also set up the Morals and Minors Protection Brigade ("*Police des Mœurs et de la Protection des Mineurs*" or "PMPM"), which 'directly receives reports of child sexual exploitation cases' referred from the helpline, from victims, and from witnesses.[67] They 'centralise and handle the majority of reporting of criminal cases involving children'.[68] However, the PMPM 'suffers from extremely limited resources, which prevent cases of exploitation from being taken into court'.[69] They 'sometimes have no way of getting to the child victim because there is no fuel, or even a vehicle' to respond to reports.[70] Furthermore '[d]ata collection is often not computerized and patrols are restricted and cannot be carried out in all high-risk areas'.[71] Whilst reports reportedly 'work well' in the capital Antananarivo, reports in the other Provinces 'are weak and irregular'.[72] As a result, there 'are significant differences between numbers of cases of child sexual exploitation observed, reported and convicted'.[73]

C. Judicial System

Even where cases of SECTT are reported and responded to, many are dropped in the judicial system. Whilst the 'Ministry of Justice is responsible for the legal protection of children through juvenile judges and prosecutors', like the *Gendarmerie Nationale* it also 'suffers from limited resources'.[74] Across the whole country, there are only 13 juvenile judges, and courts in rural and remote areas do not have access to the internet.[75] Further weaknesses in the system include 'bribes from foreigners or officials in exchange for filing false evidence'.[76] As highlighted by ECPAT, 'fat envelopes are common' for 'the competent authorities that dismiss the case'.[77] Corruption is compounded by 'insufficient State resources', as '[u]nderpaid law enforcement personnel are susceptible to bribes from perpetrators'.[78] Because of this, 'the laws are applied inconsistently' or not at all.[79] The United Nations Committee on the Rights of the Child, in its Concluding Observations on Madagascar's State Report submitted in 2015, found that the number of prosecutions and convictions for SECTT offences was 'extremely low'.[80] Further, when conducting interviews of the judicial services on her visit to Madagascar, the UN Special Rapporteur found that no one 'had been able to cite a single conviction for child sexual exploitation'.[81] She concluded that as a result, 'the Malagasy people have no confidence in their justice system' and that '[e]ven if the family or the victim takes the matter to court, it is often covered up'.[82] It is this situation that fosters impunity and has allowed SECTT to become so widespread in Madagascar. The weakness of the justice system is further 'compounded by the

---

[65] Child Helpline International and UNICEF, 'A New Reality: Child Helplines Report on Online Child Sexual Exploitation and Abuse from Around the World' (2018) 36 <https://www.unicef.org/protection/files/LEAP_report_CHI_and_UNICEF_(final).pdf> accessed 30 August 2020.
[66] AROZAZA, 'Report a Child in Danger' (August 2020) <https://arozaza.mg/signaler-un-enfant-en-danger/> accessed 30 August 2020.
[67] ECPAT International, 'Don't Look Away' (n 7) 44; Najat Maalla M'jid, 'Report of the Special Rapporteur: Mission to Madagascar' (n 6) 13.
[68] ECPAT International, 'Don't Look Away' (n 7), 44.
[69] Ibid, 38.
[70] Najat Maalla M'jid, 'Report of the Special Rapporteur: Mission to Madagascar' (n 6) 13.
[71] Ibid.
[72] Representative from the Antananarivo Police Morals and Minors Protection Brigade in ECPAT International, 'Don't Look Away' (n 7) 44.
[73] ECPAT International, 'Don't Look Away' (n 7) 38.
[74] Ibid 42.
[75] Ibid, 42.
[76] Ibid, 38.
[77] Ibid, 50.
[78] Fredette (n 3) 15.
[79] ECPAT International, 'Don't Look Away' (n 7) 40.
[80] United Nations Committee on the Rights of the Child, 'Concluding Observations on the Report submitted by Madagascar under Article 12(1) of the Optional Protocol on the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography' (CRC/C/OPSC/MDG/CO/1, 28 October 2015) para 31.
[81] Najat Maalla M'jid, 'Report of the Special Rapporteur: Mission to Madagascar' (n 6) 16.
[82] Ibid, 13.

importance of customary law, which often runs contrary to the rights of the child'.[83] The dominance of customary law means that 'many cases of abuse suffered by children are still settled out of court within the community', often 'at the children's expense, their testimonies receiving very little attention'.[84]

D. Lack of Resources

It is clear that Madagascar, as a Destination State, is predominantly suffering from weak enforcement rather than inadequate laws. Because of the practical problems with implementation, the domestic laws and policies in Madagascar have been described as 'paper tigers' – '[p]owerful looking on paper but with little impact due to lack of practical implementation'.[85] It does therefore seem that stronger and more consistent enforcement would help to tackle the problem. However, this is a solution that predominantly requires a reduction in poverty and greater resources through socio-economic strategies, which is beyond the scope of this Article. Another important factor to consider is that Madagascar relies 'heavily on tourism as a vital means for economic development'.[86] This is important because 'revenues from sex tourism, now an unfortunate part of many countries' tourist attractions, form a significant portion of many national economies'.[87] Svensson argues that with 'such economic reliance on sex tourism, it is no wonder that nations with a well-developed sex tourism industry have little to no incentive to prosecute wealthy foreigners who pour their foreign currency into the local market'.[88] Whilst this is a pessimistic perspective, it highlights that where resources are already extremely limited, local authorities are less likely to divert those scarce resources into tackling SECTT. As a result, with 'so few local incentives for prosecution', there is a need for interventions by Sending States to hold their nationals accountable.[89] Furthermore, as seen above, despite recent local efforts, the government has not reported any prosecutions or convictions for SECTT and offenders continue to act freely.[90] This indicates 'that unilateral local efforts alone are inadequate',[91] allowing 'offenders to commit their crimes in the shadows and with impunity'.[92] Fredette argues that the 'unfortunate reality of Destination State failure with regard to rampant [SECTT] underscores the need for Sending State involvement'.[93] As a transnational problem, it demands transnational solutions to combat the continuing impunity of perpetrators.[94] As highlighted by UNICEF, '[e]nding violence against children is everyone's responsibility'.[95] As many of the perpetrators originate from abroad, and thus continue to fuel demand for SECTT, 'Sending States share a responsibility for prosecuting [SECTT] offenses'.[96] The next section therefore shifts the focus onto the obligations held by Sending States, to establish whether this can be used as an effective mechanism to tackle SECTT in Madagascar.

IV. THE OBLIGATIONS OF SENDING STATES TO TACKLE SECTT

---

[83] ECPAT International, 'Don't Look Away' (n 7) 40.
[84] Ibid, 40-1.
[85] Ibid, ii.
[86] Naomi Svensson, 'Extraterritorial Accountability: An Assessment of the Effectiveness of Child Sex Tourism Laws' (2006) 28(3) *Loyola of Los Angeles International and Comparative Law Review* 641, 645.
[87] Ibid, 645.
[88] Ibid, 645.
[89] Ibid, 645.
[90] United States Department of State, 'Trafficking in Persons Report: Madagascar' (2019) <https://www.state.gov/reports/2019-trafficking-in-persons-report-2/madagascar/> accessed 30 August 2020.
[91] Fredette (n 3) 32.
[92] Hawke and Raphael, 'Offenders on the Move' (n 33) 21.
[93] Fredette (n 3) 17.
[94] UN Special Rapporteur, '25 Year Mandate' (n 30) 14.
[95] UNICEF, 'A Familiar Face: Violence in the Lives of Children and Adolescents' (2017) 89 <https://www.unicef.org/sites/default/files/2019-01/Violence_in_the_lives_of_children_and_adolescents.pdf> accessed 30 August 2020.
[96] Fredette (n 3) 17.

Maud de Boer-Buquicchio, the fifth UN Special Rapporteur on the Sale of Children, argues that 'lack of accountability continues to fuel demand' for SECTT.[97] In 2015, she dedicated a thematic study to addressing the 'demand factor' of SECTT because of the 'significant gaps in understanding offenders and how to reduce the demand for such abhorrent crimes'.[98] She argued that this is fundamental because 'if the demand is stemmed, the offer will correlatively decrease'.[99] Consequently, '[a]ddressing the demand factor is…an effective way to eradicate the sexual exploitation of children'.[100] This chapter therefore aims to combat the demand for SECTT by turning to the obligations that Sending States have under international human rights law to tackle it.

A. SECTT as a Violation of Human Rights

First, it is necessary to consider the relationship between human rights and SECTT, in order to understand the correlating duties that States have to tackle it. It is imperative that SECTT is viewed as a violation of human rights and understood 'in relation to other child rights and child protection issues'.[101] This 'requires an understanding of the ways in which human rights violations arise' by SECTT, as well as an understanding of 'the ways in which States' obligations under international human rights law are engaged'.[102] A human rights-based approach identifies rights-holders (children), 'their entitlements and the corresponding duty bearers (usually States) and their obligations'.[103] It 'works towards strengthening the capacities of rights holders to secure their rights and of duty bearers to meet their obligations'.[104] This approach also ensures that the '[c]ore principles and standards derived from international human rights law (such as equality and non-discrimination, universality of all rights, and the rule of law) should guide all aspects of the response at all stages'.[105] All three World Congresses against Commercial Sexual Exploitation of Children (held in Stockholm in 1996, Yokohoma in 2001 and Rio de Janeiro in 2008) have thus reaffirmed the need for the 'human rights-based goal of universal protection of children from all forms of sexual exploitation'.[106] As confirmed by the UNCRC, children are equal holders of human rights, and sexual exploitation violates a number of those rights.[107] Most notably this includes the right to effective protection from SECTT, as found in Article 34 of the UNCRC.[108] However, more widely, SECTT also amounts to a violation of the right to respect for their human dignity;[109] the right not to be submitted to slavery, servitude, forced labour or bonded labour;[110] the right to liberty and security;[111] the right of children to special protection;[112] the right not to be subjected to torture and/or cruel, inhuman, degrading treatment or punishment;[113] the right to an adequate

---

97 United Nations Office of the High Commissioner of Human Rights, 'UN Expert Says States Must Step Up Efforts to Eradicate the Sale and Exploitation of Children' (3 March 2020) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25648&LangID=E> accessed 30 August 2020.
98 Maud de Boer-Buquicchio, 'Report of the Special Rapporteur 2015' (n 40) 4.
99 Ibid, 6.
100 Ibid.
101 UNICEF, 'Research on Sexual Exploitation of Children in Travel and Tourism' (2020) <https://www.unicef-irc.org/research/research-on-sexual-exploitation-of-children-in-travel-and-tourism/> accessed 30 August 2020; Geraldine Van Bueren, 'Child Sexual Abuse and Exploitation: A Suggested Human Rights Approach' (1994) 2 *The International Journal of Children's Rights* 45.
102 UN OHCHR, 'Human Rights and Human Trafficking' (n 4) 1.
103 Ibid, 8.
104 Ibid.
105 Ibid.
106 UNICEF, 'Legal Frameworks for Combating Sexual Exploitation of Children' (2010) 2 <https://www.unicef-irc.org/files/documents/d-3743-Legal-frameworks-for-comb.pdf> accessed 30 August 2020.
107 United Nations Convention on the Rights of the Child (1989) Preamble.
108 United Nations Convention on the Rights of the Child (1989) Article 34.
109 Universal Declaration of Human Rights (1948), Article 1.
110 Universal Declaration of Human Rights (1948), Article 4; International Covenant on Civil and Political Rights (1966), Article 8.
111 International Covenant on Civil and Political Rights, Article 9.
112 Universal Declaration of Human Rights (1948), Article 25(2); International Covenant on Economic, Social and Cultural Rights (1966), Article 10(3).
113 Universal Declaration of Human Rights (1948), Article 5; United Nations Convention on the Rights of the Child (1989) Article 37(a); International Covenant on Civil and Political Rights, Article 7; United Nations Convention against Torture (1984), Article 2.

standard of living;[114] the right to just and favourable conditions of work;[115] and the right to the highest attainable standard of physical and mental health.[116] When viewed through a human rights lens, it can be seen that SECTT is not only an abhorrent crime, but also amounts to a 'gross violation of children's rights'.[117] Taking a human rights-based approach to SECTT is thus vital to its elimination, as it ensures the full protection of victims' rights, as well as ending the impunity of offenders by ensuring that States meet their obligations to tackle the problem.

B. Positive Obligations

However, whilst the link between human rights and SECTT is clear, 'it does not necessarily follow that human rights will naturally be at the centre of responses'; it is 'possible for States to address [SECTT] primarily as a matter of crime or public order'.[118] Furthermore, it is less clear to what extent States, especially Sending States, are responsible for the harm caused by SECTT. This is because 'the primary wrong has been committed by private criminals and not by the State itself'.[119] However, as highlighted by the Office of the United Nations High Commissioner for Human Rights:

> States will generally not be able to avoid responsibility for the acts of private persons when their ability to influence an alternative, more positive outcome can be established. In such cases, the source of responsibility is not the act itself but the failure of the State to take measures of prevention or response in accordance with the required standard, usually to be found in a treaty.[120]

For example, in *X and Y v the Netherlands*, the European Court of Human Rights ("ECtHR") made reference to a State's positive obligations under Article 8 of the European Convention of Human Rights ("ECHR"), 'which covers the physical and moral integrity of the person, including his or her sexual life',[121] to provide minors with 'practical and effective protection' from sexual abuse.[122] In this case, a 6-year-old girl with mental disabilities had suffered sexual abuse, and neither criminal nor civil law allowed her to bring an action against the perpetrator in the Netherlands. The ECtHR 'found that it was the State's obligation to provide for the possibility to bring the case before the criminal courts'.[123] The Court confirmed that Article 8 'does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life'.[124] Furthermore, in *E and Others v the United Kingdom*, the ECtHR found that 'all viable steps must be taken to prevent the abuse or exploitation of children under Article 3 ECHR, which prohibits torture, inhuman or degrading treatment'.[125] In this case, the ECtHR clarified that:

> The test under Article 3 however does not require it to be shown that 'but for' the failing or omission of the public authority ill-treatment would not have happened. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State.[126]

---

[114] Universal Declaration of Human Rights (1948), Article 25(1); International Covenant on Economic, Social and Cultural Rights (1966), Article 11.
[115] Universal Declaration of Human Rights (1948), Article 23; International Covenant on Economic, Social and Cultural Rights (1966), Article 7.
[116] United Nations Convention on the Rights of the Child (1989) Article 24; International Covenant on Economic, Social and Cultural Rights (1966), Article 12.
[117] Hawke and Raphael, 'Offenders on the Move' (n 33) 13.
[118] UN OHCHR, 'Human Rights and Human Trafficking' (n 4) 7.
[119] Ibid, 11.
[120] Ibid.
[121] *X and Y v the Netherlands* [1985] ECHR 4, para 22.
[122] Ibid, para 30.
[123] UNICEF, 'Legal Framework' (n 105) 19.
[124] *X and Y v the Netherlands* (n 120) para 23.
[125] UNICEF, 'Legal Framework' (n 105) 19; *E and Others v the United Kingdom* [2002] ECHR 763.
[126] *E and Others v the United Kingdom* [2002] ECHR 763, para 99.

These cases make clear that when it comes to the sexual exploitation of children, States have positive human rights obligations 'to prevent all forms of sexual exploitation and to respond urgently to it when it occurs'.[127] UNICEF therefore argues that the 'effective protection of children from all forms of sexual exploitation must be seen as the fulfilment of States' clear and immediate human rights obligations under international law'.[128] Furthermore, the response to SECTT must be 'anchored in the rights and obligations established by international human rights law'.[129] It is therefore necessary to establish exactly what these human rights obligations are and to whom they are owed.

C. Jurisdictional Reach

It is clear that SECTT violates a number of human rights and that States have positive obligations for tackling it within their jurisdiction. However, it is necessary to establish how wide this jurisdiction reaches in order to determine to whom these obligations are owed. Under international human rights law, States generally have obligations to secure and protect the rights only of those within their jurisdiction, which is 'understood to be primarily territory'.[130] In *Soering v the United Kingdom*, the ECtHR found that 'Article 1 of the ECHR sets a limit, notably territorial, on the reach of the Convention', and that 'the engagement undertaken by a Contracting State is confined to "securing" the listed rights and freedoms to persons within its own "jurisdiction"'.[131] Furthermore, in the ECtHR case of *Banković v Belgium*, it was confirmed that jurisdiction under the ECHR was 'primarily' or 'essentially' territorial; any extension of jurisdiction beyond the territory of the State Party was 'exceptional', and thus required 'special justification in the particular circumstances of each case'.[132] This position was again confirmed by the ECtHR in *Al Skeini v the United Kingdom*, which stated that the 'essentially territorial basis of jurisdiction reflected principles of international law and took account of the practical and legal difficulties faced by a State operating on another State's territory'.[133] In the case of SECTT, as a transnational phenomenon, territorial jurisdiction would prevent Sending States from owing any duties to victims abroad. As such, whilst the legal framework for monitoring and preventing child sexual exploitation is strong within most Sending States, 'as soon as the offence is committed abroad it is seen as "their problem"' and there is not 'the same type of law enforcement interest or international cooperation'.[134] However, to expect the Malagasy authorities 'to spend their limited resources over and over again on surveillance and monitoring of offenders [from Sending States] that we knowingly turn away from is disingenuous and counter to the spirit of international cooperation on child protection'.[135] This allows child sex abusers from Sending States to travel to developing countries where they can act with relative impunity,[136] and thus 'the exploitation of children through travel and tourism mostly escapes investigation and prosecution'.[137]

However, in both *Banković* and *Al Skeini*, the ECtHR confirmed that there were a limited number of exceptions to territorial jurisdiction.[138] In *Banković*, the principal exception applied was 'when a State, as a consequence of military action, exercised effective control of an area outside its national territory'.[139] In *Al Skeini*, the ECtHR cited

---

127 UNICEF, 'Legal Framework' (n 105) 65.
128 Ibid.
129 UN OHCHR, 'Human Rights and Human Trafficking' (n 4) 8.
130 Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (Second Edition, Cambridge University Press, 2016) 82; see generally Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2009).
131 *Soering v the United Kingdom*, Application no. 14038/88 [1989] ECHR, para 86.
132 *Banković and Others v Belgium and Others*, Application no. 52207/99 [2001] ECHR 890, paras 59 and 61.
133 *Al Skeini and Others v the United Kingdom*, Application no. 55721/07 [2011] ECHR 1093, para 109.
134 Christine Beddoe, 'Return to Sender: British Child Sex Offenders Abroad – Why More Must Be Done' (ECPAT United Kingdom, 2008) <https://www.ecpat.org.uk/Handlers/Download.ashx?IDMF=8a2a9c5f-cff0-4884-9ff0-a941d0c26172> accessed 30 August 2020.
135 Ibid, 5.
136 Najat Maalla M'jid, 'Report of the Special Rapporteur: Mission to Madagascar' (n 6).
137 UNICEF, 'Legal Framework' (n 105) 58.
138 *Banković* (n 131) para 67; *Al Skeini* (n 132) para 110.
139 *Banković* (n 131) paras 70-71.

other cases which confirmed that there were a 'number of other exceptional categories where jurisdiction could be exercised by a State outside its territory', such as on board a vessel or aircraft flying the flag of the State.[140] For example, in *Öcalan v Turkey* it was held that Turkey exercised jurisdiction over the applicant when arrested inside an aircraft registered in Turkey but within the international zone of Nairobi Airport.[141] Furthermore, the case of *Drozd and Janousek v France and Spain* demonstrated that jurisdiction could be exercised by a State if it brought an individual before its own court, sitting outside its territory, to apply its own criminal law.[142] In the case of SECTT, as confirmed by the Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, a 'government's responsibility does not end at the national borders', and States owe human rights obligations beyond the limits of their territory.[143] As explained by Seabrook, '[t]erritorial considerations are no longer consistent with the universal obligations to protect children'.[144] The specific sources of these extraterritorial obligations will now be identified and explored.

D. Sources of Obligations

The most significant international instrument in relation to SECTT is the UNCRC.[145] Under the UNCRC (which all but two States have ratified), State Parties are legally accountable for the protection of children from all forms of sexual exploitation.[146] Najat Maalla M'jid, the UN Special Rapporteur on the Sale of Children, has made clear that this 'commitment applies to all children, not just those within their jurisdiction'.[147] Sending States, such as France, therefore have obligations under the UNCRC to protect children in Madagascar from sexual exploitation. More specifically, Article 34 of the UNCRC requires State Parties to adopt 'all appropriate national, bilateral and multilateral measures to prevent: (a) the inducement or coercion of a child to engage in any unlawful sexual activity; and (b) the exploitative use of children in prostitution or other unlawful sexual practices'.[148] The Optional Protocol strengthens this commitment and provides more clarity on the human rights obligations that States have.[149] The Optional Protocol has been ratified by 176 States (including France) and 'further refines the protections offered under the UNCRC',[150] by making specific reference to SECTT in its preamble and in Article 10.[151] It clarifies the human rights obligations that States have; requiring 'State parties to criminalise these child rights violations as offences and to provide adequate support to child victims for their physical and psychological recovery, social reintegration and repatriation'.[152] Specifically, under Article 3, State Parties have obligations to criminalise SECTT and to sanction offenders, 'whether such offences are committed domestically or transnationally'.[153] Article 4 explicitly extends 'the jurisdiction over any offence under Article 3 committed abroad by a State's citizen', allowing

---

[140] *Al Skeini* (n 132) para 115.
[141] *Öcalan v Turkey*, Application no. 46221/99 [2005] ECHR 282, para 91.
[142] *Drozd and Janousek v France and Spain*, Application no. 12747/87 [1992] ECHR 52, para 91.
[143] Suzanne Kragten-Heerdink, Laura Menenti and Corinne Dettmeijer-Vermeulen, 'Expert Paper: Governments' Responsibilities as countries of Demand, Supply and/or Victimisation' (Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, 2015) 3 <https://www.dutchrapporteur.nl/binaries/25.national-rapporteur-netherlands-final_tcm24-35295.pdf> accessed 31 August 2020.
[144] Jeremy Seabrook, *No Hiding Place: Child Sex Tourism and the Role of Extraterritorial Legislation* (Zed Books, 2000) 114.
[145] United Nations Convention on the Rights of the Child (1989).
[146] Najat Maalla M'jid, 'Report of the Special Rapporteur: Mission to Madagascar' (n 6) 10; United Nations Convention on the Rights of the Child (1989) Articles 19 and 34.
[147] Najat Maalla M'jid, 'Report of the Special Rapporteur: Mission to Madagascar' (n 6) 10.
[148] United Nations Convention on the Rights of the Child (1989) Article 34; Maud de Boer-Buquicchio, 'Report of the Special Rapporteur 2015' (n 40) 4.
[149] The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (2000).
[150] Hawke and Raphael, 'Offenders on the Move' (n 33) 87; Maud de Boer-Buquicchio, 'Report of the Special Rapporteur 2015' (n 40) 4.
[151] Maud de Boer-Buquicchio, 'Report of the Special Rapporteur 2015' (n 40) 4; The Optional Protocol, Preamble and Article 10.
[152] Hawke and Raphael, 'Offenders on the Move' (n 33) 87; Maud de Boer-Buquicchio, 'Report of the Special Rapporteur 2015' (n 40) 4.
[153] The Optional Protocol, Article 3.

for prosecution of offences committed abroad.[154] Finally, Articles 8 and 9 require States to provide 'access to procedures to seek compensation and prevention measures to protect children from sexual exploitation'.[155]

Further international legal instruments provide a wider duty to combat the sexual exploitation of children, including the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, and International Labour Organization ("ILO") Convention No. 105 (1957) concerning the Abolition of Forced Labour and Convention No. 182 (1999) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.[156] The latter ILO Convention 'recognises the "use, procuring or offering of a child for prostitution" as a worst form of child labour, requiring immediate prohibition and elimination as a matter of urgency'.[157] France has ratified all of these instruments.[158] Regionally, the 'European Union has also taken a number of directives in order to reinforce the protection of children against sexual exploitation', including Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography.[159] France has also ratified the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007) ("The Lanzarote Convention"), which provides a duty to combat SECTT and is 'widely considered to be the most advanced, comprehensive international legal instrument of its kind'.[160] UNICEF similarly describes the Lanzarote Convention as 'the most comprehensive instrument so far adopted to combat sexual abuse and exploitation',[161] as it provides 'an important framework for international action'.[162] For example, Chapter II of the Lanzarote Convention puts an obligation on States to 'take the necessary legislative or other measures to prevent all forms of sexual exploitation and sexual abuse of children and to protect children'.[163] Chapter VI 'defines in detail the conduct that must be criminalised', including sexual abuse, child prostitution, and solicitation, including "grooming" a child through the Internet. Furthermore, Article 25 provides a legal basis for a Sending State to have extraterritorial jurisdiction where an offence is committed by one of its nationals or residents.[164]

It is therefore clear that Sending States, including France, have international human rights duties under the UNCRC, its Optional Protocol, and other various legal instruments to protect children around the world by tackling SECTT. The duty of Sending States under these international legal instruments is 'to criminalize and penalize effectively, in conformity with all relevant and applicable international instruments, all forms of sexual exploitation and sexual abuse of children'.[165] It is therefore 'the duty of States party to those instruments to take all appropriate measures to fulfil that obligation', and '[p]roactive measures to address the demand factor should

---

154 The Optional Protocol, Article 4; Hawke and Raphael, 'Offenders on the Move' (n 33) 87.
155 The Optional Protocol, Articles 8 and 9; UNICEF, 'Legal Framework' (n 105) 7.
156 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000), supplementing the UN Convention against Transnational Organized Crime; International Labour Organization Convention No. 105 (1957) concerning the Abolition of Forced Labour and Convention No. 182 (1999) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; Najat Maalla M'jid, 'Report of the Special Rapporteur 2012' (n 1) 11.
157 UNICEF, 'Legal Framework' (n 105) 11.
158 United Nations Treaty Collection, 'Status of Treaties' (2020) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en> accessed 07 September 2020; International Labour Organization, 'Ratifications for France' <https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102632> accessed 07 September 2020.
159 Najat Maalla M'jid, 'Report of the Special Rapporteur 2012' (n 1) 11; Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography.
160 Hawke and Raphael, 'Offenders on the Move' (n 33) 30; The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007) ("Lanzarote Convention"); Council of Europe, 'Chart of Signatures and Ratifications of Treaty 201' (2020) <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201/signatures?p_auth=3tqzGUeu> accessed 07 September 2020.
161 UNICEF, 'Legal Framework' (n 105) 17.
162 Hawke and Raphael, 'Offenders on the Move' (n 33) 90.
163 UNICEF, 'Legal Framework' (n 105) 18.
164 The Lanzarote Convention, Article 25.
165 United Nations General Assembly, 'Report of the Ad Hoc Committee on the Whole of the Twenty-Seventh Special Session of the General Assembly' (27th Special Session, A/S-27/19/Rev.1, 2002) para 45 <http://undocs.org/en/A/S-27/19/REV.1(SUPP)> accessed 31 August 2020.

be an upmost priority'.[166] An essential part of this is 'to deal with existing offenders by ensuring accountability, which also addresses the underlying factor of impunity'.[167]

V. HOW CAN THESE OBLIGATIONS BE MET BY SENDING STATES?

This chapter considers how Sending States can implement these international obligations and translate them 'into effective and enforceable national legislation, while respecting all the rights of child victims'.[168] It will do so by examining the legal mechanisms which exist to allow them to tackle SECTT, with a focus on France as the main tourist Sending State to Madagascar.

A. Extraterritorial Legislation

One of the most important tools in combating SECTT is extraterritorial legislation, which is a fundamental mechanism to 'deal adequately with the often international nature of demand for the sexual exploitation of children'.[169] It provides an 'extension of a country's legislative reach',[170] which 'allows legal authorities to hold nationals and citizens accountable for crimes committed abroad and undertake prosecution in their country of origin'.[171] As discussed in the previous chapter, Articles 1 to 3 of the Optional Protocol 'oblige States to prohibit and punish (even extraterritorially)' the sexual exploitation of children.[172] Articles 4 to 6 of the Optional Protocol explicitly require State Parties to adopt extraterritorial jurisdiction in order to be able to effectively prosecute perpetrators of SECTT.[173] The Lanzarote Convention also requires States to criminalise all forms of sexual exploitation committed by its nationals or residents, whether they occur at home or abroad.[174] The UN Special Rapporteur argues that extraterritorial legislation is an effective tool for tackling SECTT, because it 'decreases the likelihood of offenders escaping legal punishment';[175] ensuring that they can be prosecuted in their own countries 'if they have managed to escape the jurisdiction in which they have committed the offence'.[176] Furthermore, 'it sends a signal to all potential child sex tourists that they may be the focus of more than one legal system'.[177] It also 'sends a clear message that countries will not let their citizens take a "holiday" from their own legal systems'.[178] Austin therefore argues that the 'enactment and enforcement of…extraterritorial legislation against commercial sexual exploitation can be enormously effective in ensuring children's protection'.[179] A clear example of extraterritorial legislation which prohibits SECTT can be seen in Section 72 of the UK's Sexual Offences Act 2003.[180] This extraterritorial legislation was the mechanism that enabled UK authorities to prosecute and convict prolific child sex offender Richard Huckle in 2016 in the UK courts, for 71 counts of serious sexual offences committed against children in Malaysia.[181]

---

166 Maud de Boer-Buquicchio, 'Report of the Special Rapporteur 2015' (n 40) 12.
167 Ibid.
168 UNICEF, 'Legal Framework' (n 105) 29.
169 Maud de Boer-Buquicchio, 'Report of the Special Rapporteur 2015' (n 40) 5; Najat Maalla M'jid, 'Report of the Special Rapporteur 2012' (n 1) 11; see generally Jeremy Seabrook (n 143).
170 ECPAT International, 'Combating Child Sex Tourism: Questions and Answers' (2008) 33 <https://www.ecpat.org/wp-content/uploads/2016/04/cst_faq_eng.pdf> accessed 31 August 2020.
171 Najat Maalla M'jid, 'Report of the Special Rapporteur 2012' (n 1) 11.
172 Bantekas and Oette (n 129) 534.
173 The Optional Protocol, Articles 4-6.
174 The Lanzarote Convention, Article 25.
175 Najat Maalla M'jid, 'Report of the Special Rapporteur 2012' (n 1) 11.
176 Muireann O'Briain, Executive Director of ECPAT International, 'Foreword' in Jeremy Seabrook, *No Hidden Place: Child Sex Tourism and the Role of Extraterritorial Legislation* (Zed Books, 2000).
177 ECPAT International, 'Combating Child Sex Tourism: Questions and Answers' (n 169) 33.
178 ECPAT International, 'Extraterritorial Laws – Why They Are Not Really Working and How They Can Be Strengthened' (2008) 5.
179 Austin (n 9) 39.
180 Sexual Offences Act (2003) (United Kingdom) Section 72.
181 *R v Huckle* [2016] Central Criminal Court (United Kingdom).

France has already enacted provisions in its criminal law which allow it to exercise extraterritorial jurisdiction over crimes committed by French citizens outside French territory, facilitating its ability to prosecute SECTT perpetrators in Madagascar.[182] Whilst SECTT is not an explicitly named offence, France has made sexual offences against children, including 'child prostitution', a crime both domestically and abroad. Article 225-12-1 of the Penal Code makes it an offence to accept or obtain, 'in exchange for remuneration or promise of a remuneration…relations of a sexual nature with a minor who engages in prostitution', punishable by three years' imprisonment and a fine of €45,000.[183] Article 225-12-2 increases the penalty to seven years' imprisonment and to a fine of €100,000 if the offence was committed against a minor under 15 years of age.[184] Furthermore, Article 225-12-3 provides for extraterritorial jurisdiction over these offences, making clear that where they are 'committed abroad by a French national or by a person habitually resident on French territory, French law is applicable'.[185] This provision also removes the double-criminality requirement usually required for French extraterritorial jurisdiction,[186] which means that the offence does not need to be a punishable offence in both countries (the perpetrator's "home" country, and the country in which the crime was committed).[187] This 'removes a key obstacle to prosecution'.[188] The same provision also removes the requirement for a complaint by the victim or official accusation to initiate proceedings.[189] As such, whilst SECTT is not explicitly named in the legislation, under the current legal framework France does have extraterritorial jurisdiction over child prostitution offences committed by French citizens abroad. One advantage of France applying its domestic penal code extraterritorially in this way 'is that children abroad are afforded the same legal protections as domestic children'.[190] However, a 'major shortfall of this strategy is that while domestic penal codes have relevant provisions, they are rarely [SECTT]-specific and therefore are unresponsive to the uniquely exploitative conditions of foreign victims and elements'.[191] Specifically, they fail to provide 'special protections that [SECTT] victims require'.[192] It is therefore submitted that France should clearly name the offence of SECTT within its legislation, as recommended by the UN Special Rapporteur Najat Maalla M'jid.[193]

Whilst extraterritorial legislation can be an effective tool in combating SECTT, there are a number of practical difficulties with its implementation, as transnational prosecutions 'raise unique procedural requirements'.[194] Using extraterritorial legislation in practice 'can be quite labour-intensive, as it often requires police to travel to the country where the crime occurred'.[195] For example, 'investigators are faced with the difficult task of identifying the victim and gathering evidence in a foreign country, all of which is likely to require a substantial investment of time, staffing, and resources'.[196] Furthermore, 'evidence and witnesses must then travel to the tourist's country to be a part of the legal process and to secure the conviction of a travelling child sex offender'.[197] As a result, although a number of countries have extraterritorial legislation, not all of them 'actually use it to stop their citizens from exploiting children abroad', including France.[198] Despite these practical difficulties, examples of extraterritorial

182 ECPAT International, 'Extraterritorial Laws' (n 177) 10.
183 The Penal Code (France), Article 225-12-1 (Decree no. 2002-305 of 4 March 2002 Article 13 Official Journal of 5 March 2002) (Act no. 2003-239 of 18 March 2003 Article 50 3° 4° Official Journal of 19 March 2003).
184 The Penal Code (France), Article 225-12-2.
185 The Penal Code (France), Article 225-12-3.
186 Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003) 283; The Penal Code (France), Article 113-6.
187 The Protection Project, 'International Child Sex Tourism: Scope of the Problem and Comparative Case Studies' (John Hopkins University, 2007) 188 <http://www.protectionproject.org/wp-content/uploads/2010/09/JHU_Report.pdf> accessed 31 August 2020.
188 UNICEF, 'Legal Framework' (n 105) 51.
189 The Penal Code (France), Article 225-12-3.
190 Fredette (n 3) 19.
191 Ibid.
192 Ibid, 19-20.
193 Najat Maalla M'jid, 'Report of the Special Rapporteur 2012' (n 1) 11.
194 Fredette (n 3) 23.
195 ECPAT International, 'Combating Child Sex Tourism: Questions and Answers' (n 169) 33.
196 Svensson (n 85) 660.
197 ECPAT International, 'Combating Child Sex Tourism: Questions and Answers' (n 169) 33.
198 Ibid.

legislation can be found which has been carefully crafted to overcome these hurdles.[199] Most notably, Australia's extraterritorial law, found in Division 272 and 279 of its Criminal Code Act 1995, contains specific provisions dealing with the transnational nature of SECTT.[200] These include 'specific accommodations for foreign witnesses, including the child victim', such as allowing witnesses to testify by video link with translators to avoid the distress of travel and of a foreign court system.[201] Furthermore, Division 272(E) of the Act relates specifically to the conduct of trials and makes provisions for establishing a victim's age, allowing certain evidence to be admissible, including (but not limited to) the victim's appearance, medical or scientific opinion, or an official document.[202] This is particularly important, as establishing a victim's age in SECTT cases can be difficult, especially in Destination States such as Madagascar where only 61.8 per cent of children aged 0-5 have been registered with a valid birth certificate.[203] As highlighted by Svensson, '[a]ccommodations such as these can help lead to convictions where evidence gathering would otherwise be too difficult'.[204] These provisions in Australian law 'have successfully enhanced victim protections and curbed the State's prosecution expenditures',[205] demonstrating 'that extraterritorial legislation can be remarkably effective'.[206] Despite more onerous practical considerations, the use of extraterritorial legislation is a fundamental tool to 'increase the effective protection of children from commercial sexual exploitation and the chances of prosecutions taking place' in cases of SECTT.[207] Extraterritorial legislation is therefore an important and necessary mechanism for all Sending States to hold their nationals accountable for SECTT and to meet their international obligations to tackle it.[208] In order to facilitate this and overcome the procedural difficulties with transnational prosecutions, ECPAT recommends establishing specialised police units 'to investigate and prosecute transnational sex offences', which 'could transform rarely-implemented extraterritorial jurisdiction laws into a real deterrent for potential perpetrators'.[209]

However, a further limitation arises with extraterritorial legislation in that it only 'allows States to exercise jurisdiction…over offences committed abroad by their own nationals'.[210] This is known as the "Active Personality Principle", according to which Sending States, such as France, may only exercise jurisdiction over transnational child sex offenders if they are State nationals. This limits the scope of the jurisdiction, as perpetrators of SECTT in Madagascar also originate from elsewhere, such as Italy, Germany and the UK.[211] As such, 'even with substantial improvements, extraterritorial legislation is only one part of the fight against [SECTT]'.[212] Whilst employing extraterritorial legislation is an important step, it cannot be the only step; the 'complexity of the sex tourism industry requires multiple, long-term coordinated strategies'.[213]

B. Universal Jurisdiction

---

199 Fredette (n 3) 17-18.
200 Criminal Code Act (1995) (Australia) Division 272 and 279.
201 Svensson (n 85) 661; Crimes (Child Sex Tourism) Amendment Act (1994) Australia, section 50EA; Criminal Code Act (1995) (Australia) Division 279 (as amended by addition No. 74 2013).
202 Criminal Code Act (1995) (Australia) Division 272.
203 World Bank, 'Identification for Development Country Diagnostic: Madagascar' (2017) 11 <http://documents1.worldbank.org/curated/en/809191510763351833/ID4D-Country-Diagnostic-Madagascar.pdf> accessed 31 August 2020; see also United Nations Committee on the Rights of the Child, 'Concluding Observations on the Report submitted by Madagascar under Article 8(1) of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict' (CRC/C/OPAC/MDG/CO/1, 30 October 2015) para 14.
204 Svensson (n 85) 661.
205 Fredette (n 3) 26.
206 Svensson (n 85) 661.
207 Najat Maalla M'jid, 'Report of the Special Rapporteur 2012' (n 1) 12.
208 ECPAT International, 'Combating Child Sex Tourism: Questions and Answers' (n 169) 33-4.
209 Hawke and Raphael, 'Offenders on the Move' (n 33) 68.
210 ECPAT International, 'Creating a United Front against the Sexual Exploitation of Children in Travel and Tourism' (2009) 8 <https://www.ecpat.org/wp-content/uploads/2016/04/ecpatjournaljune2009.pdf> accessed 31 August 2020.
211 ECPAT International, 'The Commercial Sexual Exploitation of Children in Africa: Developments, Progress, Challenges and Recommended Strategies' (n 29) 11; World Bank, 'Madagascar – Tourism Sector Review' (n 39).
212 Svensson (n 85) 642.
213 Raven Washington, 'Treating the International Child Sex Tourism Industry as a Crime Against Humanity' (2018) 24 *Southwestern Journal of International Law* 361, 371.

Other legal mechanisms must therefore also be harnessed by Sending States in order to ensure perpetrators are sanctioned, and thus to meet their duties to tackle SECTT. Another legal mechanism that may be applicable to this is universal jurisdiction. This is:

> the idea that a national court may prosecute individuals for any serious crime against international law – such as crimes against humanity, war crimes, genocide, and torture – based on the principle that such crimes harm the international community or international order itself, which individual States may act to protect.[214]

Whilst extraterritorial jurisdiction requires 'some link to the forum State', applying universal jurisdiction to the offence of transnational child sexual exploitation allows States to 'indict and prosecute offences' without any link whatsoever.[215] It is therefore an effective mechanism for tackling the transnational nature of SECTT, and allows Sending States like France to bring charges against an offender of any nationality. However, due to the 'broad extraterritorial competence' that it provides, the applicability of universal jurisdiction is limited to a small number of offences.[216] Universal jurisdiction only covers 'international crimes' on the basis that they harm international order; it does not therefore extend to 'ordinary' crimes.[217] Article 5 of the Rome Statute of the International Criminal Court (1998) lists the four international crimes: genocide, war crimes, the crime of aggression, and crimes against humanity.[218] Crimes against humanity are defined in Article 7 and include 'rape, sexual slavery, enforced prostitution', or 'any other form of sexual violence of comparable gravity'.[219] In order to use this mechanism to sanction perpetrators of SECTT, it is therefore necessary to fit the crime into one of these categories of international crimes. Bantekas and Oette explain that offences have 'customarily attracted universal jurisdiction in two independent ways'.[220] The first is 'on the basis of the repugnant nature and scale of the conduct', as with crimes against humanity.[221] In *Re Pinochet (No. 3)*, Lord Millett explained that international crimes attract universal jurisdiction on this ground where they infringe *jus cogens* (customary law), and where they are 'so serious and on such a scale that they can justly be regarded as an attack on the international legal order'.[222] This ground for extending universal jurisdiction has been persuasively harnessed by Washington to argue that, due to its 'heinous nature', SECTT 'should be treated as a crime against humanity and [accordingly] given universal jurisdiction'.[223] This is justified using the 'gravity of the harm' rationale, 'which views certain crimes as so heinous as to constitute an attack on the international order', thus 'justifying States to prosecute alleged offenders in the interests of the international community'.[224] This is a convincing ground on which to extend universal jurisdiction to the crime of SECTT, because it is 'not an ordinary crime with transnational dimensions', but rather is one of the 'most serious crimes of concern to the international community as a whole'.[225] As discussed in Chapter IV, SECTT has a 'devastating human rights impact', and should therefore be treated as a crime against humanity.[226] Whilst no State has yet explicitly based their SECTT legislation on this principle, 'both Belgium and Sweden extend application to

---

[214] International Justice Resource Centre, 'Universal Jurisdiction' <https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/> accessed 31 August 2020; see also Kenneth Randall, 'Universal Jurisdiction under International Law' (1988) 66 *Texas Law Review* 785.
[215] Bantekas and Oette (n 129) 692.
[216] Ibid.
[217] International Justice Resource Centre (n 213).
[218] Rome Statute of the International Criminal Court (1998), Article 5.
[219] Rome Statute of the International Criminal Court (1998), Article 7(1)(g).
[220] Bantekas and Oette (n 129) 692.
[221] Ibid.
[222] *R v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte* (No.3) [1999] 2 WLR 827 at 275.
[223] Washington (n 212) 369.
[224] Ibid, 370.
[225] Tome Obokata, 'Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System' (2005) 54 *International and Comparative Law Quarterly* 445, 445.
[226] Fredette (n 3) 18-19; see also Fatuma Hashi, 'Foreword' in Don Brandt (ed.), *Violence Against Women: From Silence to Empowerment* (World Vision, 2003).

persons who have merely passed through their territories'.[227] To some commentators, such as Svensson, this suggests a form of universal jurisdiction.[228]

The second way that offences have attracted universal jurisdiction is 'as a result of the inadequacy of domestic enforcement mechanisms over unlawful conduct committed in locations not subject to the authority of any state, such as the high seas'.[229] This was the original basis for developing universal jurisdiction, which was used as a means to tackle the piracy occurring beyond the territorial and jurisdictional reach of States.[230] This second ground for extending universal jurisdiction may also be used as a basis for extending universal jurisdiction to SECTT.[231] As pirates previously did, child sex offenders are able to travel to other territories and act with impunity, because the domestic justice systems in those countries are failing to adequately combat the issue. In the case of Madagascar, it is clear that the Malagasy authorities do have jurisdiction to prosecute child sex offenders who commit offences in Madagascar. However, because of the numerous problems discussed in Chapter III, the domestic Malagasy authorities are failing to tackle the problem alone, and therefore perpetrators are continuing to escape justice. The purpose of the universal jurisdiction mechanism is to act as a '"safety net" when the territorial State is unable or unwilling to conduct an effective investigation or trial', and to reduce the 'existence of "safe havens"' where perpetrators can enjoy impunity.[232] It is therefore submitted that both grounds are met for treating SECTT as a crime against humanity, and thus universal jurisdiction applies. Article 689 of the French Code of Criminal Procedure already provides a basis for universal jurisdiction over certain crimes, including torture, terrorism, airplane hijacking, nuclear smuggling, and naval piracy.[233] France should update this law to clearly include the crime of SECTT, explicitly expanding its jurisdictional reach and closing legal loopholes that allow transnational perpetrators to escape without punishment. The symbolic importance of treating SECTT as a crime against humanity, and thus a crime under international law, is also not to be underestimated, as it sends a clear message to perpetrators about the severity of the crime. Universal jurisdiction is therefore an effective mechanism that Sending States, in particular France, can use to investigate and prosecute transnational child sex offenders in Madagascar, and therefore meet their international duties to tackle SECTT.

C. Domestic Legislation

As well as extraterritorial legislation and universal jurisdiction, domestic legislation can be used by Sending States to tackle SECTT. The UN Special Rapporteur argues that countries should implement specific legislation which 'not only cover[s] travelling and engaging in illicit sexual acts with a child, but also travelling with the intent to do so and attempts or conspiracy to commit such a crime'.[234] Therefore, in addition to enacting extraterritorial legislation, a number of Sending States have enacted domestic laws which criminalise certain offences occurring within their own territories. A good example of this can again be seen in the amendments made to the Australian Criminal Code Act in April 2010, which introduced a 'preparatory offence' and made it a crime 'for Australians to prepare for or plan to commit a [SECTT] offence', punishable by ten years' imprisonment.[235] A similar law in the

---

[227] Fredette (n 3) 18-19; the Code of Criminal Procedure (Belgium), Article 10ter and the Criminal Code (Belgium), Article 379 <http://www.ejustice.just.fgov.be/eli/loi/1878/04/17/1878041750/justel> accessed 05 September 2020; Penal Code (Sweden), Chapter 2, Section 2.
[228] Svensson (n 85) 655.
[229] Bantekas and Oette (n 129) 693.
[230] A Hays Butler, 'The Doctrine of Universal Jurisdiction: A Review of the Literature' (2000) 11(3) *Criminal Law Forum* 353, 355; M Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 *Virginia Journal of International Law* 81, 108.
[231] Washington (n 212) 370.
[232] Human Rights Watch, 'Basic Facts on Universal Jurisdiction: Prepared for the Sixth Committee of the United Nations General Assembly' (19 October 2009) <https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction> accessed 31 August 2020.
[233] Code of Criminal Procedure (France), Article 689.
[234] Najat Maalla M'jid, 'Report of the Special Rapporteur 2012' (n 1) 12.
[235] Ibid.

