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Editor-In-Chief
Richard Liu

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Editors' Introduction to the Second Volume of the Cambridge Law Review

It has been a great privilege and pleasure to work on the second volume of the *Cambridge Law Review*. The journal has flourished. Developments we have undertaken since the inaugural volume include: creating a new website, placing the journal on HeinOnline, developing a social media presence, engaging a more representative cross section of the entire law community at Cambridge (including BAs, LLMs, and PhDs), growing the reputation of the *Cambridge Law Review*, and focusing on contemporary legal issues. We thank the Board of the inaugural volume for the strong foundations they gave to the journal.

We believe more than ever in the value of student-run journals in legal scholarship. As a blind-reviewed, rigorously-edited journal run by a team of exceptional students, the *Cambridge Law Review* is poised to be one of the leaders of legal scholarship. This year's volume includes a diverse array of articles that we hope will be of interest to both domestic and international readers alike. One may notice that there is comparatively greater European Union law and international law coverage in this volume than the inaugural volume. This was a conscious choice. Even though the United Kingdom is leaving the European Union, our belief is that engaging in thoughtful discourse with the European Union and the rest of the world is not any less important now than before.

We would like to give special thanks to everyone on the Board, especially our senior editors, for their tireless work. We would also like to thank the Cambridge University Law Society for their generous continued support, without which the *Cambridge Law Review* would not be possible. We wish the new Board every success with the third volume and look forward to the development of the *Cambridge Law Review.*

Richard Liu
Carly Krakow
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Patel v Mirza: A Tale of Insider Trading and Illegality in the Supreme Court

Veena Srirangam*

I. Introduction

Salman Mirza received £620,000 from Chantrakant Patel to bet on the share prices of the Royal Bank of Scotland (RBS), based on insider information, known to the former. The parties anticipated a government announcement that would affect the price of RBS shares, but the announcement was never made and the bet was never placed. Mr Mirza then refused to repay the funds transferred by Patel.

Mr Patel sought to recover the £620,000 in a claim for unjust enrichment for failure of consideration. The High Court dismissed Mr Patel's claim on the ground that the court should not aid a claimant seeking to rely on illegal activity.[1] The agreement between the parties was illegal because it amounted to a conspiracy to commit the offence of insider dealing under section 52 of the *Criminal Justice Act 1993*. On appeal, the Court of Appeal found for Mr Patel, and ordered repayment of the sums.[2]

In the Supreme Court, a nine-Justice panel had to decide whether Mr Mirza was required to repay the sums and, if so, on what grounds. The Justices of the Supreme Court unanimously agreed that Mr Patel was entitled to repayment of the amount he had paid to Mr Mirza, but were sharply divided in their approaches to the issue. The difference in approach is significant not only because of the differing views advanced by their Lordships on the defence of illegality, but, at a lower level of abstraction, about the role of the courts in civil disputes.

The discussion follows in three parts. In the first part, the doctrine of illegality as a defence or a bar to relief is set out and its operation in *Patel v Mirza* is addressed.

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1 *Patel v Mirza* [2013] EWHC 1892 (Ch).

2 *Patel v Mirza* [2014] EWCA Civ 1047.

In the second and third parts, the different approaches of the Supreme Court are considered in detail. In the fourth part, the schisms underlying the different approaches in the judgments in *Patel v Mirza* are explored.

II. The Issue of Illegality

The defence of illegality has been the subject of judicial discussion in a number of recent judgments and in *Patel v Mirza,* the Supreme Court took the opportunity to reform the doctrine.[3]

The traditional illegality defence was governed by two Latin maxims to which there were two principal exceptions. The two maxims were: *ex turpi causa non oritur actio* (no action can arise from a base cause) and *in pari delicto potior est conditio defendentis* (in the case of mutual fault, the position of the defendant is the stronger one).[4] The two exceptions to these maxims were the rule in *Tinsley v Milligan*[5] and *locus poenitentiae*. Under *Tinsley v Milligan,* a claim would succeed if it could be pleaded without reliance on the illegal conduct. Under *locus poenitentiae*, the claimant could succeed if they voluntarily withdrew from the illegal transaction.[6]

Within which of these principles or exceptions was Mr Patel's claim to be analysed? Were these principles and rules satisfactory? All nine Justices of the Supreme Court eschewed a broad conception of *ex turpi causa* and agreed that illegal conduct should not, on its own, preclude a claimant from seeking relief from the courts.

However, the Justices of the Supreme Court adopted sharply different approaches to these questions. Their judgments, discussed below, can be thought of as espousing two different approaches. The first can be thought of as the discretionary 'balancing approach', put forward by the majority (Lord Toulson SCJ, supported by Lords Kerr, Wilson and Hodge SCJJ and Lady Hale DPSC) and the second 'rules-based approach' of the minority (advanced by Lord Neuberger PSC and Lords Clarke, Mance and Sumption SCJJ). The majority sought to achieve a narrower application of the defence of illegality by balancing the policy considerations that arise in a given case. By contrast, the minority preferred a rules-based approach to achieve the same result.

III. The Balancing Approach

The majority judgment, delivered by Lord Toulson, provides a new test for illegality that is predicated on balancing the competing considerations in a given

[3] *Hounga v Allen* [2014] 1 WLR 2889; *Les Laboratoires Servier v Apotex Inc* [2015] AC 430 and *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1.

[4] *Holman v Johnson* (1775) 1 Cowp 341.

[5] *Tinsley v Milligan* [1994] 1 AC 340.

[6] *Tribe v Tribe* [1996] Ch 107.

case. The majority rejected the two maxims (*ex turpi causa* and *in pari delicto*) and provided a new test for the application of the defence of illegality.

Lord Toulson's judgment is a detailed treatment of the authorities on illegality. The judgment places much emphasis on the policy rationales for the maxims: (i) that no person should be allowed to benefit from his own wrongdoing, and (ii) that the law should be coherent and must not condone illegality by 'giving with the left hand what it takes with the right hand.'[7]

The new test advanced by Lord Toulson adopts a holistic approach to the issue of illegality and is aimed at directing the court to reach the best result in terms of policy, in any given case. Approving Professor Burrows's 'range-of-factors' approach, Lord Toulson set out a 'trio of considerations' that a court must consider in order to judge whether recognising a claim tainted by illegality might be contrary to the public interest.[8]

The court must take into account:

(i) the underlying purpose of the rule which has been broken by the claimant's illegal conduct;
(ii) other relevant public policies that might be rendered ineffective or less effective by the court's denial of the claim; and
(iii) the possibility of 'overkill' unless the law is applied with a proper sense of proportionality.

Lord Toulson concluded that a claimant who is able to satisfy the requirements of a claim in unjust enrichment for failure of consideration should not, in general, be barred from recovery merely because the consideration was unlawful.[9] Applying the trio of considerations to Mr Patel's claim, Lord Toulson allowed the claim, reasoning that it would not undermine the integrity of the legal system.

A. To balance or not to balance?

The flexibility that this approach affords is attractive and Lord Toulson considered that safeguarding the integrity and harmony of the law required this level of flexibility, despite it often being criticised for bringing with it the risk of unpredictability and uncertainty.[10] His Lordship advanced three responses to such criticism.[11]

Firstly, he noted that the present state of the law, which was rule-based, was just as prone to criticisms of uncertainty. In particular, his Lordship drew attention

[7] *Patel v Mirza* [2016] UKSC 42 [99]. See also: *Hall v Hebert* [1993] 2 SCR 159, 169 (McLachlin J).
[8] *Patel v Mirza* [2016] UKSC 42 [101].
[9] *Patel v Mirza* [2016] UKSC 42 [116].
[10] *Patel v Mirza* [2016] UKSC 42 [108].
[11] *Patel v Mirza* [2016] UKSC 42 [113].

to the criticism that *Tinsley v Milligan* had received and noted the Law Commission's four-fold criticism of this area of law: that it was complex, uncertain, arbitrary and lacked transparency.[12]

Secondly, Lord Toulson noted that it was not evident that a problem of uncertainty or unpredictability existed in jurisdictions where a more flexible approach had been adopted. Yet, this was not persuasive for Lord Mance, who considered the reliance placed on other jurisdictions to be unsatisfactory and highlighted that the court had no information on the effectiveness of approaches adopted in jurisdictions like New Zealand and Australia.[13]

Thirdly, Lord Toulson argued, while ordinary citizens who engage in lawful activity have an entitlement to legal certainty, that consideration applied with less vigour to persons engaged in illegal activity.[14] Lord Neuberger, however, questioned the premise of this argument and concluded instead that the entitlement to certainty was universal and not lost by one's engagement in illegal activity. At any rate, his Lordship noted that the rights of third parties may be at stake and their entitlement to legal certainty should not be undermined because of the claimant's engagement in illegal conduct.[15]

Lord Toulson's approach, premised on the view that the illegality defence is based on public policy concerns, seeks to address those public policy concerns by requiring the court to explicitly engage with those considerations in each case. It is an approach that inherently requires balancing.

Engaging in such an exercise will often require the court to make a policy judgment, if not a moral one. What of the argument that such an exercise would be more appropriate to be left for Parliament to undertake and that legislative reform ought to be vehicle for the sort of change proposed by Lord Toulson?[16] Lord Toulson rightly rejected that argument noting that the Law Commission had already produced detailed proposals for reform in this area and suggested that the government may have more pressing priorities for reform. He reiterated Kirby J's view in *Clayton*: 'waiting for a modern Parliament to grapple with issues of law reform is like waiting for the Greek Kalends. It will not happen.'[17]

IV. Rule-Based Approaches

Lord Neuberger and Lords Mance, Clarke, and Sumption adopted rules-

[12] *Patel v Mirza* [2016] UKSC 42 [20] and [23].
[13] *Patel v Mirza* [2016] UKSC 42 [207].
[14] *Patel v Mirza* [2016] UKSC 42 [137].
[15] *Patel v Mirza* [2016] UKSC 42 [158] (Lord Neuberger).
[16] *Tinsley v Milligan* [1994] 1 AC 340, 364D (Lord Goff).
[17] *Clayton v The Queen* (2006) 231 ALR 500 [119] (Kirby J); *Patel v Mirza* [2016] UKSC 42 [114].

based approaches to the defence of illegality. However, their approaches are not homogeneous and each followed a distinct route in their reasoning and formulated their rules in very different ways.

Given the relative similarities in the approaches of Lords Neuberger and Mance, their judgments are explored together in the following. Lord Sumption's judgment, which adopts somewhat different reasoning, is then explored.

A. 'The Rule'

(i) Illegal Conduct – A Preliminary Point

Before turning to Lord Neuberger's substantive approach, it is worth noting that his Lordship construed the meaning of 'illegal conduct' narrowly and explained that an illegal contract would normally be an agreement the whole purpose or essential ingredient of which was the commission of a crime, or one that could not be performed without the commission of a crime.[18]

This is a narrower definition of illegality compared to the suggestions made in earlier case law. In *Nayyar v Denton Wilde*, Hamblen J considered illegality to include immoral acts and 'improper conduct evincing serious moral turpitude'.[19] Similarly in *Safeway Stores*, Flaux J suggested illegal conduct could include 'morally reprehensible' conduct.[20] The approaches taken by Flaux and Hamblen JJ are arguably over-inclusive in their focus on the moral value of the conduct in question rather than its criminal character. There must be some legal sanction upon the conduct for the law to appear inconsistent and incoherent if it were to allow a claim in the civil courts based on such conduct.

Furthermore, whilst a broader approach may have been appropriate under the old regime, which was premised on 'base' causes and 'penitence', Lord Neuberger's approach is consistent with the objective of narrowing the application of the defence of illegality supported by all nine Justices of the Supreme Court. A narrower approach to illegal conduct, furthermore, avoids the court having to undertake an exercise in moral evaluation. Reasonable minds can invariably disagree on what constitutes 'morally reprehensible' conduct.

On the other hand, there is the concern that a claimant whose conduct is strictly not within the remit of the criminal law, due to a technicality rather than the particular nature of his/her conduct, may be able to escape the application of

[18] *Patel v Mirza* [2016] UKSC 42 [159].
[19] *Nayyar v Denton Wilde Sapte* [2009] EWHC 3218 (QB) [92] (Hamblen J).
[20] *Safeway Stores v Twigger* [2010] EWHC 11 (Comm) [26].

the *ex turpi causa* rule. Further, under Lord Neuberger's approach conduct that is unlawful as a matter of civil law – breach of trust, for example – may not come within the definition of illegality. This may be an area where courts could widen the definition of 'illegal conduct' to include unlawful conduct, more generally, rather than being limited to criminal conduct.

(ii) The Substance of 'the Rule'

In any event, once the presence of illegal conduct has been established, Lord Neuberger considered that the courts should ask whether it should operate as a bar to relief. The starting point in his Lordship's analysis is 'the Rule' that, in general, the claimant should be entitled to the return of the monies paid. His Lordship supported this rule by reference to a long line of case law, from *Smith v Bromley* to *Tribe v Tribe*.[21]

Lord Neuberger further noted the desirability of 'the Rule' in public policy terms because it ensures that the law does not inadvertently legitimise the illegal transaction in putting the parties back in their original positions.[22] For example, in a case like *Parkinson* – where the claimant donated a large sum of money to the defendant charity under an unlawful agreement to receive a knighthood in return – not letting the claimant recover the sums he had paid meant that the defendant was legitimately entitled to keep the sums paid.[23] That cloaked the illegal transaction with legitimacy it did not deserve.

Nonetheless, Lord Neuberger was reluctant to endorse a 'clear and inflexible' rule as he considered that would inevitably lead to difficulties in application. Lord Neuberger recognised that there will be exceptions to the Rule. If the defendant is intended to be protected by the criminal legislation that was breached, it would not be appropriate to apply the Rule inflexibly to that instance. Similarly, if the defendant was unaware of the illegality of the conduct as a matter of fact, then it would not be fair to require him to return the sums especially if he or she had altered his position. In these cases, his Lordship considered that the Rule should not be automatically invoked.

(iii) 'The Rule' and locus poenitentiae

The exception of *locus poenitentiae* provides that a claimant who repents his illegal conduct and voluntarily withdraws from the transaction should be able to

[21] *Patel v Mirza* [2016] UKSC 42 [145]–[152], *Smith v Bromley* (1702) 2 Doug KB 696n; *Tribe v Tribe* [1996] Ch 107.

[22] *Patel v Mirza* [2016] UKSC 42 [153]–[154].

[23] *Parkinson v College of Ambulance Ltd* [1925] 2 KB 1

succeed in his/her action.[24] Lord Neuberger argued, however, that 'repentance' should not be a requirement for recovery.[25] Instead, his Lordship contended that the court ought to engage in an objective analysis of the illegal purpose and whether it had been carried out, rather than in moralistic enquiries as to whether the claimant repents his unlawful conduct.

Lord Mance, whose approach is similar to Lord Neurberger's in many ways, stressed that Lord Toulson's approach did not allow for sufficient consideration of *locus poenitentiae*. His Lordship considered that the principle had been expressed in older cases such as *Smith v Bromley* to include an incomplete illegal transaction, not only one from which a party withdrew.[26]

Whether this is desirable as a matter of public policy is questionable. The rule on *locus poenitentiae* before *Tinsley v Milligan* was firmly grounded in repentance and not in whether the parties had managed to fulfil their illegal transaction. There is a policy justification for the law coming to the aid of a repentant claimant, but it is by no means obvious that one who was merely unsuccessful in his or her illegal venture should have a legitimate cause of action.

(iv) 'The Rule' and the 'Range-of-Factors'

Despite their relative similarities, Lords Neuberger and Mance had very different views about the value of the 'range-of-factors' approach.

Although analytically very different to Lord Toulson's approach, Lord Neuberger's proposed application of the Rule overlaps in some respects with the former, because it envisages that flexibility will be required in some cases and that each case should be decided on its particular facts. The underlying premise of Lord Neuberger's approach is that rigid rules are not appropriate in this context. Further, his Lordship highlighted that despite initial misgivings, he had concluded that Lord Toulson's approach provided a 'reliable and helpful guidance' of the considerations that a court should grapple with in these types of cases.[27]

In sharp contrast, Lord Mance all but rejected Lord Toulson's approach. His Lordship considered that the latter's approach required judges to make a value judgment in a 'highly unspecific non-legal sense' and by reference to 'a mélange of ingredients'. Lord Mance's analysis, on the other hand, follows from his view that the law on illegality did not require wholesale reform to achieve a just result in this

[24] *Tribe v Tribe* [1996] Ch 107.
[25] *Patel v Mirza* [2016] UKSC 42 [156].
[26] *Patel v Mirza* [2016] UKSC 42 [193]–[194]; *Smith v Bromley* (1760) 2 Doug KB 696n, 697 (Lord Mansfield CJ).
[27] *Patel v Mirza* [2016] UKSC 42 [174]–[175].

case.[28] His Lordship argued for a limited approach which 'focussed on the need to avoid inconsistency in the law, without depriving claimants of the opportunity to obtain damages for wrongs or to put themselves in the position in which they should have been.' That, for Lord Mance, did not require adopting the 'range-of-factors' approach which he considered to be open-ended and uncertain.[29]

Lord Neuberger's approach then can be characterised as occupying a middle ground between the approaches of Lords Toulson and Mance and the other Justices of the Supreme Court.

B. 'Founded on an Illegal Act'

In a similar vein to Lords Neuberger and Mance, Lord Sumption (with whom Lord Clarke agreed) argued for an approach based on rules rather than balancing a range of factors. The crux of the issue, for his Lordship, was whether the claim was '*founded* on an illegal act.'[30] In other words, Lord Sumption argued that the court needed to consider how closely connected to the illegal conduct the claim is in a given case, thus endorsing the reliance principle. He considered that the reliance test provided the narrowest test of connection available.[31] Therefore, Lord Sumption concluded, with the exception of *in pari delicto* and *locus poenitentiae*, a claim founded on an illegal act – in the sense that the claimant will need to rely on his/her illegal conduct to establish the claim – should not be allowed to succeed.

Lord Sumption considered that the defence of illegality defence should remain as narrow as possible because it represents a departure from the principle that the courts should provide remedies in support of legal rights. That view is reminiscent of McLaghlin J's judgment in the Canadian case of *Hall v Hebert*, in its description of *ex turpi causa* as a draconian power.[32]

The 'range-of-factors' approach, in his Lordship's view, broadened the scope of the defence to an unacceptable extent as it does not require any connection between the illegality and the claim. Lord Sumption, like Lord Mance, considered that approach to be unprincipled because it was designed not to vindicate the public interest as against the legal interests or rights of the parties, but to evaluate the moral equities between them. His Lordship objected to the nature of the balancing exercise which would involve the judge attaching as much or as little weight to a particular consideration, or to the illegality of the conduct, as they considered appropriate.

[28] *Patel v Mirza* [2016] UKSC 42 [192], [204].
[29] *Patel v Mirza* [2016] UKSC 42 [192].
[30] *Patel v Mirza* [2016] UKSC 42 [233], [239].
[31] *Patel v Mirza* [2016] UKSC 42 [239].
[32] *Hall v Hebert* [1993] 2 SCR 159, 169 (Canada).

V. The Underlying Schisms

Lord Sumption described the differences in approach between the rule-based and range-of-factors as a 'judicial schism'. That schism appears to be only the tip of the iceberg. Underlying that schism were two others: (i) whether fairness or certainty should be the primary consideration for the court, and (ii) what the role of the courts is in the adjudication of civil disputes.

(i) Fairness and Certainty

For Lord Toulson, it was imperative that the approach adopted not result in unjust or disproportionate outcomes.[33] It would appear then that a paramount concern for Lord Toulson was achieving an equitable result on the facts in each case before the court. Lord Sumption, by contrast, accepted that the equities of a particular case were important but held that they should be subject to pragmatic limits. A more important consideration for Lord Sumption was ensuring the certainty of the law, so that it did not become 'arbitrary, incoherent, and unpredictable even to the best advised citizen.'[34]

To some extent, a tension between fairness and certainty inheres in every civil dispute and, in some respects, it is a zero-sum game. A bright-line rule promotes certainty but (at least) at the potential cost of fairness in individual cases. Rules typically prescribe results in a somewhat rigid manner based on the presence or absence of particular factors. However, they can rarely take into account those considerations that were not in play (for example, on the facts of a particular case) when the rule was formulated. Further, in the context of illegality, these considerations arise in a nuanced manner because they need to be balanced against the general public policy concern of discouraging individuals from entering into illegal transactions. To that end, Lord Toulson is right to hold that, in general, certainty is not an entitlement for those who have engaged in illegal conduct. Equally, that position may be departed from where the rights of third parties are involved, as Lord Neuberger indicated. The flexible approach endorsed by Lord Toulson allows for that outcome.

[33] *Patel v Mirza* [2016] UKSC 42 [101], [120].
[34] *Patel v Mirza* [2016] UKSC 42 [226].

(ii) The Role of Courts

On the role of courts in civil adjudication, Lord Sumption stated that the 'starting point is that the courts exist to provide remedies in support of legal rights.'[35] Under Lord Toulson's approach, on the other hand, the courts ought primarily to be concerned with upholding the integrity and harmony of the law.

At the lowest level of abstraction, this difference in approach reveals a disagreement about the function of civil courts. Are the courts primarily charged with the vindication of the private law rights of individuals or is their function to promote integrity and harmony in the law more generally? In particular, which of these functions should take precedence in the context of illegality?

The vindication of private law rights can be thought of as a narrow conception of the judicial function in civil disputes because the court is concerned only with the entitlement of the parties rather than necessarily reaching a just outcome on the facts. In other words, justice is regarded as simply being able to vindicate one's rights. Lords Sumption and Mance, and to some extent Lord Neuberger, appear to support that view.

A wider conception of the judicial function, by contrast, permits the court to look beyond the strict legal rights and entitlements of the parties. This may well require looking to the factors that Lord Toulson identified in his judgment. With the greatest respect, the narrower conception of the judicial function also assumes to some extent that rights of the parties are settled and the court merely needs to enforce them. In these cases, the court is also necessarily deciding the scope of an individual's rights.

Further, the wider conception can explain why, in some cases, courts do not recognise certain rights and, to that end, is transparent about the considerations that a judge takes into account in deciding a case like *Patel v Mirza*. Furthermore, where public policy concerns are engaged, as in the context of illegality, it is difficult to formulate rules about the rights to which the parties are *prima facie* entitled to without looking to such factors.

Constraints of space preclude a detailed analysis of this topic. It is sufficient to note, for present purposes, that *Patel v Mirza* and the defence of illegality throws into sharp relief a fundamental disagreement about what role the courts play, or should play, in civil adjudication.

[35] *Patel v Mirza* [2016] UKSC 42 [233].

VI. Conclusion

Patel v Mirza is one of those unusual cases where the judges agree on what the just outcome is on the facts but adopt very different routes to reach that result. Of the nine-Justice panel, six delivered their own judgments advancing different solutions. All nine Justices agreed that the defence of illegality should apply more narrowly and that *ex turpi causa* is no longer the starting-point where a claim involves illegal conduct.

Finally, it merits noting that Lord Toulson's 'range-of-factors' approach, which was supported by a majority of the judges, is not necessarily limited to the context of unjust enrichment. As Lord Kerr emphasised:

> '[this] mode of analysis requires examination of the justification for the defence of illegality in whatever context it arises, not a decision to circumvent the defence because of the type of remedy that is claimed.'[36]

Patel v Mirza is likely to have ramifications which go further than the law on unjust enrichment.[37] In any event, the case merits careful attention not only for its rich and nuanced discussion on illegality but also for the valuable insight it provides into the underlying debates about the fairness and certainty and the role of courts in civil disputes.

[36] *Patel v Mirza* [2016] UKSC 42 [142] (Lord Kerr).

[37] Goudkamp, 'The end of an era? Illegality in private law in the Supreme Court' (2017) 133 LQR 14.

'Anti-Suit' Injunctions Enforcing Arbitration Agreements in the EU: Analytical Failings After Gazprom and the Brussels (Recast)

Myron N. R. Phua* and Serena S. Y. Lee**

I. Introduction

In the European Union, injunctions issued by a Member State court enjoining an entity from litigating before another Member State court are prohibited for being 'incompatible' with the Brussels Regulation ['the Regulation'].[1] The European Court of Justice's ruling in *Turner v Grovit* first forbade those injunctions issued by courts enjoining an entity from bringing an action which was 'vexatious and oppressive'.[2] Subsequently, the Court held in *West Tankers* that injunctions issued by Member State courts to enjoin litigation brought in breach of an arbitration agreement ['Arbitration Agreement-Enforcing Injunctions', or 'AAEIs'] were also prohibited, even if the injunction were issued in proceedings which themselves fell within Brussels' 'arbitration exception'.[3] But what would otherwise appear as a categorical ban on anti-suit injunctions supporting arbitration has been complicated by two developments of late.

The first is the *Gazprom* decision,[4] which appeared to hold that orders by an arbitral tribunal enjoining a party from commencing or proceeding with parallel

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** LLM (Columbia), BA in Law (Cantab), BA (Oxon). We thank Professor George Bermann of Columbia Law School for his guidance and insights. All errors are our own.

1 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("Recast").

2 Case C-159/02 *Turner v Grovit* [2004] ECR I-3565.

3 Case C-185/07 *Allianz v West Tankers* [2009] ECR I-663.

4 Case C-536/13 *Gazprom OAO* EU:C:2015:316.

litigation, as with judicial orders enforcing them, were not subject to the *West Tankers* prohibition. The second is the advent of the Brussels Regulation (recast) (hereinafter 'Recast'), which incorporated a Recital (12) that sought to explain the 'arbitration exception' in Art 1(2)(d).[5] Some, including AG Wathelet in his *Gazprom* opinion, had argued that Recital (12) had displaced the *West Tankers* prohibition.[6] The *Gazprom* Court, however, omitted to address whether—and how far—its Advocate General was right.

The upshot of these two developments, then, is a juridical morass that demands closer analysis than has been accorded. Perhaps owing to its 'pro-arbitration' result, the *Gazprom* decision has been described as 'unremarkable', 'perfectly practical', and 'perfectly comprehensible'.[7] Conversely, AG Wathelet's arguments relating to the Recast have been criticised even by 'pro-arbitration' critics of *West Tankers*.[8] In response to these contentions, this article counsels closer scrutiny of the two developments, arguing that the juridical configuration emerging is more uncertain and intricate than might first appear.

The article proceeds as follows. After a summary explanation of what an AAEI is, we shall argue that *Gazprom* is not as 'unremarkable' or 'comprehensible' as commentators would have it.[9] Outcome aside, *Gazprom*'s reasoning fails to explain how judgments or equivalent orders by a court enforcing arbitral 'anti-suit' awards are exempt from the *West Tankers* prohibition even if they technically involve the same remedial mechanisms and can be as disruptive of a court's jurisdiction as judicial AAEIs. We shall argue, therefore, that *Gazprom*, involves a conceptually inexplicable backtracking from the ethos of *West Tankers*, under which any judicial act which interfered with a court's exercising of Brussels-conferred jurisdiction was inconsistent with it. We shall further demonstrate that *Gazprom does not* conclusively establish that all manner of judicial acts enforcing arbitral awards are exempt from

5 Recital (12) and Art 1(2)(d), Recast (n 1).

6 Opinion of AG Wathelet, Case C-536/13 *Gazprom* (n 4).

7 See Adrian Briggs, 'Arbitration and the Brussels Regulation Again' (2015) LMCLQ 284, 286–287; Vesna Lazic and Steven Stuij, *Brussels Ibis Regulation* (Springer 2016) 143–49; Chukwudi Ojiegbe, 'Arbitral tribunals are not bound by the principle of mutual trust' (2015) 18(4) Int ALR 74, 75; Ewelina Kajkowska, 'Anti-suit injunctions in arbitral awards: enforcement in Europe' (2015) 74(3) CLJ 412, 415; James Drake, 'Gazprom: The Report of the Demise of West Tankers is Greatly Exaggerated' (2015) CIArb Bulletin 5; Eva Storskrubb, 'Gazprom OAO v Lietuvos Republika: a victory for arbitration?' (2016) 41(4) EL Rev 578; Jae Sundaram, 'Case Note' (2015) 27 Denning LJ 303, 322, *inter alia*.

8 ibid 287; George Bermann, 'The Gazprom Case: 'Sounds' and 'Silences' in Relations between EU Law and International Arbitration' (2015) 22(8) Maastricht JEL 899–903.

9 See eg Drake (n 7); Briggs (n 7); Trevor Hartley, 'Antisuit Injunctions in Support of Arbitration: West Tankers Still Afloat' (2015) 64 ICLQ 965; Chukwudi Ojiegbe, 'From West Tankers to Gazprom: anti-suit injunctions, arbitral anti-suit orders and the Brussels I Recast' (2015) 11(2) JPIL 267, 289ff.

the *West Tankers* prohibition, and so leaves the resulting rule uncertain. In respect of the Recast, we shall argue that Recital (12) does little to address the *West Tankers* prohibition. In that respect, we shall argue that AG Wathelet's arguments are problematic and unlikely to be accepted by the Court.

The article's bottom line, consequently, is deliberately provocative: Gazprom, regardless of the desirability of its outcome, is analytically problematic, and the Recast does not salvage it.

II. The '"Anti-Suit" Injunction Supporting Arbitration'

The AAEI is a device largely peculiar to the common law jurisdictions.[10] It is a judicial or arbitral order that specifically enforces the negative obligation undertaken by a party to an arbitration agreement to not litigate an issue exclusively meant for arbitration.[11] Though theoretically discretionary, an AAEI will be granted by a court upon proof that an enforceable arbitration agreement 'highly probably' exists and is, or is threatened to be, breached.[12]

Because the AAEI enforces a contractual obligation which a party has assumed under an arbitration agreement not to litigate a claim meant for arbitration,[13] it is distinguishable from the other kinds of 'anti-suit' injunctions issued in response to equitable wrongdoing like a litigant's 'vexatious and oppressive' conduct.[14] Unlike those,[15] the AAEI involves the specific enforcement of a pre-existing contractual obligation not to litigate a claim meant for arbitration.[16] This functionality exists because the negative obligational aspect of an arbitration agreement is regarded special.[17] Being twinborn of the choice to arbitrate a claim exclusively,[18] a party's breach of its negative obligation is regarded as pecuniarily incompensable,[19] because the trouble of having to litigate in another forum is the very mischief which the parties to an arbitration agreement are deemed to have 'aimed and

[10] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer 2014) 1290–96.

[11] See *Ust-Kamenogorsk Hydropower Plant v AES Ust-Kamenogorsk* [2013] UKSC 35, [1], [20]–[25]; cf *Donohue v Armco* [2001] UKHL 64, [24].

[12] *AES*, ibid; *Ecobank Transnational Inc v Tanoh* [2016] 1 WLR 2231, [82] – [122]; *The Angelic Grace* [1995] 1 Lloyd's Rep 87; *OT Africa Line v Magic Sportswear Corpn* [2006] 1 All ER (Comm) 32, [30]–[34].

[13] *AES* ibid, [25], citing *The Angelic Grace*, ibid 96.

[14] *The Angelic Grace*, ibid; Adrian Briggs, *Civil Jurisdiction and Judgments* (Routledge 2015) 551–557

[15] See eg *OT Africa Line* (n 12) [30]–[34].

[16] Briggs (n 14) 552.

[17] *AES* (n 11), [25]; Adrian Briggs, *Private International Law in the English Courts* (OUP 2014) 1014–16; cf *Doherty v Allman* [1878] 3 App Cas 70, 719–23.

[18] See Born (n 10) 1274–75, 1393–94.

[19] *Starlight Shipping v Tai Ping Insurance Co* [2007] EWHC 1893 (Comm), [12]; *AES* (n 11), [25].

bargained to avoid' *ex ante*,[20] and so cannot easily be reduced to an exigible sum.[21]

III. West Tankers and its Categorical Prohibition on Judicially-Issued AAEIs in the European Union

The European Court of Justice in the West Tankers decision ruled that the AAEI was prohibited. In that case, a party to an arbitration agreement brought a suit in an Italian Court for claims in tort arising from a collision in Italian waters. In response, West Tankers, a party to an arbitration already ongoing in London concerning the same claim, applied to the English High Court for an injunction enjoining that suit on grounds that it was brought in breach of the arbitration agreement. The injunction was granted. On leapfrog appeal, the House of Lords referred to the ECJ the question of whether it was 'incompatible with Regulation No 44/2001 for a [Member State court] to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement, even though Article 1(2)(d) of the regulation excludes arbitration from the scope thereto'.[22] The Court answered the question affirmatively, but its reasoning must be understood in light of the dialectic between the referring court's apologia for the AAEI and the Advocate-General's outright rejection of the same.

A. The dialectic between the UKHL, the Advocate-General, and the Court in West Tankers

In its reference, the UKHL, in hopes of influencing the ECJ, answered the question it referred in the negative.[23] Chiefly, Lord Hoffmann argued that an application of the 'subject matter' test expounded in previous case law made it that the proceedings concerned only '…the contractual right to have the dispute determined by arbitration' and were thereby exempted by Article 1(2)(d) of the Regulation.[24] Consequently, cases like *Gasser* and *Turner* were distinguishable because those cases had concerned a subject matter outwith the Regulation's scope.[25]

Their Lordships' exhortations, however, were rejected by Advocate-General Kokott, whose arguments the ECJ later adopted. AG Kokott professed

[20] *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA* [2007] UKHL 4, [28]–[30].
[21] See Martin Illmer, 'Brussels I and Arbitration Revisited' (2011) 75(3) RabelsZ, 645, 654.
[22] ibid [23].
[23] ibid [14]–[15], [28]–[30].
[24] ibid [10]–[14], referring to Case C-190/89 *Marc Rich v Impianti* [1991] ECR I-3855; Case C-391/95 *Van Uden Maritime BV v Deco-Line* [1998] ECR I-7091.
[25] Case C-116/02 *Erich Gasser v MAAEIT* [2003] E.C.R. I-14693; *Turner* (n 2).

a fundamentally different understanding of the Regulation and the Article 1(2)(d) 'arbitration' exception.[26] The Advocate-General first objected at their Lordships having '... regard[ed] as irrelevant the effect of the anti-suit injunction on the proceedings before the [Italian court]'.[27] For AG Kokott, the operative question was not whether the anti-suit proceedings in London fell within the Regulation's material scope, 'but whether the proceedings *against which* the anti-suit injunction [was] directed [i.e. the Italian proceedings]' did.[28] One had to look at the *receiving end* of the injunction, [29] because an act which did not itself fall within the Regulation's scope could nevertheless impair its 'practical effectiveness' by the *effects* it had on another court's jurisdiction.[30] So it mattered not that Colman J's order was issued in proceedings exempted by Article 1(2)(d),[31] but that the proceedings in the Italian court *did* fall within the Regulation for involving a tort and contract claim.[32]

The Grand Chamber essentially adopted the views of AG Kokott. The Court began by conceding that the anti-suit proceedings themselves were excepted by Article 1(2)(d).[33] However, it then proceeded to hold that the mere fact that the injunction proceedings fell outside the material scope of Brussels I did not mean that it was necessarily consistent therewith.[34] Instead, the Court identified the operative rule to be that judicial acts having consequences which 'undermine[d] [Brussels I's] effectiveness [by] preventing the attainment of [its] objectives...' were 'incompatible' with the Regulation.[35] Applying the rule, the Court found that Colman J's AAEI enjoining Allianz from proceeding with its suit in Italy did 'undermine [the Regulation's] effectiveness'. The Court gave three reasons:

1. That Colman J's act 'necessarily amount[ed] to stripping the [Italian court] of the power to rule on its own jurisdiction', conferred upon it by the Regulation[36] to consider the claim brought before it.
2. That the injunction's interference with the Italian court's jurisdiction was contrary 'to the trust which the Member States accord to one another's legal

[26] *Allianz* (n 3), Opinion of AG Kokott.
[27] ibid [32]–[33].
[28] ibid [33].
[29] ibid [37].
[30] ibid [35]–[37].
[31] ibid [43]–[49].
[32] ibid [54].
[33] *Allianz* (n 3) [22]–[23].
[34] ibid [24]–[32].
[35] ibid [24]. See further Hartley (n 9) 967.
[36] ibid [28]–[29].

systems and judicial institutions and on which the system of jurisdiction under [Brussels I was] based'.

3. That the injunction had the effect of 'barr[ing] [Allianz] … [from] access to a court' and so denied it 'of a form of judicial protection to which it [was] entitled'.[37]

Before the Court concluded so, however, it had first to find that the proceedings brought before the Italian court had, as their 'principal subject matter', [38] a claim in tort within the jurisdiction granted by Article 5(3) of the Regulation (or what is now Art 7(2) of the Brussels Recast), because the challenge to the arbitration agreement was merely a 'preliminary issue' to the main proceedings involving the tort claim. [39] On those grounds, the Court concluded that all such AAEIs were 'incompatible' with the Regulation. [40]

B. West Tankers established an 'Effects' Principle securing the effet utile of the Brussels Regulation

West Tankers broke new ground from the Court's jurisprudence by its undertaking an 'Effects'-based analysis which forbade all that, in effect, potentially interfered with the exercising of Brussels-given jurisdiction.[41] The Court in *Gasser* and *Turner* did hold that an injunction issued in proceedings *themselves* falling within the Regulation's material scope would be prohibited if it interfered with the jurisdiction of another court seised of a Regulation-governed claim. But both cases left open the question of whether that same logic would (1) apply when the injunction was issued in proceedings *not themselves falling* within the material scope of the Regulation to begin with; and (2) would thus apply to AAEIs like that issued by Colman J.[42] The Court in *West Tankers* answered that question affirmatively.

Professor Briggs has explained[43] that *West Tankers* departed from the logic of such cases as *Owens Bank v Bracco*,[44] and *Hoffmann v Krieg*.[45] These cases stood for the proposition that a court seised of a matter outwith the material scope of the

37 ibid [31].

38 ibid [26]; See also *Marc Rich* (n 24) [26].

39 ibid [26].

40 ibid [34].

41 Briggs (n 17) 200-01; Hartley, (n 9) 907; Patrizio Santomauro, 'Sense and Sensibility: Reviewing *West Tankers*' (2010) 6(2) JPIL 283, 293-94; Burkhard Hess, 'Hess on *West Tankers*' (*COL.net* post, 10 Feb 2009).

42 Adrian Briggs, 'Fear and Loathing' (2009) LMCLQ 161, 163-66; Edwin Peel, 'Arbitration and Anti-Suit Injunctions in the EU' (2008) 125 LQR 365, 366–68.

43 Briggs, ibid 164–65.

44 Case C-129/9, [1994] ECR I-117.

45 Case C-145/86 [1988] ECR 645.

Regulation could permissibly act in a way that contradicted the Regulation's own rules or, *a fortiori*, impaired their effectiveness. They were logically inconsistent with an 'Effects' principle which looked not to the question of whether an act itself fell within the Regulation's scope but the act's effects instead.

Nevertheless, the *West Tankers* court innovated. [46] No longer did it matter that the offending judicial act did not fall within the Regulation's scope. So long as it had the effect of adversely interfering with an action that did fall within Brussels, it was *ipso facto* 'incompatible' therewith. The Court, in accepting AG Kokott's thesis, had engendered a novel and potent 'Effects' principle that would begrudge even remote acts which the Regulation was not directly purposed to regulate.[47]

IV. Gazprom's Uneasy Relationship with West Tankers

Given the aforementioned history, *Gazprom* remains the Court's most recent exposition on AAEIs in the EU to date, and many regard it as holding *ex facie* that *West Tankers* neither prohibits (1) an order issued by an arbitral tribunal having the effect of an AAEI, nor (2) a Member State court from enforcing that order against the party whom it enjoins.[48] As shall be explained, however, the true legal position emerging is not as clear.

In *Gazprom*, the Stockholm Chamber of Commerce, after finding breaches of an arbitration agreement, rendered a final award ordering the Lithuanian Ministry of Energy to withdraw or reformulate the claims it had initiated in the Lithuanian courts.[49] This award, therefore, operated as an AAEI. Gazprom OAO sought to enforce the award in the Lithuanian courts. The Ministry opposed enforcement, arguing that the award 'constituted an anti-suit injunction [whose] recognition and enforcement would be contrary to [the Regulation] as interpreted [in *West Tankers*]'.[50] The Lithuanian Supreme Court, fearing that judicial enforcement of an arbitrally-issued AAEI was foreclosed by *West Tankers*, tendered a preliminary reference.[51] It queried whether a court of a Member State had the 'right to refuse' to an arbitral award which operated like an AAEI on grounds of 'incompatibility'

[46] Briggs, (n 42) 16465; Guido Carducci, 'Arbitration, Anti-suit Injunctions and Lis Pendens under the European Jurisdiction Regulation and the New York Convention' (2011) 27(3) Arb Intl 171, 179–81; Peel (n 42).

[47] See Hess (n 41); Geert Van Calster, *European Private International Law* (Hart 2013) 35-38, 50, christening this '*[t]he Effet Utile Sledgehammer*'; Pietro Ortolani, 'Antisuit Injunctions in Support of Arbitration Under the Recast Brussels I Regulation' (MPILux Working Paper 6, 2014) 9–11.

[48] eg Briggs (n 7); Ojiegbe (n 9); David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (3rd edn, S&M 2015) paras 12.62–12.63.

[49] Final Award of July 31, 2012, SCC Arbitration No. V (125/2011), [225]ff. See also *Gazprom*, Opinion of AG Wathelet, (n 4) [37].

[50] ibid [46].

[51] *Gazprom* (n 4) [31], [26]. Opinion of AG Wathelet, ibid [47].

with the Regulation, and, alternatively, whether a court could, anyway, decline enforcement of such an award because it violated EU public policy.[52]

The Court answered the first question in the negative and evaded the public policy question.[53] In doing so, it visibly reaffirmed its *West Tankers* ruling,[54] recalling that judicial AAEIs were prohibited by *West Tankers* for being 'incompatible' with Brussels I.[55] It further expounded, now, that *West Tankers* was predicated on the general principle of Mutual Trust, being the 'general principle … that every court seised itself determines, under the applicable rules, whether it has jurisdiction to resolve the dispute before it', interference with which '[ran] counter to the trust which the Member States accord to one another's legal systems and judicial institutions'.[56] However, the Court then explained that the arbitral award in question, as with its enforcement by the Lithuanian courts, did not violate Mutual Trust for three reasons:

1. That the principle of Mutual Trust applied only to the courts of Member States and not arbitral tribunals.[57] Concomitantly, the Regulation governed '... only conflicts of jurisdiction between courts of the Member States' and not arbitral acts.[58] Being so, an arbitral award, even where it operated like an AAEI, could not violate Mutual Trust.[59] The Court then briskly reasoned in a single sentence that, simply because '... the order ha[d] been made by an arbitral tribunal', a judicial act enforcing that order was also 'unquestionably'[60] not a violation of Mutual Trust.[61]

2. That arbitral awards enjoining litigation, unlike judicial AAEIs, did not have the effect of denying a claimant the 'right to judicial protection', since those awards could always be contested at the enforcement stage by a claimant in foro, and so did not flout the principle of Mutual Trust.[62]

3. That, the Stockholm tribunal's award, as with its 'legal effects', was distinguishable from judicial AAEIs because its issuance could not result in

[52] ibid [47].
[53] *Gazprom* (n 4) [27]; cf Bermann (n 8) 899, 903.
[54] ibid [32]–[33].
[55] ibid [33].
[56] ibid [33].
[57] ibid [37].
[58] ibid [36].
[59] ibid [37].
[60] ibid.
[61] ibid.
[62] ibid [34], [38]–[39].

'penalties' being imposed upon a claimant by the court of another Member State for non-compliance.[63]

On these three bases, the Court concluded that the Lithuanian court's enforcement of the arbitral award in question was not 'incompatible' with the Regulation.

A. *Gazprom* establishes that member state courts can enforce (some) arbitral AAEIs notwithstanding *West Tankers*

Gazprom clearly establishes that *West Tankers* did not prohibit a court from enforcing an arbitral AAEI which operated as the Stockholm tribunal's award did. That conclusion, apparently, flowed from the premise that arbitral acts fell outwith the Regulation's material scope and were therefore incapable of violating the principle of Mutual Trust.[64] The conclusion was, to many, a welcome conclusion.[65] Critics had previously feared that *West Tankers* made it that '... as long as a matter can be said to have some sort of connection to the Regulation, then ... anything which "undermines its Effectiveness" is prohibited.'[66] Now *Gazprom* had proven that there was at least a limitation to the 'Effects' principle: arbitral awards (and at least some judgments enforcing them).

At the same time, however, the Court expressly affirmed the rest of the *West Tankers* prohibition.[67] *Gazprom* does not revive the logic of *Hoffmann* or *Bracco*.[68] The mere fact that an act has 'arbitration' as its subject-matter need not exempt it from being 'incompatible' with the Regulation.[69] Nevertheless, *Gazprom*'s specific outcome was still largely welcomed by those previously opposing *West Tankers*.[70]

B. But *Gazprom* does not explain why Member State courts can enforce and recognise arbitral AAEIs in spite of *West Tankers*

The whole trouble with *Gazprom*, however, is that various obscurities surround its core ruling that (some) judicial acts enforcing arbitral awards are not

63 ibid [40]; cf Maximillian Sattler 'Abandon ship? West Tankers, Gazprom, and anti-suit injunctions under "Brussels Ia' (2016) 34(2) ASA Bulletin n 19 342, 348.

64 See IV.D(ii) below.

65 Briggs (n 7) 287; Ojiegbe (n 9) 289–90; Berk Dermikol, 'Ordering Cessation of Court Proceedings' (2016) 65(2) ICLQ 379, 381.

66 Briggs (n 42) 166; Margaret Moses, 'Arbitration/Litigation Interface: The European Debate' (2014) 35 Northwestern J Intl LB 1, 26-29.

67 *Gazprom* (n 4) [34]–[35].

68 *Contra* Ojiegbe (n 9) 289-90; cf Hartley (n 9) 973-75.

69 cf *Gazprom* (n 4) [28] [44].

70 eg Briggs (n 7).

'incompatible' with the Regulation.[71]

The Court's reasoning—while reaching an arguably desirable result—does not explain why, in light of its affirmation of *West Tankers*, judicial acts enforcing arbitral AAEIs are not prohibited when ordinary judicial AAEIs are.[72] The *Gazprom* court's proposition that a *court's* enforcing of an arbitral award 'unquestionably' benefits from the same exemption that arbitral awards enjoyed is incompletely explained.[73] It is one thing to say that arbitral acts (i.e. awards) cannot violate Mutual Trust and are not capable of being 'incompatible' with the Regulation, and wholly another to hold that *judicial acts enforcing arbitral acts* (i.e. 'award judgments' or equivalent orders) automatically inherit the same exemptive character.[74] It is submitted that there are two problems inherent in 'leaping' from the premise that arbitral awards are excepted from the Regulation, to the proposition that judicial acts enforcing them acquire that 'exceptionality':

1. Judicial acts enforcing arbitral AAEIs still involve a mediating act of enforcement which is essentially similar to judicial AAEIs; and
2. That very act may effectively be just as disruptive of another court's Brussels-conferred jurisdiction.

(i) There is still a mediating judicial act which essentially shares the same agency as a judicial AAEI

In the first place, the *Gazprom* court does not appear to appreciate that the act of a court enforcing an arbitral act technically involves either a court rendering an independent judgment in terms of the award, or declaring the award to be enforceable in the manner of a true *exequatur*.[75] In England, for example, both avenues are available.[76] Scholars have termed these enforcement orders 'award judgments'.[77] That a judgment (or equivalent order) is rendered either way proves, first, that there is a *mediating judicial act* between the enforcing of an arbitral AAEI and a party being so enjoined. A court exercises an independent power to enforce the award, and by so doing asserts its jurisdiction over the party enjoined.[78] It is just

[71] *Contra* Ojiegbe (n 9) 289-290 and Mukarrum Ahmed, 'PhD Thesis' (University of Aberdeen, 2016) 61, 173n616.

[72] cf Briggs (n 7) and Hartley (n 9), Van Calster (n 42) 56-57, and Sattler (n 63) 348–49.

[73] See *Gazprom* (n 4) [35]–[39].

[74] cf Hartley (n 9) 975, 975n44; Sattler (n. 63) 489–90; Van Calster (n. 47) ibid 56.

[75] See Maxi Scherer, 'Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road?' (2013) JIDS 587. On what an 'exequatur' is, see Scherer, ibid 606.

[76] ss 66(1) – (2) and 101(1) – (3) Arbitration Act 1996.

[77] eg Scherer (n 75)) *passim.*

[78] See eg *West Tankers Inc v Allianz* [2012] EWCA Civ 27, [38].

as how, in the case of a judicial AAEI, a court order mediates between the negative contractual obligation and the party breaching it.

More importantly, the Court also appears not to perceive that an award judgment enforcing an arbitral AAEI still effectuates specific performance of the negative obligational aspect of the arbitration agreement. Whether an AAEI is judicially or arbitrally issued, therefore, both acts still do *ultimately* involve the same mechanisms. So the *Gazprom* court's curious insistence,[79] replicated by some,[80] in reckoning *only* a directly judicially-issued order as an anti-suit injunction, but a judgment award enforcing an arbitral 'anti-suit' order as something else altogether, is analytically questionable. They are both 'anti-suit' injunctions if that label should be used, for it cannot sensibly be claimed that an order by a court enforcing an arbitral AAEI enforces a different obligation or enforces it differently from a judicial AAEI. In effect, a court is technically still issuing an AAEI when it renders that award judgment.[81] Notwithstanding that the award which such a judgment recognises and enforces was 'arbitrally made', it is a court that *finally administers* the remedy. Indeed, if said award judgment should be wilfully disregarded by the party enjoined, the same sanctions as are imposable in a case of a judicial AAEI doubtlessly could be imposed.[82]

The difference, therefore, which the Court found significant, is a contextual and not a conceptual one: that the latter involves the enforcement of an arbitral award and the former does not. But just why is this difference of legal significance? To be sure, the intervening judicial act of award enforcement would *itself* fall within Article 1(2)(d). But again, *West Tankers* taught us that such did not matter, because one focused instead on the impact of the judicial act on a court's jurisdiction.

(ii) That mediating judicial act could well be as disruptive of another Member State court's Brussels-conferred jurisdiction

Furthermore, the *Gazprom* court seems totally to neglect the fact that an award judgment enforcing an arbitral AAEI can be just as disruptive of a court's Brussels-conferred jurisdiction as an ordinary AAEI—a consequence which the original 'Effects' analysis of *West Tankers* deems sufficient for a thing to be 'incompatible' with the Regulation. Because, on *Gazprom*'s own particular facts, the arbitral AAEI issued was not actually disruptive, the possibility that *other* awards *could still be* seems to have wholly eluded the Court. Therein, the tribunal issued an arbitral AAEI as a final award, and was thereafter *functus officio*.[83] Thus, there

[79] *Gazprom* (n 4) [25], [30].

[80] Trevor Hartley, 'The Brussels I Regulation and Arbitration' (2014) 63(4) ICLQ 843, 855-57.

[81] cf Joseph (n 48) paras 16.88-16.91.

[82] eg *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3131 (Comm); *SM Shipping Ltd of India v TTMI* [2007] EWHC 927 (Comm).

[83] On the doctrine of *functus officio*, see eg Born (n 10) 748–49.

was therefore no prospect of it making further orders awarding damages or costs if its award enjoining litigation should have been ignored.[84] It was also the case that the Ministry of Energy, a government entity, would probably comply with a Lithuanian court's award judgment, and so there was no real prospect of that court dispensing sanctions for default. And—perhaps most importantly—the enforcing court in *Gazprom* was a Lithuanian court enforcing an award enjoining litigation *in Lithuania* and not before the courts of another Member State.[85] Cumulatively, these facts created a situation wherein the award judgment was not as capable of being potentially disruptive as an ordinary judicial AAEI. But, were one still truly adherent to *West Tankers*' 'Effects' analysis, it is difficult to see why the prohibition should not categorically bite when an award judgment enforcing an arbitral AAEI, as a member of a class of acts, simply *could be* disruptive in the circumstances.

Some might still contend that award judgments enforcing arbitral AAEIs, *post Gazprom*, benefit from the logic of 'that which lays outside stays outside'.[86] So even where a court couples its award judgment with sanctions, or where the award enforced enjoins against the bringing of suit in another Member State, the *mere fact* that the award judgment enforces an arbitral award insulates it from *West Tankers*.[87] That conclusion, however, is highly precipitous. One simply cannot neglect that *Gazprom* affirms *West Tankers* expressly. And *West Tankers* had emphatically demonstrated that injunctive judicial acts did not benefit from the fact that the proceedings in which they were issued were not themselves governed by the Regulation.[88] Otherwise, Colman J's order, falling indisputably within Article 1(2)(d),[89] would have been unobjectionable. The order was disruptive of a court's 'Brussels-given' jurisdiction, and therefore 'inconsistent' with the Regulation *ipso facto*.[90] Being so, there is little assurance against the prospect that the 'Effects' principle might be invoked again to catch award judgments that *were in fact disruptive of another court's jurisdiction.*

C. Two Unanswered Questions Post-*Gazprom* About the Nature and Scope of *West Tankers*' Prohibition

As shall be discussed, two basic questions remain about the nature and extent of the *Gazprom* 'carve-out': (1) whether all judicial acts enforcing arbitral AAEIs are

[84] See *Gazprom* (n 4) [12]–[15].

[85] See Van Calster (n 47) 56–57; Sattler (n 63) 348-49; David Sutton et al (eds) *Russell on Arbitration* (24th edn, S&M 2015) para 7,15ff.

[86] eg Ojiegbe (n 9) 289-91, 292-94; Ahmed (n 71) 173–74. The expression is Briggs' (n 42) 163.

[87] Ojiegbe, ibid 290.

[88] See III.B above.

[89] *Allianz* (n 3) [22]–[23].

[90] See III.A above.

permissible; and (2) whether *West Tankers*' 'Effects-analysis' still remains relevant after *Gazprom*.

(i) It remains doubtful if all judicial acts enforcing arbitral AAEIs are always exempt from the West Tankers prohibition

First of all, one cannot tell from *Gazprom*'s reasoning if all award judgments enforcing arbitral AAEIs would *always* be regarded as 'compatible' with the Regulation just because they enforce arbitral awards.[91]

The *Gazprom* Court did expound that arbitrators could not violate the principle of Mutual Trust and so their acts could not be 'incompatible' with Brussels.[92] But, for starters, we cannot know just how categorical this proposition is, if *West Tankers*' 'Effects' analysis still has any role to play.[93]

Let us nevertheless assume, as many readily have,[94] that the exemption is absolute and that *all* arbitral acts are just exempt. Even so, that does not necessarily indicate whether *all judicial acts enforcing arbitral AAEIs* are categorically exempt.[95] Conversely, it will be seen that three indicia in the *Gazprom* Court's reasoning militate against the hypothesis that it was espousing a claim that strong.

First, interpretive conservatism counsels against assuming that the *Gazprom* Court meant to propound a categorical 'carve-out' from the logic of *West Tankers* when it expounded:

> '... [A]s the order has been made by an arbitral tribunal there can be no question of an infringement of that principle by interference of a court of one Member State in the jurisdiction of the court of another Member State.'[96]

That sentence could be literally interpreted, as some commentators have, as postulating axiomatically that so long '... as the order has been made by an arbitral tribunal', *West Tankers* would not apply.[97] But such an 'easy' reading isolates the statement from its context, and is not the only possible interpretation. This is because the *Gazprom* Court actually did thrice point out that it was addressing the

[91] Cf Guido Carducci, 'Notes on the EUCJ's ruling in Gazprom' (2016) 32(1) Arb Intl 111, 9-11; Van Calster (n 47) 56-57; Lazic and Stuij (n 7) 147–8.
[92] *Gazprom* (n 4) [36].
[93] cf Hartley (n 9) 975n44, *contra* Ojiegbe (n 9); Ahmed (n 71) 173.
[94] Eg Ojiegbe, ibid; Briggs (n 7); Sundaram (n 7) 322.
[95] cf Satter (n 63) 348–49; Carducci (n 91) 9-11.
[96] *Gazprom* (n 4) [37], [44].
[97] See eg Ojiegbe (n 9); Briggs (n 7); Sundaram (n 7) 322.

specific 'circumstances of the main proceedings' in *Gazprom*.[98] Taken in context, rather, the Court's paragraph 37 remark might just as well be as a necessary *but insufficient* condition for the "carve-out". In other words, it might be that, for the prohibition not to apply: (1) the order must have been made by an arbitral tribunal, *and* (2) in such circumstances as those in *Gazprom* (or being at least sufficiently analogous).

This weaker reading is corroborated by another aspect of the Court's reasoning. Namely, it might plausibly be argued that the Court *did not actually hold* that it followed *only* from the fact that arbitral tribunals were not subject to the general principle of Mutual Trust that judicial acts enforcing them were consequently exempt. Had it done so, its exposition would have ended at paragraph 7. But the Court apparently went on. At paragraphs 38 to 40 the Court gave *two* other seemingly adventitious reasons to support its observation at paragraph 37: it stated that the arbitral award in *Gazprom* (i) did not deny a party of judicial protection for being challengeable (paragraph 38), and (ii) did not 'result in penalties being imposed on the enjoined party by a court of another Member State' (paragraph 40). These, we grant, could conceivably be taken as over-subscriptive reasons unnecessary for *Gazprom*'s outcome. But they could just as well be read as further qualifiers upon the paragraph 37 premise—that it obtained *only* where *those* specific conditions were likewise present,[99] and not when the circumstances differed from those at hand.[100]

In that respect, the point the Court made in paragraphs 40 is highly portentous. One might query what is to happen if a court enforces an arbitral award enjoining a party from pursuing litigation in the courts of *another Member State*,[101] given that *Gazprom* involved a Lithuanian court enforcing an award enjoining litigation in Lithuania. In such a case, paragraph 40 would apparently counsel the converse outcome than that in *Gazprom*, since '... failure on the part of the [enjoined party] to comply with the arbitral award' would then be '... capable of resulting in penalties being imposed upon it *by a court of another Member State*'.[102] This starkly evinces the potential narrowness of *Gazprom*'s 'carve-out'. Assume for example that an arbitral tribunal seated in England issues an award enjoining a party from continuing proceedings in Italy. The award-creditor, for pragmatic reasons, seeks to enforce the award not before an Italian court but an English court. That court then renders a judgment enforcing the arbitral AAEI. In that case, it is not obvious

[98] See *Gazprom* (n 4) [37] – [40].
[99] ibid [38].
[100] ibid [37] – [40]; see Joseph (n 48) paras 12.61–7; Sattler (n 63); contra Sutton et al (n 85) para 7.15.
[101] See Sattler, ibid 348–49; Sutton, ibid para 7.15.
[102] *Gazprom* (n 4) [40].

that *Gazprom* exempts that award judgment just because it is an instance of arbitral award enforcement.

For all the foregoing reasons, it is *arguable* that *Gazprom* might be read as not actually holding that all judicial acts enforcing arbitral awards were exempt from *West Tankers*. Instead, it might have held that those acts were exempt *only when* the reasons it cited obtained, and not otherwise.[103] So a judicial act enforcing an arbitral AAEI might be exempt only where it (1) did not deny a party of judicial protection, and (2) did not result in penalties being imposed by a court of another Member State. Effectively, then, it remains distinctly possible that an enforcing court might be debarred from using its coercive toolkit when enforcing awards and securing compliance with its award judgments. Granted, these are surmises. But the point here is that the *Gazprom* Court's reasoning simply does not admit of only one reading. In light of these competing interpretative possibilities, the convenient proposition espoused by some commentators, that all judicial acts enforcing arbitral acts are exempt from *West Tankers*, cannot unexaminedly be accepted.[104] And, absent a proper analytical understanding of why award judgments enforcing arbitral AAEIs are exempt notwithstanding *West Tankers*, it is impossible even to discern which of these alternative readings of *Gazprom*—in addition to the 'easy' reading adopted by said commentators—is correct.

(ii) Absent a rationalisation of why judicial acts enforcing arbitral AAEIs are exempt, one cannot tell whether and how far West Tankers' 'Effects' analysis still applies

The second question left unanswered post-*Gazprom* is incidental to the first. Namely, because *Gazprom* does not adequately explain just how judicial acts acquire the 'exceptionality' of the awards they enforce, we do not know if *West Tankers*' 'Effects-analysis' still remains relevant after *Gazprom* (as where damages in lieu of an injunction are being awarded by courts).[105]

The uncertainty is further compounded by the Court's reasoning in *Gazprom*—by which it seems to have silently abandoned its erstwhile attitude of being jealous about the *effects* a given judicial act might have on another court's Brussels-conferred jurisdiction. Here, it is unclear if the same rigorous level of scrutiny ostensibly applied in *West Tankers* would be replicated thereafter. Recall that, for *West Tankers*, the *mere possibility* of disruption of another court's jurisdiction sufficed for a thing to be 'incompatible' with the Regulation. In contrast, the *Gazprom* Court

[103] cf Hartley (n 9) 973–75.

[104] cf Sutton et al (eds), (n 85) paras 7-043–7-047.

[105] eg *The Alexandros T* [2013] UKSC 70 and [2014] EWCA Civ 1010. See further Andrew Dickinson, 'Once Bitten – Mutual Distrust in European Private International Law' (2015) 131 LQR 186.

was content to assume that (i) an arbitral award could always be challenged *in foro* and therefore did not deny a claimant her right of judicial protection,[106] and (ii) that such an award did not carry with it the prospect of the same penalties that a judicial AAEI did.[107] The ease of that assumption plainly suggests a resiling from *West Tankers*' 'Effects' ethos. Both premises would very arguably not have stood the scrutiny adopted back in *West Tankers*, on three counts.

First, it was irrelevant for the *West Tankers* Court that, unlike arbitral awards favoured by the New York Convention, a judicially-issued AAEI *need not* always be disruptive. It goes without saying that a judicial AAEI, unlike a Convention award, could always be ignored by a court.[108] The judicial AAEI, as a commentator has vividly remarked, is merely 'a card in the game in which the [other court] holds all the aces'.[109] But this simply did not matter for *West Tankers*, wherein the mere *possibility* of disruption seemingly sufficed for the prohibition.

Second, it was then also apparently irrelevant in *West Tankers* that a claimant seeking to litigate could challenge the AAEI at the place of issuance. It did not matter that there existed such ample internal constraints upon the granting of an AAEI that made it unlikely that a bona fide claimant would actually be unfairly harassed. English courts, after all, do not issue AAEIs without a 'highly probable' showing that an enforceable arbitration agreement exists.[110] Thus, one might seriously inquire why the mere fact that a *presumptively enforceable* arbitral award could be challenged (under narrow Convention grounds)[111] counted for much in *Gazprom*, while the fact that an injunction could just be brushed aside by the other court or successfully resisted by a *bona fide* claimant counted for naught in *West Tankers*.

Third, contrary to the *Gazprom* Court's apparent assumptions, it is not necessarily the case that a party could defy an arbitral AAEI without consequence. Granted, in *Gazprom* itself the award was final and the tribunal thereafter *functus officio*. However, in the general run of cases, an arbitral AAEI could well be an interim award, in which case the tribunal might still be able to award damages or other sanctions for a party's non-compliance.[112] Besides, where the arbitral AAEI is judicially-enforced, it might be reinforced with the same sanctions as exist for non-

[106] *Gazprom* (n 4) [38].
[107] ibid [40].
[108] eg *General Star International v Stirling Cooke Reinsurance* [2003] EWHC 3 (Comm), [16].
[109] Daniel Tan 'Enforcing International Arbitration Agreements in Federal Courts' (2007) 47 VJIL 545, 594.
[110] See *Ecobank Transnational* (n 12) [87]ff.
[111] Article V, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38 (1958). cf *Kanoria v Guinness* [2006] 2 All ER 413, 421.
[112] eg *West Tankers v Allianz SpA* [2012] EWHC 854 (Comm); cf Ortolani (n 47) 13–14, 13n25.

compliance with a court's judgment. In England, for example, an award judgment debtor surely would not be able to defy an award judgment rendered by a court without consequence.[113] Ignoring all of this, however, the *Gazprom* Court readily assumes, at paragraph 40, that non-compliance with an arbitral AAEI would not lead to penalties being imposed on a parallel claimant.[114]

So the impression one gets is that the *Gazprom* court has adopted a materially more lenient standard of scrutiny in making those findings as it did. Yet, there is scant indication as to why, analytically, this should be the case, further compounding an analysis of the precise basis underlying the Court's conclusion that judicial enforcement of AAEIs would not jeopardise the Regulation's *effet utile*.

In sum, the foregoing obscurities suggest that it is difficult to tell just how far the 'carve out' in *Gazprom* extends. They expose the underlying tension between the logic of the two cases. *Gazprom*, by treating (at least some) award judgments as being exempted along with the arbitral awards they enforce, has posited a proposition conflicting with *West Tankers*' original 'Effects' ethos. By the latter's lights, all acts which potentially jeopardised the Regulation's effectiveness, irrespective of whether they fell within Article 1(2)(d), were prohibited. However, *Gazprom* now suggests that, so long as a court enforces an arbitral award, it acquires that award's character of 'exceptionality', notwithstanding that such an act essentially shares the same mechanism as an AAEI and could be equally disruptive.[115] For the reasons discussed above, that suggestion appears neither explicable nor axiomatic. And because one cannot explain *how* judicial acts enforcing arbitral acts inherit their 'exceptionality', one is similarly unable to tell just *when* and *what* judicial acts are so exempted. Consequently, one can neither affirm nor falsify such propositions, made by commentators, as:

> "[Even after *Gazprom*] [i]t is doubtful whether arbitrators can, by themselves, impose and enforce penalties for disobedience to their orders. If a court of a Member State were to enforce a penalty of this nature imposed by arbitrators, that would constitute an antisuit injunction as understood in *West Tankers*."[116]

The resultant uncertainty arising from the analytical mismatches between *West Tankers* and *Gazprom*, causes much concern, demanding a further search for a rationalisation of how the *Gazprom* could have reasoned as it did.

[113] eg *Cruz City* (n 82); cf Born (n 10) 2510ff.
[114] *Gazprom* (n 4) [40].
[115] cf *Gazprom* (n 4) [38]–[40].
[116] Hartley (n 9) 975 n44.

D. Rationalising *Gazprom*'s 'Carve-Out' from the *West Tankers*' Prohibition

Our inquiry then becomes whether *Gazprom*'s 'carve-out'—consisting in its reasoning from the premise that arbitral acts are exempt to the conclusion that judicial acts enforcing arbitral acts are exempt—might be satisfactorily explained in analytical terms.

In what follows, two leading scholarly attempts shall be evaluated. The first, propounded by Professor Adrian Briggs,[117] holds that the enforcing Court's exercise of its jurisdiction when it enforces an arbitral award relevantly differs from that exercised when issuing an AAEI.[118] The second, expounded by Professor Trevor Hartley, treats the inquiry as turning simply on whether the act in question violates the general principle of Mutual Trust as conceptualised by the Court.[119] Both theses shall hereafter be analysed to be individually problematic. The upshot is that there is no intellectually satisfactory explanation of *Gazprom*'s reasoning, other that Mutual Trust has been invoked by the Court as a proxy for analysis as to curtail the potential reach of *West Tankers* whilst still sustaining its prohibition.

