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Elizabeth Herbert and Ida Petretta
Southampton Student Law Review, Editors-in-Chief
October 2014

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Foreword

It gives me great pleasure to write a forward to this issue of Southampton Student Law Review. This review, now in its fourth volume is now firmly established and is growing in its substance and reach. The richness of insights, as well as quality of scholarship of our students, both graduate and undergraduate, testifies to the vibrant student research community at the School and the intensity of its interaction with the wider academic research environment. Students' research is a central pillar of school life and we can witness many pearls of new connections that are being sawn here. Each of the articles published here, is exemplary in expression, connection and design and evidences the ability to draw trends of arguments from a wide range of materials; distil questions that cut across legal fields and, finally, to combine general issues in jurisprudence and political theory with terms and concepts deployed in critical arguments within legal doctrine.

The LLB 10,000 words dissertation, also celebrated in this volume is unique to our LLB programme. The dissertations published here show the sheer awareness, talent and research skills of our third year students and the kind of critical legal education that they get in the LLB both in breadth and depth. Supervised by our full-time members of staff, the dissertation is a compulsory module that involves independent research by third year LLB students on any topic of their choice. The design of our LLB programme gives students the tools that empower them to become insightful and courageous. Our graduate students programme, seminar series and student conferences ensure that the students opening their horizon all the time.

I would like to congratulate contributors for their terrific pieces and to thank all members of staff whose dedicated inspiration and supervision keep making SSLR possible. Warm thanks are due to Joy Caisley, our Law Librarian, who always offers unparalleled guidance and support in using library resources throughout the LLB and graduate research. Last but not least warm congratulations Ida Petretta and Liz Herbert and all members of the editorial team of SSLR for their dedicated work in seeing this gem to publication.

Wishing you rewarding reading,

Oren Ben-Dor

Professor of Law and Philosophy,

Southampton Law School

October 2014

Somali Pirates and International Law: Domestic Interests Preventing a Permanent Solution? A Critical Examination of the International Legal Framework and Response to Somali Piracy

Balpreet Lailna

Introduction

The Gulf of Aden is one of the busiest international shipping lanes close to the coast of Somalia, with up to 30,000 ships traveling through it annually.[1] With increasing aggressiveness and sophistication, pirates operating out of Somalia have made international headlines by attacking vessels passing through the Gulf of Aden, off the Horn of Africa (HOA).[2] In 2011 the International Maritime Bureau of the International Chamber of Commerce (IMB) attributed approximately 54% of all attempted piracy attacks worldwide to Somali pirates.[3] Consequently, these piracy attacks have caused significant international ramifications. The economic costs of Somali piracy have been cited upwards of US$ 6.6 – 6.9 billion in 2011.[4] Meanwhile, "cruise-liners have been shot at, aid deliveries jeopardized and the crews of fishing, recreational and aid vessels have been taken hostage for ransom."[5] Evidently, a variety of domestic interests have been affected, thus giving the international community an incentive to intervene.[6] Particularly, "the country in which the vessel

* Balpreet S. Lailna BA (Hons), LLB: I wish to thank Dr Matthew Nicholson from the University of Southampton Law School for his supervision and invaluable feedback on another version of this paper. I also wish to thank the Editors-in-Chief of the Southampton Student Law Review Miss Liz Herbert and Miss Ida Petretta, and Reviewer James Dingjing for their comments and feedback.

[1] A Anyimadu, 'Notorious Somali Pirate Quits: Now is Shipping Safe?' (Marketplace Africa: CNN 2013) <http://edition.cnn.com/2013/01/11/opinion/somalia-pirate-retires/index.html> accessed January 22 2013

[2] D Guilfoyle, 'Counter-piracy Law Enforcement and Human Rights' (2010) ICLQ 141, 141

[3] International Maritime Bureau of the International Chamber of Commerce, *Piracy and Armed Robbery Against Ships* (Annual Report for 2011, ICC-IMB London, 2012) 5-6

[4] A Bowden and S Basnet, 'The Economic Cost of Somali Piracy 2011' (2012) One Earth Future Foundation, Working Paper 1 < http://oceansbeyondpiracy.org/sites/default/files/economic_cost_of_piracy_2011.pdf> accessed 2 February 2013

[5] D Guilfoyle, 'Piracy off Somalia: UN Security Council Resolution 1816 and the IMO Regional Counter-piracy Efforts' (2008) ICLQ 690, 691

[6] E Kontorovich, '"A Guantánamo on the Sea": The Difficulty of Prosecuting Pirates and Terrorists' (2010) 98 Cal. L. Rev. 242, 247

is flagged, the various countries of nationality of the seafarers taken hostage, regional coastal countries, the country of the vessel or cargo owner, and transshipment and destination countries" all have a direct interest in ensuring further attacks do not occur.[7] As British Prime Minister David Cameron suggests, in the fight against piracy, "the world needs to come together with [great] vigour."[8]

Given the international impact of Somali piracy the UNSC, charged with responsibility of maintaining international peace and security, has spearheaded the international fight against piracy.[9] Relying on the United Nations Convention on the Law of the Sea 1982 (UNCLOS),[10] which, inter alia, provides an international legal framework against piracy, the Council has adopted Resolutions 1816,[11] 1846[12] and 1851;[13] hereafter the international framework. These resolutions have arguably mitigated many of the complexities in law and in practice concerning enforceability in and off the coast of Somalia. Accordingly, an attempt is made to provide a foundational enforcement framework, uniting international efforts on the seas to suppress Somali piracy. But is this enough to permanently supress piracy stemming from Somalia? Is this the goal?

This piece argues that the international framework on piracy provides an effective structure for the international community to effectively supress piracy permanently; however, the international community's desire and willingness to do so in turn highlights the weaknesses of the framework itself. This piece challenges the international framework with the realities of enforcement and influence of domestic interests that pose great danger to supressing piracy. Therefore, this piece seeks to emphasize that the effectiveness of international laws and UNSC resolutions against piracy are only as effective as the policing behind them. A solid international legal framework exists to address piracy but its aims and purposes must be enforced to achieve a permanent solution to Somalia piracy. However, the role domestic interests and political unwillingness has had on the enforcement of UNSC resolutions on Somali piracy has been largely limited to the seas. What is lacking to achieve a permanent solution to Somali piracy is the "political will and capacity" to tackle its root causes.[14] Until then, any international anti-piracy efforts against piracy must be understood to have a limited effect at permanently supressing piracy within Somalia, where its roots are, even if successful on the sea.

1 UNCLOS, Piracy and Legal Limitations

[7] United States Government Accountability Office, Action Needed to Assess and Update Plan and Enhance Collaboration among Partners Involved in Countering Piracy off the Horn of Africa (GOA-10-856) 78 <http://www.gao.gov/new.items/d10856.pdf> accessed 22 February 2013
[8] BBC News, 'The Andrew Marr Show: Transcript: David Cameron' (BBC News 2011) <http://news.bbc.co.uk/1/hi/programmes/andrew_marr_show/9627898.stm> accessed 20 February 2013
[9] Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI [hereafter UN Charter]: Article 24
[10] United Nations Convention on the Law of the Sea 1833 UNTS 397 [hereafter UNCLOS]
[11] UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816
[12] UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846
[13] UNSC Res 1851 (16 December 2008) UN Doc S/RES/1851
[14] E Kontorovich, '"A Guantánamo on the Sea": The Difficulty of Prosecuting Pirates and Terrorists' (2010) 98 Cal. L. Rev. 242, 245

Articles 100 to 107 of UNCLOS are considered a codification of customary international law on piracy.[15] The significance of these provisions is that they are arguably "binding on every state including non-parties to the convention."[16] Article 101 of UNCLOS defines piracy as any act involving:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Thus, two vessels must be involved. The crew or passengers of one vessel, 'the aggressors', must commit any illegal act(s) listed for private ends against the second vessel, 'victim' ship, or persons or property therein.[17] Furthermore, these acts must take place on the high seas for private ends; these two elements must be further clarified.[18] Any acts that do not fall under this criterion are not considered piracy under UNCLOS.

1.1 The High Seas and Geographic Limits

Article 89 of UNCLOS provides that "[n]o State may validly purport to subject any part of the high seas to its sovereignty." There are five key classifications relevant to classifying waters where sovereignty can and cannot be asserted under UNCLOS: the high seas, territorial sea, internal waters of a state, contiguous zone, and the exclusive economic zone (EEZ).[19] Outside the high seas, states have sovereignty over these waters insofar as UNCLOS provides. Problematically, with the fall of Barre's regime, lawlessness has plagued Somalia since 1991.[20] Therefore, exercising control over these waters has been a challenge for Somalia and subsequent governments.[21]

Within the abovementioned water classifications the high seas provisions do not generally apply. Article 86 of UNCLOS makes this clear: the high seas provisions apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State... This article does not entail any abridgment of the freedoms enjoyed by all State in the [EEZ] in accordance with

[15] D Chang, 'Piracy Laws and the Effective Prosecution of Pirates' (2010) 33(2) B.C. Int'l & Comp L. Rev. 273, 274
[16] ibid; this presumption is of course notwithstanding the technicalities and various discussions in relation to customary international law and its incorporation within domestic legal orders internationally. The scope of such a discussion is beyond the range of this paper.
[17] UNCLOS, Art 101(a); M Sterio, 'Fighting Piracy in Somalia (and Elsewhere): Why More is Needed' (2010) 33 Fordham Int'l L.J. 372, 386
[18] UNCLOS, Art101(a)(i)
[19] *Ibid*, Art 2, 3, 33, 55
[20] M Murphy, Somalia, the New Barbary?: Piracy and Islam in the Horn of Africa (Columbia University Press, New York 2011) 6
[21] ibid

article 58.

Therefore any acts of violence, detention or depredation for private ends, which would otherwise be considered piracy on the high seas will not be considered piracy if these acts are committed on domestic waters, under international law.[22] Nonetheless, this does not mean complete immunity for piracy on the territorial sea of a state. Instead, only that state has jurisdiction to try the pirates under their domestic laws.[23] Additionally, the exceptions within UNCLOS must be noted because for the purposes of piracy, UNCLOS permits the powers of enforcement and suppression against piracy vested in Article 101 to apply within the high seas.

The territorial sea element can be seen as one potential limit within the international definition of piracy since Somalia is unable to effectively enforce laws. The territorial sea breadth is recognized as not extending beyond twelve nautical miles from the baselines of a state.[24] The territorial sea is also beyond the scope of the high seas, as it falls under Article 86. The sovereignty of Somalia extends onto these territorial waters.[25] Eugene Kontorovich clarifies that international law does not permit international policing beyond the high seas onto a state's territorial sea.[26] Anna Petrig and Robin Geib agree, arguing "even if [pirates are] initially encountered on the high seas, the enforcement powers granted to all states in international waters do not extend to pursuing pirate vessels into the territorial sea."[27] Lucas Bento further stipulates "foreign states capable of repressing piracy must respect the weak state's sovereign rights."[28]

Nevertheless, Bento as acknowledges, this leaves a gap in controlling piracy because the domestic waters then provide an impunity zone for pirates to commit their acts.[29] Unfortunately, as Kontorovich rightly notes, pirates readily take advantage of the lawless territorial waters of a failed state.[30] Unsurprisingly, Somali pirates have taken advantage of the weaknesses on land for criminal purposes and exploited the lawless territorial sea, due to this "legal loophole" preventing international policing on the territorial sea.[31] This loophole, preventing international policing on Somalia's territorial sea, and its implications are explored after understanding the relevance of the contiguous zone and EEZ.

The contiguous zone, where a state can exercise and enforce customs and sanitary laws, is recognized as not extending beyond twenty-four nautical miles from the

[22] D Rothwell and T Stephens, *The International Law of the Sea* (Hart Publishing Ltd, Oxford 2010) 163
[23] ibid
[24] ibid, Art 3
[25] ibid, Art 2
[26] E Kontorovich, '"A Guantánamo on the Sea": The Difficulty of Prosecuting Pirates and Terrorists' (2010) 98 Cal. L. Rev. 242, 253
[27] A Petrig and R Geib, Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden (Oxford University Press, New York 2011) 67
[28] L Bento, 'Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish' (2011) 29 Berkeley J. Int'l Law 399, 419
[29] ibid
[30] E Kontorovich, '"A Guantánamo on the Sea": The Difficulty of Prosecuting Pirates and Terrorists' (2010) 98 Cal. L. Rev. 242, 253
[31] J Pham, 'The Failed State and Regional Dimensions of Somali Piracy' in Bibi van Ginkel and Frans-Paul van der Putten (eds), *Somali Piracy: Challenges and Opportunities* (Martinus Nijhoff Publishers, Leiden 2010) 45

baseline of a state.[32] Here, a state can exercise and enforce customs and sanitary laws within its territorial sea or territory.[33] The obvious precondition to this enforcement is Somalia's ability to do exactly that: assert jurisdiction and enforce laws domestically. However, as discussed above, Somalia lacks this capacity. For the purposes of piracy, "the contiguous zone... is part of the high seas."[34] The benefit of this subsequently becomes that the international community is able to patrol these waters and remedy the lack of law enforcement capacity Somalia has.

Lastly, the EEZ, where a state can exercise their "sovereign rights for the purposes of exploring and exploiting" natural resources or protecting and preserving the marine environment, is recognized as not extending beyond two hundred nautical miles from the baseline of a state.[35] This would appear to be protected under Article 86. However, the EEZ protection a coastal state has can be deceptive, particularly if focusing only on Article 86 above; for the purposes of piracy, the EEZ is part of the high seas.[36] Douglas Guilfoyle notes this intricate complexity in light of Article 58(2) of UNCLOS. Article 58(2) provides that "Articles 88 to 115 (on the high seas and piracy respectively) and other pertinent rules of international law apply to the [EEZ] in so far as they are not incompatible with this Part."[37] Therefore, Guilfoyle suggests that anti-piracy encounters can take place within the EEZ so long as the third state involved pursuing pirates has 'due regard' "for the coastal State's rights in matters of natural resources, marine pollution, etc in any action it takes."[38] Therefore, to summarize, for the purposes of piracy, the "high seas are all waters outside any territorial sea" and accordingly, any state may engage in suppression of piracy beyond these waters.[39]

1.1.2 Addressing the Loophole

The UNSC expressed its views on the Somali Transitional Federal Government (TFG) in Resolution 1816, the first Council resolution targeting Somali piracy.[40] Noting increasing piracy attacks off the coast of Somalia, the Council acknowledged "the lack of capacity of the [TFG] to interdict pirates or patrol and secure either the international sea lanes off the coast of Somalia or Somalia's territorial waters."[41] This lack of capacity provides favourable conditions for piracy to be committed. Steel J

[32] UNCLOS, Art 33(2); *Sorensen and Jensen, Case no 3134* (1991) 89 ILR 78 [3]
[33] UNCLOS, Art 33(1)
[34] L Azubuike, 'International Law Regime Against Piracy' (2010) 15 ANNSICL 43, 50
[35] UNCLOS, Art 56, Art 57
[36] D Guilfoyle, 'Treaty Jurisdiction over Pirates: a Compilation of Legal Texts with Introductory Notes' (2009) Working Group 2 of the Contact Group on Piracy off the Coast of Somalia 2 <http://www.academia.edu/195470/Treaty_Jurisdiction_over_Pirates_A_Compilation_of_Legal_Texts_with_Introductory_Notes> accessed 21 February 2013
[37] This 'Part' is a reference to Part V of UNCLOS concerning the EEZ.
[38] D Guilfoyle, 'Treaty Jurisdiction over Pirates: a Compilation of Legal Texts with Introductory Notes' (2009) Working Group 2 of the Contact Group on Piracy off the Coast of Somalia 2 <http://www.academia.edu/195470/Treaty_Jurisdiction_over_Pirates_A_Compilation_of_Legal_Texts_with_Introductory_Notes> accessed 21 February 2013
[39] D, Guilfoyle 'The Legal Challenges in Fighting Piracy' in Bibi van Ginkel and Frans-Paul van der Putten (eds), *Somali Piracy: Challenges and Opportunities* (Martinus Nijhoff Publishers, Leiden 2010) 128
[40] S Hanson and E Kaplan, 'Somalia's Transitional Government' (Council on Foreign Relations 2008) <http://www.cfr.org/somalia/somalias-transitional-government/p12475> accessed 19 January 2013: The TFG, recognized by the United Nations (UN), formed the government of Somalia from 2004 to 2012; from 2012 onwards, the Federal Government of Somalia has been inaugurated as the new government.
[41] UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816

reiterated this point in the United Kingdom (UK) High Court of Justice, in Masefield AG v Amlin Corporate Member Ltd[42] (Masefield): "Somalia is a failed state with no effective government or law enforcement. It is also one of the poorest countries in the world. This provides a fertile breeding ground for piracy... along the lengthy seaboard of Somalia."[43] Moreover, Rear Admiral Potts of the European Union's (EU) antipiracy mission cites lawlessness and humanities challenges as "allowing piracy to exist in the first place."[44] Roger Middleton of Chatham House argues these challenges on land, which continue to exist today, are best recognized as the causes of piracy; these challenges have given rise to increasing piratical attacks in the region and need to be addressed.[45]

Considering these increasing attacks, the Council nevertheless imposed no direct duties or obligations on Somalia in Resolution 1816 – but reasonably, even if it did, given the TFG's weaknesses, the obligations would likely have little practical effect. Instead, the UNSC only encouraged Member States to assist in enhancing Somalia's capacity to fight against piracy and enhance maritime security.[46] The benefit of this does assist in building Somalia's capacity to govern and police law and order; the negative of this does acknowledge the deep-rooted weakness within the governing structure of Somalia.

Ultimately, the TFG has had limited power to actually govern and enforce laws within Somalia, let alone its coastal waters. The TFG "has never gained widespread local support," and has been unable to exert widespread control within Somalia "to no more than a few blocks of Mogadishu" – the capital of Somalia.[47] The TFG's own survival was cited by Bronwyn Bruton as depending "entirely on the protection provided by a weak African Union peacekeeping force."[48] Beyond this, the reality must be accepted that Somalia does not have the means to adequately and effectively arrest Somali pirates on land.[49]

Milena Sterio notes the consequence of lawlessness in Somalia's domestic waters: coastal, lawless Somalia has become a safe haven for pirates, which they return to with captured ships and persons.[50] Martin Murphy, a naval analyst, argues that this safe haven element, along with "rewarding hunting grounds, [and] acceptable levels of risk" allows piracy to be sustainable.[51] Somalia possesses these 'sustainable'

[42] [2010] EWHC (Comm) 280; [2010] ALL ER 593
[43] ibid [12]
[44] M Pflanz, 'Piracy Attacks Drop to Zero for First Full Month in Five Years' (The Telegraph 2012) <http://www.telegraph.co.uk/news/worldnews/piracy/9462185/Piracy-attacks-drop-to-zero-for-first-full-month-in-five-years.html> accessed 12 January 2013
[45] R Middleton, 'Piracy Symptom of Bigger Problem' (BBC News 2009) <http://news.bbc.co.uk/1/hi/world/africa/8001183.stm> accessed 12 January 2013
[46] ibid
[47] B Bruton, *Somalia: a New Approach* (Council on Foreign Relations New York 2010) 3, 7
[48] ibid 3; this peacekeeping force, known as the African Union Mission in Somalia (AMISOM) is mandated "to conduct Peace Support Operations in Somalia to stabilize the situation in the country in order to create conditions for the conduct of Humanitarian activities and an immediate take over by the United Nations (UN)." *See*: African Union Mission in Somalia 'AMISOM Mandate' (African Union Mission in Somalia Website 2012) <http://amisamisom-au.org/about/amisom-mandate/> accessed February 21
[49] M Sterio, 'Fighting Piracy in Somalia (and Elsewhere): Why More is Needed' (2010) 33 Fordham Int'l L.J. 372, 383: "Somalia does not have a stable central government that can adequately apprehend pirates."
[50] ibid
[51] M Murphy, Small Boats, Weak States, Dirty Money: Piracy and Maritime Terrorism in the Modern World (Columbia University Press, New York 2008) 30

characteristics; it is not only positioned next to one of the busier international commercial shipping lanes, but its lawlessness makes it a prime location for committing piracy and getting away with it.[52]

Ultimately, if international enforcement efforts cannot pursue Somali pirates onto the domestic waters of Somalia, because UNCLOS only permits it on the high seas, and Somalia is incapable of controlling pirates domestically, because of its weak governing structure and law enforcing capacity, then pirates are able to optimize the territorial sea ultimately provided for and protected by international law. Because of this, Tullio Treves argues that "[v]iolent activities against ships off the Somali coast [taking place]... in the territorial seas, thus often outside the scope of the [UNCLOS] definition" of piracy.[53] However, this gap should not be attributed to UNCLOS but instead the lack of governance and law enforcement within Somalia.[54] Any subsequent measure aiming to suppress piracy must effectively tackle the lawlessness on the ground and assist Somalia to build its capacity as a nation. Otherwise, this piece asserts, the suppression of piracy on the sea provides only a band-aid solution.

In addressing this loophole, the Council adopted Resolution 1816 which decided that:

> 7. ... For a period of six months from the date of this resolution, States cooperating with the TFG in the fight against piracy... at sea off the coast of Somalia... may:
>
> (a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law...[55]

Given the lack of capability of the TFG, pirates cannot be controlled domestically on territorial waters, making this region a safe haven.[56] Therefore, the UNSC, with the consent of the TFG, authorized co-operating states to enter the territorial waters of Somalia as if they were the high seas under international law in encountering pirates.[57] Resolution 1838 further permitted that "states interested in the security of maritime activities to take part actively in the fight against piracy on the high seas off the coast of Somalia, in particular by deploying naval vessels and military aircraft."[58] Accordingly, this should therefore be seen as providing a mandate for the international community to respond to Somali piracy on the seas, within the

[52] J Pham, 'The Failed State and Regional Dimensions of Somali Piracy' in Bibi van Ginkel and Frans-Paul van der Putten (eds), *Somali Piracy: Challenges and Opportunities* (Martinus Nijhoff Publishers, Leiden 2010) 42; A Anyimadu, 'Notorious Somali Pirate Quits: Now is Shipping Safe?' (Marketplace Africa: CNN 2013) <http://edition.cnn.com/2013/01/11/opinion/somalia-pirate-retires/index.html> accessed January 22 2013

[53] T Treves, 'Piracy, Law of the Sea and the Use of Force: Developments off the Coast of Somalia' (2009) EJIL 399, 402

[54] J Osei-Tutu, 'The Root Causes of the Somali Piracy' (2011) KAIPTC (Occasional Paper No 31) 1, 10-11 <http://www.kaiptc.org/Publications/Occasional-Papers/Documents/Occasional-Paper-31-Joana.aspx> accessed 9 January 2013

[55] UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816 [7][a]-[b]

[56] M Sterio, 'Fighting Piracy in Somalia (and Elsewhere): Why More is Needed' (2010) 33 Fordham Int'l L.J. 372, 383

[57] UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816 [7][a]: the consent and authorization of the TFG is relevant insofar as highlighting that the current resolutions apply to the territorial waters of Somalia, while paying homage to state sovereignty – a fundamental concept in international law.

[58] UNSC Res 1838 (7 October 2008) UN Doc S/RES/1838 [2]; The purpose and effectiveness of Resolution 1816, and others including 1846 and 1851, will be discussed in the latter parts of this work.

territorial waters.[59] Resolution 1816 could serve as a vital weapon for international naval patrol of the seas off the coast of Somalia, allowing providing co-operating states an exception from the high seas limitation within UNCLOS. Essentially, Resolution 1816 fills the gap hampering international anti-piracy efforts since Somalia is unable to control illegal pirate activity on its territorial sea.

Previously, for the purposes of international law, any acts within the territorial waters of Somalia did not constitute piracy under UNCLOS or enable other states to enforce UNCLOS in capturing and prosecuting pirates.[60] Internationally, piratical acts still occur only on the high seas.[61] However, given the piracy crisis off the coast of Somalia, Resolution 1816 can be seen as providing an exemption, allowing states to capture and try pirates under their own municipal laws even if captured within Somalia's territorial sea.[62] This resolution has subsequently been extended by newer resolutions; first by Resolution 1846 and most recently by Resolution 2077.[63] Therefore, insofar as patrolling the pirate-infested waters off the coast of Somalia are concerned, UNCLOS and the UNSC provide strong framework to target pirates in the region and repress piracy. However, enforcement of these measures, discussed below, tell a different story.

1.2 Private Ends

According to Article 101, "any illegal acts of violence or detention or any act of depredation" committed on the high seas "for private ends" are considered piracy under UNCLOS. Private ends entail personal gains; however, "any act of violence on the high seas not attributable to or sanctioned by a State (a public act) is not piracy (a private act)."[64]

Steel J in Masefield[65] notes the modus operendi of Somali pirates: pirates hold crews and vessels as collateral in a transactional sense to negotiate a ransom with ship-owners or other interested parties for the release of the captured individuals and vessel.[66] These piratical acts including aggression, violence and ransom cannot be seen to possess any state authorization.[67] Importantly, lawlessness and instability within Somalia is a contributing factor to the root cause of piracy. Piracy "is a problem arising from Somalia's internal crisis" and therefore "should not be seen in

[59] D Guilfoyle, 'Counter-piracy Law Enforcement and Human Rights' (2010) ICLQ 141, 146: "French Prime Minister declared on 12 April 2008 his hope to create a UN-mandated international counter piracy force to patrol waters off Somalia... a draft text [was introduced] before the Security Council, subsequently adopted as UNSC Resolution 1816."
[60] UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816 [9]
[61] ibid
[62] ibid
[63] UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846 [10]; UNSC Res 2077 (21 November 2012) UN Doc S/RES/2077
[64] D Guilfoyle, 'Treaty Jurisdiction over Pirates: a Compilation of Legal Texts with Introductory Notes' (2009) Working Group 2 of the Contact Group on Piracy off the Coast of Somalia 3 <http://www.academia.edu/195470/Treaty_Jurisdiction_over_Pirates_A_Compilation_of_Legal_Texts_with_Introductory_Notes> accessed 21 February 2013
[65] [2010] EWHC (Comm) 280; [2010] ALL ER 593
[66] ibid [19]
[67] S de Bont, 'Prosecuting Pirates and Upholding Human Rights Law: Taking Perspective' (2010) One Earth Future Foundation, Working Paper 8 <http://oceansbeyondpiracy.org/sites/default/files/human_rights_law_-_saoirse_de_bont.pdf> accessed 20 January 2013

isolation."[68]

"Somali pirates operate for large amounts of ransom money and not for any political reason. Ransoms are paid in cash and the Somali pirates take this cash for their personal gain."[69] The significance of these payments underlines the deeper issues within Somalia forming the root cause of piracy. Lack of effective governance, a failing economy, famine, among other things continue to pose challenges for Somalia.[70] In contrast, effects of Somali piracy can be felt positively as pirates, "seem to drive the local economy and thus enjoy societal protection."[71] Ransom proceeds have been acknowledged by Sterio as being sufficient for "entire coastal towns in Somalia to live off" of, with some statistics suggesting a single ship seizure can earn a pirate up to US$150 000.[72] Therefore, in articulating an effective response, Sterio argues piracy must be considered as a whole in order to repress it.[73]

This argument is strongly preferred, particularly if a permanent solution to Somalia piracy is desired: the challenges on land must be addressed. As Middleton argues, "[p]iracy in Somalia is a symptom of state collapse in Somalia and a comprehensive solutions needs to focus on root causes."[74] For a coastal fisherman, ridden by poverty and a starving family with no state support, piracy is undoubtedly an attractive and rational means of earning an income, even if it is illegal. However, this tragedy of Somalia should not wholly overshadow the current reality of piracy.[75] Presently, as Ken Menkhaus suggests, piracy has morphed into a lucrative criminal enterprise exploited by militia leaders.[76]

Nevertheless, as analyzed below, in contrast to Somalia as a failed state, the international community has been extremely effective at controlling piracy on the sea. The UNSG in 2008 confirmed that Member States have shown "exceptional will

[68] R Middleton, 'More than Just Pirates: Closing the Space for Somali Pirates through a Comprehensive Approach' in Bibi van Ginkel and Frans-Paul van der Putten (eds), *Somali Piracy: Challenges and Opportunities* (Martinus Nijhoff Publishers, Leiden 2010) 14

[69] J Harrelson, 'Blackbeard Meets Blackwater: an Analysis of International Conventions that Address Piracy and the Use of Private Companies to Protect the Shipping Industry' (2010) 25 Am. U. Int'l L. Rev 283, 299 <http://www.auilr.org/pdf/25/25-2-5.pdf> accessed 23 February 2013

[70] R Middleton, 'Piracy Symptom of Bigger Problem' (BBC News 2009) <http://news.bbc.co.uk/1/hi/world/africa/8001183.stm> accessed 12 January 2013

[71] M Sterio, 'Fighting Piracy in Somalia (and Elsewhere): Why More is Needed' (2010) 33 Fordham Int'l L.J. 372, 384; J Gettleman, 'Pirates Pirates Outmaneuver Warships Off Somalia' (The New York Times 2008) <http://www.nytimes.com/2008/12/16/world/africa/16pirate.html?pagewanted=all&_r=0> accessed 21 January 2013

[72] M Sterio, 'Fighting Piracy in Somalia (and Elsewhere): Why More is Needed' (2010) 33 Fordham Int'l L.J. 372, 384

[73] ibid 384-385: "The fight against piracy on the whole will not be complete without a full reexamination, and possible elaboration, of international law, to define and sharpen the legal tools needed to capture and prosecute both pirates themselves and the masterminds of piracy operations."

[74] R Middleton, 'More than Just Pirates: Closing the Space for Somali Pirates through a Comprehensive Approach' in Bibi van Ginkel and Frans-Paul van der Putten (eds), *Somali Piracy: Challenges and Opportunities* (Martinus Nijhoff Publishers, Leiden 2010) 13

[75] J Pham, 'The Failed State and Regional Dimensions of Somali Piracy' in Bibi van Ginkel and Frans-Paul van der Putten (eds), *Somali Piracy: Challenges and Opportunities* (Martinus Nijhoff Publishers, Leiden 2010) 43-44

[76] K Menkhaus, 'Dangerous Waters' (2009) Survival: Global Politics and Strategy 21, 22-23 <http://www.tandfonline.com/doi/pdf/10.1080/00396330902749640> accessed 23 January 2013

and commitment of military assets... in respect of the fight against piracy."[77] In 2012, the Combined Maritime Forces, an international naval partnership promoting maritime security, report that only seven ships were successfully hijacked off the coast of Somalia compared to forty-four in 2010.[78] Conversely, the response the UNSG received concerning Member States contributing to a multinational peace keeping force in Somalia in the same letter was not as promising. Specifically, only 14 out of 50 countries responded, of which only one offered to provide funding, equipment and logistical support, while a second has offered funding... However, no Member State has yet pledged troops or offered to assume the lead nation role.[79]

Why the contrast in commitment? Because now, arguably, the conflict within Somalia has reached and affected the interests of UNSC Member States domestically through piracy – this was not the case before.

Ultimately, this contrast should illustrate that international law is only as capable as the enforcement behind it. If the motivation behind enforcement is rooted in political interests and not the international law then clearly the desired outcome in Somalia may not even be permanently suppressing piracy.

1.3 Universal Jurisdiction

Article 105 of UNCLOS provides that

> On the high seas... every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed... subject to the rights of third parties acting in good faith.

Specifically, states have the ability to arrest pirates, seize pirate ships and any property on board a pirate ship on the high seas, while the courts of the enforcing state have the ability to decide the relevant penalties against the pirates.[80] This reiterates the centuries old 'universal jurisdiction' doctrine. Given the geographic dimensions of the oceans, committing crimes on high seas historically put pirates beyond the jurisdiction of any one state, posing questions of justiciability.[81] Consequently, pirates have been considered 'hostis humani generi': enemies of the entire human race.[82] Douglas Burgess notes the critical idea behind this notion and universal jurisdiction in supressing piracy is "that pirates may be seized anywhere they are found, and prosecuted by any country that captures them;" they are enemies

[77] UNSC 'Letter dated 19 December 2008 from the Security-General to the President of the Security Council' (2008) UN Doc S/2008/804 1

[78] J Michaels, 'Pirates in the Somalia Region Hijacked Seven Merchant Ships this Year, Down from 44 in 2010' (USA Today 2012) <http://www.usatoday.com/story/news/world/2012/12/20/piracy-somalia/1781929/> accessed 5 February 2013; *See*: 'About CMF' (Combined Maritime Forces Website <http://combinedmaritimeforces.com/about/> accessed 20 February 2013

[79] UNSC "Letter dated 19 December 2008 from the Security-General to the President of the Security Council' (2008) UN Doc S/2008/804 1

[80] UNCLOS, Art 105

[81] In Re Piracy Jure Gentium [1934] AC 586 [588]

[82] D Burgess, 'Hostis Humani Generis: Piracy Terrorism and a New International Law' (LLM thesis, University of British Columbia 2003) 4 <https://circle.ubc.ca/handle/2429/14412> accessed 9 January 2013 or alternatively see: (2006) 13 U. Miami Int'l & Comp. L. Rev. 293

of humanity.[83] Ultimately, Article 105 of UNCLOS does provide the necessary grounds to make a detention of a suspected Somali pirate and impose penalty, on the high seas.[84] In fighting against piracy, this is an important tool.

However, as Admiral James Stavridis and Lieutenant Commander Richard LeBron of the US Navy articulate, the UNCLOS definition of piracy:

> Though adequate for the framing of law enforcement and anti-piracy activities on the high seas, does not account for the dual challenge that characterizes piracy. UNCLOS article 101 is focused on the symptom, the crime at sea, and not the cause, the deplorable conditions ashore.[85]

This dual challenge on land, and not only addressing the symptoms on sea, must be remedied to provide a permanent fix to piracy. In understanding this, the UNSC implemented key resolutions that are now worth investigating.

2 UNSC Response to Somali Piracy

This chapter analyses the powers provided by resolutions 1816, 1846, and 1851 embedded within international law, and their forcefulness, but ultimately questions their basis: were these resolutions really adopted to enforce international law, to establish international peace and security, to permanently suppress piracy?[86]

2.1 UNSC Resolution 1816 and Domestic Interests

France, a permanent member of the UNSC, took a leading role to encourage a "UN-mandated international counter-piracy force to patrol waters off Somalia" which consequently resulted in a number of UNSC resolutions, starting with 1816.[87] Its practical impact is as follows. Resolution 1816 noted that the TFG "needs and would welcome international assistance to address the [piracy] problem."[88] Ultimately, the effects of piracy have been domestic and international. Within Somalia, piracy threatens the "prompt, safe and effective delivery of humanitarian aid;" internationally, "the safety of commercial maritime routes and to international navigation" is threatened.[89] For a nation already struggling with the challenges this

[83] ibid 22; For example, the Kenyan Court of Appeal at Nairobi in *Attorney General v Mohamud Mohammed Hashi & 8 others* [2012] eKLR was asked, inter alia, whether Kenyan courts had jurisdiction to try pirates which were apprehended committing piracy offences beyond its territorial waters. Relying on UNCLOS, Maraga J stated that with regard to piracy in Somalia, its magnitude and UNSC resolutions, "[a]ll States, not necessarily those affected by it, have therefore a right to exercise universal jurisdiction to punish the offence." *See:* [2012] eKLR <http://www.kenyalaw.org/CaseSearch/view_preview1.php?link=60890212189581632900640> accessed 2 February 2013 [37]-[38]

[84] Klein Wolterink (Presiding Judge), Jassen and Van den Enden (Judges), 'LJN: BM8116, Rotterdam District Court, 10/600012-09' (United Nations Interregional Crime and Justice Research Institute 2010) <http://unicri.it/topics/piracy/database/Netherlands_2010_Crim_No_10_6000_12_09%20Judgment.pdf > accessed 29 January 2013

[85] J Stavridis and R LeBron, 'Taming the Outlaw Sea' (2010) 63 Nav. War. Col. Rev 73, 78

[86] UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816; UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846; UNSC Res 1851 (16 December 2008) UN Doc S/RES/1851

[87] D Guilfoyle, 'Counter-piracy Law Enforcement and Human Rights' (2010) ICLQ 141, 146; This resolution was discussed in the earlier parts of this dissertation to note its effect in addressing the lawlessness of the territorial seas going beyond UNCLOS.

[88] UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816 2

[89] ibid 1

analysis has thoroughly examined, the significance of permanently suppressing piracy cannot be overstated; it poses dangers to humanitarian relief efforts. However, the purpose of this resolution, disappointingly, was to be vigilant and "deter acts of piracy" off the coast of Somalia, doing nothing to examine or address the root causes of piracy.[90]

In urging states to be vigilant off the coast of Somalia against piracy, the Council interestingly made particular reference to those states "interested in the use of commercial maritime routes off the coast of Somalia, to increase and coordinate their efforts to deter acts of piracy..."[91] Ultimately, piratical acts have had a great effect internationally on shipping, manufacturing and commodity industries.[92] In 2008, the costs of piracy globally, both direct and indirect, were approximated in the range of up to USD$16 billion.[93] Clearly, this is one direct incentive Resolution 1816 impliedly gives effect to; it places a particular emphasis on states with a vested commercial interest in the Gulf of Aden. This illuminates that Somalia as a failed state, that the suffering of the Somali people and that international laws are not arguably the only factors at stake. Instead, they include domestic interests, which Resolution 1816 clearly notes. Importantly, this piece argues that it is these interests that take a greater influence in the means Member States commit to the fight against piracy than the devastating realities causing the upsurge of piracy.

The Council made clear that the extent of Resolution 1816 extended only as far as tackling piracy on the sea. Specifically, Resolution 1816 permitted that:

> States cooperating with the TFG in the fight against piracy... may:
>
> ...7. (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy...[94]

The key emphasis within this provision is repressing piracy in the territorial seas by all means necessary. However, nothing particularly targets the root causes of piracy within Somalia or outlines what means are necessary, thereby implying discretion upon a Member State.[95] Notably, domestic interests and commercial shipping on the seas are now likely to be afforded greater protection with "greater naval patrols" off the coast of Somalia.[96]

Even the origin of Resolution 1816 is entrenched in domestic interests of a Member State being affected. Specifically, France, took this leading role particularly after

[90] ibid 2
[91] ibid [2] (emphasis added)
[92] UNSC Res 1838 (7 October 2008) UN Doc S/RES/1838; A Sullivan, 'Piracy in the Horn of Africa and its Effects of the Global Supply Chain' (2010) 3 J. Transp. Sec. 231, 231
[93] R Gilpin, 'Counting the Costs of Somali Piracy' (2009) United States Institute of Peace Working Paper 12 <http://www.usip.org/files/resources/1_0.pdf> accessed 2 February 2013
[94] UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816 [7. (b)] (emphasis added)
[95] Ö Direk, M Hamilton, K Openshaw, P Terry, 'Somalia and the Problem of Piracy in International Law' (2010) Uluslararası Hukuk ve Politika Cilt 6 115, 136 <http://www.academia.edu/709384/Somalia_and_the_Problem_of_Piracy_in_International_Law> accessed 8 January 2013
[96] L Bento, 'Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish' (2011) 29 Berkeley J. Int'l Law 399, 409

Somali pirates captured a French yatch, Le Ponant, and held 22 French nationals hostage demanding ransom.[97] There was no doubt that the piracy issue existed well before the hijacking of the Le Ponant in Somalia.[98] "Attacks on international shipping have been a problem since the Somali government collapsed in the 1990s."[99] There was no doubt that the humanitarian and violent conflict was a threat to Somalia and international peace and security. Yet no actions attempting to suppress piracy were made by any state earlier. But why not? It is worth questioning, in the absence of piracy's international commercial effect and the Le Ponant hijacking, if any actions at all would have ever been taken at all.

In assessing the effectiveness of the international law and UNSC resolutions, what must be noted is that to be effective, these measures must be enforced, distinct from enforceable. Holmes J eloquently stated: "legal obligations that exist but cannot be enforced are ghosts that are seen in the law, but that are elusive to the grasp."[100] Put another way, despite an effective international law regime, including UNSC resolutions, the most important factor is giving effect to their aims. It is such concerns that give rise to questions such as: is international law a compelling legal framework? Can the UNSC compel states to enforce international laws and resolution aims? Unfortunately, the confines of this piece do not extend in allowing a detailed debate of these questions. What it does allow is an assessment of the effectiveness of the UNSC response embedded within international law on piracy in Somalia.

Disappointingly, the aim of Resolution 1816 was only to deter acts of piracy on the high seas, and repress them on the territorial seas.[101] This is problematic because only the symptoms of piracy on the sea are addressed. Understanding that more measures are needed for a permanent solution to piracy in Somalia, the UNSC in 2008 adopted Resolutions 1846 and 1851, but again their purpose, aim and enforceability will be shown to be largely limited to addressing the symptoms of piracy on sea and vested in domestic interests. Ray Mabus, the 2011 US Secretary of the Navy, testified before a subcommittee, arguing that by addressing piracy only on the sea, the deeper causes of Somalia as a failed state that give rise to piracy does not provide a permanent solution.[102] "We are treating the symptoms of piracy, rather than its fundamental cause: Somalia's failure as a state."[103]

2.2 UNSC Resolutions 1846, 1851 and Political Unwillingness

[97] D Guilfoyle, 'Counter-piracy Law Enforcement and Human Rights' (2010) ICLQ 141, 146; or see RFI, 'French Court Sentences Four Somalia Pirates to 4-10 years for Le Ponant Hijack' (Radio France Internationale 2012) <http://www.english.rfi.fr/africa/20120615-french-court-sentences-four-somalis-pirates-4-10-years-le-ponant-hijack> accessed 3 February 2013

[98] E Kontorovich, 'Piracy and International Law' (2009) JCPA <http://jcpa.org/article/piracy-and-international-law/> accessed 28 January 2013; This issue was raised as an issue before the UNSC in UNSC Res 1676 (10 May 2006) UN Doc S/RES/1676

[99] ibid (Kontorovich)

[100] *The Western Maid* (1922) 257 U.S. 419 [433] (Mr Justice Holmes)

[101] UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816 1, [7. (b)]

[102] R Mabus (United States Navy Secretary), United States Department of Defense (Department of the Navy, Office of the Secretary) Testimony 16 March 2011, 'Department of Defense Appropriations for Fiscal Year 2012' delivered to the United States Senate, Subcommittee of the Committee on Appropriations <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg99104434/html/CHRG-112shrg99104434.htm> accessed 19 January 2013

[103] ibid

2.2.1 UNSC Resolution 1846

Resolution 1846 reiterated this piece's key claim: for a permanent eradication of piracy, measures beyond the sea establishing "peace and stability within Somalia" need to be adopted."[104] However, the Council made clear that the TFG lacks the ability to interdict, prosecute and patrol its waters effectively to control piracy off its coast.[105] Additionally, the Council acknowledged "escalating ransom payments [as] fuelling the growth of piracy off the coast of Somalia."[106] Ultimately, more measures were needed in addition to Resolution 1816.

Addressing this, the UNSC emphasized the need for "investigation and prosecution of persons responsible for acts of piracy."[107] In doing so, the Council relied upon the Suppression of Unlawful Acts against the Safety of Maritime Navigation Convention 1988[108] (SUAC). SUAC is distinct from UNCLOS and particularly focuses on unlawful acts beyond the scope of piracy defined in Article 101 of UNCLOS.[109] Specifically, SUAC provides an expansive definition the Council relies upon to encourage members to internalize the fight against piracy.[110] By internalize, it is suggested that parties to SUAC act in accordance with Articles 3, 6 and 7. Specifically, Article 6 obligates Member States to "establish its jurisdiction over the offence" in Article 3, taking appropriate action, as per Article 7, to "enable any criminal or extradition proceedings." Article 3 suggests, inter alia, illegalizing any seizure or exercise of "control over a ship by threat or use of force thereof or any other form of intimidations."[111] These articles broadly provide parties to the SUAC to criminalize acts within the Convention, which should then be seen as enabling states prosecute and incarcerate pirates.[112]

However, like UNCLOS, like UNSC resolutions, SUAC must also be enforced. Combined, these frameworks lack an ability to impose obligations directly on Member States to take action against Somali piracy on land. Of course, in making such a statement, this author has regard to its significance, plausibility internationally and limitations within the UN Charter and UNSC structure, which are beyond the scope of this piece. The reality is, as the International Law Commission (ILC) articulates it, in the fight against piracy any state "must be allowed a certain latitude as to the measures it should take to this end."[113] Notwithstanding this,

[104] UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846 2
[105] ibid 1
[106] ibid 1, [2]
[107] ibid [14]
[108] Suppression of Unlawful Acts against the Safety of Maritime Navigation Convention 1988 (10 March 1998) No. 29004 [hereafter SUA Convention]
[109] A Mihneva-Natova, 'The Relationship Between United Nations Convention on the Law of the Sea and the IMO Conventions' (2005) The United Nations – The Nippon Foundation of Japan Fellows Programme 26 <http://www.un.org/depts/los/nippon/unnff_programme_home/fellows_pages/fellows_papers/natova_0506_bulgaria.pdf> accessed 24 February 2013
[110] UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846 [15]
[111] SUA Convention, Art 3, Art 5
[112] UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846 [15]
[113] [1956] II YBILC, 282 cited in D Guilfoyle, 'Treaty Jurisdiction over Pirates: a Compilation of Legal Texts with Introductory Notes' (2009) Working Group 2 of the Contact Group on Piracy off the Coast of Somalia 1 <http://www.academia.edu/195470/Treaty_Jurisdiction_over_Pirates_A_Compilation_of_Legal_Texts_with_Introductory_Notes> accessed 21 February 2013

appreciating the distinction between imposing obligations and discretionary, selective enforcement of the international framework does arguably highlight the weaknesses and rationale for why, perhaps, land based operations addressing the root causes of piracy are not readily pursued, as explored below. The significance and effectiveness of this is best understood after analyzing Resolution 1851 and in the combined context.