United States, passed in 2003, was used to arrest and convict the American national John Seljan in the same year.[236] He was found guilty of six counts of sexual offences, including 'attempting to travel overseas with the intent to engage in illicit sexual conduct', based on intercepted letters with underage Filipino girls and evidence found in his luggage, such as pornographic materials, chocolate, local currency and sexual aids.[237] These 'preparatory offences' provide good examples for other Sending States (in particular France) to follow, allowing them to prosecute transnational sex offenders before they cause harm to a child abroad. Criminalising these inchoate offenses also helps to overcome the transnational evidentiary hurdle in some cases, as '[p]rosecutors can obtain and rely on evidence available in the sending country, thereby removing the difficult task of collecting evidence overseas'.[238] These offences do fail to capture the opportunistic offenders – those who travel without the intention to sexually exploit children – but they are nevertheless an effective tool in the arsenal of Sending States to facilitate action against SECTT.[239] Furthermore, travel bans should be issued 'widely and rigorously' for convicted child sex offenders in France and other Sending States.[240] This is to ensure that they are unable to escape to Madagascar and other Destination States, where they can commit further crimes against some of the most vulnerable children in the world. This method is already used in the Netherlands where, under the Dutch Passport Act, a person convicted of child sexual exploitation within the previous 10 years may be refused a passport or have their existing one revoked.[241] Again, whilst these 'efforts mainly target preferential offenders, who are more likely to be known to authorities',[242] they are an important step in tackling SECTT, as they 'bolster law enforcement capacity to prevent and effectively respond' to it.[243] Other Sending States such as France must follow suit to ensure that they effectively challenge the demand that continues to fuel SECTT.

D. International Cooperation

Another fundamental tool in tackling the impunity of transnational child sex offenders in Madagascar, and one that is explicitly required by both the Optional Protocol and the Lanzarote Convention, is international cooperation. Articles 6 and 10 of the Optional Protocol 'call for cooperation among State Parties to prevent and address crimes related to sexual exploitation of children'.[244] Article 6 requires States to 'afford each other "the greatest measure of assistance" in connection with investigations or criminal or extradition proceedings, including through treaties or arrangements on mutual legal assistance'.[245] Similarly, Article 10 requires State Parties to 'take all necessary steps to strengthen international cooperation…for the prevention, detection, investigation, prosecution and punishment of those responsible' for SECTT.[246] It also requires State Parties to 'promote international cooperation and coordination between their authorities, national and international non-governmental organizations and international organizations'.[247] Chapter IX of the Lanzarote Convention also requires international cooperation 'for the purpose of: (a) preventing and combating sexual exploitation and sexual abuse of children; (b) protecting and providing assistance to victims; and (c) investigations or proceedings concerning the offences established' in the Convention.[248] It is therefore clear that Sending States, including France, have

---

[236] Nick Madigan, 'Man, 86, Convicted Under New Law Against Americans Who Go Abroad to Molest Minors', *New York Times* (20 November 2004) <https://www.nytimes.com/2004/11/20/us/man-86-convicted-under-new-law-against-americans-who-go-abroad-to-molest.html?searchResultPosition=1> accessed 31 August 2020; The Protect Act (2003) (United States).
[237] Madigan (n 235); The Protect Act (2003) (United States); Naomi Svensson (n 85) 657.
[238] Svensson (n 85) 657.
[239] Fredette (n 3) 29.
[240] UNICEF, 'Legal Framework' (n 105) 51-2; Rebekah Read, 'The Exportation of Child Sex Offenders Must Stop – Could Removal of Passports be the Answer?' (Leigh Day, 2017) <https://www.leighday.co.uk/Blog/October-2017/The-exportation-of-child-sex-offenders-must-stop-c> accessed 04 September 2020.
[241] The Passport Act (1991) (the Netherlands), Article 18.
[242] Hawke and Raphael, 'Offenders on the Move' (n 33) 92.
[243] United Nations Office on Drugs and Crime, 'Child Sexual Exploitation in Travel and Tourism: A Brief Analysis of Domestic Legal Frameworks in Cambodia, Lao PDR, Thailand and Viet Nam' (Regional Office for Southeast Asia and the Pacific, 2015).
[244] Hawke and Raphael, 'Offenders on the Move' (n 33) 87.
[245] UNICEF, 'Legal Framework' (n 105) 7.
[246] The Optional Protocol, Article 10.
[247] The Optional Protocol, Article 10(1).
[248] The Lanzarote Convention, Chapter IX.

explicit obligations to cooperate effectively with Malagasy authorities to prevent SECTT, investigate and prosecute offenders, and to protect children in the process.

Most importantly, these obligations require Sending States such as France to cooperate with Malagasy authorities in order to prevent cases of SECTT from occurring in the first place. The UN Special Rapporteur, in her 2012 thematic report on tackling demand for SECTT, recommended that States strengthen and expand their international alert systems to communicate information about child sex offenders who are likely to reoffend in other countries.[249] This can be achieved most effectively by setting up 'bilateral notices where the country of origin of the child sex offender informs the country of destination when a registered child sex offender intends to travel'.[250] Furthermore, the UN Special Rapporteur also recommended '[e]stablishing an international and regularly updated registration system of people convicted of sex crimes against children'.[251] This method is currently used by Australia, where a National Child Offender System ("NCOS") has been established to keep law-enforcement authorities updated about the whereabouts of child sex offenders.[252] The Australian Federal Police have used this data to establish a list of the top destination countries for NCOS Registered Sex Offenders, allowing them to identify popular Destination States with which to prioritise resources for cooperation. ECPAT argues that a 'shared global child sex offender registry would support cooperation by increasing the information available to all and giving law enforcement a tool for stronger collaboration'.[253] An invaluable tool which could be used by France, and which is already established, is INTERPOL's Green Notice system.[254] This 'aims to share key police intelligence on a global scale and to stop offenders crossing borders unnoticed'.[255] Green Notices are 'international requests for cooperation or alerts that allow police in member countries to share critical crime-related information'.[256] However, to date this has been 'woefully underused' by Sending States.[257] This system must be utilised more effectively by France in order to meet its obligations to cooperate internationally to prevent SECTT from occurring in the first place.

Furthermore, in order to tackle the impunity of perpetrators and to facilitate prosecutions, France must enhance methods of cooperating with the Malagasy authorities when prosecuting extraterritorial SECTT cases. This is because, '[w]ithout an integrated effort between officers and prosecutors from both the destination country and the sending country, governments will have a difficult time obtaining the necessary evidence to move forward with a successful prosecution'.[258] Improving international cooperation is thus 'vital to effective prosecution'.[259] This can be done by '[s]trengthening transnational partnerships between States to increase judicial cooperation and facilitate access to evidence and witnesses by the State pursuing the case, [which] will help to bridge law enforcement gaps in cases based on extraterritorial principles'.[260] The United Nations Committee on the Rights of the Child thus systematically recommends in its Concluding Observations that States establish or strengthen bilateral agreements to facilitate the sharing of information and evidence.[261] Furthermore, Article 37(3) of the Lanzarote Convention specifically obligates States to 'remove any legal obstacles to the sharing of information',[262] to ensure '[c]ooperation across agencies and borders among the police and judiciary, to allow exchange of information for investigations and prosecution of every case where a person is suspected or accused of having sexually exploited a child in

[249] Najat Maalla M'jid, 'Report of the Special Rapporteur 2012' (n 1) 22.
[250] Hawke and Raphael, 'Offenders on the Move' (n 33) 79.
[251] Najat Maalla M'jid, 'Report of the Special Rapporteur 2012' (n 1) 22.
[252] Australian Criminal Intelligence Commission, 'Protection Service' (2020) <https://www.acic.gov.au/our-services/protection-services#accordion-2> accessed 31 August 2020.
[253] Hawke and Raphael, 'Offenders on the Move' (n 33) 74.
[254] INTERPOL, 'About Notices' <https://www.interpol.int/How-we-work/Notices/About-Notices> accessed 31 August 2020.
[255] Hawke and Raphael, 'Offenders on the Move' (n 33) 77-8.
[256] Ibid.
[257] Ibid, 78.
[258] Svensson (n 85) 661-2.
[259] Ibid.
[260] Hawke and Raphael, 'Offenders on the Move' (n 33) 74.
[261] See for example United Nations Committee on the Rights of the Child, 'Concluding Observations on the Report submitted by Madagascar (n 79) para 39; UNICEF, 'Legal Framework' (n 105) 41.
[262] Lanzarote Convention, Article 37(3); UNICEF, 'Legal Framework' (n 105) 45-5.

another country'.[263] It can therefore be seen that '[e]nhancing police-to-police cooperation between countries and with INTERPOL should be a top priority, as well as international cooperation between immigration authorities, child protection services and other key actors'.[264] To facilitate police-to-police cooperation, Sending States can provide training for local law enforcement personnel or establish 'law enforcement liaisons in popular Destination States'; in this case Madagascar.[265] Furthermore, UNICEF argues that the 'sharing of information and evidence between States, including of convicted and travelling sex offenders and child abuse images, is vital to identifying victims and ending impunity of perpetrators'.[266] INTERPOL again provides a vital tool in coordinating international investigations through its Child Abuse Image Database, which 'holds more than 2.7 million images and videos and has helped identify 23,100 victims worldwide'.[267] This 'supplies both a powerful technical tool and valuable access to a worldwide online network of specialized investigators who share their expertise with each other'.[268] France has been a member of INTERPOL since 1923, and with INTERPOL's headquarters currently based in Lyon, France should be able to cooperate more closely with the INTERPOL child sexual exploitation investigators' network.[269] Furthermore, Article 5(2) of the Optional Protocol provides a 'legal basis for extradition', even where no extradition treaty exists between the States involved.[270] Additionally, Article 335 of the Malagasy Criminal Code provides that 'requests for the extradition of persons wanted for prosecution in a foreign State shall be granted in respect of the offences provided for in this Act or to enforce sentences for such offences'.[271] These provisions allow France to legally make extradition requests in order to prosecute its own nationals at home, or to extradite perpetrators back to Madagascar where they have fled to France but are in the process of being prosecuted in Madagascar.

E. Private Sector

Another method through which France and other Sending States can ensure that they meet their international obligations to tackle SECTT is by holding private actors to account. Private actors in the travel and tourism industry, such as hotel companies, airlines, travel agents, restaurants, and transportation companies, are often on the "front line" of SECTT crimes and therefore hold a unique position in which they can be 'key players in the solution' or fuel the problem.[272] Whilst 'the travel and tourism sector is not the cause of child sexual exploitation', 'its services, facilities and infrastructure, including transportation networks and accommodation facilities, can be misused for the sexual exploitation of children'.[273] As such, actively involving them in the fight against SECTT is fundamental to its elimination in Madagascar. Accordingly, the First World Congress against Commercial Sexual Exploitation of Children 'specifically called for the mobilisation of the business sector – including the tourism industry – against the use of its networks and establishments for the sexual exploitation of children'.[274] Ensuring private actors in the travel and tourism industry are held accountable by France is particularly important, with a

---

263 Hawke and Raphael, 'Offenders on the Move' (n 33) 112.
264 Ibid, 74.
265 Fredette (n 3) 25.
266 UNICEF, 'Legal Framework' (n 105) 45-5.
267 INTERPOL, 'International Child Sexual Exploitation Database' (2020) <https://www.interpol.int/en/Crimes/Crimes-against-children/International-Child-Sexual-Exploitation-database> accessed 31 August 2020.
268 UNICEF, 'Legal Framework' (n 105) 50.
269 INTERPOL, 'How INTERPOL Supports France to Tackle International Crime' <https://www.interpol.int/en/Who-we-are/Member-countries/Europe/FRANCE> accessed 31 August 2020.
270 The Optional Protocol, Article 5(2).
271 The Criminal Code (Madagascar) (as amended by Act No. 2007-038 of 14 January 2008 amending and supplementing certain provisions of the Penal Code on the fight against human trafficking and sex tourism), Article 335.
272 Carol Bellamy, '32nd Meeting of the UNWTO World Tourism Network on Child Protection' (2017) <https://www.unwto.org/archive/global/event/32nd-meeting-unwto-world-tourism-network-child-protection> accessed 31 August 2020.
273 UNICEF, 'Government, Civil Society and Private Sector Responses to the Prevention of Sexual Exploitation of Children in Travel and Tourism' (2016) 43 <https://www.unicef.org/protection/files/UNICEF_Technical_Paper_on_Prevention_of_SEC_in_travel_and_tourism_(2016).pdf> accessed 31 August 2020.
274 Hawke and Raphael, 'Offenders on the Move' (n 33) 86.

large number of French registered travel agents organising tours and trips to Madagascar.[275] Furthermore, whilst many hotels are locally run in Madagascar, there are also large foreign hotel chains operating in the country, such as the Italian owned VOI Andilana operating on Nosy Be, with more foreign chains set to open multiple hotels in Madagascar by 2022, such as the US owned Radisson Blu and Marriott International.[276] This highlights the increasing importance of all Sending States holding their private sectors to account. The UN Special Rapporteur has therefore acknowledged that the 'involvement of the private sector is crucial in this broad strategy' to tackle SECTT.[277]

However, private actors do not bear human rights obligations in the same way that States do, and therefore have no direct human rights obligations to tackle SECTT. Furthermore, States are generally only responsible for the actions of 'organs of the State' under Article 4 of the International Law Commission's Articles of State Responsibility, and not for the actions of private actors.[278] Nevertheless, the United Nations Committee on the Rights of the Child has confirmed that a State will 'be in breach of its obligations under the UNCRC where it fails to respect, protect and fulfil children's rights in relation to business activities and operations that impact on children'.[279] Therefore, whilst States are not directly liable for the actions of private actors, they are responsible for ensuring that children's human rights are not violated through the actions of businesses. Accordingly, 'States must take all necessary, appropriate and reasonable measures to prevent business enterprises from causing or contributing to abuses of children's rights'.[280] The UN Special Rapporteur explains that there 'is a need for State intervention when the private sector does not take sufficient measures to ensure that it does not become or remain a facilitator in the demand for the sexual exploitation of children'.[281] States must therefore 'ensure that legal entities can be liable for any involvement in sexual exploitation of children, as well as aiding and abetting or other complicity in offences'.[282] Article 3(4) of the Optional Protocol establishes the liability of all 'legal persons' for offences committed under the Protocol.[283] This liability may be criminal, civil or administrative. Under the Guidelines on Reporting to the United Nations Committee on the Rights of the Child, legal persons are defined as 'physical persons that have legal personality, such as corporations and other businesses, local or regional governments and legally recognized foundations, organizations and associations'.[284] Furthermore, Article 26 of the Lanzarote Convention and EU Directive 2011/92 'make corporations subject to liability when involved in the crime directly or due to lack of supervision'; these include 'operational sanctions for the companies and extraterritorial measures to punish offenses committed abroad by a company or for its benefit'.[285] All of these legal instruments therefore require States to legislate to ensure that legal persons, including companies, are subject to criminal, civil or administrative liability where they commit or facilitate SECTT. In accordance with these

---

[275] See for example Voyageurs du Monde, 'Travel Agency: Madagascar Specialist' (2020) <https://www.voyageursdumonde.fr/voyage-sur-mesure/conseillers-pays/specialiste-madagascar> accessed 31 August 2020.
[276] Hospitality Net, 'Radisson Hotel Group Signs Agreement for Three Hotels to Enter Madagascar' (26 April 2019) <https://www.hospitalitynet.org/news/4093070.html> accessed 31 August 2020; Protea Hotels, 'Marriott International Continues Extensive Expansion in Africa' (10 October 2017) <https://protea.marriott.com/marriott-international-continues-extensive-expansion-in-africa/> accessed 31 August 2020.
[277] Maud de Boer-Buquicchio, 'Report of the Special Rapporteur 2015' (n 40) 12.
[278] International Law Commission's Articles on State Responsibility (2001) Article 4 <https://casebook.icrc.org/case-study/international-law-commission-articles-state-responsibility> accessed 31 August 2020.
[279] United Nations Committee on the rights of the Child, 'General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights' (CRC/C/GC/16, 2013) 8.
[280] Ibid.
[281] Maud de Boer-Buquicchio, 'Report of the Special Rapporteur 2015' (n 40) 22.
[282] UNICEF, 'Legal Framework' (n 105) 72; see for example Jonathon Todres, Prosecuting Sex Tour Operators in United States Courts in an Effort to Reduce the Sexual Exploitation of Children Globally' (1999) 9(1) *Boston University Public Interest Law Journal* 1.
[283] Optional Protocol, Article 3(4).
[284] United Nations Committee on the Rights of the Child, 'Revised Guidelines Regarding Initial Reports to be Submitted by State Parties under Article 12(1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography' (CRC/C/OPSC/2, 2006) 13.
[285] Hawke and Raphael, 'Offenders on the Move' (n 33); Marta Gil Gonzales, 'Expert Paper: Corporate Responsibility and Liability of the Travel and Tourism Industry in Cases of Sexual Exploitation of Children in Travel and Tourism' (2015) 24 <https://www.ecpat.org/wp-content/uploads/2016/10/4.11-Expert-Paper-ECPAT-Corporate-Liability.pdf> accessed 31 August 2020; the Lanzarote Convention, Article 26; EU Directive 2011/92.

obligations, Article 225-12-4 of the French Penal Code does make 'legal persons' criminally liable for SECTT offences.[286] According to Article 121-2, legal persons 'are criminally liable for the offences committed on their behalf by their organs or representatives', including directors and managers.[287] Under Article 121-7, a person who 'knowingly, by aiding and abetting, facilitates its preparation or commission' is treated as an accomplice, and sanctioned as the author of the offense.[288] Consequently, a French parent company may be held criminally liable as an accomplice to SECTT offences committed by one of its subsidiaries in Madagascar. These laws are useful in ensuring that the private sector is held to account by French authorities, however they must be utilised more frequently to ensure their efficacy. Furthermore, it is recommended that France enacts more specific laws criminalising the promotion of child sexual exploitation in the travel and tourism industry. Countries such as Malta and Italy have already done so, and those convicted for organising or publicising travel linked to child sexual exploitation are liable to imprisonment and fines, and businesses can be sanctioned with the seizure of goods, bans from the industry and closure of business.[289] This is in accordance with Article 7 of the Optional Protocol, which 'requires that goods and proceeds be seized or confiscated and that any premises relating to the commission of offences be closed'.[290] Additionally, France should enact legislation which puts 'explicit and legally binding duties to report cases of SECTT' on 'the travel and tourism sectors, employers of business travellers, and Internet service providers'.[291]

Furthermore, Article 9 of the Lanzarote Convention requires States to 'encourage private-sector participation, particularly in the tourism and technology industries, in information campaigns designed to raise awareness about exploitation among travellers and communities with at risk child populations'.[292] Similarly, the United Nations Committee on the Rights of the Child recommends that State Parties should '[u]ndertake awareness-raising and advocacy with the travel and tourism industry to draw attention to the harmful effects of SECTT'.[293] Awareness-raising campaigns are paramount because some 'tourists fail to understand the exploitative conditions of [SECTT] and assume their patronage principally benefits the prostituted children'.[294] As such, '[i]nformation campaigns within the tourism industry highlighting the exploitative conditions of child prostitution, as well as health and legal risks associated with [SECTT] offenses, may act as effective deterrents for some offenders', particularly situational offenders.[295] A good example of this can be seen in Italy, where '[l]egislation even makes it mandatory for tour operators to repudiate sexual exploitation of children in travel and tourism in their promotional materials', and to insert a warning against it in all promotional materials.[296] It would be possible for France to enact similar legislation. Furthermore, in order to ensure that travel, tourism and transportation firms take this seriously, France could also legislate to put obligations on companies to sign up to child protection codes, such as the 'Code of Conduct for the Protection of Children against Sexual Exploitation in Travel and Tourism' and the 'World Tourism Organisation Code of Ethics'. These codes require companies to take a zero-tolerance stance towards SECTT, and to communicate this within the company and to customers.[297] Whilst they are not currently legally binding under international law, it is possible for States to legislate domestically to ensure that companies sign at least one

[286] The French Penal Code, Article 225-12-4.
[287] The French Penal Code, Article 121-2.
[288] The French Penal Code, Article 121-7.
[289] Hawke and Raphael, 'Offenders on the Move' (n 33) 93.
[290] UNICEF, 'Legal Framework' (n 105) 40; Optional Protocol, Article 7.
[291] Hawke and Raphael, 'Offenders on the Move' (n 33) 108.
[292] Fredette (n 3) 40.
[293] United Nations Committee on the Rights of the Child, 'Guidelines Regarding the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography' (CRC/C/156, 10 September 2019) 9.
[294] Fredette (n 3) 41.
[295] Ibid.
[296] Hawke and Raphael, 'Offenders on the Move' (n 33) 93.
[297] The Code of Conduct for the Protection of Children in Travel and Tourism (2020) <http://www.thecode.org/> accessed 31 August 2020; United Nations World Tourism Organisation 'Global Code of Ethics for Tourism' (2020) <https://www.unwto.org/global-code-of-ethics-for-tourism> accessed 08 September 2020; see also ECPAT International, 'Don't Look Away' (2020) <https://dontlookaway.report/> accessed 31 August 2020.

of these codes, and in this way take another step in fulfilling their international human rights obligations to tackle SECTT. This action is strongly encouraged by the United Nations Committee on the Rights of the Child.[298]

This section has laid out the various mechanisms that Sending States, including France, can utilise in order to meet their international human rights obligations to tackle SECTT in Madagascar. These include the enactment of extraterritorial legislation to prosecute perpetrators, the potential to use universal jurisdiction, strengthening domestic criminal laws, improving international cooperation between law enforcement authorities, and finally holding the private sector to account. It has shown that there are multiple avenues through which Sending States can use their resources to effectively help in the fight against SECTT. These methods already exist and are established in law. Further, they have already been harnessed by other Sending States, showing that they are feasible and practical methods with which to engage in the fight against SECTT. France's failure to take its international obligations seriously can no longer be tolerated.

VI. CONCLUSION

When viewed through a human rights lens, it is clear that SECTT is not only a heinous crime, but a gross violation of the human rights of some of the most vulnerable children in the world. All States must do better to meet their international obligations to protect children from SECTT. Destination States, including Madagascar, must do more to ensure the proper implementation and enforcement of their laws. However, the 'sexual exploitation of children, is a phenomenon of global dimensions that demands a global response by all concerned actors'.[299] A siloed approach by Malagasy authorities alone will not be effective in tackling a crime so complex, without Sending States such as France simultaneously adding to these efforts by taking their international human rights obligations seriously to tackle SECTT. This Article has shown that this is a feasible task – current international legal mechanisms exist which Sending States can harness to ensure that perpetrators do not continue to commit these abhorrent crimes with impunity. These mechanisms not only exist, but have already been harnessed by other States, including the use of extraterritorial legislation, universal jurisdiction, domestic legislation, international cooperation, and corporate liability. Whilst it is acknowledged that 'legal action is only one means among many of addressing the problem', legal action 'is critical in helping create an international social and political climate where the commercial sexual exploitation of children will no longer be tolerated, and where there is no impunity for offenders'.[300] It is recognised that the task will not be an easy one, and that '[s]trenuous efforts are required to end impunity for offenders', as well as increased resources for legislative changes, enforcement and international cooperation.[301] However, as made clear by the African Child Policy Forum, '[c]hild sexual exploitation has never been and will never be an inevitable human condition. It is preventable, and it can and should be eliminated. And we have the means to make that happen'.[302] It is imperative that Sending States, like France, start showing the political will to fight SECTT in Madagascar as a matter of urgency, before more vulnerable children suffer sexual abuse at the hands of transnational child sex offenders.

---

298 United Nations Committee on the Rights of the Child, 'Guidelines Regarding the Implementation of the Optional Protocol' (n 292) 9.
299 UNICEF, 'Government, Civil Society and Private Sector Responses' (n 272) 2.
300 Austin (n 9) 39.
301 Hawke and Raphael, 'Offenders on the Move' (n 33) 16.
302 African Child Policy Forum, 'Sexual Exploitation of Children in Africa: A Silent Emergency' (2019) viii.

DOES THE FRIEDMAN DOCTRINE THAT THE SOLE SOCIAL RESPONSIBILITY OF BUSINESS IS TO INCREASE ITS PROFITS STAND TRUE IN THE CONTEMPORARY CORPORATE GOVERNANCE LANDSCAPE?

Concobhar Jolliffe-Grimes[1]

ABTRACT

In light of corporate meltdowns, near environmental disaster and widespread human rights violations, the seemingly universal acceptance that profit is king has been widely rejected. Stakeholder theory, long-termism and corporate social responsibility (CSR), under the umbrella of sustainability, have been posited as the solution. Driven from a corporate governance perspective, this questions the fundamental understanding of the company's basic function; whether to operate as a medium for shareholder interest or wider society. In mounting a defence for the former, this article decries the modern recognition that profit is finished. Thus, this article's central focus will be Milton Friedman, an apostle of neoliberalism, and his articulation that the social responsibility of business is to increase profits, to be assessed in light of contemporary practice. Under close analysis, this pinpoints the regulatory approach of voluntarism within both the domestic and international framework, constructed to favour corporate interests. Accordingly, within such an environment, the move towards sustainability is fanciful. Analysis that is supported by practice; the corporate propaganda machine embraces cosmetic change alone. Superficiality is the best that sustainability has achieved, especially concerning extractive industries where practice is decoupled from rhetoric. In light of this, this article fears the worst. Whilst the strength of Friedman and profit have proved their relevance, this is damning. From a societal perspective, environmental degradation and human rights violations are the progeny of the neoliberal regime. Thus, this article operates as both a defence and a warning concerning the pervasiveness of Friedman, neoliberalism and shareholder primacy.

[1] LLB Law and LLM in International Law and International Relations graduate from the University of Bristol. Trainee solicitor at Macfarlanes LLP.

1. Introduction

Financial meltdowns, environmental degradation and human rights violations. This is the ugly face of Anglo-American neoliberal ideology, whereby pathological consumption is the built-in imperative of the regime,[2] as shareholder primacy has welcomed mainstream acceptance. The internalisation and reproduction of this creed has seen the "slow collapse of public health and education, resurgent child poverty, the epidemic of loneliness, and the collapse of ecosystems."[3] Simply put, the human cost has been drastic. Inevitably, this has engendered a powerful 'sustainability' backlash, advocating for meeting the needs of society, implying that humanity must use no more of a resource than can be regenerated.[4] In application to the corporation, activists publicly espouse a stakeholder framework to ameliorate the devastation of neoliberalism, whereby managers must consider a wide range of constituencies from customers to the local environment in promoting long-term success. Indeed, sustainability reporting is the new normal; a KPMG International Survey showed that 93% of the largest 250 companies worldwide have issued sustainability reports.[5]

In this vein, Milton Friedman's doctrine that the sole responsibility of the company is to make profit has been mocked as the "world's dumbest idea"[6] and derided as a "tiresome cliché."[7] Ultimately, in the eyes of the mainstream "Friedman is passé,"[8] with his model of shareholder primacy a relic of contemporary scholarship. Nevertheless, this article will mount a defence of his economic theory, and by extension neoliberalism. This will be achieved both on the merits of its logic theoretically and the pervasiveness by which it encompasses modern practice. Thus, this article begins by tracing the Friedman tradition, in an exploration of his now-infamous normative theory of business ethics. The core assumption that 'profit is king,' will be supported with reference to Archie Carroll, who similarly accepts economics as the foundational block of the pyramidal structure of business. Next, this will be mapped on to the corporate governance landscape, namely, in the reconsideration of the shareholder vs stakeholder debate, evidencing support for the former.

The next two sections operate as an exposé of contemporary regulation and practice, primarily in reference to the UK, whilst drawing on international examples. The rules by which companies are governed reflect a state's system of capitalism, and in turn, the interests being served. In this vein, this article pinpoints the operation of voluntary disclosure mechanisms that govern vast swathes of corporate practice, bound by neoliberal commitments in promoting rampant shareholder primacy. Indeed, Friedman is as relevant as ever in light of a legal framework, modelled on 'comply or explain,' that is innately lenient towards business interests. Translated into practice, this has seen superficiality on the part of any genuine efforts to integrate CSR. PR stunts and cosmetic surgery mark the terrain as companies employ CSR solely for financial gain. Thus, Friedman's articulation of economic theory is deeply embedded within the legal, social and political framework. Accordingly, attempts to alter the status quo are futile.

---

[2] George Monbiot, 'Neoliberalism - The Ideology at the Root of All Our Problems' (2016) The Journal of the Committee on Monetary and Economic Reform Vol. 28, No. 4 1.
[3] Ibid 2.
[4] Paul Hawken, *The Ecology of Commerce* (HarperCollins 1994) 10-50.
[5] KPMG, 'The Road Ahead: The KPMG Survey of Corporate Responsibility Reporting 2017' (2017) available at: <https://assets.kpmg/content/dam/kpmg/xx/pdf/2017/10/kpmg-survey-of-corporate-responsibility-reporting-2017.pdf> accessed 21 June 2020 10.
[6] Steve Denning, 'The Origin Of 'The World's Dumbest Idea': Milton Friedman' (2013) available at: <https://www.forbes.com/sites/stevedenning/2013/06/26/the-origin-of-the-worlds-dumbest-idea-milton-friedman/#447bed24870e> accessed 27 June 2020.
[7] Subhabrata Bobby Banerjee, *Corporate Social Responsibility: The Good, the Bad and the Ugly* (Edward Elgar Publishing 2009) 60.
[8] David Colander, 'Is Milton Friedman an Artist or a Scientist?' (1995) Journal of Economic Methodology Vol. 2, No. 1 105.

However, in concluding the relevance of Friedman within the neoliberal landscape, this article reaches the verdict that this position is in fact untenable. Concerning sustainability, neoliberalism is "scaling new heights"[9] via a litany of corporate malpractices. This has intentionally and maliciously engendered widespread environmental degradation, diminished socio-economic entitlements, and created extensive human rights violations. Cumulatively, neoliberalism's destructive capabilities abdicate all responsibility, with its harm posing an existential threat to society. Thus, this article operates as both a defence and a warning concerning the pervasiveness of Friedman, neoliberalism and shareholder primacy.

2. Friedman's doctrine

Friedman's ideological revival must be placed within the contemporary neoliberal landscape to which it owes its resurgence. Following the decline of social democracy and the Keynesian consensus in the West, the dominant economic discourse since the mid-1970s has stressed the role of unregulated markets to deliver prosperity.[10] Despite the economic meltdown of the global financial crisis as the culmination of economic bubbles, financial disasters and corporate scandals, the resilience of neoliberal ideas in Europe's political economy is surprisingly resolute.[11] Indeed, Schmidt and Thatcher recognises that neoliberalism continues to "constitute the ruling ideas."[12] As a systemic conception, this posits a market-based system as the optimal form of social organisation, with importance placed on the value of competition and individual responsibility.[13]

As the prevailing global wisdom, contemporary neoliberalism has cemented its universality as the playground of powerful coalitions of interests that pursue strategic policies for material benefit.[14] This witnesses economic actors as overtly self-interested, notably through advancing lower taxes and deregulation, and in turn, gaining autonomy and increasing power. Thus, they have a vested interest in popularising and reproducing this creed. A model that Roberts notes has been highly successful; in retreating from a 'nanny state,'[15] governments now seek legitimacy via their ability to create the economic conditions for growth.[16] The importance of profitability is clear. Rhetoric from Trump and Johnson that drives a business-friendly agenda is inherently conservative and looks to maintain the status quo.[17] The USA's grapple with the global warming crisis clearly illustrates this; unwilling to cut back on energy consumption and oil profits in the face of severe environmental degradation, Trump has repetitively and vociferously clamoured to fight for blue-collar workers, particularly through efforts to revive the dying coal industry as a vote-seeking tool.[18]

Within this environment, Friedman, as an apostle of neoliberalism, famously articulated his model of shareholder primacy, in the sole social responsibility of business being to increase profits.[19] Friedman founded this belief, and thus his aversion towards corporate sustainability by virtue of the corporation as an artificial entity. Whilst it has

---

[9] Paddy Ireland, 'Corporate Schizophrenia: The Institutional Origins of Corporate Social Irresponsibility' in Nina Boeger, Charlotte Villiers, (eds.), *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Hart 2018) 1.
[10] James Arnt Aune, 'How to Read Milton Friedman: Corporate Social Responsibility and Today's Capitalisms' in Steve May, Steve Kent May, George Cheney, Juliet Roper, *The Debate Over Corporate Social Responsibility* (Oxford University Press 2007) 207-216.
[11] Vivien A Schmidt, Mark Thatcher, 'Why Are Neoliberal Ideas So Resilient in Europe's Political Economy?' (2014) Critical Policy Studies Vol. 8, No. 3 340-347.
[12] Ibid 340.
[13] Michael Hoexter, 'Living in the Web of Soft Climate Denial,' *New Economics Perspective* (2016) available at: <http://neweconomicperspectives.org/2016/09/living-web-soft-climate-denial.html#more-10635> accessed 20 December 2019.
[14] Schmidt (n10) 344.
[15] John Roberts, 'The Manufacture of Corporate Social Responsibility: Constructing Corporate Sensibility (2003) Organization Vol. 10, No. 2 255.
[16] Ibid.
[17] Stephen Fidler, Gerald Seib, 'Boris Johnson Joins Trump in Redefining Conservatism' (2019) The Wall Street Jounral available at: < https://www.wsj.com/articles/boris-johnson-joins-trump-in-redefining-conservatism-11576277776> accessed 25 June 2020.
[18] Keith Johnson, 'Trump Can't Save Coal Country' (2019) available at: <https://foreignpolicy.com/2019/10/30/trump-save-coal-country-murray-bankruptcy-gas/> accessed 24 June 2020.
[19] Milton Friedman, 'The Social Responsibility of Business is to Increase its Profits' (1970) The New York Times available at: <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> accessed 8 July 2020.

corporate personhood, a business cannot have responsibilities in such a vague sense, it is people who bear this responsibility.[20] Roberts concurs as he articulates that the company is "an idea, an imaginary entity, without substance or sensibility and therefore incapable of anything like responsibility."[21] Thus, the modern corporation is ill-suited to enact social responsibility.[22] Individuals and more specifically government are tasked with ensuring a fair, just and equitable society. In this vein, social responsibility is tantamount to the imposition of taxes.[23] The terminology of constituencies is testament to this. However, this is generally accepted to be a function of government. The establishment of elaborate constitutional, parliamentary and judicial provisions control this, in ensuring that taxes are imposed to align with public preferences.[24] Competence is central to this; the corporate executive may spend unwisely.[25] This individual is unlikely to be an expert in matters of social responsibility and the cost of evaluating such decisions exacerbates this further.

Therefore, in rejecting the political nature of business, Friedman posits businessmen, more specifically corporate executives as the chief actors. The corporate executive in this role ultimately constitutes an employee.[26] Thus, they owe a direct responsibility to their employers. This should manifest itself in conduct which accords with their employers' desires, typically profit-maximisation within legal limits. Whilst this article does not refute the possibility of the eleemosynary corporation, this does not detract from the reality that profit is both the most widespread measure of success and the simplest criterion in establishing performance.[27] By contrast, individual social responsibility in pursuing 'worthy' causes, such as charitable giving and raising awareness for social issues in this respect means the individual is acting as a principal, not an agent; they are spending their money and time in the pursuit of their conscience, not their employer's.[28] The adoption of a socially responsible position within the corporate arena for reasons that are not rhetoric ensures they are contravening the base interest of their employers.[29] Indeed, raising expenditure to reduce pollution or hiring the disenfranchised over better qualified, experienced workmen, whilst noble, is simply insubordination.

This understands that CSR especially threatens private property rights. It denies owners the rights to determine how their property is used.[30] Owners are stopped from devoting their property unequivocally to whichever ends they assert. This is inherently undemocratic, by strong-arming individuals to contribute to social causes against their will.[31] This also sees detriment for wider society. This is seen in reduced shareholder returns, raised prices which disadvantage customers, and lower employee wages to accommodate social requests. Such disadvantages to shareholders, customers and employees alike in an environment competing for scarce capital, poses the danger that these constituencies may desert the company, threatening the stability of profit-making.[32] Thus, sustainability can threaten a corporation's very survival, justifying a profit-based approach.

Friedman also supports his economic theory by distinguishing between genuine social responsibility and financially driven examples, whereby CSR operates as a "cloak for actions that are justified on other grounds."[33] It may be in the interest of businesses to promote 'sustainability.' Nestle embodies this, working directly with small farmers in

---

[20] Ibid.
[21] Roberts (n14) 263.
[22] Jill McMillan, 'Why Corporate Social Responsibility: Why Now? How?' in Steve May, Steve Kent May, George Cheney, Juliet Roper, *The Debate Over Corporate Social Responsibility* (Oxford University Press 2007) 15.
[23] Friedman (n18).
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Elisabet Garriga, Domènec Melé, 'Corporate Social Responsibility Theories: Mapping the Territory' (2004) Journal of Business Ethics Vol. 53, No. 1 53.
[28] Friedman (n18).
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] Friedman (n18).

developing countries to source basic commodities on which it builds its global business, such as milk and cocoa.[34] The transfer of knowledge and investment in local infrastructure has produced "enormous social benefits through improved health care, enhanced education and greater economic development,"[35] whilst operating as a successful profit-strategy to provide direct and reliable access to supplies. More generally, this may make it easier to attract human capital, lessen the chance of sabotage and reduce the wage bill.[36] However, this should not be rationalised as the exercise of social responsibility, it is business first. In this vein, Henderson argues that this "qualifies but does not invalidate the general case for treating profitability, and the interests of shareholders, as the primary concern."[37] Sustainability here is a façade for profit.

Cumulatively, this looks to justify the conclusion that profit is king. A conclusion that this article complements with reference to Carroll, who similarly argues that economic concerns reign supreme within the corporate arena.[38] Carroll conceptualised his understanding of social responsibility into a pyramid structure. His four-part analysis encompassed economic, legal, ethical and discretionary expectations, creating the infrastructure to delineate the details of business responsibility.[39] At the base and prioritised as the founding component is economic value.[40] Carroll advocates this to be the "fundamental condition or requirement of existence."[41] It is what society expects to be able to sustain themselves and continue. Indeed, per neoliberal ideology, this recognises that "profits are necessary both to reward investors and also for business growth when profits are reinvested back into the business."[42] Thus, the 'other' factors, being legal, ethical and discretionary, responsible for social responsibility are moot considerations in a hypercompetitive global market where capital is scarce and economic value is threatened.[43] In this vein, small and medium-sized enterprises (SMEs) represent 99% of the business population in the European Union (EU),[44] and whilst crucial to economic development, are subject to paralysing financial restraints. Although SMEs provide a remarkable economic contribution, accounting for 58% of the EU's economic outputs and 66% of its jobs, they receive but 17% of total loans from banks and building societies.[45] Simply, this is "inadequate for their survival and growth."[46] Therefore, with "economic responsibility a baseline requirement that must be met in a competitive business world,"[47] weak economic foundations cannot support the infrastructure of the company. As all value spawns out of this, the sole responsibility of the business must be profit.

This analysis is bolstered by reference to developing countries, in which the majority of the world's population live, where sustainability is in its infancy. Eyasu pinpoints sub-Saharan Africa, where "profit is the sole purpose of a business that would be achieved at any cost."[48] Within this environment, natural selection pressures ensure that

---

[34] Michael Porter, Mark Kramer, 'Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility' (2006) Harvard Business Review available at: <https://hbr.org/2006/12/strategy-and-society-the-link-between-competitive-advantage-and-corporate-social-responsibility> accessed 18 July 2020 12-13.
[35] Ibid 13.
[36] Friedman (n18).
[37] David Henderson, *Misguided Virtue: False Notions of Corporate Social Responsibility* (Institute of Economic Affairs 2001) 23.
[38] Archie Carroll, 'Carroll's Pyramid of CSR: Taking Another Look' (2016) International Journal of Corporate Social Responsibility (2016) Vol. 1, No. 1 1-8.
[39] Archie Carroll, 'The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders' (1991) Business Horizons Vol. 34, No. 4 40-43
[40] Ibid 42.
[41] Carroll (n37).
[42] Ibid.
[43] Michael Harvey, Milorad Novicevic, 'The Hypercompetitive Global Marketplace: The Importance of Intuition and Creativity in Expatriate Managers' (2002) Journal of World Business Vol. 37, No. 2 127-138.
[44] Lerong Lu, 'Solving the SME Financing Puzzle in the UK: Has Online P2P Lending Got the Midas Touch?' Journal of International Banking Law and Regulation (2018) Vol. 33, No. 12 449.
[45] Lu (n43) 450.
[46] Lerong Lu, 'Promoting SME Finance in The Context of The Fintech Revolution: A Case Study of The UK's Practice and Regulation' (2018) Banking and Finance Law Review Vol. 33, No. 3 318.
[47] Carroll (n37).
[48] Anteneh Mulugeta Eyasu, Mamenie Endale, 'Corporate Social Responsibility in Agro-Processing and Garment Industry: Evidence from Ethiopia' (2020) Cogent Business & Management Vol 7, No. 1 3.

managers cannot afford to operate from a moral perspective.[49] The existing infrastructure cannot support social responsibility. Matten and Moon concur as they assume basic institutional prerequisites for CSR to exist; a functioning market in which corporations have discretion, alongside functioning governmental and legal institutions that guarantee and administer the market to address failures.[50] By their own admission, this represents an "idealized system."[51] Profitable opportunities for irresponsibility grow in the absence of these conditions, as evidenced by the presence of "monopolistic companies exploiting capitalist economies"[52] globally.

2.1 Rational self-interest

A key component in the internalisation and reproduction of this model is the concentration on self-interest as the fundamental human motivation. Friedman defines human nature downward,[53] taking "men as they are,"[54] that is as untrustworthy agents with the propensity to behave selfishly. Indeed, Williamson's classic transaction cost analysis of the firm mirrors this.[55] Williamson posits three levels of self-interest. The most dangerous being opportunism; self-interested seeking with guile that includes blatant forms such as stealing and cheating, whilst more passive forms constitute subtle forms of deceit.[56] Ultimately, the overarching theme of opportunism represents calculated efforts to mislead, obfuscate, or otherwise confuse.[57] In this vein, Robert's understanding of the Western neoliberal system observes that it is built upon an "'atomistic' conception of the 'individual': the person as an opportunistic and self-seeking entity."[58] Social relations are therefore inevitably competitive, calculated cooperation at best.[59] This leaves little to no space for ethics. This argument adheres to the extensive literature on rational action and utility-maximisation by individuals.[60] This propounds that individuals are motivated by power, prestige and security in advancing their interests.[61]

This draws parallels with corporate practice. Financial incentives drive cost-cutting as the firm is inevitably rewarded by externalising operating costs, imposing any negative consequences on to wider society, such as environmental pollution.[62] Campbell supports this reasoning, as he draws on an extensive body of literature to argue that under competitive conditions, cultivated within a neoliberal environment, structural incentives and opportunities enable firms to benefit themselves at the expense of others.[63] Campbell evidences this in pointing to a "history, replete with examples of firms acting in socially irresponsible ways."[64] Indeed, from Enron to Nike's working practices, this indicts corporate practice, as corners are cut in the push for profit. Thus, Hutton's characterisation of a "hopelessly… greedy and myopic"[65] market-system is fitting.

---

[49] John Boatright, 'Does Business Ethics Rest on a Mistake?' (1999) Business Ethics Quarterly Vol. 9, No. 4 583-591
[50] Dirk Matten, Jeremy Moon, "'Implicit" and "Explicit" CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility' (2008) Academy of Management Review Vol. 33, No. 2 404-424.
[51] Ibid 406.
[52] Matten (n49) 407.
[53] Aune (n9) 212.
[54] Niccolò Machiavelli cited in Oliver Williamson, *The Economic Institutions of Capitalism* (Simon and Schuster 1985) 48.
[55] Ibid 47-52.
[56] Ibid 47.
[57] Ibid 47-49.
[58] Roberts (n14) 251.
[59] Ibid.
[60] Randall Bartlett, *Economic Foundations of Political Power* (New York: Free Press 1973); James Buchanan, *The Limits of Liberty* (Chicago: University of Chicago Press 1975); William Niskanen, *Bureaucracy and Representative Government* (Chicago: Aldine & Atherton 1971).
[61] Anthony Downs, 'A Theory of Bureaucracy' (1965) The American Economic Review Vol. 55, No. 1 441.
[62] William Greider, *The Soul of Capitalism: Opening Paths to a Moral Economy* (Simon and Schuster 2003) 39.
[63] John Campbell, 'Why Would Corporations Behave in Socially Responsible Ways? An Institutional Theory of Corporate Social Responsibility' (2007) Academy of Management Review Vol. 32, No. 3 947.
[64] John Campbell, 'Institutional Analysis and the Paradox of Corporate Social Responsibility' (2006) American Behaviouralist Scientist Vol. 49, No. 7 926.
[65] Will Hutton, 'Quarterly Capitalism' is Short-Term, Myopic, Greedy and Dysfunctional' (2015) available at: <https://www.theguardian.com/commentisfree/2015/jul/26/capitalism-shareholders-greedy-stakeholderschange> accessed 15 November 2019.

2.2 Corporate governance debate

2.2.1 Stakeholder theory

This article maps this profit-based understanding on to the contemporary scholarship concerning corporate governance. Namely, that corporate sustainability threatens the very foundations of the value creation model that pervades the Anglo-American system. A model that employs purely economic goals for the benefit of shareholders. Indeed, corporate sustainability as enumerated through stakeholder theory derides the "naked greed"[66] of cowboy capitalism. Instead, it promotes a measured approach whereby managers are not solely responsible to shareholders but must also consider the interests of stakeholders.[67] In this sense, businesses are a part of society and must uphold human rights and contribute to human development and social welfare.[68] This demands a transformation of the relationships within society, namely, the close alignment of company interests with the interests of various constituencies, such as customers and employees; the forming of a societal alliance. Blowfield concurs as he contends that sustainability is "the latest example of profound change demanding transformation throughout society."[69] Within this context, Post, Preston and Sachs define stakeholders as "individuals and constituencies that contribute, either voluntarily or involuntarily, to its wealth-creating capacity and activities."[70] Thus, they are risk bearers in some sense and should have sufficient power to affect performance. Ultimately, this reciprocal relationship between business and its stakeholders necessitates a governance model to reflect this.