(i) Explanation 1: Briggs' 'Auxiliary Jurisdiction' Thesis

Perhaps the most analytically sophisticated explanation tendered in *Gazprom*'s wake, seeking to rationalise how award judgments acquire the 'exceptionality' of the arbitral acts they enforce, is that posited by Professor Briggs.[120]

Briggs has propounded what could be called the 'auxiliary judgment' thesis, which holds that, *whenever* a court acts to enforce an arbitral award, it is merely 'acting as *auxiliary* to a body which stands outside the personal scope of the Regulation', akin to an agent acting for its principal.[121] Accordingly, the act does not involve an original exercise of jurisdiction, because an enforcing court merely renders an award judgment which 'claims to have no effect outside the territorial jurisdiction of the court'.[122]

Therefore, accordingly,[123] 'a court may lend its power to an arbitral tribunal or to its award, but in doing so it exercises an auxiliary, not an original, jurisdiction'.[124] Thus, as long as a Member State court acts in this 'auxiliary' capacity, whether to

[117] Briggs (n 7).
[118] ibid 285–88.
[119] Hartley (n 9) 973-75. cf Dermikol (n 65) 396–97, 400–01.
[120] Briggs (n 7).
[121] ibid 285–288.
[122] ibid 287.
[123] ibid.
[124] ibid 285.

make ancillary orders such as the appointment of an arbitrator, or orders which 'give additional force to an arbitral award' as in *Gazprom*, the court 'acts in a matter of arbitration which has no effect on any other court' and thus enjoys the same exception as applies to the arbitral tribunal which it is aiding.[125] Whereas, when a court directly issues an AAEI, it is not acting in that 'auxiliary' capacity because it neither 'exercis[es] its jurisdiction to give power to the award of a tribunal' nor 'assist[s] the mechanics of the process before the tribunal', but exercises an independent, 'original' jurisdiction instead.[126] Briggs also identifies some determinants of whether other judicial acts are 'auxiliary', such as whether the act claims to have extra-territorial effect or if the act 'is intended to have effects on the courts of another Member State'.[127] According to Briggs, all of this 'unremarkably' and 'perfectly comprehensib[ly]' resolves what some might have perceived as 'initially perplexing' about *West Tankers*.[128]

Briggs' account is an incisive attempt at lending some rational rigour to the *Gazprom* Court's reasoning. *Prima facie*, there also exists an intuitive appeal in seeking to explain *Gazprom's* 'carve-out' by invoking the exceptional character of award judgments rendered by courts enforcing awards.[129] Nevertheless, Briggs' explanation is still unsatisfactory because of four reasons: (1) judgments enforcing arbitral AAEIs are still independent exercises of curial jurisdiction; (2) the *West Tankers* prohibition arguably does not respond to technicalities relating to the nature of judgments; (3) Briggs' thesis omits to explain why 'Effects' analysis becomes inapplicable; and (4) the purposes accompanying an award judgment enforcing an arbitral AAEI are irrelevant for *West Tankers*' 'Effects' analysis.

(a) Judgments enforcing arbitral AAEIs are still independent exercises of curial jurisdiction

First, it is juridically unclear how the fact that a court is exercising an 'auxiliary' jurisdiction in enforcing an award makes it *any less an exercise of its own jurisdiction*, or how one can attribute those acts to the tribunal to the elimination of the court's role in that process.[130] Just why is the rendering of what Scherer has termed an 'ancillary judgment' not an independent exercise of curial jurisdiction capable of

[125] ibid.
[126] ibid 286.
[127] ibid 286–87.
[128] ibid 288.
[129] See further Scherer (n 75) *passim*.
[130] cf Scherer, ibid 610ff.

being identified discretely from the award?[131]

Indeed, first principles suggest otherwise. The jurisdiction of a court to recognise and enforce an arbitral award is a public law construct, typically a creature of national legislation.[132] Quite differently, an arbitral tribunal's jurisdiction is constituted by the parties' agreement.[133] Being so, one cannot reckon both jurisdictions as a composite unit even where the exercising of the one seeks practically to effectuate the product of the other.

Furthermore, for a jurisdiction—like England and Wales—that espouses the 'parallel entitlement' theory of award judgments, the discrete existence of the award judgment from the award it enforces is conceptually presupposed.[134] Briggs' analysis, if true, would sit very uneasily with a jurisdiction's acceptance of the 'parallel entitlement' theory of award judgments.

For all these reasons, we see that Briggs' thesis affords no additional basis for conceiving of the judicial act as losing its individual existence or otherwise being a mere extension of that which it enforces.

(b) The *West Tankers* prohibition arguably does not respond to technicalities relating to the nature of judgments

While it is arguably true that award judgments differ in character from other judgments, the proposition that they claim to have no extra-territorial effect, apart from being itself controversial,[135] is arguably irrelevant to the *West Tankers* analysis for two reasons.

First, much controversy looms over whether a judgment by a court confirming or enforcing an award bears the same 'extra-territorial imprint' as other judgments do.[136] Indeed, Scherer accurately describes the issue as essentially one of policy, and not answerable *a priori* as a conceptual question, suggesting that there exists no settled answer in most jurisdictions.[137]

Second, it remains unclear how the *West Tankers* prohibition, as originally understood, might be at all sensitive to the distinction Briggs wishes to invoke. Instead, the notion of a court playing 'auxiliary' to an arbitral tribunal seems

[131] ibid 606–07.

[132] Eg *Mutual Shipping Corpn v Bayshore Shipping* [1985] 1 Lloyd's Rep 189; *Guangzhou Dockyards Co v ENE Aegiali* [2010] EWHC 2826.

[133] Born (n 10) 215–216.

[134] ibid 600-01. On what 'award judgments' are, see the text accompanying (n 76).

[135] See eg Scherer (n 75) 608–612.

[136] See Scherer, ibid 587–88, 608–611.

[137] ibid 609–11.

the very sort of analytical nicety an 'Effects' analysis would ignore. Imagine, for example, if the injunction applicant in *West Tankers* had obtained an award by the London arbitrators in the form of an enjoining order and appeared again before Colman J, who proceeded to enforce that award against the insurers. [138] If Briggs' thesis were correct, then, conceptually, that award judgment would not fall afoul of *West Tankers*. Yet, as discussed above, it is highly unlikely that the *West Tankers* Court would have agreed, or even that the *ratio* of *Gazprom* extends that far.[139]

(c) Briggs' thesis does not explain why *West Tankers*' 'Effects' analysis becomes inapplicable

Relatedly, a key predicate of Briggs' thesis is the premise that, because a judicial order enforcing an award is *not a judgment for Brussels I purposes*, '... it acts in a matter of arbitration which has no effect on any other Court' and accordingly 'lies outside the domain of the Brussels I Regulation'.[140] But that argument is arguably made irrelevant by the original 'Effects' principle of *West Tankers*. The exact same could have been said about judicial AAEIs like that issued by Colman J, which, similarly, were not judgments governed by Brussels. Indeed, the Court conceded as much.[141] But that, however, did not preclude them from being nevertheless 'incompatible' with the Regulation by virtue of their disruptive impact on another court's Brussels-conferred jurisdiction. *Mutatis mutandis*, it would be irrelevant whether or not an award judgment is a judgment for Brussels purposes.[142]

(d) The purposes accompanying an award judgment enforcing an arbitral AAEI are irrelevant for 'Effects' analysis

Finally, Briggs' method of distinguishing between 'auxiliary' and 'non-auxiliary' judicial acts in terms of their accompanying purpose is also questionable. One could accept that an award judgment is not 'designed to have an impact on the courts of another Member State' nor 'reac[h] into the legal order of another Member State'.[143] But, again, the very logic of *West Tankers*' 'effectiveness' imperative arguably makes it that the designs of the issuing court arguably do not

[138] cf Hartley (n 9) 975n44.
[139] See G*azprom* (n 4) [40]. cf Briggs's response in (n 7) 288.
[140] ibid 285–86.
[141] *Allianz* (n 3) [22]–[23].
[142] cf Hartley (n 9) 969.
[143] ibid 286.

matter.[144] As Briggs himself argues elsewhere, the AAEI is not purposed as such to influence the courts of another Member State or to thwart their jurisdiction.[145] Rather, it seeks to compel the enjoined entity not to breach its contract. But all of that was ostensibly irrelevant for both AG and Court, who focused on how potentially disruptive the injunction was *in fact,* not in design.[146]

For the foregoing reasons, Briggs' attempt to prove the existence of a coherent nexus of principle between *West Tankers* and *Gazprom* is unsatisfactory. One remains perplexed by *Gazprom*'s failing to explain why (and when) judicial acts of award enforcement can inherit the 'exceptionality' of arbitral awards if other judicial acts are assessed purely in terms of their effects.

(ii) Explanation 2: Hartley's 'Mutual Trust' Thesis

A second and less analytically ambitious explanation might be put forth as being more accurately descriptive of the *Gazprom*'s reasoning. This thesis, advocated by Professor Hartley,[147] holds that:

1. The principle of Mutual Trust *simpliciter* now constitutes the underlying basis for the prohibition in *West Tankers.*[148]
2. Judicial acts enforcing arbitral awards *just are* not contrary to the general principle of Mutual Trust.[149]
3. Conversely, other judicial acts like the issuing of anti-suit injunctions, while themselves falling within the 'arbitration exception' in Article 1(2)(d), are still prohibited for being contrary to Mutual Trust. Thus, in Hartley's words: *'[Gazprom] changes the basis of the [West Tankers] prohibition: it is no longer based solely on the Brussels Regulation, but is now contrary to a general principle which emerges from the case law of the CJEU.'*[150]

Hartley's thesis is, at least, descriptively persuasive. Closer analysis shows that the *Gazprom* Court did place newfound emphasis on the principle of Mutual Trust in apparent displacement of *West Tankers'* original rationale. In *West Tankers*, as Hess observes, 'Mutual Trust [was] only used as an additional argument [and] much

[144] ibid 286.
[145] Briggs (n 14) 544–45.
[146] See ibid 566–68; *West Tankers* (n 20) [26]-[31]. cf Ortolani (n 47) 13–15.
[147] Hartley (n 9) 973–74.
[148] ibid, 973–74; cf Hartley (n 80) 852n46.
[149] ibid 974–75, reading *Gazprom* (n 4) [35] and [39] to imply this.
[150] ibid 973; see also 974n43 and 975n44.

later'.[151] The rationale for its prohibition was instead presented as the securing of the 'proper operation of the Regulation' and 'the priority of Community law',[152] leading commentators like Briggs to surmise that *'...[a]s long as a matter can be said to have some sort of connection to the Regulation ... anything which "undermines its effectiveness" is prohibited'*.[153] Conversely, in *Gazprom*, Mutual Trust took centre-stage, occupying four paragraphs in the Court's reasoning when it was only mentioned supplementally once in *West Tankers*.[154] *Effet utile* was not once invoked by the *Gazprom* court,[155] which conducted its inquiry in terms of whether arbitral acts were incapable of violating Mutual Trust and therewith extrapolated that judicial acts enforcing them followed suit.[156] Practically, then, the 'Effects' principle which then drove *West Tankers* was relegated to the backseat in *Gazprom*. Mutual Trust was identified not only as having explanatory priority over the Regulation's *effet utile*, but was visibly reinstituted as the basis of *West Tanker*s' prohibition.[157]

(iii) Hartley's account is descriptively accurate, but presents an analytically unsatisfactory picture

Thus, Hartley's explanation succeeds where Briggs' 'auxiliary judgment' thesis falters. It accurately accounts for what the *Gazprom* Court basically did—shelving the three discrete bases given in *West Tankers* as to why a judicial AAEI was 'incompatible' with the Regulation into a single conceptual repository: Mutual Trust.

That Hartley's thesis should be descriptively preferable, however, does not bode favorably for an attempt at rationalising *Gazprom*. While descriptively accurate, Hartley casts the Court as perpetrating conceptual say-so: judicial acts enforcing arbitral awards were exempt *just because* the court defined Mutual Trust not to begrudge them.

That must worry us. If the overarching rationale underlying the *West Tankers* prohibition post-*Gazprom* is now reducible to the Principle of Mutual Trust instead being based on the *effet utile* of the Regulation, one needs to be able to discern what Mutual Trust means in order to identify what else might or might not be caught. No longer can one be sceptical about its provenance,[158] or treat it as a side-wind

[151] Hess (n 41).
[152] ibid.
[153] See further Briggs, (n 42) 166; Ortolani (n 47) 13-15.
[154] Compare *Gazprom* (n 4) [34], [37]–[39] with *Allianz* (n 3) [30].
[155] Hartley (n 9) 973–75.
[156] *Gazprom* (n 4) [37]–[40].
[157] *Accord* Hartley (n 9) 973–75.
[158] Briggs (n 42) 164–65 and 165n26.

to the Regulation's *effet utile*.[159] But that, unhappily, is easier professed than done. Because the principle of Mutual Trust has not been clearly defined, one cannot predictably tell what it requires or exempts beyond what *West Tankers* and *Gazprom* demonstrates by example.

(a) 'Mutual Trust' is unintelligible content-wise and cannot afford much practical guidance

The general principle of Mutual Trust has been regarded to be the "essential basis" of the Brussels Regulation.[160] It is mentioned in the recitals of both Regulations.[161] Further afield, the principle also finds application in the context of the European Arrest Warrant cases,[162] in insolvency,[163] and in family law.[164] Much ink has also been spilt on its wider jurisprudential aspects.[165] Even so, one could well question what the principle practically requires where it specifically comes to the work of courts in support of arbitration, apart from the fact that it abhors judicial AAEIs. True, both the Court and commentators have expounded that 'Mutual Trust' basically means that Brussels' jurisdictional rules are to be regarded as *common* and *compulsory*,[166] entailing that 'courts of one Member State [must] respect the right of the court of another Member State to determine its own jurisdiction.'[167] But, where AAEIs are specifically concerned, one could still question if the principle has any independent parameters existing apart from the bare proposition that judicial AAEIs are forbidden but (at least some) acts enforcing arbitral AAEIs are not.

The answer must be negative. It is difficult to see how, but for the Court's judgment in *West Tankers*, one would have deduced from Mutual Trust alone that a judicial AAEI issued in proceedings which were not themselves governed by Brussels would flout Mutual Trust.[168] Likewise, if not for *Gazprom*, it would be hard

[159] Hess (n 41).

[160] See Andrew Dickinson in Andrew Dickinson and Eva Lein (eds), *The Brussels I Regulation Recast* (OUP 2015) para 1.67; cf Thomas Wischmayer, 'Generating Trust Through Law? – Judicial Cooperation in the European Union and the 'Principle of Mutual Trust' (2016) 17 German LJ 339, 358-59; *Turner* (n 2) [24].

[161] Recitals (3) and (16) in Brussels I (n 1); Recital (26) in Recast (n 1).

[162] Case C-436/04 *Van Esbroeck* [2006] ECR I–0233, [30].

[163] Case C-533/08 *TNT Express Nederland* [2010] ECR I-4107, [54]–[56].

[164] Case C-195/08 *Rinau*, EU:C:2008:406, [50].

[165] See eg Wischmayer (n 160); Felix Blobel and Patrick Späth, 'The Tale of Multilateral Trust and the European Law of Civil Procedure' (2005) 30(4) ELR 528.

[166] *Turner* (n 2) [24]–[25].

[167] See Neil Dowers and Zheng Sophia Tang, 'Arbitration in EU Jurisdiction Regime: the Recast Regulation and a New Proposal' (2015) 3(1) Groningen JIL 125, 143.

[168] Wischmeyer (n 160) 342.

to augur, by *West Tankers'* lights alone, that Mutual Trust was not violated by (at least some) award judgments enforcing arbitral AAEIs.[169] In truth, the case law—from *Gasser* to *Gazprom*—does not provide much more practical guidance than their respective conclusions on what the principle did prohibit.[170] One is not even told if Mutual Trust operates independently of Brussels's material scope,[171] and so if whether, as Hartley hypothesizes, '*the prohibition applies to protect proceedings in the courts of Member States even if they are outside the subject-matter scope of the Brussels Regulation.*'[172]

To wit, there are four standing uncertainties relating to a 'Mutual Trust'-based prohibition of the sort *Gazprom* appears to have instituted.

First, Mutual Trust tells us little further about the precise parameters of *Gazprom*'s 'carve-out', and therefore gives little guidance on what Mutual Trust requires in respect of the mooted variations on *Gazprom*'s facts discussed above. For one, the Court suggested at ¶38 that the 'contestability' of the award mattered.[173] So, would it flout Mutual Trust for a French court to enforce an arbitral AAEI—since French law mandates the recognition and enforcement of awards save where 'manifestly contrary to international public policy'?[174] And even where a Member State simply employs Art V NYC grounds, it is unclear how arbitral AAEI awards might be more 'contestable' relative to ordinary court-issued injunctions. Judicial AAEIs, as aforesaid, can be ignored *in foro* or be opposed at its origin upon much broader bases than Art V permits in respect of arbitral awards. Because Mutual Trust lacks a proper juridical grammar, there is frighteningly little the analyst can do to affirm or falsify these possibilities, apart from drawing hopeful analogies with what passed bar in *Gazprom*.

Second, it is difficult to discern just what legal incidents accompany the intercurial obligation of Mutual Trust. A crucial question, left unanswered by *Gazprom*, is whether a violation of 'Mutual Trust' constitutes a violation of EU public policy, as then affords a V(1)(b) basis for refusal of an arbitral AAEI's recognition and enforcement.[175] Furthermore, *Gazprom* also suggests that Mutual Trust requires a claimant to have "access to the court before which [she] ... brought proceedings",[176] but offers little further guidance on what other possible legal incidents that 'right' might entail or be based upon. Might it, for example, be that a court before which parallel proceedings are brought, *qua* beneficiary of Mutual Trust, might

[169] cf *Allianz (EWHC)* (n 3) [51]–[68].
[170] Van Calster (n 47) 50–57.
[171] Hartley (n 9) 973–75.
[172] ibid 973.
[173] *Gazprom* (n 4) [39].
[174] Art 1514, NCPC; cf *Beverage Intl c. Zone Brands Europe* (Cass Civ 1re, 08-16.369, 14 Oct 2009).
[175] cf Opinion of AG Wathelet, (n 6) [161]–[188].
[176] See *Gazprom* (n 4) [34], [37]–[39].

reciprocally have a duty to respond in kind by properly handling the parallel claim? And it is even intelligible for one to argue that the right enjoyed by a parallel claimant should be defeasible on a showing of complicit fault or bad faith by a third forum's courts?[177] Or do these commonsense arguments defy what 'Mutual Trust' *conceptually* means? Again, because the concept lacks a juridical grammar, one is left to guess.

Third, there remains the question of whether the judicial enforcement of an award of damages for the breach of an arbitration agreement by commencing a parallel suit would be compatible with Mutual Trust,[178] as Flaux J had suggested in an English decision.[179] *Prima facie* it might seem intuitive that, if the enforcement of an award having the effect of an AAEI has been found compatible, then the enforcing of an award of damages for the breach of the same obligation should be similarly exempt.[180] But the amorphousness of Mutual Trust does not allow us to conclude so with confidence. Recall that the *Gazprom* Court had emphasised at paragraph 40, apparently as a datum of Mutual Trust compliance, the absence of penalties being imposed on an individual for non-compliance with an arbitral AAEI.[181] It eludes comprehension why the exaction of a penalty by an arbitral tribunal itself is apparently objectionable, when penalties already exist for non-compliance with *the award judgment* enforcing the arbitral AAEI.[182] But accepting the Court's logic (as we must), an award of damages might be argued to resemble more closely a sanction than the Stockholm tribunal's AAEI sans damages, and thus be prohibited.[183] Again, lacking a proper analytical explanation as to what animates Mutual Trust, all that succeeds is success.

Finally, the amorphousness of Mutual Trust also thwarts identification of whether *judicially-awarded* damages in lieu of an AAEI, as in the *Starlight* cases,[184] would be similarly caught. Were the *effet utile* of the Regulation still an uncompromising quantity, then the answer, as Dickinson cogently prognosticates, would likely be 'yes'.[185] Inasfar as an award of damages could be disruptive of

[177] Carducci (n 46) 178, argues so, but cf *Turner* (n 2) [12].
[178] Hartley (n 9) 862–64; Martin Illmer, 'Scope and Definitions' in (n 160) 86–87.
[179] *Allianz (EWHC)* (n 3) [51]–[68]. See further Illmer, ibid 86–87.
[180] Tan (n 109), 597–611.
[181] *Gazprom* (n 4) [40]. The SCC did not award damages for breach: (n 49) [269]–[277].
[182] cf *Cruz City* (n 82).
[183] cf Hartley (n 9) 862-84; Ortolani (n 47) 12–15.
[184] See Dickinson (n 105) for a summary account. The *Starlight* cases involved the English courts holding that judicially-awarded damages in lieu of an AAEI were not prohibited under EU law.
[185] ibid 190–93.

another court's jurisdiction, it would be incompatible with Brussels.[186] In light of *Gazprom*'s apparent re-orientation of the rationale underlying *West Tankers*, however, all is muddied. For instance, if Mutual Trust did not resent judicial acts purposed to *compensate* the innocent party instead of imposing a penalty, perhaps it might pass. Conversely, if damages were seen as more analogous to the 'penalties' contemplated by paragraph 40, then the reverse might hold. Withal, it is wholly unclear just how sensitive Mutual Trust would be to the differences obtaining between judicial AAEIs and damages in lieu. On one hand, as Carducci points out, pecuniary damages do not coerce or compel, and '[do] not [directly] conflict with ... the right to file claims before courts'.[187] But, as Dickinson correctly observes, the prospect of damages could still very well have the *effect* of deterring a claimant from filing suit,[188] which would clearly be relevant had the original *West Tankers* prohibition been the only rule. The problem, again, is that one cannot tell how far Mutual Trust imports *West Tankers*' 'effectiveness' ethos.

E. Ultimately, *Gazprom's* 'carve-out' from the *West Tankers*' prohibition is analytically inexplicable

So the spectacle emerging is troubling. While it is true that, in a post-*Gazprom* world the *West Tankers* prohibition may no longer be potentially limitless, it has been confounded beyond ready explication. Simultaneously, its apparent conceptual basis has been both simplified in the abstract ('All is Mutual Trust') and yet further complicated when sought to be practically applied ('What does Mutual Trust Require?'). Therefore, *Gazprom*, in the final analysis, cannot be analytically reconciled with the logic and ethos of *West Tankers*, and must be reckoned a conceptually inexplicable backtracking fuelled by a preference for good policy over coherence of doctrine. Still better analytically unintelligible than absolute, some might argue, and so *Gazprom*'s opacity was necessary. However, at least from a systemic perspective, the uncertainty that *Gazprom* brings is inconsistent with the Rule of Law.[189] This is not to conclude that *Gazprom*'s result was not worth its price in coherence. But one cannot deny that *Gazprom*, in effecting an inexplicable carve-

[186] ibid 190. cf Ahmed (n 71) 169–174.

[187] Guido Carducci, 'The New EU Regulation 1215/2012 of 12 December 2012 on Jurisdiction and International Arbitration' (2013) Arb Intl 467, 489. See further Opinion of AG Wathelet (n 6) fn 87; *Marzillier v AMT Futures Ltd* [2015] EWCA Civ 143, [61]–[62].

[188] Dickinson (n 105) 190–93.

[189] In the Razian sense: Joseph Raz, 'The Rule of Law and its Virtue' (1997) 93 LQR 195.

out from the *West Tankers* prohibition, comes at considerable analytical cost.

V. The Recast Does Not Resolve the Analytical Deficiencies Gazprom Brings

With *Gazprom* having both expressly affirmed the continuing existence of the *West Tankers* prohibition whilst muddying its juridical basis and scope, one might question whether the Recast has improved or clarified anything. We argue that the answer is negative.[190] Recital (12) of the Recast serves as an interpretative guide for the Article 1(2)(d) 'arbitration' exception. Even assuming that a recital in a Regulation has independent legal effect and can therefore displace a Grand Chamber decision (an unsettled question),[191] it shall be seen that the *West Tankers* prohibition continues to exist, in an analytically deficient state, as it had post-*Gazpro*m.

A. Discerning the impact of Recital (12) Post-*Gazprom*

(i) Pace AG Wathelet, Recital (12) does not modify the West Tankers prohibition

Any discussion of the effect of Recital (12) on *West Tankers* must start with AG Wathelet's opinion in *Gazprom*. As is widely known,[192] AG Wathelet had controversially argued, at length, that Recital (12) had the effect of displacing the prohibition in *West Tankers* for all manner of AAEIs.[193] Two of his arguments, that paragraphs 2 and 4 of the Recital (12), respectively, had reversed the *West Tankers* prohibition, are key, and will be scrutinised. The following analysis shall demonstrate that the Advocate-General erred on both counts, and that Recital (12) has had neither modificative nor clarificatory effect on the state of things post-*Gazprom*.

(a) The AG's argument from paragraph 2 of Recital (12) is problematic

As his first argument, AG Wathelet contended that paragraph 2 of Recital (12)

[190] Most commentators similarly conclude: see Bermann (n 8) 274–80, 280; Briggs (n 7) 287; Briggs (n 14) 792–794, 794n137; Hartley (n 9) 974–75; Dermikol (n 65) 397-404; Kajkowska (n 7) 415; Illmer, (n 178) 78, para 2.52; Simon Camilleri, 'Recital 12 of the Recast Regulation: A New Hope?' (2013) 62 ICLQ 899, 903ff. *Contra*: Joseph (n 48) paras 12.61–12.78; Richard Fentiman, *International Commercial Litigation* (2nd edn, OUP 2015) 534–38.

[191] cf Bermann (n 8) 899–901; Moses (n 66) 18n87; Dickinson (n 178) 20; Carducci (n 187) 470.

[192] Briggs (n 7) 287; Bermann (n 8) 898–901; Illmer (n 178) 78.

[193] Opinion of AG Wathelet (n 6) [91]–[157].

was intended to be a legislative reversal of *West Tankers*.[194] Paragraph 2 states that a ruling by a Member State court as to the validity of an arbitration agreement is not subject to the 'rules of recognition and enforcement' of the Regulation, 'regardless of whether the court decided on [that] as a principal issue or as an incidental question'.[195]

The AG tendered a two-step argument. First, he argued that paragraph 2 of Recital (12) operated to exclude any court proceedings, relating to whether an arbitration agreement was valid and enforceable, from the material scope of Recast.[196] Paragraph 2 had, in Illmer's words,[197] the effect of '*splitting*' any determinations on an arbitration agreement's validity—for the purposes of determining their 'subject matter'—from the rest of the proceedings following that determination, thereby reversing the *West Tankers* paragraph 26 principle that the 'subject matter' of proceedings relating to an arbitration agreement replicated that of the main proceedings.[198] Second, being so, an AAEI would, accordingly, only be interfering with a jurisdiction which was not conferred by the Regulation, and thus cannot be 'incompatible' therewith.[199]

The AG's thesis, however, is problematic on at least four counts.

First, putting that point about the exact legal status of Recital (12) aside, it is a better construction of paragraph 2 that it *merely* stipulates that rulings on an arbitration agreement's enforceability 'should not be subject to the *rules of recognition and enforcement*' of Recast. Paragraph 2 does not state that such rulings should *also fall outwith* the scope of Recast, and so might be read as excluding that possibility.[200] The AG's argument would be plausible only if we categorically assume that what paragraph 2 meant by not 'subjecting' a ruling on the validity of arbitration agreements 'to the [Regulation's] rules of recognition and enforcement' was that a court's jurisdiction to do so was not governed, and thereby not *protected*, by the Regulation. Only then *might* it follow that anything interfering with *only* that sliver of jurisdiction was not 'incompatible' therewith.[201] But that assumption is multiply dubious. An exemption from the 'rules of recognition and enforcement' connotes perfectly autonomously that a ruling is not to be treated as a judgment under

[194] ibid [125]–[135].
[195] See further Moses (n 66) 20–21; Carducci (n 187) 472–75.
[196] Opinion of AG Wathelet (n 6) [125] – [135] and nn 73–74.
[197] Illmer (n 178) 78–79. See also Carducci (n 187) 473.
[198] *Gazprom*, Opinion of AG Wathelet (n 6) [133]–[135] and n 74.
[199] ibid.
[200] cf Hartley (n 9) 971–72, making a similar point.
[201] See also Fentiman (n 190) 534–38. cf Dermikol (n 65) 400–02.

Recast. So why might it do more?

Second, one might object to AG Wathelet's apparent assumption that a *'ruling'* necessarily implicates a court's *jurisdiction*.[202] Paragraph 2 ostensibly exempts the 'ruling' by a court from the material scope of Brussels, but this need not imply that the *jurisdiction* of a court to make that ruling is similarly exempt. True, one could infer that, if a ruling on the arbitration agreement's validity falls outwith Brussels, so would a court's jurisdiction to make it. But the fact remains that paragraph 2 could have stated 'jurisdiction' if it was intended that 'ruling' should comprise the same.[203]

Third, even if one assumes that the jurisdiction to rule on an arbitration agreement's validity are exempt from the Recast, that does not alter the fact that a judicially-issued AAEI could still have the *effect* of interfering with a court's prospects of considering the merits, or of deterring a claimant from commencing suit elsewhere and so to forgo her supposed 'right of judicial protection'.[204] Indeed, that very thought centrally permeates the original *West Tankers* ruling.[205] Therein, the argument that an AAEI merely targeted a claimant *in personam* did not persuade the Court.[206] *Mutatis mutandis*, the argument that an AAEI would target *only* a court's jurisdiction to address the preliminary issue might find comparable dyspathy. Under *West Tankers*, it would not matter if an AAEI more immediately interfered with the jurisdiction of another state's court to address the 'gateway' issue of an arbitration agreement's validity, for it would still disrupt that court's ability to consider the case's merits *eventually*.[207] Even with *Gazprom*, the conclusion would remain so if Mutual Trust should still involve any kind of an 'Effects' analysis.

Fourth, and perhaps most fatally, the legislative history behind the Recast militates very strongly against there being an outright reversal of *West Tankers* intended by virtue of any combination of the paragraphs in Recital (12).[208]

The fact remains that apart from the recitals, the text of Brussels remained the same. And the reason for this is intelligibly accounted for by the Recast's history. In Illmer's vivid language, the final Recast was a 'surrender rather than a well-founded solution' borne out of legislative deadlock.[209] Summarily recounted, in the wake of

[202] See Hartley (n 9) 971–72.
[203] ibid 971–72.
[204] *Allianz* (n 3) [31]; *Gazprom* (n 4), [34], [38].
[205] *Allianz*, ibid [24]ff. cf Sattler (n 63) 345.
[206] cf Briggs, (n 42) 163–166.
[207] For a variant argument, see Dermikol (n 65) 399–401; cf Briggs (n 17) 999–1002.
[208] cf Bermann (n 8) 899, Hartley (n 9) 972; Ojiegbe (n 9) 283–284.
[209] Illmer (n 178) 60.

the Heidelberg Report,[210] the Commission had proposed a partial abrogation of the Article 1(2)(d) exception and a *lis alibi pendens* regime under which Seat courts would enjoy priority to decide whether arbitration agreements were valid.[211] The Council and Parliament, however, rejected that.[212] Thereafter there came another proposal by the Committee on Legal Affairs proposing the total exclusion of '... any dispute, litigation, or application which the parties have subjected to an arbitration agreement' from Brussels' scope.[213] This too failed to pass, *inter alia*, because it enabled litigants seeking to obviate Brussels to plead fictitious arbitration agreements.[214] Thus, in the end, the institutions 'simply asserted that the problem [of parallel actions] did not exist' and left the text of Brussels I mainly intact with merely minor clarifications.[215] Amidst that backdrop, it is difficult to see how a decision of the Grand Chamber might be reversed by a legislative attempt which contemplated the prospect but could not consummate it in the end.[216]

Indeed, as commentators have consistently noted,[217] paragraph 2, when read with Article 73(2),[218] seems much more purposed to solve the problem which arose in *The Wadi Sudr,*[219] whereby a judgment made by a court on an arbitration agreement's validity was reckoned to be a judgment enforced under the Regulation. The mischief of the *Wadi Sudr* phenomenon was acute, since it could make the Regulation preclusive of a seat court's ability to rule on the validity of an arbitration agreement where another court beat it to the ruling.[220] This had various other ramifications, such as the potential non-confirmation of an arbitral award if that other court's contrary ruling had to be treated *res judicata* by the seat's courts.[221] Moore-Bick LJ even mooted, controversially, that a court's judgment so treated could foreclose arbitral decision were the arbitration procedurally governed by the seat's law.[222] All this made a 'Torpedo' action considerably more threatening. It is

[210] Burkhard Hess et al, *Report on the Application of Regulation Brussels I in the Member States* (Study JLS/C4/2005/03, RKU Heidelberg 2007) [106]ff. cf Illmer, ibid 56.

[211] European Commission, *Proposal* (COM(2010) 748 final, 14 Dec 2010).

[212] See Moses (n 66) 15–17, citing Luca Radicati di Brozolo, 'Arbitration and the Draft Revised Brussels I Regulation' (2011) 7(3) JPIL 432.

[213] European Parliament Committee on Legal Affairs, *Draft Report* (C7-0433/2010–2010/0383(COD), 28 June 2011).

[214] Illmer (n 178) 59–60.

[215] ibid 60-61; Carducci (n 187) 484, 489ff; Moses (n 66) 18.

[216] See Bermann (n 8) 900–02.

[217] Moses (n 66) 19–20; Bermann, ibid 899-900; Illmer (n 178) 78–79.

[218] Art 73(2), Recast (n 5).

[219] [2009] EWCA Civ 1397.

[220] cf Arts 34 and 35, Brussels I (n 1); Illmer (n 21) 652–55; Camillieri (n 190) 904–16.

[221] Ilmer (n 21) 652–55; Moses (n 66) 20–21.

[222] *The Wadi Sudr* (n 219) [118]–[119]. See Moses (n 66) 20n96; Camilleri (n 190) 908–09.

therefore far more likely that paragraph 2 was targeted at reversing that specific mischief inasfar that other court's ruling should no longer be treated as a judgment under Brussels.[223]

Ultimately, therefore, the success of AG Wathelet's paragraph 2 argument turns on two doubtful premises: (1) that its language implies that *a court's jurisdiction* to make such a ruling falls outwith Recast's scope; and, (2) that an act impeding that jurisdiction does not spill over to impede its Brussels-given 'merits' jurisdiction in a way that offends Mutual Trust (or whatever remains of 'Effects' analysis). These premises are highly questionable.

(b) The AG's argument from paragraph 4 of Recital (12) is also problematic

The AG's argument that paragraph 4 of Recital (12) encompasses, and so exempts, judicial AAEI is even more doubtful.[224] To wit, AG Wathelet had contended that the phrase 'ancillary proceedings' in paragraph 4 covered judicial anti-suit injunctions, since, accordingly, '*an anti-suit injunction [was] among the measures which the court of the seat of the arbitral tribunal may order in support of the arbitration with the aim of ensuring the proper conduct of the arbitral proceedings*'.[225]

With respect, the AG's construction is analytically doubtful. In the first place, 'ancillary proceedings' was a term that was contemplated by all three official reports on the Brussels Convention to mean things *ejusdem generis* the appointment of arbitrators, determination of the seat of the arbitration, and extension of time limits.[226] Thereafter the Court, in its cases, conceived of an 'ancillary' proceeding as 'the process of setting arbitration proceedings in motion'.[227] Thus understood, an AAEI cannot congruently be deemed an 'ancillary proceeding' for several reasons. First, an AAEI does not directly or affirmatively facilitate the arbitral proceedings. Rather, it involves the enforcing of the *negative* contractual obligation *not* to sue elsewhere. Furthermore, an AAEI is a substantive contractual remedy enforcing the negative obligational aspect of an arbitration agreement, not an act of procedural administration like the appointing of an arbitrator.[228] While it is true that, as the AG observes, an injunction might be most needed when the arbitral

[223] cf Bermann (n 8) 899–900.

[224] The weight of commentary disfavours AG Wathelet: eg Bermann (n 8) 900-01, Dowers and Tang (n 167) 140; Camilleri (n 190) 904–08; Moses (n 66) 23–25; Carducci (n 187) 488–90; Dermikol (n 65) 402; Briggs (n 17) 1002–03; Ilmer, (n 178) 78.

[225] *Gazprom*, Opinion of AG Wathelet (n 6), ibid [138]–[140].

[226] Peter Schlosser, *Report* [1979] OJ C59/71, [64]ff; Dimitri Evrigenis and Konstantinos Kerameus, Report [1986] OJ C298/01, [35]; Paul Jenard, (1979) 22 OJ C59 1; See further Illmer (n 178) 75, para 2.46.

[227] *Marc Rich* (n 24) [21]; *Van Uden* (n 24) [31]–[34].

[228] eg Born (n 10) 2190ff.

proceedings are not yet set in motion,[229] it is precarious to base the analytically problematic interpretation contended for on that pragmatic need alone.

Even if one surmounts the foregoing objections, there remains a final obstacle. *Even if* judicial AAEIs were contemplated to fall within the term 'ancillary proceedings', *that might just not matter*. The fact (assuming *arguendo*) that AAEIs were now by grace of paragraph 4 not governed by the Recast does not then entail that they would not still be prohibited by a *wider, free-standing basis* of prohibition. Such remains a standing possibility because, to recap, the *Gazprom* Court had seemingly rationalised the *West Tankers* prohibition as now being predicated wholly upon the 'general principle' of Mutual Trust. As Hartley suggests, that move made by the *Gazprom* court possibly means that the prohibition remains capable of catching acts (apart from *Gazprom*'s uncertain 'carve-out') which impede the jurisdiction of other courts, even if they should be themselves expressly exempted from Brussels' scope of application.[230]

(ii) Therefore, Recital (12) does not resolve the analytical deficiencies post-Gazprom

Thus, the foregoing analysis evinces that the Recast does not change in the main what *West Tankers* instituted and what *Gazprom* has affirmed but complicated. Consequently, it does little to resolve the analytical complications plaguing the present doctrinal configuration.

VI. Conclusion

Finally reckoned, our picture is this. The *West Tankers* decision did not merely propound a rule that prohibited judicial AAEIs, but founded that prohibition on what appeared to be an uncompromising 'Effects' analysis. The same Court later endeavoured in *Gazprom* to exempt (some) judicial acts of enforcing arbitral AAEIs from its seemingly relentless logic. But to do so, the Court had to reconceptualise the prohibition by replacing its 'Effects' ethos for that of Mutual Trust. Therewith emerged many other uncertainties concerning the nature and parameters of this 'carve-out', which continue to defy proper explication. We know not if *all* judicial acts of arbitral award enforcement are categorically exempt. We know not what remains of the 'Effects' analysis if Mutual Trust now drives the prohibition. And, while the EU institutions had attempted to devise a legislative solution, it was never consummated. The Recast simply does not alleviate these troubles.

In the end, the doctrinal configuration emerging post-Recast is uncertain and analytically incomprehensible. Regardless of whether *West Tankers* or *Gazprom*

[229] *Gazprom*, Opinion of AG Wathelet (n 6) [155]–[156].
[230] Hartley (n 9) 973–975.

reached the right outcomes, they have exacted a non-negligible toll on doctrinal integrity. Some might think it for the better that *Gazprom* secured the exemption of (at least some) judgments enforcing arbitral awards. Or, perhaps, it could be objected that the Court should have fully backtracked instead of producing an unprincipled compromise. Minds will perennially differ, but all concerned should not neglect the analytical costs that *Gazprom* brings.

Rumblings of Realism: A Bildungsroman of the Australian Legal Academy

Peter A. Bruland*

> Far from being an esoteric indulgence … the history of scholarly agendas and endeavours of the legal academy should be of primary interest and concern to all legal scholars of integrity—those who think hard about what and how to write and teach—and is important for rational discussion about both law and legal education.
>
> — Susan Bartie[1]

I. Introduction

THE TWENTIETH CENTURY was a vibrant, dynamic time for Anglo-American jurisprudence. Opening on the waning days of classical legal formalism, it soon witnessed the radical uprising of the legal realists and their polemical assault against formalist orthodoxy. As jurisprudential thought swung from rationalism to scepticism—and then back and forth again—the century marked its progress in spirited transatlantic debates that left their indelible mark on American and British law teaching, alike. It was an era characterized by dramatic growth, conflict, and transformation.

But for all that is made of philosophical contributions and confrontations

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1 Susan Bartie, 'Towards a History of Law as an Academic Discipline' (2014) 38 Melb U L Rev 480.

centred around the Atlantic, far less attention is devoted—at least in Anglo-American legal scholarship—to theoretical developments elsewhere in the common law world. Indeed, despite the shared genealogy and corresponding practices of British, American and Australian law, the Anglo-American legal academy has generally shown little interest in the Antipodes. As a result, scholars have had little to say about the complex interplay of clashing interests and assumptions that defined twentieth-century Australian legal philosophy and pedagogy. This Article, situated at the intersection of legal intellectual history, comparative law, and jurisprudence, seeks to break that silence, tracing the stages and influences that have shaped the Australian legal academy from its birth to its modern coming of age.

Proceeding in six chronological parts, the Article seeks both to sketch the historical development of Australian jurisprudential thought and to explicate the various theoretical commitments that have played a role in its evolution.[2] Part I traces the early history of Australian legal education, outlining the progression from apprenticeships to law schools. It also explores the classical formalist approach that came to define law teaching in the newborn legal academy. Turning briefly toward American jurisprudence, Part II introduces the legal realists of the 1920s and 1930s, reviewing their revolutionary ideas and defining traits before assessing their contemporary influence in Australia. Part III focuses on Julius Stone, the central figure in modern Australian jurisprudence, addressing his ideas, impact, and legacy. Building on the conclusion that Stone's brand of sociological jurisprudence has had little lasting influence in Australian legal philosophy, Part IV examines two analytical theories that have enjoyed far greater sway: Hart's modern formalism and Dworkin's legal idealism.[3] Opposed to these theories was the critical legal studies movement of the 1970s and 1980s. Investigating its origins and commitments, Part V assesses its sceptical contributions to the Australian legal

[2] In examining the historical progression of philosophical approaches, this Article takes no stance on the ultimate jurisprudential question of which perspective offers the best account of legal argument and judicial decision-making. Instead, it seeks clearly and accurately to describe each theoretical position, highlighting overlaps, drawing distinctions, and identifying the ways in which theories have built upon and reacted against one another.

[3] I am deeply indebted to Professor Lewis D Sargentich for my jurisprudential typology, which I share with Gregory C Keating, 'Fidelity to Pre-existing Law and the Legitimacy of Legal Decision' (1993) 69 Notre Dame L Rev 1. While I will elaborate this typology below, I can offer here no better introduction than Keating's:

> My interpretations ... of these traditions are driven by my [particular focus on] if and how (or if not, how not and why not) legal decision might be reduced to the enterprise of resolving present disputes by pre-existing norms. My interpretations of these positions, therefore, are likely to appear unbalanced and unsympathetic to their adherents. It might help the reader to place quotation marks around my use of terms like 'formalism' and 'positivism' and names like 'Hart' and 'Dworkin'.

ibid 9.

academy. Finally, drawing largely upon interviews and observations conducted in Australia, Part VI concludes this Article by considering the current state of Australian jurisprudential thought and legal pedagogy.

II. Birth of the Legal Academy

Early developments in Australian legal education were inextricably tied to the needs and concerns of the colony's nascent legal profession. Originally responsible for all legal instruction, the Bar was slow to share this function with the legal academy—especially given the abstract approach that initially dominated academic law teaching. When the profession finally did shift the training of its aspiring members to Australia's fledgling universities, it did so on its own terms, shaping the curriculum and providing instructors from its own ranks. As a result, the fin de siècle Australian legal academy was characterized by a heavily doctrinal approach, a tack it maintained well into the twentieth century.

A. Early Struggles

When the British colonized Australia in 1788, they brought with them their culture, their customs, and their common law tradition. Established as a penal outpost, New South Wales had from its founding a rudimentary legal system—albeit in the style of a military tribunal—to administer the colony's amalgam of criminal and civil matters.[4] The new courts, primitive as they were, could boast neither barristers nor solicitors, relying instead on the assistance of disbarred lawyers who had been transported as convicts.[5] By the early nineteenth century, however, efforts were underway to regularize and professionalize the practice of law, leading to the establishment of qualification requirements for prospective Australian lawyers.[6] Aspiring solicitors were obliged to complete a five-year practical apprenticeship with a qualified attorney, while barristers were required to study and sit for bar examinations in history, classics, mathematics, and law.[7] Whichever track a budding lawyer took, though, his training focused on legal

[4] Gregory D Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788–1900* (Federation Press 2002) 21–23, 26.

[5] ibid 26, 42. Nor were there prosecutors. Rather, early colonial victims were left to argue their own cases. ibid 22.

[6] Linda Martin, 'From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales' (1986) 9 UNSW LJ 113–14. Driving these efforts were concerns—both among leading practitioners and among certain laypeople—about the propriety of former convicts to practicing law. ibid 114.

[7] ibid 114–15, 118–19.

doctrine, with no overt theoretical instruction.[8]

Shortly after Australia's first university, the University of Sydney, was founded in 1850, calls sounded to introduce legal instruction into the curriculum.[9] The University Senate heeded these calls, establishing a Faculty of Law five years later.[10] Far from professional training, however, Australia's first law school was meant to offer students an education worthy of its university setting: theoretical instruction in jurisprudence.[11] Preaching the separation of practical and liberal education, the University's first Principal proclaimed that '[t]he soundest lawyers come forth from schools in which law is never taught; the most accomplished physicians are nurtured where medicine is but a name'.[12] Accordingly, the school's inaugural law lecture course eschewed the study of cases and 'mere professional details',[13] introducing students instead to the theory and principles behind constitutional law and the common law.[14] Envisioning law as a 'high and noble science,'[15] the course approached these subjects from a classical formalist perspective—the same theoretical viewpoint that animated the postbellum American legal academy.[16,17]

The central tenet of classical formalism was the notion of law as an affair of formal rules, knowable and applicable without moral inquiry. To the classical formalist, such rules constituted 'a body of scientific principle',[18] characterized by generality, universality, and continuity.[19] Declaring law's systematic and all-

[8] Nickolas J James, 'A Brief History of Critique in Australian Legal Education' (2000) 24 Melb U L Rev 966.

[9] Martin (n 6) 123–25.

[10] ibid 123.

[11] ibid 122, 125, 127.

[12] Henry E Barff, *A Short Historical Account of the University of Sydney* (Angus & Robertson 1902) 34.

[13] Martin (n 6) 127 (internal quotation marks omitted).

[14] ibid 122. See also John F Hargrave, *Law Lectures* vii (John Ferguson 1878).

[15] Hargrave (n 14) vii.

[16] Leading American classical formalists included Harvard's Dean Christopher Columbus Langdell and his colleagues James Barr Ames, Joseph Beale, and Samuel Williston. The formalist movement also found favour within the conservative wing of the *Lochner*-era United States Supreme Court. Gerald B Wetlaufer, 'Systems of Belief in Modern American Law: A View from Century's End' (1999) 49 Am U L Rev 10–11.

[17] It is important to distinguish between two variables that can aid in characterizing the legal academy of a particular time and place: (a) the prevailing theoretical perspective and (b) the level of theoretical engagement. While classical formalism came to dominate both the Australian and American legal academies, the two institutions differed in their emphases on theory. Whereas the Australian legal academy focused almost exclusively on theory, American law schools balanced an interest in theory with a concern for doctrine. The difference between these approaches is reflected in the two legal academies' contrasting attitudes toward the teaching of cases.

[18] Joseph H Beale, *A Treatise on the Conflict of Laws* (HUP 1916) 135.

[19] ibid 153–154.

encompassing nature, the classical formalists insisted that judges could rationally resolve novel legal problems through deduction from abstract formal propositions.[20] This process relied not on judicial discretion—which would have destroyed the predictability inherent in law[21]—or on purposive reasoning, but rather upon the professional techniques of 'legal logic'.[22] Through such techniques, the formalists contended, judges could apply legal doctrine 'with constant facility and certainty to the ever-tangled skein of human affairs … '.[23]

Unsurprisingly perhaps, given its purely theoretical approach, Australia's first law school garnered an apathetic response from the legal profession. Indeed, the Bar neither required aspiring practitioners to attend lectures nor even recognized attendance for professional admission purposes.[24] This indifference was reflected in discouraging attendance rates. Although the first lecture course initially attracted some thirty pupils, only five or six remained by the year's end, a fact largely attributable to the lack of professional incentives.[25] Struggling on in this manner until 1869,[26] the school eventually discontinued its lectures, leaving the small law faculty to act as a body of examiners for students who elected to study independently.[27] From its promising beginnings, the Australian legal academy had been dealt a disheartening setback.

B. Rebirth

Australia's first law school did not resume operation until two decades later, after significant liberalization in both the legal profession and the academy. Criticized for its social exclusivity and rigid control over admission, the profession gradually began recognizing and eventually requiring formal academic training.[28] Simultaneously, the University's new Chancellor adopted a more moderate approach toward professional education.[29] The University Senate followed suit when, receiving a large bequest, it established a chaired professorship in law

[20] Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Guenther Roth & Claus Wittich eds, Univ Cal Press 1968) 657.
[21] Beale (n 18) 155.
[22] Weber (n 20) 657.
[23] Christopher Columbus Langdell, *Selection of Cases on the Law of Contracts* (1st edn, Little, Brown & Co 1871) vi.
[24] Univ of Sydney Law Sch, *The Jubilee Book of the Law School of the University of Sydney, 1890–1940* (Thomas Bavin ed, Halstead Press 1940) 6.
[25] Martin (n 6) 126–27.
[26] Barff (n 12) 98.
[27] Martin (n 6) 128.
[28] ibid 142.
[29] ibid 131, 133.

along with four law lectureships.[30] Ushering in a new era of legal education, these developments helped shift primary responsibility for legal instruction from the profession to the University.[31]

This reconciliation of the legal academy with the needs of the Bar occurred on the legal profession's terms. The reanimated law school was located away from the main University campus and near the law offices and courts.[32] Moreover, the reconstituted law faculty consisted of a judge and several practicing barristers, 'an ample guarantee that the teaching would have a sufficiently practical bias'.[33] As the profession came increasingly to dominate the academy—a pattern not unique to Sydney Law School—practitioners-turned part-time faculty reshaped legal education into 'the imparting of information in the form of legal principles, rules and propositions ... to be committed to memory for examination purposes'.[34] While formalist assumptions continued to inform law teaching, overt theoretical engagement was all but abandoned in favour of practical instruction.[35] This doctrinal, practitioner-driven approach, starkly in contrast with the 1850s and 1860s' theory-steeped pedagogy, would define Australian legal education for the next half century.[36]

III. Polemics, Policy, and Pragmatism

In the 1920s and 1930s, the American legal academy was engulfed by a wave of radical scepticism:[37] the legal realist movement.[38] Realism represented the crest of a surge of progressive thought building since *Lochner*.[39,40] Tearing through classical formalist orthodoxies and sweeping away the vision of law as a neutral, apolitical science, realism transformed American jurisprudential thought and legal pedagogy.

30 ibid 139.
31 ibid.
32 ibid 142.
33 Pitt Cobbett, 'The Establishment of the Law School' *Sydney Morning Herald* (Sydney, 16 July 1890) 8.
34 Comm on the Future of Tertiary Educ in Austl, 'Tertiary Education in Australia' (1964) ¶11.38.
35 James (n 8) 967. cf Morton J Horwitz, *The Transformation of American Law: 1780–1860* (HUP 1977) 256.
36 James (n 8) 967.
37 Morton J Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (HUP 1992) 169–212.
38 With early beachheads at Columbia Law School and Yale Law School, legal realism counted Karl Llewellyn, Felix Cohen, Jerome Frank, and Walter Wheeler Cook among its leading academic voices. On the bench, Justices Oliver Wendell Holmes, Jr. and Benjamin Cardozo had anticipated realist insights, while Justice William O Douglas later reflected the movement's influence. Wetlaufer (n 16).
39 Lochner v New York, 198 US 45 (1905).
40 Horwitz, *Transformation: 1870–1960* (n 7) 170.

For all its seething intensity, however, the realist breaker never reached Australian shores.[41] Restrained by barriers both practical and theoretical, its insights were kept at bay until mid-century, rippling into the Australian legal academy only under the banner of other theories.

A. The Functional Approach

Although the realists often differed as much from one another as from the classical formalists they criticized, several defining characteristics were common throughout the movement.[42] The realists' unifying theme was their assault on the classical faith in formal rules, a campaign they prosecuted with gusto[43] on multiple fronts. One wave of attack—preaching the evils of rigid formalism[44]—echoed a millennia-old refrain.[45] More novel and radical was the charge of formal indeterminacy. Rejecting the formalist notion of law as systematic and continuous, the realists insisted that legal argument is riddled with ambiguity, gaps, and conflicts. Both general propositions and particular rules, they observed, can be construed either broadly or narrowly.[46] Moreover, judges must constantly choose among equally applicable rules and counter-rules that could yield polar outcomes in a given situation: '[i]n any case doubtful enough to make litigation respectable the available authoritative premises—*i.e.*, [formal rules]—are at least two, and ... the two are mutually contradictory as applied to the case in hand'.[47] In view of such dilemmas, the realists maintained, formal rules leave judges not with determinate

41 James (n 8) 968.

42 Karl Llewellyn, 'Some Realism about Realism—Responding to Dean Pound' (1931) 44 Harv L Rev 1233–1255.

43 Radical polemicists in tone, the realists sought less to critique the old jurisprudence than to sweep away its very foundations. Max Radin, 'Statutory Interpretation' (1930) 43 Harv L Rev 872 ('A legislative intent, undiscoverable in fact, irrelevant if it were discovered ... is a queerly amorphous piece of slag. Are we really reduced to such shifts that we must fashion monsters and endow them with imaginations in order to understand statutes?').

44 Felix Cohen, 'The Ethical Basis of Legal Criticism' (1931) 41 Yale LJ 213–217.

45 Aristotle, Rhetoric bk I (WD Ross ed, W Rhys Roberts tr, Cosimo 2010) 50 ('Equity bids us ... to think less about the laws than the man who framed them, and less about what he said than what he meant ... '.). Oliver Wendell Holmes, Jr offered a more recent rendering in *The Common Law* (1st ed, Little, Brown & Co 1881) 24, commending judges who refuse to 'sacrifice good sense to a syllogism'. But see Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 U Chi L Rev 1175.

46 *See* Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown & Co 1960) 77–91 (detailing techniques for manipulating precedent).

47 Llewellyn, 'Some Realism' (n 42) 1239. See also Cohen, 'Ethical Basis' (n 44) 216 ('Every decision is a choice between different rules which logically fit all past decisions but logically dictate conflicting results in the instant case'.); Karl Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes Are to Be Construed' (1950) 3 Vand L Rev 401–406 (1950) (listing duelling canons of statutory construction).

resolution of legal problems, but with a menu of alternatives.

Hand-in-hand with their critique of formalism, the realists also derided the invocation of legal abstractions such as property rights, corporate entities, proximate cause, due process, and malice.[48] These manipulable concepts, they argued, are functionally inefficacious,[49] serving mainly to cloak formal indeterminacy and unarticulated judicial biases.[50] While such abstractions may be convenient shorthand, the realists cautioned against treating them as anything more than that: 'poetical or mnemonic devices' offering no foundation for adjudication, prediction, or critique.[51] Thus, the judge whose opinion turns, for instance, on a corporation's physical location—rather than the social facts and consequences of extending liability here or there—might just as fruitfully concern himself with the number of angels that can stand on the head of a pin.[52]

To the extent the realists offered a prescriptive program, it centred on judicial candour and open, intelligent policy deliberation.[53] Convinced as they were that underlying political and ethical considerations—not formal rules or concepts—ultimately decide cases, the realists urged judges to 'frankly assess the conflicting human values that are opposed in every controversy, appraise the social importance of the precedents to which each claim appeals, [and] open the courtroom to all evidence that will bring light to this delicate practical task of social adjustment ...'.[54] Returning to the example of personal jurisdiction over a corporation, then, a realist judge might balance 'the difficulties that injured plaintiffs may encounter if they have to bring suit against corporate defendants in the state of incorporation' versus 'the possible hardship to corporations of having to defend actions in many states'.[55] To foster sensible decisions and genuine debate, the realists insisted, law must trade the unarguable innuendo of formal rules and abstractions for the honest weighing of ethical values and pragmatic consequences.[56]

[48] Felix Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Colum L Rev 820.

[49] ibid 820 ('Legal arguments couched in these terms are necessarily circular, since these terms are themselves creations of law, and such arguments add precisely as much to our knowledge as Moliere's physician's discovery that opium puts men to sleep because it contains a dormative principle'.).

[50] ibid 817.

[51] ibid 812. See also Karl Llewellyn, 'A Realistic Jurisprudence—The Next Step' (1930) 30 Colum L Rev 453.

[52] Cohen, 'Transcendental Nonsense' (n 48) 810–11.

[53] Llewellyn, 'Some Realism' (n 42) 1253 ('[O]nly policy considerations ... can justify "interpreting" ... the relevant body of precedent in one way or another'.).

[54] Cohen, 'Transcendental Nonsense' (n 48) 842.

[55] ibid 810.

[56] Cohen, 'Ethical Basis' (n 44) 202.

B. All Quiet on the Antipodean Front

For all the iconoclastic reverberations realism sent through American law, the Australian legal academy felt none of its rumblings. Several factors account for the failure of realism to take hold in Australia. On a practical level, Australia's geographic remoteness and reliance on oceangoing commerce restricted outside contact.[57] The Great Depression, which struck just as the realist movement was beginning to coalesce, can only have hindered the exchange of jurisprudential ideas between Australia and faraway New York or New Haven.[58]

The tenor of contemporary legal education also impeded realist insights that reached Australian shores.[59] Theoretical engagement was at its nadir in the doctrinal 1930s, when legal education focused on grounding pupils in legal rules and practical skills. Controlled by practitioners who saw little value in legal philosophy or scholarly debates, the Australian legal academy was hardly fertile ground for revolutionary jurisprudential ideas.[60] The analytical methodology ingrained in Australian legal culture was inhospitable to the realists' pragmatic scepticism.[61] An inheritance from British legal thought, the analytical tradition prizes clarity, precision, and logical rigour, giving rise to theoretical arguments grounded in the *corpus juris*.[62] The realists, by contrast, were prone to bold assertions and fiery invectives, supporting their positions by reference to extra-legal social facts.

Owing to these barriers, Australian jurisprudential thought did not move beyond classical formalism until mid-century, when full-time academics wrested control of the legal academy from the Bar and respectable analytical theories incorporated realist insights.

[57] Kevin Burley, *British Shipping and Australia: 1920–1939* (CUP 1968) 1.

[58] ibid at 19 (detailing effects of the Depression); see also Michael Kirby, 'HLA Hart, Julius Stone and the Struggle for the Soul of Law' (2005) 27 Sydney L Rev 323, 333 (remarking on Australian intellectual isolation).

[59] James (n 8) 969; see also Martin (n 6) 143.

[60] James (n 8) 969.

[61] Interview with Fleur Johns, Professor, Univ of NSW Law Sch (Sydney, Austl, 13 January 2015).

[62] Allan H Hutchinson, 'The Province of Jurisprudence (Really) Redetermined' in Helen Irving, Jacqueline Mowbray & Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press 2010) 88–91.

IV. *Enter* Julius Stone

It was against this rigidly doctrinal, classical formalist backdrop that Julius Stone,[63] soon to become one of Australia's foremost legal scholars, took the academic stage in 1942.[64] Appointed to a chaired professorship at Sydney Law School,[65] Stone, who had by this time earned five law degrees,[66] stood out in a faculty dominated by part-time practitioner-lecturers. Dedicated to theoretical scholarship and critical of classical formalism,[67] Stone would spend the next four decades working to reshape Australian jurisprudential thought. While his legacy reveals a mixed record of success, Stone's arrival marked a turning point for the Australian legal academy.

Born and educated in England, Stone spent the early 1930s studying at Harvard Law School, where, drawn into the intellectual orbit of Dean Roscoe Pound, he developed the jurisprudential ideas he would elaborate over his long career in Australia.[68] Echoing realist insights, Stone consistently emphasized law's openness and the attendant 'leeways of choice' available to judges.[69] He went beyond the realists, however, in his attempt at a prescriptive account of principled judicial discretion. Indeterminate cases, Stone argued, require judges to evaluate and adjust the interests at stake in light of the particular circumstances of the case.[70] Crucial to this inquiry is the process of sociological analysis, which promises to 'deliver law-like generalities about law' and to offer insight into the needs of a given social situation.[71] Echoing Pound, Stone thus advocated for a broader jurisprudence—a jurisprudence that would move beyond analytical

63 Leonie Star, *Julius Stone: An Intellectual Life* (Sydney Univ Press 1992).

64 Murray Gleeson, 'Julius Stone and the Legal Profession' in Helen Irving, Jacqueline Mowbray & Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press 2010) 9.

65 ibid.

66 Helen Irving, Jacqueline Mowbray & Kevin Walton, 'Introduction' in Helen Irving, Jacqueline Mowbray & Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press 2010) 1.

67 Gleeson (n 64) 10.

68 Kirby (n 58) 324–26. See also Nicholas Aroney, 'Julius Stone and the End of Sociological Jurisprudence: Articulating the Reasons for Decision in Political Communication Cases' (2008) UNSW LJ 107 (reviewing Stone's philosophical commitments).

69 Julius Stone, *Legal System and Lawyers' Reasonings* (Stanford Univ Press 1964) 241.

70 Julius Stone, *The Province and Function of Law* (HUP 2nd prtg 1950) 146, 189, 782–85 (emphasizing the importance of ethical and sociological analysis of the needs of a concrete situation). See also Stone, *Legal System* (n 69) 241 (explaining that when legal 'syllogism' fails, a court must decide 'based on an evaluation, conscious or unconscious, of the social situation confronting it'.).

71 Julius Stone, *Social Dimensions of Law and Justice* (Stanford Univ Press 1966) 391, 783. Stone's emphasis of situation-oriented sociological inquiry is akin to that of Lon L Fuller, *Anatomy of the Law* (Praeger 1968) 59; Llewellyn (n 46) 121–22 (discussing courts' 'situation sense). See also Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harv L Rev 378.

'logic chopping'[72] to recognize that law is 'conditioned by the social, political, and economic environment as well as by human thought processes'.[73]

Eager to expound these ideas, Stone left Harvard in 1936 to seek a teaching post in his native England.[74] His hopes were soon dashed, however, as university after university rejected his overtures—rejections, Stone later learned, stemming from an academic reference who warned of his Jewish heritage and outspoken Zionist convictions.[75] Facing similar anti-Semitic rebuffs across the Atlantic, Stone widened his search, eventually accepting a chaired professorship in jurisprudence and international law at the faraway Sydney Law School.[76] For Stone, the post amounted to 'banishment'.[77] Despite his disappointment and isolation, he persevered in the face of prejudice, determined to leave his mark on the Australian legal academy.[78]

Among Stone's greatest legacies was rekindling the flame of Australian legal scholarship. Arriving at Sydney to find the law school practice-oriented and practitioner-driven,[79] Stone set out to increase its theoretical engagement, challenging the doctrinal focus on rule-mastery and encouraging the study of law as an academic discipline in its own right.[80] He began by revitalizing the teaching of jurisprudence[81] and helping to launch the *Sydney Law Review*,[82] along with lobbying for the hiring of more full-time academics.[83] A prolific scholar,[84] Stone also established himself as a leader within the broader legal academy, founding the Australian Society of Legal Philosophy[85] and promoting the further professionalization of law

[72] Hutchinson (n 62) 94.
[73] Stone, *Social Dimensions* (n 71) 190.
[74] Star (n 63) 42.
[75] Adrienne Stone, 'Julius Stone: A Reflection' in Helen Irving, Jacqueline Mowbray & Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press 2010) 16.
[76] Kirby (n 58) 327.
[77] ibid 333.
[78] Stone (n 75) 16–17.
[79] Gleeson (n 64) 9.
[80] Interview with Kevin Walton, Senior Lecturer; Dir, Julius Stone Institute of Juris, Univ of Sydney Law Sch (Sydney, Austl, 12 January 2015).
[81] ibid. See also Stone, *Legal System* (n 69) 14–20 (detailing recent developments in the teaching of jurisprudence).
[82] *See* Irving, Mowbray & Walton (n 66) 2; 'Professor Julius Stone: In Commemoration of Twenty-Five Years of Scholarship' (1967) 5 Sydney L Rev 352.
[83] Interview with Kevin Walton (n 80). See also James (n 8) 967–68 (detailing the professionalization of legal education and the 'concerted endeavor to adopt a more scholarly approach to the teaching of law').
[84] Stone authored more than 30 books and over 100 articles and chapters. Stone (n 75) 17.
[85] Irving, Mowbray & Walton (n 66) 2.

teaching.[86] Within two decades, Stone's 'leaven' was working.[87] Indeed, by 1960, as theoretical engagement was on the rise and law schools across Australia had begun replacing part-time practitioners with full-time academics,[88] a newly-minted legal theorist at the University of Queensland could report that '[o]ur jurisprudence is to some extent practice-oriented, as Anglo-American jurisprudence largely is, but we are also keenly aware of purely theoretical problems of law, and have made contributions in this field'.[89]

For all his success in reinvigorating legal scholarship, however, Stone largely failed in his assault against classical formalism and his efforts to introduce sociological jurisprudence into the legal academy.[90] In fact, with formalist thought running stronger than ever,[91] Stone's ideas gained little ground, either contemporaneously[92] or subsequently[93]—an unsurprising fate, given their place well outside of the philosophical mainstream. Dominated by the analytical approach Stone criticized,[94] Australian jurisprudential thought was prepared to accept neither Stone's methodology nor his insights.[95] Still, although his attempts

86 Interview with Kevin Walton (n 80).

87 'Professor Julius Stone: In Commemoration' (n 82) 352.

88 James (n 8) 967–69.

89 RD Lumb, 'Recent Developments in Legal Theory in Australia' (1960) 46 Archiv für Rechts- und Sozialphilosophie 114.

90 Interview with Kevin Walton (n 80).

91 James (n 8) 968 (arguing that the new generation of full-time legal scholars embraced classical formalism and the notion of law as a science in order to 'justif[y] their own existence' and bolster their academic credibility). Formalist ascendency was not merely confined to the legal academy, however. Indeed, nowhere is the jurisprudential zeitgeist of postwar Australia better illustrated than in Chief Justice Dixon's avowed commitment to 'strict and complete legalism'. Swearing in of Sir Owen Dixon as Chief Justice (1952) 85 CLR xi. See also Helen Irving, 'The Dixon Court' in Rosalind Dixon & George Williams (eds), *The High Court, the Constitution and Australian Politics* (CUP 2015).

92 Interview with Kevin Walton (n 80).

93 ibid. cf Fleur Johns, 'The Gift of Realism: Julius Stone and the International Law Academy in Australia' in Helen Irving, Jacqueline Mowbray & Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press 2010) 22–25 (finding little engagement with Stone's ideas among international law scholars). Absent from modern syllabi, Stone's brand of sociological jurisprudence has faded into intellectual obscurity. Interview with Jeffrey Goldsworthy, Professor, Monash Univ Law Sch (Melb, Austl, 20 Jan 2015).

94 Julius Stone, 'The Province of Jurisprudence Redetermined' (1944) 7 Mod L Rev 98 (lamenting that 'analytical jurisprudence is "The Jurisprudence"').

95 Interview with Fleur Johns (n 61). Outside of the legal academy, however, Stone's insights did have a profound and lasting effect on many of his former students—most notably those who ascended to the Australian High Court. In particular, Stone's influence is commonly credited with inspiring the 'creative' Mason Court of the 1990s. Interview with Jeffrey Goldsworthy (n 93). See also Kirby (n 58) 334. For background on the Mason Court's innovations, see Paul Kildea & George Williams, 'The Mason Court' in Rosalind Dixon & George Williams (eds), *The High Court, the Constitution and Australian Politics* (CUP 2015).

to dislodge classical formalism proved unavailing, Stone's efforts in reshaping the legal academy may have helped indirectly to achieve this goal. Indeed, the reawakening of philosophical scholarship and the trend toward greater theoretical engagement arguably paved the way for a pair of post-realist analytical theories that moved Australian jurisprudential thought into the modern era.