2.2.2 UNSC Resolution 1851

This Resolution enabled Member States to operate on Somali territory, bringing to justice those that "are using Somali territory to plan, facilitate or undertake criminal acts of piracy..."[114] The effects of this provision more broadly can be seen as allowing nations with a political and constitutional ability to commit their armed forced to a UN mandated operation on land.[115] This enables Member States to more easily intervene without needing the authorization of the TFG, as was required in the rescue efforts of the Le Ponant hijacking victims.[116] This goes beyond the enforcement capacity states have on international waters provided by UNCLOS.

However, in practice, this analysis has discovered only one instance, after the adoption of Resolution 1851, where Member States have engaged Somali pirates on land. Specifically, European Union forces launched a raid on May 15, 2012 to target "logistical dumps in Somalia... in accordance with... Resolution 1851 (2008)" according to EU Foreign Policy Chief Catherine Ashton.[117] Targeting "speedboats, fuel depots and an arms store" Bile Hussein, a Somali pirate, said the attack "destroyed our equipment to ashes. It was a key supplies center for us."[118] Undoubtedly, this attack severed a strike, at least temporarily, to pirates operating out of the coast of Somalia. However, no reports of any arrests have been made. Despite this temporary destruction of piracy supplies, this piece questions the long-term effect it will have in permanently suppressing piracy, if the alternative to piracy is poverty, famine and lack of opportunity while attacks of this kind remain limited. These measures must equally be addressed by the UNSC.[119]

Additionally, reiterating a continued concern, the Council noted a great concern of the lack of Somali capacity and legislation in disposing of captured pirates to face justice.[120] In some instances pirates were even being released without facing

[114] UNSC Res 1851 (16 December 2008) UN Doc S/RES/1851 [7]
[115] D Guilfoyle, 'Counter-piracy Law Enforcement and Human Rights' (2010) ICLQ 141, 147
[116] ibid
[117] European Union (Press Release) Statement by the Spokesperson of EU High Representative Catherine Ashton Following the Disruption of Pirate Logistical Dumps in Somalia by EU Naval Force – Operation Atalanta' (15 May 2012) EU Doc A 225/12 1 <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/130252.pdf>
[118] F Gardner, 'Somali Piracy: EU Forces in First Mainland Raid' (BBC News 2012) <http://www.bbc.co.uk/news/world-africa-18069685> accessed 27 February 2013
[119] There are other instances of raids by the US, for example, on Somali territory to rescue kidnapped Danish Demining Group workers, but these do not concern piracy or the UNSC resolutions. These raids must not be confused with targeting piracy on land through Resolution 1851. *See*: M Kiser, 'Navy SEALs' Daring Hostage Rescue May Signal More Somalia Land Raids by U.S.' (The Daily Beast 2013) <http://www.thedailybeast.com/articles/2012/01/26/navy-seals-daring-hostage-rescue-may-signal-more-somalia-land-raids-by-u-s.html> accessed 1 March 2013
[120] UNSC Res 1851 (16 December 2008) UN Doc S/RES/1851 2

prosecution.[121] Consequently, capturing and prosecuting pirates, inter alia, was central to this resolution. Hence, the UNSC reiterated that parties to the SUAC take appropriate domestic measures to prosecute accused pirates.[122]

This Resolution encouraged international co-operation and endorsed states to "conclude special agreements or arrangements" with willing countries in investigating and prosecuting suspected pirates.[123] Accordingly, now three possibilities exist to prosecute Somali pirates. One, Somali officials can capture, prosecute and incarcerate Somali pirates. However, given the continual instability within Somalia from 1991 to present, this is unlikely to be the most effective measure.[124] Alternatively, two, an arresting state can prosecute Somali pirates under municipal laws if enacted, as provided for by Article 6 of the SUAC or under UNCLOS Article 105, if a party to either or both conventions, or under customary international law. Here, more developed nations can be seen to internalize the prosecution and incarceration processes many regional states lack the means and facilities to do.[125] Or three, an arresting state can make special agreements with a third country, usually a regional state that will prosecute the pirates instead.[126] Such agreements include the standing Memorandum of Understanding between the UK and Mauritius, where captured pirates are transferred from UK naval vessels to Mauritius to face prosecution.[127]

Through Resolutions 1816, 1846 and 1851, an increase in authorized power becomes evident from authorization to operate on Somali territorial waters and land to transferring pirates to other willing states for prosecution and imprisonment.[128] The abovementioned resolutions, and their authorizations therein, have been continually renewed by the UNSC, allowing united international efforts to continue the fight against piracy.[129] Hence, the UNSC has granted co-operating, enforcing states, with the consent of the TFG, a comprehensive legal framework for capturing and prosecuting pirates.[130]

However, upon a further critical examination of these resolutions in practice, intrinsic flaws become apparent emphasizing again that international law is only effective as the enforcement behind it. Any effective attempt at ridding piracy must be addressed beyond the sea. Although patrolling the seas off the coast is an effective measure to address the symptoms, establishing law and order on land and addressing weakness within Somalia is equally necessary, if a permanent solution is

[121] ibid
[122] ibid [5]
[123] ibid [3]
[124] UNSC Res 2077 (21 November 2012) UN Doc S/RES/2077 [12]
[125] Y Dutton, 'Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Escape Justice?' (2011) 34 Fordham Int'l L.J. 236, 238-240
[126] UNSC Res 1851 (16 December 2008) UN Doc S/RES/1851 2
[127] Foreign and Commonwealth Office, 'UK Signs Agreement with Mauritius to Transfer Suspected Pirates for Prosecution' (2012) <https://www.gov.uk/government/news/uk-signs-agreement-with-mauritius-to-transfer-suspected-pirates-for-prosecution> accessed 19 January 2013
[128] UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816; UNSC Res 1851 (16 December 2008) UN Doc S/RES/1851
[129] UNSC Res 2077 (21 November 2012) UN Doc S/RES/2077 [12]
[130] E Kontorovich, '"A Guantánamo on the Sea": The Difficulty of Prosecuting Pirates and Terrorists' (2010) 98 Cal. L. Rev. 242, 251; T Treves, 'Piracy, Law of the Sea and the Use of Force: Developments off the Coast of Somalia' (2009) EJIL 399, 406-408

desired. Only then can the attractiveness of piracy be eradicated. The key becomes to reach a comprehensive solution, which mitigates the rigors of life in Somalia and not only on sea. [131] However, that requires great political will internationally.

3 Political Interests above International Law

The weaknesses within UNSC resolutions insofar as enforceability and imposing obligations are concerned, now need to be discussed. Ultimately, their inability to impose obligations and require strict compliance will be shown to reinforce the argument that domestic interests incorporate a significant role in the response against piracy. This then arguably leaves states "free to choose whether or not to take any further action against pirates which they apprehend" thereby impliedly encouraging political interests to play a role in enforcing the international framework.[132]

This piece acknowledges that the discussion of imposing obligations and requiring strict compliance raises broader issues concerning the nature, legitimacy and power of international law and the UNSC. This piece does not argue for imposing obligations; the complexities of this have been mentioned above, and considered in light of comments by the ILC.[133] Instead, imposing obligations and requiring strict compliance is only relevant to emphasize what open-ended discretion and selective enforcement can result in, thereby hampering the permanent suppression of piracy.

3.1 Generality

UNSC resolutions against piracy have a tendency to be generic and discretionary; this allows for selective enforcement of provisions contained within. Specifically, the language used in these resolutions includes phrases such as calling: "upon States and regional organizations that have the capacity to do so, to take part in the fight against piracy" or "upon States to cooperate also, as appropriate on the issue of hostage taking, and the prosecution of suspected pirates for taking hostages" or even more appallingly "upon States interested in the security of maritime activities to take part in the fight against piracy..." [134] Additionally, consistent terminology such as "encourages" or "urges" or "requests" or "favorably consider" all illustrate that no particular imposition of obligations upon States is actually made.[135] No particular guidance is provided concerning what approach to take; rather, it is left up to a state – and even that too is whichever state actually decides to enforce the resolutions. Yes, this has its benefits in terms of allowing states "in determining when the

[131] J Stavridis and R LeBron, 'Taming the Outlaw Sea' (2010) 63 Nav. War. Col. Rev 73, 78
[132] Ö Direk, M Hamilton, K Openshaw, P Terry, 'Somalia and the Problem of Piracy in International Law' (2010) Uluslararası Hukuk ve Politika Cilt 6 115, 136 <http://www.academia.edu/709384/Somalia_and_the_Problem_of_Piracy_in_International_Law> accessed 8 January 2013
[133] *See*: [1956] II YBILC, 282 cited in D Guilfoyle, 'Treaty Jurisdiction over Pirates: a Compilation of Legal Texts with Introductory Notes' (2009) Working Group 2 of the Contact Group on Piracy off the Coast of Somalia 1 <http://www.academia.edu/195470/Treaty_Jurisdiction_over_Pirates_A_Compilation_of_Legal_Texts_with_Introductory_Notes> accessed 21 February 2013 or alternatively refer to footnote 131.
[134] UNSC Res 2077 (21 November 2012) UN Doc S/RES2077 5-6 (emphasis added)
[135] ibid 5-9

circumstances calling for [action] have arisen" and in determining what forces can be logically and practically allocated.[136] Unquestionably, such determinations are extremely important political decisions domestically. However, dangerously, such ambiguity within the resolutions arguably also allows for selective enforcement based on political interests and not necessarily the aim of a particular resolution. Consequently, this has resulted in many states employing such a selective approach and is best illustrated through a discussion over the realities of capturing and prosecuting Somali pirates.

3.2 Politically Motivated Blindness

Despite a strong international military presence off the coast of Africa, Mabus suggests international political will has been lacking to prosecute and incarcerate pirates after conviction.[137] In 2011, he suggested that "[n]ine of ten pirates captured are ultimately freed as there is often insufficient evidence or political will to prosecute them, or to incarcerate them after conviction."[138] Ultimately, if measures are not implemented by Member States to enable the investigation, prosecution and incarceration of Somalia pirates due to political unwillingness, then piracy cannot be permanently suppressed because the legal measures, inter alia, attempting so are not fully enforced. Therefore, it is necessary to examine anti-piracy practices on the seas.

3.2.1 Catch and Release Approach (CARA)

This approach literally entails capturing pirates, seizing their equipment but ultimately taking no further prosecutorial action due to various difficulties.[139] The intention here is to disrupt the pirates and avoid potential difficulties many states simply do not want to face.[140]

One difficulty includes naval forces tasked with differentiating between Somali fishermen carrying weapons for self-protection against pirates versus Somali pirates carrying the exact same types of weapons, if naval forces cannot catch pirates in the act.[141] Given the difficulties of securing prosecution in such circumstances, some naval forces, including Britain's Royal Navy, have instead opted to capture suspected pirates, disrupt their activities and discard any weaponry they catch on sea.[142]

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[136] V Gowlland-Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace and Maintenance' (2000) 11(2) EJIL 361, 369

[137] R Mabus (United States Navy Secretary), United States Department of Defense (Department of the Navy, Office of the Secretary) Testimony 16 March 2011, 'Department of Defense Appropriations for Fiscal Year 2012' delivered to the United States Senate, Subcommittee of the Committee on Appropriations <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg99104434/html/CHRG-112shrg99104434.htm> accessed 19 January 2013: "Despite the international community`s commitment, piracy has both continued to increase and move further offshore, a measure of pirate resiliency and the strong economic incentives that underpin it."

[138] ibid

[139] United Kingdom Foreign Affairs Committee, *Piracy off the Coast of Somalia* (tenth report) [58] <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/1318/131807.htm> accessed 20 January 2013

[140] ibid

[141] ibid [80]

[142] United Kingdom Foreign Affairs Committee, *Developments in UK Foreign Policy: Further Supplementary Written Evidence from the Foreign Secretary: International Piracy* <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/881/881we03.htm> accessed 21 January 2013

Another difficulty includes prosecution by an arresting state, which further entails additional costs, logistical factors, including detaining and incarcerating, and legal challenges, including providing evidence and witnesses for trial. [143] These pose a serious blockade to the prosecution of pirates not many international nations have been willing to incur.[144] James Kraska and Brian Wilson suggest such difficulties with prosecuting Somali pirates "involve cases with suspects from one country and witnesses and victims from others."[145] Furthermore, they contend that beyond the territorial seas, many states have not incorporated provisions allowing them to apply domestic criminal law against Somalia pirates.[146] Therefore, CARA can hardly be seen as a surprising practice.

In 2009, Dutch Minister of Foreign Affairs Maxime Verhagen stated that CARA has its weaknesses. [147] Despite its attractiveness and use, Verhagen argues CARA is contrary to suppressing piracy due its failure in securing prosecution.[148] It evidently does not further the aim of the international framework on Somali piracy, in capturing and prosecuting pirates, yet it continues to be used. In 2010, the Russian Navy released and left adrift captured pirates after an attempted attack on an oil vessel and a direct shootout on the high seas.[149] Similarly, the US, citing its failure to find a nation willing to prosecute captured pirates, released pirates after weeks of detention.[150] Both Russia and the US are permanent members of the UNSC.[151] Many other states have taken similar actions including Canada, Denmark, Germany and France.[152] It would be unfair to suggest every nation patrolling the seas adopted CARA; however, this reality must be acknowledged as defeating the purpose of suppressing piracy.[153] A Danish Officer referred to the practice as frustrating: "We catch them, confiscate their weapons, and then we let them go."[154] Ultimately, this should be seen as avoiding the heavy costs and complexities of prosecution regional states in the region have had to bear. Otherwise, why would powerful western

[143] Rear Admiral William Baumgartner, United States Department of Homeland Security (United States Coast Guard), Statement 4 February 2009, 'International Piracy on the High Seas' delivered to the United States House of Representatives, Committee on Transportation and Infrastructure and Subcommittee on Coast Guard & Maritime Transportation <http://www.marad.dot.gov/documents/HOA_Testimony-RADM%20William%20Baumgartner-USCG.pdf> accessed 20 January 2013
[144] ibid
[145] J Kraska and B Wilson, 'The Pirates of the Gulf of Aden: the Coalition is the Strategy' (2009) 43 Stan. J. Int'l L. 241, 281
[146] ibid 266
[147] Government of the Netherlands: Ministry of Foreign Affairs, 'Pioneering for Solutions Against Piracy: Focusing on a Geopolitical Analysis, Counter-piracy Initiatives and Policy Solutions' (Ministry of Foreign Affairs Website 2009) <http://www.minbuza.nl/en/news/speeches-and-articles/2009/07/pioneering-for-solutions-against-piracy-focusing-on-a-geopolitical-analysis-counter-piracy-initiatives-and-policy-solutions.html> accessed 20 January 2013
[148] ibid
[149] Y Dutton, 'Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Escape Justice?' (2011) 34 Fordham Int'l L.J. 236, 237; A Hassan, 'Somalia Rips Russian Navy for Casting Captured Pirates Adrift' (Globe and Mail 2010) <http://www.theglobeandmail.com/news/world/somalia-rips-russian-navy-for-casting-captured-pirates-adrift/article1211216/> accessed 4 February 2013
[150] Y Dutton, 'Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Escape Justice?' (2011) 34 Fordham Int'l L.J. 236, 237
[151] UN Charter, Art 23
[152] J Kraska and B Wilson, 'The Pirates of the Gulf of Aden: the Coalition is the Strategy' (2009) 43 Stan. J. Int'l L. 241, 266-267
[153] ibid
[154] ibid

nations not prosecute captured pirates themselves?

3.2.2 Prosecuting Pirates... Kind of

Increasingly, the pressure has undoubtedly turned on regional states being responsible and taking measures to secure prosecution due to Western states' unwillingness to internalize the fight against piracy and accept its burden domestically.[155] After all, if international trade and seafarers can be protected off the coast of Somalia, why go beyond that? Because "[p]rosecuting pirates... is necessary to actually deter pirates from continuing to commit [piracy]."[156]

Regional states have had to bear this prosecutorial pressure as some key international powers have deployed internal measures to avoid doing much with captured pirates, like CARA.[157] Of a total 1011 pirates held for prosecution by 20 nations internationally in 2011, only 544 have been convicted, and with 537 of those convictions being held in regional states.[158] Yvonne Dutton states that:

> While relying on Kenya seems a convenient solution for nations wishing to avoid the difficulties and costs associated with prosecuting pirates in their own courts, it offers only a partial, temporary solution to the impunity problem for piracy. Kenya only has so much capacity...[159]

In a separate article, Dutton, arguing that Western states should bring Somali pirates to justice within their own jurisdictions, contends that these more developed nations should do so "because of the greater good that will come from ensuring that pirates are brought to justice."[160] This analysis agrees and argues that the 'greater good' argument carries weight insofar as prosecuting pirates is concerned but, with great respect, questions the likeliness of the international community actually adopting it. If the greater good has not been a concern for the past 20 years, causing Somalia to fail as a State and arguably, inter alia, giving rise to piracy, then this piece is unenthusiastic about any great progress concerning prosecution in the near future based on the greater good. The reality is, as Middleton vehemently and consistently argues is the problems of Somalia, at times, seem to be "completely ignored."[161] Meanwhile, the wide-ranging discretion provided by the international framework on

[155] Rear Admiral William Baumgartner, United States Department of Homeland Security (United States Coast Guard), Statement 4 February 2009, 'International Piracy on the High Seas' delivered to the United States House of Representatives, Committee on Transportation and Infrastructure and Subcommittee on Coast Guard & Maritime Transportation 6 <http://www.marad.dot.gov/documents/HOA_Testimony-RADM%20William%20Baumgartner-USCG.pdf> accessed 20 January 2013

[156] Y Dutton, 'Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Escape Justice?' (2011) 34 Fordham Int'l L.J. 236, 295

[157] ibid

[158] UNSC 'Report of the Secretary-General on the Modalities for the Establishment of Specialized Somali Anti-piracy Courts' (15 June 2011) UN Doc S/2011/360 [27]-[28]

[159] Y Dutton, 'Bringing Pirates to Justice: a Case for Including Piracy within the Jurisdiction of the International Criminal Court' (2010) One Earth Future Foundation, Discussion Paper 19 <http://www.oneearthfuture.org/siteadmin/images/files/file_52.pdf> accessed 2 February 2013

[160] Y Dutton, 'Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Escape Justice?' (2011) 34 Fordham Int'l L.J. 236, 242

[161] R Middleton, 'More than Just Pirates: Closing the Space for Somali Pirates through a Comprehensive Approach' in Bibi van Ginkel and Frans-Paul van der Putten (eds), *Somali Piracy: Challenges and Opportunities* (Martinus Nijhoff Publishers, Leiden 2010) 14

piracy enables Member States to only pursue the 'deterring' aim, while more powerful provisions including tackling piracy on Somali territory and prosecution lack any effective support and enforcement.

But even Kenya, a major contributor, has had its own capacity issues reservations given the burden its been subjected to concerning prosecuting pirates. Kenyan Attorney General Amos Wako has questioned why signatory UNCLOS states are "afraid to prosecute the pirates, arrested by their naval forces in the high seas?" [162] He says "[a]s soon as they give us the pirates, they dump them here and forget about what happened."[163]

There are only a few instances in which prosecution has been pursued by UNSC Member States. However, even these few cases, where nations beyond HOA region have tried pirates largely include an attack on domestic vessels. In US v Hasan et al.,[164] US v Said et al.,[165] the captured pirates had targeted American vessels. Likewise, the Hanseatic Higher Regional Court of Hamburg heard the first piracy trial in Germany in over 400 years.[166] In this instance, ten Somali pirates were convicted after an attack on a German vessel.[167] Meanwhile, France has also conducted proceedings against six Somali pirates charged with the Le Ponant hijacking.[168] Ultimately, these examples highlight the motives behind these trials: to ensure those targeting their national vessels were captured. Accordingly, based on that assessment, domestic interests again encompass a leading role in enforcement efforts in relation to CARA, prosecution and imprisonment. The few examples that do come up often relate to a national interest at stake somewhere in the process of trying pirates. Accordingly, can it be said that these states do not care about permanently suppressing piracy but ensuring political leverage is not lost when domestic interests are touched? Arguably, that is one way to look at it.

Consequently, whether it is trying pirates domestically, enforcing international law or UNSC resolutions, this piece raises an important point: "the application of law is a political as much as legal consideration."[169] It is this political consideration, it is argued, that controls the enforcement of international laws against piracy. This allows selective enforcement of the provisions against piracy only as far as necessary in protecting domestic interests, as illustrated above. Ultimately, it is this selective enforcement that hinders a permanent solution to piracy. In accomplishing a permanent solution, as UK MP Henry Bellingham rightly suggests, the key thing is

[162] A Shiundu, 'AG Queried Over Kenya's Role on Piracy Cases' (Daily Nation 2010) <http://www.nation.co.ke/News/AG-queried-over-Kenya-role-in-piracy-cases/-/1056/889516/-/65h5pe/-/index.html> accessed 28 January 2013
[163] ibid
[164] (2010) 2:10cr56 (E.D. Va.)
[165] (2010) 757 F. Supp. 2d 554, 560 (E.D. Va.)
[166] P Snyder, 'German Court Convicts 10 Somali Pirates' (Jurist 2012) <http://jurist.org/paperchase/2012/10/germany-court-convicts-10-somali-pirates.php> accessed 6 February 2013
[167] ibid
[168] S Posner, 'Accused Somali Pirates Face Trial in Paris Court for Hostage Incident' (Jurist 2012) <http://jurist.org/paperchase/2012/05/accused-somali-pirates-face-trial-in-paris-court-for-hostage-incident.php> accessed 6 February 2013
[169] S de Bont, 'Prosecuting Pirates and Upholding Human Rights Law: Taking Perspective' (2010) One Earth Future Foundation, Working Paper 33 <http://oceansbeyondpiracy.org/sites/default/files/human_rights_law_-_saoirse_de_bont.pdf> accessed 20 January 2013

"to help build capacity in the region."[170] Without that capacity, this piece argues the root causes of piracy cannot be addressed within Somalia and the Gulf of Aden, while the anti-piracy measures on the sea only address the symptoms. But to what extent are these symptoms relevant? Surely if attempted piratical attacks have dropped, the international framework must have been effective and addressing the symptoms been justifiable, right?

Conclusion

Royal Navy Lieutenant Commander Carolyn Jones rightly points out that "[y]ou can't get complacent and think piracy is now finished."[171] International naval patrols of the region causing a decrease in attempted attacks must not be confused with providing a long-term solution or an increase in prosecution and incarceration. The former, international naval patrols, are arguably only effective as long as continued patrols exist, which without doubt will not be indefinitely. The latter, prosecution, incarceration as well as rebuilding Somalia offer a long-term solution.

Captain John Carter, of the US Navy, stated that "a relaxation of counter-piracy protective measures by navies may once again see an increase in the number of pirate attacks."[172] A resurge in piracy is not unconceivable. Rear Admiral Potts made clear that "[i]f all of our [anti-piracy naval] vessels moved on, and the shipping industry slowed down its vigilance over security, word would soon enough get around."[173] Newer avenues for Somali pirates may open. Somali pirates may alternatively decide to attack vessels where there is a less frequent international naval presence or wait until a patrolling naval vessels pass. Such has been the approach Jama Ali, a Somali pirate, and his men have adopted evading international flotillas attempted to control piracy.[174] The seas are simply too vast to completely patrol and the current band-aid solution is lacking, addressing only the symptoms of piracy on the sea.[175]

All these factors underline one point: current efforts only address the symptoms of piracy and not their causes, which is the failed state of Somalia. This piece has examined the UNCLOS framework in relation to piracy, while highlighting that the greatest hurdles posed to controlling piracy on the territorial sea of Somalia, is

[170] United Kingdom Foreign Affairs Committee, *Piracy off the Coast of Somalia: Corrected Transcript of Oral Evidence* <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/c1318-iii/c131801.htm> accessed 29 January 2013

[171] J Michaels, 'Pirates in the Somalia Region Hijacked Seven Merchant Ships this Year, Down from 44 in 2010' (USA Today 2012) <http://www.usatoday.com/story/news/world/2012/12/20/piracy-somalia/1781929/> accessed 5 February 2013

[172] Combined Maritime Forces, 'Global Punishment for Somali Piracy' (Combined Maritime Forces 2013) <http://combinedmaritimeforces.com/2013/01/16/global-punishment-for-somali-piracy/> accessed 6 February 2013

[173] M Pflanz, 'Piracy Attacks Drop to Zero for First Full Month in Five Years' (The Telegraph 2012) <http://www.telegraph.co.uk/news/worldnews/piracy/9462185/Piracy-attacks-drop-to-zero-for-first-full-month-in-five-years.html> accessed 12 January 2013

[174] J Gettleman, 'Pirates Pirates Outmanoeuvre Warships Off Somalia' (The New York Times 2008) <http://www.nytimes.com/2008/12/16/world/africa/16pirate.html?pagewanted=all&_r=0> accessed 21 January 2013

[175] K Homan and S Kamerlin, 'Operational Challenges to Counterpiracy Operations off the Coast of Somalia in Bibi van Ginkel and Frans-Paul van der Putten (eds), *Somali Piracy: Challenges and Opportunities* (Martinus Nijhoff Publishers, Leiden 2010) 67

weaknesses within Somalia. Lawlessness, hunger, poverty and lack of opportunity have been discussed as key contributing factors giving rise to Somali piracy. In an attempt to remedy this, the UNSC has adopted Resolutions 1816, 1846 and 1851 in an attempt to address the loophole hampering international anti-piracy efforts on the lawless territorial waters of Somalia, while additionally providing the means to capture, prosecute and detain pirates. However, these provisions and their enforcement have not been able to permanently suppress piracy. Member states have largely gone only as far as enforcing these provisions to protect domestic interests, and this only addresses piracy on the sea: the symptoms not the causes.

Without doubt, any effective attempt at ridding piracy must be addressed beyond the sea; after all, that is where Somali piracy has stem. Measures must be aimed at patrolling the seas but also at establishing law and order on land; at effectively prosecuting pirates caught on the seas; at providing Somalis protection from the ongoing violence and humanitarian issues they have been facing since the early 1990s. Only then can the attractiveness of piracy be eradicated.[176] The key becomes to reach a comprehensive solution, which mitigates the issues giving rise to piracy, while continuing to patrol the waters off the coast of Somalia.[177] The key question becomes, does the political will exist for a solution addressing the root causes of piracy within Somalia?

[176] J Stavridis and R LeBron, 'Taming the Outlaw Sea' (2010) 63 Nav. War. Col. Rev 73, 78
[177] ibid

Equity and Trusts: Concerned with Moral Questions or Formal Rules?

Constantia Charalambous

Introduction

An 'apparent tension'[1] that equity and trusts law faces is whether to concern itself with moral questions or formal rules. This dilemma has a historical background, since the origins of equity and, by extension, trust law as a subset to equity, closely link it to morality but through the passage of time it has been forced to incorporate solid rules.

Historically equity was recognized as a 'moral virtue'[2] and associated with 'morality' [...] in general' [3] Moreover, the moral nature of the trust construct is evident from the language used in describing various aspects of the relationship since the words 'all contain moral and ethical assumptions upon which have been imposed a legal gloss'. [4]

Increasingly being 'associated with discretionary'[5] justice and criticized[6] for being too subjective to the Lord Chancellor's own sense of conscience and morality, equity was rapidly consolidated into a system of technical rules, distancing itself from its conscience and morality based origins.

As seen by the law's current strong reliance on inflexible rules it may be deduced that it has become overwhelmed by technicality, with the effect of ousting moral concerns. However, this may be argued to be far removed from reality when considering the interplay between the 'technical rules like certainty [...] mixed with the fluid understanding of how [...] equity may operate to disrupt their application '.[7]

[1] James Sheedy, 'Civil Law Jurisdiction and the English Trust Idea' (2008) 20 Denning LJ 173,180
[2] *Lord Dudley v Lady Dudley* (1705) Prec 241, 244
[3] Margaret Haliwell, *Equity and Good Conscience in a Contemporary Context* (Old Bailey Press1997) 2
[4] Douglas Alderson, 'Express Trust's Nocturnal Cerberus: Some Observations on the Morality of Intention to Create on Express Trust' (1988) 9 Est. & Tr. J. 319, 331
[5] Gary Watt, *Cases and Materials on Equity and Trusts* (6th edn, OUP 2007) 3
[6] Michael Evans, Ryan Jack *Sources of English Legal and Constitutional History* (Butterworths 1984) 223
[7] Alastair Hudson, *Equity and Trusts* (7th edn, Routledge 2012) 328

In this essay's analysis of the required certainties for the creation of trusts, it will be argued that morality is still operative in various recent decisions, where justice can be seen as being done, despite the technicality involved.

Certainty of Intention, Subject and Object:

In the creation of an express trust, three elements have to be present: ' first... the words must be imperative...; secondly... the subject must be certain...; and thirdly... the object must be as certain as the subject'. [8] The development of these rules into inflexible 'dogma'[9] can be seen as giving sufficient ground to the argument that technicality forms the focus of modern law. However, through this essay we will encounter several instances where through equity's fluid principles and the court's consequentialist approach, the judiciary has come to just conclusions on the basis of morality.

Certainty of Intention

An example of the fact that equity and trusts law is not weighed down by strict rules is embodied in Paul v Constance. [10] This case concerned Constance separating from his wife and subsequently forming a relationship with Paul. Throughout his relationship with her he conveyed that the 'existing fund was as much the plaintiff's as his own'[11] but when he died intestate, there was an issue of whether there was certainty of intention.

Arguably, in this case, the court took a strong consequentialist stance in finding intention, since it was strongly based on surrounding circumstances[12] and motivated to infer[13] a just result for that particular context. Had the court adhered to the strict rule of a clear intention being expressed, they would not have found in favor of Paul, which would have lead to an unfair and thus unconscionable result. Equity being based on morality and conscience would not allow that and therefore on relatively 'flimsy evidence'[14] of Constance's statements and the fact that he was considered an unsophisticated man, the courts inferred an express trust.

Another instance of inference of intention, which can be seen to be motivated by morality is Re Kayford[15] in which Megarry J stated his concern that some 'members of the public can ill afford to exchange their money for a claim to a dividend in the liquidation'.[16] This arguably shows the judiciary's strong concern to find a trust in order to come to a just result concerning the parties, at the cost of sacrificing technicality.

[8] *Wright v Atkyns* (1823) Turn. & R. 143, 157 (Lord Eldon)
[9] Thomas Watkin, 'Doubts and Certainties'(1979) 8 Anglo-Am. L. Rev. 123,123
[10] [1977] 1 All ER 195
[11] Hudson (n 7) 94
[12] Alderson (n 4) 332
[13] ibid 320
[14] Hudson (n 7) 251
[15] [1975] 1 WLR 279
[16] ibid 282

As a corollary to the court's willingness to infer intention where it would be conscionable to do so, is the fact that equity penetrates beneath outward appearance and regards the substance in order to validate a trust.[17]

This is well demonstrated in Midland Bank v Wyatt[18] in which Wyatt purported to create a trust so as to shield his property from creditors. It had transpired that his wife had not been told of the trust, making it a sham trust. So, in line with the 'fundamental tenets of equity that '"someone seeking to prove a trust must come to equity with clean hands"' [19] and 'he who seeks equity must do equity' the trust was not given effect to in order to come to a just result.

Therefore it is illustrated that despite the presence of strict rules, equity's principles and a strong motivation to give fair rulings on the circumstances, demonstrates the court's concern for morality.

Certainty of Subject

The certainty of subject matter rule is the requirement that property intended to constitute a trust fund is segregated so that its identity is sufficiently certain.[20] If there is no segregation, the trust will fail for uncertainty of subject matter.[21]

The unnecessary concern for technicality, with the exclusion of morality is most effectively shown by an individual's case in Re Goldcorp.[22] Leggatt made a large order of maple coins, of which he could prove the exchange would not usually carry a large stock.[23] Although there had been an agreement that the coins would be kept segregated, there were a handful of coins, which the exchange ordinarily held, mixed in together with his order. As a result the court held that there was uncertainty about the subject matter since there was uncertainty as to which coins were part of his order and which belonged to the exchange.

Arguably it is unnecessarily technical to reject this claim since there was no discernible difference between the coins. It was clear that the order was Leggatt's, the exchange had acted unfairly in not segregating property which they agreed they would separate and there were no logistic problems in accepting a trust to have taken effect. Arguably the court could have used equity's fluid principles embedded in maxims and a consequentialist approach in order to create a moral outcome.

Other such rigid applications of technicality are found in MacJordan Construction Ltd v Brookmount Erostin Ltd[24] and Re London Wine.[25]

However, there is a line of alternative cases in which the court's concern over morality is prioritized over technicality.

[17] Will Walz, 'Trusts Express and Implied' (1913) 7 MeLRev 48
[18] [1995] 1 FLR 697
[19] Hudson (n 7) 111
[20] ibid 116
[21] *Re London Wine Co (Shippers) Ltd* [1986] PCC 121
[22] [1995] 1 AC 74
[23] Hudson (n 7)120
[24] [1994] C.L.C. 581
[25] [1986] PCC 121

The first case is Hunter v Moss[26] in which an employee was entitled to 50 out of 950 shares held by the employer under the employee's contract. The employer did not transfer the shares and it was argued that the purported trust had failed 'for want of certainty of the subject matter'.[27]

Dillon LJ, giving the judgment of the court took a different approach to Re Goldcorp and held there to be sufficient certainty of subject matter for the formation of a trust. There are a few notable features of Dillon's LJ judgment, which make it stilted and therefore clear that the court was willing to sideline the technical rules for a moral result.

Firstly, Dillon LJ cross-referred the rights of the claimant with the position of an executor on a testator's death arguing that there are situations in which trusts law enforces trusts over unsegregated property. Moving from this premise Dillon LJ held that this would therefore allow him to distance himself from the rigidity of the rule. This essay maintains that this is questionable reasoning since the inter vivos trustee arguably occupies a very different position from an executor.[28]

The second feature making the reasoning quite spurious is that Dillon LJ, after considering Re London Wine, held that that case was concerned with 'chattels' whereas the case in front of him was concerned with a 'trust over shares'.[29] Which in effect, has subsequently been taken to mean[30] that it was not necessary to segregate property comprising the trust fund if the property was intangible property. [31]

This implicit and, arguably superficial, distinction between tangible and intangible made by Dillon LJ in order to reach a moral result on the facts may show the court's concern not to allow individuals get away on technicalities and thus give justice and morality effect. However, arguably the courts are not going far enough to give the law a moral dimension by making this distinction between tangible and intangible. This essay maintains that there is tangible property, which to all intents and purposes is indistinguishable, but there seems to be a continued superficial distinction between the two, which can lead to the potential exclusion of moral considerations in other cases.

However, despite current shortcomings of the law, it is clear that in this case the court was 'concerned to do justice' and 'prevent the employer from benefiting'[32] from unethical behavior by prioritizing morality over formality.

The judiciary arguably also showed concern over morality in cases involved in the banking crisis, where they were faced with scandalous behavior on the part of bankers. Faced with disreputable practice on the part of banks in, Re Lehman Brothers International (Europe) (in administration) v CRC Credit Fund Ltd[33] it was

[26] [1994] 1 WLR 452
[27] ibid 452
[28] Hudson (n 7)122
[29] *Hunter* (n 25) 458
[30] *In re Harvard Securities* [1997] 2 BCL 369
[31] Hudson (n 7)121
[32] Hudson (n 7)126
[33] [2010] EWCA Civ 917

held that there was one large trust fund from which all clients would be able recover property. This was held despite the unethical practice of the bankers in technically not segregating assets, which therefore could strictly have been construed as creating uncertainty of subject matter. The court's incorporation of flexibility into trusts law arguably showed the judiciary's willingness to come to a moral and just result with the bank's client base in mind.

Overall therefore, it is clear that in this part of the law there is an alternative line of cases where there is a willing flexibility in the application of rules and reasoning which makes no meaningful distinction to justify the desertion of rules. As Hudson has pointed out, this gives life to the argument that equity's moral concern is behind the diversions although moral reasoning is hidden in technical language.[34]

Certainty of Object

In close observance of the reasoning that 'there must be some person in whose favor the courts can decree performance', [35] the judiciary observes the rule that there must be identifiable beneficiaries for every trust. A fixed trust requires a complete list of beneficiaries [36] be drawn up, while discretionary trusts have experienced an increasing amount of flexibility that can readily be associated with a move towards morality.

In this context, the degree to which the law can be seen as fulfilling moral concerns is the degree to which it allows for opportunities to escape the rigid and often arbitrary rules that plague the reasonable and just process of passing on money to particular people and fulfilling the settlor's wishes.

This essay will analyze the 'moral nature of the trust' [37] in the context of the required certainty in the context of discretionary trusts.

The initial relaxation of technical concern is initially found in Re Gulbenkian Settlements (No2), [38] in which the courts expressed support for the 'is or is not' test to replace the 'complete list' test. Although there seems to be an ongoing debate about whether this initial relaxation of the rule concerning discretionary trusts, is based on a step towards morality or on a misunderstanding between the judge's opinions,[39] the essay will move from the premise of settled law that was subsequently stated in McPhail v Doulton.[40]

Although the 'is or is not' test rendered the law looser, the test originally stated, was still able to lead to theoretical difficulties imposing the avoidance of otherwise reasonable trusts; which indicates the initial prioritization of technicality over the morality and fairness of having a settlor's wishes carried out. What this essay will therefore do, is analyze the cases in which the courts have shown a more purposive

[34] Hudson (n 7) 126
[35] *Morice v Bishop of Durham* (1804) 32 ER 656, [404]
[36] *IRC v Broadway Cottages* (1952) 35 TC 577
[37] Alderson (n 4) 339
[38] [1970] Ch 408
[39] Hudson (n 7)159
[40] [1971] AC 424

approach to this test in order to give effect to trusts which would have fallen foul of a technically strict interpretation.

Re Baden (No. 2)[41] epitomizes this movement since all three judges in the Court of Appeal gave separate judgments, attempting to paint a gloss over the decision in McPhail, in order to validate the trust in question.

Stamp LJ in a clearly consequentialist approach concentrated on the facts before him ruling that the relative should be restricted to 'statutory next of kin' while Megaw LJ took the Re Allen[42]approach in order to validate the trust.

Sachs LJ took the most interesting approach by placing the burden of proof on the beneficiaries, thus making the validity of a trust an evidential matter and successfully surpassing the law's unnecessary concern with technicality embodied in theoretical discussions of conceptual certainty. Arguably, through this approach, the purpose behind the rule is not defeated and a moral dimension is incorporated by making it more likely to validate a reasonable trust and fulfilling someone's wishes, since the transaction will not be subject to unnecessary theoretical issues.

Overall therefore, the courts may be argued to have taken a more purposive and contextualized approach in this area of the law, showing a concern for morality rather than technicality.

Conclusion

Generally throughout equity and trusts law, the courts have attempted to give the formal rules involved in ascertaining the three certainties a more moral dimension by eliminating some of the conceptual and theoretical difficulties in the rules by using a consequentialist approach, and arguably finding guidance in equity's fluid principles and maxims although not expressly stated in judgments. This essay maintains that although there may still be a great amount of technicality involved in the law, the alternative line of cases have been successful in loosening the rigidity and incorporating the court's moral concern.

[41] [1973] Ch 9
[42] [1968] Ch 126

Criminalisation of Extreme Pornography: An Anti-Pornography Feminist Perspective

Fiona Raye Clarke

Introduction

The Problem of Regulating Pornography

It has been argued that '[c]rimes are generally acts which have a particularly harmful effect on the public and do more than interfere with mere private rights'.[1] Thus, the reasons for criminalisation of any given activity are crucial, and identifying the precise harm of a crime is necessary in alleviating the crime's effects. Regulation of pornography and public morality, have long been debated in the United Kingdom, the most famous debate being that between Lord Devlin and HLA Hart on the relationship between law and morality.[2]

Homosexuality was legalised in England after the Wolfenden Report, and Lord Devlin argues against this liberal movement positing the existence of 'public morality' which criminal law can be used to 'preserve'.[3] HLA Hart, however, argues against Lord Devlin's position, holding that 'a society [does not] have the right to take any step necessary for its preservation'[4] in criminalising activity that 'moral conservatism' finds abhorrent.

Regulation of pornography in the United Kingdom is principally set down in the Obscene Publications Act 1959. The Act 'criminalises the production and distribution of "obscene" materials: defined as those which may "deprave and corrupt" the consumer (subject to a defence for materials deemed to be in the "public good")'.[5] The use of the words 'deprave and corrupt' to define obscene material, however, indicate that the primary justification for the criminalisation of such materials is a continuation of the moralism advocated by Lord Devlin.

[1] David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 5.
[2] See HLA Hart, *Law, Liberty and Morality* (OUP 1963); Patrick Devlin, *The Enforcement of Morals* (OUP 1965).
[3] Ormerod (n 1) 9.
[4] Hart (n 2) 82.
[5] Clare McGlynn, 'Marginalizing feminism?: Debating extreme pornography laws in public and policy discourse' in Karen Boyle (ed) *Everyday pornography* (Routledge 2010) 191.

The Williams Report was published in 1979 on the issue of pornography regulation.[6] Between the two positions of moralism and liberalism, liberalism was successful and there was found to be 'no harm in pornography'.[7]

In January 2009, however, the possession of an 'extreme pornographic' image became an offence in English law under Section 63 of the Criminal Justice and Immigration Act 2008.[8] The debate about pornography regulation arose again because of the violent 'sexual murder' of Jane Longhurst, who was 'asphyxiated and sexually murdered by Graham Coutts in 2003'.[9] There was public outrage over the case because evidence was produced that Coutts possessed 'internet pornography featuring images of necrophilia, asphyxiation and forced sex'.[10]

As the legislation shifts the focus from pornography producers to consumers, its introduction sparked a huge amount of debate. The issue of regulation of pornography is so contentious that there is a split within feminism, in which some feminists are in favour of the regulation of pornography – anti-pornography feminists – claiming that it is harmful to women, while others – pro-pornography feminists – are against regulation arguing that pornography is beneficial to women.

Before enacting the legislation, the Home Office produced a consultation paper that outlined its motives in proposing the legislation. These were to limit the production and consumption of images of sexual violence which typically featured women,[11] and to send the message that such images are 'aberrant' and have 'no place in society'.[12]

Despite the benefits of the legislation, anti-pornography feminists, such as Clare McGlynn, are nevertheless dissatisfied with such moralistic justifications against pornography. McGlynn argues that these justifications act to 'marginalize' the feminist viewpoint in the pornography regulation debate.[13] Thus, despite the positives of regulatory legislation, provisions such as Section 63 of the Criminal Justice and Immigration Act 2008, ultimately fail to highlight the true wrong of the offence: harm to women.

Furthermore, reasons for criminalisation such as violence to women and disgust are considered illegitimate according to the liberal perspective. This paper represents a literature review considering some of the key scholarship in the pornography regulation debate. Its aim is to educate the reader and show that there is other literature that needs to be considered in the discussion, namely a feminist perspective, which some authors argue provides good reasons for criminalising extreme pornography featuring women despite the absence of 'harms' in the strict liberal sense of the term. The paper employs an anti-pornography feminist perspective and seeks to refute the liberal criticisms of the legislation and show that

[6] ibid 193.
[7] ibid.
[8] Susan Easton, 'Criminalising the Possession of Extreme Pornography: Sword or Shield?' (2011) 75 JCL 391.
[9] McGlynn, 'Marginalizing feminism?' (n 5) 191.
[10] ibid.
[11] Home Office, *Consultation: On the Possession of Extreme Pornographic Material* (Home Office, London, 2005) 5.
[12] ibid 1.
[13] McGlynn, 'Marginalizing feminism?' (n 5) 190.

the liberal criticisms, arguments from moralism and paternalism, and individualist feminism fundamentally miss what is wrong with extreme pornography.