This scholarship has inspired wide acceptance, exemplified by Bichta's assertion that the corporation owes a moral duty to a wide variety of stakeholders.[71] Yet, this falls down per Friedman's doctrine**.** Firstly, the all-encompassing 'stakeholder' definition is problematic. Indeed, Jensen recognises that stakeholder theory mandates that managers account for *all* the stakeholders concerning the firm.[72] Rationalising this witnesses "various groups with some connection"[73] who can leverage influence to determine key matters of company policy. Indeed, the original Stanford characterisation of 'stakeholder' included a condition of materiality; necessary for the companies' survival.[74] Edward Freeman has since widened this. The effect is the transformation of almost everyone into a stakeholder, excluding all criteria of materiality, immediacy and legitimacy.[75] Sternberg notes that the increasing globalisation of modern life, notably improved transportation links, communications and computing power, means those affected by an organisation include virtually everyone.[76] Appealing to the extremes, this logic incorporates "terrorists and competitors, vegetation and nameless sea creatures,"[77] leaving the term redundant.

Secondly, Barry stresses that the logical flaw in the stakeholder argument is the lack of decisive action in collective decision-making. In empowering various stakeholder groups, no one group is decisive, including the owners. A

---

66 Edward Freeman, Robert Phillips, 'Stakeholder theory: A Libertarian Defence' (2002) Business Ethics Quarterly Vol. 12, No. 3 331.
67 Shih-Fang Lo, Her-Juin Sheu, 'Is Corporate Sustainability a Value-Increasing Strategy for Business?' (2007) Corporate Governance: An International Review Vol. 15, No. 2 345-346.
68 Domènec Melé, 'Corporate Social Responsibility Theories' in Andrew Cane (eds), *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press 2008) 73; Nien-he Hsieh, 'Corporate Social Responsibility and the Priority of Shareholders' (2009) Journal of Business Ethics 88(4) 553.
69 Michael Blowfield, *Business and Sustainability* (Oxford University Press 2013) 4.
70 James Post, Lee Preston, Sybille Sachs, 'Managing the Extended Enterprise: The New Stakeholder View' (2002) California Management Review Vol. 45, No. 1 8.
71 Constantina Bichta, *Corporate Social Responsibility: A Role in Government Policy and Regulation? Research Report 16* (Centre for the Study of Regulated Industries 2003) 17
72 Michael Jensen, 'Value Maximisation, Stakeholder theory, and the Corporate Objective Function' (2002) Business Ethics Quarterly Vol. 12, No. 2 236.
73 Norman Barry, 'The Stakeholder Concept of Corporate Control is Illogical and Impractical' (2002) The Independent Review Vol. 6, No. 4 544.
74 Elaine Sternberg, 'The Defects of Stakeholder Theory' (1997) Corporate Governance: An International Review Vol. 5, No. 1 3.
75 Ibid 4.
76 Sternberg (n73) 4.
77 Ibid.

balance has to be struck.[78] Indeed, as Freeman advocates, "the very purpose of the firm is to serve as a vehicle for stakeholder interests."[79] Wealth maximisation is but one consideration. Consequently, how does a firm make appropriate decisions in light of these competing purposes? Stakeholders are marked by heterogeneity; customers, suppliers, and employees are unlikely to have uniform interests - rivalry is likely to dominate.[80] This is especially so in light of Sundaram and Inkpen's differentiation of stakeholding groups; different classes of employees, seniority levels for bondholders, and tiers for suppliers confuse the hierarchy and so authority.[81] Thus, there is the Arrow dilemma. This analyses the rationality of collective decision-making in contrast with that of individual decisions.[82] Arrow argues that an individual's preferences are consistently ordered, if an individual prefers x to y, and y to z, then they prefer x to z. However, collective choice simply cannot express the same transitivity.[83] Where more than two choices are in operation, preferences can rarely be derived from all possible individual orderings. No single determinative route can be reached, cyclical majorities produce ever-changing outcomes, as no preference takes precedence.[84] Simply put, disputes are logically irresolvable when a question arises, and rival groups emerge with differing moral claims - yet there is no preeminent decision-maker. Indeed, section 172's failure to offer advice on the weighting of preferences[85] rationalises Freeman, the pioneer of stakeholder theory, freely accepting that conflicts are likely to emerge.

2.2.2 Business case

Central to the viability of the stakeholder model is the business case for sustainability. This looks to combat Friedman's dogma, arguing that a stakeholder transformation based upon the tenets of sustainability does not sacrifice profit. Indeed, Aras notes that the "more enlightened of these corporations are realising that socially responsible activity makes business sense."[86] This is premised on the costs of capital a company incurs which is related to the risk associated with investing in that company. Naturally, a sustainable company will be less risky than those that are not, long-termism promotes continued growth with expectations for future profitability.[87] On this basis, extractive industries make sustainability a prominent issue. BP exemplifies this; redesigning themselves from oil to an energy company, emphasising the use of renewable energies, even though this constitutes a minor part of their operations.[88] Kivivirta stresses the positive effects on company image, reputation, retention and recruitment, higher market share and cost savings.[89]

There is some evidence indicating that socially responsible companies perform at least as well as those who are not.[90] Indeed, Margolis and Walsh empirically demonstrate a positive relationship between corporate social performance and corporate financial performance.[91] Similarly, Al-Ghamdi and Badawi find that CSR activities

---

78 Barry (n72).
79 William Evan, Edward Freeman, 'A Stakeholder Theory of the Modern Corporation: Kantian Capitalism' in Tom Beauchamp, Norman Bowie, *Ethical Theory and Business* (Englewood Cliffs N.J.: Prentice Hall 1993) 82.
80 Barry (n72) 545.
81 Anant Sundaram, Andrew Inkpen, 'The Corporate Objective Revisited' (2004) Organization Science Vol. 15, No. 3 354.
82 Kenneth Arrow, *Social Choice and Individual Values* (Yale University Press 2012) 2-19.
83 Barry (n72) 546.
84 Barry (n72) 545.
85 Companies Act 2006, section 172.
86 Gu¨ler Aras, David Crowther, 'Corporate Sustainability Reporting: A Study in Disingenuity?' (2009) Journal of Business Ethics Vol. 87, No. 1 283.
87 Ibid 284.
88 Ibid.
89 Veera Kivivirta, 'Corporate Social Responsibility in Management Control Systems - Case: Financial Services Industry in Finland' (2010) Department of Accounting and Finance, Aalto University.
90 Moses Pava, Joshua Krausz, 'The Association Between Corporate Social Responsibility and Financial Performance: The Paradox of Social Cost' (1996) Journal of Business Ethics Vol. 15, No. 3 321–357.
91 Joshua Margolis, James Walsh, 'Misery Loves Companies: Rethinking Social Initiatives by Business' (2003) Administrative Science Quarterly Vol. 48, No. 2 268–305.

have a strong and positive impact on customer satisfaction and loyalty.[92] Al-Ghamdi and Badawi go further, undermining the tenets of the market-based system to claim that price and quality of product are no longer the main competitive advantage, ethical and social practice is what stimulates customer response.[93] Accordingly, customers will willingly reject a firm with no social responsibility.[94] Boycotts of companies such as Nike reflect this.[95] Similarly, Porter and Kramer point to the success stories of socially responsible companies such as Ben & Jerry's and Patagonia who have distinguished themselves through extraordinary long-term commitments.[96] This ability to pursue both profit and social responsibility simultaneously would certainly undermine Friedman if conclusive.

However, this is premature. The business benefits are difficult to determine. Porter and Kramer cite "studies on the effect of a company's social reputation on consumer purchasing preference or on stock market performance as inconclusive at best."[97] Similarly, empirical evidence 'demonstrating' causation is derided by Banerjee as unconvincing, citing serious shortcomings from sampling problems to measurement issues[98] to undermine such 'conclusive' studies. Moreover, this article disparages success stories such as Ben & Jerry's as misleading. As a powerful global corporation, they can afford to bear a trial and error approach that leaks resources in the short-term. Yet, with 99% of businesses in the EU being SMEs, pushing anecdotal selective success is simply misrepresentative. Certainly, for the majority of organisations, managers need conclusive empirical support to justify the CSR expense to shareholders.[99] Indeed, Webb, Mohr and Harris argue that "corporate executives need more than aggregate research results to convince them."[100] Whilst authors have found little evidence of a negative relationship,[101] corporate logic dictates that the adoption of CSR has a high probability of cost increases and impaired performance. Inevitably, accounting for a wider range of goals is time-consuming.[102] This risk extends beyond the individual firm; higher costs and lower profits will see unregenerate rivals taking advantage.[103] Therefore, the limited evidence of a robust business case, in conjunction with the logical costs associated with implementation rationalises the superficial approach taken to sustainability and fails to comprehensively threaten Friedman's legacy.

2.2.3 Enlightened shareholder value

In light of the deficiencies of the stakeholder model, and per Friedman's doctrine, the primacy of shareholder value becomes the default governance position. Whilst this is often rejected as myopic, monopolistic and overtly callous,[104] it seamlessly maps on to the British corporate governance model that accepts the maximisation of shareholder value as the supreme criterion to evaluate corporate activity in the UK. This overtly distinguishes between economics and ethics, viewing business as amoral.[105] This is justified in reference to Easterbrook and Fischel, who argues that "as residual claimants, shareholders are the group with the appropriate incentives to make

---

92 Shumookh Abdul Aziz Al-Ghamdi, Nada Saleh Badawi, 'Do Corporate Social Responsibility Activities Enhance Customer Satisfaction and Customer Loyalty? Evidence from the Saudi Banking Sector' (2019) Cogent Business & Management Vol. 6, No. 1 1-10.
93 Ibid 1.
94 Ibid.
95 Max Nisen, 'How Nike solved its Sweatshop Problem' (2013) available at: <https://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5?r=US&IR=T> accessed 23 June 2020.
96 Porter (n33).
97 Ibid.
98 Banerjee (n6) 26.
99 Philipp Schreck, *The Business Case for Corporate Social Responsibility: Understanding and Measuring Economic Impacts of Corporate Social Performance* (Springer Science & Business Media 2009) 2.
100 Deborah Webb, Lois Mohr, Katherine Harris, 'A Re-Examination of Socially Responsible Consumption and its Measurement' (2008) Journal of Business Research Vol. 61, No. 2 92.
101 Banerjee (n6) 26.
102 Henderson (n36) 59.
103 Ibid 18.
104 Hutton (n64)
105 Manuel Castelo Branco, Lúcia Lima Rodrigues, 'Positioning Stakeholder Theory Within the Debate on Corporate Social Responsibility' (2007) Electronic Journal of Business Ethics and Organization Studies Vol. 12, No. 1 8.

discretionary decisions."[106] Fundamentally, in bearing the lion's share of risk and reward this entitles shareholders to an active role in determining company operations. In stressing that cash flows from share ownerships are purely "residual" claims, such claims are due only after other corporate liabilities are met.[107] These liabilities concern the interests of employees and suppliers for example, who are protected by regulation, namely contract law. Insolvency demonstrates this, whereby creditors typically have rights to payment. In contrast, shareholders generally face the outright termination of their governance rights, and rarely recover their financial input.[108] Thus, the protection of the law for stakeholders by comparison, stresses the precarity of the shareholder position and thus encourages value maximisation to mitigate this.

Moreover, capitalism, neoliberalism and shareholder primacy in this format are adopted within the governance landscape because it is seen, or so it is said, that they are the route to aggregate social welfare.[109] Human history has been marked by stasis. However, the modern era has changed this fact. In 1500, global production of goods and services was equal to about $250 billion, today it is approximately $60 trillion.[110] Thus, modern economic history can be encapsulated by one word - growth. That is, "stupendous growth."[111] This stems from Smith's classic enumeration that **"**it is not from the benevolence of the butcher… that we expect our dinner, but from their regard to their own interest."[112] This is the idea that greed is good. When profits exceed that which is necessary to survive the surplus is used to employ more 'assistants' to further increase profits.[113] More profit, more assistants. It follows that an increase in profits of private entrepreneurs is the basis for increasing collective wealth. This is a revolutionary idea, positing egotism as altruism.[114] Whilst scholars dispute the trickle-down potential of the system, Friedman and Co. point to a documented history of success. Prior to the industrial revolution, equality saw everyone residing in poverty; most people lived on roughly £800 per year in today's money. As of 2015, average earnings for a full-time UK employee were £27,600.[115] Yet, this success story is not limited to income. The public has been liberated from the gruelling agricultural toil, working hours have dropped dramatically, yet crop yields have risen and undernourishment has collapsed.[116] Global life expectancy has risen from 52.5 years in 1960 to 71.6 in 2015 alone.[117] Thus, the strengthening of human rights, general living conditions and civil liberties is testament to the success of a profit-hungry model, that shows that social welfare is best maximised when all firms in an economy maximise total firm value.[118] This historical success, particularly the prosperity of the last 50 years under the watch of neoliberalism's radical deregulation, strengthens the relevance of Friedman.

The regulatory landscape inevitably reflects this. The idea that profit is king is codified via 'enlightened shareholder value.'[119] On paper, this suggests that the Government adopted a middle course. Stuck between "business not wanting to see any change to the law, and many of the constituents… who wished to see the nature of companies changed,"[120] the model embraces key elements of stakeholder theory. Section 172 of the Companies Act 2006[121] demonstrates this through the "core"[122] duty to promote the success of the company "for the benefit of its

---

106 Frank Easterbrook, Daniels Fischel, 'Voting in Corporate Law' (1983) The Journal of Law & Economics Vol. 26, No. 2 403.
107 Easterbrook (n105) 404.
108 Ibid.
109 Jacques Bughin, Thomas Copeland, 'The Virtuous Cycle of Shareholder Value Creation' (1997) The McKinsey Quarterly No. 2 156.
110 Yuval Noah Harari, *Sapiens: A Brief History of Humankind* (Random House 2014) 305.
111 Ibid.
112 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations: Volume 1* (Adam and Charles Black 1850) 26-27.
113 Harari (n109) 308.
114 Harari (n109) 309.
115 Ryan Bourne, 'Capitalism's Critics Need to Be Told About its 200 Years of Success' (2018) available at: <https://www.telegraph.co.uk/business/2018/06/08/capitalisms-critics-need-told-200-years-success/> accessed 21 June 2020.
116 Ibid.
117 Ibid.
118 Jensen (n71) 239.
119 Companies Act 2006, section 172- Explanatory notes available at: <https://www.legislation.gov.uk/ukpga/2006/46/notes/division/6/2> accessed 18 June 2020.
120 Joan Loughrey, *Directors' Duties and Shareholder Litigation in the Wake of the Financial Crisis* (Edward Elgar Publishing 2013) 58.
121 Companies Act 2006, section 172
122 Paul Lyndon Davies, Laurence Cecil Bartlett Gower, Sarah Worthington, Eva Micheler, *Principles of Company Law* (Sweet & Maxwell 2016) 506.

members as a whole."[123] The central elements being: an explicit focus on long-term shareholder value; consideration of decisions relating to extended shareholder constituencies; rejection of changes to the corporate decision-maker.[124] This is now the standard Anglo-American model. *Enlightened* shareholder value by its nature appeals to various constituencies, with explicit legislative reference to employees,[125] customers,[126] suppliers and non-employees and the community and environment,[127] in terms of which decisions must be justified. The legislation's overt mandate provides a "strong normative element"[128] in convincing boards to more patently account for their interests.

Undoubtedly, the legislation has introduced new terms and concepts into the corporate nomenclature. However, practice is squarely grounded in shareholder primacy, with emphasis placed on economic efficiency. The "radical"[129] move to enlightened shareholder value and stakeholder considerations is little more than cosmetic. The common law, per Lord Greene MR in *Re Smith & Fawcett*,[130] has historically embedded a duty that directors "exercise their discretion bona fide in what they consider… is in the interests of the company."[131] The legislation appears to have clear links with this, with section 172 its natural successor. Indeed, accounting for various stakeholders is historically implied in the common law duty.[132] This is evident per *Re West Coast Capital (LIOS) Ltd*[133] where Lord Glennie found that section 172 does "'little more than set out the pre-existing law on the subject."[134] Similarly, the court in *Re Southern Counties Fresh Foods Ltd*[135] maintained that the law pre- and post- the Companies Act 2006 "came to the same thing."[136] Thus, the bottom line remains unchanged; section 172 poses little threat to directors maximising profits at the expense of stakeholders.[137] Indeed, the core must remain unaltered with the continued imposition of a subjective test for directors' decision-making.[138] As Davies explains, the subjective test means that "litigation is likely to be relatively uncommon and probably even less often successful."[139] Naturally, the inquisition into the state of mind of a director concerning their good faith obligations is unlikely to reap results. This is especially so as it is the same common law duty that oversaw unchecked recklessness in the push for profit, witnessing economic bubbles and corporate scandals in the lead up to the global financial crisis of 2008. More explicit reference doesn't seem to push the law further.

Moreover, the section's limitations in terms of its overall utility are further hampered by its enforcement mechanisms. This is the final nail in the coffin of stakeholder empowerment. Per the common law, shareholders are the only individuals with the power to enforce a breach of a director's duty, via a derivative claim on behalf of the company against a director (s.260),[140] a feat which is incredibly improbable in itself.[141] This undermines section

---

123 Companies Act 2006, section 172(1).
124 Virginia Harper Ho, ""Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide' (2010) Journal of Corporation Law Vol. 36, No. 1 79.
125 Companies Act 2006, section 172(1)(b).
126 Companies Act 2006, section 172(1)(c).
127 Companies Act 2006, section 172(1)(d).
128 Deryn Fisher, 'The Enlightened Shareholder: Leaving Stakeholders in The Dark - Will Section 172(1) of the Companies Act 2006 Make Directors Consider the Impact of their Decisions on Third Parties? (2009) International Company and Commercial Law Review Vol. 20, No. 1 10.
129 Margaret Hodge, DTI June 2007: Ministerial statements- introduction available at: <https://webarchive.nationalarchives.gov.uk/20070628230000/http://www.dti.gov.uk/files/file40139.pdf> accessed 23 June 2020.
130 [1942] Ch 304.
131 Ibid [306] (Lord Greene).
132 *Regentcrest plc v Cohen* [2001] 2 BCLC 80*; Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62; *Extrasure Travel Insurance Ltd v Scattergood* [2003] 1 BCLC 598.
133 [2008] CSOH 72.
134 Ibid [21] (Lord Glennie).
135 [2008] EWHC 2810
136 Ibid [52] (Warren J)
137 Fisher (n127).
138 Georgina Tsagas, 'Section 172 of the Companies Act 2006: Desperate Times Call for Soft Law Measures' in Nina Boeger, Charlotte Villiers, *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Hart Publishing 2018) 135.
139 Davies (n121) 543.
140 Companies Act 2006, section 260.
141 Wenjing Chen, *A Comparative Study of Funding Shareholder Litigation* (Springer 2017) 38.

172. Whilst it is couched in stakeholder-oriented language, it fails to offer disgruntled stakeholders an avenue for recourse. Thus, the legislation can be said to "lack effective teeth"[142] as it provides the illusion of sustainability alone.[143] Certainly, in the knowledge that no director has been found in breach of section 172,[144] the lack of change in practice supports this analysis, with ample evidence suggesting that it will not facilitate the goal of good governance as demanded by corporate sustainability.[145]

With the impending expiration of the transition period concerning the UK's break from its EU ties, this moment is critical - with the possibility of the UK granting new life to Friedman's shareholder primacy model. Tsagas highlights European pressures as the key prompt in the UK adopting wider stakeholder considerations.[146] Yet, the UK's withdrawal from the EU will result in the non-direct effect and non-applicability of EU company legislation,[147] compounded by the Corporate Governance Code failing to explicitly refer to stakeholders.[148] Thus, there is the threat that stakeholders will be relegated from the corporate agenda. The political need to sell the UK as business-friendly is real.[149] Per neoliberalism's deregulatory agenda and profit mantra, the vulnerability of robust corporate governance propounding sustainable development looks certain.

3. Regulatory framework

Friedman's economic theory centres all business concerns around the idea of profit. To divert resources is to violate the tenets of private property and, in turn, decrease the operational efficiency of the firm. Apprehension of this coming to fruition has resulted in a regulatory system that propounds excessive flexibility. Whilst contemporaries push the idea of sustainability, manifested within a stakeholder framework, this article will pinpoint voluntarism, particularly the regulatory approach of 'comply or explain' to undermine this.[150] Indeed, in the absence of consensus regarding sustainability, the UK has pursued a governance model deferential to business interests in promoting a market-based system to monitor compliance.[151] Thus, the general framework is structured to support Friedman's focus on profit; whether corporations comply or deviate from the regime, both actions are determined by profit, as economic interests remain at the base of Carroll's pyramid, dictating corporate behaviour.

This corporate bias embedded within the UK's domestic governance structure looks to exploit the aforementioned uncertainty surrounding sustainability. Sustainability can generally be understood as meeting the needs of society, implying that humanity must use no more of a resource than can be regenerated.[152] Brundtland represents the original conceptualisation of this.[153] In 1987, a watershed document known as the Brundtland Report established an ethical standard, created as a response to mounting pressures regarding the "accelerating deterioration of the human environment and natural resources and the consequences of that deterioration for economic and social

---

142 Andrew Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach'" (2007) Sydney Law Review Vol. 29, No. 4 607.
143 Tsagas (n137) 144.
144 Nina Boeger, David Hunter, 'Mission-led Business: CSR Reboot or Paradigm Shift?' Bristol Law Research Paper Series; Vol. 2018, No. 001 available at: <http://www.bris.ac.uk/media-library/sites/law/Jan18%20research%20paper%201%20Hunter%20Boeger_MERGED.pdf> accessed 23 July 3 15.
145 Tsagas (n137) 131.
146 Tsagas (n137) 134.
147 Ibid 150.
148 Ibid 144.
149 Michael Ford, 'The Effect of Brexit on Worker's Rights' Journal (2016) King's Law Journal Vol. 27, No. 3 398-415.
150 FRC, Financial Reporting Council Risk in Financial Reports: What Constitutes an Explanation Under 'Comply or Explain'?' (2012) available at: <https://www.frc.org.uk/getattachment/a39aa822-ae3c-4ddf-b869-db8f2ffe1b61/what-constitutes-an-explanation-under-comply-or-exlpain.pdf> accessed 17 June 2020.
151 David Seidl, Paul Sanderson, John Roberts, 'Applying "Comply-Or-Explain': Conformance with Codes of Corporate Governance in the UK and Germany' (2009) Working Paper No. 389, Centre for Business Research: University of Cambridge 6.
152 Hawken (n3).
153 United Nations General Assembly, 'Report of the World Commission on Environment and Development: Our Common Future' *Brundtland* (1987).

development."[154] The report defines sustainable development as "meeting the needs of the present without compromising the ability of future generations to meet their own needs."[155] This comprises an economic, ecological and social dimension, with certain emphasis placed on the concept of 'need.'[156] This looked to prioritise the disenfranchised, naming food, clothing and shelter as basic needs that are not internationally satisfied.[157]

Whilst the global response was overwhelmingly positive, owing to the integration of sustainable development into public discourse, sustainability as a systemic concept has proved ambiguous, coming to mean different things to different people.[158] Banerjee stresses that Brundtland is tantamount to a "slogan."[159] The reduction to an intellectually empty catchphrase, politicised to justify policy, exposes a certain vulnerability concerning the usefulness of the term itself. In the absence of authority and consensus, Aras argues that the use of sustainability, and particularly sustainable development, has an "obfuscating effect"[160] regarding the true impact of corporate activity upon external factors. The management literature over the decades has exacerbated this, equating corporate sustainability with continuity.[161] Thus, business interests have popularised the purist notion of stasis. This is sustainability manifested as the status quo. The ability for businesses to operate in an unchanged manner.[162] This engenders a study in disingenuity, whereby self-interested entities advocate sustainable development as a business opportunity alone, exploiting ambiguity in the name of "billions of dollars in products, services, and technologies."[163] Contextualised within the contemporary neoliberal regime, this is ultimately premised on the unquestioning acceptance of market economics and unbridled growth.[164] Willers concurs, stressing that sustainability has become corrupted, becoming "code for perpetual growth… force-fed to the world community"[165] by powerful business interests. Therefore, in exploiting ambiguity businesses have pursued stasis in the name of self-interest and profit, creating an environment that inevitably lends itself to a weak legal framework.

3.1 Domestic framework

The UK, driven by neoliberal convictions, has effectively accepted this business-friendly approach, chiefly through the adoption of 'soft law' in the form of the Corporate Governance Code. Indeed, the general trend appears to be shifting towards self-regulation in this area, evidenced by the growing number of NGOs offering environmental voluntary disclosure outlets to corporations, such as the Carbon Disclosure Project as a standard of good practice.[166] Yet, despite wide adoption, the European Corporate Governance Forum (ECGF) continues to stipulate a strict criterion for effectiveness. Three elements must be present, namely: a real obligation to comply or explain; a high level of transparency, with coherent and focused disclosures; and a way for shareholders to hold company boards ultimately accountable for their decisions to comply or explain, and the quality of their

---

154 Christa Thomsen, 'Sustainability – World Commission on Environment and Development definition' Encyclopaedia of Corporate Social Responsibility (Springer 2013)
155 Brundtland (n152) 16.
156 Ibid 41-43.
157 Ibid. 41.
158 Sarah Amslet, 'Embracing the Politics of Ambiguity: Towards a Normative Theory of "Sustainability"' (2009) Capitalism Nature Socialism Vol. 20, No. 2 111-119.
(2009) Capitalism Nature Socialism Vol. 20, No. 2 111-125.
159 Banerjee (n6) 65.
160 Aras (n85) 279.
161 See: Richard Reed, Robert Defillippi, 'Causal Ambiguity, Barriers to Imitation, and Sustainable Competitive Advantage' (1990) The Academy of Management Review Vol. 15, No. 1.
162 Aras (n85) 281.
163 Stuart Hart, 'Beyond Greening: Strategies for a Sustainable World' (1997) Harvard Business Review available at: <https://hbr.org/1997/01/beyond-greening-strategies-for-a-sustainable-world> accessed 6 July 2020.
164 Aras (n85) 281.
165 Bill Willers, 'Sustainable Development: A New World Deception' Conservation Biology (1994) Vol. 8, No. 4 1146.
166 Elise Perrault Crawford, Cynthia Clark Williams, 'Should Corporate Social Reporting be Voluntary or Mandatory? Evidence from the Banking Sector in France and the United States' Corporate Governance International Journal of Business in Society (2010) Vol. 10, No. 4 513.

disclosures.[167] In this context, the Code as "a non-binding set of principles, standards or best practices," fails this benchmark by a narrative that prioritises economic interests.

Indeed, the regulatory approach of 'comply or explain,' lying at the heart of the UK's corporate governance regime, operates as the primary mechanism by which the Code champions profit. First introduced in 1992 following the Cadbury Report, the defining characteristics of 'comply or explain' were the introduction of voluntary best practice guidelines in the hope of raising corporate governance standards.[168] At first glance, one can identify the UK Code as "an international benchmark for good corporate governance practice."[169] This appears accurate in providing the benefits of flexibility. The ability to comply or the opportunity to explain non-compliance allows companies to adopt the spirit of the Code, if not the letter. This recognises that, from the outset, some companies will have difficulty in applying provisions,[170] thus avoiding 'box-ticking.'[171] This is sensible in light of heterogeneity; [172] variations across size, diversity and share ownership illustrate fundamental differences between organisations. Indeed, deviations are not automatically to be treated as breaches, [173] with industry specifics, company structure, and transitional justifications offering adequate explanations for deviations that a rigid mandatory operation simply couldn't accommodate.[174]

Statistically, Seidl, Sanderson and Roberts find that compliance levels drop where company size decreases,[175] supporting the notion that economic concerns intrinsic to the company dictate behaviour. This corroborates Carroll's pyramid, whereby the economic hurdles facing small companies limit the ability to enact sustainable policies, justifying a flexible approach that can mediate this, without stigmatising organisations that by their very being cannot comply. In fostering broad compliance, the 'comply or explain' model is a simple if not resounding success; encouraging more than 50% of the non-financial constituents of the FTSE350 to be fully compliant with all provisions,[176] whilst less than 10% of firms are not compliant with a given single provision demonstrates this.[177] However, the presence of said non-compliance poses a serious problem. These organisations afford "very poor"[178] explanations for deviations. In fact, Arcot, Bruno and Faure-Grimaud find that 20% of non-compliant firms failed to provide any explanation.[179] Thus, the UK has maintained a corporate governance regime that facilitates malfeasance through the backdoor; the ability for corporations to deviate at will enables the circumvention of the regime[180] and in turn the pursuit of Friedman's theory, being profit-maximisation at all costs. This undermines its status as an international benchmark.

Subjectivity precipitates this problem. A company can exploit significant manoeuvrability in presenting ignorance as fact; a corporation 'believing' it adheres even if its actions do not reflect this, will simply not provide a non-compliance statement. Consequently, the markets will not be able to judge the company's substantive policies, at

---

[167] European Corporate Governance Forum, 'The Comply-or-Explain Principle' (2006) available at: <http://ec.europa.eu/intemal-market/company/ docs/ecgforum/ecgf-comply-explain-en.pdf> accessed 12 June 2020.
[168] Committee on the Financial Aspects of Corporate Governance, 'The Financial Aspects of Corporate Governance' (1992) *Cadbury Report: London.*
[169] Sridhar Arcot, Valentina Bruno, Antoine Faure-Grimaud, 'Corporate Governance in the UK: Is the Comply or Explain Approach Working?' International Review of Law and Economics (2010) Vol 30, No. 2 193.
[170] Ibid 199.
[171] Ibid.
[172] Sridhar Arcot, Valentina Bruno, 'One Size Does Not Fit All, After All: Evidence from Corporate Governance' (2007) Journal of Empirical Legal Studies Vol. 4, No. 4 1041.
[173] Financial Reporting Council, 'The UK Corporate Governance Code' (2018) 4 available at: <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf> accessed 28 June 2020 2.
[174] Seidl (150) 25.
[175] Ibid 24.
[176] Arcot (n168) 195.
[177] Ibid.
[178] Seidl (n150) 24.
[179] Arcot (n168) 196.
[180] Andrew Keay, 'Comply or Explain in Corporate Governance Codes: In Need of Greater Regulatory Oversight? Legal Studies (2014) Vol. 34, No. 2 289.

least immediately anyway.[181] This is widely detrimental; directors comply when they feel it is appropriate, with compliance determined by the discretion of the board. An efficient capital market allocates ownership of stock within a market that provides accurate signals, reflecting all available information.[182] A reflective market is thus efficient. However, whilst Fama notes that "all available information costlessly available to all market participants"[183] is a prerequisite condition for market efficiency, opaqueness undermines this. Opaqueness marks the environment if companies fail to reveal the true extent of their substantive policies in the absence of third-party arbiters addressing the veracity of company statements.[184] This also undermines the merits of the flexible model. Companies fail to use the Code to fine-tune governance to their specific context.[185] Instead, they fail to reflect reality either via mistake or deception. Thus, the ability and willingness of organisations to deviate from regulatory pressures in the name of rational self-interest, reasserts that profit is king.

Yet, the model of shareholder monitoring adopted within the UK attempts to ameliorate such failures.[186] Indeed, Seidl recognises the role of third parties in this arena. At the aggregate level, this constitutes capital markets in the form of shareholders.[187] The assumption being that upon evaluating compliance, they will either penalise via a negative share price reaction or accept where justified in the circumstances.[188] Sanctions for unjustified deviations is supported by the according publicity reporting mandates, whereby company reliance on brand image and legitimacy should,[189] in theory, suffice to ensure best practice. As McKinsey & Company find, fund managers were prepared to pay an average premium of 14% for well-governed companies within Europe and North America.[190] This illustrates the potential for market forces to subject companies to serious economic incentives.

However, this analysis portrays an unduly optimistic image. Public censure concerning corporate malfeasance, particularly unjustified deviations, is often hollow. It is typically ephemeral and can be outlived or distracted from by strategic planning.[191] As monitoring is founded upon exposure, the "little publicity surrounding any failure of a company to comply"[192] wholly undermines this. Indeed, apathy marks the terrain. This is dangerous; passivity is the inevitable result of the modern corporation, characterised by a separation of ownership,[193] whereby the efforts of dispersed shareholders with little stake in one particular company, [194] to inform and devise a value-maximising strategy leaves themselves undercompensated.[195] Whilst, in theory, shareholders have an array of options available to them if dissatisfied, these are impractical to execute. Voting with their feet becomes the de facto solution as seeking to exert pressure on boards, exercising voting rights, and bringing a derivative action are rare and difficult to invoke.[196]

Similarly, information asymmetry weakens shareholder activism. Keay highlights that 'comply or explain' pursues the empowerment of the shareholder, stressing shareholder awareness for operational efficiency in making

---

181 Iain MacNeil, Xiao Li, "'Comply or Explain": Market Discipline and Non-Compliance with the Combined Code' Corporate Governance: An International Review (2006) Vol. 14, No. 5 488.
182 Eugene Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) The Journal of Finance Vol. 25, No. 2 383.
183 Ibid 387.
184 John Campbell, 'Institutional Analysis and the Paradox of Corporate Social Responsibility' American Behavioural Scientist (2006) Vol 49, No. 7 930.
185 Arcot (n168) 193.
186 Campbell (n183).
187 Seidl (n150) 6.
188 Ibid.
189 Olivier Boiral, 'Corporate Greening Through ISO 14001: A Rational Myth?' (2007) Organization Science Vol. 18, No. 1 128.
190 McKinsey & Co, 'Global Investor Opinion Survey: Key Findings' (2002) 2 available at: <http://www.eiod.org/uploads/Publications/Pdf/II-Rp-4-1.pdf> accessed 27 June 2020.
191 Mark Fishman, *Manufacturing the News* (University of Texas Press 1988) 3-16.
192 Keay (n179) 284.
193 Adolf Berle, Gardiner Means, *The Modern Corporation and Private Property* (Transaction Publishers 1932) 6.
194 John Armour, Simon Deakin, Suzanne Konzelmann, 'Shareholder Primacy and the Trajectory of UK Corporate Governance British Journal of Industrial Relations' (2003) Vol. 41, No. 3 833.
195 Mike Burkart, Samuel Lee, 'One Share-One Vote: The Theory' (2008) Review of Finance Vol. 12, No. 1 33.
196 Keay (n179) 288.

informed judgements as to the validity of non-compliance.[197] This is unrealistic. Shareholders generally suffer from information asymmetry, particularly retail investors who often have neither the time nor expertise to justify the upfront costs of effective monitoring.[198] Insubstantial explanations ensure that shareholders cannot make a wholly informed decision, and therefore, rational assessment of compliance. Ultimately, the culmination of these impediments leaves individual shareholders virtually powerless to enact real change. It is a model that wholly undermines the EU's 2011 Green Paper assertion that "the corporate governance framework is built on the assumption that shareholders engage with companies and hold the management to account for its performance."[199] Consequently, Harris finds that such indifference leads to shareholders acquiescing with management as a reflex action,[200] entrenching the current regime and failing to question non-compliance. This indicts the UK regime, whereby both 'comply or explain' and shareholder monitoring facilitate corporate profit-making with impunity.

Indeed, the consequence of entrenchment in this format poses a credibility problem, cutting to the heart of the rational self-interest upon which Friedman's neoliberalism is premised. Management makes self-serving voluntary disclosures.[201] An argument which adheres to the extensive literature on rational action and utility-maximisation, this propounds that individuals are motivated by power, prestige and security in advancing their interests.[202] Accordingly, the selective release of information looks to gloss over damaging information concerning incompetence or illegality, with Downs noting "all types of individuals tend to… minimise those that reveal their own shortcomings."[203] This is dangerous; self-regulation can encourage managers to deviate from governance standards to hide shirking or private consumption. This fosters an environment antithetical to the standards set by sustainability practices, whereby reckless profit-seeking can continue with ease.

The overarching reluctance and impracticality of shareholders holding managers to account undermines the ECGF prerequisites to effectiveness and cultivates a climate dictated by profit and self-interest. Yet, this acquiesces with the Code, that posits business concerns over sustainability. Its discussion of sustainability is premised on an "effective and entrepreneurial board"[204] generating value for shareholders. Whilst the Code's singular mention of the 'environment',[205] in contrast, lends itself to support Friedman's profit analysis.[206]

In fact, any move to sustainability is premised on shareholder pressure in light of economic performance. This is corroborated by MacNeil and Li who assert that markets are unconcerned with non-compliance as long as company performance remains constant.[207] Morrison's illustrates this; the supermarket chain has historically been non-compliant with the Code's provisions with either poor or no explanations. Nonetheless, shareholders failed to challenge this in the face of strong financial performances. However, in 2004, upon the takeover of Safeway, the company issued its first profit warning in its 106-year history, quickly followed by three more warnings. Consequently, shareholder pressure intensified, directly leading to the appointment of non-executive directors to enact change.[208] This demonstrates that corporate governance moves to strengthen corporate sustainability are not pre-emptive, but rather as the result of poor economic performance. Ultimately, 'comply or explain' is better enumerated as 'comply or perform.'[209] Unsurprisingly, this reflects Friedman's understandings of the power of

---

197 Ibid 286.
198 Lee Harris, 'Missing in Activism: Retail Investor Absence in Corporate Elections' (2010) Columbia Business Law Review, Vol. 1 108.
199 European Commission, 'Green Paper: The EU Corporate Governance Framework' (2011) available at: < https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0164:FIN:EN:PDF> accessed 24 June 2020 3.
200 Harris (n197).
201 Anita Anand, 'Voluntary vs Mandatory Corporate Governance: Towards an Optimal Regulatory Framework' The Delaware Journal of Corporate Law (2005) Vol. 31, No. 1 39.
202 Anthony Downs, 'A Theory of Bureaucracy' (1965) The American Economic Review Vol. 55, No. 1 441.
203 Ibid 123.
204 UK Code (n169) 4.
205 UK Code (n169) 1.
206 Chen Ding, *Corporate Governance, Enforcement and Financial Development* (Edward Elgar Publishing 2013) 101.
207 MacNeil (n180) 488.
208 Arcot (n168) 199.
209 Keay (179) 287.

profit. The absence of socially responsible factors in determining corporate behaviour is damning for CSR and stakeholder theory, as the sole concern of business is demonstrably profit.

3.2 International framework

Internationally, sustainability is widely accepted as a social good and is now "endorsed and actively promoted by key global institutions such as the World Bank, the OECD, the UN and the ICC."[210] Indeed, this is almost to the extent that it overrides national singularity, as global initiatives look to transcend regional borders. Within a patchwork of international initiative and strategies, this article pinpoints the EU's Directive 2014/95/EU,[211] as an attempt to harmonise non-financial reporting (NFR) across the EU on a voluntary basis. This seeks to improve the quality of NFR across the continent, ensuring that the information published will be more relevant, consistent and comparable.[212] Whilst the EU has historically shied away from mandatory regulation concerning sustainability, in 2014 it embraced indirect encouragement through the Non-Financial Reporting Directive (NFRD) concerning large scale undertakings.[213] Information disclosure here covers environmental, social and human rights matters.[214] This helps wider society, including investors, consumers and stakeholders, evaluate companies' non-financial performance, encouraging responsible approaches to business.

The Directive applies to large undertakings which are public-interest entities exceeding an average number of over 500 employees and with a balance sheet total of €20 million or a net turnover of €40 million.[215] These companies are obliged to issue public reports on their policy implementation concerning environmental protection, respect for human rights and social responsibility amongst others.[216] This broadens the scope of NFR in comparison with conventional governance codes; disclosure must go beyond basic metrics such as gender to incorporate education and professional background,[217] whilst going beyond board policy to cover 'administrative, management and supervisory bodies' and how such policies are implemented.[218] On this basis, the Directive can be seen to "represent an advance on the pre-existing disclosure regime in requiring affected companies to go beyond the disclosure of employee and environmental information in the management report."[219] Kinderman concurs, arguing that the Directive "represents an important step towards greater corporate accountability."[220] This is premised on the meaningful step towards greater accountability in reporting on organisations' social and environmental impact.

However, this article suggests that the success of the NFRD is muted. This is largely the result of economic forces, once more supporting Friedman. Indeed, Kinderman observes that the Directive was "watered down substantially"[221] during the legislative process. This is evident in light of the original proposal seeking to regulate all companies with more than 250 employees, covering 18,000 companies.[222] The more stringent threshold of 500 employees sees more than a 60% decrease in the number of companies covered by the regime to 6,000.[223] This represents a very limited number of undertakings, a minority of the business entities across Europe. This is especially so with SMEs, better reflected by the 250 employees threshold, constituting 99% of the EU's business

---

210 Maria Gjølberg, 'The Origin of Corporate Social Responsibility: Global Forces or National Legacies? (2009) Socio-Economic Review, Vol. 7, No. 4 10.
211 European Union Directive 2014/95/EU.
212 Georgina Tsagas, Charlotte Villiers, 'Why "Less is More" in Non-Financial Reporting Initiatives: Concrete Steps Towards Supporting Sustainability' (2020) Accounting, Economics, and Law: A Convivium Vol. 10, No. 2 (forthcoming) 9-17.
213 European Union Directive 2014/95/EU, *Article 19A*(1).
214 Tsagas (n211) 16.
215 European Union Directive 2014/95/EU, section 14.
216 Ibid, section 16.
217 Ibid, section 19.
218 Ibid, *Article 19A*(1).
219 Deirdre Ahern, 'Turning Up the Heat? EU Sustainability Goals and the Role of Reporting under the Non-Financial Reporting Directive' (2016) European Company and Financial Law Review Vol. 13, No. 4 609.
220 Daniel Kinderman, 'The Struggle Over the EU Non-Financial Disclosure Directive' (2015) WSI-Mitteilungen 8/2015 613.
221 Kinderman (n219) 614.
222 Ibid.
223 Ibid.

demographic. However, in line with this article's emphasis on the power of profit, the weakening of the final text was largely a result of business opposition. Indeed, whilst the leading actors within the business arena are often decried as "dinosaurs,"[224] the success of such organisations in diluting the Directive is testament to their good health.[225] The myriad of derogations heighten this analysis. The safe harbour clause[226] for example, allows member states to exclude commercially sensitive information in exceptional cases. Ultimately, the shadow of business opposition has demonstrated that the push for profit directly led to the weakening of the Directive, successfully undermining corporate sustainability.

Moreover, at the macro level, considerable discretion is afforded to companies to process disclosures. Indeed, the Directive put in place general mechanisms of a reporting framework as opposed to a highly prescriptive regime.[227] This empowers organisations to decide on the format of the report, the extent of the information that is disclosed, and the specific issues that are included in the report.[228] This is compounded by the Directive stipulating information disclosure '*to the extent necessary for an understanding.*'[229] This is notably vague, which ultimately allows companies to operate from a position of rational self-interest. A troubling example is 'Dieselgate'; in 2013, Volkswagen was awarded a sustainability award by the World Forum for Ethics in Business for "responsible action in the environmental and social fields."[230] An achievement secured whilst simultaneously seeing the company fraudulently programming their engines to activate their emissions control *only* during laboratory testing to meet regulatory standards. This practice was applied in approximately 11 million cars worldwide.[231] Inevitably, in the same vein as the UK's domestic framework, working on a flexible 'comply or explain' basis enables businesses to exploit voluntarism. Thus, this is an international model that bows to market freedom, undermining conformity and comparability.[232] On this basis, heralding the NFR regime as a "historic date in the transition to business sustainability for all,"[233] is premature.

4. Superficiality of practice

The UK corporate governance regime more generally has descended into a game of how much can you get away with.[234] Accordingly, this article argues that regulatory lenience has been exploited as a vehicle by the irresponsible for superficial gain. Indeed, Villiers argues that CSR "does not exist in substance and that it is essentially no more than an aspiration for 'best practice' or morally acceptable behaviour."[235] The insidious consequences are that the repair of cosmetic harm has the potential to placate ethical sensibilities beyond the corporation and therefore reduce pressure. Thus, allowing the corporation to operate unchanged and so entrench a profit-based model.

This will be evaluated from the perspective of legitimacy theory; organisations provide explanations for behaviour that deviates from expectations to preserve legitimacy in the eyes of their external audience.[236] Suchman defines legitimacy as a "generalised perception or assumption that the actions of an entity are desirable, proper, or

---

[224] Ibid 623.
[225] Ibid.
[226] Ibid 618.
[227] Ahern (n218) 602.
[228] Ibid 625.
[229] European Union Directive 2014/95/EU, *Article 19A*(1).
[230] Automotive World, ' Volkswagen Wins International Sustainability Award' (2012) available at: <https://www.automotiveworld.com/news-releases/volkswagen-wins-international-sustainability-award/> accessed 23 June 2020.
[231] Sandra Passinhas, "'Dieselgate" and Consumer Law: Repercussions of the Volkswagen Scandal in Portugal' (2017) Journal of European Consumer and Market Law Vol. 6, No. 1 42.
[232] Ahern (n218) 629.
[233] Richard Howitt, 'The EU Law on Non-Financial Reporting- How We Got There' (2014) available at: <https://www.theguardian.com/sustainable-business/eu-non-financial-reporting-how-richard-howitt> accessed 21 June 2020.
[234] Keay (n179) 293.
[235] Charlotte Villiers, 'Corporate Law, Corporate Power and CSR' in Nina Boeger, Rachel Murray, Charlotte Villiers, *Perspectives on Corporate Social Responsibility* (Edward Elgar 2008) 86.
[236] Deepa Aravind, Petra Christmann, 'Decoupling of Standard Implementation from Certification: Does Quality of ISO 14001 Implementation Affect Facilities' Environmental Performance?' (2011) Business Ethics Quarterly Vol. 21, No. 1 78.

appropriate within some socially constructed system of norms, values, beliefs, and definitions."[237] This understands that society evaluates the legitimacy of an organisation, and as a business is reliant on societal resources, whether that be raw materials or customer loyalty, it would be self-destructive to ignore such problems. Indeed, companies respond for reasons of legitimacy as opposed to efficiency. Legitimacy can directly lead to corporate survival; audiences are likely to supply resources to organisations that appear desirable.[238] Naturally, this consolidates the notion that profit is king, as company operations centre on methods to enhance profitability.