V. A Middle Path: The Analytical Tradition

While the American and Australian legal academies reflected polar responses to realist insights—one fixated, the other essentially unaffected—British legal theorists took a middle road. Less shaken than their American counterparts, legal philosophers in the Oxbridge analytical tradition nonetheless grappled with the realists' indeterminacy thesis. By the 1970s, two responses had emerged, both asserting law's determinacy and upholding the possibility of rationally resolving legal questions. The first response, a modern reformulation of the classical formalism, incorporated realist insights while maintaining the formalists' emphasis on determinate rules. The second response, legal idealism, accepted the indeterminacy of formal rules but held out hope for rational resolution through practical moral reasoning.[96] Mainstream in their analytical methodology, these two approaches managed to introduce realist insights into Australian jurisprudential thought (albeit indirectly and in sublimated form) where Stone had failed, showing the legal academy a path forward beyond classical formalism.[97]

A. Modern Formalism

With the classical vision of law fracturing under realist onslaught, legal theorists committed to rule-oriented jurisprudence sought to develop a more modest formalism. Chief among these efforts—and most influential in Australia—was the work of British legal philosopher HLA Hart.[98,99] Hart discarded the notion of law as a grand, systematic body of scientific principles, viewing it instead as a collection of individual rules. The process of adjudication, he argued, requires judges not to

[96] In truth, the later idealists saw themselves as responding rather to the modern formalists than to the realist critique. Still, in their rationalism and methodology, the idealists unarguably stood opposed to the realist project.

[97] Interview with Jeffrey Goldsworthy (n 93).

[98] For an overview of the striking similarities between Hart and his fellow Oxonian—and sometime rival — Julius Stone, see Kirby (n 58) at 324–329.

[99] To be sure, Hart was not alone in his quest to rework formalism into a credible, post-realist jurisprudential theory. The Austrian legal philosopher Hans Kelsen, for example, developed a sophisticated formalist approach emphasizing judicial discretion within a framework of rules. Hans Kelsen, *The Pure Theory of Law* (Max Knight tr, Univ Cal Press 1967). Kelsen's ideas, however, have played a less prominent role than Hart's in the Australian legal academy.

deduce right answers from general propositions, but rather to determine whether or not specific rules apply in particular situations.[100] Contending that formal rules enable the rational resolution of most cases, Hart aimed to chart a middle path between the Scylla of blind formalism and the Charybdis of 'rule-scepticism'.[101]

Hart began by acknowledging law's openness, invoking the philosophy of language to elaborate upon realist insights. Because rules are communicated through language, he insisted, they are inescapably 'open textured'.[102] Every rule has both a core of settled meaning—a 'standard instance' in which it clearly applies—and a penumbra of uncertainty where its applicability is ambiguous.[103] A prohibition against vehicles in the public park, for instance, clearly covers automobiles, but it may or may not govern bicycles, toy cars, or airplanes.[104] This vagueness is magnified when rules incorporate practical moral criteria such as *due* care, the *best* interests of the child, or *unreasonable* restraint of trade.[105] While these standards, like rules, have core instances of certain applicability, they are fringed by especially wide, uncertain penumbrae.[106]

Faced with a penumbral case, Hart explained, a judge must choose 'intelligent[ly] and purposive[ly]' how to apply the rule or rules in question, deciding among alternative outcomes by reference to social aims and policies.[107] Hart rejected the notion that such principles, policies, or purposes constitute authoritative legal premises, however,[108] echoing the realists in denying that practical moral reasoning could guide judges to determinate answers. Thus, although formal law necessarily limits the scope of choice in penumbral cases—a judge could not dictate an outcome foreclosed by the relevant rules—judges exercise strong, essentially legislative discretion in deciding among the available alternatives.

Yet, while acknowledging that law is inherently open-textured, Hart accused the realists of exaggerating the extent of indeterminacy. Reproving these 'rule-skeptics' for overstating the proportion of penumbra to core,[109] Hart maintained

[100] *See* HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harv L Rev 607–08.

[101] *See* HLA Hart, *The Concept of Law* (1st edn, OUP 1961) 144.

[102] ibid at 125. ('[U]ncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact'.).

[103] Hart, 'Law and Morals' (n 100) 607.

[104] ibid.

[105] Hart, *Concept of Law* (n 101) 127–28.

[106] ibid 128.

[107] Hart, 'Law and Morals' (n 100) 614.

[108] ibid.

[109] ibid 615 ('Of course, it is good to be occupied with the penumbra … . But to be occupied with the penumbra is one thing, to be preoccupied with it another'.).

that most cases fall clearly within the ambit of a formal rule, enabling determinate results 'in case after case, without further recourse to official direction or discretion'.[110] Thus, Hart insisted, notwithstanding the resort to discretion in fringe cases, judges' decisions are 'unquestionably rule-governed' 'over the vast, central areas of the law'.[111]

B. Legal Idealism

Less confident about formal determinacy were a group of theorists whose approach can be styled as legal idealism. Pioneered at Harvard, the idealist perspective found its fullest expression in the work of Ronald Dworkin,[112] who succeeded Hart as Oxford's chair of jurisprudence. The idealists, like the formalists, rejected the skeptical vision of law, maintaining that most legal problems are rationally resoluble. But whereas Hart saw formal rules as generally determinate and regarded practical moral reasoning as an indeterminate resort in penumbral cases, the idealists' commitments were precisely the opposite. Formal rules, they observed, are far more complex, conflicted, and open than Hart supposed, yielding indeterminate answers to most legal questions, just as the realists had insisted.[113] However, the idealists declared, legal ideals—that is, underlying principles, policies, and purposes—enable judges to reach right answers and determinate resolution when formal rules run out.

According to the idealists, behind every formal rule is a practical moral principle, policy, or purpose: an ideal objective the rule aims to achieve that can help resolve ambiguities about its meaning and application.[114] Anchored

[110] Hart, *Concept of Law* (n 101) 133.

[111] ibid 150.

[112] What follows, I hasten to emphasize, is self-consciously a reconstruction of one aspect of Dworkin's work—alongside that of legal scholars of a similar bent—and not an attempt fairly to summarize Dworkin's overarching theory of law. Specifically, while Dworkin wrote eloquently and voluminously about legal practice as 'guid[ing] and constrain[ing] the power of government', I will focus here on reconstructing certain threads of Dworkin's theory of adjudication. For a similar approach, see Keating (n 3) 16 (reconstructing Dworkin's writing to 'fashion the strongest argument that decision in accordance with pre-existing standards requires a holistic and coherentist form of legal justification'.).

[113] See, for example, Charles Fried, 'The Laws of Change: The Cunning of Reason in Moral and Legal History' (1980) 9 JL Stud 340. See also Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart (1958) 71 Harv L Rev 662–69.

[114] Henry M Hart, Jr. & Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (tent edn, Foundation Press 1958) 166. Even in seemingly straightforward cases, the idealists insisted, it is not formal rules but rather these underlying principles, policies, and purposes that guide judges' decisions. Fried (n 113) 340. See also Fuller (n 113) 663 ('If the rule excluding vehicles from parks seems easy to apply in some cases, I submit this is because we can see clearly enough what the rule "is aiming at in general" so that we know there is no need to worry about

in the formal law, such ideals can be rationally derived through careful analysis of particular rules.[115] This process, the idealists explained, begins by attributing plausible objectives to a specific rule, reasons that might properly have persuaded the legislature to enact it. From among these possibilities, a judge must identify the objective that fits the rule most coherently and offers the best justification for it.[116] When the rule's purpose is thus established, this purpose can be deployed to guide and shape the rule's application, resolving formal indeterminacy.[117]

But since attributing a purpose to every rule would merely replicate formal disarray at a new level—pitting purposes against counter-purposes—the idealizing project necessarily takes on a more expansive scope. Indeed, according to the idealists, a judge seeking to wring right answers from ambiguous, conflicted rules must find 'a larger and subtler purpose as to how … particular [rules are] to be fitted into the legal system as a whole',[118] developing a coherent theory to identify the overarching purpose of a given body of law.[119] As the idealists realized, 'the organizing and rationalizing power of this idea is inestimable'.[120] In building such a theory, however, a judge is bound to encounter tensions and inconsistencies that defy perfect reconciliation. Thus, the idealists observed, if a theory is to harmonize discordant doctrines, it must have a critical edge that subordinates certain rules while emphasizing others[121]—that is, it must fit *most* but not *all* of the underlying formal law. Guided by the analytically rigorous[122] tests of fit and justification, this approach allows a judge to bring coherent order where formal chaos once reigned.[123]

Of course, more than one theory might be advanced for any given body of

the difference between Fords and Cadillacs'.).

115 Thus, crucially, the idealist's brand of moral reasoning looks not to unconstrained individual or societal *background morality*, but rather to *law's morality*—moral principles that, grounded in formal law, can be derived through careful analysis of the *corpus juris*.

116 Ronald Dworkin, 'Hard Cases' (1975) 88 Harv L Rev 1085–87. See also Hart & Sacks (n 114) 1414–15. This approach, it should be noted, is not limited to statutory cases. Dworkin (n 116) 1083–85 (constitutional rules), 1087–90 (common law rules).

117 Dworkin (n 116) 1085–87.

118 Hart & Sacks (n 114) 1414.

119 Dworkin (n 116) 1064, 1085, 1094.

120 Hart & Sacks (n 114) 167.

121 ibid 1097–1101.

122 Dworkin personifies this rigor in a mythical judge called 'Hercules', a 'lawyer of superhuman skill, learning, patience, and acumen'. Dworkin (n 116) 1083. Faced with a question of constitutional interpretation, Dworkin explains, Hercules first 'develop[s] a theory of the constitution in the shape of a complex set of principles and policies ... by referring alternately to political philosophy and institutional detail. He must generate possible theories justifying different aspects of the scheme and test the theories against the broader institution'. ibid.

123 For examples of ideal theories, see Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (HUP 1981) (arguing that the notion of free choice offers the governing ideal of contract

law.[124] In such situations, the tests of fit and justification again come into play, eliminating theories that fail sufficiently to cohere with or account for the underlying formal rules.[125] Using this analysis, the idealists maintained, a judge can identify the best theory for a particular body of law.[126] After all, only rarely will conflicting theories be in perfect equipoise; in almost every case, the idealists insisted, a single theory will enjoy better support and offer a better explanation of the underlying law than will its rivals.[127] By the idealists' account, reference to this correct theory can ultimately resolve ambiguities, gaps, and conflicts in the underlying formal law, enabling a judge to reach rational resolution and right answers.

VI. Critical Re(Awakenings)

By the late 1970s, the analytical theories had gained widespread acceptance throughout Australia, Great Britain, and the United States. Incorporating skeptical insights into their overarching rationalist visions of law, they had become the dominant schools of jurisprudential thought and the perspectives implicit in most law teaching. The realists' skeptical impulse, meanwhile, seemed all but dead; in the words of Roberto Unger, the leading scholars of the day 'were like a priesthood that had lost their faith and kept their jobs. They stood in tedious embarrassment before cold altars'.[128] All of this was to change, however, with the eruption of the critical legal studies movement.

A. A Tale of Two Theses

The critical movement that emerged in the late twentieth century was less an organized school than a coalescence of the legal left,[129] an umbrella under which diverse groups joined in their common critique of the prevailing legal order.[130] Two claims about the nature of law and legal argument can be distilled from the

law); Richard A Posner, *The Problems of Jurisprudence* (HUP 1990) 353–392 (expounding an economic theory of the common law founded on the principle of wealth maximization); Samuel D Warren & Louis D Brandeis, 'The Right to Privacy' (1890) 4 Harv L Rev 193 (advancing the principle of privacy to account for various tort and property doctrines).

124 Dworkin (n 116) 1084.

125 ibid 1084–86.

126 Ronald Dworkin, *Taking Rights Seriously* (HUP 1977) 283–90.

127 ibid.

128 Roberto M Unger, 'The Critical Legal Studies Movement' (1983) 96 Harv L Rev 674.

129 For a first-hand reflection on the nature of the 'legal left', see, for example, Zinaida Miller & Brishen Rogers, 'Radicalism and Responsibility: An Introduction to Unbound' (2005) 1 Unbound: Harv J Legal Left 1.

130 Mark Tushnet, 'Critical Legal Studies: A Political History' (1991) 100 Yale LJ 1516 (describing critical legal studies as a political location for a group of people on the Left who share the project of supporting and extending the domain of the Left in the legal academy'.).

corpus of this heterogeneous movement.[131] These claims are not equally on display in every work of critical scholarship; some critical theorists, for example, tended to elaborate one line of argument while the other idea featured only as a background assumption or a logical entailment of their contentions. Despite such variations in form and emphasis, however, these claims reflect the central convictions that unified critical scholarship.

The first critical thesis—the 'conflict thesis'—offers a radically sceptical response to modern formalism and legal idealism, projecting a vision of law as plagued with indeterminacy and admitting of no right answers.[132] Echoing realist insights, the thesis begins by affirming the openness of formal law. Formal rules, the critical theorists observed, are beset with vagueness, gaps, and conflicts. Going beyond the penumbral uncertainty that Hart recognized, this pervasive ambiguity renders formal argument indeterminate in all but the simplest of cases.[133] Accordingly, judges necessarily resort to Dworkin's brand of purposive reasoning to resolve most legal questions.

But just as the realists exposed the problem of rule and counter-rule, the critical theorists seized on the dilemma of theory and counter-theory,[134] challenging the idealists' faith that judges can identify correct theories by means of fit and justification. The test of fit, the critical theorists explained, acts as a threshold criterion, eliminating theories that fail sufficiently to cohere with the underlying formal law.[135] Yet beyond this threshold, it offers no guidance; a sprawling, apologetic theory that fits more of the established doctrine is not necessarily privileged over its narrower, more critical rival.[136] As such, the critical theorists observed, judges

[131] To my knowledge, no one has explicated the commitments of critical jurisprudence more clearly than Professor Lewis D Sargentich. While I am indebted to him for the jurisprudential typology used throughout this Article, I wish to credit him specifically for the following insights.

[132] Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 Harv L Rev 1737 (describing 'conflicting visions' that claim 'universal relevance, but [are] unable to establish hegemony anywhere').

[133] Mark Tushnet, 'Legal Scholarship: Its Causes and Cure' (1981) 90 Yale LJ 1210.

[134] Although the idealists acknowledged that a given body of law might give rise to more than one theory, (see n 122 and accompanying text), they treated these theories as fundamentally commensurable. The critical theorists, by contrast, observed that theories of the same general area of law may differ in the specific domains they identify, in their overall degree of criticism, and in the particular doctrines they criticize. For example, Fried's will theory of contract (n 125) subordinates the doctrines of duress and unconscionability, while excluding reliance, which it classifies under the banner of tort law. The regulated theory of contract, meanwhile, regards reliance, duress, and unconscionability as among its core doctrines. See also Horwitz, *Transformation: 1780–1860* (n 35) 264 (insurance law).

[135] Tushnet (n 133) 1212. For instance, while the will theory, Fried (n 123), fits most of the doctrines found in contract law, it would be rejected as a theory of torts.

[136] Consider, for example, the theories of equal protection reflected in the Supreme Court's landmark segregation cases. Whereas *Plessy v Ferguson*, 163 US 537 (1896) insisted that equality

are left to ask which theory offers the best justification for a given body of law. This inquiry, however, involves not a rationally constrained analysis, but an unbounded, indeterminate moral or political decision among conflicting theories.[137]

Accordingly, the critical theorists concluded, with formal argument mired in indeterminacy—just as the idealists insisted—and ideal argument generating a menu of alternatives—as the modern formalists suggested—most cases culminate in judicial choice.[138] Far from Hart's collection of 'determinate rules which ... do not require ... a fresh judgment from case to case'[139] or Dworkin's system of coherent ideals offering 'a single right answer to complex questions',[140] law proves to be an indeterminate endeavour, shaped ultimately by the collective choice of legal elites.[141] Thus, denying the analytical claim to right answers and rational resolution, the conflict thesis proclaims that discretion is inescapable and that law is open.[142]

Notwithstanding this openness, however, the second critical claim—the more socially radical 'structure thesis'—asserts that law is also fundamentally closed. Whereas the conflict thesis takes a telephoto view of legal argument, exposing the indeterminacy of formal doctrines and the chaos of ideal reasoning, the structure thesis surveys law through a wide-angle lens, revealing its overarching ideological framework. Even as rival theories clash within this framework, the critical theorists maintained, law's ideology forecloses countless positions that would challenge society's existing rules and legal institutions.

According to the critical theorists, every field of law is surrounded by a discursive perimeter that describes and constrains the contours of legal argument within its bounds. Conflicted though they may be, theories developed inside this perimeter nonetheless overlap, united within an overarching ideology—a structure of shared themes and commitments that suffuses argumentation throughout the entire body of law. The defining feature of this framework is its justificatory nature. Indeed, the critical theorists asserted, by 'presuppose[ing] both the existence of and

is compatible with the 'separate but equal' doctrine, *Brown v Board of Education of Topeka*, 347 US 483 (1954) offered a more critical account of the same ideal.

137 Tushnet, (n 133) 1206, 1212–15.

138 Karl E Klare, 'The Law School Curriculum in the 1980s: What's Left?' (1982) 32 J Legal Educ 340.

139 Hart, *Concept of Law* (n 101) 132 (emphasis omitted).

140 Dworkin, (n 126) 279.

141 See Horwitz, *Transformation: 1870–1960* (n 35) 180–85 (describing conflict and choice in contract law).

142 Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic against the System* (NYU Press 2004) 36 ('Legal reasoning is not distinct, as a method for reaching correct results, from ethical and political discourse in general ... There is never a "correct legal solution" that is other than the correct ethical and political solution ...'.) (emphasis omitted).

the legitimacy of existing hierarchical institutions',[143] law's ideological structure melds the descriptive with the prescriptive to project a social vision[144] that justifies and perpetuates[145] the prevailing legal order.[146] In law's ideology, 'what is, ought to be'.[147]

The upshot of this justificatory hegemony is the foreclosure from legal discourse of perspectives at odds with the dominant framework.[148] For example, the critical theorists observed, law's ideological structure rejects the arguments of feminist jurisprudence[149] and critical race theory[150] as radical and inconsistent with prevailing legal norms. Law thus privileges a narrow band of ideals while ignoring or dismissing positions foreclosed by its ideological framework.[151] The problem with this state of affairs, the critical theorists warned, is the danger that law will 'present[] as just and fair that which is inequitable, cruel, and inhumane'.[152] To the critical theorists' estimation, this danger was often a reality.

[143] Peter Gabel & Paul Harris, 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law' (1982–83) 11 NYU Rev L & Soc Change 373.

[144] Henry J Steiner, *Moral Argument and Social Vision in the Courts: A Study of Tort Accident Law* (Univ Wisc Press 1987) 92–98.

[145] Recall the idealists' emphasis on fit and *justification*.

[146] See Kimberlé Williams Crenshaw, 'Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (1988) 101 Harv L Rev 1350.

[147] Peter Gabel, 'Reification in Legal Reasoning' in Steven Spitzer (ed), *3 Research in Law and Sociology* (Jai Press 1980) vol 3 29. This assessment, of course, was not a novel one. See also Frederick Engels, 'The Housing Question' in *Karl Marx and Frederick Engels, Selected Works* (Lawrence & Wishart 1962) vol 1 624 ('[F]or the jurists … justice is but the ideologised, gloried expression of the existing economic relations ...'.).

[148] Karl E Klare, 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness 1937–1941' (1978) 62 Minn L Rev 292.

[149] Robin West, 'Jurisprudence and Gender' (1988) 55 U Chi L Rev 58 ('The values that flow from women's material potential for physical connection are not recognized as values by the Rule of Law, and the dangers attendant to that state are not recognized as dangers by the Rule of Law'.).

[150] See Crenshaw, *supra* note 146 at 1350.

[151] This observation is by no means limited to issues of gender and race, however. See, for example, Gerald Frug, 'The City as a Legal Concept' (1980) 93 Harv L Rev 1095–1120 (finding the ideal of powerful, self-governing cities rejected in municipal government law). See also Klare (n 148) (noting that, in interpreting the National Labor Relations Act, the Supreme Court 'foreclosed those potential paths of development most threatening to the established order'.).

[152] Karl Klare, 'Law-Making as Praxis' (1979) 40 Telos 132 (1979). For a dire example, see *State v Mann*, 13 NC (2 Dev) 263 (1829) (legitimating the practice of slavery in antebellum North Carolina).

B. *L'émeute*

The 1980s witnessed an uprising in the Australian legal academy.[153] The revolt began with three small sparks; lighting on dry analytical tinder, these sparks sprang to life and united in the flame of critique. As with the American critical movement, the first spark came from the legal left.[154] Free from McCarthy's pall,[155] Australian leftist thought drew explicitly on vigorous, unfettered Marxism, wielding its blistering critique against the existing legal order.[156] The second spark took the form of a growing coalition—feminist scholars, critical race theorists, queer theorists, and the like—joining their voices to decry law's preservation of the status quo and rejection of foreclosed positions.[157] Lighting their brands in the critical flame, they resolved to illuminate law's legitimating structure. Finally, the uprising also drew strength directly from the American critical legal studies and British critical legal conference movements.[158] Joining friends and colleagues from overseas, academics throughout Australia rallied to these critical banners.

As the 1980s progressed, so did the critical rebellion, spreading chiefly through the influence of individual scholars.[159] Aspiring professors who studied abroad often returned to Australia with a more sceptical outlook; as these academics distinguished themselves, their underlying theoretical commitments gained influence along with their scholarship.[160] Fanned by calls to integrate critical jurisprudence into the law school curriculum, the flames of critique thus tore from faculty to faculty, licking up at the gates of even the most established institutions. Indeed, the venerable Melbourne Law School became a bastion of critical jurisprudence in the 1980s and 1990s, animating doctrinal courses with legal critique and sceptical perspectives.[161] Although the analytical theories remained dominant at most other law schools,[162]

[153] Interview with Kevin Walton (n 80). See also James (n 8) 969.

[154] James (n 8) 969.

[155] Even '[i]n the late 1970s and early 1980s, there was still a real fear of orthodox, determinist Marxism [in the United States,] and ... "red baiting" was not an uncommon practice, even in academia.' John Henry Schlegel, 'CLS Wasn't Killed by a Question' (2007) 58 Ala L Rev 972.

[156] Interview with Fleur Johns (n 61). See also James (n 8) 976.

[157] Interview with Fleur Johns (n 61). See also James (n 8) 969–70.

[158] James (n 8) 970.

[159] For example, Regina Graycar pioneered feminist theory within the Australian legal academy, becoming Australia's first chair of feminist jurisprudence. Interview with Fleur Johns (n 61). See, for example, Regina Graycar, 'The Gender of Judgments: An Introduction' in Margaret Thornton (ed), *Public and Private Feminist Legal Debates* (OUP 1995) 262.

[160] Hilary Charlesworth, for instance, introduced feminist jurisprudence into the field of international law through precisely this process. Interview with Fleur Johns (n 61). See, for example, Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93 Am J Int'l L 379.

[161] Interview with Dale Smith, Senior Lecturer, Univ of Melb Law Sch (Melb, Austl, 19 January 2015).

[162] James (n 8) 972.

Australia was nonetheless ablaze with critical jurisprudence.

Crucially for this critical uprising, the academic atmosphere of the 1980s offered the perfect climate for combustion. With the legal academy in the hands of scholars—not practitioners—increased theoretical engagement fostered the exchange of sceptical insights and radical perspectives. Furthermore, while critical jurisprudence was revolutionary by any account, it could locate each of its seeds (formal indeterminacy and ideal indeterminacy) in the prevailing analytical theories.[163] As such, the distance between the critical scholars and their analytical rivals was far less than the gulf between, for instance, classical formalists and legal realists. Critical jurisprudence succeeded in igniting the Australian legal academy where both realism and sociological jurisprudence had failed.

Yet for all its raging advances, the critical impulse was checked by the firewalls of Australia's analytical tradition—the same barriers that had helped to block realist forays. Monash Law School, for example, proved largely resistant to critical thought, a fact owing much to the Hartian influence of Jeffrey Goldsworthy.[164] A broader backlash against the critical insurgency built throughout the 1980s. Striking back at their rivals, the analytical theorists dismissed critical insights[165] and questioned whether students trained from a critical perspective would even be employable.[166]

These tensions came to a head in 1987. Concerned with the quality of higher education, the Australian government had commissioned reviews of all the commonwealth's academic disciplines. The 1987 Pearce Report, which evaluated the legal academy, offered a harsh appraisal of the critical movement.[167] Commending the incorporation of theory and critique into legal education, it nonetheless denounced critical legal studies as 'attack[ing] law schools very fundamentally' and 'oppos[ing] strongly efforts to educate students for careers requiring full legal qualifications'.[168] The Report reserved its sharpest assessment, however, for Macquarie Law School, then a hotbed of critical thought. Observing

[163] Recall that legal idealism preaches formal indeterminacy, while modern formalism insists that ideal reasoning is ultimately open.

[164] Interview with Dale Smith (n 161).

[165] James (n 8) 971–72. For a contemporary American critique, see Paul Carrington, 'Of Law and the River' (1984) 34 J Legal Educ 227 ('[N]ihilist teachers are more likely to train crooks than radicals ... [T]he nihilist who must profess that legal principle does not matter has an ethical duty to depart the law school.').

[166] Andrew Lang, 'Will Macquarie Law Graduates Remain Employable?' (1989) May Law Soc NSW J 41.

[167] James (n 8) 973–74.

[168] Dennis Pearce, Enid Campbell & Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987) vol 1 49. See also James (n 8) 974.

the bitter ideological clashes among Macquarie's faculty[169]—and attributing this conflict to radical efforts to undermine professional legal education—the Report recommended that the law school be 'phased out' or reconstituted.[170]

While Macquarie ultimately endured, this moment of crisis represented a turning point for critical legal studies and for the Australian legal academy more broadly.[171] The critical inferno, dampened by official censure, began to subside as fewer scholars openly aligned themselves with its insights.[172] At the same time, conflicting visions of critique led to discord within the critical movement itself.[173] Thus, while the flame burned on throughout the 1990s—kept alive mainly by feminist legal theory—it had lost much of its influence in Australian jurisprudential thought.[174]

VII. Today's Legal Academy

Over its first 160 years, the Australian legal academy has grown from struggling infancy into robust, flourishing maturity. At each stage of its development, the academy has been animated by wide-ranging perspectives on the nature of law and legal argument. Vying for the heart of Australian jurisprudential thought, some of these theories attained the status of orthodoxy—at least for a time—while others faded quickly into obscurity. The resulting interplay among approaches has fostered vigorous, organic growth within the legal academy as theorists in each successive generation of scholars build upon (or dismantle) the commitments of earlier generations. Admittedly, the wide variations among and within today's law faculties complicate efforts to characterize the modern legal academy with any precision. Still, certain generalizations can be drawn about Australian law teaching in the twenty-first century.

The pulse of today's Australian legal academy can be felt in its legal philosophy and its legal pedagogy. First, it is useful to consider which theoretical perspective enjoys the most currency in modern jurisprudential thought. This line of analysis reveals how today's legal academy has received the theories elaborated in Parts I through V of this Article. Second, it is also instructive to evaluate the nature of

[169] These clashes paralleled the 1987 tenure denial battles at Harvard Law School. Tushnet (n 130) 1530 n.60. See also Jennifer A Kingson, 'Harvard Tenure Battle Puts 'Critical Legal Studies' on Trial' *NY Times* (New York, 30 August 1987) <http://www.nytimes.com/1987/08/30/week-inreview/ harvard-tenure-battle-puts-critical-legal-studies-on-trial.html> accessed 29 October 2017.

[170] David Weisbrot, *Australian Lawyers* (Longman Cheshire 1990) 130.

[171] Interview with Fleur Johns (n 61).

[172] James (n 8) 976. See also Schlegel (n 155) 968.

[173] James (n 8) 976.

[174] Interview with Fleur Johns (n 61).

Australian legal pedagogy as a whole, beyond the narrow field of legal philosophy. Legal pedagogy is always informed by a set of assumptions—be they explicit or unconscious—about the nature of legal argument. Formalist assumptions will give rise to a pedagogy where right answers can usually be derived from concrete rules and doctrines. Critical assumptions, by contrast, will support a pedagogy of indeterminacy and conflicting perspectives.[175] Considering both the prevailing (if implicit) theoretical perspective underlying regular doctrinal courses as well as the extent to which such courses engage with theoretical issues can help illuminate the range of jurisprudential commitments and engagement within the Australian legal academy.

A. Jurisprudential Thought

The Australian legal academy, long a bastion of classical formalism, today bears the marks of modern formalist, idealist, and critical perspectives. With scholars working within each theoretical school, Australian jurisprudential thought has proven rich, creative, and dynamic. Still, the bulk of today's Australian legal philosophers subscribe to Hartian formalism.[176] Thus, most theorists regard formal rules as generally determinate, while acknowledging that certain marginal cases defy formal resolution. In such situations, legal argument necessarily turns to moral principles, policies, and purposes, although most scholars agree ideal inquiry fails to provide the rational constraint the idealists supposed. Notwithstanding these marginal cases, however, formal rules are commonly thought to offer determinate answers to the great majority of legal questions.[177]

Since its high point in the 1980s and 1990s, the influence of legal skepticism has steadily ebbed within the Australian legal academy.[178] To be sure, a number of critical enclaves continue to flourish—Melbourne Law School, for instance, still boasts a robust contingent of critical theorists[179]—but the last two decades have seen a definite shift in tides. For one matter, as Australia's critical legal studies movement has fractured and gone out of vogue, most of the theorists who accept its insights have ceased to identify themselves with the movement or to invoke it in their work. More significantly, the analytical schools have experienced a recent scholarly influx, further cementing their dominance over critical jurisprudence within Australian legal thought.[180] Accordingly, while the critical impulse lives on,

[175] I owe these insights to Professor Lewis D Sargentich.
[176] Interview with Jeffrey Goldsworthy (n 93).
[177] ibid.
[178] Interview with Fleur Johns (n 61).
[179] Interview with Dale Smith (n 161).
[180] ibid. See also Hutchinson (n 62) 91.

sustained in part by young academics who have studied outside of Australia,[181] it enjoys only limited influence among today's legal philosophers.[182]

This jurisprudential landscape is reflected in the general pedagogy of legal theory courses. At Melbourne Law School, for example, Dale Smith leads a seminar exploring the philosophical foundations of law and the connections between legal rules and moral philosophy. Taught from an analytical perspective, the seminar encourages honest critique, but stops short of overt legal scepticism.[183] Kevin Walton takes a similar approach in the jurisprudence course he teaches at Sydney Law School. Covering the likes of Marx, Foucault, and McKinnon alongside Austin, Hart, and Dworkin, the class presents critical perspectives within a generally analytical framework. While both courses emphasize philosophical rigor and seek to foster a degree of critique, neither course prioritizes the arguments of critical legal studies, and—consistent with the Hartian approach—neither dwells on the critical indeterminacy thesis.

B. Legal Pedagogy

Outside the specialized field of jurisprudence, modern formalism also tends to underlie the teaching of most doctrinal courses.[184] This perspective, however, is usually implicit.[185] Indeed, the chief pedagogical difference between today's Australian and American legal academies lies in the extent of their overt theoretical engagement. While scholars at America's top law schools—even those professors with no specific interest in jurisprudence—often infuse their courses with theoretical overtones, the law faculty at Australia's leading universities are generally less engaged with legal theory.[186] As a result, Australian law teaching tends to be concrete and doctrinal, with comparatively little time spent on abstraction or ambiguity. While most Australian law schools require students to take an introductory course in jurisprudence,[187] this class has a limited impact on students' academic development.[188]

Although Australia's leading universities are generally united in their modern

[181] Interview with Fleur Johns (n 61).
[182] Interview with Kevin Walton (n 80).
[183] Interview with Dale Smith (n 161).
[184] Hutchinson (n 62) 90 (observing that the analytical-formalist approach 'can be treated as the default theory of the legal world; its influence is so common and so ingrained that it has become almost pervasive and unappreciated'.).
[185] Interview with Jeffrey Goldsworthy (n 93).
[186] ibid.
[187] Interview with Helen Irving, Professor, Univ of Sydney Law Sch (Sydney, Austl, 8 January, 2015). See also James (n 8) 966.
[188] Interview with Kevin Walton (n 80). Indeed, many students regard their obligatory legal philosophy course as one 'to be painfully endured and quickly forgotten'. James (n 8) 966.

formalist approach to law teaching,[189] they do differ in their level of theoretical engagement. A degree from Melbourne Law School, for instance, tends to be more theoretical than one from Monash, which has traditionally placed greater emphasis on clinical education than on legal philosophy.[190] Similarly, whereas Sydney Law has historically taken a more scholarly, theoretical approach to legal instruction, U.N.S.W. Law has tended to emphasize social justice and pragmatic coursework.[191] Likewise, as in the United States, the extent of overt theoretical engagement also depends on the level of instruction, with a substantial difference existing between undergraduate and graduate teaching.[192]

Of course, individual professors also vary widely in their pedagogical approaches, with members of the same faculty offering a study in contrasts. For example, Michael Skinner, a barrister who teaches corporations at Sydney Law School, represents one pole of the theoretical engagement spectrum. Focusing on concrete cases, statutes, and doctrines, his course omits theoretical issues,[193] and he insisted in conversation that theory is the province of the legislature, not the courts.[194] Implicit in his perspective was a staunch commitment to formalism: Skinner presented rules as clear and determinate, entertaining no discussion of ambiguity or of the principles, policies, and purposes underlying corporate law.[195] In marked contrast to Skinner's approach is that of Jennifer Hill, also of Sydney Law, who directs the school's Ross Parsons Centre of Commercial, Corporate, and Taxation Law. While Hill's courses, like Skinner's, focus on doctrine, Hill takes care to emphasize theoretical issues and relevant policy considerations, presenting conflicting perspectives and competing theories:[196] Hill's approach accords with the insights of critical legal studies.

Despite the wide variations among faculties and faculty members, Australian legal pedagogy viewed overall reflects a formalist perspective and to favour the

[189] Interview with Jeffrey Goldsworthy (n 93). See also Interview with Dale Smith (n 161); Interview with Kevin Walton (n 80).

[190] Interview with Dale Smith (n 161).

[191] Interview with Fleur Johns (n 61). This is not to say, of course, that Monash or UNSW are bereft of theoretical engagement; indeed, Monash is home to Jeffrey Goldsworthy, one of Australia's foremost legal philosophers. Still, as a general matter, Sydney Law and Melbourne Law have historically been more prominent in the field of jurisprudence than their fellow top-tier Australian law schools.

[192] ibid.

[193] Michael Skinner, Adjunct Lecturer, Univ of Sydney Law Sch, Corporations Law Seminar Lecture (14 January 2015).

[194] Interview with Michael Skinner, Adjunct Lecturer, Univ of Sydney Law Sch (Sydney, Austl, 14 January 2015).

[195] Michael Skinner Lecture (n 193).

[196] Interview with Jennifer Hill, Professor; Director, Ross Parsons Centre of Commercial, Corporate and Taxation Law, Univ of Sydney Law Sch (Sydney, Austl, 12 January 2015).

practical over the theoretical.[197] To be sure, this is not to say that the average Australian law professor is theoretically unsophisticated or subscribes unquestioningly to formalist assumptions. The widespread teaching of policy-based reasoning, for instance, clearly reflects a post-realist perspective and a rejection of the classical formalist vision of legal argument.[198] On the whole, however, law teaching in Australia generally places little emphasis on theoretical abstraction, ambiguity, or conflict, while foregrounding formal rules and rigorous doctrinal argument.[199]

VIII. Conclusion

In 1951, then-Harvard Law School Dean Erwin Griswold spent five weeks in Australia, visiting law schools in Sydney, Canberra, Melbourne, and several other cities.[200] Along with droll assessments of Australian society ('a Queenslander may think a Victorian rather effete, and the Victorian may regard the Queenslander as a bit of a roughneck')[201] and the struggles of newly-minted lawyers ('the students must for some time be little more than office boys, hanging around for a crumb of practical experience which may be found in a potpourri of errands and odd jobs'),[202] Griswold spent his trip recording observations about Australia's law schools, which he declared were 'doing good work'.[203] He also noticed, however, the scarcity of professional scholars[204] and the 'restraint against novel thinking and suggestions'[205] in that practitioner-dominated era.

In these latter regards, today's Australian legal academy would be almost unrecognizable to Griswold. The modern institution is comprised mainly of full-time academics, many of whom have gained international recognition for their scholarship. Moreover, notwithstanding the general doctrinal tenor of legal education, the luminaries of Australia's legal academy are uniformly engaged in sophisticated, theory-steeped scholarship, often with complex interdisciplinary overtones. Helen Irving,[206] for instance, is pursuing ground-breaking research at

[197] Interview with Kevin Walton (n 80). Indeed, even in courses such as criminal law that lend themselves to theoretical or interdisciplinary approaches, there is little departure from formal doctrine. ibid.

[198] Interview with Fleur Johns (n 61).

[199] Interview with Kevin Walton (n 80).

[200] Erwin N Griswold, 'Observations on Legal Education in Australia' (1952) 5 J Legal Educ 139.

[201] ibid 142.

[202] ibid 144.

[203] ibid 154.

[204] ibid 146–47.

[205] ibid 148 ('I am not making an argument for crackpots or mere iconoclasts. But the universities should be centers of progressive thought, of stimulation, of new ideas ... '.).

[206] See, for example, Helen Irving, 'Federalism is a Feminist Issue: What Australian Can Learn from the United States Commerce Clause' (2007) 28 Adel L Rev 159.

the intersection of constitutional law and gender, while Fleur Johns[207] is conducting similarly innovative work at the crossroads of international law and feminist jurisprudence. Likewise, while Jennifer Hill[208] has blazed a trail in corporate governance law and theory, Rosalind Dixon[209] has earned international acclaim for her work on constitutional design and comparative constitutional law. All four scholars have studied, taught, and published prolifically within and outside of Australia.

Meanwhile, Australian legal philosophers—working predominantly in the analytical tradition—have both strengthened theoretical education within Australia and burnished the legal academy's international reputation. Eminent in philosophical and constitutional circles, Jeffrey Goldsworthy,[210] for example, is recognized as a leading scholar not only in Australia but also throughout the entire common law world. Similarly, Dale Smith,[211] an expert in analytical legal philosophy and statutory interpretation, and Kevin Walton,[212] who has written extensively on legal and political philosophy, have taught and published in Australia and around the globe. With dozens of similarly accomplished philosophers, the legal academy boasts an impressive corps of jurisprudents dedicated to advancing theoretical teaching and scholarship.

But another fact would surprise Dean Griswold nearly as much as the transformation of Australian legal education: in the sixty years since his first visit, precious little British or American scholarship has focused on Australian comparative legal thought and pedagogy. Indeed, while Griswold would make several more trips to the Antipodes,[213] few Anglo-American scholars since have shared his interest in Australian legal education and jurisprudential thought.[214]

[207] See, for example, Fleur Johns, 'International Legal Theory: Snapshots from a Decade of International Legal Life' (2000) 10 Melb J Int'l L 1.

[208] See, for example, Jennifer Hill, 'Corporate Governance and Executive Remuneration: Rediscovering Managerial Positional Conflict' (2002) 25 UNSW LJ 294.

[209] See, for example, Rosalind Dixon, 'A Democratic Theory of Constitution Comparison' (2008) 56 Am J Comp L 947.

[210] See, for example, Jeffrey Goldsworthy, 'The Case for Originalism' in Grant Huscroft & Bradley W Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (CUP 2011) 42. See also Jeffrey Goldsworthy, 'The Limits of Judicial Fidelity to Law: The Coxford Lecture' (2011) 24 Can J L & Juris 305.

[211] See, for example, Dale Smith, 'Theoretical Disagreement and the Semantic Sting' (2010) 28 Ox J Legal Stud 635.

[212] See, for example, Kevin Walton, 'Jurisprudential Methodology: Is Pure Interpretation Possible?' in Jordi F Beltran and others (eds), *Neutrality and Theory of Law* (Springer 2013) 255.

[213] 'Dean Griswold Will Tour In Australia, New Zealand' *Harv. Crimson* (Cambridge 13 Nov 1958) <http://www.thecrimson.com/article/1958/11/13/dean-griswold-will-tour-in-australia/> accessed 29 October 2017.

[214] Craig M Bradley, 'Legal Education in Australia: An American Perspective' (1989) 14 J Legal Prof 27 (offering brief overview of enrolments and other quantitative data) for an example of

Thus, if Susan Bartie is correct and 'the history of scholarly agendas and endeavours of the legal academy ... is important for rational discussion about both law and legal education',[215] this insularity has deprived us of valuable insights.

In examining the birth and growth of the Australian legal academy, this Article has sought to recall those insights, carrying on Griswold's project and exploring important moments in the field of comparative jurisprudence. Worth investigating in its own right, the history of Australian legal education also offers new perspectives on familiar movements in American and British jurisprudential thought. From the reign of formalism, to the realists' startling absence and the rise of analytical jurisprudence, to the critical uprisings and their fallout, the Australian narrative is valuable for the ways it traces—and departs from—our own. This coming of age story, long overlooked and bursting with unexplored chapters, beckons to Anglo-American scholars.

American scholarship on Australian legal education.

[215] Bartie (n 1) 480.

Refugee Adjudication under the UNHCR's Mandate and the Exclusion Dilemma

James C. Simeon*

I. Introduction

THE UNITED NATIONS High Commissioner's Office for Refugees (UNHCR) plays a very prominent and highly influential role in refugee status adjudication on a global scale. For instance, the UNHCR decides far more individual refugee applications than any State, including the States with the largest number of refugee applicants[1] Refugee status determination (RSD) comprises a very important operational role for the UNHCR, particularly for the resettlement of refugees from abroad to host countries, and continues to draw an ever-growing portion of its resources. However, the information publicly available on RSD is rudimentary at best, and seems to be lacking entirely in some vitally important areas. For instance, one of the most critical areas of RSD is the exclusion of those persons who have committed war crimes and crimes against humanity, or who have committed serious non-political crimes prior to entering the country where they are seeking refuge or asylum, or who are guilty of acts contrary to the purposes and principles of the United Nations.[2] In fact, there is extensive literature

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1 UN High Commissioner for Refugees (UNHCR), 'UNHCR Statistical Yearbook 2014' (2015) 52–54 <http://www.unhcr.org/56655f4cb.html> accessed 10 January 2016. Katia Bianchini states that the UNHCR is the largest refugee decision maker in the world. See 'The Mandate Refugee Program: a Critical Discussion' (2010) 3 International Journal of Refugee Law 368.

2 Office of the High Commissioner for Refugees, 'Annex: Statute of the Office of the High

that provides a critique of the UNHCR's RSD procedures and systems, along with a number of international non-governmental organisations that are active in this area.[3] What is noticeably absent and very much required, however, is greater transparency in the UNHCR's RSD determinations with respect to the exclusion of asylum-seekers due to serious criminality and, indeed, to the fate of these persons thereafter. How are these persons dealt with subsequently? Are they prosecuted? Are they no longer under the protection of the UNHCR, and, if they are residing in a refugee camp are they expelled? Too little is known about what happens to those asylum applicants who are excluded from mandate refugee protection by the UNHCR. For just as States are faced with refugee claimants who are excluded from refugee protection and cannot be refouled, so too is the UNHCR faced with the same so-called "exclusion dilemma", persons who are excluded from mandate refugee status but because of a well-founded fear of persecution cannot be returned to their country of nationality or former habitual residence.

Given the state of the world today and the number of protracted armed conflicts and wars, whether inter-state, intra-state, or internationalised intra-state armed conflicts,[4] it is evident that the single most important cause of forced displacement

Commissioner for Refugees, Chapter II, Section 7 (d)' (2010) <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3b66c39e1&query=1950%20Statute%20of%20the%20UNHCR> accessed 17 January 2016. See also 'Article 1F, Convention relating to the Status of Refugees' (1989 UNTS 137, 1951, in force 22 April 1954) and the 'Protocol relating to the Status of Refugees (19 UNTS 6223 6257, 1967, in force 4 October 1967).

3 Michael Alexander, 'Refugee Status Determination Conducted by UNHCR' (1999) 11(2) International Journal of Refugee Law 251. Michael Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by the UNHCR Refugee Status Determination' (2006) 18(1) International Journal of Refugee Law 1–29; Katia Bianchini, 'The Mandate Refugee Program: a Critical Discussion' (2010) 22(3) International Journal of Refugee Law 367–378. See RSD Watch at <http://rsdwatch.com/about-us/> which is a website set up by Michael Kagan to help promote the reform of the way that the UNHCR conducts its refugee status determination. There are a number of other websites that should be consulted regarding the UNHCR RSD activities and they include: Asylum Access <http://asylumaccess.org/about/story/>; International Refugee Rights Initiative: Rights in Exile Programme, <http://www.refugeelegalaidinformation.org/#RSDWatch.org>.

4 Wars in the World, Daily News on Wars in the World and on New States, List of ongoing conflicts, <http://www.warsintheworld.com/?page=static1258254223> accessed 7 January 2016. This website lists some 66 countries in the world that are engaged in various forms of ongoing conflicts with some 680 different militias-guerrillas, separatist groups, anarchic groups, and drug cartels. The breakdown according to regions is as follows: Africa: 28 countries and 199 militias-guerrillas, separatist groups and anarchic groups; Asia: 16 countries with 151 militias-guerrillas, separatist groups and anarchic groups; Europe: 9 countries with 75 militias-guerrillas, separatist groups and anarchic groups; Middle East: 8 countries with 228 militias-guerrillas, separatist groups and anarchic groups; Americas: 5 countries with 25 drug cartels, militias-guerrillas, separatist groups and anarchic groups. These are astonishing figures that give an insight into the extent of the degree of armed conflict in the world today. Uppsala University, Depart-

in the world today is war, armed conflict, or both.[5] Accordingly, the exclusion of refugee and asylum applicants for these types of international crimes is not only likely to continue, but is most probably on the rise.[6] Those who are excluded from refugee status may, in fact, have a well-founded fear of persecution on one of the five grounds listed in the *1951 Convention relating to the Status of Refugees*. In short, they would have been recognized as a refugee by the UNHCR or a State save for the fact that they fell within the provisions of Chapter II, Section 7(d) of the Annex to the *Statute of the Office of the High Commissioner for Refugees* or Article 1F of the *1951 Convention*. Consequently, they cannot be refouled on the grounds that they have a well-founded fear of persecution should they return to their country of nationality

ment of Peace and Conflict Research, Uppsala Data Conflict Program, indicates that there is one interstate, 26 intrastate ongoing armed conflicts and 13 internationalized intrastate ongoing armed conflicts in the world in 2014. <http://www.pcr.uu.se/research/ucdp/> accessed 7 January 2016. See also, Uppsala Conflict Data Program (UCDP) UCDPGED, 'Global Instances of Political Violence, 1989–2013' which lists 21,860 events and 751,151 fatalities over this 24-year period. It is important to note that this is only an estimate as the dataset is still not complete. <http://www.ucdp.uu.se/ged/#__utma=1.1970331471.1390365762.1417227057.1427213715.6&__utmb=1.4.10.1427213715&__utmc=1&__utmx=-&__utmz=1.1427213715.6.5.utmcsr=google|utmccn=(organic)|utmcmd=organic|utmctr=(not%20provided)&__utmv=-&__utmk=203496464> accessed 24 March 2015. In addition, see J. S. Goldstein, 'Wars in Progress' <http://www.internationalrelations.net/wars-in-progress/> accessed 13 June 2016.

5 UNHCR, 'Global Trends, Forced Displacement in 2014' in UNHCR (ed), *World at War* (2015) <http://unhcr.org/556725e69.html> accessed 7 January 2016. This report states that global forced displacement was accelerated in 2014 reaching unprecedented levels and that the principal cause of the displacement was due to conflict or persecution. See also UNHCR, 'World displacement hits all-time high as war and persecution increase' 18 June 2015 <http://www.unhcr.org/558193896.html> accessed 7 January 2016. The 'UNHCR Statistical Yearbook 2014', 14th edition at page 27, states:

> Escalating wars and continuous conflict around the world contributed to the mass displacement of people in 2014. As a result of these unprecedented events, global forced displacement grew to a staggering 59.5 million individuals at the end of the year, up from 51.2 million a year earlier. A continuation of armed conflicts in the Middle East and North Africa and in combination with conflicts in the sub-Saharan Africa has impacted negatively on recent dynamics and trends. As such the inter-linked crisis in both Iraq and Syrian Arab Republic contributed significantly to the rise seen in displacement trends.

See <http://www.unhcr.org/56655f4b19.html> accessed 10 January 2016. See also UNHCR, 'Global Trends 2013, "War's Human Costs" ' United Nations High Commissioner for Refugees (2014) <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=5399a14f9&query=Global%20Trends%202013> accessed 23 January 2016; UNHCR, 'Solutions needed to stem the global refugee crisis, says Grandi' (7 January 2016) <http://www.unhcr.org/568e82ff6.html> accessed 10 January 2016.

6 For an in-depth examination of these issues and the efforts of the United Nations and the UNHCR to address forced displacement as a consequence of war and armed conflict see Tom Clark and James C. Simeon, 'War, Armed Conflict and Refugees: The United Nation's Endless Battle for Peace' (2016) 35(3) Refugee Survey Quarterly 35–70.

or former habitual residence. Depending on the grounds of their exclusion—that is, whether it has been determined that they have committed a war crime or a crime against humanity, or they are guilty of actions contrary to the purposes and principles of the United Nations, or both—they may be subject to prosecution either by their host State, or an UN International Criminal Tribunal or Special Court, or the International Criminal Court (ICC). However, if the grounds for exclusion are the commission of a serious non-political crime outside the country of refuge prior to their admission in the country in which the person is seeking refugee status, then it is entirely dependent on the circumstances of the individual case. Is there an outstanding warrant against the individual or was the person convicted, sentenced and have they, in fact, served their term of imprisonment? Again, depending on the circumstances, the person could be returned to their country of nationality to be prosecuted, or they could be deported to some other country that is willing to accept them. Alternatively, there may be no option but to allow the person to remain in the host State as "undesirable," yet not "returnable," to their country of nationality or former habitual residence. This is one aspect of the exclusion dilemma. Refugee claimants who are excluded from refugee protection, but who cannot be returned to their country of nationality or former habitual residence, must remain largely unwanted and in limbo in their host States and/or by the UNHCR, for example, in a refugee camp or urban setting. What becomes of those persons who are no longer eligible for international protection by the UNHCR? This article seeks to explore this question from the perspective of the UNHCR's RSD mandate and its broader legal and public policy implications.

The article begins by reviewing the legal basis for the UNHCR's role in RSD. The legal authority of the UNHCR is based on a number of key UN resolutions and the *1950 Statute* as well as other international instruments, but, most importantly, the *1951 Convention* and its *1967 Protocol*. The article then considers the UNHCR's statutory and mandate refugee status structures and procedures and assesses the extent of its contribution to RSD in the international refugee protection system. The next section of the article examines how the UNHCR handles those cases that are determined to fall under Article 1F, under the so-called Exclusion Clauses. The administrative structures and procedures, including the internal appeal process, are described and considered. The article concludes by providing a broad overview and assessment of UNHCR's methods for excluding statutory or mandate refugee applicants. It argues for greater transparency in UNHCR's RSD procedures and, in particular, those that involve persons who are excluded from the UNHCR's statutory or mandate refugee status. Providing basic information and statistics on the numbers who are excluded by UNHCR from statutory or mandate refugee status would be a positive step towards strengthening policy relevant research

on this important matter. At the same time, it could potentially contribute to advancing the international community's principal aim of ending impunity for perpetrators of the most serious international crimes.[7] At the very least, it would be a check against those who might seek to use refugee status or asylum as a cover for their criminality, or immunity from prosecution, or both. Otherwise, it could potentially undermine the legitimacy of the international refugee protection regime and bring it into disrepute. Indeed, it can be argued that the prosecution of those who are responsible for the most serious breaches of international criminal and humanitarian law is not only a matter of justice, but is absolutely essential for ensuring that all human rights and human dignity, including those of persons who are considered to be among the most vulnerable—refugees—are truly protected and advanced under the rule of law.[8]

Many of those who are excluded from statutory or mandate refugee status can never be prosecuted. Unlike States, the UNHCR is not in the position to prosecute anyone, nor, for confidentiality and privacy reasons, will it identify anyone who has been excluded from statutory or mandate refugee status, unless obligated to do so under extraordinary circumstances, such as high-profile war criminals who have been indicted by the ICC.

What then becomes of those who are excluded from statutory or mandate refugee status? This remains an open question, as there appears to be little or no information available from public sources on this question. Nonetheless, an important and relevant issue for both the UNHCR and for States to address is how to deal with the growing number of those who are presumably left in limbo

[7] International Criminal Court, 'About the Court', <http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx.> accessed 7 January 2016 states,

> The International Criminal Court (ICC), governed by the Rome Statute, is the first permanent, treaty based, international criminal court *established to help end impunity for the perpetrators of the most serious crimes* of concern to the international community. [Emphasis added]

Refugee status and asylum should never be used, of course, to harbor those who are responsible for serious criminality at either the municipal or international levels. Excluding perpetrators of serious criminality, or those who are responsible for severe breaches of international criminal and humanitarian law, from refugee status or asylum or both is not, in the first instance, intended to advance the international community's noble objective of ending impunity. Nonetheless, it does play a crucial role in maintaining the integrity of the international refugee protection regime and the enforcement of international law and it does have the potential to be used for the purpose of ending impunity for the perpetrators of the most serious international crimes in the appropriate situations and circumstances.

[8] James C. Simeon, 'Ethics and the exclusion of those who are "not deserving" of Convention Refugee Status' in Satvinder Singh Juss and Colin Harvey (eds), *Contemporary Issues in Refugee Law* (Edward Elgar Publishing Limited 2013) 258–288.

as a result of being excluded from statutory or mandate refugee status. The article concludes by calling on the UNHCR and States to develop guidelines and "best practices" for how to deal with the exclusion dilemma or the "post-exclusion conundrum predicament," where those who are determined to have a well-founded fear of persecution and, therefore, cannot be refouled, but, at the same time, cannot receive international protection because they have been excluded under Chapter II, Section 7(d), or for that matter by States under Article 1F.[9] Sometimes some of the more high-profile persons in this situation become the subject of media reports and become part of the political discourse of a State, thus degenerating into a highly politicised debate over the failure of the RSD system, or the courts and legal system, to properly address the situation of the "undesirable" refugee who is also "non-returnable."[10]

[9] Joke Reijven and Joris van Wijk consider this to be a 'fundamental systems error in international law.' See their article, 'Caught in Limbo: How Alleged Perpetrators of International Crimes who Applied for Asylum in the Netherlands are Affected by a Fundamental Systems Error in International Law' (2014) 26(2) International Journal of Refugee Law 248–271. See also by the same authors, 'Alleged Perpetrators of Serious Crime Applying for Asylum in the Netherlands: Confidentiality and the Interests of Justice and Security' (2015) 15(4) Criminology and Criminal Justice 484–501.

[10] Sarah Singer, 'Undesirable and Unreturnable in the United Kingdom', 'Undesirable and Unreturnable? Policy Challenges around Excluded Asylum Seekers and Other Migrants Suspected of Serious Criminality but who cannot be Removed', 25–26 January 2016, University of London; Jennifer Bond, 'Country Specific Report: Canada', 'Undesirable and Unreturnable – An International Consultation re: Policy Challenges around Excluded Asylum Seekers and Other Migrants Suspected of Serious Criminality but cannot be Removed', 10 March 2015, VU University Amsterdam; Maarten Bolhius, 'The Issue of Non-Removable Migrants Suspected or Convicted of Serious Crimes in the Netherlands,' 10 March 2015, VU University Amsterdam; Mi Christiansen, Terje Einarsen, 'The Situation in Norway,' 10 March 2015, VU University Amsterdam. See the 'Undesirable and Unreturnable? Policy Challenges around Excluded Asylum-Seekers and Migrants Suspected of Serious Criminality but who cannot be removed' on the Centre for International Criminal Justice, VU University Amsterdam website at https://cicj.org/events/undesirable-and-unreturnable/ accessed 20 August 2017; Joris van Wijk, David James Cantor, Sarah Singer, Maarten Pieter Bolhuis; 'Foreword' (2017) 15(1) *Journal of International Criminal Justice* 51–54, and the four accompanying articles under 'Symposium' in this edition of this journal; See also the Refugee Law Initiative and Centre for International Criminal Justice, 'Undesirable and Unreturnable? Policy challenges around excluded asylum seekers and other migrants suspected of criminality who cannot be removed' undated, http://oldsite.sas.ac.uk/sites/default/files/files/RLI/ubufull%20(1).pdf. accessed 18 July 2017. Joris van Wijk, David James Cantor, Sarah Singer, Maarten Pieter Bolhuis, 'The Emperor's New Clothing: National Responses to "Undesirable and Unreturnable" Aliens Under Asylum and Immigration Law' (2017) 36(1) Refugee Survey Quarterly, Special Issue: 'Undesirable and Unreturnable' Aliens in Asylum and Immigration Law 1–8, and the eight articles that make up this special issue of this journal.

II. International Protection and the Competence of the UNHCR

The UNHCR was established by the United Nations General Assembly through resolution 319 A (IV) of 3 December 1949 and came into effect 1 January 1951.[11] The *Statute of the Office of the High Commissioner for Refugees* (*1950 Statute*) was passed by the United Nations General Assembly as an Annex to resolution 428 (V), December 14th, 1950.[12] A year later, on July 28th, the *Convention relating to the Status of Refugees* (1951 Convention) was adopted. The *1951 Convention* and, subsequently, its *1967 Protocol*, are the legal foundations for determining who is a Convention refugee in international law as well as the legal international instruments for guiding the UNHCR's work.[13] The United Nations General Assembly *1967 Declaration on Territorial Asylum* also articulates clearly the principles on which Convention refugee status determination is intended to operate.[14] This includes a number of provisions that reinforce the sovereign right of States to grant asylum to those who are seeking to invoke Article 14 of the *Universal Declaration of Human Rights.*[15] It also invokes,

[11] UNHCR, 'Introductory Note, Statute of the Office of the High Commissioner for Refugees' (2010) 2 <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3b66c39e1&query=1950%20Statute%20of%20the%20UNHCR> accessed 13 March 2015.

[12] UNHCR, 'History of UNHCR, A Global Humanitarian Organization of Humble Origins' <http://www.unhcr.org/pages/49c3646cbc.html> accessed 7 March 2015; Statute of the Office of the High Commissioner for Refugees, General Assembly Resolution 428(V) (14 December 1950) <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3b66c39e1&query=1950%20Statute%20of%20the%20UNHCR> accessed 7 March 2015.

[13] ibid. 'Convention relating to the Status of Refugees' (28 July 1951, in force 22 April 1954) 1989 UNTS 137 and the 'Protocol relating to the Status of Refugees' (31 January 1967, in force 4 October 1967) 19 UNTS 6223, 6257.

[14] UN General Assembly, 'Declaration on Territorial Asylum' (14 December 1967) A/RES/2312(XXII) <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3b00f05a2c&skip=0&query=Declaration%20on%20Territorial%20Asylum> accessed 7 March 2015, Wherein it states:

> *Recognizing* that the grant of asylum by a State to persons entitled to invoke article 14 of the *Universal Declaration of Human Rights* is a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State,
>
> *Recommends* that, without prejudice to existing instruments dealing with asylum and the status of refugees and stateless persons, States should base themselves in their practices relating to territorial asylum on the following principles…

It is important to note that there is also an Organization of American States (OAS) 'Convention on Territorial Asylum' (29 December 1954) OAS Treaty Series, No. 19, UN Registration: 03/20/89, No. 24378 <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3ae6b36614&skip=0&query=Convention%20on%20Territorial%20Asylum> accessed 7 March 2015.

[15] UN General Assembly, 'Universal Declaration of Human Rights' (10 December 1948) 217 A (III). http://www.un.org/en/universal-declaration-human-rights/index.html. accessed 18 July

however, a number of important principles with respect to the exclusion of persons from territorial asylum. For example, at the very outset it states, "Everyone has the right to seek and to enjoy in other countries asylum from persecution."[16] However, it then immediately qualifies this right by noting that:

> This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations,[17]

Article 1(2) of the *Declaration on Territorial Asylum* further qualifies this by stating that:

> The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.[18]

Finally, it concludes by stating in Article 4 that:

> States granting asylum shall not permit persons who have received asylum to engage in activities contrary to the purposes and principles of the United Nations.[19]

All of this indicates that the *1967 Declaration of Territorial Asylum* evokes fully the now well-established and entrenched principles of excluding those persons who have committed, or who are complicit in or guilty of, serious breaches in international human rights, humanitarian, and criminal law, from Convention refugee status or territorial asylum.

The *Statute of the Office of the High Commissioner for Refugees* outlines in clear terms the roles and responsibilities of the United Nations High Commissioner for Refugees. For instance, paragraph two of the UN General Assembly resolution 428

2017 as quoted in the 'Declaration of Territorial Asylum' (14 December 1967).

16 ibid.

17 ibid.

18 UN General Assembly, 'Declaration on Territorial Asylum' (14 December 1967) A/RES/2312(XXII); 'Statute of the Office of the High Commissioner for Refugees' General Assembly Resolution 428(V) (14 December 1950) <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3b00f05a2c&skip=0&query=Declaration%20on%20Territorial%20Asylum> accessed 18 July 2017.

19 ibid.

(V) calls upon governments "to co-operate with United Nations High Commissioner for Refugees in the performance of his functions concerning refugees falling under the competence of his Office."[20] Eight specific tasks are outlined for governments under Resolution 428 (V). Two are worth highlighting:

> 2(b) Entering into special agreements with the High Commissioner for the execution of measures calculated to improve the situation of refugees and to reduce the number requiring protection;
>
> 2(c) Admitting refugees to their territories, not excluding those in the most destitute categories.[21]

Paragraph 2(c) definitively underscores the necessity of governments to allow all refugees access to their territories for the purposes of seeking protection, and paragraph 2(b) specifies that governments shall enter into bilateral or multilateral special agreements with the High Commissioner for Refugees for the purposes of improving the situation of refugees and reducing their numbers. Both are essential for realising the most basic of international refugee law principles, *non-refoulement*.[22]

Sir Elihu Lauterpacht and Daniel Bethlehem define *non-refoulement* in the following manner:

> Non-refoulement is a concept which prohibits States from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.[23]

Indeed, they note the pronouncements on *non-refoulement* in the *1984 Cartagena*

[20] 'Statute of the Office of the High Commissioner for Refugees' General Assembly Resolution 428(V) (14 December 1950) 6 <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=-search&docid=3b00f05a2c&skip=0&query=Declaration%20on%20Territorial%20Asylum> accessed 18 July 2017.

[21] ibid.

[22] 'The international legal status of the refugee necessarily imports certain legal consequences, the most important of which is the obligation of States to respect *the principle of non-refoulement through time*. In practice, the (legal) obligation to respect this principle, independent and compelling as it is, may be difficult to isolate from the (political) options which govern the availability of solutions.' Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Third Edition Oxford University Press 2007) 1. [Emphasis added].

[23] Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion,' in Erika Feller, Volker Turk, Frances Nicholson (eds), *Refugee Protection in International Law: Global Consultations* (Cambridge University Press 2003) 89.

Declaration, Section III, paragraph five:

> The importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and the state of international refugee law should be acknowledged and observed as a rule of *jus cogens*.[24]

In addition, this legal principle is found in the *1951 Convention relating to the Status of Refugees*, at Article 33. The *1951 Convention* has been also called the "cornerstone of today's international refugee protection."[25]

The *1950 Statute of the Office of the High Commissioner for Refugees* provides the legal authority for the UNHCR to determine whether a person is a statutory or mandate refugee. The *1951 Convention* and its *1967 Protocol* are treaties that provide States with the legal bases for determining whether a person is a Convention or a territorial refugee.[26] It is also worth emphasising that, even though the *1950 Statute* does not include the ground of "membership in a particular social group",[27] the UNHCR under its operational standards applies the definition of who is a refugee under the *1951 Convention* and *1967 Protocol*. For refugee status determination

[24] ibid 92. Jean-Francois Durieux and Jane McAdam have argued that '… *non-refoulement through time* is construed as a dynamic concept, allowing for a general evolution of the basic duty to admit refugees into a more complete set of solution-oriented obligations, which are no less real for being shared with the international community at large. The challenge, it seems, lies in regulating the manner in which the passing of *time* affects the accrual of States' obligations under the Convention, beyond the *non-refoulement* standard which is both peremptory and immediate.' Anne F. Bayefsky (ed) *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton* (Martinus Nijhoff Publishers 2006) 221.

[25] UNHCR, 'Conventions, Key Legal Documents,' <http://www.unhcr.org/ceu/251-enre-sourcesconventions-html.html> accessed 11 March 2015. 'The "1951 Convention Relating to the Status of Refugees", together with its "1967 Protocol", is the cornerstone of today's international refugee protection. Indeed, the Convention is the only international agreement that covers the most important aspects of the life of a refugee.'

[26] James C. Simeon, 'A Comparative Analysis of the Response of the UNHCR and Industrialized States to Rapidly Fluctuating Refugee Status and Asylum Applications: Lessons and Best Practices for RSD Systems Design and Administration' (2010) 44(1) International Journal of Refugee Law 76–78. It is further worth noting that in dualist systems such as in common law jurisdictions the provisions of treaties do not have the force of law unless they have been incorporated in domestic legislation.

[27] 'Statute of the Office of the High Commissioner for Refugees' General Assembly Resolution 428(V) (14 December 1950) 6 <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=-search&docid=3b00f05a2c&skip=0&query=Declaration%20on%20Territorial%20Asylum> accessed 18 July 2017.

purposes, the UNHCR applies the *1951 Convention* and *1967 Protocol*.[28]

It is also worth noting that there are three basic forms of asylum in international law: territorial, extraterritorial, and, neutral.[29] "Territorial asylum is granted within the territorial bounds of the state offering the asylum and is the exception to the practice of extradition."[30] "Extraterritorial asylum is the asylum granted in embassies, legations, consulates, warships, and merchant vessels in foreign territories"[31] and is thus granted within the territory of the state where protection is sought. This is also referred to as "diplomatic asylum." Neutral asylum is exercised by states that are neutral in a war and offer asylum to the troops of belligerent States, "provided that the troops submit to internment for the duration of the war."[32] The UNHCR has pointed out that "territorial asylum can only be provided by States"[33] and that the "UNHCR may recognize refugees under its mandate, but

[28] UNHCR, 'Procedural Standards for Refugee Status Determination Under UNHCR's Mandate' Design and Printing, IMP Alpes, Unit 4.8.2, Procedures for Examining the Application of Article 1F. <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4317223c9&query=UNHCR%20mandate%20status> accessed 7 January 2016.

[29] George J. Andreopoulos, 'Asylum Law – Alternate Title: *political asylum*,' *Encyclopaedia Britannica*. <http://www.britannica.com/EBchecked/topic/40220/asylum#ref41289> accessed 14 March 2015. It is also relevant and important to keep in mind that there are important distinctions between the terms migrant, refugee, and asylum-seeker. The UNHCR states that, 'The terms asylum-seeker and refugee are often confused: an asylum-seeker is someone who says he or she is a refugee, but whose claim has not yet been definitively evaluated.' UNHCR, 'Asylum-Seekers' <http://www.unhcr.org/pages/49c3646c137.html> accessed 19 January 2016. Harry Mitchell QC makes a distinction between asylum-seeker, refugee, and economic migrant. He states that, 'Asylum seeker means a person who has applied for asylum under the 1951 Refugee Convention relating to the Status of Refugees on the ground that if he is returned to his country of origin he has a well-founded fear of persecution on account of race, religion, nationality, political belief or membership of a particular social group. He remains an asylum seeker for so long as his application or an appeal against refusal of his application is pending.' And, he states that a refugee is 'an asylum seeker whose application has been successful.' Economic migrants, he states, are 'person[s] who has left his own country and seeks by lawful or unlawful means to find employment in another country.' Harry Mitchell QC, 'The distinction between asylum seekers and refugees' (24 January 2006) <http://www.migrationwatchuk.org/briefing-paper/70> accessed 19 January 2016. See also Alan Travis, 'Migrants, refugees and asylum seekers: what's the difference?' *The Guardian* (28 August 2015) <http://www.theguardian.com/world/2015/aug/28/migrants-refugees-and-asylum-seekers-whats-the-difference> accessed 19 January 2016.