The Offence of Extreme Pornography

In the Criminal Justice and Immigration Act 2008, extreme pornography is defined as images which 'must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal'[14] and is an extreme image which 'is grossly offensive, disgusting or otherwise of an obscene character'.[15] Thus, it 'portrays, in an explicit and realistic way':
(a) an act which threatens a person's life,
(b) an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals,
(c) an act which involves sexual interference with a human corpse, or
(d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive).[16]

The legislation includes a defence for those who have a 'legitimate reason' for having these images and those who have received the image accidently.[17] It also contains a defence for those who are participants in the pornographic acts contained in the images.[18] The penalty for possession of extreme pornography is a fine or a maximum of three years imprisonment.[19]

The Liberal Perspective: Feinberg and the Harm Principle and Offence Principle

The primary objection to Section 63 of the Criminal Justice and Immigration Act 2008 a liberal would likely raise is that it does not conform to the harm principle. The harm principle was famously stated by John Stuart Mill in his book On Liberty, as '[t]he only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others'.[20] Thus, the only justification for criminalisation is to prevent harm to others,[21] with 'harm' defined as a 'setback of interests'.[22] On this principle, the liberal would argue that viewing pornography, even if extreme, does not justify the use of coercion as it does not cause a direct harm. Pornography consumption is a private, self-regarding act, which takes place in the home and therefore does not warrant interference from the state. Merely watching or reading something pornographic does not directly harm others.

In 'Pornography and the Criminal Law', Feinberg discusses the issue of

[14] Criminal Justice and Immigration Act 2008, s 63(3).
[15] Criminal Justice and Immigration Act 2008, s 63(6)(b).
[16] Criminal Justice and Immigration Act 2008, s 63(7).
[17] Criminal Justice and Immigration Act 2008, s 65 (a) and (c).
[18] Criminal Justice and Immigration Act 2008, s 66.
[19] Criminal Justice and Immigration Act 2008, s 67(2).
[20] Hart (n 2) 4.
[21] Joel Feinberg, *Social Philosophy* (Prentice-Hall Inc. 1973) 25.
[22] ibid 26.

pornography.[23] He equates it with a nuisance and proposes a potential justification for its criminalisation under the offence principle.[24] Feinberg holds that it is a 'harm' to be offended, however, it is usually insignificant and thus principally does not warrant justified criminalisation and the use of coercion.[25] To develop this, Feinberg posits a nuisance test which entails judging the universality of offensiveness, the reasonableness of the perpetrator's use and the 'avoidability' of the material.[26] Feinberg holds that pornography is not necessarily offensive to everyone but is rather offensive only to particularly sensitive adults. Thus, he concludes that pornography in the form of literature is easily avoidable, and therefore does not warrant criminalisation.[27] However, if the pornography was unavoidable, for example in the form a homosexual-themed billboard, this would reasonably equate to coercion as it would be unavoidable and offensive, causing harm to its viewers.[28] Thus, by Feinberg's analysis, general pornography would not qualify as causing sufficient harm and therefore would not merit criminalisation.

Extreme pornography, however, may be considered a different case. In the Home Office's consultation paper, statistics are cited indicating the wide availability of pornography on the Internet.[29] According to a survey conducted by Ofcom, the top concern of 17% of Internet users is 'sexual content/pornography', a statistic which to some conservative persons may seem low.[30] Furthermore, it is not uncommon to accidentally stumble across some form of sexualised content while web-surfing. In Feinberg's day, pornography required a person to physically leave the home to obtain it. Pornography is now available at home, thus calling into question his claim about avoidability.

The Home Office consultation paper assumes that many people would agree that the material depicted is offensive. Though bestiality is legal in some countries, such as Belgium and Denmark, most people are likely to hold the opinion that interest in viewing acts of necrophilia and bestiality are fairly unreasonable.[31] While views on sexuality have changed drastically over time, necrophilia and bestiality are still minority sexual interests. Thus, perhaps extreme pornography could qualify under the offence principle after all.

However, feminists such as Clare McGlynn and Erika Rackley would argue that justifying Section 63 on the basis of disgust detracts from what should be the real purpose of criminalising extreme pornography featuring women: harm to women. Other forms of extreme pornography not featuring women, thus require separate justification for criminalisation. The Home Office states that the aim of the legislation is to show that extreme pornography has no place in society and to

[23] Joel Feinberg, 'Pornography and the Criminal Law' (1978-1979) 40 U Pitt L Rev 567.
[24] ibid 570.
[25] Feinberg, *Social Philosophy* (n 21) 28.
[26] Feinberg, 'Pornography and the Criminal Law' (n 23) 570-571.
[27] Feinberg, *Social Philosophy* (n 21) 44-45.
[28] ibid 43.
[29] Home Office, *Consultation: On the Possession of Extreme Pornographic Material* (n 11) 6.
[30] Ofcom, Adults media use and attitudes report, Research Document, April 2013, 62 <http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/adult-media-lit-13/2013_Adult_ML_Tracker.pdf> accessed 21 December 2013.
[31] BBC News Europe, 'Animal welfare: Germany moves to ban bestiality,' 28 November 2012. <http://www.bbc.co.uk/news/world-europe-20523950> accessed 21 December 2013.

'protect those who participate in the creation of sexual material containing violence, cruelty or degradation, who may be the victim of crime in the making of the material, whether or not they notionally or genuinely consent to take part' and:
to protect society, particularly children, from exposure to such material, to which access can no longer be reliably controlled through legislation dealing with publication and distribution, and which may encourage interest in violent or aberrant sexual activity.[32]

However, upon reading the enacted legislation one notices the shift from discussions of sexual violence to more vague language such as 'an act which threatens a person's life',[33] and reference to injury of specific parts of the body. [34] Rather than focusing on sexual violence against women, Section 63 of the Criminal Justice and Immigration Act 2008 emphasises disgust, which is a position of legal moralism.

Arguments from Moralism: Paul Johnson in 'Law, Morality and Disgust: the Regulation of 'Extreme

Pornography'' provides an argument in favour of this moralism. He argues that it is useful to speak in terms of disgust as it encourages 'transparency' in the aims of criminalisation and emphasises that the legislation is based on a moralistic view, criticising the liberal perspective in its emphasis on physical harm. To Johnson, Section 63(6)(b) of the legislation is specifically focused on the evaluation of the 'moral content' of the pornography, which helps to distinguish extreme forms of pornography from non-extreme, and establishes a new standard of obscenity. Thus, 'limiting the scope' of the legislation rather than targeting wider ranges of pornography.[35] McGlynn and Rackley, however, criticise this view in 'Striking a Balance: Arguments for the Criminal Regulation of Extreme Pornography' holding that it does not elucidate pornography's real harm.

The liberal response to moralism according to Feinberg is that moral offences do not usually qualify for the offence principle because they do not usually occur in public.[36] Thus, he appears to argue against legal moralism on two fronts. First, that it is difficult to determine whose morality one should legislate for, as he argues, it would seem that whoever is in power would determine the morality that would be in force. Second, that since moral offences usually take place within the home, it would create difficulties for privacy. Not only would such laws be difficult to enforce, since it would require invading people's homes, it would also be detrimental to privacy and personal liberty as people should not be prohibited from acts which they freely choose and which do not cause harm to others.[37]

McGlynn and Rackley's point of view against disgust arguments in favour of extreme pornography is best clarified in 'John Stuart Mill and the Harm of Pornography' by

[32] Home Office, *Consultation: On the Possession of Extreme Pornographic Material* (n 11) 2.
[33] Criminal Justice and Immigration Act 2008, s 63(7)(a).
[34] Clare McGlynn and Erika Rackley, 'Striking a Balance: Arguments for the Criminal Regulation of Extreme Pornography' [2007] Crim LR 677, 678-679.
[35] Paul Johnson, 'Law, Morality and Disgust: The Regulation of 'Extreme Pornography' in England and Wales' (2010) 19 S & LS 147, 148.
[36] Feinberg, *Social Philosophy* (n 21) 40.
[37] ibid 40-41.

David Dyzenhaus.[38] Here, Dyzenhaus draws on Mill's work The Subjection of Women. According to anti-pornography feminist theorists, pornography 'eroticises dominance'.[39] By sexualising inequality between the sexes, pornography is harmful to society. By limiting the cause for criminalisation to harm, the narrow liberal position does not admit of the inequality inherent in the position of women in society. This persistent state of inequality, Dyzenaus argues, limits women's pursuit of autonomy and the good life.[40] Furthermore, the liberal is supposed to be committed to formal autonomy for everyone.[41] Therefore, Dyzenhaus claims that the inability to achieve autonomy in society because of pornography acts as a kind of coercion by a majority on the minority – men on women – and thus forms the kind of coercion Mill tried to argue against through the harm principle.[42]

As Dyzenhaus points out, the inequality of women takes place in the privacy of the home: the same place pornography consumption takes place. Thus, the liberal's veneration for privacy naturally comes at the expense of women's equality and autonomy.[43] Thus, the true harm of pornography is that it harms the status of women and reinforces inequalities in society.

Paternalism and Pornography

A liberal, however, would further argue that Section 63 is merely a paternalistic argument and would ask for proof of the causal link between pornography consumption and physical harm. Feinberg defines paternalism as criminalising activity that would do self-harm.[44] Though Feinberg states that legal paternalism is not always warranted, he argues that it is sometimes legitimate. He clarifies instances where legal paternalism, in the liberal view, would be permissible. It requires the addition of a 'voluntariness standard' thus forming a qualified view of legal paternalism.[45] The result of this would be that if the individual who is about to embark on self-harming or risky activity is adequately determined to be making an informed and voluntary choice, he should be permitted to do so. If it is determined that he is not making a voluntary choice, then he can properly be coerced into refraining.

In the case of extreme pornography, Feinberg would presumably claim that most viewers of such images are making voluntary choices unless mentally disturbed in some fashion. Thus, there is no justification for government coercion of keeping the average person from viewing the extreme pornography.

McGlynn and Rackely, however, argue in response to this objection that arguments in favour of Section 63 that rely on paternalism emphasise the male consumer in pornography, thus detracting focus from women's experience in pornography.[46]

[38] David Dyzenhaus, 'John Stuart Mill and the Harm of Pornography' (1992) 102 Ethics 534.
[39] McGlynn and Rackley, 'Striking a Balance' (n 34) 679.
[40] Dyzenhaus (n 38) 539.
[41] ibid 538.
[42] ibid 544-545.
[43] ibid 540.
[44] Feinberg, *Social Philosophy* (n 21) 45.
[45] Dyzenhaus (n 38) 46.
[46] Clare McGlynn and Erika Rackley, 'Criminalising Extreme Pornography: A Lost Opportunity' [2009] Crim

According to Susan Easton in The Problem of Pornography: Regulation and the right to free speech, the focus of anti-pornography feminists is on the autonomy of women, rather than on the 'moral condemnation of the consumer as a bad person', though she points out that 'it is likely that the individual's sensibilities are blunted by constant exposure to degrading sexual images'.[47]

Against the 'Effects Model' and Pro-Pornography Feminism: The True Harm of Extreme Pornography

Feminist scholars such as Susan Easton and Karen Boyle offer a critique of liberal positions which emphasise the need for proof of physical harm, with Boyle discussing the problems with the 'effects model' in her paper, 'The Pornography Debates: Beyond Cause and Effect'.[48] She states that it is 'impossible to prove' a causal link between pornography and harm'.[49] She argues that by focusing on the effects of pornography, it denies what pornography says about society. Emphasising the future violence that pornography produces denies the violence that already takes place in the production of the pornography.[50]

Easton highlights some of the harms in the production process, such as coercion and bodily harm.[51] Moreover since extreme pornography may contain depictions of acts of violence, these harms must also be considered.[52] Furthermore, Easton suggests that pornography may contribute to the discrediting of victims of sexual offences. She points out that many times victims are accused of having 'invited' the attack. Thus she argues:
If women and children are portrayed in pornography as acquiescing and enjoying violence and abuse, if these assaults are portrayed as normal sex, then it becomes harder for the survivors of sexual violence to establish their credibility and to be taken seriously.[53]

Thus, rather than create a climate of violence, the existence of pornography is only possible within such a climate.

Furthermore, Boyle criticises research studies which aim to 'prove' the causal effect of pornography for focusing on the individual responsibility of pornography users.[54] By focusing on the experience of the individual in the use of pornography, Boyle argues that this enables pro-pornography feminists to point to the 'liberating' experiences some women have with pornography.[55]

LR 245.
[47] Susan Easton, *The Problem of Pornography: Regulation and the right to free speech* (Routledge 1994) 156.
[48] Karen Boyle, 'The Pornography Debates: Beyond Cause and Effect' (2000) 23 Women's Studies Intl Forum 187.
[49] ibid 193.
[50] ibid 189.
[51] Easton, *The Problem of Pornography* (n 47) 19.
[52] ibid.
[53] ibid 21.
[54] Boyle (n 48) 187.
[55] ibid 193.

Individualist feminists such as Wendy McElroy are pro-pornography feminists. These feminists stress the importance of individual choice in undertaking pornographic work and/or the consumption of pornography by women. Choice is defined by McElroy in her book, XXX: A Woman's Right to Pornography, as:

present whenever a woman acts without physical coercion. Certainly, it is present whenever the woman herself says the actions are voluntary, because she is the only person truly capable of judging that claim. The peaceful choices of every woman must be respected; the voice of every woman should be heard.[56]

Furthermore, McElroy argues that there are significant benefits to pornography for women; a key one being that '[p]ornography is one of the windows through which women glimpse the sexual possibilities that are open to them'.[57]

Thus, individualist feminists argue that women, if they are making the free choice to engage in pornographic activities, should be free to do so without being dictated by anti-pornography feminist criticisms which privilege the class 'women' over the individual.[58] McElroy lauds sexual liberty and argues that women have the right to explore these relatively new avenues which have arisen primarily due to movements such as radical feminism.[59]

Easton responds to such individualist feminist critiques, however, by arguing against what she calls 'contractarianism'. Easton holds that contractarianism is a view which attempts to provide a defence of the sex industry and:

relie[s] upon contractual arguments and on the volenti argument that, if individuals consent to an activity which others find offensive, the state should not intervene provided that consent is freely given.[60]

Easton argues however that such contractarianism 'overlooks' 'that women's choices may be conditioned by fundamental structural inequalities which affect her life chances and earning capacity'.[61] She goes on to say that '[b]y focusing on the voluntary nature of participation in the sex industry, choice theorists overlook coercion and the various techniques to ensure participation'.[62]

Often the pornography industry 'depends on the exploitation of the weakest groups'.[63] Thus Easton finds that there is a 'problem with the presumption of choice if seen in the context of a lifetime of cultural pressures and expectations'.[64] For her, such choice 'may be possible only in a social structure without sexual discrimination'.[65] Since such sexual discrimination exists throughout social structures, free voluntary choice advocated by individualist feminists is not possible for pornography.

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[56] Wendy McElroy, 'Individualist Feminism: A True Defense of Pornography' ch 6 of *XXX: A Woman's Right to Pornography* <http://www.wendymcelroy.com/xxx/chp6.htm> accessed 31 October 2013.
[57] ibid.
[58] ibid.
[59] ibid.
[60] Easton, *The Problem of Pornography* (n 47) 7.
[61] ibid.
[62] ibid 8.
[63] ibid.
[64] ibid.
[65] ibid.

Furthermore, as an alternative position to McElroy's claim that pornography is sexually liberating to women, Easton holds that:

Women's provision of sexual services, whether in the form of prostitution or participation in pornographic films and magazines, could be seen as the most extreme form of alienation and dehumanisation as the body becomes a commodity and subordination is confirmed in every act. The buying and selling of images of women's bodies as commodities open to all on the market with sufficient disposable income to purchase those services reinforces the right of access to women.[66]

Thus, by participating or consuming forms of pornography, women are perpetuating their own commodification as sexual objects, reinforcing the harmful notion that this access to their bodies for sexual gratification is a right.

A further pro-pornography feminist argument put forward by McElroy is that pornography is merely a form of free speech. She therefore argues in favour of a positive relationship between feminism and pornography, the relationship being one of parallels rather than one of antagonism. She holds that '[f]eminism is freedom of speech applied to women's sexual rights'[67] and '[pornography] is nothing more or less than freedom of speech applied to the sexual realm'.[68] Moreover, other anti-censorship feminists fear that 'once censorship is in place it may well be used to constrain feminism rather than to enhance it'.[69]

In response to McElroy's view that pornography should not be regulated due to freedom of speech, Easton, while acknowledging the dangers of over-regulation, argues that such a danger could be avoided by emphasising the precise elements of pornography. These are its 'intentionality' to 'sexually arouse the audience' and the 'actus reus of degrading or dehumanising depictions of women'.[70] This she argues 'distinguishes pornography from works with a redeeming value'.[71]

Thus, Easton holds that because of pornography's degrading nature it should not be held to be protected from censorship by freedom of speech. Instead, it should be regulated because such regulation 'may strengthen women's position within the private sphere and the credibility of victims of sexual violence'.[72]

Liberal Perfectionism and Long-Term Harm of Extreme Pornography in 'Criminalising the Possession of Extreme Pornography: Sword or Shield?'

Easton provides an argument in favour of extreme pornography using a version of liberalism she calls 'perfectionism' which she argues accepts aims to 'promote

[66] ibid 9.
[67] McElroy (n 56).
[68] ibid.
[69] Easton, *The Problem of Pornography* (n 47) 68.
[70] ibid 69.
[71] ibid.
[72] ibid.

autonomy and respect for individuals and to promote a range of good options'.[73] This version of the liberal argument privileges long-term beneficial decisions to short-term ones. Thus Easton argues that opposition to extreme pornography could potentially be argued on the ground that harming women as a 'source of sexual gratification' is harmful to autonomy in society in the long run.[74]

Similar arguments against necrophilia and bestiality she admits, however, are difficult to hold under perfectionist grounds.[75] She also points out, that though there is a defence to the offence in Section 66, it does not contain a defence for consent. She argues against objections to this omission by stating that in cases such as R v Brown,[76] consent is not a defence for sadomasochistic activities.[77]

While there have been objections to Brown alleging that it was decided on paternalistic and moralism grounds, cases such as R v Coutts,[78] give credence to the need for state regulation of sadomasochistic activities; even those performed with consent.

Conclusion

There are many good reasons for criminalising acts which do not cause a setback of interests of specific individuals in society. One such example is extreme pornography. Though it is difficult to show a causal link between harm and pornography, as this paper has attempted to show, there are social reasons such as harm to women which merit its criminalisation. While moralistic and paternalistic arguments can also be employed in favour of its criminalisation, the anti-pornography feminist argument that the wrong of pornography is harm to women best illustrates the real wrong of extreme pornography. Though extreme pornography could qualify under the offence principle and under perfectionist grounds, the liberal position of the harm principle however neglects to admit that not all individuals possess formal autonomy and that there is a persistent state of inequality between men and women in society, which criminalising extreme pornography could potentially help to alleviate.

Recognition of the true harm of extreme pornography thus elucidates the need for couching public policy discourses in feminist terms rather than ones which reflect the deficient justifications of the regulation of pornography such as disgust and moralism.

[73] Easton, 'Criminalising the Possession of Extreme Pornography' (n 8) 397.
[74] ibid.
[75] ibid 398.
[76] [1994] 1 AC 212 (HL).
[77] Easton, 'Criminalising the Possession of Extreme Pornography' (n 8) 401.
[78] [2006] UKHL 461, [2006] WLR 2154.

Undergraduate Dissertations

The following are some *of the best undergraduate dissertations from the 2012-2013 academic year.*

These dissertations have not been edited.

Physician-Assisted Suicide: Can the Doctor and Patient Escape the Slippery Slope, Together?

Vijay Chohan

The Assisted Suicide debate has been controversial and longstanding with ethical, medical and legal complexities. Assisted Suicide remains illegal in England and Wales after several Commission Reports and Reform Proposals. The current legal framework is confusing and inappropriate in the modern, democratic society. The media uproar in response to high profile cases, including Diane Pretty, Debbie Purdy and most recently, Tony Nicklinson, have sparked interest from the legislature which is yet again under pressure to produce clarification in this convoluted area. This Dissertation will consider the recent All Party Parliamentary Group 'Safeguarding Choice' Draft Assisted Dying Bill (2012), Lord Joffe's 'The Assisted Dying for the Terminally Ill Bill' (2004) and Director of Public Prosecution Policy for Prosecutors in respect of Cases of Encouraging and Assisting Suicide (2010). With thorough analysis of these documents, combined with academic commentary, the need for a more specific, patient-led guidance, aimed solely at qualified physicians will be evaluated. Both ethical and practical considerations will be deliberated, in an attempt to create a justified balance.

The concept of patient autonomy must be enshrined in any proposed system, allowing the terminally ill to choose a dignified death, within limits. The traditional libertarian views and more modern opinions of autonomy will be discussed in light of physician-assisted suicide (PAS) and how they have developed to our modern way of thinking. The patient's autonomy remains central to the legalisation process, where a balance must be struck between the sufferer's choice to die and the protection of society as a whole.

Particular emphasis will be placed on the doctor-patient relationship and how it can be utilised to create a safe process, emphasising equality and control. The history and development of the relationship will be analysed and brought forward to the modern, efficient, patient-focused relationship that creates a unique mutual trust and confidence.

Finally, the 'slippery slope' arguments against legalisation will be addressed and reconciled with various, substantial safeguards. Delving into the logical, empirical and psychological 'slippery slopes', provides an understanding of the need for certain safeguards that attempt to minimise the prevalence of specific risks, inherent in the PAS process.

This Dissertation will conclude with a proposal, building on the DPP Policy and APPG Draft Bill to create a unified system that will clarify the eligibility criteria and safeguards, necessary in any legal PAS process. The various arguments stemming from consideration of the patient autonomy, the doctor-patient relationship and the slippery slopes will be incorporated to provide a thorough and innovative proposal.

It is essential that the law is reformed, to provide clarity and comfort in a scenario that rests on the fine line between morality and immorality, or legality and illegality.

Introduction:

'It is not for the court to decide whether the law about assisted dying should be changed and, if so, what safeguards should be put in place. Under our system of government these are matters for Parliament to decide, representing society as a whole, after Parliamentary scrutiny, and not for the court on the facts of an individual case or cases'[1]
Lord Justice Toulson (*Tony Nicklinson v Ministry of Justice*)

What is assisted suicide?

'If D arranges for a person ("D2") to do an act that is capable of encouraging or assisting the suicide or attempted suicide of another person and D2 does that act, D is also to be treated for the purposes of this Act as having done it'.[2]

Assisted suicide is the act of one individual providing another with the means to end their life, either by offering the fatal medication itself or taking the person to a place where it can be carried out. It is not the same as euthanasia, which involves a person actively ending the life of another. Physician-assisted suicide (PAS) includes a qualified medical practitioner as the 'assistor', who guides the patient through the process, from the initial diagnosis, to the prescription of the life-ending medication.[3]

Assisted suicide is illegal in England, under section s59 of Coroners and Justice Act 2009 which amends s2 of the Suicide Act 1961. There has been enormous debate over the past few decades, which have questioned the classification of PAS as a 'crime' and the possibility of a legalised procedure. The debate is particularly controversial, combining a number of ethical, medical and legal arguments, as well as the greatly influential Human Rights perspective. The media uproar over the past decade has attracted enormous public interest. The case of Regina (Purdy) v Director of Public Prosecutions (Society for the Protection of Unborn Children intervening) is very relevant as the House of Lords held that the DPP should promulgate specific guidance to produce some kind of clarity and coherence for those contemplating assisted suicide, in regards to the factors that the prosecution will consider when deciding a case. Pretty v The United Kingdom was also a seminal judgement as the

[1] The Queen on the Application of Tony Nicklinson v Ministry of Justice [2012] EWHC 2381 (Admin) [150] (Lord Toulson)
[2] Coroners and Justice Act 2009, s59 (amends s2 of the Suicide Act 1961)
[3] John Keown, *Euthanasia, Ethics and Public Policy: An Argument Against Legalisation* (Cambridge University Press, 2002) 31

European Court of Human Rights held that assisted suicide does engage Article 8 of the ECHR, yet did not result in violation. These cases have not only gripped the public, through the media, but have also sparked a great deal of interest from members and committees of Parliament. For example, Lord Joffe (a key proponent for legalisation) has made several attempts to introduce bills that would effectively legalise assisted suicide, but Parliament has vehemently rejected them all.[4] Those in favour of legalisation believe that England should follow in the footsteps of Switzerland and the Netherlands where assisted suicide has been made legal.[5] The greatest worry is that if England remains vastly opposed to assisted suicide, more and more individuals will travel abroad, in what has been described as 'suicide tourism', to gain relief from their suffering.[6] This has been publicised through the use of the 'Dignitas' Clinic in Switzerland which has assisted in the death of over 180 Britons, in a period of only 10 years since it has opened.[7]

DPP Policy Guidance

'This policy does not in any way "decriminalise" the offence of encouraging or assisting suicide. Nothing in this policy can be taken to amount to an assurance that a person will be immune from prosecution if he or she does an act that encourages or assists the suicide or the attempted suicide of another person'.[8]

In 2010, the DPP, Kier Starmer, produced the Policy guidance that the House of Lords requested in Purdy. It effectively assists prosecutors in deciding whether to prosecute the 'assistor' in the event of suicide, with public interest factors both for and against. Although this was greatly welcomed in theory, it has had very little impact in practice. Dignity in Dying profess the practical futility, stating 'the revised guidelines make clear that there is a distinction between compassionate acts to assist someone to end their own life which, subject to other factors, are unlikely to be prosecuted, and malicious encouragement or assistance of suicide which will be prosecuted'.[9] It may have been regarded as a step forward in the legalisation debate but does not actually provide a defence for the assistor. Under the guidelines, each case is considered and a check-list approach is adopted, regarding the factors both for and against prosecution. In reality, this does little to improve the certainty of the law.

[4] BBC, 'Assisted Dying Legislation in the UK' <http://www.bbc.co.uk/ethics/euthanasia/overview/asstdyingbill_1.shtml> (accessed 13/01/13)
[5] Ezekiel J Emanuel, 'Euthanasia: where the Netherlands leads will the world follow?' BMJ 2001;322:1376–7 <http://www.bmj.com/content/322/7299/1376> (Accessed 15/01/2012)
[6] Dignitas, 'Members of Dignitas by country of residence' as of 31 December 2012 <http://www.dignitas.ch/index.php?option=com_content&view=article&id=32&Itemid=72&lang=en> (accessed 16/02/12)
[7] Care Not Killing, 'Ten years of assisted suicide at Dignitas – another excuse for an international news story', 25th October 2012 <http://www.carenotkilling.org.uk/articles/assisted-suicide-at-dignitas> (accessed 13/01/13)
[8] The Director of Public Prosecutions 'Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide' (Feb 2010) < http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html> (accessed 30/11/12) para 6
[9] Dignity in Dignity, 'DPP's Policy on assisted suicide' <http://www.dignityindying.org.uk/assisted-dying/faqs-dpps-policy-assisted-suicide.html> (accessed 13/01/13)

APPG Draft Bill

'The draft Bill that is at the heart of this consultation focuses on having in-built, upfront safeguards and strict eligibility criteria which must be satisfied before the person applying for assisted dying could access life-ending medication, as well as stringent monitoring procedures to identify and investigate cases of potential abuse or malpractice'.[10]

The All Party Parliamentary Group on 'Choice at the end of Life' produced a draft bill for consultation in July 2012, in conjunction with Dignity in Dying. The bill proposes a safeguarded legal process whereby a registered medical doctor can assist in the death of a terminally ill, suffering individual. It is a promising proposal that indicates the potential effectiveness of a closely-regulated, legal, assisted dying process.

Structure and Aims of this Dissertation

In this Dissertation, the ability of Parliament to produce an effective piece of legislation that provides for a legal PAS process will be addressed from both an ethical and legal perspective. Previous attempts including the Joffe Bill and APPG Bill, as well as the DPP Policy will be critiqued in light of the arguments put forward. Firstly, to provide some theoretical grounding to the debate, I will describe the significance of patient autonomy and consider the different views on how much weight should be given to individual choice. 'Individuals being able to decide autonomously for themselves whether their own life retains sufficient quality and dignity. Entitled to decide about the mix of self-determination and personal wellbeing that suits them'.[11] It is evident that the entire process rests on the genuine, autonomous decision of the individual.

Secondly, I will focus on the doctor-patient relationship, which builds on a degree of trust and confidence, combined with medical expertise, to facilitate the patient's autonomy. 'Open, legally regulated process subject to safeguards is better for the patient...would allow for far more predictability and accountability. Safeguards and open deliberation are the best way to balance responsiveness, predictability and protection against error, abuse and coercion'.[12] The doctor-patient relationship allows for a safe and efficient process, although the opposition from the medical community is worrying.

Lastly, I will analyse the viability of the various 'Slippery Slope' arguments that have been the driving force behind the majority of opponents. The logical, empirical and psychological slippery slopes will be dissected in detail. 'It is necessary to find a balance between respecting the rights of patients...and limiting the undesirable consequences to which the recognition of such rights might give rise'.[13] The comprehensive safeguards in a proposed system should provide sufficient protection.

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[10] Choice at the End of Life All Party Parliamentary Group, 'Safeguarding Choice', A Draft Assisted Dying Bill for Consultation (2012) < http://www.appg-endoflifechoice.org.uk/pdf/appg-safeguarding-choice.pdf> (accessed 30/11/12) p10

[11] Robert Young, *Medically assisted death* (Cambridge University Press, 2007) 23

[12] Timothy Quill, 'Physicians should assist in suicide when appropriate' (2012) 40 Journal of Law, Medicine and Ethics Volume 1, 7

[13] Simon Chesterman, 'Last rights: euthanasia, the sanctity of life, and the law in the Netherlands and

To conclude this Dissertation, I will propose an idea of what any prospective legislation should include, taking and building upon the provisions in previous proposals, in an attempt to show how Parliament could legislate to allow PAS. The proposal shall include both eligibility criteria and safeguards, specifically tailored towards PAS and justified by the various arguments put forward.

Patient Autonomy

Patient autonomy is one of the most significant issues with regard to physician assisted suicide and could be argued as the main reason in favour of legalisation. The concept is based on the simple idea that an individual should be given a degree of choice about certain aspects of their life and in this case, the end of their life. It is a very heavily debated subject as it crosses several areas of society, medically, ethically and legally. Many argue that Parliament has a moral duty to facilitate patient autonomy in the law and disregard the deep-rooted paternalistic constraints on individual liberty.[14]

Autonomy is crucial in the final stages of life, where individuals should have a degree of choice regarding when and where they are going to die. In this chapter, I will briefly consider the libertarian perspective as well as Gerald Dworkin's opposition to hard paternalism in the criminal law. I will then examine the well-publicised cases of Diane Pretty and Debbie Purdy, which have sparked an increased interest in the idea of autonomy, particularly with respect to the European Convention on Human Rights and the Director of Public Prosecution. I will then analyse Parliament's response to the recognised need for autonomy in the DPP 'Policy for Prosecutors in respect of Cases of Encouraging and Assisting Suicide'. Lastly I will focus on the APPG Draft Bill which expressly provides for patient autonomy with the inclusion of a declaration from the patient and two independent doctors assessing capacity and freedom. There are still, however, gaps in which patient autonomy can be pushed aside or overruled by instances of public policy, which serve to protect the wider interests of society as opposed to focusing on the one dying individual. Any suggested reform of PAS must implement stringent safeguards, not only to protect the patient's autonomy, but to allow for safe and effective practice in society.

What Is Autonomy?

Autonomy suggests that as individual human beings, we should be able to make decisions for ourselves. The argument has always surrounded the fact that 'we are all free willed agents, capable of making decisions'[15] and this must be respected, whatever the context.

Dworkin states that 'in pursuing autonomy, one shapes one's life and one constructs its meaning'[16] indicating that the concept is very much personal, based on the morals and values of the particular individual. Autonomy plays a substantial part in PAS because the act of assisting someone to die is based on the dying person's choice to

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the Northern Territory of Australia' (1998) I.C.L.Q. 362, 374

[14] Horacio Spector, *Autonomy and Rights: The Moral Foundations of Liberalism* (First Published 1992, Oxford University Press, New York, 2007) 1

[15] Alasdair Maclean, *Autonomy, Informed Consent and Medical Law* (Cambridge University Press, 2009) 10

[16] Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press, 1988) 31

end their life, 'a right to assist is the inevitable corollary of a "right to die"'.[17] It may be difficult to comprehend such a decision because of the fatal consequences but the decision should nonetheless be respected in the individual's circumstances. The ability to control's one's life and the quality of one's life has remained central to this medico-ethical debate, in that autonomous decision making should be respected and upheld.[18]

Autonomy and liberty are very much intertwined, 'an autonomous agent is someone with free will and liberty relates to the freedom to act',[19] playing an essential role in medical decision making. Living in a democratic society, autonomous liberty, as it were, should be established in its foundations. The traditional paternalistic constraints on liberty should be reconsidered and relaxed by Parliament, to facilitate a degree of patient autonomy. It is understandable that Parliament cannot permit outright autonomy, simply based on individual freedom to act. However it must consider the availability of such a process which is almost entirely based on that choice, and build on this, tackling the array of incidental risks involved. Parliament is not solely motivated by paternalism, it has the difficult task of balancing the benefits and potential risks of any policy. The Slippery Slope, as later discussed, is a means of visualising these concerns and evaluating the variety of consequences that may arise.

It is interesting to consider the libertarian perspective because one can envisage the foundations of autonomy and thus its importance in PAS. Gerald Dworkin professes the libertarian ideal, with strong views about the theory and practice of autonomy within society, opposing the hard paternalism of the criminal law. 'Autonomy functions as a moral, political and social ideal, in all three cases there are values attached through reasons, values and desires of the individual'.[20] This establishes the various influences on autonomy and again, the emphasis on the individual. It could be argued that in placing the entire focus on the individual, Dworkin loses sight of the wider community that require equal protection in this potentially dangerous scenario. However, there are similar moral, political and social influences in PAS which need to be addressed to provide a fair and just system. At this stage it is important to stress that the political philosophy behind the debate plays a crucial role, particularly through Parliament's implementation of various policies and procedures. Linking this to modern society, one must not limit autonomy to choice but also consider the influence of various other elements, such as the role of doctors, which are governed by Parliament, through the law. The focus on authority and governance is prevalent in the PAS debate because where 'authority is inconsistent with autonomy, there can be no legitimate authority'.[21] Therefore from the libertarian perspective, in order to legitimise the authority, Parliament must give effect to autonomy through the clarity and meaning of the law. It must be argued that Parliament cannot always adopt a libertarian perspective because through its legislation and policies, it is compelled to restrict the liberty of individuals to an extent, with the legitimate aim of securing the safety of society.

[17] Ben Livings, 'A right to assist? Assisted dying and the interim policy' (2010) J. Crim. L. 31, 34
[18] Julian Sheather, 'Patient Autonomy' Student BMJ 2011;19:d680 <http://student.bmj.com/student/view-article.html?id=sbmj.d680> (accessed 1/02/2013)
[19] John Coggon & Jose Miola , 'Autonomy, liberty, and medical decision-making' (2011) 70 C.L.J. 523, 525
[20] Dworkin (n16) 10
[21] Dworkin (n16) 26

Recent Case Law – Is Parliament Beginning to Appreciate Autonomy?

A number of recent high-profile cases have mounted pressure on Parliament to produce clarity in the law regarding assisting suicide and have to some extent succeeded. R (on the application of Purdy) v DPP[22] has been a breakthrough case as 'their Lordships agreed that the DPP must issue an offence-specific policy detailing the considerations that will be taken into account when deciding whether or not to pursue a prosecution against an individual who helps another to take his own life'[23] which was in fact later produced in 2010. The facts of the case are somewhat typical of the assisted suicide case history. The claimant suffered from primary progressive multiple sclerosis for which there was no known cure. She expected that there would come a time when she would want to end her life while still physically able to do so. By that stage, however, she would be unable to do so without the assistance of her husband who was willing to assist her travel to a country where assisted suicide was lawful. However, she was concerned that he might be prosecuted for an offence under section 2(1) of the Suicide Act 1961 if he did so.[24] Purdy sought judicial review on the decision of the DPP not to promulgate a policy which outlined the factors to be considered when deciding whether a prosecution would occur under section 2(4) of the Suicide Act 1961. The claim was based on the fact that the Suicide Act and associated policies did not satisfy the certainty and clarity that the law required in such a controversial context. To add to the confusion, there had been over seventy cases related to assisted suicide, of which none had resulted in prosecution. The second limb of Purdy's claim was particularly relevant to her autonomy as a terminally ill individual, seeking the ability to choose to end her life, should she wish. She claimed that the law contravened her 'right to respect for private life' under Article 8(1) of the European Convention of Human Rights. The House of Lords recognised that Article 8 guarantees the right to self-determination and made reference to the case of Diane Pretty,[25] concluding that 'Mrs Pretty has a right of self-determination...her private life is engaged even where in the face of a terminal illness she seeks to choose death rather than life'.[26]

The case of Pretty v UK[27] provides informative judicial interpretation of the concept of autonomy, within the context of the ECHR. The European Court of Human Rights held that the UK law prevented individuals from 'exercising choice to avoid what [is] considered to be an undignified and distressing end to her life'[28] which directly relates to the law's infringement of autonomy, expressly opposed by the courts. In Purdy, Lord Hope stated that the DPP failed to provide adequate guidance in cases of assisted suicide as it does not 'ensure predictability and consistency of decision-taking'.[29] The accessibility and foreseeability requirements are necessary in order to facilitate a patient's autonomy and allow them to formulate an informed decision. Baroness Hale in Purdy makes her dissatisfaction of the current law very apparent with express reference to autonomy, 'the deterrent effect of a prosecution would be a

[22] Regina (Purdy) v Director of Public Prosecutions [2009] UKHL 45
[23] Rob Heywood, 'R. (on the application of Purdy) v DPP: clarification on assisted suicide' (2010) 126 L.Q.R. 5
[24] *Purdy* (n22) (case headnote)
[25] Regina (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening) [2002] 1 A.C. 800
[26] ibid 846
[27] Pretty v United Kingdom [2002] ECHR 427
[28] Ibid para 67
[29] *Purdy* (n22*)* 423 (Hope)

disproportionate interference with the autonomy of the person who wishes to end her life'[30] and reveals the court's emphasis on the importance of autonomy in such a compassionate context. She establishes that there is an urgent need for Parliament to address this as 'the object must be to protect the right to exercise a genuinely autonomous choice'[31] where again, the emphasis on autonomy is obvious. The case law provides the courts' perspective on autonomy, illustrating how it impacts individuals in reality, who have actively made the decision to end their lives.

Policies and Proposals: paving the way for autonomy?

The following policies and proposals illustrate the increased focus on autonomy and further emphasise the need for its appreciation within the PAS context. Each will be considered in turn, highlighting in particular, the provisions that provide for autonomy and why they have been incorporated as such.

In an attempt to satisfy the House of Lords in Purdy, the DPP published the Policy for Prosecutors. It lists sixteen factors in favour of prosecution and six factors against, in deciding a case where someone has assisted another to die. 'The DPP's final guidelines clearly emphasize the victim's autonomy in the prosecutorial analysis'[32] which is consistent with the judgements in Purdy and their emphasis on autonomy. This can be seen in the factors against prosecution which state that prosecution will be more likely if 'the victim had not reached a voluntary, clear, settled and informed decision to commit suicide [or] the victim had not clearly and unequivocally communicated his or her decision to commit suicide to the suspect'.[33] This makes it abundantly clear that the patient's choice is paramount and that the patient must have had sufficient capacity and knowledge to make such a choice. Equally, prosecution will be less likely, where the individual made a rational, autonomous and independent decision to end their own life. The policy has given effect to autonomy in the prosecution process. However Parliament has not endorsed autonomy in the fullest sense because any prosecutorial guidelines which intends to 'respect autonomy must exclude any qualifying factors regarding an individual's physical condition; thus, there is a tension between protecting personal autonomy and stipulating when a person is suffering enough to end his or her own life'.[34] This so-called trade off creates the biggest issue within patient autonomy and PAS because on the one hand, autonomy should be respected, while on the other, individuals may need protection from themselves.

The APPG Bill arguably places a fuller emphasis on autonomy, through the various enshrined safeguards that are suggested. Firstly and perhaps most obviously, the draft bill is entitled 'Safeguarding Choice', which immediately gives the impression that the politicians wish to protect and nurture the choice of individuals, strengthened by the fact that the APPG group is based on 'Choice at the end of life'. The model produced is expressly intended to 'allow terminally ill, mentally competent adults in the last weeks of life the choice of controlling the manner and

[30] *Purdy* (n22) 425 (Hale)
[31] *Purdy* (n22) 426 (Hale)
[32] Carol Cleary, 'From "Personal Autonomy" to "Death-on- Demand": Will Purdy v. DPP Legalize Assisted Suicide in the United Kingdom?' (2010) 33 B.C. Int'l & Comp. L. Rev. 289, 299
[33] DPP Policy for Prosecutors (n6)
[34] Neil M. Gorsuch, *The Future of Assisted Suicide and Euthanasia* (Princeton University Press, 2006) 96

timing of their death'[35] which again, stresses the inevitability of autonomy in the assisted suicide scenario. Looking at the draft bill itself, it is clear that choice and autonomy were at the forefront of the drafter's minds and the driving force behind the proposed legislation. Section 1(1) states that 'a person who is terminally ill may request and lawfully be provided with assistance to end his or her own life'[36] where emphasis is placed on the word 'request', indicating that it can only be the choice of the patient who must autonomously initiate the process. The signed declaration in section 3 facilitates this request and allows the patient to have their choice formally recognised by their doctor. The inclusion of a second, independent doctor to validate the declaration is an additional safeguard to ensure that the patient has made a truly autonomous decision with 'clear and settled intention...without coercion or duress'.[37] This is paramount to the entire model because it provides for a second medical opinion on the patient's state of mind and capacity to make a decision. Further safeguards are imposed to ensure that the entire process is based solely on the patient's autonomy, such as the fourteen day cooling-off period and the ability to revoke the declaration at any time. It seems as though almost every aspect of the bill promotes and protects the autonomy of the dying individual which is promising for any future of legislation in this area. However it could be argued, that as with the DPP Policy guidance, complete autonomy is hindered by the requirement of terminal illness, which can be justified by the need provide some limit on those who qualify for PAS. The concern here is more on the interpretation of 'terminal illness' and whether it places an unfair burden on individuals who are genuinely suffering from an incurable illness. The Bill does provide some guidance on what is meant by terminal illness (s2) but lacks the certainty which is crucial in these circumstances.

It cannot be disputed that autonomy plays the most important part in PAS as the entire process is formulated through the patient's decision to end their life, and the physician merely assists with medical means. It is for this precise reason that the legalisation of assisted suicide has been protested. Conversely, it is also this reason which fuels the sceptics. The issue of patient autonomy harbours a number of problems such as undue influence, coercion and mental capacity which have been addressed to a certain degree but the value of autonomy cannot be stressed without considering these potentially fatal pitfalls. The APPG bill implements a variety of safeguards to prevent these concerns but any future reform must include similar guidance to both promote and protect the autonomy of the dying individual. The 'slippery slope' can be invoked with regard to autonomy, especially as it is such a delicate and emotional concept with a variety of influences that can hinder its true nature. To alleviate some risk, a greater analysis of the doctor's role should be undertaken and the relationship between the doctor and patient ought to be addressed, as it is the doctor's inherent duty to facilitate their patient's autonomy.

The Doctor Patient Relationship

In this chapter I will focus on the doctor-patient relationship, what it is in our modern society and why it is necessary. I will argue that the unique partnership can be utilised and enhanced within PAS to provide a safe legal framework. Mutual trust

[35] APPG Draft Bill (n10) 8
[36] APPG Draft Bill (n10) s1ss1
[37] APPG Draft Bill (n10) s3ss3(c)

and confidence are fundamental, with the inclusion of open discussion and information to facilitate an informed, autonomous decision of the patient. I will then discuss the requirement of a qualified medical practitioner as an essential regulatory safeguard. This is somewhat difficult, given the opposition from the medical community but further medical investigation should shine light on the prospect. The greatest fear is the abuse of the relationship, which stems from the inherent imbalance of power and knowledge between the doctor and patient. I conclude with the analysis of the various safeguards in recent proposals which aim to protect the vulnerable patient and the suggestion that further legislative deliberation is necessary to ensure maximum safety.

The History of the Doctor-Patient Relationship

When considering the doctor-patient relationship and why it is so crucial to the PAS debate, it is important to briefly explain its history and development. What is apparent today is the strong move away from medical paternalism to a more patient-centred approach, essential for the facilitation of patient autonomy and informed consent. Over the years, the medical profession has attempted to find a balance with a 'model for shared decision making'.[38] Parson's 'model of the sick role and doctor's role' is a useful starting point and illustrates traditional paternalism. He describes the sick as deviants in society and doctors as having the distinct role in correcting this deviance. The 'role of the doctor in officially legitimating illness and acting as a gatekeeper to the sick role'[39] implies that doctors were in control of the classification of illness and subsequent access to medical care. The patient played a very limited role and had little involvement in the medical process. In line with modern society and increased emphasis on autonomy, 'bioethics has forced medicine to recognise patients as autonomous beings who are entitled to choose among medical treatments'.[40] The medical society has embraced a process which is based on mutual decision making between the doctor and patient, with intense focus on the patient's interest where 'medical paternalism has no place'.[41] It has been suggested that 'a more ethical and effective approach is to enhance a patient's autonomy by advocating a medical beneficence that incorporates patients' values and perspectives'[42] which is arguably the current approach adopted by the medical community. The doctor-patient relationship, in its developed form, is absolutely necessary for the effective treatment of patients while balancing the wider interests of society. Mead and Bower 'advocated the use of a democratic, equal doctor-patient relationship differing fundamentally from the paternalistic focus envisaged by Parsons'[43] which reflects the notion of shared power and responsibility that lies at the heart of the modern doctor-patient relationship.[44] It is this relationship that provides safety for the patient.