On this basis, companies employ strategies and tactics to preserve legitimacy, which manifest via promising reform or engaging in dialogue with the relevant audience without substance.[239] Indeed, due to the aforementioned lack of external parties verifying the veracity of reporting statements, it is difficult to recognise whether a published commitment translates into practice. Ramus' empirical analysis of the oil and gas industries demonstrates this. Intrinsically hostile to CSR as an extractive industry, these companies are nevertheless just as likely to commit to specific policies of sustainable development as other sectors.[240] However, they were not likely to implement fossil fuel use reduction policies.[241] This raises the question of greenwashing - the marketing spin to deceptively convince the public of environmentally friendly operations.[242] Certainly, corporations can exploit this situation; there is little downside to publicly committing, and in turn legitimising the responsibility of their brand, whilst knowing there is no mechanism for verification.[243]

Alongside superficial commitment, legitimacy can also be retained if an organisation diverges from societal norms, yet that divergence goes unnoticed.[244] Ben & Jerry's exemplify this. The ice cream giant has been widely heralded as a success story of modern sustainability, with various responsibility programmes and its humble beginnings seeing its Foundation funded by 7.5% of the company's pre-tax profits to support the local community.[245] However, the business succumbed to the inevitable corporate temptation, and was acquired by Unilever in 2000,[246] a company subject to ranging environmental criticism. In 2014, Unilever was criticised by Greenpeace for causing deforestation.[247] In 2019, Unilever was cited by BreakFreeFromPlastic as one of the top ten global plastic polluters,[248] and the company was also caught dumping toxic mercury wastes in a densely populated part of a south Indian town.[249] Ultimately, profit triumphs and shapes practice.

4.1 Decoupling

This demonstrates the practice of decoupling. Driven by financial motivations, companies have incentives to decouple implementation from rhetoric. This offers the benefit of legitimacy without incurring the high costs and

---

[237] Mark Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) The Academy of Management Review Vol. 20, No. 3 574.
[238] Ibid.
[239] David Seidl, Paul Sanderson, John Roberts, 'Applying the 'Comply-or-Explain' Principle: Discursive Legitimacy Tactics with Regard to Codes of Corporate Governance' (2013) Journal of Management & Governance Vol. 17, No. 3 795.
[240] Catherine Ramus, Ivan Montiel, 'When Are Corporate Environmental Policies a Form of Greenwashing?' (2005) Business & Society Vol. 44, No. 4 377-409.
[241] Ibid.
[242] William Laufer, 'Social Accountability and Corporate Greenwashing' (2003) Journal of Business Ethics Vol. 43, No. 3 255-258.
[243] Ramus (n239) 378.
[244] Suchman (n236).
[245] Corporate Reform Collective, *Fighting Corporate Abuse: Beyond Predatory Capitalism* (Pluto Press 2014) 56.
[246] Unilever, 'Ben & Jerry's' available at: < https://www.unilever.co.uk/brands/food-and-drink/ben-and-jerrys.html> accessed 22 June 2020.
[247] BBC, 'Ape Protest at Unilever Factory' (2008) available at: <http://news.bbc.co.uk/1/hi/england/7358071.stm> accessed 22 June 2020.
[248] Elizabeth Segran, 'Coca-Cola, Nestlé, and PepsiCo are the World's Biggest Plastic Polluters—Again' (2019) available at: <https://www.fastcompany.com/90425011/coca-cola-nestle-and-pepsico-are-the-worlds-biggest-plastic-polluters-again> accessed 22 June 2020.
[249] Greenpeace, 'Unilever Admits Toxic Dumping: Will Clean Up But Not Come Clean' (2001) available at: <https://web.archive.org/web/20140508042719/http://www.greenpeace.org.uk/media/press-releases/unilever-admits-toxic-dumping-will-clean-up-but-not-come-clean> accessed 22 June 2020.

potential disruption of comprehensive implementation.[250] Indeed, Aravind and Christmann conclude that comprehensive implementation would engender "considerable commitments of time and resources such as ongoing maintenance of the EMS."[251] Updating documentation, continuous training and increased auditing,[252] culminate in unnecessary costs. This is the unintended bureaucracy of certification,[253] constraining activities with claims to decreased productivity and operational smoothness.[254] Per Carroll, the basic institutional prerequisite being economic security should deter the vast majority of organisations from accepting such onerous obligations freely.

In this vein, this article highlights international certifiable standards, that have been heralded as the corporate governance mechanism to combat globalised firms,[255] whilst the reality is ultimately one of rational self-interest. Christmann and Taylor conclude that firms strategically choose the quality of implementation by a cost: benefit analysis.[256] Unsurprisingly, if substantive implementation is perceived as costly, symbolic integration will be pursued.[257] As customer demands necessitate the adoption of environmental standards, this satisfies their interests superficially.

The implementation of the Global Reporting Initiative (GRI) supports this analysis. The independent international organisation has pioneered sustainability reporting, looking to unite businesses and governments globally to understand and communicate their impact on critical sustainability issues such as global warming.[258] The GRI Standards are the first and most widely adopted standard of sustainability reporting.[259] This is a remarkable achievement in terms of output effectiveness; seeing the promotion of the increased dissemination of sustainability reporting and standardising the practice.[260] However, Barkemeyer, Preuss and Lee find that outcome effectiveness, by contrast, is limited.[261] These limitations include, but are not limited to, the widespread failure to engage stakeholders with their respective companies in a meaningful manner.[262]

Similarly, international certifiable management standards such as the ISO 14001 Environmental Management System fail to effectively combat the corporate threat. Introduced in 1996 by the International Organisation for Standardisation, the world's largest standard-setting organisation, the standards specify environmental management practices to negate the negative external effect of companies' operations.[263] The system acts as both an internal management tool to uphold a preventative approach and integrate environmental concerns into daily practice,[264] whilst also a path to publicising an organisation's legitimacy amongst stakeholders.[265] The standard has established itself as an international benchmark, with high adoption rates of approximately 188,815 certified facilities in 155 countries as of 2008,[266] striking to mitigate de-territorialisation and globalisation.

---

250 Aravind (n235).
251 Ibid.
252 Ibid.
253 Darcy Leach, 'The Iron Law of What Again? Conceptualizing Oligarchy Across Organizational' (2005) Sociological Theory Vol. 23, No. 3 312-337
254 Aravind (n235).
255 Petra Christmann, Glen Taylor, 'Firm Self-Regulation Through International Certifiable Standards: Determinants of Symbolic Versus Substantive Implementation' (2006) Journal of International Business Studies Vol. 37, No. 6 863–865.
256 Christmann (n254) 864.
257 Ibid 867-876.
258 Global Reporting Initiative, 'About GRI' available at: <https://www.globalreporting.org/Information/about-gri/Pages/default.aspx> accessed 21 June 2020.
259 Ibid.
260 Ralf Barkemeyer, Lutz Preuss, Lindsay Lee, 'On the effectiveness of Private Transnational Governance Regimes—Evaluating Corporate Sustainability Reporting According to the Global Reporting Initiative' (2015) Journal of World Business Vol 50, No. 2 322.
261 Ibid 312-325.
262 Ibid 322.
263 Aravind (n235).
264 Boiral (n188).
265 Ibid.
266 Aravind (n235).

However, despite widespread adoption, the intended performance benefits are compromised due to a lack of integration,[267] facilitating superficiality. Indeed, Prakash and Potoski find that the efficacy is based on physical visibility and regulatory stringency.[268] Concerning water pollution, Prakash and Potoski find no statistically discernible effect regarding certification and less visible water pollution.[269] Pollutant characteristics shape stewardship priorities. Exogenous shocks such as oil spills that generate wide media coverage force action. However, less visible pollutants do not generate similar attention and therefore companies, in practice, choose not to combat them.[270] Similarly, Boiral's empirical evidence focuses around a case study of nine ISO 14001 organisations, concluding that the adoption of this standard "leads to a ceremonial behaviour intended to superficially show that the certified organisations conformed to the standard."[271] Company 'improvements' are largely technical and administrative in nature, such as the monitoring of nonconformities, updating documentation and computerisation of the management system.[272] This rationalises the lack of tangible environmental improvement following the adoption of the regime,[273] offering little to suggest it is a genuine tool for improvement.

Despite little to no sustainable improvement, decoupling remains a widespread practice, a feat premised on "rational myths."[274] Boiral defines this as "the rupture between the reassuring image of rationality, formalism, and intellectual rigour that an organisation attempts to project by adopting somewhat superficial structures and systems perceived as legitimate on the one hand, and the organisation's real practices on the other hand."[275] Ultimately, a rational myth is created via an organisation's rhetoric to resolve contradictions, whereby a disconnect between policies and practice is apparent.[276] This constitutes a company's search for legitimacy in the face of institutional pressures. Indeed, the push for external recognition is often the underlying incentive for adoption, however, this is often incompatible with the objectives of internal efficiency and robust environmental practice.[277] Frankental identifies a UK-based oil company that operates in Burma that exemplifies this practice.[278] The company has a history of malfeasance, with documented evidence of forced labour, forcible relocation of the indigenous population and wage confiscation.[279] Yet, this starkly contrasts with the reality of the company's annual report which suggests that it is politically neutral and that it is a humble guest in the countries within which it operates,[280] creating a narrative that obfuscates any human rights responsibility. Thus, the ISO 14001 system is best defined as a formal structure detached from reality, whereby the presence of rational myths cuts against the grain of CSR. Best practice is reliant on transparency, requiring a critical faculty on the part of companies to admit shortcomings.[281] However, rational myths are pervasive. This pervasiveness lends itself to the profit analysis, as companies look only to secure their financial security.

4.2 ExxonMobil

Per legitimacy theory, it is clear that communication is king. Communication between an organisation and its audiences involves skilful legitimacy management, encompassing a diverse arsenal of techniques.[282] Indeed, in

---

267 Boiral (n188) 130-135.
268 Aseem Prakash, Matthew Potoski, 'Global Private Regimes, Domestic Public Law: ISO 14001 and Pollution Reduction' (2014) Comparative Political Studies Vol. 47, No. 3 370-371.
269 Prakash (n268) 388.
270 Ibid 389.
271 Boiral (n188) 127-128.
272 Ibid 137.
273 Ibid.
274 Ibid 127-146.
275 Ibid 128.
276 Ibid 128-129.
277 Ibid.
278 Peter Frankental, 'Corporate Social Responsibility – a PR invention?' (2001) Corporate Communications: An International Journal, Vol. 6 No. 1 21.
279 Ibid.
280 Ibid.
281 Ibid 20.
282 Suchman (n236) 586

gaining legitimacy or repairing it in light of environmental degradation per se, efforts to legitimise often see manipulation on the part of the corporation.[283] In this vein, Livesey evaluates ExxonMobil's corporate public discourse to express concern in the socially constructed nature of reality.[284] She uses textual examples from four advertorials published by the company and relating to climate change.[285] Unsurprisingly, ExxonMobil as one of the world's largest oil and gas companies,[286] has been threatened by evolving understandings of environmental degradation. Environmental disasters stemming from industry negligence have inculpated the oil industry as a primary culprit in the global warming crisis.[287] In the face of such criticism, Livesey notes ExxonMobil's habit of pleading to maintain the status quo.[288] In adopting the purist notion of sustainability, this manifests itself in measures to counter the momentum of environmental activism; the company's rhetorical task looks to degrade environmental protection into a force for evil.[289] This promotes business whilst deriding the competence of regulators. ExxonMobil achieves this via the advertorials, "wrapping the environmental issue in paradox."[290]

This behaviour is situated within a sustained campaign to discredit the dangers posed by climate change, in the protection of corporate interests. Fundamentally, climate change denial can be understood as a defence of the Western social order, which built upon industrialism, is borne out of fossil fuels.[291] Simply acknowledging the threat of global warming undermines this. In this vein, Dunlap and McCright identify that media coverage of anthropogenic (human-caused) global warming (AGW) is "often subsumed by socio-political and economic concerns, such as how certain GHG (greenhouse gas) reduction efforts may restrict economic activities."[292] This is problematic because it emphasises the danger of regulation from an economic perspective, whilst neglecting the existential threat that climate change poses. Ultimately, this aligns with a neoliberal discourse that rejects governmental interference, and instead, demands that competing social interests like that of environmental degradation find a place within the market itself.[293]

Corporate interests, namely the fossil fuel industry, have pioneered this economic echo-chamber, masterminding a campaign of deception to support this. ExxonMobil exemplifies this disingenuous practice. ExxonMobil is a giant in the global oil industry, incidentally, making it one of the biggest polluters.[294] The Union of Concerned Scientists has comprehensively dismantled the corporation's operations in scathing claims to "the most sophisticated and most successful disinformation campaign."[295] This is compelling in the face of the company channelling $16 million between 1998 and 2005 to a network of companies for the sole purpose of manufacturing debate on the existence of global warming.[296] This callous disinformation enterprise to manufacture doubt is justified by reference to profit; the company ardently opposes regulation that would limit their business opportunities and diminish profits. Therefore, a campaign of distraction from meaningful change is initiated, as financial factors shape behaviour in the corporate arena based on rational self-interest.

---

283 Ibid 571-573
284 Sharon Livesey, 'Global Warming Wars: Rhetorical and Discourse Analytic Approaches to Exxonmobil's Corporate Public Discourse' (2002) International Journal of Business Communications Vol. 39. No. 1 117.
285 Ibid 118-142.
286 Ibid 126.
287 Greenpeace, 'Oil' available at: <https://www.greenpeace.org/usa/global-warming/issues/oil/#:~:text=The%20Problem%20With%20Oil%3A%20Global,dioxide%20emissions%20from%20fossil%20fuels.> accessed 22 June 2020.
288 Livesey (n283) 127.
289 Ibid.
290 Ibid.
291 Riley Dunlap, Aaron McCright, 'Organized Climate Change Denial' in John Dryzek, Richard Norgaard, David Schlosberg, *The Oxford Handbook of Climate Change and Society* (Oxford University Press 2011) 144.
292 Maxwell Boykoff, 'From Convergence to Contention: United States Mass Media Representations of Anthropogenic Climate Change Science' (2007) Transactions of the Institute of British Geographers Vol. *3*2, No. 4 485.
293 Livesey (n283) 129.
294 Union of Concerned Scientists, 'Smoke, Mirrors & Hot Air- How ExxonMobil Uses Big Tobacco's Tactics to Manufacture Uncertainty on Climate Science' (2007) Cambridge, MA: Union of Concerned Scientists 4.
295 Ibid 6.
296 Union of Concerned Scientists (n293) 5.

Critically, this is worsened by the practice of what Hoexter defines as soft climate denial; the "acknowledgement in some parts of one's life that climate change is real, disastrous and happening now but in most other parts of one's life, one ignores that AGW is, in fact, a real existential emergency and catastrophic."[297] ExxonMobil looks to appease public clamour by continuing its 'voluntary' approach and promoting the natural environment by producing 'some' energy-efficient fuels.[298] However, this is unrepresentative of the business's true operations and polluting potential. This is dangerous, in providing the illusion of responsibility, whilst failing to take accountability for removing fossil fuel dependency and furthering corporate entrenchment.

5. Harm

In light of the enduring relevance of Friedman, the power of profit and shareholder primacy per the regulatory landscape and its practical application, this article recognises the consequences of ruthlessly consigning morality to obscurity. The sole focus on profit that neoliberalism demands abdicates responsibility, which has wrought untold harm. Fundamentally, O'Connell posits that "one cannot be committed to the protection of fundamental human rights and at the same time acquiescent in the dominant model of globalisation."[299] This article wholeheartedly agrees. Neoliberalism is inherently antithetical to democracy. This political-economic philosophy champions market-orientation as the supreme form of social organisation, which has in practice favoured the "owners and managers of capital"[300] over the ordinary man, in the prioritisation of unfettered growth for private enterprise. The dangerous consequence is individual rights sacrificed at the altar of hedonism.

The universality of this ideological commitment, "penetrating every nook and cranny of Western societies,"[301] globalises this victimisation. Neoliberalism is not producing, nor is it intended to produce, harmony and widespread prosperity. Rather, it contributes to increased inequality.[302] This is fatal in light of the destructive human costs that ensue, from infant mortality to mental illness.[303] This is compounded by its stifling effect on human rights; neoliberalism inherently propounds a global agenda, encroaching on the ability of domestic actors to implement policies freely, including rights-related pathways. Indeed, participation in global economic institutions has the unintended consequence of imposing regulatory pressures; a precondition of joining the WTO is the harmonisation of domestic laws concerning intellectual property.[304] However, patent enforcement hinders competition, facilitates pharmaceutical monopolies and in turn the high pricing of drugs, directly affecting the right to life and health.[305]

With such harm "scaling new heights," the future looks bleak. McMillan concurs, remarking that the "recent siege of corporate malfeasance goes beyond the pale."[306] This understands scandals such as Enron, not as the self-professed 'bad apple' syndrome but better demonstrated by 'cockroach theory.'[307] One indicates many more lurking nearby.

---

297 Hoexter (n12).
298 Livesey (n283).
299 Paul O'Connell, 'On Reconciling Irreconcilables: Neo-Liberal Globalisation and Human Rights' (2007) Human Rights Law Review, Vol. 7, No. 3 483,
300 Robert Wade, 'How High Inequality Plus Neoliberal Governance Weakens Democracy' (2013) Challenge Vol. 56, No. 6 7.
301 Ibid 11.
302 Paddy Ireland, 'Shareholder Primacy and the Distribution of Wealth' (2005) The Modern Law Review Vol. 68, No. 1 81.
303 Kate Pickett, Richard Wilkinson, *The Spirit Level: Why Equality is Better for Everyone* (Penguin 2010) 10-45.
304 Robert Weissman, 'A Long, Strange Trips: The Pharmaceutical Industry Drive to Harmonize Global Intellectual Property Rules, and the Remaining WTO Legal Alternatives Available to Third World Countries' (1996) University of Pennsylvania Journal of International Economic Law Vol. 17, No. 4 1069-1126.
305 Philippe Cullet, 'Patents and Medicines: The Relationship Between TRIPS and the Human Right to Health' (2003) International Affairs Vol. 79, No. 1 139-160.
306 Jill McMillan, 'Why Corporate Social Responsibility: Why Now? How?' in Steve May, Steve Kent May, George Cheney, Juliet Roper, *The Debate Over Corporate Social Responsibility* (Oxford University Press 2007) 17.
307 Ibid.

Accordingly, this article will evaluate the real cost of Friedman's legacy in reference to neoliberalism's destructive capabilities regarding environmental and human rights degeneration.

5.1 Environmental harm

The scale of current environmental degradation poses an existential threat to humanity. Indeed, the "immediate grievous harm"[308] that AGW poses, threatens to undermine the life support system of many species. This is exemplified by increased water pressures; increasing drought in the mid-latitudes places billions under increased stress with low crop yield, whilst rising sea-levels from melted icebergs elsewhere threaten severe flooding of coastal areas, such as Florida and Bangladesh.[309] Similarly, Crowther notes "extreme weather as excessive rain or snow, floods, droughts, heatwaves, and hurricane"[310] as a direct consequence of human activity. Inevitably, this endangers civilisation, with the breakdown of stable socio-economic systems, migration on startling levels and widespread fatality rates increasing. This is a real and immediate threat. Indeed, Bullis and Ie find that the "state of the natural environment is so degraded that the quality of human life is threatened."[311] Dire straits premised on scientific consensus, with 98% of climate science papers accepting that AGW exists,[312] which in turn indicts human contribution.

The corporation is at the heart of this; as central players in the economic arena, they wield major influence over political, environmental and social matters. Certainly, cast as the "villains,"[313] their commercial and economic activities are a primary driver that fuels climate change, with carbon dioxide pumped into the environment.[314] Crowther pinpoints the rapid rise of globalisation as accelerating such degradation.[315] The development of the BRIC countries is testament to this. Neglecting the planet's "finite"[316] resources, they have adopted a feckless strategy of rapid growth and economic development built upon the unquestioning acceptance of market economics and unbridled growth.

Nevertheless, contrarian scientists maintain that the "human contribution is negligible,"[317] diagnosing unnecessary "alarmism"[318] concerning environmental pessimism. As demonstrated by ExxonMobil's campaign of deception, business interests have succeeded in obfuscating the debate. On this basis, neoliberalism poses a dangerous threat. The economic philosophy fails to include "any realistic assessment of the role of government… and of moral or emotional bonds… with humanity as a species as a whole."[319] Thus, the hedonism of unfettered economic growth maliciously chooses to ignore green responsibility that may detract from profits. Ultimately, as long as the money flows, no one "wants to get off the carousel or yell stop,"[320] as the insular pursuit of profit has cost the planet.

5.2 Human rights harm

---

308 Richard Kerr, 'How Urgent Is Climate Change?' (2007) Science, 318(5854) 1230.
309 Kerr (n307) 1231.
310 David Crowther, Shahla Seifi, 'The Flawed Logic of Sustainable Development' in Kıymet Çalıyurt, Ülkü Yükse, *Sustainability and Management: An International Perspective* (Taylor & Francis 2017) 14.
311 Rasmus Benestad et al., 'Learning from Mistakes in Climate Research' (2016) Theoretical and Applied Climatology Vol. 126, No. 3 699.
312 Connie Bullis, Fumiko Ie, 'Corporate Environmentalism' in Steve May, Steve Kent May, George Cheney, Juliet Roper, *The Debate Over Corporate Social Responsibility* (Oxford University Press 2007) 321.
313 Ibid.
314 Adrian Henriques, *Corporate Impact: Measuring and Managing Your Social Footprint* (Routledge 2010) 183.
315 Shahla Seifi, David Crowther, 'Managing with Depleted Resources' (2016) Corporate Responsibility and Stakeholding Vol. 10, No. 1 Emerald Group Publishing Limited 1.
316 Seifi (n314) 2.
317 Crowther (n309).
318 Henderson (n36).
319 Hoexter (n12).
320 Ibid.

Whilst neoliberalism has sought to erode environmental sustainability, it has equally left a trail of devastation concerning political and socio-economic rights. Philip Green, the "unacceptable face of capitalism,"[321] embodies the dangers of the regime. The culmination of high executive pay, asset stripping, social inequality and disappearing pension entitlements,[322] is a damning indictment of a "lamentable"[323] corporate governance regime that has allowed recklessness on such a scale. Green extracted more than £400 million in dividends from the department store BHS, whilst eventually selling the company for £1.[324] His stewardship of the company was understandably subject to a parliamentary inquiry that uncovered the human cost; approximately 11,000 workers were left unemployed and the pension fund concerning 20,000 members was put at high risk.[325] Corporate greed, as the progeny of neoliberalism, singlehandedly ruined the lives of a significant demographic of the working population.

This constitutes the dark side of neoliberalism. Yet, this is to be expected. The neoliberal emphasis on economic freedom and deregulation has resulted in the subordination of "all others to the interests of big businesses."[326] The most high-profile manifestation of this was the 2008 global financial crisis. The culture of "as long as the music is playing, you've got to get up and dance"[327] inevitably wreaked monumental harm. In the UK, the global financial crisis cost the UK economy £137 billion in bailouts to rescue banks that had failed or almost collapsed.[328]

Short-termism was central to this crisis. Short-termism can be defined as an excessive emphasis on immediate results, termed 'quarterly capitalism,' negating concerns for long-term value creation.[329] In the pursuit of efficiency and instant results, short-termism lies at the heart of the rampant shareholder primacy model that Friedman espoused. This often expedites layoffs and witnesses a lack of investment in human capital, and illogical mergers, all of which destabilise the organisation.[330] Indeed, in "playing by the current rules of the game, this allows corporations to externalize many of their real costs to society without regard," embodying the aggressive pursuit of financial gains that characterises short-termism. This aggression is substantiated in light of 10% of profits being distributed to shareholders in 1970, however, this figure now stands at 70%.[331] Boeger and Hunter inculpate the capitalist system on this basis. Citing competition at its core, the effects of free-market capitalism has in fact seen the opposite, the suppression of competition in many respects.[332] Amazon and Google exemplify this, central players in monopolistic winner-takes-all markets. Amongst a litany of corporate malpractices, the latter has been penalised for preferentially favouring their own products,[333] requiring exclusive use of their goods[334] and impeding the development of markets and access to competitors.[335] This state of affairs is fundamentally antithetical to the tenets of sustainability, in rejecting responsibility, long-termism and diversity.

---

321 David Nelken, Michael Levi, 'Sir Philip Green and the Unacceptable Face of Capitalism' (2018) King's Law Journal Vol. 29, No. 1 36-57.
322 Nelken (n320) 56.
323 House of Commons Select Committee, 'Governance Code Crucial for Large Companies with Social Impact' (2017) available at: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/work-and-pensions-committee/news-parliament-2015/corporate-governance-reform-report-published-16-17/> accessed 25 June 2020.
324 House of Commons: Work and Pensions and Business, Innovation and Skills Committees, 'BHS' (2016) available at: <https://publications.parliament.uk/pa/cm201617/cmselect/cmworpen/54/54.pdf?utm_source=54&utm_medium=module&utm_campaign=modulereports> accessed 16 June 2020 5.
325 House of Commons (n323) 4.
326 Iain Ferguson, 'Neoliberalism, the Third Way and Social Work: the UK Experience' (2004) Social Work & Society Vol. 2, No. 1 2.
327 Charles Prince cited in John Cassidy, 'Rational Irrationality' (2009) available at: <https://www.newyorker.com/magazine/2009/10/05/rational-irrationality> accessed 21 November.
328 Federico Mor, 'Bank Rescues of 2007-09: Outcomes and Cost' (2018) House of Commons: Briefing Paper Number 5748 available at: <https://commonslibrary.parliament.uk/research-briefings/sn05748/> accessed 23 June 2020 3.
329 Lynne Dallas, 'Short-Termism, the Financial Crisis, and Corporate Governance' (2011) Journal of Corporation Law Vol. 37, No. 2 268.
330 Sandra Waddock, 'Corporate Citizenship: The Dark-Side Paradoxes of Success' in Steve May, Steve Kent May, George Cheney, Juliet Roper, *The Debate Over Corporate Social Responsibility* (Oxford University Press 2007) 77.
331 Hutton (n64).
332 Boeger (n143) 1.
333 *Infederation Ltd v Google LLC, Google Ireland Ltd and Google UK Ltd* [2020] 4 C.M.L.R. 22.
334 *Wheat v Google LLC* [2020] F.S.R. 24.
335 *Google Android (COMP/AT.40099)* [2019] 5 C.M.L.R. 19.

Yet, beyond corporate fines, this short-term culture has a human cost. Khan draws on the example of poor labour conditions; the majority of the world's footballs have historically been produced in Pakistan, sourced by leading brands such as Nike and Adidas.[336] At its height over 15,000 children were estimated to be involved.[337] Allegations of exploitation involving unpaid wages, bonded child labour, workplace beatings and sweatshop conditions aired via a short CBS documentary.[338] Public clamour led to a modicum of success; an effective case of CSR in ensuring the removal of human rights abuses.[339] According to the International Labour Organisation, 95% of exports were made without child labour following the outrage.[340] However, the "industry made no apologies for the past treatment of children."[341] The chief concern was with branding; in soothing the sensibilities of Western consumers, the reputation of these branded balls was restored, without raising awkward questions and attributing blame to "vague and unfathomable traditions."[342] Indeed, legitimacy was repaired, and these dark practices could be resumed elsewhere.

This provides a lesson for contemporary globalisation. The labour conditions around Pakistan's football making is not an isolated incident. The influx of multinational corporations naturally sees a chase for cheap labour.[343] In a hypercompetitive market cutting costs is a must. Waddock observes this "dark side to successes."[344] This understands the external impact of extremely successful companies on wider society. Logic dictates that power, wealth and control concentrated in the hands of those pursuing solely economic gains, sees "entire cultures… bent to the will of those who focus… on consumption."[345] Low prices, low wages and efficiency above all else contributes to a culture of exploitation. Indeed, some corporations are richer than entire nations.[346] Without the according accountability, therefore, Cloud concludes that there "is no such thing as a nonexploitative capitalist workplace."[347] Profit is created through labour, however, rational self-interest witnesses the life, liberty and happiness of the working population under real threat.

This cuts to the heart of Friedman's defence of neoliberalism. Whilst he championed wealth creation, characterised by free markets and private property, this was premised on the belief that it ultimately benefitted wider society.[348] Is this tenable today? Whilst heralded as our economic salvation, O'Connell recognises that "in order to advance its central agenda, the rhetoric of neoliberalism has virtually promised the sun, moon and stars."[349] However, the growing distrust in the system stems from its failure to live up to its core promise; economic prosperity. Escalating inequality, stagnating wages, and poor labour conditions are undermining the central tenets of neoliberalism.[350] Furthermore, McSweeney argues that maximising shareholder value is not equivalent to maximising aggregate social value. This is correct on the grounds that, evidentially, developed countries who propound shareholder-

336 Farzad Khan, Kamal Munir, Hugh Willmott, 'A Dark Side of Institutional Entrepreneurship: Soccer Balls, Child Labour and Postcolonial Impoverishment' (2007) Organization Studies Vol. 28, No. 7 1061.
337 Ibid.
338 Ibid 1056-57.
339 Ibid 1062-63
340 Ibid 1067.
341 Ibid 1064.
342 Ibid.
343 Jackie Smith, Dawn Wiest, 'National and Global Foundations of Global Civil Society' in Christopher Chase-Dunn, Salvatore Babones, Global Social Change: Historical and Comparative Perspectives (JHU Press 2006) 296.
344 Waddock (n329) 74.
345 Ibid 75.
346 Michael Stohl, Cynthia Stohl, Nikki Townsley, 'A New Generation of Global Corporate Social Responsibility' in Steve May, Steve Kent May, George Cheney, Juliet Roper, *The Debate Over Corporate Social Responsibility* (Oxford University Press 2007) 34.
347 David Cloud, 'Corporate Social Responsibility as Oxymoron: Universalization and Exploitation at Boeing' in Steve May, Steve Kent May, George Cheney, Juliet Roper, *The Debate Over Corporate Social Responsibility* (Oxford University Press 2007) 228
348 Friedman (n18).
349 O'Connell (n298) 480
350 Jon Wisman, 'Wage Stagnation, Rising Inequality and the Financial Crisis of 2008' (2013) Cambridge Journal of Economics Vol. 37, No. 4 921.

centric ideology have the greatest disparity of wealth.[351] With greater disparity facilitating an unhealthier, crime-infested and generally less happy society,[352] it is difficult to justify the current regime.

Thus, the neoliberal attack on the state is evident. This sees an economic elite, unburdened of governance restrictions, looking to relieve the state of its social responsibilities,[353] pushing for the instatement of minimal government. This stands in stark contrast to the international human rights regime which presupposes a robust state with the capacity to meet its human rights obligations.[354] Thus, the conditions for the violations of human rights are embedded within the existing structure. Success for the neoliberal project equates to a denial of human rights.

5.3 Harmful implications

In light of this harm, this article looks to the future. To the possibilities of amelioration. This article has established the root of rational self-interest that sits at the heart of Friedman's thesis. This extends to elected officials, individuals who share the "pure motivation to win office."[355] Inevitably, this leaves policymaking susceptible to the exertion of company pressure, leading to the "promotion of tax-cutting and retrenchment policies that advantage business and wealthy individuals."[356] This serves to maintain a lax governance regime in the name of economic interests.

Indeed, this article has derided the efficacy of voluntarism within the corporate governance landscape, questioning whether flexibility is appropriate within an environment characterised by excessive risk and unbridled profit-making. This suggests that the market alone is insufficient, mirroring Easterbrook and Fischel's understanding that "in a world with… no mandatory disclosure system, firms could remain silent with impunity."[357] In this vein, a mandatory system would serve to create a more "level playing field for business, it would have legitimacy, based on and providing due process of law."[358] In according primary importance to investor protection through compelling compliance in the face of penalties,[359] Crawford and Williams found that a highly regulated context led to both increased and higher quality disclosure.[360] Consequently, La Porta et al. root the importance of such measures, in finding that strong investor protection leads to healthier capital markets, and that financial markets fail to prosper if left to market forces alone.[361]

Yet, the adoption of a mandatory model is unlikely. The operation of this system would be difficult within a globalised world, whereby falling barriers to trade and foreign direct investment allows multi-jurisdictional organisations to exploit de-territorialisation,[362] positioning their 'activities' outside regulatory scope. Furthermore, the business community inevitably regard mandatory regulation with contempt; with claims to diminished

---

351 Brenda McSweeney, 'Maximizing Shareholder-Value: A Panacea for Economic Growth or a Recipe for Economic and Social Disintegration?' (2008) Critical Perspectives on International Business Vol. 4, No. 1 65.
352 Lars Osberg, 'What's So Bad About More Inequality' (2014) daleconwp2014-01, Dalhousie University, Department of Economics
353 Mark Olssen, *Liberalism, Neoliberalism, Social Democracy: Thin Communitarian Perspectives on Political Philosophy and Education* (Routledge 2009) 94-99.
354 Andrew Moravcsik, 'Explaining International Human Rights Regimes: Liberal Theory and Western Europe' (1995) European Journal of International Relations Vol. 1, No. 1 178-180.
355 Paul Pierson, *The New Politics of the Welfare State* (Oxford University Press 2001) 267.
356 Peter Taylor-Gooby, 'The Divisive Welfare State' (2016) Social Policy & Administration Vol. 50, No. 6 716.
357 Frank Easterbrook, Daniel Fischel, 'Mandatory Disclosure and the Protection of Investors' (1984) Virginia Law Review Vol. 70, No. 4 680.
358 Doreen McBarnet, 'Corporate Social Responsibility Beyond Law, Through Law, for Law' (2009) University of Edinburgh School of Law Working Paper No. 2009/03 27.
359 Anand (n200) 8.
360 Elise Perrault Crawford, Cynthia Clark Williams, 'Should Corporate Social Reporting be Voluntary or Mandatory? Evidence from the Banking Sector in France and the United States' (2010) Corporate Governance International Journal of Business in Society Vol. 10, No. 4 512-523.
361 Rafael La Porta, Florencio Lopez-De-Silanes, Andrei Shleifer, Robert Vishny, 'Investor Protection and Corporate Valuation' (2002) The Journal of Finance Vol. 57, No. 3 1147.
362 Christmann (n254) 863.

profitability as a consequence of costly and time-consuming implementation, greater exposure undermining company strategy and bureaucracy slowing innovation and hampering productivity.[363] The watering down of the NFRD is testament to the hostility with which corporations treat 'red-tape,'[364] in taking great lengths to bend policy to align with their profit-based interests.

6. Conclusion

Fundamentally, this article has asserted the relevance of Friedman. The widespread derision of his neoliberal ideology as a "tiresome cliché" has been demonstrated to be flawed in light of regulation and practice. This cuts to the heart of the global corporate governance debate considering the fundamental division on the purpose of the corporation. Whilst stakeholder theory, long-term projections and voluntarism are posited as the new raison d'être of the company, current practice is best described by the primacy of the shareholder. The current legal framework complements this analysis; voluntarism and 'comply or explain' allow for rationally self-interested organisations to pursue value-maximisation without accountability. The driving incentive for all corporate action is shown to be financial. The superficiality of CSR in practice demonstrates this. Companies have incentives to decouple implementation from rhetoric - propounding rational myths that offer the benefit of legitimacy, without incurring the high costs and potential disruption of comprehensive implementation. ExxonMobil aptly demonstrates this; as a central player in an extractive industry, the company has employed deceptive means to obfuscate consensus around the climate debate to further their profit-based interests.

However, ExxonMobil is symptomatic of a larger disease. Concerning sustainability, the current regime has wrought untold harm through environmental degradation and the violation of human rights. Friedman and neoliberalism as a package envision a small state, muddying the waters of accountability and pursuing profit at all costs. Unfortunately, this is antithetical to the sustainability model that pursues transparency, accountability and long-termism. Thus, the current position is untenable. Whilst, Friedman can no longer be derided as irrelevant, his understanding as enshrined by practice must be challenged in light of its destructive capabilities.

363 Barry Bozeman, *Bureaucracy and Red Tape* (Prentice Hall 2000) 24-26.
364 Barry Bozeman, Patrick Scott, 'Bureaucratic Red Tape and Formalization: Untangling Conceptual Knots' (1996) The American Review of Public Administration Vol. 26, No. 1 1-3.

THIRD COUNTRY CAPACITY-BUILDING AS A MEANS OF EXTRATERRITORIAL MIGRATION CONTROL: A DOCTRINAL ANALYSIS OF THE EUROPEAN UNION'S SUPPORT FOR THE LIBYAN COASTGUARD IN LIGHT OF THE HUMAN RIGHT TO LEAVE AND THE OBLIGATION OF NON-REFOULEMENT

Fabian Othmerding[1]

ABSTRACT

In the following, this article seeks to analyse the European Union's (EU) support for the Libyan Coastguard (LCG) as a means of extraterritorial migration control. In particular, it is concerned with maritime interceptions by the LCG of irregular migrants' vessels on the Mediterranean Sea. Thereby, European 'capacity-building' will be analysed in light of the right to leave and the obligation of non-refoulement. The main research questions are, firstly, whether maritime interceptions by the LCG can possibly be in accordance with Libya's responsibility to protect a person's right to leave, and secondly, whether the EU as a legal entity may itself incur responsibility for potentially occurring violations of said right.

In this pursuit, the article will begin with an overview of non-entrée politics, leading to the partnership set up between Europe and Libya, focusing on 'capacity-building'. Thereafter, it elaborates the legal scaffolding of maritime departure, drawing on both the normative context of the right to leave and the relevant jurisdictional spheres. This leads to the core of the work, namely the doctrinal analysis of both interceptions and capacity-building. The former will elaborate on the different potential grounds for restrictions under Article 12 (3) ICCPR. The article concludes that no appropriate legal basis is conceivable to satisfy these requirements. LCG interceptions and disembarkations in Libya regularly violate the migrants' right to leave. On this ground and premised on the hypothetical accession of the EU to the ECHR, the article assesses whether the EU's capacity building support for the LCG could trigger jurisdiction under the ECHR. Drawing on the relevant case-law and the applicable Draft Articles of the International Law Commission, the different possible reasonings will be elaborated. As will be shown, the preferable arguments favour direct EU responsibility for violations under the ECHR, triggered by its capacity-building for the LCG.

[1] LLM International Law and International Relations at University of Bristol. Successfully passed the First German State Examination, after studying Law at Free University of Berlin, Germany, with studies abroad at Universidad Adolfo Ibañez in Viña del Mar, Chile, and specialising in Criminology and Criminal Justice. Currently trainee at the Higher Regional Court of Berlin.

I. Introduction

Europe's responses to new migratory movements have led to a multitude of different measures. Some of these approaches remain little explored. This article seeks to analyse a specific form of such contemporary border control and address its deeply troubling implications for human rights protection. In particular, it is concerned with capacity-building support programmes for the Libyan Coastguard (LCG), enhancing Libya's abilities of maritime interceptions of migrants on the Mediterranean Sea. The main research questions are, firstly, whether a maritime interception by the LCG can possibly be in accordance with Libya's responsibility to protect a person's right to leave a country, and secondly, whether and how the European Union (EU) as a legal entity may incur responsibility for Libyan violations of the right to leave.

The following section will begin with an overview of so-called *non-entrée* politics and the partnership set up between Europe and Libya, focusing on its 'capacity-building' programmes. Thereafter, the legal scaffolding of maritime departure is elaborated, drawing on both the normative context of the human right to leave and the relevant jurisdictional spheres. This leads to the core of the work, namely the doctrinal analysis of LCG interceptions and European capacity building for the LCG. The former will elaborate on the different potential grounds for restrictions under Article 12 (3) ICCPR, showing that no appropriate legal basis is conceivable to satisfy these requirements in the case given. On this ground and premised on the hypothetical accession of the EU to the ECHR, the article assesses whether the EU's capacity building support could trigger jurisdiction before the ECtHR. While the sources available support differing opinions, this article argues the most coherent legal interpretation to be, indeed, direct EU responsibility for own violations under the ECHR.

II. European Cooperative Migration Control

In this chapter, an overview will be given over the complex that is cooperative migration control. Thereby, the more general shift in attitude from so-called western states towards the international migration rights regime, as well as the more specific emergence of non-entrée policies will be depicted. Thereafter, the Libyan-European cooperation will be closely examined.

1. From solidarity to evasion

When the New York Declaration for Refugees and Migrants declared 'profound solidarity with, and support for, the millions of people in different parts of the world who, for reasons beyond their control, are forced to uproot themselves'[2], this seemed like a promising signal. Even better still, when it mentioned 'varying capacities and resources to respond to these movements' and the 'shared responsibility'[3].

All this notwithstanding, current developments in global migration policy and *Realpolitik* appear to paint a very different picture, which some commentators portrayed as ashift in attitude from 'humanitarian reception and solidarity' towards a dreaded 'invasion of the poor'[4]. Abandoning the international migrant protection framework altogether, however, would risk the rest of the world following suit, with catastrophic consequences for international security and economic welfare, creating an even more accelerated migratory movement[5]. Thus,

[2] United Nations High Commissioner for Refugees (UNHCR), *New York Declaration for Refugees and Migrants,* A/RES/71/1, 3 October 2016. Available at: https://www.unhcr.org/uk/57e39d987 [Accessed: 09.09.2020].
[3] Ibid, para. 11.
[4] Alscher, S., and Albahari, M., in Den Heijer, M.: '*Europe and Extraterritorial Asylum*', (Bloomsbury Publishing Plc 2012) p. 212.
[5] Gammeltoft-Hansen, T. and Hathaway, J., 'Non-Refoulement in a World of Cooperative Deterrence', in *Columbia Journal of Transnational Law* vol. 53, issue 2 2015, pp. 235-284 (239-41).

wealthy states are determined to demonstrate a commitment to refugee protection[6], but would rather avoid practical consequences - most importantly, the obligation of *non-refoulement*. International cooperation on migratory movement has not yet seen the 'shared responsibility'[7], proclaimed in New York. Instead, one has concentrated significantly on preserving the sovereignty over border control[8]. With this 'seemingly schizophrenic posture'[9], States of higher living standards are instead trying to 'avoid becoming comparatively more attractive to protection seekers'[10], provoking a sort of 'negative regulatory competition'[11] or a 'market of deflection'[12].

2. Non-entrée

While there is no express obligation of a State to permit entry[13], the obligation of *non-refoulement* is grounded on the assumption of the need for protection until 'disproved at a later stage of proceedings'[14]. Therefore, efforts to still hamper migration flows into national territory have led to what Hathaway calls the 'politics of *non-entrée*'[15]. This central approach has coined the design of immigration policies in the developed world for the last thirty years[16]. Instead of demanding people to leave after reviewing their grounds for stay, the idea is to prevent migrants' arrival in the first place.

Non-entrée has many faces, shifting from conventional visa controls, carrier sanctions, so-called Safe Third Country campaigns[17] and high seas interdictions to modern, 'cooperation-based' measures of joint border patrols, financial incentives and the provision of equipment or training to other states[18]. Especially the latter entail an ever more increased cooperation and alignment of policies with both countries of origin and transit[19] throughout the 'displacement chain'[20]. The resulting policies may be described pointedly as 'consensual and pro-active containment of trans-boundary flows', which is 'transferring the coercive management of exiles to third countries'[21]. Instead of offering a global approach, hence, this 'cooperative deterrence'[22] remained fractional, operating cross-regional and on an ad hoc basis[23].

---

6 UNHCR, Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees, 16 January 2002, HCR/MMSP/2001/09; UNHCR Ministerial Communiqué, 8 December 2011; Feller, E., 'Asylum, migration and refugee protection: realities, myths and the promise of things to come', in *International Journal of Refugee Law* vol. 18, 2006, pp. 509–36.
7 UNHCR, supra 1, para. 11.
8 Ibid.
9 Gammeltoft-Hansen, T. and Hathaway, J., supra 4, p. 6.
10 Giuffré, M., and Moreno-Lax, V., "The rise of consensual containment: from 'contactless control' to 'contactless responsibility' for migratory flows", in Juss, S. (Eds.) *Research Handbook on International Refugee Law* (Cheltenham, UK: Edward Elgar Publishing 2019), Chapter 7, p.83.
11 Barbou Des Places, S. and Deffains, B., "Cooperation in the Shadow of Regulatory Competition: The example of Asylum legislation" in *International Review of Law and Economics* vol. 23, 2004, pp. 345-364 (361).
12 Noll, G., *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Brill, Netherlands 2000).
13 Giuffré, M. and Moreno-Lax, V., supra 9, pp. 84-5.
14 Fischer-Lescano, A., Löhr, T. and Todhidipur, T., "Border Controls at Sea/ Requirements under International Human Rights and Refugee Law" in *International Journal of Refugee Law*, 21, no 2 (2009) pp. 256-298 (278).
15 Hathaway, J., in Gammeltoft-Hansen, T. and Hathaway, J., supra note 4, p. 241, footnote 17.
16 Gammeltoft-Hansen, T., and Tan, N.F., 'Beyond the deterrence paradigm in global refugee policy', in *Suffolk Transnational Law Review*, vol. 39, issue 3 2016, p. 637.; Gammeltoft-Hansen, T. and Tan, N.F., 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy', in *Journal on Migration and Human Security,* vol. 5 (2017), pp. 28-56.
17 The EU and other destination States often deem certain countries in closer proximity to a migrant's country of origin to be safe, thereby making it significantly more difficult, if not nullifying any possibility, for the respective migrants to claim a right to enter the destination State.
18 Gammeltoft-Hansen, T. and Hathaway, J., supra note 4, p. 243; Pijnenburg, A., 'Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control?', in *Human rights law review,* vol. 20, Issue 2, (2020) pp. 306-332 (318); Giuffré, M. and Moreno-Lax, V., supra note 9, p. 83; Nicholson, F., 'Implementation of the immigration (carriers' liability) act 1987: privatising immigration functions at the expense of international obligations?', in *The international and comparative law quarterly,* vol. 46, issue 3 (1997), pp.586-634.
19 Gammeltoft-Hansen, T. and Hathaway, J., supra note 4.
20 Giuffré, M. and Moreno-Lax, V., supra note 9, p.84-5.
21 Ibid.
22 Gammeltoft-Hansen and Hathaway, supra note 4; Giuffré and Moreno-Lax, Ibid.
23 Giuffré and Moreno-Lax, Ibid., p. 83.