[30] ibid.

[31] ibid.

[32] ibid.

[33] UNHCR, 'Chapter 3, Asylum and Refugee Status Adjudication' in 'UNHCR Statistical Yearbook 2003' (2003) <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=42b018454&query=territorial%20asylum> accessed 14 March 2015.

it cannot provide asylum".[34] Hence, there is a technical distinction between refugee status and asylum. Convention refugee status, on the one hand, can encompass all three basic forms of territorial asylum. On the other hand, by definition, territorial asylum cannot be included in mandate or statutory refugee status.[35]

Under Chapter II of the *1950 Statute*, the functions of the High Commissioner, it states that the "competence of the High Commissioner shall extend to"[36] persons who fall within certain categories as defined in paragraph six of the *Statute of the Office of the High Commissioner for Refugees.* The definition of who is a refugee under the *1950 Statute* is found in paragraph 6A (ii):

> Any person who, as a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it.[37]

[34] ibid.

[35] See, in addition, US Citizenship and Immigration Services, Department of Homeland Security, 'Refugees & Asylum' <https://www.uscis.gov/humanitarian/refugees-asylum> accessed 27 March 2016; Harry Mitchell, QC, 'The distinction between asylum seekers and refugees', Migration Watch UK <http://www.migrationwatchuk.org/briefingPaper/document/70> accessed 27 March 2016; UNHCR, Adrian Edwards, 'UNHCR Viewpoint: "Refugee" or "Migrant" – Which is right?' (27 August 2015) <http://www.unhcr.org.uk/news-and-views/news-list/news-detail/article/unhcr-viewpoint-refugee-or-migrant-which-is-right.html?j=853600&e=barbara.harrell-bond@qeh.ox.ac.uk&l=462_HTML&u=32158003&mid=6192421&jb=0&utm_source=UK+monthly+E-news+September+2015+-+Prospect&utm_medium=email&utm_term=003D000001MGGrfIAH&utm_content=refugee_migrant_story_ukEnews&utm_campaign=> accessed 27 March 2016.

[36] Statute of the Office of the High Commissioner for Refugees' General Assembly Resolution 428(V) (14 December 1950) 6 <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3b00f05a2c&skip=0&query=Declaration%20on%20Territorial%20Asylum> accessed 13 March 2015.

[37] ibid 7.

Paragraph 6B then states:

> Any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had a well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.[38]

The determination of who is eligible to receive the protection of the UNHCR—that is, the determination of mandate or statutory refugee status, or the determination of those who fall within the competence of the UNHCR—is deemed to be a "core UNHCR protection function."[39] According to the UNHCR, "the purpose of mandate RSD is to permit the UNHCR to determine whether asylum seekers fall within the criteria of international protection."[40] It is relevant and important to note that under the "*1950 Statute* and subsequent resolutions adopted by the United Nations General Assembly and ECOSOC (the United Nations Economic and Social Council), the UNHCR has a mandate to ensure international protection and seek appropriate solutions to refugees within its competence."[41]

To summarise, the competence of the UNHCR to provide international protection extends to those who meet the definition of refugee in the *1951 Convention* and its *1967 Protocol* and those who come "within the extended refugee definition under the UNHCR's mandate because they are outside their country of nationality or former habitual residence and are unable or unwilling to return to their country of nationality or former habitual residence owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing the public order".[42] At the heart of the international

[38] ibid 8.

[39] UNHCR, 'Procedural Standards for Refugee Status Determination Under UNHCR's Mandate' Design and Printing, IMP Alpes <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4317223c9&query=UNHCR%20mandate%20status> accessed 7 January 2016.

[40] ibid.

[41] UNHCR, 'Refugee Status Determination: Identifying who is a refugee, Self-Study Module 2' 10-11 <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=43144dc52&query=handbook%20on%20determining%20mandate%20refugee%20status> accessed 7 January 2016.

[42] ibid 8–9.

refugee protection system in the world today is the peremptory norm of *non-refoulement*, which is at the very root of Convention refugee or territorial asylum status and mandate or statutory refugee status. States exercise legal competence over the first and the UNHCR has the legal competence for mandate or statutory refugee status as well as supervisory responsibility for the Convention refugee or territorial asylum status.[43]

III. Mandate or Statutory Refugee Status Determination

The UNHCR *Statistical Report 2014* states that, out of the 173 countries and territories where information was available, governments were responsible for refugee status determination procedures in 103 countries (60%) and the UNHCR was responsible in 51 countries (29%). In addition, the UNHCR conducted mandate refugee status determination procedures in parallel with governments or joint RSD procedures, or both, in 19 countries or territories (11%).[44] Hence, the UNHCR in 2014 had conducted RSD under its competence in at least some 70 States in the world today.

The UNHCR undertakes a wide range of varied activities in the fulfilment of its legal obligations under its founding UN resolutions and *1950 Statute* and other international instruments, that include but are not limited to: the provision of advice and guidance with respect to States' RSD systems, including, drafting refugee laws; capacity building for States' RSD systems; the provision of international protection to those persons who fall within its ever expanding mandate; assisting governments in the provision of durable solutions to refugees, including, resettlement; and, research on relevant issues and concerns, monitoring States' parties compliance

[43] 'Article 35(1)', 'Convention relating to the Status of Refugees' (28 July 1951, in force 22 April 1954)1989 UNTS 137 and the 'Protocol relating to the Status of Refugees' (31 January 1967, in force 4 October 1967) 19 UNTS 6223, 6257. Moreover, see the UN General Assembly Resolution 428 (V) of 14 December 1950 that calls upon '… Governments to co-operate with the United Nations High Commissioner for Refugees in the performance of his functions concerning refugees falling under the competence of his Office.' This further lends support to the UNHCR's supervisory function with respect to the provision of international protection for refugees. 'Office of the High Commissioner for Refugees, 'Annex: Statute of the Office of the High Commissioner for Refugees, Chapter II, Section 7 (d)' (2010) <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3b66c39e1&query=1950%20Statute%20of%20the%20UNHCR> accessed 17 January 2016 See the 'Annex: Statute of the Office of the High Commissioner of Refugees, Chapter 1, General Provisions, section 1', which further underscores that the UNHCR is acting under the authority of the General Assembly and the auspices of the United Nations in the provision of international protection for refugees. Again, further bolstering the authority of the UNHCR to supervise the provision of international protection to refugees.

[44] UNHCR, 'UNHCR Statistical Yearbook 2014' 51 <http://www.unhcr.org/56655f4cb.html> accessed 10 January 2016

with their obligations under the *1951 Convention*, among many others. Another important function performed by the UNHCR is RSD under its mandate or statute. It does so in a number of different ways, including:

- In countries which are not Party to the *1951 Convention/1967 Protocol*;
- In countries which are Party to the *1951 Convention/1967 Protocol*, but where:
  - ◊ asylum determination procedures have not been established, or
  - ◊ the national asylum process is manifestly inadequate or where determinations are based on erroneous interpretation of the *1951 Convention*; and
- As a precondition for the implementation of durable solutions such as resettlement.[45]

It is important and informative to note the number of asylum and refugee applications received by both States and the UNHCR have increased significantly over that last several years. Table 1 indicates the number of new and appeal asylum and refugee applications that were received by States and the UNHCR from 2011 to 2014.

TABLE 1[46]

New and Appeal Refugee and Asylum Applications Registered from 2011 to 2014				
	2011	*2012*	*2013*	*2014*
States	734,100	781,400	870,700	1,402,800
UNHCR	98,800	125,500	203,200	245,600
Joint	31,700	22,800	5,800	12,900
Totals	864,600	929,700	1,079,700	1,661,300
UNHCR Only	11%	13%	19%	15%

Several points are worth noting from Table 1. First, the total number of new and appeal refugee and asylum applications has been increasing for States and the

[45] UNHCR, 'Refugee Status Determination: Identifying who is a refugee, Self-Study Module 2' 11 <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=43144d-c52&query=handbook%20on%20determining%20mandate%20refugee%20status> accessed 12 January 2016.

[46] UN High Commissioner for Refugees (UNHCR), 'UNHCR Statistical Yearbook 2014' (2015) 52 <http://www.unhcr.org/56655f4cb.html> accessed 10 January 2016.

UNHCR but the number of Joint, State and UNHCR applications, have been sharply declining, particularly, from 2012 to 2013. There has been a rebound, however, in joint claims (UNHCR and States) in 2014, a nearly 45 per cent increase over the previous year. The most dramatic increase or decrease occurred from 2013 to 2014. There was a 53.8 per cent increase in the number of new and appeal refugee and asylum applications overall. The largest increase was amongst the States, where there was a 61.1 per cent increase in the number of new and appeal refugee applications. There was also a 20.8 per cent increase of new and appeal refugee applications at the UNHCR and a 122.4 per cent increase in the number of Joint applications processed by States and the UNHCR from 2013 to 2014. While the numbers appear to have increased over time, the highest percentage increase in these applications was clearly with the UNHCR. The number of new and appeal applications processed by the UNHCR increased by 148 per cent over this three-year period. The percentage increase for States in the same period was only 91 percent. The UNHCR now accounts for about fifteen percent, a drop from nearly one-fifth (19 per cent) from the previous year, of all of the new and appeal refugee and asylum applications in the world today. Nonetheless, this accounts for an enormous number of refugee cases, some 245,600 cases in 2014 alone.[47] Table 2 presents the number of new asylum applications that were received by States and the UNHCR in 2014.

[47] Michael Kagan noted in 2005 that,

> The number of individual RSD applications received by UNHCR offices worldwide nearly doubled from 1997 to 2001. UNHCR performed RSD in at least 60 countries in 2001, nearly all in the developing world and received approximately 66 000 individual refugee claims, more than the United States, five times more than Australia, and about as many as Austria, Belgium, Denmark, Greece and Spain combined. UNHCR RSD predominantly affects urban refugee populations, and is particularly common in the Middle East.

Michael Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by the UNHCR Refugee Status Determination' (2006) 18(1) International Journal of Refugee Law 3. Since 2001, then, there appears to have been close to a 180,000 increase in the number of registered refugee applications that are being processed by the UNHCR. This is nearly a three-fold increase in the numbers of refugee applications being processed by the UNHCR in just over a dozen years.

TABLE 2[48]

New Asylum Applications Received by States and the UNHCR in 2014	
UNHCR	245,600
Russian Federation	274,700
Germany	173,100
United States	121,200
Turkey	87,800
Sweden	75,100
South Africa	71,700
Italy	63,700
France	59,000
Hungary	41,100
Uganda	32,400
Canada	13,500[49]

The 2014 new asylum applications statistics received by States and the UNHCR reveal that the single largest recipient among States was the Russian Federation. It is important, however, to note that the figures for the Russian Federation breakout as follows: 7,000 applications for refugee status and 267,800 applications for temporary asylum.[50] The UNHCR notes that, "Outbreak of conflict in Eastern Ukraine had a major impact on the 2014 figures, in view of the fact that 271,200 or close to 99 percent of the claims in the Russian Federation were lodged by Ukrainians."[51] Temporary asylum, in the Russian Federation, has been described as follows:

> … This kind of asylum is equivalent to Europe's "humanitarian status" and is given out on compassionate grounds. That is to say, if an asylum seeker does not meet the criteria for full refugee status, but cannot be extradited back to his country of origin

[48] ibid 52–54.

[49] For Canada only see, UNHCR, 'Asylum Trends 2014: Levels and Trends in Industrialized Countries' (2015) 3 <http://www.unhcr.org/551128679.html> accessed 10 January 2016.

[50] UNHCR Statistical Yearbook 2014' (2015) 52 <http://www.unhcr.org/56655f4cb.html> accessed 10 January 2016.

[51] ibid.

> for "humanitarian" reasons, then he is eligible for temporary asylum status. There are many "humanitarian" grounds such as the risk of a person experiencing inhumane treatment in their country. There were 8,952 applications for temporary asylum granted to 5,728 people between 2007 and 2012.[52]

If temporary asylum in the Russian Federation is equivalent to "humanitarian status" in Europe, then it is clearly not Convention refugee status. It is patently self-evident that the 245,600 asylum applications the UNHCR received surpasses by a wide margin any of the States that are listed in Table 2. Germany ranks high on this list with some 173,100 asylum applications, second only to the Russian Federation, but with the caveat that temporary asylum is equivalent to "humanitarian status." If that is the case, Germany would rank number one amongst States in terms of the number of new asylum applications proper received in the world today.

The increasing number of refugee and appeal applications that are being conducted under the UNHCR's statutory or mandate refugee status is troubling. As noted earlier, the UNHCR cannot decide whether the applicant is a Convention or territorial refugee, unless it does so jointly or on behalf of a State, but rather simply decides whether the person is a mandate or statutory refugee. This raises concerns regarding whether the UNHCR has sufficient resources, financial, materiel and personnel, to fulfill its broad and growing mandate while assuming more and more of the new refugee and appeal applications. Moreover, it has been observed that the UNHCR should not be conducting its RSD for States unless absolutely necessary.[53] States ought to be conducting their own RSD processes, perhaps in conjunction with the UNHCR, as in some jurisdictions. If so, the UNHCR's limited resources could be used more effectively elsewhere for the assistance of refugees. If, however, States are unable or unwilling to fulfill their obligations to conduct their own RSD, then the UNHCR will have to try and fill this gap. Presumably, this would be done in conjunction with the State or with the State's consent and agreement, as appropriate.

[52] Tom Balmforth, 'Explainer: How do you get asylum in Russia?' Radio Free Europe, and Radio Liberty <http://www.rferl.org/content/explainer-russia-asylum/25057895.html> accessed 10 January 2016.

[53] Michael Kagan, 'Why is the UNHCR doing RSD anyway? A UNHCR Report identifies the hard questions', in *Rights in Exile, The International Refugee Rights Initiatives Refugee Legal Aid Newsletter* (1 January 2015) <http://rightsinexile.tumblr.com/post/106852080002/why-is-unhcr-doing-rsd-anyway-a-unhcr-report> accessed 14 September 2017.

TABLE 3[54]

Top Ten UNHCR Offices with New Refugee Claims			
Country	*2012*	*2013*	*2014*
Turkey	26,500	44,800	87,800
Jordan	25,000	6,700	29,100
Malaysia	19,400	53,600	25,700
Lebanon	1,800	2,800	14,500
Kenya	20,000	19,200	12,100
Egypt	6,700	10,800	10,000
Cameroon	3,500	5,800	9,100
India	2,900	5,600	7,000
Pakistan	3,900	5,200	5,800
Indonesia	7,200	8,300	5,700
	94,400	*162,800*	*206,700*

Table 3 lists the top ten UNHCR regional offices that received new refugee applications for the last three years where statistics are fully available. It is interesting to note that, in 2014, Turkey received the highest number of new refugee claims, followed by Jordan, Malaysia, Lebanon, Kenya, and Egypt. The top five UNHCR regional offices accounted for 72 per cent of all new refugee applications.[55] Further, 80 per cent of the UNHCR's RSD work was concentrated in just seven countries.[56] However, most importantly there was a dramatic increase in the number of new refugee claims from 2012 to 2014 on this list of top ten UNHCR regional offices. There has been, in fact, a 119 per cent increase in the number of new refugee claims made at UNHCR regional offices between 2012 and 2014. All these UNHCR regional offices experienced an increase in the number of refugee claims over the previous year, save Malaysia, Kenya, Egypt, and Indonesia. Six out of the ten UNHCR regional offices experienced an increase over the previous year and Turkey experienced the highest increases among all UNHCR regional offices around the world from 2012 to 2014. The reason for the tremendous increase in the number of new refugee claims in Turkey as well as Jordan and Lebanon is the

[54] UNHCR Statistical Yearbook 2014' (2015) 52 <http://www.unhcr.org/56655f4cb.html> accessed 10 January 2016.

[55] ibid 56.

[56] ibid 57.

escalating Syrian civil war.

From this list of the top ten UNHCR regional offices with new refugee claims, it is apparent that there are long standing civil wars or insurgencies and armed conflicts that have been "seriously disturbing the public order,"[57] whether within the borders of these countries or contiguous to them, or both, that have contributed to the escalating numbers of new refugee claims.[58] Security concerns lie at the very root of the difficulties confronting these countries that result in displacement and forced migration.[59]

TABLE 4[60]

Top Ten Source Countries for New Refugee Claims Filed with States in 2014	
Ukraine	288,600
Syria	170,000
Iraq	100,00
Afghanistan	73,400
Eritrea	60,000
Serbia and Kosovo: S/RES/1244 (1999)	55,300
Democreatic Republic of Congo	48,100
Somalia	41,100
Pakistan	35,100
Nigeria	32,000

Out of the 1.47 million asylum and refugee applications submitted to States and the UNHCR in 2014, the top ten source countries are listed in Table 4.[61] Again,

[57] 'Article 35(1)', 'Convention relating to the Status of Refugees' (28 July 1951, in force 22 April 1954)1989 UNTS 137 and the 'Protocol relating to the Status of Refugees' (31 January 1967, in force 4 October 1967) 19 UNTS 6223, 6257.

[58] 'The International Institute for Strategic Studies, IISS, 'All Conflicts', Armed Conflicts Database, Monitoring Conflicts Worldwide <https://acd.iiss.org/en/conflicts> accessed 20 March 2015.

[59] UNHCR, 'UNHCR report shows a leap in asylum applications in industrialized countries" (21 March 2014) <http://www.unhcr.org/532afe986.html> accessed 31 March 2015. Wherein it states, 'The three major components of global forced displacement are internal displacement, refugee numbers, and asylum-seekers (together totaling 45.2 million people, as of data from early 2013).'

[60] UNHCR Statistical Yearbook 2014' (2015) 52 <http://www.unhcr.org/56655f4cb.html> accessed 10 January 2016.

[61] ibid. At the Third International Humanitarian Pledging Conference for Syria, Antonio

the relationship between protracted war, armed conflict, and extremist violence, and displacement and forced migration is evident in each of these countries.[62] This is most obvious in relation to the countries of Ukraine, Syria, Iraq, Afghanistan, and Eritrea, where war and terrorism coverage often dominates the news media.[63]

It is also relevant to consider the number of substantive decisions taken by States and the UNHCR in their asylum and refugee applications in the last four years for which statistics are available. Table 5 indicates that the UNHCR made eleven per cent of the decisions on all asylum and refugee applications in 2013 and 9 per cent of all asylum and refugee applications in 2014. There was a three per cent increase over the previous year in 2013 and a two per cent drop in these figures in 2014 and despite this percentage drop in the proportion of substantive decisions taken in 2014, there was still a substantial increase in the total number of RSD decisions that the UNHCR made in 2014, of close to 100,000 decisions. What is less clear is why there has been such a precipitous drop in the number of joint, UNHCR and States, substantive decisions taken on asylum and refugee applications. This represented a 97 per cent drop in the total number of joint decisions taken in just one year. These figures increased in 2014, but came nowhere

Guterres, United Nations High Commissioner for Refugees at the time, stated that, 'Over 3.9 million [Syria refugees] are registered in the neighbouring countries, and they are becoming increasingly impoverished and vulnerable, with living conditions deteriorating drastically. Two million people rely on food assistance for their survival. Over a third of all refugees in the region live in substandard shelter–in Lebanon and the urban areas of Jordan their proportion reaches 50%. More than 600,000 refugee children are not going to school. There are serious response gaps in vital health care.' Written statement, Third International Humanitarian Pledging Conference for Syria, Remarks by António Guterres, United Nations High Commissioner for Refugees, Kuwait City, 31 March 2015.

62 The International Institute for Strategic Studies, IISS, Armed Conflicts Database, Monitoring Conflicts Worldwide, 'All Conflicts' <https://acd.iiss.org/en/conflicts> accessed March 20, 2015. See UNHCR, 'Global Trends 2013, "War's Human Costs" ' United Nations High Commissioner for Refugees (2014) <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=5399a14f9&query=Global%20Trends%202013> accessed 23 January 2016. Wherein it quotes, Antonio Guterres, UN High Commissioner for Refugees at the time, as stating, 'We are seeing here the immense costs of not ending wars, of failing to resolve or prevent conflict. Peace is today dangerously in deficit. Humanitarians can help as a palliative, but political solutions are vitally needed. Without this the alarming levels of conflict and the mass suffering that is reflected in these figures will continue.'

63 For example, see Thomas Adamson, 'France pays tribute to victims of terrorism' *The Globe and Mail* (11 January 2016) A9. Mitch Potter, 'Analysis: Trajectory of gloom trails 2015' *Toronto Star* (14 January 2016) A11. BBC News, 'Asia: Jakarta attacks: Indonesia's new breed of militants' <http://www.bbc.com/news/world-asia-35310951> accessed 14 January 2016; BBC News, 'Ukrainian Crisis' <http://www.bbc.com/news/world-europe-26270866> accessed 21 January 2016; BBC News, 'Islamic State Conflict' <http://www.bbc.com/news/24758587> accessed 21 January 2016; BBC News, 'Syria's War' <http://www.bbc.com/news/world-middle-east-17258397> accessed 21 January 2016.

near the numbers that UNHCR were experienced in 2012—18,200.

TABLE 5[64]

Asylum and Refugee Substantive Decisions Taken 2011-2014				
	2011	*2012*	*2013*	*2014*
States	518,200	627,200	590,200	957,400
UNHCR	52,600	54,400	72,100	99,600
Jointly	6,500	18,200	500	4,400
Totals	577,300	699,800	662,800	1,061,400
UNHCR Only	9%	8%	11%	9%

It is interesting to point out that global Refugee Recognition Rate (RRR), which combines both States and the UNHCR decisions, was 32 per cent for all asylum and refugee decisions that were taken during 2013.[65] The RRR in 2014 dropped to 27 per cent.[66] The Total Recognition Rate (TRR), a figure that is calculated by dividing the number of asylum-seekers granted Convention refugee status or a complementary form of protection by the total number of substantive decisions (Convention refugee status, complementary protection, and rejected cases), was 43 per cent in 2013.[67] The TRR was substantially higher at first instance for applicants from particular countries. For instance, for those asylum and refugee applicants who were from Syria, Myanmar, South Sudan, and Eritrea, the TRR was over 90 per cent.[68] Likewise, the recognition rates were also high for asylum-seekers from Somalia (82 per cent), Iraq (79 per cent), the Democratic Republic of the Congo (74 per cent), Sudan (69 per cent), the Islamic Republic of Iran (67

[64] UNHCR Statistical Yearbook 2014' (2015) 52 <http://www.unhcr.org/56655f4cb.html> accessed 10 January 2016.

[65] ibid., 'UNHCR Statistical Yearbook 2013'. The UNHCR calculates the Refugee Recognition Rate (RRR) as the number of asylum-seekers granted Convention refugee status divided by the total number of substantive decisions (Convention status, complementary protection, and rejected cases).

[66] ibid., 'UNHCR Statistical Yearbook 2014'.

[67] ibid., 'UNHCR Statistical Yearbook 2013'. It is important to note that non-substantive decisions are excluded, to the extent possible, from both the RRR and TRR calculations. 'For the purpose of global comparability, UNHCR only uses these two recognition rates and does not report rates calculated by national authorities.'

[68] ibid.

per cent), and Afghanistan (65 per cent).[69] The TRR for 2014 was 59 per cent.[70]

It is also interesting to note that at the end of 2014, 1.8 million individuals were still awaiting decisions in their asylum claims. This is the highest figure in the last fifteen years.[71] However, the UNHCR notes that the true number of pending asylum claims is unknown because many States do not keep or report these statistics.[72]

These statistics clearly establish that the UNHCR is the single largest refugee status decision-making body in the world by a very wide margin over the largest States, Germany and the United States. It is important to emphasise that the UNHCR determines who is a statutory or mandate refugee, unlike States, which can determine who is a territorial or Convention refugee. The statistics on the number of new refugee claims at the UNHCR and among States reinforces that the major source countries for refugees are those who have been engaged in protracted internal armed conflict. This is further reinforced by the fact that the high RRR's for refugee applicants, who are coming from the top ten source countries, come from countries that are afflicted by protracted internal armed conflicts. This also applies to the TRR, which stood at 59 per cent for 2014. The TRR for some of the war torn countries is much higher with Syria, Myanmar, South Sudan and Eritrea all at 90 per cent; Somalia at 82 per cent; Iraq 79 per cent; and the Democratic Republic of the Congo at 74 per cent.

Overall, the above statistics suggest that the vast majority of the world's refugees come from countries where war and protracted armed conflict prevail.[73] This, in turn, suggests that exclusion under Article 1F of the 1951 Convention will likely remain an issue in determining whether a person is eligible to receive statutory or mandate refugee status from the UNHCR. Hence, this underscores the need to address the issue of the exclusion dilemma that will not diminish, but will, in all likelihood, increase steadily over time.

[69] ibid.

[70] ibid., 'UNHCR Statistical Yearbook 2014'.

[71] ibid 55.

[72] ibid.

[73] In fact more than half of the world's refugees come from three countries: Syrian Arab Republic (4.9 million); Afghanistan (2.7 million), and Somalia (1.1 million). UNHCR, 'Global Trends, Forced Displacement in 2015' (2016) 3 <http://www.unhcr.org/576408cd7.pdf> accessed 21 July 2017. All three countries have been wracked by protracted armed conflict, and in several instances for decades, and are considered to be amongst the deadliest armed conflicts on earth.

IV. Excluding Applicants from Asylum or Refugee Status

Even if an applicant is determined to be a Convention or territorial refugee or a mandate or statutory refugee they can be excluded from this status under Article 1F of the *1951 Convention* or Section 7(d) of the *1950 Statute*. These are commonly referred to as the "Exclusion Clauses."[74]

The *1950 Statute* outlines, at Chapter II, Section 7(d) where the competence of the High Commissioner for Refugees shall not extend. It lists four distinct areas, including:

> (d) In respect to whom there are *serious reasons for considering* that he has *committed a crime covered by the provisions of the treaties of extradition* or a *Tribunal or by the provision of article 14*,[75]

Chapter II, Section 7(d) is similar to the Exclusion Clauses in Article 1F of the *1951 Convention*, which states:

> F. The provisions of this Convention shall not apply to any person with respect to whom there are *serious reasons for considering* that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, *as defined in the international instruments drawn up to make provision in respect of such crimes*;
>
> (b) he has *committed a serious non-political crime outside the country of refuge* prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.[76]

[74] Variations of the Exclusion Clauses are found consistently in other international refugee law instruments such as the '1969 OAU Convention Governing Specific Aspects of the Refugee Problem in Africa', Article 1F of the '1951 Convention', but adds an additional provision that states that any person can be excluded for being guilty of acts that are contrary to the purpose and principles of the Organization for African Unity. See Article 5 of the OAU Convention <http://www.unhcr.org/45dc1a682.html> accessed March 24, 2015.

[75] 'Statute of the Office of the High Commissioner for Refugees', General Assembly Resolution 428(V), 14 December 1950, 9. [Emphasis added.] <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3b66c39e1&query=1950%20Statute%20of%20the%20UNHCR> accessed 13 March 2015.

[76] 'Convention relating to the Status of Refugees' (1989 UNTS 137, 1951, in force 22 April 1954) and the 'Protocol relating to the Status of Refugees (19 UNTS 6223 6257, 1967, in force 4 October 1967).

As noted above, just as the UNHCR utilises the *1951 Convention*, operationally, for the purposes of deciding who is a mandate or statutory refugee, it also uses Article 1F in deciding who ought to be excluded from mandate or statutory refugee status. This is clearly articulated in the *UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the* 1951 Convention relating to the Status of Refugees.[77] At "Introduction, E, Responsibility for determination of exclusion," paragraph 7, it notes as follows:

> States parties to the 1951 Convention/1967 Protocol and/or OAU Convention and UNHCR need to consider whether the exclusion clauses apply in the context of the determination of refugee status. Paragraph 7(d) of UNHCR's Statute covers similar grounds to Article 1F of the 1951 Convention, although UNHCR officials should be guided by the language of Article 1F, as it represents the later and more specific formulation.

This further applies in the situation where there is a cancellation or revocation of refugee status on the basis of exclusion. Paragraph 6 of these Guidelines, at "D. Cancellation or revocation on the basis of exclusion", it states:

> Where facts which would have led to exclusion only come to light after the grant of refugee status, this would justify **cancellation** of refugee status on the grounds of exclusion. The reverse is the information casting doubt on the basis on which an individual has been excluded should lead to reconsideration of eligibility for refugee status. Where a refugee engages in conduct falling within Article 1F(a) or 1F(c), this would trigger the application of the exclusion clauses and the **revocation** of refugee status, provided all the criteria for the application of these clauses are met.[78]

The adjudication of the exclusion clauses for refugee applications under mandate or statutory refugee status is covered in detail in the UNHCR's *Procedural Standards of Refugee Status Determination under UNHCR's Mandate.*[79] Those refugee

[77] UNHCR, 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees' (4 September 2003) HCR/GIP/03/05. <http://www.unhcr.org/3f7d48514.pdf> accessed 18 January 2016.

[78] ibid.

[79] UNHCR, 'Procedural Standards for Refugee Status Determination Under UNHCR's Mandate' Design and Printing, IMP Alpes, Unit 4.8.2, Procedures for Examining the Application of Article 1F 4-26–4-28.
<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4317223c9&query=UNHCR%20mandate%20status> accessed 16 January 2016.

applicants who are excluded have an automatic right to an appeal.[80] Indeed, certain decisions dealing with exclusion can only be taken by the Division of International Protection (DIP) in UNHCR Headquarters in Geneva. Article 1F cases that involve complex "doctrinal or interpretative issues" or children must be sent to the DIP for final recommendation.

Typically, decisions involving Article 1F are subject to the review of the RSD Supervisor or the UNHCR Head Office, or both:[81]

> Once an exclusion decision has been finalized by the UNHCR Office it should be **submitted to the Senior Legal Advisor in the relevant Bureau for concurrence and copied to DIP as appropriate** before the individual is notified. Exclusion cases that raise complex doctrinal or interpretative issues relating to Article 1F of the 1951 Convention or which involve children must be **submitted to DIP**, which will make the final recommendation. (See 4.4.3 – *Procedures for Consultations with UNHCR Headquarters on RSD Decisions*)[82] [Emphasis in the original.]

The appeal of those who's refugee applications are excluded under Article 1F go to the "Protection and National Security" Unit of the Division of International Protection within the UNHCR Headquarters in Geneva for final recommendation.

Statutory or mandate refugee status decisions that are appealed to the DIP are considered by the "Protection and National Security" Unit.[83] The refugee applications are screened for security purposes to ensure that the applicants are not wanted under any indictments by any national or international criminal courts. Outstanding warrants may or may not go against the refugee applicant's claim for refugee protection. It is reasonable to assume that an indictment from the ICC would be taken very seriously indeed.[84] In comparison, however, it may be less detrimental to a refugee's application were his name to appear on an Interpol list

[80] ibid 4.8.3 Review and Approval of Exclusion Decisions, 4–26.

[81] ibid 4–26.

[82] ibid.

[83] The 'Protection and National Security Unit' has a limited staff complement of three persons and, consequently, a limited capacity for dealing with exclusion cases that come under its purview. 'Undesirable and Unreturnable? Policy Challenges Around Excluded Asylum Seekers and other Migrants Suspected of Serious Criminality Who Cannot be Removed' Preliminary Workshop, Centre for International Criminal Justice, Faculty of Law, VU University, Amsterdam, (27 March 2015).

[84] ibid., General Issues, Unit 2, 2–2, where it states that, 'All requests that are received by **international courts or tribunals** for information about persons registered or in contact with the UNHCR should be forwarded to DIP.' [Emphasis in the original].

of outstanding warrants.[85]

The UNHCR takes its policies on refugee applicants' privacy and confidentiality seriously.[86] Accordingly, it does not publish the number of refugee decisions based on the exclusion clauses or the number of refugee claimants who are excluded under Article 1F(a), (b), or (c). Nor does it publish the figures for the number of refugee applicants who have won their case following the appeal of their decision to be excluded from statutory or mandate refugee status. Nor are any statistics provided on the number that are assessed on appeal by the "Protection and National Security" Unit in the DIP in the UNHCR Headquarters. It would be sheer speculation to estimate what portion of the 8,600 appeals that were processed within the UNHCR in 2013 or the 11,200 appeals that were processed by UNHCR in 2014 would have dealt with exclusion.[87] Further, there is no information on what percentage of the refugee applicants were excluded by the UNHCR under each of the subsections of Article 1F.

The UNHCR does not disclose refugee applicant's information, but depending on the operational context, there could in fact be a disclosure of information to a State. The information that would be provided is limited to basic biographical information such as the applicant's name, date of birth, nationality, and whether their application for statutory or mandate refugee status was accepted or rejected. This information would only be disclosed at the request of the host government where the UNHCR was operating. Information sharing between the UNHCR and States is highly discreet and is typically conducted in an informal manner.

It is unclear whether the UNHCR monitors what happens to the refugee applicants who are excluded. Some are, undoubtedly, prosecuted.[88] Others are likely not and remain as *prima facie* refugees within their refugee camp context and others remain within their particular place of residence, typically, within an urban setting. The fact is that the UNHCR is silent on how it treats those who have been

[85] UNHCR, 'Guidance Note on Extradition and International Refugee Protection' (April 2008) <http://www.refworld.org/docid/481ec7d92.html> accessed 24 March 2015.

[86] UNHCR, 'Procedural Standards for Refugee Status Determination Under UNHCR's Mandate', Design and Printing, IMP Alpes, Unit, General Issues, Confidentiality in UNHCR RSD Procedures, 2–1 <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4317223c9&query=UNHCR%20mandate%20status> accessed 16 January 2016.

[87] UNHCR, 'Global Trends 2013, "War's Human Costs" ' (Geneva: UNHCR, 2014) <http://www.unhcr.org/5399a14f9.html> accessed 19 January 2016; UNHCR, 'Global Trends, Forced Displacement in 2014' in UNHCR (ed), *World at War* (2015) 30 <http://unhcr.org/556725e69.html> accessed 7 January 2016.
<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=556725e69&query=2014%20refugee%20appeals> accessed 19 January 2016.

[88] This is based on a reasonable presumption that some refugee applicants will come to the attention of the authorities and will be arrested and prosecuted. It does not imply in any way that the UNHCR discloses any such information to the host State's authorities.

excluded from mandate or statutory refugee status. It has no explicit policies for how to deal with those who have been excluded from refugee status or asylum. We are aware, however, that the UNHCR is concerned about the situation of those who have been excluded from asylum and who have been prosecuted but not convicted of any crimes.[89] The 2011 Expert Meeting on Complementarities between International Refugee Law, International Criminal Law, and International Human Rights Law: Summary Conclusions, Arusha, Tanzania, states at paragraph 45 that,

> In practical terms, the question of the relocation of acquitted persons who are unable to return to their country of origin due to threats of death, torture or other serious harm is a real one. The problem of such relocation of persons is not easy to resolve and this problem is expected to persist beyond the existence of the ICTR and to arise in the future for other international criminal institutions and, in particular, the ICC. At present, three out of eight individuals who have been acquitted by final judgment before the ICTR have been unable to find countries willing to accept them. It was agreed that durable solutions need to be found for those acquitted by an international criminal tribunal or court and who are unable to return to their country of origin. Indeed, this is a fundamental expression of the rule of law and essential feature of the international criminal justice system. Concern was accordingly expressed about the consequences of failing to find such solutions.[90]

Those who are excluded from statutory or mandate refugee status by the UNHCR are technically not eligible to receive international protection.[91] They

[89] UNHCR, 'Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions' (July 2011) <http://www.refworld.org/docid/4e1729d52.html> accessed 31 March 2015.

[90] ibid.

[91] UNHCR, 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the Convention relating to the Status of Refugee', Distr. General (HCR/GIP/03/05, 4 September 2003) <http://www.unhcr.org/3f7d48514.html> accessed 20 January 2016. Paragraph 8 and 9 are worth quoting here in their entirety:

> 8. Although a State is precluded from granting refugee status pursuant to the 1951 Convention or the OAU Convention to an individual it has excluded, it is not otherwise obliged to take any particular course of action. The State concerned can choose to grant the excluded individual stay on other grounds, but obligations under international law may require that the person concerned be criminally prosecuted or extradited. A decision by UNHCR to exclude someone from refugee status means that that individual can no longer receive protection or assistance from the Office.
>
> 9. An excluded individual may still be protected against return to a country

would certainly not be eligible for resettlement to another country. Presumably, they would also be precluded from local integration, one of the three durable solutions along with resettlement and voluntary repatriation. They could, however, be subject to prosecution or extradition, given the nature of the crimes that they were found to be guilty of committing. Lastly, from the example noted immediately above, even when the person is prosecuted and found "not guilty", the mere fact that they were charged and tried on these offences may be sufficient for them not to be able to return to their countries of nationality or former habitual residence where they potentially could face persecution. In essence, they become "unreturnable" simply by virtue of the charges laid and the matter being brought to trial, irrespective of the outcome. Here, then, is one aspect of the exclusion dilemma.[92] When the UNHCR excludes a refugee claimant from statutory or mandate refugee status it is denying, technically, the person from receiving international protection. It is not clear, however, what in fact happens to those refugee claimants who are excluded from refugee status by the UNHCR. Are they de-registered as refugees, do they cease to be *prima facie* refugees, and are they asked to leave the refugee camp? If they are a high-profile war criminal, should they be brought to the attention of the host State for possible extradition or prosecution under universal jurisdiction? If there is an outstanding indictment from the ICC against the refugee claimant, should they notify the ICC or the host State, or both? Should the UNHCR keep track of such cases? In other words, should the UNHCR keep records of how many of these serious offenders are actually charged and prosecuted; how many are actually convicted; the nature of their penalty or sentence; the average penalty (whether monetary or otherwise); and the average length of their sentence? Indeed, it might be relevant to suggest that the UNHCR should also request and compile these statistics for States as well.

It may also be worth considering whether the mere act of excluding someone may result in undue hardship for the refugee applicant? For instance, can the act of exclusion result in the refugee claimant becoming "undesirable and unreturnable?" When can the action of excluding someone from statutory or mandate refugee status

> where he or she is at risk of ill-treatment by virtue of other international instruments. For example, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment absolutely prohibits the return of an individual to a country where there is a risk that he or she will be subjected to torture. Other international and regional human rights instruments contain similar provisions.

[92] The word 'dilemma', of course, has several related meanings. For instance, it can be 'a situation requiring a choice between equally undesirable alternatives' or 'any difficult of perplexing situation or problem.' Dictionary.com <http://dictionary.reference.com/browse/dilemma> accessed 19 January 2016. Another definition of dilemma is 'a situation in which a difficult choice has to be made between two different things you could do.' Cambridge Dictionaries Online <http://dictionary.cambridge.org/dictionary/english/dilemma> accessed 19 January 2016.

be detrimental, if not harmful, to the point of it being persecutory to the refugee claimant themselves? The UNHCR has taken the position that exclusion should only be applied in the most atrocious instances where the person, unquestionably, falls clearly within the parameters of Article 1F,[93] By the same token, the Executive Committee of the United Nations High Commissioner for Refugees has called for,

> (v) the need to apply scrupulously the exclusion clauses stipulated in Article 1F of the 1951 Convention and in other relevant international instruments, to ensure that the integrity of the asylum institution is not abused by the extension of protection to those who are not entitled to it;
>
> (vii) the responsibility of host States, working, where appropriate, with international organizations, **to identify and separate any armed or military elements from refugee populations**, and to settle refugees in secure locations at a reasonable distance, to the extent possible, from the frontier of the country of origin, with a view to safeguarding the peaceful nature of asylum; [94] [Emphasis added]

Hence, not excluding someone who has committed or is complicit in a war crime, a crime against humanity, actions that are contrary to the purposes and principles of the United Nations, or any combination of these, undermines the integrity of the institution of asylum itself, as the persecutors, who have created refugees, then effectively become the beneficiaries of a system intended to benefit refugees. Failing to bring to justice these individuals is fundamentally unfair and unjust at best, and at worst perpetuates the impunity of the perpetrators of such horrendous crimes.

The significance of the exclusion clauses, then, lies in their ability to assist in maintaining the integrity of the international refugee system by excluding those

[93] UNHCR, 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the Convention relating to the Status of Refugees' Distr. General (HCR/GIP/03/05, 4 September 2003) <http://www.unhcr.org/3f7d48514.html> accessed 20 January 2016. Wherein, at paragraph two, it states:

> … The exclusion clauses must be applied "scrupulously" to protect the integrity of the institution of asylum, as is recognised by UNHCR's Executive Committee in Conclusion No. 82 (XLVIII), 1997. At the same time, given the possible serious consequences of exclusion, it is important to apply them with great caution and only after a full assessment of the individual circumstances of the case. The exclusion clauses should, therefore, always be interpreted in a restrictive manner.

[94] UNHCR, 'Safeguarding Asylum, No. 82 (LXVIII) – 1997', EXCOM Conclusions (17 October 1997) <http://www.unhcr.org/3ae68c958.html> accessed 20 January 2016.

who have severely breached the human rights and human dignity of others and who have created refugees. What is *not* transparent, or at all acknowledged or considered, is what role the UNHCR plays or ought to play in ensuring that those persons who are excluded under its mandate or statute are dealt with appropriately at the conclusion of their RSD hearings. The dilemma lies in choosing how best to deal with those who have been excluded from refugee status by the UNHCR. It is evident that the UNHCR needs to disclose aggregate statistical data on the number of refugee claimants who are excluded from statutory or mandate refugee status. It further needs to provide adequate information regarding what happens to these persons during the post-exclusion stage. Moreover, the UNHCR ought to seriously consider developing common post-exclusion international standards for States and for its own RSD staff who are confronted continuously with these types of cases.

The "Undesirable and Unreturnable?" project, based on the collaborative efforts of the Centre for International Criminal Justice (CICJ), VU University Amsterdam, and the Refugee Law Initiative (RLI), School of Advanced Study, University of London, is one serious effort to try and explore all reasonable avenues for addressing the "post-exclusion dilemma."[95] These range from prosecution, extradition to deportation, diplomatic assurances, voluntary return, indefinite detention, humanitarian alternatives and withholding of any status. This research project's final report includes a policy brief that outlines a number of directions for future policy responses that include: limiting the number of criminal migrants that end up in "legal limbo;" and, increasing the number of returns and removals.[96] The policy brief concludes by observing:

> Without a coordinating body pushing for and overseeing the implementation of a harmonized and coherent approach, it is not likely that this will take shape in the near future. So far, UNHCR has considered the issue of unreturnable 1F-excluded asylum seekers to fall outside its mandate. It has not published

[95] For further information regarding this research initiative please see the 'Undesirable and Unreturnable? Policy Challenges around Excluded Asylum-Seekers and Migrants Suspected of Serious Criminality but who cannot be removed' website at <https://rli.sas.ac.uk/research-projects/undesirable-and-unreturnable> accessed 20 August 2017. See also the following reports 'Preliminary Workshop: Undesirable and Unreturnable? Policy Challenges around Excluded Asylum-Seekers and Migrants Suspected of Serious Criminality but who cannot be removed' (27 March 2015), VU University, Amsterdam <https://rli.sas.ac.uk/sites/default/files/files/Preliminary%20Workshop%20Report.pdf> accessed 20 August 2017.

[96] Refugee Law Initiative and Centre for International Criminal Justice, 'Undesirable and Unreturnable? Policy Challenges around Excluded Asylum-Seekers and Other Migrants Suspected of Serious Criminality who cannot be Removed' (Undated) <https://cicj.org/wp-content/uploads/2016/09/Undesirable-and-Unreturnable-Full-report.pdf> accessed 21 July 2017.

any guidance in this regard.[97]

It is evident from the above that policy guidance with respect to the issue of the exclusion dilemma is needed, and that this research initiative goes some way in helping to bring attention to this issue and how it ought to be addressed. However, the UNHCR is clearly in the best position to provide much-needed guidelines for States with respect to the legal issues and concerns relating to the exclusion dilemma. The justifications for doing so, both legally and morally, would be the need to maintain the integrity of the refugee system itself, and the UNHCR's role in supervising the *1951 Convention*, the *1967 Protocol*, and other international refugee rights instruments.

V. Conclusions

The information available pertaining to UNHCR's RSD structures and procedures is highly limited. The UNHCR would prefer to have each State perform its own RSD. Nonetheless, from UNHCR's own statistical reports, it is evident that the UNHCR has the single largest RSD system in the world and that UNHCR's RSD operations are larger than Germany and the United States combined, the two single largest State RSD systems. Moreover, as noted above, the UNHCR accounts for 11 per cent of the refugee and asylum decisions in the world in 2013 and 9 percent in 2014, and these figures, along with the number of new refugee and asylum applications that it receives each year, seem to be growing over time. If this trend continues, it is reasonable to conclude that the UNHCR will have to allocate greater portions of its resources and overall budget to RSD. Presumably, this will have to come at the cost of doing less in other areas of its operations or refugee protection obligations, or both. Nonetheless, it is worth emphasising that RSD is one of the UNHCR's most important core functions and operational roles.

From the statistics presented above, it is evident that the UNHCR makes a significant contribution to the total RSD that is done in the world today on an annual basis. It surpasses by far the largest single State that undertakes RSD. Furthermore, the UNHCR conducts RSD operations in some 75 countries around the world. The geographic spread and reach of the UNHCR exceeds that of any State. While there are significant differences to the RSD that is conducted by industrialised States, with highly sophisticated judicial systems, and the UNHCR, which is based on administrative structures and procedures, nevertheless, the UNHCR's contribution in this regard cannot be discounted.

One of the major distinctions between the RSD systems conducted by industrialized States and those of the UNHCR is the juridical nature and relative transparency of these States' RSD systems. The UNHCR is clearly lacking in the same transparency in this regard. There may be good reasons for this to

[97] ibid.

some degree, given the necessity to protect a refugee applicant's privacy and the confidentiality of their claim for refugee protection, and given the operational requirements of the UNHCR working within its host States. Nonetheless, more can be done by the UNHCR for greater transparency in its RSD operations with respect to exclusion, with only a modicum of additional effort.

This is perhaps most evident in relation to matters dealing with exclusion under Article 1F of the *1951 Convention*, which the UNHCR relies on when considering matters dealing with the exclusion of refugee applicants for statutory or mandate refugee status. The UNHCR does not provide any statistics as to the number of refugee applicants that are excluded on an annual basis, or indeed what happens to those who are excluded from statutory or mandate refugee status. Although it is evident that, in some situations and circumstances, high-profile refugee applicants are most likely brought to the attention of international criminal special UN tribunals or the International Criminal Court, the UNHCR generally does not bring these matters before host governments where the RSD is conducted, unless the government explicitly makes such a request.[98] In such instances, only the most basic information is provided and whether the applicant's claim for refugee status has been accepted or rejected. The basis of the refugee claim is not disclosed to the States in question.

The lack of information disclosed by the UNHCR to States or the public at large leaves much to speculation or to the possible misunderstanding of how UNHCR conducts its RSD operations, with respect to exclusion and to how it deals with those who have committed serious international crimes. This is clearly one area of its RSD operations that the UNHCR might wish to consider correcting. The shedding of light on how the UNHCR conducts its RSD when issues of exclusion are raised would be most welcomed by not only States, but also by the public at large.

The main considerations here are undoubtedly the concerns of privacy and confidentiality. However, these concerns can be addressed easily, simply by providing information publicly in an aggregate statistical form without any refugee applicant being identified or open to any form of identification. Balancing the rights of the refugee applicants with the right of the general public to know more about the manner in which the UNHCR conducts its RSD with respect to exclusion is not simple and straightforward. Nevertheless, finding a way forward on this issue is the best way to proceed if we hope to advance this aspect of the UNHCR's contribution to RSD and, overall, its mandate to provide international protection to the "people of concern" it has responsibility to protect, including, of

[98] These conclusions are based on a reasonable inference based on what is publicly available on the UNHCR's operations with respect to its RSD procedures and the application and interpretation of the Exclusion Clauses.

course, refugees and asylum seekers.

Another key area of concern is how best to address the exclusion dilemma that occurs when the UNHCR excludes a person from statutory or mandate refugee status or those who have been excluded from Convention, or territorial refugee status for that matter. In the first instance, the UNHCR and States should be obligated to keep track of what happens to those who are excluded from statutory or Convention refugee status. Secondly, the UNHCR and States need to develop guidelines for how to deal with those who have been excluded under Article 1F. It is reasonable to presume that many of these excluded refugee claimants would not be able to return to their countries of nationality or former habitual residence. What then would be the alternatives for dealing with these failed refugee claimants? It seems reasonable to presume that, as a minimum, some form of arbitration, if not prosecution, that entails an admission of responsibility should be in order. This should be accompanied by a requirement for restitution, in some manner if possible, and concrete evidence of rehabilitation, followed by restoration to a fully responsible and contributing member of society, whether in their host State or elsewhere.

All of this is contingent on the UNHCR first undertaking to provide greater transparency to its RSD operations with respect to the exclusion, from statutory or mandate refugee status, of those refugees who are denied refugee protection for the commission of serious criminality under the provisions of Chapter II, Section 7(d) under its *1950 Statute*. The UNHCR should be providing statistics on who is being excluded from refugee protection under its mandate and what becomes of these persons. For example, are they prosecuted for their direct or indirect involvement or commission serious international crimes? Moreover, the UNHCR should be providing guidelines to States and to its own UNHCR staff for how to deal with those who are excluded from refugee protection for the commission of serious international crimes not only to fulfill its obligation to protect the integrity of the international refugee protection regime but to help ensure that there is no impunity for the commission of international crimes that produce the very refugees it is obligated to protect.

Call for Jus Ad Bellum for Non-International Use of Force

Elijah Oluwatoyin Okebukola*

I. The Extent of the Operation of the Article 2(4) Jus ad Bellum Regime to Non-International Armed Conflict

FOR THE PURPOSES of the present discourse, non-international use of force occurs in the context of a non-international armed conflict (NIAC) and therefore differs from acts of violence that do not reach the threshold of armed conflict. In considering the relationship of Article 2(4) of the UN Charter (UNC) to NIACs, the definition of NIAC must be briefly drawn out. In the most basic terms, the armed conflicts fought by or against non-state actors (NSTACs) are NIACs. NIACs are distinguished from international armed conflicts (IACs) by the parties involved.

When the conflict is between a state and NSTACs or between NSTACs, it is classified as a NIAC. For the purpose of differentiating inter-state use of force in an IAC from non-international use of force in a NIAC, it is important to point out that the geographical spread or location of the conflict does not affect the classification of the conflict. For example, the Boko Haram conflict which is taking place in the territories of Nigeria, Cameroon, and Chad remains a NIAC despite involving the territories of more than one state.

In addition, the participation of more than one state in a conflict does not necessarily make it an IAC unless one state is engaged in armed conflict against the other. Where the states are jointly combating a NSTAC the conflict is a NIAC despite the involvement of several states. Using the Boko Haram example again, the involvement of the governments of Nigeria, Chad and Cameroon in the conflict does not make it an IAC since they are working together to fight the

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NSTACs participating in the conflict. In this scenario, the multiple states engaged in a NIAC are not engaged in the use of force against themselves. As demonstrated below, the *jus ad bellum* regime created by the UNC only applies to states. It does not extend to NIACs.

The trajectory of *jus ad bellum* in international law has two highly significant periods. First, there was a period when states had absolute discretion in determining recourse to armed conflict;[1] and second, the present regime of Article 2(4) of the UNC. Between these periods, there have been some notable developments including the theological circumscription of resort to war under the *bellum justum* theory;[2] prohibition of recourse to armed force provision in 1907 Hague Convention II on Limitation of Employment of Force for Recovery of Contract Debts[3]; limitations on resort to war imposed by Covenant of the League of Nations (CLN) 1919[4]; and the condemnation of war in the General Treaty for the Renunciation of War 1928.[5]

The present *jus ad bellum* regime derived from the UNC is configured as a tripod consisting of settlement of disputes by peaceful means; prohibition of the use of force; and illegality of any use of force that is not permitted by the UNC. It is the combination of the three pillars of the tripod that make prohibition of the use of force practicable and acceptable to states. The first leg of the tripod entails an obligation on states to "settle their international disputes by peaceful means in such a manner that international peace and security, and. justice, are not endangered."[6] The second requires states to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."[7] The third allows force whether as a matter of "individual or collective

1 Josef Mrazek, 'Prohibition of the Use and Threat of Force: Self-Defence and Self-Help in International Law' (1989) 27 Can YB Int'l L 81, 81.

2 This is commonly referred to as the just war theory.

3 Article 1 prohibited "recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals."

4 Article 12 Covenant of the League of Nations (CLN) imposed an obligation to peacefully settle disputes. This obligation was emphasised in Articles 13, 14 and 15 CLN. Failure to allow the League institutions to adjust the dispute makes the erring State liable to actions taken pursuant to Article 16 CLN. Under this provision war in disregard of Articles 12, 13 or 15 CLN shall ipso facto be deemed to be an act of war against all other Members of the League.

5 This treaty is also known as the Kellogg-Briand Pact (KBP). Article 1 of the KBP condemned recourse to war and renounced it as an instrument of national policy. Note also that technically the KBP is still in force and was relied on by the Nuremberg Tribunal as the basis for ruling that customary international law had prior to 1939 recognised the crime of aggressive war.

6 Article 2(3) UNC.

7 Article 2(4) UNC.

self-defence if an armed attack occurs against a Member of the United Nations",[8] or by authorisation of the Security Council of the UN under Chapter VII of the UNC,[9] or by authorisation of a regional body in keeping to Chapter VIII of the UNC,[10] or special circumstances under Articles 106 and 107 of the UNC.

The second leg of the tripod as encapsulated in Article 2(4) of the UNC forms the central linchpin for the tripodal context of contemporary *jus ad bellum*.[11] It restates customary international law relating to use of force.[12] The UNC principle that states must refrain from the threat or use of force has been reinforced by other international instruments.[13] For example, the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States; the 1974 Definition of Aggression[14]; the Helsinki Final Act 1975; and The Declaration on Enhancing the Effectiveness of the Principle of Refraining from the use of Force, 1987.[15]

As noted by the International Law Commission in 1963, the provisions of Article 2(4) "together with other provisions of the UN Charter, authoritatively declares the modern customary law regarding the threat or use of force."[16] The relationship between Article 2(4) and customary international law was further clarified by the International Court Justice (ICJ) in the *Nicaragua* case.[17] In that case, the ICJ held that the use of force rules in general and customary international law are identical with the provisions of the UNC.[18] The UNC itself seems to recognise, or at least project, the customary nature of the prohibition on the use of force by extending the protection and obligation of the principle to non-member states.[19]

As a principle of customary international law, the prohibition on the threat or use of force which is codified in Article 2(4) UNC is binding on states that are not party to the UNC. This is momentous in two major respects. First, the principle will continue to be binding on a state that withdraws its membership of the UNC and second, it is binding on a new state even if it does not become a party to the UNC.

The significance of Article 2(4) is heightened by not only being a reflection of

8 Article 51 UNC.
9 Articles 39, 41, 42 UNC.
10 Article 53 UNC.
11 See generally, Christine Gray, *International Law and the Use of Force* (Oxford University Press 2008).
12 Ian Brownlie, *International Law and the Use of Force by States* (1963) 264.
13 Mrazek (n 1) 81.
14 UNGA Res 3314 XXIX.
15 UNGA Res 22 XLII.
16 ILC Yearbook, 1966, 1966–II, 247 para 1.
17 *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v *United States of America*) [1986] ICJ Rep. 14 para 93.
18 ibid.
19 Article 2(6) UNC.

customary international law but also possessing a *jus cogens* character. As the ILC put it, "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*."[20] The nature of Article 2(4) as jus cogens is not dependent or determined by whether it is a rule of treaty or customary international law.[21]

Legal scholars have questioned the importance or significance of the *jus cogens* nature of Article 2(4) since its provisions already reflect customary international law. As one commentator on the *Nicaragua* case put it:

"Once the Court established that non-use of force had become customary law, it did not need *jus cogens* to apply this rule to the United States. Evidence that the United States accepted this norm would have sufficed. What additional work did *jus cogens* do in the opinion?"[22]

One answer to this question is that being a norm of *jus cogens*, it creates obligations *erga omnes*.

Furthermore, it does not permit derogation and can only be changed by another peremptory norm of international law.[23] It cannot be easily circumvented. For example, an economically or militarily strong state cannot enter into a treaty with a weaker state on the basis that if the weaker does not perform its obligations, it will be invaded by the military forces of the strong state. Such a treaty provision would be a derogation of the prohibition of the use of force in the context of the tripodal *jus ad bellum* regime of the UNC.

States have adapted to the Article 2(4) *jus ad bellum* regime by engaging in fewer international armed conflicts, submitting their disputes to peaceful settlement mechanisms, and seeking to justify use of force by reference to provisions of the UNC. Between 1946 and 2010 there were approximately 46 international armed conflicts and 216 non-international armed conflicts out of about a total of 260 armed conflicts in the period under consideration.[24] In the same period, 297 cases have been brought or submitted before the ICJ for judicial determination.[25] Out

[20] ILC Yearbook, 1966, 1966–II, 247 para 1.

[21] Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988) 12 Aust YBIL 82, 103.

[22] Paul B. Stephan, *Political Economy of Jus Cogens, The Symposium: Foreign State Immunity at Home and Abroad*, vol 44 (2011) 1091.

[23] Article 53 Vienna Convention on the Law of Treaties.

[24] 'Overview of UCDP Data' (*Uppsala Universitet Department of Peace and Conflict Research*, 2014) <http://www.pcr.uu.se/data/overview_ucdp_data> (accessed 12/09/2017); see also Meredith Reid Sarkees and Frank Wayman, 'Resort to War: 1816 – 2007' (*CQ Press*, 2010) <http://cow.dss.ucdavis.edu/data-sets/COW-war> (accessed 29/11/2015).

[25] A dispute is brought before the Court by a unilateral application filed by one State against another State. A dispute is submitted to the Court on the basis of a special agreement between States. See 'Cases' (*International Court of Justice, 2017*) <http://www.icj-cij.org/en/cases> (ac-

of this number 274 were contentious cases,[26] while 23 were requests for advisory opinions.[27] Out of these cases, 161 were entered in the General List.[28]

In addition to judicial settlement by the ICJ, there has also been an increase in number of disputes between states that are settled by means of peaceful settlement mechanisms.[29] For example, between January 1995 and July 2015, 497 disputes were submitted for resolution by the Dispute Settlement Body (DSB) of the World Trade Organisation (WTO).[30] Each of these 497 disputes results from the conduct of a state which is considered to be unacceptable by another.

Between the WTO and ICJ, about 794 disputes have been submitted for peaceful settlement. Countries have been known to go to war for all kinds of reasons, therefore each of the 297 matters submitted to the ICJ and 497 disputes submitted to the DSB is potentially an armed conflict situation. Yet, rather than resort to war, states are increasingly seeking peaceful means of resolving their differences.

It may seem that the existence of so many cases before judicial, quasi-judicial, and non-judicial mechanisms is indicative of a problem, namely the abundant bouquet of reasons for states to have contentious disputes. While it may be true that there are so many reasons for modern states to have grievances, the volume of cases processed through peaceful determination mechanisms at the ICJ and other fora suggests an adaptation of state behaviour to the *jus ad bellum* regime created by the UNC. Under this UNC *jus ad bellum* regime, the legitimate reasons for resorting to force are so constricted that even where the dispute relates to the alleged illegal use or threat of force,[31] states are still required to settle such disputes peacefully.

cessed 12/09/2017).

[26] 'Contentious Cases' (*International Court of Justice, 2017*) <http://www.icj-cij.org/en/contentious-cases> (accessed 12/09/2017).

[27] 'Advisory Proceedings' (*International Court of Justice, 2017*) <http://www.icj-cij.org/en/advisory-proceedings> (accessed 12/09/2017)

[28] 'Cases' (*International Court of Justice, 2017*) <http://www.icj-cij.org/en/cases> (accessed 12/09/2017).

[29] See for example, August Reinisch, 'The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections From the Perspective of Investment Arbitration' in I. Buffard and others (eds), *International Law between Universalism and Fragmentation* (2008). See also Anne Peters, 'International Dispute Settlement: A Network of Cooperational Duties' (2003) 14 European Journal of International Law 1, where it is argued that international law of dispute settlement is transcending the phase of mere cooperation, as identified by Wolfgang Friedman, and is displaying characteristics of a network.

[30] 'Chronological list of disputed cases' (*World Trade Organisation*, 2017) <https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm>. (accessed 29/11/2015).

[31] Dispute in this sense refers to 'a disagreement over a point of law or fact, a conflict of legal views or of interests'. This is the definition given by the PCIJ in the *Mavrommatis Palestine Concessions* (Jurisdiction) case PCIJ, Series A, No. 2, 1924, 11.

The use of countermeasures may ostensibly suggest that illegal use of force may be permissible for a prior illegal use of force.[32] However, in the extant *jus ad bellum* regime, countermeasures in the form of forceful reprisals are prohibited and "recourse to countermeasures not involving the threat or use of force is in itself a peaceful means of settling a dispute arising from an internationally wrongful act."[33]

The most important reason for the existence of the UNC *jus ad bellum* regime is the promotion and protection of international peace and security. Indeed, every other objective of the UNC is dependent on the reality of peace and security. Recourse to peaceful settlement mechanisms is therefore consistent with the core objective of the UNC as well as the *jus ad bellum* regime built on that objective. Certainly, the peaceful settlement mechanisms now adopted by states are far from perfect. Their imperfections are especially glaring in terms of the duration for concluding matters and implementing decisions.[34]

Indeed, it would appear more expedient for a militarily strong state to invade a weaker state rather than go through the time-consuming rigours of peaceful settlement mechanisms. Notwithstanding these imperfections, states have no legal and legitimate choice to resort to threat or use of force except they are acting in consonance with the exceptions to Article 2(4) which are recognised by the UNC. They are therefore constrained to increasingly resort to the peaceful settlement mechanisms despite the shortcomings of the mechanisms. The exceptions to use of force created by the UNC do not release parties from the obligation to settle disputes peacefully. In all, the tripodal *jus ad bellum* regime of the UNC relates to inter-state use of force.

Article 2(4) of the UNC and the entire tripodal UNC *jus ad bellum* regime

[32] Countermeasures entail acts that are ordinarily illegal but are taken to be permissible when carried out in reaction to an earlier or prior illegal act of the state against which they are directed or done.

[33] Bruno Simma, 'Counter-measures and Dispute Settlement: A Plea for a Different Balance' (1994) 5 European Journal of International Law 102, 103. As noted in the *Gabčíkovo–Nagymaros Project* case [1997] 116 ILR 1, 89, "In order to be justifiable, a countermeasure must meet certain conditions ... In the first place, it must be taken in response to a previous international wrongful act of another state and must be directed against that state ... Secondly, the injured state must have called upon the state committing the wrongful act to discontinue its wrongful conduct or to make reparation for it ... In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question ... [and] its purpose must be to induce the wrongdoing state to comply with its obligations under international law, and … the measure must therefore be reversible."

[34] See for example The Registry, 'The International Court of Justice Handbook' <http://www.icj-cij.org/files/publications/handbook-of-the-court-en.pdf> (accessed 29/11/2015) at p. 50 where it is stated that it takes an average of 4 years from the institution of proceedings to the delivery of final judgment.

applies to use or threat of force by one state against another. Thus, the rights and duties imposed by the tripodal UNC *jus ad bellum* regime do not apply to NSTACs. *Jus ad bellum,* therefore, only arises for consideration in an IAC situation. The non-applicability of UNC *jus ad bellum* to NSTACs is brought to the fore by the Rome Statute of the International Criminal Court (ICCSt) which recognises the violation of Article 2(4) as a crime of aggression.[35] The crime of aggression as contemplated by the ICCSt can be committed by state agents but not agents of NSTACs.[36] Interestingly, apart from the crime of aggression, every other crime within the remit of the ICC can be committed by NSTACs or their agents who will bear individual criminal responsibility.

Essentially, the lawfulness or otherwise of a NIAC is largely determined by the law of the state against which the NSTAC is engaging in armed conflict. Outside the nebulous area of international terrorism,[37] international law is largely silent on the legality of resort to force in NIACs. In the face of this silence, the incidence of NIACs is increasing and the number of NSTACs involved in these conflicts is multiplying. Among others, this creates sovereignty issues as discussed later in this article.

Although the legality of the use of force in a non-international situation is a matter for domestic law, the incident of non-international armed conflict affects the peace and security of the international community. The impact on international peace and security is justification for suggesting that non-international use of force needs to be subjected to international legal control.

There are various reasons for engaging in armed conflict. The Uppsala Conflict Data Program (UCDP) terms these reasons incompatibilities.[38] Incompatibilities refer to "a disagreement between at least two parties where their demands cannot be met by the same resources at the same time."[39] It is hypothesised in this article that in order to achieve the objective of suggesting a *jus ad bellum* for non-international use of force, it is necessary to identify the incompatibilities that lead to NIACs. The legal effectiveness of the suggested *jus ad bellum* will be largely dependent on its capacity to address the incompatibilities that inform non-international use of force.

35 Article 8 bis Rome Statute of the International Criminal Court.

36 ibid.

37 See generally, John Arquilla, 'The End of War as We Knew It? Insurgency, Counterinsurgency and Lessons from the Forgotten History of Early Terror Networks' (2007) 28 Third World Quarterly 369 for the proposition that insurgency and terror are frequently blended.

38 'Definitions' (*Uppsala Universitet Department of Peace and Conflict Research*, 2014) <http://www.pcr.uu.se/research/ucdp/definitions/#incompatibility_2> (accessed 29/11/2015).

39 'Frequently Asked Questions' (*Uppsala Universitet Department of Peace and Conflict Research*, 2014) <http://www.pcr.uu.se/research/ucdp/faq/#What_is_an_incompatibility_> (accessed 29/11/2015).

II. Incompatibilities Leading to Non-International Use of Force

Invariably, NSTACs are involved in NIAC and the use of force that precedes and accompanies it. In comparison to states, there are more NSTACs involved in the non-international use of force. The table below shows the sheer number of NSTACs involved in recent, and some ongoing, NIACs worldwide.[40] The attempt to identify incompatibilities resulting in NIAC will therefore include the perspectives of NSTACs. Although there are fewer states than NSTACs involved in NIACs, NIACs either take place on the territory of states or have state participants.

The situation is therefore such that notwithstanding the number of NSTACs involved, every NIAC touches and is of direct concern to, at a minimum, the state on whose territory the conflict is taking place. Moreover, states are fundamental to the creation of international legal rules and the suggested *jus ad bellum* for non-international use of force can only be formulated by states.[41] Therefore, incompatibilities leading to NIAC will also be viewed from the perspective of states.

The UCDP identifies incompatibilities concerning either government, territory, or both.[42] While fully agreeing with the categories identified by the UCDP, there is an additional category of resource incompatibility. This does not quite fit into incompatibility over government and territory. For the present purposes, there are incompatible claims to government where a group moves to change either the entire political system of a state or the configuration of government in a manner unacceptable to the ruling government. Government incompatibility occurs where a party or parties to the NIAC disputes the validity or legitimacy of the government of a state. This incompatibility relates to the political authority and governance of a state.