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[38] J Chin, 'Doctor-patient Relationship: from Medical Paternalism to Enhanced Autonomy' (2002) 43(3) Singapore Med J 152, 152

[39] M Morgan, *The Doctor Patient Relationship* as extracted in G Scambler, *Sociology as applied to medicine* (Saunders/Elsevier, 2008) 51

[40] M Sullivan, 'The new subjective medicine: taking the patient's point of view on health care and health' (2003) 56 Social Science & Medicine 1595, 1602

[41] Speedling & Rose, 'Building An Effective Doctor-Patient Relationship: From Patient Satisfaction To Patient Participation' (1985) 21(2) Soc. Sci. Med. 115, 119

[42] Chin (n38)

[43] Kaba & Sooriakumaran, 'The evolution of the doctor-patient relationship' (2007) 5 International Journal of Surgery 57, 61

[44] GMC, 'Good Medical Practice' GMC/GMP/0910 (2006, updated 2010) 15 paras 20/21 <http://www.gmc-uk.org/static/documents/content/GMP_0910.pdf> (accessed 25/02/13)

Doctors and PAS: mutual trust, confidence and communication

A successful doctor-patient relationship is vital for a safe and effective PAS process. The relationship must be utilised and enhanced, building on the trust and confidence between the knowledgeable doctor and vulnerable patient. The fundamental scenario which defines the relationship is when a patient seeks advice from the doctor who they trust, and it is this reliance that shall be considered, in conjunction with the patient's autonomy. The element of trust is vital as the patient relies on the medical expertise of their doctor, who they believe, will always act in their best interests. Trust becomes more apparent in assisted suicide when the consequences are inevitably death; the patient and society need to be absolutely sure they can trust their doctor. 'Patient knowledge, patient compliance and patient satisfaction'[45] should remain the primary focus of the doctor at all times, in order to maintain the mutual respect and understanding. The duty falls on the physician to 'elicit from their patients their assessments and feelings...encouraging patients to take an active role in the formation of strategies for managing their health problems'[46] and linking this to PAS, the physician must ensure that the patient is fully informed and willing to participate in the management of their dying process. It is essential that the patient remains at the centre of the decision making process and for this to work, the doctor must openly communicate with them and keep them fully informed. 'The fact that informed consent and shared decision making are now such major issues is good for patients, as they are offered more information than ever before'.[47] The emphasis on communication cannot be stressed enough, especially in such a delicate context. 'What clinicians say will be interpreted in terms of the patient's own framework of ideas',[48] renders it to be vital that they provide all the relevant information in a way that the patient will understand, aside from any preconceived ideas about their illness or PAS.

Having considered the foundations of the relationship, it is necessary to evaluate the potential conflicts with autonomy. Medical professionals believe that doctors should 'articulate empathy explicitly...creating a safe conversational space'[49] and it is this 'space' which must be respected, as it allows both doctors and patients to express concerns and risks associated with PAS and the ability to come to a common understanding about the process. While the patient is autonomous in their choice to die, the doctor must assess their choice in light of their medical expertise and make a decision accordingly. The patient is not self-reliant. Therefore the role of the doctor is absolutely fundamental, providing access and advice throughout the process. Furthermore, patients cannot demand any and every treatment they wish, solely based on autonomy, thus the doctor retains a degree of power in deciding what choices the patients should have and in what circumstances.[50] Herring reaffirms this view, that 'a doctor is at liberty to refuse to provide treatment however keenly the

[45] Bensing, 'Doctor-Patient Communication And The Quality Of Care' (1991) 32(11) Soc Sci Med 1301, 1301
[46] Speedling & Rose (n41) 117
[47] Peter Tate, *The Doctor's Communication Handbook* (Radcliffe Publishing, 2010) 128
[48] Philip Ley, *Communication with Patients: Improving Communication, Satisfaction and Compliance* (Stanley Thornes, 1988) 173
[49] Back, Arnold, Tulsky, *Mastering Communication with Seriously Ill Patients* (Cambridge University, 2009) 6
[50] R (on the application of Burke) v The General Medical Council [2005] EWCA 1003

patients wants it'[51] which further emphasises the notion of a balance between patient autonomy and the doctor's regulation of this, to a certain degree.

Restricted to medically qualified physicians?

Having established the development and significance of the doctor-patient relationship, it must be directly tested in the context of PAS. It is easy to demonstrate the benefits of a successful doctor-patient relationship in general but one must consider its suitability and applicability to this scenario. The immediate concern is whether assisted suicide should be confined to qualified physicians. The predominant benefit of restricting assistance to qualified physicians is the ability to regulate a specific group in society. 'There is general consensus, with a few exceptions, that assisted dying cannot satisfactorily be regulated without medical expertise'[52] as it is a medical process, with medical requirements. The majority of those in favour of legalisation, would base their preference on the condition that a medically qualified physician is closely involved throughout the process, as one of the fundamental safeguards. Bosshard opposes this view, claiming that any legal PAS process should assign tasks 'exclusively to medical doctors and separate out those that might be better performed by other professions'.[53] His adoption of the multi-disciplinary team appears justified, in that not every aspect of the process requires a medical doctor. Other professionals such as social workers and psychologists could be incorporated as they are able to provide the patient with necessary social support. This does not detract from the actual life-ending process, which would still require qualified assistance, to reduce the potential for any medical risks.

There is also the question of whether doctors would require additional training or qualifications to assist patients in their dying process. Assisting in the death of a patient, may be construed as contrary to their profession which prides itself on assisting patients to health.[54] In this respect, doctors that choose to participate (respecting conscientious objectors) may need psychological training to enable them to deal with the scenario effectively, should it arise. 'On the one hand, the active dedication to life on the part of the doctor and, on the other, the patient's resolute adherence to an assisted suicide scenario carefully planned in advance'.[55] This has not been adequately addressed in the literature surrounding the debate but remains practically very important, should a legal framework be developed. It would require further investigation in the medical field.

Another potential area for concern is whether patients not seeking assisted suicide would feel comfortable being treated by physicians who actively participate in PAS. This would cause a number of practical problems for both physicians and patients because those who choose to go down the PAS route, may be segregated from the rest of the medical community. Some would suggest that physicians who assist the terminally ill to die, should not be able to treat patients who do not wish to end their

[51] Jonathon Herring, *Medical Law and Ethics* (Oxford University Press, 4th ed, 2012) 196
[52] Bosshard, 'Assisted Dying in search of appropriate assistants' (2012) 23 KLJ 141, 142
[53] Bosshard et al, 'A role for doctors in assisted dying? An analysis of legal regulations and medical professional positions in six European countries' (2008) 34 J Med Ethics 28, 31
[54] General Medical Council, 'Good Medical Practice: Duties of a Doctor' <http://www.gmc-uk.org/guidance/good_medical_practice/duties_of_a_doctor.asp> (accessed 16/02/13)
[55] Bosshard (n52) 145

lives.[56] This would however raise issues regarding the accessibility of PAS, should it be restricted to a certain number of physicians who choose not to practice other areas of medicine. Linking this with the idea of specific PAS qualifications, it would seem that both the opinions of the physicians and patients would need consultation to identify a general consensus, should it arise.

One of the major obstacles to legalisation of PAS is the opposition or uncertainty from the medical profession which 'has traditionally maintained a clear distance from euthanasia and assisted suicide'.[57] The British Medical Association (BMA) and Royal College of Physicians adopted a neutral position to Joffe's Bill at first but reverted back to their stark opposition, emphasising the controversy surrounding the subject. Any attempt to legalise PAS would require the support of medical organisations, as they provide the majority of regulation and guidance which would undoubtedly be heightened in this context.[58] 'The diversity of medical opinion is backed up by research commissioned by the House of Lords select committee on assisted dying...reported support among doctors for the legalisation of assisted dying ranged from 30% to 60%'[59] and establishes the difficulty in ascertaining a general opinion from the medical community. Medical Organisations, such as the BMA appear to agree on the inadequacy of safeguards which could be addressed by more protective legislation. Interestingly, 'the House of Commons has thrown its overwhelming support behind guidelines on assisted suicide'[60] and has launched its first full debate on assisted dying, with the aim of an open and proper consultation. With this in mind, outright opposition no longer seems viable, in the face of detailed empirical research that shows a growing change in attitude.

The Potential Abuse of Power

Nevertheless, there are inherent dangers and limitations to the doctor-patient relationship, with the significant imbalance of knowledge and power. 'Intimacy and power must be balanced in the direction of benefiting patients'.[61] These 'boundaries' in the relationship must be carefully addressed to ensure maximum protection for the patient. The patient will always rely on the doctor for medical advice and expertise but this reliance can be abused due to the vulnerability and obliviousness of the patient. The medical profession is aware of 'the potential to exploit the dependency of the patient on the doctor and the inherent power differential in this relationship'.[62] This may not be visible to a bystander because of the pedestal that doctors are placed on in society, but with such fatal consequences, every eventuality must be measured. The move away from paternalism has heightened the need for patient protection, particularly as 'the patient has "come of age" through recognition

[56] Prokopetz & Lehmann, 'Redefining Physicians' Role in Assisted Dying' (2012) 2 New England Journal of Medicine 367
[57] Bosshard et al, 'A role for doctors in assisted dying? An analysis of legal regulations and medical professional positions in six European countries' (2008) 34 J Med Ethics 28, 28
[58] Francis Pakes, 'The legalisation of euthanasia and assisted suicide: A tale of two scenarios' (2005) 33 International Journal of the Sociology of Law 71, 79
[59] A Somerville, 'Changes in BMA policy on assisted dying' BMJ 2005;331:686, 686
< http://www.bmj.com/content/331/7518/686> (accessed 13/01/13)
[60] C Dyer, 'MPs back guidance on assisted suicide in first Commons debate for 40 years' BMJ 2012;344:e2424
< http://www.bmj.com/content/344/bmj.e2424?rss=1> (accessed 13/01/13)
[61] Nadelson & Notman, 'Boundaries In The Doctor–Patient Relationship' (2002) 23 Theoretical Medicine 191
[62] Nadelson & Notman (n61)

that ultimately, power rests with patients'.[63] In PAS, it is vital that the doctor explains every little detail to the patient so they can provide the necessary informed consent. Doctors must go further than this and ensure that the patient fully understands all the potential risks and consequences involved. It is not merely what the doctor thinks is necessary but what the patient needs to know as a corollary right to their autonomy. This 'informed consent' is a fundamental safeguard in the PAS process and is the direct product of the doctor-patient relationship facilitating the patient's autonomy.

Policies and Proposals: endorsing the relationship?

Looking at the recent proposals for legalisation, the doctor-patient relationship has certainly been recognised as a dominant consideration, as well as patient protection. The proposals focus on the need for specific safeguards that guard against potential abuse and create a safer process overall.

Joffe's Bill explicitly states that doctors 'acting in good faith, who assist a qualifying patient to die...shall not be guilty of an offence'.[64] The inclusion of the 'good faith' requirement is substantial as it presupposes the potential for an abuse of power. It does not however provide any detail as to what 'good faith' means or give any examples of where a doctor may be acting inconsistently with this requirement. This could be problematic for doctors contemplating advice because of the lack of certainty, in a context where clarity is key. The Bill imposes a number of obligations on the attending physician to fully inform the patient including 'the medical diagnosis, prognosis, process of being assisted to die and the alternatives'[65] and similar requirements on the consulting physician. This helps to overcome the knowledge and expertise barrier in the doctor-patient relationship and facilitates the informed consent of the autonomous patient.

The APPG Bill provides further safeguards for the patient, in an attempt to persuade the legislature of its viability. The 'transparent process proposed in the draft Bill would encourage more patients to talk to their healthcare professionals openly...and receive professional support and information on all their options, before making a decision about whether to end their own life'.[66] From the offset, it is clear that the process will utilise and enhance the doctor-patient relationship to make the dying process as patient-centred as possible. The provision of two independent doctors and other professionals is a pretty stringent safeguard as it reduces the potential for abuse. Although the APPG Bill goes further than the Joffe Bill, additional safeguards could be introduced to strengthen patient protection, which must always remain at the centre of focus. The proposal that concludes this dissertation attempts to strengthen and build upon the safeguards suggested.

In summary, the doctor-patient relationship is crucial in the PAS process because it is through this medium that the patient can make a medically-evaluated, autonomous decision to end their life. One must not detach autonomy from the doctor-patient relationship as they are mutually dependent, where the doctor acts as

[63] Goodyear-Smith, 'Power Issues in the Doctor-Patient Relationship' (2001) 9 Health Care Analysis 449, 451
[64] Assisted Dying for the Terminally Ill HL Bill (Joffe) (Session 2003-2004) Bill 17 at para 10(1)
[65] Assisted Dying for the Terminally Ill HL Bill (Joffe) (Session 2003-2004) Bill 17 at para 10(1)
[66] APPG Draft Bill (n10) 11

a gateway for the patient to the PAS process. The mutual trust and respect within the relationship allows for effective communication and fully informed consent. Although there is potential for abuse of the inherent power imbalance, by virtue of the doctor's profession, they should advocate beneficence in all respects to provide safety in society. Legislation and policies in force have attempted to minimise this potential abuse and produce a more open, safeguarded process.
While this should be the case, in reality, there will inevitably be some deviation which would provide weight to the opponents' argument, with particular emphasis on the 'slippery slope'. It is to this that the dissertation now turns.

The Slippery Slope and Assisted Suicide

'Policy makers in both the UK and the US have found slippery slope concerns to be sufficiently compelling to uphold existing laws that prohibit the practices of assisted suicide'.[67] (Craig Paterson)

The 'Slippery Slope' argument is constantly proclaimed in any discussion of PAS. If physicians are legally allowed to assist in certain circumstances, following the criteria laid out in legislation, it may become acceptable for them to assist in other circumstances, slowly deviating and pushing at the boundaries of law. It can be argued that the concept is based on weak foundations that are difficult to perceive in reality. The hypothetical nature of the slippery slope nevertheless provides useful analysis of the PAS supporters' claims and would certainly guide in the creation of various safeguards by illustrating a variety of potential, albeit rare scenarios. When dealing with such fine lines between life and death, it is vital to consider any eventuality, particularly when formulating legislative guidance. It is therefore 'necessary to find a balance between respecting the rights of patients and limiting the undesirable consequences to which the recognition of such rights might give rise'.[68] The slippery slope challenges both patient autonomy and the doctor-patient relationship, yet when combined, they come together to produce a safeguarded process. In this chapter I will consider the various strands of the slippery slope argument, namely the logical, empirical and psychological slippery slopes and describe how and why they cannot succeed in denying the possibility of effective legislation. The fallacious nature of the argument portrays how it can often be used tactically to avoid reasonable discussion. 'The slippery slope is a defeasible argument...always open to possible rebuttal'[69] which must be borne in mind when deliberating the possibility of legal PAS.

The 'Logical' Slippery Slope

The logical argument is simple. The idea is that once the first step is taken towards a certain procedure, it is logical for another step to follow. In terms of assisted suicide, once it is made legal in one scenario (the first step), it will become legal or acceptable in another scenario (the step which follows), as 'there are no good reasons for not going on to accept the additional practices once we have taken the all-important first

[67] Craig Paterson, *Assisted Suicide and Euthanasia: A Natural Law Ethics Approach* (Ashgate, 2008) 173
[68] Chasterson, 'Last rights: euthanasia, the sanctity of life, and the law in the Netherlands and the Northern Territory of Australia' (1998) I.C.L.Q. 362, 374
[69] Douglas Walton, *Slippery Slope Arguments* (Oxford, 1992) 164

step'.[70] Therefore, the all-important first step of legalisation should not be taken. It would be easy to rebut this presumption by emphasising the heavy reliance on safeguards which would be in place, as later attempted in the concluding proposal. Keown, a proponent of the slippery slope, believes that even if guidelines are created, they would give way in practice because of the unlimited emphasis placed on the patient's autonomy and equivalent trust given to the doctor.[71] His argument is clearly faulted because he 'wrongly implies that only either the physician's opinion or patient's autonomous choice is required for physician-assisted suicide to be permitted'.[72] This is crucial to the downfall of Keown's theory because he fails to distinguish between two jointly necessary conditions of autonomy and the doctor-patient relationship. Having discussed the two concepts in relation to PAS, it is apparent that the doctor-patient relationship operates in such a way to facilitate the patient's autonomy, within acceptable limits. The patient's autonomy is communicated to the doctor, who then provides medical access to the process, should he feel it is appropriate, given the relevant criteria and safeguards. Therefore patient autonomy and the doctor-patient relationship are mutually dependent and can be combined to defeat the logical argument, as asserted by Keown. In this context, it cannot be said that by allowing a legal PAS process, it will become acceptable in other circumstances because once the autonomy has been deduced, the doctor, in effect, authorises the continuation of the process. There are two hurdles that must be jumped, if this process was to give way to the slippery slope.

Although the logical perspective has little weight in that respect, it does generate concerns regarding the indeterminacy of various criteria. Warnock and Macdonald profess that if law contains terms which are impossible to define precisely, then it is inevitable that law will become more permissive than that which was first proposed, envisaging a slippery slope due to the indeterminacy of the law and the 'uncertainty principle'.[73] As with the majority of legislation, it is impossible to eradicate every ambiguity, however with well-defined safeguards and thorough regulation, the likelihood of increased permissiveness would be significantly reduced.

The 'Empirical' Slippery Slope

The empirical argument is slightly more complex. It would suggest that once assisted suicide is legalised, a slide down the slope is inevitable 'because safeguards to prevent it cannot be made effective'.[74] The theory is based on the practical inapplicability of guidance that could be promulgated, once the logical argument is superseded and a line is drawn between legal and illegal conduct. This is potentially fatal to legalisation as it matters not what the safeguards include and how they protect the patient, but whether they can fulfil their function in reality. This propounds one of the major ethical concerns in relation to the slippery slope, that of the 'loss of effective regulation'.[75] When developing prospective legislation to be applied across society, one must appreciate the practical applicability of safeguards and their regulation because people's lives are at risk.

[70] James Rachels, *The End of Life: Euthanasia and Morality* (Oxford University Press, 1986) 172–3
[71] Keown (n3) 76
[72] Sathasivam, 'Ethical Considerations in Physician-Assisted Suicide' 2011 ACNR 11(5) p26
[73] Mary Warnock & Elizabeth Macdonald, *Easeful Death: Is there a case for assisted dying?* (OUP, 2008) 75
[74] Keown (n3) 72
[75] Sathasivam (n72) 2

Arras provides an interesting discussion which helps to illustrate the workings of an empirical slippery slope. He starts with an 'Option Without Limits' which contends that 'a socially sanctioned practice of PAS would in all likelihood prove difficult, if not impossible, to contain within its originally anticipated boundaries'.[76] This reveals the underlying concern of a legalised regime based on the realities of the situation. He then foresees that supporters would create a modest policy, which would limit assisted suicide to a small range of individuals but contends that it is highly unlikely that society could stop with this modest proposal once it had ventured out on the slope.[77] This is further demonstrated by the 'Likelihood of Abuse' as an inevitable corollary of any justifiable criteria. He claims that patients who fall outside the ambit of justifiable criteria will become candidates for death based on an empirical prediction of what is likely to happen when we insert a particular social practice into society.[78] This particular perspective appears to undermine the practical efficacy of safeguards which are put in place specifically to prevent any kind of abuse. Although the dangers are critical, no legislation is capable of providing complete protection because of the unpredictable nature of human conduct and the existence of criminals.

Both the Joffe Bill and APPG Bill rely on relatively fluid concepts, such as 'terminally ill' and 'unbearable suffering' which could potentially be misconstrued or expanded. The use of such terms is designed to limit the class of patients that may request assistance in suicide. However 'there will be incentives to broaden the available class of patients...frankly it is impossible to limit that class'.[79] This hypothetical analysis is conceivable in reality but with such strong, ethical implications, very close monitoring would have to be made available.

The empirical argument stands well but leaves a significant gap. The burden of proof in this uncertainty would fall on those seeking to rely on the slippery slope because it is the critics who emphasise the dangers involved in PAS, in an attempt to restrict the natural development of the law, without sufficiently supporting their claims. Although the empirical strand has its merits in a hypothetical sense, it has not been substantiated with actual empirical evidence, 'we would need to compare data from before and after legalisation'.[80] Therefore it could be beneficial to examine the situation in Netherlands where assisted suicide is now legal and has been for some time.[81] 'Netherlands has become primary battleground of the empirical slippery slope arguments...the world's best test cause'.[82] In 2009, Rietjens et all produced a meta-analysis of all the euthanasia studies in Netherlands over the last twenty years. Following the promulgation of legislation allowing assisted suicide in 2005, the upward trend of year-on-year increase in assisted deaths was in fact reversed.[83] This

[76] Aras, 'Physician-Assisted Suicide: A Tragic View' (1996) 13 J. Contemp. Health L. & Pol'y 361, 369
[77] ibid
[78] Aras (n76) 370
[79] Forsythe, 'The Incentives and Disincentives Created by Legalizing Physician-Assisted' (1997) 12(3) Journal of Civil Rights and Economic Development p4
[80] Emily Jackson & John Keown, *Debating Euthanasia* (Hart Publishing, 2012) 56
[81] T Sheldon 'Holland decriminalises voluntary euthanasia' BMJ 2001;322:947.
< http://www.bmj.com/content/322/7292/947.1> (accessed 13/01/13)
[82] Lewis, 'The Empirical Slippery Slope from Voluntary to Non-Voluntary Euthanasia' (2007) 35(1) The Journal of Law, Medicine & Ethics 197, 198
[83] JAC Rietjens et al,'Two decades of research from Netherlands. What have we learn and what questions remain?' (2009) 6 Journal of Bioethical Inquiry 271-283

may shock a number of opponents to assisted suicide but could be the result of a number of reasons. It could be due to the reduced regulation of terminal sedation which has not been classified as assisted suicide, or as a result of reduced reporting since legalisation. A direct comparison between the Netherlands and England would be unreliable, due to the inherent differences in the legal systems and society. It is difficult to say that the empirical slippery slope is entirely rebutted but the argument is weakened to a certain degree, displaying its lack of solid foundations and perhaps over exaggeration.

The 'Psychological' Slippery Slope

The psychological thread is linked with the empirical but is focused on the wider view of acceptance within society. However it can be rebutted in a similar fashion. Jackson deliberates that 'over time, we become accustomed to the idea of assisted death and as it becomes routine and familiar, taking a further step down the slope becomes less alarming'.[84] Therefore, legalisation proposes a cultural change, affecting the attitudes and opinions we share. It could be argued that a similar phenomenon has occurred with abortion which was originally legalised for health reasons but is now socially accepted as convenient termination.[85] This clearly illustrates that 'society allows some exceptions to the sanctity principles'[86] in line with modern views. If PAS were legalised and it were to become acceptable in society, it would not necessarily create danger but would allow for more open reflection and regulation.

The mass media is one of the driving forces behind social change as it reflects and informs the public opinion, especially in controversial legal/ethical debates. The current generation has been subjected to media which has desensitised death and shaped the public perception to some degree, through vast exposure and growing media technology.[87] 'Although we cannot make death optional, we can create the illusion that it is by making its timing and the conditions and way in which it occurs a matter of choice'.[88] This is where the psychological slippery slope stands, as people may start to think that assisted suicide is available and accepted, rather than a last resort. One mustn't disregard the importance of autonomy and the doctor-patient relationship in this respect, which in themselves, guard against such risks, through communication and informed consent.

The Slippery Slope: A Fallacy?

The Slippery Slope argument is often employed by the opponents of assisted suicide as a tactic to avoid discussion or attention. It is not enough to neglect debate, simply on the basis of potential consequences but it is equally important to consider every eventuality. There are, however numerous critics who advance the argument earnestly and have a genuine concern about the dangers involved. Rather than

[84] Forsythe (n79) 60
[85] Clement Dore, 'Abortion, Some Slippery Slope Arguments and Identity over Time' (1989) 55 Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition 279-291
[86] Warnock and Macdonald (n73) 75
[87] The Economist, 'Over my dead body', The Economist Newspaper Limited, 2012 <http://www.economist.com/news/international/21564830-helping-terminally-ill-die-once-taboo-gaining-acceptance> (accessed 31/01/13)
[88] M Somerville, *Death Talk: The Case Against Euthanasia and Physician-Assisted Suicide* (McGill-Queen's University Press, 2002) 297

maintaining focus on the potential downfalls of legalisation, emphasis should be placed on proposed safeguards to minimise slippery slope claims and allow for positive development in the hope of producing an effective legalised system in England. 'Hypothetical and pessimistic speculation about our inability to regulate...does not offer an adequate justification for a refusal to contemplate thinking about what effective regulation might involve'.[89]

After considering the different slippery slope arguments, the various concerns and opponents of PAS appear feasible, given the array of risks inherently involved. The logical slippery slope proclaims that there will be an inevitable 'slide down the slope' once the initial step, of legalisation in this case, has been taken. The argument is based on rather whimsical grounds and merely asserts that one thing will lead to another. The empirical slippery slope is far more convincing as it suggests that once the process is legalised, the recognised safeguards will fail in practice because of the inapplicability of guidance, which lacks effective boundaries and the certainty of objectivity. However, in such a medical context, it would be impossible to remove the subjective requirements such as 'terminally ill' and 'suffering' which simply have no quantifiable basis. Lastly, the psychological slippery slope appears well-founded, describing the eventual acceptance of PAS in society, once it is legalised and practised over time. There is no doubt that the media plays a significant role in the public's reaction to legislation but one mustn't forget the benefits of open deliberation and discussion. Overall the arguments highlight the risks or potential slippery slopes that cannot be overlooked, but equally should not act as a barrier to the much-needed development of the law.

Proposals/Reform

This dissertation concludes with a proposal which attempts to reform the law, based on the arguments put forward, namely autonomy and the doctor-patient relationship. Emphasis will be placed on safeguards which will build upon the APPG Draft Bill. Each safeguard will be explained as to why it is necessary and how it will be implemented, with reference to the 'slippery slope'. Should the following criteria and safeguards be respected, a physician who assists in the suicide of a patient shall not be prosecuted under s2 Suicide Act 1961 (as amended).

Eligibility Criteria:

I will first set out the criteria for an individual who wishes to end their life with the assistance of a physician.

1. Patient must be over the age of 18 – only adults shall be allowed to request assistance in death, in line with the majority of legislation in England. If it were allowed to all ages, for example with a proviso that the parent of a child could make the final decision, the process would not be truly autonomous and there would be a potential slippery slope. Opening up the process to children would be dangerous and difficult to regulate. The notion of 'Gillick competence'[90] is

[89] Forsythe (n79) 62
[90] Gillick v West Norfolk and Wisbech Area Health Authority [1985] 3 All ER 402

relevant here, however for an absolutely strict criteria, this kind of mental assessment must be excluded.

2. Patient must have mental capacity – only adults with sufficient capacity are eligible. Psychiatrists/psychologists should be involved to assess the mental capacity and ensure that the patient has the requisite capacity to make an autonomous decision.
   A patient will not be entitled to request PAS if they are unable to make a decision, following the guidance in s3 of the Mental Capacity Act 2005, which describes the ability to make certain decisions.
3. Genuine informed consent – the decision must only come from the patient themselves and must not be influenced by anyone else, entirely voluntary throughout. The patient must be aware of the procedure itself, the fatal consequences and the alternatives, including palliative care and medication. This is vital to ensure that the patient is acting truly autonomously and has all the necessary information to make a decision for themselves. It would be the physician's responsibility to provide the patient with all the requisite information and ensure they are able to make an informed decision.
4. Irreversible, overwhelming suffering – the patient must have explored every other option and feel that PAS is the most appropriate way to relieve their suffering. There is no way of definitively evaluating this requirement but the family and carers of the patient could be involved, as they would have had experience in dealing with the patient. This does produce a potential, abusive slippery slope but may be the only way to verify the patient's suffering.
5. Terminal illness – must be quantitatively defined as accurately as possible by two independent doctors both agreeing that the patient has less than 6 months to live.
   A prognosis longer than 6 months would undoubtedly lack the requisite accuracy as to the patient's life expectancy. The illness has no cure and the patient has no chance of recovery. This ensures that PAS is the most effective treatment for their suffering.
6. Last resort – patient must produce evidence that they have considered every alternative and none could possibly relieve their suffering to a bearable standard,
   e.g. palliative care or medication.

<u>Additional Safeguards:</u>

1. Patient declaration – only the patient can instigate the procedure through an autonomous request which is then sent to two independent doctors and a multi-disciplinary team who assess the eligibility of the patient, following the criteria set out above. The declaration must be revocable at any time prior to death.
2. Medical assistance – the patient may choose the medically qualified physician that they send their request to. The qualification requirement, whether it be from the General Medical Council or independent body, is essential to ensure a safe process, as opposed to alternative assistance.
3. Multi-disciplinary team – ensure the eligibility criteria is sufficiently met. Along with the physicians, psychologists/psychiatrists shall assess the capacity and consent of the individual through a counselling process, where every aspect of the procedure, as well as the patient's own feelings are discussed in detail. Social workers shall work with the patient and family/carers to discuss

alternatives such as palliative care in order to fulfil the informed consent criteria.

4. Each physician shall check evidence of the eligibility criteria – allows for a more rounded medical assessment of the patient's eligibility. They should create a report or case file which sets out the evidence that each element has been satisfied.
5. Post-mortem investigation – an independent investigator shall assess the procedure from the initial declaration to the final act of suicide, checking for abuse, malpractice or coercion at any stage. Physicians may be liable if they fail to follow the procedure accurately or fail to assess the patient in some way. The doctor must be wholly motivated by compassion and avoid the relaxation of safeguards that could lead to a slippery slope.
6. Family/carer – should be consulted before the final decision is made, only they can assess the patient in certain circumstances, having experienced the effects of the illness and the impact it has had on their life. Some would argue there is a potential for abuse but this safeguard is in addition to the physician's/MDT's assessment and cannot take precedent over the patient's declaration. This should facilitate the autonomy by providing another opinion that substantiates the patient's choice.
7. Enhanced (or new) code of conduct for assisting physicians – building on the existing GMC code, with specific regard to the PAS scenario and the doctor-patient relationship as discussed, including procedural requirements of discussion and medical advice.
8. Self-administration – patient must administer the lethal medication, prepared by the assisting physician. This is to avoid the slippery slope from physician assisted suicide to voluntary euthanasia and ensure that the patient retains control throughout. There must be some leeway for patients who are physically incapable of self-administration, (e.g. Tony Nicklinson) and perhaps a unique authorisation process could be incorporated where the patient is paralysed.
9. Each person involved in the PAS process should act in the best interest of the patient at all times, to avoid the risks of abuse or malpractice.

Conclusion

It is clear that the assisted suicide debate has come a long way over the years, encompassing a variety of arguments both for and against legalisation. Although Parliament has rigidly maintained its anti-assisted suicide stance, it has nevertheless considered various proposals and provided extensive feedback. Whilst there is still a staggering number of opponents to legalisation, those who can envisage the potential benefits and see past the somewhat over-exaggerated slippery slope arguments, are able to portray some hope for the public, who feel their autonomy is harshly restricted by the legislature. The general public opinion has shifted more in favour of legalisation, particularly in response to the heart-breaking cases that have exploded in the media, evoking enormous sympathy. It is however these same cases that critics attempt to use, manipulating their arguments around them, to play on the public emotion and instill fear in society.

In this dissertation, arguments from both sides of the debate have been broken down. Patient autonomy will always remain fundamental. The whole process is based upon the individual being able to choose to end their suffering with the help of a physician, who is able to provide relief. Although autonomy is pleaded very heavily in favour of legalisation, it must be taken with a pinch of salt as patients cannot be given outright autonomous choice. It is for this reason that a number of safeguards have been proposed to ensure that the patient is able to formulate a genuine, informed decision to end their life. The doctor-patient relationship facilitates the patient's autonomy, through mutual trust and confidence, enabling both parties to express their opinion. On the one hand the patient is able to explain their wishes and seek guidance, whilst on the other hand the doctor is able to discuss the various risks and alternatives in a medical context. With expertise and communication skills, doctors are able to provide the patient with as much information as possible. Lastly, the dominant 'slippery slope arguments' have been considered in light of autonomy and the doctor-patient relationship, which appeared somewhat fallacious when discussed alongside the various safeguards proposed. The mutuality of patient autonomy and the doctor-patient relationship is sufficient to hinder a number of claims arising from the slippery slope. Nonetheless, the slippery slope arguments do highlight the sheer risks involved in a legalised PAS process. In looking at other jurisdictions and analysing each risk, Parliament should be able to produce the most effective safeguards to guard against them. The final part of this dissertation outlines a process, explaining each criteria and safeguard, what it is guarding against, and why it is essential. This has only been possible after reflecting upon the recent proposals, as well as the DPP Policy for Prosecutors, which have highlighted a number of essential safeguards as well as the much-needed public response. Combining and building on the success of these proposals, allows for a positive development in the law and a possible unified procedure where PAS is accepted in our society.

Paradox and Pragmatism: 'Virtual Immunities' and the Imposition of Liability in Negligence Claims Against Local Authorities.

David Humphreys

The field of public authority liability has attracted much attention through apparent uncertainty of law. The issue of immunity for local authorities, due to policy considerations, has received divided judicial and academic opinion. This paper journeys beyond the hypothetical realm of immunities - those afforded for policy reasons - and argues that 'virtual immunities', which affect potential claimants on a practical level, are far more damaging to the judicial process. This paper argues that recent legal aid reform, and other financial limitations on access to the courts, will deny some of the most vulnerable people in society access to bring a claim in negligence in the education cases.

In a criticism of the current system, this paper identifies a series of paradoxes which must be considered before any resolution can be sought. Namely, the paradox that is imposing liability for past harm at the cost of potential further harm. Secondly, the notion that public funding is often used to sue public bodies. Thirdly, the lack of intervention by the judiciary actually removes any possibility of a solution independent of the courts. This paper dispels the policy considerations which have proven a facet of public authority liability, whilst contemplating the validity of a non-interventionist approach to dealing with liability in negligence in the education cases.

Introduction

The legal system of England and Wales does not, nor intends to, facilitate an easy route for claimants seeking to challenge a public authority in negligence; rather, we have an unsettled system with both the Law Commission and the judiciary, at home and in Strasbourg, providing illusions of a solution.[1] It is not until we step beyond the hypothetical realm and consider the practical application of the law, that we can fully realise its true inadequacies. This paper will firstly consider the

[1] Lord Hoffman, 'Reforming the Law of Public Authority Negligence' (The Bar Council Law Reform Lecture 2009); Law Commission, *Administrative Redress: Public Bodies and the Citizen* (Law Com No 187, 2008)

unsettled law relating to public authority liability, whilst arguing that the judiciary takes a consequentialist view towards the imposition of duties of care. Secondly, this paper will develop a notion of 'virtual immunities' and demonstrate how indirect barriers to justice, as a result of financial restrictions, are in practice more damaging than explicit immunities. Finally, it will conclude that despite the weakness of the assumption-based policy considerations cited by the judiciary in rejecting claims, local authorities may be better placed to act without fear of litigation. Throughout this process, three paradoxes will become apparent. Firstly, the 'greatest good paradox' which presents us with the dilemma of awarding damages for past harm, at the risk of future harm. Secondly, the 'funding paradox', that public funding is often used to sue public bodies. Thirdly, the 'liability paradox' questions the fact that the rejection of liability in court, acts to decrease the likelihood of a solution independent of the judiciary.

The seven judge panel, which presided over X (Minors) v Bedfordshire County Council, held that a local authority owed no direct duty of care to the claimants whilst exercising its statutory function.[2] This decision was based on policy considerations and the all-encompassing "fair, just and reasonable" test, which I shall discuss in detail below.[3] I shall argue that this test, from Caparo Industries plc v Dickman,[4] has an essentially forward-looking application in public authority liability cases; it forces the judiciary to ask a moral or philosophical question when finding a duty of care. Do we impose liability on a local education authority and award damages to a claimant for past harm if, in doing so, we reduce the pool of funding for the education authority which may be used to prevent further harm?

Historically, a blanket immunity would prevail in order to protect the efficient functioning of a public body.[5] However, the European Court of Human Rights rejected an unmitigated refusal to find a duty of care, on the ground that this denied claimants an access to justice in breach of Article 6(1) of the European Convention on Human Rights. Following this, it has become increasingly important to hear claims on their facts.[6] Despite this, a system of 'virtual immunity' has proven a problematic facet of English tort law.[7] This has arisen as a result of the judicial discretion to deny a duty of care, based on policy considerations.[8] My hypothesis is simple; this 'virtual immunity' must be extended to include indirect and implied barriers to access the courts, particularly when dealing with the most vulnerable claimants, such as children. This paper will focus on the financial restrictions, which act independent of the judiciary, following the recent legal aid reform and the subsequent effect on the education cases.[9] The importance of this issue, and its relation to the doctrine of the separation of powers and fundamental rights, gained new significance on 5th March

[2] Duncan Fairgrieve, 'Pushing back the boundaries of public authority liability: tort law enters the classroom' [2002] PL 288, 291; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633
[3] *Caparo Industries plc v Dickman* [1990] 2 AC 605, 618
[4] *Caparo Industries plc v Dickman* [1990] 2 AC 605
[5] *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 63
[6] *Osman v United Kingdom* [1998] EHRR 101
[7] Lord Bingham, 'The Uses of Tort' (2010) 1 JETL 3, 15; Francois Du Bois, 'Human Rights and the Tort Liability of Public Authorities' (2011)127 LQR 589
[8] Keith Stanton, 'Professional negligence: duty of care methodology in the twenty first century' (2006) 22 PN 134
[9] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 will come into force on 1 April 2013. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 5 and Saving Provision) Order 2013, s 3

2013. Lord Neuberger, President of the Supreme Court, told the BBC that he feared that the most recent legal aid reform will make "people will feel like the government isn't giving them access to justice in all sorts of cases".[10] This of course highlights the aforementioned practical application, which cannot be recognised in legal theory. Furthermore, this essay will argue that such 'virtual immunities' act in a more arbitrary, and hence more damaging, manner than blanket immunities.

It is important to state from the outset that teachers owe a duty of care for the physical safety to pupils under their control. However, the policy-based approach of the judiciary often presents us with inconsistencies.[11] Lord Justice Auld, in the Court of Appeal in G (A child) v Bromley LBC, took a liberal view towards finding a duty of care in an education setting.[12] He placed emphasis on Barrett v Enfield LBC – a case in which the House of Lords was sceptical of public interest factors – and held that teachers should owe a duty of care when teaching.[13] This is a common sense approach, which recognises the trust which parents place on teachers when leaving children in their care. Conversely, the Court of Appeal in Phelps v Hillingdon LBC declined to take such a stance, in overturning the decision to award the claimant £45,000 in damages, for a negligent failure to diagnose dyslexia. The court in this case held that, not only was there no assumption of personal responsibility, but once again policy considerations act towards a denial of a duty of care.[14]

The proximity requirement for the claimant is to prove a "necessary nexus" between themselves and the education professional.[15] The inherent circularity of the test has resulted in inconsistency in its application. This is evident in the House of Lords' deviation from the earlier Court of Appeal decision in Phelps; Lord Slynn held that where there is reliance on advice, a duty must be owed.[16] This step can be seen as representing the liberalisation of public authority liability, and in fact provides clarification of the process despite deviating from the traditional protectionist stance of earlier judges. It was held in Phelps that the losses which may be claimed for range from "lack of educational progress to psychiatric injury".[17] The comparatively broad range of losses supplement the judicial discretion to decide on a case-by-case basis. As such, it appears that we are not generally looking at single incidents per se, rather a trend of multiple incidents which devalue the child's education as a whole; this reflects the sympathy the judiciary has for mistakes made by public bodies.[18] A judge's sympathies conveyed through discretion can result in inconsistency in decision-making or alternatively can produce a 'virtual immunity' for public bodies. This is further evidenced in my examination of the "fair, just and reasonable" test below.

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[10] 'Lord Neuberger, UK's most senior judge, voices legal aid fears' *BBC News* (5 March 2013) <http://www.bbc.co.uk/news/uk-21665319> accessed 6 March 2013

[11] *Van Oppen v Clerk to the Bedford Charity Trustees* [1989] 3 All ER 389

[12] Auld LJ in *G (A Child) v Bromley LBC* [1999] ELR 356

[13] *G (A Child) v Bromley LBC* [1999] ELR 356; *Barrett v Enfield LBC* [2001] 2 AC 550

[14] *Phelps v Hillingdon LBC* [1999] ELR 38

[15] *Phelps v Hillingdon LBC* [2001] 2 AC 619, 653-654

[16] Duncan Fairgrieve, 'Pushing back the boundaries of public authority liability: tort law enters the classroom' [2002] PL 288, 290-291; *Phelps v Hillingdon LBC* [2001] 2 AC 619, 655

[17] *Phelps v Hillingdon LBC* [2001] 2 AC 619, 654, 664

[18] The argument that the inherent sensitivity and difficulty of claims may excuse public bodies from some mistakes has been raised in cases such as *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 580

Fundamental to the rule of law is the principle of certainty.[19] The moral discretion afforded to the judiciary places this principle at great risk. Due to the test in Caparo, the judges are permitted discretion in placing weight on policy decisions. Stemming from this discretion are issues of definition relating to the test itself. Of course, it is inherently broad.[20] A judge must not only ask if it is "fair, just and reasonable" to find a duty of care, he must further consider how we understand such concepts of "fair", "just" and "reasonable". These questions steer incredibly close to the subjective realm. The unreachable aim would be a consistent definition which can objectively be applied, but this certainly was not Lord Bridge's intention in Caparo.[21] The adaptability of the definition of the "fair, just and reasonable" test itself, inevitably results in inconsistency. Conversely, with the 'greatest good paradox' - of imposing liability at the cost of potential further harm - the judiciary's stranglehold to give effect to both government and public interest is incredibly desirable. The overarching value seems to follow from another limb of the rule of law, namely the doctrine of the separation of powers.[22] Rather than for the judiciary, it is for the public authority to dictate to whom a benefit should be conferred. In East Suffolk v Kent, the House of Lords held that no liability arises, in circumstances where a body has statutory power and fails to exercise that power, provided it uses its discretion honestly.[23]

An alternative viewpoint is that it is only "just" to hold a local authority to account for deliberate action. To what extent can the judges determine whether a deliberate action is wrong? Here we return to the doctrine of the separation of powers. Providing a policy is properly enacted, it is not for the judiciary to challenge or correct it. Judicial Review provides a course of action to challenge a decision on the grounds of ultra vires, irrationality or procedural impropriety.[24] So is tort redundant for claims against public bodies? Despite the fact that "a common law duty of care in relation to the taking of decisions involving policy matters cannot exist".[25] Traditionally the accountability argument is one reserved for administrative law; if we are to impose tortious liability in negligence, we are to recognise individual failings and financially hold specific bodies to account.

To a certain extent however, the 'virtual immunity', in relation to the "fair, just and reasonable" test, may be justified with regard to the nature of the liability. A claim is usually brought against a local authority vicariously for harm caused by an employee. Vicarious liability itself dictates that, on the facts, the authority has usually only played a peripheral role in the damage.[26] The question which must be asked, is does the intentional act of an employee, for example in cases of sexual abuse of a pupil by a teacher, take this act beyond the scope of employment to negate vicarious

[19] Joseph Raz, 'The Rule of Law and Its Virtue' (1977) 93 LQR 195
[20] Basil Markesinis, *Tortious Liability of Statutory Bodies: a Comparative and Economic Analysis of Five Cases* (Hart Publishing 1999) 43
[21] *Caparo Industries plc v Dickman* [1990] 2 AC 605, 618
[22] Duncan Fairgrieve and Paul Craig, 'Barrett, negligence and discretionary powers' (1999) PL 626 (note), 649
[23] *East Suffolk Rivers Catchment Board v Kent* [1941] 1 AC 74,102
[24] Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374
[25] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 738; Duncan Fairgrieve and Paul Craig, 'Barrett, negligence and discretionary powers' (1999) PL 626 (note), 627
[26] Jane Stapleton, 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 LQR 1995

liability?[27] The test, from Lister v Hesley Hall, is found on the close connection between the wrong committed by the employee and the nature of employment.[28] The crux of the matter is vulnerability and hence the position in Lister is incredibly satisfactory. Where a relationship is based on trust – usually between a vulnerable child and an adult – and the tortfeasor breaches that trust on a most severe level, no policy justification should negate liability.