The European Union (EU) and its Member States have engaged in a multitude of measures to 'externalise' their border policies[24]. Ideally, they consist of political incentives, like visa facilitation, fund transfers, or accession talks[25], so that the Union may then be rest assured of a synallagmatic commitment to contain irregular migrants in another state's jurisdictional area[26].
In the upcoming section, it shall be focused on cooperation based maritime border control in the Mediterranean. Yet again, it is not an easy task to determine exactly what such cooperation will typically involve[27]. The strategies employed may vary over time and will depend on both the Member States and the third countries involved. Generally, border controls become geographically relocated to the high seas or third country territories and the burden of border control is transferred or at least shared[28]. Southern Mediterranean States are thus urged to take on responsibility for migrants that otherwise would have left the country towards Europe and what was supposed to be European entry control likely becomes the cooperating states' exit control. Alongside often appalling human rights situations on the territory of the third countries involved, this shift in responsibility risks nullifying the right to leave and circumventing the duty of non-*refoulement*[29].

Until no formal assessment of someone's protection status has been done, the migrant enjoys the benefit of the doubt[30], which is also reflected in the absolute character of non-refoulement. From the governmental point of view, this makes mixed flows of migrants particularly undesirable[31]. The appeal of non-entrée politics is thus premised on the idea that no physical contact means no jurisdiction and no responsibility to even assess the protection needs. Whether, from a human rights point of view, capacity building containment is a feasible way of dealing with migratory flows will be elaborated subsequently. Since this work is therefore equally concerned with a situation before any formal assessment has taken place, its underlying premise must logically be the above-mentioned benefit of the doubt. It will hence not be distinguished between asylum seekers, those entitled to subsidiary protection, those deemed 'economic migrants' or unaccompanied minor refugees. Where such a differentiation is not explicitly relevant to the question at hand, it will be homogenously referred to as 'irregular migrants' or just 'migrants'.

3. The Case of Libya

The following section seeks to illustrate the above mentioned along the case of Libya. First, some light will be shed on the developments that led the country to become the significant and troubled transit state it is today. Second, a chronology of the EU-Libyan partnership on migration control and its most pertinent contents will be given.

a. From Destination to Departure State

Libya used to be more of a destination rather than a departure or transit state. With its geographic location, dependence on foreign labour, and oil wealth, Libya used to be a place of hope for people seeking to improve their living conditions. From the 1970s to 1990s, Gaddafi proclaimed his Libyan Pan Africanism and open-doors policy towards migrants from both Arab and Sub-Saharan states, in order for them to resettle in Libya and to take

---

24 Giuffré, M. and Moreno-Lax, V., Ibid.; Pijnenburg, supra note 17; Den Heijer, M., 'Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control', in Ryan, B. and Mitsilegas, V. (eds) *Extraterritorial Immigration Control: Legal Challenges*, (Netherlands: BRILL 2010), pp. 169-198 (190).
25 Giuffré, M., and Moreno-Lax, V., Ibid, p. 84.
26 Ibid.
27 Den Heijer, M., supra note 3, p. 212.
28 Den Heijer, M., supra note 23, p.190
29 Markard, N., 'The Right to Leave by Sea: Legal Limits on Eu Migration Control by Third Countries', in *European Journal of International Law*, vol. 27, no. 3 (2016), pp. 591–616 (593-4); Also see, Giuffré, M. and Moreno-Lax, V., supra note 9; Pijnenburg, A., supra note 17; Den Heijer, M., supra note 3, Ch. 4.
30 Den Heijer, M., supra note 23, p. 190.; Fischer-Lescano, A., Löhr, T. and Todhidipur, T., supra note 13, p. 278.
31 As the then Director of the EU's borders agency Frontex put it: *'Flüchtlinge? Das sind keine Flüchtlinge, sondern illegale Migranten'*. (Englisch: *'Refugees? They are not refugees, but illegal migrants.'*) in 'Frontex ist ein Sündenbock*', Der Standard*, 21 December 2006.

up all kinds of careers, from manual labour to formal professional sectors. The rise of conflicts in the Horn of Africa and Western Africa in the late 1980s and 1990s served as significant additional push-factors on emigration[32]. Libya's significance on the international stage was eventually underlined when it became a signatory to the International Covenant on Civil and Political Rights (ICCPR) on May 15th 1970, demonstrating a commitment to universal civil and political rights[33].

However, the 2011 uprising and end of Gaddafi's dictatorship handed significant control over Libyan territory and borders to armed groups, creating a prolific atmosphere for organized crime, including human trafficking and smuggling[34]. Since mid-2014, the crumbling of state institutions and continuing violence led Libya to spiral down a governance, security and humanitarian crisis, and has caused a collapse of the rule of law[35]. Combined with the inevitable economic breakdown and an undeniable and increasing atmosphere of racism and xenophobia, growing numbers of migrants and refugees have left Libya towards Europe, including those that called it a home for decades[36].

However, a much larger number remains, not least because they have been unable to successfully depart the country. It is estimated that by the end of 2017, around one million foreign nationals still resided in Libya[37], with reliable statistics being unavailable. Their plight is enormous, described by some as 'hell on earth'[38]. Amnesty International reports an extremely concerning human rights situation, which includes indiscriminate imprisonment, torture, rape, forced labour, slavery and homicide[39]. The UN Support Mission in Libya speaks of 'unimaginable horrors' which migrants and refugees suffer 'during their transit through and stay in Libya' – beginning 'the moment they step onto Libyan soil'[40].

As will be shown in the following section, it is the successful containment of migrants departing from Libya, however, that has become a European top priority. Libya is one of the most important transit states on the 'Central Mediterranean Migratory Route', meaning the transit route from Sub-Saharan Africa to Italy, one of the most active and dangerous worldwide. Its proximity to Italian territory and the EU's failure to agree on a uniform allocation key for migrants have given fertile grounds for diplomatic exchange between Rome and Tripoli, starting before the uprising, and increasing significantly ever after.

b. European Partnership: Italian Groundwork

The European cooperation with Libya began in Rome. Starting twenty years ago, Italy has progressively nurtured collaboration with Libya on matters of migration, signing various agreements, beginning in December 2000,

---

32 Migration Policy Center, Libya The Demographic-Economic Framework of Migration, The Legal Framework of Migration, The Socio-Political Framework of Migration, June 2013, available at: https://migrationpolicycentre.eu/docs/migration_profiles/Libya.pdf (Accessed 22.08.2020)

33 UN Office of the High Commissioner for Human Rights (UNOHCHR), UN Treaty Body Database for Libya, available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=99&Lang=EN [Accessed 09.09.2020].

34 Micallef, M., '*The human conveyor belt: Trends in human trafficking and smuggling in post-revolution Libya*', Global Initiative against Transnational Organized Crime, March 2017, available at https://globalinitiative.net/wp-content/uploads/2017/03/GI-Human-Conveyor-Belt-Human-Smuggling-Libya-2017-.pdf ; Eaton, T., 'Libya's War Economy: Predation, Profiteering and State Weakness', Chatham House Publications, April 2018, available at: https://www.chathamhouse.org/publication/libyas-war-economy-predation-profiteering-and-state-weakness (Accessed both 22.08.2020).

35 UNOHCHR, *'Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya'*, December 2018, p. 10.

36 Ibid.

37 International Organisation for Migration (IOM), 'UN migration agency moves to relieve plight of migrants trapped in Libya. Backing AU, EU plan', December 2017, available at https://www.iom.int/news/un-migration-agency-moves-relieve-plight-migrants-trapped-libya-backing-au-eu-plan. [Accessed 22.08.2020].

38 Leghtas, I. and Eisenstein, A., *'Hell on Earth': Abuses Against Refugees and Migrants Trying to Reach Europe from Libya Field Report'* (Refugees International, June 2017), available at: https://reliefweb.int/sites/reliefweb.int/files/resources/2017.6.1%2BLibya.pdf [Accessed 09.09.2020]

39 Amnesty International, Report: '*Libya's Dark Web of Collusion*' (2017) Available at: https://www.amnesty.org/en/documents/mde19/7561/2017/en/ [accessed 09.09.2020].; Leghtas, I. and Eisenstein, A., Ibid.

40 UNOHCHR, supra note 34, p. 4.

initially aiming for a cooperative fight against terrorism, organized crime, illegal traffic of drugs and irregular migration[41].
However, this development reached new heights in August 2008, when the Berlusconi-Qhadaffi Treaty of Friendship (ToF)[42] was signed. It did not just involve a $5 billion reparation[43] for Italian colonialism, but the states specifically agreed to cooperatively curtail the flow of migrants heading towards Europe[44]: Libya commits to an effective containment of illegal migration while Italy and, ideally, the EU[45] fund another $500 million[46] worth of electronic surveillance gear on the Libyan coastline[47]. It was this agreement, which had underlain the Italian interception of a migrant vessel and its subsequent return to Libya, deemed an unlawful push-back in the 2012 ECtHR landmark ruling in the case of *Hirsi Jamaa*[48].

While the ToF was suspended due to the beginning Arab Uprising in February 2011, Italy did not defer the topic for long and negotiations with the Libyan resistance began as early as June 2011[49]. Italy signed a Memorandum of Understanding with the National Transitional Council (NTC)[50], followed by several additional agreements concerning 'illegal immigration' the following year[51].

c. European Partnership: EU Continuation

The partnership was eventually fully back on the table during the so-called 'European Migration Crisis' of 2015-2016. By then, the Greek-Turkish passage had been closed, and most unauthorized arrivals by maritime traffic followed the Central Mediterranean route through Libya. This time, however, cooperation with Libya reached the EU level.

i. *2016 Migration Partnership Framework*

In June 2016, the European Commission proposed[52] its new Migration Partnership Framework (MPF), which the European Parliament endorsed soon after[53]. It stipulates the strengthening of relationships with third countries, for actions *inter alia* directed at the rescue at sea and increased returns of people not entitled to remain. The long-

---

41 Dastyari, A. and Hirsch, A., 'The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy', in *Human Rights Law Review*, vol. 19, no. 3, 2019, pp. 435–465 (446).
42 Italy and Libya, *Treaty of Friendship, Partnership, and Cooperation between the Great Socialist People's Libyan Arab Jamahiriya and the Republic of Italy* (Treaty of Friendship), 30 August 2008. Unofficial transcription provided by DCAF Trust Fund for North Africa (Libyan Security Sector Legislation project), available at: https://security-legislation.ly/sites/default/files/lois/7-Law%20No.%20%282%29%20of%202009_EN.pdf [Accessed 13.08.2020].
43 Di Pascale, A., 'Migration Control at Sea: The Italian Case', in Ryan, B. and Mitsilegas, V. (eds), supra note 2 supra note 223, pp. 281-310 (298).
44 Pijnenburg, A. and Rijken, C., 'Playing Cat and Mouse: How Europe Evades Responsibility for its Role in Human Rights Abuses against Migrants and Refugees', in Van Reisen, M., Mawere, M., Stokmans, M. and Gebre-Egziabher, K.A. (eds): *Mobile Africa: Human Trafficking and the Digital Divide*, (Cameroon: Langaa RPCIG 2019), Chapter 23, pp. 697-72 (701).
45 Article 19(2) Treaty of Friendship.
46 Di Pascale, supra note 42, p. 298.
47 Di Pascale, Ibid.; Dastyari, A. and Hirsch, A., supra note 40, p.447.
48 *Hirsi and others v Italy*, App. no. 27765/09, ECtHR 2012-II, p. 97.
49 Dastyari, A. and Hirsch, A., supra note 40, p. 448.
50 Italy and the Libyan National Transitional Council, Memorandum of Understanding, June 2011, Unofficial translation provided by Associazione per gli Studi Giuridici sull'Immigrazione (ASGI), available at: http://download.repubblica.it/pdf/2011/migrazione.pdf. Also see: MIGRANTS AT SEA, 'Memorandum of Understanding Between Italy and Libyan NTC', available at: https://migrantsatsea.org/2011/06/20/memorandum-of-understanding-between-italy-and-libyan-nct/ [Both accessed 09.09.2020].
51 Dastyari, A. and Hirsch, A., supra note 40, p. 449; Paoletti, E., *'Migration Agreements between Italy and North Africa: Domestic Imperatives versus International Norms'*, Middle East Institute, December 2012, available at: https://www.mei.edu/publications/migration-agreements-between-italy-and-north-africa-domestic-imperatives-versus [Accessed 09.09.2020].
52 Commission to the European Parliament, the European Council, the Council and the European Investment Bank, Communication on establishing a new partnership framework with third countries under the European agenda on migration, COM(2016) 385 final, June 2016. Available at: https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-385-EN-F1-1.PDF [Accessed 09.09.2020].
53 European Council, Conclusions 28 June 2016, at: https://www.consilium.europa.eu/media/21645/28-euco-conclusions.pdf [Accessed 09.09.2020].

range goal, allegedly, is to address the root causes of irregular migration and forced displacement by supporting the economic, social, and political development of third countries[54].

Significantly, however, the framework is 'based on effective incentives and adequate conditionality' aiming at 'measurable results in terms of fast and operational returns of irregular migrants' and applying 'necessary leverage, by using all relevant EU policies, instruments and tools, including development and trade' while cooperation on readmission is made 'a key test of the partnership between the EU and these partners'[55]. In short, development aid depends on the effective return of migrants. At that time, around 1000 Libyan Coastguard (LCG) Officers were already starting to get trained[56], and in January 2017, a Commission had already announced its plans to increase the training programme yet again[57].

ii. *2017 Memorandum of Understanding and Malta Declaration*

Based on the MPF, the European Council issued the Malta Declaration[58] on 3rd February 2017, containing external aspects of its migration strategy and the Central-Mediterranean route. Especially, it pictures training and equipping the Libyan Coastguard for increased operational action, such as disrupting the smuggling business, increasing search and rescue operations and preventing unseaworthy boats from departing towards Europe. Thereby, 'dialogue and cooperation on migration with all countries neighbouring Libya' should be 'deepened' [59]. The Declaration further explicitly emphasized 'to support Italy in its implementation'[60] of the Memorandum of Understanding (MoU)[61], which Libya and Italy signed the day before.

In this MoU, Italy offers funding, equipment and the coordination of rescue operations and the EU complements this support by additionally funds to the LCG[62]. While the two countries 'commit to interpret and apply the present Memorandum in respect of the international obligations and the human rights agreements to which the two Countries are parties'[63], no express referral to any human rights or refugee law obligations is made[64]. Equally problematic, 'virtually all such [Italy-Libya] agreements are outside the public domain'[65], including the 2017 MoU. The approach laid out in the MoU was confirmed again in June 2018, when Europe's leaders came to numerous agreements at a Council meeting, concluding that 'a precondition for a functioning EU policy relies on a comprehensive approach to migration which combines more effective control of the EU's external borders, increased external action and the internal aspects, in line with our principles and values'[66].

iii. *Additional Agreements*

---

[54] Commission to the European Parliament, the European Council, the Council and the European Investment Bank, supra note 51.
[55] European Council, supra note 52.
[56] Giuffré, M. and Moreno-Lax, V., supra note 9, p. 89.
[57] European Parliament, the European Council and the Council, Joint Communication 'Migration on the Central Mediterranean route: Managing flows, saving lives', JOIN(2017) 4 final, 25 January 2017, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017JC0004&from=EN [Accessed 09.09.2020].
[58] Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route (Malta Declarations), 3 February 2017, at: https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/ (Accessed 11.08.2020).
[59] Malta Declarations, para. 6 j.).
[60] Malta Declarations, para. 6 i.)
[61] Italy and Government of National Accord, Libya: 'Memorandum d'intesa Sulla Cooperazione Nel Campo Dello Sviluppo, Delcontrasto All'immigrazione Illegale, Al Traffico Di Esseri Umani, Al Contrabbando E sul Rafforzamento Della Sicurezza Delle Frontiere Tra Io Stato Della Libia e La Repubblica Italiana, 2nd February 2017, (*'Memorandum of Understanding on Cooperation in the Fields of Development, the Fight against Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Security of Borders between the State of Libya and the Italian Republic',* henceforth Memorandum of Understanding or MoU 2017). Unofficial translation provided by Uselli, as revised by Di Filippo, Marati and Palm, available at: https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf [Accessed 09.09.2020]
[62] Articles 2(2) and 4 MOU 2017, Ibid.; Also see Dastyari, A. and Hirsch, A., supra note 40, p. 449.
[63] Article 5 MoU 2017, Ibid.
[64] Dastyari, A. and Hirsch, A., supra note 40, p. 449.
[65] Den Heijer, M., supra note 3, p.213; see also Di Pascale, A., supra note 42, p. 300.
[66] European Council meeting, Conclusions, EUCO 9/18, 28 June 2018. Available at: https://www.consilium.europa.eu/media/35936/28-euco-final-conclusions-en.pdf [Accessed 09.09.2020].

The illustrated strategy is complemented by a multitude of further European components. Among them are readmission agreements with countries of origin, aimed at facilitating the reception of intercepted migrants through, again, technical and economic support by Italy and the EU[67]. Further, the EU's engagement is supported by the already existing EU Border Assistance Mission to Libya (EUBAM), 'a civilian Mission under the Common Security and Defence Policy (CSDP), to support the Libyan authorities in improving and developing the security of the country's borders'[68]. While not explicitly directed at migration policy when it was established in 2013, its original mandate was extended multiple times, and in 2016 it also came to include the 'advice and capacity-building in the area of...migration [and] border security'[69]. Its mandate has subsequently been extended[70]. Since October 2016, the EUNAVFOR Med Operation (Operation *Sophia)* [71], has provided patronage of the LCG Training stipulated in the 2017 MoU[72], which is also a secondary task of its successor, Operation *Irini*[73].

d. Consequences for Migrant Protection

According to the partnership framework, the EU and its member states, as well as Libya and its neighbours, are sought to form a control network that halts migrants and refugees in such a way that the factual interception action is undertaken by intermediary countries, not European ones[74]. The LCG intercepts, while Europe supports from a distance, setting up a blockade of migrants[75]. The mechanisms have not been without results. Italy saw more arrivals in July 2016 alone than in the entire year of 2018, with the downward trend continuing[76]. This can be linked directly to the EU 'gradually shifting search and rescue operations in international waters to the LCG'[77]. This is a highly worrisome development, considering Libya's dire human rights situation[78] and a steadily increasing number of migrants neither arriving nor returning[79]. While the number of refugees crossing the sea in 2016 dropped significantly, the number of those who died rose sharply[80]. In 2017, it was one in 43. In 2018, it was one in 18[81].

4. Interim Conclusion

What should be taken from this array of mechanisms is that the cooperation with Libya, which was initially launched by Italy alone, has long since been elevated onto the European sphere and must be understood within this EU-supported structure[82]. The 'Capacity-building policies' established by the framework of MPF, MoU, and

---

67 Giuffré, M. and Moreno-Lax, V., supra note 9, p. 90.
68 EU Border Assistance Mission in Libya (EUBAM); available at: https://eeas.europa.eu/csdp-missions-operations/eubam-libya/3859/about-eu-border-assistance-mission-libya-eubam_en. [Accessed 12.08.2020].
69 European Council, Press Release: *'EUBAM Libya: mission extended, budget approved'*, 4 August 2016, available at: https://eeas.europa.eu/delegations/zambia/10551/eubam-libya-mission-extended-budget-approved_en. [Accessed at 09.09.2020].
70 European Council, Press Release: *'Council extends the mandates of EU CSDP civilian missions for one more year'*, 30 June 2020, available at: https://www.consilium.europa.eu/en/press/press-releases/2020/06/30/council-extends-the-mandates-of-eu-csdp-civilian-missions-for-one-more-year/. [Accessed: 09.09.2020].
71 About EUNAVFOR Med Operation Sophia: https://www.operationsophia.eu/about-us/. [Accessed 09.09. 2020]. Operation Sophia is an EU naval military operation aiming to counteract established refugee smuggling routes in the Mediterranean.
72 Dastyari, A. and Hirsch, A. supra note 40, p. 450.
73 European Council, Press Release: *'EU launches Operation IRINI to enforce Libya arms embargo'*, 31 March 2020, available at: https://www.consilium.europa.eu/en/press/press-releases/2020/03/31/eu-launches-operation-irini-to-enforce-libya-arms-embargo/ [Accessed 09.09.2020].
74 Giuffré, M. and Moreno-Lax, V., supra note 9, p. 86.
75 Dastyari, A. and Hirsch, A., supra note 40, p. 451.
76 While the UNHCR recorded an annual total of arrivals in Italy of 181,436 in 2016, it sunk to 119,369 in 2017 and to as little as just 23,370 in 2018. The trend continued in 2019. See UNHCR, Operational Portal: '*Situation in the Mediterranean*', available at: https://data2.unhcr.org/en/situations/mediterranean/location/5205 [Accessed 09.09.2020].
77 UNOHCHR, supra note 34, pp. 12-3.
78 Amnesty International, supra note 38.
79 UNOHCHR, supra note 34, pp. 12-3.
80 dpa-International, '*2016 saw sharp drop in Mediterranean migrants, surge in deaths*', 6 Jan. 2017, at: https://www.dpa-international.com/topic/2016-saw-sharp-drop-mediterranean-migrants-surge-deaths-170106-99-774948 [Accessed 09.09.2020].
81 UNOHCHR, supra note 34, pp. 13.
82 Giuffré, M. and Moreno-Lax, V., supra note 9, p. 90.

Malta Declaration are explicitly directed at enhancing the LCG's impact on the Mediterranean Sea. Especially important in this respect is the framing of LCG interceptions as rescue operations and the subsequent disembarkation in Libya. As it is strictly Libyan officials carrying out the operations, and by their ad hoc nature[83], the EU establishes a system of 'contactless control', 'practiced on demand by partner countries'[84].

As will be shown below, the manner in which this blockade is designed poses a multitude of complex legal questions and challenges. By preventing physical contact between European administration and migrants, it becomes increasingly difficult to identify any jurisdictional link establishing European human rights responsibilities[85].

III. The Legal Scaffolding of Maritime Departure

For the migrants affected, LCG interceptions take place at the conjunction of leaving one place and entering another. The developments on the Mediterranean, thus, provoke a shift of legal attention from the right to enter, an obligation naturally in the effective range of the destination state, towards the right to leave, a provision that generally ought to be taken care of by the State of departure[86].

1. The Right to Leave a Country

The right that 'everyone shall be free to leave any country, including his own'[87] became a cornerstone of the Western liberal ideal of free movement[88]. In the following section, the right's normative context in human rights law and international law of the sea is illustrated, followed by its permissible restrictions.

a. Normative Context

The right to leave a country had already been included in Article 13 (1) of the Universal Declaration of Human Rights (UDHR)[89], and became universally binding for signatories to the ICCPR, through its inclusion in Article 12 (2)[90]. The latter then served as a model[91] for Article 2 (2) of Protocol No. 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[92]. By virtue of the ICCPR alone, the right to leave nowadays binds all Mediterranean countries and similar provisions can be found in many international treaties[93]. However, the ICCPR's Human Rights Committee (hereafter HRC) and the European Court for Human

---

83 Den Heijer, M., supra note 3, p. 215.
84 Giuffré, M. and Moreno-Lax, V., supra note 9, p. 85-6.
85 Den Heijer, M., supra note 3, p. 215; Giuffré, M. and Moreno-Lax, V., supra note 9, p. 85
86 Pijnenburg, A., supra note 17, p. 321.
87 Article 12 (2), International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. Available at: https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf [Accessed 09.09.2020].
88 Grahl-Madsen, A., Melander, G., 'Article 13', in Gudmundur, A., and Eide, A. (eds): *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Netherlands: Martinus Nijhoff, 1999), p. 274.
89 United Nations, Universal Declaration of Human Rights, 10 December 1948, Avialable at: https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf [Accessed 09.09.2020].
90 ICCPR, supra note 85.
91 Markard, N., supra note 28, p. 594.
92 Protocol No 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, 16 September 1963, ETS 46. Available at: https://www.coe.int/de/web/conventions/full-list/-/conventions/rms/090000168006b65c [Accessed 09.09.2020].
93 Article 8 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, United Nations, 18 December 1990, Treaty Series, vol. 2220, p. 3; Doc. A/RES/45/158. Available at: https://www.ohchr.org/en/professionalinterest/pages/cmw.aspx [Accessed 09.09.2020]; Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, United Nations, 7 March 1966 Treaty Series , vol. 660, p. 195. Available at: https://treaties.un.org/doc/Treaties/1969/03/19690312%2008-49%20AM/Ch_IV_2p.pdf [Accessed at 09.09.2020], Article 10 of the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live: resolution / adopted by the General Assembly, 13 December 1985, A/RES/40/144. Available at: https://www.un.org/en/genocideprevention/documents/atrocity-

Rights (ECtHR) are the only international treaty bodies that have substantively assessed its matters[94] and shall therefore be the guiding voices interpreting its scope in the context of this article.

While leaving a country is one thing, entering a different country is another. Hence, while the right to leave is considered to be closely related to the right to seek asylum[95], the destination state, however, still upholds the sovereignty to police entry and guard its borders. Borders are considered the primary means of upholding international stability, peace and order[96]. The notion that a border needs to be unshakably stable is articulated by Article 62(2) of the Vienna Convention of the Law of Treaties (hereinafter 1969 VCLT), which sets out that: *'[a]* fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary'[97].

Leaving a country, hence, is far from equal to entering another[98]. This has prompted some commentators to call the right to leave a mere 'half right' – hollow without a corresponding permission of entry by another state[99]. This notion, however, would place the entire international community in the position of a collective guarantor to enable the right to leave[100]. According to Article 47 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), however, each State is only liable for its respective international obligations. This constitutes an *independent*, rather than a collective responsibility to guarantee the rights of any signed treaty[101]. . Thus, the idea of the right to leave as a 'half right' opposes the principle that of such independent responsibility[102]. Instead of an 'anomaly of lack of legal rights'[103], it therefore has 'a substance of its own'[104].

b. Permissible Restrictions

Article 12 (3) ICCPR states that the right can be subjected to restrictions provided by law, given they are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and as long as they are consistent with the other rights of the Covenant. Hence, while it is not an absolute right[105], any restriction must comply with the requirements put forth in 12 (3) ICCPR. The HRC's General Comment No. 27[106] holds an array of principles on the normative extent of the right to leave. Any restriction needs to be proportionate, constituting the least intrusive of multiple available and suitable measures[107] and must not discriminate[108]. Notably, any restriction 'must not impair the essence of the right' - the general freedom to leave should remain the norm

crimes/Doc.26_Declaration%20on%20the%20Human%20Rights%20of%20Individuals%20who%20are%20not%20nationals.pdf [Accessed 09.09.2020].

94 Harvey, C., and Barnidge, R., 'Human Rights, Free Movement, and the Right to Leave in International Law', in *International Journal of Refugee Law*, vol. 19, no. 1, 2007, pp. 1–21 (5).

95 Article 14 of the UDHR, see Markard, N., supra note 28, p. 595.

96 See, for example, Trevisanut, S., 'The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea', in *Leiden Journal of International Law*, vol. 27, no. 3, 2014, pp. 661–675 (670).

97 Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf [Accessed 09.09.2020].

98 Harvey, C., and Barnidge, R., supra note 93, p. 2; Moreno-Lax, V., *Accessing Asylum in Europe.* (First Edition, UK: Oxford University Press 2017), Chapter 9, p. 341.

99 Juss, S., 'Free Movement and the World Order', in *International Journal of Refugee Law*, vol. 16, no. 3, 2004, pp. 289–335 (293).

100 Den Heijer, M., supra note 3, p. 148–50.

101 International Law Commission (ILC), Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA Commentary), (2001), *Yearbook of the International Law Commission*, 2001, vol. II, Part Two ('ARSIWA Commentary'), on Article 47 ARSIWA, p. 124.

102 Moreno-Lax, V., supra note 97, p. 345.

103 Juss, S., supra note 98, p. 293.

104 Moreno-Lax, V., supra note 97, p. 346.

105 Goodwin-Gill, G. and McAdam, J., *The Refugee in International Law*, (UK: Oxford University Press, Third Edition, 2007) p. at 370; Den Heijer, M., supra note 3, p. 152.

106 UN Human Rights Committee, *General Comment No. 27: Article 12 (Freedom of Movement)*, UN Doc. CCPR/C/21/Rev.1/ Add.9, 2 November 1999. Available at: https://undocs.org/CCPR/C/21/Rev.1/Add.9 [Accessed: 09.09.2020].

107 Ibid, Para. 14.

108 Ibid., Para. 18.

and ought not to become the exception[109]. Despite the minor variations of wordings, the accessible case law of the ECtHR on limitations under Article 2 (3) Protocol No 4 ECHR suggests a very similar test. It demands lawfulness, a legitimate purpose of aim of the interference, and for it to be 'necessary in a democratic society'[110]. Consequently, any interference with the right to leave must be in accordance with the law, pursue a legitimate aim, and be proportional.

2. Jurisdictional Spheres

Jurisdiction is not always an intuitive concept. Frequently referred to as 'sovereignty', it generally encompasses the competency of a state, be it legislative, executive or judicial, and presents an important 'threshold criterion of responsibility for human rights violations'[111].The complicated nature of cooperation-based containment policies using interceptions by third states lies in their character of 'outsourcing'[112] immigration control and thereby keeping potentially problematic conduct away from the destination State's own territory and, potentially, jurisdiction. Containment policies alter the preconceptions of responsibility for departure and destination. The challenge, thereby, is to legally comprehend whether and how the destination State retains its involvement and, possibly, bears responsibility. Therefore, it helps to depart slightly from the classic approach of pinpointing the violations first and subsequently addressing the issue of jurisdiction and attribution. Instead, for the benefit of the article's clarity, the different levels of jurisdiction should be briefly addressed first, elaborating subsequently whether the particular conduct falling under it may amount to a violation of rights.

a. Territoriality

As a basic rule, a State's jurisdictional competence is territorial[113]. Hence, a migrant vessel in Libyan territory will be under Libyan jurisdiction, while European jurisdiction is not exactly self-evident. The general rule of territoriality implies, however, that exceptions have been developed, and extraterritoriality, thus, does not *per se* prevent responsibility, depending on the specific facts of the case [114]. The rationale behind loosening a State's territorial confines of jurisdiction is rather unambiguous. If it was not, a state could easily 'perpetrate violations […] on the territory of another State, which violations it could not perpetrate on its own territory'[115] and effectively nullify the *telos* of human rights treaties through diplomatic relations – an 'unconscionable'[116] outcome.

---

[109] Ibid., Para. 10.
[110] *Luordo v Italy,* App. no. 32190/96, ECtHR 2003-IX, p. 117, paras. 94 – 97; *Bartik v Russia,* App. no. 55565/00, ECtHR 2006-XV, p. 111, paras. 38 – 52; *Napijalo v Croatia,* App. no. 66485/01, (ECtHR 13 November 2003), para. 74.
[111] Goodwin-Gill, G., 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement', in *International Journal of Refugee Law*, vol. 23, no. 3, 2011, pp. 443–457 (452); Brownlie, I., *Principles of Public International Law* (UK: Oxford University Press, Seventh Edition, 2008), p. 371.
[112] Den Heijer, M., supra note 23, p.190; Gammeltoft-Hansen, T., 'Outsourcing European Migration Control and the Reach of International Refugee Law' in Minderhoud, P. and Guild, E. (eds): *Citizens and Third Country Nationals: Examining Ten Years of the EU's Area of Freedom, Security and Justice. A Celebration of Ten Years of the European Journal of Migration and Law* (Netherlands: Brill, 2011).
[113] Human Rights Committee (HRC), *General Comment No 31: The nature of the general legal obligation imposed on States Parties to the Covenant (General Comment No 31)*, 29 March 2004, CCPR/C/21/Rev.1/Add. 13, at para 10. Available at: https://undocs.org/CCPR/C/21/Rev.1/Add.13 [Accessed 09.09.2020]; Committee against Torture, *General Comment No 2: Implementation of Article 2 by States Parties (General Comment No 2)*, 24 January 2008, CAT/C/GC/2, para. 16. Available at: https://undocs.org/CAT/C/GC/2 [Accessed 09.09.2020]; *Coard and Others v United States of America*, Case 10.951, Report 109/99 (1999) at para 37; *Al-Skeini and Others v United Kingdom*, App. no. 55721/07, ECtHR 2011-IV, p.99, para. 131; *Soering v. United Kingdom,* App. no. 14038/88, (ECtHR 07 July 1989), para. 86; *Banković and Others v. Belgium and Others,* App. no. 52207/99, (ECtHR 19 December 2001), para. 61; *Ilaşcu and Others v. Moldova and Russia,* App. no. 48787/99, ECtHR 2004-VII, p. 179 para. 312.
[114] *Al-Skeini and Others v United Kingdom* supra note 112, para. 130 ff.
[115] *Lilian Celiberti de Casariego v. Uruguay,* CCPR/C/13/D/56/1979, HRC 29 July 1981; para. 10.3; See also *Issa and others v Turkey,* App. no. 31821/96, (ECtHR 16 November 2004), para. 71; *Isaak v. Turkey*, App. no. 44587/98), (ECtHR 24 June 2006), para. 19; *Solomou v. Turkey,* App. no. 36832/97, (ECtHR 24 June 2008), para. 45; *Andreou Papi v. Turkey, App. no. 45653/99, (ECtHR 22 September 2009),* para. 10; *Saadoon and Mufdhi v. UK,* App. no. 61490/08, ECtHR 2010-II, p. 61, para. 85.
[116] HRC, *Celiberti de Casariego v. Uruguay*, supra note 114, para. 10.3.

b. Effective Control

The HRC has therefore clearly stipulated that 'a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power *or* effective control of that State Party, even if not situated within the territory of the State Party' and 'regardless of the circumstances in which such power or effective control was obtained'[117]. For both Libya and the EU, this means that the ICCPR may most certainly be triggered extraterritorially and with regards to foreign nationals[118]. Additionally, concerning the EU, the ECtHR similarly found that the ECHR's object and purpose demand its application whenever, lawfully or unlawfully, a Party exercises 'effective control over an area'[119] or such of 'agent authority and control'[120], which must be determined according to the individual facts[121]. Specifically, the court noted in its *Al-Skeini* judgement[122], that 'whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual'[123]. A decade earlier, this was still expressly ruled out in *Bankovic*[124]. Based on the 'instantaneous'[125] nature of incident, the court rejected the claim that positive obligations under Convention would extend to securing the Convention rights proportionate to the level of control exercised, fearing the idea of jurisdiction to render 'superfluous and devoid of any purpose'[126]. Hence, *Al-Skeini* can be seen as establishing a more functional conception[127], according to which 'authority over' or 'control of' a given situation is the decisive threshold for extraterritorial jurisdiction.

To establish exceptional, extraterritorial jurisdiction under Article 1 ECHR, the ECtHR distinguishes explicitly between two forms of effective control: *de jure* and *de facto* control.

Regarding the former, it stated that 'nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality' may serve as 'suggested bases' of extraterritorial *de jure* jurisdiction[128]. The latter includes factual exercise of state authority with regards to jurisdiction and responsibility. The distinction is particularly pertinent in the context of European maritime interceptions, as *Hirsi* established the significance of *de jure* control by virtue of flag[129], existing independently from de facto control[130].

The HRC, on its part, pointed out that it is 'not the place where the violation occurred, but [...] the relationship between the individual and the state in relation to the violation' that matters in order to establish jurisdiction.[131] Similarly, the International Court of Justice (ICJ) has famously stipulated that '[p]hysical control of a territory, and

---

117 HRC, General Comment No. 31, (2004), para. 10.
118 HRC, *Concluding Observations on Israel*, 21 August 2003, CCPR/CO/78/ISR, para. 11.; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* (International Court of Justice (ICJ), Advisory Opinion July 2004), para. 111. Similarly, *Armed Activities on the Territory of the Congo,* (International Court of Justice (ICJ), 19 December 2005), paras 178–180, 216 and 219; *Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia),* Order on the Request for the Indication of Provisional Measures, (International Court of Justice (ICJ) 15 October 2008), para. 109; Moreno-Lax, V., supra note 97, p. 261.
119 *Loizidou v. Turkey,* App. no. 15318/89, (ECtHR 18 December 1996), para. 62.
120 *Al-Skeini and Others v United Kingdom* supra note 112, para. 133 ff and 138 ff.
121 Cf. *Al-Skeini and Others v. the United Kingdom*, supra note 112, paras. 132 and 136; *Medvedyev and Others v. France* (Application no. 3394/03) 29 March 2010, paras. 65, 67; *Banković and Others v. Belgium and Others,* supra note 112, para. 73;
122 The case concerned the question of UK jurisdiction over noncombatants killed by British soldiers during security operations based on UN Security Council Resolutions and regulations of the Coalition Provisional Authority in Iraq.
123 *Al-Skeini and Others v. the United Kingdom,* supra note 112, paras 137.
124 This case had to assess the extent to which ECHR applied to acts performed by State Parties extraterritoriality due to the 1999 aerial bombardment of the Serbian radio/television station by the North Atlantic Treaty Organization (NATO) in Belgrade.
125 *Hirsi and others v Italy*, supra note 47, para.73., referring to *Banković and Others v. Belgium and Others,* supra note 112, para. 75.
126 *Banković and Others v. Belgium and Others,* supra note 112, paras 75.
127 Moreno-Lax, V., supra note 97, p. 280.
128 *Banković and Others v. Belgium and Others,* supra note 112, para 59.
129 *Hirsi and others v Italy,* supra note 47, para. 77.
130 Moreno-Lax, V., supra note 97, p. 280.
131 *López Burgos v. Uruguay,* Communication No. 52/1979, CCPR/C/OP/1, HRC 29 July 1981, para. 12.1.; Also see HRC *Celiberti de Caseriego v Uruguay*, supra note 114, para. 10.

not sovereignty or legitimacy of title, is the basis for State liability for acts affecting other States'[132]. While the particularities of the different control tests may provoke different outcomes if applied to the same case, it suffices at this stage to emphasise that under both ICCPR and ECHR, it is not just territoriality but also the physical control or legal entitlement that may enable courts to invoke the principle of extraterritoriality when considering disputes concerning states' liability.

c. Normative Context of Maritime Departure

Means of extraterritorial immigration control thus naturally create tensions towards the right to leave and no difference is to be expected in cases of regulating someone's departure by sea. The central international legal framework covering the sea is the UN Convention on the Law of the Sea (UNCLOS)[133]. Apart from Turkey, Israel and Syria, every Mediterranean country is a signatory to UNCLOS, including the EU. 'The sea' covers three main areas: the territorial sea, the so-called 'exclusive economic zone' (EEZ) and the high seas. Another zone is the Search and Rescue (SAR) zone, which is not primarily concerned with territorial demarcations and will be dealt with in more detail below.

The principal rationale governing the territorial sea is that the coastal state shall govern it just as it does with land[134]. This is counterbalanced by another state's right of 'innocent passage', meaning that another State's maritime navigation shall not be interfered with as long as 'it is not prejudicial to the peace, good order or security of the coastal State' as stated in Article 19 UNCLOS. The EEZ is an area adjacent to the territorial sea, yet not a part of the coastal territory[135]. However, coastal states are allowed to exercise jurisdiction over specific policy matters[136]. Beyond the EEZ lie the high seas. Here, the law remains concerned with only two fundamental principles, namely flag-state jurisdiction and freedom of navigation[137]. Any state exercises exclusive jurisdiction and control over those ships flying its flag, independent of whether this ship lies in territorial or high seas[138]. This merely requires a 'genuine link' between ship and state[139], the nationality of the people on board does not play any role[140]. A coastal state shall generally not interfere with a ship in its territorial waters if it enjoys its right of innocent passage[141]. Reversely, a coastal state can obstruct the departure of a ship, if its passage is not 'innocent'[142].

The privilege of non-interference with navigation is premised 'on the existence or presence or possibility of another's legal interest - that of the flag state or the coastal state'[143]. It is generally acknowledged that something like the inflatable boats or dinghies are most commonly used by irregular migrants are not registrable 'ships' within

---

132 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (International Court of Justice (ICJ) 1970, Advisory Opinion June 1971), para. 118.; Also see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* supra note 117, paras. 107-113. Similarly, Inter-American Court of Human Rights, *Coard et al. v United States*, supra note 112, para. 37.

133 United Nations Convention on the Law of the Sea Montego Bay (UNCLOS), 10 December 1982, 1833 U.N.T.S. 397. Available at: https://www.refworld.org/docid/3dd8fd1b4.html [Accessed 09.09.2020].

134 Article 2 UNCLOS, Ibid; Also see Report of the International Law Commission covering the work of its eighth session, *Yearbook of the ILC 1956,* vol. II, p 265.

135 Article 33 (1) UNCLOS, supra note 132.

136 Of particular interest in the context of immigration are the permission controls to secure, *inter alia*, the coastal states' immigration laws. This does not touch the content of this work, however, since LCG interceptions are not protecting orderly immigration into Libya, but the opposite. See thereto, Markard, N., supra note 28,
p. 605 and for a more detailed discussion Den Heijer, M., supra note 3, p. 221, Section 6.3.1.2.

137 Articles 87 and 92(1) UNCLOS, supra note 132; Articles 2 and 6(1) Convention on the High Seas Geneva, 29 April 1958, United Nations, Treaty Series, vol. 450, p. 11. Available at. https://treaties.un.org/doc/Treaties/1963/01/19630103%2002-00%20AM/Ch_XXI_01_2_3_4_5p.pdf [Accessed 09.09.2020].

138 Article 92 UNCLOS, supra note 132. See, highly significant in the context of migration, *Hirsi and others v Italy*, supra note 47.

139 Article 91(1) of UNCLOS, supra note 132.

140 *M/V "Saiga" Case, Saint Vincent and the Grenadines v Guinea*, Judgment, ITLOS Case No 1, ICGJ 334 (ITLOS 1997), (1998) 37 ILM 360, 4th December 1997, International Tribunal for the Law of the Sea [ITLOS], para. 106

141 Articles 14–26 UNCLOS, supra note 132.

142 For important considerations regarding the innocence of registered migrant vessels, see Markard, N., supra note 28, p. 605.

143 Ibid, p. 599.; Gallagher, A.T. and David, F., *The International Law of Migrant Smuggling* (UK: Cambridge University Press, 2014), pp. 422–23; Goodwin-Gill, G., supra note 110, p. 448.

UNCLOS[144], and thus are navigating as stateless individuals. Therefore, it may not claim the right of free navigation or the right to innocent passage. As such dinghies yet remain the most usual form of transport for central Mediterranean migration, this work is premised on the notion that the boats intercepted by the LCG do not enjoy the status of a registered ship flying a state's flag[145], and can therefore generally be stopped, irrespective of whether this happens in Libyan territorial sea, EEZ or on the high seas[146]. They are, however, not without any protection. Most importantly, as this article argues in the following section, boarded migrants still enjoy international human rights[147].

IV. Capacity-building Containment Policies and Human Rights

In light of the analyses above, the notion of entire vessels of migrants being intercepted at sea and transported back to the departure country clearly has a bearing on the right to leave. The question is whether the infringement also amounts to an internationally wrongful violation. In this chapter, the European cooperation on migration containment with Libya will be put under scrutiny.

1. Libyan Violation of the Right to Leave

In addition to intercepting migrants in its territorial waters, the LCG has also upscaled its interception activity in international waters significantly[148]. While Libya's domestic law may permit restrictions of the right to leave merely within its territorial sea, international legal frameworks could possibly grant legitimate grounds for infringements even beyond this point.

In this regard, it should directly be addressed that a successful 'departure' by sea and an obstruction of the right to leave do not necessarily contradict each other: According to Article 2 UNCLOS, 'departure' is complete once a vessel has cleared the territorial waters[149]. Arguing, however, that having successfully 'departed' also implied having 'left' the country according to Article 12 (2) ICCPR, even though one was 'pulled back' into territorial waters shortly after would certainly contradict the *bona fide* requirement[150] of Article 26 of the VCLT. What matters is whether or not the right has lived up to any 'meaningful effect'[151].

a. Libyan Domestic Law

As aforementioned , Libya exercises full sovereignty over its territorial waters, while the migrant vessels which this article refers to do not enjoy any right to innocent passage and may generally be stopped and searched according to the domestic laws of Libya. In the Libyan case, however, even acts under its territorial sovereignty quickly seem problematic with regards to international human rights protection.

---

144 Markard, N., supra note 28, p. 599, with further references.
145 Ibid.; Gallagher, A.T. and David, F., supra note 142, p. 422-23.
146 Discussion surrounding the application of, for instance, Article 17(2)(g), 27(1)(d) or 33 or UNCLOS (supra note 132) are therefore of no relevance in the context of this work.
147 See, for example, *Medvedyev and Others v. France and others*, *Hirsi and others v Italy* supra note 47; *Xhavara and Others v. Italy and Albania,* App. no. 39473/98, (ECtHR 11 January 2001).
148 UNOHCHR, supra note 34, p. 13, Section 3.2.1.
149 Hathaway, J. and Foster, M., *The Law of Refugee Status* (UK: Cambridge University Press, Second Edition 2014), p. 25.
150 '*Bona fide*' is latin for 'good faith' and refers to the principle that a mutual contract should always be performed in a genuine interest to fulfill the treaty's true purpose. This is codified by Article 26 VCLT: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.
151 Den Heijer, M., supra note 3, p. 152. Similarly, Markard, N., supra note 28, p.597. Also cf. Kotzur: 'Each party shall [...] refrain from taking unfair advantage due to a literal interpretation, if the mere focus on the wording would fall short of respecting the objects, purposes, and spirit of the agreement', in Kotzur, M., 'Good Faith (Bona Fide)', in *Max Planck Encyclopaedia of International Law* [MPIL] (January 2009), para.20. Available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1412?rskey=Yks1Z5&result=1&prd=OPIL [Accessed 09.09.2020].

As noted, an important requirement to restrict the right to leave is for the restriction to be provided by law[152]. For the HRC, this means that any restrictive measure must be necessary to protect its purpose, be the least intrusive available[153] and must not discriminate[154]. Eventually, '[t]he laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.'[155]

In the Libyan reality, however, irregular entry into, stay in and exit from Libya is criminalized indiscriminately and no distinction is made between different degrees of protection needs[156]. While Article 10 of the 2011 interim Constitutional Declaration[157] does forbid the extradition of 'political refugees', no asylum system is established in Libya, neither in law nor practice[158]. The UN Support Mission in Libya summarizes Libya's national legal framework as follows: 'In practice, the overwhelming majority of migrants and refugees are placed in indefinite detention pending deportation without being charged, tried or sentenced under applicable Libyan laws'[159]. Libya's migration governance framework can be described as insufficient and to 'fall short of international standard'[160]. As also follows from 2(3) ICCPR and the requirement of effective remedies, Libya is obliged to ensure an 'effective, enforceable remedy for violation of a Covenant right, determined and enforced by a competent domestic authority'[161]. However, the country lacks any such 'legislative and administrative structures' according to the HRC's the most recent concluding observations[162].