Incompatible claims to territory arise where a group moves to secede, control a piece of territory or change the status of the territory.[43] In the case of territory incompatibility, a positive outcome for the challenger would be the loss of territory by a state. The lost territory may become part of an existing state or form part of a new state or just be a territory without the status or recognition of statehood.

[40] The table is extrapolated from 'List of Ongoing Conflicts' (*Wars in the World*, 2017) <http://www.warsintheworld.com/?page=static1258254223> and correlated with 'UCDP Conflict Encyclopedia (UCDP database)' (*Uppsala Universitet Department of Peace and Conflict Research*, 2014) <www.pcr.uu.se/research/ucdp/database>, especially UCDP/PRIO Armed Conflict Dataset; 'Wars since 1900' (*The Polynational War Memorial*, 2017) <http://www.war-memorial.net/wars_all.asp?q=3>.

[41] States can make laws that are binding on non-state actors. An obvious example is in the case of international criminal law and international humanitarian law where individuals and groups have obligations.

[42] 'Frequently Asked Questions' (*Uppsala Universitet Department of Peace and Conflict Research*, 2014) <http://www.pcr.uu.se/research/ucdp/faq/#What_is_an_incompatibility_> (accessed 29/11/2015).

[43] 'Definitions' (*Uppsala Universitet Department of Peace and Conflict Research*, 2014) <http://www.pcr.uu.se/research/ucdp/definitions/#incompatibility_2> (accessed 29/11/2015).

Incompatibility concerning territory and government are not mutually exclusive and indeed frequently occur in conflict situations.

Incompatible claims to resources occur where a group lays claims to the resources located within the territory of a state. Such claims may relate to all or part of the resources in issue. The group may require an increased share of the resources or control of the disbursement of the resources. In all three categories, the reasonableness or legitimacy of the claims is not considered in identifying the prevailing incompatibility. The following case studies of some NIACs illustrate the different categories of incompatibility.

A. Case Study 1: The First Chechen War

Following the dissolution of the Soviet Union in 1991, 15 constituent republics became independent states with their own governments while Chechnya remained within the Russian Federation but as an autonomous constituent unit of the Federation. Following some violent political struggles within Chechnya, Chechnya declared full independence from Moscow in 1993 as the Chechen Republic of Ichkeria (ChRI). In December 1994, forces of the Russian Federation launched an attack against ChRI. While Moscow fought to keep the Russian Federation whole,[44] the ChRI wanted a self-governing state independent of the Russian Federation. This conflict became known as the First Chechen war.[45] It ended in 1996, leading to the withdrawal of Russian troops from Chechnya and a "final decision on the status of Chechnya vis-a-vis the Russian Federation was postponed until 2000."[46]

This case study identifies a competition for political control of Chechnya. Government is therefore the category of incompatibility. It is not a competition for territory as such because a defined territory was already in existence and the separatists only wanted to independently govern that territory.

B. Case Study 2: The Caucasus Emirate Conflict

About three years after the end of the First Chechen War, the Islamic International Brigade (IIB), an NSTAC based in Chechnya, invaded Dagestan.[47] This led to the Second Chechen War. Russian Federation forces subsequently ousted IIB from Dagestan and by April 2009 withdrew from Chechnya leaving the local authorities in Chechnya to deal with the low-level insurgency that continued

[44] Rajan Menon and Graham E. Fuller, 'Russia's Ruinous Chechen War' (2000) 79 Foreign Affairs 32, 40.

[45] For a general background see, Kimberly L. Jones, 'From Moscow to Makhachkala: The People in Between' (2013) 41 Fordham Urb LJ 35.

[46] Jakob Rigi, 'Chaos, Conspiracy, and Spectacle: The Russian War against Chechnya' (2004) 48 Social Analysis: The International Journal of Social and Cultural Practice 143, 145.

[47] Dagestan is another constituent unit of the Russian Federation.

at that time.

In October 2007, a leader of the Chechen rebels, Doku Umarov, proclaimed himself as the Emir of the new "Caucasus Emirate" which would be an Islamic State spanning several federating units (Chechnya, Dagestan, Kabardino-Balkaria) in the Russian North Caucasus.[48] The fighting associated with this situation is the Caucasus Emirate Conflict. Territory is the main incompatibility in this case study. The anti-Russian NSTACs intend to take territory from the Russian State. Since the NSTACs also intended to govern the territory if they had succeeded in taking it over from the Russian State, government incompatibility also arises in this case study.

C. Case Study 3: Turkey vs Kurdistan Workers' Party (PKK)

The Kurdistan Workers' Party (PKK) was formed in the late 1970s. PKK commenced hostilities against the Turkish government in 1984 in order to actualise the carving out of an independent Kurdish State.[49] Turkey generally considered PKK as a terrorist organisation and refused to negotiate with it. In 1999, however, a PKK leader, Abdullah Öcalan, was dramatically captured by Turkey in Nairobi, Kenya and jailed for treason.[50] Since then there have been apparent talks between Turkey and PKK.

This is also a case of incompatibility relating to territory. PKK wants to take away territory that presently belongs to Turkey. Although PKK intends to make the desired territory an independent state, the incompatibility does not primarily relate to government.

D. Case Study 4: Sri Lanka vs Liberation Tigers of Tamil Eelam (LTTE)

The majority Sinhalese, which are primarily Buddhist, and the minority Tamils, which are primarily Hindus, are two major ethnic groups in Sri Lanka. The Sinhalese elite, created several laws that were detrimental to Tamil representation and interests.[51] For example the *Official Language Act, No. 33 of 1956 (Sinhala Only*

[48] Sven Chojnacki, Maurice Herchenbach and Gregor Reisch, 'Perspectives on War: Disentangling Distinct Phenomena: Wars and Military Interventions, 1990–2008' (2009) 27 Sicherheit und Frieden (S+F) / Security and Peace 242, 244.

[49] For some historical background see generally, Richard Falk, 'Problems and Prospects for the Kurdish Struggle for Self-Determination after the End of the Gulf and Cold Wars' (1993–1994) 15 Mich J Int'l L 591.

[50] Michael M. Gunter, 'The Continuing Kurdish Problem in Turkey after Öcalan's Capture' (2000) 21 Third World Quarterly 849.

[51] Houchang Hassan-Yari, 'Third World Avoidable Crisis: Mismanaging National Legitimate Grievances' (2004) 1 Int'l Stud J 63.

Act),[52] is said to have signalled the beginning of deeply entrenched disunity.[53] Tamils demanded non-discrimination and equal status for the Tamil language and culture. These demands became radicalised and cumulated in the agitation for an independent Tamil State under the governance of the LTTE.[54] Hostilities were punctuated by periods of demonstrable signs that the conflict could end through the peaceful settlement mechanism of negotiation.[55] The conflict, however, came to an obvious end in 2009 with the decimation of the LTTE.

The dispute here primarily relates to the political control of territory already predominantly occupied by the Tamil. The incompatibility therefore relates more to government than to territory. On the other hand, if the dispute is viewed from the perspective that the territory the Tamils sought to exercise political control over is one within Sri Lanka, then the incompatibility relates to both territory and government.

E. Case Study 5: The Cabinda Conflict

Angola is a non-contiguous state and is separated from its oil-rich Cabinda Province by the Democratic Republic of the Congo.[56] Cabinda, then referred to as Portuguese Congo, was a separate administrative entity from Portuguese West Africa as Angola was then known.[57] The Portuguese colonial authorities subsequently amalgamated Cabinda with Angola. Following the execution of the Alvor Agreement,[58] Angolan independence was established and Cabinda was designated as part of Angola. The Front for the Liberation of the Enclave of Cabinda-Forças Armadas de Cabinda (FLEC-FAC) however contested Angolan authority and proclaimed the Republic of Cabinda as an independent country in August 1975. A ceasefire agreement was signed with some FLEC representatives

[52] It provided that the Sinhala language was official language in the operation of government departments and other public services.

[53] Lakshman Marasinghe, 'The British Colonial Contribution to Disunity in Sri Lanka' (1994) 6 Sri Lanka J Int'l L 81, 86.

[54] Peter Chalk and David M. Rothenberg, 'Tigers Abroad: How the LTTE Diaspora Supports the Conflict in Sri Lanka, The Conflict & Security' (2008) 9 Geo J Int'l Aff 97, 99.

[55] Rajat Ganguly, 'Sri Lanka's Ethnic Conflict: At a Crossroad between Peace and War' (2004) 25 Third World Quarterly 903.

[56] Justus Reid Morrison Weiner, Diane, 'Legal Implications of Safe Passage Reconciling a Viable Palestinian State with Israel's Security Requirements' (2006) 22 Conn J Int'l L 233, 307.

[57] See Treaty of Simulambuco, 1885.

[58] For this, Angola's three national liberation movements (People's Movement for the Liberation of Angola (MPLA), National Liberation Front of Angola (FNLA) and National Union for the Total Independence of Angola (UNITA)) met with the colonial power in Alvor, Portugal.

in 2006 but has been rejected by some other factions.[59]

The incompatibility here relates more to the political control of Cabinda than the acquisition of territory. The territory known as Cabinda was already in existence. The problem between the Angolan government and FLEC was essentially about the governance structure of Cabinda. This is a clear case of government incompatibility.

F. Case Study 6: Niger Delta Conflict

Nigeria's oil and gas deposits are located in the Niger Delta and there are several large and small groups of NSTACs agitating for total control, or at least, a fair share of the revenues from the oil and gas deposits. The first recorded Niger Delta agitator was Isaac Boro who formed the Niger Delta Volunteer Force (NDVF) in 1966 to fight the Federal Government of Nigeria for a more equitable share of oil revenues.

From low intensity engagement in the 1980s, groups in the Niger Delta increased the intensity of their confrontation. In general, the collective demand of these groups related to the distribution of oil revenues and environmental restoration.[60] In addition to armed groups, many civil society groups are engaged in advocacy for equitable control and distribution of oil revenue accruing from the Niger Delta conflict.[61] The resource control element of the Niger Delta conflict is essentially the "demand for ownership and control of natural resources to be vested (wholly or, at least, partly) in the constituent states of the Nigerian federation or communities where they are naturally located; and not, as presently, exclusively in the federal government."[62]

In 2009, the Federal Government proclaimed a general amnesty for Niger Delta militants. The amnesty included financial commitments to the Niger Delta including formal education for former militants. The amnesty was widely received by the groups and there has been relative quiet in the Niger Delta.

This conflict does not relate to territory and government as much as it relates to resource control. Indeed, the avowed position of the NSTACs involved is that the resources should be controlled by the communities where they are located.

[59] Ceasefire negotiations were carried out with António Bento Bembe in his capacity as president of the Cabindan Forum for Dialogue and Peace.

[60] See Uwafiokun Idemudia and Uwem E. Ite, 'Demystifying the Niger Delta Conflict: Towards an Integrated Explanation' (2006) 33 Review of African Political Economy 391, where centralisation of oil revenue is identified as a major cause of the Niger Delta conflict.

[61] See generally Augustine Ikelegbe, 'Civil Society, Oil and Conflict in the Niger Delta Region of Nigeria: Ramifications of Civil Society for a Regional Resource Struggle' (2001) 39 The Journal of Modern African Studies 437.

[62] Kaniye S. A. Ebeku, 'Oil, Niger Delta and the New Development Initiative: Some Reflections from Socio-Legal Perspective International Humanitarian Law' (2007) 19 Sri Lanka J Int'l L 1, 14.

Therefore, this is not a government incompatibility because political control is not a main demand of the fighting groups nor are they contesting territory with the federal government. It therefore falls under a category of incompatibility that is outside the UCDP list.

III. Legal Justifications Offered for Non-International Use of Force

Apart from factual claims of entitlement over government, territory or resources, parties to non-international armed conflict frequently attempt to legally justify their non-international use of force. In the case of almost all conflicts involving NSTACs, the actual or perceived right to self-determination features prominently in proffering a legal justification for non-international use of force.

Self-determination has long been recognised as a legal right in relation to decolonisation,[63] and some of the earliest attempts to justify use of force on the basis of self-determination related to struggles for independence from colonial rule. The UN General Assembly has by resolution confirmed the right to self-determination in the colonial context.[64] The ICJ has also confirmed this right, in the *Namibia*,[65] and *Western Sahara* Advisory Opinions.[66] The *erga omnes* character of self-determination was emphasised by the ICJ in the *East Timor* case.[67] It is doubtful that Article 2(4) relates to these colonial conflicts. They are, therefore, ostensibly within the situations being presently considered. However, colonial conflicts are considered to be IACs and for this reason, fall outside the scope of the present inquiry.

Outside the colonial context, self-determination stands as a right applicable to peoples within a sovereign state. The right to self-determination is expressly recognised by the UNC.[68] Article 1(2) UNC identifies self-determination as one of the purposes of the UN. Article 55 asserts self-determination as a context for creating conditions of stability and well-being for peaceful and friendly relations. This will further the attainment of important political, social and economic goals that inure to the benefit of the peoples in the state.

Self-determination is also provided for in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic,

[63] Gaetano Pentassuglia, 'State Sovereignty, Minorities and Self-Determination: A Comprehensive Legal View' (2002) 9 International Journal on Minority and Group Rights 303, 305.

[64] Resolution 1514 (XV) of 1960 and Resolution 1541 (XV) of 1960.

[65] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep. 16.

[66] *Western Sahara* [1975] ICJ Rep. 31.

[67] *East Timor (Portugal v Australia)* [1995] ICJ Rep. 90, 102.

[68] Articles 1(2) and 55 UNC.

Social and Cultural Rights (ICESCR).[69] These two instruments recognise the right to freely determine political status. Other instruments that recognise the right of peoples to self-determination include the 1975 Helsinki Final Act,[70] and the 1981 African Charter on Human and Peoples' Rights.[71] These instruments apply to peoples in non-colonial situations.[72] The totality of the legal provisions on self-determination lead to the point that there is an external and internal aspect to self-determination.

The external aspect of self-determination relates to the right to freely determine the political status of a community. External self-determination appertains to the international status of a people.[73] It relates to the right to constitute a state or to become part of an existing state.[74] So, in a case of government or territory incompatibility, NSTACs may claim to be fighting for external self-determination. It is frequently argued that the right to self-determination is extinguished upon attainment of political independence.[75] This view of self-determination is erroneous to the extent that it does take cognisance of the internal aspects of self-determination, for example "the participation of the people in the governance of states."[76]

The internal aspect concerns the liberty to determine the economic, political, social and cultural existence or status of a community within the framework of a given state. Essentially, internal self-determination puts the people forward "as the ultimate authority within the State."[77] This internal aspect may be broad enough to include the rights of minorities within the state.[78] The NSTACs in the first five case studies above can claim to be desirous of exercising their right to the external aspect of self-determination, while the NSTACs in the sixth case study may rely on

[69] Article 1(1) ICCPR and ICESCR provides that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

[70] Principle VIII.

[71] Article 20.

[72] Pentassuglia, 'State Sovereignty, Minorities and Self-Determination: A Comprehensive Legal View' 9 Int'l J on Minority & Group Rts 303, 306.

[73] Salvatore Senese, 'External and Internal Self-Determination' (1989) 16 Social Justice 19.

[74] ibid.

[75] J. V. Cole Rowland, 'Revolutions in the Maghreb—resisting authoritarianism and accessing the right to self-determination and democratic governance' (2012) 45 The Comparative and International Law Journal of Southern Africa 389, 390.

[76] ibid.

[77] Patrick Thornberry, 'Self-Determination, Minorities, Human Rights: A Review of International Instruments' (1989) 38 The International and Comparative Law Quarterly 867, 869.

[78] ibid 868, where self-determination and minority rights are discussed as the 'two sides of the same coin'.

the internal aspect of self-determination.

While it may be argued that the NSTACs in the above case studies can rely on self-determination as justification for using force to address their individual incompatibilities, in the reality of municipal and international law, a state has the sovereignty to administer its territories and the peoples. This entails the powers to make and enforce its laws. National sovereignty is "one of the most well established principles of international law."[79] Just as self-determination may give rights to peoples, sovereignty gives rights to states.[80] As of right, the state exercises sole authority over a territory and its population.[81] Again, just like self-determination, sovereignty has internal and external constructs. Internally, it consists of the state's "ultimate authority to take decisions within its space."[82] Externally, it consists of the recognition by all subjects of international law that a state has "the right to do what it wants within its space without interference."[83] This will include the right to use force to resist or quell a rebellion against the sovereign authority to determine the operations of government, delimitation of territory and use of resources.

In the exercise of sovereignty, states ensure that their municipal laws contain provisions against treason and similar violence against the state. These anti-treason laws will necessarily apply against NSTACs conducting armed conflict against the state. Therefore, the exercise of sovereignty implies that only the state can determine the matters relating to government, territory and resources. Sovereignty allows the state, and only those permitted by the state, to use force within its territory.[84] It follows that NSTACs seeking to address incompatibilities by use of non-international force are challenging the sovereign right of the state.

The question then arises as to the lawfulness or otherwise of using force against the state for the purpose of secession or other demonstrations of self-determination. Interestingly, international law does not grant a right to secession,[85] nor does it prohibit secession.[86] The conclusion, therefore, is that there is no legal

[79] L. C. Green, 'Enforcement of International Humanitarian Law and Threats to National Sovereignty' (2003) 8 J Conflict Security Law 101.

[80] Alexander Wendt and Daniel Friedheim, 'Hierarchy under anarchy: Informal empire and the East German state' in Thomas J. Biersteker and Cynthia Weber (eds), *State Sovereignty as Social Construct* (Cambridge University Press 1996) 240.

[81] Neil MacFarlane and Natalie Sabanadze, 'Sovereignty and self-determination: Where are we?' (2013) 68 International Journal 609, 611.

[82] ibid.

[83] ibid.

[84] ibid.

[85] Peter Hilpold, 'The Kosovo Case and International Law: Looking for Applicable Theories' (2009) 8 Chi J Int'l L 47.

[86] ibid.

right to secession.[87] This non-prohibition of secession becomes problematic when aligned with the non-prohibition of the use of force in non-international situations as nothing in international law stops secessionists from using force.[88] It would therefore mean that when a NSTAC commences or instigates a NIAC it would not be violating any rule of international law prohibiting intra-state use of force. In this context, it instructive that states have a power to prevent secession or resist any use of force within its territory.[89] There is therefore a legal impasse involving conflicting rights or powers. This manifests in perpetual tension between the right to self-determination and the territorial integrity of states.

The normative conflict will take a different dimension where no state is involved in the non-international use of force. Instead of having a conflict between self-determination and sovereignty, the NSTACs involved will rely on opposing claims to self-determination. The international legal problem arising from this scenario does not stem from the legal validity of the claims of the parties but the legal probability of the claims. Any attempt to control the use of non-international force must therefore, as a minimum, balance the conflicting rights of sovereignty versus self-determination or self-determination versus self-determination.

Whether the justification for non-international use of force is self-determination or sovereignty, the factual reality is that NIAC is a matter that touches on the peace and security of the international community. It can therefore be subjected to international legal control. Given that international law is presently silent on the control of non-international use of force, the subsequent part of this article seeks to open up the discourse for the development of a *jus ad bellum* regime in NIACs.

[87] See generally, David Copp, 'International Law and Morality in the Theory of Secession' (1998) 2 The Journal of Ethics 219, which discusses the morality of secession. It suffices for this article that such moral arguments or discussions are not relevant to the legal question.

[88] Article 2(4) UNC does not apply to NSTACs.

[89] Hilpold (n 85).

IV. Opening the Discourse on Legal Control of Non-International Use of Force

The main essence of the tripodal UNC *jus ad bellum* regime is to maintain international peace and security. Given the apparent success of UNC *jus ad bellum* in relation to international use of force, the international community may work towards adapting a similar regime for non-international use of force situations. Establishing the *jus ad bellum* for non-international use of force has the obvious problem of controlling the sovereign right of the state to use force within its own territory.

This problem may be resolved by reference to the reality of limitations to sovereignty. A manifest limitation to sovereignty is contained in the provisions of the UNC which recognise the authority of the UN to intervene in a matter which is essentially within the domestic jurisdiction of a state provided the matter relates to action with respect to threats to the peace, breaches of the peace, and acts of aggression.[90] The import of this provision of the UNC is to uphold the notion of sovereignty but allow it to yield to "an overarching normative trend defined by visions of world peace, stability, and human rights."[91] In sum, the right of the state to non-international use of force can be subject to legal control.

In this context, the legal control of sovereignty stems from the recognition that an abusive use of force against individuals and groups will not only violate the human rights of the victims but may also destabilise the state and ultimately jeopardise world peace.[92] In addition, the sovereign right of the state to act and use force within its territory is subject to the recognition that individuals and groups within the state may have rights and duties under international law.[93]

Unlike the state that has a recognised right of non-international use of force, the NSTAC has no such right. *Jus ad bellum* for non-international use of force therefore stands the risk of not only conferring legitimacy on the non-international use of force by NSTACs but also encouraging NSTACs to be quick to resort to force in exercise of a perceived right. Thus an international attempt to control the non-international use of force must clearly restate that international law does not confer a right of use of force on NSTACs. This absence of a right of non-international use of force does not mean that states do not recognise that NSTACs

[90] See Article 2(7) and Chapter VII of the UNC.

[91] S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press 2000) 42.

[92] See, for example, Malgosia Fitzmaurice, 'The New Developments Regarding the Saami Peoples of the North' (2009) 16 Int'l J on Minority & Group Rts 67, for an extensive discussion of the human rights protection of indigenous people within a state.

[93] Generally on the overarching normative trend of mutual inclusion of sovereignty and the rights of individuals (or groups) see Gaetano Pentassuglia (n 72).

in fact apply non-international use of force, nor does it mean that states do not sometimes recognise the outcome of non-international use of force by NSTACs.

The tension between self-determination and national sovereignty does not necessarily lead to use of force. However, where there is resort to use of force, a conflict arises between the claimed right to self-determination, the certain rights of sovereignty and the overriding international community interest of peace and security. Where the tension is between opposing claims to self-determination and there is resort to use of force, conflict arises between each claim to self-determination and the overriding international community interest of peace and security. In devising a *jus ad bellum* regime for non-international use of force, these conflicting claims must be resolved.

In resolving the conflicting claims, the lesser right should yield to the greater.[94] In a conflict between NSTACs and state(s), which is the superior right: self-determination, sovereignty, or peace and security? In a conflict between NSTACs, which is the superior right: each opposing claim to self-determination, or peace and security? Based on the supposition that rights spring from the recognition of definite interests,[95] the right of the international community will be collocated with its interests. In the answer to both questions as to superiority of rights, the right of the international community to peace and security is superior to sovereignty and self-determination.

In another vein, "[t]he right to self-determination answers the question 'who is to decide?' not 'what is the best decision?'"[96] Self-determination may or may not be the best decision in certain circumstances. In effect, the utility of self-determination is subjective. For example, in Case Study 2 above, the IIB wanted a self-governing state that is independent of the Russian Federation. Yet within the Chechen territory, there were people that felt more inclined to remain a part of the Russian Federation. In all ramifications, it is more of a procedural norm.[97] It is therefore "neither absolute nor unconditional."[98] Although armed conflicts resulting from self-determination claims may be limited and localised to a state's territory,[99] the threat to international peace and security is not diminished because

[94] Theodore S. Woolsey, 'Self-Determination' (1919) 13 The American Journal of International Law 302, 303.

[95] Philip Marshall Brown, 'The Rights of States under International Law' (1916) 26 The Yale Law Journal 85, 93.

[96] Avishai Margalit and Joseph Raz, 'National Self-Determination' (1990) 87 The Journal of Philosophy 439, 454.

[97] Jan Klabbers, 'The Right to Be Taken Seriously: Self-Determination in International Law' (2006) 28 Human Rights Quarterly 186, 205.

[98] Margalit and Raz (n 96) 461.

[99] Tom J. Farer, 'The Ethics of Intervention in Self-Determination Struggles' (2003) 25 Human Rights Quarterly 382, 391.

a conflict is localised. Self-determination is to be applied "with due regard to the balancing of results good and bad, rather than with relentless disregard of consequences".[100]

Each claim to self-determination requires a complex analysis and judgment on the merits of individual claims.[101] Notwithstanding the bona fides or correctness of a right to self-determination, the claim must be exercised in a manner consistent with international peace and security. "Exercising fully a given right of self-determination need not imply separate statehood or the dismemberment of an existing territorial State."[102] Where the right is exercised in a manner inconsistent with international peace and security, then the state may resort to the non-international use of force.

In a similar vein, the notion of sovereignty also raises the question 'who is to decide'? It does not guarantee that the best decision will be taken. Certainly, it is inescapable that the sovereigns will use coercion to resist NSTACs that seek to use violence to address incompatibilities.[103] However, in using coercion to exercise sovereign rights, the conduct of the state must be consistent with international peace and security. The right to self-determination and the rights of sovereignty have costs.[104] However, these costs must not be at the price of peace and security.

Using the model of the *jus ad bellum* regime created by the UNC, the requirement for consistency with international peace and security can translate into a prohibition of the non-international use of force by NSTACs in addressing incompatibilities. As a corollary, states would also be prohibited from the non-international use of force against NSTACs whose actions are consistent with international peace and security. While this proposition could be the central pillar of *jus ad bellum* in non-international situations, it would stand to benefit from an obligation to settle incompatibilities by peaceful means.

V. Conclusion

NIACs arising from or accompanying non-international use of force remain one of the most glaring shortcomings of the present international legal order. This shortcoming is exacerbated by the glaring absence of legal control. It is a weak argument to say that such legal control cannot or should not be devised merely because it does not presently exist. This article has proposed that the legal

[100] Woolsey (n 94) 305.

[101] Michael Freeman, 'The Right to Self-Determination in International Politics: Six Theories in Search of a Policy' (1999) 25 Review of International Studies 355, 368.

[102] Falk (n 49) 595.

[103] W. Michael Reisman, 'Criteria for the Lawful Use of Force in International Law Special Feature—Restraints on the Unilateral Use of Force: A Colloquy' (1984) 10 Yale J Int'l L 279, 279.

[104] Freeman (n 101) 368.

control of non-international use of force operates as the required *jus ad bellum* in non-international situations. *Jus ad bellum* for non-international situations will significantly contribute to the maintenance of international peace and security.

Miller and Brexit: Prerogatives on Parliament and Public Law

Jarret J. Huang*

In *R (MILLER) v Secretary of State for Exiting the European Union* [2017], the Supreme Court considered whether an Act of Parliament had to be passed in order to invoke Article 50 of the TEU and give formal notice to commence proceedings for leaving the EU, or whether ministerial exercise of the Royal prerogative would suffice.[1] The case also raised a host of devolution issues spanning the precise justiciability of the Good Friday Agreement and Sewel Convention, but for reasons of length these will not be covered herein. The Court ruled, 8-3, that an Act of Parliament was required prior to the invocation of Article 50, with Lords Reed, Hughes, and Carnwath dissenting. The devolution issues proved less divisive, with the Court unanimously finding that the Sewel Convention, even after the Scotland Act 2016, was non-justiciable, and that it was thus unnecessary to consult or secure the consent of the devolved governments prior to triggering Article 50.

This casenote will begin by summarising the central issues which formed the crux of disagreement between the majority and dissenting judgments: a) the relevant constitutional background to the instant facts, b) whether the text of the European Communities Act 1972 ('ECA 1972') permits or precludes the use of prerogative power to trigger an exit from the EU, and c) precisely which non-textual considerations are relevant in ascertaining the precise ambit of the ECA 1972, and what bearing these considerations have on specifically texturing the Government's prerogative power. After establishing the array of considerations upon which the two sides disagreed, this note will suggest that while there are valid criticisms of the majority judgment, notably from Lord Millett (extra-judicially) concerning the 'Trigger Mechanism' and the argument that triggering Article

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1 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5

50 *necessarily* impinges on existing domestic rights, the majority's view is still to be preferred.[2] In reaching this conclusion, Lord Reed's dissenting views on the appropriate interpretation of the ECA 1972, Professor Feldman's argument on the canons of interpretation *viz* what conclusions the Court could legitimately have reached,[3] as well as Professor Finnis' position on the applicability of double taxation treaty analogies to illustrate the Royal prerogative's continuing effect on domestic law, will all be addressed.[4] This casenote will conclude by highlighting the *fons et origo* of the disagreement: the relevant conceptual starting points adopted by each side, and how those perceptions of the nexus of operation between EU Law and domestic law indelibly shaded subsequent analysis. This nexus, arguably left nebulous since the 1972 Act itself, represents the central novel point of law in a case that is otherwise almost startling in its continuity: the main disagreement centred on questions of statutory interpretation that appear fairly commonly in judicial review. For the first-ever case that all eleven justices of the Supreme Court heard *en banc*, the distinctly discordant cacophony of the public discourse belies a fairly orthodox application of the norms of statutory interpretation, underpinned by the real disagreement as to how EU Law and UK Law have interacted over the past fifty years.

Turning first to a summary of the central struts of argumentation, the applicable constitutional background proved the first hotbed of dissension. The majority, at [40]-[59], outlined how 'the Royal prerogative … (was) progressively reduced as Parliamentary democracy and the rule of law developed', making reference to seminal cases such as *The Case of Proclamations* and Coke CJ's admonishment that 'the King…cannot change any part of the common law, or statute law',[5] as well as Lord Reid's dictum in *Burmah Oil* that the Royal prerogative 'is a source of power which is "only available for a case not covered by statute"'.[6] This was accentuated in the context of statutory provisions, with the majority noting at [51] that 'ministers cannot frustrate the purpose of a statute or a statutory provision… by emptying it of content or preventing its effectual operation', relying on *Laker Airways*,[7] Lord Browne-Wilkinson in *Fire Brigades Union*,[8] and *De Keyser's Royal Hotel*.[9] Granted, the majority recognised two categories of cases in which the exercise

[2] Peter Millett, 'Prerogative Power and Article 50 of the Lisbon Treaty' [2016] 7 UK Supreme Court Yearbook 190.

[3] David Feldman, 'Brexit, the Royal Prerogative, and Parliamentary Sovereignty' *UK Constitutional Law Blog* (8 November 2016) < http://ukconstitutionallaw.org > (accessed 16 October 2017).

[4] John Finnis, 'Terminating Treaty-Based UK Rights' [2016] Judicial Power Project 26.

[5] [1610] EWHC KB J22.

[6] [1965] AC 75.

[7] [1977] QB 643.

[8] [1995] 2 AC 513.

[9] [1920] AC 508.

of prerogative powers would have domestic legal consequences, even without changing domestic law *per se*: First, where it is 'inherent in the prerogative power that its exercise will affect the legal rights or duties of others', such as in the context of employment for Crown employees. Second, where the 'effect of an exercise of prerogative powers is to change the facts to which the law applies', such as in the case of declarations of war or extension of territorial waters. This caveat aside, the majority's vision of the relevant constitutional background to this case is one of sustained and progressive narrowing to the ambit of prerogative powers in line with the sovereignty of Parliament. This expressly recognises that even the dualist system the UK adopts, which requires treaties to be incorporated into domestic law before they have domestic legal effect, 'is a necessary corollary of Parliamentary sovereignty… [which] exists to protect Parliament, not ministers'.

By contrast, in his dissent, Lord Reed emphasised the continuing power vested in the prerogative, and sought to raise questions as to the applicability of *Laker Airways* and *Fire Brigades Union* as part of the relevant constitutional background. While not denying Parliament's centrality should it have adjudicated on a particular matter, Lord Reed, at [159]-[160], underscored the centrality of the Crown's prerogative powers in the context of treaty-making, asserting that Blackstone's 18th Century argument that 'unanimity, strength, and despatch' justified the unity of power to manage international relations was 'as evident in the 21st Century as they were in the 18th'.[10] Lord Reed went on to cast aspersions on the cases the majority relied on to establish that the Crown cannot use the prerogative to regulate a matter differently from Parliament's regulation, noting that in *Laker Airways* only Roskill LJ relied on that principle ('contrast Lord Denning MR at 705G-706A and Lawton LJ at 728A') and that the decision in *Fire Brigades Union* relied on a different principle altogether ('see Lord Browne-Wilkinson at 553G and Lord Lloyd at 573C-D'). Moreover, Lord Reed cited with approval Lord Denning's dicta in *McWhirter v AG*, that 'the Crown retained, as fully as ever, the prerogative of the treaty-making power', noting that neither the Bill of Rights nor the Scottish Claim of Right restricted the Crown's prerogative in relation to foreign affairs.[11] Taken cumulatively, Lord Reed's conception of the relevant constitutional background places far more emphasis on the continuing viability and vigour of the prerogative, and expends comparably less ink on the legal history of the prerogative's narrowing.

Pace Lord Reed, the most defensible reading of *Laker Airways* remains contestable: Lord Denning MR noted that if the Secretary of State could 'displace the statute by invoking a prerogative', it 'would mean that, by a side-wind, Laker

[10] Blackstone, *Commentaries on the Laws of England* Bk 1, 143.
[11] [1973] 1 AllER 689.

Airways would be deprived of the protection which the statute affords…such a procedure was never contemplated by the Statute'. Similarly, Lawton LJ's position can be read as an affirmation of the view that the prerogative, even in treaty-making spheres, cannot infringe on rights granted by Parliament: 'the Secretary of State cannot use the Crown's powers in this (international relations) sphere in such a way as to take away the rights of citizens: see *Walker v Baird* (1892)'.[12] Granted, this focuses on 'taking away rights' more specifically as compared to general Parliamentary statute, but the notion of the prerogative being curtailed by Parliament remains clearly present.

Either way, neither side disputes the rule that the Royal prerogative may not affect domestic law, or the primacy of the Executive in exercising the Royal prerogative in managing international relations. Where they differ is in the emphasis granted to each: For the majority, the emphasis placed on non-infringement of domestic law translates into a greater guardedness against potential infringements of domestic rights by application of unincorporated treaties. For the minority, the enduring vivacity of the Crown's prerogative powers contours their attention to the suggestion that the treaty obligations which introduced EU Law fall squarely and solely within the legitimate treaty-making powers of the Executive. The impact of this difference in emphasis thus should not be understated.

The second key area of contention, which formed a major part of both the majority and dissenting analyses, seeks to answer whether the text of the ECA 1972 permits or precludes the operation of prerogative power to trigger Article 50. The majority argued that the ECA neither 'contemplates nor accommodates the abrogation of EU Law…without prior Parliamentary authorisation' and that instead, Parliament acted 'in a way inconsistent with the future exercise by ministers of any prerogative power to withdraw'. In rejecting Eadie QC's argument for the Secretary of State that the rights under the ECA 1972 were 'ambulatory' and applied only insofar as there were EU Law rights that the 1972 Act could 'latch onto', the majority noted a 'vital difference' between the evolving nature of EU Law and the 'fundamental change in the constitutional arrangements of the UK' associated with wholesale exit. Granted, this notion of a 'fundamental change' is a question of scale. It a) raises questions of just how fundamental a treaty-induced change must be before it is protected against the prerogative, and b) draws attention to further questions on precisely *how* EU Law was able to effect such a fundamental change. At [82], the majority, in interpreting the 1972 Act, took EU membership as a 'fixed domestic starting point' which 'followed from the ordinary application of basic concepts of constitutional law'. That is to say, the majority interpreted the 1972 Act as evincing Parliament's intention, at the time of its passing, to be that

[12] [1892] AC 491.

the UK should enter into EU membership, making prerogative-based withdrawal irreconcilable with the Act.

This claim by the majority as to Parliament's intention is buttressed by three arguments: First, any argument that the words 'from time to time' in Section 2(1) of the ECA demonstrate contemplation that a time might arise where there were no EU treaty obligations is undermined by the absence of a similar phrase in Section 1 of the Act.[13] Second, the long title of the Act ('An Act to make provision in connection with the enlargement of the European Communities to include the UK') was noted at [88] to further elucidate Parliament's intention. Third, the common law presumption of statutory interpretation in *ex parte Simms* that 'fundamental rights cannot be overridden by general or ambiguous words' militates in favour of the interpretation that the 1972 Act does not clearly leave a power as dramatic as overarching withdrawal from the EU (and removing all associated rights) in the hands of ministers.[14]

Arrayed against this is Lord Reed's threefold argument. First, His Lordship eschews Eadie QC's submission that the ambulatory nature of the ECA translates into Parliamentary cognizance and acceptance of withdrawal, adopting instead the argument that s2 of the ECA is conditional in nature. He argues that s2 can be written as 'All such [members of a specified category] as [satisfy a specified condition] shall be [dealt with in accordance with a specified requirement].' This conditionality, as well as Lord Reed's argument that 'the form of the rule does not convey any intention that the condition *will* be satisfied', illustrated to his Lordship that Parliament had envisaged withdrawal and led to his conclusion that its declining to require statutory authorisation illustrated that withdrawal remained within the sphere of prerogative powers. Second, Lord Reed rejected the 'vital difference' between changes to the content of EU Law and wholesale withdrawal, suggesting that there was no basis 'in the language of the 1972 Act for drawing such a distinction'. Third, he argued that any rights which the ECA might incorporate into UK Law were 'obviously conditional on the UK's continued membership of the EU', and that the cessation of such rights was 'inherent' in the nature of conditional rights. He went further to suggest that 'the only logical alternative is to hold that Parliament has created a right to remain in the EU, and none of the arguments goes that far'. Thus, on Lord Reed's interpretation of the text of the ECA, the text does not preclude the operation of the prerogative to effect withdrawal, and arguably even tacitly or impliedly permits it, insofar as his conditionality argument holds.

The third ground of clash was on what non-textual considerations arose in

[13] Simon Renton, 'Historical Perspectives and the *Miller* Case', *UK Constitutional Law Blog* (19 January 2017) < https://ukconstitutionallaw.org/ > (accessed 16 October 2017).

[14] [2000] 2 AC 115.

interpreting the ECA 1972. The majority, basing the bulk of their analysis on the text of the ECA as well as the 'vital distinction' between amendment and revocation, paid considerably less attention to non-textual considerations. At [100], the majority suggested that Eadie QC's argument that it is legitimate to consider that 'Parliament will, of necessity, be involved…as a result of UK withdrawal' militates in favour of, rather than against, the view that Parliament should have to sanction giving notice. The majority explained that 'an evitable consequence of withdrawing from the EU treaties will be the need for a large amount of domestic legislation…such a burden should not be imposed on Parliament…without prior Parliamentary authorisation'. Granted, the majority expressly stipulated that they did not 'rest (their) decision on this point', but they used it to 'emphasise the major constitutional change' involved, and tacitly, to buttress the aforementioned 'vital distinction'.

By contrast, Eadie QC sought to argue that rather than looking at the ECA 1972 in isolation, its interpretation should be 'addressed by viewing the effect of the present state of the legislation as a whole'. On this approach, the ECA might be interpreted in light of the TEU/TFEU (as incorporated) and the express recognition of withdrawal as a possibility, or even the 2015 European Union Referendum Act. This, while rejected by the majority, was picked up on by Lord Reed, who suggested that post-1972 legislation was of 'secondary importance' in demonstrating that Parliament had 'legislated on the basis that the prerogative was not restricted'. Lord Reed further used it to demonstrate that Parliament is 'perfectly capable of making clear its intention to restrict the exercise of the prerogative when it wishes to do so'. His Lordship referred to the European Union Act 2011, which he argued implemented a raft of stricter Parliamentary controls. By extrapolation, Lord Reed posited that the absence of particular restrictions in the 1972 Act 'tended to support the conclusion that no such restriction was intended to arise by implication'. Neither Lord Reed's argument nor that for the majority in this context was taken to be decisive, but they illustrate the mental gymnastics involved in conjuring up arguments which characterised the struggle to convincingly interpret the ECA.[15]

Refracted through a more evaluative lens, there are difficulties with both the majority and minority positions across the judgment. First, there has been considerable extra-judicial criticism of the tactical decision by counsel for the Secretary of State to concede that invoking Article 50 would *necessarily* engender an effect on domestic rights. Paul Craig, responding to s10 of the Divisional Court's recognition of the unchallenged nature of the concession, suggested that there were two grounds on which the irrevocability of Article 50 invocations could be

[15] Jeffrey Jowell and Naina Patel, '*Miller* Is Right', *UK Constitutional Law Blog* (15 November 2016) < https://ukconstitutionallaw.org/ > accessed 16 October 2017.

contested: A) He deemed it a 'cardinal legal principle' that a party was not bound by contracts or treaties until agreement had been reached.[16] B) Craig notes that Article 68 of the Vienna Convention on the Law of Treaties expressly enshrines the principle that 'a notification or instrument…may be revoked at any time before it takes effect', and given that prior to conclusion of a withdrawal agreement (or the lapsing of two years) a notifying state has all EU rights and obligations, it follows, per Craig, that the state can revoke before that time. A further argument that calls into question the tactical decisions to avoid engagements on revocability is that of Lord Millett, who suggested extra-judicially that 'it is a strange right which Parliament can grant and revoke but which, once revoked, it cannot re-enact'.[17] It is arguable that a corollary of this is that such rights were simply not 'granted' by Parliament, and that their removal will not abrogate Parliamentary legislation, but the bigger point centres on the surprisingly unexamined notion of revocability and what implications that may yield. Granted, this under-examination of revocability and its implications is likely a function of the adversarial system and the decisions by both counsel to accept irrevocability, but the majority judgment does face difficulties vis-à-vis revocability. If Article 50 is revocable, the argument that triggering it will not *necessarily* affect domestic rights becomes far more pertinent. If it is irrevocable, however, then Lord Millett's aforementioned conundrum poses a difficulty. Granted, the Supreme Court's notion of a 'grafted' state of EU Law onto domestic law does sidle both domestic and international spheres and thus avoid Lord Millett's criticism, but even that response raises new questions of how the grafting came about, and the precise extent of integration required before such 'grafting' may be asserted.

While the majority's overall argument is not without difficulties, the notion of the irrevocable 'trigger' was barely raised in oral argument before the Supreme Court. The overwhelming bulk of the Court's attention was centred on the interpretation of the ECA 1972, and three responses may be made to Lord Reed's interpretation. First, while Lord Reed is right in that s2(1) is conditional, and correct that 'the form of the rule does not convey any intention that the condition *will* be satisfied', to suggest that there is no intention conveyed whatsoever is plainly inaccurate in light of the long title of the ECA: 'An Act to make provision in connection with the enlargement of the European Communities to include the UK'. The clear intention to join is conveyed therein, and even in the side-heading to s2 of the ECA, which concerns the 'general implementation of treaties' (and not their abrogation'). Second, Lord Reed's assault on the viability of the 'vital

[16] Paul Craig, 'Miller: Alternative Syllogisms', *OxHRH Blog*, (23 November 2016) < http://ohrh.law.ox.ac.uk/miller-alternative-syllogisms/ > accessed 16 October 2017.

[17] Millett (n 3).

difference' between changes to the content of EU Law and wholesale withdrawal, while intellectually intriguing in raising questions as to how much change to content is required before the effect is that of *de facto* wholesale withdrawal, is similarly indecisive. The main challenge to the 'vital difference' is that it is difficult for the majority to pinpoint a 'tipping-point' situation and ascertain when enough change has occurred to suffice as a 'wholesale withdrawal'. Yet, there is a clear logical distinction between amendments to a framework, and removal of that framework altogether. Even the example Eadie QC raised of the 1972 European Free Trade Agreement ('EFTA') is illustrative; the withdrawal from the EFTA was not a wholesale withdrawal from the European integration project insofar as withdrawal was part of a pre-agreed set of measures to enter the European Economic Community. Even upon withdrawal, the institutional framework and basis for continued integration continued. This would not be present upon leaving altogether, and that marks the conceptual distinction which the majority is relying on. The precise point at which a 'change' becomes a 'withdrawal' may be imprecise, but that does not elide the clear conceptual differentiation. Similarly, that the distinction upon this ground is not in the statute is neither here nor there; it may easily be deemed an implied term that an overarching exit and repudiation of even the institutions of co-operation is fundamentally different from the continued evolution and updating of terms. Third, the notion that the rights provided are 'inherently' 'conditional' upon EU membership and that cessation of membership translates into a termination of those rights is dependent on the ECA being a mere conduit for rights, devoid of any normative value as to whether those rights *should* be implemented. It has been suggested in the first rebuttal above that this description of the ECA is not wholly defensible, and the 'conditionality' argument in this form is thus similarly tenuous.

In counter, reference may be had to Feldman's arguments concerning the norms of statutory interpretation.[18] Feldman suggests, in the context of the Divisional Court's judgment, that 'the problem with the Court's interpretative approach to section 2(1) of the Act is that it relies on indications as to the proper meaning of the provision which are not normally regarded as sound guides to interpretation'. Feldman argues that the 'long title of a Bill is descriptive, not normative', with its function being to describe the '*scope*' of a Bill and not illustrate its purpose. He also doubts the utility of the long title in being a guide to the 'intention' of Parliament, suggesting that it merely offers indication as to whether proposed amendments to the Bill are within its scope for questions of admissibility. Per Feldman, similar arguments apply to the side-heading of s2(1), and it arguably is of even less utility in divining Parliamentary intention insofar as a side-heading

[18] Feldman (n 4).

cannot even be the subject of a motion to amend during the passage of a Bill. Feldman's arguments thus go some way towards resisting critiques on Lord Reed's 'conditionality-centric' interpretation of s2(1), and of the ECA as a whole.

That said, Feldman's observations are not wholly non-contentious. First, John Bell and George Engle have observed that the long title 'usually contains a general indication of the legislative purpose', suggesting that courts should not wilfully blind themselves to the hints as to intention secreted in the interstices of an Act.[19] Second, and more directly applicable to the interpretation of the ECA, there are further observations about the Act itself which are telling. Feldman himself acknowledges that the specificity of s1(2) and 1(3), which list the treaties to which the Act gives effect and stipulate that any Orders in Council to add an EU Treaty to the s1(2) list must be approved in draft by each House of Parliament, is 'not compatible' with the intention that the Executive should be able to amend domestic law simply via prerogative powers. This dovetails with the observation of the Divisional Court that 'the fact that Parliament's approval is required to give even an ancillary treaty made by exercise of the Crown's prerogative effect in domestic law is strongly indicative of a converse intention that the Crown should not be able, by exercise of the prerogative, to make far more changes in domestic law by unmaking all the EU rights set out in or arising by virtue of the principal EU treaties.' It is thus suggested that rather than providing a complete defence of Lord Reed's dissenting interpretation of the ECA, Feldman's arguments are constrained by the structure of the statutory scheme and the inferences that may rightly be drawn therein.

A further set of rebuttals to the minority approach targets the analogies and background panoply of constitutional arrangements they seek to rely on. First, Eadie QC's submission that the appropriate interpretation of the ECA 1972 (or in fact the very question of whether the prerogative will suffice to trigger Article 50) can be gleaned from 'viewing the effect of the present state of the legislation as a whole, without regard to what the position might have been at some earlier stage' is deeply problematic. As the majority noted at [113], a statute cannot normally be interpreted by reference to a later statute save insofar as they 'are given a collective title, are required to be construed as one, have identical short titles, or deal with the same subject matter on similar lines.' None of these apply to the 1972 Act, or any of the subsequent Acts, and this submission appears to be something of a tenuous stretch which seeks to foist the less EU-friendly language of recent Acts upon the interpretation of the 1972 Act. Second, Elliott's rebuttal to the majority's use of *ex parte Simms* to buttress their insistence that any alleged removal of rights by Parliament is clear and unambiguous is contentious.[20] Elliott has suggested that

[19] John Bell and George Engle, *Cross On Statutory Interpretation* (3rd Ed., Lexis Law Pub, 1995) 276.

[20] Mark Elliott, 'Analysis: The Supreme Court's Judgment in *Miller*', *Public Law for Everyone* (25

this application of *Simms* is 'misguided' insofar as 'the EU law rights at stake… are statutory rights…not the common law rights that the principle of legality as articulated in *Simms* are generally understood to protect'. However, this does not adequately take notice of Lord Reed's exhortation in *Osborn v Parole Board* that the common law falls to be developed 'in accordance with' other sources where appropriate, and the majority in *Miller* went further to note that EU Law had now been 'grafted onto…existing sources of domestic law'.[21] Granted, the notion of 'grafting' does raise the questions of precisely how and when this occurred, but it does reflect a more realistic and evolving picture of EU Law's interaction with domestic law, as opposed to a more sterile and static one. Third, it is noteworthy that the attempted analogy to Double Taxation Treaties (DTTs) raised academically by Finnis, and in written submissions by Eadie QC, is deeply problematic.[22] The argument operates to suggest that insofar as a unilateral amendment or withdrawal from a DTT by exercise of the prerogative can destroy or amend domestic law rights and obligations (since tax obligations to HMRC or any foreign customs agency would then start to run again), it is not alien to suggest that the prerogative can be used to modify or even terminate domestic rights. This argument, however, remains problematic. Kieron Beale QC noted the non-analogous nature, arguing that unlike EU Law which automatically becomes part of UK law by virtue of the ECA, DTT arrangements do not take effect automatically but only through a specific Order in Council which has to be approved by parliament.[23] As the majority noted, 'the conduit pipe metaphor which applies to the 1972 Act in relation to EU Law is inapposite for section 788…in relation to DTTs'. On this analysis, it may broadly be advanced that even the analogies and background asserted in support of the Secretary of State's claim do not appear compelling, militating in favour of the Miller claimants.

Having engaged with the central arguments raised, what arguably is the overarching nub of disagreement is this notion of 'grafting' EU Law onto domestic law and its corollary question of what the precise nexus of operation between EU and domestic law is. For the majority, EU Law is at once formally incorporated into domestic law by the operation of the ECA, but also realistically a source of domestic law in its own right. If it is treated as a source of domestic law, the prerogative's use in the context of treaty-making is otiose for the purposes of the instant litigation.

January 2017) https://publiclawforeveryone.com/2017/01/25/analysis-the-supreme-courts-judgment-in-miller/ (accessed 17 October 2017).

21 [2013] UKSC 61.

22 Finnis (n 5).

23 Kieron Beal, 'The Taxing Issues Arising in Miller' *UK Constitutional Law Blog* (14 November 2016) <https://ukconstitutionallaw.org/2016/11/14/kieron-beal-qc-the-taxing-issues-arising-in-miller/> (accessed 17 October 2017).

By contrast, Lord Reed, who sees EU Law as operating domestically *only* by virtue of the ECA, unsurprisingly takes the prerogative as the starting point for this context of international relations. This notion of starting points is thus drawn into sharp relief: If EU Law enters only via a value-neutral ECA, it falls within the realm of international relations governed by the prerogative, and the vibrancy of the prerogative is the starting point. For the majority, insofar as either a) the reality of EU Law's integration and its *sui generis* nature refract a domestic element to EU Law or b) the ECA is not value-neutral and evinces Parliamentary intention to require more than mere prerogative pronouncement for withdrawal, and EU Law can thus be clad with the breastplate of Parliamentary authority, it is apropos to begin from the bulwark of Parliamentary sovereignty and constraining of the prerogative. This notion of starting points is thus central to the case, and it is suggested that the majority's starting point is more defensible insofar as i) it better reflects the reality of how deeply intertwined and mutually-reinforcing EU Law and domestic law have become, and ii) even apart from the 'grafting' issue, the ECA itself offers a viable basis for manifesting Parliament's intent to require more than an Executive assertion of the prerogative power.

The chief difficulty herein is with i), where Elliott aptly notes the difficulty of simultaneously accepting that EU Law is now a source of domestic law in its own right, and also accepting that EU Law is part of domestic law only by the conduit of the ECA, in line with dualism in international law theory.[24] What the majority may be seeking to do, in much the same way Laws LJ in *Thoburn* sought to do with the notion of 'constitutional statutes', is to create a new category of legal sources with a more flexible and permeable nature, that can seamlessly straddle both domestic and EU Law and claim the characteristics of both.[25] It remains to be seen whether this will be borne out in subsequent cases (and in fact their Lordships were keen to assert that there was no change to the rule of recognition), but even if Elliott is right on this point, argument ii) above still operates to place Parliamentary intention squarely in the way of any assertions of the prerogative.

As the first-ever case that all eleven justices of the Supreme Court heard *en banc*, the actual effect of the *Miller* judgment, absent the raucous din of tabloid uproar and jingoism, is not all that dramatic. True, an uneasy assertion of EU Law as a source of domestic law has been made, but much of the case turned on the orthodox application of the usual arguments one might expect from judicial review cases; examinations of Parliamentary intention, recourse to the words and non-textual elements of statute to divine such intention, and whether other statutes may shed light on what was meant in the one at hand. It may be a step too far to

[24] Elliott 'Analysis: The Supreme Court's Judgment in *Miller*' (n 21).
[25] [2003] QB 151.

suggest that the case was startling in how much fanfare and writing it generated, but yet how ordinarily it was decided, but it would not be a huge step. Elliott also notes that *Miller*'s 'wider constitutional consequences might turn out to be more constrained than had perhaps been anticipated', and agrees that 'the only real novelty is the majority's view that Parliament is capable of legislating so as to institute a source of UK law independent of the legislation enacted to achieve that outcome'. With so much ink spilled on the matter, the supposed 'biggest case in fifty years' does not quite seem to live up to its billing when its internal logic is scrutinised. That said, this should not detract from the weightiness of the issues grappled with, nor should it dampen the whetstone of academic inquiry which the more contentious issues raise. It is hoped that this note has contributed, in some small way, to that ongoing questioning of how Britain's constitution continues to evolve and develop in the turbulence of the Brexit era.

Discretionary Coherence: Excluding the Private Law Liability of Public Authorities in Paradis Honey v Canada

Natalie V. Kolos*

I. Introduction

'[F]EW HAVE BEEN brave enough to articulate a unified theory of government liability.'[1] In Canada, public authorities occupy a unique space when it comes to legal liability. Public authorities are subject to the public law (for example, by way of judicial review of a governmental decision). The public law exists for the sole purpose of addressing the relationship between the government and other parties. Public authorities are also subject to private law, which generally governs the relationship between non-governmental parties (for example, a public authority may be liable in negligence).[2] The private law in Canada has adapted to deal with the government actor's unique characteristics. Where a plaintiff seeks damages, he

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1 Geoff McLay, 'What are we to do with the public law of torts?' (2009) 7 NZJPIL 373. See e.g. Tom Cornford, *Toward a Public Law of Tort* (Ashgate 2008); David Cohen and JC Smith, 'Entitlement and the Body Politic: Rethinking Negligence in Public law' (1986) Can Bar Rev 1.

2 See generally Robert M Solomon et al, *Cases and Materials on the Law of Torts* (9th edn, Carswell 2015). In private law, a public authority may be liable for performing a variety of governmental functions. This paper is only concerned with government liability for administrative functions. More particularly, government liability in tort (as opposed to breach of contract). Public authorities may only exercise an administrative function if they are empowered to exercise administrative acts. Administrative functions involve establishing and applying policies that affect the public. For example when a licensing board prohibits a certain act it is exercising an administrative function.

or she must generally proceed in private law.[3] In contrast, monetary remedies in public law are limited,[4] while other non-monetary remedies are available.[5] In this way, public authorities straddle public and private law.[6]

Before his appointment to the Federal Court of Appeal, Stratas JA observed that public authority liability in Canada was 'fraught with uncertainty, conflicting principles, and unresolved questions.'[7] Until recently, only private law actions typically resulted in a damage award for a successful plaintiff. In *Paradis Honey v Canada*.[8], Stratas JA, writing for the majority of the Federal Court of Appeal, proposed a new framework to grant monetary relief in public law Although Stratas JA did not propose completely removing private law liability of public authorities, his suggestion that a monetary award may be necessary as grounded in public law implied that private law liability of public authorities is currently inadequate. Moreover, Stratas JA suggested that 'the current law of liability – the provenance

3 Freya Kristjansen and Stephen Moreau, 'Regulatory Negligence and Administrative Law' (2012) 25 CJALP 103 at 104; *Ashby v White* (1703), 2 Ld Raym 938, 92 ER 126 (QB), rev'd Ld Raym 320, 92 ER 710 (HL) ('If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for a want of right and want of remedy are reciprocal' at 953). The maxim is not, *ubi damnum, ibi remedium*: 'wherever there is a right, there is a remedy'; Jamie Cassels and Elizabeth Adjin-Tettey, *Remedies: The Law of Damages* (Irwin Law 2014) ('From a pragmatic point of view, the issue of remedies is of utmost importance in civil litigation since a right has practical value only to the extent that it is vindicated by an adequate remedy' at 1).

4 Under Part I of the Constitution Act 1982, Canadian Charter of Rights and Freedoms, s 24(1) (the "Charter"): a claimant may obtain damages for a breach of their *Charter* rights.

5 JM Browns and M Evans, *Judicial Review of Administrative Action in Canada* (Canvasback Publishing 1998) ('The defining characteristic of the remedies of *certiorari*, prohibition, and *mandamus*, is that they are available only in respect of a breach of a duty imposed by public law' at para 1.1200).

6 McLay (n 2) 374.

7 David Stratas, 'Damages as a Remedy Against Administrative Authorities: An Area Needing Clarification' (Paper delivered at the CIAJ Annual Conference 2009) [unpublished] [Stratas 2009] (Stratas argues for a 'unified coherence' of public authority liability: 'It would be more coherent if there were a single standard of misconduct by administrative authorities that invites liability, and a single set of defences; then there would be one vision of the 'justice-governance' policy tension. At present though, the analysis above shows that we have much uncertainty and many questions surrounding a patchwork array of causes of action and defences' at 370); see also David Stratas, 'Public Law Remedies: The Next Five Years' (Paper delivered at Annual Educational Seminar at Court of Appeal for Ontario, 2004) [unpublished]. Stratas JA is not alone in this view. See *Syl Apps Secure Treatment Centre v BD* (2007) SCC 38; *Fullowka v Pinkerton's of Canada Ltd* (2010) SCC 5; see also Kristjansen (n 4) (many cases are 'contradictory' and 'in a state of lamentable confusion' at 127); *Just v British Columbia*, [1989] 2 SCR 1228; Paul Daly, 'The Policy/Operational Distinction – A View from Administrative Law', in Matthew Harrington (ed) *Compensation and the Common Law* (LexisNexis 2015); Bruce Feldthusen, 'Public Authority Immunity from Negligence Liability: Uncertain, Unnecessary, and Unjustified' (2014) 92 Can Bar Rev 211, 214, 216–217.

8 [2015] FCA 89 (Justice Nadon concurring).

and essence of which is private law … should now end.'[9] I argue that the courts should not adopt the *Paradis Honey* framework to the exclusion of private law for three reasons.[10] First, the premise under which Stratas JA operates, namely that there exists, or should exist, a rigid distinction between public and private law, is flawed. Stratas JA places too much importance on keeping the public and private separate. I assert that, to the contrary, public and private law are not so divergent. Nor should they be. There is much overlap between these two bodies of law. This overlap should not be considered problematic. Even assuming a rigid public-private divide, Stratas JA nonetheless imports private law principles into his public law claim. Ultimately, the public-private divide is impedes meaningful public authority liability and unnecessarily complicates this area of the law.

Second, the new public law claim does not remove uncertainty or confusion in the law. It creates another sphere of uncertainty under the umbrella of judicial discretion. Moreover, the new claim imports the very essence of the problematic nature of private law liability: the policy-operational distinction.

Third, the new claim potentially limits the liability of government authorities. Factual scenarios not amenable to public law may be left outside the scope of liability, thereby rendering public authorities immune from certain administrative actions. The discretionary nature of the new claim may also mean that damage awards are less frequent. This would subdue government accountability.[11] I assert that favouring discretion over the patchwork of actions in both private and public law creates a 'discretionary coherence', which does not adequately address the alleged confusion of private law liability. A public law claim is insufficient, on its own, to adequately compensate victims of administrative abuse. Private law liability of public authorities should remain.

This paper will proceed by examining the liability of public authorities before *Paradis Honey*. It will then explore critiques of the existing private law framework, followed by Stratas JA's potential solution: the novel public law framework. Finally, the paper will argue that private law liability for public authorities should remain intact for the three reasons asserted above.

[9] *Paradis Honey* (n 9) [129]–[130].

[10] Canadian courts have already relied on Stratas JA's *obiter dictum* as authority *McNally v Canada (Minister of National Revenue)* [2015] FCA 248; *R v Michaud* [2015] ONCA 585; *Carhoun & Sons Enterprises Ltd v Canada (Attorney General)* [2015] BCCA 163.

[11] On application for leave, the Crown argued that the *obiter dictum* 'significantly lowers the threshold for claimants to plead a viable claim against the Crown, contrary to existing authority. The proposed analytical framework could expose government to expanded liability in damages… unrestrained by traditional tort elements and defences' (Appellant Memorandum on Leave (n 30) at para 31). I take the opposite stance.

II. Public Authority Liability in Canada

The Crown is liable in tort in the same way as a private citizen. Historically, the Crown was immune from all tort claims at common law.[12] The Crown Liability and Proceedings Act has removed this immunity and the federal Crown is now liable in tort to the same 'as if it were a person.'[13] Consequently, the scope of the Crown's tort liability is left to be decided on common law principles.[14] Although there is no special 'public' law of torts in Canada,[15] public law principles infect the private law in this context. For example, when faced with tortious liability, the public authority can rely on the defence of legal authority. If a governmental act is authorized by statute or prerogative, then it is not tortious.[16] This principle is a fundamental component of constitutional and administrative law.[17]

Public authorities in Canada are also subject to other forms of liability like declarations and injunctions. Declarations and injunctions originated as private law remedies but may be used to challenge administrative action in public law.[18] Public authorities may also have damages awarded against it for a breach of the Canadian Charter of Rights and Freedoms.[19] The availability of a monetary remedy for a breach of the *Charter* widens the scope of the traditionally purely

[12] *National Harbours Board v Langelier* (1968), 2 DLR 81.

[13] Crown Liability and Proceedings Act, ss 2.1 and 3. Similar provisions exist in all jurisdictions in Canada, Australia, New Zealand, and the United Kingdom: Hogg (n 114) 32.

[14] Michael F Donovan, 'When Public and Private Law Collide: The Relationship Between Judicial Review and Tort Remedies in Claims Against the Federal Government' (2007) 22 Advoc Q 355.

[15] ibid, 195. See also David Phillip Jones and Anne de Villars, *Principles of Administrative Law* (5th edn, Carswell 2015) ch 13.

[16] Hogg (n 114) 188.

[17] *Entick v Carrington* [1765] 19 St Tr 1029 (KB) 189.

[18] Browns (n 6) at para 1.1200.

[19] Charter (n 5); *Guimond c Québec (Procureur général)*, [1996] 3 SCR 347; *Mackin v New Brunswick (Minister of Justice)* (2002) 209 DLR 564. As a rule, an action for damages cannot be combined with an action for a declaration of invalidity based on s 52 of the Charter; but see *Boyce v Toronto Police Services Board* (2011) CarswellOnt 2958, where the plaintiff did not have a right under s 24(1) of the Charter to bring action for damages for personal injury; ML Pinkington, 'Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms' (1984) 62 Can Bar Rev 517; K Cooper-Stephenson 'Tort Theory for the Charter Damages Remedy' (1988) 52 Sask L Rev 1; *Charter Damages Claims* (1990) (Cooper-Stephenson); Hogg (n 114) s 6.5(d); GS Gilden 'Allocating Damages Caused by Violation of the Charter: The Relevance of American Constitutional Remedies Jurisprudence' (2009) 24 Nat J Con Law 121; K Roach, 'A Promising Late Spring for Charter Damages: Ward v Vancouver' (2011) 29 Nat J Con Law 135; see also *Crown Trust Co v Ontario* (1986) 26 DLR 41 (Ont DivCt); *Dix v Canada (Attorney General)* [2003] 1 WWR 436 (remedies for breaches of Charter rights subsumed in remedy for damages for malicious prosecution).

private right to seek damages.[20] Monetary relief for a *Charter* breach has regularly been called the 'constitutional tort.'[21] *Charter* damages may serve an important gap-filling function where a *Charter* breach does not give rise to a potential tort claim.[22]

Damages for a *Charter* breach, though, are not automatically awarded. In *Ward v Vancouver*,[23] McLachlin CJ wrote for the Court that damages are an appropriate and just remedy when they serve a 'useful' function. The function is threefold: (1) to compensate the plaintiff for his loss; (2) to vindicate the *Charter* right; and (3) to deter future *Charter* breaches.[24] Since vindication and deterrence are societal goals, *Charter* damages would not necessarily be the same as common law damages.[25] Nonetheless, the availability of damages in public law, albeit somewhat limited and obscure,[26] is evidence of public law's import of private law principles.

The availability of *Charter* damages still does not explain why private law claims should be abolished for abusive administrative action.[27] A section 24(1) damage award is constrained by the availability of alternative remedies, like private actions in tort, and concern for effective performance.[28] This is evidence of the value of private law principles. Even where damages might serve compensation, vindication, or deterrence, there may be cases where countervailing considerations render a damage award unjust.[29] *Charter* damages fulfill a specific gap-filling purpose when private law is inadequate to address the wrong.

The above discussion highlights the complex patchwork of liability a public authority may face in Canada. In some circumstances, litigants prefer a monetary remedy to any other judicial review remedy in public law, which puts pressure on judicial review doctrine.[30] Stratas JA states that the essentially private law doctrine

[20] Roach, ibid.

[21] Van Harten (n 80) 1175.

[22] See *Québec Commission des driots de la personne et des droits de la jeunesse v Communauté urbaine de Montréal* [2004] 1 SCR 789; *Ferri v Ontario (Attorney General)* (2007) 279 DLR 643 (Ont CA), leave to appeal refused: [2007] SCCA 175.

[23] [2010] 2 SCR 28.

[24] ibid, [25].

[25] Hogg (n 114) 40–39 (since they are purely compensatory). Hogg notes that McLachlin CJ did not talk about the possibility of punitive damages: see *Whiten v Pilot*, [2002] SCC 18.

[26] See Raj Anand, 'Damages for Unconstitutional Actions: A Rule in Search of a Rationale' 27 NJCL 159. Damages are often nominal: *Ayangma v Prince Edward Island* (2000) 194 Nfld and PEIR; *Delude v Canada* (2000) 264 NR1 (FCA); contra *Proulx v Attorney General* (2001) 3 SCR 9.

[27] ibid Anand. See also *Mackin* (n 20): '[t]hus it is only in the event of conduct that is clearly wrong, in bad faith, or abuse of power that damages may be awarded' at [79].

[28] Kent Roach, 'Enforcement of the Charter' (2013) 62 SLCR 473. Since private law actions are a consideration under section 24(1), it is not clear how Stratas JA's proposal will impact the application of this remedy.

[29] See *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003] 3 SCR 3; but see *Henry v British Columbia (Attorney General)*, (2015) SCC 24.

[30] Feldthusen (n 8).

governing liability of public authorities 'remains chaotic and uncertain with no end in sight.'[31] Stratas JA cites one commentator, who argues that 'more recently, that trend may have been attenuated somewhat, although, over-all, the law remains mired in a lamentable state of obscurity and confusion.'[32] By removing the availability of damages in private law and transferring them to public law, it is thought that coherence will be achieved. However, public law is not that clear either. For example, the Supreme Court in *Dunsmuir* recognised that '[d]espite its clear, stable, constitutional foundations, judicial review has proven to be difficult to implement.'

In light of the potentially complex nature of public authority liability, commentators have attempted to streamline it. First, Richard Evans[33] and Tom Cornford[34] propose a regime of strict liability: anyone who suffers loss by relying on an invalid governmental decision should be entitled to damages.[35] Second, Michael Fordham and others[36] propose that courts use their discretion to award damages in judicial review.[37] Third, Cornford also proposes that tort liability should be extended to encompass a public authority's failure to conduct itself reasonably in relation to the victim.[38] A general remedy for maladministration has been refuted.[39]

[31] *Paradis Honey* (n 9) [119], [124].