In X v Bedfordshire County Council, the claimants were children who had suffered abuse at home for some years. Even though they were alerted to this fact, the local authority failed to attempt to take the claimants into care, despite their statutory duty to protect children who are at risk. The claimants sued the local authority for their losses. The question here was, whether the statutory duties in question were conferred for the benefit of the claimants. Despite obvious failings on the part of the local authority, the House of Lords held that the duties breached were "all concerned to establish an administrative system designed to promote the social welfare of the community", and not a duty to protect the particular claimants.[29] This highlights once again the issue with regard to the separation of powers and the intention of Parliament. If the intention of Parliament when they enacted the statute was to permit breaches of that duty to be actionable in tort, then a duty of care will be imposed. This leads to the crux of this dissertation, that it is Parliament who regulates access to justice, rather than the judiciary. Access to justice is a fundamental right which should not be regulated in this manner by a process of 'virtual immunity'.[30] The issue of access to justice for claims against public bodies caught the attention of Europe at this stage.

It was principles of access to justice, and in particular Article 6(1) of the European Convention on Human Rights, which took inter alia the case of X (Minors) v Bedfordshire County Council to the European Court of Human Rights.[31] One would expect settlement of our uncertain English law, or at least revolutionary repercussions, following its journey to Strasbourg; I shall argue that this has been far from the case in a later discussion of Z v UK and its predecessor, Osman v UK.[32] We must first move beyond the education cases, to consider the liability of the police, in order to understand the development of the law.

Key developments, and indeed setbacks, have occurred in the field of public authority liability in relation to police liability. It is not in contention that the police will owe a duty of care, in circumstances where damage occurs, due to their positive act in terms of their "operational" liability – which can be contrasted with liability arising from policy-based decisions.[33] It is with regard to the "investigation and suppression" of crime that real difficultly arises.[34] In Hill v Chief Constable of West Yorkshire no duty of care was found, based on Lord Wilberforce's two stage test from

[27] Duncan Fairgrieve (n 2) 292-293
[28] *Lister v Hesley Hall Ltd* [2001] UKHL 22
[29] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 747
[30] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6
[31] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6(1)
[32] *Z v United Kingdom* [2001] 2 FLR 612; *Osman v United Kingdom* [1998] EHRR 101
[33] e.g. *Rigby and another v Chief Constable of Northamptonshire* [1985] 1 WLR 1242, 1251
[34] *Osman v United Kingdom* [1998] EHRR 101, 126-7

the earlier decision in Anns v Merton.[35] Firstly, the House found that there could be no proximity between the victim and the defendant police force, and secondly, Lord Keith addressed a number of policy considerations which "ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise".[36] This decision is often considered as highlighting the traditional approach of affording blanket immunities to public bodies, such as the police force. The policy considerations were largely to ensure the effective working of the institution and prevent defensive practice. I will dispel these policy considerations, with regard to my examination of the effect of imposing liability, towards the end of this dissertation.

The Court of Appeal considered the policy reasons for finding a duty of care in Swinney v Chief Constable of Northumbria in terms of the protection of informants. Despite this, the initial action was held not to be justiciable, and thus was struck out.[37] Until this point, there has been two hurdles for a claim: that is, whether an action is justiciable, whether there is even a case to answer, and whether it is fair, just and reasonable to find a duty of care. In Osman v UK, the European Court of Human Rights examined the policy of striking out claims and the blanket immunity enjoyed by the police. The Court found a breach of article 6(1) of the European Convention of Human Rights - the claimant had been denied a right of access to the court.[38] I will explore the difficulties associated with Osman and its limited application shortly.[39]

Before we explore what I will refer to as 'virtual immunities', it is important to take a standardised definition of the aforementioned explicit immunity. McBride and Bagshaw, in their text book on tort law, proffer the scenario in which a "defendant will enjoy an immunity from being sued in negligence if a claimant would normally be entitled to sue the defendant in negligence but in fact she is prevented from doing so by some special legal rule".[40] In the case of X v Bedfordshire, it cannot be said that the decision was based on a "special legal rule", rather the established test for finding a duty of care in our law of tort. In general, any express barrier to justice runs the risk of being held in contravention with the European Convention on Human Rights; article 6(1) provides that "in the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within reasonable time by an independent and impartial tribunal established by law".[41] Thus potential claimants have a universal right to access the civil courts, in circumstances where the claimant has an arguable case against a defendant.[42] If immunity serves no legitimate purpose, or if this legitimate purpose is applied in a disproportionate way, it will be in breach of article 6(1). Following the Human Rights Act 1998, and the incorporation of convention rights into domestic law, courts are specifically required not to act in a way which might infringe a claimant's rights.[43] The rejection of

[35] *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 63
[36] *Anns v Merton* [1978] AC 728, 752
[37] Swinney *v Chief Constable of Northumbria (no 1)* [1997] QB 464
[38] *Osman* (n 33)*;* European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 Art 6(1)
[39] Duncan Fairgrieve and Paul Craig, 'Barrett, negligence and discretionary powers' (1999) PL 626 (note), 631
[40] Nicholas McBride and Roderick Bagshaw, *Tort* Law (2nd edn, Pearson 2005) 84
[41] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6(1)
[42] e.g. *Golder v UK* [1975] 1 EHRR 524
[43] Human Rights Act 1998, s 3(1)

immunities, from actions in negligence against certain classes, can clearly be demonstrated by the removal of the immunity that prevented barristers from being sued by their clients.[44] However, it has been observed that the test for whether an immunity is proportionate seems relatively relaxed.[45]

In Osman v UK, the European Court of Human Rights held that a defendant enjoyed an immunity, whenever a claimant was prevented from bringing a claim, on the ground that she did not owe the claimant a duty of care.[46] Essentially a potential claimant could claim a breach of article 6(1), whenever a court held that a defendant owed no duty of care, regardless of the policy considerations which have been so prevalent in this field. Yet, did the Court of Appeal in Osman really confer an immunity?[47] Osman was certainly not a case of a special legal rule and followed key English common law decisions.[48] It is now accepted that the decision in Osman v UK was based on a misunderstanding of English Law. This was clarified by Z v UK, the appeal to Strasbourg following X v Bedfordshire.[49] In Z v UK, the European Court of Human Rights held that it was not possible to argue that the House of Lords had violated article 6(1).[50] The Court, in rejecting the access to justice claim, held that the immunity was not a special legal exception, the case was thrown out because of well-established principles in the English law of negligence. However, the applicants succeeded under article 3 and article 13 of the Convention.[51] The United Kingdom had failed to provide protection from inhumane and degrading treatment, and the claimants were subsequently denied any effective remedy for this.

Although this paper's focus is on the law of negligence, as we have seen, it is impossible to avoid human rights law, and public law concepts, in a discussion of public authority liability. It has previously been argued that public law concepts may be able to aid us in our understanding of tortious liability of this nature.[52] Lord Browne-Wilkinson for instance, suggested in Barrett v Enfield LBC that in ascertaining a breach of duty, the test to be applied would be akin to Wednesbury unreasonableness.[53] This is the standard of unreasonableness which a public body must reach for their decision to be liable to being quashed in judicial review. He stated that there could be no liability unless "the decision complained of is so unreasonable that it falls outside the ambit of the discretion conferred upon the local authority".[54] Lord Browne-Wilkinson's attempt to define how a breach must be ascertained however, has proven unpopular due to its inherent limitation of what is intended to be a discretionary decision-making process; Wednesbury unreasonableness is an incredibly high standard for apparently wronged claimants to

[44] *Arthur JS Hall & Co v Simons* [2002] 1 AC 615
[45] McBride and Bagshaw (n 40) 85
[46] *Osman* (n 33); James George, 'Negligent public authorities and Convention rights - the legacy of Osman' (2001) 6 EHRLR 599
[47] *Osman v Ferguson* [1993] 4 All ER 344
[48] For example, *Hill v Chief Constable of West Yorkshire* [1989] AC 53
[49] *Z v United Kingdom* [2001] 2 FLR 612
[50] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6(1)
[51] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 3, art 13
[52]Tom Cornford, *Towards a Public Law of Tort* (Ashgate Publishing Limited 2008); Jenny Steele, 'Damages in tort and under the Human Rights Act: remedial or functional separation?' (2008) 67 CLJ 606
[53] Lord Browne-Wilkinson in *Barrett v Enfield LBC* [2001] 2 AC 550
[54] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 736

achieve.[55] Essentially, the academics are critical of an uncertain, discretion-based field of law, but are unhappy when the judiciary seeks a clear cut standard for decision-making.[56] We are hence left with the high judicial discretion - of which I've previously been critical - which leads to uncertainty in law and the 'virtual immunities' on which this paper focuses.

The role of the private law, as an alternative to public law, was considered with regard to the remedial element in the House of Lord's judgement in the joint appeals of Van Colle v Chief Constable of Hertfordshire Police and Smith v Chief Constable of Sussex Police by Lord Brown: "where civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather to uphold minimum human rights standards and to vindicate rights".[57] In the education cases, it seems that a minimum standard is sought rather than compensation for losses of claimants – this seems to negate the role of tort law itself. In practice, where issues such as budget and time constraints arise, local education authorities have no choice but to seek to protect a minimum overall standard; it becomes almost impossible for a local authority to guarantee a standard for all individuals separately. Part of the issue is undoubtedly related to the sensitivity of the circumstances on which these claims are based; it has been argued that in this "delicate area" we should leave the concerned parties alone.[58] I will explore the possibility of a non-interventionist approach when considering the consequences of imposing liability.

It is clear that the European Court of Human Rights offered no assistance, nor resolution, to our unsettled law. The effect of Z v UK is to permit a limitation of access to the courts subject to a test of proportionality; abiding by English law's well-established principles cannot constitute a "special legal rule" to follow McBride and Bagshaw's terminology.[59] However, we can distinguish this kind of immunity from the 'virtual immunity' to which I have referred. Rejecting a claim based on an absence of a duty of care would affect all claimants who have been wronged in the same manner, in exactly the same way. However, indirect immunities prevent access to justice independent of the judiciary. For example, the lack of legal aid – and financial considerations – will affect different claimants in different ways. It is this discriminatory 'virtual immunity' which is of great concern.

Virtual Immunities and Legal Aid Reform

As we have established, there is no absolute prohibition on immunity per se. The discretionary power, afforded to the judiciary, is often used in a way to protect the workings of a local authority under certain circumstances. The current position of immunity has been defended by Lord Bingham in his recent article. This followed his unsuccessful attempt, in Smith v Chief Constable of Sussex Police, to merge human rights law with liability in tort.[60] He observes that "if the virtual immunity now

[55] Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials* (4th edn, OUP Oxford 2010) 510
[56] Duncan Fairgrieve, 'Pushing back the boundaries of public authority liability: tort law enters the classroom' [2002] PL 288, 298
[57] *Van Colle v Chief Constable of the Hertfordshire Police* [2009] 1 AC 255, 285
[58] *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 580
[59] Nicholas McBride and Roderick Bagshaw, *Tort* Law (2nd edn, Pearson 2005) 84
[60] Lord Bingham, 'The Uses of Tort' (2010) 1 JETL 3, 15; Francois Du Bois, 'Human Rights and the Tort Liability of Public Authorities' (2011) 127 LQR 589

extended by English law to large areas of police activity were removed, there would no doubt be a cost falling, directly or indirectly, on the community who fund the service".[61]

Despite the rejection of the claim under article 6(1) in Z v UK, principles of universal access to justice are still vital and must be preserved.[62] Surely, it is a bigger issue. The European Court of Human Rights misunderstood the position under English law in its judgement of Osman, but in the education cases - due to the bargaining power and legal knowledge of potential claimants - there are far more pertinent indirect barriers to justice. In the ruckus of immunities and concerns of duties of care, academics often neglect to consider these 'virtual immunities'.

In order to analyse these 'virtual immunities', we must step back from the hypothetical realm and consider public authority liability on a practical level. There are two kinds of 'virtual immunity': implied immunity and indirect immunity. Implied immunity may occur under circumstances where a statute confers a duty, but the intention of Parliament was not for it to be legally enforceable in private law. This can be interpreted from the fact that its language does not confer legal accountability other than the possibility of a public law action. Lord Hoffman offers us the example of implied immunity by way of section 1 of the National Health Service Act 2006.[63] Under this provision, the Secretary of State must promote a comprehensive health service, designed to secure the physical and mental health of the people of England. It is clear that the intention behind this responsibility, which can be ascertained through the use of language, is not to confer a specific duty of care for challenges in negligence. Implied immunity of this kind is often left to the determination of the judiciary.

It is indirect immunity however, which acts independent of the judiciary, on which this paper focuses. Indirect immunity is, for example, a circumstance or condition which may indirectly place a barrier for a claimant seeking a particular course of action. The right of access to civil courts can only be seen as universal, if it applies equally to all people in all areas. A potential claimant may have the ability to have their claim heard on a hypothetical level, but is this a truly fair and equal ability in practice? This notion of arbitrary 'virtual immunity' is evidenced in controversial recent legal aid reform.[64]

Returning to the education cases, a moderate depressive episode may suffice to demonstrate the relevant harm requirement for a claimant attempting to sue a local authority in negligence.[65] This standard may include, but does not require, a recognition of special educational needs. It is undeniable that a child may suffer from such a depressive episode without qualifying for special educational needs. The significance of this may not be immediately clear until we consider that, following the recent reform in legal aid, financial assistance for litigation will only be available for

[61] Lord Bingham, 'The Uses of Tort' (2010) 1 JETL 3, 15
[62] *Z v United Kingdom* [2001] 2 FLR 612
[63] Lord Hoffman, 'Reforming the Law of Public Authority Negligence' (The Bar Council Law Reform Lecture 2009)
[64] Legal Aid, Sentencing and Punishment of Offenders Act 2012; 'Barristers threaten strike action over legal aid reforms' *The Telegraph* (1 December 2012) <http://www.telegraph.co.uk/news/uknews/law-and-order/9716515/Barristers-threaten-strike-action-over-legal-aid-reforms.html> accessed 6 March 2013
[65] *Bradford-Smart v West Sussex CC* [2001] ELR 138; *Coxon v Flintshire CC* [2001] 2 FLR 33

special needs cases. On a practical level, vulnerable children may be unable to afford litigation, despite having a legitimate claim in negligence.

Empirical data may shed light on this often-overlooked indirect immunity afforded to local education authorities. Following the reform of state funded legal aid, it is expected that 13% of children who would need aid to bring an action will be denied this financial assistance; the affected number of children has been predicted at six thousand per annum.[66] Naturally, under the sensitive circumstances in which cases are brought, it is probable that these six thousand children are amongst the most vulnerable in society. These children are often living away from home, in care and have been subject to some harm.[67] In addition, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 restricts legal aid for advice.[68] Legal advice is fundamental to the education cases as we have particularly young claimants who have usually had some traumatic experience with no knowledge of the law and their rights. As I have previously demonstrated, with this area of law which is fraught with inconsistencies, expert legal advice is imperative.

The restriction of legal aid for advice is somewhat ill-conceived. Firstly, in the interests of justice it is unfair to deny potential claimants the ability to have their claim objectively assessed by a legal professional. Secondly, the advice provided may be advice away from litigation. In addition, as is forecast with the overhaul of legal aid for clinical negligence cases, lawyers are likely to be discouraged from the most difficult cases.[69] Indeed it is precisely the difficult cases which must be heard in order to settle the law relating to the liability of public bodies.

'Virtual immunity' is more complex than explicit immunity and with the arbitrary removal of legal aid, we are yet again forced to ask questions of possible breaches of convention rights. Article 14 of the European Convention on Human Rights provides for an absolute prohibition on discrimination.[70] Of course we have domestic legislation which specifically targets issues of discrimination and equality subject to a test of proportionality.[71] This extends to indirect discrimination, but can this apply to discrimination which occurs as a result of the current legal aid reform? This remains to be seen, and will only come to light once the reform comes into force on 1st April 2013.[72] Certainly the new approach to litigation funding has received much criticism from young person's charities, raising similar objections; it would not be unexpected if it is challenged in judicial review.[73] Despite being broad in definition, 'virtual immunities' may occur as a result of a multitude of different factors, hence are more damaging due to a complete lack of consistency. This position can be juxtaposed for

[66] Hannah Richardson, 'Thousands of children' to lose legal aid in shake-up' *BBC News* (17 April 2012) < http://www.bbc.co.uk/news/education-17728128> accessed 6 March 2013
[67] ibid
[68] Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 8(1)(a)
[69] e.g. Steven Simpkins, 'An ethical choice? A practical reaction to the death of legal aid in personal injury and medical negligence claims' (1998) JPIL 128
[70] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 14
[71] Equality Act 2010, s 19
[72] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 5 and Saving Provision) Order 2013, s 3
[73] Kerra Maddern, 'Legal aid cuts 'deprive justice' to school-dispute families' TES (26 November 2010) <http://www.tes.co.uk/article.aspx?storycode=6064227> accessed 6 March 2013

instance with the certain blanket immunity in Hill.[74] These 'virtual immunities' cannot be quantified, as there is the potential for an infinite numbers claimants who are overlooked, this may lead to a feeling of "disenfranchisement from the judiciary".[75] Cuts in legal aid may be a necessary evil, but surely a more effective way of system optimisation would be to reduce costs involved in the process. This practice can be evidenced in the digitisation of the small claims procedure.[76]

It is important to note that litigation funding may also be provided in other ways; it is a requirement for solicitors to discuss funding options with their client.[77] This does not, of course, negate the fact that the lack of legal aid for advice in these circumstances undeniably means that, although there may be access on a hypothetical level, potential claimants are over-looked and may even be unaware of this.[78] One alternative to state funded legal aid is that charities may provide third party funding, although this is far from a universal solution.[79] However, the alternative of conditional fee agreements (CFAs) seem to have a much more widespread application in negligence claims. The question remains whether, in reducing legal aid, it is permissible for the Government to rely on discretionary CFAs in order to guarantee universal access to justice? It is surely the responsibility of the State to ensure that its citizen's convention rights are protected.

The recent legal aid reform must have some grounding in a response to the modern day alternatives to state funding, but it cannot be the intention or expectation of Parliament for litigation of this nature to be covered solely by third parties. This system would only permit the most blatant breaches of duty, claims with the most convincing chance of success, reaching court. Moreover this echoes the traditional, and now shrinking, French notion of "faute lourde".[80] This is the requirement that there must be gross fault before the French courts will impose liability on a public body. There is a clear distinction that while the French system is explicit, with the nature of 'virtual immunities', the English "gross fault" requirement is on an indirect financial level. This begs the question whether legal aid can still be relevant to the majority of negligence cases? Conditional fee agreements and third party funding certainly seems like a far more efficient approach. Can CFAs represent the solution to the paradox that is public funding, to sue a public body? Unfortunately, perpetuated by the State's responsibility in protecting convention rights, the overarching paradox remains. In finding a duty of care, the courts may compensate a claimant for past

[74] *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 63
[75] Michael Higgs, 'Comment: How the government's reforms to legal aid and judicial reviews are disenfranchising the poorest and will destroy confidence in the judiciary' (Left Foot Forward, 11 January 2013) < http://www.leftfootforward.org/2013/01/comment-how-the-governments-reforms-to-legal-aid-and-judicial-reviews-are-disenfranchising-the-poorest-and-will-destroy-confidence-in-the-judiciary/> accessed 6 March 2013; 'Lord Neuberger, UK's most senior judge, voices legal aid fears' *BBC News* (5 March 2013) <http://www.bbc.co.uk/news/uk-21665319> accessed 6 March 2013
[76] 'Adviceguide: Small Claims' <http://www.adviceguide.org.uk/england/law_e/law_legal_system_e/law_taking_legal_action_e/small_claims.htm> accessed 6 March 2013
[77] Susan Dunn, 'Paying for personal injury claims - what are the options for clients and their representatives?' (2009) 3 JIPL 218, 218
[78] Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 8(1)(a)
[79] Herbert Kritzer, 'Fee regimes and the cost of civil justice' (2009) 28 CJQ 344, 347-348
[80] Basil Markesinis, *Tortious Liability of Statutory Bodies: a Comparative and Economic Analysis of Five Cases* (Hart Publishing 1999) 17

harm, and in doing so increase the likelihood of future negligent action due to a restriction on funds.

The revolutionary system of CFAs which, as the Court of Appeal observed back in 1995 following the Courts and Legal Services Act, represents "a radical shift in the attitude of public policy to the practice of conducting litigation on terms that the obligation to pay fees will be contingent on success".[81] Obviously these fee agreements only apply in cases which lawyers are prepared to take on. Nevertheless, it is compulsory for these fee agreements to be covered by an after the event (ATE) insurance policy to cover any, however remote, possibility of losing the claim.[82] These premiums are high, and the likelihood of lawyers accepting the most difficult and most sensitive cases is low due to a reduced chance of success.[83]

The Government's policy of reducing legal aid may act to reflect the increased number of options available to claimants; it is no longer the case that the distribution of legal aid could have the effect of holding claimants to ransom. The importance of funding litigation has been raised by the judiciary, Lord Phillips endorsed litigation funding in the Court of Appeal in Arkin v Borchard Lines Ltd (Costs Order).[84] This was then followed by an endorsement in the Civil Justice Council report of 2006.[85] These announcements represent a concern of public disenfranchisement with the judiciary and a desire not to further this process, something which the Government seems to have ignored with this most recent legal aid reform.[86] In the education cases, it is essential, in order for everyone to have fair access to the courts, that claimants cannot only be open to bring a claim if they can afford to do so. The increased cost of litigation is a concern.[87] Even with alternatives such as CFAs, which are regularly utilised by claimants, these are not free endeavours. As I have mentioned, the ATE premium must still be paid, even in circumstances where liability is so clear.[88] It is coming to light that insurance plays a multifaceted role in negligence claims against public bodies.

Where there is a specific statutory body to deal with claims, it has long been established that the courts will not interfere.[89] But in circumstances where there is no such body, the intention seems to be that insurance will play a vital role. As Susan Dunn explains, a potential claimant may have 'before the event' insurance to fund a claim; this is subject to considerations such as a predetermined lawyer.[90] However, Dunn's research is of the whole field, and as I have observed, the education cases,

[81] *Arkin v Borchard Lines Ltd and Others (Zim Israel Navigation Co Ltd and Others, Part 20 Defendants) (Nos 2 and 3)* [2005] 1 W.L.R. 3055, 3067
[82] Susan Dunn, 'Paying for personal injury claims - what are the options for clients and their representatives?' (2009) 3 JIPL 218, 219
[83] E.g. Steven Simpkins, 'An ethical choice? A practical reaction to the death of legal aid in personal injury and medical negligence claims' (1998) JPIL 128
[84] *Arkin v Borchard Lines Ltd and Others (Zim Israel Navigation Co Ltd and Others, Part 20 Defendants) (Nos 2 and 3)* [2005] 1 WLR 3055, 3067
[85] Civil Justice Council, *Annual Report* (2006)
[86] 'Lord Neuberger, UK's most senior judge, voices legal aid fears' *BBC News* (5 March 2013) <http://www.bbc.co.uk/news/uk-21665319> accessed 6 March 2013
[87] Herbert Kritzer, 'Fee regimes and the cost of civil justice' (2009) 28 CJQ 344, 345
[88] Herbert Kritzer, 'Fee regimes and the cost of civil justice' (2009) 28 CJQ 344, 345-346
[89] c/f *Marcic v Thames Water Utilities* [2003] UKHL 66
[90] Susan Dunn, 'Paying for personal injury claims - what are the options for clients and their representatives?' (2009) 3 JIPL 218, 219

and indeed education itself, has a unique character. We are often dealing with vulnerable children, who live away from their parents, who cannot be expected to be in a position to insure against losses whilst in education. Insurance in the education cases is utilised instead to deal with matters internally, through public liability insurance for example, rather than letting claims reach the stage of litigation.[91] This is a practical solution which is likely to have less of an impact on the welfare of the claimant.

In contrast, David Fisher takes an alternative view of negligence claims and the role of insurance.[92] Rather than relating to access to justice, he argues that the "majority of...claims are a commodity needing little legal input".[93] In other words, he considers claims as a commodity, which firms seek to profit from, rather than taking cases on their merit. It is important however to distinguish between the education and negligence cases, from the sort of 'no win no fee' style of personal injury to which Fisher refers. He does not believe that this means lawyers have no place, simply that their involvement must be proportionate with regard to cost and time.[94] It is a logical conclusion if we are to consider the stresses and strains which litigation places on vulnerable claimants. Furthermore, in Fisher's market-based approach, he argues that, rather than the government and local education authorities regulating access, this regulation of the access to the market is by the insurance companies. This results in them becoming an "inhibitor to reform".[95] If the process were regulated independently of both the judiciary and the government, such as we may see in schools, through the utilisation of public liability insurance, any negative consequences for the claimant, as a result of litigation, could be avoided. Maybe the greatest good, which the judiciary seeks, is a refusal to impose liability in order to encourage settlement out of court. They can give effect to this through the application of discretion, through the "fair, just and reasonable" test, which is discussed in the first chapter. There are circumstances in which settlement may not be possible, yet we must consider why it is that such claimants do not start proceedings.

It has been argued that there are a plethora of reasons why potential plaintiffs do not commence proceedings.[96] It is true that financial restrictions are one of the many, previously established, 'virtual immunities' which act as a barrier to the courts. However, the deep concern raised in this dissertation derives from principles of discrimination, and basic access to advice, which surely must be seen as impermissible. On a pragmatic level, legal aid and the lack thereof, could indeed act as a barrier to access justice. Yet, in reality, the problem is extended in a far more abstract sense. Schools govern themselves and this is accepted due to the unique character of education.[97] In a recent interview about legal aid reform Amanda Quincey, a head teacher at an independent special school in Hampshire, said that

[91] Rob Merkin, 'Tort and insurance: some insurance law perspectives' (2010) 26 PN 194
[92] David Fisher, 'The future of personal injury: an insurer's perspective' (2008) 2 JPIL 164
[93] ibid 165
[94] ibid 165
[95] ibid 166
[96] Hazel Genn, *Paths to Justice: What People Do and Think About Going to Law* (Hart Publishing 1999)
[97] The unique legal character or education can be demonstrated across legal disciplines. For example, in the higher age of consent for sexual relations between teachers and pupils under Sexual Offences Act 2003, s 16. As I've mentioned before, the reason for this unique character is because of the vulnerability of those involved.

much of the debate "misses the main point".[98] In referring to the process of statementing for children who have special educational needs, she argues that "we would be far better looking at ways to help local authorities to improve the statementing process and reducing the need for legal challenges in the first place".[99] In improving efficiency in the system, local education authorities may be better placed acting without fear of private law negligence actions. This further lends credence to the utilisation of the "fair, just and reasonable" test by the judiciary.

The often-overlooked indirect barriers to justice, the 'virtual immunities', have the potential to affect claimants arbitrarily from a point of legal legitimacy. Recent legal aid reform has denied funding to claimants in the education cases except for in circumstances relating to special educational needs. Claimants are hence only able to bring an action in negligence against a public body if they can afford to. As this work has demonstrated, there are alternative funding methods. The lack of universality however, means that these alternatives are far from satisfactory. It is the responsibility of the state to ensure that its citizens have a fair and equal access to the civil courts, though recent legal aid reform indicates that the United Kingdom is failing in this duty. Insurance, and out of court settlement, inevitably play a part in negligence claims against public bodies. There seems to be great benefit for allowing local authorities, or schools, to pursue alternatives such as dealing with matters internally. Having established this, it is nevertheless important to consider the effect that imposing liability would have on both claimants and public bodies.

The Consequences of Imposing Liability

The "instability and uncertainty" of the law in this field has attracted the attention of the Law Commission.[100] This lack of certainty comes from the utilisation of the Caparo test, and the judicial discretion to place weight on a plethora of different policy considerations. In order to further our understanding of liability in these cases, we must assess the consequences of an imposition of liability in relation to the policy arguments, which are often employed. These considerations have been summarised by Cherie Booth and Dan Squires as the efficient use of public resources, whether liability would result in defensive practice, whether liability would disrupt "delicate relationships" given the nature of a public authority.[101] Booth and Squires further identify the risk of flooding the courts with vexatious and complex litigation in finding a duty of care, as well as whether there are alternative remedies available to the claimant. However, these policy considerations are often cited on the basis of assumption rather than fact. I shall build towards dismissing these considerations in this chapter.

The system of public authority liability is forward-looking, with regard to education cases in particular. Liability is often imposed in circumstances where a wrong has occurred and subsequent wrongs are sought to be deterred, rather than imposing liability for the inherent wrong of an action. One must contextualise the impact of an

[98] Kerra Maddern, 'Legal aid cuts 'deprive justice' to school-dispute families' *TES* (26 November 2010) <http://www.tes.co.uk/article.aspx?storycode=6064227> accessed 6 March 2013
[99] ibid
[100] Law Commission, *Remedies against public bodies: a scoping report* (2006)
[101] Cherie Booth and Dan Squires, *The Negligence Liability of Public Authorities* (OUP Oxford 2006)

imposition of liability in terms of the claimant themselves. Will changes in liability really affect the behaviour of claimants, their representatives, and the judiciary, before it will impact upon public bodies?[102] A principle of increased liability for public bodies would have to be endorsed by the judiciary. This practice will likely occur by finding duties of care through the application of the "fair, just and reasonable" test.[103] The judiciary must also adequately endorse the principle through their awarding of damages in order to have a suitable impact on public bodies.[104] But would this process undermine the system? Booth and Squires highlighted concerns for vexatious and complex litigation flooding the system.[105] It is the floodgates argument, which acts to predict the conduct of potential claimants, which was adopted by Lord Browne-Wilkinson in X v Bedfordshire County Council.[106]

There are various ways in which complex and vexatious litigation might flood the system. Alex Marsh, in 'the impact of liability on public bodies: lessons from the literature', suggests ways in which this might occur.[107] Firstly, by indirectly broadening the range of grounds upon which claims can be brought, more claimants may be able to find a claim. Although this may open the floodgates prima facie, I would argue that an increased number of grounds cannot be viewed as inherently negative as Marsh suggests. The system would more likely adapt to better reflect the circumstances of potential claimants. We cannot use the floodgates argument as an excuse for not finding a duty of care, if the primary reason for the currently limited number of claims, can be traced back to the inadequacy of the system. It is not merely a case of changing the system, so the number of claims may increase; it is a case of fixing the system to allow legitimate claimants an access to justice. Secondly Marsh argues that one particular ground may be over used, and claimants hence have an "increase the propensity to claim" with respect to this ground. The overuse of a ground would simply highlight the failings of meeting this minimum standard by the public body. Thirdly, a more relaxed system of liability may increase vexatious and unmeritorious litigation.[108] The concern of vexatious litigation is particularly relevant to the education cases, especially with regard to sexual abuse. This concern may be emphasised in consideration of the diminished burden of proof required under civil law, compared to the beyond reasonable doubt requirement of the criminal law.[109] It has been argued that the "[d]enial of the existence of a cause of action is seldom, if ever, the appropriate response to fear of its abuse".[110] Naturally one must adhere to the responsibility of permitting wronged claimants access to have their case heard; abuse of the system must be combated separately, and does not discharge this responsibility.

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[102] Alex Marsh, 'The impact of liability on public bodies: lessons from the literature' (Socio-Legal Studies Association Conference, Manchester, March 2008) 5

[103] *Caparo Industries plc v Dickman* [1990] 2 AC 605, 618

[104] Alex Marsh, 'The impact of liability on public bodies: lessons from the literature' (Socio-Legal Studies Association Conference, Manchester, March 2008) 5; e.g. Margit Cohn, 'Judicial activism in the House of Lords: A composite constitutional approach' (2007) PL 95

[105] Cherie Booth and Dan Squires, *The Negligence Liability of Public Authorities* (OUP Oxford 2006)

[106] Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633

[107] Alex Marsh, 'The impact of liability on public bodies: lessons from the literature' (Socio-Legal Studies Association Conference, Manchester, March 2008) 5

[108] Alex Marsh, 'The impact of liability on public bodies: lessons from the literature' (Socio-Legal Studies Association Conference, Manchester, March 2008) 5

[109] Paula Case, 'The accused strikes back: the negligence action and erroneous allegations of child abuse' (2005) 21 PN 214

[110] *Phelps v Hillingdon LBC* [2001] 2 AC 619, 667

With regard to the floodgates argument, it is of interest to consider the rise of the current 'compensation culture' - a phrase often used by the tabloid press to criticise a greedy modern day society. On the topic of negligence in the education sphere, the Daily Mail published an article claiming that £18 million was paid out in compensation to injured teachers in one year.[111] The issue of Britain's compensation culture prompted the Young Report, 'Common Sense, Common Safety', which investigates this phenomenon in the context of health and safety laws.[112] The concept of a 'compensation culture' may help us in understanding the validity of the floodgates argument.[113] Empirical evidence suggests that this notion is largely a product of the 21st century.[114] However, there was a significant rise in medical negligence claims in the 1980s and 1990s, even though the liability regime remained unchanged.[115] There is no straightforward relationship, nor a clear measurable correlation, between the likelihood of success and the propensity to claim.[116] With regard to the clinical negligence claims, in 1996, 45 per cent of cases were abandoned by the claimant and 52 per cent were settled out of court.[117] This demonstrates my earlier arguments that there are a number of different barriers to bringing a successful claim, and the role of the judiciary affects only a minority of claimants. I shall revisit the analogy between medical negligence and the education cases shortly as there are clearly observable similarities in the intended role of insurance, the attitude against litigation, and the claimant's engagement with the litigation process.

This leads us to consider how claimants engage with the litigation process in a practical setting. A lower standard of liability is likely to encourage claimants to reject out of court settlement. The significance here is the parties' perceptions; the defendant's settlement offer is "shaped by the perception of the costs".[118] An alternative viewpoint is that a more reasonable offer may be made if a defendant is in genuine fear of liability, through regular imposition of a duty of care. A defendant offers not what they believe the claimant deserves, but what a claimant will accept.[119] For the local authorities, it is advantageous to settle out of court; damages may be lower and to a certain extent regulated by the local authority themselves. Settlement offers are intended to be fair, and proportionate to the damages which are expected to be awarded in court, less the costs associated with litigation. Yet the harm inflicted by the tortfeasor is the same regardless of higher offers of settlement. This provides us with a third paradox. In rejecting liability for policy reasons, the chances of settlement are reduced, despite there being advantageous public policy reasons for allowing local authorities to self-regulate damages. This is due to the fact they are likely to have an expert knowledge of the facts and circumstances and can budget

[111] Laura Clark, 'Schools pay out £18million compensation to injured teachers in ONE year' *The Daily Mail* (11 April 2009) < http://www.dailymail.co.uk/news/article-1169085/Schools-pay-18million-compensation-injured-teachers-ONE-year.html> accessed 6 March 2013

[112] Lord Young, 'Common Sense Common Safety' (October 2010) <http://www.number10.gov.uk/wp-content/uploads/402906_CommonSense_acc.pdf> accessed 6 March 2013

[113] Richard Lewis et al, 'Tort personal injury claims statistics: is there a compensation culture in the United Kingdom?' (2006) 2 JPIL 87

[114] R Lewis, *Deducting Benefits From Damages For Personal Injury* (Oxford University Press, 1999) Ch 14

[115] ibid 90-91

[116] ibid 90-91

[117] ibid 94-95

[118] Alex Marsh, 'The impact of liability on public bodies: lessons from the literature' (Socio-Legal Studies Association Conference, Manchester, March 2008) 5

[119] ibid

efficiently for predicted losses. As presented in the first chapter, it can be extremely unpredictable whether a duty of care will be found in court due to judicial discretion. If it is unlikely that a duty of care will be found in court, it is unlikely that a local authority make any offer of compensation, and wrongs will continue to occur without any repercussion. Essentially this reasoning sheds new light on the 'funding paradox', if we can encourage higher settlement offers instead of litigation, we may be provided with the cheapest and least abrasive way to deal with liability. This would encourage the claimant and defendant to deal directly, thus reducing the impact of 'virtual immunities'.

Attributing a substantive role to out of court settlement for negligence claims, assumes claimants to be rational actors. Even when both sides have an agreed set of facts before them, failure to settle due to an 'over-optimism bias' - people read evidence to support their own view - is common.[120] Foreign jurisdictions might guide us in this difficult situation. Some U.S. States impose caps on damages available from tort cases in order to provide clarity, as well as a lower expectation of damages to parties.[121] This would increase the chance of settlement out of court, as the claimant's expectations are restricted by the judiciary. This approach may be favoured by public authorities, particularly due to the, at times, incredibly high damages awarded in tort.[122] These caps would further allow local authorities to make more accurate calculations for negligence claims and therefore budget accordingly. This approach strikes a fair balance between the recognition of wrongs, and allows the technocratic local education authority to deal with education matters. The U.S. system of imposing caps on damages may however be too far removed from our own system; Lord Slynn observed the differences between the jurisdictions in Phelps.[123] Politically the U.S. is more conservative in its governance, and places less emphasis on the role of public bodies in the workings of the State. Nevertheless, it is undeniable that a less restricted system of liability would improve the chances of pre-trial settlement, whilst providing a consistent recognition and compensation for wrongs.[124]

The liability of public bodies certainly goes beyond the realm of tort and has the essence of a political rather than legal issue. The approach of allowing professionals in the education field to be instrumental in the determination of liability, should not be seen as controversial in English law. To return to the analogy between education and medical negligence cases, I would draw your attention to the Bolam test.[125] This test provides a general rule for assessing the reasonable standard of care that skilled professionals must take in negligence cases. The test states that a doctor is "not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art".[126] This protects the autonomy of medical practitioners and respects that those in the medical profession are best placed to make decisions as to the conduct of medical professionals. It has

[120] George Loewenstein et al, 'Self-serving assessments of fairness and pre-trial bargaining' (1993) 22 JLS 135
[121] Duncan Fairgrieve, 'Pushing back the boundaries of public authority liability: tort law enters the classroom' [2002] PL 288, 289
[122] e.g. *Dennis v Ministry of Defence* [2003] EWHC 793
[123] *Phelps v Hillingdon LBC* [2001] 2 AC 619, 655
[124] Linda Babcock and Greg Pogarsky, 'Damage caps and settlement: a behavioural approach' (1999) 28 JLS 341
[125] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[126] ibid 587

been argued that a similar application may be appropriate in the education cases.[127] This echoes my earlier conclusions about the benefits of allowing a local authority to self-regulate. It would provide a fairer outcome for claimants if the negligence of a failure to diagnose a condition were assessed by other practitioners, rather than denying a duty of care itself on policy grounds. This would provide a clearer standard as to how professionals and local authorities should act. It has been argued that in the education cases, the Bolam test may be likely to eliminate many claims due to the fact that, particularly with regard to special educational needs, cases must be dealt with on their own unique circumstances.[128] In addition, there are a variety of acceptable approaches with regard to diagnosis and teaching.[129]

The law requires that a public body should achieve a "reasonable standard of performance" in order not to be held negligent.[130] However, once again, we have an issue of definition. Do we mean reasonable on a case-by-case basis or a collective overarching reasonable standard? If we accept collective reasonableness, from the outset we have issues of quantification. A school or local authority could provide substandard treatment for a minority of pupils, but still be seen to be promoting an overall good. Is this permissible? This seems to be the practice throughout the country and pupils will inevitably slip through the net; this can be recalled in relation to the permissibility of mistakes reviewed in the first chapter of this dissertation. Perhaps in general terms we can identify the situation to be as follows. Public law provides guarantees of an overall standard in terms of accountability - an interested party may bring a claim on policy grounds, which has the potential to affect the overall standard. Private law on the other hand, provides a different level accountability based on a reasonable standard for each person, on a case-by-case basis. To strike out, or even to use policy considerations to weigh against finding a duty of care, is to deny this specific level of care; this is particularly crucial when dealing with the young and vulnerable. The test in Caparo acts to reflect this principle of accountability on an individual level to a variable degree. Although this denies the possibility of consistency in law, it reflects the complex and dynamic situations on which a claim might rest.

We can best explain the position of a more comprehensive system of private law actions against local education authorities, with reference to the field of medical negligence. In addition to the floodgates argument, the judiciary has often held that finding a duty of care, and increasing the risk of litigation for a public body, will result in defensive practice.[131] The opposing argument is that greater exposure to litigation will improve practice, as has been demonstrated in the medical negligence cases.[132] Daryl Levinson argues that it is misconceived to say that the imposition of

[127] Basil Markesinis, *Tortious Liability of Statutory Bodies: a Comparative and Economic Analysis of Five Cases* (Hart Publishing 1999) 88
[128] Duncan Fairgrieve, 'Pushing back the boundaries of public authority liability: tort law enters the classroom' [2002] PL 288, 303
[129] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 763
[130] Alex Marsh, 'The impact of liability on public bodies: lessons from the literature' (Socio-Legal Studies Association Conference, Manchester, March 2008) 8
[131] Don Dewees et al, *Exploring the domain of accident law: taking the facts seriously* (OUP Oxford 1995) 417
[132] e.g. Andrew Symon, 'Litigation and changes in professional behaviour: a qualitative appraisal' (2000) 16 Midwifery 15

monetary remedies against public bodies will have a significant impact on them.[133] He argues that it is political rather than financial costs which motivate public bodies, as for example financial costs can be passed on to others. This raises a bigger question with regard to the system itself; our political system is inherently transient. Long term plans are naturally difficult to achieve due to the potentially volatile, or at least uncertain length of, term in power. Hence, it becomes increasingly difficult to hold local government to account.

Levinson's conclusions have been disputed by Lawrence Rosenthal. He argues that financial outlays will decrease resources available for politicians to pursue their preferred agenda. [134] Both Levinson and Rosenthal take an unnecessarily cynical view of political institutions. Levinson fails to recognise that, the very nature of the system dictates, political reputation will never leave an institution. Certainly a local authority is motivated by political factors, however their political agenda often emphasises the protection of the vulnerable. The previously mentioned 'greatest good paradox' appears again from Rosenthal's argument. It is common sense that local government will seek to avoid unnecessary outlays, in order to promote its own agenda of protection. It could be argued then, that it is a legitimate aim to reject compensation of the injured, in order to protect those vulnerable to injury.

The prediction of the conduct of public bodies, following an increased risk of liability in tort, assumes a certain level of awareness. This argument is prevalent in the John Hartshorne's examination of the impact of Capital and Countries plc v Hampshire CC.[135] In this case a fire officer was held to be negligent in switching off the sprinkler system in a burning building. Hartshorne found that "the argument that the imposition of liability may lead to defensive fire fighting rested on the premise that fire fighters would be aware both of any legal decision imposing liability, and its full legal implication". [136] The question is, how aware are the concerned parties of the true repercussions regarding litigation and liability? This information would be largely foreign in some cases, even to decision-makers. Changes in the liability regime would take time to be properly communicated to all ranks. Moreover, there is a likelihood that this information may become distorted in the process. Similarly in the education cases, it remains unclear whether education professionals – whose individual action often leads to a vicarious liability claim against their employer - truly realise the impact of litigation. It is fair to consider local authorities as rational actors, however decision-makers often use heuristic methods, as opposed to full cost benefit calculation, to determine the likelihood of litigation. [137] Rather than considering decisions in terms of their potential vulnerability to legal challenge, decision-makers utilise their experience and knowledge of other practical situations.

[133] Daryl Levinson, 'Making governments pay: Markets, politics and the allocation of constitutional costs' (2000) 67 U Chi L Rev 345

[134] Lawrence Rosenthal, 'A theory of governmental damages liability: torts, constitutional torts, and takings' (2006) 9 J Const L1, 30

[135] John Hartshorne et al, 'Caparo under fire: a study of the effects upon the Fire Service of liability in negligence' (2000) 63 MLR 502; *Capital & Counties Plc v Hampshire County Council & Ors* [1997] 3 WLR 331

[136] John Hartshorne et al, 'Caparo under fire: a study of the effects upon the Fire Service of liability in negligence' (2000) 63 MLR 502, 518.

[137] Alex Marsh, 'The impact of liability on public bodies: lessons from the literature' (Socio-Legal Studies Association Conference, Manchester, March 2008) 12

The imposition of tortious liability on decision-makers under these circumstances may change the perceptions of what is required of them in any process of decision-making. An increased chance of liability may influence the amount of information acquired before making the decision, in addition to the number of people involved in it.[138] In the education cases, time and resources are likely to be restricted. This fear of liability may result in excessive resources being allocated in one area, to the detriment of another. The previously discussed minimum standard requires everyone involved, at many different levels of decision-making, to have some level of understanding of the legal principles which govern their work.[139] It has been observed that "low levels of legal knowledge within an organisation will reduce the likelihood that administrative practice will be in accordance with the law".[140] Education professionals, at all levels, must have some knowledge of legal implications in order to give effect to decisions in a manner which does not result in negligent treatment. Do we therefore have an obligation to train our teachers to be lawyers? One method of creating consistent adherence with legal principles is to reduce the scope we afford to frontline workers to exercise discretion.[141] This is analogous to Lord Browne-Wilkinson's unpopular attempt to restrict the discretion afforded to the judiciary in finding a duty of care.[142] The reason for this unpopularity stems from our desire to permit professionals, with expert knowledge, the freedom to act in their chosen field. The common sense approach is to see the "street" or, more appropriately, school level as "rule saturated but not rule bound".[143]

In light of these considerations, I would invite the reader to view this situation through a consequentialist lens, in a similar manner to how the judiciary utilises the "fair, just and reasonable" test. What good can be found in holding local authorities as generally liable in negligence? Pupils would receive a reduced service through a reduction of the funding pool, hence may be at an increased risk of harm. Once again, if we consider the practical application of liability on the local authority, it is important to note that budgets are the responsibility of separate departments from those commonly challenged in negligence.[144] The impact is further difficult to ascertain, as the reduction in funding is likely to be transferred to other departments, rather than employed to hold negligent actors to account. The courts seek to utilise their tools in order to mould a positive and constructive outcome from litigation.