It must be concluded that the Libyan migration framework cannot be understood as a system fit to provide legitimate grounds for a restriction in accordance with Article 12 (3) ICCPR.

b. EU – Libyan Cooperative Framework

One may consider whether the cooperative framework set up by both the EU and Libya could possibly lay grounds for permissible interceptions under Article 12 (3) ICCPR. Unfortunately, most of the European cooperative border control mechanisms with Libya take place under informal arrangements. They are not equally publicly available

---

[152] *Marques de Morais v. Angola,* CCPR/C/83/D/1128/2002, HRC 29 March 2005, para. 6.9; *Yklymova v. Turkmenistan*, CCPR/C/96/D/1460/2006, HRC 20 July 2009, paras. 2.3 and 7.5; *Orazova v. Turkmenistan*, CCPR/C/104/D/1883/2009, HRC 20 March 2012, paras. 2.3 and 7.4.

[153] HRC, *General Comment No. 27*, para. 14.

[154] Ibid., para. 18.

[155] Ibid., para. 13.

[156] Such as migrants, refugees, asylum seekers, victims of trafficking, migrants in vulnerable situations, migrant children, or other migrants in need of international human rights protection, see: UNOHCHR, supra note 34, pp. 24-25.

[157] The Libyan Interim Constitutional Declaration is currently the supreme law of Libya and was introduced following the overthrow of the Gaddafi government. Article 7 of the Declaration states that 'Human rights and his basic freedoms shall be respected' and that the state 'shall commit itself to join the international and regional declarations and charters which protect such rights and freedoms'. According to Article 17, international agreements must be ratified by the Transitional National Council. Whether they subsequently enjoy direct application in domestic law or need to be approved by additional bodies is not clarified in the declaration.

[158] UNOHCHR, supra note 34, pp. 24-25.

[159] Ibid. Equally, Amnesty International, supra note 38, pp. 20-3.

[160] UNOHCHR, supra note 34, p. 11.

[161] Taylor, P., *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights*, (UK: Cambridge University Press, 2020), Article 2(3), p. 78.

[162] HRC, *Considerations Of Reports Submitted By States Parties Under Article 40 Of The Covenant: Concluding observations of the Human Rights Committee, Libyan Arab Jamahiriya (Concluding Observations Libya)*, 15 November 2007 ACCPR/C/LBY/CO/4, para. 18. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/LBY/CO/4&Lang=En [Accessed 09.09.2020].

nor legally binding as traditional bilateral agreements[163]. Any '[r]estrictions which are not provided for in the law'[164] pose a risk of unlawful restrictions to the freedom of movement.

One main reason for states to deformalize their agreements is a desired adaptability to security concerns[165]. While this seemingly corresponds to a 'legitimate aim' of national security, it is not the law itself, but the measure based on it that may be assessed according to this notion[166]. Lending a formulation from European case law, the foreseeability of prosecution for a crime 'should not be confused with the foreseeability of the law pleaded as the basis for the intervention' [167], as otherwise 'any activity considered criminal under domestic law would release the states from their obligation to pass laws having the requisite qualities'[168]. This is transferrable to the case in question: The foreseeability of potential repercussions for migrants in breach of domestic immigration laws, should not be conflated with the foreseeability of the law providing the basis for such repercussions. It simply cannot be compromised[169].

Even if the framework was legally binding, it would not become any less problematic. Any provision that merely restricts someone's right to leave on the grounds that he or she is accused of 'irregular migration' likely lacks the precision necessary to comply with Article 12 (3) ICCPR, as 'no assessment has been made as to their proportionality in relation to the specific individuals affected'[170]. Further, the partnership framework misses any procedural warranties for the migrants to object their interception and effectively provides the LCG with exactly such 'unfettered discretion' that is incompatible with Article 12 (3) ICCPR. This article therefore strongly agrees with Den Heijer's conclusion, stating that the present bilateral framework 'seem[s] to be incapable of satisfying the requirement that, when human rights are at issue, the law must set limits to the discretionary powers of states'[171].

c. Smuggling Protocol

Controlling irregular migration is also part of underlying international community interests[172]. Important in this context is the commitment to fight human trafficking and smuggling. Their difficult differentiation has been tackled extensively by several academics[173]. In abstract legal terms, one may state that the former is committed specifically 'for the purpose of exploitation'[174], while smuggling is not. Rather, the purpose of smuggling is to obtain 'financial or other material benefit, of the illegal entry of a person into a State'[175]. Thus, while trafficking

---

163 Guild, E., and Stoyanova, V., 'The Human Right to Leave Any Country: A Right to be Delivered', in Benedek, W., Czech, P., Heschl, L., Lukas, K., and Nowak, M. (eds.): *European Yearbook on Human Rights 2018* (UK: Intersentia, 2018), pp. 373-394 (387); Specifically regarding Italy, Di Pascale, A., supra note 42, pp. 283–89; Cassarino, J-P., 'Informalising Readmission Agreements in the EU Neighbourhood', in *The International Spectator* vol. 42, 2007, pp. 179–196; For the case of Spain, see García Andrade, P., 'Extraterritorial Strategies to Tackle Irregular Immigration by Sea: A Spanish Perspective', in Ryan, B. and Mitsilegas, V., supra note 23, pp. 311-346 (313–16); Regarding joint border control operations, see Den Heijer, M., supra note 3, p. 247.

164 Joseph, S., and Castan, M., *The International Covenant on Civil and Political Rights : Cases, Materials, and Commentary*, (UK: Oxford University Press, Third Edition 2014), Article 12 ICCPR, p. 928.

165 Cassarino, J-P, supra note 162, pp. 179–196.

166 *Riener v Bulgaria*, App. No. 46343/99, (ECtHR 23 May 2006); *Bartik v Russia*, supra note 107.

167 *Medvedyev v France*, supra note 143, para. 100.

168 Ibid.

169 ECtHR, *Sunday Times v UK*, (Application No, 6538/74), 26 April 1979, para. 49; *Dzhaksybergenov v. Ukraine* (Application No. 12343/1), 20 June 2011, paras. 57–62; *Medvedyev v France*, supra note 143, para. 100.

170 Guild, E. and Stoyanova, V., supra note 162, p. 393. Equally, Pijnenburg, A., supra note 17, p. 321.

171 Den Heijer, M., supra note 3, p. 248.

172 Also see in detail Markard, N., supra note 28; Guild, E. and Stoyanova, V., supra note 162.

173 See, for instance, Dauvergne, C., *Making People Illegal: What Globalization Means for Migration and Law.* (UK: Cambridge University Press, 2008), Chapter 5.

174 Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, United Nations, 15 November 2000, Treaty Series, vol. 2237, p. 319; Doc. A/55/383. Available at: https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx [Accessed 09.09.2020].

175 Protocol Against the Smuggling of Migrants by Land, Sea, and Air, Supplementing the United Nations Convention against Transnational Organized Crime United Nations, United Nation, 15 November 2000, Treaty Series, vol. 2241, p. 507; Doc. A/55/383

possibly involves irregular migration, smuggling certainly does. In this chapter, the focus shall therefore be on the Protocol Against the Smuggling of Migrants[176].

The Smuggling Protocol obliges states to cooperate 'to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea'[177], also permitting to board and search stateless vessels[178]. States should exchange necessary information and secure the validity and legitimacy of travel or identity documents[179]. If suspicions are confirmed, the coastal state shall take 'appropriate measures with respect to the vessel and persons […] on board'[180]. Akin to the operation of international rules against illicit drug trafficking[181], this will most possibly imply confiscating the ship and arresting and prosecuting the crew[182]. This has led some commentators to conclude that the Smuggling Protocol 'establishes a treaty framework by which states can control the departure of migrants'[183].

What seems doubtful, however, is the extent to which this equally applies to the smuggled persons, as it does to the smugglers. As Article 5 of the Protocol stipulates unmistakably, those smuggled 'shall not become liable to criminal prosecution'. Also, while a state 'shall consider taking measures that permit […] the denial of entry'[184], denying departure to those smuggled is not mentioned anywhere[185]. This begs the question as to what measures are appropriate towards those persons, especially since 'the safety and humane treatment of the persons on board'[186] needs to be ensured at all times. Since the protocol lacks a clear answer, one must turn to the general rules governing interdictions at high seas. In the case of stateless vessels, the question of 'appropriate measures' is to be answered according to the domestic law of the coastal state, thus, Libya[187].

While it is already doubtful whether Libya upholds any provision prohibiting being on international waters without travel documents[188], the Libyan domestic legal system has much greater problems. As elaborated above, Libya's domestic laws concerning questions of irregular migration must be, in its entirety, dismissed as unfit to meet any standard of international human rights protection[189]. Thus, any international 'catch-all' element does not meet human rights standards if it merely relies on Libya's migration laws. Consequently, the Smuggling Protocol does not provide sufficient ground for an LCG interception and return of migrants which is in accordance with the requirements of Article 12 (3) ICCPR.

d. Obligations of Search and Rescue

(Smuggling Protocol). Available at: https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf [Accessed 09.09.2020].

176 Ibid. The Protocol Against the Smuggling of Migrants is an international protocol supplementing the Convention against Transnational Organised Crime and was adopted by the United Nations General Assembly in 2000. It aims at protecting migrant rights and reducing the power and influence of organised criminal groups. It entered into force on 28th January 2004 and has currently been signed by 112 parties and ratified by 149.

177 Ibid., Article 7.

178 Ibid., Article 8.

179 Ibid., Articles 11-13.

180 Ibid., Article 8(2)(7).

181 Den Heijer, M., supra note 3, p. 229, footnote 100.

182 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 19 December 1988, UN Doc E/CONF.82/15, United Nations, Treaty Series, vol. 1582, p. 95. Available at: https://www.unodc.org/pdf/convention_1988_en.pdf [Accessed 09.09.2020]; Guilfoyle, D., *Shipping Interdiction and the Law of the Sea* (UK: Cambridge University Press, 2009), pp. 84-85.

183 Harvey, C., and Barnidge, R., supra note 93, p. 14.

184 Smuggling Protocol, supra note 167, Article 11(5).

185 Markard, N., supra note 28, p. 607.

186 Smuggling Protocol, supra note 167, Article 9(1)(a).

187 Den Heijer, M., supra note 3, p. 229.

188 Ibid., p. 230.

189 See above, section IV. (1)(a).

While the EU-Libyan partnership framework itself is unfit to meet the requirements set out in article 12 (3) ICCPR[190], it regularly refers to the aim of ensuring safety at sea. Hence, the maritime legal framework for such search and rescue operations ("SAR")operations may possibly serve as a legitimate ground for the LCG to intercept migrant vessels.

In order to define states' duties in maritime rescue operations, international SAR obligations are relevant in two regards. Primarily, they impose the overall responsibility to assist any person 'in distress at sea'. This is a crucial constitutional component of the Law of the Sea and set out in multiple treaties[191]. The SAR Convention allows alteration to the rule of interdiction powers[192] in the different maritime zones[193], as states shall agree on specific SAR regions which are unrelated to national boundaries[194]. Indeed, the LCG has gradually assumed rescue operations in international waters[195]. As of August 2017, its SAR zone extended to 94 nautical miles off its coast, while specifically ordering foreign ships to keep out[196].

Furthermore, the obligation of SAR contains the responsibility to bring those rescued to a 'place of safety'[197]. According to the SAR Convention, a distress phase is 'a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance'[198]. The suitable criterion in this question, generally, is the 'preservation of life'[199]. As the typical dinghy carrying migrants across the Mediterranean is overcrowded and unseaworthy, it seems reasonable to assume that it is also, upon departure, 'in distress'. Being 'able to come into port under its own power […] can obviously not be cited as conclusive evidence that the plea of distress [was] unjustifiable'[200]. However, whether any place of disembarkation may qualify as a 'place of safety' seems debatable.

Touching on the obligation of non-*refoulement*, Den Heijer questions whether the notion of safety under the Law of the Sea and that under refugee law should be incorporated and taken as one[201]. Indeed, while the former calls upon both governments and shipmasters, the latter only applies to contracting states. The UNHCR also underlines that private shipmasters 'cannot reasonably be expected to assume any responsibilities beyond rescue'[202]. Equally, a private shipmaster encountering an unseaworthy dinghy should not be held responsible if the migrants are brought back to the very territory they have just left, possibly withdrawing their right to leave of any meaningful effect.

Although this is not in itself wrong, the argument Den Heijer construes *a contrario*[203] is unconvincing for contracting states. There is no reason to bless a signatory government with the same low expectations as applied in the laypersons' sphere. Contracting states, as they have 'signed the contract', can very well be expected to assume their

---

190 As well as Article 2(2) of Protocol No. 4 ECHR, supra note 90, respectively.
191 Article 98 UNCLOS, supra note 132; International Convention for the Safety of Life At Sea (SOLAS), 1 November 1974, 1184 UNTS 3. Available at: https://treaties.un.org/doc/publication/unts/volume%201184/volume-1184-i-18961-english.pdf [Accessed 09.09.2020]; International Convention on Maritime Search and Rescue (SAR), 27 April 1979, 1405 UNTS 23489. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201405/volume-1405-I-23489-English.pdf [Accessed 09.09.2020], (Ratified by all Mediterranean states except Egypt and Israel).
192 SAR, Ibid.
193 Den Heijer, M., supra note 3, p. 232.
194 SAR, supra note 183, Annex, paras 2.1.3–2.1.12.
195 UNOHCHR, supra note 34, p.17, Section 3.2.3.
196 Ibid.
197 SAR, supra note 183, Annex, para 1.3.2.
198 SAR, supra note 183, Annex, para 1.3.13.
199 Churchill, R. R, et al. *The Law of the Sea.* (New York: Juris Pub, Third Edition 1999), p. 63.
200 General Claims Commission United States and Mexico, Opinion rendered 2 April 1929, *Kate A Hoff v The United Mexican States*, 4 UNRIAA 444, reprinted in *American Journal of International Law* vol. 23, 1929, pp. 860–65 (860).
201 Den Heijer, M., supra note 3, p. 236
202 UN High Commissioner for Refugees (UNHCR), *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea (Final version, including Annexes)*, 18 March 2002, para 22. Available at: https://www.refworld.org/docid/3cd14bc24.html [Accessed 09.09.2020].
203 Den Heijer, M., supra note 3, p. 236.

responsibilities beyond rescue. It is therefore unpersuasive to abstract one right from another, when, for the beneficiary, the 'place of safety' under maritime law is close to the opposite under human rights law. Yet, the state is equally obliged by both treaties. As Den Heijer agrees himself, both sets of rules are 'complementary obligations'[204]. As such, however, obligations arising from one international regime 'do not displace obligations under another[205].

In the European context, the ECtHR concluded in *Hirsi* that the concept of a 'place of safety' should not be restricted solely to the physical protection of people, but necessarily also entails respect for their fundamental rights'[206]. Rather, 'the notion of 'safety' extends beyond mere protection from physical danger and must also take into account the fundamental rights dimension of the proposed place of disembarkation'[207]. Because of the thoroughly reported insufficiencies in its handling of migrants[208], Libya cannot be regarded as a 'place of safety' in any possible perspective. Rather, security constraints regularly hinder humanitarian aid delivering 'life-saving assistance'[209] and many migrants departing from Libya 'claim they would rather die at sea than go back to Libya'[210]. It is thus inconsistent with international human rights to allow the LCG pulling migrants back to Libya under the cloak of SAR operations, if, once back in the country, their 'preservation of life' is not guaranteed in the slightest[211]. Rather, through such a narrative, interdictions are falsely 'laundered into an ethically sustainable strategy of border governance'[212].

e. Interim Conclusion

It remains to summarize that no interception of irregular migrants by the LCG can reasonably be considered in accordance with Article 12 (3) ICCPR and the human right to leave, as long as the migrants in question are returned to Libya. In cases of people who not 'only' migrate, but furthermore intend to claim asylum, rejecting a right to leave possibly even equates to rejecting the very right to seek asylum[213]. Moreno-Lax convincingly elaborates that if one additionally takes Article 7 ICCPR into the equation, the general right to leave becomes an ever more fundamental pillar of the specified 'right to flee'[214]. Thereby, '[p]ublic order considerations will play a lesser role, if any at all'[215]. However, even if taken in isolation, Article 12 (3) ICCPR inhibits LCG interceptions and returns to Libya.

2. EU Responsibility

It does not sit easily before the backdrop of Article 2 of the Treaty on the European Union (TEU)[216] when the LCG violations happen in exercise of Libya's reciprocal obligations under their partnership with the EU[217]. Also,

---

[204] Ibid.
[205] In the context of European obligations, cf. Pijnenburg, A., 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?, in *European Journal of Migration and Law*, vol. 20, issue 4 2018, pp. 396-426 (400).
[206] *Hirsi and others v Italy*, supra note 46, para. 27 (5.2).
[207] Ibid., para. 27 (9.5)
[208] UNOHCHR, supra note 34; Amnesty International, supra note 38.
[209] UNHCR and IOM, '*Joint UNHCR and IOM statement on addressing migration and refugee movements along the Central Mediterranean route',* 02 February 2017. Available at: https://www.unhcr.org/news/press/2017/2/58931ffb4/joint [Accessed 09.09.2020].
[210] Giuffré, M. and Moreno-Lax, V., supra note 9, p. 98.
[211] Ibid.
[212] Moreno-Lax, V., 'The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without- Protection' Paradigm', in *Journal of Common Market Studies* Volume 56, Issue 1, 2018, pp. 119 – 140 (119).
[213] Ibid, at 348.
[214] Moreno-Lax, V., supra note 97, p. 349.
[215] Ibid, at 349.
[216] Treaty on the European Union (Consolidated Version), Treaty of Maastricht , 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002, Article 6 (2). Available at https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF [Accessed 09.09.2020].
[217] Article 2 of the TEU states that '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. The TEU, alongside Treaty on

in both international[218], as well as European[219] jurisprudence, there is no doubt that the jurisdiction of one state does not generally preclude that of another[220]. Thus, one may not only question the extent to which the EU is still founded on the 'respect for human rights'[221], but even whether the EU itself may be found responsible for their violations committed by the LCG.

The following section intends to explore the possible pathways of incurring such responsibility before the ECtHR, based on the EU's capacity-building support. This endeavour is without a doubt of primarily academic nature. Most pertinently, because the latest attempt for the EU to accede to the ECHR, and therewith comply with the intention expressed in Article 6 (2) TEU, failed in December 2014[222], meaning that the ECtHR until today remains without jurisdiction over the EU as an entity. It is beyond the scope of this work to discuss the legal particularities of such accession and its failure, which has been analysed by several academics[223]. Neither does the following section involve questions of division of responsibility between the EU and its Member States - in the Libyan case most importantly Italy[224]. Nevertheless, this work is based on the conviction that European migration control is a pan-European, rather than an Italian, Spanish or Greek issue. Based on both the applicable ECtHR case-law, as well as the Draft Articles on the Responsibility of International Organisations (ARIO), it is therefore intended to explore the possible directions a future ECtHR jurisdiction could take, provided the EU will one day accede to the ECHR.

a. Direct Responsibility

Questions of state authority are generally addressed by the International Law Commisions (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), widely considered[225] customary international law[226]. However, these are not directly applicable to the EU as an International Organisation (IO). The ILC has adopted its ARIO, which 'follow the same approach adopted with regard to State responsibility'[227]. They can be considered *lex specialis* to them[228], but also lack the use in international practice to consider them

---

the Functioning of the European Union (TFEU), is one of the two fundamental treaties on the functioning and role of the EU as a community of states and trade bloc.

[218] See, for example, HRC, *Lopez Burgos v Uruguay*, supra note 130, para 12.3.

[219] *Ilaşcu and Others v. Moldova and Russia* supra note 112; *Al-Skeini and Others v. the United Kingdom* supra note 112; *Al-Saadoon and Mufdhi v. United Kingdom,* supra note 114; Milanovic, M., 'Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court' Van Aaken, A., and Motoc, I. (eds): *The European Convention on Human Rights and General International Law* (UK: Oxford University Press, First Edition 2018), pp. 97 – 111.

[220] Article 47 (1) of the International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1. Available at: https://www.refworld.org/docid/3ddb8f804.html [Accessed 09.09.2020]; Crawford, J., *State Responsibility: The General Part*, (UK: Cambridge University Press, 2013) pp. 334-35. Pijnenburg, A., supra note 17, p. 323.; Gammeltoft-Hansen, T. and Hathaway, J., supra note 4, p.273.

[221] Article 2, Consolidated version of the Treaty on the Functioning of the European Union, 26.10.2012, C326/47, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN [accessed 13 September 2020].

[222] Opinion 2/13 pursuant to Article 218(11) TFEU , ECLI:EU:C:2014:2454, European Union: Court of Justice of the European Union, 18 December 2014. Available at: https://www.refworld.org/cases,ECJ,5899f2c74.html [Accessed 09.09.2020]. The European Court of Justice found that the proposed agreement by which the EU was supposed to accede to the ECtHR was, in the form it was presented, not suitable with applicable European Law.

[223] Korenica, F., *The EU Accession to the ECHR: Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection* (Switzerland: Springer International Publishing, First Edition 2015); Kosta, V., et al (eds), *The EU Accession to the ECHR* (UK: Hart, Bloomsbury 2016).

[224] See in this regard, for example, Den Heijer, M., 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights', in *Journal of International Dispute Settlement*, vol. 4, no. 2, 2013, pp. 361–383.

[225] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia-Herzegovina v. Yugoslavia), (International Court of Justice (ICJ), Judgement 11 July 1996), para. 419; Crawford, J., and Brownlie, I., *Brownlie's Principles of Public International Law* (UK: Oxford University Press, Ninth Edition 2019), at 540.

[226] Customary International Law is a fundamental source of international law, consisting of two elements: State practice and *opinion juris*. The latter refers to all such unwritten norms that are considered to be collectively accepted as law by states, if not explicitly objected. These principles were first set out by the International Court of Justice in its Advisory Opinion on the 'Legality of the Threat or Use of Nuclear Weapons' form 8th July 1996.

[227] ILC, Draft articles on the responsibility of international organizations, with commentaries (ARIO Commentary), (A/66/10) and *Yearbook of the International Law Commission, 2011, vol. II, Part Two*, General Commentary para. 3.

[228] Pijnenburg, A., and Rijken, C., supra note 43, p. 712.

custom[229]. Generally following the same rationales as their customary counterparts, however, they may still guide this academic endeavour. Article 48 ARIO adopts the principle of independent responsibility, applicable in most cases of cooperative conduct[230]. In order to establish an IO's responsibility, Article 4 ARIO requires a breach of an international obligation attributable to it[231], 'regardless of the origin or character of the obligation concerned'[232]. All the EU members states are signatories to the ICCPR[233], and the EU as a whole is, inter alia, devoted to the rights in the ECHR[234]. Its actions ought to be guided by 'the universality and indivisibility of human rights'[235]. The ECtHR considers the ECHR applicable whenever a Party 'produce[s] effects' outside its territory[236], and exercises, be it lawfully or unlawfully[237], either 'agent authority and control' or 'effective control of an area outside its national territory'[238]. The EU generally incurs responsibility for the conduct of its institutions or agencies[239]. As the LCG is no such agency, the fundamental question is that of attribution. Through the rules of attribution, the conduct of actual organs[240], *de facto* organs[241] or those directed or controlled[242] is connected to the IO. In the case of capacity-building policies and their only indirect involvement in, rather than direct control over the eventual interception, attribution is not self-evident. Nevertheless, one may still explore whether the EU's impact on the LCG operations amounts to such an extent that it can be considered 'effective control' under Article 1 ECHR and Article 6 (2) of the TEU. Given the case it exercises jurisdiction, the implied repercussions for the EU's obligation of *non-refoulement* will be elaborated in particular.

i. *Public Powers*

One possible pathway could be derived from the ECtHR's *Al-Skeini*[243] judgement. The court held that extraterritorial jurisdiction shall be recognised when the country in question 'through the consent, invitation or acquiescence of the Government of that territory, […] exercises all or some of the public powers normally to be exercised by that Government'[244]. Hathaway and Gammeltoft-Hansen[245] present an insightful interpretation of *Al-Skeini,* according to which 'jurisdiction for human rights purposes will follow under certain circumstances', 'where states are entitled to exercise public powers abroad', thus arguing it was specifically applicable to extraterritorial migration control as it constitutes such an exercise of public powers abroad[246].

---

229 Boon, K., 'New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organizations', in *Yale Journal of International Law*, 2011: Seton Hall Public Law Research Paper No. 2011-01, p. 9.; Pijnenburg, A. and Rijken, C., Ibid.

230 Just as Article 47 ARSIWA does, see ILC, ARIO Commentary, supra note 226, Article 48, para. 7.; Crawford, J., *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (UK: Cambridge University Press, 2002), p. 146, para. 5; Den Heijer, M., supra note 23, p. 192.

231 Just as Article 2 ARISWA does for states.

232 Article 10 ARIO.

233 Pijnenburg, A., supra note 17, p. 316.

234 European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002, Article 6 (2).
Available at: https://www.refworld.org/docid/3ae6b39218.html [Accessed 11 September 2020].

235 Article 21 TEU, supra note 215.

236 *Drozd and Janousek v. France and Spain,* App no. 12747/87, (ECtHR 26 June 1992), para. 91; *Banković and Others*, supra note 112, para. 67, *Ilaşcu and Others v. Moldova and Russia*, supra note 112, para 314; *Hirsi and others v Italy,* supra note 47, para. 72; *Al-Skeini and Others v. the United Kingdom,* supra note 112, para 131.

237 *Al-Skeini and Others v. the United Kingdom*, supra note 112, para. 132 and 136; *Medvedyev and Others v. France and others* supra note 143, para. 65, 67; *Banković and Others,* supra note 112, para. 73.

238 *Al-Skeini and Others v. the United Kingdom,* supra note 112; *Banković and Others supra note 112*; *Al-Saadoon and Mufdhi v. UK* supra note 114; *Hirsi and others v Italy,* supra note 47; *Loizidou v. Turkey*, supra note 116.

239 Hoffmeister, F., 'Litigating against the European Union and Its Member States - Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?', in *European Journal of International Law* vol. 21, 2010, pp. 723-747 (745–746); Boon, K., supra note 228, pp. 3–9.

240 Articles 4–7 ARSIWA; 6 – 8 ARIO.

241 Article 4(2) ARSIWA; 6(2) ARIO.

242 Article 8 ARSIWA; 15 ARIO.

243 *Al-Skeini and Others v. the United Kingdom,* supra note 112.

244 Ibid., para. 135, 144.

245 Gammeltoft-Hansen, T. and Hathaway, J., supra note 4.

246 Ibid. p. 267.

The exact contours of what constitutes such 'public power', thereby, remain widely debatable[247]. However, what is evident is that any such powers require that 'the acts in question are attributable to it rather than to the territorial State'[248]. In the case of the capacity-building policies at hand, however, this appears doubtful. Most importantly, because the LCG continues flying the Libyan flag, and no provision within the framework of mere capacity building includes formal European authority over the LCG. This is also underlined by the secondary laws of attribution of conduct. Here, '[t]he conduct of an organ of a State' shall be considered an act of an IO, if it is 'placed at [its] disposal'[249]. While the provision is not one to one transferable to Article 6 ARSIWA since any organ seconded to the IO will to some degree always remain in control of its State of origin[250], the essential mutuality remains the necessity to act 'in conjunction with the machinery' of the beneficiary[251]. Thus, even if the LCG certainly exercises the interception in the interest of the EU, it does not do so in the direct capacity of a formal EU authority.

Den Heijer rightfully makes a similar argument when discussing Article 6 ARISWA with regards to Italy and concludes that the lack of European Command structures 'would most likely rule out any argument for attributing the conduct' [252]. While this evaluation may differ in cases of joint patrol operations[253], the capacity building programme lacks any provision establishing a chain of command between EU authorities and LCG agents. This is *a fortiori* the case then for the question of coercion[254].

ii. *Decisive Influence*

An internationally wrongful act does not have to be an action but can also be an omission[255]. Instead of asking whether the EU could enforce interceptions, it may be more fruitful to ask *e contrario* whether it could stop them. In this regard, the ECtHR case of *Ilaşcu and Others v Moldova and Russia*[256] offers an insightful argument for establishing jurisdiction under Article 1 ECHR. The case concerned human rights violations committed by separatist local authorities of the Moldovian Republic of Transnistria (MRT)[257]. In its judgement, the ECtHR took particular heed of the support the local authorities of MRT received from the Russian Federation. This consisted, *inter alia*, of armaments, technology, and financial means[258], to such an extent that the court concluded the MRT was under the 'decisive influence' of the Russian Federation and survived only 'by virtue of the […] support given to it'[259]. The court therefore assumed a 'continuous and uninterrupted link'[260] of Russian responsibility for the

---

247 Milanovic, M., 'Al-Skeini and Al-Jedda in Strasbourg', in *European Journal of International Law*, vol. 23, issue 1, 2012, pp. 121–139 (130); Costello C., 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored', in *Human Rights Law Review*, vol. 12, no. 2, 2012, pp. 287–339 (297-8); Mallory, C., 'European Court of Human Rights Al-Skeini and Others V United Kingdom (Application No 55721/07) Judgment of 7 July 2011', in *International and Comparative Law Quarterly*, vol. 61, issue 1, 2012, pp. 301–312 (311); Bodini, S., 'Fighting Maritime Piracy Under the European Convention on Human Rights', *European Journal of International Law*, vol. 22, issue 3, 2011, pp. 829–84 (847); Gammeltoft-Hansen, T. and Hathaway, J., supra note 4, p. 266-71.

248 *Al-Skeini and Others v. the United Kingdom*, supra note 112, para. 135

249 Article 7 ARIO.

250 Sari, A., 'UN Peacekeeping Operations and Article 7 Ario: The Missing Link', in *International Organizations Law Review*, vol. 9, no. 1, 2012, pp. 77–85 (79); Ago, R., 'Third Report on State Responsibility', in *Yearbook of the International Law Commission, 1971, vol. II, Part One*, UN Doc. A/CN.4/246 and Add.1-3, pp. 268–269.

251 Note that the 'control' criterion is contingent on the 'disposal' criterion: '[*W]hen* an organ or agent is placed at the disposal of an international organization [not *whether*], the decisive question in relation to attribution of a particular conduct appears to be who has effective control over the conduct in question", see ILC, ARIO Commentary, supra note 226, Article 7, para. 8. For the contours of 'disposal', see Crawford, J., supra note 229, Article 6, para. 2.

252 Den Heijer, M., supra note 23, p. 193. Equally, Hoffmeister, F, supra note 238, p. 726.

253 See, for example, Pijnenburg, A., supra note 204, pp. 412-3.

254 Article 16 ARIO.

255 Article 4 ARIO.

256 *Ilaşcu and Others v. Moldova and Russia,* supra note 112.

257 A separatist regional administration within the territory of Moldova that declared its independence in 1991 but remained unrecognized by the international community.

258 *Ilaşcu and Others v. Moldova and Russia*, supra note 112, para. 390.

259 Ibid. para. 392.

260 Ibid. para. 393.

applicants and on this basis, significantly, condemned Russia for not preventing the violations allegedly committed[261].

Thus, responsibility was not assumed on the grounds that the MRT committed violations *because* of the Russian influence, but rather that Russia did not prevent the MRT's violations *despite* its influence. This is also important in application to the LCG, as it is hence of no concern whether the LCG can be compared to the MRT in its functioning or structure. What matters is whether the influence of the Russian Federation over the MRT is comparable to the EU's influence over the LCG. It is worth revising the modalities of the EU-Libyan agreements: The MoU is explicitly endorsed by the Malta Declaration, which in turn is based on, and specifies, the MPF. According to MPF, any partnership between the EU and its partners will be specifically evaluated along the 'measurable results' in returns, applying 'necessary leverage […] including development and trade'[262].

This differs, for example, from the assumption of European 'Direction' or 'Control' in the sense of Article 15 ARIO, which corresponds with Article 17 ARSIWA. The ILC states that the term must not be understood as requiring 'complete power'[263]. Rather, 'the adoption of a binding decision' may constitute a kind of direction or control, when the other part of such decision 'is not given discretion to carry out conduct that, while complying with the decision, would not constitute an internationally wrongful act'[264]. One could argue that this corresponds with the MPF, MoU, Malta Declarations framework insofar as 'the *de facto* binding nature of reciprocal commitments does significantly restrict the discretion available'[265] for Libya to comply with the partnership and yet protect the migrants' right to leave. However, the *telos* of the provision is aimed at 'an actual direction of an operative kind'[266]. The immediate act of interception is mostly at the discretion of the LCG. The partnership framework, from this angle, should rather be characterized as an incitement. Unfortunately, this form of incitement is not governed by the provisions of Article 17 ARISWA, 15 ARIO[267].

What constitutes jurisdiction according to the *Ilaşcu* judgement is not the immediate direction of the interception, but the omission of possible prevention while having sufficient leverage to do so: While Article 15 ARIO concerns the 'how' of an interception, an interpretation along the lines of *Ilaşcu* concerns 'if' an interception occurs at all. The agreed upon funding, training, and equipping is unambiguously conditioned on Libya hindering exit towards Europe or 'managing' the migratory flows. Without the substantial support from Europe, on the other hand, there is little reason conceivable why exactly Libya would have any such interest in intercepting irregular migration departing its territory. Considering the ongoing civil war and domestic unrest, it is far from obvious, for example, to extend its SAR zone so significantly and therewith increase the burdens of international responsibilities. It is also little apparent for Libya to have any enunciated desire to crack down on smugglers when the Government itself can hardly uphold any effective authority over the vast majority of its own territory[268]. Thus, even if European influence over the LCG cannot be considered a military occupation as in *Ilaşcu*, it is nevertheless decisive enough to establish a *conditio sine qua non*[269] for the LCG interceptions as a whole[270]. Guild and Stoyanova thus rightly argue that the LCG 'would not operate if it were not for the support that Libya receives'[271].

---

261 Ibid. para. 393.
262 European Council Conclusions, supra note 52.
263 ILC, ARSIWA Commentary, supra note 100, Article 17, para 7.
264 ILC, ARIO Commentary, supra note 226, Article 15, para. 4.
265 Giuffré, M. and Moreno-Lax, V., supra note 9, p. 104.
266 Crawford, J., supra note 229, Article 17, para 7; ILC, ARIO Commentaries, supra note 216, Article 15, para. 4.; Also c.f. Pijnenburg, A., supra note 197, p. 425.
267 Crawford, J., supra note 229, Article 17, para 7; ILC, ARIO Commentaries, supra note 216, Article 15, para. 4.
268 UNOHCHR, supra note 34, p. 10, Section 3.1.
269 Latin for a 'a condition without which it could not be', meaning an indispensable condition of which the object of discussion is its logical consequence.
270 Giuffré, M. and Moreno-Lax, V., supra note 9, p. 105-6; Guild, E. and Stoyanova, V., supra note 162, p. 380.
271 Guild, E. and Stoyanova, V., Ibid.

Arguably, one may find it hard to square such an approach with the dichotomy of either 'effective control over an area' or 'agent authority and control'. On the other hand, European border policies demonstrate a considerable tendency to continuously develop new models of border control, 'specifically intended to eclipse any jurisdictional links to the sponsoring State'[272]. Since the final determination of jurisdiction 'involves a value judgment to be assessed in the light of the functions of IHRL'[273], one should refrain from formalistically overemphasising the exact wording of the twofold 'effective control' tests and instead focus on whether the existing case-law provides a reasonable value judgement in the respective context. According to the author of this work, *Ilaşcu* does this with regards to the LCG. Alternatively, one could extend the existing ECtHR tests to also include 'control over situations'[274], involving considerations of '[t]he dangerousness of the effects, impact duration, choice of means and the vulnerability of the targeted or affected individuals' relative to the overall context[275]. The EU's capacity-building demonstrates such effective EU control over LCG interceptions.

Accordingly, the EU-Libya policy framework invokes jurisdiction under Article 1 ECHR and Article 6 (2) of the TEU. The subsequent omission to prevent the LCG's violation of the human right to leave then constitute a wrongful act according to Article 4 ARIO. The assumption that the EU exercises full jurisdiction over migrants intercepted by the LCG has fundamental repercussions, however, on which rights are actually violated under the ECHR. Most crucially, the premise of jurisdiction allows an exploration of a possible violation of the non-refoulement principle by the EU[276]. This will be elaborated on in the following section.

b. European Refoulement

The principle of *non-refoulement* is certainly one of the most important pillars of migrant protection. While it is expressly contained in some provisions, it has been interpreted into others and is further considered part of customary international law, even constituting *jus cogens*[277]. If one applies the arguments elaborated above and finds the EU establishes jurisdiction over migrants intercepted by the LCG, their return to Libya may amount to refoulement.

i. *Refoulement along the Lines of Jurisdiction*

The ECtHR has held on the European level that a State can be responsible under Article 3 ECHR[278] when it 'fail[s] to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known'[279]. Article

---

[272] Gammeltoft-Hansen, T., 'International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law', in *European Journal of Migration and Law*, vol. 20, issue 4, 2018, pp. 373–395 (380). Mann even argues that 'a court is also inviting such policies' and eventually 'contribute[s] to understandings of how to evade judicial review in future cases', see Mann, I., 'Dialectic of transnationalism: Unauthorized migration and human rights, 1993–2013', in *Harvard International Law Journal*, vol. 54, issue 2, 2013, pp. 315– 391 (369).

[273] Altwicker, T., 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts' in *European Journal of International Law*, vol. 29, issue 2, 2018, pp. 581–606 (591).

[274] Ibid, pp. 591–2.

[275] Ibid, p. 591.

[276] Moreover, other violations suffered in the transit State may be explored as well, such as torture in Libyan detention camps. See, for instance, Pijnenburg, A., supra note 17, p. 327.

[277] Jus cogens norms are those to which no derogation is possible. Cf. Allain, J., 'The Jus Cogens Nature of Non-Refoulement', in *International Journal of Refugee Law*, vol. 13, issue 4, 2001, pp. 533–558; Lauterpacht, E. and Bethlehem, D., 'The Scope and Content of the Principle of Non-refoulement: Opinion' in Feller, E. et al., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection.* (UK: Cambridge University Press, 2003), pp. 87-177 (141, para 195).

[278] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: https://www.echr.coe.int/Documents/Convention_Eng.pdf [Accessed 09.09.2020].

[279] *Mahmut Kaya v Turkey,* App. no. 22535/93, ECtHR 2000-III, p. 149, para 115;
Al Nashiri v Poland, App. No. 28761/11, (ECtHR 24 July 2014), para 509; *El- Masri v The Former Yugoslav Republic of Macedonia,* App. no. 39630/09, ECtHR 2012-VI, p. 263, para 198.

3 ECHR is flanked by the prohibition of collective expulsions[280]. Only an individual expulsion of an alien may allow sufficient consideration to still be in accordance with the rights of Article 3 ECHR[281].

In *Soering v. United Kingdom*[282], it further held that 'where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country', that person shall not be extradited[283]. Moreover, *Al-Saadoon* established that handing over detainees from one country's custody to another may also violate obligations under Article 3, even if no physical border is crossed in the instance[284]. This shows that non-refoulement under Article 3 ECHR applies when there is a transfer of jurisdiction no matter the political territory and resonates with the broad applicability of Article 7 ICCPR. According to the HRC, states must 'not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement'[285]. It is accepted as an implicit element of the Article 7 ICCPR, which is not limited to those cases where the person concerned has reached his/her destination[286].

As a result, the prohibition of refoulment under Article 3 ECHR, as well as Article 7 ICCPR, is to be understood as general responsibility to protect someone from harm 'regardless of territorial considerations, provided that a person is within the jurisdiction of a Contracting State'[287]. Thus, neither the expansive discussion regarding extraterritorial application of Article 33 GRC[288], nor its exclusive application to refugees is of any concern in the present discussion. Additionally, this explains that from a Libyan perspective, a pull-back action cannot be understood as a refoulement[289], since a return to Libya by Libyan authorities lacks the necessary transition of state authority[290].

As illustrated above, however, EU jurisdiction over LCG interceptions should not be ruled. If the above is correct, the argument that '*refoulement* will not arise if interceptions and returns occur within the territorial waters of Libya'[291] appears increasingly questionable. Since both returning migrants to a departure state where they risk suffering ill-treatment[292] and transferring someone to that departure state's authorities without even crossing the border[293] may constitute a violation of non-refoulement under Article 3 ECHR, it is then contradictory allowing a State exercising

---

280 Article 4 of Protocol No. 4 ECHR.

281 Schabas, W., *'The European Convention on Human Rights : A Commentary'* (Oxford University Press 2015) Article 4 of Protocol No. 4, Introductory Comments; Pichl, M. and Schmalz, D., '"Unlawful" may not mean rightless: The shocking ECtHR Grand Chamber judgment in case N.D. and N.T.', in *VerfassungsBlog*, 14.02.2020, Available at: https://verfassungsblog.de/unlawful-may-not-mean-rightless/ [Accessed: 09.09.2020].

282 In this landmark judgment, the ECtHR established that the extradition of a young German national to the United States would violate Article 3 of the ECHR, guaranteeing the right against inhuman and degrading treatment, as he was facing charges of capital murder and possibly the death penalty.

283 *Soering v. United Kingdom*, supra note 112, para 91.

284 *Al-Saadoon and Mufdhi v. UK,* supra note 114, at para 143.

285 HRC, *General Comments No 20*, para. 9.

286 Pijnenburg, A. supra note 17, p. 320.

287 Den Heijer, M., supra note 3, p. 140. Similar, Battjes, H., 'Territoriality and Asylum Law: The Use of Territorial Jurisdiction to Circumvent Legal Obligations and Human Rights Law Responses' in Kuijer, M., and Werner, W., (eds) *Netherlands Yearbook of International Law 2016: The Changing Nature of Territoriality in International Law* (Germany: Asser Press, 2017), Chapter 11, pp. 263-286 (283).

288 *Regina v. Immigration Officer at Prague Airport and Another*, Ex parte European Roma Rights Centre and Others, [2004] UKHL 55, United Kingdom: House of Lords (Judicial Committee), 9 December 2004*; Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Counci*l, Inc., et al., 509 U.S. 155; 113 S. Ct. 2549;125 L.Ed. 2d 128; 61 U.S.L.W. 4684; 93 Cal. Daily Op. Service 4576; 93 Daily Journal DAR 7794; 7 Fla. Law W. Fed. S 481, United States Supreme Court, 21 June 1993; Goodwin-Gill and McAdam, supra note 104; Den Heijer, M., supra note 23, pp. 181-88.

289 The fact that Libya has not signed the 1951 GRC or its 1967 Protocol is thus irrelevant regarding its ICCPR and CAT obligations.

290 See, for example, *M v Denmark* (Application No 17392/90), Commission Report, 14 October 1992, at para 1; *Mohammad Munaf v Romania* (1539/2006), Views, CCPR/C/96/D/1539/2006; Taylor, P., supra note 160, Article 7, p. 176.; Pijnenburg, A., supra note 17, p. 320.

291 Dastyari, A. and Hirsch, A., supra note 40, p. 457-8.

292 *Soering v. United Kingdom,* supra note 112.

293 *Al-Saadoon and Mufdhi v. UK,* supra note 114.

jurisdiction to prevent someone from leaving a country where that person faces said treatment in the first place[294]. Given the 'decisive influence' the EU incurs over LCG interceptions, the disembarkation of the migrants on Libyan territory entails a subsequent relinquishment of its effective control over the intercepted persons. Thus, a transfer of jurisdiction occurs. As long as the terms of the EU-Libyan partnership concerning LCG capacity-building are still in force and abided by, an EU violation of both Article 3 ECHR and Article 4 of Protocol No. 4 ECHR should therefore be assumed in cases of LCG interceptions.

ii. *Dangerous Precedent: N.D and N.T.*

The Grand Chamber of the ECtHR, on the other hand, has recently established a precedence of rather unfortunate implications for European migrant protection. Namely, its ruling in *N.D. and N.T. v Spain*[295]. While underlining that Article 3 ECHR remains an absolute right, it held that Spain's so-called 'hot returns'[296], in which the Spanish border guard immediately returned irregular migrants to the Moroccan territory, did not amount to a collective expulsion contrary to Article 4 of Protocol No. 4 ECHR.

Firstly, it found that 'the lack of an individual expulsion decision can be attributed to the applicant's own conduct'[297] if migrants cross a land border in an 'unauthorised manner' that is 'difficult to control and endangers public safety'[298]. As the applicants formed part of a larger group who intended entering Spanish territory by climbing a border fence, the court found their immediate return to Morocco without any chance to apply for protection justifiable. This does not hold up to closer scrutiny. Apart from fundamentally contradicting the non-penalisation principle of Article 31 GRC[299], the court's alleged recourse to 'well-established case-law'[300] that established the 'culpable conduct test' is dubious. Of the five cases cited, only two[301], incurred an actual 'own culpable conduct' test under Article 4 Protocol 4 ECHR. The rest merely referred to the hypothetical test but did not apply it in any way[302]. Notably, in both cases actually applying the test, the receiving state at least attempted to evaluate the applicant's claims[303]. This did not happen in the slightest in *N.D. and N.T.* Instead, the court emphasised the destination states' right 'to control their borders and to take measures against foreigners circumventing restrictions on immigration'[304].

Secondly, the court articulated a problematic way of balancing a state's interest to control its borders and a migrant's interest to cross it. According to *N.D. and N.T.*, it was to evaluate whether the destination state generally provided 'genuine and effective access to means of legal entry'[305].