[32] Kristjansen (n 4).

[33] RC Evans, 'Damages for Unlawful Administrative Action' (1982) 31 Int & Comp LQ 640, 660.

[34] Cornford (n 2) 57–58.

[35] Hogg (n 114).

[36] A variation of this proposal is to award damages directly in judicial review. In keeping with Law Commission of Wales, damages would be available for invalid decisions in judicial review proceedings if (a) the underlying statutory or common law regime conferred a benefit on the claimant; (b) there was serious fault on the part of the public authority; (c) and the claimant suffered loss as a result. The Law Commission's Proposals were heavily criticized and was abandoned (Final Report 2010). This remedy would play an ancillary role. Where the facts were not truly 'public', tort law governs. An act or omission is truly public if: (a) the body exercised, or failed to exercise, a special statutory power; or (b) the body breached a special statutory duty; or (c) the body exercised or failed to exercise a prerogative power: Law Commission (England and Wales), *Administrative Redress* (Consultation Paper 2008). See also *Monetary Remedies in Public Law* (Discussion Paper 2004) and *Remedies Against Public Bodies* (Scoping Report 2006).

[37] Michael Fordham, 'Reparation for Maladministration: Public Law's Final Frontier' (2008) 8 Judicial Review 104 and Michael Fordham, 'Monetary Awards in Judicial Review' (2009) Public Law 1. See also M Amos, 'Extending the Liability of the State in Damages' (2001) 21 Legal Studies 1.

[38] Hogg (n 114) 208–211. Cornford argues that recovery should be allowed via Principle I: reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person. Such a failure is presumed in case of transgression of an established legal rule: Council of Europe Committee of Ministers Recommendation No R (84) 15 of the Committee of Ministers to Member States Relating to Public Liability (18 September 1984).

[39] Stephen Bailey, 'Public Authority Liability in Negligence: the Continued Search for Coherence'

In Canada, an invalid exercise of statutory duty is not actionable without proof of fault.[40] Hogg, Monahan, and Wright argue that the current patchwork approach is preferable to the above reforms because (1) current approach is familiar; (2) the law already catches cases most deserving of compensation; (3) the existing torts are flexible enough to fill in any inappropriate gaps in liability.[41] Stratas JA's public law tort, which will be discussed below, can be considered an additional reform in this area.

III. The *Paradis Honey* Framework: Public Law Claim for Private Law Remedy

In *Paradis Honey*, a group of commercial beekeepers brought a class action in negligence and bad faith against the Crown.[42] The plaintiffs relied on importing honeybee 'packages' to replace colonies lost in the winter. The plaintiffs argued that the Crown was negligent in adopting a blanket prohibition on the import of bee 'packages' from the continental United States after December 31, 2006.[43] Since the legislation previously banning importing these packages expired at the end of 2006, [44] the plaintiffs argued that the public authority had no legal basis to prohibit them from importing honeybee packages once the legislation expired.

The Crown brought a motion to strike the pleading for failure to disclose a reasonable cause of action.[45] The Court of Appeal overturned the Federal Court's decision[46] to strike out a claim. While Stratas JA held that it was not 'plain and obvious' that the negligence claim would fail, examining whether monetary relief[47] could be awarded based on public law principles would be '[f]or the benefit of future cases.'[48]

Both Justice Pelletier, dissenting, and Stratas JA recognised that the facts

(2006) 26 LS 155.

40 Paul Craig, *Administrative Law* (6th edn, Sweet & Maxwell 2008) 1015–1016. Breach of statutory duty is not a tort alone, and is subsumed in negligence law: *The Queen v Sask Wheat Pool* [1983] 1 SCR 205.

41 Hogg (n 114) 213.

42 ibid, 4. Her Majesty the Queen, Minister of Agriculture and Agri-Food, and the Canadian Food Inspection Agency, collectively 'the Crown'.

43 *Paradis Honey* (n 9) [2].

44 ibid.

45 *Paradis Honey* (n 9) [114].

46 *Paradis Honey Ltd v Canada (Attorney General)* (2014) FC 215.

47 Interestingly, he never uses the word 'damages' in his portion of the judgment addressing the public law claim, only in the area addressing negligence.

48 *Paradis Honey* (n 9) [112]. In *Ishaq v Canada (Minister of Citizenship and Immigration)* (2015) FC 156, Stratas JA cited his *obiter dictum* as an example of when the common law can take a slow step forward.

could facilitate an award of administrative law remedies, or more generally public law remedies.[49] The facts appeared to be sufficiently 'public' in nature to prompt judicial review proceedings. Damages, however, are not available through judicial review.[50] To seek monetary relief, a litigant must initiate a separate civil action for damages alongside, or in lieu of, a judicial review application.[51] Reading the allegations by the plaintiff 'generously,' Stratas JA concluded that '[i]n substance, the beekeepers allege they are victims of abusive administrative action warranting monetary relief. Getting past the legal label and the technical form of the pleading, the real issue before us is the viability of a claim for monetary relief in public law.'[52]

According to Stratas JA, monetary relief against public authorities should be based on public, rather than private, law principles. Public law principles come from administrative law; in particular, judicial review.[53] In administrative law, if a public authority acts unacceptably or indefensibly the courts have discretion to grant relief.[54] According to Stratas JA, these two public law factors should govern whether monetary relief may be had by way of private action.[55] Stratas JA effectively would allow damages in public law if: (1) the public authority acts unacceptably or indefensibly in the administrative law sense; and (2) as a matter of discretion, a monetary remedy should be awarded.

Stratas JA's finding that the facts as pleaded supported a claim for monetary relief in public law, albeit in *obiter dictum*,[56] may be seen as a direct response to the private law's 'confusion' when applied to public authorities. As Stratas JA commented:

> In cases involving public authorities, we have been using an analytical framework built for private parties, not public authorities. We have been using private law tools to solve public law problems. So to speak, we have been using a screwdriver to turn a bolt.[57]

In *R v Imperial Tobacco*,[58] the Supreme Court of Canada appeared to favour the admission of novel causes of action and cautioned courts on constraining the

[49] ibid, [85].
[50] ibid, [120]–[121].
[51] ibid, [121].
[52] ibid, [115].
[53] ibid, [132].
[54] ibid.
[55] ibid, [132] and [139].
[56] The *obiter dictum*, though, was of such importance to the federal government in this case that it formed the substance of their factum to the Supreme Court of Canada. Leave to appeal was ultimately denied: [2015] SCCA No 227.
[57] *Paradis Honey* (n 9) [127].
[58] [2011] 3 SCR 45.

development of the law at an early stage:

The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *McAlister (Donoghue) v Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognised the particular claim. The court must rather as whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed at trial.[59]

Perhaps, then, the framework is reaction to the fact that when a public authority acts in a public manner, rather than in a private manner,[60] public law damages should nonetheless be available. This may especially be the case when the victim has suffered some form of financial loss, as was the case in *Paradis Honey*. Given the apparent public nature of the alleged wrongful public conduct in this case, Stratas JA may have been dissatisfied with the lack of monetary relief in public law. He may also have foreseen that the facts, although being robust enough to pass the 'not plain and obvious test', may have precluded a successful negligence claim at trial. These are all good reasons to move forward with the novel public law tort. However, as will be discussed below, the courts should consider this tort in tandem with existing private law remedies.

IV. Private Law Liability for Public Authorities Should Remain Intact

A. The Public And Private Law Are Not, And Should Not Be, Distinct

Public authority liability is not so straight-forward as to warrant an all-or-nothing approach. A public authority may wear more than one hat. In *Paradis Honey*, Stratas JA asserts the public and private law are distinct bodies of law with distinct rules: 'private matters are governed by private law and are addressed by private law remedies; public matters are governed by public law and addressed by public law remedies. This has become a fundamental organizing principle.'[61] This proposition is supported by *Dunsmuir v New Brunswick*,[62] *Air Canada v Toronto Port Authority*,[63] and *Canada (Attorney General) v Mavi*.[64] In these cases, the distinction between private and public law was drawn to determine the applicability of

[59] ibid, [21].

[60] For example, see *Dunsmuir* (n 63) where the public authority was bound by contract law. In this particular instance, the public authority was acting in a private manner.

[61] *Paradis Honey* (n 9) [129].

[62] [2008] SCC 9.

[63] [2011] FCA 347.

[64] [2011] 2 SCR 504.

judicial review. If the relationship between the public authority and the claimant is essentially private in character, private, not public, law applies to the claim.[65] For example, in *Dunsmuir*, a government dismissed one of its employees. The Supreme Court of Canada (SCC) considered the extent to which public law (judicial review) and private law (contract) applied to an employee/employer relationship when the employer was a public authority. Since contract law governed this relationship, the Court ultimately held that it was unnecessary to consider any public law duty and the employee successfully claimed contractual remedies for his dismissal.[66] While this case provides narrow support for Stratas JA's distinction between public and private law, it also suggests that these bodies of law must be considered together (in that their principles may or may not apply depending on the nature of the situation).

Although *Dunsmuir* concerns the application of judicial review, the public-private distinction drawn in *Dunsmuir* is useful for examining *Paradis Honey*. The ultimate issue the court must determine before applying judicial review is 'what is public and what is private?'[67] This determination suggests that, on a broader level, public and private law are distinct. For example, *Black's Law Dictionary* defines public law as '[t]he laws that cover administration, constitution, and criminal acts. It controls the actions [between] the citizens of the state and the state itself. It deals with the government's operation and structure.'[68] By contrast, private law 'means all that part of the law which is administered between citizen and citizen, or which is concerned with the definition, regulation, and enforcement of rights in cases where both the person in whom the right inheres and the person upon whom the obligation is incident are private individuals.'[69] A plain reading of this suggests that public authority liability should be confined to public law, in tandem with Stratas JA's holding.

In order to make a place in the law for the public law framework, Stratas JA concludes that 'nothing in law obstructs the ability of whether monetary relief in public law may be had by way of action.'[70] As an example, he states that the

[65] ibid.

[66] *Dunsmuir* (n 63) [117].

[67] Interestingly, it is not clear whether the new framework proposed by Stratas JA would eliminate the effect of contract law on public authorities. Such research would be a worthy endeavor, as removing contract liability from governments seems absurd.

[68] Bryan A Garner, *Blacks Law Dictionary*, (10th edn, West Group 2014).

[69] ibid.

[70] *Paradis Honey* (n 9) [139]–[140]. In support of this change to public authority liability, Stratas JA relies on two authorities English law: (Maurice Sunkin, 'Remedies Available in Judicial Review Proceedings' in D. Feldman (ed), *English Public Law* (OUP 2004); United Kingdom Law Commission, *Consultation Paper No. 187, Administrative Redress: Public Bodies and the Citizen* (The Law Commission 2010). In the United Kingdom, 'non-judicial review remedies' may be claimed in association with judicial review proceedings. Specifically, those seeking judicial review may claim damages but may not seek damages alone: UK Supreme Court Act 1981 s 31(4)). If a

traditional rules of Crown immunity and the Crown Liability and Proceedings Act (and its predecessors) did not prevent the damages award in 'public law cases' like *Roncarelli v Duplessis*[71] and *McGillivray v Kimber*.[72]

The Supreme Court of Canada awarded damages in both *Roncarelli* and *McGillivray* for the wrongful cancellation of licenses. In *Roncarelli*, the plaintiff restaurant owner's injury engaged public law principles in establishing the public authority's fault under the Article 1053 of the Civil Code of Lower Canada.[73] Under Article 88 of the *Code of Civil Procedure*, public authorities are granted a defence where they act within the 'exercise of their functions.'[74] In determining whether the public authority acted within this function, the court held that 'he acted well beyond the scope' of any function given to him. Indeed, it was 'so far so that it was done exclusively in a private capacity.'[75]

While both 'public law cases' (in that they engaged public law principles), in *Roncarelli* and *McGillivray*, the court awarded damages where the authorities were acting without jurisdiction. In other words, they lacked the authority and were thus likened to acting in private capacity.[76] This casts doubt on Stratas JA's reasoning in *Paradis Honey*, where the public authorities were also acting as private parties, not as public authorities, and thus damages flowed from their actions in the private capacity.

While distinct, the delineation between public and private law is not as rigid as Stratas JA's judgment or *Black's Law Dictionary* seems to suggest. Nor does it need to be. Stratas JA recognised this in *Air Canada* where he stated that when determining what is public and what is private, 'perhaps there [is] no comprehensive answer.'[77] He went on to state that in law, 'certain concepts cannot

claim for damages is made in judicial review proceedings, the court may award damages if it is satisfied that damages would have been awarded in ordinary private law proceedings. Damages are not available to compensate those who have suffered as a consequence of actions or decisions that are unlawful in the public law sense barring certain circumstances: Michael Fordham and Gemma White, 'Monetary Claims Against Public Authorities' (2001) Judicial Review 44. However, Stratas JA did not address the fact that these provisions reflect the absence in English public law of any general right to indemnity for financial loss suffered as a consequence of invalid action on the part of public bodies: *R v Secretary of State* [1991] 1 AC 603; *X Minors v Befordshire*, [1995] 2 AC 633.

71 [1959] SCR 121.

72 *Paradis Honey* (n 9) [140]; [1915] 52 SCR 146.

73 Succeeded by Article 1457 *Civil Code of Québec*, CQLR Chapter C-1991. See also David Mullan, '*Roncarelli v Duplessis* and Damages for Abuse of Power: For What Did It Stand in 1959 and For What Does it Stand in 2009?' (2010) 55 McGill LJ 587.

74 CQLR Chapter C-25.

75 *Roncarelli* (n 72) 145.

76 For a discussion of the public-private divide in *Roncarelli*, see Derek McKee 'The Public-Private Distinction in *Roncarelli v Duplessis*' (2010) 55 McGill LJ 461.

77 *Air Canada* (n 64) [56]–[57] (again, in the context of judicial review).

be reduced to clear definition given their elusive nature.'[78] Similarly, administrative law has been described as 'pervasive' because of the extensive and fundamental role of government in modern society.[79] As evidenced by the above discussion, the common law has not distinguished between public law and private law in a systematic way.[80] Absent a complete codification of public authority liability, the common law must remain flexible. As mentioned by Hogg, Monahan, and Wright, tort law provides this flexibility. Flexibility is important given the complex nature of modern governments and the variety of ways in which they can act. To exclude liability from private law would thus not allow the law to keep up with the nature of modern government.

Moreover, even if Stratas JA is correct in his rigid delineation between public and private,[81] it is not clear why damages should be awarded in public law and not private law. A strict interpretation of private and public law may contradict Stratas JA's conclusion: private law damages would belong only in private law and public law remedies would belong only in public law. Nonetheless, Stratas JA imports damages into public law. Then he holds that public authorities, being public bodies and thus governed by public law, should be confined to public law remedies and actions. This latter conclusion apparently justifies his import of damages into public law. In other words, the nature of the defendant dictates what sphere the action should live in. It is not clear, though, why this is a good reason for preferring public law instead of private law.

In order to maintain flexibility it is preferable to follow the current system, which looks at the nature of the impugned act carried out by the public authority. Even where a public authority makes a 'public' law wrong, there is no reason to exclude a parallel private law cause of action. Once the precondition of finding that government acted outside legal powers is met, ordinary private law governs the government's liability to pay damages.[82] Therefore, it should not matter, at least

[78] *Dunsmuir* (n 63) [57].

[79] Gus Van Harten, Gerald Heckman, David Mullan and Janna Promislow, *Administrative Law: Cases, Text, and Materials* (7th edn, Emond Publishing 2015), 4.

[80] Browns (n 6) para 1.1200. See Mayo Moran, 'The Mutually Constitutive Nature of Public and Private Law' in Andrew Robertson and Tang Hang Wu (eds) *The Goals of Private Law* (Oxford 2009) (public and private law are mutually constitutive).

[81] On application for leave to the SCC, the Crown argued that Stratas JA blended public and private law concepts where damages would be awarded for nothing more than 'a breach of statutory duty'. The plaintiff argued, as respondent, that the Crown mischaracterized Stratas JA's judgment. It is also important to note that, in corporate law, there is no special law of corporations that refuses to cooperate with traditional private law principles. Corporations are considered 'natural persons' in Canada under the Canadian Business Corporations Act 1985, Chapter C-44 s 15.

[82] Judicial review used to be mandatory before private law action: *Canada v Grenier* [2006] 2 FCR 287. But this has been overruled: *Canada (Attorney General) v TeleZone Inc* (2010) SCC 62.

for the sake of preventing a completely categorical approach, that the defendant is a public authority. Indeed, the Crown is subject to liability only to the extent that it voluntarily submits itself to judicial authority though legislation.[83] Courts are guardians of the rule of law, but they still need to operate within their sphere of authority.[84] This means respecting the fact that, through enabling statutes, legislatures do not grant authority over certain things to the courts themselves.[85] This would invariably include the assumption that the courts would not completely usurp the legislature. Choosing public law to the exclusion of private law is therefore unnecessary and potentially damaging. It would be equally unnecessary to provide redress for abusive administrative action in solely private law. As law professor Stephen Bailey has recognised, 'the default position is that they should be treated in the same way as other defendants … there needs to be a good reason either for restricting or expanding liability simply because the defendant is a public authority.'[86] Public and private law actions serve different objectives and are governed by different substantive and procedural rules.[87] Where facts may give rise to a tort action and judicial review, it should be left to the claimant to decide their course of action.

B. Circumventing Private Law Liability Does Not Resolve Doctrinal Confusion

Since *Donoghue v Stevenson*,[88] the law of negligence has applied to both private parties and public authorities. In Stratas JA's view, negligence law does not take into account the difference between private parties and public authorities. These differences, he says, render private law an unsatisfactory tool for assessing liability. Public authorities may be '"giant", "complex," and "serve millions."'[89] Stratas

[83] Robert M Solomon et al, *Cases and Materials on the Law of Torts* (9th edn, Carswell 2014), 802. Public authorities can act for 'public' purposes or in 'private' ways, as in the law of contract. The important point is that the law recognises the distinction, but does not recognise the exclusivity of one over the other when it comes to public authorities. It comes down to the facts and the capacity in which the public authority was acting.

[84] Colleen M Flood and Lorne Sossin, *Administrative Law in Context* (Emond Montgomery Publications 2013) at 107.

[85] ibid.

[86] Bailey (n 40) 164.

[87] ibid 165.

[88] [1932] UKHL 100.

[89] *Paradis Honey* (n 9) [119]. Given the size and reach of modern government, Stratas JA does not think it makes sense to apply the neighbour principle These characteristics aptly describe corporations as well, who do not enjoy immunity from private law suits. It is also possible that the public authority in question is one individual, such as a Minister. It is not clear how this factored into his analysis.

JA also holds that the standard of care is inadequate because it is difficult to determine a standard of care for a body with a wide variety of mandates and purposes.[90] He cites further differences, including the fact that public authorities carry out mandatory statutory obligations, which 'invariably' advantages some and disadvantages others.[91] Lastly, certain defences for private parties do not apply realistically to public authorities and there are less drastic tools to address public authorities' misbehaviour.[92] Stratas JA holds that the standard of care is inadequate because it is difficult to determine a standard of care for a body with a wide variety of mandates and purposes.[93] He cites further differences, including the fact that public authorities carry out mandatory statutory obligations, which 'invariably' advantages some and disadvantages others.[94] Lastly, certain defences for private parties do not apply realistically to public authorities and there are less drastic tools to address public authorities' misbehaviour.[95]

But it is characteristic of government that they must consider competing interests and it is uncontroversial that its conduct will affect many. This reason, alone, may not be a good one for limiting tort liability. Moreover, public authorities are not liable in negligence unless their conduct is operational and broader policy implications do not negate the duty of care. This is arguably an adequate safeguard against rampant public authority liability.[96] The negligence framework also takes into account the unique nature of public authorities. Indeed, Stratas JA recognises this: '[t]o make this analytical framework suitable … courts have tried gamely to adapt it.'[97] In essence, it is not the fact that negligence law differentiates between public authorities and private parties that is the source of Stratas JA's need for reform, but the fact that this differentiation is inadequate. As mentioned above, Stratas JA concedes elsewhere in the judgment that his new framework shares similarities to the application of negligence to public authorities.

Dicey famously asserted that no person is above the law and officials are just as liable as ordinary citizens for harmful acts done without justification.[98] But

[90] ibid, [128].
[91] ibid, [125].
[92] ibid, [128].
[93] ibid.
[94] ibid, [125].
[95] ibid, [128].
[96] See Feldthusen, 'Tilting the Balance of Power between the Courts and Government through the Common Law of Negligence' (2015) Working Paper Series University of Ottawa, Working Paper 2015-31. See also Norman Siebrasse, 'Liability of Public Authorities and Duties of Affirmative Action' (2007) 57 UNBLJ 84.
[97] *Paradis Honey* (n 9) [120].
[98] AV Dicey, *The Law of the Constitution* (10th edn, Macmillan 1967) 193–194; contra Van Harten (n 80) 1110. As noted by administrative law scholar Gus Van Harten, determining whether

this assertion has been questioned.[99] Australian legal scholar Peter Cane, cited by Stratas JA in *Paradis Honey*, states that the equality principle is imperfect in its application and courts and legislatures must attempt to arrive at the correct balance.[100] The law that applies to public authorities should take into account the way that governments differ from private parties.[101] Cane takes this notion of substantive equality[102] for governments further and argues that there should be no special head of damages available only against governments. This would certainly bring into question the tort of misfeasance in a public office,[103] which is only available against public officers.

Removing private law liability of public authorities is inconsistent with Dicey's idea of equality. In order to reconcile his new action with the Crown Liability and Proceedings Act, Stratas JA concludes that the defendant public authority must be regarded as having committed a 'tort' within sections 3(a)(i) and 3(b)(i).[104] In an interesting exercise of statutory interpretation, Stratas JA concludes that the word 'tort' 'must extend to any legally-recognized fault… otherwise… the rest of Canada would have a different liability rule. Preventing different liability rules within Canada was the point of the amendments made to these provisions…'[105]

While Cane's critique is attractive, it has been rendered moot by the legislature. Private law liability of public authorities does not arise from thin air. Recall the Crown subjects itself to tort liability. Therefore, even if good theoretical or practical arguments exist to refute the private law liability of public authorities, absent usurping the legislature's role, the statutory connection to private law should stand. Ultimately, Dicey's idea of equality provides the basis for a rational, workable, and acceptable theory of governmental liability.[106] Applying private law to government activities conforms to a widely held political ideal, circumvents

monetary relief should be available against public authorities in the same way as private parties starts traditionally with a discussion of A. V. Dicey's idea of equality: Van Harten (n 80) 1110.

99 ibid Van Harten, 111. For a functionalist critique of Dicey see John Willis, 'The McRuer Report: Lawyers' Values and Civil Servants' Values' (1968) 18 UTLJ 351; John Willis, 'Three Approaches to Administrative Law: The Juridical, the Conceptual and the Functional' (1935) 1 UTLJ 53.

100 Peter Cane, 'Remedies Available in Judicial Review Proceedings' in D Feldman (ed) *English Public Law* (OUP 2004) 915, 949.

101 ibid.

102 For a discussion of various theoretical perspectives on substantive equality, see C Edwin Baker, 'Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection' (1983) 131 University of Pennsylvania Law Review 933.

103 See generally Erika Chamberlain, *Misfeasance in a Public Office* (Carswell 2016).

104 *Paradis Honey* (n 9) [140].

105 ibid.

106 Hogg (n 114) 3–4.

practical problems,[107] and provides a satisfactory resolution of conflicts between government and citizen.[108]

C. Narrowing The Scope Of Governmental Accountability

Stratas JA's framework has provided an opportunity for litigants seeking to challenge wrongful policy decision that do not fit within existing private or public law frameworks. In *Tk'emlups Te Secwèpemc Indian Band v Canada*,[109] a group of First Nations proposed a class action against the federal Crown for injuries resulting from Residential Schools. The government argued that there was no reasonable cause of action in an attempt to strike the claim. The court held that the allegation, which was that Canada had a policy to eliminate Indians by the systematic erosion of their language and culture, was allowed to proceed. Relying on Stratas JA's *obiter dictum*, the court recognised that 'a viable argument can be made that indefensible applications of public policy may be actionable.'[110] The new action may thus serve factual scenarios that do not appear to fit within any other action: either in public or private law.

At the same time, however, the *Paradis Honey* framework arguably narrows the scope of public authority liability in situations that were traditionally brought in private law. At first glance, Stratas JA provides litigants harmed by administrative action the opportunity to obtain monetary relief in public law. It is not an application for judicial review, but rather its own freestanding action. Stratas JA's new claim, although not a judicial review application, relies largely on judicial review principles. On closer examination, the action has striking similarities to judicial review, yet overrides the requirement that damages may not be awarded on a judicial review application.

This is important because, if his action is similar to judicial review, it will inform the types of cases that will come within its ambit and therefore the scope of public authority monetary liability. Damages, traditionally awarded in private law, hold governments accountable[111] for abusive administrative decisions and

[107] M Olson, 'Dictatorship, Democracy, and Development' 1993 87 Am Poli Sci Rev 567 (it also has economic advantages).

[108] Hogg (n 114).

[109] [2015] FC 706.

[110] ibid at [39], citing Stratas JA in *Paradis Honey* (n 9). This may be consistent with the Crown's fear that liability will be widening, not becoming smaller. However, while the action may allow more claims to come forward, I still assert that the discretionary nature of the action will bar claims.

[111] Tort law is an avenue where public decision-makers may be held accountable as a more general proposition: Aloke Chatterjee, Neil Craik and Carissima Mathen, 'Public Wrongs and Private Duties: Rethinking Public Authority Liability in Canada' (2007) 57 UNCLJ 1.

compensate the victim for losses suffered.[112] Moreover, the removal of private law liability does not solve any confusion in the doctrine; it merely ignores it. The potential damaging effects of ignoring the confusion of the private law are exacerbated by the discretionary nature of awarding remedies in public law. Stratas JA's framework imports the broad discretion afforded to judges to refuse a public law remedy even where one may be warranted.[113] This is also a far removal from the nature of private law, where an appropriate remedy promptly follows a finding of liability.[114] The public law claim may very well provide some level of certainty[115] or coherence to public authority liability. However, keeping private law liability of public authorities is important given that different torts in private law address different factual matrixes. Therefore, the novel action should not be adopted by Canadian courts to the extent that adopting it would require the complete exclusion of private law liability for governmental action.

In Canada, a damage award pursuant to judicial review proceedings is not possible.[116] Indeed, a damage award is not one of the remedies that can be obtained

[112] Jefferson T Hunter, 'Constitutional Wrongs and Common Law Principles: The Case of Recognition of State Constitutional Actions against State Governments' (1997) Vand L Rev 1525. See also AM Linden, 'Tort Law as Ombudsman' (1973) 51 Can Bar Rev 155.

[113] Peter W Hogg, Patrick J Monahan and Wade K Wright, *Liability of the Crown* (Carswell 2011), 64.

[114] ibid. A claimant may also have issues enforcing judgment in public law. For an excellent article discussing the difficulty of suing a public authority see Lewis Klar, 'Tort Liability of the Crown: Back to *Canada v Saskatchewan Wheat Pool*' (2006) 32 Advoc Q 293. See also *Elipolous v Ontario* (2006) 82 OR 321; Brown and Brochu, 'Once More Unto the Breach: *James v BC* and Problems with the Duty of Care in Can Tort Law' (2008) 45 Alta L Rev.

[115] See e.g. Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 Yale LJ 823 ('Since the law should strive to balance certainty and reliability against flexibility, it is, on the whole, wise legal policy to use rules as much as possible for regulating human behavior as they are more certain than principles and lend themselves more easily to uniform and predictable application', 841–42). See also Richard Craswell and John E Calfee, 'Deterrence and Uncertain Legal Standards' (1986) 2 JL Econ & Org 279, 298–99; Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 U Chi L Rev 1175, 1178–83 (arguing that courts should decide cases in such a way that provides guidance to lower courts, future legislators, and citizens); Cass R Sunstein, 'Problems with Rules' (1995) 83 Cal L Rev 953, 957 (describing the conventional view that a target of law is clarity). See especially Anthony D'Amato, 'Legal Uncertainty' (1983) 71 California L Rev 1 (D'Amato argues that legal certainty actually decreases over time because 'legal systems favour disentangling legal rules and principles.' D'Amato defines legal uncertainty as determining the outcome of a particular case. However, his argument, in my view, can be expanded to account for certainty in a body of law. 'A related but operationally different definition of legal uncertainty has recently been used by a number of writers concerned with a specialized problem in jurisprudence. They mean by 'uncertainty' the situation that obtains in a legal system when that system contains at least one case that in principle cannot be decided in an identifiably and uniquely correct way').

[116] Chief Justice John D Richard, 'Judicial Review in Canada' (2007) 45 Duq L Rev 483, 514; Felix Hoehn, 'Privatization and the boundaries of judicial review' (2011) 54 Canadian Public Admin

in an application for judicial review under section 18 of the Federal Courts Act.[117] Moreover, the Federal Court, like most provincial courts, has no jurisdiction to award damages on an application for judicial review.[118] The reason for this seems to be that damages and any duty to mitigate usually requires evidence that is better received at trial than through summary procedure for judicial review.[119] Moreover, public law grievances will not give rise to a cause of action unless the invalid decision also involves a tort.[120] Interestingly, section 18.4(2) of the Federal Courts Act gives the Court discretion to convert judicial review into an action. This provision showcases the importance of keeping private law actions against public authorities and the non-urgency of creating a unified public law liability framework.

Generally, judicial review addresses the following jurisdictional failings: '(1) substantive *ultra vires*, such as building a highway when the legislature has authorized building a park;[121] (2) exercising a discretion for an improper purpose,[122] with malice,[123] in bad faith,[124] or by reference to irrelevant considerations;[125] (3) ignoring relevant matters; (4) making serious procedural errors;[126] and (5) making an error of law[127] in certain circumstances…'[128] The ambit of judicial review would likely be very similar to the ambit of the public law claim. While the above five scenarios may capture facts that would allow a successful misfeasance in public office claim, it is not clear that negligence cases would survive. Acting unreasonably

73 ('unlike private law, damages are not a typical remedy in administrative law', 76). This is not strictly accurate. Money can be awarded through judicial review if *mandamus* is used and a public official breaches a legal duty to remit a specific sum of money from an already allocated budget: *R ex rel Lee WCB*, [1942] 2 DLR 665 (BCCA).

117 Federal Courts Act 1985, Chapter F-7. The Federal Courts Act is a complete statutory code governing *all* aspects of the judicial review of federal administrative action, including grounds of review, available remedies, and the procedure for applying for relief: Browns (n 6) para 2.1000 [emphasis added].

118 See *Liddar v Canada* [2007] 371 NR 65 (FCA) (Federal Court lacked authority to order minister to repay interest and penalties); *Radhil Bros Fishing Co v Canada* (2000) 29 Admin LR 159 FCTD, aff'd on this point FCA 2001. ibid Browns, 5.45.

119 ibid Browns, 5.46.

120 *Sask v Eacom Timber* (2012) SKQB 226 at [134]–[137]. Where both damages and admin law remedies are sought, the application for judicial review and the action are both permitted: see *Meggeson v Canada* [2012] FCA 175, [40].

121 *Ritiche v Edmonton (City)* (1980) 108 DLR 694 (Alta QB).

122 ibid.

123 *Roncarelli* (n 72).

124 *Campeau Corp v Calgary (city)* (1978) 7 Alta LR 294 (Alta CA).

125 *Padfield v Min of Agriculture, Fisheries and Food* [1968] UKHL 1; [1968] 2 WLR 924.

126 *Quebec v Alliance* [1953] 2 SCR 140).

127 *R v Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1951] EWCA Civ 1.

128 De Villars (n 16) 7–8.

in the private law sense does not seem to be caught within the ambit of judicial review doctrine. This is problematic in light of the recognition that the courts must delicately balance the discharge of public obligations with the rights and interests of individuals.[129] If public authorities were immune from negligence, the rights and interests of individuals to be free from negligent administrative action would be completely without redress (save for cases that managed to come within public law).[130]

If negligence is left outside the ambit of the new claim, it appears Stratas JA has scarified justice for coherence. Moreover, tort law is both consistent with and capable of taking into account public and private law principles as discussed above. This issue was recognised by the Supreme Court of Canada in *Kamloops (City of) v Nielson*, where it was held that 'the activities of a public authority and its powers and duties are a matter of public law; but alongside its public law duties, a public authority may have private law duties to avoid causing damage to others…'[131] If a public authority can act as private parties do, such as through contract, and be liable in contract,[132] it is not clear why negligence should be removed. If a public authority is negligent, they should be liable in negligence.[133] To hold otherwise, is to leave a gap in the law where none existed before.

Stratas JA does not remove himself entirely from the incoherence of private law. Following his two-step framework, it becomes apparent that there are two discretionary hurdles that a claimant must pass in order to get damages. First, the margin of appreciation afforded to the public authority 'depends on the circumstances.'[134] The margin of appreciation is narrow where the public authority's decision is 'clear-cut' or constrained by law. In these cases, the court is 'more likely to reach the remedial stage.'[135] On the other hand, absent bad faith, the remedial stage would rarely be reached where the public authority had wide discretionary authority. [136] This distinction is eerily similar to the policy-operational distinction in negligence. Stratas JA also explicitly recognises this as characteristic of negligence

[129] Kristjansen (n 4).

[130] *Association des crabiers acadeiens Inc v Canada (Attorney General)* (2009) FCA 357, [32].

[131] *Kamloops (City of) v Nielsen* [1984] 2 SCR 2.

[132] *Dunsmuir* (n 63) [13].

[133] For example, in *TeleZone* (n 83), public and private law present distinct and separate justiciable issues at [28]–[30].

[134] ibid.

[135] *Canada (Attorney General) v Abraham* (2012) FCA 266, 440 NR 201; *Canada (Attorney General) v Almon Equipment Limited* (2010) FCA 193, [2011] 4 FC 203; *Canada (Public Safety and Emergency Preparedness) v Huang* (2014) FCA 228.

[136] *Rotherham Metropolitan Borough Council v Secretary of State for Business Innovation and Skills* [2015] UKSC 6.

(therefore not avoiding problem with private law).[137] But he seems to conclude that even so, it is better to understand using public, not private, law.

Second, awarding damages based on public law principles is potentially problematic. If the remedial stage is reached, the court will use their discretion to determine if damages would be appropriate.[138] In contrast to private law damage awards, monetary relief in public law has a discretionary character. Judicial review is fundamentally discretionary, in the way that appeals are not, because the court has the discretion to refuse a remedy.[139] Stratas JA's new framework has the same discretionary character. Public authorities are afforded a margin of appreciation regarding their decision.[140] If the decision is outside of the margin, the court may consider a remedy. If the decision is within a range of acceptability or defensibility, then a remedy is precluded.[141] By importing judicial review principles, remedial discretion in his new claim is informed 'by an examination of the acceptability and defensibility of the decision, the circumstances surrounding it, its effects, and the public law values that would be furthered by the remedy in the particular practical circumstances of the case.'[142] Public law values are principles inherent in administrative law and are repeatedly asserted in case law, particularly when courts explain their exercises of discretion.[143] These values include the rule of law, the principles of good administration (including proper, fair, pragmatic, efficient, and effective regulation and decision making), the democratic principle (including Parliamentary supremacy), and the separation of powers.[144] The above considerations, in my view, do not render the discretion any less confusing than determining whether a public authority was negligent.

Hogg, Monahan, and Wright have doubted the usefulness of judicial discretion in some cases, as it simply postpones difficult decisions, leaving it to the courts to develop the principles that ought to apply in determining whether to award compensation for invalid decisions beyond the situations in which damages

[137] *Paradis Honey* (n 9) [137].

[138] ibid, [138].

[139] Sossin (n 85) 107–108; Browns (n 6) 2–44ff; *Immeubles Port Ltee v Lafontaines (village)* (1991) 1 SCR 326.

[140] ibid.

[141] ibid.

[142] *D'Errico v Canada (Attorney General)* (2014) FCA 95.

[143] See generally Peter Cane, 'Damages in Public Law' (1999) 9 Otego L Rev 489; Peter Cane, 'Theory and Values in Public Law,' in Paul Craig and Richard Rawlings (eds) *Law and Administration in Europe: Essays for Carol Harlow* (OUP 2003).

[144] *D'Errico* (n 143) [15]–[21]; *Wilson v Atomic Energy of Canada Limited* (2015) FCA 17 [30], citing Paul Daly, 'Administrative Law: A Values-Based Approach' in Mark Elliott and Jason Varuhas (eds) *Process and Substance in Public Law Adjudication* (Oxford 2015); *Community Panel of the Adams Lake Indian Band v Adams Lake Band*, 419 NR 385(FCA) at [33]–[37]; *Stemijon Investments Ltd v Canada (Attorney General)*, 341 DLR 710, [52].

in tort are already available.[145] Indeed, a court has subsequently applied Stratas JA's new framework with a confusing result. In *Patrong v Banks*,[146] the plaintiff was shot by a well-known criminal and suffered debilitating injuries. The plaintiff brought an action in negligence, misfeasance in a public office, and a *Charter* challenge. The plaintiff argued that Toronto Police Service was negligent in not arresting the criminal during a surveillance sting. The criminal proceeded to shoot the plaintiff. On a motion to strike, the court considered *Paradis Honey* in the context of the negligence analysis.

The court stopped to consider the difficulties of the proximity analysis in this case. The court recognised that, although the negligence pleading was ultimately successful, the negligence analysis had little bearing on the real issue: 'should the police compensate the plaintiffs …?'[147] In the court's view, the question of proximity turns on broader considerations in public authority liability cases since the government serves the public at large under public law duties.[148] The court recognised that Stratas JA's *obiter dictum* takes the point even further: by ending the 'fiction' of private law liability for governments. The court in *Patrong* understood Stratas JA's framework as 'an application for judicial review involving remedial discretion and a remedial monetary mandate.'[149] The court held that Stratas JA was 'absolutely correct' in pointing out the unsuitability of making decisions based on narrow private law factors. The fact that the defendant is the government broadened the scope of the inquiry.[150] While allowing the negligence claim, the court held that a better view would be to consider a range of factors in determining '*whether it is fair and reasonable that the police ought to compensate the plaintiffs for the losses alleged*.'[151] Balancing all the relevant factors, it was 'fair, just, and reasonable' that the defendants ought to compensate. Stratas JA's claim thus provides ammunition for a further dilution of recognised legal principles.

The new public law action may be even more problematic if the law were to reach a stage where private law damages are not available. However, Stratas JA does provide some guidance for the courts with respect to the new action. First, he emphasizes that compensation is the goal of monetary relief in public law. In exercising this discretion, the courts must keep the compensatory goal of damages in the foreground.[152] Put another way, monetary relief will neither be necessary nor

[145] Hogg (n 114) 208.
[146] (2015) ONSC 3078. Leave to appeal allowed: (2015) ONSC 6167.
[147] ibid, [75].
[148] ibid.
[149] ibid.
[150] ibid, [77].
[151] ibid, [78] [emphasis in original].
[152] *Paradis Honey* (n 9) [143]. Interestingly, he never actually uses the word 'damages'. I expect this is

appropriate in some cases, and in others it may be the only way to accomplish the compensatory objective.[153]

Second, he suggests that the intention or nature of the administrative conduct is relevant. The 'quality' of the public authorities conduct must be considered because monetary relief in this context is a mandatory order against a public authority.[154] In public law, mandatory orders against public authorities can only be made to fulfill a clear duty, redress significant maladministration, or vindicate public law values.[155] The effect of this is that his new action appears to cover only the factual claims falling on the 'public' side. Similarly, judicial review will not move forward if the facts appear 'private'.

Lastly, Stratas JA emphasizes the importance of the governments' role. He holds that concerns about indeterminate liability,[156] and leaving public authorities free to exercise their legislative mandates must also form part of the remedial discretion.[157] But this is also recognised in tort via the policy-operational distinction. On examination of these three features, it is not clear how the problems with private law, particularly negligence, are avoided, especially since his framework is similar to negligence liability for public authorities. It is also far from clear how this claim would apply in practice.

V. Conclusion

Private law liability of public authorities should be maintained absent a clear and convincing reason to discard it. There may even be good reasons to embrace uncertainty in the law,[158] especially where a potential solution does not do much to alleviate such uncertainty. Moreover, the public-private distinction is elusive. It is not the type of divide that either is, or warrants, a categorical approach. I echo Hogg Monahan and Wrights' conclusion that, before adopting a reform in this area of the law, it must be clear that it is better than the approach that precedes it.

Courts should proceed with caution when considering adopting Stratas JA's proposal in its entirety. Providing another avenue for litigants to seek monetary relief from public authorities through a public action may be positive step for government accountability and access to justice. This step, however, is positive only

because it sounds too much like private law.

153 ibid, [144].

154 ibid. This 'intention' is similar to the bad faith requirement in s 24(1) for Charter damages.

155 ibid.

156 This is addressed in negligence in the duty of care analysis. See *Cooper v Hobart* (2001) SCC 79.

157 *Paradis Honey* (n 9) [146].

158 See Alon Harel and Uzi Segal, 'Criminal Law and Behavioral Law and Economics: Observations on the Neglected Role of Uncertainty in Deterring Crime' (1999) 1 Am L & Econ Rev 276, 277.

if it works in conjunction with private law. I recommend keeping his new public law tort alive and using it in tandem with the current framework. It would make an interesting addition to the current patchwork of actions available to claimants. That being said, the public law tort should not be available at the expense of the already-existing private law framework. To warrant a complete renovation of public authority liability, coherence must be more than discretionary.

The Tabbane Case: What the ECtHR Said and What It Didn't

*Andreas Vassiliou**

I. Introduction

ARBITRATION IS PROGRESSIVELY becoming the primary means for resolving international commercial disputes in today's world. The rationale behind this trend is the desire to avoid proceedings before national courts, which do not provide the advantages of neutrality, confidentiality, technical expertise, and finality that an arbitral award usually guarantees.[1] In this vein, it is a common practice for parties to a commercial contract to agree not only to resolve their disputes before arbitral tribunals, but also to waive in advance their right to appeal against the arbitral awards in a domestic court. Such waivers provide the parties with the choice to settle their disputes definitively at the end of the arbitration proceedings, without having to spend considerable time and money relitigating the dispute before a court.[2]

However, the waiver of the right to have recourse before a national judge raises concerns over the conditions under which such renunciations are valid, and gives rise to a possible violation of the rights enshrined in Article 6 of the European Convention on Human Rights (ECHR).[3] This paper examines these issues in light of the jurisprudence of the Swiss Federal Tribunal as well as the recent case of *Tabbane v Switzerland*, which was adjudicated by the European Court of Human Rights (ECtHR) on 1 March 2016.[4]

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1 M L Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, CUP 2012) 3.

2 G J Meijer & R H Hansen, 'Arbitration and financial services' in N Dorn (ed), *Controlling Capital: Public and Private Regulation of Financial Markets* (Routledge 2016) 206.

3 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted in 4 November 1950, entered into force 3 September 1953).

4 *Tabbane v Switzerland* App no 41069/12 (ECtHR, 1 March 2016).

II. The Case Law of the Swiss Federal Tribunal Before the Tabbane Case

While numerous jurisdictions have enacted legislation that permits *ex ante* waivers of the right to appeal against arbitral awards,[5] only two of them have a record of its application: the Russian Federation, in relation only to domestic arbitration proceedings,[6] and Switzerland.[7]

In the international arbitration realm, it is common for companies and business people to prefer Switzerland as the seat of arbitration. This is because of the country's liberal arbitration legislation and, more specifically, the provision of Article 192 of the Swiss Private International Law Act (PILA), which stipulates that "[i]f none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Article 190(2)". Two conditions are established in this Article: both parties must reside outside Switzerland, and the renunciation of their right to appeal must be written and express.

With regard to the condition of the "express" waiver, the Swiss Federal Tribunal has since 1990 adopted a strict interpretation, looking for a clear and outright statement of the parties.[8] As a result, the Tribunal has held invalid waivers which either provided that the arbitral award would be "final"[9] or merely "excluded" appeals to state courts.[10] Interestingly, it was not until 2005 that the Federal Tribunal accepted as valid a waiver which stipulated that "all and any awards or other decisions of the arbitral tribunal … shall be final and binding on the parties who exclude all and any rights of appeal from all and any awards insofar as such exclusions can validly be made".[11] According to the Swiss court, although an explicit reference to the provision of Article 192 in the text of the waiver is

5 See indicatively the domestic law of Belgium (Judicial Code, art 1718), England (Arbitration Act 1996, s 69), Sweden (Arbitration Act 1999, s 51), Tunisia (Tunisian Code of Arbitration 1993, art 78(6)) and Turkey (International Arbitration Law, art 15(A)).

6 See the Russian Federation Law on International Commercial Arbitration, art 34(1).

7 See the Swiss Private International Law Act, art 192.

8 For a detailed overview of the Swiss Tribunal's jurisprudence see N Krausz, 'Waiver of Appeal to the Swiss Federal Tribunal: Recent Evolution of the Case Law and Compatibility with ECHR' (2011) 28 Journal of International Arbitration 137.

9 Swiss Federal Tribunal, 19 December 1990, *S. v K. Ltd and ICC Arbitral Tribunal in Zurich,* ATF 116 II 639.

10 Swiss Federal Tribunal, 2 July 1997, *L. Ltd. v The Foreign Trade Association of the Republic of U* case no 4P.265/1996.

11 Swiss Federal Tribunal, 4 February 2005, *A. v B., C. and UNCITRAL Arbitral Tribunal* case no 4P.236/2004, ATF 131 III 173.

not required, it is necessary that "the express declaration of the parties reveals, indisputably, their intention to waive their right to any challenge of the award".[12] This decision undoubtedly marked a shift in the Tribunal's jurisprudence towards a less restrictive approach to the issue, and this approach has been reaffirmed in numerous recent cases.[13]

However, another condition for the validity of the *ex ante* waivers has emanated from the Tribunal's jurisprudence. Specifically, even an expressly stated intention of the parties to waive the annulment of an award will not suffice, if the consent of one of them was given under any form of duress. This was the ruling of the Federal Tribunal in the case of a contract between a sports federation and a professional athlete, who had no real choice but to sign such a waiver clause.[14] Therefore, even if the formal requirements provided for in Article 192 PILA are met, a waiver clause that has been concluded without the free consent of the parties is invalid.[15]

All in all, through this case-by-case approach of the Swiss Federal Tribunal,[16] it has been established that a waiver can ultimately only be held valid if it is explicit and voluntary. These criteria have been recently reaffirmed by the ECtHR.

III. The Tabbane Case

In the case of *Tabbane v Switzerland*, the ECtHR was called upon for the first time to rule if a waiver of recourse to a court against an arbitral award is compatible with Article 6(1) ECHR, which enshrines the right to a fair trial, including the right

[12] For a review of the Tribunal's judgment see D Baizeau, 'Waiving the right to challenge an arbitral award rendered in Switzerland: caveats and drafting consideration for foreign parties' [2005] International Arbitration Law Review 69.

[13] See, among many, Swiss Federal Tribunal, 6 March 2007, *X S.p.A v Y.* case no 4A_500/2007, ATF 134 III 260, which deemed valid a waiver stipulating that "the parties renounce from now any ordinary or extraordinary appeal against the decision which will be issued", and Swiss Federal Tribunal, 21 March 2011, *X. v Y. SA* case no 4A_486/2010, which considered sufficient the following statement: "The decision of the arbitration shall be final and binding and neither party shall have any right to appeal such decision to any court of law".

[14] Swiss Federal Tribunal, 22 March 2007, *Guillermo Cañas v ATP Tour and Court of Arbitration for Sport (CAS)* case no 4P.172/2006, ATF 133 III 235.

[15] See G Kaufmann-Kohler & A Rigozzi, *International Arbitration: Law and Practice in Switzerland* (OUP 2015) 444–445.

[16] For more decisions of the Swiss Tribunal see the cases cited in L Guglya, 'Waiver of Annulment Action in Arbitration: Progressive Development Globally, Realities in and Perespectives for the Russian Federation (Different Beds – Similar Dreams?)' in A J Bělohlávek & N Rozehnalová (eds), *Czech (& Central European) Yearbook of Arbitration: Party Autonomy versus Autonomy of Arbitrators* (Juris 2012) 94.

of access to a court.[17]

The case concerned a Tunisian businessman, Mr. Tabbane, who had been ordered by an arbitral award to transfer his shares in a holding company to the French company Colgate-Palmolive. The arbitration clause in the agreement between the two parties provided that "the decision of the arbitration shall be final and binding and neither party shall have any right to appeal such decision to any court of law". However, Mr. Tabbane appealed to the Swiss Federal Tribunal to annul the award, submitting, *inter alia*, that the provision of Article 192 PILA is inconsistent with the ECHR.[18]

The Tribunal held that the application was inadmissible, given that the Article 192 PILA requirement of an express statement had been met. It further noted that neither the letter nor the spirit of Article 6(1) ECHR is opposed to renunciations of judicial recourse against an arbitral award.[19]

The case was finally brought before the ECtHR, which settled the dispute. The Court reiterated that the right of access to a court, enshrined in Article 6(1) ECHR, does not necessarily encompass the right to have access to a court of the classic type, integrated within the standard judicial system.[20] Therefore, according to the Court's settled jurisprudence,[21] submitting disputes to arbitration is not incompatible with Article 6(1) ECHR.

Moreover, the ECtHR referred to its well-established distinction between compulsory and voluntary arbitration.[22] Whereas compulsory arbitration must comply with the guarantees provided for in Article 6(1) ECHR,[23] in voluntary arbitration parties are entitled to waive certain rights guaranteed by the ECHR as

[17] The ECtHR has declared that "the right of access [to a court] constitutes an element which is inherent in the right stated by Article 6 para 1", in: *Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) para 36.

[18] For a summary of the principal facts of the case, see ECtHR Press Release, 'The impossibility of appealing against a verdict issued by the International Court of Arbitration was not in breach of the Convention' (24 March 2016) <http://hudoc.echr.coe.int/eng?i=003-5335030-6651343> accessed 12 February 2017.

[19] Swiss Federal Tribunal, 14 January 2012, *X. v. Z. SA* case no 4A_238/2011.

[20] See the case cited in the *Tabbane* judgment of *Lithgow and others v the United Kingdom* App nos 9006/80, 9262-9266/81, 9313/81, 9405/81 (ECtHR, 8 July 1986) para 201.

[21] See the cases cited in the *Tabbane* judgment of *Suda v Czech Republic* App no 1643/06 (ECtHR, 28 October 2010) para 48; *Deweer v Belgium*, App no 6903/75 (ECtHR, 27 February 1980) para 49.

[22] For the distinction between the compulsory and voluntary arbitration in Switzerland see A Bucher, *Commentaire romand: Loi sur le droit international privé - Convention de Lugano* (Helbing Lichtenhahn Verlag 2011) ch 12 <www.andreasbucher-law.ch/NewFlash/Commentaire-romand.html> accessed 12 February 2017.

[23] See the case cited in the *Tabbane* judgment of *Bramelid and Malmström v Sweden* App nos 8588/79, 8589/79 (ECtHR, 12 October 1989).

long as minimum safeguards are adhered to[24] and the renunciation is freely made, lawful, and unequivocal.[25]

In applying those criteria, the Court noted that the waiver was accompanied by minimum safeguards appropriate to its gravity, since Mr. Tabbane was able to take part in the appointment of the arbitral tribunal. It also found that Mr. Tabbane gave his consent under no form of duress. Lastly, it upheld the Federal Tribunal's finding that the wording of the waiver ("neither party shall have any right to appeal such decision to any court of law") was unequivocal.

On the main issue of the complaint that the provision of PILA is inconsistent with the Convention, the ECtHR declared that it would not rule generally upon the compatibility of a national legislation with the Convention, and moved on to examine whether in the current case the restrictions imposed on Mr. Tabbane's rights served a legitimate aim and were proportionate to this end.[26]

Specifically, the Court observed that the main objective of the Swiss legislation has been the promotion of Switzerland as a venue for arbitration. Hence, the aim of the restrictions was legitimate. Furthermore, given that the parties were not obliged but free to take the opportunity provided by the Swiss legislation to renounce judicial recourse, the restrictions were found to be proportionate. Besides, the Court noted that, in any case, the recognition and enforcement of an arbitral award could be refused by the Swiss courts on the grounds of the New York Convention of 1958 (NYC), which, according to Article 192(2) of the PILA, apply by analogy.[27] Thus, the Court implied that, in employing the proportionality test, it took into account that the arbitral award could still be quashed at the enforcement stage on the grounds of public policy enshrined in Article V(2)(b) NYC.

Interestingly, the Court also addressed a second complaint regarding the refusal of the arbitral tribunal to order an expert in the evidentiary process at the request of Mr. Tabbane. The ECtHR issued that, even if the guarantees of Article 6 ECHR were applicable in the case, this refusal did not constitute a violation of the principle of equality of arms. Mr. Tabbane had sufficient access to the evidentiary documents and requested an additional expert for their examination; thus, he was not put at a substantial disadvantage compared with the Colgate-Palmolive

[24] See the case cited in the *Tabbane* judgment of *Pfeifer and Plankl v Austria* App no 10802/84 (ECtHR, 25 February 1992) para 37.

[25] See the cases cited in the *Tabbane* judgment of *Eiffage SA and Others v Switzerland* App no 1742/05 (ECtHR, 15 September 2009); *Transportes Fluviais do Sado SA v Portugal* App no 35943/02 (ECtHR, 16 December 2003).

[26] For the principle of proportionality in the jurisprudence of the ECtHR see A Mowbray, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights' (2010) 10(2) Human Rights Law Review 289.

[27] See Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959).

company. Therefore, the Court found that both complaints were manifestly ill-founded and declared the application inadmissible.

IV. A Critique of the Decision

The *Tabbane* case was the first time that the Court ruled upon the compatibility of the *ex ante* waiver of the right to challenge an arbitral award before a domestic court with the Convention. To reach its conclusion, the Court applied the criteria for the validity of such waivers, as developed by the Swiss Federal Tribunal[28] and its own previous jurisprudence. Although the conclusion of the ECtHR has been appraised positively,[29] the line of reasoning of its decision and the examination of the second complaint lodged in the same case raise some intriguing considerations.

A. The Line of Reasoning—An Unnecessary Step

The Court found that the agreement of the parties to exclude the annulment of the award was freely made, lawful, and unequivocal, and hence held that Mr. Tabbane validly waived his right of access to justice, pursuant to Article 6(1) ECHR. However, it did not stop its reasoning at this point; rather, it moved on to rule upon whether the restrictions imposed on Mr. Tabbane's right to a fair trial were proportionate to the legitimate aim sought.

Nevertheless, this proportionality test requires foremost that some kind of restriction has, in fact, been imposed by a State on the rights of individuals.[30] *In casu*, the provision of Article 192 PILA establishes no such restriction. As the Court itself observed, the aforementioned article provides individuals with the choice to exclude the annulment of an arbitral award. Essentially, it respects the autonomy of the parties during the arbitration proceedings, giving them the choice to avoid at all the lengthy and costly litigation procedures before national courts.[31] Thus, there was no reason for the Court to employ the proportionality test and examine if a fair balance has been struck between the protection of the individual's right to a fair trial and the requirements of the general interest. If the right of access to

[28] For an overview of the general rules developed by the Federal Tribunal see L Lévy & T Bersheda, 'Recent Swiss Developments on Exclusion Agreements' in D Bray & H L Bray (eds), *International Arbitration and Public Policy* (Juris 2014) 120.

[29] N Voser & A George, 'ECtHR: Waiver of Recourse against International Arbitral Award Not Incompatible with ECHR' (*Kluwer Arbitration Blog*, 31 March 2016) <http://kluwerarbitrationblog.com/2016/03/31/ecthr-waiver-of-recourse-against-international-arbitral-award-not-incompatible-with-echr/> accessed 12 February 2017.

[30] See O J Settem, *Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings: With Special Emphasis on the Balance Between Procedural Safeguards and Efficiency* (Springer 2016) 27ff.

[31] For the core principle of party autonomy in Swiss law see G Kaufmann-Kohler & A Rigozzi (n 15) 84ff.

justice has been waived voluntarily, there is no right that has been restricted.

B. The Second Complaint – An Issue Never Addressed

The second complaint of Mr. Tabbane, alleging the violation of the principle of equality of arms during the arbitration process, gave the Court the unique chance to rule whether and how the guarantees of Article 6 ECHR are applicable in arbitration proceedings.[32] The Court, however, avoided addressing the issue. It declared that even if the arbitral tribunal was obligated to guarantee the rights of the parties under Article 6 ECHR, the equality of arms enshrined therein was not infringed in this case. It thus seemed willing to examine if the guarantees of a fair trial were met in the arbitration proceedings, without clarifying whether the guarantees of Article 6 ECHR were of general applicability to arbitration proceedings. As a result, the question of what the decision of the Court would be if the arbitral award contravened the guarantees of the ECHR still remains.

To give a proper answer, we should start our argumentation by considering that only States, and not private entities such as arbitral tribunals, can be parties to the ECHR and hence be held responsible for its violation.[33] Therefore, the follow-up question that arises is whether Switzerland could be held responsible in this case.

To address this, we should first turn our focus on the specific obligations arising from the ECHR, which could have been infringed in the case at hand. Given that Mr. Tabbane had renounced his right of access to a court, enshrined in Article 6(1) ECHR, it could be argued that Switzerland could not have violated that provision. Nonetheless, an individual's waiver of his right to have recourse to a court does not, without more, mean that he has waived his inalienable right to have a fair hearing, which is also established in Article 6(1).[34] This has been reaffirmed by the jurisprudence of the ECtHR, which has held that "a waiver should not

[32] See S Besson, 'Arbitration and Human Rights' (2006) 24 ASA Bulletin 395, 402, who supports that Article 6 of the ECHR applies directly to arbitrators. For a different approach see A Samuel, 'Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights: An Anglo-Centric View' (2004) 21 Journal of International Arbitration 413, 426, who finds no good reason why the ECHR should play any significant role, as long as basic notions of fairness are respected.

[33] Article 1 of the ECHR provides that it is the States-parties that "shall secure to everyone within their jurisdiction the rights and freedoms".

[34] J C Landrove, 'European Convention on Human Rights' Impact on Consensual Arbitration: An Etat des Lieux of Strasbourg Case Law and of a Problematic Swiss Law Feature' in S Besson et al (eds), *Human Rights at the Center* (Schulthess 2006) 72, 86; M V Benedettelli, 'Human rights as a litigation tool in international arbitration: reflecting on the ECHR experience' [2015] Arbitration International 631, 646–7.

necessarily be considered to amount to a waiver of all the rights under Article 6".[35] Thus, Switzerland was still under an obligation to protect the other guarantees set out in Article 6 ECHR, although the right of access to a court had been waived in the present case. It could do so by enacting a legal framework, which would give the national courts the authority to ensure that the non-waivable guarantees of Article 6 ECHR are respected during the arbitration proceedings.

In this light, notwithstanding that Swiss legislation provides the parties with the choice to exclude the annulment of the award by the state courts, judicial review of the award is still available at the enforcement stage.[36] In fact, as the ECtHR noted,[37] Swiss law stipulates that the enforcement of the arbitral awards can be refused by the state courts on the grounds of international public policy of the NYC.[38] These grounds include, *inter alia*, violations of the safeguards for a fair hearing enshrined in Article 6 ECHR, as widely accepted in the scholarly community.[39] Thus, the Swiss courts would be able to refuse the enforcement of the award, should the right of Mr. Tabbane to a fair hearing were violated in the arbitration proceedings. As a result, Swiss law provides for an adequate form of judicial review of the award at hand within its jurisdiction. Consequently, even if the arbitral award ran counter to the right to a fair hearing, Switzerland would still be in compliance with its ECHR obligations, since its courts had the authority to refuse the enforcement of such an award.[40]

[35] *Osmo Suovaniemi and others v Finland* App no 31737/96 (ECtHR, 23 February 1999).

[36] This consideration is also in line with the European Commission's jurisprudence, which has suggested that the fact that the award has to be recognized by the national courts may entail the responsibility of the state under the ECHR. See *Jakob BOSS Söhne KG v Germany* App no 18479/91 (Commission Decision, 2 December 1991).

[37] This remark was paradoxically made with regards to the first and not the second complaint, to which it truly pertains. See *Tabbane v Switzerland* (n 4) para 35.

[38] Art 192(2) of the Swiss Private International Law Act provides that "[w]here the parties have excluded all setting aside proceedings and where the awards are to be enforced in Switzerland, the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy".

[39] See S Besson (n 32) 402 and the scholars cited in fn 32; M V Benedettelli (n 34) 657; J C Landrove (n 34) 83; N Krausz (n 8) 157. The European Court of Justice has also stated, with regards to Article 27 of the Brussels Convention of 1968, that the rights established in Article 6 ECHR pertain to international public policy. See Case C-7/98 *Dieter Krombach v André Bamberski* [2000] ECR I-1956, para 44.

[40] It should be duly noted that this would not be the case if an arbitral tribunal denied jurisdiction or dismissed all the claims of the applicant in the arbitration. In that case, the award could not *per se* be enforced and, since there would no enforcement stage, the Swiss courts would not be able to review if the rights of the applicant were violated. It follows that under certain circumstances – *ex ante* waiver of the annulment, *per se* not enforceable award and violation of rights in the arbitration proceedings – Switzerland could be held responsible for a breach of its obligation to protect the rights established in the ECHR. For this probably rare case scenario see also J C Landrove (n 34) 99; N Krauz (n 8) 153.

V. Concluding Remarks

The ECtHR has settled the issue of the compatibility of the waivers to appeal against arbitral awards with Article 6(1) ECHR, declaring that there is no violation of the ECHR so long as the waiver is freely made, lawful, and unequivocal. This decision does not come as a surprise. It is in line with both the previous case law of the ECtHR and the Swiss jurisprudence on the matter. What is important is that, contrary to the approach of the Swiss Federal Tribunal, which rules upon the validity of the waivers on a case-by-case basis, the ECtHR has set out some general criteria governing those renunciations.

Despite the deficiencies in the ECtHR's line of reasoning, which should be reexamined, the decision has provided some vital guidelines on the issue of the free consent to waivers. When the dispute concerns business-to-business relationships, it seems that the question of whether the waiver is freely made or not should *prima facie* be answered in the positive. This is because a fair balance of competing interests is easier to be struck during a contract negotiation between businesses rather than between individuals and organizations such as athletes and sports associations, the latter of which very often impose terms on the former, including waiver clauses.

Lastly, the ECtHR chose not to answer the crucial question of whether or how the guarantees of the ECHR apply in arbitration proceedings. Nevertheless, a closer look at the jurisprudence shows that States are under a concrete obligation to protect the inalienable rights of Article 6(1) ECHR in arbitration proceedings by enacting a legal framework that assures that every arbitral award is reviewed by the state courts, either at the annulment stage or at the enforcement stage.

The Watson Case: Another Missed Opportunity for Stricto Sensu Proportionality?

Ioannis Kouvakas*

I. Introduction

On 21 DECEMBER, 2016, the Grand Chamber of the Court of Justice of the European Union (CJEU) handed down its judgment in the *Watson* case.[1] The case was brought in 2014 by Tom Watson MP and David Davies MP, from which the latter withdrew on his appointment to Government.

The judgment adds to the debate of the compatibility of mass surveillance with international and EU law, and could be considered to advance the approach adopted by the Grand Chamber of the Luxembourg Court in the *Digital Rights Ireland* case.[2] The case concerned the Data Retention Directive 2006/24,[3] which laid down the obligation for the providers of publicly available electronic communication services or of public communications networks to retain all traffic and location data "in order to ensure that the data were available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law." The Data Retention Directive was held to create a disproportionate interference with the fundamental rights enshrined in Articles 7 and 8 of the EU Charter, and was hence declared invalid.

Following the judgment in *Digital Rights Ireland*, the United Kingdom enacted the Data Retention Investigatory Powers Act 2014 (DRIPA), which sought to

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1 Joined Cases C–203/15 and C–698/15 *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson* [2016] ECR I–970 (Watson case).

2 Joined Cases C-293/12 and C-594-12 *Digital Rights Ireland Ltd v Minister for Communications*, *Marine and Natural Resources & Others and Seitlinger and Others* [2014] ECR I-238.

3 Directive (EC) 2006/24 of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54 (Data Retention Directive).

immediately restore the powers contained in the Directive. It enabled the Secretary of State to adopt, without any prior authorisation, measures that would require public telecommunications services operators to retain all traffic and location data relating to any postal or telecommunications service for a period of up to 12 months. Watson MP and Davies MP brought a challenge against DRIPA, and the High Court of Justice (Divisional Court) held that the requirements on the retention of communications data and access to such data laid down by the CJEU in the *Digital Rights Ireland* case should be considered mandatory and applicable to the legislation of Member States. In an order dated 17 July, 2015, the Divisional Court declared section 1 of DRIPA inconsistent with EU law, mainly because the provision was identical to the ones contained in the Data Retention Directive.

The Secretary of State for the Home Department appealed against the decision of the High Court. The Court of Appeal considered that, in *Digital Rights Ireland*, the CJEU was only examining the compatibility of a Directive, and not the compatibility of national legislation with EU law, and did not therefore intend to lay down mandatory requirements that each member state should incorporate, in its domestic provisions governing retention and access to communications data. Instead, it decided to stay the proceedings and refer two questions to Luxembourg for a preliminary ruling.

The case bears significantly on the future of mass communications data retention in the United Kingdom, as well as in other member states which have enacted similar legislation. Although DRIPA has already expired, the recently minted Investigatory Powers Act 2016 (IPA) makes provision for equally—now prescribed—broad powers pertaining not only to mass communications data retention, but also to the acquisition of Bulk Personal Datasets (BPDs), and to mass equipment interference (hacking).

During the proceedings before the CJEU, *Watson* was joined with another Swedish case, brought by Tele2Sverige, a Swedish electronic communications services provider. Tele2Sverige had brought an action before the Administrative Court of Stockholm, challenging an order by the Swedish Post and Telecom Authority (PTS), by virtue of the law transposing Directive 2006/24 into Swedish legislation, to continue retaining all communications data, even after the *Digital Rights Ireland* judgment. The action had been dismissed and Tele2Sverige appealed against the decision before the Administrative Court of Appeal of Stockholm, which decided to stay the proceedings and refer to the CJEU two questions for a preliminary ruling.

II. The Judgment

The legal issues that the Grand Chamber was confronted with were, firstly, whether a general obligation to retain communications data—covering all persons, without any distinctions, for the purpose of combating crime—could be held to be compatible with Article 15(1) of Directive 2002/58/EC (Directive on privacy and electronic communications);[4] secondly, whether the Court in *Digital Rights Ireland* intended to lay down mandatory requirements of EU law that should be also applicable to a Member State's domestic legislation governing the retention and access to communications data, for it to comply with Articles 7 and 8 of the EU Charter; and, thirdly, whether the Court intended, in the aforementioned case, to expand the scope of the protection granted by Articles 7 and 8 of the Charter beyond that established by the article 8 of the European Convention on Human Rights and the relevant European Court of Human Rights (ECtHR) jurisprudence.

Regarding the first issue, the Court acknowledged that Article 15(1) of Directive 2002/58/EC allows for restrictions to the protection enshrined in the Directive—that is, the principle of confidentiality of electronic telecommunications—and does not preclude domestic legislation of Member States to introduce limitations upon the right, so long as these restrictions are necessary and proportionate, and justified by the objectives laid down exhaustively in that Article. Nevertheless, any limitation imposed upon the rights and obligations enshrined in the Directive shall be interpreted in the light of Articles 7, 8, and 52(1) of the Charter.