Conclusion

As we have established, the current law operates on a system of 'virtual immunities' through the application of the "fair, just and reasonable" test.[145] This position was

[138] Barry Bozeman and Sanjay Pandey, 'Public management decision making: effects of decision content' (2004) 64 PAR 553
[139] Alex Marsh, 'The impact of liability on public bodies: lessons from the literature' (Socio-Legal Studies Association Conference, Manchester, March 2008),13
[140] ibid 15
[141] ibid 16
[142] Lord Browne-Wilkinson in *Barrett v Enfield LBC* [2001] 2 AC 550
[143] Steven Maynard-Moody and Michael Musheno, 'State agent or citizen agent: Two narratives of discretion' (2000) 10 J of Pub Admin Research and Theory 329, 334, 339
[144] Alex Marsh, 'The impact of liability on public bodies: lessons from the literature' (Socio-Legal Studies Association Conference, Manchester, March 2008) 24
[145] *Caparo Industries plc v Dickman* [1990] 2 AC 605, 618

considered by Z v UK, and the European Court of Human Rights held that, it did not represent a breach of Article 6(1) of the European Convention on Human Rights.[146] It is the indirect barriers to justice, those independent of the judiciary, which have proven most troublesome in this dissertation. These 'virtual immunities' are simply impermissible in any field of law – not least to the detriment of the 6,000 vulnerable young people affected by the new legal aid regime.[147] It is a streamlining of the process on a practical level, with a view to long-term efficiency, which would be the most logical resolution to our unsettled law. As I have established, the degree to which the more frequent imposition of liability will affect both claimants and public bodies, is much more limited in scope than the judiciary has assumed. In order to ensure this efficiency, we should leave education related decisions to local education authorities, and aim to avoid litigation through the use of insurance and out of court settlements.

This dissertation has reminded us of a longstanding problem: with severe cutbacks in legal aid, justice will only be available to those who can afford it.[148] Admittedly, legal aid for tort claims is not commonplace. However, when we are dealing with negligence actions against public bodies – institutions which the most vulnerable in society have no choice but to deal with – it must be a priority of the State to provide access to advice for potential claimants.[149] There is clear "instability and uncertainty" within the field of private law actions in negligence against local authorities. This has attracted the attention of both the Law Commission and the judiciary.[150] No clear resolution was offered following the intervention by the European Court of Human Rights in Strasbourg. Uncertainty derives from a forward-looking, consequentialist, application of the "fair, just and reasonable" limb of the test for finding a duty of care.

This paper has dispelled the relevance of the policy arguments which are often used to deny a duty of care to claimants. The floodgates argument, which was crucial in the case of X v Bedfordshire County Council, simply fails to consider the circumstances on a practical level. The fact of the matter is, the current limited number of claims traces back to the inadequacy of the system; the judiciary assumes that potential claimants are primarily deterred by the difficulty of succeeding in court. Although I have argued that local authorities are often best placed to act without fear of litigation; this is due to the requirement for legal knowledge at all levels, rather than a risk of liability resulting in defensive practice. The most damaging aspect of the law is not the 'virtual immunities' which are afforded as a result of the "fair, just and reasonable" test, on a hypothetical level; rather, the 'virtual immunities' on a practical level in terms of the financial barriers to justice as a result of recent legal aid reform. Indeed, Lord Neuberger, President of the Supreme Court, has raised similar concerns of access to justice for those most in need.[151] Not only will restrictions for claimants lead to a "disenfranchisement" between the public

[146] *Z v United Kingdom* [2001] 2 FLR 612
[147] Hannah Richardson, 'Thousands of children' to lose legal aid in shake-up' *BBC News* (17 April 2012) < http://www.bbc.co.uk/news/education-17728128> accessed 6 March 2013
[148] Legal Aid, Sentencing and Punishment of Offenders Act 2012
[149] Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 8(1)(a)
[150] Lord Hoffman, 'Reforming the Law of Public Authority Negligence' (The Bar Council Law Reform Lecture 2009); Law Commission, *Administrative Redress: Public Bodies and the Citizen* (Law Com No 187, 2008)
[151] 'Lord Neuberger, UK's most senior judge, voices legal aid fears' *BBC News* (5 March 2013) <http://www.bbc.co.uk/news/uk-21665319> accessed 6 March 2013

and the judiciary, some of the most vulnerable people in society have lost access to a judicial safety net. [152]

[152] Michael Higgs, 'Comment: How the government's reforms to legal aid and judicial reviews are disenfranchising the poorest and will destroy confidence in the judiciary' (Left Foot Forward, 11 January 2013) < http://www.leftfootforward.org/2013/01/comment-how-the-governments-reforms-to-legal-aid-and-judicial-reviews-are-disenfranchising-the-poorest-and-will-destroy-confidence-in-the-judiciary/> accessed 6 March 2013

Offensive Tweeting: Criminal or Just Crass? "Freedom Only to Speak Inoffensively is not Worth Having" [1]

Oluwatomi Ibirogba

There is currently much interest surrounding the question whether the established approach to freedom of expression does more to protect high value, political speech to the detriment of casual Internet content. This paper starts off explaining the fundamental workings of Article 10 of The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) as the lifeblood of democracy before moving on to examine how the courts' rigid adherence to communication legislation pays insufficient regard to the requirements of Article 10. Since Article 10 is a qualified right, compliance with it requires recognition of the right to freedom of speech, no matter how ill judged, and any restrictions on that speech must be necessary and proportionate in pursuing a legitimate aim such as the protection of the rights of others. This paper examines the novelty of digital communication and the attempt of communication legislation to keep up with it. On one hand, respect for amateur digital communication does not mean complete freedom from responsibility. On the other hand, whether or not the act falls within article 10 and loses its protection as a constitutional right, this paper argues that case law has shown there can be insufficient reasons for involving criminal law against the speaker.

Introduction

Freedom of expression is a central and facilitative human right, universally recognized as forming the basis for contesting and safeguarding other rights.[2] Symbolically, the Magna Carta of 1215 laid down its theoretical foundations through recognition of the need for unhindered political communication between citizens in their efforts to participate in governmental and societal development.[3] The present system of international regulation was developed to universalise human rights thus The European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") provides a detailed right to freedom of expression

[1] *Redmond-Bate v DPP* [2000] H.R.L.R. 249, [20] (Sedley L.J.)
[2] Ignatieff. M, and Guttman. A, *Human Rights as Politics and Idolatry* (Princeton University Press, New Jersey, 2001). 90
[3] Joyce. D, "Human Rights and The Mediatisation of International Law" (2010) 23 *Leiden Journal of International Law* 507-527.

in its Article 10.[4] Prior to the implementation of the Human Rights Act 1998 ("HRA") there was no general statutory protection of freedom of expression. Now, the HRA guarantees this right under domestic law and since then, Article 10 has been instrumental in allowing media and thus public insight into court processes, which previously took place behind closed doors. Government has also ratified the Universal Declaration of Human Rights ("UDHR") and the International Covenant on Civil and Political Rights ("ICCPR") and Article 19 of both treaties protects freedom of expression.[5]

It is difficult to avoid both exaggeration and cliché when describing the growth of digital technology. In a matter of decades computing moved from mainframe computers in universities, financial and Government organisations to playing an integral part in our daily lives. Facebook alone has 901 million monthly active users making it, in population terms, the third largest 'country' in the world.[6] Mobile telephone communication is now accessible to 90% of the world's population and if the world is home to 7 billion people, one third of those are using the Internet.[7] As an emerging technology with nearly limitless boundaries and possibilities, social media has given users exceptional engagement with brands, companies and other users. It is possible, common even, to reach an unlimited audience with the click of a mouse or the use of a smart phone.[8]

Several recent cases have highlighted the range of legal controls that have been applied to expression on social networks and other amateur digital content.[9] Thus, this paper examines how English law is a bit too quick to criminalise words alone and the balance generally comes down firmly against free speech. Before analysing specific freedom of expression concerns in detail, chapter two will introduce the general structure and operation of Article 10. Chapter three affirms that Internet communications are subject to an extensive range of laws and the courts have applied such laws in a manner too restrictive to protect Article 10. Chapter four follows a similar path contemplating that freedom of expression does not call for absolute protection but seeks to ensure that any controls on expression are proportionate and, particularly, alternatives to criminal law be considered. Such alternatives will then be highlighted in chapter five.

[4] Article 10, European Convention for the Protection of Human Rights and Fundamental Freedoms <http://www.hri.org/docs/ECHR50.html#C.Art10> accessed 10 December 2012.
[5] Spurrier. M, "Gillberg v Sweden: Towards A Right of Access To Information Under Article 10 (Case Comment)" (2012) 5 *European Human Rights Law Review* 551-558. 53
[6] United States Census Bureau 2011 <http://www.census.gov/ipc/www/idb/rank.php> accessed 11 May 2012.
[7] International Telecommunication Union 2011 <http://www.itu.int/ITUD/ict/facts/2011/material/ICTFactsFigures2011.pdf> accessed 1 March 2013.
[8] Scaife. L, "The DPP and Social Media: A New Approach Coming Out of The Woods?" (2013) 18 *Communications Law* 5-10. 5
[9] *Regina v Blackshaw and Others* [2011] E.W.C.A Crim 2312, *Keith-Smith v Williams* [2006] E.W.H.C 860 (QB), *Cairns v Modi* [2012] E.W.H.C 756 (QB) etc

Article 10: Freedom Of Expression

Introduction

The ECHR was signed in 1950, entered into force in 1953 and has been ratified by all 46 member states of the Council of Europe. Under Article 10, there is a sense of devotion to the freedom of expression and information. It provides, inter alia, that "everyone has the right to freedom of expression... without interference by public authority and regardless of frontiers" this right includes the "freedom to hold opinions, and to receive and impart information and ideas through any media."[10] Freedom of expression is a fundamental common law right. It is the lifeblood of democracy.[11] The court asserts the need to respect Article 10 because the free flow of information and ideas informs political debate. It is recognised as a safety valve because people are more ready to accept decisions than go against them if they can, in principle, seek to influence them. It acts as a brake on the abuse of power by public officials and facilitates the exposure of errors in the governance and administration of justice of the country.[12] The Court has no problem affirming its importance, describing freedom of expression as one of the basic conditions for the progress of democratic societies and the development of each individual.[13]

General Operation

Article 10(1) is of very wide application. Expression could be political, artistic or commercial. You can pretty much do anything you want; we can voice our opinions in any way we please, whether verbally, in writing or both. We have the right to be heard and to hear the opinions of others without being obliged to believe what they say. If you have strong opinions about how the country is being run, you can voice them. If you have cold, hard proof about crimes being committed, you can report to authorities. Article 10 is applicable not only to information or ideas that are favourably received, inoffensive or indifferent, but also to those that offend, shock or disturb the State or any sector of the population.[14] As Sedley L.J. said, free speech encompasses "the irritating, the contentious, the heretical, the unwelcome and the provocative provided it does not provoke violence."[15] All forms of expression, although disturbing to any person of ordinary sensibilities will be protected[16] because without this there is no democracy.

Kentridge[17] gives at least three reasons for recognizing the importance of freedom of speech as a form of freedom of expression. Firstly, freedom of speech encourages the self-fulfilment of individuals because the toleration of a range of ideas, no matter how unpopular or even hurtful, fosters the personal development of those who

[10] Article 10(1), European Convention for the Protection of Human Rights and Fundamental Freedoms <http://www.hri.org/docs/ECHR50.html#C.Art10> accessed 10 December 2012.
[11] *Regina v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 155. 126
[12] *Handyside v The United Kingdom* (1976) Series A, No. 24, 49
[13] *Ibid.*
[14] *Ibid.*
[15] *Redmond-Bate v Director of Public Prosecutions* [2000] H.R.L.R. 249. 20
[16] *Regina v Secretary of State for the Home Department ex parte Farrakhan* [2002] 4 All E.R. 289. [13] (Laws L.J)
[17] Kentridge, S, "Freedom Of Speech: Is It The Primary Right?" **(**1996) 45 *International and Comparative Law Quarterly* 253- 270.

express the ideas and those who receive them. Secondly, he continues, the truth is likely to emerge from the free expression of conflicting views. As explained by Mr Justice Holmes, in words that still resonate after 75 years, "...the best test of truth is the power of the thought to get itself accepted in the competition of the market."[18] Finally, freedom of speech is designed to serve the integrity of a democratic government, which requires that opinion and information about those who govern or wish to govern are available to the electorate.[19] This purpose of protecting the free flow of information, ideas and debate is to equip the electors to make choices, the elected to make decisions and thus enhance the efficacy of a representative government. Little wonder why Kentridge, attempted to explore whether freedom of expression was a primary right in itself i.e. one which is not merely described as "fundamental" but which is assumed to take precedence over other rights or interests.[20]

The decision in White[21] also illustrates the Court's logic in affirming the prevailing importance of public interest in publishing information i.e. freedom of expression over other rights, such as the right to protection of reputation. In this case, the applicant brought criminal proceedings against newspapers that alleged he murdered the Swedish Prime Minister in 1986. The press was acquitted on the argument that the newspapers had a reasonable basis for the published information. The applicant complained that his Article 8 rights of private and family life had been breached, since the Swedish courts failed to provide due protection for his name and reputation. Nonetheless, the Court concluded that the domestic courts were, in this circumstance, justified in finding that the public interest in publishing the information in question outweighed the applicant's right to the protection of his reputation. Similarly, in Guja[22] the Court held that the interest, which the public may have, in particular information could sometimes be so strong as to override even a legally imposed duty of confidence.[23] Such cases indicate the particular significance that open discussion of issues of public concern may have so as to supersede other legal interests.

While certain laws might interfere with the right to freedom of expression, not every such interference will violate that right. In deciding the level of protection to be afforded to a particular type of expression, the courts consider its "value". Those types of expression that are of the highest value will be granted the strongest protection; while less rigorous standards of review will apply to lower value expression.[24] Of all the categories, political speech is deemed to be of the highest importance.[25] And on numerous occasions, The European Court of Human Rights ("ECtHR") has stressed that under Article 10, there is little scope for restrictions on political speech or debate on questions of public interest.[26]

[18] *Abrams v United States* 250 U.S. 616 (1919), 624
[19] *Ibid 17.* 258
[20] *Ibid 17.* 254
[21] *White v Sweden* (2008) 46 E.H.R.R. 3 [30]
[22] *Guja v Moldova* (2011) 53 E.H.R.R. 16
[23] *Ibid.* [74]
[24] Rowbottom. J, "To Rant, Vent and Converse: Protecting Low Level Digital Speech" (2012) 71 *Cambridge Law Journal* 355-383. 368
[25] *Regina v British Broadcasting Corporation ex parte ProLife Alliance* [2003] UKHL 23, [6] (Lord Nicholls), *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [148] (Baroness Hale)
[26] *TV Vest As & Rogaland Pensjonistparti v Norway* (no. 21132/05) [2008] ECHR, [59].

Human Rights Act

Article 10, like all Convention rights, is now incorporated into domestic law by the HRA section 12 [27]. It applies if a court is considering whether to grant any relief that might affect the exercise of Article 10 and was included in the HRA as a result of press lobbying. The HRA places two express duties on the UK courts: the section 2 duty to take into account, inter alia, any previous relevant judgment of the ECtHR when interpreting domestic law. [28] Secondly, the section 3 duty of statutory interpretation to read and give effect to primary and subordinate legislation in a way compatible with the Convention rights, so far as it is possible to do so.[29] Section 6(1) imposes a positive duty on the courts to enforce these convention rights and makes it unlawful for a public authority, including the court, to act in a way incompatible with a Convention right.[30]

Of all the Convention rights, freedom of expression was the most developed prior to the HRA coming into force. UK courts had generally given great respect to freedom of expression as it had already attained the status of a constitutional right with higher normative force.[31] In Douglas, Brooke L.J. explained that although the right to freedom of expression may not always be "the ace of trumps," it is a powerful card to which the courts must always respect."[32] Frequent judicial explanation was given as to why it was important to protect freedom of expression and it was widely recognised that there is a public interest per se in it.[33] Thus the practical outcome of s.12 has been merely to set the standard of proof for claimants seeking injunctions. It makes the likelihood of success at trial an essential element in the court's consideration of whether to make an interim order. Other than that, s.12 arguably adds very little to Article 10. Although the changes have not been as radical as some would have liked, that is not to say that there has been no change to the legal protection of freedom of expression as a result of the HRA. In the meantime, we cannot speak as freely as some would like, but we can say as much as Article 10 will allow.[34]

Necessity and Proportionality

Article 10 is a qualified right. Once Article 10(1) is engaged, and it is clear that there has been interference, it is for the court to consider Article 10(2) including the questions of whether the interference is prescribed by law and necessary in one of the interests listed. In this regard, the European Court of Justice ("ECJ") has a supervisory function to merely review the decisions of national courts & decide

[27] s.12, Human Rights Act 1998 <http://www.legislation.gov.uk/ukpga/1998/42/section/12> accessed 1 March 2013
[28] s.2, Human Rights Act 1998 <http://www.legislation.gov.uk/ukpga/1998/42/section/2> accessed 1 March 2013
[29] s.3, Human Rights Act 1998 <http://www.legislation.gov.uk/ukpga/1998/42/section/3> accessed 1 March 2013
[30] s.6(1), Human Rights Act 1998 < http://www.legislation.gov.uk/ukpga/1998/42/section/6> accessed 1 March 2013
[31] *Reynolds v Times Newspapers* [2001] 2 AC 127, [207G]-[207H] Lord Steyn
[32] *Douglas v Hello! Ltd (No 1)* [2001] QB 967, [49]
[33] *Ashdown v. Telegraph Group Ltd* [2001] 3 W.L.R. 1368, [66]
[34] Merris. A, "Can We Speak Freely Now? Freedom of Expression Under The Human Rights Act" (2002) 6 *European Human Rights Law Review* 750-763. 763

whether the reasons given by the national authorities justify the restrictions under Article 10(2).

In Handyside,[35] the applicant was the publisher of "The Little Red Schoolbook" which urged young people to take a liberal attitude in sexual matters. A prosecution was brought against him based on the Obscene Publications Act 1959, as amended by the Obscene Publications Act 1964. He complained that his criminal conviction, the seizure and subsequent forfeiture and destruction of the matrix and of hundreds of copies of the Schoolbook was in breach of, inter alia, Article 10. Under Article 10(1), these amounted to interferences by public authority and the Government did not deny it. In assessing Article 10(2), the Courts first ascertained that the law, i.e. under the Obscene Publications Act 1959/1964 section 1, prescribed this limitation on his freedom of expression. It must be noted that to date, it is rare for an interference to not be prescribed by law; the general view being that laws whose subject matter touch areas of subjective judgment where public opinion may shift, cannot be expected to be rigid.[36] The Court concluded that because the 1959/1964 Act aims to protect morals in a democratic society, this purpose satisfies the necessity limb since the object of the said Acts—to wage war on 'obscene' publications, that 'deprave and corrupt' [37]—is linked far more closely to the protection of morals than to any of the further purposes under Article 10(2). It then investigated whether the protection of morals in a democratic society necessitated the actual measures taken against Handyside. The interpretation of Article 10(2) is ultimately that the exercise of this freedom, since it carries with it duties and responsibilities, may be limited as long as the limitation; is prescribed by law, is necessary and proportionate; and pursues one of the listed legitimate aims.[38] This can be referred to as the Article 10(2) three stage criteria. Freedom of expression is the rule and the regulation of speech is the exception requiring justification.[39]

The Court in Sunday Times [40] reaffirmed these principles stating that the public could be deprived of crucial information only if it appeared "absolutely certain" that its diffusion would threaten the authority of the judiciary.[41] The phrase "absolutely certain" illustrates the very limited conditions under which the Court would allow interferences with Article 10. In Bowman [42], Mrs Bowman was charged under section 75(5) of the Representation of the People Act 1983 which provides a person shall be guilty of a corrupt practice if he incurs, aids, abets, counsels or procures any other person to incur, any expenses in contravention of section 75.[43] She then submitted that her freedom of expression was restricted by this s.75. The Court noted that s.75 did not directly restrain freedom of expression, but instead limited the amount of money which unauthorised persons were permitted to spend on the election period to £5.00. However, it clearly engaged Article 10(1) as a restriction on freedom of

[35] *Handyside v The United Kingdom* (1979-80) 1 E.H.R.R. 737
[36] *Ibid 25.* [24]
[37] Janis.M, Kay.R and Bradley.A, *European Human Rights Law: Text and Materials*, 3rd ed (Oxford University Press, Oxford, 2008). 239
[38] Article 10(2), European Convention for the Protection of Human Rights and Fundamental Freedoms <http://www.hri.org/docs/ECHR50.html#C.Art10> accessed 10 December 2012
[39] *Ibid. 31*. [200F]
[40] *Sunday Times v United Kingdom* (1979) 2 E.H.R.R. 245
[41] *Ibid.* 66
[42] *Bowman v United Kingdom* (1998) 26 E.H.R.R. 1
[43]. *Ibid.* 1

expression. The Article 10(2) three stage criteria then remained to be considered and the Court held it was undisputed that the s.75 restriction on expenditure was "prescribed by law." It "pursued a legitimate aim" of protecting the rights of others, namely the electoral candidates and the electorate by securing equality through ensuring candidates remained independent of wealthy third parties and powerful interest groups. [44] However, the Court found it was not "necessary and proportionate" to limit her expenditure to £5.00 in order to achieve that aim, particularly because there were no restrictions placed upon the press or political parties and their supporters to advertise fairly at national or regional level.[45]

In making these decisions, the Court adopts a margin of appreciation. This principle explains that the protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and freedoms it enshrines.[46] This applies notably, to Article 10(2) as it is almost impossible to find a uniform European conception of legitimate aims. The notion of morals will vary from place to place. Public safety will depend on the nations' current climate and what may be rendered a disorder in one state may very well not be one in another. So state authorities are, in principle, in a better position to give an opinion on the exact content of these requirements as well as on the 'necessity of a restriction' intended to meet them. In this way, the ECtHR regards the margin of appreciation concept as a necessary form of judicial self-restraint. [47]

Conclusion

The Court's judgments relating to Article 10 [48] stress the major principle that freedom of expression constitutes one of the essential foundations of a democratic society subject to limited exceptions that must be narrowly interpreted and convincingly established. These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, inter alia, in the interests of national security or for maintaining the authority of the judiciary, it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role as public watchdog[49]. News is a perishable commodity and to delay its publication, even for a short period, may well deprive it of its value and interest.

Internet Freedom: The Concept

Introduction

[44] *Ibid.*
[45] *Ibid.*
[46] *Belgian Linguistic Case (No. 2)* (1968) 1 EHRR 252. 10
[47] Mahoney P, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin" (1990) 11 *Human Rights Law Journal* 57-88
[48] *Handyside v The United Kingdom* (1979-80) 1 E.H.R.R. 737, *Oberschlick v Austria* (No. 2) (1997) 25 E.H.R.R. 357, *Sunday Times v United Kingdom* (1979) 2 E.H.R.R., *Lingens v Austria* (1986) 8 E.H.R.R. 40
[49] *Observer v United Kingdom* (no 13585/88) (1992) 14 E.H.R.R. 153. 59

Freedom of expression encompasses freedom of speech. Article 10 is not limited to written or spoken word but rather all types of expression e.g. photographs,[50] videos,[51] artistic forms and even certain behaviour.[52] In order to be protected, the expression does not have to satisfy a test of quality or public interest [53] hence why almost any web page on the Internet can be protected. The most common form of Internet expression takes place via the social media. Social media and social networking have become embedded into people's lives. For many, it is an integral part of both their online and offline existence. It is an interesting way to get people to express themselves; be it via a Facebook status, Twitter updates, Youtube videos etc. These are all extensions of ones personality. They help portray ones interests, views and offer a platform for you to be yourself, to be creative, to be who you want to be and most importantly, have an audience for all of this. Relationships and networks built through social media, whether formal (Facebook friendships) or informal (Twitter hashtags), can and do seem to have an impact beyond the digital domain. The rise of social networking sites has encouraged millions to express their opinions on the Internet, often in 140 words or less. In this way, the use of the internet and social media sites by both individuals and organisations engages their right to freedom of expression; the right both to receive and to impart information and ideas.

Framework Of Internet Law

In its early days, the Internet was often characterised as a digital wild west that was anarchic, untamed and beyond the reach of regulation.[54] Presumably because the safeguards for free speech were shaped by years of litigation with mass media and thereby framed with the mass media, rather than digital content, in mind. That view was soon displaced as laws in the offline world applied online, and new forms of regulation emerged. In this digital age, the world's best, and worst, thinkers all partake of the social media. There now exist social businesses, social media marketing strategies, social customer services and blogging. This paper argues that if it is generally recognised that the mass media have a positive duty to act as the eyes and ears of the general public because press freedom is in the public interest,[55] so also should social media be bestowed with that privilege.

Currently, there are four UK statute laws relevant to the use of Information Technology particularly when this technology is allegedly abused. Firstly, The Protection From Harassment Act 1997, Section 1. This is seemingly more centred on the issue of cyber stalking. Cyber stalking is best viewed as a new variant of pre-existent behaviour as the term denotes stalking through the use of the Internet, email and other electronic communication devices.[56] The Act also applies to harassment on the Internet and through the misuse of email and a person is guilty of the offence of stalking only if he or she is first guilty of harassment.[57] The Criminal Justice & Public

[50] *Ibid 32.*
[51] *Ibid 25.*
[52] *Percy v Director of Public Prosecutions* [2001] Crim.L.R. 835
[53] *B&C. v A.* [2002] 2 All E.R. 545, [11(v)]
[54] Yen. A, "Western Frontier or Feudal Society? Metaphors and Perceptions of Cyberspace" (2002) 17 *Berkeley Technology Law Journal* 1207-1263
[55] *Regina v Sherwood ex parte Telegraph Group & Others* [2001] 1 W.L.R. 1983, 17-18
[56] Whitty. M and Joinson. A, *Truth, Lies and Trust on the Internet* (Routledge, London, 2009). 111
[57] Gillespie. A, "Cyberstalking and The Law: A Response to Neil MacEwan" (2013) 1 *Criminal Law Review* 38-45.

Order Act 1994, Section 154 concerns the criminal offence of intentional harassment.[58] Section 1, Malicious Communications Act 1988 renders it an offence to send indecent, offensive or threatening communication to another person with the intent to cause distress or anxiety. It was enacted to tackle the problem of poison pen letters[59] and extended to posting content on a website.[60] Lord Bingham also found (obiter) that the object of Section 1 was to protect people against messages they might find seriously objectionable,[61] such as racist speech. Lastly, by far the most recent Act to be passed, the Communications 2003, Section 127. This is the broadest provision in this category. The defendant must be shown to have intended or be aware that the message he sent was grossly offensive, indecent, obscene or menacing, which can be inferred from the terms of the message or from the defendant's knowledge of the likely recipient.[62] The offence is committed by sending the message, there is no requirement that any person sees the message or be offended by it. Of all the laws discussed, s.127 appears to be used as a general criminal control on digital communications.

These laws are good support for the assertion that innovation changes crime.[63] Crime is in constant flux as the Internet fosters new forms of criminality. First, Internet technologies widen the pool of victims. In 2011, a study of 354 cyberstalking victims found that 21% of the victims were stalked by mere acquaintances, and 22% by total strangers.[64] Digital technology has provided a host of new ways in which offenders may threaten their victims as they offer direct and speedy lines of contact, around the clock, which would be more difficult to replicate offline. The possible veil of anonymity online encourages the perpetrator to continue these acts making it difficult for law enforcement agencies to identify, confront and arrest them before matters get worse.[65] For these reasons, this paper affirms that there is no general objection to the laws of the offline world applying online, but rather there needs to be evaluation of the balance struck between the application of these rules and the harm it may cause. These legislation pose possible problems of over-criminalisation and over-regulation and the current approaches do not provide a satisfactory method of combating the harms caused by some digital communications. Police and prosecutors can not possibly have the resources to deal with every communication that people will have cause to complain about. Thus, given these difficulties, the danger exists that the laws will be applied selectively in a way that is hard to predict & this can leave speakers over-exposed to legislation.[66]

At some point in our lives, we have all sat with a friend and heard them come out with witticism we would rather they had kept to themselves. Whether the remark was

[58] Jason-Lloyd. L, *The Criminal Justice & Public Order Act 1994: A Basic Guide for Practitioners* (Frank Cass & Co Ltd, London 1996). 37
[59] *Report on Poison Pen Letters*, Law Com. No. 147 (1985)
[60]The Guardian, <http://www.guardian.co.uk/tv-and-radio/2011/jul/03/britains-got-talent-blogger-cautioned> accessed 1 March 2013
[61] *Director of Public Prosecutions v Collins* [2006] 1 W.L.R. 2223. [7]
[62] Ormerod. D, "Telecommunications: Sending Grossly Offensive Message By Means of Public Electronic Communications Network" (2007) *Criminal Law Review* 98-100
[63] K. Pease, "Crime Futures and Foresight: Challenging Criminal Behaviour in the Information Age" in D. S. Wall (ed.), *Crime and the Internet*, (Routledge, London, 2001). 24
[64] Yar. M, *Cybercrime and Society* (Sage Publications, London, 2006). 130
[65] MacEwan. N, "The New Stalking Offences in English Law: Will They Provide Effective Protection From Cyberstalking?" (2012) 10 *Criminal Law Review* 767-781. 772
[66] *Ibid 24.* 365

too cold, too cruel or simply too revolting, we might have meekly giggled along, glanced down and quietly thought less of our companion or even perhaps plucked up courage to tell them what we thought. Whatever the case may have been, it is a fair guess that one did not pick up the phone to the police with a view to starting criminal proceedings. This is probably because direct incitement to violence is one thing but sentencing people for bad jokes, poor taste and terrible manners is somewhat blurring the distinction between stupidity and criminality. Any sanctions for such should remain an issue for parents, teachers and peer groups. This paper thus seeks to explore whether s.127, and its regulatory counterparts, can be viewed as a menace itself as its effect tends to be felt far beyond the specific mischief it seeks to prevent by deterring people from exercising their legitimate free speech rights, to the detriment of society as a whole. The Internet and social networking sites, by providing a platform for everyone with none of the usual media gatekeepers, has created an electronic mob by giving a megaphone to every misfit with a grudge and social inadequate in the land. The social media-sphere has created the electronic equivalent of the Roman Coliseum, with millions of computer cursors poised to destroy their victims' reputation whether anonymously or not. But while anarchy rages on the net, Britain is steadily shutting down dissent.[67] Communication prosecutions appear to be urged on by a public increasingly fed up with an increasing variety of online racist bullies, trolls, stalkers etc. The central problem identified in the cases that will be referred to shortly is the chilling effect such laws are likely to have on freedom of expression, through the threat of sanctions. We are seeing a draconian censorship of free speech, with people being arrested for sending insults. What on earth has happened to freedom of expression in Britain?

The Twitter Joke Trial

The case of Paul Chambers, better known as "Twitter joke trial", is the most well known instance of s.127 being deployed against an online speaker.[68] After heavy snowfall had affected transport across the country and threatened Chambers' plans to fly to Belfast to meet his girlfriend, whom he met on Twitter user, he tweeted the following words:

Crap! Robin Hood Airport is closed. You've got a week and a bit to get your shit together otherwise I am blowing the airport sky high!!

Chambers was subsequently arrested and prosecuted under s.127. He was convicted of the offence before a District Judge and fined. His appeal to the Crown Court was unsuccessful and he appealed to the Divisional High Court. One question poised to the High Court was, having defined a menacing message, as "a message that conveys a threat ... which seeks to create a fear in or through the recipient that something unpleasant is likely to happen,"[69] is the court then required to prove that the person sending the message intended to create fear in or through the recipient? Or conversely, is it correct to conclude that the question of whether a message is of a menacing character is an objective question of fact for the Court to determine applying the standards of an open and just society and taking account of the words,

[67] The Mail Online < http://www.dailymail.co.uk/debate/article-2181815/Twitter-Tyranny-Hailed-medium-speaking-mind-people-arrested-sending-insults.html> accessed 27 November 2012
[68] *Paul Chambers v Director of Public Prosecutions* [2012] EWHC 2157 (Admin)
[69] *Director of Public Prosecutions v Collins* [2005] EWHC 1308 (Admin), Sedley LJ

context and all relevant circumstances? A summary of the court's response showed that that the s.127 offence could not be proved unless the content of the message was of a menacing character. The Court held that a message, which does not create fear or apprehension in those to, whom it is communicated, or who may reasonably be expected to see it, falls outside the provision of s.127, for the simple reason it lacks menace.[70]

This eventual judgment from the case was undoubtedly a victory not only for Chambers, but also for common sense. Nonetheless, the conflict with Article 10 lies in the mere fact that the trial was allowed to advance to the stage it did. As this paper will explore, whenever s.127 is used in respect of social media, it raises debates ranging from questioning if it is an appropriate use of law at all, to concerns regarding the effect on the right to freedom of expression. After engaging Article 10(1) and following the Article 10(2) three-stage criteria, it would have been plain for the District Judge to see that perhaps s.127 did prescribe the limitation on his freedom of expression. But what exactly is the legitimate aim being pursued? Should we accept that the legitimate aim be the protection of the rights of others for national security sake. After all, the Crown Court was understandably concerned that this message was sent at a time when, there is public concern about acts of terrorism and the continuing threat to the security of the country from possible further terrorist attacks. However, that is plainly relevant to context. The more one reflects on it, the clearer it would have become that this message did not represent a terrorist threat, or indeed any other form of threat. It was posted on Twitter for widespread reading, a conversation piece for the Chamber's followers, drawing attention to himself and his predicament. Although it purports to address "you", meaning those responsible for the airport, it was not sent to anyone at the airport or anyone responsible for airport security, or indeed any form of public security. The grievance addressed by the message is that the airport is closed when the writer wants it to be open. The language and punctuation are inconsistent with the writer intending it to be a serious warning. Finally, although we are accustomed to very brief messages by terrorists to indicate that a bomb has been put in place and will detonate shortly, it is difficult to imagine a serious threat in which warning of it is given to a large number of tweet followers in ample time for the threat to be reported and extinguished.[71] We can thus arguably say the restriction failed to be necessary and proportionate in a democratic society.

The other big issue before the court was the requisite mens rea. The court held that as the message lacked the characteristic required for the purposes of the offence, the issue of the appellant's state of mind when he sent it, and whether it was criminal, did not arise for decision. Nonetheless, the mental element is satisfied if the offender is proved to have intended that the message should be of a menacing character or recognised the risk at the time of sending the message that it may create fear or apprehension in any reasonable member of the public who reads or sees it. As we have established there was no intention due to context, who then is this reasonable member of the public? Could it be the Crown Court, and the South Yorkshire Police who reported the case to them? If yes, what makes them different from the limited

[70] The Judiciary of England and Wales <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/chambers-v-dpp.pdf> accessed 12 December 2012

[71] *Ibid 68.* 15

class of people, that is, Mr. Chamber's twitter followers who, knowing him, would be neither fearful nor apprehensive when they read it. Surely if the airport staff is "reasonable" for the purpose of having him convicted, why cant his followers be reasonable too for the alternative? If the key is whether fear is actually produced, it follows that only those who do read it can have fear produced in them and seeing as his followers read it first without fear, why did the Crown Court pursue this case? It is disconcerting that according to s.127, those who are grossly offended by the message need not be the recipients, just so long as somebody gets to be outraged.

Going back to the scene we originally set, likening social media conversations to real-life ones. Joking about bombing airports is, in recent times, undeniably a poor choice of joke. Anyone who provides a joke answer when answering the security questions at the airport will quickly find that the police and authorities take a dim view of it. However, such persons are rarely prosecuted; they could be interviewed, given stern words of advice and (inevitably) prevented from taking their flight.[72] Perhaps Chambers should have been told to be careful about his choice of tweets, but prosecution was unnecessary, especially given that nobody took it seriously. This judgment produces neither clarity nor safety for those who tweet jokes like the one Chambers made. Yes, the courts will consider the full context of your tweet but you still really cannot know before you tweet an apparent joke whether it just might make someone feel apprehensive. If you think it just conceivably might, and in the event someone says that it does, then you may well commit an offence under s.127 despite the fact you have your Article 10 right to say whatever you want. Yes it does clarify that, if the offender intended the message as a joke, it was unlikely that the required mens rea would be established for a s.127 offence. Nonetheless, one certainly would not enjoy having to argue his innocence concerning an online comment because the person who claimed to be apprehensive was being unreasonable. Due to that, one will simply not tweet and as everybody does that, watch what happens to the freedom of expression.

Conclusion

Digital communications are more persistent. When a comment is made online, it is recorded in a form that can be searched and examined long after the statement has been made, even if the message took only seconds to write.[73] It was this fact that rendered most fatal to Mr. Chambers. Some five days after his frustrated tweet, the duty manager responsible for security at Robin Hood Airport was at home searching generally for any "tweets" which referred to Robin Hood Airport and, in accordance with airport procedure, this tweet was passed on to the airport police when found. Digitised communications allow the expression to come to the attention of people beyond the speaker's intended audience. Its content may be returned in the results of a search query or recipients of the original message may forward or re-post it, thereby bringing the message to a wider audience. The capture and storage of information facilitated by digital technologies can allow for greater monitoring of expression, allowing the participants' behavior to be reviewed long after the event.[74]

[72] Gillespie. A, "Twitter, Jokes and The New Law" (2012) 76 *Journal of Criminal Law* 364-369. 368
[73] D. Boyd, "Social Network Sites as Networked Publics: Affordances, Dynamics, and Implications" in Z. Papacharissi (ed.), *Networked Self: Identity, Community, and Culture on Social Network Sites* (Oxford University Press, Oxford, 2010).
[74] *Ibid 8.* 7

The fact the expression remains this accessible, even if the author chooses to delete it, is yet another factor s.127 failed, and as this paper will show, continues to fail to take into account. When the search results are returned without their context, the material has the potential to cause significant harm because those who are interested in the subject are the most likely to make the searches and jump to uncalculated conclusions, as was the case with Paul Chambers. Digital communications are not only subject to a wide range of legislation but also new methods of detection thus the concept of Internet freedom is steadily shutting down and it could be because the Internet never forgets.

Internet Freedom: The Crackdown

Introduction

Eady J noted Internet comments are more like contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar), which people simply note before moving on. They can be uninhibited, casual and ill thought out. Thus those who participate know this and expect a certain amount of repartee.[75] Nonetheless, this chapter will highlight how 2012 can be seen as the year in which criminal law tried to get to grips with social media as we saw a number of high profile prosecutions of individuals who posted abhorrent messages on social media websites.[76] Two decades ago, ill-judged remarks made in the heat of the moment or poor taste jokes among friends were unlikely to be on the radar of law enforcers. Now, despite the libertarian aspirations associated with digital communications, people's everyday expressive activities are potentially subject to more regulation.[77] At this point, Internet censorship seems like a slippery slope that started off targeting racist abuse or incitement to hatred and quickly leading to pointless arrests. In this new online environment with permanency of digital traces and such comments being more readily accessible to a large audience, the prosecution of everyday expressive activities is somewhat blurring the distinction between expressing an opinion and sending a threatening or menacing message.

Criminalising Free Speech

The legislative history of s.127 can be traced back to Collins.[78] Over a period of time, the defendant telephoned the constituency office of a Member of Parliament asking for him to do something about the 'black bastards' and similar even more unpleasant terms. In determining if a s.127 offence had been committed, the House of Lords considered the standards of an "open and just multi-racial society", taking into account the context of the words and all relevant circumstances.[79] It stressed that individuals are entitled to express their views strongly and that the proper question for determining if s.127 had been infringed was whether the language used went beyond what could be considered as tolerable in society. The Court then held; while his messages had been offensive, a reasonable person would not consider them

[75] *Smith v ADVFN Plc* [2008] EWHC 1797 (QB). [14]
[76] For example the cases of *Paul Chambers, Joshua Cryer, Sam Busby, Neil Swinburne, John Kerlen etc*
[77] *Ibid 24.* 356
[78] *Director of Public Prosecutions v Collins* [2006] UKHL 40. [11]
[79] *Ibid.*

grossly offensive. Besides, not every transmission of grossly offensive language is punishable, but only those which, in their particular circumstances and context, are to be regarded in society as a whole as grossly offensive.[80] In another case, Daniel Thomas the semi-professional footballer posted a homophobic message on Twitter about two Olympic divers[81]. The decision not to prosecute came as the Director of Public Prosecutions ("DPP") echoed the question is not whether it was offensive, but whether it was so grossly offensive that criminal charges should be brought in the given context and circumstances. The DPP explained that in this context and under these circumstances, it was a one-off offensive Twitter message, intended for family and friends, which made its way into the public domain. Thomas removed it reasonably swiftly, expressed remorse and thus no criminal charges were brought.[82] However, Matthew Woods was jailed under s.127 over his drunken facebook joke about the missing April Jones and Madeleine McCann.[83] The court claimed Woods was arrested for his own safety because, as a result of public reaction to his posts, a mob descended on his home. The court felt the reason for the sentence is the seriousness of the offence, which was derived from the public outrage[84]. The offensive/grossly offensive distinction is an important one and not easily made thus it seems the courts are looking to other contextual factors because the distinguishing factors between both cases remains the level of public outcry and, unfortunately, the social status of the defendants.

In March 2012, 21-year-old Liam Stacey was sentenced for a racially aggravated s.4A Public Order Act 1986 offence, after sending abusive messages on Twitter when the footballer Fabrice Muamba collapsed on the field.[85] Stacey tweeted "LOL [laughing out loud], **** Muamba. He's dead!!! #haha" and then proceeded to tweet insults at other twitter users when confronted. Stacey initially contended that his account had been accessed by someone else but later pleaded guilty. Public order laws are primarily about standards of behavior in public. The law seeks to manage the competing rights and interests of people sharing public spaces; the convictions during the summer of 2011 for inciting riots on Facebook provide a high profile example.[86] Also, in Sheppard, the defendants were convicted for publishing racially inflammatory material on the Internet, including a pamphlet titled "The Holohoax."[87] These cases thus show that any person who posts material within the public ambit e.g. on the Internet can be liable when that material causes harassment, alarm and distress.[88] While the requirement of intent to cause harm provides a safeguard to the s.4A offence by limiting its reach, this paper argues that the requirement that the speech be insulting and cause distress is a too low a threshold. A prosecution under s.4A surely cannot be consistent with Article 10 unless it is

[80] Calleja. R, "Telecommunications: Meaning of "Grossly Offensive" (Case Comment)" (2005) 16 *Entertainment Law Review* N70-N71
[81] Carney. D, "Football Banning Orders and Twitter-Bomb Joke On Twitter" (2012) 85 *Police Journal* 255-263. 262
[82] *Griffiths.* R, "Social Media and The Criminal Law" (2013) 24 *Entertainment Law Review* 57-60. 58
[83] *Director of Public Prosecutions v Woods (Matthew)* Unreported October 2012 (MC)
[84] *Ibid 8. 6*
[85] Crown Prosecution Service News Blog <http://blog.cps.gov.uk/2012/03/liamstaceys-conviction-for-tweet-about-fabrice-muamba.html.> accessed 5 March 2013
[86] Thomas. D, "Sentencing: Public Disorder - Offences Committed in Context of Public Disorder" (2012) 1 *Criminal Law Review* 57-62
[87] *Regina v Sheppard and Whittle* [2010] EWCA Crim 65
[88] *Steele v Director of Public Prosecutions* [2008] EWHC 438 (Admin).

necessary to protect public order.[89] Thus what form of protest or social disorder could possibly have come from Stacey's tweets that made it necessary and proportionate to arrest, jail and cause this young man to lose his source of livelihood? I guess the lesson to learn here is that, if you get drunk and tweet stupid things, you might find yourself up in front of a judge and this is quite scary, especially when most people tweet reactions to newsworthy events pretty instinctively these days.

In July 2012, a 17-year-old made tasteless twitter comments about the Olympic diver, Tom Daley, who, in his opinion, had underperformed. The tweets stated that he would have disappointed his deceased father. He was detained on suspicion of contravening the Malicious Communications Act 1988.[90] What is distinguishable in this case was that the teenager did subsequently send vivid death threats to the diver. But with the lack of clarity recent case law has provided, it is difficult to ascertain whether the death threats themselves were the principal factors of the arrest. Seeing as the threats gained much less attention than the intended recipient. Nonetheless, like many of the cases before him, the defendant obviously had an opinion to impart. No matter how ill judged or rude it was. The fact that he used a crass and insensitive method of manifesting that opinion should not detract from the fact that it was speech and should, therefore, be protected from unnecessary interference.