---

294 Pijnenburg, A., supra note 17, p. 320.
295 *N.D. and N.T. v. Spain,* App. Nos. 8675/15 and 8697/15, (ECtHR 3 October 2017).
296 Spanish: '*devoluciones en caliente*'.
297 *N.D. and N.T. v. Spain,* supra note 294, para 200.
298 Ibid., para. 206.
299 Raimondo, G., 'N.D. and N.T. v Spain: A Slippery Slope for the Protection of Irregular Migrants', in *Border Criminologies Blog,*(University of Oxford Faculty of Law), 20 April 2020. Available at: https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/04/nd-and-nt-v-spain [Accessed 09.09.2020]
300 *N.D. and N.T. v. Spain,* supra note 294, para 200.
301 ECtHR, *Dritsas and Others v. Italy*, (Application no 2344/02), 01 February 2011*; Dzavit Berisha and Baljie Haijiti against the former Yugoslav Republic of Macedonia* (Application no. 18670/03), 10 April 2007.
302 *Khlaifia and Others v. Italy*, App no. 16483/12, (ECtHR 15 December 2016), para. 240, and *Hirsi Jamaa and Others v Italy*, supra note 47, para. 184; see also *M.A. v. Cyprus,* App. no. 41872/10, ECtHR 2013-IV, p. 193.
303 Hakiki, H., 'N.D. and N.T. v. Spain: defining Strasbourg's position on push backs at land borders?' in *Strasbourg Observers Blog,* 26 March 2020. Available at: https://strasbourgobservers.com/2020/03/26/n-d-and-n-t-v-spain-defining-strasbourgs-position-on-push-backs-at-land-borders/ [Accessed 06.09.2020]
304 *Ilias and Ahmed v. Hungary*, App. no. 47287/15, (ECtHR 21 November 2019), para. 213.
305 *N.D. and N.T. v. Spain,* supra note 294, para 209.

The contours of the specific term 'genuine and effective', first introduced to the context of collective expulsions in the *Khlaifia v Italy*[306] judgement, became increasingly ambiguous and unclear[307] when the court coupled it with the requirement of an 'access to means of legal entry'. Hakiki rightfully points to the extraordinarily 'diluted nature of the requirement' since 'it is neither "access to legal entry" nor "means of legal entry" which are considered, but a doubled-up version of the two'[308] that fully ignores the border assistance between Spain and Morocco[309]. Contrary to the court's findings[310], sub-Saharan migrants were 'systematically prevented from reaching the border on the Moroccan side'[311].

It is true that without jurisdiction, Spain does not bear responsibility for third-country exit prevention[312]. It is an exercise of double standards, however, to preclude Spain from bearing responsibility on a jurisdictional basis, yet entirely exclude the exit-prevention when determining the 'culpability' of resorting to irregular entry. The court has not recognised this tension but has instead only upheld the responsibility to enshrine the principle of non-refoulement[313]. It remains unclear how exactly this right remains guaranteed when the destination state is simultaneously allowed to engage in hot returns[314]. The case of *N.D. and N.T.* thus creates a dangerous precedent, as it waters down the requirements of a Member State to secure the rights of Article 3 ECHR, while it becomes increasingly restrictive for migrants to access them.

If one were to imagine the interceptions of irregular migrants by the LCG being litigated against the EU before the ECtHR, *N.D and N.T.* could pave the way for arguing that the EU was not responsible for Libyan obstacles to legal transit and that irregular maritime departure would constitute 'culpable conduct'. Such argument would clearly be oblivious to the reciprocal EU-Libya partnership. Unfortunately, however, the Grand Chamber demonstrated a similar disinterest for facts regarding the discriminatory Spanish and Moroccan border cooperation. The pivotal task of litigators will be to convince the court of, firstly, the doctrinally untenable nature of the requirements outlined in *N.D and N.T.*[315], and secondly, the need to engage in an expansive, rather than a restrictive approach towards migration control, in order to address its everchanging landscape.

c. EU Complicity

Jurisdiction under the ECtHR is not necessarily equal to responsibility. Considering the uncontested influence which the EU has on the LCG, it is worthwhile to also mention the EU's potential engagement beyond direct responsibility, namely potential complicity according to Article 14 ARIO. Subsequently, the nevertheless

---

306 *Khlaifia and Others v. Italy*, supra note 301.

307 Cancellaro, F. and Zirulia, S. 'Controlling Migration through De Facto Detention: The Case of the 'Diciotti' Italian Ship', in *Border Criminologies Blog* (University of Oxford Faculty of Law), 22 October 2018. Available at: https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/10/controlling [Accessed 09.09.2020]; Venturi, D., 'The Grand Chamber's ruling in Khlaifia and Others v Italy: one step forward, one step back?', *in Strasbourg Observers Blog*, 10 January 2017, available at: https://strasbourgobservers.com/2017/01/10/the-grand-chambers-ruling-in-khlaifia-and-others-v-italy-one-step-forward-one-step-back/ [Accessed 09.09.2020].

308 Hakiki, H., supra note 302; Similarly, Pichl, M. and Schmalz, D., supra note 280.

309 Raimondo, G., supra note 298.

310 *N.D. and N.T. v. Spain*, supra note 294, para. 212

311 *N.D. and N.T. v. Spain*, supra note 294, UNHCR intervention, para 155. Also see, Weizman, E. et al, 'Pushbacks in Melilla: N.D. and N.T. v Spain' in *Forensic Architecture*, 15 June 2020. Available at: https://forensic-architecture.org/investigation/pushbacks-in-melilla-nd-and-nt-vs-spain.; 'Melilla: No asylum for black men', in *Deutsche Welle (DW)*, 16 November 2017. Avilable at: https://www.dw.com/en/melilla-no-asylum-for-black-men/a-41404179 [Accessed: 09.09.2020].

312 *N.D. and N.T. v. Spain,* supra note 294, para 218.

313 Ibid., para 167, 181, 232.

314 Lübbe, A., 'The Elephant in the Room: Effective Guarantee of Non-Refoulement after ECtHR N.D. and N.T.?', in *VerfassungsBlog*, 19 February 2020. Available at: https://verfassungsblog.de/the-elephant-in-the-room/ [Accessed 06.09.2020].

315 Similarly, yet less optimistically suggesting to rather rely on the UN treaty bodies: Markard, N., 'A Hole of Unclear Dimensions: Reading ND and NT v. Spain', in *EU Immigration and Asylum Law and Policy Blog,* 01 April 2020, Available at: https://eumigrationlawblog.eu/a-hole-of-unclear-dimensions-reading-nd-and-nt-v-spain/ [Accessed: 09.09.2020].

contradicting nature of complicity on the one hand, and jurisdiction under the ECHR on the other will be addressed.

i. *Article 14 ARIO*

Pursuant to Article 14 ARIO, an IO can be held responsible if it aids or assists that state in committing an internationally wrongful act 'with knowledge of the circumstances' and if the act was 'internationally wrongful if committed by that [IO]'. If applicable, the IO is responsible not for the immediate commission of the act, but for the unlawful contribution to it. Mirroring Article 16 ARSIWA, both the rules and the uncertainties[316] that remain between states also apply to an IO[317].

First of all, Libya must have committed an internationally wrongful act. As elaborated above, a maritime interception and return to Libya by the LCG constitutes an internationally wrongful violation of the migrants' right to leave under Article 12 (3) ICCPR. Secondly, the financing, equipping and training of the LCG would have to establish a form of 'aid or assistance'. Required is less a specific form, rather than some 'causative contribution to the illegal act'[318]. Financing, thereby, is certainly included[319], and there is little reason to question that the equipment provided, and skills conveyed contributed 'significantly'[320] when they are used and applied directly in LCG operations.

Another question is that of knowledge, as required by Article 14 (a) ARIO. The ILC demands for Article 16 ARSIWA that 'the relevant State organ intended, […] to facilitate the occurrence of the wrongful conduct'[321]. While it goes without question that the EU intended the LCG to intercept migrant vessels, the more critical question is whether it needs to be proven that it also particularly intended a Libyan violation of Article 12 (2) ICCPR. The discussion regarding the exact extent of the knowledge element in Article 16 ARSIWA[322] is equally applicable to Article 14 ARIO[323]. However, when regarding the mere interception and return of migrants, such a lengthy discussion is not necessary. Be it the lack of sufficient domestic legal protection for migrants in Libya, the shortcomings of their partnership in terms of being 'in accordance with the law', the prohibition to criminalise those subject to smuggling or the wider situation in Libya unfit to be qualified as a 'place of safety'; Considering the close cooperation between the two parties, the EU cannot be reasonably considered to have been merely 'wilfully blind'[324], let alone to not have known what it 'should have known'[325]. Even under a strict interpretation of knowledge, the EU 'knew' what it was contributing to.

Finally, Article 14 (b) ARIO demands that the interception and return of migrants would be equally wrong if committed by the EU itself. Since an IO 'cannot do by another state, what it cannot do by itself'[326], the same is true the other way around: No party is bound by the obligations of another, if it is not part to said obligation itself,

316 Pijnenburg, A., and Rijken, C., supra note 43, p. 713; Aust, H., *Complicity and the Law of State Responsibility* (UK: Cambridge University Press, 2011), pp. 99–100.
317 ILC ARIO Commentary, supra note 226, Article 14, para. 1.
318 Crawford, J., supra note 219, pp. 402–3.
319 Jackson, M., *Complicity in International Law* (UK: Oxford University Press, First Edition 2015), pp. 153–5; Crawford, J., supra note 219, Article 16, para. 4.
320 ILC ARSIWA Commentaries, supra note 100, Article 16, p. 66, para. 5; ILC, ARIO Commentary, supra note 226, Article 14, para. 4.
321 ILC, ARSIWA Commentary, supra note 100, Article 16, p. 66, para. 5.
322 Aust, H., supra note 315, pp. 246-248; Crawford, J., supra note 219, p. 408; Jackson, M., supra note 302, p. 161; Lanovoy, V., *Complicity and Its Limits in the Law of International Responsibility* (UK: Hart, Bloomsbury, 2016) pp. 236-240.
323 ILC, ARIO Commentary, supra note 226, Article 14, para. 1.; Pijnenburg, A., and Rijken, C., supra note 43, p. 713.
324 Moynihan, H., 'Aiding and Assisting: The Mental Element Under Article 16 of the International Law Commission's Articles on State Responsibility', in *International and Comparative Law Quarterly*, vol. 67, issue 2 2018, pp. 455–471 (471).
325 'Constructive Knowledge Standard', suggested by Gammeltoft-Hansen, T. and Hathaway, J., supra note 4, p. 280-1. Criticized by Moynihan, H., Ibid., p. 471.
326 Crawford, J., supra note 229, Article 16, para. 6.

as laid down in Articles 34 and 35 VCLT[327]. This, also, is of little difficulty in the given case. The EU is just as bound to Article 12 (2) ICCPR as is the LCG. Also, the EU is bound by Article 7 ICCPR and the customary principle of non-refoulement, and, additionally, by their European counterparts of Article 3 ECHR and Article 2 (2) and 4 of Protocol No. 4 of ECHR[328].

The EU can undoubtedly be found complicit in LCG violations of migrants' right to leave under Article 12 (2) ICCPR. What seems much more questionable, however, is the relevance of such complicity before the ECtHR, addressed in the following section.

ii. *The Problem of ECtHR Jurisdiction over Complicit Behaviour*

The notion of the EU being complicit in a third country's human rights violation is complicated on several accounts, as Pijnenburg points out[329] lucidly: On the one hand, the ECHR does not explicitly prohibit assisting the commission of a human rights violation, but rather only explicitly prohibits itself from directly committing a violation[330]. Hence, the question of whether someone is complicit under the ARIO is not congruent with that of exercising jurisdiction under ECHR, as direct responsibility under the ECHR is the necessary precondition for the ECtHR's competence to adjudicate[331]. Moreover, the ECtHR would have to assess the occurrence of an internationally wrongful act by Libya[332]. Yet, as stated clearly in *Soering,* there was 'no question of adjudicating on or establishing the responsibility'[333] of the third country.

Based on *Soering*, however, Jackson suggests an expansive and progressive approach towards the question of jurisdiction by complicity[334]. As the ECtHR states that Article 3 ECHR applies to 'foreseeable consequences of extradition suffered outside [the extraditing state's] jurisdiction'[335], Jackson argues *Soering* contained a 'narrow preventive complicity rule', which prohibits to provide 'the principal state of the person of the potential victim'[336]. Similarly, Pijnenburg suggests understanding Article 3 ECHR as 'including a prohibition of aiding or assisting another State in breaching the prohibition of ill- treatment'[337]. Eventually, any extradition case likely 'derives the individual risk of a future injury' from some kind of assessment of the receiving state[338]. According to this understanding, derived responsibility under Article 14 ARIO could still constitute direct responsibility under Article 3 ECHR.

The notion of complicity should be broadened. As Jackson argues, 'there is no good reason to confine its application to one very specific form of complicity'[339]. This resonates with the HRC, who stated in *Munaf* that 'a link in the causal chain that would make possible violations in another jurisdiction' may nevertheless incur responsibility[340]. Assuming the ECtHR were to follow such interpretation, the court could establish that the EU breached its obligations under Article 2 (2) of Protocol No. 4 ECHR for being complicit in Libya's violations in

---

327 Ibid.
328 Pijnenburg, A., supra note 17, p. 330.; also see *Hirsi Jamaa and Others v Italy*, supra note 47.
329 Pijnenburg, A., supra note 204, p.420.
330 Ibid.
331 Ibid.
332 Ibid.; See also Den Heijer, M., supra note 223, p. 373.
333 *Soering v. United Kingdom,* supra note 112, para. 91.
334 Jackson, M., 'Freeing Soering: The Echr, State Complicity in Torture and Jurisdiction', in *European Journal of International Law*, vol. 27, issue 3 2016, pp. 817–830.
335 *Soering v. United Kingdom*, supra note 112, para 86.
336 Jackson, M., supra note 333, p. 824.
337 Pijnenburg, A., supra note 204, p.421.
338 Den Heijer, M., supra note 223, p. 374.
339 Jackson, M., supra note 333, p. 824. See, for instance, the application of this interpretation to offshore processing of asylum claims in African States in Davitti, D. and Fries, M., 'Offshore Processing and Complicity in Current EU Migration Policies (Part 2)', in *EJIL:Talk!, Blog of the European Journal of International Law*, 11 October 2017. Available at: https://www.ejiltalk.org/offshore-processing-and-complicity-in-current-eu-migration-policies-part-2/ [last accessed 05.09.2020].
340 *Mohammad Munaf v Romania*, supra note 289, para 14.2.

the sense of Article 14 ARIO, as it significantly and knowingly contributed to the LCG's violations under Article 12 (2) ICCPR.

V. Conclusion

This article sought to answer two main research questions. Firstly, whether a maritime interception by the LCG can possibly be in accordance with Libya's responsibility to protect a person's right to leave. Secondly, whether and how the EU as a legal entity may incur responsibility for Libyan violations of said right.

Regarding the former question, the answer, clearly, is 'no'. Because of insufficient domestic legal protection for migrants in Libya, the shortcomings of the EU-Libya partnership in terms of being in accordance with the law, the prohibition to criminalise smuggled persons and the utter inability to consider Libya a 'place of safety' even for SAR operations, no interception of irregular migrants by the LCG and subsequent disembarkation in Libya can be reasonably squared with the human right to leave.

Regarding the latter question, the answer is not as unambiguous. While the EU remains to accede to the ECHR, an academic endeavour analysing relevant case-law, nevertheless, may shed light on possible pathways in the future. As shown, different outcomes seem possible. Due to the indirect nature of capacity-building, established grounds for attribution of conduct are incapable of grasping the indirect European involvement in LCG interceptions. Moreover, the recent *N.D. and N.T.* ruling offers concerningly restrictive arguments to free the EU of much of its responsibility to protect human rights. However, grounds for more expansive interpretations exist. A progressive reading of *Soering* could also allow triggering EU jurisdiction for assisting in Libya's violations of the right to leave. Preferably, however, the *Ilaşcu* line of argument allows establishing direct EU jurisdiction under the ECHR, for preventing the LCG violations happening. This, then, further paves the way to understand LCG capacity-building as a form of unlawful refoulement.

It remains to be seen which exact directions future Strasbourg rulings will take in this regard. As this article has shown, however, an earnest commitment to human rights protection will require to be very critical of new European forms of extraterritorial border control, and to approach them with the willingness to understand migrant protection expansively.

CRITICALLY EVALUATING THE INTERNATIONAL CRIMINAL COURT THROUGH A REALISTICALLY UTOPIAN LENS: A PRAGMATIC APPRAISAL

Ethan Gren[1]

ABSTRACT

Numerous critics have subjected the ICC to utopian expectations such as ending impunity, which it has failed to meet, resulting in the mass criticism of the Court, causing a legitimacy crisis. Against this backdrop, this article critically evaluates the ICC through the lens of John Rawls' realistic utopia. It is that submitted the application of realistic utopia to the ICC significantly alleviates its legitimacy crisis by restoring a strong element of faith and legitimacy in the Court. The ICC, viewed through a realistically utopian lens, is a success. In order to demonstrate this, section one firstly provides a brief overview of the ICC and defines realistic utopia. Its theoretical use and application to the ICC is then outlined and justified. Section two illustrates how the euphoric appetite for the ICC and international criminal justice at the Court's inception instilled it with utopian expectations, which it has failed to meet, resulting in mass scholarly criticism, causing the current legitimacy crisis. Thereafter, section three provides the realism in realistic utopia. It injects a much-needed dose of realism into the critical evaluation of the ICC, illustrating many criticisms are unjustified, alleviating their critical sting. Finally, section four utilises the analysis in the preceding two sections and critically evaluates the ICC through the lens of realistic utopia. It is argued that the Court's legitimacy is restored through the dismissal of unjustified criticism, subsequently engaging in a pragmatic appraisal of the ICC in that the Court makes valuable contributions to international criminal justice through its work.

[1] BCL Graduate of University of Oxford. LLB Law at Newcastle University, including a year studying at McGill University Law Faculty.

Introduction

The International Criminal Court (hereafter, the ICC) is a remarkable achievement. Once a pipe dream, a permanent international criminal court to try and punish the world's most heinous criminals is now a reality. It has raised international criminal accountability to unprecedented levels, contributing significantly to ending the culture of impunity which permeated the 20th century whereby justice for international crimes was sparse and criminals remained beyond the reach of the law. From its inception, the ICC has been met with very high, utopian expectations, for instance, single-handedly ending impunity. Once reality ensued, it became evident the ICC was not meeting these expectations, nor was it capable of doing so. There exists a discrepancy between what the ICC is expected to achieve, particularly by critics, and what it can *actually* achieve in practice.[2] A wave of scholarly critique followed, replacing the ICC's euphoric spirit with manifest criticism, to the point that the ICC is rarely perceived in a positive light.[3] This has damaged the ICC's legitimacy to the point of crisis,[4] whereby faith in the Court as the pinnacle of international criminal justice is increasingly being questioned. Both Burundi and the Philippines have withdrawn from the ICC.[5] Burundi, the first State to withdraw from the Court, did so because it perceived it to be deliberatively targeting Africans for prosecution.[6] The Philippines withdrew after its President Rodrigo Duterte decided the country's justice system was sufficient and that membership of the Court was not necessary. By contrast, the US has never signed or ratified the Rome Statute, yet consistently antagonises the Court because it refuses to regard it as a legitimate institution.[7] Against this backdrop, this article critically evaluates the ICC through the lens of John Rawls' realistic utopia. It is submitted that the application of realistic utopia to the ICC significantly alleviates its legitimacy crisis by restoring a strong element of faith and legitimacy in the Court. The ICC, viewed through a realistically utopian lens, is a success.

In order to demonstrate this, section one firstly provides a brief overview of the ICC and John Rawls' concept of realistic utopia. Herein, it is defined as tempering our highest aspirations for something by what is achievable in practice.[8] Subsequently, its theoretical use and application to the ICC is then outlined and justified. Realistic utopia better aligns expectations of the ICC with reality, shortens the normative gap between ambition and reality, and constitutes an improved evaluative benchmark through which to evaluate the ICC. As such, realistic utopia restores the ICC's legitimacy through the dismissal of unjustified criticism and enables a greater appreciation of the Court's work and functions, such as sending moral messages and deterring perpetrators.

Section two illustrates how the euphoric appetite for the ICC and international criminal justice at the Court's inception instilled it with utopian expectations, which it has failed to meet, resulting in mass scholarly criticism, causing the current legitimacy crisis. Several prominent criticisms of the Court are analysed to bring these abstract issues into clearer focus: a failure to end impunity, a lack of deterrence, delayed justice, failure to garner state co-operation, and bias towards African States. This section provides the utopian expectations facet of the realistically utopian framework.

Section three provides the realism in realistic utopia. It injects a much-needed dose of realism into the critical evaluation of the ICC, with particular consideration of the criticisms in section two, illustrating they are unjustified and alleviating their critical sting. The ICC is constrained by inherent and practical realities existing within the

[2] Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2018) 173
[3] Marieke De Hoon, 'The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC's Legitimacy' (2017) 17 Int CLR 591, 593
[4] Joseph Powderly, 'International Criminal Justice in an Age of Perpetual Crisis' (2019) 32 *Leiden Journal of International Law* 1, 1
[5] Jason Gutierrez, 'Philippines Officially Leaves the International Criminal Court', *The New York Times*, 17 March 2019
[6] 'Burundi leaves International Criminal Court amid row', *BBC News*, 27 October 2017
[7] Patricia Teles, 'The ICC at the Centre of an International Criminal Justice System: Current Challenges' (2017) 8 *E-Journal of International Relations* 61, 62
[8] Mark Jensen, 'The Limits of Practical Possibility' (2009) 17 *The Journal of Political Philosophy* 168, 168

complex environment in which the ICC operates and international criminal justice more generally. In particular, complementarity, limited resources, the complex and inevitably lengthy nature of international criminal investigations and trials, a lack of an enforcement mechanism and dependence on state co-operation, the complex operations of deterrence in practice, and an inevitable degree of selectivity in prosecuting international crimes.

Finally, section four utilises the analysis in the preceding two sections and critically evaluates the ICC through the lens of realistic utopia. The ICC's expectations are reconfigured under realistic utopia, subsequently illustrating it is an improved evaluative benchmark for the ICC. It is then argued that the Court's legitimacy is restored through the dismissal of unjustified criticism, subsequently engaging in a pragmatic appraisal of the ICC in that the Court makes valuable contributions to international criminal justice through its work, and the often-overlooked contributions of sending moral messages and deterring perpetrators, further bolstering its legitimacy. The Court's existence and work is much more significant than critics too readily assume. Possible criticisms are considered and rebutted, before offering some final reflections going forward. It is concluded that the application of realistic utopia significantly alleviates the Court's current legitimacy crisis, and a strong element of legitimacy and faith can be restored in the Court as the pinnacle international criminal justice institution. The ICC, viewed through a realistically utopian lens, is a success.

1. *Descriptive formalities: the ICC and realistic utopia*

1.1 *The ICC*

On 1st July 2002, idealists in the international sphere achieved their pipe-dream: the creation of the permanent International Criminal Court.[9] Many hoped the Court would provide the medium through which to end impunity vis-à-vis atrocities and egregious human rights violations, which the international community had been incrementally striving towards for decades.[10] The Court's creation was finalised by the widespread ratification, signing and entry into force of the Rome Statute 1998.[11] Today, there are 123 state parties to the Statute, illustrating worldwide commitment to international criminal justice and ending impunity.

The ICC has competency over the core crimes which were at the forefront of the Nuremberg era,[12] namely the period whereby Nazi war criminals were tried in Nuremberg and brought to justice for their crimes committed during WW2. The Court has competency to deal with genocide, crimes against humanity, war crimes and crimes of aggression;[13] some of the 'worst offences known to human kind.'[14] The universal repression of these crimes is paramount, but the Court only has jurisdiction vis-a-vis States which have become a party to the Rome Statute,[15] unless a non-party state has made a declaration granting jurisdiction to the Court over the crime in question.[16] Once the ICC has jurisdiction, there exists three ways it can be exercised: a situation referred to the ICC Prosecutor by a State (self-referral), a Security Council referral to the Court, or when the ICC Prosecutor initiates an investigation.[17] The ICC's ability to exercise jurisdiction is governed by the principle of complementarity; the ICC is complementary to national jurisdictions.[18] Domestic justice systems have the chief responsibility of pursuing the accountability of individuals through prosecution and securing international criminal justice.[19] Under complementarity, a case is only admissible to the Court where a State is unable or unwilling to prosecute the

---

[9] Jack Goldsmith and Stephen D Krasner, 'The Limits of Idealism' (2003) 132 *On International Justice* 47, 53
[10] Hyeran Jo and Beth A Simmons, 'Can the International Criminal Court Deter Atrocity' (2016) 70 Int'l Org 443, 468-469
[11] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6 Available at: < https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> (Rome Statute)
[12] Manuela Melandri, 'The Relationship Between State Sovereignty and the Enforcement of International Criminal Law Under the Rome Statute (1998): a Complex Interplay' (2009) 9 Int CLR 531, 531-532
[13] Rome Statute, art 5
[14] Rene Blattmann and Kristen Bowman, 'Achievements and Problems of the International Criminal Court' (2008) 6 JICJ 711, 730
[15] Rome Statute, art 11(2)
[16] ibid, art 12(3)
[17] ibid, art 13
[18] ibid, art 1
[19] Stahn (n 1) 165

perpetrator.[20] When a case is deemed admissible to the Court, State parties are put under various obligations. For instance, one aspect considered integral to the success of prosecution is the duty of States to 'cooperate fully with the Court in its investigation and prosecution of crimes.'[21]

The preamble of the Rome Statute specifies that the ICC exists to enforce international criminal justice, prevent crimes within its jurisdiction, and is determined to end impunity.[22] Ending impunity may be the fundamental aim of the ICC enshrined in the Rome Statute, but international criminal justice has been associated with much broader aims.[23] For instance, retribution, deterrence, and restorative justice.[24] As such, the ICC has been bestowed with ambitious aims.[25] Emphasised in section two, over-extending the goals of international criminal justice, particularly seeking to end impunity, can be detrimental to the project as a whole.

1.2 *John Rawls and realistic utopia*

Political philosophy strives to produce the best possible picture of society,[26] and arrive at 'justified conclusions about how political life should proceed,' which real individuals will support.[27] John Rawls envisages a society where individuals are free, equal and have basic rights.[28] Rawls' *A Theory of Justice* is an attempt to devise the 'most adequate conception of justice to be used by a democratic society,' premised on realistic conditions.[29] To find the conditions under which societal institutions are considered just, he seeks to create a realistic utopia: 'an account of the world which is utopian in so far as it does not reflect existing social arrangements, but realistic in so far as it does not contravene anything we know about human nature.'[30] Rawls employs realistic utopia to prevent the recurrence of 'the great evils of human history' such as genocide and slavery.[31] These evils are caused by political injustices throughout history and can be prevented through the utilisation of realistic utopia;[32] through providing just, well-ordered and reasonable domestic political institutions.[33] It is imperative to instantiate these reliable and robust institutional structures, especially when juxtaposed with piecemeal solutions. For instance, individual court rulings, because of their unreliable and *ad hoc* nature, do not provide the same degree of justice-inducing ethos which substantive institutional structures do.

Realistic utopia is achieved by probing the 'limits of practical political philosophy;'[34] exploring a vision of the world whereby our highest aspirations 'for human society are balanced by our understanding of what humans can actually achieve.'[35] It is realistic in that the results it produces are 'workable and applicable to ongoing political and social arrangements,'[36] creating a 'reasonably just, though not perfect, democratic regime.'[37] Although international criminal law is not the context Rawls originally had in mind for the application of realistic utopia, this does not detract away from its utility in this new context. The concept, at its basic level, is concerned with tempering our highest aspirations by what is achievable in practice and reality. This is precisely what is needed in the context of

---

[20] Rome Statute, art 17
[21] ibid, art 86.
[22] ibid, preamble
[23] Stahn (n 1) 2.
[24] Tim Miejers and Marlies Glasius, Trials as Messages of Justice: What Should be Expected of International Criminal Courts?' (2016) 30(4) *Ethics and International Affairs* 429, 434
[25] Catherine Gegout, 'The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace' (2013) 34 TWQ 800, 812
[26] Jensen (n 7) 168
[27] Leif Wenar, 'John Rawls', *The Stanford Encyclopedia of Philosophy,* (25 March 2008) www.plato.stanford.edu/entries/rawls/
[28] ibid
[29] Jon Mandle, *Rawls's 'A Theory of Justice*' (Cambridge University Press 2012) 11
[30] Chris Brown, 'The Construction of a 'realistic utopia': John Rawls and International Political Theory' (2002) 28 Rev Int'l stud 5, 7
[31] Wenar (n 26) 29
[32] Deen K Chatterjee, *Encyclopedia of Global Justice* (Springer 2011) 931
[33] Wenar (n 26) 29
[34] John Rawls, *The Law of People's* (Harvard University Press 2001) 6
[35] Jensen (n 7) 168
[36] Rawls (n 33) 13
[37] John Rawls, *Lectures on the History of Political Philosophy* (Harvard University Press 2007) 11

the ICC. The reasons justifying the application of Rawls' realistic utopia as the critical evaluative benchmark in assessing the ICC will now be explored, illustrating its utility and justifying its transposition to this novel context.

1.2.1 *Better aligning expectations with reality*

Realistic utopia can balance our highest expectations of the ICC with what is achievable in practice by probing the limits of what is practically possible. This enables *better* appreciation of what the ICC can achieve in practice by providing a more realistic picture, and *better* aligning expectations with reality. The ICC ought to strive to achieve particular consequences, and to function in a way to maximise these consequences in the parameters of the particular difficulties and constraints it experiences.[38] This bears stark resemblance to realistic utopia by taking an ideal and maximising its *realisation* within the practical constraints in which we find ourselves situated.

1.2.2 Shortening the normative gap

Realistic utopia adequately shortens the disconnect between normative ambition and reality vis-à-vis the ICC. Currently, there exists a significant 'gap between normative ambition and reality;' a discrepancy between what we expect the ICC to be achieving, and the reality of what it is achieving.[39] In order to adequately address this, we need to ask ourselves the difficult questions of whether what we expected from the ICC when it was created exceeded what it could reasonably aspire to achieve, and whether this continues to do so now.[40] By grounding expectations in what can reasonably and practically be achieved in the limits of realistic utopia, the normative gap can be shortened. For example, taking the expectation of ending impunity and grounding it within the practical limits the ICC faces, such as the fact that its jurisdiction only extends to States who sign up to the Rome Statute, one can see that expecting the ICC to end impunity is utopian. Through taking an ideal the ICC aspires to achieve and grounding it within the practical limits of the field, one can discern expectations are too high. Thorough application of realistic utopia can mitigate this 'chronic unbalance,'[41] and shorten the gap between normative ambition and reality.

1.2.3 *Improving the evaluative benchmark*

Realistic utopia also improves the framework of evaluation for the ICC. International criminal justice needs to understand its existence in the context and circumstances of the world as they are, not what they *ought* to be.[42] Critical debates regarding the ICC have been largely flawed and unhelpful because they have omitted to identify the conditions and circumstances in which one might expect the Court to work and succeed.[43] A realistically utopian lens can be used to better 'articulate frameworks of evaluation,' which will re-energize and deepen the discourse surrounding the ICC, and enable reflection on ideas concerning what the ICC should be striving to achieve.[44] Rather than critically evaluating the ICC by an ideal which it cannot possibly achieve, it is evaluated by a realistically utopian ideal, grounded in practical realities and what is practically possible. With greater appreciation of the inherent complexities and realities at play, the Court's supposed problems and issues might be perceived with less scepticism and lament. This will result in both scholarly arguments and those further afield being more nuanced and pragmatic, with an 'open-minded' perspective being adopted towards the Court.[45] Utilising realistic utopia avoids the charge of a facile approach which many critics have adopted, namely one which omits to consider

[38] Miejers and Glasius (n 23) 437
[39] Stahn (n 1) 173
[40] Ernst Hirsch Ballin, 'The Value of International Criminal Justice: How Much International Criminal Justice Can the World Afford?' (2019) 19 Int CLR 201, 205
[41] Frederic Megret, 'International Criminal Courts and Tribunal: the Anxieties of International Criminal Justice' (2016) 29 LJIL 197, 218
[42] ibid, 221
[43] Jo and Simmons (n 9) 470
[44] Darryl Robinson, 'Inescapable Dyads: Why the International Criminal Court Cannot win' (2015) 28 LJIL 323, 324
[45] ibid

the various aspects and inherent complexities.[46] Most arguments concerning the ICC's limitations comprise no clear view on what exactly the court should be doing, and the yardsticks critically evaluating the ICC are unsound by virtue of not clarifying the ICC's precise task.[47] Stahn notes how the Court has "struggled to bring 'hard cases' that threaten powerful states,"[48] yet simultaneously fails to specify whether this is something the Court should realistically be striving to achieve and to what extent, and to offer any solutions that might help mitigate this problem. Using a facile and inappropriate benchmark has inevitably had adverse consequences for the ICC.

1.2.4 *Alleviating criticisms and restoring the ICC's legitimacy*

Realistic utopia significantly alleviates these consequences by restoring a strong element of faith and legitimacy in the ICC. The resulting critical diagnosis of how well the ICC is functioning depends on the baseline adopted to evaluate it.[49] Accordingly, if the ICC is diagnosed by an unjustified choice of baseline which falls outside realistically utopian parameters, naturally the result is dire. Disappointment in the ICC stemming from unmet, utopian expectations can be very damaging to international criminal justice, particularly for the ICC whose legitimacy in the international community and among affected populations is 'as delicate as the wings of a butterfly.'[50] Demonstrated in section two, the ICC is 'living on borrowed time' – a mere temporary and failed experiment which is in a constant battle to demonstrate its merit against a standard it can never reach.[51] This is partly due to a critical diagnosis which rests in the previously mentioned chasm between normative ambition and reality. By using a realistically utopian yardstick to critically evaluate the ICC, many facets of its critical diagnosis can be healed. This has the grander effect of restoring a strong element of faith and legitimacy in the ICC as the pinnacle institution of international criminal justice. Not only does this yield vast importance in terms of wider effects, it also prompts greater appreciation of the ICC's work and functions, further bolstering the ICC's legitimacy.

To improve on the current situation and avoid being overly utopian, it is necessary to conceive of a set of parameters which are realistically appropriate.[52] Eradicating unrealistic expectations can engender the ICC's growth as an institution.[53] In order to 'save the ICC from its pending implosion,' it is essential to understand its limitations, taking criticisms soberly.[54] Application of realistic utopia enables the Court's work and functions to gain evaluative weight and greater appreciation which hitherto, has not been possible. Consider the ICC's capacity to send moral messages and uphold international norms. As Simmons highlights, various studies suggest that the norms the Court embodies and upholds are supported by, and enjoy consensus within, communities which have been subject to egregious violations.[55] The ICC played an important role in stimulating local discussions on accountability norms and reform of the justice system in Uganda.[56] This, in conjunction with rebutting various unjustified criticisms of the ICC, buttresses the ICC's legitimacy significantly. Realistic utopia provides a new and interesting way to take a nuanced approach to an area of law that is 'over-studied and over-researched.'[57]

1.2.5 *Analytical caveat*

[46] Judge Anita Usacka, 'Promises Fulfilled? Some Reflections on the International Criminal Court in its First Decade' (2011) 22 Crim LF 473, 488
[47] Florian Jessberger and Julia Geneuss, 'The Many Faces of the International Criminal Court' (2012) 10(5) JICJ 1081, 1083
[48] Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2018) 171
[49] David Luban, 'After the Honeymoon: Reflections on the Current States of International Criminal Justice' (2013) 11 JICJ 505, 506
[50] Mirjan Damaska, 'What is the Point of International Criminal Justice?' (2008) 83 Chi-Kent L Rev 328, 365
[51] Megret (n 40) 99
[52] Stanley Hoffmann, 'World Governance: Beyond Utopia' (2003) 132 *On Intenational Justice* 27, 30
[53] Damaska (n 49) 365
[54] De Hoon (n 2) 614
[55] Beth A Simmons and Hyeran Jo, 'Measuring Norms and Normative Contestation: The Case of International Criminal Law' (2019) 4(1) Journal of Global Security Studies 18, 24
[56] Hyeran Jo and Beth A Simmons, 'Can the International Criminal Court Deter Atrocity' (2016) 70 Int'l Org 443, 451
[57] Stahn (n 1) xiii

Rawls himself has highlighted the difficulty that 'the limits of the possible are not given by the actual,' and hence speculation must be used to envision what these limits are and to imagine the set of circumstances within the realms of what is practically possible.[58] Applying this to the ICC, one might ask: how *ought* we to determine the practically possible limits of what the ICC can achieve, in terms of, for example, retribution? Retribution is a central aim of the ICC and is enshrined in the Rome Statute's preamble whereby it states that the crimes within its jurisdiction must not go unpunished.[59] Whilst subjective judgements do have to be made in determining the limits of what is practically possible, the interpretation and application of realistic utopia to the ICC in this article can be defended. It constitutes an important starting point for deepening and improving the debate on how one should critically evaluate the ICC and is grounded in arguments seeking to maximise the ICC's potential. In any case, there exists no 'magic in-between point' unassailable from criticism;[60] there 'will always remain a spectrum for legitimate disagreement about where the 'right' balance lies.'[61]

2. *The ICC submerged in criticism: the utopia in realistic utopia*

2.1 *From euphoria to crisis*

With the integral framework of the article presented, it is now apt to examine the utopia in realistic utopia: the vast criticism in which the ICC is submerged. A prominent theme at the Rome Conference was reconciling sovereignty with a strong judicial institution.[62] The U.S, on the final day of the Conference in a last-ditch attempt to shield their interests, sought to 'limit the Court's jurisdiction to cases when only the State of the accused had accepted the jurisdiction of the Court,' but this was rejected.[63] It was not enough. The Rome Statute was adopted, filling the conference room with tremendous emotion.[64] It was a momentous step forward for humanity, even though the Statute is imperfect,[65] for instance, lacking an enforcement power. Accompanying the ICC's creation was 'extraordinary optimism for the prospects of international criminal justice.'[66] Proponents of the Court posited that it 'ushered in a new era of international [criminal] justice.'[67] The ICC, being a permanent international criminal court with a more expansive international jurisdiction than, for example, the International Criminal Tribunal for the former Yugoslavia , elevates expectations much higher than anything within the era of the *ad hoc* tribunals.[68] Disappointment and perceived failure among critics is to a great extent fuelled by unrealistic expectations stemming from the euphoria which existed in the 1990s, portraying the ICC and international criminal justice as an omnipotent force.[69] The ICC has been bestowed with a huge list of 'deliverables': convicting, deterrence, and bringing peace and reconciliation to conflicts.[70] It has not been able to meet its expectations,[71] for instance, to end impunity.[72] Once reality emerged, it was inevitable the 'happy vision of global justice' would subside.[73] The disappointment animating ICC critics, namely, *inter alia*, scholars and States, is a consequence of overarching ambitions they have placed on the court's shoulders.[74] Immediately after the court's inception, scholars were averse

---

58 Rawls, *The Law of People's* (n 33) 12
59 Rome Statute, preamble
60 Robinson (n 43) 326
61 ibid, 329
62 Dominic McGoldrick, Peter Rowe and Eric Donnelly, *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing 2004) 54
63 Roy S Lee, *The International Criminal Court: the making of the Rome Statute – issues, negotiations, results* (Kluwer Law International 1999) 25-26
64 ibid
65 ibid, 26
66 William W Burke-White, 'Proactive Complementarity: the International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 Harv Intl LJ 53, 53
67 Benjamin J Appel, 'In the Shadow of the International Criminal Court: Does the ICC deter Human Rights Violations?' (2018) 62 J Conflict Resol 3, 4
68 Jo and Simmons (n 9) 444
69 William Schabas, 'The Banality of International Justice' (2013) 11 J Int'l Crim Just 545, 547
70 Megret (n 40) 209
71 Schabas (n 68) 546
72 Rome Statute, preamble
73 Jeremy Rabkin, 'Global Criminal Justice: An Idea Whose Time Has Passed' (2005) 38 *Cornell Int'l LJ* 753, 754
74 Ballin (n 39) 207

to adopting an undue critical stance,[75] but now the ICC is 'surrounded by controversies and criticisms.'[76] These are undermining its value, legitimacy and identity.[77] For instance, Powderly posits the Court's legitimacy is now in a 'persistent state of crisis.'[78] Likewise, Luban argues that the ICC's 'honeymoon is [now] over,'[79] whereby the euphoria which accompanied the Court's creation has now dwindled. Approaching the second decade after the court's creation, critics are unrelentingly questioning if there have been any real accomplishments.[80] The critical discourse has now reached a point whereby 'the ICC is hardly ever seen in [a] positive light or celebrated as a success.'[81] To illustrate the ICC's submersion in criticism, it is necessary to consider concrete examples, first starting with the failure of the ICC to meaningfully contribute to fulfilling its main aim: ending impunity.

2.2 *The criticisms*

2.2.1 *Failing to end impunity*

Arguably, the most fundamental aim of the ICC is to convict perpetrators of the worst crimes enumerated in the Rome Statute, ending their impunity.[82] This is included in the preamble and well-accepted in the discourse.[83] If the ICC is not breaking the 'vicious cycle of crimes, impunity and conflict,'[84] it becomes susceptible to the charge that it is failing its main mission. The ICC has been described by critics as a 'pathetic institution;'[85] one that has negligible effect on those seeking international criminal justice.[86] The world is experiencing considerable human suffering and impunity,[87] in particular in Syria. In 2014, a Security Council Resolution referring the situation in Syria to the Court was jointly vetoed by China and Russia.[88] The Security Council's referral power is completely negated when parties with a veto power, who have strong alliances with the state to be investigated, can prevent the situation from being referred to the Court.[89] Due to the Rome Statute not being ratified universally, situations whereby iniquitous international crimes are occurring as in Syria, cannot be referred to the ICC despite it being a *permanent* international criminal court.[90] Thus, a sparsity of accountability can encourage more perpetrators and fuels resentment towards the ICC for being unable to act.[91] There is a lingering anxiety that nothing will continue to be done about present atrocities and international criminal justice will land far afield of any potential it could have fulfilled.[92] This criticism is inevitably tied to the nature of the international legal system as a whole, whereby sovereignty occupies a central place meaning States can elect to not ratify the Rome Statute, preventing the ICC from having jurisdiction. This will be discussed further in the subsequent section where such criticism is alleviated. Akin to this critique is the charge that the ICC has failed to realize the second of its main aims: deterring international criminals.

2.2.2 *Weak deterrence*

---

75 Robinson (n 43) 324
76 ibid, 323
77 Stahn (n 1) 166
78 Powderly (n 3) 4-5
79 Luban (n 48) 505
80 Miejers and Glasius (n 23) 429
81 De Hoon (n 2) 593
82 Gegout (n 24) 800
83 Rome Statute, preamble
84 Joseph M Isanga, 'The International Court Ten Years Later: Appraisal and Prospects' (2013) 21(2) Cardozo J Intl and Comp L 235, 275
85 Rabkin (n 72) 754
86 Kirsten Ainley, 'The International Criminal Court on Trial' (2011) 24 *Cambridge Review of International Affairs* 309, 319
87 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) https://www.un.org/sg/en/content/sg/speeches/2016-05-24/opening-remarks-press-conference-president-erdogan-turkey-world accessed 20 November 2019
88 Teles (n 6) 65
89 Dawn L Rothe, James Meernik and Thordis Ingadottir, *The Realities of International Criminal Justice* (Brill 2013) 198
90 Teles (n 6) 62
91 McGoldrick et al (n 61) 457
92 Megret (n 40) 199

Another area where the ICC has been heavily criticised is deterrence: the prevention of further crimes and atrocities through trials and subsequent convictions.[93] The central idea is that potential criminals will refrain from engaging in criminal behaviour due to the fear of being tried, convicted and punished by the ICC.[94] Critics argue the ICC is not a sufficient general deterrent; the very remote prospect of being tried in the Hague in many years' time is not going to be a salient factor in the minds of perpetrators, deterring them from committing crimes.[95] For deterrence to work, potential violators must believe the ICC applies to them;[96] without thinking punishment in the distant Hague is a real possibility, perpetrators will have 'little disincentive toward offending.'[97] Linked to forthcoming discussion, the lack of co-operation and enforcement mechanisms at the ICC's disposal further reduces the possibility of any deterrent effect; the chances of the ICC apprehending and punishing potential perpetrators on their own, without the help and support of states is very doubtful.[98] Thus, the ICC has been heavily criticised for not fulfilling another of its primary aims, deterring potential criminals. An equally prominent critique the Court has faced centres on the excessive time it takes to convict perpetrators of international crimes.

2.2.3 *Justice delayed is justice denied*

The ICC has been heavily criticised because of the long and highly costly nature of its proceedings.[99] It was not until July 2005, three years after the Court's creation that the first arrest warrant was issued, one for Thomas Lubanga Dyilo for war crimes in Uganda.[100] The ICC's first trial, *Lubanga,* only commenced in 2009, seven years after its creation.[101] It was not until 2012 that his conviction was confirmed.[102] Out of all the international criminal courts established, the ICC took the longest to secure its first conviction, nearly ten years.[103] This is part of the wider narrative criticising the ICC and its trials for being 'too long, expensive, inhospitable, exclusive, complex and above all, unable to meet the needs of victims, offenders and the communities.'[104] This is aptly demonstrated in the recent conviction of Bosco Ntaganda for war crimes in the Democratic Republic of Congo. Although a warrant was issued for his arrest in 2006, he was only convicted in July 2019, prompting feelings this was no triumph at all due to his prolonged impunity.[105]

Another notorious example of the prolonged impunity of ICC indicted individuals is the case of al-Bashir, who has still not been surrendered to the ICC,[106] although Sudan has expressed its intention to do so.[107] The ICC issued its first arrest warrant for al-Bashir in 2009 for charges ranging from crimes against humanity to genocide. Despite these arrest warrants, the African Union declared its Member States would not help the ICC and cooperate in arresting al-Bashir.[108] Consequently, al-Bashir could freely travel across Africa, from Chad to Kenya.[109] He became the first Head of State to be re-elected whilst subject to an international arrest warrant.[110] This is not what proponents of the ICC had in mind when creating an institution designed to end impunity, in which a person's official capacity such as presidency is irrelevant as a bar for their criminal responsibility and the Court's

---

93 Miejers and Glasius (n 23) 430
94 Jo and Simmons (n 9) 444
95 McGoldrick et al (n 61) 92
96 Kate Cronin-Furman, 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) 7 *IJTJ* 434, 442
97 Rothe et al (n 88) 196
98 Damaska (n 49) 345
99 Stahn (n 1) 5
100 Usacka (n 45) 478
101 William Schabas, 'The International Criminal Court at Ten' (2011) 22 Criminal Law Forum 493, 495.
102 https://www.icc-cpi.int/drc/lubanga
103 Rothe et al (n 88) 15-16
104 ibid, 233
105 Vava Tampa, 'A brutal warlord has been convicted- so why doesn't it feel like a triumph?', *The Guardian*, 8 July 2019
106 www.icc-cpi.int/darfur/albashir
107 'Omar al-Bashir: Sudan agrees ex-president must face ICC', *BBC News*, 11 February 2020
108 Gegout (n 24) 806
109 Rothe et al (n 88) 154
110 ibid, 198

jurisdiction.[111] It seriously brings into question the ability of the ICC to secure high profile convictions and justice for victims of atrocities.[112] The ability of al-Bashir to completely neglect the international warrant for his arrest via African States' reluctance to arrest him is representative of another major problem which the ICC faces and has been criticised for, its inability to garner state co-operation.