The Court acknowledged that the categories of data covered by national legislation correspond, in essence, to the data for which retention was required by the Data Retention Directive. Although retention did not relate to the content of communications and would not engage the essence of these rights, retention of communications data, particularly traffic and location data, allows for very precise conclusions to be drawn concerning the private lives, daily movements, permanent or temporary places of residence of persons. It also enables authorities to, inter alia, identify the names and addresses of subscribers or registered users, and should be regarded as a particularly serious and far reaching interference with the rights enshrined in the Charter. Such an interference, according to the Grand Chamber, could be justified by the objective of combatting only serious crime.

More importantly, the CJEU held that the general and indiscriminate retention of all traffic and location data was disproportionate. National legislation must lay down clear and precise rules, governing the scope and application of such a measure by ensuring that retention is limited to what is strictly necessary.

[4] Directive (EC) 2002/58 of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L201/37.

Therefore, an objective link needs to exist between a public likely to be involved in serious criminal activity and the objective pursued, such as retention of data pertaining to a particular time period or geographical area or group of persons, or all three. Otherwise, the legislation fails to meet the necessity test.

Regarding the second issue, the Grand Chamber underlined that, irrespective of a general or targeted retention of communications data, domestic legislation must make provision for adequate safeguards, which would either provide sufficient guarantees against abuse, or counterbalance risk of abuse. Three minimum safeguards were held to be mandatory. First, access should be granted to the data of individuals suspected of planning, committing or having committed a serious crime or having or being implicated in such nefarious criminal activity. Second, with the exception of urgent cases, such access should be granted only subject to prior review by a court or an independent administrative body following a request made by the competent authorities. Finally, traffic and location data must be retained within the EU.

The judgment also refers to the obligation of national authorities to notify the persons to whose communications data access has been granted, as soon as such a notification is practically possible without the risk of jeopardising an ongoing investigation. In this manner, these persons will be able to fully exercise their right to a legal remedy and challenge these measures successfully, in the event that their rights are infringed.

Regarding the third issue, stemming from the second question referred by the English Court of Appeal, the CJEU reiterated that while Article 52(3) is intended to ensure the necessary consistency between the Charter and the ECHR, it does not prevent EU law from providing more extensive protection than the ECHR. Further, Article 8 of the Charter constitutes a fundamental right different from that enshrined in Article 7, a right which has no equivalent in the ECHR. Nevertheless, the Court declared the question inadmissible, because it did not appear that an answer to it would provide an interpretation of EU law necessary for the English court's ruling in light of the *Watson* case.

III. Comment

The reasoning of the Grand Chamber in *Watson* signals a hardened stance by the Court to accept mass surveillance measures without the existence of stringent safeguards, and especially prior review by an independent judicial or administrative body. It also raises some interesting issues concerning the application of the principle of proportionality in the context of general surveillance measures. Although the Strasbourg Court also engages in a similar assessment under the

ECHR when it comes to qualified rights, the proportionality test applied by the CJEU is a more structured one, and is quite similar to the one applied by English courts in the context of human rights adjudication. Actually, in determining whether an interference with a right shall be deemed proportionate, the principle of proportionality could be further formulated into (two) separate stages: necessity and *stricto sensu* proportionality.

Necessity, in the human rights context, is interpreted as the requirement of "less restrictive means", meaning that when another means exists that could achieve the same result with less onerous implications, the more human rights compliant alternative must be chosen. A necessity assessment does not imply, of course, that an interference with the right must always be minimal.[5] What is important for the necessity stage is the measure to be precisely tailored to its aim. On the other hand, certain policies which affect more individuals than necessary could be characterised as over inclusive or, in certain cases, indiscriminate.

What the Grand Chamber ruled in both *Watson* and *Digital Rights Ireland* was that indiscriminate data retention measures are, in principle, disproportionate. They fail to satisfy the necessity test because of their indiscriminate nature. In other words, the CJEU held that a general measure to retain the traffic and location data of all individuals, without differentiation, cannot be precisely tailored to the aims pursued by the legislative objective and thus, in principle, contradicts necessity. In that regard, the reasoning of the Court remains unsatisfactory mainly for two reasons.

First, retention of traffic and location data is, by its very nature, an indiscriminate measure. It cannot target specific individuals, unlike targeted interception warrants, because its purpose is to identify potential threats and provide important information for persons that might in the long term prove to engage or to have engaged in nefarious activities. Therefore, the basic characteristic of communications data retention, and of bulk surveillance in general, is the lack of "reasonable suspicion", which otherwise serves as an effective safeguard, strengthening the foreseeability of the law and preventing the risk of discriminatory abuses on a subjective basis. Thus, the question to be addressed is whether the indiscriminate (strategic) retention of communications data can incorporate a reasonable suspicion criterion, and still fulfil the aim of effectively identifying potential or future threats.

The CJEU attempted to answer this question in the affirmative by inserting some "objective criteria" that would render the data retention less indiscriminate, namely criteria pertaining to a certain time period, geographical area or group of

[5] Aharon Barak, Proportionality*: Constitutional Rights and their Limitations* (Cambridge University Press 2011) 321.

persons for a link to be established between persons who are likely to have engaged in serious crime and the aim pursued. In the context of contemporary pre-empting technologies, however, the application of a reasonable suspicion standard remains problematic.

It is worth noting here that a similar approach was adopted by the ECtHR in the case of *Marper v UK*.[6] The reasoning of the Strasbourg Court was extensively followed by the Grand Chamber in *Digital Rights Ireland*. In *Marper*, the ECtHR was confronted with the legal issue of whether an Act providing for the indefinite retention of fingerprints, as well as cellular and DNA samples taken by anyone accused of an offence irrespective of their consequent conviction or acquittal, could be held to be proportionate, and, in particular, to successfully pass the necessity test under Article 8 of the Convention. The Strasbourg Court held that a blanket DNA retention policy fails to satisfy the necessity stage and is thus, in principle, a disproportionate interference with the right to private life.[7]

However, this reasoning is flawed because the ECtHR, instead of addressing the moral question of whether the retention of cellular samples and DNA profiles was justified under the Convention, stopped at the necessity stage of its overall proportionality assessment.[8] It ruled that blanket policies are, in principle, incompatible with Article 8, and stressed that a differentiation should be made between convicted and unconvicted individuals, giving the impression that unconvinced persons have more of a *pro tanto* right to privacy than convicted persons. The implications of *Marper* on a domestic level are obvious if one looks at the case of *Gaughran*.[9] In that case, the Supreme Court held that the measure of indiscriminate retention of DNA profiles, fingerprints and photographs of all adults convicted of recordable offences was compatible with Article 8 of the ECHR. Interpreting *Marper* by the same token, the Supreme Court found that "[T]here is no indication that the Strasbourg court was considering the position of those who had been convicted at all … Strasbourg was not saying that a blanket policy of [indefinitely] retaining the data of convicted persons would be unlawful".[10]

In the case of *Szabo and Vissy*, the ECtHR appeared to gradually abandon the reasonable suspicion requirement, placing greater emphasis on the importance

6 *S and Marper v UK* (2008) 48 EHRR 50.

7 ibid, para 125.

8 George Letsas, 'The scope and balancing of rights: Diagnostic or constitutive?' in Eva Brems and Janneke Gerards (eds), *Shaping Rights: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2015) 59.

9 *Gaughran v Chief Constable of the Police Service of Northern Ireland* [2015] UKSC 29. For an overview and assessment of the current DNA (and, generally, biometrics) retention regime, see Paul Wiles, '2016 Annual Report of the Commissioner for the Retention and Use of Biometric Material' (September 2017).

10 ibid *Gaughran* [31]–[33].

of other safeguards, especially prior judicial authorisation.[11] In his Opinion in the *Watson* case, the Advocate General concluded that bulk surveillance is not in principle unlawful if it is accompanied by all safeguards considered by the CJEU in *Digital Rights Ireland*.[12] Reasonable suspicion, however, was one of the main safeguards that the Court noted the Directive had failed to incorporate. In other words, the Advocate General argued that the reasonable suspicion criterion could still be excluded, as long as bulk surveillance satisfies the requirements of strictly defined purposes, prior independent (judicial) authorisation and minimum retention periods to what is strictly necessary.[13] In that regard, the Grand Chamber was right in holding that the requirements laid down in *Digital Rights Ireland* should be considered mandatory.

Second, limiting retention to certain time periods, geographical areas, or groups of persons ultimately reduces the efficiency of the measure.[14] Hence, the existence of a less injurious alternative does not necessarily imply that this alternative has to be chosen if it is less effective in advancing the means pursued by the choices of the legislature.[15] This view was endorsed by the Canadian Supreme Court in the case of *USA v Cotroni*,[16] which concerned an extradition law according to which Canadian citizens could also be extradited. The Supreme Court examined the indiscriminate nature of the law, noting that "the effective prosecution and the suppression of crime is a social objective of a pressing and substantial nature", and held that an alternative policy of refusing to extradite Canadian citizens "would reduce the effectiveness of extradition as a major tool in combatting transnational crime".[17]

In examining the question of whether a general data retention obligation is proportionate, contrary to the submissions of Tele2Sverige, Privacy International and Open Rights Group that any general (blanket) data retention obligation should be *per se* regarded as violating the principle of necessity, because of their inherently

[11] *Szabo and Vissy v Hungary* App no 37138/14 (ECtHR, 12 January 2016), paras 68 and 73.

[12] Opinion of Advocate General Saugmandsgaard Øe in joined Cases C–203/15 and C–698/15 *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson* [2016] ECR I–572, para 202 (Watson AG Opinion).

[13] ibid, para 244.

[14] T. Raine, 'The CJEU and Data Retention: A Critical Take on the Watson Case', (UK Const. L. Blog, 16 January 2017) <https://ukconstitutionallaw.org/2017/01/16/thomas-raine-the-cjeu-and-data-retention-a-critical-take-on-the-watson-case> accessed 20 September 2017.

[15] Tom Hickman, *Public Law after the Human Rights Act* (Hart 2010) 181; Barak (n 6) 323.

[16] *USA v Cotroni* [1989] 1 S.C.R. 1469.

[17] ibid, 1499; *USA v. Swystun* (1987) 50 Man. R. (2d) 129, 133. See also HCJ 7052/03 *Adalah–The Legal Center for the Rights of the Arab Minority v Minister of Interior* (unpublished, 14 May 2006), para 88.

over-inclusive character,[18] the Advocate General stated that the obligation did not go beyond what was strictly necessary, but it was because of the "combined effect of the generalised retention of data and the lack of safeguards aimed at limiting the interference with the rights enshrined in Articles 7 and 8 of the Charter"[19] to what was strictly necessary that led the Luxembourg Court to declare the Directive invalid in its entirety. He then stated:

[T]he requirement of strict necessity … requires a comparison to be made between the effectiveness of such an obligation and that of any other possible national measure ... Nevertheless, it is important to bear in mind that any substantial limitation of the scope of a general data retention obligation may considerably reduce the utility of such a regime in the fight against serious crime.[20]

According to the Advocate-General, the issue of proportionality of such measures had thus to be determined at the final *stricto sensu* stage by national courts, which are called to weigh the advantages of such techniques and the serious risks that arise from such intrusive powers. The Advocate General then referred to the policy of installing a GPS tracking device on each and every citizen for the purposes of combatting crime; an indiscriminate measure that would, for the reasons illustrated above, satisfy necessity considerations. This does not necessarily imply that the measure would still be *stricto sensu* proportionate since, in this case, the aim sought to be achieved does not outweigh the overall impact on the individuals' rights.[21]

A similar question arises in relation to a blanket obligation imposed upon telecommunications service providers to retain traffic and location data. Considering the particularly manifold and serious interference with the fundamental right to privacy, the question that needs to be addressed is whether national authorities can strike a fair balance between competing public interests, such as the fight against serious crime, and fundamental rights of persons enshrined in Articles 7 and 8 of the Charter.[22]

[18] Watson AG Opinion (n 12), para 192.

[19] ibid, para 202; C362/14 *Schrems v Data Protection Commissioner* (CJEU, 6 October 2015), para 93.

[20] ibid Watson AG Opinion (n 12), paras 207 and 213. As regards the importance of bulk powers for safeguarding national security, see David Anderson, 'Report of the Bulk Powers Review' (2016) paras 6.47 and 9.14(b) <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2016/08/Bulk-Powers-Review-final-report.pdf> accessed 20 September 2017; Privacy International v Secretary of State for Foreign and Commonwealth Affairs [2017] UKIPTrib IPT_15_110_CH paras 14–17; European Commission, 'Evaluation Report on the Data Retention Directive (Directive 2006/24/EC)' COM (2011) 225 final 25.

[21] ibid Watson AG Opinion (n 12), paras 261-262.

[22] David Anderson, 'CJEU Judgment in Watson' (21 December 2016) <https://terrorismlegislationreviewer.independent.gov.uk/cjeu-judgment-in-watson> accessed 20 September 2017.

IV. Conclusion

In sum, the judgment of the Grand Chamber in *Watson* should be welcomed as an advance towards more robust safeguards in the context of bulk interception powers. The CJEU seems to embrace the argument that, because of its peculiar characteristics, mass surveillance cannot be treated the same as targeted interception techniques. Nevertheless, this flexible approach towards mass surveillance should not be interpreted as an effort to circumvent stringent controls but as an effort of the Court to adapt to cutting edge pre-empting technologies.

By ruling, however, that indiscriminate communications data retention policies in principle contradict necessity and by focusing on such quantifiable aspects of a case, the Court seems to withdraw "from a battle regarding the general principle without a fight".[23] In other words, in an ultimate attempt to limit the scope of a generalised data retention obligation, the Grand Chamber inserted criteria, such as that of particular time periods or geographical areas, which could establish an objective link between potential threats and the aim pursued.

All in all, the judgment still strikes a massive blow to indiscriminate communications data retention measures *per se* and, although DRIPA expired at the end of December 2016, raises compatibility issues with the data retention principles set out by the European Court regarding bulk powers contained in the recently passed IPA.[24]

More specifically, IPA provides, among others, for the obtaining and retention of metadata in bulk,[25] as well as for bulk personal datasets (BPDs) acquisition[26] and equipment interference (hacking).[27] As regards the former, the current IPA authorisation regime allows for access to retained communications data to be

[23] Stavros Tsakyrakis, 'Proportionality: An assault on human rights?' (2009) 7 IJCL 486.

[24] Cf *Privacy International* (n 21), concerning the lawfulness of the Security and Intelligence Services' capability to acquire and use communications data, pursuant to s. 94 of the Telecommunications Act 1984 (which requires communications data to be delivered up to security and intelligence services so as to constitute bulk communications data in their custody, access to which could be later granted either for targeted purposes or for, more likely, the electronic trawling of masses of data in order to discover "the needle in the haystack"), and personal datasets in bulk. In October 2016, the Investigatory Powers Tribunal ruled that, albeit lawful in domestic law, those regimes had not been ECHR compliant prior to their public avowal, see *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2016] HRLR 21. However, while acknowledging that a similar application of the Watson requirements to the regime governing the bulk acquisition of communications data by the security and intelligence services may seriously impede national security capabilities of the services, the IPT eventually decided to refer the issue of compatibility of s. 94 with EU law to the CJEU, see *Privacy International* (n 21) paras 69 and 72.

[25] Investigatory Powers Act 2016, pts 3 and 4.

[26] ibid, pt 7.

[27] ibid, pt 6.

granted on the basis of internally signed off warrants by senior officers within the public authority requesting access,[28] It also allows for access to be granted "for the purpose of preventing or detecting crime or of preventing disorder",[29] namely any crime and not just serious one. To adhere to the safeguards upheld by the Luxembourg Court, a legislative amendment of these provisions is required that limits the purpose of access to metadata to serious crime only, and ensures that access warrants are *ex ante* reviewed and approved by an independent authorising body, such as the one already provided for in the Act (Judicial Commissioners). However, the long-term consequences of the judgment in light of an imminent Brexit, which might well hinder any external pushes coming from the European Court,[30] remain to be seen with the assistance of the Court of Appeal to which the answers have now been returned.

[28] ibid, s 61(1) and (2), although prior judicial authorisation to access data is required for local authorities.

[29] ibid, ss 87 and 61(7)(b). Section 67(1) includes purposes far wider than serious crime such as taxation, the functioning of financial markets, and national security. For the lack of statutory definition and wide judicial interpretation of the latter see *R (Lord Carlile) v SSHD* [2014] UKSC 60.

[30] Bingham Centre for the Rule of Law, APPG on the Rule of Law, 'EU Law, the Investigatory Powers Act, and UK-EU Cross-Border Crime and Security Cooperation' (14 March 2017) 4. <https://www.biicl.org/documents/1634_2017-04-29_-_appg_report_14_march_2017.pdf?-showdocument=1> accessed 20 September 2017.

Law and Practice Following the Lord Falconer Bill: Should England and Wales Reform the Law on Assisted Dying?

George C. Mavrantonis*

FOREWORD

At the time of writing the United Kingdom remains a full member of both the European Union and the European Convention on Human Rights (through the Council of Europe). Therefore, any discussion or potential impact on domestic legislation surrounding Brexit—the United Kingdom's possible exit from the European Union—or its withdrawal from the Convention, is not included for reasons of legal certainty.

I. Introduction

THE EUROPEAN ASSOCIATION for Palliative Care defines assisted suicide as one person 'intentionally helping [another] person to commit suicide by providing drugs for self-administration'.[1] The difference from euthanasia is that a 'doctor intentionally kills another person with the administration of drugs'. In both circumstances, the patient's 'voluntary and competent request' is required; the patient must have the requisite capacity to make such a decision,

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[1] Lars Materstvedt et al., 'Euthanasia and physician-assisted suicide: a view from an EAPC Ethics Task Force' (2003) Palliative Med. 97, 98.

if law permits it.[2]

This paper shall concentrate on the existing law in England and Wales as per the Suicide Act (SA) 1961[3] and prominent case law. I shall then proceed to critically analysing the current practice, taking into account the related Director of Public Prosecutions (DPP) Guidelines of 2010[4] that explain the circumstances where the DPP is 'more' or 'less likely' to prosecute a person for assisting the suicide of another.[5] This paper shall argue that the law, in contrast to present day practice, not only presents a problem that needs to be amended, but also creates uncertainty and confusion both for medical practitioners and patients' relatives.

This paper shall focus on the Supreme Court case of *R (Nicklinson) v DPP* to underline the existing clash between Art. 2 ('right to life' in support of the patient's interests) and Art. 8 ('respect of private and family life')[6] of the European Convention on Human Rights (ECHR), in defence of the rights of the relative assisting the patient's suicide.[7] Until 2014 in England and Wales the burden of this problematic area in law fell on Courts rather than Parliament. *Nicklinson* reiterates that the onus is on Parliament, if it so wishes, to change the present law as regards assisted suicide. This paper shall demonstrate that courts from other jurisdictions, as exemplified by the most recent case of *Carter v Canada (Attorney-General)* in the Supreme Court of Canada,[8] can act above Parliament. I shall then concentrate on Westminster's most recent failed call to amend the law, the Assisted Dying Bill 2014,[9] and its potential dangers. I then conclude that the law (including the 2010 DPP Guidelines) on this controversial matter must be amended due to the uncertainty caused. However, due to flawed caveats present in the rejected Falconer Bill, the draft Bill should be re-examined in order to reach safeguards as envisaged by MPs.

Although this paper ultimately supports the legalisation of assisted suicide based on the principle of a person's own autonomy, such support requires the most prudent protection of all those affected by such a change in the law. This especially applies to the vulnerable.

2 ibid.
3 The 1961 Act applies only to England and Wales.
4 As amended in 2014.
5 DPP, Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide (2010), hereafter referred to as the 2010 DPP Guidelines.
6 Article 8 of the European Convention on Human Rights provides a right to respect for one›s 'private and family life, his home and his correspondence'.
7 *R (Nicklinson & Anor) v Ministry of Justice; R (AM) v DPP* [2014] UKSC 38 (conjoined).
8 [2015] SCC 5 (Canada).
9 Hereafter referred to as the Lord Falconer Bill.

II. Ethics: Do We Have a Right to Die?

Today, one Briton every two weeks travels to Dignitas[10] in Switzerland to die.[11] In *Nicklinson*, it was argued, though unsuccessfully, that Art. 2 ECHR and the 'right to life' should naturally and automatically confer a 'right to die' as well to patients who have voluntarily chosen to die. Herring emphasises that supporters of legalisation of assisted suicide claim that 'there is nothing more horrific than a slow, pain-filled, undignified death' and that these terminally ill patients have a right to autonomy: to be able to choose on their own accord how and when they want to die, as these are matters of personal choice.[12] The principle of autonomy to that extent is dominated by the view that people should 'have control over their own bodies' and all decisions on how a person wants to live must be respected.[13] Legally, per Justice Cardozo, autonomy is defined as 'every human being of adult years and sound mind [that] has a right to determine what shall be done with his own body'.[14] Supporters of the quality of life argument claim that a good life is defined by the 'experiences of the person and their interaction with others'. If this, due to illness, can no longer be experienced by the patient, then 'life has lost its goodness'.[15]Consequently, supporters argue that if the individual patient believes that his life does not carry any more value, their decision to die should be upheld.[16] This opinion agrees with those who oppose a paternalistic approach in medical practice, since under the notion of modern paternalism a government or, in this case, the law, prohibits people from taking certain decisions or actions for their own good, as considered by society.[17]

On the other hand, the Hippocratic Oath[18] states that 'to please no one will I prescribe a deadly drug nor give advice which may cause his death'; the Oath could be claimed to cover both practices of assisted suicide and euthanasia equally.[19] The NGO Dignity in Dying—an organisation which supports the decriminalisation of assisted suicide—challenges this claim and supports that the Hippocratic Oath is

[10] A clinic assisting the suicide of competent patients.
[11] Dignity in Dying, *Assisted Dying: Setting the Record Straight* (November 2014) 3.
[12] Jonathan Herring, *Medical Law and Ethics* (4th edn, OUP 2012) 509.
[13] ibid 513.
[14] *Schloendorff v New York Hospital* (1914) 105 NE 92 (USA).
[15] Jamie Hale, 'We are told we are a burden. Legalising assisted suicide would further devalue our lives' (17 July 2017, The Guardian, London).
[16] Herring (2012) 512.
[17] ibid 198–99.
[18] Hippocratic Oath: One of the oldest binding documents in history, the Oath written by Hippocrates is still held sacred by physicians: to treat the ill to the best of one›s ability.
[19] Kenyon Mason and Graeme Laurie (eds), *Mason and McCall Smith's Law and Medical Ethics* (9th edn, OUP 2013) 741.

nowadays 'generally considered incompatible with contemporary medicine'[20] and has been replaced by a new Physicians' Oath, as prescribed in the 1948 Declaration of Geneva.[21] Nevertheless, the 1994 House of Lords Select Committee stressed that although assisting dying (including euthanasia) may be seen as appropriate in some circumstances, prohibition of intentional killing 'is the cornerstone of the law' and 'individual cases cannot…establish…a policy that would have such serious and widespread repercussions' on society.[22] Most importantly, the Committee challenged the principle of autonomy mentioned earlier, as it claims that the 'death of a person affects the lives of others' since in these cases 'the interests of the individual [patient] cannot be separated from the interest of society as a whole'.[23] As Herring puts it, 'dying is not an individual matter' due to its impact on patients' relatives and the society.[24]

The principle of sanctity of life remains one of the biggest arguments for opponents of assisted dying and euthanasia. The principle considers that no person should be intentionally killed, as each person should be highly valued even if she or he is voluntarily requesting to die. The core of this principle stems from the suggestion that if a society loses this norm, inevitably it then 'becomes necessary to value some lives as less than others'.[25] In societies that value religion more, such as Italy (predominantly Christian Catholic), Greece and Cyprus (predominantly Christian Orthodox) for example, it is considered a blessing,[26] even in severe terminal illnesses, for the patient to stay alive for as long as possible. God, and only God, decides on the length of the patient's life and the relatives will take care of the patient no matter what.[27] One could argue nevertheless that the above paradigm of three smaller societies is affected by religious views, as all three countries mentioned are considered to belong in the most religious states in the European Union.[28]

It is indeed a fact that theologists and all prominent religious faiths in the

[20] Dignity in Dying (2014) 7.

[21] As revised in 2006. The Declaration of Geneva 1948 is one of the World Medical Association's (WMA) oldest policies adopted by the 2nd General Assembly in Geneva in 1947. It builds on the principles of the Hippocratic Oath, and is now known as its modern version. It also remains one of the most consistent documents of the WMA. With only very few and careful revisions over many decades, it safeguards the ethical principles of the medical profession.

[22] House of Lords Select Committee on Medical Ethics, *Report of the House of Lords Select Committee on Medical Ethics* (HL 21–1, 1994) [237]; cited in Sheila McLean, *Assisted Dying: Reflections on the Need for Law Reform* (1st edn, Routledge 2007) 10.

[23] ibid [237]–[238].

[24] Herring (2012) 514.

[25] ibid 517.

[26] "The Will of God'.'

[27] "True compassion leads to sharing another's pain; it does not kill the person whose suffering we cannot bear" Pope John Paul II, Evangelium Vitae (1995)

[28] European Commission, *Discrimination in the EU in 2012* (Special EuroBarometer 393, 2012) 49;

world (with some exceptions) oppose intentional killing in the form of either assisted suicide or euthanasia. The Church of England, for example, supports that 'life should be respected' and 'treatment should never be to make the patient die'.[29] Interestingly, the Church highlights that by changing the law to allow assisted suicide, persons 'who are ill or dying would feel a burden to others' and inevitably, the 'right to die would become a duty to die'.[30] Montgomery makes another significant argument, that surrounding the 'peculiarly British obsession' of secularism found in bioethics committees in this country.[31] The author rightfully underlines that the tendency in public ethics committees has led to secularism in the 'reductionist sense of religion' rather than to more pluralism, essentially arguing that religious views (or religion in general) have been left out of this committees and are not heard in the public debate.[32] This in the United Kingdom has arisen from a domination of 'imported individualism' from North America that has subsequently eroded the 'sense of common good' that is dominant in mainland Europe.[33] The effect, unfortunately, is to 'impoverish public debate on bioethical issues' in this jurisdiction.[34] Although some of the blame is attributed to religious representatives, Montgomery gives the example of the case of *Pretty*, discussed below, whereby the secularist restriction made 'it difficult to voice traditional Christian formulations of the issues' concerning assisted suicide.[35]

III. The Current Status of Assisted Suicide in England and Wales

A. The Law

As per s.2(1) of the Suicide Act (SA) 1961[36] a person who 'aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide'

cf. the United Kingdom is considered to be one of the least religious nations within the EU.

29 House of Lords Select Committee on Assisted Dying for the Terminally Ill Bill, Minutes of Evidence, *Letter from the Church of England House of Bishops and the Catholic Bishops' Conference of England and Wales* (HL 86–II, 2004) [11].

30 ibid [22].

31 Jonathan Montgomery, 'Public Ethics and Faith' (2014) Theology 342, 343.

32 ibid.

33 ibid 345.

34 ibid 347.

35 ibid 345.

36 As amended by s.59 Coroners and Justice Act 2009 to clarify the language used on assisted suicide; "The Law Commission…identified confusion about the scope of the law on assisted suicide…[s.59 CJA]…does not substantively change the law, but it does simplify and modernise the language of s.2 SA 1961 to increase public understanding…that the provision applies as much to actions on the internet as to actions off-line" HC Deb 1st March 2012, vol 487 col 35 (Lord Chancellor); cited in *Nicklinson* [2012] EWHC 2381 [33].

shall be liable for a term of imprisonment of up to fourteen years. Therefore, under this offence a physician would be potentially liable for administering the patient fatal drugs that caused or attempted to cause his suicide. In addition, this offence would include any other person who may have 'aided, abetted, counselled or procured' the patient in his effort to attempt suicide, for example a spouse. A person may also be liable for encouraging another to commit suicide, irrespective to whether the patient did actually attempt suicide or not.

In addition, following earlier *Re J (A Minor) (Wardship: Medical Treatment)*,[37] it was mentioned that death cannot be the main objective of medical treatment and that it would be 'unsafe to permit any erosion in the principle of the absolute sanctity of human life'.[38] It is vital to note that following *Airedale NHS Trust v Bland*,[39] if the patient's treatment is not promoting[40] his best interests, albeit a rare occurrence, an omission assisted by a professional physician such as discontinuing life support equipment, is permitted by law. The explanation given here by the Court per Butler-Sloss LJ was that removing life support treatment from the patient would not amount to murder, but would conversely constitute an omission since he would have been placed 'in the position he would have been in before the nasogastric tube was inserted'. Here, albeit speculative, I could argue that a strong motive behind the decision was public policy and to what extent long-term patients on life support cause a financial burden to the NHS.

S. 2(4) SA 1961 states that any prosecution for assisted suicide requires the consent of the DPP. It is clear that especially for family members acting out of compassion for their severely ill relatives who have expressed their decision to die, the Act causes uncertainty especially when taking into account that it was drafted more than five decades ago. Such uncertainty is illustrated by the fact that spouses who accompany their partners to other countries such as Switzerland return to the United Kingdom in fear of prosecution for aiding suicide.[41] In one of the circumstances involving a trip to Dignitas, the parents of a terminally ill man were initially arrested for suspicion of assisting suicide although eventually not prosecuted, for they were able to prove their 'relentless plead with him to change his mind' by having booked a return ticket to the UK for their son as well.[42]

[37] [1991] 3 WLR 592.

[38] [1991] Fam 33 (CA), 51 (Lord Justice Balcombe).

[39] [1993] AC 789 (HL).

[40] Emphasis added.

[41] Philippa Roxby, 'Assisted Suicide: 10 Years of Dying at Dignitas' *BBC News* (London, 21 October 2012) [6].

[42] Richard Edwards, 'Assisted Suicide: Parents of Daniel James Will Not Face Charges' *The Guardian* (London, 9 December 2008) [4]–[5].

B. The Impact of Convention Rights

R v DPP ex parte Pretty was the first modern case to address the issue of uncertainty with the existing law as per the 1961 Act and to that extent challenge the prohibition on assisted suicide.[43] It is a significant case as it challenges the 1961 Act in light of the ECHR. The claimant, who suffered from motor neurone disease, claimed that she could receive assistance from her husband in order to assist her suicide. In order to achieve this she sought a statement by the DPP that her husband would not be prosecuted in doing so. This was rejected. The appellant claimed that the SA 1961 was incompatible[44] to the ECHR due to the fact that Art. 2 should offer her the right to die and through the DPP's earlier refusal, she was subject to 'inhuman or degrading treatment' under Art. 3 of the Convention. Pretty also alleged that the United Kingdom's blanket ban on all methods of assisted suicide was disproportionate in accordance to Art. 8 and the right to a private and family life.[45] Finally, deploying *Thlimmenos v Greece*,[46] the appellant alleged that her rights under Art. 14 were violated as she had been discriminated upon due to her disability.[47]

The Court refused her claims for a number of reasons. Violations of Art. 2 and Art. 3 could not be justified as under Art. 2(2) ECHR there is a positive obligation on the state to protect life, as concluded in *Osman v United Kingdom*.[48] Due to this positive obligation, it could not be said that Pretty was subjected to inhuman or degrading treatment because the negative obligation under Art. 3 (that one shall be subjected to inhuman or degrading treatment) complements the positive obligation to actively protect citizens' lives under Art. 2(2).[49] As regards the appellant's Art.8 'private life' claim, this could not be justified due to the provision of Art. 8(2), which provides for 'no interference of a public authority with the exercise of this right' unless it is 'in accordance with the law and necessary in a democratic society', and is in the interests of 'the protection of health' or the 'protection of the rights and freedoms of others'.[50] Under the doctrine of proportionality the latter outweighed the former. Lastly, her claim for discrimination under Art. 14 was considered by Lord Bingham to be a 'misconception' as the 1961 Act deals specifically with prohibiting assisted suicide and does not refer to disabilities.[51] Pretty then took the

43 [2002] 1 AC 800 (HL).
44 As incorporated by the Human Rights Act 1998, ss.3 and 4.
45 *Pretty* 801.
46 (2000) 31 EHRR 411.
47 *Pretty* 805.
48 (1998) 29 EHRR 245.
49 *Pretty* 806–807.
50 ibid 822.
51 ibid 825.

case to the European Court of Human Rights (ECtHR) where, in a unanimous verdict, no violations were found.[52]

C. *Purdy*: A Struggle to Clarify the Law

Debbie Purdy had been diagnosed with multiple sclerosis. As with *Pretty*, she concluded that her husband would be able to travel with her to Switzerland to assist her during her last moments. Her legal challenge under this case involved the claim that the DPP had failed to provide clear guidance on when one would be prosecuting for assisting suicide. Lord Pannick QC for Purdy, contended that s. 2(1) SA 1961 breached her right to respect of private life under Art. 8(1) of the Convention. In addition, as mentioned earlier, such an interference is permitted under Art. 8(2) if it is in 'accordance with the law'.[53] Counsel rightfully argued that this interference was unlawfully imposed due to the 'absence of an offence-specific policy' issued by the DPP, making the interference not in accordance with the law.[54] Purdy sought to also challenge whether assisting a patient to commit suicide was permitted if this occurred in a jurisdiction other than England, such as Switzerland and the Netherlands, where assisted suicide or euthanasia have been decriminalised. S. 3(3) SA 1961 states that 'this Act shall extend to England and Wales only'.[55]

The Lords unanimously agreed that Purdy rightfully challenged her decision for assisted suicide through Art. 8(1). The Law Lords opinion can be reflected through Lord Brown's judgment. His Lordship rhetorically questioned whether on some occasions assisting one's suicide could be 'commended rather than condemned'. He continued by adding that it would be possible, in certain situations, to 'regard the conduct of the aider and abettor as altruistic rather than criminal'.[56] The Court also concluded that interference of Art. 8(1) could be justified under Art. 8(2),[57] only if in accordance with the law. Lord Hope recognised that the then current practice remained unclear. He noted that the law is clear as regards someone's action of assisting another person's suicide. Nevertheless, His Lordship underlined that the 'practice that will be followed in cases where compassionate assistance' is requested from a spouse as in *Purdy*, 'is far less clear'.[58] To that extent it was ruled that the DPP should issue a Code that will 'provide sufficient guidance to Crown Prosecutors and to the public, as to how decisions' to prosecute a person

[52] *Pretty v United Kingdom* [2002] ECHR 423.
[53] *R (Purdy) v DPP* [2009] UKHL 45 [28].
[54] ibid [29]
[55] ibid [11]
[56] ibid [83]
[57] Thus overruling earlier *Pretty* on the question of Art.8.
[58] *Purdy* [27].

assisting suicide should be taken and if these are in the sphere of public interest or not.[59]

Lord Hope finally addressed the challenge to the jurisdictional spectrum of the 1961 Act and whether it would be an offence to travel with someone abroad to assist their suicide. The terminology cited by Lord Hope to analyse the construction of s. 2(1) SA 1961, was first drawn by Glanville Williams.[60] Under the terminatory theory, 'jurisdiction to try the offence is established in the country in which it was completed'.[61] Conversely, under William's initiatory theory, 'jurisdiction is established in the country where the offence had commenced'.[62] In the judgment, Lord Hope was the only Law Lord to address the issue of jurisdiction directly and concluded that the application of s. 2(1) cannot be avoided by 'arranging for the final act of suicide to be performed on the high seas…or in Scotland'.[63]

IV. The Practice

A. 2010 DPP Guidelines

Purdy required the DPP to issue Guidelines that would make the practice of prosecution for assisting suicide, for both patients and others assisting them, clearer. The Guidelines were relaxed in 2014 as regards to prosecution of physicians. One view against the reform contended that the revised Guidelines made 'society think [the disabled] are in the way', with the best option for the vulnerable being death.[64] Following *R (Nikki Kenward) v DPP*,[65] a challenge of judicial review by a pro-life disability campaigner, the Guidelines were amended in 2014 to negate the change of policy that previously said medical practitioners engaged in assisting suicide were less likely to be prosecuted.[66]

To begin, the Guidelines state expressly that *Purdy* 'did not change the law' and that only Parliament can do so.[67] The Guidelines divide into two sets of categories the factors in favour and against prosecution for a person assisting another's suicide. Some examples of prosecution being 'more likely' to be required are when

[59] ibid [54].
[60] Glanville Williams, 'Venue and the Ambit of the Criminal Law' (1965) LQR 518, 519.
[61] *Purdy* [20].
[62] ibid.
[63] ibid [18], [24].
[64] Emma Glanfield, 'Disability Campaigners to Challenge Country's Top Prosecutor' *Daily Mail* (London, 28 April 2015) [13].
[65] Unreported (28 April 2015).
[66] Owen Bowcott, 'Campaigners Win Right to Challenge Assisted Dying Prosecution Policy' *The Guardian* (London, 28 April 2015) .
[67] DPP Guidelines 2010 [5].

the victim is under 18, when they do not have capacity to reach an 'informed decision' and when the suspect 'stood to gain in some way' from the death of the victim.[68] On the other hand, it is 'less likely' for one to be prosecuted for assisting suicide if the victim had reached a 'voluntary, clear, settled and informed decision', the suspect was 'wholly motivated by compassion' and when the actions of the suspect were of 'only minor encouragement'.[69] The latter three 'less likely' factors seem relatively clear, however there are other factors that cause uncertainty. For example, one is less likely to be prosecuted if the actions of the suspect could be 'characterised as reluctant encouragement or assistance' towards the victim's wish to die.[70] The Guidelines state that the evidence to support the above mentioned factors must be 'sufficiently close in time to the assistance [to suicide]'.[71] One could question how a suspect would be expected to find evidence proving that their encouragement towards the victim was merely 'reluctant' rather than 'complete', or even challenge what 'reluctant encouragement' actually means. The Guidelines create more uncertainty to the present law and practice as they underline that the public interest factors mentioned are 'not exhaustive and each case must be considered on its own facts'.[72]

B. A Change in the Law?

Herring argues that until September 2011, 44 cases had been referred to the Crown Prosecution Service (CPS) for suspects assisting suicide, however none were prosecuted, as they were 'not motivated by a desire to gain'.[73] This could strongly indicate that the Guidelines, in practice, legalised what was already a criminal offence through s. 2(1) SA 1961. Nevertheless, this is not exactly true because between April 2009 and April 2015 there had been 110 recorded cases referred to the CPS for assisted suicide. Of these, 95 were withdrawn possibly due to policy considerations. There are currently 8 ongoing cases, 1 case that was successfully prosecuted in 2013 and 6 cases that were referred onwards for other serious crimes.[74] The CPS indicates that it is still active in following the law and initiating prosecution for alleged assisted suicide, however one would argue that s. 2(1) SA 1961 is still in place, making—at least under the strict application of the law—assisted suicide a criminal offence for all circumstances, without exceptions.

[68] ibid [43].
[69] ibid [45].
[70] ibid [45(5)].
[71] ibid [46].
[72] ibid [47].
[73] Herring (2012) 489.
[74] CPS, 'Latest Assisted Suicide Figures' (24 April 2015) <www.cps.gov.uk/publications/prosecution/assisted_suicide.html> accessed 21 July 2015.

Of the 95 withdrawn cases mentioned, most of them involved relatives acting by compassion and without any direct gain following the victim's death. This mere statistic may indicate that the law, through the democratically passed 1961 Act, has covertly been replaced by current practice, through the 2010 DPP Guidelines.

It could be argued that the Guidelines offer a fresh flexibility to the ones requesting assisted suicide, as the practice of assisting suicide may in some cases be "excused" through the DPP's decision not to prosecute but at the same time keep the law as it is, at least on paper. Supporters of the Guidelines contend that they offer a 'reasonable balance between the competing views' as regards to assisted suicide. Also, the Guidelines seem to focus more on the victim's wishes, for example by referring to family relatives that have acted wholly by compassion.[75] It is also important to note that the Guidelines focus on whether or not to prosecute the person assisting, and not on the morality behind assisting suicide. Mullock argues that the Guidelines actually reversed the pre-Guidelines 'consistent lack of prosecutions' as there existed a 'long-standing motive-centred approach to the offence' on behalf of the CPS.[76]

C. The Case Against the DPP Guidelines

There is a strong argument against the maintenance of the 2010 DPP Guidelines, which is supported by this paper. It can be claimed that these Guidelines are 'dangerous'[77] for a number of reasons, the primary reason being the potential contravention to the doctrine of supremacy of Parliament and to that extent, the rule of law. Keown underlines that even if the Guidelines did not decriminalise the s.2(1) offence *de jure*, they have done so *de facto*.[78] Lord Falconer noted that 'the DPP…in practice…carv[ed] out an exception to the terms of s.2(1)'[79] and that the existing law is 'in a mess and no longer capable of being enforced'.[80] This opinion was reflected in the 2012 Report of the Falconer Commission, discussed later in detail, where it was said that the Guidelines had 'taken a whole identifiable category of case (the offenders under s.2) out of the ambit of the criminal justice process'.[81]

[75] Herring (2012) 489–490.

[76] Alexandra Mullock, 'Compromising on Assisted Suicide: is "Turning a Blind Eye" Ethical?' (2012) Clinical Ethics 17, 17; cited in Catherine O'Sullivan, 'Mens Rea, Motive and Assisted Suicide: Does the DPP's Policy Go Too Far?' (2015) Legal Studies 96, 104.

[77] ibid.

[78] John Keown, 'In Need of Assistance?' (2009) New.L.J. 1340, 1340.

[79] Charles Falconer, 'A right to die – and a right to clarity in the law' *The Times* (London, 31 July 2009).

[80] Owen Bowcott, 'Lord Falconer: Government Must Clean Up Assisted Dying Legal Mess' *The Guardian* (London, 1 June 2015).

[81] Commission on Assisted Dying, *The Current Legal Status of Assisted Dying is Inadequate and Incoherent* (2012) 285.

Crucial is the dissenting opinion in *Nicklinson* of Lord Judge in the Court of Appeal. His Lordship highlighted that reform is necessary in the area of law surrounding assisted suicide had been 'subsumed into a method of law reform (if only by way of non-enforcement of the criminal law) which is outside the proper ambit of the DPP's responsibilities'.[82] He added that it will be 'inevitable' that the Guidelines 'at the very lowest, [will]…encourage a deep misunderstanding of the responsibilities and functions of the DPP'.[83] As laws are created for the public, public perception is also a crucial factor in defining how effective the criminal justice system is. Greasley states that 'it is not relevant… that clarification does not modify the offence (of assisted suicide) itself, so long as the public perception is that [it has been]'.[84] Put simply, the argument here is that even if the Guidelines did not modify the law under s. 2(1) *per se*, public perception to these is what counts. Indeed, as supported earlier, it seems that the public perception has been affected since 2010. The Solicitor-General in the House of Commons had underlined that 'there is a growing confusion…between the [DPP] Guidelines…and the substantive view that is set out in s. 2 SA 1961'.[85] Importantly, the Falconer Commission noticed that there was a 'broad public perception that assisted suicides that meet the criteria stipulated in the [Guidelines] are effectively decriminalised'.[86]

Once that has happened, I argue that there are two options available: either to repeal the law, or enforce it strictly, without middle or temporary solutions. This is exactly the situation with the lacuna created as regards s. 2(1) SA 1961, following the 2010 Guidelines. This argument is important because there is an obvious and potential infringement of parliamentary supremacy: a public body, the DPP, effectively amended the democratic parliamentary provision of s. 2(1) SA 1961. In *Purdy*, it was stated that the legislature and not judges are to 'make law'.[87] O'Sullivan supports that by exempting suspect relatives that had acted by compassion[88] to assist suicide from prosecution 'through the language of motive', the offence of assisted suicide has been 'dramatically curtailed by the [Guidelines]'.[89] As mentioned in *Nicklinson*, the judgment in *Purdy* could have potentially brought the DPP close to 'cross[ing] the line of constitutional propriety'.[90]

As rightfully claimed by O'Sullivan, if a 'legitimate expectation of non-

[82] *Nicklinson* (n 7) [169].
[83] ibid.
[84] Kate Greasley, '*Purdy* and the Case for Wilful Blindness' (2010) Oxford J Legal Stud. 301, 326.
[85] HC Deb 27 March 2012, vol 287 col 1380.
[86] Falconer Commission (2012) 299.
[87] *Purdy*, n 42, [26] (Lord Hope); [83] (Lord Brown); [106] (Lord Neuberger).
[88] Also referred to as 'Class 1 Helpers.'
[89] O'Sullivan (2015) 104.
[90] *Nicklinson* [145].

prosecution has been created, then this constitutes an effective[91] amendment of the offence',[92] and here the DPP Guidelines, surely, can be regarded as a legitimate expectation to potential offenders. She continues that this problem may be created when a person is prosecuted under s. 2(1), despite adhering to the Guidelines, choosing to argue 'abuse of process'.[93] Finnis agrees, noting that the 'legal (un) certainty' created by the Guidelines 'publicly carves out an exception to the blanket ban on assisted suicide'.[94] It should be reminded that the aim of publishing the 2010 Guidelines was to help a 'prospective assister and/or requester (of suicide)'[95] to foresee the 'consequences which [their] action may entail'.[96] The principal problem however is that the Guidelines 'cannot do what is asked of [them] because [they] create that which [they] seek to reduce (assisted suicides)'.[97] For that reason, by agreeing with O'Sullivan, this paper supports that *Purdy* did 'not provide clarity' but instead, 'created the very circumstances of uncertainty'.[98] These circumstances, if not acted upon immediately by Parliament, could inevitably bring the ultimate repeal of the s.2(1) offence 'by unconstitutional means'.[99]

V. Constitutionality

A. *Nicklinson*

It was expected that the decision in *Purdy* and the subsequent DPP Guidelines would lead to more 'experimentation' with the law by affected individuals. *Nicklinson*, a conjoined case in the Supreme Court, focused its claim mainly on *Purdy* and the development of the right to one's 'private life', and the Guidelines.

Tony Nicklinson had suffered a stroke that left him paralysed and in a permanent vegetative state (PVS). Following this, he could only move his mouth and eyes.[100] Mentally he remained unaffected. His wish was to die with the help of either a physician or his wife. During the first appeal, Nicklinson sought a declaration from the Court that the UK's general ban on assisted suicide under s. 2(1) SA 1961 is incompatible with his 'private life' under Art. 8 ECHR and his

[91] Emphasis added.
[92] O'Sullivan (2015) 105.
[93] ibid.
[94] John Finnis, 'Invoking the Principle of Legality Against the Rule of Law' (2010) NZ L.Rev. 601, 605.
[95] O'Sullivan (2015) 107.
[96] *Purdy* [41] (Lord Hope).
[97] O'Sullivan (2015) 106–07.
[98] ibid 107.
[99] ibid.
[100] *Nicklinson* [11].

'right to life' under Art. 2, as per the powers of s. 4 HRA 1998.[101] In the second appeal, the other appellant, Martin, challenged whether the 2010 DPP Guidelines had become present day law[102] while he also requested that the DPP Guidelines be clarified and modified in order to allow for non-family carers to assist a patient's suicide without being prosecuted.[103]

B. Compatibility with the European Convention

Nicklinson was a landmark case. The Court first addressed the issue of a 'blanket ban' on assisted suicide in England and consequently whether s. 2 SA 1961 falls within the United Kingdom's margin of appreciation under Art. 8 ECHR.[104] Here we recall that in *Pretty* any suggestion for an Art. 8 infringement on the applicant, was outright rejected by the Court. This stance was however overridden in *Purdy*.[105] Lord Neuberger, presiding the Court, stated that the 'blanket ban' concerned in *Hirst* was very different to the nature of the law on assisted suicide, which in any event is there to protect the vulnerable.[106] His Lordship emphasised that he does not consider that 'the Strasbourg jurisprudence suggests that a blanket ban on assisted dying is outside the margin of appreciation afforded to member states', adding that the current ban cannot be claimed to be a 'blanket ban' since under s. 2(4) exceptions can be made by the DPP as regards whom to prosecute.[107]

Lord Neuberger, citing *Pretty v United Kingdom* in the ECtHR,[108] stated that the position in Strasbourg is that it is 'a matter for each member state whether, and if so in what form, to provide exceptions to a general prohibition on assisted suicides'.[109] The applicants contented that the earlier *Koch v Germany* indicated that a blanket ban on assisted suicide is incompatible with Art. 8. This was rejected by His Lordship.[110] The judgment in *Koch* had importantly stated that 'a spouse or partner of… [a]…party wishing to die may claim that his…own rights under Art. 8 of the Convention are directly infringed as a result of denying a remedy to the

[101] ibid [18].
[102] ibid [36]–[42].
[103] DPP Guidelines 2010, *Factors Tending in Favour of Prosecution* [14]; whereby the suspect if acting as a 'professional carer (whether for payment or not)' is more likely to be prosecuted for assisting one's suicide.
[104] A constitutional 'leeway' offered by Strasbourg to national Courts to decide on some of their own domestic policies; discussed in *A, B, C v Ireland* [2010] ECHR 2032, a case concerning abortion in Ireland.
[105] *supra* (n 50)
[106] *Nicklinson* [62].
[107] ibid [63].
[108] *Pretty* (n 49).
[109] *Nicklinson* [64]; citing *Pretty* [74].
[110] App no 479/09 (ECtHR, 19 July 2012).

party wishing to die'.[111] His Lordship distinguished that the main issue in *Koch* was that the German courts refused to consider the applicant's issue at first sight, in form of an application for judicial review.[112] Both arguments were dismissed.

The Court next addressed the issue of whether it is 'constitutionally open' to United Kingdom courts to consider the issue of compatibility with Art. 8.[113] Emphasising that especially within cases that Strasbourg has 'deliberately declined to lay down an interpretation'[114] by awarding a wide margin of appreciation to member states, the Court 'has jurisdiction to consider whether a provision such as… [s.2]…is compatible…with Art. 8, because that is part of the Court's function as determined by Parliament' in the HRA 1998.[115] Lord Neuberger noted that under our constitutional settlement it is 'open to a domestic court to consider whether s.2 infringes Art. 8'.[116] On the question of whether it is 'institutionally appropriate'[117] for the Court to consider whether there is an incompatibility in the law, Lord Neuberger, although holding an opinion contrary to those of Lords Sumption and Hughes, urged that the Court could 'properly hold that s.2 infringed Art. 8' but a declaration of incompatibility would only be considered 'on its merits'.[118]

The judgment becomes more constitutionally complex when it reaches the question of whether the Court should grant a declaration of incompatibility in *Nicklinson*.[119] Lady Hale expressed the view that a judge of the High Court should be the one deciding on the issue,[120] after feeling satisfied that the person's wish to die was 'voluntary, clear, settled and informed'.[121] Lord Neuberger agrees with this suggestion stating that it would have been inappropriate to 'reach such a conclusion in these proceedings [since] neither the Secretary of State nor the courts below have had a proper opportunity to consider this…proposal'.[122] His Lordship concludes on the matter by underlining that there would have 'been too many uncertainties to justify our (the Court in *Nicklinson*) making a declaration of incompatibility'.[123]

As mentioned above, Martin had initially challenged that the 2010 Guidelines

[111] ibid [45].
[112] *Nicklinson* [65]; citing *Koch* [52], [71].
[113] ibid [62]–[66].
[114] ibid [72]; citing Lord Hoffman in *Re G (Adoption)* [2008] UKHL 38 [36].
[115] ibid [73].
[116] ibid [76].
[117] ibid [77]–[118].
[118] ibid [112].
[119] ibid [119]–[128].
[120] ibid [314]–[316].
[121] ibid [123] (Lord Neuberger).
[122] ibid [126].
[123] ibid [127].

infringed Art. 8 because they were unclear and required more qualification and foreseeability with regards to doctors and professional carers. The Court concluded that although the Guidelines do 'not enable the healthcare professional to foresee to a reasonable degree the consequences of providing assistance'[124] to patients wishing to die, at that stage there should not be an order against the DPP.[125] Lord Neuberger explained that by granting such an order, 'the contents of any order would either be very vague or…would risk doing that which the court should not do, namely usurping the function of the DPP, or even of Parliament'.[126] It was also noted that if the 2010 Guidelines do not appear to reflect what the DPP intends, it would seem inevitable that 'she [would] take appropriate steps to deal with the problem [of confusion]'.[127] Lord Sumption reviewing his dismissal of this claim concluded that 'whatever…said about the clarity or lack of it in the Director's published…[Guidelines], the fact is that prosecutions for encouraging or assisting suicides are rare'.[128]

C. *Nicklinson* and the Role of Parliament

One of the most crucial aspects of this judgment is the Court's insistence for Parliament to take action. In summary, out of the nine Justices of the Supreme Court, three, namely Their Lordships Neuberger, Mance and Wilson, declined to issue a declaration of incompatibility while Lord Kerr and Lady Hale would have done so. Nonetheless, the remaining four Justices, namely Their Lordships Clarke, Sumption, Reed and Hughes, concluded that the issue of assisted suicide should be directed to Parliament.

Lord Neuberger mentioned that it is 'for Parliament to decide how to respond to a declaration of incompatibility and in particular how to change the law' on assisted suicide.[129] Lord Kerr underlined that if 'a provision of an Act of Parliament is incompatible with an applicant's Convention right, this is matter of Parliament'[130] and then accepts that in such controversial areas of the law, Parliament 'might have the means to consider the issue more fully'.[131] Lady Hale makes an important argument maintaining that even if an Act of Parliament does not 'share [the Supreme Court's] view that the present law is incompatible',

[124] ibid [138] (Lord Neuberger); citing Lord Dyson and Elias LJ in the judgment of *Nicklinson* in the Court of Appeal [140].
[125] ibid [144].
[126] ibid [145].
[127] ibid [146].
[128] ibid [255(5)].
[129] ibid [127].
[130] ibid [363].
[131] ibid [347].

it should be respected because Parliament may 'consider an incompatible law preferable to any alternative' at the moment.[132] Her Ladyship concludes that 'we (the Court) have no jurisdiction to impose anything: that is a matter for Parliament alone'.[133] As rightfully stated by Lord Browne-Wilkinson in a different context, 'it is for Parliament…to repeal legislation'.[134] The appeals were dismissed.

D. Post-*Nicklinson* Position: Blurrier?

Mullock claims that the judgment in *Nicklinson* actually brought a positive outcome to those supporting a change in the law of assisted suicide.[135] She noted that following *Nicklinson*, we are in a 'position of balancing the cruelty of forcing some people to stay alive in a state of interminable suffering' against the potential risks that could impact the vulnerable, if assisted suicide became legal.[136] Lady Hale had mentioned that 'it would not be beyond the wit of a legal system to devise a process for identifying those…few people who should be allowed help to end their own lives'.[137] Mullock examines Lady Hale's suggestion of setting a High Court judge, to assess who would be permitted to die and mentions that a last moment amendment to the Assisted Dying Bill, discussed below, 'replac[ed] doctors with judges as gate-keepers' to permit assisted suicide.[138] The author supports this approach mentioning that evidence during legislative scrutiny of the Mental Capacity Act 2005 suggests that 'doctors…often make inadequate or inaccurate capacity assessments' for their patients.[139]

Lord Neuberger, following *Bland*,[140] had underlined that 'a doctor commits no offence when treating a patient in a way which hastens death, if the purpose of the treatment if to relieve pain and suffering'.[141] As per Jackson this position would be likened to a 'thou shalt not kill but needst not strive officiously to keep alive' approach.[142] This practice can be referred to as lawful end-of-life care given to patients. Mullock recognises however that an oxymoron is created if one takes into

[132] ibid [300].
[133] ibid [325].
[134] *R v Secretary of State for the Home Department, ex parte Fire Brigade* [1995] 2 AC 513, 552.
[135] Alexandra Mullock, 'The Supreme Court decision in *Nicklinson*: Human Rights, Criminal Wrongs and the Dilemma of Death' [2015] PN 18.
[136] ibid 22.
[137] *Nicklinson* [314].
[138] Mullock (2015) 22.
[139] ibid 23.
[140] [1991] 3 WLR 592
[141] *Nicklinson* [18].
[142] Adam Jackson, 'Further clarification of the law regarding mercy killing, euthanasia and assisted suicide' (2013) JCL 468, 471; citing Arthur Clough's satirical poem 'The Latest Decalogue.'

account the virtual certainty test in *Woollin*:[143] if an action was foreseen to bring about a virtually certain consequence, for example, death, the necessary mens rea element to kill can be construed automatically. This above clash in the criminal law is deployed in order to indicate that doctors and medical professionals can face confusion and in some occasions fear as to what actions they are allowed to take.[144]

In its most recent guidance published, the General Medical Council (GMC) urges doctors to 'limit any advice or information about suicide to an explanation that it is a criminal offence to encourage or assist a person to attempt suicide'.[145] The GMC guidance however adds that following assessment of the patient's symptoms and possible pain, doctors are placed under a duty to provide care which may include 'prescribing medicines or treatment to alleviate pain or other distressing symptoms'.[146] It is thus argued that in situations whereby patients express their wish to die, doctors 'must tread a careful line' between not assisting suicide but at the same time providing end-of-life care tailored towards such patients.[147] Mullock emphasises that this confusion needs to be clarified, offering the example of terminally ill patient Jean Davies,[148] who took the decision to starve to death but unfortunately required more than five weeks of suffering, without food and water, to finally rest in peace.[149] She concludes that many people 'approaching death will suffer needlessly because of the profound tension surrounding end-of-life care' and the muddled law on assisted suicide.[150]

E. Comparison: The Canadian Perspective

Recent *Carter v Canada (Attorney General)*,[151] although decided within the Canadian common law jurisdiction, followed a completely different approach to the one seen in *Nicklinson*. Since the 1990s, Canadian courts had received a number of cases that challenged the Canadian prohibition on assisted suicide. *Carter* involved five plaintiffs.[152] For the purpose of this discussion, however, I shall focus on three. Lee Carter and Hollis Johnson had assisted a family relative to travel to Dignitas to die and they were concerned with possible prosecution upon

[143] [1999] AC 82 (HL).
[144] Mullock (2015) 26.
[145] GMC, *When a Patient Seeks Advice or Information About Assistance to Die* (March 2013) [6(b)(i)].
[146] ibid [7].
[147] Mullock (2015) 27.
[148] Alexandra Topping, 'Right-to-die campaigner who starved herself said she had no alternative' *The Guardian* (London, 19 October 2014).
[149] Mullock (2015) 27.
[150] ibid 28.
[151] [2015] SCC 15.
[152] The government side shall be referred to as the 'Respondents.'

their return to Canada. Gloria Taylor, the third plaintiff, suffered from ALS and advocated for the availability of physician-assisted death upon reaching the stage where she could not commit suicide on her own due to her progressing disability.

According to s. 241 (at the time) of the Canadian Criminal Code concerning assisted suicide, a person who 'counsels a person to commit suicide, or aids and abets a person to commit suicide' is guilty of an 'indictable offence and liable to imprisonment' for a maximum term of fourteen years. Under s. 14 of the Criminal Code with regards to euthanasia, 'no person is entitled to consent to have death inflicted on him and such consent does not affect the criminal responsibility of any person by whom death may be inflected on the person by whom consent is given'.[153] The applicants challenged that the current prohibition in the law infringed Taylor's rights under s. 7 of the Canadian Charter of Rights and Freedoms (CCRF),[154] which guarantees a person's 'right to life, liberty and security'. A violation under s. 7 however would be permitted if found to be reasonable under s. 1 CCRF which refers to certain circumstances where Canada can limit one's rights under the Charter. In addition, it was contested that the current prohibition violated Taylor's right to 'equal treatment by and under the law', as per s. 15 CCRF, because she was disabled.

More than two decades ago the Canadian Supreme Court in *Rodriguez v British Colombia (Attorney General)* upheld the prohibition on assisted suicide by a narrow majority.[155] The judgment in the Supreme Court addresses all issues outlined and initially refers to trial at first instance presided by Justice Smith.[156] Firstly, under the *Rodriguez* precedent, the respondents claimed that *stare decisis* was breached and that because of that principle the lower court at first instance was obliged to follow the ruling in the judgment of *Rodriguez* in the Supreme Court. The Supreme Court found that because in this case a 'new legal issue' was raised[157] and because evidence on 'controlling the risk of abuse associated with assisted suicide' was further developed,[158] Justice Smith had correctly reversed *Rodriguez*. On the matter, the Court mentioned that '*stare decisis* is not a straitjacket that condemns the law to stasis'.[159] Arvay et al disagree with the Court's approach, emphasising that the application of *stare decisis* in the 'Charter context must be tempered both because it is a common law doctrine' and because it deals with constitutional cases.[160]

Furthermore, the Court had to balance between competing values before

[153] Criminal Code, RSC 1985, c.46 (Canada).
[154] As enacted by the Constitution Act 1982 (Canada).
[155] [1993] 3 SCR 519 (Canada).
[156] [2012] BCSC 886 (Canada).
[157] *Carter* [44] (SC); the majority in *Rodriguez* had not addressed the right to life.
[158] ibid [45].
[159] ibid [44].
[160] Joseph Arvay, Sheila Tucker and Alison Latimer, '*Stare Decisis* and Constitutional Supremacy: Will our Charter past become an obstacle to our Charter future?' (2012) SCLR 61, 75.

taking a decision. On the one hand there was the autonomy and dignity of a 'competent adult who seeks death as a response' to suffering and on the other hand, sanctity of life and protection of the vulnerable.[161] The Court found that because 'predicted abuse…on vulnerable populations has not materialised' in other Western nations,[162] the current law prohibiting assisted suicide in Canada violated s. 7 CCRF and hence Taylor's right to life, liberty and security. It found that the prohibition was 'not in accordance with the principles of fundamental justice'[163] because the current law had the effect of 'forcing some individuals to take their own lives prematurely'.[164] It defined liberty as the right to 'make fundamental personal choices free from state interference' and on the issue concluded that the prohibition violated the 'protection of individual autonomy and dignity' of the applicant[165] and was thus not justified under s. 1.[166]

The Court found a violation of s. 15 CCRF on the guarantee of equality as it was highlighted that the prohibition 'imposed a disproportionate burden on persons with physical disabilities' as they only had available the option of 'starvation and dehydration in order to take their own lives'.[167] Most interestingly, the Court also found that the law was 'overbroad'—a test similar to the European proportionality test found under Art. 8 ECHR. Overbreadth exists when a law that takes away rights 'goes too far by denying the rights of some individuals in a way that bears no relation to the object'.[168] It followed that the object referred to was what the Parliament had intended the law (or the prohibition in this case) to address.[169] The Court then underlined that the Parliament's aim was to 'protect vulnerable persons from being induced to commit suicide at a moment of weakness'[170] and consequently argues that the present prohibition, at least in some cases, '[is] not connected to the objective of protecting vulnerable persons'.[171] The Court concluded that the prohibition under s. 14 and s. 241(b) of the Criminal Code unjustifiably infringed the rights of i) a competent adult person who ii) consents to the termination of his life and iii) has a 'grievous and irremediable medical condition' that causes iv) 'enduring suffering that is intolerable' and is requesting

[161] *Carter* [2].
[162] ibid [25].
[163] ibid [56].
[164] ibid [57].
[165] ibid [64]; citing *Blencoe v British Columbia (Human Rights Commission)* [2000] SCC 44 [54] (SC) (Canada).
[166] ibid [28].
[167] ibid [29].
[168] ibid [85].
[169] ibid.
[170] ibid [86].
[171] ibid; cf. The Respondents argued that it is 'difficult to conclusively identify the vulnerable' [87].

physician-assisted death.[172] Parliament has until mid-2016 to revise the legislation and bring it into line with the Court's judgment.

F. *Carter* Versus *Nicklinson*: So Different Yet So Similar?

The two jurisdictions, England and Canada, clearly hold a few subtle differences as regards their nearly identical judicial systems. In *Nicklinson* the Supreme Court of the United Kingdom retracted from granting a declaration of incompatibility under Art. 8 ECHR for constitutional reasons. It focused on the 2010 DPP Guidelines and whether or not to clarify them further, and diverted the matter to Parliament before ultimately dismissing the appeals. In *Carter*, the Canadian Supreme Court found that the general prohibition on assisted suicide and euthanasia infringed fundamental rights of the Charter of Rights, namely ss. 1, 7 and 15. The Canadian Court in essence repealed s. 241(b) and s. 14 of the Criminal Code—laws once democratically created by Parliament. Although the Canadian Court acknowledged that the 'provincial power over health [does not] exclude the power of the federal Parliament to legislate on physician-assisted dying', one could suggest that the Court has undermined the doctrine of parliamentary supremacy, at least following *Carter*.[173] Palmer emphasised that it is a constitutional principle that 'Parliament changes the law'.[174] Conversely, in *Nicklinson* the constitutional sovereignty of Parliament was respected leading up to the Falconer Bill 2015.

This paper supports that the above outcome indicates three core differences between the judgments in *Nicklinson* and *Carter* that could explain the current (as of 2016) opposing laws now found in the two jurisdictions. Firstly, I argue that in comparison to *Nicklinson* the judgment in *Carter* is more anthropocentric rather than sociocentric: it rather addresses the rights of the individual, which are potentially violated, than the society's wider interests. This is best illustrated in *Carter* in the discussion surrounding the overbreadth of the prohibition and s. 7 CCRF. Recalling that the Parliament's target when legislating was to protect the vulnerable, the Court stated that 'the question is not whether Parliament has chosen [a particular prohibition], but whether the chosen means infringe life, liberty or security of the person in a way that has no connection' with Parliament's intentions.[175] The Court interestingly then underlines that 'the focus is not on broad social impacts, but on

[172] ibid [147].
[173] ibid [53].
[174] Stephanie Palmer, 'Assisted suicide and Charter rights in Canada' (2015) CLJ 191, 194.
[175] *Carter* [85].

the impact of the…individual whose… [rights]' are trammelled.[176]

Secondly, in various instances within the judgment in *Carter*, the Court reflected that no evidence whatsoever has indicated that legalisation of assisted suicide could lead to manipulation of the vulnerable. Smith J, at first instance, concluded that evidence has shown that 'a properly administered regulatory regime is capable of protecting the vulnerable from abuse or error'.[177] She added that 'there was no evidence from permissive jurisdictions that people with disabilities are at heightened risk of accessing physician-assisted dying'.[178] On the other hand, although in *Nicklinson* Lord Kerr mentioned that in other countries that have legalised assisted suicide 'no evidence has emerged of the vulnerable…being oppressed', the Court's direction remained cautious on the issue of protection of the vulnerable population.[179] Per Lord Neuberger for example: 'there is a risk that [legalisation of] assisted suicide may be abused in the sense that… [vulnerable] people may be persuaded that they want to die or that they ought to want to die'.[180]

Thirdly, perhaps due to the United Kingdom's direct influence from the European Convention—to which Canada is not a party—we may notice that in *Nicklinson* the applicant's challenge to his 'right to life' under Art. 2(1) ECHR could not be justified to have been violated due to the positive obligation placed on the respondent state under Art. 2(2). Conversely, under s. 7 CCRF, the Court in *Carter* found that the Canadian prohibition not only infringed the applicant's 'right to life, liberty and security' but was also found to be 'overbroad' and thus of disproportionate coverage and effect.[181] In *Nicklinson*, as mentioned above, Lady Hale with the support of other Law Lords, suggested the possibility of lessening the United Kingdom's 'blanket ban' on assisted suicide in order to make it less disproportionate by having High Court judges set out the exceptions on cases of who and when a fully consenting terminally ill patient in pain could die. Nevertheless, in England this has remained a mere proposal.[182]

VI. Parliament's Call

A. The Lord Falconer Bill on Assisted Dying

Following the Court's direction in *Nicklinson* indicating that Parliament is the

[176] ibid.
[177] ibid [3].
[178] ibid [107].
[179] *Nicklinson* (n 7) [356].
[180] ibid [49]; citing Lord Steyn in *Pretty v DPP* [54].
[181] *Carter* [85]–[87].
[182] *Nicklinson* [314]–[316].

institution to legislate on the issue of whether to legalise assisted suicide, the Bill on Assisted Dying, prepared by Lord Falconer of Thoroton, was introduced to Parliament in 2014. The Bill had experienced more than 160 amendments to date.[183] Parliamentary debates at the time indicated a tendency in slim support of the proposed Bill, an approach very different from earlier historical efforts to change the law.[184] In late 2015 the Bill got rejected by Parliament, with 330 MPs voting against the law and 118 in favour. However, as the Bill may set precedent for future legislation, it is vital to analyse its key provisions.