The courts have adopted harsh penalties and severe jail terms to deter individuals from acting in such ways, but the case of Stan Collymore would suggest that such an approach may not always be successful. Former footballer Stan Collymore reported Stacey to the police for the remarks he made about Muamba discussed previously; immediately after he did and after Stacey was sentenced, Collymore was the subject of racist tweets, compelling him to report them to the police as he had with Stacey.[91] Joshua Cryer was fined for this but instead remarked that in acting as he did he had hoped to "snare a celebrity" on Twitter, where response tweets from celebrities are highly valued.[92] Rather than the case of Stacey acting as a deterrent, it did nothing for Cryer, who wanted to boast to friends. It was not a case of his acting on impulse or on the spur of the moment as he had done this up to seven times previously over a period of a few days.[93] As well as individuals appearing to be undeterred by the threat of punishment, the number of offenders who have acted in singular instance can be so vast that punishments seem entirely impractical. Daily Mail journalist Samantha Brick wrote an article in April 2012 entitled "'There are downsides to looking pretty': Why Woman hate me for being beautiful", for which she received huge a huge online backlash. Within the space of 24 hours, 4,510 individuals had left comments on the article on the Daily Mail 's website, and according to Brick over 1,000 emails were left within 24 hours in her private email account, and there were thousands of messages from friends attacking her on Facebook.[94]

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[89] *Dehal v Crown Prosecution Service* [2005] EWHC 2154 (Admin), [12]
[90] BBC News, < http://www.bbc.co.uk/news/uk-england-19059127> accessed 18 December 2012
[91] Khan. S, "Can The Trolls Be Put Back Under The Bridge?" (2013) 19 *Communications and Telecommunication Law Review* 9-13. 12
[92] *Ibid.*
[93] *Ibid.*
[94] Daily Mail Online <http://www.dailymail.co.uk/femail/article-2124782/Samantha-Brick-says-backlash-bile-yesterdays-Daily-Mail-proves-shes-right.html> accessed 29 October 2012

An important point of the Court's rationale in Lingens[95] is the observation that excessive measures, such as these criminal prosecutions, could have a more extensive chilling effect on freedom of expression. Such measures could amount to censure likely to discourage one from making criticisms and deter journalists from contributing to public discussion of issues affecting the life of the community.[96] This does not mean that amateur online expression should have no constrains because very real harms can flow from digital communications, affecting people in a way that offline conversations cannot. But rather, that any sanctions should occur within clearly defined limits and should accord primacy to the Article 10(2) three-stage criteria.

Lack of Clarity

Explaining that the Tom Daley twitter would not be prosecuted, the DPP explained that banter, jokes and offensive comment are commonplace and often spontaneous. Thus the CPS has the task of balancing the fundamental right of free speech and the need to prosecute serious wrongdoing and it will proceed on a case-by-case basis.[97]

It seems the Court has failed to act in accordance with its deep-rooted assumptions on ensuring a firm protection of free expression by applying a strict test for any interference with it. Nevertheless, the Court does not state this directly and this remains an issue. There is nothing in its judgment to suggest that the Court is now deliberately shifting its principles with respect to the protection of freedom of expression. However, the Court has evidently started to attach greater weight to the right to protecting reputation, for example. 19-year-old Azhar Ahmed was arrested in March 2012 for suggesting on his Facebook wall that: “all soldiers should DIE and go to HELL! THE LOWLIFE FOKKIN SCUM!.” This came in reaction to the news that six more British servicemen died in Afghanistan. If we proceed on the judgment of Collins or The Twitter Joke Trial, it should be sufficient to conclude that "soldiers" is far too broad a term to constitute a direct threat to anyone specifically. At the time of his trial, there was a Facebook hate group with a few thousand Facebook likes dedicated to Azhar Ahmed. It was filled with blatantly racist abuse directed at him but the police have not decided to act yet. It seems the need to protect the reputation of the British soldiers coupled with the extent of public fury was the deciding factor in this case. But what about another case that involves less national figures? What should we expect?

Given these questions, the danger exists that the laws are being applied selectively in a way that is hard to predict. The Court has specifically referred to the style of expression as having significance in the assessment of any interference with that freedom. It said style constitutes part of communication as a form of expression and is as such protected together with the content of the expression.[98] Accordingly, usage of vulgar phrases is not to be conclusive in characterising certain speech as offensive - rather, it could serve as indicating a specific style, such as a satirical one or an ill-mannered one. These cases highlight the difficulty of judging ones tone on social

[95] *Lingens v Austria* (1986) 8 E.H.R.R. 407
[96] Filipova.V, “Standards of Protection of Freedom of Expression and The Margin of Appreciation in The Jurisprudence of The European Court of Human Rights” (2012) 17 *Coventry Law Journal* 64-83, 71
[97] Foster. S, “Freedom of Expression: Is There A Human Right To Make A Joke? (Case Comment)” (2012) 17 *Coventry Law Journal* 97-102, 102
[98] *Tusalp v Turkey* (2012) app no 32131/08. 48

networks, and it seems the legal system has not gotten to grips with the ever evolving Twitter and other online interaction. There are a lot of unpleasant people online, but should they all be arrested?

Part of the Courts problem lies in the fact that much of the Article 10 jurisprudence is focused on "high level, high value" speech that is professionally produced, well researched and contributes to discussion of matters in the public interest.[99] The Court has explained that the limits of permissible criticism are wider with regard to the Government than in relation to a private citizen because the dominant position the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings.[100] Thus, when it comes to "low level, low value" speech such as these amateur online statements, there is almost no established level of protection. Undoubtedly, the press forms an indispensable part of every democratic society. However, does this right to be informed then not coincide with the right to comment or debate on what you have been informed? According to Lord Steyn, freedom of expression acts as a brake on the abuse of power by public officials & facilitates the exposure of errors in the governance and administration of justice.[101] This should suggest that press freedom encourages freedom of expression, and should then encourage the acceptance of criticism and recognise the right and opportunity of any citizen to openly challenge any censures by the means of the media itself. However, a blogger who called a local politician a 'c***' on Twitter was convicted under s.127.[102] If the court had taken its own advice and read the tweets in the context of his battle with Bexley council, it could be described as a further demonstration of his frustration. Besides, how exactly is a four-letter word likely to fall foul of Article 10 to incite violence? Freedom of expression, an inherent trait of a healthy democracy and social progress, is only achievable through substantial tolerance from government, no matter how offensive, shocking or disturbing the comment is to the State or any sector of the population[103]. "I disapprove of what you say, but I will defend to the death your right to say it."[104]

Conclusion

We still do not know what is illegal on social media and what is not. Do Chambers, Ahmed, and Stacey's prosecutions mean that thousands of people are getting away with committing crimes on the Internet right this very second? Following such a wave of controversy about these prosecutions, the DPP has issued guidelines on social media prosecutions.[105] Nonetheless, guidance alone is simply not good enough. The law itself must have a quality of predictability and certainty.

For the future, this writer suggests the establishment of a certain, consistent and principled approach systematically upheld by the European Court in its jurisprudence. It should be flexible enough to deal with the ever-changing world, but

[99] *Ibid 24. 357*
[100] *Castells v Spain* (1992) 14 EHRR 445, 46
[101] *R v Secretary of State for the Home Department, ex p Simms* [1999] 3 WLR 328, 337
[102] The Daily Mail, <http://www.dailymail.co.uk/news/article-2130346/Blogger-used-letter-term-councillor-Twitter-facing-jail-offensive-tweet.html> accessed 5 December 2012
[103] *Ibid 12.*
[104] Hall. E.B. *The Friends of Voltaire* (Bibliolife LLC, United States, 2009), 199
[105] The Crown Prosecution Service, <http://www.cps.gov.uk/consultations/social_media_consultation.html> accessed 7 March 2013

sufficiently rigid to uphold the classic values of democracy, pluralism and freedom of expression.[106] Definitely it is no bad thing if more crimes are being detected. However, such laws were drafted with particular contexts in mind so facing new types of complaint about digital communications, the authorities have an incentive to apply existing laws to new situations. This writer suggests if a type of speech is so harmful that it requires a legal response, the laws should be framed in a way that protects the freedom to converse and any controls should be proportionate. And then that law should be laid down clearly for all to see. Or else, the capture and storage of information facilitated of digital technologies will contribute to "digital panopticon" in which people believe that they are under surveillance,[107] and thus keep silent.

The Self-Regulation Suggestion

Introduction

Assuming Chamber's tweet or Azhar Ahmed's facebook post had technically been "menacing", the decision to prosecute affected their lives in a severe way involving, in the case of Chambers, first the threat and then the reality of a criminal record, which we understand lost him two jobs. This sort of outcome is expected in criminal cases as there is enough of a public interest in punishing the allegedly unlawful behaviour that the private interest affect is outweighed. In such social media cases, not only was there not such a public interest; it was glaringly obvious from the start that none existed as the perpetrators were always harmless. These criminalizing interferences were thus, in my opinion, a disproportionate and incompatible interference with Article 10.

There may be cases that cause sufficient harm to warrant some action, but for which the existing laws are possibly too heavy handed. In such circumstances what is needed is not absolute freedom to speak regardless of the consequences, but proportionate responses that can help to foster a sense of responsibility and ethics with those using the online media. Thus this chapter will propose a self-help remedy. Although the UK courts have arguably never discussed this proposition, there is a potential that this self-regulation suggestion would be compatible with the proportionality requirement of Article 10(2).

Operational Overview

In proposing a solution, the CPS stated the threshold for criminal prosecution has to be a high and a prosecution has to be required only in the public interest. Thus separate cases where there is a campaign of harassment from cases with a credible and general threat and communications cases that are merely offensive or grossly offensive.[108] All of these groups will be subject to prosecution but a more proportionate response may be for the social media sites themselves, Twitter, Facebook, Youtube etc, to pay more attention to the world they have created and ultimately patrol it. A solid example was when the Twitter account of a British

[106] *Ibid 96.* 83
[107] *Ibid 24. 367*
[108] *Ibid 8. 7*

journalist was suspended.[109] Annoyed by the fact the National Broadcasting Company ("NBC") was not showing the Olympics 2012 ceremony live, correspondent Guy Adams tweeted the email address of the executive in charge and encouraged followers to tell him what they thought. Twitter then contacted NBC about the message before suspending his account. Twitter's 'trust and safety' department contacted Adams directing him to the site's terms and conditions against publishing someone's personal details. The issue is not whether Adams published already public information; the issue is how the case was handled.
Section 4 of Twitter's policy, entitled 'Contents of the Service', contains a free speech policy, stating that it will not interfere in disputes or restrict what it describes as 'controversial content'.[110] Twitter may claim it cannot police the content of the more than 100 million messages that traverse its global network each day. However, I suggest it is in Twitter's interest to do so. Looking back, Tom Daley's decision to publicise the comments rather than to make a complaint to the police was the appropriate course of action. He re-tweeted the offensive comments and the Twitter troll received a social humiliation at the hands of Tom's many fans. At this point, Twitter should have noticed uproar on its site and suspended the teenager's account or even blocked him off the site for a few months. Thus twitter removes the offending user and his harmful messages thereby depriving the speaker of an audience. This kind of punishment is usually better than involving the law. Another response may be to resolve disputes through a low-cost regulator that can publish its findings and, where appropriate, impose a fine and direct the speaker to remove the material.

A further possibility is that the regulator could refer the most serious and repeat offenders to criminal prosecutors as a final measure. In 2011, Sean Duffy caused "untold stress" by attacking a condolence page of a 15-year-old that had committed suicide, by mocking her death. Duffy was a repeat offender because the day after the victim killed herself by jumping in front of a moving train, he branded her a "spoiled little ****" and publicised a video in which the face of the victim was placed on a train with the theme from Thomas the Tank Engine playing in the background. He also created a Facebook page attacking a 14-year-old who died in January 2011 following an epileptic fit in her home, as he pretended he was the victim and said to the victim's mother: "Help me Mummy, it's hot in Hell." He then targeted a site for a 16-year-old, who died in a car crash on the M6, while in another case he created a page called "Jordan Cooper rest in pieces" for a 14-year-old who was stabbed to death.[111] Arguably, the context, circumstance and repetition of this warrants a conviction under communication legislation as opposed to the one time stupidity of the likes of Stacey and Woods. If it can be shown that at the first instance, Duffy was sufficiently warned then the decision to prosecute can be argued under the Article 10(2) three-stage criteria as necessary for the protection of the right of grieving families to mourn in peace and thus proportionate because of the warnings, and only after the online regulation had run its course.

Rowbotton suggests combining both options.[112] Add a regulator, which adjudicates the dispute and gives direction to the social network as to the appropriate remedy.

[109] Yahoo Sports < http://sports.yahoo.com/news/olympics--critic-of-nbc-has-twitter-account-suspended-after-network-complains.html> accessed 9 January 2013
[110] Twitter < https://twitter.com/tos> accessed 7 March 2013
[111] *Ibid 91.* 9
[112] *Ibid 24.* 381

This would at least give the speaker notice that his comment is being challenged and a chance to defend his statements. Where appropriate, the regulator could also require the network to provide a right of reply to the individual e.g. via a forum. Alternatively, a search engine or intermediary could provide its own statement, providing links to sources that challenge the offending viewpoint. Whatever the case may be, what we do not want is to get people in the habit of going to the police for something that is a non-credible threat as this clearly leads to an abuse of Article 10 and waste of time and resources.

5.3 Conclusion

Undoubtedly, these reform approaches to digital communications will be riddled with difficulties. For one, if the social network is very responsive to complaints, that may provoke criticisms that its gives too little protection to expression and potentially takes down harmless and lawful material simply because someone objects to it.[113] There is also the danger that the online regulatory agency would simply be overwhelmed with applications. However, the point to be made here is that if a regulatory system were workable, it would be more proportionate than criminal sanctions and high cost litigation as way of dealing with the harms caused by insults, offensive remarks and other ill-judged online comments. While there are still free speech concerns with such measures, the consequences of falling foul of such a regulation would not be a criminal record that taints the speaker for the rest of his life.[114]

Conclusion

Case law suggests that there may be some protection for digital communications that relate to politics and public affairs, but much everyday speech posted online will not fall into a high value category and will receive little protection under the current jurisprudence. Perhaps it is because the categories of speech identified by the courts are misguided and certain categories of speech should not be dismissed as "low value". Zimmerman argues that gossip, while characterised as trivial by many, can act as a form of social glue that bonds people.[115] Gossip, and the rules governing who participates and who is privy to what information about whom, helps mark out social groupings and establish community ties. Thus this point can be extended beyond gossip to conversation in general. The chance to engage with others, which can include poor taste jokes, ill-judged comments and some offensive remarks, allows the speaker to decide how to present himself to society. It is a way of making social connections, and people's reactions to such comments can provide a route to discovering social norms.

The reasoning that casual speech should not be given the same level of protection as political expression need not be abandoned. However, and most crucially, the approach should be supplemented with an additional principle to grant some limited

[113] "The Fall and Rise of Intermediary Liability Online" in Lillian Edwards and Charlotte Waelde (eds.), *Law and the Internet* (Oxford University Press, Oxford, 2009). 73-76

[115] Zimmerman. D, "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort" (1983) 68 *Cornell Law Review* 291

protection to conversations and informal expression that are thought to have little value. The protection should not be absolute, but should ensure restrictions are proportionate and do not hamper people's day-to-day conversations, no matter how offensive they may be. While greater thought and preparation should generally be encouraged, people should be given leeway to say things they later regret without running into serious legal difficulties. The self-regulation remedy may be adequate to give the speaker enough room to remove or edit what has been said spontaneously. And there will be a case for notice requirements, in which a failure to remove something once informed by the relevant authorities could lead to liability.

Saying context is everything introduces a degree of uncertainty, as the threshold is determined on a case-by-case basis and sensitive to the particular facts. While uncertainty is a common feature in many laws and does not provide a decisive argument, it is important to note a chilling effect may result if speakers do not know where the boundaries lie. A broadly worded criminal offence can have a chilling effect on speakers if it is not clear whether a prosecution is likely or not. The prospect of being subject to an investigation, even where no prosecution follows, can have a chilling effect in itself. As more complaints are made about digital content, there is also a risk that more prosecutions will be brought, as the police and prosecutors reach for the legal tools available governing that situation. [116] Finally, the fact that prosecutions have been brought where the harm was minimal, such as the Twitter joke trial, provides reason to doubt the effectiveness of prosecutorial discretion as a safeguard in all cases. Regardless of the penalty, having a criminal record or having to go through a trial or expensive litigation may be disproportionate in itself. For the future, more clearly defined legal mechanisms need to be in place to raise the threshold in determining when speech causes actionable harm and when it is appropriate to use regulatory sanctions.

In todays new, challenging digital environment, the existing body of legislative instruments, including the Communications Act 2003, does not provide for the degree of harmonisation, clarity nor the necessary efficiency to meet the demands which cases such as Woods/Chambers are placing on them. If however the content of posts or tweets is of such severity that a legal response is required, the legislative instruments employed need to be framed in such a way that the freedom to converse is adequately protected and the sanctions for the content of such speech are proportionate in the circumstances and measured against objective standards. The time has come for an overhaul of the current regime, and the CPS has led the way with its guidance designed to raise public consciousness as to the potential sanctions for using online mediums to express themselves. Whatever the form of guidance that is adopted, it will certainly give academics, lawyers and the CPS something to tweet about!

[116] *Ibid 24.*

Religion, Parliament and the End of Life Debate: How do Religious Beliefs Influence the Legislative Process of England and Wales?

Jacqueline Powell

Following failed proposals to develop the law of Euthanasia and Assisted Suicide, there is a need to examine a shared feature present in each unsuccessful development - religion. Religious beliefs have historically played a significant role in the legislative process of England and Wales; but in light of increasing liberalisation and dwindling religious practice, it is questionable as to what extent religious beliefs do and should influence Parliamentary decision-making. Such questions are explored here through discussions of religious morality and religious representation in Parliament, with particular regard to religious influence over the law of Euthanasia and Assisted Suicide. This paper also addresses the role of religion in a twenty-first century secular society, the direct and indirect effects of religion on Parliament, and the relationship between religion, Parliament and society. Through analysis of Hansard, legislative proposals, judicial perspectives, religious doctrine, religious lobbying and pressure groups, this paper demonstrates that religious influence is still prevalent in UK Parliament. The recommendation following this finding is that official religious representation of the Church of England in Parliament through the Lords Spiritual should be reduced or eradicated by the reintroduction of the House of Lords Reform Bill, or similar legislative proposal, allowing for democratic religious representation by the Lords Temporal. Further issues for research emerging from the findings of this paper include the impact of religious debates in the media on the legislative process, the retention and future of the General Synod in Parliament and the significance (if any) of personal religious views in the House of Commons.

Introduction

Religious beliefs have always played a significant role in the development of the law governing England and Wales. Nevertheless, secularism and dwindling religious practice[1] raise the question of whether religion does, and should still

[1] 'Church of England continues to shrink according to official figures' (National Secular Society, 19 Jan 2012) < http://www.secularism.org.uk/news/2012/01/church-of-england-continues-to-shrink-according-to-official-figures> accessed 05/02/2013

significantly influence Parliamentary decisions, particularly regarding Euthanasia and Assisted Suicide. Judicial competence in this area is doubtful[2], leaving such issues in the hands of Parliament. This paper will discuss previous parliamentary proposals to change the law on Euthanasia and Assisted Suicide and explore the impact of religion on their failures. In order to do this effectively, attention must be drawn to the wider issues faced by the interrelation of law and religion. With over 50% of people regarding themselves as not belonging to any particular religion[3], 71% disagreeing with the statement that 'Religious leaders should have influence over the decisions of government'[4] and 84% of people against any further Christian influence on politics than is already present[5], this is an issue in grave need of addressing, particularly following the withdrawal of the House of Lords Reform Bill in 2012[6].

Chapter one of this paper will evaluate the role and value of religion in England and Wales and how religion is represented in Parliament. It will also explore how the public view religion in Parliament, with discussions of recent proposals and developments surrounding this issue. Chapter two will consider religious and secular views towards Euthanasia and Assisted Suicide, with a summary of recent case law, Bills, reports and amendments. The third and final chapter will include an analysis of religious influence in relation to the proposed legislative developments discussed in chapter two. This chapter will also explore religion in relation to informal political influences such as APPGs and lobbying groups, and evaluate the general appropriateness of religious influence in Parliament.

This paper is not intended to address issues of whether Euthanasia and Assisted Suicide should be legalised, but instead aims to evaluate the influence of religion on Parliament and the legislative process, with particular regard to the illegality of Euthanasia and Assisted Suicide. It is however important to note that this study may not be generalizable to all areas of law, with Euthanasia and Assisted Suicide being particularly contentious issues. Ultimately, the central themes of this paper are to assess whether religion has a future in the legislative process, understand the relationship between religion, the legislative process and the rule of law, and evaluate the role of religion in the twenty-first century.

Religion, Society and Parliament

The value of religion in society

Religion; from teachings, doctrines, communities, beliefs, traditions, and leaders, Judaeo-Christian values are entrenched in English Society. However, the role of religion has never gone undoubted. Religious influence on law and morality is often contested, for example the famous debate between Lord Devlin and Professor Hart, which has since sparked vast academic discussion. With the view that religion is

[2] *Tony Nicklinson v Ministry of Justice and Others* [2012] EWHC 304, per Lord Justice Toulson, [150]
[3] 'YouGov-Cambridge Survey Results', (YouGov, 13 September 2012) <http://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/md6rf2qvws/Reputation%20UK%20Report_21-Aug-2012_F.pdf > p21 , accessed 15/11/2012
[4] Ibid p22
[5] Ibid p24
[6] House of Lords Reform HC Bill, (2012-2013)

entrenched in the law, Lord Devlin states 'it is built into the house in which we live and could not be removed without bringing it down'[7]. Prima facie, this would seem a convincing view when read in conjunction with legal reflections of religious teachings (albeit not expressly); for example, the Bible's Ten Commandments[8] and the 'love thy neighbour' principle[9]. As Devlin continues, 'Morals and religion are inextricably joined – the moral standards generally accepted in the Western civilization being those belonging to Christianity'[10]. However, Hart contrastingly argues that religion is non-rational and unreliable and thus does not shape morality[11]. Professor Henkin shares a similar school of thought, claiming religion is a branch of paternalism rather than a base for legal morality[12]. 'Rationality' is also questionable in relation to religion; d'Entrèves argues, 'the system of ethics which is based on these [religion as morality] assumptions cannot properly be called a 'rationalist' system'[13] as it is biased towards doctrine and not reasoned argument. Bob Watt shares this view, asserting 'we are not wholly rational creatures'[14]. Therefore, it is arguable that religion and 'rationality' are not compatible, and thus religious arguments are weak in the context of moral debates. However, d'Entrèves explains that 'reason and faith are not incompatible' as 'Christianity can be implemented and enriched by philosophy'[15]. From whichever angle the debate is viewed, it is evident that religion cannot and does not go unnoticed in society and in law-making.

Many legal philosophers hold that the doctrine of 'Natural Law', which 'overrules all other laws'[16] is significantly influenced by religion. For example, d'Entrèves describes Natural Law as a 'natural system of ethics, distinct but not separate from Christian or revealed ethics'[17]. Lord Devlin goes a step further, claiming 'morality is logically dependent on Christian beliefs'[18]. Thus when examining the political environments that have allowed religion to influence law-making, we should look to John Locke's political philosophy of tolerance[19]. Locke explains the need for religious acceptance between one another and from the state to prevent societal unrest and promote peace[20]. Religious freedom under Article 9 European Convention on Human Rights 1950 (ECHR) reflects this philosophy, aiming to avert social disorder through individual religious freedom. However Article 9 does not impose a positive duty on the state to incorporate religion into national constitutions. Locke argues that only religions that are tolerant to one another should be allowed in society, but disregards Atheists and non-religious communities, describing their knowledge as limited without religion. It is reasonable to assume that this is an inaccurate reflection of twenty-first century politics; however some truth can be drawn from Locke's

[7] Basil Mitchell, *Law, Morality and Religion in a Secular Society* (OUP 1967), 103
[8] The Holy Bible (King James Version) Exodus 20:1-17
[9] Ibid Matthew 22:39
[10] Mitchell (n7) 3
[11] Ibid 83
[12] Ibid
[13] A. P. d'Entrèves, *Natural Law: An Introduction to Legal Philosophy* (First published 1951, Hutchinson and Co Ltd, 1967) 45
[14] Bob Watt, 'To every thing there is a season and a time to every purpose under the heaven – a time to be born and a time to die. Natural law, emotion and the right to die' (2012) 24 *Denning Law Journal* 89,114
[15] d'Entrèves (n13) 36
[16] Ibid 34
[17] Ibid 46
[18] Mitchell (n7) 104
[19] John Locke, *A Letter Concerning Toleration*, (J. Brook, 1796)
[20] Ibid

writings, such as the continuance of the Church of England as a politically established body. In today's secular society, 'tolerance' towards non-religious communities is more prevalent than ever; however a question arises as to the appropriateness of such religious tolerance in the legislative processes of a pluralistic society.

The role of religion in the legislative processes of England and Wales

Religion is still very much incorporated in Parliament, headed by the Queen of England; also the head of the predominant faith throughout England and Wales – the Church of England. The strongest example of a spiritual subdivision of parliament is the General Synod of the Church of England, introduced by The Synodical Government Measure 1969, replacing the previous Church Assembly. The General Synod limits the sovereignty of Parliament by exercising both deliberative and legislative functions relating to measures affecting the governance of the Church of England and its institutions, in addition to matters regarding Canon law and Liturgy [21]. Although it has a narrow agenda, the General Synod reflects the importance of the Church of England as an established body and its effect on the legislative process. A recent example of the Synod's power to prevent legislation is their rejection of a proposal to grant women bishopry in November 2012, consequently preventing them from sitting as Lord Spirituals in the House of Lords. Voting results showed that 94% of Bishops, 77% of the House of Clergy and 64% of the House of Laity were in favour; however, six votes lost in the latter House barred the measure gaining the two-third majority it required [22]. Although not directly affecting the role of the Lords Spiritual for general legislative purposes, this Synod-induced outcome will indirectly influence diversity in the second chamber. Debatably, women bishopry in the Church of England could have progressed the Church into the twenty-first century, representing more liberal religious views; particularly in light of the Sex Discrimination Act from which the Church is exempt. Broader issues facing society such as life and death choices could also be affected by consequential changes in the Lords composition. As stated by Dr Rowan Williams (former Archbishop of Canterbury), the Church of England has 'undoubtedly lost a measure of credibility' following this decision [23]. Therefore, the value and integrity of religion - particularly that of the Church of England – within the legislative process appears to be rapidly diminishing.

This position was markedly reflected by common law in R (on the application of Johns) v Derby City Council [24]. Pentecostal Christians Eunice and Owen Johns were refused the right to become foster parents because their Christian beliefs disapproved of homosexuality. In their judgment, Lord Justice Munby and Lord Justice Beatson unequivocally rejected that Christian values play a role in English Law today; a controversial and widely publicised judicial response, 'we live in this

[21] 'About General Synod' (Church of England) <http://www.churchofengland.org/about-us/structure/general-synod/about-general-synod.aspx> accessed 28/11/12

[22] 'Women bishops vote: Church of England 'resembles sect''(BBC, 22 November 2012) <http://www.bbc.co.uk/news/uk-politics-20443718> accessed 23/11/12

[23] 'Female bishops: we have lost credibility says Archbishop of Canterbury – video' (The Guardian, 21 November 2012) <http://www.guardian.co.uk/world/video/2012/nov/21/female-bishops-lost-credibility-archbishop-video> accessed 23/11/12

[24] [2011] EWHC 375 (Admin)

country in a democratic and pluralistic society, in a secular state not a theocracy'[25]. This acknowledgement of England and Wales as a pluralistic society is not novel. According to the 2012 British Social Attitudes Survey, 50% of British citizens described themselves as non-religious, contrastable with 44% who described themselves as Christian[26]. This vast societal shift is reiterated by Munby and Beatson in their judgement, 'Although historically this country is part of the Christian west, and although it has an established church which is Christian, there have been enormous changes in the social and religious life of our country over the last century. Our society is now pluralistic and largely secular'[27]. Munby and Beatson went even further to say 'the laws and usages of the realm do not include Christianity, in whatever form. The aphorism that "Christianity is part of the common law of England" is mere rhetoric'[28]. This view implies that there is no longer room for Christianity in English law, or for any religious beliefs that contravene pluralistic and secular opinion. However, Munby and Beatson may have understated the reality of religious value, particularly in light of the maintained presence of the Church of England in Parliament, despite undeniable societal tensions. For example, David Cameron echoed the tone of the judicial approach in the Johns case, stating 'Christians must be "tolerant and welcoming" towards homosexuality'[29], a seemingly accurate reflection of public opinion when read alongside the BSA survey data above. However, this can be contrasted with the view of former Shadow Home Secretary and Roman Catholic, Ann Widdecombe who disagreed, claiming it is 'high-time the government was tolerant and welcoming and broad minded towards Christians'[30].

From both Parliament and common law, pressure is on the state to limit the impact of religious views on the governance of England and Wales. However, the Lords Spiritual in the House of Lords show an 'enduring constitutional arrangement, with an established Church of England and its Supreme Governor as Monarch and Head of State'[31]. Bishops have sat in the Lords since the fourteenth century and have almost always had power to influence law-making in England and Wales. The Church of England today is made up of forty-four dioceses, however, the Lords only provide seats for twenty-six Anglican Bishops (Lords Spiritual), amounting to 3.5% of the total chamber. This figure, deriving from the Bishopric of Manchester Act 1847, demonstrates attempts to restrict religious influence on Parliament as early as the nineteenth century. Further limitations to the number of Anglican Bishops in the second chamber have since been proposed. For example, The Royal Commission's report, 'A House for the Future'(2000) [32], and the Government's White Paper, 'Completing the Reform' (2001)[33]. Both proposals suggested reducing the number of Bishops from twenty-six to sixteen, and highlight the importance of

[25] Ibid [36]
[26] 'British Attitudes Survey 28' (National Centre for Social Research, 17th September 2012) <http://ir2.flife.de/data/natcen-social-research/igb_html/index.php?bericht_id=1000001&index=&lang=ENG> accessed 27/11/12
[27] [2011] EWCH 375 (Admin) [38]
[28] Ibid [39]
[29] Andrew Hough, 'David Cameron defends ban on anti-gay foster parents', (The Telegraph, 9 March 2011) <http://www.telegraph.co.uk/news/religion/8370280/David-Cameron-defends-ban-on-anti-gay-foster-parents.html> accessed 27/11/2012
[30] Ibid
[31] 'Bishops in the House of Lords' (Church of England) <http://www.churchofengland.org/our-views/the-church-in-parliament/bishops-in-the-house-of-lords.aspx> accessed 27/11/12
[32] Royal Commission on the Reform of the House of Lords, *A House for the Future*, (Cm 4534, 2000)
[33] Government, *The House of Lords: Completing the Reform*, (White Paper, Cm 5291, 2001)

representation of religions other than the Church of England. Nevertheless, according to the Church of England, the Lords Spiritual 'seek to be a voice for all people of faith, not just Christians'[34]; a claim difficult to accept considering faith discrepancies, to be discussed in chapter two.

The House of Lords Reform Bill 2012

The House of Lords Reform Bill 2012[35] is the most recent attempt to reorganise the Lords Spiritual within the House of Lords. Introduced into the House of Commons by Deputy Prime Minister Nick Clegg in June 2012, Part 4 of the Bill proposed to amend the composition of the House of Lords, separating the Lords Spiritual into 'Named' and 'Ordinary'. 'Named' Lords Spirituals would be the Archbishop of Canterbury, Archbishop of York, and the Bishops of London, Durham and Winchester, who would automatically qualify for a place in the second chamber. 'Ordinary' Lords Spirituals on the other hand would be reduced at each election period from sixteen to eleven and finally down to seven from the current twenty-one seats. This would decrease official religious representation in the House of Lords from 3.5% to approximately 1.5%[36]; a suggestion supported by both the government and the public.

A poll conducted by YouGov-Cambridge in August 2012[37] asked over one thousand people their views on the role and value of religion in parliament. Unsurprisingly, the results mirrored the House of Lords Reform Bill. 71% of those consulted disagreed with the statement that 'Religious leaders should have more influence over the decisions of Government'[38]. 81% also agreed with the statement that 'Religious practice is a private matter and should be separated from the political and economic life of my country'[39]. Judging from this data, the public would prefer a religiously-neutral or independent state, free of religious interference. Yet despite its indubitable support, including a House of Commons majority of 462 votes in favour to 124 against, the House of Lords Reform Bill was officially withdrawn by Nick Clegg in September 2012[40]. As a result, the Lords Spiritual continue to occupy 3.5% of the Lords; a seemingly minor proportion of the chamber. However, in practice the Lords Spiritual do indeed have the power to sway legislative decisions. A distinct example of this occurred during the debate of the Equality Bill (Division 3) 2010[41], to remove the religious exemption of Equality provisions from organised religion. In this instance, eight Lords Spirituals voted against the removal of the provision, whilst the margin of defeat was five[42]. Thus, although a minority in the House of Lords, religious power should not be underestimated or regarded as insignificant, particularly during the legislative processes for faith-sensitive issues.

[34] 'Bishops in the House of Lords' (Church of England) (n31) accessed 20/11/12
[35] House of Lords Reform HC Bill, (2012-2013)
[36] Calculation: (12/811) x 100
[37] 'YouGov-Cambridge Survey Results' (YouGov, 13 September 2012) (n3), accessed 15/11/2012
[38] Ibid p22
[39] Ibid p23
[40] 'House of Lords reform' (Parliament) <http://www.parliament.uk/business/lords/lords-history/lords-reform/> accessed 04/03/2013
[41] Equality (Division 3) HC Bill, (2009-2010)
[42] Matthew Purvis, 'House of Lords: Religious Representation'(25 November 2011, LLN 2011/036) 41

Religious influence in the House of Commons

An elected chamber, the House of Commons aims to represent the views and policies of their political parties, as voted for by the general public. Thus prima facie, this chamber is less influenced by religion than the Lords. However, circumstances may arise that require Members of Parliament to abandon their political stance and apply personal judgment –'conscience' or 'free' votes. This method of voting is typically used for contentious issues of ethics and religion including homosexuality, abortion and end-of-life law[43]. These indirect religious influences raise concerns in relation to representation, accountability and rationality of opinion. Søren Holm reiterates this point, 'a religious person should not use religious arguments and should only use secular arguments to come to the same conclusions if he is convinced that they are valid and sound'[44]. Therefore, if 'conscience' votes can be supported by non-religious reasons, they can be justifiably generalised and apply to all, not just the religious community with whom they are associated. Nonetheless, conscience votes in the House of Commons are rare.

Religious contributions are also noticeable through reports and research carried out by All-Party Parliamentary Groups (APPGs); increasingly common throughout government to encourage legislative change. APPGs are 'informal, cross-party interest groups that have no official status within Parliament'[45], consisting of members across both houses of Parliament. While playing no formal role in the legislative process, APPGs enable the like-minded within Parliament to discuss and campaign for certain policies. Whilst appearing a fair, democratic and representative process, APPGs often mimic and collaborate with lobbying groups (including charities and religious organisations), who may utilise their position to indirectly influence parliamentary agendas. As explained by APPG guidance rules, 'many groups choose to involve individuals and organisations from outside of Parliament in their administration and activities'[46]. For example, the 'Humanist' APPG's secretariat is the 'British Humanist Association'[47], whilst the 'Christians in Parliament' APPG have the assistance of a researcher from the 'Bible Society' (charity) three days a week[48]. Therefore, religion is undeniably central throughout Parliament, extending to even informal associations, facilitating significant non-parliamentary influences in the legislative process.

By looking to the development of the law on Euthanasia and Assisted suicide in England and Wales, an effective evaluation can be made as to the extent of religious influence in this area. From this, we can then assess whether the legislative outcomes

[43] Philip Cowley, 'Unbridled passions? Free votes, issues of conscience and the accountability of British Members of Parliament' (1998) 4 *Journal of Legal Studies* 70

[44] Søren Holm, 'Religion and Scientific Freedom', in Simona Giordano, John Coggon and Marco Cappato (eds), *Scientific Freedom*, (Bloomsbury Academic, 2012) 136

[45] House of Commons, 'Guide to the rules of All-Party Groups' (March 2012). <http://www.parliament.uk/documents/pcfs/all-party-groups/guide-to-the-rules-on-apgs.pdf> accessed 23/11/2012, p3

[46] Ibid

[47] House of Commons, 'Register Of All-Party Groups'(1 February 2013), <http://www.publications.parliament.uk/pa/cm/cmallparty/register/register.pdf> accessed 22/02/2013

[48] Ibid

reflect the views of society and consequently, are religious influences in Parliament justifiable in a twenty-first century secular democracy?

Euthanasia, Assisted Suicide, Religion And The Law

Euthanasia and Assisted Suicide in today's society

Euthanasia – Greek for 'a good death' – and Assisted Suicide form internationally controversial areas of law and ethics. Euthanasia is defined in the Oxford English Dictionary as 'a gentle and easy death, the bringing about of this, especially in the case of incurable and painful disease'[49]. Euthanasia can be active (killing), passive (letting die), voluntary (person's request), involuntary (against a person's wishes) and non-voluntary (no capacity to make a request)[50]. Assisted suicide is defined and prohibited under section 2 of the Suicide Act 1961, 'A person ("D") commits an offence if D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and D's act was intended to encourage or assist suicide or an attempt at suicide', carrying a maximum imprisonment sentence of fourteen years. Euthanasia is illegal in England and Wales and carries a life imprisonment sentence under section 1 of the Murder Act 1965. This prohibition is reinforced by international legislation - the Universal Declaration of Human Rights 1948, Article 3 'Everyone has the right to life, liberty and security of person' and Article 2 of the ECHR, the 'right to life'. Both international 'agreements' arose following World War II, from which Euthanasia has negative connotations stemming from distressing memories of the Nazi regimes in Germany. However, 'the Nazi euthanasia programme was driven by racial imperatives, it had little significance for debates about the mercy killing of the terminally ill'[51], upon which such issues now focus. Despite the advancement of scientific research and medical treatment, many illnesses remain terminal and deteriorative. In such situations, it is arguable that people should have the freedom to choose when their inevitable death occurs and under what circumstances.

Religious views on Euthanasia and Assisted Suicide

As discussed above, religion plays a large part in the legislative process, both directly and indirectly, particularly regarding controversial issues such as end-of–life law. In addition to his arguments in chapter one, d'Entrèves explains 'Mankind is ruled by two laws: Natural Law and Custom. Natural Law is that which is contained in the Scriptures and the Gospel'[52], and thus religious perspectives must be observed. England and Wales are multi-faith societies, as illustrated by the aforementioned BSA Survey data which showed, 50% of people as non-religious, 35% as Christian, 9% as Roman Catholic, and 6% as other[53]. Various views on Euthanasia and Assisted Suicide are present in different religious communities, although the sanctity of life is a central tenet of all. It is essential for this discussion to explore the main religious

[49] Emily Jackson and John Keown, *Debating Euthanasia*, (Hart Publishing, 2011) 1
[50] Hazel Biggs, *Euthanasia: Death with Dignity and the Law*, (Hart Publishing, 2001) 12
[51] Michael Burleigh, *Ethics and Extermination: Reflections on Nazi Genocide*, (Cambridge University Press 1997) 147
[52] d'Entrèves (n13) 33
[53] 'British Attitudes Survey 28' (National Centre for Social Research, 17th September 2012) (n26)

views in England and Wales regarding Euthanasia and Assisted Suicide to evaluate the application of such views in Parliament.

Euthanasia and Assisted Suicide are prohibited by the Buddhist community. The ending of human life is 'the third parajika; one of the four most serious offences in the monastic code that are punished by lifetime expulsion from the monastic community'[54]. Judaism holds that one should not take their own life or seek help to do so, but instead 'pray to God to permit death to come'[55]. Hinduism on the other hand, argues that Karma explains inevitable suffering, although a 'good death' – one 'timely, in the right place, conscious and prepared'[56] - is preferred over unnecessary suffering. Thus, Hinduism acknowledges 'religious grounds for voluntary euthanasia, especially for spiritually advanced individuals'[57]. Conversely, Islam prohibits both Euthanasia and Assisted Suicide, 'it is not given to any soul to die, save by the leave of God, at an appointed time' (Qur'an 3:145) as 'God gives life, and He makes to die' (Qur'an 3:156)[58]. Similarly, Sikhism teaches that life is a gift from God and shouldn't be interfered with, although Sikhs should 'look at the whole picture, and make appropriate distinctions between ending life, and not artificially prolonging a terminal state'[59]

The Church of England, the predominant religion in England and Wales appears to have split views on Euthanasia and Assisted Suicide. On the one hand, knowing the time of their death is a blessing, enabling them to repent and seek forgiveness for wrongdoings[60]. However, the fundamental principle of the sanctity of life is likely to trump 'mercy killing' and assisted dying, 'The life of every creature and the breath of all people are in God's hands' Job 12:10. The Bible repeatedly refers to the importance of cherishing and preserving life: Genesis 1:27, 'God created man in his own image'; Psalms 31:15, 'my times are in thy hand' and Ecclesiastes 3:1-4 'For everything there is a season, and a time for every matter under heaven: a time to be born, and a time to die'[61]. Additionally, 'thou shalt not kill', found in Exodus 20:13[62] is often quoted in debates. However, the Bible seems to allow Euthanasia and Assisted Suicide in circumstances of compassion, such as 2 Samuel 1:9-10 which states 'slay me: for anguish is come upon me, because my life is yet whole in me. So I stood upon him, and slew him, because I was sure that he could not live after that he was fallen' [63] .This demonstrates that compassion may prevail alongside the exercising of the 'second most important' commandment, 'love thy neighbour as thyself' found in Mark 12:31. However, this verse can be applied contrastingly; to facilitate dignity and compassion, but also to protect vulnerable people and preserve the sanctity of life.

[54] Damien Keown, 'End-of-life: the Buddhist view', (2005) 366 *Lancet* 952, 953
[55] Elliot N Dorff, 'End-of-life: Jewish Perspectives', (2005) 366 *Lancet* 862
[56] Shirley Firth, 'End-of-life': a Hindu view', (2005) 366 *Lancet* 682
[57] Ibid
[58] Abdulaziz Sachedina, 'End-of-life: the Islamic view', (2005) 366 *Lancet* 774, 779
[59] 'Euthanasia, assisted dying and suicide' (BBC, 27th October 2009) <http://www.bbc.co.uk/religion/religions/sikhism/sikhethics/euthanasia.shtml> accessed 07/02/2013
[60] H Tristam Engelhardt Jr and Ana Smith Iltis, 'End-of-life: the traditional Christian view', (2005) 366 *Lancet* 1045, 1046
[61] The Holy Bible, (King James Version)
[62] Ibid
[63] Ibid

Catholicism, for reasons similar to the Church of England, strictly condemns Euthanasia and Assisted Suicide. In his Evangelium Vitae, the former Pope John Paul II described society as having a 'culture of death'[64], condemning Euthanasia as a 'grave violation of the law of God'[65]. However, Catholic theology teaches that 'while patients are obliged to choose ordinary methods for preserving life, they have the choice as to whether or not to accept extraordinary measures'[66]. Markwell states that 'the art of medicine is a human endeavour that imitates the beauty and creativity of God' [67]. Thus, while medicine and treatment should be used to preserve life and prevent pain, it should not be used to end life. However, Catholicism generally accepts 'double effect', as developed by Lord Goff in Airedale NHS Trust v Bland[68]. Double effect allows 'a bad consequence to result from one's actions, even if it is foreseen as certain to follow'[69]; for example, the acceleration of a person's death as a result of pain relief treatment.

The most recent reiteration of the Catholic stance can be found in the annual speech of Pope Benedict XVI given on the 7th January 2013, during which he reminded countries to have 'respect for human life at every stage'[70]. He continued, stating he was 'gratified that a resolution of the Parliamentary Assembly of the Council of Europe, in January of last year, called for the prohibition of euthanasia'[71]. However, this prohibition only applied to Euthanasia, not assisted suicide. With this in mind, Pope Benedict attacked the central secular argument favouring Assisted Suicide - individual autonomy, 'Sadly, especially in the West...Rights are often confused with exaggerated manifestations of the autonomy of the individual, who becomes self-referential, no longer open to encounter with God'[72].