2.2.4 *The ICC's co-operation conundrum*

The ICC lacks 'sufficient mechanisms to hold individuals accountable for the most serious international crimes.'[113] This has a crippling effect on the ICC; it is dependent on state co-operation and without it, its effectiveness is severely weakened.[114] A continuous lack of support renders the ICC an 'exorbitant, but toothless' international criminal court.[115] When States do not implement the ICC's arrest warrants, this conveys the message they do not view them as binding and the ICC's legitimacy, by effect, is belittled.[116] Compounding matters is the U.S's 'campaign to actively ensure the Court will not exercise jurisdiction over its nationals.'[117] Hostility is rooted in the belief that its military personnel situated abroad, citizens or otherwise will be subject to 'disproportionate politically motivated charges' in the Court.[118] The U.S. has concluded over ninety bilateral agreements with other States,[119] agreeing not to transfer to the Court U.S. persons who might have committed crimes under the Court's jurisdiction without the U.S's consent.[120] Exempting officials, military personnel and nationals from the ICC significantly undermines the Court's legitimacy and integrity,[121] and diminishes the Court's effective functioning in the fight against impunity.[122] The U.S's approach aims to weaken the ICC to the point of failure.[123] These agreements are an inevitable drawback of the international legal system and framework in which the ICC is situated; one whereby sovereignty and state consent occupy a central place.[124] With the workload and jurisdiction of the Court ever-increasing, as will be illustrated later, securing state co-operation is all the more vital for preserving the Court's credibility and enabling it to function effectively.[125]

2.2.5 *African bias*

A central reason underlying African States regarding the ICC's arrest warrants as illegitimate, and ultimately the Court, stems from another significant criticism, an ICC bias towards African States. As such, a common criticism is the ICC is selective; ICC trials merely target leaders who threaten Western interests.[126] Certain African States perceive the ICC purely as an instrument of Western politics.[127] The current Rwandan President, Paul Kagame, said the ICC was only created for African or poor countries.[128] These perceptions stem from the fact that the ICC

---

111 Rome Statute, art 27
112 Moses Restselitistsoe Phooko, 'How Effective the International Criminal Court Has Been: Evaluating the Work and Progress of the International Criminal Court' (2011) 1 Notre Dame J Int'l Comp & Hum Rts L 182, 183
113 Philippe Kirsch, 'The Role of the International Criminal Court in Enforcing International Criminal law' (2007) 22 Am U Intl Rev 539, 540
114 Antonio Cassese, 'Is the ICC Still Having Teething Problems?' (2006) 4 Int'l Crim Just 334, 335
115 Phooko (n 111) 185-186
116 Gegout (n 24) 806
117 Markus Benzing, 'U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties' (2004) 8 *Max Planck Yearbook of United Nations Law Online* 181, 183
118 Goldsmith and Krasner (n 8) 56
119 Bradford Betz, 'What is the ICC and how does it function?' *Fox News*, 12 March 2020
120 Sean D Murphy, 'U.S. Bilateral Agreements Relating to the ICC' (2003) 97 *The American Journal of International Law* 200, 201
121 Risks for the Integrity of the Statute of the International Criminal Court, Eur. Parl. Assemb., 2002 Sess., Res. 1300 (2002) paras 9-10
122 'United States Efforts to Undermine the International Criminal Court: Legal Analysis of Impunity Agreements' *Human Rights Watch*
123 Leila Nadya Sadat, 'Summer in Rome, Spring in the Hague, Winter in Washington – U.S. Policy towards the International Criminal Court' (2003) 21 Wis Int'l LJ 557, 560
124 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 1
125 Teles (n 6) 70
126 Zaya Yeebo, 'Is Africa on Trial?', *Global Policy Forum*, 27 March 2012
127 Stahn (n 1) 169
128 ibid

has not pursued any non-African cases,[129] although there are signs that times are changing with the commencement of investigations in non-African States like Afghanistan for war crimes and crimes against humanity.[130] The ICC has been coined the 'International Caucasian Court' in response to such alleged biases.[131] If 'big fish' like the USA can go free when they are suspected of acts of aggression against Iraq,[132] or using torture in its 'war against terrorism,'[133] and only 'small fish' are tried such as African States, it is inevitable charges and perceptions of bias will follow.[134] Selective enforcement 'conveys the message international behavioural commands do not bind each and every person, but just those with a specific, usually weak political standing.'[135] The 'sword of justice' is not universal because it seems to only apply to 'individual States that occupy a lowly place in the *de facto* hierarchy of States.'[136] This perception of bias towards Africa has resulted in African States withdrawing from the ICC; South Africa, Burundi and Gambia,[137] but eventually only Burundi withdrew, with South Africa and Gambia revoking their withdrawal.[138] Withdrawal reduces support for the ICC, but also reinforces the view the ICC is merely a servant of the West, as opposed to the international community as a whole in securing the common goal of international criminal justice, thus undermining the Court's legitimacy.[139] In sum, the ICC has been bestowed with a broad range of deliverables and has been subject to mass criticism, by both scholars and States, undermining its legitimacy to the point of crisis. Discussion has provided the utopia in realistic utopia. It is now apt to consider the latter part, the realism in realistic utopia.

3. *Injecting realism: the realism in realistic utopia*

3.1 *Injecting realism into the critiques*

This section injects a much-needed dose of realism- what is possible in practice, as opposed to utopian ideals unlikely to happen[140]- into the critical evaluation of the ICC, with particular consideration of the criticisms in the preceding section to alleviate their critical sting. The ICC is constrained by several practical realities: complementarity; limited resources; the complex and inevitably lengthy nature of international criminal investigations and trials; a lack of an enforcement mechanism and dependence on state co-operation; the complex operations of deterrence in practice; and an inevitable degree of selectivity in prosecuting international crimes. Critical evaluation of the ICC's effectiveness cannot be justifiably assessed without due consideration of these inherent and surrounding factors.[141] This is necessary to provide a 'reality check' and a more realistically informed account of the circumstances and conditions the Court has to operate in, and for the future,[142] providing the second part of the realistically utopian framework employed in the final section.

3.1.1 *Ending impunity: a far-fetched goal for the ICC*

The previous section considered how the criticism that the ICC has failed to end impunity for not having any substantive effects on convicting perpetrators of international crimes. Emphasising complementarity alleviates this

---

[129] Miejers and Glasius (n 23) 441
[130] www.icc-cpi.int/afghanistan
[131] Rebecca Hersher, 'Gambia Says It Will Leave the 'International Caucasian Court' *National Public Radio*, 26 October 2016
[132] Rothe et al (n 88) 197
[133] Schabas, The Banality of International Justice (n 68) 551
[134] Jane E Stromseth, 'The International Criminal Court and Justice on the Ground' (2011) 43 Ariz St LJ 427, 433
[135] Jessberger and Geneuss (n 46) 1087
[136] Damaska (n 49) 330
[137] Teles (n 6) 62
[138] Elise Keppler, 'Gambia Rejoins ICC' (Human Rights Watch, 17 February 2017) Available at: <https://www.hrw.org/news/2017/02/17/gambia-rejoins-icc> accessed 3 February 2020
[139] Robinson (n 43) 28
[140] https://dictionary.cambridge.org/dictionary/english/realism
[141] Carsten Stahn, 'Between 'Faith' and 'Facts': by what Standards should we Assess International Criminal Justice?' (2012) 25 LJIL 251, 263
[142] Hans-Peter Kaul, 'The International Criminal Court: Current Challenges and Perspectives' *Salzburg Law School on International Criminal Law* (USA keynote speech 2011) 12

charge. Under complementarity, a case is only admissible to the Court where States are unable or unwilling to prosecute the alleged perpetrator(s).[143] Hence, the ICC is a court of 'last resort' and complementary to national criminal jurisdictions,[144] with States having the first option,[145] and primary responsibility to investigate and prosecute alleged offenders.[146] The weak prospects of the ICC trying a huge number of perpetrators is not to be regretted.[147] The ICC does not have the capacity to serve as the primary enforcer and prosecutor of international criminal law, nor was this intended under the Rome framework.[148] It was not designed to try huge numbers of people,[149] meaning realistically the ICC ought not to be criticised for failing to solely end impunity. Likewise, there are criticisms condemning the ICC for failing to investigate situations like the one in Syria, whereby crimes against humanity have been committed since the start of Syria's civil war under al-Assad's regime. These are equally unjustified. The ICC's jurisdiction is not universal, it rests on consent; jurisdiction only extends to States and territories which have ratified the Rome Statute.[150] Complementarity is based on a compromise between respecting state sovereignty and the imperative of prosecuting crimes which threaten the international community.[151] This concept has high political utility in that it helps sustain the Court's legitimacy by providing States with the first option to prosecute, which facilitates the perception that the Court is not unduly intruding into States' domestic affairs without their consent. It is highly unlikely Syria will ratify the Rome statute and it is consequently unjustified to criticise the ICC for failing to pursue a case without legal basis. As long as state sovereignty remains the backbone of international law,[152] these problems will persist. Akin to the sovereignty-centred nature of the international legal system, another reality which must be acknowledged is the ICC's limited resources.

3.1.2 *The ICC's limited resources*

A sub facet of the failure to end impunity charge is the ICC's unsuccessfulness in securing an adequate number of convictions, and even those secured are highly costly and delayed. The reality of limited resources alleviates this. The idealistic desire to secure international criminal justice conflicts with the reality of finite time and resources.[153] There is a disparity between the resources available to the Court and the number of potential crimes it could, in theory prosecute, furnishing the Court with an overload of possible cases.[154] ICC resources are very limited.[155] In 2019, the Court's yearly budget was 144 million euros.[156] International investigations by their very nature are highly costly; they require experts, trial staff, interpreters and various other staff to support victims in securing international justice.[157] The final trial at the Special Court of Sierra Leone finding Charles Taylor, the former president of Liberia, guilty of war crimes[158] cost (approximately) 235 million euros.[159] Constraints on resources impairs the Court from initiating new investigations and trying more perpetrators.[160] How can the Court be

---

143 Rome Statute, art 17
144 ibid, art 1
145 Jo and Simmons (n 9) 448
146 Stahn (n 1) 165
147 Hilaire McCoubrey, 'War Crimes Jurisdiction and a Permanent International Criminal Court: Advantages and Difficulties' (1998) 3 *Journal of Conflict and Security Law* 9, 24
148 Teles (n 6) 65
149 Ballin (n 39) 206
150 Thomas W Smith, 'Moral Hazard and Humanitarian Law: the International Criminal Court and the Limits of Legalism' (2002) 39 *International Politics* 175, 177
151 Melandri (n 11) 536
152 Smith (n 149) 182-182
153 Stephanos Bibas and William Burke-White, 'International Idealism Meets Domestic-Criminal-Procedure Realism' (2010) 59 *Duke Law Journal* 637, 680
154 Robinson (n 43) 332
155 Jessberger and Geneuss (n 46) 1086
156 Assembly of States Parties, Proposed Programme Budget for 2020 of the International Criminal Court, ICC-ASP/18/10, 18th session, The Hague, 2-7 December 2019
157 Rothe et al (n 88) 155-156
158 www.rscsl.org/Taylor.html
159 Rothe et al (n 88) 271
160 Bibas and Burke-White (n 152) 677

expected to provide global accountability on such a measly annual budget?[161] The *ad hoc* tribunals, namely the ICTY and ICTR, had primacy over jurisdiction but once it was realised that their resources and capacities did not provide for its effectiveness, emphasis was placed on using domestic courts.[162] The logical way to address finite resources is to request greater funding from States, but States are largely unwilling to contribute anything more to the Court,[163] evidenced by States' anti-cooperative stance towards the Court, demonstrated by, for example, various African States' refusal to arrest and transfer Omar al-Bashir to the Court after he was indicted. The hard reality of finite resources inherently constrains the ICC's ability to contribute to ending impunity, and is exacerbated by the complex, difficult and time-consuming nature of international criminal investigations and trials.

3.1.3 *Delayed justice is an inevitable part of international criminal justice*

ICC investigations and prosecutions by their nature consume a sizeable amount of time. They have greater inherent complexity than those at domestic level, necessitating much greater time-scales needed for completion.[164] Sometimes thousands of victims are interviewed and investigations continue for many years.[165] When investigating crimes, the ICC has to circumvent various practical and operational issues such as security, language barriers, and acquiring state co-operation.[166] The situations the ICC investigates are foreign; cultures and societies in, for example, remote areas of Africa can be alien and unfamiliar to ICC officials.[167] These areas are sometimes not readily accessible and encompass various ethnic groups with multiple language barriers,[168] for which the Court has to provide translation.[169] This causes delays and is compounded by limited resources.[170] Likewise, collecting evidence in these environments is inherently difficult.

Investigations often occur long after the crime was committed, meaning the availability of evidence will have diminished, as well as its quality, for instance, victims and citizens might not have the knowledge of how to preserve it.[171] Normally, there is ongoing conflict in which security is a large concern; danger to ICC staff, victims, witnesses and other involved parties has meant access to certain areas has been difficult, necessitating large time delays.[172] Central authorities often have no control and evidence is often scattered or hard to ascertain.[173] Evidence will not be readily collectable; perpetrators are eager to stay in power and thus will take all steps possible to dispose of evidence and absolve themselves of any future responsibility for their crimes.[174] Sometimes victims are reluctant to testify as witnesses fearing further attack, or do not equally share the aims of the ICC; they might prefer local justice as opposed to helping an ICC investigation.[175] This is consistent with the underlying aims of the ICC, in that criminals should firstly be prosecuted and convicted at the domestic level insofar as possible before the Court can exercise jurisdiction. When cases do come within the Court's remit, these 'investigative challenges' significantly reduce the Court's effectiveness;[176] the success of prosecution rests on the availability of evidence.[177] Akin to the ICC, the *ad hoc* tribunals were slow in their operations, illustrating rather than constituting an inherent failure of

161 Burke-White (n 65) 66
162 Megret (n 40) 214
163 Frederik Harhoff, 'Legal and Practical Problems in the International Prosecution of Individuals' (2000) 69 *Nordic Journal of International Law* 53, 59
164 ibid
165 Megret (n 40) 219
166 International Criminal Court, 'Strategic Plan of the Office of the Prosecutor 2019-2021', 17 July 2019, 15
167 Stahn (n 1) 172
168 Blattmann and Bowman (n 13) 724
169 Usacka (n 45) 483
170 De Hoon (n 2) 613
171 ICC Strategic Plan (n 165) 30
172 Blattmann and Bowman (n 13) 724
173 ICC Strategic Plan (n 165) 22
174 Kaul (n 141) 9
175 Gegout (n 24) 811
176 ICC Strategic Plan (n 165) 14
177 McGoldrick et al (n 61) 81

the Court, it signifies the 'practical realities for international criminal tribunals;'[178] they are inevitable and inherent in the very operations of international criminal justice. Thus, it is common and expected for proceedings to average between 'between five and eight years from investigation to completion, due to their complexity.'[179] Delays are exacerbated by the persistent lack of state co-operation with the ICC.[180]

3.1.4 *No state co-operation, no convictions*

Lack of support and co-operation from States has led to criticisms that the Court is ineffective.[181] However, this can be attributed to States omitting to cooperate by arresting and transferring suspects.[182] Although expressly recognised under the Rome Statute that a state must act immediately to arrest an indicted suspect,[183] al-Bashir was able to freely roam Africa due to African States' reluctance to enforce the ICC's arrest warrant. There is no readily available peacekeeping force which the ICC can use to apprehend indicted suspects, and in the absence of military means, States refusing to cooperate 'will need to be persuaded with the help of economic carrots and sticks into handing over offenders and evidence.'[184] For instance, the U.S. provided Serbia with economic aid incentives to motivate them to extradite Milosevic to the International Criminal Tribunal for the former Yugoslavia.[185] The reality is that the ICC's ability to apprehend indicted subjects is heavily reliant on sovereign state law enforcement[186] and the good will of States.[187] State co-operation is vital for the ICC to access archives, witnesses and information,[188] execute searches, serve papers and preserve evidence,[189] which has already proved inherently difficult. The ICC's effectiveness depends on state support;[190] without arrests and custody, there can be no trials.[191] To maximise effectiveness, substantive co-operation from States and the international community is required.[192] Therefore, the ICC should not be unfairly criticised for failing to elicit co-operation from hostile States, it is the hostile States that should be criticised. In any event, non-co-operation is an inherent trademark of international law more generally.

Non-compliance pervades the general *corpus* of international law. Within international human rights law, there is widespread non-enforcement of human rights norms.[193] Akin to the ICC, there is no world police force to ensure compliance with international human rights.[194] Human rights enforcement depends on the will of States.[195] Consequently, securing enforcement and co-operation at the international level is increasingly difficult and not unique to the ICC; both international human rights and the ICC are bound by extrinsic forces. The reality is sovereign States can ignore ICC arrest warrants and it is unjustifiable to criticise it for lacking the power to force state compliance when it was never furnished with such a power under the Rome Statute. Anyhow, arguably, States would never accede to a scheme permitting the ICC to utilise force in apprehending indictees from States due to not wanting their internal affairs and sovereignty interfered with.[196] Enforcement of international criminal law

178 ibid, 454
179 Stahn, Between 'Faith' and 'Facts' (n 140) 262.
180 Isanga (n 83) 250
181 Kaul (n 141) 11
182 Rothe et al (n 88) 296
183 Rome Statute, art 59
184 McGoldrick et al (n 61) 92
185 Ainley (n 85) 322
186 Jo and Simmons (n 9) 443
187 Gegout (n 24) 801
188 McGoldrick et al (n 61) 45
189 Smith (n 149) 182-183
190 Robinson (n 43) 338
191 Kaul (n 141) 8
192 Blattmann and Bowman (n 13) 730
193 Hersch Lauterpacht, *International Law and Human Rights* (FA Praeger 1950) 27
194 Emilie Hafner-Burton, *Making Human Rights a Reality* (Princeton University Press 2013) 9
195 Mahmoud Cherif Bassiouni, 'A Critical Introduction Assessment of the UN Human Rights Mechanisms' in Mahmoud C Bassiouni and William A Schabas, *New Challenges for the UN Human Rights Machinery* (Cambridge, UK: Intersentia 2011) 3
196 Rothe et al (n 88) 187

resides with sovereign States,[197] as was illustrated with the U.S. bilateral agreements not to transfer U.S. individuals to the ICC. Continuous lack of state support means the ICC will not be able to fulfil its consistently increasing mandate, for instance the recently authorised investigation into alleged war crimes and crimes against humanity committed in Afghanistan by U.S, Afghan and Taliban troops,[198] thus decreasing the chances of ending impunity and securing justice.[199] Issues like this are not an inherent failure of the ICC, but rather inherent limitations of a system ultimately based on state sovereignty and consent. A persistent lack of co-operation means possible deterrent effects are weakened due to reduced likelihood of perpetrators being tried in the Court. Akin to co-operation, realism can be used to alleviate criticisms of the ICC's deterrence effect.

3.1.5 *A realistic view of deterrence*

Criticisms of the ICC for not having a strong enough deterrent effect on international criminals have failed to account for the inherent complexities and actual mechanics of deterrence in practice, and how these interact with international crimes' commission.[200] They too readily assume a black and white causal link within deterrence, that merely increasing the prosecutions and convictions of the Court will deter future perpetrators. This view relies upon criminals being rational actors; making a calculation about whether to commit a crime or not, for example if the threat of punishment is high and likely, they will not commit an atrocity.[201] In reality, possible deterrent effects are not uniform, they vary; perpetrators will differ in the weight they attach their risk of being apprehended and the costs to be incurred by being found guilty.[202] Even if prospects of conviction and punishment is high, perpetrators might not be deterred; they are ready to accept the risk of punishment in pursuing their agenda.[203] For instance, during the Yugoslavia conflicts, some perpetrators sincerely believed what they were doing was right, a higher prospect of punishment would have had little effect.[204] Where perpetrators are willing to die pursuing their 'mission,' it is difficult to theorise that the elusive prospects of being tried in the Hague will have any effect on preventing perpetrators from offending.[205] Consequently, critics' version of deterrence used to criticise the ICC is facile, it fails to recognise the realities *actually* at play. Criticising the ICC for failing to have an adequate deterrent effect without taking into account realities outside the control of the Court is unjustified. Proponents of African bias are also prone to adopting a facile perspective, too readily equating the ICC pursuing African situations with an inherent African bias.

3.1.6 *Exaggerated bias*

It is reasonable to see why the ICC has been accused of African bias; repeat decisions to target countries in the same region whilst a greater number of atrocities are occurring in different parts of the globe.[206] Nevertheless, this does not mean they merely reflect political bias nor lack legal underpinning. Most selective decisions are made according to where the priorities of international criminal justice are required.[207] Charges of African bias are used by those in power to mask the reality of the millions suffering from oppression and the victims in these regions who need the ICC.[208] Unjustified criticisms of this sort are not peculiar to the ICC but inhere in international law more generally. For instance, a similar accusation has been made against proponents of human rights arguing they are neo-colonial in nature, merely Western tactics to regain control of their former colonies through imposing

---

197 Rabkin (n 72) 760
198 www.icc-cpi.int/afghanistan
199 Fatou Bensouda, 'Reflections from the International Criminal Court Prosecutor' (2012) 45 *Vanderbilt Journal of Transnational Law* 955, 960
200 Cronin-Furman (n 95) 454
201 Miejers and Glasius (n 23) 431
202 Jo and Simmons (n 9) 452
203 Damaska (n 49) 344
204 Miejers and Glasius (n 23) 431
205 McGoldrick et al (n 61) 92-93
206 Rothe et al (n 88) 323-324
207 De Hoon (n 2) 606
208 Bensouda (n 198) 959

human rights on the global South.[209] Human rights, rather than a neo-colonial agenda by the West, are a global fight for increased protection against discrimination and oppression.[210] Akin to African bias, charges of neo-colonialism are predominantly advanced by repressive governments eager to avoid attention on their atrocities, and rarely advanced by the oppressed who are eager to benefit from human rights protection.[211] Likewise, victims of international crimes are keen to benefit from international criminal justice at the ICC.[212] Besides, the ICC has begun to investigate various non-African situations such as Afghanistan for war crimes, and Bangladesh/Myanmar, for the mass persecution and genocide of the Rohingya people by the Myanmar government.[213] Once the reality behind the criticism is unveiled, it is easy to perceive the charge is overstated. Although atrocities occur elsewhere such as war crimes in Iraq, which the ICC prosecutor has yet to open an investigation into,[214] it must be borne in mind a degree of selectivity is inevitable;[215] the Court's jurisdiction and resources are limited. Going forward, the Court needs to be transparent as to why particular cases are selected.[216] This would enhance legitimacy among the eyes of critics, as the ICC would be trying to more effectively fulfil its mandate in a more transparent way, reducing its bias function. The need for realism pervades a substantive majority of the criticisms the ICC is facing. Overall, this section has, via realism, alleviated the sting of the previous section's criticisms, providing the second part of realistic utopia. Analysis can now engage in critical evaluation of the Court through the lens of realistic utopia.

4. *Applying realistic utopia to the ICC and critical reflection*

The previous two sections provide an integral structure to realistic utopia: the utopian expectations of the ICC with its accompanying criticisms, and the ICC's inherent practical limits in the form of realism. This final section critically evaluates the ICC through a *realistically utopian* lens as outlined in section one, demonstrating the Court is a success; it makes valuable contributions to international criminal justice, reasserting its legitimacy. Firstly, the ICC's expectations will be reconfigured under realistic utopia, subsequently illustrating realistic utopia is an improved evaluative benchmark for the ICC. It is then argued that the Courts' legitimacy is restored through the dismissal of unjustified criticism, engaging in a pragmatic appraisal of the ICC in that the Court makes valuable contributions to international criminal justice through its work and the often-overlooked contributions of sending moral messages and deterring perpetrators, further bolstering its legitimacy. Subsequently, possible criticisms are considered and rebutted, before offering some final reflections going forward.

4.1 *Reconfigured expectations*

Under realistic utopia, the realities in section three have significant implications for redefining expectations of the ICC. Expectations must be reconfigured to evaluate whether the ICC has been successful. The two preceding sections indicate an acute discrepancy between ideas of international criminal justice and the realities it has produced, necessitating more realistic expectations. The excessive goals of the ICC and international criminal justice strive to achieve too much; success is narrowly defined in realising various utopian goals without any qualification, thus becoming a weakness.[217] Expectations of the ICC cannot demand the realisation of ideals irrespective 'of the unavoidable circumstances of each case.'[218] Certain problems are unavoidable and the best course of action is to acknowledge and seek to minimise them.[219] The ICC's lack of enforcement power and States'

[209] Eric A Posner, *The Twilight of Human Rights Law* (Oxford University Press 2014) 66
[210] Kathryn Sikkink, Evidence for Hope: Making Human Rights Work in the 21st Century (Princeton University Press 2017) 29
[211] Higgins (n 123) 96
[212] *Decision Pursuant to Article 15 of the Rome Statute* on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-27, 14 November 2019, para 38
[213] Owen Bowcott, 'War Crimes Court Approves Inquiry Into Violence Against Rohingya', *The Guardian*, 14 November 2019
[214] www.coalitionfortheicc.org/country/iraq
[215] Miejers and Glasius (n 23) 441
[216] De Hoon (n 2) 608
[217] Marina Aksenova, 'International Criminal Courts and Tribunals' (2017) 30 LJIL 475, 499
[218] Phooko (n 111) 195
[219] Bibas and Burke-White (n 152) 643

non-co-operation, preventing the ICC from achieving its goals, will persist as long as international law is founded on sovereign States' consent.[220] Constrained practically, financially and legally, it is not possible for the ICC to prosecute all unpunished cases of international crimes, 'choices are inevitable.'[221] Phrases like ending impunity which have at their core utopian promises, should not be part of international criminal law.[222] As a result, the number of cases tried at the ICC will be less, especially compared to the amount of crimes committed under its jurisdiction within a given year.[223] The Court will inevitably yield more symbolic and 'moral authority than real might,' limiting itself to a few high-profile cases,[224] meaning justice remains symbolic.[225] Rather than designating the Court as an abject failure, it awakens us to the hard realities the Court operates under, enabling greater appreciation of what the ICC can *actually* a*chieve* in practice, shortening the normative gap. Realistic utopia also improves the evaluative framework for the ICC.

4.2 Improvement of evaluative benchmark

A central issue vis-a-vis the ICC is how 'success' ought to be defined.[226] There are numerous standards by which the ICC can be critically evaluated, for example, cost or efficiency.[227] The ICC needs to be critically evaluated with a strong awareness of what we expect it to achieve.[228] Critics have omitted to identify the conditions and circumstances in which one might expect the Court to work and succeed.[229] Arguments concerning the ICC's limitations comprise no clear view on what exactly the Court should be doing, and the yardsticks critically evaluating the ICC are unsound by not clarifying the ICC's precise task.[230] The evaluative benchmark used to critically evaluate the ICC cannot simply entail judging success with reference to conviction statistics; a genuine assessment necessitates nuanced analysis of its inherent limitations and surrounding context.[231] Using a facile and inappropriate benchmark has had adverse consequences for the ICC, evidenced by the mass criticism damaging legitimacy in section two. Rather than critically evaluating the ICC through ideals it cannot possibly achieve, evaluation should be by a realistically utopian ideal, grounded in realism and what is practically possible. The ICC, and by extension, international criminal justice, needs to understand its existence in the context and circumstances of the world as they are, not what they *ought* to be.[232] This would improve clarity for both the public and itself, in understanding the content of its own institutional function, and avoids a facile approach which many ardent critics have adopted.[233] A greater appreciation of inherent complexities and realities means numerous of the Court's supposed problems and issues are perceived with less scepticism and lament, revealing many problems are not the Court's fault.[234] Application of realistic utopia illustrates numerous criticisms are unjustified, and the ICC viewed through a realistically utopian lens is a success, restoring the ICC's legitimacy.

4.3 *Restoring legitimacy: a pragmatic appraisal*

4.3.1 *Removing unjustified criticism*

[220] Hurst Hannum, *Rescuing Human Rights: A Radically Moderate Approach* (Cambridge University Press 2019) 159
[221] Schabas, The International Criminal Court at Ten (n 97) 506-507
[222] De Hoon (n 2) 598
[223] Burke-White (n 65) 67
[224] Kaul (n 141) 13
[225] Gegout (n 24) 811
[226] Megret (n 40) 216
[227] Ballin (n 39) 202
[228] Diane F Orentlicher, 'Judging Global Justice: Assessing the International Criminal Court' (2003) 21 Wis Int'l LJ 495, 497
[229] Jo and Simmons (n 9) 470
[230] Jessberger and Geneuss (n 22) 1083
[231] Stahn, Between 'Faith' and 'Facts' (n 140) 264
[232] Megret (n 40) 221
[233] Usacka (n 45) 488
[234] Robinson (n 43) 324

The critical diagnosis of how well the ICC is functioning depends on the evaluative baseline adopted.[235] If the ICC is held to utopian standards, such as ending impunity,[236] it will inescapably result in disappointment.[237] Likewise, the ICC's legitimacy will be damaged if limitations on its goals are not clearly explained;[238] these limitations hinder the achievement of expectations, meaning inadequate explanation renders the Court prone to the charge of ineffectiveness.[239] As exhibited in the preceding sections, the ICC has been 'overburdened by…unrestrained idealism underlying [its] ambitions,'[240] meaning many criticisms the Court faces, when injected with realism, lose their critical sting. By using a realistically utopian yardstick to critically evaluate the ICC, its legitimacy is restored. Criticising the ICC because it cannot investigate Syria which has not ratified the Rome Statute is disingenuous and unjustified because it compares the ICC not to its governing framework under Rome, but to a desired and utopian ideal of international criminal justice.[241] Thus, it is not surprising in the context of inflated and unrealistic expectations that the ICC is being perceived as a failing institution.[242] No doubt the ICC's credibility and legitimacy would increase if it could act with greater independence from States in apprehending and arresting criminals, having increased resources to deliver justice quicker, or wider jurisdiction.[243] But the ICC must be critically evaluated by what it can do, not what it cannot. The Court is viewed with less despair once realised certain factors such as limited resources and weak state co-operation is beyond the Court's control. The inability to arrest perpetrators is not a failure of the ICC nor international criminal justice, it is a failure of state political will.[244] Acknowledging that the ICC, in striving to achieve its goals, is practically constrained, provides the much needed 'reality check that prevents the system from losing its legitimacy by not delivering what it promises.'[245] The ICC's legitimacy will be bolstered by 'critical scrutiny – but not by disingenuous charges.'[246] From preceding analysis, it is evident that much criticism that the Court has faced is unjustified, which has clearly weakened its legitimacy. Now, one is placed in a greater position to more readily appreciate the ICC and further restore its legitimacy.

4.3.2 *The ICC is a success*

To fully understand and appreciate the ICC's significance and its work, consideration of its historical background is required.[247] The ICC was once a 'utopian aspiration.'[248] Having a permanent and functioning international criminal court that can be criticised is itself an occurrence not thought possible a couple of decades ago;[249] 'its very existence is remarkable.'[250] Even if one added up the problems and difficulties the ICC has faced, one finds we are still in a superior position than three decades ago.[251] Heads of States and perpetrators of genocide being brought to justice by international criminal tribunals was inconceivable in the 1980s.[252] Holding perpetrators accountable for heinous international crimes is now a reality. ICC convictions, though limited, contribute significantly to ending the previously accepted culture of impunity.[253] Given there is now a live threat and possibility for perpetrators to be held accountable, both the ICC and international criminal justice are a success.[254] This significance is magnified

---

235 Luban (n 48) 506
236 Ballin (n 39) 207
237 Bibas and Burke-White (n 152) 681
238 Aksenova (n 216) 481
239 ibid, 499
240 Ballin (n 39) 208
241 Sikkink (n 209) 43-44
242 Burke-White (n 65) 67
243 Gegout (n 24) 801
244 Payam Akhavan, 'The Rise, and Fall, and Rise, of International Criminal Justice' (2013) 11 J Int'l Crim Just 527, 530
245 Aksenova (n 216) 480
246 Orentlicher (n 227) 512
247 Isanga (n 83) 237
248 Akhavan, The Rise, and Fall, and Rise of International Criminal Justice (n 243) 527
249 ibid, 529
250 Ainley (n 85) 310
251 Schabas, The Banality of International Criminal Justice (n 68) 545
252 Luban (n 48) 507
253 Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 *American Journal of International Law* 7, 8
254 De Hoon (n 2) 592

when considered in light of the difficult operative environment the Court works in, as recounted in section three. Building on the *ad hoc* tribunals' legacy, the Court has elevated accountability to an unprecedented level.[255] This is especially salient as the ICC continues to expand its areas of investigations beyond Africa to countries such as Afghanistan and Myanmar/Bangladesh. Every conviction, even if it takes a decade is significant; 'it stands for the proposition that no matter how long it takes, the international community's resolve to fight impunity is strong and unyielding.'[256] A Rawlsian realistic utopian view of pragmatism recognises *some* justice is better than none.[257] The number of convictions is not a sufficient benchmark by which to judge the success of the ICC,[258] justice is not merely about quantity; success depends on the quality of the judgments and decisions made by reference to specific legal standards like the rule of law and impartiality.[259] This overarching significance, together with the ICC's liberation from unjustified criticism, illustrates the ICC is a success, furnishing it with legitimacy. Under a realistically utopian lens, previously neglected functions and contributions of the ICC can be bestowed with greater significance, further restoring the ICC's legitimacy.

4.3.3 *The ICC's symbolic significance*

The ICC is more than a mere criminal court adjudicating responsibility for crimes.[260] An important, yet overlooked effect of international criminal justice is the 'shadow of a ruling;' its wider, expressive function in sending important messages.[261] The ICC emits the important message perpetrators will be punished.[262] Investigations and punishments inflate awareness to a global level, yielding key symbolic implications.[263] Accountability reinforces universal condemnation.[264] The ICC communicates to individuals globally the norms contained in the Rome Statute;[265] respecting human rights and securing accountability,[266] transforming the view that political violence against populations is not the inherent power of States nor the norm.[267] Every conviction and condemning statement aids the creation of a 'moral climate,' rendering it all the more difficult for perpetrators to flout international norms.[268] Statements such as "perpetrators will be brought to justice" set powerful future thresholds,[269] by setting a legal and moral example for norms and behaviour.[270] Even a few important cases can sufficiently communicate these messages;[271] they yield 'strong normative authority.'[272] The ICC provides victims with hope; perpetrators, no matter how invincible, cannot escape the law.[273] Although, the ICC's ability to transmit important symbolic messages can be limited. The authority of such messages authority is undermined by the absence of a coercive power to enforce them.[274] Likewise, the moral climate is weakened when prosecutions are viewed as selective; atrocities occur all over the world yet the Court has failed to investigate and prosecute 'big fish,'[275] like the U.S. Selective enforcement is problematic because it conveys the message law and norms do not bind everyone equally, just those with a 'weak political standing.'[276] It must be recalled the ICC is not expected to

255 Akhavan, Beyond Impunity (n 252) 9
256 Isanga (n 83) 320
257 Damaska (n 49) 362
258 Jessberger and Geneuss (n 46) 1082
259 Stromseth (n 133) 428
260 Jessberger and Geneuss (n 46) 1081
261 Stahn (n 1) 116
262 Isanga (n 83) 240
263 Jessberger and Geneuss (n 46) 1086
264 Stromseth (n 133) 432
265 Jessberger and Geneuss (n 46) 1084-1085
266 Miejers and Glasius (n 23) 438
267 Luban (n 48) 509
268 Damaska (n 49) 363
269 Aksenova (n 216) 485
270 Akhavan, Beyond Impunity (n 252) 10
271 Bibas and Burke-White (n 152) 653
272 Stahn (n 1) 182
273 Leila Sadat, 'A Rawlsian Approach to International Criminal Justice and the International Criminal Court' (2010) 19 *Tulane Journal of International & Comparative Law* 1, 25-26
274 Goldsmith and Krasner (n 8) 62
275 Robinson (n 43) 334
276 Jessberger and Geneuss (n 46) 1087

prosecute every perpetrator,[277] investigations and prosecutions will remain selective.[278] This reflects the imperfect nature of the Court and international criminal law,[279] and should be openly acknowledged going forward. Accordingly, though limited, the ICC makes valuable contributions to international criminal justice by transmitting important moral messages, bolstering its legitimacy. Akin to this symbolic function, the ICC's deterrence contribution is also overlooked.

4.3.4 *Reinvigorated deterrence*

Encapsulated in section two, critics posit the ICC will not have sufficient deterrent effects because punishment is uncertain due to difficulties in apprehending perpetrators.[280] Nevertheless, critics fail to recognise the 'ICC's influence [goes] well beyond the common assertion the institution has no teeth.'[281] The ICC can have deterrent effects, irrespective of apprehension issues.[282] The indictment itself can have powerful 'shaming' effects.[283] Investigations and indictments signal to the international community and domestic actors that a particular individual or group 'has committed grave abuses in violation of international law.'[284] Indictees are furnished with 'fugitive status' and will be continuously trying to outrun the law.[285] International legitimacy is valuable for Heads of States and government officials meaning stigmatization through an ICC indictment, as well as the chances of being arrested and prosecuted for their crimes, may constitute a barrier to them retaining power.[286] Politicians and military leaders are no longer 'clean', they are internationally delegitimised and politically incapacitated as indictments can prevent them from travelling abroad,[287] limiting movement to States non-party to the Rome Statute.[288] Other States will not want to damage their own international legitimacy by harbouring a wanted international criminal, impairing criminals' ability to pursue their agenda and avoid capture; although some States permitted al-Bashir to visit, others like South Africa said they would arrest him if he travelled there.[289] The ICC, being a permanent international criminal court is likely to have a degree of deterrent effect simply by virtue of this fact,[290] through increasing the chances of prosecution,[291] and signalling its intention and capacity to do so.[292] The costs of committing international crimes are notably raised when juxtaposed with the previous climate of impunity;[293] even though prosecution and apprehension are not definite, they are a possible reality perpetrators have to consider when acting.[294] Although, empirical assessment of deterrence is limited;[295] the number of crimes not committed due to the Court's presence is not readily ascertainable.[296] Likewise, deterrent effects will be limited due to failure to arrest and convict long-standing perpetrators like al-Bashir.[297] This argument is not intended to suggest that 'the ICC has positive impacts in all cases,'[298] rather the ICC's deterrent effect is much more significant than critics assume, increasing the Court's legitimacy. For the ICC to retain legitimacy, both prospects and

277 Stromseth (n 133) 434
278 Stahn, Between 'Faith' and 'Facts' (n 140) 279
279 Stahn (n 1) xv
280 Isanga (n 83) 241
281 Jo and Simmons (n 9) 444
282 Appel (n 66) 5
283 Isanga (n 83) 247
284 Appel (n 66) 8
285 Isanga (n 83) 240
286 Akhavan, Beyond Impunity (n 252) 12
287 Jessberger and Geneuss (n 46) 1091
288 Isanga (n 83) 243
289 Appel (n 66) 10-11
290 McGoldrick et al (n 61) 458
291 ibid, 459
292 Jo and Simmons (n 9) 446
293 Beth A Simmons and Allison Danner, 'Credible Commitments and the International Criminal Court' (2010) 64(2) Int'l Org 225, 231
294 Akhavan, The Rise, and Fall, and Rise of International Criminal Justice (n 243) 528
295 Stahn, Between 'Faith' and 'Facts' (n 140) 257
296 Suzanne Katzenstein, 'In the Shadow of Crisis: The Creation of International Courts in the Twentieth Century' (2014) 55 *Harvard International Law Journal* 151, 189
297 Hafner-Burton (n 193) 111
298 Jo and Simmons (n 9) 470

limitations must be acknowledged.[299] Conversely, even appreciating this overarching significance of the ICC, it might be argued that realistic utopia narrows expectations, and in turn foreshortens the Court's prospects.

4.3.5 *A due dilution*

It might be argued that application of realistic utopia, to achieve success, 'brusquely downsize[s] expectations' of the ICC.[300] Lowering expectations of the ICC due to their difficulty of achievement 'foreshortens the prospects of international justice.'[301] By deflating expectations and goals, success will be less valuable and easier to attain because less is sought after.[302] Likewise, if realistic utopia is perceived as pinning the ICC's non-achievement of goals on the 'institutional failures [of] outside actors, and having [its] hands bound by international reality,' it excuses non-achievement but also necessitates the conclusion the ICC will never be able to achieve its goals.[303] Nevertheless, the intention is not to use this *trojan horse* approach whereby the ICC's expectations and goals are lowered to merely paint the ICC as a success through the backdoor. Rather, explaining and acknowledging the ICC's inherent limitations and redefining its expectations by taking them into account, creates transparency between the Court, victims, and other stakeholders.[304] Recognition of these limitations aids transparency and helps restore legitimacy.[305] This approach merely acknowledges the way things are and how the current practical realities work; it is markedly different to accepting such realities.[306] It enables progress to be made in shortening the 'gap between normative ambition and reality,'[307] reducing the discrepancy between what we expect the ICC to be achieving and doing, and the reality of what it is achieving and doing.[308] As opposed to excusing the ICC for failing to achieve goals, this approach redefines goals in a realistically utopian way so as to render them attainable within practically possible limits; progress is realized when 'idealism sharpens our view on reality.'[309] With this in mind, it is now apt to provide some final analytical reflections going forward.

4.4 *Reflections going forward*

States agree with the ICC in principle, but in practice are not disposed to offer the help and co-operation the Court needs to successfully fulfil its goals.[310] It is an interesting paradox whereby the values underpinning international criminal justice are ones which the international community claim to agree, yet simultaneously fail to provide the coercive powers and will to implement.[311] However, impunity is not an academic fiction, it is an unfortunate reality affecting millions of individuals and victims.[312] Each judgement and ruling issued by the ICC is incredibly important for individuals and groups affected.[313] The ICC creates and embodies hope for victims in securing international criminal justice, but it can only do so much, the rest must be borne by States.[314] The ICC is a remarkable achievement, but to fully realise its effectiveness, it needs requisite, tangible support,[315] in particular States implementing the ICC's arrest warrants.[316] The ICC is a last resort; it was purposively designed lacking the

299 Rothe et al (n 88) 209
300 Megret (n 40) 217
301 Damaska (n 49) 364-365
302 Megret (n 40) 217
303 ibid, 217-218
304 De Hoon (n 2) 611
305 Aksenova (n 216) 478
306 Jacob Katz Cogan, 'The Problem of Obtaining Evidence for International Criminal Courts' (2000) 22 *Human Rights Quarterly* 404, 425
307 Stahn (n 1) 113
308 ibid, 173
309 Ballin (n 39) 209
310 Leila Nadya Sadat and S Richard Carden, 'The New International Criminal Court: An Uneasy Revolution' (2000) 88 Geo LJ 381, 444
311 Aksenova (n 216) 477
312 Bensouda (n 198) 959
313 Ballin (n 39) 204
314 Sadat (n 272) 19
315 Kirsch (n 112) 547
316 Gegout (n 24) 813

power and abilities of domestic courts.[317] It is not a panacea for all of the world's ills; it does not have 'titanic strength' to pursue every violation of international criminal law.[318] Although an integral piece of the puzzle,[319] it cannot fight and end impunity on its own,[320] the ICC is one medium of international criminal justice among many. Accountability and ending impunity will only materialise if States fulfil their obligations under the Rome Statute.[321]

Although 'wishful thinking [will] not bring about justice,'[322] the 'impossibility of the project need not undermine its necessity.'[323] There is no alternative to the ICC and abandonment equally abandons norms of international accountability.[324] The ICC is not a temporary experiment, it is permanent and here to stay;[325] it is not going to be deserted 'simply because of the predictable difficulties of being in the world.'[326] Within the limitations and practical difficulties illustrated in this article, 'the [C]ourt needs to execute its agenda as effectively as possible.'[327] Acknowledging these limitations creates transparency and maintains legitimacy.[328] Support for the Court can be increased by delineating what we should and can expect from the ICC in the future.[329] Until further support is realized, an ICC working under realistically utopian conditions is the best one can ask for.

5. *Concluding remarks*

This article has critically evaluated the ICC through the lens of realistic utopia. It has been illustrated that the ICC has been subject to very high, utopian expectations by critics, such as ending impunity and having a substantial deterrent effect on potential perpetrators. The ICC has subsequently been vastly criticised for failing to meet these expectations, as well as for being slow in delivering justice, failing to garner state co-operation, and being biased towards African States, causing a crisis in legitimacy. The ICC is constrained by several practical realities: complementarity, limited resources, the complex and inevitably lengthy nature of international criminal investigations and trials, a lack of an enforcement mechanism and dependence on state co-operation, the complex operations of deterrence in practice, and an inevitable degree of selectivity in prosecuting international crimes. These practical realities in the form of realism, have alleviated prominent criticisms of the ICC and rendered critics' expectations both unobtainable and untenable. Realistic utopia constitutes an improved evaluative benchmark by providing a more informed and nuanced critical evaluation of the ICC which grounds expectations in reality and what is achievable in practice. It significantly alleviates the Court's legitimacy crisis by illustrating that many prominent criticisms of the Court are unjustified. The Court's existence and work is much more significant than critics too readily assume; the Court makes invaluable contributions to international criminal justice by significantly contributing to ending impunity, sending moral messages and deterring perpetrators. The ICC, viewed through a realistically utopian lens, is a success.

317 Kirsch (n 112) 546
318 Damaska (n 49) 331
319 Sadat (n 272) 25
320 ICC Strategic Plan (n 165) 28
321 Burke-White (n 65) 107
322 Payam Akhavan, *In Search of a Better World: A Human Rights Odyssey* (House of Anansi Press2017) 128
323 Robinson (n 43) 347
324 Patricia M Wald, 'Why I Support the International Criminal Court' (2003) 21 Wis Int'l LJ 513, 515
325 Teles (n 5) 71
326 Megret (n 40) 200
327 De Hoon (n 2) 613
328 Aksenova (n 216) 478
329 Kirsch (n 112) 539