The proposed Bill begins, under s.1(1), by stating that 'a person who is terminally ill may request and lawfully be provided with assistance to end his or her own life'. However, this would occur legally only where the person (the patient) who has a 'clear and settled intention to end' their life[185] is an adult[186] and has been living in England or Wales for no less than a year.[187] The proposed Bill will not apply to Scotland or Northern Ireland.[188] After satisfying the above conditions the patient will need to sign a declaration, as per s. 3. A person who is not a relative of the patient and not directly linked to their treatment shall sign the declaration as a witness.[189] The declaration shall then be countersigned by two medical practitioners;[190] the first is referred to as 'the attending doctor' and the second as 'the independent doctor'. The attending doctor may be the person who first diagnosed the terminally ill patient.[191] The independent doctor must 'not [be] a relative, partner or colleague in the same practice or clinical team of the attending doctor'.[192] Before signing the declaration, the two practitioners must ensure that the patient is terminally ill,[193] has the necessary capacity to take such a decision[194] and that the 'clear and settled' voluntary decision to die had not been reached by coercion or duress.[195] The two doctors would be expected to 'separately examine the person…each acting independently of the other'.[196] Lastly, the patient

[183] House of Lords, 'Amendments' (*Assisted Dying Bill*, 2015) <www.publications.parliament.uk/pa/bills/lbill/2014-2015/0006/amend/ml006-II-R.htm> accessed 16 August 2015.

[184] Rowena Mason, 'House of Lords debate evenly split over assisted dying' *The Guardian* (London, 18 July 2014).

[185] Lord Falconer Assisted Dying Bill, s.1(2)(a); 'capacity' as encompassed in MCA 2005.

[186] ibid s.1(2)(c)(i).

[187] s.1(2)(c)(ii).

[188] s.13(5).

[189] s.3(1).

[190] s.3(1)(b).

[191] s.3(2).

[192] s.3(b)(ii).

[193] s.3(3)(a).

[194] s.3(3)(b).

[195] s.3(3)(c).

[196] s.3(3).

must have been informed about all other alternatives such as palliative and hospice care.[197] The declaration could be revoked at any time and need not be in writing.[198]

As noted, the proposed Bill was only expected to cover patients who are terminally ill. The Bill explains that a terminally ill person is one who 'has been diagnosed by a registered medical practitioner as having an inevitably progressive condition which cannot be reversed by treatment'.[199] Most interestingly, the patient should reasonably be expected to die within six months or less so as to qualify under the purposes of this Bill.[200] In terms of the extent of assistance available to the prospective patient under the Bill, it is emphasised that any medicines prescribed should be delivered to the patient only by either the attending doctor,[201] another registered medical practitioner,[202] or a registered nurse.[203] The medicines should be delivered to the patient within fourteen days from the day their declaration came into force.[204] If however the two medical practitioners agree that the patient is expected to die within one month or less from the day their declaration came into force, then any medicines must be delivered to the patient within six days.[205]

S. 4(4) of the Bill proposes a number of methods for assisting the patient to self-administer the medicines, but underlines that 'the decision to self-administer the medicine and the final act of doing so must be taken by the person for whom the medicine has been prescribed'. S. 4(5) makes clear that the Bill 'does not authorise an assisting health professional to administer (himself) a medicine to another person (the patient) with the intention of causing that person's death' and in this way rightfully draws a distinction between assisted suicide and euthanasia. The Bill gives leeway to the Secretary of State to regulate in the future the form and manner medicines and prescriptions will take.[206]

If enacted, the Bill would repeal s. 2(1) Suicide Act 1961, if in accordance with the regulations of the Bill.[207] Under the Bill, the Chief Medical Officer shall inspect, monitor and submit annual reports as regards to compliance with the law.[208] Furthermore, a person shall be committing an offence if he 'makes or knowingly

[197] s.3(4).
[198] s.3(6).
[199] s.2(1)(a).
[200] s.2(a)(b).
[201] s.4(2)(a).
[202] s.4(2)(b)(i).
[203] s.4(2)(b)(ii).
[204] s.4(2)(d).
[205] s.4(3).
[206] s.4(7).
[207] s.6(2).
[208] s.9.

uses a false instrument which purports to be a declaration made under [s. 3]'.[209] This person, if proven that he had the 'intention of causing death to another person' is liable to 'imprisonment for life, a fine, or both'.[210]

B. Was the Falconer Bill Flawed?

This paper stands against previous and current forms of the proposed Falconer Bill which have not been rejected by Parliament. In this case, although it supports future legalisation of assisted suicide for the terminally ill, I believe that the proposed Bill does not place the prerequisite safeguards for the protection of the vulnerable. Although there are positive aspects to the proposal such as the option of contentious objection under s. 5, I contend that the regulations surrounding completion of the necessary declaration under s. 3, the ambiguous encapsulation of the new criminal offences under s. 10, and the problematic criteria for eligibility under s. 2 urgently need to be revisited and clarified. I also support that without these necessary legal safeguards analysed below, a 'slippery slope' argument is more likely.

Under s. 3 a valid declaration must be completed, first by the patient and then by two independent medical practitioners. This paper argues that this is an inadequate safeguard because the doctor who first diagnosed the patient may be one of the two doctors required to countersign the declaration, as the 'attending doctor'. Again, under a healthcare context, we may recall the mistakes that occurred under the Abortion Act 1967. The said Act, similarly to the Falconer Bill, requires for two medical practitioners acting in good faith to ascertain whether the patient interested to receive an abortion falls within the four broad defences that allow an abortion to take place under the law.[211] A few years ago a scandal was revealed whereby it was found that medical practitioners were pre-signing the necessary declarations for an abortion without even examining the patient.[212] The above instance is arguably of less gravity in comparison to legalising assisted suicide, nonetheless it may indicate that either two doctors are not sufficient in number to safeguard the law as envisaged by Parliament, or that correct monitoring and inspection was not taking place effectively.[213] As in the Falconer Bill under s. 9, s. 2(2) of the 1967 Act provides for the Chief Medical Officer to monitor its

[209] s.10(1)(a).

[210] s.10(3).

[211] Abortion Act 1967, s.1(1).

[212] David Burrowes, 'Doctors Must not be Above the Law on Abortion' *The Telegraph* (London, 12 May 2014).

[213] The issue of abortions is touched upon briefly in John Keown, 'Physician-Assisted Suicide: Some Reasons for Rejecting Lord Falconer's Bill' (2015) [13] <www.carenotkilling.org.uk/public/pdf/falconer-bill---john-keown.pdf> accessed 15 August 2015.

compliance with the profession. Keown, writing against the Bill, underlines that there is 'nothing to prevent a patient "shopping around" to find two compliant doctors'.[214]

Moreover, as per s. 3(1)(b)(i), the two doctors need to act 'independently of the other' and must not be relatives, colleagues or partners in the same practice. The Falconer Bill does not refer to any criminal consequences whatsoever in case the two doctors are found to have breached the above requirements for independent assessment. The Bill imposes positive obligations on doctors (for example that they must not be colleagues) but fails to touch on the potential criminal consequences should the obligations not be followed. The Bill, under s. 10, refers only to other more serious criminal offences such as 'wilfully conceal[ing] or destroy[ing] a declaration made under [s. 3]'.[215] These particular offences are directed to all persons and not to doctors solely. One would speculate, for example, as to the legal outcome (if any) of a declaration under s. 3 regarding a truly terminally ill patient, of acceptable capacity, and with a clear and settled wish to die, but with the two doctors having previously not acted independently or with even one of them pre-signing relevant necessary documents, as in the case of abortions.

We may assume that future Codes of Practice would be developed by the Secretary of State or bodies such as the GMC to address this issue, however bearing the seriousness of the medical issue in question, this paper argues that such circumstances should be addressed clearly in the Bill. Keown rightfully argues that the vague terms of s. 4(7) whereby the Secretary of State may publish relevant Codes '[cannot] secure effective control'.[216] Baroness Finlay agrees and emphasises that the Bill is 'asking Parliament to sign a blank cheque' since the decision to approve the Bill would have to be taken 'in complete ignorance of what the safeguarding regime is'.[217]

It is noteworthy that even in cases of serious criminal offences under the Bill such as when making or 'knowingly us[ing] a fake instrument which purports to be a declaration' with the intention of causing another person's death, sentencing guides remain elusive.[218] In such an event and per s. 10(3) the offender would be faced with 'imprisonment for life, or a fine, or both'. *Inter alia*, this provision aims to protect the vulnerable. However, assuming that under this offence, in essence, the offender is illegally assisting another person by 'aiding, abetting, counselling or procuring' his suicide, the sentencing guide expectation would be imprisonment

[214] ibid.
[215] Falconer Bill, s.10(1)(b).
[216] Keown (n 212) [19].
[217] Graeme Catto and Ilora Finlay, 'Assisted Death: a basic right or a threat to the principal purpose of medicine?' (2014) JR Coll Physicians Edin 134, 137.
[218] Falconer Bill, s.10(1)(a).

of fourteen years or less and certainly without the option of a mere fine, as per the Suicide Act 1961. This paper argues that the option of a fine may potentially cause a sentencing 'slippery slope' at least in cases of *bona fide* assistance to mercy killings that would not otherwise qualify under the proposed Bill—for example a situation whereby a suffering terminally ill patient is predicted to die in more than six months.

C. Six-Month Eligibility Clause and Commission Funding

Among others, a patient would qualify for assisted suicide only if they are 'reasonably expected to die within six months',[219] possibly with the intention of protecting the long-time disabled. This paper supports that the six-month limitation not only is very restrictive but also imposes undue pressure on prospective patients, their relatives and medical practitioners.

It is supported that prognoses of death for a short period of time such as the proposed six months can be problematic. The Royal College of General Practitioners had submitted that although 'reasonably accurate prognoses of death' are possible if within minutes, hours or days, the problem underlying the six-month limitation is that it is 'genuinely difficult for doctors' to estimate death especially when it 'stretches into months' since the 'scope for error can extend into years'.[220]

Moreover, the proposed eligibility limitation does not solve the matter of patients travelling to Switzerland; it neither reduces patient flow to Dignitas nor does it clarify the ambiguity of the law surrounding people who accompany them abroad. For example, a person accompanying a patient to Switzerland, with the patient projected to die in more than six months, could still theoretically be liable for an offence under s. 2 SA 1961 as their circumstances would not be 'in accordance with the Act (the Falconer Bill)'.[221]

The s. 2(1)(b) limitation does not even address the questions presented in *Pretty* and *Purdy* since the law and practice, especially following the 2010 DPP Guidelines, would still remain blurry. Most importantly, as emphasised by Lord Neuberger in *Nicklinson*, the six-month limitation does not tackle the wider problem as reflected by patients such as Nicklinson and Martin. If alive, both applicants would not be covered by the Bill they so much fought for, because they were expected to live for much longer than six months.[222] This paper thus supports that a six-month limitation would only cover a very slim proportion of those patients wishing to

[219] s.2(1)(b).

[220] HL Select Committee (n 27) *Memorandum by the Royal College of General Practitioners* [4].

[221] Falconer Bill, s.6(1).

[222] '[The Falconer Bill] would not assist the Applicants' *Nicklinson* [122].

have assisted suicide. I believe that the focus of Parliament should not so much concentrate on whether a terminally ill patient is predicted to die in six or twelve months, but on ensuring adequate and effective safeguards are put in place to protect the potentially vulnerable.

The Falconer Commission was privately funded by influential pro-legalisation individuals such as the late Terry Pratchett and Bernard Lewis, and the NGO Dignity in Dying.[223] Opponents of a change in the law, such as the disability charity Scope, raised concerns as to the transparency and independence of the Commission's Report that is exclusively funded by pro-euthanasia individuals and organisations.[224] Lord Falconer however emphasised that the Report 'evaluates all the evidence…on a fair basis'.[225] Maynard, Chair of Scope, stresses that the Commission's 'recommendations are paper-thin on [the] crucial point' of safeguards to vulnerable persons,[226] noting that disabled lives may be seen as 'a burden on society'.[227] This paper does not assert that due to the Commission's source of funding, that arising exclusively from pro-euthanasia supporters, any lack of independence is present. Nevertheless, I argue that one could point to presumed[228] structural bias due to the Bill's pro-legalisation proposals. Montgomery, albeit from a different theological viewpoint, rightfully argues that due to the funders' 'firm secular views', the stances of Christianity (and more generally of faith under the representation of religious organisations) have been absent from the Report's (and the Commission's) core considerations.[229] As this Bill deals with serious matters that could become law, and to avoid any claims of structural bias, this paper suggests that Parliament revisits the topic with a new, fast and cost-effective White Paper or Consultation that would be independently prepared.

VII. Conclusion

This paper has argued in favour of changing the law under s. 2(1) Suicide Act 1961 and legalising the practice of assisted suicide in England and Wales. This nonetheless must not be sought at any cost to society. It is believed that the judgment in *Purdy* produced a trail of legal instability, in both the short- and long-

[223] Commission on Assisted Dying (n 78) 9, 38.

[224] ibid *Transcript of Evidence from Alice Maynard Chair of Scope* [2].

[225] Rachel Williams, 'Assisted Dying Inquiry will be Fair' *The Guardian* (London, 30 November 2010).

[226] Alice Maynard, 'Response to the Commission on Assisted Dying' (*Scope*, 10 January 2012) [8] <www.blog.scope.org.uk/2012/01/10/scope-chair-alice-maynard-responds-to-the-commission-on-assisted-dying/> accessed 16 August 2015.

[227] ibid [14].

[228] Emphasis added.

[229] Montgomery (n 29) 347.

run, whereby the DPP was requested to produce policy Guidelines to clarify the practice surrounding prosecutions for assisting suicides. To date, the 2010 DPP Guidelines have clashed with the law under the 1961 Act. In criminal law, an accused requires, *inter alia*, two elements to be convicted of an offence: breaking the law and being prosecuted for it. I therefore support that at least *de facto*, the Guidelines have somewhat changed the criminal offence of assisting suicide especially for situations involving close relatives and assistance directed by genuine compassion and no gain.

The judgment in *Nicklinson* has been constitutionally proper in diverting the matter ultimately to Parliament, although discussions around incompatibility of the law with the European Convention had been thorough. Noteworthy is also any possible effect the withdrawal of the United Kingdom from the ECHR may have on current and future euthanasia law. The contrast of *Nicklinson* with the Canadian case of *Carter* reflected the willingness of the Justices in the Canadian Supreme Court to amend the law themselves, as they saw fit. This paper supports the democratic imperative and would expect Parliament and only Parliament, to change the law on assisted suicide.

However much this paper welcomes Parliament's efforts to debate on an appropriate change of the law on assisted suicide, it cannot support the most recent Lord Falconer Bill on Assisted Dying which has now possibly set a trail for any future legislation on the matter. It has been indicated from its birth that the Commission on Assisted Dying had been funded by private pro-euthanasia individuals such as Pratchett.[230] I do not claim that the Commission and its subsequent Report have not been transparent or independent, nonetheless I do recognise the possibility of one claiming presumed structural bias towards the Report. For that reason, this paper has proposed that Parliament re-examine this serious piece of legislation by the means of a new, more pluralist (which includes religious views), fast and cost-effective White Paper or Consultation.

Although some, as in *Carter*, have made the claim that legalising assisted suicide does not produce evidence of a potential negative impact on the vulnerable, some would support that the risk to those who are vulnerable is real. Our line of argument follows that assisted suicide should be legalised only when proper and adequate safeguards have been put in place by Parliament, in order to protect the vulnerable. This paper supports that under the Falconer Bill these safeguards had not been identified appropriately, especially when considering s. 4(7) which may invite the Secretary of State to publish crucial Codes of Practice. Neither has protection been sought under the Bill by avoiding to refer to criminal consequences

[230] BBC News, 'Assisted dying inquiry backed by Terry Pratchett starts' (30 November 2010) <http://www.bbc.co.uk/news/uk-11875323>

in cases whereby doctors are found pre-signing declarations, or where they have not acted independently.

Moreover, I believe that the six-month limitation under the rejected Bill reduced terminally ill patients' eligibility to a great extent. Consequently, a vicious circle would be created whereby the road to Dignitas would still be open to prospective patients. But the ambiguity of the law, as well as fear of prosecution for assisting the suicide of a person who has been given a prognosis of more than six months to die, would also still remain. Finally, this paper supports that the only way forward is to ensure a future assisted dying Bill extends the six-month limitation to cover a wider scope of terminally ill patients, to guarantee proper safeguards for the vulnerable are put in place and to repeal the relevant section of the 1961 Act.

The Trade Union Act 2016: What Next?

Azfer A. Khan*

I. Introduction

THE TRADE UNION Act 2016 is the product of the Conservative Government's promises during the 2015 election to give trade unions a greater democratic mandate. It has introduced several important changes to the law governing industrial action, and commentators have criticised the Act for lacking any coherent explanation to justify the need for a change in the law, for making it significantly more difficult for unions to go on strike, and for placing further limitations on picketing. After revisiting the main shortcomings of the Act, this paper argues for a shift in focus to alternative strategies, notably compulsory arbitration, which the UK might wish to adopt to better safeguard the rights of workers against employers.

The freedom to associate under Article 11 of the European Convention of Human Rights (ECHR) includes the right to bargain collectively,[1] and now, the right to strike.[2] But what Strasbourg has enshrined in terms of rights, it has defiled on the basis of the wide margin of appreciation accorded to the State under Article 11(2): the UK government's complete ban on secondary action is justified,[3] and the onerous pre-strike ballot and notice provisions have been glossed over.[4]

But not all is lost, at least the European Court of Human Rights (ECtHR) has affirmed the ability to strike as a right,[5] which is exactly the opposite of what has been the position under UK law: for it was only in 2009 that the Court of

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1 *Demir and Baykara v Turkey* [2008] ECHR 1345, (2009) 48 EHRR 54.

2 *National Union of Rail, Maritime and Transport Workers v United Kingdom* [2014] ECHR 366, [2014] IRLR 467.

3 ibid [76]–[78].

4 ibid [45].

5 Whether or not the right to strike is an absolute (or integral) part of the freedom to associate or not was left open by the Court, ibid [83].

Appeal affirmed that "English law does not of course recognise [such] a right", and without statutory exemption, unions would be liable for tortious activity for calling a strike.[6]

Having established that the orthodoxy of the common law must be challenged in the light of the developments of labour law standards globally, it is disappointing to note that under the banner of bringing "sunlight to the dark corners of the [trade union] movement",[7] the Conservative Government has proceeded to chip away at what little strength remains of the trade unions in the UK by introducing the Trade Union Act 2016 (TUA).

In force since the 1st of March 2017, the provisions of the TUA will undoubtedly make it more difficult for unions to organize industrial action, or to go on strike. In part I, this paper outlines the main changes to be brought about by the TUA and the criticisms commentators have levelled against the Act. In part II, an attempt is made to synthesize the UK position on collective labour law with alternative methods to ensure collective bargaining. The paper concludes with a few thoughts on how the labour market in the UK might evolve in the near future.

The TUA will have four main effects. These are: (1) introduction of a requirement that 50% of those entitled to vote must turn out to vote for the industrial action to be valid;[8] (2) introduction of a requirement that, for "important public services", 40% of those entitled to vote must have voted in favour;[9] (3) introduction of union supervised picketing;[10] and (4) two weeks' notice to be given to employers of forthcoming industrial action, unless they agree to a seven days' notice.[11]

Other major changes, which we need not discuss for the sake of brevity include the Certification Officer reforms and the opting in by union members to political funds.[12]

A. Mismatch Between Objectives and Act

To understand the objectives of the TUA, we must go back to 2010, to the right-wing think-tank Policy Exchange, and to a paper written for it, entitled "Modernising Industrial Relations".[13] Given that the correspondence between

6 *Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829, [2010] ICR 173 [37] (Lloyd LJ).
7 HC Deb 14 September 2017, col 791.
8 TUA s 2.
9 TUA s 3.
10 TUA s 10.
11 TUA s 8.
12 On this latter point, see K. D. Ewing and John Hendy, 'The Trade Union Act 2016 and the Failure of Human Rights' (2016) 45 ILJ 391.
13 Ed Holmes, Andrew Lilico and Tom Flanagan, 'Modernising Industrial Relations' (Policy Exchange, 2010).

its suggestions and the Government's legislative programme is too alike be a coincidence, Bogg rightly suggests that the relevant promises made in the Conservative Manifesto[14] likely came from this paper.[15] This in and of itself would not be an issue, after all, the government should be free to adopt whatever legislative position it chooses. However, as Bogg, Ford and Novitz point out, the paper was fundamentally misguided about the role of trade unions in the UK, portraying them as vehicles for reducing transaction costs and reducing the monopoly of the employers, when in fact the primary role of trade unions is to represent its members and provide an avenue for collective bargaining.[16] Given this bias, we must receive the stated aims of the TUA with a healthy dose of scepticism.

The government has repeatedly cited the policy objectives of the TUA as being those of "fairness, democracy, and transparency".[17] Before the election, it had done so by painting a picture of aggressive union leaders bullying union members to take part in industrial action, against the members' better judgement,[18] but over time their focus has shifted to a wider public interest argument: that the people "have a right" to expect that services that families rely on will not be disrupted.[19]

However, there is no right under domestic, European, or International Law guaranteeing that citizens can expect services that families rely on not to be affected by industrial action.[20] Rhetoric of such a right blinds us to the core of the government's position, which is that the interest of striking workers stands in direct conflict with those of other worker-consumers,[21] when in fact it has always been against the employer. The government cited its concerns of union leaders and the vocal minority strong-arming the silent majority of members into taking part in industrial action, and produced an *Impact Assessment* on ballot thresholds, which strongly criticised the current pre-strike balloting rules. As Dukes and Kountouris note, this assessment was roundly rejected by the Regulatory Policy Committee for "its lack of evidence" and failure to explain the rationale for the proposals "in a

[14] Conservative Party, 'Strong leadership, a Clear Economic Plan, A brighter, More Secure Future' <https://www.conservatives.com/manifesto> (accessed 27 January 2017).

[15] Alan Bogg, 'Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State' (2016) 45 ILJ 299, 301.

[16] ibid 301; Michael Ford and Tonia Novitz, 'Legislating for Control: The Trade Union Act 2016' (2016) 45 ILJ 277, 278-281. For a traditional account of this point see S. and B. Webb, *The History of Trade Unionism* (Longmans, Green and Co. 1894).

[17] BIS, Trade Union Bill: Consultation on Ballot Thresholds in Important Public Services (July 2015) BIS/15/418.

[18] Ruth Dukes and Nicola Kountouris, 'Pre-strike Ballots, Picketing and Protest: Banning Industrial Action by the Back Door?' (2016) 45 ILJ 337, 350.

[19] Ruth Dukes, Tonia Novitz and Alan Bogg, 'Pre-strike Ballots and the Trade Union Bill 2015: denying the workers the right to strike?' Emp. L.B. 2015, 2-4.

[20] ibid 3.

[21] ibid.

coherent manner".[22]

Notwithstanding the fundamental labour law issues that the government seems to have failed to grasp, and a lack of a coherent rationale for the legislative changes, there exists a clear mismatch between the stated objectives of the government (i.e. to improve the democratic mandate of the unions) and the actual changes that are set to be brought about through the Act.

Firstly, and most obviously, the government's claim of improving democracy within the trade unions must be called into question. If they wished to improve democracy within the unions, there is no reason why electronic balloting should not have been introduced through the TUA.[23] At present, trade unions must disseminate pre-strike ballots by post, something which, in an age of computers and instantaneous communication, is clearly dated, onerous, and only serves to increase the workload for the unions and make it more difficult for them to organize industrial action. Although s.4 TUA specifies that the Government should make provision for a review to consider electronic balloting, and the Government has committed to such a review, it by no means makes the outcome of this review binding, nor does it place any meaningful obligation on the Government to introduce such a change.

Secondly, as Dukes and Kountouris helpfully point out, the Government, believing that all union leaders are dictators coercing their members into disrupting the economy, seems to have ignored the fact that union leaders are elected by their members,[24] cannot take any action against members who refuse to take part in the industrial action even if there is majority support for it,[25] and are prohibited from using industrial action to pursue personal or political objectives.[26] The portrayal of the union leaders as tyrannical seems to be wide off the mark.

Finally, the government's intended reforms do nothing to improve the democratic mandate of the unions. By ramping up turnout requirements, the government has, essentially, given more power to abstentions.[27] Never mind the fact that in democratic societies it is not the number who voted that matters, but those who voted in favour or against a given measure—it is odd that the voting requirements for calling a strike are more onerous than voting in the local election. To provide further context, Dukes and Kountouris conclude that if the voting

[22] Dukes and Kountouris (n 18) 350.

[23] Michael Ford and Tonia Novitz, 'An Absence of Fairness: Restrictions on Industrial Action and Protest in the Trade Union Bill' (2015) 44 ILJ 522.

[24] TULRCA ss 46-61.

[25] TULRCA ss 64, 65

[26] TULRCA ss 219-244.

[27] This point has been forcefully made by R. Darlington and J. Dobson, *The Conservative Government's Proposed Strike Ballot Thresholds: The Challenge to Trade Unions* (Liverpool: IER 2015), ch 6.

requirements of s.3 TUA had applied in the recent Brexit referendum, the UK would still be a member of the European Union.[28]

It seems clear, therefore, that the TUA will not improve the democratic mandate of the trade unions. Hepple suggested that this was because the Government "failed to consider accurate evidence" on which to make its claims,[29] but many commentators go further and suggest that the Government has a hidden agenda to pre-emptively strike against unions in anticipation of austerity measures.[30] As for the stated aims of transparency and fairness, there are no provisions in the TUA that can clearly and meaningfully fulfil those values.[31]

B. Impact of the TUA

The impact of the TUA will be significant, and national ballots are likely to be affected the most, since area and workplace ballots usually have higher turnout rates.[32] Although Darlington and Dobson must be right to conclude that the new ballot turnout requirements will make it more difficult to go on strike, one must not push this argument too far because they support their argument on the basis of past ballots and retrospectively applying the ballot requirements to conclude that a significant number of those strikes would have failed the TUA requirements.

The problem with using such data is that it is being applied to a different context: one could very well say (though less convincingly) that the high turnout requirement imposed by the TUA will ensure that unions do their utmost to persuade as many members to vote as possible, thereby reducing member apathy. This does not rob the significant empirical research conducted by Darlington and Dobson of its importance. Indeed, the very opposite is true: it can be a valuable yardstick against which to measure voter turnouts for industrial action going forward to see the precise effect of the TUA on the collective labour market in the UK.

The Trade Union Congress (TUC) strongly criticized the Bill before it was passed through Parliament and has continued voicing its grievances against the TUA.[33] Three objections seem especially relevant: (1) the additional picketing

[28] Dukes and Kountouris (n 18) 362.

[29] Bob Hepple, 'Back to the Future: Employment Law under the Coalition Government' (2013) 42 ILJ 203.

[30] Ford and Novitz (n 16) 280-281.

[31] Some may suggest that the requirements to give more information per ss 5-7 TUA improve transparency, but this would be to conflate procedural red-tape for meaningful transparency.

[32] Darlington and Dobson (n 27) ch 6.

[33] Frances O'Grady, 'Trade Unions Bill: Unfair, Unnecessary and Undemocratic' (2015), <http://touchstoneblog. org.uk/2015/07/trade-unions-bill-unfair-unnecessary-and-undemocratic > (accessed 27 January 2017).

requirements; (2) the additional ballot requirements for "important public services";[34] and (3) and the draft regulations to lift the ban on agency workers.

With regards to picketing, the Government's concerns were with "intimidation" and the use of leverage tactics by workers while picketing,[35] purportedly based on evidence submitted to the Carr Review.[36] However, as Mr Carr QC gave his report, he added a warning that the evidence supplied to the Review was "one-sided" and "untested", with the result that he did not state his findings as findings of fact, but rather as a record of the evidence submitted to him.[37] Ostensibly, therefore, the Government has started off with a misstep, much like its objectives discussed in the previous section, but this misstep is a more serious one: under s.220(1) of TULRCA 1992, the only lawful form of picketing is peaceful, which means that the concerns about intimidation while picketing is a non-issue because it is already a criminal offence.[38]

Nevertheless, the TUA introduces union-supervised picketing,[39] and, crucially, requires the picket supervisor to identify himself with the police[40] and wear something that makes the supervisor readily identifiable as a picket supervisor.[41] Arguably, it will be difficult to find enough volunteers to take on this role, especially in the light of the recent blacklisting scandal which left many active union members unable to find jobs because of their union-related activities. Simply put, workers do not have enough trust in the government to ensure that their details and privacy will be safeguarded, and indeed the government has made no firm assurances that it will take steps to do so.

Another major impact that the TUA will have is that it will limit the ability of workers working in "important public services" to strike. These services include health services, education of those aged under 17, fire services, transport services, border security and decommissioning of nuclear installations and management of radioactive waste and spent fuel.[42] Unions in these services will require 40% of those entitled to vote in the ballot to have voted yes. This is a significant hurdle to overcome, one more onerous than voting requirements of referendums and

[34] See n 9 above.
[35] BIS, Trade Union Bill: Consultation on Tackling Intimidation of Non-Striking Workers (July 2015) BIS 15/415.
[36] Bruce Carr, The Carr Report: The Report of the Independent Review of the Law Governing Industrial Disputes (October 2014).
[37] ibid [1.11].
[38] For an excellent discussion on why the government's "evidence was misleading", see Dukes and Kountouris (n 18) 355-359.
[39] TUA s 10.
[40] TUA s 220A(4)(a).
[41] Trade Union Act 2016 (TUA 2016), s 220A(8).
[42] TUA 2016, s 3(2E).

of general elections. Moreover, it has been argued that pre-strike ballots are only compatible with international labour standards, set by the International Labour Organisation (ILO), if they do not present a "substantial limitation" on the means of action open to trade unions.[43] It is not clear why the Government chose not to impose a minimum service agreement between the unions and employers for these "important public services" if their core aim was to ensure that consumers would not be disadvantaged by a strike. A minimum service agreement is one where the union and the employer agree that, should union take industrial action, a minimum service will run during the time.[44] This ensures that a strike does not deprive the general public of any essential services (e.g. ambulances), whilst still giving industrial action teeth because the employer will suffer some degree of economic loss. This should encourage the employer to agree to better terms for the workers. By increasing the voter turnout threshold for pre-strike ballots in disputes involving "important public services", the Government has taken a step towards rejecting any industrial action for these services altogether.

Finally, the requirement that two weeks' notice must be given to the employer[45] will severely limit the effectiveness of the industrial action because the employer will now have time to anticipate and pre-empt any losses that might be incurred.

In sum, it is becoming clear that the UK is an increasingly hostile environment for the development of collective labour law rights. Indeed, the General Secretary of the TUC, Frances O'Grady, has claimed (perhaps rightly so) that the cumulative changes will "effectively end the right to strike in the public sector".[46]

II. An Alternative to Strike Action

There are two reasons why an alternative to industrial action is necessary if we are to ensure that meaningful collective bargaining takes place in the UK. First, the TUA will have the effect of making industrial action all the more difficult to occur in the UK, because "important public services" may well become an unattainable goal, and the onerous notice period requirements may well render many threatened strikes less likely to lead to an agreement with the employer. Secondly, the changing market in the UK, the rise of the "gig-economy" and a call

[43] Bernard Gernigon, Alberto Odero and Horacio Guido, *ILO Principles Concerning the Right to Strike* (Geneva, ILO Office 2000) 25.

[44] International Labour Organisation, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th edn, Geneva 2006).

[45] TUA 2016, s 8.

[46] Ben Tufft, 'Conservatives to "effectively end the right to strike" in the public sector, union leader says' *Independent* (10 January 2015) <http://www.independent.co.uk/news/uk/politics/conservatives-to-effectively-end-the-right-to-strike-in-the-public-sector-union-leader-says-9969693.html> (accessed 29 January 2017).

to synthesize labour law reform under a coherent guiding principle all indicate a need to develop new frameworks to tackle new problems as they arise.[47] But before moving on to the alternatives, it is important to consider whether strikes are the best way to ensure that collective bargaining actually takes place.

Collective Bargaining, Not Collective Action

Otto Kahn-Freund argued that the primary purpose of the law is "to regulate social power",[48] and while that may be a contentious claim for some commentators, one cannot deny that there are exists an inherent tension between the employer—whose main expectation is to ensure maximum profits, and the worker—whose main expectation is to work in a "stable and dignifying" environment. The individual employee is subordinated to the power of the employer, and quite significantly so.[49] For Kahn-Freund, therefore, it is clear: "only power stands against power",[50] and organized labour provides the "countervailing power" against the employer's to ensure that employers treat their workers fairly, and with dignity.[51] For Kahn-Freund, collective bargaining is persuasion,[52] and by bargaining collectively the employer gives effect to its legitimate expectation not to have work interrupted, and the employee has her legitimate expectation of fair conditions of work upheld.

But willingness to bargain is quite different from willingness to agree,[53] and even if the employer is willing to come to the table and negotiate, it would serve no meaningful purpose if the employer refused to concede any requests made by the workers. Since the contract of employment is still just that—a contract—the law cannot force an agreement between the parties (though it can, and does, provide a floor of rights that the employer must respect).[54] It is on the level of persuading an employer to agree to a change in the terms of the employment contract that

47 On this last point see Simon Deakin and Frank Wilkinson, 'The Law of the Labour Market' in Paul Davies, Keith Ewing and Mark Freedland (eds), *Oxford Monographs on Labour Law* (OUP 2005) 342-353.

48 Otto Kahn-Freund, *Labour and the Law* (2nd edn, Stevens & Sons Ltd 1977) 14.

49 ibid 22.

50 ibid 69.

51 Further on the use of the term "dignity", see Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011).

52 ibid.

53 ibid 88.

54 ibid 58. A focus on voluntary collective bargaining and a non-intrusive legal regime is an aspect of what Kahn-Freund called "collective laissez-faire". For further details see Otto Kahn-Freund, 'Labour Law' in Morris Ginsberg (ed), *Law and Opinion in England in the 20th Century* (Stevens & Sons Ltd 1959). For an interesting discussion of the impact of individual rights on the role of trade unions, see Trevor Colling, 'What Space for Unions on the Floor of Rights? Trade Unions and the Enforcement of Statutory Individual Employment Rights' (2006) 35 ILJ 140.

industrial action comes in.

Nobody likes a strike: employers suffer from the disruption of work, consumers suffer as services are disrupted,[55] the economy suffers as productivity is reduced, and the process of organising industrial action is complex for both employees and unions. Many recognise the ability to go on strike to be a necessary feature of the labour market in order to protect the employee. The ECtHR has gone so far as to declare it a part of Article 11, a right that workers are entitled to exercise.[56] However, the ECtHR has wisely refrained from embroiling itself in a political nightmare by refusing to comment on whether a right to strike is a necessary part of the freedom to associate or whether it is contingent on the principles of effective collective bargaining.

Why is the "right of workmen to strike…an 'essential' element in the principles of collective bargaining?"[57] If the answer is that it is essential to give collective bargaining teeth, then it begs the question: why is it essential? If the purpose of a strike is to ensure the employer is encouraged to listen to the concerns of the workers, then surely a strike is a means to an end, and so there may be other means which lead to the same end, perhaps in a manner that does not fundamentally force the employee and employer into an overtly antagonistic position.

The first point to be made must be that we should not ignore the possibility that alternatives to collective bargaining as an underlying concept have been suggested,[58] and indeed when the Webbs first explored the purposes of trade unions in 1894, they identified three equally important and equally likely methods by which trade unions could ensure regulation of the labour market.[59] These alternatives will not be considered in depth because they would require an overhaul of collective labour law in the UK, something which is not likely to happen in the near future.[60] Instead, the focus should be on alternatives that can work within the system of minimal legal regulation for collective bargaining that our current system so prominently enshrines (at least in so far as there is no mandatory obligation for employers to bargain; it is very largely still voluntary).

The second point to be made is that the number of successful strikes that are called has declined.[61] The reasons for this are varied, and differ from year to

55 Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016) 189.

56 See n 5.

57 *Crofter Harris Tweed v Veitch* [1942] 1 All ER 142, 157 (Lord Wright).

58 Sidney Webb and Beatrice Webb, *The History of Trade Unionism* (Longmans, Green & Co. 1894).

59 Simon Deakin and Frank Wilkinson, 'The Law of the Labour Market' in Paul Davies, Keith Ewing and Mark Freedland (eds), *Oxford Monographs on Labour Law* (OUP 2005) 200.

60 For an excellent discussion of the different theoretical views, see Alan Bogg, 'Labour Law and the Trade Unions: Autonomy and Betrayal' in Alan Bogg and others (eds), *The Autonomy of Labour Law* (Hart 2015) 76–106.

61 A.C.L. Davies, *Perspectives on Labour Law* (2nd edn, CUP 2009) 219. On trade union membership

year because of successive changes in government policies, but there is a strong argument to be made that the idea of "partnership" between employers and workers, outlined in the *Fairness at Work* White Paper,[62] has tried to undermine the traditional portrayal of employers in a constant state of conflict with their workers, and to encourage conciliation and dialogue between the unions and employers.[63]

Thus, one argument is that the Government should take more steps to encourage dialogue between workers and employers. This can be done in a number of ways, including the promotion of worker participation in management, and the modification of information and consultation rules so as to encourage a more meaningful exchange of information between unions and employers for the purpose of collective bargaining. Although there have been countries who have done so quite successfully, like Sweden, a country where collective bargaining is pervasive and strike incidence is low,[64] these methods are not alternatives to strikes. Instead, they aim to reduce the need, or incidence, of industrial action.

One alternative to industrial action is the introduction of a national works council to collectively manage certain terms (usually wages) of a category or class of contracts of employment. The example of Germany should serve as inspiration, because, as Addison, Teixeira and Zwick demonstrate, it seems that German works councils have had the effect of promoting higher wages than it situations of voluntary collective bargaining.[65] In general, the rates agreed by representatives at these councils tend not to be disputed, and the need for industrial action is avoided.

The arguments against such a scheme, however, are conclusive. First, the German works councils have very high levels of government support, whereas the necessary governmental or legislative support for such councils is "non-existent" in the UK.[66] Moreover, the works councils manage specific terms of the contract of employment, usually wage-related. Industrial action occurs for a variety of reasons, not just one term of the contract, and in some circumstances, can be simply a show of solidarity in support or against a particular decision taken by the employer. Replacing industrial action with a works council removes this flexibility that accompanies industrial action, flexibility inherent in the idea of collective

density see Organisation for Economic Co-operation and Development (OECD), 'Trade Union Density' <http://stats.oecd.org/Index.aspx?QueryId=20167≥ (accessed 27 January 2017).

62 Department of Trade and Industry, *Fairness at Work* (Cm 3968, 1998).

63 Further, see M. Terry and J. Smith, *Evaluation of the Partnership at Work Fund* (DTI URN 03/512 2003).

64 Nils Elvander, 'The New Swedish Regime for Collective Bargaining and Conflict Resolution: A Comparative Perspective' (2002) 8 European Journal of Industrial Relations 197, 215-216.

65 John T. Addison, Paulino Teixeira and Thomas Zwick, 'German Works Councils and the Anatomy of Wages' (2010) 63 Industrial and Labour Relations Review 247.

66 Indeed, the two periods when such councils were actively introduced in the UK were the two world wars. For a detailed treatment of this topic, see F. J. Bayliss, *British Wages Councils* (Blackwell 1962).

bargaining.[67] One could very well argue that the works council could be introduced to manage specific terms and hence make only those issues fall outside the scope of industrial action, or indeed retain the possibility of industrial action as it stands now. However, there is something to be said about such works councils (assuming they can ensure higher wages) bringing down the total revenue of the employers, as some of their profit will fund the corresponding higher wages.[68] There may well be strong motivation for the employers to resist the implementation of such measures.

III. Compulsory Arbitration

The meaning of compulsory arbitration has always been a subject of debate,[69] but at its core is a simple concept: workers and employers can bargain meaningfully through arbitration processes, and where the option of going on strike is unfavourable (for example for essential services like ambulances) it may be worthwhile to have state-sanctioned arbitration between the parties as a platform for negotiation.

Compulsory arbitration "does not have as its necessary corollary a prohibition against industrial action",[70] that is to say, compulsory arbitration and industrial action are not mutually exclusive: in fact, after the second Great War, a modified version of compulsory arbitration existed[71] (arguably successfully) alongside the right to strike in the UK.[72] Having said that, this paper assumes the higher burden of showing that compulsory arbitration has the potential to wholly replace industrial action, and hence, is a viable alternative to effectuate meaningful collective bargaining. To clarify, the argument is not for any particular type of compulsory arbitration mechanism. Indeed, that would require extensive research into the alternatives available and likely be the subject of a different paper altogether. One must further concede that a sudden overhaul of the system will be unlikely; it will be more attractive to have a system where both compulsory arbitration and the right to strike coexist in the near future.

We could start the argument from case-studies, from States which have successfully implemented compulsory arbitration, Singapore for example, which has its own Industrial Arbitration Court and despite criticisms, is generally seen

67 Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016) 162.

68 John T. Addison and others, 'Do Works Councils Inhibit Investment?' (2007) 60 Industrial and Labour Relations Review 187, 188–189.

69 James A. Jaffe, 'The Ambiguities of Compulsory Arbitration and the Wartime Experience of Order 1305' (2003) 15 Historical Studies in Industrial Relations 1.

70 Otto Kahn-Freund and Bob Hepple, 'Laws against strikes' in Brian Lapping (ed), *International Comparisons in Social Policy* (Fabian Research Series 305 1972) 29.

71 Conditions of Employment and National Arbitration Order of 1940 (Order 1305) LAB 10/547.

72 Carl M. Stevens, 'Is Compulsory Arbitration Compatible with Bargaining?' (1966) 5 Industrial Relations 38, 42.

as a success.[73] But this would be a mistake. The greatest hurdle that compulsory arbitration faces in the UK is the unique social, political, and economic context, and the deep-rooted history of strike action that shapes British politics to this day. From the *Taff Vale*[74] dispute in 1901, to the miners' strikes of 1984-85, to the 2017 Tube strike, large-scale industrial action has been instrumental in shaping the history of political development in the UK. Any suggestion to abolish the right to strike must therefore be taken with a great degree of suspicion. But, keeping in mind the changes in the labour market in the UK, stringent restrictions on trade unions' ability to strike and the general decline of strike activity may well provide the catalyst for change.

Several criticisms can be levelled at compulsory arbitration. The first, and perhaps the most crucial of these, is that compulsory arbitration is not compatible with collective bargaining.[75] The answer to this depends on the kind of compulsory arbitration system being envisioned, and, as Stevens rightly suggests, compulsory arbitration could well have a voluntary element (despite the misnomer of "compulsory") in so far as it may allow unions or employers to "contract out" of the system.[76] Our argument is more succinct: if the focus is on collective bargaining (bringing the employer to the table) then industrial action, or the threat of it, is sufficient, but if the focus is on collective agreement (getting the employer to agree to changes), then arbitration provides an avenue where there is both certainty and (relative) fairness in terms of outcome for both parties. There is no inherent reason why compulsory arbitration rules out collective bargaining, in so far as collective bargaining involves the employer hearing out the requests of the workers (usually but not necessarily) through unions.

Other criticisms which have been put forward include: (1) a greater likelihood of "non-observance" of an arbitral award compared to agreements voluntarily entered into; (2) the "tendency to hold back on any concessions" so as to prevent influencing the award; and (3) the fact that arbitration serves as a "crutch for weak union leadership" who can take shelter behind an award instead of taking unpopular decisions.[77] These problems are only minor when compared to the state of collective labour law in Britain today. Legislative amendments can be made to tackle the non-observance of arbitral awards (including the imposition of criminal

[73] Paul L. Kleinsorge, 'Singapore's Industrial Arbitration Court: Collective Bargaining with Compulsory Arbitration' (1964) 17 Industrial and Labor Relations Review 551, 564–565.

[74] Taff Vale Railway Co v Amalgamated Society of Railway Servants [1901] UKHL 1.

[75] Otto Kahn-Freund, 'Legal Framework' in Allen Flanders and H. A. Clegg (eds), *The System of Industrial Relations in Great Britain* (Blackwell 1954) 101.

[76] Carl M. Stevens, 'Is Compulsory Arbitration Compatible with Bargaining?' (1966) 5 Industrial Relations 38, 42.

[77] Otto Kahn-Freund and Bob Hepple, 'Laws against strikes' in Brian Lapping (ed), *International Comparisons in Social Policy* (Fabian Research Series 305 1972) 30.

sanctions), and the lack of concessions will usually go against the employer's interests in securing a favourable award. Equally, a weak union leader who takes shelter behind arbitral tribunals might be voted out in the next election, so they should not pose a significant concern. Indeed, arbitration is developing rapidly across the globe, especially in cases which concern international contracts, and various arbitration models are being refined and improved. The UK should take notice of these developments, rather than stick to a dated model of collective bargaining in an environment averse to industrial action.

In sum, this paper argues for three main propositions. First, industrial action is likely to be less effective in encouraging a compromise between workers and their employers because of the TUA. Secondly, it is the right of workers to collectively bargain that is paramount, not the right to take industrial action, although the two often intertwine. Thirdly, compulsory arbitration is a dispute resolution model that may well serve as a viable alternative to industrial action. The introduction of compulsory arbitration in certain essential public services may well be more beneficial to protect the rights of workers than the current legislative framework. Over time, it may become the primary mode of collective bargaining in the UK, though perhaps that is looking too far ahead into the future.

IV. Conclusion

To conclude, it is clear that the TUA will have significant adverse consequences on a trade union's ability to proceed with industrial action. These consequences will be more keenly felt in national-level strikes where a massive turnout requirement will be imposed through the TUA, and for jobs that fall within the uncertain boundaries of "important public services". There may be further repercussions on the ability of workers to peacefully picket, and the complex balloting requirements coupled with the substantial notice periods will fundamentally undermine any meaningful strike action to compel employers to bargain with the unions for better terms for their members.

Even with this development, we must not lose sight of the woods for the trees: industrial action gives weight to collective bargaining. Nobody benefits from a strike, especially in circumstances where the employer is not persuaded to negotiate better terms. Lastly, there may be something in the suggestion that alternative mechanisms to induce employers to bargain or come to an agreement should be tested, and compulsory arbitration being one viable alternative.

There is also a hope that the ECtHR will find the provisions of the TUA in breach of the ECHR, or that the CJEU will find them in breach of EU law, and that may prevent the government from dealing a death-blow to the public-sector trade unions.

Children Under the Knife: Current Interests, Future Interests or Parental Interests?

Jade Michelle Ferguson*

I. Introduction

IT IS BOTH natural and essential to take a paternalistic approach to raising a child.[1] This is in order to protect the child's long-term interests from their immature judgement. Parents have a right to shape their child by raising them in accordance with their religion and values, choosing their diet, education and accommodation. However, it is a parent's duty to preserve their child's right to an open future and to not take irreversible actions which may deprive the child of future life choices.[2] There is a potential adult in every child, and it is this potential adult's autonomy which must be protected while they are young.[3]

In the context of health care decisions, the law supports a parent's right to make medical decisions on the behalf of their children. The general presumption is that a parent will make a decision on medical treatment with the child's best interests in mind.[4] Parental rights, however, tend to only be invoked where a decision is controversial.[5] Where there is an agreement on medical treatment between parents and doctors, it is presumed that the best interests standard has been satisfied. This parent-doctor presumption allows doctors to recommend, and parents to give consent to, medically unnecessary treatments. This leaves gaps in the law which potentially will lead to a failure in protecting a child's right to an open future.[6]

This article will examine the adequacy of the law in protecting the open

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1 Joel Feinberg, *Freedom and Fulfilment* (Princeton University Press, 1992), 76.

2 Robert Darby, 'The Child's Right to an Open Future: is the Principle Applicable to Non-therapeutic Circumcision?' (2013) 39 Journal of medical ethics 463, 464.

3 ibid.

4 Alicia Ouellette, 'Eyes Wide Open: Surgery to Westernize the Eyes of an Asian Child' (2009) 39 The Hastings Centre Report 15, 16.

5 Robert van Howes, 'Infant Circumcision: the Last Stand for the Dead Dogma of Parental (Sovereignal) Rights' (2013) 39 Journal of Medical Ethics 475, 475.

6 Anne Tamar-Mattis, 'Exceptions to the Rule: Curing the Law's Failure to Protect Intersex

future principle. As will be discussed, the law protects children against some non-therapeutic procedures but not others. It will be claimed that the malleability of the best interests standard leads to gaps in the law for three reasons. Firstly, if the surgery is not life-threatening it can often be justified through the harm principle. Secondly, there is a presumption that the parent will make a decision with their child's interests at heart, even though this is not always the case. Thirdly, the medical profession is afforded too much scope when applying the best interests standard. The arguments in this paper will focus on young minors who are not yet *Gillick* competent.[7]

II. The Best Interests Standard

Parental authority over healthcare decisions is not unlimited. For example, all UK blood transfusion refusals have been overridden on the basis that necessary transfusions represent the child's best interests, even if this conflicts with the religious views of the family.[8] The restrictions to a parent's power over their child's body apply not only to refusals of treatment but also to consent. This can be seen through the criminalisation of non-therapeutic surgery such as female genital mutilation (FGM) and sterilisation of children without court approval. In these situations, the law acknowledges and protects a child's right to an open future. In view of this, the law appears to agree with the claim that parents play a fiduciary role in a child's life rather than a property-owning one.[9] They are legally bound to hold their child's future rights on trust until they are old enough to exercise them. However, the laws limiting parental authority are only procedure specific and therefore do not protect children from being inflicted with other non-therapeutic treatment.

In regards to other non-therapeutic decisions, a parent-doctor presumption is applied. Parents may provide consent to procedures of a cosmetic nature such as ear-pinning, circumcision, limb-lengthening and genital normalising surgery by arguing that the procedure is in the child's best interests. The legality of such procedures raises questions concerning the adequacy of the best interests standard applied by the courts and medical professions in guarding the concept of an open future.

The best interests standard has been criticised for its inherent vagueness and lack of explicit normative guidance.[10] It has been described as an 'empty

Infants' (2006) 21 Berkeley Journal of Gender Law and Justice 39, 89.

7 *Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] 1 FLR 224.

8 *Re S (A Minor)* [1993] 1 FLR 376; *Re O (A Minor) (Medical Treatment)* [1993] 1 FCR 925; *Re S (A Minor) (Consent to Medical Treatment)* [1995] 1 FCR 604.

9 Ouellette (n 4) 17.

10 Mary Donnelly, *Health Care Decision Making and the Law: Autonomy, Capacity and the Limits of Liberalism* (CUP, 2010), 176.

rhetoric'.[11] The ambiguity of the phrase raises concerns that the standard can be manipulated in order to justify questionable treatments.[12] Despite this, supporters of the best interests standard agree that the concept is subjective but also highlight that as a society we have a general consensus about what a good life entails.[13]The standard is easily applied where the child's life is at jeopardy and parental autonomy rights are overridden.[14] However, in situations where a proposal for treatment lacks therapeutic intent, an application of best interests standard is not so straightforward.

III. The Court's Approach to Non-Therapeutic Procedures

The malleability of the best interests standard becomes obvious in its application to ritual male circumcision, a procedure which has no proven medical benefits. When weighing the benefits and the harms of the procedure in terms of the child's well-being, it is apparent that the surgery is not in the child's best interests. Irrespective of this, it was held *obiter dicta* in *R v Brown*[15] that ritual male circumcision is lawful.[16] The best interests standard is inherently centred on values,[17] and therefore a multitude of reasons can justify a procedure if more weight is attached to cultural values than the physical harm caused. Bridge claims that circumcision is justified under the best interests principle as it is important for the welfare of the child that he conforms to family traditions.[18] Such reasoning is also listed as a justification in the British Medical Association guidelines.[19] However, it is debatable whether cultural benefits justify impinging a child's right to an open future.

A right to an open future places value on self-fulfilment and liberty.[20] If actions are taken in childhood which later leave an adult unable to make future choices, the opportunity for self-fulfilment and liberty will be diminished. Although a child's relational background will influence their decisions later in life, the child may grow up to challenge the values of their parents. As circumcision involves permanently

11 Ian Kennedy, *Treat Me Right: Essays in Medical Ethics* (Clarendon Press 1991), 90.
12 Jonathan Herring, *Vulnerable Adults and the Law* (OUP, 2016), 208.
13 ibid.
14 *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 193.
15 *R v Brown* [1993] 2 All ER 75.
16 *R v Brown* [1993] 2 All ER 75, 79.
17 Douglas Diekma, 'Parental Refusals of Medical Treatment: The Harm Principle as Threshold for State Intervention' (2004) 25 Theoretical Medicine and Bioethics 243, 246.
18 Caroline Bridge, 'Religion, Culture and Conviction – the Medical Treatment of Young Children' (1996) 11 Child and Family Law Quarterly 1, 5.
19 British Medical Association, 'The Law and Ethics of Male Circumcision: Guidance for Doctors' (2004) 30 Journal of Medial Ethics 259.
20 Jonathan Morgan, 'Religious Upbringing, Religious Diversity and a Child's Right to an Open Future' (2005) 24 Studies in Philosophy and Education 367, 370.

altering the body, the child's freedom of religious choice may be restricted by their parents' decision.[21] On the other hand, Mills claims that providing children with an open future is both impossible and undesirable.[22] She argues that the idea of raising a child in a way which provides the ability to pursue all options is superficial and it is impossible to rear a child without encouraging them down one path or another.[23] However, this does not take into account that a child can be raised in a way which makes them aware of other ways of life so that, if they choose to, they have the option of living their life differently.

In the context of circumcision, Mills' thoughts can be applied to debate that, while Muslim parents may be viewed as closing off the right to religious freedom through circumcision, state intervention could also be seen as closing off a child's option of living in accordance with his family's values and belonging to a religion. In this way, it can be argued that state intervention will influence religious freedom. It is highly debatable where a line should be drawn between morally acceptable and unacceptable decisions.[24] Feinberg contends that state-neutrality is impossible.[25] In refusing to intervene, the state is still playing a part in closing off the child's options. With that being said, the state's decision to intervene may not have such a drastic effect as the child has the option of being circumcised as an adult. Increasing or reducing the likelihood of a child's faith will not close off their options. The child will still have the ability to reject or accept the faith they have been raised to follow when they become autonomous.

IV. Is Imposing Harm Ever Justifiable?

It is suggested that the courts allow circumcision because it is thought to be a relatively minor procedure. Ouellette identifies that the best interests standard may merely be a question of identifying a harm threshold, above which parents will have discretionary powers.[26] One of the reasons that non-therapeutic surgery does not result in court proceedings is that the surgery is not life threatening.[27] It is suggested that the harm principle is applied rather than an assessment of what is in the child's best interests.[28] This indicates a sliding scale of parental authority

[21] Darby (n 2) 465.
[22] Claudia Mills, 'The Child's Right to an Open Future?' (2003) 34 Journal of Social Philosophy 499, 499.
[23] ibid 500.
[24] ibid 503.
[25] Feinberg (n 1) 85.
[26] Alicia Ouellette, 'Shaping Parental Authority Over Children's Bodies' (2010) 85 Indiana Law Journal 955, 970.
[27] Tamar-Mattis (n 6) 80–81.
[28] Sarah Elliston, *The Best Interests of the Child in Healthcare* (Routledge-Cavendish 2007), 53.

depending on the severity of the decision. This would explain why circumcision is justified through religion but blood transfusion refusals are not.

However, using the harm principle alone as a threshold to justify permanent body modifications on a child is inadequate.[29] A parental right to prevent harm does not extend to a right to impose harm on a child through unnecessary procedures.[30] Judging the degree of harm inflicted on the child is not only subjective, but it fails to give consideration to the open future principle. Parental consent should be restricted as it is a privilege, not a right.[31] Actions which will restrict the child's future right to make decisions about their life should not be taken by parents. To illustrate this point, Davis uses the example of deaf parents who wish to ensure that their child is also deaf.[32] He argues that the greatest moral harm caused would not be the physical effect, but the denial of choice. It would violate the child's autonomy as the scope of their choices would be restricted by the permanent disability. This will therefore impinge their right to an open future.

Davis' analogy highlights the need to prohibit, or at least delay, non-therapeutic surgery until the child is able to make an autonomous choice. The importance of this is further emphasised when examining the outcome of genital normalising surgery of intersex children. In the UK, genital cosmetic surgery for children with ambiguous genitalia remains part of standard medical care.[33] An issue with allowing parents to assign the gender of their child is that the child may later deviate from this assignment. Intersex people who have spoken out about their surgery argue that the decision to undergo surgery should not have been made by their parents but by themselves when they were competent.[34] This in itself provides a strong argument in favour of delaying non-therapeutic procedures until the child is old enough to take part in the decision-making process.

It has been argued that leaving ambiguous genitalia unaltered may lead to problems with the child's gender and sexual identity, causing long-term psychological harm.[35] In contrast, Fraser likens non-therapeutic procedures such

[29] Van Howes (n 5) 479.

[30] Darby (n 2) 464.

[31] Svoboda JS, Van Howe RS, Dwyer JG, 'Informed Consent for Neonatal Circumcision: an Ethical and Legal Conundrum' (2000) 17 Journal of Contemporary Health Law and Policy 61, 86.

[32] Davis DS, 'Genetic Dilemmas and the Child's Right to an Open Future" (1997) 27 Hastings Centre Report 7, 11.

[33] Lih-Mei Liao and Dan Wood, 'Parental Choice on Normalising Cosmetic Genital Surgery: Between a Rock and a Hard Place' *British Medical Journal* (28 September 2015) <https://pdfs.semanticscholar.org/57e4/d8d0e78eafd233e58d3169ccd19de1aa2731.pdf > (accessed 17 October 2017).

[34] Tamar-Mattis (n 6) 70.

[35] Maharaj et al. (n 34) 401.

as genital cosmetic surgery on children to FGM.[36] She argues that both FGM and genital cosmetic surgery have not shown to be medically beneficial. It is not proven to be detrimental to children who grow up with ambiguous genitalia. Further, the argument that children with ambiguous genitalia need to be normalised adopts a paternalistic approach which allows for the subordination of children's rights in order to conform to society's norms. The allowance of genital cosmetic surgery suggests that there are "rules of normality" which must be followed, when this is not strictly true.[37] Postponing surgery would leave the widest range of options open to the child.[38] They can decide for themselves for or against the procedure, and more importantly, they will have a choice over their gender identity.

Mills argues that in some cases it is impossible for the law to obligate parent's to provide an open future as options close all the time.[39] We are always faced with one choice or another, and we must close one option in order to pursue another. Although this is true, encouraging a certain choice does not impede the selection of another.[40] In the context of intersex children, making the decision to undergo surgery irreversibly alters the child's body. This can be distinguished from adults who wish to undergo gender reassignment surgery because they have made an autonomous decision to pursue that choice. Intersex children whose parents make this decision for them may feel resentment as they will have had this important choice taken away from them.

V. Surgically Shaping Children

An area yet to be considered by the UK courts is cosmetic surgery on minors[41] and so there are no specific legal barriers to prevent its use.[42] Due to the lack of case law, the discussion in this section is purely theoretical. It is thought that a reason why cosmetic surgery is not brought before the courts is because parents are demonstrably concerned with the welfare of their child when seeking procedures.[43] Surgical shaping is often argued to be in the child's best interests. Commonly, parents claim that the surgery will improve the child's integration into society by reducing

[36] Sylvia Fraser, 'Constructing the Female Body' (2016) 9 International Journal of Human Rights in Healthcare 62, 69.

[37] Ellen Feder, 'In their Best Interests' in Erik Parens (ed) *Surgically shaping children: Technology, Ethics, and the Pursuit of Normality* (Johns Hopkins University Press, 2006), 214.

[38] Tamar-Mattis (n 6) 75.

[39] Mills (n 22) 499.

[40] Mianna Lotz, 'Feinberg, Mills and the Child's Right to an Open Future' 37 (2006) Journal of Social Philosophy 537, 542.

[41] Elliston (n 28) 62.

[42] Ouellette (n 4) 15.

[43] Tamar-Mattis (n 6) 80–81.

the amount of social stigma that they are exposed to due to their appearance.[44] Where the risk is low, it is thought that minor cosmetic surgery may be viewed in a similar way to male circumcision in that it will not have a detrimental effect on the child's interests[45] and therefore is to be left to the discretion of the parents.

It is challenging to refute parental wishes to 'normalise' their child as these desires often stem from the knowledge that their child may experience social grief if they are not "normalised".[46] However, cultural factors may inhibit the parents' ability to focus on the child's right to an open future.[47] It is easier to concentrate on the child's current needs rather than examining the needs of the child when they reach adulthood. The principle of an open future may provide a remedy to the paternalism which results from the best interests test. Where a child is too young to express a preference, the procedure should not be allowed if it will restrict their future options.

The notion that a parent has a right to alter a child's body in order to satisfy aesthetic, social or cultural norms is contrary to the open future concept.[48] Sullivan, who has personal experience of undergoing non-therapeutic body modifications as a child, highlights the importance of considering the impact the surgery will have on the child's identity as an adult.[49] She argues that a strong sense of identity is essential for a child to be able to deal with the difficulties of life. However, this sense of self may be damaged if, at a young age, the child is surgically shaped in order to fit into societal norms. Sacrificing identity for social acceptance is too high a price to pay.[50] There is a need for the law to distinguish between parental decisions which have immediate functional impact on the child and decisions which are designed to meet cultural or social norms and ultimately subordinate the child's interests.

There may be conflicting interests at play: the child's interest in an open future, and the parent's interest in having a 'normal' child.[51] This may interfere with the parent's ability to weigh other interests in making decisions about surgery,

[44] Elliston (n 28) 62.

[45] ibid 64.

[46] Tony Bogdanoski T, 'Every Body is Different: Regulating the Use (and Non-use) of Cosmetic Surgery, Body Modification and Reproductive Genetic Testing' (2009) 18 Griffith Law Review 503.

[47] Tamar-Mattis (n 6) 84.

[48] Ouellette (n 26) 971.

[49] Emily Sullivan, 'My Shoe Size Stayed the Same: Maintaining a Positive Sense of Identity with Achondroplasia and Limb Lengthening Surgeries' in Erik Parens (ed), *Surgically shaping children: Technology, Ethics, and the Pursuit of Normality* (Johns Hopkins University Press, 2006), 29.

[50] H. Lindemann, 'The Power of Parents and the Agency of Children' in Erik Parens (ed), *Surgically shaping children: Technology, Ethics, and the Pursuit of Normality* (Johns Hopkins University Press, 2006), 184.

[51] Tamar-Mattis (n 6) 84.

meaning that the surgery may neither support the open future principle or the best interests standard. This raises concerns as the belief that parents will put the interests of their child first is the foundation for parental authority to make medical decisions. If there is a conflict of interests the basis of this presumption will be undermined. After all, the rationale for restricting parental authority in non-therapeutic sterilisation cases is that conflict of interests may be present.[52] The parents of a disabled child may be more inclined to have the child sterilised to ensure it is easier to care for her when she is older, and also to prevent the burden of an unwanted baby. If conflicting factors are also present in providing consent to cosmetic surgery on minors, then matters should also be brought before the court.

VI. Power of the Medical Profession

It is argued that non-therapeutic surgery requires an objective justification to ensure that the child's right to an open future is not compromised.[53] The General Medical Council have released new guidelines concerning cosmetic surgery which came into force in June 2016.[54] These guidelines state that doctors must take "particular care" when considering cosmetic surgery on minors[55] and that a cosmetic intervention must be in the best interests of the child.[56] However, as previously discussed, best interests is a subjective concept. A parent cannot obtain treatment without an agreeable doctor, and therefore there is an imbalance of power.[57] The doctor's duty is to present an unbiased and objective assessment of best interests regardless of their personal values. Sensitivity is also key as the mere mention of an option may be interpreted by an anxious parent as a recommendation. The scope which the law affords to medical judgement results in a lack of legal tools to examine whether the medical standard is appropriate. It is argued that the best interests standard is negligent in accommodating the correct level of care to children's rights.[58] In the current approach, too much power lies in the judgement of the medical profession.

Jones comments that cosmetic surgery is often major, painful and always therapeutically unnecessary. Consideration should be given to outlawing all

[52] ibid 98.
[53] Elliston (n 28) 97.
[54] British Medical Council, 'Guidance for Doctors who Offer Cosmetic Interventions' *British Medical Council* (1 June 2016) <http://www.gmc-uk.org/Guidance_for_doctors_who_offer_cosmetic_interventions_210316.pdf_65254111.pdf> (accessed 17 October 2018.
[55] ibid 3.
[56] ibid 9.
[57] Svoboda et al. (n 31) 71.
[58] Tamar-Mattis (n 6) 82.

unnecessary non-therapeutic surgery on children.[59] Where shaping a child will encroach on their right to an open future, the state should intervene to protect the child's future ability to make choices.[60] Subjecting children to surgical shaping presents problems of psychological harm, injury to identity, long-term physical harm and even death.[61] Yet, arguments in merit of the procedures are usually framed around best interests, meaning that surgical shaping can be approved by parents and doctors without any legal overview. It appears that as long as the harm is not too severe, a procedure will be permitted without consideration of whether the choice should be left to the child when they are mature.

VII. Conclusion

There is a presumption that parental decisions will be made in the child's best interests. With this being said, parent's authority over their child's body is limited. The law seeks to protect children through criminalisation of FGM and unnecessary sterilisation. However, these laws are procedure specific and therefore do not protect children from being subjected to other harmful non-therapeutic treatment. The reasons for this current gap in the law are threefold. Firstly, the harm principle is often applied in order to justify surgery. This means that procedures which are not life-threatening are often justified by arguing that the harm is not severe enough to outweigh the cultural and social benefits of the procedure. Secondly, there is a presumption that the parent will make a decision with their child's interests at heart. However, as discussed, there are often conflicting interests at play meaning that the surgery may accommodate the parents' interests rather than the child's. Lastly, there is too much power given to the medical profession to allow such procedures. Cosmetic surgery guidelines repeat the empty rhetoric of best interests rather than focusing on the open future principle.

The current law fails to adequately protect a child's right to an open future. The scope of parental decisions over a child's body should be questioned.[62] There is a need to distinguish between parental decisions which have immediate functional impact on the child or their right to an open future, from decisions which are designed to meet cultural or social norms. Only autonomous individual should be allowed to choose whether to subject their bodies to invasive procedures.[63]

[59] Jones RB, 'Parental consent to cosmetic facial surgery in Down's syndrome' (2000) 26 Journal of Medical Ethics 101, 102.

[60] Dena Davis, *Genetic Dilemmas: Reproductive Technology, Parental Choices, and Children's Futures* (Psychology Press, 2001), 24–28.

[61] Ouellette (n 26) 973.

[62] ibid 974.

[63] Adrienne Asch, 'Appearance Altering Surgery, Children's Sense of Self and Parental Love' in Erik Parens (ed), *Surgically shaping children: Technology, Ethics, and the Pursuit of Normality* (Johns Hopkins University Press, 2006), 248.

Presently, the law's approach is too intensely focused on the child and parents' current interests rather than the child's future interests as an autonomous adult. The idea of parental autonomy as a privilege rather than a right needs to be reinforced in order to prevent parents from taking actions which will restrict their child's future options.[64]

[64] Darby (n 2) 464.