Similarly, Lord Devlin argued that to breach the principle valuing the sanctity of life is 'an offence not merely against the person who is injured, but against society as a whole'[73], as 'the law is concerned to enforce a moral principle'[74]. Contrastingly, Sarah Wootton, chief executive of the pressure group 'Dignity in Dying', argues 'At heart, people should not be prosecuted for compassionate assistance. We have to think about what is criminal and what is not'[75]. After all, should personal decisions such as when to end your life not be matters beyond the criminal law? Not according to Professor Hart, who regards law as paternalistic, 'designed to protect individuals

[64] Pope John Paul II, *Evangelium Vitae, (Saint Peter's,* 25 March 1995), paragraph 12<http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html> accessed 25/02/2013
[65] Ibid paragraph 65
[66] Hazel Markwell, 'End-of-life: a Catholic view'(2005)366 *Lancet* 1132, 1133
[67] Ibid 1134
[68] [1993] AC 789, per Lord Goff [867]
[69] John Keown, *Euthanasia, Ethics and Public Policy: An Argument Against Legalisation* (Cambridge University Press, 2002) 20
[70] Pope Benedict XVI, *Address of His Holiness Pope Benedict XVI to the members of the Diplomatic Corps accredited to the Holy See* (Sala Regia, 7 January 2013) paragraph 10 <http://www.vatican.va/holy_father/benedict_xvi/speeches/2013/january/documents/hf_ben-xvi_spe_20130107_corpo-diplomatico_en.html> accessed 20/02/2013
[71] Ibid
[72] Ibid paragraph 11
[73] Mitchell (n7) 5
[74] Ibid 13
[75] Philippa Roxby, 'Assisted suicide:10 years of dying at Dignitas' (BBC, 21 October 2012) <http://www.bbc.co.uk/news/health-19989167> accessed 02/02/2013

against themselves'[76] and prevent people from making poor decisions. As stated by Mill, 'because it will be better for him' or 'make him happier' should be distinguished from what is 'right'[77]. Although, debatably Mill's approach would apply differently in religious and non-religious contexts; with God's will trumping what society may consider to be 'right' in faith communities.

Church of England policy advisor, Claire Foster holds that vulnerable people may be exploited through pressure to prematurely end their lives[78].Contrastingly, Christian theologian Hans Küng argues that the exploitation of vulnerable people actually occurs through intolerable pressure for patients to undertake stressful and burdensome treatments that are unlikely to work[79].This demonstrates that even within religions, views may differ significantly, despite hard-line stances of religious leaders and organisations (particularly within Parliament). Such disparity can also be seen through the works of Reverand Professor Paul Badham[80], a patron of 'Dignity in Dying' and Vice-Chancellor of the 'Modern Church' council, a 'membership organisation that promotes liberal Christian theology'[81]. Badham shares Emily Jackson's argument that 'God's monopoly on determining the moment of death has already been substantially usurped by modern medicine'[82]. Badham believes that Assisted Suicide should be legal as an 'insurance policy' for when life becomes too unbearable[83]; a view taken from biblical teachings in Ecclesiasticus 30:17, 'death is better than a miserable life and eternal rest than chronic illness'. This religious compromise with secularity is an approach compatible with society, encompassing values from religion whilst embracing majority views.

It is clear from the above discussion that religious views on Euthanasia and Assisted Suicide are not unanimous; although generally, prominent religious viewpoints oppose the legalisation of Euthanasia and Assisted Suicide due to the value of human life and for non-interference with God's will.

Secular views on Euthanasia and Assisted Suicide

Euthanasia and Assisted Suicide are even contested within non-religious, secular communities. With regard to religious argument, Emily Jackson controversially stated that the 'sanctity of life objection to assisted dying can be dispensed with relatively easily as a determinant of public policy in a secular society'[84]. However, as noted by John Keown, the sanctity or 'inviolability' of life is a concept not just relevant to religious communities, 'we all share a fundamental equality-in-dignity'[85]. Such principles derive from human rights law (e.g. ECHR 1950), applied by the Council of Europe in 1999 when considering the decriminalisation of assisted dying

[76] Mitchell (n7) 13
[77] Ibid
[78] Claire Foster and Reverand Professor Paul Badham, 'Christian views on Euthanasia', Clip 443, (BBC,) '<http://www.bbc.co.uk/learningzone/clips/christian-views-on-euthanasia/433.html> accessed 10/01/2013
[79] Hans Kung, Walter Jens, John Bowden, *A Dignified Dying*, (SCM Press, 1995)
[80] Paul Badham, *Is there a Christian case for Assisted Dying?* (SPCK Publishing, 2009)
[81] 'Modern Church' <http://www.modchurchunion.org/about/index.htm accessed> 06/01/2013
[82] Jackson and Keown (n49) 38
[83] Badham, (n80)
[84] Jackson and Keown (n4) 37
[85] Ibid 89

at European Level[86]. 'Inviolability' arguments are strongly supported by Pro-Life lobbying groups such as Care Not Killing, CARE, and The ProLife Alliance, made up of religious and non-religious members.

The 'British Medical Association' and 'Royal Medical Colleges' also explicitly oppose the legalisation of Euthanasia and Assisted Dying, deeming improvements to palliative care a more justifiable investment[87]. This view is shared by many other opposition groups and religious communities such as the 'Christian Medical Fellowship'[88]. A further argument opposing legalisation is the protection of vulnerable people against personal and societal pressures, as mentioned above. For example, 'Not Dead Yet UK' campaign to protect the disabled and terminally ill from such risks[89]. As highlighted by Richard Harries, the endorsement of Assisted Suicide arguably sends out an undesirable 'subliminal message' that when people become burdensome or reliant on others, their life is consequently less valuable[90].

The predominant support group in favour of legalising Euthanasia and Assisted Suicide in the UK are 'Dignity in Dying' (DID). DID claim to support 'greater choice, control and access to services at the end of life...providing terminally ill adults with the option of an assisted death' and currently has over 25,000 members[91]. Individual autonomy and the right to respect for private and family life (as stated in Article 8 of the ECHR), are fundamental arguments in favour of legalisation. However, interestingly such arguments have not been compelling in court[92]. Compassion is also valued, but as stated by Keown, 'Compassion is a laudable emotion...not a moral principle'[93]. Pro-legalisation groups believe that legalisation in England and Wales would ensure safeguarding, end political outsourcing[94] and provide clarity and certainty to the law. Legalisation could also prevent discrimination against the less wealthy, unable to afford to travel abroad to end their lives (which costs around £5000 at Dignitas[95]).

Despite widespread secular controversy and religious opposition, the 'gradual eroding of the taboos around death, how we die and what it means to an individual, can only be a good thing'[96]. This view reflects public opinion recently surveyed

[86] Ibid 91
[87] Peter Saunders, 'The Role of the Media in Shaping the UK Debate on 'Assisted Dying' (2011) 11 *Medical Law International*, 239, 241
[88] 'Assisted Suicide' (Christian Medical Fellowship) <http://www.cmf.org.uk/publicpolicy/end-of-life/assisted-suicide/> accessed 02/03/2013
[89] 'About Not Dead Yet UK' (Not Dead Yet UK) <http://www.notdeadyetuk.org/notdeadyet-about.html> accessed 02/03/2013
[90] Richard Harries, *Questions of Life and Death: Christian Faith and Medical Intervention* (London, Society for Promoting Christian Knowledge, 2010) 109.
[91] 'Marie Fleming loses legal case challenging Irish laws prohibiting assisted dying' (10 January 2013) <http://www.dignityindying.org.uk/news/general/n352-marie-fleming-loses-legal-case-challenging-irish-laws-prohibiting-assisted-dying.html> accessed 21/01/2013
[92] See R *(on the application of Purdy) v Director of Public Prosecutions* [2009] UKHL 45, and *R (on the application of Nicklinson) v Ministry of Justice* [2012] EWHC 2381 (Admin)
[93] Jackson and Keown (n49) 101
[94] Philippa Roxby, 'Assisted suicide:10 years of dying at Dignitas' (n75)
[95] 'Dignitas founder is millionaire' (The Telegraph, 24 June 2010) <http://www.telegraph.co.uk/news/worldnews/europe/switzerland/7851615/Dignitas-founder-is-millionaire.html> accessed 15/02/2013
[96] 'Euthanasia and Assisted Suicide' (Dr Gill Jenkins, June 2011) <http://www.bbc.co.uk/health/support/terminalillness_euthanasia.shtml> accessed 23/12/2012

showing that out of 1052 people, 22% believed 'doctor-assisted suicide (euthanasia)' was 'always morally acceptable', 65% felt 'it depends on the situation', and only 8% supported the view that it was 'always morally wrong'[97]. Interestingly, the same poll showed 82% of the sample deemed it morally acceptable to 'convert away from your religion' [98] .This data illustrates the liberalisation of views towards religiously controversial issues, alongside the decline of religious value and importance in society.

Case law surrounding Euthanasia and Assisted Suicide

Case law in this area has slowly evolved since the 1990s; however the judiciary have been reluctant to stretch their jurisdiction to significantly modify the law on Euthanasia and Assisted Suicide. Nevertheless, in the case of Airedale NHS Trust v Bland[99] the House of Lords held that the withdrawal of artificial nutrition and hydration was lawful, assessing the patient's 'best interests' and the fact that the removal of treatment was not an 'act' but an 'omission'. In 2002, the European Court of Human Rights (ECtHR) heard the case of British woman Diane Pretty[100], a motor neurone disease sufferer who sought confirmation that upon assisting to end her life, her husband would not face prosecution. The ECtHR found that there had been no violation of any articles proposed (2, 3, 8, 9 and 14 ECHR), and dismissed a 'right to die' under Human Rights law.

Seven years later, the House of Lords in R (on the application of Purdy) v Director of Public Prosecutions[101] held that 'a custom-built policy statement' was needed to provide guidance for prosecutions of Assisted Suicide[102]. In February 2010, the DPP published the 'Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide' providing information about which factors may lead to or detract from prosecution[103]. This publication was heavily criticised by religious lobbying groups such as the 'Christian Medical Fellowship' (CMF), who openly voiced their concerns[104]. Debbie Purdy's case followed the death of a young, paralysed rugby player, Daniel James, whose parents had accompanied him to end his life at Dignitas. Although a clear contravention of English law, the DPP decided that prosecuting James' parents was not in the public interest[105]. While religious communities disapproved of this decision and the guidelines, chief executive of 'Dignity in Dying' Sarah Wootton described them as 'a watershed moment'[106].

A recent case attracting vast public interest is Tony Nicklinson's, a locked-in syndrome sufferer, who claimed that his inability to be voluntarily euthanized

[97] 'YouGov-Cambridge Survey Results' (YouGov, 13 September 2012) (n3) 29
[98] Ibid 30
[99] [1993] AC 789
[100] Pretty v United Kingdom (2346/02) [2002] 2 F.L.R. 45
[101] [2009] UKHL 45
[102] Ibid [53] per Lord Brown of Eaton-Under-Heywood
[103] 'Policy for Prosecutions in Respect of Cases of Encouraging or Assisting' (Director of Public Prosecutions, February 2010) <http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html> accessed 10/01/2013
[104] 'Assisted suicide DPP guidelines currently cause concern' (Christian Medical Fellowship, 2009) <http://www.cmf.org.uk/publications/content.asp?context=article&id=25448> accessed 09/02/2013
[105] 'Decision On Prosecution – The Death By Suicide Of Daniel James'(CPS, 9 December 2008) <http://www.cps.gov.uk/news/articles/death_by_suicide_of_daniel_james/> accessed 09/02/2013
[106] Philippa Roxby, 'Assisted suicide: 10 years of dying at Dignitas' (n75)

contravened his Article 8 ECHR rights. In 2012, the High Court reiterated that a blanket ban on Assisted Suicide did not contravene Article 8, and thus neither would a ban on Voluntary Euthanasia[107]. Lord Justice Toulson stated 'It is not for the court to decide whether the law about assisted dying should be changed and, if so, what safeguards should be put in place...these are matters for parliament to decide'[108]. Tony Nicklinson passed away six days after the ruling, but his family have been granted permission to appeal the case on his behalf[109]. However, following Toulson's recommendation, any change to the law is likely to derive from Parliament, not the appellate courts.

Legislative proposals

Alongside the development of case law on Euthanasia and Assisted Suicide, various legislative proposals have emerged; however all have resulted in the same outcome – the maintained illegality of both acts. In 2003, Lord Joffe introduced a Private Member's Bill, the Patient (Assisted Dying) Bill[110], with the aim to decriminalise Assisted Suicide for assisting travel for the purpose of ending life. The Bill began its second reading in June 2003, but did not proceed any further. On 10th March 2004, Lord Joffe introduced a follow up Bill, the Assisted Dying for the Terminally Ill Bill[111], which aimed 'to enable a competent adult who is suffering unbearably as a result of a terminal illness to receive medical assistance to die at his own considered and persistent request'[112]. The Bill was remitted to a Select Committee, chaired by Lord Mackay of Clashfern. A take note debate was carried out on the 10th of October 2005, but lapsed at the end of the 2004/5 session. The Bill was eventually reintroduced on the 9th November 2005 and had its second reading on the 12th May 2006. However, contrary to tradition, the Bill was defeated 148 votes to 100 in the Lords at second reading[113].

The Mental Capacity Act 2005 also attracted much debate regarding Euthanasia and Assisted Suicide. The act was 'designed to protect people who can't make decisions for themselves or lack the mental capacity to do so'[114], and much importance was placed on the patient's best interests. Following religious and lobbyist pressure, section 4(5) (the 'Howarth amendment') was inserted into the act. The purpose of this provision was to prohibit 'backdoor Euthanasia'[115] through 'motivations' to bring about a person's death by claiming that it was in their best interests. However, as discussed in chapter three, the practical effectiveness of this provision has since been doubted.

[107] [2012] EWHC 2381 (Admin) [148] per Lord Justice Toulson
[108] Ibid [150]
[109] 'Tony Nicklinson's family wins right to appeal against high court ruling'(The Guardian, 3 January 2013) <http://www.guardian.co.uk/uk/2013/jan/03/tony-nicklinson-family-right-appeal> accessed 07/02/2013
[110] Patient (Assisted Dying) HL Bill (2003-2004)
[111] Assisted Dying for the Terminally Ill HL Bill, (2004-2005)
[112] Sally Lipscombe and Gavin Colthart, 'Assisted Suicide' (House of Commons, Standard Note SN/HA/4857, 16 March 2012) p13 <www.parliament.uk/briefing-papers/sn04857.pdf> accessed 26/02/2013
[113] Ibid
[114] 'Mental Capacity Act' (NHS) <http://www.nhs.uk/CarersDirect/moneyandlegal/legal/Pages/MentalCapacityAct.aspx> accessed 02/03/2013
[115] 'Mental Capacity Act' (Christian Medical Fellowship) <http://www.cmf.org.uk/publicpolicy/end-of-life/mental-capacity-act/?index=10> accessed 04/03/2013

In 2009, former Secretary of State for Health Patricia Hewitt MP attempted to introduce an amendment to the Coroners and Justice Bill[116], legalising Assisted Suicide for assisting end-of-life travel. This amendment, introduced during the Bill's report stage in the House of Commons, was rejected. Contrastingly, Lord Falconer proposed a similar amendment to the Coroners and Justice Bill, during its committee stage in the Lords. Although debated, the amendment was defeated 194 votes to 141[117]. Following the proposed amendments and the DPP's prosecution guidelines, the independent 'Commission on Assisted Dying' was created in November 2010 by Terry Pratchett (patron of 'Dignity in Dying') and Bernard Lewis. Think-tank 'Demos' were appointed administrators and researchers of the commission alongside Lord Falconer who was appointed chairman. The Commission published its final report on the 5th January 2012, branding the law as 'inadequate and incoherent' and suggesting Parliament consider a new legal framework[118]. Using the findings of the Commission, the 'Choice at the End of Life' APPG, in partnership with 'Dignity in Dying', drafted a Bill and launched a consultation in preparation for Lord Falconer to propose to Parliament in 2013.

As mentioned earlier in relation to Pope Benedict XVI, on the 25th January 2012 the Parliamentary Assembly of the Council of Europe passed a resolution, explicitly prohibiting Euthanasia. Section 5 of the resolution states, 'Euthanasia, in the sense of the intentional killing by act or omission of a dependent human being for his or her alleged benefit, must always be prohibited'[119]. However, no such discussion of Assisted Suicide was undertaken.

Contrastingly, on the 23rd September 2012, UK Parliament passed the policy motion 'Medically Assisted Dying', calling for 'parliamentary time to be allotted to a private members bill when it is tabled'[120], ensuring the consideration of Lord Falconer's future Bill. Thus, it would seem that Parliament, alongside wider Europe (through their decision not to prohibit Assisted Suicide) is finally acknowledging what legal philosophers such as Dworkin have argued for many years, 'in a free society, individuals must be allowed to make...decisions for themselves, out of their own faith, conscience and convictions'[121].

In light of both religious and non-religious discussion there is confusion as to why proposed legislative developments surrounding the law of Euthanasia and Assisted Suicide have not succeeded in Parliament. Out of 182 citizens who have travelled to Dignitas to end their lives, no convictions for Assisted Suicide have followed[122].

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[116] Coroners and Justice HC Bill (2008-2009)
[117] Lipscombe and Colthart, 'Assisted Suicide' (n112) p15
[118] Commission on Assisted-Dying, "*The current legal status of Assisted Dying is inadequate and incoherent"* (5 January 2012) <http://www.demos.co.uk/files/476_CoAD_FinalReport_158x240_I_web_single-NEW_.pdf?1328113363> accessed 16/02/2013
[119] Council of Europe Parliamentary Assembly, *Protecting human rights and dignity by taking into account previously expressed wishes of patients,* (Resolution 1859, 2012) <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta12/ERES1859.htm> accessed 19/01/2013
[120] 'Parliament should have a free vote on assisted dying, says Lib-Dems' (Private Client Advisor 24 September 2012) <http://www.privateclientadviser.co.uk/news/vulnerable-clients/parliament-should-have-free-vote-assisted-dying-says-lib-dems> accessed 04/02/2013
[121] Ronald Dworkin *Life's Dominion* (New York: Alfred A Knopf, 1993) 157
[122] Martin Beckford, '14% rise in British members of Dignitas' (The Telegraph, 23 January 2013) <http://www.telegraph.co.uk/news/uknews/law-and-order/9028651/14-rise-in-British-members-of-Dignitas.html> accessed 02/03/2013

Assisted suicide is being effectively outsourced and unofficially decriminalised. Thus arguably, the law prohibiting Assisted Suicide only remains as a means of reassurance for religious and Pro-Life pressure groups.

Religious Influence On The Illegality Of Euthanasia And Assisted Suicide

Religion and the law surrounding Euthanasia and Assisted Suicide

Religious influence on certain policies is welcomed and valued, even within a secular society. However, religious opposition of legislation strongly favoured by the public creates societal hostility and parliamentary tensions. Throughout parliamentary debates regarding changes to the law of Euthanasia and Assisted Suicide, much discussion has focused on religious issues in addition to secular and ethical considerations. To evaluate the extent of such religious influence, we must explore the recent parliamentary developments discussed in chapter two in more detail.

In the 1994 'Report of the Select Committee on Medical Ethics on Assisted Dying'[123], discussion opened with the principle of the 'sanctity of life', 'Belief in the special worth of human life is at the heart of civilised society. It is the fundamental value on which all others are based, and is the foundation of both law and medical practice'[124]. Although a principle shared by most, 'sanctity of life' is often indicative of religious beliefs. With written evidence from fourteen different religious organisations, a religious tone was very much present throughout the report. Amongst other reasons, this resulted in the failure to propose a Bill legalising assisted suicide following the report. In contrast, The Medical Treatment (Prevention of Euthanasia) Bill 2000 was introduced by Ann Winterton (ex-Conservative MP), who although not openly religious, was actively involved with religious issues such as faith-based adoption agencies[125] and blasphemy[126]. The Bill was debated by the House of Commons on the 14th April 2000[127]. Prompted by the case of Tony Bland, the Bill sought to criminalise euthanizing individuals by both acts and omissions. Eventually, the Bill ran out of debate time and has not resurfaced since. Religion did not feature within the debates of the Bill, nor was there any notable external pressure present (from lobbyists), making the Bill distinguishable from others trying to decriminalise assisted dying.

Section 4(5) Mental Capacity Act 2005, lobbyists and religion

The 'Howarth Amendment', Section 4(5) of the Mental Capacity Act 2005 states, 'Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death'. Prima facie, this provision affects the law of Assisted Suicide and Euthanasia by preventing a person's desire to die

[123] Select Committee on Medical Ethics, *Report of the Select Committee on Medical Ethics*, (House of Lords, 1993-1994)
[124] Ibid p13
[125] Early Day Motion 742, Tabled 25 January 2007, Signed by Winterton 5 February 2007 <http://www.parliament.uk/edm/2006-07/742> accessed 09/02/2013
[126] Winterton opposed the abolishment of the Criminal Justice and Immigration Bill: Blasphemy — 6 May 2008 <http://www.publicwhip.org.uk/mp.php?id=uk.org.publicwhip/member/1509&showall=yes> accessed 22/02/2013
[127] HC Deb, 14/04/2000, Vol 348, Col 603

influencing a practitioner's decision. However, as highlighted by John Coggon, the clause is legally ineffective due to its 'hollow drafting and lack of teeth'[128], as noticeable through the use of the ambiguous word 'motivation'. Arguably, this provision was drafted in such a way to ease pressure from Pro-Life and religious lobbyists (particularly Roman Catholic Archbishop of Southwark (then Cardiff) Peter Smith)[129], without actually changing the law. In a letter to John Smeaton, National Director of the Society for the Protection of Unborn Children, regarding s4 (5)[130], John Finnis explained 'Archbishop Smith and I jointly protested...and the Government came up with its final offer'[131]. Despite the provision's ineffectuality, such personal bargaining with religious leaders demonstrates the impact that religious organisations can have on Parliament and the legislative process. In 2008, the Catholic Church (prompted by Archbishop Smith) even published a document, 'Mental Capacity Act and 'Living Wills': a practical guide for Catholics'[132], providing guidance and information on the act from a Catholic viewpoint. This religious tolerance exerted by the state is reflective of John Locke's theory of tolerance in order to prevent societal unrest, outlined in chapter one.

As demonstrated above, lobbying groups and religious communities can heavily influence Parliamentary decisions to amend or enforce legislation. Such power is facilitated by the interrelation of lobbying groups, religious organisations and Parliament itself. For example, many Pro-Life organisations consist of religious leaders and are closely affiliated with the 'Pro-Life' APPG, who receive monthly payments from 'Christian Action Research and Education'[133]. Another example of this, as outlined in chapter one, is the relationship between pressure group, 'Dignity in Dying', who favour the legalisation of Assisted Suicide, and the 'Choice at the End of Life' APPG. Thus despite having no formal role in Parliament, APPGs can still indirectly influence Parliamentary agendas. The most recent illustration of such indirect influence is the 'Commission on Assisted Dying' report, prompted by 'Choice at the End of Life', which will lead to a new legislative proposal to legalise Euthanasia and Assisted Suicide. Furthermore, the Christian Medical Fellowship are actively involved in medico-political issues such as end-of-life law, with chief executive Peter Saunders having undertaken numerous public debates with Lord Joffe and Lord Falconer[134].

Patient (Assisted Dying) Bill 2003

[128] John Coggon, 'The Wonder of Euthanasia: A Debate that's Being Done to Death' (2012) *Oxford Journal of Legal Studies* 1, 11

[129] Gabby Hinsliff, 'End to 'living will' euthanasia loophole', (The Guardian, 12 December 2004) <http://www.guardian.co.uk/politics/2004/dec/12/health.healthandwellbeing> accessed 24/02/2013

[130] John Smeaton,'Professor John Finnis is misrepresented in Catholic Herald interview' (1 July 2010) <http://spuc-director.blogspot.co.uk/2010/07/professor-john-finnis-is-misrepresented.html> accessed 02/03/2013

[131] Also discussed in John Finnis, 'The Mental Capacity Act 2005:Some Ethical and Legal Issues' in Helen Watt (ed), *Incapacity and Care* (The Linacre Centre 2009)

[132] 'Mental Capacity Act and 'Living Wills': a practical guide for Catholics'(The Catholic Truth Society, 2008) <http://www.catholic-ew.org.uk/Catholic-News-Media-Library/Archive-Media-Assets/Files/Legislation-and-Public-Policy/The-Mental-Capacity-Act-and-Living-Wills-a-Practical-Guide-for-Catholics> accessed 02/03/2013

[133] House of Commons, 'Register Of All-Party Groups' (n47)

[134] 'Assisted Suicide' (Peter Saunders debates) <http://www.cmf.org.uk/publicpolicy/end-of-life/assisted-suicide/> accessed 02/03/2013

Another significant legal development was Lord Joffe's Patient (Assisted Dying) Bill (2003)[135]. The House of Lords second reading debate on 6th June 2003 was flooded with religious opinion from Catholicism, Church of England, Islam, Hinduism and Buddhism [136]. Lord St John of Fawsley prompted the religious discussion surrounding assisted dying, describing himself as a liberal Catholic, explaining, that 'the sacredness of human life from conception to dissolution'[137] was fundamental to his faith. He also raised an argument that without religion, there is no morality and thus we must listen to religious leaders for guidance[138]. Reference to the Catholic principles of 'extraordinary' treatment and double effect were also made as Lord St John echoed the Lord Bishop of Oxford's distinction between Christian and Secular views of autonomy, 'secular models imply that we are autonomous individuals and that our real value lies in our ability to act and to choose. By contrast, the Christian understanding assumes that we are essentially not isolated individuals but persons in relationships'[139]. In agreement with the above views, the Lord Bishop of Oxford refused to support the Bill, claiming 'The Roman Catholic church and the Church of England are totally at one on this'[140]. Such rigid and inflexible opposition combined with deep theological reflections would seem inappropriate in a contemporary and secular parliamentary debate. As stated by Baroness Warnock 'I believe that the arguments derived from religious beliefs should be kept to one side in this debate'[141]. In contrast to the views of St John-Stevas, Baroness Warnock continued, 'it seems to me that the law should be based not on religious beliefs, but on a concept of morality separate from any particular religion...for many, morality is essentially secular. It is this secular path that the law must follow'[142]. This view was also shared by Lord Alexander of Weedon, who felt that religious views must not hinder others, 'who are themselves capable of making moral judgments'[143].

Criticising numerous letters received from religious communities, Lord Hughes of Woodside stated, 'they [communities] are not entitled to say to me that those who take a different view must bow to their will, their decisions and their faith'[144]. Contrastingly, Baroness Richardson of Calow explained that her Christianity did not prevent her from supporting the Bill, even acknowledging the secularity of England and Wales 'we are not the majority in this country'[145]. Church of England priest, Lord Beaumont of Whitley also supported the Bill, unusually stating that his religion had not led him to 'come across any arguments...that the freedom of choice which we are given in free will cannot be exercised in the matter of our deaths'[146]. Baroness Flather of the Hindu faith supported the Bill on the grounds of wanting a 'good death' (as referred to in chapter two), and again, upon considering views of others in society [147]. However, the religiously compatible views were few, and opposing religious opinions dominated the debate.

[135] Patient (Assisted Dying) HL Bill (2003-2004)
[136] HL Deb, 06/06/2003, Vol 648, Col 1585
[137] Ibid Col 1593
[138] Ibid
[139] Ibid Col 1600
[140] Ibid Col 1602
[141] Ibid Col 1608
[142] Ibid
[143] Ibid Col 1623
[144] Ibid Col 1671
[145] Ibid Col 1627
[146] Ibid Col 1641
[147] Ibid Col 1663

Baroness Masham and Lord Tombs quoted the Ten Commandments, 'Thou shalt not kill', in a limited attempt to oppose the Bill[148], whilst Lord Ahmed quoted the Qur'an to illustrate the view of Islam, 'As Muslims, we believe that life is sacred and that only God, the creator of all, is the owner of life...in Islam and in all holy scriptures euthanasia and assisted suicide are prohibited'[149]. Lord Ahmed drew attention to three verses of the Qur'an and quoted the Prophet Mohammed in his Hajj sermon before concluding 'God forbid - this Bill becomes law'[150]. The Lord Bishop of St Albans, again highlighted the 'profound and inalienable sanctity of human life', and like Lord Ahmed, concluded, 'I urge your Lordships not to allow the Bill to pass'[151]. Lord Maginnis of Drumglass concurred, asking 'have religion and morality no longer a place in our consideration of what is beneficial?'[152]. This question was later discussed by the Lords, in a debate titled 'Religion in the United Kingdom' in November 2012[153].

The Assisted Dying for the Terminally Ill Bills

Religious and secular considerations raised in relation to the Patient (Assisted Dying) Bill 2003 were carried over to discussions and debates of the Assisted Dying for the Terminally Ill Bills[154]. These Bills sparked much controversy in religious and non-religious communities alike, resulting in demonstrations and a 10,000 signature petition in an attempt to prevent its passing[155]. Following its second reading, the 2004-2005 Bill was defeated by 148 votes to 100. Fourteen of these votes were of the Lords Spiritual and a further two were from religious leaders Lord Sacks (Chief Rabbi) and Lord Ahmed (the head of the Muslim Council of Britain). For the first time in Parliamentary history, the 2005 Assisted Dying for the Terminally Ill Bill attracted a personal open letter addressed to both Houses of Parliament. The letter was signed by nine religious leaders spanning Hinduism, Islam, Church of England, Evangelism, Catholicism, Judaism and Sikhism, sent just days before the Bill was to be debated[156]. Such determination and solidarity of religious leaders against the development of the law shows the breadth of religious influence being exercised over Parliament, with the open letter underpinning much of the Bill's debate[157].

Upon the reintroduction of the Bill into the new Parliamentary session (2005-2006), on the day of the 2006 debate, former Archbishop of Canterbury Dr Rowan Williams, the Cardinal Archbishop of Westminster Cardinal Cormac Murphy-O'Connor and the Chief Rabbi of the United Hebrew Congregations of the Commonwealth Dr Jonathan Sacks, wrote a co-signed letter to the Times newspaper, strongly opposing the Bill[158].

[148] Ibid Cols 1634 and 1665
[149] Ibid Col 1641
[150] Ibid Col 1642
[151] Ibid Col 1652
[152] Ibid Col 1645
[153] HL Deb, 22/11/2012, Vol 740, Col 2036
[154] Assisted Dying for the Terminally Ill HL Bill, (2004-2005) and (2005-2006)
[155] 'Assisted-dying legislation in the UK' (BBC)<http://www.bbc.co.uk/ethics/euthanasia/overview/asstdyingbill_1.shtml> accessed 15/02/2013
[156] Peter Saunders, 'The Role of the Media in Shaping the UK Debate on 'Assisted Dying' (n87) 243
[157] HL Deb, 10/10/2005, Vol 674, Col 30
[158] 'Assisted Dying - Joint Faith Leaders Letter to The Times' (12 May 2006), <http://rowanwilliams.archbishopofcanterbury.org/articles.php/640/assisted-dying-joint-faith-leaders-letter-to-the-times> accessed 21/01/2013

Also, hours prior to the debate on the 12th May 2006, Williams and Murphy-O'Connor appeared on a BBC Radio Four Today show to voice their opposition of the Bill, claiming that they had not only a 'right', but a 'duty' to do so[159]. Such public, media and political involvement from religious leaders demonstrates the tenacity of religious communities to maintain the criminalisation of the acts in question. Debatably, this interference undermines religion, by leaders acting as policy lobbyists. Stating the legal implications of this, Emily Jackson stated, 'the law should not insist that others, who do not share their faith, must have their freedom restricted in order to satisfy a religious tenet which makes no sense to them'[160].

The debate surrounding the 2005-2006 Assisted Dying for the Terminally Ill Bill took place on 12th May 2006[161]. Lord Joffe opened the debate by criticising religious opposition to the Bill, following a political campaign led by the Catholic Archbishop of Cardiff (as seen above in relation to s4 (5) Mental Capacity Act 2005). This included the 'the dissemination of 500,000 leaflets or DVDs asking recipients, among other things, to write to Peers and MPs'[162] opposing the Bill. Amongst others, Lord Gilmour was very outspoken of his disapproval of the Archbishop Smith's campaign, arguing the money used could have been much better spent elsewhere rather than through trying to sway a debate by religious pressure[163]. Muslim communities were also encouraged by 'The Muslim Council of Britain' to write letters opposing the legislation, but on a lesser scale, reflecting the smaller proportion of Muslims in England and Wales[164]. For Lord Archer, the question was whether religious leaders (particularly the Archbishop) 'should be entitled to impose his faith on those who do not share it. That is not exercising his right; it is denying the right of someone else'[165]. This interestingly valid point sparked much debate in the Lords as to the general value of religion in Parliamentary debates within a secular society. Lord Mawhinney took a strong stance on this issue, stating 'I seek to have my faith integrated as part of who I am. I cannot – and I will not- seek to dissociate who I am and my views from my faith'[166].

Contrastingly, Lord Joffe asked the Lords to put their religious views aside, stating 'I question the right of those who object on faith grounds to seek to impose their beliefs on those who do not share them – the overwhelming majority of society'[167]. Whilst this request was still overlooked by many, Lord Winston complied, 'we live in a pluralistic society...So I will set aside completely my religious views and speak from a purely secular point of view'[168]. However, Lord Winston still opposed the Bill for 'secular' reasons. Lord Taverne also highlighted the important point, that whilst religious views must be respected, 'I regret the nature of the campaign waged against

[159] Radio 4 – Today, (BBC, 08.10am 12/05/2006)<http://www.bbc.co.uk/radio4/today/listenagain/listenagain_20060512.shtml> accessed 22/01/2013
[160] Jackson and Keown (n49) 101
[161] HL Deb, 12/05/2006,Vol 681, Col 1184
[162] Ibid Col 1186
[163] Ibid Col 1204
[164] 'The Response of the Muslim Council of Britain to Lord Joffe's Bill' (Care Not Killing, 1/10/2005) <http://www.carenotkilling.org.uk/statements/mcb-response-to-joffe-bill/> accessed 22/01/2013
[165] HL Deb, 12/05/2006,Vol 681, Col 1218
[166] Ibid Col 1224
[167] Ibid Col 1187
[168] Ibid Col 1243

the Bill, at vast expense, by the Churches and senior Church leaders, much of which either ignores or distorts the evidence'[169].

Lord Joffe highlighted the irony that despite opposition and campaigning led by religious leaders, a '2004 NOP [National Opinion Polls] survey...found that about 80 per cent of Christians of all denominations support assisted dying'[170]. Therefore, arguably religious leaders, including the Lords Spirituals are not representative of their religious community, but of their own religious values, beliefs and teachings. Thus, a question of balance arises between strict religious teachings and liberal, majority views. For example, an emotive statement by the former Archbishop of Canterbury concluded that the sanctity of life is 'pertinent for anyone who wishes to see our society remain committed to human dignity and liberty'[171]. However, some Christians may favour the approach in 2 Samuel 1:9-10, as noted in chapter two, where compassion prevailed over the sanctity of life. Therefore, whilst religion is influential, it is the views of religious leaders that are being adopted, not those of the religious communities at large. This causes problems of representation and laws that contravene general opinion, both secular and religious, such as the law regarding Euthanasia and Assisted Suicide.

As noted by Elizabeth Wicks, huge tensions are present in Parliament regarding moral and ethical debates, with the non-religious criticising the weight given to religious contributions, and the religious fearing their viewpoints are being undermined due to 'scepticism about their faith'[172]. However, in light of the above, such undermining may be justifiable.

The Coroners and Justice Bill 2009

On the 7th July 2009, Lord Falconer introduced an amendment to the Coroners and Justice Bill (2009)[173] in the House of Lords, seeking to decriminalize assisting travel for the purposes of enabling someone to end their life. In a free vote, the amendment was defeated by 194 to 141[174]. Much religious debate surrounded this result, with the Bishop of Exeter, Rt Reverand Michael Langrish adopting language with religious connotations, such as being 'done unto' (based upon the 'love thy neighbour' principle) in the context of trust and professionalism[175]. Quoting the philosopher and Roman Catholic Alasdair MacIntyre, Langrish claimed that 'the fundamental truth about human beings is not that we are autonomous individuals, but that we are dependent on one another'[176]. Lord Mackay of Clashfern, an active member of the Church of Scotland, also based his arguments on religion, declaring interests 'as a member of a variety of Christian organisations'[177]. He continued to quote the fundamental Christian value of 'respect for and protection of human life' as 'defining

[169] Ibid Col 1125
[170] Ibid Col 1186
[171] Ibid Col 1198
[172] Elizabeth Wicks, 'Religion, Law and Medicine: Legislating on Birth and Death in a Christian State', [2009] 17 *Medical Law Rev*iew 410, 419
[173] Coroners and Justice HC Bill (2008-2009)
[174] Lipscombe and Colthart, 'Assisted Suicide' (n112), p15
[175] HL Deb, 07/07/2009 Vol 712, Col 605
[176] Ibid Col 606
[177] Ibid Col 599

characteristic of a civilised society'[178]. However, interrupting Mackay's speech, an unidentified Lord exclaimed 'God is angry'[179]. Arguably, this mockery of 'God' during parliamentary debate reflects the undesirability of religious input in the Parliament of a secular country. Alternatively, this could illustrate that religious arguments are not taken seriously by some Lords and thus religious influence is not as substantial as was thought. However, in light of the general discursive topics, the former would appear a stronger explanation. Various secular issues were also raised by religious Lords alongside faith objections. Lord Carlile of Berriew stated, 'I offer your Lordships an entirely non-religious but, I hope, ethical judgment, that it is better to leave a decision of this kind in the sphere of personal responsibility'[180]. This statement encourages the view that for ethical and moral standing, an argument need not involve religion.

Patricia Hewitt's attempt to introduce a similar amendment to the above Bill in the House of Commons, as noted before, was rejected. Also, interestingly during a debate that took place on 10th March 2010 in the House of Commons on Assisted Suicide[181], no mention of God or religion occurred. Therefore, it could be argued that religious influence is less prominent in the House of Commons, where members are democratically elected and seek to avoid controversy or potentially negative media attention due to the power of the public regarding their positions.

Recent and future developments

The Commission on Assisted Dying published its final report on the 5th January 2012 (as detailed in chapter two). Reverend Canon James Woodward was the only commissioner to oppose the findings and recommendations of the Commission, stating a 'greater ethical, moral and social consensus needed to be generated on this issue before legal change should be considered'[182]. Criticisms arose regarding the lack of media coverage of Woodward's opinions. The Bishop of Burnley, Right Reverend John Goddard felt that the 'independent' Commission and their report was biased and unsound, 'if you set up a commission in which all but one person is totally committed to moving forward to assisted dying or assisted killing that will give you the report we've got. It's a flawed report'[183]. Thus, it would seem that the significance of religious opinion which historically shaped debates surrounding Euthanasia and Assisted Suicide is slowly diminishing. Although not a formal subordinate of Parliament, the Commission's recommendations have been used by the 'Choice at the End of Life' APPG, to draft a new Bill, to be proposed by Lord Falconer and read by Parliament. Although religious arguments may be given less consideration in future debates, in light of previous persistence by religious leaders, communities and lobbyists to deter the decriminalisation of Assisted Suicide and Euthanasia, their acquiescence is unlikely.

Furthermore, standpoints of the Lords Spiritual, whose role is to represent the Church of England, are unlikely to change following a motion passed at the General

[178] Ibid
[179] Ibid
[180] Ibid Col 623
[181] HC Deb 10/03/2010, Vol 507 Col 401
[182] Lipscombe and Colthart, 'Assisted Suicide' (n112) p20
[183] Joe Wilson, 'Bishop of Burnley: assisted suicide report 'flawed'' (BBC, 9 January 2012) <http://www.bbc.co.uk/news/uk-england-lancashire-16473822> accessed 02/03/2013

Synod in February 2012, stating that they 'affirm the intrinsic value of every human life and express its support for the current law on assisted suicide as a means of contributing to a just and compassionate society in which vulnerable people are protected'[184]. Prior to this, the Synod had heard that 'The idea that freedom of choice is possible is a mirage. You cannot have it without influencing the freedom of others'[185]. This demonstrates the power of the General Synod, even on matters extending beyond their official jurisdiction.

Notable from each of the proposals discussed, is the undeniable presence of religious consideration and the persistence of religious leaders, communities and individuals to influence and deter the decriminalisation of Euthanasia and Assisted Suicide in England and Wales.

Conclusion

Religion has been irrefutably influential in Parliament from as early as the Middle Ages, with Parliament themselves stating, 'The Church is an integral part of the state and this position has been strongly upheld'[186]. Despite claiming to have 'responded to changing social realities and relaxed the laws on religious liberty'[187], religion still forms a predominant part of the legislative process, despite numerous failed attempts to reduce its official involvement, as noted in chapter one. Throughout Parliamentary debates, religious views have been fundamental discussion points and thoroughly examined throughout the progression of Bills and statutory amendments, including explicit references to religious doctrines and texts. Whilst it is arguable that such religious presence was due to the morally contentious nature of Euthanasia and Assisted Suicide, other areas of law such as employment (sex discrimination, see chapter one) can be determined by votes of the Lords Spiritual or free votes in the Commons if unanimity is not present. Indirect religious prevalence in Parliament and law-making is also indubitable, including religiously-dominated APPGs, lobbying groups, religious communities and religious campaigns, facilitated by close and interrelated relationships. Debatably, such informal influences have even led to the enactment of futile provisions, such as s4 (5) Mental Capacity Act 2005 and s2 Suicide Act 1961, under which no convictions for assisting travel to Dignitas have materialised. Thus such provisions may have only been enacted to appease religious and secular pressure groups. Ultimately, if religion was not officially represented in Parliament (for example by the Lords Spiritual and the General Synod), the illegality of Euthanasia and Assisted Suicide may be different today.

However, despite public (and judicial) antagonism towards the lasting influence of religion on the legislative process, arguably religion should retain some authority in Parliament. As stated by Søren Holm, religious arguments can be legitimate, and providing such 'arguments convince policy makers, there is nothing problematic'[188].

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[184]General Synod, *Report of Proceedings 2012, February Group of Sessions* (Vol.43, No.1, 6 February 2012) p35 <http://www.churchofengland.org/media/1429406/february%202012%20(edited).pdf> accessed 26/02/2013
[185] Ibid p34
[186] 'Religion and Belief' (UK Parliament – Living Heritage) <http://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/religion/> accessed 03/03/2013
[187] Ibid
[188] Holm, (n44) 140

Lord Alton of Liverpool[189] also supports Holm's argument that 'there is no a priori reason to believe that religious worldviews are any more or any less coherent than other worldviews' [190]. However, religious arguments often ignore secularity, automatically undermining their cogency. Therefore, religion must acknowledge and adapt to an increasingly liberal society, as opposed to remaining an 'inflexible modernism' [191]. Basil Mitchell highlights that 'the extent to which society will tolerate...departures from moral standards varies from generation to generation'[192]. Thus religious influence may continue to diminish over time, preventing religious leaders, from being 'in a liberal, secular democracy – entitled to foist those values on others'[193].

Public opinion will forever be contested regarding controversial issues such as Euthanasia and Assisted Suicide, even in religious communities. Therefore, Lord Devlin's description of England and Wales as homogeneous is 'exaggerated'[194], and societal diversity should be reflected in Parliament. As stated by Baroness Warnock, 'morally speaking, believers and unbelievers are equal and their right to make their voices heard democratically is equal'[195]. Therefore, the representation of twenty-six Church of England Bishops in the House of Lords is outdated and 'perverse'[196] in a democratic, secular society. Despite many religious followers deviating from archaic moral attitudes, religious leaders are reluctant to embrace liberalisation. In her recent publication, Baroness Warnock concluded 'Our parliamentary democracy is doubtless flawed...we must do all we can to mend it; and this entails doing all we can to fend off the forces of theocracy' [197]. Realistically, faith considerations are 'democratically' represented by Lords Temporal in the second chamber anyway. For example Sikhism is represented by Lord Singh, Islam, Lord Ahmed, Hinduism, Baroness Flather, Christianity, Lord St John of Fawsley and Judaism, Lord Sacks.

As recently as 22nd November 2012, the value of religion in Parliament was discussed in the House of Lords, during which Baroness Falkner explained 'Separating religion and state enables those of all religions and none to participate as equal citizens', making reference to effective constitutional arrangements in the United States and India[198]. Consequently, the reintroduction of the House of Lords Reform Bill or similar legislation, restructuring Parliament and reducing the role of the Lords Spiritual is needed to reflect societal reality and provide fairness in the legislative process.

[189] HL Deb 6/6/2003, Vol 648, Col 1615
[190] Holm, (n44) 135
[191] Mitchell (n7) 110
[192] Ibid 104
[193] Jackson and Keown (n49) 7
[194] Mitchell (n7) 108
[195] Mary Warnock, *Dishonest to God: On Keeping Religion Out of Politics* (Continuum Publishing Corporation, 2011) 166
[196] 'Easing the way' (The Guardian, 10/10/2005) <http://www.guardian.co.uk/politics/2005/oct/10/lords.immigrationpolicy> accessed 18/01/2013
[197] Warnock, (n195) 166
[198] HL Deb, 22/11/2012, Vol 740, Col 2040